CITATION: Tessaro v. Gora, 2024 ONSC 198
COURT FILE NO.: CV-20-653920
DATE: 20250109

ONTARIO SUPERIOR COURT OF JUSTICE

IN THE ESTATE OF Leopold Ryczkowski, deceased

RE:

LYNN TESSARO and KIM MARZEC, Plaintiffs

-and-

JOHN LEONARD ZIGMUND GORA, Defendant

AND RE:

COURT FILE NO.: CV-20-654011

THE ESTATE OF IRENE SEDGEWICK, deceased, represented by DAVID ANTHONY SEDGEWICK, and VIRGINIA BOYLE, Plaintiffs

-and-

JOHN LEONARD ZIGMUND GORA, Defendant

BEFORE: FL Myers J

COUNSEL: *Kristine Anderson and Dan Zacks*, for the Defendant in each action

James J. Dunphy, for the Plaintiffs the Estate of Irene Sedgewick, deceased, represented by David Anthony Sedgewick, and Virginia Boyle in action CV-20-654011

David Mills and Matthew Lee, for the Plaintiffs Lynn Tessaro and Kim Marzec in action CV-20-653920

HEARD: January 7, 2025

ENDORSEMENT

Background

[1] These two actions arise from the same facts and present the same issues. In both claims, beneficiaries under a poorly drafted will sue the drafting lawyer for negligently causing them to receive less than the deceased intended them to receive from his estate.

[2] For the reasons set out below both actions must be dismissed because they were commenced after the expiry of the 15-year ultimate limitation period set out in s. 15 (2) of the *Limitations Act, 2002*, SO 2002, c. 24, Sch. B.

[3] I agree with Mr. Zacks that while in some ways the result may appear harsh and perhaps even unfair, I cannot torture the language of the statute to try to create a special exemption to the ultimate limitation period by fanciful interpretation that could undermine the purpose of the law. Rather, if the outcome of this case creates a result that was not intended by the Legislature, despite the wording of the statute, then that is a matter that can be corrected readily by the Legislature. That is what happened after the Court of Appeal released its decision in *Hare v. Hare*, 2006 CanLII 41650 (ON CA), concerning the limitation period applicable to demand obligations under the same statute.

[4] Limitation periods, by definition, prevent injured people from pursuing potentially meritorious claims on public policy grounds. When a claim is barred by a limitation period passing, someone may lose the ability to seek compensation for injuries sustained by the unlawful or actionable misconduct of another. Moreover, while not the case here, in a claim by a beneficiary against a lawyer for negligent drafting a will, if the deceased lives for more than 15 years after his or her will was negligently drafted, the beneficiaries may never have any opportunity to sue the lawyer. Their right to a remedy may be barred before their right to assert a claim even arises. The does not sound like a fair balancing of the rights of the parties. Rather, the lawyer is receiving protection and the beneficiaries are simply losing their right to claim relief in a situation that the common law long ago labelled as unjust.

[5] But, the Legislature has created exceptions to the universal applicability of the ultimate limitation period where it deemed it in the public interest to do so. Even were I inclined to create an exception to the ultimate limitation

period on the facts of this case, I do not believe that the statute allows me to do so. Accordingly, if an exception is to be made to the ultimate limitation period for claims against lawyers brought by disappointed or victimized will beneficiaries, it will have to me made by the Legislature.

Order to Continue

[6] A preliminary matter was addressed at the hearing on an unopposed basis. The defendant Gora passed away after the lawsuits were commenced against him. I am signing an Order to Continue that confirms the appointment of Mr. Jonathan Keslassy as Litigation Administrator for Mr. Gora's estate and amends the title of the proceedings accordingly. The order also confirms the amendment of the Title of Proceeding in the *Sedgewick* claim under Court File No. CV-20-654011 in connection with an Order to Continue that was previously made in that action.

The Motion

[7] The defendant lawyer moves to dismiss the two actions against him under Rule 21.01 (1)(a) of the *Rules of Civil Procedure*, RRO 1990 Reg 194. The rule allows a party to move for a determination before trial of a question of law where doing so may substantially shorten the trial or result in a substantial saving of costs.

[8] As the applicability of the ultimate limitation period leads to a summary dismissal of the lawsuits, it is apparent that trial time and costs are saved in this case. I raised with the parties whether there were any issues concerning the assessment of the litigation as a whole that might counsel against embarking on a summary disposition of the proceeding. They jointly submitted that there was no risk of duplication or inconsistent verdicts at trial in the event that I held that the actions were to continue. The issues at trial would focus on whether the drafting lawyer was negligent when he wrote the deceased person's will. That happened decades before and entirely independent of the expiry of the ultimate limitation period (if it applies).

