

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Purdy v. Halifax Regional Water Commission*, 2020 NSSM 6

SCCH 493897

Between:

Philip A. Purdy

Claimant

— and —

Halifax Regional Water Commission

Defendant

Adjudicator: Augustus M. Richardson, QC

For the Claimant Billy Sparks, and Kallen Heenan

For the Defendant Elise Martino, A/C

Heard: January 14th, 2020

Decisions: January 28th, 2020

DECISION

Introduction

[1] This is a claim for \$13,377.35 for property damage caused when water from a blocked drainage ditch overflowed the ditch and ran across the claimant's property and into his garage and basement. The claimant says that the defendant Halifax Regional Water Commission ("HRWC") is liable in negligence for the damage. The HRWC says that it has statutory immunity in respect of such a claim; that if not, it can be liable only for gross negligence, and that in this case no such

negligence was established. The defendant also says that the claimant has not properly proved his loss.

The Hearing

[2] I heard the testimony of the claimant Mr Purdy on his own behalf. I also received some documentary exhibits. On behalf of the defendant, I heard the testimony of

- a. Sheldon Parsons, the defendant's Supervisor of Waste and Storm Water, East, an area that takes in Dartmouth and the Eastern Shore; and
- b. George Bent, a sub-foreman employed by the defendant since 2012, who attended the claimant's property at the material time.

[3] There was no substantive conflict of fact in the testimony of the three witnesses. I will accordingly simply set out my findings of fact based on that testimony and the documents introduced into evidence.

The Facts

[4] Mr Purdy lives at 825 Cow Bay Road in Cow Bay on the eastern shore. His house is set back from the road. There is a drainage ditch that runs along the side of the road, between the road and his front yard. There is a culvert where the ditch runs under his driveway. There is a bit of a slope from the top of the ditch to his garage and basement. Prior to the events in question he has never had a problem with water overflowing the ditch to run onto his property.

[5] The drainage ditch is in a right of way that belongs to the Halifax Regional Municipality (“HRM”). The HRM is responsible for stormwater management and collection. Until relatively recently the HRM had maintained the ditch. However, under an agreement between the HRM and the HRWC the latter took over management of the stormwater runoff from municipally-owned public rights of way such as the drainage ditch in issue. For this service the HRWC collects a charge from property owners such as Mr Purdy. All of this is set out in bills that are regularly sent by the HRWC to—and paid by—Mr Purdy.

[6] On March 15, 2019 Mr Purdy learned from local weather reports that a storm was expected to bring large amounts of precipitation—mainly in the form of rain—within the next 24 hours. At the time he noted that the ditch and culvert was full of, and blocked by, the winter’s snow and ice. He was concerned that because of this blockage the resulting water would overflow the ditch and run into his garage and house. He called the phone number listed on his HRWC bill. He told the person who answered that the ditch was full of ice and snow; that heavy rainfall was predicted in the next few hours; and that his ditch might overflow as a result. He asked that the ditch be cleared before the rain started.

[7] At that point, and unbeknownst to Mr Purdy, the management agreement between HRWC and HRM came into play. Pursuant to that agreement

- a. culverts that were blocked *inside* with snow and ice were the responsibility of HRWC;
- b. culverts that were blocked *from the outside* by snow and ice were the responsibility of the HRM;
- c. ditches that were blocked by snow and ice were the responsibility of the HRM; and

- d. ditches that were blocked by other material were the responsibility of HRWC: see Ex. D2, Tab 4.

[8] The person taking the call from Mr Purdy interpreted his concern as being one about a culvert, or a ditch, blocked with ice and snow—and accordingly as being something that fell within the obligations of the HRM. The person accordingly forwarded Mr Purdy’s call and concern to the HRM: see Ex. D2, Tab 3. For a reason unknown the HRM did not respond to the forwarded message. The rain came. The ditch flooded and the water overflowed onto and into Mr Purdy’s garage and basement, there to damage tools, some appliances, and other personal property. (The items are listed at Ex. C1, Tab 3.)

[9] The morning of March 16, 2019 Mr Purdy called the HRWC’s number again. He explained what had happened; that he had called the day before but that nothing had been done; and that now his basement and garage were full of water. At that point, given that the HRM had not responded, and notwithstanding the agreement between it and the HRM, HRWC personnel who were already in the area (including Mr Bent) decided to attend Mr Purdy’s property and clear the ditch, which they did.

[10] On these facts then the issue between the parties is joined.

The Position of the Parties

[11] The HRWC says it has statutory immunity. For that it relies on s.29 of the *Halifax Regional Water Commission Act*, SNS 2007, c.55, as amended:

- 29 Where an overflow of water or sewage from a water, wastewater or stormwater system or a drain, ditch or watercourse is a consequence of snow, ice or rain, the

Commission is not liable for a loss as a result of the overflow.

[12] A similar provision s found in s.377(2) of the *Halifax Regional Municipality Charter*, SNS 2008, c.39.

