

Cases of Interest

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City Permitting Accumulation of Ice and Snow on Sidewalk Is Grossly Negligent

***Bramer v. City of Hamilton*, 2015 ONSC 713 (CanLII) http://canlii.ca/t/gj3mr**

The plaintiff slipped and fell on a sidewalk in the City of Hamilton in 2009. The plaintiff alleges that the City is grossly negligent in failing to maintain the surface of the sidewalk in a safe and proper state of repair, permitting an accumulation of ice and snow contrary to the City's own bylaw and therefore liable pursuant to s.44 of the *Municipal Act*. The plaintiff further alleges that the City was negligent in failing to maintain in a proper state of repair a metal pedestrian handrail that ran beside the sidewalk in question. The City admits that the sidewalk in question falls within its responsibility to maintain, but denies any negligence. The City claims to have exercised reasonable care in discharging its responsibilities either in respect of the sidewalk surface or in respect of the handrail.

HELD: The City is liable to the plaintiff

DISCUSSION: Section 44(9) of the *Municipal* Act renders a municipality liable for personal injuries caused by snow or ice on a sidewalk only in a case of gross negligence. As indicated in *Crimson v. Toronto (City)* 2010 ONCA 44 gross negligence is more than just a breach of duty of care, which is determined upon the facts of each particular case. It has long been recognized in Canadian case law that citizens in Canada must be taken as being familiar with Canadian winters and be taken to know that sidewalks and streets can be slippery at that time of the year. Nevertheless, the Court held that the defendant was grossly negligent. Its employees did no snow removal, or sanding or salting for many days prior to the fall, during which time snow accumulated on a particularly steep and well–used sidewalk. The City also failed to utilize independent contractor services available in the five days before the fall. The Court concluded that the facts of this case squarely fall within the parameters of gross negligence as described in *Crimson.*

With regards to the handrail, the failure of the defendant to properly maintain its pedestrian handrail in a proper and useable condition is appropriately considered as a factor supporting the finding of gross negligence on the part of the City. The condition of the handrail did not cause the fall; the snow and ice did. A handrail in proper condition may well have prevented the fall, just as proper snow removal and salting and sanding may have. The Court considers the unusable condition of the handrail to have been proven, but it is an element supporting the finding of gross negligence, rather than being a separate actionable wrong upon proof of simple negligence in failing to maintain it.

School Trustee Reinstated Despite Missing Municipal Elections Act Deadline

***Singh v. Peel District School Board and The Clerk of The City of Brampton/ Corporation of The City of Brampton*, 2015 ONSC 3092 http://canlii.ca/t/gj16t**

Gurratan Singh and Harkirat Singh were candidates in the municipal election for the City of Brampton. Both applicants campaigned together and shared campaign resources and expenses. As required under s.78 of the *Municipal Elections* Act "*MEA*" the applicants were required to file with the Clerk of the City of Brampton a financial statement and an auditor's report reflecting the revenue and expenses of their election campaigns by 2:00pm on March 27, 2015. After a mix-up, Harkirat ended up filing his financial statements and auditor's report five days late and Gurratan was six days late. The *MEA* set out consequences of failing to comply with these provisions in that under s.80(1) and (2), a candidate who fails to comply with s. 78 forfeits any office to which he or she was elected, the office is deemed vacant, and the candidate is ineligible to be elected or appointed to any office to which the *MEA* applies until the next regular election has taken place.

Harkirat was successful in his campaign and was ultimately removed from his position, and Gurratan (an unsuccessful candidate) was prevented from running for any office until after the next election. The applicants each sought an order granting them relief against penalties imposed by the *MEA* for having failed to file a financial statement by the established deadline.

HELD: The City should extend the deadline for filing.

DISCUSSION: In granting the candidates their requested relief from forfeiture, Justice Woolcombe applied the test established by the Supreme Court of Canada in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*

Justice Woolcombe indicated that the applicants could have exercised greater due diligence to ensure the documents were submitted in accordance with the *MEA*. However, their conduct was a far cry from that described in *Ecker v. Hamilton-Wentworth Catholic District School Board* 2012 ONSC 2246, where in declining relief in a similar situation, the court stated: "the applicant's conduct bespeaks indifference to the necessity of complying with campaign financing rules rather than acting in good faith.

