Court of Appeal for Saskatchewan
Docket: CACV3994

Citation: *Ernst & Young Inc. v Koroluk*, 2024 SKCA 19
Date: 2024-02-27

Between:

Ernst & Young Inc.

Appellant
(Defendant)

And

Randy Koroluk

Respondent
(Plaintiff)

And

Dan Anderson, Tom Archibald, Francis Bast, Doug Frondall, Mike Hough, Will Olive, Tom Robinson and Irene Seiferling

Respondents
(Defendants)

Before:	Barrington-Foote, Tholl and McCreary JJ.A.
Disposition:	Appeal allowed
Written reasons by:	The Honourable Mr. Justice Tholl
In concurrence:	The Honourable Mr. Justice Barrington-Foote The Honourable Madam Justice McCreary
On appeal from:	2022 SKQB 61, Regina
Appeal heard:	January 11, 2024
Counsel:	Doug Hodson, K.C., for the Appellant Tony Merchant, K.C., for Randy Koroluk Amanda Quayle, K.C., for the other Respondents

Tholl J.A.

I. INTRODUCTION

[1] Randy Koroluk is the plaintiff in a prospective class action. He amended his statement of claim to include Ernst & Young Inc. [EYI] as a defendant, but he took no steps to serve it. About 14 months after the statement of claim was amended in this way, EYI became aware that it had been named as a defendant in the action and obtained a copy of the claim. Its counsel promptly wrote to Mr. Koroluk's counsel, informed him that the claim had never been served on it, and stated that it considered the claim to have been abandoned. Mr. Koroluk's counsel did not respond to the letter, but after 16 further months, he applied to the Court of Queen's Bench (now the Court of King's Bench) to, inter alia, have EYI's receipt of the amended statement of claim validated as constituting service. That order was granted: *Koroluk v Anderson*, 2022 SKQB 61 [*Chambers Decision*].

[2] EYI appeals and asserts that the Chambers judge erred by finding that mere knowledge that a statement of claim has been issued is sufficient to validate service and that, even if such mere notice is sufficient, she erred by validating service. There is an additional, and inconsequential, issue regarding the confirmation of a without notice order that will be discussed briefly below.

[3] For the reasons that follow, the appeal is allowed and the order validating service on EYI is set aside.

II. BACKGROUND

[4] On June 12, 2018, Mr. Koroluk had a statement of claim issued against eight directors of PrimeWest Mortgage Investment Corporation [PrimeWest]. The claim seeks to become a class action with Mr. Koroluk as the representative plaintiff. It relates to losses allegedly suffered by investors. On December 3, 2018, Mr. Koroluk amended his claim and added EYI as a defendant. He alleges that EYI had been retained by PrimeWest to perform audit services in 2014, 2015, and 2016 and was negligent in that capacity.

[5] Mr. Koroluk did not serve any of the defendants within six months of the initial issuance of the statement of claim as required under Rule 3-10 of *The Queen's Bench Rules*. On December 19, 2018, he obtained an order, upon application without notice, extending the time in which to serve the amended claim to June 15, 2019, with leave to apply for further time if necessary. Mr. Koroluk obtained a second order on a without notice application on September 6, 2019, further extending the time for service to March 6, 2020.

[6] In the meantime, a liquidator had been appointed for PrimeWest. On approximately January 15, 2020, the liquidator wrote to EYI advising it that EYI had been named as a defendant in the action commenced by Mr. Koroluk. Counsel for the liquidator subsequently provided a copy of the amended claim to EYI's counsel. It is undisputed that a copy of the amended claim came into EYI's possession on February 6, 2020. There is no evidence that it had any knowledge of the claim before that date.

[7] EYI is a federally incorporated business corporation with its registered office listed in the Saskatchewan Corporate Registry. It also has a physical office in Saskatoon. Mr. Koroluk pleaded these facts in paragraph 11 of his amended statement of claim. It is undisputed that Mr. Koroluk never made any attempts to serve the amended statement of claim on EYI at any point at its registered office or at its physical office. Mr. Koroluk had no difficulty serving EYI with the application that forms the basis of this appeal.

[8] On March 16, 2020, EYI's counsel wrote the following letter to Mr. Koroluk's counsel:

> I am in house counsel and am writing on behalf of Ernst & Young Inc. ("EYI").
>
> On February 6, 2020, we received correspondence from the Liquidator for PrimeWest Mortgage Investment Corporation ("PrimeWest") indicating that EYI may be a creditor in the liquidation. On further investigation, we learned that a Statement of Claim (the "SoC") in *Koroluk v. Anderson et al*. QBG 1727/2018 (issued June 12, 2018) was amended on December 3, 2018 to name EYI as an additional defendant, and that the period for service was extended to June 15, 2019.
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> The amended SoC has never been served on EYI. We had no knowledge of it until contacted by the Liquidator. The period for service has not been further extended. The limitation period for the underlying claim set forth in the SoC has now expired. It appears that the action never got off the ground as against EYI and was abandoned.
>
> As an aside, please note that EYI is a licensed Trustee in Bankruptcy and performs insolvency-related services only. It played no part in the audits referred to [in] the unserved SoC. As evidenced by the audit reports filed on SEDAR, audits of PrimeWest were performed by Ernst & Young LLP.

