IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Patry v. Capital One,* 2023 BCSC 1836

Date: 20231010
Docket: S220036, S220037
Registry: Vancouver

No. S220036
Between:

Raymond Guy Joseph Patry

Petitioner

And

Capital One (Canada Branch)

Respondent

and

No. S220037
Between:

Tara Dawn Patry

Petitioner

And

Capital One (Canada Branch)

Respondent

Before: The Honourable Justice Brongers

On judicial review from: Orders of the Provincial Court of British Columbia, dated November 26, 2021 (*Capital One Bank (Canada Branch) v. Tara D Patry*, C-2168871 and *Capital One Bank (Canada Branch) v. Raymond G Patry*, C-2168895).

Oral Reasons for Judgment

In Chambers

Appearing on their own behalf, by videoconference: R. Patry and T. Patry

Counsel for the Respondent, by videoconference:	D. Georgetti
Place and Date of Hearing:	Vancouver, B.C. September 25, 2023
Place and Date of Judgment:	Vancouver, B.C. October 10, 2023

Introduction

[1] Before the Court are two petitions for judicial review of interlocutory decisions of a Provincial Court Judge in two Small Claims proceedings.

[2] The petitioners are Raymond Patry and Tara Patry (“the Patrys”). They are spouses, and they represent themselves.

[3] The respondent is Capital One Bank (Canada Branch) (“Capital One”). It is represented by counsel.

[4] The Patrys apply to review the Provincial Court Judge's refusal to set aside default orders obtained against them by Capital One. The Patrys say that the judge wrongly found that they had been validly served with Capital One's notice of claim. The Patrys also say that he failed to address their argument that Capital One's notice of claim was filed at the wrong Small Claims registry location.

[5] Capital One disagrees. It says that the Patrys were properly served, that the Provincial Court Judge's decision was reasonable, and that it ought not to be set aside in any event.

[6] I have now had an opportunity to review the petition records and consider the parties' submissions. I agree with the Patrys that the Provincial Court Judge's decision is unreasonable. I will therefore direct that the Patrys' applications to set aside the default orders against them be reconsidered.

[7] My reasons for this conclusion are as follows.

Background

The Provincial Court Proceedings

[8] In April 2021, Capital One filed notices of claim against the Patrys in the Provincial Court Small Claims registry in Vancouver. The claims relate to the Patrys' credit card debt. Capital One pleads that Raymond Patry owes $30,301.64 on his

MasterCard account, and that Tara Patry owes $19,469.53 on her two MasterCard accounts.

[9] Capital One sent the Patrys the notices of claim through Xpresspost. This is a service provided by Canada Post which apparently allows the sender to track delivery of parcels, but does not require the addressee to acknowledge receipt through a signature or otherwise.

[10] Capital One prepared certificates of service indicating that the notices of claim had been successfully delivered to the Patrys' home address in Surrey. Canada Post tracking printouts were attached to the certificates. The printouts show that Xpresspost deliveries were made on April 22 and 28, 2021. Capital One says that the first delivery was made in respect of its claim against Tara Patry, and the second delivery was made in respect of its claim against Raymond Patry.

[11] While the Patrys acknowledge that they have a community mailbox associated with their home address, they say that they never received Capital One's notices of claim. Accordingly, they took no steps to respond to Capital One's Small Claims proceeding against them.

[12] In May 2021, Capital One filed applications for default orders in the Provincial Court. Such orders were then granted. The order against Tara Patry is dated May 7, 2021. It directs her to pay Capital One a total of $19,776.95. The order against Raymond Patry is dated May 13, 2021. It directs him to pay Capital One a total of $30,796.26.

[13] The Patrys learned of the default orders when they received copies from a process server in June 2021. They then hired legal counsel, who filed applications to set aside the default orders.

[14] These applications were presented before Judge Galati of the Provincial Court on November 26, 2021. Tara Patry's application was heard and decided first, followed by that of Raymond Patry.

