REFORMING STATUTES OF LIMITATIONS

Kent Roach*

Introduction

The legal environment concerning statutes of limitations has been remarkably dynamic over the last 20 years and presents particular challenges to the law reformer. In two landmark decisions in the 1980s, the Supreme Court of Canada decided that statutes of limitations are subject to principles of discoverability.[1] These cases responded to the "injustice of a law which statute-bars a claim before the plaintiff is even aware of its existence."[2] They in turn adversely affected the traditional functions of statutes of limitations promoting repose for potential defendants, diligence for potential plaintiffs and ensuring that cases are litigated while the evidence is reasonably fresh. These purposes were re-asserted in a number of provinces by ultimate limitation periods which apply regardless of discoverability. In British Columbia, for example, there are ultimate limitation periods of 30 years with special ultimate limitation periods of 6 years for actions against doctors and hospitals. In Alberta and Newfoundland, there are 10 year ultimate limitation periods to balance the statutory incorporation of discoverability principles.[3]

This paper will focus on recent developments in Canada, major law reform proposals in Canada and abroad and their implications for future legislative reform. The first part of this paper will examine judicial developments in the interpretation and imposition of discoverability principles. There have been some major innovations which make the case for legislative reform, including the establishment of ultimate limitation periods to re-assert some of the traditional purposes of statutes of limitations, a relatively urgent priority. The Supreme Court's decisions in *K.M.*

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* Professor of Law, University of Toronto. An earlier draft of this paper was originally prepared for the Ontario Ministry of the Attorney General, Policy Division. I thank various members of the Ministry for their valuable assistance, but add that the views expressed in this paper are only my own.

[1] *City of Kamloops* v. *Nielson et al.* (1984), 10 D.L.R. (4th) 641 (S.C.C.); *Central Trust Co.* v. *Rafuse et al.* (1986), 31 D.L.R.(4th) 481.

[2] *Kamloops, ibid.* at 685.

[3] *Limitation Act* R.S.B.C. 1996, c.266, s.8; *Limitations Act* S.A. 1996, c.L-15.1, s.3; *Limitations Act*, S.N. 1995, c.L-16.1, ss.7, 14.

v. *H.M.*[4] and *Novak* v. *Bond*[5] arguably constituted two revolutions in the judicial development of discoverability principles. *Novak* led the minority of the Court to accuse the majority of effectively abolishing statutes of limitations. This is strong language, but it has a ring of truth. At a minimum, *Novak* v. *Bond* adds further uncertainty to the application of discoverability principles and strengthens the case for the introduction of ultimate limitation periods. Although the Supreme Court has consistently adverted to defendant and public interests in encouraging diligence in bringing law suits, ensuring that lawsuits are based on fresh evidence, and providing defendants with certainty and repose; I will suggest that the trajectory of its jurisprudence has been to favour plaintiff interests in bringing lawsuits even after the plaintiff is aware of the material facts on which the lawsuit is based. In their concern for achieving full fairness for plaintiffs, the Supreme Court of Canada has eroded the repose, evidentiary and diligence functions associated with statutes of limitations.

The second part of this paper will examine major law reform proposals concerning limitations law reform not only in Canada but abroad. Many law reform agencies have issued reports on statutes of limitations and their main proposals will be examined. Law reformers are frustrated with the complexity of the current situation and propose new limitation periods which will generally apply to all claims. The consensus that seems to be emerging is the need to accept and codify discoverability principles, but to balance them with ultimate limitation periods. There also is an interesting debate in England and Australia about whether judges should be given an explicit discretion to depart from limitation periods in exceptional cases where their application would cause injustice.

The third part of this paper will focus on possible legislative responses to the various law reform proposals. Although the legislature should not be oblivious to the interests of plaintiffs, it may wish to re-assert defendant and public interests in statutes of limitations. The legislature may also attempt to create greater certainty and less litigation than the current state of affairs in which courts have dominated the debate. One option open to legislatures is to codify the discoverability principles to be applied by the courts. The Supreme Court's decision in *Novak* v. *Bond* to allow the plaintiff to wait until it was reasonable in her circumstances to sue may be related to the ambiguous language used in British Columbia's *Limitation Act*. If discoverability principles were codified, this type of problem might be avoided. At the same time, courts guided by their views of the equities of the individual case

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[4] (1992), 96 D.L.R. (4th) 289 (S.C.C.).

[5] (1999), 172 D.L.R. (4th) 385 (S.C.C.), (1999) 32 C.P.C. (4th) 197 (S.C.C.).

might have reached the same result if the legislature had chosen different language. Legislative attempts to codify discoverability principles and to reply to court decisions on discoverability could generate more uncertainty and litigation.

The fourth part of this paper will deal with the sensitive and, at times, controversial issue of special limitation periods. Many provinces have numerous special short limitation periods often affecting medical malpractice claims and claims against public authorities. I will suggest that the issue of special limitation periods is connected with the length of general limitation periods. A 6 year general limitation period will require more short limitation periods than a 2 year period and a 30 year ultimate limitation period may require more shorter exceptions than a 10 year limitation period. There is also a question of whether limitation periods should be applied to claims based on breach of fiduciary duty, including claims that may be brought by Aboriginal people against the Crown. There are also sensitive issues with respect to whether limitation periods should be applied to claims based on sexual abuse. These cases raise fundamental issues about whether the diligence, certainty and repose purposes of limitation periods should be applied in all contexts. Although there is a wide consensus among law reform commissions, the legal profession and judges about the need for limitations reform, special limitations are a potentially controversial issue that should be treated with care. Otherwise, needed limitations reform that could bring greater clarity and uniformity to the law could be undermined by a lack of sensitivity to contextual considerations that argue in favour of some special limitation periods.

I. The Court's Evolving Discoverability Doctrine

The K.M. v. H.M. Revolution

K.M. v. *H.M.*[6] is a case involving a claim of assault, battery and breach of fiduciary duty by a woman who, as a child, had been a victim of incest by her father. The plaintiff turned 18 years of age in 1975 but did not commence her action until 1985, shortly after entering therapy. Because she was aware of the incest before she turned 18, the trial judge and the Ontario Court of Appeal held that her claim was statute barred. This case seemed so clear at the time that the Ontario Court of Appeal only issued a short endorsement in rejecting her appeal.

The Supreme Court, however, unanimously allowed the appeal. La Forest J.

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[6] *Supra* note 4.

took a functional approach that focused on what he identified as the three purposes of statutes of limitations: certainty or repose, evidentiary concerns and diligence. Although he recognized that "there are instances where the public interest is served by granting repose to certain classes of defendants, for example, the cost of professional services if practitioners are exposed to unlimited liability,"[7] he found that the defendant (who had been found liable at trial) had no valid interest in repose. He also dismissed evidentiary concerns in this case on the basis that childhood sexual abuse claims would often be decided years after they were alleged to occur. Finally, he held that diligence concerns should be tempered by an understanding of the devastating nature of incest. This justified the creation of "a presumption that certain incest victims only discover the necessary connection between their injuries and the wrong done to them (thus discovering their cause of action) during some form of psychotherapy."[8] Both Justices Sopinka and McLachlin expressed concerns about the creation of this presumption with Justice McLachlin arguing that "some incest survivors may not discover their cause of action until after lengthy therapy or several therapeutic relationships, and that such a presumption might inure to their disadvantage."[9]

K.M. suggests that statutes of limitations will only run, at least in cases of incest, when the plaintiff fully appreciates his or her injuries and their connection with the defendant's wrong. It also suggests a willingness to apply the rationales and purposes of statutes of limitations on a case by case basis. This has allowed courts to tailor their decisions to the merits of particular cases. At the same time, however, it has created uncertainty in the law and difficulty in separating the procedural issue of whether a claim was statute barred from the merits of the case. The particular context of *K.M.* meant that the Court understandably discounted defendant interest in repose and diligence by the plaintiff and concerns about the age of evidence.

