

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

**Citation: *Prospect Septic Services Inc. v. Nova Truck Centres*, 2017 NSSM 94**

Claim No: SCCH 455545

**BETWEEN:**

Prospect Septic Services Inc.

**Claimant**

-and –

Nova Truck Centres

**Defendant**

Jeffery Jollimore appeared as agent for the Claimant.

Peter Coulthard, QC, represented the Defendant.

***Editorial Note: The electronic version of this judgment has been edited for grammar, punctuation and like errors, and addresses and phone numbers have been removed.***

**DECISION**

(1) This is a claim arising from the repair of a truck used by the Claimant in its septic pumping business. The Claimant alleges the repairs were covered by a warranty issued by the Defendant. If not, he submits the Defendants are liable in negligence for the advice they provided him and for breach of contract. The Claimant is seeking \$25,000, the maximum permitted under the *Small Claims Court Act*.

**Preliminary Matters**

(2) The identification of the parties is somewhat ambiguous, based on the viva voce evidence and the documentation. The Claimant identified his business as “Prospect Septic Services Inc.”, although the Nova Truck Centres (“Nova”) invoices are issued to a numbered company, 3089467 Nova Scotia Limited and the Robby’s invoice is 3295186 Nova Scotia Limited. Likewise, the Defendant is identified as “Nova Truck Centres” and in correspondence is identified as “a division of Nova Enterprises”. It is not clear which is the business name or what corporate structure is in place. I have left the style of cause as provided by the parties. I will accept evidence to support a change of style of cause if the parties so desire and can agree.

(3) The evidence provided in this proceeding has been extensive and well-presented. While I have not referenced all of the evidence in this decision, I have considered all that was tendered and given it the appropriate weight.

## **Background**

(4) On April 1, 2016, the Claimant purchased a 2012 Freightliner M2 truck (“the truck”) from a business known as Hilchie’s Environmental Septic Services (“Hilchie’s”). Hilchie’s had originally purchased the truck from the Defendant and in August or September 2015, hired the Defendant to rebuild the engine. The engine subsequently failed due to problems with the motor allegedly causing it to be dusted. The Claimant seeks compensation from the Defendant under the warranty and alternatively, claims damages for negligent advice. The Claimant seeks \$25,000, representing the repair costs of approximately \$16,000 paid to a third party, together with lost revenue arising from being without his truck for several months.

## **Issues**

(5) The issues in this claim are as follows:

- Were the repairs to the Claimant’s truck covered under a warranty issued by the Defendant?
- Was the Defendant liable in negligence for the advice it provided to the Claimant? Specifically, did the advice provided by the Defendant cause the damage for which the Claimant seeks to be compensated?
- Is the Defendant liable in breach of contract?
- If the answer to any of the questions is yes, what is the extent of any damages?

For the reasons stated below, I have found the Claimant has not proven the existence of a warranty in its favour covering the repairs. Further, I have been unable to find that any negligence or breach of contract caused the damage to the truck which the Defendant paid to have repaired, or any resulting loss of profits. However, I found the diagnostic services provided by the Defendant to the Claimant to be of no value and a complete failure of consideration. I ordered the Defendant to reimburse the Claimant for the costs of this service together with prejudgment interest and costs.

## **The Evidence**

(6) Jeffrey Jollimore is the sole shareholder and director of Prospect Septic Services Inc. He testified that the Claimant purchased the truck from Hilchie’s on April 1, 2016. According to service records in Mr. Jollimore’s possession, Hilchie’s hired the Defendant to have the engine rebuilt, the service was completed on August 31, 2015.

(7) He has also provided evidence of what appears to a summary of warranty coverage from the Defendant. There is no copy of a warranty document. Since purchasing the truck, Mr. Jollimore returned the truck several times to Nova (over the course of four months) to address an engine light for what was diagnosed as crankcase pressure.

(8) Mr. Jollimore describes his work as pumping residential septic tanks. It is a seasonal business performed during good weather. Thus, most of it takes place during the summer. The engine was taken to Nova for this problem on three separate occasions, April, June and August. He had the truck finally repaired by Robby's Tractor-Trailer Services Ltd. He described what took place when he attempted to have the vehicle fixed by the Defendants.

