Court of King's Bench of Alberta

Citation: Sabir v Gill, 2025 ABKB 402

Date: 20250702
Docket: 2201 11259
Registry: Calgary

Between:

Gagan Kaur Gill

Appellant

– and –

Saira Sabir

Respondent

– and –

The Administrator of the Motor Vehicle Accident Claims Act

Third Party

– and –

John Doe I

Third Party

– and –

John Doe II

Third Party

Reasons for Judgment of the Honourable Justice D. Jugnauth

I. Overview

[1] The Appellant appeals the decision of an Applications Judge reported at ***Sabir v Gill***, 2023 ABKB 679. The Applications Judge granted an order backdating the Respondent's Statement of Claim by one day to fit within the two-year limitation period, thereby depriving the Appellant of the ability to plead statutory immunity pursuant to the Alberta *Limitations Act*, RSA 2000, c L-12.

[2] This appeal examines the contours and limits of the Court's authority to grant relief in the nature originally sought by the Respondent, either through the *Rules of Court*, Alta Reg 124/2010 or through the Court's equitable jurisdiction to issue a *nunc pro tunc* order.

[3] For reasons that follow the appeal is allowed. The order of the Applications Judge is vacated, and the court record shall show October 4, 2022 as the date the Respondent's Statement of Claim was filed and issued. The Appellant is free to pursue the application for summary judgment that has been held in abeyance pending this appeal.

[4] For clarity and ease of comprehension, the discussion that follows substitutes the term Defendant for Appellant, and Plaintiff for Respondent.

II. Background

[5] The underlying action relates to a personal injury claim arising from a motor vehicle accident that occurred on October 2, 2020. The applicable limitation period expired on October 3, 2022.

[6] On September 29, 2022 a legal assistant from the law firm representing the Plaintiff submitted the Statement of Claim for filing through the court's Filing Digital Service (FDS). In doing so the assistant made a critical error.

[7] Notwithstanding the assistant was filing a commencement document, when prompted by FDS to select the "Type of Document", she selected "discontinuance of action". Owing to this error the assistant was not directed to a screen that would have allowed her to enter a limitation date. Had a limitation date been entered, the submission would have been flagged for priority processing by the Registry.

[8] In addition, marking the submission as a discontinuance prompted the assistant to pay a printing fee of $6 rather than the filing fee of $250 to commence a new action. After the assistant paid the printing fee no further action was taken.

[9] Given the submission was not marked for priority processing, the Registry did not review the document until October 3, 2022, which was the day the limitation period expired. At 4:27 pm on that date the Registry wrote to the Plaintiff's law firm advising that the submission had been rejected because of the incorrect document type.

[10] On October 4, 2022 at 8:34 am – after the limitation period expired – the legal assistant resubmitted the Statement of Claim for filing together with the correct fee and a notation that the limitation date was October 4, 2022. The Registry prioritized processing that document and issued the Statement of Claim seven minutes later, at 8:41 am.

[11] Approximately seven months later the Plaintiff filed an application seeking an order to backdate the Statement of Claim by one day to fall within the limitation period. Notably, the Defendant had already filed a Statement of Defence pleading the *Limitations Act*. Following a contested hearing the order sought was granted, which now forms the subject matter of this appeal.

[12] I pause to explain my use of two terms, the distinction between which is important for the disposition of this appeal. When I use the phrase “submitted for filing” I am referring to the act of submitting a document for filing using the FDS system, which includes the steps taken by the assistant in this case on both September 29th and October 4th.

[13] When I use the term “issued”, I am referring the actions of the Registry to review the submitted document for compliance with the technical requirements in rule 13.13; verify receipt of the applicable fee (if any); attach an action number (in the case of a commencement document); and stamp the document filed with a corresponding date.

III. Issue

[14] The issue before me is whether the Applications Judge erred in granting an order to backdate the Statement of Claim.

