COURT FILE NUMBER	1501-00396	Clerk's Stamp CLERK OF THE COURT FILED FEB 12 2019 JUDICIAL CENTRE OF CALGARY
COURT	COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY	
JUDICIAL CENTRE	CALGARY	
	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, R.S.A. 2000, c. B-9	
APPLICANT	**ERNST & YOUNG INC., THE COURT-APPOINTED MONITOR IN THE MATTER OF GASFRAC ENERGY SERVICES INC., GASFRAC SERVICES GP INC., GASFRAC ENERGY SERVICES (US) INC., GASFRAC US HOLDINGS INC., and GASFRAC INC.**	
DOCUMENT	**BRIEF RE: APPLICATION TO REVIVE GASFRAC SERVICES GP INC.**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Norton Rose Fulbright Canada LLP 3700, 400 Third Ave SW Calgary, Alberta T2P 4H2 Phone: 403.267.8222 Fax: 403.264.5973 **Howard A. Gorman Q.C. / Aditya M. Badami** File No. 1000145163 *Counsel for the court-appointed monitor Ernst & Young Inc.*	

I. OVERVIEW

1. This Brief is submitted by Ernst & Young Inc. in its capacity as court-appointed monitor (**Monitor**) of the Gasfrac group of companies (**Gasfrac** or the **Company**)[1] and in support of the Monitor's application filed February 12, 2019.

2. This application seeks the revival of Gasfrac Services GP Inc. (**Gasfrac GP**), a Gasfrac entity that was dissolved on December 31, 2016.

3. Gasfrac GP is the petitioner in a lawsuit initiated in the British Columbia Supreme Court against the Province of British Columbia with respect to certain disputed Provincial tax claims (the **Tax Litigation**). The Tax Litigation was commenced after Gasfrac GP's dissolution.

4. Gasfrac GP's dissolution is an alleged defect preventing the Tax Litigation from being resolved.

5. Section 210 of the *Business Corporations Act* (Alberta)[2] (**ABCA**), empowers this Court to revive Gasfrac GP with retrospective effect, such that the Monitor can pursue the Tax Litigation in accordance with the powers previously bestowed upon it by this Court.

6. The Tax Litigation is the last remaining claim to be addressed by the Monitor in the Gasfrac restructuring process. Any proceeds of the litigation are for distribution by the Monitor pursuant to the court-sanctioned restructuring plan of arrangement (**CCAA Plan**).

7. The respondent in the Tax Litigation, the Province of British Columbia, is not prejudiced by this application because the respondent has already defended the claim on its merits and the alleged "defect" was identified by the Province one year after the defence was filed.

8. To deny the application would amount to nullifying the Tax Litigation on the basis of a technicality. Such injustice should not be countenanced. Indeed, it is technical defects precisely like that facing the Monitor that section 210 of the ABCA was intended to remedy.

9. Thus, the Monitor requests that this Court exercise its equitable jurisdiction in conjunction with the authority granted to it by section 210 of the ABCA to revive Gasfrac GP and authorize the Monitor to continue its prosecution of the Tax Litigation.

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[1] Gasfrac Energy Services Inc., Gasfrac Services GP Inc., Gasfrac Energy Services (US) Inc., Gasfrac US Holdings Inc., and Gasfrac Inc. were all placed under *Companies' Creditor Arrangement Act* protection by an Initial Order dated January 15, 2015, as amended.

[2] RSA 2000, c B-9 [*ABCA*] [Monitor's Authorities, Tab 1].

II. BACKGROUND

10. The relevant facts are stated in the Monitor's filed application and summarized here for ease of reference.

11. In short, the CCAA Plan sanctioned on June 24, 2015, authorized the Monitor to make distributions to Gasfrac's creditors in respect of claims against the Gasfrac estate. A Claims Process was authorized by the Alberta Court of Queen's Bench on March 16, 2015, to determine and settle claims against the Company. The Monitor advised upon and played a role in the allowance or contestation of such claims.

12. An Expansion of Monitor's Power order was granted on July 14, 2015 (the **Expansion Order**). The Expansion Order stated at paragraph 1 that the Monitor was "authorized and empowered [...] to take all steps [...] that are necessary to conclude the transactions, <u>claims processes</u>, <u>the [CCAA] Plan</u> and any other arrangement approved by the Court in these proceedings" (emphasis added).

13. The Expansion Order further authorized the Monitor to "take any other steps on behalf of the Company [Gasfrac] deemed necessary or reasonably incidental to the completion of the items listed above in paragraph 1 of this Order, which the Company would otherwise complete on its own behalf but for the resignation of the Company's board of directors as contemplated by the Plan."

14. As noted in the Monitor's Ninth Report dated March 8, 2017, the only remaining claim for the Monitor to resolve is the Tax Litigation.

15. The Tax Litigation was commenced by way of petitions to the Supreme Court of British Columbia on August 1, 2017. The respondent, the Province of British Columbia (the **Province**), filed responses to the petitions dated November 10, 2017.

16. Unbeknownst to the Monitor when the Tax Litigation was commenced, Gasfrac GP had been dissolved on December 31, 2016. Gasfrac GP was dissolved by the Alberta Registrar of Corporations pursuant to section 213(1) of the ABCA because the Company did not file the necessary corporate documentation with the Registrar, contrary to the ABCA.

17. It was not until a year following the Province's filed responses on October 5, 2018, that the Province's counsel wrote to Gasfrac GP's counsel[3], that the Monitor became aware of Gasfrac GP's dissolution.[4]

18. In its letter, the Province framed the corporate dissolution as a "defect" to "rectify" – a characterization that is the impetus for this application.

III. LAW AND SUBMISSIONS

Legislation

19. Section 210 of the ABCA provides that:

> 210(1) <u>Any interested party may apply to the Court within 5 years after the date of dissolution for an order reviving</u>
>
> (a) a body corporate dissolved under section 273,
>
> (a.1) a body corporate dissolved under this Part,
>
> (b) a body corporate that was dissolved under the *Companies Act* or its predecessors before or after the coming into force of this Act and that was not at the time of its dissolution a not-for-profit company as defined in section 273(1), or
>
> (c) a body corporate that was dissolved by reason of the operation of subsection (7). [...][5]

20. Sub-section 210(9) states that a revival order under section 210 deems the subject corporation "to have continued in existence as if it had not been dissolved."[6]

Case law

21. ***Court of Appeal in* Khurana *and* English.** The revival clause under the ABCA has been considered by the Alberta courts a handful of times.

22. In *1036122 Alberta Ltd. v. Khurana*[7] (***Khurana***), the Court of Appeal granted an order reviving a corporation with retrospective effect, such that a claim commenced when the corporation was dissolved was permitted to proceed as though the corporation had not been dissolved.

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[3] EY Law LLP was retained by the Monitor to take conduct of the Tax Litigation.
[4] Letter dated October 5, 2018, from Shannon Davis, Ministry of Attorney General, to David Robertson and Jonathan Ip, EY Law LLP [Monitor's Tenth Report, Appendix A].
[5] *ABCA*, s 210(1) [Monitor's Authorities, Tab 1].
[6] *ABCA*, s 210(9) [Monitor's Authorities, Tab 1].
[7] *1036122 Alberta Ltd. v Khurana*, 2012 ABCA 10 [Monitor's Authorities, Tab 2].

23. In *Khurana* the plaintiff had initiated its action and it was only after that fact that the defendant discovered that the plaintiff corporation had been struck from the corporate registry.

24. The defendant sought to strike the plaintiff's claim on the basis that the corporation was dissolved when the claim was filed. After the strike application was filed, but before it was heard, the plaintiff obtained a certificate of revival from the corporate registry. Notwithstanding, the chambers judge agreed with the defendant and the claim was struck.

