The New Ontario Limitations Regime:

Exposition and Analysis

Coordinating Editors:
Jacob Ziegel – Wayne Gray – Brian Bucknall – Lisa Kerbel Caplan

Executive Editor:
Melissa Krishna

Ontario Bar Association
Association du Barreau de l'Ontario

TWENTY QUESTIONS (ABOUT SECTION 23 OF THE LIMITATIONS ACT, 2002)

Janet Walker[*]

I. THE GAME

Let's play a game. It is called "Twenty Questions." Usually, one player thinks of something and poses a riddle about it. Then the other players ask 20 questions in an effort to discover what the first player had in mind. If the questioners guess the answer correctly, they win. If not, the first player wins. This time, we will play the game differently. This is because the new Limitations Act, 2002[1] gives us all the answers in section 23. The answer is: "For the purpose of applying the rules regarding conflict of laws, the limitations law of Ontario or any other jurisdiction is substantive law." I think that is a good answer—in fact, it is probably the best answer that could be given in 25 words or less.[2] But each time I think about it, it raises yet another question. In fact, I would like to ask you 20 of them. Perhaps together we can discover what the legislators had in mind.

II. THE ANSWER

Before we play the game, a word or two about the answer is in order. Like the answer to any good riddle, s. 23 is a succinct solution to a complex set of problems. The problems arose from

---

[*] Associate Dean, Osgoode Hall Law School.

[1] Limitations Act, 2002, S.O. 2002, c. 24, Schedule B ("Ontario Act" or "the Act").

[2] The Foreign Limitation Periods Act 1984 (U.K.), c. 16 ("UK Act") contains well over 1,000 words. Section 13 of the British Columbia Limitation Act R.S.B.C. 1996, c. 266 is shorter. It provides "If it is determined in an action that the law of a jurisdiction other than British Columbia is applicable and the limitations law of that jurisdiction is, for the purposes of private international law, classified as procedural, the court may apply the British Columbia limitation law or may apply the limitation law of the other jurisdiction if a more just result is produced." Concise though this provision may be, it provides little guidance—unless courts need to be reminded to produce a just result. Whether, in light of the reasoning in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, it continues to authorize the application of local limitations law is doubtful.

the common law notion that limitations statutes could be procedural.[3] It was thought that a meritorious claim could live on past the time when legislators had agreed that the courts should provide no remedy for it. The idea that a legal right could exist without a legal remedy is no longer readily accepted—at least, not in Canadian courts.[4]

Nevertheless, the notion of a right without a remedy was then fastened onto the doctrine of strict interpretation of statutes so that common lawyers were persuaded that limitations provisions could be either substantive or procedural, depending on the way in which they were worded. They were substantive if they extinguished the right, and they were procedural if they merely barred the remedy.[5] Common lawyers would determine whether a statute was substantive or procedural by reading it.

The idea that limitations provisions could be substantive or procedural was then buckled rather mechanically onto the rule of practical necessity that even when courts apply foreign laws, they continue to apply their own procedural rules. This meant that in a situation in which foreign law governed the rights and obligations of the parties and a limitations defence was raised, common lawyers would read both the local and the foreign statutes of limitations. If the local limitations provision was procedural, the court would apply it—instead of the foreign provision if that was procedural,[6] or in addition to the foreign provision if that was

---

[3] *Huber v. Steiner* (1835) 2 Bing. N.C. 202. See Law Commission of England and Wales, "Working Paper No. 75: Classification of Limitations in Private International Law" (London: HMSO, 1980); Law Commission of England and Wales, *Classification of Limitations in Private International Law* (London: HMSO, 1982). This notion probably originated with the common law forms of action in which the availability of relief depended less upon substantive rights and obligations than it did upon meeting the court's strict formal requirements for pleading claims. In the days before the fusion of common law and equity, a claim might fail to meet the requirements for relief in one court but succeed in doing so in another court.

[4] *Tolofson v. Jensen, supra,* footnote 2.

[5] For example, section 180 of the Vehicles Act, R.S.S. 1978, c. V-3, cited in *Tolofson v. Jensen, supra,* footnote 2, at para. 74, provides in part that "*no action shall be brought* against a person for recovery of damages...after the expiration of twelve months from the time when the damages were sustained." (emphasis added). This provision would be considered procedural.

[6] *Huber v. Steiner, supra,* footnote 3; *Don v. Lipmann* (1837) 5 Cl. & Fin. 1 (H.L.). This approach seems to have inspired the drafters of the limitations legislation in Northwest Territories and Nunavut. Section 4.1 of the Limitation of Actions Act R.S.N.W.T. 1988, c. L-8 as am., which applies in Northwest Territories and in Nunavut, provides: "Where an action is one defined in

substantive (thus, giving the defendant the benefit of the shorter of the two periods). If the local limitations provision was substantive, the court would ignore it in favour of the foreign limitation period if that was substantive. However, if the local limitations provision was substantive and the foreign provision was procedural and, therefore, neither was susceptible to application, no limitation period would apply.[7] The possibility that a claim could be liberated from the constraints of any limitations period despite the fact that limitations periods for that claim existed both in the law of the forum and in the governing law was unsatisfactory. It was just as unsatisfactory as the situation in which both the local and the foreign provisions were procedural and plaintiffs were encouraged to select the forum opportunistically, for no better reason than to revive a claim that was stale under the governing law.

Some 35 years ago, when the Ontario Law Reform Commission considered this question,[8] it noted the flaw in the approach[9] and it recommended that:

> The proposed statute contain a provision that Ontario limitations law and the analogous law of any other province, or of any state or country, shall be classified as a substantive law for the purposes of private international law (conflict of laws), whether or not the particular law bars the remedy or extinguishes the right.[10]

---

subsection 2.1(1) and the court determines, in that action, that the law of a jurisdiction other than the Territories is applicable and that the law of that jurisdiction governing the limitation of actions is, for the purposes of private international law, classified as procedural, the court shall apply the law of the Territories as set out in section 2.1." Classifying a foreign statute is an ambitious undertaking. Is it intended to be done in accordance with the foreign law? And in any event, "If…[instead of characterizing issues] one were to adopt the approach of characterizing rules of law found in the legal systems having some connection to the dispute, applying the one which was framed so as to apply in the given context, one could end up with two contradictory solutions or none at all." A. Briggs, *The Conflict of Laws* (Oxford: Clarendon, 2002) ("Briggs") at 12.

[7] This result was reached by the German Supreme Court in *R.G.* (4 Jan. 1982) R.G.Z. but it has since not been followed. See L. Collins (ed.) *Dicey and Morris on The Conflict of Laws* 13th ed. (London: Sweet & Maxwell, 2000) ("*Dicey and Morris*") at para. 7-042.

