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Alberta Court of Appeal

Remote Commissioning of Affidavits

As of April 1, 2020 the Court of Appeal issued “[Notice - COVID-19 - Remote Commissioning of Affidavits](#)” which adopts the Court of Queen’s Bench practice regarding the remote commissioning of affidavits. The Court of Appeal has made the following accommodations for the commissioning of affidavits, subject to the Court’s discretion to apply the best evidence rule.

1. Any affidavit to be sworn using video technology must contain a paragraph at the end of the body of the affidavit explaining that the deponent was not physically present before the commissioner, but was linked with the commissioner utilizing video technology, and that the process described below for remote commissioning of affidavits was utilized.
2. While connected via video technology, the deponent must show the commissioner the front and back of the deponent’s current government-issued photo identification and the

commissioner must compare the video image of the deponent and information in the deponent's government-issued photo identity document to be reasonably satisfied that it is the same person and that the document is valid and current. The commissioner must also take a screenshot of the front and back of the deponent's government-issued photo identity document and retain it.

3. The commissioner and the deponent are both required to have a paper copy of the affidavit, including all exhibits, before each of them while connected via video technology.
4. The commissioner and the deponent must review each page of the affidavit and exhibits to verify that the pages are identical and if so, must initial each page in the lower right corner.
5. At the conclusion of the review, the commissioner will administer the oath, the deponent will state what needs to be said to swear or affirm the truth of the facts, and the commissioner must watch the deponent sign his or her name to the affidavit.
6. The deponent will then send the signed affidavit with exhibits electronically to the commissioner.
7. Before completing the affidavit, the commissioner must compare each page of the copy received from the deponent against the initialed copy that was before him or her in the video conference and may affix his or her name to the jurat only upon being satisfied that the two copies are identical.
8. The two copies will then be attached together with a certificate signed by the commissioner stating that the commissioner was satisfied that the process was necessary because it was impossible or unsafe, for medical reasons, for the deponent and the commissioner to be physically present together.
9. The completed package is then permitted to be filed.

Provincial Court of Alberta

Electronic Documents

On March 31, 2020, the Lieutenant Governor in Council released [Order in Council 107/2020](#) which creates the *Electronic Documents Regulation* (the "**Regulation**").

The *Regulation* sets out the classes of documents and electronic documents to which section 9.91 of the *Provincial Court Act* applies. Section 3 allows the Court to accept electronic documents that are in a form which allows the Court to retain and access it for subsequent reference, in the same manner as if it were a paper copy. Although this new *Regulation* is geared towards increasing the use of electronic documents during the current health crisis, all filed documents must still meet the usual requirements under any applicable enactments. Moreover, electronic

documents must adhere to the information and technology standards in use by the Court, such that the document can be printed or otherwise displayed to the Court in the required form when necessary.

Section 4 of the *Regulation* also allows one to satisfy the requirement that a document be made in writing by either creating the document electronically or converting a paper document into electronic form. When taking this course of action, lawyers must still ensure that the electronic document complies with all of the section 3 considerations, as noted above.

The *Regulation* also permits the Court to accept, and treat as an original, a document that originated as a paper document and was converted to electronic form, provided that the document adheres to all of the requirements in section 3.

Another important power granted by the *Regulation* is the ability to make an affidavit, a solemn declaration, a statement under oath or a solemn affirmation by way of an electronic document. When doing so, the person to whom the information, affidavit or solemn declaration or statement is conveyed must state in the electronic document that it was made under oath, solemn declaration or solemn affirmation, as the case may be. Any of the aforementioned documents must comply with the general requirements of section 3, as well the signature requirements in section 6, which are discussed below. Finally, parties must be aware that when commissioning documents electronically, they must do so in accordance with all applicable laws governing the practice, including appropriate processes for identifying affiants remotely.

As a measure of caution, parties may wish to consult the [identification procedures](#) for remote commissioning of affidavits, as adopted by the Court of Queen's Bench and the Court of Appeal, as discussed above.

In order to ensure the reliability of signed documents in electronic form, section 6 of the *Regulation* creates a set of standards which apply to both electronic signatures, and signed paper documents that are subsequently converted to an electronic document. When considered in conjunction with the accompanying documents and information such as Government issued identification, the signature must enable a party to verify the identity of the signatory. In the same manner as a signature made on paper, an electronic signature must be "uniquely" linked to the signatory. Thus, parties should strive to create an electronic signature which retains the same defining features as their signature when made on paper. Finally, electronic signatures must be created and used by means that are within the sole control of the signatory. Practically speaking, lawyers must guarantee that they are the only party with access to their electronic signature in order to safeguard electronically signed documents from scrutiny.

While all of the foregoing has demonstrated that the Order in Council was designed to broaden the use of electronic documents in response to the COVID-19 crisis, parties should be cautioned that the *Regulation* does not require a Judge to accept an electronic document, nor does it prevent a Judge from directing that a particular document be made in writing.

