

CANADA / JUDGMENT

Anonson v. North Vancouver (City)

2017 BCCA 205

COURT

British Columbia Court of Appeal

DECIDED

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2017 BCCA 205 Anonson v. North Vancouver (City)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Anonson v. North Vancouver (City),

2017 BCCA 205

Date: 20170531

Docket: CA43527

Between:

Tammy Lee Anonson

Respondent

(Plaintiff)

And

The City of North Vancouver

Appellant

(Defendant)

Corrected Judgment: The summary was corrected on June 1, 2017.

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice D. Smith

The Honourable Mr. Justice Willcock

On appeal from: An order of the Supreme Court of British Columbia, dated February 16, 2016
(Anonson v. Insurance Corporation of British Columbia,

2016 BCSC 441, Vancouver Docket No. M143894).

Counsel for the Appellant:

L.C. Galvin

Counsel for the Respondent:

V. Critchley

Place and Date of Hearing:

Vancouver, British Columbia

April 4, 2017

Place and Date of Judgment:

Vancouver, British Columbia

May 31, 2017

Written Reasons by:

The Honourable Madam Justice D. Smith

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Willcock

Summary:

The respondent was struck by a truck while riding her bicycle on a street in the City of North Vancouver. She commenced an action for damages and eventually applied to add the City as a defendant. The City conceded that it was "just and convenient" to add it as a defendant on condition that the order be made without prejudice to its ability to pursue its late notice defence at trial pursuant to the former s. 286 of the Local Government Act (now s. 736). The Master acceded to the City's request and granted the application on that condition. The respondent appealed the order to a chambers judge, who set aside the Master's order and granted the respondent's application without condition, effectively eliminating the City's late notice defence. The central issue on appeal was whether s. 736 (which is identical in wording to s. 286) is akin to a statutory limitation period for the purpose of engaging s. 4(1) of the Limitation Act, which eliminates a limitation defence where a party is added to an action on the basis that it is "just and convenient" to do so. Held: appeal allowed, judge's order is set aside and Master's order reinstated. While this is the first decision interpreting the notice provision of s. 736 of the LGA,

its wording is identical to the former s. 286 and substantially the same as the earlier s. 755 of the Municipal Act. Courts have interpreted those provisions as being different in purpose and effect from the provisions in the Limitation Act and therefore not subject to s. 4(1) of the Limitation Act. The plain meaning of the words of s. 736 are also substantially different from the provisions of the Limitation Act.

Reasons for Judgment of the Honourable Madam Justice D. Smith:

INTRODUCTION

- [1] The City of North Vancouver (the "City") appeals an order of a chambers judge, which set aside a Master's order granting the application of the respondent, Tammy Anonson, to add the City as a defendant to her underlying action without prejudice to the City's ability to advance its late notice defence at trial.
- [2] The respondent made the application pursuant to R. 6-2(7)(c) of the Supreme Court Civil Rules [the "SCCR"] and the then applicable s. 4(1)(d) of the Limitation Act, R.S.B.C. 1996, c. 266 [the "Limitation Act"]. The City conceded that it was "just and convenient" to add it as a defendant to the action on condition that it retained the ability to pursue its late notice defence at trial pursuant to s. 286 of the former Local Government Act, R.S.B.C. 1996, c. 323 [the "LGA"]. The Master made the order on that condition.
- [3] The respondent appealed, submitting that once the City was added as a defendant to the action on the basis that it was "just and convenient" to do so, s. 4(1) of the Limitation Act effectively eliminated what she submitted was an accrued limitation defence under s. 286 of the LGA. The judge agreed, allowed the appeal and granted the application without condition. The chambers judge's reasons are indexed at *Anonson v. Insurance Corporation of British Columbia*, 2016 BCSC 441; the Master's reasons are indexed at *Anonson v. Insurance Corporation of British Columbia*, 2015 BCSC 1867.
- [4] The incident that gave rise to the action occurred on July 30, 2012, when Ms. Anonson was struck by a truck while riding her bicycle on a street in the City. The truck operator failed to stop and left the scene of the collision. On June 17, 2014, Ms. Anonson filed a Notice of Civil Claim naming the Insurance Corporation of British Columbia ("ICBC") as the defendant pursuant to s. 24 of the Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231, and requesting damages for personal injuries and related losses arising out of the collision. On May 27, 2015, ICBC filed a Third Party Notice naming the City as a third party to the action. On August 11, 2015, Ms. Anonson applied to have the City added as a defendant to the action.
- [5] The central issue on appeal is whether s. 736 of the current Local Government Act, R.S.B.C. 2015, c. 1 [the "LGA"], which is s. 286 of the former LGA and previously s. 755 of the Municipal Act, R.S.B.C. 1979, c. 290 [the "Municipal Act"] is akin to a limitation period for the purpose of engaging s. 4(1) of the Limitation Act. In my respectful view, it is not.

