CV NO. 4660

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

B E T W E E N:

MUNICIPAL CORPORATION OF
THE CITY OF YELLOWKNIFE

Plaintiff

- and -

BEN WOLTERS and BELINDA WOLTERS

Defendants

REASONS FOR JUDGMENT OF
THE HONOURABLE JUDGE THOMAS B. DAVIS
FILED: JUNE 10, 1994

APPEARANCES:

For the Plaintiff: Mr. Neil Jamieson, City Engineer.

For the Defendants: Mr. Ben Wolters appeared in person.

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REASONS FOR JUDGMENT

The City of Yellowknife had replaced about fourteen (14) linear metres of recently poured sidewalk in front of the property of the Defendants, Ben and Belinda Wolters, at civic number 137 Banke Crescent, when the City inspector noticed cracks in the sidewalk which the City Engineering Department believed to have been caused by the passage over the sidewalk of construction equipment that had been hired by the Defendants to remove unwanted large pieces of fill from the Defendants' lot.

The Defendant Ben Wolters acted for himself and on behalf of the other Defendant at a civil trial in this court.

A City engineer, Neil Jamieson, acted for the City of Yellowknife in the prosecution of this claim for $1,650.63, being the cost incurred by the City to replace the sidewalk, which amount is not being disputed by the Defendants. The Defendants deny liability for the claim.

The Defendants acknowledge that the contractor who removed the large chunks, rocks and inappropriate fill from their lot did in

fact drive a payloader across the sidewalk after the contractor had placed a few inches of sand on top of the sidewalk in an effort to avoid damage to the newly installed concrete sidewalk. The sand was pushed or scraped away in spots, allowing the tires of the equipment to make obvious scuff marks on the sidewalk.

The City had originally placed the large rocks and fill on the lot when it was preparing the area for the subdivision and sale of the lots for residential purposes. The City engineer agreed that a payloader would be similar to a tandem truck of gravel on the force applied to a sidewalk when driving on it.

Prior to the laying of the sidewalk, the Defendant Ben Wolters had asked the on-site employees of the firm hired by the City to lay the sidewalk if the installation of the sidewalk in front of his home could be delayed for a few weeks so that equipment which he intended to hire could remove the boulders and unwanted fill from his lot before any new sidewalk was in place.

When this request was not complied with, he then accepted the advice of the on-site City contractor that 95% of the final strength in the sidewalk would occur within 10-14 days from the date of laying the concrete. The excavation contractor hired by the Defendants did not start to pass over the sidewalk before the two week curing period had passed. The Defendant acknowledges that cracks were observed after the contractor had completed the removal of the materials from the Defendants' lot.

EXHIBITS

The Defendants admitted that copies of photos supplied to the court by the Plaintiff show the condition and appearance of the sidewalk in front of his house as it was in August, 1992 after the contractor's equipment had removed the fill for the Defendants. Photograph No. 2 was not accepted as an Exhibit as it was not proven by the Plaintiff.

I also note that the photos, as filed by the City, show heavy construction equipment on and over the sidewalk near the portion being then removed at the direction of the City. If that equipment did not cause cracks in the sidewalk within a few weeks after the Defendants' contractor had driven its equipment over the sidewalk laid by the same pour of concrete, how am I to presume that the excavation contractor's equipment had caused cracking in front of the Defendants' house, unless the installation of that part of the sidewalk was defective when it was first laid?

The Defendant had on many occasions and very regularly observed the original preparation and placement of the base for the new sidewalk, as well as part of the actual pour of the concrete. At no time did he see any compacting equipment of the sub-base for the sidewalk area but had seen the material being dumped in place, graded and then run over and re-graded by only a bobcat, the name used for a light weight and relatively small four-wheel vehicle with a small bucket that works like a payloader. He had observed a steam roller and large tire roller on the road surface but never on the sidewalk area. An inspector who had done compaction tests remembered seeing roller marks on the mine muck and sand that was used for the base of the sidewalk and which satisfied his density compaction specifications.

The tester noted that the tests were done on June 28, a number of days before the sidewalk was poured. He noted that, in the interim, the base could have dried out but was of the opinion that this should not affect its use. He also stated that the tires of a bobcat could mark any base of loose material even after it has been compacted. He agreed with both the Plaintiff and the Defendants that the sub-base for the sidewalk in front of the Defendants' lot was filled to depths of over a foot and more in some spots.

The Defendants did not dispute the results of the compaction tests showing 105% suitability for sidewalk purposes, but does not agree that the testing occurred at the location of the cracking. The tests were performed as is usual in the industry and occurred usually when the inspector observed changes in the type, quality, colour or texture of the material being used as the base, as well as on each street and usually within maximum distances apart as shown on construction specifications.

The City appears not to dispute the Defendants' claim that they had done nothing to break the sidewalk.

When the Defendant Ben Wolters was called as a witness by the City, he stated that there was no compaction equipment associated with the bobcat that placed the material, graded it and ran back and forth over it to construct the base for the sidewalk. He also noted that bobcat tire marks were evident when the equipment, which removes excess materials before pouring the concrete, was in operation. This pouring equipment also has no compaction ability.

The City engineer, Neil Jamison, after observing the cracks in the sidewalk, stated that the location of the cracks indicate a loss of support under the sidewalk on the Defendants' lot side. He acknowledged that he had never observed cracks resulting solely from weight being placed on the concrete, except when some excavation had occurred under the concrete slabs. He also stated that hair line cracks can occur from the drying out of the concrete.

