INSIDE CANADA

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Risky Skateboarding, Plastic Bans, Uncooperative Officers and More

Amending a Statement of Claim
Oak Lake Four Seasons Island Resort Ltd. v. The Rural Municipality of Sifton and The Government of Manitoba, 2019 MBQB 188 http://canlii.ca/t/j4h5l
Oak Lake

Four Seasons Island Resort Ltd. ("Plaintiff") owns property in the Rural Municipality of Sifton ("Municipality"), situated near a body of water and a provincial highway. The Plaintiff advised the Government of Manitoba ("Manitoba") that the highway was stopping the natural flow of water, causing severe causing severe flood damage and economic loss. The Plaintiff filed an action against the Municipality in 2013, and then sought to amend the statement of claim to reflect Manitoba's negligence. The lower court dismissed and the Plaintiff appealed.

HELD: Appeal granted.

DISCUSSION: The question on appeal was whether the amendments sought by the Plaintiff raised a new cause of action merely provided a clarification on the existing claim. The Supreme Court of Canada defines a new cause of action as "a set of facts that provides the basis for an action in court" *Markevich v. Canada,* 2003 SCC 9. The Plaintiff argued that the amendments elaborated on particulars already in the existing statement of claim. Manitoba argued that they introduced new facts or in the alterative failed to disclose a reasonable cause of action. The Court held that two amendments were unrelated to the allegations in the statement of claim. Relying on *Maxwell v. Dhalla et al.*, 2006 MBCA 33, the Court determined even if Manitoba was successful in defending the current statement of claim, it might still be found liable based on the two proposed amendments, meaning created a new cause of action. However, the Court was satisfied that five of the proposed amendments were furthering particulars and were not allegations arising to an independent action; as such the Court granted the Plaintiffs motion to amend the statement of claim.

***"Cooperate Fully"* - Compliance with Civilian Investigatory Agencies**
Independent Investigations Office of British Columbia v. Vancouver (City) Police Department, 2020 BCCA 4 http://canlii.ca/t/j4c9b

A shooting fatality in the City of Vancouver caused police officers in the City's Police Department ("VPD") to appear before the Independent Investigations Office ("IIO") as witnesses. The IIO, governed under the *Police Act,* RSBC 1996, c. 367 ("*Act*") is a civilian led agency who investigates officer actions when there is a death or serious bodily harm. The IIO began an investigation, scheduling compulsory "witness officer" interviews for all police officers ("Appellants") who were present at the fatality. The Appellants requested disclosure prior to the interview, the IIO refused; whereupon the Appellants declined to be interviewed. The IIO successfully filed an application before the Supreme Court of British Columbia and compelled the Appellants to attend the interview. The Appellants filed an appeal arguing the Court erred by declaring the duty of a witness officer to *cooperate fully* with the IIO included the duty to attend interviews. (emphasis added)

HELD: Appeal dismissed.

DISCUSSION: Section 38.101(1) of the *Act* requires an officer to fully cooperate with an IIO investigator's exercise of powers or performance of duties under the *Act*.

> 38.101 An officer must cooperate fully with
> (a) the chief civilian director in the chief civilian director's exercise of powers or performance of duties under this Act, and
> (b) an IIO investigator in the IIO investigator's exercise of powers or performance of duties under this Act.

The issue was which party may define what it means to fully cooperate. The IIO argued that witness officers do not have discretion to determine terms of their cooperation, while the Appellants argued that s the IIO does not have unilateral authority to impose interview terms, particularly lack of disclosure to officer witnesses. The Court reviewed the legislation to ensure that the plain language interpretation was consistent with and furthered the purpose of the *Act*. It found that the plain language imposed a duty to cooperate on police officers, and nothing in the *Act* supported an inference that the legislature intended that "fully cooperate" required a discussion among the parties.

