

LAW REFORM COMMISSION OF SASKATCHEWAN RESEARCH PAPER

**COMPARISON OF PROPOSALS FOR REFORM OF THE
LIMITATIONS OF ACTIONS ACT**

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INTRODUCTION

In 1989, the Saskatchewan Law Reform Commission's *Proposals for a New Limitation of Actions Act* made recommendations for a major reform of limitations law in the province. The Commission's research was also used by the Uniform Law Conference of Canada, which adopted a *Uniform Limitations Act* in 1982. Both the SLRC and ULCC proposals were part of a broad reexamination of limitations law in Canada and other Commonwealth nations. Since 1989, the Commission has had an opportunity to observe reformed limitations law in action in jurisdictions that have adopted new legislation. In Canada, British Columbia adopted legislation similar to the ULCC and SLRC proposals, and in 1994, the British Columbia Law Reform Commission undertook a review of the legislation.

After reviewing the 1989 draft *Limitations Act*, the Commission has concluded that it remains a satisfactory basis for reform of limitations law. The Uniform Act is also, in our opinion, a viable alternative, differing from the Commission's proposals in only relatively minor ways. However, we have identified some respects in which both models could be improved in light of experience in other jurisdictions.

Because of renewed interest in revision of limitations law in Saskatchewan, the Commission has prepared a comparison of the Uniform Act and the SLRC draft Act as a guide to adaptation of either or both to provide the foundation for a new limitation of actions statute. The commentary that follows identifies differences between the models and expresses the Commission's opinion as to the best choice where the differences are substantial. In addition, both acts have been re-examined, in some cases, alternatives to both have been formulated.

Much of the discussion focuses on technical matters, but some important policy issues are also considered. In particular, the discovery rule applicable to "hidden causes of action" and the 30 year "ultimate limitation period" proposed in the 1989 draft have been reconsidered. We now recommend extending the scope of the discovery rule, but no longer believe that the 30 year ultimate limitation period is a useful addition to the law.

In the commentary that follows, the sections of the SLRC draft *Limitation of Actions Act* are set out in numerical order, and the corresponding provisions of the *Uniform Limitation of Actions Act* are compared with them.

A COMPARISON OF THE SLRC AND ULCC MODEL LIMITATIONS ACTS

Scope the legislation (SLRC 3(1); IJLCC 2)

Both the SLRC and ULCC proposals apply to actions governed by statute and common law, but not to equitable remedies subject to the rules of acquiescence and laches. The scope of the proposed *Acts* differs in only two respects: (1) The ULCC model would also place limitation of judicial review outside the scope of the Act. (2) The SLRC draft expressly makes special limitation periods outside the statute subject to the general rules in the statute governing application of limitation periods.

SLRC

3. (1) Nothing in this Act:

- (a) interferes with the rule of equity that refuses relief, on the grounds of acquiescence, to a person whose right to bring an action is not barred by this Act;
- (b) interferes with a rule of equity that refuses relief, on the grounds of laches, to a person claiming equitable relief, whose right to bring an action is not barred by this Act.

(2) Where a limitation period is contained in any other statute, the provisions of this Act apply to it as though it were a limitation period contained in this Act

ULCC

2. Nothing in this Act affects

- (a) a rule of equity that refuses relief, on the grounds of acquiescence, to a person whose right to bring an action is not barred by this Act;
- (b) a rule of equity that refuses relief, on the ground of laches, to a person who claims equitable relief in aid of a legal right and whose right to bring the action is not barred by this Act; or
- (c) a rule of law that establishes a limitation period, or otherwise refuses relief, in respect of proceedings by way of judicial review of the exercise of statutory power.

(1) Exclusion of judicial review

We are of the opinion that adoption of the ULCC provision excluding applications for judicial review should be considered. Judicial review is the contemporary equivalent of the prerogative remedies. As such, they have been controlled by the courts themselves. Rules in the nature of limitation periods

applicable to judicial review have traditionally been contained in Rules of Court rather than statute. Moreover, the limitations imposed by the Rules are not limitation periods in the conventional sense. Because of these distinctions, it is probably desirable to leave judicial review outside the scope of a limitations statute. Because the SLRC draft is silent on this point, it is unclear whether existing quasi-limitations or the residual limitation period provided in the draft would apply to judicial review.

(2) Effect on limitation periods outside the statute

The ULCC model contains no equivalent to SLRC 3(2). In our opinion, this is a fundamental difference. One of the goals of the SLRC's proposals is unification of limitations law. At present, rules in general limitations statutes relating to disabilities, discovery and similar matters apply only to the actions governed by the statute. Special limitation periods in other statutes are usually not subject to the general rules in the limitations statute. The Commission's review of special limitations periods suggests that exclusion of the general rules is more often an oversight rather than deliberate policy. In those few cases in which there appears to have been a deliberate decision to depart from the general rules, it is difficult to discover the rationale for the departure or justify it on principled grounds. For these reasons, we believe SLRC 3(2) is a necessary element in any effective and comprehensive reform of limitations law.

Limitation periods (SLRC 4-7; IJLCC 3-7)

Both the SLRC and the ULCC propose establishment three basic limitation periods of 2,10, and 6 years. The 6 year period is conceived as a residual limitation applying to all actions not expressly made subject to other periods or expressly stated to be subject to no limitation period. Although the SLRC and ULCC provisions are structured somewhat differently, the differences between them are perhaps less significant than a casual reading of them might suggest (see below). The basic scheme is not controversial, and is more a simplification of existing limitations periods rather than a radical departure.

(1) The 2 year limitation period

SLRC

4. The following actions shall not be brought after the expiration of two years after the date on which the right to do so arose:

- (a) an action in contract other than an action specifically mentioned in section 5, 6 or 7;
- (b) an action in tort other than an action specifically mentioned in section 5, 6 or 7; (c) an action under *The Fatal Accidents Act*;
- (d) a civil action by the Crown or any other person to recover a fine or other penalty imposed under any act.

ULCC

3.(1) No action for damages for breach of a duty of care, if based on contract, tort or statutory duty, where the damage arises from injury to persons or property, including any economic loss arising from the injury, shall be brought after the expiration of 2 years after the day on which the damage resulting from the injury first occurs.

(2) The following actions shall not be brought after the expiration of 2 years after the day on which the right to bring the action arose:

- (a) An action for damages in respect of injury to persons or property, including economic loss arising from the injury, that is not an action mentioned in subsection (1).
- (b) An action for trespass to property that is not an action mentioned in subsection (1).
- (c) An action for defamation.
- (d) An action for false imprisonment.
- (e) An action for malicious prosecution.
- (f) An action for seduction.
- (g) An action for breach of promise of marriage, for alienation of affection, for jactitation of marriage or for criminal conversation.
- (h) An action for conspiracy to commit any of the wrongs mentioned in clauses (a) to (g) or in subsection (1).
- (i) A civil action by the Crown or any person to recover a fine or penalty imposed under an Act, except an action to (sic) by the Crown or a municipality to recover taxes or royalties imposed under an Act or a penalty or interest imposed for non payment of late payment of the taxes or royalties.
- (I) An action under the Fatal Accidents Act.
- (k) An action for payment from a statutory fund of damages arising from a motor vehicle accident.