> Recent case law makes it clear that the claim set out in the unserved SoC -- even if properly served and made against the right party -- could not succeed. I draw your attention to the Supreme Court of Canada decision in *Livent v. Deloitte & Touche*, the Ontario Court of Appeal decision in *Lavender v. Miller Bernstein*, and the recent Ontario Superior Court decision in *Whitehouse v. BDO Canada LLP*, attached for ease of reference. These decisions reaffirm the Supreme Court's 1997 landmark ruling in the *Hercules Management Ltd. v. Ernst & Young* case and make it clear that the Plaintiffs in the SoC could not sustain a claim against the auditor.
>
> For the moment, we have filed a contingent claim in the Liquidation, on the basis, inter alia, of PrimeWest's written indemnities contained in the relevant audit engagement agreements between PrimeWest and Ernst & Young LLP, which would fully indemnify EY parties against the claims asserted in the unserved SoC.
>
> We understand that an application is scheduled to be heard on March 19, 2020 addressing whether action 1727/2018 is properly included in the Liquidation. We will support what we understand to be the Liquidator's position that the action has to be included in the Liquidation, as it would [be] impossible for the Liquidation to [be] completed until the indemnity claims in our proof of claim are resolved.
>
> As indicated above, it appears to us that the unserved SoC has been abandoned as against EYI , and in any event, even if a claim were brought and served on the correct party, it would be bound to fail. If we are correct that you do not intend to proceed as against EYI, I would appreciate that this be confirmed to us in writing. Specifically, if you will confirm in writing that:
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> > (i) you do not intend to proceed against EYI or any EY party,
> >
> > (ii) you undertake not to amend the SoC or seek to extend the service period as against EYI or any EY party, and
> >
> > (iii) you undertake not to commence any fresh proceeding against EYI or any EY party,
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> we will advise the Liquidator accordingly, and will take no position in the March 19 application.

[9] Mr. Koroluk's counsel did not respond to the letter, and EYI's counsel did not correspond further with him on the issue.

[10] The liquidation proceedings for PrimeWest continued, and in the course of that matter, a fiat was rendered on July 7, 2020, by Gabrielson J., in which he noted that "Ernst & Young has not been served with a copy of the statement of claim" (*Re PrimeWest Mortgage Investment Corporation* (7 July 2020) Saskatoon, QBG 1455 of 2019 (Sask QB) at para 19). The fiat arose out of an application by Mr. Koroluk.

[11] On July 8, 2021, Mr. Koroluk filed an application with the Court of Queen's Bench seeking to validate service on EYI and certain other defendants, pursuant to Rule 12-1. He also applied to extend the time for service on EYI and four other defendants and for an order permitting electronic service.

[12] In an affidavit filed in response to Mr. Koroluk's applications, EYI's Associate General Counsel averred that the amended statement of claim relates to audits of PrimeWest performed in 2014, 2015, and 2016 by a different entity, being Ernst & Young LLP. As noted in his March 16, 2020, letter, he asserts that EYI is a trustee in bankruptcy and never provided any services to PrimeWest. He further says that 19 different individuals worked on the audit team during that period and, of that number, 10 are no longer employed by Ernst & Young LLP. Particularly, 6 individuals who worked on the 2016 audit left in the period of August 17, 2018, to March 27, 2019. As part of standard business procedure, the former employees' laptop computers were wiped and their email-calendar accounts were deleted before EYI became aware of the amended statement of claim. An exception to this standard procedure applies if a statement of claim has been served on Ernst & Young LLP. If that occurs, it takes steps to preserve relevant information on laptops and suspends the deletion of relevant email-calendar accounts. It did not do so with the employees noted here.

III. CHAMBERS DECISION

[13] The Chambers judge first addressed the application to validate service. She described the background of the matter, listed which defendants had been properly served with the amended statement of claim, detailed the efforts to serve the other defendants, and found that no effort had been made to serve EYI. She analyzed the service issues in relation to the defendants, excluding EYI, and validated service on them. As that part of her decision is not challenged, I will not describe that aspect further.

[14] Turning to service on EYI, the Chambers judge noted EYI's evidence regarding when it had received a copy of the claim, its counsel's March 16, 2020, letter to Mr. Koroluk's counsel, and EYI's description of its alleged prejudice in relation to the departure of employees and deletion of the information from their laptops and email folders. She then set out the rules of court that were in play:

Time for service of statement of claim

3-10(1) Unless an enactment provides otherwise, a statement of claim must be served on the defendant within 6 months after the date that the statement of claim is issued unless the Court, on application, grants an extension of time for service.

