

Inside Canada

Appeals Dismissed: Late, Vexatious, and Otherwise Unsuccessful Litigants

By: Monica Ciriello, Assistant Barrister and Solicitor, Middlesex County, Ontario

If You're Going to be Late to Court, Call

City of Winnipeg v. Innocent Vision, Inc., 2018 MBCA 76 http://canlii.ca/t/htltv

The Appellant was charged and convicted for contravening the City of Winnipeg's *Neighborhoods Liveability By-law* for allowing garbage to accumulate on his property and fined $3,700. The Appellant filed a summary conviction appeal and the presiding judge directed the Appellant to file a factum and reappear before the Court the following month. No factum was filed, and the Appellant was not present when his matter was called at 9:00 am; it was stood down until 9:15 am and when he was still not in attendance, Court dismissed the appeal. The Appellant appeared before the Court later in the day; when asked by the Court why he was late the Appellant stated that his sister's ex-husband died had recently died and he also had other garbage cases to attend to. The Court did not change its decision and the Appellant seeks leave to appeal the summary conviction to the Court of Appeal.

HELD: Appeal is dismissed.

DISCUSSION: As stated in *R v. McCorriston (GJ),* 2010 MBCA 3 the criteria for leave to appeal a summary conviction pursuance to subsection 839(1) of *Criminal Code,* RSC 1985, c. C-46 (*Code)* requires the appeal to involve a question of law. Furthermore, even if a question of law exists, leave should only be granted if the question raises an arguable case of substance which is of sufficient importance to the Court. In addition, there should be a compelling reason for such review--One compelling reason would be that the issue raises matters that are of significance to the administration of justice or the development of the law. Subsection 825(b) of the *Criminal Code,* RSC 1985, c C-46 provides the Court jurisdiction to dismiss a summary conviction appeal for failure to appear or want of prosecution:

> **Dismissal for failure to appear or want of prosecution**
> 825. The appeal court may, on proof that notice of an appeal has been given and that
> ...
> (b) the appeal has not been proceeded with or has been abandoned, order that the appeal is dismissed.

Furthermore, the Court has authority to dismiss a summary conviction appeal if a party fails to file the required documents, pursuant to Rule 20.18 of the *Criminal Proceedings Rules of the Manitoba Court of Queen's Bench,* SI/2016-34. Rule 20.18 does not provide for an automatic dismissal of an Appellant's right to appeal a summary conviction. As seen in *R v. Sopko*¸ 1994 CarswellMan 118, an appeal may be granted where the contravention is minor, or there is a satisfactory explanation, or there is limited prejudice to the public interest in the timely finalization. When applying its jurisdiction to dismiss, the Court held that the Appellant had taken no steps to comply with the contravention before the Court. Furthermore, there was no evidence provided to establish that the Appellant was rectifying the garbage accumulation. Finally, the Appellant did not provide a satisfactory explanation and by no means did this matter rise to the level of importance to the administration of justice. Appeal dismissed.

Are Supervisors or the Employer Liable for Discrimination?

Klewchuk v. City of Burnaby and others, 2018 BCHRT 200 http://canlii.ca/t/htltr

An Employee at the City of Burnaby (City) filed a human rights complaint against the City and three immediate supervisors (collectively, Supervisors) alleging discrimination on the basis of an allergy to latex contrary to section 13 of the *Human Rights Code*, RSBC 1996, c 210 (*Code*). The Employee works in various recreation centres located throughout the City, and at times she has been exposed to latex balloons on those premises. In 2007, the Employee informed each of the Supervisors of her allergy and requested that latex balloons stop being used at City recreation centres. She alleges that balloons remained on the premises and that, as a result of her request she received fewer scheduled shifts. The Supervisors sought to have the complaint against them dismissed on the basis that it did not further the purposes of the *Code*.

HELD: Complaint dismissed against Supervisors.

DISCUSSION: Pursuant to subclause 27(1)(d)(ii) the Human Rights Tribunal (Tribunal) has the authority to dismiss all or part of a complaint if proceeding with it would not further the purpose of the *Code.* Despite the authority, the Tribunal must review the facts of the matter in light of two interpretations. First, case law states that the purpose of the Code is to require that individual perpetrators of discrimination are held accountable for their actions, and as a result a complaint against individuals furthers the purpose of the *Code (British Columbia Human Rights Tribunal v. Schrenk,* 2017SCC 62). Second, by

contrast, *Daley v. BC (Ministry of Health) and others,* 2006 BCHRT 341 highlights that naming individuals in a complaint has the potential to cause distress, increase personal animosity and delay any resolution proposed by the Tribunal. The Employee argued that the Supervisors failed to reasonably accommodate her latex allergy. In reviewing the facts, the Tribunal held that the Supervisors were merely doing their job at the City, although it recognized that in doing so it could have resulted in a finding of discrimination. The Tribunal was satisfied that the purpose of the *Code* was better served by dismissing the complaint against the individual Supervisors and that the City would be able to fulfill any remedy that the Tribunal may order.