[15] Counsel for the Patrys essentially raised three arguments before the Provincial Court Judge:

> (1) the Patrys were not properly served with the notices of claim, since Xpresspost is not a valid method of service;
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> (2) the notices of claim were improperly filed in the Vancouver Small Claims registry, as they should have been filed in Surrey instead; and
>
> (3) the Patrys have met the three-part test for setting aside default orders set out in *Miracle Feeds v. D & H Enterprises Limited*, 1979 10 B.C.L.R. 58, County Court (the "*Miracle Feeds* Test") because:
>
> > (a) the Patrys did not wilfully or deliberately fail to respond to Capital One's claims,
> >
> > (b) the Patrys applied to set aside the default orders as soon as reasonably possible after learning of them, and
> >
> > (c) the Patrys had meritorious defences to Capital One's claims.

With respect to the last point, the Patrys' proposed defences were threefold:

> (1) the amount of credit card debt claimed by Capital One is inaccurate;
>
> (2) the Patrys' credit card contract with Capital One was made for no consideration; and
>
> (3) the Patrys were denied a reasonable opportunity to obtain legal advice before agreeing to the credit card contracts.

[16] In response, counsel for Capital One took the position that the Patrys' applications ought to be dismissed. In oral submissions, he noted in particular that Xpresspost had been found by another Provincial Court Judge to constitute a valid method of service. He also argued that the Patrys have no meritorious defence to Capital One's claims, in any event.

The Judgments of the Provincial Court Judge

[17] Immediately after hearing the parties' submissions, the Provincial Court Judge issued his decision on Tara Patry's application. He refused to set aside the default order, but directed that a "payment hearing" take place to determine the specific amount of money that she owes to Capital One.

[18] The Provincial Court Judge provided oral reasons for his decision. Its key passages are the following:

> [1] … With respect to the service issue, I am not going to - particularly in light of Judge Lee's decision, which I am not familiar with - I am not prepared to say that service by Express Post [*sic*] is not valid service. What I am prepared to say is that in the particular circumstances of this case, where the defendant denies having received the notice of claim, I am going to accept that evidence for the purposes of this application, and I will accept her evidence that she did not become aware of the fact that judgment had been taken against her until, I think, it was June 7, according to the material here somewhere.
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> …
>
> [4] … Now, there are a couple of months that go by, July 7, August 7, because the application to set aside was not attempted to be filed until August 11. In the circumstances, I am not going to consider that that two-month period, particularly given the rest of what is sort of deposed to in the defendant's affidavit, I am not going to find that that was an unreasonable period of time, or that what she did do, in terms of waiting to have counsel, was totally unreasonable … As it turned out, it was unwise. But I am not prepared to go so far as to find that she was acting unreasonably.
>
> [5] The real crux of this comes down to whether or not there is a defence worthy of investigation. You know, I have had a quick look at the draft defence and without going into it in any detail, I would give very little weight, at this stage, to a pleading that there was no consideration, or for granting a credit card, or entering into a credit card agreement. I would give very little weight, as well, to the allegation or to the pleading that the defendant was not given an opportunity to get legal advice before signing a credit card agreement, for a credit card that she had applied for.
>
> [6] The defence does not go so far as to say that there was no credit granted at all. In fact, the meritorious part of this, if there is a meritorious part, is whether or not the amount claimed by Capital One is the correct amount. So what I would be prepared to do is, I am not going to set aside the default judgment, per se. I would set aside the amount of the default judgment, because that seems to me to be what is really in issue and what the defendant is actually taking issue with in the draft pleading.
>
> …

> [9] So that is the nature of the order that I am making. The default judgment is not set aside, but there will be a hearing to determine the amount owing, pursuant to that default judgment.

[19] The formal order with respect to Tara Patry's application is dated November 26, 2021. It reads as follows:

> The Default Judgment granted May 7, 2021 is not set aside.
>
> The parties are adjourned to the Judicial Case Manager to set a 2-hour hearing to determine the amount owing pursuant to the Default Judgment.

[20] Raymond Patry's application was then called for hearing, immediately following the Provincial Court Judge's decision on Tara Patry's application. At the judge's urging, counsel for the parties agreed that the outcome of the two applications should be the same, given their factual and legal similarities. Accordingly, the Provincial Court Judge issued an essentially identical order for Raymond Patry as the one he issued for Tara Patry.

