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Navigating Limitation Periods in Estate Litigation

Justin W. de Vries & Christopher Cook
de VRIES LITIGATION LLP
Toronto and Oakville Offices

Tel: 416.640.2754
Fax: 416.640.2753

Email: jdevries@devrieslitigation.com
Website: devrieslitigation.com

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NAVIGATING LIMITATION PERIODS IN ESTATE LITIGATION

By Justin W. de Vries and Christopher Cook of de VRIES LITIGATION LLP

Introduction

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 given the passage of time. Limitation periods encourage litigants to pursue their claims diligently and without delay, thereby promoting the expeditious resolution of disputes and ensuring that disputes are adjudicated on the basis of contemporary values and standards.[1]

This paper is geared towards providing estate litigators with some general guidance for navigating limitation periods. Estate litigation requires practitioners to juggle a number of different statutes each with their own unique limitation periods. This paper is divided into three sections. The first section deals with the limitation provisions of the *Limitations Act*, *2002* (the "***Limitations Act***").[2] This will include a discussion on limitation periods in the context of will challenges. The second section deals with limitation periods set out in various other statutes, which are of significance to estate litigators. The third section deals with the *Real Property Limitations Act* (the "***RPLA***").[3]

1 – Limitation Periods Generally

In Ontario, limitation periods are generally governed by the provisions of the *Limitations Act.* The *Limitations Act* came into force on January 1, 2004 and was the culmination of various attempts by the legislature, starting in the late 1960s, to reform the law of limitations in Ontario. The *Limitations Act* replaced a complex, obscure, and confusing regime of multiple limitation periods with a simple and comprehensive scheme.[4]

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[1] *Independence Plaza 1 Associates, LLC v Figliolini*, 2017 ONCA 44 (CanLII) ("***Figliolini***"), at paras. 19-23.
[2] *Limitations Act*, SO 2002, c 24, Sched B (the "***Limitations Act***").
[3] *Real Property Limitations Act*, RSO 1990, c L.15 (the "***RPLA***").
[4] *Figliolini*, at paras. 28-29.

Section 4 of the *Limitations Act* provides that a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.[5] This basic two-year limitation period generally applies to claims commenced in Ontario. As set out in subsection 5(1) of the *Limitations Act*, a claim is "discovered" on the earlier of,

> (a) the day on which the person with the claim first knew,
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> (i) that the injury, loss or damage had occurred,
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> (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).[6]

Subsection 5(1) of the *Limitations Act* codifies the common law rule of "discoverability." This is a rule of fairness which holds that a limitation period should not run against the claimant until they know, or reasonably ought to know through the exercise of due diligence, the material facts upon which their claim is based. The degree of knowledge necessary to trigger the limitation period is more than mere suspicion but is less than perfect knowledge. Ultimately, the court must adopt an individualized and contextual approach when determining the date on which the plaintiff discovered their claim.[7]

Notably, subsection 5(2) of the *Limitations Act* provides that a person is presumed to have discovered the material facts giving rise to their claim on the date on which the alleged wrongful act or omission took place, unless the contrary is proved.[8] In other words, if the plaintiff commences a proceeding in respect of a claim more than two years after the alleged wrongful act or omission took place (and assuming the defendant raises a limitation defence), the onus is on

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[5] *Limitations Act,* s. 4. Note: a claim means a "claim to remedy an injury, loss or damage that occurred as a result of an act or omission" (*Limitations Act*, s. 1).
[6] *Limitations Act*, s. 5(1).
[7] *Wong v Wong*, 2019 ONSC 3937 (CanLII) ("***Wong***"), at paras. 150-155.
[8] *Limitations Act*, s. 5(2).

the plaintiff to prove that they in fact discovered the claim less than two years before commencing the proceeding.

