

Recent Decisions of Interest

By Monica Ciriello, Ontario 2015

Municipalities Entitled to Appoint and Instruct Separate Counsel under Insurance Policies

***The Corporation of the City of Markham v Intact Insurance Company,* 2017 ONSC 3150 (CanLII) http://canlii.ca/t/h3wcl**

The Applicant, City of Markham (City) brought an application seeking relief against the Respondent, Intact Insurance (Intact) following a slip and fall on the City's sidewalk. The City had contracted its sidewalk winter maintenance of ploughing, sanding and salting to contractor VTA. VTA took out a Commercial General Liability policy with Intact naming the City as an additional insurer pertaining to liability arising out of the operations of VTA. On February 24 2014, the Plaintiff fell on an icy sidewalk in the City and brought a negligence action against both the City and VTA for failing to keep the sidewalk free of snow and ice. The City had requested VTA to clear the sidewalks everyday between February 18-22 2014, and no snow had accumulated beyond that date.

Intact defended VTA but maintained that it did not have a duty to defend the City. Intact submitted that the City was not an additional insured in this claim as the claim did not arise from VTA's operations, given that no operations were undertaken on February 24. The City commenced this application against Intact and sought: (1) A declaration that Intact is required to defend the City; (2) An order that the City is entitled to appoint and instruct counsel of its choice at the expense of Intact; (3) An order reimbursing the City for all past legal expenses incurred in defending the main action; and (4) costs of the application.

HELD: The Court found in favour of the City on all grounds.

DISCUSSION: The Court found that Intact is required to defend the City on all claims made against it by the Plaintiff. The elements of the test to determine if there is a duty to defend are outlined in the Ontario Court of Appeal decision *Carneiro v. Durham (Regional Municipality),* 2015 ONCA 909:

> First, when pleadings allege facts that, if true, require the insurer to indemnify the insured, the insurer is obliged to defend the claim. The mere possibility that a claim may fall within the policy is sufficient to trigger the duty to defend. In assessing whether the facts pleaded fall within the policy, the court must consider the substance and true nature of the claim. Extrinsic evidence expressly referred to in the pleadings may be considered.

In reviewing the Plaintiff's Statement of Claim, the Court concluded that the Plaintiff alleged identical negligence claims against both the City and VTA: that the parties failed to maintain the sidewalk and permitted it to be in an unsafe condition leading up to and on the date of the fall. The Court found that the Intact policy applied, and "Intact has a duty to defend the City...for the same reasons it has already agreed to defend VTA."

The Court also agreed with the City that it was entitled to appoint and instruct its counsel of choice without reporting to Intact, due to a conflict of interest. The Court highlighted VTA's Statement of Defense and Cross-claim which established VTA's attempts to shift liability to the City.

Finally, the Court found that Intact was required to pay for the City's defense and reimburse past costs in defending the action. Citing *Carneiro*:

> Where there is no practical means of readily distinguishing the costs of defense between the covered and not covered claims, or where it is impossible to do so, it is not appropriate to attempt to allocate defense costs and, therefore, the insurer should absorb them all.

The Court found no practical means of separating the covered and uncovered claims, and therefore held that Intact was responsible to cover the City's defense in its entirety.

Additional Parking Charges Allowed under *Housing Services Act* and *Residential Tenancies Act*

***El Sayed v Ottawa (City),* 2017 ONSC 3702 (CanLII) http://canlii.ca/t/h4bh5**

The Applicant is a recipient of rent-geared-to-income (RGI) and occupies a subsidised housing unit owned by the Ottawa Community Housing Corporation (OCHC) in the City of Ottawa (City). (OCHC and City are collectively Respondents). The Applicant is seeking judicial review of the decision made by Respondents to add an amount for parking at the unit, submitting that parking was always included in the RGI.

HELD: Application dismissed.

DISCUSSION: Citing ***Simpson v. Toronto Community Housing Corporation,*** 2016 ONSC 76 the Court found that the standard of review of the Respondents' decision is reasonableness. The Court noted that the "decisions were not only reasonable, but were the only decisions that could reasonably be made." The Applicant's position was that Respondents acted illegally and ultra vires to the authority provided to them in the *Housing Services Act, 2011 (HSA)* by adding a parking chare over and above the RGI amount. The

Court agreed that no language in the *HSA* provided the Respondents such authority, but noted that no language prohibited it.

In addition, the Court directed the Applicant's misguided argument to examine the landlord tenant relationship outlined in the *Residential Tenancies Act, 2006 (RTA)* as the *HSA* does not exclude the operation of the *RTA* unless specifically outlined in Section 7. The evident purpose of Section 7 is to allow the *HSA* and the *RTA* to be complementary and to function without a conflict. Section 7 of the *RTA* does not include s.123 which permits a landlord to increase the rent charged a tenant for a rental unit at any time if the landlord and tenant agree that the landlord will add any of the following: s.123 (1) a parking space. There was no evidence presented by the Applicant suggesting that the Respondents ever offered or agreed to provide free parking. Rather, the Respondent pointed to language in the tenancy agreement that clearly stated there were parking charges in addition to the cost of the subsidised rent.

