

## UNDERSTANDING LIMITATION PERIODS IN ESTATE LITIGATION

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As is widely understood, limitation periods generally aim to strike the appropriate balance between an aggrieved party's right to seek redress and a potential defendant's right not to remain under the cloud of litigation indefinitely or to answer for a wrong where it has become difficult, if not impossible, to marshal the evidence.

However, limitation periods are widely regarded as the bane of a lawyer's existence. In the estates context, there is a dirge of case law both old and new, a relatively recent limitations act to consider, and exceptions for certain types of estate litigation proceedings.

In this article, I will address limitation periods as they apply to estate litigation generally as well as three discrete topics that an estate litigator would routinely encounter: (1) Spousal elections under the *Family Law Act* ("FLA")<sup>1</sup>; (2) Dependant support claims under the *Succession Law Reform Act* ("SLRA")<sup>2</sup>; and (3) Will challenges.

Ontario's new *Limitations Act*, (the "**2004 Act**")<sup>3</sup> came into effect on January 1, 2004. The 2004 Act sought to bring some clarity to Ontario's mishmash of limitation periods. The 2004 Act consolidated 69 different limitation periods into one piece of legislation. Changes applicable to estate litigation include:

- Equitable claims, for example breach of fiduciary duty, are now governed by the two-year basic (subject to discoverability) and 15 year ultimate limitation periods.
- Breach of trust claims must now be brought within two years of when the claim was discovered. However, under the provisions of the 2004 Act, it can be argued that no limitation period will apply where the trustees wilfully concealed an act or omission and wilfully mislead the beneficiaries.
- The limitation period does not run against a person with a claim during any time in which the person is a minor and a litigation guardian does not represent the minor in relation to the claim. The same is true for a person who is incapable of commencing a proceeding because of a physical, mental or psychological condition and he or she is not represented by a litigation guardian in relation to the claim. A person is presumed to be capable of commencing a proceeding, but this presumption may be rebutted.
- If a litigation guardian represents a person in relation to a claim, it is the litigation guardian's knowledge that is used to determine when the claim was or should have been discovered.
- If the running of the two-year basic limitation period is postponed or suspended due to the person's incapacity and there is less than six months left to run when the incapacity ends and the limitation period begins to run again, the limitation period is extended to include six months after the day the incapacity ends.

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<sup>1</sup> R.S.O. 1990, c. F.3, as amended

<sup>2</sup> R.S.O. 1990, c. S.26, as amended

<sup>3</sup> S.O. 2002, c. 24. Sched. B

- A “potential defendant” may bring an application to the court to have a litigation guardian appointed for a “potential plaintiff” who is either a minor or incapable of commencing a claim and against whom the limitation period has been suspended or postponed.
- A litigation guardian appointed in this way must consent to the appointment either in writing or in person before the court, and should obtain independent legal advice before consenting.
- A person may serve notice of a possible claim on another person, and a court may consider this notice when determining when the applicable limitation period begins to run. However, this provision will not apply to a person who is a minor or is incapable and who is not represented by a litigation guardian in relation to the possible claim.
- Pursuant to section 19 and the accompanying Schedule of the 2004 Act, limitation provisions in other Ontario legislation may be incorporated into the 2004 Act and will prevail over the basic two-year limitation period (plus discoverability). If a limitation period is not expressly incorporated, it will not be applicable and the basic two-year limitation period will apply. Relevant legislative provisions incorporated pursuant to section 19 and the Schedule include:

<b>Statute</b>	<b>Section(s)</b>	<b>Limitation</b>
<i>Estate Act</i>	ss. 44(2), 45(2) and 47	Contesting claims against estate
<i>Estate Administration Act</i>	s. 17(5)	Distributing estate by court order
<i>Family Law Act</i>	s. 7(3)	Equalization claims (discussed below)
<i>Succession Law Reform Act</i>	s. 61	Dependant Support claims (discussed below)
<i>Trustee Act</i>	s. 38(3)	Tort actions by estate trustee

Despite the 2004 Act, limitation period are still fraught with difficulty. For example, the two-year limitation period under section 38(3) of the *Trustee Act* is unique in that the Ontario Court of Appeal held in *Waschkowski v. Hopkinson Estate*<sup>4</sup> that the discoverability principle did not apply and the two-year limitation period could not be extended. The Ontario Court of Appeal has also held that a fiduciary duty claim was an injury of a personal nature and therefore captured by section 38 of the *Trustee Act* (*Roth v. Weston Estate*<sup>5</sup>).

### **Spousal Elections under the FLA**

The FLA allows a surviving spouse to elect to either receive benefit under the deceased’s will (or on an intestacy if there is no will), or receive an equalization of net family property under the FLA. Normally, the surviving spouse seeks information regarding each of the options and then elects for the greater benefit.