Estate litigators should take special note of sections 6 and 7 of the *Limitations Act*. Together, these provisions provide that the basic two-year limitation period is postponed or suspended during any time in which the person with the claim is a minor or incapable and is not represented by a litigation guardian. A person is presumed to be capable of commencing a proceeding, though this presumption may be rebutted.[9]

Where the basic two-year limitation period is postponed or suspended because a potential plaintiff is a minor or incapable, the potential defendant may bring an application or motion to appoint a litigation guardian for the potential plaintiff.[10] 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 ought to have been discovered.[11]

Ultimately, the rule of discoverability can only extend the basic two-year limitation period so far. Section 15 of the *Limitations Act* provides that no proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.[12] This ultimate fifteen-year limitation period applies regardless of whether or not the claim was discovered by the plaintiff. This is in keeping with the underlying public policy of promoting finality and certainty, and preserving evidence.

Notwithstanding the non-applicability of the rule of discoverability, the ultimate fifteen-year limitation period is postponed or suspended during any time in which the person with the claim is a minor or incapable, and is not represented by a litigation guardian. Further, the ultimate fifteen-year limitation period does not run against the claimant during any time in which the person against whom the claim is made wilfully conceals the material facts giving rise to the claim or wilfully misleads the claimant as to the propriety of commencing legal proceedings.[13]

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[9] *Limitations Act*, ss. 6, 7.
[10] *Limitations Act*, s. 9.
[11] *Limitations Act*, s. 8.
[12] *Limitations Act*, s. 15(1)-(2).
[13] *Limitations Act*, s. 15(4).

2 – Limitation Periods in Will Challenges

Following its enactment, there was some uncertainty regarding the applicability of the *Limitations Act* to will challenges. Some clarity was finally brought to the matter in the 2014 decision, *Leibel v Leibel* ("***Leibel***"), where Justice Greer held that the basic two-year limitation period set out in section 4 of the *Limitations Act* applied to the applicant's will challenge. As explained by Justice Greer, to conclude that the *Limitations Act* does not apply to will challenges would mean that "every next-of-kin has an innate right to bring on a will challenge at any time as long as there are assets still undistributed or those that can be traced, [which] would put all Estate Trustees in peril of being sued at any time."[14] This, however, would run counter to the public interest in promoting finality and certainty in legal affairs by ensuring that defendants are not exposed to indefinite liability.

In *Leibel*, Justice Greer found that the applicant's will challenge, based on lack of capacity and undue influence, was statute-barred. The application was brought on September 5, 2013, more than two years after the testator's death on June 4, 2011. In or around the time of the testator's death, the applicant had all the information he needed to commence his claim. Among other things, the applicant knew: that the testator had been suffering from cancer; that she had changed her previous wills; the date of the testator's death (the applicant was informed the day she died); the contents of the disputed wills (he received copies shortly after the testator's death); and what the testator's assets and income were.[15]

Leibel has been followed in subsequent decisions.[16] In *Shannon v Hrabovsky* ("***Shannon***"), Justice Wilton-Siegel confirmed that sections 4 and 5 of the *Limitations Act* apply to proceedings in respect of will challenges. Because a will speaks from the date of death (i.e., becomes effective when the testator dies), the two-year limitation period in respect of a will challenge presumptively commences on the date of the testator's death. (This follows the presumption in subsection 5 (2) of the *Limitations Act*.) This presumption, however, may be rebutted where the applicant proves that he or she did not know the material facts upon which his or her claim is based until some later date.[17]

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[14] *Leibel v Leibel*, 2014 ONSC 4516 (CanLII) ("***Leibel***"), at paras. 35, 52.
[15] *Leibel*, at paras. 15, 36, 39, 50-53.
[16] See: *Birtzu v McCron*, 2017 ONSC 1420 (CanLII); and *Bristol v Bristol*, 2020 ONSC 1684 (CanLII).
[17] *Shannon v Hrabovsky*, 2018 ONSC 6593 (CanLII), at para. 67.