(Note: Clause (k) will be unnecessary in provinces where there is no statutory fund for payment of damages arising out of motor vehicle accidents.)

(3) Subsections (1) and (2) do not apply to an action for breach of trust against a trustee

by a person entitled to a benefit under the terms of the trust to obtain recovery of the benefit.

At present, actions in tort (other than torts involving property interests) are subject to a 2 year limitation period. Breach of contract, on the other hand, is subject to a 6 year limitation period. Because a wide class of actions involving breach of duty may be actionable in both tort and contract (e.g. action for breach of duty by a professional), the difference in limitation periods has been a source of uncertainty in the law. Both SLRC and ULCC create a uniform limitation period of 2 years for this class of actions, but do so in different ways. The SLRC draft applies the 2 year period to all breaches of contract other than those that involve debt or proprietary interests. The ULCC model retains a basic 6 year limitation for breach of contract, but reduces the period to 2 years if the breach of contract is also a tortious breach of a duty. The SLRC proposal would establish a uniform 2 year limitation for a broad core of personal actions, essentially all actions in tort and contract except actions to recover debt and actions affecting title to property.

We are of the opinion that the SLRC approach is preferable. As the Commission's report observed, "a short limitation period is justified in these cases because the claim, usually for damages, arises out of a specific injury-causing event or series of events. The potential plaintiff can be expected to pursue his relief within a reasonably short period of time after the event. If he does not do so, it is not unreasonable to bar him from taking action" (SLRC Report, p. 11).

Note also that the special limitation period for breach of duty in ULCC 3(1) runs from the time when "the damage resulting from the injury first occurs". This would appear to oust the general principle that time runs from discovery of the injury (see below). This departure from the general discovery rule appears to be intended to protect professionals from the uncertainty created by long-delayed actions. In our opinion, special treatment is not justified. Two observations point to this conclusion.

(1) Ouster of the discovery rule effectively shortens the real limitation period. The proliferation of short special limitation periods to protect particular interest groups has been severely criticized, and is recognized as a major source of complexity and inconsistency in limitations legislation. (2) The ULCC's decision to adopt this provision reflected concern about escalating professional liability insurance rates in the 1980's. The "liability insurance crisis" now appears to be past, and reasonably stable insurance premiums have returned without adopting any special measures to limit professional liability.

(2) the 10 year limitation period

SLRC

5. The following actions shall not be brought after the expiration of ten years after the date on which the right to do so arose:

- (a) an action against a personal representative for a share of the estate;
- (b) an action against a trustee in respect of any fraud or fraudulent breach of trust to which the trustee was party;
- (c) an action against a trustee for the conversion of trust property to the trustee's own use;
- (d) an action to recover trust property or property into which trust property can be traced against a trustee or any other person;
- (e) an action to recover money on account of a wrongful distribution of trust property against the person to whom the property is distributed, or a successor.

ULCC

4.(1) The following actions shall not be brought after the expiration of 10 years after the day on which the right to bring the action arose:

- (a) An action against a personal representative of a deceased person for a share of the estate.
- (b) An action against a trustee in respect of a fraud or fraudulent breach of trust to which the trustee was party or party.
- (c) An action against a trustee for the conversion of trust property to the trustee's own use.
- (d) An action against a trustee or any other person to recover trust property or property into which trust property can be traced.
- (e) An action to recover money on account of a wrongful distribution of trust property against the person to whom the property is distributed or a successor to that person.
- (f) An action on a judgment, other than a foreign judgment, for the payment of money, for the return of personal property (or for possession of land).

(2) No action for possession of land shall be brought after the expiration of 10 years after the day upon which the right to bring the action accrues to the claimant or to any person from or through whom the claimant acquired his right to possession.

(3) In respect of an action for possession of land

- (a) the right to possession accrues to, and the limitation period runs against a co-tenant upon ouster or retention of the rents and profits by another co-tenant; and
- (b) the right to possession does not accrue to and the limitation period does not commence running against a person holding an estate or interest in land until the right to possession of the land vests in that person.

(Note: In provinces in which title to land cannot be acquired by possession, subsections (2) and (3) and the reference to judgments for possession of land in clause (I) of subsection (1) should be deleted and clauses (h) and (i) of section 5 should be included.)

Much of the apparent difference between the SLRC and ULCC provisions reflects the

fact that title is indefeasible under the Saskatchewan land titles system, with the result that title can never be extinguished by lapse of time. Thus the 10 year period is limited to trust matters in the SLRC draft.

If the ULCC provisions in regard to recovery of real property are set aside, the only substantive difference between the ULCC and SLRC proposals is contained in ULCC 4(1)(f), which applies the 10 year period to actions on domestic judgements for payment of money and actions for return of personal property. (The latter is presumably modified by the special rules applicable to property subject to security interests in IJLCC 6). The SLRC makes no express provision for actions on judgements. In the result, they are subject to the residual 6 year period. Like the ULCC, the SLRC makes express provision for actions to recover property subject to security interests. Other actions for recovery of personal property are subject to the residual limitation period.

Although the SLRC draft is contains no express provision relating to actions on domestic judgements, the Commission's report on limitations stated that it would be "appropriate to retain a relatively long limitation period for actions to enforce judgments" (SLRC report p.¹ 9). The Saskatchewan *Limitation of Actions Act* presently imposes a 10 year limitation period on actions on a judgment. It should also be noted that an action on a judgment will usually only be used to extend a writ of execution. Under the Queen's Bench Rules, a writ of execution remains in force for a period of 10 years.

(3) No limitation period

SLRC

6.(1) The following actions are not governed by any limitation period and may be brought at any time:

- (a) an action by a debtor in possession of property subject to a security interest to redeem the property;
- (b) an action by a secured party in possession of property subject to a security interest to realize on the property
- (c) an action for possession of land by a life tenant or remainder man;
- (d) an action relating to the enforcement of an injunction or restraining order,
- (e) an action to enforce an easement, restrictive covenant, or profit-a-prendre;
- (f) an action for a declaration as to personal status;
- (g) an action for declaration as to the title to property by any person in possession of that property;
- (ii) an action for possession of land where an owner has been dispossessed under circumstances amounting to trespass;
- (i) an action by a purchaser to obtain title to land under an agreement for sale;

- (j) an action by a vendor for cancellation under an agreement for sale of land; and
- (k) an action on a judgment for the possession of land.

(2) In an action by a purchaser to obtain title to land under an agreement for sale, the amount required to be paid by the purchaser to the vendor shall not include interest accruing after the expiration of six years after the last payment under the agreement for sale became due.

