Federal Court of Appeal | Cour d'appel fédérale

Date: 20201229

Docket: A-242-20

Citation: 2020 FCA 224

CORAM: **NADON J.A.**
GAUTHIER J.A.
STRATAS J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA and DARRYL ZELISKO

Appellants

and

STEVAN UTAH

Respondent

Heard by online video conference hosted by the registry on December 16, 2020.

Judgment delivered at Ottawa, Ontario, on December 29, 2020.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: NADON J.A.
GAUTHIER J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] Mr. Utah has brought an action for damages. In it, he alleges that a federal government officer failed to process his request for refugee protection in a timely manner, causing him injury.

[2] The defendants to the action, the Attorney General of Canada and the federal government officer (hereafter "Canada"), moved for summary dismissal on the ground that the limitation period expired before Mr. Utah started his action.

[3] All agree that the relevant limitation period is found in Alberta law: paragraph 3(1)(*a*) of the *Limitations Act*, R.S.A. 2000, c. L-12. All agree that this Alberta law applies by virtue of section 39 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. All agree that the limitation period is two years. The parties disagree about when this two-year period started.

[4] In the Federal Court and now in this Court, Mr. Utah submits that as a matter of law the limitation period started when he received documents from an access to information request. If so, he started his action within the two-year period. On this view, his action is not barred.

[5] Canada submits that as a matter of law the limitation period started to run long before that. If so, Mr. Utah started his action after the two-year period had expired. On this view, his action is barred and must be dismissed.

[6] The Federal Court agreed with Mr. Utah and dismissed the motion: 2020 FC 923 (*per* Diner J.).

[7] In my view, the Federal Court erred in law. As a legal matter, the limitation period started to run at an earlier time. When Mr. Utah started his action, the limitation period had expired.

Thus, I would allow the appeal, set aside the judgment of the Federal Court, grant the motion for dismissal, and dismiss the action.

B. Analysis

(1) The authentic meaning of paragraph 3(1)(a) of Alberta's *Limitations Act*

[8] The key provision in this case is paragraph 3(1)(*a*) of Alberta's *Limitations Act*. It tells us when the two-year limitation period started. Our task is to determine the authentic meaning of paragraph 3(1)(*a*) and apply it to the facts before us.

[9] We determine the authentic meaning of paragraph 3(1)(*a*) by taking the plain meaning of its words, seeing them in their proper context, and keeping front of mind the purposes the provision is to serve: *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601. We do this neutrally, dispassionately and objectively: *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252, [2018] 4 F.C.R. 174 at paras. 41-52; *Canada v. Cheema*, 2018 FCA 45, [2018] 4 F.C.R. 328 at paras. 73-86; *Hillier v. Canada (Attorney General)*, 2019 FCA 44, 431 D.L.R. (4th) 556 at paras. 18 and 24-27.

[10] In this task, we are assisted by the good work of the Alberta Court of Appeal. It has considered paragraph 3(1)(*a*) many times. As a matter of law, normally its decisions have only

persuasive effect on us, not binding effect: Hon. M. Rowe and L. Katz, "A Practical Guide to Stare Decisis" (2020), 41 *Windsor Rev. Legal Soc. Issues*, 1 at 6-7. However, this situation is not normal. We are dealing with decisions of the highest court in Alberta interpreting an Alberta statute. Only the clearest demonstration of error could cause us not to follow them. In this case, all parties relied upon decisions of the Alberta Court of Appeal concerning paragraph 3(1)(*a*). No one suggested any were wrong.

[11] Paragraph 3(1)(*a*) provides that the limitation period starts to run when the plaintiff "first knew, or in the circumstances ought to have known" three things: "injury…had occurred", "the injury was attributable to the conduct of the defendant" and "the injury…warrants bringing a proceeding": for guidance on the standard "know…[or] ought to have known", see *Gratton v. Shaw*, 2011 ABCA 175, 505 A.R. 340 at para. 32; *Boyd v. Cook*, 2013 ABCA 27, 542 A.R. 160 at para. 28, *Condominium Corporation No. 0213028 v. HCI Architecture Inc.*, 2017 ABCA 375 at para. 11 and *HOOPP Realty Inc v. Emery Jamieson LLP*, 2020 ABCA 159, 5 Alta. L.R. (7th) 213 at para. 45. The limitation period is two years. After the two years have run, defendants have "immunity from liability in respect of the claim": subsection 3(1).

