

Court of King’s Bench of Alberta

Citation: Frog Lake First Nation v 2250657 Alberta Ltd, 2025 ABKB 206

Date: 20250403

Docket: 2503 03052; 2503 03935

Registry: Edmonton

Docket: 2503 03052

Between:

Frog Lake First Nation

Plaintiff

- and -

2250657 Alberta Ltd

Defendant

Docket: 2503 03935

Between:

2250657 Alberta Ltd

Plaintiff/Appellant

- and -

Frog Lake First Nation

Defendant/Respondent

**Reasons for Decision
of the
Honourable Justice Douglas R. Mah**

A. Nature of the Application

[1] When is an appeal “commenced” for the purposes of section 46(1) of the *Arbitration Act*?

[2] The Appellant (225) submits that the within appeal was effectively commenced when its counsel sent the email that transmitted the Notice of Appeal to the Clerk’s Office, after business hours on the last day of the appeal period. It also says that any delay in formal filing of its appeal documents was caused by the Clerk’s Office and the Court should *deem* the appeal was commenced in time. 225 asks for a ruling or declaration that its appeal to this Court was commenced within the 30-day time limit and must now be dealt with on the merits.

[3] The Respondent (FLFN) says that an appeal is not commenced until the Notice of Appeal is stamped “Filed” by the Clerk’s Office. That did not occur for various reasons in this case until more than 7 weeks after the 30-day period had elapsed. FLFN further contends that the appeal is still out of time even if the court finds that email transmission, after hours on the last day of the appeal period, constitutes commencement. Either way, the appeal was not commenced within the required time limit and is therefore a nullity. Accordingly, FLFN seeks enforcement of the Award under section 49.

B. Factual Background

[4] The Arbitrator issued the Award by electronic means on November 21, 2024, and the Costs Award the same way on December 17, 2024. FLFN’s Affiant, Mr. Quinney, deposed in his February 7, 2025 Affidavit that as at that date, neither FLFN nor its counsel had been served with any applications or appeals in respect of the Awards. He attached as an exhibit to the Affidavit a courthouse search of January 28, 2025, showing that no such appeals or applications had been filed.

[5] As such, FLFN contends the Awards are enforceable under section 49.

[6] Current counsel for 225 submitted her own Affidavit, sworn on March 17, 2025, in which she deposed:

- The Award was served on 225 on December 2, 2024, meaning the 30-day appeal period did not expire until January 2, 2025.
- She “filed” the Notice of Appeal and supporting affidavit on January 2, 2025, using the King’s Bench email filing process.
- As an out-of-province lawyer, she is not entitled to file through the “online portal” that is available to Alberta lawyers.
- “The Court was not open on January 2, 2025 as it was on holidays.”
- On January 13, 2025, she received a response from the Clerk’s Office indicating that her materials were rejected because she had failed to file Form 8.
- She corrected the documents and paid the filing fee in early January 2025 but “it was not stamped until February 23, 2025.” (I am uncertain what “it” refers to.)
- On February 25, 2025, she had a colleague assist by trying to file the documents in-person at the Courthouse but was told she had to file online.

- On March 13, 2025, she herself attended personally at the Courthouse to try to get the documents “backdated” to the date they were originally submitted but to no avail. She was told by a manager in the Clerk’s Office to “write an affidavit outlining my request and to provide justification of my difficulties trying to get my documents stamped.”
- She tried her best to file the documents on January 2, 2025, but did not realize that, as an out-of-province lawyer, she would face such obstacles.

[7] The Affidavit attaches the email exchange between 225’s current counsel and the Clerk’s Office, which reveals:

- The Notice of Appeal and Supporting Affidavit were originally submitted from counsel’s office in Saskatchewan on January 2, 2025, at 6:06 p.m. local time.
- The submission was first acknowledged by the Clerk’s Office on January 13, 2025, with a rejection because Form 8 was not concurrently submitted.
- Form 8 was submitted on February 5, 2025. On that date, counsel was asked to resubmit her documents again, this time with the correct form of affidavit.
- She resubmitted on February 16, 2025.
- The documents were rejected again on February 24, 2025, because they were not submitted through the King’s Bench Civil Filing Digital Service.
- On February 25, 2025, counsel for 225 advised the Clerk’s Office that she did not have an ID number from the Law Society of Alberta that would enable her to use the Digital Service.
- She was advised later that same morning to file her documents using the email filing process (as she originally had).

[8] I note from the Court File for Action Number 2503 03935 (the Appeal Action) that the Notice of Appeal, Form 8 and Affidavit of George Stanley were all stamped by the Clerk’s Office as “Filed” on February 26, 2025.

