

CANADA / JUDGMENT

Sampare v. 1199 Holdings Ltd.

2025 BCSC 234

COURT

Supreme Court of British Columbia

DECIDED

31 January 2025

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2025 BCSC 234 Sampare v. 1199 Holdings Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sampare v. 1199 Holdings Ltd.

2025 BCSC 234

Date: 20250131

Docket: S2011280

Registry: Vancouver

Between:

Cheryl Jane Sampare

Plaintiff

And

1199 Holdings Ltd., The Corporation of the City of Vancouver,

and XYZ Maintenance Company

Defendants

Before: Associate Judge Robinson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

T. Dennis

Counsel for the Defendant, The Corporation of the City of Vancouver:

R. McMullan

For the Defendants, XYZ Maintenance Company and 1199 Holdings Ltd.:

No appearances

Counsel for the Attendee, Henderson Land Holdings Canada Ltd.:

D. Volpatti

D. Suri, A/S

Counsel for the Attendee, 7-Eleven Canada Inc.:

C. Chisholm

Place and Date of Hearing:

Vancouver, B.C.

January 17, 2025

Place and Date of Judgment:

Vancouver, B.C.

January 31, 2025

- [1] THE COURT: I am providing reasons for judgment in respect of two applications which were heard concurrently on January 17, 2025. Specifically, the defendant, the City of Vancouver (the "City"), seeks leave to file and serve third party notices naming both Henderson Land Holdings Canada Ltd. ("Henderson"), and 7-Eleven Canada Inc. ("7-Eleven"), as third parties. Meanwhile, the plaintiff, Cheryl Jane Sampare (the "Plaintiff"), seeks an order adding both Henderson and 7-Eleven as defendants to an existing and ongoing action.
- [2] I am providing these reasons orally. In the event that a transcript is ordered, I reserve the right to make revisions. Such revisions if made will not change my decision nor the basis for my decision.

Background

- [3] To understand and appreciate the issues on these applications, it is necessary at the outset to briefly recite the context in which they have arisen.
- [4] The underlying litigation concerns an alleged trip and fall which occurred on October 26, 2018.

[5] Following that incident, the Plaintiff retained counsel, and on March 4, 2019, counsel for the Plaintiff wrote to the City and purported to provide notice of a potential action in accordance with s. 294(2) of the Vancouver Charter, SBC 1953, c 55. I note parenthetically the s. 294(2) of the Vancouver Charter generally requires notice of potential claims setting forth the time, place and manner in which damage has been sustained to be delivered to the City Clerk within two months of the date on which the damage was sustained. For the purposes of the present applications, I neednot address whether the Plaintiff complied with that requirement.

[6] What is salient is the correspondence from Plaintiff's counsel dated March 4, 2019, which states:

Notice is hereby given of a trip and fall incident which occurred on October 26, 2018, at or around 8:39 p.m., at or near the 7-Eleven located at 1199 West Pender Street, Vancouver, B.C. As a result, Ms. Sampare sustained serious injuries to and about her body when she tripped and fell on uneven pavement due to the negligence of the City.

[7] The City acknowledged receipt of that correspondence on March 6, 2019.

[8] Less than two weeks later, on March 15, 2019, counsel for the Plaintiff delivered another letter to the City which was virtually identical to the correspondence of March 4, 2019. The only significant difference was that, instead of referencing a location on West Pender Street, the March 15, 2019 letter stated:

Notice is hereby given of a trip and fall incident which occurred on October 26, 2018, at or around 8:39 p.m., at or near the 7-Eleven located at 556 Abbott Street inside International Village Mall in Vancouver, B.C. As a result, Ms. Sampare sustained serious injuries to and about her body when she tripped and fell on uneven pavement due to the negligence of the City.

[9] The City responded to the letter of March 15, 2019, noting that it seemingly referenced the same trip and fall as the previous letter but at a different location. The City also pointed out that because the March 15, 2019, letter referred to an incident which was stated to have occurred inside "International Village Mall", it presumably occurred on private, commercial property for which the City would not be liable.

[10] Thereafter the Plaintiff did not take any known steps in respect of pursuing her claim until October 2020. Specifically, on October 23, 2020, almost two years after the date of the incident, she filed a notice of civil claim. Therein she alleged the incident occurred on the sidewalk "in front of" and/or "at" a property located at 1199 West Pender Street in Vancouver. This was the same location referenced in the letter of March 4, 2019, to which I have previously referred.

[11] In addition to the City, the notice of civil claim also named the alleged owner of the property at or adjacent to the location where the incident occurred and the maintenance company which was allegedly responsible for maintaining and inspecting the site of the incident.

[12] The City's response to civil claim was filed on December 17, 2020. Therein the City denied liability and also alleged that if the incident occurred as alleged, the incident was caused in whole or in part by the negligence of the other named defendants.

[13] On April 30, 2021, the Plaintiff arranged to discontinue the litigation insofar as it concerned the alleged owner of the property at or adjacent to the site of the incident. Counsel for the Plaintiff explained the discontinuance roughly 18 months later when, in an email to the City dated October 10, 2023, Plaintiff's counsel wrote:

Find attached a copy of a filed notice of discontinuance. Please note we are in the process of amending our notice of civil claim as the location of the incident needs to be revised.

[14] The City did not take any steps at that time, or thereafter, to rejoin the owner of the property at 1199 West Pender Street as a third party. Indeed, having regard for the fact that the Plaintiff had disclosed an intention to revise the location of the incident, the City would not have had a basis for seeking to rejoin the party against whom the action had been discontinued.

[15] On the same date, being October 10, 2023, the Plaintiff delivered her list of documents to the City. The list included documents described as "four coloured photographs re incident scene" dated March 14, 2019. The incident scene depicted in the photographs were taken of the area at 556 Abbott Street. These photographs predated the initiation of the litigation by more than 18 months. Notably, it is not the case that the photographs came into the possession of the Plaintiff or counsel for the Plaintiff sometime after the notice of civil claim was filed.

[16] During the Plaintiff's examination for discovery, which took place on April 10, 2024, her counsel confirmed that a person from his office was responsible for taking the four coloured photographs disclosed in the list of documents. Deductively, in taking those photographs, the photographer would have had to have attended at the site of the incident and would have obviously recognized the site of the incident was not at, or for that matter anywhere near, 1199 West Pender Street.

