WILL CHALLENGES AND THE *LIMITATIONS ACT, 2002*: A RECONSIDERATION

Matthew Furrow* and Daniel Zacks**

* Arkin Furrow Estate Law LLP, Toronto.
** Zacks Law, Toronto.

I. INTRODUCTION

The 2014 Ontario Superior Court decision in *Leibel v. Leibel*[1] is widely considered to have established that the basic two-year limitation period in the *Limitations Act, 2002* (the "*Limitations Act*")[2] applies to proceedings challenging the validity of a will in Ontario. In this article we argue the opposite: the *Limitations Act* does not apply to will challenge proceedings.

Historically, statutory limitation periods have not applied to will challenges. Statutory limitation periods apply to causes of action, which a will challenge is not. There was never any suggestion that Ontario's former *Limitations Act*[3] (the "former Act") applied to will challenges.

The coming into force of the *Limitations Act* abolished different limitation periods for different categories of causes of action by introducing one basic and one ultimate limitation period. It did not expand the application of statutory limitation periods to proceedings that, like a will challenge, are without a cause of action.[4]

The Court of Appeal for Ontario has yet to consider directly the application of the *Limitations Act* to will challenges. Our aim is to situate the limitation of will challenges in its historical context; demonstrate how the coming into force of the *Limitations Act* was not intended to, and did not, impose a limitation period on will challenges where none had existed before; explain the problems that arise from applying the *Limitations Act* to a will challenge; and critique *Leibel* and the case law following it.

1. (2014), 2 E.T.R. (4th) 268, 2014 ONSC 4516 (Ont. S.C.J.[Estates List]).
2. S.O. 2002, c. 24, Sched. B ("*Limitations Act*").
3. R.S.O. 1990, c. L.15. A substantial portion of this statute was repealed and replaced by the new *Limitations Act*; provisions relating to real property remain and the statute has been renamed *Real Property Limitations Act*.
4. The cause of action is the "factual situation the existence of which entitles one person to obtain from the court a remedy against another" — see p. 202.

II. PROBATE PROCEEDINGS: HOW A WILL IS PROVEN AND CONTESTED

1. The Origin and Evolution of the Court's Probate Jurisdiction

The law of probate (proof of a will)[5] is *sui generis*. It derives from canon law, which is distinct from both common law and equity. The first records of the English ecclesiastical courts granting probate of testaments disposing of personal property appear in the 13th century.[6] Probate continued to fall under the canon law jurisdiction of the ecclesiastical courts for centuries.[7] Not until the 1540 *Statute of Wills* did the law of post-Norman Conquest England recognize a will disposing of real property. For centuries afterward, probate was ineffective for a devise of land; if title to land transferred under a will were disputed, the will would need to be proved like a deed within that litigation.[8] Not until the 19th century were uniform rules established in English law for the execution and construction of wills for both real and personal property,[9] the probate jurisdiction removed from the ecclesiastical courts, and the same court made responsible for probate of all wills regardless of whether they disposed of real or personal property.[10]

As of the date of reception of English law to Upper Canada in 1792, the ecclesiastical courts still had jurisdiction over

5. From the Latin *probare*, "to test" or "to prove." Historically, a "testament" disposed of personal property and a "will" disposed of real property: Charles C. Pickett, "Jurisdiction in Will Contest Cases" (1930), 8 Chicago L. Rev. 1, at p. 3; Ian M. Hull and Suzana Popovic-Montag, *Macdonell, Sheard and Hull on Probate Practice*, 5th ed. (Toronto: Carswell, 2016), p. 1.
6. Thomas E. Atkinson, "Brief History of English Testamentary Jurisdiction" (1943), 8 Missouri L. Rev. 107, at p. 112.
7. Albert Oosterhoff, "The Discrete Functions of Courts of Probate and Construction" (2017), 46 Adv. Q. 316, at pp. 321-322; Eugene A. Haertle, "The History of the Probate Court" (1962), 45 Marquette L. Rev. 546, at pp. 547-548.
8. Atkinson, *supra*, footnote 6, at p. 121; Pickett, *supra*, footnote 5, at p. 5.
9. *Wills Act 1837*, 7 Wm. IV & 1 Vict., c. 26; Atkinson, *ibid.*, at p. 123.
10. In 1857, the Court of Probate was established with power to grant probate in place of the ecclesiastical courts, including probate of wills disposing of both real property and personalty. As of 1875, the Court of Probate was abolished and its probate jurisdiction transferred to the Probate, Divorce and Admiralty Division of the High Court of Justice. In 1897, probate became effective for wills disposing of land alone: Oosterhoff, *supra*, footnote 7, at pp. 322-323; Atkinson, *supra*, footnote 6, at pp. 124-125; *Macdonell, Sheard and Hull*, 5th ed., *supra*, footnote 5, at p. 2.

probate in England. The *Probate and Surrogate Courts Act* of 1793 established a Court of Probate for Upper Canada and a series of inferior regional surrogate courts.[11] In 1858, the Court of Probate was abolished in Canada West (as modern-day Ontario was known from 1841-1867) and all probate jurisdiction was vested in the surrogate courts. These acquired jurisdiction over wills of real property in 1886.[12]

The surrogate courts, like the English ecclesiastical courts before them, were neither courts of common law nor equity. They applied their own unique system of probate law, and their own rules of practice, derived from centuries of English canon law.[13] The surrogate courts were abolished, and their jurisdiction was transferred to the Superior Court of Justice (then the Ontario Court (General Division)), in 1990.[14] However, the Court of Appeal for Ontario has confirmed that despite the transfer of jurisdiction and the replacement of the former *Surrogate Court Rules* with Rules 74 and 75 of the *Rules of Civil Procedure*, "the nature of the court's jurisdiction has not changed in material respects."[15] This suggests that the probate jurisdiction now exercised by the Superior Court retains its own nature distinct from both common law and equity.

The Court of Appeal in *Neuberger v. York* has highlighted three key aspects that distinguish probate proceedings from those advancing typical private disputes between litigants: First, the court's jurisdiction in probate is inquisitorial, to ascertain and pronounce what documents constitute the testator's last will and are entitled to be admitted to probate. Second, a will is a public document. Probate is an *in rem* pronouncement as to the validity of a will, and the authority of the estate trustee, to society at large. Third, the court owes a special responsibility to the testator, who is now deceased, to see that their wishes are carried out.[16] We will return later to these concepts.

---

11. S.U.C. 1793, c. 8; Oosterhoff, *supra*, footnote 7, at p. 324; Rodney Hull and Maurice Cullity, *McDonnell, Sheard and Hull on Probate Practice*, 3rd ed. (Toronto: Carswell, 1981), at pp. 3-4.
12. *Surrogate Courts Act*, S.C. 1858, c. 93; *Devolution of Estates Act*, S.O. 1886, c. 22; Oosterhoff, *supra*, footnote 7, at pp. 324-325.
13. Oosterhoff, *ibid.*, at pp. 325-326 and 336-342.
14. *Court Reform Statute Law Amendment Act*, S.O. 1989, c. 56; *Macdonell, Sheard and Hull*, 5th ed., *supra*, footnote 5, at p. 3.
15. *Neuberger Estate v. York* (2016), 395 D.L.R. (4th) 67, 129 O.R. (3d) 721, 16 E.T.R. (4th) 1, 2016 ONCA 191 (Ont. C.A.), at para. 67, reversing 2014 ONSC 6706 (Ont. S.C.J. [Estates List]).
16. *Neuberger*, *supra*, footnote 15, at paras. 68 and 117-122.

2. Methods of Proving a Will

In non-contentious matters, in order to obtain a certificate of appointment of estate trustee with a will (*i.e.*, probate the will), it usually suffices for the will's named executor(s) to prove the will in common form. This is a largely administrative process in which the original will is submitted to the court, together with proof of due execution, on notice to the beneficiaries. If the requirements of the *Rules of Civil Procedure* are met, including the payment of estate administration tax, and if no objection is received, a certificate of appointment of estate trustee may be issued by the registrar.[17]

The more rigorous form of proving a will is known as proof in solemn form (also historically known as proof *per testes*). This means "to prove, in open court upon notice to all parties having a financial interest in the estate, that the will was duly executed, the testator had testamentary capacity and that the testator had knowledge and approval of the contents of the will."[18] The propounder of a will may be obliged to seek probate in solemn form where proof in common form is not possible (for instance, if there is insufficient proof of due execution).[19] A party with an interest in the estate may also apply to the court to require proof in solemn form.[20] Such an application may be made even though probate has already been granted in common form; if the will cannot be proved in solemn form, the grant of probate (*i.e.*, the certificate of appointment of estate trustee) will be revoked.[21] Proof in solemn form will be set aside only in exceptional circumstances, such as fraud or the subsequent discovery of a later will.[22]

---

17. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("*Rules*"), r. 74.04 and 74.12-74.14 delineate the process for an application for a certificate of appointment of estate trustee. We note that it is uncontroversial that an application for probate is not subject to the *Limitations Act*. Although it will usually be in the interest of the estate for the will to be probated as soon as possible, there is no statute bar if the executors, for whatever reason, choose to delay an application for a certificate of appointment of estate trustee.
18. *Neuberger*, *supra*, footnote 15, at para. 77, citing Rodney Hull and Ian Hull, *Macdonell, Sheard and Hull on Probate Practice*, 4th ed. (Toronto: Carswell, 1996), at p. 315.
19. *Macdonell, Sheard and Hull*, 5th ed., *supra*, footnote 5, at p. 463.
20. *Rules*, *supra*, footnote 17, r. 75.01.
21. *Macdonell, Sheard and Hull*, 5th ed., *supra*, footnote 5, at p. 465.
22. *Ibid.* at p. 472.

