

NOVA SCOTIA COURT OF APPEAL

Citation: *Banfield v. Nova Scotia (Utility and Review Board)*, 2020 NSCA 6

Date: 20200128

Docket: CA 486010

Registry: Halifax

Between:

David Banfield

Appellant

v.

Nova Scotia Utility and Review Board, Attorney General of Nova Scotia and
Halifax Regional Water Commission

Respondents

Judge: The Honourable Justice Joel Fichaud

Appeal Heard: November 19, 2019, in Halifax, Nova Scotia

Subject: Stormwater charges – privacy – *Municipal Government Act*, S.N.S. 1998, c. 18 – *Charter of Rights and Freedoms*, ss. 7 and 8

Summary: The Halifax Regional Water Commission (“Halifax Water”) captures and redirects stormwater through ditches and culverts. It finances the service by user charges that have been approved by the Utility and Review Board (“Board”) under the *Public Utilities Act*. Halifax Water billed David Banfield for stormwater service.

Further to the Regulations that govern Halifax Water, Mr. Banfield: (1) appealed the stormwater charge to a Dispute Resolution Officer, who dismissed his appeal; and (2) appealed further to the Board, which also dismissed his appeal. The Officer and Board both found, based on evidence, that Mr. Banfield’s property drained stormwater to Halifax Water’s catchment system. The Board found that Halifax Water had not infringed the Regulations that govern the stormwater service. The charge was calculated according

to the formula approved by earlier Board Decisions.

Mr. Banfield appealed the Board's decision to the Court of Appeal.

Issues:

In the Court of Appeal, Mr. Banfield did not challenge the finding that his property drains into Halifax Water's stormwater system, or the ruling that Halifax Water had not offended the Regulations, or the Board's earlier rulings that prescribed the formula to calculate the stormwater charge.

Rather, Mr. Banfield submitted that the provision of his name and address by Halifax Regional Municipality to Halifax Water, so Halifax Water could send him a bill, offended his privacy rights under (1) provincial legislation and (2) ss. 7 and 8 of the *Charter of Rights and Freedoms*.

Result:

The Court of Appeal dismissed the appeal.

Mr. Banfield's statutory right to privacy was governed by s. 485 of the *Municipal Government Act*. Section 485 permitted the Municipality's provision of Mr. Banfield's name and address to Halifax Water, and Halifax Water's use of that information.

Mr. Banfield had not suffered a deprivation of liberty or security of the person under s. 7 of the *Charter of Rights*.

Mr. Banfield had no reasonable expectation of privacy to his name and address under s. 8 of the *Charter of Rights*.

<p><i>This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 23 pages.</i></p>
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v.

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and Halifax Regional Water Commission

Respondents

Judges: Bryson, Oland and Fichaud JJ.A.

Appeal Heard: November 19, 2019, in Halifax, Nova Scotia

Held: Appeal dismissed without costs, per reasons for judgment of
Fichaud J.A, Oland and Bryson JJ.A. concurring

Counsel: The Appellant on his own behalf
John C. MacPherson, Q.C. for the Respondent Halifax
Regional Water Commission
Jeff Waugh for the Respondent Attorney General of Nova
Scotia
The Respondent Nova Scotia Utility and Review Board not
participating

Reasons for judgment:

[1] The Halifax Regional Water Commission (“Halifax Water”) captures and redirects stormwater through its culverts and ditches. The stormwater service is mandated by statute but not funded by any level of government. Halifax Water finances the service by billing residents whose properties drain into the system. Halifax Water is a public utility subject to regulation by the Utility and Review Board (“Board”) under the *Public Utilities Act*. Through a series of rulings from 2006 to 2016, the Board approved Halifax Water’s user-pay billing method for the stormwater service.

[2] The Regulations that govern Halifax Water provide a process for dispute resolution by a Dispute Resolution Officer whose decision is appealable to the Board. The Board’s decision is appealable to this Court on issues of law or jurisdiction.

[3] Halifax Water determined that Mr. David Banfield’s property in Upper Tantallon drains stormwater into Halifax Water’s system. It billed Mr. Banfield for the stormwater service according to the billing method approved by the Board. Mr. Banfield appealed to the Dispute Resolution Officer who dismissed his appeal. He appealed further to the Board which also dismissed his appeal. The Officer and the Board, citing evidence from a contour map, each found that Mr. Banfield’s property drains stormwater into Halifax Water’s system. The Board also held that Halifax Water had not offended the Board’s Regulations governing the stormwater charge.

[4] Mr. Banfield appeals to this Court. His grounds do not challenge the finding that his property drains into Halifax Water’s stormwater system and the ruling that Halifax Water had not violated the Regulations. Nor does he seek to appeal the Board’s earlier rulings that approved Halifax Water’s user pay methodology to calculate stormwater billings.

[5] Rather, Mr. Banfield focuses on the fact that the Halifax Regional Municipality provided Halifax Water with Mr. Banfield’s name and address so Halifax Water could send him a bill for the stormwater charge. He submits this violated his privacy rights under provincial legislation and the *Canadian Charter of Rights and Freedoms*.

Halifax Water's Charges for Stormwater Service

[6] Halifax Water was incorporated by the *Halifax Regional Water Commission Act*, S.N.S. 1963, c. 55 (“1963 HRWC Act”). That statute was replaced by the *Halifax Regional Water Commission Act*, S.N.S. 2007, c. 55, as amended by S.N.S. 2012, c. 60 and S.N.S. 2016, c. 23 (“*Halifax Water Act*”).

