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The Problems of Public Choice: The Case of Short Limitation Periods

Kent Roach

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The Problems of Public Choice: The Case of Short Limitation Periods

Abstract

This article examines public choice as a predictor of legislative behaviour and as a guide for statutory and constitutional interpretation. It focuses on short limitation periods, which have often been criticized as special interest legislation benefiting well-organized groups, such as medical doctors. The author concludes that the economic assumptions of public choice cannot adequately explain complexities in interest group behaviour, and that the Canadian legislative process has the ability to advance the interests of diffuse and unorganized groups, such as patients. The author also argues that given the absence of normative content in public choice analysis, Canadian courts have rightly rejected it as a guide for constitutional review or strong forms of statutory interpretation, which ignore clear legislative purposes or words.

Keywords

Social choice; Democracy--Citizen participation; Pressure groups

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THE PROBLEMS OF PUBLIC CHOICE: THE CASE OF SHORT LIMITATION PERIODS[©]

BY KENT ROACH*

This article examines public choice as a predictor of legislative behaviour and as a guide for statutory and constitutional interpretation. It focuses on short limitation periods, which have often been criticized as special interest legislation benefiting well-organized groups, such as medical doctors. The author concludes that the economic assumptions of public choice cannot adequately explain complexities in interest group behaviour, and that the Canadian legislative process has the ability to advance the interests of diffuse and unorganized groups, such as patients. The author also argues that given the absence of normative content in public choice analysis, Canadian courts have rightly rejected it as a guide for constitutional review or strong forms of statutory interpretation, which ignore clear legislative purposes or words.

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I. INTRODUCTION

Public choice theory uses economic assumptions to explain and predict the behaviour of interest groups and legislatures.¹ On the whole, it paints a rather bleak picture of the legislative process. Interest groups with pre-existing organizational structures and a concentrated membership can dominate the demand for the legislative product, because only such groups can overcome the problems of rational individuals being unwilling to pay the costs of organizing and lobbying. Thus, concentrated groups of producers will be able to make more effective demands on governments than diffuse groups of consumers. When they are not plagued by the problems created by log-rolling and agenda setting, legislators will respond to the demands of concentrated interest groups for benefits and be rewarded through campaign contributions and other forms of payment. The costs of such measures will be borne by diffuse and unorganized groups who cannot organize to complain. In short, public choice assumes that the legislative process is a market and one in which concentrated interest groups have a distinct advantage.

Public choice is presently attracting much attention from legal academics in the United States.² Legal scholars are intrigued by public choice, in part, because its critical portrayal of the legislative process begs the question of what role the judiciary should play. In this paper, I will assess public choice as a predictor of legislative behaviour and as a guide for judicial behaviour in one Canadian context: statutory limitation periods and, in particular, special short limitation periods.

Statutory limitation periods prevent the assertion of civil claims deemed stale. All common law provinces in Canada have general limitation statutes that provide set periods beyond which various civil

¹ M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, Mass.: Harvard University Press, 1965); J.M. Buchanan & G. Tullock, *The Calculus of Consent* (Ann Arbor: University of Michigan Press, 1962); and D.C. Mueller, *Public Choice* (Cambridge: Cambridge University Press, 1979).

² See, generally, the collection of symposium articles in (1988) 74 Va. L. Rev. 167 and following; the "Positive Political Theory and Public Law" symposium articles in (1989) 65 Chi-Kent L. Rev. 3 and following; the "Symposium on Post-Chicago Law and Economics" articles in (1992) 80 Geo. L.J. 457 and following; and D.A. Farber & P.P. Frickey, *Law and Public Choice: A Critical Introduction* (Chicago: University of Chicago Press, 1991). In the United Kingdom, see P. McAuslan, "Public Law and Public Choice" (1988) 51 Mod. L. Rev. 681. There has been less interest in public choice among Canadian legal academics. The leading Canadian work is M.J. Trebilcock *et al.*, *The Choice of Governing Instrument* (Ottawa: Economic Council of Canada, 1982). See also M.R. Gillen, "Countervailing Duties: Efficiency and Public Choice" (1991) 23 Ottawa L. Rev. 1.

claims cannot be asserted against defendants. In addition, most provinces also have special short limitation periods applying to a subset of claims. These periods are often provided in legislation governing members of a profession. They have often been criticized as special interest legislation designed to protect powerful and well-organized groups of potential defendants, most notoriously medical doctors.³ In addition, the plaintiffs whose claims are precluded by short limitation periods are generally the diffuse and unorganized groups that public choice suggests are disadvantaged in the legislative process. Thus, short limitation periods present a context in which public choice analysis may help to explain legislative behaviour.

The first part of this paper will outline the nature of short limitation periods in the Canadian common law provinces. Short limitations are found in a variety of contexts and protect a variety of defendants, including health professionals, the media, insurance companies, and municipalities. The second part will attempt to explain short limitations in light of public choice theory. Focusing on short limitation periods for medical malpractice actions, I will suggest that there are complexities in interest group behaviour that are not easily captured by the economic assumptions of public choice. Public choice analysis ignores softer non-material and non-rational variables which may motivate interest groups and runs the risk of providing non-falsifiable and tautologous explanations for any result.

Next, I will examine the role that the judiciary has played in the administration of short limitation periods. Courts have protected plaintiffs in latent damage cases by delaying the running of time limits to the point at which a wrong could reasonably have been discovered.⁴ Further, the Supreme Court of Canada has stated that it will strictly interpret short limitation periods so that "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."⁵ In recent years, plaintiffs have also attacked short limitation periods directly by arguing that they violate the *Canadian*

³ J.P.S. McLaren, "Of Doctors, Hospitals and Limitations—The Patient's Dilemma" (1973) 11 Osgoode Hall L.J. 85; and Law Reform Commission of Saskatchewan, *Proposals for a New Limitation of Actions Act* (Saskatoon: Law Reform Commission of Saskatchewan, 1989) at 51.

⁴ *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (application of discoverability principles to tort actions) [hereinafter *Rafuse*]; *Consumers Glass Co. v. Foundation Co. of Canada* (1985), 51 O.R. (2d) 385 (Ont. C.A.) (application of discoverability principles to actions based on contract); and *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 (application of discoverability principles to claims based on childhood incest) [hereinafter *M.(K.)*].

⁵ *Berardinelli v. Ontario Housing Corporation* (1978), [1979] 1 S.C.R. 275 at 280.

Charter of Rights and Freedoms.⁶ I will address whether Canadian courts have or should play an active role in counteracting the deficiencies public choice claims exist in the legislative process.

In the final section, I will suggest that public choice has limited utility in explaining the behaviour of Canadian legislatures and that, contrary to its predictions, legislative reform of short limitations in the interest of diffuse groups of plaintiffs is possible. Moreover, I will suggest that a fundamental problem in public choice analysis is its lack of explicit normative analysis. Public choice fails to explain why special interest legislation is undesirable and it ignores the possibility that some short limitation periods may actually serve the public interest. I will argue that because of these deficiencies, public choice cannot justify courts striking down short limitation periods on constitutional grounds or modifying them through strong forms of statutory interpretation, which ignore clear statutory purposes and words.

II. SHORT LIMITATION PERIODS

Short limitation periods, applying only to certain civil claims against certain defendants, have long been a feature of Canadian law. Twenty years after Confederation, an *Act to Amend the Medical Act*⁷ was passed in the Ontario legislature providing that:

[n]o duly registered member of the College of Physicians and Surgeons of Ontario shall be liable for any action for negligence or malpractice, by reason of professional services requested or rendered, unless such action be commenced within one year from the date when in the matter complained of such professional services terminated.⁸

Over the next twenty years, similar legislation, modifying a normal six-year limitation period for negligence actions, was enacted in most provinces through special provisions in their respective acts governing the medical profession.⁹

In the years that followed, legislation has been passed to provide short limitation periods for civil actions against other professional

⁶ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 [hereinafter *Charter*]. See, generally, J.B. Laskin *et al.*, eds., *The Canadian Charter of Rights Annotated* (Aurora: Canada Law Book, 1993) c. 15(1):400000.

⁷ S.O. 1887, c. 24.

⁸ *Ibid.*, s. 2, quoted in McLaren, *supra* note 3 at 87.

⁹ S.M. 1888, c. 36, s. 9; S.B.C. 1898, c. 9, s. 61; S.N.S. 1899, c. 32, s. 35; S.P.E.I. 1899, c. 24, s. 22; S.N.B. 1903, c. 118; S.A. 1906, c. 28, s. 59; S.S. 1906, c. 28, s. 55.

groups such as dentists,¹⁰ pharmacists,¹¹ optometrists,¹² and nurses.¹³ Such legislation also protects hospitals.¹⁴ In addition, short limitation periods for claims on accident, life, fire, and automobile insurance policies are also found in legislation governing the insurance industry.¹⁵ The media are protected by short notice and limitation periods for defamation actions.¹⁶ Short limitations also govern claims against various public authorities, including claims against municipalities for

¹⁰ *Limitation of Actions Act*, R.S.A. 1980, c. L-15, s. 55(b) (one year from termination of services); *The Dental Association Act*, R.S.M. 1987, c. D-30, s. 44 (two years from termination of services); *The Dental Act*, S.N. 1983, c. 26, s. 32 (two years from termination of services); *Limitation of Actions Act*, R.S.N.S. 1989, c. 258, s. 2(1)(d) (two years from termination of services); *Health Disciplines Act*, R.S.O. 1990, c. H.4, s. 17 (one year from discoverability); *Dental Profession Act*, R.S.P.E.I. 1988, c. D-6, s. 11(2) (six months from termination of services); and *The Dental Profession Act*, R.S.S. 1978, c. D-5, s. 51 (one year from termination of services).

¹¹ *Pharmacy Act*, R.S.N.S. 1989, c. 343, s. 60 (one year from termination of services); and *Health Disciplines Act*, R.S.O. 1990, c. H.4, s. 17 (one year from discoverability). Note that in this catalogue I have excluded limitation periods for regulatory offences that are often listed in texts on limitation periods. See G. Mew, *The Law of Limitations* (Toronto: Butterworths, 1991) at Appendix; and J.C. Morton, *Limitation of Civil Actions* (Toronto: Carswell, 1988) at Appendix. My concern is only with limitations that restrict the ability of individuals to bring civil actions. Limitations regarding when the state can prosecute regulatory offences raise different issues.

¹² *Limitation of Actions Act*, R.S.A. 1980, c. L-15, s. 55(f) (one year from termination of services); *The Optometry Act*, S.S. 1985, c. O-6.1, s. 50 (one year from termination of services); and *Health Disciplines Act*, R.S.O. 1990, c. H.4, s. 17 (one year from discoverability).

¹³ *Health Disciplines Act*, R.S.O. 1990, c. H.4, s. 17 (one year from discoverability); *Limitation of Actions Act*, R.S.N.S. 1989, c. 258, s. 2(1)(d) (two years from termination of services); and *Hospitals Act*, R.S.P.E.I. 1988, c. H-10, s. 13 (one year from termination of services).

¹⁴ *Limitation of Actions Act*, R.S.A. 1980, c. L-15, s. 56 (one year after cause of action arose); *Limitation Act*, R.S.B.C. 1979, c. 236, s. 8(1) (six years from termination of services); *Public Hospitals Act*, R.S.N.B. 1973, c. P-23, s. 17 (two years after termination of services); *Limitation of Actions Act*, R.S.N.S. 1989, c. 258, s. 2(1)(d) (two years from termination of services); *Public Hospitals Act*, R.S.O. 1990, c. P.40, s. 31 (two years from termination of services); *Hospitals Act*, R.S.P.E.I. 1988, c. H-10, s. 13 (one year from termination of services); and *The Hospitals Standards Act*, R.S.S. 1978, c. H-10, s. 15 (three months from damage).