Turning Back a Vexatious Litigant
Dick v. City of Coquitlam, 2018 BCSC 1402 http://canlii.ca/t/htkqk

For years the Petitioner has submitted applications to the City of Coquitlam (City) to obtain the necessary permits to develop his property. The City denied all applications and permits. There were two separate applications before the Court; New Westminster Registry, Action No. S128222 (128 Action) and Action No. S198971 (198 Action). The Petitioner applied to amend the notice of civil claim regarding the 128 Action. The City applied to have the 198 Action dismissed and a declaration that the Petitioner is a vexatious litigant, and an order that requires the Petitioner to obtain leave of this Court to proceed with any further proceedings with the City.

HELD: Petitioner's matter dismissed, the City's matter granted.

DISCUSSION: In addressing the 128 Action, the Court confirmed this was not the first time that the Petitioner has brought up the matter, which had already been dealt with and dismissed: the Court of Appeal already upheld the dismissal of both the application and the judicial review. As a result, the Court held that 128 Action is over and the Court is *functus officio*.

The Court next turned its attention to the 198 Action–the more recent application filed by the Petitioner. The Petitioner had sought a conservation permit for his property, whereupon the City outlined the deficiencies with the property and advised that it did not meet the City's Conservation Bylaw. The Conservation Bylaw provides the City with discretion to determine whether or not the permit should be issued. To date, there was no evidence before the Court that the deficiencies had been remedied by the Petitioner. The Court held that the 198 Action was disposed of based on *estoppel* and the City's application for summary trial was granted.

As found in *Carten v. Carten*, 2015 BCCA 201, the City provided a non-exhaustive list of principles to support its application that the Petitioner is a vexatious litigant. The Court was satisfied that the principles support the designation in respect to the Petitioner. The City was granted a declaration and an order that the Petitioner shall not institute any further proceedings against the City without further leave of the court, however, the Court declined to expand the required leave of the court to all legal proceedings in the Provincial Court.

No Individualized Duty for Correct Delivery of Trash Bill
2188160 Ontario Limited v. City of Toronto, 2018 ONSC 4653 http://canlii.ca/t/ht7q8

The Appellant, a numbered corporation, owns an apartment building in the City of Toronto (City) that was subject to the City's 2008 by-law amendment that imposed increased fees on all property owners who received solid waste services by the City. Notice of the by-law amendment and increased fees, which were designed to encourage greater recycling efforts, was mailed to the property owner. However, due to an internal error by the City, the Applicant was never billed for the garbage pickup services until August 2010. The City subsequently charged the Appellant fees for the services in the amount of $17,625.48. The Appellant requested an explanation of the charges and sought a credit, claiming that had it been aware of the additional city-imposed costs, Appellant could have contracted with a private trash hauler for approximately $11,000 less than the City's charges. It commenced a small claim action for that amount, submitting that the City had a duty of care to provide accurate account statements on a timely basis, which it breached when failing to provide statements over a 25-month period. Relying on the principles in *Maritime Electric Co. Limited v. General Dairies Limited*, [1937] 1 All E.R. 749 (J.C.P.C) the Deputy Judge held that the Appellant failed to demonstrate that a common law duty of care existed. The Appellant appealed.

HELD: Appeal is dismissed.

DISCUSSION: The Appellant's appeal pursuant to section 31 of the *Courts of Justice Act,* R.S.O. 1990, c. C. 43, suggested that the Deputy Judge erred in finding that Appellant had failed to demonstrate the necessary elements to establish a common law duty of care. The Appellant incorrectly suggested that the City's failure to deliver the accurate statements gave rise to an alleged duty of care.

The Court cited *Williams v. Toronto (City)*, 2016 ONSC 42 to summarize the three requirements that must be satisfied by the Appellant to establish a common law duty of care owed by a City, at para. 61:

> (1) foreseeability, in the sense that the defendant ought to have contemplated that the plaintiff would be affected by the defendant's conduct; (2) sufficient proximity, in the sense that the relationship between the plaintiff and the defendant is sufficient to give rise to a duty of care; and (3) the absence of overriding policy considerations that would negate any prima facie duty established by foreseeability and proximity.

In a short analysis the Court concluded that there was no evidence before it indicating that the City had a special or direct "individualized" relationship with the Appellant which would create a common law duty of care to ensure that Appellant actually received the trash pickup notices. It awarded the City costs of $4350 plus HST.

ML