

KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 1**

Date: **2024 01 02**
Docket: QBG-SA-00348-2019
Judicial Centre: Saskatoon

BETWEEN:

DARREN COOK

PLAINTIFF

- and -

ROBERT RISLING and LOST RIVER WATER CO. LTD.

DEFENDANTS

Counsel:

Glenn A. Wright
Stuart A. Busse, K.C.

for the plaintiff, Darren Cook
for the defendants, Robert Risling and
Lost River Water Co. Ltd.

JUDGMENT
January 2, 2024

R.S. SMITH J.

Introduction

[1] In 2019, the plaintiff commenced an action against the defendants with respect to a dispute they were having regarding the defendants' supply of water to the plaintiff's home in Mission Ridge, Saskatchewan, a small community outside of Saskatoon.

[2] The defendant, Lost River Water Co. Ltd. [Lost River] is a corporation

created to provide water to the homes in the Mission Ridge area. The defendant, Robert Risling [Risling] is a director and officer of Lost River.

[3] The crux of the plaintiff's claim is that water provided by Lost River is not sufficiently pressurized and, in addition, the lack of pressurization creates or may create health and safety hazards which would place Lost River offside with the Water Security Agency [WSA]. The WSA is the provincial regulator of Lost River and others in the water supply business.

[4] The defendants have brought a notice of application seeking:

- (1) an order for Summary Judgment dismissing the claim of the plaintiff in its entirety, and the costs of this application.

Suffice it to say, the plaintiff vigorously resists.

Background

[5] All of the parties believe that there was a contract signed sometime in 2008 between Lost River and the plaintiff, whereby Lost River agreed to supply water to the plaintiff. However, neither party can produce a copy of the contract.

[6] The defendants assert that the contract did not require it to supply a minimum volume of water or any particular PSI (pounds per square inch) flow rate. As to health and safety, the WSA is constantly monitoring the system to ensure the water is safe.

[7] There were no issues between the parties until May 2016 when the plaintiff contacted Lost River to complain about low pressure or "low flow".

[8] Lost River attended the plaintiff's home to check the water system and no anomalies were found in the Lost River system. However, Lost River discovered

that the plaintiff had installed a water bypass device on the water supply line into his basement. This allowed the plaintiff to obtain an unrestricted flow of water which he may have regarded as improving the water pressure. However, the bypass device also resulted in the plaintiff receiving water that did not pass through a meter and, therefore, no charge was recorded.

[9] From that point, the relationship between the plaintiff and the defendants began to deteriorate rapidly. In due course, Lost River ceased to supply water to the plaintiff.

[10] As noted, in 2019 the plaintiff commenced a claim with respect to the lack of what it regarded as adequate pressure and with respect to water safety.

[11] The claim metastasized into other allegations against Risling, namely, malicious prosecution, intentional infliction of emotional harm, abuse of process, as well as an allegation of negligence against Lost River alleging that they had a duty of care to the plaintiff and that they had breached it, giving rise to damages.

Germane Rules

[12] Rule 7-9(1) and (2) of *The King's Bench Rules* deals with applications to strike and the defendants invoke it.

[13] Alternatively, the defendants say that the plaintiff's claim is so manifestly ill-founded, that the Court can also bring an analysis based on summary judgment. In other words, it invites the Court to review the plaintiff's claim and dismiss it, out of hand. That request raises the issue of "is summary judgment appropriate in this case?"

[14] Rule 7-5(1) and (2) of *The King's Bench Rules* govern applications for granting summary judgment. That Rule provides:

Disposition of application

7-5(1) The Court may grant summary judgment if:

- (a) the Court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
- (b) the parties agree to have all or part of the claim determined by summary judgment and the Court is satisfied that it is appropriate to grant summary judgment.

(2) In determining pursuant to clause (1)(a) whether there is a genuine issue requiring a trial, the Court:

- (a) shall consider the evidence submitted by the parties; and
- (b) may exercise any of the following powers for the purpose, unless it is in the interest of justice for those powers to be exercised only at a trial:
 - (i) weighing the evidence;
 - (ii) evaluating the credibility of a deponent;
 - (iii) drawing any reasonable inference from the evidence.

