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Limitation Periods in Estate and Trust Litigation

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INTRODUCTION*

Limitation periods are a necessary part of our legal system. Their purpose is to ensure that litigation is commenced in a timely manner and to protect defendants from being blindsided by a claim that arises from events that took place many years ago. Public policy demands that justice with certain closure be served. Limitation periods are helpful in limiting record keeping costs in business practices. Evidence for a claim may erode over time, documents may be lost or destroyed, and witnesses may forget or die, another reason for limitation periods. Having an unlimited amount of time to commence a claim would be detrimental to the carriage of justice.

Basic Principles of Limitation Periods

The History of Equitable Claims and Limitation Acts

In 1969 when the ***Report of the Ontario Law Reform Commission on Limitation of Actions*** (the "Report")¹ was released, many recommendations were made to improve limitation periods in the trust and estate context. Unfortunately, not all of these recommendations were followed. One of the observations that the *Report* made was that the former limitation act was "complex, confused, and obscure". The former act did not prescribe limitation periods for most equitable claims. The Report also observed that there were many problems about the operation of the former limitations act when a trustee, including a constructive trustee, commits a breach of trust.² Under the old limitations act constructive (and other non-express) trust claims, were not subject to any fixed limitation period. Instead they were subject to the equitable doctrines of *laches* and acquiescence. These doctrines conferred discretion on the court to determine whether or not, on the facts of the case, the trust claim ought to be allowed to proceed despite any delay in commencing a claim.³

The Report was not implemented by the government but over the years various discussion papers were put forward and consultation groups were formed. Bills introduced in 1992, 2000

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¹ Ontario Law Reform Commission, *Report on Limitation of Actions* (Toronto: Department of the Attorney General, 1969) ("*Report*").

² *Ibid.* at pp.53-63, see also *Pirani v. Karmali*, 2012 ONSC 1647 at para. 56.

³ *Report*, *supra* note 1 at pp.18-22 and 53-61 and *McConnell v. Huxtable*, *infra* note 33 at para. 71.

and 2001 did not proceed.⁴ Finally a bill in 2002 did proceed however no clause by clause consideration was completed by a committee and the bill was passed without amendment. Equitable causes of action in general and constructive trusts in particular were not discussed in the Legislature at all.⁵ The new *Limitations Act, 2002* took effect from January 1, 2004.

Now, based on the cases below, it appears that equitable claims are generally covered under the new *Limitations Act, 2002*.⁶

In the estates context, limitation periods can cause some confusion as historically equitable claims were not governed by limitation statutes. However, with the enactment of the *Limitations Act, 2002*, c.24, Sch. B and recent case law outlined below this has changed.

1) Basic Limitation Period

In Ontario, limitation periods are governed mainly by the *Limitations Act, 2002* c.24, Sch. B. (the "*Limitations Act, 2002*" or the "*Act*") and through other applicable acts such as the *Real Property Limitations Act*, R.S.O. 1990, c.L.15 ("*RPLA*") (discussed below).

The *Limitations Act, 2002* provides for a basic **two (2) year limitation period** subject to the doctrine of discoverability (discussed below). Section 4 of the *Limitations Act, 2002* states:

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the **second anniversary of the day on which the claim was discovered**. 2002, c. 24, Sched. B, s. 4. [emphasis added]

Under the *Act*, a "claim" means "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission".⁷

2) Discoverability

Section 5 of the *Limitations Act, 2002* codifies the common law discoverability principle:

5. (1) A claim is discovered on the earlier of,

⁴ *McConnell*, *infra* note 33 at para.68.

⁵ *Ibid.* at para. 70.

⁶ See also *Bouchan v. Slipacoff*, 2010 ONSC 2693 (rectification of a contract); *Schneider v. State Farm*, 2010 ONSC 4734 at para. 49 (breach of fiduciary duty); Graeme Mew, *The Law of Limitations*, 2nd ed (2004), at 37; and *Placzek v. Green*, 2009 ONCA 83, at paras. 25,34-5 and 50.

⁷ *Limitations Act, 2002*, c.24, Sch. B. section 1 ("*Limitations Act, 2002*").

- (a) the day on which the person with the claim first knew,
 - (i) that the injury, loss or damage had occurred,
 - (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
 - (iii) that the act or omission was that of the person against whom the claim is made, and
 - (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
- (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1).

Therefore, the two year limitation period will not commence until the claim is "discovered". However, that does not mean that plaintiffs have forever to commence a claim if it is not "discovered". The *Limitations Act, 2002* provides for an ultimate limitation period of 15 years.⁸ If 15 years have passed, no claim can be commenced regardless of when the act or omission that would give rise to a claim was discovered.

The *Limitations Act, 2002* also includes a "*rebuttable presumption*" that a claim is discovered on the day that the act/omission on which the claim is based takes place.⁹ The burden therefore is on the claimant to establish that he or she did not know or could not have known, with reasonable diligence before the expiry of the limitation period that the injury/loss/damage was caused by or contributed to by an act or omission of another party.¹⁰

When the material facts on which the claim is based have been discovered, or ought to have been discovered, is the time at which the cause of action arises for the purposes of the *Limitations Act, 2002*.¹¹

It is important to note that a plaintiff is not required to know *all* of the facts underlying a claim at the time of *discovery*, rather only 'enough facts'; and as such, then the claim would be considered to have been *discovered*, and the limitation period begins to run.¹²

⁸ *Limitations Act, 2002*, *supra* note 7, section 15.

⁹ *Limitations Act, 2002*, *supra* note 7, section 5(2).

¹⁰ *Blinn v Burlington (City)*, 2010 ONSC 3446.

¹¹ *Kenderry-Espirt v. Burgess, MacDonald, Martin and Younger*, 2001 CanLII 28042 (ONSC).