In *Shannon*, the applicant's will challenge, based on lack of capacity and undue influence, was commenced on December 23, 2016, more than two years after the testator's death on November 15, 2014. Nevertheless, Justice Wilton-Siegel held that the claim was not statute-barred. The applicant could not have reasonably discovered her claim without knowledge of the existence and contents of the disputed will, which Justice Wilton-Siegel described as "essential elements" of a will challenge. Only after receiving a copy of the disputed will in January 2015 did the applicant know of its existence and contents. Accordingly, the applicant's will challenge was commenced just before the expiration of the two-year limitation period.[18]

On appeal, the respondents sought to admit fresh evidence in the form of a letter from the applicant's lawyer, demonstrating that the applicant in fact knew about the existence of the disputed will in or around December 16, 2014 (i.e., two years and a week before the applicant commenced her claim). In dismissing the appeal, the Court explained that the letter would not have changed Justice Wilton-Siegel's decision. The fact remained that the applicant had not received a copy of the disputed will until January 2015, and as such, had no knowledge of its contents until that time. It was open to Justice Wilton-Siegel to conclude that it would have been "premature" for the applicant to commence her will challenge until she had received a copy of the disputed will and examined its terms. Interestingly, it did not matter that the applicant had suspected for many years that the testator had made a new will disinheriting her.[19]

Ultimately, the two-year limitation period (subject to the rule of discoverability, and presumably the ultimate fifteen-year limitation period as well) set out in the *Limitations Act* applies to will challenges. When exactly the limitation period begins running is a fact-specific and circumstantial inquiry, and hinges on when the applicant discovered the material facts giving rise to the claim. Given the rebuttable presumption that the limitation period beings to run on the date of death, the safest course of action is to commence a will challenge within two years of the testator's death.[20]

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[18] *Shannon v Hrabovsky*, 2018 ONSC 6593 (CanLII), at paras. 3, 55, paras. 69-70.
[19] *Shannon v Hrabovsky*, 2024 ONCA 120 (CanLII), at paras. 21, 39-56.
[20] An interesting discussion relates to the applicability of subsection 16(1)(a) of the *Limitations Act* to will challenges. This provision provides that there is no limitation period in respect of a proceeding for a declaration if no consequential relief is sought. In *Piekut v Romoli*, 2020 ONCA 26 (CanLII), the Ontario Court of Appeal affirmed Justice Dietrich's decision that an application simply to establish the validity or lack of validity of codicils, which no one had sought to propound, was an application for declaratory relief to which no limitation period applied. However, this case did not involve a will challenge *per se*. Compare this with *Bristol v Bristol*, 2020 ONSC 1684 (CanLII), where Justice Gilmore dismissed the applicant's attempt to characterize her will challenge, based on lack of capacity and undue influence, as an application for declaratory relief. In dismissing this argument, Justice Gilmore wrote at para. 31: "the Applicant cannot escape the consequences of ss 4 and 5

3 – Exceptions to the limitation provisions of the *Limitations Act*

As discussed, the general rule is that the basic two-year limitation period (subject to discoverability and the ultimate fifteen-year limitation period) will apply to legal claims, including will challenges, commenced in Ontario. There are, however, exceptions to this general rule.

Section 19 of the *Limitations Act* provides that the limitation provisions set out in a selection of Ontario statutes will prevail over the limitation provisions of the *Limitations Act*. These Ontario statutes are enumerated in the Schedule to the *Limitations Act*.[21]

Estate litigators should pay particular attention to the following limitation provisions, which will prevail over the basic and ultimate limitation periods of the *Limitations Act*:

Act	Provision	Nature of Claim
Estates Act	ss. 44 (2), 45 (2), & 47	Contesting claims against estate, and suspending limitation periods under the *Trustee Act*
Estates Administration Act	s. 17 (5)	Distributing estate by court order
Family Law Act	s. 7 (3)	Equalization claims
Succession Law Reform Act	s. 61	Dependent support claims
Trustee Act	s. 38 (3)	Personal actions by/against estate trustee

