LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON LIMITATIONS (PROJECT No. 6)

1974

PART II—GENERAL

LRC 15

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To THE HONOURABLE ALEX. B. MACDONALD, Q.C.,
ATTORNEY-GENERAL FOR BRITISH COLUMBIA:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON LIMITATIONS

(Project No. 6)

PART 11—GENERAL

This Report has been prepared in the Commission's Study on Limitations, which is Project No. 6 in the Commission's Approved Programme.

The Commission has concluded that the *Statute of Limitations* is both archaic and obscure. The portion of that statute which governs the vast majority of civil actions is based on an English statute which is now 350 years old and largely unintelligible to lawyer and layman alike. It is recommended that the *Statute of Limitations* be repealed and replaced by a statute which is contemporary in both language and substance. The desirable features of such a statute are discussed and recommendations made as to its form and content. This Report also considers a number of special limitation periods contained in various Provincial statutes and recommends their repeal.

The Commission feels that the reform of the laws relating to limitation periods which are contained in this Report would, if implemented, prove to be of significant benefit, not only to the legal profession who must deal with these laws on a day-to-day basis, but to the general public whose interests are affected. The retention on the statute books of the *Statute of Limitations* in its present form is a disservice to all who are affected by it.

CHAPTER I INTRODUCTION

A. The Statute of Limitations

The concept of a statute of limitations is not unfamiliar to the layman. It is widely known that a right must be pursued within some period of time or that right is lost. Consider, then, the position of the layman who wishes to ascertain what limitation periods govern his rights and obligations by examining the *Statute of Limitations.*[1]

If the right of action involved is one for negligence, nuisance, or breach of contract, he will search in vain for any reference to such an action in the Act. The statute was framed before those actions evolved in their present form. He would have to know that, historically, those causes fall within the "actions upon the case" referred to in section 3 of the Act and are governed by a six-year limitation period.

While the important action of negligence does not appear to be specifically provided for, the *Statute of Limitations* does specifically provide for many causes which have no relation to contemporary British Columbia law. For example, the landlord wishing to ascertain the limitation period governing his claim for rent is told by section 15 that:

> "rent" shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses of compositions belonging to a spiritual or eleemosynary corporation sole)

What is a "heriot"? It is the feudal right of the lord of a manor to the best beast of a deceased tenant. While British Columbia inherited many features of English land law, the manorial system of landholding was not among them. The various references throughout the Act to "copyhold" tenures are equally redundant. A number of sections of the *Statute of Limitations* deal with the position of the tenant in tail.[2] Estates in fee tail were abolished in British Columbia over 50 years ago. Other archaic references in the Act include those to: coparceners,[3] tithes,[4] tenant in dower,[5] tenant by the courtesy of England,[6] *scire facias,*[7] hereditaments,[8] manors,[9] *action sur trover,* [0] menace, [11] and *trespass quare clausum fregit.*[12]1

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1 R.S.B.C. 1960, c. 370.

2 Ss. 33, 34, 35.

3 S. 26.

4 S. 15.

5 *Ibid.*

6 *Ibid.*

7 S. 49.

8 S. 48.

9 *Ibid.*

10 S. 3.

11 *Ibid.*

12 *Ibid.*

The diligent layman who learns that his action for negligence is governed by the limitation period applicable to "actions upon the case" may feel he can rest easy, having six years to pursue his claim. That is not the case if his claim is against a doctor, dentist, or other professional man who receives the protection of a special limitation period. Special limitation periods are normally much shorter than the period otherwise applicable and are contained, not in the *Statute of Limitations,* but in other Acts where he is not likely to look.

Our hypothetical layman, facing a set of limitations laws such as those described above, may be forgiven for thinking that he is the victim of a deliberate attempt to obfuscate the laws which govern his rights and obligations. In many ways, the lawyer is little better off than the layman in grappling with the language and effect of the *Statute of Limitations.*

The present limitations law is not, however, the product of a cabal of lawyers and judges intent on perpetuating their monopoly over some black art. Rather, it is the product of nothing more invidious than 350 years of neglect. The Commission hopes to remedy this by recommending appropriate reforms. The starting point is an examination of the nature, function, and purpose of limitation periods.

Limitation periods require potential plaintiffs to commence lawsuits within specified times in order to preserve their rights against potential defendants. The function of a limitation period is to bar the bringing of an action after a specific length of time has passed from the alleged (by a potential plaintiff) occurrence of events which, if those events could be proved, would amount to a *cause* of action. It must be emphasized that the right to bring an action is not the same as having a good cause of action. A plaintiff's action may be so sound that it will not be defended, or it may be so poor that he will discontinue proceedings once a defence has been entered. On the other hand, lawsuits may be vigorously fought as to the facts alleged, or the law, or both. A limitation period provides protection to the potential defendant whether he has a valid defence or not, and provides finality to potential lawsuits.

In theory, limitation provisions raise procedural bars only. The right of a potential plaintiff is not extinguished by the passing of a limitation period. His right remains alive. The effect of the limitation provision is to bar procedurally the potential plaintiff from utilizing the legal process to obtain a remedy by which he could enforce his right. There are certain circumstances, albeit few, under which a statute-barred potential plaintiff may be entitled to realize on his rights through the use of the legal process.[13] The *Statute of Limitations* must be specifically pleaded if raised as a defence. In practice, however, the general consequence of the application of limitations provisions is to sterilize forever the potential claimant's rights. The Commission will consider later in this Report whether or not lapse of time should have the effect of extinguishing rights or remain purely a procedural bar.[14] The distinction between these alternatives has relevance in both constitutional law and private international law, where a rule that extinguishes a right is regarded as substantive law and one which bars the remedy as

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13 For example, an acknowledgment of a statute-barred debt will enable the potential plaintiff to sue; or where a creditor receives an undesignated payment from a debtor, he may apply the funds to a statute-barred debt. *See generally* Appendix G.

14 *See* Chapter VI, s. B.

procedural law.

The reasons for having limitations provisions have been stated to be:[15]

> Lawsuits should be brought within a reasonable time. This is the policy behind limitation statutes. These laws are designed to prevent persons from beginning actions once that reasonable time has passed. Underlying the policy is a recognition that it is not fair that an individual should be subject indefinitely to the threat of being sued over a particular matter. Nor is it in the interests of the community that disputes should be capable of dragging on interminably. Furthermore, evidentiary problems are likely to arise as time passes. Witnesses become forgetful or die: documents may be lost or destroyed. Certainly, it is desirable that, at some point, there should be an end to the possibility of litigation in any dispute. A statute of limitation is sometimes referred to as an "Act of peace
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> Apart from the protection they give to potential defendants, limitation statutes enable the courts to function more effectively by ensuring that litigation is not started so long after the event that there are likely to be evidential difficulties. In addition, the commercial world is able to carry on more smoothly. The limitation statutes encourage early settlements so that the disrupting effect of unsettled claims on commercial intercourse is minimized.

We are in full accord with that statement. As a general principle, the Commission believes there should be specific time limits for the bringing of almost all actions and proceedings.

The Commission recommends:

1. As a general principle, the right to bring an action to assert or enforce a claim of any kind should be subject to some limitation period.

2. Any exceptions to that general principle should be clearly specified by law.

B. Historical Background

In this Province, legislation concerning limitations consists of the *Statute of Limitations,* [16] and the special limitation provisions that are scattered willy-nilly throughout more than 100 Provincial statutes.[17]

Our *Statute of Limitations* is almost entirely a collection of provisions drawn from nine English statutes enacted between 1623 and 1861. These statutes were:

Limitation Act, 1623.[18]
Administration of Justice Act, 1705.[19]
Statute of Frauds Amendment Act, 1828.[20]

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15 Ontario Law Reform Commission, *Report on Limitation of Actions* 9, 10 (1969). Hereafter referred to as the Ontario Report.

16 RS.B.C. 1960, c. 370. Set out in Appendix A.

17 *See* Chapter VII.

18 21 Jac. I, c. 16.

19 4 & 5 Anne, c. 3.

20 9 Geo. 4, c. 14.

Real Property Limitation Act, 1833.[21]
Civil Procedure Act, 1833.[22]
Real Property Limitation Act, 1837.[23]
Justices Protection Act, 1848.[24]
Mercantile Law Amendment Act, 1856.[25]
Crown Suits Act, 1861.[26]

A table showing, on section by section by section bases, the English legislation on which the present British Columbia statute is based is set out in Appendix B.

All but the last of the above statutes were received as part of the law of British Columbia in 1858.[27] To the extent that they were to remain the law of this Province they were incorporated into a Provincial statute, the *Statute of Limitations,* in the 1897 Revised Statutes of British Columbia.[28] Section 48 of the 1897 statute (being also section 48 of the present Act) was taken from the English *Crown Suits Act, 1861,* which modified part of the *Crown Suits Act,* 1769.[29] This last-mentioned statute was not otherwise dealt with in the 1897 revision and appears still to be in force in British Columbia by virtue of the *English Law Act.*[30]

The 1897 *Statute of Limitations* also included three sections which had been previously enacted as Provincial legislation. These were sections 56, 57, and 58 in the 1897 Revision, which dealt with the defence of foreign limitations.[31] Those sections 56 and 57 now appear as sections 55 and 56 in the 1960 Revision. Section 58 of the 1897 Revision was dropped in the1936 Revision as being obsolete.[32] Part of section 11 in the 1897 Revision (part of the present section 11 (1)) was taken from a Provincial statute of1888.[33]

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21 3 & 4 Will. 4, c. 27.

22 3 & 4 Will. 4, c. 42.

23 7 Will. 4 and 1 Vict., c. 28.

24 11 & 12 Vict., c. 44.

25 19 & 20 Vict., c. 97.

26 24 & 25 Vict., c. 62.

27 *See English Law Act,* R.S.B.C. 1960, c. 129.

28 C. 123. *See also Draft Revised Statutes of British Columbia, First Report,* L11, LI5, and L27 (1896).

29 9 Geo. 3, c. 16.

30 R.S.B.C. 1960, c. 129. *See* R.S.B.C. 1911, vol. IV, at 64 (published in 1913). *See also* R.S.B.C. 1960, vol 5, at 5332, referring to *Crown Lands—Limitation of Action (Imp.) Act,* and at 5343, referring to *Limitation of Time—Suits by Crown (Imp.) Act.*

31 First enacted by S.B.C. 1868, No. 100. *See* 1888 C.A.B.C., c. 75.

32 R.S.B.C. 1936, vol. IV, at 4709.

33 S.B.C. 1888, c. 15, s. 4. *See also* 1888 C.A.B.C., c. 75.

Since 1897, there have been a few changes. The first was in 1915. The word "actions" was substituted for the word "prosecutions" in line four of what is now section 11 (1) and "absence beyond the seas" was removed as a disability from what was then, and is still, section 29.[34] What is now subsection (2) of section 11 was added in 1918 [35] and the present sections 57 and 58 were added in 1938.[36] As mentioned above, section 58 as it appeared in the 1897, 1911, and 1924 Revisions was dropped in the 1936 Revision as obsolete. So was section 44 of the 1897 Revision, and for the same reason.

The many special limitation periods have just grown and grown in number, the legislation providing for them generally being enacted as a result of requests made by special interest groups. Several examples will demonstrate their proliferation.

The special six-month limitation period in section 738 (1) of the *Municipal Act* [37] goes back to 1896,[38] and the one-year period in section 82 (1) of the *Medical Act* [39] to 1898.[40] Dentists first gained the protection of a special limitation period, one year, in 1908,[41] but this was shortened to six months in 1917.[42] It is still six months today.[43] The six-month limitation period provided for in section 57 of the *Pharmacy Act* [44] was first enacted in 1935.[45] The one-year periods established in section 20 of the *Podiatry Act* [46] and section 14 (2) of the *Chiropractic Act*[47] were first enacted in 1955[48] and 1967[49] respectively. The one-year period for bringing actions in

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34 S.B.C. 1915, C. 37.

35 S.B.C. 1918, c. 48, s. 2.

36 S.B.C. 1938, c. 31, ss. 2—3.

37 R.S.B.C. 1960, c. 255.

38 S.B.C. 1896, c. 37, s. 239.

39 R.S.B.C. 1960, c. 239.

40 S.B.C. 1898, c. 9, s. 61.

41 S.B.C. 1908, c. 2, s. 62.

42 S.B.C. 1917, c. 16, s. 65

43 *Dentistry Act,* R.S.B.C. 1960, c. 99. s. 65.

44 R.S.B.C. 1960, c. 282.

45 S.B.C. 1935, c. 56, s. 51.

46 R.S.B.C. 1960, c. 53.

47 R.S.B.C. 1960, c. 54.

48 S.B.C. 1955, c. 9, s. 4.

49 S.B.C. 1967, c. 8, s. 6.

50 R.S.B.C. 1960, c. 263.

51 S.B.C. 1947, c. 62, s. 14

section 79 of the *Motor-vehicle Act*[50] only goes back to 1947[51] although other provinces had special limitation periods much earlier.[52] Until 1947, the general limitation period of six years applied to actions for negligence involving a motor-vehicle.

C. The Existing Law

(a) Its Archaism

This Province's *Statute of Limitations* is, both in substance and language, archaic and obscure. A few examples will serve to illustrate.

The key provision of British Columbia's *Statute of Limitations* is section 3, which creates general limitation periods applicable to most contract and tort actions. Sections 3 is taken almost verbatim from section 3 of an English statute enacted in 1623.[53] It is as follows:

> All actions of trespass quare clausum fregit; all actions of trespass, detinue, action sur trover, and replevin for taking away of goods and cattle; all actions of account and upon the case (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants); all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent; and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, which shall be sued or brought at any time, shall be commenced and sued within the time and limitation hereafter expressed, and not after, that is to say:—
>
> The said actions upon the case (other than for slander), and the said actions for account; and the said actions for trespass, debt, detinue, and replevin for goods or cattle; and the said action of trespass quare clausum fregit, within six years after the cause of such actions or suit, and not after:
>
> And the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within four years next after the cause of such actions or suit, and not after:
>
> And the said action upon the case for words, within two years next after the words spoken, and not after.

Section 3 imposes limitation periods on a variety of common law actions. These actions have evolved in 350 years so that, to some extent, they are no longer recognizable. The term "action on the case," for example, has long been obsolete, although out of that action have developed the modern actions for breach of contract, negligence, and nuisance.[54] The action of *"trespass quare clausum fregit"* (wherefore he broke the close) is simply the modern action of trespass to land. [55]

Not only is the section archaic, it was badly drafted in the first place. The first part of

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52 Ontario, for example, introduced a special limitation period in 1923. *See* S.O. 1923, c. 48, s. 54.

53 *Limitation Act,* 1623, 21 Jac. I, c. 16.

54 *See* Fleming, *The Law of Torts,* 16-19, 107-108, 364-366 (3rd ed. 1965); Cheshire and Fifoot, *The Law of Contracts,* 8-15 (7th ed. 1969).

55 *See* Fleming, *id.,* at 37 *et seq.*

section 3, which sets out the various actions to which the section was to apply, does not correspond entirely with the second part of the section, which sets out the appropriate limitation periods. The following inconsistencies might be noted:

(1) The actions for debt, referred to in the first part of the section, have been lumped with the actions for trespass, detinue, and replevin of *goods and cattle* in the second part of the section;

(2) The *action sur trover,* referred to in the first part of the section, has been omitted from the second part;

(3) The action of "menace," referred to in the first part of the section, has been omitted from the second part;

(4) The action of trespass, grouped with assault, battery, wounding, and imprisonment, in the second part of the section, was not grouped with these actions in the first part.

Obviously, the circumstances existing in 1623 that would have led to the choice of the six- and four-year periods have much changed.

Section 8 of the present Act, taken from section 7 of the 1623 statute, provides for the suspension of the running of time where a potential plaintiff is under certain named disabilities, such as infancy, coverture, or being *non compos mentis.* This particular section is expressly applicable to nearly all the actions listed in section 3. "Actions on the case," however, were not included and it might, therefore, appear that section 8 would not apply to the modern actions of breach of contract, negligence, or nuisance. In a extraordinary exercise of statutory interpretation; the Courts long ago decided that the English equivalent of section 8 did apply to "action on the case," as Parliament could not have intended to omit that action from the section.[56]

The reverse appears to be true of the feme covert (a married woman). Section 8 clearly provides that time does not run against a feme covert.[57] Yet the English Courts have decided that the section does not mean what it says in this respect. Since every married woman obtained the right to sue *as if* she were a feme-sole under that married women's property legislation enacted in England (and in British Columbia[58]) late last century, the English Courts have taken the position that time will run against married women. The effect of the *Married Women's Property Act,* the English Courts have held, was to make a woman "discovert" within the meaning of the limitations disability provision.[59] An Ontario Court of Appeal decision, however, which was given before the English cases on this point, went the other way.[60] As a result of that case,

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56 In *Crosier* v. *Tomlinson,* (1676) 2 Mod. Rep. 71; 86 E.R. 947, it was held the section applied to an action of *indebitatus assumpsit* (the modern action of breach of contract), which was an action on the case. The Court found that, looking at the statute as a whole, actions on the case were intended to be governed by, and were included in the meaning of trespass for the purpose of, s. 7. This case and others firmly established the applicability of s. 7 (British Columbia's s. 8) to actions on the case, although there were some expressions of doubt as to the validity of the reasoning in the *Crosier* case. *See Piggott* v. *Rush,* (1836) 4 Ad. & El. 912; 111 E.R. 1027.

57 *See also* ss. 29 and 50.

58 *See Married Women's Property Act,* R.S.B.C. 1960, c. 233. *See also* S.B.C. 1873, Act No. 29; S.B.C. 1887, c. 20.

59 *Weldon* v. *Neal,* (1884) 51 L.T. 289; *Lowe* v. *Fox,* (1885) 15 Q.B.D. 667, 672, 676—677 (C.A.). The decision was affirmed in the House of Lords, 12 App. Cas. 206, but the relevant point was not there in issue. *See also Jacobs* v. *London County Council,* [1934] 1 K.B. 67, 72.

60 *Carrol* v. *Fitzgerald,* (1880) 5 O.A.R. 322.

apparently, the Ontario limitations legislation was amended so as to delete the reference to the feme covert.[61] "Feme covert" was also later dropped from the English limitations legislation.[62]

The expression "beyond the seas" appears in sections 9, 10, 45, 46, and 54. From a British Columbia point of view, being in Alberta or the State of Washington would seem to constitute being "beyond the seas."[63] Even in England, where the legislation originated and where because of the insular nature of that jurisdiction the expression might have been thought to have its natural meaning, it has been held to have a technical meaning of "outside the jurisdiction."[64]

The lack of organization in the British Columbia *Statute of Limitations* is demonstrated by the fact that three of the provisions just referred to, sections 10, 46, and 54, are identical. Obviously, one general provision should suffice.

The largest part of our *Statute of Limitations,* sections 15 to 48, deals with the real property actions and is taken from English statutes of the last century. In England, the most significant aspect of these provisions was that they provided the *basis* for acquisition of title by adverse possession which was then and, to a large extent, still is a dominant feature of land ownership in that country. In British Columbia, for practical purposes, title to land cannot be acquired by adverse possession. Under the Torrens-style land registration system that operates in this Province, title by adverse possession cannot be acquired once a certificate of title has been issued.[65] Nor can adverse possession give rise to title in respect of Crown lands.[66]

Sections 33, 34, and 35 deal with the position of a "tenant in tail." Estates in fee tail were abolished in this Province in 1921.[67]

It is obvious that this Province's *Statute of Limitations* should be repealed and replaced by a statute which is contemporary in language and principle, and which will be comprehensible to the ordinary citizen as well as the lawyer. If there is such new legislation, then the need for many of the special limitation periods scattered through a multiplicity of separate statutes will be removed.

The Commission recommends:

The Statute of Limitations *be repealed and replaced by a statute that is contemporary both in language and substance.*

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61 R.S.O. 1897, c. 324, s. 39. *See* R.S.O. 1970, c. 246, s. 47.

62 *Limitations Act, 1939,* 2 & 3 Geo. 6, c. 21, s. 31 (2) and Schedule.

63 *Commercial Securities Corporation* v. *Davies,* (1937) 51 B.C.R. 481; *Boulton* v. *Langmulr,* (1897) 24 O.A.R. 618.

64 *Ruckmaboye* v. *Lulloobhoy Mottichund* (1852), 8 Moo. P.C.C. 4; 14 E.R. 2.

65 *Land Registry Act,* R.S.B.C. 1960, c. 208, s. 38 (3).

66 *Land Act,* S.B.C. 1970, c. 17, s. 6.

67 *See Land Registry Act,* R.S.B.C. 1960, c. 208, s. 23. *See also* S.B.C. 1921, c. 26, s. 25.

(b) Its Application

The *Statute of Limitations* does not apply to all causes of actions. It expressly applies to the actions referred to in its provisions.[68] It is applied by analogy to certain other actions[69] such as an action to set aside a gift made under undue influence (as being similar to the common law action for money had and received). The *Statute of Limitations* has, obviously, no application where another enactment has created a special limitation period. But there are some actions for which there is no limitation period at all. These include

(a) proceedings by the Crown, except actions by the Crown to recover land and to protect other rights respecting real property;[70]

(b) actions for enforcing by foreclosure or otherwise a charge on personal property, and actions for redeeming a mortgage of personal property;

(c) an action by a *cestui que trust* against a trustee based on fraud or a fraudulent breach of trust,[71]

(d) certain proceedings for the judicial review of the exercise of statutory powers such as by prohibition, *habeas corpus, quo warranto,* injunction, *mandamus,* or declaratory judgment.[72]

With respect to the fourth example, this Commission is currently conducting a study on statutory tribunals, including the topic of judicial review. It is felt the reform of limitation periods applicable to proceedings for judicial review would be best dealt with in the context of that study. We, therefore, make no recommendation for reform at this time beyond one that such limitation periods remain unaffected by other recommendations made in this Report.

The position of the Crown, fraudulent breaches of trust, and security on personal property are discussed later in this Report. We conclude that these matters should not remain outside the scope of limitation laws.[73]

Special limitation periods in other statutes are also dealt with later in this Report, in Chapter VII. In that chapter, we recommend that the number of such special limitation periods should be reduced so far as it is possible to do so. We point out, however, that there are some proceedings which, owing to their special nature, should remain the subject of special provisions in other statutes.

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68 *See* Ontario Report 18—19.

69 *See id.,* at 19—20.

70 *See Statute of Limitations,* R.S.B.C. 1960, c. 370, s. 48.

71 *See Trustee Act,* R.S.B.C. 1960, c. 390, s. 93 (1).

72 There may, however, be a requirement that proceedings be brought within a reasonable time. *Certiorari* is subject to a six-month limitation period. *See Certiorari Procedure Act,* R.S.B.C. 1960, c. 49, s. 2, with respect to review of orders, etc., of a Justice of the Peace and *Supreme Court Rules,* 1961, 0. 59, R. 33 (M.R. 871), with respect to review of all tribunals.

73 *See* Chapter VI, s. A; Chapter III, s. D; and Chapter IV, s. D respectively.

The Commission recommends:

The proposed statute not establish limitation periods with respect to

(a) proceedings by way of judicial review of the exercise of statutory powers; or

(b) those actions which, owing to their special nature, should remain the subject of special provisions in other statutes.

Section 3 of the *Statute of Limitations,* which was taken from the English Act of 1623, only applies to common law actions. Apart from some provisions in Part II of the statute,[74] which deals with real property actions, equitable claims are outside the express terms of the statute. The statute, however, is made expressly applicable to certain trust actions by the *Trustee Act.*[75]

The defence of "laches" or undue delay may be raised as a defence in actions to enforce equitable rights, if the statute does not expressly apply to the kind of action being brought. As part of the doctrine of laches, the statute has been applied by analogy to certain equitable actions. Where an analogy can be drawn, equity adopts the Act as a yardstick. Laches may also be a defence where an equitable remedy, such as specific performance, is sought in aid of a legal right. Thus, where a party has failed to carry out the terms of a contract, the other party could sue for damages at any time within six years of the breach of contract, but, if he seeks an order for specific performance, he must ask for that remedy without undue delay.

"Acquiescence" is another equitable defence and overlaps that of laches. Acquiescence may be established by conduct by which a person shows himself indifferent to the violation of his rights. There may be acquiescence without delay, but usually, although not always, delay will indicate acquiescence.[77]

Brunyate, in his book *Limitations of Actions in Equity,* remarked that:[78]

> The limitation of actions in equity, whether by statute or under the equitable rules of laches and acquiescence, is one of those corners of English law which still remain a little obscure.

The Commission believes that the obscurity would be removed if all actions (apart from the recommended exceptions) were expressly governed by a new limitations statute. If such were the case, acquiescence should continue to remain a defence to the extent that it now is. "Laches" should only remain as a possible defence where an equitable remedy is being sought in the enforcement of a legal right.

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74 *See* ss. 36-39. Note s. 39. The two references in s. 39 to "Act" are misleading. The word "Act" appeared, as it does today, in the provision when it was originally enacted as s. 27 of the English *Real Property Limitation Act, 1833,* 3 & 4 Will. 4, c. 27. When the provisions of that English statute were incorporated into this Province's *Statute of Limitations,* constituting in the main Part II, the word "Act" in s. 39 should have been replaced by "Part."

75 *See Trustee Act,* R.S.B.C. 1960. c. 390, s. 93. *See also Laws Declaratory Act,* R.S.B.C. 1960, c. 213. s. 2 (11).

76 *See* Ontario Report, 21—22.

77 *Ibid.*

78 At 12.

The Commission recommends:

1. Acquiescence remain available as a defence to the extent that it now is.

2. Laches be available only as a defence with respect to those claims for equitable relief in aid of a legal right which may now be defeated by laches.

D. Our Approach and Reform Elsewhere

In this Report we have endeavoured to set forth the principles on which a modern limitation statute should be based. The Commission has derived much assistance from the experience, both in research and legislation, of other jurisdictions.

There have been two substantial studies on the law of limitations carried out recently by law reform bodies. In 1967 the new South Wales Law Reform Commission completed a report[79] which included a draft Bill that has subsequently been enacted.[80] In 1969 the Ontario Law Reform Commission reported on the subject after a comprehensive study.[81] The 370-page report of the Ontario Commission did not include a draft Bill and its recommendations have yet to be implemented. The Ontario Commission acknowledged in its report the benefits it had obtained from work carried out elsewhere, and made particular reference to the New South Wales report.

In turn, we wish to acknowledge our very considerable debt to the Ontario Commission. We have adopted many, although by no means all, of the recommendations of the Ontario report. The text and materials contained in the Ontario report have been of great assistance to us in our discussions and have reduced the resources that we would otherwise have had to allocate to this study. *The Limitations Act* in Ontario, like the British Columbia *Statute of Limitations,* is virtually nothing more than a collection of provisions taken from old English statutes. Since the problem of limitations is of similar magnitude in British Columbia to that in Ontario, it would, in many respects, be desirable for this Commission to produce a report which would match that of the Ontario Commission in substance and thoroughness. However, since most problems are virtually identical in both Provinces, and since we are in agreement with much of what has been stated in the Ontario report, our Report will consider many aspects of limitations in somewhat less detail. We do not see any point in unnecessarily repeating the research of the Ontario Commission or in rewriting its report for our purposes. We have taken the liberty of quoting from it and referring to it extensively.

In addition to the New South Wales and Ontario Commissions' reports, there have been studies in other jurisdictions. England, for example, long ago reformed her limitations laws and continues to keep them under review. There was a complete overhaul of English limitations laws in 1939,[82] as a result of a report of the English Law Revision Committee in 1936.[83] Significant

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79 *First Report on the Limitation of Actions* (LRC 3). Hereafter referred to as the New South Wales Report.

80 S.N.S.W. 1969, Act No. 31. Set out in Appendix D.

81 *Report on Limitation of Actions* (1969).

82 *Limitation Act, 1939,* 2 & 3 Geo. 4, c. 21.

83 Fifth Interim Report, 1936, Cmd. 5334.

changes were made in 1954[84] and 1963[85] as a result of studies by special committees.[86] The English Law Commission completed a report on the 1963 changes in 1970,[87] the recommendations therein being implemented in 1971.[88] In 1971 the Lord Chancellor referred the general law of limitations to the Law Reform Committee for study.[89] The Scottish Law Commission published a report on prescription and limitation of actions in 1970,[90] and since then has been working on the drafting of legislation to implement its proposals.[91] The Law Reform Committee of South Australia also completed a report in 1970 on certain aspects of limitations law.[92] There does not appear to be a great deal in the way of American experiences that can be helpful.[93]

Something should be said about the model *Limitation of Actions Act,* approved by the Conference of Commissioners on the Uniformity of Legislation in Canada.[94] This model Act has been adopted in four provinces and both territories.[95] The model Act was approved in 1931, with some amendments being made in 1932 and 1944. Since then it has remained unchanged. Two of the provinces which adopted the model legislation, Alberta and Manitoba, have recently made substantial changes in their limitations laws.[96]

The Ontario Commission had initially decided to use the model Act as a basis for discussion, but soon found that it was very much out of date as it did not contain some of the

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84 *Law Reform (Limitation of Actions & c.) Act, 1954,* 2 & 3 Eliz. II, c. 36.

85 *Limitation Act,* 1963, 11 & 12 Eliz. II, c. 47.

86 *Report of the Committee on the Limitation of Actions,* 1949, Cmd. 7740; *Report of the Committee on Limitation of Actions in cases of Personal Injury,* 1962, Cmnd. 1829.

87 *Limitation Act,* 1963 (Law Coin. No. 35), Cmnd. 4532.

88 *Sixth Annual Report of the English Law Commission, 1970—71* (Law Coin. No. 47), at pp. 14-15.

89 *Ibid.*

90 Scot. Law Com. No. 15.

91 *Sixth Annual Report of the Scottish Law Commission, 1970—71* (Scot. Law Com. No. 23), at p.6.

92 Law Reform Committee of South Australia, *Twelfth Report: Law Relating to Limitation of Time for Bringing Actions.*

93 The American National Conference of Commissioners on Uniform State Laws promulgated a Uniform Statute of Limitations in 1939, but withdrew it from "active promulgation" in 1966. No state had adopted it. Some states have made improvements in their limitations laws. New York, for example, made a major revision of civil procedure, including limitations, in 1963. *See McKinney's Consolidated Laws of New York,* Book 7B, pp. 38—399. American state law in this area has its foundations in the old English law. *See Developments in the Law—Statutes of Limitation,* 63 Har. L. Rev. 1177 (1950).

94 *See Model Acts Recommended* from 1918 to 1961 inclusive, published by the Conference in 1962, at 199. The model Uniform Act is also set out in Appendix C to this Report.

95 By Manitoba and Saskatchewan in 1932, Alberta in 1935, Prince Edward Island in 1939, the Northwest Territories in 1948, and the Yukon Territory in 1954. In some instances the adoption was with modifications. In 1946, Manitoba replaced the earlier version of the model Uniform Act with the revised version.

96 S.A. 1966, c. 49; S.M. 1967, c. 32.

better features of limitations reform subsequently adopted elsewhere. While stating its adherence to the principle of uniformity, the Ontario Commission rejected the model Act on the ground that a substantially better alternative could be developed.[97]

The Uniformity Conference has been giving some attention to updating the model Act. In 1966 the Conference agreed to examine it and referred it to the Alberta Commissioners for study.[98] The Alberta Commissioners submitted their report the following year and were then asked to report at the 1968 meeting with a draft statute for discussion of policy.[99] The Alberta Commissioners, whose suggestions for change were mainly directed toward personal injury, property damage, and professional negligence actions, did report again at the 1968 meeting.[100] Again, the matter was referred back to the Alberta Commissioners. In the 1969,[101] 1970,[102] and 1971[103] proceedings there is nothing but a passing mention of the subject in the Conference Proceedings and, on each occasion, a reference back to the Alberta Commissioners for a report at the next meeting.

In carrying out its Limitations Project, this Commission decided first to deal with the law of prescription as a relatively small study which could be dealt with expeditiously and apart from the main limitations study. In theory, this separation was also sound, as prescriptive rights are created by the passage of time, whereas limitation laws, for practical purposes, result in the loss of rights by the passage of time. In some jurisdictions, however, the legislation governing both areas is combined in one statute. This is true of Ontario,[104] but was not of British Columbia, where there was in force a *Prescription* Act[105] until 1971. In November 1970 we circulated a working paper (Working Paper No. 2) on the law of prescription to 30 experienced practitioners throughout the Province, all Registrars of Title, and others with a special interest in the subject. Subsequently, in our first Report, we recommended the abolition of prescription, subject to certain transitional provisions.[106] The recommendation was implemented by the Legislature by an amendment to the *Land Registry Act*[107] during the 1971 Session. The *Prescription Act* was thus repealed and the common law doctrine of prescription and the doctrine of the lost modern grant abolished.

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97 Ontario Report 13.

98 *1966 Proceedings* 26.

99 *1967 Proceedings* 24, 172

100 *1968 Proceedings* 26, 68.

101 *1969 Proceedings* 24.

102 *1970 Proceedings* 35.

103 *1971 Proceedings* 75.

104 *See The Limitation Act,* R.S.O. 1970, c. 246, ss. 30—35, 39—40.

105 R.S.B.C. 1960, c. 296.

106 Law Reform Commission of British Columbia, *Report on Limitations, Part I—Abolition of Prescription* (LRC 1, 1970).

107 S.B.C. 1971, c. 30, s. 8, adding s. 38A.

Instead of circulating a working paper, as is its usual practice, on the general law of limitations, the Commission decided to publish its proposals for a new statute of limitations in *The Advocate,* which has a general circulation to the Bench and Bar throughout the Province. We felt that this was an area of the law in which every member of the legal profession'had an interest and we wished to canvass opinion from as wide a group as possible. Through the courtesy of the editor, David Roberts, our proposals were published in the April-May issue of *The Advocate* in 1971.[108] Criticism was invited, but little received. We wish to thank those who took the trouble to write us. Their comments on particular points are discussed in the appropriate parts of the Report. Generally, those who have been in touch with us expressed satisfaction with our proposals.

In formulating proposals for the reform of limitation laws, there is a temptation for lawyers to look at limitation problems from their point of view as practitioners, i.e., as to how the law affects them in their practice. While this is a point of view which should be taken into account, we have attempted to place the emphasis on the position of the citizen who may wish to bring an action or against whom an action might be brought.

108 At 119—126.

CHAPTER II APPROPRIATE PERIODS: GENERAL

A. The Present Position

There are seven different limitation periods established in this Province's *Statute of Limitations,* the longest being 60 years and the shortest six months. These periods apply to a variety of actions, as follows:

SECTION

Sixty years - Actions by the Crown to recover land (manors, lands, tenements, rents, tithes, or hereditaments).....48

Twenty years -

An entry or distress or an action for the recovery of land or rent (except by the Crown).....16

An action to redeem a mortgage of real property, when a mortgagee has obtained possession or receipt of the profits of any land or rent comprised in the mortgage (from the time of possession or receipt).....40

An action to recover any sum of money charged on or payable out of any land or rent.....43

An action to recover any legacy (whether charged against land or not) [1].....43

An action of debt for rent on an indenture of demise.....49

An action of covenant or debt on any bond or other specialty.....49

An action for debt or *scire facias* on any recognizance.....49

Six years—

An action upon the case[2] (other than for slander).....3

An action of account.....3,4

An action of trespass, detinue, and replevin for taking way of goods or cattle.....3

An action of debt grounded on any lending or contract without specialty.....3

An action of *trespass quare clausum fregit* [3].....3

An action of debt for arrears of rent.....3

Arrears of:

(i) rent,

(ii) interest in respect of any sum charged on or payable out of

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1 While it is not clear from a reading of section 43 if all legacies (whether charged against land or not) were to be governed by that provision, it was held in England that the equivalent English legislation did apply to all legacies. *See Sheppard* v. *Duke*, (1839) 9 Sim. 567; 59 E.R. 477. The English legislation was subsequently clarified by amendment in 1874. *See* 37 & 38 Vict., c. 57, s. 8. The change was adopted in Ontario (but not British Columbia). See S.O. 1874, c. 16, s. 13.

2 This includes the modern actions for negligence, nuisance, and breach of contract.

3 "Wherefore he broke the close." An action for trespass to land.

any land or rent, or in respect of any legacy (or any damages in respect of such arrears) which may be recovered in any action.....44

An action of debt on any award where the submission is not by specialty.....49

An action for any fine due in respect of any copyhold estates 49

An action for an escape.....49

An action for any money levied on any *fieri facias*.....49

Four years—An action of trespass, assault, battery, wounding,imprisonment.....3

Two years -

An action on the case for words spoken.....3

An action for a penalty, damages, or sum of money given to the party aggrieved by any statute.....49

Twelve months—An action for an act done in pursuance or execution, or intended execution, of any Act of the Legislature, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority.....11 (2)

Six months—An action against a Justice of the Peace for

(i) anything done by him in the execution of his office, or

(ii) a penalty incurred by him under any law or statute.....11 (1)

B. Other Jurisdictions

In the table below a comparison is made of the period of limitations governing the main causes of action in a number of jurisdictions. Also included is the Uniform Act and, under Ontario, the periods recommended by the Law Reform Commission of that Province. Where a "catch-all" provision (applying to all actions not specified in a jurisdiction's limitations statute) exists, it is referred to.

Comparison of Limitation Periods Governing Main Causes of Action

Action	British Columbia	Alberta	Ontario-Present Law	Ontario-Recommended by OLRC	Uniform Act	England	New South Wales	State of Washing-ton
To recover land	20	10	10	10	10	12	12	10
Debt and breach of contract	6	6	6	6	6	6	6	6 [A] 3 [B]
Deed (specialty)	20	[C]	20	10	[C]	12	12	[C]
Injury to personal property	6	2	6	2	6	6	6	3 [D]
Personal injuries (a) based on assault and battery (b) except those based on assault and battery	4 6	2 2	4 6	2 2	2 2	3 3	6 6	2 3
Defamation-								
(a) libel	6	2	6	2	2	3	6	3
(b) slander where words actionable *per se*	2	2	2	2	2	6	6	2
Catch-all period for actions not provided for	[E]	6	[E]	6	6	[E]	[E]	2

Key: A. Contract in writing. B. Contract not in writing. C. No special provision. D. Negligent injury, two years. E. None provided.

C. Considerations

The Ontario Law Reform Commission set out six general considerations to be borne in mind in determining suitable limitation periods. These well describe what this Commission believes are the relevant matters to be taken into account and are worth repeating here:[4]

> First, different periods may be appropriate to different causes of action. What is a suitable period to govern personal injury actions may not be practical with respect to actions to recover land or for breach of contract.
>
> Second, simplicity should be an objective. The public and the legal profession will be served well if the limitations laws are capable of being understood. In this respect, it is desirable to have as few limitation periods as practically possible. The fewer the periods, the less likely there are to be difficulties classifying actions in order to determine which period applies to them. Furthermore, the public, either directly or through the legal profession, will be more

4 Ontario Report 30-31.

> likely to know their rights. From the same point of view, it is important to reduce to the greatest extent possible the multiplicity of special limitation periods that have arisen...
>
> Third, a case can be made for a general shortening of the periods of limitation from their present length. Since the present periods were first established, means of communication and transportation have so improved that these factors no longer have the same importance they once had. Life generally and commercial activity in particular move at a much faster pace and, thus, there is much to be said for encouraging the disposition of disputes more quickly.
>
> Fourth, if there is to be a general preference for shorter periods, there is likely to be greater difficulties with respect to potential plaintiffs who do not know they have a cause of action. A safety-valve for such cases can be provided in the form of a procedure by which the period can be extended. The Commission recommends such a procedure **. . .** Without this safety device, it may well be that a longer period should be prescribed for some of the matters which the Commission proposes should be governed by the two-year period.
>
> Fifth, if special limitation periods, such as the one-year periods under *The Highway Traffic Act* and *The Medical Act,* are to be eliminated, the matters governed by those special periods would come under the new general provisions. The general provisions would in all of these situations provide a longer period. In order not to change existing litigation patterns in these areas more than is necessary, it is obviously reasonable that the general limitation periods should not be farther removed from the existing special limitation periods than is essential to the working of the proposed legislation. Thus, if either a two or three-year period would be appropriate for personal injury actions, this consideration is an argument for selecting the shorter period.
>
> Sixth, there is some merit in maintaining a particular period that is well-known, particularly if it is common to other jurisdictions. Take, for example, the six-year period for contract and debt actions, which was originally established by the Statute of Limitations in 1623 and has been in effect in Ontario since the Province of Upper Canada was created. A four, five or seven-year period might be equally appropriate to such actions. Nevertheless, the six-year period is one that is well-recognized and is still the governing period in contract actions in all the other common law provinces of Canada.

On the basis of the above considerations, the Ontario Commission concluded that there should be four (instead of the six existing in Ontario) general limitation periods of 2, 6, 10, and 20 years, and that some 20 special limitation periods should be abolished.

D. Our Recommendations

This Commission believes that three general limitation periods would be most desirable. Limitation periods of 2, 6, and 10 years have been selected as appropriate. We feel that the three general limitation periods should be applicable to actions, as follows:

Two years -

- *(a)* all actions for damages in respect of injury to person or property, including economic loss arising therefrom, whether based on contract, tort, or statutory duty;
- *(b)* trespass to property not included in (a);
- *(c)* defamation;
- *(d)* false imprisonment;
- *(e)* malicious prosecution;
- *(f)* torts under the *Privacy Act*;
- *(g)* actions under the *Families' Compensation Act*;

(h) actions under section 150 of the *Government Liquor Act*;
(i) seduction.

Ten years -

(a) judgments;
(b) for serious breaches of trust, such as actions in respect of a fraudulent breach of trust; for the conversion by a trustee of trust property to his own use; to recover money on account of a wrongful distribution of trust property; against personal representatives for a share of an estate; or to trace trust property.

Six years -To all other causes of action governed by the proposed statute.

The Commission also feels that there should be no limitation period with respect to, *inter alia*, the following actions relating to land:

(a) To recover land where an owner has been disposed in circumstances amounting to trespass or by a landlord against an overholding tenant;
(b) By a mortgagee to foreclose on or exercise a power of sale with respect to real or personal property in his possession;
(c) By a mortgagor to redeem real or personal property in his possession;
(d) For the enforcement of easements, restrictive covenants, and *profits - a - prendre.*

A more detailed consideration of specific actions and the appropriate limitation periods is contained in Chapters III and IV of this Report.

