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Summaries provided by: Monica Ciriello, Ontario, 2015

City Failed to Meet the Reasonable Standard of Care to Plaintiff Who Fell on City Sidewalk

Binette v. Salmon Arm (City), 2017 BCSC 302 (CanLII) http://canlii.ca/t/gxqf2

The Plaintiff was injured when she was walking on a sidewalk in March and tripped on the base of a crosswalk sign in the City of Salmon Arm (City). When the City became aware that the Plaintiff fell, it responded by sending an employee to the location to eliminate the hazard and re-install the sign. The Plaintiff submitted that the City was negligent in implementing its Sidewalk and Signage Policy (Policy) and its actions caused her to fall. The City responded by arguing that it took reasonable steps to protect the community from sidewalk hazards by following the Policy it had in place. This matter proceeded by summary trial.

HELD: Plaintiff may proceed to trial.

DISCUSSION: In conducting the summary trial application analysis, the Court began by outlining the distinction between a policy decision and an operational decision by public authorities. This was important because a City could be liable for negligence of its operational decisions but not its policy decisions absent bad faith. To provide clarity as to what type of decision was being made by the City the Court relied on the Supreme Court of Canada decision in *Just v. British Columbia*, 1989 CanLII 16 (SCC):

> In determining what constitutes [a] policy decision, it should be borne in mind that such decisions are generally made by persons of a high level of authority

in the agency, but may also properly be made by persons of a lower level of authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors.

Both parties were satisfied that the actions of the City employees carrying out the Policy would be an operational decision. To be successful in this negligence claim, the Plaintiff must present evidence that proved that the City failed to meet the standard of care and therefore caused the fall. The Court found that the evidence presented by the Plaintiff did establish that the City failed to meet the standard of care required in the negligence claim. A few months before the Plaintiffs'fall the City received a call from a resident that a crosswalk sign was laying in the snow. City employees went out to retrieve the sign and were unable to locate where it came from. The Court found that the City employees misused the Policy when placing the sign in a City building until the snow melted. At that point, the City was aware that there was base of a sign somewhere in the vicinity of where the crosswalk sign was picked up. When the snow melted, the City made no effort to re-examine this location and only returned when the Plaintiff fell. The Court found that the City's actions did not keep the Plaintiff reasonably safe on its sidewalks.

Demolition of Property Formally on the Heritage Inventory List Was Handled Appropriately by City

Valastro v City of London, 2017 ONSC 773 (CanLII) http://canlii.ca/t/h0pw4

Rygar Properties (Rygar) is the owner of property in the City of London (City) downtown core. In September 2015, a recommendation was made to City Council that Rygar's property be designated cultural heritage under the *Ontario Heritage Act*. The City worked with Rygar to maintain the heritage features of the property during redevelopment but by July 2016 an Order to Make Safe (Order) was issued requiring Rygar to demolish or repair the buildings on the property. Rygar provided notice of its intent to demolish the buildings and in September 2016 City Council expressed its decision to no longer designate Rygar's property as cultural heritage. The property was removed from the City's Inventory of Heritage Resources, following which Rygar successfully obtained a permit to demolish the buildings. Annamaria Valastro, the Applicant, unsuccessfully filed an application with the Ontario Municipal Board (OMB) arguing that the *Planning Act* prohibited the City from issuing a demolition permit, and that the City erred when it issued the Order prior to removing the property from the Heritage Inventory List. The Applicant appealed.

HELD: Application dismissed.

DISCUSSION: The Court was hesitant to grant the Applicant standing as an "aggrieved" person under s.25 of the *Building Code Act (Act)* as the appeal was beyond the 20-day limitation. However, the Court did proceed with the application, as the City did not dispute standing. The Court dismissed the Applicant's first argument as moot, indicating that the OMB already determined that the City was not prohibited from issuing a demolition permit to Rygar. The Applicant attempted to argue that the City erred by issuing the Order prior to removing the property from the Heritage Inventory List. The City successfully responded that the *Act* and the *Ontario Heritage Act* do not provide immunity from an Order. The City relied on s.27 of the *Ontario Heritage Act* that indicates a municipality "shall keep a register of property situated in the municipality that is of cultural heritage value or interest," but there were no restrictions concerning an Order. In the alternative, the City put forth a timeline that demonstrated that the actual permit for demolition was not issued until

after the property was removed from the Heritage Inventory List. The Court agreed.

