
Court of Appeal for Saskatchewan

Docket: CACV4550

**Citation: *Gersten Estate v Weimer*,
2026 SKCA 13**

Date: 2026-01-26

Between:

Ken Zmlak as Executor of the Estate of Stephen Gersten

*Appellant
(Plaintiff/Respondent)*

And

Melody Weimer

*Respondent
(Defendant/Applicant)*

Before: Caldwell, Kalmakoff and Kilback JJ.A.

Disposition: Appeal allowed

Written reasons by: The Honourable Justice Keith D. Kilback
In concurrence: The Honourable Justice Neal W. Caldwell
The Honourable Justice Jeffery D. Kalmakoff

On appeal from: KBG-RG-02519-2022 (SKKB), Regina
Appeal heard: November 7, 2025

Counsel: Kolade Oladokun and Emmanuel Egbehor for the Appellant
Dominique Roelants for the Respondent

Kilback J.A.

I. Introduction

[1] Ken Zemplak is the executor of the estate of Dr. Stephen Gersten. Melody Weimer was a residual beneficiary of the estate and the designated beneficiary of Dr. Gersten's RRSP. The issue raised in this appeal is whether a judge of the Court of King's Bench erred in striking the estate's claim against Ms. Weimer based on the expiry of the applicable limitation period.

[2] After Dr. Gersten passed away, other beneficiaries disputed Ms. Weimer's entitlement under the will. The dispute was settled on the basis that Ms. Weimer would receive the RRSP and be responsible for the associated tax liability but would give up her claim as a residual beneficiary. In April 2020, the settlement was determined to be binding on the parties and the estate was ordered to transfer the proceeds of the RRSP to Ms. Weimer (*TD Waterhouse Canada Inc. v Weimer*, 2020 SKQB 111). However, that judgment did not include any provision for calculating the amount of the tax liability and did not impose a deadline for payment.

[3] After receiving the RRSP proceeds, Ms. Weimer attempted to have Mr. Zemplak confirm the tax liability incurred because of the deemed disposition of the RRSP so she could pay that amount to the estate in accordance with the settlement. This confirmation was not provided. On August 19, 2020, Ms. Weimer put Mr. Zemplak on notice of her position that the time to commence an action against her for payment of the amount she owed to the estate had begun to run and that she would rely on the limitation period governing such an action, if necessary.

[4] On October 27, 2022, the estate sued Ms. Weimer for payment of the taxes she had agreed to pay. Ms. Weimer then applied under Rule 7-9 of *The King's Bench Rules* for an order striking the statement of claim on the basis that the limitation period for commencing the action against her had expired.

[5] A judge of the Court of King’s Bench sitting in Chambers found Ms. Weimer’s obligation to the estate was akin to a demand obligation and that the limitation period for commencing an action to enforce it had expired. The judge granted the application and struck the claim (*Zemlak v Weimer* (24 April 2025), Regina KBG-RG-02519-2022 (SKKB) [*Decision*]). Although Ms. Weimer was successful in having the claim against her struck, the judge noted in *obiter* that she would nevertheless have ordered Ms. Weimer to pay the tax liability to the estate in accordance with the settlement if she had the authority to do so.

[6] Mr. Zemlak appeals from the *Decision*. He contends the judge erred in two ways: (i) by determining that the claim against Ms. Weimer was statute barred because it was discovered on October 20, 2020, more than two years before the action was commenced; and (ii) by failing to recognize that she had inherent authority to order Ms. Weimer to comply with the settlement even though the estate’s claim against her was commenced after the limitation period had expired.

[7] I would allow the appeal. In my respectful view, the judge erred by finding that the limitation period began to run on the day of the estate’s demand for payment instead of the day on which a default in performing the demand obligation occurred. It was therefore not plain and obvious that the estate’s claim was discovered on October 20, 2020, and the judge erred by summarily striking the statement of claim under Rule 7-9. Given these determinations, it is not necessary to consider the second ground of appeal advanced by Mr. Zemlak.

