SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Beaton v. Peach,* 2018 NSSM 107

Date: 2018-11-22
Docket: Sydney, No. 476888
Registry: Halifax

Between:

Earl and Mary Beaton

Claimants

v.

Douglas and Gloria Peach

Defendants

Adjudicator:	**Patricia Fricker-Bates**
Heard:	**September 12 and 24th, 2018**
Decision:	**November 22, 2018**
Appearances:	**Earl and Mary Beaton, Claimants, self-represented; Douglas and Gloria Peach, Defendants, self-represented.**

BY THE COURT:

[1] The Claimants, Earl and Mary Beaton, filed a Notice of Claim on June 1, 2018, alleging the following:

> SEVERE FLOODING & EROSION OF MY PROPERTY DUE TO A CHANGE OF BROOK LOCATION.

The Claimants are seeking $10,000; or, in the alternative, "HAVE THE PROBLEM RESOLVED."

[2] The Defendants, Douglas and Gloria Peach, filed a Defence on June 4, 2018, stating:

> Claim is without merit, frivolous and vexatious. A stream alteration of less than 200 feet was carried out in 1997 with engineering design completed by Porter Dillon having the joint approvals of the Nova Scotia Department of Environment and Fisheries. Contract work was carried out under the supervision and approval of Peter Weaver with Nova Scotia Department of Environment. The subject properties are a natural flood plain and flooding only occurs during extreme weather and periods of high discharge causing the river to rise and back up the stream. Flooding has no connection or relationship to a stream alteration carried out twenty years ago.

In addition, during closing summations, the Defendants argued that the *Limitations of Action Act*, S.N.S. 2014, c. 35, barred the Claimants' claim. This ground was not raised in the defence filed by the Defendants. In order to give the Claimants time to respond to the *Limitations of Action* argument, this adjudicator indicated that she would give them time, by way of an adjournment, to prepare submissions in response. The Claimants declined.

[3] This matter spanned two court sittings on September 12 and September 24, 2018. Proceedings on September 12, 2018, were adjourned to September 24th as the Claimants had not prepared copies of documents, including photos, for either the Defendants or the Court. Although the Defendants waived their entitlement to pictures and documents, this adjudicator adjourned the matter given the complexity of the case. The Claimants and the Defendants had been sworn in.

[4] The Claimants had subpoenaed one witness, Karen Madden, from the Department of the Environment. According to the subpoena, she was to give "info/documentation regarding brook alteration adjacent to 849 Trout Brook Rd." Ms. Madden was present on both court dates of September 12 and September 24, 2018. However, the Claimants decided not to call Ms. Madden as a witness.

[5] The Defendants had intended to call one witness, Phillip Gibbons, on September 24th, but he decided to leave the courthouse after the court session started as he was not under subpoena.

Review of the Evidence

[6] Claimant Earl Beaton testified during the hearing. He identified the issue as follows: his property has been subject to flooding since the diversion of the stream next to his property line and he wants the Defendants to either fix the problem or pay him $10,000 to do so. I note that at one point in his testimony, the Claimant Earl Beaton stated: "The company who designed the brook are at fault, not the Peaches." He maintained that the Defendant Peaches have tried to resolve the problem by planting trees and putting stones on the Claimants' side of the diverted stream (see Exhibit #2, photos 30-32), but that their efforts are not enough. He testified in cross-examination that the design of the diverted stream was flawed; and that the Defendants should go after Porter Dillon, the engineering company responsible for the design, or pay the Claimants. Claimant Earl Beaton rooted the Claimants' claim against the Defendants in the following excerpt from a letter to the Defendant Peaches from the Nova Scotia Department of the Environment dated October 2, 1997 [see Exhibit #2, pg. 5]:

> It is your duty to advise the Department of any new and relevant information respecting any adverse effect that results or may result from the approved activity, which comes to your attention after the issuance of the approval. This is required under Section 60 of the *Environment Act*.

This material relied upon by the Claimants was acquired after the Claimants filed an application under the *Freedom of Information and Protection of Privacy Act*, 1993, c. 5, s. 1, on July 16, 1999 (see Exhibit #2, pg. 3).