Another important feature of *K.M.* was the Court's holding that statutes of limitations did not apply to claims of breach of fiduciary duty in Ontario. La Forest J. concluded that s.2 of the *Limitations Act,* which provides that nothing in the Act interfered with any rule of equity in refusing relief, "gives rise to the inference that there is a category of equitable claims not subject to the Act at all, and that the

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[7] *Supra* note 4 at 302.

[8] *Ibid.* at 314.

[9] *Ibid.* at 340.

equitable defences survive in these cases."[10] He noted that "Ontario is rather unique in this regard"[11] and that equitable claims were caught by general statute of limitations legislation in most other jurisdictions.

Discoverability Continues: Murphy v. Welsh and Peixeiro v. Haberman

A year after *K.M.*, the Supreme Court decided another limitations case. The issue in *Murphy* v. *Welsh*[12] involved a general provision in Ontario's *Limitation Act* that held that the beginning of a limitation period did not start until a plaintiff turned 18 years of age. The Supreme Court of Canada indicated that this would also apply to a special limitation period, in this case the two year limitation period under the *Highway Traffic Act*. The Ontario Court of Appeal had held that the special limitation period excluded the provisions of the general legislation. As in *K.M.*, however, the Court of Appeal's decision was overturned and a result more favourable to the plaintiff was reached in the Supreme Court. The Court again focused on the purposes of limitations legislation. Major J. held that not extending accident claims until the plaintiff became 18 years of age inequitably "favours the defendant."[13] The principle of diligence would not be served because a plaintiff under 18 years of age could not be expected to commence litigation: "Whatever interest a defendant may have in the universal application of the 2 year motor vehicle limitation period must be balanced against the concerns of fairness to the plaintiff under legal disability."[14] Concerns about fairness to the plaintiff prevailed over the defendant's interests in repose and fresh evidence with the Court holding that the special limitation should be extended by the general provision in the *Limitations Act*. This case reveals, once again, the strong emphasis the Court places on achieving fairness to plaintiffs when interpreting statutes of limitations. Major's J. statement that the special limitation period "truncates liability" but that "surely the legislature did not intend to remove these risks altogether"[15] even hints at a doctrine of strict construction in interpreting special limitation periods.

In 1997, the Supreme Court again revisited the two year limitation period under

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[10] *Supra* note 4 at 329.

[11] *Ibid.* at 328.

[12] (1993), 18 C.P.C. (3d) 137 (S.C.C.).

[13] *Ibid.* at 150.

[14] *Ibid.* at 150.

[15] *Ibid.* at 151.

Ontario's *Highway Traffic Act*. The issue in *Peixeiro* v. *Haberman*[16] was whether the legislature had precluded discoverability principles when it provided that actions arising from traffic accidents would be barred "after the expiration of two years from the time when the damages were sustained."[17] The trial judge held that this language did preclude discoverability principles, but this finding was overruled by the Supreme Court. Major J. stated that "discoverability is a general rule applied to avoid the injustice of precluding an action before a person is able to raise it."[18] He noted that discoverability principles were applied in *Kamloops*[19] to a similar statute that had based the running of the limitation period on when the damage was sustained. Major J. went so far as to state that "the discoverability rule has been applied by this Court even to statutes of limitations in which plain construction of the language used would appear to exclude the operation of the rule."[20] This suggests that there will be a strong presumption that discoverability principles apply to all statutes of limitations.

Other parts of *Peixeiro* suggest a judicial willingness to defer to clear legislative expressions of a desire to displace discoverability principles. Major J. adopted a Manitoba Court of Appeal decision which indicated that "the judge-made discoverability rule is nothing more than a rule of construction" and that "when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed."[21] This suggests that the presumption of discoverability can be displaced whenever the legislature clearly makes the plaintiff's knowledge irrelevant.

The Supreme Court's decision in *Peixeiro* to apply discoverability principles to a statute of limitations that began when "damages were sustained"[22] continues the trend started in *K.M.* of tailoring discoverability to the particular cause of action. The issue is not when the plaintiff is aware he or she was injured in a traffic accident, but rather when he or she knew the injury was severe enough that it could be litigated

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[16] (1997), 12 C.P.C. (4th) 255 (S.C.C.).

[17] *Ibid.* at 261.

[18] *Ibid.* at 267.

[19] *Supra* note 1.

[20] *Supra* note 16 at 268.

[21] *Ibid.* at 267.

[22] *Ibid.* at 261.

under Ontario's no fault scheme. This approach is more generous to the plaintiff and displaces the traditional common law position that "ignorance of or mistake as to the extent of the damages does not delay time under a limitation period."[23] The United States Supreme Court has taken a position less generous to the plaintiff and held that time starts to run once the plaintiff knows about the injury.[24]

The above cases all suggest that the Supreme Court is firmly committed to the principle that a statute of limitation should not expire before a particular cause of action is reasonably discoverable. Mere knowledge of an injury or a wrong is not sufficient as the Court tailors discoverability to the particular cause of action; the Supreme Court will not apply statutes of limitations in a uniform or mechanical manner. Rather, the Court will tailor the application of discoverability principles to the particular cause of action brought by the plaintiff. Individualized justice for plaintiffs, not uniformity for defendants, is the Court's maxim. The cases also reveal a willingness to examine the importance of the certainty, evidentiary and diligence rationales of limitation periods in particular cases, as well as a tendency to place achieving fairness to plaintiffs before defendant and public interests in repose, diligence and fresh evidence.

The Novak v. Bond Revolution

The Supreme Court's decision in *Novak* v. *Bond*[25] suggests a willingness to go beyond these rulings when it comes to achieving full fairness for the plaintiff over defendant and public interests in statutes of limitations. The case involved a medical negligence claim, commenced in 1996, by a woman on the basis that her doctor had failed to diagnosis her breast cancer between October, 1989 and October, 1990. The plaintiff was diagnosed with breast cancer in October 1990 by another doctor and received treatment at that time. She considered suing her former doctor at that time, but after discussion with her priest decided to concentrate on maintaining her health. Unfortunately, in 1995, her cancer recurred and spread. She brought the malpractice action against the first doctor in 1996, almost six years after she knew she had been misdiagnosed.

An important feature of this case is that it arose under what the Court noted was

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[23] *Supra* note 16 at 263.

[24] *United States v. Kubrick* 444 U.S. 111 (1979) at 123.

[25] (1999), 32 C.P.C. (4th) 197 (S.C.C.).

an "obscure" and "troublesome" provision in British Columbia's *Limitation Act*[26] codifying discoverability principles which, over the years, had been subject to four different interpretations by the B.C. courts.[27] Section 6(4) of the B.C. Act provides that time, under limitation periods, does not start to run until:

> those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice that a reasonable person would seek on those facts, would regard those facts as showing that...(b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.

The language in the legislation suggests an approach tailored to the subjective knowledge, interests and circumstances of particular plaintiffs.

The Court divided 4:3 on whether the limitation period had expired in this particular case. For the majority[28], McLachlin J. concluded that the proper approach to the B.C. legislation was if a reasonable person could conclude that someone in the plaintiff's position "could" reasonably bring an action. The reasons for delay had to be "serious, significant and compelling," not "tactical."[29] The issue was when "in light of the plaintiff's particular situation, the bringing of a suit is reasonably *possible*, not when it would be *ideal* from the plaintiff's perspective to do so."[30] In addition to the repose, diligence and evidentiary functions of limitation periods identified in prior cases, McLachlin J. added a new concern: namely, a desire to "account for the plaintiff's own circumstances when assessing whether a claim should be barred by the passage of time."[31] This extends the individualized approach in *K.M.* beyond the incest and sexual abuse context. On the facts in *Novak*, the majority held that the plaintiff had acted reasonably in not bringing a lawsuit earlier than 1996 given her serious and compelling interest in concentrating on her health. Time started to run in 1995 when her cancer recurred and spread because at the point of time she reasonably could have brought an action:

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[26] R.S.B.C. *supra* note 3 at s.6(4).

[27] This very fact is a powerful warning that attempts to codify discoverability principles can create uncertainty and litigation.