[8] Ontario Law Reform Commission, *Report of the Ontario Law Reform Commission on Limitation of Actions* (Toronto: Department of the Attorney General, 1969) ("OLRC Report") at 133-136.

[9] Relying on J.D. Falconbridge, *Essays on the Conflict of Laws*, 2 ed, c. 12 and G.C. Cheshire, *Private International Law*, 7 ed, at 585-588.

[10] OLRC Report, *supra*, footnote 8, at 136.

Since that time, Canadian courts have come to appreciate the flaw in the old common law approach. A free-floating legal right for which no remedy is available from the courts is of dubious merit and little practical value.[11] This appreciation ripened in the Supreme Court of Canada's 1994 decision in *Tolofson v. Jensen*[12] into a firm pronouncement that the common law courts in Canada should adopt the well-established civil law approach to the prescription of claims. Under the civil law approach, regardless of the wording of a statute, once the time has run on a claim, the right is extinguished. A limitations defence is, therefore, part of merits of the *lis* between the parties and it is subject to the governing law.[13] It is as much a part of the balance of rights and obligations between the parties as any other feature of the applicable substantive law.[14] The period within which a potential plaintiff has the right to bring a claim, and the point at which a potential defendant has the right to be free of the obligation to respond to the claim, should be determinable as soon as the claim arises. In addition to enhancing legal certainty, this approach eliminates situations in which claims might suddenly be freed of any limitation period, or in which parties might have the incentive to engage in forum shopping to revive stale claims.

Section 23 of the Ontario Act captured the essence of this common law development. It confirmed that in situations in which Ontario courts decide to apply the law of another jurisdiction to questions of substance in claims brought before them, the law that is applied includes the limitations law of that jurisdiction. And yet, if this is clearly the right answer, it becomes less clear why codification was necessary. This Supreme Court of Canada pronouncement seems unlikely to be distinguished or overturned by an Ontario court in the foreseeable future;[15] and it is a rule that

---

[11] Drawing upon an analysis of the relationship between a right and the remedy in the context of retrospectivity in limitations provisions in *Martin v. Perrie* [1986] 1 S.C.R. 41, later cited in *Tolofson v. Jensen, supra,* footnote 2, at para 83.

[12] *Tolofson v. Jensen, supra,* footnote 2, at paras. 73-90.

[13] For example, article 3131 of the Civil Code of Québec provides that "Prescription is governed by the law applicable to the merits of the dispute."

[14] Following this reasoning, it would be inappropriate to suggest that differences in limitation periods could be resolved by applying both provisions because this would give the defendant the benefit of the shorter limitation period without regard to the balance between the rights and obligations of the parties under the applicable law. The Alberta Court of Appeal applied both limitation periods in *Castillo v. Castillo* (2004) 244 D.L.R. (4th) 603.

[15] It has been endorsed by the Court of Appeal for Ontario in *Somers v. Fournier* (2002), 60 O.R. (3d) 225 (C.A.); *Desautels v. Katimavik* (2003), 175 O.A.C. 201

might be constitutionally mandated.[16] Still, this codification does not seem to have varied the legal principle stated in *Tolofson* or otherwise impaired its operation. To this extent, there is not a great deal more to be said about s. 23 than has already been said about the previous common law development in *Tolofson*.

Nevertheless, the enactment of the provision highlights a range of incidental questions that can arise in the course of applying limitation periods—questions to which the courts might wish to apply local law in spite of s. 23. Even if limitations law is deemed to be substantive, courts apply foreign limitation periods as a result of conflict of laws rules, and this can involve issues to which they might properly apply their own law. Limitations law, even on the local level, entails more than the simple stipulation of the length of the limitation period. This is illustrated by the inclusion in the Ontario Act of many provisions other than those stating the length of the limitation periods.

The way in which these incidental questions should be treated is anticipated in the Ontario Act by referring in s. 23 to the "limitations *law*" rather than the "limitation *period*", in describing the law that is deemed to be substantive. The Act recognizes though, that the application of foreign law will occur in the context of the operation of conflict of laws rules. In this way, s. 23 acknowledges that in order to answer some questions about what is covered by the term "limitations law" it might be necessary to refer to conflict of laws rules more generally.

For example, notwithstanding the wording of s. 23, there remain some technical logistical features of the administration of claims in our civil justice system that would be disrupted if the court applied the law of another jurisdiction, even if that law related to a limitations defence. In these situations, despite the provision deeming limitations law to be substantive, a Canadian court will rightly continue to apply its own procedural rules. As the Supreme Court noted in *Tolofson*, "this is not to say that procedural rules of

---

(C.A.), leave to appeal to SCC dismissed S.C.C. Bulletin, 2004, p. 711; and *Roy v. North American Leisure Group Inc.* (2004) 192 O.A.C. 209 (C.A.); and see *Soriano (Litigation Guardian of) v. Palacios* [2004] O.T.C. 443 (S.C.).

[16] To the extent that the characterization of limitation periods as procedural undermines legal certainty and promotes forum shopping, it may give rise a "structural problem" in a federal setting as it was described by the Supreme Court of Canada in *Tolofson v. Jensen, supra*, footnote 2, at para. 35 and it might, therefore, be inconsistent with the constitutional principles of order and fairness.

the forum may not affect the operation of the statute of limitation of the *lex loci delicti*."[17]

In addition, s. 23 makes no explicit provision for excluding foreign law on grounds of public policy. However, foreign law may be excluded on these grounds even if it is part of the limitations law and, therefore, otherwise applicable. Unfortunately, the general jurisprudence on the distinction between substance and procedure is often confused by courts citing it on occasions in which they wish to exclude foreign law on grounds of public policy. This occurs because the reasons that must be cited for excluding foreign law on public policy grounds can sound harsh and strident. In order to avoid open criticism of the foreign law, courts are tempted to explain their reasons for resorting to local law by characterizing a matter as procedural rather than by saying that it would be contrary to public policy to apply the foreign law. While the outcome is the same in the individual case, the conflation of the two concepts can render the term "procedural law" unclear. The jurisprudence would be clearer if the exclusion of foreign law on policy grounds was stated frankly as a matter of public policy. The obligation to cite public policy explicitly as a reason for excluding foreign law on policy grounds would cause courts to consider carefully whether their inclination to exclude foreign law rises to the level of public policy or is merely a form of parochialism. This would permit courts to reserve the distinction between substance and procedure for occasions in which the application of foreign law would interfere with the basic logistics of court processes.

This is not to say that foreign limitations law ought never to be excluded on grounds of public policy. However, as the Supreme Court of Canada has observed, this should not be a matter of routine:

> I do not accept that this [limitations] defence is so repugnant to public policy that a British Columbia court should not apply it. The extent to which limitation statutes should go in protecting individuals against stale claims obviously involves policy considerations unrelated to the manner in which a court must carry out its functions, and the particular balance may vary from place to place. To permit the court of the forum to impose its views over those of the legislature endowed with power to determine the

[17] *Tolofson v. Jensen, supra,* footnote 2, at para. 88.

