

Court of King’s Bench of Alberta

Citation: Lauzon v Edmonton (Police Service), 2024 ABKB 612

Date: 20241016
Docket: 2103 15136
Registry: Edmonton

Between:

Ryan Lauzon

Plaintiff/Respondent

- and -

**Edmonton Police Service, Edmonton Chief of Police Dale McFee, Andrew James Donald,
John Doe I, John Doe II, John Doe III, John Doe IV, Constable Lucas Braithwaite,
Constable Dennis Dalziel, Constable Krista Gavin, Constable Daniel Fedechko,
and Constable Nicholas Karampelas**

Defendants

- and -

**Edmonton Police Service, Edmonton Chief of Police Dale McFee, Constable Lucas
Braithwaite, Constable Dennis Dalziel, Constable Krista Gavin,
Constable Daniel Fedechko, and Constable Nicholas Karampelas**

Defendants/Appellants

**Reasons for Judgment
of the
Honourable Justice S. Leonard**

Appeal from the Judgment by
Lucille Birkett, The Honourable Applications Judge

Dated the 21st day of July, 2023
(Docket: 2103 15136)

I. Introduction

[1] Pursuant to *Rule 3.26* of the *Alberta Rules of Court*, Alta Reg 124/2010 (*Rules of Court*), the Respondent obtained an *ex parte* order from an Applications Judge extending his time to serve a Statement of Claim.

[2] The Appellants brought an application before the same Applications Judge to have both the *Ex Parte* Order and service of the Statement of Claim on the Appellants set aside. The Applications Judge dismissed the Appellants' application. The Appellants appeal this decision.

[3] For the reasons that follow, I allow the appeal and set aside the *Ex Parte* Order extending time to serve the Appellants. It follows that service of the Statement of Claim did not occur within the required time limit and no further proceeding may be taken in the action against the Appellants.

II. Background and Litigation History

[4] Ryan Lauzon (the "Respondent") filed a Statement of Claim on October 6, 2021, against the Edmonton Police Service ("EPS"), the Edmonton Chief of Police, Andrew Donaldson, and the Appellants ("Constables Gavin, Karampelas, Lucas Braithwaite, Dennis Dalziel and Daniel Fedechko").

[5] The Chief of Police was served with the Statement of Claim on December 9, 2021, and retained the firm of Weir Bown LLP to defend the action. The EPS was not served. Weir Bowen LLP was not retained by the Appellants or the EPS.

[6] Pursuant to *Rule 3.26* (1) of the *Rules of Court*, the Statement of Claim had to be either served on the Appellants by October 6, 2022, or the Respondent had to file an application by October 6, 2022, seeking an extension of time for service: ***Alberta (Director of Law Enforcement) v McPike***, 2019 ABCA 330 at para 26.

[7] On October 6, 2022, the Respondent filed a Without Notice Application by way of Desk Application. The single-page Desk Application form did not indicate what relief was being sought. The area inviting the Respondent to write submissions for consideration by the Court was left blank (the "Blank Desk Application").

[8] The Blank Desk Application was filed with an affidavit dated October 6, 2022, sworn by John Carlo Doctolero, a paralegal. The Affidavit was titled, "Affidavit of Order for Substitutional Service (sic)" (the "Substitutional Service Affidavit").

[9] Within the Substitutional Service Affidavit, Mr. Doctolero indicated that the Affidavit was made:

...in support of an Application for an Order permitting substitutional service of the Statement of Claim ... filed by the Plaintiff on October 7, 2021 on the Defendants Constable Krista Gavin & Constable Nicholas Karamples & Constable Lucas Braithwaite & Constable Dennis Dalziel & Constable Doug Fedechko.

[10] Along with the Blank Desk Application and the Substitutional Service Affidavit, an Affidavit sworn by Mr. Doctolero on October 6, 2022, was filed in support of an application for an order granting an extension of time to serve the same Statement of Claim on the Defendant, Andrew Donald. Mr. Donald is not a party to this Appeal.