I would find indifference rather than inadvertence in all the circumstances." The court held that missing the deadline was 'inadvertent' and notwithstanding the importance of the deadline and the need to comply, the penalty was too harsh for the unintentional failure.

Bylaw Upheld: Taxicabs Prohibited From Using Drive-Thru Liquor Outlets
***Duffield v. Prince Albert* (City), 2015 SKCA 46 (CanLII) http://canlii.ca/t/ghdpj**

The appellants are hotel owners who off-sale liquor by means of a "drive-thru" service. The City of Prince Albert's bylaw amended the taxicab bylaw to prohibit taxicab owners and taxicab drivers from driving their taxicabs through off-sale, drive thru liquor outlets in the City. The appellants asked the Court of Queen's Bench to quash the bylaw for two reasons. First, the procedure for its passage did not comply with the requirements of *The Cities Act*. Second, the subject matter of the bylaw is *ultra vires* the bylaw making powers of the City, because it regulates the sale of alcohol (a provincial concern). The Court of the Queen's Bench dismissed the appellant's application, and the appellants appealed.

HELD: Appeal dismissed.

DISCUSSION: With regards to the first ground of appeal before the Saskatchewan Court of Appeal, the appellants argued that the first, second and third reading of the proposed bylaw took place at the same council meeting without the unanimous consent required by s. 77 of *The Cities Act*. The Court concluded that the procedure used by City Council was appropriate. The Court of Appeal agreed with the Chambers judge that the wording of the proposed bylaw were not such that they change its 'essential character' and that minor changes are expected between readings and do not make the bylaw a new act with new procedural requirements on every change. The change was to add owners in addition to drivers of cabs. As such, it cannot reasonably be said that the bylaw was completely different by the time it received its second and third reading. The Court concluded that the passage of the bylaw complied with *The Cities Act*.

On the second ground of appeal, the Court of Appeal did not reach the conclusion that the bylaw is not *ultra vires* as easily as did the Chambers judge; however the Court ultimately did uphold the Chambers judge decision. The Court reviewed the record and the presumption that cities act in good faith. A review of the record indicated that the bylaw as passed was focused on regulating the activities of taxi cab drivers and taxicab owners, which is a legitimate exercise of its municipal power. It was far from obvious that council acted in bad faith when enacting the bylaw. Moreover, the record indicated council never intended to pass a bylaw to regulate- in pith and substance- the sale of alcohol. Rather, it appears, council's objective was always- in pith and substance- to regulate the taxicab business so as to mitigate the safety risks to taxicab operators arising from their patron's use of drive-thru off-sale liquor outlets.

Judge Throws Out Claim Against City for Abuse of Zoning Powers
***Prince George (City) v. Geisser*, 2015 BCSC 697 (CanLII) http://canlii.ca/t/ghf0r**

The City of Prince George commenced this proceeding in February 2011. It sought, *inter alia*, orders that Colleen Geisser cease storage of shipping or cargo containers on the Property without enclosing them and removing such containers if they were not enclosed. The City had received a complaint about the containers being moved on the property in the summer of 2010. The City contends that Geisser's property was not properly zoned for a commercial warehousing and storage function. Further, in 1991 had Geisser signed a restrictive covenant for the property, on behalf of her company Gypsy Holdings, that also excluded warehousing and storage.

Geisser's position was that the City knowingly permitted her to use the property for warehousing and storage purposes for many years. In 1991, there was a structure used for storing cars, tools, boats put up and in 2008 she moved two 40-foot containers onto the property. Geisser filed a counterclaim in which she made the allegations that the City misappropriated a portion of her property located at 3505 Pierreroy Road in Prince George, BC to build or widen a portion of Landsdowne Road, deliberately used the zoning bylaws process to interfere with her ability to earn an income and dealt with her in a malicious manner including making threats, abusing its powers, and invading her privacy interests with the intent to cause her harm. The City's position is that Geisser's claims are frivolous and vexatious.

HELD: Counterclaim dismissed.