> consequences of wrongs that take place within its jurisdiction would invite the forum shopping that is to be avoided if we are to attain the consistency of result an effective system of conflict of laws should seek to foster.[18]

There is no doubt that limitations law has significant effects on important social interests, such as access to justice and the need for repose in stale claims. This suggested to the Alberta Law Reform Institute that the courts of Alberta should apply Alberta limitations law to all claims regardless of the governing law. According to its Report:

> Courts should apply local procedural law. Limitations law is based on a foundation of legal philosophy and concepts of fairness. Applying the limitations law of Alberta ensures the application of a just limitations system in accordance with accepted Alberta principles because the Alberta law reflects what Alberta believes is the fairest balance between the conflicting interests of claimants and defendants.[19]

The approach recommended by the Alberta Law Reform Institute would appear to relegate the application of foreign law to a questions of little social importance, and to encourage the courts to apply forum law to any matter in which foreign law was inconsistent with local "legal philosophy and concepts of fairness." A law requiring the application of forum law to all questions of limitation periods would seem to be inconsistent with the approach recommended in *Tolofson.*[20]

---

[18] *Tolofson v. Jensen, supra,* footnote 2, at para. 89.

[19] Alberta Law Reform Institute, *Limitations* (Report No. 55, 1989) at p. 98. For an effort to reconcile this provision of the Limitations Act, R.S.A. 2000, c. L-12, s. 12 with the principles enunciated in *Tolofson v. Jensen, supra,* footnote 2, see *Castillo v. Castillo, supra,* footnote 14.

[20] Still, s. 12 of the Limitations Act, R.S.A. 2000, c. L-12 provides, "The limitations law of the Province shall be applied whenever a remedial order is sought in this Province, notwithstanding that, in accordance with conflict of laws rules, the claim will be adjudicated under the substantive law of another jurisdiction." Similarly, s. 23 of the Newfoundland and Labrador Limitations Act, S.N.L. 1995, c. L-16.1 provides, "This Act applies to actions in the province to the exclusion of laws of all other jurisdictions which (a) impose limitation periods for bringing actions; or (b) in another manner prohibit or restrict the bringing of an action because of a lapse of time or a delay."

Nevertheless, there may be occasions in which the invocation of the public policy exception is warranted.[21] Applying the public policy exception on the rare occasions in which applying the foreign limitations law would be contrary to public policy would not be inconsistent with the Ontario Act. This is so because, once again, the Act does not require the application of the limitations law of another jurisdiction—it merely deems it to be substantive for the purposes of applying conflict of laws rules. Since conflict of laws rules permit the exclusion of foreign law on public policy grounds, this would appear to remain an option for Ontario courts.

Although s. 23 is intended to operate in the context of ordinary conflict of laws principles, it is drafted in a way that provides some guidance on its intended application. In describing the legal rules that it deems to be substantive in broad terms, as the "limitations *law,*" s. 23 encourages courts to apply not only the limitations *period* of the other jurisdiction but also as much of the law of the other jurisdiction to their determination of the limitations defence as they reasonably can without impairing the basic adjudicative process. This is consistent with the pragmatic approach to distinguishing between substance and procedure recommended by the Supreme Court of Canada in *Tolofson.*[22] The UK Act also recommends this approach. It provides that "'relevant law", in relation to any country, means "the procedural and substantive law applicable."[23]

Despite the guidance given by the statute, a range of questions can arise in considering limitations defences that apply under the laws of other jurisdictions—questions to which the answers will not be obvious from a simple reading of s. 23. It is worth considering these questions, even if views on them can be expressed only as a matter of first impression, subject to cases actually raising them that could reveal additional considerations and compelling counter-arguments.

---

[21] Sections 2(1) and 2(2) of the UK Act *supra,* footnote 2, provide: "2(1) In any case in which the application of section 1 above would to any extent conflict (whether under subsection (2) below or otherwise) with public policy, that section shall not apply to the extent that its application would so conflict. (2) The application of section 1 above in relation to any action or proceedings shall conflict with public policy to the extent that its application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings."

[22] *Tolofson v. Jensen, supra,* footnote 2.

[23] Subsection 4(2), UK Act, *supra,* footnote 2.

III. THE QUESTIONS

The 20 questions are divided into three groups, roughly tracking the tentative views on the answers that might be given to them. In the first group of questions, despite the various arguments that might be made against applying the law of another jurisdiction, it is suggested that a court might ultimately be inclined to regard the matter as substantive and one to which the limitations law of the other jurisdiction should apply. In the second group of questions, it is suggested that despite the use of the broad term "limitations law" in the Ontario Act, a court might be inclined to regard the matter as one to which the procedural law of Ontario law should be applied by reason of practical necessity in the processing of the claim. In the third group of questions, it is suggested that under certain circumstances, despite the general encouragement in the Ontario Act to apply the governing law to questions of limitations, a court might be inclined not to do so for reasons of public policy. Finally, the distinct question of the law applicable to limitations on the enforcement of foreign judgments is considered.

A. Substance

The following are questions that a court might ultimately be inclined to regard as relating to the substance of the dispute and, therefore, questions to which the limitations law of the other jurisdiction should apply.

1. Which law applies to determine when the time begins to run?

The simple part of limitations law is the part that describes the period of time in which the claim may be brought. The more complex, but equally important, part of limitations law is the part that determines the point at which time begins to run. Together, these two parts constitute the legislatively determined balance of rights and obligations between potential claimants and defendants. The accrual of a cause of action has long been supplemented in Canadian law by the doctrine of discoverability in determining when the limitations period begins to run.[24] The Ontario Act now embeds this doctrine in its articulation of "the Basic Limitation

[24] *Central Trust v. Rafuse*, [1986] 2 S.C.R. 147.

Period," thereby confirming that this feature of limitations law is integral to the substance of the law:[25]

> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of *the day on which the claim was discovered.* (emphasis added)

To the extent that Ontario law treats the commencement of the limitations period as an integral feature of its own limitations law, it would seem odd for it to exclude this feature from the "limitations law" as this is described in s. 23 of the Act.

Applying the governing law to the question when the limitation period begins is consistent with the general approach taken in Canada to distinguishing matters of substance and procedure. First, the principle of legal certainty would support a rule that enables the parties to know from the outset when the claim will be barred. They should not have to wait until a forum is selected to be able to determine this. To know when the claim will be barred, they must know from the outset when the time begins to run. Second, foreign law relating to the point at which time begins to run is likely to be just as capable of proof and easy to apply as foreign law relating to the length of a limitation period. Finally, the potential for reviving claims that have become stale under the governing law by shopping for a forum with a different approach to determining the commencement of the claim is just as unsatisfactory as the potential for reviving claims that have become stale under the governing law by reason of a shorter limitation period. Accordingly, for the same reasons that the Ontario Act deems limitations law to be substantive, the law relating to the point at which time begins to run should be treated as part of the "limitations law".