Paper or Plastic: Which Law Governs?
Canadian Plastic Bag Association v. Victoria (City), 2019 BCCA 254 http://canlii.ca/t/j1dng

The City of Vancouver ("City") was approached by an environmental non-profit organization dedicated to the "pro-

tection and enjoyment of the world's oceans, waves, and beaches through a powerful activist network" with the goal of eliminating all single use plastic check out bags. Following extensive consultation, City Council approved the "Checkout Bag Regulation Bylaw" ("Bylaw") which prohibited businesses in the City from providing or selling plastic single use plastic bags to customers at checkout and required fees to be charged for paper or other reusable bags. The Canadian Plastic Bag Association ("Association") filed for judicial review of the Bylaw. The Association submitted that any Bylaw passed by the City for the protection of the natural environment must be approved by the Ministry of the Environment ("MOE"), and without such approval the City lacked jurisdiction to prohibit single use bags. The Association sought a declaration that the Bylaw was *ultra vires* to the City's authority and sought to quash it The Chamber Judge agreed that the City did not have the approval of the MOE but held that it was not required because the Bylaw fell within the City's authority to regulate businesses under the *Community Charter*, S.B.C. 2003, c. 26 ("*Charter*") and did not seek to protect the natural environment. The Association appealed.

HELD: Appeal allowed, and Bylaw quashed.

DISCUSSION: The Association argued that the Chamber Judge erred in his findings because the "dominant characteristic" of the Bylaw was to protect the natural environment which required MOE approval, and without it, the Bylaw was *ultra vires* to the City's authority. The Court had to determine between two sources of authority within the *Charter*, one to regulate business under s.8.(6) and one to protect the natural environment under s.(8)(3)(j) and 9(1)(b) applied to this Bylaw. The City argued that the Bylaw only regulated the actions of the business, not the customer. The Court disagreed, stating that the inverse is true as customers would be the ones that were most impacted by the Bylaw. Furthermore, the Court examined the stated measure for success outlined in the Bylaw which was to reduce the amount of plastics in the oceans. The Court determined that this was clearly a natural environment objective, not a business or consumer protection measure. The Bylaw was for the protection of the natural environment and therefore required that the approval of the MOE. Appealed granted and Bylaw quashed.

Skateboarding at Night on Recreational Trail: *Caveat Emptor*?
Karpouzis v. Toronto (City of), 2020 ONSC 143 (CanLII) http://canlii.ca/t/j4j6d>

The Plaintiff suffered a severe brain injury on a recreational trail in the City of Toronto ("City") while skateboarding alone at 2:00 am with no protective gear or flashlight. He brought an action for negligence and public nuisance, arguing that the City acted with reckless disregard as there was a lack of lighting on the trail and no signs prohibiting use of the trail at night. The City agreed that the trail was dark and lacked signage but argued that the darkness would have been visible from the entrance of the trail. The City sought summary judgement to dismiss the Plaintiff's action.

HELD: Summary judgement granted.

DISCUSSION: The Court may grant a summary judgment under Rule 20 of the *Rules of Civil Procedure* RRO 1990, Reg. 194 if it is satisfied that there is no genuine issue before it that requires a trial. The Plaintiff's claim for negligence is under the *Occupiers' Liability Act* RSO 1990, c. O.2 ("*Act*"). Neither party disputed that the City is the occupier of the recreational trail. Section 3 of the *Act* outlines the standard duty of care for occupiers, which requires reasonable precautions to be taken to guard against known risks. The Supreme Court of Canada in *Waldick v. Malcolm,* [1991] 2 S.C.R. 456, stated "After all, the statutory duty on occupiers is framed quite generally, as indeed it must be. That duty is to take reasonable care in the circumstances to make the premises safe." However, section 4 of the *Act* indicates that the statutory duty is lowered when a person enters a premise for recreational activity, and as such the occupier is under no duty to take reasonable care of the premises mentioned in *Waldick v. Malcolm*. Under the lowered standard, the occupier's duty is not to create a danger and not to act with reckless disregard. It was not disputed by either party that the Plaintiff entered the trail for a recreational activity, as such the Court held that section 4 governed the Plaintiff's claim. Therefore, the Court held that the City did not create a danger, but rather the Plaintiff willingly accepted the risk of skateboarding at night without protective equipment or a flashlight.

The question before the Court was whether the City acted with reckless disregard for the Plaintiff using the trail at night. To constitute reckless disregard, the City must have known or should have known that an injury was likely to happen on the trail. The Plaintiff argued that the City failed to post warning signs about using the trail at night, did not provide lights on the trail, and failed to close the park. The Court held that anyone entering the trail at night would be able to observe the potential risk of entering a wooded area, and the Plaintiff did not need to be warned about these obvious conditions. Furthermore, the Court was satisfied with the City's evidence of regular inspections, maintenance and enforcement of the trail, which demonstrated that the City did not recklessly disregard the safety of trail users. The City was successful in showing that there were no genuine issues requiring a trial. The Court granted summary judgement. ML