The Applicant submitted that the City neglected its duty to the community by failing to investigate earlier deterioration claims, arguing that due to the City's negligence the property had the opportunity to deteriorate even further, beyond the point of reasonable repair contrary to s.8(11) of the *Act.* The Court noted that the *Act* also has an immunity clause for chief building officials that are acting in their capacity under the *Act*, the only limit is acting in bad faith. The onus is on the Applicant to demonstrate that the chief building official was acting in bad faith (*Uukkivi v. Lake of Bays (Township)*, 134 A.C.W.S. (3d) 909). The Court found that the evidence presented by the Applicant did not satisfy a bad faith argument against the City. The Court found the City's actions reasonable, and the Applicant's frustration with the situation did not establish improper discretion by the City.

Discretionary Forfeiture Denied by the Court to an Unsuccessful City Councillor Who Failed to File Mandatory Financial Statements

Giannini v. City of Toronto, 2017 ONSC 1489 (CanLII) http://canlii.ca/t/h07hw

The Applicant ran as an unsuccessfully candidate for City Council in the City of Toronto (Respondent) 2014 municipal elections. Prior to and following the municipal election the Respondent advised all candidates, successful and unsuccessful, of the requirement under the *Municipal Elections Act, 1996 (MEA)* to file campaign financial statements by March 2015. In addition, if campaigns spent more than $10,000 the financial statements to be submitted must also be audited. If this deadline could not be met, the Respondent advised the candidates that they could apply to the Ontario Court of Justice for an extension. The Applicant failed to file her financial statement as well as submit an auditor's report. The Respondent advised the Applicant that she was in default and pursuant to s. 80(2) of the *MEA* she would be prohibited from being elected or appointed to office until the next election. The Applicant filed this application seeking relief from forfeiture under s. 98 of the *Courts of Justice Act (CJA)*, as she may be prevented from running as a Provincial party nominee as the committee policy is to deny a candidate who is in default for not filing financial statements in the last municipal election.

HELD: Application dismissed.

DISCUSSION: In assessing the application to grant forfeiture, the Court began by reviewing its authority under s. 98 of the *CJA* which indicates: "a court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just". When reviewing the case law, the Court noted that the decisions were mixed and it was not clear as to whether s.98 could be relied on to relieve against statutory penalties, such as non-monetary penalty under s. 80(2) of the *MEA*. The decisions that have found that s.98 can be used to provide relief have used Henderson J. interpretation of *Thomas v. Fort Erie (Town),* 1995 CanLII 7188 in *Niagara Falls (City) v. Diodati*, 2011 ONSC 2180. The Court noted that it would be an error to rely on the reasoning in *Thomas* for the current application as *Thomas* applied its specific authority under the *Fines and Forfeitures Act*, RSO 1990 to reverse a penalty and return unclaimed funds following a tax sale to an owner opposed to surrendering the funds to the municipality, not s.98 of the *CJA.*

To complete its analysis the Court also chose to review the factors outlined in the

Supreme Court decision *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.,* 1994 CanLII 100 (SCC) which are used when a court is deliberating if relief from forfeiture is appropriate. The Court found that the Applicant failed to take adequate steps to be reasonably diligent to comply with the *MEA* regardless of the numerous correspondences by the Respondent. When the Applicant became aware of the deadline to file her financial statements and audit report, she failed to take immediate steps to retain an auditor to submit the report or obtain an extension from the Ontario Court of Justice. The Court did not take the Applicant's breach lightly, highlighting that the *MEA* "exists to ensure free, open and fair elections by failing to file her financial statements in a timely way or at all, [the Applicant] frustrated that important public policy goal." Taking into account the criteria in *Saskatchewan River Bungalows Ltd.* the Court found that this was not an appropriate application to exercise a discretionary remedy and that the discretionary forfeiture relief under s. 98 would not supersede the specific time extension provision available for the Applicant under the *MEA.*

Human Rights Application Upheld Despite Another Complaint by the Applicant Based on the Same Events Currently Before the Ministry of Labour

Phillips v. The Corporation of the City of London, 2017 HRTO 273 (CanLII) http://canlii.ca/t/h083b

The Applicant, a former employee at the City of London (Respondent) filed an application under the *Human Rights Code,* R.S.O, 1990 (*Code*) alleging discrimination with respect to employment. The Respondent submitted that the Tribunal should defer the application as the Applicant had a pending complaint filed under the *Employment Standards Act, 2000 (ESA)*. The Applicant provided evidence to the Tribunal that illustrated that her *ESA* complaint was denied, but submitted another complaint that was filed against the Respondent under the *Occupational Health and Safety Act,* R.S.O. 1990 (*OHSA)* alleging harassment. Although the Applicant acknowledged that the application and the *OHSA* complaint evolved out of the same set of events, she argued that the complaints should remain separate to address both the discrimination and the harassment claims. The Respondent argued for a deferral of the application as there was significant overlap between the two complaints, increasing the possibility of inconsistent findings of law or fact.