[9] 225’s application to deem the appeal commenced in time and FLFN’s application to enforce the Award were heard by me together in Civil Chambers on March 21, 2025. Counsel for 225 told me during her submissions that she had been retained for the appeal only on December 23, 2024, and experienced difficulty getting the client’s file from predecessor counsel.

C. Positions

[10] 225’s counsel argues that:

- The appeal was commenced in time. The documents were sent for filing on the 30th day.
- On the authority of *Alvarez v Alvarez*, 2021 ABQB 717 at para 18 and *Davis v Davis*, 2023 ABKB 242 at paras 102-106, while the Court may not have the authority to enlarge the 30 day appeal period found in section 46(1) of the

Arbitration Act, it does have inherent power to deem an appeal to be commenced in time where it would have been filed in time but for bureaucratic delay.

- The appeal documents would have been filed in time but for filing delays on the Clerk's part and but for the Clerk's Office imposing artificial constraints on 225's counsel, such as not allowing her to file using the Civil Filing Digital Service because she is an out-of-province lawyer.

[11] FLFN's counsel submits:

- The Court has no authority to extend the 30-day appeal period set out in the *Arbitration Act* at section 46(1): *Allen v Renouf*, 2019 ABCA 250 at paras 6-7.
- Taking the Appellant's evidence at its highest on this point, the appeal documents were still submitted late because it would have been 5:06 p.m. (AB time) when they were sent, outside of the Court's business hours. Deeming the 30-day appeal period to have been complied with in these circumstances is therefore tantamount to extending the statutory appeal period.
- The date of filing of a document in King's Bench is the date on which it is stamped as filed, which in this case is February 26, 2025. Furthermore, 225 did not follow the published King's Bench protocols and conventions with respect to filing where there is an imminent limitation expiry.
- *Alvarez* and *Davis* are distinguishable from this case in that here there was no bureaucratic delay or intervention that prevented timely filing. The Appellant was just plain late.
- Apart from the unsuccessful attempt to commence an appeal, there is no defence to the enforcement application and FLFN is entitled to enforcement under section 49(3).

D. Commencement versus Filing

[12] Section 46(1) of the *Arbitration Act* states that an appeal "must be commenced within 30 days after the appellant ... received the award." There is no statutory definition of what constitutes an appeal being "commenced."

[13] It stands to reason, and I do not think it is controversial that "commencing" any type of civil legal proceeding necessitates lodging the proper documents, in the proper form, with the Clerk of the Court and receiving some kind of acknowledgement from the Clerk that they are received, and an action number is assigned.

[14] *Rule 13.15* of the *Rules of Court* provides:

When document is filed

13.15 A document is filed when the court clerk of the judicial centre acknowledges on the document that the document is filed in the action.

[15] The filing of a court document is signified in the Court of King's Bench by the placing of the familiar round stamp in the top right-hand corner of the first page of the document, which also bears the location of the Judicial Centre where the filing takes place and the date of it.

[16] In my view, the “commencement” of a civil legal proceeding [including the commencement of an appeal under section 46(1) of the *Arbitration Act*] cannot mean anything different than the filing of the proper “commencement document” (as that term is used in the *Rules of Court*) in accordance with *Rule* 13.15.

E. Publicly Available Information Regarding Date of Filing in the Court of King’s Bench

[17] FLFN’s counsel submits that information published on the Court’s public website¹ sets out the ground rules and expectations for when documents are filed in King’s Bench. The upshot of this information is:

- For King’s Bench purposes, the date of filing of a document is the date of its stamping, (which is consistent with *Rule* 13.15).
- There is a “current lead time” involved with filing, which is the lag between the date of submission and the date of stamping.
- There is an automated method for users to obtain the “current lead time” involving the sending of a “test” email.
- If a filing party faces an imminent time expiry for filing, either within 3 days or within the current lead time, there is a special notification process for alerting the Clerk’s Office.

[18] The exhibit to counsel’s affidavit shows that 225’s counsel did not use this process but rather just sent in the documents by email. The inference I am asked to draw is that 225, even with the late retainer of current counsel, could have and should have taken steps to commence its appeal on time and it has no one to blame but itself.