[11] Upon reviewing the Blank Desk Application and supporting affidavits, the Applications Judge sent correspondence to the Respondent's counsel indicating that the Substitutional Service Application received on October 6 would be dismissed, but that the Applications Judge was willing to grant an order extending the time to serve the Statement of Claim on the Appellants. In response, counsel for the Respondent provided a revised form of order to the Applications Judge. There is a dispute between the parties as to whether the Applications Judge reviewed the Blank Desk Application on October 6 or October 7, 2022.

[12] The revised form of order submitted on behalf of the Respondent was titled, "Order for Substitutional Service" and contained the following orders:

1. The Plaintiff is given an extension of time to serve the Statement of Claim filed on October 6, 2021 on the Defendants... in accordance with *Rule 3.26* of the *Alberta Rules of Court*.
2. The Plaintiff shall have an extension of 3 months from October 6, 2022 within which to serve the Statement of Claim.

[13] The Applications Judge signed this Order on October 7, 2022 (the "Extension Order").

[14] The Order granting an extension of time to serve Mr. Donald was also granted on October 7, 2022.

[15] On December 2, 2022, counsel for the Respondent sent the Statement of Claim to a process server for service on the Appellants. The status of service on each of the Appellants is as follows:

Constable Nicholas Karampelas was served on December 29, 2022;

Constable Krista Gavin was served on December 30, 2022;

Constable Dennis Dalziel was served on January 4, 2023;

Constable Daniel Fedechko was served on January 12, 2023; and

Constable Lucas Braithwaite was never served.

[16] With respect to Constable Fedechko, the Respondent's evidence is that they initially served Constable Doug Fedechko, retired, instead of his son, Constable Daniel Fedechko, causing a delay in service.

[17] On January 24, 2023, the Appellants filed an application pursuant to *Rule 9.15* seeking, an order setting aside the Extension Order and an order that service of the Statement of Claim on the Appellants was of no force or effect. The Appellants argued the Respondent did not file an application requesting an extension of time for service of the Statement of Claim before the expiry of that Statement of Claim, and the Substitutional Service Affidavit was false and misleading.

[18] The Appellants' Application was heard on June 20, 2023, with a continuation hearing held on July 21, 2023.

III. The Decision of the Applications Judge

[19] On July 21, 2023, the Applications Judge dismissed the Appellants' Application to set aside the Extension Order. In doing so, the Applications Judge found that *Rule 1.4* gave her the authority to consider the Blank Desk Application as a request for an extension. She explained:

With respect to the application itself, I am looking at Rule 1.4, which says that to implement or advance the purpose and intention of the Rules, the Court may, subject to any specific provision of these rules, make any order with respect to practice or procedure or both in an action, application, or proceeding before the Court.

So with that authority of the Court, I considered the application that was before me, which was for substitutional service. I rejected the application for substitutional service. I noted that the Statement of Claim was filed October 6. I also had before me at that time an application for Donaldson... But the bottom line is that having rejected the application for substitutional service, I was aware that the Statement of Claim was going to expire as against these defendants. As a result of that, I advanced—advised counsel that I was rejecting the application for substitutional service, and I was prepared to grant an order for an extension of time. Counsel sent that order. I signed it...

The constables have applied to set aside the order based mainly on the basis that there was no application made. I find that I had jurisdiction within the rules and the authority given to the Court under 1.4 to consider this application as an application to extend the time for service. The constables argue it was not done in time. Given the system that we have for dealing with these applications, if the application is submitted on the date that the Statement of Claim is to expire, that is considered that it was made within time. So the application was submitted on October 6th. I find that it was made in time.

[20] The Applications Judge also found the efforts made by the Respondent to effect service were sufficient to support an order extending service of the Statement of Claim.

[21] In her decision, the Applications Judge did not address service of Constable Fedechko even though Constable Fedechko was served after the expiry of the Extension Order. The effect of the Application Judge's decision was that the Statement of Claim remained in effect as against all the Appellants, including Constable Fedechko.