[17] Despite being imbued with that awareness, it was not until November 27, 2023, that the Plaintiff arranged to file an amended notice of civil claim. The most significant amendment concerned the location of the alleged incident. Instead of referring to 1199 West Pender Street, the amended notice of civil claim alleged that the incident occurred "at or near the block of 556 Abbott Street in Vancouver". This was the same or approximately the same location as described in the Plaintiff's letter of March 15, 2019, to which I have previously referred. That letter predated the amended notice of civil claim by more than four years.

[18] The amended notice of civil claim does not name or seek to ascribe liability to the owner of the property at or adjacent to 556 Abbott Street.

- [19] Based on the amended notice of civil claim and the information subsequently gleaned during the examination for discovery of the Plaintiff in April 2024, the City subsequently arranged to commission a survey of the alleged incident site. The survey was carried out in May 2024, and the survey results appear to indicate that the site of the incident, which consisted of an uplifted portion of the sidewalk, existed on private property or very close to the line separating the public portion of the sidewalk from private property.
- [20] Further investigation by the City caused it to determine that Henderson was the owner of the private property in question and that 7-Eleven was the lessee or occupier of the property with Henderson as the lessor. The City asserts that it was this determination which compelled to seek leave to join both Henderson and 7-Eleven as third parties to this litigation. Its application for that purpose was filed on August 1, 2024.
- [21] After being served with the City's application, the Plaintiff filed her own notice of application on August 14, 2024, wherein she seeks leave to file a further amended notice of civil claim naming both Henderson and 7-Eleven as defendants. After having brought these applications, the trial of this matter, which had been scheduled to begin on October 28, 2024, was adjourned. The trial has not been reset.
- [22] These reasons concern those two applications, and having set out the context in which they have arisen I turn to address each of them in the order in which they were brought.

City's Application

- [23] The City's application is brought pursuant to Rule 3-5(4) in Supreme Court Civil Rules, B.C. Reg. 168/2009 which provides:
- (4) A party may file a third party notice
- (a) at any time with leave of the court, or
- (b) without leave of the court, within 42 days after the filing of the response.
- [24] Because more than 42 days have lapsed since the City filed its response to the notice of civil claim, leave is required. Whereas Rule 3-5(4) clearly confers discretion on the court to grant leave to file a third party notice, the exercise of that discretion is subject to established principles.
- [25] An overarching principle is that in the exercise of the court's discretion consideration should be given to the presumed benefit of having all related questions addressed in the same proceeding. Our Court of Appeal in *McNaughton v. Baker*, 1988 CanLII 3036 (BC CA), explained at para. 14:

Third party pleadings function as a special type of statement of claim. Indeed, the claim they embody could be brought by separate action. But to avoid a multiplicity of proceedings, the rules permit the claim to be made in the action which has been commenced against the defendant. The object of permitting third party proceedings to be tried with the main action is to provide a

single procedure for the resolution of related questions, issues or remedies, in order to avoid multiple actions and inconsistent findings, to provide a mechanism for the third party to defend the plaintiff's claim, and to ensure the third party claim is decided before a defendant is called upon to pay the full amount of any judgment. The avoidance of a multiplicity of proceedings is fundamental to our rules of civil procedure.

- [26] The passage contemplates third party proceedings which could be brought by separate action. As I will discuss momentarily, Henderson, and in particular 7-Eleven, take the position that any separate action the City might be inclined to initiate against them would be statute barred by the effluxion of time.
- [27] Other principles to be considered on this application were summarized by this court in *Steveston Seafood Auction Inc. v. Bahi*, 2013 BCSC 1072, at para. 19, as follows:
- (a) The test on this application is the same as under Rule 9-5. The proposed third party must establish beyond doubt that the pleadings discloses no cause of action. The court is permitted to reject proposed claims only if the action is "bound to lose" or there is no bona fide triable issue.
 - (b) In exercising its discretion as to whether leave ought to be granted, the court can consider factors such as prejudice to the parties, the expiration of a limitation period, the merits of the proposed claim, any delay in the proceedings and the timeliness of the application.
 - (c) The court is required to assume that all pleaded facts are true.
 - (d) An important consideration is whether it is "just and convenient" in all the circumstances of the case to grant leave to file the third party notice.
 - (e) A third party claim will not lie against another person with respect to an obligation belonging to the plaintiff which the defendant can raise directly against the plaintiff by way of defense.

Position of the Parties

- [28] The City contends that all of the factors favour the granting of leave to join Henderson and 7-Eleven as third parties. Its position is premised on a submission that it could initiate separate actions against both entities if leave is denied and that doing so would offend the court's preference for a single proceeding. Moreover, separate actions to address the City's claims for contribution and indemnity could give rise to inconsistent findings of fact, thereby creating an embarrassment.
- [29] In this regard, the City's position is premised on the submission that any separate claim against Henderson and/or 7-Eleven are subject to a limitation period of two years pursuant to s. 6(1) of the Limitation Act, SBC 2012, c 13. That provision states:

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] A central issue in this application is the date on which the City discovered the claims that it seeks to advance by way of third party notice. In this regard the City relies on s. 16(1) of the Limitation Act, which states:

16 A claim for contribution or indemnity is discovered on the later of the following:

- (a) the day on which the claimant for contribution or indemnity is served with a pleading in respect of a claim on which the claim for contribution or indemnity is based;
- (b) the first day on which the claimant knew or reasonably ought to have known that a claim for contribution or indemnity may be made.

[31] The City says that in accordance with that provision there are alternative dates on which the limitation period may be found to have commenced to run:

- 1) October 10, 2023: This was the first date on which the plaintiff disclosed an intention to amend the notice of civil claim to reference an incident location other than 1199 West Pender Street;
- 2) October 31, 2023: This was the date on which the plaintiff delivered an unfiled copy of her amended notice of civil claim which expressly referenced the incident site as being at or near the block of 556 Abbott Street in Vancouver;
- 3) November 27, 2023: This was the date on which the plaintiff filed and served her amended notice of civil claim on the City;
- 4) April 10, 2024: This was the date on which the City examined the plaintiff for discovery and determined the precise location of the uplift in the sidewalk which allegedly caused the incident; or
- 5) May 14, 2024: This was the date on which the City obtained the results of the survey which appeared to disclose that the uplifted portion of the sidewalk existed on private property or very close to the line separating the public portion of the sidewalk from private property.