[7] Further to the *Halifax Water Act*, Halifax Water supplies water for consumption and fire protection and provides wastewater and stormwater services to customers in Halifax Regional Municipality (“Municipality”). Halifax Water is a not-for-profit public utility regulated by the Utility and Review Board under the *Public Utilities Act*, R.S.N.S. 1989, c. 380, as amended. Halifax Water is directed by Commissioners consisting of seven residents of the Municipality. Of these, four may be members of the Municipality’s elected Regional Council and one is a non-voting municipal employee who is appointed by the Municipality’s Chief Administrative Officer. [*Halifax Water Act*, ss. 2(1)(a), (b), (c), (e) and (h), 3, 4, 5, 19, 20]

[8] Halifax Water’s stormwater charge has a winding lineage. A chronology will assist an appreciation of the appealed issues.

[9] **Before 2006 – unregulated municipal charges:** In 1973, Halifax Water, on behalf of the former City of Halifax, began to bill its water customers for what later became wastewater and stormwater charges.

[10] That revenue contributed to the City of Halifax’s cost of constructing, maintaining and operating pollution control facilities, including the Halifax Harbour Interceptor and the future sewage treatment plant. Beginning July 1, 1994, the billings included a wastewater management charge and were re-designated from pollution control to environmental protection for the collection and treatment of sewage.

[11] In 1989 and 1994 respectively, the former City of Dartmouth and County of Halifax included environmental service or pollution control charges in their water utility bills.

[12] In the late 1990s, further to a regional amalgamation, the Cities of Halifax and Dartmouth, the County of Halifax and Town of Bedford became the Halifax Regional Municipality: *Municipal Government Act*, S.N.S. 1998, c. 18, later

supplemented by the *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39 (“*HRM Charter*”).

[13] Following the regional amalgamation, Halifax Water continued to bill water customers for the environmental protection and wastewater management charges levied by the Municipality. The charges accompanied billings for water usage and were not causally connected to usage of stormwater services.

[14] Before 2006, any wastewater and stormwater charges levied by the Municipality and collected by Halifax Water were not subject to the jurisdiction of the Board.

[15] **2006 – Board assumes jurisdiction:** In 2006, at the request of the Municipality and Halifax Water, the Legislature amended the *1963 HRWC Act* to say, in s. 28, that “[a]ny sewer system, either storm or sanitary ... owned, operated, managed or controlled by [Halifax Water] is deemed to be a public utility within the meaning of the *Public Utilities Act*”.

[16] The current *Halifax Water Act* repeats this provision:

Public Utility

19 The *Public Utilities Act* applies to the Commission and any water, wastewater or stormwater facility or system owned, operated, managed or controlled by the Commission for service to the public is deemed to be a public utility within the meaning of that Act.

[17] Since 2006, Halifax Water’s stormwater system and charges have been subject to the Board’s regulation under the *Public Utilities Act*.

[18] **2007 – Halifax Regional Municipality/Halifax Water Transfer Agreement:** On June 12, 2007, the Municipality and Halifax Water executed an Agreement that transferred to Halifax Water the Municipality’s interest in municipal waste-water and storm-water facilities (“Transfer Agreement”). The Transfer Agreement included:

4. This Agreement shall be interpreted and implemented in accordance with its purposes, which are:

(a) **to transfer municipal waste-water facilities and municipal storm-water facilities and their operation and administration to HRWC from HRM, to better serve the public interest;**

(b) to have such facilities operated as a public utility integrated with HRWC's existing water utility facilities to the extent deemed appropriate by the Utility and Review Board;

(c) to evolve the operation and administration of municipal waste-water services and municipal storm-water services towards a system whereby the general taxpayer of HRM does not subsidize the utility rate payer of HRWC and the utility rate payer of HRWC does not subsidize the general taxpayer of HRM; and

(d) to have HRM pay a fee for service on a full cost recovery basis for waste-water services and storm-water services made necessary by the operation of other municipal services, including, but not restricted to, solid waste management services, and parks and recreation services.

[bolding added]

[19] The "transfer of ... facilities and their operation and administration" in article 4(a) included names and addresses of Halifax Water's customers.

[20] **2007 – Board approves the Transfer:** On June 28, 2007, Halifax Water applied to the Board for approval of the transfer outlined in the Transfer Agreement. On July 26, 2007, the 2007 Board issued a letter Decision that approved the transfer and authorized interim rates and charges (Decision quoted in 2008 NSUARB 8, paras. 7-8). The Decision cited s. 28 of the former *1963 HRWC Act* as authority for the Board's regulation of Halifax Water's wastewater and stormwater services.

[21] To implement the Transfer Agreement, the Municipality provided to Halifax Water information required for the operation and administration of the system. The information included the names and addresses of customers. The provision of Mr. Banfield's information is the crux of his appeal.

[22] After the approval of the Transfer Agreement, came the Board's consideration of Halifax Water's wastewater and stormwater charges.

