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Summaries provided by:
Monica Ciriello, Director, Municipal Law and Licensing, Hamilton, ON

Court Applies a Common-Sense Approach to Limitation Periods

Nguyen v Winnipeg (City of), 2023 MBCA 7

In 2017, the plaintiff was injured in a fall after slipping on the stairs of a library operated by the City of Winnipeg ("City"). The plaintiff commenced an action against the City in 2019. The City sought a summary judgement dismissing the plaintiff's action for failing to provide timely notice as required under s. 491 of the *City of Winnipeg Charter*, SM 2002, c. 39 ("*Charter"*). The motion was dismissed, and the City appealed.

HELD: Appeal dismissed with costs.

DISCUSSION: Section 491 of the *Charter* establishes that no action may be commenced against the City for loss or damage arising from the failure to maintain a public facility unless it is served within 7 days after the alleged incident. The motion judge was satisfied that although the plaintiff did not serve the action on the City within 7 days, the plaintiff still satisfied s.491 of the *Charter* because sufficient notice was provided to the City when the plaintiff was interviewed by library staff on the date of the incident. The Court agreed with the motion judge's common-sense approach to s. 491 of the *Charter* which was in line with the *Law of Canadian Municipal Corporations,* 2nd ed (Toronto: Thomson Reuters, 2023) relevant application of s. 491(a) of the *Charter:*

…Generally speaking, a notice is good if it gives enough information to enable the municipality to investigate the claim, that is, if it accomplishes the object of the [Charter]… it is a question of fact in every case having regard to all the circumstances where the notice given was "substantial notice of what has occurred" so that inquiries might be made…"

The Court held that the City had fair and reasonable notice of the complaint relied on by the plaintiff, which was well within the limitation period and had enabled the City to investigate the accident to the satisfaction of s. 491 of the *Charter*.

"Litigation Finger" Points at Roadway Company, not Sidewalk Clearing Contractor

Reimer v. City of Toronto, 2023 ONSC 484

In 2017, the appellant twice slipped and fell in near succession while getting off City of Toronto ("City") transit, first on a sidewalk and then on the roadway. Crupi & Sons was under contract by the City to salt and maintain the roadway, and Maple-Crete was under contract with the City to perform snow removal services on the sidewalk. Maple-Crete subcontracted the work to Royal Crest. In 2018, the appellant gave notice of the incident to the City. In 2019, the appellant filed a motion to add Crupi & Sons and Maple-Crete as additional defendants to the claim, Crupi & Sons were added as a defendant unopposed. Opposed portions of the motion were heard by the case conference Master ("Master") in 2020. The appellant appealed the order of the Master dismissing the motion to add Maple-Crete and RoyalCrest as defendants to the action.

HELD: Appeal dismissed, with costs.

DISCUSION: In reviewing the order of the Master, the Court was satisfied that the core question to be answered was whether an "objective and generous reading of the pleading would demonstrate the 'litigation finger' is pointing at the proposed defendant (Maple-Crete)". The Master concluded that the statement of claim did not point the litigation finger at Maple-Crete, and the Court agreed. The statement of claim did not particularize alleged breaches of duty that distinguished between the roadway and the sidewalk. Rather, the statement of claim provided that the plaintiff's injuries were caused by the fall on the roadway; they did not allege injuries caused by the fall on the sidewalk.

The claim that the plaintiff was injured on the roadway when crossing the street, pointed the litigation finger at Crupi & Sons, not Maple-Crete who was responsible for clearing the sidewalk. Furthermore, the *Limitations Act*, and Rule 5.04(2) of the Rules of Civil Procedure, expired and the limitation period prevented adding a party. The Court held that the Master made no error in dismissing the appellant's motion to add Maple-Crete and RoyalCrest as defendants to the action. Appeal dismissed with costs.

No Relitigating *Human Rights Code* Allegations Previously Decided by the Tribunal

Davis v. Windsor (City), 2023 HRTO 26

The applicant filed a *Human Rights Code,* R.S.O. 1990, c. H. 19, ("*Code")* violation against the City of Windsor ("City"), alleging discrimination with respect to employment because of race, colour, and disability. The applicant alleged that, during the timeframe from 2005-2012, he had suffered racial slurs, GPS tracking by his supervisor, refusal of time off, and denial of training that employees with less seniority were given, entitling them to other benefits. He alleged that he filed various complaints with the City during his tenure, but no actions were taken. The City sought to dismiss the application, submitting that the allegations had been previously decided by the Tribunal.

HELD: Those allegations which have previously been decided cannot be relitigated; only the allegations for the most recent 2100-2012 timeframe can go forward.