[28] The majority included L'Heureux-Dube, McLachlin, Gonthier and Cory JJ.

[29] *Supra* note 25 at 213.

[30] *Ibid.* at 227 (emphasis in original).

[31] *Ibid.* at 222.

> The circumstances that precluded a decision to sue earlier – the need to maintain a positive outlook and believe herself cured- were no longer operative. Absent these considerations, her need to redress the serious wrong allegedly done to her and her consequent willingness to undergo the stresses and strains of litigation outweighed her intensely felt desire to concentrate on regaining her health. Litigation became a realistic option.[32]

In dissent, Lamer C.J., Iacobucci and Major JJ. would have found that time started to run in 1990 when the plaintiff discovered that her breast cancer had been misdiagnosed. They argued that the majority had focussed on the reasonableness of the particular plaintiff delaying her lawsuit whereas "the proper analysis should be...to find the earliest point at which a reasonable person, contemplating the facts within the plaintiff's means of knowledge and taking into account her particular circumstances, could reasonably have brought an action."[33] This test does not seem that different from that articulated by McLachlin J. even though the results reached are radically dissimilar. The dissenters stressed that the plaintiff received no qualified professional advice that her health would be threatened by bringing a suit between 1991 and 1995 and that the B.C. legislation focussed on when it was reasonable for the plaintiff "to be able" to bring an action as opposed to when it was reasonable "to bring an action."[34] The minority went on to speculate that under the majority's approach a whole host of personal factors, including the plaintiff's economic and emotional circumstances, would justify delaying the bringing of an action. The minority also argued that it was difficult, if not impossible, to separate permissible personal factors from impermissible tactical factors. Iacobucci and Major JJ. concluded with the dire warning that the majority had interpreted "a section designed to temper the injustice of an absolute statute of limitation...[to] commit the opposite but equal injustice of effectively abolishing the statute of limitations."[35]

An interesting feature of *Novak* v. *Bond* is the attitude the judges take to the issue of ultimate limitation periods. McLachlin J. seemed to suggest that the existence of a special 6 year ultimate limitation period against medical malpractice claims in B.C. justified the pro-plaintiff approach she adopted in the application of discoverability principles. She stated that the debate was simply about "the type of

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[32] *Supra* note 25 at 232.

[33] *Ibid.* at 207.

[34] *Ibid.* at 209.

[35] *Ibid.* at 211.

circumstances in which, *within that larger period of time*, the commencement of the limitation period for the initiation of an action that has a reasonable prospect of success should be postponed."[36] She discounted the defendant's interests in the general limitation period by suggesting that it was only after the ultimate limitation period had expired that "the potential defendant truly [could] be assured that no plaintiff may bring an action against him or her."[37] In contrast, Iacobucci and Major JJ. warned that the majority effectively made the ultimate limitation period (which they observed in most cases was 30 years) the only recognition of defendant and public interests in repose, fresh evidence and diligence. They argued that such a result "does not appear to be the British Columbia legislature's intended result" and effectively abolished limitation periods, other than ultimate limitation periods.[38] *Novak* v. *Bond* suggests that judges will not ignore the existence or length of ultimate limitation periods when interpreting general limitation periods. They may, as the majority did in *Novak* v. *Bond*, favour plaintiff interests when interpreting general limitation periods if they are satisfied that defendant interests are well served by the ultimate limitation period. Ultimate limitation periods may be the only effective means of recognizing defendant interest in repose and certainty.

What is the effect of *Novak* v. *Bond* outside of British Columbia? Defendants will argue that the case is based on the particular language used in the British Columbia legislation. Most other legislation does not focus on the subjective knowledge, interest and circumstances of the plaintiff as the B.C. legislation does. Plaintiffs will argue that the case is the natural development of discoverability principles which should apply throughout Canada so long as the legislature has not clearly displaced them. Before *Novak* v. *Bond* is too quickly dismissed as applying only to the particular legislation in British Columbia, it should be recalled that the Supreme Court in *K.M.* applied a British Columbia Court of Appeal decision based on the particular wording of the B.C. legislation despite the fact that the *K.M.* case arose in Ontario. La Forest J. noted that "British Columbia's limitations legislation is very different from the statute before us in the instant case,"[39] but nevertheless adopted a B.C. test that tied discoverability to whether

> the hypothetical reasonable person in the shoes of the plaintiff here would not have been acting sensibly in commencing an action until such a person came to appreciate

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[36] *Supra* note 5 at 411 (emphasis in original).

[37] *Supra* note 25 at 223.

[38] *Ibid.* at 211.

[39] *Supra* note 4 at 313.

> that a wrong or wrongs that had occasioned significant harm to her well-being could be established.[40]

The Supreme Court could apply *Novak* v. *Bond* to existing and future limitation periods in other provinces.

There are strong arguments on both sides of the issue on whether *Novak* v. *Bond* will apply in other provinces. It is at least arguable that consideration of *Novak* v. *Bond* might have changed the result in some recent medical malpractice cases in which the Ontario Court of Appeal held that the statute of limitations had expired.[41] It would be possible to design new legislation to attempt to displace *Novak* v. *Bond*, but there are no guarantees given the Court's commitment to discoverability and achieving fairness for plaintiffs. The only guarantee is that *Novak* v. *Bond* will increase uncertainty and litigation surrounding limitation periods throughout Canada.

II. Law Reform Proposals

The issue of limitation reform has been a favourite of law reform commissions. Limitation periods cry out for simplification and modernization, but rarely command legislative attention. What follows is an outline of some recent law reform proposals with an emphasis on whether a consensus is emerging on how legislatures should respond to the increased willingness of courts to interpret existing statutes of limitations subject to discoverability principles.

In 1969, the Ontario Law Reform Commission recommended comprehensive limitation reform that would have replaced numerous special limitation periods with limitation periods of twenty, ten, six and two years with time generally running from the occurrence of damage, but with an extension procedure for cases in which the plaintiff was not aware that he or she had a cause of action with a reasonable prospect of succeeding.[42] In keeping with the practice of the time, the Commission suggested a range of limitation periods as opposed to one general one.

In 1992, Bill 99, which was an attempt at comprehensive reform of limitation

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[40] *Supra* note 4 at 313.

[41] See for example *Findlay* v. *Holmes* (1998) 111 O.A.C. 319 (C.A.); *Soper* v. *Southcott* (1998) 39 O.R. (3d) 737 (C.A.).

[42] Ontario Law Reform Commission *Report on Limitation of Actions* (Toronto: Department of the Attorney General, 1969).

periods, received first reading in the Ontario Legislature. It established a basic limitation period of two years and attempted to codify common law principles of discoverability by providing that a claim is only discovered when the person knew that the "injury, loss or damage had occurred, been caused or contributed to by an act or omission of the defendant and that having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to remedy it" or when "a reasonable person with the abilities and in the circumstances of the person with the claim" would know the above factors.[43] It also contained a general 30 year ultimate limitation period that would apply regardless of discovery, and special 10 year ultimate limitation periods with respect to claims against doctors, hospitals and building contractors.[44]

In a 1986 report, the Newfoundland Law Reform Commission proposed three limitation periods that would run upon damage. They were 2 years for personal injury, property damage and defamation, 6 years for other actions in contract and tort, and 10 years for estate and breach of trust.[45] This approach was followed in 1995 reforms which codified discoverability principles for personal injury, property damage and professional negligence actions on the simple basis that time "does not begin to run against a person until he or she knows or, considering all circumstances of the matter, ought to know that he or she has a cause of action."[46] The 1995 Newfoundland legislation also introduced two ultimate limitation periods: a 10 year ultimate limitation period applies to personal injury, professional negligence, property damage and most trust claims while a 30 year ultimate limitation period applies to other claims under the act.[47] No limitation periods apply to claims for a declaration as to the title of property, "to personal status" or misconduct of a sexual nature where the plaintiff was under the care or authority of the defendant.[48]

A 1989 Saskatchewan Law Reform Commission report recommended a 2 year limitation period for contract and tort actions, a 6 year period for most trust matters and a 10 year limitation for breach of trust and actions on judgment. As with the

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[43] Bill 99, Ontario Legislature Nov 25, 1992 s.5(1), 35th Legislature, 2nd session.