3.1 – Contesting claims under sections 44 and 45 of the *Estates Act*

Together, sections 44 and 45 of the *Estates Act* provide a summary procedure for determining claims or demands against the estate for the payment of money.[22] Where a claim or demand is made against the estate, or the personal representative has notice of such claim or demand, the personal representative may serve the claimant with a notice of contestation in writing. Upon receipt of the notice of contestation, the claimant has thirty days to apply to the court for an order

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of the *Act* by framing her relief as declaratory. Will challenges cannot be framed as declaratory relief as they are not stand-alone court decisions. Threshold tests with supporting evidence must be met before findings in relation to undue influence and testamentary capacity can be made."

[21] *Limitations Act*, s. 19 and Schedule.

[22] *Estates Act*, RSO 1990, c E.21 ("***Estates Act***").

allowing their claim and determining the amount of it. The claimant may bring an application to extend the thirty day limitation period to three months. Ultimately, if the claimant fails to apply to the court for an order allowing their claim within thirty days or three months, as applicable, upon receiving the notice of contestation, the claim will be forever statute-barred.[23]

The purpose of sections 44 and 45 of the *Estates Act* is to expedite the winding up of estates by providing personal representatives with a summary procedure to determine, within a reasonable timeframe, the legal validity of claims that they may wish to contest. These provisions are seldom used and anticipate claims brought against the estate by third party creditors, as opposed to beneficiaries or legatees.[24]

3.2 – Distribution ordered under subsection 17 (5) of the *Estates Administration Act*

Subsection 17 (5) of the *Estates Administration Act* (the "***EAA***") allows a personal representative or a beneficiary to apply to the court, within three years of the death of the deceased, for an order directing the personal representative to divide or distribute the estate, or any part of it, to or among the beneficiaries in accordance with their respective rights and interests.[25] Judging by the paucity of case law and academic literature relating to section 17 (5) of the *EAA*, this provision is either seldom used or uncontroversial.

While it is not enumerated in the Schedule to the *Limitations Act*, estate litigators should also pay attention to section 9 of the *EAA*.[26] This provision provides that where a personal representative has failed to convey real property to those beneficially entitled to it within three years of the testator's or intestate's death, the real property automatically vests in those beneficiaries. In other words, the real property will be legally transferred to the relevant beneficiaries such that it no longer forms part of the deceased's estate.[27] Keep in mind, the beneficiaries are still required to take steps to have the land registrar record them as the legal owners of the property in the land titles system (which likely necessitates a court order).

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[23] *Estates Act*, ss. 44 (2), 45 (2). Also, see r. 75.08 of the *Rules of Civil Procedure*, RRO 1990, Reg 194 for the procedure involved in filing a notice of contestation of claim pursuant to ss. 44 and 45 of the *Estates Act*.

[24] *Omiciuolo Estate v Pasco*, 2008 ONCA 241 (CanLII) ("***Omiciuolo***"), at paras. 19-25.

[25] *Estates Administration Act*, R.S.O. 1990, c. E.22 ("***EAA***"), s. 17 (5).

[26] *EAA*, s. 9 (1).

[27] *Fray v Evans*, 2017 ONSC 1528 (CanLII), at paras. 18-20; *MacDonald v Estate of James Pouliot*, 2017 ONSC 3629 (CanLII) ("***MacDonald***"), at paras. 37-38. Also, see s. 100 of the *Courts of Justice Act*, RSO 1990, c C.43, which deals with the court's authority to order the vesting of real or personal property in any person.

