October 6th, 2008

Is Proof of Irreparable Harm to the Plaintiff or Proof of Wilful Delay by the Defendant Required to Defeat an Application to Set Aside Default Judgment?

By Jonnette Watson Hamilton

Cases Considered:

Alberta v. Fjeld, 2008 ABQB 558

Some debtors seem to think they can avoid being held accountable for money they owe if they refuse to answer the phone, or pick up registered mail, or accept documents being served upon them. They act as if, by mimicking the proverbial ostrich and hiding their head in the sand at the first hint of collection efforts, they will be able to make their debts go away. The taxpayers of Alberta should be pleased to know that the ostrich approach did not work in the case of *Alberta v. Fjeld*. Ignoring collection efforts merely resulted in the provincial government obtaining an easy default judgment against Rhonda Fjeld, which was upheld by a Master in Chambers, Rod Wacowich, and then, on appeal, by Mr. Justice Keith Yamauchi of the Court of Queen's Bench. Ms. Fjeld's debt arose out of a Commercial Timber Permit issued to her by the Alberta government in February 2000. The government gave Ms. Fjeld permission to harvest timber on Crown lands. The actual harvesting was apparently done by her husband, Darren Cox, who operated under the trade name of Northern Forest Products, but Ms. Fjeld was still the one who received the permit and was responsible for paying timber dues for that permit in accordance with the *Timber Management Regulations*, Alta. Reg. 60/1973, made under the *Forests Act*, R.S.A. 2000, c. F-22. Timber dues are fees for the use of Crown timber, i.e. trees grown on public land. Ms. Fjeld was required to pay timber dues to the government within 30 days of the last day of each month in which she sold timber. Ms. Fjeld also had to submit a timber return at the same time, setting out how much timber she sold.

Ms. Fjeld never submitted a timber return and never paid timber dues. Of course, that did not mean that no timber dues were owing. If a permit holder does not file a timber return stating how much timber they sold, then the government assesses timber dues based on the full timber volume the permit holder is allowed to harvest. Ignoring the requirement to file a return is a mistake.

In 2003, when asked by the government for an update on their harvesting activities, both Ms. Fjeld and her husband failed to respond. The government therefore calculated the timber dues owing based upon the maximum allowed under the permit and sent Ms. Fjeld a bill for

$129,124.11. They sent it by registered mail and Ms. Fjeld refused to pick up the registered letter. That did not, of course, make the bill or amount owing go away.

More bills were sent, to no avail. The government finally lost patience and sued for the debt in February 2005. They issued a Statement of Claim and served it on Ms. Fjeld. They served it by registered mail and - oddly enough - this was one document Ms. Fjeld did sign for.

When a defendant such as Ms. Fjeld wants to contest a claim, she or he must do what the notice at the end of the Statement of Claim tells them to do. Rule 88 of the *Alberta Rules of Court*, Alta. Reg. 390/1968 states that every Statement of Claim must carry the following warning to the person sued:

> TO (NAME OF DEFENDANT)
> You have been sued. You are the Defendant. You have only 15 days to file and serve a Statement of Defence or Demand of Notice. You or your lawyer must file your Statement of Defence or Demand of Notice in the office of the Clerk of the Court of Queen's Bench in , Alberta. You or your lawyer must also leave a copy of your Statement of Defence or Demand of Notice at the address for service for the Plaintiff named in this Statement of Claim.
> WARNING: If you do not do both things within 15 days, you may automatically lose the law suit. The Plaintiff may get a Court judgment against you if you do not file, or do not give a copy to the Plaintiff, or do either thing late.

Ms. Fjeld did not heed that warning. She did not file and serve a Statement of Defence within 15 days. She did file a Statement of Defence with the office of the Clerk of the Court of Queen's Bench in Edmonton. However, she did not serve that Statement of Defence on the Alberta government. Therefore, as the warning admonishes, she automatically lost the lawsuit. The Alberta government entered default judgment against Ms. Fjeld for the almost $130,000 debt plus interest plus costs in April 2005.

A person such as Ms. Fjeld who has had a default judgment entered against her is able to apply to the courts to set aside that default judgment, even when it is entirely her fault that the default judgment was entered. However, setting aside a default judgment when there have been no irregularities in how the plaintiff proceeded is entirely in the court's discretion. It has to be fair to do so. What Ms. Fjeld did after the default judgment was entered against her is therefore important.