IV. Issues

[22] These circumstances give rise to the following issues on appeal:

- (a) What type of application did the Respondent file on October 6, 2022?
- (b) Did the Applications Judge review the file and invite the Respondent to submit an extension order on October 6 or October 7, 2022?
- (c) Did the Applications Judge have jurisdiction to grant the Extension Order?
 - (i) Did the Applications Judge have jurisdiction to grant the Extension Order on her own motion?

- (ii) Did *Rule 1.4* give the Applications Judge jurisdiction to grant the Extension Order after the expiry of the limitation period for service of the Statement of Claim?
- (d) Was there sufficient evidence before the Applications Judge to grant an extension of the time to serve the Statement of Claim?
- (e) Should the service of the Statement of Claim on Constable Fedechko be set aside?

V. Standard of Review

[23] The standard of review on this appeal is correctness: *Bahcheli v Yorkton Securities Inc.*, 2012 ABCA 166 at para 30.

VI. Position of the Parties

[24] The Appellants' position is that the Substitutional Service Affidavit sought only a substitutional service order, not an extension order. The Applications Judge did not have jurisdiction to grant the Extension Order on her own motion and *Rule 1.4* did not give the Applications Judge jurisdiction to grant the Extension Order after the expiry of the limitation period for service of the Statement of Claim.

[25] The Appellants also argue the evidence before the Applications Judge was misleading and was insufficient to grant an Extension Order.

[26] The Respondent's position is that the Application's materials were filed on October 6, 2022, before the one-year time limit had expired and therefore in compliance with *Rule 3.26*. *Rule 1.4* gave the Applications Judge jurisdiction to grant the Extension Order. The Substitutional Service Affidavit was not false or misleading, and it provided sufficient evidence to support the Extension Order.

VII. Analysis

a. What Type of Application did the Respondent File on October 6, 2022?

[27] The Respondent argues its materials went before the Applications Judge on October 6, 2022. The Respondent argues it should not be prejudiced because the materials were submitted on October 6, 2022, but the Order was not signed until the following day.

[28] I agree that the Blank Desk Application and the Substitutional Service Affidavit were both filed on October 6, 2022. Having carefully reviewed the materials, I conclude that the Respondent did not apply for an extension of time to serve the Appellants; the Respondent applied for a substitutional service order. Had an application for an extension been submitted on October 6, 2022, it would have met the requirements of *Rule 3.26* regardless of when the Applications Judge reviewed and/or signed the Extension Order: *Patkaciunas v Economical Mutual Insurance Company*, 2021 ONSC 5945 at paras 9, 13; *Sabir v Gill*, 2023 ABKB 679 at para 45.

b. Did the Applications Judge Review the File and Invite the Respondent to Submit an Extension Order on October 6 or October 7, 2022?

[29] In her written submissions and in oral argument, counsel for the Respondent asserted she received the correspondence from the Applications Judge on October 6, 2022, inviting her to submit a form of order for an extension.

[30] Counsel for the Appellants disputes this claim, and says the evidence establishes that the communication from the Applications Judge occurred on October 7, 2022.

[31] In support of her assertion, counsel for the Respondent relies on two paragraphs from an Affidavit of Mr. Doctolero sworn on February 21, 2023 (the “February 2023 Doctolero Affidavit”). These are as follows:

4(l) As the Plaintiff counsel did not hear a response from the Defendant counsel, she made an application for Substitutional Service on October 6, 2022, at 1:24pm via the Online filing portal. We received a response from Judge L.R. Birkett that we would be receiving an extension of time to serve, but not Substitutional Service. Unfortunately, the filing system does not keep notes. Attached as “Exhibit H” is Notice of Application. Attached as Exhibit I” is the Order for Extension. Attached as “Exhibit J” is the Affidavit for Extension.