[7] The Claimants' FOIPOP Application of July 16, 1999, set out the following specific request:

> In the fall of 1997, the brook adjoining my property and that of Mr. Douglas Peach was moved to the very edge of my property. I would like to know who allowed this brook to be altered and the reasons for doing so. We've encountered severe flooding and erosion since this time! Please supply all pertinent information in regards to this request along with the people involved in the granting of this alteration.

Thus, the problem related to the alteration of the stream bed was raised by the Claimants as early as July 1999. Prior to that date, the Claimants had their then-lawyer, Wendy Wadden, send a memo to Lawrence MacDonald [1] on August 17, 1998 re: "Flooding of Property owned by Earl and Mary Beaton—Trout Brook Road, Marion Bridge, N.S.—Relocation of Brook by [redacted portion]" (see Exhibit #2, pg. 2) Based on the evidence before me, flooding and erosion have been an alleged ongoing problem since the alteration of the stream.

[8] Claimant Earl Beaton maintained that the Defendants have built up the stream on their side (see Exhibit #2, photos 3-4, 8) diverting an increased volume of water onto the Claimants' property. Defendants' Exhibit #3 shows an aerial overview of the Beaton and Peach properties along the diverted stream.

[1]The reference to Lawrence MacDonald appears to be a reference to the then Acting Manager, Eastern Region, Nova Scotia Department of the Environment: see Exhibit 5, Tab 3, pg. E.

[9] Claimant Earl Beaton indicated, however, that flooding is caused primarily by the alleged 90-degree turn in the diverted stream. During cross-examination, he did not dispute the information detailed in the partial stream relocation plan developed by Porter Dillon Limited in 1997 (see Defendant Exhibit #4). I note that the relocated brook has a rounded, as opposed to a sharp, 90-degree turn.

[10] Defendant Douglas Peach testified during the hearing. He maintained that the Nova Scotia Department of Environment authorized the stream diversion in October 1997 (see Exhibit #5, Tab 3, pg. A). The purpose of the diversion was to "relocate 200 feet of the existing watercourse to a property edge to allow for construction of a dwelling on the property": Exhibit #5, Tab 3, pg. B. In a letter dated September 17, 1997, the Nova Scotia Department of the Environment noted: "Considering the limited amount of work to be done, that the watercourse was likely altered from its original condition and the fact that fish habitat will be provided for in the new channel, there is no objection to the project": Exhibit #5, Tab 3, pg. E. On September 25, 1997, a fax was forwarded to Porter Dillon by the Nova Scotia Department of the Environment recommending approval of the stream diversion (Exhibit #5, Tab 3, pg. D). The approved diversion of the 'unnamed tributary to Mira River' proceeded with all the necessary governmental and environmental approvals.

[11] In his testimony, Defendant Douglas Peach maintained that the elevations on the Peach side and the Beaton side of the stream were equal at the time of diversion, that both sides are in a flood plain: see Exhibit #4. He challenged the Claimants on their lack of remediation work on their side of the diverted stream. Defendant Douglas Peach maintained that when the Mira River rises, it infills both

the Beaton and Peach properties and stops the diverted stream from flowing: see Exhibit #6, Picture Board.

[12] In closing summation, the Claimants indicated that they were not disputing the fact that the Defendants had approval to divert the stream, an unnamed tributary to the Mira River. They argue, however, that the alterations left a bend in the stream and the water cannot make the turn. If there was a stone wall or the like on the Claimants' side of the water course, the Claimants maintain that the water would flow better. This has been an ongoing issue. The Claimants hired a professional landscaper—MJM Landscaping Limited (Exhibit #2, pg. 9)—who advised them that their side of the diverted stream should be three feet higher than it is at present. The Claimants maintain that the Defendants should have notified the Department of the Environment of the overflow, that the engineers at Porter Dillon should have built the Claimants' side of the diverted stream much higher, and the failure of the engineers to have done so is why the Defendants planted trees and placed rocks on the Claimants' side of the water course. In short, the Claimants maintain that the turns put in the altered brook caused flooding and the design should have allowed for the diverted stream to hold water at peak periods of volume. The Defendants, the Claimants submit, should have notified the Nova Scotia Department of the Environment in keeping with the Department's letter of approval to the Defendants dated October 2, 1997. The Claimants' opined that maybe they, the Claimants, should be going after the Department of the Environment.