DISCUSSION: The Court began by relying on the principals outlined in *Bradshaw v. Stenner*, 2010 BCSC 1398 assessing the credibility of a witness. When applying these principals the Court concluded that on the key issues where there is a dispute between the parties, Geisser's evidence is not credible; mainly because Geisser's evidence is motivated by her strong belief that she was wronged by the City for many years. Regarding Geisser's first claim relating to the misappropriation of her property for the purpose of road construction, the claim was dismissed. The belief that a misappropriation occurred was based on erroneous conclusions Geisser reached with respect to the methodology utilized by registered land surveyors. The second claim related to the City allegedly having improperly used the zoning process to prevent Geisser from using her property for commercial storage purposes. This claim was passed on a misunderstanding of the zoning process. The third claim related to malicious acts of the City's employees designed to embarrass Geisser. The Court concluded that again, there was no credible evidence.

City Can Terminate Private Practice Lawyer Working As Municipal Prosecutor
***Donovan c. Montreal (City of)*, 2015 QCCS 2277 (CanLII) http://canlii.ca/t/gj5k9**

Beginning in 1977 Mtre. John Donovan a private practice lawyer, acted as a prosecutor for the Municipal Court of the City of Westmount. In 2000 Westmount merged with the City of Montreal. Following the merger, Donovan worked as a part-time Municipal Court prosecutor for Montreal. Montreal then had to decide whether or

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not it would continue to use Donovan or rely on and use its internal legal employees as city prosecutors. In 2010 Donovan was advised in writing that Montreal was going to use its full time lawyers to act as Municipal prosecutors, and his services would no longer be needed. Donovan alleged that Montreal had no right to terminate his services since it had to respect the resolution adopted on June 2, 1992 by Westmount, confirming that the latter retained his services as a Westmount Municipal Court prosecutor. Donovan also argued that if he was to be terminated, Montreal had to give him appropriate notice before terminating his service.

HELD: Motion Dismissed.

DISCUSSION: The Court held that Montreal was able to terminate the services of Donovan. At the time Montreal terminated Donovan's services, the Westmount resolution was obsolete. The Court relied on the *Act Respecting the Exercise of Certain Municipal Powers In Certain Urban Agglomerations,* which delegated to Montreal the competence concerning municipal court affairs. Furthermore, the agreement relating to the delegation of activates of penal proceedings before Montreal Municipal Court signed by Westmount in 2006 permitted Westmount to use the services of prosecutors other than those used by Montreal-but Westmount had never subsequently retained the services of Donovan. It was Montreal that continued to retain Donovan, and therefore Montreal was able to put an end to Donovan's services.

With regards to notice, the Court indicated that Donovan was terminated because Montreal decided to use its own employees to act as Municipal Court prosecutors. Therefore it is clear that Donovan was not Montreal's employee. The Court agreed with the position put forward by Montreal that Donovan was bound by a service contract and was subject, as any lawyer, to the *Code of Ethics of Advocates*. The Code of Ethics provides that a lawyer may not, at any time, limit the right of the client to consult another lawyer. Montreal argued that requiring a client to give his lawyer prior notice of termination of service would be in violation of the client's right to choose his lawyer. ML

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to self-defense outside the home. The Second Circuit grudgingly "assumed" that such a right may exist—but proceeded to uphold a restrictive "proper cause" permitting scheme by applying intermediate scrutiny in the form of an "interest-balancing test:"

> Because our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, we conclude that intermediate scrutiny is appropriate in this case. The proper cause requirement passes constitutional muster if it is substantially related to the achievement of an important governmental interest."

Freed of the requirement to find narrow tailoring, the Second Circuit determined that maintaining public safety was an important governmental interest and the New York "proper cause" process served that interest– in stark contrast to the recent DC Circuit analysis in *Wrenn*.

High Court Reprise? *Heller* and *McDonald* resolved narrow questions about gun possession—and left many other questions unanswered. Subsequent interpretations of those decisions and their implications for limits on firearms, whether in the home or in public, have diverged widely, as evidenced in *Wrenn, Peruta, Moore, Kachalsky, Jackson* and other Circuit Court holdings. While the general momentum is shifting unmistakably towards less restriction on the right "to keep and bear arms," the real meaning of the Second Amendment will clearly require continuing explication by the Supreme Court. ML

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issue of the reasonableness of the accommodations proposed after this incident by Sheehan's litigation expert (i.e., that the officers should have allowed Sheehan to remain in her "comfort zone" until they were able to calm her down), was one for the jury.