[21] It should also be noted that the Patrys' payment hearing took place on January 11, 2022, before Judge Brownstone of the Provincial Court. Further to that hearing, Judge Brownstone confirmed that the Patrys owed the same amounts that were set out in the default judgments granted against them in May 2021.

The Supreme Court Judicial Review Proceedings

[22] On January 5, 2022, counsel for the Patrys filed petitions for judicial review in respect of Provincial Court Judge Galati's two orders. As might be expected, the two petitions are for all intents and purposes identical.

[23] They seek orders directing a reconsideration of the Provincial Court Judge's dismissals of the Patrys' applications to cancel the default orders against them. In the alternative, the Patrys ask that the Provincial Court Judge's orders be set aside, and that the default orders be set aside as well.

[24] The written pleadings prepared by the Patrys' counsel raise a number of arguments in support of the relief sought. However, the Patrys have since decided to

represent themselves. They are no longer advancing all of the arguments that were written for them by their former lawyer.

[25] Indeed, the Patrys appeared in person at the hearing of the petitions before me on September 25, 2023. Raymond Patry made detailed oral submissions on his own behalf and that of his wife, Tara Patry. She was invited to make further submissions but was content to adopt those of her husband. A written argument was also handed up for the benefit of the Court.

[26] The Patrys clarified at the hearing the precise nature of the primary argument they are advancing on judicial review. It is that the Provincial Court Judge was wrong to find that Capital One had properly served them. This is because Capital One sent its notices of claim by Xpresspost, which the Patrys say is not registered mail.

[27] The Patrys also clarified that they are not pursuing any arguments about the validity of their credit card contracts with Capital One because of a lack of consideration or legal advice.

[28] Accordingly, the focus of the parties' judicial review submissions was on the issue of whether the notices of claim were properly served. Indeed, all parties provided thorough and helpful representations, both oral and written, on this question.

[29] The only other issue that I understand to still be in dispute is whether the notices of claim were filed at the wrong Small Claims registry. This argument is clearly raised in the Patrys' petitions and addressed in Capital One's responses to petitions. While it was not the subject of any detailed oral argument at the hearing, I do not understand it to have been abandoned by the Patrys.

[30] As such, I will address the two grounds of judicial review set out in the petitions that were ultimately pursued by the Patrys. They concern allegations that Capital One's small claim proceedings are invalid because of: (1) the method of delivery used for service; and (2) the location of the registry used for filing.

[31] On the other hand, I will not consider in any detail the "further alternative" ground mentioned in the Patrys' petitions regarding how the Provincial Court Judge applied the *Miracle Feeds* Test. The Patrys did not make any express submissions with regard to this ground at the hearing. Furthermore, as has already been noted, they effectively abandoned its underpinning by dropping the lack of consideration and legal advice arguments. I would add only that, leaving aside the issue of how the notices of claim were served and filed, I can see nothing unreasonable in the Provincial Court Judge's application of the *Miracle Feeds* Test, in any event.

Analysis

[32] Adjudication of the Patrys' petitions therefore requires the following questions to be addressed:

> (1) What is the applicable standard of review?
>
> (2) Did the Provincial Court Judge make a reviewable error about service of the notices of claim?
>
> (3) Did the Provincial Court Judge make a reviewable error about filing of the notices of claim?
>
> (4) If the answer to (2) or (3) is yes, what remedy should be granted?

I will address these issues in turn.

Issue 1: Standard of Review

[33] The Patrys are challenging an interlocutory decision of a Provincial Court judge made in the context of an action under the *Small Claims Act*, R.S.B.C. 1996, c. 430. There is no dispute that such decisions are reviewable by the Supreme Court of British Columbia, pursuant to the *Judicial Review Procedure Act*, R.S.B.C.1996 c. 241 [*JRPA*].