4(v) I am advised that the Without Notice Application Order of Extension Application was filed on October 6, 2022. The Order states the Statement of Claim was filed on October 6, 2021. The court did not pronounce the matter until October 7, 2022, but the matter was filed within the limitation time, and the extension provided was from the date of October 6, 2022.

[32] I note that the February 2023 Doctolero Affidavit referred to Exhibit J as being “the Affidavit of Extension”. However, it is actually the Substitutional Service Affidavit sworn on October 6, 2022, in which he indicates that the Affidavit is made in support of an application for substitutional service of the Statement of Claim. The evidence before the Court establishes that the Respondent did not file an application seeking an extension of time to serve the Statement of Claim on the Appellants. The assertion in Mr. Doctolero’s Affidavit sworn in February 2023 is either in error or intentionally misleading.

[33] Paragraphs 4(l) and 4(v) of the February 2023 Doctolero Affidavit do not indicate when the Applications Judge reviewed the Desk Application or when she communicated back to the Respondent that an extension order could be provided.

[34] In oral argument, counsel for the Respondent indicated that her notes reflect she heard back from the Applications Judge on October 6. These notes are not in evidence on this Appeal.

[35] During the June 20, 2023 appearance, the Applications Judge explained that she keeps notes of the desk applications she receives. In reviewing her notes, she said the following:

Okay. So my notes say. Downloaded October 7 at 11:44 AM. Not signed. Notes: Rejected. Application for sub serve – rejected application for sub service but will extend service. Rule 3.26. ...

[36] And then further in the transcript, the Applications Judge said:

Okay. So the one that I have signed says Modified October 7 at 4:26 PM Notes: Application to extend time.

So it looks like what probably happened is I rejected it at 11:44 AM, then when I went back to look at documents at 4:26 PM, this second form of order was there.

[37] The Applications Judge clarified that that the application to extend was not made until October 7, 2022.

[38] The Respondent has not provided any admissible evidence that the Applications Judge dealt with the Desk Application on October 6, 2022. The Applications Judge maintains contemporaneous notes of the desk applications she receives. I accept that she reviewed the Blank Desk Application on October 7, 2022, and on October 7, 2022, invited the Respondent to submit an order for an extension of the time to serve the Statement of Claim.

VIII. Did the Applications Judge have Jurisdiction to Grant the Extension Order?

[39] The Respondent argues *Rule 1.4* gave the Application Judge discretion to grant the Extension Order in place of a substitutional service order.

[40] The Appellants disagree and argue the Applications Judge did not have jurisdiction to grant the Extension Order on her own motion, and *Rule 1.4* does not permit the extension of the limitation period contained in *Rule 3.26* regarding service of Statements of Claim.

a. Did the Applications Judge have Jurisdiction to Grant the Extension Order on her own Motion?

[41] A Court may act on its own motion in exceptional circumstances, however, given the risks associated with doing so, this should not be the norm.

[42] The Court of Appeal has observed that a judge “should not take jurisdiction to grant an order that has not been sought by either party with a properly filed application and supported by evidence”: *Cold Lake First Nations v Alberta (Tourism, Parks and Recreation)*, 2012 ABCA 36 [*Cold Lake*] at para 35, citing *Hicks v Kennedy*, 1957 CanLII 276 (AB CA); *Wagner v Wagner*, 2014 ABCA 428 [*Wagner*] at para 27.

[43] In the absence of a properly brought application, a party cannot know the case that must be met and is unable to make full answer: *Cold Lake* at para 36. The relief sought should be stated precisely in the application and “not left to be divined from other documents filed”: *Wagner* at para 27.

[44] Related to the need for a proper application is the requirement for an evidentiary foundation: *Deiure v Deiure*, 2000 ABCA 328 at para 3. A court “should not grant relief without evidence to support the order”: *Cold Lake* at para 38. As will be discussed later in these Reasons, I am of the view that there was insufficient evidence to grant the Extension Order.