¹² *Lawless v. Anderson*, 2010 ONCS 2723 (CanLII), *aff'd* 2011 ONCA 102.

It is the plaintiff who bears the evidentiary burden to prove a claim is issued within the limitation period prescribed by the *Limitations Act, 2002*.¹³ In ***Ferrara v Lorenzetti***,¹⁴ Justice Lauwer found that the plaintiff's action was statute barred because the action crystallized when the plaintiff entered into a settlement which the court found was the requisite time that the damage was suffered. The effort to set aside the settlement was an attempt to reverse the damage. In the end, the failure of that attempt did not revive the negligence claim.

However, in a split 2-1 decision at the Ontario Court of Appeal,¹⁵ Ferrara's appeal was allowed and the Court declared that his action was not statute-barred by the *Limitations Act, 2002*. The majority relied on the following comment from Molloy J. in ***Kenderry-Esprit (Receiver of) v. Burgess, MacDonald, Martin, and Yonger***: "The date upon which the plaintiff can be said to be in receipt of sufficient information to cause the limitation period to commence will depend on the circumstances of each particular case."¹⁶

In *Ferrara*, minutes of settlement were entered into in June of 2005. A post-closing dispute arose which was adjudicated in 2009. In a decision released by Justice Belobaba, in July 2009, Ferrara lost. Ferrara appealed to the Ontario Court of Appeal in 2010, but the 2009 decision was upheld. Ferrara sued his lawyer, Schwartz in 2011 for solicitor negligence for negligently preparing the minutes of settlement and for failing to ensure that the minutes were properly implemented. While the judge at first instance, Lauwer J., had held that the limitation period began to run on September 19, 2006, when the post-closing claim was *commenced*, the majority of the Court of Appeal held that the claim was not discoverable until July 2009 when Justice Belobaba released his decision. Laskin J. based this finding on the fact that Schwartz (who was Ferrara's lawyer for over 20 years) repeatedly assured Ferrara that he was right, as well as Ferrara's uncontradicted evidence that no one told him otherwise.¹⁷

In dissent, Justice Epstein would have dismissed the appeal. While Epstein J. disagreed with the motion judge that the cause of action arose when the post-closing claim was commenced, she held that the fact that Ferrara retained three sets of litigation counsel during

¹³ *Ferrara v Lorenzetti, Wolfe Barristers and Solicitors*, 2012 ONSC 151 (CanLII) ("*Ferrara*").

¹⁴ *Ibid.*

¹⁵ 2012 ONCA 851.

¹⁶ (2001), 53 O.R. (3d) 208 (S.C.J.) at para. 19.

¹⁷ 2012 ONCA 851 at para. 72.

the dispute was enough to trigger the discoverability rule. Ferrara claims that none of these sets of counsel suggested to him that he had a claim against Schwartz. Epstein J. found this hard to believe:

*This assertion is difficult to accept. First, it begs the question of why these lawyers and their firms have not been named as defendants in this action. Second, given the issues raised in the [post-closing claim] and the way in which they were described by Belobaba J., the implication being that it should have been relatively easy for Schwartz to have identified his error, and the level of experience of these lawyers, it is a difficult assertion to accept without clear and convincing evidence.*¹⁸

In the recent Ontario Court of Appeal case of **Lipson v. Cassels Brock**,¹⁹ the Court examined the discoverability principle in connection with the certification of a class action against a law firm for solicitor negligence and negligent misrepresentation. In *Lipson*, a motion judge had determined that the proposed class action was statute-barred based on when the representative party first discovered the claim. The Court of Appeal allowed the appeal and overturned the motion judge's decision.

Lipson involved a class of investors who relied on a legal opinion from a law firm which opined on the likelihood of the Canadian Customs and Revenue Agency (the "CCRA") successfully denying anticipated tax credits from a donation to a "Timeshare Tax Reduction Program". The legal opinion indicated that it would be "unlikely" that the CCRA could successfully deny the tax credits.

In 2004, the CCRA notified the representative party, Lipson, that it intended to disallow the tax credits. Immediately, Lipson and other donors sought legal and accounting advice. In 2006 two of the donors launched challenge proceedings against the CCRA as a test case against the denial of the tax credits. In 2008 the CCRA settled the test case whereby the donors would receive some but not all of their tax credits. Lipson and other members of the class entered into similar settlements with the CCRA.

In April of 2009 Lipson commenced the proposed class action against the law firm for negligence and negligent misrepresentation. In November 2011, Justice Perrell issued an order dismissing the action, holding that it was statute-barred by the two-year limitation period in the *Limitations Act, 2002*. Perrell J. held that based on the Supreme Court of

¹⁸ Ferrara, *supra* note 13 at para. 46.

¹⁹ 2013 ONCA 165 ("*Lipson*").

Canada decision in **Central Trust Co. v. Rafuse**, [1986] 2 S.C.R. 147 ("Central Trust") and a review of the facts alleged in the statement of claim, the claims for negligence and negligent misrepresentation should have been discovered in 2004 when the CCRA denied the validity of the tax credits or, at the very latest, in 2006 when Lipson retained legal counsel to sue the CCRA.²⁰

The Court of Appeal held that the motion judge erred in interpreting and applying *Central Trust* and when interpreted correctly it was apparent that the record before the motion judge did not disclose whether Lipson's claim was statute-barred. The facts in *Central Trust* involved a challenge to a mortgage registered against a property. The mortgage was registered in 1969 and a subsequent action in 1977 found that the mortgage was *void ab initio*. In 1980 Central Trust sued the solicitors who acted for it in the mortgage transaction.