[32] The City asserts that irrespective of what date it is found to have discovered the claim for contribution and indemnity, the limitation period has not expired such that it would be within its right to initiate separate proceedings for contribution and indemnity if leave is denied on this application.

[33] With respect to other factors for consideration, the City concedes that the delay in bringing this application would result in prejudice to both Henderson and 7-Eleven, if leave is granted. In doing so, the City acknowledges that the litigation has been ongoing for more than four years and that the litigation concerns an incident which allegedly occurred more than six years ago. In the intervening time, both the Plaintiff and the City have carried out examinations for discovery, exchanged documents and arranged for independent medical

assessments on the Plaintiff. At the same time, the City points out there is no imminent trial date, or for that matter any trial date at all, since the trial has been adjourned generally and has not been reset. Accordingly, both Henderson and 7-Eleven, according to the City, will have an opportunity to undertake whatever processes they deem necessary to prepare for trial.

- [34] For their part, neither Henderson nor 7-Eleven strenuously deny or dispute the proposed claims for contribution and indemnity raise bona fide triable issues. Rather, their opposition to the City's application is premised largely on the delay in bringing this application and the associated potential expiration of the applicable limitation period, as well as on the prejudice they both assert they will sustain if leave is granted.
- [35] With respect to the expiration of the applicable limitation period, Henderson argues that the claim for contribution and indemnity was discovered by the City, for the purposes of s. 16(1) of the Limitation Act, on October 23, 2020. That was the date on which the notice of civil claim was initially filed. It bears restatement that the notice of civil claim at that time referred to the sidewalk "in front of" and/or "at" a property located at 1199 West Pender Street in Vancouver.
- [36] Henderson says that on being served with a notice of civil claim on that date, the basis for a claim for contribution and indemnity was discoverable by the City had it exercised reasonable diligence. In this respect, Henderson points to the fact that more than 18 months earlier the Plaintiff had delivered inconsistent notices describing the location of the incident at both 1199 West Pender Street and then subsequently at 556 Abbott Street. It was submitted that on being served with the notice of civil claim, the City had both the ability and the duty to resolve that inconsistency, and if it had done so by the exercise of reasonable diligence it would have discovered the basis to serve a claim for contribution and indemnity.
- [37] Alternatively, Henderson argues that even if the City had not taken steps to determine the correct address at which the incident occurred, it nevertheless knew and is deemed to have discovered on October 23, 2020, the basis for a claim for contribution and indemnity because the original notice of civil claim implied that the incident occurred at or near private property. Accordingly, Henderson submits that even if the City was not under any duty to ascertain the identity of the private property owner, it was imbued with sufficient knowledge to constitute a basis for a claim for contribution and indemnity and could have named the unknown property owner as, for example, "ABC Company" as a kind of placeholder until the property owner was determined.
- [38] Henderson's alternative position is that if the court is unable to find that the limitation period has expired, the court should nevertheless decline to grant leave in this context due to the prejudice it has and will continue to experience from the delay in bringing this application. In this respect, Henderson says that in addition to the prejudice that is to be presumed in this context, it has evidence of actual prejudice. In this regard, the affidavit evidence proffered by Henderson discloses that its representative has undertaken a search

of its records and has been unable to locate any records of any kind in relation to the incident.

- [39] The positions taken by 7-Eleven are similar to those of Henderson. However, its argument regarding the expiration of a limitation period are augmented by an important difference. 7-Eleven points out that in October 2018, when the incident occurred, it operated outlets at or proximate to both 1199 West Pender Street and 556 Abbott Street. It also points out that both letters dated March 4, 2019 and March 15, 2019 purporting to give the City notice of a potential claim expressly described the incident as at or near the 7-Eleven. Accordingly, 7-Eleven submits that upon being served with the notice of civil claim, on October 23, 2020, the City was aware that a 7-Eleven outlet existed at or near 1199 West Pender Street and had sufficient knowledge based on the previous letters to know that it may have the basis for a claim for contribution and indemnity as against 7-Eleven, irrespective of the precise address at which the incident was alleged to have occurred.
- [40] 7-Eleven submits that the basis for a claim for contribution and indemnity by the City was, if not known, then unquestionably knowable upon being served with the notice of civil claim on October 23, 2020, and that the applicable limitation period commenced to run on that date.
- [41] As with Henderson, 7-Eleven's alternative position is that if the court is unable to find that the limitation period has expired, the court should nevertheless decline to exercise its discretion to grant leave because the City has delayed in bringing this application and because granting leave would be prejudicial.
- [42] Regarding the City's delay in bringing this application, 7-Eleven points out that this application was filed on August 1, 2024, which is:
- a) almost 10 months after the City was advised by email that the Plaintiff intended to amend her notice of civil claim and correct the location of the incident;
 - b) more than eight months after the Plaintiff served her amended notice of civil claim to reference 556 Abbott Street;
 - c) nearly four years after the litigation was initiated;
 - d) more than three years after the Plaintiff discontinued her claim as against the owner of the private property at or near 1199 West Pender Street;
 - e) more than five years after the City had notice of a potential claim which expressly referenced a 7-Eleven outlet; and
 - f) nearly six years after the incident itself allegedly occurred.
- [43] 7-Eleven submits that unexplained delay, without more, is a basis on which the court may decline to grant leave in this context. Moreover, 7-Eleven submits that delay gives rise to a presumption of presumption, and where that presumed prejudice is accompanied by

evidence of actual prejudice, leave should be denied. In taking this position, 7-Eleven makes the point that its outlet located at or near 556 Abbott Street was permanently closed on October 28, 2021. Moreover, of the 10 employees who worked at that location in October 2018, only three remain employed by 7-Eleven. As well, 7-Eleven has determined that it has no records pertaining to the incident to which this litigation relates nor any surveillance footage which is normally retained by 7-Eleven for a minimum of 90 days.

[44] Taking these factors into account, 7-Eleven says that it would be actually prejudiced in its ability to answer and defend itself if required to participate in this litigation as a third party.

