

LS-Case Notes 2021-02
LawSource Case Notes
January 20, 2021

LawSource Case Notes — January 20, 2021

Weekly summary of notable Canadian federal and provincial civil and criminal court decisions.

Find more cases dealing with the same issue by clicking on the Canadian Abridgment classification links at the bottom of each summary

© Thomson Reuters Canada Limited or its Licensors (excluding individual court documents). All rights reserved.

IN THIS ISSUE

Civil practice and procedure

Proper characterization of loan was not something that could be determined summarily

Constitutional law

City failed to properly balance attainment of its statutory objectives with applicant's right to freedom of expression

Environmental law

Ontario's constitutional obligation to take positive steps to redress future harms of climate change should be decided on full evidentiary record, not at Rule 21 stage

Estates and trusts

Curative provisions of s. 58 of Wills, Estates and Succession Act could not be invoked to save pour-over clause

Human rights

Human Rights Commission made no palpable and overriding error in awarding significant costs against applicant

Motor vehicles

Crown conceded trial judge erred by purporting to impose lifetime driving prohibition

Municipal law

Trial judge correctly found that s. 530 of Municipal Government Act was both more specific and later in time than s. 5 of Occupiers' Liability Act and therefore exempted municipality from liability

Real property

Section 147 of Land Titles Act simply confirmed caveat's role in protecting priority and did not mean caveat provided same degree of indefeasibility as registration of instrument

Trial judge did not err in denying recovery of commission on completed sale

Remedies

Assistant pastor's conduct was blameworthy as he exploited vulnerability of young woman entrusted to his care

Tax

Tax Court judge erred in effectively equating test for determining whether gross negligence penalty should be assessed with test for determining whether amounts were taxable

Torts

Statements of minister were properly made in his role as cabinet minister

Civil practice and procedure - Trials

Proper characterization of loan was not something that could be determined summarily

In 2004, parents advanced \$170,000 to daughter and son-in-law to assist them in purchasing property. Father died in 2007 and mother died in 2019. Daughter and son-in-law asserted \$170,000 was repaid pursuant to agreement that mother and father would reside in basement suite of house in exchange for normal rent that would be used to pay down amount owing. Evidence of parties on whether agreement was reached for repayment of loan through application of nominal rent was in direct conflict. Executor of mother's will, who was her son, commenced action to recover \$170,000 plus interest from daughter and son-in-law. Executor brought application for summary trial. Application dismissed. Matter was not suitable for determination by way of summary trial. Proper characterization of loan was not something that could be determined summarily. Parties relied extensively on hearsay statements allegedly made by deceased parents as described or interpreted by deceased's children. Affidavits relied on by both parties were rife with self-serving opinion and argument. While necessity element of test for admitting hearsay evidence was met, there had to be reliability, which turned largely on credibility and it was not possible to meaningfully engage in that analysis given problems with evidence. Credentials of experts and their opinions were not tested by cross-examination and opinion evidence was not accepted as determinative. To decide matter required finding that false document was created, and court was reluctant to make findings of fraud or perjury on summary trial.

Civil practice and procedure—Trials—Summary trial—Availability—Miscellaneous

Cadwell Estate v. Martin, 2020 BCSC 2091, 2020 CarswellBC 3419 (B.C. S.C.)

[TOP](#)

Constitutional law - Charter of Rights and Freedoms

City failed to properly balance attainment of its statutory objectives with applicant's right to freedom of expression

Applicant was registered charity which provided referrals to pregnancy support and post-abortion counselling. City had shelter advertising agreement with third party advertising company which governed sale of advertising space on city buses and shelters. Under terms of that agreement, advertising was to be of moral and reputable character and advertising company agreed to remove any advertisement subject to reasonable discretion as exercised by city. City had previously run one of applicant's advertisements and removed it after complaints. City rejected all five of applicant's new proposed advertisements with anti-abortion messaging, with some reasons relating to all of proposed advertisements and some relating to individual proposed advertisements. Reasons cited for rejection of all proposed advertisements were applicable code of advertising standards, content and implied/perceived content of advertisements, applicant's branding and website, city's statutory objective to maintain safe community, community response to applicant's previous advertisement on transit property, case law, and city's contract with advertising company. Applicant sought to quash city's decision on basis that it infringed s. 2(b) of Canadian Charter of Rights and Freedoms (Can.) and was not saved by s. 1 of Charter. Application granted. City's reasons contained single sentence referring to Charter but no mention of s. 2(b) Charter rights. City did not actually conduct minimal impairment analysis before denying applicant's request and city did not have before it type of evidence of actual apprehended harm that could potentially outweigh importance of protecting applicant's right to freedom of expression. City placed undue reliance on provisions of code of advertising standards and reached conclusions that were contrary to opinion provided by advertising regulator. Requisite criteria of "hateful nature" and "extreme tone" did not exist in advertisements in question. City failed to

properly balance attainment of its statutory objectives with applicant's right to freedom of expression.