[34] There is also no dispute that the applicable standard of review is reasonableness. This flows from our Court of Appeal's decision in *Hubbard v. Acheson*, 2009 BCCA 251, a case that also arose from a judicial review of a Provincial Court judgment that had dismissed an application to set aside a default

order. Furthermore, the continued applicability of the reasonableness standard to Provincial Court Small Claims interlocutory decisions was very recently noted by Justice Riley of this Court in *Marples v. Biddlecombe*, 2021 BCSC 1690 [*Marples*], at para. 11.

[35] The Supreme Court of Canada set out the principles to be applied when conducting judicial review on a reasonableness standard in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [*Vavilov*]. The *Marples* decision contains a helpful summary of these principles at para. 12:

> Reasonableness is a deferential standard. The reviewing court is not allowed to simply substitute its view for the view of the original decision maker. Nor is the reviewing court permitted to conduct a new analysis in an effort to determine its view of the correct outcome: *Vavilov* at para. 83. The reviewing court can only intervene where satisfied that the decision, in light of both the rationale and the outcome, was unreasonable: *Vavilov* at para. 87. The decision must be transparent, intelligible, and justified: *Vavilov* at para. 15. Thus, the reasonableness standard of review involves a consideration of both the outcome and the reasoning process that led to that outcome: *Vavilov* at para. 83. The reviewing court should adopt a "reasons first" approach: *Vavilov* at para. 84.

In other words, the Court's task here is to examine the reasons of the Provincial Court Judge in order to ascertain whether his decision is internally coherent, rational, and justified in relation to the facts and law that constrain him. Furthermore, a decision that may itself not be unreasonable is still subject to being set aside if it is based on an unreasonable chain of analysis: *Vavilov* at paras. 85 to 87.

Issue 2: Service of the Notices of Claim

The Parties' Positions

[36] The *Small Claims Rules*, B.C. Reg. 261/93, prescribe how service of a notice of claim is to be effected on an individual at Rule 2(2), as follows:

> (2) If the defendant is an individual, the notice of claim must be served by
>
> (a) leaving a copy of it with the defendant, or
>
> (b) mailing a copy of it by registered mail to the defendant.

[37] The parties agree that the issue of whether the Patrys were properly served in accordance with the requirements of Rule 2(2) of the *Small Claims Rules* was potentially dispositive of the Patrys' application to set aside the default judgment.

[38] Specifically, if service was invalid, the proceeding would be a nullity, and the resulting default order cannot be permitted to stand. This principle was noted by Justice Jenkins in *Pacific Aviation Academy of British Columbia v. Hassan*, 2017 BCSC 1259, at paras. 42 and 43:

> [42] Alternatively, I am persuaded that, as the petitioners have submitted, a default judgment given without notice to the defendant is a nullity, not merely an irregularity, as it denies the other party the right to be heard and should be set aside as of right. see *Wright v. Czinege*, 2008 BCSC 1292 [*Wright*], *Bache Halsey Stuart Sheilds Inc. v. Charles Estate*, (1982) 1982 CanLII 730 (BC SC), 40 B.C.L.R. 103 (S.C.) and *Hudson's Bay Co. v. Kallweit* (1976) 2 B.C.L.R. 92 (S.C.).
>
> [43] At para. 41 of *Wright*, Humphries J. summarized paras. 26-40 of *William v. Lake Babine Indian Band* [2000] 1 C.H.L.R. 233, a case that also concerned an application to set aside a default judgment, which are applicable in the case before me as the petitioners were never served with the Notice of Trial prior to the trial date:
>
> > There seems little question that defective service of documents cannot be cured merely by the fact that such documents have found their way into the possession of the person served. Service must be effected in a manner provided for by the Rules of Court or by such other statutory provision that may apply.
> >
> > . . .
> >
> > Service improperly effected is no service.
> >
> > . . .
> >
> > Where there has been no service of the proceedings leading up to default judgment then the judgment cannot stand, for it was obtained in circumstances where the defendant was denied an opportunity to be heard. That cannot be said to be an irregularity . . .
>
> If the petitioners were never served the Notice of Trial as required by the Rules until after the trial date, default judgment should not have been entered against them. On this basis, I find Judge De Couto's decision was unreasonable.

