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Indexed as:

M.M. v. Roman Catholic Church of Canada

Between
M.M. (plaintiff) respondent, and
Les Oblats de Marie Immaculée du Manitoba and Oblate Sisters of Saint Boniface, (defendants) appellants, and
The Roman Catholic Church of Canada, The Attorney General of Canada, Archdiocese of St. Boniface, Father Beaulieu, Father Ruest, Father John Doe and Sister Jane Doe, (defendants)
And between
D.R.C., (plaintiff) respondent, and
Les Oblats de Marie Imaculée du Manitoba and Oblate Sisters de Saint Boniface (defendants) appellants, and
The Roman Catholic Church of Canada, The Attorney General of Canada, Archdiocese of St. Boniface, Father Plumondeau, Father John Doe and Sister Jane Doe, (defendants)

[2001] M.J. No. 401

2001 MBCA 148

Docket No. AI 00-30-04783 and AI 00-30-04790

Manitoba Court of Appeal

Philp, Helper, Kroft, Monnin and Steel JJ.A.

Heard: June 8, 2001.
Judgment: September 26, 2001.

(95 paras.)

Limitation of actions -- Purpose of limitation provisions -- Interpretation of limitation provisions -- Discoverability rule, application of -- Actions -- Ultimate limitation period -- Breach of fiduciary duty.

Appeal by the Church and other defendants from the dismissal of their application to have actions struck or dismissed as statute-barred. MM and DC were students at residential schools who claimed damages for breach of fiduciary duty with respect to preservation of their cultural heritage. MM was a student between 1930 and 1942, DC between 1944 and 1950. The Church argued that the claims were barred due to the limitation periods in place at the time the incidents occurred, as well as those in place when the actions were brought.

HELD: Appeal allowed. The limitation act in place at the time the incidents occurred had a clear 30-year ultimate limitation period that applied at least from the time the damages arose, regardless of discoverability. It was not intended by the legislature to be knowledge-based. At the latest, the limitation periods would have expired in 1972 for MM and 1980 for DC. This was the law that applied to MM's and DC's claims. The Church acquired a vested right under that act that was not disturbed by the introduction of the current act. Even if the limitation period under the present act applied, the result would have been the same. MM and CD's attempt to argue a breach of the Charter for the first time on appeal was not allowed to proceed.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 15.

Limitation of Actions Act, 1931, S.M. 1931, c. 30, ss. 3, 3(1)(i), 6, 40A(1), 40A(2).

Limitation of Actions Act, R.S.M. 1940, s. 41(1), 41(2).

Limitation of Actions Act, R.S.M. 1987, c. L150, ss. 7, 7(1), 7(5), 58.

Interpretation Act, S.M. 2000, c. 26 - Cap. I80, s. 46(1), 46(1)(c).

Medical Act, R.S.M. 1987, c. M90, s. 61.

Limitation Act, R.S.B.C. 1979, c. 236, ss. 6(3)8.

Medical Act, R.S.B.C. 1960, c. 239.

Miscellaneous Statutes (Amendment) Act, S.B.C. 1977, c. 76.

Limitation Act, R.S.B.C. 1996, c. 266, ss. 3(4)(k).

Limitation of Actions Act, R.S.S. 1978, c. L-15, s. 3(3.1).

Limitation of Actions Act, R.S.Y. 1986, c. 104, s. 2(3).

Limitations Act, S.A. 1996, c. L-15.1, s. 13.

Appeal From:

Appeal from (1999), 141 Man.R. (2d) 209 See [2001] M.J. No. 256, 2001 MBCA 91

Counsel:

D.K. Paterson and P. Halamandaris, for the appellants.
V.S. Savino and P.M. Jerch, for the respondents.
A. Frechette, for the Attorney General of Canada.
D.R. Davis, for the Attorney General of Manitoba.
R. Pollack, Q.C., for the Archdiocese of St. Boniface.

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1 THE COURT:-- The respondent in each of these actions is an "Indian" within the meaning of the Indian Act. Each has alleged harm of a physical, emotional, and cultural nature caused by the treatment received when each was a student at an Indian Residential School. Each was in residence during periods that ended more than three decades before the statements of claim were filed.

2 The appellants moved in the Court of Queen's Bench for the determination of a question of law; that being whether the cause of action brought by each of the respondents was statute-barred and should be dismissed or struck out. The motions were filed pursuant to Queen's Bench Rule 21.01 after the respondents filed their respective statements of claim.

3 The motions judge dismissed both motions without prejudice to the appellants' rights to plead that the claims were statute-barred because they were not brought within six years from the discovery of the cause of action. The appellants appeal from both orders.

The Facts

4 The statement of claim by M. M. (the M. claim) was filed on April 30, 1998.

5 In the M. claim, the respondent alleges that she attended the Pine Creek Indian Residential School (the school) for approximately 12 years; from the ages of 3 to 15. In particular, she says that she attended the school from in or around August 1930 to in or around June 1942.

6 The statement of claim by D. C. (the C. claim) was filed on June 11, 1998.

7 In the C. claim, the respondent alleges that he attended the school for approximately six years; from the ages of 10 to 16. In particular, he says that he attended the school from on or about September 1, 1944, to in or around 1950.

8 In both claims, the respondents initially alleged, inter alia, that while they were students at the school, various of the defendants committed certain torts against them (assault, sexual assault, and false imprisonment) and breached fiduciary duties owed to each of them with respect to the preservation of their culture and heritage. They each claim general and special damages, loss of income, interest, and costs. At the hearing of this appeal, counsel for the respondents advised that his clients had abandoned their claims in tort and were proceeding simply on the basis of breach of fiduciary duty.

The Constitutional Question - A Preliminary Issue

9 Counsel for the respondents served the Attorney General of Manitoba with notice of a constitutional question and

addressed that question in the written material filed in response to these appeals. The respondents sought to argue that The Limitation of Actions Act violates s. 15 of the Canadian Charter of Rights and Freedoms (the Charter). The issue was not argued before or adjudicated by the motions judge, although it may have been referred to before him in passing.