[9] The parties agreed to a very simple set of facts that frame the legal interpretation of the relevant statutory provision. None of the agreed facts would be in issue were the matter to proceed to trial.

[10] I am therefore satisfied that this is a proper case in which to make a determination of law under Rule 21.01 (1)(a) and I do so below.

The Agreed Facts

[11] The agreed facts are set out in an Agreed Statement of Facts, an Agreed Document Brief, and a Supplementary Agreed Document Brief.

[12] These two actions concern the estate of Leopold Ryczkowski.

[13] Mr. Ryczkowski passed away on July 16, 2018.

[14] In 1991, Mr. Ryczkowski retained the defendant John Leonard Zigmund Gora as his lawyer to draft a will.

[15] On November 6, 1991, Mr. Ryczkowski signed the will drafted for him by Mr. Gora.

[16] The plaintiffs Virginia Boyle and the late Irene Sedgewick were the surviving sisters of Mr. Ryczkowski. They were both alive at his death.

[17] Mr. Ryczkowski also had a third sister named Monica Marzec. She died before Mr. Ryczkowski died. Ms. Marzec left two daughters who are the plaintiffs Kim Marzec and Lynn Tessaro.

[18] Simplified for the purposes of these motions, Mr. Ryczkowski's will is not clear on whether the daughters of his deceased sister stand in her place and share the assets of the deceased with his two surviving sisters.

[19] The will says, among other things:

> To such of my sisters living at the time of my death, I give whatever real estate that I own or that may be in my possession at the time of my death, in equal shares *per stirpes*.

[20] The first underlined phrase seems to say that only the two sisters who were alive when Mr. Ryczkowski died will share in his real estate. But the second underlined phrase - "in equal shares *per stirpes*" - points to the deceased sister having a share that is then available to her daughters equally.

[21] This and other similar paragraphs of the will therefore created an ambiguity, at minimum, as to whether the deceased's two surviving sisters alone each take 50% of Mr. Ryczkowski's real estate (and other assets) or whether the will divides the real estate into thirds, with the share of the deceased sister Monica Marzec being shared by her daughters.

[22] On June 11, 2019, the surviving sisters of the deceased, Ms. Sedgewick and Ms. Boyle, commenced an application seeking an interpretation of the will to determine whether they must share their late brother's estate with their nieces. The pleadings from that proceeding are before this court in the Supplementary Agreed Document Brief.

[23] On December 24, 2020, the nieces of the deceased, Kim Marzec and Lynn Tessaro, commenced their action against Mr. Gora for lawyers' negligence under Court File No. CV-20-653920.

[24] Five days later, the surviving sisters of the deceased, Virginia Boyle and Irene Sedgewick, commenced their action against the lawyer under Court File No. 654011. Ms. Sedgewick has since passed away.

[25] The plaintiff beneficiaries have now settled the will interpretation out of court by Minutes of Settlement dated June 17, 2024. So, no judicial interpretation has been made as to Mr. Ryczkowski's intention as expressed in his will and whether the will expressed his actual intention. Rather, all the beneficiaries claim that because of Mr. Gora's negligent drafting they settled the will interpretation and thereby received less than the deceased intended for them to receive.

[26] Finally, Lynn Tessaro and Irene Sedgewick are the named estate trustees listed in Mr. Ryczkowski's will. So, in each of the two separate actions brought against the lawyer, one of the plaintiffs is an estate trustee. They never joined forces to bring a claim against Mr. Gora on behalf of the estate formally. But the involvement of the estate and claims by estate trustees raise an issue about the applicability of s. 38 of the *Trustee Act*, RSO 1990, c T.23 that is also considered below.

Relevant Provisions

[27] Section 15 of the *Limitations Act, 2002* provides:

> **Ultimate limitation periods**
> 15 (1) Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of a limitation period established by this section
>
> **General**
> (2) 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.

...

Period not to run
(4) The limitation period established by subsection (2) does not run during any time in which,

(a) the person with the claim,

(i) is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition, and

(ii) is not represented by a litigation guardian in relation to the claim;

(b) the person with the claim is a minor and is not represented by a litigation guardian in relation to the claim; or

(c) the person against whom the claim is made,

(i) wilfully conceals from the person with the claim the fact that injury, loss or damage has occurred, that it was caused by or contributed to by an act or omission or that the act or omission was that of the person against whom the claim is made, or

(ii) wilfully misleads the person with the claim as to the appropriateness of a proceeding as a means of remedying the injury, loss or damage.

Burden
(5) The burden of proving that subsection (4) applies is on the person with the claim.