[12] This statutory language reflects a policy choice of the Legislature of Alberta: when parties know or ought to know injury caused by a defendant has been suffered and warrants an action, they must launch it within two years.

[13] This policy balances the interests of claimants and defendants. On the one hand, claimants deserve access to justice. But, on the other hand, defendants should not have suits

hanging over their heads indefinitely. Nor should they have to defend themselves on a stale evidentiary record. See *Yugraneft Corp. v. Rexx Management Corp,* 2010 SCC 19, [2010] 1 S.C.R. 649 at para. 60 (a case concerning Alberta's *Limitations Act*); *James H. Meek Trust v. San Juan Resources Inc.,* 2005 ABCA 448, 37 A.R. 202 at para. 43; *Boyd* at para. 4; *Bowes v. Edmonton (City),* 2007 ABCA 347, 425 A.R. 123 at paras. 118-121. This policy of balance is expressed not only in paragraph 3(1)(*a*). It pervades the Act: see, *e.g*., ss. 3.1, 5 and 5.1.

[14] Some might dislike this legislative policy. It can be harsh. A claimant might plan to bring a suit that, on the merits, is a cinch, with enormous recovery to boot. But if the claimant starts it after the limitation period has run out, the Court must dismiss it, regardless of its merit.

[15] Harsh the policy might be. But judges—even the most experienced ones we have—cannot meddle with it or refuse to enforce it unless the legislation enacting it is unconstitutional. Nor can judges go through the back door and skew their reasons to get the outcomes they want or cite non-binding sources promoting policies they prefer: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at para. 121 (in the context of administrative decision-makers but equally applicable to judges); *Canada (Attorney General) v. Kattenburg*, 2020 FCA 164 at paras. 24-26. Judges are only unelected lawyers who happen to hold a judicial commission. They have no right to smuggle into the task of statutory interpretation their personal views of what is best and then boost their views to the level of law that binds all. Under our constitutional arrangements, that is alone for our legislators, the people for whom we vote.

(2) Applying paragraph 3(1)(*a*) to this case

[16] Mr. Utah's claim is for damages arising from Canada's failure to investigate and process his application for refugee protection in a timely manner: see, in particular, paras. 27-78 of Mr. Utah's amended statement of claim that refer to that failure alone. Mr. Utah's alleges that the delay was for the better part of a decade and it caused him great injury.

[17] In this case, we must assess when Mr. Utah, in the words of paragraph 3(1)(*a*), "first knew, or in the circumstances ought to have known" that "injury…had occurred", "the injury was attributable to the conduct of the defendant", and "the injury…warrants bringing a proceeding". At that time, the two-year limitation period started to run.

[18] The parties have filed much evidence. However, one bit of evidence stands out.

[19] In early 2016, a new immigration officer in charge of Mr. Utah's file asked Mr. Utah to submit a new refugee application. Understandably, Mr. Utah wondered why this was necessary since he had applied nearly nine years earlier: Federal Court's reasons at para. 16.

[20] On January 18, 2016, the officer replied. He stated that he recognized that Mr. Utah had "started this procedure" of applying for refugee status "in 2007/2008". The officer confessed that the "process was not put forward" due to "[e]rrors…made by previous officers". The officer gave no explanation that could justify those errors.

[21] When that January 18, 2016 message arrived, Mr. Utah knew or ought to have known the matters under paragraph 3(1)(*a*), namely that "injury…had occurred", "the injury was attributable to the conduct of the defendant" and "the injury…warrants bringing a proceeding":

- Mr. Utah was already aware that, in the words of subparagraph 3(1)(*a*)(i), "the injury [to him]…had occurred" due to the lengthy non-processing of his refugee application: see, *e.g.*, the Federal Court's factual finding at para. 43.