[23] **2008 and 2010 – Board gives directions on the stormwater charge:** In 2008, the Board approved Rules and Regulations and Rates and Charges for wastewater and stormwater services to be provided by Halifax Water: 2008 NSUARB 8. Initially, these were the rates already in place from the Municipality's bylaws. This was an interim measure, and the Board noted there was work to be done. Given the newly legislated status of wastewater and stormwater services as a public utility, the Decision gave directions for the process to be followed for the

Board's review and approval of Halifax Water's rates and charges for those services. The Decision directed Halifax Water to file a Cost of Service Study for its wastewater and stormwater operations. That was because, under the cost causality principle of utility regulation, the charge should connect to usage. Otherwise, one customer would subsidize another's usage. In this respect, the Decision said:

[47] In addition, **the cost causality of the stormwater services needs to be determined.** As HRWC stated in its Business Plan:

It is recognized that there are disconnects between the cost causer/beneficiary and charges levied under the current rate structure. **One of the key disconnects relates to the fact that current charges for stormwater services are based on water consumption. It is recognized there is no connection between water consumption and inflows to the storm sewer system.** In addition, there are some beneficiaries of the stormwater system who do not contribute financially to its upkeep. These involuntary beneficiaries [they get the service even if they don't want it], are being subsidized by customers who are billed for wastewater service.

...

[bolding added]

[24] Two years later, the Board elaborated on the appropriate structure for Halifax Water's wastewater/stormwater charge and directed Halifax Water to file further information: 2010 NSUARB 244. The Decision noted that cost causality for a stormwater charge would depend on impervious area:

[9] With the transfer of the wastewater and stormwater operations from the Halifax Regional Municipality ("HRM") in 2007, HRWC became the first regulated water, wastewater and stormwater utility in Canada. The current rate structure for water is based on a traditional utility model. In the case of wastewater and stormwater, HRM did not operate in a regulated environment and, therefore, **the rate structure needs to be revised.**

...

[136] **Currently there are no separate stormwater charges, as they are included within the existing wastewater volumetric charge. A stormwater charge, based upon impervious area, was approved by the Board in its decision on the Airport/Aerotech system [2008 NSUARB 149]. The COSS [Cost of Service Study] recommended that the stormwater charge be developed based upon the average impervious area of three water meter size groupings (5/8", 3/4" to 1 1/2" and 2" and larger). These are interim rates until the data base is developed to measure actual impervious areas on lots served by meters larger than 5/8", upon which to base rates. In cases where customers only receive stormwater service, HRWC indicated that they will have to be identified and**

a method established to collect stormwater charges. HRWC anticipated that it will be 2012 before changes are implemented so as to bill such customers for stormwater service.

[bolding added]

[25] **2013 – Board approves separate stormwater charge based on impervious area:** Next, the Board considered Halifax Water’s first proposed separate stormwater charge: 2013 NSUARB 127. The Decision noted:

[16] Currently the stormwater and wastewater charge is combined for rate-making purposes. The applied separate charge for stormwater service is new and is proposed to be a flat quarterly charge for residential customers of \$13.30 in 2013/14 and \$14.67 in 2014/15. The rate proposed for other customers is a two part charge based upon square meters of street right of way and site generated flow.

[17] The effect on the overall rates for individual customers is dependent upon customer class, and the services provided (*i.e.* any combination of water, wastewater and stormwater).

[26] Further to the earlier direction from the Board, Halifax Water had filed a Cost of Service (“COS”) Manual. The COS Manual proposed that the separate stormwater charge be calculated based on impervious area, rather than volumetric consumption of water. The Board’s 2013 Decision elaborated:

[36] One of the major differences from current practice proposed in the COS Manual is the introduction of a separate stormwater charge. The ownership of municipal stormwater systems located within the Stormwater Boundary, as defined in the 2007 Transfer Agreement, was transferred from HRM to HRWC. However, within this boundary, there are some stormwater systems which are owned by the Province, HRM or by private property owners, and are not part of the Transfer Agreement. **Currently the costs to operate the stormwater system are recovered through a combined wastewater/stormwater rate, which includes a volumetric charge based upon water consumption. The COS Manual notes that the current methodology does not provide a direct relationship between the amount of stormwater entering the system and the recovery of operating costs for the system.**

[37] **The COS Manual proposes a new charge for stormwater, based upon the impervious area of a property.** It is noted that the impervious surface reduces the natural infiltration of water and therefore is used as a billing determinant for the amount of stormwater which enters the system. ... The measured impervious area is based upon satellite imagery. The COS Manual notes there are a large number of residential properties, with relatively small variations in impervious area. As such a system wide average residential impervious area

will apply to these properties, while all other properties will be charged based upon actual impervious area. **There are currently approximately 20,000 properties within the stormwater boundary which do not receive water or wastewater service from HRWC, who are now proposed to be charged a stormwater rate.**

[bolding added]

[27] Mr. Banfield’s property has received only stormwater service from Halifax Water, and is within the group of 20,000 noted in the final sentence of this passage.

[28] The Board’s 2013 Decision accepted the “impervious area” approach to the calculation of stormwater charges:

[47] ... Therefore, **the Board accepts the use of impervious area** as the billing determinant. HRWC provided the revised calculation of stormwater rates based upon revisions to the impervious area, which the Board accepts, with the understanding that as revised data is available, the calculation will be updated. ...

[bolding added]

[29] An intervenor in the 2013 proceeding submitted that the Board had no authority to regulate stormwater. The Board rejected the submission:

[187] Section 19 of the *HRWC Act* states:

Public utility

19 The *Public Utilities Act* applies to the Commission and any water, wastewater or stormwater facility or system owned, operated, managed or controlled by the Commission for service to the public is deemed to be a public utility within the meaning of that *Act*.

[188] The Board agrees with HRWC that its authority extends to any stormwater facility or system owned, operated, managed or controlled by HRWC for service to the public. HRWC either owns or operates a stormwater system in the service territory of HRM and for that purpose, pursuant to the *HRWC Act*, is a public utility subject to the supervision of the Board.