II. Analysis

A. The judge identified the applicable legal principles

[8] The judge began her analysis by correctly identifying the legal principles that apply to the determination of when a limitation period governing a claim based on a failure to perform a demand obligation has expired. To illustrate this, it is helpful to briefly review relevant provisions of *The Limitations Act*, SS 2004, c L-16.1, to demonstrate that, in most cases, a claim based on a default in performing a demand obligation is presumed to be discovered for limitations purposes on the day a default occurs.

[9] A two year limitation period is set out in s. 5 of *The Limitations Act*. Unless otherwise provided in that Act, “no proceedings shall be commenced with respect to a claim after two years from the day on which the claim is discovered” (s. 5). The criteria for determining when a claim is discovered is set out in s. 6:

6(1) Unless otherwise provided in this Act and subject to subsection (2), a claim is discovered on the day on which the claimant first knew or in the circumstances ought to have known:

- (a) that the injury, loss or damage had occurred;
- (b) that the injury, loss or damage appeared to have been caused by or contributed to by an act or omission that is the subject of the claim;
- (c) that the act or omission that is the subject of the claim appeared to be that of the person against whom the claim is made; and
- (d) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.

(2) A claimant is presumed to have known of the matters mentioned in clauses (1)(a) to (d) on the day on which the act or omission on which the claim is based took place, unless the contrary is proved.

[10] Generally, a claim is discovered on the day on which the claimant first knew or, in the circumstances, ought to have known, all the facts set out in s. 6(1)(a) to (d) (see: *Saskatchewan (Highways and Infrastructure) v Venture Construction Inc.*, 2020 SKCA 39 at para 55, leave to appeal to SCC refused 2020 CanLII 81398 [*Venture Construction*]; *Olkowski v Nano-Green Biorefineries Inc.*, 2024 SKCA 11 at para 26; *Nadeau v Nadeau*, 2021 SKCA 69 at para 36 [*Nadeau CA*]). However, under s. 6(2), a claimant is presumed to know those facts “on the day on which the act or omission on which the claim is based took place, unless the contrary is proved”. In the case of a default in performing a demand obligation, “the day on which an act or omission on which a claim is based takes place is the day on which the default occurs.” Section 10 of *The Limitations Act* reads as follows:

10 Unless otherwise provided in this Act, in the case of a default in performing a demand obligation, the day on which an act or omission on which a claim is based takes place is the day on which the default occurs.

[11] The combined effect of these provisions is that, in most cases, a claim based on a default in performing a demand obligation is discovered on the day of the default, unless the contrary is proved.

[12] For purposes of the application before her, the judge agreed with Mr. Zemplak that Ms. Weimer's obligation to pay the estate's tax liability attributable to the deemed disposition of the RRSP was akin to a demand obligation (*Decision* at para 22).

[13] Citing *Nadeau CA* and s. 10 of *The Limitations Act*, the judge correctly recognized that a claim based on a demand obligation arises when the debtor defaults on payment. She held that “the claim is ‘discovered’ when the debtor defaults in repayment in response to a demand for payment” and that “the limitation period of two years starts to run on the day of default” (*Decision* at para 18). However, in my respectful view, the judge lost sight of this when applying s. 10 and erred by finding that the limitation period governing the estate’s claim against Ms. Weimer started to run on the day a demand for payment was made instead of on the day a default in performing the obligation occurred.

B. The limitation period was not triggered by the demand

[14] To inform the discussion that follows, a review of the relevant communications between counsel for Mr. Zemlak and Ms. Weimer is necessary. Shortly after the settlement was declared to be binding in April 2020, Ms. Weimer asked for the estate tax returns so she could determine the amount of tax the estate had to pay due to the deemed disposition of the RRSP. She needed the exact figure so she could arrange to pay that amount in accordance with the settlement, but Mr. Zemlak did not provide the tax returns.