[39] The parties are also fundamentally agreed on the underlying facts. Capital One did send the notices of claim to the Patrys' home address by Xpresspost, as shown by Canada Post's tracking service. However, the delivery was made to a

community mailbox. Since Xpresspost does not require a recipient to acknowledge delivery through a signature or otherwise, there is no evidence to refute the Patrys' assertion under oath that they never received the notices of claim.

[40] Where the parties part company, however, is with respect to the question of witness Xpresspost constitutes "registered mail" for the purposes of Rule 2(2) of the *Small Claims Rules*.

[41] The Patrys argue that it is not registered mail because the recipient of Xpresspost mail is not required to sign for it. They say that by finding there was proper service, notwithstanding Capital One's choice to use Xpresspost to send its notices of claim, Judge Galati's decision is unreasonable.

[42] Capital One disagrees. It says that Xpresspost has been accepted by the Provincial Court as a valid method of service for the purpose of Rule 2(2) in the matter of *Capital One Bank (Canada Branch) v. Prosser*, an unreported decision dated August 3, 2021 rendered by Judge Lee [*Prosser*]. In his oral reasons, Judge Lee said the following at paras. 6 and 7 of that decision:

> [6] Now, the rules do not define what registered mail is. In this case, the claimant was served by way of Xpresspost, which is a tracked form of service or delivery where Canada Post records when a letter is picked up. The rules do not require that a Notice of Claim sent by registered mail be signed by a recipient. Indeed, if anyone was concerned that they were going to be served with a Notice of Claim, that person is unlikely to ever pick up a registered letter.
>
> [7] The *Small Claims Act* is intended as a means of an inexpensive and speedy method of resolving disputes, and the ability to serve by registered mail is in keeping with this. I am satisfied that service by Xpresspost meets the requirements to service by registered mail, as set out in Rule 2(2).

Counsel for Capital One argues that it was not unreasonable for Judge Galati to conclude that the Patrys were validly served through Xpresspost, given the precedent established by Judge Lee in *Prosser*.

Discussion

[43] In its very recent decision in *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, [*Mason*], the Supreme Court of Canada reaffirmed the analytical principles for conducting reasonableness judicial review that were set out in *Vavilov*. It also highlighted the importance of doing so using a "reasons first" approach. This means that the reviewing court must begin its analysis with the reasons of the decision-maker. The court must not start with its own perception of the merits, as doing so creates a risk that the court might inadvertently try to decide the issue itself. This is what is known as "disguised correctness review", and is impermissible when the standard of review is reasonableness: *Mason* at paras. 58 to 63, and 68.

[44] I will therefore begin with an examination of the Provincial Court Judge's reasons for finding that the Patrys were validly served.

[45] They are very brief. In fact, they are only one sentence long:

> [1] With respect to the service issue, I am not going to - particularly in light of Judge Lee's decision, which I am not familiar with - I am not prepared to say that service by Express Post [*sic*] is not valid service.

[46] With the greatest of respect to the Provincial Court Judge, such a brief analysis of the "service issue" does not stand up to reasonableness review. This is because it does not enable one to understand how and why he made the decision he made, and whether it is within the range of what is acceptable given the evidence presented and the applicable legal framework. According to *Vavilov*, at paras. 99 and 102:

> [99] A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision.
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> …
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> [102] To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error" ….

> However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived".

[47] In this case, the question of whether service by Xpresspost is "registered mail" for the purposes of Rule 2(2) of the *Small Claims Rules* was squarely raised by the Patrys. Its answer is not obvious. Therefore, a simple statement by the decider that he is not prepared to accept an argument that service was invalid cannot meet the reasonableness standard.

[48] Accordingly, I find this aspect of the Provincial Court Judge's decision to be unreasonable.

[49] I have reached this conclusion while recognizing that I must not assess a statutory decision-maker's reasons against a standard of perfection (*Vavilov* at para. 91). However, even on a generous reading done in conjunction with the record, I cannot trace from the Provincial Court Judge's reasons why he accepted Xpresspost as being a valid form of service.