[19] I also take judicial notice² of the following, which information (as indicated) is also published on the Court’s public website:

- While January 2, 2025, was a day on which the Court had reduced sittings, it was open as usual for filing.³ Justices were available to hear urgent matters on January 2, 2025.⁴
- The Clerk’s Office was indeed closed between December 24, 2024 and January 1, 2025 but was still accepting electronic filing throughout that period.⁵

¹ <https://www.albertacourts.ca/kb/resources/announcements/announcement-from-cjs-filing-dates-for-documents-filed-via-email>

² Judicial notice is the acceptance by a court, without the requirement of proof, of any fact or matter that is so generally known and accepted in the community that it cannot be reasonably questioned, or any fact or matter that can be readily determined or verified by resort to sources whose accuracy cannot reasonably be questioned: Paciocco, Paciocco & Stuesser, *The Law of Evidence*, 8th Edition (Toronto: Irwin Law, 2020) at p 573.

³ <https://www.albertacourts.ca/kb/resources/announcements/announcement-from-court-and-justice-services-regarding-filing-during-the-holiday-closure>

⁴ <https://albertacourts.ca/kb/resources/announcements/court-of-kings-bench-2024-holiday-sittings>

⁵ <https://www.albertacourts.ca/kb/resources/announcements/announcement-from-court-and-justice-services-regarding-filing-during-the-holiday-closure>

- The Court’s “Filing Counter Hours” are 8:15 a.m. to 4:00 p.m., Monday to Friday and its Building Hours” are 8:15 a.m. to 4:30 p.m., Monday to Friday.⁶

F. Discussion

[20] 225 contends its good faith attempts to file its appeal on time were frustrated by the Clerk’s delay and bureaucratic process. FLFN says that everyone else follows the protocols and conventions set out by the Court Administration and 225 should not be given special treatment.

[21] I first note that 30 days from December 2, 2024 actually expired on January 1, 2025, a statutory holiday. However, by operation of section 22(1) of the *Interpretation Act*, the appeal period was extended to January 2, 2025.⁷

[22] It is not accurate to say the Court was not open on January 2, 2025, because it was on holidays. The judicial function was on reduced sittings. For the administrative function, it was business as usual that day.

[23] 225 did not commence its appeal, at least in the conventional sense or as contemplated by the *Rules*, within 30 days. Because of the filing issues outlined above, the appeal was not formally commenced until February 26, 2025, well outside the 30-day period.

[24] I recognize that some obstacles were placed in the way of 225’s counsel in her attempt to get the appeal commenced properly after January 2, 2025:

- First, the Clerk’s Office rejected the initial January 2, 2025 submission on January 13, 2025 because of a lack of Form 8. Form 8 is the Notice to Obtain Record of Proceedings. It is clear at some point that Form 8 needs to be filed and served on the Arbitrator in order to procure the record for the appeal. However, 225’s appeal was launched under *Rule 3.2(2)* which permits an appeal or reference in a civil matter to be commenced by way of Originating Application. There is no mention of Form 8 in *Rule 3.2(2)*. By contrast, when initiating an application for judicial review by Originating Application under *Rule 3.15*, *Rule 3.18* specifically requires the concurrent filing of a Form 8. My point here is that although a filed Form 8 is necessary for an appeal of an arbitration award, there is no strict requirement that it must be filed at the same time as the Notice of Appeal/Organizing Application.
- Second, 225’s counsel was told on February 5, 2025, that the affidavit was non-compliant, and the documents were rejected a second time on that date. While it is clear that the affidavit had to be in compliant form at some point to be filed, again, strictly speaking there is no requirement in the *Rules* that the affidavit be filed concurrently (or that an affidavit is even needed).
- Third, after 225’s counsel’s documents were rejected twice by email filing, she was told to refile using the Digital Filing Service, and when she advised that she was an out-of-province lawyer who had no access to that service, was told to file

⁶ <https://www.albertacourts.ca/kb/about/locations-and-sittings/location-detail/edmonton>

⁷ “If in an enactment the time limited for the doing of a thing expires or falls on a holiday, the thing may be done on the day next following that is not a holiday.”

by email. She did this again and was finally successful as of February 26, 2025 in getting the documents stamped.

[25] The events in the paragraph above explain the delay between January 2, 2025 and February 26, 2025. They do not explain why the Notice of Appeal and Affidavit were originally sent in for filing by email at 6:06 p.m. (SK time) or 5:06 p.m. (AB time) on January 2, 2025.

[26] Essentially, I am being asked by 225's counsel to create a non-codified exception to *Rule* 13.15 in this case. She argues that she tried to file on time, was prevented from doing so by the Clerk's Office and therefore, I should deem that she did so.

[27] I acknowledge that this Court, like all across Canada, has adopted electronic filing processes for the ease of both the Court and its users. The use of technology in this context should promote fairness and certainty in litigation, not obscure it.