Another resident of Banke Crescent, Terrence Ward, who had observed the work being done for the installation of the road and sidewalk and who had observed the pouring of the concrete, had observed compaction equipment on the road surface both before and after the pavement was in place, but had never seen compaction equipment on the sidewalk area.

VIDEO TAPE

As part of the Defendants' case, the Defendant Ben Wolters showed a video that he had made the summer after the sidewalk and road had been installed. The video showed numerous cracks in the sidewalk at locations other than in front of the Defendant's house, which were explained by the Defendant to be as long, wide and severe as those in front of his house. In some locations of the same sidewalk pour, there appeared to be greater cracking than in front of the Defendant's lot.

The Defendant's calculation showed that three (3%) percent of the whole job showed cracking to have occurred within one year.

STANDARD SPECIFICATIONS

Although the Defendant suggests that the City was aware that the lot owners would be likely to move some of the large boulders from their lots, and therefore should have given the owners time to remove them or have built the sidewalk to a stronger standard in order to support heavy vehicles passing over it, I am satisfied that the City has no obligation to construct sidewalks of greater strength than the municipal construction industry and the municipalities have accepted as a reasonable standard to provide sidewalk service to residential properties, in residential areas.

The City engineer has satisfied me that the standard used by the City was sufficient for this purpose. It was rather unfortunate that the contractor hired by the City would not or could not comply with the Defendant's request to delay the installation of the sidewalk for a short time so that he could have had the boulders removed, as the Defendant had requested prior to the concrete pour.

BALANCE OF PROBABILITIES

Having heard the evidence of the Defendant and having seen the video that he presented in court, I am not satisfied that the City

has proven that the sidewalk that ultimately was cracked so extensively, both in front of the Defendant's residence and elsewhere, was suitably and sufficiently supported by the base that had been installed for that purpose. If the base had been suitable, then I am not satisfied that the City has shown that the concrete that had cracked so extensively was suitable for the purpose for which it was poured.

VICARIOUS LIABILITY

The City's claim, which is made against the Defendants as the property owners of the lot adjacent to the replaced sidewalk, presumes that the owners are liable for the damage done to the sidewalk by either the Defendants or the contractor they had hired to remove excess rocks and boulders from their lot.

If an individual damages another person's property, that individual is usually responsible to restore the property to its original state or to make good the damage that has been done. If the damage has been done by an employee of a person or a company, then the employer can also become responsible for his employee's actions if the acts are within the scope and course of the employment.

If a person hires an independent contractor to perform services, and the contractor does damage or causes injury to another party or the property of another party, the hiring person may in some circumstances become liable for the negligent actions of the hired contractor, his employees, agents and servants. Whether or not the person becomes liable can depend upon the extent of control, authority and direction that person has or exercises over the contractor or the contractor's employees.

DEFENDANT'S CONTROL OF CONTRACTOR

There is very little evidence before me to show the extent of control exercised by the Defendant over his contractor or the

employees who operated any equipment or machinery while removing the boulders from the Defendant's lot.

The Defendant had observed the placement of a few inches of sand on the sidewalk where it was expected the equipment would traverse. There was no evidence to confirm that the Defendant had calculated or approved the amount of the material or gave any directions on how it was to be placed or used for the protection of the new sidewalk.

The Defendant's only direct involvement in the movement of the contractor's equipment appears to indicate that he had inquired about a possible delay in laying the sidewalk and then in directing that no work should be done until after the concrete had time to set, as was advised by persons who were pouring the concrete for the City.

I find that there is insufficient evidence before me to support the view that the Defendant had exercised sufficient dominion over his contractor so as to render the Defendant liable for the negligence (if there was any) of his contractor.

This assessment is in line with the finding of the Ontario High Court in **Centre Town Developments** v. **Gray and Associates Inc.**, 1983, 9 C.L.R. 144.

Even if the Defendant had hired or leased the equipment of the contractor, he would not become vicariously liable without some dominion or control over the operation of the equipment. **Nixon** v. **Robert**, 1983, 59 N.S.R. (2d) 245 and 3 D.L.R. (4) 272, Supreme Court of Nova Scotia, Trial Division.

CONCLUSION

I cannot find that the Defendants had personally caused the damage to or cracks in the sidewalk.

I cannot find that the cracks in front of the Defendants' property were any different from those in other locations, where it appears there had been no heavy equipment passing over the sidewalk.

The cause of the two marks that appear to be breaks in the concrete on the edge of the sidewalk, as shown in Photograph No. 2 of the Plaintiff's exhibits, were not referred to in any of the evidence presented by the Plaintiff, except during the Plaintiff's examination of the Defendant when he denied that any damage to those specific spots were caused by his contractor or himself.

I cannot find the Defendants liable for any damage at those two specific spots. I do not find that the Defendant exercised sufficient control, direction or dominion over his contractor to make the Defendants liable for any damage that was or may have been caused by the negligence of the Defendant's contractor.

In the result, I dismiss the claim. As both parties acted without counsel I see no reason at this time to award costs to either party. I will, however, hear submissions on costs upon ten (10) days notice from either party to the other.

THOMAS B. DAVIS
JUDGE