E. Offences Under Provincial Acts

I should be mentioned here that there is one category of proceedings that we have considered to be outside the scope of our Report.[5] These are proceedings under the *Summary Convictions Act* for breach of a provincial statute. Such proceedings must be brought within six months from the time when the subject-matter of the proceedings arose.[6] This limitation period is adopted from the *Criminal Code*.[7] Traditionally, statutes of limitation in Commonwealth jurisdictions have dealt only with civil causes of actions and any special limitation periods with respect to criminal proceedings have been dealt with in separate enactments. The distinction between criminal and civil law has a certain rigidity which arises out of the *British North America Act*.[8] In Canada, criminal law and procedure is a Federal matter, while civil procedure is generally a provincial matter. We could deal with proceedings in relation to provincial offences; however, we have concluded it would be preferable to confine this Report to civil matters.

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5 R.S.B.C. 1960, c. 373.

6 *Id.* s. 42.

7 *See* s. 693.

8 30 & 31 Vict.. c. 3.

Certainly there is much to be said for having the limitation period for summary conviction proceedings the same for both criminal law offences and offences under provincial statutes. The Commission, does not, in any event, find the six-month period unsatisfactory generally.[9]

9 It was, however, suggested to the Commission, in reference to its *Mechanics' Lien Act* Study, that six months is not usually sufficiently long for the facts to emerge on which a prosecution for breach of trust, under that statute, would be based. *See* R.S.B.C. 1960. c. 238, 2. 3 (2).

CHAPTER III APPROPRIATE PERIODS: PARTICULAR ACTIONS

A. Personal Actions

It has now been 350 years since limitation periods were first imposed with respect to personal actions.[1] It has been pointed out elsewhere in this Report that the passage of time has made the language and the classification of the actions within the scope of the statute of 1623 archaic. Obviously a different approach to the classification of these actions for the purposes of limitations is required.

Although contemporary law tends to classify personal actions as being in contract or tort, this is not wholly satisfactory for the purpose of establishing limitation periods. In many instances they overlap and the same fact situation or breach of duty might give rise to a cause of action sounding in both contract and tort. One also finds cases in which an action can only be brought in contract where the damage has been caused by negligence. Professional negligence cases seem to provide an example of that situation.[2]

Analytically, the Commission feels that the preferable approach is, in the first instance, to assign one limitation period (in this case, six years) to all of the personal actions and then examine a number of different situations to which that period would apply to see if any departure from the basic period is justified and, where that is the case, assign a more appropriate limitation period.

(a) Simple Contract Debt

The six-year limitation period which presently governs actions for simple contract debt has the advantage of being very well known. It is in effect in all the common law provinces in Canada and, at one time or another, has been in effect in almost every common law country in the world, having been introduced into most settled colonies as part of the introduction of English law.[3] Law reform bodies in England, New South Wales, New York, and Ontario have all considered whether that period is appropriate and recommended its retention.[4] That period is also retained by the Uniform Act.

A multiplicity of situations is encompassed within the notion of a contract. As the

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1 While it is not clear from a reading of section 43 if all legacies (whether charged against land or not) were to be governed by that provision, it was held in England that the equivalent English legislation did apply to all legacies. *See Sheppard* v. *Duke,* (1839) 9 Sim. 567; 59 E.R. 477. The English legislation was subsequently clarified by amendment in 1874. See 37 & 38 Vict., c. 57, s. 8. The change was adopted in Ontario (but not British Columbia). See S.O. 1874, c. 16, s. 13.

2 There, the duty has been said to exist in contract but not in tort. *See,* e.g., *Schwebel* v. *Telekes,* [1967] 1 O.R. 541; *Rowswell* v. *Pettit* [1968] 2 O.R. 81; Ontario Report 32.

3 J. E. Cote, *The Introduction of English Law into Alberta,* (1964) 3 Alta. L. Rev. 262.

4 Ontario Report 33.

Ontario Law Reform Commission stated in its Report:[5]

> There are, of course, many varieties of contract. There may be a simple oral contract for minor plumbing repairs or a detailed written contract for the construction of a 50-storey office building. The purchase of goods, whether by the householder at the supermarket or the factory owner of complex machinery, is always the subject of contract. So is the borrowing of money, whether it is a small loan from a friend or from a bank, or a complicated multi-million dollar financing by a commercial concern. The arrangement that the patient has with his doctor, or the client with his lawyer, is based, in law, on contract.

An argument can be made that the present six-year limitation period may be inappropriate in many situations. A small businessman may wish to inject capital into a limited company of which he is the beneficial owner by means of a demand loan to the company. It may be contemplated that the demand will not be made for many years. Nonetheless, the limitation period will expire only six years after the making of the loan.[6] The limitation period might appear to be too short in these circumstances. On the other hand it might be argued that oral contracts are much less likely to deal with important matters than written ones, and evidentiary problems are likely to increase with the passage of time, therefore a much shorter limitation period is warranted.[7]

The Commission appreciates the force of such arguments. However, it is felt that to sacrifice the simplicity of having one limitation period for all simple contract debts would not be desirable. Simplicity should be a key feature of any new statute of limitations. The fact that the existing six-year period is so well known provides an additional justification for its retention in all cases.

(b) Actions for Damages for Breach of Contract

Most of the observations with respect to actions for simple contract debt are also applicable to actions for damages for breach of contract. In most cases, therefore, the six-year limitation period is felt to be appropriate.

The Commission does, however, feel that actions for breach of contract which involve a breach of duty and result in damage to person or property deserve special treatment. They are more closely analagous to actions sounding in tort and, in many instances, will be actionable in tort as well. They are dealt with below.

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5 *Ibid.*

6 When money is payable on demand, time begins to run from the making of the contract, rather than the making of the demand. *See* 24 Halsbury 213—214 (2nd ed.).

7 The states of Washington, California, and Illinois provide shorter limitation periods for oral contracts. *See* Ontario Report 33. Contracts for the sale of goods are treated separately in most American jurisdictions. Article 2-725 of the Uniform Commercial Code, which has been widely adopted, provides a basic four-year limitation period to actions for breaches of such contracts, subject to reduction, by the parties to the contract, to a period of not less than one year.

(c) Actions in Tort

Tort encompasses many different kinds of actions. The Ontario Law Reform Commission has listed these as including:[8]

1. Libel and slander.
2. Deceit.
3. Seduction.
4. Malicious prosecution.
5. False imprisonment.
6. Trespass to the person, assault and battery.
7. Trespass to property.
8. Conversion.
9. Detinue.
10. Negligence.
11. Nuisance.
12. Breach of a statutory duty (although it is not settled that this is a tort).
13. Inducing a breach of contract.
14. Civil conspiracy.

To that list might be added:

(a) Injurious falsehood.
(b) Torts under the *Privacy A ct.*[9]
(c) Actions under the *Families' Compensation Act.*[10]
(d) Actions under section 150 of the *Government Liquor Act.*
(e) Actions based on the rule in *Rylands* v. *Fletcher.*[11]

Section 3 of the *Statute of Limitations* provides a limitation period of two years for slander; four years for assault, battery, wounding, or imprisonment; and six years for all other torts, including trespass to lands or goods, detinue, and actions upon the case, other than for slander. Although modern tort law is dominated by actions in negligence, it is not mentioned in the statute, nor is nuisance. Those actions, and others, have grown out of the old action on the case which, in a sense, has acquired the character of a residuary clause which covers actions not specifically enumerated. That all negligence actions should be subject to a six-year limitation period is a situation which requires close examination. Evidentiary problems suggest that time is much too long in cases which result in physical damage to person or property. As the Ontario Law Reform Commission said: "This state of affairs has been a major factor in special interest

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8 Ontario Report 34.

9 S.B.C. 1968, c. 39.

10 R.S.B.C. 1960, c. 138.

11 (1868) L.R. 3 H.L. 330. Actions based on *Rylands* v. *Fletcher* seem to be based upon a rule of liability which is independent of any breach of duty of care. *See Collins* v. *F.M.C. Chemicals Ltd.* [1973] 1 W.W.R. 733 (B.C.S.C.).

groups seeking and obtaining individual treatment by the legislature." [2]1

In grappling with the problems of classifying tort actions it is instructive to attempt to group them from the point of view of effect rather than cause. Broadly speaking, the results of tortious behaviour falls into four groups:

1. Damage to a person (including reputation and personal freedom)—
   - *(a)* assault, battery, and trespass to person;
   - *(b)* negligence;
   - *(c)* malicious prosecution;
   - *(d)* false imprisonment;
   - *(e)* defamation;
   - *(f)* nuisance;
   - *(g)* breach of statutory duty;
   - *(h)* torts under the *Privacy Act;*
   - *(i)* actions under the *Families' Compensation Act;*
   - *(j)* actions under section *150* of the *Government Liquor Act;*
   - *(k)* actions based on the rule in *Rylands* v. *Fletcher.*

2. Damage to property—
   - *(a)* trespass;
   - *(b)* nuisance;
   - *(c)* negligence;
   - *(d)* breach of statutory duty;
   - *(e)* actions based on the rule in *Rylands* v. *Fletcher.*

3. Damage through the loss of use of goods or services—
   - *(a)* conversion;
   - *(b)* detinue;
   - *(c)* seduction; [3]1
   - *(d)* breach of statutory duty.

4. Damage to economic interests—
   - *(a)* deceit;
   - *(b)* negligence;
   - *(c)* inducing breach of contract;

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12 Ontario Report 35.

13 This action has fallen into disuse. Technically, the action was one brought by the father or master seeking recompense for the loss of service of his daughter or servant caused by the seduction and "... the parent is put to prove of some pecuniary loss, such as his daughter's inability to perform her household duties in consequence of illness, pregnancy, or confinement. But the requirement gradually came to be reduced virtually to vanishing point by courts anxious to find a peg for recovery, even on so meagre a basis as an errant daughter's delay on an errand to fetch a jug of rum for her father. ... [I]t might well be questioned whether it has not come to the time for abolishing the whole action; based as it is on economic relations between parent and child, and social views concerning parental honour which have long become outmoded." Fleming, *The Law of Torts,* 620, 622 (3rd ed. 1965).

(d) injurious falsehood; [4]1
(e) civil conspiracy;
(f) breach of statutory duty.

Several interesting points emerge from this grouping. Some of the actions such as defamation or inducing breach of contract appear in one group only, while nuisance appears in two groups, negligence appears in three groups, and breach of statutory duty may cut across all four groups. Generally speaking, groups 3 and 4 involve actions which are more likely to be documented and as such may deserve a longer limitation period than groups 1 and 2. Moreover, actions in groups 3 and 4 most commonly arise between persons whose relationship one would normally think of as being contractual. Conversion and detinue may arise out of a bailment situation. Actions involving a civil conspiracy or inducing a breach of contract will normally have commercial overtones. This suggests that there is some virtue in keeping the limitation periods for such actions consistent with those for breach of contract. Two examples may suffice to illustrate this:

5. *A,* in selling a car to *B,* utters words which amount to not only a warranty but a fraudulent misrepresentation. It seems logical that if an action were brought by *B* for damages, the same limitation period should apply irrespective of whether the action were framed in deceit or warranty.
6. *A* induces *B* to break *B*'s contract with *C*. *C* wishes to sue both *A* and *B*. There seems to be no logical reason why C's time to sue *A* should be any different from that applicable to his right to sue *B*.

In our opinion those actions in tort founded on damage to the plaintiff's economic interests or the plaintiff's loss of use of goods should be subject to a six-year limitation period. We do, however, feel that seduction should be subject to a shorter limitation period. Although, technically, the action is for loss of services, it is closer in spirit to actions for damage to person. [5]1

If a shorter limitation period is justified for actions involving damage to person or property, how short should it be? In the final analysis any choice must be arbitrary, but the period selected must achieve a happy balance between the principle that these actions should be brought promptly and the desire to be fair to the potential plaintiff (who, after all, derives nothing whatsoever from the existence of a limitation period). We have concluded that a limitation period of two years comes closest to achieving an equitable balance between the interests involved. So long as there is a postponement scheme such as that described in Chapter V (D) to assist the plaintiff who is not aware he has a cause of action, no person should be prejudiced.

It is suggested that the manner in which we have classified various actions for the purpose of limitations is sound in principle because the dividing line between those situations which result in damage to a person's economic interest and those which result in damage to his person, property, reputation, or liberty is relatively clear. In practice, few situations will arise in which it will be difficult to ascertain whether the right of action should be governed by the two- or the six-

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14 This tort mainly encompasses behaviour which amounts to interference with economic relations, such as slander of title and false assertions depreciating the quality of a competitor's goods. *See* Fleming, *id.,* at 671.

15 *See* n. 13 *supra.*

year limitation period. We consider such a clear division to be an important feature of limitations legislation. It is recommended elsewhere in this Report[16] that the six-year limitation period act as a "catch all" or residuary provision governing all causes except those for which a different limitation period is specifically provided. In drafting appropriate legislation, it will, therefore, not be necessary to specify those personal actions which will be governed by the six-year period but only those to which the two-year period is applicable.

The Commission recommends:

1. *The following personal actions be subject to a two-year limitation period:*

   (a) All actions for damages in respect of injury to person or property, including economic loss arising therefrom, whether based on contract, tort, or statutory duty:
   (b) Trespass to property not included in (a):
   (c) Defamation:
   (d) False imprisonment:
   (f) Torts under the Privacy Act:
   (g) Actions under the Families' Compensation Act:
   (h) Actions under section 150 of the Government Liquor Act:
   (i) Seduction.

2. *All other personal actions be subject to a six-year limitation period.*

B. Contracts Under Seal, Recognizances and Penalties

Actions to recover upon recognizances, for penalties and upon contracts under seal, are dealt with under Part 3 of the *Statute of Limitations*[17] under the heading "Limitation of Actions for Recovery of Specialty Debts." The Report of the Ontario Law Reform Commission pointed out that "specialty" is a most imprecise term: [18]

> Usually, a specialty is thought to refer to a contract under seal, which, unlike the simple contract, does not require for its validity consideration for a promise. However, an obligation to pay money arising under a statute is also said to be a specialty. Thus, actions for taxes, or for compensation for land expropriated by statute, or for interest charged contrary to statute have been said to be actions on specialties for the purposes of limitations ...
>
> Sometimes it has been said that a judgment is a specialty, and, to a lesser extent the term has been applied to a recognizance ... These latter applications of "specialty" must be regarded as doubtful.

So long as there is no real consensus as to the meaning of the word "specialty," it is preferable that the word should not appear in a contemporary limitations statute.

For the purpose of defining limitation periods it is most useful to deal with these various obligations or actions separately, as different considerations apply to each.

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16 *See* s. 5 *infra*.

17 S. 49.

18 Ontario Report 42.

(a) Deeds

In the opinion of this Commission for the limitation periods, the distinction between instruments under seal, commonly called "deeds," and other documents which serve the same purpose, should not be retained. The historical reasons which led to deeds being given special treatment have all but disappeared. As the Ontario Law Reform Commission pointed out:[19]

> At one time the placing of one's seal on a document was regarded as indicating the solemnity with which the promises had been made. How relevant is this to-day, particularly having regard to modern commercial operations?

In modern commercial practice the seal most often appears on documents evidencing a transaction to which a limited company is a party. In most such cases the company seal is affixed, not with the intention that the document be one "under seal," but, rather, as the "signature" of the company in much the same way as an ordinary person would sign the contract. How far is it necessary that the parties to such a contract intend that it be one "under seal?"[20]

Most acts which may be done by deed may also be done by simple contract. The one exception is a promise to pay money which is not supported by consideration. There seems to be little justification for a longer limitation period with respect to gifts of money made under seal than with respect to ordinary debts.

The Commission, has, therefore, concluded that actions for the recovery of money under deed should be subject to the same limitation period applicable to contracts not under seal. Therefore, instead of the 20-year limitation period now applicable, ordinary covenants would be subject to a six-year limitation period.

(b) Recognizances

Most recognizances arise in criminal matters. They are dealt with by sections 696 to 707 of the *Criminal Code.*[21] Section 705 deals with proceedings in case of default. There does not appear to be any limitation period in the *Criminal Code* with respect to proceedings against a surety. Section 47 of the *Summary Convictions Act*[22] adopts sections 696 to 707 of the *Criminal Code mutatis mutandis* as applicable to recognizances given under that Act.

More detailed procedures for the enforcement of recognizances is set out in the *Recognizances Act*.[23] The Ontario Law Reform Commission made the following observations about its Ontario counterpart, *The Estreats Act:*

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19 *Id.,* at 45.

20 *See Chilliback* v. *Pawliuk* (1956) 1 D.L.R. (2d) 711 (Alta. S.C.); *cf.* comment A. B. Weston 34 Can. B. Rev. 453 (1956).

21 R.S.C. 1970. c. C34.

22 R.S.B.C. 1960, c. 373.

23 R.S.B.C. 1960, c. 333.

> Recognizances, too, should be regarded separately. *The Estreats Act* lays down the procedure by which a forfeited recognizance would normally be realized upon. It is probably correct to say that the taking of steps under the *Estreats Act* on a forfeited recognizance does not amount to an "action" under *The Limitations Act,* although "action" is defined in the latter statute as including "any civil proceedings." In any event, so far as proceedings under *The Estreats Act* are concerned, there would seem to be no likelihood of that Act being brought into play after any lapse of considerable time from the forfeiture. The statute contemplates early enforcement. (See ss. 1 and 2.) However, apart from the *Estreats Act,* it appears a recognizance may still be enforced by an ordinary action, although in practice this rarely, if ever, occurs.[24]

As the Crown in the right of the Province is not bound by the *Statute of Limitations* [25] it would appear that even the 20-year period imposed by section 49 has no application to proceedings to recover recognizances given under the *Summary Convictions Act.*

Actions on recognizances can, however, arise in civil matters. Proceedings with respect to such recognizances are regulated by the *Bail Act,*[26] an Act which consists largely of a re-enactment of various pre-Victorian English provisions. Section 8 of the *Bail Act* appears to contemplate that, in the first instance, recognizances be given to the Sheriff, who then assigns them to the party on whose behalf the process has been issued. If the recognizance should be forfeited thereafter "[T]he person to whom the same has or have been assigned may bring and maintain an action thereupon in his own name and may recover the full amount by law recoverable under the recognizance of bail..."[27] The 20-year limitation period would appear to be applicable in such proceedings.

That limitation period, however, again appears to be far too long. A six-year limitation period was considered appropriate by the Law Reform Commissions of Ontario and New South Wales, and the framers of the Uniform Act and the English legislation of 1939. We agree and feel that the limitation period should apply to actions upon recognizances given under both the *Bail Act* and the *Summary Convictions Act.*

(c) Obligations Arising Under Statute

Obligations to pay money do not always arise through a contract between the parties. That obligation may be imposed by statute. As the Report of the Ontario Law Reform Commission stated:

> ...actions for taxes, for compensation for land expropriated by statute. and for interest charged contrary to statute have been regarded as actions on specialties, since the subject matter of these suits is a debt created by statute. (See Weaver, at p. 301.) The 1936 English Report (at p. 7—8) drew attention to

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24 Ontario Report 44.

25 *See Interpretation Act,* R.S.B.C. 1960, c. 119, s. 35. *See also* Law Reform Commission of British Columbia, *Report on Legal Position of the Crown* (LRC 9, 1972).

26 R.S.B.C. 1960, c. 23.

27 *Id.,* s. 8.

> difficulties that have arisen in deciding whether the action arises out of the statute or outside the statute. These are instances where, although the statute is necessary for the cause of action, the action nevertheless arises, at least to some extent, because of a legal relationship outside the statute. For example, it may depend on a contract. If the courts so find, the limitation period may be six years rather than twenty.[28]

The 20-year limitation period seems unnecessarily long. A uniform six-year limitation period is more appropriate and would avoid the "difficulties" referred to.

(d) Penalties

"Bounty hunting" is no longer fashionable and actions for penalties are rare, although they are still provided for in the *Interpretation Act*:[29]

> 36. Where any pecuniary penalty or any forfeiture is imposed for any contravention of any Act, then if no other mode is prescribed for the recovery thereof, the penalty or forfeiture is recoverable with costs by civil action or proceeding at the suit of the Crown only, or of any private party suing as well for the Crown as for himself, in any form allowed in such case by the law of the Province before any Court having jurisdiction to the amount of the penalty in cases of simple contract, upon the evidence of any one credible witness other than the plaintiff or party interested; and if no other provision is made for the appropriation of such penalty or forfeiture, one-half thereof belongs to the Crown, and the other half belongs to the private plaintiff (if any) and if there is none the whole belongs to the Crown.

An action by a private party to recover a penalty under such a provision is known as a *qui tam* action. The disuse into which the *qui tam* action has fallen is largely attributable to the fact that, invariably, provincial statutes provide that breaches be dealt with under the *Summary Convictions Act,* which renders section 36 inapplicable. Section 42 of the *Interpretation Act* provides a six-month limitation period for actions to recover penalties. No British Columbia statute has been brought to the Commission's attention in which no mode of recovery is provided; however, at least one statute specifically authorizes a *qui tam* action. Section 77 of the *Partnership Act* provides:[30]

> Every member of a firm or other person required to file a declaration under the provisions of this Part who fails to comply with the requirements of this Part shall forfeit the sum of one hundred dollars, to be recovered before any Court of competent jurisdiction by any person suing as well in his own behalf as on behalf of Her Majesty; and half of such penalty shall belong to the Crown for the uses of the Province, and the other half to the party suing for the same, unless the action is brought, as it may be, on behalf of the Crown only, in which case the whole of the penalty shall belong to Her Majesty for the uses aforesaid.

A number of Acts do provide for the payment of a portion of a fine which may be imposed under

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28 Ontario Report 44.

29 R.S.B.C. 1960, c. 199, s. 36.

30 R.S.B.C. 1960, c. 277, s. 77.

the *Summary Convictions Act* to be paid to the informant, or some other person.[31] Limitation periods in those cases, however, are either those specifically provided by the Act creating the offence or the general six-month limitation period provided by section 4 (2) of the *Summary Convictions Act.*[32]

A *qui tam* action is one which is brought by a technically disinterested party. The limitation period provided in section 49 of the *Statute of Limitations* only applies to actions for penalties given to the party aggrieved. In that case, the limitation period is two years. Statutes which give an aggrieved person a right to sue for a penalty are rare, and in the one example which has been drawn to the Commission's attention, a special limitation period was provided.[33]

This Commission questions the wisdom of providing limitation periods for these archaic actions. It is felt that the *qui tam* action and any statutes which may give a special right to a person aggrieved to sue *for a penalty* should be abolished or repealed. It would follow that section 27 of the *Laws Declaratory Act,*[34] which provides for security for costs in *qui tam* actions, should also be repealed. Consideration might also be given to the repeal of those provisions which permit the informant to share in the proceeds of a fine. As the McRuer Report stated: [35]

> The sharing of fines with informers or prosecutors and the payment of fines to boards, tribunals, or other bodies for their own purposes is wrong in principle. No person or body other than the state which represents the entire population should have a pecuniary interest in securing a conviction . . . This brings the law into contempt.

The Commission recommends:

1. *Actions arising out of deeds be subject to the same limitation period which would be applicable to contracts not under seal.*
2. *Actions upon recognizances given under the* Bail Act *and the* Summary Convictions Act *be subject to a six-year limitation period.*
3. *Actions for obligations arising out of Statutes be subject to a six-year limitation period.*
4. *Sections 36 and 42 of the* Interpretation Act, *section 27 of the* Laws Declaratory Act, *and any other provision of any statute purporting to give an aggrieved party (other than the Crown) the right to sue for a penalty be repealed.*
5. *Section 77 of the* Partnership Act *and any similar statutory provision be repealed to the extent that a* qui tam *action is permitted.*

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31 *See Ferries Act,* R.S.B.C. 1960, c. 144, s. 12; *Dogwood, Rhododendron, and Trillium Protection Act,* R.S.B.C. 1960, c. 119, s. 6 (ii); *Revenue Act,* R.S.B.C. 1960, c. 341, s. 50; *Companies Act,* R.S.B.C. 1960, c. 67, s. 270; *Medical Act,* R.S.B.C. 1960, c. 239, s. 88.

32 *Supra* n. 22.

33 The *Cemetery Companies Act,* R.S.B.C. 1960, c. 46, s. 34, gives a riparian owner the right to sue for a penalty against a polluting cemetery company. A special limitation period of six months is provided.

34 R.S.B.C. 1960, c. 213, as amended, S.B.C. 1973, c. 84.

35 *Inquiry into Civil Rights* Report No. 1, vol. 2, p. 913.

C. Judgments and Orders

The only legislation in British Columbia prescribing a limitation period for bringing actions on judgments is section 43 of the *Statute of Limitations* which provides a limitation period of 20 years with respect to any

> ...action or suit or other proceeding . . . brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity or any legacy...

Upon first reading, this would appear to be applicable only to a very restricted class of judgment, namely judgments for money charged upon land. In *Thaker Singh* v. *Pram Singh*[36] the British Columbia Court of Appeal held that the limitation was not restricted to judgments charged on land. As McDonald, *C.J.B.C.* stated:[37]

> ...Notwithstanding this peculiar wording, the decisions made clear that the section applies to all judgments and not merely to the charge they create . . . It should also be noted that the section applies not only to action on the judgment, but to all "proceedings," which would include executions.

Despite the broad reference to "all judgments," it is arguable that the limitation period is inapplicable to judgments which are not for money. The limitation period would appear to be inapplicable to an *order* for the payment of money as opposed to a judgment for the same.[38]

As the Ontario Report points out:[39]

> Some judgments and orders do not need to be enforced as the judgment itself is all that the party obtaining it requires. For example, a judgment determining status does not call for enforcement. There is nothing further to be done. On the other hand, many judgments require the payment of money, the transfer of property, the doing of some other act, or the abstaining from the doing of such act.

Where a judgment requires enforcement, the party entitled to its benefit may try to enforce it by the taking of such proceedings as may be appropriate. For instance, a judgment for the recovery of land may be enforced by writ of possession,[40] while a judgment for the recovery of other property may be enforced by writs of delivery, attachment, or sequestration.[41] A writ of attachment may issue to enforce a judgment for the payment of money into Court[42] or to enforce a

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36 (1942) 57 B.C.R. 372.

37 *Id.,* at 375.

38 *But see* Marginal Rule 602 which provides that judgments and orders be enforced in the same manner.

39 At 47.

40 Marginal Rule 583.

41 Marginal Rule 684.

42 Marginal Rule 582.

judgment requiring a person to do or abstain from doing an act.[43] The rules define all such proceedings as "issuing execution against any party."[44]

Certain time limits are provided in the rules. Where six years elapse from the date of the judgment, no party may issue execution without a Court order.[45] The rules also provide that an unexecuted writ of execution remains in force for one year only from its issue unless it is renewed before its expiration by Court order.[46] The term "writ of execution" is defined as including writs of *fieri facias, capias,* sequestration and attachment, and subsequent writs that may issue giving effect thereto.[47] Writs of possession and delivery appear to be outside the renewal requirement and remain in force indefinitely. An unrenewed writ of execution will expire "if unexecuted ." There appears to be no authority construing the words "if unexecuted ." However, it appears to be the practice of the Vancouver Sheriff's office to treat writs of *fieri facias,* which would have otherwise expired, as being in force if the judgment debtor has made any payment whatsoever, or if a seizure has been made within the year, notwithstanding that the goods have not yet been sold.

There are other proceedings which can be brought for the enforcement of judgment debts which do not fall within the rules. Examples are charging orders issued under the Imperial *Judgments Act, 1838* [48] and, more important, proceedings against land pursuant to the *Execution Act.*[49] The latter Act provides that when a judgment is obtained against a defendant who owns an interest in land, the judgment may be registered in the appropriate Land Registry Office where it forms "a lien and charge on all the lands of the judgment debtor . . . in the same manner as if charged in writing by the judgment debtor under his hand and seal. . ."[50] The charge thereby created may be enforced by an originating notice in the Supreme Court calling upon the judgment debtor to show cause why the land should not be sold to satisfy the judgment.[51] The registration of a judgment expires after two years unless the registration of the judgment is renewed.

In the case of judgments for money, the judgment creditor who sees the limitation period about to expire can preserve his position by bringing an action on the judgment within the 20-year period. If he obtains a fresh judgment, time will start to run from the date of this new

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43 Marginal Rule 585.

44 Marginal Rule 586.

45 Marginal Rule 601. This has been held to include the issuing of process under the *Attachment of Debts Act. See Thaker Singh* v. *Pram Singh* 57 B.C.R. 372, per O'Halloran, J. A. at 386.

46 Marginal Rule 598.

47 Marginal Rule 586.

48 1 & 2 Vict., c. 110 (extended by 3 & 4 Vict., c. 82).

49 R.S.B.C. 1960, c. 135.

50 S. 35.

51. S. 38.

judgment. He can safeguard his position indefinitely in this fashion. This is a rare procedure as judgment debts on which no payment or acknowledgment has been made for 20 years have actually been long forgotten.

In the words of the Ontario Report, there are three categories of actions on judgments:[52]

1. actions on foreign judgments,
2. proceedings, amounting to "actions", such as an application for leave to issue execution, which are brought to enforce judgments,
3. actions on judgment debts, given within the jurisdiction for the purpose of avoiding the consequences of the statute.

Actions on foreign judgments are not governed by the 20-year period, but by the six-year period, since they are regarded as simple contract debts. If, however, a foreign judgment is registered under the *Reciprocal Enforcement of Judgments Act,*[53] it appears that it will then be governed by the 20-year period, and time would start to run from the date of registration. It is treated as if an action had been brought on the foreign judgment and a judgment obtained. On the other hand, the effect of a registration of an order under the *Reciprocal Enforcement of Maintenance Orders Act*[54] is to allow proceedings to be taken as if the order had originally been obtained in the Court of registration or confirmation.[55]

Various provisions in the rules permit the Court to make orders staying execution and other enforcement proceedings. At present, a stay of execution would not appear to prevent time running against the judgment creditor.

One further anomaly may arise. Where a judgment is for money, interest accrues at the legal rate. Action on the judgment itself may become statute-barred; however, because interest will have accrued within the limitation period, it may be argued that proceedings are still available to collect that interest.[56] Similarly, where the judgment debtor has incurred taxable costs in abortive attempts to effect collection after judgment, proceedings to collect those costs may not become statute-barred at the same time as action on the judgment itself.

A number of problems should be considered:

1. Should there by any limitation period for the enforcement of judgments?
2. What is the appropriate period for the enforcement of judgments?
3. Should orders be subject to the same period?

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52 Ontario Report 47—48.

53 R.S.B.C. 1960, c. 331.

54 R.S.B.C. 1960, c. 332.

55 *See* Ontario Report 48.

56 This problem is dealt with in Chapter VI.

4. Is there some point at which the judgment debtor should be freed from further pursuit?

5. Once the period has run with respect to a judgment, should the judgment creditor be able to

(a) continue enforcement proceedings commenced prior to the expiration of the limitation period but not yet completed?

(b) renew writs of execution and other process capable of being renewed indefinitely?

(c) take proceedings to collect interest and subsequent costs of enforcement even though the judgment with respect to which such sums became payable has become statute-barred?

6. Should time cease to run against a judgment creditor in cases where the judgment debtor has been granted a stay of execution?

7. Should foreign judgments be included within a definition of judgments so that they would be governed by the period applicable to judgments?

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

The answer to the foregoing argument seems to be that similar evidentiary problems can arise with respect to the enforcement of judgments as with respect to the enforcement of any other obligation to pay money. Arguments can arise over the extent to which a judgment has been paid. As time passes, receipts or documents evidencing payment may become lost or destroyed; witnesses may become forgetful or die. If no limitation period existed with respect to the enforcement of judgments, it is not unlikely that old judgments would emerge only at the time the judgment debtor has died and an advertisement to creditors is publicized. Personal representatives would have a great deal of difficulty in resisting unfounded claims on judgments given many, many years before.

These considerations, and others outlined in the introduction to this Report regarding the desirability of limitation periods generally, have prompted the Commission to conclude that some sort of limitation period for actions on judgments is warranted, although it should be longer than that applicable to ordinary contracts. Having regard to all of the interests involved, it is felt that a 10-year limitation period is appropriate.

The foregoing observations are applicable mainly to judgments for money, and the imposition of a limitation period on judgments requiring further enforcement should be considered further. Such judgments may be for the recovery of land or personalty or judgments ordering persons to do, or refrain from doing, specified acts. When the right to take enforcement proceedings accrues immediately, the Commission sees no harm in a limitation period which requires the party entitled to enforce the order to do so expeditiously. One exception to this principle should be judgments for the recovery of possession of land. One basic recommendation contained in this Report is that no person should be permitted to acquire an interest in land through adverse possession. It would be inconsistent with this recommendation to impose a limitation period which would prevent a person entitled to possession from enforcing a judgment to that effect.

Other considerations apply to those judgments which contain a continuing prohibition against the doing of some act. Where no necessity to take enforcement proceedings arises until the prohibition is breached, it seems unfair that a person who is the subject of a continuing injunction should be able to allow 10 years to elapse and then breach the prohibition with impunity. The Commission, therefore, feels that there should be no limitation on the enforcement of restraining injunctions and similar prohibitions.

Although judicial orders do not have quite the same formal significance as judgments, the Commission can see no reason for treating them differently. Although orders appear to be something less than judgments, they are, on many occasions, treated in the same way. For example, in the *Supreme Court Rules,* Marginal Rule 602 provides that judgments and orders be enforced in the same manner. In the Uniform Act, actions brought on a "judgment or order for the payment of money" must be brought within 10 years. The Commission believes that judgments and orders should be similarly coupled under the proposed statute.

The Ontario Commission raised another problem:[57]

> While the Commission considered actions on a judgment or order should be made subject to a longer period than other actions, it also considered whether there should be a point at which a judgment debtor should be free from the threat of further action. If the twenty-year period has almost run (and this will mean from the date of the last part payment or acknowledgment of the debt in instances where part payment or acknowledgment has been made) the judgment creditor should not be able to start time running afresh by bringing an action on the old judgment and obtaining a new one. If nothing has been done to enforce the payment of the judgment debt for such a long time, this might indicate that the judgment debt had, in fact, been paid. At common law, lapse of time could raise a presumption that a debt had been paid, albeit that the presumption was rebuttable, After the passage of many years, evidence of the payment may have been lost or destroyed. Furthermore, if a judgment debtor has been unable to make a payment for twenty years on a judgment debt, perhaps there is something to be said for giving him a fresh start at this point.

The Ontario Commission went on to recommend that it should not be possible to sue on a judgment given in the Ontario Courts for the purpose of obtaining a fresh judgment.

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57 Ontario Report 49.

We have come to a different conclusion. This Commission believes that the right of a judgment creditor to bring fresh proceedings on his judgment should be retained. A prohibition against that right would not be a limitation but rather the abolition of a substantive cause of action. The Commission also feels that the notion of giving the judgment debtor a fresh start, however worthy it may be, is one more closely related to bankruptcy than limitations.

Enforcement proceedings which are outstanding at the end of the 10-year period pose a difficult problem.[58] If property had been seized under a writ of execution, but was not yet realized upon at the time the 10-year period had expired, it would clearly be reasonable that the process of execution should continue in such a case. In addition, the fact that the judgment creditor has been sufficiently interested to pursue his rights by having a current writ, demonstrates that he has not regarded his claim as stale. It is, therefore, less likely that there will be evidentiary problems over whether payment had been made previously. This reasoning is less applicable, however, to writs of possession and delivery which do not appear to expire automatically after one year. The Commission feels that the rules should be amended to bring those writs within the definition of writs of execution. If the judgment creditor is permitted to commence a fresh action on his judgment, the Commission can see little justification in allowing him to continue to renew writs of execution which are outstanding at the time the limitation period expires. Renewals of such writs should be prohibited.

If unexpired writs of execution such as *fieri facias* are to remain in force, it is reasonable that the writs in aid of *fieri facias* should also continue to be available. The Commission has, therefore, concluded that there should be no limitation period with respect to the issuance of writs of *distringas* and *venditioni exponas.*

Outstanding charging orders present a different problem. Upon a charging order being made absolute, a new right is created which secures the judgment debt against specified property. The Commission believes that the right of the judgment creditor to realize on the security which he has obtained or was in the process of obtaining when the 10-year period expired should not be impaired. The judgment creditor should be permitted to make the order absolute and realize on the security within the limitation period appropriate for the enforcement of debts charged on personalty with time running from the date of the order absolute.

Similar considerations are applicable in the case of judgments registered against land pursuant to the *Execution Act.*[59] The Commission feels that the judgment creditor who has registered a judgment under that Act should be permitted to commence proceedings under section 38 and carry them to their logical conclusion, notwithstanding that the 10-year limitation period may have expired, so long as the registration of the judgment shall not have expired under section 36. The Commission does feel, however, that once the 10-year limitation period has run, no judgment creditor should be permitted to renew registration of the judgment unless enforcement

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58 ***See*** Ontario Report 50.

59 R.S.B.C. 1960, c. 135.

proceedings have been commenced.[60]

The Commission also feels that once a judgment has become statute barred, consequential amounts of money owing, such as costs of enforcement, should be similarly barred notwithstanding the time at which such claims actually arose. The Commission finds it illogical that a judgment debtor, 19 years after judgment was entered, could find himself facing proceedings claiming costs for a garnishing order which was issued to enforce the judgment during its ninth year.

The Commission also finds it unfair that the judgment creditor who is prevented from enforcing his judgment by a stay of execution should find time running against him, notwithstanding that stay. Time should not run in those circumstances.

Finally, we agree with the Ontario Commission that foreign judgments should not be treated as judgments for the purpose of limitations.[61] The Ontario Report states:

> The judgment creditor will have, as he now does twenty years once he either registers the judgment under *The Reciprocal Enforcement of Judgments Act* or sues on the foreign judgment and obtains a judgment in the Ontario courts. However, either of these procedures must be taken within six years of the obtaining of the foreign judgment. When a judgment debtor emigrates from one jurisdiction to another, it is more probable that evidential problems with respect to payment will arise with the passage of time. Most common law jurisdictions do treat foreign judgments as simple contract debts, separating them from local judgments for limitation purposes.

The Ontario Commission pointed out, however, that the New South Wales Report recommended that foreign and local judgments be treated alike. That Report stated:[62]

> It is better to have a uniform rule for all judgments and to avoid reliance on the fiction that a judgment debtor contracts to pay the judgment debt.

We agree with the conclusion of the Ontario Commission that, while fictions should be avoided, foreign judgments should be governed by a shorter period.[63] The desired result can be achieved by expressly excluding foreign judgments from the meaning of judgments in the proposed statute and allowing foreign judgments to be governed by the six-year catch-all provision.

A number of the recommendations following concern technical rules relating to the enforcement of judgments. The Commission wishes to point out that it is conducting a general

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60 The commencement of proceedings under s. 38 and the filing of a *lis pendens* do not "freeze and maintain in being the lien and charge created by s. 35:" It seems fatal to permit registration to lapse in the course of such proceedings. *See Butler-Lafarge Lid.* v. *Lowe,* 1973 (36 D.L.R. 104) (B.C.S.C.). Renewal must, therefore, be permitted to enable the judgment creditor to preserve his position during the course of enforcement proceedings.

61 Ontario Report 50.

62 Para. 65.

63 Ontario Report 51.

review of the law concerning the enforcement of judgments as part of its project on debtor-creditor relationships. It may be that when the Report on the enforcement of judgments is finalized, recommendations will be made of a broad nature which will render some of the following recommendations inapplicable.

The Commission recommends:

1. Judgments be subject to some limitation period.

2. Orders be treated in the same way as judgments.

3. The appropriate limitation period for actions and proceedings on judgments be 10 years, except that there should be no limitation period with respect to the enforcement of injunctions, restraining orders, and similar permanent prohibitions and judgments for possession of land.

4. The judgment creditor be permitted to preserve his rights by commencing a fresh action on the judgment within the limitation period.

5. Once the 10-year period has run, if there is enforcement process outstanding, the judgment creditor be able to

(a) continue to proceed on an unexpired writ of execution provided writs of possession and delivery are brought within the definition of "writs of execution", but no renewals of such writs of execution should be permitted;

(b) in the case of charging orders, continue proceedings to the point of making the charging order absolute, in which case the time limit for the enforcement of charges against personalty will be appropriate, and should be made applicable with time beginning to run from the making absolute of the charging order; and

(c) in the case of judgments registered against land pursuant to the Execution Act, *at the expiration of 10 years no further registrations or renewals thereof should be permitted, unless enforcement proceedings have been commenced, but the judgment creditor should be permitted to commence proceedings on a judgment under section 38 of the Act, notwithstanding the limitation period so long as the registration of the judgment shall not have expired.*

6. Once proceedings on a judgment have become statute-barred, any claim for subsequent taxable costs be barred, notwithstanding that those claims arose within the limitation period.

7. In cases where the judgment debtor has obtained a stay of execution, time should not run against the judgment creditor.

8. Foreign judgments not be treated as judgments for the purposes of the 10-year period but continue to be treated as simple contract debts subject to the appropriate limitation period.

D. Trusts

The extent to which a limitation law may apply to an action based on a breach of trust is

not always clear. Its applicability may turn on, *inter alia,* whether or not the trust is an express trust, that is one created by the specific act of a party and which carries with it a very high obligation on the trustee to carry out his responsibilities.

Trusts which are not created by some specific act of the parties create difficult problems of classification. As the Ontario Law Reform Commission pointed out:[64]

> The classification of other kinds of trusts is a matter on which the learned writers are not in agreement. Underhill, for example, groups all trusts, other than express trusts, under the head of constructive trusts. Keeton divides this group into implied, resulting and constructive trusts: however, he treats resulting trusts with implied trusts, although he seems to think there is an argument for classifying them with constructive trusts. Scott divides non-express trusts into resulting trusts and constructive trusts. These various kinds of trusts are explained below, in order to consider whether there is any justification for continuing the special treatment afforded to express trusts.
>
> *Implied*
>
> Here, in the absence of a clearly expressed intention, the court will presume an intention to create a trust from the conduct of the parties. For example, X purchases property from Z in the name of Y (i.e., X supplies the purchase price and Z, at the request of X, transfers the property to Y). If there is no explanation for the transaction, such as an intention on X's part to make a gift to Y, then it will be presumed Y was to hold in trust for X. (There is a notable exception to this example. If Y is X's wife, there will be no trust in favour of X, as the law presumes a gift in the transfer of property from husband to wife.)
>
> *Resulting*
>
> These occur in circumstances where a trust results in favour of a person (or his successors) because that person, in establishing a trust, has not either fully or partially disposed of the beneficial interest. For example, X transfers property to Y on certain trusts for Z. If the trusts turned out to be void for some reason, such as uncertainty, then Y would hold the property on a resulting trust for X. (For limitation purposes, a resulting trust is said to be an express trust, as it is regarded as appearing on the face of an instrument.)
>
> *Constructive*
>
> These are created in equity in the interest of good conscience, without regard to the express or implied intention of the person the law holds to be a constructive trustee. For example, X held a lease from Z in trust for Y. On the expiration of the lease, X tried to renew it on behalf of Y but Z, as he was entitled to do, refused a renewal. Z was, however, prepared to give and, in fact, did give X a lease on his own account. X was said to be a constructive trustee for Y. A trustee must not secure an authorized advantage from his position: if he does so, he holds his gain as a constructive trustee.