The issue before the court was when the limitation period began to run. Justice Le Dain in *Central Trust* had this to say:

Since the [lawyers] gave the [Central Trust] a certificate on January 17, 1969 that the mortgage was a first charge on the Stonehouse property, thereby implying that it was a valid mortgage, *the earliest that it can be said that [Central Trust] discovered or should have discovered the respondents' negligence by the exercise of reasonable diligence was in April or May 1977 when the validity of the mortgage was challenged in the action for foreclosure.* Accordingly [Central Trust's] cause of action in tort did not arise before that date and its action for negligence against the [lawyers] is not statute-barred. [emphasis added]

Perrell J., in *Lipson*, interpreted this passage as such:

It should be noted that the damage suffered by Central Trust occurred when it accepted a mortgage that could be challenged as illegal. It later transpired that the mortgage was challenged, *and Justice Le Dain held that the limitation period for the claim of solicitor's negligence commenced running with the manifest challenge to the mortgage*, even though the actual declaration of invalidity of the mortgage would occur still later.[emphasis added]

The Court of Appeal found this interpretation to be incorrect and that Justice Le Dain had not concluded that the limitation period commenced running with the manifest challenge to the mortgage but rather that Justice Le Dain concluded that the *earliest date* on which the claim for solicitor's negligence could have commenced running was the date on which the validity of the mortgage (and therefore the validity of the solicitor's opinion) was challenged.²¹

²⁰ *Lipson*, *supra* note 19 at para. 56.

²¹ *Lipson*, *supra* note 19 at para.73.

The Court of Appeal went on to observe that in ***Kenderry-Esprit (Receiver of) v. Burgess, MacDonald, Martin and Younger***²² Justice Molloy recognized that Central Trust is not binding authority for the proposition that the limitation period in an action for solicitor negligence begins to run on the date of a manifest challenge to the solicitor's opinion.²³ Instead, Molloy J. held that "the date upon which the plaintiff can be said to be in receipt of sufficient information to cause the limitation period to commence to run will depend on the circumstances of the particular case." The Court of Appeal agreed with this conclusion and held that:

*In our view, neither the fact that the CCRA was challenging the claimed tax credits nor the fact that the class members may have been incurring professional fees to challenge the CCRA's denial of the tax credits is determinative of when the class members reasonably ought to have known they had suffered a loss as a result of a breach of the standard of care on the part of [the law firm].*²⁴

Under s.5(1)(a) of the *Class Proceedings Act*, (the reasonable cause of action prong of the certification), no evidence is admissible. The legal opinion stated that it was *unlikely* that the CCRA could *successfully challenge* the tax credits claimed. The Court found that the pleadings implied that Lipson and the other class members were not advised until January 2008 of the *likelihood* that the CCRA's disallowance of the tax credits *would not succeed* at least in part. Therefore the claim was not statute-barred when it was commenced in 2009.

Also, it should not be assumed that a limitation period only begins to run when related litigation is resolved.²⁵ In ***Isailovic v. Voyvodic***,²⁶ the Court held that the plaintiff's claim for solicitor negligence was statute barred as the plaintiff's entire cause of action upon which the plaintiff sought to rely crystallized when the plaintiff entered into a settlement and not four years later when the plaintiff's attempt to set aside the settlement ended at the Court of Appeal. This has particular relevance to solicitor's negligence claims raised in the estates arena. Potential claims against a drafting solicitor, if any, therefore must be looked at within the 2-year period from the date of death.

²² (2001), 53 O.R. (3d) 208 at para.19.

²³ *Lipson*, supra note 19 at para. 75.

²⁴ *Ibid.* at para. 82.

²⁵ See *Isailovic v. Voyvodic*, 2011 ONSC 5854; *Ferrara*, supra note 13 and *Lipson*, supra note 19.

²⁶ *Isailovic*, *ibid.*

See also the case of *Waschkowski v. Hopkinson Estate* (2000), 47 O.R. (3d) 370 where the Ontario Court of Appeal held that the discoverability principle did not apply to the two year limitation period under section 38(3) of the *Trustee Act* and that the two year limitation period could not be extended.

3) Minors or Incapable Persons

The basic two year limitation period does not run against minors or incapable persons. The *Limitations Act, 2002* provides for an extension of the limitation period until the minor has reached age of majority or is represented by a litigation guardian.²⁷ The limitation period will not run against incapable persons until they are represented by a litigation guardian.²⁸ However, a person is presumed to be capable of commencing a proceeding unless proven otherwise.²⁹

4) Exclusions and Exceptions

The *Limitations Act, 2002* applies to all claims except those listed in section 2 of the *Act* and where the limitation period is preserved by other statutes set out in the schedule to section 19 of the *Act*.

Section 2 of the *Act* states:

Application

2. (1) This Act applies to claims pursued in court proceedings other than,
- (a) proceedings to which the *Real Property Limitations Act* applies;
 - (b) proceedings in the nature of an appeal, if the time for commencing them is governed by an Act or rule of court;
 - (c) proceedings under the *Judicial Review Procedure Act*;
 - (d) proceedings to which the *Provincial Offences Act* applies;
 - (e) proceedings based on the existing aboriginal and treaty rights of the aboriginal peoples of Canada which are recognized and affirmed in section 35 of the *Constitution Act, 1982*; and
 - (f) proceedings based on equitable claims by aboriginal peoples against the Crown. 2002, c. 24, Sched. B, s. 2 (1).

²⁷ *Limitations Act, 2002*, *supra* note 7, s.6.

²⁸ *Limitations Act, 2002*, *supra* note 7, s.7(1).

²⁹ *Limitations Act, 2002*, *supra* note 7, s.7(2).

