CITATION: McCarthy v. 2065943 Ontario Ltd., 2019 ONSC 2445
COURT FILE NOS.: C5077/16-A1
DATE: 2019-04-18

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Amber McCarthy	)	
Plaintiff	)	
-and-	)	
2065943 Ontario Ltd. carrying on business as Algonquin North Outfitters	)	
Defendant (Responding Party)	)	G. Marcuccio, for Defendant
-and-	)	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, as represented by the Ministry of Natural Resources and Forestry ("MNR") and Geoff Brown	)	R. Horst, for Third Party MNR
Third Parties (MNR, Moving Party)	)	**HEARD:** April 12, 2019

REASONS ON SUMMARY JUDGMENT

A.D. KURKE J.

Overview

1. The third party, Her Majesty the Queen in Right of the Province of Ontario, represented by the Ministry of Natural Resources and Forestry (the "MNR") applies pursuant to Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended, for an order dismissing the

claim against Ontario on the ground that the defendant did not provide proper notice of its claim as required pursuant to the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27 (the "*PACA*").

2. On August 10, 2014, the plaintiff was injured going over the Parasseux Falls on the Mattawa River in the Samuel de Champlain Provincial Park (the "Park").

3. The *PACA* provides that in order to bring a claim against Ontario for breach of duties attaching to property, a claimant must serve notice of a claim on Ontario within ten days after the claim arose.

4. On January 2, 2017, the plaintiff served the defendant with a statement of claim. The defendant claims that it only discovered its own third party claim as against the MNR on July 11, 2018, during the examination for discovery of the plaintiff. The defendant served notice of its claim on the MNR on September 14, 2018.

Facts

5. The Park is a non-operating, waterway class provincial park. The plaintiff and the third party Geoff Brown rented a canoe from the defendant on August 10, 2014, and followed the canoe route recommended by the defendant. As the plaintiff and her companion approached the Parasseux Falls, they tipped the canoe and were carried over the falls.

6. Park staff were alerted that an incident had occurred in the park when they spotted emergency service responder vehicles at an access road adjacent to Highway 17 that leads to the Mattawa River. Given the remoteness of the site, no Park staff attended there.

7. At the time of the incident, no Park staff had contact with the plaintiff or the plaintiff's companion Geoff Brown, or with the defendant.

8. On August 12, 2014, Park Superintendant Tracey Snarr prepared a memorandum with two attached incident reports. Incident reports are prepared by Park staff whenever they become aware of an injury to the public on Crown land. Information for the reports was gleaned by speaking to first responders. The plaintiff's name is noted in the report.

9. The plaintiff has served no notice of claim on the MNR. On July 26, 2016, the plaintiff issued a claim as against the defendant, which claim was served on January 2, 2017. The defendant served a statement of defence on February 13, 2017.

10. At the plaintiff's examination for discovery on July 11, 2018, the defendant discovered its claim against the MNR. In that examination, the plaintiff gave evidence that she relied upon signage along the Mattawa River to identify hazards and portage routes, but that the signs were inconsistent, not obvious, or were missing. The plaintiff believed that signage issues ultimately led to this accident.

11. The defendant first served its claim on the MNR on September 14, 2018, "pursuant to s. 7 of the *Proceedings Against the Crown Act*." Prior to this date, no one working for or on behalf of the MNR had had any contact with anyone from or on behalf of the defendant about any claim relating to this incident. Only the timing of that notice is at issue in this motion, not the content.

12. On January 18, 2019, a motion was heard granting leave to the defendant to add the MNR as a third party. That claim has been filed and served, and alleges negligence as against the Crown, its servants and agents. That alleged negligence relates to the MNR's failure to warn of hazardous conditions, failure to advise of available portage routes, failure to signal the presence of the Parasseux Falls, and failure to maintain and install proper and clear signage. It is claimed that the MNR was responsible for maintaining these "premises", had a duty to ensure that persons entering the premises were reasonably safe and were made aware of hazards while on the premises, but failed to do so.

13. In its List of Documents, the MNR includes its investigation into the incident that was undertaken prior to receiving notice on September 14, 2018. Over these documents the MNR seeks to claim "litigation privilege".