---

[25] In contrast, the UK Act may be read to suggest that English courts apply their own law to determine the point from which time begins to run and this might seem to suggest that this is a discreet feature of the law to which forum law should be applied as a question of procedure. See Briggs, *supra*, footnote 6, at p. 38, relying on s. 4 of the UK Act presumably on the basis that the section does not mention the commencement of the limitation period as among those matters to which an English court must apply the relevant foreign law.

2. Which law applies to determine the effect of acknowledgements of liability, and to determine whether and for how long the limitations period may be interrupted?[26]

It might be thought that it would be difficult for a court to grasp the significance of details of foreign law on technical points such as those relating to the effect of acknowledgements of liability and mechanisms for pinpointing or adjusting the commencement of the limitation period. However, there is no reason in principle for this to be so. To the extent that the parties look to the applicable law when the claim arises to determine their rights, applying some other law to adjust the commencement of the limitation period or to determine whether it has been interrupted would introduce an unfortunate element of uncertainty. In *Stewart v. Stewart,* the British Columbia Court of Appeal refused to apply a local provision extending the limitation period in situations when the claim is confirmed on the basis that the plaintiff had to meet the standards of the corresponding provision of the applicable law.[27]

On the question of interruptions, the English courts apply their own law to determine whether "a limitation period is or may be extended or interrupted in respect of the absence of a party to the action or proceedings from any specified jurisdiction or country."[28] However, not all tolling provisions are confined to situations in which a party is absent from the jurisdiction where the matter is commenced,[29] and the UK Act applies the foreign law to other kinds of extensions or interruptions.[30]

---

[26] As provided for in ss. 13-14 of the Ontario Act, *supra*, footnote 1.

[27] *Stewart v. Stewart* (1997), 145 D.L.R. (4th) 228 at 234 (B.C.C.A.).

[28] Subsection 2(3) of the UK Act, *supra*, footnote 2, provides: "Where, under a law applicable by virtue of section 1(1)(a) above for the purposes of any action or proceedings, a limitation period is or may be extended or interrupted in respect of the absence of a party to the action or proceedings from any specified jurisdiction or country, so much of that law as provides for the extension or interruption shall be disregarded for those purposes."

[29] In one current example, class action legislation often includes provisions for tolling limitation periods against putative class members during the period in which their membership in the class is being determined.

[30] Subsection 4(1) of the UK Act, *supra*, footnote 2, provides: "Subject to subsection (3) below, references in this Act to the law of any country (including England and Wales) relating to limitation shall, in relation to any matter, be construed as references to so much of the relevant law of that country as (in any manner) makes provision with respect to a limitation period applicable to the bringing of proceedings in respect of that matter in the courts of that country and

3. Which law applies to determine whether notice requirements apply and what form they must take?

In some claims, the defendant is entitled to notice of the claim in addition to any entitlement that might arise through the operation of the limitations law. Although this is a different kind of entitlement from a limitations defence, it would seem to be governed by the same principles that give rise to the application of the law of the other jurisdiction.

4. Which law applies to determine the limitation period for claims brought by minors and incapable persons?

The protection of vulnerable persons from the harsh consequences that may result from the strict application of the law is an important social policy that often warrants exceptions to ordinary legal rules. This might suggest that the conflict of laws rules also should be varied. However, it is seems unlikely that this is so. The Ontario Act follows the typical pattern of establishing the legal rights of persons who are deemed capable of exercising them, and then creating exceptions for incapable persons. It does this in ss. 6-10. A similar pattern is followed in many other legal systems. However, regardless of whether this or some other pattern is followed, the decision to apply the law of another jurisdiction to determine the rights and obligations between the parties indicates a preparedness to defer to the balance of rights and obligations between the parties that is established by the applicable law, including those rights and obligations relating to limitations defences.

Short of determining that some particular balance of rights and obligations could violate public policy, provisions in the foreign law for incapable persons should be treated as substantive. Moreover, for the public policy exception to be invoked, the breach would have to be more than a breach of local social policy. To warrant exclusion on public policy grounds, the foreign law must not merely breach local public policy, it "must violate some fundamental principle of justice, offend international norms or some prevalent conception of good morals, or some deep-rooted tradition of the forum."[31]

---

shall include-- (a) references to so much of that law as relates to, and to the effect of, the application, extension, reduction or interruption of that period."

[31] See J. Walker, *Castel and Walker: Canadian Conflict of Laws*, 6th ed. (Markham: Butterworths, 2005) ("*Castel and Walker*") at ch. 8.6.

Although the applicable foreign law should generally be applied, even where the incapable person resides in Ontario from the time the cause of action arises and throughout the limitation period, there may be good reason to take into account the provisions for such persons that are contained in ss. 6-10 of the Ontario Act. This would be particularly so where the defendant was aware of the claimant's disability and place of residence, or where the foreign law to be applied took into account the law of an incapable person's residence in its own limitations law.

5. Which law applies to determine the limitation period for successors, and for principals and agents?[32]

It has often been said that questions of the proper parties to an action may give rise to the application of forum law as a matter of procedure.[33] However, the question of standing to sue would not necessarily affect the question of whether certain parties would be time barred. Again, this is a situation in which the courts should take into account as much of the law of the other jurisdiction as is feasible through the introduction of evidence of that law.

6. Which law applies to determine the limitation period applicable to a claim for contribution or indemnity?

The limitation period for a claim for contribution or indemnity would seem to be subject to a range of factors, some of which might have an effect on determining which law should govern the limitation period. Two factors are immediately apparent. First, if the claim is brought outside the limitation period for the main claim (which was brought within the limitation period) the permissibility of doing so would seem to be part of the limitations law applicable to the main claim. Second, if, for some reason the claim for contribution and indemnity was governed by a law other than that of the main claim, there may be reason for the court to take into account the limitations law applicable to the claim for contribution and indemnity as well.[34]

---

[32] As described in s. 12 of the Ontario Act, *supra*, footnote 1.

[33] *Castel and Walker*, *supra*, footnote 31, at ch. 6.3.

[34] One example of an analysis of the law applicable to the question of the availability of a claim for contribution and indemnity may be found in *Red Sea Insurance Co. Ltd. v Bouygues S.A.*, [1995] 1 A.C. 190 (P.C., H.K.).

7. Which law applies to determine how the court should exercise discretion if the limitations law of the other jurisdiction permits the court to do so?