25. In overturning the chambers judge's decision, the Court of Appeal articulated the equities underpinning corporate revival in the context of actions commenced by dissolved corporations. The Court endorsed the statements of Justice Macklin in an earlier Queen's Bench decision as follows:

> [...] <u>I cannot see a logical distinction between a case where a statement of claim has validly been issued by one party and a second party is applying to be added as a plaintiff pursuant to s. 6, and a case where a statement of claim has been issued by an entity that technically may not have had capacity when the statement of claim was issued but later, and retroactively, acquires that capacity</u>. Surely a claimant in the latter case wishing to proceed with an action that has already been commenced, with proper parties named, and in a form that need not be amended in any way whatsoever should stand in at least as strong a position as a party that must seek an amendment to either the style of cause, the body of the statement of claim or both.
>
> [...]
>
> [...] <u>All that has occurred is that the capacity of the Plaintiff has changed</u>. A Statement of Claim was issued and served by the Plaintiff. The conduct, transaction and events all remain the same and are described in the body of the Statement of Claim. This was done prior to the expiry of the limitation period. A Statement of Defence to the merits was filed by the Defendants which clearly had sufficient knowledge of the claim to defend. <u>The Defendant has not been prejudiced in any way in its ability to defend the action</u>. [...][8]

26. The Court of Appeal in *Khurana* also endorsed the statements of Justice Slatter (as he then was) in another earlier Queen's Bench decision styled as *Kopr v. Kopr* (***Kopr***). In *Kopr*, Justice Slatter wrote that "holding actions to be nullities even though they are subsequently rectified is excessively technical, and can only lead to injustice."[9] Justice Slatter specifically

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[8] *1036122 Alberta Ltd. v Khurana*, 2012 ABCA 10, para 22, citing with approval *Associated Asbestos Services Ltd. v Canadian Occidental Petroleum Ltd.*, 2002 ABQB 893 [emphasis added] [Monitor's Authorities, Tab 2].
[9] *Kopr v Kopr*, 2006 ABQB 405, para 23 [Monitor's Authorities, Tab 3].

addressed the issue of dissolved corporations by stating that "an action commenced by a corporation that has been struck off is not a nullity"[10].

27. Citing the "restorative powers" of the ABCA, the Court of Appeal in *Khurana* concluded by stating that the "wording of the statute in the instant case makes clear that the revival of the company cures that which would otherwise be a nullity."[11] The Court continued, citing foundational rule 1.2[12] that, in the Court's view, "accords with a policy choice 'against finding actions to be nullities where the defendant has notice of the claim, and the nullification of the action would defeat a claim.'"[13]

28. In *English v. Alberta (Service Alberta)*[14] the Court of Appeal considered the same issue of corporate revival, but in that case the plaintiff corporation did not take steps to revive itself within the five-year period stipulated by section 210(1) of the ABCA and, thus, its claim was rendered a nullity.[15]

29. Nonetheless, the Court of Appeal adopted the *Khurana* panel's reasoning and confirmed that the "revival of a corporation with retrospective effect may save a claim which would otherwise be a nullity due to dissolution".[16]

30. ***Upshot.*** The principal conclusion emanating from the case law is this: to deny revival of a corporation within the five-year period under section 210(1), where that corporation initiated a claim while it was dissolved, would be unjust and contrary to both the ABCA and the *Rules of Court*. Indeed, as is plain from its wording, section 210(1) expressly authorizes the courts to revive corporations.

31. ***Application to Facts.*** Gasfrac GP was dissolved before the Tax Litigation was commenced. Section 210(1) authorizes this Court to rectify that defect.

32. The Province is not prejudiced by the relief sought by the Monitor. Indeed, the Province has conceded that the matter is a "defect" warranting rectification.

33. To deny the Monitor's application would render an otherwise valid claim a nullity on the basis of a technicality. That outcome should be avoided.

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[10] *Kopr v Kopr*, 2006 ABQB 405, para 24 [Monitor's Authorities, Tab 3].
[11] *1036122 Alberta Ltd. v Khurana*, 2012 ABCA 10, para 25 [Monitor's Authorities, Tab 2].
[12] *Rules of Court*, AR 124/2010, r 1.2 [Monitor's Authorities, Tab 4].
[13] *1036122 Alberta Ltd. v Khurana*, 2012 ABCA 10, para 25 [Monitor's Authorities, Tab 2].
[14] *English v Alberta (Service Alberta)*, 2018 ABCA 141 [Monitor's Authorities, Tab 5].
[15] *English v Alberta (Service Alberta)*, 2018 ABCA 141, paras 1-2 [Monitor's Authorities, Tab 5].
[16] *English v Alberta (Service Alberta)*, 2018 ABCA 141, para 34 [Monitor's Authorities, Tab 5].

IV. CONCLUSION AND RELIEF SOUGHT

34. For the reasons set out above, the Monitor seeks an order pursuant to section 210(1) directing the Alberta Corporate Registry to revive Gasfrac GP for the purposes of the Monitor's prosecution of the Tax Litigation. The Monitor also seeks an order approving the Monitor's ongoing prosecution of the Tax Litigation for the benefit of Gasfrac's stakeholders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12th DAY OF FEBRUARY, 2019.

Howard A. Gorman, Q.C.	Aditya M. Badami
Norton Rose Fulbright Canada LLP	Norton Rose Fulbright Canada LLP

TABLE OF AUTHORITIES

Case Law

Legislation

TAB 1

Alberta Statutes
Business Corporations Act
Part 17 — Liquidation and Dissolution

R.S.A. 2000, c. B-9, s. 210

s 210. Revival

Currency

210.Revival

210(1) Any interested person may apply to the Court within 5 years after the date of dissolution for an order reviving

(a) a body corporate dissolved under section 273,

(a.1) a body corporate dissolved under this Part,

(b) a body corporate that was dissolved under the *Companies Act* or its predecessors before or after the coming into force of this Act and that was not at the time of its dissolution a not-for-profit company as defined in section 273(1), or

(c) a body corporate that was dissolved by reason of the operation of subsection (7).

210(1.1) A body corporate may not be revived after the expiry of 5 years from the date of dissolution.

210(1.2) Notwithstanding subsection (1.1), a body corporate that was dissolved before the coming into force of the *Unclaimed Personal Property and Vested Property Act* may be revived at any time up to 5 years after the coming into force of that Act.

210(2) An applicant under subsection (1) shall give notice of the application to the Registrar and the Registrar is entitled to appear and be heard in person or by counsel.

210(3) An order under subsection (1) may revive the body corporate

(a) for the purpose of enabling it to apply for continuance under section 274, or

(b) for the purpose of carrying out particular acts specified in the order,

and the order shall state that the revival remains in effect for a specific time limited by the order.

210(4) In an order under subsection (1), the Court may

(a) give directions as to the holding of meetings of shareholders, the appointment of directors and meetings of directors,

(b) in the case of a body corporate revived for the purpose of enabling it to apply for continuance under section 274, give directions regarding any matter that the shareholders are required or authorized to provide for pursuant to section 273(4) and (6),

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(c) specify any provisions of the *Companies Act* that are not to apply to the body corporate during the period of its revival, or declare that any provisions of the *Companies Act* are to apply to the body corporate with the variations prescribed by the order,

(d) change the name of the body corporate to a number designated or name approved by the Registrar, and

(e) give any other directions the Court thinks fit.

210(5) Where a person seeks the approval of the Registrar under subsection (4)(d), the person shall provide to the Registrar documents relating to corporate names that are prescribed by the regulations.

210(6) Subject to subsection (4)(c), the *Companies Act* applies to a body corporate revived under this section.

210(7) A body corporate revived by an order under this section is dissolved on the expiration of the time limited by the order unless it is sooner continued as a corporation under section 274.

210(8) If an order is made under this section, the applicant shall forthwith send a certified copy of the order to the Registrar who shall file it and restore the body corporate to the register under the *Companies Act*.

210(9) A body corporate is revived on the making of an order under this section and, subject to the terms imposed by the order and to rights acquired by any person prior to the revival, the body corporate is deemed to have continued in existence as if it had not been dissolved.