10 It was the position of the Attorney General of Manitoba that the issue was not properly before this court. The Attorney General moved to strike those parts of the respondents' factum which refer to and rely upon the argument raised under s. 15 of the Charter and further asked this court to decline to entertain any constitutional question at this time.

11 The pronouncement of the Supreme Court in MacKay v. Manitoba, [1989] 2 S.C.R. 357, is applicable to this case. Charter issues ought not to be argued in a factual vacuum. The factual underpinnings of a constitutional issue have not been established in this case, where the only materials on the record are the respective statements of claim and a single supporting affidavit. Scott C.J.M. stated in R. v. C.J. (1997), 115 Man.R. (2d) 72, that absent exceptional circumstances, this court will reject any invitation to entertain constitutional arguments raised for the first time on appeal, especially where a factual context is absent. It was on this basis that the court granted the Attorney General's motion and did not allow the respondents to proceed with the constitutional issue raised by them.

The Appellants' Argument

12 The appellants submit that both claims in their entirety must be dismissed, either by virtue of the provisions of The Limitation of Actions Act that were in force at the time the causes of action pleaded in the statements of claim arose (The Limitation of Actions Act, 1931, S.M. 1931, c. 30, as amended by S.M. 1932, c. 24, and thereafter) (the 1931 Act) or, alternately, by virtue of the provisions of The Limitation of Actions Act in force at the current time (The Limitation of Actions Act, R.S.M. 1987, c. L150) (the current Act).

13 The appellants say that the claims filed against them are governed by the provisions of the 1931 Act that were in force when the facts on which the claims are based are alleged to have occurred. They argue that both claims became absolutely statute-barred under the provisions of the 1931 Act. They go on to argue that their right of immunity from suit after the respondents' claims became statute-barred is a vested right which cannot be retroactively affected by the enactment of the current Act. They say they acquired an "accrued right to plead a time bar." See Martin v. Perrie, [1986] 1 S.C.R. 41, a case which we will address in greater detail later in these reasons. In the alternative, they argue they are protected from suit by the provisions of the current Act.

Which is the Applicable Act?

14 The current Act does not contain any detailed transitional provisions. Section 58 states:

> Application of Act
>
> 58 This Act applies to all causes of action whether they arose before or after the coming into force of this Act.

15 This section, which says that it is the statute in force today which governs regardless of when the cause of action arose, must be read together with s. 46(1) of The Interpretation Act, S.M. 2000, c. 26 - Cap. I80. There the principle is clearly prescribed that the legislature does not intend new statute law to interfere with vested rights.

> Effect of repeal
>
> 46(1) The repeal of an Act or regulation, whether or not it is also replaced, does not

. . . . .

(c) affect a right, privilege, obligation or liability acquired, accruing or incurred under the repealed Act or regulation;

. . . . .

16 In light of the Supreme Court decision in Martin v. Perrie, s. 46(1) means that the current Act governs in all cases by virtue of s. 58 unless a limitation defence has already vested under the repealed statute. We will begin therefore by addressing the appellants' submission that they acquired a vested right under the 1931 Act.

(A) The longstop provision of the 1931 Act

17 The following are the provisions of the 1931 Act upon which the appellants rely:

3.

(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:

. . . . .

(i) actions grounded on accident, mistake or other equitable ground of relief not hereinbefore specifically dealt with, within six years from the discovery of the cause of action;

. . . . .

6. If a person entitled to bring any action mentioned in paragraphs (c) to (j) inclusive of subsection (1) of section 3 is under disability at the time the cause of action arises, he may bring the action within the time hereinbefore limited with respect to such action or at any time within two years after he first ceased to be under disability.

18 Section 10 of S.M. 1932, c. 24, added the following to the 1931 Act:

40A. (1) If, at the time at which the right to take any proceedings referred to in Parts II, III or IV first accrued to any person, he was under disability, then such person or a person claiming through him may (notwithstanding anything in this Act) take proceedings at any time within six years next after the person to whom the right first accrued first ceased to be under disability or died, whichever event first happened, provided that if he dies without ceasing to be under disability, no further time to take proceedings shall be allowed by reason of the disability of any other person.

(2) Notwithstanding anything in this section, no proceedings shall be taken by a person under disability at the time the right to do so first accrued to him, or by any person claiming through him, but within thirty years next after that time.

[emphasis added]

This section was renumbered s. 41(1) and (2) in the 1940 Revised Statutes. For ease of reference, we will refer to s. 41(1) and (2) as the longstop provision of the 1931 Act.

(B) Is the longstop provision subject to discoverability?

19 The appellants agree that s. 3(1)(i) of the 1931 Act has its own built-in discoverability provision. They submit, however, that it is not s. 3(1)(i) that is the governing provision of the Act, but rather, the longstop provision applies in this case. They say that the longstop provision is not knowledge-based, is not subject to discoverability, and that discoverability has no place in the construction and interpretation of that provision.

20 The appellants argue that in enacting the longstop provision, the legislature intended to bar all claims that had not been initiated within 30 years from the time the cause of action arose; that the meaning of the longstop provision is clear from its language and, to the extent that it is relevant, that the description of s. 41(2) in the marginal note as the "ultimate limit" is consistent with their submission. Therefore, the M. claim became statute-barred no later than 1972, 30 years after she left the school. The C. claim became statute-barred no later than 1980, 30 years after he left the school.

21 On the other hand, the respondents argue that there is no basis in law to construe the longstop provision in a manner that restricts rights otherwise recognized by the legislature. Section 3(1)(i) provided to a person wronged by the breach of a fiduciary duty the right to commence an action within six years after the discovery of the cause of action. In introducing the longstop provision, the legislature did not restrict a plaintiff's time for discoverability under s. 3(1)(i) and did not make that section in the 1931 Act subject to the longstop provision. Indeed, the use of the phrase "the right to do so first accrued to him" in the longstop provision, they argue, is far from clear. The respondents argue that clear legislative intent to restrict a plaintiff's right to commence an action pursuant to s. 3(1)(i) would be required to support the interpretation advanced by the appellants.