[50] Now, it is true that the Provincial Court Judge referenced and acknowledged the existence of Judge Lee's decision in *Prosser*. However, Judge Galati candidly stated that he was not familiar with *Prosser*, and he did not adopt Judge Lee's reasons as his own. In these circumstances, I cannot decide this petition as if there has been an incorporation by reference of the *Prosser* reasons which would then become the subject of this judicial review.

[51] Furthermore, I am not prepared to find that Judge Galati was bound to follow *Prosser* as a matter of horizontal *stare decisis*, as counsel for Capital One urges me to do. This is because I am not satisfied that Judge Lee was able to fully and properly consider the issue of whether Xpresspost is registered mail for the purpose of Rule 2(2) of the *Small Claims Rules* in the apparently exigent circumstances of Ms. Prosser's chambers application before him: *R. v. Sullivan*, 2022 SCC 19 at paras. 75 and 78.

[52] Indeed, as I have already noted, it is apparent that the question of whether Xpresspost constitutes registered mail for the purposes of Rule 2(2) of the *Small Claims Rules* does not lend itself to an obvious answer. I say this for the following three reasons.

[53] First, the term "registered mail" is not defined in the *Small Claims Rules*. While s. 1 of the *Interpretation Act*, R.S.B.C. 1996 c. 238 provides that "'registered mail' includes certified mail", this clarification does not answer the question in relation to Xpresspost either.

[54] Second, in addition to *Prosser*, there are a number of other decisions rendered by Canadian courts and tribunals that have grappled with whether Xpresspost constitutes a form of acceptable registered mail under other legislation. The conclusions reached are inconsistent and highly contextual.

[55] For example, the reasons for decision in the following four cases indicate that the decision maker was of the view that Xpresspost is an acceptable form of legal notification or service, within the applicable statutory context:

> (a) *Biogen Idec Ma Inc. v. Canada (Attorney General)*, 2016 FC 517: The Federal Court found a delivery of submissions to the Commissioner of Patents through Xpresspost is valid, for the purposes of s. 5(4) of the *Patent Rules*, (SOR 2019-251).
>
> (b) *Kawana v. Shemal*, 2013 BCSC 1573: The Supreme Court of British Columbia effectively found that a notice to commence an action to enforce a claim of lien mailed by Xpresspost was validly served, pursuant to s. 33(3) of the *Builders Lien Act*, S.B.C. 1997 c. 45.
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> (c) *Institute of Chartered Accountants of Alberta (Complaints Inquiry Committee) v. Barry*, 2016 ABCA 354. The Alberta Court of Appeal found that notice of a discipline hearing sent by Xpresspost was validly served, pursuant to s. 132 of the *Regulated Accounting Profession Act*, RSA 2000 c. R-12.

(d) *Biggs (Re)*, 2014 NSLB 243, the Nova Scotia Labour Board found that Xpresspost is an acceptable form for serving documents, pursuant to s. 40 of the *Occupational Health and Safety Act*, SNS 1996 c. 7.

[56] However, the reasons for decision in the following four cases suggest that the decision maker was of the view that Xpresspost is not the same as registered mail:

(a) *Augier v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1185: A Federal Court judge found that a prothonotary had erred in finding that a notice of decision was sent by registered mail when the notice was actually sent in an Xpresspost envelope.

(b) *Pursuit International Investigations Limited (Re)*, 2005 CanLII 93926 BCEST: The British Columbia Employment Standards Tribunal was not satisfied that a delegate of the Director of Employment Standards had properly sent official correspondence to a party since it was delivered by Xpresspost, and not by registered mail or through personal service.

(c) *Lee v. Brown*, 2011 CanLII 64135 ONLRB: While the Ontario Labour Relations Board found that an Employment Standards officer's Order to Pay was validly served by Xpresspost, the Board effectively noted that Xpresspost is not the same as "Canada Post regular or registered mail service".

(d) *Edmonton City v. Edmonton City Assessment Review Board*, 2012 ABQB 399: The Alberta Court of Queen's Bench noted that a party filing a complaint to an assessment review board could have mailed it by way of "priority post, Xpresspost or registered mail", suggesting that these are three different methods of delivery, although perhaps functionally equivalent.