There are at least two notable exceptions to automatic vesting under section 9 of the *EAA*. First, the personal representative may register a caution on the real property, which has the effect of restarting the three-year period such that automatic vesting does not occur until the third anniversary of the registered caution. The personal representative may also renew the caution before it expires, which will again restart the three-year period.[28] Second, where the deceased dies testate, the terms of the deceased's will may prevent automatic vesting. This will be the case where the will gives the personal representative the power to sell the real property at such time and in such manner as they see fit, and where the will does not specifically bequeath the real property to the beneficiaries.[29]

3.3 – Spousal elections under the *Family Law Act*

The *Family Law Act* (the "***FLA***") allows a surviving spouse to elect to either receive a benefit under the deceased's will (or on an intestacy if there is no will) or to receive an equalization of net family property under the *FLA*.[30] Normally, the surviving spouse seeks information regarding each of the options and then elects for the greater benefit. Unless the court orders otherwise, a surviving spouse has six months from the deceased spouse's date of death to file an election and bring an application for an equalization of net family property. Otherwise, the surviving spouse will be deemed to have chosen to take under the will or on an intestacy.[31]

The requirement that an election be made within six-months balances the public interest in ensuring that surviving spouses are able to make choices in their best interests, with the public interest in ensuring that estates are properly administered in a timely fashion. A surviving spouse is an important stakeholder in the estate administration process, but they are not the only stakeholder.[32]

Pursuant to section 2 (8) of the *FLA*, the court has the discretion to extend the six-month limitation period where three criteria are met: (a) there are apparent grounds for relief; (b) relief is unavailable because of delay that has been incurred in good faith; and (c) no person will suffer

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[28] *EAA*, ss. 9 (1), 9 (6).
[29] *SMITH v SMITH*, 2022 ONSC 63 (CanLII), at paras. 23-29.
[30] *Family Law Act*, RSO 1990, c F.3 (the "***FLA***"), ss. 5, 6.
[31] *FLA*, ss. 6(10), 6(11), 7(3)(c); *Lundy v Lundy Estate*, 2017 ONSC 2101, at para. 8.
[32] *Miller v Blackmore*, 2022 ONSC 189 (CanLII), at para. 37.

substantial prejudice by reason of the delay.[33] Courts have traditionally applied this test liberally. Generally, a spouse should not be deprived of their share of matrimonial property rights because of a missed limitation period except in cases of bad faith, or a wilful or reckless disregard for the limitation period.[34]

In *Trezzi v Trezzi*, the surviving spouse applied for an extension of time to file an election more than 23 months after the death of her husband. The application judge granted an extension until such time as the estate's assets had been valued, in order give the surviving spouse time to make an informed decision. In this case, there were complex underlying issues concerning the estate's assets that had not been resolved.[35]

The Court of Appeal upheld the application judge's decision to grant an extension. First, the surviving spouse had apparent grounds for relief. As the surviving spouse, she clearly had a right to make an election. It was not necessary for her to prove that she had a right to an equalization payment *per se*. Such a requirement would defeat the remedial purpose of the *FLA*. In other words, it would deprive a surviving spouse of the right to choose the more favourable financial outcome as between a will and under the *FLA*, simply because the surviving spouse lacks information necessary to make an informed choice between the two.[36]

Second, the surviving spouse's delay in applying for the extension was incurred in good faith. The "good faith" requirement merely requires that the applicant show that they acted "honestly and with no ulterior motive." In this case, the surviving spouse had delayed in applying for an extension while her lawyer obtained information that might allow her to make an informed choice. When it became clear that the issues would not be resolved consensually, she applied for the extension. Moreover, her lawyer had put the other side on notice about her intention to apply for an extension in the future, if appropriate. The Court of Appeal agreed with the application judge that the surviving spouse was not required to apply immediately to court for an extension of time simply to protect her right to file an election, as she might never need to exercise that right.[37]

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[33] *FLA*, s. 2(8).
[34] *Mocanu v Mocanu*, 2023 ONSC 7098 (CanLII), at para. 118.
[35] *Trezzi v Trezzi*, 2019 ONCA 978 (CanLII) ("***Trezzi***"), at paras. 41-43.
[36] *Trezzi*, at paras. 49-53.
[37] *Trezzi*, at paras. 54-57.