THE NOTICE PROVISIONS

[6] Section 286 of the LGA required that a plaintiff intending to bring an action for damages against a municipality, deliver to the municipality, within two months of the damage having been sustained, written notice of "the time, place and manner in which the damage was sustained." The wording of the current s. 736 of the LGA is identical to the former s. 286 of the LGA. While the Master's reasons for judgment refer to the former s. 286, the chambers judge's reasons for judgment refer to the current s. 736. I shall therefore refer to s. 736 of the LGA in these reasons.

[7] Section 736 provides:

Notice requirement respecting damages

736 (1) A municipality or regional district 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 or regional district, as applicable, within 2 months from the date on which the damage was sustained.

(3) Failure to give the notice required by this section or its insufficiency is not a bar to the maintenance of the action if the court before whom it is tried, or, in case of appeal, the Court of Appeal, believes

(a) there was a reasonable excuse, and

(b) the defendant has not been prejudiced in its defence by the failure of insufficiency.

[8] The wording of the earlier s. 755 of the Municipal Act provided:

Notice to municipality after damage

755. The municipality is in no case liable for damages unless notice in writing, setting forth the time, place and manner in which the damage has been sustained, is delivered to the clerk within 2 months from the date on which the damage was sustained. 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. 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 there was reasonable excuse and that the defendant has not been prejudiced by it in its defence.

[9] While s. 755 of the Municipal Act was not identical to the former s. 286 or the current s. 736 of the LGA, it was not substantively different, as noted in *Thauli v. Delta*, 2009 BCCA 455:

- [10] Section 755 contained the same notice requirement found in s. 286(1) of the Local Government Act as well as the same saving provision now found in s. 286(3). Although not identically worded, there is no difference in substance between s. 755 of the Municipal Act and s. 286 of the Local Government Act.

ADDING A PARTY TO AN ACTION

- [10] An application to add a party to an action is made pursuant to R. 6-2(7) of the SCCR. Where the party to be added has accrued a limitation defence, s. 4(1) of the Limitation Act may apply.

- [11] Rule 6-2(7) of the SCCR provides:

- (7) At any stage of a proceeding, the court, on application by any person, may
- (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with,
- (i) any relief claimed in the proceeding, or
- (ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

- [12] Section 4(1)(d) of the Limitation Act provides:

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.

- [13] It is settled law that the addition of a party to an action pursuant to R. 6-2(7) of the SCCR on the basis that it is "just and convenient" to do so generally will engage s. 4(1) of the Limitation Act and eliminate a party's accrued limitation defence: *Lui v. West Granville Manor Ltd.* (1987), 11 B.C.L.R. (2d) 273 (C.A.) at 295; *Letvad v. Fenwick*, 2000 BCCA 630 at para. 17; and *Kerpan v. Higginbotham*, 2003 BCSC 1220 at paras. 58–64.