The ***Real Property Limitations Act***³⁰ (the "*RPLA*") is an act that governs all limitation periods affecting land. The old *Limitation Act, 1990* was mostly repealed and replaced by the *Limitations Act, 2002*, however Part 1 of the 1990 act remained in force and was renamed the *RPLA*. Section 2 of the *Limitations Act, 2002* makes it clear that the new Act does not apply to proceedings to which the *RPLA* applies.

Some aspects of the *RPLA* apply to estate administration. The limitation period applicable to a claim for recovery of a legacy (including a share of residue) or a devise is in the *RPLA*, not the *Limitations Act, 2002*.³¹ The *RPLA* provides for a ten (10) year limitation period which starts at the time the claimant has a vested interest in possession of the legacy (or devise) and not with discovery.³² The recent case of ***McConnell v. Huxtable***³³ (discussed below) deals with the interpretation and application of this limitation period in the *RPLA* to a constructive trust claim. Recovery of interest on a legacy is also governed by the *RPLA* which provides that a legatee has six years from the date that the interest became due to commence a claim for recovery.³⁴ The ten year limitation period under the *RPLA* does not apply to an intestate share of an estate.³⁵ The two year limitation period from the date of discovery under the *Limitations Act, 2002* would apply in that circumstance.

Schedule 19: Legislative Exceptions to the 2 Year Basic Limitation Period

Section 19 of the *Limitations Act, 2002* addresses other statutes which contain limitation periods and how they should be applied:

Other Acts, etc.

19. (1) A limitation period set out in or under another Act that applies to a claim to which this Act applies is of **no effect unless**,

(a) the provision establishing it is listed in the Schedule to this Act; or

(b) the provision establishing it,

(i) is in existence on January 1, 2004, and

(ii) incorporates by reference a provision listed in the Schedule to this Act. 2002, c. 24, Sched. B, s. 19 (1); 2008, c. 19, Sched. L, s. 3.

Act prevails

(2) Subsection (1) applies despite any other Act. 2002, c. 24, Sched. B, s. 19 (2).

³⁰ R.S.O. 1990, c. L.15 ("*RPLA*").

³¹ *Ibid*, s.4.

³² See Anne Werker, "Limitation Periods in Ontario and Claims by Beneficiaries" (2008) 34:1 *Advocates' Quarterly*, at p.4 ("*Werker*").

³³ 2013 ONSC 948 ("*McConnell*")

³⁴ *RPLA*, *supra* note 30 at s.17.

³⁵ Werker, *supra* note 32 at p.13.

Interpretation

(3) The fact that a provision is listed in the Schedule shall not be construed as a statement that the limitation period established by the provision would otherwise apply to a claim as defined in this Act. 2002, c. 24, Sched. B, s. 19 (3).

Same

(4) If there is a conflict between a limitation period established by a provision referred to in subsection (1) and one established by any other provision of this Act, the limitation period established by the provision referred to in subsection (1) prevails. 2002, c. 24, Sched. B, s. 19 (4).

Period not to run

(5) Sections 6, 7 and 11 apply, with necessary modifications, to a limitation period established by a provision referred to in subsection (1). 2002, c. 24, Sched. B, s. 19 (5).

In other words, unless a specific limitation period in another piece of legislation is set out in the Schedule to the *Limitations Act, 2002*, it will have no force or effect and the two (2) year limitation period and the ultimate 15 year limitation period will prevail.

However, the Schedule to the *Limitations Act, 2002* lists the following legislation that is applicable in the estates context and which will override the basic two year limitation period: section 38(3) of the *Trustee Act*, sections 44(2), 45(2) and 47 of the *Estates Act*, section 17(5) of the *Estates Administration Act*, section 7(3) of the *Family Law Act* and section 61 of the *Succession Law Reform Act*. These specific sections which are listed in Schedule 19 and are exceptions to the two year limitation period are discussed below:

a) *Claims by and Against an Estate (s.38(3) of the Trustee Act)*

The Schedule to the *Limitations Act, 2002*, preserves the 2-year limitation period set out in section 38(3) of the *Trustee Act*.

The two Acts, read together provide a 2-year limitation period from the date of the deceased's death for an estate trustee to sue for all torts or injuries to the deceased person or to the property of the deceased.

Section 38(1) of the *Trustee Act* is as follows:

Actions by executors and administrators for torts

38. (1) Except in cases of libel and slander, the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or to the property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do, and the damages when recovered shall form part of the personal estate of the deceased; but, if death results from such

injuries, no damages shall be allowed for the death or for the loss of the expectation of life, but this proviso is not in derogation of any rights conferred by Part V of the Family Law Act.

Actions against executors and administrators for torts

(2) Except in cases of libel and slander, if a deceased person committed or is by law liable for a wrong to another in respect of his or her person or to another person's property, the person wronged may maintain an action against the executor or administrator of the person who committed or is by law liable for the wrong.

Limitation of actions

(3) An action under this section shall not be brought after the expiration of two years from the death of the deceased.

The limitation period in section 38(3) of the *Trustee Act* begins to run from the date of death. Discoverability principles do not apply to overcome the statutory bar imposed by section 38(3) of the *Trustee Act*.³⁶

At common law, there is no cause of action available to an estate for any tort or injury to the deceased or the deceased's property. Section 38 of the *Trustee Act* was enacted to provide a statutory remedy for the estate trustee to bring a claim within 2 years of the date of death for torts or injuries to the person and property of the deceased.

Courts have held that a breach of contract is a *personal injury* which falls within the ambit of section 38(1) of the *Trustee Act*.³⁷ A breach of contract claim is governed by the 2-year limitation period prescribed by sections 4 and 5 of the *Limitations Act*.