Constitutional law—Charter of Rights and Freedoms—Nature of rights and freedoms—Freedom of expression—Advertising

Lethbridge and District Pro-Life Association v. Lethbridge (City), 2020 ABQB 654, 2020 CarswellAlta 2055 (Alta. Q.B.)

[TOP](#)

Environmental law - Constitutional issues

Ontario's constitutional obligation to take positive steps to redress future harms of climate change should be decided on full evidentiary record, not at Rule 21 stage

Ontario passed Cancellation Act (CA), cancelling federal cap and trade plan under Climate Change Act (CCA) in favour of their own environmental plan with more lenient target for reduction of greenhouse gas emissions in Ontario by 2030. Applicants, Ontario residents between ages of 12 and 24, brought application on behalf of future generations challenging Ontario's cancellation of CCA and new target in plan. Applicants alleged Ontario's target violated rights of Ontario youth and future generations under ss. 7 and 15 of Charter, and other constitutional principles. Ontario brought motion to strike application under R. 21 of Rules of Civil Procedure. Motion dismissed. It was not plain and obvious that pleading disclosed no reasonable cause of action or had no prospect of success. Novel application was about whether Ontario violated applicants' ss. 7 and 15 rights by repealing CCA through CA and by setting target for emission reductions that was insufficiently ambitious. Preparation of plan and repeal of CCA by Ontario were governmental actions that were reviewable by court for compliance with Charter. For purposes of motion, facts in applicants' pleadings were capable of scientific proof. Issue of whether Ontario had constitutional obligation to take positive steps to redress future harms of climate change should be decided on full evidentiary record, not at R. 21 stage.

Environmental law—Constitutional issues—Charter of Rights and Freedoms

Mathur v. Ontario, 2020 ONSC 6918, 2020 CarswellOnt 17113 (Ont. S.C.J.)

[TOP](#)

Estates and trusts - Estates

Curative provisions of s. 58 of Wills, Estates and Succession Act could not be invoked to save pour-over clause

Testator and her husband executed wills in Connecticut and settled separate revocable and amendable inter vivos trusts. Testator was resident and domiciled in British Columbia at time of her death. Article of testator's will purported to distribute residue of estate to acting trustee of trust and then disposed of in accordance with terms of trust. Testator's husband predeceased her, and they had no children. Executor was testator's only surviving sibling and would inherit residue of estate if it passed on intestacy. Executor brought application for directions to determine whether provision on distribution of residue of estate in will was valid. Distribution of residue of estate passed as on intestacy. Impugned clause in will was pour-over clause reflecting testator's intention to pour residue of her estate into trust, which could be amended or revoked at any time prior to her death. Facts of current case fell squarely within analysis of British Columbia Court of Appeal case that established that pour-over clause to amendable or revocable trust was invalid in province since similar to codicil, it reserved right of testator to make unattested change (or codicil) to their will. Curative provisions of s. 58 of Wills, Estates and Succession Act could not be invoked to save

pour-over clause. Section 58 could be used to cure defect that did not meet formal requirements of s. 37 but could not be used to cure will that was substantively invalid. Trust was not testamentary document. Testator intended to make gift to inter vivos trust whose purpose was part of but not limited to her estate planning and whose corpus she could also add to or withdraw at any time, to take immediate effect and performed during her lifetime, and one that she could amend or revoke at any time. Fact testator chose not to utilize all of trust's provisions during her lifetime did not change nature or character of trust. There was no need to look to Connecticut law to construe what was found to be testator's clear intent. There was no collateral attack on grant of probate as grant referred to will and not trust and Registrar who issued grant did not treat will and trust as part of composite testamentary document.