(9) The Claimant purchased the vehicle on April 1 and a Motor Vehicle Inspection was completed by Nova. On April 28, the engine and shutdown light came on. He brought the truck to Nova, who diagnosed excessive crankcase pressure. They cleaned the crankcase and installed a crankcase ventilation kit. The work was not under warranty as he paid for the work in cash. The next day the engine light came on again and he took his truck in to have the codes cleared. There were no further issues until approximately a month and a half later.

(10) On June 15, Mr. Jollimore noticed the engine and shutdown light was on. He took his truck to Nova and they performed essentially the same services but for a reduced cost. He expressed his concern to the employees at Nova of the amount of time being spent on this repair.

(11) On August 8, the engine lights were on once again. The Defendant performed essentially the same services including installing a crankcase ventilation kit and clearing the codes. This time, the truck was sent to the local office of its engine manufacturer, Cummins. The report from Cummins dated August 16 and 17 indicated that the engine was dusted. In simple terms, dusting means that dirt and dust from the road and elsewhere had somehow bypassed the filters in the engine and collected on various engine components causing them to wear. Cummins also noted missing bolts and clamps.

(12) On September 8, 2016, Mr. Jollimore took the vehicle to Robby's who repaired the truck. Total cost was \$16,068.69. Following its repair, Mr. Jollimore has not experienced any further difficulties with the truck. As part of his claim, the Claimant is seeking the repair costs. In addition, the Claimant seeks time spent without his truck. He estimates his profits per tank at \$130.50. He estimates losing business on 100 tanks, or \$13,050.

(13) After a lengthy cross-examination by Mr. Coulthard, Mr. Jollimore acknowledged the truck was conveyed by Hilchie's to a company known as "Coast Capital Equipment" who then transferred the truck to the Claimant under a lease purchase. He was not provided with the warranty given by Nova to Hilchie's. (In my view, nothing turns on

that.) Mr. Jollimore recognizes that the warranty may be a manufacturer's warranty given by Cummins.

(14) In his dealings with Cummins, Mr. Jollimore dealt with an employee named "Shane". Shane found there were loose nuts and braces on the engine, holes in the engine as a result of bolts not put back properly, which he believes contributed to the dusting of the engine. He provided a copy of the Cummins report to Robby's in New Glasgow. Robby's recommended the engine be taken apart and rebuilt, which they did. Mr. Jollimore has experienced no further difficulties. He did not seek any further opinions as he wanted to have his truck repaired and returned to the road. At the conclusion of his cross examination, Mr. Jollimore acknowledged the work on the engine was performed by Robby's and no second or third opinion was sought. With respect to his claim for lost profits, he indicated that he did not hire somebody else to do the work for him. Any lost business was work for which he would never get paid.

(15) David Rossiter is the service operation manager with Nova Truck Centres. He was involved in the work performed with the Claimant's truck prior to and since it has been owned by the Claimant. He described his role as overseeing the operation of the service department and providing technical support to service managers, shop foremen and others. He becomes involved in actually repairing vehicles only when the problems are not resolved through normal diagnostics. Mr. Rossiter is located in Dartmouth Nova Scotia, but describes his job as the "go to guy" for the Atlantic Provinces.

(16) Mr. Rossiter was not qualified as an expert witness. His opinion evidence below has been taken to show the basis for his conclusions, not the truth of its content.

(17) The truck was brought in and hooked up to the computer to read its fault codes. He identified in evidence the Cummins diagnostic chart entitled "Crankcase Gases (Blowby) Excessive – Symptom Tree t027". When the code reads "Nock Sensor", it was identified as excess crankcase pressure.

(18) In this case, they installed a crankcase ventilation kit as part of the first step in the tree. The service was performed on April 27, 2016. The codes were then cleared and the truck did not return. If a truck was not returned after was driven a short distance, the shop typically assumes the work was successful.

(19) On August 9, the readings showed 150 counts. This means the engine had been running 150 times and a problem occurring since the codes were last cleared. The problem was identified as crankcase pressure. It was measured and identified as such. The recommendation was to replace the crankcase ventilation kit. The crankcase ventilation kit was changed a total of three separate times.