Law

Summary Judgment

14. Pursuant to Rule 20.01, the Court shall grant summary judgment if it is satisfied that there is no genuine issue requiring a trial. No trial is necessary if a summary judgment can

achieve a fair and just adjudication, and if it permits a judge to make necessary findings of fact, to which the law can be applied. In such circumstances, a motion for summary judgment permits a more expeditious, efficient and less expensive means to achieve justice than does a trial, thus enhancing the important principle of proportionality: *Hryniak v. Mauldin*, [2014] S.C.J. No. 7, at paras. 4-5, 41.

15. Accordingly, the Supreme Court of Canada, in *Hryniak* [para. 49], defined that there will be no genuine issue requiring a trial when the process:

a. allows the judge to make the necessary findings of fact;
b. allows the judge to apply the law to the facts; and
c. is a proportionate, more expeditious and less expensive means to achieve a just result.

16. If the judge on a motion for summary judgment is unable to determine whether there is a genuine issue requiring a trial based only on the evidence before him or her, the judge may resort to fact-finding powers in Rule 20.04(2.1), including a) the weighing of evidence; b) evaluating the credibility of a deponent; and c) drawing any reasonable inference from the evidence: *Hryniak*, at para. 66.

Notice of a claim pursuant to the *PACA*

17. I set out here the relevant portions of the *PACA*:

> 5. (1) Except as otherwise provided in this Act, and despite section 71 of Part VI (Interpretation) of the Legislation Act, 2006, the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject,
>
> (a) in respect of a tort committed by any of its servants or agents;
>
> (b) in respect of a breach of the duties that one owes to one's servants or agents by reason of being their employer;
>
> (c) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property; and
>
> (d) under any statute, or under any regulation or by-law made or passed under the authority of any statute.
>
> 7. (1) Subject to subsection (3), except in the case of a counterclaim or claim by way of set-off, no action for a claim shall be commenced against the Crown unless the

> claimant has, at least sixty days before the commencement of the action, served on the Crown a notice of the claim containing sufficient particulars to identify the occasion out of which the claim arose, and the Attorney General may require such additional particulars as in his or her opinion are necessary to enable the claim to be investigated.
>
> (2) Where a notice of a claim is served under subsection (1) before the expiration of the limitation period applying to the commencement of an action for the claim and the sixty-day period referred to in subsection (1) expires after the expiration of the limitation period, the limitation period is extended to the end of seven days after the expiration of the sixty-day period.
>
> (3) No proceeding shall be brought against the Crown under clause 5 (1) (c) unless the notice required by subsection (1) is served on the Crown within ten days after the claim arose.

18. The legislation in s. 7(1) offers a much more forgiving limitation period with respect to tort claims, employment claims, and statutory claims, but s. 7(3) imposes the 10-day deadline for notice "in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property". This 10-day notice provision is considered an essential step in a proceeding against the Crown when occupiers' liability is concerned, and for the most part it must be strictly observed. Failure to comply with the notice provision renders the proceeding a nullity: *Jos. Zuliani Ltd. v. Windsor (City)* (1973), 2 O.R. (2d) 598 (H.C.), at para. 6.

19. The purpose of this notice requirement is to "target occupiers' liability" with a special and strict notice requirement": *Latta v. Ontario* (2002), 62 O.R. (3d) 7 (C.A.), at para. 18. Such notice has been held to be driven by a policy that permits the Crown to gather sufficient information either to seek to resolve a claim or prepare a defence to an anticipated action: *West v. West*, 2013 ONSC 247, at para. 14; *cf. Mattick Estate v. Ontario (Ministry of Health)*, [2001] O.J. No. 21 (C.A.), at para. 15.

20. Strict compliance with the notice provision has been relaxed in certain circumstances. Thus, imperfect notice that takes into account the frailties or limitations of an injured plaintiff may nevertheless be deemed sufficient to put the Crown on notice that a claim could reasonably be anticipated: *Latta*, at paras. 30-35; *Leone v. University of Toronto Outing Club*, [2006] O.J. No. 4131 (Sup. Ct.), at paras. 75-76. Moreover, there is no indication in the *PACA* that the notice must be in writing, written by the hand of the plaintiff, or be in any particular prescribed form, so

long as it provides the requisite elements of proper notice: *Coulter v. Ontario (Ministry of Natural Resources)*, 2014 ONSC 1573, at paras. 61-67.