[Estates and trusts—Estates—Legacies and devises—Grounds for invalidity](#)

Waslenchuk Estate, 2020 BCSC 1929, 2020 CarswellBC 3158 (B.C. S.C.)

[TOP](#)

Human rights - Practice and procedure

Human Rights Commission made no palpable and overriding error in awarding significant costs against applicant

Applicant worked as independent contractor for respondent on six-month fixed term contract. Applicant filed human rights complaint against respondent alleging discrimination on basis of race in area of employment. Alberta Human Rights Commission ("tribunal") dismissed complaint, finding that applicant failed to establish prima facie case of discrimination. Tribunal issued costs decision which found that applicant engaged in misconduct awarded costs against applicant in amount of \$20,000. Applicant appealed tribunal's costs decision. Appeal dismissed. Tribunal made no palpable and overriding error in awarding significant costs against applicant. Tribunal acted as quasi-judicial body performing administrative function and had weighed all evidence and facts before exercising broad discretion granted to it under s. 32(2) of Alberta Human Rights Act. Act did not limit amount of costs that tribunal could award. Tribunal had acted within statutory powers conferred on it by Act and duly considered applicable legal principles required for exercise of its discretion where human rights complaints were involved.

[Human rights—Practice and procedure—Commissions, tribunals and boards of inquiry—Costs and interest—Improper conduct](#)

Facey v. Bantrel Management Services Co., 2020 ABQB 719, 2020 CarswellAlta 2209 (Alta. Q.B.)

[TOP](#)

Motor vehicles - Offences and penalties

Crown conceded trial judge erred by purporting to impose lifetime driving prohibition

Accused pleaded guilty to theft of motor vehicle, possession of weapon for dangerous purpose, uttering threats, threatening peace officer, and theft under \$5,000, and driving while disqualified. Accused was sentenced to two years imprisonment, followed by two years probation. Accused appealed imposition of lifetime driving prohibition. Appeal allowed, and sentence varied to five-year driving prohibition. Crown conceded that trial judge erred by purporting to impose prohibition for life, as maximum length of prohibition that was available in case was five years.

[Motor vehicles—Offences and penalties—Suspension of licence—Types of suspension—Mandatory](#)

R. v. Wittke, 2020 ONCA 835, 2020 CarswellOnt 18499 (Ont. C.A.)

[TOP](#)

Municipal law - Municipal liability

Trial judge correctly found that s. 530 of Municipal Government Act was both more specific and later in time than s. 5 of Occupiers' Liability Act and therefore exempted municipality from liability

Appellant E stepped into sprinkler hole and broke her foot while attending festival held at park in respondent municipality L. E brought action against L seeking damages for personal injuries. Trial judge found that E was visitor within meaning of Occupiers' Liability Act ("OLA"), and L owed her duty of care as set out in s. 5 of OLA but that it was exempt under blanket exclusion of liability afforded to municipalities by s. 530 of Municipal Government Act ("MGA"). Therefore, notwithstanding finding that L was negligent under s. 5 of OLA, trial judge dismissed action. E appealed. Appeal dismissed. When defending claim in negligence, municipalities can avail themselves of s. 530 of MGA as complete defence, if negligence stems from systems of maintenance or inspection, as in present case. Interactions between different enactments and provisions are common, whether or not each provision specifically contemplates other enactments. Finding that provisions of MGA may only interact with other enactments if they explicitly state as much would result in absurdities. Trial judge correctly identified that neither OLA nor MGA had any applicable paramountcy clause or specific provision that would establish which took priority. He found that there was conflict in specific circumstances, as s. 5 of OLA and s. 530 of MGA would impose and preclude liability, respectively. Trial judge correctly found that s. 530 of MGA was both more specific and later in time than s. 5 of OLA and therefore exempted L from liability.

[Municipal law—Municipal liability—Occupier's liability](#)

Ellis v. City of Lethbridge, 2020 ABQB 783, 2020 CarswellAlta 2434 (Alta. Q.B.)