Discussion

[45] Insofar as the limitation period and its possible expiration is concerned, the decision of Mr. Justice Kent in *Sohal v. Lezama*, 2019 BCSC 1709, affirmed on appeal at 2021 BCCA 40, is instructive. There, the court outlined three scenarios at para. 74:

[74] It follows that the discretion bestowed upon the court by Rule 3-5(4) does not permit the court to in effect extinguish a proposed third party's substantive legal defence to a contribution claim based on an expired limitation period. Rather, the court should approach the matters as follows:

- if it is clear the limitation period has expired, the application under Rule 3-5(4) to issue a Third Party Notice beyond the 42-day time limit must be dismissed;
- if it is clear the limitation period has not expired, the court may exercise its discretion under Rule 3-5(4) taking into account the well-established factors for the exercise of that discretion; and
- if the parties disagree as to whether the limitation period has expired, and the court is unable to determine this issue on the leave application, the court should consider the factors for the exercise of its discretion under Rule 3-5(4), and if it is otherwise inclined to grant leave, direct that the merits of the limitation defence be decided in the third party proceedings on a more fulsome evidentiary platform.

[46] The foregoing approach guides my analysis as it relates to both Henderson and 7-Eleven.

[47] With respect to Henderson, I have little hesitation in finding that the limitation period for a claim for contribution and indemnity by the City has not expired. Having regard for the fact that s. 16(1) of the Limitation Act clearly states that the claim for contribution and indemnity is not discovered until the later of the day on which the claimant is served with the pleading in respect of a claim for which contribution and indemnity is based and the first date on which the claimant knew or reasonably ought to have known that a claim for contribution and indemnity may be made, it is clear on the evidence before me that the claim in this context was not discovered until November 27, 2023, that being the date on which the City was served with the amended notice of civil claim.

- [48] While I accept that upon being served with the original notice of civil claim in October 2020, the City had an obligation to undertake reasonable diligence to ascertain whether it had a basis for any claims or contribution and indemnity, that obligation did not extend to requiring the City to make inquiries of the Plaintiff to ensure that the pleadings correctly identified the site of the incident. The City was entitled to rely on the facts as pleaded for the purposes of determining whether it had any basis for advancing claims of contribution and indemnity.
- [49] In reaching this conclusion, even if I am prepared to assume the City was remiss in its obligations, it is salient that the exercise of diligence based on the pleadings as they existed until November 27, 2023, would not have caused the City to have any reason to know or even suspect that it had a basis on which to seek contribution and indemnity from Henderson. The exercise of diligence would have potentially led to the owners and occupiers of properties at or proximate to 1199 West Pender Street. Whether or not the City would have had any basis for seeking contribution and indemnity for such entities is speculative at best. In any event, none of those entities would have been Henderson.
- [50] Moreover, it is no answer to say that the City's exercise of diligence ought to have caused it to refer back to the inconsistent notices from March 2019, as a basis for naming Henderson as a third party. The City was entitled to proceed on the assumption the plaintiff had correctly identified the site of the incident by the time the pleadings were filed. Indeed, if the City had named Henderson as a third party prior to November 2023, it would have done so on the basis that Henderson was responsible for the maintenance, upkeep and repair of the area proximate to 1199 West Pender Street, which would be consistent with the allegations in the notice of civil claim. This would have required the City to file a pleading for which there was no basis in fact or in law and which it knew was false.
- [51] Unless and until the City was served with the amended notice of civil claim, it could not have pursued any claim for contribution and indemnity against Henderson. Accordingly, the applicable limitation period commenced to run on November 27, 2023, and has not expired.
- [52] That finding is not the end of the analysis.
- [53] Having found that the limitation period has not expired, it is necessary to consider the factors outlined in *Steveston Seafood Auction Inc.* which inform my discretion. Of the factors set out, those applicable to this application are the City's alleged delay in bringing this application and the prejudice, both presumed and actual, to Henderson.
- [54] Regarding delay, the lapse of time may, in and of itself, constitute a basis to refuse leave. This is due not only to the presumption of prejudice but also the interest of justice. Delay, and in particular inordinate delay, brings the administration of justice into disrepute.
- [55] With that in mind, I have determined that while the City did delay in bringing this application, its delay was not inordinate by any reasonable measure. It was not until November 27, 2023, the City had any basis to add Henderson as a third party to this

litigation. Thereafter, the City proceeded with reasonable diligence to examine the Plaintiff for discovery and carry out a site visit at which it determined that the incident may have occurred on private property. Whereas the City may have had reason to suspect that it had a basis for a claim for contribution and indemnity as early as November 27, 2023, this was not confirmed until May 2024. In the circumstances, the City's delay is explained.

- [56] Moreover, the delay in this circumstance is almost entirely attributable to the Plaintiff and her perplexing decision to reference the incorrect address of the incident when the action was commenced. This created unnecessary confusion and generally explains each of the applications to which these reasons relate.
- [57] Had the Plaintiff referred to the correct incident site from the outset, the City would have been able to carry out an earlier site visit and identify potential third parties sooner. In my view, the delay is not simply explained, it is generally excused in this context.
- [58] The next factor for consideration is prejudice, which is often a consequence of delay. In this regard, I am mindful of Henderson's evidence that its representative has undertaken a search and has been unable to locate any records of any kind in relation to the incident. While the absence of records may adversely affect Henderson's ability to respond to the claim, I am unable to conclude that the absence of records is attributable to any delay.
- [59] The evidence of Henderson's representative is that it used closed-captioned television to record its properties and that it preserves the resulting footage for 15 to 30 days. Implicit in that evidence is that after 15 to 30 days the close-captioned television footage is lost. Having regard for the fact that the incident itself occurred in October 2018, there would have been no footage when the notice of civil claim was originally filed in October 2020. Moreover, the footage would presumably not have existed when the City first received notice of a potential claim in March 2019.
- [60] To the extent that Henderson might be inclined to rely on the fact that its representative does not believe that any of its current security team were employed in 2018, no evidence is offered as to when the employment of such persons ended and there is no evidence as to the unavailability of former employees to provide evidence as witnesses, if needed. Similarly, I am unable to attach much significance to the assertion that Henderson has been unable to locate any reports or records in relation to the incident because there is no basis on which to infer that such records or reports have ever existed.
- [61] This is not a situation on which the delay has resulted in Henderson being unable to sufficiently prepare for an imminent trial date. As discussed, the trial was adjourned generally and has not been reset. Accordingly, Henderson cannot plausibly assert insufficient time to prepare for trial as prejudice.