ULCC

5. In sections 6 and 7, "debtor" means a person who owes payment or performance of an obligation secured by a security interest whether or not he owns or has rights in or to the property which is subject to the security interest.

6. The following actions may be brought at any time:

- (a) An action by a debtor in possession of property subject to a security interest to redeem the property.
- (b) An action by a secured party in possession of property subject to a security interest to realize on the property.
- (c) An action relating to the enforcement of an injunction or a restraining order.
- (d) An action to enforce an easement, restrictive covenant, profit a prendre or incorporeal hereditament.
- (e) An action for a declaration as to personal status.
- (f) An action for a declaration as to the title to property by a person in possession of the property.
- (g) An action to correct a register in respect of the ownership of any estate or interest in land under (The Land Titles Act).
- (h) An action for possession of land.
- (i) An action on a judgment for possession of land.

(Note: In provinces in which title to land may be acquired by possession, clauses (h) and (i) should be deleted and subsections (2) and (3) of section 4 should be included with a reference to judgments for possession of land under clause (I) of subsection (1) of section 4).

The substantive differences in the SLRC and ULCC provisions reflect the fact that title is indefeasible under the Saskatchewan Land Titles System.

Note that the SLRC 6(2) is a special provision relating to use of agreements for sale as real property security interests, a uniquely western Canadian practice. This provision is designed to remove uncertainty in the law. Under the proposal, no limitation applies to the purchaser's right to sue for title. However, the right of the vendor to collect accrued interest on the purchaser's application is extinguished by lapse of time. Query, however, whether the proposed 6 year limitation is appropriate. A 10 year limitation in matters involving real property rights is contained in the existing *Limitation of Actions Act*.

(4) 6 year limitation period

SLRC

7. (1) Any other action not specifically provided for in this Act or any other Act shall not be brought after the expiration of six years after the date on which the right to do so arose.

(2) Without limiting the generality of subsection (1), the following actions shall not be brought after the expiration of six years after the date on which the right to do so arose:

- (a) an action to recover a debt whether secured or not;
- (b) an action for restitution or unjust enrichment, other than an action based on a constructive trust;
- (c) an action by a secured party not in possession of property subject to a security interest to realize on the property;
- (d) an action by a debtor not in possession of property subject to a security interest to redeem the property;
- (e) an action for damages for conversion or detention of goods or chattels;
- (f) an action to recover goods or chattels wrongfully taken or detained;
- (g) an action by a tenant against his landlord for possession of land; and
- (h) an action on a foreign judgment.

(3) Where a cause of action for the conversion or detention of goods accrues to a person and afterwards, possession of the goods not having been recovered by him or by a person claiming through him:

- (a) a further cause of action for the conversion or detention of the goods;
- (b) a new cause of action for 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.

ULCC

7.(1) Any action for which a limitation period is not specifically provided in this Act (or in any other Act) and to which section 5 does not apply shall not be brought after the expiration of 6 years after the date on which the right to do so arose.

(2) Without limiting the generality of subsection (1), and notwithstanding sections 3, 4 and 6, the following actions shall not be brought after the expiration of 6 years after the date on which the right to do so arose:

- (a) An action for breach of contract that does not come within subsection (1) of section 3 or clause (a) of subsection (2) of section 3.
- (b) An action to recover a debt, whether secured or not.
- (c) An action by a secured party not in possession or property subject to a security interest to realize on the property.
- (d) An action by a debtor not in possession of property subject to a security interest to redeem the property.

- (e) An action for damages for conversion or detention of goods or chattels.
- (f) An action to recover goods or chattels wrongfully taken or detained.
- (g) An action to realize on a foreign judgment.

(Note: The words "or any other Act" in subsection (1) could be deleted if the intent is to confine all limitation periods to The Limitations Act.)

(3) Where a cause of action for damages for the conversion or detention of goods or chattels accrues to a person and afterwards, possession of the goods or chattels not having been recovered by him or by a person claiming through him,

- (a) a further cause of action for damages for the conversion or detention of goods or chattels; or
- (b) a new cause of action for damage to the goods or chattels; or
- (c) a new cause of action to recover the proceeds of a sale of the goods or chattels; accrues to him or a person claiming through him, no action shall be brought by him on the further or new cause of action after the expiration of 6 years from the date on which the first cause of action accrued to him or to a person through whom he claims.

As noted above, actions for breach of contract that are not also actionable in tort fall under the residual 6 year limitation period in the ULCC model, but not in the SLRC draft. In other respects, the proposals are practically identical.

Confirmation (SLRC 8; ULCC 17)

Both the SLRC and ULCC consolidate and rationalize provisions in existing limitations legislation that re-start the running of a limitation period on confirmation or acknowledgement of the cause of action. The provisions in the proposed acts are similar, but there are minor differences that may be significant in practice.

(1) When confirmation must be made

SLRC

8.(1) Where, after time has commenced to run but before the limitation period has expired, a person against whom an action lies confirms the cause of action, the time during which the limitation 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.

ULCC

17.(1) Where a person against whom an action lies confirms the cause of action, the time before the dates of the confirmation shall not be counted in determining the limitation period for the action by a person having the benefit of the confirmation against the person bound by the confirmation.

(2) In the case of an action to enforce or declare a right or title referred to in section 9, subsection (1) does not apply unless the confirmation takes place before the expiration of the limitation period for the action.

Under the SLRC proposal, the confirmation must be made before the expiry of the limitation period in order to restart the running of the period. This is in keeping with SLRC 13, which extinguishes the cause of action upon expiration of a limitation period. The ULCC model, on the other hand, provides generally that a confirmation restarts the running of the limitation period whether or not the original cause of action has been barred by expiry of a limitation period (subject to an exception in the case of an action to enforce a title or to recover property or money).

The question of whether limitation periods should be substantive or act as mere procedural bars has long been debated. Most modern commentators are of the opinion that less difficulty is produced in practice if limitations periods have substantive effect. The SLRC confirmation formula more fully reflects this policy, and is preferable to the ULCC approach for that reason.

(2) Acknowledgement of debt etc.

SLRC

8.(2) For the purposes of this section:

- (a) a person confirms a cause of action only if he:
 - (i) acknowledges a cause of action, right, or title of another; or
 - (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 effect:
 - (i) whether or not a promise to pay can be implied from it; 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;
- (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.

ULCC

17.(3) For the purposes of this section

- (a) a person confirms a cause of action only if
 - (i) he acknowledges a cause of action, right or title of another, or
 - (ii) he makes a payment in respect of a cause of action, right or title of another;
- (b) an acknowledgement of a judgment, debt or obligation has effect
 - (i) whether or not a promise to comply with the judgment, to pay the debt or to perform the obligation can be implied therefrom, and
 - (ii) whether or not it is accompanied by a refusal to comply with the judgement, pay the debt or perform the obligation;
- (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 due at a particular time operates also as
a confirmation of a cause of action to recover income due at a later time on the same amount.