The exercise of discretion is a sensitive matter on which the determination of a first instance judge is rarely disturbed. However, this is because the judge is in a special position to know the record, and not because the judge is in a special position to know the legal principles to be applied. There is no obvious reason why an expert could not explain the principles on which discretion is exercised under the foreign law just as well as the expert could explain the way in which the foreign law operates in matters that are not discretionary. The English courts "so far as practicable exercise (any discretion conferred by the law)...in the manner in which it is exercised in comparable cases by the courts of that other country."[35] This seems to be a sound approach to the exercise of discretion in determining a limitations defence.

8. Which law applies to determine the limitation period applicable to matters that the parties have agreed shall be governed by the law of another jurisdiction?

The provision in s. 22 of the Ontario Act that "a limitation period under this Act shall govern despite any agreement to vary or exclude it" does not pre-empt the ordinary operation of s. 23 in cases in which the rules regarding the conflict of laws would require the application of the law of another jurisdiction. It has long been accepted that where the parties have chosen a law to govern their contract, their choice will be respected by the courts "provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy."[36] The choice is *bona fide* where the parties have not selected it primarily for the purpose of evading the mandatory provisions of the law that would otherwise govern their contract.[37] Since s. 22 of the Ontario Act makes the limitation periods under the Act mandatory, the parties' choice of some other governing

---

[35] Subsection 1(4) of the UK Act, *supra, foot*note 2, provides: "A court in England and Wales, in exercising in pursuance of subsection (1)(a) above any discretion conferred by the law of any other country, shall so far as practicable exercise that discretion in the manner in which it is exercised in comparable cases by the courts of that other country."

[36] Vita Foods Products Inc. v. Unus Shipping Co., [1939] A.C. 277.

[37] See *Castel and Walker, supra,* footnote 31, at ch. 31.2.

law would be respected only if it was not made to evade s. 22. However, provided that the choice was *bona fide*, s. 23 would require the application of the limitations law of the other jurisdiction.[38]

9. Which law applies to determine transitional matters?

This is one of those unusual points on which courts might wind up applying both local and foreign law. Clearly, the transitional provisions in the Ontario Act would apply notwithstanding that local and foreign limitations law is deemed by s. 23 to be a matter of substance. However, the conflict of laws rules addressing issues of the "time element" can often lead to the application of transitional provisions in the foreign law as well.[39] Accordingly, Ontario law would apply to determine transitional questions arising in respect of the application of the Ontario Act and the applicable law of the other jurisdiction would apply to determine transitional questions arising under that law.

10. Which law applies to determine the limitation periods for matters in which the Limitations Act, 2002 provides that there should be no limitation period?

The matters described in s. 16 of the Ontario Act to which the Act provides that no limitation period should apply are heterogeneous in nature. Some, such as the enforcement of local court orders,[40] are proceedings for which there is no defence against the legal right, and, therefore, no scope for the application of a statute of repose. Others, such as actions to recover money owing under a student loan,[41] are likely to be governed by local

[38] See J. Cameron, "New Limitations Periods — Contracting in Ontario" (2004) 40 Can. Bus. L. J. 109, reprinted in this book.

[39] *Castel and Walker, supra,* footnote 31, at ch. 9.

[40] Clauses 16(1)(b) and (d) of the Ontario Act, *supra,* footnote 1, provide that: "There is no limitation period in respect of ...(b) a proceeding to enforce an order of a court, or any other order that may be enforced in the same way as an order of a court. ... (d) a proceeding to enforce an award in an arbitration to which the Arbitration Act, 1991 applies..."

[41] Clause 16(1)(k) of the Ontario Act, *supra,* footnote 1, provides that: "There is no limitation period in respect of ...(b) a proceeding to recover money owing in respect of student loans, awards and grants made under the Ministry of Training, Colleges and Universities Act, the Canada Student Financial Assistance Act or the Canada Student Loans Act.

law and so are unlikely to require the application of conflict of laws rules. Still others, such as those relating to the enforcement of support orders, may involve questions of sufficient social importance to warrant the imposition of mandatory rules. Accordingly, this is a question that is better addressed on a case by case basis as issues arise than speculatively in the aggregate.

B. Procedure

The following are questions that a court might be inclined to regard as matters to which the procedural law of Ontario law should be applied by reason of practical necessity in the processing of claims.

11. Which law applies to determine whether some law is part of the "limitations law" of another jurisdiction?

It is widely accepted in the conflict of laws that characterization is done in accordance with the law of the forum.[42] This includes the conflict of laws rules such as those relating to the distinction between substance and procedure, and the exclusion of foreign law for reasons of public policy. Accordingly, courts will apply their own law to determine whether a feature of the law is part of the "limitations law" of the applicable law for the purposes of s. 23.[43]

12. Which law applies to determine what stops the time from running?

Perhaps the drafters of the Ontario Act thought that issuing an originating process was so well known to mark the commencement of a claim in Ontario that there was no need to define further the date on which it would be determined whether a claim was time-barred. As a result, there is no provision in the Ontario Act for this

---

[42] *Castel and Walker, supra,* footnote 31, at ch. 3. Article 3078 of the Civil Code of Québec provides in part: "Characterization is made according to the legal system of the court seised of the matter...."

[43] The relevant provision in the legislation of the Northwest Territories, which also applies in Nunavut, provides for characterization of foreign limitation provisions, which would seem feasible only through reference to the foreign law, thereby rendering the exercise rather doubtful. See discussion above at note 6.

for claims to which Ontario law applies. However, the time at which a claim is regarded as having been commenced for purposes of determining whether it is time-barred can vary from jurisdiction to jurisdiction. For example, in some countries,[44] a court is regarded as seised of an action only when the defendant is served with the notice of the proceeding. Where the applicable law of another jurisdiction varies on this point, an Ontario court might wonder whether it should consider this to be a matter of "limitations law" and, therefore, apply the law of the other jurisdiction, or whether it should apply its own law.

On one view, it might be supposed that, if the event that starts the time running on the limitation period is a matter of substantive law, then so too should the event that stops the time from running be regarded as a matter of substantive law. Contrary to this, the English courts apply their own law to determine "whether, and the time at which, proceedings have been commenced in respect of any matter."[45] Although the Ontario Act does not seem to offer any guidance on this,[46] it is suggested that this is a sensible approach: first, because the question arises only as a result of the commencement of the action in accordance with the Ontario Rules, second, because the vagaries of service abroad may reduce a claimant's ability to ensure this occurs in a timely fashion, and finally because it is unlikely that the foreign limitation period would have been designed to accommodate the delay that could occur in the service of documents for foreign proceedings.

---

[44] This is so in France, Germany, Italy, Luxembourg and the Netherlands for the purposes of the application of the *lis alibis pendens* principle in Article 27 of the Council Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ L12/1 ("Brussels I Regulation") see *Dicey & Morris, supra,* footnote 7, at para. 12-050.