DISCUSSION: Section 45.1 of the *Code* provides that the Human Rights Tribunal may dismiss an application if it is of the opinion that another proceeding has appropriately dealt with the substance of the application, *British Columbia (Workers Compensation Board) v. Figliola,* 2011 SCC 51. Between 2012-2014 the applicant had filed applications with the Tribunal raising allegations against the City. Various of these had been found to be untimely or without merit. The applicant had essentially reprised the same issues in subsequent allegations. The Tribunal concluded that the applicant was bringing forward allegations that had already been litigated and decided by the Tribunal, and it was appropriate to use the previous decisions to preclude re-litigation. Only those allegations that have not yet been determined by the Tribunal may continue to be considered.

Owner Must Comply with Dangerous Dog Designation

Victoria (City) v Evans, 2023 BCSC 11

The City of Victoria ("City") applied for a mandatory and prohibitive interlocutory injunction to compel the respondent, a resident dog owner, to comply with the City's Animal Responsibility Bylaw ("Bylaw")—and specifically, to obtain a valid dog licence and comply with the Bylaw's dangerous dog provisions.

HELD: Injunction granted.

DISCUSSION: There was no issue before the Court challenging the validity of the Bylaw, which obtains its authority under the *Community Charter,* S.B.C. 2003, c. 26, ss. 8(3)(k) and 12. The Bylaw sets out general requirements for licensing dogs, as well as additional provisions for dangerous dogs, which may be so designated by City Animal Control Officers for a two-year period. The City submitted that the respondent had flagrantly disregarded the Bylaw, having been in breach since 2022 for failing to licence his dog and failing to respect his duties as an owner of a dangerous dog. The respondent filed no evidence in response to the City's application but did dispute the dangerous dog designation at the hearing.

The Court held that whether or not the dog is dangerous is not the issue before the Court; the respondent had an option to challenge the designation and failed to do so. Therefore, the designation of the dog is deemed to be valid and the respondent has an obligation to fulfill the duties of an owner of a dangerous dog as outlined in the Bylaw. To obtain an interlocutory injunction, the onus is on the City to establish a *prima facie* case or a "clear breach" of the Bylaw, *Whistler (Resort Municipality) v. Wright,* 2003 BCSC 1192. In reviewing the evidence before it, detailing serious charges against and convictions of the respondent for breaching the Bylaw, the Court was satisfied that the City established a strong *prima facie* case that the respondent had breached the Bylaw – repeatedly. The Court granted the injunction requiring the respondent to obtain a valid dog licence and comply with all aspects of the dangerous dog provisions until 2024.

The Downstream Impacts of Setting Down a Point of Law

McDonald v Comox (Town), 2023 BCSC 18

The plaintiffs reside in the Town of Comox ("Town") and alleged that the quality of water in the creek running through their property had been adversely affected by upstream stormwater management practices of the Town. The plaintiffs filed an application to set down a point of law for determination before trial. The point of law is whether there "is an unabrogated riparian right at common law in British Columbia to receive water of a quality substantially undiminished from its natural state?" The Town sought to dismiss the application, submitting that this point had already been decided by the Court of Appeal.

HELD: Application dismissed.

DISCUSSION: The Court has discretion to apply Rule 9-4(1) to set down a point of law for determination before trial, should there be a saving of time to the parties by shortening the trial or a saving of substantial cost. The Court of Appeal in *Can-Dive Services Ltd. v. Pacific Coast Energy Corp*. (1993), 77 B.C.L.R. also provides additional principles to be considered when using discretion, including whether the point of law is clearly defined in the pleadings or the facts related to the point of law are not in dispute, and the point of law is capable of resolution without receiving evidence.

The Town argued that the point of law has already been decided by the Court of Appeal in *Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto Alcan Inc.*, 2015 BCCA 154, where it was held that the Province abolished common law riparian rights in British Columbia. Furthermore, the Town relied on the *Water Sustainability Act,* S.B.C. 2014, c. 15 to submit that common law rights as to watercourses were abolished in British Columbia many years prior to the subdivision that created the plaintiffs' property. It was the Town's position that there is no need for this application, as the point of law had already been determined. The plaintiff submitted that common law riparian rights attach to ownership of the banks of watercourse and not to ownership of the water. In reviewing the submissions, the Court found that the plaintiffs' position on the point of law was arguable, and that this was not an appropriate case to determine a point

of law before trial. The Court was cautious of the impact authorizing a point of law determination would have on this litigation and was not persuaded that there would be a savings to the parties or savings of court time. Rather, the severance of this legal issue would likely hinder the trial. The plaintiffs' application to set down for hearing the proposed point of law was dismissed.

Questions?

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