3. Methods of Contesting a Will

A party may seek to challenge a will's validity on various grounds. Most commonly, it is alleged that the testator lacked capacity to make a will, that the testator lacked knowledge and approval of the terms of the will, that will was executed without the requisite formalities, or that the will was procured through undue influence exerted over the testator.

There are several different procedural ways to advance such allegations in order to contest a will. The challenging party may commence an application seeking a declaration that the will is invalid, or seeking an order that the propounding party is required to prove the will in solemn form. A party appearing to have a financial interest in the estate may file a notice of objection pursuant to the *Rules*, either before or after an application for probate has been filed; this will typically lead to a motion for directions from either the propounding or objecting party to set a procedural roadmap to an ultimate hearing to determine the will's validity.[23] Because of these different procedural avenues, the propounders of a will may find themselves named as applicants, respondents, plaintiffs or defendants, with the parties contesting the will named in the corresponding opposite role.

In every case, the court is ultimately called on to determine, on all the relevant and admissible evidence, whether the will was properly executed by a capable testator free of fraud or undue influence: in other words, whether the will is proven in solemn form. The substantive law to be applied remains the same. The burdens of proof as to testamentary capacity, undue influence, and other relevant doctrines remain the same as between the propounding party and the contesting party or parties, regardless of the procedural method used to reach a hearing, and regardless of which parties are applicants/plaintiffs and which are respondents/defendants.[24]

---

23. *Rules*, *supra*, footnote 17, r. 75.03 and 75.06. See the more detailed discussion at page 211 below.
24. *Vout v. Hay* (1995), 125 D.L.R. (4th) 431, [1995] 2 S.C.R. 876, 1995 CarswellOnt 186 (S.C.C.), at paras. 19, 20 and 22; *Macdonell, Sheard and Hull*, 5th ed., *supra*, footnote 5, at p. 463.

III. THE HISTORICAL LIMITATION OF WILL CHALLENGES

1. No Limitation Period for Will Challenges Before 2004

Until January 1, 2004, the former Act, along with various other statutes containing limitation periods, imposed limitation periods on Ontario proceedings.[25]

In *M. (K.) v. M. (H.)* the Supreme Court of Canada described the former Act as applying limitation periods to "a closed list of enumerated causes of action",[26] a statement that appears frequently in the jurisprudence. However, what Part III of the former Act actually lists when it prescribes limitation periods for personal actions are forms of action. Take for example s. 45(1)(g):

> *45*. (1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned,
>
> > ... (g) an action for trespass to goods or land, simple contract or debt grounded upon any lending or contract without specialty, debt for arrears of rent, detinue, replevin or upon the case other than for slander,
>
> within six years after the cause of action arose;

These forms of action are the common law writs that, prior to their abolishment in the 19th century, enabled a party to enforce a cause of action. Each form of action had its own particular procedure and substantive law, including the causes of action that could be advanced within it.[27] For example, the "action upon the case" in s. 45(1)(g) encompassed causes of action that sound in tort for negligence, and the six-year limitation period prescribed by s. 45(1)(g) for that form of action commenced when the cause of action accrued. Because each form of action encompassed one or more causes of action, they were effectively a short form for those causes of action, which is why the former Act can be said to apply to a list of causes of action.

The distinction between forms of action and causes of action had been of limited consequence for nearly a century before the

---

25. *Supra*, footnote 3.
26. *M. (K.) v. M. (H.)* (1992), 96 D.L.R. (4th) 289 (S.C.C.), at p. 329.
27. F.W. Maitland, *The Forms of Action at Common Law* (Cambridge: Cambridge University Press, 1963), at p. 3.

Supreme Court decided *M. (K.) v. M. (H.)*. However, it is a distinction worth emphasising because it demonstrates the extent of the historical nonintercourse between statutory limitation periods and will challenges.

Forms of action were exclusively legal and within the jurisdiction of the courts of law. They concerned real property, personal actions (arising from debt, duty, and injury to person or property), and some combination of the two.[28] Generally, if proven, they resulted in a damages award as the courts of law had no authority to award injunctive and, for the most part, *in rem* relief.[29] As we have seen, the law of probate developed from canon law in the ecclesiastical courts and not in the common law. There was accordingly no common law form of action with respect to will challenges.[30] When the forms of action were in use, it would have been considered axiomatic that a will could not be challenged by form of action, and that limitation periods, which applied to forms of action, did not apply to will challenges.

This is presumably why historically the courts have very infrequently (indeed, almost never) considered the application of statutory limitation periods to will challenges.[31] In *Oestreich v. Brunnhuber* (a 2001 decision delivered long after the forms of action ceased to have any significance outside of limitations law), Haley J. made the point explicitly:[32]

> There are no time limitations by statute within which a person with a financial interest in an estate may require a will to be proved in solemn form. For example, the *Statute of Limitations Act*, R.S.O. 1990, C. L.15, affects claims relating to assets of the estate, but not to the declaring of a will to be valid or invalid. The beneficiary who delays in attacking the will runs the risk that the assets may have already been distributed and that tracing procedures may have to be undertaken.

In support of this principle, Haley J. cited *Feeney's Canadian Law of Wills* for the proposition that "There does not appear to be a specific limit on the time within which an executor who has

28. *Ibid.*
29. Linda S. Abrams and Kevin P. McGuinness, *Canadian Civil Procedure Law*, 2nd ed. (Markham, Ontario: LexisNexis, 2010), at 1.61.
30. When a will was contested through litigation at common law over title to a property, this was done by way of action for ejectment: Pickett, *supra*, footnote 5, at p. 5.
31. Brian A. Schnurr, *Estate Litigation*, 2nd ed. (Toronto: Thomson Reuters Canada) (looseleaf), ch. 22.4.
32. *Oestreich v. Brunnhuber* (2001), 38 E.T.R. (2d) 82 (Ont. S.C.J.), at para. 17.

proved the will in common form may be called upon to prove it in solemn form." Feeney in turn cites *In the Goods of Topping*, an 1853 English Ecclesiastical Court decision:[33]

> There have been instances in which wills have been called in, and the executors compelled to prove them in solemn form, after a great length of time. . . . Notwithstanding what is stated in some of the books to the contrary, it was the opinion of that learned judge Sir William Wynne, that there is no limitation, as to time, in calling in question a will. I concur in that opinion.

Some historical English sources suggest that once a will was proved in common form, the executor could not be required to prove it in solemn form after 30 years had elapsed; this, however, appears to based on the historical "ancient documents" rule of evidence assuming the authenticity of documents more than 30 years old. It was not based on a statute of limitations.[34] We have found no case invoking this 30-year doctrine in Ontario law.

Some decisions suggest that equitable doctrines such as *laches* and acquiescence may act to bar a will challenge, but only in cases of exceptional delay.[35] As we have seen, the of law probate is not based on equity and arguably these doctrines should be inapplicable.[36] Some more recent cases have relied on the discretion granted to the court by the *Rules of Civil Procedure* whether or not to revoke a certificate of appointment of estate trustee, or to return it to the court pending the resolution of a will challenge, to justify the dismissal of a thinly-supported will challenge on the basis of delay.[37] However, not

33. *Oestreich v. Brunnhuber*, *supra*, footnote 32, at para. 18, citing Thomas G. Feeney, *The Canadian Law of Wills*, 3rd ed. (Toronto: Butterworths, 1987), at p. 181, citing *In the Goods of Topping* (1853), 163 E.R. 1434, 2 Rob. Ecc. 620 (Eng. Ecc.). See also the current edition of this text, James MacKenzie, *Feeney's Canadian Law of Wills*, 4th ed. (Butterworths) (looseleaf), § 7.22.
34. William Roberts, *A Treatise on the Statute of Frauds* (London: Kings Printer for J. Butterworth, 1805), at p. 449; John Godolphin, *The Orphan's Legacy: Or, a Testamentary Abridgment in Three Parts*, 4th ed. (London: Printed by the assigns of Richard and Edward Atkins, Esq.; For Robert Vincent, 1701), Part I at p. 62; Pickett, *supra*, footnote 5, at p. 3.
35. *Allan v. Hodgins Estate*, 1974 CarswellSask 147 (Sask. Q.B.), at para. 4; *Oestreich*, *supra*, footnote 32, at paras. 20 and 26-27.
36. Oosterhoff, *supra*, footnote 7, at pp. 323, 325 and 333.
37. *Rules*, *supra*, footnote 17, r. 75.04 and 75.05; *Bermingham v. Bermingham Estate* (2007), 32 E.T.R. (3d) 292, 2007 CarswellOnt 2033 (Ont. S.C.J.), at paras. 51-57; *Re Prong Estate* (2011), 65 E.T.R. (3d) 48, 2011 ONSC 632 (Ont. S.C.J.).

until *Leibel* did a court consider the application of the new *Limitations Act* to will challenges.

2. Calls for Reform to Ontario Limitations Law Leading to the Modern *Limitations Act*

The prescription of a statutory limitation period for a will challenge would be a fundamental change to Ontario limitations law. It would be the first instance of the application of a statutory limitation period to a proceeding without a cause of action, and the first instance of the statutory limitation of will challenges.

Certainly the Legislature intended for the *Limitations Act* to effect fundamental reforms to limitations law. However, none of these reforms was aimed at expanding the application of the limitations scheme beyond causes of action, and, in particular, none was aimed at subjecting will challenges to statutory limitation.

