

Court of King's Bench of Alberta

Citation: Sabir v Gill, 2023 ABKB 679

Date: 20231201
Docket: 2201 11259
Registry: Calgary

Between:

Saira Sabir

Plaintiff

- and -

**Gagan Kaur Gill, the Administrator of the Motor Vehicle Accident Claims Act,
John Doe I and John Doe II**

Defendants

Reasons for Decision of the Honourable Applications Judge J.T. Prowse

[1] The applicant seeks an order back dating the 'filed' date of a statement of claim to the date on which it was initially submitted for registration to the Courthouse.

[2] To be clear, this is not a situation where the applicant seeks to back date the filed date to a date earlier than the date on which it was submitted for registration.

[3] The statement of claim in question was submitted for registration 4 days prior to the applicable 2 year limitation date, but, due to the error of the submitting party, was not 'filed' until 5 days after the initial submission, at which point the limitation period had expired. I will describe the exact nature of the error later in these reasons.

[4] I have not been made aware of any Alberta decisions on point.

[5] There are two Ontario decisions on point, both of which allowed the back dating of the originating document to the date on which it was submitted for registration.

The Ontario decisions

[6] In *Patkaciunas v. Economical Mutual Insurance Company*, 2021 ONSC 5945, 2021 CarswellOnt 12437, the facts were as follows (para 3):

The plaintiffs' paralegal was in the waiting room in the court office with a date and time stamped numbered ticket waiting to be called more than half an hour before closing on June 25, 2019. When the paralegal was called to the counter in his turn, the lone clerk on duty announced to him that his computer was shutting down in 90 seconds and he would not process the statement of claim for issuance on that day. The clerk turned around and walked away. He should not have done this. As a result of this court clerk's actions, the paralegal was unable to obtain a stamp to evidence the issuance of the claim until the next day.

[7] The only fault which might be attributable to the plaintiffs in the *Patkaciunas* case was in not attempting to file the statement of claim until shortly before closing on the last date prior to the expiry of the limitation period (although, to be fair, an accident on the roads apparently had delayed the time at which the paralegal arrived at the Courthouse).

[8] With respect to jurisdiction to make the order requested the Court observed:

I have the inherent jurisdiction to treat as done that which public officials had a duty to do and when they had a duty to do it. I am declaring that the statement of claim was issued on June 25, 2019. I am not excusing the plaintiffs' failure to take a step in the time prescribed — I am finding as a fact on the evidence before me that the step required was taken even if not recorded by the court as it ought to have been through no fault of the plaintiffs.

[9] The Court in *Patkaciunas* considered the leading case on *nunc pro tunc* orders, which is the Supreme Court of Canada's decision in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 (CanLII), [2015] 3 SCR 801, and made the following observations (para 12):

Despite the significant point of difference between this case and *Green*, what is sought to be done here is entirely in line with the ratio of *Green*. There is no prejudice to the defendants beyond the loss of a procedural advantage that they had no way of knowing they had. The plaintiffs had six months to serve the statement of claim after issuance at all events and they gave notice of the claim long before the six month period expired. There is no prospect of the defendants' having adversely relied upon an expiring limitation period that they had no way of knowing for six further months had expired. The irregularity at issue was certainly not intentional and indeed it was occasioned solely by a failing of the court. There was nothing foreseeable about the delay that occurred here. The prospect of requiring a motion in advance to excuse that which had not yet happened is of course an absurdity, but the assessment of this court that its own staff failed in the execution of their duty on that day and that such failing was the proximate cause for the failure being corrected is the functional equivalent.

Nothing in the order sought undermines any of the legislative purposes underlying this or any other statutory limitation period. In this case, the failing was of the court and not of the plaintiffs. It may be good policy for plaintiffs to leave a margin or error for unexpected occurrences that lie within their own control — they are not required to anticipate failings by court staff over which they have no control.

[10] The case I face is different than *Patkaciunas* because in this case there is fault attributable to the plaintiffs. The question is whether that difference should lead to a different outcome.