[45] The importance of having a proper evidentiary foundation is heightened when a Court is acting of its own motion, particularly when the application is dealt with *ex parte*. Absent exceptional circumstances, a Court should not act on its own motion as doing so risks compromising the role of an impartial arbitrator: *Malton v Attia*, 2016 ABCA 130 [*Malton*] at para 41; *Jensen v Ross*, 2014 BCCA 173 at paras 24-27.

[46] While the decision in *Malton* leaves open the possibility of a Court acting on its own motion in exceptional circumstances, I am not satisfied that the circumstances before the Applications Judge either permitted or warranted intervention. The circumstances before the Applications Judge were not exceptional. Further, as will be reviewed in the next sections, the Applications Judge did not have jurisdiction to invite the Extension Order because the limitation period had already expired, and the materials filed by the Respondent were misleading. In short, the risks associated with a Court acting on its own motion in an *ex parte* application were at play in this case.

b. Did Rule 1.4 give the Applications Judge Jurisdiction to Grant the Extension Order after the Expiry of the Limitation Period for Service of the Statement of Claim?

[47] I find that Rule 1.4 did not give the Applications Judge jurisdiction to grant the Extension Order. The Respondent did not file an application for an extension of the Statement of Claim. The possibility of an extension only arose on October 7, 2022, one day after the expiration of the limitation period contemplated in Rule 3.26.

[48] The Respondent argues Rule 1.4 is sufficiently broad to have allowed the Court to grant an extension of the limitation period in replacement of a substitutional service order. The applicable portions of Rule 1.4 are as follows:

1.4(1) To implement and advance the purpose and intention of these rules described in rule 1.2 the Court may, subject to any specific provision of these rules, make any order with respect to practice or procedure, or both, in an action, application or proceeding before the Court.

(2) Without limiting subrule (1), and in addition to any specific authority the Court has under these rules, the Court may, unless specifically limited by these rules, do one or more of the following:

...

(h) adjourn or stay all or any part of an action, application or proceeding, extend the time for doing anything in the proceeding, or stay the effect of a judgment or order...

[49] In support of its position, the Respondent relies on *Ford v New Democrats of Canada Association*, 2024 ABKB 141 [*Ford*]. The *Ford* matter was an action in defamation against the Alberta NDP arising from comments made on the Alberta NDP's website. The matter before the Court involved the appointment of a litigation representative for the defendant Alberta NDP, an unincorporated association. The "sticking" point was the indemnification of the litigation representative. The appointment of a litigation representative would be of limited utility unless the representative was indemnified by the Alberta NDP or an entity with the ability to pledge the funds of the Alberta NDP in a way that would be legally enforceable.

[50] The Court in *Ford* determined that using a combination of Rule 1.4(2) and Rule 2.6 (representative actions), it had the jurisdiction to direct the Alberta NDP to name a litigation representative and to provide the plaintiff with a copy of any indemnification agreement entered between the litigation representative and the Alberta NDP. The Court further directed that the indemnification agreement could not be cancelled, terminated or altered without approval of the Court.

[51] In arriving at its ultimate conclusion, the Court noted the breadth of *Rule 1.4*, including the ability of the Court to control its own process and make procedural orders that will advance the purpose of the rules: *Ford* at paras 48-52, citing *Bova Steel Inc v Constructions Beauce-Atlas Inc (Les)*, 2016 ABQB 589 at para 55, *Royal Bank of Canada v Kaddoura*, 2013 ABQB 630 at para 34, *Tiger Calcium Services Inc v Sazwan*, 2019 ABQB 623 at paras 22-23 and *Royal & Sun Alliance Insurance Company of Canada v Co-Operators General Insurance Company*, 2023 ABKB 426 at para 37.

[52] I acknowledge the broad authority of *Rule 1.4* however, the *Ford* decision did not deal with *Rule 3.26* and is therefore distinguishable.

[53] The Respondent also relies on *Makar v Luedey*, 2013 ABQB 189, a decision that addressed whether an extension of time for service can be granted after a substitutional service order is set aside. This is factually different from the case at bar and invokes *Rule 3.27(b)*, a rule that is not in issue in this Appeal.