[30] **2014 – Board reiterates validity of the stormwater charge:** In April 2014, the Board received a complaint from several petitioners who challenged the stormwater charge. The Board issued a letter Decision dated June 11, 2014. The Decision upheld the charge, saying:

Up until 2007 Halifax Regional Municipality (“HRM”) constructed and maintained the stormwater infrastructure (including ditches) throughout the

municipality. HRM paid for the necessary expenditures to construct and maintain this infrastructure. Subsequently, HRM Council decided to transfer the responsibility for a substantial portion, but not all, of the stormwater infrastructure to HRWC. This transfer, which took effect on August 1, 2007, included the responsibility to construct and maintain the stormwater infrastructure with an appropriate level of expenditures, but did not provide any revenues.

HRWC is a regulated utility and is entitled to charge rates, subject to the approval of the Nova Scotia Utility and Review Board (“Board”), for services delivered. The rates are based on the cost for the delivery of a service, and the revenues derived from the delivery of one service are not to be used to subsidize the costs of delivering another service. At present, HRWC provides water, wastewater and stormwater services.

For various reasons, up until 2013, HRWC had combined the cost of service for wastewater and stormwater into one rate. Consequently, customers who were receiving wastewater service from HRWC were paying for the stormwater service received by all within the service boundary. **In effect property owners who were in fact receiving stormwater service but were not receiving wastewater service, were getting the stormwater service for free. This was corrected by the Board’s 2013 decision [2013 NSUARB 127] which approved a separate stormwater service for all those within the service territory.**

[bolding added]

[31] The 2014 Decision recognized the introduction of the stormwater charges might involve some inaccuracies. So the Board freshened the Regulations that govern the process for Halifax Water’s response to a customer’s complaint that a stormwater charge was inaccurate.

[32] **2016 – Board adopts the current rate design of stormwater charges:** Further to an application by Halifax Water, the Board extended the regulated “stormwater” service to encompass properties with ditch and culvert access to Halifax Water’s stormwater service: 2016 NSUARB 73. The Board set out the background to the application:

[11] Under the current definition of stormwater service, if stormwater from a property enters HRWC’s system, the property is billed for the service based on the impervious area of the property. Residential properties have a predetermined assumed impervious area. Commercial properties are billed on their actual impervious area.

[12] HRWC noted the rate is based on the cost causation principle that if stormwater generated from a property utilizes HRWC’s system, then the customer is charged the fee to pay for that service. However, the administration of the rate has been the subject of a great deal of controversy. HRWC noted that one of the

significant challenges with respect to the current rate design is the administrative costs associated with defining which properties received stormwater service and also in investigating and responding to notices of objection and complaints to the Board. The estimated cost to date related to administration of the notice of objection process is \$835,000. HRWC attributed that to the complexity of the definition of service.

[13] The Board notes that it is currently dealing with 10 times more complaints against HRWC than against Nova Scotia Power Inc. (“NSPI”) yet NSPI has many more customers. In response to an Information Request (“IR”) from Multeese Consulting, HRWC identified the top three challenges with respect to administration of the current charge as:

- The volume of notices of objection (appeals) and the administrative burden of dealing with them;
- Dissatisfaction from non-residential customers on the lack of a credit system; and
- Perceived inequities – the use of a residential average making it difficult to explain to customers why a big house does not pay more than a small house or a small property and the lack of a mechanism to address properties that are only partially within the stormwater service boundary.

[14] HRWC sees this Application as an attempt to improve the service definition.

...

[16] ... HRWC proposed that properties within the service boundary, which receive one or more of the following services from HRWC, be considered a customer:

- (a) Stormwater from the property enters into HRWC’s stormwater system;
- (b) Stormwater from upgrade lands is intercepted by and directed around the property by HRWC’s stormwater system; and
- (c) The property is accessed directly by a driveway which crosses over an HRWC culvert.

[17] The Board will review each of the components in turn.

[33] Items (a) and (c) bear on Mr. Banfield’s circumstances.

[34] The Board accepted item (a) as “logical and appropriate” [para. 19].

[35] The Board declined to include item (b) in the definition of stormwater service [paras. 30-34].

[36] The Board accepted item (c) as an appropriate criterion for stormwater service:

[35] HRWC noted that there are two ways this proposed criteria come into play. The first is that the property owner uses the HRWC culvert to access the property if the driveway runs over it. Otherwise, the owner receives the benefit of the stormwater system through the ditches over which the culvert passes. HRWC believes the inclusion of its ownership of a culvert in the definition of service will assist in explaining to property owners how they are receiving service from HRWC. HRWC has the financial responsibility for maintenance and replacement of the culvert. ...

2.2.3.1 Findings

[38] Unlike the intercept criteria **there is clearly a cost causation if HRWC is maintaining the culvert or replacing the culvert if it becomes unusable. This is a service being provided to a property owner.**

...

[41] **The Board approves inclusion of this criteria.**

[bolding added]

[37] To implement the re-designed criteria, the Board adopted a tiered system of rates for stormwater service and concluded:

[79] The Board finds that the tiering by impervious area of residential rates, as subsequently amended by HRWC, is a more equitable way to bill properties (or parcels) within this class of customers.

[38] The tiered system is in place and generated the stormwater charge to Mr. Banfield.

[39] The Board's rulings set out above have not been appealed to this Court.