Trusts may also be imposed by statute independently of the intentions of the parties. In some cases a trust is imposed directly and specifically, while in other cases it is questionable how far the rules relating to trusts are in-tended to apply. One example of a clearly imposed trust is to be

64 Ontario Report 53.

found in section 3 (1) of the *Mechanics' Lien Act,*[65] which provides:

> (1) All sums received by a contractor or sub-contractor on account of the contract price are and constitute a trust fund in the hands of the contractor or of the sub-contractor, as the case may be, for the benefit of the owner, contractor, sub-contractor, Workmen's Compensation Board, workmen, and material-men; and the contractor or the sub-contractor, as the case may be, is the trustee of all such sums so received by him, and, until all workmen and all material-men and all sub-contractors are paid for work done or material supplied on the contract and the Workmen's Compensation Board is paid any assessment with respect thereto, shall not appropriate or convert any part thereof to his own use, or to any use not authorized by the trust.

Less clear is the relationship between a collection agent and his client. Section 9 (1) *(b)* of the *Debt Collection Act* [66] provides that every collection agent shall:

> ...maintain a trust account in a chartered bank in the province or a trust company registered under the *Trust Companies Act* and shall deposit all moneys collected from a debtor, or received on behalf of a creditor, or pursuant to a debt-pooling system, in the trust account.

Does that sort of provision impose a trustee-beneficiary relationship on the parties? How far may such "statutory" trusts be considered as express trusts for the purpose of the *Statute of Limitations?*[67]

Executors and administrators pose different problems. First, there is some doubt as to whether a personal representative, merely by virtue of his office, may be regarded as a trustee in the absence of any statutory provision declaring him to be a trustee.[68] In British Columbia, the *Administration Act* [69] appears to impose the status of trustee on personal representatives only with respect to real estate. Section 96 (1) provides:

> (1) Subject to the powers, rights, duties, and liabilities hereinafter in this Part mentioned, the personal representatives of a deceased person shall hold the real estate as trustee for the persons by law beneficially entitled thereto, and those persons have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of the personal estate.[70]

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65 R.S.B.C. 1960, c. 238.

66 S.B.C. 1973, c. 26.

67 This Commission has considered the operation of the trust section of the *Mechanics' Lien Act* elsewhere and recommended that a special limitation period of one year be imposed with respect to claims under the trust. *See* Law Reform Commission of British Columbia, *Report on Debtor Creditor Relationships, Part II Mechanics' Lien Act: Improvements on Land* (LRC 7, 1972).

68 *See Commissioner of Stamp Duties (Queensland)* v. *Livingston* (1965) A.C. 694 at 707 (P.C.). In that case, a Court, while recognizing that the executor is "in a fiduciary position with regard to the assets that came to him in the light of his office and for certain purposes and in some aspects was treated by the court as a trustee . . . essentially the trusts are to preserve the assets, to deal properly with them, and to apply them in the due course of administration . . . and . . . they might just as well have been termed 'duties in respect of the assets' as trusts." *See also* Ontario Report 55.

69 R.S.B.C. 1960, c. 3.

70 Emphasis added.

The definition of "trust" and "trustee" found in the *Trustee Act*[71] is somewhat broader. The definition section provides:

> "trust" does not mean the duties incident to an estate conveyed by way of mortgage; but, with this exception, the words "trust" and "trustee" include implied and constructive trusts, and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and include the duties incident to the office of personal representative of a deceased person.[72]

That definition, however, only operates for the purposes of the *Trustee Act.* Assuming for the moment that a personal representative is a trustee, how far may the trust be considered an express one? It has been held in Ontario that an executor is not an express trustee.[73]

The reason why it is important to distinguish between express trustees and others is to be found in section 12 of the *Laws Declaratory Act,*[74] which provides:

> Except as provided in the *Trustee Act,* no claim of a cestui que trust against his trustee of any property held on an express trust shall be held to be barred by any Statute of Limitations:

That provision, which has its origin in the *Supreme Court of Judicature Act, 1873,*[75] did not effect any change in the law but merely restated a rule applied by Courts of Equity. As Viscount Cave put it:[76]

> It is clear...an express trustee could not rely, as a defence to an action by his beneficiary, either upon the statutes of limitation or upon the rules which were enforced by Courts of equity by analogy or in obedience to those statutes. The possession of an express trustee was treated by the Courts as the possession of his cestuis que trustent, and accordingly time did not run in his favour against them.

What statutes of limitation are available to the nonexpress trustee? Section 36 of the *Statute of Limitations* provides that a person claiming land or rent in equity would be subject to the same limitation period applicable had he been entitled at law to the estate or interest which he claims. Section 43 provides a 20-year limitation period for actions by beneficiaries under wills to recover legacies. Under section 44, only six years of a rent or interest in respect of any legacy are recoverable.

Section 37 of the *Statute of Limitations* provides:

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71 R.S.B.C. 1960, c. 399.

72 *Id.* s. 2.

73 *See re Thompson,* [1955] O.W.N. 521; *re Beatty,* [1959] O.R. 13.

74 R.S.B.C. 1960, c. 213, as amended, S.B.C. 1973, c. 84.

75 36 & 37 Vict., c. 66, s. 25 (2).

76 *Taylor* v. *Davies,* [1920] A.C. 636, 650 (P.C. on appeal from Ontario).

> When any land or rent shall be vested in a trustee upon any express trust, the right of the cestui que trust, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.

Although on the face of it that section appears to impose a limitation period with respect to breaches of an express trust, it is, in fact, aimed at protecting the subsequent purchaser rather than the trustee. As the Ontario Law Reform Commission said of the comparable Ontario provision:[77]

> Where an express trustee improperly conveys land or rent to a purchaser for valuable consideration, the right of the person beneficially entitled to sue the purchaser (and any person claiming through him) for the recovery of the land or rent shall be deemed to have accrued at the time of the conveyance. This . . . was apparently designed to do nothing more than set the point at which the limitation period . . . starts to run in cases of this kind. . . . While by its terms it applies to a purchaser for value, such a purchaser would only be liable to the person beneficially entitled if he was not a *bona fide* purchaser of the legal title, without notice of the trust. A *bona fide* purchaser for value, without notice, of the legal title to the land or rent . . . acquires a good title.

Even though the limitation period had expired, an action would continue to lie against the trustee unless the trustee received the protection of the *Trustee Act,* which is the exception provided for in section 12 of the *Laws Declaratory Act.*

The provision of the *Trustee Act*[78] which contains the exception to section 12 of the *Laws Declaratory Act* reads:[79]

> 93. (1) In any action or other proceedings against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions apply:—
>
> *(a)* All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him:
>
> *(b)* If the action or other proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitations applies, the trustee or person claiming through him is entitle to the benefit of and is at liberty to plead the lapse of time as a bar to such action or other proceeding, in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the Statute runs against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but does not begin to run against any beneficiary unless and until the interest of such beneficiary is an interest in possession.

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77 Ontario Report 57.

78 R.S.B.C. 1960, c. 390.

79 *Id.* s. 93. The provision is based on s. 8 of the *English Trustees Act,* 1888, 51 & 52 Vict., c. 59.

(2) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.

(3) This section applies only to actions or other proceedings commenced after the first day of January, 1906, and does not deprive any executor or administrator of any right or defence to which he is entitled under any existing Statute of Limitations.

The fraudulent trustee is clearly exempted from the protection of the statute. On the face of it, however, the statute would appear to go even further and remove protection from the constructive trustee who may still be in possession of the trust property or the proceeds thereof. The Courts, however, have held that the provision does not operate to deprive any constructive trustee of any defence of the *Statute of Limitations* which would have been available to him before the enactment of the *Trustee Act.*[80]

Clauses *(a)* and *(b)* of section 93 (1) purport to define the manner in which limitation periods apply to trustees within that section, but the curious drafting, particularly of clause *(a),* has left considerable doubt as to its intended effect. As *Lewin on Trusts* [81] states:[82]

> The wording of clause *(a)* ... is especially perplexing, and it has been doubted whether that clause can have any operation at all. An action by a *cestui que trust* against his trustee is necessarily grounded on the fiduciary relation existing between them, and upon the hypothesis which, in applying the statutes of limitation, the Court is by this Act required to make, *viz.,* that the defendant trustee is not a trustee, such an action could never have been brought at all, and consequently no rights and privileges conferred by any statute of limitations could be enjoyed in it.

Such a construction, however, would tend to deprive provision *(a)* of all meaning whatsoever, and the Courts have struggled to avoid reaching such a conclusion. Their efforts, however, have not yielded a consistent or satisfactory interpretation of provision *(a).*[83] Clarification and simplification of limitations law relating to trusts is obviously required.

The Ontario Law Reform Commission identified five basic questions which should be considered:[84]

1. *(a)* To what exent, if any, should claims for breaches of trust be subject to limitation periods?
2. Is there any justification for maintaining any distinction between express and other trusts?
3. Should executors and administrators be treated as trustees for the purpose of

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80 *Taylor* v. *Davies,* [1920] A.C. 636 (P.C. on appeal from Ontario).

81 14th ed., 1939.

82 *Id.,* at 846.

83 *See generally Lewin on Trusts, supra,* n. 81. 847.

84 Ontario Report 58.

limitations?

4. What period or periods would be most appropriate?

5. At what point should the period begin to run when the beneficiary is unaware that he has a cause of action?

That the distinction between express trusts and constructive trusts should be abolished and that personal representatives should be treated as trustees for limitation purposes was a common feature of the reports of the Ontario and New South Wales Law Reform Commissions and the English legislation of 1939. That Act adopted a definition of "trust" and "trustee" comparable to that contained in the British Columbia *Trustee Act.*

The English legislation also continued to deny the protection of limitation laws to the fraudulent trustee and the trustee still in possession of the trust property or proceeds thereof. The New South Wales Law Reform Commission, on the other hand, felt that a limitation period was justified:[85]

> We do not think that even a fraudulent trustee should be forever outside the law of the limitation of actions. Under section 47 (1), the defrauded beneficiary would have twelve years to bring his action after the time when he discovers or may with reasonable diligence discover the facts [and] that he has the cause of action: this seems to us to be quite long enough. If no action is brought within this period, we think it fair that the trustee should have the peace which it is the policy of a statute of limitations to give. Under the law as it stands, a beneficiary under no disability and knowing his rights may wait, subject to questions of laches and acquiescence, for thirty or forty or more years and then call upon his trustee (or the executors of the trustee) to meet charges of fraud in relation to events of which all documentary and other evidence is likely to be lost. This is wrong and should be changed.

The Ontario Law Reform Commission also felt that a limitation period was desirable, but felt that the New South Wales decision regarding when time begins to run should be modified:[86]

> On . . . the question of whether fraud, conversion and retention claims against trustees should remain outside the statute, the Commission has had difficulty in coming to a conclusion. Once a beneficiary is aware of the facts which would form the basis for a claim, there seems to be no reason why he should not be required to sue within some reasonable specified time. (Under the law at present, the trustee can plead laches if the beneficiary delays too long in such a case.) On the other hand, if he is not aware of those facts, should time run against him if he could have discovered them had he been reasonably diligent? Is is fair to place this onus on the beneficiary? The Commission thinks not. A beneficiary should not be required to be reasonably diligent in ensuring that the trustee acts properly. The very nature of a trust pre-supposes a confidence in the trustee. The elderly widow, who is the beneficiary of a trust established under her husband's will, relies on the trustee almost as a friend. She should not be required to be on guard against him. The Commission has concluded, therefore, that claims for serious breaches of trust should be governed by a limitation period, but that time should only run against the beneficiary when he becomes aware of the breach.

The Ontario position appears to represent the most desirable compromise between the competing viewpoints on this question.

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85 New South Wales Report, para. 230.

86 Ontario Report 60.

To avoid confusion, it should be pointed out that the foregoing proposal with respect to the running of time relates to a fraudulent breach of trust. Elsewhere in this Report recommendations are made to postpone the running of time in situations involving fraud where a trust is not involved and in situations involving a nonfraudulent breach of trust. Those recommendations are less generous to the potential plaintiff in that constructive knowledge may start time running.

This Commission feels that all actions in respect of serious breaches of trust should be subject to a relatively long limitation period. Ten years seems appropriate. The six-year catch-all provision could then govern all other actions in respect of a breach of trust.

The Commission recommends:

1. All actions for breach of trust be subject to some limitation period.

2. No distinction be made between express trusts and other kinds of trusts for the purpose of limitation periods.

3. Personal representatives be treated as trustees for the purposes of limitations.

4. The following actions be subject to a 10-year limitation period:

(a) Actions against the personal representatives of a deceased person for a share of the estate:

(b) Actions in respect of any fraud or fraudulent breach of trust to which the trustee was party or privy:

(c) Actions against a trustee for the conversion of trust property to his own use:

(d) Actions to recover trust property or property into which trust property can be traced against a trustee or any other person:

(e) actions to recover money on account of a wrongful distribution of trust property against the person to whom the property is distributed, or his successor.

5. All other actions brought in respect of a breach of trust for which a limitation period is not prescribed by some other provision of the proposed statute be subject to a six-year limitation period.

6. Time should not run against a beneficiary with respect to an action

(a) based on any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property, or the proceeds thereof, in the possession of the trustee, or previously received by the trustee and converted to his own use, until the beneficiary becomes fully aware of the fraud, fraudulent breach of trust, conversion or other act of the trustee on which the action would be based, the onus of proof of which should rest on the trustee.

7. Time should not run against a beneficiary in respect of a future interest in trust property until the interest becomes a present interest.

8. Section 93 (2) of the Trustee Act *be incorporated into the proposed legislation so a statute-barred beneficiary should not be able to improve his position if another beneficiary, who is not statute barred, makes a successful claim; but section 93 (1) of that Act and section 12*

of the Laws Declaratory Act *should be repealed.*

E. The Catch-all Provision

It was pointed out early in this Report that the *Statute of Limitations* does not apply to all causes of action. It applies only to those actions which are either expressly within its terms or which may be included by analogy. Any action which is not within the *Statute of Limitations* must be dealt with by a special limitation period or it will not be subject to any limitation period whatsoever.

In our view, with certain exceptions, all actions should be subject to some limitation period and a recommendation to that effect has been made. The most convenient way of achieving that objective is to provide for a "residual" limitation period which will govern all actions which are not dealt with specifically. The Ontario Law Reform Commission labelled this a "catch-all" provision and recommended its inclusion in the proposed Ontario Act. In doing so, they followed the lead of the Uniform Act which contained a six-year catch-all provision. A number of American states have also adopted a catch-all provision.[87] This Commission agrees that a catch-all provision would be a desirable feature of a new *Statute of Limitations.*

We also agree that a six-year limitation period would be appropriate. That is the period of time which we feel should govern most actions. The drafting of the proposed statute should, therefore, be simplified. As the Ontario Commission observed:[88]

> In drafting the recommended statute, the Commission believes, in the interests of simplicity, that the provision setting out the appropriate limitation periods should simply state that all causes of action should be subject to a six-year period, unless the Act, or some other Act, expressly provides otherwise. . . . This would avoid spelling out, as the Uniform Act now does, a number of actions subject to six-year periods, as well as all the other actions specifically provided for, and then concluding with a "catch-all" period of six years.

The catch-all provision would also avoid the necessity of determining whether or not a general *Statute of Limitations* should be applied by analogy to actions not clearly within it.

The Commission recommends:

All causes of action be subject to a six-year limitation period, except where the proposed statute or some other statute has specifically provided that a different limitation period or no limitation period should apply.

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87 *See* generally Ontario Report 62.

88 *Id.,* at 63.

CHAPTER IV RECOVERY OF LAND AND CHARGES ON PROPERTY

A. General

Part II of the *Statute of Limitations* deals with actions to recover land and to enforce charges against real property. It is drawn entirely from English limitation legislation of the 19th century.

Certain provisions of Part II are dealt with elsewhere in this Report. These are:

(c) Sections 28, 40, 43, 44, and 47, in so far as they relate to acknowledgment and part payment:

(d) Sections 29 to 31, 45 and 46, which deal with disabilities and absence from the jurisdiction:

(c) Sections 37, 43, and 44, in so far as they relate to legacies and trusts:

(d) Sections 36 and 39, which deal with equitable claims:

(e) Section 38, which provides for concealed fraud.

The Commission's position is that all the matters listed above, save those in clause *(c),* should be governed by provisions that apply generally to all causes of action.

Sections 33, 34, and 35 deal with the tenant in tail. Since estates in fee tail were abolished in 1921,[1] these three sections are obsolete and no longer necessary.

The question of extinguishment of title or right generally is discussed in a later chapter. It is also discussed below where relevant.

This chapter is mainly concerned with

(a) actions to recover land, provided for by sections 15 to 27, 32 and 41;

(b) the enforcement of charges against land, provided for in sections 15 to 27, 32, 40 to 44, and 47;

(c) the enforcement of charges on personal property, which are not subject to the present *Statute of Limitations;*

(d) the enforcement of other charges.

Before the Commission decided upon its final recommendations in relation to this aspect of limitations, a then full-time member of the Commission met with the British Columbia Real Property Sub-section of the Canadian Bar Association for a discussion of tentative conclusions that the Commission had reached. In addition, a number of other experienced conveyancers were consulted, as were J. V. DiCastri, the Director of Legal Services in the Department of the Attorney-General, and Prof. A. J. McClean, Dean of the Faculty of Law and a long-time teacher of property law.

B. Actions to Recover Land

1 S.B.C. 1921, c. 26, s. 25. *See* R.S.B.C. 1960, c. 208, s. 23.

In British Columbia, land titles are governed, almost entirely, by the system of registered ownership established under the *Land Registry Act.*[2] It is possible, however, in certain circumstances, to have acquired or to acquire a possessory title under the law which this Province inherited from England. The provisions of Part II of the *Statute of Limitations* provide the basis for the acquisition of a possessory title. A discussion of the possessory titles, the *Land Registry Act,* and the relationship between them is, therefore, necessary.

(a) The Possessory Title

Under the English common law, title to land was based on possession rather than ownership. In disputes over entitlement to land, the question asked by the Courts was: Who, as between the disputants, has the better right to possession? In regulating claims over possession of land, it was recognized in England, centuries ago, that long-held possession land should not be disturbed. There were a series of English statutes that laid down limitation periods with respect to actions to recover (the possession of) land.

The last of these statutes, which is of relevance in this respect to British Columbia law, was the *Real Property Limitation Act, 1833.*[3] In that enactment, it was provided:

> 1. Actions to recover land must be brought within twenty years from the time the cause of action arose.[4]
>
> 2. Where a person was barred from bringing an action because the twenty-year period had elapsed, his title to the land was also extinguished.[5]

Thus, a person who was dispossessed for more than 20 years was *procedurally* barred from bringing an action *and* also lost his *substantive* right of title. The person who dispossessed him was said to acquire title by adverse possession. This is how the so-called "squatter's title" arises.

The statutory provisions above referred to became British Columbia law in 1858[6] and are to be found today as sections 16 and 41 of our *Statute of Limitations.* England reduced the 20-year period to 12 years in 1874[7] and it has since remained unchanged in that country. Ontario, which also adopted the English statute, has had a 10-year period since 1875.[8] British Columbia, however, has retained the 20-year period.

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2 R.S.B.C. 1960, c. 208.

3 3 & 4 Will. 4, c. 27 (Imp.).

4 S. 2.

5 S. 34.

6 Proclamation, dated November 19, 1858. *See English Law Act,* R.S.B.C. 1960, c. 129.

7 *See Real Property Limitation Act, 1874,* 37 & 38 Vict., c. 57, s. 1.

8 38 Vict., c. 16, s. 1.

Special provision, it should be pointed out, is made for the Crown. Section 48 of the *Statute of Limitations,* which comes from another English statute, allows the Crown 60 years to bring action.

A person claiming a possessory title may apply under the *Quieting Titles Act* [9] for a declaration of title. If he is successful, the declaration he obtains can be the basis for the issuing of a certificate of indefeasible title under the provisions of the *Land Registry Act.* This process is seldom utilized. In the two and a half years following January 1, 1970, it has apparently been used no more than once throughout the entire Province.[10]

(b) Title Under the Land Registry Act

The principle underlying a system of land registration, such as we have in British Columbia, is that the register should reflect the state of the title. There are two types of registered title in existence in British Columbia today. The older, and less common, type is the absolute fee which was provided for in the first *Land Registry Act* enacted in 1860.[11] Later legislation provided that a Registrar of Titles might also issue a certificate of indefeasible title. The latter was considered to be the superior title as it was "conclusive evidence . . . that the person named is the absolute owner of an indefeasible fee-simple . . . against the whole world,"[12] while the registered owner of an absolute fee was deemed to be the "prima facie owner"[13] only. Machinery was provided and still exists for the conversion of absolute fees to estates evidenced by a certificate of indefeasible title. After 1905 all new applications to bring land within the registry system were regarded as applications for certificates of indefeasible title and no further absolute fees were issued, although some of the old absolute fees are still in existence.[14]

A system of land registration is defeated if title can change hands by adverse possession. Persons dealing with the land, such as prospective purchasers, are not able to rely on the register to inform themselves accurately of the state of the title. The 1905 amendments to the *Land Registry Act* enshrined the principle that the registered owner under a certificate in indefeasible title was no longer subject to the "disseised" and that the acquisition of title by adverse possession was expressly ruled out in respect of such lands. That 1905 provision is now subsection (3) of section 38. It provides:

> After the issuance of a certificate of indefeasible title no title adverse to or in derogation of the title of

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9 R.S.B.C. 1960, c. 327.

10 Information obtained from responses to a questionnaire sent to Registrars of Title.

11 *See Land Registry Act,* C.S.B.C. 1888, c. 67.

12 *Id.,* s. 66.

13 *Id.,* s. 18.

14 *See Land Registry (Amendment) Act,* S.B.C. 1905, c. 31.

the registered owner shall be acquired by length of possession merely.

The provision does have a weakness, in referring to title acquired by "length of possession merely." It could be argued that there are other elements besides mere length of possession that provide the basis for a possessory title (e.g., for a possessory title to arise, the possession must be inconsistent with the title of the owner). However, it now appears well settled that section 38 (3) rules out possessory titles. [5]1

The *Land Registry Act* does preserve the title of any person adversely in actual possession at the time the certificate was applied for, providing that person continues in possession.[16]

Thus, *once a certificate of indefeasible title has been issued,* title by adverse possession cannot be acquired by subsequent adverse possession in the lands to which that certificate applies.[17] There would appear to be no question that section 38 (3) of the *Land Registry Act* was intended to prevail over sections 16 and 41 of the *Statute of Limitations.* This was the issue of the 1958 case of *Lukiv* v. *Abbotsford School District No.* 34.[18] In his reasons for judgment, Collins, J. stated:[19]

> My view is that beyond doubt the indefeasible provisions of the present *Land Registry Act* and particularly sec. 38 with special emphasis on subsecs. (1) and (3) thereof have rendered both secs. 16 and 41 of the *Statute of Limitations* inapplicable to land in British Columbia held under indefeasible title in all cases where the possession of a stranger had not ripened into a possessory title prior to the effective date of the first indefeasible title issued after the 1905 amendment. In the case at bar it is unnecessary to consider what the result would have been prior to that amendment.

(c) The Possessory Title in British Columbia Today

It has not been possible in British Columbia, therefore, to acquire by adverse possession a title to lands after a certificate of indefeasible title in respect of those lands has been issued, where

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15 *See* the *Lukiv* case, referred to below.

16 S. 38 (2).

17 Section 38 (3) should be amended to make it absolutely clear that title by adverse possession cannot be acquired after the *first* certificate of indefeasible title has been issued in respect of any property. It might be argued that the provision, as it now stands, would permit the acquisition of possessory title after a certificate of title has been issued as against subsequent registered owners. There is, however, *obiter* to the contrary in *Morrison* v. *Weller,* [1951] 3 D.L.R. 156, 159. The Manitoba legislation provides that title by adverse possession cannot be acquired in any land after it "has been brought under this Act." See R.S.M. 1970, c. R30, s. 61 (2). For a discussion of the relationship of title by adverse possession and titles under Torrens systems, *see* Di Castri, *Thom's Canadian Torrens System* (2nd ed.); Jeremy Williams, *Title by Limitation in a Registered Conveyancing System,* 6 Alta. L. Rev. 67 (1968); Michael J. Goodman, *Adverse Possession of Land—Morality and Motive,* 33 Mod. L. Rev. 281 (1970).

18 26 W.W.R. (N.S.) 645. *See also Washington and Great Northern Townsite Company* v. *Holbrook,* [1924] 1 W.W.R. 511, 512; *Kapoor Sawmills Ltd.* v. *Deliko,* (1940) 56 B.C.R. 433.

19 *Id.,* at 650-651.

such a certificate was issued after 1905. It may be that title by adverse possession could have been acquired where such a certificate was issued prior to 1905. If a possessory title had been acquired at the time of issuing the certificate of title (whether before or after 1905), the possessory title is paramount.

Certainly, however, it is clear that, until 1970, title by adverse possession could be acquired to lands for which no certificate of infeasible title had been issued. Such lands would include

(a) Crown lands (where the Crown was not registered as owner under a certificate of indefeasible title).[20]

(b) Crown-granted lands, where the grantee had not applied for a certificate of indefeasible title.[21]

(c) Lands subject to registered ownership as "absolute fees" under legislation existing prior to 1921.

In 1970, however, a revised *Land Act* was enacted.[22] It included the following provision:

> 6. Notwithstanding the provisions of any other statute or law to the contrary, no person shall acquire by prescription, or by occupation not lawfully authorized, or by any colour of right, any right, title, or interest in or to any Crown land, or in or to any lands as against the interest therein of the Crown.

Since the section was not made retrospective, its effect would appear to be confined to ruling out the acquisition of title by adverse possession with respect to Crown lands from 1970 onward. Title acquired by adverse possession before 1970 would not appear to be wiped out by the section.

"Crown land," as referred to in section 6 of the *Land Act* is confined to land "belonging to Her Majesty in right of the Province"[23] and does not, therefore, apply to lands owned by Her Majesty in right of Canada. There is a provision in the Federal *Public Lands Grant Act* which states that [24] "No right, title or interest in or to public lands is acquired by any person by prescription." "Public lands," for the purposes of that provision, means "lands belonging to Her Majesty in right of Canada and includes lands of which the Government of Canada has power to

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20 *See A.-G. of Canada and city of Vancouver* v. *Gonzalves,* (1924) 34 B.C.R. 361 (B.C.C.A.) and *A.-G. of Canada and City of Vancouver* v. *Cummings,* (1924) 34 B.C.R. 433 (B.C.C.A.).

21 *Worsnop* v. *Wood,* (1911) 19 W.L.R. 533. *See also McIntyre* v. *Haynes,* (1925) 35 B.C.R. 40 (B.C.C.A.); *Greases* v. *Carruthers,* (1913) 18 B.C.R. 267 (B.C.C.A.). Since 1968, Crown grants, when issued, are required to be transmitted to the proper land registry office for registration. S.B.C. 1968, c. 17, s. 8; S.B.C. 1970, c. 17, s. 51.

22 S.B.C. 1970, c. 17.

23 *Id.,* s. 2 *(g).*

24 R.S.C. 1970, c. P-29, s. 5.

dispose."[25]

There is also a provision dating back to 1939 in the *Municipal Act* which states that the right of possession of a municipality to every highway within it shall not be "adversely affected nor derogated from by prescription in favour of any other occupier."[26]

To summarize, then, possessory titles may exist in British Columbia today with respect to

(a) lands for which certificates of indefeasible title had been issued prior to 1905;

(b) lands for which certificates of indefeasible title have been issued (whether before or after 1905), where at the time of issuing such certificates possessory titles have been acquired;

(c) lands subject to registered ownership as "absolute fees" under legislation existing prior to 1921;

(d) Crown lands (where the Crown was not registered as owner under a certificate of indefeasible title), the possessory title having been acquired prior to 1970 (assuming that section 6 of the *Land Act* is not retrospective); and

(d) Crown-granted lands, where the grantee has not applied for a certificate of indefeasible title (i.e., the Crown grant is unregistered).

So far as acquiring title by adverse possession today is concerned, this could only occur with respect to lands subject to an unregistered Crown grant or registered as an absolute fee. These exceptions should be removed. Thus, in the new limitations statute proposed by the Commission, there should be no provision equivalent to section 41 of the present *Statute of Limitations.* In addition, the Commission believes that there should be a specific legislative statement that title cannot be acquired by adverse possession.

The Commission recommends:

1. The proposed limitations statute contain no provision for the extinguishment of title to land (similar to section 41 of the present Statute of Limitations).

2. There be a general legislative statement that title to land cannot be acquired by adverse possession.

This leaves several questions to be considered:

(a) What should be done, if anything, about existing possessory titles?

(b) Should there be a limitation period for actions to recover land?

(c) Should special procedures be available to deal with boundary and encroachment problems?

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25 *Id.,* s. 2.

26 *See* R.S.B.C. 1960, c. 255, s. 506. *See also* R.S.B.C. 1936, c. 199, s. 322, as amended by S.B.C. 1939, c. 38, s. 21.

(d) Existing Possessory Titles

When all methods of acquiring prescriptive rights were abolished in 1971, it was also provided that any prescriptive right then in existence should lapse in five years unless steps had been taken to give notice of the claimed right in the appropriate land registry office.[27] Thus, after 1976, persons interested in a particular property will be able to rely on the Land Registry Office records in so far as prescriptive rights are concerned. Should there be a similar provision with respect to possessory titles?

The Commission thinks not. It would seem unduly harsh for a person holding a possessory title to lose it if he did not meet some registration requirement, particularly if he had no knowledge of that requirement. From a practical point of view, the imposition of the registration requirement in the case of prescriptive easements and *pro fits-a-prendre* would be very unlikely to have such an unfair effect as there was no evidence that such rights existed. The benefit has been to remove the theoretical problem. Possessory titles, however, do exist, although there appears to be few in existence.

The Commission recommends:
There be no transitional provision comparable to that applying to prescriptive rights, which would cause existing possessory titles to lapse unless registered within a limited time.

(e) Actions to Recover Land

In British Columbia, the system of registration of title has long prevailed over that of acquisition of title by adverse possession. The implementation of the recommendation to formally abolish the latter system is little more than a tidying-up operation.

However, does it follow that there should be no limitation period at all for actions to recover land? The following example illustrates some of the problems:

> Suppose *X* is the registered owner of a parcel of land under a certificate of indefeasible title. *Y*, his neighbour, constructs a fence along what he thinks is the boundary between his and *X*'s parcel of land. The fence, however, is built 1 foot inside *X*'s land so that *Y* has "captured" a strip of *X*'s land 1 foot wide, running the full length of the boundary between their two parcels. Twenty years pass. Is *X* (or some subsequent purchaser of his land) entitled to the 1-foot strip?

Certainly, *Y* cannot be said to have acquired a title by adverse possession. *X*'s title is not extinguished. But is there any procedural bar which precludes him from bringing an action to recover the strip? Section 38 (3) of the *Land Registry Act,* it may be recalled, provides that:

> After the issuance of a certificate of indefeasible title no title to or in derogation of the title of the

27 *See* S.B.C. 1971, c. 30, s. 8, adding s. 38A to the *Land Registry Act.*

registered owner shall be acquired by length of possession merely.

Does that provision exclude the procedural bar from operating? Could it be argued successfully that, while the registered owner has title, he is precluded from bringing an action to recover possession? Apparently not, according to the *Lukiv* decision, referred to earlier.

In any event, in the proposed limitation statute, should there be any time limit for the bringing of an action by a dispossessed owner (at least a registered owner under a certificate of indefeasible title) to recover his land? (This question is posed on the basis that the extinguishment of title provision in respect of actions, to recover land is abolished.) At least so far as the registered owner is concerned, should he have the right to recover possession indefinitely? If he did not have such a right, the policy behind the *Land Registry Act* would be defeated. The register could reflect an ownership that was virtually meaningless. Prospective purchasers could not, therefore, rely on the register and, to protect themselves, would have to investigate possession.

The Commission feels that there should be no time limit on actions to recover land where an owner has been dispossessed in such a way that the original dispossession would amount to trespass. We believe that there should be no limitation period whether the land is owned under a certificate of indefeasible title, and absolute fee, or an unregistered Crown grant.

The Commission recommends:

The proposed limitation statute contain no limitation period on actions to recover land where an owner has been dispossessed in circumstances amounting to trespass.

(f) Boundary and Encroachment Problems

A prospective purchaser can only rely on a certificate of indefeasible title as a guarantee of title, but not of "extent." If he wishes to be sure that he is acquiring land within certain physical boundaries, such as fences and hedges, he must take care to ensure that the "paper" boundaries of the registered land, as indicated by the survey and legal description on which the registration was made, match with those physical boundaries.

If, after acquiring the land, the purchaser discovers that there has been an error in the survey, he may obtain relief under the *Special Surveys Act,*[28] a statute must in need of clarification and simplification. It may also be possible for him to obtain relief under the *Special Surveys Act* if either he or his predecessor in title has encroached on his neighbour's land either by building on it or by fencing it in with his land (as in the X and Y example given above.) Under section 3 *(b)* of the *Special Surveys Act,* the Attorney-General may order a special survey to be made where "any discrepancy exists or is thought to exist between the occupation of a parcel" and its legal description. The Act does not lay down any requirement as to *length* of occupation. The special survey may take into account "occupation and improvements" in establishing

28 R.S.B.C. 1960, c. 368.

boundaries. Where boundaries are adjusted to take occupation into account, presumably some recommendation as to compensation would be made.

The difficulty with the *Special Surveys Act* is that its procedure is cumbersome and that it is not at all clear in what circumstances occupation will determine boundaries. Special surveys are only made at the order of the Attorney-General, who has a discretion to order them. A single, registered owner has no right to apply for a special survey. If a land-owner is unable to have a special survey made, or if the survey does not take occupation into account, where he has built on his neighbour's land, even in genuine error, and perhaps only by encroaching in terms of a few inches, his neighbour can require him to remove the structure in so far as it encroaches.[29]

Sometimes the neighbour will give him the alternative of purchasing the land on which the encroachment has been made at an exorbitant price, which may well make the encroaching owner feel that he is being subjected to blackmail. We stated in our Report on the Abolition of Prescription that there was a great deal of merit in Manitoba's statutory solution to this problem. Section 28 of *The Law of Property Act*[30] of Manitoba provides:

> Where, upon the survey of a parcel of land being made, it is found that a building thereon encroaches upon adjoining land, the Court of Queen's Bench may, in its discretion,
>
> *(a)* declare that the owner of the building has an easement upon the land so encroached upon during the life of the building upon making such compensation therefor as the court may determine; or
>
> *(b)* vest title to the land so encroached upon in the owner of the building upon payment of the value thereof as determined by the court; or
>
> *(c)* order the owner of the building to remove the encroachment.

At present, where the apparent physical boundaries do not match the "paper" boundaries, because of inaccurate fencing, the dispossessed owner under a certificate of indefeasible title is, subject to the possibility of a survey under the *Special Surveys Act,* entitled to recover his land, regardless of the lapse of time. Is that the correct result? It should be noted that in all three of "problem" situations (the incorrect survey, the building encroachment, and the misplaced fence), the physical boundaries would determine ownership under a possessory title system, such as exists in Ontario, provided that the dispossession has been for the requisite period and the other requirements for the acquisition of the title be adverse possession had been met. If the *X* and *Y* position given above occurred in respect of lands governed by *The Registry Act*[31] in Ontario, *Y* would acquire a possessory title in the 1-foot strip 10 years after he had fenced that property in with his own.[32]

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29 The common law and equity, however, may provide relief in certain situations. *See*, e.g., *Clark* v. *McKenzie,* [1930] 2 D.L.R. 843; *Ramsden* v. *Dyson*. (1866) L.R. 1 H.L. *129*.

30 R.S.M. 1970, c. L90.

31 R.S.O. 1970, c. 409.

32 *The Limitations Act*, R.S.O. 1970, c. 246, ss. 4, 15.

There is something to be said for the acquisition of title by adverse possession as a solution in these kinds of situations—as opposed to that where there is an intentional dispossession by a squatter. Prospective purchasers are usually interested in acquiring land on the basis of its actual physical boundaries. There are many advantages for those dealing with land in being able to rely on physical boundaries, particularly if those boundaries have existed for some time. We do feel, however, that solutions better than adverse possession can be evolved—solutions which do not depend on the passage of time. Where there has been an incorrect survey, the situation should be remedied under the *Special Surveys Act,* although we recognize that the statute can be improved upon. In the case of building encroachment, we believe there should be legislation similar to that in Manitoba.

We also believe that some sort of relief should also be available where a boundary fence has been improperly located. In these situations, an inflexible rule favouring the "paper" boundaries may lead to injustice. When a survey brings to light the fact that a boundary fence has been misplaced, that may represent a windfall to owner *X* and a corresponding loss for owner *Y*. If the apparent physical boundary was relied upon at the time each purchased his property, this would be most unfair.

There seems to be little reason why the Manitoba legislation could not be broadened to deal with this sort of situation. This could be done by adding a further provision to deal with misplaced fences, which might read as follows:

> Where, upon the survey of a parcel of land being made, it is found that a boundary fence has been improperly located so as to enclose adjoining land, the Court may, in its discretion,
>
> *(a)* declare that the owner of that parcel of land has an easement upon that part of the adjoining land so enclosed for such period as the Court may determine, and upon making such compensation therefor as the Court may determine; or
>
> *(b)* vest title to the land so enclosed in the owner of that parcel of land upon payment of the value thereof as determined by the Court to the owner of the adjoining land; or
>
> *(c)* order the owner of that parcel of land to remove the fence and relocate it so that it no longer encloses any part of the adjoining land.

Such a provision would give the Court the degree of flexibility required to achieve a just solution in such cases.

The Commission recommends:

1. The Special Surveys Act *be reviewed and clarified.*

2. Legislation be enacted comparable to section 28 of The Law of Property Act *of Manitoba, but modified so as to include improperly located boundary fences.*

(g) Other Actions to Recover Land

The Commission has recommended that there should be no time limit on actions to recover land where an owner has been dispossessed in such a way that the dispossession would amount to trespass. There are, however, other actions to recover land, where the person in

possession is one who may have originally been entitled to possession, such as a mortgagor or tenant. Should there be a limitation period for these other actions? Such actions would include

(a) an action by a mortgagee, where the mortgagor is in default (or a vendor under an agreement for sale where the purchaser is in default);

(b) an action by a lessor, where the lessee is in default;

(c) an action by a grantor, where there has been a breach of condition subsequent or where a possibility of a reverter has become vested in possession;[33]

(d) an action by the owner of a dominant tenement to enforce an easement, restrictive covenant, or *profit-a -prendre.*

Because all of the foregoing actions relate to the enforcement of interests which normally appear as charges against the title of a registered owner under our land registry system, it is most convenient to deal with such actions in the context of the enforcement of charges on property rather than as actions to recover land.

C. Enforcement of Charges

(a) The Appropriate Limitation Period

In its proposal published in *The Advocate,* the Commission indicated that it had not yet reached a conclusion on whether actions to recover land (in the sense of enforcing charges against land) should be subject to the 10-year period or the six-year period. Comment on this point was specially invited. The Commission has now concluded that the six-year period is appropriate. Some arguments can be made in favour of a longer limitation period. Historically, limitations law has favoured the secured creditor with respect to the enforcement of his security, and that position should not be lightly disturbed. It may also be argued that the creditor who has taken the trouble to ensure that moneys owing to him are secured against something of value deserves greater protection than the creditor who has not safeguarded his position in that fashion. It is felt, however, that the desirability of a six-year limitation period outweighs those considerations.

It will be recalled that the Commission has already recommended that contracts under seal (specialties) should be governed by the same limitation period applicable to ordinary contract. This would mean that the limitation period in an action for debt would be six years, whether the contract creating the debt was under seal or not. Is there any logical reason why there should be a longer limitation period merely because security is given for the performance of that contract? This security, and the remedies attached to it, are merely ancillary to the personal debt, and logic suggests that in enforcing his security, the creditor should be governed by the same

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33 It might be argued that a possibility of reverter cannot be created in British Columbia in view of section 23 (1) of the *Land Registry Act.* That provision, which was clearly designed to abolish estates in fee tail, begins "No estate in fee-simple shall be changed into any limited fee..." Does the term "limited fee" include "determinable" fee for the purpose of section 23? We understand that the land registry office practice is to register such interests, and also conditions subsequent, as charges. *See* s. 150 of the *Land Registry Act.*

limitation period which applies to the personal covenant to repay the loan. As the New South Wales Law Reform Commission stated:[34]

> ...the remedies of the mortgagee affecting the property, whether by recovery of possession, foreclosure or otherwise, are taken to be merely accessory to the principal debt. . . . On this approach it is right that the accessory remedies against the property should last as long as the principal debt remains recoverable but no longer.

Fixing the limitation period at six years will also avoid anomalous situations occurring where the creditor may have lost his right to sue directly on the personal covenant but may still enforce his security with respect to that statute-barred debt. That is the present situation with respect to arrears of interest which accrued more than six years ago. Section 44 of the *Statute of Limitations* provides that arrears of interest which accrued more than six years earlier shall not be recoverable. If, however, the mortgagor wishes to redeem the property, or have the mortgage reinstated, he can be required to pay the statute-barred arrears of interest as the price of doing so. This anomaly would vanish if the limitation period with respect to arrears of interest is the same as the limitation period with respect to proceedings to enforce a change.

Particular charges are discussed in greater detail below.

(b) Actions to Recover Rent

The term "rent," as it is used in the *Statute of Limitations,* may have either or both of the following two meanings:[35]

1. Rent service, by which is meant a sum payable (reserved) under a lease between landlord and tenant.
2. Rent charge, by which is meant a periodical sum of money payable by owner of land to another, the payment of that money being secured by a charge against the land. It is the real property counterpart of the annuity.