[11] I note, parenthetically, that the Court of Kings Bench of Alberta applied the reasoning in *Patkaciunas* in a recent decision, *Resta v Thornton*, 2023 ABKB 498, 2023 CarswellAlta 2277, but that case did not deal with the topic of back dating the filed date on an originating document, and so is not directly applicable to this case.

[12] *Patkaciunas* was considered and applied in *Norman Towing v. Riordan Leasing Inc.*, 2022 ONSC 7167.

[13] In *Norman Towing* the defendant Riordan filed a statement of defence and counterclaim. This was done on the last day before the counterclaim would be limitations barred. Under Ontario procedure, given that a new party was added to the counterclaim, it needed to be filed and issued, not just filed. The defendant sought a *nunc pro tunc* order to declare the counterclaim issued on the date that it was presented to the clerk's office. The court stated as follows (para's 53 and 54):

In this case, I conclude that Riordan was ready to proceed with its Counterclaim on June 18th, 2021. It had taken all necessary steps to prepare that claim, including attending at the Court office. All that remained to do was to issue the claim, rather than merely filing it as was done. Had Riordan asked for the claim to be issued, it would have been issued on June 18th, 2021.

More importantly, had Court staff advised Riordan that the claim had to be issued, Riordan would have carried out that step. Unlike the bankruptcy or security cases relied upon by the plaintiff, no leave was required. In the words of those cases, Riordan was "ready to argue" that its claim should be issued and the Court would have been required to grant that request as a matter of course. Therefore, when the facts in this case are considered, all of the factors in *Green* set out at paragraph 47 above favour granting the *nunc pro tunc* order.

Facts of this case

[14] At the time the statement of claim was submitted for filing on Thursday, September 29, 2022, there were two systems for electronic filing of documents at the Court of Queen's Bench of Alberta.

[15] Firstly there was an email filing system where the party submitting the document would attach it (as a pdf attachment) to an email sent to a designated courthouse email address. The courthouse had a written policy which indicated that documents submitted this way would be shown as 'filed' on the date they were emailed, and not on a subsequent date when they were processed.

[16] Secondly there was a “FDS” filing system. That was the system used here as the filing of statements of claim was not allowed under the email filing system.

[17] The process in place for filing a statement of claim under the FDS system required users to:

- Create the filing request on the FDS portal
- Identify the document(s) being submitted for filing
- Provide information and upload the documents being submitted
- Review the information which had been provided before finalizing the request to file
- Pay for and submit the document
- Receive confirmation that their request had been submitted
- Receive a notification (following processing by the Clerk’s office) that the filing has been accepted or rejected

[18] An assistant from the plaintiff’s law firm (not the law firm representing the plaintiff on this application) logged onto the portal on Thursday, September 29, 2022 in an attempt to file the subject statement of claim.

[19] After being presented with a ‘dashboard’ containing information on previously submitted documents, the user would then click on ‘Create’ which took her to a screen which gave two choices: (i) “Originating (will be assigned a new action number)” or (ii) Subsequent (already has an action number)”.

[20] If choice (i) is made then the user is presented with a screen to complete the judicial centre, area of law/domain and style of cause.

[21] If choice (ii) is made then the user is presented with a screen to complete the action number. The user is then presented with the style of cause, judicial centre and area of law, and asked to confirm if these three items are correctly displayed.

[22] It is presumed that the assistant on September 29 chose (i) because she did not have any action number to insert. As well, a later form of acknowledgement indicated “type of submission – originating”.

[23] The statement of claim in question was for damages for a motor vehicle accident which occurred on October 2, 2020. As October 2, 2022 was a Sunday, the last day for filing within two years was October 3, 2022.

[24] After choosing option (i) i.e. “Originating”, the user clicks ‘next’ and is taken to a screen to select the type of document being filed. Instead of choosing ‘statement of claim’ the assistant must have mistakenly chosen ‘discontinuance of action’. Notwithstanding that “Originating” had earlier been indicated, the FDS system was not designed to require that either “statement of claim” or “originating application” be entered as the type of document.