(2) An application for an extension of time for service pursuant to this rule may be made without notice, before or after the expiration of the time for service.

…

Validating or setting aside service

12-1(1) Subject to the express provisions of any enactment and notwithstanding any rule respecting service, the Court has discretion to validate or set aside the service of any document.

(2) The primary consideration for the Court in the exercise of its discretion is that the person served or to be served:

(a) received notice of the document; or

(b) would have received notice except for the attempts of that person to evade service.

(3) If the Court is satisfied that the person to be served received notice of the document, the Court may:

(a) validate any irregular or unauthorized service of a document; and

(b) impose any terms that it considers appropriate on the validation.

[15] After listing some of the relevant jurisprudence, including *McAdam v Grimard*, 2017 SKQB 39, 7 CPC (8th) 123 [*McAdam*], and *Emigh v Diamond Messenger Services (Saskatoon) Ltd.* (1987), 65 Sask R 264 (QB) [*Emigh*], the Chambers judge noted that there was no question that the amended statement of claim was in the hands of EYI as of February of 2020 because of its participation in the liquidation proceedings. She then determined that she must first decide whether to confirm the September 6, 2019, without notice order – which had extended the time for service on a without notice application by Mr. Koroluk – before moving on to the issue of validation of service. Neither party had applied for such relief or requested that she do so. After analyzing the issue, she confirmed the September 6, 2019, order. Her reasons for doing so are not relevant to this appeal, except to the extent that they overlap with the main issue of service validation. Having concluded that the September 6, 2019, order should be confirmed, the Chambers judge summarily validated the service on all the defendants who had not yet been served, including EYI.

[16] In the course of her reasons, the Chambers judge made the following pertinent findings (*Chambers Decision*):

> [6] Mr. Koroluk made many efforts to serve the individual defendants, before and after the two applications to extend the time for service. However, Mr. Koroluk made no effort to serve E&Y [EYI].
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> …
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> [15] Mr. Koroluk seeks to validate service of the claim on the unserved Directors and E&Y. He relies on materials filed in the Liquidation Proceedings to establish that the unserved Directors received notice of the Statement of Claim in early 2020.
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> …
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> [19] In *Emigh v Diamond Messenger Services (Saskatoon) Ltd.* (1987), 65 Sask R 264 (QB), Gerein J. held that documents do not have to be served on an opposing party when it is clear the opposing party has the documents … .
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> …
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> [26] The first issue to determine is whether to validate service on the unserved Directors and on E&Y. Klatt J.'s order of September 6, 2019, extended the time for service of the claim to March 6, 2020. There is no controversy that the claim was in the hands of the unserved Directors and E&Y in February 2020 because of their participation in the Liquidation Proceedings.
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> [27] As held by Goebel J. in *McAdam*, I may "validate irregular or unauthorized modes of service where [I am] satisfied that as a result of such methods, notice has reached the hands or minds of the intended parties": *McAdam* at para 24. I am satisfied here that the defendants had clear notice of the claim within the currency of Justice Klatt's order.
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> …
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> [39] The amended Statement of Claim that added E&Y as a party was issued on December 3, 2018. Relevant employees of E&Y departed between August 17, 2018 and March 27, 2019 and in the ensuing months the contents of computer hard drives were deleted: affidavit of Donald Hanna, sworn August 11, 2021, paras. 19–24. Therefore, even if E&Y had been served during the initial six month time frame, it is likely information would have been deleted.
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> …
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> [43] … E&Y has not demonstrated how the lost information prejudices its defence, only that it might do so. On the other hand, if the time to serve the claim is not extended, Mr. Koroluk and the class of members he represents will lose the right to bring their claim. Moreover, because the parties were participating in KPMG's application during the Liquidation Proceedings, the defendants were well aware of the claim against them. On balance, I am satisfied Mr. Koroluk would suffer the greater prejudice if he were denied an order extending the time for service.
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> [44] In conclusion, I find it is appropriate to validate service of the Statement of Claim on Dan Anderson, Francis Bast, Doug Frondall, Tom Robinson, and E&Y. As I have confirmed the service on the defendants, further service of the Statement of Claim is unnecessary.

[17] As a result of her decision on validation of service, the Chambers judge did not make an order with respect to Mr. Koroluk's application to further extend the time for service or for directions regarding electronic service.

[18] Leave to appeal was granted by Barrington-Foote J.A. on July 26, 2022: *Ernst & Young Inc. v Koroluk*, 2022 SKCA 81. Only EYI has appealed the *Chambers Decision*.

