

Positive Proof Not Necessary For Summary Judgment

September 23, 2016

The Court granted summary judgment for the defendant in *Choma v City of Toronto*, 2016 ONSC 5510.

On September 1, 2016, the Court granted summary judgment for the defendant in *Choma v City of Toronto*, 2016 ONSC 5510.

This case arose from a trip-and-fall incident that occurred on the evening of March 12, 2010, on a grass island adjacent to a parking lot. The parking lot had been constructed in 2004 by a contractor hired by the defendant, the City of Toronto (the "City"), and was leased to a private entity by the City pursuant to a "carefree net lease" since December 2004.

It was alleged that the plaintiff was crossing the grass island when she tripped over a bolt protruding from the ground. The bolt was one of four embedded in the base of a light standard. The light standard itself was gone, but its base had been left in place. The City moved for summary judgment on the basis that it did not create the alleged hazard.

The City bore the burden of showing the Court that a trial was not necessary to prove, on a balance of probabilities, that it did not create the hazard. This was especially difficult because the City had no positive evidence to indicate which party had created the hazard and was essentially tasked with proving a negative. Based on the evidence, the Court made the following findings:

- If the City had removed or approved the removal of the light standard, it would have generated a record of that removal;
- The City conducted a diligent search of every department that might reasonably have records of the light standard's removal, and found none; and
- The evidentiary record would not improve with a trial.

Ultimately, the Court found that a trial was not required to find that the City had not removed or approved the removal of the light standard.

This decision suggests that, given a proper evidentiary record, a Court may draw reasonable inferences and grant summary judgment in favour of a defendant who is seeking only to prove a negative, so long as the defendant can show that it exercised due diligence in searching its records and that a trial would not change anything in that regard.

By

[Robin Squires](#)

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3
T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9
T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2
T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4
T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3
T 416.367.6000
F 416.367.6749

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