[28] The conduct of both commercial and personal affairs in our society requires certainty in how expiry of mandatory time periods is determined. The rights of people, businesses and other entities are defined by whether a cause of action or right to proceed has been preserved by filing of a court action or extinguished by the expiry of a statutory time period. For example, in this case, the expiry of the appeal period in the *Arbitration Act* creates a substantive right of enforcement in favour of the successful party to the arbitration.

[29] To say that an action is commenced or filed at the moment someone clicks the "send" button for the email that transmits the commencement document to the Clerk's Office introduces a measure uncertainty into the process of ascertaining whether rights exist or not. I say so for the following reasons:

- The stamping of a court document by the Clerk's Office is certain, standardized, easily ascertainable and accessible for all to see. The court record is presumptively public. Delving into someone's email records, which may be private, is none of these things.
- Although not an issue in the case before me, the authenticity or accuracy of email records might be contested. Court stamping, on the other hand, is completely reliable.
- What happens if the document that is transmitted is corrupted and incapable of being opened or uploaded? Is it still "filed"? Whose fault is it?
- What if the commencement document is truly or even arguably non-compliant with the *Rules*?⁸
- What happens if the sender's server or the receiving server is down. i.e., non-operational at the critical time?
- What if the sender's email platform or ISP fails or has an outage and the email does not go through? Is intention to send enough?
- What if there is a localized power outage, as has been known to happen on the King's Bench side of the Edmonton Courthouse?

⁸ *Rule* 1.5(5) states: The Court must not cure any contravention, non-compliance or irregularity if to do so would have the effect of extending a time period that the Court is prohibited from extending.

[30] There is no precise evidence about when the January 2, 2025 email from 225's counsel was received by the Clerk's Office. I accept that, barring technology or infrastructure failure, email transmission is generally instantaneous. The next piece of evidence in the chronology shows the Clerk's Office acknowledging receipt on January 13, 2025, by rejecting the documents. The span between January 2 and 13 was apparently the "lead time" period referred to above, the length of it likely because of significant backup with email submissions coming in between December 24, 2024 and January 1, 2025 and no staff on duty to look at them.

[31] Users are warned by the Court Administration about the inherent delays in processing (the "lead times"), given a method to manage inherent delay (the sending of the "test" email) and further provided with a specific process to deal with imminent expiry of limitation periods. By public promulgation of these protocols and conventions, all users be they in-province counsel, out-of-province counsel or self-represented litigants (SRLs) are put on the same footing, know what to expect and how they should govern themselves in order to meet time periods about to expire.

[32] An imminent limitation expiry sometimes calls for desperate measures. 225's counsel could have tried on January 2, 2025 to file the appeal documents, during business hours, in various ways. She could have called the Clerk's Office to say that a Notice of Appeal was coming in by email right away and to watch for it because it had to be filed that day. She could have filed the appeal documents in-person through an agent. At worst, if the Clerk's Office was insisting on email filing, it was an option on January 2, 2025 for counsel to make an urgent application on a without notice basis (in-person, by agent or even by telephone) to the Duty Justice for a direction or fiat that the Clerk's Office immediately file a commencement document about to be sent or presented in-person, because a limitation period was set to expire at the end of the day. I cannot think of a reason why such an application would be refused. Applications of that nature are sometimes made in-person in regular Civil Chambers.

[33] Furthermore, nothing the Clerk's Office did caused 225's counsel to send the documents in by email when she did on January 2, 2025.

[34] In *Alvarez*, Malik J deemed a notice of appeal under the *Arbitration Act*, submitted by email well within the 30 days but not processed by the Court until after expiry of the 30 days, to be filed on time, stating at para 18:

The delay which arose in the formal filing of the application on January 23, 2021, was not the Applicant's fault but was caused due to the court's own filing delays. Had the Applicant attended upon the courthouse in person to file his application on December 10, 2020, his application would have been received and filed that day. That is when I deem his application to have been filed.

[35] Had 225's counsel attended the Courthouse at 5:06 p.m. (AB time) on January 2, 2025, she would have found the KB Filing Counter closed and the building locked. The rationale from *Alvarez* does not apply here.

[36] I note that the Court of Appeal has a specific rule found in its Practice Direction on Electronic Filing about when a document is considered submitted:

A document received electronically on or before 4:00 p.m. Mountain Time on a day on which the Registry is open will be considered submitted on the day that it is received. A document received electronically after 4:00 p.m. Mountain Time,

or on a day when the Registry is not open, will not be considered to be submitted until the next business day.

[37] Even using the more specific standard applied by the Court of Appeal would have resulted in 225 missing the 30-day period. I know of no *Rule* or other legal rule that allows me to treat a document submitted after business hours are over as being submitted before business hours are over.