[57] Finally, determining whether Xpresspost is an acceptable form of "registered mail" that can be used to serve legal documents requires two analytical exercises. First, a statutory interpretation of the specific legislation that prescribes how service is to be effected. Second, a factual assessment of the manner by which Xpresspost operates. Logically, the focus of this assessment would be on the extent to which

delivery by Xpresspost provides assurance that documents will come to the attention of their intended recipients, as well as the cost and speed of the service. Other factors may also be relevant. In any event, it bears repeating that the conclusion that will be reached by the decision-maker after these analyses are performed is by no means preordained or predictable with any certainty.

[58] In sum, the Patrys' argument that they were not properly served because Xpresspost does not constitute "registered mail" under the *Small Claims Rules* is deserving of serious consideration. Its dismissal without any real analysis by the Provincial Court Judge is unreasonable and cannot be allowed to stand on judicial review.

Issue 3: Filing of the Notices of Claim

The Parties' Positions

[59] Rule 1(2) of the *Small Claims Rules* prescribes the location where a claimant must file a notice of claim as follows:

> A claimant must file a notice of claim and an address for service and pay the required fee at the Small Claims registry nearest to where
>
> (a) the defendant lives or carries on business, or
>
> (b) the transaction or event that resulted in the claim took place.

[60] Capital One filed its notices of claim against the Patrys in the Vancouver Small Claims registry, even though there is also a Small Claims registry in Surrey.

[61] The Patrys argued before the Provincial Court Judge that since the Patrys live in Surrey, the notices of claim had to be filed at the Surrey Small Claims registry. Capital One's choice to file at the Vancouver Small Claims registry instead is therefore contrary to Rule 1(2) and renders the proceedings against them a nullity.

[62] However, this argument was not dealt with by the Provincial Court Judge. In fact, his reasons for judgment contain no mention of the filing location issue at all. The Patrys now argue on judicial review that the Provincial Court Judge's failure to address this issue constitutes a reviewable error.

[63] As for Capital One, there is no indication that its counsel presented any specific response to the Patrys' filing location argument before the Provincial Court Judge. In addition, Capital One does not dispute that the Provincial Court Judge's reasons are silent on this issue.

[64] However, counsel for Capital One nonetheless argues now that this aspect of the Patrys' judicial review application is without merit. Under Part 4 (Factual Basis) of the response to petition filed on behalf of Capital One, it states:

> 41. The failure to file in the proper registry does not nullify an action. The remedy would be a transfer application, and possibly in extreme cases, costs.

In addition, under Part 5 (Legal Basis), counsel for Capital One wrote:

> 24. Similarly, the petitioner made no application to transfer the matter to the Surrey Registry. Even if the petitioner had done so, the failure to file in the correct registry does not nullify an action.

Capital One has provided no authority for these propositions, however.

Discussion

[65] It is implicit that the Provincial Court Judge did not accept the Patrys' argument that the default judgments against them should be set aside because the originating claims were filed at the wrong registry. However, as agreed to by the parties, no reasons for this implicit conclusion were provided.

[66] In my view, the issue of whether a notice of claim is a nullity if it is not filed at the proper Small Claims registry, as prescribed by Rule 1(2) of the *Small Claims Rules*, is also a valid one that is deserving of analysis and a reasoned conclusion. Because none has been provided, it is impossible for this Court on judicial review to understand the basis for the Provincial Court Judge's implicit holding that the claims against the Patrys were validly filed.

[67] Furthermore, I do not accept that the Patrys' argument on this issue is bound to fail, as Capital One seems to suggest. In the absence of any binding authority, it is not self-evident that filing a notice of claim contrary to the Rule 1(2) requirement is a mere irregularity that does not impact its validity. That said, it is possible that a judge

of the Provincial Court might come to that conclusion, after giving the matter due consideration.

[68] In sum, for essentially the same reasons provided above in relation to the Xpresspost service issue, I find that the Provincial Court Judge's implicit decision on the registry location filing issue is also unreasonable and does not withstand judicial review.

Issue 4: Remedy

[69] I have found the Provincial Court Judge's orders to not set aside the default judgments against the Patrys are unreasonable. Accordingly, the Provincial Court Judge's orders to that effect will be set aside, pursuant to s. 7 of the *JRPA*.

