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What Happens when a Self-Rep Steps on a Procedural Landmine during Judicial Review

By: Sarah Burton

Case Commented On: *Raczynska v Alberta Human Rights Commission*, 2015 ABQB 494

The Alberta Court of Queen's Bench recently rejected an application to judicially review the dismissal of a meritorious human rights claim. Why? The self-represented applicant did not name and serve the correct respondent on time. The fatality of this misstep would have been reasonably evident to any lawyer familiar with the *Rules of Court*, Alta Reg 124/2010 and case law governing judicial review. For self-represented litigants, however (and particularly those coming from the relatively forgiving forum of the Alberta Human Rights Commission) this is just one of the endless procedural landmines that can destroy their claim.

How should we deal with self-represented litigants who have seemingly valid claims, but lack an understanding of legal procedure? This question is at the forefront of *Raczynska v Alberta Human Rights Commission*. Justice Robert A. Graesser's decision is a relatively straightforward application of the *Rules* as interpreted by case law. The *Rules* themselves, however, are undeniably harsh in this context - and the dismissal they compel invokes very little sympathy from the Court. In all, *Raczynska* asks the legal profession to revisit a nagging question: In light of the wave of self-representation (and the financial restraints behind it), have we struck the right balance between ensuring order and making justice accessible?

Facts

The Complainant, Krystyna Raczynska, launched a complaint with the Alberta Human Rights Commission on the grounds of age discrimination in the course of employment practices. She is a registered dental assistant whose name was on an "on call" list for temporary work. In June 2011, an employee from the Yousif Chaaban Professional Corporation (the "Professional Corporation") left a message on Ms. Raczynska's telephone, asking if she was interested in applying for a job. When she returned the call, the employee asked "how old are you?" Ms. Raczynska replied that this was an inappropriate question, and the employee hung up (at paras 8-11).

Ms. Raczynska filed a complaint with the Commission, who investigated and found reasonable grounds existed. The investigator recommended Ms. Raczynska receive $2,500 in compensation for loss of dignity and injury to self-respect. Ms. Raczynska originally rejected this remedy, but later verbally agreed to accept the settlement. The Commission forwarded her a signed settlement agreement for her signature, but received no reply. The Commission unsuccessfully attempted to contact Ms. Raczynska on multiple occasions over the next month, at least two of which were returned unopened to the Commission (at paras 18-19). Two months after the settlement agreement was originally mailed, the Director discontinued her claim (at paras 20-28). One month after that discontinuance, Ms. Raczynska contacted the Commission, explaining that

she had been hospitalized and was unable to access her mail over the past 3 months. She requested a review of her case dismissal (at para 29). The Commission considered and rejected her appeal, maintaining that the Director appropriately dismissed her complaint (at paras 31-33).

Ms. Raczynska filed an application for judicial review of this decision. She represented herself before the Court. Her application named the "Office of the Chief of the Commission and Tribunals". It did not name the Professional Corporation (at para 35). At the hearing, the Commission brought a preliminary application to add the Professional Corporation to the application, despite the fact that the time for doing so had expired. The Professional Corporation appeared and opposed the application.

Result

Ms. Raczynska failed to name the correct party on her application for judicial review, and failed to repair this error or serve the Professional Corporation in the stipulated time frame (at paras 4, 5 citing *Leon's Furniture Limited v Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94). Rule 3.15 of the *Rules of Court* provides that the Court lacks jurisdiction to extend the time for adding and serving a party on an application for judicial review:

> 3.15(2) …[A]n originating application for judicial review…must be filed and served within 6 months after the date of the decision…and rule 13.5 [which gives judicial authority to extend time periods] does not apply to this time period.
> (3) An originating application for judicial review must be served on
> (a) the person or body in respect of whose act or omission a remedy is sought,
> (b) the Minister of Justice and Solicitor General or the Attorney General for Canada, or both, as the circumstances require, and
> (c) every person or body directly affected by the application.
> [emphasis added]

Case law supported Justice Graesser's interpretation of Rule 3.15. As such, Justice Graesser dismissed the application to add the Professional Corporation (at para 66).

