DOLDEN WALLACE FOLICK LLP

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IN THIS ISSUE

18th FLOOR – 609 GRANVILLE ST
VANCOUVER, BC. V7Y 1G5
Tel: 604.689.3222
Fax: 604.689.3777
E-mail: info@dolden.com

Unit 302 – 590 KLO Road
KELOWNA, BC. V7Y 7S2
Tel: 1.855.980.5580
Fax: 604.689.3777
E-mail: info@dolden.com

850 – 355 4th AVE SW
CALGARY, AB. T2P 0H9
Tel: 1.587.480.4000
Fax: 1.587.475.2083
E-mail: info@dolden.com

14th FLOOR – 20 ADELAIDE ST E
TORONTO, ON. M5C 2T6
Tel: 1.416.360.8331
Fax: 1.416.360.0146
Toll Free:1.855.360.8331
E-mail: info@dolden.com

Subrogated Claims Involving Bankrupt Insureds: the Aftermath of *Douglas et al.* v. *Stan Fergusson Fuels Ltd.*

By *Christine Galea*, DWF Toronto, Email: cgalea@dolden.com

Can an insurer bring a subrogated claim in the name of its insured when the insured is an undischarged bankrupt? In *Douglas et al.* v. *Stan Fergusson Fuels Ltd.*, 2018 ONCA 192, the insurer commenced a subrogated claim in the name of its insured against an oil company to recover the cost of remediating oil contamination to property of its insured. The court determined that since the insured was an undischarged bankrupt, the insurer could not commence the subrogated claim in the insured's name, and dismissed the claim.

The court confirmed that upon assignment in bankruptcy, the property of the bankrupt, including the insured's cause of action against the oil company, immediately passes and vests in the Trustee in Bankruptcy. Accordingly, following an assignment in bankruptcy, a subrogated claim that has vested in the Trustee should be commenced in the name of the Trustee rather than the insured.

The court further noted that if the Trustee subsequently refuses or neglects to pursue the action, section 38 of the *Bankruptcy and Insolvency Act* ("BIA") permits a creditor to seek an assignment of the cause of action from the Trustee such that the creditor can then pursue the claim. An insurer with a subrogated claim is a "*creditor*" under section 38 of the BIA.

However, if the cause of action for the subrogated claim was assigned to the insurer prior to the assignment in bankruptcy, it

could have been maintained. Contractual assignment of the cause of action to an insurer prior to bankruptcy will result in a property interest that does not vest in the Trustee upon assignment in bankruptcy.

Take Away

Upon bankruptcy, an insured's cause of action vests in the Trustee in Bankruptcy. If an insurer wishes to commence a subrogated claim, it must either:

> (a) obtain an assignment from the Trustee before commencing the action; or
>
> (b) commence the action in the name of the Trustee rather than the insured.

Insurers should also be mindful of the provisions in their policies with insureds. Particularly, a subrogation clause does not transfer the cause of action for a subrogated claim to an insurer. In the absence of an assignment clause, the insurer must take one of the steps noted above before commencing the action.

Case Comment: *Jansen* v. *William and Markle Jewellers Ltd.*

By *Robert Smith*, DWF Toronto, Email: rsmith@dolden.com

In *Jansen v. William and Markle Jewellers Ltd.*, 2019 ONSC 425, the court held that a municipality is the default occupier of a sidewalk and an adjacent property owner will only be found liable in a narrow band of special circumstances.

In *Jansen*, the plaintiff sued the storeowner for a slip and fall on ice that occurred one foot away from the door on a sidewalk that was owned by the City of Woodstock. The storeowner brought a motion for summary judgment on the basis that it was not an "*occupier*" of the sidewalk for the purposes of the *Occupiers' Liability Act.*

The plaintiff argued that the defendant had sufficient control over the area of the sidewalk to make the defendant an "*occupier*" of the sidewalk. Specifically, the plaintiff argued:

1. A municipal bylaw requires the defendant to clear ice and snow from the sidewalk;
2. The defendant's employees routinely maintained the sidewalk;
3. The area of the fall was directly below a bulkhead from which water and snow would fall;
4. The plaintiff fell on an area of the sidewalk that was less than a foot away from the store and was almost exclusively used by the patrons of the store;
5. A brick wall that separated the defendant's store from the adjacent store extends onto the sidewalk approximately 3-4 inches and this had the effect of directing pedestrian traffic around the area of sidewalk used exclusively by the defendant's patrons to enter and exit the store.