Day of occurrence
(6) For the purposes of this section, the day an act or omission on which a claim is based takes place is,

(a) in the case of a continuous act or omission, the day on which the act or omission ceases;

> (b) in the case of a series of acts or omissions in respect of the same obligation, the day on which the last act or omission in the series occurs;
>
> (c) in the case of an act or omission in respect of a demand obligation, the first day on which there is a failure to perform the obligation, once a demand for the performance is made.
>
> **Application, demand obligations**
> (7) Clause (6) (c) applies in respect of every demand obligation created on or after January 1, 2004.

[28] The parties agree that the transition provision under s. 24 (5) of the statute applies in this case:

> (5) If the former limitation period did not expire before January 1, 2004 and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after that date, the following rules apply:
>
> 1. If the claim was not discovered before January 1, 2004, this Act applies as if the act or omission had taken place on that date.

[29] Section 38 of the *Trustee Act* provides:

> **Actions for torts**
> **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.

Issues

[30] The defendant Gora submits that under s. 15 (2) of the *Limitations Act, 2002*, the ultimate limitation period expired 15 years after the "the act or omission on which the claim is based took place." As the plaintiff beneficiaries' causes of action had not been discovered by January 1, 2004, s. 24 (5) of the statute deems the act or omission to have taken place on that date.

[31] The defendant submits, correctly, that the basis of liability pleaded against him by the beneficiaries in their respective statements of claim in these actions is the negligent will drafting conducted in late 1991. He therefore submits that the ultimate limitation period expired on January 1, 2019 being 15 years after the deemed date of January 1, 2004.

[32] There is no doubt that s. 15 (1) makes the ultimate limitation period apply even if the regular two-year limitation period under ss. 4 and 5 of the statute has not yet run out. That means that a claim can be barred by the ultimate limitation period irrespective of the date of discovery of the plaintiff's right to sue. See: *Mega International Commercial Bank (Canada) v. Yung*, 2018 ONCA 429 at para. 69.

[33] The plaintiffs submit in response that this is not a proper reading of the statute. Under s. 22 of the *Succession Law Reform Act*, RSO 1990, c S.26 wills speak only from the date of the death of the testator as if they were made immediately prior to the death of the testator. Beneficiaries have no rights under a will until the testator dies. They cannot sue the drafting lawyer before the testator dies since the testator can revoke or change the will right up to the moment of death. The beneficiaries are not injured until the will comes into force on the testator's death and then fails to do what the testator intended it to do. Therefore, the beneficiaries have no cause of action on which to sue the lawyer until the testator's date of death.

[34] If the limitation period is running before the will even comes into effect, the defendant's submission would deprive beneficiaries who will been injured by a lawyer's will drafting negligence of the ability to seek the compensation provided by the common law any time the testator lives more than 15 years from the date he or she signs a will.

[35] The issue then is whether the ultimate limitation period bars the claims of an injured beneficiary who wishes to sue a negligent will drafting lawyer. That issue turns on whether "the day on which the act or omission on which the claim is based" in s. 15 (2) of the statute is the day that the lawyer negligently drafted the will or if it is the day the will came into force on the death of the testator.

Analysis

This is a Statutory Interpretation Exercise

[36] The issue before me is one of statutory interpretation. What do the words "act of omission on which the claim is based" mean? Do they mean what they say in their ordinary meaning, or can I import into the phrase the accrual of the cause of action to the beneficiaries when the deceased died decades after the lawyer drafted the will poorly?

[37] The modern approach to statutory interpretation is not in doubt. Prof. Drieger wrote, and the Supreme Court of Canada accepted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, that

> …the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[38] The court looks at the words used through the lens of understanding and trying to implement the intention of the legislator in using those words in that section and as part of the overall scheme of the statute.

[39] The exercise is driven off the words used by the legislator. This point was emphasized in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII) and has been repeated again by the Supreme Court of Canada in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43.

[40] In this very recent decision, the court considered the interpretation of a Quebec statute - *Youth Protection Act*, CQLR, c. P-34.1 ("YPA"). The Chief Justice set out the interpretive approach on behalf of a unanimous court at para. 24:

> In this case, it is important to highlight a few principles that guide the interpretation of s. 91 para. 4 of the *YPA*. First, the *YPA* must be given a large and liberal interpretation that will ensure the attainment of its object and the carrying out of its provisions according to their true intent, meaning and spirit (see *Interpretation Act*, CQLR, c. I-16, s. 41; *Protection de la jeunesse* – 123979, at para. 21). However, just as the text must be considered in light of the context and object, the object of a statute and that of a provision must be considered with close attention always being paid to the text of the statute, which remains the anchor of the interpretive exercise. The text specifies, among other things, the means chosen by the legislature to achieve its purposes. These means "may disclose qualifications to primary purposes, and this is why the text remains the focus of interpretation" (M. Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022), 59 *Alta. L. Rev*. 919, at p. 927; see also pp. 930-31). In other words, they may "tell an interpreter just how far a legislature wanted to go in achieving some more abstract goal" (p. 927). As this Court recently noted, an interpreter must "interpret the 'text through which the legislature seeks to achieve [its] objective', because 'the goal of the interpretative exercise is to find harmony between the words of the statute and the intended objective . . .'"