22 The respondents contend that the longstop provision in the 1931 Act is knowledge-based and point to the very different wording of the comparable longstop provision in the current Act to support that contention. They say the right to bring an action first accrued to them under the longstop provision when they discovered their cause of action.

23 The longstop provision in the current Act reads as follows:

> Persons under disability
>
> 7(1) For the purposes of this section and section 8, a person is under a disability
>
> (a) while he is a minor; or
> (b) while he is in fact incapable of the management of his affairs because of disease or impairment of his physical or mental condition.
>
> . . . . .
>
> Ultimate time
>
> 7(5) Notwithstanding anything in this section, no action to which this section applies shall be brought by a person who is or has been under a disability or for or on his behalf by another after the expiration of 30 years after the occurrence of the act or omission that gave rise to the cause of action.
>
> . . . . .

24 Under the longstop provision in the 1931 Act, the limitation period runs from the time when the right to take

proceedings first accrued to the person. The current Act states that time begins to run from the completion of the occurrence of the acts or omissions giving rise to the cause of action.

(C) The meaning of the phrase "the right to do so first accrued to him"

25 To address this issue, we pose the following question: Does the phrase "the right to do so first accrued to him" used in the 1931 Act mean the same thing as "when a cause of action first accrued for the purposes of a limitation period"? Put another way, the question is: Does that phrase in the statute mean the same thing as "the occurrence of the act or omission that gave rise to the cause of action," the wording of s. 7(5) of the current Act? If the answer to the question is in the affirmative, then we conclude that the changes in the wording of the longstop provision in the 1931 Act were effected for the purposes of clarification and not to change the meaning and application of that provision. On the other hand, if the answer to the question is in the negative, the respondents' submission is strengthened.

26 To answer the question, it will be helpful to consider a working definition of a "cause of action."

27 One of the leading definitions comes from Cooke v. Gill (1873), L.R. 8 C.P. 107. Three concurring judgments were written. Brett J., in the course of his judgment, defined the cause of action as follows (at p. 116):

> "Cause of action" has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed, - every fact which the defendant would have a right to traverse.

Brett J. concluded his reasons by noting (at p. 117):

> ... [T]he jurisdiction to issue an attachment does not exist unless every fact material to establish a cause of action accrued within the city.

28 In Letang v. Cooper, [1964] 2 All E.R. 929 (C.A.), Lord Diplock defined a "cause of action" as follows (at p. 934):

> A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.

29 Craig J.A., in Crown Zellerbach Can. Ltd. v. R. (1979), 11 C.P.C. 187 at 193 (B.C.C.A.), said that the phrase "cause of action" "includes, or comprises, every fact which the plaintiff must prove, if opposed, in order to obtain a judgment."

30 Lord Diplock's definition from Letang v. Cooper and Brett J.'s definition from Cooke v. Gill are the classic definitions and the ones most often quoted and adopted in Canadian cases. See, for example, Domco Industries Ltd. v. Mannington Mills, Inc. (1990), 29 C.P.R. (3d) 481 at 496 (F.C.A.), Photinopoulos v. Photinopoulos (1988), 31 C.P.C. (2d) 267 at 275 (Alta. C.A.), Grover v. Grover (1980), 17 C.P.C. 298 at 301-2 (B.C.C.A.), Foley v. Greene (1990), 4 C.C.L.T. (2d) 309 at para. 36 (Nfld. T.D.), July v. Neal (1986), 19 C.C.L.I. 230 at 239 (Ont. C.A.), and Consumers Glass Co. v. Foundation Co. of Can./Cie Foundation du Can. (1985), 1 C.P.C. (2d) 208 at 215 (Ont. C.A.).

31 A cause of action therefore is comprised of those elements necessary to establish the success of a claim.

32 Given the foregoing definition, it is not surprising that, traditionally, the rule was that the cause of action accrues and the limitation period begins to run from the point that the elements of the action are complete, regardless of whether or not the injury is reasonably discoverable. In Canada, accrual of a cause of action for limitation purposes has, however, been complicated by the issue of latent undiscovered injury, whether to person or property.

33 The Law Reform Commission of British Columbia in its Report on the Ultimate Limitation Period: Limitation Act, Section 8 (LRC 112, March 1990) describes the conventional rule as follows (at p. 21):

> The traditional rule concerning the point at which a limitation period commences is that time starts to run when the cause of action arises. In other words, time is considered to run from the point at which the plaintiff first had the right to sue. Determining the point when the right to sue first arises depends on the nature of the claim presented. In actions based on breach of contract, for example, the breach itself gives the right to sue. In actions based on the tort of negligence, however, the cause of action is not complete until the plaintiff has suffered actual damage. Under the traditional rule, the limitation period commences when damage occurs, whether the plaintiff has the means of knowing the fact or not.
>
> [citations omitted]

34 This is the position that held in England until changed by statutory amendment: Pirelli General Cable Works Ltd. v. Oscar Faber & Partners (a firm), [1983] 1 All E.R. 65 (H.L.).

35 The Supreme Court of Canada took a different view of that rule in Kamloops (City of) v. Nielsen et al., [1984] 2 S.C.R. 2. They confirmed that view in Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147. In these cases, the court held that a cause of action based in tort accrues for the purposes of a limitation period when the injured party knew or, in all of the circumstances, ought to have known that a cause of action was available.

36 In M. (K.) v. M. (H.), [1992] 3 S.C.R. 6 at 34, La Forest J. referred with approval to the Supreme Court of New Hampshire's comments in Raymond v. Eli Lilly & Co., 371 A.2d 170 at 172 (1977):

> There are at least four points at which a tort cause of action may accrue: (1) When the defendant breaches his duty; (2) when the plaintiff suffers harm; (3) when the plaintiff becomes aware of his injury; and (4) when the plaintiff discovers the causal relationship between his harm and the defendant's misconduct.