- Mr. Utah knew or ought to have known in the circumstances that, in the words of subparagraph 3(1)(*a*)(ii), "his injury was attributable to the conduct of the defendant". But if there was any doubt on this, the January 18, 2016 message made it all clear: "[e]rrors…made by previous officers" in the department caused the application "not [to be] put forward" for processing.

- By January 18, 2016, Mr. Utah knew or ought to have known in the circumstances that the delay was beyond the pale and that his resulting injury—caused by "errors…made by previous officers" in the department—was tangible and severe. Injuries that are tangible and severe are those for which a proceeding is warranted: *Community Futures Lesser Slave Lake Region v. Alberta Indian Investment Corporation*, 2014 ABCA 232, 1 Alta. L.R. (6th) 180 at para. 25. By January 18, 2016, in the words of subparagraph 3(1)(*a*)(iii), Mr. Utah knew or ought to have known that his "injury…warrant[ed] bringing a proceeding".

[22] Thus, the two-year limitation period started to run on January 18, 2016. It expired on January 18, 2018. By that time, Mr. Utah had not started his action. He only did so on June 29, 2018. Therefore, his action must be dismissed.

[23] That is sufficient to determine this appeal. But plenty of other evidence before us, if accepted, shows that the two-year period might have started earlier than January 18, 2016. Mr. Utah's amended statement of claim pleads that he suffered injury from 2007 because of the non-processing of his refugee application and other conduct by Canada; he was aware of these injuries as he was suffering them. Mr. Utah's testimony on cross-examination in this motion supports this. From September 2007 to June 2015, Mr. Utah met with the officer assigned to his refugee claim on "more than 70 occasions": Amended Statement of Claim at para. 48. In June 2015, a new officer told Mr. Utah his refugee claim, filed in 2007, had not been submitted to the Immigration and Refugee Board: Federal Court reasons at para. 36, referring to evidence from Canada. As well, over many years, Mr. Utah had access to independent legal advice and availed himself of it. From 2007, after a year or so of delay and serious harm, a reasonable person might not have known enough to conduct inquiries, appreciate who was responsible and realize that legal proceedings were warranted. But after two years? Five years? Longer than that?

(3) Mr. Utah's submissions

[24] Mr. Utah makes submissions on the proper interpretation of paragraph 3(1)(*a*). But he does not follow the accepted method of interpreting legislative provisions. For one thing, he does not start with the text of paragraph 3(1)(*a*). Indeed, he does not place any emphasis at all on the

text. In the interpretation of legislation, the text is the starting point: *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144.

[25] Instead, Mr. Utah points to what he says is the purpose of the Act: "to create a fair balance between the rights of the respective parties and to do justice as between the parties". In support of this, he relies upon a Supreme Court decision interpreting a differently worded Ontario limitations provision: *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, 151 D.L.R. (4th) 429. From there, he submits, in essence, that it would be fair and just in the circumstances of this case to find that his claim is not barred. This approach is misconceived. *Peixeiro* says nothing about the differently worded Alberta legislation—the law on the books we must apply in this case.

[26] Absent constitutional concern—and there is none here—the Legislature of Alberta is entitled to implement whatever policy it likes in its limitations legislation. Here, it has done so, in paragraph 3(1)(*a*).

[27] No Court can pave over a legislature's policy choice by, for example, importing a different policy from another jurisdiction's legislation or from a case discussing another jurisdiction's legislation: *Michel v. Graydon*, 2020 SCC 24 at paras. 16, 40 and 136. That would be an improper judicial displacement or amendment of legislation—an improper substitution of judges' views for those of elected legislators: *Williams* at paras. 48-50; *Cheema* at paras. 79-80; *Hillier* at paras. 31-33.