¹⁵ These are often in the form of statutory conditions which require claims on accident and illness policies, fire insurance policies, and motor vehicle policies to be brought within one or two years. Life insurance claims have to be brought before the earlier of one year after presenting evidence or six years after contingency. See generally Mew, *supra* note 11 at 286-87; and Morton, *supra* note 11 at 116-18.

¹⁶ *Defamation Act*, R.S.N.B. 1973, c. D-5, s. 14 (six months from publication); *The Defamation Act*, S.N. 1983, c. 63, s. 17 (three months from knowledge); *Defamation Act*, R.S.N.S. 1989, c. 122, s. 19 (six months from publication); *Libel and Slander Act*, R.S.O. 1990, c. L.12, s. 6 (three months from knowledge); *Defamation Act*, R.S.P.E.I. 1988, c. D-5, s. 15 (six months from publication); and *The Libel and Slander Act*, R.S.S. 1978, c. L-14, s. 14 (six months from publication). The acts also generally provide a notice requirement, usually within fourteen days.

lack of repair of roads and claims against some public utilities.¹⁷ As this catalogue demonstrates, short limitations benefit a variety of professions, industries, and public bodies and it might be thought difficult to generalize about political behaviour in so many contexts. Nevertheless, public choice claims to be able to explain and predict a broad range of political behaviour through its use of economic assumptions.¹⁸

The existence of short limitation periods is complicated by the fact that most common law provinces have altered the traditional six-year limitation period governing negligence actions, replacing it with a two-year period.¹⁹ Thus, many limitation periods that may have qualified as short limitations when originally enacted, no longer have the same status. For example, of all the common law provinces with a two-year negligence limitation period, only Alberta and Saskatchewan now have shorter limitation periods of one year to bring malpractice claims against doctors.²⁰

The situation is further complicated because courts will now interpret limitation periods subject to discoverability principles, unless there are clear words that displace such an interpretation. The one-year limitation for malpractice actions against doctors in Alberta and Saskatchewan is made shorter in cases of latent injury by the fact that the legislation specifies that time starts to run from the termination of medical services. Ontario's *Health Disciplines Act* contains a one-year limitation period for medical malpractice claims which is especially

¹⁷ *The Public Officers Act*, R.S.M. 1987, c. P230, s. 21(1) (two years after act); *Constables' Protection Act*, R.S.N.S. 1989, c. 88, s. 5 (six months); *The Justices and Other Public Authorities (Protection) Act*, R.S.N. 1970, c. 189, s. 19(c) (six months); *Public Authorities Protection Act*, R.S.O. 1990, c. P.38, s. 7 (six months); *The Public Officers' Protection Act*, R.S.S. 1978, c. P-40, s. 2(1)(a) (one year); *Public Utilities Act*, R.S.O. 1990, c. P.52, s. 33 (six months); and *Municipal Act*, R.S.O. 1990, c. M.45, s. 284(2) (three months).

¹⁸ See, generally, Trebilcock *et al.*, *supra* note 2 (applying public choice to various contexts, including public inquiries, taxation, public enterprise, and regulation).

¹⁹ *Limitation of Actions Act*, R.S.A. 1980, c. L-15, s. 51; *Limitation Act*, R.S.B.C. 1979, c. 236, s. 3(1); *The Limitation of Action Act*, R.S.M. 1987, c. L150, s. 2; *Limitation of Actions Act*, R.S.N.B. 1973, c. L-8, s. 4; *Statute of Limitations*, R.S.P.E.I. 1988, c. S-7, s. 2(1); and *The Limitation of Actions Act*, R.S.S. 1978, c. L-15, s. 3(1)(d). In contrast, only British Columbia has reduced the traditional six-year limitation for contractual actions to two years.

²⁰ *Limitation of Actions Act*, R.S.A. 1980, c. L-15, s. 55; and *The Medical Profession Act*, R.S.S. 1978, c. M-10, s. 72. Ontario, Nova Scotia, and Newfoundland have retained the six-year limitation on negligence actions, but have special limitations of one year, two years, and two years, respectively, for malpractice claims against doctors. See *Health Disciplines Act*, R.S.O. 1990, c. H.4, s. 17; *Limitation of Actions Act*, R.S.N.S. 1989, c. 258, s. 2(1)(d); and *The Medical Act*, S.N. 1974, c. 119, s. 25(a).

short, given that ordinary negligence actions are still governed by a six-year limitation period in that province. Nevertheless, Ontario amended its malpractice limitation in 1974, so that the limitation runs from the time the plaintiff should have known the facts upon which the action is based, thus incorporating discoverability principles in a statutory form before they were imposed by the courts.²¹ New Brunswick is unique in giving the plaintiff the longer of a two-year period from the date of termination of medical services or one year from knowledge of the facts.²² It is important to understand that whether any particular limitation period qualifies as short depends upon what the limitation would be in the province, absent the special limitation, and whether it precludes judicial application of discoverability principles.

The various provincial law reform commissions that have examined limitation periods have invariably criticized short limitations as creating confusion and unfairness.²³ A 1989 report by the Law Reform Commission of Saskatchewan concluded that “[p]erhaps the single greatest problem plaguing Saskatchewan limitation law is the proliferation of special limitation periods.”²⁴ Law reform commissions have generally recommended the wholesale repeal of special limitation periods and the incorporation of all limitations affecting civil claims into one comprehensive statute. They have stressed fairness to the plaintiff and the desirability, for both the public and lawyers, of having simple uniform limitation periods. At the same time, the commissions suggested that special limitations were developed, in part, because of the inappropriateness of the traditional six-year period for negligence actions.²⁵ With the enactment of a standard two-year limitation for negligence actions, they argue that special limitations of less than two years are no longer justified.

²¹ *Health Disciplines Act*, R.S.O. 1990, c. H.4, s. 17. British Columbia also incorporated discoverability principles in its legislative reforms. See *Limitations Act*, R.S.B.C. 1979, c. 236, s. 6(3).

²² *Medical Act*, S.N.B. 1981, c. 87, s. 67.

²³ See, for example, Ontario Law Reform Commission, *Report on Limitation of Actions* (Toronto: Queen's Printer, 1969) c. 5; Law Reform Commission of British Columbia, *Report on Limitations: Part II—General* (Victoria: Queen's Printer, 1974) c. 7; Law Reform Commission of Saskatchewan, *supra* note 3, c. 5; and Newfoundland Law Reform Commission, *Working Paper on Limitation of Actions* (St. John's: Newfoundland Law Reform Commission, 1985) c. 9.

²⁴ Law Reform Commission of Saskatchewan, *supra* note 3 at 51.

²⁵ Ontario Law Reform Commission, *supra* note 23 at 35.

III. PUBLIC CHOICE EXPLANATIONS OF SHORT LIMITATION PERIODS

Like any other social science, public choice has different schools with different orientations.²⁶ For our purpose, the relevant insights of public choice come from its understanding of the interest group, the demands created by interest groups for legislative benefits, and the supply provided by legislatures. This form of public choice owes much to the work of Mancur Olson on groups and the provision of public goods.²⁷ Olson applies the economic assumption of self-interested behaviour to the behaviour of individuals and groups. Although many individuals could benefit from organizing together with other individuals with similar interests to lobby politicians, the costs of organization are significant. It is never in the interest of any particular individual to pay the costs of organizing and lobbying. Thus potential lobbies "would get no assistance from ... rational, self-interested individuals."²⁸ The exception, however, is in the case of small groups, in which individuals receive enough concentrated benefits to justify the costs of organization. Benefits are more diffuse in larger groups and the organization costs greater. As Olson concludes, "the larger the group, the less it will further its common interests."²⁹ Thus, concentrated groups of producers can be expected to produce more effective demands for governmental favours than larger, more diffuse groups of consumers. Large dispersed groups will not organize or act to further their common interests and they will suffer at the hands of smaller groups which can organize and lobby.³⁰

Olson developed a more sophisticated "by-product" or "special interest" theory of demand for government favours based on the observation that some groups are already organized for purposes other than lobbying governments. Thus, the organization costs of these groups are substantially reduced. The problem of individual self-interest in the formation of the group has been overcome and resources can be devoted to lobbying for the group's interests. Citing the American Medical Association as a prime example, Olson noted "[t]he large and powerful

²⁶ See, generally, Mueller, *supra* note 1; and N. Gunningham "Public Choice: The Economic Analysis of Public Law" (1992) 21 Fed. L. Rev. 117.

²⁷ See Olson, *supra* note 1.

²⁸ *Ibid.* at 11.

²⁹ *Ibid.* at 36.

³⁰ *Ibid.* at 165-67.

economic lobbies are in fact the by-products of organizations that obtain their strength and support because they perform some function in addition to lobbying for collective goods."³¹ Doctors, who may have to form an organization as part of a state-mandated licensing body, and who, in any event, have an interest in organizing in order to provide services such as education and insurance, would promise to be a particularly powerful and effective lobby. In comparison, the organization costs of patients (who are prospective malpractice plaintiffs) would be formidable, because they are a diffuse group with no pre-existing organizational structure.

On the supply side, public choice theorists have also applied the assumptions of economics to predict the behaviour of legislatures faced with strong demands from small and organized groups, and weak or non-existent demands from larger groups. The ability to reward organized groups is thought to increase the likelihood, either directly or indirectly, of politicians being re-elected. Landes and Posner posit a "Chicago-style" market for the legislative process:

[L]egislation is supplied to groups or coalitions that outbid rival seekers of favorable legislation. The price that the winning group bids is determined both by the value of legislative protection to the group's members and the group's ability to overcome the free-rider problems that plague coalitions. Payment takes the form of campaign contributions, votes, implicit promises of future favors, and sometimes outright bribes. In short, legislation is "sold" by the legislature and "bought" by the beneficiaries of the legislation.³²

Whatever the actual mechanism of exchange, public choice suggests that public initiatives, which redistribute wealth to concentrated interest groups by imposing costs on diffuse groups, can and will be undertaken.³³

Objections to such redistributive measures must overcome the organizational obstacles that produced the differential demands in the first place, as well as any information costs. For consumer or other diffuse groups to complain, they must know that they are being hurt, but many statutes, including short limitations, are not highly visible. Even if diffuse groups know that they are being hurt, they must still organize, and they cannot organize easily, because they are diffuse. Even if this vicious circle could be broken by diffuse interests having their interests

³¹ *Ibid.* at 132.

³² "The Independent Judiciary in an Interest-Group Perspective" (1975) 18 *J. of Law & Econ.* 875 at 877.

³³ Trebilcock *et al.*, *supra* note 2 at 5.

represented,³⁴ well-organized groups will continue to be able to lobby against the repeal of their benefits. By making use of procedural imperfections and inertia in the legislative process, well-organized groups may be able to block the repeal of the benefits they enjoy.

Although the application of economic concepts to political behaviour was novel, the conclusions reached by Olson and others were not. The dominance of special interests in government has long been a concern of political scientists, as well as an inspiration for populist politics. Olson himself noted:

[t]he greater degree of organization and activity of small groups is not difficult to illustrate; the late V.O. Key argued in his standard textbook that "the lobbyists for electrical utilities, for example, are eternally on the job; the lobbyists for the consumers of this monopolistic service are ordinarily conspicuous by their absence."³⁵

A public choice understanding of interest group domination of the legislative process accords with much conventional, but pessimistic, wisdom about the dominance of special interest in politics.