In the Ontario Court of Appeal decision in ***Bikur Cholim Jewish Volunteer Services v. Penna Estate***,³⁸ the court applied the two year limitation period under the *Trustee Act*, applied. Therefore the discoverability provisions under the *Limitation Act*, did not apply.

The motion judge in *Bikur*, Justice Greer, found that no limitation period applied and dismissed a motion for a declaration that the claims against the estate of an executor were statute-barred. Her Honour held that the combined effect of the *Trustee Act*, the former *Limitations Act*, the *Limitations Act, 2002* and the *Estates Act* provided for no limitation period. The Court of Appeal disagreed and held that s.38(3) of the *Trustee Act* applied:

³⁶ *Lafrance Estate v. Canada Attorney General* 2003, CarswellOnt 994, at para 47

³⁷ *LeCour Estate v. North American Life Assurance Co.*, 2000 CanLII 16849.

³⁸ 2009 ONCA 196 ("*Bikur*").

Section 19(1) of the *Limitations Act, 2002* is engaged since the claim in this case is one to which a provision set out in or under another Act applies, specifically section 38(3) of the *Trustee Act*. It is also one to which the *Limitations Act, 2002* applies, since the claim is pursued in court proceedings and does not fall within any of the exceptions in s.2. In these circumstances s. 19(4) is clear. If there is a conflict between a limitation period established by any other provision of the *Limitations Act, 2002*, the limitation period established by a provision such as s. 38(3) prevails.³⁹

The Court held that the motion for summary judgement was barred by section 38(3) of the *Trustee Act*.

b) Notice of Claim to Extend the Limitation Period (s.47 of the Estates Act)

Section 47 of the *Estates Act* provides that the limitation period in the *Trustee Act* will not apply where notice of a claim (giving full particulars of the claim and verified by affidavit) is provided to the estate trustee at any time prior to the date upon which the claim would be barred by the *Trustee Act*. Where no estate trustee (or administrator) has been appointed, the notice may be filed in the office of a local registrar of the Superior Court of Justice. Section 47 also provides that where the claim of a person against any other person would be barred by the *Trustee Act* at any time within three months after the death of the person having the claim, the claim shall for all purposes be deemed not to be barred until three months after the date of such death.

Where an estate trustee has notice that claim or demand has been made against the estate, sections 44 (liquidated claim) and 45 (unliquidated claim) of the *Estates Act*⁴⁰ permits the estate trustee to serve a Notice of Contestation of the Claim. The claimant has 30 days to apply to a judge of the Superior Court of Justice for an order allowing their claim. The thirty days can be extended to up to three months if the claimant successfully brings an application for an extension. These sections in the *Estates Act* basically expedite the administration of an estate by giving the estate trustee a reasonable amount of time to determine the validity of any claims that may be made against the estate.

In *Bikur*, the beneficiaries sought to sue the Estate of Lorraine Penna for Lorraine's breach of duty as an Estate Trustee. No claim had been commenced within the two year limitation period from Lorraine Penna's death set out in s.38(3) of the *Trustee Act*. However, at a

³⁹ *Bikur*, *supra* note 38 at para. 26.

⁴⁰ R.S.O. 1990, c.E.21 ("*Estates Act*").

meeting which was held within the two year period, the solicitor for Lorraine Penna's estate was "informed of a possible claim".⁴¹ The Court of Appeal held that this was sufficient notice to "invoke the procedure in s.47 of the *Estates Act*, which would have stopped the s.38(3) clock from running."⁴²

c) *The Estates Administration Act (s.17(5))*

Section 17 of the *Estates Administration Act*⁴³ governs the powers of estate trustees for selling and conveying real estate. Section 17(5) governs the limitation period for distribution of the estate by court order:

Distribution by order within three years from death:

(5) Upon the application of the personal representative or of any person beneficially entitled, the court may, before the expiration of three years from the death of the deceased, direct the personal representative to divide or distribute the estate or any part thereof to or among the persons beneficially entitled according to their respective rights and interests therein.

d) *Family Law Act Claims (s.7.3)*

When a spouse dies, the surviving spouse may elect to take the benefits under the will by election, seek an equalization payment of the net family property under the *Family Law Act*. If there is no will, the spouse can elect to take under the intestacy rules.

Section 7(3) of the *FLA* sets out a 6 month limitation period (commencing with the other spouse's date of death) for the surviving spouse to make an election. If no election is made within that time the surviving spouse is deemed to have chosen to take under the will or the intestacy rules.

However, a spouse may apply for an extension of this limitation period pursuant to section 2(8) of the *FLA*. For a court to grant an extension, the spouse must meet the following test:

- a) There must be apparent grounds for relief;
- b) relief is unavailable because of delay that has been incurred in good faith; and
- c) no person will suffer substantial prejudice by reason of the delay.⁴⁴

⁴¹ *Bikur*, *supra* note 38 at para. 54.

⁴² *Bikur*, *supra* note 38 at para. 54.

⁴³ R.S.O. 1990, c.E.22 ("*Estates Administration Act*").

⁴⁴ *Ibid.*, s.2(8), see also *Webster v. Webster Estate*, 2006 CarswellOnt 22941 (S.C.J.) ("*Webster*").

In **Webster v. Webster Estate**⁴⁵ the Court found that Mrs. Webster's delay in seeking an election had not been incurred in good faith. There had been an opportunity for Mrs. Webster to obtain legal advice upon the death of her husband and she failed to do so. This failure amounted to "wilful blindness".⁴⁶ The Court also held that there would be substantial prejudice for Mrs. Webster's delay based on her declining health and diagnosis of suffering from Alzheimer's disease.⁴⁷

e) Succession Law Reform Act Claims (s.61)

Under the *Succession Law Reform Act* (the "SLRA")⁴⁸ where a deceased, has not made adequate provision for the proper support of his or her dependant(s), the dependant may seek an order for proper support and the Court may make such a provision as it considers adequate out of the deceased's estate.⁴⁹

Section 61 of the *SLRA* requires the Application to be made no later than 6 months after the grant of letters of probate or letters of administration, now known as a Certificate of Appointment. However, under section 61(2), the Court has discretion to extend the six month limitation period if it considers it to be proper and there are assets that remain undisturbed at the time of the application. Estate Trustees should consider obtaining a Certificate of Appointment as Estate Trustee to trigger the running of the limitation period.