He concluded (at p. 35):

> In my view the only sensible application of the discoverability rule in a case such as this is one that establishes a prerequisite that the plaintiff have a substantial awareness of the harm and its likely cause before the limitations period begins to toll.

37 What must be remembered is that these cases were decided in the context of interpreting legislation from other jurisdictions which does not contain provisions akin to those found in Part II of the Manitoba legislation. (Part II of the Manitoba legislation provides protection for those plaintiffs who discover they have a cause of action against a wrongdoer, but make that discovery close to the end of the limitation period or after the limitation period has lapsed. More will be said about Part II of the current Act later in these reasons.) What also must be remembered is that in these cases, the court was not required to interpret a statutory longstop provision or to address the relationship between the limitation periods set out in provisions comparable to s. 3 and a longstop provision.

38 In Fehr v. Jacob and Bethel Hospital (1993), 85 Man.R. (2d) 63 (C.A.), Twaddle J.A. stated that the judge-made discoverability rule invoked by the Supreme Court in Kamloops (City of) v. Nielsen et al. and Central Trust Co. v. Rafuse is a rule of construction, not a principle of general application detached from the statutory language. He concluded that the discoverability rule had no application to s. 61 of The Medical Act, R.S.M. 1987, c. M90, because time there was specifically stated to run from the date professional services terminated rather than from the date the cause of action accrued. He stated (at para. 13):

> In both those cases, the Supreme Court ruled that a cause of action did not accrue for limitation purposes until all the material facts were discovered by the prospective plaintiff.

He continued (at para. 22):

> In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, 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.

39 Twaddle J.A.'s comments were adopted by the Supreme Court of Canada in Peixeiro v. Haberman, [1997] 3 S.C.R. 549 at para. 37. (See also Rarie v. Maxwell (1998), 131 Man.R. (2d) 184 at paras. 61 et seq. (C.A.), per Twaddle J.A.)

40 In Rarie v. Maxwell, this court held that Part II of the current Act was a comprehensive statutory regime to deal with the potential unfairness of limitation periods taking away a cause of action before reasonable discoverability was possible. Philp J.A. commented on an ultimate limitation period. He stated (at para. 36):

> The provision of an ultimate limitation, Lord Fraser's "final longstop date," is an express policy enactment of the Legislature that has no counterpart in the judge-made discoverability rule.

He went on to state (at para. 53):

> Part II of the Act relieves against the injustice of statutory limitation periods that preclude an action before the material facts are known. It is unnecessary to resort to a rule of construction in order to postpone the accrual of a cause of action to the date of discovery of the material facts. The general rule of discoverability laid down in Kamloops has no place in Manitoba.

41 The purpose of a longstop provision is to give a sense of absolute finality in certain cases. As with all limitation periods, it represents the legislative attempt to create a proper balance. Injured parties should not be deprived of a claim because of circumstances beyond their control, such as minority or incapacity or discoverability. Putative defendants, on the other hand, should not be compelled to have the sword of Damocles hanging over their heads forever. The first objective can be met if the period is truly long; 30 years in Manitoba. The second objective can be met, however, only if that very long period applies no matter what, even in the face of ongoing and continuing disability or the absence of knowledge despite reasonable efforts.

42 A legislated longstop provision prescribes a date by which courts and parties alike are obliged to recognize that there has been closure. If societal standards of the past are later regarded as unacceptable or unjust in the eyes of a new generation, and if remedies or compensation are deemed to be necessary to rectify the situation, then that initiative must come from government policy and legislative action. To achieve a result by interpreting The Limitation of Actions Act in the way urged by the respondents would be an invitation for the court to exceed its proper judicial role.

43 In Graeme Mew, The Law of Limitations (Toronto and Vancouver: Butterworths, 1991), four broad categories of reasons for limitation periods are identified (at pp. 7-8):

> 3.1. "Peace and Repose"
>
> It is said that statutes of limitation are acts of "peace" or "repose". The theory is that, at

some point after the occurrence of conduct that might be actionable, a defendant is entitled to peace of mind. Courts should not be called upon to adjudicate stale disputes.

When a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proofs of witnesses which have been taken; discharge his solicitor if he has been retained; and order his affairs on the basis that his potential liability has gone. That is the whole purpose of the limitation defence.

[Yew Bon Tew v. Kenderaan Bas Mara, [1983] 1 A.C. 553 at 563 (P.C.), per Lord Brightman]

3.2. Evidentiary Concerns

With the passage of time between the occurrence of events giving rise to a claim and the adjudication of the claim, the quality and availability of the evidence will diminish. Memories will fade, witnesses will die or move away, and documents and other records will be destroyed. If a point in time is reached when evidence becomes too unreliable to form a sound basis for adjudication, a limitation period should prevent the claim from being adjudicated at all.

3.3. Economic Considerations

People who provide goods and services may be adversely affected by the uncertainty of potential litigation. Economic consequences will directly flow. A potential defendant faced with possible liability of a magnitude unknown may be unable or unwilling to enter into other business transactions. Others may be unaware of a specific claim until many years after an event upon which the claim is based. The cost of maintaining records for many years and obtaining adequate liability insurance is ultimately passed on to the consumer. The Alberta Report concluded:

> ... the result of peace denied can become excessive cost incurred, for the cost burden on the entire society is too high relative to any benefits which might be conferred on a tiny group of claimants by keeping defendants exposed to claims.

3.4. Judgmental Reasons

If a claim is not adjudicated until many years after the events that give rise to it, different values and standards from those prevailing at the time the events occurred may be used in determining fault. Because of changes in cultural values, scientific knowledge, and societal interests injustice may result. Can it be said that the conduct of the "reasonable person" as perceived by a court today would accord with the view taken by a judge of an earlier generation?

44 The Law Reform Commission of British Columbia in its Report, supra, stated unequivocally as follows (at p. 6):

> Once again, a postponement under section 6 [postponement for concealed causes of action] resulting from the plaintiff's ignorance of the material facts will not affect the running of time under the ultimate limitation periods in section 8, which operate independently of the plaintiff's state of knowledge.