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<sup>4</sup> (2000), 47 O.R. (3d) 370 (C.A.)

<sup>5</sup> (1997), 36 O.R. (3d) 515 (C.A.)

An application for an equalization payment must be brought within six months of the first spouse's death, otherwise the surviving spouse is deemed to have chosen to take under the will.

In *Webster v. Webster Estate*<sup>6</sup>, Mrs. Webster did not file an election within the prescribed six months of her husband's death. This meant that she could no longer elect to equalize their net family property. Mrs. Webster sought an order extending the time within which she could file an election to make an equalization claim from the estate of her deceased husband. The Ontario Superior Court of Justice considered limitation periods and a FLA spousal election.

The Webster family was well known in Montreal and the world of philanthropy. Mr. & Mrs. Webster were married for 29 years. It was a second marriage for both parties. Mrs. Webster was a devoted wife. The Websters gave generously to their community. They lived happily ever after until Mr. Webster's death on October 11, 2003. Mr. Webster was 87 years old when he died. Mrs. Webster was then 81 years old.

Mr. Webster's estate was valued at around \$24 million. Mrs. Webster was provided for under the terms of the Will, but the bulk of the estate was left to the Eric T. Webster Foundation. Unfortunately, since the death of her husband, Mrs. Webster developed Alzheimer's disease, which had progressed to the point where she was unable to testify as a witness in the proceeding.

The will appointed four estate trustees or executors of the estate including Mrs. Webster and her son by her first marriage who was also Mrs. Webster's legal representative and the step-son of Mr. Webster.

Mrs. Webster did not file a spousal election within the prescribed six months. However, Mrs. Webster and her son both alleged that they were unaware of any right to elect to receive an equalization payment under the FLA in the six months following Mr. Webster's death. Mrs. Webster therefore sought an order extending the time within which she could file an election to make an equalization claim from the estate.

Unfortunately for Mrs. Webster, and her son who ultimately spearheaded the proceeding, they did not receive a sympathetic hearing from the court. According to the court, while there was evidence to suggest that Mrs. Webster was content with her benefits under the Will during the life of Mr. Webster, the court nevertheless recognized that she was completely free to change her mind and seek an equalization payment within the prescribed time.

Section 2(8) of the *Family Law Act* provides that the court may, on a motion, extend the prescribed time if it is satisfied that: (1) there are apparent grounds for relief; (2) relief is unavailable because of delay that has been incurred in good faith; and (3) no person will suffer substantial prejudice by reason of the delay.

While courts have generally been liberal in extending the time limit, especially where there is any sign of ongoing negotiation prior to the limitation period lapsing, the court stated that was not the situation here.

Mr. & Mrs. Webster had also signed a prenuptial agreement in Quebec in 1974. The agreement provided that Mrs. Webster and her husband would be separate as to property upon dissolution

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<sup>6</sup> *Webster v. Webster Estate* (2006), 25 E.T.R. (3d) 141 (Ont. S.C.J.); supplementary reasons (2007), 30 E.T.R. (3d) 165 (Ont. S.C.J.)

of the marriage by death. According to the court, however, the marriage contract did not bar the wife from an equalization claim because it did not expressly address election issues upon the death of one of the spouses (an important drafting point to take note of).

Mrs. Webster and her son alleged that they were initially unaware of any right to make an election for equalization of the net family property. Six months after the expiration of the limitation period, the son learned otherwise, consulted a lawyer, and an application was brought a further six months later. No explanation was offered for the delay incurred after Mrs. Webster's son became aware of the right to make an election for equalization. While the court recognized that Mrs. Webster might have been in a state of emotional upset and had much difficulty in dealing with Mr. Webster's death, it noted that the majority of surviving spouses would be in a similar state of grief. Moreover, the court held that there was an opportunity for Mrs. Webster and her son to obtain legal advice upon the death of Mr. Webster, which they did not do.

Given the above, Mrs. Webster did not meet the criteria for an extension of the prescribed time because the delay in filing an election was not incurred in good faith. The failure by Mrs. Webster and her son to make inquiries amounted to wilful blindness. There was no justifiable reason for not making such inquiries.

The court also held that Mrs. Webster's declining health during the delay substantially prejudiced the ability of the estate to defend the motion. The court also held that this was not a case that warranted an exercise of judicial discretion in Mrs. Webster's favour, due to the clear expression of Mr. Webster's intention to redistribute his wealth to charity. The court held that the FLA should not be used as a scheme to rewrite a will and redistribute wealth contrary to the testator's intention. Accordingly, the court declined to exercise its discretion and dismissed Mrs. Webster's motion.