5) Equitable Claims

Until the *Limitations Act*, 2002, there was no limitation period in which to bring equitable claims.

Boyce v. Toronto Police Services Board⁵⁰ holds that the *Limitations Act*, 2002, includes actions in equity.

⁴⁵ *Webster*, *supra* note 44.

⁴⁶ *Ibid.* at para. 38.

⁴⁷ *Ibid.* at para. 48.

⁴⁸ R.S.O. 1990, c. S.26 ("*SLRA*").

⁴⁹ *Ibid.* at s.58.

⁵⁰ 2012 ONCA 230 ("*Boyce*"), leave to appeal dismissed 2012 CanLii 66225.

Breach of Fiduciary Duty

In **Boyce v. Toronto Police Services Board**,⁵¹ the Ontario Court of Appeal determined that claims for breach of fiduciary duty are caught by the phrase "claims pursued in court".⁵² These claims do not fall within any of the exceptions under the *Act* and the 2-year limitation period applies.

Fraudulent Conveyances

If a fraudulent conveyance is discovered on or after January 1, 2004, it is subject to the 2-year limitation period in the *Limitations Act*, 2002. The law previously had provided no limitation period at all for such an action.⁵³ **Toronto Standard Condominium No. 1703 v. 1 King St. West**,⁵⁴ in that action, the plaintiff wished to amend a Statement of Claim in December of 2008, to include a claim that two mortgages registered in November of 2006 were void as fraudulent conveyances. Master Glustein dismissed the plaintiff's motion for leave to amend as the claim for fraudulent conveyance was subject to the 2-year limitation period and was statute barred.

On appeal to the Divisional Court, the appellant submitted that "the proposed amended fraudulent conveyance pleading was not a "claim" as that term is defined in the *Limitations Act*, 2002, because no injury, loss or damage had yet occurred." The appellant also argued that the Master erred in applying the discoverability principle and for not concluding that s.16(1)(a) of the *Limitations Act*, 2002 (that there is no limitation period for a proceeding for a declaration with no consequential relief) was applicable to this case. Justice Sachs, however, upheld the Master's decision and held that:

In my view, the Master was correct when he concluded that the proposed claim was a "claim" within the meaning of s.1 of the Limitations Act, 2002. The decision of the Court of Appeal in Perry, supra, has been superseded by the Limitations Act, 2002. Unlike an "action on the case" it is not essential that a "claim" under s. 1 of the Act "sound in damages" or "create a legal duty, the breach of which gives rise to a cause of action."

The Plaintiff is alleging an injury, namely that assets that should be available to satisfy its claim against the Defendants have been put beyond its reach. According to the Plaintiff, that injury occurred as a result of the act of 1KW in granting two mortgages on its assets to HEL. Finally, the Plaintiff is seeking a remedy for its injury

⁵¹ *Boyce*, supra note 50.

⁵² *Ibid.* at para.2.

⁵³ *Toronto Standard Condominium No 1703 V 1 King St. West*, 2010 ONSC 2129 (Div. Crt), dismissing appeal from 2009 CanLII 55330 ("*Toronto Standard Condo*").

⁵⁴ *Ibid.*

– first, a declaration that the transaction that put the assets out of its reach is void and, second, a declaration that its claims have priority over any claims that HEL might make against 1KW.⁵⁵

Justice Sachs also confirmed that the Master did not err in his application of the discoverability doctrine, nor in his decision that s.16(1)(a) of the *Limitations Act, 2002* did not apply in this case.

Fraud, Breach of Fiduciary Duty and Misrepresentation

Of notable relevance to estates matters, is the decision in ***Portuguese Canadian C.U. v. Pires***⁵⁶ which held that the applicable limitation period for fraud, breach of fiduciary duty and misrepresentation under the *Limitations Act, 2002* is 2 years. The Court held that the plaintiff knew in May of 2006 that he had purchased something which was worth less than what he said was represented to him.⁵⁷ His claim, commenced in 2010, was statute barred.

In ***Fracassi v. Cascio***⁵⁸ the Ontario Superior Court of Justice also held that the applicable limitation period for breach of fiduciary duty and oppression under the *Limitations Act, 2002*, is 2 years.⁵⁹

Failure to Account for Trust Funds

In the decision in ***Syndicate Number 963 (Crowe) v. Acuret Underwriter***⁶⁰ it was accepted that the 2 year limitation period under the *Limitations Act, 2002*, applied to an action arising out of a failure to account for trust funds.

Lloyd's Underwriters, representing Syndicate Number 963, claimed that Acuret failed to properly account for and pay out funds that were remitted to Acuret, in trust for Lloyd's, in January 2002. Lloyd's claimed that they did not become aware that the trust funds had not been accounted for or paid out until April of 2005. Lloyd's commenced an action in October of 2006. Acuret argued that the claim was statute barred. The court held that the two year limitation period applied but as the claim was not discovered until April 2005, it was not statute barred in 2006.

⁵⁵ *Toronto Standard Condo*, *supra* note 54 at paras.28-29.

⁵⁶ *Portuguese Canadian C.U. v. Pires*, 2012 ONCA 335 (Div.Ct.), affirming 2011 ONSC 7448 (CanLII).

