The *Limitations Act, 2002* is a 'catch-all' statute

Since the *Limitations Act, 2002* came into force on January 1, 2004, it has given rise to a torrent of court decisions. Everyone understands that the *Limitations Act, 2002* radically reformed Ontario's limitation law. But one must be mindful of one crucial distinction between the *Limitations Act*, R.S.O. 1990, c. L.15 and the *Limitations Act, 2002*. The "old" Act was NOT a "catch-all" statute. Either a cause of action fell within an express provision of that Act, in which case it was governed by the Act, or it did not, in which case the Act did not apply. On the other hand, the *Limitations Act, 2002* applies to all claims, unless they are expressly exempted from its application.

This distinction is illustrated by T*oronto Standard Condominium 1703 v. 1 King West Inc.,* 2010 ONSC 2129 (Div. Ct.), dismissing the plaintiff's appeal from 2009 CanLII 55330. The events giving rise to this claim occurred after January 1, 2004.

The court had to consider whether an action to set aside two mortgages as fraudulent conveyances fell within ss. 1 and 4 of the *Limitations Act, 2002*. The plaintiff argued that it did not. The court found that it did.

The Divisional Court distinguished *Perry, Farley & Onyschuk v. Outerbridge Management Ltd. et al.* (2001), 54 O.R. (3d) 131, on which the plaintiff relied. *Perry* was decided under the "old" limitations regime. In *Perry*, the Court of Appeal held that an action based on s. 2 of the *Fraudulent Conveyances Act* was not governed by the "old" *Limitations Act*, because it was neither an action on a simple contract, nor an action on the case. Since no provision of the "old" Act was applicable to a fraudulent conveyance action, no limitation period applied to the action brought in *Perry*.

A claim based on s. 2 of the *Fraudulent Conveyances Act* is, however, a "claim" within the meaning of s. 1 of the *Limitations Act, 2002*, and is governed by the two-year limitation period set out in s. 4.

The distinction between the *Limitations Act, 2002*, as a "basket" statute, and the "old" Act, which applied only to causes of action expressly governed by it, has ramifications for claims based in equity.

Under the "old" limitations regime, equitable causes of action, with few exceptions, fell outside of the *Limitations Act*, R.S.O 1990, c. L.15. Sections 43 and 44(2) of the "old" *Limitations Act* were notable exceptions. These provisions governed claims to recover trust property. These sections were repealed as of January 1, 2004, and were not carried forward in either the *Limitations Act, 2002* or the *Real Property Limitations Act*, R.S.O. 1990, c. L.15.

Under the "old" limitations regime, in the majority of equitable claims, plaintiffs had to concern themselves with the doctrine of laches, but NOT with any statutory limitation period.

For example, in legal malpractice claims against solicitors, it was clearly understood that claims for negligence and breach of contract were governed by s. 45(1)(g) of the "old" Act, which required that such actions be brought within six years from the date of discovery of the cause of action. Claims for breach of fiduciary duty, on the other hand, were NOT governed by that provision. Some plaintiffs went to considerable lengths to present their claims as actions for breach of fiduciary duty, since s. 45(1) (g) did not apply to breach of fiduciary duty claims, and laches is difficult to establish.

Case law decided under the *Limitations Act, 2002*, suggests that legal malpractice claims against solicitors, whether based on negligence, breach of contract, or breach of fiduciary duty, are governed by the two-year limitation period set out in

s. 4 of that Act: *Hughes v. Kennedy Automation*, 2008 ONCA 770, dismissing appeal from 2008 CanLII 8603 (ON S.C.); *Sheeraz v. Kayani*, 2009 CanLII 47571 (ON S.C.). An action for breach of fiduciary duty is, after all, a "court proceeding" within the meaning of s. 2 of the Act.

In *Toronto Standard Condominium*, the parties and the Master accepted, but apparently without argument, that a claim for constructive trust over money in the defendant's hands was subject to a two-year limitation period under the *Limitations Act, 2002*. It was unnecessary for the Divisional Court to deal with this point.

