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In This Issue

Applicant Unsuccessful in Demonstrating Discrimination

City Found to Have Acted Reasonably Responding to Snow Fall

Motion Judge Erred in Law Concluding that Action Was out of Time

New Trial: Court of Law Not Place for Justice to Engage in Sarcasm

Paralegal is Not 'Officer of the Court of Justice' and is Eligible to Serve as Juror

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Applicant Unsuccessful in Demonstrating Discrimination

Pozsar v. City of Maple Ridge, 2018 BCHRT 107 (CanLII) http://canlii.ca/t/hs3bx

The Applicant, a resident in the City of Maple Ridge (City) filed an application under the British Columbia *Human Rights Code (Code)* alleging discrimination against the City on the basis of physical disability and political belief when he was not offered a position on the City's Agricultural Advisory Committee (Committee). The Applicant submitted that around the same time as his interview for the Committee position he was in the process of proposing a plan to build and operate a large-scale chicken farm on his property. The City and the Regional Agrologist at the British Columbia Ministry of Agriculture were not supportive of the proposal. The Applicant argued that the successful candidate for the Committee position had "less experience, knowledge and qualifications" and the only reason he was not offered the position was because of his physical disability political views. The City responded that it offered the Committee position to the best candidate and applied to dismiss this application under s.27(1)(b) and (c) of the *Code.*

HELD: Application dismissed.

DISCUSSION: The Tribunal began by laying the foundational requirements for a discrimination claim under the *Code*. To succeed, the Applicant must demonstrate beyond the realm of speculation that the protected characteristics of both his physical disability and political belief were factors in the City's Committee decision: *Berezoutskaia v. British Columbia (Human Rights Tribunal)* 2006 BCCA 95. To dismiss the application for no reasonable prospect of success, the City bore the onus to prove that the Applicant's physical disability and political belief were not a factor in the City's decision.

The Tribunal reviewed each discrimination claim separately, beginning with

discrimination based on political belief. Both the Applicant and the City provided the Tribunal a variety of decisions where political belief was considered and defined. Relying on the decisions provided, the Tribunal found guidance and was able to determine broad criteria to determine what constituted a political belief within the *Code*. In brief, a) it would be determined on the facts and circumstances of each case; b) be given a liberal definition; c) have a factual foundation to ensure that there is a sufficient tangibility to the belief; d) ensure it is genuinely held; and e) ensure it is the core to a person's concept of a social cooperation. In applying these criteria, the Tribunal was challenged in determining what political beliefs were held by the Applicant. Further, the Tribunal was challenged as to how the Applicant's political beliefs were conveyed to the City so as to have an influence on its decision. The Applicant stated that as a result of his controversial chicken farm he was perceived by the City as a "political hot potato." The Tribunal successfully proved that this did not give rise to the level of a personal belief about a system of social cooperation and as a result there was no reasonable prospect of success. With regards to a physical disability, the City did not dispute that the Applicant had a physical disability but stated this was not the reason he was not successful for the Committee position. The City provided evidence that the Applicant had participated on other City committees where accommodation had not been an issue. The Tribunal ultimately disagreed with the Applicant's argument that suggested that the City viewed him as a liability more than an asset as a result of his physical disability. The Tribunal proceeded under s. 27(1)(c) of the *Code* and dismissed the application for no reasonable prospect of success.

City Found to Have Acted Reasonably Responding to Snow Fall

***Christoforou v. City of Toronto and Maple-Crete Inc.*, 2018 ONSC 2982 (CanLII) http://canlii.ca/t/hs464**

The Plaintiff, a resident of the City of Toronto (City) slipped and fell on a City sidewalk. The Plaintiff brought an action against the City and Maple Crete Inc. (Maple) the company contracted out by the City to plow its sidewalks. As a result, the City and Maple cross claimed against each other and brought this summary judgment motion. Both the City and Maple argued there was no need for a trial as the three outstanding issues could be sufficiently addressed in this motion. The three issues before the Court were: first, was the City grossly negligent; second, can the City rely on the statutory defenses set out in s.42(3)(a) and (b) of the *City of Toronto Act,* 2006 (*Act*) and third. whether Maple breached its contractual winter maintenance duty of care.

HELD: Summary judgement granted.

