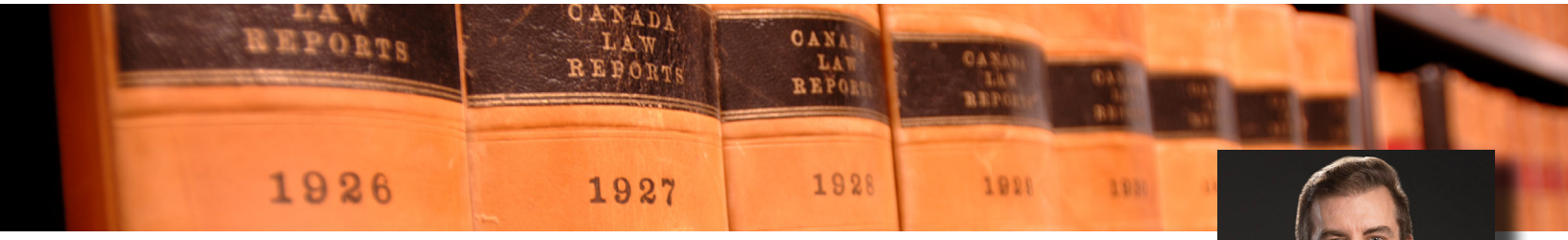
COVID-19 – MATTERS OF ESTATE ADMINISTRATION AND ESTATE LITIGATION STILL PROCEEDING



MCKERCHER LLP BARRISTERS & SOLICITORS

MARCH 24, 2020

As of March 20th, 2020, regular operations of the Saskatchewan Court of Queen's Bench have been suspended, and the Court has restricted what matters may be heard in Chambers. This does not mean Estate Administration and Estate Litigation comes to a standstill. In fact, if you fail to file and issue your legal claim within the limitation period, then you would be statute barred from bringing your claim at a later time, meaning, quite simply, that you no longer have a legal claim to advance.

Commencing a Claim and Limitation Periods

Unless otherwise identified by legislation, the standard limitation period is two (2) years from the date of discovery of the claim, but for some claims against an estate, the limitation period can be as short as six (6) months. There are exceptions that can extend the basic limitation period, such as the discoverability principle or fraud.[i]

Claims brought pursuant to *The Dependants' Relief Act*, and *The Family Property Act* must be brought within six (6) months from the grant of probate or letters of administration.[ii] The Court reserves the discretion to, where it deems appropriate, allow a claim outside the limitation period for a dependant relief claim where any portion of the estate remains undistributed.[iii] Dependant relief claims and family property claims are commenced through petitions.

A notice that the Will be proven in solemn form is filed when an interested party believes the Will is invalid by reason of improper execution, the testator did not have requisite mental capacity at the time of executing the Will, or the testator was unduly influenced in the creation of the Will.[iv] A Chambers application is necessary to the proof in solemn form action, however, prior to scheduling the Court hearing, the parties give notice of their claim and compile evidence to satisfy the Chamber's judge that there is a genuine issue for trial or, if you are charged with proving the Will is valid, to provide uncontradicted evidence of such.

In addition to a notice to prove the Will in solemn form, a person may still file a caveat to prevent the administration of the estate.[v] Caveats give the executor or administrator notice of your claim so that they do not distribute estate assets until the expiry of the caveat or the individual's claim is dismissed or resolved. Caveats can be used to protect a potential interest in an estate in a variety of circumstances (e.g. determining what testamentary document should be probated).

Potential litigants should consult with counsel once they become aware of any potential claim against an estate so that they can be appropriately apprised of any limitation periods and deadlines.

While the regular operations of the Court are suspended, counsel must seek permission from the Court if the claim is being commenced by originating application, and it is not presumptively urgent or an emergency. If such is the case, then counsel will need to convince the Court that serious consequences may result to persons or property if there is a delay in hearing the matter.

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Ongoing Administration and Litigation of Estates

Estate Administration matters can resolve without Chamber hearings if the Will, assets and executorship remain uncontested, and a Court hearing does not become necessary. This means that letters of administration, grants of probate and resealing applications can all proceed in normal course. A Court hearing would become necessary if an interested party disputes the Will, the conduct of the executors becomes disputed, a purported dependant brings a claim for relief, and/or a spouse brings a family property application.

With respect to Estate Litigation claims, the commencement documents that formalize an individual's claim must continue to be filed within their limitation periods. Once a claim is filed, litigation can still proceed up to the point when a Chamber hearing becomes necessary. This can include extensive document disclosure and review, obtaining medical experts to determine capacity, drafting and executing sworn evidence in support of your legal position, seeking an accounting from an executor or administrator,[vi], reviewing and verifying accounts, appointing an executor to the exclusion of another, and approving the sale of real property through consent.[vii]

In some circumstances, a hearing will become necessary before regular operations of the Courts have recommenced. Pursuant to the directive, the Court will allow emergency or urgent applications to be heard. They have identified circumstances that are presumptively deemed urgent or an emergency, which include applications for preservations orders, injunctions,[viii] orders pursuant to *The Guardianship and Co-decision-making Act* where there is an immediate risk of harm to the adult or their property.[ix] Other hearings may be allowed to proceed where the Court is satisfied that delay could result in serious consequences to persons or property. Depending upon the facts, applications to remove an executor or power of attorney, approving the sale of real property through the Court, [x] seeking directions from the Court,[xi] or revoking letters probate could meet this threshold. Applications without notice can also continue to be filed at Court, and such applications include:

- Where the value of the Estate does not exceed the prescribed amount of $25,000, or the deceased owned no property in Saskatchewan, an application can be made to pay or deliver the personal property of the deceased without granting letters probate or administration.[xii]
- Application to discharge the executor or administrator without passing accounts with releases or consents from each beneficiary and proof that all debts of the estate are paid.[xiii]
- Application to increase or decrease the amount of fees or expenses paid to the official administrator.[xiv]
- Application for an order for an appointment for the examination of the accounts to occur within 30 days of filing the accounts.[xv]

This means counsel can still resolve emergency matters through hearings or preliminary issues between counsel, so that once normal operations resume, we can continue the litigation process in an as advanced stage of the proceedings as possible.