The conclusions of several law reform commissions are remarkably consistent with the insights of public choice theory. In its 1969 report, the Ontario Law Reform Commission observed that most of the special limitation periods were "enacted to protect the interests of some special group, such as municipal corporations, hospitals, doctors, dentists and insurance companies."³⁶ The Law Reform Commission of British Columbia concluded "many of these special limitation periods appear only to serve the special interests of special professions or other bodies."³⁷ The Saskatchewan Law Reform Commission, perhaps influenced by prairie populism, was the most harsh:

[s]pecial limitations provisions appear to throw a "protective cloak" around many of the professions. This perception is extremely damaging, as it suggests a conspiracy between lawmakers and powerful lobby groups at the expense of the public.³⁸

These bodies did not accept that short limitations are justified in the public interest by the needs for certainty and repose, for litigation to be

³⁴ For example, organized groups of personal injury lawyers who represent patients may have an incentive to lobby against short limitations. Likewise, private and public bodies who insure potential plaintiffs may have an incentive to lobby against short limitations. On the other hand, insurers of potential defendants, such as doctors and hospitals, would have an incentive to lobby for short limitations.

³⁵ Olson, *supra* note 1 at 128.

³⁶ Ontario Law Reform Commission, *supra* note 23 at 75.

³⁷ Law Reform Commission of British Columbia, *supra* note 23 at 118.

³⁸ Law Reform Commission of Saskatchewan, *supra* note 3 at 52.

based on fresh evidence, and for plaintiffs to assert their rights in a diligent fashion.³⁹

Despite the intuitive appeal that public choice has in explaining short limitation periods, care must be taken not to ignore complexities in interest group and legislative behaviour that are not easily captured in public choice analysis. The following will illustrate some shortcomings in public choice analysis as it is applied to short limitation periods.

Public choice purports to apply the scientific method to the study of politics and in science it is important to examine the data, both to determine when it accords with a hypothesis, and when it does not. Short limitation periods do not always benefit the organized producer and professional groups that Olson takes as the model of those who will be able to secure favours from the legislature. For example, lawyers would seem to be a perfect example of a group that, because of their pre-existing, legislatively mandated organizational structure, should be able to lobby for short limitation periods, that would decrease their litigation and insurance costs. Yet, with the exception of Newfoundland,⁴⁰ no Canadian province provides such limitation periods for negligence actions against lawyers. Although the reasons why lawyers have not obtained such benefits from the legislature are quite speculative,⁴¹ the absence of short limitation periods to protect this well-organized group is a significant false negative.

Short limitation periods often protect governmental bodies, which are not the concentrated interest groups that Olson's theory predicts will obtain benefits from the legislature. Here, public choice may still have explanatory and predictive power. Although governmental bodies, such as municipalities and public utilities, may not be bound by the same economic pressures as corporations and professions, they may be able to make use of pre-existing organizational

³⁹ On the purposes of statute of limitations, see *M.(K.) supra* note 4 at 29-30; and *Stoddard v. Watson*, [1993] 2 S.C.R. 1069 (*sub nom. Murphy v. Welsh*) [hereinafter *Stoddard*].

⁴⁰ *Law Society Act, 1977*, S.N. 1977, c. 77, s. 95 (period of lesser of four years from termination of services or two years from discovery as compared to normal six-year limitation for negligence actions). Note that architects and accountants, who are also organized professional groups, likewise receive almost no special protection. See *Mew, supra* note 11 at 119-27.

⁴¹ It is possible that the nature of much high-risk legal work was not actionable within traditional limitation periods that run from the date of the legal service being rendered; *Schwebel v. Telekes* (1967), 61 D.L.R. (2d) 470 (Ont. C.A.). Now, however, discoverability principles would apply. See *Rafuse, supra* note 4 (applying discoverability principles to legal defects in a mortgage). It is also possible that the unpopularity of lawyers and media attention raise the costs for legislators to enact short limitations to benefit lawyers. This, however, would complicate public choice analysis by suggesting that the media and publicity can frustrate the will of well-organized interests.

structures and resources to pursue their own self-interests. It may be rational for organized groups of municipalities and utilities to lobby for shorter limitation periods to limit successful claims. Successful claims may come out of revenues and, at some margin, force increases in taxation or reductions in expenditures which again, at an indeterminate margin, can threaten re-election prospects and bureaucratic ambitions.⁴² It should not be forgotten, however, that liability awards and litigation costs in the public sector will be absorbed into a "bureaucratic black box" with its own particular, and sometimes perverse, incentives.⁴³ If municipalities and other public bodies were not protected by short limitation periods, it is possible that the costs of increased litigation could be absorbed or passed on without adverse consequences to incumbents.

Public choice relies on the economic assumption that individuals and interest groups will pursue their material self-interest. It has been argued that the assumption that individuals and groups will rationally pursue their material self-interest is the best predictor of human behaviour, even if it does not hold true in all cases.⁴⁴ This may be so, but in the context of short limitations, it is not clear that the interest groups that benefit from them are acting in a rational and materialistic manner. To take the oldest, most notable example: have medical doctors acted rationally in their material interest in securing short limitation periods and lobbying against their reform? Short limitation periods prevent some subset of all malpractice claims from being successfully litigated, and by eliminating some litigation and damage award costs this reduces some costs for some doctors.⁴⁵ In the modern context, however, these cost reductions are mediated through collective insurance schemes. Despite the central importance that material incentives have in public choice theory, there is some evidence that doctors may be interested in short limitations for reasons that are not primarily material.

Short limitations have an important repose function, which enables doctors to know that a year or two after they have performed a

⁴² For an application of public choice assumptions to the behaviour of various governmental bodies, see Trebilcock *et al.*, *supra* note 2.

⁴³ P.H. Schuck, *Suing Government* (New Haven: Yale University Press, 1983) at 123-24.

⁴⁴ Trebilcock *et al.*, *supra* note 2 at 18-19.

⁴⁵ Note that "doctors" may not be the homogenous group that Olson and other interest group theorists presume and this will complicate their analysis. Doctors in different fields may have different incentives to obtain short limitations, particularly if insurance is sold on the basis of their speciality. Thus obstetricians, who are frequently sued, may be more interested in lobbying to obtain short limitations than family practitioners.

medical intervention, they will not face public challenges to their work through litigation. This sense of repose has economic dimensions, but it primarily promotes a psychological sense of well-being by diminishing insecurity and anxiety. A recent study based on extensive consultation with the medical profession has concluded that Canadian doctors relate to the threat of litigation primarily in a psychological as opposed to an economic sense.⁴⁶ In calculating the value of short limitation periods to doctors, it may be crucial to include not only the financial advantages of precluding some claims, but also the less tangible psychological value of repose.⁴⁷

As the calculus of human motivation becomes more complex, however, it becomes much more difficult to predict behaviour. Particular calculations of psychological value may be difficult to disprove. For example, it can be posited that if a short limitation period does not protect the material interests of the medical profession, then it must serve their psychological interest. Such a conclusion verges on a non-falsifiable tautology and undermines the utility of public choice as a predictive and explanatory tool. On the other hand, to restrict analysis to material benefits may fail to capture important motivations for human behaviour.

The problem of interest group motivation is further complicated by the possibility that a group will not correctly perceive its own interests, however defined. Again, short limitations for medical malpractice claims provide an interesting example. It is not clear that short limitations actually promote either the psychological or economic self-interest of doctors. A recent study has reported that short limitation periods have the effect of encouraging premature filing of civil claims,

⁴⁶ The Prichard Interprovincial Committee concluded that "the most significant negative effects of civil liability claims on physicians have been in the development of symptoms of stress, anxiety and anger and the resulting diminution in their satisfaction from the practice of medicine." *Federal/Provincial/Territorial Review on Liability and Compensation Issues in Health Care, Liability and Compensation in Health Care* (Toronto: University of Toronto Press, 1990) (Chair: J.R.S. Prichard) at 19. The repose function of limitation periods has traditionally been recognized to have a psychological, as well as an economic, dimension. See G.D. Watson, "Amendment of Proceedings after Limitation Periods" (1975) 53 *Can. Bar Rev.* 237 at 272.

⁴⁷ Other groups may be motivated by other intangible concerns. For example, some professions may consider that a short limitation enacted for their benefit in special legislation helps to confer official recognition and prestige on their profession. On the symbolic value of legislation and other official policies, see M. Edelman, *The Symbolic Uses of Politics* (Urbana: University of Illinois Press, 1964).

which are later abandoned or settled.⁴⁸ Even if doctors think that short limitation periods limit successful claims and encourage repose, they may be wrong. Short limitation periods may actually encourage premature litigation that imposes both psychological and economic costs on doctors. The economic assumptions about human behaviour that public choice employs are complicated both by the importance of less tangible, non-material incentives and the possibility of miscalculation and non-rational behaviour. If public choice humanizes its calculus by including these factors, however, it runs the risk of undercutting its predictive utility, not to mention its self-image as a scientific discipline.

Another limitation of public choice analysis is that it tends to explain legislative and interest group behaviour in static terms which focus on the enactment of statutes, while forgetting that the interests and behaviour of groups change over time.⁴⁹ As examined in the last section, the status of a limitation period as "short" depends not just on the motivations behind its enactment, but on subsequent legal developments. One important legal development has been adjustments to the baseline limitation period, which has been lowered from six to two years for negligence actions in most common law provinces. Doctors, who successfully lobbied for a one-year limitation period that was five years shorter than the average when it was enacted, have seen their comparative advantage decreased, as the standard limitation for negligence actions was lowered to two years. They might welcome this reform, because it makes their limitations less conspicuous and vulnerable to reform. On the other hand, they might regret the loss of their comparative advantage for symbolic reasons. In any event, reform of the baseline limitation periods suggests that limitation periods of two years or more, that were originally enacted as short limitations to benefit interest groups, may now be justified for general reasons, such as the increased availability of legal services and the application of discoverability principles to claims based on latent injuries.

Another important development has been the inclination of courts in the last decade to extend limitation periods by interpreting them subject to discoverability principles. Such principles, when applied

⁴⁸ Prichard, *supra* note 46 at 20. A study included in the appendix of that report concluded that the incidence of premature filing of claims means that short limitation periods "increase the frequency of claims and reduce the quality of claims, both being disadvantageous developments from the perspectives of the health care providers" [emphasis added]. Prichard, *ibid.*, appendix A: Health Care Liability and Compensation Review "Working Paper" at 197 [hereinafter Prichard, Appendix A].

⁴⁹ See, generally, R. Hardin, *Collective Action* (Baltimore: Johns Hopkins University Press, 1982) at 101 and following.

to special limitation periods, can significantly reduce the value of the limitation to defendants, by exposing them to indefinite periods of liability. This development erodes both the financial and psychological value of short limitation periods, by exposing defendants to claims for latent harms. Public choice recognizes that the independent judiciary can upset the advantages organized groups attain in the legislative arena.⁵⁰ It would predict, however, that the organized groups harmed by the judiciary would respond to this development by lobbying for statutory amendments to displace discoverability principles and have the limitation run from the time of the contractual breach or negligence. As will be discussed later, there has been some movement in this direction,⁵¹ but it has been far from universal.

Another complication lies in the variation in short limitations among provinces and among different professional groups. Public choice explanations of these variations are indeterminate and can justify almost any scenario. For example, it could be argued that the more populous provinces face stronger demands for short limitations, because their interest groups have more developed organizational structures and economies of scale. On the other hand, it could be argued that interest groups have disproportionate influence in the less populous provinces, because of their smaller numbers and tighter organizational structures.⁵² Similar ambiguities are encountered in explaining differences between the treatment of different groups. Older professions, such as doctors, could have better developed organizations and more lobbying power than newer professions, such as chiropractors. On the other hand, newer professions could have tighter organizational structures as they struggle for recognition and thus be in a better position to lobby governments for short limitation periods. The problem is not that public choice theory cannot be made to fit the facts, but that it can offer speculative explanations for any set of facts.

Despite the shortcomings identified above, public choice does provide some plausible explanations for the existence of short limitation periods. Interest groups and governmental bodies that are already

⁵⁰ Landes & Posner, *supra* note 32.