[13] The Defendants maintain that following the diversion of the stream, they did put additional stone/rock and trees on both sides of the stream and were encouraged to do so by the Nova Scotia Department of the Environment. The

Claimants agree that in 1997-98 they contacted the Defendants and tried to work on mitigation together. The Defendants maintain that the undated photographs submitted by the Claimants, particularly in Exhibit #2, were taken during extreme flooding periods that do not represent the norm. They submit that the Claimants brought land fill onto their property beyond the stream, filling in the wetlands, but doing nothing to mitigate the overflow from the stream along the bank.

[14] The Defendants argued that they built up their side of the diverted stream at a cost of $450.00 whereas the Claimants are maintaining that to buttress their side of the diverted stream would cost $20,000 (see Exhibit 2, pg. 9). The Claimants contend that the flow of the diverted stream causes the flooding, not the backing up of the Mira River into the diverted stream which, itself, is an unnamed tributary of the Mira. There was no expert evidence before this court to support that submission. Claimant Earl Beaton worked as a construction manager with electrical, welding and instrumentation background; and has acquired waste-water certification through the Department of the Environment. Defendant Douglas Peach is a retired Director of Finance. Neither the Claimants nor the Defendants were qualified to give evidence on matters relating to diverted water courses, alleged flood plains or the impact of weather events on either. As noted earlier, the witness subpoenaed by the Claimants from the Nova Scotia Department of the Environment was dismissed by the Claimants without testifying.

[15] As to the alleged failure of the Defendants to report the flooding issue to the Nova Scotia Department of the Environment in keeping with the letter of approval from the Department on October 2, 1997 (see Exhibit #5, Tab 3, pg. A), the evidence before me establishes that the Department of the Environment was aware of the issue based on (1) the evidence of the Defendants that they planted trees and

placed rocks along the Claimants side of the stream with the encouragement of the Department of the Environment; and (2) the evidence of the Claimants in making their concerns known to the Department as evidenced by the memo from their lawyer dated August 17, 1998, to Lawrence MacDonald; and their *Freedom of Information Protection of Privacy Act* application dated July 16, 1999.

DECISION OF THE COURT

[16] This is a case where the foundational facts are not in dispute. In 1997, the Defendants obtained approval from the Nova Scotia Department of the Environment to divert an unnamed tributary of the Mira River that cuts through the bordering properties of both the Claimants and the Defendants. The area of water course diverted approximated 200 feet. Based on the evidence before me, this is the first action brought by the Claimants against the Defendants in relation to flooding that the Claimants allege is the result of the stream diversion. Approximately 20 years and seven (7) months have passed since the stream was diverted. Based on the Claimants' FOIPOP application of July 16, 1999 (see Exhibit #2, pg. 3) and the Memorandum from their then-lawyer Wendy E. Wadden to Lawrence MacDonald dated August 17, 1998, with the subject line: "Flooding of Property owned by Earl and Mary Beaton—Trout Brook Road, Marion Bridge, N.S.—Relocation of Brook by [redacted portion]" (see Exhibit #2, pg. 2), it is clear that the issue before the court today was raised/discovered by the Claimants approximately 19 years and ten (10) months ago.

[17] It appears that by operation of the *Limitations of Actions Act*, S.N.S. 2014, c. 35, the Claimants' action is statute barred. The Defendants did not raise this issue in their defence filed with the Small Claims Court on June 4, 2018. Therefore, I

was prepared to grant the Claimants an adjournment in order to file a response to the Defendants' submission concerning the *Limitation of Actions Act*. The Claimants declined.