- [14] The approach to determining whether a party having an accrued limitation defence should be added to an action was summarized in *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 [Neilson] as follows:

- [47] The existence of a limitation defence is a relevant, but not determinative, factor in deciding whether to permit joinder, since the effect of s. 4(1)(d) of the Limitation Act is to extinguish such a defence if the proposed defendant is added. In *Brito (Guardian ad litem of) v. Wooley* (1997), 15 C.P.C. (4th) 255, [1997] B.C.J. No. 2487, Joyce J. set out a three step approach to

considering a possible limitation defence, which was adopted by this court in *Strata Plan LMS 1725 v. Star Masonry Ltd.*, 2007 BCCA 611, 73 B.C.L.R. (4th) 154 at para. 12. I summarize it as follows:

1. If it is clear there is no accrued limitation defence, the only question is whether it will be more convenient to have one or two actions since the plaintiff will be able to commence a new action against the proposed defendant if it is unsuccessful in the joinder application.
2. If it is clear there is an accrued limitation defence, the question is whether it will nevertheless be just and convenient to add the party, notwithstanding it will lose that defence. The answer to that question will emerge from consideration of the factors set out in *Letvad*.
3. If the parties disagree as to whether there is an accrued limitation defence, and a court cannot determine this issue on the joinder application, the court should proceed by assuming that there is a limitation defence, and consider whether it is just and convenient to add the party, even though the result will be the elimination of that defence. If that question is answered affirmatively, an order for joinder should be made, and it becomes unnecessary to deal with the limitation issue since it will be extinguished by s. 4(1)(d) of the Limitation Act.

[48] There is also a fourth option, an alternative to the third step, set out by Lambert J.A. in *Lui v. West Granville Manor Ltd.*, [1987] W.W.R. 49, 11 B.C.L.R. (2d) 273 at 303 (C.A.) [Lui No. 2]. He suggested that when the limitation issue could not be determined on the joinder application, and the applicant had not established that considerations of justice and convenience justified extinction of the limitation defence under s. 4(1) of the Limitation Act, judicial discretion could be exercised to permit joinder on terms that the limitation defence would be preserved and determined at trial. That approach was considered and adopted in *Strata Plan No. VR 2000 v. Shaw*, [1998] B.C.J. 1086 (S.C.) [Shaw] and *Stone Venepal (Celgar) Pulp Inc. v. IMO Industries (Canada) Inc.*, 2008 BCCA 317, 83 B.C.L.R. (4th) 138.

[15] Both the Master and the chambers judge referred to this approach from Neilson in their respective analyses of whether the City retained its late notice defence to the claim after being added as a party to the action.

THE MASTER'S DECISION

[16] The Master concluded that the former s. 286 was a notice provision and not a statutory limitation period that engaged s. 4(1) of the Limitation Act because s. 286 set out a mechanism for the trial court or the Court of Appeal to determine the effect of late notice on the joinder application. The Master also accepted the City's position that the late notice issue could not be determined on the joinder application. She therefore found that this case fell into the fourth option outlined in para. 48 of Neilson, which allows joinder on terms that the limitation defence is preserved and determined at trial (at para. 17).

- [17] In the result, the Master ordered the City be added as a defendant to the action pursuant to R. 6-2(7) "without prejudice to the right of the City to raise the issue of late notice under s. 286 of the Local Government Act." (at para. 19).

THE CHAMBERS JUDGE'S DECISION

- [18] Ms. Anonson appealed the Master's order. It was common ground that the issue on appeal, the interpretation of s. 736, raised a question of law and therefore the standard of review was correctness. The chambers judge held that the Master erred by: (1) finding that s. 736 is simply a notice period and not a statutory limitation period (at paras. 14–15); and (2) failing to apply the third option for adding a party as set out in Neilson at para. 47 when there was no dispute on the application that it was just and convenient to add the City as a defendant to the action (at para. 19).
- [19] In allowing the appeal and granting the respondent's application to add the City as a defendant without condition, the judge stated:
- [19] the Master was not being asked to "determine" the effect of a failure to give notice under s. 736. The cases (including Neilson) make it clear that, if no determination can be made on the joinder application, the court should proceed by assuming there is a limitation defence and then consider whether it is just and convenient to add the party, even though the result will be the elimination of that defence. This is the "third option" described in Neilson. The fourth option could not apply here because there was no dispute on the application that it was just and convenient to add the City as a defendant. The correct approach would have been to apply the "third option" described in Neilson.
- [20] Since there was no dispute that it was just and convenient to add the City as a defendant, the order ought to have been made without any conditions.
- [20] The judge appears to have been advised that there was no authority directly on point interpreting s. 736.