IV. Standard of Review

[15] In ***Lesenko v Wild Rose Ready Mix Ltd***, 2024 ABKB 333 Justice Feasby provided a robust explanation of the standard of review in relation to an appeal of an Applications Judge’s decision. I adopt Justice Feasby’s articulation of the law and repeat relevant portions of that decision below:

> [14] Justice Hollins distinguished between *de novo* review and the correctness standard in ***Steer v Chicago Title Insurance Company***, 2019 ABQB 318. She explained that *de novo* is the wrong term to use because an appeal of an Applications Judge's decision is not really a fresh start in cases where no evidence is added to the record. Instead, the reviewing King's Bench judge is required to assess whether the Applications Judge's decision is correct. Such an assessment requires engagement with the Applications Judge's reasons. Justice Price explained at para 22 of ***Western Energy v Savanna Energy***, 2022 ABQB 259, aff'd 2023 ABCA 125 that "on an appeal from a master where no new evidence has been adduced, a Justice is not hearing the matter anew, but is considering whether the master's decision was correct based on the record that was before him." These decisions are consistent with *Pacer* ***Construction Holdings Corporation v Pacer Promec Energy Corporation***, 2018 ABCA 113 at para 66, where the Court explained that there are important distinctions between hearings *de novo* and correctness review. See also ***HOOPP Realty Inc v Emery Jamieson LLP***, 2020 ABCA 159 at para 41.
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> [15] I agree that where there is no new evidence on appeal it is more accurate to describe the proceeding as a correctness review. […] In my view, the use of the term *de novo* for convenience instead of correctness review is appropriate given that new evidence may be adduced and new arguments may be made on appeals of Applications Judge decisions. My use of the term *de novo* should not be construed as a failure to appreciate that the correctness standard is often applied: ***Singh v Noce***, 2019 ABCA 55 at para 8.
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> […]
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> [17] An appeal from an Applications Judge to a King's Bench judge is statutory. The *Court of King's Bench Act*, RSA 2000, c C-31, s 12 provides: "An appeal lies to a judge

in chambers from a decision of an applications judge." Rule 6.14(3) provides further definition to the right, explaining: "An appeal from an applications judge's judgment or order is an appeal on the record of proceedings before the applications judge and may also be based on additional evidence that is, in the opinion of the judge hearing the appeal, relevant and material." Rule 6.14(3) essentially creates two kinds of appeals: (1) appeals on the record that was before the Applications Judge; and (2) appeals with additional evidence. Both kinds of appeal are heard *de novo* or are subject to correctness review, depending how the standard is framed.

V. Positions of the Parties

[16] The Defendant argues three primary points. First, that the Applications Judge erred in granting a *nunc pro tunc* order that had the effect of subverting a limitation period. Second, the Applications Judge erred in granting the order to backdate the claim in circumstances where the prerequisites set out in rule 1.5 were not met. Third, the Applications Judge erred in holding that granting the *nunc pro tunc* order would not prejudice the Defendant.

[17] The Plaintiff argues that it was open to the Applications Judge to grant the order to backdate the claim under either the statutory authority set out in various rules of court, or pursuant to the Court's inherent jurisdiction to grant equitable relief. Under either route, the Plaintiff argues it was in the overall interests of justice to cure the irregularity.

[18] Further, the Plaintiff argues that issuance of the order did not cause the Defendant prejudice but rather restored her to the same position she would have been in had the Registry issued the Statement of Claim on the date it was first submitted for filing.

VI. Law & Analysis

[19] Aside from rule 1.5, which is discussed in more detail below, the Plaintiff argued that she relied on a host of rules before the Applications Judge, including: rules 1.4, 13.14, 13.15, 13.16, 13.38, 13.41, 13.44, and 13.45.

[20] Most of those rules have no application (e.g. 13.38 regarding a judge's authority to issue a fiat) or have otherwise been addressed in my reasons below (e.g. rule 13.41 regarding the authority of the clerk of the court). However, rule 1.4 bears further comment.