- [62] The prejudice to Henderson amounts to being required to participate in litigation. That is not a sufficient basis on which to decline leave in these circumstances. Indeed, it is probable that every third party and indeed every defendant could assert the same prejudice as an objection to its involvement in legal proceedings. Were that a compelling argument, there would be no litigation at all.
- [63] Accordingly, insofar as Henderson is concerned, I grant the City's application and grant leave to file the third party notice as attached to the City's notice of application as Schedule A.
- [64] Turning to the City's application as it relates to 7-Eleven, while the circumstances are similar, 7-Eleven is in a somewhat different position than Henderson. This is because throughout, the Plaintiff has conveyed to the City that the incident occurred at or near a 7-Eleven outlet. 7-Eleven was expressly referenced in the notice letters of March 4 and March 15, 2019. Most notably, the letter of March 4, 2019, described the location of the incident as at or near the 7-Eleven located at 1199 West Pender Street, Vancouver, B.C.
- [65] When the notice of civil claim was initially filed, it did not expressly reference 7-Eleven but it did reference the same address - 1199 West Pender Street. Accordingly, 7-Eleven submits that upon being served with the notice of civil claim in October 2020, the City was imbued with sufficient knowledge to determine that it had the basis for a claim for contribution and indemnity as against 7-Eleven and the limitation period commenced to run on the date the City was served with the original notice of civil claim. Accordingly, 7-Eleven submits that the proposed third party claim of the City is statute barred by operation of the Limitation Act and the application must be dismissed in accordance with the decision in *Sohal v. Lezama*.
- [66] The position of 7-Eleven raises an interesting issue and one that, as far as I can discern, has not been directly addressed by the authorities. It is not an argument that can be dismissed out of hand.
- [67] Insofar as the general principles are concerned, there is no significant dispute. It is settled that upon being served with pleadings for which it may have a basis to seek contribution and indemnity a defendant is expected to proceed with relative haste to identify the persons or entities from whom contribution and indemnity may be sought: *Neale Engineering Ltd. v. Ross Land Mushroom Farm Ltd.*, 2023 BCCA 429.
- [68] Here, the City was served with pleadings which expressly identified a street address describing the location of a trip and fall. The same street address was the address for a 7-Eleven outlet. This was known to the City since it had received notice of that fact more than one year prior in March 2019.

- [69] In determining whether the time limited for initiating a third party claim has expired, the issue for resolution is whether the foregoing circumstances meant that the claim for contribution and indemnity was discovered by the City in October 2020, for the purposes of s. 16(1) of the Limitation Act. In this regard it bears reminding that a claim is deemed to be discovered on the later of:
- (a) the day on which the claimant for contribution or indemnity is served with a pleading in respect of a claim on which the claim for contribution or indemnity is based; [or]
 - (b) the first day on which the claimant knew or reasonably ought to have known that a claim for contribution or indemnity may be made.
- [70] I have serious misgivings in finding that the original notice of civil claim included a claim on which the City's proposed claim for contribution and indemnity is based. The pleadings, as initially drafted, referred to the incident having occurred at 1199 West Pender Street. This, as later determined, was the incorrect address. The actual address was on Abbott Street. The proposed claim for contribution and indemnity concerns the state of the sidewalk proximate to the 7-Eleven outlet on Abbott Street. Until the amended notice of civil claim was served on the City in November 2023, the City had no basis to raise or assert the third part claim it now proposes. It was on that date that the City was in a position to make inquiries including carrying out a site visit and inspection of the sidewalk proximate to the site of the incident and to ascertain: the condition of the sidewalk; whether the incident occurred on private versus public property; and if the sidewalk was in a state of repair the cause or potential cause of the disrepair.
- [71] Had the City undertaken an investigation of the incident site prior to being served with the amended notice of civil claim, its investigation would have focussed on an entirely different area - an area which was not associated with the incident.
- [72] Accordingly, irrespective of the findings of any earlier investigation the City would not have been in a position to raise the claims for contribution and indemnity it presently proposes. At the same time, it cannot be disputed that when served with the original notice of civil claim the City knew that the claim concerned an incident which had allegedly occurred on or about October 26, 2018, when the Plaintiff was walking on the sidewalk near a 7-Eleven outlet.
- [73] Arguably this was a sufficient basis on which to support a claim for contribution and indemnity since the City arguably had a basis for a claim against 7-Eleven as the occupier or alleged occupier of the sidewalk at which the incident was alleged to have occurred.
- [74] While I accept that these are arguable points, they are, in my view, specious arguments. Nonetheless in the circumstances where there is some doubt as to the expiration of the limitation period, I am not required to determine the issue.