DISCUSSION: The Court outlined the legal framework for a summary judgement found in Rule 20.04(2)(a) of the *Rules of Civil Procedure* including its authority to grant summary judgement if satisfied that there is no genuine issue before it that would require a trial. The Court examined each of the three outstanding issues to determine if a trial was required. For the first issue the Court cited s. 42(5) of the *Act* which states that a City shall not be liable for personal injury claims caused by snow unless the City was grossly negligent. In establishing the liability requirement, the Court relied on the two factors outlined in *Billings v. Mississauga (City),* 2010 ONSC 3101 to determine if the City was grossly negligent: first, examining the reasonableness of the City's snow and ice policy and second, reviewing whether the City's response was reasonable on the day of the Plaintiff's fall.

The Court found that the City's policy was reasonable as it ensured that standard operating procedures were in place, including monitoring and dispatching as well as the hiring of independent contractors to plow and salt sidewalks. Further, the Court held that the City's response on the date of the Plaintiff's fall was reasonable as the City had assigned Maple to plow the area were the Plaintiff fell, and GPS evidence showed that the plow went over the area four times. The Court held that a trial was not required to determine this issue.

In addressing the second issue, whether the City can rely on the statutory defenses set out in s.42(3)(a) and (b) of the *Act*, the Court determined that the City took reasonable steps on the day of the Plaintiff's fall and put its policy into effect. The Court took the time to clarify that "the question is not whether something different or something more intensive could have been done - rather, the issue is whether the steps that the City did take were reasonable": *Ondrade v. Toronto (City),* [2006] O.J. 1769. The Court held that a trial was not required to address this issue. Finally, in reviewing the third issue the Court held that Maple did not breach its contractual winter maintenance duty of care. The Court granted summary judgement.

Motion Judge Erred in Law Concluding that Action Was out of Time

Har Jo Management Services Canada Ltd. v. York (Regional Municipality), 2018 ONCA 469 (CanLII) http://canlii.ca/t/hs4n0

In 2009, the Regional Municipality of York (Region) expropriated lands under the *Expropriations Act,* R.S.O. 1990, adjacent to the Appellant's property, and began construction which remained ongoing until 2013. In May 2013, the Region experienced heavy rainfall which resulted in flooding on the Appellant's property. On June 3, 2013 the Appellant wrote to the Region alleging that the Region's ongoing construction caused the flooding. On June 28, 2013 the Region's adjuster responded to the Appellant's claim indicating that following an investigation it was determined that a blocked catch basin on the Appellant's property caused the flooding. The Appellant issued a notice of action on June 29, 2015 two years after the letter received by the Region's adjustor (June 28 was a Sunday). The Region argued that the Appellant's claim was barred by the two-year limitation period outlined in the *Limitations Act,* 2002 as the Appellant knew or ought to have known the origins of the flooding on June 3, 2013. The motion judge agreed with the Region and held that the June 3, 2013 letter contained sufficient information to make out a prima facie case against the Region. The Appellant appealed.

HELD: Appeal allowed.

DISCUSSION: The *Limitations Act,* 2002 outlines a basic two-year limitation period which begins on the date a claim is discoverable. The *Limitations Act* clarifies that discoverable refers to the earlier date of when a party knew or ought to have known the elements of a claim and that a remedy could be obtained by proceeding in Superior Court. The motion judge applied the June 3, 2013 date having interpreted the Appellant's position to be that the Region's construction caused the flooding. The Court held that in concluding that the action was out of time, the motion judge erred in law. The motion judge had failed to consider the Appellant's affidavit which highlighted that, to the extent that the flooding damage was caused by the Region's construction, it would form part of the Appellant's claim for damages for injurious affection under the *Expropriations Act* and fall under the Appellant's exist Ontario Municipal Board (OMB) (known now as the Local Planning Appeal Tribunal) claim.

Case law states that a claim for damages for injurious affection is to be brought before the OMB to determine, not to court: *Curactive Organic Skin Care Ltd. v. Ontario, 2012 ONCA 81*. The Appellant's affidavit stated that only if the OMB determined that the claim is improper, and the flooding was not caused by the Region's construction shall the Appellant seek damages in Superior Court. In reviewing the Appellant's affidavit, the Court concluded that the first time there was a suggestion that the flooding may have been caused by something other than the Region's construction was the June 28, 2013 letter. The letter from the adjuster mentioned the blocked catch basin may be at fault. As a result, the Court held that the date the Appellant knew or ought to have known in accordance with the *Limitations Act* was June 28, 2013.