[21] Rule 1.4(2)(h) states, "[w]ithout 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, […] extend the time for doing anything in the proceeding [...]".

[22] On one interpretation it might appear that this rule confers authority on a judge to backdate a statement of claim. Presumably this explains why the Plaintiff relied on this rule at first instance.

[23] However, I take a different view. On a plain reading that rule confers authority upon a judge to extend the time for doing anything in the proceeding. This language clearly contemplates an extant action. As such, the interpretation of this rule must be constrained to

managing deadlines within an existing proceeding, such as amending filing dates for applications, briefs and affidavits, and other procedural elements of a similar nature.

[24] Rule 1.4 does not confer upon a judge the authority to retroactively validate a claim. Limitation periods pertaining to the commencement of actions are governed by the Alberta *Limitations Act*. Courts do not have discretion to override or extend the limitation periods therein unless the Legislature expressly permits doing so. On my reading of rule 1.4, that legislative intent is missing.

[25] My interpretation is informed by the procedural nature of rule 1.4, which confers upon a court wide discretion to manage the procedural elements of an action. On the other hand, limitation periods are substantive in nature because they can extinguish the legal right to advance a claim: ***Castillo v Castillo***, 2005 SCC 83 at para 15 citing ***Tolofson v Jensen***, [1994] 2 SCR 1022.

[26] Absent express language to the contrary, the Legislature cannot be taken to have intended to embed a substantive remedy for non-compliance with the *Limitations Act* within a procedural rule of a different enactment. Rule 1.4 does not assist the Plaintiff.

a. Rule 1.5 – Rule contravention, non-compliance and irregularities

[27] While the Applications Judge did not expressly refer to rule 1.5 in rendering his decision, that rule provides a statutory path to cure contraventions, non-compliance and other irregularities. On appeal, the parties proceeded on the basis that rule 1.5 was available to the Applications Judge to grant the relief sought. The parties disagree whether the remedy granted was warranted on the facts.

[28] I pause to note that my reasons below should not be taken as condoning the view that the authority in rule 1.5 can remedy non-compliance with the *Limitations Act*. Indeed, my analysis above suggests otherwise. However, without the benefit of fulsome submissions by counsel I decline to decide that point.

[29] To that end, my reasons are limited to applicability of rule 1.5 based on the record before me. In my view, the curative power in rule 1.5 was not available to the Applications Judge for several reasons. First, the Plaintiff did not file her application to backdate the Statement of Claim within a reasonable time.

[30] Second, aware of the prejudice to her ability to prosecute a statute-barred claim, the Plaintiff contravened rule 1.5(3) when she took a further step in the litigation by adding a third-party defendant before commencing an application to deal with the filing date of the Statement of Claim.

[31] Third, backdating the Statement of Claim caused irreparable harm to the Defendant by extinguishing the Defendant's right to claim statutory immunity.

[32] Fourth, the overall interests of justice favoured dismissing the Plaintiff's application to backdate the Statement of Claim, rather than granting it.

[33] Fifth, granting the order had the effect of extending a time period the Court was prohibited from extending. I will discuss each in turn.

i. The Respondent did not bring an application to cure its non-compliance within a reasonable time and took a further step in the interim

[34] Pursuant to rule 1.5(2) "[an] application [to cure an irregularity under rule 1.5] must be filed within a reasonable time after the applicant becomes aware of the contravention, non-compliance or irregularity". Here, the Plaintiff was aware the limitation period had expired when the Plaintiff received a rejection notice from the Registry at 4:27 pm on October 3, 2022.

[35] After successfully filing the Statement of Claim the next day, what followed was protracted back and forth correspondence between the Plaintiff and the Registry over several months in a failed attempt to persuade the Registry to backdate the Statement of Claim *without* a court order.