By the 1960s there was wide recognition that the limitations scheme required reform. Myriad statutes contained limitation periods of varying lengths, which caused confusion.[38] The language of the former Act originated in English statutes dating from 1588 to 1888 and was inconsistent with contemporary law and procedure (not least in its use of forms of action).[39] The principles of cause of action accrual determined the commencement of limitation periods. These had evolved, in the words of the Alberta Institute of Law Research and Reform in 1986, to be "extremely complex" and "frequently uncertain", and to "often result in a limitation period beginning at a time which is inappropriate insofar as the reasons for and the objectives of a limitations system are concerned."[40] The Institute comprehensively set out the many problems it identified arising from the accrual rules; among other things, it noted that the Fourth Edition of *Halsbury's Laws of England* had 90 pages devoted to accrual problems.[41]

38. See *Schwebel v. Telekes*, [1967] 1 O.R. 541 (Ont. C.A.).
39. Ontario Law Reform Commission, *Report on Limitation of Actions* (Toronto: The Commission, 1969) ("LRC 1969 Report"), at p. 11. York University has made this unexpectedly engaging document available at <http://digitalcommons.osgoode.yorku.ca/library_olrc/13/>. See generally *Schwebel v. Telekes*, [1967] 1 O.R. 541 (Ont. C.A.).
40. Institute of Law Research and Reform, *Limitations*, Report for Discussion No. 4 (Edmonton: Institute of Law Research and Reform, 1986), at p. 88.
41. *Ibid.* at p. 91.

In 1969, the Ontario Law Reform Commission published a comprehensive review of Ontario limitations law and the first of three major proposals for legislative reform.[42] The commission did not consider probate proceedings or will challenges, even tangentially. Had its proposed limitations act been enacted, no limitation period would have applied to will challenge proceedings. Indeed, the commission was explicit that statutory limitation periods should continue to apply only to causes of action and, subject to certain exceptions, should commence on accrual.[43]

The next major proposal came in 1977 when the Ministry of the Attorney General ("MAG") released a discussion paper consisting of a draft bill intended to replace the former Act.[44] The draft bill largely reflected the commission's recommendations, with some modifications imported from recently enacted British Columbia reforms. It would have applied limitation periods to causes of action only and contained no provision for will challenges. There is no mention of probate proceedings or will challenges in MAG's commentary to the draft bill.

The third proposal came in 1991 from the *Limitations Act* Consultation Group established by the Attorney General to conduct a comprehensive review of the legislation and to make recommendations for reform. The consultation group's proposed act would also have applied to causes of action only. The commentary on the proposal contains a single reference to wills: "the interpretation of legal instruments like wills" should be exempt from limitation.[45]

Through a convoluted legislative history, the consultation group's proposal underwent material modifications and became the *Limitations Act*, which was enacted in 2002 and came into force on January 1, 2004.[46]

---

42. LRC 1969 Report, *supra*, footnote 39.
43. See LRC 1969 Report, *ibid.*, at pp. 92-93 and 162.
44. Ministry of the Attorney General, *Discussion Paper on Proposed Limitations Act* (Toronto: Ministry of the Attorney General, 1977).
45. Limitations Act Consultation Group, *Recommendations for a New Limitations Act* (Toronto: Ministry of the Attorney General, 1991), at p. 18 ("1991 Consultation Group Report").
46. The best summaries of the *Limitations Act*'s legislative history are in Graeme Mew, Debra Rolph and Daniel Zacks, *The Law of Limitations*, 3rd ed. (Toronto: LexisNexis Canada, 2016), at pp. 7-9 and in *York Condominium Corp., No. 382 v. Jay-M Holdings Ltd.*, 2007 ONCA 49 (Ont. C.A.).

IV. THE *LIMITATIONS ACT, 2002*: WHAT IT DID, AND DID NOT, CHANGE

1. Key Differences from the Former Act

The *Limitations Act* effected three fundamental reforms:

(1) It resolved the confusion arising from multiple limitation periods in different statutes by creating one basic and one ultimate limitation period of universal application, while preserving certain other specific limitation periods;
(2) It codified common law discovery, which had become a rule of general application in the 1990s; and
(3) It resolved the problems arising from cause of action accrual by replacing the cause of action in the limitations scheme with the "claim", a cause of action derivative comprised of only two elements that allows for one accrual rule, one basic limitation period, and one ultimate limitation period.

As set out below, the *Limitations Act*'s reforms did not expand the application of statutory limitation periods to proceedings without causes of action, including will challenges.

2. A "Claim"-based Limitations Scheme

The words "cause of action" do not appear in the *Limitations Act*. Instead, the *Act* limits the "claim" (to avoid confusion, we refer to a "claim" within the meaning of the *Limitations Act* as a "Claim").[47] Section 2(1) provides that the *Limitations Act* "applies to claims pursued in court proceedings" (with certain enumerated exceptions).[48] Thus the existence of a Claim is the precondition to the application of the *Limitations Act* and, in turn, the commencement of its limitation periods.[49] The *Limitations Act* does not apply to court proceedings that are without a Claim.

Section 1 of the *Limitations Act* defines the Claim: it is "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission."[50]

47. *Limitations Act*, *supra*, footnote 2, s. 1.
48. *Ibid.*, s. 2(1).
49. *Armitage v. Salvation Army* (2016), 406 D.L.R. (4th) 563, 23 E.T.R. (4th) 1, 2016 ONCA 971 (Ont. C.A.), at para. 27. For a discussion of judicial consideration of the Claim, see Daniel Zacks and Matthew Furrow, "The Limitation of Applications to Pass Accounts" (2016), 46 Adv. Q. 230.

As the courts have noted, this definition is broad.[51] Its breadth reflects the intention that the *Limitations Act* should function "as a comprehensive scheme for limitation periods."[52] The definition does not distinguish between Claims commenced by statement of claim or notice of application,[53] or between those arising from common law, statutory, or equitable causes of action.[54]

There is little jurisprudence considering the nature of the Claim. The court generally finds that a proceeding is in respect of a Claim with minimal or no enquiry.[55] This is because the majority of civil proceedings are for damages, and a proceeding in which a plaintiff seeks damages is self-evidently a Claim.

It is nevertheless important to be precise about the nature of a Claim, and what is and is not a Claim. This is because the existence of a claim is the threshold to the application of the *Limitations Act*, and therefore fundamental to determining whether the *Limitations Act* applies to a will challenge proceeding.

3. The Claim Requires a Cause of Action

The cause of action is the legal concept that entitles the plaintiff in a civil proceeding to ask the state, through its judicial apparatus, to come to their aid and grant certain relief.[56] By the mid-1980s, Ontario courts settled on defining a cause of action as "a factual situation the existence of which entitles one person to obtain from the court a remedy against another."[57]

50. *Limitations Act*, *supra*, footnote 2, s. 1.
51. *McConnell v. Huxtable* (2013), 113 O.R. (3d) 727, 2013 ONSC 948 (Ont. S.C.J.), at para. 72 ("*McConnell* (S.C.J.)").
52. *McConnell v. Huxtable* (2014), 370 D.L.R. (4th) 554, 118 O.R. (3d) 561, 2014 ONCA 86 (Ont. C.A.) ("*McConnell* (C.A.)"), at para. 7.
53. R. 1.03 of the *Rules*, *supra*, footnote 17, defines "proceeding" to include an action and an application; the Court of Appeal has applied this definition to the term "proceeding" as used in the *Limitations Act*: see, *e.g.*, *Giglio v. Peters*, 2009 ONCA 681 (Ont. C.A.), at paras. 21-22. See also *Guillemette v. Doucet*, 2007 ONCA 743 (Ont. C.A.), at para. 20.
54. *McConnell* (C.A.), *supra*, footnote 52, at para. 30.
55. So noted the court in *Middlesex Condominium Corp. No. 643 v. Prosperity Homes Ltd.*, 2014 ONSC 1406 (Ont. S.C.J.), at para. 26 after a comprehensive review of the jurisprudence.
56. See, *e.g.*, Silas A. Harris, "What is a cause of action?" (1927-1928) 16 Cal. L. Rev. 459, at p. 461.
57. *July v. Neal* (1986), 57 O.R. (2d) 129 (Ont. C.A.). See also *1100997 Ontario Ltd. v. North Elgin Centre Inc.*, 2016 ONCA 848 (Ont. C.A.), at para. 19.

The precondition of every Claim is a cause of action. In a proceeding, it is the cause of action that entitles the plaintiff to relief and not, as is sometimes suggested, the Claim.[58] The Claim is purely a limitations concept, relevant only to the limitation of the proceeding in which the plaintiff asserts the cause of action.[59] Plaintiffs plead causes of action, not claims.

The function of the Claim is to convert every cause of action, for limitations purposes, into a single remedial unit comprised of two elements: actionable conduct and resulting loss.

A Claim derives from a cause of action. The actionable conduct in the cause of action is the "act or omission" in the Claim. The damage that arises from the actionable conduct, whether it forms part of the cause of action or not, is the "injury, loss or damage" in the Claim.

The cause of action's connection to the Claim is apparent in the pervasiveness of the court treating the Claim as equivalent, if not identical, to the cause of action.[60] However, a cause of action is not a Claim. If it were, a Claim would not respond to any of the troublesome limitations issues that arise from a scheme based on cause of action accrual and which successive law reform efforts sought to eliminate.

Claims and causes of action differ materially in two ways.

First, damage is always an element of a Claim, but not a cause of action. While certain causes of action generally accord with the elements of a Claim (particularly those sounding in tort

58. See, *e.g.*, James J. Carthy, W.A. Derry Millar, and Jeffrey G. Cowan, *Ontario Annual Practice 2018-2019* (Toronto: Canada Law Book, 2018), where the authors, citing s. 1 of the *Limitations Act*, state, "A 'claim' provides the legal foundation to remedy an injury, loss or damage that occurred as a result of an act or omission." However, it is the cause of action that provides the legal foundation for a remedy, not the Claim. See also *Kaynes v. BP p.l.c.*, 2021 ONCA 36, 2021 CarswellOnt 579 (Ont. C.A.).

59. It is of no assistance that the *Limitations Act* uses "claim" inconsistently. The *Limitations Act* applies to claims pursued in court proceedings (s. 2) and the basic and ultimate limitation periods bar the commencement of proceedings in respect of a claim (ss. 4 and 15). These provisions distinguish between the claim and the proceeding used to advance it, and the *Limitations Act*'s provisions generally are consistent with this distinction. However, s. 9(3)2.v. refers to the "commencement of a claim", which would suggest that it is the claim which is commenced rather than a proceeding in a respect of a claim.

