

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**

Cite as: Halifax Independent Elementary School Society v. Sackville Trenching Ltd., 2009 NSSM 10

BETWEEN:

**HALIFAX INDEPENDENT ELEMENTARY SCHOOL SOCIETY**

**Claimant**

- and -

**3071061 NOVA SCOTIA LIMITED, carrying on business as  
SACKVILLE TRENCHING LIMITED**

**Defendant**

---

**ORDER**

---

**Adjudicator: David T.R. Parker**

**Heard: November 5 & 6, 2008**

**Decision: January 26, 2009**

**Counsel:**

**Kevin C. MacDonald assisted by Jeffrey P. Flinn, Articled Clerk,  
represented the Claimant.**

**Andrew B. Gough represented the Defendant**

This case involves damage to the Claimant's property which the Claimant alleged was caused by the Defendant who was hired to do excavation work on the Claimant's property.

**Pleadings:**

**The Claim:**

The Claimant is an independent elementary and junior high school and it entered into a contract with the Defendant who was to perform excavation work on the Claimant's playing field in order to improve the drainage on the field.

The Claimant stated prior to commencement of excavation work the Defendant was shown the plan of a geothermal heating system located on the property where the excavation was to take place.

The Claimant alleges the Defendant damaged pipe and did not notify the Claimant but covered it over. The work happened in September of 2007 and in November 2007 the Claimant turned on the heating system and it would not work. Investigation determined that dirt had entered the geothermal heating system through the damaged pipe.

The Claimant asserts breach of contract and negligence and as a result it suffered damages when the heating system was damaged.

**The Defence:**

The Defendant stated it performed the work as instructed and at no time before or during its work was it advised by the Claimant of any underground hazard or

underground heating system. The Defendant denies it was negligent or breached its contract with the Claimant.

**Counterclaim:**

The Defendant and Claimant by counterclaim, claims payment of its account for excavation work completed on the Claimants property.

**Facts and Analysis:**

The head teacher of the Claimant school wanted to deal with two wet spots on the school playing field. She contacted the Defendant and explained what the problem was and asked him to dig exploratory holes. She stated in her testimony that she made the Defendant understand about the geothermal system in the area. She said the Defendant was to do a square 13 m x 13 m and go down 18 inches and she stated that she was not concerned about the system as the Defendant was only going down 18 inches which would have been well above the in ground geothermal system.

There was a second digging which occurred on September 26, 2007, and she said when she went out to look at the digging she noticed the Defendant had gone down far and she saw the well head. She said she was shocked that they went down more than 18 inches. She said she met with the Defendant owner in December and he acknowledged to her that the breach in the system must have happened during the exploratory digging.

The head teacher said she believed she showed the Defendant a plan showing the geothermal heating system just prior to the second exploratory dig. She said that she wanted them to be very careful. She also gave the Defendant a diagram provided to her by Nova Scotia Power showing an underground electrical wire. In her testimony she said she remembered Paul [of the Defendant Company] and

"that I believe that is when I showed him the plans. I'm not sure if that was outside or inside."

James McKee, the landscape architect, was asked to take a look at the problem. He observed two distinct puddles 25 to 30 feet apart and approximately 4 to 6 inches deep and he concluded they had been wet for a long period of time. He said he knew there was a geothermal well and wondered if it had anything to do with the problem. He noticed that the soil was hard and dry beside the puddles. He said that two or three weeks later he met with Peter Connell, the school's architect, who suggested an excavation to check it out and he was asked to take a look. As a result he said he would meet with the excavator with respect to the test pit. He said he and the head teacher met the Defendant to tell where the excavator could ride into the property. He said he warned the Defendant of the electrical line, exact location unknown. He said he wasn't planning on going too deep and we dug around the wet areas 12 to 18 inches. He said the surface around the puddles was bone dry, and the soil was not wet underneath so he figured it was not a geothermal well doing it. McKee said he was given a plan of the geothermal system from the head teacher and he recalled that the excavator operator saw it but he didn't know if it was left with him. He said he remembered there was a discussion of the geothermal wells and that is why the head teacher gave him a diagram of it. Mr. McKee said it didn't appear to be surface water and also not coming from below so he suggested taking 18 inches away and then putting gravel and topsoil in place.