[44] *Ibid.* s.15.

[45] Newfoundland Law Reform Commission *Report on Limitation of Actions* (St. John's: Law Reform Commission, 1986) at 4-5.

[46] *Limitations Act,* S.N. 1995, c.L-16.1, s. 14(1).

[47] *Ibid.* ss 7, 14, 22.

[48] *Ibid.* s .8.

Ontario and Newfoundland reports, this approach seems overly complex and against the trend to a general 2 year limitation period. The 1993 Heilbron report for example argued that a general 6 year limitation period, which has its origins in English legislation enacted in 1623, was too long. It dryly concluded: "we can see no reason why it should take longer to decide whether or not, for example to bring a claim for professional negligence, than it did to fight the Second World War."[49]

The Saskatchewan Commission also recommended that most short limitation periods, including those for defamation and those benefiting various professions, be eliminated with the remaining ones listed in an accessible schedule within the general limitations legislation. It also proposed that discoverability principles apply to the general limitation period, but that a 30 year ultimate limitation period would also apply.[50] The B.C. Law Reform Commission dealt with the issue of ultimate limitation periods the next year, recommending that its ultimate limitation period be reduced from 30 to 10 years except in fraud and breach of trust cases. The Commission also suggested that special ultimate limitation periods of 6 years for medical malpractice claims be replaced by a general 10 year ultimate limitation period. The reasons for the recommendations included defendant concerns about the expense of maintaining records and insurance for the 30 year period.[51]

In its 1989 report, the Alberta Law Reform Institute proposed a 2 year general limitation period, subject to discoverability, and a 15 year ultimate limitation period that would apply even if the plaintiff could not reasonably be expected to know of the cause of action. It rejected a 10 year ultimate limitation period as too short, but concluded that some "ultimate limitation period is essential for the achievement of the objectives of a limitations system."[52] The limitation periods would apply to all common law or equitable claims but would be postponed in the case of fraudulent concealment or disability. The Institute recommended that requests for declarations be excluded from both limitation periods, recognizing that "declarations represent a growth area in law. Their exclusion from the operation of the general limitations

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[49] Heilbron Report *Civil Justice on Trial* (June, 1993) para 4.5-4.7; The Law Commission, *Limitation of Actions: A Consultation Paper* (London: The Stationary Office, 1998) at 5.

[50] Law Reform Commission of Saskatchewan, *Proposals for a New Limitation of Action Act* (Saskatoon: Law Reform Commission, 1989).

[51] Law Reform Commission of British Columbia, *Report on the Ultimate Limitation Period: Section 8* (Victoria: Ministry of Attorney General, 1990) at 28-30.

[52] Alberta Law Reform Institute *Limitations* (Edmonton: Alberta Law Reform Institute, 1989) at 35.

scheme leaves room for creative play by lawyers and courts."[53] The report also recommended a concise 14 section law that was largely followed in the enactment of new legislation in Alberta in 1999. The main differences are that the legislature opted for a 10 year ultimate limitation period and amended the bill so that the limitation would not apply to claims brought by Aboriginal people against the Crown.

In 1997, the Law Reform Commission of Western Australia[54] made recommendations for comprehensive limitations reform. It suggested the abolition of special short limitation periods in favour of a general 3 year limitation period that would apply to all common law or equitable claims. These claims would be subject to legislated discoverability principles based on when the plaintiff knew or ought to have known about the injury and that it warranted bringing proceedings. The Commission also proposed a 15 year ultimate limitation period that would run regardless of discoverability. Courts would have the discretion to extend either limitation period in exceptional circumstances where the prejudice to the defendant and the public interest is outweighed by other factors, including the plaintiff's conduct and reasons for delay and the conduct of the defendant. This discretion was designed to deal with latent injuries that would be statute barred by the new ultimate limitation period, including child sexual abuse. It also suggested that

> a stronger case may be needed to justify the exercise of the discretion to extend the ultimate period than the discovery period. Disregarding the ultimate period means permitting litigation to proceed even though more than 15 years have elapsed since the acts or omissions in question, and there are strong arguments in the interests of both the defendant and the public for upholding the time-bar provided by the ultimate limitation period in all but the most exceptional case.[55]

While it is true that exemptions from an ultimate limitation period could harm defendant and public interests, it may be necessary in cases of latent injury because the ultimate limitation period applies without regard to discoverability principles. It is doubtful that there is a need for any exemptions from a general limitation period that is subject to discoverability principles. Given the Canadian approach to discoverability principles in *K.M.* and *Novak* v. *Bond*, it is difficult to imagine equitable claims that the plaintiff might have that would not be interpreted by the

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[53] *Supra* note 52 at 3.

[54] Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions*, (Perth: The Commission, 1997).

[55] *Ibid.* at 183.

courts so as to delay the date of reasonable discovery.

In 1998, the Queensland Law Reform Commission[56] recommended a general 3 year limitation period, subject to codified discoverability principles, and a 10 year ultimate limitation period that would run from the date of the conduct, act or omission giving rise to the claim. The periods would cover equitable claims based on breach of trust as well as common law claims. Like the Western Australia Commission, the Queensland Commission also recommended that courts be given the discretion to extend limitation periods in the interest of justice in all cases. Courts would consider the reasons why the plaintiff did not bring a claim, the nature of the injury, the prejudice to the defendant, the defendant's conduct and the public interest. This general discretion was recommended instead of specific provisions dealing with sexual and institutional abuse or fraudulent concealment.

In 1998, the English Law Reform Commission issued a comprehensive consultation document on limitation reforms. Its provisional proposals were a general 3 year limitation period subject to codified discoverability principles with a 10 year ultimate limitation period (also known as a long stop) for most claims, but a 30 year ultimate limitation period for personal injury claims. The longer ultimate limitation period for personal injury claims may well be related to the recommendation to abolish the residual discretion that English judges have to depart from limitation periods in personal injury cases, as well as the tentative decision not to have adult disability stop the running of the ultimate limitation period. The Commission also observed that in the case of latent personal injury, such as asbestosis, "the merits of cutting into the 'discoverability' test are particularly questionable" and even demonstrated some sympathy for having no ultimate limitation period.[57]

The English Commission also proposed that both equitable and common law actions be covered by this regime, as well as claims against public authorities. Relying in part on a decision of the European Court of Human Rights in which it was decided that the application of a statute of limitation to a sexual abuse claim did not violate the European Convention[58] or the ability of discoverability principles to

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[56] Queensland Law Reform Commission, *Review of the Limitation of Actions Act 1974* (Brisbane: Major Offset, 1998).

[57] Law Reform Commission, *Limitation of Actions: A Consultation Paper* (London: The Stationery Office) at 287.

[58] *Stubbings* v. *United Kingdom* (1997), 23 E.H.R.R. 213.

achieve a just result, the Commission recommended no special exemption of sexual abuse claims from the limitations regime. It also proposed that the general regime apply to fiduciary claims, including claims based on fraudulent breach of trust. The Commission also raised, but did not answer, the issue of whether parties should, by contract, be able to extend or shorten a limitation period.[59]

There has not been a significant amount of work by legal academics in the area of limitation periods. Somewhat surprisingly, legal academics were not the champions of discoverability principles. Writing in 1987, Professor Gerald Robertson argued that it was not desirable to apply discoverability principles to all statutes;[60] however, in 1994, he admitted he had changed his mind and argued against a case in which discoverability principles were not applied to legislation that precluded law suits against doctors after one year. Professor Robertson concluded that "the most striking feature" of the case was "the patent injustice of the decision – 'the injustice of a law which statute-bars a claim before the plaintiff is even aware of its existence.'"[61] The 1994 case he criticized came from the Alberta courts which, even after the Supreme Court had applied discoverability principles to claims in tort and contract, continued to resist the imposition of discoverability principles.[62] It is significant that even in the province most resistant to discoverability principles, the legislature has now codified discoverability principles, albeit subject to a 10 year ultimate limitation period.