IV. ISSUES

[19] The following issues arise in this matter:

(a) Can service be validated under Rule 12-1 when the plaintiff has made no efforts to serve the defendant?

(b) Is mere notice sufficient to validate service under Rule 12-1?

(c) Did the Chambers judge otherwise err in determining that service on EYI should be validated under Rule 12-1?

(d) Did the Chambers judge err by requiring confirmation of the September 6, 2019, order before validating service of the amended claim on EYI?

[20] The last issue is a minor one that, while not abandoned by EYI, was not vigorously pursued. In light of my determination on the first three issues, it need not be addressed.

V. ANALYSIS

A. Standard of review

[21] This is an appeal of a discretionary decision. However, that does not determine the standard of review. As the majority noted in *Stromberg v Olafson*, 2023 SKCA 67, 45 BLR (6th) 171 [Stromberg], "the real issue that always arises in relation to the standard of review is not whether the decision being appealed has been or could be categorized as discretionary. Rather, the standard of review depends on the nature of the error alleged" (at para 120). That principle was discussed in *MacInnis v Bayer*, 2023 SKCA 37:

> [38] … an alleged error by a court in arriving at a discretionary decision is subject to appellate review in accordance with the appellate standards of review specified in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235. As is always the case, the standard of review depends on the nature of the error alleged, not the type of decision that was made. The standard of review in relation to alleged errors of law is correctness, where no deference is called for. An appellate court may intervene in a discretionary decision if there

> has been an error of law, including an error in the identification or application of the legal criteria that govern the exercise of the discretion: "Such errors may include a failure to give any or sufficient weight to a relevant consideration" (*Kot v Kot*, 2021 SKCA 4 at para 20, 63 ETR (4th) 161).
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> [39] An appellate court may also intervene if there has been a palpable and overriding error of fact or of mixed fact and law: see also, for example, *676083 B.C. Ltd. v Revolution Resource Recovery Inc.*, 2021 BCCA 85 at para 30, 49 BCLR (6th) 101; *Ernst & Young v Koroluk*, 2022 SKCA 81 at paras 25–26; *Finkel v Coast Capital Credit Union*, 2017 BCCA 361 at para 55, 2 BCLR (6th) 300; *AIC Limited v Fischer*, 2013 SCC 69 at para 65, [2013] 3 SCR 949 [*Fischer*]; and *Lewis v WestJet Airlines Ltd*., 2022 BCCA 145 at paras 30–31, 468 DLR (4th) 713. However, an appellate court is not entitled to substitute its own decision for that of the judge merely because it would have exercised the discretion differently: *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 76–77.

See also *Abrametz v Law Society of Saskatchewan*, 2023 SKCA 114 at paras 23–30, 18 Admin LR (7th) 1, which summarizes the evolution of the Court's approach to the discretionary standard and *Stromberg* at paras 117–122.

[22] In *Stromberg*, the majority discussed the significance of a decision being characterized as discretionary:

> [119] … the Federal Court of Appeal adopted the *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235, standards of review where the appeal is of a discretionary, interlocutory order in *Decor Grates Incorporated v Imperial Manufacturing Group Inc.*, 2015 FCA 100 at paras 14–29, [2016] 1 FCR 246. As Stratas J.A. commented in that case, "Discretionary orders, such as the one in issue in this case, are the result of applying law to the facts of particular cases — in other words, they are questions of mixed fact and law" (at para 18). I agree. The description of a decision as discretionary is best understood as a shorthand statement that the legal principles that govern the decision such that they contemplate more than one potential outcome, based on the application of the judgment of the court with the authority to find the facts and applies those principles. That may be so, for example, because there are a number of factors that may or may not properly be found to apply on the facts, the weight that may properly be accorded to different factors, or the nature of a governing principle.

[23] Here, EYI contends that the Chambers judge erred in interpreting *The Queen's Bench Rules* (now *The King's Bench Rules*). That is, an allegation that she erred in law, reviewable on the correctness standard. EYI also claims that, even if there were no error in her interpretation of the *Rules*, the Chambers judge erred in the application of the law to the facts. That would constitute an error of mixed fact and law, reviewable on the palpable and overriding error standard.

B. Efforts to serve a defendant

[24] As I have already observed, it is uncontroverted that Mr. Koroluk made no effort of any kind to serve EYI with the amended statement of claim. The affidavit material provides no explanation whatsoever regarding this aspect of the matter. Likewise, Mr. Koroluk's submissions pointed to no reasons for the absence of attempts at service in this specific matter.

[25] EYI argues that service should not have been validated under Rule 12-1, because that rule only permits a judge to validate any *irregular or unauthorized service*. It asserts that in order to fit into Rule 12-1, there must have been some manner or mode of service that was irregular or unauthorized for that method to be validated as constituting service. A complete absence of any effort, in its view, cannot meet this requirement. In response, Mr. Koroluk submits that the rule does not require any actions to have been taken by a plaintiff.