ULCC I 7(3)(b) refers to an "acknowledgment of a judgment, debt or obligation" whereas the equivalent provision in SLRC 8(2)(b) refers to only a "judgment or debt." The SLRC report nevertheless suggested that the doctrine of confirmation should extend to all causes of action (SLRC report p.40). The ULCC provision is more comprehensive, and therefore preferable.

The ULCC provision gives effect to an acknowledgment whether or not a promise or refusal "to comply with the judgment, to pay the debt or to perform the obligation can be implied therefrom." The equivalent provision in the SLRC does mention an implied promise or refusal to comply with a judgment. This difference in language may not be significant, but the SLRC provision lacks the clarity of the ULCC proposal.

(3) Part payment of a secured debt

SLRC

8.(3) Where a secured party has a cause of action to realize on property subject to a security interest:

- (a) a payment to him of principal or interest secured by the property;
- (b) any other payment to him in respect of his right to realize on the property or any other performance by any other person of the obligation secured; is a confirmation by the payer or performer of the cause of action.

8.(4) Where a secured party is in possession of property subject to a security interest:

- (a) a payment to him of principal or interest secured by the property; or
 - (b) any other payment to him in respect of his right to realize on the property or any other performance by another person 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.

ULCC

17.(4) Where a secured party has a cause of action to realize on property subject to a security interest

- (a) a payment to him of principal or interest secured by the property; or
- (b) any other payment to him in respect of his right to realize on the property or any other performance by another person of the obligation secured; is, as against the payor or performer, a confirmation of the cause of action.

17.(5) Where a secured party is in possession of property which is subject to a security interest in his favour

- (a) his acceptance of a payment to him of principal or interest secured by the property; or

- (b) his acceptance of
 - (i) payment to him in respect of his right to realize on the property, or
 - (ii) any other performance by another person of the obligation secured; is a confirmation by him to the payor or performer of the payor's or performer's cause of action to redeem the property.

SLRC 8(3) and ULCC 17(4) are essentially identical, but SLRC 18(4) and ULCC 17(5) differ in detail in ways that may affect the operation of these provisions. The ULCC provision defines acceptance of payment by a secured party in possession of secured property as confirmation of a right to redeem the property, whereas the SLRC simply defines payment to a secured party in possession as confirmation. Obviously, if the secured party is to make a confirmation, some act must be attributed to him from which confirmation can be implied; acceptance is that act. However, the provision in the SLRC proposal would deem confirmation to have occurred even if the secured party was unaware of the payment; it is the act of the payor that triggers the confirmation, not an act of the secured party. In all other cases, confirmation results from an act of the party adversely affected by the confirmation. For that reason, the ULCC provision is probably preferable.

(4) Formalities

The formal requirements for an acknowledgement or a confirmation in the SLRC draft and IJLCC model are essentially the same in language and effect.

SLRC

8.(5) For the purposes of this section, an acknowledgment of a cause of action is not binding unless it is in writing and signed by the person giving the acknowledgment.

(6) For the purposes of this section, a person has the benefit of a confirmation only if the confirmation is made to him, or to a person through whom he claims, or if the confirmation is made in the course of proceedings or a transaction purporting to be pursuant to the *Bankruptcy Act* (Canada).

(7) For the purposes of this section, a person is not bound by a confirmation unless:

- (a) he is a maker of the confirmation;
- (b) after the making of the confirmation the person becomes, in relation to the cause of action, a successor of the maker;
- (c) the maker is a trustee at the date of confirmation, and the person at that date or thereafter becomes a trustee of the trust to which the maker is a trustee; or
- (d) the person is bound under subsection (8).

(8) Where a person who confirms a cause of action:

- (a) to recover a property;
- (b) to enforce and equitable estate or interest in property;
- (c) to realize on property subject to a security interest;
- (d) to redeem property subject to a security interest;

- (e) to recover principal money or interest secured by a security agreement, by way of the appointment of a receiver of property subject to a security interest or income or profits of such property or by way of sale, lease, or other disposition of such property or by way of other remedy affecting such property; or
- (f) to recover trust property into which trust property can be traced; is on the date of confirmation in possession of the property, the confirmation binds any other person in possession during the continuance of the limitation period unless that other person was in possession of the property in the date of the confirmation or claims through a person, other than the maker of the confirmation, who was in possession of the property on the date of the confirmation.

(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.

ULCC

17.(6) For the purposes of this section, an acknowledgment of a cause of action is not binding unless it is in writing and signed by the person giving the acknowledgment.

(7) For the purposes of this section, a person does not have the benefit of a confirmation unless the confirmation is made

- (a) to him;
- (b) to a person through whom he claims; or
- (c) in the course (sic) of proceedings or a transaction purporting to be pursuant to the Bankruptcy Act (Canada).

(8) For the purposes of this section, a person is not bound by a confirmation unless

- (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, 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 (9).

(9) Where a person who confirms a cause of action

- (a) to recover property;
- (b) to enforce an equitable estate or interest in property;
- (c) to realize on property subject to a security interest;
- (d) to redeem property subject to a security interest;
- (e) to recover principal money or interest secured by a security agreement, by way of the appointment of a receiver of property subject to a security interest or of the income or profits of such property or by way of sale, lease or other disposition of such property or by way of other remedy affecting such property; or
- (f) to recover trust property or property into which trust property can be traced;

is, on the date of the confirmation, in possession of the property, the confirmation binds any other person in possession during the continuance of the limitation period unless that

other person was in possession of the property on the date of the confirmation or claims through a person, other than the maker of the confirmation, who was in possession of the property on the date of the confirmation.

(10) 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.

(5) Confirmation of unliquidated damages

ULCC subsection 17(11) provides that confirmation of unliquidated damages does not extend the limitation period. There is no similar provision in the **SLRC** proposal. The **SLRC** report notes that under the present law, a defendant will be estopped from denying liability if "negotiations have reached the point that liability has been accepted by the defendant, leaving only the quantum of damages or compensation to be settled." (**SLRC** report p.39). The **ULCC** proposal would change the law in this regard. In our opinion, the existing estoppel rule is reasonable and should be retained.

ULCC

17.(1 1) Except as otherwise provided in this section, nothing in this Act operates to allow confirmation of an unliquidated sum or to make any right, title or cause of action capable of being confirmed that was not capable of being confirmed before this Act came into force.

Fraudulent breach of trust (SLRC 9; ULCC 12)

Both the **SLRC** and **ULCC** propose giving statutory expression to the equitable rule that deprives a fraudulent trustee of the protection of a limitation period. The equitable rule would be modified, however, to apply only prior to discovery of the breach of trust. The provisions differ in substance only in that the **ULCC** places a burden on the trustee to prove that the beneficiary was aware of the breach.