[54] In *Ball v 1979927 Alberta Ltd*, 2022 ABKB 814 [*Ball*] at paras 57-60, the Court considered whether *Rule 1.4* can be used to extend the time to serve a Statement of Claim. The Court first noted that *Rule 1.4(1)* is “subject to any special provisions of these Rules.” *Rule 1.4(2)(h)* expressly permits a Court to “extend the time for doing anything in the proceeding,” unless it is “specifically limited by these rules.”

[55] The Court then noted that the ability to vary time periods is dealt with in *Rule 13.5* and is limited by *Rule 13.5(1)* which says, “Unless the Court otherwise orders or a rule otherwise provides, the parties may agree to extend any time period specified in these rules.” However, *Rule 3.26(3)* specifically provides that *Rule 13.5* does not apply “to this rule or to an extension of time ordered under this rule.” *Rule 3.26* provides as follows:

3.26(1) A statement of claim must be served on the defendant within one year after the date that the statement of claim is filed unless the Court, on application filed before the one year time limit expires, grants an extension of time for service.

(2) The extension of time for service under this rule must not exceed 3 months.

(3) *Rule 13.5* does not apply to this rule or to an extension of time ordered under this rule.

[56] The Court in *Ball* concluded that *Rules 3.26* and *13.5*, along with *Rule 3.27*, provide a complete code regarding the circumstances in which the time to serve a Statement of Claim can be extended. Because the *Rules* specifically address the time within which a Statement of Claim must be served, *Rules 1.4(1)* and *1.4(2)* are not applicable and cannot be used as a basis upon which to extend the time to serve a Statement of Claim.

[57] Decisions after *Ball* have not undermined the validity of this result. Similarly, there is no suggestion that the Court in *Ball* failed to consider relevant binding caselaw or statutes, or that the decision is ill-considered. Therefore, horizontal *stare decisis* dictates that I am bound by the decision in *Ball: R v Sullivan*, 2022 SCC 19 at para 6.

[58] I conclude that *Rule 1.4* did not give the Applications Judge authority to extend the limitation period contained in *Rule 3.26*. The Extension Order was therefore issued in error.

IX. Did the Desk Application Contain Sufficient Evidence to Justify an Extension of Time for Service?

[59] Although my conclusions regarding the applicability of *Rule* 1.4 are dispositive of the appeal, I am also of the view that the materials filed by the Respondent in support of its application for substitutional service were insufficient to support an application to extend the time to serve the Statement of Claim. I reach this conclusion for two reasons: the materials were misleading, and they did not comply with the requirements contained in ***Scott v Westwinds Communities***, 2021 ABCA 30 [***Westwinds***].

a. The Materials were Misleading

[60] The Appellants argue that several assertions in the Substitutional Service Affidavit were false and misleading, the most significant of which is contained at paragraph 6:

I am further advised that we have asked that the Defence regarding if service on the Edmonton Police Service and Chief of Police Dale McFee is also effected on the Constables involved in the assault. (sic) We have received no further response.

[61] Although this paragraph falsely suggests the EPS was served, there are two more serious inaccuracies in this paragraph. First, counsel for the Respondent did not ask if service was “effected” on the Appellants by virtue of service having been completed on the Chief of Police. Rather, on April 11, 2022, counsel for the Respondent asked counsel for the Chief of Police whether she could *accept* service on behalf of the Appellants.

[62] Second, the statement that there was no response is false. Counsel for the Chief of Police responded on April 11, 2022 by sending an email that said:

Respecting accepting service on behalf of the members, I have been advised that we will need to know what steps have been taken to serve the defendant EPS members to date in order to consider the request to accept service on their behalf.

[63] Counsel for the Respondent did not respond to this inquiry. Six months later, on October 6, 2022, counsel for the Respondent emailed counsel for the Chief of Police and asked whether service would be accepted on behalf of the Appellants. Once again, counsel for the Chief of Police asked what steps had been taken to serve the Appellants. Counsel for the Respondent responded at 10:05 AM, indicating that they had made attempts to call the EPS to obtain further particulars of each constable and that the only information they had about the officers was obtained from the disclosure documents.