[28] That sort of thing offends a constitutional principle known as the hierarchy of laws. Part of this principle recognizes that the laws passed by legislatures bind courts, not the other way around: *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781; *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 at para. 117; *Sturgeon Lake Cree National v. Hamelin*, 2018 FCA 131, 424 D.L.R. (4th) 366 at para. 54; *Tsleil-Waututh National v. Canada (Attorney General)*, 2017 FCA 128 at para. 82. This principle is so fundamental that lower courts have been known to shun decisions that offend the hierarchy of laws—even those from the highest court in the land: see, *e.g.*, *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293 (where the Supreme Court purported to assert a court-made presumption over statutory law), *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at para. 24 (where this Court confessed to having to "tip-toe" around it for years), and *Vavilov*, above (which cast aside *Edmonton East*).

[29] Mr. Utah's remaining submissions all stem from his misinterpretation of paragraph 3(1)(*a*), in particular his failure to take into account its express text.

[30] Mr. Utah submits that the limitation period did not start until he had a high degree of knowledge about his potential claim. He says he only had that level of knowledge on June 20, 2018 when he received documents from an access to information request.

[31] But paragraph 3(1)(*a*) does not provide that the two-year limitation period runs from the time the claimant has much of the evidence relevant to the proceeding or perfect knowledge of the claim: *Gratton* at para. 13; *Geophysical Service Incorporated v. Encana Corporation*, 2018 ABCA 384, 78 Alta. L.R. (6th) 82 at para. 19; *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49, 86 Alta L.R. (6th) 240 at para. 58. Under Alberta's *Limitation Act*, the limitation period runs from the date the plaintiff knew or ought to have known the paragraph 3(1)(*a*) criteria. The level of subjective or objective knowledge that triggers the start of the limitation period is sufficient information to put a plaintiff on inquiry of a claim and if claimants fail to make reasonable inquiries or exercise reasonable diligence to confirm matters during the limitation period, they do so at their own peril: *Pioneer Corp. v. Godfrey*, 2019 SCC 42, 437 D.L.R. (4th) 383 at para. 31; *Canadian Natural Resources Ltd. v. Jensen Resources Ltd.*, 2013 ABCA 399 at paras. 46-48; *Geophysical Service* at para. 20. By January 18, 2016, Mr. Utah had or ought to have had that level of knowledge. Indeed, as explained in paragraph 21 above, by January 18, 2016 he had more than that.

[32] Mr. Utah next submits that he could not start his action until he knew about all of the elements of the particular cause of action he chose to pursue, abuse of public office. In particular, he submits that he could not sue until he knew the identity of the person who committed the abuse of public office and whether his conduct was deliberate. He says he knew these things only when his access to information request was satisfied on June 20, 2018.

[33] This submission fails to take into account the text of paragraph 3(1)(*a*) of the Act. Paragraph 3(1)(*a*) "focuses on knowledge about the injury, not the cause of action": *Lay v. Lay*,

2019 ABCA 21, 80 Alta. L.R. (6th) 221 at para. 29; *Geophysical Service* at paras. 31-32; *Pedersen v. Soyka*, 2014 ABCA 179, 99 Alta L.R. (5th) 139 at para. 19; *Sun Gro Horticulture Canada Ltd. v. Abe's Door Service Ltd*., 2006 ABCA 243, 397 A.R. 282 at para. 11. "Injury" is defined in the Act and it is the same injury regardless of which cause of action is pursued: section 1(*e*) and *Geophysical Service* at para. 31. As well, the Act "does not ask whether the particular statement of claim [with its particular cause of action]… had warranted filing at the relevant time"; rather, it "asks about whether some court proceeding had been warranted": *Boyd* at para. 16.

[34] Mr. Utah's submission overlooks the historical context surrounding paragraph 3(1)(*a*) of the Act. Alberta's limitations legislation used to provide that the limitation period started to run when the "cause of action arose": *Limitation of Actions Act*, R.S.A. 1980, c. L-15. But Alberta repealed that legislation and did not include that phrase in the new legislation. Rather, in paragraph 3(1)(*a*), time runs from when the claimant ought to have known of an injury that was attributable to the defendant and that warranted a proceeding—not from when a cause of action arose.