60. See, *e.g.*, *Pepper v. Sanmina-Sci Systems (Canada) Inc.*, 2017 ONSC 1516 (Ont. S.C.J.), at para. 61: "A claim is a cause of action." See also *Placzek v. Green*, 2009 ONCA 83 (Ont. C.A.), at para. 52; and *York Condominium Corp., No. 382 v. Jay-M Holdings Ltd.*, *supra*, footnote 46.

that require both actionable conduct and resulting damage to complete), any cause of action based on conduct that is actionable *per se* (such as breach of contract) does not.[61]

Second, causes of action are factually more expansive than Claims. Whereas actionable conduct and resulting loss are the sole elements of a Claim, some causes of action contain multiple elements (for example, the tort of negligent misrepresentation has five elements).

A Claim cannot exist, however, without a cause of action because it derives from one. The very definition of a Claim implies the existence of a cause of action. For an "act or omission" that causes "injury, loss or damage" to entitle the injured party to bring "a claim to remedy" that injury, loss or damage before the court, the act or omission must be actionable — it must give rise to a cause of action. If the act or omission does not give rise to a cause of action, the injured party has no right to ask the court for a remedy. The absence of a reasonable cause of action in a statement of claim is a ground for the court to strike it.[62]

Importantly, this means that a Claim does not encompass or describe some other substantive right that exists independent of legal, equitable, and statutory causes of action. If there is a cause of action, there is a Claim; if there is a Claim, there is a cause of action.

Thus the claim does not expand the application of the *Limitations Act* beyond causes of action. This is a point often missed in considerations of the *Limitations Act*'s comprehensiveness. The *Limitations Act* does not apply comprehensively to all proceedings, only to those proceedings in respect of a cause of action.

The *Limitations Act*'s codification of common law discovery underscores that it applies only to causes of action:

> *Basic limitation period*
>
> *4* Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
>
> *Discovery*
>
> *5* (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,

61. See, *e.g.*, *Long v. Western Propeller Co.* (1968), 67 D.L.R. (2d) 345 (Man. C.A.), at paras. 20-22.
62. *Rules, supra*, footnote 17, at r. 21.01(1)(b).

(i) that the injury, loss or damage had occurred,
(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
(iii) that the act or omission was that of the person against whom the claim is made, and
(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

The basic limitation period commences on the date of discovery of the Claim. Discovery requires knowledge of the four matters in s. 5(1)(a), which are conjunctive.[63] It occurs presumptively on the date of the act or omission giving rise to the Claim. The plaintiff can rebut this presumption by establishing that they could only reasonably have obtained knowledge of the four discovery matters on a later date.

The discovery provisions are a codification of common law discovery. At common law, discovery requires knowledge of the material facts of the cause of action. A material fact common to all causes of action is the commission of actionable conduct by the party against whom the remedy is sought. This is codified in s. 5(1)(a)(iii) of the *Limitations Act*.

Accordingly, though the definition of Claim does not specify that it is the party against whom the Claim is made that must have committed the "act or omission", this is implicit in the *Limitation Act*'s discovery provisions.

Thus it is impossible to apply the discovery provisions to any proceeding without actionable conduct committed by the defendant/respondent. Justice Perkins's discovery analysis for a family law constructive trust Claim in *McConnell v. Huxtable* illustrates the problem:

> With no act or omission of the respondent, the claimant could not reasonably have knowledge of suffering a loss caused or contributed to by an "act or omission" of the respondent. Without that knowledge, the

63. *Longo v. MacLaren Art Centre Inc.*, 2014 ONCA 526 (Ont. C.A.), at para. 41.

> third element is not satisfied, the claim has not been "discovered" and the limitation period never starts to run.[64]

The Court of Appeal in *McConnell v. Huxtable* rejected the lower court's conclusion on discovery on a different ground: that the respondent committed actionable conduct by retaining a benefit without juristic reason. This gave rise to the equitable cause of action of unjust enrichment, and therefore a Claim.[65] Still, the problem identified by Perkins J. is instructive: the *Limitations Act*'s discovery provisions cannot apply to any proceeding that does not have actionable conduct by the defendant/respondent as its premise. This includes a will challenge proceeding.

V. WILL CHALLENGES ARE NOT SUBJECT TO THE *LIMITATIONS ACT*

1. A Will Challenge is Not Founded in a Cause of Action

Whereas the former Act applied only to legal causes of action, the *Limitations Act* applies to equitable and statutory causes of action as well. One might ask whether a will challenge is a cause of action and therefore subject to the *Limitations Act*. It is not.

A will challenge is not a "factual situation that entitles one person to a remedy against another."[66] It is, ultimately, a contested proceeding to prove a will in solemn form pursuant to the court's jurisdiction in probate. As we have seen, the court's role in a contested probate proceeding is inquisitorial as well as adjudicative. The court's task is to ascertain and pronounce "what is the last will or what are the testamentary documents constituting the last will of the testator, which is or are entitled to be admitted to probate."[67] A grant (or refusal) of probate binds not only the parties to the proceeding, but operates *in rem* to bind the rights of other persons. It does not determine a private dispute between individuals. Thus the court traditionally

64. *McConnell* (S.C.J.), *supra*, footnote 51, at para. 123.
65. *McConnell* (C.A.), *supra*, footnote 52, at para. 52.
66. As defined *supra*, footnote 57.
67. *Otis v. Otis* (2004), 7 E.T.R. (3d) 221 (Ont. S.C.J.), at para. 23, citing *Re Heys Estate*, [1914] P. 192 (Eng. P.D.A.), at p. 196; C.D. Freedman, "Probate Contests and the New Law of Summary Judgment" (2014), 34 E.T.P.J. 199, at p. 208. See also *Neuberger*, *supra*, footnote 15, at para. 68.

refuses probate in solemn form on an unopposed application without evidence, or based on the parties' consent alone. Nor, as a general rule, will it declare a will invalid based on parties' consent to probate an earlier will, or without evidence.[68]

In contrast, there are no such impediments to the court determining a party's cause of action unopposed, which is what happens in any default proceeding, or based on the parties' consent.

To be sure, certain will challenges arise from conduct that might be characterised as wrongful, but this conduct is never actionable in the sense that gives rise to a cause of action.

For example, though disinheriting a dependant or other family member may in some circumstances be wrongful, it is not actionable *per se*. There is no automatic right in Ontario to be included as a beneficiary in another person's will. The disinheritance of a close family member might point to concerns about the testator's capacity or suggest undue influence, but a testator who lacks testamentary capacity by reason of dementia, delusion, or other natural medical causes, or has been unduly influenced, has not committed any actionable conduct.[69] Similarly, while most would consider unduly influencing a testator wrongful, it is not actionable.[70]

2. No Cause of Action Means No Claim and No Application of the *Limitations Act*

We have shown that the *Limitations Act* applies to Claims pursued in court proceedings. The precondition of a Claim is a cause of action. If a proceeding (like a will challenge) does not assert a cause of action, it does not assert a Claim. The *Limitations Act* will not apply to it.

This is so even though the *Limitations Act*'s definition of Claim does not specify the party which committed the "act or omission", which appears to leave open the argument that, insofar as a will challenge is a remedy for loss arising from an "act or omission", it is a Claim that triggers the application of

68. *Otis*, *supra*, footnote 67, at paras. 24-26.

69. Where a testator fails to make adequate provision from their estate for the proper support of a dependant, the dependant has a statutory cause of action against the estate for dependant's support under Part V of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26. But this is not a will challenge.

70. *Dryden v. Dryden*, 2011 ONSC 7060 (Ont. S.C.J.), at paras. 70-72 and 87; *Moore v. Piccioni*, 2011 BCSC 664 (B.C. S.C.), at para. 11; *Hughes Estate v. Hughes*, 2007 ABCA 277 (Alta. C.A.), at para. 34.

the *Limitations Act*. This argument fails for two reasons already reviewed above.

First, the Claim does not confer a substantial right. It is the cause of action from which the Claim derives that entitles a party to a judicial remedy. If the "act or omission" does not give rise to a cause of action that accrues to the party seeking the remedy, that party has no right it.

Second, the discovery provisions of the *Limitations Act* require that the actionable conduct in question is caused by the party against whom the remedy is sought.

A will challenge, however it is procedurally or substantively advanced, is not a Claim under the *Limitations Act*. No limitation period applies to it.

3. Section 16(1)(a) and the "Consequential Relief" Exception

Some commentators have argued that the *Limitations Act* applies to will challenges, but excludes them from limitation by operation of s. 16(1)(a). This provision states that there is no limitation period in respect of "a proceeding for a declaration if no consequential relief is sought."[71]

This was the position Anne Werker took in her influential 2008 article "Limitation Periods in Ontario and Claims by Beneficiaries."[72] Werker reasoned that will challenge proceedings do not seek consequential relief, but rather a declaration by the court of a will's validity or invalidity; accordingly, they are proceedings for a declaration without consequential relief. However, if a party seeks an order requiring a person to repay amounts paid pursuant to an invalid will, the party seeks consequential relief and the basic and ultimate limitation periods apply. The limitation periods would commence (presumptively, in the case of the basic limitation period) on the date of the distribution but would not be discoverable until the declaration of invalidity.[73]

Respectfully, the flaw in this reasoning is that it fails to consider the threshold question asked in s. 2 of the *Limitations Act*: whether a will challenge is a Claim pursued in a court proceeding. Instead, Werker accepts without analysis that a will challenge is a Claim and would be subject to the basic and

71. *Limitations Act,* s. 16(1)(a).
72. Anne Werker, "Limitation Periods in Ontario and Claims by Beneficiaries" (2018), 34 Adv. Q. 1.
73. *Ibid.* at pp. 25-27.

ultimate limitation periods but for s. 16(1)(a). Because will challenges are not Claims pursued in a court proceeding, the question of whether a will challenge is within the scope of s. 16(1)(a) is, in our view, moot. Our view is that a will challenge likely does amount to "consequential relief", despite not being based on a cause of action, but this is academic given our principal argument.[74]

We argue that a Claim derives from a cause of action. To our knowledge, there is virtually no circumstance in which a proceeding based on a cause of action seeks a declaration without consequential relief. Remedying injury, loss, or damage would appear to require consequential relief. In *Harrison v. Antonopoulos*, a frequently-cited case on the nature of declaratory relief, Lang J. (as she then was) held that declaratory relief is "a declaration of parties' rights with no coercive effect or remedial entitlement."[75] This illustrates our point: a Claim is remedial by definition, yet s. 16(1)(a) applies to declaratory relief that is not remedial.