In *Syndicate Number 963 (Crowe) v. Acuret Underwriter*, [2009] O.J. No. 4002, it was apparently accepted that the two-year limitation period under the *Limitations Act, 2002* applied to an action arising out of a failure to account for trust funds.

In *Estate of Blanca Ether Robinson (Re)*, 2010 ONSC 3484, it was accepted by the parties and the court that a claim for rectification is subject to s. 4 of the *Limitations Act, 2002*. Under the "old" regime, claims for rectification were not governed by the *Limitations Act*, although it was subject to being barred by laches: *Mentary v. Welsh* (1973), 1 O.R. (2d) 393 (C.A.).

One important statute which survives outside of the *Limitations Act, 2002* is the *Real Property Limitations Act*, R.S.O. 1990, c. L.15. For all practical purposes, it carries forward the sections of the *Limitations Act*, *1990* which dealt with real property. Section 2 of that Act expressly preserves the equitable defence of acquiescence "and otherwise." "Otherwise" includes laches: *Egnatious v. Leon Estate*, [1990] O.J. No. 1700.

Particularly important is s. 4 of the *Real Property Limitations Act* (RPLA), which provides a 10-year limitation period to bring an "action to recover land." This limitation period has traditionally governed claims dealing with adverse possession and a mortgagee's right to recover possession of a property after the mortgagor's default.

An interesting question is whether this 10-year limitation period might apply to claims for a constructive or resulting trust over real property. In *Hartman (Estate) v. Hartfam Holdings*, 2006 CanLII 266 (C.A.), the plaintiff asserted a constructive or resulting trust over real estate to which the defendant trustees retained title. Gillese, J.A. held that the plaintiff's action was not statute-barred, because she was entitled to avail herself of s. 43(2) of the "old" *Limitations Act*, that is, the trustees still retained the trust property; therefore, no statutory limitation period applied. As previously noted, s. 43 of the "old" *Limitations Act* was not carried forward into the "new" Act, or any other current statutory provision.

Gillese, J.A. raised, but did not resolve, the question of whether the 10-year limitation period under s. 4 of what is now the RPLA might apply where a constructive or resulting trust over real property is sought. She noted at para. 57 of her judgment that:

> On a plain reading of s. 43(2), the word "recover" appears to mean "to obtain" the trust property. Such an interpretation accords with the meaning given to "recover" in s. 4 of the *Act*. In *Williams v. Thomas*, [1909] 1 Ch. 713 (C.A.) at p. 730, the English Court of Appeal held that the expression "to recover any land" in comparable legislation is not limited to obtaining possession of the land nor does it mean to regain something that the plaintiff had and lost. Rather, "recover" means to "obtain any land by judgment of the Court." See also *OAS Management Group Inc. v. Chirico* (1990), 9 O.R. (3d) 171 (Dist. Ct.) at 175 to the same effect.

Thus, it is POSSIBLE that where a constructive or resulting trust over real property is asserted, the 10-year limitation period under s. 4 of the RPLA may apply.

Unless you are absolutely sure that your claim is NOT governed by the two-year limitation period in s. 4 of the *Limitations Act, 2002*, you had better comply with that two-year limitation period.

It goes without saying that you should carefully review the *Limitations Act, 2002* and the Schedule referred to in s. 19 to ensure that your action is not subject to a limitation period even shorter than the "two years from discoverability" stipulated in s. 4.

For instance, the Schedule refers to s. 148, statutory condition 14 of the *Insurance Act*, R.S.O. 1990, c. I.8, which provides that a claim against an insurer for a fire loss must be brought within one year of the date of the loss. Likewise, s. 259.1 of the *Insurance Act* provides that a claim for loss or damage to an automobile or its contents must be brought within one year of the loss. Also, be wary of s. 38(3) of the *Trustee Act*, R.S.O 1990, c. T.23, which stipulates that a claim by or against executors or administrators must be brought within two years of the death of the deceased. Discoverability is inapplicable.

Carefully reviewing the *Limitations Act, 2002* and its exemptions and Schedule could save you from a future negligence claim.

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