- [75] Sohal v. Lezama makes clear that if the parties disagree as to whether a limitation period has expired and the court is unable to determine this issue on a leave application, the court should direct the merits of the limitation defence be decided in the third party proceedings on a more fulsome evidentiary platform and proceed to decide the application on the basis of factors which would otherwise guide the exercise of discretion.
- [76] Similar to the positions taken by Henderson, 7-Eleven relies primarily on the City's alleged delay in bringing this application and on the prejudice, both presumed and actual, it says it will suffer if the application is allowed. Regarding delay, 7-Eleven argues the City has not proffered any evidence to explain or excuse its decision to wait until August 2024 to initiate this application. I disagree with that assertion.
- [77] In my view, as I have stated in respect of the application as it relates to Henderson, the City proceeded reasonably expediently after being served with the amended notice of civil claim to determine whether it had a basis to pursue claims for contribution and indemnity. It is notable that it received the Plaintiff's list of documents in October 2023. That list included colour photographs of the incident scene - photographs which had not been previously disclosed despite having been in the possession of the Plaintiff or control for several years.
- [78] An examination for discovery of the Plaintiff proceeded thereafter in April 2024, and it was the evidence obtained in that process which allowed the City to carry out a meaningful site inspection including a survey. It was that site inspection and survey which satisfied the City that it had a basis to pursue third party claims. Until then, any third party claim initiated by the City would have been based largely on speculation. The law should, in my view, discourage speculative claims and require parties to hold off on initiating proceedings which might otherwise be baseless or frivolous.
- [79] 7-Eleven also points to the fact that the delay in bringing this application has compromised its ability to defend itself. As indicated, it refers to the fact that the outlet located on Abbott Street was permanently closed on October 28, 2021. Only three of the 10 employees who worked at the Abbott Street outlet remain employed by the company and it has no records or surveillance footage pertaining to the incident or the date of the alleged incident.
- [80] Without minimizing the significance of those concerns, none are sufficiently compelling to cause me to decline to exercise the discretion conferred by Rule 3-5(4). Regarding the closure of the outlet, the court received no evidence and heard no argument as to how that affects or prejudices the ability of 7-Eleven to answer the City's claim. Having regard for the fact the incident allegedly occurred on an exterior sidewalk and not inside the former outlet, the ability of 7-Eleven to carry out an inspection of the site and to review its maintenance records and policies as were in effect in 2018 is presumably unaffected.
- [81] Regarding the loss of staff members, the affidavit of 7-Eleven's representative does not give any indication of attempts, successful or otherwise, to locate former employees who may have worked at the Abbott Street outlet in 2018. The fact that persons are no longer employed does not mean they are no longer available as witnesses. Moreover, while it can be

fairly inferred that person's memories may fade with the passage of time, there is no evidence that 7-Eleven has contacted any employee, including the three persons who remain employed by the company, to determine their ability to provide evidence as to the events of October 2018. Indeed, 7-Eleven's representative deposes:

I have not had an opportunity to reach out to these three employees yet to confirm if they have knowledge of the incident.

- [82] Apart from accepting as uncontroversial that memories fade with time, I am unwilling to go further and to find, as 7-Eleven has suggested, that the passage of time and the changes to its workforce constitute prejudice sufficient to deny the City's application. Likewise, it is disingenuous to point to 7-Eleven's lack of records or surveillance footage as a basis for denying this application. As was the case with Henderson, the lack of records presupposes that records had existed or would have existed but for the delay of the City in bringing this application. There is simply no evidence in this regard.
- [83] 7-Eleven's representative deposes that the company's process for incident tracking and investigation includes logging any reported incidents. There is no evidence that the incident to which this litigation relates was ever logged. Assuming that to be the case, it can be extrapolated that the incident involving the Plaintiff was never reported and accordingly 7-Eleven would never have had a record.
- [84] Insofar as surveillance is concerned, the same representative deposes that footage is retained for a minimum of 90 days unless an incident is reported. Since there is no evidence of the subject incident having been reported, it follows that any surveillance footage would not have survived for longer than 90 days and would have been unavailable to 7-Eleven after January 2019. In other words, if surveillance footage related to the incident had existed, it would not have existed in March 2019, the date on which the City was first made aware of an incident. The prejudice associated with not having footage is not attributable to the City in any way.
- [85] As is the case with Henderson, the fact that there is no looming trial date means that if 7-Eleven is joined as a third party, it will have an opportunity to take whatever steps it deems necessary to prepare and will be able to do so without the constraints created by timeframes to which it did not agree prior to its involvement as a party.
- [86] In the circumstances, I grant the City's application and grant leave to file a third party notice as against 7-Eleven in the form attached to the City's notice of application as Schedule A. However, I do so without making a final determination as to the merits of any limitation defence that 7-Eleven may be inclined to raise at trial. While I have misgivings as to such a defence, I recognize those misgivings may be addressed with the benefit of a more comprehensive body of evidence, and accordingly should be addressed by the presider at trial.

Plaintiff's Application

[87] While the Plaintiff's application is similar to that brought by the City in the sense that it too seeks a right to pursue claims against 7-Eleven and Henderson, the basis for the Plaintiff's application is distinct.

[88] The Plaintiff's application is brought in accordance with Rule 6-2(7) which provides:

(7) At any stage of a proceeding, the court, on application by any person, may, . . . ,

(a) order that a person cease to be party if that person is not, or has ceased to be, a proper or necessary party,

(b) order that a person be added or substituted as a party if

(i) that person ought to have been joined as a party, or

(ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and

(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.

[89] The foregoing rule is clearly discretionary and in the exercise of that discretion the court is to employ a two-part test. As stated by this court in *Bader v. British Columbia (Minister of Public Safety)*, 2015 BCSC 715, at para. 19:

The court must be satisfied: (1) that there is a question or issue between the parties relating to the relief, remedy, or subject matter of the suit; and (2) it is just and convenient to determine the issue in the proceedings in question. The first branch of the test requires that the judge must be satisfied that a real and not frivolous issue exists between the plaintiff and the person sought to be added.

[90] This is not a high threshold. The court need only concern itself with the proposed pleadings and does not require evidence as to the merits of the proposed claim.

[91] If the court is satisfied the first branch of the test is met, the second branch requires the court to consider whether the requirements of justice and convenience are satisfied. In doing so, the court in *Bader* sets out some of the factors for consideration at para. 25, specifically:

(a) the stage of the proceedings at which the application is made;

- (b) the length of a delay in bringing the application;
- (c) the reason for the delay;
- (d) whether a limitation period has expired;
- (e) whether there is prejudice caused by the delay;
- (f) the extent of any connection between the existing claims and the proposed new causes of action and whether it is suitable that the issues be tried together; and
- (g) whether the proposed new claims will not only increase the number of parties but also the issues and overall scope of the litigation, with resulting costs and delay.

[92] These factors, while helpful and instructive, do not and are not intended to compromise an exhaustive list. It would be an error for the court to engage in a kind of checklist: *Madadi v. British Columbia*, 2020 BCSC 765 [sic, 765], affirmed at 2021 BCCA 10.

Position of the Parties

[93] The Plaintiff's position is straightforward. She submits that a cursory review of the proposed pleadings makes clear that the first branch of the test is satisfied. In this regard the proposed claim of the Plaintiff as against both Henderson and 7-Eleven pleads:

1. that Henderson was the owner of the premises at all material times;
2. that 7-Eleven was the operator of a business at the premises; and
3. that the Plaintiff was injured when she tripped and fell while walking on the sidewalk of the premises as a result of a height differential.