⁵⁷ *Ibid.*

⁵⁸ 2011 ONSC 178 ("*Fracassi*").

⁵⁹ *Ibid.*

⁶⁰ *Syndicate Number 963 (Crowe) v. Acuret Underwriter Inc.*, 2009 CanLII 51195 (ONSC).

Rectification Claims

In the *Estate of Blanca Esther Robinson (Re)*⁶¹ it was determined that rectification claims are subject to section 4 of the *Limitations Act, 2002* and a 2-year period applied. Rectification claims were not governed under the old *Limitations Act*, however, they could be barred by the doctrine of *laches*.

Constructive Trust (and other non-express trust) Claims

*McConnell v. Huxtable*⁶² dealt with limitation periods for constructive trust claims, albeit in a family law context.

The applicant brought an application in 2012 for a constructive trust claim against her former common-law spouse. She claimed that they had co-habited from the early 1990's until 2007 and that she had an interest in the house which was registered in the respondent's name alone. The applicant acknowledged that in 2007 she was aware of a potential constructive trust claim.

The respondent, acknowledged there had been a relationship, but denied that they ever co-habited. He argued that her constructive trust claim was statute barred as the *Limitations Act, 2002* applied and it had been more than two years since she had discovered her claim. The applicant argued that no limitation period applied as there was a legislative gap for this situation, or in the alternative, a ten year limitation period applied under section 4 of the *RPLA* as this was for a claim to "recover" land/property.

After a thorough review of all of the law, Perkins J. concluded that section 4 of the *RPLA* did apply to the facts of this case because as it was a claim to recover lands. Therefore, he held that the applicant's constructive trust claim was not statute-barred:

The plain words of the section, "action to recover any land", seem to apply comfortably to the applicant's claim in this case. The rest of the *Real Property Limitations Act* talks about various kinds of claims other than trust claims but does not indicate any intention that constructive trust claims are not properly within the meaning of section 4. The repeal of the former Parts II and III of the old *Limitations Act*, R.S.O. 1990, c. L.15, does not shed light on the meaning of section 4. **A ten year period for constructive trust claims seeking ownership of land is not**

⁶¹ *Estate of Blanca Esther Robinson (re)*, 2010 ONSC 3484, aff'd 2011 ONCA 493, leave to appeal dismissed 2012 CanLii 8365 (SCC).

⁶² *McConnell*, *supra* note 33.

inconsistent with the rest of the *Real Property Limitations Act* or with the general scheme of the *Limitations Act, 2002*, which expressly defers to the *Real Property Limitations Act*."⁶³ [emphasis added]

Perkins J. did not decide whether the discoverability principle applied to section 4 of the *RPLA*.⁶⁴

Perkins J. also went on to examine and analyse the applicant's claim that there was a legislative gap for limitation periods for constructive trust claims in the family law context. After looking at the basic limitation period (s.4) and the four elements required to "discover" a claim under the *Limitations Act, 2002* and start the two year limitation period running (s.5), Perkins J. concluded that:

[i]t is impossible to apply sections 4 and 5 of the *Limitations Act, 2002* to constructive trust claims in family law. . . Claims to recover land aside, the *Limitations Act, 2002* may have been meant to but does not manage to encompass constructive trust claims. . . .In other words, while I cannot find that a legislative policy of a two year limitation period for family law constructive trust claims is "absurd", I find there is no coherent, sensible or reasonable way to apply sections 4 and 5 of the *Limitations Act, 2002* to such claims. **I am therefore driven to conclude, that aside from section 4 of the *Real Property Limitations Act*, there is no applicable statutory limitation period for constructive trust claims in family law cases and that there is a legislative gap, as submitted by the applicant.**⁶⁵ [emphasis added]

Perkins J.'s final observation was a call for legislative reform, stating that that "[o]nly a comprehensive legislative approach to these matters will result in a coherent and consistent limitations scheme."⁶⁶

Will Challenges

Under the *Limitations Act, 2002* no limitation period applies to a claim for a declaration without any consequential relief.⁶⁷ Some argue that this applies to will challenges.⁶⁸ However, it seems that the court has never squarely considered the question.

⁶³ *McConnell*, supra note 33 at para. 79.

⁶⁴ *McConnell*, supra note 33 at para. 83.

⁶⁵ *McConnell*, supra note 33 at para. 144-145.

⁶⁶ *McConnell*, supra note 33 at para. 152.

⁶⁷ *Limitations Act, 2002*, supra note 7 at s.16(1)(a) and see also *Boyce*, supra note 50 at para. 3.

⁶⁸ See Werker, supra note 32; and Archie Rabinowitz, "Limitation Periods in Estate Litigation", Practice Gems: The Administration of Estates 2012; September 13, 2012 ("*Rabinowitz*").

If the court declares the later of two wills to be invalid and entirely different beneficiaries could inherit the estate. The estate trustee will be bound to comply with the terms of the older will. Therefore, it is argued that no consequential relief was sought or declared.

In *Lund v. Rossiter*, 2012 ONSC 6777, the estate trustee told a beneficiary that certain assets formed part of the estate and provided him with an accounting. More than two years after the deceased died and after he received the accounting, the beneficiary took the position that the will was invalid. He alleged that he should have inherited the assets by right of survivorship. The beneficiary maintained that he was asking for declaratory relief. The estate trustee took the position that the beneficiary was really asking for a consequential order that the estate trustee remedy a breach of her fiduciary duty. Justice Pollak concluded that "the summary judgment motion procedure was inappropriate" for the application and dismissed the motion.⁶⁹ Therefore there is no decision on the limitation period issue.