ON APPEAL

- [21] The City submits the judge erred in law in finding that the two-month notice requirement in s. 736 of the LGA was equivalent to a statutory limitation period, thereby barring the City from raising late notice as a defence after it was added as a party to the action. The City contends that: (1) the plain meaning of the words of the provision does not create a statutory bar to commencing or maintaining an action; and (2) where the required notice is not provided, s. 736 contains an express saving provision, which provides that an action is not barred if there is a reasonable excuse for the delay and the delay does not cause prejudice to the local government, and which can only be determined by the trial court or the Court of Appeal.

- [22] The respondent submits the notice provision in s. 736 of the LGA is akin to a limitation period in that a failure to comply with s. 736 constitutes a bar to the action just as a failure to commence the action within a limitation period is a bar. In support of this position, she relies on *Bannon v. Thunder Bay (City)*, [2000] 48 O.R. (3d) 1 (O.N.C.A.) [Bannon], where, she submits, the Court dealt with a provision similar to s. 736 of the LGA and concluded:
- [22] The notice requirement in s. 284(5) is not, strictly speaking, a limitation period. The limitation period (three months) is found in s. 284(2) of the Act. The notice requirement is, however, akin to a limitation period in that failure to comply with the section constitutes a bar to the action just as failure to commence the action within the limitation period constitutes a bar. The notice requirement also promotes the same interests served by limitation periods. It prompts the plaintiff to pursue the claim diligently, affords the defendant an opportunity to make timely investigation of the incident giving rise to the action and allows the defendant to proceed with its affairs secure in the knowledge that it will not face claims for which notice was not given as required by the statute: see *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.) at 562-64. A statutory provision requiring notice of a claim has been aptly described as "a limitation period within a limitation period."
- [23] Based on the statutory framework, I think that ss. 284(2) and (5) should be read together as constituting the applicable limitation period. Read together, they establish the period within which Ms. Bannon's action against the City had to be commenced. The first step, the giving of notice, had to be taken within seven days, and the second step, the formal commencement of the action, had to be taken within 3 months. In effect, s. 284(5) of the Act imposed a seven-day limitation on the commencement of Ms. Bannon's action.
- [27] The notice requirement in s. 284(5) is a prerequisite to the commencement of an action like this one. As indicated above, its effect is to impose a limitation on the period within which an action can be commenced
- [23] Ms. Anonson further contends that the chambers judge correctly applied the Neilson approach with respect to the application of s. 4(1) of the Limitation Act.

DISCUSSION

A. Statutory Interpretation

- [24] The modern approach to statutory interpretation provides a convenient starting point: "Today there is only one principle or approach to statutory interpretation, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.": *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 S.C.R. 27 at para. 21, citing the classic statement from *Elmer Driedger's Construction of Statutes* (2d ed. 1983) at 87.
- [25] In *R. v. D.A.I.*, 2012 SCC 5, the Court added: "The first and cardinal principle of statutory interpretation is that one must look to the plain words of the provision." (at para. 26).

[26] It is clear from the plain meaning of the words in s. 736 of the LGA that its notice provision is substantially different from the words of the limitation provision in s. 4(1) of the Limitation Act. While s. 4(1) expressly barred commencement of an action after the limitation period, s. 736 and its predecessor provisions do not bar commencing or maintaining an action for non-compliance with the notice provision, as the trial or appeal court must first determine whether the action can be saved by s. 736(3).

[27] Furthermore, s. 735 of the LGA (formerly s. 285) contains an express six-month limitation period for certain actions against a municipality or regional district, independent of the notice provision:

Limitation period for certain actions

735 All actions against a municipality or regional district for the unlawful doing of anything that

- (a) is purported to have been done by the municipality or regional district under powers conferred by an Act, and
- (b) might have been lawfully done by the municipality or regional district if acting in the manner established by law

must be commenced within 6 months after the cause of action arose, or within a further period designated by the council or board in a particular case but not afterwards.