[26] As candidly admitted by EYI, it was unable to locate any cases that explicitly state that attempts at service must be made before Rule 12-1 can be relied upon for validation. However, it argues that every case referenced by the Chambers judge and the parties involved a party first endeavouring to serve the opposite party before resorting to Rule 12-1. The question is whether any such effort is a requirement before a party can have service validated under the rule.

[27] As a starting point, I note that Rule 12-1 cannot remedy a plaintiff's non-compliance with the service requirements imposed by statute: *Palen v Dagenais*, 2018 SKQB 288 at para 16, and Rule 12-1(1). Otherwise, the Court of King's Bench "has broad authority under Rule 12-1 to validate irregular service of a document where notice of the document was received" (*McAdam* at para 22). I agree with the following summary description in *McAdam* of the approach that has been taken by judges of the King's Bench for validating service under Rule 12-1:

> [24] In other words, the court is generally prepared to validate irregular or unauthorized modes of service where it is satisfied that as a result of such methods, notice has reached the hands or minds of the intended parties: *Re Avery*, [1952] OR 192 (Ont CA). If this has not occurred, unauthorized modes of service should not be validated and even valid modes of service may be set aside.

[28] Rule 12-1 does not explicitly state that the plaintiff must take any steps in an attempt to serve a defendant, but on the other hand, it also does not say that a plaintiff can completely forego serving a document and jump right to a validation application. No decision has been identified that calls for some effort on the part of the plaintiff, or anyone else, to serve a document before Rule 12-1 can be invoked. Conversely, no case has been cited to the opposite effect. However, in every case where service was validated under this rule, some positive attempt at service had been made by the plaintiff.

[29] Turning more comprehensively to the jurisprudence, I note that service has been validated under this rule "where the defendant clearly had notice by way of positive engagement in the process" (*McAdam* at para 22, referencing *Mitchell v Mitchell* (1995), 138 Sask R 116 (QB) [*Mitchell*]). In *Mitchell*, the plaintiff challenged a writ of execution that the Maintenance Enforcement Office had registered against his property. The creditor on the registered writ was listed as "Janet Marie Mitchell, c/o W. Brent Cotter, Deputy Minister of Justice, Civil Law Branch, 9th Floor, 1874 Scarth Street, Regina, Saskatchewan S4P 3V7" (at para 8). The plaintiff served his statement of claim "c/o W. Brent Cotter" (at para 4), and his office sent a copy of the statement of claim to the defendant's lawyer. The defendant then applied for, inter alia, an order compelling the plaintiff to serve her directly with the document. The Chambers judge hearing the service matter validated service after finding that the defendant, by launching an application against the proceedings, had "entered into the process in a positive and active way" and that it would be "foolish to now require that the statement of claim be served again" (at para 11).

[30] Service has also been validated in cases where the "service was irregular but the party was aware of the claim" (*McAdam* at para 22), referencing *Emigh*. In *Emigh*, the statement of claim was served on a courier driver who had been retained as an independent contractor for the corporate defendant. At the same time, several garnishee summonses before judgment were issued and funds were paid to the court in response. The Chambers judge found that the mode of service was improper because the courier driver did not qualify as someone who could be validly served for the corporation. However, the Chambers judge also found it "impossible to believe that the applicant had no knowledge that certain of its monies had been attached" and that the applicant "did not receive notice of the proceedings" (at para 7). The service was thus validated.

[31] In *Levy v Levy*, 2022 SKCA 126, the appellant was noted in default for failing to reply to her spouse's petition for divorce. The Chambers judge ruled that the respondent's application for judgment was to be brought with notice and served on the appellant in accordance with the rules. The respondent's process server made three unsuccessful attempts to personally serve the appellant at her home. Counsel for the respondent then emailed the application for judgment to the appellant, and this message was successfully transmitted. The appellant did not attend the hearing. The Chambers judge determined that the appellant had received notice of the application, validated the service by email, and granted judgment in the appellant's absence. The appellant argued that she had not received the notice of the application and that the Chambers judge had erred by granting judgment. Justice McCreary provided the following rationale for affirming the Chambers judge's decision to validate service:

> [17] In the Chambers judge's November 25, 2021, fiat that accompanied the Judgment, she stated: "The court accepts that Ms. Levy had notice of this application, certainly by email on November 10th, 2021". I am not persuaded that this finding of fact constitutes a palpable and overriding error. On the contrary, the record demonstrates that Ms. Levy was served with the application for judgment on at least two occasions at the email address she had consistently used, and that on one occasion she replied to Mr. Levy's legal counsel in direct response to service of the application.
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> [18] Ms. Levy had an opportunity to respond to the petition and to the application for judgment, but she did not do so. She has not provided an explanation for why she did not respond, despite the record demonstrating that she corresponded electronically several times with Mr. Levy's counsel from the email address at which she was served with the application for judgment during the relevant time period. Respectfully, the Court of Appeal is not empowered to overturn lower court decisions simply because a litigant failed or refused to participate in the lower court process and, having judgment entered against them, does not like the result. The Judgment was not issued on the basis of any palpable and overriding errors of fact, which would allow this Court to intervene.