[TOP](#)

Real property - Registration of real property

Section 147 of Land Titles Act simply confirmed caveat's role in protecting priority and did not mean caveat provided same degree of indefeasibility as registration of instrument

Plaintiff gave loan to friend, with property as security. Security documents were signed by friend, who foraged signature of joint owner defendant. Plaintiff registered caveat against property. Friend passed away leaving defendant as sole owner. Plaintiff's action against estate of friend, defendant and personal corporation was dismissed. Trial judge found that security agreement was obtained by fraud and was not enforceable. Accused did not register "mortgage" endorsed on title by memorandum with sworn affidavits of execution, as required by Land Titles Act but rather filed caveat to notify public that he claimed interest in land, presumably to protect his interest in "unregistered instrument" as contemplated by s 130(a)(iii) of Act. Caveat does not itself create interest in land; it simply provides notice of claim to such interest. While caveat might protect plaintiff's priority over subsequent claims, it did not operate to validate otherwise invalid claim. Section 147 of Act simply confirmed caveat's role in protecting priority and did not mean that caveat provided same degree of indefeasibility as registration of instrument. Plaintiff did not plead severance of title regarding property. Caveat was discharged, plaintiff entitled to bring claim against estate of friend only.

[Real property—Registration of real property—Registration of land—Land titles—Caveats—Miscellaneous](#)

St Pierre v. Schenk, 2020 ABCA 382, 2020 CarswellAlta 2003 (Alta. C.A.)

[TOP](#)

Real property - Sale of land

Trial judge did not err in denying recovery of commission on completed sale

Purchasers failed to complete transaction with sellers for purchase real estate. Sellers were to pay commission on failed transaction because listing agreement provided commission became owing if enforceable agreement of purchase and sale came into existence. Sellers subsequently sold property for lower price than original contract and were required to pay commission for completed sale. Sellers' action for damages for failed transaction was allowed and trial judge found sellers entitled to damages equal to difference between original contract price and resale price. Trial judge was not satisfied sellers in fact paid commission on first transaction and found that to order purchasers to pay sellers' real estate commission on second sale would result in windfall for sellers and would put sellers in better position than they would have been in had first sale not collapsed. Purchasers appealed, but abandoned appeal. Sellers cross appealed on whether their damages should include amount of real estate commission payable on completed sale. Cross appeal dismissed. Trial judge did not err in denying recovery of commission on completed sale without sellers showing they paid both commissions. Trial judge was correct to conclude that adding second commission to sellers' damages would overcompensate sellers even though on broad view of causation purchasers' breach made that expenditure necessary. Second commission was not as closely connected to purchasers' breach as first and was not cost thrown away or wasted, but it was cost sellers would have had to pay in any event 'out of pocket' and they received benefit of brokerage firm's services in return. Trial judge did not err in finding that sellers did not prove they paid commission on failed sale. There was no evidence it was paid, and no fresh evidence was proffered on appeal.

[Real property—Sale of land—Remedies—Damages—Failure to close—Repudiation by purchaser](#)

Panegos v. O'Byrne, 2020 BCCA 352, 2020 CarswellBC 3151 (B.C. C.A.)

[TOP](#)

Remedies - Damages

Assistant pastor's conduct was blameworthy as he exploited vulnerability of young woman entrusted to his care

Plaintiff was devout Catholic and in 1976 was elementary school teacher in Catholic school. Defendant Father was assistant pastor at same parish under supervision of defendant Diocese. Plaintiff sought out Father for comfort and solace as she was grieving recent death of her father. Father commenced sexual relationship with plaintiff that ended months later. Father proposed marriage and plaintiff met with Bishop who suspended Father from Diocese. Prior to arrival of plaintiff in Diocese, Bishop was aware of Father's reputation in Diocese for sexual impropriety and there were complaints concerning Father. When Bishop confronted Father, Father said "I'm only human", but Bishop kept Father at Diocese and did nothing to curb his apparent predilections. Plaintiff asserted she suffered severe mental injuries, including low self-esteem, anxiety, depression, and feelings of worthlessness as result of Father's conduct that diminished her quality of life, and deprived her of chance of successful career as medical doctor or educator with Ph.D. In 2016, plaintiff brought action for damages against Father for sexual battery and against defendant Diocese in negligence. Action allowed. Plaintiff was awarded damages totalling \$844,140, including punitive damages of \$250,000 against Father in addition to compensatory damages awarded. Father's conduct was egregious and reprehensible abuse of power, and Father was in position of trust and authority. Father's conduct was blameworthy as he exploited vulnerability of young woman entrusted to his care to engage in prolonged and repeated course of sexual exploitation. Father demonstrated brazen indifference to harm caused by his actions. Although concerns were addressed to some extent in

award of aggravated damages, award of aggravated damages alone did not provide sufficient denunciation of Father's reprehensible conduct.