### **Dependant Support Claims**

Section 58(1) of the SLRA states as follows:

Where a deceased, whether testate or intestate, has not made adequate provision for the proper support of his dependants or any of them, the court, on application, may order that such provision as it considers adequate be made out of the estate of the deceased for the proper support of the dependants or any of them.

Pursuant to section 61 of the SLRA, no application for an order under section 58 may be made six months after a certificate of appointment of estate trustee has been issued (formerly referred to as "probate"). However, pursuant to section 61(2) of the SLRA, the court, **if it considers it proper**, may allow an application to be made at any time as to the portion of the estate remaining undistributed at the date of the application.

In *Blatchford (Litigation guardian of) v. Gardiner*<sup>7</sup>, a leading decision on section 61(2), Himel J. set out the following principles:

- Even with the requirement of a broad, liberal interpretation of 61(2), the section cannot be interpreted as automatically being granted. What is "proper" depends on the facts of

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<sup>7</sup> *Blatchford (Litigation guardian of) v. Gardiner* [2000] O.T.C. Uned. 973, [2000] O.J. No. 53 (S.C.)

the case. Proper means “fit, suitable, appropriate, adapted, correct”. These words incorporate the concept of reasonableness.<sup>8</sup>

- The discretion to extend or to refuse to extend the time limit under 61(2) is to be exercised having regard to what is equitable as between the parties concerned in all the circumstances of the case. A judge has discretion to be exercised in the principal of promoting justice between those interested in the estate.
- In exercising its discretion, the court should consider the factors of the delay involved, the reasons for the delay, and the extent of prejudice to the estate. The court should exercise its discretion under 61(2) only if there is sufficient reason for the delay and the application has merit.
- In deciding whether to grant an extension, the court must determine whether the situation bears review of whether or not the testator made adequate provision in his will for the proper maintenance and support of his dependants. “The dominant theme running through [dependant support] cases, and they are myriad, is one of ethics, even more than economics. The court was never intended to rewrite the will of a testator and in discharging its difficult task of correcting a breach of morality on the testator’s part the court must not, except in plain and definite cases, restrain a man’s right to dispose of his estate as he pleases.” (quoting from *Barr. v. Barr*<sup>9</sup>)

Given the wide discretion granted to the court, an applicant relying on section 61(2) of the SLRA should carefully consider his/her chances before seeking to extend the limitation period. Any delay will have to be adequately explained. If too much time has passed and it is not proper (i.e. reasonable) in all the circumstances to extend the limitation period, the court will refuse to do so. Moreover, if extending the time limit under 61(2) would work an injustice, the court will refuse to act. Equitable considerations will often stay the hand of the court.

## **Will Challenges**

There has been some controversy as to whether a will challenge (lack of testamentary capacity, undue influence, etc.) is subject to a limitation period under the 2004 Act. Several learned authors<sup>10</sup> are of the view that no limitation period applies to will challenges. Not even the absolute 15 year limitation period set out in the 2004 Act applies. This starting proposition seems to fly in the face of the stated purpose of the 2004 Act, and the public policy underpinning it, that the purpose of the 2004 Act was to bring under one roof the myriad of limitation periods and impose an almost universal two-year limitation period (subject only to reasonable discoverability).

However, an argument can, in fact, be made that the 2004 Act does not automatically bar a will challenge despite the passage of time where, for example, there are grounds discovered subsequent to the issuing of a certificate of appointment of estate trustee (probate), such as a later will, or evidence that brings the will into question.

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<sup>8</sup> See also *McGahan v. McIsaac Estate* 42 E.T.R. (2d) 264

<sup>9</sup> *Barr v. Barr* [1972] 2 W.W.R. 346, 25 D.L.R. (3d) 401

<sup>10</sup> See Anne Werker’s excellent paper “Limitations and Claims by Beneficiaries” presented at the LSUC’s 10<sup>th</sup> Annual Estate and Trusts Summit

However, when a will challenge is launched after a certificate of appointment of estate trustee has been issued, the return of an issued certificate of appointment of estate trustee is also not automatic. A party can, for example, rely on equitable relief such as laches (failure to act) or acquisition (concurrence). When a certificate of appointment of estate trustee has already been issued, on notice to the interested parties, and if the grounds to challenge the will are weak, unexplained delay (notwithstanding any limitation argument) will be a significant factor in whether the court exercises its discretion to allow a will challenge to proceed.

However, it is likely that the court will, and ultimately should, decide that the two-year limitation period does apply subject only to certain well known exceptions such as fraudulent concealment. The court will likely be able to use the principle of reasonable discoverability to saddle a potential beneficiary with the knowledge that he/she has two years from the triggering event in which to challenge a will. As with all limitation periods, the reality and prudent course of action is that a will challenge should be commenced sooner rather than later.