August 2018

# BRIEFING NOTE

## No Occupier Liability for Failure to Follow Bylaw to Clear Sidewalk Snow

Can a municipal bylaw that requires property owners to clear snow or ice from sidewalks adjacent to their properties give rise to a legal liability when there is a claim for injury? According to a recent British Columbia Supreme Court decision the answer is no.

### I. Background

In *Scheck* v. *Parkdale Place Housing Society*, 2018 BCSC 938, the Court was considering a lawsuit by a plaintiff who had slipped and fell on a sidewalk in the City of Summerland. The Plaintiff sued both the City and the housing society that owned the property adjacent to the sidewalk.

The City of Summerland had a bylaw requiring property owners to remove snow, ice and rubbish from sidewalks or footpaths bordering on their property, and the bylaw proscribed deadlines for doing so.

At the time of the summary trial hearing the parties had not agreed on whether the plaintiff's fall was caused or contributed to by an accumulation of ice or snow or some other peculiarity. However, the essence of the plaintiff's claim against the defendant property owner was that Summerland's bylaw put the responsibility to remove snow and ice on the property owner and that that gave rise to a legal duty on the property owner to clean snow and ice from the sidewalk.

Both Summerland and the property owner applied for summary trial.

### II. The Decision concerning Summerland's Application

Summerland's primary argument was that the bylaw was a reasonable, rational and *bona fide* policy decision (in law, the "policy immunity defence"). It argued that after weighing its obligations against its ability to pay, it reasonably and properly shifted any obligation to clear its sidewalk of snow and ice to the adjoining property owner.

The Court concluded that it would be unjust to determine Summerland's policy immunity defence without any agreement that the plaintiff did in fact slip on snow or ice, and adjourned that application.

### III. The Decision concerning the Property Owner's Application

The property owner argued that it was not an "occupier" of Summerland's sidewalk within the meaning of the *Occupier's Liability Act*, RSBC 1996, c 336 (the "*OLA*"), and that it owed no duty of care to the plaintiff. The property owner argued that it was not in physical possession of the sidewalk and had no control over the condition of the sidewalk, activities conducted on it, and those allowed on the sidewalk.

The Court concluded that the property owner was not in physical possession of Summerland's sidewalk within the meaning of section 1(a) of the *OLA*.

With respect to whether the property owner had responsibility for and control over the sidewalk, the activities on the sidewalk and those allowed on the sidewalk, the Court analyzed the case law and concluded as follows:

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

[43] There is no evidence that Parkdale asserted any control over the activities conducted on the sidewalk outside its building, or that it purported to control or regulate who might use the sidewalk. Its obligations to clear snow and ice gave it arguable control over at least that aspect of the condition of the sidewalk, but not, say, control over cracks or other defects in the surface of the sidewalk.

[44] On a review of all of the cases cited, I conclude that Parkdale owed no duty to Ms. Scheck as an occupier of the municipal sidewalk where she fell.

[45] As to whether Parkdale owed a duty at common law, I accept the reasoning of the Ontario Court of Appeal in *Bongiardina* at para. 19:

> The question then becomes: is there a common law duty on the owner of the property to clear snow and ice from public sidewalks adjacent to the property? In my view, the answer to this question must be "No". Although the "neighbour" principle from *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), has been expanded in recent years to cover a myriad of new relationships, it would stretch it too far if it was applied in the circumstances of this case. A homeowner has a duty to ensure that his or her own property is maintained in a reasonable condition so that persons entering the property are not injured. If the homeowner complies with this duty, he or she should be free from liability for injuries arising from failure to maintain municipally owned streets and sidewalks. The snow and ice accumulating on public sidewalks and the potholes on the street in front of the house are the legal responsibility of the municipality, not the adjacent property owner.

*[emphasis added]*

This decision affirms the British Columbia Supreme Court's prior rulings in *Cullinane* v. *City of Prince George et al*, 2000 BCSC 1089 and *Gardner* v. *Unimet Investments Ltd* (1995), 4 BCLR (3d) 376, aff'd (1996), 19 BCLR (3d) 196 (CA).

## IV. Conclusion for Municipalities

The primary take-away for municipalities is that municipalities are the *sole* occupiers of municipal sidewalks. A third party claim against a property owner or property manager is unlikely to be successful.

Unfortunately the decision did not address the ultimate issue of Summerland's policy immunity defence, based on its snow and ice removal bylaw. However, this may be an interesting action to watch as Summerland may proceed with its summary trial application after the factual dispute is sorted out.

## V. Conclusion for Property Owners / Property Managers

While property owners and property managers can still be fined for failing to remove snow and ice from municipal sidewalk by the time proscribed in a bylaw, they are not however under a *legal duty* to clear snow or ice that gives rise to liability in tort or the *OLA*. As such third party users cannot successfully sue property owners or property managers if they slip and fall on snow or ice on municipal sidewalk adjacent to the property owner or manager's property.

***Alexander D.C. Kask*** *is a partner with Guild Yule LLP and practices in the areas of municipal law, professional negligence, health law, administrative law, and insurance defence litigation.*

***Aaron Gubeli*** *is an articled student with Guild Yule LLP and has experience in the area of general insurance defence litigation, including the defence of municipalities, educational institutions, health authorities, professionals, and businesses.*

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