SLRC

- 9.** The running of time with respect to the limitation period fixed by this Act for an action:
- (a) based on fraudulent breach of trust to which a trustee was a party or privy; or
 - (b) to recover from a trustee trust property, or the proceeds from it, in the possession of the trustee, or previously received by the trustee and converted to his own use;
- is postponed and does not commence to run against a beneficiary until that beneficiary becomes fully aware of the fraudulent breach of trust, conversion, or other act of the trustee upon which the action is based.

ULCC

12.(1) In respect of an action

- (a) based on fraud or fraudulent breach of trust to which a trustee was a party or privy; or
- (b) to recover from a 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;

the right to bring the action does not arise and the limitation period does not begin to run against a beneficiary until the beneficiary knows 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 burden rests on the trustee to prove when the beneficiary knew of the fraud, fraudulent breach of trust, conversion, or other act of the trustee upon which the action is based.

Discovery of injury

Both the SLRC and the ULCC propose a "discovery rule" that would delay the running of a limitation period in some cases in which the potential plaintiff is not aware that injury has been inflicted by the potential defendant. However, the SLRC and ULCC formulae differ in some significant respects:

(1) The SLRC discovery provision applies to a wider class of actions. The SLRC discovery rule applies to all actions subject to the 2 year limitation period and any other action based on fraud or deceit. It thus applies to essentially all personal actions in tort and contract. The ULCC provision applies to actions subject to the ordinary 2 year limitation period (ULCC 3(2)), but not to breaches of duty that may be actionable in both tort and contract (ULCC 3(1)), even though these actions are also subject to a 2 year limitation period. In addition, the ULCC subjects most other actions for breach of contract to a 6 year limitation period, which does not attract the discovery rule.

In our opinion, the scope of the discovery rule set out in the SLRC draft is more rational and appropriate than the ULCC rule. As a minimum, a discovery principle should apply to all short limitation periods. The reasons why the IJLCC exempts actions for breach of duty has been discussed above. We do not regard them as persuasive. We are also of the opinion that it is appropriate to apply the principle to all personal actions. For that reason, we believe that breach of contract should be subject to the discovery rule whether a 2 or 6 year limitation period applies to it.

If any change in the SLRC proposal is merited, it would be to extend, not restrict, the scope of the rule. SLRC 9 establishes a separate discovery rule in actions for fraudulent breach of trust. In practice, this provision brings most actions subject to the 10 year limitation period within the scope of the discovery principle. Most other causes of action will rarely involve the kind of hidden injury

that makes a discovery rule necessary. Nevertheless, we can find no good reason why the discovery rule should not be available in all cases. The fact that it will be invoked only rarely except in personal actions is not a reason for limiting the potential scope of the rule, and in fact makes extension less problematic.

(2) The SLRC provision provides that time begins to run only when the plaintiff knew or ought to know the identity of the defendant, the facts on which the action is founded, and "that the injury suffered was significant." The ULCC provision omits the requirement of knowledge that the injury was significant. Discovery rules following the formula proposed by the ULCC have been subject to criticism. A plaintiff may know, for example, that she has been exposed to a noxious chemical and suffered minimal harm. Serious illness triggered by the chemical may not appear for many years. A "significant injury" test has been in place in England for some time. The courts have had no difficulty applying the test (see SLRC Report, p. 32).

(3) The ULCC proposal does not allow the discovery principle to operate for more than 10 years after the injury was sustained. The SLRC proposal allows the limitation period to remain in suspense until expiration of the 30 year "ultimate limitation period" proposed in the draft Act (see below). In our opinion, the 10 year suspense provided by the ULCC is not adequate. The effects of exposure to noxious substances may not become apparent until more than 10 years has elapsed after exposure. Even the 30 year ultimate limitation period may be objectionable in principle and unnecessary in practice (see below).

SLRC

10.(1) The running of time with respect to the limitation period fixed by this Act for an action to which this section applies is postponed and does not commence to run against a plaintiff until he knows, or in all the circumstances of the case, he ought to know:

- (a) the identity of the defendant;
- (b) the facts upon which his action is founded; and
- (c) that the injury suffered was significant

(2) Subsection (1) applies only to:

- (a) actions subject to a two year limitation period other than an action to recover a penalty;
- (b) actions based on fraud or deceit;
- (c) actions in which material facts relating to the cause of action have been wilfully concealed;
- (d) actions for breach of trust not within section 9.

(3) For the purposes of subsection (1), an injury is significant if a person would reasonably have considered it sufficiently serious to justify instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(4) **This** section (1) does not operate to the detriment of a bona fide purchaser for value.

ULCC

13(1) This section applies only to

- (a) an action for damages for breach of duty of care, if based on contract, tort or statutory duty, where the damages arise from injury to persons or property, including any economic loss arising from the injury;
- (b) an action for damages in respect of injury to persons or property, including economic loss arising from the injury, that is not an action mentioned in clause (a);
- (c) an action for damages for economic loss arising from a breach of duty of care in the rendering of services under a contract other than a contract of employment;
- (d) an action based on fraud or deceit;
- (e) an action where the material facts relating to the cause of action have been wilfully concealed;
- (1) an action for relief from the consequences of a mistake;
- (g) an action under The Fatal Accidents Act; or
- (h) an action for breach of trust that is not an action mentioned in section 12.

(2) The beginning of the limitation period for an action is postponed until the plaintiff knows or, in all circumstances of the case he ought to know

- (a) the identity of the defendant; and
- (b) the facts upon which his action is founded.

(3) This section does not allow an action

- (a) after the expiration of 10 years after the date of the act or omission on which the action is based; or
- (b) in the case of an action based upon a series of acts or omissions or a continuing course of conduct, after the expiration of 10 years after the date of the last of the series or the termination of the course of conduct.

(4) The burden of proving that the beginning of the limitation period for an action has been postponed by reason of subsection (2) rests on the person claiming the benefit of the postponement.

14.(1) Sections 12 and 13 do not operate to the detriment of a bona fide purchaser for value.

(2) Sections 12 and 13 do not postpone the beginning of the limitation period for an action by a person who suffers damage or injury beyond the day when

- (a) his agent;
- (b) his guardian or committee;
- (c) his personal representative; or
- (d) his predecessor in right, title or interest; knew or ought to have known the facts upon which the action is based.

Disabilities (SLRC 11; ULCC 15)

Both the SLRC and ULCC recommend preserving the general principle that limitation periods do not ordinarily run against persons under a disability (infants and incompetents). The SLRC proposals do not make any substantive change in the general rules, while the ULCC modifies them in some respects. These modifications are discussed below.

(1) Definition of disabilities and notice to proceed

SLRC

11(1) For the purpose of this section, a person is under a disability:

- (a) while he is a minor;
- (b) while he is in fact incapable of the management of his affairs because of disease or impairment of his physical or mental condition and he or his estate is not represented by a committee or other person appointed under *The Public Trustee Act* or *The Mentally Disordered Persons Act* who has the legal capacity to commence the course of action on behalf of that person or his estate.