[38] Sending a commencement document for filing by email on the last day of a limitation period but after closing time is only hoping (not ensuring) that it is filed on time. It is the electronic equivalent of sliding it under the door after business hours. The staff have gone home, and the document is unlikely to be retrieved until the next business day.

[39] The decision of Renke J in *Davis* is also a different sort of case. There, the appellant had retained counsel with time running out but nonetheless that counsel submitted a Notice of Appeal in a family law arbitration at 11:48 a.m. on the 30th day. Rather than accept the Notice of Appeal for filing, the Clerk's Office rejected the document and directed counsel to instead appear in Family Docket Court to obtain direction about next steps. The involvement of Family Docket Court was not contemplated in the arbitration agreement nor is it in the *Arbitration Act*. It was the misdirection of counsel by the Clerk's Office to Family Docket Court that resulted in the late eventual filing, which Renke J cured by deeming the appeal commenced in time.

[40] In the case before me, 225 was not misdirected by the Clerk's Office. 225 simply sent in its appeal documents after business hours on the final day. There was no chance, either in-person or electronically, that the documents could have been acknowledged by staff in the Clerk's Office that day. Thus, the appeal was commenced outside the 30-day period. What happened post-January 2, 2025, after the 30-day period was already missed, has no bearing on the outcome.

[41] I do not mean to sound overly harsh. I appreciate that 225's counsel had challenges in being retained during the holiday season with a limitation set to expire on the first business day of the new year and having to deal with a totally different jurisdiction. But I cannot accept the reasoning that as out-of-province counsel, 225's counsel being unfamiliar with the rules, standards and practices of King's Bench in Alberta means that an exception to the Rules should be granted.

G. Ruling on Whether Appeal Filed on Time

[42] I do not dispute per *Alvarez* and *Davis* that the Court may exercise inherent authority, in proper circumstances, to deem a document to have been filed on time even though it is stamped late. It is a discretionary decision. *Rule* 13.15 is the default position for reasons of certainty (as discussed above) and applies in almost every case, especially in light of the publicly available information from Court Administration, applicable to both lawyers and SRLs alike, about how they can manage filing lag time to minimize the risk of missing of limitation periods. The exercise of inherent authority to overcome the express effect of a *Rule* should be exercised sparingly and only in the most obvious cases of unfairness. I exercise discretion *against* deeming here because 225 was simply late in this case, not because of delay in filing caused by bureaucratic reasons or unfairness.

[43] I find that 225's appeal was not filed within 30 days and is a nullity.

H. Ruling on Enforcement Application

[44] Section 49(3) of the *Arbitration Act* directs that if no appeal has been commenced within the 30-day appeal period, then the Court shall give a judgment enforcing the award. Since I have ruled that no valid appeal has been commenced within the period, I grant judgment in favour of FLFN in respect of both the Award and the Costs Award.

I. Note about counsel appearing on her/his own affidavit

[45] The practice of a lawyer swearing her or his own affidavit in the proceedings and then relying on that affidavit as counsel is discouraged. Here, counsel for 225 advanced her own affidavit as the sole evidence in support of the relief sought by 225 while the very same counsel was doing the argument in Court on behalf of 225. Doing so may create an inherent conflict of interest that leads to the lawyer's disqualification: *Stanfield v Low*, 2019 ABCA 83 (per Antonio JA) at paras 15-24 and the authorities cited therein, including *Downham v Wawanesa Insurance Company*, 2005 ABQB 299 (per Greckol J, as she then was) at paras 31-33; *Forward v Zurich Insurance Co*, 2002 ABCA 123 at para 6; *MacDonald Estate v Martin*, [1990] 3 SCR 1235 at p 1261.

[46] It also creates an awkward situation when opposing counsel, as they are entitled to do, decides to question on that affidavit. The pitfalls of swearing one's own affidavit and then being questioned on it are illustrated in *Lex Tex Canada Ltd v Duratex Inc*, [1979] 2 FC 722, 13 CPC 153 at pp 722-724.

[47] While the practice is not, strictly speaking, prohibited by the *Rules of Court* in Alberta, counsel who engage in this practice run the risks described in the cases cited above.

J. Costs

[48] Costs of this application, if sought and not agreed to, may be addressed by counsel submitting to me, within 30 days of this decision, written submissions in letter form not to exceed 2 single-spaced pages, excluding exhibits or authorities.

Heard on the 21st day of March, 2025.

Dated at the City of Edmonton, Alberta this 3rd day of April, 2025.

Douglas R. Mah
J.C.K.B.A.

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