I have already mentioned that Ms. Fjeld's husband, Darren Cox, was the one who actually operated under her timber permit. He had his own permits too, and his own refusals to file timber returns or pay timber dues under them. He too was sued by the Alberta government. Unlike his wife, however, Mr. Cox had hired a lawyer after he was sued in August 2005. Actually, he hired at least four of them. In March 2006, Mr. Cox hired Christine Goodwin. Ms. Goodwin first mentioned the default judgment against Ms. Fjeld in March 2007. Saying she had just found out about it, Ms. Goodwin asked for the government's consent to setting aside Ms. Fjeld's default

judgment. The government refused, telling Ms. Goodwin she would have to ask a court to set aside the default judgment. This Ms. Goodwin did not do. As noted by Justice Yamauchi, shortly after this flurry of activity Ms. Goodwin was administratively suspended by the Law Society of Alberta. She could no longer act for Mr. Cox and Mr. Cox had to change lawyers yet again. Dave Shynkar was the next lawyer to contact the Alberta government, telling them in July 2007 that he represented Mr. Cox and he had just found out about the default judgment against Ms. Fjeld. Nothing further happened on Ms. Fjeld's default judgment.

Finally, in January 2008, Ms. Fjeld hired a lawyer to represent her own interests and to ask the court to set aside the default judgment granted against her in April 2005. Her lawyer, Ackroyd LLP, moved quickly and that firm was commended by Mr. Justice Yamauchi for using its best efforts to resolve the situation.

On February 8, 2008, Ackroyd LLP applied on behalf of Ms. Fjeld to have the government's default judgment against Ms. Fjeld set aside. Master Wacowich denied that application for two reasons. First, he held that Ms. Fjeld did not have an arguable defence. Second, he found there had been undue delay in bringing the application. Ms. Fjeld appealed this order to the Court of Queen's Bench. Mr. Justice Yamauchi found that the Master was correct and dismissed the appeal.

How does a judge decide whether or not to set aside a default judgment? I mentioned that it must be fair to do so. The matter is governed by Rule 158 of the *Alberta Rules of Court*:

> 158 The court may, upon such terms as it thinks just, set aside or vary any judgment entered upon default of defence or in pursuance of an order obtained ex parte or permit a defence to be filed by a party who has been noted in default. [emphasis added]

The setting aside of default judgments is entirely in the court's discretion. The Rule itself does not impose any pre-requisites or suggest any guidelines. Different judges have, of course, taken different approaches to the exercise of their discretion under Rule 158.

There appears to be three different approaches currently in use in the Court of Queen's Bench. Some judges are guided more by the words of Rule 158 and the demand for fairness. Those judges usually cite the decision of Madam Justice Joanne Veit in *Don Reid Upholstery Ltd. v. Patrie* (1995), 32 Alta. L. R. (3d) 281, 173 A.R. 233. Others rely more on lists of things the applicant should show or the court should consider in order to find it just to set aside a default judgment. The leading case for this approach used to be the Alberta Court of Appeal decision in *Wilson Arches Ltd. v. Sayers*, [1974] 2 W.W.R. 277, a case a few judges still rely upon and a case which appears to be the last word of the Court of Appeal on the subject. However, those adopting a list of factors to be proven approach nowadays tend to rely upon what was said to be the "settled law" described in W.A. Stevenson and Jean Côté, *Alberta Civil Procedure Handbook, 2004* (Edmonton: Juriliber, 2004), which entered the case law through *Graylake Holsteins Ltd. v. Kzam Farms Ltd.*, 2004 ABQB 828, another decision of Madam Justice Veit.

The main difference between the list of factors in Wilson Arches and the list in *Graylake Holsteins* is that the former requires that the applicant prove the plaintiff is not prejudiced by the setting aside of a default judgment.

In the *Alberta v. Fjeld* case, Mr. Justice Yamauchi relied upon counsel for the appropriate approach. The lawyers for both parties had agreed "that the test the court must apply in deciding whether to set aside a default judgment is taken from *Graylake Holsteins Ltd. v. Kzam Farms Ltd.*, 2004 ABQB 828 at para. 19″ (emphasis added). Because the setting aside of a default judgment is a matter of judicial discretion, however, references to a "test" that a court "must" apply can only be a sort of shorthand for facts that are usually proven when a court decides to set aside a default judgment.

As mentioned, the leading case for the approach focused on fairness in general is the decision of Madam Justice Veit in *Don Reid Upholstery Ltd. v. Patrie*. In that case, counsel for Don Reid Upholstery had put forward "three sets of requirements" for the setting aside of a default judgment, but had then conceded, citing *The "Saudi Eagle"*, [1986] 2 Lloyd's L.R. 221 (C.A), that "discretion, by definition, rejects rigid rules." Madam Justice Veit picked up on this concession and English Court of Appeal approach, noting (at para. 24) that "[u]nder R. 158, the court has discretion to do what is just; the most that case law can do is provide 'general indications to help the Court in exercising the discretion.'" This broader approach has been followed in a number of recent cases. See, for example, *Fabutan Corp. v. Clement*, 2007 ABQB 750, where Mr. Justice D.K. Miller found that the discretionary mandate in Rule 158 "eschews a rigid set of rules." See also *Acast Enterprises Ltd. v. Family Pizza (Alberta) Ltd.*, 2007 ABQB 8, where Madam Justice L.D. Acton agreed (at para. 3) that the "central rule" for the court to follow "is to do what is fair."