[41] I therefore need to look closely at the words used as the means chosen by the Legislature to achieve its statutory purpose. The goal of the exercise is to achieve harmony between the words used and that purpose.

The Purpose of the 15-Year Ultimate Limitation Period

[42] The defendant submits that the object of the ultimate limitation period is well understood. It was enacted as part of a reform of limitations law in response to the common law's broad adoption of the "discoverability principle" as the driver of the commencement of limitation periods. In cases such as *Kamloops v. Nielsen*, 1984 CanLII 21 (SCC), the Supreme Court of Canada confirmed that limitation periods do not begin to run until the plaintiff discovers or reasonably ought to have discovered his or her cause of action.

[43] As a basic principle of fairness, it is simple to understand that as a starting point a person should know that he or she has a right to sue someone before the time clock runs to takes away that right.

[44] But one then needs to assess what the purpose is of running a clock to limit peoples' rights to sue. Time limits prevent good lawsuits as well as bad ones. So, why do we need them?

[45] In *Levesque v. Crampton Estate*, 2017 ONCA 455 (CanLII), Chief Justice Strathy in Court of Appeal described the purposes of statutes of limitation as follows:

> [53] As this court observed in Independence Plaza 1 Associates, L.L.C. v. Figliolini, 2017 ONCA 44, limitations statutes reflect public policy about efficiency and fairness in the justice system. See Manitoba Métis Federation Inc. v. Canada (Attorney General), 2013 SCC 14, [2013] 1 S.C.R. 623, at paras. 231-34 (per Rothstein J. in dissent, but not on this point). They have several goals. They promote finality and certainty in legal affairs by ensuring that potential defendants are not exposed to indefinite liability for past acts. They reflect a policy that, after a reasonable time, people should be entitled to put their pasts behind them and should not be troubled by the possibility of "stale" claims emerging from the woodwork. They ensure the reliability of evidence. And they promote diligence, because they encourage litigants to pursue claims with reasonable dispatch.

[46] The issue identified by the Legislature, after cases such as *Neilsen* broadly adopted a "discoverability" rule for limitation periods, was that the rule could effectively extend indefinitely the period for which potential defendants remain at risk of being sued. The main point of limitations statutes, as discussed by Chief Justice Strathy, is to avoid the risk of indeterminate liability.

[47] Indeterminate liability has social costs. People have to store documents, investigate old events long forgotten, and spend money on insurance or reserve for risks of liability potentially forever.

[48] The administration of justice is also exposed to risk by old claims. Witnesses die or lose memory. Documents may or may not be comprehensively maintained. The older a case is, the more there is risk of a wrong decision because the quality of evidence has declined. These thoughts also lie behind the extensive case law concerning dismissal of old lawsuits for delay.

[49] In drafting a modern limitations law at the turn of the century, the Legislature was balancing competing policies. It sought to impose a fair limitation process based first on discoverability. It considered exceptions where the limitations period should be extended or eliminated altogether. And it adopted the idea of an ultimate limitation period to guard against indeterminate risk of liability.

[50] As explained to the Legislature by the Attorney General of the day David Young:

> The bill in front of the Legislative Assembly, if passed, would establish two key limitation periods. First, a basic two-year period after the damage has been discovered would exist to start a lawsuit. The basic limitation period would start from the date the person finds out, or should reasonably have found out, about the injury, loss or damage that was experienced and who contributed to it. This period would give plaintiffs adequate time to seek legal advice, consider the options they have and begin legal proceedings.
>
> The second limitation period is an ultimate limitation period of 15 years that would commence on the date of the occurrence. This would mean that Ontarians would have 15 years to identify the loss or damage and to take legal action. This would balance the needs of the plaintiffs to have sufficient time to commence a legal proceeding with those of the defendants for certainty that after a fixed period of time further claims would be barred. Other jurisdictions have fixed or varied ultimate limitation periods ranging from 10 to 20 years. After extensive and comprehensive consultation, we were of the view that 15 years strikes the right balance.

[51] The beneficiary plaintiffs focus on the balancing of interests referred to by the Attorney General. In the case of beneficiaries who take under a will, they have no ability to bring proceedings before the will takes effect on the death fo the testator. If the testator lives for more than 15 years from the date of the will signing, the beneficiaries will lose their right to sue a negligent lawyer altogether. There is no “time to commence a legal proceeding” let alone a “sufficient time.”