Third, the extension would not cause anyone to suffer substantial prejudice. There had been limited administration of the estate to date, and in any case, the estate would not be in a position to make a distribution until after the issues relating to the assets had been resolved. Moreover, only one of the four equal residual beneficiaries opposed the extension request.[38]

3.4 – Dependent support claims under the *Succession Law Reform Act*

Section 58 (1) of the *Succession Law Reform Act* (the "***SLRA***") provides:

> 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.[39]

Pursuant to section 61 (1) of the *SLRA*, no application for an order under subsection 58 (1) may be made six months after a certificate of appointment of estate trustee (formerly referred to as "probate") has been issued. This limitation period will not begin running where no one has applied for a certificate of appointment of estate trustee.[40]

Generally, the six-month limitation period for dependent support claims is designed to allow personal representatives to proceed with their estate administration responsibilities, including the distribution of assets, without fear of late claims being made by potential dependents, while also providing a reasonable timeframe after the deceased's death for dependents to advance their claims.[41]

Section 61 (2) of the *SLRA* provides that the court may, if it considers it proper, allow an application for dependent support to be made at any time as to any portion of the estate remaining undistributed at the date of the application.[42] The *SLRA* provides no guidance as to when the court should or should not exercise its discretion to allow an application after the expiration of the six-month limitation period.

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[38] *Trezzi*, at paras. 59-60.
[39] *Succession Law Reform Act*, RSO 1990, c S.26 ("***SLRA***"), s. 58 (1).
[40] *SLRA*, s. 61 (1); *Gefen v Gefen*, 2015 ONSC 7577 (CanLII), at paras. 49-50.
[41] *Omiciuolo*, at para. 25; *De Athe v Estate of De Athe*, 2021 ONSC 2404 (CanLII) ("***De Athe***"), at para. 13.
[42] *SLRA*, s. 61 (2).

The case law provides that the court should consider the delay involved, the reasons for the delay, and the extent of any non-compensable prejudice to the estate in defending the claim. In the absence of any non-compensable prejudice to the estate, equity will generally favour the granting of an extension. The absence of any explanation for the delay may count against granting the extension.[43]

The governing question for the court is whether the "situation bears review" of whether the deceased made adequate provision for his or her dependents. It is not necessary, however, for the dependent to establish the likelihood that they will succeed in their claim. Ultimately, the court must consider all the circumstances of the case to determine what is equitable, or otherwise just and reasonable, as between the parties.[44]

Estate litigators should keep in mind that section 61 (2) of the *SLRA* allows a claimant to bring a dependent support claim only in respect of estate assets that have not been distributed as of the date of the application. In *MacDonald v Estate of James Pouliot*, the applicant commenced a dependent support claim outside the six-month limitation period. The Court held that the claim was statute-barred because there were no estate assets left to distribute. The last remaining asset was the deceased's house, which had automatically vested in the respondent two months before the application was commenced, by virtue of section 9 of the *EAA* (discussed earlier).[45]

3.5 – Personal claims by/against an estate trustee under section 38 of the *Trustee Act*

Subsection 38 (1) of the *Trustee Act* allows an estate trustee to maintain a claim for any tort or injury to the person or property of the deceased (other than libel or slander) in the same manner and with the same rights and remedies as the deceased would have. Similarly, subsection 38 (2) allows an aggrieved party to bring a claim against the estate trustee of the deceased's estate for any wrong committed by the deceased against the aggrieved party's person or property.[46] Generally, the claims brought under these subsections are those of an "*in personam*" nature (i.e., made against or affecting a specific person): for example, claims based on breach of

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[43] *Habberfield v Sciamonte et al*, 2017 ONSC 4332 (CanLII) ("***Habberfield***"), at para. 24; *De Athe*, at para. 17.
[44] *Habberfield*, at para. 24; *De Athe*, at paras. 19, 21.
[45] *MacDonald*, at paras. 35-40.
[46] *Trustee Act*, RSO 1990, c T.23 ("***Trustee Act***"), ss. 38 (1), 38 (2).