This raises a question about the purpose of s. 16(1)(a). If a Claim necessarily seeks consequential relief, then the exception in section 16(1)(a) is superfluous. The *Limitations Act* would never apply to a proceeding for a declaration that does not seek consequential relief because such a proceeding would never pursue a Claim. What then is the purpose of section 16(1)(a)?

The provision originates in the Consultation Group's 1991 Consultation Group Report. The Consultation Group proposed to define "claim" broadly: "a matter giving rise to a proceeding in a court." This would have included non-remedial proceedings, but the Consultation Group nevertheless intended to exclude non-remedial proceedings from limitation:

---

74. Section 16(1)(a) will be narrowly construed: *Alguire v. The Manufacturers Life Insurance Company (Manulife Financial)*, 2018 ONCA 202 (Ont. C.A.), at para. 28. For a discussion of the application of s. 16(1)(a), see Krystyne Rusek, "The Application of Limitation Periods in Will Challenges", paper presented to OBA Institute in Trusts & Estates Law (February 2020). Rusek identifies a number of ancillary consequences of a will challenge which can be said to be consequential relief. In our view the very nature of a will challenge, which is a proceeding for which standing is restricted to parties having a financial interest in the estate (*Rules* 75.01, 75.03 and 75.06, *supra*, footnote 17), will affect the entitlement of the parties to administer the estate and the financial interests of potential beneficiaries; these are "significant consequences for the parties" that go "beyond clarifying the nature of a particular obligation" as discussed in *Alguire* at para. 29.

75. *Harrison v. Antonopoulos*, 2002 CarswellOnt 4331 (Ont. S.C.J.), at para. 27.

> Declarations do not grant any judicial remedy. Therefore, since they impose no legal obligation on the defendant there is no justification for barring them. Moreover, there will be circumstances in which parties will wish to submit matters to the court, such as interpretation of legal instruments like wills and contracts, without seeking a remedy from the court.[76]

Accordingly, the Consultation Group proposed a provision that would exclude "an application for a declaration" from limitation.[77]

It appears that in defining "claim" as wholly remedial, the Legislature did not appreciate that it would render the Consultation Group's exemption provision unnecessary.

This would not be the only oversight in the drafting of the *Limitations Act*. For example, it uses the language "claim" inconsistently. Section 2, which provides that the *Limitations Act* applies to Claims pursued in court proceedings, and section 4 and 15, which provide that the basic and ultimate limitation periods bar the commencement of proceedings in respect of a Claim, distinguish between the Claim and the proceeding used to advance it. The *Limitations Act's* other provisions are generally consistent with this distinction, but not all. Section 9(3)2.v. refers to the "commencement of a claim", which implies that a party commences a Claim rather than a proceeding in a respect of a Claim. This inconsistent usage is not easily reconcilable.

We are mindful of the interpretive presumption that the Legislature "does not speak in vain" and includes every word in a statute for a purpose. This principle, at least at first instance, permits the argument that for s. 16(1)(a) to serve a purpose, a Claim must include proceedings for declarations without consequential relief. We consider this untenable. The better construction, and the one required to maintain the conceptual integrity of the limitations scheme, is that s. 16(1)(a) serves the purpose of emphasising that the *Limitations Act* does not apply to non-remedial proceedings.

---

76. 1991 Consultation Group Report, *supra*, footnote 45, at p. 18.
77. *Ibid.*

VI. THE DIFFICULTIES OF APPLYING THE *LIMITATIONS ACT* TO WILL CHALLENGE PROCEEDINGS

Even if the *Limitations Act* could be read to apply to a proceeding without a cause of action, such as a will challenge proceeding, it is difficult — arguably impossible — to reconcile its provisions with the nature of a will challenge.

1. Procedural Problems

The expiry of a limitation period is an affirmative defence that a defendant/respondent must plead and prove. Yet the party challenging a will may be plaintiff/applicant or a defendant/respondent depending on which method is used to bring the proceeding to court:

- If there is uncertainty about the validity of a will, an application may be brought to have a testamentary instrument that is being put forward as the last will of a deceased proved in such matter as the court directs.[78] An estate trustee, who may not have a personal financial interest, may seek directions from the court as to the validity of testamentary documents, without taking an active stance as to their validity.[79]
- In practice, applications are also brought simply seeking a declaration that a will is invalid, without reference to proving it; such an application is, in essence, a proceeding demanding that the will be proved in solemn form, and opposing the grant of probate.
- Before or during the probate process, *i.e.*, before a certificate of appointment of estate trustee has issued, any person who appears to have a financial interest in an estate may file a notice of objection to the issuance of a certificate of appointment of estate trustee, in which they must identify their financial interest and the grounds for the objection.[80] The court will not issue a certificate of appointment while an objection remains outstanding.[81] Either the applicant or the objecting party may move

78. *Rules*, *supra*, footnote 17, r. 75.01.
79. As the estate trustee ostensibly sought in *Piekut v. Romoli*, 2019 ONSC 1190 (Ont. S.C.J.).
80. *Rules*, *supra*, footnote 17, r. 75.03.
81. *Ibid.*, r. 74.12(1)(b).

for directions from the court to determine procedural matters including the issues to be decided, the parties, who is plaintiff and defendant, and other matters necessary to determine the validity of the will at a hearing in light of the objection. If not adjudicated or withdrawn, the objection will expire after three years.[82]

- After a certificate of appointment has been issued, an application may be brought to revoke the certificate or have it returned to the court.[83] This, again, will lead to a contested hearing to prove the will.

Historically, in cases where it has been necessary in a contested proceeding to direct which parties are plaintiffs and which are defendants, the parties supporting the will have been considered the plaintiffs.[84] This is logical because the onus of proving a will is always on the party propounding it.[85]

It follows that if the *Limitations Act* applies to will challenges, it becomes possible (and, indeed, probable) that there will be a proceeding where it is the plaintiff/applicant that must "plead" a limitations defence. This is akin to the plaintiff in a breach of contract action pleading that some portion of a statement of defence is statute-barred. It is, on its face, irreconcilable with a limitations scheme that bars the commencement of proceedings.

The use of notices of objection in estates proceedings also sits uncomfortably with the *Limitations Act*. The *Limitations Act* applies to "claims pursued in court proceedings." The courts have settled on applying the definition for "proceeding" found in the *Rules of Civil Procedure*: "an action or an application."[86] The *Rules* define "action" as:

82. *Ibid.*, r. 75.03(6) and 75.06.
83. *Ibid.*, r. 75.04 and 75.05.
84. *Macdonell, Sheard and Hull*, 3rd ed., *supra*, footnote 11, at p. 331; *Newcombe v. Evans* (1917), 40 O.L.R. 299 (Ont. H.C.).
85. *Vout*, *supra*, footnote 24, at paras. 19, 20 and 22. In this important decision, the Supreme Court of Canada set out the somewhat complex series of presumptions and rebuttals of presumptions that arise from the law of testamentary capacity, suspicious circumstances, and undue influence. It is always for the propounder to prove due execution and testamentary capacity, without which a will cannot be admitted to probate.
86. *Rules*, *supra*, footnote 17, r. 1.03. In our paper, and below, we note that the jurisprudence which stands for this principle does so without substantive analysis: Furrow and Zacks, *supra*, footnote 49, at p. 246 and note 66.

> . . . a proceeding that is not an application and includes a proceeding commenced by,
>
> (a) statement of claim,
> (b) notice of action,
> (c) counterclaim,
> (d) crossclaim, or
> (e) third or subsequent party claim.[87]

An "application" is a proceeding commenced by notice of application.[88] A notice of objection is not included in the list of documents that constitute an originating process, which is defined as "a document whose issuing commences a proceeding."[89] It is plain that when "proceeding" has this meaning, a notice of objection does not commence a proceeding.[90] As the basic and ultimate limitation periods of the *Limitations Act* limit the commencement of proceedings, this means that there can be no limitation on the filing of a notice of objection.

Yet filing a notice of objection is sufficient under the *Rules* to permit parties to bring a motion for directions, seeking an order from the court laying out the procedural path to bring the objection to an adjudicated resolution. A motion for directions is, likewise, not an originating process and does not commence a proceeding. If the *Limitations Act* applies to will challenges advanced by statement of claim or notice of application, but not to will challenges advanced by notice of objection, the result would be a different application of the law based purely on the form of procedural mechanism used to initiate the challenge to the will's validity.[91] This is antithetical to a rational limitations regime.

