ALEXANDER HOLBURN

**ISSUE 1 | JANUARY - MARCH 2025**

E-NEWSLETTER


**SUBSCRIBE TO RECEIVE FUTURE UPDATES HERE.**

## In This Issue:

## 1. *Riches* v. *Welland (City)*, 2025 ONSC 262

The plaintiff, Conor James Riches (the "Plaintiff"), was injured in a slip and fall that occurred February 4, 2022 on Thorold Road in the City of Welland. The Plaintiff alleges that he sustained serious personal injury due to the slip and fall, for which the defendant City of Welland (the "City") is liable.

The Plaintiff was 22 years old at the time of the incident. He had been previously diagnosed with mental health issues and neurodevelopmental disorders and he struggled with addiction. His pre-accident presentation was alleged to impact his overall functioning.

On October 13, 2022, approximately eight months after the slip and fall, the Plaintiff notified the City of the incident. The notice provided advised that the loss occurred on February 9, 2022 at 4:30 pm "on the sidewalk located between Thorold Road and Prince Charles Road". On October 14, the City retained an independent adjuster to investigate the loss. On the same day, the adjuster advised plaintiff counsel that the notice provided to the City was late and did not comply with the requirements of the *Municipal Act, 2001,* S.O. 2001, c. 25. In response, plaintiff counsel advised that the Plaintiff suffered from mental disabilities which caused the notice to be late. The City advised plaintiff counsel on November 24, 2022, that it took the position that the City was prejudiced in its ability to investigate the incident.

Plaintiff counsel proceeded to issue a Simplified Procedure claim on December 16, 2022, which plead that the loss occurred on February 4, and not on February 9, the date included in the initial notice. Examinations were completed in June 2023. A notice of readiness was served by plaintiff counsel following the completion of the examinations, and the action was placed on the September 2024 trial sittings with a pre-trial conference scheduled for May 2024. In the course of the pre-trial conference, defence counsel advised of their intention to pursue a summary judgment motion on the basis that the claim was statute barred because the Plaintiff failed to provide notice to the defendant within ten days of the incident, as required under s. 44(10) of the *Municipal Act, 2001.*

The City filed a motion record which included a neuropsychological expert report that opined that the Plaintiff was intellectually and psychologically capable of reporting the accident within the ten-day notice requirement and that the primary factor for failing to report the incident was not a lack of ability, but a lack of awareness of the deadlines. Plaintiff counsel served a responding record, which included an expert report authored by a registered nurse and capacity assessor, albeit 3 days outside of the Court ordered timeline for delivery of the Plaintiff's responding materials. The responding report opined that the Plaintiff lacked the ability to comply with the legislative notice requirements. Defence counsel, in response, argued that the report could not be relied upon as it was not served within the timelines set out in Rule 53.03 of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194.

The Court was asked to determine, first, whether the Plaintiff was permitted to rely on its expert report despite its delivery not being compliant with the timelines set out in Rule 53.03; and second, whether a determination of a limitation period issue was appropriate for summary judgment.

On the issue of the report, the Court found that the Plaintiff may tender the expert report for the purposes of the motion. While Rule 53.03 deals with expert evidence that a party seeks to call at trial and the requirements for admissibility of same, Rule 39 governs how evidence may be given on motions and applications. While Rule 39 explicitly incorporates the foundational requirements for the substance of an expert's report under r. 53.03(2.1), it does not contain any explicit reference to the provisions dealing with timelines for service of an expert report. There is a clear delineation in the Rules regarding timelines for service of evidence on motions/applications and those that apply to evidence at trial.

On a motion for summary judgment, regardless of trial strategy, a responding party must either refute or counter the moving party's evidence or risk summary judgment. Integrating the timelines from Rule 53.03(1) and (2) into the timelines for filing evidence on a motion could hinder a party's ability to effectively challenge a moving party's evidence and potentially lead to an unavoidable summary judgment.

For the foregoing reasons, the Court found that Rules 53.03(1) and (2) do not apply for the purpose of the motion. In the event that the interpretation of the Rules was incorrect, the Court nonetheless advised that it would permit the Plaintiff to rely on the report further to its judicial discretion.

Turning to the issue of whether the determination of a limitation period is appropriate for summary judgment, the Court noted that a determination of whether a plaintiff's claim is statute barred depends on whether they have a reasonable excuse for failing to comply with the notice requirements of the Act and whether this exception prejudices the defendant. In the case at hand, the Court could not reach a fair and just determination on the question - whether or not it invoked the discretionary fact-finding powers under Rule 20.04(2.1) or (2.2).

The tendered expert evidence was found to not meet the threshold requirements of admissibility. Both parties raised concerns over whether the other party's witness was properly qualified. However, neither made substantive submissions beyond a cursory statement of concern. The Form 53 submitted by the Plaintiff's expert was signed, but incomplete. The defence expert was cross-examined, however there was no substantive examination on his CV to allow for qualification of his expertise by the Court.

Additionally, the case was ill-suited for summary judgment on the basis that the Court was faced with two conflicting expert opinions on a crucial issue, which resulted in there being a genuine issue that required a trial. Two competing expert opinions on a central issue does not lend itself to judgment in the absence of a trial: see Cuming v. Toronto, 2019 ONSC 1720, at paras. 23-24. While there were exceptions to this general proposition (as cited in *Moffitt* v. *TD Canada Trust*, 2021 ONSC 6133, at para. 198) they did not apply in the case at hand.

The City's motion for summary judgment was dismissed, along with the Plaintiff's request for reverse summary judgment on the limitation period question.