(4) Notwithstanding subsections (2) and (3), where a person under a disability has a cause of action against another person, that other person may cause a notice to proceed with the action to be delivered in accordance with this section, and the limitation period begins to run against the person under the disability on the date on which the notice to proceed was delivered.

(5) A notice to proceed mentioned in subsection (4) shall:

- (a) be in writing;
- (b) be addressed or delivered:
 - (i) in the case of a minor, to his parent or guardian, as the case may be, and to the Public Trustee, and
 - (ii) in the case of a person incapable of the management of his affairs because of disease or impairment of his physical or mental condition, to the committee or other person appointed under *The Mentally Disordered Persons Act*, and to the Public Trustee;
- (c) state the name of the person under the disability;
- (d) specify the circumstances out of which the cause of action may arise with such particularity as is necessary to enable a determination to be made as to whether the person under the disability has or may have a cause of action;
- (e) give warning that the cause of action arising out of the circumstances stated in the notice is liable to be barred by this Act;
- (f) state the name of the person on whose behalf the notice is delivered; and
- (g) be signed by the person delivering the notice or his solicitor.

(6) Where there is no parent, guardian, committee or other person to whom notice can be given under subsection (5), the Court of Queen's Bench may appoint a guardian ad litem; and the notice referred to in subsection (5)

may thereafter be given to the guardian ad litem and to the Public Trustee.

(7) Subsection (4) does not apply to a person under a disability in bringing an action against his parent or guardian, the committee or other person appointed for him, or the Public Trustee.

(8) The delivery of a notice to proceed under this section operates to benefit only those persons on whose behalf the notice is delivered and only with respect to a cause of action arising out of the circumstances specified in the notice.

(9) The onus of proving that the beginning of a limitation period for an action has been postponed or suspended under this section rests 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) Where a notice to proceed under this section is delivered to the Public Trustee and it appears to him that the other person to whom the notice was delivered has failed to take reasonable steps to protect the interest of the person under disability, the Public Trustee shall:

- (a) investigate the circumstances specified in the notice; and
- (b) if he believes that an action for the benefit of the person under the disability would result in a judgment that would justify the bringing of the action, commence and maintain such an action.

(12) The Lieutenant Governor in Council may make regulations prescribing the form, content and method of delivery of and other matters relating to notices to proceed to be delivered under this section.

ULCC

15.(1) For the purpose of this section, a person is under a disability

- (a) while he is a minor;
- (b) while he is in fact incapable of the management of his affairs because of disease or impairment of his physical or mental condition.

(6) Notwithstanding subsections (2) and (4), where a person under a disability has a case of action against another person, that other person may cause a notice to proceed with the action to be delivered in accordance with this section, in which case the limitation period set out in subsection (3) or (5), as the case may be, begins to run against the person under the disability as if he had ceased to be under the disability on the date on which the notice to proceed was delivered.

(7) A notice to proceed mentioned in subsection (6) shall

- (a) be in writing;
- (b) be addressed and delivered
 - (i) in the case of a minor, to his parent or guardian, as the case may be and to (name of appropriate government official), and
 - (ii) in case of a person incapable of the management of his affairs because of disease or impairment of his physical or mental condition, to his parent or committee, as

- the case may be, and to (name of appropriate government official);
- (c) state the name of the person under the 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 a determination to be made as to whether the person under the disability has or may have a cause of action;
- (e) give warning that the cause of action arising or which may arise out of the circumstances stated in the notice is liable to be barred by this Act;
- (f) state the name of the person on whose behalf the notice is delivered;
- and
- (g) be signed by the person delivering the notice or his solicitor.

(8) Subsection (6) does not apply to a person under a disability in bringing an action against

- (a) his parents;
- (b) his guardian;
- (c) his committee; or
- (d) (here name appropriate government officials mentioned in (7)(b).

(9) The delivery of notice to proceed under this section operates to benefit only those persons on whose behalf the notice is delivered and only with respect to a cause of action arising out of the circumstances specified in the notice.

(10) The onus of proving that the beginning of a limitation period for an action has been postponed or suspended under this section rests on the person claiming the benefit of the postponement or suspension.

(11) 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.

(12) Where a notice to proceed under this section is delivered to (name of government official) and it appears to him that the other person to whom the notice was delivered has failed to take reasonable steps to protect the interest of the person under the disability, (name of appropriate government official) shall

- (a) investigate the circumstances specified in the notice; and
- (b) if he believes that an action for the benefit of the person under the disability would have a reasonable prospect of succeeding and would result in a judgment that would justify the bringing of the action, commence and maintain such an action.

(13) The Lieutenant Governor in Council may make regulations prescribing the form, content and method of delivery of and other matters relating to notices to proceed to be delivered under this section.

Until recently, a limitation period was suspended if the potential plaintiff is mentally incompetent, whether or not a committee or property guardian had been appointed to manage the incompetent's affairs. In 1983, the Saskatchewan *Limitations of Actions Act* was amended (SS 1983, c.80, s.13) to provide that the limitation period remains in suspense only so long as no committee or guardian has been appointed. In our opinion, this is a reasonable approach. Committees and guardians are appointed for the express purpose of making decisions on behalf of their wards. They are either public officials or court appointees. In either case, they can be expected to protect the interests of the ward. The SLRC proposal adopts the substance of the 1983 Saskatchewan amendment.

Extension of the logic applied to incompetents to infants is problematic. Under the Alberta *Limitation of Actions Act*, time will also run against a minor a "in the actual custody of a parent or guardian" (SA, 1966, c 49, s.3). A similar provision has been recommended by the Ontario Law Reform Commission. The SLRC agreed with the British Columbia Law Reform Commission that parents cannot be equated with court-appointed guardians or public officials in this context. Instead, the SLRC and B.C. Commission proposed a new mechanism for compelling an action to be brought in a timely fashion on behalf of a minor. It is proposed that a potential defendant may compel action by serving a "notice to proceed" on the minor's parent or guardian and the Public Trustee. Involvement of the Public Trustee is intended to insure that the minor's interests will be adequately protected. The SLRC also concluded that the notice to proceed mechanism would be appropriate in the case of incompetent adults.

In substance, the ULCC provisions relating to the definition of disabilities and the notice to proceed are identical to the SLRC provisions. Note, however, that the SLRC formula contains a potentially confusing redundancy. SLRC 15(1) excludes incompetents who have committees or guardians from the definition of persons under disability. This is unnecessary if the notice to proceed provisions apply to incompetents. No similar exclusion is made in the case of minors. Note also that if the SLRC provision is adopted, reference to the *Mentally Disordered Persons Act* should be replaced by reference to *The Dependant Adults Act*. To reflect the language of the new legislation, the reference to "committee" should similarly be replaced by reference to "property guardian".