[15] In *Tchozewski v Lamontagne*, 2014 SKQB 71 at para 30, [2014] 7 WWR 397, Barrington-Foote J. (as he then was), summarized the process for applying summary judgment rules:

[30] The central question posed on a Rule 7-2 application, accordingly, is whether summary judgment will achieve what Karakatsanis J. calls (at para. 28) the “principal goal”, and Popescul C.J.Q.B calls “the overarching consideration” (at para. 49, *Pervez* [2013 SKQB 377, [2013] 12 WWR 794]): that is, a fair process that results in a just adjudication of the dispute before the court. The answer to this question calls for an analysis of the affidavit and other evidence presented and the issues raised by the application, in the context of the litigation as a whole. In *Hyrniak* [2014 SCC 7, [2014] 1 SCR 87] Karakatsanis J. breaks that analysis down into discrete steps and key principles — a “roadmap” — based on the various elements of the summary judgment rules. In brief, the key elements of that roadmap, in the context of a Rule 72 application, are as follows:

1. The court must first decide if there appears to be a genuine issue requiring a trial within the meaning of Rule 7-5(1)(a), based solely on the evidence before the court, and without using the powers provided by Rule 7-5(2)(b) to weigh the evidence, evaluate credibility and draw inferences. (*Hryniak*, para. 66)
2. There will be no genuine issue requiring a trial if the judge is able to reach a fair and just determination on the merits based on the affidavit and other evidence. That will be so if the summary judgment process:
 - (a) allows the judge to make the necessary findings of fact;
 - (b) allows the judge to apply the law to the facts; and
 - (c) is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial. (*Hryniak*, para. 49)

...

[16] I am confident that the material before me allows me to meet the three goals, as articulated above, and, therefore, I conclude a summary judgment analysis is appropriate.

Analysis

[17] The plaintiff has spent considerable time reading the regulations administered by the WSA, which has also been a target of the plaintiff's ire.

[18] In a related action, *Cook v Water Security Agency*, 2023 SKKB 268 [Cook], the plaintiff sought an order in the nature of *mandamus* requiring the WSA to enforce its regulations against Lost River with respect to a minimum water pressure (PSI), as well as health and safety protocols.

[19] In essence, the plaintiff says from his reading of the regulations there

must be a minimum water pressure of 14 PSI. In *Cook*, the WSA, through its officer, Lee Reinhart, answered the plaintiff's allegation. Paragraphs 19 and 20 from *Cook* contain Mr. Reinhart's explanation:

[19] Lee Reinhart is an environmental project officer who has worked for the Government of Saskatchewan since 2006. Currently, he works in that role under the environmental and municipal management services division of WSA. At paragraphs 2 and 3 of his affidavit sworn March 19, 2021 he outlined his role:

2. Part of my mandate is to carry out the regulatory functions of the WSA with respect to the Mission Ridge Development ("Mission Ridge") water Distribution System since it was originally developed, and as such, I have personal knowledge of the matters and facts herein deposed to except where stated to be on information and belief and where so stated I verily believe the same to be true.

3. Amongst its many functions, the Water Security Agency acts as the regulator of waterworks Distribution Systems in Saskatchewan. The WSA issues permits to construct waterworks, permits to operate waterworks, and conducts inspections of these systems, at a minimum, on an annual basis. This power has been conferred on the WSA by the Minister responsible for the WSA pursuant to the powers under the Environmental Management and Protection Act, 2010, SS 2010, c E-10.22 (EMPA, 2010).

[20] At paragraphs 11 – 25 of the affidavit Mr. Reinhart helpfully outlines the regulatory environment within which Lost River operates. He avers:

11. None of the applications or permits made with respect to the Mission Ridge Pipelines included any pressure requirements. Only a design flow rate is included in any of the applications or regulatory approvals.

12. Systems with low flow rates, such as the Mission Ridge system, are typically referred to as "trickle

systems” and are designed to deliver water to small/rural communities. As a result of the low flow rates and other design parameters, such as pipeline length, it is impractical to design these systems with pressure requirements.

13. Instead, trickle systems are designed only to deliver a low rate of flow into a user’s cistern. In residential homes, a cistern will typically be located in the basement and the user will then pump and pressurize the water to the various taps throughout the home at a pressure that they desire. There are no regulatory pressure requirements on a user’s property.

14. As mentioned earlier, the governing regulations have changed since the Pipeline was constructed. At the time of construction, waterworks such as these fell under the jurisdiction of the Ministry of Environment pursuant to *EMPA, 2002* and *The Water Regulations, 2002*, RRS c E-10.21 Reg 1 (the “*2002 Regulations*”).

15. The initial permits that were issued prior to the change in governing regulations stated that the Mission Ridge Pipeline was to comply with *2002 Regulations*.

16. Section 24 of the *2002 Regulations* required waterworks to conform to the design standards within the *Guide to Waterworks Design*, EPB 201 (“EPB 201”). EPB 201 is a document authored by the WSA and the Ministry of Environment, and it contains numerous pieces of design information and standards for water supply, treatment, storage, and Distribution Systems.

