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- The Limitations of Limitation Periods in Estates Litigation

By Hayley Peglar

Over the past year, the Court of Appeal for Ontario has released a number of decisions which consider the application of limitation periods in trusts and estates litigation. Two of these decisions, discussed below, serve as important reminders of the limitations of limitation defences to claims against estates.

[Roulston v. McKenny](#)¹

In a unanimous decision by Doherty, Brown and Huscroft JJ.A., the Court of Appeal applied the doctrine of fraudulent concealment to toll the limitation period set out in s. 38(3) of the *Trustee Act*.

Subsection 38(3) of the *Trustee Act* provides that an action brought against an estate trustee (i.e. against a deceased's estate) shall not be brought after the expiration of two years from the death of the deceased. This hard deadline can only be relieved in cases of fraudulent concealment or where special circumstances apply to toll the limitation period.²

In *Roulston*, the deceased, Paul, died in March 2013. He was survived by his sister, Rita, who was his estate trustee and a beneficiary under his will, and by his former wife, Pauline.

When Paul and Pauline separated in 2002, they entered into a separation agreement in which Paul agreed to maintain \$150,000 in life insurance designating Pauline as beneficiary. They further agreed that in the event Paul failed to maintain the insurance, Pauline would have a first charge against his estate in the amount of \$150,000. Although Paul set up the insurance policy, he failed to pay the premiums and the policy lapsed before he died. Paul's estate was worth roughly \$100,000, which was to be divided among Rita and his nieces and nephews under the terms of his will.

Shortly after Paul's death, Pauline made inquiries to Rita about the status of Paul's insurance policies. Rita, as estate trustee, had exclusive control of the information about Paul's insurance policies. By May 2013, Rita knew that Paul had no active policies at the time of his death. Despite this, she continued to suggest to Pauline that there may have been an active insurance policy at the time of Paul's death.

Pauline commenced a claim against the estate in September 2015, more than two years after Paul's death. Rita argued the action was statute barred under s. 38(3) of the *Trustee Act*.

The trial judge applied the doctrine of fraudulent concealment to toll the limitation period until at least September 2013 on the basis that: (1) Rita, as estate trustee, was in a special relationship with Pauline because she had exclusive possession of knowledge and information about whether an insurance policy existed and whether Pauline had a debt claim against the estate; (2) Rita acted in an unconscionable manner by withholding material facts about the status of the insurance policy from Pauline; and (3) as a result of Rita's withholding of information, Pauline had a reasonable belief, at least until September 2013, that the deceased's insurance policy was in good standing at the time of his death. The Court of Appeal upheld the trial judge's analysis and decision.

Roulston serves as an important reminder that the Court will not permit an estate trustee to shield an estate from claims by withholding information regarding potential claims against the estate until two years after the deceased's death. In this case, an omission by the estate trustee was sufficient to establish fraudulent concealment and toll the limitation period under s. 38(3) of the *Trustee Act*.

Armitage v. Salvation Army³

In another unanimous decision, Sharpe, Pepall and Hourigan J.J.A. considered the application of the two-year general limitation period under the *Limitations Act, 2002*⁴ to claims for attorney compensation in a passing of accounts application.

Sharon was Morley's attorney for property, and later, estate trustee of his estate. Morley died on February 5, 2013. Morley's will named 'The Salvation Army' as the sole beneficiary of his estate.

On January 30, 2015, Sharon started applications to pass her accounts as attorney for property and as estate trustee. The Salvation Army argued that the claim for compensation as attorney for property was statute-barred under the *Limitations Act, 2002*. The Salvation Army argued that the words "may take annual compensation" in s. 40(1) of the *Substitute Decisions Act, 1992*⁵ mean that the end of each year of service as attorney triggers the beginning of a two-year limitation period for a claim for compensation for the annual period. The applications judge rejected this argument, and held that the limitation period for a claim for attorney compensation runs from date of death, when the power of attorney ceases to be effective.

The Court of Appeal agreed that the claim was not statute-barred, but held that the *Limitations Act, 2002* does not apply because a claim for compensation for an attorney for property through the passing of accounts process does not constitute a "claim" within the meaning of the *Limitations Act, 2002*. A "claim" is defined in the Act as "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission."⁶ Justice Hourigan, writing on behalf of the Court, concluded that an application to pass accounts is "the opposite of remedial; it is a process that seeks a court order that no remedy is necessary with respect to the accounts".⁷

The Court of Appeal confirmed that, at common law, there is no limitation period for an application to pass accounts. The introduction of the *Limitations Act, 2002* did not change the common law in this regard. The only defences applicable to an application to pass attorney accounts are the equitable defences of laches and acquiescence, neither of which was asserted in *Armitage*.

The Court of Appeal left open the issue of whether, for example, the *Limitations Act, 2002* can operate to bar a beneficiary from filing a notice of obligation after than attorney has sought a passing of accounts.

Footnotes

¹ 2017 CarswellOnt 16, 23 E.T.R. (4th) 187, 2017 ONCA 9 (Ont. C.A.), affg 2016 CarswellOnt 12946, 2016 ONSC 2377, 19 E.T.R. (4th) 265 (Ont. S.C.J.).

² *Bikur Cholim Jewish Volunteer Services v. Penna Estate*, 2009 CarswellOnt 1105, 2009 ONCA 196, 48 E.T.R. (3d) 22

(Ont. C.A.) at paras. 50-51.

³ [2016 CarswellOnt 20023](#), [2016 ONCA 971](#), [23 E.T.R. \(4th\) 1](#) (Ont. C.A.), aff'g [2016 CarswellOnt 4582](#), [2016 ONSC 2043](#) (Ont. S.C.J.), on other grounds.

⁴ S.O. 2002, c. 24.

⁵ S.O. 2002, c. 30.

⁶ *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, s. 1.

⁷ *Armitage v. Salvation Army*, [2016 CarswellOnt 20023](#), [2016 ONCA 971](#), [23 E.T.R. \(4th\) 1](#) (Ont. C.A.) at para. 27.

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