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BRIEFING NOTE

Municipal Liability: section 736 of the *Local Government Act* is not a statutory limitation period

Guild Yule LLP
BARRISTERS AND SOLICITORS
2100 – 1075 Georgia Street
Vancouver, BC V6E 3C9
www.guildyule.com
P 604 688 1221
F 604 688 1315
E feedback@guildyule.com

***Anonson v. North Vancouver (City)*, 2017 BCCA 205**

In an update to our briefing note last year[1], the Court of Appeal has reversed the decision of the chambers judge in *Anonson*, and held that the late addition of a municipality as a defendant does not necessarily extinguish an accrued notice period defence under section 736 of the *Local Government Act*, RSBC 2015, c 1 ("*LGA*").

Factual Background

The plaintiff, Ms. Anonson, was struck in a hit-and-run by a motor vehicle while she was cycling in North Vancouver in 2012. She sued ICBC in June 2014 as the motorist could not be identified. ICBC filed a third party notice against the City of North Vancouver (the "City"), alleging that a traffic sign at the location of the accident directed cyclists to travel on the sidewalk instead of the road.

Master's Decision: 2015 BCSC 1867

In August 2015, the plaintiff applied to add the City as a defendant. The City conceded that it was "just and convenient" for the City to be added as a defendant, which is the test for the addition of a defendant. While the City did not oppose the application, the City argued that its addition as a defendant should be without prejudice to its ability to rely on not having received notice of the accident within two months, as required by section 286(1) of the *LGA* (now section 736):

> 286 (1) A municipality is in no case liable for damages unless notice in writing, setting out the time, place and manner in which the damage has been sustained, is delivered to the municipality within 2 months from the date on which the damage was sustained.
>
> (2) In case of the death of a person injured, the failure to give notice required by this section is not a bar to the maintenance of the action
>
> (3) Failure to give the notice or its insufficiency is not a bar to the maintenance of an action if the court before whom it is tried, or, in case of appeal, the Court of Appeal, believes
>
> (a) there was reasonable excuse, and

[1] Accessible at: http://www.guildyule.com/uncategorized/municipal-liability-section-736-of-the-local-government-act-is-a-statutory-limitation-period/

> (b) the defendant has not been prejudiced in its defence by the failure or insufficiency.
>
> [emphasis added]

The plaintiff argued that the notice period in section 286 established a limitation period, and on a plain reading of the former *Limitation Act*, the two-month notice limitation could not act as a bar to the addition of the City as a defendant. In particular, section 4(1)(d) of the former *Limitation Act* provided that:

> 4(1) If an action to which this or any other Act applies has been commenced, the lapse of time limited for bringing an action is no bar to
>
> …
>
> (d) adding or substituting a new party as plaintiff or defendant,
>
> under any applicable law, with respect to any claims relating to or connected with the subject matter of the original action.

The plaintiff submitted that, as the City was being added as a defendant, section 4(1)(d) of the former *Limitation Act* eliminated the limitation defence found in section 286 of the *LGA*. Therefore, the addition of the City as a defendant should defeat any defence that the City did not receive timely notice of the accident.

In response, the City argued that the notice requirement was not a limitation period, noting that section 286(3) provided a relief mechanism if adequate notice was not given in time. When a plaintiff fails to meet the notice period, the action will not be barred if "the court before whom it is tried" believes that (1) there was reasonable excuse for the delay, and (2) the defendant has not been prejudiced by the plaintiff's failure to provide adequate and timely notice.

The Master agreed with the City and granted the application without prejudice to the City's ability to rely on the notice period defence.

Appeal to the Chambers Judge: 2016 BCSC 441

The plaintiff successfully appealed the Master's decision. The only issue on appeal was whether the Master should have added the City without prejudice to the City's ability to rely on the notice period defence.

The appeal turned largely on two issues. The first related to the relief mechanism found in section 286 of the *LGA*, which had become section 736 by the time of the appeal. The chambers judge noted that section 736(3) referred to "the court before whom it [i.e., the action] is tried", and not to the "trial judge". As such, the chambers judge interpreted section 736(3) as referring to one of the trial courts, being the B.C. Supreme Court and the B.C. Provincial Court. The chambers judge reasoned that the B.C. Supreme Court could determine the consequence of a failure to give adequate notice at an application to add a municipality as a defendant, instead of needing to wait for a determination on the issue by the trial judge.

The second issue was whether the notice requirement was a limitation period to which section 4(1) of the former *Limitation Act* applied. The chambers judge concluded that section 736 of the *LGA* was a statutory limitation period, and therefore section 4(1)(d) of the former *Limitation Act* applied to extinguish any notice period defence. The Court opined that there was no meaningful difference between section 736 and any other statutory limitation period.

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Appeal to the Court of Appeal: 2017 BCCA 205

The Court of Appeal set aside the chambers judge's Order and reinstated the Master's decision, finding that the notice requirement was distinct from a limitation period, and that the trial or appeal court needed to decide whether late notice barred an action based on the evidentiary record. The Court reasoned that:

> The notice provisions do not function in the same way as limitation period provisions for the following reasons: (1) non-compliance with s. 736 of the *LGA* or its predecessors does not prevent a plaintiff from commencing or maintaining an action; (2) unlike the more objective language of s. 4(1) of the *Limitation Act*, the discretionary saving provision of s. 736(3) may or may not act as a bar to an action; and (3) the trial or appeal court must determine whether the discretionary saving provision applies based on the evidentiary record.

In distinguishing the notice requirement in the *LGA* from a limitation period, the Court noted that there is an express six-month limitation period contained in the *LGA* for certain actions against municipalities. More importantly, the two-month notice requirement serves a different purpose than a limitation period; namely, to allow municipalities to fully investigate a claim. This relatively short notice period is intended to allow municipalities to attend the site of accidents and interview witnesses while the underlying event is still fairly fresh. If late or inadequate notice does not prejudice a municipality in its ability to investigate a claim, then that is one of the considerations in determining whether late notice should bar a claim.

Conclusion

The Court of Appeal in *Anonson* confirmed that the notice requirement in the *LGA* is not a statutory limitation period, as the notice requirement has the distinct purpose of allowing municipalities to fully investigate claims.

The result of the Court's decision is that, when a municipality is added as a defendant and timely notice has not been provided, the municipality can still rely on the failure to provide adequate notice as a potential bar to the action. Whether that defence ultimately succeeds is a matter left to the trial or appeal court.

Joe D. Antifaev
Direct Line: 604-844-5563
Email: jantifaev@guildyule.com

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