[28] The Limitation Act also provided that an action may not be brought after the expiry of the applicable limitation period:

Limitation periods

3(2) After the expiration of 2 years after the date on which the right to do so arose a person may not bring any of the following actions

[29] This provision has effectively been retained in s. 6(1) of the current Limitation Act, S.B.C. 2012, c. 13, which provides:

Basic limitation period

6(1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.

[30] Moreover, s. 22(1) of the current Limitation Act clarifies s. 4(1) of the former Limitation Act by referring expressly to a limitation period and not merely a lapse of time:

Counterclaim or other claim or proceeding

22(1) If a court proceeding has been commenced in relation to a claim within the basic limitation period and ultimate limitation period applicable to the claim and there is another claim (the "related claim") relating to or connected with the first claim, the following may, in the court proceeding, be done with respect to the related claim even though a limitation period applicable to either or both of the claims has expired:

- (d) new parties may be added or substituted as plaintiffs or defendants.

B. Interpretation of the Notice Provisions

- [31] While the decision under appeal appears to be the first decided case under s. 736 of the LGA, there is considerable jurisprudence with respect to its predecessor notice provisions. In general, courts have distinguished the predecessor notice provisions in s. 286 of the LGA and s. 755 of the Municipal Act from the limitation provisions in the Limitation Act and therefore concluded that s. 4(1) of the Limitation Act does not apply.
- [32] The purpose of the notice provision in s. 755 was described by Madam Justice Southin in the five-judge decision *Teller v. Sunshine Coast Regional District* (1990), 43 B.C.L.R. (2d) 376 (C.A.) as follows:
- [40] What then is the purpose of the section? Clearly one of the purposes of the section is to enable a municipality to investigate a claim fully. But that purpose is addressed by the second branch of the concluding sentence. The only other purpose I can think of was to protect municipalities against stale claims in order to enable them to estimate their future liabilities and make budgetary provision for them. But I know of no authority for that surmise. It really is difficult to make much sense out of the words "reasonable excuse" in the context.
- [33] In allowing the appeal and remitting the matter to the trial court, Southin J.A. stated that it was "regrettable" the parties had pursued a decision under R. 18 (the then summary judgment rule) as the true issue was whether the regional district was prejudiced in its defence of the liability or damages issues in the action because of the plaintiff's non-compliance with the two-month notice period. In her view, those issues should have been determined "in the usual way", i.e., by a conventional trial.
- [34] In *Grewal v. Saanich (District)* (1989), 38 B.C.L.R. (2d) 250 (C.A.), this Court noted that: (1) s. 755 did not limit the time within which an action may be brought but found that it nevertheless had a draconian effect because it barred recovery in circumstances in which late or no notice had been given unless the court found the conditions for the saving provision (reasonable excuse and lack of prejudice) were met (at para. 24); and (2) s. 755 required notice not only that damage had been sustained but also notice of "the time, place and manner in which the damage [was] sustained." The Court identified the provision's purpose and effect as follows:

