IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER BETWEEN:

SCOTT BRETON

Plaintiff

- and -

CITY OF YELLOWKNIFE

Defendant

REASONS FOR JUDGMENT

of the

HONOURABLE JUDGE B. E. SCHMALTZ

Heard at:	Yellowknife, Northwest Territories
Trial Date:	October 29, 2009
Judgment Filed:	January 19, 2010
For the Plaintiff:	Scott Breton on his own behalf
For the Defendant:	Kerry Penny

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I. INTRODUCTION:

[1] The Plaintiff seeks judgment against the Defendant in the amount of $1,456.25. In April, 2008, a "sewer line disconnect" occurred on the Plaintiff's property, which the Defendant repaired. Due to the "sewer line disconnect" the Plaintiff claims the following costs:

Deposit Fee paid to the Defendant	$	500.00
Line Steam Fee paid to Pick's Steam Ltd.		131.25
Yard Renovations		300.00
Time lost from work		525.00
	$	1,456.25

[2] The Plaintiff claims that the same or similar situation occurred in 2004, at which time the Defendant issued the Plaintiff a full refund of the costs incurred by the Plaintiff at that time. The Plaintiff relies on the City of Yellowknife Service Connection Failure Assistance Programme – Policy Notification and Registration pamphlet (Exhibit 3), and the previous actions of the Defendant in support of his claim.

[3] The Defendant denies the Plaintiff's claim. Whereas the "sewer line disconnect" that occurred on the Plaintiff's property in April 2008, is admitted, the Defendant relies on the City of Yellowknife By-laws (specific By-laws referred to later) in support of its position.

II. FACTS

[4] In 2004, there was a problem with the sewer line to the Plaintiff's home (29 Horton Crescent). The problem was described to Tracey Breton (the Plaintiff's spouse) by the workers who did the repair on behalf of the Defendant as "a disconnect from the main." At that time the Plaintiff paid a $500 deposit to

the Defendant in order to have the repair done, and also incurred some additional costs associated with the sewer line repair.

[5] After the repair in 2004 was completed, the Plaintiff was refunded $906.60 by the Defendant for costs the Plaintiff had incurred associated with the repair to the sewer line, being: the $500 deductible; the cost of having Picks Steam attend; the cost of "camera-ing" the sewer line; and, the cost of replacing landscaping in the Plaintiff's yard.

[6] In April 2008, Tracey Breton again experienced a problem with the plumbing at 29 Horton Crescent; the problem was similar to the problem encountered in 2004. Thinking that the pipes were frozen, Tracey Breton called Picks Steam who attended and advised Tracey Breton that the problem was with the City line.

[7] In April 2008, Scott Gillard, Assistant Superintendent, Public Works, Water and Sewer Division, with the City of Yellowknife, was contacted by either Picks Steam or Tracey Breton. Tracey Breton testified that in April 2008, after the lines had been "camera-ed", Scott Gillard told her that he had seen the video and that it appeared that it was the same break that the Plaintiff had experienced in 2004.

[8] In April 2008, the Plaintiff again paid the Defendant $500.00 as is required by *Part 14* of *Fees and Charges By-Law No. 4436* (Exhibit #1) and outlined in the procedure section of The City of Yellowknife Service Connection Failure Assistance Programme – Policy Notification and Registration pamphlet (Exhibit #3), hereinafter referred to as the Policy pamphlet. The repairs were completed.

[9] It was determined that the service pipe to the Plaintiff's property had separated from "the main" (the Defendant's/City's main sewer line). This separation was determined to be between the Plaintiff's building foundation and the City mains. Consequently, pursuant to *Part 14* of *Fees and Charges By-Law No. 4436* and the Policy pamphlet, the Plaintiff was entitled to assistance from the Defendant for the repair of the separation of his service pipe from the main. *Part 14* of *By-Law 4436* states that the Plaintiff is responsible for the first $500 and the Defendant will pay the remainder up to $25,000.00; this is also reiterated in the Policy pamphlet.

[10] In the Policy pamphlet, under the heading **Procedure**, section 8(a) states:

> 8(a) Where it is determined by the City that the City is the cause of the failure or interruption in service, then the deductible [the $500] shall be returned.

[11] The following questions in reference to the cause of the problem encountered by the Plaintiff were put to Scott Gillard, and he gave the following answers:

Q. … there was a problem experienced at … 29 Horton Crescent in 2004 and another problem experienced in 2008. Do you have any knowledge of why there might be more problems or any knowledge of a specific problem that's occurring at Horton Crescent?