[70] In terms of next steps, the Supreme Court of Canada held in *Vavilov* that when a decision under review is found to be unreasonable, it is generally appropriate to remit the underlying proceeding to the decision-maker for reconsideration:

> [141] Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome…

[71] In my view, it would indeed be best for the Patrys' application to be sent back to the Provincial Court, so that it can be re-determined in accordance with these reasons. As I have already noted, this is not one of those cases where the outcome is inevitable, and therefore remitting it would serve no useful purpose: *Vavilov* at para. 142.

[72] To the contrary, it is my understanding that it would be of significant utility to both the parties and the public for the Provincial Court to address the two contentious questions raised by the Patrys. I make this observation based on an affidavit filed in this proceeding by Capital One that was sworn by Alan Chim, counsel for Capital One, who appeared before the Provincial Court in this matter. Mr. Chim deposes as follows:

> 4. Over the past 15 years, I have commenced over 500 claims on behalf of my clients at the Robson Square Provincial Court Registry and obtained default judgments which were supported by a Certificate of Service evidencing service by way of Canada Post Xpresspost.

[73] Specifically, the Provincial Court will be directed to reconsider the issue of whether the default orders against the Patrys should be set aside. This reconsideration should include an assessment of whether Capital One's notices of claim were:

> (1) validly filed in accordance with Rule 1(2) of the *Small Claims Rules*; and
>
> (2) validly served in accordance with Rule 2(2) of the *Small Claims Rules*.

These directions will be made pursuant to s. 5 of the *JRPA*.

[74] Before concluding, however, there are two remaining matters to address with respect to remedy.

[75] First, the Patrys have also asked that I direct that a judge other than Judge Galati is to hear the reconsideration of their applications. I will not make such a direction. The determination of which judge should be assigned to this matter is one that should be made by the Chief Judge of the Provincial Court, at her entire discretion.

[76] Second, counsel for Capital One raised in his oral submissions a concern regarding the impact of these petitions on the January 11, 2022 orders of Judge Brownstone. In particular, he queries whether they would remain in force in the event these petitions are allowed. Given my decision to grant the petitions, counsel's concern is a valid one.

[77] Judge Brownstone's orders arose further to the payment hearings that were effectively ordered by Judge Galati on November 26, 2021. That aspect of Judge Galati's orders has not been directly challenged and is not set aside. Accordingly, Judge Brownstone's orders of January 11, 2022 still stand. However, if, following reconsideration of the Patrys' applications, the default orders are set aside, then

presumably Judge Brownstone's orders confirming the amount payable under those default orders would necessarily become nullities as well, since they would lose their judicial foundation.

Disposition

[78] For all of these reasons, the following order is issued:

(1) The petitions of Raymond Patry and Tara Patry are allowed;

(2) The following portion of the November 26, 2021 order of the Provincial Court Judge in respect of Raymond Patry is set aside:

"The default judgment granted May 13, 2021 is not set aside";

(3) The following portion of the November 26, 2021 order of the Provincial Court Judge in respect of Tara Patry is set aside:

"The default judgment granted May 7, 2021 is not set aside."

(4) The Provincial Court is directed to reconsider the October 29, 2021 applications to set aside default orders issued by the Provincial Court in respect of Raymond Patry and Tara Patry, in accordance with these reasons.

(SUBMISSIONS ON COSTS)

[79] THE COURT: So, the Patrys have been substantially successful in this application. While I understand that the matter came on largely because of the respondent's efforts, and that this matter has a public interest, in my discretion, I find that these considerations do not justify a departure from the standard principle that costs follow the event. Capital One will be ordered to pay the Patrys their costs of their petitions at Scale B. There will also be no stay of this order.

[80] I will also order that the signatures of the Patrys on the orders will be dispensed with. This is being ordered on consent by both parties. Finally, I will direct that a transcript of these reasons for judgment be ordered by the Court on an

expedited basis, as they will be needed by both the parties and the Provincial Court, for its reconsideration. Unless there are any further questions, we are concluded.

"Brongers J."