contract, negligence, breach of fiduciary duty, unjust enrichment, and even claims based on economic loss.[47]

Subsection 38 (3) of the *Trustee Act* provides that any claims brought under subsections 38 (1) and 38 (2) shall not be brought after the expiration of two years from the death of the deceased.[48] This is a "hard" or "absolute" limitation period triggered by a fixed and known event—namely, the deceased's date of death. Unlike the basic two-year limitation period in the *Limitations Act*, the two-year limitation period in the *Trustee Act* is not subject to the rule of discoverability. This means that a claim may be statute-barred before it can even be reasonably discovered.[49]

The rationale for the strict limitation period under subsection 38 (3) of the *Trustee Act* was explained by the Ontario Court of Appeal in *Waschkowski v Hopkinson Estate*:

> The underlying policy considerations of this clear time limit are not difficult to understand. The draconian legal impact of the common law was that death terminated any possible redress for negligent conduct. On the other hand, there was a benefit to disposing of estate matters with finality. The legislative compromise in s. 38 of the Trustee Act was to open a two-year window, making access to a remedy available for a limited time without creating indefinite fiscal vulnerability for an estate.[50]

Notwithstanding the non-applicability of the rule of discoverability, the strictness of the limitation period under subsection 38 (3) may be mitigated in some circumstances by the doctrine of fraudulent concealment. This is an equitable doctrine that prevents limitation periods from being used as an instrument of injustice. Specifically, where a defendant has fraudulently concealed the existence of the plaintiff's cause of action (e.g., by hiding, secreting, cloaking, camouflaging, disguising, or covering-up the conduct or identity of the wrongdoing), the limitation period under section 38 (3) will be suspended until the plaintiff discovers or reasonably ought to discover the cause of action.[51]

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[47] *Rolston v Rolston*, 2016 ONSC 2937 (CanLII), at paras. 55-58; *John C Chaplin v First Associates Investments Inc et al*, 2016 ONSC 3774 (CanLII), at paras. 12, 13, 17, 18-19.
[48] *Trustee Act*, s. 38 (3).
[49] *Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57 (CanLII) ("***Beaudoin Estate***"), at paras. 16-17.
[50] *Waschkowski v. Hopkinson Estate*, 2000 CanLII 5646 (ON CA), at para. 9.
[51] *Beaudoin Estate*, at paras 17-19; *Zeppa v Woodbridge Heating & Air-Conditioning Ltd.*, 2019 ONCA 47 (CanLII) ("***Zeppa***"), at para. 62.

Historically, the doctrine of fraudulent concealment required the plaintiff to establish (1) that they were in a special relationship with the defendant; (2) that the defendants' conduct was unconscionable in light of that special relationship; and (3) that the defendant concealed the plaintiff's cause of action either actively or by the manner of the wrongdoing.[52] However, the Supreme Court of Canada has recently indicated that a special relationship between the parties is not required for the doctrine to apply. What matters, rather, is "whether it would be, for *any* reason, *unconscionable* for the defendant to rely on the advantage gained by having concealed the existence of a cause of action."[53]

Further, section 47 of the *Estates Act* (which is included in the Schedule to the *Limitations Act*) provides a mechanism for suspending the running of the limitation periods under the *Trustee Act*. Section 47 provides:

> 47 (1) The Trustee Act does not affect the claim of a person against the estate of a deceased person where notice of the claim giving full particulars of the claim and verified by affidavit, is filed with the executor or administrator of the estate at any time prior to the date upon which the claim would be barred by the Trustee Act, but where no executor or administrator has been appointed, the notice may be filed in the office of a registrar.
>
> (2) 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.[54]

Given the dearth of case law and academic literature on section 47 of the *Estates Act*, it is generally unclear how this provision interacts with subsection 38 (3) of the *Trustee Act*. The procedure involved in section 47 of the *Estates Act* presupposes that the claimant is aware of their claim. This provision therefore does nothing to mitigate against the non-applicability of the rule of discoverability to the limitation period under subsection 38 (3), which is what makes for the harshness of the limitation period.