[64] There is no evidence that any further communications occurred between counsel for the Chief of Police and counsel for the Respondent. Counsel for the Respondent then filed the Blank Desk Application and the Affidavit for Substitutional Service at 1:24 PM.

[65] Counsel for the Respondent argued before the Applications Judge that she did not receive a further response after 10:05 AM. This is what the statement, “we have received no further response” was referring to. As such, she argues the statement is not false.

[66] A party seeking relief by way of an *ex parte* application has an elevated duty to advise the Court of all of the relevant facts, both for and against their position. A failure to disclose vital facts may constitute a basis for setting aside an order granted after a without notice application: ***Hansraj v Ao***, 2004 ABCA 223 [***Hansraj***] at paras 84-85. See also ***Secure 2013 Group Inc v Tiger Calcium Services Inc***, 2017 ABCA 316 [***Secure 2013***] at paras 44-47.

[67] The implication of paragraph 6 is that the Respondent had received no response to its efforts to clarify whether the Edmonton Police Service (EPS) and the Chief of Police would accept service on behalf of the Appellants. While the paragraph may not technically be false in that there was no further response after 10:05 AM on October 6, 2022, it leaves the mistaken impression that the Chief of Police (and the EPS, an unserved party) failed to respond in a timely manner and was not participating in the litigation process. In fact, counsel for the Chief of Police asked a question that went unanswered for 6 months. Counsel for the Respondent only re-engaged counsel for the Chief of Police on the day that the Statement of Claim was set to expire. The “failure” to respond spanned a mere 3 hours and 19 minutes. None of this was explained in the Substitutional Service Affidavit.

[68] It is difficult to know what impact this paragraph of the Substitutional Service Affidavit had on the decision-making process. During the June 20, 2023 appearance before the Applications Judge, the Court initially indicated she was not misled by the Affidavit but then seemed to resile from this assertion when further information was provided. During the July 21, 2023, appearance before the Applications Judge, this issue was hotly contested with counsel interrupting one another over several pages of the transcript. Given the way the exchange occurred, I can draw no conclusions regarding how the Applications Judge interpreted the paragraph in question. This specific issue is not dealt with in the final decision issued at the conclusion of the appearance, other than to state that the Applications Judge was left with the impression that there was some communication between counsel for the Respondent and counsel for the Chief of Police “that had to do with service”.

[69] Paragraph 6 of the Substitutional Service Affidavit leaves the reader with the impression that the Chief of Police was not participating in the litigation process. This is misleading. On this basis alone, the Extension Order is set aside.

b. The Materials do not Meet the *Westwinds* Requirements

[70] *Rule 3.26* requires that an application be made to extend the time for service of a Statement of Claim. The Court of Appeal in ***Westwinds*** set out a non-exhaustive list of general principles for a *Rule 3.26* application. These are found at paragraph 37:

1. A *Rule 3.26* application calls upon a court to exercise its discretion. The *Rule* does not provide a plaintiff with a unilateral right to a three-month extension.
2. The *Rule* is not only for the benefit of the plaintiff, as identified in ***Oberg***, but also the defendant. It is for the benefit of the defendant in that it establishes a further type of limitation period, over and above the *Limitations Act*, RSA 2000, c L-12, to know if one must prepare to defend against a claim and assemble a defence. The passage of time can make this more difficult.
3. The application must be supported by an affidavit or other evidence. See *Rules 6.3 and 6.11*.
4. The affidavit or other evidence should set out what attempts, if any, have been made to serve the defendant and explain the reason or reasons for the lack of service within the 12 months. This does not mean there is an absolute rule that some attempt to serve must be made before bringing an

application under *Rule 3.26*. We agree with the observations of Master Smart at para 5 of **Wardill** that: "Simply put the evidence provided should state 'why you need it and what have you done?' . . . It makes no sense to have a deadline for service within 12 months if extensions are granted as a matter of course with not even the barest threshold of evidence required."