Mr. McKee said he marked the spot on the field and left directions for the excavator. He said they may have to go down as far as 24 inches; it would be dry and then put in a drainage trough. He said he prepared the instructions for the excavator as he would not be on site.

The administrative assistant who worked for the Claimant said in her testimony she knew Mr. McKee would not be there when excavation was going to take

place [on the second occasion]. She said she wanted Mr. McKee to write down his instructions at it was a geothermal area. She said she wrote down what he told her. She said she told the Defendant the instructions on September 26, 2007, and pointed out Mr. McKee's telephone number.

Paul Arthur was the excavator operator who was called upon by the Defendant to do the excavation on the Claimant's field. He confirmed that the administrative assistant told him that "here is a number to get in touch with the engineer." He stated he called Mr. McKee and said he would meet with him and they met. He said the head teacher came out when Mr. McKee showed up. He told them there were all row houses here before and it could have been an old line leaking. He said Mr. McKee told him 50 x 50' and a couple of feet deep. He said he worked until dark and telephoned McKee and told him the water was still coming out of the ground. He said he never saw the instructions of McKee. He did say Mr. McKee said he could go down deeper so we went 1 foot at a time. He said he thought it was a drilled well as we were six or 7 feet down. He said Mr. McKee said that must be a heat pump system and that was the first time we were told that. The operator said the fitting was broken and was broken up during the backfill. He said he phoned Mr. McKee who said to fill it in for the weekend and he also asked us to do a runoff trench. He said he did not remember breaking off any pipes.

Jerry Wentzell, owner of the Defendant Company, said it was not mentioned to him there was an in ground heating system. He felt they were not responsible because it may have been the exploratory dig that caused the damage. He said that his people knew there was a heating system they just didn't know where it was. He went on to say there was only mention of the electrical system no mention of the geothermal system.

Kevin Hubbard, licensed mechanic, who is familiar with geothermal heat pumps, was called in to determine what the problem was when the heating system did

not work when it was turned on in November 2007. He determined after his investigation that there was a breach in the system. The Defendant was called in and they found a piece of pipe on the ground amongst the fill. He said that they had to dig down further where the pipe was connected and the pipe was reconnected after that the system worked however parts of the system had to be replaced to have it work properly. His testimony was that he had no idea when the pipe was broken or how it was broken.

The testimony of Mr. McKee, the head teacher, Mrs. Molly Hurd, and the administrator assistant Valerie Walker was consistent. The Defendant and people he employed were aware that there was a geothermal system in the area. The operator of the excavator received specific instructions the second time in, on where to dig and how far down he should go. The maximum was 2 feet. The operator's evidence that he was to go down further than 2 feet was inconsistent with all the other testimony of the other witnesses. The Claimant is asking for damages in the amount of \$21,859.93. I have reviewed the invoices and they would appear to be slightly higher than that however some of the heat pumps had to be replaced and based on the betterment principle I will accept the amount of \$21,859.93. With respect to the Counterclaim there was a drainage system put in place by the Defendant and I will accept the amount of \$2,975.00 plus HST a \$416.50 for a total of \$3,391.50 to install the drainage system as per the Defendant's quote of October 22, 2006, as well as the amount required to supply and replace topsoil in the amount of \$2,422.50 plus \$339.15 HST for a total of \$2,761.65. As both parties were successful in part I shall make no order as to costs.

**IT IS THEREFORE ORDERED** that the Defendant pay the Claimant the following sums:

	\$21,859.93
less	\$3,391.50
less	<u>\$2,761.65</u>
Total	<b>\$15,706.78</b>

Dated at Halifax, on the 26 day of January, 2009

---

David T.R. Parker  
Small Claims Court Adjudicator