87. *Rules*, *supra*, footnote 17, r. 1.03.
88. *Ibid.*
89. *Ibid.* An originating process is a statement of claim, a notice of action, a notice of application, an application for a certificate of appointment of an estate trustee, a counterclaim against a person who is not already a party to the main action, and a third or subsequent party claim. The *Rules* appear to contradict themselves on the nature of an application for a certificate of appointment of estate trustee. It is explicitly named as an originating process, and an originating process is defined as one "whose issuing commences a proceeding" under r. 1.03. But r. 14.01(2.1) states that an application for a certificate of appointment of estate trustee "need not be issued."
90. See also *Newcombe*, *supra*, footnote 84. We have argued that defining "proceeding" to have the meaning ascribed by the *Rules* rests on a shaky foundation and is problematic. It seems to us sufficient to define "proceeding" as "any court proceeding capable of advancing a claim." See Daniel Zacks and Matthew Furrow, "Revisiting Limitations and Passing Accounts in Ontario: A comment on *Wall v. Shaw*" (2019), 50 Adv. Q. 279.

2. The Problem of the Ultimate Limitation Period

A further difficulty arises from the *Limitations Act*'s ultimate limitation period. The ultimate limitation period runs from the date of the "act or omission on which the claim is based" without regard to discovery. If a will challenge arises from an "act or omission", this must be the conduct that led to the will's invalidity: the exertion of undue influence, for instance, or the simple act of signing the will without capacity. This conduct necessarily occurs no later than the execution of the will, which means the ultimate limitation period would run always from that date at the latest. Yet for many centuries, will challenges have not been permitted before the testator's death: the will is considered akin to a piece of "waste paper" which does not create an enforceable proprietary interest until the testator's death because it may be revoked or varied by the testator during their lifetime.[92] This means that where a testator executed a will 15 or more years prior to their death, the ultimate limitation period combined with the rule against *inter vivos* will challenges would preclude a will challenge at any time.

VII. JUDICIAL CONSIDERATION OF THE LIMITATION OF WILL CHALLENGE PROCEEDINGS

1. *Kenzie v. Kenzie*

In *Kenzie v. Kenzie*,[93] a 2010 decision, counsel conceded, and the Court did not disagree, that the new *Limitations Act* did not bar a proceeding to prove testamentary documents in solemn form, "particularly before a Certificate of Appointment of Estate Trustee has been issued." The court cited *Oestreich v. Brunnhuber* for the proposition that "mere delay in questioning the validity of a will, subject to issues of prejudice, will not

91. This issue has recently arisen in *Bristol v. Bristol*, 2020 ONSC 1684 (Ont. S.C.J.), discussed further below.

92. *Duke of Marlborough v. Lord Godolphin* (1750), [1558-1774] All E.R. Rep. 264, 28 E.R. 41 (U.K. H.L.), cited in *A. (S.) (Trustee of) v. S. (M.)*, 2005 ABQB 549 (Alta. Q.B.), at para. 25; *Wolfson Estate v. Wolfson* (2005), 22 E.T.R. (3d) 255, 2005 CarswellOnt 7667 (Ont. S.C.J.), at paras. 26-32. For an analysis of the law on this point, and a critique of recent cases applying this doctrine inconsistently, see Calvin Hancock, "Beyond Great Expectations: *Spes Successionis* in 21st Century Canadian Law" (2019), 38 E.T.P.J. 233.

93. *Kenzie v. Kenzie*, 2010 ONSC 4360 (Ont. S.C.J.).

prevent the court from requiring proof in solemn form where there is a genuine issue for trial."[94] Because *Oestreich* was decided under the former Act, however its *ratio* is not determinative of the impact of delay under the new *Limitations Act*.

Although the will challenge portion of the application was held to be timely, the court nonetheless dismissed the application, apparently on the basis that all of the other relief sought by the applicant, which related to transactions carried out before the testator's death and whose details had become known to the applicant when his brother began litigation years prior, was statute-barred. On appeal, the Court of Appeal held in a brief appeal book endorsement that the allegations advanced by the applicant were *res judicata*, and that the application was not merely declaratory relief exempt from the *Limitations Act*.[95]

2. *Leibel v. Leibel*

Leibel is, to our knowledge, the first Ontario decision to consider the limitation of will challenge proceedings after the *Limitations Act* came into force in 2004.[96] The court held that the *Limitations Act* applies to will challenge proceedings, and because wills speak from death, that is when the limitation period commences presumptively.

Leibel is widely considered determinative of the limitation of will challenges. Its reasoning is, at least at first instance, compelling and even intuitive. One of us wrote approvingly of the *ratio* in *The Law of Limitations*.[97] Other commentators have taken the same position.

The applicant in *Leibel* sought a declaration that his mother's primary and secondary wills were invalid on the basis that she lacked testamentary capacity, and that she was unduly influenced to sign them. The respondent estate trustees and beneficiary moved to dismiss the proceeding as statute-barred by the expiry of the basic limitation period. The applicant opposed the motion on the basis that no limitation period applies to will challenge proceedings. He appears to have argued both that the

94. *Kenzie v. Kenzie*, *supra*, footnote 93, at para. 6, citing *Oestreich*, *supra*, footnote 32.
95. *Kenzie v. Kenzie*, 2011 ONCA 53 (Ont. C.A.).
96. *Supra,* footnote 1.
97. Mew, Rolph and Zacks, *supra*, footnote 46, at p. 456.

Limitations Act did not apply and, in the alternative, that s. 16(1)(a) provided that no limitation period applies to will challenge proceedings because they do not seek consequential relief.

The motion judge granted the motion and dismissed the action as statute-barred. Her analysis begins with an implicit finding that the *Limitations Act* applies to will challenge proceedings:[98]

> In my view, with the passage of the new Act in 2002, the Legislature placed a two-year limitation on the bringing on of actions, subject to the discoverability principle, in order to prevent exactly what [the applicant] is trying to do, that is, circumvent the limitation by claiming, late in time, that the 2011 Wills were invalid. To say 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, would put all Estate Trustees in peril of being sued at any time. There is a reason why the Legislature replaced the six-year limitation in favour of a two-year limitation.

The motion judge then found that the basic two-year limitation period commences presumptively on the date of death of the testator because wills speak from death. In support of this conclusion, she cited the lower court decision in *Lawless v. Anderson* for the principle that limitation periods begin to run when the plaintiff discovers the material facts necessary to plead a reasonable cause of action. The motion judge found that the applicant discovered the material facts of his cause of action when he obtained knowledge of the following:

(1) prior to her death, the testator had recovered from lung cancer but had brain cancer;
(2) the testator had changed her previous wills;
(3) the date of the testator's death;
(4) who the estate trustees were under the wills;
(5) the testator's assets;
(6) that he had signed corporate documents for a company now owned by the estate; and
(7) that he had raised concerns with the will-drafting solicitor who provided him with names of estates counsel.

98. *Leibel*, *supra*, footnote 1, at para. 52.

The applicant had discovered these facts by July 31, 2011 at the latest. Because the application was not commenced until September 5, 2013, it was statute-barred.[99]

Lastly, the motion judge found that the exception in s. 16(1)(a) of the *Limitations Act* did not apply because the applicant sought a number of heads of consequential relief arising from the declaration of invalidity, including an order revoking the grant of probate and removing the estate trustees; an order that the estate trustees pass their accounts; an order for the appointment of an estate trustee during litigation; a declaration relating to the revocation of the challenged wills; damages in negligence against the drafting lawyer; and production of medical documents.[100]

The court's reasoning on the application of the basic limitation period, however intuitive it may be, suffers from multiple flaws. The precedential importance accorded to *Leibel* requires setting out these problems in some detail.

(a) The absence of a section 2 analysis

The fundamental problem with the reasoning in *Leibel* is that it does not begin with asking the threshold question posed by s. 2 of the *Limitations Act*'s application provision: is a Claim pursued in the proceeding? Answering this question would have required the motion judge to consider whether a will challenge is a Claim. As the Court of Appeal held in *Gillham v. Lake of Bays (Township)*, the failure to consider whether there is a Claim is an error of law.[101]

Instead of applying s. 2, the motion judge determined the application of the *Limitations Act* to will challenges based on legislative intent. In the court's view, the "reason why the Legislature replaced the six-year limitation period in favour of a two-year limitation" was to avoid putting "all Estate Trustees in peril of being sued at any time."[102] We are not aware of any basis for this conclusion.

First, no statutory limitation period applied to will challenges

99. *Leibel*, *supra*, footnote 1, at paras. 36, 39 and 50, citing *Lawless v. Anderson*, 2010 ONSC 2723 (Ont. S.C.J.), at para. 58. The motion judge also found the will challenge to be barred by estoppel, a holding disapproved of by the Court of Appeal in *Neuberger*, *supra*, footnote 15.

100. *Leibel*, *supra*, footnote 1, at para. 38.

101. *Gillham v. Lake of Bays (Township)*, 2018 ONCA 667 (Ont. C.A.), at para. 34.

102. *Leibel*, *supra*, footnote 1, at para. 52.

under the former scheme. While the former Act prescribed a six-year limitation period for many forms of action and the causes of action they encompassed, we have seen that will challenges were not among them.

The motion judge may have been contemplating s. 43 of the former Act, which gave "trustees" — defined to include executors and administrators — the protection of statutory limitation periods, including the widely-applicable six-year limitation period in s. 45(1)(g).[103] However, s. 43 applied only when the trustee had committed some actionable conduct, and not to a will challenge. There is no authority for the application of s. 43 to a will challenge.

Second, there is no evidence of any legislative intent for the *Limitations Act* to apply to will challenges. In the debate that preceded the legislature's unanimous consent to the bill that ultimately became the *Limitations Act*, there was no discussion of will challenges.[104] Nor is there any statement advocating for the limitation of will challenges in the reports and proposals of the Commission, MAG, or the Consultation Group.

(b) The discovery analysis

The motion judge determined the commencement of the basic limitation period by applying the principle in *Lawless v. Anderson* that a limitation period begins to run when the plaintiff discovers the material facts necessary to plead a reasonable cause of action.