[15] On August 19, 2020, Ms. Weimer wrote to Mr. Zemlak offering to pay \$307,616 (which she estimated to be the taxes owing in connection with the RRSP) upon receipt of documents confirming the net income of the estate and the final value of the RRSP when it was collapsed. In that letter, Ms. Weimer stated that she would not be paying anything until she received documentation that allowed her to precisely calculate the required payment. She also put Mr. Zemlak on notice that, in her view, the time to commence an action for recovery of the amount she owed to the estate had begun to run and that she would rely on *The Limitations Act* if such an action was commenced outside the applicable limitation period.

[16] Two months later, on October 20, 2020, Mr. Zemlak requested payment of \$325,406 that he said was the amount owing, plus Ms. Weimer’s share of executor’s fees. The email to Ms. Weimer’s counsel read, in relevant part, as follows:

Also, aside from the 9% executor’s fee, kindly advise when the \$325,406 due to the Estate is to be released. I am getting significant pushback from the Estate.

[17] Approximately 10 months after that, on August 30, 2021, Mr. Zemlak forwarded to Ms. Weimer an email he had received from a Canada Revenue Agency collection agent. In that email, the agent stated that “\$335,119.00 is an approximation of the amount Ms. Weimer is to pay”, though that amount did not account for provincial taxes. The covering email sent by Mr. Zemlak’s counsel read, in relevant part, as follows:

This is a follow up to my last correspondence dated September 16, 2021. Please find attached to this email correspondence received from CRA respecting the estate. This is the only document I have at the moment. Please let me know if quoted amount (\$335,119.00) is the correct amount due from your client, and when to expect the cheque.

[18] The statement of claim was issued on October 27, 2022. In that action, the estate sought payment of the taxes associated with the collapse of the RRSP that Ms. Weimer had agreed to pay. The estate pleaded that the total tax liability was \$325,406, which was the same figure Mr. Zemlak had demanded on October 20, 2020 — two years and seven days earlier.

[19] After again noting that the date of default triggers the start of the limitation period, the judge considered whether the emails from Mr. Zemlak’s counsel on October 20, 2020, and August 30, 2021, started the limitation period running. However, instead of analyzing whether either email established a *default* in payment of Ms. Weimer’s obligation to the estate so as to engage s. 10 of *The Limitations Act*, the judge considered whether either email constituted a *demand* for payment of that obligation. After quoting the two emails, the judge stated as follows:

[25] Mr. Zemlak argues that only the latest email, that of August 30, 2021, counts as a demand for payment. His position is untenable.

[26] In my view, there are two differences between the two emails. One is the amount of payment that is being demanded from Ms. Weimer.

[27] The second difference is that there is obviously some question in the August 30, 2021, email as to whether the stated amount is, in fact, what Ms. Weimer owes. It is really a question to Ms. Weimer's lawyer to ascertain if that amount was correct. That does not qualify as a demand for payment.

[28] There is no such uncertainty as to the amount demanded in the October 20, 2020 email.

[29] The limitation period started to run, at the latest, on October 20, 2020. Thus, the action commenced on October 27, 2022 is struck as being statute-barred.

[20] The judge made no finding that a default had occurred. Instead, she concluded that the limitation period started to run on October 20, 2020, the date of the demand. In doing so, she failed to apply the correct legal framework governing her determination of when the limitation period began to run. The combined effect of ss. 6(2) and 10 of *The Limitations Act* was that the estate was presumed to have known all the facts that ground discovery of the claim set out in s. 6(1)(a) to (d) on the day the default occurred, not on the day the demand for payment was made.