And at p. 7 of the Report:

> .... If the disability occurs after the cause of action has arisen, when the basic limitation period is already running, the running of time is suspended from the onset of the disability until it ceases.
>
> The ultimate limitation periods provided by section 8, however, are not affected by the plaintiff's disability.

45 In Bera v. Marr (1986), 1 B.C.L.R. (2d) 1 (C.A.), the plaintiff commenced an action against a medical doctor claiming damages for alleged negligence in carrying out a surgical procedure on September 26, 1974, when the plaintiff was 12 years of age. In his statement of defence, the defendant pleaded the provisions of the Limitation Act, R.S.B.C. 1979, c. 236, and the Medical Act, R.S.B.C. 1960, c. 239, contending the action was statute-barred. It was agreed that the plaintiff first sought medical advice with regard to his alleged injury on November 18, 1981, seven years after the procedure was undertaken. The writ of summons was issued on April 23, 1982.

46 The question before the court was whether the limitation period which governed the action was the 10-year period specified in the 1975 legislation or the six-year period specified in the Miscellaneous Statutes (Amendment) Act, S.B.C. 1977, c. 76, now s. 8 of the Limitation Act. If the limitation period governing the action was held to be the period of "six years from the date on which the right to do so arose," as set out in s. 8 of the 1979 legislation, did the right to bring an action arise on the date on which the damage occurred or on the date upon which the plaintiff obtained the knowledge specified in s. 6(3) of the 1979 Limitation Act?

47 In the context of the case, the court concluded that the phrase "the right to do so arose" must mean the date of the alleged negligent conduct, not the date on which the plaintiff became aware of the negligent conduct or could reasonably have become aware of it.

48 Esson J.A. stated (at p. 27):

> There are strong policy reasons for not construing the date as of which the right to bring action arose in a manner different from that which has heretofore been given to them in the Limitation Act. To do so would be destructive of a balanced legislative scheme. Sections 6 and 8 are obviously designed to work together with s. 3(1) to provide relief against the injustice which can be created by hidden facts and, on the other hand, to provide reasonable protection against stale claims. All of that is premised upon the "right to do so" meaning the date of accrual of the cause of action without reference to knowledge. If that premise is disturbed, s. 6 will be made more difficult of application and s. 8 will cease to provide any real protection against stale claims.

49 Esson J.A. acknowledged that an infant's cause of action might lapse before reaching majority. He stated (ibid.):

> A significant part of the "balance" created by ss. 6, 7 and 8 [the statutory discoverability provisions and the longstop provision] is that the 30-year ultimate limitation is long enough so that no action by an infant can be barred before he comes of age and other

> actions falling within ss. 6 and 7 cannot be ultimately barred for more than a generation. The special ultimate limitation conferred upon physicians and hospitals is inconsistent with that balance. It is only in such cases that the infant's action can be barred before his majority and that other actions can be barred before the passage of a period of time beyond what could reasonably be regarded as adequate to prevent injustice to any claimant. In the case of physicians and hospitals, the legislature has seen fit to place greater weight on avoiding the injustice which can be caused to defendants by stale claims. It is for the legislature to decide what balance should be struck between those competing interests. The fact that it has accorded special treatment to two classes of potential defendants does not justify the court in disturbing one of the basic premises of the Act.

50 In Manitoba, where the 30-year period set out in the longstop provision (generally viewed as the span of one generation) exceeds by more than a decade any possible period of disability owing to legal infancy, the argument that such limitation period should not apply loses considerable force.

51 In our view, the reasoning employed by Esson J.A. in the British Columbia context logically applies to the construction of the longstop provision of the 1931 Act. It is evident and logical that the longstop provision applies despite continuing disability and was never intended by the legislature to be knowledge-based. The subsection begins, "Notwithstanding anything in this section"; that is, notwithstanding the suspension of time because of disability. It is clear that disability includes legal infancy.

52 It is also clear that the legislature made a policy decision in enacting the longstop provision to impose an ultimate 30-year limitation period in all cases where the victim of a breach of duty is an infant or a person suffering from a disability. Accordingly, the judge-made discoverability rule of statutory construction has no place in the interpretation of the longstop provision in the 1931 Act. The right to take proceedings "first accrued" once there had been a breach of a duty and the plaintiff had suffered harm. The injured party then had 30 years from that point of time onward to file the claim, regardless of continuing incapacity and regardless of his or her state of knowledge.

53 Limitation legislation enacted in other jurisdictions supports our opinion that the longstop provision is not subject to the judge-made discoverability rule. The legislatures in British Columbia, Saskatchewan, and the Yukon have specifically addressed the problem of limitation periods where there is an allegation of sexual misconduct resulting in damages. In these three jurisdictions, there is no limitation period for sexual misconduct with a minor or sexual assault with anyone (Limitation Act, R.S.B.C. 1996, c. 266, s. 3(4)(k) and (l); The Limitation of Actions Act, R.S.S. 1978, c. L-15, s. 3(3.1); and Limitation of Actions Act, R.S.Y. 1986, c. 104, s. 2(3)). Alberta already separates aboriginal claims to some extent since claims by aboriginal people based on fiduciary breach are governed by the former statute rather than the present one, which contains a longstop of ten years (Limitations Act, S.A. 1996, c. L-15.1, s. 13).

54 We would answer the question posed earlier in these reasons as follows: The phrase "the right to do so first accrued to him" in the longstop provision of the 1931 Act means exactly the same thing as "the occurrence of the act or omission that gave rise to the cause of action" in s. 7(5) of the current Act.

55 Disability and knowledge are therefore irrelevant when determining the accrual of the cause of action for the purposes of the ultimate limitation period. The only difference then between the longstop provision of the 1931 Act and the current Act relates to the issue of loss or damage.