[25] If ‘statement of claim’ had been correctly indicated, the FDS system would have then presented the user with a box indicating “next court date, filing deadline or limitation date (optional)”. Because ‘statement of claim’ had not been indicated, this box would not have been presented to the assistant in question by the FDS system.

[26] The user then has to upload their document under that document type. The user would select 'next' and be presented with a review summary. This would have shown the mistaken 'discontinuance of action' and would show in the processing fee that there was no filing fee for the Discontinuance, only a printing fee instead of 'statement of claim', but the assistant did not pick up the error – she must have approved the review and clicked 'payment'.

[27] The payment screen would have shown a \$6 charge for a discontinuance of action instead of a \$250 charge for a statement of claim. Again, the assistant must have not noticed this error on her part. After paying and submitting the document, the assistant would then be directed to a confirmation page that again includes information on how much was paid for the submission and the document type(s) that was submitted.

[28] The assistant in question submitted six documents for filing on September 29, 2022. We do not know if they were submitted concurrently (during one session on the portal) or on multiple sessions on the portal.

[29] Upon entering 'pay', the assistant would have received the following message by email:

Your filing request has been submitted. You will be notified once the request has been accepted or rejected.

Documents submitted during business hours, 8:15 AM to 4:00 PM, Monday through Friday excluding statutory/civic holidays, that have a Filing Deadline, Limitation Date or Upcoming Hearing and are flagged as such will be given priority. All remaining documents will be filed on the date in which they are processed. (emphasis added)

[30] The submission was not processed the following day, Friday September 30, but rather on Monday, October 3, which was the last day for filing under the *Limitations Act*.

[31] The assistant next received a message sent by the Clerk's office at 4:27 PM on Monday, October 3, which noted that the "type of submission" was "originating" and stated as follows:

You have this submitted as a Discontinuance of Claim, please ensure you are submitting this under the right document type.

[32] The assistant resubmitted the statement of claim for filing the next day and it was marked filed on October 4, 2022. When the assistant subsequently requested that the clerk's office backdate the filing date, the clerk's office provided the following email response on October 5, 2022:

I have reviewed the details of your submission and can see that a clerk rejected the submission on October 3 as it was incorrectly submitted as a Discontinuance, and it needed to be submitted as a Statement of Claim to ensure that the proper payment was taken and that the document was filed correctly. When it was submitted as a Discontinuance, it was not prioritized as it was not submitted as a time sensitive document. The clerk could not have accepted and filed the document.

Then it was resubmitted on October 4 at 8:34 am. It was marked as having a limitation date for Oct 4 (not Oct 2) and so the clerk filed it at 8:41 am that same day. We do not read through Statements of Claim to determine when the limitation date is. It is the responsibility of the law firm to ensure that they are

submitting it prior to the limitation date and if they are going to mark that there is a limitation date, that the accurate one is provided to the clerk.

I have attached a screenshot of the submission history and the submission with the indicated limitation date to this email.

We can not back date the Statement of Claim.

Discussion

[33] It is clear from the facts recited above that it was the clerical error of the assistant at the plaintiff's office that the statement of claim was not entered as 'filed' by the Clerk on or before October 3, 2023.

[34] I agree with the comment by the Clerk's office, contained in their email of October 5, 2023, that it is not the Clerk's responsibility to review statements of claim submitted for upcoming limitation dates. Nor is there any fault in the Clerk's office for not processing (and rejecting) the statement of claim until late in the day on October 3, 2023. There had been no notice to the Clerk of any urgency.

[35] I do note that, under the design of the FDS system, once a user has indicated "originating", the choices of document type presented to the user as the next step included documents (such as "discontinuance") which were not originating documents. Had the system been designed differently it would have prevented the error which the assistant in question made.

[36] As well, the Clerk's office made a policy decision to back date email filings to the submission date but to not back date FDS filings to the submission date.

[37] The complete statement of claim (as ultimately filed on October 5, 2022) had been submitted to the Clerk via the FDS system prior to the expiry of the limitation date.

