

Cases of Interest

By Monica Ciriello, Ontario 2015

"Immigration Experience" Desired: Candidate Files Human Rights Application *Konesavarathan v. Guelph* (City), 2016 HRTO 1453 (CanLII) http://canlii.ca/t/gvn41

Kovarthanan Konesavarathan (Applicant) applied for a "Project Specialist, Immigration Partnerships" position posted by the City of Guelph (City). The job posting included a 14-point bullet list under the heading "Qualifications." The first two were:

- Experience related to the duties listed above, normally acquired through a degree or diploma in Social Sciences or related field and experience with community initiatives or in a related area. Candidates with an equivalent education and experience may be considered.
- Experience overseeing projects and project teams ensuring they are on track and completed on time.

The last of the 14 qualification items stated:

- Lived immigration experience will be considered an asset.

The Applicant was not among the eight candidates (out of 110 total respondents) selected for an interview and followed up with the City. The City indicated that taken together, the Applicant's resume and work experience did not present the breadth of knowledge to be brought in for an interview. The Applicant filed a *Human Rights Code (Code)* application based on not getting an interview and on the job posting itself, alleging discrimination based on race, colour, ethnic origin and/or place of origin contrary to the *Code*.

HELD: Dismissed.

DISCUSSION: The Adjudicator began by applying the summary hearing test to determine if the application had a reasonable prospect of success. To set the framework for the test, the Adjudicator relied on *Forde v. Elementary Teachers' Federation of Ontario*, 2011 HRTO 1389: to continue in the Tribunal's process following a summary hearing, there must be a basis beyond mere speculation and accusations to believe that an applicant could show a breach of the *Code*. The Applicant argued that the City did not look beyond the candidates' job titles to determine competencies and skills. This put the Applicant, of Sri Lankan origin, at a disadvantage because his non-Canadian positions had different job titles that were overlooked by the City despite having obtained the requisite competencies and skills for the position. The City indicated that the candidates chosen for an interview demonstrated greater competencies and experiences required for the position in their job applications and resume.

The Adjudicator found that the Applicant was unable to present evidence that his non-Canadian experience was overlooked in the hiring process. In addition, the Adjudicator highlighted *Thambipillai v. Toronto District School Board*, 2012 HRTO 843 which found that there is nothing overtly discriminatory about an employer basing its decisions on whether to grant interviews solely on the information provided by the job applicant. In the issue at hand, that was exactly what the City did; the Applicant had insufficiently described his relevant experience and qualifications in his cover letter and resume.

Next, the Applicant argued that the job posting itself was discriminatory as it indicated that "lived immigration experience" would be an asset, when in reality the City had used that criterion to filter out immigrants, contrary to section 23(2) of the *Code*. Although *Rocha v. Pardons and Waivers of Canada*, 2012 HRTO 2234 held that simply asking a question which serves to classify an individual by a *Code* ground can constitute adverse treatment (and that there is no requirement to show an intention to discriminate) there was no evidence of discrimination here. The Adjudicator contrasted the statements from *Rocha* with the Applicant's argument, finding that in the present case there was no immigration-based adverse treatment towards the Applicant and that "lived immigration experience" would genuinely be viewed as an asset and qualification for the position. The Adjudicator dismissed the application, finding no reasonable prospect of success.

Yes, There is Ice in the Arctic: Unsuccessful Slip and Fall Action *Nancy Vail v. City of Yellowknife*, 2016 NWTTC 16 (CanLII) http://canlii.ca/t/gvhjf

In early November 2015 Nancy Vail (Plaintiff) decided to walk home in downtown Yellowknife (City). It was dark and the downhill sidewalk she was walking on was icy. Plaintiff slipped and fell, suffering a fracture to her wrist that resulted in surgery. The Plaintiff brought forward this claim, seeking $8,000 as compensation for damages from the City for failing to keep the street safe and free of ice. The City acknowledged it has a duty to remove snow and ice from the streets but argued that its actions on the day the Plaintiff fell did not amount to gross negligence.

HELD: Dismissed.

DISCUSSION: The Court began by outlining the provisions in the *Cities, Towns and Villages Act (Act)* highlighting section 87 and 133(1). Section 87 refers to the City's responsibility to keep sidewalks 'in a state of reasonable repair':

87. A municipal corporation shall keep each highway and other public place that is subject to its direction, control and management, including works in, on or above the highway or public place put there by the municipal corporation, in a state of reasonable repair, having regard to the character of the highway, place or work and the area of the municipality in which it is located.

Section 133 of the *Act* limits a municipality's liability to instances of gross negligence:

133(1). A municipal corporation is not liable for loss or damage caused by snow, ice or slush on highways in the municipality, unless the municipal corporation is grossly negligent.

The Court accepted the Plaintiff's evidence that the sidewalk she was

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walking on was icy as a result of the weather thawing and freezing throughout the day. In response, the City acknowledged that it did have a duty to the Plaintiff under section 87, but its actions did not rise to the level of gross negligence. The City presented evidence by calling three employees as witnesses, to explain its snow and ice removal process. The evidence presented by the City indicated that there is a bylaw in place that requires snow and ice removal from sidewalks within 24 hours and the sidewalk where the Plaintiff fell had been cleared between 2 pm and 3 pm that afternoon. The City argued that it therefore fulfilled its duty to keep the sidewalks in a state of reasonable repair, and that it had no way of knowing that the sidewalk would again be icy by 9 pm.