⁵¹ *Limitation Act*, R.S.B.C. 1979, c. 236, s. 8(1) (six-year ultimate limitation period for malpractice claims against doctors and hospitals, compared to standard thirty-year ultimate limitation period, which also applies regardless of discoverability). For criticisms of this provision and a proposal for a standard ten-year ultimate limitation period see Law Reform Commission of British Columbia, *Report on the Ultimate Limitation Period: Limitation Act, Section 8* (Victoria: Queen's Printer, 1990) [hereinafter *B.C. Report*].

⁵² On interprovincial differences in another context, see R.J. Daniels, "Should Provinces Compete? The Case for a Competitive Corporate Law Market" (1991) 36 McGill L.J. 130.

organized are in a good position to lobby the legislature for benefits. At the same time, the legislature is in a position to respond to these concentrated demands and impose the costs of short limitations on unorganized and diffuse groups of potential plaintiffs. Many conventional accounts of short limitation periods accord with public choice theory by depicting them as special interest legislation. Although public choice does have some power to explain short limitations, in many instances, it will be important to factor in less tangible motivations, the possibility of error, and the dynamic nature of group interests. Doing so, however, risks making public choice an indeterminate and tautologous way of explaining interest group and legislative behaviour.

IV. JUDICIAL REFORM OF SHORT LIMITATION PERIODS

Public choice promotes a distrust of the legislative process and its vulnerability to capture by organized interests. Increasingly, legal theorists influenced by public choice are looking to the independent judiciary and the vehicles of constitutional review and statutory interpretation as a restraint on the legislative process. Have Canadian courts attempted to correct the deficiencies that public choice claims exist in the legislative process? Should they?

A. *Constitutional Review*

Recall that public choice theorists believe that small, well-organized groups will dominate the demands for legislation and that legislators will systematically ignore the interests of unorganized and diffuse interests. As Judge Abner Mikva has noted, the insights of public choice require

[j]udges to be judicial activists without even the traditional justification for judicial activism—that judges sometimes must protect minorities from the excesses of majoritarianism. The public choice theorists would turn this rationale on its head and have judges protect the *majority* from the minorities who supposedly have expropriated the majority institutions for private ends.⁵³

What Judge Mikva identifies as “the traditional justification for judicial activism” is associated in the United States with strict scrutiny of laws that affect “discrete and insular minorities,” a phrase that was used in

⁵³ A.J. Mikva, “Foreword: Public Choice Symposium” (1988) 74 Va. L. Rev. 167 at 170.

the famous footnote in *United States v. Carolene Products Co.*⁵⁴ In that case, the United States Supreme Court articulated an approach to judicial review that helped put an end to the type of judicial review exemplified by its *Lochner v. New York*⁵⁵ decision that invalidated maximum hour laws for bakers. Bruce Ackerman has suggested that the *Carolene Products* justification for judicial review is hopelessly out of date, in large part because of the development of public choice theory.⁵⁶ He urges a repudiation of “the bad political science that allows us to ignore those citizens who have the most serious complaints: the anonymous and diffuse victims of poverty and sexual discrimination who find it most difficult to protect their fundamental interests through political organization.”⁵⁷ Although Ackerman sees women, the poor, and gays and lesbians as the groups most in need of protection in American society,⁵⁸ public choice theory predicts that those who are vulnerable in the legislative process may not share those groups’ history of suffering prejudice, or their tenuous organizational base. Public choice would suggest that courts should protect all large and unorganized groups because of their vulnerability in a political process dominated by organized interests.

Judges who acted on public choice premises would embark on a searching form of judicial review that would bear some resemblance to the role that American courts played in the *Lochner* era. They would be suspicious of the legislative process and the ability of well-organized groups to use this form of judicial review to impose costs on unorganized

⁵⁴ 304 U.S. 144 at 152, note 4 (1938) [hereinafter *Carolene Products*].

⁵⁵ 198 U.S. 45 at 56-57 (1905) [hereinafter *Lochner*]. The *Lochner* Court posed the question of whether the legislation was “a fair, reasonable, and appropriate exercise of the police power of the state” and, anticipating public choice, was suspicious that the law only applied to bakers. Justice Peckham suggested “[t]here is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state[.]”

⁵⁶ “Beyond *Carolene Products*” (1985) 98 Harv. L. Rev. 713.

⁵⁷ *Ibid.* at 745.

⁵⁸ Although Ackerman appeals to public choice theory, which is best known for stressing the vulnerability of groups such as consumers, he selects for protection groups that have historically suffered prejudice and disadvantage. Interestingly, in the Canadian context, the groups he suggests that are vulnerable but not protected under *Carolene Products*, *supra* note 54, would probably be protected under the broad form of anti-majoritarian judicial review contemplated under *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 152-53. For example, women are specifically protected as an enumerated group, and the poor and homosexuals have a good chance of being recognized as analogous groups who are vulnerable in the broader social, legal, and political context. *Andrews* was, in part, inspired by *Carolene Products*, but recognized the need for its test to be adapted to the modern Canadian context and changing political and social conditions.

interests. This would require them to scrutinize all legislation that made any legal distinctions in the treatment of similarly-situated individuals. They would strike down distinctions that benefit organized interests, but are "arbitrary" and "irrational" to legitimate governmental purposes. In addition, the right of access to courts would be taken seriously, because courts as independent bodies have a key role to play in protecting individuals from a legislative process which can easily be dominated by well-organized interests.

In both Canada and the United States plaintiffs have challenged short limitation periods as infringing their rights to equal protection of the law and unfairly denying them access to the courts. Some American courts, deciding cases under their state constitutions, have accepted public choice premises as justification for invalidating short limitation periods.⁵⁹ For example, the Arizona Supreme Court in *Kenyon v. Hammer*⁶⁰ rejected arguments that a three-year ultimate limitation period for medical malpractice suits was justified by a malpractice insurance crisis and stated:

[t]he state has neither a compelling nor legitimate interest in providing economic relief to one segment of society by depriving those who have been wronged of access to, and remedy by, the judicial system. If such a hypothesis were once approved, any profession, business or industry experiencing difficulty could be made the beneficiary of special legislation designed to ameliorate its economic adversity by limiting access to the courts by those whom they have damaged. Under such a system, our constitutional guarantees would be gradually eroded, until this state became no more than a playground for the privileged and influential.⁶¹

The Court stressed the private interests of doctors in the limitation period, and dismissed the possibility that the public might benefit if the limitation period increased the availability and affordability of medical

⁵⁹ See, generally, F.E. McGovern, "The Variety, Policy and Constitutionality of Product Liability Statutes of Repose" (1981) 30 Am. U.L. Rev. 579; C.J. Trombetta, "The Unconstitutionality of Medical Malpractice Statutes of Repose: Judicial Conscience Versus Legislative Will" (1989) 34 Villanova L. Rev. 397; and J.H. Hicks, "The Constitutionality of Statutes of Repose: Federalism Reigns" (1985) 38 Vand. L. Rev. 627. For an application of public choice concepts to these questions, see H.A. Learner, "Restrictive Medical Malpractice Compensation Schemes: A Constitutional 'Quid Pro Quo' Analysis to Safeguard Individual Liberties" (1981) 18 Harv. J. on Legis. 143.

⁶⁰ 688 P.2d 961 (Ariz. 1984) [hereinafter *Kenyon*].

⁶¹ *Ibid.* at 976. See also *Farley v. Engelken*, 740 P.2d 1058 at 1064 (Kan. 1987) (strict scrutiny justified because of medical malpractice victims' "lack of group cohesiveness and political disorganization").

services. *Kenyon* is extreme in its suspicion of the legislative process⁶² and it represents a form of judicial review that shows little or no deference to the legislature.

On the other hand, an equal number of states have upheld medical malpractice statutes of repose. Following more traditional patterns of deference to legislative objectives, they have accepted a public interest in responding to rising insurance premiums. They thus reject the conclusion that such legislation is illegitimately aimed at furthering only the private interests of defendants. Moreover, they apply more deferential standards in determining if legislation rationally and effectively pursues valid governmental objectives.⁶³

In Canada, most plaintiffs that have challenged short limitation periods as infringing their rights under ss. 7 and 15 of the *Charter* have lost. Courts have held that either their constitutional rights have not been violated or that the government is justified in providing special limitations.

The Canadian case that comes closest to *Kenyon* is the decision of Smith J. of the Ontario High Court in *Streng v. Township of Winchester*.⁶⁴ In a decision later overruled by the Ontario Court of Appeal,⁶⁵ Smith J. held that a three-month limitation period under the *Municipal Act* for suits against municipalities for non-repair of roads violated s. 15 of the *Charter*. He was faced with compelling facts. The plaintiff suffered serious injuries in a car accident and was hospitalized for seven months. Upon his release, the plaintiff promptly commenced an action against the municipality. Smith J. relied on the Ontario Law Reform Commission's criticisms of short limitations as "protect[ing] the interests of some special group, such as municipal corporations, hospitals, doctors, dentists, and insurance companies"⁶⁶ and held that "the consideration of 'the kind of defendant being sued' is totally extraneous to those individuals exercising the right or claiming access to

⁶² Public choice theory has been criticized as cynical and corrosive of public spirit. See, generally, S. Kelman, "Public Choice and Public Spirit" (1987) 87 *Pub. Interest* 80; and M. Kelman, "On Democracy-Bashing: A Skeptical Look at the Theoretical and 'Empirical' Practice of the Public Choice Movement" (1988) 74 *Va. L. Rev.* 199.

⁶³ *Barwick v. Celotex Corp.*, 736 F.2d 946 (4th Cir. 1984); and *Jewson v. Mayo Clinic*, 691 F.2d 405 (8th Cir. 1982).

⁶⁴ (1986), 56 O.R. (2d) 649 (H.C.J.) [hereinafter *Streng*]. See also *Toronto Transit Commission v. Mississauga (City)* (1987), 50 M.V.R. 145 (Ont. Dist. Ct.), reaching the same results and relying on *Streng*.

⁶⁵ *Colangelo v. Mississauga (City)* (1988), 66 O.R. (2d) 29 (Ont. C.A.).

⁶⁶ *Streng*, *supra* note 64 at 654-55.

the courts.”⁶⁷ Section 15 of the *Charter* was interpreted to preclude “all irrelevant or unreasonable classifications” in limiting “the right to sue.”

In the majority of similar cases, however, the three-month limitation period for claims against a municipality for not keeping a road in repair was upheld under s. 15 of the *Charter*. Some cases were decided on the tautologous grounds that there was no discrimination because the plaintiff was “treated in the same manner as any other person who has a claim against a municipality for failure to maintain a public street in a reasonable state of repair.”⁶⁸ Other cases were decided on the grounds that the government should not be compared to individuals under s. 15 of the *Charter*.⁶⁹ This latter line of reasoning has now been affirmed by the Supreme Court of Canada in another context.⁷⁰ Canadian courts have accepted the need for governmental bodies to receive special and preferential treatment under statutes of limitations.

The leading case upholding the three-month limitation period for suits against municipalities for non-repair of roads is the Ontario Court of Appeal’s decision in *Colangelo v. Mississauga*.⁷¹ At the time, the Court of Appeal interpreted s. 15 to require the similar treatment of classes of persons that are similarly situated in relation to the purposes of the impugned law. Applying the similarly situated test, Morden J.A. concluded that those who sue a municipality with respect to accidents on the highways are not similarly situated to those who sue private owners of land. He traced the history of common law immunity of municipalities for want of repair of highways and stressed their unique

⁶⁷ *Ibid.* at 657.

⁶⁸ *Meldrum v. Saskatoon (City of)* (1985), 46 Sask. R. 239 at 240 (Q.B.). See also *Sheets v. Burlington (City of)* (1987), 14 C.P.C. (2d) 109 at 113 (Ont. Dist. Ct.), where Clarke D.C.J. found that “[e]very plaintiff who sues a municipality for personal injuries in similar circumstances is subject to the identical limitation period;” and *Teller v. Sunshine Coast (Regional District)* (1988), 27 B.C.L.R. (2d) 73 at 81 (S.C.), where Hinds J. found that “[a]ll persons who seek to sue a municipality are faced with the same statutorily imposed limitation.”