A. Other than frost action, there are [sic] different frost movement. Horton Crescent has been a known area of different frost actions so the City can't control ground movements and mother nature per se.

…

Q. And how does the City make a determination that the City would be the cause of the failure or an interruption to service.

A. Basically that determination would be made once the excavation is open and if per se like in the case of a water system if the leak was determined to be actually a part of the main then the deductible would be refunded from there.

…

Q. … Can you just describe to me what constitutes a poor service connection? … Is it a discovered separation in the line as you're ---

A. It could be a joint in the pipe that's actually separated due to settling. It could be an improper installation where a gasket has rolled. It could be a number of different things. Poor connections are usually caused by grading issues that have settled or twisted because of frost action, frost heaving.

…

Q. Another statement just in general terms again is that you didn't feel it was appropriate for the incident in 2008 to be assessed as being a City problem. So again it came down to your personal decision as to where the problem, actually who it lay [sic] with, being myself as the resident – is that correct?

A. Yes. The problem upon excavation was found to be the service had disconnected beyond the connection at the City main.

…

Q. … so if that's the description of the problem in '04, what's the difference between '04 and '08?

A. As for the separation itself, they were very similar.

…

Q. And are you able to say what caused this [the break between the service pipe and the main]?

A. Definitely, no.

Q. … do you have an opinion ---

A. It's my opinion that there was settling or movement within the service pipe due to frost issues within the ground. Horton Crescent is a known area where frost movement does occur. And from the video, I do believe it indicated some back grading which indicated a settlement further upgrade which would have caused the separation at the City main.

Q. Are you satisfied that the problem was not caused by the owner?

A. … Yes, I don't believe the owner caused the problem. I believe it was done through frost action.

[12] The following questions in reference to the return of the deductible were put to Scott Gillard, and he gave the following answers:

Q. And if a person or resident qualifies under the program and pays the $500 deductible to register a claim, is there ever a time when that's refunded back to that client or resident?

A. No. There has been a couple of instances where we've made mistakes with leak detection for water line leaks that we had determined were originally on a resident's service but they were determined to be in a connection, a joint, a bend within the City main. At that point in time I did refund the deductibles but that's [sic] the only ones that I know of.

Q. So when you say – when you refer to that, you're saying that if it was a problem with the main?

A. Yes, it was an actual leak on the physical joint within the main itself, not the service connection.

…

Q. Now you had said that the $500 would be refunded if there was a leak on the joint. Am I right on that?

A. The only cases that it has been refunded is when it's become in the case of water service … on a couple of cases our leak detection equipment has indicated the leak to be on the service. We went through the process, …but in actual fact when we did the excavation we found it to be on one of the circular pipe joints basically or on a bend in the pipe, not on the actual service itself, so it ended up being a couple of metres away from or original detection and then I did refund the deductible.

…

Q. And when you determine the cause, does that affect whether a customer is responsible for payment of the $500 deductible or non-payment of the $500 deductible?

A. Cause per se if it was, yes, if it was 100 percent determined that there was an issue, an outside issue that caused the problem within the service, then it would be waived, the deductible would be waived. … If there was an outside cause, like if there was a known cause during construction depending on of course that would also fall into a warranty period or if there was an outside damage that may have caused it.

Q. And based on your quick review of the file [2004 file re damage to the Plaintiff's property] would you have applied the policy and required the $500 deductible to be paid?

A. I believe I would of [sic]. I believe it was an assumption of behalf of the contractor that did the repair on behalf of the City at that time.

The Court: What was the assumption?

A. They assumed it was movement within one of the City mains – I can't remember exactly how it was written – which caused the separation. But at that point in time there was no engineering done to say either way. If I'm remembering correctly. I only reviewed the file briefly.

…

Q. If this situation had arisen within two years of the 2004 repair, would the City have – would you have, being that it's your call, it's somewhat discretionary -- … But would you have decided to refund the deductible?

A. In this instance? Possibly. Because of the familiarity of the repair.

III. ISSUE

[13] The only issue in this case is whether or not the Defendant is responsible or liable to the Plaintiff for the costs incurred by the Plaintiff due to the "sewer line disconnect". As the trial unfolded, it was apparent that there is no dispute with respect to the fact of the "sewer line disconnect", or the costs that were incurred by the Plaintiff. There may have been an issue as to whether or not the Defendant had in fact reimbursed the Plaintiff for a similar "sewer line disconnect" in 2004. I am satisfied based on the evidence of the Plaintiff and of Tracey Breton, and the copy of the Defendant's cheque dated July 22, 2004, payable to the Plaintiff, that the Defendant did in fact reimburse the Plaintiff at that time in the amount of $906.60.