Appearances

As per the updated Provincial Court, Civil Division, [Master Order](#), dated and filed April 1, 2020, Civil matters scheduled from March 15, 2020 up to and including May 22, 2020, unless otherwise specified, are adjourned *sine die*. This includes chambers list applications, pretrial conferences, case management conferences, assessments, trials, and binding judicial resolutions.

However, any hearings which have the Court's prior approval to proceed electronically, including pretrial conferences and case management conferences, will go ahead as scheduled. Additionally, any matters that are set for May 23, 2020 and thereafter will maintain their scheduled dates until further notice.

All emergency and urgent matters will be dealt with pursuant to the previous Provincial Court [Announcements](#), dated March 16, 2020 and March 23, 2020, as discussed in our previous [Special Edition Newsletter](#).

Bar Admissions

Attendance at Bar Admission [ceremonies](#) scheduled from April 3, 2020 to May 31, 2020 in the Provincial Court will be limited to the applicant and his or her principal. New ceremonies are still being scheduled at this time, although priority will be given to urgent Court matters.

Federal Court of Appeal

Filing

The Federal Court of Appeal has [waived filing or issuance fees](#) for any documents filed during the suspension period from March 17, 2020 to May 15 2020.

The Court continues to strongly encourage filing documents by email sent to Information@fca-caf.gc.ca, but paper copies can still be filed at the designated document [drop-off locations](#) at the registry counter.

Appearances

On April 2, 2020, the previously imposed suspension period was extended to May 15, 2020. All matters scheduled during that suspension period are [adjourned](#).

Any parties whose appeal or judicial review applications were ready to be heard as of March 13, 2020, whether or not the matter was scheduled, may consent to have the hearing conducted remotely. Parties may also choose to have the matter disposed of on the basis of the record, and their respective memoranda of fact and law. To do so, parties must send a letter signed by both parties via email, to the Judicial Administrator at: Information@fca-caf.gc.ca.

As was the case in the Court's previous Notice, urgent matters will proceed [remotely](#). With respect to members of the public, including the media, who wish attend proceedings, they may

consult the Hearing Schedule on the Court's [website](#). Where the matter proceeds remotely, arrangements can be made to allow for attendance of members of the public and the media, provided that an advance notice of two business days is given. Such notice must be emailed to Information@fca-caf.gc.ca.

Alberta Ministerial Order 27/2020 - Limitation Periods

Order 27/2020

On March 30, 2020, the Minister of Justice and Solicitor General issued [Ministerial Order 27/2020](#) ("**Order 27/2020**") in response to the public health emergency arising from the COVID-19 pandemic. Order 27/2020 purports to do two things:

1. Suspend limitation periods in the enactments listed under "Appendix A"; and
2. Suspend any period of time within which any "step" is required to be taken in any "proceeding or intended proceeding" (subject to the discretion of the court, tribunal or decision-maker);

Both suspensions are retroactive and suspend the limitation period or affected period of time from March 17, 2020 to June 1, 2020. The limitation period or affected period of time will resume running on June 1, 2020. The temporary suspension periods "shall not be counted". As a result, this Order may impact limitation defences for many years following the end of the pandemic and suspension period.

Paragraph 1: Limitation Periods

The Ministerial Order, as noted, suspends "limitation periods" under "Appendix A". There is no "Appendix A", but there is an "Appendix I". It is assumed that Appendix I is what was meant to be referred to in the Ministerial Order.

Order 27/2020 does not provide any clarity on how a "limitation period" is defined as for the purposes of paragraph 1.

Generally, a limitation period in Alberta is raised as a defence asserting immunity from liability after the expiration of a period of time. In considering Appendix I, very few of the enactments listed contain what we would consider to be a "limitation period" and many do not feature a "period of time within which [a] step must be taken" in a "proceeding".

Court or Tribunal Discretion for Limitation Periods

According to Order 27/2020, the suspension of time relating to steps in a proceeding is subject to the discretion of the courts or tribunals, whereas Order 27/2020 does not state the suspension of limitation periods are subject to the same discretion. Regardless of the strict reading of the limitation periods, the Alberta Human Rights Commission considers the limitation period extended only if the one-year deadline was going to expire between March 17, 2020 and June 1,

2020. Therefore, the Alberta Human Rights Commission is of the opinion that any limitation period that runs during this time period, but does not expire in this time period, is unaffected by the suspension. The Commission's comment on the Ministerial Order 27/2020 can be found [here](#) and is reproduced:

By Ministerial Order (M.O. 27/2020), limitation periods pertaining to the *Alberta Human Rights Act* are suspended starting March 17, 2020 and will resume June 1, 2020. This will impact the set period of time that people have to make a complaint to the Commission. The one-year limitation period for complaints made to the Commission will be extended if the deadline falls after March 17, 2020 and before June 1, 2020. For example, for a complaint where the one-year limitation period ends April 1, 2020 (15 days after March 17, 2020), the new limitation period becomes June 16, 2020 (15 days after June 1, 2020).