Remedies—Damages—Exemplary, punitive and aggravated damages—Assault and battery

Anderson v. Molon, 2020 BCSC 1247, 2020 CarswellBC 2072, 42 B.C.L.R. (6th) 113 (B.C. S.C.)

[TOP](#)

Tax - Income tax

Tax Court judge erred in effectively equating test for determining whether gross negligence penalty should be assessed with test for determining whether amounts were taxable

After leaving employment, taxpayer provided engineering consulting work through numbered company and later M Inc.. During 2007 to 2011, various amounts were withdrawn from M Inc.'s account and transferred to taxpayer's personal account or accounts of his family members. In 2015, taxpayer was reassessed on basis that these amounts were benefits conferred on him as shareholder and therefore were included in his income under s. 15(1) of Income Tax Act and gross negligence penalties were assessed. On taxpayer's appeal, Tax Court judge found taxpayer received \$2,349,779 from M Inc., which he did not report in his income, and that there was insufficient evidence to support taxpayer's position that amounts were repayment of shareholder loan. Tax Court judge concluded that Minister could reassess years 2007 to 2010 after expiration of normal reassessment period and also assess gross negligence penalties, and he dismissed taxpayer's appeal. Taxpayer appealed. Appeal allowed in part. While Tax Court judge should have recognized that for four of five taxation years before him Minister had onus of proving there was misrepresentation which was attributable to neglect, careless or wilful default, there was sufficient evidence before him to conclude Minister had satisfied onus. Taxpayer withdrew amounts in question from M Inc. during taxation years in question and shareholders' loan account ledger did not accurately reflect amounts withdrawn. Consequently, taxpayer made misrepresentation in tax returns for 2007 to 2010 by not reporting amounts that were transferred to him and family from M Inc., which were not, on balance of probabilities, repayments of amounts due to him. This misrepresentation was attributable to taxpayer's neglect or carelessness in not properly maintaining shareholders' loan account. Statutory requirements for assessing gross negligence penalties were not same as statutory requirements for reassessing statute-barred year and gross negligence penalties could only be assessed if conduct of taxpayer amounted to gross negligence. Tax Court Judge effectively equated test for determining whether gross negligence penalty should be assessed with test for determining whether amounts were taxable, and in doing so he erred. There was no basis to conclude taxpayer admittedly knew he was receiving shareholder benefits as his position was that he was simply repaying amounts he had previously advanced to M Inc.. Taxpayer's failure to maintain proper records that might have established that M Inc. was repaying amounts payable to him did not establish that his failure to include the amounts withdrawn in his income demonstrated negligence or indifference to compliance with Act and therefore did not amount to gross negligence.

Tax—Income tax—Administration and enforcement—Penalties (administrative)—Gross negligence

Deyab v. Canada, 2020 FCA 222, 2020 CarswellNat 5519 (F.C.A.)

[TOP](#)

Torts - Defamation

Statements of minister were properly made in his role as cabinet minister

Plaintiff realtor developed plan, to help foreign residents purchase real estate in province tax-free. Realtor advertised plan

publicly, both online and through distribution of flyers. Member of taxpayer organization raised concerns with realtor's plan, via radio talk show hosted by two defendants. Hosts discussed matter, with defendant provincial cabinet minister calling show to express disapproval of plan. Defendant media company published report as to discussion between defendants on show. Remaining defendants published subsequent reports on issue. Realtor claimed defendants had misrepresented his plan, and claimed it had been acted upon when it had not. Realtor claimed he was branded as fraudster and tax evader as result of defendants' actions. Realtor brought action in defamation against defendants. Action was defended, with defendants each claiming action should be dismissed by way of summary trial. Defendants brought applications for dismissal. Applications granted; actions dismissed. Statements of minister were protected by qualified privilege, as well as fair comment and justification. Statements of minister were properly made in his role as cabinet minister.

[Torts—Defamation—Defences—Qualified privilege—When qualified privilege arises—Statements by public figures—Members of federal or provincial legislatures](#)

Zhao v. Corus Entertainment Inc., 2020 BCSC 1533, 2020 CarswellBC 2541 (B.C. S.C.)

[TOP](#)

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.