IV. DISCUSSION and ANALYSIS

[14] Section 201(1) of City of Yellowknife *By-law No. 3607* states:

> (1) Customers, who comply with the provisions and requirements of this By-Law, shall be entitled to assistance for service pipe failures between the customer's building foundation and the City mains.

Section 210(1) states:

> (1) Customer's [sic] are required to pay to the City customer portion of payment for work as set out in the Fees and Charges By-law or any successor by-law.

[15] Part 14 of *By-law No. 4453*, which amends *By-law 4436* (Consolidation of *Fees and Charges By-law*), sets out the Service Connection Failure Assistance Program Fees, specifically the portion of payment for which the Customer is responsible:

> All costs up to and including the first $500.00 and any and all costs over $25,000.00

[16] The relevant portions of the Policy pamphlet are as follows:

> **OUTLINE OF POLICY**
>
> A municipal services customer of the City of Yellowknife … is entitled to assistance for the repair cost of *a service pipe failure between the customer's building foundation and the City mains*. (my emphasis)
>
> The customer is responsible for repair costs up to the amount actually incurred or $500.00, whichever is less.
>
> All customers pay a small fee on their monthly water bills to cover the costs of this program. …
>
> …
>
> The Service Pipe Failure Assistance Program only deals with *service pipe repairs* and excavation and backfill related to the work. (my emphasis)

> Costs associated with the repair of lawns, driveways, … personal property, … trees, … plants and other losses, expenses or damages are outside the program and are to be borne by the customer. …
>
> **PROCEDURE**
>
> …
> 7. If the failure is between the main and building foundation, the Department of Public Works will arrange for and conduct the necessary investigations and repairs once the deductible is paid. …
>
> 8.(a) Where it is determined by the City that the City is the cause of the failure or interruption in service, then the deductible shall be returned.
>
> (b) Should investigation and repairs cost less than the $500 deductible, the remainder shall be returned.
>
> (c) If the investigation and repair cost is greater than $500 then the deductible shall be retained by the City and the City shall pay for the remainder of the investigation and repair up to a maximum of $15,000, as per Clause 210.(1) of the Service Connection Failure Assistance By-law.
> …
> Subject to the above, any repair work previously paid for by the customer which is directly related to a service failure covered by the program, as determined by the City, is also recoverable under the program. Receipts are required for previously paid work.
> …

[17] In reviewing Scott Gillard's testimony in this case, it is apparent that Scott Gillard's view is that if the problem is on the service pipe, as opposed to the City main, then the $500 paid by the customer will not, in any circumstances, be refunded. If the problem is determined to be on the City main, then the $500 paid by the customer will be refunded.

[18] The difficulty I have with this interpretation of the Defendant's policy set out in the Policy pamphlet is that if the problem is determined to be on the City main, then the policy has no application, i.e. the Service Pipe Failure Assistance Program only deals with service pipe repairs. The customer is not responsible for repairs to the City main. It cannot be that the policy is that the City will return the $500 to the customer if it is determined that the customer was not responsible for the repair in the first place. That would go without saying. No policy would be required to say that was the case, and therefore would mean that section 8(a) set out in the Policy pamphlet has no meaning.

[19] In this case Scott Gillard testified that he could not definitely say what the cause of the failure or break in the service line was; it could have been due to settling, an improper installation, grading issues due to frost action or frost heaving. In his opinion there was settling or movement within the service pipe due to frost issues within the ground. He testified that as far as he could tell, the problem encountered by the Plaintiff in 2008 was very similar to the problem encountered in 2004. He was satisfied that the problem was not caused by the Plaintiff.

[20] I am satisfied from the evidence and the pictures that it is a reasonable inference to conclude that the cause of the problem encountered by the Plaintiff in 2008 was the same or very similar to the cause of the problem encountered by the Plaintiff in 2004. In 2004, the Defendant refunded the $500 deposit or deductible to the Plaintiff, and also reimbursed the Plaintiff for other costs incurred. There is no evidence as to why the other costs incurred by the Plaintiff in 2004 were reimbursed. I find that it is a reasonable inference to conclude that the $500 deductible was refunded to the Plaintiff in 2004 in compliance with the Defendant's policy, i.e. that it was determined by the City that the City was the cause of the failure or interruption in service.