[emphasis added]

Order 27/2020 does not limit its application to only limitation periods that are *expiring* during the suspension period. It remains to be seen how this suspension will be interpreted by the Courts.

Paragraph 2: Steps in Proceedings

Paragraph 2 of Order 27/2020 extends periods of time within which steps in any proceeding or intended proceeding must be taken, subject to discretion. This paragraph of Order 27/2020 raises some questions.

1. What are steps, proceedings or intended proceedings? What does paragraph 2 of Order 27/2020 include?

Order 27/2020 fails to define what a "proceeding" is and does not explicitly reference Appendix I for guidance. Therefore, this Order could, and likely does, capture proceedings outside of the enactments listed in Appendix I. It is not apparent from Order 27/2020 if notice periods or appeal periods are steps in proceedings or intended proceedings. What about service requirements? Is the service of a Statement of Claim a "step" in a proceeding? If so, do plaintiffs now have the luxury of serving what would have been expired claims (subject to the discretion of the court) because the period of time within which it must be done is "suspended"?

As an example of what may be an "intended proceeding" we considered the *Reciprocal Enforcement of Judgments Act*. The six-year time period for a judgment creditor to register a judgment from a reciprocating jurisdiction in section 2(1) may have been suspended by this Order as a step in an "intended proceeding".

Some of the enactments listed in Appendix I create further questions. For example, in the *Administrative Procedures and Jurisdiction Act* there is no period of time within which a step must be taken in a proceeding, but there is a 14-day notice period required regarding questions of

constitutional law. It is unclear whether such a notice period is a step that is suspended during this time. It applies to constitutional questions such as whether a tribunal is violating a *Charter* right. Is no notice now required? As another example, section 4 of the *Motor Vehicle Accident Claims Act* prevents a plaintiff from taking the next step in an action until 30 days after the service of notice to the Administrator. Does this Order suspend the running of the 30 days, meaning a plaintiff must wait an extended period of time following the notice to the Administrator? As a final example, are attachment orders under the *Civil Enforcement Act* extended, or will they still expire in 60 days from the date of judgment?

2. What discretion do the Courts, tribunals or decision makers have?

The Courts have already addressed some of their procedural steps and have chosen their own dates for those extensions. For example, Master Order 2 from the Court of Queen's Bench of Alberta has suspended all filing deadlines under the *Alberta Rules of Court* until May 1, 2020. It is not clear whether the Ministerial Order extends the Court's deadline of May 1st or not.

Further, Master Order 2 chose not to extend non-filing deadlines under the *Alberta Rules of Court*, which now appear to be extended to June 1, 2020 pursuant to Order 27/2020 and its extension of time-sensitive "steps" in proceedings. For example, Affidavits of Records under the *Rules of Court* are not filed, only served. Master Order 2 extended only filing deadlines. The Ministerial Order suspends any period of time in which a step must be taken in a proceeding, which appears to capture an Affidavit of Records.

It is not clear how the Courts will interpret the Ministerial Order, especially in any competing interpretation with their own Master Order 2. It is advisable for counsel to act within the earliest limitation period or period of time if any uncertainty exists, failing which adverse consequences may result.

Further, any deadlines in litigation plans or orders from the Court appear to be unaffected by the Ministerial Order and Master Order 2, unless the Court otherwise directs.

3. Is the Minister of Justice the Minister responsible for all proceedings in Alberta?

Cabinet invoked section 52.1 of the *Public Health Act* ([Order in Council 080/2020](#)) which empowers a Minister to suspend enactments or parts thereof. All legislation and all regulations are enactments. Paragraph 2 of the Ministerial Order captures all times within which a step must be taken in a proceeding. There are generally no binding steps in a proceeding, except by: Legislation; Regulation; Court order; or Agreement.

The first two are suspended to some degree by Order 27/2020, Master Order 2, other Notices to the Profession or some combination thereof. The latter two are arguably not affected. However, at least according to the language in the Ministerial Order, "section 52.1(3) of the [*Public Health Act*] authorizes the Minister of Health/Minister responsible for an enactment (Minister), to make an order...". In fact, section 52.1(3) of the *Public Health Act* allows a suspension order to be made by "the Minister responsible for the enactment", or "if the Minister responsible for the enactment

is not available, the Minister of Health”. Counsel should be alert to whether the Minister of Justice is the, or the only, “Minister responsible for” every enactment. As paragraph 2 of the Ministerial Order is not restricted to only the enactments listed in Appendix I, the Minister of Justice may be suspending (or attempting to suspend) all time-sensitive steps in all proceedings regardless of their legislative origin. There is a basis to be concerned with the extent of the efficacy of the Ministerial Order.

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