[36] In an email dated October 5th the legal assistant who filed the Statement of Claim wrote to the Registry advising that she had submitted the commencement document for filing on September 29th and expressed dissatisfaction that the filed copy was stamped October 4th. The assistant explained the October 4th filing date "is hugely detrimental for our case as we will be out of the limitation [sic] for making a claim against the Defendants in this Action".

[37] The Registry responded within a few hours. The Registry's reply explained that the original submission was flawed because it was submitted as a discontinuance rather than a statement of claim, the latter being required to ensure the correct fee was paid.

[38] The Registry further explained that submitting the document as a discontinuance meant it was not prioritized as a time sensitive document. The Registry ended its reply by advising it could not backdate the Statement of Claim.

[39] On October 7th a lawyer from the firm representing the Plaintiff replied to the Registry's email. The tenor of that correspondence placed blame on the Registry vis-à-vis a flawed design of the FDS. The lawyer also expressed frustration that delays in the Registry completing their work "would disable a law firm's ability to file a claim on time". On October 31st, not having received a response from the Registry, the lawyer followed up on his October 7th correspondence.

[40] On November 3rd the acting supervisor of the Registry replied to the lawyer stating that it was the law firm's error to categorize the document as a discontinuance and not pay the proper fee to commence an action by statement of claim. This correspondence included copies of the payment transaction details from both September 29th and October 4th.

[41] On January 11, 2023, the Plaintiff filed an Amended Statement of Claim adding the Administrator of the Motor Vehicle Accident Claims Act as a third-party defendant.

[42] On January 31, 2023, the same lawyer from the firm representing the Plaintiff attended the Registry in person and spoke with the acting supervisor. The lawyer was again advised that the Registry could not backdate the Statement of Claim.

[43] On February 1, 2023, that same lawyer sent further email correspondence to the Registry asking, again, for the Registry to change the filing date of the Statement of Claim.

[44] On February 3, 2023, a Registry manager telephoned the lawyer in reply advising that the Registry had not erred in processing the document. The Registry confirmed that the submission of the document as a discontinuance meant that it was not flagged for priority processing.

[45] On May 5, 2023, the Defendant filed a Statement of Defence in which she pled statutory immunity based on the *Limitations Act*.

[46] On May 8, 2023, the Plaintiff filed an application seeking a court order to backdate the Statement of Claim.

[47] On May 9, 2023, the Plaintiff's application and the Defendant's Statement of Defence were each served on the opposing party.

[48] This timeline demonstrates that the Plaintiff took more than seven months to file its application to cure the filing date of the Statement of Claim after it became aware of its non-compliance on October 4, 2022. In my view this delay was unreasonable.

[49] Rather than initiating a timely court application, the Plaintiff preferred to embark on a pressure campaign against the Registry to persuade the Registry to backdate the Statement of Claim without a court order. After those discussions ended on February 3, 2023, and without explanation, the Plaintiff waited a further three months before filing an application to seek relief.

[50] Particularly in the context of a dispute where the Plaintiff failed to perfect the filing of a commencement document within the applicable limitation period, the Plaintiff's further delay in seeking redress from the Court was neither reasonable nor prudent.

[51] Owing to unreasonable delay in filing its application the Plaintiff was not entitled to relief under rule 1.5.

ii. The Respondent took a further step in the litigation before seeking to address the filing date of the Statement of Claim

[52] On January 11, 2023, four months prior to filing an application to cure the filing date defect, the Plaintiff took a further step in the litigation by adding a third-party defendant. When she did so, the Plaintiff was aware of the prejudice to its ability to prosecute a statute barred claim, as evidenced by the legal assistant's correspondence dated October 5, 2022.

[53] Rule 1.5(3) prohibits an application by a party who alleges prejudice as a result of the contravention, non-compliance or irregularity if that party has taken a further step in the action knowing of the prejudice.