The court reiterated the rule that without "*special circumstances*", the owner or occupier of land adjacent to a municipal sidewalk is not an occupier of the sidewalk for the purposes of the *Occupiers' Liability Act*.

The court held that the mere fact that a property owner removed snow and ice from a municipal sidewalk is not sufficient to make the owner an occupier of the sidewalk. Also, the fact that patrons of the store must use the portion of the sidewalk on which the fall occurred to enter and exit the store does not, in and of itself, make the owner of the adjacent property an occupier of the sidewalk.

Take Away

The decision in *Jansen* reiterates that the default rule for municipal sidewalks is that owners of adjacent properties are not occupiers. Rather, the municipality that owns the sidewalk bears the responsibility of keeping the sidewalk in a reasonable state of repair. Therefore, insurers of municipalities cannot, except in a very confined number of circumstances, look to the owners of adjacent properties to shoulder some of the liability for sidewalk slip and falls.

Cannabis Producers at Risk for Class Action Lawsuits

By *Denny Chung*, DWF Vancouver, Email: dchung@dolden.com

In the wake of legalization of recreational cannabis in Canada, a court in Nova Scotia has now certified a class action lawsuit against a federally licensed cannabis producer for selling tainted medical cannabis contrary to the *Access to Cannabis for Medical Purposes Regulations* (*ACMPR*).

In *Downtown* v. *Organigram,* 2019 NSSC 4, the representative plaintiff Dawn Rae Downton, purchased and consumed medical cannabis from the New Brunswick based producer, Organigram – the cannabis was later the subject to a recall by Health Canada. Testing revealed the cannabis contained unauthorized pesticides. Organigram issued a statement that the contamination may have been the result of unregistered products, i.e. the pesticides, coming into contact with their cannabis plants.

The plaintiff was successful in certifying her action as a class proceeding and appointing herself as representative plaintiff for the class. The accepted class was defined as:

> *All persons and entities who purchased from Organigram cannabis for medical purposes that has been the subject of a voluntary or involuntary recall …*

In coming to its decision, the court found there was some basis in fact in respect of the plaintiff's class action on several grounds.

First, the court held the pleadings disclosed a cause of action. The court relied on *Hollick* v. *Toronto (City),* 2001 SCC 68, to utilize a generous analysis of the pleadings, wherein the Supreme Court of Canada affirmed that class actions have 3 important advantages:

(1) judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis;

(2) improved access to justice by distributing fixed litigation costs; and,

(3) serving efficiency and justice by ensuring actual and potential wrongdoers modify their behaviour to take full account of the harm they cause or might cause to the public.

Second, the court found that the class of plaintiffs proposed was adequately defined and showed commonality amongst the proposed class members. Of note, the court reiterated the principle that at the certification stage of a class action, undue emphasis should not be placed on the fact that some or many members of the proposed class will be unable to establish liability.

Third, the court found there was commonality amongst the claims raised by the class members.

The court further found that a class action would be preferable to achieve behaviour modification as goal of class action lawsuits. The court held litigation would better achieve behaviour modification than allowing Organigram to initiate product testing and safety measures after-the-fact and avoid a lawsuit.