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[52] *Zeppa*, at para. 62.
[53] *Pioneer Corp v Godfrey*, 2019 SCC 42 (CanLII), at paras. 51-55.
[54] *Estates Act*, s. 47.

3 – Equitable claims under the *Real Property Limitations Act*

As estate litigation often deals with claims in respect of real property, estate litigators should be aware of the interaction between the *Limitations Act* and the *RPLA*. Pursuant to subsection 2(1)(a) of the *Limitations Act*, the limitations provisions of the *Limitations Act* do not apply to claims to which the *RPLA* applies.[55] Generally, the Ontario Legislature intended that all limitation periods affecting land would be governed by the *RPLA*.[56]

Section 4 of the *RPLA* provides that: "No person shall… bring an action to recover any land… but within ten years next after the time at which the right to… bring such action first accrued to the person bringing it."[57] Put another way, the *RPLA* creates a ten-year limitation period in respect of civil proceedings to recover land. This is broad enough to encompass equitable claims for an ownership interest in land: for example, claims based on breach of trust, unjust enrichment, or proprietary estoppel, and claims which seek the imposition of a resulting or constructive trust over real property.[58] Equitable claims that do not relate to the recovery of land are generally governed by the basic two-year limitation period in the *Limitations Act*.[59]

Notably, alternative claims for damages can shelter under the ten-year limitation period of the *RPLA*. Equitable claims seeking an ownership interest in land often seek a monetary award as an alternative or fallback position. The Ontario Court of Appeal in *McConnell v Huxtable* agreed with the motion judge's reasoning on this issue:

> it would not make sense to interpret section 4 of the Real Property Limitations Act as a sort of all or nothing proposition, forcing the court either to award a proprietary interest on what it finds to be a meritorious claim, when a monetary award would otherwise be an adequate and appropriate remedy, or to award nothing at all, because a shorter limitation period for a damage award bars that kind of remedy. To interpret the section as not protecting an alternative damage award would mean that a claimant would never be able to rely on the section in determining when to launch a court case involving land and would always have to meet the limitation period for a damages claim, for fear of being locked out at the end of the case.[60]

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[55] *Limitations Act*, s. 2(1)(a).
[56] *McConnell v Huxtable*, 2014 ONCA 86 (CanLII) ("***Huxtable***"), at para. 41.
[57] *RPLA*, s. 4; *Huxtable*, at para. 15.
[58] *Tomek v Zabukovec*, 2020 ONSC 2930 (CanLII), at para. 25; *Andreacchi v Andreacchi*, 2023 ONSC 4877 (CanLII) ("***Andreacchi***"), at para. 43; *David v Stiuca*, 2024 ONSC 83 (CanLII) ("***Stiuca***"), at para. 126;
[59] *Stiuca*, at para. 126.
[60] *Huxtable*, at para. 40.

The *RPLA* says nothing about the rule of discoverability, as enshrined in section 5 of the *Limitations Act*. Nevertheless, recent case law has confirmed that the rule of discoverability applies equally to the ten-year limitation period under the *RPLA*.[61]

Conclusion

Limitation periods are widely regarded as the bane of a lawyer's existence. Arguably, this is especially so for estate litigators, who are required to balance a number of different statutes each with their own unique limitation periods. Failure to keep on top of these limitation periods may result in a claim being statute-barred and opening the door to a solicitor's negligence claim (which in no one's best interests and is best avoided).

Finally, it is always prudent (and is a best practice) to clearly mark and diarize limitation periods, and not wait until the last minute to commence a legal proceeding. For estate litigators, the best and safest course of action is to commence legal proceedings within two years of the date of death of the deceased – you cannot go wrong!

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[61] *Andreacchi*, at para. 48; *Wong*, at paras. 146-147; *Burbidge v Cassulo*, 2023 ONSC 5808 (CanLII), at paras. 155-156.

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