HELD: Deferral denied.

DISCUSSION: The Tribunal assessed its authority under Rule 14.1 of the *Tribunal's Rules of Procedure* to defer an application, finding that it could be used as a discretionary measure on its own accord or at the request of any party. It next relied on the factors laid out in *Calabria v. DTZ Barnicke,* 2008 HRTO 411 to determine the risk of the concurrent legal proceedings and an inconsistent decision on fact or law; ranging from subject matter of the applications to the current status of each proceeding. The Tribunal concluded that the Applicant's *OHSA* complaint and this application evolved out of the same facts and acknowledged that do to this there was a possibility that both the Ministry of Labour and the Tribunal would have to make a determination on the same facts. However, there was no information in either submissions by the Application or the Respondent that outlined the current status of the *OHSA*. Without knowing the status of the *OHSA* complaint, the Tribunal concluded that this application would not be deferred.

Subleasing Taxi Licenses is Contrary to the City's Livery Transport Bylaw

Seroya v Calgary (City), 2017 ABQB 157 (CanLII)
http://canlii.ca/t/h0ps1

Harjit Seroya (Applicant) was an active member of the taxi industry in the City of Calgary (Respondent), having purchased five taxi licenses since 1994. The Respondent became aware that the Applicant was subleasing the five licenses, which is contrary to the Respondent's *Livery Transport Bylaw ("Bylaw")*. The Respondent held a review hearing where the Manager and Chief License Officer of the Livery Transportation System (Manager and Hearing Officer) ultimately found that the Applicant had breached the *Bylaw*. As a result, the Applicant had all five licenses revoked and reassigned to the five individual drivers to whom he had subleased. The Applicant unsuccessfully appealed to the License and Community Standards Appeal Board (Appeal Board) in an attempt to have his licenses reinstated. He then filed this application for judicial review.

HELD: Application dismissed.

DISCUSSION: The Respondent raised preliminary issues with the application by first arguing that it was submitted beyond the six-month limitation period. The *Alberta Rules of Court* states that:

> an originating application for judicial review to set aside a decision or act of a person or body must be filed and served within 6 months after the date of the decision or act.

The Court disagreed. Finding that the Respondent erred in assigning the start date as the date the Appeal Board issued its oral decision, opposed to the date the written reasons were received by the Applicant. The Respondent also submitted that the courts should exercise restraint before getting involved in matters that fall within the jurisdiction of administrative bodies. The Court agreed, but found that the Applicant had exhausted all of the internal remedies within the administrative system. Thus proceeding with the application for judicial review, the Court heard the Applicant's argument surrounding his alleged deprivation of of procedural fairness at the hearing. The Applicant alleged that the notice he received from the Respondent failed to adequately outline the allegations against him, which ultimately preventing him from preparing a full answer and defense. The Court assessed whether the Applicant had enough information to make him aware of the case that had to be met at the hearing. The evidence demonstrated that the Applicant was aware of not only the complaints that led to the hearing, but also prior to the hearing he received multiple correspondence from the Respondent outlining actions that alleged a breach of the *Bylaw*. The Court found that there was no element of surprise at the hearing and no "serious possibility" of prejudice to the Applicant. The Applicant also alleged bias on behalf of the Manager and Hearing Officer at the hearing. The Supreme Court of Canada (SCC) outlined the common law test for bias as:

> what a reasonable informed person would conclude viewing the matter realistically and practically, and whether her or she would think that it is more like than not that the decision-maker would not decide fairly. *R v. S (RD)*, 1997 CanLII 324 SCC.

However, when a Court is proceeding with judicial review of administrative or tribunal decisions, as was the case here, it "must defer to the legislator's intention in

assessing the degree of independence require of the tribunal in question" (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52. Applying this principle to the legislative context, the Court identified that City Council, under the authority of the *Municipal Government Act*, passed the *Bylaw* which regulates the Respondent's taxi industry as well as grants the Manager and Hearing Officer the authority to act as both the enforcer and decision maker of the *Bylaw.* When examining the Record at the hearing, the Court found nothing improper in the manner in which the Manager and Hearing Officer conducted himself which would rise to the level of bias towards the Applicant. The Court agreed that the Manager and Hearing Officer's decision to revoke the Applicant's five licenses was warranted after concluding that the Applicant had breached the *Bylaw.*

Questions?

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