[18] Sections 8, 9 and 23 of the *Limitations of Actions Act* (NS) state:

> **8(1)** Unless otherwise provided in this Act, a claim may not be brought after the earlier of
> (a) two years from the day on which the claim is discovered; and
> (b) fifteen years from the day on which the act or omission on which the claim is based occurred.
>
> **8(2)** A claim is discovered on the day on which the claimant first knew or ought reasonably to have known
> (a) that the injury, loss or damage had occurred;
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
> (c) that the act or omission was that of the defendant; and
>
> (d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.
>
> **8(3)** For the purpose of clause (1)(b), the day an act or omission on which a claim is based occurred is
> (a) in the case of a continuous act or omission, the day on which the act or omission ceases; and
> (b) in the case of a series of acts or omissions concerning the same obligation, the day on which the last act or omission in the series occurs.
>
> …
>
> **9(1)** A claimant has the burden of proving that a claim was brought within the limitation period established by clause 8(1)(a).
>
> **9(2)** A defendant has the burden of proving that a claim was not brought within the limitation period established by clause 8(1)(b).
>
> …
>
> **23(1)** In this Section,
> (a) **"effective date"** means the day on which this Act comes into force;
> (b) **"former limitation period"** means, in respect of a claim, the limitation period that applied to the claim before the effective date.
>
> **23(2)** Subsection (3) applies to claims that are based on acts or omissions that took place before the effective date, other than claims referred to in Section 11, and in respect of which no proceeding has been commenced before the effective date.
>
> **23(3)** Where a claim was discovered before the effective date, the claim may not be brought after the earlier of

(a) two years from the effective date; and
(b) the day on which the former limitation period expired or would have expired.

23(4) A claimant may bring a claim referred to in Section 11 at any time, regardless of whether the former limitation period expired before the effective date.

In *Ryan* v. *Moore*, 2005 SCC 38, the Supreme Court of Canada commented on the discoverability rule (at para. 22):

> 22. The discoverability principle provides that "a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence": *Central Trust*, at p. 224.

As noted earlier, the Claimants waited approximately 19 years and ten (10) months to commence an action against the Defendants, well before the 'effective date' of the current *Limitations of Actions Act*—September 1st, 2015. As early as August 17, 1998 (see Exhibit 2, pg. 2), the Claimants maintained that the diversion of the stream caused their property to be flooded repeatedly. By operation of s. 23(2) of the *Limitation of Actions Act*, the Claimants' action should have been dated no later than September 1, 2017. Even taking the outside limitation period of 15 years set out in s. 8(1)(b), the Claimants are outside the limitation period using August 17, 1998—the date of the Memorandum from the Claimants' lawyer to Lawrence MacDonald—as the baseline for calculation.

[19] Though I have dismissed the Claimants' claim on the basis of the Defendants' submissions pertaining to the operation and application of the provisions of the *Limitations of Actions Act* and related jurisprudence, there is also an alternative basis for my dismissal. The common law and equity, as expressed through the so-called doctrine of laches, requires that Claimants bring their claims within undefined yet reasonable periods of time following their discovery. Here,

the Claimants have commenced their claims almost two decades following their original complaints regarding the Defendants alleged activities.

[20] Though statutory in nature and without any true form of inherent jurisdiction, all proceedings in the Small Claims Court are nevertheless governed by general provisions of Section 2 of the *Small Claims Court Act*, R.S., c. 430, s. 1.

> 2. It is the intent and purpose of this Act to constitute a court wherein claims up to but not exceeding the monetary jurisdiction of the court are adjudicated informally and inexpensively but in accordance with established principles of law and natural justice. *R.S., c. 430, s. 2.*

By virtue of Section 2, claims that come before this Court must be brought and maintained according to the principles of law and natural justice.

[21] In the circumstances of this case, I cannot find that it would in any way be consonant with such principles for the Claimants to effectively hold their claim for almost two decades and then attempt to perfect them. Such delay is simply fraught with too much potential for prejudice.

[22] On both bases, then, there are grounds to dismiss the Claimants' case.

[23] The Defendants maintain that the "claimant's actions are not rooted in property damage but rather personal animosity" (Exhibit #5, Tab 4, pg. 1). There is nothing in the evidence before me that supports the contention that the Claimants' case is rooted in personal animosity.

[24] Having reviewed all of the evidence and exhibits before me, and for the reasons set out herein, I am dismissing the Claimants' claim.

[25] There will be no order for costs.

Patricia Fricker-Bates
Adjudicator

November 22, 2018