The rent charge has nothing to do with the relationship of landlord and tenant. Today, in British Columbia, it is a rarity.

The provisions of the *Statute of Limitations* which refer to "rent" were taken from three different English statutes, and are confusing and in conflict. The position would appear to be as follows:[36]

1. Although "rent" is defined in section 15*,* for the purposes of Part II**,** as extending "to all services and suits for which a distress may be made," the term appears to mean rent charge (and not rent payable under a lease) in sections 16 and 48 and the related sections dealing with actions to "recover land or rent." Actions to recover "rent" under section 16 must be brought

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34 New South Wales Report, para. 214 and 215.

35 *See* Ontario Report 67—68; 20 *Halsbury's Laws of England* 648—649 ; 656—657, 672—675, and 681 *et seq.* (2nd ed.).

36 *See* Ontario Report *ibid.*

within 20 years and under section 48 (by the Crown) within 60 years.

2. Actions for debt for arrears of rent must be brought within six years, if the rent became owing under a binding agreement not amounting to a specialty, i.e., if the agreement is not under seal. *(See* section 3.)

3. Actions for rent upon an indenture of demise (a specialty) must be brought within 20 years. *(See* section 49.)

4. *(a)* "Rent" in section 44, which provides that no more than six years' arrears of rent are recoverable, includes both a rent charge and rent service.

(b) Where arrears of rent become owing under an indenture of demise, up to 20 years' arrears are recoverable in action on the covenant to pay rent, by virtue of section 49, but in all other proceedings by the landlord, such as distress, only six years' arrears are recoverable, by virtue of section 44.

(c) Where arrears of rent becoming owing other than under an indenture of demise, only six years are recoverable, under section 44.

A six-year limitation period, applicable to all debts, whether or not those debts are secured or under seal, would make the foregoing provisions redundant.

(c) Mortgages and Other Charges on Realty

The present position under the *Statute of Limitations* with respect to mortgages is:

Mortgagee's Rights

1. A mortgagee's right to bring a personal action on the covenant to pay in the mortgage is subject to a 20-year limitation period under section 49.

2. A mortgagee's right to foreclosure

(a) is not subject to any limitation period so long as he is in possession;

(b) is subject to a 20-year limitation period, as an action to recover land under section 16, where the mortgagor is in possession.[37]

3. Other actions which may be brought by mortgagee are subject to a 20-year limitation period under section 43.

4. No more than six years' arrears of mortgage interest can be recovered out of mortgaged land, under section 44 (except in certain circumstances where a prior encumbrancer has been in possession).

Mortgagor's Rights

1. A mortgagor's right to redeem

(a) is not subject to any limitation period so long as he remains in possession;

(b) is subject to a 20-year limitation period, under section 40, where the

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37 The mortgagee's rights will become extinguished under s. 41 when those rights become statute-barred under s. 16. *See re Simpson,* (1970) 14 D.L.R. (3d) 624. *See also* s. 199 of the *Land Registry Act,* which provides for the extinguishment of the mortgage debt on the registration by the mortgagee (or any person claiming under him) in the land registry of a final order of foreclosure.

mortgagee has obtained possession.

The application of the six-year limitation period which the Commission has recommended must be considered with respect to four situations.

(i) Foreclosure action—mortgagor in possession: These are the most common proceedings to which the limitation period will apply. No action for foreclosure would lie after six years had expired.

(ii) Redemption actions—mortgagee in possession: Redemption actions by a mortgagor who is out of possession should be subject to the six-year limitation period.

(iii) Foreclosure action—mortgagee in possession: We see a problem if there is to be limitation period for foreclosure actions where the mortgagee is in possession and there is also, as we propose in such cases, a limitation period for redemption actions. What will happen when both periods have expired? The result would appear to be that the mortgagee is entitled to the property since he is in possession. It can be argued that that consequence is desirable since he will normally have taken possession as a means of enforcing his security. On the other hand, it could be said, and this appears to be what the New South Wales Commission has said, that since he can no longer sue on the covenant, he should lose his rights with respect to the security. We believe that the mortgagee should be entitled to enforce his security in these circumstances, as being in accord with the realities of the mortgagee's position. Such being the case, we think there is nothing to be gained by imposing a limitation period on him where he is in possession. This is, as we have mentioned earlier, the present position in British Columbia.

(iv) Redemption actions—mortgagor in possession: We agree with the Ontario and New South Wales Commissions that there should continue to be no limitation period imposed on actions for redemption where the mortgagor is in possession of the mortgaged property.

The Commission does see a need for machinery which will enable the records of the Land Registry Office to be amended to reflect the changes in rights which occur with the passage of time. The mortgagee of property who is in possession will wish to have a certificate of indefeasible title issued in his name once the right to redeem has expired. Similarly, a mortgagor in possession will wish to have the registration of a mortgage cancelled once the time limited for foreclosure has expired. The purchaser of property under an agreement for sale who remains in possession will wish to have title issued in his name once the right of the vendor to enforce further payment has expired.

At present it may be open to the person seeking relief to obtain a declaration from the Courts as to the true state of the title. However, one problem is that Registrars of Title may be reluctant to give effect to such declarations unless the applicant can point to some specific provision of a statute which gives the Court authority to make such a declaration. It may be that amendments to the *Land Registry Act* are required to ensure that such declarations are given effect according to their tenor.

Alternatively, provisions might be added to the *Land Registry Act* to specifically cover these situations. Section 185 of the Act already provides a statutory remedy to the vendor under

an agreement for sale who re-enters upon the breach of a covenant. Similar legislation might be provided to deal with the other situations referred to above. The formulation of specific recommendations is beyond the scope of this Report.[38]

(d) Other Problems

(i) *The running of time*—The New South Wales draft bill provides that the limitation period for foreclosure or recovery of possession by a mortgagee should not start running so long as payments of principal or of interest are continued.[39] This is to prevent the remedies of the mortgagee becoming inadvertently barred during the ordinary course of a scheme of repayments over an extended period.[40] We believe the Act we propose should contain a similar provision.[41]

(ii) *Agreements for sale*—The Commission's recommendations with respect to mortgagors and mortgagees should also apply to purchasers and vendors under agreements for sale.

(iii) *Extinguishment of right*—Where a mortgagor's or mortgagee's claim becomes statute-barred, we believe that the right on which that claim would have been based should be extinguished. Extinguishment of right generally is proposed later in our Report,[42] and should apply in respect of all statute-barred claims for the enforcement of charges.

(iv) *Recovery of land by lessor*—Where land is in the possession of a lessee and the lessor is entitled to recover possession due to some default on the part of the lessee, the right of the lessor to recover possession should not be subject to any limitation period.

D. Actions Relating to Charges on Personal Property

In British Columbia, as was the case in England and still is the case in Ontario, there is no limitation period for actions for redemption or foreclosure in respect of a mortgage on personal property, or liens on personal property.

The Ontario Report states:[43]

> Claims in respect of charges on personalty should be subject to a limitation period. Mortgages sometimes include both personal and real property and this has created difficulty, from a limitations point of view. The simple solution is to have the same provisions that apply to mortgages of realty apply equally to personalty. This is what is done under Part IV of the Uniform Act.

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38 *See* Ontario Report 70; New South Wales Report, para. 204.

39 *See* Appendix D, s. 54 (3).

40 New South Wales Report, para. 216.

41 This may be done by making such a payment a confirmation of the right to foreclose. *See infra.*

42 *See* Chapter VI, B.

43 Ontario Report 71.

The Ontario Commission concluded that charges on personal property should be subject to the same limitation period as those on real property. We agree. This has been done in the Uniform Act. It is also noted that England, since 1939, has treated charges on personalty and realty similarly, with two exceptions.[44] No limitation period was imposed on actions to redeem mortgaged personalty, whether in the hands of the mortgagee or not. (This differs from the position of mortgaged realty where there is a limitation period with respect to redemption actions if the property is in the hands of the mortgagee, but not if in the hands of the mortgagor.) Both the New South Wales and Ontario Commissions[45] thought this difference was unnecessary.

The English exception was based on the fact that, unlike mortgagees of land, mortgagees of personal property frequently have possession of mortgaged property as part of the terms of the mortgage. There was a fear that lenders might obtain title unfairly where securities had been held indefinitely to cover a more or less permanent overdraft, but without any acknowledgment by the mortgagee of the mortgagor's[46] title. The New South Wales Commission did not think the English exception was necessary since the 1939 English statute also provided that time should run anew in actions for redemption of mortgaged land where part payment was made: it felt that there was no reason why the mortgagor should be barred when the mortgagee had been in possession for 12 years and the mortgagor had paid nothing.[47] The Ontario Commission agreed, stating:[48]

> In commercial practice, it should be added, it would be highly improbable that a mortgage of personalty would remain in default for ten years without acknowledgment or any part payment and without the mortgagee having taken action to realize on his security.

The possibility exists, however, that the mortgagor might suffer unfairly in such circumstances, particularly if the six-year period which we recommend is adopted.

The difficulty is that, in many ways, the position of the mortgagee of personalty who has the property in his custody is similar to that of the mortgagee in possession of real property. When no payment has been received for a lengthy period of time, he may feel that he is "constructively" enforcing his security by merely retaining possession of it and allowing the redemption period to expire. It would be equally unfair in those circumstances if after six years expired the mortgagee found that the mortgagor could claim return of the goods without paying anything. On the whole, the Commission feels that this exception provided in the English statute should not be adopted.

The second exception in the English statute is that time should not begin to run against a

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44 *Limitation Act, 1939*, 2 & 3 Geo. 6, c. 21.

45 Ontario Report 72; New South Wales Report, paras. 210-212.

46 *Fifth Interim Report of the Law Revision Committee, 1936*, 15-16, Cmd. 5334.

47 New South Wales Report, paras. 210-212.

48 Ontario Report 72.

mortgagee with respect to an unmatured life insurance policy, given as security, until the policy has matured, or with respect to a mortgaged future interest until that interest has become vested in possession.[49] The provision reads:

> The right to receive any principal sum of money secured by a mortgage or other charge and the right to foreclose on the property subject to the mortgage or charge shall not be deemed to accrue so long as that property comprises any future interest or any life insurance policy which has not matured or been determined.

The reason for the exception for unmatured insurance policies was described in the following terms by the Law Revision Committee, which had recommended it:[50]

> It would be a hardship to the mortgagee, and outside the contemplation of the parties, that the mortgagee (if not in possession) should have to realize the security within the period of limitation or else lose his rights by default. In many cases he would prefer to keep the policy alive until it matures for payment. We recommend therefore that time should not run in the case of a charge on a life insurance policy until the policy matures.

The Ontario Commission recommended that a similar exception be made, pointing out that the difference between the cash surrender value and the value at maturity may be substantial.[51] The same reasoning applies to a mortgaged future interest.

The English provision, however, appears to deprive the mortgagee of any right to commence proceedings to recover the principal amount until the future interest becomes vested in possession or the insurance policy matures, as the case may be. That time may be some distance in the future, and it might be equally outside the contemplation of the parties that the remedies of the mortgagee be postponed in that fashion in case there is a default. Circumstances may also arise in which the insurance policy or future interest is merely collateral to some other security interest which the mortgagee has taken in the lands and goods of the mortgagor or a guarantor. In those circumstances, the English provision may introduce severe complications. In other cases the cash surrender value of a life insurance policy may be sufficient to satisfy the mortgagee. Why should he be forced to wait until the policy matures?

While there may be instances in which hardship would be caused by requiring a mortgagee to commence foreclosure proceedings in these circumstances, the situation is one against which the mortgagee can protect himself, by contract, at the time the transaction is entered into. It is felt that it is preferable to leave it up to the parties rather than introduce such a complication into the law of limitations.

In so far as pledges, possessory liens, and equitable liens where the lien-holder is in possession are concerned, the Commission considers that these forms of security should be

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49 *Limitation Act*, 1939, 2 & 3 Geo. 6, c. 21, s. 18 (3).

50 *Supra* n. 46.

51 Ontario Report 72.

treated in the same way as mortgaged personalty in the hands of a mortgagee. A six-year redemption period would be applicable. The enforcement of all other charges on property, which exist as security for money owing, should also be subject to the six-year limitation period.

The Commission recommends:

1. *There be no limitation period with respect to actions*
   - (a) *by a mortgagor to redeem real or personal property in his possession; or*
   - (b) *by a mortgagee to foreclose on or exercise a power of sale with respect to real or personal property in his possession;*
   - (c) *by a landlord to recover possession of land from a tenant who is in default or overholding.*

2. *Except as provided in the foregoing recommendation, actions relating to charges on both real and personal property be subject to a six-year limitation period.*

3. *In the foregoing recommendation, actions relating to charges on real and personal property include any proceedings to*
   - (a) *enforce a rent charge;*
   - (b) *enforce a mortgage by foreclosure, by exercising a power of sale, taking possession, or any other means;*
   - (c) *enforce a contract for the conditional sale of goods by seizure or otherwise;*
   - (d) *enforce a lien;*
   - (e) *redeem mortgaged property in the hands of a mortgagee.*

4. *For the purposes of limitation periods, an agreement for sale of land be treated as a mortgage on land.*

E. Nonsecurity Charges on Land

There are a number of interests which are registered as charges on land which do not exist as a security for the payment of money, but represent rights relating to the possession of the land, the use of the land, or to future ownership. Those relating to the use of the land are easements, restrictive covenants, and profits-a-prendre. Those relating to possession are leases and life estates. Those relating to future ownership are the possibility of a right to enter for a condition subsequent which has been broken and the possibility of reverter where a determinable estate has been granted.

Each of these interests presents particular problems. English land law permits a large number of varied interests to be created out of a single estate in fee-simple. On the other hand, our system of land registration recognizes only two sorts of interest—registered ownership and the charge. Attempts to accommodate our registry system to the sophisticated English conveyancing techniques we have inherited have resulted in a distortion of the concepts of both ownership and charge. This is particularly true with regard to life estates and future interests, because the mechanics of the registry system do not permit the issuance of more than one certificate of title where present and future interests have been created out of the single estate.

Because a number of very dissimilar interests may be registered as charges, it is impossible to deal with them in the same fashion. Rather, each must be considered separately.

(a) Leases: Actions by Tenants for Possession

Rights to recover land subject to a lease have already been touched upon in this Report. It has been recommended that there should be no limitation period with respect to an action by a landlord to recover possession from an overholding tenant. It has also been recommended that there should be no time limit for actions for possession of land where the person entitled to possession has been dispossessed in circumstances amounting to trespass. That would encompass a situation where the plaintiff's right of possession is under a lease.

Situations may occur, however, in which the landlord may have possession as against the tenant in circumstances which do not fall within the foregoing recommendations.[52] If the lease is unregistered and under three years, the limitation period which should govern the tenant's right to bring an action for possession is not crucial. Where, however, a long-term lease is in question, other considerations emerge.

Where a tenant has permitted time to pass without taking any steps to enforce his rights, we think it fair to assume that he has accepted the status quo and (so long as the landlord has not confirmed the tenant's right by accepting the payment of rent) his rights should be subject to a limitation period.

This same reasoning, however, is equally applicable where the landlord has ousted the tenant in circumstances amounting to trespass. Different considerations apply to that situation than that of a stranger holding adversely against the tenant. We favour a limitation period in the case of the former but not the latter. Six years seems appropriate.

The Commission recommends:

Actions by a tenant against his landlord for possession of land should be subject to a six-year limitation period, whether or not the tenant was dispossessed in circumstances amounting to trespass.

(b) Life Interests

It is not uncommon to find land conveyed or devised in the following fashion:

To *A* for life, remainder to *B;* or

To *A* for life, remainder to *B* for life, remainder to *C.*

When an interest in land is transferred in this fashion, it is the current practice in our land

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52 Where the landlord has refused initially to let the tenant into possession. Note that the doctrine of *interesse tremini* has been abolished with respect to residential tenancies; *Landlord and Tenant Act,* R.S.B.C. 1960 c. 207, s. 40, as amended, 1970 c. 18, s. 2.

registry system to issue a certificate of indefeasible title naming the ultimate remainder man as registered owner with the life interest or interests appearing as charges on the title.

As the successive interests ripen into a right to possession, should any limitations be placed on the parties with respect to actions to enforce those rights? Take for example a conveyance in the following terms:

> To *A* and *B* for their joint lives, remainder to *C* and *D* for their joint lives, remainder to *E.*

If *C* and *D* are in possession and *C* dies, *E* should have an unlimited period of time to obtain possession from *D.* This would seem to flow from his status as registered owner. Assume, however, that *A* and *B* are in possession when *A* dies, should there be any limitation on the rights of *C* and *D* to recover possession? The mechanics of our land registry system make the assertion of such rights the enforcement of a charge. Should that make any difference? We think not. For the purposes of limitations, *C* and *D* should be in no worse position than *E* and should not be subject to any limitation period. To provide otherwise would permit *B* to acquire rights as against *C* and *D* by adverse possession, a notion which the Commission rejects.

The Commission recommends:

The right of a life tenant or remainderman to bring an action for possession of land should not be subject to any limitation period.

(c) Possibilities of Reverter and Rights of Entry for Conditions Broken

Two further rights relating to future ownership are the possibility of reverter and the right of entry for a condition broken. The possibility of reverter arises when a determinable estate has been granted such as "to *A* in fee-simple *so long as* the land is used for a public library." A determinable estate automatically comes to an end when the condition which is part of the words of limitation has been broken. The person who had the possibility of reverter would, apart from the provision of the *Land Registry Act,* become the owner of an estate in fee-simple and become immediately entitled to possession.

A right to enter for a condition broken arises where land has been granted subject to a condition subsequent, such as "to *A* in fee-simple *provided that* the land is used for a public library." An estate subject to a condition subsequent comes to an end only if the condition is broken *and* the right to enter which arises therefrom has been exercised.

Both the possibility of reverter and the right to enter for a condition broken are treated as charges under our land registry system.[53] In each case, when these future interests ripen into a present right to possession, the person so entitled will wish to have a certificate of indefeasible title issued in his name. In the case of a determinable estate, he would presumably have to

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53 *See* s. 150 of the *Land Registry Act.*

obtain, first, a judicial declaration[54] and then apply for registry under the *Land Registry Act.* If he had any difficulty obtaining possession of the land, he would have to bring an action to recover possession. On the other hand, the person entitled on a condition broken would have to enter first and then apply for a judicial declaration. Having obtained the declaration, he would then apply for registration as owner. The extent to which the exercise and enforcement of these rights are governed by existing limitation laws does not appear to have been tested.

Having regard to the mechanics of the land registry system, we feel there is some advantage in having these interests subject to a limitation period. The effect of a limitation period would be to keep the land marketable and thus support the purpose of the land registry system. It would mean that those dealing with the land would only have to examine events during some specified period in order to determine whether the condition had been broken. Three possible situations might arise upon which the limitation period should operate:

(a) A determinable estate ends and the person who has the possibility of reverter delays in taking steps to obtain registration:

(b) A condition subsequent is broken and the person entitled delays in exercising his right to enter:

(c) A condition subsequent is broken and the person entitled makes an entry, but then returns possession to the former holder and delays taking proceedings to declare his title.

These are all situations in which the prospective purchaser, relying on the records in the Land Registry Office, might be misled. It is not always enough to say that the prospective purchaser is free to make inquiries of the holder of the future interest to see if the relevant term of the grant has been violated. A determinable estate ends automatically and the person entitled may not even be aware of his entitlement. Consider the following situation:

> In 1920, land is granted by *A* to the Animal Protection Society so long as the land is used for an animal shelter. In 1935 the society acquires new premises and leases the land out for five years to *C* as a warehouse. In 1940 the society moves back onto the land and starts running an animal shelter again. In 1973 the society wishes to erect a new building on the land and is seeking mortgage funding. *A* died in 1942 and his heirs have no knowledge of how the land had been dealt with over the years.

The society's title to the land would have automatically determined in 1935. Where does this leave the prospective mortgage lender? He can examine the present use of the land, but only the most stringent examination of the use of the property since 1920 will disclose the defect in the society's title. With a reasonable limitation period of, say, six years, his inquiries as to use would be limited to that time. Moreover, even if a mortgage or conveyance were not contemplated, it seems unfair that *A's* heirs should be able to assert their right many years after a title has determined through a hiatus in permitted use.

If the conveyance in the foregoing example had been subject to a condition subsequent, whether or not *A* made an entry in 1935, the situation would be much the same.

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54 Whether or not the declaration could be obtained under the *Quieting Titles Act* must be doubtful in view of *Re Quieting Titles Act: Re A Certain Lot, Kootenay District,* (1967) 60 W.W.R. 119. However, it would appear that the declaration could be obtained under Marginal Rule 285 of the *Supreme Court Rules. See re Simpson,* (1970) 75 W.W.R. 736.

There are two other situations, however, where different considerations emerge. When the estate determines or the condition subsequent is broken, the person entitled to do so may take and retain the possession in a reasonable period of time, but not take any steps to have a title issued in his name. In that case the prospective purchaser or encumbrancer is put on his guard by possession which is inconsistent with the certificate of title. In those circumstances the limitation period seems unnecessary.

It should be noted that the effect of imposing a limitation on these future interests would be to change the nature of the possibility of reverter on the determinable estate so that it would become much the same as the right to enter for a condition broken. The determinable estate would only be terminated if the person entitled took steps to assert his title.

The Commission recommends:

The person who has a right to enter for a condition subsequently broken or a possibility of reverter of the determinable estate should be required to assert his rights within six years after they arose by

(a) taking possession of the land;
(b) commencing an action for a declaration of his title; or
(c) commencing an action for possession.

(d) Easements, Restrictive Covenants, and Profits-a-prendre

Easements, restrictive covenants, and profits-a-prendre are all interests in land which do not amount to possession. The easement is the right to limited use of another's property. It may at common law take a number of different forms, including a right-of-way and a right to lateral support. A *profit-a-prendre* is also the right to limited use of land which gives the holder the right to some product such as timber or coal from the land in question. The restrictive covenant is an agreement running with land which restricts the use of enjoyment of certain land for the benefit of other land.

We do not think the case for a limitation period with respect to causes of action arising out of these property interests is so strong. Is there any reason why the owner of an easement (which we can assume will be registered as a charge), for example, should not have an indefinite period for enforcing his easement rights? Should he not be treated in the same way as the registered owner is with respect to a trespasser who has taken possession? The registered owner has unlimited time in which to recover possession. Why should the owner of the easement not also have an unlimited time? True, it may be undesirable for him to be bringing proceedings with respect to events that happened long ago. But this is unlikely and, in any event, the burden of proof will be on him.

In addition, the owner of the land subject to the easement and persons dealing with that land have notice of the easement from the land registry records. Also, the question of whether the easement rights have been infringed would not create a cloud on the title in the same way as the question of whether a condition has been broken. Certainly so far as a continuing breach is

concerned, we believe that the owner of the easement should be able to continue to assert his rights. If the owner of the servient tenement has built a structure on a right-of-way created by an easement, the owner of the easement should have an unlimited time to bring proceedings to require its removal. This is in accord with the principle that reliance may be placed on the land registry records.

The Commission recommends:

No limitation period should exist with respect to the enforcement of easements, restrictive covenants, and profits-a-prendre.

CHAPTER V THE RUNNING OF TIME: POSTPONEMENT, SUSPENSION, AND EXTENSION

A. Introduction

There is little doubt that the rigid operation of a Statute of Limitations can have harsh results. The purpose of such a statute is to promote the timely bringing of actions; however, unless some modifications are introduced, such a statute will also bar claims by those who cannot be said to have slept on their rights. In recognition of this, limitations statutes have long included special provisions to mitigate their operation in that regard. Infants, persons of unsound mind, femes covert, and persons outside the jurisdiction have all, at one time, received special protection as potential plaintiffs. Similarly, limitation periods have been relaxed in cases where the defendant was "beyond the seas," when the plaintiff was the victim of a concealed fraud, and when the defendant has confirmed certain causes of action.

In many cases, the reasons which led to the special relaxation of the limitation period are no longer valid. In other cases, modern circumstances justify a relaxation of the limitation period in circumstances where the present law allows none. In this chapter the Commission makes recommendations which it feels would, if enacted, make the law relating to postponements, suspension, and extension consistent with contemporary needs and notions of justice.

B. Absence From the Jurisdiction

Either the potential plaintiff, the potential defendant, or both may be absent from the jurisdiction at the time a cause of action arises or during the period in which the limitation period is running. How far, if at all, should the running of a limitation period be affected by such absence?

The justification for the relaxation of a limitation period to benefit the absent plaintiff is that he may not be aware he has a cause of action. The *Statute of Limitations* of 1623 postponed the running of time against a potential plaintiff who was "beyond the seas."[1] Comparable provisions are normally not found in contemporary statutes of limitation nor have they been recommended for enactment.[2] The Commission feels that the policy reasons which might justify the inclusion of such a provision might be better served by a more general provision giving relief in certain cases where the potential plaintiff is not aware that he has a cause of action. The desirability of such a provision is considered later in this Report.

Where it is the potential defendant that is absent from the jurisdiction, he may be beyond the reach of legal process, thus a stronger case can be made for a relaxation of a limitation period in such circumstances. Sections 9 and 50 of the present *Statute of Limitations* both postpone

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1 21 Jac. 1, c. 16, ss. 2, 7.

2 *See* Ontario Report 94. S. 45 of the *Statute of Limitations,* R.S.B.C. 1960, c. 370, in fact, specifically provides that absence beyond the seas of a creditor shall not be a disability in actions involving real property.

the running of time in certain cases when the potential defendant is absent from the jurisdiction. Sections 10, 46, and 54 relate to situations involving joint defendants where one or more, but not all, were in the Province when the cause of action arose.

These provisions are not totally satisfactory. The limitation period is only postponed when the defendant is actually absent from the jurisdiction at the time the cause of action arises. If the defendant is present at that time, but leaves one day later, the provision has no application. Even if the potential defendant is absent when the cause of action arises, time will start running once he is in the jurisdiction, notwithstanding that his stay may be of very short duration. The practicality of suspending the running of time for absences of the defendant from the jurisdiction which occur after time has started to run, is open to serious question.[3]

The English legislation of 1939 and the Reports of the Law Reform Commissions of New South Wales and Ontario all reject absence of the defendant from the jurisdiction as justifying a relaxation of a limitation period. As the Report of the New South Wales Commission stated:[4]

> To regard absence beyond the seas as itself justifying an extension of the limitation period is to disregard the current ease of transport and communication...

The Ontario Law Reform Commission felt it was unnecessary to have a postponement for absence in view of the following:[5]

(1) modern facilities for transport and communication;
(2) the "beyond the seas" notion is hardly applicable in any event to movement from province to province;
(3) an action can be brought against the potential defendant even if he is absent from the jurisdiction;
(4) the provisions in the Rules, by which a person may serve *ex juris;*
(5) the fact that it is unusual for potential defendants to be outside the province when a cause of action over which the provincial courts have jurisdiction arises (in tort cases it would rarely occur);
(6) the complexities of modern commercial activities;
(7) there are difficulties in determining when a potential defendant has "returned" (he may never have been in the province in the first place); and
(8) it is not generally desirable to keep alive causes of action for an indeterminate time.

Those who framed the Uniform Act, however, felt that this relaxation of the limitation period should be retained in modified form. Section 48 provides:

> ...If a person is out of the province at the time a cause of action against him arises within the Province the person entitled to the action may bring the same within two years after the return of the first mentioned to the Province or within the time otherwise limited by this Act for bringing the action.

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3 *See* Ontario Report 94.

4 New South Wales Report, para. 6.

5 Ontario Report 95.

The Commission has concluded that limitation periods should not be relaxed because either the potential plaintiff or potential defendant is absent from the jurisdiction. The problem of the absent plaintiff is really one which may be more aptly dealt with by a general provision relating to absence of knowledge. In cases where the defendant is absent from the jurisdiction, a potential plaintiff might prefer to await his return before commencing his action, rather than incurring the added expense of applying for leave to issue and serve the writ *ex juris* or, in situations where *ex juris* service is not available, commencing an action in a foreign jurisdiction. To that extent it might be said that to permit time to run against the plaintiff will cause him some hardship; however, cases in which the running of time would leave the plaintiff without any remedy whatsoever will be comparatively rare, if not nonexistent.

The Commission recommends:

No provision be made to postpone or suspend the running of time in the case of the potential plaintiff or the potential defendant who is absent from the jurisdiction.

C. Disabilities: Minority, Mental Incapacity, and Coverture

It is obviously unfair that a limitation period should operate rigidly against the person who is incapable of managing his own affairs. It has long been public policy that there should be some relaxation of limitation periods in such cases. This policy is reflected in some provisions in the present *Statute of Limitations;* however, their language is badly out of touch with modern-day requirements.

For example, mental incapacity is variously referred to in terms of "idiocy,"[6] "lunacy,"[7] "unsoundness of mind,"[8] and *"non compos mentis."*[9] Much more satisfactory and contemporary terminology is to be found in the *Mental Health Act, 1964.*[10] The definition section provides:[11]

> "mentally disordered person" means a mentally retarded or mentally ill person;
> "mentally ill person" means a person who is suffering from a disorder of the mind
> *(a)* that seriously impairs his ability to react appropriately to his environment or to associate with others; and
> *(b)* that requires medical treatment or makes care, supervision, and control of the person necessary for his protection or welfare or for the protection of others;
> "mentally retarded person" means a person

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6 S. 29.

7 S. 29.

8 S. 29.

9 Ss. 8, 50.

10 S.B.C. 1964, c. 29, s. 1.

11 *Id.* s. 2.

(a) in whom there is a condition of arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, that is of a nature or degree that requires or is susceptible to a medical treatment or other special care or training; and

(b) who requires care, supervision, and control for his own protection or welfare or for the protection of others.

Both the Ontario and New South Wales Law Reform Commissions felt that the notion of "unsound mind" as it appears in limitations legislation may be too narrow. As the New South Wales Report pointed out: [2]1

> A person may be in a state of coma or unconsciousness which in fact prevents him from attending to his affairs but which does not amount to unsoundness of mind.[13]

While definition of "mentally disordered person" in the *Mental Health Act, 1964* is relatively precise it may be somewhat narrow to define mental incapacity for the purpose of limitations. For example, it might not be wide enough to encompass the "coma" situation. In our view the desirable result will be achieved by a general statement that a person who is, in fact, incapable of or substantially impeded in the management of his affairs in relation to the cause of action is under a disability.

The *Statute of Limitations* also refers to coverture as a disability. It has been pointed out earlier in this Report[14] that, while the English authorities have considered legislation comp arable to British Columbia's *Married Women's Property Act* as making a woman "discovert" within the meaning of limitations legislation, an earlier Ontario Court of Appeal decision arrived at a different conclusion. The point appears to be untested in British Columbia, although the English authorities are certainly to be preferred. Whatever the effect of the *Married Women's Property Act* may be, that a statute presently in force should class married women along with "infants," "idiots," and "lunatics" as being persons in need of special protection, is highly distasteful and brings the law into disrepute.

The *Statute of Limitations* contains the following provisions relating to disabilities:

(a) Section 8 provides that if a person is under a disability at the time certain specified personal actions accrue, the running of the limitation period is postponed until the disability ceases.

(b) Rights relating to real property are dealt with as follows:

(i) Section 29 provides that, if a person entitled to bring the action or make an entry or distress was under a disability when his rights accrued, he, or his successors, must bring the action or exercise the rights within 10 years after the time the the disability ceased, or that person died (whichever

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12 New South Wales Report, para. 89; Ontario Report 99.

13 *See Kirby* v. *Leather,* [1965] 2 Q.B. 367.

14 *See* p. 12.

event happens first).

(ii) Section 30 places a 40-year maximum limitation on the bringing of an action of exercise of rights, notwithstanding that the person entitled to bring the action continues to be under a disability or the 10-year period provided in (i) has not yet expired.

(iii) Section 31 provides that when a person who is under a disability when his rights accrue dies under such disability there shall be no further postponement of the limitation period by reason of any disability of his successors.

(c) Section 50 deals with the recovery of specialty debts and is much the same in effect as section 8.

The foregoing provisions appear to treat the plaintiff, who is under a disability, most generously; perhaps too generously in many instances. Some situations, however, may find the deserving plaintiff unprotected. It should be noted that the provisions apply only when the plaintiff is under a disability at the time the cause of action accrues. Time will not stop running if the disability arises at a later date. The Law Reform Commissions of Ontario and New South Wales recommended that a disability provision should apply in such cases.[15] We agree with the observation of the Ontario Commission that:

It seems absurd that time should not run against a person who was of unsound mind when a cause of action accrued to him but that it should run against him if he became of unsound mind the following day.[16]

As a general rule, no provision is made for disability in statutes providing special limitation periods. Like an adult, a minor has one year to sue under the *Medical Act.* The potential for injustice is obvious. The only British Columbia statutes containing special limitation periods that specifically provide for disabilities appear to be the following:

(a) The *Credit Unions Act, 1961*[17] provides that in actions against the guarantee fund the limitation period of six months does not begin to run against a minor until he reaches his majority.

(b) The *Land Registry Act*[18] provides that in actions against the assurance fund for damages, for deprivation of land, the running of the six-year limitation period is suspended in the case of any person "under the disability of infancy or unsoundness of mind" at the time of the deprivation, until the disability ceases.

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15 New South Wales Report, para. 244; Ontario Report 99.

16 Ontario Report 97.

17 R.S.B.C. 1961, c. 14, s. 94.

18 R.S.B.C. 1960, c. 208, s. 222 (6).

(c) The *Motor-vehicle Act*[19] provides that in actions for damage occasioned in an action involving a motor-vehicle, the running of the one-year limitation period is suspended with respect to any person who is a minor or *"non compos mentis"* until the disability ceases.

(d) The *Unclaimed Money Deposits Act*[20] provides, in the case of money deposited for the benefit of an infant, the running of the 10-year limitation period is suspended until the age of majority.

(e) The *Municipal Act*[21] requires that claims for compensation for property expropriated or injured may be made by "a person who is legally competent" within one year from specified events. The effect of this provision is uncertain. It might be taken as recognizing a disability although no suspension of time is specifically provided for.

Even where a section containing a special limitation period specifically provides for disabilities, such as the *Motor-vehicle Act,* the interpretation of such provisions have not been free of confusion or injustice.[22] It appears that in British Columbia the law does not recognize any general disability of minority which will relax a limitation period. The only disabilities are those specifically provided for, and the British Columbia Courts have shown a great reluctance to extend either by analogy or by the interpretation of statutes the disability of minority.[23]

In the *Statute of Limitations,* separate disability sections are provided for personal actions, actions relating to land and actions to recover specialty debts. Separate disability provisions may also be found with respect to special limitation periods in the Acts noted above. This multiplicity is unnecessary. It would seem desirable to consolidate all legislation concerning such disabilities into one provision. We have considered whether or not such a provision should be made applicable to a much larger number of actions which are now covered by special limitation periods, or be confined to actions under the statute itself. It would be possible to specify that the disability section is applicable to all special limitation periods and notice provisions,[24] except those which specifically provide that they operate notwithstanding that section. This would allow a desirable degree of protection for the disabled plaintiff but still permit the existence of more rigid special limitation periods where it is felt that a disability

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19 R.S.B.C. 1960, c. 253, s. 79 (4).

20 R.S.B 1960, c. 393, s. 2.

21 R.S.B.C. 1960, c. 255, s. 482.

22 *See Miller* v. *Bradford,* (1955) 15 W.W.R., 318; *Schartner* v. *Yoski Yoke,* (1957) 22 W.W.R., 26; *Van Gestel* v. *Frank's Taxi Ltd.,* (1969) 67 W.W.R., 584.

23 *See Duncan* v. *Board of School Trustees of Ladysmith,* (1930) 43 B.C.R. 154. In that case the court held that an infant suing a defendant against whom the action would be otherwise barred by s. 11 of the *Statute of Limitations* (Public Officers Protection) was not under a disability which would relax the limitation period. The court indicated a reluctance to extend the s. 8 disability provision to causes of action not expressly covered in that section.

24 Failing to comply with a notice provision can have the same effect as allowing a limitation period to expire. See *Van Gestel* v. *Frank's Taxi Ltd.;* (1969) 67 W.W.R. 584.

provision would be inappropriate.[25]

The difficulty is, that it may place too great a burden on government to seek out all limitation provisions and make an appropriate decision as to whether or not they should operate subject to a disability provision. This might unduly delay the implementation of the recommendations contained in this Report. It is also possible that some special limitation period might be overlooked. If, for instance, the time limited for filing a mechanic's lien was postponed during the claimant's minority, security of title under the land registry system might be seriously impaired. Elsewhere in this Report we have recommended that a number of special limitation periods be repealed.

If that is done, those special limitation periods which remain will normally deal with very special situations where the interests of a minor are unlikely to be impaired, or which should operate notwithstanding minority. For the foregoing reasons we have concluded that the operation of the disability provision should be confined to the proposed statute.

How long, after he ceases to be under a disability, should a person have to bring an action? Clearly, he should not be compelled to bring the action any sooner than required, had he not been under the disability. It is equally clear that he should have no more time than he would have if the cause of action accrued at the time he ceased to be under a disability. The latter time, however, may be too long in certain cases, such as actions on judgments and, therefore, some shorter "outside" limitation might be justified. This appeared to be the thinking of the Ontario Law Reform Commission when they recommended:[26]

> 2. Time should begin to run against a person when he ceases to be under a disability on the following basis: the person would then be entitled to the longer of either:
>
> *(a)* the period which he would have had to bring his action had he not been under a disability, running from the time that the cause of action arose; or
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> *(b)* such period running from the time that the disability ceased except that in no case should that period extend more than six years beyond the cessation of disability;...

This seems a sensible recommendation. A six-year "outside limit" is a period of time which is consistent with other limitation periods and which strikes a nice balance between the protection of those under a disability and the general policy behind limitations legislation—that law suits should be brought within a reasonable time.

The Ontario Commission also recommended that: "In land actions, the maximum period of twenty years for bringing actions, when disabilities are being taken into account, should be retained."[27] This recommendation is comparable to the "ultimate bar" proposed by the New

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25 *See, e.g., Execution Act,* R.S.B.C. 1960, c. 135, s. 43 (2).

26 Ontario Report 97.

27 Ontario Report 100.

South Wales Law Reform Commission[28] which would operate notwithstanding postponement for any reason. The desirability of such an "ultimate bar" is considered elsewhere in this Report.[29]

In a large proportion of cases, persons under a disability will have someone who is legally responsible for them and who can sue on their behalf. A minor will normally be in the custody of a parent or guardian. The affairs of a person of unsound mind will frequently be administered by a committee or the Public Trustee. Should limitation periods be relaxed in such cases? There is a considerable body of opinion that it should not. The English *Limitation Act, 1939* [30] provides that the relaxation of the limitation period shall not apply ..... unless the plaintiff proves that the person under disability was not, at the time when the right of action accrued to him, in the custody of the parent: . . ." The 1966 amendments to *The Limitation of Actions Act* of Alberta[31] provide that the disability provision shall not apply:

> *(a)* where the person under disability is an infant in the actual custody of a parent or guardian; or
> *(b)* where the person under disability is a mentally incapacitated person whose affairs are in the custody of a committee or of the Public Trustee.

The English legislation covers all causes of action while the Alberta amendments relate only to actions sounding in and relating to, tort.

The Ontario Law Reform Commission agreed with the approach of the Alberta legislation. As was stated in their Report:[32]

> The Commission believes that time should run against a person under a disability if there is someone legally responsible for him and who can sue on his behalf. The Commission would, however, like to see the law more clearly establish the duty of parents to sue on behalf of children in their custody. Furthermore, if time is to run against an infant in the custody of his parent or guardian, it certainly should not do so in actions by the infant against that parent or guardian. The same applies to committees and the Public Trustee with respect to persons of unsound mind.

This Commission does not find the approach of the Ontario Law Reform Commission wholly satisfactory on this point, especially regarding the position of minors. We would be loath to see the way open for a parent to seriously impair the rights of a child because he, for any one of a variety of reasons, might be unwilling to prosecute an action on behalf of that child. The position is less serious in the case of a committee who is in a fiduciary relationship to the patient and so may be more easily called to account for his acts or omissions than a parent. On the other hand, one can appreciate the thinking behind the Alberta legislation and the recommendations of the Ontario Law Reform Commission. Actions should be brought expeditiously and a defendant

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28 *See* New South Wales Report, para. 240.

29 *See* Chapter VI, s. D.

30 2 & 3 Geo. VI, c. 21, s. 22.

31 S.A. 1966, c. 49, s. 3; now R.S.A. 1970, c. 209, s. 59.

32 Ontario Report 98.

should not be prejudiced by unnecessary delays.

A most satisfactory solution with regard to persons of unsound mind was evolved by the Law Reform Commission of New South Wales. They recommended that a person against whom a cause of action might lie may give a notice to proceed to a curator of a mentally unsound plaintiff. Once that notice has been given, the plaintiff ceases to be protected by the disability and time begins to run against him.[33] Such a scheme gives the defendant the benefit of the limitation period if he wishes it, and brings home forcefully to the curator the fact that some sort of action is required.

There seems to be no reason why such a scheme could not be extended to the situation where the plaintiff is a minor. It would seem reasonable to permit a potential defendant to start time running against a minor by delivering a notice to proceed to the parent or guardian having custody of the minor. That scheme could be supplemented even further to deal with the parent or committee who refuses to commence proceedings in circumstances where a reasonable man would. It is suggested that in every case in which a notice to proceed is delivered, a copy also be served on the Public Trustee. That and no more might have a beneficial effect. The knowledge that the rights of the disabled party have come under the eye of a public official may, in itself, encourage parents and committees to act reasonably where they might not otherwise do so.

We would, however, go one step further and suggest that in every case where a notice to proceed has been served and the parent or committee has failed to commence an action or take other steps to pursue the claim in reasonable time, the Public Trustee should be required to investigate the situation. If satisfied that the disabled plaintiff has a good cause of action which should reasonably be pursued, he should commence an action on behalf of that plaintiff. Appropriate amendments to the *Official Guardian Act*[34] would achieve this end. Although the foregoing scheme might be regarded as cumbersome,[35] we feel it would provide a just and satisfactory balance of the interests of plaintiff, defendant, and society.

One final problem emerges with respect to persons of unsound mind. What of the plaintiff who is wrongly held in a mental hospital and later released? Is there any suspension of a limitation period? In England it would seem not.[36] The Commission feels that such a person should be deemed to be under a disability so long as he is incarcerated.