Flowing from that dismissal, the application for judicial review was moot. Ms. Raczynska's application for judicial review was dismissed in its entirety (at para 77). Even if not moot, Justice Graesser would have held that the Commission's decision to dismiss Ms. Raczynska's case was reasonable (at para 93).

Commentary

This decision, while perhaps inevitable, is unfortunate on so many fronts. It is plainly evident that Ms. Raczynska's complaint had merit. The settlement was verbally struck before Ms. Raczynska was hospitalized rendering her unable to deal with her complaint (a fact confirmed by her doctor - at para 37). Furthermore, even though the Professional Corporation had not been properly served, it was present at the application and made limited submissions (at para 6). Lastly, Ms. Raczynska's fatal mistake is somewhat understandable. After all, she was challenging the Commission's decision to dismiss her complaint, not any substantive determination of the Professional Corporation's fault. Indeed, the error of her ways would have only been evident if she had read case law on the issue – it is not explicit in the *Rules* (see para 4, citing *Leon's Furniture Limited v Alberta (Information and Privacy Commissioner)*).

On these facts, it seems inherently unfair that her claim was dismissed.

Before jumping to conclusions, however, the decision is littered with suggestions that Ms. Raczynska's misfortunes were largely the result of her own poor decisions. Of note, the Commission informed Ms. Raczynska on multiple occasions that she needed to name and serve the Professional Corporation in her application (at paras 59, 72, 73). It is not clear why she refused to heed this advice. Ms. Raczynska also refused the Professional Corporation's offer to pay her the $2,500 settlement as a good faith gesture despite being out of time, and advanced some ill-founded arguments about the conduct of Commission counsel (at paras 38 -45).

With that framework in mind, I wish to expand on two questions raised by this decision.

- First, the decision raises questions about the severity of the *Rules* as they relate to judicial review. Are the Rules governing judicial review harsher than other avenues, and if so, why?
- Second, this decision asks us to consider the perspective of the self-represented litigant. Are we too quick to dismiss their arguments as inherently unreasonable, when in fact they merely differ from our expectations?

A. The Unforgiving Universe of Judicial Review

Whether or not someone has legal training, judicial review can be a nebulous avenue to pursue. Rule 3.15 doesn't provide much guidance. In order to understand how to conduct a judicial review, a party must understand principles outlined case law and textbooks on the topic. In light of this complexity, it is curious that Rule 3.15 has adopted an arguably harsher procedural stance that the rules governing other commencing documents.

In dismissing Ms. Raczynska's plea for leniency, Justice Graesser explained, "Rule 3.15 provides a deadline which is essentially 'absolute', just like the time requirements for issuing a statement of claim under the *Limitations Act*" (at para 65). His analogy is correct insofar as it relates to filing requirements. However, Rule 3.15 is actually broader and stricter than the *Limitations Act* – it places an absolute time restriction on filing *and service* of an application for judicial review. A Statement of Claim has an "absolute" restriction for filing, but permits judicial discretion when it comes to service (see Rule 3.26). Rule 3.15 explicitly removes this discretion in the case of applications for judicial review.

Given that judicial review is already particularly difficult to navigate, why should the rules be harsher than those required for analogous documents? In answering this question, it is worth noting that Justice Graesser referenced three other Alberta decisions (two of which were from 2015) that faced the same or similar issues – usually involving self-represented litigants. In all cases, the applications were completely dismissed for failure to adhere to this rigid time line (see paras 53- 56).

B. A Note on the Reality of Self-Represented Litigants

Ms. Raczynska was not doing herself any favors with some of her pre-courtroom choices and arguments before Justice Graesser. That much is obvious. With that said, however, some of the Court's commentary on her choices requires closer examination. We may be quick to dismiss the views of a self-represented person as being inherently unreasonable, but if we take a moment to consider their perspective, the views are entirely rational. For example, in dismissing the motion to add the Respondent, the Court stated:

> [59] [Raczynska's] communications with [Commission counsel] indicate that she thought that the Commission would notify the [Professional Corporation]. There is nothing before me to suggest that there is any reasonable basis for that belief.
> …
> [60] There is nothing in the materials to support Ms. Raczynska's submissions that she was misled as to proper process by [Commission counsel]. Nothing could be clearer from [Commission counsel's] communications: get legal advice somewhere, serve the [Professional Corporation] and serve it within the necessary time.