⁶⁹ *Kurolak v. Saskatchewan (Highways & Transportation)* (1986), 28 D.L.R. (4th) 273 at 275 (Sask. Q.B.); and *Mund v. Medicine Hat* (1985), 67 A.R. 11 at 13 (Q.B.). Here the court found that “[t]he word ‘individual’ in s. 15(1) does not include corporations and in particular, municipal corporations. It relates only to human beings.”

⁷⁰ *Rudolf Wolff & Co. v. Canada*, [1990] 1 S.C.R. 695 at 701, where the court found that “the Crown is simply not an individual with whom a comparison can be made to determine whether a s. 15(1) violation has occurred.” The Court also indicated that those adversely affected by the exclusive jurisdiction of the Federal Court to hear claims against the federal Crown, were not disadvantaged groups in Canadian society.

⁷¹ *Supra* note 65 [hereinafter *Colangelo*].

exposure to potential liability claims.⁷² Unlike Smith J. in *Streng*, the Court of Appeal accepted the legitimacy of special treatment of municipalities as compared to other defendants.

The Court of Appeal in *Colangelo* did, however, hold that a provision barring snow and ice claims if notice was not given within seven days violated s. 15 by discriminating against snow and ice claimants who were similarly situated to those bringing other claims against the municipality. Under the impugned provision, other claimants against a municipality could proceed with a civil suit despite failure to give notice within seven days if, the court determined that the municipality "was not prejudiced ... and that to bar the action would be an injustice[.]"⁷³ Although the Court of Appeal recognized the legitimacy of giving municipalities special treatment as compared to other land owners, it did not accept the legislative claim that snow and ice claims should be treated more harshly than other claims against the municipality arising from the care of highways.

Even the limited potential of *Charter* invalidation of short limitation or notice periods available under *Colangelo* was curtailed after the Supreme Court of Canada emphatically rejected the similarly situated test in *Andrews v. Law Society of British Columbia*.⁷⁴ In that case, the Court held that a plaintiff must not only demonstrate unequal legal treatment, but that such treatment would result in discrimination on the enumerated grounds of race, national or ethnic origin, colour, religion, sex, age, and mental and physical disability or analogous grounds. This decision restricted the ambit of s. 15 litigation, in part out of a concern that the similarly-situated test invited courts to engage in a *Lochner*-like review of all legal distinctions.⁷⁵ *Andrews* was also based on

⁷² *Colangelo, ibid.* at 38-40. See also *Rosati v. Niagara Falls (City of)* (1987), 60 O.R. (2d) 474 at 478 (Dist. Ct.).

⁷³ *Municipal Act*, R.S.O. 1980, c. 302, s. 284(6). See also *Suche v. The Queen* (1987), 37 D.L.R. (4th) 474 at 484 (F.C.T.D.), aff'd (1988), 54 D.L.R. (4th) 384 (Fed. C.A.), which struck down a similar provision under the federal *Crown Liability Act*, R.S.C. 1985, c. C-50, as violating equality before the law under the *Canadian Bill of Rights*, S.C. 1960, c. 44. McNair J. concluded that the distinction between claimants against the Crown, in general, and those injured by snow and ice was "arbitrary and capricious and so unfairly discriminatory as to violate s. 1(b) of the *Canadian Bill of Rights* ... [T]he purpose of the notice of claim provision of the Act is to give the Crown an early opportunity of investigating the circumstances under which an injury occurred and for which a claim will likely be made. That purpose can still be achieved without having to absolutely bar the proceedings in the case of snow or ice injuries."

⁷⁴ *Supra* note 58 [hereinafter *Andrews*].

⁷⁵ Before *Andrews, ibid.*, various forms of economic regulation such as the licensing of medicines and liquor sales, the regulation of the colour of margarine, fish catches, and milk production were all challenged as infringing the s. 15 equality rights of individuals and corporations.

the view that the purpose of equality rights was to protect groups disadvantaged in the larger political, social, and legal context; not every individual treated more harshly by a law.⁷⁶

In a case decided shortly after the *Andrews* decision, the Ontario Court of Appeal held that a six-month limitation period for actions done pursuant to statutory or other public duties⁷⁷ did not violate s. 15 of the *Charter*. In that case, the plaintiff brought suit eight months after a beating by other inmates in a jail, alleging that the Crown had negligently failed to provide a sufficient number of properly trained prison guards to ensure the safety of inmates. Morden J.A. stated that if the plaintiff's equality rights were violated by the short limitation period, it did not "involve discrimination, that is a distinction based upon a ground enumerated in s. 15(1) or an analogous ground."⁷⁸ Blair J.A. elaborated:

[p]laintiffs affected by s. 11(1) of the Act are a disparate and heterogenous group linked together only by the fact that they are victims of alleged wrongs committed by persons in the execution of public duty or authority. The books are full of examples including persons injured by police officers, ambulance drivers, school janitors, snow-plough operators, hydro line repair staff and employees of the Toronto Harbour Commission. ... These plaintiffs and the appellant are not linked by any personal characteristics relating to them as individuals or members of a group. It cannot be said that s. 11(1) of the Act discriminates against the appellant on grounds which are analogous to those enumerated in s. 15(1) and he is, therefore, not entitled to invoke the protection of the Charter against the special limitation periods prescribed in the Act.⁷⁹

On the pre-*Andrews* law, see, generally, G. Brodsky & S. Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back* (Ottawa: Canadian Advisory Council on Status of Women, 1989); C.L. Smith, "Judicial Interpretation of Equality Rights under the Canadian Charter of Rights and Freedoms: Some Clear and Present Dangers" (1988) 23 U.B.C.L. Rev. 65; and M.D. Lepofsky & H. Schwartz, "Case Comment" (1988) 67 Can. Bar Rev. 115.

In *Andrews*, *ibid.* at 194, La Forest J. addressed these concerns directly and stated:

I am convinced that it was never intended in enacting s. 15 that it become a tool for the wholesale subjection to judicial scrutiny of variegated legislative choices in no way infringing on values fundamental to a free and democratic society. Like my colleague, I am not prepared to accept that all legislative classifications must be supportable before the courts. Much economic and social policy-making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions.

⁷⁶ *Andrews*, *ibid.* at 151-53; and see also *Turpin v. R.*, [1989] 1 S.C.R. 1296 at 1330-35.

⁷⁷ *Public Authorities Protection Act*, R.S.O. 1980, c. 406, s. 11(1).

⁷⁸ *Mirhadizadeh v. Ontario* (1989), 69 O.R. (2d) 422 at 427 [hereinafter *Mirhadizadeh*].

⁷⁹ *Mirhadizadeh*, *ibid.* at 426-27. See also *Brochner v. MacDonald*, [1989] 6 W.W.R. 257 (Alta. C.A.). Here, the plaintiff, who was barred by a limitation period for medical negligence and malpractice, was not found to be in a group analogous to groups listed in s. 15(1) of the *Charter*. In *Agnew et al. v. Dow Chemical et al.* (1991), 116 N.B.R. (2d) 1 at 15, Stratton C.J.N.B., dissenting on other grounds, held that a two-year limitation period for fatal injuries does not violate s. 15 because it "does not differentiate between these claimants and other claimants based on a personal

Similarly, in *Filip v. Waterloo (City of)*,⁸⁰ the Ontario Court of Appeal reversed *Colangelo* and held that the absolute bar for those who do not give a municipality notice of snow and ice claims within seven days did not violate s. 15 of the *Charter* because "individuals injured as a result of snow and ice on municipal sidewalks are a disparate and heterogenous group, not a discrete and insular minority." The fact that a group disadvantaged by a law was "disparate and heterogenous" would, under public choice, indicate its vulnerability in the political process rather than a justification for not finding a s. 15 violation. In these cases, Canadian courts have implicitly rejected the justification for judicial review suggested by public choice theory.

The *Andrews* approach has been criticized for narrowing the ambit of equality rights,⁸¹ but in my view, it is true to the purposes of the provision in protecting disadvantaged or vulnerable minorities. Critics of *Andrews* would find support in public choice theory, but acceptance of this support might weaken their case. It would reveal their deep suspicion of the legislative process and their confidence that courts can, and should, scrutinize the purposes and reasonableness of all legislation which makes legal distinctions.⁸²

Even under s. 7 of the *Charter*, the courts have been deferential to legislative determinations when reviewing short limitations. British Columbia's special ultimate limitation period, requiring that malpractice actions against doctors and hospitals be brought within six years of the negligence regardless of discoverability, has been unsuccessfully

characteristic analogous to those of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

⁸⁰ (1992), 98 D.L.R. (4th) 534 at 539 (Ont. C.A.) [hereinafter *Filip*].

⁸¹ D. Gibson, "Equality for Some" (1991) 40 U.N.B.L.J. 2; and A. Bayefsky, "Case Comment" (1990) 1 Supreme Court L.R. (2d) 503. But, see W. Black & L. Smith, "Case Comment" (1989) 68 Can. Bar Rev. 591; and P.W. Hogg, "Interpreting the Charter of Rights: Generosity and Justification" (1990) 28 Osgoode Hall L.J. 817 at 836-37.

⁸² This is not to say that the *Andrews* approach immunizes all statutes of limitations from s. 15 review. A short limitation may have adverse effects on those protected on enumerated and analogous grounds, even though it would not be suspect on public choice grounds as legislation designed to help an organized interest or legislation that is arbitrary to legitimate governmental ends.

In *Speerin v. North Bay (City)* (1991), 85 D.L.R. (4th) 365 (Ont. Gen. Div.), a seven-day notice period was held to be of no force or effect, to the extent that it disadvantaged those unable to give notice by reason of physical disability, an enumerated ground. A similar claim was rejected in *Filip*, *supra* note 80 at 540, but only on the ground that the plaintiff was not disabled from giving notice. However, in *Murphy v. Welsh; Stoddard v. Watson* (1991), 81 D.L.R.(4th) 475 at 483, *rev'd* on other grounds (1993), 156 N.R. 263 (S.C.C.), the Ontario Court of Appeal formalistically concluded that a two-year limitation period for highway traffic accidents did not discriminate against those under eighteen years of age because the law was "not directed at the personal characteristics of infants but rather at circumstances or events, namely motor vehicle accidents causing injury to infants."

challenged as infringing the right to security of the person in a manner not in accordance with fundamental justice. The British Columbia Court of Appeal concluded that

time limits upon the recovery of damages are not matters which affect the dignity and worth of the human person but are matters which properly lie within the realm of general public policy, with the legislation responding to the conflicting interests of prospective litigants and balancing those matters in a manner it considers appropriate.⁸³

Faced in this case with a limitation period that has been criticized as protecting special interests and compelling facts of a plaintiff who was, quite reasonably, unable to bring an action within the time provided, the Court of Appeal nevertheless resisted the temptation to engage in a constitutional review of short limitations.

It does not appear likely that Canadian courts will invalidate short limitations on constitutional grounds. In part, they have declined to do so for reasons of institutional competence. In *Colangelo*, Morden J.A. noted that Ontario's special limitation periods had been criticized, but concluded that reform "is truly a policy-based legislative function. It could only be performed sporadically and crudely by constitutional adjudication."⁸⁴ Moreover, Canadian courts have committed themselves since *Andrews* to an anti-majoritarian form of judicial review that focuses on the protection of groups which are vulnerable to prejudice and discrimination, and not all the diffuse and unorganized groups that public choice suggests are vulnerable in the legislative process. If anything, public choice would suggest that some of the groups protected under s. 15 would, because of their discreteness and organizational base, be advantaged in the legislative process.