[32] In *Anstead v Saskatchewan Medical Association*, 2013 SKQB 185, 420 Sask R 290 [*Anstead*], the plaintiff applied to have a judge designated to consider a certification application. Chief Justice Popescul noted that, before this could occur, it was "necessary for the plaintiff to establish that all named defendants [had] been properly served and that proof of such service [was] filed with the Court" (at para 2, referencing *Adams v Canadian Tobacco Manufacturers' Counsel*, 2009 SKQB 387, 344 Sask R 37). The plaintiff had sent the statement of claim to the defendant by registered mail and a delivery date of February 1, 2013, was recorded. Registered mail was not a valid mode of service in the circumstances. However, the defendant subsequently sent a letter to the court "requesting that a judge be designated so that the matter could be moved forward" (at para 18). Chief Justice Popescul found that this letter established that the defendant had "actually

received notice" of the statement of claim and validated "the irregular service" under Rule 12-1 (at paras 18 and 19).

[33] In *Saskatchewan Valley Potato Corporation v Massey*, 2004 SKQB 401, 258 Sask R 240, the plaintiff served its statement of claim on the defendant by registered mail. The defendant received the document, but he did not respond to the claim because it was his understanding that registered mail "did not constitute proper service" (at para 1). He was correct; the plaintiff had not applied for an alternate or special mode of service, so the defendant should have been personally served with the statement of claim. However, in applying to set aside the default judgment, the defendant admitted to having received a copy of the statement of claim by registered mail, so the service was validated. Service by registered mail was also validated in *Thorstad v Robson* (1998), 166 Sask R 83 (QB) [*Robson*], because the Chambers judge was satisfied that the respondent, having confirmed receipt of the registered letter, had notice of the claim against him.

[34] In *Ford v Bell Estate* (1996), 154 Sask R 193 (QB), the applicant's lawyer served a motion on the respondent's lawyer by fax. The respondent's lawyer appeared in Chambers on the return date of the motion and stated that she had no instructions to accept service for or make submissions on behalf of the estate. It was revealed that while the executors had never been directly served by the applicant, they had received a copy of the motion from their lawyer. Justice Klebuc (as he then was) was satisfied "that the documents served came to the notice" of the estate (at para 23), so the predecessor rule to Rule 12-1 operated to validate the irregular service of the motion.

[35] In *C.D.R. Developments Inc. v ACI Holdings Inc.*, 2017 SKQB 163 at para 26, 10 CPC (8th) 118 [*C.D.R. Developments*], Danyliuk J. emphasized the importance of "real and substantial" service or that "real notice is reaching parties opposite" (at para 30). There, the plaintiff filed a contradictory affidavit of service. The first paragraph of the affidavit asserted that the statement of claim had been served on the defendant by registered mail. The second paragraph stated that the mail was "unclaimed by the defendant" (at para 4), and a copy of the envelope indicating as such was appended as an exhibit. Justice Danyliuk aptly deemed the document an "affidavit of non-service" (at para 26) and chastised counsel for filing this evidence: "In this case, counsel *knows* as a fact that the statement of claim never reached the defendant, yet adopts a position unblemished by reason, fairness or common sense, and seeks this large judgment" (emphasis in original, at para 16).

[36] Justice Danyliuk, in *C.D.R. Developments* found that the defendant did not have notice of the claim against it and refused to validate the irregular service. He also provided the following commentary regarding the importance of proper service and notice:

> [30] Finally, I make a note to all counsel, and I wish to be clear. Service is not merely a hoop through which a party is to jump. Service is not something to which only lip service is to be paid. It is real and substantial. It lies at the heart of our system of litigation in Canada. Effecting service needs to be taken more seriously than presently appears to be the case. Real attention needs to be paid by counsel to ensure that real notice is reaching parties opposite. Counsel have a duty to the court in this regard. Counsel generally should expect that improper or insufficiently supported applications for substitutional service, to validate irregular service, or which rely on improper service will routinely be dismissed.

This strongly worded comment must, of course, be read in light of the fact that irregular or unauthorized service may be validated.

[37] All these cases support EYI's position that judges have not validated service unless at least some type of positive step had been taken by a party to attempt to bring the document to the other party's attention and give them notice. Here, there were no such efforts. In my view, the primary purpose of Rule 12-1 is to grant the discretion to validate service when a party has done something to provide notice of the claim to the other party but has not strictly complied with the other rules regarding service. The rule is not meant to provide a means to sidestep service altogether.