In retrospect, we are not entirely satisfied that the SLRC and (following its lead) the ULCC were correct in assuming that the notice to proceed mechanism devised originally to deal with minor plaintiffs is also appropriate for incompetent plaintiffs. The mechanism is more cumbersome than the simple rule in the present *Limitation of Action Act* in regard to incompetents. The notice to proceed was proposed by the B.C. Law Reform Commission as a way to protect minors' interests by involving the Public Trustee. It is not necessary when the Public Trustee is the guardian of an adult incompetent, or when the adult incompetent has a court-appointed guardian.

(2) cases in which the cause of action arose after the disability

SLRC

11 .(2) Where a person is under a disability at the time his right to action arises, the beginning of the limitation period is postponed so long as that person is under a disability.

ULCC

15(2) Where a person who has a cause of action is under a disability when, except for this section, the limitation period for the action begins to run, the beginning of the limitation period is postponed until he is no longer under a disability.

(3) Where the beginning of a limitation period for an action is postponed under subsection (2), and the person who has the cause of action ceases to be under a disability, the action may be brought before the later of

(a) the date of the expiration of the limitation period for the action that would have applied if the person had never been under a disability; or

(b) the date of the expiration of the limitation period for the action beginning on the date the disability ceased but not later than 6 years after the date the disability ceased.

Under the present law, when a person is under a disability when a cause of action arises, time does not begin to run until the disability ceases. The potential plaintiff will have the benefit of the entire length of the limitation period from the date the disability ceases. The SLRC proposal preserves this rule. The ULCC takes the position that the protective policy of the disability rule will be effectively carried out if the potential plaintiff is given a reasonable time to act after the disability ceases, which may be shorter than the limitation period. While this would reduce the period of uncertainty for a potential defendant, we have difficulty accepting it in principle. A person under a disability is deemed to be incapable of appreciating his or her legal rights. In effect, the potential plaintiff only discovers the right of action when the disability ceases. If the limitation period is appropriate (as it must be assumed to be), the potential plaintiff should have its full benefit.

(3) Cases in which the disability arose after the cause of action

SLRC

11(3) Where a person who has a cause of action comes under a disability after the limitation period for the action has begun to run but before the expiration of it, the running of the limitation period for the action is suspended until he is no longer under a disability.

ULCC

15(4) Where a person who has a cause of action comes under a disability after the limitation period for the action has begun to run but before the expiration thereof, the running of the limitation period for the action is suspended until he is no longer under a disability.

(5) Where the running of a limitation period for an action is suspended under subsection (4), and the person who has the cause of action ceases to be under a disability, the action may be brought before the later of

(a) the date of the expiration of the limitation period for the action as it would have applied if the person had never been under disability; or

(b) one year after the date the disability ceased.

Under the present law and the SLRC proposal, if a potential plaintiff comes under a disability while a limitation is running, the clock stops until the disability ceases. Thus, for example, if 1 year of a 6 year period has run when the potential plaintiff becomes incompetent, he or she will have 5 years in which to bring the action after recovering competency. The ULCC would cut down on the time allowed to bring the action after the potential plaintiff recovers competency. For the reasons outlined in the last section of this report, we prefer the SLRC approach.

The ultimate limitation period (SLCC 12; ULCC 18)

SLRC

12.(1) Subject to section 6, but notwithstanding a confirmation made under section 8 or a postponement or suspension of the running of time under section 9, 10 or 12, 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.

[The reference to section 12 above is an apparent misprint; it should read section 11]

(2) Subject to subsection (1), the effect of sections 9, 10 and 11 is cumulative.

IYLCC

18. Subject to section 6, but notwithstanding a confirmation under section 17 or a postponement or suspension of a limitation period under section 13 or 15,

- (a) no action for which a limitation period is fixed shall be brought after, and
- (b) all rights and claims arising out of a cause of action for which a limitation period is fixed are extinguished on;
the expiration of 30 years after the occurrence of the act, omission or breach which gave rise to the cause of action or on which the action is based.

(Note: Should this section operate notwithstanding section 12 or should section 12 operate without the 30 year limitation.)

Both the SLRC and ULCC propose an "ultimate limitation period" of 30 years, after which an action would be finally barred. The 30 year period would, in the context of the SLRC draft, override extensions of the ordinary limitation period due to disabilities or the discovery rule. Because the discovery rule in the ULCC model can operate to extend the time for no more than 10 years, the 30 year limitation period will affect the discovery rule in the context of the ULCC model only if a cumulative extension due to disability and the discovery rule would exceed 30 years.

An ultimate limitation period will prevent limitation periods from being extended indefinitely.

The idea was first proposed by the New South Wales Law Reform Commission, and introduced to Canada by the B.C. Law Reform Commission. Two factors appear to account for popularity of the idea with law reformers: (1) Other reforms, including in particular discovery rules, would increase the likelihood that limitation periods may be suspended for inordinately long periods of time. (2) Concern about the uncertainty created by long suspense of limitation periods was heightened during the 1980's by escalating liability insurance costs. Uncertainty was identified as a factor contributing to the "liability insurance crisis".

In retrospect, we are doubtful that a strong case can be made for the 30 year ultimate limitation period. British Columbia, following the recommendations of its Law Reform Commission, has adopted new limitations legislation that includes a 30 year ultimate period. In 1994, the B.C. Law Reform Commission reviewed the operation of new legislation. It found no case in which the 30 year period had been applied, and no evidence that the 30 year period was filling any practical function.

The B.C. experience is directly relevant to the ULCC model. The B.C. legislation, like the ULCC model, limits extension of time under the discovery rule to 10 years.

The 30 year period might have more practical utility if the SLRC model is adopted, but we are doubtful that its value would be significant. Very few actions would be brought more than 30 years after the cause of action arose in the absence of the 30 year final stop. Even if the potential plaintiff survives and maintains interest in bringing the action, the evidentiary difficulties in proving the case after more than 30 years will usually operate as a practical bar. Even hidden injuries will usually be difficult to link to events more than 30 years in the past. On the other hand, the few cases in which a successful case can be made may be just those cases that justice and public opinion will regard as meritorious. Consider, for example, the recent publicity given to cases in which severe mental disorder was not traced to abuse in early childhood until years after the victims reached adulthood. The Supreme Court of Canada has relieved plaintiffs of the limitation period in such cases on Charter grounds. The ULCC model would deny relief in most cases of this type, and the SLRC model would deny relief in at least some.

The argument that the 30 year period is necessary to reduce uncertainty is, in our view, misplaced. 30 years exceeds the normal fiscal planning horizon of businesses. It is therefore unlikely to relieve concern about indefinitely suspended causes of action even if such concern is significant. In addition, much of the concern appears to have dissipated with the return of more stable insurance rates in the 1990's.

Extinguishment of right, cause of action or title (SLRC 13; ULCC 9)

Both the SLRC and ULCC would change the existing law to provide that expiration of a limitation period has substantive rather than merely procedural effect. In our opinion, the more succinct SLRC formula is adequate. Title to property is clearly extinguished when the action to recover it is barred.

SLRC

13.(1) When a limitation period expires and the right to bring an action is thereby barred, the cause of action upon which the action was based and any title involved are extinguished.