[52] The facts of the cases before the court do not support that submission. Mr. Ryczkowski died in the summer of 2018. The ultimate limitation period did not expire until the end of the year. Irene Sedgewick swore an affidavit in the application for a will interpretation indicating that the beneficiaries knew

that they needed a will interpretation at least by the end of November, 2018. It is at least arguable, if not more, that the did have a period of time to bring proceedings before the ultimate limitation period expired in this case. Whatever other rights that may give to the beneficiaries however, if any, it does not affect the analysis of the ultimate limitation period.

[53] Rather, I accept the submission of the plaintiff beneficiaries that the position being adopted by the defendant could and likely will mean that in any case where a testator survives for 15 years after signing a negligently drawn will, the beneficiaries will lose their ability to sue the drafting lawyer for negligence even before they have the right to do so.

[54] The risk of rights being taken away before they are discovered was also before the Legislature when the new law was being considered. In the same day's Hansard, future Attorney General Bryant raised for debate the issue of claims being barred before they were discovered:

> The ultimate limitation period of 15 years for latent defects in buildings: currently there is no ultimate time limit for bringing such actions. Of course, homeowners who have poured their savings into a home only to discover construction defects after the fact deserve to have their concerns addressed. Many of our constituents deserve to have our questions answered in that regard. Right now, the limitation period does not start to run until the defect is discoverable, meaning, in essence, that if a defect in a home was discovered after 10 years, then under the current rules, if one brought an action at that time, it would not be statute barred.
>
> Clearly, a number has to be set and a line has to be drawn somewhere. The ultimate limitation period of 15 years makes sense for a lot of the matters dealt with in the courts and in this particular act. Does it make sense that architects and engineers can be sued 50 years after building a home? Of course not. Interestingly, that is the current state of affairs, which doesn't make much sense at all. But whether or not that bright line at 15 years makes sense is going to be something that is the subject of debate.

[55] Mr. Zacks submits that had the lawyer Mr. Gora died a few years earlier, the two-year limitation period applicable to suing his estate set out in s. 38 (3) of the *Trustee Act* would have precluded these lawsuits well before Mr. Ryczkowski died. The potential harshness of this result was noted by the Court of Appeal in *Levesque*. At paras 54 – 56, Chief Justice Strathy wrote:

> [54] As Sharpe J.A. noted in Canaccord, at para. 24, the purpose of the Limitations Act, 2002 is to "balance the plaintiff's right to sue with the defendant's need for certainty and finality".
>
> [55] The legislative history of the Limitations Act, 2002, dating back to 1969, reflects a concern about the Trustee Act limitation period and no less than five recommendations or legislative initiatives to abolish it. The fact that it was expressly retained in the Schedule reflects a clear policy choice in favour of certainty and finality in estate matters after a fixed period of two years.
>
> [56] As this court noted in Bikur Cholim, at para. 25, the result of the application of the strict rule in the Trustee Act can sometimes be harsh. ***In this case, its application results in a claim being time-barred before it is discovered.*** In Bikur Cholim, the court noted that the statute's harshness may, in some circumstances, be mitigated by common law rules. That was the case, for example, in Giroux Estate v. Trillium Health Centre (2005), 2005 CanLII 1488 (ON CA), 74 O.R. (3d) 341, [2005] O.J. No. 226 (C.A.), where the common law doctrine of fraudulent concealment applied. No such remedy is available here. [Emphasis added.]

[56] The *Limitations Act, 2002* mitigates against unjust outcomes where the Legislature has chosen to do so. For example, where liability for liquidated debt is acknowledged by a debtor, s. 13 of the statute deems “the act or omission on which liability is based” to be the date of acknowledgement rather than the earlier date that the debt first became due. Section 15 itself defers the date of “the act or omission on which liability is based” in s. 15 (6) for: continuous acts or omissions, a series of acts or omissions, and in respect of a demand obligation. Section 18 of the statute defers the limitation period for claims for contribution and indemnity by deeming a later date as the date on which “the act or omission on which the alleged wrongdoer’s claim is based took place.”

[57] There is another deeming provision that applies directly in this case. It is in the transition provision of s. 24 (5) of the statute. As set out above, because the beneficiaries' causes of action had not been discovered by the time of the coming into force of the new statute, s. 24 (5) deemed the date of the acts or omission on which the claim is based to be January 1, 2004 rather than November 1991.

[58] In my view, the Legislature has weighed the competing policy goals and settled upon wording of the ultimate limitation period that reflects its assessment of the social policy priorities. It has also provided exceptions where minded to do so.

What is the "Act or Omission on which Liability is Based"?