6) Other Applicable Equitable Doctrines

While the *Limitation Act, 2002* is the main source for limitation periods, the equitable doctrine of *laches* and the common law doctrines of fraudulent concealment and special circumstances may have an affect on those limitation periods.

a) Doctrine of Laches

Historically, statutes of limitations did not apply to equitable claims, so courts of equity developed their own equitable remedies. The doctrine of *laches* is one such remedy. It prevents recovery to a plaintiff who is guilty of their unreasonable delay in commencing an action. The leading case is the Supreme Court of Canada case of *M(K) v. M(H)*.⁷⁰ The defendant must demonstrate that the delay amounted to the plaintiff's acquiescence to the defendant's conduct or has caused the defendant to alter its position in reasonable reliance on its acceptance of the *status quo* or otherwise permitted a situation to arise which it would be unjust to disturb.⁷¹

⁶⁹ 2013 ONSC 1338.

⁷⁰ [1992] 3 S.C.R. 6 (*MK v. MH*).

⁷¹ *Ibid.* at para.98.

In the estates context, even when a limitation period does not bar a claim, a defendant may plead the doctrine of *laches*. See the cases of *Hipel Estate, Re*⁷² and *Johnson v. Futerman et al.*⁷³

b) Doctrine of Fraudulent Concealment

Another remedy is the doctrine of fraudulent concealment. This doctrine can be used by a plaintiff to toll a limitation period when material information has been concealed from them by a defendant. In *Giroux Estate v. Trillium Health Centre*⁷⁴ the Ontario Court of Appeal held that the doctrine of fraudulent concealment applied to suspend the running of the limitation period in s.38(3) of the Trustee Act. The Court of Appeal also held that this doctrine survived the new *Limitations Act, 2002*:

In my view s. 38(3) was exempted from the new Act so that its common law status would be preserved and it would remain immune from the discoverability rule. In other words, the legislature intended that s.38(3) should continue to be governed by common law principles. The doctrine of fraudulent concealment is one such principle.⁷⁵

Fraudulent concealment applies to situations where 1) the defendant and plaintiff are in a special relationship, 2) given the special or confidential nature of their relationship, the defendant's conduct amounts to "an unconscionable thing for the one to do towards the other"; and, 3) the defendant conceals the plaintiff's right of action, either actively or recklessly.⁷⁶

The relationship between an estate trustee and a beneficiary, an inter vivos trustee and a beneficiary or the person holding a power of attorney for property for another would appear to fall within a special relationship.

c) Doctrine of Special Circumstances

The doctrine of special circumstances is derived from the Supreme Court of Canada decision of *Basarsky v. Quinlan*, [1972] S.C.R. 380. The plaintiff had brought a claim within the applicable limitation period, but later sought to add a new claim after the limitation period had expired. The SCC held that an amendment cannot be made that would prejudice the other party, except in peculiar or special circumstances that warrant the amendment. In *Basarsky*,

⁷² 2011 ONSC 5259, aff'd 2012 ONCA 371, leave to appeal dismissed 2012 CanLii 76984 (SCC).

⁷³ 2012 ONSC 4092.

⁷⁴ 2005 CanLii 1488 (ONCA) ("*Giroux*").

⁷⁵ *Giroux*, *supra* note 74 at para. 33.

⁷⁶ *Ibid.* at para. 23 and 28.

the SCC found that the defendant was not prejudiced and allowed the amendment on the basis of special circumstances including the fact that all of the facts relating to the claim and liability were pleaded in the original statement of claim and that the defendants admitted responsibility.

However, in the 2008 decision in ***Joseph v. Paramount Canada's Wonderland***,⁷⁷ of the Ontario Court of Appeal held that courts cannot extend an expired limitation period under the new *Limitations Act, 2002* on the basis "special circumstances". The Court decided that litigants need certainty when it comes to limitation periods and therefore a court should not be allowed to extend limitation periods at its own discretion.

In ***Meady v. Greyhound Canada Transportation Corp.***, released concurrently with *Joseph*, the Court of Appeal also held however that the *Limitations Act, 2002* did not repeal the doctrine of special circumstances, despite the fact that the doctrine has been abolished by s. 20 of the *Limitations Act, 2002* for cases governed by the limitation periods set out in that *Act*.

The Ontario Court of Appeal held that the doctrine of special circumstances is available to permit a court to add parties to an existing action, despite the expiration of the limitation period in s.38(3) of the *Trustee Act*.⁷⁸

In 2009, the Ontario Court of Appeal examined the doctrine of special circumstances in the estate context in ***Bikur v. Penna Estate*** (discussed above). The Court held that the doctrine of special circumstances was available to extend the limitation period under s.38(3) of the *Trustee Act*. However, it declined to add the estate of Lorraine Penna as a Defendant to the existing action, because there was no "special or peculiar circumstances" on the facts of the case.

Conclusion

It is apparent that not all relevant limitation periods can be found in one place for estate litigation. It is important to be aware of all possible sources for limitation periods.

⁷⁷ 2008 ONCA 469 ("*Joseph*"), see also *Meady v. Greyhound Canada Transportation Corp.* (2008), 90 O.R. (3d) 774 (C.A.), released concurrently with *Joseph*.

⁷⁸ See *Bikur*, *supra* note 38 at para. 51.

The relative unimportance of limitation periods in estates and trusts litigation has been radically altered by the *Limitations Act, 2002*. Every case must be immediately assessed from the perspective of limitations. The plaintiff or applicant's solicitor should diarize all potential limitations when the file is opened. Counsel defending a claim must be alert to potential defences based on missed limitations. Given the uncertainty as to some of the limitation periods, the best course of action will be to commence a claim or enter into a tolling agreement.

This paper is intended for the purposes of providing information only and is to be used only for the purposes of guidance. This paper is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

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