Amendment History
2005, c. 8, s. 49; 2007, c. U-1.5, s. 68(3)

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Alberta Statutes
Business Corporations Act
Part 17 — Liquidation and Dissolution

R.S.A. 2000, c. B-9, s. 213

s 213. Dissolution by Registrar

Currency

213.Dissolution by Registrar
213(1) Subject to subsections (2) and (3), if a corporation

(a) has not commenced business within 3 years after the date shown in its certificate of incorporation,

(b) has not carried on its business for 3 consecutive years, or

(c) is in default for a period of one year in sending to the Registrar any notice or document required by this Act,

the Registrar may dissolve the corporation by issuing a certificate of dissolution under this section or the Registrar may apply to the Court for an order dissolving the corporation, in which case section 218 applies.

213(2) The Registrar shall not dissolve a corporation under this section until the Registrar has

(a) given 120 days' notice of the Registrar's decision to dissolve the corporation to the corporation and to each director of the corporation, and

(b) published notice of the Registrar's decision to dissolve the corporation in the Registrar's periodical or The Alberta Gazette.

213(3) Unless cause to the contrary has been shown or an order has been made by the Court under section 247, the Registrar may, after expiry of the period referred to in subsection (2), issue a certificate of dissolution in the prescribed form.

213(4) The corporation ceases to exist on the date shown in the certificate of dissolution.

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TAB 2

2012 ABCA 10
Alberta Court of Appeal

1036122 Alberta Ltd. v. Khurana

2012 CarswellAlta 4, 2012 ABCA 10, [2012] A.W.L.D. 1382, [2012] A.W.L.D. 1385, [2012] A.J. No. 7, 11 C.L.R. (4th) 164, 17 C.P.C. (7th) 334, 519 A.R. 221, 539 W.A.C. 221, 57 Alta. L.R. (5th) 338, 93 B.L.R. (4th) 113

1036122 Alberta Ltd. carrying on business under the firm name and style of AML Construction, Appellant (Plaintiff) and Des Raj Khurana and Kailash Devi Khurana, Respondents (Defendants)

Elizabeth McFadyen, Ronald Berger, Brian O'Ferrall JJ.A.

Heard: September 7, 2011
Judgment: January 10, 2012
Docket: Edmonton Appeal 1003-0281-AC

Proceedings: reversing *1036122 Alberta Ltd. v. Khurana* (2010), 2010 CarswellAlta 1455, 2010 ABQB 490, 29 Alta. L.R. (5th) 158, 76 B.L.R. (4th) 216, 498 A.R. 183, 98 C.P.C. (6th) 252 (Alta. Q.B.); reversing *1036122 Alberta Ltd. v. Khurana* (2010), 2010 CarswellAlta 1499 (Alta. Master)

Counsel: M.L. Engelking, for Appellant / Plaintiff
K. Handzic, for Respondents / Defendants

Subject: Civil Practice and Procedure; Corporate and Commercial

APPEAL by plaintiff company from judgment reported at *1036122 Alberta Ltd. v. Khurana* (2010), 2010 CarswellAlta 1455, 2010 ABQB 490, 29 Alta. L.R. (5th) 158, 76 B.L.R. (4th) 216, 498 A.R. 183, 98 C.P.C. (6th) 252 (Alta. Q.B.), allowing appeal by defendants from decision of Master dismissing motion to strike out statement of claim.

***Per curiam*:**

1 The Appellant, carrying on business under the name of AML Construction ("AML"), was struck from the Register of the Alberta Corporate Registry on September 22, 2007. Thereafter, in the context of an underlying dispute concerning a construction management contract, the Appellant:

(a) filed a builder's lien on the Respondents' land six days later;

(b) filed a Statement of Claim to enforce the builder's lien on October 31, 2007, together with a *lis pendens*;

(c) filed a defence to counterclaim on March 10, 2008;

(d) filed an affidavit of records on July 2, 2008;

(e) presented a representative of the company for examination for discovery on April 20, 2009;

(f) provided answers to undertakings.

2 It was not until January 25, 2008, that counsel for the Respondents discovered that AML had been struck from the Corporate Registry prior to filing the Statement of Claim. Counsel for the Respondents advised AML's counsel that it had been struck and they would not file a Statement of Defence until AML was revived.

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3 On February 11, 2008, AML's counsel advised counsel for the Respondents that AML had been revived and the Respondents filed a Statement of Defence and counterclaim the next day. The Respondents conducted a subsequent search of the Corporate Registry on November 10, 2008 which revealed that AML had not been revived. The limitation period expired in September 2009.

4 On February 9, 2010, the Respondents filed a motion to strike out the Statement of Claim on the basis that AML was a non-existent entity lacking capacity to commence an action at the time the claim was filed.

5 Notwithstanding instructions to their accountants to revive AML, unbeknownst to the principals of AML, no such revival occurred.

6 The Respondents applied to amend their Statement of Defence and strike the claim of AML on the basis that it had not been revived. In fact, a certificate of revival was issued on February 19, 2010. The motion, originally returnable on February 12, 2010, was heard on February 25. The application to dismiss AML's action was denied. An appeal was heard in the Court of Queen's Bench on July 21, 2010. Lee J. allowed the appeal and directed that AML's claim be dismissed.

7 The chambers judge held that although AML had no capacity to commence an action and the Statement of Claim was invalid from the outset, it was capable of being prosecuted upon revival of the company. However, recognizing that the restorative powers of s. 208(4) of the *Business Corporations Act*, RSA 2000, c. B-9 are subject to rights acquired by third parties prior to revival, the chambers judge concluded that in this case the Respondents had acquired the right to have the Statement of Claim struck on the basis that AML lacked the capacity to sue. He reasoned that this right crystalized into a tangible and enforceable right when the Respondents filed their motion to strike prior to the revival. The chambers judge therefore allowed the appeal and directed that AML's Statement of Claim be struck.

8 The Appellant maintains that if a body corporate is revived before the hearing of an application to strike a claim, the revival retrospectively validates the action. In the instant case, when the application was heard, AML had been revived.

9 The application to strike out the Statement of Claim was brought under recently repealed Rule 129. It read as follows:

> 129(1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that
>
> (a) it discloses no cause of action or defence, as the case may be, or
>
> (b) it is scandalous, frivolous or vexatious, or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly.
>
> **(2)** No evidence shall be admissible on an application under clause (a) of subrule (1).
>
> **(3)** This Rule, so far as applicable, applies to an originating notice and a petition.

10 Section 208(4) of the *Business Corporations Act* is engaged:

> "(4) A corporation is revived on the date shown in the certificate of revival and, subject to any reasonable terms that the Registrar may impose <u>and to rights acquired by any person prior to the revival</u>, the corporation is deemed to have continued in existence as if it had not been dissolved."
>
> [emphasis added]

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11 It follows that the question to be decided is whether the right to strike out the Statement of Claim was an "acquired right" when the application to strike was filed and served. It will be remembered that the motion was brought on February 9, 2010; scheduled to be heard on February 12, 2010; and adjourned to and heard by the Master on February 25, 2010. In the interim, the Appellant was revived on February 19, 2010. The adjournment was opposed by counsel for the Respondents, but granted by the Master.