Take Away

The Organigram class action serves as a caution and motivator for businesses entering the cannabis space in the wake of legalization. Compliance is key. While the *Organigram* case pertains to compliance under the medical cannabis regime, the *ACMPR,* the claims and implications equally apply to cannabis producers and retailers in the recreational market. The fact that cannabis businesses centre around mass consumer products which relate to health and well-being, means such businesses must ensure they meet (and preferably exceed) all applicable regulatory standards pertaining to their products – from design, to manufacturing, to marketing, and ultimately to sale. Any shortcomings will certainly draw the risk of lawsuits. The court in *Organigram* has pointedly noted that class action lawsuits may be preferred mechanisms of encouraging compliance by a business such as a cannabis producer.

Summary Judgment Test in Alberta Clarified

By *Justin Brunette*, DWF Calgary, Email: jbrunette@edolden.com and *Vik Mall*, DWF Calgary, Email: vmall@dolden.com

The Court of Appeal of Alberta resolved an 18-month question over the standard of proof to be applied in an application for summary dismissal. The majority of the five-member panel in *Weir-Jones Technical Services* v. *Purolator Courier Ltd.*, 2019 ABCA 49, confirmed that there is only one standard of proof in civil law: proof on a balance of probabilities.

The *Alberta Rules of Court*[1] allow a party to obtain summary judgment where, on the record before the court:

(a) there is no defence to a claim or part of it;

(b) there is no merit to a claim or part of it; or

(c) the only real issue is the amount to be awarded.

The Supreme Court of Canada, in the landmark decision, *Hryniak* v. *Mauldin*,[2] advocated a "*culture shift*" in favour of summary judgment. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case.

Since *Hryniak*, lower courts have grappled with finding the correct balance of procedural fairness and access to justice, particularly where one party seeks dismissal of another party's claim without a trial.

Until recently, the Court of Appeal in Alberta was divided on what standard a defendant had to satisfy to obtain summary dismissal.

In *Whissell Contracting Ltd.* v. *Calgary (City)*,[3] the majority judgment held that summary judgment may be appropriate if the moving party's position is "*unassailable or so compelling that its*

[1] Alta Reg 124/2010, Rule 7.3.
[2] 2014 SCC 7.
[3] 2018 ABCA 204.

likelihood of success is very high and the non-moving party's likelihood of success is very low."

However, in *Stefanyk* v. *Sobeys Capital Incorporated,*[4] the Court of Alberta unanimously rejected the "*unassailable*" approach on the party seeking summary dismissal. This panel of justices held that there is only one standard of proof in a civil case, and that is proof on a balance of probabilities.

This divide on the appropriate standard for granting summary dismissal caused considerable uncertainty in advising on the most cost-effective means of resolving a claim.

It is for the above reasons that the Court of Appeal of Alberta convened a five-member panel in *Weir-Jones Technical Services* to decide the test for summary dismissal in Alberta.

In *Weir-Jones Technical Services,* the majority rejected that an "*unassailable*" and "*very high likelihood of success*" standard of proof applied to summary disposition, and confirmed that the only standard of proof in civil law is proof on a balance of probabilities. The court also differentiates this from the "*burden of proof*" (the moving party also has to prove that there is no issue requiring trial).

Take Away

While rejecting the "*unassailable*" standard of proof, the Court of Appeal has made it clear that summary judgment is far from automatic. Judges have many considerations to balance when deciding the issues before them. At the same time, the Court of Appeal of Alberta has provided the Alberta bar with a clearer roadmap of the considerations to address in order to have the best chance of success in obtaining cost-effective relief for their clients.

[4] 2018 ABCA 125.

EDITOR

Chris Stribopoulos
Tel: 647.798.0605 Email: cstribopoulos@dolden.com

Please contact the editor if you would like others in your organization to receive this publication.

CONTRIBUTING AUTHORS

Christine Galea
Tel: 647.798.0614 Email: cgalea@dolden.com

Robert Smith
Tel: 647.798.0609 Email: rsmith@dolden.com

Denny Chung
Tel: 604.899.3180 Email: dchung@dolden.com

Justin Brunette
Tel: 587.480.4006 Email: jbrunette@dolden.com

Vik Mall
Tel: 587.327.5107 Email: vmall@dolden.com