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PUBLICATION

New Occupiers' Liability Notices Coming Soon

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Background

On December 8, 2020, Bill 118, *An Act to amend the Occupiers' Liability Act* (the "*Act*") received Royal Assent from the Legislative Assembly of Ontario. The Act has not yet come into force with the date to be named by proclamation of the Lieutenant Governor. [Editors Note: The act came into force January 29, 2021]

The primary amendment to the Act is found under Section 6.1(1):

No action shall be brought for the recovery of damages for personal injury caused by snow or ice against [an occupier or an independent contractor employed by the occupier to remove snow or ice], unless, within 60 days after the occurrence of the injury, written notice of the claim is served.

The Bill originally tabled a 10-day notice period after the occurrence of an injury (similar to the notice provision under the *Municipal Act*), however, debate and amendments resulted in a 60 day notice period. Notice will be required to include the date, time and location of the incident and will need to be served personally or by registered mail. While notice of an injury as a result of snow and ice will be required as a result of the *Act*, the actual time for issuing a claim will still be subject to the standard two (2) year limitation period provided under the *Limitations Act*.

Purpose

The stated purpose of Bill 118 is to reduce insurance costs for businesses who provide winter maintenance services. There was significant anecdotal evidence provided during the third reading that insurance premium increases were caused by: (1) a surge in slip-and-fall claims leading to expensive litigation; and (2) the difficulty insurers have in predicting when a claim will arise under a two-year window.

Whether this is accurate or not, the *Act* appears to assume that early notice provisions will assist the prospective parties with the preservation of evidence. It is hoped this will in turn assist in accurately and efficiently resolving disputes.

Additional Notice Requirements

An occupier who receives notice in accordance with Section 6.1(1) must serve a copy of the notice to any other occupiers of the premises during the relevant period in which the injury occurred and any contractor employed to remove snow or ice on the premises. There is a mirror provision in subsection 6.1(4) if the injured party serves notice on the contractor rather than the occupier.

The *Act* is silent with respect to the time frame in which the notice must be served on these potential third parties. In the *Municipal Act,* there is no similar requirement to provide a copy of notice to potential additional parties.

Exceptions

There are exceptions to the 60-day notice period. Failure to give notice in accordance with the *Act* will not bar the action in the case of death. Furthermore, if a judge finds there was a "reasonable excuse" for the plaintiff's failure to give notice then it will not bar a claim. Notably, the "reasonable excuse" provision closely mirrors section 44 (12) of the *Municipal Act* which has been interpreted liberally by the Ontario Court of Appeal in the recent cases of *Azzeh v. Legendra, 2017 ONCA 385 and Crinson v. Toronto (City)*, 2010 ONCA 44.

Issues & Commentary

The *Act* has some ambiguity that may lead to a reliance on judicial interpretation.

For example, the *Act* fails to provide a clear timeframe to provide a copy of the notice to potential co-defendants. Presumably there is none. There are moreover no specific consequences listed for a failure to pass on such notice.

The *Act's* curing provision at Section 6.1(7) allows claims to be brought against any defendant so long as at least one of the occupiers or contractors was properly notified by the plaintiff. It is unclear whether such provision has relevance in the case of third party claims, although logically it might.

These questions will have to be monitored as case law and practice in this area develops.

Nevertheless, it would be prudent for potential defendants receiving the injured party's notice to provide a copy to other likely targets without delay. Indeed, it is the longstanding practice of some occupiers to notify potential defendants as soon as a claim is anticipated.

Once in force, the *Act* may provide additional protection for occupiers and contractors by forcing plaintiffs to provide early notice with ample detail to support their claim. This is most relevant in this context of exterior slip-and-fall cases where there may be no witnesses and evidence tends to be scant. It is anticipated that Bill 118 will assist parties with the preservation of evidence as

the required notice period will hopefully result in clearer witness testimony, improved record retention, the creation of more-detailed incident reports and the safe-guarding of video surveillance which may assist in accurately adjudicating claims.

We will continue to monitor all developments regarding the *Occupiers' Liability Act* and will provide further bulletins as significant changes are made. Please contact any member of our Insurance Litigation Group if you have questions regarding this update.

The information contained in this article is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.