City Did Not Meet the Pre-Trial Appropriateness Test to Proceed

Barriault v. Corner Brook (City), 2017 CanLII 38631 (NL SCTD) http://canlii.ca/t/h4ffr

In 1979 the City of Corner Brook (City) built a road and installed a culvert pipe on property owned by John Barriault (Plaintiff). In 2009, the Plaintiff submitted a plan to the City to develop his property. The development permit was denied on the grounds that the Plaintiff is required to carry out specific changes to correct the drainage on his property. The Plaintiff filed an action against the City alleging trespass and abuse of public authority. The City filed this application under s. 38.01(a) of the *Rules of the Supreme Court, 1986* for a pre-trial to determine questions of law prior to trial.

HELD: Application is dismissed.

DISCUSSION: The City maintains that the Plaintiff's trespass claim is not valid, as the City is authorized under the *City of Corner Brook Act,* R.S.N.L. 1990 *(Act)* to enter property during reasonable hours to perform required work. In the alternative, the City argues that *Limitations Act*, S.N.L. 1995, bars the Plaintiff's trespass claim from 1979. The City further argues that the Supreme Court is the not appropriate forum to hear the appeal of the Plaintiff's development permit. The Newfoundland West Regional Appeal Board has jurisdiction to review the Plaintiff's development permit in accordance with the *Urban and Rural Planning Act*.

It is established law that the Court has discretion to determine a question of law prior to trial. As outlined in *Ind-Rec Highway Services Ltd. v. Miawpukek Band* (1999) CanLII 19592, the onus is on the applicant to establish that a question or questions are appropriate for a pre-trial. Appropriateness is outlined in *Ind-Rec Highway Services Ltd* as:

—Agreed Statement of Facts or Matters of Public Record
—Determination of Factual Dispute
—Suitable Vehicle to Determine Questions of Law
—Discernable Advantage

The Court found that the City did not meet pre-trial appropriateness test, determining that not only is there no agreement of facts, there are factual disputes between the City and the Plaintiff. The Court found value in proceeding to trial to allow for additional facts to be examined by the trial judge, and found that there would be no reduction of time at trial if these issues were dealt with at the present. The Court ordered the matter to trial.

City Cannot Waive Material Element Outlined in Invitation To Tender When Granting Bid

Maglio Installations Ltd. v Castlegar (City), 2017 BCSC 870 (CanLII)

The City of Castlegar (City) put out a tender contract for the construction of three pools within the City. Marwest was successful in obtaining the bid from the City. The Plaintiff, an unsuccessful bidder for the contract, filed an action alleging that the City was in breach of contract. The Plaintiff suggested that the City failed to deal with all bidders fairly and in accordance with the material terms of the invitation to tender when it awarded the contract to Marwest, who submitted a deficient bid by failing to include the required Preliminary Construction Schedule (PCS) as outlined in Appendix 2 of the invitation to tender. The City maintained that the PCS was not a material element of the bid.

HELD: City breached contract with Plaintiff.

DISCUSSION: At issue was determining whether the PCS was a material element of the bid. Consistent with the Supreme Court of Canada decision *M.J.B. Enterprises v. Defence Construction (1951) Ltd.* 1999 CanLII 677 (SCC), a bid contract often includes an implied term that the City can accept only minor or non-material defects in a bid submission. Both parties agreed that if the Marwest's bid lacked a material element in its submission, then the City's award of the bid to Marwest breached the terms of its contract with the Plaintiff. Neither party challenged that a contract existed, recognizing that the City's invitation to tender was an offer and the Plaintiff's bid submission was acceptance.

The Court began by reviewing the plain meaning of the definition of "material," which is defined in the Oxford Dictionary as "important, essential, relevant... concerned with the matter not the form of reasoning..." Additionally, the court set the two-pronged test for non-material compliance as outlined in *Graham Industrial Services Ltd. V. Greater Vancouver Water District*, 2004 BCCA 5 (CanLII):

> The court must first assess whether the defect was as to an important or essential element of the invitation to tender and second determine on an objective basis whether there was a substantial likelihood that the defect would have been significant in the deliberations of the owner in deciding which bid to select.

In reviewing the facts of the case, the Court arrived at the conclusion that the PCS satisfied both prongs of the material test. The requirement for the PCS was clearly outlined in the invitation tender and there was nothing optional about this submission–with good reason, as the PCS would outline for the City if work could be completed within the required construction windows. The Court held that the importance of the PCS made it a material element of the bid, and the City did not have the authority to waive such material requirement. ML