12 In *Associated Asbestos Services Ltd. v. Canadian Occidental Petroleum Ltd.*, 2002 ABQB 893, 326 A.R. 31 (Alta. Q.B.) the defendant brought an application to strike out the Statement of Claim after the plaintiff company was revived. The right invoked by the defendant in that case was that of a limitation defence. In the instant case, the right invoked is based on the lack of capacity to sue. In *Associated Asbestos* the Court held at para. 34:

> "During the period of dissolution, the Defendant in the present case did have a right to bring an application to strike out the Statement of Claim on the ground that the Plaintiff did not have capacity to sue. <u>If successful on that application, which would have required that it be brought before any revival</u>, the Defendant could then have relied on a limitation period defence if a new Statement of Claim was issued after the limitation period expired."
>
> [emphasis added]

13 The emphasized words make clear that it is a "*successful* application" that results in an acquired right to assert a limitation period defence. Moreover, I have difficulty accepting the notion that the revival provision of the *Business Corporations Act* operates in identical terms with respect to both a limitation period and the right to sue. The filing of a motion, in my view, does not confer the right. On the other hand, as the Appellant acknowledges, an order granted prior to revival does. I respectfully disagree with the chambers judge that the filing of the application is the event that crystalizes the right acquired in the context of the revival provision; indeed, it is not the hearing that crystalizes the right; it is the order that issues in consequence of the hearing. In *299076 Alberta Ltd. v. Horizon Village Corp.*, [1987] A.J. No. 1331 (Alta. Q.B.), Master Funduk dismissed an application to strike a Statement of Claim where the plaintiff was revived two days before the hearing.

14 In some jurisdictions there is a general rule that motions be decided on the facts as they existed on the date the motion was filed and served. Put another way, in some circumstances the parties' rights are crystalized at the date of service. Subsequent events do not affect their rights as they existed at that time. See *Philippine/Filipino Centre Toronto v. Datol*, 2010 ONSC 956, 261 O.A.C. 290 (Ont. Div. Ct.) at para. 44. See also *Kornblum v. Canada (Minister of Human Resources & Skills Development)*, 2010 FC 656, [2010] F.C.J. No. 1000 (F.C.) at para. 29 and *Shipdock Amsterdam B.V. v. Cast Group Inc.* (1999), 179 F.T.R. 279 (Fed. T.D.) at para. 7, citing with approval *Preston v. Tunbridge Wells Opera House, Ltd.*, [1903] 2 Ch. 323 (Eng. Ch. Div.).

15 I have not been able to find any case law in Alberta adopting that approach; neither is there any Alberta jurisprudence rejecting it. The factual underpinnings in *Brightman Capital Ventures Inc. v. J.P. Haynes & Associates Inc.* (2001), 143 O.A.C. 188, 8 C.P.C. (5th) 318 (Ont. Div. Ct.) are most similar to the case at bar. The defendants in *Brightman* brought a motion for security for costs. At the outset of the hearing, the Master expressed his opinion that the action was a nullity, because the plaintiff corporation was dissolved. The hearing was adjourned at the request of the plaintiff in order to enable material to be filed respecting liability for costs. At the subsequent hearing, the plaintiff delivered affidavits which indicated the plaintiff corporation had been revived in the interim. Nevertheless, the Master dismissed the action as a nullity on the basis of the state of affairs as of the original motion hearing date and held that the Court was bound to ignore anything done after notice of the motion was served.

16 On appeal, the Ontario Superior Court of Justice reversed. At paras. 14, 15 and 17, Southey J. held:

> "If the Master had decided on August 31, 1999, that the action was a nullity, because the plaintiff was not in existence, his decision to dismiss the action would be unassailable. But he made no decision. He adjourned the matter to September 14, without making a decision.

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> The defendants claim, as a post-dissolution right, the right to the dismissal of the plaintiff's action as a nullity. Any such right, however, was subject to the legal effect of the revival of the corporation, as occurred on September 2, 1999, before the action was dismissed. The right thus claimed was quite different from one acquired by the expiry of a limitation period, because it could be affected, if not nullified, by timely action on the part of the plaintiff. The plaintiff was under no restriction preventing it from obtaining Articles of Revival. ...
>
> The general rule that motions be decided on the basis of the facts as they existed on the date the motion was commenced cannot negate the effect of the plain words of the statute. The plaintiff is deemed to have had the right to bring this action as though it had not been dissolved."
>
> [emphasis added]

17 Southey J. was of the view that the revival provision of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B-16 ought to be interpreted according to s. 1.04(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which provides: "These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits." Section 1.2 of the *Alberta Rules Of Court*, Alta Reg 124/2010, describes a similar purpose and intention. It reads as follows:

> 1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.
>
> (2) In particular, these rules are intended to be used
>
> (a) to identify the real issues in dispute,
>
> (b) to facilitate the quickest means of resolving a claim at the least expense,
>
> (c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,
>
> (d) to oblige the parties to communicate honestly, openly and in a timely way, and
>
> (e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

18 I turn to a consideration of whether prejudice is a relevant factor in determining whether to strike a claim by a dissolved corporation subsequently revived. In considering the issue of prejudice, Lee J. noted that in *Associated Asbestos* the Court considered the question of prejudice in the context of a broader consideration of policy behind limitation periods. He reasoned that "to maintain the intent, function and the very viability of the rights provision, the right must be seen as secured against the revival upon the filing and service of the motion ..." (2010 ABQB 490 (Alta. Q.B.) at para. 42) He concluded "that 'prejudice' is not an appropriate consideration in the present case because the expiry of the limitation period is not the right claimed, *but rather the incapacity of AML to commence an action.*" [emphasis added] (at para. 43)

19 I respectfully disagree. The incapacity of AML to commence an action is conceded. Its revival validated the action because no order setting aside the Statement of Claim preceded the revival. The reasons in the Court of Queen's Bench suggest that such a ruling "would be nothing more than the *carte blanche* for dissolved corporations to be revived without any regard to the rights of third parties." (at para. 42). I disagree. The rights of third parties are, indeed, engaged. The issue is when such rights crystalize.

20 The Appellant relies on *Stout Estate v. Golinowski Estate*, 2002 ABCA 49, 299 A.R. 13 (Alta. C.A.), for the proposition that notice is the critical issue. In that decision, this Court discussed the two approaches in assessing whether pleadings can be amended outside the limitation period; however, as this Court pointed out at para. 100, this debate has

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been resolved by s. 6 of the *Limitations Act*, RSA 2000, c. L-12 which reflects a "legislated functional approach." Section 6(3)(b) of the *Limitations Act* reads:

> (3) When the added claim adds or substitutes a claimant, or changes the capacity in which a claimant sues,
>
> . . .
>
> (b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits.

Section 6(5)(b) of the *Limitations Act* puts the onus on the defendant to prove it was not prejudiced in maintaining a defence on the merits.

21 This Court also discussed this legislated functional approach in *Yancey v. Neis*, 1999 ABCA 272, 250 A.R. 19 (Alta. C.A.). At para. 22, Russell J.A. held the functional approach would "permit a claim to be added after the limitation period ... unless the defendant can prove that he or she did not receive, within the limitation period, sufficient knowledge of the claim to avoid being prejudiced in maintaining a defence."

22 In *Associated Asbestos*, Macklin J. addressed the distinction between adding a plaintiff to a claim pursuant to s. 6(3)(b) of the *Limitations Act* and reviving a dissolved corporation that already commenced a claim. At paras. 46 and 47, Macklin J. wrote:

> ... I cannot see a logical distinction between a case where a statement of claim has validly been issued by one party and a second party is applying to be added as a plaintiff pursuant to s. 6, and a case where a statement of claim has been issued by an entity that technically may not have had capacity when the statement of claim was issued but later, and retroactively, acquires that capacity. Surely a claimant in the latter case wishing to proceed with an action that already has been commenced, with the proper parties named, and in a form that need not be amended in any way whatsoever should stand in at least as strong a position as a party that must seek an amendment to either the style of cause, the body of the statement of claim or both.
>
> . . .
>
> It is not unjust in the case at bar to remove a potential limitations defence from the Defendant. All that has occurred is that the capacity of the Plaintiff has changed. A Statement of Claim was issued and served by the Plaintiff. The conduct, transaction and events all remain the same and are described in the body of the Statement of Claim. This was done prior to the expiry of the limitation period. A Statement of Defence to the merits was filed by the Defendant which clearly had sufficient knowledge of the claim to defend. The Defendant has not been prejudiced in any way in its ability to defend the action. Section 6(3) of the *Limitations Act* applies.