## 2. *Hamilton-Dawkins* v. *Ajax (Town)*, 2025 ONSC 1591

The plaintiff, Ms. Hamilton-Dawkins (the "Plaintiff"), appealed the decision of Justice Sutherland dismissing her action for damages arising from her fall on a Town of Ajax (the "Town") sidewalk, which occurred on May 9, 2011.

In the underlying action, the parties had agreed, prior to trial, that (1) the Plaintiff had fallen in front of 38 Clements Road East; (2) that the fall, and her resulting injuries, were caused by a surface discontinuity in the sidewalk; and (3) that the sidewalk surface discontinuity constituted a state of non-repair within the meaning of section 44(1) of the *Municipal Act,* 2001, S.O. 2001, c. 25 (the "Act"). The parties also agreed on damages.

The sole issue at trial was whether any of the defences under s. 44(3) of the Act excused the Town from liability. The trial judge found in favour of the Town on the basis that the Town "did not know and could not reasonably have been expected to have known about the state of repair" of the sidewalk. On the basis that section 44(3)(a) of the Act applied, it dismissed the Plaintiff's action.

The Plaintiff appealed the decision of the trial judge, asserting that they failed to assess the Town's inspections, failed to weigh evidence tendered under the *Evidence Act,* and reversed the onus of proof under the Act.

The appeal (*to the Divisional Court as the damages sought did not exceed $50,000) was dismissed.

**Did the trial judge fail to assess the adequacy of the Town's inspections?**

The Plaintiff argued that the trial judge should have considered the adequacy of the Town's inspections and not the fact of inspection, relying on the decision in *Sauve v. Ottawa Hydro-Electric Commission,* [1993] O.J. No. 688. At trial, the Town relied on a spreadsheet that recorded 20 issues discovered on May 27, 2010 in the area of the loss. The Divisional Court found that in accepting the spreadsheet, the trial judge was satisfied that the inspection was adequate to show compliance with the minimum standard and the s. 44(3)(a) defence. The trial judge did not err in his reliance on the spreadsheet as constituting as adequate inspection.

**Did the trial judge fail to weigh evidence tendered as business records under the Evidence Act?**

The evidence tendered as a business record under the *Evidence Act* was the printout of the May 2010 sidewalk inspections via data entered with a GPS. At trial, the Plaintiff argued that, as the Town's witness did not have personal knowledge of the data and the recording of it, it was not admissible under s. 35 of the *Evidence Act.* On appeal, the Plaintiff did not dispute the admissibility of the record, but argued that the trial judge failed to determine the weight to be given to the document and therefore erred in relying upon the document as evidence that the inspections occurred and were accurately recorded. The Divisional Court found that it was implicit in the trial judge's reasons that he considered the circumstances of the making of the record and the limited direct knowledge of the witness as to the training of the inspectors and the instructions that the inspectors were given. Accordingly, it was satisfied that the trial judge assessed the weight to be given to the document. No error was demonstrated.

**Did the trial judge reverse the onus of proof under the Municipal Act?**

The plaintiff submitted that the trial judge reversed the burden of proof under the *Municipal Act.*

The submission was based on the alleged lack of evidence contesting the findings of the inspection or contesting the Town's position that it did not have notice of a problem with the sidewalk at that location. The Town took the position that the trial judge consistently stated, throughout the reasons, that the onus was on the Town to establish that one or more of the defences under s. 44(3) applied. It further submitted that statements challenged by the Plaintiff in the trial judge's decision simply acknowledged that, on the totality of the evidence, there was no evidence to counter the Town's evidence that the Town "did not know and could not reasonably have been expected to have known about the state of repair". The Divisional Court agreed and found that the trial judge did not reverse the onus.

The appeal was dismissed.

SHARE THIS NEWSLETTER:

## ABOUT THE AUTHOR


### JENNIFER HUNEAULT

PARTNER

EMAIL jhuneault@ahbl.ca
TEL 416 639 9054
Toronto
V-Card


Jennifer is the Practice Lead in Alexander Holburn's Toronto Office, and is a member of the firm's Insurance Group. She defends matters relating to complex personal injury, occupier's liability, CGL claims, municipal liability, professional negligence, D&O claims, product liability and recall, property claims, and subrogated claims. Jennifer also handles coverage disputes and fraudulent claims. She works for insurers, and private clients alike. Jennifer is committed to working with her clients in a collaborative approach to develop a litigation strategy that is mindful of their goals, and needs, as an organization. She is client focused and customer service driven, and is dedicated to understanding her clients' business objectives, in an aim to not only deliver high quality work, but also an exceptional client experience. Jennifer has completed a certificate in Risk Management and holds a Canadian Risk Management Designation. As a value-added service to her clients, she can provide advice on risk mitigation and financing, and strategies to reduce claims.

## ABOUT ALEXANDER HOLBURN BEAUDIN + LANG LLP

Alexander Holburn is a leading full-service, Canadian law firm with offices in Vancouver, Kelowna and Toronto, Canada. We have operated in British Columbia for 50 years and opened our Ontario office in 2019, followed by our Kelowna office in 2023. With over 100 lawyers, we provide a full spectrum of litigation, insurance, business, and personal law services for clients based in Canada, the United States, and Europe.

At Alexander Holburn, high-quality work is our baseline. We are dedicated to providing pre- eminent legal services to clients by forming strategic, service-oriented business partnerships. We are also equally committed to delivering exceptional customer service to our clients, which begins with taking the time to get to know our clients' needs, and the environments they work and operate in. We not only want to be your advocate, but we also want to be your trusted advisor.

Alexander Holburn lawyers are repeatedly recognized in *Best Lawyers in Canada*, the *Canadian Legal Lexpert Directory*, *Benchmark Litigation*, and *Who's Who Legal*. In addition to providing outstanding legal services, we aim to be thought leaders who can add insight beyond the individual mandates we receive.