[38] However, I would not limit Rule 12-1 to the absolute degree asserted by EYI. There may be exceptional situations where no direct effort to effect service has been taken but service may be validated under Rule 12-1. This explains why it is not uncommon for persons to show up in court at a hearing, despite not having been served, having found out about the matter through another party, and to have them deemed to be served with the application that is the subject of the hearing. Similarly, it is not unheard of for a person to be personally served, provide the document to their co-defendant spouse, and have that sharing validated as service on the co-defendant spouse, despite the lack of any effort to serve them. But, the failure of a party to make any efforts to serve another party constitutes part of the overall circumstances to be considered by a judge when examining a Rule 12-1 application. In my view, whether and to what extent a plaintiff has attempted to effect service is an important consideration on an application to have service validated under Rule 12-1, and a complete lack of any attempt to do so will justify the denial of such an application, absent exceptional circumstances.

C. Sufficiency of mere notice

[39] EYI asserts that mere notice of a statement of claim – having it come into a defendant's possession through no effort of the plaintiff – is not a sufficient basis to validate service under Rule 12-1. Mr. Koroluk argues that it is.

[40] Notice is the primary consideration for a Chambers judge when deciding whether to validate or set aside the service of a document: Rule 12-1(2) and *Anstead* at para 19. Unsurprisingly, irregular or unauthorized service will not be validated if the person to be served has not received notice: *Tetrad Auto Services Ltd. v Universal Tire & Services Ltd.*, 2023 SKKB 104 at para 30 [*Tetrad*]; *Bank of Montreal v Thompson*, 2022 SKQB 152 at para 26; *C.D.R. Developments* at paras 26–30; and *McAdam* at para 36. Service may also be set aside under Rule 12-1 where the mode itself was valid but the document was "never brought to the defendant's attention" (*McAdam* at para 23):

> [23] Likewise, the court has the discretion to set aside valid service where the defendant did not actually receive notice of the claim, so long as the application is brought within a reasonable time, the default is satisfactorily explained and a good defence on the merits is disclosed. In *Royal Bank of Canada v Kruchkowski*, [1988] SJ No 491 (QL) QB, the court set aside a default judgment where service by registered mail was contradicted by the defendant's affidavit denying receipt. Likewise in *Schachtel v Wasmann*, 2004 SKQB 120, although a document was validly served on a third party pursuant to an order for substitutional service, it was never brought to the defendant's attention and was therefore, set aside.

[41] The receipt of a document through some means has long been considered to be sufficient notice where it "has reached the hands or minds of the intended parties" (at para 24, referencing *Re Avery*, [1952] 2 DLR 413 (Ont CA)): see also *Bradbrooke v Ross* (1989), 78 Sask R 102 (QB) at para 14 [*Ross*]. Although it is clear that notice of some sort is required to validate service under Rule 12-1, the question must be, Notice of what?

[42] In describing the essential purposes of the service of a statement of claim, Kalmakoff J.A. noted the three pieces of information provided to a defendant through service – the details of the claim itself, the temporal requirements to file a defence, and the possibility of default judgment: "The purpose of the rules regarding service of documents such as statements of claim is to ensure that a party being sued has notice of the claim being made against them, has notice of the temporal requirements for filing a defence, and has notice that default judgment may be granted against them if they do not respond to the claim" (*Stephens v Canadian Imperial Bank of Commerce*, 2021 SKCA 155 at para 42 [*Stephens*]).

[43] Justice Robertson recently cited this reasoning from *Stephens* in *Tetrad*, where he noted that "the purpose of the rules regarding service of documents … [I]s to bring notice to the person served so they are aware of the matter and can respond" (at para 17).

[44] Related to these three purposes, there are at least two rules which militate against mere notice being a sufficient basis for service to be validated under Rule 12-1:

(a) Rule 3-11(a) – "If a statement of claim is not served on a defendant within the time or extended time for service … no further proceeding may be taken in the action against a defendant who was not served in time"; and

(b) Rule 3-13 – a defendant cannot "do one or more of the following" in the Court of King's Bench – "serve and file a statement of defence, notice of intent to defend or demand for notice" – until they have been served with the statement of claim.

[45] I would note that there are several reasons why a plaintiff might issue a statement of claim but subsequently decide not to serve it at all. This could include preserving a limitation period (while contemplating whether to pursue the action against certain defendants), preserving the right to bring the claim while continuing to negotiate with a party to resolve the matter, or taking more time to investigate the prudence of suing a particular defendant but wishing to avoid the costs consequences from abandoning a claim that arise under Rule 4-49(2) (once a defendant has been served). For that reason, it would be inappropriate to assume that merely obtaining a copy of the document, or, for that matter, being advised that it has issued and what it contains, should be taken by the defendant to mean that the plaintiff intends to proceed with the action. The meaning that the defendant would reasonably attribute to the issuance of the claim would depend on evidence of the surrounding circumstances. It may be, for example, that there is evidence that demonstrates that the defendant is aware that the plaintiff intends to proceed and has taken steps in anticipation of that.