5. The purpose of the renewal cannot be a stalling tactic.
6. Prejudice to the defendant, if any, is a factor to consider.

[71] The Respondent argues that the evidence contained in both the Affidavit filed on October 6, 2022, and the February 2023 Doctolero Affidavit contain sufficient evidence to support the Extension Order.

[72] Relying on paragraph 6 of the Substitutional Service Affidavit, counsel for the Respondent asserts that she had received no response to her inquiry as to whether the Chief of Police would accept service on behalf of the Appellants. The Respondent asserts this is evidence that the Respondent was making "strides to effect service."

[73] I have found that paragraph 6 of the Substitutional Service Affidavit was misleading. In addition, I am also of the view that asking one defendant whether they will accept service on behalf of other defendants is not an attempt at service. *Rule 11.5(1)* requires that a commencing document be left with the defendant or sent by registered mail. As stated in **Al-Ghamdi v Alberta**, 2017 ABQB 684 at para 320:

The regime for service under the *Rules of Court* is a complete code. If service of commencement documents on an individual could be achieved by means other than personal service or recorded mail acknowledged by the addressee, there would be no need for substitutional service or an order validating service. Nor would there be a reason for creating a distinction between service of commencement documents and other documents.

[74] With respect to the evidence contained in the February 2023 Doctolero Affidavit, the Respondent also argues this additional evidence was sufficient to support the Extension Order. This affidavit was not before the Applications Judge when she made her decision but even if it was, it does not contain anything new that would justify the Extension Order. This Affidavit reinforces that the only step the Respondent took to effect service was to ask whether the Chief of Police would accept service on behalf of the Appellants. This Affidavit contains the email communications that were sent and received between counsel on October 6, 2022. It also contains correspondence to a process server showing that the first time the Respondent attempted to serve the Appellants was on December 22, 2022.

[75] I conclude that neither the Substitutional Service Affidavit nor the February 2023 Doctolero Affidavit contain sufficient information to support an extension of the time to serve the Statement of Claim.

[76] With respect to the other **Westwinds** factors, while there is no evidence of prejudice, the Appellants were entitled to rely on the limitation period. Further, I do not have sufficient evidence to conclude this was a delay tactic on the part of the Respondent. However, there is no valid reason given for the delay. Counsel for the Respondent asserted the only information they had about the Appellants came from the police disclosure, making it difficult to locate the

Appellants. I note that the filed evidence establishes that once the Statement of Claim was given to a process server, the Appellants were served within 3 weeks.

[77] I conclude that the Respondent failed to meet the requirements for an extension of the time to serve the Statement of Claim.

X. Should the Service of the Statement of Claim on Constable Fedechko be Set Aside?

[78] Given my conclusions, the Extension Order is set aside, and no further proceedings may be taken in the action against the Appellants. While this is determinative, I observe that Constable Fedechko was not served until January 12, 2023. This is after the expiration of the Extension Order on January 6, 2023. *Rule 3.28* states that where a Statement of Claim is not served on a defendant “within the time or extended time for service”, then “no further proceeding may be taken in the action” against that defendant who was not served in time. After the Statement of Claim expires, service is impossible: *Hansraj* at para 63; *Foster v Robb*, 2011 ABQB 776 at para 6.

[79] As a result, the Applications Judge should have concluded Constable Fedechko was not served on time and that no further proceeding could be taken in the action against him.

XI. Conclusion

[80] The Appeal is allowed. The July 21, 2023 Order of the Applications Judge is set aside, the Extension Order is set aside, and pursuant to *Rule 3.28*, no further proceeding may be taken in the action against the Appellants.

Heard on the 9th day of July, 2024.

Dated at the City of Edmonton, Alberta this 16th day of October, 2024.

S. Leonard
J.C.K.B.A.

Appearances:

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