[94] In the pleadings, "the premises" are defined as real property legally described as PID: 016560264, Lot 193 Except part in Plan LMP 44501 False Creek, New Westminster, District Plan 23011. Meanwhile "the sidewalk" is defined as the sidewalk at or near the block of 556 Abbott Street in Vancouver.

[95] It is alleged inter alia that each of Henderson and 7-Eleven were occupiers of the premises for the purposes of the Occupiers' Liability Act, RSBC 1996, c 337, and that they failed in their duty to ensure or to take positive steps to ensure that the Plaintiff would be reasonably safe in using those premises.

[96] I accept and accede to the Plaintiff's position in this regard. While Henderson, and to a more significant extent 7-Eleven, argued that the pleadings did not give rise to a triable issue, I am satisfied that the Plaintiff has met the low threshold and has proposed pleadings which, if true, would constitute the basis for a claim against both parties. This is not to say the claim would necessarily succeed. However, it is not necessary that I be satisfied as to the merits of the claim or likelihood of success. I need only be satisfied the pleadings give rise to a triable issue related to the relief, remedy or subject matter of the suit. In my view, the Plaintiff has unquestionably met that threshold. To the extent that there are meaningful and substantive

issues of contention between the parties, they arise under the second branch of the test.

Stage of Proceedings

[97] The Plaintiff concedes that several steps have been taken in this litigation including the exchange of documents and examinations for discovery. However, she points out there is no imminent trial date such that even though Henderson and 7-Eleven have been uninvolved until now they will have an opportunity to effectively catch up and do what is necessary to prepare for trial and avail themselves of any pretrial processes. This position has merit, and indeed it is not strenuously disputed by either Henderson or 7-Eleven.

Delay in Bringing this Application

[98] In this regard the Plaintiff argues that in assessing delay the court needs to consider the delay arising one year after the expiration of the applicable limitation period. She says that in this case the limitation period for any claim against Henderson and 7-Eleven would not have expired until October 26, 2021. This is because of the operation of the temporary suspension of limitation periods during the COVID-19 pandemic which operated to ensure that the Plaintiff had three, instead of the usual two, years in which to commence proceedings.

[99] The Plaintiff also notes that after initiating litigation she would have had up to 12 months in which to effect service. Accordingly, she submits that in assessing delay, the relevant period is from October 26, 2022 to August 14, 2024, a period of approximately 22 months. The Plaintiff concedes that the delay of 22 months has been, in her own words, considerable.

Reasons for Delay

[100] The Plaintiff purports to explain her failure to seek to add Henderson and 7-Eleven as defendants sooner to the disclosure of the survey results obtained by the City.

[101] Henderson points out that notwithstanding the survey, the location of the incident was known to the Plaintiff at all times. Even if she was unable to convey the precise location to her lawyers, by March 14, 2019, a person from the office of her lawyers attended at 556 Abbott Street and took photographs of the incident site. In other words, within six months of the incident, if there had been any doubt as to where the incident occurred, that doubt was resolved.

[102] Moreover, if the Plaintiff was unsure as to whether the uplifted portion of the sidewalk occurred on or approximate to private property, she had the ability to carry out a survey. Here, there is no evidence of any steps being taken by the plaintiff to identify potential tortfeasors.

Has the Limitation Period Expired?

- [103] This factor is the most significant on the present application. Unsurprisingly, it is also the most contentious.
- [104] The Plaintiff relies on *Roberts v. E. Sands & Associates Ltd.*, 2014 BCCA 122 for the proposition that a limitation period does not begin to run until the facts on which a cause of action is based are known to the claimant. In this context the Plaintiff argues that it was not until she was served with the City's application on August 1, 2024, that she was aware or had reason to believe that the uplifted portion of the sidewalk to which she attributes the incident was or may have been located on private property. She says this revelation imbued her with knowledge of facts to support naming Henderson and 7-Eleven as defendants and accordingly constituted the date on which the limitation period started to run.
- [105] Both Henderson and 7-Eleven dispute this. They point out that the proposition relied upon by the Plaintiff is incomplete and inaccurate. It is not the date on which a cause of action is based are known to the claimant that matters, rather it is the date on which those facts are knowable.
- [106] Both Henderson and 7-Eleven submit that a litigant has a positive obligation to be diligent in discovering the facts in which a cause of action may be based. A litigant cannot rely on its failure in this regard to avoid the operation of the Limitation Act. Wilful blindness cannot stand as an answer to a limitation defence.
- [107] They further point out that the Plaintiff was uniquely positioned to know where the incident allegedly occurred, and even if she was unable to convey that knowledge to her solicitors immediately, the colour photographs taken or commissioned by her solicitors make clear that the location of the incident was known at least as early as March 2019. The fact that the notice of civil claim as initially filed in October 2020, references "West Pender Street" is entirely unexplained.
- [108] Both Henderson and 7-Eleven argue that the time limited for the initiation of any action by the Plaintiff would have expired on October 26, 2021. They argue that the lapse of the limitation period is a significant factor which militates against granting the orders sought by the Plaintiff.

Prejudice

- [109] The Plaintiff submits that any prejudice faced by Henderson and 7-Eleven is largely eliminated by the adjournment of trial. She further submits that a consideration of prejudice must account for the prejudice she will sustain if the application is not granted. Specifically, she will be denied the right to pursue recourse and redress against two parties who, in the Plaintiff's submission, are central to her claim.