ULCC

9. Subject to section 19, the right and title of a person to property or to recover money out of property is extinguished

(a) in the case of personal property wrongfully taken or detained, on the expiration of the limitation period for an action to recover the property; and

(b) in the case of land, a rent charge or money charged upon land, on the expiration of the limitation period for an action to recover possession of the land or to recover the rent charge or money.

(Note: 1. In provinces in which title to land cannot be acquired by adverse possession, this section, particularly clause (b), should be varied to exclude its application to those situations relating to adverse possession.

2. A province with a property title registration system may wish to provide a procedure for varying the registrations relating to the property to reflect the application of this section.)

Counter claim, set-off, and third party proceedings (SLRC 14; IJLCC 19)

The SLRC 14, and the ULCC 19, provide for the assertion of statute barred claims in other actions. The language of SLRC 14(1) and the ULCC 19(1) is the same except that the SLRC proposal expressly requires that "the action originally brought is not barred by the expiry of a limitation period." There are differences in the subsequent subsections. The IJLCC proposal provides for a one year limitation period for the bringing of a third party action following the beginning of the original action. The SLRC proposal allows for court discretion to limit the time period and does not impose a one year limit. ULCC 19(3) also prevents a barred claim from being allowed in set-off, counter claim, or third party proceedings if the party asserting set-off, counter claim, or third party proceeding can defeat the original claim by pleading a limitation defence. The SLRC proposal is silent in this regard. However, SLRC 13 provides that the expiry of a limitation period extinguishes the cause of action and any title involved. This would seem to preclude revival of the claim for the purposes of setoff, or otherwise.

SLRC

14.(1) Where an action has been brought, the expiry of the limitation period for bringing

an action or a claim does not bar the making of that claim in the action originally brought:

- (a) by way of counterclaim, including the addition of a new party as a defendant by counterclaim;
- (b) by way of third party proceedings; or
- (c) by way of set off;

under any applicable law if the claim is related to or connected with the action originally brought, and the action originally brought is not barred by the expiry of a limitation period.

(2) A court may disallow third party proceedings permitted under subsection (1) if it is satisfied that the third party will suffer actual prejudice.

ULCC

19.(1) Where an action has been brought, the expiry of the limitation period for bringing an action or a claim does not bar the making of that claim in the action originally brought

- (a) by way of counterclaim, including the addition of a new party as a defendant by counterclaim;
- (b) by way of third party proceedings; or
- (c) by way of set off;

under any applicable law if the claim is related to or connected with the cause of action or the action originally brought.

(2) Without leave of the court, a notice of third party proceedings permitted under subsection (1) in respect of a claim on which an action cannot be brought because of the expiration of the limitation period therefor, shall not be served by a defendant in an action after the expiration of 1 year after the service of the statement of claim or other process by which the original action against the defendant was begun.

(3) Subsection (1) does not permit a person to make a claim against another person in an action where the claim by that other person

- (a) against the first mentioned person; and
- (b) to which or with which the claim of the first mentioned person is related or connected; is or will (may) be defeated by the first mentioned person pleading that the limitation period for an action on the claim has expired.

Amendment of pleadings

SLRC 15 allows for the amendment of pleadings to assert a new claim or to substitute parties provided the claim asserted arises out of the same transaction or occurrence and the amendment does not create prejudice. ULCC 20, is more restrictive, limiting discretion to a greater extent. If a plaintiff is to be substituted or added the court must be satisfied that it is "necessary or desirable to ensure the effective enforcement of the claims originally made."

SLRC

15.(1) Notwithstanding that a limitation period has expired since the commencement of an action, the court may allow an amendment of the pleadings:

- (a) asserting a new claim; or
- (b) adding or substituting parties;

if the claim asserted by the amendment, or by or against the new party, arose out of the same transaction or occurrence as the original claim and the court is satisfied that no party will suffer actual prejudice as a result of the amendment.

ULCC

20.(1) The court may allow an amendment changing the claim made in an action after the expiration of the limitation period for the action if the claim sought to be added by the amendment arose out of the facts set forth in the original pleadings.

(2) The court may allow an amendment adding or substituting a plaintiff in an action or changing the capacity in which a plaintiff in an action sues, after the expiration of the limitation period for the action if

- (a) the claim to be asserted by the new plaintiff, or by the original plaintiff in the new capacity, arose out of the facts set forth in the original pleadings;
- (b) the defendant has, before the expiration of the limitation period for the action and the additional period provided by law for service of process, received formal or informal notice that he will not be prejudiced by the addition, substitution or change if allowed in defending on the merits; and
- (c) the court is satisfied that the addition, or substitution of the new plaintiff or the change in the capacity of the plaintiff is necessary or desirable to ensure the effective enforcement of the claims originally made (or intended to be made) in the action.

(3) The court may allow an amendment adding or substituting a defendant in an action, or changing the capacity in which a defendant in an action is sued, after the expiration of the limitation period for the action if

- (a) the claim to be asserted against the new defendant, or against the original defendant in an action, or changing the capacity in which a defendant in an action is sued, after the expiration of the limitation period for the action if
- (b) the party to be added or substituted or the defendant to be assigned a new capacity in the action has, before the expiration of the limitation period for the action and the additional period provided by law for service of process, received formal or informal notice that he will not be prejudiced by being added or substituted, or by the change in capacity, if allowed, in defending on the merits.

Conflict of laws

SLRC 16 permits the limitation of actions law of another jurisdiction to be applied in Saskatchewan if the action is governed by the substantive law of that jurisdiction. The Court is given discretion to determine whether the foreign limitation period should be applied. IJLCC 21, on the other hand, requires that the Uniform Act be applied in all cases.

SLRC

16. Where it is determined in an action that the law of a jurisdiction other than Saskatchewan is applicable and the limitation law of that jurisdiction is, for the purposes of private international law classified as procedural, the court may apply Saskatchewan limitations law or may apply the limitations law of the other jurisdiction if a more just result is produced.

ULCC

21. This Act applies to actions in the province to the exclusion of laws of all other jurisdictions

- (a) imposing limitation periods for bringing of actions; or
- (b) in any other manner prohibiting or restricting the bringing of actions because of lapse of time or delay.

The crown

The SLRC proposal simply states that the Crown is bound by the Act. The Uniform Act also binds the Crown but a provision is added to prevent extinguishment of Crown title by adverse possession or prescription. Such a provision is not necessary in Saskatchewan since no limit is proposed for actions concerning recovery of land against an adverse possessor.

SLRC

17. The Crown is bound by this Act.

ULCC

22.(1) Except as provided in subsection (2), Her Majesty is bound by this Act.

(2) An action by Her Majesty for possession of land may be brought at any time and the title of Her Majesty to land is not extinguished by possession by another person.

(Note: Subsection (2) may not be necessary in provinces where the general law provides that title to land is not extinguished by adverse possession and clause (h) of section 5 is included.)