[13] The HRWC also relies on the decision by Adjudicator O’Hara in *Baigent v. Halifax Regional Municipality and Halifax Water* (SCCH 488511, unreported, September 16, 2019). The facts there appear to have been that damage to the claimant’s property was caused when a water drainage pipe was blocked by heavy rains and snow melt. Adjudicator O’Hara found that the facts fit squarely within these provisions, which in his view were “intended to address exactly the situation at hand in this case.”

[14] In the alternative, the HRWC says that if s.29 does not apply on the facts of this case, then it is still protected by s.26 of the *Halifax Regional Water Commission Act*, which provides as follows:

26 The Commission, its officers and employees, are not liable for damages caused

(a) directly or indirectly by

(i) the design, construction, operation, maintenance, repair, breaking or malfunction of wastewater facilities, a stormwater system or a water system, or

(ii) interference with the supply of water through a water system,

unless the damages are shown to be caused by the gross negligence of the Commission or its officers or employees;

(b) by the discharge of sewage or water into premises from a sewer unless the discharge was caused by improper construction or neglect in the maintenance of the sewer, or a failure to remedy a matter that was known, or should reasonably have been known, to the Commission and should reasonably have been repaired; or

(c) in any case where this Act or the regulations have not been complied with by an owner or previous owner of premises that have been damaged.

[15] The HRWC says that its actions did not constitute gross negligence, which has been characterized as a “very marked departure from the standards by which responsible and competent people habitually govern themselves:” *McCulloch v. Murray* [1942] 2 DLR 179 (SCC), applied in *Pettigrew v. Halifax Regional Water Commission* 2019 NSSC 362 at paras.29-30. It relied on the agreement and acted accordingly. Once it found out that the HRM was apparently not abiding by its obligations it acted to correct the problem. These actions did not amount to gross negligence.

[16] For his part Mr Purdy says that s.29 has no application. His claim is not for damage caused by overflow. Rather, it’s for damage caused by HRWC’s failure to respond to a potential risk of damage to property when it knew or ought to have known that damage would result if it did not act. And as for s.26 is concerned, Mr Purdy says that given that HRWC’s conduct amounted to gross negligence. It knew of the pending heavy rain; it had been warned of the potential damage to his property; it took no steps to remedy the risk; it flipped his message to the HRM without following up to ensure that the HRM did act: see counsel’s brief at Ex. C1, Tab 4.

Decision

[17] I have considered the facts; the submissions of counsel; the decision of Adjudicator O’Hara; the statutory provisions relied upon by the defendant; and the other authorities submitted by counsel.

[18] I agree that s.29 is intended to deal with situations where water overflows as the result of snow, ice or rain, provided that the overflow is the immediate result of a snowfall or rain. It is not clear to me, however, that s.29 was intended to cover a

situation where the HRWC knew that a ditch was blocked with snow or ice, and had sufficient time to respond by removing the blockage before it led to an overflow. So, and for example, it is not clear to me that the HRWC could rely on s.29 where (a) it knew the ditch was blocked, and (b) it knew that the party responsible to remove the blockage (whether the HRM or the HRWC, as the case might be) had not done so, and (c) it was aware that if the blockage was not removed there was a potential risk of overflow because of pending rain or snow.

[19] Here the facts are closer to the latter than the former situation. That is to say, the facts are not simply that there was an overflow during a heavy rainfall or snowfall. Rather, there was an overflow that happened sometime after HRWC became aware of a blockage; and that happened only after the HRWC failed to take steps to remove the blockage after it had been warned about it and the possibility that it would cause an overflow.

[20] However, it is not necessary for me to decide that question here. I say that because assuming s.29 had no application on the facts of this case, there would still be the defence afforded to HRWC by s.26. HRWC is protected against simple negligence—it is liable only for gross negligence. On the facts before me HRWC did follow the agreement that existed between it and the HRM; it did alert the HRM to the problem; and once it discovered that the HRM had not responded it took it upon itself to correct the problem. Such conduct does not in my view fall within the scope of gross negligence, as it is defined in the authorities.

[21] For that reason the claim must be dismissed.

[22] Had I reached a different conclusion I would have had difficulty with the quantification of the claimant's damages. The figures provided by him were based on replacement cost for new items. However, the items in question were for the most part a number—if not many—years old. I was not provided with any idea of what their purchase price had been at the time they were first purchased, or indeed when they were in fact purchased. While it is clear that the items damaged would

have had some fair market value, I was not persuaded that the value would have come anywhere near their replacement cost today. Nor was I persuaded that all the items (for example, the wood stove or the snow blower or chainsaw, or the three copper cutters) were damaged beyond repair by the overflow of water. Had I found the HRWC liable I would for these reasons not have allowed the claimant more than \$1,000.00 as a result.

DATED at Halifax, NS
this 28th day of January, 2020

Augustus Richardson, QC
Adjudicator