- [26] The object of the section is to provide an early opportunity for the municipality to examine the place where the damage has occurred, to interview witnesses, and to consider whether to settle or contest the matter.
- [30] The giving of notice in the manner prescribed by the statute has been considered a condition precedent to the right of action: Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed., vol. 2, p. 1333, citing *Ritchie v. Gale*, 49 B.C.R. 251, [1934] 3 W.W.R. 703, [1935] 1 D.L.R. 362 (C.A.).
- [35] In *Thauli v. Delta*, the Court adopted the purpose of the notice provision as it was articulated in *Grewal* with respect to s. 286 of the LGA. Writing for the Court, Madam Justice Rowles explained:
- [47] That object [from *Grewal*] was referred to again in *Teller* in which Southin J.A. said that the obvious purpose of the notice provision in the legislation was to "enable a municipality to investigate a claim fully" (at 383). However, as Southin J.A. observed, that purpose "is addressed by the second branch" which requires that the municipality not be prejudiced in its defence by the failure or insufficiency of the notice if an action against it is to proceed.
- [36] A number of trial court decisions have also held that a notice provision is different from a limitation period provision, and that the question of whether there was a reasonable excuse for the late or lack of notice and whether the defendant has been prejudiced by the late or lack of notice can only be determined on the evidence at trial. See *Simon (Litigation Guardian of) v. McKinlay*, 2013 BCSC 674 at para. 36 [s. 286]; *Griffiths v. Corp of City of New Westminster et al.*, 2001 BCSC 1516 at para. 31 [s. 286]; *Day v. Regional District et al.*, 2000 BCSC 1134 at para. 47 [s. 286]; *Blanck v. British Columbia*, [1994] B.C.W.L.D. 1321 (S.C.) at para. 10 [s. 755]; *Strickland v. Bahnsen* (1991), 26 A.C.W.S. (3d) 650 (S.C.) at para. 16 [s. 755]; and *Lloyd v. Richards and Corporation of Delta* (1985), 67 B.C.L.R. 22 (S.C.) [s. 755], where the Court helpfully summarized the issue as follows:
- [16] In *Stelmock v. I.C.B.C.* (1982), 42 B.C.L.R. 145 Macdonell J. rejected a submission that a provision for notice in the Insurance (Motor Vehicle) Act had been repealed by s. 15 of the Limitation Act on the ground that the requirement that notice be given is a different matter entirely than limitation against commencement of action.
- [17] Section 755 of the Municipal Act specifically provides for consideration of the circumstances to determine whether there was a reasonable excuse for failure to give notice, in which event the failure would not bar the maintenance of the action. That provision does not have the effect of limiting time in which the action may be brought. Failure to give notice of an intended action is a different matter from failure to start the action within the time limited.

C. The Bannon Decision

[37] The respondent submits that s. 736 of the LGA is akin to a limitation period, relying on the Ontario Court of Appeal decision in *Bannon*. With respect, *Bannon* does not assist the respondent as the wording of Ontario's Municipal Act, R.S.O. 1990, c. M.45, was substantially different from this jurisdiction's notice provisions in the LGA and Municipal Act. The Ontario legislation includes the following language, which is more akin to the Limitation Act provisions:

Limitation of actions

284(2) No action shall be brought against a corporation for the recovery of damages occasioned by such default, whether the want of a reasonable state of repair was the result of nonfeasance or misfeasance, after the expiration of three months from the time when the damages were sustained.

Notice of action

284(5) No action shall be brought for the recovery of the damages mentioned in subsection (1) unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered mail to the head or the clerk of the corporation, in the case of a county or township within ten days, and in the case of an urban municipality within seven days, after the happening of the injury, nor unless, where the claim is against two or more corporations jointly liable for the repair of the highway or bridge, the prescribed notice was given to each of them within the prescribed time.

SUMMARY

[38] In British Columbia, notice provisions for local government have been interpreted as substantially different from limitation period provisions. The Legislature chose to treat local government differently from other litigants by requiring that local government be given notice within a short period following an incident to allow the City to investigate the potential claim.

[39] Unlike the Limitation Act, s. 736 of the LGA (and the former notice provisions in s. 286 of the LGA and s. 755 of the Municipal Act) are not akin to a lapse of time in which to bring an action. 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.

[40] The notice provisions of the current and former legislation have never been captured by s. 4(1) of the Limitation Act when a party is added to an action because the trial or appeal court must first determine whether the saving provision applies. Neither Bannon, which interprets differently worded legislation, nor Neilson, which assumes that s. 4(1) of the Limitation Act is engaged, are applicable to this issue.

DISPOSITION

[41] In the result, I would allow the appeal, set aside the chambers judge's order, and reinstate the Master's order. It follows that the City is entitled to its costs in this Court and in the court below.

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Willcock"

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