A number of academic commentators have criticized discoverability principles for introducing uncertainty in the law and undermining the purposes of statutes of limitations. Professor Richard Bauman argued that "the discoverability principle itself creates a significant measure of injustice....the discoverability approach to the application of a time limit leaves potential defendants exposed to the risk of a suit indefinitely into the future."[63] For Professor Bauman, discoverability undermines the four main purposes of limitations, which he sees as: 1) ensuring litigation based on

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[59] *Supra* note 57 at 390.

[60] G. Robertson, "Fraudulent Concealment and the Duty to Disclose Medical Mistakes" (1987) 24 Alta.L.Rev. 215 at 219-220.

[61] G. Robertson, "Case Comment: Limitation Periods in Medical Malpractice Cases" (1994) 32 Alta.L.Rev. 181.

[62] *Costigan* v. *Ruzicka* (1984), 33 Alta. L.R.(2d) 21 (C.A.); *Fidelty Trust* v.*Weiler*, [1988] 6 W.W.R. 428 (Alta. C.A.).

[63] R. Bauman, "The Discoverability Principle: A Time Bomb in Alberta Limitation Law," (1993) 1 Health L. J. 65 at 79.

fresh evidence, 2) providing peace and repose, 3) "the predictability of costs involved in insuring against the hazards arising from legal liability," and 4) "the advisability of having judgments reflect moral and scientific standards contemporaneous with the triggering events."[64] Even though he was writing in the Alberta context and the Alberta courts resisted for a time the move to discoverability principles, Professor Bauman nevertheless accepted the judicial application of discoverability as a *fait accompli*. His argument was that the unfairness of discoverability principles to defendants had to be counteracted by the adoption of ultimate limitation periods that would apply regardless of discoverability. Such new legislated limitation periods were necessary so that defendants, such as doctors, could have cases against them litigated on the basis of reasonably fresh evidence and the application of moral and legal standards similar to those in existence at the time of the act or omission. He also argued that ultimate limitation periods would ensure that insurance risks could be accurately predicted and priced, that records could be safely thrown away, and that defendants would enjoy repose after some time. Most law reform commissions have accepted similar arguments as a justification for the introduction of ultimate limitation periods that would apply regardless of discoverability.

Professor Andrews is also opposed to the uncertainty created by discoverability principles. He proposes that discoverability principles should only be applied in personal injury and fatal accident cases, latent damage relating to real property, and to all claims made by individuals and corporations who are not engaged in a trade or business. His rationale for not allowing those in trade or business to benefit from discoverability principles is that "those engaged in trade or business should be expected to look after their interests prudently."[65] Any special needs of business can be adequately served by allowing them to contract around limitation periods.[66] One problem with Professor Andrew's proposal is that not even a prudent business may be expected to anticipate some forms of latent damage. Another problem is that the line between "trade or business" and other enterprises will create uncertainty and litigation. He suggests that "'trade or business' should be given a wide definition to

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[64] *Supra* note 63.

[65] N.H. Andrews, "Reform of Limitation of Actions: The Quest for Sound Policy" (1998) 57 Camb. L.J. 589 at 601.

[66] Professor Andrews suggests that because of the public interest in limitations, parties should not be allowed to provide a longer period in contract than in the statutory limitation period to bring a lawsuit. In my view, this is questionable. There may be a public interest in limiting claims, but is not likely to be so strong as to justify the state in overriding the informed wishes of contracting parties.

include activities of government at all levels, local and other public authorities, sovereign states and the Crown,"[67] but any legislated definition of a trade or business will have borderlines which will be litigated if the difference is between being able to bring an important law suit and not being able to bring it.

A number of trends can be seen from the above law reform proposals. One is the general acceptance of discoverability principles and the desirability of their codification. There are no law reform proposals, even in Alberta and England where there was the greatest judicial reluctance to adopt discoverability principles, that do not propose the legislative acceptance and codification of discoverability principles. At the same time, there is also a trend to recommend the adoption of ultimate limitation periods that would run regardless of discoverability. These are generally seen as necessary to re-assert the traditional evidentiary and repose functions of statutes of limitations in a world where various forms of latent damage may only be discoverable decades after the event in question. There is also a trend in law reform proposals towards shorter limitation periods, with respect to both general and ultimate limitation periods. Six year limitation periods are to be reduced to two or three years while thirty year ultimate limitation periods are to be reduced to ten or fifteen years.

The issue of whether courts should have a legislated residual discretion to depart from limitation periods is more contentious. Both England and Australia have considerable experience with such a discretion.[68] Australian law reform commissions approve of the discretion because it can be used to avoid the harshness of limitation periods in exceptional cases and avoids the need for special limitation periods to deal with sexual abuse and other cases. The English law reform commission, as well as English academics, do not like the residual discretion on the basis that it creates uncertainty and litigation and undermines the purposes of limitation periods. The Canadian approach has been closer to that of England, but at the same time it is fair to say that the residual discretion issue has received much less attention than in England or Australia. Cases such as *K.M.* and *Novak* v. *Bond* suggest that our courts are prepared to interpret discoverability principles in an equitable enough fashion to accommodate exceptional cases in which plaintiffs have good reasons for delay that outweigh the harm to defendants and the public. Given our pro-plaintiff discoverability principles, there seems to be little need for a discretion to depart from

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[67] *Supra* note 65 at 602.

[68] In Canada, only Nova Scotia gives courts a discretion to disapply limitation periods if it appears equitable to do so. *Limitation of Actions Act* R.S.N.S. 1989 s.3.

general limitation periods. There may, however, be a stronger case for a discretion to depart from an ultimate limitation period that applies regardless of discoverability principles, especially if that period is, as in Alberta, only 10 years. Nevertheless, no Canadian jurisdiction that has adopted or proposed either a 30 or 10 year ultimate limitation period has seen fit to provide for a residual discretion to depart from the limitation period. They have, however, exempted some claims from the ultimate limitation period. The choice may be between exempting specific claims from an ultimate limitation period or providing a general discretion to depart from an ultimate limitation period.

III. Design Issues for Legislation

The law reform proposals discussed above suggest that Canadian legislatures should engage in comprehensive limitation reform in order to simplify and modernize limitation periods. This would also reassert the traditional defendant and public interests that are served by limitation periods, including the creation of certainty or repose for defendants, ensuring that plaintiffs are duly diligent in pursuing their rights and encouraging litigation on fresh evidence. So far, only Newfoundland and Alberta have undertaken the task of comprehensive limitation reform. In what follows, I will examine the major design options available to legislatures.

Codifying Discoverability Principles

There may be temptation to define discoverability principles in a manner that attempts to restrict the uncertainty created by cases such as *K.M.* and *Novak* v. *Bond*. Most language that could be used to define such principles will, however, be somewhat ambiguous. The cases examined in part one of this paper suggests that courts will not be overly deterred by language that stands in the way of what they believe to be a just result. The legislature cannot be assured that the language it uses to define discoverability principles will be interpreted in any particular way. Attempting to reassert defendant and public interests in statutes of limitations via codified discoverability principles may promote a dialogue between courts and legislatures, but it may be an unproductive and frustrating one. It could lead to a scenario in which the legislature frequently corrects the court by amending limitations legislation to reverse pro-plaintiff judicial decisions. Each amendment, however, would create more uncertainty and litigation, thus defeating one of the main goals of limitation reform.

Discoverability ought to be defined in a simple fashion that recognizes that courts will have considerable discretion in interpreting the new statutory

discoverability provisions. For example, the new Alberta legislation simply defines discoverability as when "the claimant knew, or in the circumstances ought to have known, of a claim...."[69] This allows the courts to decide the extent to which *K.M.* and *Novak* v. *Bond* are applicable in Alberta. It could be argued even under the Alberta legislation that some plaintiffs are not in the position to bring their claim. This would strain the statutory language, but still be in the realm of possible statutory interpretations, especially if the court felt it was necessary to reach a just result.