B. *Statutory Interpretation*

Constitutional interpretation is, of course, the most drastic form of judicial intervention. Although a court may not be prepared to strike down a special limitation period on constitutional grounds, thus precluding the legislature from enacting such a limitation, it may more easily allow its attitudes towards the legislation influence its interpretation of the statute. Statutory interpretation would only assign to one of the parties the benefit of legislative inertia. The losing party

⁸³ *Wittman v. Emmott* (1991), 77 D.L.R. (4th) 77 at 92 [hereinafter *Wittman*]. See also *Filip*, *supra* note 80 at 537-38.

⁸⁴ *Colangelo*, *supra* note 65 at 41. See also *Filip*, *ibid.* at 540.

could always, in theory at least, obtain statutory amendments to displace the court's ruling.

Because they attempt to impose harsher limitation periods on a subset of disputes, short limitations produce many interpretative opportunities. Defendants argue for a wide imposition of short limitation periods and often appeal to the principle of generous interpretation of statutes in order to fulfil their purposes. Plaintiffs seek to narrow the ambit of short limitation periods and often ask courts to construe short limitation periods strictly and to read them subject to discoverability principles which are not derived from the statute itself. Through the lens of public choice theory, the courts must choose whether to protect plaintiffs who are diffuse and unorganized and thus disadvantaged in the legislative process, or to assist defendants who are well organized and already have obtained a short limitation.

Commentators have used the insights of public choice theory to advocate a somewhat surprising variety of approaches to statutory interpretation.⁸⁵ Some, such as Judges Easterbrook and Scalia, have taken public choice insights to justify a textual form of statutory interpretation on the grounds that the judiciary should enforce only what was clearly enacted.⁸⁶ Interest groups should get what they clearly bargained for and no more. Judges should not pay much attention to legislative history or professed legislative purposes because statutes are bargains, not coherent instruments of public policy. Such an approach is also consistent with applying a doctrine of strict construction to laws so that whenever a judge perceives an ambiguity in the text, he or she can read it down to derogate as little as possible from the common law or other baseline rights. In the limitations context, short limitations would be strictly construed because they derogate from the rights plaintiffs would have under ordinary statutes of limitations.

Other commentators have used public choice to advocate a more activist and creative form of statutory interpretation. They argue that judges should not aim to enforce legislative deals but, rather, to interpret legislation to advance public goods⁸⁷ that may have been discounted in

⁸⁵ J.L. Mashaw, "The Economics of Politics and the Understanding of Public Law" (1989) 65 *Chi-Kent L. Rev.* 123.

⁸⁶ Landes & Posner, *supra* note 32; F.H. Easterbrook, "Statutes Domain" (1983) 50 *U. Chi. L. Rev.* 532; and F.H. Easterbrook, "Foreword: The Court and the Economic System" (1984) 98 *Harv. L. Rev.* 4 at 49-51. See generally, W.N. Eskridge, Jr., "The New Textualism" (1990) 37 *U.C.L.A. Law R.* 621; Farber & Frickey, *supra* note 2.

⁸⁷ J.R. Macey, "Promoting Public Regarding Legislation through Statutory Interpretation: An Interest Group Model" (1986) 86 *Colum. L. Rev.* 223. If the legislation is truly designed to benefit interest groups, it may not have a genuine public purpose and one will have to be imputed. See J.M.

the legislative process. Thus, courts would interpret statutes so as to protect diffuse interests that may not have been well represented in the legislative process.⁸⁸ In the limitations context, courts could interpret statutes of limitations subject to discoverability principles in order to protect plaintiffs suffering from latent injuries who, as a diffuse and unorganized group, are not likely to be protected in the legislative process.

Both of these approaches to statutory interpretation have their problems. The textual approach stands in tension with modern techniques of statutory interpretation designed to give statutes a remedial or purposive interpretation.⁸⁹ A literal approach that looks only to the text of a statute "risks normative chaos by not requiring that state actions be based on reasons"⁹⁰ or statutory purposes. On the other hand, an activist approach to statutory interpretation runs the risk of discounting both legislative language and purposes, and authorizing judicial activism of a "swashbuckling variety."⁹¹ Courts have been attracted to both the textual and activist approaches to statutory interpretation when interpreting short limitation periods. The Supreme Court of Canada has, on the one hand, authorized courts to read short limitation periods strictly and, on the other, has more actively imposed pro-plaintiff discoverability principles. The techniques of statutory interpretation have differed, but the results have been the same: limitation periods have been interpreted in a manner favourable to plaintiffs and adverse to defendants who have already secured short limitation periods.

In *Berardinelli v. Ontario Housing Corporation*,⁹² the Supreme Court decided that a short six-month limitation in s. 11 of the *Public Authorities Protection Act* that applies to acts done in the execution of "any statutory or other public duty or authority" did not apply to the failure of a public housing corporation to keep its common areas cleared of ice. In the result, the plaintiff was entitled to the benefit of the

Beermann, "Interest Group Politics and Judicial Behavior: Macey's Public Choice" (1991) 67 *Notre Dame L. Rev.* 183.

⁸⁸ W.N. Eskridge, "Dynamic Statutory Interpretation" (1987) 135 *U. Pa. L. Rev.* 1479; and Farber & Frickey, *supra* note 2 at 141-43.

⁸⁹ See, for example, *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12, which provides that "[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

⁹⁰ J.A. Ferejohn & B.R. Weingast, "Limitation of Statutes: Strategic Statutory Interpretation" (1992) 80 *Geo. L. J.* 565 at 572.

⁹¹ Mashaw, *supra* note 85 at 153.

⁹² *Supra* note 5 [hereinafter *Berardinelli*].

regular six-year limitation period for negligence actions under Ontario law. Estey J. applied a doctrine of strict construction to short limitation periods, stating:

[s]ection 11, being a restrictive provision wherein the rights of action of the citizen are necessarily circumscribed by its terms, 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.⁹³

Estey J. expressed a reluctance to “create different conditions of owner liability for ... similar housing facilities” or to “reduce the right of recovery of members of the public who suffer loss or injury.”⁹⁴ Such an interpretative approach resembles the *Streng* case, discussed above, in its antagonism to special distinctions and its desire to preserve the normal rights that citizens enjoy to bring civil claims. This approach is also consistent with public choice premises in its distrust of legislation that protects special interests and its insistence that where possible, the rights of diffuse members of the public be preserved by judicial action. Taken to its extreme, a doctrine of strict construction would discount legislative purposes and stress the preservation of pre-existing rights except where judges believed words clearly derogate from them.

As discussed above, the textual approach to statutory interpretation stands in tension to modern purposive approaches. It is not surprising then that *Berardinelli* was ambiguous about its reliance on strict construction. Estey J. also attempted to justify the result by interpreting the short limitation period in a purposive manner. He reasoned that the short limitation period was designed to protect public authorities and thus should only limit their exposure to liability for their public functions. The snow clearing function of the public housing corporation did not have a “direct public purpose,” but rather was an activity of “an internal or operational nature having a predominantly private aspect.”⁹⁵ This form of analysis is more congruent with those theorists who have not abandoned purposive interpretation, but have insisted that public choice justifies the court in pushing legislation in the

⁹³ *Ibid.* at 280.

⁹⁴ *Ibid.* at 284. Similarly, in *Stoddard*, *supra* note 39 at 1080-81, the Supreme Court of Canada interpreted a short two-year limitation period for motor vehicle accidents in the *Highway Traffic Act*, R.S.O. 1980, c. 198, s. 180(1) as subject to general legislation that delays time from running until a plaintiff reaches the age of eighteen. See *Limitation Act*, R.S.O. 1980, c. 240, s. 47. Major J. stated that “[t]he s. 180(1) limitation period truncates liability” and concluded that “whatever interest a defendant may have in the universal application of the two-year motor vehicle limitation period must be balanced against the concerns of fairness to the plaintiff under legal disability.”

⁹⁵ *Berardinelli*, *supra* note 5 at 286 and 284.

direction of a public purpose that may have been discounted in the legislative process.

Attempts at purposive construction rather than reliance on strict construction have dominated subsequent cases interpreting the six-month limitation in the *Public Authorities Protection Act*. This has led to a significant number of cases in which courts have attempted, without success or consistency,⁹⁶ to decide whether particular governmental activities have a predominantly public or private character. It is not difficult to imagine that the jurisprudence would be clearer if the courts had eschewed attempts to give the short limitation a legitimate purpose and had simply interpreted it strictly, giving plaintiffs the benefit of any reasonable ambiguity. The short limitation would not have been invalidated, as was urged in *Mirhadizadeh*, but the courts would require a clear statement that claims were covered by it. In cases of ambiguity, they would assign the benefit of legislative inertia to plaintiffs who might not be as well represented in the legislative process as the defendant public authorities.

In contrast to their equivocal endorsement of strict construction, the Supreme Court has successfully encouraged courts to interpret statutes of limitations subject to discoverability principles. Starting with *Kamloops v. Neilson*,⁹⁷ the Court has interpreted limitation periods as subject to when a reasonable person would have discovered the cause of action. In explaining her decision in *Kamloops*, Justice Wilson has commented on the ambiguity of much statutory language and the policy space that this presents to judges:

[i]n my view, the bare bones phrase, "when the cause of action accrues" discloses little about whether the relevant factor in accrual is the negligent act itself, the damage, or the discoverability of the tortious injury. The choice among the possibilities cannot be made in a policy vacuum that does not take account of the various contemporary contexts in which limitation periods must operate.⁹⁸

⁹⁶ For example, the *Act* has been held to cover claims where the plaintiff fell on a school's steps, but not for a fall on ice in a school yard. Compare *Danis v. Roman Catholic Separate School Board of Nipissing* (1985), 49 O.R. (2d) 786, aff'd 61 O.R. (2d) 319 (C.A.) with *Urzi v. Board of Education of North York* (1980), 30 O.R. (2d) 300 (H.C.J.). Likewise, the *Act* has been held to cover an action against a school board for constructive dismissal, but not an action for wrongful dismissal against Ontario Hydro. Compare *Re Gallant & Roman Catholic Separate School Board of Sudbury* (1985), 56 O.R. (2d) 160 (C.A.) with *Hanna v. Ontario Hydro* (1982), 18 B.L.R. 93 (Ont. H.C.). See generally, A. Herschorn, "Limitation Periods in Ontario" (1988) 9 *Advocates' Q.* 287 at 299-300; Mew, *supra* note 11 at 234-37.

⁹⁷ *Supra* note 4 [hereinafter *Kamloops*].

⁹⁸ B. Wilson, "Law and Policy in a Court of Last Resort" in F.E. McArdle, ed., *The Cambridge Lectures: 1989* (Montreal: Yvon Blais, 1990) at 232.

Justice Wilson has suggested that the Court's decision was one of policy to prevent injustice to plaintiffs and was not dictated by statutory language or purposes.

Kamloops fits within an activist approach to statutory interpretation because the court chose to impose pro-plaintiff values that were not found in either the text or purpose of the statute of limitations. The Supreme Court has in fact been criticized for usurping the legislative role in reforming limitation periods.⁹⁹ Presumably critics of *Kamloops* would require the Court to wait for legislative reform of limitations. I think that *Kamloops* was a justified form of judicial activism for two reasons. First, the Court wanted to avoid "the injustice of a rule which statute-bars a claim before a plaintiff was even aware of its existence."¹⁰⁰ This was considered more important than the defendant's interest in repose, certainty, and having claims based on fresh evidence. Second, the Court's activism favoured the interests of a diffuse and unorganized group—plaintiffs who suffer latent injuries—over those of defendants. Remember that the defendant municipality in *Kamloops* had already obtained a benefit from the legislature, namely a one-year limitation under the *Municipal Act*.¹⁰¹ In imposing discoverability principles, the Court assigned the burden of overcoming legislative inertia on the defendant municipality which, in this case, had already obtained a short limitation and could presumably lobby the legislature for an ultimate limitation period that would apply regardless of discoverability.