In addition, the City submitted that it has provided multiple ways for residents to inform the City of situations such as dangerous sidewalks that require City attention, such as calling an emergency dispatcher (on call 24/7 during the winter); reporting the situation online; and reporting the situation to a municipal officer. None of these were utilized on the day of the Plaintiff's fall.

The Court found that despite the snow and ice policies, the City had failed to protect the Plaintiff, however, the Court was unable to find the City grossly negligent. In order to be grossly negligent, the City must have no policy of addressing icy conditions or must ignore known icy conditions, and no such evidence was presented. The Court relied on *Occhino v. Winnipeg (City)* 1988 CanLII 5647 (MB CA) to arrive at this conclusion:

The duty to protect the public from the hazard of snow and ice is far from absolute. The city is not an insurer of safety. It must take reasonable steps to keep the sidewalks free of dangerous conditions, but its failure to do so does not necessarily result in liability to everyone who falls and is injured. For liability to ensue, the cause of the injury must be more than a mere breach of duty. The breach must be of such magnitude that it can properly be described as gross negligence. (Court's emphasis)

Blurred Lines: Accident on Border of Two Municipalities

***Laughlin v. Esmaeili*, 2016 ONCA 826 (CanLII) http://canlii.ca/t/gvgzh**

While driving on Steeles Avenue East, which forms the border between the City of Toronto (Toronto) and the Town of Markham (Markham), the Plaintiff's vehicle hit a concrete curbstone that made its way into the lane. The Plaintiff sued both Toronto and Markham. Toronto responded by cross-claiming Markham. The motion judge dismissed both Toronto's cross-claim and the Plaintiff's claim against Markham, finding that the curbstone originated on a boulevard where Toronto had exclusive jurisdiction. The motion judge ultimately held that it was "just and fair in all of the circumstances of this case" that Toronto be solely responsible to Markham for $51,903 in costs and characterized it as a "*Sanderson* order." Toronto appealed the summary judgment and the costs in favour of Markham.

HELD: Toronto's appeal of summary judgment dismissed, appeal of costs granted.

DISCUSSION: Toronto put forth four arguments:

As a result of the motion judge granting summary judgement, there will be duplication of proceedings and the possibility of inconsistent findings as the plaintiff's claim against it is proceeding to trial.

The motion judge should not have made a finding that the curbstone was a hazard that Toronto had an obligation to remove, as the plaintiff's claim is proceeding to trial.

The motion judge erred in finding that Toronto had exclusive jurisdiction over the boulevard from where the curbstone originated; that Markham was not liable to the plaintiff nor that Markham owed Toronto a duty of care.

The motion judge erred in holding Toronto solely responsible for Markham's cost and making a *Sanderson* order.

The Court addressed and dismissed Toronto's first and second argument together. The Court found that granting summary judgment dismissing Markham would not have an effect on the trial. The trial is set to determine whether Toronto breached its duty to Plaintiff under section 44(1) of the *Municipal Act, 2001* which requires a municipality to keep its highways in a reasonable state of repair. There is no dispute that when the Plaintiff hit the curbstone, the curbstone was in the curb lane of Steeles Avenue, and that Toronto had an obligation under section 44(1) to keep it in a reasonable state of repair. The motion judge made no binding decision regarding section 44(1) and therefore there is no risk of an inconsistent finding at trial.

The Court also dismissed Toronto's third argument, finding that the motion judge correctly relied on a 1974 Agreement in which Toronto assumed jurisdiction over the portion of Steele Avenue where the Plaintiff hit the curbstone. In addition, the Court found that Markham did not owe Toronto a duty of care, as the evidence presented showed that Toronto did not rely on Markham to notify it of "any and all potential problem areas." Therefore, "the facts did not disclose 'a relationship of proximity in which failure to take reasonable care might foreseeably cause harm to the plaintiff' and the motion judge correctly found that Markham did not owe Toronto a duty of care."

To analyze Toronto's fourth argument, the Court relied on *Moore (Litigation Guardian of) v. Wieneck,* 2008 ONCA 162 and stated "unless 'plainly wrong' a motion judge's costs order, *Sanderson* or otherwise, should not be set aside. The Court found the motion judge's *Sanderson* order plainly wrong. A *Sanderson* order deviates from the general rule of costs in a multi-party litigation and compels the unsuccessful defendant to pay all the successful defendant's costs. Here, there had not yet been a determination of Toronto's liability. At this point, Markham was entitled to costs of $25,951 against Toronto on the summary judgment motion and the cross-claim, and costs of $25,951 against the Plaintiff on the summary judgment motion and the action against the Plaintiff. In the event that Toronto was ultimately found to have breached its duty to Plaintiff, it would be required to reimburse Plaintiff for such payment to Markham.