[46] Taking all of this into account, it is my view that the mere fact that a defendant has obtained a copy of an unserved statement of claim, without an examination of the surrounding circumstances, is not sufficient to ground an order validating service. While notice is the primary ground, as mandated by Rule 12-1(2), it is not the only consideration. The entirety of the relevant circumstances must also be considered.

D. Validating service on EYI under Rule 12-1

[47] In my view, the Chambers judge erred by not considering the totality of the circumstances in this matter. In her examination of the Rule 12-1 question, she considered only the fact of EYI's knowledge of the claim – as represented by the presence of the issued amended statement of claim in EYI's hands – and, perhaps, prejudice. While notice is the primary consideration, the whole of the relevant circumstances must be considered when making this discretionary decision. Here, she needed to have considered the following factors:

(a) the claim was amended on December 3, 2018, naming EYI as a defendant;

(b) no efforts of any kind were made to serve EYI with the amended statement of claim, despite the fact that service on EYI would have been simple to accomplish at its registered or physical office;

(c) while the amended statement of claim came into EYI's hands on February 6, 2020, this was through a communication from a person not connected to Mr. Koroluk;

(d) promptly after coming into possession of the amended statement of claim, EYI clearly communicated to Mr. Koroluk's counsel that it had not been served, that it was the wrong party, that it disputed liability, and that, given the passage of time, it considered the unserved claim to have been abandoned – while a defendant telling a plaintiff that it has concluded that a claim is abandoned does not make it so, the lack of activity for well over a year after this communication is a relevant consideration;

(e) reference to the amended statement of claim in a fiat in a tangential proceeding reiterated to Mr. Koroluk a fact that he would have been aware of, that is, that the claim had never been served on EYI;

(f) a further 16 months passed after EYI's letter before Mr. Koroluk brought his Rule 12-1 application;

(g) EYI suffered some limited prejudice related to the retention of documents but would have suffered some of that prejudice even if the claim had been properly served before March 6, 2020; and

(h) EYI is the incorrect party, which is not disputed by Mr. Koroluk.

[48] When giving effect to the primary criteria of notice, certain questions must be asked: Of what did EYI have notice? What has reached the hands and mind of this defendant? Here, EYI had notice of the following:

(a) an amended statement of claim had been issued through the Court of Queen's Bench, naming it as a defendant, and it had a copy of the amended statement of claim thereby knowing exactly what was being alleged;

(b) no attempt had been made to serve it in well over two years since its issuance, despite the ease with which service could have been effected;

(c) it had communicated to Mr. Koroluk that it had not been served in over 14 months after the issuance of the claim, that it was treating the claim as abandoned, that it expected confirmation of its understanding of the matter, and that no action was taken by him in response;

(d) in other related proceedings, Mr. Koroluk had been reminded that he had not served EYI, and he did nothing in response with regard to service on EYI;

(e) the claim was related to audits of PrimeWest in which EYI was not involved; and

(f) in its view, a claim against Ernst & Young LLP had little prospect of success (although this last circumstance would receive little weight).

[49] This *notice* was in the context of over two and a half years passing between the issuance of the amended statement of claim and the Rule 12-1 application. In these unusual circumstances, the mere presence of the document in the hands of EYI, 13 months after it was issued and 16 months before the Rule 12-1 application was made, was not a sufficient basis to validate irregular service of the amended statement of claim on EYI, and the Chambers judge erred in law by doing so. She misinterpreted Rule 12-1 and failed to consider the entirety of the situation. In my view, once the whole of the relevant circumstances is considered, an order validating service should not have been granted. As such, the order validating service on EYI should be set aside.

VI. CONCLUSION

[50] The portion of the order validating service of the amended statement of claim on EYI is set aside.

[51] The Chambers judge did not address Mr. Koroluk's application in which he sought an extension of time to serve EYI and permission to do so electronically. Therefore, the matter is remitted to the Court of King's Bench for a determination of Mr. Koroluk's application to extend the time in which to serve the amended statement of claim on EYI and for his request for electronic service.

[52] Taking into account general costs principles, and the factors listed in s. 40 of *The Class Actions Act*, SS 2001, c C-12.01, EYI shall have its costs of this appeal and the leave application, calculated in the usual manner.

"Tholl J.A."

Tholl J.A.

I concur.

"Barrington-Foote J.A."

Barrington-Foote J.A.

I concur.

"McCreary J.A."

McCreary J.A.