Analysis

21. No notice to the MNR was given by anyone within the ten days following the date of the incident in this proceeding, August 10, 2014. Even on a generous interpretation of the *PACA*, reading a "discoverability" requirement into the determination of the date that constitutes "after the claim arose" for the purposes of a third party claim under s. 7(3) of the *PACA*, no notice was provided within 10 days of the date the defendant points to for discovery of the claim, July 11, 2018. Notice to the MNR was not provided until September 14, 2018, more than 60 days after the "discoverability" date.

22. The defendant raises two main arguments against the *PACA* notice requirement advanced by the MNR. It asserts that its third party claim addresses negligence, and not occupier's liability, and is not therefore subject to the 10-day limitation. It further submits that no such notice is necessary in the circumstances of this case, and that the MNR has suffered no prejudice from the absence of notice.

23. The defendant argues that its claim involves negligence of MNR servants and employees in the placement, clarity, and maintenance of necessary signage, and is not a claim "in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property." On such an argument, the claim relates to negligence, and not to occupier's liability, and is subject to the more lenient notice requirement in s. 7(1) of the *PACA*.

24. However, such an argument rings hollow in the circumstances of this case, where all of the defendant's allegations in its third party claim actually appear to relate to issues of occupiers' liability, and duties attaching to the ownership of property. Indeed, a claim that is, in substance, "in respect of a breach of duties attaching to the ownership of property" does not escape into the tort claim provision under s. 5(1)(a) of the *PACA*, so as to bypass the 10-day notice required for s. 5(1)(c) property-related claims, merely by disguising its true nature under an over-arching assertion of negligence: *Daoust-Crochetiere v. Ontario (Minister of Natural Resources)*, 2014 ONCA 776, at para. 3; *Latta*, at para. 18. This argument fails.

25. Given the passage of time before the defendant became aware of the signage issue that was raised by the plaintiff only at her discoveries, the defendant submits that the purposes served by strict application of the notice requirement cannot be fostered in any way in relation to this third party claim, which almost necessarily arose much later than ten days after the date of loss. By the time the defendant was served with the plaintiff's claim, the MNR's opportunity to investigate was already significantly attenuated. It is submitted that strict application of s. 7(3) of the *PACA* to defendants seeking to launch third party claims will result in injustices.

26. The defendant also argues that in this case the MNR suffered no prejudice as a result of the failure by the defendant to provide notice, as Ms. Snarr conducted her own investigation that must have contemplated the possibility of litigation, since the MNR now seeks to wrap her report in "litigation privilege". The defendant argues that the policy behind the *PACA* notice has therefore been met, even if the notice requirement has not been.

27. To accede to this argument would require a court to read into the provisions of the *PACA* an exception that its legislators did not see fit to include. While some areas of plaintiff incapacity have resulted or may result in a forgiving application of the *PACA* notice requirements in certain circumstances, such as with respect to the form of notice, a flexible approach that would bypass a notice requirement altogether, even in the absence of prejudice to the Crown, reads into the legislation an exception that does not exist. The Ontario Court of Appeal has specifically rejected such an approach: *Daoust-Crochetiere*, at para. 12.

28. This argument also does not take into account the elements that make up proper notice under the *PACA*. Adequate notice must contain both sufficient particulars to allow the Crown to identify the source of the potential problem, so that it can investigate, and a complaint in some form, to alert the Crown to the importance of investigation to avert a potential claim or prepare a defence to an impending claim: *Latta*, at paras. 26-27, 42; *Mattick Estate*, at paras. 15-18; *Conners v. Ontario (Minister of Community Safety and Correctional Services)*, 2016 ONSC 7238, at paras. 21-22.

29. The Crown had a right under the legislation to be alerted to the defendant's third party complaint relating to signage long before September 14, 2018, so that it would be encouraged to

conduct what investigation it still could in as timely a way as possible. Ms. Snarr's report, though it may contain significant details of the incident, the names of individuals involved, and injuries sustained, has not been shown to have been directed to the plaintiff's allegations about improper signage in the Park. This argument must fail.

Conclusion

30. Insofar as the evidence indicates that the defendant has failed to comply with the notice requirement under s. 7(3) of the *PACA*, there is no genuine issue requiring a trial.

31. The third party claim brought against the MNR by the defendant is dismissed.

32. If the parties are unable to agree on costs, they may submit to the court written submissions of no more than three pages by April 30, 2019.

April 18, 2019

A.D. Kurke J.

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HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, as represented by the MINISTRY OF NATURAL RESOURCES AND FORESTRY and GEOFF BROWN,
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Released: 2019-04-18