I have also already mentioned that when judges use an approach based on a test or guidelines or list of things that fairness usually requires be proved, there has been some variation, with the most notable difference being whether or not lack of prejudice to the plaintiff is required. I have referred to the list of factors approach requiring lack of prejudice as the Wilson Arches approach. The list of factors approach not requiring a lack of prejudice is from Graylake Holsteins' adoption of a test in the *Alberta Civil Procedure Handbook*. In *Alberta v. Fjeld*, Mr. Justice Yamauchi summarized (at para. 16) the *Graylake Holsteins* approach to the exercise of discretion as an inquiry into whether the Appellant is able to show that:

> a) she has an arguable defence; and
> b) she did not deliberately let judgment go by default and has some excuse for the default, such as illness or a solicitor's inadvertence; and
> c) after learning of the default judgment, she moved promptly to open it up.

The third approach, the *Wilson Arches* approach, was most recently considered by the Alberta Court of Appeal in 2007, in *Hubert v. Outlaws Group Inc.*, 2007 ABCA 352. In a Memorandum of Judgment, the Court of Appeal allowed the appeal by Outlaws Group Inc. from a chambers decision which dismissed its application to set aside a noting in default. Noting in default is

governed by Rule 158 as well: see Wilson Arches at para. 11. In *Hubert v. Outlaws Group Inc.*, the chambers judge, Mr. Justice Neil Wittmann (as he then was), said he had to determine why a statement of defence was not delivered, whether there was a delay in applying to set aside the default and, if so, whether there was a satisfactory explanation accounting for the delay, and whether a reasonably meritorious defence was raised. He then quoted from the *Wilson Arches* decision at p. 279, where the Court of Appeal had held: "Mere delay will not be a bar to the application unless an irreparable injury will be done to the plaintiff or the delay has been wilful." However, Mr. Justice Wittmann made no express findings as to whether the respondents had suffered irreparable harm as a result of the appellant's delay in applying to set aside or as to whether the delay was wilful. The applicant in *Hubert v. Outlaws Group Inc.* admitted that Mr. Justice Wittmann cited the correct tests and the Court of Appeal did not take issue with those tests. Nevertheless, the Court of Appeal allowed the appeal, holding (at para. 12) that there was no evidence of irreparable harm to the plaintiff as a result of the delay: "The respondents adduced no evidence of harm, and there is no other evidence of harm to the respondents on the record. Therefore, it was an error of law to dismiss the application on the basis of irreparable harm." Neither did the evidence establish wilful delay.

The Court of Appeal has therefore made it quite clear in its 2007 decision in *Hubert v. Outlaws Group Inc.* that there must either be evidence of irreparable harm to the plaintiff or evidence of wilful delay on the part of the defendant before an application to set aside a default judgment or noting in default will be defeated. This is a fairly elaborate test, with a change in who bears the burden of proof. Under the approach to Rule 158 in *Wilson Arches* and *Hubert v. Outlaws Group Inc.*, the applicant must produce evidence on three matters in order to win:

> 1) An adequate explanation as to why the Statement of Defence was not delivered;
> 2) An adequate explanation for any delay in applying to have the default judgment or noting in default set aside.
> 3) A meritorious defence, i.e., the facts must disclose a triable issue of fact or law.

However, even if there is delay, the default judgment will not be set aside unless the plaintiff proves one of two things:

> 4) Either an irreparable injury will be done to the plaintiff if their judgment is set aside, or the delay by the defendant has been wilful.

The *Wilson Arches* / *Hubert v. Outlaws Group Inc.* approach requiring prejudice to the plaintiff or wilful delay by the defendant in order to refuse to set aside a default judgment has been followed in a number of lower court decisions. However, it has been more usual for the lower courts to treat prejudice to the plaintiffs as a factor, rather than a decisive factor. Some lower courts have even cited *Wilson Arches* merely for the three factors an applicant must prove, ignoring the decisive nature of a lack of prejudice or a lack of a wilful delay. *Oxford Properties Group Inc. v. Lymer*, 2004 ABQB 196 and *Goulet v. da Silva*, 2002 ABQB 369 are typical in this regard. However, *Wilson Arches* was very clear (at para. 12) when it explicitly adopted the tests