[45] Subsection 1(3) of the UK Act, *supra,* footnote 2, provides: "The law of England and Wales shall determine for the purposes of any law applicable by virtue of subsection (1)(a) above whether, and the time at which, proceedings have been commenced in respect of any matter; and, accordingly, section 35 of the Limitation Act 1980 (new claims in pending proceedings) shall apply in relation to time limits applicable by virtue of subsection (1)(a) above as it applies in relation to time limits under that Act."

[46] Apart, possibly, from an argument that the fact that the legislators left this question to be determined in accordance with the Rules of Procedure, this suggests that they regarded this to be a matter of procedure.

13. Which law applies to determine how the time is calculated?

While this might seem to be a highly technical point, it would be amenable to evidence of foreign law.[47] Nevertheless, it would remain the case that a person issuing an originating process would need to follow the Ontario Rules of Civil Procedure[48] and this would include points such as whether a claim can be issued on a Sunday and, if not, whether a period of time can be calculated to result in a deadline for such a step falling on a Sunday. Accordingly, it seems appropriate to treat it as a matter of procedure to which local law would apply.

14. Which law applies to determine whether a limitation period must be pleaded?

This question is not likely to arise frequently as a discreet question because Canadian conflict of laws rules require the relevant foreign law to be pleaded in any event, and this would include the limitation period. Since the Ontario Act does not tell the court which law to apply, but merely deems limitations law to be substantive, this conflict of laws rule would not be affected by the Act. Accordingly, even if the limitation period would not need to be pleaded specifically under its own law, it would need to be pleaded specifically by a party seeking to rely upon it in a claim brought in Ontario. This was acknowledged by the Supreme Court in *Tolofson*:

> This is not to say that procedural rules of the forum may not affect the operation of the statute of limitation of the *lex loci delicti*. Thus, whether or not a litigant must plead a statute of limitation if he or she wishes to rely on it is undoubtedly a matter of procedure for the forum; some rules of court or judicial interpretations of the rules require the pleading of all or certain statutes. Limitation periods included in the various rules of court, such as those for the filing of pleadings, are also undoubtedly matters of procedure. These may be waived with leave of the court or

[47] Subsection 4(2) of the UK Act, *supra*, footnote 2, provides: "In subsection (1) above "relevant law", in relation to any country, means the procedural and substantive law applicable, apart from any rules of private international law, by the courts of that country."

[48] R.R.O. 1990, Reg. 194.

> the agreement of the other parties, as often happens. Additionally, a substantive limitation defence such as the one in the case at bar may be waived either by failure to plead it, if this is required, or by agreement.[49]

15. Which law applies if the limitations law of the other jurisdiction is not proved?

The drafters of the Ontario Act deftly avoided the conundrum that can arise for common law courts when the statute provides for the application of some other law and that law is not proved by counsel. Because proof of foreign law in common law courts is a matter of party prosecution, the courts are not well-placed to do their own research, and they must rely on counsel to present evidence of the foreign law and make argument on how it should be interpreted and applied by the court to the facts of the case.[50] Where the parties refrain from presenting evidence of the law that might govern their claim by reason of the relevant conflict of laws rules, the court usually defers to the parties' determination that foreign law would not assist in the determination of their rights and obligations and the court does not attempt to determine it and to apply it. However, where a Court is required by statute to apply foreign law, it may be placed in an awkward position where the parties have not pleaded or proved it.[51]

Where the limitation periods of the forum and the applicable law differ and the claim has been brought in the interval between them, it would seem odd for the party who stood to benefit from the application of the foreign limitation period not to introduce it in evidence. However, where it is not introduced, an Ontario court might feel awkward about conducting its own research in a way that would run counter to the principle of party prosecution. Fortunately, the wording of s. 23 allows for the ordinary operation of conflict of laws rules, which would preserve the principle of party prosecution in the event that the parties choose to refrain from pleading or presenting evidence of the foreign law, including that relating to the limitations law of the foreign jurisdiction.

---

[49] *Tolofson v. Jensen, supra,* footnote 2, at para. 88.
[50] *Castel and Walker, supra,* footnote 31, at chapter 7.3.
[51] See *Amosin v. The Ship "Mercury Bell"* (1986) 27 D.L.R. (4th) (F.C.A.).

16. Which law applies to determine whether "the limitations law of another jurisdiction" includes equitable doctrines such as *laches*?

The clean hands doctrine cautions those seeking equitable relief that it may be denied where their efforts to seek it are subject to reproach on equitable grounds. This would suggest that the court should consider its own law in determining equitable reasons for denying relief. However, an enduring concern of the law of equity is to enable courts to consider appropriate relief unhampered by the restraints of rigid rules. The UK Act neatly accommodates both interests. In cases of delay, the English courts may refuse equitable remedies[52] but they will have regard to the applicable foreign law.[53] This seems to be a sound approach to this question.

17. Which law applies to determine which limitation period should apply?

The answer to this question in the context of limitation periods is no more obvious than the answer to the question of *renvoi* wherever it arises: Which law would apply where the limitations law of the other jurisdiction would require the application of the limitation period of Ontario or some third jurisdiction to the matter (either alone, or together with its own law, *e.g.* as a result of the doctrine of double actionability[54])? The English courts do not apply *renvoi* to matters of limitations.[55] This blanket exclusion of *renvoi* has rightly been criticized on the basis that it applies

---

[52] *Partridge v Partridge* [1894] 1 Ch 351, 359, see J. O'Brien, *Smith's Conflict of Laws*, 2 ed (Cavendish: London, 1999) at 118.

[53] Subsection 4(3) of the UK Act, *supra*, footnote 2, provides: "References in this Act to the law of England and Wales relating to limitation shall not include the rules by virtue of which a court may, in the exercise of any discretion, refuse equitable relief on the grounds of acquiescence or otherwise; but, in applying those rules to a case in relation to which the law of any country outside England and Wales is applicable by virtue of s. 1(1)(a) above (not being a law that provides for a limitation period that has expired), a court in England and Wales shall have regard, in particular, to the provisions of the law that is so applicable."

[54] Under the double actionability rule, which continues to apply to some torts in England and in other common law jurisdictions, the tort must be actionable under the *lex loci delicti* and the *lex fori* in order to proceed, and this can affect a limitations defence: *Dicey and Morris, supra*, footnote 7, at para. 7-043.

