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Civil Litigation

Judges can't 'smuggle' personal views into statutory interpretation: Federal Court of Appeal

By **Christopher Guly**

(January 18, 2021, 9:28 AM EST) -- Based on its interpretation of the "authentic meaning" of Alberta's *Limitations Act*, the Federal Court of Appeal recently set aside a Federal Court judgment awarding Albertan Stevan Utah damages from the federal government based on his allegation that an immigration officer failed to process his request for refugee protection in a timely manner and thus caused him injury.

In *Canada (Attorney General) v. Utah* 2020 FCA 224, released on Dec. 29, the three-judge appellate panel held that Utah should have at least — if not sooner — commenced his proceeding against Ottawa after he was informed by an immigration officer on Jan. 18, 2016, that a refugee application he filed in September 2007 had not yet been processed, due to "errors." Utah started his action on June 29, 2018, six months after the two-year limitation period expired under Alberta law.

(An Australian citizen, Utah served as a police informant on outlaw motorcycle gangs and fled to Canada in June 2006 after suffering serious injuries from members of the Bandidos, according to documents filed with the Federal Court.)

As the Federal Court of Appeal highlighted in its unanimous ruling, section 3(1)(a) of the *Limitations Act* states that a claimant must seek a remedial order within "two years after the date on which the claimant first knew, or in the circumstances ought to have known, that the injury for which the claimant seeks a remedial order had occurred; that the injury was attributable to conduct of the defendant; and that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding."

Utah's statement of claim before the court pleaded that he suffered injury from 2007 because of the non-processing of his refugee application.

From that point, "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?" wrote Justice David Stratas in the decision agreed to by Justices Marc Nadon and Johanne Gauthier.

"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," he said, "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."

"By January 18, 2016, Mr. Utah had or ought to have had that level of knowledge."

As Justice Stratas wrote, s. 3(1)(a) "balances the interests of claimants and defendants," recognizing that the former "deserve access to justice," while ensuring that the latter "should not have suits hanging over their heads indefinitely."

Utah's counsel addressed the desire for parity in the statute by stating its purpose is "to create a fair balance between the rights of the respective parties and to do justice as between the parties," but relied on *Peixeiro v. Haberman* [1997] 3 S.C.R. 549, in which the Supreme Court of Canada interpreted "a differently worded Ontario limitations provision," wrote Justice Stratas, who pointed out that approach was "misconceived," since *Peixeiro* says nothing about the differently worded Alberta legislation — the law on the books we must apply in this case."

"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," said the court, citing the Supreme Court of Canada's decision, *Michel v. Graydon* 2020 SCC 24.

The federal appellate court summary noted that Utah also submitted that the limitation period did not begin until "he had a high degree of knowledge about his potential claim" and "only had that level of knowledge on June 20, 2018 when he received documents from an access to information request."

Utah argued 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," and until June 20, 2018, "could not sue until he knew the identity of the person [Darryl Zelisko, an officer with the Canada Border Services Agency] who committed the abuse of public office and whether his conduct was deliberate."

The Court of Appeal rejected that submission, citing jurisprudence from Alberta's appellate court on s. 3(1)(a) of the *Limitations Act* in which rulings have interpreted its focus to be "on knowledge about the injury, not the cause of action."

Justice Stratas wrote that Utah's argument overlooked the "historical context" of s. 3(1)(a). "Alberta's limitations legislation used to provide that the limitation period started to run when the 'cause of action arose' under the 1980 *Limitation of Actions Act*. "But Alberta repealed that legislation and did not include that phrase in the new legislation," which came into force in 1996. He said that under s. 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."

The Federal Court of Appeal judge continued that by Jan. 18, 2016, "Mr. Utah knew or should have known enough to start legal proceedings for compensatory damages to redress his injury," such as by way of 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."

In dismissing the motion by the attorney general and Zelisko for summary judgment, Federal Court Justice Alan Diner wrote in his ruling, *Utah v. Canada (Attorney General)* 2020 FC 923, "that the *Limitations Act's* two-year period is predicated not only on the date when the claimant first knew, or in the circumstances ought to have known, that the injury occurred (subparagraph 3(1)(a)(i)), but also when that injury was attributable to conduct of the defendant (subparagraph 3(1)(a)(ii)), and (assuming liability on the part of the defendant) the injury warrants bringing a proceeding (subparagraph 3(1)(a)(iii))."

"Therefore, the two-year limitation is premised not only upon the injury, but also upon the author of the injury, and when the identity of that author was revealed to the plaintiff. Mr. Utah's evidence is that he and others only knew that the evidence was attributable to Officer Zelisko, and warranted bringing a proceeding, upon reviewing the results of his ATIP [access to information and privacy] request in June 2018."

Relying on its interpretation of s. 3(1)(a), the Federal Court of Appeal held that Justice Diner committed several errors in law with his decision involving a legislative policy that "can be harsh," but one which requires a court to dismiss a suit "after the limitation period has run out … regardless of its merit."

"Harsh the policy might be," Justice Stratas wrote, "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."

"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."

Péter Szigeti, University of Alberta assistant law professor

In reviewing the *Utah* case, Péter Szigeti, an assistant professor of law at the University of Alberta, was particularly interested in the Federal Court's comment that Utah was "vulnerable" while "awaiting the outcome of a refugee claim for over a decade (until its positive result on Sept. 29, 2017)," when he was granted "protected person" status, as Justice Diner wrote.

Szigeti said that determination reminded him of a similar finding in *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143 in which the Supreme Court of Canada said that non-citizens were "vulnerable by default."

As the late Justice Bertha Wilson wrote, "non-citizens are a group lacking in political power and as such [are] vulnerable to having their interests overlooked and their rights to equal concern and respect violated." She concluded that "non-citizens fall into an analogous category to those specifically enumerated" under s. 15 of the Charter.

But in *Utah*, the Federal Court failed to explain or "offer any evidence in support of vulnerability, [when] in fact there [was] evidence supporting a different conclusion," Justice Stratas wrote.

"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,' " he said, referring to the federal government's memorandum of fact and law, citing affidavit and cross-examination evidence.

"Alberta's *Limitations Act* does not allow a court to extend a limitation period for 'vulnerability,' " the appellate court held.

"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."

The Canada Border Services Agency declined to comment on the ruling. Utah's lawyers did not respond to an interview request.