[35] As explained above, by January 18, 2016 Mr. Utah knew or should have known enough to start legal proceedings for compensatory damages to redress his injury, for example a claim for regulatory negligence. He did not need to know the particular identity of the negligent government official to plead that tort. The same is true for the tort of abuse of public office: *St. John's Port Authority v. Adventure Tours Inc*., 2011 FCA 198, 335 D.L.R. (4th) 312 at para. 61.

[36] In support of his submission that the limitation period did not start until he knew all of the elements of his chosen cause of action, Mr. Utah cites passages from the recent cases of *Milota v. Momentive Specialty Chemicals*, 2020 ABCA 413 and *Canadian Natural Resources Limited v. Husky Oil Operations Limited*, 2020 ABCA 386. But the passages he relies upon are from cases decided under the earlier version of the Act which referred to when "a cause of action arose" : *e.g.*, *Luscar Ltd. v. Pembina Resources Limited*, 1994 ABCA 356, [1995] 2 W.W.R. 153 at para. 138. They are not relevant to paragraph 3(1)(*a*) of the current Act.

[37] A related submission from Mr. Utah concerns the type of "injury" that starts the limitation period running under paragraph 3(1)(*a*). Mr. Utah and Canada disagree on this. This is of no moment. In this case, what the injury is—"personal injury", "economic loss" or "breach of an obligation"—does not matter: s. 1(*e*). Under paragraph 3(1)(*a*), all that matters is when Mr. Utah knew or ought to have known he had suffered an injury of any sort that was attributable to the defendant and that warranted a proceeding.

[38] Next, Mr. Utah submits that fraudulent concealment operates to delay the start of the two-year limitation period. The Federal Court agreed with this submission (at para. 48). This was an error. Section 4 of the Act provides that fraudulent concealment can be asserted against the running of the ten-year limitation period in paragraph 3(1)(*b*) of the Act, not the limitation period in paragraph 3(1)(*a*). As well, fraudulent concealment no longer operates as an independent doctrine in paragraph 3(1)(*a*) cases—it is merged with the discoverability analysis in that provision: *Pioneer* at para. 51; *Zeppa v. Woodbridge Heating & Air-Conditioning Ltd.*, 2019 ONCA 47, 144 O.R. (3d) 385. In any event, even if there was fraudulent concealment, on

January 18, 2016 Mr. Utah knew or should have known all of the elements under paragraph 3(1)(*a*) of the Act: see paragraph 21, above.

(4) The Federal Court's decision

[39] The Federal Court committed several errors of law that affected its analysis of the dismissal motion. As a result, this Court can interfere: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[40] The Federal Court suggested that the key question was "the date of discoverability": Federal Court's reasons at para. 26. It did not ask whether all of the criteria in paragraph 3(1)(*a*) were met. It applied principles from decisions in other jurisdictions with differently worded limitations legislation: Federal Court's reasons, *e.g.*, at paras. 30 and 51. In applying paragraph 3(1)(*a*), the Federal Court considered only what Mr. Utah actually knew and not what he ought to have known in the circumstances: Federal Court's reasons at para. 55. The Federal Court also erred by considering factual disputes that relate to the merits of Mr. Utah's intended proceeding and assessing the strength of his claim: Federal Court's reasons at paras. 32, 44-45 and 48-50. Contrary to the authority in paragraph 35 above, and contrary to the express wording of paragraph 3(1)(*a*), the Federal Court also held that the two-year period did not start until Mr. Utah knew the identity of the officer who had misconducted himself: Federal Court's reasons at para. 47.