[54] Adding a third-party defendant before addressing the filing date of the Statement of Claim contravened rule 1.5(3). In my view, that fact disentitled the Plaintiff to relief under rule 1.5.

iii. Backdating the Statement of Claim caused irreparable harm

[55] Central to the application of rule 1.5 is the absence of irreparable harm to any party. Notably, the language of the enactment is proscriptive. Rule 1.5(4)(a) states, "[the] Court must not cure any contravention, non-compliance or irregularity unless to do so will cause no irreparable harm to any party". [Underlining added]

[56] While the rule does not set out a definition of "irreparable harm", that phrase has been judicially considered in the context of injunctions. In ***RJR-MacDonald Inc v Canada (Attorney General)***, [1994] 1 SCR 311 at 341 the Supreme Court stated that "irreparable" refers to the nature of the harm suffered. It is either: (i) harm that cannot be quantified in monetary terms, or (ii) harm that cannot be cured.

[57] At paragraph 45 of his decision the Applications Judge states that it "is noteworthy that there is no prejudice to the defendant if I back date [sic] the filing date as requested". He goes on to explain that, but for the errors made by the legal assistant, the Defendant would have had to defend the claim in the ordinary course and "that is exactly what will happen if I back date [sic] the filing date as requested".

[58] I disagree that backdating the Statement of Claim did not cause prejudice to the Defendant. In my respectful view, the Applications Judge's rationale fails to acknowledge the delicate balance of competing interests struck by the Legislature in setting a fixed limitation period for claims.

[59] On one hand, a two-year period within which to commence an action recognizes that claimants may not be immediately aware of their injury or its cause. The law promotes justice to a plaintiff by offering a reasonable period for discoverability.

[60] On the other hand, the law aims to protect potential defendants from indefinite exposure to legal claims. A fixed limitation period promotes the timely prosecution of claims before the passage of time erodes memories, causes witnesses to be unavailable, impairs the obtainability of evidence, or otherwise interferes with the administration of justice: see also ***Canadian Imperial Bank of Commerce v Green***, 2015 SCC 60 at para 57 [*Green*].

[61] Rarely will filing materials a day late prejudice the opposing party in terms of marshalling a defence on the merits. However, that is not the same as saying a defendant will not suffer prejudice from backdating a claim to fit within a limitation period that otherwise expired. The latter represents the loss of the defendant's legal right to claim statutory immunity.

[62] In my view, the loss of this right constitutes irreparable harm within the meaning of rule 1.5(4). The harm is neither compensable in damages nor curable later in the proceedings since the immunity, if successfully pled, ends the prosecution of the claim and liberates the defendant of any potential liability.

[63] To suggest that backdating the Statement of Claim would simply restore the Defendant to the position she would have otherwise been in fails to give effect to the balance intentionally struck by the Legislature.

[64] The irreparable harm occasioned upon the Defendant by backdating the Statement of Claim disentitled the Plaintiff to relief under rule 1.5.

iv. The overall interests of justice favoured dismissing the Plaintiff's application

[65] Pursuant to rule 1.5(4)(d), "[the] Court must not cure any contravention, non-compliance or irregularity unless … it is in the overall interests of justice to cure the contravention, non-compliance or irregularity".

[66] While the Applications Judge did not address this consideration expressly, it appears he had the interests of justice in mind when he referred to the hardship the Plaintiff might endure if the Applications Judge did not grant the relief sought:

> [46] If I decline to back date [sic] 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.

[67] With the greatest of respect, I find this reasoning flawed. First, the relative complexity of the Plaintiff pursuing a professional negligence claim against her lawyer, versus a personal injury claim stemming from a motor vehicle accident, is not a fact subject to judicial notice.

[68] Second, and more importantly, this was not a valid consideration that should have impacted on the result. In my view, it was an error of law to deny the Defendant her right to claim statutory immunity based on a perceived increase in complexity for the Plaintiff to pursue a negligence claim against her lawyer. In my view, the "overall interests of justice" must be considered in relation to the parties in the action, not in relation to one party and a new defendant based on a different cause of action.