56 Under the longstop provision of the 1931 Act, time does not begin to run until the injured party has actually suffered loss or damage because it is only then that the right to bring proceedings crystallizes. Under s. 7(5) of the current Act, however, the calculation of time begins from the completion of the events giving rise to the cause of action detached from the issue of loss or damage: Fehr v. Jacob and Bethel Hospital.

57 This difference is significant because the factual foundation necessary in order to determine when the time begins to run is different under the two sections. Under the longstop provision of the 1931 Act, the court needs to know when the events took place and when the injured party first suffered damage or loss. Under s. 7(5), the court needs to know only when the events or omissions giving rise to the action were complete.

58 In this case, the limitation time period has expired because both respondents ceased attending the residential schools in question more than 30 years ago. The respondents are not arguing that loss arose only after leaving the school. Their argument is that loss was suffered throughout the years at the school and continued throughout their lives. Accordingly, even if one is generous (from the respondents' perspective) and considers the last day of school attendance as the starting point for calculating the 30-year period, the respondents are well past the 30 years stipulated under the longstop provision.

59 We wish to comment upon an apparent lacuna in the 1931 Act.

60 The action of a plaintiff for injuries resulting from a breach of fiduciary duty that occurred when she was 17 years of age in circumstances where discovery of her cause of action is delayed will be barred by the longstop provision 30 years after the breach of duty occurred. Such is not the case for a victim in similar circumstances who was 18 years of age at the time the breach of fiduciary duty occurred. She would be able to take advantage of s. 3(1)(i) of the 1931 Act and would be entitled to commence an action six years after she discovered her cause of action, even if the discovery occurred more than 30 years after the cause of action arose. It is the respondents' contention that such an inequity was never the legislative intent and thus this court should not accept the interpretation advanced by the appellants.

61 However, the same inequity would apply to the circumstances of a 17-year-old victim and an 18-year-old victim under the current Act. The current Act is clearly not knowledge-based. Thus, the same gap in the legislation exists. The respondents' argument therefore lacks merit.

62 The appellants say that the different treatment accorded the two hypothetical plaintiffs described in the above scenario ought not to influence this court's interpretation of the statutes. The resulting impact of the legislation may be viewed as an oversight by the legislature and may result in a harsh effect. However, it is up to the legislature to remedy that oversight. The court's function is to apply the governing principles of statutory interpretation to the facts and to the legislation before it.

63 It is our view that the court should be very slow indeed to depart from the application of a limitation period which ensures that claims are judged within the general legal and social context of the time in which the allegedly tortious or inequitable conduct is supposed to have taken place.

64 Under the longstop provision of the 1931 Act, the appellants acquired a vested right to be immune from claims 30 years after the respondents left the school.

65 Therefore, pursuant to s. 46(1)(c) of The Interpretation Act, the current Act is not applicable to this case.

Is the Decision in Martin v. Perrie Applicable?

66 The Supreme Court of Canada considered the issue of the retrospective operation of legislation in Martin v. Perrie and concluded that the passage of a limitation period created an accrued legal right.

67 The facts were that, in Ontario, the limitation period for bringing medical malpractice suits was amended in 1974 from a period within one year of termination of medical services to a period of within one year of the date when the plaintiff learned of or ought to have known the facts giving rise to the action. The defendant surgeon operated on the plaintiff in 1969. In 1979, the plaintiff suffered pain in the area of the surgery and underwent another operation to remove a non-absorbable suture which had been left at the time of the 1969 surgery. Although such a malpractice suit would have been statute-barred by the pre-1974 legislation, both the Ontario Supreme Court and the Court of Appeal

allowed the action to be brought in that it had been commenced within a year of the facts becoming known.

68 On appeal to the Supreme Court of Canada, the doctor's appeal was allowed.

69 The court discussed the retrospective operation of legislation. Chouinard J., for a unanimous court, stated (at pp. 46-47):

> On retrospectivity, Dickson J., as he then was, wrote in Gustavson Drilling (1964) Ltd. v. Minister of National Revenue, [1977] 1 S.C.R. 271, at p. 279:
>
> > First, retrospectivity. The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively.
>
> At page 282, in the same judgment, he wrote with respect to vested rights:
>
> > Second, interference with vested rights. The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction: Spooner Oils Ltd. v. Turner Valley Gas Conservation Board, [1933] S.C.R. 629, at p. 638. The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective or prospective in operation. A prospective enactment may be bad if it affects vested rights and does not do so in unambiguous terms. This presumption, however, only applies where the legislation is in some way ambiguous and reasonably susceptible of two constructions.

70 The court focussed its decision on vested rights. It held that the expiry of a limitation period was a vested legal right and that the doctor therefore had the right to assume that he was no longer at risk from a stale claim.

71 For the most part, the decision in Martin v. Perrie has been applied without hesitation. See Tolofson v. Jensen, [1994] 3 S.C.R. 1022; Lucas (Litigation Guardian of) v. Gagnon, [1994] 3 S.C.R. 1022, and 602533 Ontario Inc. v. Shell Canada Ltd. (1998), 37 O.R. (3d) 504 (C.A.).

72 We would be remiss if we did not point out however that the application of Martin v. Perrie has caused some courts discomfort in the area of family law.[1]

Note 1: See S.(D.D.) v. H.(R.) (1993), 104 D.L.R. (4th) 73 (Alta. C.A), and T. (S.J.) v. D. (S.) (1996), 16 B.C.L.R. (3d) 1 (C.A.).

73 We find no difficulty in applying the principles set out in Martin v. Perrie to the cases at bar. The relationship between the appellants and the respondents, even accepting the respondents' submission that there was a fiduciary component in that relationship, was not and is not comparable to a continuing parent/child relationship.

74 Given the wording of s. 58 of the current Act, together with s. 46(1)(c) of The Interpretation Act, we conclude that the appellants had acquired a vested right pursuant to the longstop provision of the 1931 Act, that that right was not

disturbed by the introduction of the current Act.