This is a statement of the common law discovery rule, not discovery under the *Limitations Act*. The jurisprudence has long been rife with confusion about the distinction between common law and statutory discovery; only recently did the Court of Appeal in *Apotex Inc. v. Nordion (Canada) Inc.* recognise the distinction explicitly.[105] However, in this instance, the motion judge's invocation of common law discovery is helpful. By stating discovery in terms of cause of action accrual, the cause of action pleaded becomes the driver of the discovery analysis.

103. Former *Limitations Act*, *supra*, footnote 3, ss. 42, 43 and 45(1)(g). See generally *Edwards v. Law Society of Upper Canada* (2000), (*sub nom. Edwards v. Law Society of Upper Canada (No. 1)*) 48 O.R. (3d) 321 (Ont. C.A.), at para. 13.

104. Ontario, Legislative Assembly, *Official Report of Debates* (*Hansard*), No. 65A (December 2, 2002) at pp. 3442-3446 (Gary Carr).

105. *Apotex Inc. v. Nordion (Canada) Inc.*, 2019 ONCA 23 (Ont. C.A.), at paras. 84-92.

It is therefore conspicuous that *Leibel* does not discuss directly which cause(s) of action the applicant asserted, and in particular whether his challenge of the validity of the wills constituted one. Instead, the decision takes for granted that a will challenge is a cause of action. It cites no authority for this principle, and does not set out what the elements of a will challenge cause of action might be.

This bears emphasising. Under the former Act, determining the commencement of time required identifying the elements of the cause of action, because knowledge of those elements — the material facts of the cause of action — made the cause of action accrue. It was common, and often necessary, for the court to set out the constituent elements of the cause of action to determine the commencement of the limitation period.

The seven material facts identified by the motion judge as causing the applicant to discover the will challenge cause of action, even on a generous reading, permit no inference as to what the constituent elements of the cause of action might be, nor why they accrue always on the date of death of the testator.

Furthermore, if the *Limitations Act* did apply to will challenge proceedings, it would not, as noted, be the common law discovery rule that determined the commencement of the basic limitation period, but the *Limitation Act*'s discovery provisions. Attempting to apply these provisions to the material facts identified by the motion judge underscores the difficulty of treating a will challenge as if it were a cause of action (and therefore a Claim).

For example, s. 5(1)(a)(ii) and (iii) of the *Limitations Act* makes the applicant's knowledge that the respondent committed an act or omission which caused or contributed to their loss a precondition to discovery of the Claim. None of the seven facts cited in the discovery analysis, on its face, could have caused the *Leibel* applicant to obtain this knowledge. None refers to an act or omission by the respondents, nor to any actionable conduct by the testator. It is not evident how these seven facts could have caused the applicant to discover a Claim within the meaning of the *Limitations Act*.

The absence of a discernible act or omission is also a problematic for the application of s. 5(2) of the *Limitations Act*, which provides that discovery occurs presumptively on the date of the act or omission that gives rise to the Claim. This provision would be determinative of the date of discovery unless the applicant could rebut its presumption. However, because the

decision does not explicitly identify the act or omission that gives rise to the applicant's Claim, it is impossible to apply s. 5(2) and the motion judge did not. Instead, the motion judge found that as wills speak from death, the limitation period necessarily commenced presumptively on that date. This finding is not responsive to the question asked by s. 5(2).

To base the commencement of the limitation period on the date of the testator's death is also conceptually problematic. The limitation period could commence presumptively on the date of the testator's death only if the act or omission giving rise to the will challenge occurred always on the date of death. This could never be so (unless the will were coincidentally signed the same day the testator died). The applicant in *Leibel* challenged the wills on the basis of lack of capacity and undue influence. Even if the testator's lack of capacity or exposure to undue influence amounted to acts or omissions, they would not be acts or omissions that occurred at the time of her death; to the contrary, as they relate to the drafting of her wills, they necessarily occurred before her death. If those are acts or omissions that trigger the presumptive commencement of the limitation period, an absurdity results: the limitation period will commence presumptively before the testator dies and the plaintiff's right to challenge the will accrues.[106]

(c) The section 16(1)(a) "consequential relief" analysis

The essential flaw in the decision's s. 16(1)(a) analysis is that it presumes the application of the *Limitations Act* to a will challenge proceedings. The precondition to applying s. 16(1)(a) to the proceeding is confirming that it contains a Claim. We have argued above that it does not.

We therefore argue that the s. 16(1)(a) analysis in *Leibel*, or regarding any will challenge application, is moot. With that being said, we do note that some of the examples of consequential relief in *Leibel* are not truly direct consequences of a declaration of invalidity. The appointment of an estate trustee during litigation and the disclosure of medical records would be ancillary orders made within the will challenge proceeding, not consequences deriving from it. The proposed claim in damages against the drafting solicitor is an entirely separate claim and would have its own limitations analysis. But we agree that consequences such as the revocation of the

106. As discussed at p. 214 above.

certificate of appointment of estate trustee, and replacement of the estate trustees, are consequential relief. Indeed, we would argue that seeking to replace one will with another, and thereby change the disposition of the estate, is also consequential relief.

3. The Aftermath of *Leibel*: Subsequent Decisions

(a) Birtzu v. McCron, Shannon v. Hrabovsky and discovery

To date, there have been a total of five reported decisions on the application of the *Limitations Act* to will challenges after *Leibel*. All of these have relied on that decision without further analysis as to whether the basic limitation period applies. The first two cases to follow *Leibel* expanded on the application of the discovery principle.

In *Birtzu v. McCron*, the plaintiffs commenced their will challenge action on August 18, 2011. Their counsel had written a demand letter on July 17, 2009 alleging that the testator had lacked capacity when her last will was executed, and threatened legal action if estate assets were not turned over by July 22, 2009. The court found that this correspondence demonstrated the plaintiffs' knowledge of two facts essential to discovering their claim: (1) that the testator had dementia; and (2) that the last will denied the plaintiffs any benefit. Without definitively ruling out that time had commenced to run earlier (such as on the date of death), the court found that the action was statute-barred because the proceeding was commenced more than two years after the demand letter and its deadline.[107]

In *Shannon v. Hrabovsky*,[108] the testator died on November 15, 2014 and the applicant brought a will challenge by way of notice of application issued December 23, 2016. The parties agreed that the basic limitation period applied to the proceeding, but disputed when the limitation period commenced. The respondent argued that the limitation period commenced on the date of death; the applicant argued that because she was unaware of the last will until January 2015, her claim was not discoverable until then and so her proceeding was timely. Reviewing *Leibel* and *Birtzu*, the court held that time commenced presumptively on the date of death but the

107. *Birtzu v. McCron* (2017), 24 E.T.R. (4th) 14, 2017 ONSC 1420 (Ont. S.C.J.).
108. *Shannon v. Hrabovsky*, 2018 ONSC 6593 (Ont. S.C.J.).

applicant had rebutted the presumption and the proceeding was timely.

In reaching this conclusion, the court reasoned that the "act or omission" giving rise to the to the Claim occurred on the date of death:[109]

> Accordingly, [the applicant] has established that, on the date of the Testator's death, when the act on which the claim is based occurred, being the effectiveness of the 2007 Will, she did not have knowledge of the existence and contents of the 2007 Will which are essential elements of her application.

The court's wording is not entirely clear here. The "effectiveness of the 2007 Will" is neither an act nor an omission. It is difficult to characterize dying as an "act or omission" that causes injury, loss or damage to the party challenging the will. If any act or omission gave rise to the proceeding, it was surely the execution of the will in 2007.

(b) Piekut v. Romoli and declaratory vs. consequential relief

The next reported decision and its appeal focused on the declaratory relief exception at s. 16(1)(a) of the *Limitations Act*.

In *Piekut v. Romoli*,[110] one of the three children of the testators, Piekut, brought an application seeking a declaration as to the validity of certain codicils executed by the testators on July 30, 2006. There was evidence of both incapacity and undue influence. The testators died in 2008; Piekut first saw the codicils at some point in 2009, and brought her application in 2015. The will and codicils had not yet been submitted to probate. Piekut's sister Romoli, one of the respondents, brought a motion for summary judgment seeking a declaration that Piekut's application was statute-barred pursuant to the *Limitations Act*; Piekut cross-moved for summary judgment on her application.

Romoli argued that Piekut had discovered her Claim by August 19, 2009 when she received copies of the codicils. Piekut argued that her application was seeking declaratory relief only and was exempt from limitation by s. 16(1)(a) of the *Limitations Act*. She argued that she was not explicitly challenging the codicils; she was rather acting in her capacity as executor by seeking direction from the court respecting their validity and

109. *Shannon v. Hrabovsky*, *supra*, footnote 108, at para. 69.
110. *Supra*, footnote 79.

effect, given that allegations of testamentary incapacity had been raised.

The motions judge held that if Romoli had brought an application to propound the codicils and Piekut responded with a challenge to their validity, the basic limitation period would have applied. In the absence of such an application, it was open to Piekut to bring her own application for declaratory relief.

The motions judge concluded that with respect to the validity of the codicils, Piekut was seeking a declaration without consequential relief. She was not asking the court to determine the ultimate beneficiary of the property purportedly disposed of by the codicils, nor to make any sort of vesting order. The step following the declaration was administrative, namely, submitting the will (with or without the codicils) to probate. Any further order that might be required would arise in the context of the administration of the estate "and not as a consequence of the declaratory relief sought." Accordingly, no limitation period applied. The motions judge went on to assess the evidence and rule that the codicils in question were invalid.[111]

Romoli unsuccessfully appealed from the motions judge's finding that s. 16(1)(a) applied.[112] The Court of Appeal distinguished *Leibel* and *Birtzu* on the basis that a variety of other consequential relief was sought in those cases, and that Piekut had brought her application before any grant of probate. In these circumstances, the court reasoned, she "was entitled to seek declaratory relief, simply to establish the validity, or lack of validity, of the codicils — to define the rights of the parties in order to avoid future disputes."[113] The Court of Appeal's decision did not grapple with *Leibel*'s application of the basic limitation period to will challenges. Rather, it focused on whether its s. 16(1)(a) analysis could be distinguished.