[69] Third, the errors at issue in this case were those of the law firm representing the Plaintiff, not the Defendant. The effect of the Applications Judge's decision was to shift liability for those errors from the Plaintiff onto the Defendant. That was unfair.

[70] The legal assistant's errors were not harmless. Indeed, the fault attributable to the law firm dictates a different result compared with other decisions considered by the Applications Judge.

[71] For example, in ***Patkaciunas v Economical Mutual Insurance Company***, 2021 ONSC 5945 the plaintiff's paralegal was in the clerk's waiting room with a date and time stamped numbered ticket waiting to be called for more than half an hour before closing on June 25, 2019. When the paralegal was called to the counter the lone clerk announced that his computer was shutting down in 90 seconds. After advising that he would not process the statement of claim for

issuance that day, the clerk turned around and walked away. Owing to the clerk's conduct the paralegal did not obtain a stamp to evidence the issuance of the claim until the next day.

[72] In resolving that matter the Court backdated the statement of claim holding that it had "inherent jurisdiction to treat as done that which public officials had a duty to do and when they had a duty to do it". In other words, the delay fell exclusively at the feet of the clerk who refused to do his job, and it would not have been equitable to prejudice the plaintiff as a result.

[73] In ***Norman Towing v Riordan Leasing Inc***, 2022 ONSC 7167 the defendant filed a statement of defence and counterclaim on the last day of the limitation period for the counterclaim. Because the counterclaim added a new party 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 it was presented to the clerk's office.

[74] In granting that relief the Court found the defendant was prepared to issue the counterclaim within the limitation period, but the claim was only filed (and not issued) due to an administrative error on the part of the court. The Court distinguished the case from precedents barring *nunc pro tunc* orders beyond statutory limitation periods given that there was nothing further required on the defendant's part to issue the counterclaim.

[75] ***Patkaciunas*** and ***Norman Towing*** are distinguishable because the fault giving rise to the delay in issuing the claim in each case was solely attributable to the administrative machinery of the court. That is not so here.

[76] In this case the legal assistant inadvertently selected the document type as a "discontinuance of action". That led to two critical consequences: (i) the document not flagged for priority processing; and (ii) the fee required to commence an action by statement of claim was not paid.

[77] Counsel for the Plaintiff on appeal cast blame at the feet of court administration because the digital filing service should not have permitted the legal assistant to select "discontinuance of action" as an available document type. This is because the assistant had previously indicated she was filing an originating document (meaning a new action number would be assigned) and a discontinuance is not an originating document type.

[78] While the ability of a user to select "discontinuance of action" in the sequence described above may well be a design flaw, in the absence of evidence from those responsible for the design of the FDS, and the associated workflows, I am not prepared to make that finding.

[79] More to the point, the Plaintiff's argument fails to acknowledge that the legal assistant knew or ought to have known that she had failed to meet the requirements for a statement of claim to be issued. It was not enough for the legal assistant to submit a statement of claim for filing. She also had to ensure the technical requirements were complied with and the proper filing fee was paid. She did not.

[80] In this case, the legal assistant paid a $6 printing fee, not the $250 fee for the issuance of a statement of claim. Given the legal assistant's body of experience filing similar documents, she

was aware of the appropriate fee. She also knew, or ought to have known, that she had not paid that fee.

[81] As noted above, the Registry's correspondence dated November 3, 2022 included the payment transaction details. The September 29th transaction record shows that on September 29, 2022 at 4:16 pm the legal assistant paid $6 on her personal credit card.

[82] To do so, the FDS payment screen would have presented to the legal assistant the $6 printing fee based on the discontinuance that she was filing. Paying a $6 printing fee – rather than a $250 filing fee – should have alerted the legal assistant to her error.