23 The Appellant also relies on *Kopr v. Kopr*, 2006 ABQB 405, 403 A.R. 29 (Alta. Q.B.). In that case, the plaintiff commenced an action claiming an interest in the defendant's property. The defendant was still an undischarged bankrupt and the plaintiff never informed the trustee of the action. The plaintiff brought an application to reappoint and substitute the trustee as the plaintiff. The plaintiff had no capacity to commence the action in its own name. Slatter J. (as he then was) held that limitation issues did not bar the substitution of the plaintiff. At para. 23, he wrote:

> ... Holding actions to be nullities even though they are subsequently rectified is excessively technical, and can only lead to injustice. A defendant who loses the benefit of the limitations statute as a result of the amendment of the pleadings to include the proper plaintiff, cannot truly be said to be prejudiced.

24 In *obiter*, Slatter J. specifically addressed the issue of dissolved corporations at para. 24:

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In a related context, an action commenced by a corporation that has been struck off is not a nullity: *Modern Livestock Ltd. v. Kansa Insurance* (1993), 11 Alta. L.R. (3d) 355, 143 A.R. 46, 18 C.C.L.I. (2d) 266 (Alta. Q.B.) aff'd (1994), 24 Alta. L.R. (3d) 21, 157 A.R. 167, 24 C.C.L.I. (2d) 254 (Alta. C.A.). While this decision depends on the wording of the statute, the decision and the statute show a policy against finding actions to be nullities where the defendant has notice of the claim, and the nullification of the action would defeat a claim. To the same effect, in *Alberta v. Canadian National Railway* (2001), 309 A.R. 157, 2001 ABQB 984, 2 Alta. L.R. (4th) 195, 19 C.P.C. (5th) 306 (Alta. Q.B.), aff'd, 2003 ABCA 69, 12 Alta. L.R. (4th) 4, 320 A.R. 373, 35 C.P.C. (5th) 307 (Alta. C.A.) the Court allowed the substitution of the real plaintiff (RailLink Canada Ltd.) for the original plaintiff (RailLink Ltd.), even though the original plaintiff had no cause of action at all.

25 The wording of the statute in the instant case makes clear that the revival of the company cures that which would otherwise be a nullity. Section 1.2 of the *Alberta Rules of Court*, in turn, accords with a policy choice "against finding actions to be nullities where the defendant has notice of the claim, and the nullification of the action would defeat a claim."

26 For these reasons, the appeal is allowed.

Appeal allowed.

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TAB 3

2006 ABQB 405
Alberta Court of Queen's Bench

Kopr v. Kopr

2006 CarswellAlta 711, 2006 ABQB 405, [2006] A.W.L.D. 2367, [2006] A.W.L.D. 2374, [2006] A.J. No. 673, 24 C.B.R. (5th) 205, 28 R.F.L. (6th) 446, 403 A.R. 29, 59 Alta. L.R. (4th) 99

Marie Kopr (Plaintiff) and Milan Kopr and 795760 Alberta Ltd. (Defendants)

In the matter of the Bankruptcy of Marie Kopr

Slatter J.

Heard: May 26, 2006
Judgment: June 5, 2006
Docket: Edmonton 0303-03069, 24-099267

Counsel: R.T.G. Reeson, Q.C., Alvin Goldsman for Plaintiff
Michael J. Penny, Michael Kraus for Defendants
Lyle B. Brookes for Trustee

Subject: Civil Practice and Procedure; Insolvency; Estates and Trusts; Family; Property

APPLICATION by plaintiff to substitute trustee as plaintiff in action.

***Slatter J.*:**

1 This is an application to substitute the Trustee in Bankruptcy as the plaintiff in this action, in place of the bankrupt Plaintiff Marie Kopr. The application raises the issue whether a claim for unjust enrichment (arising in the context of a common law relationship) is "property" under the *Bankruptcy and Insolvency Act*, R.S.A. 1985, c. B-3 (the "*B.I.A.*"). The application also raises the issue of substitution of plaintiffs after expiration of a limitation period.

Facts

2 Marie Kopr and Milan Kopr were married in the 1980s, but they divorced on July 14, 1987. After a long period without any contact, the Koprs commenced cohabiting in the Spring of 1997.

3 On October 9, 2002, while the parties were still cohabiting, Marie Kopr made an assignment into bankruptcy. About four months later, on February 15, 2003, the Koprs separated.

4 On February 19, 2003, while an undischarged bankrupt, Marie Kopr commenced this action against Milan Kopr and his numbered company. She claimed that the value of Mr. Kopr's property had increased during the cohabitation, and that Mr. Kopr has been unjustly enriched. She accordingly claimed an interest in his property. Ms. Kopr never advised her Trustee in Bankruptcy that she had commenced this action.

5 On August 8, 2003, Marie Kopr was discharged from bankruptcy. In December of 2004, her Trustee was discharged. This action continued and was virtually ready for trial when, in November of 2005, the Defendants challenged the status of Ms. Kopr to commence the action. An application was brought by the Defendants to strike out the action. After some delay, notice was given to the Trustee. A cross-application was then brought to reappoint the Trustee, and to substitute the Trustee as the plaintiff in this action. This cross-application is opposed.

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Standing of the Defendants

6 The Plaintiff first of all challenges the standing of the Defendants to even raise the issue of status. The Plaintiff cites *Foldy v. D'Amico* (1979), 31 C.B.R. (N.S.) 88, 25 O.R. (2d) 485, 104 D.L.R. (3d) 102 (Ont. H.C.). In *Foldy* the trustee purported to assign the cause of action to the Plaintiff under what are now ss. 40 and 41 of the *B.I.A.* The Defendant alleged that there were certain deficiencies in the assignment process. The Court concluded that the Defendants were strangers to the bankruptcy, and had no standing to challenge the Plaintiff's status based on non-compliance with procedural matters.

7 The Defendant in this action concedes that if Ms. Kopr and her Trustee had made a private arrangement for a transfer of the cause of action, the Defendants could not challenge that. However, in this case there was no arrangement between the Bankrupt and the Trustee, and indeed the Trustee had no knowledge whatsoever of the action. The Defendant argues that *Foldy* can be distinguished on this basis, and I agree.

8 In any event, the decision in *Foldy* is somewhat problematic. A defendant who is sued by a plaintiff who potentially has no status to commence the action is placed in a difficult position. If the defendant settles with that plaintiff, or takes that plaintiff to trial, the defendant stands the risk that the true owner of the cause of action could appear later and sue a second time. A defendant should always be in a position to challenge the status of the plaintiff, as was allowed in *Thompson v. Coulombe* (1984), 54 C.B.R. (N.S.) 254 (Que. C.A.), if only to obtain a court order verifying the true owner of the cause of action. I accordingly conclude that the Defendant does have status to raise this issue.

Is the Claim "Property"?

9 The *B.I.A.* defines property in s. 2:

> "Property" means any type of property, whether situated in Canada or elsewhere, and includes money, goods, *things in action*, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, *vested or contingent*, in, arising out of or incidental to property. (emphasis added)

This is obviously a very wide-ranging definition, designed to include almost every imaginable kind of property. The issue is whether a claim for unjust enrichment in a domestic context is included.

10 The Plaintiff argues that for many years it was assumed that a claim by a spouse for a division of property under the *Matrimonial Property Act*, R.S.A. 2000, c. M-8, was not "property" under the *B.I.A.* This was based on the decision in *Deloitte, Haskins & Sells Ltd. v. Graham* (1983), 47 C.B.R. (N.S.) 172, 32 R.F.L. (2d) 356, 25 Alta. L.R. (2d) 84, 42 A.R. 76 (Alta. Q.B.). The *Graham* decision held that a claim for division of matrimonial property was merely an application to the Court, asking the Court to exercise its discretion in dividing the property. As such, there was no "right" to the matrimonial property, the claim did not constitute "property" under the *B.I.A.*, and the bankrupt retained control of the claim.