Although *Berardinelli* and *Kamloops* employ different approaches to statutory interpretation, in both cases the Court interpreted the limitation to preserve the plaintiff's right to sue. In both cases, the Court stressed that it interpreted the limitation in order to treat the plaintiff fairly. This is the most compelling justification for their decisions. Nevertheless, the Court could also have supported its decision on the basis that the plaintiffs in these particular cases were likely to be vulnerable in the legislative process, especially when compared to the defendant public bodies who had already secured a short limitation.

Judicial application of discoverability principles or strict construction of short limitation periods have mitigated some of the

⁹⁹ J. Blom, "Case Comment" (1987) 21 U.B.C.L. Rev. 429 at 445-47.

¹⁰⁰ *Kamloops*, *supra* note 4 at 40.

¹⁰¹ R.S.B.C. 1960, c. 255, s. 738(2), albeit an advantage that was repealed in the 1975 reforms and replaced with a standard two-year period. *Limitations Act*, S.B.C. 1975, c. 37, s. 3.

effects of short limitation periods, but such techniques have limits. For example, the doctrine of strict construction only applies to what a judge perceives to be reasonable ambiguities in statutory language. In *Suche v. The Queen*,¹⁰² a plaintiff attempted to avoid a seven-day notice provision for injuries "caused by snow and ice" by arguing that her injury, a slip and fall on airport property in Calgary in January, was not caused by snow or ice, but rather a combination of ice and water! Although willing to read the short notice provision strictly and give the plaintiff the benefit of a reasonable doubt,¹⁰³ McNair J. quite reasonably dismissed the absurdly literal interpretation proposed by the plaintiff as "a play on words."¹⁰⁴ Strict construction can be useful in resolving cases of reasonable ambiguities, but courts will not use it to ignore what they perceive to be clear statutory words or purposes.

Likewise, courts have been unwilling to apply discoverability principles in the face of clear legislative words and purposes to the contrary. In one case, a plaintiff urged the courts to apply discoverability principles to s. 8(1) of British Columbia's *Limitation Act* which states that no medical malpractice action shall be brought "after the expiration of six years from the date on which the right to do so arose."¹⁰⁵ The Court of Appeal rejected the plaintiff's argument "that the discoverability rule applies to every limitation period, as a matter of policy, regardless of the language of the particular statute involved"¹⁰⁶ and held that the six-year ultimate limitation period had expired even though the injury was not discoverable for the first four years after the negligence occurred. The Court of Appeal held that interpreting the words "right to bring an action" subject to discoverability principles would give them "a meaning alien to that by which they have been traditionally understood"¹⁰⁷ and, more importantly, would subvert what was in their view

¹⁰² *Supra* note 73.

¹⁰³ McNair J. stated: "[i]f there were another construction that would lead to a more reasonable result from the standpoint of the plaintiff and avoid the perpetuation of what is said to be a manifest injustice then I would unhesitatingly choose to follow it. However, I see no alternative avenue of construction that would enable me to accomplish that end." *Ibid.* at 480-81.

¹⁰⁴ *Ibid.* at 479.

¹⁰⁵ *Limitation Act*, *supra* note 14.

¹⁰⁶ *Wittman*, *supra* note 83 at 83.

¹⁰⁷ *Ibid.* at 85-86. The Ontario Court of Appeal reached a similar result in interpreting a two-year limitation period, running from the date of treatment in s. 28 of the *Public Hospitals Act*, R.S.O. 1980, c. 410 in *Von Cramm v. Riverside Hospital of Ottawa* (1986), 56 O.R. (2d) 700 at 703, stating that "[t]he wording is precise and there is no valid ground for avoiding it."

a considered response to what the legislature considered to be the excessive exposure of the profession to delayed medical malpractice actions. ... Accordingly, I do not consider it appropriate to apply a "general rule" of interpretation which is so apparently in conflict with the language of the statute and with the specifically expressed intention of the legislature to balance the interests of claimants and the medical profession.¹⁰⁸

The Court went on to state:

[i]t 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.¹⁰⁹

Although courts can interpret short limitations strictly and subject to discoverability principles, they are not likely to ignore unambiguous wording and legislative purposes. In the next section, I will suggest that this balance is the appropriate one because public choice does not have the normative content necessary to justify the nullification of legislation.

Those influenced by public choice may look to the courts as the antidote to the dominance of organized interests in the legislative process, but Canadian courts are not likely to fill this role. Courts may read down short limitation periods within the limits set by reasonable ambiguities but, even after *Berardinelli*, this technique has not won wide acceptance among a judiciary more inclined to interpret statutes in a purposive manner. Since *Kamloops*, the courts have accepted as a matter of policy that limitation periods should be interpreted to allow plaintiffs a reasonable opportunity to discover they have a cause of action. Nevertheless, this policy disposition operates at a sub-constitutional level and courts will defer to clear legislative purposes and language which set the limitation running from a specific time. At the constitutional level, courts have not undertaken the searching review of the purposes and rationality of legislation that public choice invites because of a desire to defer to the legislative process and concerns about their own competence. Moreover, they have committed themselves to an anti-majoritarian form of judicial review which does not protect the unorganized groups that public choice predicts will be vulnerable in the legislative process.

¹⁰⁸ *Wittman*, *supra* note 83 at 85-86.

¹⁰⁹ *Ibid.* at 86, quoting *Esson J.A. in Bera v. Marr* (1986), 27 D.L.R. (4th) 161 at 187.

V. LEGISLATIVE REFORM OF SHORT LIMITATION PERIODS

If courts are not likely to engage in wholesale reform of short limitation periods, what about the legislature itself? Taken on its own terms, public choice would be very pessimistic about the reform of short limitations. Most potential plaintiffs who are harmed by short limitations will have difficulty organizing to lobby for legislative reform. The chance that someone will be harmed by a short limitation is too remote to justify bearing the costs of lobbying for reform. Even if the interests of plaintiffs could be represented by an organized group such as personal injury lawyers, or insurers, well-organized defendant groups such as the medical profession would be in a good position to block legislative reform. In any event, governments would not be eager to engage in reform of limitation statutes because such an activity does not deliver a visible and concentrated benefit to any one group of voters.¹¹⁰

Such a pessimistic account of the legislative process cannot explain significant examples of reform of short limitations. In England, many special limitations were repealed as part of comprehensive reform providing a general three-year limitation period for negligence actions¹¹¹ and when the courts refused to impose discoverability principles, Parliament introduced legislation allowing plaintiffs to recover for latent damages.¹¹² British Columbia eliminated most of its short limitations in 1975; and Bill 99¹¹³ in Ontario proposes to repeal thirty-two special limitation periods, including the one-year limitation for medical malpractice suits, the three-month limitation for road claims against municipalities, and the six-month limitation under the *Public Authorities Protection Act*. Both the British Columbia and Ontario reforms were inspired by the work of law reform commissions and carried out by the Attorney General through the legislative process. Law reform commissions have the potential to speak for interests that may not be well represented in the legislative process. Through publicity and criticism, they can raise the costs to interest groups and governments of

¹¹⁰ The author of a legal text on limitations has explained the lack of reform in the following terms: "[l]egislative overhaul of limitation statutes is not a big votespinner and special interest groups who stand to lose in such an overhaul argue against law reform. As a result, legislative review, normal in other areas, seldom occurs in respect of limitation statutes." Morton, *supra* note 11 at 3.

¹¹¹ *Law Reform (Limitation of Actions) Act, 1954* (U.K.), 2 & 3 Eliz. 2, c. 36, s. 1.

¹¹² *Latent Damage Act 1986* (U.K.), 1986, c. 75.

¹¹³ Bill 99, *An Act to Revise the Limitations Act* 1st reading, 3d Session, 35th Leg., Ontario, (November 25 1992), cl. 25 [hereinafter Bill 99].

retaining short limitation periods while reducing information costs for dispersed plaintiff groups and their lawyers. Likewise, the power that an Attorney General has to develop and implement reforms in the Canadian parliamentary system can be contrasted with the reliance on legislative committees in the American system. Before Canadians consider importing public choice, they should consider whether institutional differences between the Canadian and American political systems make the Canadian system less susceptible to capture by organized interests and more able to advance the public interest.

In addition to comprehensive reform, there has been important piecemeal reform of short limitations. Manitoba and Alberta repealed some short limitations in the mid-1960s.¹¹⁴ In the mid-1970s, the Ontario legislature amended the limitation period governing health professionals so that it no longer ran from the time services were terminated, but was extended until a plaintiff reasonably could have discovered the facts that justify an action.¹¹⁵ In both Ontario and British Columbia, the legislature imposed discoverability principles before the courts, despite the fact that public choice would predict that plaintiffs suffering latent injuries would not have much power in the legislative process. Of course, it is possible to explain Ontario's acceptance of discoverability principles in the medical malpractice context as a deal that allowed health professionals to retain a short one-year limitation while other negligence actions were governed by Ontario's traditional six-year period. Such an explanation ignores the resistance of the medical profession to the amendment which increased their exposure to liability for latent injuries.¹¹⁶ Moreover, it reduces public choice's explanation of reform to a non-falsifiable tautology, based on an assumption that any reform simply illustrates a calculation by the relevant interest group of where its interest really lies.

Despite these examples of successful reform, some recent developments suggest that limitation reforms remain vulnerable to interest group lobbying. Following the recommendations of their law reform commission, British Columbia abolished many short limitations

¹¹⁴ *Limitations of Actions Amendment Act*, S.M. 1967, c. 32, s. 5. *Limitations of Actions Amendment Act*, S.A. 1966, c. 49, s. 4. In 1975, Ontario amended a one-year limitation for damages by motor vehicles to two years. *Highway Traffic Amendment Act, 1975 (No.2)*, S.O. 1975, c. 37, s. 1. In 1983, *Newfoundland's Dental Act*, S.N. 1983, c. 26, s. 32, was amended to change the limitation for malpractice claims from one to two years. In 1990, P.E.I.'s *Engineering Profession Act*, S.P.E.I. 1990, c. 12, s. 24, was amended to change the limitation from one year to two years.

¹¹⁵ *Health Discipline Act*, S.O. 1974, c. 47, s. 17.

¹¹⁶ Prichard, Appendix A, *supra* note 48 at 193.

in 1975 including the one-year limitation on medical malpractice suits. Both the law reform commission and the 1975 bill prepared by the Attorney General proposed a thirty-year ultimate limitation period to recognize the value of repose. After first reading, however, a special ten-year ultimate limitation period for malpractice claims against doctors and hospitals was proposed as an amendment and accepted. To confirm any doubt about the ability of doctors to obtain special benefits from the legislature, two years later the legislature lowered the special short ten-year ultimate limitation on malpractice claims to six years.¹¹⁷ The Law Reform Commission of British Columbia has recently recommended the repeal of this short six-year ultimate limitation period, concluding that limitations "related to the occupation of the defendant are invidious."¹¹⁸

Ontario's Bill 99 also contains some special ultimate limitation periods which can be criticized from a public choice perspective. A ten-year ultimate period is contemplated for proceedings against health facilities, health practitioners, and contractual improvements to real property.¹¹⁹ A public choice theorist would conclude that these provisions are the result of the lobbying power of organized groups such as doctors, hospitals, and the home improvement industry, all of whom were, in fact, represented in the consultation group that approved Ontario's proposals.¹²⁰ Having found special interests present at their creation, it would be a short step to denounce these provisions as special interest legislation which unfairly redistributes wealth from dispersed groups of plaintiffs (patients and homeowners) to well-organized and well-connected groups of defendants.

Such conclusions may be attractive in this age of cynicism about politics, but they may not be warranted. Even if Ontario's current one-year malpractice limitation and its proposed ten-year ultimate malpractice limitation were both the product of an organized medical

¹¹⁷ *Miscellaneous Statutes Amendment Act, 1977*, S.B.C. 1977, c. 76, s. 19.