The Current Act

75 The appellants' alternate argument is that even if the 1931 Act did not apply to these cases, the limitation period had lapsed under the current Act prior to the respondents bringing their claims. The plain and ordinary meaning of the words of s. 7(5) of the current Act demonstrates the legislative intent that the 30-year ultimate limitation period is to govern all causes of action that arose when the plaintiffs were minors. It is the inclusion of the words "or has been under a disability" in s. 7(5) that reinforces the interpretation advanced by the appellants. The latest that the respondent M. could have commenced an action would have been in or around June 1972, 30 years after she ceased to be a student at the school. And for C., the outside limit would have been in or around 1980, 30 years after he ceased to be a student at the school. In the result, both respondents' claims fall outside the 30-year ultimate limitation period described in s. 7(5). It is the appellants' position that the motions judge erred in his interpretation of s. 7(5) of the current Act by failing to give effect to the words "or has been under a disability."

76 As well as the motions judge's reasons in the cases at bar, the respondents rely upon two other Manitoba cases to support their position that s. 7(5) does not operate when a minor has reached the age of majority: A.W. v. Matheis (1998), 125 Man.R. (2d) 228 (Q.B.); and C.M.F. v. Manitoba et al. (2001), 155 Man.R. (2d) 4, 2001 MBQB 75.

77 In A.W. v. Matheis, the presiding motions judge commented on the meaning and application of s. 7 of the current Act. He stated (at para. 12):

> I reject as incorrect defendant's argument that s. 7 of the Act must apply. I interpret s. 7 as codifying the common law to provide that where by reason of disability a prospective plaintiff, or someone on his/her behalf, has not commenced action within the prescribed limitation period, the period of disability shall not be included in calculating the time within which action is required to be brought, provided however, that regardless of the disability, no action shall be brought after the expiration of 30 years after the occurrence of the act or omission giving rise to the cause of action. This is an attempt to balance the rights of a plaintiff which may not be understood or acted upon by the plaintiff because of disability and the rights of a defendant in terms of bringing to an end ultimately his/her exposure to a lawsuit. Once the period of disability has ended as it did in this case long ago, the limitation period then begins to run. The plaintiff is like any other and the fact that she was an infant at the time of the alleged conduct giving rise to the claim, does not mean that she is forever subject to the provisions of s. 7 (including s. 7(5)), when in fact her disability, particularly where as here being one of age, has long since expired in the normal course of events.

78 These words were adopted by the learned motions judge in the instant cases, who said (at para. 8):

> I find that the 30-year cap provided in s. 7(5) has no application to a claim brought by a person whose disability at the time the claim arose was that she was a minor. For such a person as the plaintiff, there is closure to the claim when she turns 18 and the applicable limitation period elapses. The 30-year cap is intended to cover the case of a plaintiff who, from the time the cause of action arose, has been suffering from a single disability or several disabilities, such as a mental incapacity. For such a case, closure is provided after the passage of 30 years. Such conclusion is supported by the judgment of MacInnes, J., in A.W. v. Matheis ... where he held that s. 7(5) does not apply to a minor who has come of age.

79 In our view, both judges erred by failing to give meaning and effect to all of the words used in s. 7(5) of the

current Act. The words "or has been under a disability" cannot be ignored.

80 In A.W. v. Matheis and the cases at bar, the judges drew a distinction between incapacity caused by mental or physical impairment and incapacity which is deemed by virtue of minority. The clear and express language of s. 7(5) and the established rules of statutory construction do not support such a distinction being made.

81 Moreover, there is no principled basis for such a distinction. Why should a person who is "incapable of the management of his affairs because of disease or impairment of his physical or mental condition" be subject to an ultimate limitation period and a capable person not be? One must assume that the legislature established a 30-year outside limit in recognition of the need for a defendant to have closure and not be forever subject to the possibility of an action against him or her. There is no policy reason why a minor, who ceases to be under a deemed disability at age 18, should not be subject to the same outside limit as a person disabled by reason of mental incapacity. A person who is under a continuing disability due to mental incapacity is more vulnerable and in need of greater protection from the legislature than a person who merely was deemed to be disabled because he or she was a minor.

82 Schulman J., who was also the presiding judge in C.M.F. v. Manitoba et al., stated at para. 28 of his reasons in that case:

> Until 1980, there were in Manitoba no longstop provisions in the Act. Claims by minors were governed by the provisions of s. 9, which read:
>
> > Where a person entitled to bring any action mentioned in clauses (c) to (j) inclusive of subsection (1) of section 3 is under disability at the time the cause of action arises, he may bring the action within the time hereinbefore limited with respect to such an action or at any time within two years after he first ceased to be under disability.
>
> That provision merely reproduced the common law on the subject. Issues which arose in litigation relating to the claim in Mumford v. Health Sciences Centre et al. (1991), 77 Man.R. (2d) 1 (Q.B.), aff'd. (1993), 85 Man.R. (2d) 271 ... (C.A.), led to the preparation of a report on Limitation of Actions: Time Extensions for Children, Disabled Persons and Others (1979) Law Reform Commission of Manitoba and the enactment of subsections 3 to 6 of s. 7 and s. 8. As part of this package of amendments, the longstop provisions which are under consideration here were enacted.

83 He misstated the law. There clearly was a longstop provision in Manitoba in the 1931 Act. Additionally, s. 6 of the 1931 Act suspended the commencement of the running of time for limitation purposes during a period of disability.

84 The proposition stated by the motions judge in A.W. v. Matheis and adopted by the learned motions judge in the cases at bar and in C.M.F. v. Manitoba et al. to the effect that the impugned provisions of the current Act were merely enacted to codify the common law is simply untenable.

85 Limitation periods are a creature of statute law. The enactment of the original ultimate limitation period in 1932 was not part of a codification of common law principles dealing with the interaction of disabilities and limitation periods. Moreover, as we noted above, s. 6 of the 1931 Act served to postpone the commencement of a limitation period in respect of a cause of action by persons under disability. The 1932 amendments introduced a stand-alone ultimate limitation provision. The clear language of the longstop provision is that a minor who ceases to be under a disability would still be subject to a 30-year ultimate limitation period. It cannot be said that the enactment of an ultimate limitation period codified the common law when the common law knew no such ultimate limitation.