Mr. Banfield's Appeal

[40] Mr. Banfield owns property in Upper Tantallon and has been billed by Halifax Water for stormwater service. He does not receive water from Halifax Water. Halifax Water's *Stormwater Dispute Regulations*, approved by the Board under the *Public Utilities Act*, permit an appeal of the stormwater charge to a Dispute Resolution Officer. I cite and quote these regulations later (para. 57). On June 11, 2018, Mr. Banfield appealed to the Dispute Resolution Officer.

[41] **Background:** The record has no affidavits, transcript or sworn testimony. The Decision of the Dispute Resolution Officer, dated December 6, 2018, recites factual background that pertains to Mr. Banfield's concerns:

The property owner first complained to HRWC in 2014 regarding the stormwater charge. HRWC investigated and advised the property owner that stormwater from the property drains to the ditch or culver [*sic*] system on Winslow Drive and confirmed that the property is receiving stormwater service. ...

...

[Mr. Banfield] called HRWC He noted that his property is receiving water and no stormwater leaves his property. He would like HRWC staff to visit his property and provide assessment and not use satellite images only to make decisions.

HRWC responded to the property owner with a letter dated June 02, 2017 after investigating the property including a site visit. HRWC prepared a new contour map showing the results of its investigation and provided a copy to the property owner. HRWC confirmed its previous finding that stormwater from the property drains to its ditch and culvert system in Winslow Drive and the property is receiving stormwater service. ...

[42] **Decision of Dispute Resolution Officer:** To the Dispute Resolution Officer, Mr. Banfield submitted that he was not a customer of Halifax Water and did not agree to receive any service from Halifax Water. He cited another property across the highway that was not charged for stormwater service. Mr. Banfield submitted, as paraphrased in the Dispute Resolution Officer's Decision:

If HRWC wishes to collect tax for ditches in the area covered by its water and sewer service, it should be taken from the property taxes so that everyone pays the same for the same service.

[43] The Dispute Resolution Officer dismissed Mr. Banfield's appeal. The Officer's written reasons include:

The property owner's main argument related to this issue is that there are properties which are like his and receive same service in the adjacent areas but do not pay the HRWC stormwater charge. HRWC has agreed with the property owner and advised that the properties noted by the property owner are outside the HRWC drainage boundary and HRWC does not provide service to these properties. The DRO understands that service to these properties is provided by either HRM or the Province and it is their decision how to fund this service.

The DRO understands that in 2007, HRM decided to transfer the responsibility of stormwater service to HRWC in certain parts of the municipality. The result of

this transfer was that stormwater service in HRM will be provided by different levels of government depending upon where the property is located. ...

HRWC is a regulated utility, governed by the Public Utility Act, and is regulated by the Board. The utility need fund [*sic*] to pay for the service it provides. HRM does not pay to HRWC to provide this service. The only other alternative is for users of the service to pay for the services as per the regulated utility principles. HRWC has provided information about the cost of providing service to the Board which has approved the method and charges for the users of the service to pay for the service.

The DRO understands the property owner's point. However, when HRM transferred the service responsibility to HRWC without funding, HRWC had no choice but to charge for the service it provides as per the Board approved regulations. ...

...

FINDINGS:

The property located at 146 Winslow Drive, Upper Tantallon, drains to the HRWC system. The property receives stormwater service from HRWC and the property owner is required to pay the stormwater charge as per the Board approved regulations.

The appeal is disallowed.

[44] **Decision of Board:** The Board-approved Schedule of Rates, Rules and Regulations permits a *de novo* appeal to the Board from a Decision of the Dispute Resolution Officer.

[45] On December 7, 2018, Mr. Banfield appealed to the Board. The Board considered the matter then dismissed the appeal by a letter Decision dated February 13, 2019. The Board's reasons included:

Halifax Water maintains and constructs a stormwater drainage system which consists of ditches, culverts, pipes and other structures. To pay for the costs of these structures, including operating and maintenance costs, the Board approves the rates that Halifax Water must charge every individual property owner that receives stormwater service. The Board ordered that properties with a house, or other impervious areas, receive stormwater services if, at any time, during the year any amount of water from any portion of the property eventually enters any part of the Halifax Water stormwater system, regardless of the distance the stormwater travels between the property and the system. The property may or may not front a stormwater system to receive stormwater service. For example, runoff may flow through other properties, wetlands, lakes, and brooks before

entering the system. Also, ice or large amounts of snow on the ground may infrequently alter stormwater flow patterns into the system.

The Board generally relies upon a contour map in its review of the receipt of stormwater service at a given property. Halifax Water provided a contour map to the Board in its response to Board staff IR [Information Request]-2, dated February 5, 2019.

...

The Board notes that the contour map provided supports the drainage pattern indicated from the Property to Halifax Water's stormwater infrastructure, as described by Halifax Water and as confirmed by the DRO.

CONCLUSION

From the evidence before it, the Board agrees with Halifax Water that the Property is receiving stormwater service from Halifax Water as an amount of stormwater overland flow drains from the Property and reaches Halifax Water's stormwater system. The Board also finds that Halifax Water has not violated any of its approved Rules. The Board, therefore, denies your appeal.

[46] **Mr. Banfield's privacy concerns:** Meanwhile, in January 2019, Mr. Banfield wrote the Municipality to ask what information the Municipality had provided to Halifax Water respecting the stormwater charges.