¹¹⁸ But they did recommend that all claims be governed by a ten-year ultimate limitation period, B.C. *Report*, *supra* note 51 at 49. The Prichard Committee has also recommended that malpractice claims be governed by a ten-year ultimate limitation period which runs from the date services are rendered. Prichard, *supra* note 46.

¹¹⁹ Bill 99, *supra* note 113, cls. 15(3), (4), and (6). Clause 15(5), however, states that the ten-year ultimate limitation periods for doctors and hospitals "do not apply if the claim is based on the leaving of a foreign object having no therapeutic or diagnostic purpose in the body of the person with the claim."

¹²⁰ Ontario Ministry of the Attorney General, *Recommendations for a New Limitations Act. Report of the Limitations Act Consultation Group* (Toronto: Ministry of the Attorney General, March 1991).

lobby, there are important differences between the effects of these two pieces of legislation. The one-year period may overshoot any legitimate purpose of limitation periods and preclude a significant portion of claims, while the ten-year period may preclude far fewer claims and be justified by the repose function of limitation periods. Public choice analysis is insufficiently qualitative to evaluate law reform. Moreover, it does not allow for the possibility that some special interest legislation may serve the public interest. The ten-year ultimate malpractice limitation has been supported by two independent bodies, the Law Reform Commission of British Columbia and the Prichard Interprovincial Committee on Health Care, which both expressed concerns about the costs of record keeping and insurance being passed on to patients.¹²¹ One could argue that these bodies were captured by the medical groups they consulted, or more charitably, made prudent judgment of political feasibility given the lobbying strength of doctors. Nevertheless, in an age of rising health care costs and diminishing taxation revenues, their recommendations cannot be dismissed out of hand as special interest pleading. My point is simply that public choice analysis does not prove that what it identifies as special interest legislation is necessarily harmful to the public.

To determine whether a particular limitation was harmful to the public requires an empirical assessment of the relative costs of shorter and longer limitation periods and, most importantly, an explicit normative framework for placing values on the costs imposed on defendants, plaintiffs, and the public. Public choice invites the assessment of these relative costs but, as has been suggested, this task becomes extremely difficult if non-material values and the possibility of error is considered. Public choice does not, however, provide any normative framework for assigning values to these costs.¹²² Without the necessary data and explicit normative framework, one cannot conclude that what public choice analysis identifies as special interest legislation is harmful or beneficial to the public. The failure of public choice to justify normative conclusions can be illustrated by two examples where it is arguable that special limitation periods serve the public interest.

¹²¹ B.C. Report, *supra* note 51; Prichard, *supra* note 46 at 21.

¹²² It might be thought that public choice invites a utilitarian cost-benefit analysis, but such a calculus is highly controversial and ignores questions of distribution. Other normative frameworks, such as Pareto efficiency or corrective justice, would attach more weight to the costs borne by plaintiffs who have their claims precluded by limitation periods. See generally, M.J. Trebilcock, "Economic Analysis of Law" in R.F. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) at 103.

Most provinces have special short limitations governing defamation claims against newspapers and other media. They usually provide a short notice period of up to two weeks and require that actions be commenced between three to six months after publication.¹²³ Public choice would stress that these provisions demonstrate the lobbying power of Canada's concentrated media industry. On the other hand, it can plausibly be argued that they also serve the public interest. By forcing plaintiffs to bring suits early, these short limitations may limit attempts to influence press activities with threats of civil actions. This may help promote freedom of the press and mitigate the effects of libel chill. Again, an ultimate determination of whether these special limitations are justified would require an empirical examination of the frequency, nature, and effects of defamation actions and, most importantly, a normative framework to weigh and balance the costs to plaintiffs, defendants, and the public. Public choice provides no such framework.

My point is not that short limitation periods to protect doctors and the media are necessarily justified, but that public choice can only analyze the genesis of legislation. At best, it provides grounds to be suspicious of legislation that protects well-organized groups. Public choice must be supplemented by some form of overt normative analysis. As E.R. Elhauge has concluded, public choice analysis by itself "cannot generate any normative conclusions about whether the group's influence was disproportionate to the influence it should have had" and "unless the underlying normative issues are recognized, interest group theory threatens to obscure rather than illuminate the debate."¹²⁴

A final example that illustrates the limitations and dangers of public choice are provisions enacted in British Columbia, P.E.I., and Saskatchewan, and contained in Ontario's Bill 99 that would eliminate limitation periods for civil claims based on childhood sexual abuse.¹²⁵ These proposals could be seen as special interest legislation which reflects the lobbying strength of advocacy groups for women and the disabled, two groups of potential plaintiffs disadvantaged by the present state of limitations law. Having related these provisions to the lobbying

¹²³ See, for example, the legislation cited *supra* note 16.

¹²⁴ "Does Interest Group Theory Justify More Intrusive Judicial Review?" (1991) 101 *Yale L. J.* 31 at 51-52. See also Farber & Frickey, *supra* note 2 at 9.

¹²⁵ *Limitation Amendment Act*, S.B.C. 1992, c. 44; *An Act to Amend the Statute of Limitations*, S.P.E.I. 1992, c. 63, s. 1; *Limitation of Actions Amendment Act*, 1993, S.S. 1993, c. 9, s. 2; Bill 99, *supra* note 113, cl. 16(h).

efforts of these groups, these provisions could then be branded as "special interest" legislation.

Such an approach has several problems. Accepting public choice premises for the sake of argument, it is not clear if women and the disabled are among those who, because of pre-existing organizational structures will have an advantage in the legislative process, or if they are dispersed groups who are vulnerable in the legislative process.

Proponents of the former proposition would stress that these groups are already organized in advocacy groups, some of which receive public funding, and that they have been able in the past to secure legislation for their benefit. Proponents of the latter proposition would stress the diffuse nature of these groups and the barriers they face to political participation. Bruce Ackerman has identified women as a group who are vulnerable in the political process because they are dispersed¹²⁶ and some judges have undertaken the task of interpreting limitations to allow claims from survivors of sexual abuse on the assumption that survivors "are not organized as a political force and ... cannot produce legislative solutions to their problems."¹²⁷ Nevertheless, it is not clear on a public choice analysis whether women and the disabled would be identified as groups capable of exerting a disproportionate lobbying interest or whether they are diffuse and unorganized and hence, vulnerable in the legislative process. As Jerry Mashaw has said about public choice, "'positive theory' at this level of generality is indistinguishable from ideology."¹²⁸

Even if the proposed sexual abuse provisions were related to the lobbying strength of organized groups, this hardly answers the question of whether they are justified.¹²⁹ Such a conclusion would require an explicit normative framework to judge the value of allowing civil claims of childhood sexual abuse against the values served by limitation

¹²⁶ *Supra* note 56.

¹²⁷ *Tyson v. Tyson*, 727 P.2d 226 at 237 (Wash. 1986) per Utter J. in dissent. In Canada, the Supreme Court has held that there is a presumption that a plaintiff should not have discovered childhood incest until she receives therapy (*M.(K.)*, *supra* note 4).

¹²⁸ *Supra* note 85 at 155.

¹²⁹ See, for example, D.A. Farber & P.P. Frickey, "Is *Carolene Products* Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation" (1991) 79 *Calif. L. Rev.* 685. Even if civil rights legislation reflects lobbying strength of concentrated and organized minority groups, it may be justified to overcome non-rational behaviour of the majority, such as prejudice.

periods.¹³⁰ Such normative analysis would consider many factors, such as the effects of sexual abuse on its victims and the history of ignoring this problem, that are simply not relevant under a public choice analysis.¹³¹ My concern is that public choice analysis could be given a normative weight that it has not earned. By its focus on the lobbying efforts of organized groups, public choice could be used to discredit the gains of all such groups, even if there are good reasons why the legislature should promote their interests.

By declaring legislation to be the product of special interests, public choice begs the normative question of whether that interest should be valued. Given both its indeterminacy and its lack of explicit normative analysis, public choice allows commentators to criticize "special interest" legislation without explaining why they are opposed to such legislation. A judiciary that employed public choice analysis could invalidate or read down legislation it thought was the product of organized interests without justifying the use of judicial power.¹³² Public choice used in this conclusory fashion is, in my view, misleading and dangerous because of its false claims to scientific precision and normative neutrality.

VI. CONCLUSIONS

In the context of short limitation periods, public choice has only limited utility in predicting the behaviour of interest groups and legislatures. Its analysis is plagued by a large degree of indeterminacy, especially if the non-material benefits of legislation and the possibility that interest groups will not act rationally are considered. When its calculus is restricted to material incentives, its ability to explain the empirical record is relatively modest. To be sure, some organized

¹³⁰ See, for example, *M.(K)*, *supra* note 4. For a persuasive argument that legislative reform abolishing statute of limitations is still needed after the Supreme Court's decision in *M.(K)*, see J. Mosher, "Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest" (1994) 44 U.T.L.J. (forthcoming).

¹³¹ On the inability of law and economics to comprehend the problems of gender inequality, see W.A. Weigers, "Economic Analysis of Law and 'Private Ordering': A Feminist Critique" (1992) 42 U.T.L.J. 170.

¹³² See, for example, Justice Scalia's public choice-inspired argument that white males not promoted under affirmative action programmes are "predominantly unknown, unaffluent, unorganized" and "politically impotent" (*Johnson v. Transport Agency*, 107 U.S. 1442 at 1475 (1987)). His argument makes the controversial empirical assumption that people who benefit from such programmes are politically powerful, ignores their historical treatment, and begs the normative question of whether such programmes are justified.

groups have been able to obtain short limitations at the expense of diffuse groups of plaintiffs, but the legislative process has by no means always disregarded the interests of diffuse groups of plaintiffs, or always advanced the interests of concentrated groups of defendants. Reform of short limitations is possible and law reform commissions and Attorneys' General departments can play an important role by representing diffuse and unorganized interests.

Canadian courts are not likely to correct the deficiencies that public choice has claimed to exist in the legislative process by exercising their powers of constitutional review. Some American courts have been attracted to constitutional invalidation of short limitation periods on the grounds that they unfairly benefit organized groups of defendants, but this sort of judicial review quickly requires courts to approach all legislative distinctions with the hostility that characterized the *Lochner* era. In their landmark *Andrews* decision, the Supreme Court of Canada has implicitly rejected using constitutional adjudication to protect the diffuse and unorganized groups that public choice suggests will be vulnerable in the legislative process. In my view, public choice has rightly been rejected as a justification for constitutional review. It would require the courts to assess the purposes and reasonableness of all legal distinctions and it would deny that the ultimate purpose of judicial review, and equality rights in particular, is to protect disadvantaged minorities, not diffuse groups who may be harmed by an isolated piece of legislation. Public choice can facilitate a counterattack on legislation designed to ameliorate the conditions of the disadvantaged. It does so, not by engaging the merits of such measures, but by simply denouncing them as special interest legislation.

On the other hand, I am less certain that public choice should be rejected as a guide to statutory interpretation. In interpreting limitations, Canadian courts have sided with plaintiffs by endorsing the strict construction of short limitations and imposing discoverability principles. The judiciary is in a good position to address some of the obstacles that unorganized and diffuse groups of plaintiffs face in the legislative process. Where there are reasonable ambiguities in short limitations, courts should generally favour plaintiffs and assign the burden of legislative inertia to well-organized defendant groups who have already obtained short limitations. Even then, shortcomings in public choice analysis suggest that courts should have an independent normative reason, such as treating the plaintiff fairly, to justify their

statutory interpretation. Should the legislature clearly state that a claim is covered by a special limitation or displace discoverability principles, public choice cannot justify the court overriding such a pronouncement, because it does not prove that special interest legislation is necessarily bad.