86 And finally, at para. 32 of the C.M.F. v. Manitoba et al. case, the motions judge stated:

> The situation is different in claims under s. 2(1)(k). In those cases, time does not start running until discovery of the cause of action. In circumstances of a minority, s. 7(2) only comes into play if discovery takes place while the injured party is under the age of 18. While the party is under 18, time does not run because of s. 7(2). However, if discovery takes place after the age of 18 even if the injury was sustained before the age of 18, s. 7 has no application because time does not start running until discovery. If discovery takes place after 18, s. 7 is not triggered. On this basis, if the plaintiffs in M. can establish that discovery took place after they turned 18, s. 7 has no application, and claims will not be tolled by the ultimate limitation period of s. 7(5). Similarly, in this case, if it is found that discovery took place following receipt of the report of Dr. Shane in 1999, the applicant's claim would not be tolled by s. 7(5) because there is no reliance on the benefits of s. 7(2), even though the wrongs, if committed, were committed while he was under the age of 18. In my view, if the Legislature intended that all claims arising while a plaintiff was an infant should be tolled by s. 7(5), clearer wording would have been required. Such clear wording is plainly set out in s. 14(4), but s. 14(4) has no application in this or the M. case. Based on this interpretation, I find that s. 7(5), in itself, does not bar any of the claims of the applicant based on a cause of action subject to a built-in discovering limitation period.

87 As we explained earlier in these reasons, the motions judge's interpretation of s. 7 must be rejected.

88 What is clear is that from 1932 onward, the legislature intended the longstop provision to have the effect urged by the appellants, and nothing contained in any subsequent amendments to The Limitation of Actions Act reflects a change in that intention.

89 Section 7 applies to any proceedings in which the cause of action arose when the person is or was under a disability. It defines the outer limitation period for the bringing of an action in those circumstances. There is no distinction to be drawn between incapacity caused by mental illness and incapacity deemed by virtue of infancy, nor is there any principled basis for drawing such a distinction.

90 We wish to make one final comment on the reasons given in C.M.F. v. Manitoba et al. At para. 34, the motions judge justified his conclusion by referring to certain principles of statutory construction. He stated:

> The conclusion I have reached is bolstered by a consideration of several principles of construction. Firstly, we are dealing with remedial legislation and, as such, we are required to give such fair, large and liberal construction in interpretation as best ensures the attainment of its objects (s. 12 of the Interpretation Act, R.S.M. 1987, c. I80). Secondly, in T.L.B. [(2000), 150 Man.R. (2d) 34, 2000 MBCA 83], Philp, J.A., stated:
>
> > [58] The application of the presumptions of interpretation (discussed by Professor Ruth Sullivan in Driedger on the Construction of Statutes, 3d Ed. (Toronto: Butterworths, 1994) in Chapter 15 supports the conclusion I have reached. "It is presumed that the legislature does not intend to change existing law or to depart from established principles, policies or practices." That is what Professor Sullivan writes at p. 369. She explains (at p. 369) "The stability of law is enhanced by rejecting vague or inadvertent change ..."
>
> He stated further:

> [60] Another presumption is that "the legislature does not intend to abolish, limit or otherwise interfere with the rights of subjects. Legislation that curtails rights is strictly construed" (Professor Sullivan at p. 370). Again, nothing expressed in the 1967 amendments, or arising out of them by necessary implication, evidences an intention by the Legislature to alter so drastically the limitation provisions that had been in place for decades.
>
> [61] Finally, Professor Sullivan notes (at p. 371), citing the comment of Estey, J., in Berardinelli v. Ontario Housing Corp. et al., [1979] 1 S.C.R. 275 at p. 280, that legislation interfering with the rights to bring an action "attracts a strict interpretation and any ambiguity found upon the application of the proper principles of statutory interpretation should be resolved in favour of the person whose right of action is being truncated" ...
>
> On an application of each of these principles of construction, s. 7(5) would not in itself bar a claim that is covered by s. 2(1)(k) of the Act where discovery takes place after the age of 18.

91 The appellants submit that the above-quoted principles of statutory interpretation apply only when ambiguity necessitates resort to extrinsic aids. As noted by this court in its 1999 decision in Manitoba Hydro Electric v. Inglis (John) Co. et al. (1999), 142 Man.R. (2d) 1 at para. 47, the Supreme Court of Canada has confirmed the proper approach to statutory interpretation as follows:

> ... [T]he proper construction of a statutory provision flows from reading the words of the provision in their grammatical and ordinary sense and in their entire context, harmoniously with the scheme of the statute as a whole, the purpose of the statute, and the intention of Parliament.

[R. v. Gladue, [1999] 1 S.C.R. 688 at para. 25]

92 The Supreme Court of Canada said in an earlier decision that "words contained in a statute are to be given their ordinary meaning. Other principles of statutory interpretation only come into play where the words sought to be defined are ambiguous." See R. v. McCraw, [1991] 3 S.C.R. 72 at 80.

93 We find no ambiguity whatever in s. 7 of the current Act. All of the words used convey the clear legislative intent. The gap in the legislation to which we made earlier reference does not alter our conclusion. It is not up to the courts in construing legislation to strain the clear legislative intent, despite what may be in a given factual situation a harsh result.

Reconsideration of the Decision in T.L.B. et al. v. R.E.C.

94 Despite a very capable argument by counsel for the appellants, we decline the appellants' invitation to revisit this court's decision in T.L.B. et al. v. R.E.C. (2000), 150 Man.R. (2d) 34, 2000 MBCA 83. In light of our conclusion that the 1931 Act applies to these cases, we find it unnecessary to address the appellants' submission on this issue.

The Decision

95 In the result, the appeal is allowed with costs. The respondents' claims are dismissed as being statute-barred due to the passage of time.

PHILP J.A.
HELPER J.A.
KROFT J.A.
MONNIN J.A
STEEL J.A.

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