[47] The Municipality replied with a letter of January 31, 2019 that stated:

This application for access under Part XX of the *Municipal Government Act* (MGA) was received by the Halifax Regional Municipality's (HRM's) Access & Privacy Office on January 14th, 2019.

The request was specifically for the following: "When, what personal information was passed from HRM to the Halifax Regional Water Commission for them to be able to "bill" me for ditch tax."

This letter is to advise that HRM ICT Department has advised that as part of a data sharing agreement with Halifax Water, **HRM shares parcel data with Halifax Water** as received by the Province into our GIS database. The parcel and PID related data we receive from the Province and provide to Halifax Water is the following: ...

[bolding added]

The letter followed with a template that included: the PID (Property Identifier), property civic number, street address, apartment number, name of community, municipality and county, type of lot, area of property, owner's name and address. The Data Sharing Agreement, cited in the Municipality's letter, is dated May 15,

2003 between the Province, the Municipality and the Cape Breton Regional Municipality, and provides for the sharing of information to assist those parties to perform their governmental functions.

[48] Mr. Banfield holds the view that his name and address were not disclosable under privacy legislation and the *Charter of Rights* and, had the Municipality not provided his parcel data to Halifax Water, he could not have been billed for the stormwater charge.

[49] **Appeal to Court of Appeal:** On March 12, 2019, Mr. Banfield appealed the Board's Decision to this Court.

[50] On June 23, 2019, Mr. Banfield served the Attorney General of Nova Scotia with a Notice of Constitutional Issue citing his submissions under ss. 7 and 8 of the *Charter of Rights*.

Issues

[51] A preliminary issue is the Province's contention that this Court should decline to consider Mr. Banfield's submissions.

[52] Mr. Banfield submits, by effectively endorsing the Municipality's transfer of Mr. Banfield's private information to Halifax Water, the Board offended:

- provincial legislation – *i.e.* s. 485 of the *Municipal Government Act* and s. 20 of the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, as amended ("*FOIPOP Act*"); and
- ss. 7 and 8 of the *Canadian Charter of Rights and Freedoms*.

Standard of Review

[53] The *Utility and Review Board Act*, S.N.S. 1992, c. 11 ("*UARB Act*"), s. 26 says the Board's findings of fact are "binding and determinative". Section 30(1) says an appeal lies to the Court of Appeal "upon any question as to its jurisdiction or upon any question of law".

[54] The Supreme Court has ruled that a statutory right of appeal on an issue of "law" connotes the appellate standard of correctness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, paras. 36-52; *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, paras. 4, 34-35.

[55] Mr. Banfield mentioned his privacy concern to the Board. But the Municipality's letter of January 31, 2019, upon which Mr. Banfield relies, was not before the Board (see recitation in Board Decision, pages 1-2). The Board's Decision of February 13, 2019 did not address his privacy submission. The privacy issues are of first instance in this Court.

[56] I will apply correctness.

Should this Court consider the privacy issues?

[57] The Dispute Resolution Officer's authority derives from the *Halifax Regional Water Commission Regulations* made by the Board's Order of April 21, 2015 [Matter # M06540], as supplemented by the Board's Order dated November 29, 2016 adding Part XIII A, ss. 78A-78J ("*Stormwater Dispute Regulations*"). In particular:

- the Dispute Resolution Officer may inquire into a complaint by determining whether the Commission acted "unreasonably", "unjustly", "under mistake of law or fact, in whole or in part" or "wrongly", among other standards [Reg. 78H(1)];
- the Officer may make a recommendation to Halifax Water [Reg. 78H(2)];
- if the parties do not settle and Halifax Water fails to follow the recommendation, the Officer may adjudicate the complaint by issuing a binding order [Reg. 78I];
- the complainant or Halifax Water may appeal to the Board for a *de novo* adjudication [Reg. 78J].

[58] The Province submits, under the *Stormwater Dispute Regulations*, neither the Dispute Resolution Officer nor the Board may determine whether the Municipality's provision of Mr. Banfield's name and address to Halifax Water contravened provincial privacy legislation or the *Charter of Rights*. The Province says Mr. Banfield must file an application in the Supreme Court of Nova Scotia.

[59] It is unnecessary to address the Province's proposition. In this Court, the privacy issues have been fully argued by Mr. Banfield and Halifax Water. As I will discuss, Mr. Banfield's submissions have no merit. To dispatch the parties for a fresh proceeding in the Supreme Court, whose ruling likely would be followed by

another appeal to this Court, would serve nobody's interest. Long and costly litigation would generate the same outcome.

Breach of Provincial privacy legislation?

[60] The *FOIPOP Act* restrains interference with privacy by a “public body”. The definition of “public body” by s. 3(1)(j) includes neither Halifax Water nor the Municipality.

[61] The *HRM Charter*, s. 366, under the title “Freedom of Information and Protection of Privacy”, says “Part XX of the *Municipal Government Act* applies to the Municipality”.

[62] Part XX of the *Municipal Government Act* (ss. 461-502) is titled “Freedom of Information and Protection of Privacy”. Section 485 says:

485 (1) **A municipality may use** personal information only

- (a) for the purpose for which that information was obtained or compiled, or for a use compatible with that purpose;
- (b) if the individual the information is about has identified the information and has consented to the use; or
- (c) **for a purpose for which that information may be disclosed** to the municipality pursuant to this Section.

(2) **A municipality may disclose** personal information only

...

- (d) for the purpose of **complying with an enactment** or with a treaty, arrangement **or agreement made pursuant to an enactment**;

...