A more radical alternative, which may not be feasible in the Canadian context, is the one proposed by Professor Andrews. He would propose that appellate courts not have the power to interpret statutes of limitation except to resolve the case before them. A committee would have the power, from time to time, to issue regulations which would serve as precedents and "authoritatively enunciate the current rules and practice governing potential claims commenced during the ensuing year."[70] Such a radical proposal would be of dubious constitutionality by infringing one of the traditional tasks of superior courts. Even if it were constitutional, it is doubtful that a committee would be better able than the courts to provide "a short and definitive guide"[71] that would give lawyers, litigants and judges simple answers to all limitation questions.[72] All in all, it is best for the legislature to accept that discoverability principles will be developed in a case by case fashion in order to respond to the equities of the particular case. It would be unwise for legislatures to get into a war with the courts over the precise meaning of a discoverability principle, especially when the interests of the legislatures in promoting certainty and repose can more directly be achieved by the adoption of ultimate limitation periods.

Legislating Ultimate Limitation Periods

The most effective means to re-assert the interests of the public and defendants regarding limitation periods is for the legislature to create ultimate limitation periods that clearly apply regardless of whether the cause of action is discoverable. Given the uncertainty and pro-plaintiff orientation of the discoverability cases, this is the only sure way to promote repose. It is reasonably clear that the courts will accept ultimate limitation periods provided the legislation clearly precludes the application

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[69] *Limitations Act*, S.A. supra. note 3 at s.2(1.1).

[70] *Supra* note 65 at 608.

[71] *Ibid.*

[72] *Ibid.*

of discoverability principles. Even in *Novak* v. *Bond*, McLachlin J. assumed that the special 6 year ultimate limitation period would apply to Mrs. Novak's claim regardless of discoverability. Thus, if her cancer had recurred 7 years after the misdiagnosis, she would have been precluded from suing the doctor even though it might have been perfectly reasonable for her to wait 7 years before bringing the lawsuit. In fact, the 6 year ultimate limitation period for medical malpractice claims in B.C. would preclude claims even in cases of latent injury that could not have been reasonably discovered. Ultimate limitation periods can be effective in re-asserting the interests of defendants and the public, but they are a blunt instrument. An ultimate limitation period that is too short may preclude claims before they are reasonably discoverable. A longer ultimate limitation period may create injustice in less cases, but may not adequately serve defendant and public interest in repose.

What then is the optimal length of an ultimate limitation period? In a 1990 report,[73] the Law Reform Commission of British Columbia recommended that the province's existing 30 year general ultimate limitation period and special 6 year ultimate limitation period for medical claims be replaced by a general 10 year ultimate limitation period. It reasoned that the 30 year period appears to be unnecessarily long. Very few claims arise after so long a time. While limitation periods have not been a significant factor in the liability insurance crisis, a shorter ultimate limitation period would reduce some of the uncertainty associated with long-term risks and thus help to maintain the availability of coverage at a reasonable cost.[74]

Alberta subsequently adopted a 10 year ultimate limitation period, but qualified it by providing that it did not apply in cases of fraudulent concealment; persons under disability, including minors; claims based "on conduct of a sexual nature including, without limitation, sexual assault;"[75] or to actions "by an aboriginal people against the Crown based on a breach of a fiduciary duty alleged to be owed by the Crown."[76]

The Alberta legislation illustrates how the length of an ultimate limitation period is connected with whether there are special exceptions. A shorter ultimate limitation

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[73] *Supra* note 51.

[74] *Ibid.* at 43- 44.

[75] *Supra* note 3 s.5(2)(b).

[76] *Ibid.* s.13.

period places pressure on legislatures to either exempt certain categories of claims from that period or to give judges a general discretion to depart from the ultimate limitation period in exceptional cases where it would cause an injustice. The B.C. experience suggests the converse: a longer ultimate limitation period such as 30 years may allow most exceptional cases to be litigated, but places pressures for the existence of special shorter ultimate limitation periods especially in the area of medical malpractice. Legislatures must make a choice: have a long general ultimate limitation period (i.e. 30 years in B.C.) and special shorter ultimate limitation periods (i.e. 6 years in B.C.) or have a shorter general ultimate limitation period (i.e. 10 years as in Alberta) that exempts some types of claims (i.e. claims by Aboriginal people and sexual abuse claims in Alberta).

Legislating a Residual Discretion to Depart from Limitation Periods

There is another option that is also open to legislatures: legislate a residual discretion that allows judges to deal with exceptional cases in which it would not be reasonable to expect the plaintiff to discover the cause of action and commence litigation within 10 years of the breach. The residual discretion, like carving out special exceptions from the ultimate limitation period, makes it easier for legislatures to adopt a shorter ultimate limitation period as it allows for litigation to proceed in exceptional cases.

Given the discretionary way in which courts interpret discoverability principles, it could be argued that it would be more forthright to simply give courts an explicit discretion to depart from or postpone limitations in cases in which their application would cause an injustice. This has indeed been done in England, some Australian states and Nova Scotia. A separate question arises, however, concerning whether this discretion would apply to a general limitation period or an ultimate limitation period.

The Law Reform Commission of Western Australia[77] proposed that courts be given the power to make exceptions from both a 3 year general limitation period and a 15 year ultimate limitation period in exceptional circumstances when the prejudice to the defendant and the general public interest in repose would be outweighed by other factors, such as the nature of the plaintiff's injury and the defendant's conduct. Interestingly, the Commission cites the Court's decision in *K.M.* v. *H.M.* as a rationale for providing such discretionary extensions. A 1998 report by the

[77] *Supra* note 54.

Queensland Reform Commission also supports a similar extension provision although it recommends a 10 year ultimate limitation period.[78] That report rejects the Alberta Law Reform Institute's argument that a residual discretion to extend limitation periods would defeat the repose, certainty and diligence functions of statutes of limitations.[79] Hence, the Australian position is one in favour of a residual discretion to extend limitation periods.

The English Law Reform Commission, however, has opposed residual discretion in large part because courts have made frequent use of that discretion under existing legislation.[80] Noting over 115 reported decisions interpreting the residual discretion, the Commission concludes the English experience "demonstrates the difficulty of restricting the discretion. Moreover, the ability to ask a court to exercise its discretion or the Court of Appeal to review the exercise of the discretion by the court of first instance means a huge drain of court resources (as well as the costs for defendants in resisting such applications)."[81] Professor Andrews is even stronger in his criticisms of residual discretion under s.33 of the English *Limitation Act, 1980.* The many cases interpreting s.33 are "a juristic disaster"[82]:

> Such discretionary lifting of the limitation bar is bound to reduce the law's predictability and consistency. It must be accepted that a system of limitation by reference to a fixed period of time is intrinsically arbitrary. If the legislature creates a general power to disapply the rules, the ensuing pattern of forensic behaviour and institutional accommodation is familiar. A 'hard-luck' jurisdiction encourages the bringing of dilatory claims which are made in the hope that the plaintiff can be admitted out-of-time. Points of nice interpretation are taken on appeal. These appellate discussions generate an elaborate gloss upon the relevant statute. The law of limitation becomes a quagmire.[83]

The Commission agrees with Professor Andrews' criticisms and counsels against the introduction of a residual discretion to depart from limitation periods.

In my view, a residual discretion should not be legislated to allow courts to

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[78] *Supra* note 56.

[79] *Supra* note 52 at 135.

[80] Law Commission, *Limitation of Actions: A Consultation Paper* (No. 151) (London: Her Majesty's Stationary Office, 1998) at 322.

[81] *Ibid.* at 322 para. 12.194.

[82] *Supra* note 65 at 591.

[83] *Ibid.* at 596.

depart from a general limitation period that includes discoverability principles. The purposes of the residual discretion – avoiding an unjust application of a limitation period – are already adequately served by discoverability principles. These principles may be flexible and evolving, but they are at least defined in jurisprudence and open to debate; a residual discretion would create even more uncertainty not only concerning when the discretion would be exercised, but the degree to which appellate courts would review a trial judge's discretionary decision.