[55] Subsection 1(5) of the UK Act, *supra*, footnote 2, provides: "In this section "law", in relation to any country, shall not include rules of private international law applicable by the courts of that country or, in the case of England and Wales, this Act." See also s. 4(2).

arbitrarily even in situations in which the English courts would apply *renvoi* to the other substantive matters to which the law of another jurisdiction would apply.[56] The arguments for and against the use of *renvoi* generally would appear to apply equally to limitations issues as they do to any other issue and, accordingly, it is suggested that the question whether *renvoi* would apply to matters of limitations would seem likely to follow the same principles of conflict of laws analysis that are used in other areas of substantive law.

C. Public Policy

The following are situations in which, despite the general encouragement in the Ontario Act to apply the governing law, a court might be inclined not to do so for reasons of public policy.

18. Which law applies where the law of the other jurisdiction provides that no limitation period applies?

Limitation periods are such a routine feature of civil matters that it might seem that a claim could properly be freed of the possibility of becoming time barred only for reasons of public policy. Indeed, the existence of a limitation period of some duration in most claims might be regarded a matter of public policy in Ontario. This is suggested by the introduction of an ultimate limitation period in the Ontario Act.[57] This is because the procedures for establishing the record in a common law court, which rely heavily on oral evidence based on personal recollection, could make the evidence less reliable over time. Where there is no limitation period in the applicable law by reason of a difference in procedure, such as the extensive use of documentary evidence in establishing the record, then the application of the forum's procedural rules might make it difficult, in any event, for the case to be made out. However, where the plaintiff's claim can be established but, as a result of the passage of time, the defendant's defence cannot be established, the prejudice to the defendant occasioned by the application of Ontario rules of evidence and procedure would raise concerns of fundamental unfairness.

---

[56] Briggs, *supra,* footnote 25, at 38.
[57] Ontario Act, *supra,* footnote 1, s. 15.

The English courts apply the limitations law of the foreign jurisdiction to a matter even when that law provides that no limitation period applies.[58] However, the English courts subject this rule to an exception when this would "cause undue hardship to a person who is, or might be made, a party to the action or proceedings."[59] It is possible that an Ontario court would invoke the public policy exception under the conflict of laws rules, which continue to apply pursuant to the Act, to exclude the foreign law under these circumstances and, instead, to apply Ontario law.

19. Which law applies to determine the limitation period for a claim that became barred under the limitations law in the other jurisdiction before the claimant could reasonably be expected to have commenced it?

This is the classic example of the concern that could give rise to the invocation of a public policy exception to the application of foreign law. As has been mentioned, the UK Act explicitly acknowledges the courts authority to exercise discretion to exclude foreign law on grounds of public policy, and the Ontario Act implicitly permits courts to do so by framing the legislative provision so as to permit conflict of laws rules to continue to operate largely unaffected by the legislation. Whether an Ontario court would or would not invoke public policy to deny a limitation defence based on a foreign law that barred the claim before the claimant could reasonably be expected to have commenced it is a question of the public policy exception of the conflict of laws, and not a matter of interpreting the Act.

---

[58] Subsection 4(1) of the UK Act, *supra,* footnote 2, provides: "Subject to subsection (3) below, references in this Act to the law of any country (including England and Wales) relating to limitation shall, in relation to any matter, be construed as references to so much of the relevant law of that country as (in any manner) makes provision with respect to a limitation period applicable to the bringing of proceedings in respect of that matter in the courts of that country and shall include-- ...(b) a reference, where under that law there is no limitation period which is so applicable, to the rule that such proceedings may be brought within an indefinite period." See *Dubai Bank Ltd v Abbas,* [1998] I.L.Pr. 391, [1998] Lloyd's Rep. Bank. 230 (QBD (Comm Ct) Oct 15, 1997).

[59] Undue hardship relieved the claimant from the time bar in *The Kominos S* [1990] 1 Lloyds Rep 541 *revd.* on other grounds [1991] 1 Lloyds Rep. 370 (C.A.). Undue hardship was not made out in *Arab Monetary Fund v Hashim,* [1993] 1 Lloyds Rep. 543.

D. Enforcing Foreign Judgments

20. Which law applies to determine the limitation period for the enforcement of judgments from other jurisdictions?

Common law courts apply their own law to determine whether to give effect to judgments from other jurisdictions. They determine in accordance with their own law whether a foreign court had jurisdiction to bind the parties,[60] whether the foreign judgment is final,[61] and whether it should be denied recognition for reasons such as public policy.[62] Although they are guided by comity—that is, an appreciation of the way in which their approach would be viewed internationally—they set their own standards.

Accordingly, the answer to this question is simply: Ontario law applies to determine the limitation period for the enforcement of judgments from other jurisdictions. However, this answer does not resolve the matter entirely because it is not obvious from the Act which limitation period applies to the enforcement of judgments from other jurisdictions. The confusion arises both because the characterization of a claim to enforce a foreign judgment has been the subject of controversy in recent years, and because the drafting of the Ontario Act is itself unclear.

Under the old legal fiction that a foreign judgment was the functional equivalent of a "simple contract debt", Ontario courts were accustomed to applying the 6-year limitation period for such claims to the enforcement of foreign judgments. The analogy was apt to the extent that, like other liquidated claims, a foreign judgment was not reviewable on the merits, but was subject only to certain extrinsic defenses. In 2000, an Ontario court observed that the law of foreign judgments had so evolved in recent years that foreign judgments should be likened to local judgments, and the 20-year limitation period that applied to local judgments should be applied to foreign judgments.[63] This determination was revisited by the Court of Appeal for Ontario in 2004 in *Lax v. Lax*[64] on several grounds, including: the historical distinction made between

---

[60] *Castel and Walker, supra,* footnote 31, at ch. 14.5.
[61] *Ibid.*, at ch. 14.6.
[62] *Ibid.*, at ch. 14.8.
[63] *Girsberger v. Kresz* (2000), 47 O.R. (3d) 145, affd. 50 O.R. (3d) 157 (C.A.).
[64] 70 O.R. (3d) 520 (C.A.).

foreign and local judgments for limitations purposes; the consistency of the limitation period on an action for debt with the limitation period in the statutory schemes for registering judgments; and the rationale that the process for enforcing foreign judgments is different from the process for enforcing local judgments.

The last of these rationales is particularly compelling. There seems to be good sense in distinguishing between local judgments and foreign judgments. The defences to foreign judgments are rarely invoked and even more rarely successful, but they distinguish foreign judgments from local judgments, against which the sole recourse is by way of appeal.[65] With the availability of defences comes the entitlement to a statute of repose upon which a defendant may be relieved of the obligation to preserve the evidence that would support the defence.