11 More recently the *Graham* decision has been thrown into doubt. Both *Tinant v. Tinant*, 2003 ABCA 211, 15 Alta. L.R. (4th) 225, 330 A.R. 148 (Alta. C.A.), and *Lecerf v. Lecerf*, 2004 ABQB 501, 33 Alta. L.R. (4th) 151, 378 A.R. 69 (Alta. Q.B.), have held that a claim for division of matrimonial property is indeed "property". I would be prepared to accept that the right to a division of matrimonial property while the couple is still cohabiting is an inchoate right that does not form "property". It is analogous to a claim for a dower interest while the married couple is still living: *Phan v. Eng*, 2005 ABCA 142, 43 Alta. L.R. (4th) 199, 363 A.R. 361 (Alta. C.A.). However, once the couple separates, the claim for division of matrimonial property is more than just a petition to the Court seeking the exercise of a judicial discretion or indulgence. The claimant has a right to have property divided under the *Act*, with a presumption of equal division. The claim for division of matrimonial property would appear to be a contingent right, and included in the definition of property in s. 2 of the *B.I.A.*

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12 In any event, it should be noted that this is not a claim for division of property under the *Matrimonial Property Act*. This was a common law relationship, and the *Matrimonial Property Act* regime does not apply: *Walsh v. Bona*, 2002 SCC 83, [2002] 4 S.C.R. 325 (S.C.C.). This is a common law claim for unjust enrichment, to be decided on restitutionary principles. Although there is no claim for division of matrimonial property while the couple still cohabits, it might theoretically be possible for a claim for unjust enrichment to be launched during cohabitation.

13 The basis of a claim for unjust enrichment is that the defendant has been enriched, the plaintiff has been deprived, and there is no juridical justification for the enrichment. This is a direct claim for an interest in property, and would normally result in a money judgment. In my view, such a claim is clearly "property" under the *B.I.A.*

After-Acquired Property

14 As of the date of bankruptcy, the Koprs were still cohabiting. As mentioned, it is likely that Ms. Kopr could have commenced the claim for unjust enrichment anyway. However, even if no such claim could be advanced until separation, the claim was crystallized on the date of separation, February 15, 2003, while Ms. Kopr was still an undischarged bankrupt. As such, the claim is after-acquired property under s. 67(1)(c) of the *B.I.A.*, being property "acquired by or devolved on her before her discharge". The claim accordingly vested in the Trustee, and Ms. Kopr had no capacity to commence this claim in her own name.

15 I therefore conclude that the Trustee in Bankruptcy is the proper plaintiff in this action, and *prima facie* the trustee should be substituted for Ms. Kopr as Plaintiff.

The Limitation Period

16 The Defendants however argue that it is not possible to substitute the Trustee at this late stage. The Defendants make two related arguments. First of all, they argue that the action as commenced by Ms. Kopr is a nullity, and no substitution or ratification can revive it. Secondly, they argue that it is not possible to substitute a plaintiff after the expiration of the limitation period.

17 The law respecting the substitution of plaintiffs in an existing action is now covered by s. 6 of the *Limitations Act*, R.S.A. 2000, c. L-12:

> **6(1)** Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) or (4) are satisfied.
>
> **(3)** When the added claim adds or substitutes a claimant, or changes the capacity in which a claimant sues,
>
>> (a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,
>>
>> (b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits, and
>>
>> (c) the court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding.

The issue is whether the Trustee can place itself within this section.

18 The Defendants point to the Court of Appeal decision in *Long v. Brisson* (1992), 13 C.B.R. (3d) 181, 3 Alta. L.R. (3d) 79, 131 A.R. 99 (Alta. C.A.). In *Long* the bankrupt plaintiff commenced an action in her own name, and when the

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deficiency was discovered she obtained a consent order from a Registrar transferring the cause of action to herself. The defendant argued that the transfer after the fact was ineffective, because the action was a nullity. The Court of Appeal agreed, and struck out the action.

19 The *Long* decision is problematic, because it purported to rely on *Thompson v. Coulombe* (1984), 54 C.B.R. (N.S.) 254 (Que. C.A.). However, *Thompson* decided the exact opposite of *Long*, namely that the action was not a nullity and could be cured after the fact. I am of course bound by the decision of *Long*, if it is still good law. *Long* was decided before the new *Limitations Act*, and in my view it is inconsistent with the new *Act*, and subsequent decisions like *Stout Estate*, *infra*. I conclude that it no longer reflects the law of Alberta.

20 The law of limitations has always been plagued with the issue of "nullities". Generally, whether an action is a "nullity" is of no consequence if the limitation period has not expired. In those situations, the true plaintiff can simply commence a new action. The issue of nullity is therefore intimately related to limitation periods. The issue repeatedly arose in a number of situations. One situation was where someone other than the personal representatives purported to sue on behalf of an estate, or else the estate was incorrectly described. A second category arose from so-called "misnomers", where the party was mis-described. Sometimes there was in fact a party (usually another corporation) with the exact name used in the Statement of Claim, but it was subsequently argued that a different person or corporation was intended as the plaintiff. A third situation arose when actions were commenced in the name of dissolved corporations. In these cases the named plaintiff had no cause of action, and one could describe the action as a "nullity".

21 The new *Limitations Act* has attempted to deal with all of these situations. The scheme of s. 6 of the *Limitations Act* is to focus on notice to the defendant. The purpose of the *Limitations Act* is to bar stale claims, and a claim is not truly "stale" if the defendant had timely notice of it. In all of the situations where the wrong plaintiff has sued, the defendant does in fact have notice that a claim is being advanced. Often the defendant will actually know the identity of the true plaintiff, as well as the substance of the claim. In these situations, there is no prejudice to the defendant that the *Limitations Act* would try to obviate, and accordingly s. 6 permits substitution of claims and parties where the defendant had adequate notice of the claim within the limitation period, and where the substituted claim or party relates to the same conduct and events as the original claim.

22 In this new limitations environment it is inappropriate to speak of "nullities". Many of the misnomer situations, and the other cases concerning status of the plaintiff, could well be categorized as "nullities", because the plaintiff originally named had no cause of action. However, under the new *Act* all of these actions are allowed to proceed when the conditions of s. 6 are met, whether one wishes to characterize the original action as a "nullity" or not. The defendant is simply not entitled to immunity as a result of the passage of time in these situations.

23 In *Stout Estate v. Golinowski Estate*, 2002 ABCA 49, [2002] 4 W.W.R. 588, 100 Alta. L.R. (3d) 5, 299 A.R. 13, 18 C.P.C. (5th) 146, 43 E.T.R. (2d) 117 (Alta. C.A.), the action was commenced by an Administrator *Ad Litem*, appointed by court order on behalf of the estate of an intestate. The Administrator *Ad Litem* eventually applied for and was granted Letters of Administration. A Chambers judge subsequently held that the action was an incurable nullity, and that the subsequent Letters of Administration did not cure the defect. While the factual and legal context is undoubtedly distinguishable, the Court of Appeal did hold at para. 82, following earlier comments in *Frank v. King Estate* (1987), 56 Alta. L.R. (2d) 289 (Alta. C.A.):

> These procedural amendments are not present in this jurisdiction, but the judicial pronouncement in ***Frank Estate*** is to the same effect. In circumstances closer to the old nullity cases than this appeal, the court directed that the nullity characterization is no longer supportable. ***Frank*** is binding. There is no reason not to extend the reasoning in ***Frank*** to a plaintiff in these circumstances. The order granting the Administrator *Ad Litem* appointment is not a nullity; neither is the claim brought under its authority. Rather, the pleading is an irregularity at most. The question is whether the irregularity can and should now be cured by amendment.

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In my respectful view the reasoning in *Stout Estate* is compelling. Holding actions to be nullities even though they are subsequently rectified is excessively technical, and can only lead to injustice. A defendant who loses the benefit of the limitations statute as a result of the amendment of the pleadings to include the proper plaintiff, cannot truly be said to be prejudiced.