The Commission recommends:

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33 *See* Appendix D, s. 53.

34 R.S.B.C. 1960, c. 268.

35 *See* Ontario Report 99.

36 *See Harnett* v. *Fisher,* [1927] AC. 573.

1. There be one general provision relating to disabilities which would apply to all limitation periods within the proposed statute.

2. Time should begin to run against a person when he ceases to be under a disability on the following basis: the person would then be entitled to longer of either:

(a) the period which he would have had to bring his action had he not been under a disability, running from the time that the cause of action arose; or

(b) such period running from the time that the disability ceased, except that in no case should that period extend more than six years beyond the cessation of disability.

3. That the proposed statute define a person as being under a disability

(a) while he is a minor;

(b) while he is in fact incapable of or substantially impeded in the management of his affairs.

4. The running of time be suspended during a person's disability whether or not the disability existed at the time the cause of action accrued to that person.

5. A potential defendant be permitted to Start time running against the plaintiff, notwithstanding the disability, by delivering to the person responsible for managing the affairs of the disabled plaintiff and to the Public Trustee, a notice to proceed; in which case time should begin to run against the plaintiff as if he had attained his majority or become of sound mind.

6. The Official Guardian Act *be amended to provide that, in cases where notice to proceed has been served and the person responsible for managing the affairs of the plaintiff does not proceed, the Public Trustee shall*

(a) investigate the affairs of a disabled plaintiff in so far as they are relevant to the cause of action; and

(b) commence and maintain an action for the benefit of the plaintiff if he believes that such an action would have a reasonable prospect of succeeding and result in the award of damages sufficient to justify bringing it.

D. Absence of Knowledge

(a) Generally

Another factor to be considered in the mitigation of the otherwise rigorous operation of a limitation scheme is the extent to which the running of time should be postponed or extended in situations where the potential plaintiff is not aware that he has a cause of action. The notion that some relief should be available is not a novel one. Section 38 of the present British Columbia statute postpones the running of time in some cases involving concealed fraud. Certain equitable rules also exist which have a similar effect.

Cases involving a concealed fraud or fraudulent concealment of a right of action, however, comprise a relatively narrow portion of the spectrum of situations in which the potential plaintiff may not be aware that he has a cause of action. Five separate questions emerge when this problem is considered on a more general level:

1. Is it desirable that there be a more general provision to provide relief to the potential plaintiff who may not be aware that he has a cause of action?

2. If it is desirable, what limitations, if any, should be placed on the situations in which such relief is available?

3. Should relief be given by extending the limitation period or by postponing the running of time?

4. Should situations involving fraud and mistake be treated separately?

5. How should special problems relating to the survival of actions and actions under the *Families' Compensation Act*[37] be dealt with?

(b) Desirability of Relief

The acute hardship which can result when a limitation period runs against a person who is not aware that he has a cause of action is most obvious in cases involving personal injuries. It was one specific case[38] which inspired the appointment of the Edmond Davies Committee to:[39]

> ...consider and report whether any alteration is desirable in the law relating to the limitation of actions in cases of personal injury where the injury or disease giving rise to the claim has not become apparent in sufficient time to enable proceedings to be begun.

That Committee conducted a thorough study of the problem and concluded that some relaxation of the operation of the limitation period was justified.[40] The recommendations of the Davies Committee were implemented by the English *Limitation Act, 1963*.[41] The English legislation has been adopted in Manitoba[42] and recommended for adoption with varying degrees of modification by law reform bodies in New South Wales,[43] South Australia,[44] and Ontario.[45] The Commission accepts the basic principle that a person who is not and cannot be aware that he has a cause of action should be given some relief from the operation of a limitation period. The Commission is fortified in this conclusion by the widespread acceptance of that principle in other jurisdictions.

(c) What Restrictions Should Be Placed on the Availability of Relief?

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37 R.S.B.C. 1960, c. 138.

38 *Cartledge* v. *E. Jopling & Sons Ltd.,* [1962] 1 Q.B. 189, affd . [1963] A.C., 758.

39 *Report of the Committee on Limitation of Actions in cases of Personal Injury,* (Cmd. 1829).

40 *Ibid.,* para. 44.

41 12 Eliz. 2, c . 47. The full text of that Act is set out as Appendix B-3 to this Report.

42 S.M. 1966—67, c. 32, s. 4.

43 *See New South Wales Act,* ss. 57—62, *see* Appendix D.

44 *See* Law Reform Committee of South Australia, *Twelfth Report: Law Relating to Limitation of Time for Bringing Actions.*

45 *See* Ontario Report 108.

There are two aspects to this question. The first involves an examination of the cause of action itself and the second, an examination of the potential plaintiff's state of knowledge.

As it was an undiagnosed occupational disease which inspired the first examination of this area with a view to recommending reform, the question arose as to whether relief should be restricted to that category of claims, but the Davies Committee concluded that: "It would not be practicable to limit such relaxation to specific diseases of an occupational origin or to single 'diseases' as opposed to single 'accidents'."[46] They recommended that relief be restricted to cases involving claims for personal injuries. The New South Wales Law Reform Commission made a similar recommendation in that regard. This Commission feels that to limit relief to personal injury actions is unduly restrictive. As the Alberta Commissioners to the Conference of Commissioners on Uniformity in Canada pointed out:[47]

> Undiscovered damage can exist both in claims for bodily damage [e.g., silicosis] and property damage [which is sometimes not visible though existing] and in claims against professional men.

It is not difficult to envisage situations in which relief ought to be available, but which do not involve a personal injury. A solicitor may negligently cause his client to acquire an imperfect title to land which only comes to light at some later date when the client attempts to resell the property. Should that solicitor be relieved of the consequences of his conduct by the mere running of time? We think not. How far should the boundaries of this relief extend? The Law Reform Committee of South Australia thought there should be no restriction whatever. In their Report on Limitations[48] they recommended adoption of the 1963 English Act, altered so that ". . . the power to extend time be given in relation to any cause of action arising in any jurisdiction of the court (other than conferred Federal jurisdiction) ." With deference, we feel this suggestion goes too far and might tend to extend relief into areas of commercial law where there is little justification for its availability.

The most acceptable solution would seem to be that first propounded by the Alberta Uniformity Commissioners in their report to the 1968 Conference: [49] that relief be restricted to actions involving personal injury, property damage, and professional negligence. That suggestion was adopted by the Ontario Law Reform Commission whose formal recommendation stated:[50]

> The extension procedure should only be applicable to

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46 *Supra* n. 40.

47 *Proceedings of the 50th Annual Conference of Commissioners on Uniformity of Legislation in Canada* 71.

48 *Supra* n. 44, at 3.

49 *Supra* n. 47.

50 Ontario Report 108.

(a) personal injury actions;
(b) property damage actions; and
(c) professional negligence actions not covered by (a) and *(b)*.

In recommending that relief be restricted to personal injury cases, the New South Wales Commission made the following observations:[51]

> We believe that the great majority of personal injury cases where an extension of time would be available under legislation on the lines of the Imperial Act of 1963 are cases where the defendant will be indemnified by insurance. Where there is such an indemnity the burden of a claim by any single plaintiff will be widely spread over the community and the action will in fact be defended by an insurer whose business it is to defend such actions. In these special circumstances we think it right to give less weight to the function of protecting defendants from being vexed by stale claims and greater weight to the manifest injustice which an injured person would otherwise suffer. These considerations justify special treatment for cases of personal injury but do not justify a general relaxation of the law of the limitation of actions in all cases of claims for damages.

Professional negligence insurance has become so widespread in the Province of British Columbia that this Commission feels that most professional men against whom negligence claims are likely to be made will be covered. We believe the reasoning of the New South Wales Commissioners on the relevance of insurance is apt, and provides an additional reason for including professional negligence claims within the scope of relief given by reform legislation.

The question of the conditions which should be placed on the availability of relief has a second aspect which must turn on the state of knowledge of the potential plaintiff. Of what ought he be ignorant in order to qualify for relief? As the Ontario Commission put it:[52]

> What is it that the potential plaintiff should be aware of if the running of time is to be postponed or extended? Is mere awareness of the material facts on which a cause of action could be based sufficient? Although a person is aware of these facts he may still not actually know that he has a cause of action. He may not know the law. In a negligence case, must he know that the potential defendant owed him a legal duty to take care? What if he knows that he has a cause of action but does nothing because he considers his injuries minor, when in reality they are serious? What if he is careless about seeking medical advice as to the extent of his injuries or legal advice as to his rights? These are some of the issues raised in the consideration of an extension provision.

A number of principles emerge from a consideration of these questions. In our opinion the appropriate criteria to apply in determining when relief would be available should be the behaviour of the hypothetical reasonable man. There should be an obligation on the potential plaintiff to seek professional advice, be it medical or legal or other material facts, concerning the damage done to him in circumstances where a reasonable man would do so. The person who ". . . knows that he has a cause of action but does nothing because he considers his injuries minor when in reality they are serious"[53] should obtain relief if a reasonable man would have done

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51 New South Wales Report, para. 281.

52 Ontario Report 100, 101.

53 *Ibid.*

nothing. Ignorance of the law presents a more difficult problem. Where that ignorance concerns questions of causation or the existence of a duty the plaintiff might be excused in circumstances where the reasonable man would have been similarly ignorant. The most difficult problem occurs when the plaintiff is ignorant of the existence of the relevant limitation period. While one might sympathize with his plight, to extend relief to him would deprive limitation periods of much of their force and effect. While some "hard cases" may arise, in our view such ignorance does not justify the relaxation of a limitation period. In practice, with the simplification of limitation laws generally and a reduction in the number of special limitation periods, this particular problem would likely occur less frequently than at present.

It is instructive to see how these problems have been dealt with elsewhere. The English legislation of 1963 set out fairly elaborate and specific criteria which the potential plaintiff must satisfy. The Ontario Report summarized that Act as providing:[54]

> 1. For an extension procedure where:
> *(a)* there is a claim for personal injuries (to which the three-year period applies), and
> *(b)* if the material facts relating to the claimed cause of action were, or included, facts of a decisive character which were outside the knowledge (actual or constructive) of the potential plaintiff:
> (i) until at least twelve months before the three year period came to an end, and
> (ii) not earlier than twelve months before the action was brought. (s. 1 (2) and (2).)
>
> 2. "Material facts" means one or more of:
> *(a)* the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting that cause of action;
> *(b)* the nature and extent of the personal injuries resulting from that negligence, nuisance or breach of duty; and
> *(c)* the fact the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty, or the extent to which any of these personal injuries were so attributable. (s. 7 (3).)
>
> 3. Material facts shall be taken to be of a decisive character if they were facts which a reasonable person, knowing those facts and having obtained appropriate advice with respect to them, would have regarded as determining that he had an action which would have a reasonable prospect of succeeding and of resulting in the award of damages sufficient to justify the bringing of the action. (s. 7 (4).)
>
> 4. "Appropriate advice," in relation to any fact or circumstance, means the advice of competent persons qualified, in their respective spheres, to advise on the medical, legal and other aspects of that fact or those circumstances, as the case may be. (s. 7 (8).)
>
> 5. A fact shall be taken to be outside the knowledge (actual or constructive) of a person if, but only if—
> *(a)* he did not then know that fact;
> *(b)* insofar as that fact was capable of being ascertained by him, he had taken all such action (if any) as it was reasonable for him to taken before that time for the purpose of ascertaining it; and
> *(c)* insofar as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such action (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances. (s. 7 *(5).)*

54 *Id.,* at 103—105. The full text of the Act is set out as Appendix E-3 to this Report.

(Where the person was under a disability and in custody of a parent, the question of absence of knowledge relates to that parent.) (s. 7 (6).)

The Ontario Commissioners went on to characterize the Act as providing "...a very elaborate procedure for what should be a small number of cases."[55] Clearly, the tenor of the Act represents a sacrifice of simplicity and clarity to supposed precision. Lord Denning has referred to it as this very complicated and obscure Act."[56]

The criteria contained in the English legislation were accepted in principle by the New South Wales Law Reform Commission and embodied in a somewhat modified form in their Draft Bill. That Draft Bill has been characterized as "preferable to the English Statute . . . the provisions [being] better arranged and, thus, more understandable."[57] The Law Reform Committee of South Australia in its Report recommended adoption of the English criteria with the following modifications:[58]

That the words "of a decisive character" in subsection (3) of the English section 1 be deleted and the words "relating to the cause of action" be inserted;

That the words "(actual or constructive)" be deleted from subsection (3) and the word "actual" inserted.

The Ontario Law Reform Commission accepted the English and New South Wales criteria in principle. Its specific recommendation was that:[59]

The extension should be granted where a potential plaintiff was unaware of material facts which, if he were a reasonable person knowing those facts and having obtained appropriate advice with respect to them,
would have been of a decisive character in determining that he had an action
(a) which would have a reasonable prospect of succeeding, and
(b) result in the award of damages sufficient to justify bringing it.

The Commission has concluded that those criteria set out in the Draft Bill recommended by the New South Wales Law Reform Commission[60] and implemented by legislation are preferable to those originating in England or Ontario. They most accurately define those persons whose state of knowledge should, in the opinion of the Commission, entitle them to relief. Further simplification might, however, be possible to bring the "reasonable man" standard more directly to the fore.

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55 *Id.,* at 105.

56 *Pickles* v. *National Coal Board,* [1968] 2 All E.R. 598, 599.

57 Ontario Report 107. *See* Appendix D, ss. 57—62, for the text of the New South Wales provision.

58 *Supra* n. 44, at 4.

59 Ontario Report 108.

60 *See* Appendix D, ss. 57, 58.

(d) Postponement or Extension

Having concluded that relief is desirable and established the restrictions which should be placed on its availability, consideration must now be given to the precise legal form in which the relief should be given. There are two basic approaches to this question. The first is to provide for an extension of the limitation period in proper cases. The second is to postpone the running of the limitation period by deferring its commencement to a point in time when the potential plaintiff has adequate knowledge of his cause of action.

The first of these alternatives has been the most widely accepted. The English legislation of 1963 provides that the potential plaintiff might apply to the Court *ex parte* for leave to commence the action out of time. If the Court is satisfied that the facts alleged bring the applicant within the scope of the statute, leave is then granted.[61] The New South Wales Law Reform Commission also felt that a pre-action application for an extension of the limitation period was appropriate, but thought that applications for leave should be made on notice to the proposed defendant and would permit the determination of the application to be adjourned to the trial of the action. That Commission would also have given the discretion to refuse leave to extend. It was felt that this would be useful in situations where " . . . the damages are likely to be trivial, if the evidence on an essential point is weak, or if a special defence is proved."[62] The Ontario Law Reform Commission also thought that notice was desirable.[63] The approach of the English legislation was rejected by the Alberta Uniformity Commissioners. After considering the Act of 1963 and its application as reflected in the recited cases, the Commissioners concluded:[64]

> In our opinion it will be more satisfactory to include a section analogous to the concealed fraud [section 4] so as to provide that in cases of bodily damages, property damage and professional negligence, time shall begin to run when the plaintiff has discovered the damage [or perhaps when he reasonably could have discovered it].

The Alberta Commissioners then refer to a number of American authorities which dealt with similar problems and favoured a solution similar to the one which they proposed. The Report then goes on to say:[65]

> We realize that there may still be difficulty in an individual case in determining when the damage was discovered just as in rare cases there is difficulty in determining when it accrued. We think, however, that the proposed amendments are workable and will remove the present injustice of time running when the plaintiff did not know he had a cause of action. It may be that some defendants such as professional

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61 *See* Appendix E-3.

62 New South Wales Report, para. 283.

63 Ontario Report 108. The recommendations of the Ontario Commission were silent on the desirability of giving the Court a discretion to refuse the application of a potential plaintiff who otherwise qualified.

64 *Supra* n. 47, at 72.

65 *Ibid.*

men (and their insurers), may object to these amendments but our purpose is to strike a balance and we cannot justify the swab cases and those against architects and solicitors.

In considering the Alberta proposal, the Ontario Commissioners in their Report stated:[66]

> The simplicity of the proposed procedure for extension of the Alberta Commissioners is enticing. It would mean, apparently, having a provision something like:
>
> > In actions for personal injuries, property damage or professional negligence, the cause of action shall be deemed to have first accrued when the damage was, or might have been with reasonable diligence, discovered.
>
> Since a substantial number of actions would be covered by such a provision, it might well result in considerable argument as to when time began to run in many cases, with much undesirable confusion in the professional and the commercial world.

There may be some merit to the foregoing objections; however, inserting a greater degree of certainty into the Alberta scheme should not be an insurmountable problem. It also appears that, as the Ontario Commissioners chose to phrase it, a provision based on the Alberta proposal, although worded more generally, would in fact be considerably narrower in its operation than the English legislation or that proposed by the New South Wales Law Reform Commission. A plaintiff may be well aware of the damage but unaware of the other material facts which he requires to pursue his action.

It is suggested that a provision of acceptable precision could be obtained by using a modified form of the New South Wales criteria[67] to determine when a limitation period begins to run.

If an extension (such as that recommended by the New South Wales Law Reform Commission) is compared with the postponement scheme suggested above, two main differences emerge. The first is that under the postponement scheme, in some cases, the potential plaintiff would have a longer period of time in which to commence his action. Assuming that the limitation period would have otherwise expired, the potential plaintiff who becomes aware of material facts would have only one year under an extension scheme to commence proceedings, but under the postponement scheme would have the full limitation period appropriate to his action, a time unlikely to be less than one year. Some might find this an objectionable feature of the postponement scheme. The importance of such an objection should not, however, be over-emphasized. In most cases in which the running of time is postponed, the cause of action will be one to which a relatively short limitation period applies in any event, and thus any apparent discrepancy between the two approaches is likely to be minimal.

The other significant difference between the postponement and extension schemes is that, under the former, the necessity of an application to the Court for action is avoided. It is not clear what useful purpose is served by requiring the plaintiff to apply for leave to commence an action. It might be argued that the application tends to identify and eliminate frivolous or unfounded

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66 Ontario Report 108.

67 *See* Appendix D.

actions before substantial costs are incurred. It is difficult to see, however, why frivolous or unfounded actions should be any more of a problem in this area than they are generally.

It might also be argued that if the right of plaintiff to relief is contested and his state of knowledge in issue, that can be more expeditiously dealt with in the framework of a pre-action application, thus saving the costs of a trial. The *Supreme Court Rules,* however, presently provide for the trial of a preliminary issue of fact. There seems to be no reason why the parties should not avail themselves of this procedure in an appropriate case.[68] Examination for discovery would also be available to the parties in those circumstances where it would not be if the issue were determined within the framework of an application for leave. It is questionable if the cost to the litigant and the time spent by the Court would be justified if a plaintiff were required to obtain leave in every case before commencing an action where the limitation period may have expired.

It should also be noted that the postponement approach avoids certain conceptual difficulties which are inherent in granting an extension. Elsewhere in this Report consideration is given to the question of whether the expiration of a limitation period should act merely to bar the remedy or completely extinguish the cause of action. This Commission favours the latter solution. That being the case, the order of a Court made under an extension provision does not really effect an "extension" at all. The Court is, in fact, creating a cause of action where none existed prior to the application. While this is not objectionable *per se,* it does represent a sufficient departure from accepted principles to create some difficulty. The postponement approach neatly avoids this problem. Rather than allowing a fictional extension to something which is legally dead and which logically should be incapable of being extended, it merely defers the running of time.

Having regard to all of the foregoing factors, the Commission has concluded that the most appropriate method to extend relief to the person who is not aware that he has a cause of action is by postponing the time at which a limitation period begins to run to that time when he is, or ought to be, aware of its existence. We do feel, however, that the onus of proving that the running of time has been postponed ought to be on the person claiming the benefit of the postponement.

One further question to be considered is whether there should be some outside limitation period, referable to the time when the damage occurred, beyond which an action should not lie. The Alberta Uniformity Commissioners felt that notwithstanding the date of discovery of the damage, there should be such a limitation period. Their Report stated:[69]

> This [proposal that time begin to run when the plaintiff has discovered the damage] might be unfair to defendants when the plaintiff issues statement of claim 10 or 15 years after the alleged damage so for this reason we recommend an outside limitation of 6 years from the damage. This would give the plaintiff protection in nearly all cases.

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68 *See* Marginal Rule 397.

69 *Supra* n. 47, at 72.

The desirability of such a six-year outside limitation period is questionable. It is doubtful if all potential plaintiffs to whom relief should be given will emerge during a six-year period. Respiratory diseases such as silicosis can be discovered well beyond that time. Professional negligence may emerge even later. A surveyor may negligently issue a certificate of nonencroachment containing an error which would only be discovered when the property is resurveyed, an event unlikely to occur within six years. A solicitor may negligently fail to register a document, thus permitting a third party to acquire an interest in land or goods which is only discovered some years later. For these reasons it is felt that an outside limitation period is inappropriate in this particular context. In considering this question, the Ontario Commissioners also rejected the suggestion of an outside limitation period.[70]

The question as to whether there should be some sort of ultimate limitation period which would operate notwithstanding postponements for any purpose is considered elsewhere in this Report.[71]

(e) Fraud and Mistake

It has been noted that the present *Statute of Limitations* provides some relief to the potential plaintiff who has been the victim of a concealed fraud. Section 38 postpones the running of time by providing that the cause of action ". . . shall be deemed to have first accrued at and not before the time at which the fraud shall or with reasonable diligence might have been first known or discovered." In addition to that provision, certain equitable rules exist which also postpone the running of time in some situations involving fraud and mistake; however, the extent of these equitable rules has been described as "neither clear nor sufficient."[72]

Section 38 is confined to actions for the recovery of land or rent, and thus covers a relatively narrow range of situations. In its report, the Ontario Law Reform Commission pointed out that concealed fraud, and concealment by fraud, were dealt with in two separate sections and did not cover all of the actions within the scope of the Act.[73]

The Ontario Commissioners felt it would be preferable to have one provision of general application and noted that such a provision was to be found both in the English Act of 1939[74] and in the proposed Bill recommended by the New South Wales Law Reform Commission.[75] After an

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70 Ontario Report 108.

71 *See* Chap. VI, s. D.

72 Ontario Report 109.

73 Ibid.

74 S. 26.

75 *See* Appendix D.

analysis of both,[76] the Ontario Law Reform Commission recommended:[77]

> 1. There should be one general provision dealing with the postponement of time in fraud and mistake cases.
>
> 2. Such a provision should apply where:
>
> *(a)* an action is based on fraud or deceit,
>
> *(b)* a right of action, or the identity of the person against whom the action lies, is fraudulently concealed, and
>
> *(c)* an action is for relief from the consequences of a mistake.
>
> 3. In such cases, time should not begin to run until the plaintiff has discovered the fraud, deceit, fraudulent concealment or the mistake, as the case may be, or could with reasonable diligence have discovered it.
>
> 4. Such a provision should not operate to the detriment of a bona fide purchaser for value.

This Commission finds considerable merit in those recommendations. It is noted, however, that recommendation No. 3 bears a marked resemblance to the method by which this Commission recommends a general provision postponing the running of time should be framed. There appears to be no good reason why fraud and mistake could not conveniently be brought into the general postponement scheme as an additional class of "cause of action" in which relief would be available. This would have the advantage of simplicity and promote a desirable degree of consistency in postponement situations. It is also felt that grafting on to a provision providing relief in cases of fraud or mistake, the more precise criteria regarding the required state of knowledge of the potential plaintiff, would have a desirable result.

(f) Survival of Actions

Consideration must be given to the effect which the death of the injured party will have on causes of action in which relief should be available. Both the New South Wales Act[78] and the English Act of 1963[79] deal with this question by permitting the personal representatives of the injured party to make an application for extension up to one year after death. A provision of this type seems to be a natural outgrowth of the structure and approach of that legislation. Even though it has been provided for, questions involving survivorship have not been without difficulty or possible injustice.[80] The Ontario Law Reform Commission did not consider the problem of survival of actions in this context.

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76 Ontario Report 111.

77 *Id.* at 111.

78 *See* Appendix D, ss. 59, 60.

79 *Supra* n. 41, s. 3.

80 *See Lucy* v. *W. T. Henley's Telegraph Works* [1969] 3 All E.R. 456 (C.A.). *See also* the Law Commission's report on the *Limitation Act, 1963* (Law Comm. No. 35, cmnd. 4532, November 1970).

There appears to be no logical reason why the personal representatives of a person who become aware of facts which would have entitled that person to maintain an action would be placed in any worse or better position than that person would be were he still living and discovered those facts. It seems desirable that the rights of the survivor should be assimilated to those of the deceased. Situations in which the deceased learned or ought reasonably to have learned of his cause of action before his death present little problem. Time would continue to run against the estate in the normal fashion.

(g) Families' Compensation Act

At present under the *Families' Compensation Act*[81] a cause of action accrues on the death of a person to certain survivors. The Act provides that no action shall be brought after 12 months from the time of death. It is not difficult to envisage circumstances in which this limitation period may operate harshly and unjustly. The identity of a potential defendant may not emerge until the limitation period has expired.[82] Other material facts may remain similarly obscured. Even the fact of death may not be ascertained until some time after the fact. The potentially harsh operation of this limitation period would be mitigated if the running of time commenced not from the death but from the point in time when the potential plaintiff has sufficient knowledge of his cause of action. Normally that point in time would coincide with the death and so the policy that these actions should be brought expeditiously would not be defeated. Such a rule would, however, provide relief in the occasional "hard case."

(h) The Effect of Previous Actions

In the course of the Commission's deliberations relating to a suitable scheme for postponing the running of time when the plaintiff is unaware of certain facts upon which his action is founded, a further problem has been recognized which is of particular concern in personal injury cases. The same wrongful act may result in two distinct injuries, only one of which is known to the plaintiff. For example, the person who is the victim of an assault may suffer both a broken nose and a serious back injury which remains latent for some time. If that person considers the injury to his nose to be relatively trivial and does nothing, assuming that would be the behaviour of a reasonable man in similar circumstances, the relevant limitation period would begin to run only when he becomes aware, or ought to become aware, of the more serious injury.

Suppose, however, that person had promptly and diligently pursued an action for damages for personal injuries, recovered judgment, and was awarded damages based on the less serious injury. It seems that once the more serious injury manifests itself the plaintiff will be precluded from pursuing further claim with respect to that injury. This arises, not out of

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81 R.S.B.C. 1960, c. 138.

82 *See* the *Lucy case, supra*, n. 80.

limitations laws, but a different legal rule similar to estoppel:[83]

> The defence of "judgment recovered," arising as it does out of *res judicata,* has much in common with estoppel by record, though it is not founded upon it. A plaintiff who has once sued a defendant to judgment cannot, while the judgment stands, although unsatisfied, sue him again for the same cause, not because he is estopped from doing so, but because the cause of action is merged in the judgment, which creates an obligation of a higher nature. It is also probably true to say that a person wbo has once recovered judgment for a sum of money is estopped from averring that he ought to recover any further sum for the same cause of action.

In short, damages are awarded on a once and for all basis. In the context of personal injury claims the proposition has been put as follows:[84]

> It is a rule that when a thing directly wrongful in itself is done to a man, in itself a cause of action, he must, if he sues in respect of it, do so once and for all. As, if he is beaten or wounded, if he sues he must sue for all his damage past, present, and future, certain and contingent. He cannot maintain an action for a broken arm, and subsequently for a broken rib, though he did not know of it when he commenced his first action.

That rule leads to situations where the person who pursues his rights in a timely and diligent fashion is placed in a worse position than he who does not. This seems unfair. Although this possible inequity does not arise out of limitations laws, it is highlighted when a postponement scheme is introduced. We have given careful consideration to whether, in the context of this Report, recommendations should be made aimed at modifying the application of the doctrine of *res judicata.*

While fully recognizing the injustices, hopefully rare, which may arise in the context of personal injury cases through the defence of "judgment recovered," we have concluded that this is but one aspect of a much wider problem.

In our view appropriate recommendations can be made only in the context of a broad study of the defence of *res judicata* and related matters. For the purposes of this Report we can only reiterate that this is not a limitations problem. It would exist even if there were no *Statute of Limitations.*

The Commission recommends:

1. *The proposed statute provide that in*
   - *(a) personal injury actions;*
   - *(b) property damage actions;*
   - *(c) professional negligence actions;*
   - *(d) actions based on fraud or deceit;*
   - *(e) actions in which material facts relating to the cause of action have been wilfully concealed;*

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83 15 Halsbury 188 (3rd n.).

84 *Darley Main Colliery Co.* v. *Mitchell,* (1886) 11 App. Cas. 127, 144 per Lord Bramwell.

(f) actions for relief from the consequences of a mistake;
(g) actions brought under the Families' Compensation Act; *and*
(h) actions for non fraudulent breaches of trust,

the running of time is postponed and time does not commence to run against a plaintiff until the identity of the defendant is known to him and those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing

(i) that an action on the cause of action would (apart from the effect of the expiration of a limitation period) have a reasonable prospect of success; and
(ii) that the person whose means of knowledge is in question ought, in his own interests, and taking his circumstances into account, to bring an action.

2. For the purpose of the previous recommendation,
(a) "appropriate advice," in relation to facts means the advice of competent persons, qualified in their respective fields to advise on the medical, legal, and other aspect of the facts, as the case may require;
(b) "facts" include
(i) the existence of a duty owed to the plaintiff by the defendant,
(ii) that a breach of a duty caused injury damage or loss to the plaintiff.

3. Such a provision not operate to the detriment of a bona fide purchaser for value.

4. The onus of proving that the accrual of a cause of action has been postponed under the foregoing recommendations be on the person claiming the benefit of the postponement.

Memorandum of Dissent of Peter Fraser

I would like to emphasize that I agree with the reasoning and recommendations of this Report and it is on only one issue that I dissent—postponement of time where there is absence of knowledge (Chapter V, section D).

The majority recommendation is that absence of knowledge should not postpone time where a potential plaintiff has not taken reasonable steps to inform himself. In other words, a condition of obtaining redress in the Courts would be that the plaintiff is a reasonable person. I am troubled by the prospect that the uneducated, slow-witted, emotionally disturbed, or perhaps merely foolish person would, simply because he is that way, be denied relief. This is the sort of person the law should be concerned to protect.

The reason for limiting the ambit of postponement is the same as that put forward in defence of limitation periods at all; the sense of unfairness to the defendant, who may have difficulty putting forward a defence to a claim he may not have expected and which springs from

an event which occurred some while before. But the "unfairness" implies that the potential plaintiff is busily preparing while the potential defendant does nothing. In the absence-of-knowledge situation, assuming the worst possible prejudice to the defendant, neither party expected the lawsuit and neither made special preparation for it.

What should govern the availability of postponement is the actual state of knowledge of the potential plaintiff, not the hypothetical state of knowledge of the hypothetical reasonable man. Time should not begin to run until the potential plaintiff knows

(a) that a past event has caused him the injury, damage or loss for which relief is claimed;
(b) that the circumstances of the event were such that a cause of action may have arisen; and
(c) the identities of the potential defendants.

This standard implies that the potential plaintiff must have all the information which a lawyer would require in order to commence an action on behalf of a client.

It seems to me unlikely that, if this proposal were law, there would be a danger that a potential plaintiff would wilfully fail to inform himself in order to keep his right to litigate alive beyond the ordinary limitation period. However, since this is hypothetically possible, provision could be made that a defence based upon a limitation period will be available where the plaintiff had deliberately kept himself ignorant with the intent of prejudicing the defendant in his defence and where prejudice has actually resulted.

E. Pleading and Procedural Problems

An action may be commenced in time, but if a limitation period expires before the proceedings are concluded, certain situations can arise which create difficulties. These procedural problem areas include

(a) set-offs;
(b) counter-claims by the defendant against the plaintiff in the original action;
(c) counter-claims by which a new party is added;
(d) applications to add a new party under marginal rule 133 of the *Supreme Court Rules;*
(e) third-party proceedings;
(f) amendments to pleadings which may set up a new cause of action;
(g) change of party.

The *Statute of Limitations* is silent on the effect of set-offs and counterclaims. The *Supreme Court Rules* provide that a set-off or counter-claim "...shall have the same effect as a cross-action..."[85] which suggests that one cannot regard the claim as having been made until it is

85 Marginal Rule 199.

pleaded. The Ontario Law Reform Commission felt that "The case law is that a defendant cannot raise by either set-off or counter-claim a debt which is barred and that, for limitation purposes, the set-off is regarded as having been made at the time the writ was issued, while a counter-claim is regarded as having been made at the date it is pleaded."[86] If the law is such that, for limitation purposes, the set-off or counter-claim is regarded as having been made only when it is pleaded, it is capable of creating grave injustice. The following example should suffice:

> *A* sells *B* defective goods, in breach of a warranty which *A* has made as to their quality. *B* withholds part of the purchase price. In those circumstances, if *A* sues *B* for the balance of the purchase price, *B* is free to counter-claim against *A* for damages for breach of warranty. If, however, *A* waits until the limitation period has almost expired, issues his writ and serves it after the limitation period expires, it appears that any counter-claim which *B* might have for damages for breach of contract would then be statute-barred.

The 1939 English legislation dealt with this problem by providing that "Any claim by way of set-off or counter-claim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counter-claim is pleaded."[87]

Much more difficult problems arise when a new party is added to an action. This may come about when a third party is added, an additional party is added under Marginal Rule 133, or a new defendant by counter-claim is added. Should time continue to run in favour of such persons until they become parties to the action?[88] Sound arguments can be made both ways. The New South Wales Law Reform Commission favoured a provision which permitted time to continue to run in favour of the parties proposed to be added.[89] The Alberta Commisioners to the Conference of Commissioners on Uniformity felt that some relaxation of the limitation period was warranted. As their 1967 report stated:[90]

> We turn now to the subject of counter-claims and third-party proceedings. Generally these proceedings must be brought within the statutory period. We think, however, that they should be permitted afterwards as long as they relate to the subject matter of the action.

This Commission agrees generally with the approach taken by the Alberta Commissioners. It is felt that the trend of contemporary cases and legislation is toward a

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86 Ontario Report 111.

87 *Limitation Act, 1939,* 2 & 3 Geo. VI. c. 21, s. 28.

88 Apparently, time continues to run in favour of a third party until he is joined. *See Johnson* v. *Vancouver General Hospital,* (1937) 32 D.L.R. 568 (B.C.S.C.).

89 *See* Appendix D, s. 74.

90 *1967 Proceedings* at 174.

relaxation of limitation periods. Section 79 (2) of the *Motor-Vehicle A ct* [91] for instance, provides:

> (2) Notwithstanding subsection (1), when an action is brought within the time limited by this Act for the recovery of damages occasioned in an accident involving a motor-vehicle and a counterclaim is made or third-party proceedings are instituted by a defendant in respect of damages occasioned in the same accident, the lapse of time limited by this Act shall be no bar to counterclaim or third-party proceedings.

Comparable Ontario legislation has been held to permit a counter-claim against a person who is not a party to the main action, notwithstanding that the applicable limitation period had expired.[92]

The Commission can find no compelling policy reason which dictates that limitation periods should be rigidly enforced, so as to prevent the joinder of new parties after an action has been commenced. As the Ontario Report put it:[93]

> The purpose of the Statute should be to ensure that matters be litigated in a reasonable time. Once an action has been started, then all matters which were not statute-barred when the writ was issued and which might be dealt with at the trial of that action, should be capable of being brought before the court.

The amendment of pleadings presents somewhat different problems. These were ably discussed by the Alberta Commissioners in their 1967 report:[94]

> The next point has to do with amendments to pleadings after the statutory period. In speaking of amendments, we exclude the adding or changing of parties with which we shall deal later. It is settled that an amendment should not be permitted after the time has expired if the amendment sets up a new cause of action. This is often hard to determine. In a claim for damage to an automobile, may an amendment be made to add a claim for personal injuries? English authority said no. However, the Supreme Court of Canada, in June 1967, upheld an Alberta judgment which holds that such an amendment may be made [*Franks* v. *Cahoon* 58 W.W.R. 513]. We recommend consideration of a provision such as section 44 (11) of Saskatchewan's Queen's Bench Act R.S.S. 1965, c. 73. This provision enables the Court to permit the amendment of a pleading as it deems just, notwithstanding that the right of action would have been barred. However, it does not apply to amendments involving a change of parties other than one caused by death of a party.

Section 44 (11) of the Saskatchewan *Queen's Bench Act,* referred to by the Alberta Commissioners, provides:[95]

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91 R.S.B.C. 1960, c. 253.

92 *Broadhurst* v. *Sartisohn,* [1972] 2 O.R. 567 (Ont. H.C.).

93 Ontario Report 113.

94 *1967 Proceedings* 174.

95 *Queen's Bench Act,* R.S.S. 1965, c. 73.

> Where an action is brought to enforce any right, legal or equitable, the court may permit the amendment of any pleading or other proceeding therein upon such terms as to costs or otherwise as it deems just notwithstanding that, between the time of the issue of the writ and the application for amendment, the right of action would, but by reason of action brought, have been barred by the provisions of any statute; provided that such amendment does not involve a change of parties other than a change caused by the death of one of the parties.

The general amendment provision in the British Columbia *Supreme Court Rules*[96] is silent on the effects of limitation periods; however, the general tenor of the cases is that a plaintiff will not be allowed to amend his statement of claim by setting up an entirely new cause of action after the expiration of a limitation period.[97] It is felt that a broader discretion in the Court to amend pleadings is desirable. To permit a claim to be defeated by an improper pleading is a throw-back to the old forms of action of the 19th century. It is doubtful that the Court, if given a discretion in this area, would permit a relaxation of the limitation period to be abused. For this reason, the Commission favours a power to amend pleadings comparable to that given by section 44 (11) of the Saskatchewan *Queen's Bench Act.*

That provision does not, however, permit an amendment which effects a change of parties other than a change caused by death. The injustice which can result from a rigid prohibition against the substitution of parties was the subject of comment by the Alberta Commissioners in their 1968 Report:[98]

> ...the harshness of the rule against adding or substituting parties where there is no prejudice whatever to the defendant appears in many cases. A recent example is *McPhee* v. *Ahern* 49 W.W.R. 189 (1964) B.C. where one of the plaintiffs was Molson's Western and it should have been their subsidiary Sicks Alberta. We recommend a provision permitting the court to add or substitute parties at any time, on the basis of no prejudice to the defendant.

We agree with the conclusion of the Ontario Law Reform Commission and the Alberta Uniformity Commissioners that there should be one general amendment provision similar to that contained in the Saskatchewan legislation, but sufficiently wide to cover any change of parties.[99] It is felt that this should be dealt with in the proposed statute rather than by alteration of the applicable rules of Court.

The Commission recommends:

1. Any claim by way of set-off, counter-claim, the adding of parties under Marginal Rule 133, or a third-party proceeding, be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counter-claim was made, or the

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96 Marginal Rule 305.

97 *See City Construction Co.* v. *Salmon's Transfer* 1973 5 W.W.R. 378 (B.C.C.A.); *Compare Hyweron* v. *McIlroy* 1973 2 W.W.R. 169 (Man. Co. Ct.). *See also* Kowarsky and Stevens, *British Columbia Practice* 110, and cases there noted as to what constitutes setting up an entirely new cause of action.

98 *1968 Proceedings* 74.

99 Ontario Report 115.

parties added under Marginal Rule 133, or the third-party proceedings are taken.

2. In any action, the Court be given a discretion to allow for the amendment of any pleading or other proceedings, or an application for a change of party, upon such terms as to costs or otherwise as the Court deems just, notwithstanding that between the time of the issue of the writ and the application for amendment or change of party, a fresh cause of action disclosed by the amendment of a cause of action by or against the new party would have been barred by a limitation provision.

F. Confirmation: Acknowledgment and Part Payment

(a) General

A relaxation of a limitation period may also be effected in certain cases by some act of the defendant. Such an act may be an acknowledgment that a right exists, in which case time will start to run afresh from the time at which the acknowledgment is made. A part payment of a debt has a similar effect. The New South Wales Law Reform Commission adopted the term "confirmation"[100] to encompass both acknowledgment and part payment. There is a large body of both statute and case law relating to confirmation, and a brief statement of that law is necessary before the desirability of reform may be considered.

(b) The Present Law

(i) *Personal actions*—Soon after the passing of the *Statute of Limitations* of 1623, the common law Courts began to develop a law that the acknowledgment of a debt made within six years of the accrual of the action took the case out of the operation of the statute. The development of this body of law is set out in *Darby and Bosanquet on Limitations*:[101]

> The decisions as to what the nature of an acknowledgment must be in order to take a debt out of the statute have been very conflicting. In the earlier cases an express promise to pay or a conditional promise, with proof of the fulfilment of the condition, was necessary. Later decisions held that an admission of the existence of the debt was all that was required; so that even if the admission were accompanied by a refusal to pay, or a claim of the benefit of the statute, the case was still held to be taken out of the statute. The ground on which the doctrine was carried so far was that the statute was founded on presumption of payment; whatever repelled that presumption was an answer to the statute, and any acknowledgment which repelled that presumption was in legal effect a promise to pay the debt. Towards the end of the period in which the cases grounded on this view were decided, there were also others in which the judges showed an inclination to return to the principle of the older decisions.
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> This conflict of opinion was ultimately set at rest in 1827 by the decision of the King's Bench in *Tanner* v. *Smart* [6 B. & C. 603, 108 E.R. 573], which has remained a leading case ever since. . . . Ever since the decision . . . it has been settled law that nothing can take a debt out of the statute, unless it amounts to an express promise to pay or an unconditional acknowledgment of the debt from which

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100 *See* Appendix D, s. 54.

101 Second ed. (1893), at 66.

such an express promise may be implied. . . . [T]he tendency of the decisions since *Tanner* v. *Smart* has been to confine rather than to extend the operation of acknowledgments.

A part payment of a debt was held to have the same effect as an acknowledgment in starting time running anew. The law confined the effect of an acknowledgment to actions for debt or liquidated amount, an acknowledgment of a right of action in tort being ineffective to remove the action from the operation of the statute of 1623.

It was said that "As parol evidence of such acknowledgments was admitted, the beneficial operation of the statute [of 1623] was much limited..."[102] This led to the passing of the *Statute of Frauds Amendment Act*[103] which provided *inter alia* that no acknowledgment should be effective to take a case out of the operation of the statute of 1623 unless made in writing and signed by the party chargeable.[104] That provision is now section 12 of the present *Statute of Limitations.* The Act merely altered the mode of proof of acknowledgments. It provided no definition and left the nature and effect of an acknowledgment untouched. The Act did not alter the common law relating to part payment.