We note that *Piekut* is an example of how it is problematic for different procedural paths to the same substantive end to have different limitations analyses. If probate is an *in rem* declaration as to the validity of a will, it should not matter for limitations purposes who is seeking to propound the will, whether the application for probate has been brought yet, and whether any particular party is seeking a declaration of invalidity or neutrally presenting evidence to the court.

111. *Piekut v. Romoli*, *supra*, footnote 79, at paras. 36-52.
112. *Piekut v. Romoli*, 2020 ONCA 26 (Ont. C.A.).
113. *Piekut v. Romoli* (Ont. C.A.), *supra*, footnote 112, at para. 13.

(c) Bristol v. Bristol and notices of objection

Bristol v. Bristol is the most recent reported decision on the application of the *Limitations Act* to will challenge proceedings.[114] In that decision, the testator died on December 6, 2016. A notice of objection was filed on December 30, 2016, alleging lack of capacity and undue influence. The propounding party commenced an application for a certificate of appointment of estate trustee in January 2017. The applicant/propounding party served a notice to objector on the objecting party, who then filed a notice of appearance, all of which is standard procedure according to Rule 75.03. Under Rule 75.03(6), the next step in a will challenge is for either party to move for directions under Rule 75.06. However, neither party took a further step in the probate application for more than two years. The objecting party eventually brought a motion for directions returnable April 23, 2019. In that motion, the court directed her to issue an application challenging the will, without prejudice to the propounding party's right to bring a motion to dismiss the application as statute-barred.

The resulting motion was decided in favour of the propounding party. The court cited *Leibel* for the proposition that the *Limitations Act* applies to will challenges. The notice of application had been issued more than two years after death, and more than two years after the notice of objection had been filed. The notice of objection did not commence a proceeding. The notice of application did, but it was statute-barred. The court also rejected the objecting party's s. 16(1)(a) analysis, holding that a will challenge is not declaratory.

We find the result in this case particularly unfortunate. It is another illustration of our point that different procedural mechanisms to obtain the same substantive result should not lead to different results under the *Limitations Act*. The previous (unreported) decision directing the objector to issue a fresh notice of application in order to pursue her challenge appears to have been procedurally unnecessary, because the entire will challenge could have proceeded, as many do, under the existing probate application. Pursuant to Rule 75.06, the motion for directions could have directed all necessary procedural steps for a hearing to take place over the validity of the wills. No new proceeding needed to be brought. It was only because the

114. *Bristol v. Bristol*, 2020 ONSC 1684 (Ont. S.C.J.).

objector was directed to bring a new application that her proceeding was held to be statute-barred.

The court's reasoning was based in part on the conclusion that filing a notice of objection and bringing a motion for directions did not commence a proceeding under the *Limitations Act*.[115] We agree. But that merely demonstrates that the *Limitations Act* could not apply to the challenge as it was advanced in the existing probate proceeding. It would not have prevented the prior motions judge from permitting the existing proceeding — in which the objector had already articulated her objections to the validity of the will — to proceed to a hearing on the merits.

4. Revisiting *Neuberger*

We have already touched on the *Neuberger* case and the policy factors that the Court of Appeal set out as relevant to the exercise of the court's probate jurisdiction, namely that the court's function is inquisitorial; will challenges are *in rem* proceedings; and the court owes a special responsibility to the testator to see their wishes carried out.[116] The central issue in *Neuberger* was whether the doctrines of estoppel by convention or estoppel by representation could apply to matters involving the validity of a will. The Court of Appeal concluded that they did not, for the reasons just summarized. Estoppel is based on the actions of an individual litigant. Yet the behaviour of a particular litigant is irrelevant to the *in rem* question of validity of a testamentary document. The court could not discharge its special duty to the testator if the doctrine of estoppel prevented certain parties from requiring proof in solemn form of a will.

All of the considerations raised by the Court of Appeal in *Neuberger* apply with equal force to the application of a statutory limitation period, which is likewise based on the actions of an individual litigant and not on the considerations intrinsic to the exercise of the court's probate function.

Professor Oosterhoff argues that the Court of Appeal could have stated the law more efficiently in *Neuberger* by noting "that the previous law was not affected by the transfer of probate jurisdiction to the Superior Court and that equitable rules continue to have no relevance in a court of probate."[117]

115. *Bristol*, *supra*, footnote 114, at paras. 18-21.
116. As discussed at p. 193 above.
117. Oosterhoff, *supra*, footnote 7, at p. 356.

It is further worth noting that, although the *Limitations Act* was not raised in *Neuberger*, the Court of Appeal approvingly cited *Oestreich*, a pre-*Limitations Act, 2002* decision, for the proposition that "mere delay in questioning the validity of a will is not enough to prevent the court from requiring proof in solemn form."[118]

For all of these reasons, the *Neuberger* decision presents strong grounds, founded in the nature of probate law itself, to doubt the correctness of *Leibel*. These grounds complement our statutory interpretation of the *Limitations Act*.

VIII. SHOULD THERE BE A TIME BAR ON A WILL CHALLENGE?

Whether a limitation period *should* apply to a will challenge is chiefly a matter of policy. There are arguments either way.

Limitations statutes apply to most civil proceedings for good reason. They protect against eroding evidence, require plaintiffs/applicants to act diligently to pursue causes of action, and bring finality in the management of affairs.[119] The first and third of these considerations, at minimum, would still apply to probate proceedings.

It is also arguable that the *in rem* nature of a will's validity has become academic. The *Rules of Civil Procedure* require service of a motion or application for directions in a contested probate proceeding on any party "appearing to have a financial interest in the estate."[120] The authors of *Macdonell, Sheard and Hull* reason that persons meeting this definition would be those named as beneficiaries in the will in question and all previous wills and those entitled on an intestacy.[121] The pronouncement of a will's validity may theoretically bind the world, but all

118. *Neuberger*, *supra*, footnote 15, at para. 121, citing *Oestreich*, *supra*, footnote 32, at para. 26.

119. Mew, Rolph and Zacks, *The Law of Limitations*, *supra*, footnote 46, at p. 16; *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 (S.C.C.), at para. 57.

120. *Rules*, *supra*, footnote 17, r. 75.06(2).

121. *Macdonell, Sheard and Hull*, 5th ed., *supra*, footnote 5, at p. 38, cited approvingly in *Weidenfeld v. Parikh-Shah; Weidenfeld v. Weidenfeld Estate*, 2016 ONSC 7330 (Ont. S.C.J.); and *Magnotta v. Magnotta*, 2020 ONSC 316 (Ont. S.C.J.), at para. 39, although in both cases, the passage was cited in order to demonstrate that certain parties did not have standing to participate in litigation respecting a will.

those who stand to be immediately affected by it are necessarily on notice of the proceeding.

Nonetheless, to apply limitations periods to proceedings to prove or challenge wills would constitute a radical departure from the centuries-old tenets of probate law, which no modern court in Ontario has explicitly rejected. It would amount to a reconception of the law of probate as creating a series of individually-enforceable rights rather than a declaration to the entire world.

Moreover, it is important to acknowledge that there appear to have been no serious calls for the statutory limitation of will challenges from the reception of the common law in Upper Canada until the *Limitations Act* came into force and the bar began asking how it might affect estates proceedings. Will challenges had no statutory or equitable limitation for centuries without bar or bench finding this problematic. What was not broken, did not require fixing. There is no obvious need for the courts to extend the application of the *Limitations Act* where limitations periods have never applied before.

Because the threshold to the application of the *Limitations Act* is the existence of a Claim (and therefore a cause of action), significant amendments would be necessary for it to apply to a will challenge proceeding. The most efficient approach would likely be a reversion to the Consultation Group's proposal to define "claim" as a "matter giving rise to a proceeding in a court", which would include will challenges.[122] This would require adding a special discovery provision to address the commencement of time in circumstances where the defendant/respondent has not committed actionable conduct in regards of the plaintiff/applicant. It would also be necessary to address how the limitation period operates when the defendant to the proceeding challenges the will, or when a notice of objection is filed. A significant redrafting of the *Limitations Act* would be necessary, which would have to consider potential unintended consequences for other types of proceedings, such as those seeking purely declaratory relief.

IX. CONCLUSION

The *Limitations Act* has not expanded the application of statutory limitation periods beyond causes of action. The

122. 1991 Consultation Group Report, *supra*, footnote 45, at p. 18.

threshold to its application is the existence of a Claim pursued in a court proceeding. The precondition of a Claim is a cause of action. A will challenge is not a cause of action.

Thus the *Limitations Act* does not apply to will challenge proceedings. Moreover, it cannot (in its current form) apply to will challenge proceedings. Discovery of the Claim determines the commencement of the basic limitation period, and because will challenge has none of the elements of a Claim — actionable conduct resulting in damage to the claimant — it is not discoverable. A will challenge is the square peg to the discovery provision's round hole.

Accordingly, we consider that *Leibel* and the decisions that follow are wrongly decided. The courts have misapprehended the *Limitations Act* as applying universally to all court proceedings rather than only those court proceedings that pursue causes of action. This does not arise from the recognition that statutory limitation periods should apply to will challenges, but a misreading of the provisions of the *Limitations Act*. Statutory limitation periods have never been applied to probate proceedings because of the unique nature of the court's probate jurisdiction. Nothing about the *Limitations Act* has changed this. Indeed, in the pre-*Limitations Act* history of Ontario probate practice there has been no serious move to bring will challenges within the limitations scheme, or any suggestion that the absence of statutory limitation period is problematic.

It is our hope the Court of Appeal will build on its decision in *Neuberger* and clarify the proper (non-)application of the *Limitations Act* to will challenges in due course.