24 In a related context, an action commenced by a corporation that has been struck off is not a nullity: *Modern Livestock Ltd. v. Kansa General Insurance Co.* (1993), 11 Alta. L.R. (3d) 355, 143 A.R. 46, 18 C.C.L.I. (2d) 266 (Alta. Q.B.) aff'd (1994), 24 Alta. L.R. (3d) 21, 157 A.R. 167, 24 C.C.L.I. (2d) 254 (Alta. C.A.). While this decision depends on the wording of the statute, the decision and the statute show a policy against finding actions to be nullities where the defendant has notice of the claim, and the nullification of the action would defeat a claim. To the same effect, in *R. v. Canadian National Railway* (2001), 309 A.R. 157, 2001 ABQB 984, 2 Alta. L.R. (4th) 195, 19 C.P.C. (5th) 306 (Alta. Q.B.), aff'd, 2003 ABCA 69, 12 Alta. L.R. (4th) 4, 320 A.R. 373, 35 C.P.C. (5th) 307 (Alta. C.A.) the Court allowed the substitution of the real plaintiff (RailLink Canada Ltd.) for the original plaintiff (RailLink Ltd.), even though the original plaintiff had no cause of action at all.

25 It should be noted that the suggestion that a subsequent grant of authority by the Trustee in Bankruptcy does not revive an action originally started by the bankrupt runs counter to the general proposition that ratification of unauthorized acts is retroactive: *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur* ("Every ratification relates back and is equivalent to a prior authority"): *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295 (Eng. Ch. Div.). Where the argument is that some necessary authorization was not obtained, and the necessary authorization is subsequently obtained, it is the height of formality to say that the original action remains unauthorized. If the principal and agent agree that everything was properly done, why should the defendant be able to argue otherwise?

26 This is the general result under English law when an action has been started without authority. In *Presentaciones Musicales S.A. v. Secunda* (1993), [1994] Ch. 271 (Eng. C.A.), the Court of Appeal held, at paras. 22, 37, 39:

> It is well recognised law that where a solicitor starts proceedings in the name of a plaintiff - be it a company or an individual - without authority, the plaintiff may ratify the act of the solicitor and adopt the proceedings. In that event, in accordance with the ordinary law of principal and agent and the ordinary doctrine of ratification the defect in the proceedings as originally constituted is cured. See ***Danish Mercantile Co. Ltd v. Beaumont***, [1951] Ch. 680, since approved by the House of Lords. The reason is that by English law ratification relates back to the unauthorised act of the agent which is ratified . . . the point can best be tested by considering the simple case of an action begun by solicitors in the name of a plaintiff without authority, raising a single cause of action which would not have been barred by the Limitation Act if the issue of the Writ had been duly authorised in advance, but would have been barred if the nominal plaintiff had issued a fresh Writ at the much later date of his adoption or ratification of the unauthorised action. . . .
>
> Where a Writ is issued without authority, the cases show that the Writ is not a nullity. For the nominal plaintiff to adopt the Writ, or ratify its issue, does not require any application to the Court. Accordingly, on the same general principle that justifies ***Pontin v. Wood***, the plaintiff, in the simple example of an action raising a single cause of action which has been begun by solicitors without authority, must be entitled to adopt the action notwithstanding the expiration of the limitation period applicable to that cause of action.

In my view this is the proper approach, especially considering the philosophy of the new *Limitations Act*.

Conclusion

27 In conclusion, the claim being advanced by Ms. Kopr is "property" under the *B.I.A.* The cause of action vested in the Trustee, and the Trustee should have been the plaintiff in the action. There is at present no impediment to substituting the Trustee as plaintiff in place of Ms. Kopr. I accordingly reappoint the Trustee as Trustee of the Estate of Marie Kopr, and I direct that the Trustee be substituted as the plaintiff in this action.

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Application granted.

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TAB 4

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 1 — Foundational Rules
Division 1 — Purpose and Intention of These Rules

Alta. Reg. 124/2010, s. 1.2

s 1.2 Purpose and intention of these rules

Currency

1.2Purpose and intention of these rules

1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

1.2(2) In particular, these rules are intended to be used

(a) to identify the real issues in dispute,

(b) to facilitate the quickest means of resolving a claim at the least expense,

(c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,

(d) to oblige the parties to communicate honestly, openly and in a timely way, and

(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

1.2(3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

(a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,

(b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,

(c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and

(d) when using publicly funded Court resources, use them effectively.

1.2(4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

Currency

Alberta Current to Gazette Vol. 114:23 (December 15, 2018)

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TAB 5

2018 ABCA 141
Alberta Court of Appeal

English v. Alberta (Service Alberta)

2018 CarswellAlta 689, 2018 ABCA 141, [2018] A.W.L.D. 1786, 291 A.C.W.S. (3d) 78

William R. English and Raydan Transport Ltd. (Appellants / Applicants) and Alberta (Service Alberta), MT Investments Inc. and Worley Parsons Komex (Respondents / Respondents)

J.D. Bruce McDonald J.A., Barbara Lea Veldhuis J.A., and Michelle Crighton J.A.

Heard: April 6, 2018
Judgment: April 13, 2018
Docket: Edmonton 1703-0110-AC

Counsel: S.J. Weatherill, for Applicants / Appellants
J.M. Dube, for Respondent, Alberta (Service Alberta)
P.L. Quinton-Campbell, for Respondent, MT Investments Inc.
J.B. Marshall, Q.C., for Respondent, Worley Parsons Komex

Subject: Civil Practice and Procedure; Corporate and Commercial

APPEAL by appellants WE and R Ltd. from chambers judge's decision dismissing application to revive corporate appellant, R Ltd., more than five years after R Ltd. was struck from corporate registry.

Per curiam:

1 After hearing from counsel for the appellants, who was not counsel in the lower court, the panel dismissed the appeal with reasons to follow. These are those reasons.

2 The appellants appeal the chambers judge's decision dismissing their application to revive the corporate appellant, Raydan Transport Ltd. ("Raydan"), more than five years after Raydan was struck from the corporate registry.

3 By way of background, the respondent, MT Investments Inc. ("MT Investments") sued the appellants on July 29, 2011 for the costs to remediate a contaminated property that MT Investments purchased from Raydan several years before (the "Underlying Action").

4 In that statement of claim, MT Investments also alleged that Raydan had been struck from the registry on August 2, 2009.

5 In their statement of defence, filed on October 13, 2011, the appellants admitted that fact. The appellants in turn filed third party proceedings in the Underlying Action against the respondent, Worley Parsons Komex ("Worley Parsons"). On March 23, 2012, Worley Parsons defended on a number of grounds, including that Raydan lacked standing to issue a third party claim because it had been earlier dissolved.

6 On July 15, 2016, Worley Parsons filed an application to strike the appellants' third party claim on the ground that Raydan had been struck more than five years ago and, therefore, pursuant to s 208(1.1) of the *Business Corporations Act*, RSA 2000, c B-9, could not be revived.

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7 The application was returnable on August 17, 2016, but was adjourned *sine die* after the appellant, William R. English, became incapacitated. Mr. English eventually became represented by a litigation representative, Phillip R. Stuffco, and the application was restored to the Master's List, returnable on March 17, 2017. However, the appellants secured three more adjournments thereafter and the matter was finally adjourned *sine die* pending the outcome of this appeal.

8 During the time that Worley Parsons was attempting to set its application to strike the third party proceedings, the appellants attempted to revive Raydan. To that end, they wrote to the registrar on February 28, 2017 advising the registrar as follows: "It has recently come to our client's attention that Raydan Transport Ltd. has had its status changed to struck for failure to file returns".

9 The registrar advised that it would revive the corporation on receipt of a consent order that was never forthcoming. The appellants then applied to the chambers judge on April 7, 2017 for an order temporarily reviving Raydan for a period of five years for the purposes of the ongoing litigation but did not specify the specific provisions of the *Business Corporations Act* that were being relied upon. The appellants did not give the required notice under the *Alberta Rules of Court*, Alta Reg 124/2010, for an originating application, but the application nevertheless proceeded.