- [110] In support of her position, the Plaintiff cites and relies upon the decision in *Amezcuca v. Taylor*, 2010 BCCA 128. That case concerned an application to add defendants to an existing action. The applicable limitation period expired in October 2001. The plaintiff did not bring an application until February 2008, more than six years later. The court noted at para. 11:
- [11] In normal circumstances, that delay would be considered inordinate and, without explanation, inexcusable. . . .
- [111] However, the court was satisfied that the plaintiff in that case had a valid excuse. In particular, the court recognized that the plaintiff's chosen course of action was motivated by a desire to save litigation costs and to obtain evidence that would improve settlement prospects. This motivation was at least implicitly encouraged by the existing defendants who had, at various intervals, expressed an ongoing willingness and desire to settle the case whether or not the proper parties were added. The existing defendants had represented to the plaintiff the deficient pleadings were not a bar to settlement. The court noted at para. 44:
- [44] . . . It can be inferred from that position that the Department of Justice was prepared to allow the plaintiff to settle her claim without the need to bring her application to add the Minister as a defendant.
- [112] It was in that context the court in *Amezcuca* balanced the respective prejudice to the parties and held at para. 55:
- [55] . . . The presumed prejudice to the plaintiff after the expiry of a limitation period was the inability to pursue the claim in a separate action. The prejudice to the [proposed defendant] was the loss of "a windfall opportunity to avoid entirely any potential liability" for a claim that the law considers actionable. . . .
- [113] With respect to prejudice, both Henderson and 7-Eleven raise the same arguments concerning prejudice as were raised in respect of the City's application. I have already addressed those arguments and will not do so again.

Connection Between the Existing Claim and the Proposed Claims

- [114] Little needs to be said about the connection between the existing claims and those that would result in the addition of Henderson and 7-Eleven as defendants. The connection is undeniable and significant.

Discussion

- [115] In my view, there are three important factors which arise in respect of the Plaintiff's application which were not present in the City's application, and my analysis will focus on each of them.

- [116] First, the Plaintiff's application concerns a significant period of delay. Whereas I found that the City could not have brought a claim for contribution and indemnity against Henderson until being served with the amended notice of civil claim in 2023, here it was open to the Plaintiff to add Henderson as a defendant at any time. Counsel for the Plaintiff had known of the incident location since at least March 2019, and took no steps to address what appears to have been an oversight for more than five years. This is an inordinate delay when assessed on any measure. It is a delay attributable entirely and exclusively to the Plaintiff and her legal advisors in the sense that no other party had lulled the Plaintiff to inactivity.
- [117] In reaching this conclusion, I accept that an assessment of delay should focus only on the time lapsed between the expiration of the limitation period and the time limited for serving a notice of civil claim. In this case, that period is 22 months. In the circumstances in which that delay has arisen, I am satisfied that it is and was inordinate.
- [118] Second, the delay is not explained. This is not to say that the Plaintiff did not purport to offer an explanation. She did. Her explanation is however, wholly unsatisfactory. Contrary to her assertion, she did not need to await the results of the survey commissioned by the City to identify Henderson and 7-Eleven as potential defendants. She has known from the outset where the incident occurred and ought to have at least contemplated the basis for a claim against one or both of them.
- [119] Armed with the knowledge of the precise portion of the sidewalk to which she attributes the incident, it was open to her to make inquiries and ascertain where the public portion of the sidewalk ends and private property begins. The Plaintiff did nothing in this regard.
- [120] I can draw only one of two conclusions, neither of which offers a satisfactory explanation. Either the Plaintiff intentionally chose to forego claims against 7-Eleven and Henderson, or her failure to do so owes to a baffling, unexplained oversight. As I have stated, neither conclusion supports the Plaintiff's position on this application. This fact distinguishes the present application from the matters considered by the court in *Amezcu*. There, the court was satisfied the Plaintiff had a valid basis for the delay. Similar justification has not been proffered on this application.
- [121] Third, whereas I have found that the limitation period in respect of the City's claim for contribution against Henderson has not expired, and expressed misgivings as to whether the limitation period has expired insofar as 7-Eleven is concerned, here there is absolutely no doubt that any claim by the Plaintiff against Henderson or 7-Eleven is statute barred. This is not a situation limitation period expired recently.
- [122] In the case of both Henderson and 7-Eleven, the limitation period expired more than three years ago, in October 2021. The Plaintiff's contentions regarding discoverability are unmerited in this regard. The material facts on which the proposed claims against Henderson and 7-Eleven were, if not known to the Plaintiff and her lawyers by October 26, 2018, certainly knowable.

- [123] This feature materially distinguishes the Plaintiff's application from that of the City. I found the City could initiate separate actions as against Henderson and - subject to a final determination as to the limitation defence - 7-Eleven, as of right. Doing so would result in a multiplicity of proceedings and would be contrary to the interests of justice. That same consideration does not arise in respect to the Plaintiff's application.
- [124] Absent an order adding Henderson and 7-Eleven as defendants, any claim against them by the Plaintiff would be statute barred by operation of the Limitation Act. In saying that, and so there is no uncertainty, I am rejecting the Plaintiff's argument regarding discoverability. I find the limitation period applicable to any claim of the Plaintiff commenced to run when the incident occurred in October 2018. However, even if I am wrong in that regard, there can be no doubt the limitation period commenced to run in March 2019, when counsel for the Plaintiff arranged to photograph the incident location. Irrespective of which date is used, the limitation period has long since expired.
- [125] In the circumstances, the Plaintiff's application reflects an inordinate, unexplained delay. She could have joined Henderson and 7-Eleven as of right several years ago. Instead, this application arises more than five years after her lawyers attended at and photographed the incident site. No plausible explanation has been offered in respect of the delay which has resulted in the expiration of the applicable limitation period.
- [126] To allow the Plaintiff's application would be to countenance dilatoriness and to effectively render the Limitation Act meaningless in circumstances where a party or the party's counsel choose inaction over diligence. Just as actions have consequences, so too does inaction. An order allowing the Plaintiff to avoid those consequences would not further the interests of justice. I find it would be neither just nor convenient to grant the Plaintiff's application.
- [127] Accordingly, the application of the Plaintiff is dismissed as against both Henderson and 7-Eleven.

Conclusion

- [128] In conclusion, I order that the application of the City is allowed insofar as it relates to Henderson.
- [129] I find the application of the City is allowed insofar as it relates to 7-Eleven on the condition that the right of 7-Eleven to plead and rely upon a limitation defence is preserved and subject to being determined by the court at the trial of this matter.
- [130] I further order the City is given leave to file and serve the third party notice attached in the form attached as Appendix A to its notice of application.
- [131] The application of the Plaintiff is dismissed.
- [132] As success has been divided, costs shall be in the cause.

"Associate Judge Robinson"

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Prepared on 29 October 2026 · Esheria