[59] Liability is claimed based on the lawyer's poor drafting of the will in 1991. The statements of claim plead that expressly and clearly. Try as I might, where, as here, the testator dies more than 25 years after the drafting lawyer last touched the will, I cannot say that the "act or omission on which liability is based" occurred at the date of death.

[60] Section 15 speaks of "claims" and requires the court to find the specific "acts" or "omissions" that are the basis for the claim. Here the "act" is the allegedly negligent drafting of the will.

[61] There is no omission in issue here. An "omission" in tort law refers to an act not done when a person is under a duty to act. Generally speaking, you cannot sue someone for *not* doing something unless he or she had a positive duty to do it. Put conversely, omissions are actionable where the defendant had a duty to act and failed to do so. An omission does not refer to the quality of an act but, rather, to a failure to act when one was duty-bound to act.

[62] The statute does not use the concept of a "cause of action." The accrual of the cause of action was the underlying premise of the "discoverability principle." The term "cause of action" is eschewed in this statute. Discoverability is excluded from this analysis altogether by s. 15 (1).

[63] In my view, it is undeniable that the act on which the plaintiff beneficiaries' claims are based is the drafting of the wills by Mr. Gora in 1991 and I so find.

[64] The deceased testator had more than 25 years to look at the will and have it fixed if it did not carry out his intention. Depending on discoverability, he may have had a cause of action against the lawyer, at least for the costs of fixing the will, until the day he died.

[65] But everything that happened after the lawyer prepared the will and the deceased signed it is happenstance to the beneficiaries. The deceased could have died the next day, in a year, ten years, or after 50 more years. The deceased could have revoked or changed his will innumerable times. The sisters of the deceased could have lived or died. Monica Marzec, the sister who predeceased the deceased, could have had another child before she passed away. That child might have been a minor when the deceased died. One or more of the surviving sisters could have become incapable before the deceased died. The lawyer Mr. Gora could have died some years earlier thereby limiting claims against his estate to two years under s. 38 of the *Trustee Act*. He could have died long before the beneficiaries ever obtained rights under the will.

[66] Some of this may go to considering if the limitation period was ever suspended. But none of it touches the question of what is the "act or omission on which the claim is based" under s. 15 of the statute. The point of the section is to focus on the proposed defendant and the length of time that he or she should be exposed to the risk of liability.

There was no Omission by Mr. Gora to perform a Duty on the Date of Death

[67] Mr. Dunphy submits that when the will came into force on the date of the death of the testator, the will failed to carry out the intention of the testator. Therefore, he submits, there is thereby an actionable omission as at that date. In my view, there is no omission where a lawyer had already undertaken a duty to create a will and did so poorly. Liability is based on the lawyer's acts – his failure to draft a will up to the prevailing standard of care in 1991.

[68] The claim is not based on any failure of Mr. Gora to perform a duty owed in 2018. The submission that there was an omission on the date of death confuses the obligation to perform with the quality of performance. The fact that the will fails to carry out the testator's presumed intention may amount to a breach of the applicable standard of care. But there was no act or omission to perform an act that the lawyer was duty-bound to perform immediately prior to the date of death.

[69] The fact that the estates law treats the will "as if" it was made immediately prior to the testator's death does not change the fact that the act on which liability is based for the purposes of the *Limitations Act, 2002* happened more than 25 years previously. The *Limitations Act, 2002* does not incorporate any exceptions to the ultimate limitation period based on s. 22 of the *Succession Law Reform Act*.

[70] To find negligence committed decades earlier amounts to an omission to do as one was required to do at a later date when an executory term or document becomes executed reintroduces discoverability and the accrual of a cause of action into the assessment of the ultimate limitation period.

The Legislature can Fix Problems and Create Exceptions

[71] In *Levesque*, the Court of Appeal found it significant that the strict two-year limitation period contained in s. 38 of the *Trustee Act* has been retained despite repeated recommendations that it be replaced for being too strict.

[72] Similarly, in *Ingram v. Kulynych Estate*, 2024 ONCA 678 (CanLII), the Court of Appeal also noted that exceptions in the *Trustee Act* to the application of its own strict limitation period did not disclose an intention of the Legislature to limit the reach of the statute generally. Rather, Roberts JA wrote:

> These exceptions are just that – discrete, readily ascertainable exceptions to the legislative intent that otherwise all other estate trust claims that fall within s. 38(2) of the *Trustee Act* are meant to be subject to the two-year limitation period under s. 38(3). Again, it would have been a simple thing for the legislature to include equitable trust claims against an estate as an exception to s. 38 of the *Trustee Act*. It did not do so.