(ii) *Specialty debts*—No limitation period existed with respect to actions for the recovery of specialty debts until 1833; thus, the common law which had developed relating to acknowledgments had no application to such actions. In that year the *Civil Procedure Act*[105] was passed, which imposed a limitation period of 20 years. The Act specifically provided that an acknowledgment made in writing should start time running afresh.[106] The relevant provisions are reproduced as sections 49 and 51 of the present *Statute of Limitations.*

Oddly enough, the Courts failed to give the word "acknowledgment" as it appeared in the *Civil Procedure Act* the same meaning which it developed with respect to actions under the statute of 1623. It was, in fact, given a much more liberal construction[107] and it was held that the acknowledgment need not amount to a promise to pay and would be sufficient even if it were an admission made to someone other than the creditor or his agent. The Act also made a part payment of principal or interest equivalent to an acknowledgment.

(iii) *Actions relating to land*—The year 1833 also saw limitation periods imposed with respect to actions relating to land. These were imposed by the *Real Property Limitation Act,*

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102 *Id.,* at 65.

103 9 Geo. 4, c. 14.

104 S. 1.

105 3 & 4 Will. 4, c. 42, s. 3.

106 S. 5.

107 *See generally Derby and Bosanquet on Limitations, supra* n. 101, at 221; 20 Halsbury 651 (3rd ed.).

1833.[108] Again, specific provision was made regarding acknowledgments.[109] The relevant provision (section 28 in the British Columbia *Statute of Limitations)* stated that an acknowledgment of the title of a person entitled to land or rent given by a person in possession or in receipt of rent should be equivalent to a payment of rent, so as to start the limitation period running anew from that time. Other provisions also dealt with acknowledgment of moneys secured on land, judgments, rent, and interest in respect of money charged on land.[110] Again, the word "acknowledgment" as used in that statute received a liberal construction by the Courts.[111]

(iv) *The position of co-contractors*—The common law, as it developed before 1828, did not make any distinction between actions involving one debtor and actions involving a number of co-debtors. An acknowledgment of part payment by one debtor was sufficient to bind the rest.[112] With respect to the personal actions, the *Statutes of Frauds Amendment Act*[113] altered this by providing that an acknowledgment given by one of two or more joint contractors should bind only the party giving the acknowledgment. The Act left the common law with respect to part payment unchanged.

In 1856, the *Mercantile Law Amendment Act* was passed which provided that, with respect to the personal actions and actions for the recovery of specialty debts, a part payment by one co-contractor should not bind the others.[114] With respect to the personal actions that merely brought the law with respect to part payment into line with that relating to acknowledgment. In the case of specialty debts, however, the parties were left in what has been described as a "curious position."[115] This arises out of the fact that the position of co-contractors on specialty debts were, and still are, in precisely the same position as with the personal actions before 1828. One co-contractor may still give an acknowledgment which is capable of binding the others.

The only section of the *Real Property Limitation Act, 1833* to deal with acknowledgments given to or by co-contractors, relates to the mortgagee in possession.[116] In that situation, an acknowledgment given to one of several mortgagors operates in favour of them all. An acknowledgment given by one of several mortgagees is effectual only as against that

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108 3 & 4 Will. 4, *c.* 27.

109 S. 14.

110 Those provisions are now ss. 43 and 44 of the *Statute of Limitations,* R.S.B.C.

111 *See* Halsbury 714 (3rd ed.).

112 *See* annotations to *Chitty's Collection of Statutes* vol. 3, p. 13, n. *(c);* p. 69, n. *(h)* (3rd ed. 1865).

113 *Supra* n. 103.

114 *See Mercantile Law Amendment Act,* 19 & 20 Vict., c. 97, s. 14. *See also Statute of Limitations,* R.S.B.C. 1960, c. 370, ss. 5, 52.

115 *See* Great Britain Law Revision Committee, *Report on Statutes of Limitation,* 28, Fifth Interim Report Cmd. 5334 (1936).

116 3 & 4 Will. 4, c. 27, s. 28. *Now* R.S.B.C. 1960, c. 370, s. 40.

mortgagee. Where a mortgagee giving an acknowledgment is entitled to a divided part of the land in question, the mortgagor is entitled to redeem that divided part.

The Act is silent on the position when one of two or more persons in possession gives an acknowledgment to the owner when they came into possession other than as mortgagees.[117] Neither is any guidance given in situations in which a confirmation is given by a co-mortgagor (in possession), co-judgment debtor, or co-lessee under provisions comparable to sections 43 and 44 of the British Columbia statute.

(v) *To and by whom acknowledgments may be given*—The British Columbia *Statute of Limitations* does not display any consistency on this point. Section 12, which is based on the *Statute of Frauds Amendment Act,* provides that the acknowledgment must be made by the party to be charged. Section 13, based on the *Mercantile Law Amendment Act,* extends the power to make an acknowledgment to an agent of the party chargeable. Sections 43, 44, and 51 provide that an acknowledgment may be made by the party liable or his agent with respect to money secured on land, interest thereon, rent, judgments, and specialty debts. Section 40 provides that an acknowledgment be made by the mortgagee in possession or person claiming through him, but is silent on whether the mortgagee may be bound by the act of his agent. The effect of the English cases is that unless a statute specifically provides for an acknowledgment by an agent, such an acknowledgment is not sufficient.

The question of to whom an acknowledgment may be made is more troublesome. Sections 40, 43, and 44 specifically provide for the making of an acknowledgment to the agent of the person who will benefit from it. Sections 12 and 51 are silent as to whom an acknowledgment may be made. The answer provided by the case law is not wholly satisfactory. The decision in *Bachelor* v. *Middleton* [118] suggests that where a statute provides for an acknowledgment to be made to a person or his agent, one made to the third party will be ineffective, whereas if the statute is silent as to whom acknowledgment may be made, one made to a third party is effective. This seems difficult to reconcile with the decision in *Tanner* v. *Smart.*[119] The cases go both ways.[120] Clearly, the question requires clarification.

(c) The Desirability of Reform

The sections dealing with confirmation are scattered throughout the present *Statute of Limitations.* The effect of those sections is not uniform. An acknowledgment which may be sufficient for one action may not be sufficient for another. This Commission feels that the law relating to confirmation should be governed by one general provision which will deal uniformly with all actions within its scope.

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117 *CF.* Appendix D, s. 54 (7) *(b).*

118 6 Hare 75; 67 E.R., 1089. (1848) Chancery.

119 6 B & C 603; 108 E.R. (K.B. 1827). *See supra,* n. 101.

120 *Darby and Bosanquet on Limitations, supra,* n. 101, at 95.

It has been pointed out that the sufficiency of an acknowledgment of a simple contract debt is governed by the common law. A promise to pay, either implicit or explicit, is necessary. An unequivocal acknowledgment of the debt accompanied by a refusal to pay has no effect. This Commission feels that a promise to pay should not be necessary and would favour the abolition of such a requirement. This would bring the law relating to confirmation of simple contract debts into a line with that governing specialty debts.

Reform is also required to make the position of co-contractors uniform. It has been pointed out that, in the case of specialty debts, an acknowledgment given by one co-debtor will bind the others. This is inconsistent with the provisions regarding part payments and also with the law governing actions relating to land and simple contract debts. An acknowledgment given by one co-debtor should not bind the others in specialty debt situations.

The effect of a part payment is uniform. A part payment by one co-debtor will not start time running afresh against the others. The desirability of this rule, however, was questioned in the Report of the Wright Committee.[121] The Committee felt that a part payment by one co-debtor should bind the rest, stating:[122]

> ...the ground of the distinction is that a part payment operates for the benefit of all persons who are liable, and it would seem fair that if they take the benefit, they should take with it its accompanying disadvantages.

As mere acknowledgment does not benefit the co-debtors it was felt that it should not be binding. These views of the Committee are reflected in the 1939 English Act.[123]

The reasoning of the Wright Committee was rejected by the Law Reform Commissions of Ontario and New South Wales.[124] It was felt that:

> Such a state of the law apart from its incongruity appears to us to be apt to encourage underhand transactions between a creditor and one of his co-debtors.[125]

This Commission finds the reasoning of the Wright Committee somewhat more persuasive; however, the rule has been in effect for almost a hundred and twenty years and does not appear to have visited undue hardship on any party. We are, therefore, reluctant to discard the rule for the reasons advanced by the Wright Committee only; particularly when a desirable degree of uniformity between the law relating to acknowledgment and part payment is preserved by its

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121 *Supra* n. 115.

122 *Ibid.,* at 28.

123 *Limitations Act, 1939,* 283 Geo. 4, c. 21, s. 25 (5) (6).

124 *See* New South Wales Report, para. 259; Ontario Report 123, 124.

125 New South Wales Report, *ibid.*

retention.

At present a confirmation may be given only by the debtor or his agent and no other person. We feel this is a desirable rule which should remain unchanged; however, the position regarding the party to whom an acknowledgment may be given is less satisfactory. There is little doubt that a confirmation given to an agent of a creditor should be effective. The question is, how far, or in what circumstances, should an acknowledgment made to a third party start time running anew. Both the Ontario and New South Wales Law Reform Commissions felt that in no circumstances should an acknowledgment given to a third party be effective.[126] This Commission is in substantial agreement; however, it is felt that some leniency might be shown in the case of acknowledgments made in proceedings relating to the bankruptcy or insolvency of the debtor.

The problem may arise when bankruptcy-related proceedings are abortive. Section 31 of the *Bankruptcy Act*[127] provides that an insolvent person may make an assignment for the general benefit of his creditors. The assignment contains a list of his creditors (which usually amounts to an acknowledgment), which is filed with the official receiver, who then appoints a licensed trustee. If, however, the official receiver is unable to find a licensed trustee who is willing to act, he must, upon seven days' notice to the bankrupt, cancel the assignment.[128] If a limitation period expires between the filing of the assignment and its cancellation, the creditor who has not sued, preferring to share in the proceeds of the bankruptcy, may be defeated. Similarly, a creditor may suffer when a proposal under the *Bankruptcy Act* is annulled. In such cases the debtor is deemed to have "thereupon made an assignment"[129] and the bankruptcy does not date back to the filing of a proposal, as is usual under the Act.[130] Therefore, when a limitation period expires between the filing of a proposal and its annulment, the creditor may be adversely affected.[131]

The reported decisions on the effect of admissions made in bankruptcy-related proceedings are inconclusive.[132] The Commission feels that acknowledgments made in the course of such proceedings should be effective, even if not made to the creditor or his agent.

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126 *See* Ontario Report 23; *See New South Wales Act,* Appendix D, s. 54.

127 R.S.C. 1970, c. B-3.

128 S. 31 (5).

129 S. 42 (4).

130 *See,* e.g., *id.,* s. 39 (1).

131 A similar problem which may arise in the context of the old *Farmers' Creditors Arrangement Act, 1934,* S.C. 1934, c. 53, is recognized in the present *Statute of Limitations.*

"(2) whenever such a composition, extension of time, or scheme of arrangement as aforesaid is annulled, time under this Act shall be deemed not to have run between the date of the filing of the proposal with the Official Receiver and the date of such annulment."

132 *Darby and Bosanquet on Limitations, supra* n. 101, at 101, 225.

(d) Confirmation and Unliquidated Claims

It was pointed out earlier that the common law development of the notion that the cause of action could be confirmed so as to start time running anew was limited to simple contract debt. No doctrine ever developed that an unliquidated claim as for damages was capable of being confirmed.[133]

The Law Reform Commission of New South Wales felt that there was no reason why the doctrine of acknowledgment should be limited to debt. They demonstrated how the existing law can lead to incongruities:[134]

> If a man steals a motor car he may be candid in making written acknowledgments of his liability to the owner without risk that the statute of limitations will stop running in his favour. There may indeed be an exception in favour of the owner if the thief steals the car, for then the owner may sue to recover the proceeds of sale in an action of assumpsit, in which a promise to pay over the proceeds of sale would be imputed to the thief and such a promise would presumably be within the rule about acknowledgment and part payment. . . . If, however, the car is sold by the owner and the price is not paid, there is from the outset a debt within the rules about acknowledgment and part payment. If, to put a further case, a man has an insurance policy covering him against liability for personal injury to third parties and a third party is injured so as to give the insured a claim under the policy, the insurance company may admit liability both to its own insured and, as agent of the insured, to the third party: the admission, if in writing, will enlarge the limitation period as between the insurance company and the insured but will have no effect as against the insured in favour of the injured third party.

That Commission recommended that all limitation periods should be capable of running afresh where a cause of action is confirmed. Anticipating objections to the recommendation, the report went on to say:[135]

> As we see it, the arguments against this extension are two. First, the facts relating to a claim for unliquidated damages, either in contract or in tort, are likely to be more complicated and less the subject of written record than are claims for debts or other liquidated sums. Second, the decision whether a writing amounts to an acknowledgment, at present difficult enough in the case of a liquidated claim, would present undue difficulties in the case of claims for unliquidated damages.
>
> On the first point, while it has a foundation in ordinary experience, we think that an acknowledgment, likely as it must be to encourage the claimant to deter taking proceedings, will in general not be given carelessly and if given carelessly, should be the occasion of loss to the person giving the acknowledgment rather than to the claimant.
>
> On the second point, while it is indeed frequently a matter of difficulty to say whether, under the present law, a writing is or is not an acknowledgment, this difficulty has been significantly reduced

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133 It has been suggested that the English case of *Lubovski* v. *Snelling,* [1944] K.B. 44, might be "regarded as a step toward the development of a common law doctrine of acknowledgment of claims to unliquidated damages analagous to the common law doctrine of acknowledgment of debts." *See* New South Wales Report, para. 251. In that case, an insurer admitted liability to the plaintiff and carried on negotiations on the quantum of damages. During the negotiations, the limitation period ran out with no action having been commenced. The plaintiff commenced an action after time had run out and the Court found ". . . on slender evidence an agreement not to rely on the expiry of the limitation period had held that the defence of the statutory bar failed. *Ibid.*

134 *Id.,* para. 250.

135 *Id.,* paras. 252—254.

by section 23 of the Imperial Act of 1939. In this respect the wording of section 53 of the Bill follows the substance of section 23 of the Imperial Act.

The New South Wales recommendation was rejected by the Ontario Law Reform Commission. Their Report considered the undesirability of introducing new complications into the law and went on to point out that "...the nature of the debtor-creditor relationship is entirely different from that of the tortfeasor to the injured party. The role of acknowledgment in the former has a logical place in arrangements for giving extra time for payment.[136]

That reasoning is not entirely convincing. The possibility of complexity should not deter the recommendation of useful reforms. The present law relating to confirmation of simple debts is complex, but no one has suggested that such actions should not be capable of being confirmed, although that is the logical result of the Ontario objections.

It can be argued that in personal injury cases that a considerable length of time must elapse before the permanence of the plaintiff's injuries can be established with any certainty and, assuming that needless litigation is to be discouraged, it is perfectly consistent with public policy that the law should allow a tortfeasor to give an acknowledgment of the plaintiff's cause of action and allow the parties to deter negotiations as to *quantum* to a more appropriate time when a short limitation period intervenes. This, it is said, would avoid the artificiality of a contract to not plead a limitation period, or the existing practice of issuing a writ and "sitting on it."

That argument and those of the New South Wales Commission are appealing but, in the final analysis, we do not see the inability to confirm unliquidated claims as being a serious deficiency in British Columbia limitations law. The anomalous situations referred to in the New South Wales Report will arise only rarely. The second line of argument can be met, in part, by the elimination of limitation periods which are unduly short. Elsewhere in this Report we recommend the repeal of a number of short special limitation periods. It is not, therefore, our view that an expansion of the classes of causes of action which are capable of being confirmed can be justified at this time.

(e) Confirmation After Time Has Expired

In some circumstances, a confirmation made after a limitation period has expired will have the effect of reviving the cause of action and starting time running anew.[137] Elsewhere in this Report a recommendation is made that the expiration of a limitation period should extinguish the former right of action. It would be inconsistent with the reasoning behind that recommendation to permit a cause of action to be revived by an acknowledgment. We would, therefore, favour a provision which would allow the confirmation to be effective only if given

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136 Ontario Report 125.

137 *See Darby and Bosanquet on Limitations, supra* n. 101, at 93. This does not apply to actions relating to real property. At the end of the limitation period, the rights of the person out of possession are extinguished, so there is nothing to revive. *See Statute of Limitations,* R.S.B.C. 1960, c. 370, s. 41.

before the applicable limitation period had expired.[138]

The Commission recommends:

1. The term "confirmation" be adopted to cover both acknowledgments and part payments.

2. There be one general provision dealing with confirmation.

3. A confirmation given before the expiration of a limitation period should start time running afresh.

4. A confirmation by way of acknowledgment be sufficient, notwithstanding that it does not show a promise to pay.

5. A confirmation, to be effective, must in all cases be given by a person liable or his agent to the person entitled to the right or his agent.

6. Notwithstanding the foregoing recommendation, a confirmation made by the person liable or his agent in the course of proceedings or a transaction purporting to be pursuant to the Bankruptcy Act *be sufficient even if not made to the person entitled or his agent.*

7. The rule that an acknowledgment must be in writing and signed by the person chargeable or his agent be retained.

8. When a number of persons are liable by reason of the same event or transaction, a confirmation given by one of those persons should bind only that person and not the other persons liable.

9. A confirmation of a cause of action to recover interest on principal money due should operate also as a confirmation of a cause of action to recover the principal money.

10. A confirmation of a cause of action to recover income falling due at any time should operate also as the confirmation of a cause of action to recover income falling due at a later time on the same account.

11. The receipt of a part payment by a mortgagee in possession should operate as a confirmation of the title of the mortgagor.

12. A payment to a mortgagee of principal or interest secured by a mortgage should operate as a confirmation of his right to foreclose or exercise a power of sale under the mortgage.

Recommendations 9, 10, 11, and 12 deal with specific points covered by the English Act of 1939 and the New South Wales Report.[139] The purpose of those recommendations are largely self-explanatory.

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138 This is consistent with the position taken by the Ontario and the New South Wales Law Reform Commissions. *See* Ontario Report 125; New South Wales Report, paras. 255, 256, but *cf.* Report of the Wright Committee, *supra* n. 115.

139 *See Limitation Act, 1939,* 2 & 3 Geo. 4, c. 21, s. 23; *New South Wales Act,* Appendix D, s. 54, (2) *(b)* and *(c).*

CHAPTER VI SOME SPECIFIC PROBLEMS

A. The Crown

Although the ordinary citizen may be precluded from bringing an action once a relevant limitation period has expired, that is not necessarily true with respect to the Crown, which stands in a special position. This Commission has considered the legal position of the Crown in an earlier Report[1] and recommended appropriate reforms. In that Report the Commission made the following observations with respect to limitation of actions:[2]

> One of the basic prerogatives of the Crown at common law is the rule that the Crown is not bound by statute unless named or by necessary implication...
>
> An example of this prerogative is found in the rule that the Crown is not bound by limitation statutes. This means that the Crown may bring an action in contract, tort, etc., at any time, whereas an ordinary citizen is restricted by the relevant limitation periods. There is no reason why the valid purposes served by limitation statutes should not apply with equal vigour to the Crown.
>
> There is some doubt whether the Crown is entitled to the benefit of a statute of limitation as a defence to proceedings brought against it. It would appear the better opinion is that the Crown may take advantage of a limitation period. This is true because the rule that the Crown is not bound by statute may operate to the prejudice of the Crown.

The contention that the Crown may rely on statutes of limitation is fortified by section 14 of the recent *Crown Proceedings A ct,*[3] which reads:

> This Act shall not prejudice the right of the Crown to take advantage of the provisions of any Act of the Legislature; and, in proceedings against the Crown, any Act of the Legislature that could, if the proceedings were between persons, be relied upon by the defendant as a defence to the proceedings, whether in whole or in part, or otherwise, may, subject to any express provision to the contrary, be so relied upon by the Crown.

In British Columbia the common law position that the Crown is not bound to its detriment by limitation periods is supplemented by a section of the *Interpretation Act*[4] which provides:[5]

> No provision or enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby.

There is no provision in the *Statute of Limitations* which makes the Act as a whole binding on the Crown. Only section 48 is so binding. It is discussed below.

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1 Law Reform Commission of British Columbia, *Report on Civil Rights, Part 1 - Legal Position of the Crown* (L.R.C. 9, 1972).

2 *Id.*, at 63.

3 1974 British Columbia Bill (No. 6). The Bill had received second reading at the time this Report was signed.

4 R.S.B.C. 1960, c. 199.

5 S. 35.

The privileged position given to the Crown both at common law and under the *Interpretation Act* should not be retained, and we have recommended elsewhere that:

> The British Columbia *Interpretation Act* be amended to provide that the Crown is bound by every statute in the absence of express words to thecontrary.

We adhere to that recommendation.

If the foregoing recommendation were implemented, there would be little need in the proposed statute to specifically provide that the Crown is bound thereby. If in fact section 35 of the *Interpretation Act* continues to be the law in British Columbia, the proposed statute should specifically purport to bind the Crown.

The Commission recommends:

The proposed statute apply to proceedings by and against the Crown in the same way as it applies with respect to ordinary subjects.

The Report of the Ontario Law Reform Commission also considered the binding effect of limitations legislation on the Crown in its other aspects. That Report stated:[6]

> Section 30 of the *Interpretation Act* provides, in part:
>
> In every Act, unless the context otherwise requires ,..."the Crown" means the Sovereign of the United Kingdom, Canada and Her other Realms and Territories, and Head of the Commonwealth.
>
> [Section 24 (1) *(r)* of the British Columbia *Interpretation Act* contains a similar provision.]
>
> Notwithstanding this provision, it may be that a reference to the Crown in a statute of a province can be no more than a reference to the Crown in right of that particular province. It has been asserted that the constitutional position is that, as a general rule, a provincial legislature cannot enact legislation so as to defeat the right of the Crown in right of Canada. (See Laskin, *Canadian Constitutional Law,* 3rd ed., p. 544 *et seq*.) It may be that the same reasoning would apply to the Crown in right of another province.
>
> However, there may be room for arguing that if the Crown in right of Canada, or in right of another province, seeks relief in the provincial courts it would be bound by provincial procedural law. From a limitations point of view, this will depend on whether the particular limitations statutes are regarded as procedural for this purpose. If the extinguishment of right recommendation is adopted in Ontario, however, it is unlikely that the procedural argument could be relied on. Since the limitation law would then be substantive and have the effect, if applicable, of extinguishing the Crown's right, it might well be held not to apply to the Crown in right of Canada or some other province.
>
> Nevertheless, it may be argued that if the Crown in right of Canada is relying for its cause of action on the substantive law of the province, it cannot be selective and must take the burdens as well as the benefits of that law.
>
> The Commission believes that the Crown in all its capacities should be bound by the proposed statute to the extent that it is constitutionally possible.
>
> The Commission agrees with the position taken in the New South Wales Report which is (para. 62):
>
> It seems right that so far as other governments under the Crown have activities in New South Wales or are parties to proceedings in courts in New South Wales in relation to the limitation

6 Ontario Report 139.

> of actions. Without some such definition as this, the presumption may be that a reference in a New South Wales Act to the Crown would mean the Crown in right of New South Wales alone.
>
> The New South Wales Commission accordingly recommended that the "Crown" be defined as including:
>
> ...not only the Crown in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.
>
> The adoption of such a provision would achieve the desired result if it is constitutionally possible. If it should be held that the province cannot bind the Crown in all its capacities in this way, nothing will be lost.

This Commission agrees with the reasoning and conclusions of the Ontario Commission.

The Commission recommends:

The proposed statute apply not only to the Crown in the right of British Columbia but also so far as the legislative power of the Province permits, the Crown in all its other capacities.

The one section in the present *Statute of Limitations* which specifically purports to bind the Crown is section 48. That section places a limitation period of 60 years on actions by the Crown to recover land. That provision appears to be aimed mainly at giving the Crown special protection against those who would acquire an interest in Crown lands by adverse possession. The justification for section 48 has, therefore, almost disappeared.[7] Implementation of the recommendation contained in this Report that it should no longer be possible to acquire an interest in land by adverse possession would put the matter beyond all doubt.

B. Extinguishment of Right

In British Columbia the only statutory provision which specifically purports to extinguish a right once the limitation period has expired is section 41 of the *Statute of Limitations,* which provides:

> At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period shall be extinguished.

The expiration of a limitation period does, in practice, usually have the effect of extinguishing the right, although a few anomalous situations may still occur in which a creditor, who is otherwise statute-barred, can recover. The Commission has given careful consideration to the question of whether or not legislation should provide that every right, the enforcement of which is subject to a limitation period, is extinguished once the limitation period has expired.

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7 The 1970 amendments to the *Land Act* may not be wide enough to prevent the acquisition of title by adverse possession to land subject to registered ownership in the Crown as an "absolute fee." *See* definition of "Crown lands" in S.B.C. 1970, c. 17. *See generally* Chap IV, s. B *(c)* of this Report.

The Commission has concluded that such legislation is desirable.

This area has been so well canvassed by the Ontario Law Reform Commission in their *Report on Limitation of Actions* that any attempt in this Report to cover the same ground would only be repetitive and wasteful. Therefore, the portion of the Report of the Ontario Commission dealing with extinguishment of right is included with this Report as Appendix G. Subject to the observations which follow, this Commission adopts the reasoning, observations, and conclusions of the Ontario Report as its own.

One point which troubled the Ontario Commission was that the extinction of title provision would have to be co-ordinated with the extension of time procedure which has been recommended in cases where the potential plaintiff is not aware of his cause of action. This problem should not arise if this Commission's recommendation is adopted with respect to relief for the plaintiff who is not aware he has a cause of action. That recommendation was that the running of time be postponed until the plaintiff is aware, or ought reasonably to be aware, that he has a cause of action.[8]

The Ontario Report also raised the possibility that the extinction of right might enable a defendant to simply deny the right and title of the plaintiff in his pleading rather than specifically pleading the statute as the rules presently require.[9] This Commission feels that the rule which requires a defendant relying on a limitation period to specifically plead that provision is a sound one which should not be altered by the fact that the plaintiff's title or right has been extinguished.

The Commission recommends:

1. There be an extinguishment of right and title in all causes of action where the time limited for bringing an action has expired.

2. The foregoing recommendation should not be regarded as altering the requirement that a limitation period be specifically pleaded under Marginal Rule 211 of the Supreme Court Rules, 1961.

C. Conflict of Laws

Limitation periods may vary from jurisdiction to jurisdiction, and from time to time Courts are required to decide which of two or more limitation periods which are possibly applicable to a cause of action should be applied. There are two basic situations which are of concern to the Commission:

(a) Where a cause of action arises in British Columbia or would otherwise be governed by British Columbia law but the action is brought in a jurisdiction other than British Columbia; and

(b) Where a cause of action arises outside British Columbia or would

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8 *See generally* Chap. V, s. D.

9 *Supreme Court Rules, 1961,* 0. 19, R. 15, (M.R. 211).

otherwise be governed by the law of some jurisdiction other than British Columbia, but the action is brought in the British Columbia Courts.

The rules of private international law offer some assistance in dealing with such situations. At common law, statutes of limitation may be classified as procedural if the remedy only is barred, and as substantive if the right is extinguished. If a foreign limitation period has the effect of extinguishing a right, and so is classified as substantive law, the Court in which an action is brought may apply that foreign limitations law. On the other hand if the foreign limitations law bars only the remedy, and so is classified as procedural, the Court in which the action is brought will probably apply its own limitation law to the proceedings. [0]1

These conflict rules have been subject to criticism by the leading authorities.[11] One problem is that to draw a distinction between barring the remedy and extinguishing the right may be unrealistic. For most purposes of domestic law, nothing turns on the distinction. In private international law the distinction may achieve an importance which is not always deserved. The existing state of the common law may, in addition, encourage "forum shopping." The plaintiff who finds his action barred by a limitation law in the jurisdiction whose laws would normally govern the action may, if that limitation law is regarded as procedural, seek another forum where time is not yet expired and commence his action.[12] An added complication as the Ontario Commission pointed out, is that:[13]

> It is not always a simple matter for the courts of one jurisdiction to determine whether the limitations law of another jurisdictional is substantive or procedural. For example, if an Ontario court had to examine the limitations law of Germany, Egypt or China, it might well find different concepts and language make classification difficult.

The common law position, described above, has been altered by statute in British Columbia. Section 55 of the *Statute of Limitations* provides:

> In case any action shall be instituted in this Province against any person here resident, in respect of a cause of action or suit which has arisen between such person and some other person in a foreign country, wherein the person so sued shall have been resident at the time when such cause of action or suit shall have first arisen, such action shall not be maintained in any Court of civil jurisdiction in the Province if the remedy thereon in such foreign country is barred by any Statute or enactment for the limitation of actions existing in such foreign country.

Section 55 is a provision which is unique to British Columbia. It appears to have no counterpart in any Commonwealth jurisdiction. It first became law in 1868[14] and has changed

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10 *See generally* Ontario Report 133 *et. seq.*

11 *See,* e.g., Falconbridge, *Essays on the Conflict of Laws,* c. 12 (2nd ed.); Cheshire, *Private International Law* 585—588 (7th ed.).

12 Provided that Court will take jurisdiction.

13 Ontario Report 134.

14 *Limitation of Actions Ordinance, 1868,* [1st May, 1868]. *See* C.S.B.C. 1877, c. 107.

little since that time.

What conflicts rules should apply to limitation periods? While it is recognized that arguments can be made in favour of treating limitation laws as procedural,[15] the Ontario Commission felt that more desirable results would be achieved if they were regarded as substantive. As their Report stated:[16]

> This Commission has, however, already recommended that there should be a general extinguishment of right once time has run. The acceptance of that principle would in itself lead to improvements in the conflict of laws field. If the recommendations were implemented, courts, both in and outside of Ontario, would presumably classify the new Ontario statute as substantive and not procedural law, at least for the purposes of conflict of laws.

It has already been noted that section 55 of our *Statute of Limitations* permits the British Columbia Courts to apply foreign limitations laws in some cases, even if that law is procedural. Its policy seems to be to protect British Columbia residents and allow them to take advantage of a shorter foreign limitation period in some circumstances when the ordinary conflict of laws rules would make the domestic limitation laws applicable. Section 55, however, is somewhat narrow and will not permit the application of a foreign limitation period in some situations where it might logically be applied. Two examples will illustrate this:

1. *A* is a British Columbia manufacturer of anvils. His salesman *B,* while attempting to make a sale to *C* in Alberta, negligently drops his sample case on *C*'s foot, injuring him. Five years later *C* sues *A* in a British Columbia Court *(B* being impecunious and *A* being vicariously liable). The limitation period for such an action is two years in Alberta and six years in British Columbia. As *A* was not resident in Alberta when the cause of action arose, the two-year limitation period (assuming it is procedural only and not substantive) could not be raised by him as a defence under section 55. The common law rule prevails.
2. Satisfying *C*'s judgment leaves *A* short of working capital, so he arranges to borrow, from *D,* an Alberta businessman, $10,000 repayable at Calgary in one year. The promise to repay is contained in a sealed document. *A* fails to repay and 19 years later is sued on the covenant by *D* in British Columbia. Assuming that the contract would be governed by Alberta law and *A* was not resident in Alberta when the cause of action arose, the six-year limitation period provided by *The Limitation of Actions Act* of Alberta would not be available to *A.* The 20-year limitation on specialties provided by British Columbia law would govern.

Those examples assume the foreign limitation is shorter than that provided under British Columbia law. What is the situation when an action would be barred by British Columbia law, but not the law of foreign jurisdiction where the cause of action arose? For example:

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15 The argument is that when a foreign limitation law is formulated other procedural laws such as rules of evidence, etc., are considered in arriving at an appropriate period. If a dispute is to be determined in accordance with domestic procedural rules, which may be different, the period selected may no longer be as appropriate and the domestic limitation period formulated in accordance with domestic procedural rules should prevail.

16 Ontario Report 135.

J slanders *K*. Both are resident in England and the slander occurs there. One year later *J* emigrates to British Columbia. Four years later *K* commences an action in British Columbia against *J*. The limitation period with respect to slander is six years in England and two years in British Columbia.

The answer seems to be that while section 55 would have made the English limitation period a good defence had it been shorter than that in force here and expired, nothing in that section purports to deprive a defendant of a defence which he would otherwise have. It merely makes an additional defence available to him.

Another difficulty attached to section 55 is determining what is meant by the word "resident." Must a person be in British Columbia or a foreign jurisdiction with some degree of permanence before he is "resident" for the purpose of the section, or is mere physical presence within the jurisdiction, however transitory, sufficient? There appear to be no cases specifically on point. Mere physical presence of a defendant within the jurisdiction is certainly sufficient for a British Columbia Court to take jurisdiction over an action generally. [7]1

If some degree of permanence is required to be "resident," then the operation of section 55 is fairly restricted, particularly with respect to tort actions. The British Columbian who commits a tort while passing through another jurisdiction could not be said to be a resident there. Consequently, if he were sued in British Columbia the foreign limitation law would not be available to him. Similarly, the person who pays a fleeting visit to British Columbia, and finds himself served with a writ claiming damages for a tort which he committed in his home jurisdiction cannot plead the foreign limitation law (assuming it barred the remedy only) as he would not be a person "here resident" within section 55. On the other hand, if mere physical presence is all that is required to constitute a "resident," the foreign limitation law would be available in both situations.

It might be argued that the policy embodied in section 55 is justified but that its emphasis is misplaced. To make residence the test of when a foreign limitation law should apply is to ignore the realities of modern travel and the multiplicity of situations which can arise in which the law which should govern a dispute may be unrelated to the residence of the parties. This argument leads to the conclusion of the Ontario Commission that when a Court determines that a dispute should be resolved in accordance with the law of another jurisdiction, the limitations law of that other jurisdiction should be available as a defence in all cases.

Should the recommendation of the Ontario Commission be adopted in British Columbia? It is enticing and capable of yielding desirable results. Consider the following situation:

A and *B* are Alberta residents. *A* lends *B* $10,000 and the promise to repay is

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17 The Court does, however, have a discretion to decline jurisdiction or stay or dismiss an action to prevent the administration of justice being perverted for an unjust end. *See* Dicey & Morris, *The Conflict of Laws* 170, 1081 (8th ed., 1967).

contained in the document under seal. The loan is not repaid. Nineteen years after the loan was due *B* emigrates to British Columbia.

Under the existing law the six-year Alberta limitation period would probably be characterized as procedural and if an action on the debt were brought in a British Columbia Court in the 19th year, ignoring for the moment the effect of section 55, the present British Columbia limitation period of 20 years would apply. In effect, a debt which for all practical purposes had been dead for 13 years would be revived. If, however, the recommended Ontario provision were in force (and in fact under section 55 of the Act), the Alberta limitation period would be available as a defence. This seems the most sensible result in this instance.

On the other hand, excluding British Columbia limitations laws in favour of foreign limitations laws may yield undesirable effects. For example:

> *A,* a resident of Vancouver, while vacationing in Banff, Alberta, is assaulted by *B,* a local resident. *A*'s injuries seem superficial, but five years later new symptoms develop and he discovers that his injury was, in fact, severe. *B* comes to British Columbia and *A* sues him in a British Columbia Court.

The substantive law which would govern in this action is probably that of Alberta. If the Alberta limitation law were also to be applied, as would be the case under the Ontario recommendation, the action would be statute-barred two years after the assault. If, however, British Columbia limitations laws (amended in accordance with the recommendations made in this Report) applied, time would start to run only after the more serious injury was discovered and the plaintiff would be able to bring action in time. In this case justice seems best served by the application of the British Columbia laws, which would be excluded if the Alberta limitation law was deemed to be substantive.

Other arguments of a theoretical nature can also be mounted against the Ontario recommendation. It may be said that a British Columbia conflict of laws rule which required its Courts to classify all foreign limitation periods as substantive would be tainted with the defect of extra-territoriality. It may also be argued that such rule might discriminate against British Columbia citizens as it would open up our Courts to foreign litigants in causes which would fail if brought under British Columbia laws. The logical conclusion of such arguments is that a British Columbia Act governing limitations should contain no provision governing conflict of laws but rather allow the common law rules to develop and take their course.

While we recognize that private international law is a rapidly developing area, we are not satisfied that the precedents which bind British Columbia Courts will permit them to reach a just conclusion in every case. On the other hand, it may be undesirable to crystallize the position in accordance with the Ontario recommendations. We see the interests of justice being served not by a conflicts provision which lays down substantive rules, but, rather, by one which gives the Courts flexibility and latitude to reach a just conclusion in circumstances where the existing rules of private international law would dictate an opposite conclusion.

In this context one further problem has been recognized. In this Report we recommend that once a limitation period expires the cause of action be extinguished. This will normally result in British Columbia limitations laws being classified as substantive for the purposes of private international law. It has been suggested that "if the statute of the *lex causa* is procedural and that of the *lex fori* substantive, . . . neither applies, so that the claim remains perpetually enforceable."[18] This is a result which should be avoided.

The Commission recommends:

Where, in an action heard in a British Columbia Court, it is determined that the law of another jurisdiction is applicable and the limitations laws of that jurisdiction are, for the purposes of private international law, classified as procedural, the Court may, but shall not be bound to apply, the appropriate British Columbia limitation period and may apply the foreign limitation period if it produces a more just result.

D. Ultimate Limitation Period

Earlier in this Report reference was made to the possibility of providing an ultimate limitation period. The New South Wales Law Reform Commission recommended that after 30 years had expired an action would be statute-barred, notwithstanding any disability, confirmation, fraud, or lack of knowledge of the cause of action.

The notion of an ultimate limitation period is not a complete innovation. Section 30 of the British Columbia *Statute of Limitations* provides that, notwithstanding a continuing disability or succession of disabilities, no action shall be brought to recover land after 40 years from the time the right accrued. Is such an ultimate bar, applicable to all causes of action, and capable of overriding any confirmation, lack of knowledge, and fraud desirable? The introduction to this Report contained a reference to a statute of limitation being referred to as "an act of peace." This Commission feels that an ultimate bar is in accordance with the purposes of limitations legislation; that at some point in time the possibility of litigation should be dead. As the New South Wales Report stated:[19]

> We think, however, that, quite apart from questions of title to land, a statute of limitations ought not to allow an indefinite time for the bringing of actions even if the disabilities and other matters dealt with in Part III of the Bill do exist. These disabilities and other grounds of postponement may well be outside the knowledge of the defendant and we think it right that, after a period of thirty years has elapsed, there should be no further postponement of the statutory bar on any ground.

This Commission agrees that an ultimate bar is desirable and that 30 years is an appropriate period of time.

The Commission recommends:

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18 *See* Dicey & Morris, *The Conflict of Laws* 1095 (8th ed., 1967).

19 New South Wales Report, para. 241.

The proposed statute contain an ultimate limitation period of 30 years, beyond which no action (except those actions which should be subject to no limitation period at all) may be brought, notwithstanding any disability, confirmation, or postponement of the running of time.

E. Interest on Statute-barred Debts

Where interest on a debt runs until that debt is repaid, and an action to recover the principal amount of the debt becomes statute-barred, it does not necessarily follow that all accrued interest becomes statute-barred at the same time. If, for example, a loan, repayable in year one bearing interest before and after maturity is not repaid, the debt will become statute-barred six years later up to the time it became statute-barred. Should the creditor, eight years later, be permitted to press a claim for interest which accrued during the last four years before the claim for principal became statute-barred?

This issue arose in *Elder* v. *Northcott.*[20] After a review of the authorities, Klausen, J. held that such interest was not recoverable. This seems a sensible result. It is undesirable that an obligation to pay money should be permitted to "die by inches."

If a limitation period is to operate at all, its operation should be clean and completely terminate all obligations between persons which may arise out of a particular transaction, including a right to recover interest, even though only a relatively short period of time may have elapsed since interest last accrued. The rule in *Elder* v. *Northcott* should be given statutory expression. This has been done in the New South Wales Act. Section 24 (2) provides:

> An action on a cause of action to recover arrears of interest on principal money is not maintainable if brought after the expiration of the limitation fixed by or under this Act for an action between the same parties to recover the principal money.

The proposed statute should contain a comparable provision.

The Commission recommends:

The proposed statute provide that once proceedings to enforce a claim for the payment of principal money have become statute-barred, an action to recover arrears of interest on that principal money shall also be statute-barred.

F. Transition

We do not see transition between the existing *Statute of Limitations* and a new Act implementing the recommendations made in this Report presenting serious problems. Some specific situations must, however, be considered and special provision made where the immediate application of a new Act might produce unfair results.

All transition problems could be eliminated by providing simply that the new Act apply

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20 [1930] 2 Ch. 422.

only to causes of action which accrue after it comes into force. This approach would, however, have an undesirable effect. It would require that the rights of parties whose rights accrued before a new Act came into force be determined with reference to an Act which had been repealed. The repealed Act might, therefore, continue to have effect, albeit limited, for a lengthy period of time. For example, if a new limitations Act were to be passed in 1974 and one day before it came into force a cause of action to foreclose a mortgage on land accrued to a person who was *non compos mentis,* assuming that person never became of sound mind, his rights would remain alive, under section 30 of the repealed Act, for 40 years. This is comparable to, in 1974, ascertaining the rights of a person by referring to the Revised Statutes, 1924 to determine the contents of legislation which was repealed in 1934. This example is extreme but it does illustrate the nature of the problem.

We are of the opinion that, as a general rule, any person whose rights are affected by statute should be able to ascertain those rights without referring to legislation long ago repealed and have therefore concluded that a new Act should apply to actions which accrued before it comes into force.

The Commission recommends:

New limitations legislation apply to causes of action which accrued before it comes into force.

The application of the foregoing recommendation must be modified with respect to situations in which a new limitation period is longer than that which formerly governed a cause of action, if the old limitation period had expired before the new legislation comes into force. We have concluded that it would be unfair to defendants to allow rights of action to be revived by the enactment of new limitations laws if time had previously expired. Once a person receives the protection of the existing *Statute of Limitations* he should be able to order his affairs without the worry that he may be deprived of that protection by subsequent limitations legislation.

The Commission recommends:

The enactment of new legislation not revive any right of action which had previously become statute-barred.

Another problem may emerge when the new limitation period is significantly shorter than the present one. For example, if the present 20-year limitation period for actions on judgments were reduced to 10 years, what should be the position of the plaintiff having an 11-year-old judgment? Clearly, he should not find his action immediately statute-barred upon the enactment of the new legislation. Nor, if nine years and eleven months had passed since judgment was obtained, should find his action statute-barred after one month. Some sort of "buffer" seems desirable to cushion the impact of a shorter limitation period. In our opinion the potential plaintiff should have two years after the enactment of new legislation to bring an action where a new and shorter limitation period would have expired either before or within two years of the coming into force of that new legislation. Where, however, the old limitation period would expire within that two-year period, the rights of the potential plaintiff should continue to be

governed by the existing limitation period.