There is a somewhat stronger case for giving courts a residual discretion to depart from an ultimate limitation period, especially if that limitation period is only 10 years. This would respond to the potential injustice of precluding a claim based on latent personal injury or environmental damage when a plaintiff was not and could not be reasonably aware of the cause of action. It would allow the legislature to select a shorter ultimate limitation period without precluding meritorious claims or exempting category of claims. The main disadvantage of legislating a residual discretion to depart from an ultimate limitation period would be that it would undermine the repose function of the long stop for all defendants and claims. They would be exposed to long tail liability, albeit only in exceptional circumstances, and cases might be litigated on the basis of old evidence. As well, it would be difficult to price and obtain insurance for cases that would only be allowed to proceed in exceptional circumstances. There would also be uncertainly and costs caused by satellite litigation around the residual discretion.

The alternative to a general discretion to depart from ultimate limitation periods is the creation of special limitation periods, either in the form of exemptions or extensions from ultimate limitation periods or special short ultimate limitation periods in cases such as medical malpractice where the need for repose and certainty is considered particularly pressing. The carving out of exceptions from limitation periods is somewhat messy and awkward, but it may have the virtue of allowing an ultimate limitation period to provide repose in most cases while placing potential defendants in certain categories of cases on notice that they may not be protected by the ultimate limitation period and be exposed to the risk of litigation for a longer period than others.

IV. Special Limitation Periods

Although they have been challenged under s.15 of the *Charter*, it seems clear that

direct challenges to special short limitation periods will generally fail.[84] Section 7 of the *Charter* has also been interpreted to not include the right to bring a civil action for recovery of personal injury damages that might be violated should a short limitation period not accord with the principles of fundamental justice.[85] The fact that special limitations are likely Charter-proof does not, however, mean that they are good policy. Special limitation periods are not inherently good or bad[86]; in every case, they must be justified in the particular context as consistent with the public interest. In what follows, I will examine the main contexts in which there are arguments to support special limitation periods.

Claims Against Public Authorities

In 1989, the Ontario Court of Appeal rejected a s.15 challenge to the short 6 month limitation period that applies to claims brought against provincial, and now federal,[87] public authorities. Nevertheless, four years later the Ontario Court of Appeal held that this short statutory limitation period did not apply to claims brought under s.24(1) of the Charter. Carthy J.A. concluded that

> the purpose of the *Charter*, in so far as it controls excesses by governments, is not at all served by permitting those same governments to decide when they would like to be free of those controls and put their houses in order without threat of further complaint.[88]

Thus, the short limitation period can be circumvented if the plaintiff's claim against the public authority can be based on a violation of a Charter right. This decision may have been affected by the harshness of the short limitation period. In any event, it remains good law in Ontario and suggests that statutes of limitations will not apply to claims under s.24(1) of the Charter. Other provinces, including New Brunswick,

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[84] *Colangelo* v. *Mississauga (City)* (1988), 66 O.R. (2d) 29 (C.A.); *Mirhadizadeh* v. *Ontario* (1989), 69 O.R. (2d) 422 (C.A.); *Filip* v. *Waterloo* (1992), 98 D.L.R. (4th) 534 (Ont. C.A.), as discussed *infra* note 83 at 736-44.

[85] *Filip* v. *Waterloo, ibid.*

[86] K. Roach "The Problems of Public Choice: The Case of Short Limitation Periods" (1993) 31 Osgoode Hall L.J. 721.

[87] *Al's Steak House and Tavern Inc.* v. *Deloite and Touche*, [1997] O.J. No. 3046 (C.A.).

[88] *Prete* v. *Ontario* (1993), 16 O.R. (3d) (C.A..) 161 at 167-8.

have not, however, followed this approach;[89] short limitation periods protecting public authorities may apply to Charter claims in other provinces.

One of the major effects of limitation reform will likely be the repeal of short limitation periods protecting public authorities, including municipalities. Governments could be adversely affected by late claims, but because they are self-insuring, they may be in a better position than other defendants to deal with this uncertainty. There are also strong arguments that governments should avoid the appearance of self-interest by enacting protective short limitation periods.

Claims by Aboriginal People

In *Blueberry River Indian Band* v. *Canada (Department of Indian Affairs and Northern Development)*[90], the Supreme Court applied both the 30 year ultimate limitation period and the 6 year general limitation period under B.C. legislation to an Indian Band's claims of breach of fiduciary duty in relation to the surrender of their lands. In that case, the Band avoided the 30 year period by bringing its claim 29 years after surrender and the Court held that the 6 year limitation period had not expired because "the Bands were ignorant of critical facts in the exclusive possession of the Crown"[91] which constituted the basis of their cause of action. This was a relatively uncontroversial case that was close to fraudulent concealment. In less clear cases, courts might have to apply the principles in *Novak* v. *Bond* to claims brought by Aboriginal people. Depending on the circumstances of the particular case, it may be unfair to expect Aboriginal people to have brought claims against governments until relatively recently.

The Alberta experience with respect to Aboriginal claims and limitation reform is noteworthy. After it was first introduced, s.13 of the *Alberta Act* was amended to provide that

> An action brought, after the coming into force of this Act, by an aboriginal person against the Crown based on a breach of fiduciary duty alleged to be owed by the Crown to those people is governed by the law on limitation of actions as if the

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[89] *McGillivary* v. *N.B.* (1997), 111 D.L.R. (4th) 483 (N.B.C.A.); *Nagy* v. *Phillips* (1996), 137 D.L.R. (4th) 715 (Alta. C.A.) as discussed in K. Roach, "Constitutional Remedies in Canada" (Aurora: Canada Law Book, 1994) at 11.320.

[90] (1995), 130 D.L.R.(4th) 193 (S.C.C.).

[91] *Ibid.* at 234.

> Limitation of Actions Act had not been repealed and this Act were not in force.[92]

This provision appears designed to ensure that the new limitation periods in that Act, and in particular the new 10 year ultimate limitation period, does not apply to fiduciary claims brought by Aboriginal people. It should be recalled that the Supreme Court in *Blueberry Hill* applied B.C.'s 30 year ultimate limitation period to fiduciary claims by a Band and that the Band only brought the claim with one year left on the ultimate limitation period. A 10 year ultimate limitation might statute bar many Aboriginal claims against the Crown for breach of fiduciary duty given the long term dealings between the Crown and Aboriginal people.

In my view, s.13 of the *Alberta Act* is justified by the Crown's particular obligation to deal with Aboriginal people in an honourable and good faith manner. Arguments can be made, however, that s.13 is underinclusive as it does not exempt from the 10 year ultimate limitation period other claims based on breach of fiduciary duty, including those arising from non-sexual abuse of positions of trust and authority by doctors, teachers, prison guards and others. It may be preferable to follow the current approach in Ontario where limitation periods do not apply to fiduciary claims. If Aboriginal or other fiduciary claims are not exempted from newly enacted ultimate limitation periods, it is possible that a court would hold that the Crown should not be allowed to rely on limitations to defeat an Aboriginal claim under s.35(1) of the *Constitution Act, 1982*. The argument would stress the inconsistency between the Crown's reliance on an ultimate limitation period and the trust-like character of Aboriginal rights.

Sexual Abuse and Assault Claims

As discussed above, the Court in *K.M.* has interpreted existing Ontario legislation so that there is a presumption that claims based on incest are not discoverable until the plaintiff has received therapy. There are concerns that *K.M.* may not do enough to recognize the difficult position faced by those who survive sexual abuse.[93] In response to this and similar concerns, a number of provinces, including British Columbia and Newfoundland, have amended their limitation periods to provide that they do not apply to claims based on childhood sexual abuse.[94] Bill 99 introduced

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[92] *Alberta Act*, R.S.C. 1985, App. II, No. 20, s. 13.

[93] J. Mosher, "Challenging Limitation Periods: Civil Claims by Adult Survivors," (1992) 44 U.T.L.J. 169.