[73] I read the deeming clauses in other sections of the *Limitations Act, 2002* as distinct exceptions to the ultimate limitation period created by the Legislature. The lack of a clause deeming beneficiaries' claims against will drafting lawyers (or, for that matter, claims for latent defects against architects and engineers, and all manner of other claims that may be undiscovered and even undiscoverable despite the passage of the ultimate limitation period) is part of the tradeoff intended by the Legislature. The Legislature choose to look at the timing of the performance of the underlying "act" on which a claim is based to create a fixed maximum time limit on claiming a remedy in court that is not affected by the discoverability of the cause of action.

[74] There are endless examples of contracts or legal documents that are likely to have deferred effects. Cohabitation agreements may contain negligently drafted separation terms that do not have effect until a couple separates. A unanimous shareholder agreement may contain a negligently drawn shotgun clause that does not come into effect for decades until a shareholder decides to disengage.

[75] Mr. Mills submits that with each of these examples the parties had the ability to review the lawyers' work and to act on it at any time in the 15 years

following the lawyers' negligent drafting. Beneficiaries under a will do not have that ability.

[76] But, as mentioned above, the testator, the author of the will, has the same ability as the parties to bilateral agreements to ensure that his or her lawyer fulfilled the retainer to properly draft a document that creates the intended rights and obligations.

[77] To find in favour of the plaintiffs, I would need to deem that the acts on which their claims are based occurred at the date of death. But that is not an interpretation that the words of s. 15 of the *Limitations Act, 2002* will bear. I am required to determine when the acts occurred under s. 15 (2). Unlike the Legislature, I have no authority to deem them to have occurred at a later date.

The Unique Position of Future Will Beneficiaries

[78] I accept that will beneficiaries occupy a unique position. Case law makes clear that the common law provides a right to beneficiaries to sue a will drafting lawyer because of a "lacuna" or gap in protection. When the author of a will dies, the estate has no abiding interest in the specific split of its assets. The estate suffers no compensable loss if more money goes to one beneficiary than the testator actually intended. The common law therefore provides a cause of action to beneficiaries directly against the testator's lawyer to ensure that lawyers can be held accountable for foreseeable losses caused to the beneficiaries by their negligence. See: *White v Jones*, [1995] All ER 692 (UK HL) at para. 27.

[79] But filling the gap caused by the death of the author of the will does not change the analysis of the ultimate limitation period. The Legislature has determined that people should not be at risk of being sued beyond 15 years after they did the acts objected to (or omitted to do acts they were duty-bound to do). Nothing in the *Limitations Act, 2002* allows the ultimate limitation period to restart on others becoming entitled to sue for the same acts. Nothing deems the "act or omission on which the claim is based" to be the date of death or the date of the will coming into force or the date the beneficiaries' causes of action accrued to them.

[80] I am driven by the text of s. 15 of the statute to find that the acts on which these actions are based occurred in 1991 and the 15-year ultimate limitation period applicable to them therefore expired on January 1, 2019. This is in accord with the purpose of the law to create an ultimate limitation period to protect people from being sued many years after they did the allegedly wrongful acts. The Legislature has created numerous exceptions to the broad scope of s. 15 where it determined it was fit and proper for it to deem

acts to have occurred at later dates. This case does not fall within an exception.

[81] These actions are therefore statute barred.

The Trustee Act

[82] The plaintiffs submit that they are entitled to sue under s. 38 of the *Trustee Act* for two years after Mr. Ryczkowski's death. These actions were commenced within that time (as extended by the special tolling of all limitation periods for six months during the pandemic).

[83] Section 38 (1) of the *Trustee Act* allows estate trustees to sue for damage to the person or property of the deceased, "with the same rights and remedies as the deceased would, if living, have been entitled to do." The testator would have been subject to the ultimate limitation period as at January 1, 2019.

[84] Subsection 38 (2) allows others to bring claims against an estate. That is not applicable here.

[85] The claims brought by the plaintiffs were not available to either the testator or to the estate. As noted above, the testator could have fixed the will and sought compensation for the costs of doing so. The estate has no interest in the distribution of its assets as among the beneficiaries. The claims brought by the beneficiaries lie distinctly with them precisely because there is no one else injured or with standing to assert their losses.

[86] Therefore, the two-year limitation period in s. 38 (3) of the *Trustee Act* does not apply to these claims that are not brought under s. 38 (1) of the statute.

[87] Even if s. 38 (1) did apply (perhaps to a claim for the costs of the interpretation application that has now settled) there is conflicting case law on the question of whether the two-year period set out in s. 38 (3) of the *Trustee Act* extends limitation periods that expire after the deceased died. It does not extend limitation periods that have already passed prior to the deceased's death. See: *Dressel v Glaser*, [1954] 1 DLR 655 (ONCA). But in *Abrahamovitz v Berens*, 2017 ONSC 184 (CanLII), at para. 25 Goldstein J.

held that s. 38 (3) does not do more than allow the estate to take up a claim for injury to the deceased person or his property as if the claim were brought by the deceased person. It limits the estate to bringing such a claim within two years. But, he held, it does not extend a limitation period that would have barred the deceased from bringing a claim during that time had he lived.