[41] The Federal Court also cited and applied the Supreme Court's decision in *Novak v. Bond*, [1999] 1 S.C.R. 808, 172 D.L.R. (4th) 385, a case under British Columbia's *Limitation Act*, R.S.B.C. 1996, c. 266: Federal Court's reasons at para. 51. *Novak* very much turned on paragraph 6(4)(*b*) of British Columbia's *Limitation Act*. That provision allows a court to consider the claimants' ability to bring an action in light of their interests and circumstances. In light of that provision, the Supreme Court adopted the following test in *Novak* (at para. 90): "[t]he task in every case is to determine the point at which the plaintiff reasonably could bring an action, taking into account his or her own interests and circumstances". The Federal Court applied that test to this Alberta case governed by Alberta's *Limitations Act*. It did not apply paragraph 3(1)(*a*) of Alberta's *Limitations Act*. On this, the Federal Court erred in law.

[42] As the Supreme Court has recently recognized, a judicial interpretation of one jurisdiction's statute is not necessarily relevant to the interpretation of another's province statute: *Michel*, above. Further, as the Supreme Court has also recently recognized—consistent with the hierarchy of laws—clear statutory limitations law can oust any judicial pronouncements or common law doctrines: *Pioneer*, above at para. 32.

[43] Paragraph 3(1)(*a*) of Alberta's *Limitations Act* does just that. It requires the Court to inquire into when claimants "first knew, or in the circumstances ought to have known" the paragraph 3(1)(*a*) criteria. Under this express language, the personal circumstances of claimants are relevant to only one thing: whether the claimants ought to have known of the paragraph 3(1)(*a*) criteria.

[44] For this reason, it is not surprising to see that the Alberta Court of Appeal has never embraced the broad test in *Novak*—"to determine the point at which the plaintiff reasonably could bring an action, taking into account his or her own interests and circumstances". In some cases, the Alberta Court of Appeal has firmly rejected the idea that the claimant's reasonable ability to start a proceeding, *simpliciter*, is relevant: *Boyd*; *Condominium Corporation No. 0213028* at para. 11; *HOOPP Realty Inc.* at para. 45. In other cases, consistent with the express words of paragraph 3(1)(*a*), it has restricted the application of *Novak* to whether the claimant's personal circumstances would have affected whether the claimant knew or ought to have known a proceeding was warranted: see, *e.g.*, *Gayton v. Lacasse*, 2010 ABCA 123, 16 Alta. L.R. (5th) 182 at paras. 20-21, 32-33 and 57-58. Finally, the Alberta Court of Appeal has never adopted the idea in *Novak* that the claimant's "own interests" are to be taken into account. That sounds like an invitation to the Court to consider the claimant's interests in continuing the claim—in other words, its merits—something that is no part of Alberta's law. Thus, for very good reason, decisions of the Alberta Court of Appeal refer to *Novak* only briefly or in passing: *e.g.*, *Boyd*, above.

[45] Even if the foregoing analysis is wrong and the broad *Novak* test somehow applies in an unrestricted fashion to Alberta, I conclude that it was reasonable for Mr. Utah to bring his action within two years of receiving the message of January 18, 2016. In that message, Canada confessed to substandard conduct on its part. Thus, by January 18, 2016, Mr. Utah knew or ought to have known that his injury caused by Canada's delay was tangible and severe: see paragraph 21 above. In this case, the evidentiary record discloses nothing, including mental or emotional impairment or other shortcomings, which might have affected what Mr. Utah knew or ought to

have known at that time. The evidentiary record discloses nothing suggesting that Mr. Utah could not reasonably start a proceeding at that time.

[46] Despite the absence of evidence of mental or emotional impairment or other shortcomings on the part of Mr. Utah, the Federal Court called him "vulnerable". It did not explain what it meant by "vulnerable" or how that affected the analysis of the paragraph 3(1)(*a*) criteria. It did not offer any evidence in support of vulnerability. In fact, there is evidence supporting a different conclusion. Mr. Utah was a "sophisticated, well-connected individual, who had [Calgary Police Service] officers assisting him with his refugee claim and legal counsel representing him during most of the relevant time": Canada's memorandum of fact and law at paras. 74-83, citing affidavit and cross-examination evidence.