[21] Scott Gillard was of the opinion that the refund in 2004 was not done in compliance with the policy as he interprets the policy. However, as I said earlier Scott Gillard's interpretation of the policy for refunding the deductible leaves that policy meaningless, i.e. Scott Gillard will only refund the deductible when it is determined that the Service Pipe Failure Assistance Program has no application to the situation and the deductible never should have been paid in the first place. To say that the Program is not applicable is not *a determination by the City that the City is the cause of the failure*, it is a determination that the cost of the repair was not the responsibility of the customer in the first place. Consequently, I find that Scott Gillard's interpretation of the policy is flawed.

[22] Being that it cannot now be determined by the City what the cause of the failure of the connection was, and the fact that I have found that the interpretation of the City's policy by Scott Gillard cannot stand, I find it reasonable to consider the similarity of the problem encountered by the Plaintiff in 2004 and the problem in 2008. Scott Gillard testified that the separation of the service pipe from the main was very similar in both instances; he also testified that if the problem encountered by the Plaintiff in 2008 had been within 2 years of the 2004 problem, he may have refunded the $500 paid by the Plaintiff.

[23] At least with respect to the refunding of the $500 to the Plaintiff in 2004, I find that this was done as it was determined at that time by the City that the City was the cause of the failure in service. Scott Gillard alluded to this when he testified that when he reviewed the 2004 file, one of the contractors who did the repair at that time "assumed" that the cause of the problem was movement within one of the City mains. This leads me to find that even when the break is on the service line, it could still be that the cause of the failure was the City, as certainly appears to be the case with respect to the 2004 break which resulted in the refund of the Plaintiff's $500.

[24] I find being that the policy in 2008 was the same as the policy in 2004, and that Scott Gillard's interpretation of the policy is flawed, it is only fair and reasonable considering the similarity of the situations that the Plaintiff should be refunded the $500 deposit paid to the Defendant in 2008.

[25] With respect to the landscape costs claimed by the Plaintiff, I find no basis for the Defendant being responsible for those, and in fact the City's Policy pamphlet specifically states that such costs will not be covered by the City and "are to be borne by the customer." Though I accept that the Plaintiff was reimbursed for these damages in 2004, I cannot find any basis for that course of action, and therefore dismiss that portion of the Plaintiff's claim.

[26] With respect to the Plaintiff's claim for the $131.25 paid to Pick's Steam Ltd. The invoice from Pick's Steam Ltd. indicates that the charge was to "Thaw Sewer Line." From the evidence on this trial, it is not clear to me that the Plaintiff's pipes were not frozen in April 2008, and certainly the invoice would lead me to believe that the pipes were frozen. The Policy pamphlet indicates that repair work paid for by the customer which is directly related to a service failure covered by the program is also recoverable under the program. I am not satisfied that the frozen sewer lines were directly related to the service failure and would therefore be covered by the program, and consequently this portion of the Plaintiff's claim is also dismissed.

[27] With respect to the Plaintiff's claim for $525.00 for time lost from work, the evidence of the Plaintiff was that this loss of time from work related to the time he spent preparing for this case, and was not time lost due to the problem encountered due to the service failure in the pipes. As such, this amount is more appropriately claimed as costs rather than damages.

V. CONCLUSION

[28] The Plaintiff's claim is allowed in part. The Plaintiff's claim against the Defendant of the $500 deposit fee to the Defendant in April 2008, is allowed; the claim for reimbursement of $131.25 paid to Pick's Steam Ltd. is dismissed; the claim for $300 for yard renovations is dismissed. The claim for $525 for time lost from work is dismissed as a claim for damages. Judgment shall be entered for Plaintiff against the Defendant in the amount of $500.00.

Costs

[29] Section 2(1) of the Territorial Court Civil Claims Rules states:

> 2(1) The territorial judge shall hear and determine in a summary way all questions of law and fact and may make such order or judgment, including an order as to costs, as appears to him or her to be just and equitable.

[30] As the Plaintiff's claim has been allowed in part, and I did not hear of any offer made by the Defendant to settle this case in any manner, costs will be awarded to the Plaintiff.

- The Plaintiff will be allowed all disbursements paid by the Plaintiff arising from the filing of this action and service of any documents. Such amount to be determined by the Clerk upon reviewing the Court File.
- As the Defendant denied that any refund was issued to the Plaintiff in 2004, the Plaintiff shall also be awarded the $25.00 paid by Tracey Breton to obtain a copy of the cheque issued by the Defendant to the Plaintiff in July 2004.

[31] In addition to the disbursements set out above, I find it just and equitable in all of the circumstances to award the Plaintiff costs in bringing this action against the Defendant, in the amount of $350.00.

Bernadette E. Schmaltz
Territorial Court Judge

Dated at Yellowknife, Northwest Territories
this 19th day of January, 2010

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