[38] Do I have the jurisdiction to back date the filing date to be the 'submitted' date, and if so, should I exercise my discretion in favor of the plaintiff?

[39] In *Price v Sonsini*, 162 O.A.C 85, 2002 CarswellOnt 2255, the Court was considering whether it was strictly bound by statutory limitation periods regarding the time within which a client could seek a review of a solicitor's accounts. The Court observed, at paragraph 19:

Public confidence in the administration of justice requires the court to intervene where necessary to protect the client's right to a fair procedure for the assessment of a solicitor's bill.... The court has an inherent jurisdiction to control the conduct of solicitors and its own procedures. This inherent jurisdiction may be applied to ensure that a client's request for an assessment is dealt with fairly and equitably despite procedural gaps or irregularities. [emphasis added]

[40] In *Patkaciunas*, at paragraph 13, the Court observed:

The court must have the capacity to control its own processes and when a demonstrated failing in the court's processes is proved to be the proximate cause for the apparent failure to accomplish fully a required step before the expiry of a limitation period, the court's inherent jurisdiction extends to treating as done that which its own staff ought to have done. [emphasis added]

[41] In *Norman Towing*, the Court exercised its jurisdiction to back date the issuance of the counterclaim in question. Following are three relevant paragraphs from that decision:

36 Counsel for the Plaintiff points to a number of decisions from both this Court and from the Court of Appeal that suggest that Green has a wide application and creates a bright line rule that there can be no nunc pro tunc orders after a limitations period is missed. As will be seen, I disagree with that analysis.

39 This passage clearly acknowledges that, if there is a statute that bars the issuance of a nunc pro tunc order, the Court must respect that statutory provision. The Plaintiffs go further, however, and say that this passage amounts to a bright line where the Court can never grant a nunc pro tunc order where a limitation period has passed.

53 In this case, I conclude that Riordan was ready to proceed with its Counterclaim on June 18th, 2021. It had taken all necessary steps to prepare that claim, including attending at the Court office. All that remained to do was to issue the claim, rather than merely filing it as was done. Had Riordan asked for the claim to be issued, it would have been issued on June 18th, 2021. [emphasis added]

[42] I note that the Clerk itself has implemented a system (the email filing system as discussed earlier) under which it back dates documents from the processing date to the date the document was submitted.

[43] In my view, the Court has the jurisdiction to control its own process by back dating the statement of claim to show it as ‘filed’ on the date submitted.

[44] The question is then whether I should exercise that jurisdiction in the circumstances of this case.

[45] It is noteworthy that there is no prejudice to the defendant if I back date the filing date as requested. Were it not for the errors made by the assistant at the plaintiff’s lawyers office, the defendant would simply have had to defend the claim in the ordinary course. That is exactly what will happen if I back date the filing date as requested.

[46] If I decline to back date the filing date then the plaintiff will be faced with pursuing a lawyer negligence case rather than an automobile accident negligence case. Pursuing the lawyer negligence case will be somewhat more complicated for the plaintiff.

[47] Weighing these considerations, given the lack of prejudice to the plaintiff, and the prospect for an additional burden on the plaintiff, I consider the better option to be the back dating of the statement of claim.

[48] I wish to reiterate, as noted at the outset of these reasons, that this decision does not endorse the chaotic scene which would ensue if statements of claim were submitted after the limitations date and then back dated. This decision only deals with a statement of claim which, in its complete and final form, was submitted to the Clerk’s office for filing prior to the expiry of the applicable limitation period.

Costs

[49] If the parties cannot agree on a costs outcome they may make submissions to me in that regard.

Heard on the 7th day of September, 2023.

Dated at the City of Calgary, Alberta this 1st day of December, 2023.

J.T. Prowse
A.J.C.K.B.A.

Appearances:

Stacy Petriuk, K.C. and Robyn Graham
Jensen Shawa Solomon Duguid Hawkes LLP
for the plaintiff

Mason Worholik
for the defendant