[21] Whether a limitation period has expired is a question of mixed fact and law (*Venture Construction* at para 33; *Lombard v Ron S. Maurice Professional Corporation (Maurice Law Barristers & Solicitors)*, 2025 SKCA 35 at para 64). Here, the judge’s finding that the limitation period began to run on October 20, 2020, rested on a failure to consider a required element of the legal test for determining when the limitation period began to run, which was when a default occurred. This is an extricable error of law, reviewable on a correctness standard (see *Housen v Nikolaisen*, 2002 SCC 33 at para 36). Expressed another way, the judge effectively altered the legal test in s. 10 of *The Limitations Act* when applying it to the facts before her by asking whether the October 20 email was a demand for payment instead of whether it established a default (see *Teal Cedar Products Ltd. v British Columbia*, 2017 SCC 32 at paras 44-45; see also *Ding v Canam Super Vacation Inc.*, 2024 BCCA 102 at paras 37-38).

[22] In the limitations context, a default is not always synonymous with a demand. Section 10 of *The Limitations Act* applies in the case of a default in *performing* a demand obligation. For this reason, in the absence of any specific terms defining an act of default or addressing the performance of the obligation, in most cases “the act or omission of default must, by its nature, be subsequent to the demand” (*Nadeau v Nadeau*, 2020 SKQB 136 at para 33, affirmed *Nadeau CA*; see also *Hopkins v Stockman*, 2013 SKCA 118 at para 12).

[23] Assuming without deciding that Mr. Zemlak’s October 20, 2020, email to Ms. Weimer constituted a valid demand, the words “kindly advise when the \$325,406 due to the Estate is to be released” do not contemplate payment being made on the same day

the email was sent. The language of the demand did not communicate the expectation of immediate payment such that a failure to tender the stated amount on October 20 would constitute a default. To the contrary, the express request for Ms. Weimer *to advise when* the amount Mr. Zemlak believed to be due would be released is necessarily understood to mean that payment was expected on a future date, not on October 20, 2020. It is therefore axiomatic that a default had not yet occurred when that email was sent.

[24] For these reasons, s. 10 of *The Limitations Act* did not operate to establish that “the day on which the act or omission on which a claim is based” was October 20, 2020, because it was not plain and obvious that a default had occurred on that date. This meant that the presumption in s. 6(2) that the estate’s claim was discovered on that date was not engaged. In my respectful view, the judge’s determination that the limitation period governing the estate’s claim against Ms. Weimer had expired because it started to run on the day of the October 20, 2020 demand for payment was the product of an error in principle in applying s. 10 of *The Limitations Act*.

[25] In some circumstances, a statement of claim that is issued after the applicable limitation period has expired may properly be struck under Rule 7-9(2)(e) as abuse of process. This can occur where it is clear that a plaintiff has commenced the action knowing that it is statute barred (*Edge v Moose Jaw Downtown and Soccer/Field-House Facilities Inc.*, 2025 SKCA 17 at para 42, leave to appeal to SCC refused 2025 CanLII 104261 [*Edge*]; *GHC Swift Current Realty Inc. v BACZ Engineering (2004) Ltd.*, 2022 SKCA 38 at para 24). However, where it is not plain and obvious that this is the case, such as where there is an arguable issue as to whether the claim is statute barred at all, it is an error in principle for a Chambers judge to strike the claim under this rule (see: *Edge* at para 42; *GHC* at para 25; *Nelson v Teva Canada Limited*, 2021 SKCA 171 at paras 17-18; *CPC Networks Corp. v McDougall Gauley LLP*, 2021 SKCA 127 at para 92). Here, it was not plain and obvious that a default occurred on October 20, 2022, and that the limitation period governing the estate’s claim had expired based on the application of s. 10 of *The Limitations Act*. As such, the judge erred in summarily striking the statement of claim under Rule 7-9.

III. Conclusion

[26] I would allow the appeal and set aside the *Decision*, with costs to Mr. Zemlak on behalf of the estate calculated in accordance with Rule 54(1) of *The Court of Appeal Rules*.

“Kilback J.A.”

Kilback J.A.

I concur.

“Caldwell J.A.”

Caldwell J.A.

I concur.

“Kalmakoff J.A.”

Kalmakoff J.A.