Following this approach, a foreign judgment could be understood as a "claim" and, therefore, subject to the basic 2-year limitation period in s. 4.[66] To be a "claim," an unsatisfied foreign judgment would need to be understood as a "loss…resulting from an omission."[67] Like the old fiction of a "simple contract debt", this would analogize the foreign judgment to a liquidated sum that was owed to the judgment creditor by the judgment debtor and that remained unpaid. Despite the wording of s. 16(1)(b), the enforcement of a foreign judgment would not be "a proceeding to enforce an order of a court, or any other order that may be enforced in the same way as an order of a court." This is because s. 16(1)(b) seems to be aimed primarily at the enforcement of local judgments and court orders.[68]

---

[65] "Local judgments" here would seem to include judgments from other parts of Canada to the extent that these defences would either not apply, or would involve concerns about the judgment that should be raised only in the issuing jurisdiction. The availability of these defences against judgments from other parts of Canada has not, however, been the subject of much discussion in the caselaw.

[66] L. Kerbel Caplan and W. Gray, "Impact of the Limitations Act, 2002 on Commercial Transactions, Lending and Debt Recovery", appearing in this book.

[67] Section 1 of the Ontario Act, *supra*, footnote 1, provides, in part, that a claim is "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission."

[68] Despite the fact that the term "proceeding" as opposed to "procedure" makes for an awkward fit with the language used in Rule 60 of the Rules of Civil Procedure, *supra,* footnote 48. Rule 60 does not describe the steps taken to enforce local orders as "proceedings". Still, there is no requirement that the terms should used in different statutes should have the same meaning.

The distinction between a local judgment and a foreign judgment is more significant under the new legislation than it was under the old legislation. This is because the basic limitation period has gone from 6 years to 2 years, while the period for enforcing a local judgment has gone from 20 years to an indefinite period.[69] The existence of a limitation period would seem to be of considerable importance in advising persons considering investing in exigible assets in Ontario, particularly where they might become subject to foreign judgments that could not be enforced elsewhere. However, should both of these sections come to be regarded as inapplicable, the ultimate limitation period under s. 15 of the Act would seem to apply.[70]

If the basic limitation period applies to the enforcement of foreign judgments, it remains to be determined how "the day on which the claim was discovered" should be interpreted for the purposes of the commencement of the limitation period. While the obvious answer would seem to be that the "claim was discovered" when the judgment was issued, the ordinary practice is to enforce judgments locally and not in other jurisdictions.

Two considerations arise in enforcing foreign judgments. The first concerns judgments that are subject to appeal. Although the common law regards a foreign judgment as final and enforceable notwithstanding the availability of an appeal, it is wasteful to require a judgment creditor to commence an action before knowing the outcome of the appeal solely to avoid a limitation defence in the enforcement jurisdiction. Moreover, a judgment debtor will likely be granted a stay of execution on the judgment while an appeal is pending even if an Ontario court decides that the judgment is enforceable. Accordingly, it would seem wise to define the "loss resulting from an omission" in this context as an unsatisfied judgment no longer subject to appeal.

The second question arises because it may not be immediately obvious that the judgment cannot be satisfied out of the judgment debtor's assets elsewhere and it is wasteful, once again, to require a judgment creditor to begin an enforcement action in Ontario before determining this solely for the purpose of avoiding a limitations defence. Accordingly, it would seem wise to define the

---

[69] See Stephen Pitel and Jonathan de Vries "The Ontario Limitations Period for Actions to Enforce Foreign Judgments" (2004), 29 Adv. Q. 312.

[70] Subsection 15(1) of the Ontario Act, *supra,* footnote 1, provides: "Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced after the expiry of a limitation period established by this section."

"loss resulting from an omission" in this context as an unsatisfied judgment that cannot be satisfied out of assets in the jurisdiction in which the judgment is issued. With these caveats concerning the commencement of the limitations period, the 2-year period may seem less onerous.

Two further questions arise. First, would the basic limitation period apply to judgments from other parts of Canada? They are not local judgments, but they are also not foreign judgments. Given the broad similarities in procedure and public policy throughout the country, they seem unlikely to be subject to the defences that distinguish foreign judgments from local judgments for enforcement purposes. Despite the difficulties in fitting this into the interpretation of s. 16 discussed above, this would seem to militate in favour of assimilating Canadian judgments to local judgments for the purposes of limitations. However, this question seems unlikely to arise frequently in view of the availability of registration procedures for enforcing Canadian judgments, which include their own limitations provisions.[71]

Second, is there a distinction to be made for cases in which the foreign judgment is sought to be recognized and not enforced? Where the *res judicata* effect of a foreign judgment is sought as the primary determination in a declaratory action, it might be regarded as falling within s. 16(1)(a) and therefore not to be subject to any limitation period.[72] To the extent that *res judicata* and *issue estoppel* are equitable doctrines that are within the discretion of the court, it may be appropriate to allow a party to argue at any time that a matter has been decided between the parties in previous litigation. Whether it is inequitable to permit the party to rely on the foreign judgment as a result of the time that has elapsed since the issuance of the foreign judgment or the conditions under which the judgment was obtained will be a matter for the court's discretion in the instant case.

Finally, it should be mentioned that all of this is subject to the enactment of legislation for the enforcement of foreign judgments that specified a limitation period for the enforcement of foreign judgments. No such legislation is in force, but the Uniform Law Conference of Canada has adopted a statute that includes a

[71] The limitation period provided in s. 2 of the Reciprocal Enforcement of Judgments Act, R.S.O. 1990, chapter R.5 is 6 years.

[72] Clause 16(1)(a) of the Ontario Act provides that no limitation period applies in respect of "a proceeding for a declaration if no consequential relief is sought."

provision combining the application of the law of the rendering jurisdiction and local law as follows:

> 5. A foreign judgment can be enforced in [*the enacting province or territory*] only within the period provided by the law of the State of origin, or within ten years after the day on which the foreign judgment becomes enforceable in that State, whichever is earlier.[73]

IV. THE RIDDLE

We have discussed the questions, and the possible answers. What remains is the riddle. It might seem to be a riddle why the legislators felt the need to enact a provision merely to codify a clear Supreme Court of Canada pronouncement that is unlikely to be challenged in Ontario. However, I would suggest that the riddle remains, why, in view of the fact that the Ontario Law Reform Commission got it so right over 35 years ago, it took the legislators so long to pass the law. The tortuous wranglings of courts and legislators from around the common law world in the intervening period are testament to the practical value of such clear and prescient analysis. Perhaps, though, the store we place in the work of law reform commissions is a riddle that calls for another game of 20 questions on another day.

---

[73] Uniform Law Conference of Canada, Uniform Enforcement of Foreign Judgments Act, s. 5, available at <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1e5>. The American Law Institute has proposed a federal statute with a fixed limitation period as follows: "(c) An action or other proceeding to enforce a judgment shall be brought within 10 years from the time the judgment becomes enforceable in the rendering state, or in the event of an appeal, from the time when the judgment is no longer subject to ordinary forms of review in the state of origin." American Law Institute, *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute: Proposed Final Draft* (Philadelphia: ALI, 2005).