[88] The opposite result was reached by Heeney J. in *Whorpole v. Echelon General Insurance*, 2011 ONSC 2234, at paras 25 and 26. He held that s. 38 (3) extends the time for an estate to make a claim to ensure that the estate trustees have the ability to make informed decisions about whether to sue or not.

[89] Like Goldstein J., I do not read the two-year limitation period in s. 38 (3) as extending a limitation period that applied to the deceased himself. Subsection 38 (1) allows an estate to, "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." There is no conflict between s. 38 of the *Trustee Act* and the application of the ultimate limitation period. As discussed in *Ingram*, s. 38 is designed to limit and speed up claims involving estates. Nothing in its words, their context, or the purposes of the statute is aimed at creating new rights greater than those held by the testator himself. Rather, the quoted words from s. 38 (1) confine the estate to claims and remedies that could have been asserted by the testator.

[90] In my view, the two-year period in s. 38 (3) is a maximum that could limit a later claim even if the testator himself could have brought a claim later had he lived. But nothing in s. 38 (3) extends a claim that could not have been brought by the testator had he not passed away.

[91] While each statement of claim refers to each of the estate trustees in their capacities as estate trustees and makes passing reference to losses to the estate, neither claim as currently drafted purports to bring a proper claim by the estate of Mr. Ryczkowski against Mr. Gora or his estate. Neither claim names the estate of Mr. Ryczkowski as a party plaintiff nor seeks relief for the estate in the prayer for relief. I doubt that each estate trustee has been authorized to sue in her own action on behalf of the estate.

[92] I do not decide the issue of whether the failure to name the estate as a party in either action or the failure of the estate trustee plaintiffs to band together in one action brought expressly on behalf of the estate, is fatal as submitted by the defendant. Neither do I decide if the two personal claims by the estate trustees currently plead sufficient facts to support an amendment claiming on behalf of the estate this long after even the two-year limitation period in

s. 38 (3) of the *Trustee Act* has now run. I told the parties that I was not going to be deciding the issues based on alleged pleadings deficiencies in the statements of claim in this regard. The issue of amending the statements of claim after a limitation period has run was not before me. See: *Bank of Montreal v. Morris*, 2013 ONSC 2884, at para 46.

[93] I considered striking the statements of claim without prejudice to the plaintiffs to try to obtain leave to amend their pleadings to try to state claims on behalf of the estate of the testator under s. 38 (1) based on the facts already pleaded in accordance with case law under Rule 26 of the *Rules of Civil Procedure*. But given my holding that the ultimate limitation period expired before the claims were started and it was not extended by the *Trustee Act*, the pleadings issues do not arise. Whatever claims could have been brought under s. 38 (1) of the *Trustee Act* against Mr Gora or his estate became statute barred on January 1, 2019.

Balancing Policy Priorities

[94] I readily accept the importance that the common law places on the ability of will beneficiaries to sue lawyers for negligently drafting wills. Doing so properly holds lawyers to account. More important perhaps, it protects the integrity of our system of inheritance and succession. People are entitled to rely on wills to carry out the intentions of their deceased parents, relatives, or benefactors. People may have waited their whole lives for an inheritance. They should not be disappointed by actionable negligence of a lawyer. See: *Smolinski v Mitchell*, 1995 CanLII 1545 (BC SC) at para. 52 and *White v Jones*, at para. 27.

[95] The plaintiff beneficiaries submit that if the limitation period applies, people who do the responsible thing and obtain a will while young will be penalized. The defendant, by contrast, says that perhaps wills lawyers should be counselling people to check their wills at least every 15 years.

[96] It is not for me to decide whether the protection of society from the harms presented by allowing litigation of very old claims is more or less important than the protection of old professional negligence claims to obtain compensation for injured beneficiaries under a negligently drafted will.

[97] It is my role to interpret the statute and apply the balance drawn by the Legislature. My task is to find when the acts that form the bases of the plaintiffs' claims occurred and to apply the law set out by the Legislature in s. 15 (2) of the *Limitations Act, 2002*. Creating exceptions to the ultimate limitation period by adding a new deeming clause into the statute is the precise type of social policy prioritization that is the function of the peoples'

elected representatives in the Legislature rather than an unelected judge of this court.

Outcome

[98] The actions are therefore dismissed.

[99] The defendant is entitled to his costs on a partial indemnity basis fixed at $30,000 all-inclusive against both sets of plaintiffs jointly and severally.

Justice FL Myers

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FL Myers J

Date: January 9, 2025