10 There is no dispute that Raydan was struck, and that notice of that fact was published in *The Alberta Gazette* on September 15, 2009.

11 In the originating application, the appellants submitted that Mr. English was never personally served by the corporate registry with the notice of intention to strike Raydan and further, once struck, the corporate registry failed to notify Mr. English that Raydan had been struck.

12 Mr. Stuffco deposed that he had spoken to Mr. English's wife and reviewed the appellants' records. He further deposed that he was unable to find evidence that Mr. English, Raydan's sole director, had been personally served by the registrar with notice of Raydan's dissolution.

13 The registrar appeared on the application and advised the chambers judge that it had only recently been served with the application and that the registrar could likely provide the notices that were sent within one week. The appellants sought an immediate decision because Worley Parsons' application to strike the third party proceedings was scheduled to be heard the following week.

14 Relying on the publication in *The Alberta Gazette* and on the admission in the statement of defence, the chambers judge was satisfied Mr. English knew that Raydan had been struck and dismissed the application to revive Raydan.

The Standard of Review

15 The chambers judge's finding that the appellants had notice that Raydan had been struck is a question of fact reviewable on the standard of overriding and palpable error.

16 The chambers judge's finding that Raydan could not be revived under the *Business Corporations Act* is a question of law to which the correctness standard of review applies: *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) at paras 8, 10, 25, [2002] 2 S.C.R. 235 (S.C.C.).

Position of the Parties

17 The appellants argue the chambers judge erred by finding that proper notice had been given to Raydan and Mr. English without evidence to support that conclusion and further, that the chambers judge did not properly apply the *Business Corporations Act* in determining whether Raydan should have been revived.

18 The respondent, Worley Parsons, argues that the chambers judge determined the issues based on the evidence that was properly before the Court and made no overriding and palpable error in doing so. The respondents, Worley Parsons

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and Service Alberta, argue that the chambers judge correctly interpreted the *Business Corporations Act* and correctly refused to revive Raydan.

The Relevant Statutory Provisions

19 The sections of the *Business Corporations Act* that are relevant to this appeal are s 20, s 208, s 210, s 213, s 247, s 255, and s 256.

20 Read together, those sections provide that the registrar can dissolve a corporation if that corporation has not commenced business within three years of being incorporated, has not carried on business for three consecutive years, or is in default for a period of one year in its document filing requirements. If one of these criteria is met, the registrar may then send by ordinary mail to the corporation and to its directors — at the addresses they each maintain with the registry — a notice of its intention to strike. Both the corporation and the directors are required to notify the registrar of any change in those addresses.

21 The notice, once sent, is deemed delivered in the time it would be delivered in the ordinary course of mail. The registrar cannot dissolve the corporation unless it has given the corporation and each director 120 days' notice of its decision to dissolve the corporation and has also published notice of the decision in *The Alberta Gazette*.

22 Once these criteria are met, the registrar may issue a certificate of dissolution. Subject to an appeal of the registrar's decision under s 247 of the *Business Corporations Act*, the corporation will cease to exist on the date reflected in the certificate of dissolution.

23 Finally, if five years has passed since the date of dissolution, the corporation cannot be revived.

24 Though Raydan was dissolved more than five years ago, the appellants submit that the registrar did not give Raydan and Mr. English 120 days' notice of its intention to dissolve Raydan and, thus, the court should allow Raydan to be revived.

Analysis

25 We agree with the appellants that the registrar cannot dissolve a corporation without first giving the corporation and the directors 120 days' notice of its intention to do so.

26 However, we do not agree with the appellants that the uncontradicted evidence was that neither Raydan nor Mr. English ever received such notice.

27 Mr. Stuffco's affidavit must be read with the pleadings in the Underlying Action. The appellants filed the statement of defence before Mr. English became incapacitated. In that statement of defence, the appellants did not assert they were unaware that Raydan had been struck. Rather, they simply admit as a fact that Raydan was struck on August 2, 2009.

28 Mr. Stuffco deposed that there is no record that Mr. English was personally served. We agree with Worley Parsons that that does not meet the onus to demonstrate that the registrar did not give the required notice to the appellants.

29 First, Mr. Stuffco does not say there is no record that notice was given to the appellants. Rather, he deposes there is no evidence that Mr. English, the sole director, had been personally served by the registrar with notice of Raydan's dissolution. The *Business Corporations Act* does not require personal service on the directors. It requires only service by ordinary mail.

30 Second, Mr. Stuffco does not say that Raydan did not receive the registrar's notice, so we can infer that it did.

31 Third, Mr. Stuffco did not depose any information from which the court could infer that if a notice had been sent to Mr. English, Mr. Stuffco could reasonably expect to have found it among Mr. English's records. More specifically,

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there is no evidence regarding Mr. English's records retention habits or even if he kept the corporate registry up to date with his current address throughout the period of incorporation.

32 Establishing evidence to the contrary eight years after dissolution, in the face of an admission in 2011 that the dissolution in fact occurred in 2009, would require something more than the assertion that personal service could not be located among the appellants' remaining records. While it might have been preferable to adjourn the matter to permit the registrar to provide the necessary documentation, the chambers judge did not make an overriding and palpable error when he decided the evidence that was before him was insufficient to show the registrar had not given Mr. English the required notice.

33 Further, on a plain reading of s 208(1.1) of the *Business Corporations Act*, revival is no longer permitted after the expiry of five years from the date of dissolution. The chambers judge was correct in refusing to revive Raydan, given that more than five years had passed since the corporation was dissolved. Regardless of when or even if the notice was sent, the appellants were alerted to Raydan's status in 2011 and to Worley Parsons' intention to strike the appellants' third party proceedings because of that status in 2012. Still the appellants took no steps to revive Raydan until more than five years later.

34 We do not take issue with the general proposition espoused in *1036122 Alberta Ltd. v. Khurana*, 2012 ABCA 10, 519 A.R. 221 (Alta. C.A.), that a court may be required to exercise its discretion to intervene where a claim would be rendered a nullity. However, we agree with Worley Parsons that the general principle has no application to the facts of this case. In *Khurana*, the corporation had been revived within the five year revival period prescribed by s 208(1.1) of the *Business Corporations Act*. The issue was to what extent the corporation's actions would have had retroactive effect, where they were taken in the period before the corporation was revived. As stated by the court in *Wolfe v. Shawcor Ltd.*, 2016 ABQB 261 (Alta. Q.B.) at paras 56-57, (2016), 35 Alta. L.R. (6th) 108 (Alta. Q.B.):

> The law is clear that a company that is struck off or dissolved lacks the capacity to sue and any claim filed in the name of the former entity is subject to being struck as an abuse of process: *Bute Logging Company v Sanders* (1952), 5 WWR (NS) 142, [1952] BCJ No 11 (SC) and cases cited at para 3.
>
> The revival of a corporation with retrospective effect may save a claim which would otherwise be a nullity due to dissolution: *1036122 Alberta Ltd (cob ANL Construction) v Khurana*, 2012 ABCA 10 (CanLII), 519 AR 221. However, no law was put forward supporting the viability of a corporation's claim filed after the corporation was struck, with no subsequent revival. The principles behind incorporation speak against such a proposition.

35 The Court went on to conclude, in para 61, that: "It cannot serve the public interest to leave matters in abeyance where the legislature has clearly expressed the period within which the right of revival must be exercised".

36 On appeal, this Court accepted the lower court's conclusion in *Wolfe v. Shawcor Ltd.* to have been "not only reasonable, but indisputably correct": *Composite Technologies Inc. v. Shawcor Ltd.*, 2017 ABCA 160 (Alta. C.A.) at para 6, (2017), 51 Alta. L.R. (6th) 91 (Alta. C.A.).

37 The appeal is dismissed.

Appeal dismissed.

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