The Commission recommends:

If, with respect to any cause of action which arose before new limitations legislation comes into force, the limitation period provided by that legislation is shorter than that which presently governs the cause of action, and would expire on or before two years from the date at which the new legislation comes into force, the limitation period which governs that cause of action should be the shorter of

(a) two years from the date the legislation comes into force; or

(b) the limitation period which presently governs the cause of action.

In our view, transition provisions which incorporate the principles recommended in this section will give immediate effect to new limitations laws without visiting any serious inequities on persons affected by them.

CHAPTER VII SPECIAL LIMITATION PERIODS

A. General

There are over one hundred special provisions in the private and public statutes of British Columbia which set limitation periods on the bringing of civil actions or claims of various sorts. [1] In almost all cases the time limits specially provided are relatively short. It is not easy to develop a coherent approach to the problems presented by the multiplicity of special limitation periods. One difficulty lies in attempting to classify those periods. It is felt that this Report should properly deal only with "true limitation periods" which govern the bringing of an action as opposed to periods governing interlocutory proceedings, appeal proceedings, or quasi-criminal proceedings. Accordingly, the Commission has excluded from this Report a consideration of time limits

(a) on the bringing of appeals of any kind;
(b) on proceedings by way of applications to quash by-laws, debenture issues, share issues, etc., of municipalities or companies;
(c) for challenging elections at the municipal and Provincial level;
(d) on the prosecution of offences under Provincial legislation.

It is thought that these are not true limitation periods governing actions where the result could be the successful recovery of property or money damages by the plaintiff. Once the "true" limitation periods have been identified there is still the difficulty of considering each individual limitation period to determine whether its retention is justified and what the effect of its repeal would be. Where should the onus lie in such deliberations? Should those who benefit from the existence of a special limitation period be required to justify its existence, or should those who seek to repeal an existing limitation period be required to justify that repeal? How should limitation periods be treated which govern the exercise of a right or remedy which does not exist in common law but is created by the statute containing the limitation period?

From a consideration of these and related problems certain principles emerge:

1. There should be as few special limitation periods as possible, for the following reasons:
   (a) The public will be best served by having limitation laws that are easily understood and well known.
   (b) There will be a reduction in the difficult problems of statutory interpretation regarding the scope of a special limitation period.[2]
   (c) There would be a reduction in the number of cases in which the Courts would have to decide which of several limitation periods which might

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1 Included in Appendix F is the text of all special limitation periods and notice provisions affected by recommendations made in this Report.

2 An apt example may be found in the cases construing the special limitation period provided in the *Consolidated Railway Company's Act (B.C.),* 59 Vict., c. 55, which incorporated the B.C. Electric Railway Co. *See Green* v. *B.C. Electric Rly.,* (1906) 3 W.L.R. 347; *B.C. Electric Rly.* v. *Turner,* (1914) 49 S.C.R. 470; *Compton* v. *B.C. Electric Rly.,* (1909) 10 W.L.R. 377; *Sayers* v. *B.C. Electric Rly.,* (1906) 12 B.C.R. 102.

seem to cover a particular fact situation is applicable.[3]

2. Where a special limitation period protects a particular class of defendants such as a professional group, its retention is usually not justified.
3. Some special limitation periods appear to have been provided because the period which would otherwise apply is too long. This is especially true with respect to claims for personal injury and property damage. In cases where most of the actions which would fall into a general limitation period which this Commission has recommended be shortened, the justification for the special limitation period may no longer exist. In such cases, its repeal is generally warranted.
4. When an Act creates rights which do not exist at common law, such as those under the *Mechanics' Lien Act,*[4] or provides for a fund for certain claims and gives rights against that fund, a special limitation period is probably justified.[5]
5. Notwithstanding the previous point, if the claim is one which, in the absence of the special limitation period, would be governed by the proposed six-year "catch-all" period and the six-year period is not inappropriate, repeal of the special limitation period might be considered.

B. Professional Groups

There are a number of professions which receive the protection of special limitation periods. One of the purposes of such a shorter limitation period is to enable those against whom actions may be brought to preserve evidence and thus better protect themselves. The Commission feels that in most cases the general limitation periods recommended in this Report will afford adequate protection. In addition there are many professional, or would-be professional groups in the Province, who rightly look at the special protection given to others as being quite unfair to themselves. We favour the repeal of such special limitation periods. This is quite consistent with the approach taken by the Ontario Law Reform Commission.[6]

The Commission recommends:
The special limitation periods in the following Acts be repealed:
(a) Chiropody Act (Podiatry Act), *R.S.B.C. 1960, c. 53, s. 20;*

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3 In *Kearney* v. *Queen Charlotte Airlines Ltd.,* (1954) 14 W.W.R. 302, an aeroplane crashed, killing a male adult pilot and an infant child. The personal representatives of the child sought to bring an action under the *Families' Compensation Act* against the personal representatives of the pilot. At that time, the applicable limitation periods were one year under the *Families' Compensation Act* and six months under the *Administration Act.* It was held that the action was governed by the shorter limitation period provided by the *Administration Act.*

4 R.S.B.C. 1960, c. 238.

5 For instance, this Commission has recommended that a special limitation period of one year should be imposed in respect of all claims by a beneficiary under the trust which is imposed on moneys in the hands of a contractor or subcontractor. The period for pursuing claims under trusts which arise in other ways is, of course, much longer. *See* Law Reform Commission of British Columbia, *Report on Debtor Creditor Relationships, Part II—Mechanics' Lien Act: Improvements on Land* 99 (LRC 7, 1972).

6 *See* Ontario Report 84.

(b) Chiropractic Act, *R.S.B.C. 1960, c. 54, s. 14 (2);*
(c) Dentistry Act, *R.S.B.C. 1960, c. 99, s. 65;*
(d) Medical Act, *R.S.B.C. 1960; c. 239, s. 82 (1);*
(e) Registered Nurses Act, *R.S.B.C. 1960, c. 335, s. 33;*
(f) Veterinary Medical Act, *S.B.C. 1967, c. 55, .v. 33, as amended; S.B.C. 1970, c. 49, s. 1;*
(g) Pharmacy Act, *R.S.B.C. 1960, c. 282, s. 57.*

C. Public Officers

Section 11 of the *Statute of Limitations* provides:

> (1) That no action shall be brought against any Justice of the Peace for anything done by him in the execution of his office, unless the same be commenced within six calendar months next after the act complained of shall have been committed; and all actions against Justices for penalties incurred by them, under any law or Statute for the time being in force, wherein no other period of limitation is provided, shall be commenced within six months next after the cause of action accrued.
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> (2) Where no time is specially limited for bringing any action in the Act or law relating to the particular case, no action shall be brought against any person for any act done in pursuance or execution, or intended execution, of any Act of the Legislature, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, unless the action be commenced within twelve months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within twelve months next after the ceasing thereof.

This provision, although contained in the *Statute of Limitations,* has all the characteristics of a special limitation period. This provision can be a source of injustice.[7]

There seems to be little reason for its retention. Legislation comparable to section 11 of the *Statute of Limitations* has been repealed in England.[8] The Ontario Law Reform Commission has recommended that similar legislation be repealed in that jurisdiction.[9]

> The Commission recommends:
> *Section 11 of the* Statute of Limitations *not be retained.*

D. Other Bodies

Special protection is frequently given to public bodies such as municipalities and cities. To the extent that such special limitation periods deal with activities which are not normally undertaken by other than public bodies, such as the exercise of expropriation powers, the limitation period may be justified. Less defensible is the blanket limitation period which provides

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7 *See Page* v. *Zorn,* Nanaimo Registry No. 180/1970, May 30, 1972 (unreported). *See also Duncan* v. *Board of School Trustees of Ladysmith,* (1930) 43 B.C.R. 154, *supra* Chap. V, s. C, n. 25.

8 *Law Reform (Limitation of Actions, & c.) Act, 1954,* 2 & 3 Eliz. 2, c. 36.

9 *See* Ontario Report 84.

general protection against all actions in tort or contract which are not brought within a relatively short period of time. An example of such a provision may be found in section 738 (2) of the *Municipal Act,*[10] which states:

> (2) All actions against any municipality, other than those mentioned in subsection (1), shall be commenced within one year after the cause of such action shall have arisen, or within such further period of time as may be designated by the Council in any particular case, but not afterwards.[11]

Similar provisions may be found in the *Vancouver Charter.*[12]

Other Acts provide short limitation periods with respect to actions against certain types of institutions. Gas utilities,[13] hospitals,[14] school boards,[15] and railways[16] all receive special protection. In other cases, certain public bodies specifically constituted or incorporated by statute are protected by a special limitation period. The British Columbia Hydro and Power Authority[17] and the Greater Nanaimo Sewerage and Drainage District [18] are examples of such public bodies.

A number of private companies also enjoy the protection of special limitation periods. Around the turn of the century a large number of private companies were incorporated by special Acts to construct undertakings relating to railroads, electric power, and telephones. Many of the incorporating Acts contained a special limitation period of 12 months with respect to actions for damage or injury. Some of these companies, such as the West Kootenay Power and Light Company,[19] are still quite active. Others which have been provided for are now defunct or have been absorbed into other companies. Still others, presumably, "never got off the ground." The fates of such companies as the Goat River Water, Power and Light Company[20] are lost in the mists of time.

How far should bodies such as the ones described above be protected by special limitation periods? An argument can be made that such bodies occupy a special position, either because of the functions which they perform, such as hospitals, municipalities, or dyking authorities; or

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10 R.S.B.C. 1960, c. 255.

11 S. 738 (1) provides a six-month limitation period with respect to actions against a municipality for unlawfully doing anything purporting to have been done under the powers conferred by the Act which might have been lawfully done if acting in the manner prescribed by law.

12 S.B.C. 1953, c. 55 (as amended).

13 *See Gas Utilities Act,* R.S.B.C. 1960, c. 164, s. 31.

14 *See Hospital Act,* R.S.B.C. 1960, c. 178, s. 36.

15 *See Public Schools Act,* R.S.B.C. 1960, c. 319, s. 104 (1).

16 *See Railway Act,* R.S.B.C. 1960, c. 329, s. 271 (1).

17 *See B.C. Hydro and Power Authority Act,* 1964, S.B.C. 1964, c. 7, s. 52 *(b).*

18 *See Greater Nanaimo Sewerage and Drainage District Incorporation Act,* S.B.C. 1959, c. 100, s. 66.

19 *See West Kootenay Power Co. Incorporation Act,* S.B.C. 1897, c. 62, s. 34.

20 *See Goat River Water Power and Light Company Incorporation Act,* S.B.C. 1909, c. 53.

because, like railways and power companies, they play a special role in the economy of the Province. It might be argued that such bodies would be reluctant to undertake their present functions unless they received certain statutory protection which would not otherwise be available to them. The Commission finds such arguments unconvincing. It is not difficult to point to other bodies and organizations which carry on important public or economic functions and do not enjoy special protection but have not been deterred. Moreover, it seems unfair that the ordinary mining company incorporated under the *Companies' Act* should be subject to the longer general limitation periods, while others such as Granby Consolidated Mining, Smelting and Power Company[21] which happened to have been incorporated under a special Act should receive special protection.

It should also be noted that a number of these special limitation periods appear to be aimed at claims for personal injury or property damage. This Commission has recommended that the limitation period for such claims be reduced to two years, and so repeal of these special limitation periods should not work any undue hardship on these bodies in these circumstances.

The mechanics of repealing the special limitation periods contained in the multiplicity of private and semipublic Acts presents special problems. It is, of course, possible to compile an exhaustive list of the limitation periods provided by such Acts and recommend their repeal. However, the large number of incorporating Acts and the extent to which some of them have been extensively amended[22] make the economics of such an undertaking questionable. In addition, if that were done, the present status of each body should be ascertained: there is little point in specifically recommending the repeal of a limitation period which protects a company which is now defunct. The Commission feels that the desired reform could be effected by a general provision.

The Commission recommends:

1. Where any Act which incorporates or constitutes a body or corporation provides a special limitation period with respect to actions against that body or corporation, that limitation period should no longer continue to afford any defence to actions against that body or corporation.

2. Notwithstanding the generality of the foregoing recommendation, the special limitation periods contained in the following Acts be repealed:

(a) British Columbia Hydro and Power Authority Act, 1964, *S.B.C. 1964, as amended, c. 7, s. 52B;*

(b) Hospital Act, *R.S.B.C. 1960, c. 178, s. 36;*

(c) Industrial Transportation Act, *R.S.B.C. 1960, c. 192, s. 29 (1);*

(d) Municipal Act, *R.S.B.C. 1960, c. 255, s. 738 (2);*

(e) Public Schools Act, *R.S.B.C. 1960, c. 319, s. 104 (1);*

(f) Railway Act, *R.S.B.C. 1960, c. 329, s. 271 (1);*

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21 *See Grandby Consolidated Mining, Smelting and Power Company Ltd. Incorporation Act,* S.B.C. 1901, c. 75, s. 34.

22 For example, the special limitation period in the *Greater Victoria Water District Act* was only provided by an amendment to the Act some years later.

(g) Greater Victoria Water District Act, *S.B.C. 1922, c. 28, s. 82 (as amended); S.B.C. 1948, c. 102, s. 18;*

(h) Greater Nanaimo Sewerage and Drainage District Incorporation Act, *S.B.C. 1959, c. 100, s. 66;*

(i) Greater Vancouver Sewerage and Drainage District Act, *S.B.C. 1956, c. 59, s. 63;*

(j) Greater Campbell River Water District Act, *S.B.C. 1926, c. 77, s. 66;*

(k) Vancouver Charter, *S.B.C. 1953, c. 55, (as amended); ss. 294, 294A;*

(1) Gas Utilities Act, *R.S.B.C. 1960, c. 164, s. 31;*

(m) Department of Highways Act, *R.S.B.C. 1960, c. 103, s. 20;*

(n) Department of Public Works Act, *R.S.B.C. 1960, c. 109, s. 18;*

(o) Chilliwack Dyking District Act, *S.B.C. 1949, c. 9, s. 16;*

(p) Water Act, *R.S.B.C. 1960, c. 405, s. 48;*

(q) Drainage, Dyking, and Development Act, *R.S.B.C. 1960, c. 121, s. 89 (2);*

(r) Land Registry Act, *R.S.B.C. 1960, c. 208, s. 224 (2);*

(s) Mental Health Act, *1964, S.B.C. 1964, c. 29, s. 19 (2);*

(t) Provincial Elections Act, *R.S.B.C. 1960, c. 306, ss. 173, 285;*

(u) Public Inquiries Act, *R.S.B.C. 1960, c. 315, s. 7 (2).*

E. Other Civil Actions

The foregoing recommendations have dealt with special limitation periods governing the bringing of actions against identifiable defendants or groups of defendants. Other special limitation periods exist which are defined with reference to the nature of the action itself. Some of these limitation periods govern actions to which an existing general limitation period would otherwise apply. For the most part, however, they pertain to actions which would not lie in the absence of statute. Such actions would not, at present, be subject to any limitation period unless special provision were made. The Commission feels that a number of these special limitation periods of both types should be repealed or altered. A more detailed consideration follows.

(a) Actions to Which An Existing Limitation Period Would Otherwise Apply

Section 79 of the *Motor-vehicle Act* provides a limitation period of 12 months with respect to actions for damages "occasioned in an accident involving a motor-vehicle." In the absence of that special limitation period the majority of such actions would be governed by a limitation period of six years. There is no doubt that a period of six years is unduly long and in our proposals published in *The Advocate* we invited special comment on short limitation periods.

Surprisingly, no response was received from the Insurance Law subsection of the British Columbia branch of the Canadian Bar Association nor from any representatives of the insurance industry *per se.* Informal discussions between some individual members of the insurance bar and Commission personnel revealed no opposition to the lengthening of the limitation period governing motor-vehicle claims to two years and, in fact, there was significant support for such a change.

The written comments which we received at the time indicated a significant preference for a general two-year period governing personal injury and property damage actions, with no exception for motor-vehicle actions. It was regarded as fairer from the point of view of potential defendants.

Utmost in the minds of many of those who responded was the fact that the main beneficiaries of the one-year limitation period were insurance companies. As one respondent stated:

> In most cases a personal injury involving insurance companies, the representatives of the insurance company are well aware within the one year period that the injured party is anticipating making a claim. For example, the injured party may have consulted a lawyer who had several brief discussions with an adjuster. In my opinion, it is completely unjust and unsupported by any principle upon which you justify limitation periods that the insurance company can say a day or two after the expiration of the one year period—"you have failed to commence an action within the one year period, therefore we will not consider any further discussions about paying your claim."

Another respondent put it this way:

> The only advantage of an early limitation period in these circumstances, is that if the plaintiff fails to sue, the motor insurance carrier is let off the hook. This in my view is not in the public interest.

In 1973 the situation in British Columbia with respect to motor-vehicle insurance was radically altered by the creation of the Insurance Corporation of British Columbia.[23] Effective March 1, 1974, that Corporation is the sole carrier of automobile insurance in the Province.[24] The views of the Corporation were sought in December 1973 concerning the possible repeal of this special limitation period.

No reply was received from the Corporation, *per se,* but a letter was received from J. A. Margach, Q.C., Deputy General Counsel and Chief Counsel: Litigation for the Corporation setting out his personal views on this question. His letter stated, *inter alia:*

> [I]t [is] totally unnecessary, and indeed harmful to the general good, to consider any enlargement of the present limitation.
>
> [T]he general good is best served by getting the matter out of the hands of amateurs, and into the hands of counsel at the earliest possible time; particularly when the rules of court permit the expiration of a further twelve months before the service of a writ. In any case where further time is needed in order to evaluate proper damages based upon a stabilized medical condition an adjournment is always easily obtainable.

We do not find this reasoning entirely convincing. The logical extension of the argument is that

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23 *Insurance Corporation of British Columbia Act,* S.B.C. 1973, c. 44.

24 *See Automobile Insurance Act,* S.B.C. 1973, c. 6, s. 8B.

the limitation period should be further abridged to six or perhaps even three months. We would find this untenable. Moreover, we are not persuaded that the legal profession should enjoy any particular monopoly in the settlement of claims. Is it really in the best interest of the plaintiff in every case to force him to seek the services of a lawyer at an early stage?

Mr. Margach's observations also recognize that further time is often needed for a medical condition to stabilize so damages may be evaluated. This supports an argument that a longer limitation period may be desirable. As one respondent put it:

> [I]t is my view that the one year limitation is not practical. I say this because the self-interest of the claimants results in over 90 per cent of all claims being settled before the expiration of a year from the time of the accident. The remainder of those which can not be settled by reason that the claimant's injuries are not yet capable of being settled, or being set down for trial. The evidence of the doctors as to the claimant's degree of recovery is a thing that in continually changing as the person recovers or undergoes surgery, etc. It is therefore impossible to proceed to trial before the doctors indicate the person has completely recovered, or that his condition is static. This fact constitutes the fundamental difference between a motor-vehicle claim and almost all other claims—namely that in the latter, the evidence becomes available all at once and may be preceded or sued upon at once . . . however, in the case of a continually developing claim, as one involving personal injuries the evidence is not available with which to settle or sue and I think for this reason no harm will be done if the limitation period is extended.

To say that "an adjournment is always easily obtainable" does not meet the foregoing analysis in a wholly satisfactory fashion.

In the final analysis the reasons advanced in favour of retaining this special limitation period are not in accord with what we conceive to be the basic policy reasons which justify limitation periods. As another respondent stated:

> As long as the defendant therefore, and his insurance company, know of the continued pressing of the claim by the plaintiff, it seems to me a completely artificial situation to say that everyone's memory remains fresher, greater peace in the community is created, etc., etc. by the issuance of a writ that no one intends to proceed with.

We are persuaded that claims arising out of motor-vehicle accidents should not be excepted from the general two-year limitation period with respect to personal injuries and property damage proposed in Chapter III.

The Commission recommends:

The special limitation period provided by section 79 of the Motor-vehicle Act *be repealed.*

A number of special limitation periods are provided in the *Insurance Act.* The effect of these limitation periods is to limit the time within which the insured, or person otherwise entitled to the benefit of an insurance policy, may bring an action against the insurer. In most cases the

limitation period is one year, with time running from either the occurrence of the loss or damage[25] or from the filing of a proof of claim.[26] In some cases proofs of claim must be filed quite promptly after a claim arises.[27] A one-year limitation period is also imposed with respect to certain special benefits payable arising out of automobile accidents[28] and actions against insurers by the third party to have insurance money applied to his claim.[29] In the latter case time runs from the final determination of an action on the claim against the insured.

Is the retention of the special limitation periods in the *Insurance Act* justified? The obligation to pay money under a contract of insurance is one to which a six-year limitation period would normally apply. Why should the insurance industry receive the benefit of a one-year limitation period which is denied to other economic institutions?

A number of arguments can be made in favour of their retention. Although insurance is essentially a contractual matter, the event upon which money becomes payable is normally one involving some sort of damage to a person or property. The insurance company called upon to defend such a claim faces evidentiary problems essentially similar to those which would be encountered by a defendant being sued on the same facts. This Commission has recommended a two-year limitation period in the latter case. The reasoning behind that recommendation suggests that a shorter limitation period is justified with respect to insurance contracts which turn on personal injury or property damage. It should be noted that with respect to life insurance contracts a longer limitation period of six years is provided by the *Insurance Act.*

It may also be argued that the special limitation periods should be retained because a settled practice involving standard form agreements has developed in reliance on them. It is also true that a certain uniformity between jurisdictions now exists which should, perhaps, be maintained. *The Insurance Act*[30] of Ontario contains provisions essentially similar to our own and the Ontario Law Reform Commission in considering special limitation periods recommended that those provisions be retained.[31]

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25 *See* R.S.B.C. 1960, c. 197, s. 208, *Statutory Condition* 14 (Fire Insurance), and s. 223, *Statutory Condition* 3 (Automobile Insurance).

26 *See* s. 184 *Statutory Conditions* 10 and 12 (Accident and Sickness Insurance), s. 150 (1) (Life Insurance). *See also* s. 23, which imposes general one-year period after proof of claim applicable to all contracts of insurance.

27 If the claim is under an accident or sickness insurance policy, notice of the claim must be given within 30 days and a proper proof of claim filed within 90 days, although there is some flexibility if those time limits cannot be reasonably complied with. *See* s. 184, *Statutory Condition 7.* No time limit is provided with respect to proof of claim on the life insurance policy; however, an outside limitation period of six years is imposed on the commencement of an action, and such an action cannot be commenced unless a proof of claim had been filed no less than 60 days earlier. *See* ss. 150 (1) and 23.

28 *See* s. 250B. *See also* 2nd Schedule, s. B, *Special Provisions,* s. 7 *(c).*

29 *See* s. 241 (2).

30 R.S.O. 1970, c. 244.

31 Ontario Report 86.

This Commission has concluded that special limitation periods with respect to actions against insurers should be retained in the *Insurance Act;* however, the periods specified should be consistent with the limitation periods which would apply if the event upon which the insurance money becomes payable is accident, sickness, fire, or automobile accident and were the result of a tortious act.

The Commission recommends:

Special limitation periods be retained in the Insurance Act, *but the Act be amended to make the limitation periods applicable with respect to contracts of insurance relating to accident, sickness, fire, and automobile accident consistent with the limitation periods which would be applicable in an action against a tortfeasor by the insured if the event upon which the insurance money became payable were the result of a tortious act.*

(b) Rights Created by Statute

It was observed earlier in this chapter that when an Act provides rights which do not exist at common law and specifies a limitation period with respect to the enforcement of those rights, the limitation period is probably justified. Nonetheless, in some cases the rights created are closely analagous with those which exist and are enforceable at common law. In those cases it is felt that a desirable degree of consistency may be attained if the limitation periods governing such actions are the same as those which govern their common law counterparts. In cases where the limitation period which we feel to be appropriate would be the one which would otherwise apply under the proposed statute, all that would be required is the repeal of the special limitation period. In some cases special provision for the action might be required in the proposed limitation statute itself.

In 1973 a new *Companies Act* [32] was enacted. Section 41 prohibits the issuance or allotment of shares at a discount, and section 42 prohibits the issuance of shares which are not fully paid. Section 43 provides:

> (1) Every director is jointly and severally liable to compensate the company and any member for any loss, damage, and costs sustained by the company or the member by reason of the allotment or issue of a share in contravention of section 41 or 42.
>
> (2) Proceedings under this section shall not be commenced after the expiration of two years after the date of issuance of the share.

Section 150 provides:

> (1) The directors of a company who vote for, or consent, a resolution authorizing
>
> *(a)* the purchase, redemption, or other acquisition of shares contrary to section 257; [when the company is insolvent]
>
> *(b)* a commission or discount contrary to section *45;* [payment of certain commissions in contravention of memorandum or articles or a rate exceeding 25 per cent of the subscription price]

32 S.B.C. 1973 , c. 18.

(c) a payment of a dividend if

(i) the company is insolvent; or

(ii) the payment renders the company insolvent; or

(iii) the payment contravenes section *255;* [the transfer of a portion of yearly profits into a "capital redemption reserve fund" must first be made before a dividend can be paid]

(d) a loan, guarantee or financial assistance contravening section 124 or 125; [loans and guarantees when company is insolvent and certain other loans and guarantees]

(e) a payment of an indemnity referred to in section 151 to a director or former director without the approval of the Court required by section 151; [a company may with Court approval indemnify a director against liability incurred by reason of having been a director] or

(f) an act contravening section 24 in respect of which the company has paid compensation to any person [company acting ultra vires its memorandum] are jointly and severally liable to the company to make good any loss or damage suffered by the company as a result.

Section 150 (8) provides:

> No action to enforce a liability imposed by subsection (1) shall be commenced after two years from the date the resolution complained of was passed.

The actions authorized by those sections are essentially similar to actions which lie at common law for damages to the economic interests of the plaintiff. It has been recommended earlier in this Report that such actions should be subject to a limitation period of six years. The same actions by a potential defendant which might make him liable under those provisions may in some circumstances also amount to a breach of contract or give rise to an action at common law. In either case a plaintiff might have a right of action which is independent of the Act. It is desirable that the limitation periods should be uniform in such cases. We therefore favour the repeal of the special limitation periods contained in section 43 (2) and 150 (8) of the *Companies Act* and allow those statutory actions to be governed by the six-year period.

Section 107D of the former *Companies Act*[33] imposed a liability with respect to insider trading and provided a special limitation period of two years. That liability has been carried forward as section 152 of the present Act which provides:

> Every insider or affiliate of an insider or a corporation who, in connection with a transaction relating to any share of the corporation or any debt obligation of the corporation, makes use of any specific confidential information for the benefit or advantage of himself or of any associate or affiliate of himself, that, if generally known might reasonably be expected to affect materially the value of the share or the debt obligation, is,
>
> *(a)* liable to compensate any person for any direct loss suffered by the person as a result of the transaction, unless the information was known or ought reasonably to have been known to the person at the time of the transaction; and
>
> *(b)* accountable to the corporation for any direct benefit or advantage received or receivable by the insider or his affiliate, as the case may be, as a result of the transaction.

The special limitation period, however, was not carried forward and it appears that there is now

33 R.S.B.C. 1960, c. 67, as amended, S.B.C. 1967, c. 12, s. 10.

no time limit on an action based on section 152 brought against an insider.[34] If our recommendation with respect to the six-year "catch all" provision is adopted,[35] such actions would be governed by what we consider to be the appropriate limitation period.

The difficulty is that section 111 of the *Securities Act, 1967*[36] imposes a liability with respect to insider trading in very similar terms. It provides:

> (1) Every insider of a corporation or associate or affiliate of the insider who, in connection with a transaction relating to the capital securities of the corporation, makes use of any specific confidential information for his own benefit or advantage that, if generally known might reasonably be expected to affect materially the value of the securities, is liable to compensate any person or company for any direct loss suffered by the person or company as a result of the transaction, unless the information was known or ought reasonably to have been known to the person or company at the time of the transaction, and is also accountable to the corporation for any direct benefit or advantage received or receivable by the insider, associate, or affiliate, as the case may be, as a result of the transaction.
>
> (2) An action to enforce any right created by subsection (1) may be commenced only within two years after the date of completion of the transaction that gave rise to the cause of action.

The retention of the two-year special limitation period with respect to insider trading in the *Securities Act* while none now exists under the *Companies Act* creates an anomalous and undesirable situation. We suggest that unless the recommendations contained in this Report are to be implemented swiftly, the special limitation period of two years with respect to insider trading should be restored to the *Companies Act.*

The Commission recommends:

The limitation periods provided in sections 43 (2) and 150 (8) of the Companies Act *and section 111 of the* Securities Act *be repealed, leaving those actions to be governed by the six-year "catch all" period.*

The *Families' Compensation Act*[37] provides that when the death of a person is caused by a wrongful act and the deceased would be entitled to maintain an action had he survived, certain persons who were dependant on the deceased are entitled to maintain an action against the wrongdoer. Section 7 of that Act provides a one-year limitation period for such actions. Certain provisions of the *Families' Compensation Act* are incorporated by reference into a section of the *Government Liquor Act* [38] Section 150 of that Act provides:

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34 Unless it was held that the two-year limitation period pertaining to "actions for . . . damages given to the party aggrieved, by any Statute . . ." provided by s. 49 of the *Statute of Limitations* was applicable.

35 *See supra* c. 3, s. E.

36 S.B.C. 1967, c. 45.

37 R.S.B.C. 1960, c. 138.

38 R.S.B.C. 1960, c. 166.

> Whenever any person has drunk liquor to excess, and while in a state of intoxication from such drinking has come to his death by suicide or drowning, or perishing from cold or other accident caused by such intoxication, the person or persons who furnished or gave liquor to such person when in a state of intoxication is or are liable to an action for a wrongful act and as a personal wrong, and the amount of which may be recovered as damages shall not be less than one hundred dollars or more than fifteen hundred dollars. Sections 4, 5, 6, and 7 of the *Families' Compensation Act* apply to every action brought under this section.

Actions under the *Families' Compensation Act* or section 150 of the *Government Liquor Act* are comparable to actions in tort for personal injuries. The Commission feels that the limitation period applicable to actions for personal injuries should govern actions brought under those Acts.

The Commission recommends:

1. The special limitation period provided in section 7 of the Families' Compensation Act *be repealed.*

2. The proposed statute specify that actions brought under the Families' Compensation Act *and section 150 of the* Government Liquor Act *be subject to a two-year limitation period.*

The *Privacy Act*[39] makes it a tort, actionable without proof of damage, to willfully and without claim of right violate the privacy of another. Section 6 of that Act places a two-year limitation period on actions brought pursuant to the Act. If the Act amounting to a violation of privacy involves the publication of a fact, an analogy to defamation may be drawn. If the violation arises out of some sort of surveillance of the plaintiff, an analogy to trespass may be more apt. The analogous actions which would lie at common law would be subject to a two-year limitation period if the Commission's recommendations are adopted and, therefore, the special limitation period provided with respect to violations of privacy is a suitable one. The Commission does, however, feel that, for the sake of simplicity, the limitation period should appear in the proposed general statute.

The Commission recommends:

1. Special limitation period provided in section 6 of the Privacy Act *be repealed.*

2. The proposed statute provide that actions brought pursuant to the Privacy Act *be subject to a limitation period of two years.*

Section 20 of the *Minimum Wage Act*[40] provides that an employee who is paid less than the minimum wage to which he is entitled under the Act may maintain a civil action against his employer for the difference between the amount paid and the minimum wage. Such an action must be commenced within six months of the termination of services.

An employee's claim for unpaid wages is normally a contractual matter which is subject

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39 S.B.C. 1968, c. 39.

40 R.S.B.C. 1960, c. 230, as amended, S.B.C. 1972 (2nd Sess.), c. 7.

to a six-year limitation period. The Commission can see no justification for a shorter special limitation period if the claim is for arrears of a minimum wage which is specified by statute.

The Commission recommends:

The special limitation period provided in section 20 (1) of the Minimum Wage Act *be repealed.*

Section 18 (15) of the *Credit Unions Act, 1961*[41] provides:

> (15) A person who, directly or indirectly, receives a loan contrary to the provisions of this Act or of the rules and a treasurer, credit officer, director, or member of a credit committee who participates in making or renegotiating a loan, knowing that it is contrary to the provisions of this Act or of the rules, are jointly and severally liable to the credit union in a sum equal to the amount of the loan and interest accrued thereon, which amount may be recovered by civil action in any court of competent jurisdiction with full costs of suit by the credit union or by a member of the credit union on behalf of the credit union; but no action shall be brought after two years after the date of the last advance under a loan, or after the date of renegotiation of a loan, against a treasurer, credit officer, director, or member of a credit committee, except as a borrower, unless the loan or the renegotiation of the loan was made with intent to defraud the credit union, or the loan or renegotiation of the loan was made with intent to benefit, directly or indirectly, any of those officers.

The claim of a credit union under the provision is really with respect to damage to its economic interest and a six-year limitation period would seem more suitable than the one provided.

The Commission recommends:

The special limitation period provided in section 18 (15) of the Credit Unions Act *be repealed.*

F. Notice Provisions

There are two basic types of notice requirement found in the British Columbia statutes. The first requires the giving of notice a certain time before an action is brought.[42] The purpose of such a provision would appear to be the encouragement of settlements or to put the potential defendant on his guard. Such a notice requirement is relatively innocuous unless it is coupled with a short limitation period. Section 104 (1) of the *Public Schools Act*[43] formerly provided:

> (1) No action shall be brought against a trustee of any school district individually, or against a Board of School Trustees in its corporate capacity, for anything done in the capacity of trustee or Board, after six months after the date upon which the cause of action arises, and no such action may be commenced unless four months previous notice thereof in writing has been served on each defendant.

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41 S.B.C. 1961, c. 14.

42 *See,* e.g., *Insurance Act,* R.S.B.C. 1960, c. 197, s. 23 (2).

43 S.B.C. 1958, c. 42, s. 104.

The effect of that provision was to create a two-month "window" within which an action must be brought if it was to be brought at all. If a plaintiff failed to give notice within two months after the cause of action arose, it was impossible for him to commence an action within the limitation period. That provision has since been re-enacted with a 12-month limitation period and the notice requirement deleted.[44]

The other type of notice provision is one which requires that notice of injury or damage be given within a certain time after the cause of action arises. In some cases if the notice provision has not been complied with but the defendant is not prejudiced it may not act as a bar to the action.[45] Where, however, the time for notice cannot be extended or dispensed with it acts as a limitation period since failure to give notice in time bars further action. Since most of the periods within which notice must be given are coupled with a fairly short limitation period, actions here are subject to what appears to be legislative overkill. One purpose of such a notice provision is to enable a possible defendant to collect information about an accident or occurrence as soon as possible after the event. The importance of this purpose should not be minimized when a large municipality or other public undertaking is involved.

The notice provisions which are of concern to the Commission are contained in:

(a) *British Columbia Hydro and Power Authority Act, 1964,* S.B.C. 1964, c. 7, s. 44 (2);
(b) *Power Act,* R.S.B.C. 1960, c. 293, s. 14 (2);
(c) *Municipal Act,* R.S.B.C. 1960, c. 255, s. 739;
(d) *Vancouver Charter,* s. 294 (3);
(e) *Motor-vehicle Act,* R.S.B.C. 1960, c. 253, s. 108 (1).

The provisions in the *Municipal Act* and the *Vancouver Charter* apply to all claims for damage except with respect to a death. Those in the *Power Act* and the *British Columbia Hydro and Power Authority Act* apply only to claims for damage to crops and growing things caused by the exercise of statutory powers.[46]

All of those provisions with the exception of section 108 (1) of the *Motor-vehicle Act* do in fact permit the tribunal adjudicating a claim to relax the notice requirement in cases where the plaintiff can show a reasonable excuse for failure to give notice and the defendant protected by the notice provision has suffered no prejudice. Although this relaxation might offer relief in some hard cases, a heavy onus is still placed on the plaintiff who for one reason or another may have failed to give notice. One solution might be to make a power to waive compliance with the Act more broadly available. That was the thinking of the Ontario Law Reform Commission who

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44 *See Public Schools (Amendment) Act,* S.B.C. 1971, c. 47, s. 38.

45 *See,* e.g., *Vancouver Charter,* s. 294 (3); S.B.C. 1962, c. 82, s. 8.

46 *See* Appendix F for the text of these provisions.

recommended:[47]

> In respect of. . . notice of claim provisions, failure to notify in the right time should not be a bar to the bringing of an action if in an opinion of a judge . . . such a result would be unjust.

That recommendation, however, fails to deal with the broader question of why some bodies should receive the protection of a notice provision while others do not. This Commission feels that the potential injustice which can be created by a notice provision, and the undesirability of certain institutions receiving preferred treatment under the law of limitations, outweighs the benefits which the community may receive from the existence of those notice requirements.

The Commission recommends:

The notice requirements contained in section 44 of the British Columbia Hydro and Power Act, *section 739 of the* Municipal Act, *section 14 (2) of the* Power Act, *and section 294 (3) of the* Vancouver Charter *be repealed.*

The notice provision contained in section 108 (1) of the *Motor-vehicle Act*[48] is somewhat different. The Act provides for an unsatisfied judgment fund against which the victim of a hit-and-run accident may claim. No claim can be made, however, unless notice has been given in writing within 10 months from the time the damages were sustained. As the notice provision operates with respect to claims against a special fund, rather than to limit a civil action, somewhat different considerations apply. The Commission, therefore, does not recommend its repeal. It is felt, however, that this one provision which should be relaxed when the plaintiff is a minor.[49] It is suggested that the running of time under this provision should be subject to the same rules relating to disability as applied to actions under the proposed statute. Consideration might also be given to permitting a judge to extend the period or waive compliance with it in other appropriate cases.

CHAPTER VIII CONCLUSION

A. Summary of Recommendations

This Report of limitations illustrates the need for the reform of this area of the law. The faults with the existing *Statute of Limitations* are many. Its language is archaic and obscure. Its scope is often uncertain. It is frequently said that "ignorance of the law is no excuse," and it should, therefore, be a fundamental principle of a system of justice that every citizen should have access to knowledge of what the law is. The state of the existing *Statute of Limitations* makes such access almost impossible. In addition, many of the limitation periods which it provides are inappropriate and not in accord with contemporary needs.

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47 Ontario Report 85.

48 R.S.B.C. 1960, c. 253.

49 *See* Chap. V, s. C.

In its present form, the *Statute of Limitations* is beyond repair. What is required, is nothing less than the complete repeal of the statute and the enactment of a limitations Act which is contemporary in both language and substance.

An undesirable outgrowth of the present state of limitations law has been the proliferation of special limitation periods. Although some of these may be justified, as dealing with special situations to which the general limitations law should not be applied, many of these special limitation periods appear only to serve the special interests of special professions or other bodies. Any justification which those special limitation periods might have had at one time would disappear with the enactment of new limitations legislation implementing the recommendations contained in this Report. Special limitation periods which protect certain groups or bodies should not be retained. They are repugnant to the right of the individual to equality before the law, a principle declared in the *Canadian Bill of Rights*.[50]

A summary of the recommendations made in this Report is set out below. In each case the chapter and page at which a recommendation may be found in the body of the Report is indicated.