(20) He reviewed extensively the diagnostic tree. The symptom tree notes several steps in the process to address crankcase pressure, beginning with cleaning the breather and vent tube followed by replacing a malfunctioning air compressor. The next step is to check the oil seal on the turbocharger then the valve stem clearance, followed by more significant repairs such as the cylinder heads and pistons. Following that

process, an engine rebuild is considered. There is nothing in evidence to show that any step in the procedure needs to be repeated.

(21) Mr. Rossiter testified that to determine the problem was with the crankcase pressure, it was necessary to check that the part was not plugged with oil. Maximum pressure should result in the displacement of 12 inches of water but in this case it resulted in a displacement of 20 inches of water, which he attributed to excessive blowby.

(22) The truck engine was hooked up to a dynamometer which provides readings that simulate a load on the road. Such a reading provides an opportunity to set and isolate parameters to measure pressure that is not possible when a truck is on the road. This was performed at the Cummins location as the Defendant does not own this piece of equipment.

(23) The readings were shown to have an excessive blowby, which describes excessive pressure as a result of the combustion gases passing through the pistons to the crankcase. When the pressure is high it means the blowby is excessive. He confirmed that the crankcase ventilation kit was replaced three times and their intent was to move onto the next step in the diagnostic tree.

(24) Mr. Rossiter first became aware of the report from Cummins when he was told by the service manager in Dartmouth there were bolts missing from the engine and loose clamps. He attended to the Cummins location and checked the bolts and clamps and found nothing out of the ordinary. He removed the filter and other parts and found there was salt staining in the air cleaner housing and in the tubes. He did not believe when he saw the photographs that the engine had been dusted.

(25) In support of this conclusion, he noticed the compressor wheel was not eroded. It was suggested that the truck be returned to Nova to begin isolating the problem. He spoke with Peter McGillivary and contacted him by e-mail. Mr. Rossiter was not involved when the truck was picked up. He knows it went from Cummins' shop to Robby's in New Glasgow. He was given an opportunity to view the parts at Robby's and to take photographs.

(26) He does not believe that the photographs of the problems with the engine are consistent with the truck being dusted. He indicated that if the trip engine were dusted parts of the rings would be loose and polished. There would not be much play. He was not permitted to see other parts at Robby's due to the instructions of Mr. Jollimore.

(27) In his opinion, if the engine is dusted, one checks the turbocharger and compressor and expects to see damage. He indicated that they would follow the diagnostic tree to determine if the turbocharger and compressor were isolated as potential problems.

(28) Under cross-examination, he confirmed the crankcase ventilation kit was fact replaced three times. Nothing different happened each time except that on the third

change a reading of 150 counts was noted. He confirmed that they are replaced depending upon the load. It varies depending upon the amount of idling which tends to increase blowby.

(29) He described the parts he viewed at Cummins as looking fine with several of them having already been removed. There were bolts missing. He acknowledged that it is possible that the missing valve stem could have caused the blowby.

(30) Peter John MacGillivray is the President and CEO of Nova Truck Centres. He first spoke with Mr. Jollimore in what he described as a very respectful and quiet discussion concerning the issues he was experiencing with this truck. Mr. Jollimore believed that the engine was dusted as a result of blowby based on comments he received from Cummins dealer. Mr. MacGillivray referred to the decision tree regarding crankcase gases and determined that it was necessary to check and clean the crankcase breather and tube.

(31) He sent an e-mail to Mr. Jollimore in hopes of resolving the issue. The e-mail is marked "without prejudice" but has been referred by the parties several times in evidence. He confirmed that Nova offers a warranty on its engine repairs. During his discussions with his staff in August, he learned that Mr. Jollimore was no longer interested in working with the Defendant. Indeed, this was confirmed in several e-mails in August which are in evidence. He had taken his business elsewhere. The work was being completed at Robby's in New Glasgow.

(32) When asked in cross-examination if following the diagnostic included checking the crankcase ventilation a second time, he indicated that he could not answer that. He confirmed in questioning by his solicitor that he was not aware of what was being done as he did not have firsthand knowledge.