[83] Even had she missed her mistake at this point, the legal assistant put the payment through on her personal credit card. Presumably she was being reimbursed by her employer for file-related disbursements. At minimum the assistant would have had to lodge the disbursement in the client ledger, communicate to someone to do the same, or submit her expenses for reimbursement. Any of these steps should have alerted the legal assistant to her error.

[84] While counsel for the Plaintiff on appeal minimized the impact of paying the wrong fee, in my view that argument was misguided. Pursuant to rule 13.41(3), "[a] court clerk may refuse to file, issue, certify or do any other thing with respect to an action, application or proceeding if … a requirement of these rules has not been complied with."

[85] Pursuant to rule 13.32(1), "[in] every action, application or proceeding in Court, there must be paid to the appropriate court officer or other appropriate person the fee specified, referred to or determined in accordance with Schedule B …".

[86] In October 2022 the Schedule B fee to commence an action by statement of claim was $250. Given that fee had not been paid, the Registry was within its authority to reject the document submitted for filing on September 29th.

[87] In other words, the Plaintiff was not entitled to have the Statement of Claim issued until the appropriate fee was paid. That did not occur until October 4, 2022. By then the limitation period had expired.

[88] The distinction between submitting a Statement of Claim for filing and it being issued by the court is an important one. In ***Tartal v Alberta (Human Rights Commission)***, 2023 ABKB 381 Justice Feth noted that "[the] court clerk's endorsement of an action number and a filing stamp on a commencement document starts the action or proceeding, authenticates the document, and represents to the world that the action or proceeding exists and the technical rules are materially in compliance": ***Tartal*** at para 49. "An unfiled version of [a Statement of Claim] does not attest to an existing proceeding and leaves uncertainty about the scope of the claim, which might change before filing": ***Tartal*** at para 54.

[89] For the foregoing reasons I find that the overall interests of justice favoured dismissing the Plaintiff's application to backdate the Statement of Claim. This further disentitled the Plaintiff to relief under rule 1.5.

v. Backdating the Statement of Claim had the effect of extending a time period the Court was prohibited from extending

[90] 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". In my view, backdating the Statement of Claim by one day is the functional equivalent of extending the limitation period by one day.

[91] For its authority to do so, the Applications Judge cited the inherent power of the court to control its own process and procedures. For this proposition the Applications Judge cited ***Patkaciunas*** at para 13:

> 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.

[92] In my view, the Supreme Court's express admonition in ***Green*** that a *nunc pro tunc* order cannot be used to undermine a legislated limitation period renders the above passage an uncertain proposition. ***Green*** is explored in more detail below.

[93] I know of no authority where the court's inherent jurisdiction to control its own process permits the court to encroach directly on legislative intent to the contrary. Here, the legislative intent of rule 1.5(5) prohibits curative action by the Court where to grant relief would have the effect of extending a limitation period.

[94] In my view, backdating the Statement of Claim in this case had the effect of extending by one day the applicable two-year limitation period established in the *Limitations Act*. The Applications Judge lacked authority to do so. As such, curative relief under rule 1.5 was not available to the Plaintiff.

b. The doctrine of *nunc pro tunc*

[95] Aside from the legal authority in rule 1.5, the Plaintiff argues that the doctrine of *nunc pro tunc* was an alternate source of authority for the Applications Judge to grant the order under appeal. The doctrine of *nunc pro tunc*, a Latin expression that means "now for then", is part of the court's inherent equitable jurisdiction and permits a court to backdate its orders in the interest of fairness: ***Green*** at para 85.

[96] The doctrine is tied to the maxim *actus curiae neminem gravabit*, which means "an act of the court shall prejudice no one". Historically, the need for this type of relief arose when a party died after his case was heard but before judgment had been rendered. Equity permitted the court to backdate the judgment in cases where the delay had resulted from an act of the court and granting relief would not cause injustice to the other party: ***Green*** at paras 86-87.