- (g) to a municipality to meet the **necessary requirements of municipal operation**;

- (h) for the purpose of

- (i) **collecting a debt** or fine owing by an individual to the municipality,

...

[bolding added]

[63] Section 461(e) of the *Municipal Government Act* defines “municipality” as including a “service commission”. Halifax Water is a service commission of the Municipality.

[64] Under s. 485, the Municipality may disclose, and Halifax Water may use, personal information “for the purpose of complying with an enactment or with a treaty, arrangement or agreement made pursuant to an enactment”, or “to meet the necessary requirements of municipal operation”, or for “collecting a debt” owing to Halifax Water.

[65] Mr. Banfield’s name and address satisfy these criteria.

[66] Section 60(2)(a) of the *Municipal Government Act* and s. 74(2)(a) of the *HRM Charter* each permit a municipality to enter into an agreement with a “service commission” respecting “any service provided by the municipality”. The Transfer Agreement of June 12, 2007 was such an agreement. The Transfer Agreement, article 4, transferred to Halifax Water the Municipality’s “stormwater facilities and their operation and administration”. This included the Municipality’s information needed for billings, such as Mr. Banfield’s name and address. Further to the *Public Utilities Act*, the Board approved the Transfer Agreement on July 26, 2007.

[67] The disclosure by the Municipality and use by Halifax Water of Mr. Banfield’s name and address was:

- “for the purpose of complying with an ... agreement made pursuant to an enactment” [*i.e.* pursuant to ss. 60(2)(a) of the *Municipal Government Act* and 74(2)(a) of the *HRM Charter*], under s. 485(2)(d);
- “for the purpose of complying with an enactment” [*i.e.* the *Public Utilities Act*] as administered by the Board, under s. 485(2)(d);
- “to meet the necessary requirements of municipal operation”, by collecting the revenues needed to operate the stormwater service, under s. 485(2)(g); and
- “for the purpose of collecting a debt” owing by Mr. Banfield to Halifax Water, under s. 485(2)(h)(i).

[68] I respectfully reject Mr. Banfield's submissions that the Municipality's transfer of information to Halifax Water breached privacy rights under provincial legislation.

Breach of Charter?

[69] Mr. Banfield cites ss. 7 and 8 of the *Charter of Rights and Freedoms*.

[70] **Section 7:** To establish a breach of s. 7, Mr. Banfield must show that the transfer of his personal information (1) implicated his "life, liberty, [or] security of the person" (2) in a manner that offended "principles of fundamental justice".

[71] Mr. Banfield cites liberty and security of the person.

[72] "Liberty" under s. 7 includes physical freedom and the freedom to make "fundamental personal choices": *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, paras. 49, 54; *Carter v. Canada*, [2015] 1 S.C.R. 331, paras. 64, 66. Declining payment of a legally authorized user charge for a service that, in fact, was provided to Mr. Banfield is neither the exercise of physical liberty nor a recognized category of fundamental personal choice.

[73] As to "security of the person", Mr. Banfield's factum, para. 56, says Halifax Water "inflicted 'psychological stress' to the mental state of David Banfield". No affidavit, testimony or other evidence supports this bare assertion.

[74] In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, Chief Justice Lamer said:

60 For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensitivity. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.

See also *Blencoe, supra*, paras. 96-97.

[75] Nothing establishes that payment of the stormwater charge would have a serious and profound effect on Mr. Banfield's psychological integrity.

[76] I respectfully reject Mr. Banfield's submissions under s. 7 of the *Charter*.

[77] **Section 8:** Section 8 guarantees the “right to be secure against unreasonable search or seizure”.

[78] The protection may extend to the voluntary provision of information by a third party to a state actor without a compelled state inspection of records possessed by the protected individual: *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Dersch*, [1993] 3 S.C.R. 768; *R. v. Spencer*, [2014] 2 S.C.R. 212. That Mr. Banfield’s information was provided by the Municipality to Halifax Water, bypassing Mr. Banfield, does not foreclose Mr. Banfield’s submission.

[79] Section 8’s protected value is the “reasonable expectation of privacy”: *Hunter v. Southam*, [1984] 2 S.C.R. 145, page 159, per Dickson J. for the Court, followed by many authorities. Unless Mr. Banfield had a reasonable expectation of privacy to the critical information – *i.e.* his name and address – provided to Halifax Water, there was no breach of s. 8.

[80] In *Spencer, supra*, Cromwell J., for the Court, summarized the framework to analyze whether there was a reasonable expectation of privacy:

[16] The first issue is whether this protection against unreasonable searches and seizures was engaged here. That depends on whether what the police did to obtain the subscriber information matching the IP address was a search or seizure within the meaning of s. 8 of the *Charter*. The answer to this question turns on whether, in the totality of the circumstances, Mr. Spencer had a reasonable expectation of privacy in the information provided to the police by Shaw. If he did, then obtaining that information was a search.

[17] We assess whether there is a reasonable expectation of privacy in the totality of the circumstances by considering and weighing a large number of interrelated factors. These include both factors related to the nature of the privacy interests implicated by the state action and factors more directly concerned with the expectation of privacy, both subjectively and objectively viewed, in relation to those interests: [citations omitted]. The fact that these considerations must be looked at in the “totality of the circumstances” underlies the point that they are often interrelated, that they must be adapted to the circumstances of the particular case and that they must be looked at as a whole.