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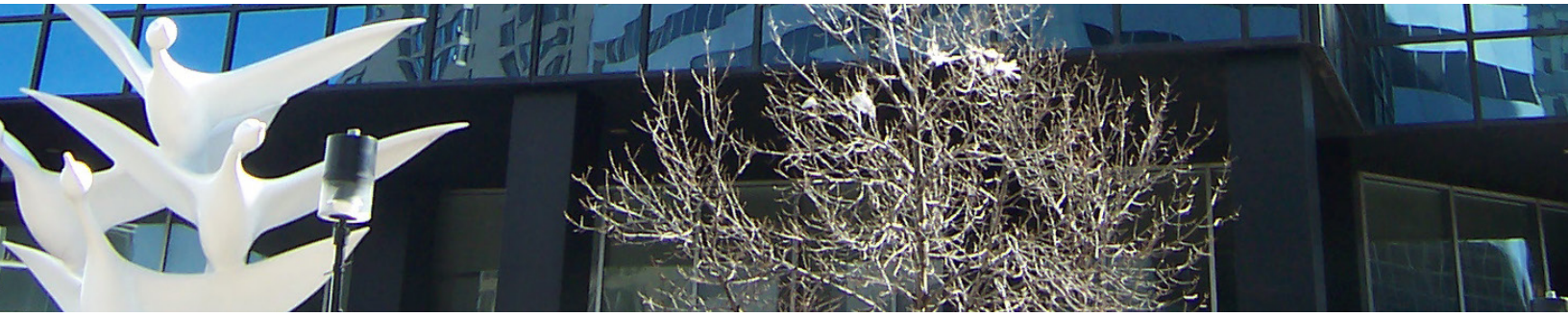

Of course, it is important for individuals to be aware of their litigation options and how matters can be resolved outside of the formal Court process through settlement discussions between counsel, formal mediation or negotiations where parties' and their counsel actively engage in settlement discussions, or through arbitrations where a third-party issues a binding decision on the hearing of evidence and legal arguments.

McKercher LLP is positioned to continue to assist current and future clients in any Estate Administration or Litigation matters while the normal operations of the Courts are suspended and continuing thereafter.

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[i] *The Limitations Act*, SS 2004, c L-16.1, s 5.
[ii] *The Dependants' Relief Act*, 1996, SS 1996, D-25.01, s 4(1); *The Family Property Act*, SS 1997, c F-6.3, s 30(2).
[iii] *The Dependants' Relief Act, 1996, ibid*, s 4(2).
[iv] *Queen's Bench Rule* 16-46.
[v] *Queen's Bench Rule* 16-38 to 43 and 47; *The Administration of Estates Act*, SS 1998, c A-4.1, s 31(1).
[vi] *Queen's Bench Rule* 16-50.
[vii] *The Administration of Estates Act*, supra note 5, s 50.4 – 50.5.
[viii] *RJR-MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311 (CanLII) at 349-351, as summarized by *Wilson v Adams Estate*, 2019 SKQB 39 (CanLII) at para 28, that "The party applying for an injunction must demonstrate: (i) that there is a serious issue to be tried; (ii) that it will suffer irreparable harm if the injunction is not granted; and (iii) that the balance of convenience favours granting the injunction" and at para 33 defines "irreparable harm," " to be more than "mere inconvenience."
[ix] *The Adult Guardianship and Co-decision-making Act*, SS 2000, c A-5.3; Pursuant to the directive, applications pursuant to *The Guardianship or Co-decision-making Act* are if a hearing is necessary, presumptively urgent and of an emergency nature because the intent of the application is to appoint a guardian or co-decision-maker for an adult who is a threat to their own safety or wellbeing, or to their own property. It is left up to the Court's discretion to determine whether a hearing is even necessary. The Court may be inclined to appoint a temporary (for a period not exceeding six (6) months) or a permanent guardian or co-decision-maker where the application is supported with compelling medical opinions in the prescribed form, and consented to by the nearest relatives as to both the need for a guardian or co-decision-maker, the extent of their empowerment to make decisions for the dependant adult and the most appropriate person to be appointed guardian or co-decision-maker.
[x] *The Administration of Estates Act, supra* note 5, s 50.4 – 50.5; *The Trustee Act*, 2009, SS 2009, c T-23.01, s 47.
[xi] *Queen's Bench Rule* 3-49(1)(a) and (3); *Administration of Estates Act, supra* note 5, s 46.4.
[xii] *The Administration of Estates Act, supra* note 5, s 9; *The Administration of Estates Regulations*, SR 1999, c A-4.1, s 8.2.
[xiii] *The Administration of Estates Act, ibid,*s 36 and *Queen's Bench Rule* 16-57.
[xiv] *The Administration of Estates Act*, *ibid,s* 45.
[xv] *Queen's Bench Rule* 16-53

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About McKercher LLP:
McKercher LLP is one of Saskatchewan's largest, most established law firms, with offices in Saskatoon and Regina. Our deep roots and client-first philosophy have helped our firm to rank in the top 5 in Saskatchewan by Canadian Lawyer magazine (2019/20). Integrity, experience, and capacity provide innovative solutions for our clients' diverse legal issues and complex business transactions.