Chapter I **Introduction**

The Commission recommends:

1. As a general principle, the right to bring an action to assert or enforce a claim of any kind should be subject to some limitation period. (p. 9)

2. Any exceptions to that general principle should be clearly specified by law. (p. 9)

3. The Statute of Limitations *be repealed and replaced by a statute that is contemporary both in language and substance.* (p. 13)

4. The proposed statute not establish limitation periods with respect to

(a) proceedings by way of judicial review of the exercise of statutory powers; or

(b) those actions which, owing to their special nature, should remain the subject of special provisions in other statutes. (p. 13)

5. Acquiescence remain available as a defence to the extent that it now is. (p. 14)

6. Laches be available only as a defence with respect to those claims for equitable relief in aid of a legal right which may now be defeated by laches. (p. 14)

Chapter III **Appropriate Periods: Particular Actions**

The Commission recommends:

1. The following personal actions be subject to a two-year limitation period: (p.27)

(a) All actions for damages in respect of injury to person or property, including economic loss arising therefrom, whether based on contract, tort

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1 R.S.B.C. 1970, Appendix III; 8 & 9 Eliz. 2, c. 44, s. 1 *(b)*.

or statutory duty;

(b) trespass to property not included in (a);

(c) defamation;

(d) false imprisonment;

(e) malicious prosecution;

(f) torts under the Privacy Act;

(g) actions under the Families' Compensation Act;

(h) actions under s. 150 of the Government Liquor Act;

(i) seduction. (p. 27)

2. All other personal actions be subject to a six-year limitation period. (p. 27)

3. Actions arising out of deeds be subject to the same limitation period which would be applicable to contracts not under seal. (p. 31)

4. Actions upon recognizances given under the Bail Act *and the* Summary Convictions Act *be subject to a six-year limitation period.* (p. 31)

5. Actions for obligations arising out of statutes be subject to a six-year limitation period. (p. 31)

6. Sections 36 and 42 of the Interpretation Act, *section 27 of the* Laws Declaratory Act, *and any provision of any statute purporting to give an aggrieved party (other than the Crown) the right to sue for a penalty be repealed.* (p. 31)

7. Section 77 of the Partnership Act *and any similar statutory provision be repealed to the extent that a* qui tam *action is permitted.* (p. 31)

8. Judgments be subject to some limitation period. (p. 37)

9. Orders be treated in the same way as judgments. (p. 37)

10. The appropriate limitation period for actions and proceedings on judgments be 10 years, except that there should be no limitation period with respect to the enforcement of injunctions, restraining orders, and similar permanent prohibitions and judgments for possession of land. (p. 37)

11. The judgment creditor be permitted to preserve his rights by commencing a fresh action on the judgment within the limitation period. (p. 37)

12. Once the 10-year period has run, if there is enforcement process outstanding, the judgment creditor be able to

(a) continue to proceed on an unexpired writ of execution provided writs of possession and delivery are brought within the definition of "writs of execution," but no renewals of such writs of execution should be permitted;

(b) in the case of charging orders, continue proceedings to the point of making the charging order absolute, in which case the time limit for the enforcement of charges against personalty will be appropriate, and should be made applicable with time beginning to run from the making absolute of the charging order; and

(c) in the case of judgments registered against land pursuant to the Execution Act, *at the expiration of 10 years no further registrations or renewals thereof should be permitted, unless enforcement proceedings have been commenced, but the judgment creditor should be permitted to commence*

proceedings on a judgment under section 38 of the Act, notwithstanding the limitation period so long as the registration of the judgment shall not have expired. (p. 37)

13. Once proceedings on a judgment have become statute-barred, any claim for subsequent taxable costs be barred, notwithstanding that those claims arose within the limitation period. (p. 37)

14. In cases where the judgment debtor has obtained a stay of execution, time should not run against the judgment creditor. (p. 37)

15. Foreign judgments not be treated as judgments for the purposes of the 10-year period but continue to be treated as simple contract debts subject to the appropriate limitation period. (p. 37)

16. All actions for breach of trust be subject to some limitation period. (p. 43)

17. No distinction be made between express trusts and other kinds of trusts for the purpose of limitation periods. (p. 43)

18. Personal representatives be treated as trustees for the purposes of limitations. (p. 43)

19. The following actions be subject to a 10-year limitation period:

(a) Actions against the person representatives of a deceased person for a share of the estate:

(b) Actions in respect of any fraud or fraudulent breach of trust to which the trustee was party or privy:

(c) Actions against a trustee for the conversion of trust property to his own use:

(d) Actions to recover trust property or property into which trust property can be traced against a trustee or any other person:

(e) Actions to recover money on account of a wrongful distribution of trust property against the person to whom the property is distributed, or his successor. (p. 43)

20. All other actions brought in respect of a breach of trust for which a limitation period is not prescribed by some other provision of the proposed statute be subject to a six-year limitation period. (p. 43)

21. Time should not run against a beneficiary with respect to an action

(a) based on any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property, or the proceeds thereof, in the possession of the trustee, or previously received by the trustee and converted to his own use, until the beneficiary becomes fully aware of the fraud fraudulent breach of trust, conversion, or other act of the trustee on which the action would be based, the onus of proof of which should rest on the trustee. (p. 43)

22. Time should not run against a beneficiary in respect of a future interest in trust property until the interest becomes a present interest. (p. 43)

23. Section 93 (2) of the Trustee Act *be incorporated into the proposed legislation so a statute-barred beneficiary should not be able to improve his position if another beneficiary,*

who is not statute-barred, makes a successful claim; but section 93 (1) of that Act and section 12 of the Laws Declaratory Act *should be repealed.* (p. 43)

24. All causes of action be subject to a six-year limitation period, except where the proposed statute or some other statute has specifically provided that a different limitation period or no limitation period should apply. (p. 44)

Chapter IV Recovery of Land and Charges on Property

The Commission recommends:

1. The proposed limitations statute contain no provision for the extinguishment of title to land (similar to section 41 of the present Statute of Limitations). (p. 49)

2. There be a general legislative statement that title to land cannot be acquired by adverse possession. (p. 49)

3. There be no transitional provision comparable to that applying to prescriptive rights, which would cause existing possessory titles to lapse unless registered within a limited time. (p. 49)

4. The proposed limitation statute contain no limitation period on actions to recover land where an owner has been dispossessed in circumstances amounting to trespass. (p. 50)

5. The Special Surveys Act *be reviewed and clarified.* (p. 52)

6. Legislation be enacted comparable to section 28 of The Law of Property Act *of Manitoba, but modified so as to include improperly located boundary fences.* (p. 52)

7. There be no limitation period with respect to actions

(a) by a mortgagor to redeem real or personal property in his possession; or

(b) by a mortgagee to foreclose on or exercise a power of sale with respect to real or personal property in his possession;

(c) by a landlord to recover possession of land from a tenant who is in default or overholding. (p. 59)

8. Except as provided in the foregoing recommendation, actions relating to charges on both real and personal property be subject to a six-year limitation period. (p. 59)

9. In the foregoing recommendation, actions relating to charges on real and personal property include any proceedings to

(a) enforce a rent charge;

(b) enforce a mortgage by foreclosure, by exercising a power of sale, taking possession or any other means;

(c) enforce a contract for the conditional sale of goods by seizure or otherwise;

(d) enforce a lien;

(e) redeem mortgaged property in the hands of a mortgagee. (p. 59)

10. For the purposes of limitation periods, an agreement for sale of land be treated as a mortgage on land. (p. 59)

11. Actions by a tenant against his landlord for possession of land should be subject to a six-year limitation period, whether or not the tenant was dispossessed in circumstances amounting to trespass. (p. 60)

12. The right of a life tenant or remainderman to bring an action for possession of

land should not be subject to any limitation period. (p. 61)

13. The person who has a right to enter for a condition subsequently broken or a possibility of reverter of the determinable estate should be required to assert his rights within six years after they arose by

(a) taking possession of the land;

(b) commencing an action for a declaration of his title; or

(c) commencing an action for possession. (p. 62)

14. No limitation period should exist with respect to the enforcement of easements, restrictive covenants, and profits-a-pendre. (p. 63)

Chapter V The Running of Time: Postponement, Suspension, and Extension

The Commission recommends:

1. No provision be made to postpone or suspend the running of time in the case of the potential plaintiff or the potential defendant who is absent from the jurisdiction. (p.65)

2. There be one general provision relating to disabilities which would apply to all limitation periods within the proposed statute. (p. 71)

3. Time should begin to run against a person when he ceases to be under a disability on the following basis: the person would then be entitled to the longer of either:

(a) the period which he would have had to bring his action had he not been under a disability, running from the time that the cause of action arose; or

(b) such period running from the time that the disability ceased except that in no case should that period extend more than six years beyond the cessation of disability. (p. 71)

4. That the proposed statute define a person as being under a disability

(a) while he is a minor;

(b) While he is in fact incapable of or substantially impeded in the management of his affairs. (p. 71)

5. The running of time be suspended during a person's disability, whether or not the disability existed at the time the cause of action accrued to t hat person. (p. 71)

6. A potential defendant be permitted to start time running against the plaintiff, notwithstanding the disability, by delivering to the person responsible for managing the affairs of the disabled plaintiff and to the Public Trustee a notice to proceed; in which case time should begin to run against the plaintiff as if he had attained his majority or become of sound mind. (p. 71)

7. The Official Guardian Act *be amended to provide that, in cases where notice to proceed has been served and the person responsible for managing the affairs of the plaintiff does not proceed, the Public Trustee shall*

(a) investigate the affairs of a disabled plaintiff in so far as they are relevant to the cause of action; and

(b) commence and maintain an action for the benefit of the plaintiff if he believes that such an action would have a reasonable prospect of succeeding and result in the award of damages sufficient to justify bringing it. (p. 71)

8. The proposed statute provide that in

(a) personal injury actions;

(b) property damage actions;

(c) professional negligence actions;

(d) actions based on fraud or deceit;

(e) actions in which material facts relating to the cause of action have been wilfully concealed;

(f) actions for relief from the consequences of a mistake;

(g) actions brought under the Families' Compensation Act; *and*

(h) actions for non fraudulent breaches of trust,

the running of time is postponed and time does not commence to run against a plaintiff until the identity of the defendant is known to him and those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing

(i) that an action on the cause of action would (apart from the effect of the expiration of a limitation period) have a reasonable prospect of success; and

(ii) that the person whose means of knowledge is in question ought, in his own interests, and taking his circumstances into account, to bring an action. (p. 81)

9. For the purpose of the previous recommendation,

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

(b) "facts" include

(i) the existence of a duty owed to the plaintiff by the defendant,

(ii) that a breach of a duty caused injury damage or loss to the plaintiff. (p. 82)

10. Such a provision not operate to the detriment of a bona fide purchaser for value. (p. 82)

11. The onus of proving that the accrual of a cause of action has been postponed under the foregoing recommendations be on the person claiming the benefit of the postponement. (p. 82)

Peter Fraser in a dissent recommends that:

The availability of postponement should be governed by the actual state of knowledge of the potential plaintiff, not by the hypothetical state of knowledge of the hypothetical reasonable man. (p. 82)

12. Any claim by way of a set-off, counter-claim, the adding of parties under Marginal Rule 133, or a third-party proceeding, be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counter-claim was made, or the parties added under Marginal Rule 133, or the third-party proceedings are taken. (p. 85)

13. In any action, the Court be given a discretion to allow for the amendment of any

pleading or other proceedings, or an application for a change of party, upon such terms as to costs or otherwise as the Court deems just, notwithstanding that between the time of the issue of the writ and the application for amendment or change of party, a fresh cause of action disclosed by the amendment of a cause of action by or against the new party would have been barred by a limitation provision. (p. 86)

14. The term "confirmation" be adopted to cover both acknowledgments and part payments. (p. 92)

15. There be one general provision dealing with confirmation. (p. 92)

16. A confirmation given before the expiration of a limitation period should start time running afresh. (p. 92)

17. A confirmation by way of acknowledgment be sufficient, notwithstanding that it does not show a promise to pay. (p. 92)

18. A confirmation, to be effective, must in all cases be given by a person liable or his agent to the person entitled to the right or his agent. (p. 92)

19. Notwithstanding the foregoing recommendation, a confirmation made by the person liable or his agent in the course of proceedings or a transaction purporting to be pursuant to the Bankruptcy Act *be sufficient even if not made to the person entitled or his agent.* (p. 92)

20. The rule that an acknowledgment must be in writing and signed by the person chargeable or his agent be retained. (p. 92)

21. When a number of persons are liable by reason of the same event or transaction, a confirmation given by one of those persons should bind only that person and not the other persons liable. (p. 92)

22. A confirmation of a cause of action to recover interest on principal money due should operate also as a confirmation of a cause of action to recover the principal money.(p. 92)

23. A confirmation of a cause of action to recover income falling due at any time should operate also as the confirmation of a cause of action to recover income falling due at a later time on the same account. (p. 93)

24. The receipt of a part payment by a mortgagee in possession should operate as a confirmation of the title of the mortgagor. (p. 93)

25. A payment to a mortgagee of principal or interest secured by a mortgage should operate as a confirmation of his right to foreclose or exercise a power of sale under the mortgage. (p.93)

Chapter VI **Some Specific Problems**

The Commission recommends:

1. The proposed statute apply to proceedings by and against the Crown in the same way as it applies with respect to ordinary subjects. (p. 95)

2. The proposed statute apply not only to the Crown in the right of British Columbia but also, so far as the legislative power of the Province permits, the Crown in all its other capacities. (p. 96)

3. There be an extinguishment of right and title in all causes of action where the time limited for bringing an action has expired. (p. 97)

4. The foregoing recommendation should not be regarded as altering the

requirement that a limitation period be specifically pleaded under Marginal Rule 211 of the Supreme Court Rules, 1961. (p. 97)

5. Where, in an action heard in a British Columbia Court, it is determined that the law of another jurisdiction is applicable and the limitations laws of that jurisdiction are, for the purposes of private international law, classified as procedural, the Court may, but shall not be bound to apply, the appropriate British Columbia limitation period and may apply the foreign limitation period if it produces a more just result. (p. 101)

6. The proposed statute contain an ultimate limitation period of 30 years, beyond which no action (except those actions which should be subject to no limitation period at all) may be brought, notwithstanding any disability, confirmation, or postponement of the running of time. (p. 101)

7. The proposed statute provide that once proceedings to enforce a claim for the payment of principal money have become statute-barred, an action to recover arrears of interest on that principal money shall also be statute-barred. (p. 102)

8. New limitations legislation apply to causes of action which accrued before it comes into force. (p. 103)

9. The enactment of new legislation not revive any right of action which had previously become statute-barred. (p. 103)

10. If, with respect to any cause of action which arose before new limitations legislation comes into force, the limitation period provided by that legislation is shorter than that which presently governs the cause of action, and would expire on or before two years from the date at which the new legislation comes into force, the limitation period which governs that cause of action should be the shorter of

(a) two years from the date the legislation comes into force; or (p. 103)

(b) the limitation period which presently governs the cause of action. (p. 103)

Chapter VII Special Limitation Periods

The Commission recommends:

1. The special limitation periods in the following Acts be repealed:

(a) Chiropody Act (Podiatry Act), *R.S.B.C. 1960, c. 53 s. 20;*

(b) Chiropractic Act, *R.S.B.C. 1960, c. 54, s. 14 (2);*

(c) Dentistry Act, *R.S.B.C. 1960, c. 99 s. 65;*

(d) Medical Act, *R.S.B.C. 1960, c. 239, s. 82 (1);*

(e) Registered Nurses Act, *R.S.B.C. 1960, c. 335, s. 33;*

(f) Veterinary Medical Act, *S.B.C. 1967, c. 55, s. 33, as amended; S.B.C. 1970, c. 49, s. 1;*

(g) Pharmacy Act, *R.S.B.C. 1960, c. 282, s. 57.* (p. 105)

2. Section 11 of the Statute of Limitations *not be retained.* (p. 106)

3. Where any Act which incorporates or constitutes a body or corporation provides a

special limitation period with respect to actions against that body or corporation, that limitation period should no longer continue to afford any defence to actions against that body or corporation. (p. 107)

4. Notwithstanding the generality of the foregoing recommendation, the special limitation periods contained in the following Acts be repealed:

(a) British Columbia Hydro and Power Authority Act, 1964, *S.B.C. 1964, as amended, c. 7, s. 52B;*

(b) Hospital Act, *R.S.B.C. 1960, c. 178, s. 36;*

(c) Industrial Transportation Act, *R.S.B.C. 1960, c. 192, s. 29*

(d) Municipal Act, *R.S.B.C. 1960, c. 255, s. 738 (2);*

(e) Public Schools Act, *R.S.B.C. 1960, c. 319, s. 104 (1);*

(f) Railway Act, *R.S.B.C. 1960, c. 329, s. 271 (1);*

(g) Greater Victoria Water District Act, *S.B.C. 1922, c. 28, s. 82 (as amended); S.B.C. 1948, c. 102, s. 18;*

(h) Greater Nanaimo Sewerage and Drainage District Incorporation Act, *S.B.C. 1959, c. 100, s. 66;*

(i) Greater Vancouver Sewerage and Drainage District Act, *S.B.C. 1956, c. 59, s. 63;*

(j) Greater Campbell River Water District Act, *S.B.C. 1962, c. 77, s. 66;*

(k) Vancouver Charter, *S.B.C. 1953, c. 55 (as amended), ss. 294, 294A;*

(1) Gas Utilities Act, *R.S.B.C. 1960, c. 164, s. 31;*

(m) Department of Highways Act, *R.S.B.C. 1960, c. 103, s. 20;*

(n) Department of Public Works Act, *R.S.B.C. 1960, c. 109, s. 18;*

(o) Chilliwack Dyking District Act, *S.B.C. 1949, c. 9, s. 16;*

(p) Water Act, *R.S.B.C. 1960, c. 405, s. 48;*

(q) Drainage, Dyking, and Development Act, *R.S.B.C. 1960, c. 121, s. 89 (2);*

(r) Land Registry Act, *R.S.B.C. 1960, c. 208, s. 224 (2);*

(s) Mental Health Act, *1964, S.B.C. 1964, c. 29, s. 19 (2);*

(t) Provincial Elections Act, *R.S.B.C. 1960, c. 306, ss. 173, 285;*

(u) Public Inquiries Act, *R.S.B.C. 1960, c. 315, s. 7 (2).* (p. 108)

5. The special limitation period provided by section 79 of the Motor-vehicle Act *be repealed.* (p. 110)

6. Special limitation periods be retained in the Insurance Act, *but the Act be amended to make the limitation periods applicable with respect to contracts of insurance relating to accident, sickness, fire, and automobile accident, consistent with the limitation periods which would be applicable in an action against a tortfeasor by the insured if the event upon which the insurance money became payable were the result of a tortious act.* (p. 111)

7. The limitation periods provided in sections 43 (2) and 150 (8) of the Companies Act *and section 111 of the* Securities Act *be repealed, leaving those actions to be governed by the six-year "catch all" period.* (p. 113)

8. The special limitation period provided in section 7 of the Families'Compensation Act *be repealed.* (p. 114)

9. The proposed statute specify that actions brought under the Families' Compensation Act *and section 150 of the* Government Liquor Act *be subject to a two-year*

B. Acknowledgments

The Study on Limitations has been a relatively long-term project and, while this Report reflects conclusions of the Commission as presently constituted, it would be incomplete without some reference to the contributions of former members of the Commission: Mr. Justice B. Davie Fulton, Mr. Justice Frank U. Collier, J. Noel Lyon, and Dr. Richard Gosse. In the earlier phases of this study, they reviewed materials upon which parts of this Report are based and made many helpful proposals which we have adopted. Special thanks are due Dr. Gosse, who undertook much of the basic research and writing of preliminary draft materials and who continued to act as a consultant on this project following his resignation from the Commission.

We also wish to express our gratitude to all others who contributed their time and energy to this project. This includes various members of the legal profession who met and corresponded with the Commission personnel to discuss specific problems; Prof. Peter Barton, formerly of the University of British Columbia Faculty of Law, who assisted the Commission in preparing research materials on a variety of matters, and Prof. Jeremy Williams, who made available to us a copy of the manuscript of his book, *Limitation of Actions in Canada,* which was then in the process of publication and which has since been published. Worthy of special mention is the *University of British Columbia Law Review.* Since 1955 its editors have published and regularly updated a table of statutory limitations covering not only the statute but an extensive list of special limitation periods. This table proved to be an invaluable research tool in assisting us, as it has assisted the legal profession in British Columbia for many years, in finding our way through the maze of special limitation periods presently in force.

Finally, our thanks go to Arthur L. Close, Counsel to the Commission, who was responsible for much of the basic research and the drafting and preparation of this Report in its present form.

R. C. BRAY
Chairman

A. A. ZYSBLAT
Commissioner

P. D. K. FRASER
Commissioner

P. FRASER
Commissioner

March 25, 1974.

Hon. Attorney-General

BILL

No.] 197...

Limitations Act

HER MAJESTY, by with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

1. (1) In this Act, unless the context otherwise requires,

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

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

"judgment" means a judgment, order, or award of:

(a) the Supreme Court of Canada relating to an appeal from a British Columbia court;

(b) the British Columbia Court of Appeal;

(c) the Supreme Court of British Columbia;

(d) a County Court of British Columbia;

(e) a Provincial Court of British Columbia;

(f) an arbitration pursuant to a submission to which the *Arbitration Act* applies.

"secured party" means a person who has a security interest;

"security agreement" means an agreement that creates or provides for a security interest;

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

"trust" includes express, implied, and constructive trusts, whether or not the trustee has a beneficial interest in the trust property, and whether or not the trust arises only by reason of a transaction impeached, and includes the duties incident to the office of personal representative but does not include the duties incident to the estate or interest of a secured party in collateral, and "trustee" and "beneficiary" bear corresponding meanings.

(2) Nothing in this Act—

(a) interferes with a rule of equity that refuses relief, on the grounds of acquiescence to a person whose right to bring an action is not barred by virtue of the Act;

(b) interferes with a rule of equity that refuses relief, on the ground of laches to a person claiming equitable relief in aid of a legal right, whose right to bring the action is not barred by virtue of this Act;

(c) interferes with any rule or law that establishes a limitation period, or otherwise refuses relief, with respect to proceedings by way of judicial review of the exercise of statutory powers.

2. (1) The following actions shall not be brought after the expiration of two years from the date on which the right to do so arose:

(a) All actions for damages in respect of injury to person or property, including economic loss arising therefrom, whether based on contract, tort, or statutory duty:

(b) Actions for trespass to property not included in (a):

(c) Actions for defamation:

(d) Actions for false imprisonment:

(e) Actions for malicious prosecution:

(j) Actions for torts under the *Privacy Act:*

(g) Actions under the *Families' Compensation Act:*

(h) Actions under section 150 of the *Government Liquor Act:*

(i) Actions for seduction.

(2) The following actions shall not be brought after the expiration of ten years from the date on which the right to do so arose:

(a) Actions against the personal representatives of a deceased person for a share of the estate:

(b) Actions against a trustee in respect of any fraud or fraudulent breach of trust to which the trustee was party or privy;

(c) Actions against a trustee for the conversion of trust property to the trustee's own use:

(d) Actions to recover trust property or property into which trust property can be traced against a trustee or any other person:

(e) Actions to recover money on account of a wrongful distribution of trust property against the person to whom the property is distributed, or a successor:

(f) Actions on judgments for the payment of money or the return of personal property.

(3) The following actions shall not be governed by any limitation period and may be brought at any time:

(a) Actions for possession of land where the person entitled to possession has been dispossessed in circumstances amounting to trespass:

(b) Actions for possession of land by a life tenant or remainderman:

(c) Actions on judgments for the possession of land:

(d) Actions by a debtor in possession of collateral to redeem that collateral:

(e) Actions by a secured party in possession of collateral to realize on that collateral:

(f) Actions by a landlord to recover possession of land from a tenant who is in default or over-holding:

(g) Actions relating to the enforcement of injunctions and restraining orders:

(h) Actions to enforce easements, restrictive covenants, and profits-h-prendre:

(i) Actions for declarations as to personal status:

(j) Actions for declarations as to the title to property by any person in possession of that property.

(4) Any other action not specifically provided for in this Act or any other Act shall not be brought after the expiration of six years from the date on which the right to do so arose.

(5) Without limiting the generality of subsection (4) and notwithstanding subsections (1) and (3), the following actions shall not be brought after the expiration of six years from the date on which right to do so arose:

(a) Actions by a secured party not in possession of collateral to realize on that collateral:

(b) Actions by a debtor not in possession of collateral to redeem that collateral:

(c) Actions for damages for conversion or detention of goods:

(d) Actions for the recovery of goods wrongfully taken or detained:

(e) Actions by a tenant against a landlord for the possession of land, whether or not

the tenant was dispossessed in circumstances amounting to trespass:

(f) Actions for the possession of land by a person who has a right to enter for a condition subsequent broken or a right to possession arising under possibility of reverter of a determinable estate.

(6) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.

(7) For the purposes of subsections (3) and (5), "debtor" means a person who owes payment or other performances of an obligation secured, whether or not he owns or has rights in the collateral.

3. (1) Where an action to which this or any other Act applies has been commenced, the lapse of time limited for bringing an action is no bar to

(a) proceedings by counterclaim, including the adding of a new party as a defendant by counterclaim; or

(b) third-party proceedings;

(c) claims by way of set-off;

(d) adding or substituting of a new party as plaintiff or defendant,

under any applicable law, with respect to any claims relating to or connected with the subject-matter of the original action.

(2) Subsection (1) does not operate so as to enable one person to make a claim against another person when a claim by that other person

(a) against the first-mentioned person; and

(b) relating to or connected with the subject-matter of the action,

is or will be defeated by the pleading of any provision of this Act as a defence by the first-mentioned person.

(3) Subsection (1) does not operate so as to interfere with any judicial discretion to refuse relief on grounds unrelated to the lapse of time limited for bringing an action.

(4) In any action the court may allow the amendment of any pleading, upon such terms as to costs or otherwise as the court deems just, notwithstanding that between the issue of the writ and the application for amendment a fresh cause of action disclosed by the amendment would have become barred by the lapse of time.

4. (1) 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 against whom an action lies confirms the cause of action, the time during which the limitation period runs before the date of the confirmation does not count in the reckoning of the limitation period for the action by a person having the benefit of the confirmation against a person bound by the confirmation.

(2) For the purposes of this section,

(a) a person confirms a cause of action if, but only if he

(i) acknowledges a cause of action, right, or title of another,

(ii) makes a payment in respect of a cause of action, right, or title of another;

(b) an acknowledgment of a judgment or debt has full effect

(i) whether or not a promise to pay can be implied therefrom, and (ii) whether or not it is accompanied by a refusal to pay;

(c) a confirmation of a cause of action to recover interest on principal money operates also as a confirmation of a cause of action to recover the principal money; and

(d) a confirmation of a cause of action to recover income falling due at any time operates also as a confirmation of a cause of action to recover income falling due at a later time on the same amount.

(3) Where a secured party has a cause of action to realize on collateral a payment to him of principal or interest secured or a payment to him otherwise in respect of his right or other performance of the obligation secured is a confirmation by the payer or performer of the cause of action.

(4) Where a secured party is in possession of collateral, his acceptance of a payment to him of principal or interest secured or payment to him otherwise in respect of his right or acceptance of other performance of the obligation secured is a confirmation by him to the payer or performer of the payer's or performer's cause of action to redeem the collateral.

(5) For the purposes of this section, an acknowledgment must be in writing and signed by the maker.

(6) For the purposes of this section, a person has the benefit of a confirmation if, but only if, the confirmation is made to him or to a person through whom he claims, or if made in the course of proceedings or a transaction purporting to be pursuant to an Act of the Parliament of Canada dealing with bankruptcy or insolvency.

(7) For the purposes of this section, a person is bound by a confirmation if, but only if,

(a) he is a maker of the confirmation;

(b) after the making of the confirmation, he becomes, in relation to the cause of action, a successor of the maker;

(c) the maker is, at the time when he makes the confirmation, a trustee, and the first-mentioned person is at the date of the confirmation or afterwards becomes a trustee of the trust of which the maker is a trustee; or

(d) he is bound under subsection (8) of this section.

(8) *(a)* Paragraph *(b)* of this subsection applies to a confirmation of a cause of action

(i) to recover property;

(ii) to enforce an equitable estate or interest in property;

(iii) to realize on collateral;

(iv) to redeem collateral;

(v) to recover principal money or interest secured by a security agreement, by way of the appointment of a receiver of collateral or of the income or profits of collateral or by way of sale, lease, or other disposition of collateral or by way of other remedy affecting collateral; or

(vi) to recover trust property or property into which trust property can be traced.

(b) Where a maker of a confirmation to which this paragraph applies, is on the date of the confirmation, in possession of the property or collateral, the confirmation binds a person in possession during the ensuing period of limitation, not being, or claiming through, a person other than the maker who is, on the date of the

confirmation, in possession of the property or collateral.

(9) For the purposes of this section, a confirmation made by or to an agent has the same effect as if made by or to the principal.

(10) Except as specifically provided, nothing in this section operates to make any right, title, or cause of action capable of being confirmed which was not capable of being confirmed before this Act came into force.

5. (1) The running of time with respect to the limitation period fixed by this Act for actions

(a) based on any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property, or the proceeds thereof, in the possession of the trustee, or previously received by the trustee and converted to his own use,

is postponed and does not commence to run against a beneficiary until that beneficiary becomes fully aware of the fraud, fraudulent breach of trust, conversion, or other act of the trustee upon which the action is based.

(2) For the purposes of subsection (1), the onus of proving that time has commenced to run so as to bar an action rests on the trustee.

(3) The running of time with respect to the limitation periods fixed by this Act for actions

(a) for personal injuries;

(b) for damage to property;

(c) for professional negligence;

(d) based on fraud or deceit;

(e) in which material facts relating to the cause of action have been wilfully concealed;

(f) for relief from the consequences of a mistake;

(g) brought under the *Families' Compensation Act;*

(h) brought under section 150 of the *Government Liquor Act;* and

(i) for breaches of trust not within subsection (1)

is postponed, and time does not commence to run against a plaintiff until the identity of the defendant is known to him and those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing

(i) that an action on the cause of action would (apart from the effect of the expiration of a limitation period) have a reasonable prospect of success, and

(ii) that the person whose means of knowledge is in question ought, in his own interests, and taking his circumstances into account, to bring an action.

(4) For the purpose of subsection (3),

(a) "appropriate advice," in relation to facts, means the advice of competent persons,

qualified in their respective fields, to advise on the medical, legal, and other aspects of the facts, as the case may require;

(b) "facts" include

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

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

(d) where a question arises as to the knowledge or means of knowledge of a deceased person, the court may, in its discretion, have regard to the conduct and statements of the deceased person.

(5) The onus of proving that the running of time has been postponed under subsection (3) shall be on the person claiming the benefit of the postponement.

(6) Subsection (3) shall not operate to the detriment of a bona fide purchaser for value.

(7) The limitation period fixed by this Act with respect to an action relating to a future interest in trust property does not commence to run against a beneficiary until the interest becomes a present interest.

6. (1) 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.

(2) Where the running of time against a person with respect to a cause of action has been postponed by subsection (1) and that person ceases to be under a disability, the limitation period governing that cause of action shall be the longer of either

(a) the period which that person would have had to bring the action had that person not been under a disability, running from the time that the cause of action arose; or

(b) such period running from the time that the disability ceased, except that in no case should that period extend more than six years beyond the cessation of disability.

(3) 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.

(4) Where the running of time against a person with respect to a cause of action has been suspended by subsection (3) and that person ceases to be under a disability, the limitation period governing that cause of action shall be the longer of either

(a) the length of time remaining to bring an action at the time the person came under the disability; or

(b) one year,

from the time the disability ceased.

(5) For the purpose of this section,

(a) a person is under a disability

(i) while he is a minor,

(ii) while he is in fact incapable of or substantially impeded in the management of his affairs;

(b) "guardian" means a parent or guardian having actual care and control of a minor or a committee appointed under the *Patients' Estates Act.*

(6) Notwithstanding subsections (1) and (3), where a person under a disability has a guardian and anyone against whom that person may have a cause of action causes a notice to proceed to be delivered to the guardian and to the Public Trustee in accordance with this section, immediately after the delivery of that notice time shall commence to run against that person as if he had ceased to be under a disability.

(7) A notice to proceed delivered under this section must

(a) be in writing;

(b) be addressed to the guardian and the Public Trustee;

(c) specify the name of the person under a 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 or person on whose behalf the notice is delivered; and

(g) be signed by the person giving the notice.

(8) Subsection (6) shall operate 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.

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

(10) 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.

(11) The Lieutenant-Governor in Council may make regulations not inconsistent with this Act prescribing

(a) the form and contents of notice to proceed;

(b) the mode of delivery of notices to proceed.

7. (1) Subject to subsection (3) of section 2, but notwithstanding any confirmation made under section 4 or any postponement or suspension of the running of time under sections 5, 6 or 11, no action to which this Act applies shall be brought after the expiration of thirty years from the date on which the right to do so arose.

(2) Subject to subsection (1), the effect of sections 5 and 6 shall be cumulative.

8. This Act is binding on the Crown in the right of the Province of British Columbia, and, so far as the legislative power of the Province permits, the Crown in all its other capacities.

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

action formerly lay and as against his successors, extinguished.

(2) On the expiration of a limitation period fixed by or under this Act for a cause of action specified in column 1 of the Schedule to this Act, the title of a person formerly having the cause of action to the property specified opposite the cause of action in column 2 of that Schedule and of a person claiming through him in respect of that property is, as against the person against whom the cause of action formerly lay and as against his successors, extinguished.

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

10. Where a cause of action for the conversion or detention of goods accrues to a person and afterwards, possession of the goods not having been recovered by him or by a person claiming through him,

(a) a further cause of action for the conversion or detention of the goods;

(b) a new cause of action for damage to the goods; or

(c) a new cause of action to recover the proceeds of a sale of the goods,

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

11. Notwithstanding sections 2 or 9, if, upon the expiration of the limitation period fixed by this Act with respect to actions on judgment, there is enforcement process outstanding the judgment creditor or his successors shall be permitted to

(a) continue proceedings on unexpired writs of execution, but no renewals of such writs shall be permitted; or

(b) commence or continue proceedings against land on a judgment registered pursuant to the *Execution Act,* but no renewals of such registration shall be permitted unless such proceedings have been commenced; or

(c) continue proceedings in which a charging order is claimed.

(2) Where a court makes an order staying execution on a judgment, the running of time with respect to the limitation period fixed by this Act for actions on that judgment is postponed or suspended so long as that order is in force.

12. Except as specifically provided by this or any other Act, no right or title in or to land may be acquired by adverse possession.

13. Where, in an action heard in a British Columbia court, it is determined that the law of another jurisdiction is applicable and the limitations laws of that jurisdiction are, for the purposes of private international law, classified as procedural, the court may but shall not be bound to apply British Columbia limitation laws and may apply the limitation laws of the other jurisdiction if a more just result is produced.

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

(a) within subsections (1), (2), and (3) of section 2; or

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

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

(2) Subsection (1) shall have no application to any limitation provision which specifically provides that it operates notwithstanding this Act.

15. (1) Nothing in this Act revives any cause of action which is statute-barred at the time this Act comes into force.

(2) Subject to subsections (1) and (3), this Act applies to actions which arose before this Act comes into force.

(3) If, with respect to any cause of action which arose before this Act comes into force, the limitation period provided by this Act is shorter than that which formerly governed the cause of action, and will expire on or before two years from the date this Act comes into force, the limitation period which governs that cause of action shall be the shorter of

(a) two years from the date this Act comes into force; or

(b) the limitation period which formerly governed the cause of action.

(4) Subject to subsection (1), any confirmation effective under section 4 shall be effective, whether given before or after this Act comes into force.

(5) Nothing in this Act interferes with any right or title to land acquired by adverse possession before this Act came into force.

16. The *Statute of Limitations,* being chapter 370 of the *Revised Statutes of British Columbia, 1960,* is repealed.

SCHEDULE

Extinction of Right and Title

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

Hon. Attorney-General

BILL

No.] 197...

Limitation Laws Amendment Act

HER MAJESTY, by with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

1. (1) Subsections (2), (3), and (4) of section 44 of the *British Columbia Hydro and Power Authority Act,* being chapter 7 of the Statutes of British Columbia, 1964, are repealed and the following is substituted as subsection (2):

"(2) Notwithstanding anything in this Act, where a claim is made against the Authority for damage to crops, gardens, shrubs, trees, or other growing things, or other damage caused by or incidental to the exercise of powers conferred by this section, if the amount of compensation for damage is not agreed upon, the claim shall be referred to a single valuator, to be appointed by the Lieutenant-Governor in Council, who shall value the damage and whose valuation is final and binding upon both the owner and the Commission and is not subject to appeal."

(2) Section 52B is repealed.

2. Section 16 of the *Chilliwack Dyking District Act,* being chapter 9 of the Statutes of British Columbia, 1949, is repealed.

3. Section 20 of the *Chiropody Act,* being chapter 53 of the *Revised Statutes of British Columbia, 1960,* is repealed.

4. Subsection (2) of section 14 of the *Chiropractic Act,* being chapter 54 of the *Revised Statutes of British Columbia, 1960,* is repealed.

5. Subsection (2) of section 43 and subsection (8) of section 150 of the *Companies Act,* being chapter 18 of the Statutes of British Columbia, 1973, are repealed.

6. Subsection *(15)* of section 18 of the *Credit Union Act, 1961,* being chapter 14 of the Statutes of British Columbia, 1961, is amended by, commencing in the ninth line, striking out the words "but no action shall be brought after two years after the date of the last advance under a loan, or after the date of renegotiation of a loan, against a treasurer, credit officer, director, or member of a credit committee, except as a borrower, unless the loan or the renegotiation of the loan was made with intent to defraud the credit union, or the loan or renegotiation of the loan was made with intent to benefit, directly or indirectly, any of those officers".

7. Section 65 of the *Dentistry Act,* being chapter 54 of the *Revised Statutes of British Columbia, 1960,* is repealed.

8. Section 20 of the *Department of Highways Act,* being chapter 103 of the *Revised Statutes of British Columbia, 1960,* is repealed.

9. Section 18 of the *Department of Public Works Act,* being chapter 109 of the *Revised Statutes of British Columbia, 1960,* is repealed.

10. Subsection (2) of section 89 of the *Drainage, Dyking, and Development Act,* being chapter 121 of the *Revised Statutes of British Columbia, 1960,* is amended by, commencing at the sixteenth line, striking out the words "and no action or proceedings shall be brought or commenced to recover indemnity under this section unless it is brought or commenced within one year from the expiration of the period allowed for redemption of the land."

11. (1) Section 7 of the *Families*' *Compensation Act,* being chapter 138 of the *Revised Statutes of British Columbia, 1960,* is amended by striking out the words "and no action shall be brought after twelve months from the death of the person whose death was caused by wrongful act, neglect, or default".

(2) Subsection (3) of section 6 is repealed.

12. Section 31 of the *Gas Utilities Act,* being chapter 164 of the *Revised Statutes of British Columbia, 1960,* is repealed.

13. Section 66 of the *Greater Campbell River Water District Act,* being chapter 77 of the Statutes of British Columbia, 1962, is repealed.

14. Section 66 of the *Greater Nanaimo Sewerage and Drainage District Act,* being chapter 100 of the Statutes of British Columbia, 1959, is repealed.

15. Section 63 of the *Greater Vancouver Sewerage and Drainage District Act,* being chapter 59 of the Statutes of British Columbia, 1956, is repealed.

16. Section 77 of the *Greater Vancouver Water District Act,* being chapter 22 of the Statutes of British Columbia, 1924, is repealed.

17. Section 82 of the *Greater Victoria District Act,* being chapter 28 of the Statutes of British Columbia, 1922, is repealed.

18. Section 36 of the *Hospital Act,* being chapter 178 of the *Revised Statutes of British Columbia, 1960,* is repealed.

19. Subsection (1) of section 29 of the *Industrial Transportation Act,* being chapter 192 of the *Revised Statutes of British Columbia, 1960,* is repealed.

20. Subsection (2) of section 224 of the *Land Registry Act,* being chapter 208 of the *Revised Statutes of British Columbia, 1960,* is repealed.

21. Section 12 of the *Laws Declaratory Act,* being chapter 213 of the *Revised Statutes of British Columbia, 1960,* is repealed and the following is substituted as section 12:

"**12.** (1) Where, upon the survey of a parcel of land being made, it is found that a building thereon encroaches upon adjoining land, or a boundary fence has been improperly located so as to enclose adjoining land, the Supreme Court may in its discretion,

16. declare that the owner of that parcel of land has an easement upon the land so encroached upon or enclosed for such period as the court may determine and upon making such compensation therefor to the owner of the adjoining land as the court may determine; or

(b) vest title to the adjoining land so encroached upon or enclosed in the owner of that parcel of land upon making such compensation therefor to the owner of the adjoining land as the court may determine; or

(c) order the owner of that parcel of land to remove the encroachment or to remove the fence and relocate it so that it no longer encloses any part of the adjoining land.

"(2) An order under subsection (1) may be made upon an application by way of originating notice claiming such relief.

"(3) For the purposes of this section, 'owner' may include any person with an interest in or right to possession of the parcel of land, or the adjoining land as the merits of the case and justice require."

22. Subsection (1) of section 82 of the *Medical Act,* being chapter 239 of the *Revised Statutes of British Columbia, 1960,* is repealed.

23. Subsection (2) of section 19 of the *Mental Health Act, 1964,* being chapter 29 of the Statutes of British Columbia, 1964, is repealed.

24. Subsection (1) of section 20 of the *Minimum Wage Act,* being chapter 230 of the *Revised Statutes of British Columbia, 1960,* is amended by, commencing in the fourth line, striking out the words "but in the case of an employee whose services with the employer have terminated, no action shall be brought by the employer under this section unless the section is commenced within six months next after the termination of the services."

25. Section 79 of the *Motor-vehicle Act,* being chapter 253 of the *Revised Statutes of British Columbia, 1960,* is repealed.

26. Subsection (2) of section 738 and section 739 of the *Municipal Act,* being chapter 255 of the *Revised Statutes of British Columbia, 1960,* are repealed.

27. The *Official Guardian Act,* being chapter 268 of the *Revised Statutes of British Columbia, 1960,* is amended by adding, after section 15, the following as section 16:

"**16.** Where a notice to proceed has been delivered to the public trustee pursuant to section 6 of the *Limitations Act* and it appears to the public trustee that the guardian to whom that notice was delivered is failing to take reasonable steps to protect the interests of the disabled plaintiff or is otherwise acting to the prejudice of the disabled plaintiff, the public trustee shall

(a) investigate the circumstances specified in the notice out of which the cause of action may arise or be claimed to arise; and

(b) commence and maintain an action for the benefit of the disabled plaintiff if he believes that such an action would have a reasonable prospect of succeeding and

result in a judgment which would justify bringing an action."

28. Section 57 of the *Pharmacy Act,* being chapter 282 of the *Revised Statutes of British Columbia, 1960,* is repealed.

29. Subsections (2), (3), and (4) of section 14 of the *Power Act,* being chapter 293 of the *Revised Statutes of British Columbia, 1960,* are repealed and the following is substituted as subsection (2):

"(2) Notwithstanding anything in Part VII, where a claim is made against the Commission for damage to crops, gardens, shrubs, trees, or other growing things, or other damage caused by or incidental to the exercise of powers conferred by this section, if the amount of compensation for damage is not agreed upon, the claim shall be referred to a single valuator, to be appointed by the Lieutenant-Governor in Council, who shall value the damage and whose valuation is final and binding upon both the owner and the Commission and is not subject to appeal."

30. Section 6 of the *Privacy Act,* being chapter 39 of the Statutes of British Columbia, 1968, is repealed.

31. Sections 173 and 285 of the *Provincial Elections Act,* being chapter 306 of the *Revised Statutes of British Columbia, 1960,* are repealed.

32. Subsection (2) of section 7 of the *Public Inquiries Act,* being chapter 315 of the *Revised Statutes of British Columbia, 1960,* is repealed.

33. Subsections (1), (2), (3), and (4) of section 104 of the *Public Schools Act,* being chapter 319 of the *Revised Statutes of British Columbia, 1960,* are repealed.

34. Subsections (1) and (2) of section 271 of the *Railway Act,* being chapter 329 of the *Revised Statutes of British Columbia, 1960,* are repealed and the following is substituted:

"**271.** (1) In any action or suit for indemnity for any damages or injuries sustained by reason of the construction or operation of the railway, the defendants may plead the general issue, and may give this Act and the special matter in evidence at the trial, and may prove that the said damages or injury alleged to have been done in pursuance of and by authority of this Act."

35. Section 33 of the *Registered Nurses Act,* being chapter 335 of the *Revised Statutes of British Columbia, 1960,* is repealed.

36. Subsection (2) of section 111 of the *Securities Act, 1967,* being chapter 45 of the Statutes of British Columbia, 1967, is repealed.

37. Section 93 of the *Trustee Act,* being chapter 390 of the *Revised Statutes of British Columbia, 1960,* is repealed.

38. Subsections (2) and (3) of section 294 and section 294A of the *Vancouver Char-*

ter, being chapter 55 of the Statutes of British Columbia, 1953, are repealed.

39. Subsection (3) of section 33 of the *Veterinary Medical Act,* being chapter 55 of the Statutes of British Columbia, 1967, is repealed.

40. Section 48 of the *Water Act,* being chapter 450 of the *Revised Statutes of British Columbia, 1960,* is repealed.

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