Two points flow from this excerpt.

First, when a human rights complaint is launched with the Commission, it is the Commission that serves the respondent. Obviously, the Court of Queen's Bench does not follow the Commission's rules on service. However, I would challenge the submission that there was no "reasonable basis" for Ms. Raczynska to think the Commission would handle service. Indeed, the Commission had handled all service on the Professional Corporation up to that point.

Second, I have no doubt that Commission counsel told Ms. Raczynska that she needed a lawyer. My problem lies with any implication that she simply refused to listen to that advice. As someone who regularly encounters self-represented litigants seeking counsel, I can attest to the fact that retaining counsel in this situation this is essentially impossible without money. Low income legal service providers are not, as a matter of course, taking on judicial review applications from human rights complaints. While I have no personal knowledge of Ms. Raczynska's personal efforts, it bears emphasizing that the vast majority of self-represented litigants are in their position out of necessity, not choice.

Justice Graesser later rejected Ms. Raczynska's argument that her status as a self-represented litigant should have garnered more assistance from the Commission, and leniency by the Court. He explained:

> [64] Ms. Raczynska also argued that as a self-represented litigant she was unfamiliar with the Rules of Court and filing and service requirements. She maintains that the Commission should have made her aware of these procedures.
> [65] In answer to these submissions, being self-represented does not provide any lesser standard of compliance with the *Rules of Court.* There is only one set of rules and they apply equally to represented litigants and self-represented litigants. Time limits cannot be extended merely because of a lack of familiarity with those requirements...

Again, there are two points I wish to make regarding this excerpt.

First, Ms. Raczynska's expectation may not be as unreasonable as the Court suggests. In the adversarial world of the Court, lawyers are not particularly inclined (or permitted) to help out or do favours for the other side. The Commission, however, is no ordinary litigant. The Commission is not supposed to be Ms. Raczynska's adversary. In this situation, the Commission clearly knew that Ms. Raczynska had made an error – they told her so numerous times. While it

did ultimately launch an application to add the Professional Corporation to the judicial review, it waited until the 6-month time frame had expired to do so. I am not convinced it is entirely unreasonable to consider whether there could be legal reforms permitting the Commission to have some role in serving respondents in applications for judicial review.

Lastly, Justice Graesser's comments at paragraph 65 state that self-represented litigants should be held to the same standard as represented parties on matters of procedure. This comment arose in the specific context of an absolute time restriction in the *Rules of Court.* Even if Justice Graesser had wanted to extend the time limit and permit Ms. Raczynska to file and serve the Professional Corporation, the *Rules* prohibited him from doing so. With that said, I would hope that this excerpt isn't taken as a suggestion that self-represented litigants are not entitled to some modification and consideration of their status in the courtroom – they are. Indeed, the Canadian Judicial Council's Statement of Principles on Self-Represented Persons and Accused Persons (September 2006) (*Statement of Principles*) explicitly states that judges should modify procedure for self-represented persons, and in particular:

- self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency in their case (Statement B, Principle 2);
- when faced with self-represented parties the presiding judge may modify the traditional order of taking evidence, and question witnesses (Statement B, Principles 4(e) and (f)); and
- judges should ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons (Statement C, Principle 3 (For the Judiciary).

These *Statements of Principle* emphasize that judges do have an interest and obligation to modify and adjust rules, where permitted and appropriate. In the present case, Rule 3.15 prevented that modification from happening. However, the *Statements of Principle* recognize that the Court should not be slaves to procedural rules at the expense of justice. Rules of Court exist to make justice fair and predictable; they must not be wielded in such a way that they become barriers to justice in and of themselves.

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