[94] *Limitation Act* R.S.B.C. 1996 c. 266 s. 3; *An Act to Revise the Law Respecting Limitations* S.N. 1995 c.L-16.1.

in Ontario in 1992 also took this approach by providing in s.16(h) that no limitation period applied in

> a proceeding arising from a sexual assault if at the time of the assault one of the parties to it had charge of the person assaulted, was in a position of trust and authority in relation to the person or was someone on who he or she was dependent, whether or not financially.[95]

Section 9 also provided that the 2 year basic limitation period did not run in respect of sexual assault and assault claims if the plaintiff was "incapable of commencing the proceeding because of his physical, mental or psychological condition"[96] and created presumptions of incapacity in cases of assault in contexts of intimacy and dependence as well as in all cases of sexual assaults.

There is a strong case that the special treatment of claims based on sexual assault should be extended to claims based on assault by a person in a position of trust or authority. For example, people in residential schools suffered both sexual and physical assaults and the Law Commission has recommended that "legislatures should revise the principles governing limitation periods in cases of institutional child abuse" including "increasing the limitation period whenever the action is based on misconduct committed in the context of a relationship of dependency."[97] The Supreme Court has also recognized that some of the same reasons for delayed reporting in *K.M.* may apply to cases involving physical abuse by a person in authority.[98]

Special Limitations and Ultimate Limitation Periods

The emerging consensus among law reform proposals is towards a general limitation period of 2-3 years. The greatest divergence is with respect to the length of ultimate, or long stop, limitation periods with proposals ranging from 10-30 years. As suggested above, the length of the long stop is intimately tied to the question of whether courts will be given a residual discretion to depart from it in exceptional cases or whether there will be special ultimate limitation periods. There are valid concerns that a general discretion to depart from an ultimate limitation period will

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[95] *Supra* note 43 at s.16(h).

[96] *Ibid.* at s.9.

[97] Law Commission of Canada, "Restoring Dignity: Responding to Child Abuse in Canadian Institutions," (Ottawa: Public Works, 2000) at 178.

[98] *Gauthier* v. *Brome Lake (Town)*, [1998] 2 S.C.R. 3.

undermine the repose function of long stops and create uncertainty and litigation. The best choice, then, appears to rely on the ultimate limitation period with special exceptions.

Special ultimate limitation periods can be crafted to provide a shorter long stop for some claims and a longer or no long stop for other claims. A 30 year long stop may not serve repose functions particularly well, especially in the medical malpractice and product liability areas; however, it can still cause injustice in exceptional cases, such as those dealing with sexual or institutional abuse or breach of fiduciary duty. A 10 year long stop would be better at promoting repose, but would cause injustice in more cases. The alternative is to identify those claims in which the shorter long stop is most likely to cause injustice and impose a longer long stop on those claims. The Alberta approach is to have a 10 year ultimate limitation period, but not to apply it to claims by Aboriginal people or claims based on sexual abuse. The English Law Reform Commission proposes a longer 30 year long stop for personal injury claims while recognizing that in exceptional cases even this special long stop could cause injustice. The decision about the length of the long stop cannot be divorced from the decision about whether it will apply to all claims or whether some claims can be either exempted from the long stop altogether or have their own longer ultimate limitation period. Another alternative would be the Bill 99 approach in which a general 30 year long stop is established, but in recognizing its weakness in promoting repose, create a special 10 year ultimate limitation for medical and building claims. This is also the approach used in British Columbia where there is a special 6 year ultimate limitation period for medical malpractice claims and a general 30 year ultimate limitation period.

The above approaches may differ, but the results are the same: the creation of a general ultimate limitation period, but carving out exceptions to that limitation. The choice may be whether one desires legislative debate to be focussed on the special repose interests of those who will have a shorter long stop or the special equity claims of those who will have a longer or perhaps no long stop. Whether the debate is focussed on particular defendants or plaintiffs, it may generate a "me too" dynamic and legislatures may have to consider expanding the ambit of the special ultimate limitation periods. As suggested above, there is a case to exempt all claims based on breach of fiduciary duty, as opposed to only claims brought by Aboriginal people, from limitation periods. Similarly, there is a case that assaults, including sexual assaults committed by those in a position of trust and authority, should be exempted from limitation periods. Even though limitation reform will involve the repeal of most existing special limitation periods, the introduction of a new ultimate limitation period will inevitably generate a new debate about the need for exceptions

and special ultimate limitation periods.

Conclusion

This paper has examined recent legal developments both with respect to the judicial evolution of discoverability principles and major law reform proposals. The most important development is the Supreme Court's continued commitment and expansion of discoverability principles. Although the Court may have achieved fair and just results by tailoring limitations to particular plaintiffs and claims, it has also created increased uncertainty and litigation about when limitation periods will be applied. Legislatures must, however, be careful not to create even more uncertainty and litigation when codifying discoverability principles. The safest route may be to follow the Alberta example by having a simple general two year limitation period subject to bare bones discoverability principles that will be interpreted by the courts with an emphasis on achieving fairness to plaintiffs. Attempts by legislatures to restrict how the courts apply discoverability principles are possible, but they may only generate more uncertainty and litigation.

The safest legislative response may be to concede that the courts will interpret discoverability principles in a manner that is generous to plaintiffs, but to re-assert defendant and public interests in diligence, certainty, repose and litigation based on fresh evidence and legal standards by enacting an ultimate limitation period that clearly excludes discoverability principles. The consensus among law reformers seems to be that discoverability principles are desirable and should be codified, but they should be balanced by an ultimate limitation period. There is, however, considerable disagreement over the length of the long stop and whether courts should have a discretion to depart from it. Despite Australian enthusiasm for a residual discretion to depart from long stops, such a discretion will undermine the repose function of the ultimate limitation period and have the potential to create considerable uncertainty and litigation. At the same time, one long stop may not be appropriate in all cases. If one size must fit all, the legislature will be placed on the horns of a dilemma between opting for a long ultimate limitation period that will allow most exceptional cases to proceed but may not effectively achieve repose, or a shorter long stop that will better promote repose but more frequently statute bar claims before they could not be reasonably discovered and litigated. The best solution may be to go with a shorter (10-15 year) long stop, but then exempt certain categories of claims from it. The focus of the debate would be on trying to predict the types of cases where legitimate claims would most likely arise after the expiration of the 10-15 year long stop. The debate would centre on the equitable claims of plaintiffs not the repose interests of defendants. The alternative is to have

a 25-30 year long stop, but then enact special short ultimate limitation periods in those cases where defendant's needs for repose and certainty are most legitimate and best known.

Exempting categories of cases from the ultimate limitation period inevitably raises problems of over and under inclusion, as well as uncertainty and litigation concerning the ambit of the categories. Some of these problems might be avoided by exempting all claims based on breach of fiduciary duty – this should include claims brought by Aboriginal people and by people who suffered assaults and sexual assaults in situations in which the defendants were in positions of trust and authority. The legitimate repose interests of those institutions and individuals who are in a fiduciary relationship with someone subject to their power is less than other defendants and can still be protected by the more flexible equitable doctrine of laches. Exempting all fiduciary duty claims from limitation periods may encourage the expansion of such claims, but it is likely that other factors, such as doctrinal and remedial flexibility are driving the Canadian expansion of fiduciary duty claims.

In the end, the case for limitation reform is even more compelling now than it was ten years ago. Decisions such as *Novak* v. *Bond* suggest that limitation periods subject to discoverability principles can achieve fairness for many plaintiffs, but that they create much uncertainty and even possible unfairness for defendants. The wisest course seems to be to allow courts to develop and impose discoverability principles within a general 2 year limitation period, but to advance defendant and public interests in limitation periods by adopting a 10 or 15 year ultimate limitation period that runs regardless of discoverability. Unless one is willing to accept the injustice that comes from a "one size fits all" approach or provide courts with a general discretion to depart from the ultimate limitation period in exceptional cases, the challenge then becomes to identify those categories of cases in which this ultimate limitation period is most likely to create injustices and to create limited, certain and principled exceptions from the new ultimate limitation period.