17. EPB 201 addresses pressure in the design of water Distribution Systems, but does not address operations. With respect to small water Distribution Systems, EPB 201 also differentiates between systems designed with fire protection and systems designed without fire protection. A system designed with fire protection is one that is designed with sufficient pressure to help fight a fire. Not all systems need to, or should be designed with fire protection.

18. For those systems that are designed without fire protection, the only requirement in EPB 201 with respect

to pressure is that the system be designed on the basis of hydraulic requirements with due regard for potential future maintenance needs. In other words, according to EPB 201, small systems designed without fire protection are only designed for flow rates based on the design demand of the system's users, with consideration for future maintenance.

19. There are no quantitative design pressure requirements (e.g. a certain number of pounds per square inch of pressure or "psi") in EPB 201 for systems without fire protection.

20. Together, the Mission Ridge Pipelines are a small system that was not designed for fire protection. It was designed only to deliver a certain flow rate (16 gallons per minute) that could accommodate a total of 46 residential homes. It was not designed to deliver water at any particular pressure.

21. As stated, EPB 201 does not address pressure during operations. Equally, neither the PTO's nor the *2002 Regulations* contain any pressure standards for the operation of small water distributions systems without fire protection (e.g. the Mission Ridge Pipelines). Typically, standards involving pressure in small systems, if there are any, will only apply to the design phase.

22. As I have indicated, the governing regulations have changed since the Mission Ridge Pipelines were constructed in 2007 and 2008. *EMPA, 2010* replaced *EMPA, 2002* and the *Waterworks and Sewage Works Regulations, 2015*, RRS c E-10.22 Reg 3 (the "*2015 Regulations*") replaced the *2002 Regulations*. As I stated, the PTO of 2016 was altered to take this change into account.

23. Section 19 of the *2015 Regulations* states that a permittee must design any new, upgraded, altered or extended waterworks in accordance with the *Waterworks Design Standard, EPB 501* ("EPB 501"). This document was authored by the WSA and effectively replaces EPB 201. Like EPB 201, it contains design

information and standards for water supply, treatment, storage, and Distribution Systems.

24. EPB 501 specifically states that it does not apply to small rural systems. The Mission Ridge Pipelines, therefore, do not fall under any of the standards as set out in EPB 501.

25. EPB 501 references another document, the *Water Pipeline Design Guidelines*, EPB 276 (“EPB 276”). EPB 276 is not adopted by the *2015 Regulations*; it is not a standard, it does not contain requirements for water Distribution Systems, and does not impose any obligations on permittees.

[20] With the greatest of respect to the plaintiff, Mr. Reinhart’s conclusions respecting the regulatory framework is more convincing than the case advanced by the plaintiff. In addition, Mr. Reinhart’s conclusions are consonant with my, admittedly less sophisticated, understanding of the regulatory framework. In sum, I adopt the position of Mr. Reinhart and reject that of the plaintiff.

[21] The plaintiff’s claim against Lost River seeks the following remedy:

27. An order of judgment against the defendant Lost River in negligence or for breach of contract for the following:
 - (a) a declaration that Lost River’s water supply system does not meet the minimum standards under the Act;
 - (b) suspending Lost River’s rights to transport and sell residential water until such time as it is able to comply with its obligations under the Act;
 - (c) requiring Lost River to remediate, source and install such equipment as necessary to provide water to the plaintiff’s residence in accordance with the Act;
 - (d) damages in the amount of \$250,000 or such an amount to be proven at trial;
 - (e) costs of this action;

- (f) interest; and
- (g) such further and other relief as counsel will request and this Honourable Court deems fit to grant.

[22] The problem the plaintiff has is that he is unable to produce any contract demonstrating that Lost River is obligated to provide a specified PSI. To the extent there is meaningful evidence, it is from the regulator, WSA, whose officer avers that there is no minimum PSI required.

[23] With respect to the issue of water safety, the plaintiff is unable to produce any evidence indicating that there is any concern with respect to water quality. In short, the evidentiary cupboard is bare.

[24] The defendants assert that the core of the plaintiff's claim is his complaint with respect to the PSI and water safety issues, and he is unable to produce any evidence on either issue. It should follow that the entire claim should be struck.

[25] With respect, I do not believe it is that simple. There are other allegations in the claim which do not turn on the issue of PSI or water quality. If the plaintiff wishes to pursue those, he may.

[26] However, with respect to the remedies sought in paragraph 27(a) to (g), I conclude that summary judgment, in the nature of summary dismissal of the claim, is appropriate and warranted.

[27] As the balance of the claim may proceed, I will award costs in this application as costs in the cause.

J.
R.S. SMITH