[47] The statutory law in this case, Alberta's *Limitations Act*, does not allow a court to extend a limitation period for "vulnerability". Paragraph 3(1)(*a*) requires a court to consider whether circumstances affected when Mr. Utah first knew or ought to have known of an injury that was attributable to the defendant and that warranted a proceeding. As mentioned in paragraph 45 above, the evidentiary record discloses nothing, including mental or emotional impairment, which might have affected what Mr. Utah knew or ought to have known, especially at the time he received the message of January 18, 2016.

[48] The Federal Court also suggested that Mr. Utah did not want to prejudice the outcome of his application for refugee protection by bringing legal proceedings: Federal Court's reasons at para. 51. Mr. Utah echoes this. He submits that he was not reasonably able to bring a proceeding

while his refugee claim was pending, either because he wanted to focus on his immigration claim or because he thought a proceeding could jeopardize his claim in some way.

[49] Here again, this is irrelevant to paragraph 3(1)(*a*): it has nothing to do with what Mr. Utah knew or should have known about the injury caused to him. But even if this were legally relevant, I would reject it. An independent and impartial tribunal adjudicates refugee applications, not the immigration department or departmental officers. A reasonable person in Mr. Utah's position would know that starting legal proceedings against the department or departmental officers would not have prejudiced the application for refugee protection; indeed, *mandamus* proceedings brought earlier would have hurried them along.

[50] The Federal Court also suggested that Mr. Utah was attempting to resolve the situation without litigation: Federal Court's reasons at para. 51. But nothing in Alberta's Act suggests that attempts at resolution can extend the limitation period.

[51] Finally, the Federal Court stated that it could not grant the motion for dismissal because of conflicting evidence and credibility issues: Federal Court's reasons at paras. 32, 45-46, 48-50 and 53. This was wrong. Conflicting evidence and credibility issues may have permeated the merits of the allegations that Mr. Utah pleaded in his action. But the evidence relevant to when the limitation period started to run under paragraph 3(1)(*a*) is not in dispute.

[52] We have an agreed statement of facts. We have Mr. Utah's amended statement of claim and, for the purposes of the motion, we can assume the material facts in it are true. We have an

affidavit from Mr. Utah and we can also assume it is true, along with the testimony he gave on it. And, most importantly, appended as an exhibit to that affidavit is the undisputed message of January 18, 2016 that confessed to years of substandard conduct on the part of Canada.

[53] All of this leads us to just one conclusion: by January 18, 2016, Mr. Utah ought to have known of an injury that was attributable to the defendant and that warranted a proceeding.

C. Conclusion

[54] By January 18, 2016, the criteria in paragraph 3(1)(*a*) of Alberta's *Limitations Act* were met. The two-year limitation period ran from that time. Mr. Utah started his claim on June 29, 2018. That was too late.

D. Disposition

[55] For the foregoing reasons, I would allow the appeal, set aside the judgment of the Federal Court, grant the motion for dismissal, and dismiss the action.

[56] While Canada is entitled to costs of the motion here and below, I would not give Canada its costs of the action beyond the pleadings stage. The motion for summary judgment was brought late. Canada should have brought it immediately after the first exchange of pleadings. This was well before the COVID-19 pandemic. When Canada filed its statement of defence to the action, it should have been aware of the all-important January 18, 2016 email.

[57] Considering Tariff "B" in the *Federal Courts Rules* and exercising my discretion to award costs on a relatively low scale due to the delay, I would fix Canada's total costs in the amount of $2,000, all-inclusive.

[58] None of this is meant to criticize counsel for Canada, whose submissions, written and oral, were very helpful to the Court.

"David Stratas"
J.A.

"I agree
M. Nadon J.A."

"I agree
Johanne Gauthier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-242-20

APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE DINER DATED SEPTEMBER 22, 2020, NO. T-1281-18

STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA and DARRYL ZELISKO v. STEVAN UTAH
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	DECEMBER 16, 2020
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	NADON J.A. GAUTHIER J.A.
DATED:	DECEMBER 29, 2020

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