Repair Your Damaged Residence–or the City Will
***Watt v. Kamloops* (City), 2016 BCSC 2029 (CanLII) http://canlii.ca/t/gvg6l**

In 2008 the home of Ms. Watt (Plaintiff) in the City of Kamloops (City) was so badly damaged by a fire that the Interior Health Authority declared it unfit for habitation. In early 2012, following no attempts by the Plaintiff to repair the home, neighbours complained to the City. The City reached out to the Plaintiff and encouraged her to remediate the home; it was unsuccessful. In late 2012, City Council approved a resolution outlining the work required to be completed by the Plaintiff, the timeline to be met, and noted that if the Plaintiff made no attempt to repair the property, the City would commence the remediation work at the Plaintiff's expense. In 2013 a process server served the resolution on the Plaintiff following which the City hired a contractor to begin remediation work. The remediation work was completed in May 2014 at a cost to the Plaintiff of nearly $58,000. The Plaintiff initiated this action claiming that the City did not serve her personally as required under the *Community Charter ("Charter")* and the remediation that was performed by the City was not reasonable. The City responded by requesting a summary trial.

HELD: Dismissed.

DISCUSSION: The Court found it suitable to proceed with the summary trial. Beginning with an analysis on remedial actions, the Court examined section 73 of the *Charter*: only if there is an unsafe condition in contravention of a bylaw or a nuisance may a municipality impose remediation upon a property at the expense of the owner. Both parties agree that the condition of the home was unsafe and/or a nuisance, but the Plaintiff agreed that the City did not serve her notice personally as required under section 77 of the *Charter*. The City submitted the process server's affidavit as evidence, which outlined the time the Plaintiff was served, that the Plaintiff was served personally, and the interaction at the time of service. The Plaintiff submitted that she was out of town visiting her children when the process server claimed to have served the resolution notice and she only found out about the notice in February 2014. The Court challenged the Plaintiff's submission, questioning why the Plaintiff did not obtain an affidavit from her children indicating she was with them on the date of service. In addition, the Plaintiff's daughter appeared before Council in November 2013 opposing the resolution for remediation, which did not align with the Plaintiff's claim of not being aware of the notice until 2014.

The Court held that the Plaintiff was served personally with notice in December 2013 thereby permitting the City to enforce the Council's resolution. The Plaintiff's claim that she was overcharged for the remediation was also dismissed by the Court as the City followed an appropriate process in selecting the contractor to do the remediation. The Court found that the City acted appropriately pursuant to the *Charter*.

Provincial Offences Court Has Jurisdiction to Award Costs Against City
***Oshawa (City) v. 536813 Ontario Limited*, 2016 ONCJ 665 (CanLII) http://canlii.ca/t/gvpgv**

The City of Oshawa ("City") charged numbered corporation 536813 Ontario Limited ("Defendant") for modifying its hanger at the Oshawa Airport when it built a loft within the hangar without obtaining a building permit as required under section 36(1)(c) of the *Building Code Act, 1992 ("Act")*. The Defendant admitted that he did not obtain a building permit when the addition was constructed but argued that the charge by the City was unconstitutional, as the federal government have exclusive jurisdiction over the field of aeronautics. The Court held that under the constitutional doctrine of interjurisdictional immunity, the *Act* does not apply to the Defendant's hanger addition, as it is a core federal competence pursuant to section 52(1) of the *Constitution Act, 1982*. At issue was whether the Provincial Offences Court is a court of competent jurisdiction to order costs against the City.

HELD: Costs ordered against the City.

DISCUSSION: The Court began its analysis with the Supreme Court decision of *Mills v. The Queen,* 1986 CanLII (SCC) that defined a "court of competent jurisdiction" as having: (1) jurisdiction over the person; (2) jurisdiction over the subject matter; and (3) jurisdiction to grant the remedy." The Court easily found that it had jurisdiction over the person and the subject matter before the court. With regards to the jurisdiction to grant the remedy, the Court recognizing that the Provincial Offence Court is created by statute with no inherent jurisdiction, meaning that the court has the powers expressly conferred upon it to control its own process. Comparing the ability of Superior Court to award costs, the Court found that depriving the Provincial Offence Court of the same ability would be undesirable. The legislature could not have intended that the Defendant in this case bring the same action, incurring additional expenses, in Superior Court simply to be awarded costs.

Therefore, the Court was able to conclude that the ability to award costs is an inherent jurisdiction of any court of law to maintain and control its own process, including the Provincial Offence Court. After determining that the Court had the authority to award costs to the Defendant, the Court examined whether such an order was warranted in this case. It found that the City had zealously acted in its own commercial interests while ignoring clear case law that aeronautics and airport-related buildings have been and continue to be a federal sphere of jurisdiction. "In its attempt to pull the foundation out from the defendant's constitutional challenge and despite the wealth of evidence to the contrary, the City tenaciously maintained the untenable position that the Hangarminium development, the defendant's hangar and the modifications made to it were not a part of the Oshawa Airport complex and, hence, could not be aeronautically related." The City had a duty to prosecute in the public interest, and the City overstepped its authority by maintaining its argument. Therefore, the Court ordered costs against the City. ML