[97] At para 90 the Supreme Court summarized a list of non-exhaustive factors that inform whether a court should issue a *nunc pro tunc* order:

i. the opposing party will not be prejudiced by the order;

ii. the order would have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity;

iii. the irregularity is not intentional;

iv. the order will effectively achieve the relief sought or cure the irregularity;

v. the delay has been caused by an act of the court; and

vi. the order would facilitate access to justice.

[98] However, the Supreme Court cautioned that "a court should not exercise its inherent jurisdiction where this would undermine the purpose of the limitation period or the legislation at issue": ***Green*** at para 93. In other words, while the court's equitable jurisdiction exists to see justice done in situations where a strict application of the law would result in unfairness, the doctrine is not without limits.

[99] Moreover, *nunc pro tunc* orders are extraordinary powers that are to be used sparingly, and not to defeat the general purpose of enactments: ***Sedgwick v Edmonton Real Estate Board Co-Operative Listing Bureau Limited (Realtors Association of Edmonton)***, 2022 ABCA 264 at para 84.

[100] At para 94 the Supreme Court confirmed a court's inherent jurisdiction to grant *nunc pro tunc* orders is circumscribed by legislative intent:

> This is because, as with all common law doctrines and rules, the inherent jurisdiction to grant *nunc pro tunc* orders is circumscribed by legislative intent. Given the long pedigree of the doctrine […] it has been held that the legislature is presumed to have contemplated the possibility of a *nunc pro tunc* order. However, *nunc pro tunc* orders will not be available if they are precluded by either the language or the purpose of a statute. None of the other equitable factors listed above, <u>including the delay being caused by an act of the court</u>, can be relied on to effectively circumvent or defeat the express will of the legislature.
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> [Citations omitted, underlining added]

[101] While I am sympathetic to the "no-fault" facts in ***Patkaciunas*** and ***Norman Towing***, this passage casts doubt on whether those cases were correctly decided. In the case before me, pursuant to the binding authority of ***Green*** I find the Applications Judge's inherent jurisdiction to control the court's own process did not extend to granting relief that defeated the two-year limitation period imposed by the Legislature.

[102] Further, and separate from the Supreme Court's express admonition that *nunc pro tunc* orders cannot be used to undermine a limitation period, the factors above do not favour granting equitable relief. As noted earlier in these reasons, backdating the Statement of Claim perpetrated significant prejudice by extinguishing the Defendant's right to claim statutory immunity.

[103] Moreover, this case is unlike ***Patkaciunas*** and ***Norman Towing***. Here, the Statement of Claim would not necessarily have issued but for the failure of the court to do that which it had a duty to do.

[104] The fact remains that the Plaintiff did not pay the required fee to commence an action until after the limitation period expired. The Registry was within its authority to not issue the Statement of Claim until the Plaintiff had completed that required step. In these circumstances it cannot be said that the problem was caused by an act or omission on the part of the court.

[105] Last, granting *nunc pro tunc* relief in this case did not facilitate justice. To the contrary, the order that issued perpetrated injustice upon the Defendant by transferring liability for the Plaintiff's errors from the Plaintiff onto the Defendant.

VII. Conclusion

[106] In the result, the order of the Applications Judge is vacated. The court record shall show October 4, 2022 as the date that the Plaintiff's Statement of Claim was filed and issued. The Defendant is free to pursue the pending application for summary judgment as she sees fit.

[107] Presumptively, the Appellant is entitled to costs. If the parties cannot agree on quantum they are directed to write to me within 30 days of the date of this judgment setting out their respective positions in a letter not exceeding 3 pages, not including relevant enclosures and case authorities.

[108] Counsel for the Appellant is directed to prepare the order arising from these reasons.

Heard on the 14th day of November 2024.
Dated at Calgary, Alberta this 2nd day of July 2025.

Derek Jugnauth
J.C.K.B.A.

Appearances:

M. Warholik
for the Appellant, Gagan Kaur Gill

S. Petriuk, KC
for the Respondent, Saira Sabir