[18] The wide variety and number of factors that may be considered in assessing the reasonable expectation of privacy can be grouped under four main headings for analytical convenience: (1) the subject matter of the alleged search; (2) the claimant’s interest in the subject matter; (3) the claimant’s subjective expectation of privacy in the subject matter; and (4) whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances [citations omitted]. However, this not a purely factual inquiry.

The reasonable expectation of privacy standard is normative rather than simply descriptive: [citation omitted]. Thus, while the analysis is sensitive to the factual context, it is inevitably “laden with value judgments which are made from the independent perspective of the reasonable and informed person who is concerned about the long-term consequences of government action for the protection of privacy”: [citations omitted].

[81] To the same effect: *R. v. Mills*, 2019 SCC 22, paras. 12-13.

[82] Mr. Banfield’s submission concerns biographical information – his identity and address – for use in a regulatory context. This is not a prosecution that turns on incriminating evidence found in a private location: *e.g.*, see *R. v. A.M.*, [2008] 1 S.C.R. 569, paras. 67-68 and 73.

[83] There is a reasonable expectation of privacy in the “biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state” that “tends to reveal intimate details of the lifestyle and personal choices of the individual”: *Plant*, *supra*, at para. 27, per Sopinka J. for the majority. In *Plant*, Justice Sopinka said the examination of Mr. Plant’s electrical consumption records from the electrical utility “cannot reasonably be said to reveal intimate details of the appellant’s life” and did not engage a reasonable expectation of privacy (para. 27). In *R. v. Tessling*, [2004] 3 S.C.R. 432, para. 26, per Binnie J. noted that Sopinka J.’s phrase was “not meant to be exhaustive”. Then Binnie J. concluded that the disclosure “offers no insight into [the accused’s] private life” and was not subject to reasonable expectation of privacy (para. 63).

[84] In *Spencer*, on the other hand, the warrantless provision of subscriber information by Mr. Spencer’s internet service provider to police disclosed Mr. Spencer’s intimate choice to watch child pornography for which he was prosecuted. This engaged a reasonable expectation of privacy under s. 8. Justice Cromwell elaborated on the expectation of anonymity:

[45] Recognizing that anonymity is one conception of informational privacy seems to me to be particularly important in the context of Internet usage. ...

...

[47] In my view, the identity of a person linked to their use of the Internet must be recognized as giving rise to a privacy interest beyond that inherent in the person’s name, address and telephone number found in the subscriber information. ...

...

[50] Applying this framework to the facts of the present case is straightforward. In the circumstances of this case, the police request to link a given IP address to subscriber information was in effect a request to link a specific person (or a limited number of persons in the case of shared Internet services) to specific online activities. This sort of request engages the anonymity aspect of the informational privacy interest by attempting to link the suspect with anonymously undertaken online activities, activities which have been recognized by the Court in other circumstances as engaging significant privacy interests [citations omitted].

...

[66] In my view, in the totality of the circumstances of this case, there is a reasonable expectation of privacy in the subscriber information. The disclosure of this information will often amount to the identification of a user with intimate or sensitive activities being carried out online, usually on the understanding that these activities would be anonymous. A request by a police officer that an ISP voluntarily disclose such information amounts to a search.

[85] In the totality of Mr. Banfield's circumstances, there is no reasonable expectation of privacy. The following factors sway the analysis.

[86] Mr. Banfield's name and address were not confidential. His name and property location are listed at the public land registry, were available to the Municipality for municipal purposes, and appear openly on any number of documents needed for everyday life. For instance, Mr. Banfield placed his name and address on the cover of his appeal factum, copied to Halifax Water. Information in "plain view" or "public view" may afford little reasonable expectation of privacy: *e.g.*, *R. v. Boersma*, [1994] 2 S.C.R. 488, per Iacobucci J. for the Court; *Tessling*, *supra*, para. 46.

[87] The provision of Mr. Banfield's name and address merely enabled the effective administration of a legally regulated activity. An individual's aim to thwart that effective administration is not analogous to the defence of a prosecution. Often "a regulatory regime will be needed in order to act as a check on an individual's self-interest" and the regulatory exigencies will outweigh the self-interest in privacy: *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, para. 56; *Smith v. Canada (Attorney General)*, [2001] 3 S.C.R. 902, para. 2, *per curiam*. See also: *R. v. Hufsky*, [1988] 1 S.C.R. 621, para. 23, *per* LeDain J. for the Court; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627; *British Columbia Securities Commission*, *supra*, paras. 51-64.

[88] Mr. Banfield's information was not confidential, secret or anonymous. Neither did it offer a glimpse into Mr. Banfield's intimate, personal or sensitive activities. Nor did it involve the investigation of a potential offence. Rather, it enabled a regulated public utility to invoice Mr. Banfield with rates approved under statutory authority for a legally authorized service that, in fact, Mr. Banfield received.

[89] Mr. Banfield prefers the former system, where stormwater charges were billed only to water customers. Not being a water customer, he just does not want to pay a stormwater user fee. But, if he does not pay, others will subsidize Halifax Water's stormwater service to Mr. Banfield.

[90] Mr. Banfield's animating concern is dissociated from any real subjective expectation of privacy to his name and address. In any case, a wide gap separates Mr. Banfield's view from a "reasonable" expectation of privacy.

[91] I respectfully reject Mr. Banfield's submissions under s. 8 of the *Charter*.

Conclusion

[92] I would dismiss the appeal without costs.

Fichaud J.A.

Concurred:

Oland J.A.

Bryson J.A.