(33) In response to a question from the court, Mr. MacGillivray confirmed that the warranty was offered by Cummins not Nova. Furthermore, the decision tree was not reviewed with the customers.

(34) Maurice Gillis Connolly is employed with Cummins' Eastern Canada dealership. He is 60 years of age and has been working in diesel mechanics and trucking for 41 years. He has been a certified field services engineer for the past 12 years. He described significant training he had undertaken during his career. He has a CFSE Level 3, which qualifies him to act as the shop foreman and service manager and to assist in the diagnostics and provide assistance. He indicated that by the time a problem reached him, all diagnostics are exhausted and the desired results have not yet been achieved. I qualified him as an expert in diagnostics and engineering on Cummins engines.

(35) He reviewed the various documents tendered by the parties. He described the process by which the pressure was measured by the dynamometer. He confirmed the definition of blowby, namely the amount of gases that pass by the ring/liner and the valve seal, stem and liner. When measuring blowby, the appropriate measure is the

higher the number of inches of water displaced, the greater the amount of blowby. He described the various photographs in evidence. In some cases, he could not tell from the pictures if the problems are consistent or inconsistent with an engine being dusted. He indicated that it was necessary to actually see the rings and liners themselves in order to determine if the engine were dusted.

(36) He described as correct Mr. MacGillivray's approach for looking at rings to determine if the engine were dusted. He described it necessary to view the leading edge of the wheel of the turbocharger as well as the shaft. These areas are where dust and dirt tend to accumulate. It would take approximately two days to completely disassemble the engine to view it. In his recollection, dusting is not covered by the Cummins warranty.

(37) He confirmed the purpose of a crankcase ventilator kit was to collect oil and ventilate it so it would not drip on the highway. He confirmed that if blowby were excessive and at a severe level, the filter would plug with oil and excess would drain into the pan. The kit is typically changed once per year although that may vary. It is part of regular maintenance. Excessive blowby would also cause damage to the turbocharger seals, valve seals, worn rings and liners and damage into the piston and rings.

(38) He identified some brown spots and dirt in the photographs. He said it is difficult to tell if the spots were dirt and debris. He confirmed Shane would know if it is dirt and debris and would recognize a dusted engine. He estimated it would cost approximately \$30,000 as a "mid-range" repair for a dusted engine. He confirmed it is impossible to tell in a photograph if the clearance between the piston and the cylinder sleeve is worn as it is necessary to measure this amount with a micrometer.

(39) In redirect evidence, he confirmed that he found a bolt missing in one of the areas. If there were excessive holes, he would expect to see dirt in the air cleaner. One bolt would not allow that amount of dirt that is being alleged.

## **Findings**

(40) This matter centers on a number of findings of fact. These findings more so than the legal issues are germane to the outcome of this case.

(41) I find the Claimant began experiencing difficulties in April 2016, shortly after he purchased the truck. The problems experienced which resulted in the lit engine light were crankcase pressure. The problem returned in June and again in August. The evidence does not establish that any of the work performed by Nova caused the problems with the truck. Any problems predated the purchase. Thus, if they were caused by the actions of Nova, they happened when they were owned by Hilchie's.

(42) It is unfortunate that the witnesses who advised Mr. Jollimore the engine was dusted were not present in court to give evidence, namely Shane at Cummins and the representatives from Robby's. They were the only independent witnesses to the

diagnostics and repairs. Their evidence would have established the full nature of the problem and what was physically observed. It is telling to me that the Defendant's expert, Mr. Connolly, could not conclusively determine the engine was dusted from the photographs but trusted Shane's opinion that it had been. Given my findings on causation, it is not necessary for me to find conclusively that the engine was dusted, although a lot of the evidence which I have accepted points to that. It is sufficient to note that the problem was larger than anything diagnosed by Nova. Their process was redundant and offered no reasonable solution. It served only to delay the repair. Mr. Jollimore was not acting hastily when he took his business elsewhere and had the repairs done to his truck. In the face of inaction, delay and mounting costs and potential lost income, he did what any reasonable business owner would have done. However, that fact alone does not create liability.