The Supreme Court granted certiorari on two issues: (1) whether the ADA requires police officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of an arrest; and (2) whether it was clearly established for the purposes of the Fourth Amendment that even where an exception to the warrant requirement applied, an entry into a residence could be unreasonable due to the anticipated resistance of an armed and violent suspect within the residence.

IMLA's brief argued, among other things, that individual police officers should not be required to perform an analysis regarding what accommodations are necessary under the ADA, but rather, police should be afforded broad discretion in these circumstances.

In a 6-2 opinion, the Court dismissed the first issue regarding the ADA as improvidently granted, declining to rule on an important issue for local governments.

Regarding the Fourth Amendment issue, the Court noted that the "real question" was "whether, despite these dangerous circumstances, the officers violated the Fourth Amendment when they decided to reopen Sheehan's door rather than attempting to accommodate her disability." Despite having reframed the question presented on the Fourth Amendment issue, the Court declined to rule on this constitutional question. The Court instead rested its holding on the fact that the law was not clearly established at the time of the events, thereby entitling the officers to qualified immunity. In so holding, the Court reversed the decision of the Ninth Circuit, admonishing that it has "repeatedly told courts – and the Ninth Circuit in particular – not to define clearly established at a high level of generality... Qualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures." The Court explained that under the circumstances, a reasonable officer could have concluded that the second entry into Sheehan's home was justified both under the continuous search rationale and the exigent circumstances rationale.

The second case decided by the Court on May 18, 2015 in which IMLA had participated as an amicus was *Comptroller of the Treasury of Maryland v. Wynne.* In *Wynne,* local governments were dealt a loss by the Court when it held that Maryland's tax scheme was unconstitutional under the dormant Commerce Clause.

The Maryland tax scheme at issue had two components: a state tax and a county tax. The county tax is based on where the individual is domiciled and maintains a principal residence. Maryland provides residents who pay income tax to another jurisdiction for income earned in that other jurisdiction a credit against Maryland state taxes, but Maryland does not provide a credit against its county taxes. Nonresidents

who earn income from sources within Maryland must pay the state income tax as well as a "special" nonresident tax in lieu of the county tax. The result of Maryland's tax structure is that some Maryland residents who earn income outside the state may be subject to so-called double taxation because a credit is only offered on the state tax and not on the county tax.

In a 5-4 opinion, writing for a sharply divided Court, Justice Alito concluded that Maryland's personal income tax scheme violates the dormant Commerce Clause. The majority concluded that Maryland's tax structure creates a risk of double taxation, is inherently discriminatory and that it fails the "internal consistency" test. The majority noted that the state's tax scheme operates as a tariff, which the Court concluded is "fatal because tariffs are 'the paradigmatic example of law discriminating against interstate commerce.'" The Court explained that Maryland's tax scheme "fails the internal consistency test because if every State adopted Maryland's tax structure, interstate commerce would be taxed at a higher rate than intrastate commerce."

The Court brushed aside arguments made by the Solicitor General (which were also advanced by IMLA and other state and local government groups) that residents of a county reap the benefits of local government services, like schools, roads, and police and fire services, and a state should therefore have the ability to tax the income of residents for those services, regardless of where that income was earned.

In the principal dissent, Justice Ginsburg argued that the dormant Commerce Clause does not invalidate a tax scheme where the discriminatory effect results from the operation of two otherwise lawful tax statutes. She also argued that it is well-established that states have the authority to tax all of their residents' income, wherever earned, and that it is a policy decision that should be left to the states and Congress to decide whether they want to offer tax credits for income that is taxed by other states. She concluded by noting that the Court is ill equipped to make these types of policy decisions.

The dissent brought together an unlikely confederation. Joining Justice Ginsburg were Justices Kagan and Scalia. Justice Scalia also wrote his own dissent arguing that the dormant Commerce Clause does not exist, because the Constitution says nothing about prohibiting state laws that burden interstate commerce. Justice Thomas joined the Scalia dissent and issued his own, arguing that even if there is a "dormant" Commerce Clause, it could not have been intended to apply in this manner. **ML**

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