In oral arguments the Appellant relied on the recent decision *407 ETR Concession Company Limited v. Day* 2016 ONCA 709 and argued that the limitation period of this claim should not start until the OMB ruled on its jurisdiction over the damages claim. Case law demonstrates that when there are two proceedings, one before the OMB and Superior Court, defendants may seek a stay of the court pending a determination of jurisdiction by the OMB. Despite being raised the Court decided not to rule on it because it already determined that the Appellant's claim could proceed. Appeal allowed and motion for summary judgement dismissed.

New Trial: Court of Law Not Place for Justice to Engage in Sarcasm

***Mississauga (City) v. Sekhon*, 2018 ONCJ 306 (CanLII) http://canlii.ca/t/hrwpz**

The Appellant was convicted of two charges issued by the City of Mississauga (City) during an *ex parte* trial. Following the convictions, the Appellant argued that he never received the summons and successfully appealed his convictions. Despite having properly served the Appellant, the City agreed to a new trial after it reviewed additional information surrounding the service of the summons. The Appellant further submitted that the new trial should be before a different justice of the peace (Justice) as a result of perceived judicial bias. During the *ex parte* trial, the Justice asked questions about the Appellant beyond the scope of the charges, he overtly added support to the prosecution's case and referred to the Appellant as an idiot. The Justice made it clear that he was frustrated with *those* who acted as the Appellant did, and that they did not receive sufficiently strict penalties. As a result, the Justice made a point to send a message to *those* people by doubling the fine requested by the prosecutor instead of imposing a fit sentence. The City did not put forward any arguments opposing a new Justice.

HELD: New trial before a different Justice.

DISCUSSION: In response to the Appellant's submission of perceived judicial bias the Court relied on the Supreme Court of Canada (SCC) decision *R v. S. (R.D.)* 1997, CanLII 324 (SCC). *R v. S. (R.D.)* reaffirmed the reasonable person test to be used to determine if judicial conduct could be perceived as judicial bias. It states, "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude...." In applying the SCC standard and reviewing the actions of the Justice, the Court found that the Justice conducted the *ex parte* trial unreasonably and as a result issued a disproportionate sentence against the Appellant. The Court stated that in the absence of an Appellant an *ex parte* trial must still follow the rules of a trial and shall be conducted fairly and

impartially. At the core of an *ex parte* trial still remains the presumption of innocence and the beyond a reasonable doubt burden of proof. The Court concluded that the Justice did not conduct himself accordingly; one comment or action on its own may not have created a bias but taken together, the Court determined that it was reasonable that an informed person viewing the matter would conclude that the Justice's actions would give rise to bias. As a result, the Court held that a new Justice would hear the new trial. The Court concluded that the court of law is not the place for a Justice to engage in sarcasm or self-aggrandizing humour.

Paralegal is Not 'Officer of the Court of Justice' and is Eligible to Serve as Juror

Gobin v. Sheriff of the Regional Municipality of Durham, 2018 ONSC 1255 (CanLII) http://canlii.ca/t/hrwpn

The Applicant, a licensed paralegal in the Province of Ontario filed an application which sought a declaration from the Court stating that paralegals licensed by the Law Society of Ontario are "officers of a court of justice" as cited in s.3(1)(6) of the *Juries Act,* RSO 1990 and as a result are exempt from serving as a juror. The Respondent, the Sherriff of the Regional Municipality of Durham did not submit an argument.

HELD: Application dismissed.

DISCUSSION: This application raised an increasingly common question for the Court to clarify; who is an "officer of a court of justice" as referred to in s.3(1)(6) of the *Juries Act*. The Court reviewed a diverse range of case law which contemplated the application of s.3(1)(6) of the *Juries Act* for a variety of positions including a law office employee, non-lawyer mediator, and trustees in bankruptcy. Despite the variety of case law, the Court was unable to determine a consistent principled reasoning to apply the definition "officer of a court of justice" to licensed paralegals in the Province of Ontario and ultimately exempt them from jury duty.

In reviewing the applicable legislation, the Court noted that the *Law Society Act* requires paralegals to be licensed and follow a code of conduct. However, it does not specifically make mention of paralegals being officers of the court as it does for barristers, solicitors and students-at-law. Further, the *Juries Act* was recently amended, and the legislature chose not to take advantage of its opportunity to address jury eligibility for licensed paralegals and clarify whether they were to be referred to as an "officer of the court". Despite the obvious arguments that a paralegal may impact or affect a deliberation of a regular jury, the Court was not satisfied that a licensed paralegal is an "officer of the court" as contemplated in the *Juries Act*.

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