(43) I shall now deal with my findings on each of the issues raised.

### **Warranty**

(44) The parties did not provide a copy of a warranty offered by either Nova Truck Centres or Cummins. Without evidence of a warranty, it is impossible to make any finding of a breach. This portion of the claim is dismissed.

### **Negligence**

(45) In order to establish negligence, the law requires the finding of a duty of care, a breach of the standard of care if a breach is established, causation for damage resulting from that breach.

(46) Clearly, a party servicing a truck or providing advice carries a duty of care. The standard of care is what a reasonable service provider such as the Defendant would do in those circumstances. There is no evidence before me of what that standard of care would be. The symptom tree is the manufacturer's standard. That is the only evidence but it is not sufficient to show a legal standard. I note however that the tree is designed to create steps in a procedure to isolate a problem. Sensibly, once one step is attempted without a result, then one moves to the next more significant step. There is no reference in the chart to repeating any of the procedures. No evidence was given as to why that was done. Once replacing the crankcase ventilation kit proved ineffectual, the logical step would be to move on to the next step in the process. As a result of this action, no further improvement was made to the truck. The problem that had been causing the engine light to come on and creating increased pressure in the crankcase remained. I find the Defendant's decision to conduct three identical procedures not required by the manufacturer to be a breach of the standard of care.

(47) However, I am unable to find that the actions of the Defendant, as troubling as they may be, were the reason for the expenditures incurred by the Claimant. They preexisted the Claimant's service work at Nova Truck Centres location in Burnside. It



was not caused by them during the Claimant's ownership of the truck. Indeed, the evidence is not conclusive the problems with the engine were caused by Nova at all.

(48) Mr. Jollimore's decision to take his truck to New Glasgow was not the result of negligence. It was a justifiably frustrated customer taking his business elsewhere. Therefore, I do not find any cause between the actions of the Defendant and the decision of Mr. Jollimore to take the truck elsewhere. His decision may have made sense from a business perspective, but it did not create liability.

(49) Where I have found the decision to take his business elsewhere is not the result of legal liability, I do not agree with Mr. Jollimore's calculation of lost profits. His estimates are based on the time needed to take his truck to Robby's. The time he lost due to the action of Nova was for three appointments that, ultimately, did not provide any benefit. I am not satisfied Mr. Jollimore took any steps to mitigate his losses for three days' business. Further, there is no corroborating evidence he had business booked on those days that he could not service. I decline to award any damages for loss of profits.

### **Breach of Contract**

(50) The contract performed by the Defendant for the Claimant was purportedly part of a larger process to isolate the problem with his truck engine light and the source of the blowby. I am satisfied the work performed by Nova Truck Centres did not accomplish any of those objectives. Accordingly, I find the work was of no value resulting in a complete failure of consideration. However, for the reasons noted above, I do not find the actions of Nova resulted in the damage which was ultimately repaired by Robby's or the lost profit.

(51) Having found the work provided by Nova Truck Centres for which the Claimant was of no value, the Claimant is entitled to full reimbursement for the service.

### **Damages**

(52) The Claimant attended to the Defendant's shop on three separate occasions. The date and amount of each invoice is stated below. The June 16 invoice also included work on the clutch billed at \$24.49 plus HST, which was deducted from this amount.

April 27, 2016:	\$1752.30
June 16, 2016	\$ 388.02
August 9, 2016	<u>\$1607.39</u>
Total	\$3747.71

### **Prejudgment Interest and Costs**

(53) I award the Claimant prejudgment interest, which I set at \$150.00. They shall also receive their filing fee of \$199.35.

**Summary**

(54) The claim is allowed in part. The Claimant shall have judgment as follows:

Amount of Debt:	\$3747.41
Prejudgment Interest	\$ 150.00
Costs:	<u>\$ 199.35</u>
<b>Total Judgment</b>	<b>\$4096.66</b>

(55) An order shall be issued accordingly.

Dated at Halifax, NS,  
on October 24, 2017;

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**Gregg W. Knudsen, Adjudicator**

Original:	Court File
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