

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE PUBLIC UTILITIES ACT

- and -

IN THE MATTER OF A COMPLAINT filed by **ALINE FINEBERG** against the **Halifax Regional Water Commission** concerning water consumption and billing.

BEFORE: Stephen T. McGrath, LL.B., Member

COMPLAINANT: **ALINE FINEBERG**

RESPONDENT: **HALIFAX REGIONAL WATER COMMISSION**

FINAL SUBMISSIONS: June 10, 2020

DECISION DATE: **June 24, 2020**

DECISION: The Board has the jurisdiction to extend the time to appeal an order of the Dispute Resolution Officer under Halifax Water's *Regulations* and approves an extension of the appeal period in this case.

1.0 INTRODUCTION

[1] Aline Fineberg is a customer of the Halifax Regional Water Commission. In the fall of 2019, there was a significant spike in her recorded water consumption, and a corresponding significant increase in her water bill for the period. Ms. Fineberg cannot identify anything that would have caused her to use significantly more water than normal and said that the issue disappeared on its own. Ms. Fineberg's water meter was tested by Halifax Water and found to be fine.

[2] On January 20, 2020, Ms. Fineberg initiated a complaint, via telephone, with the independent Dispute Resolution Officer appointed under Halifax Water's *Schedule of Rates, Regulations & Regulations for Water, Wastewater, and Stormwater Services (Regulations)*. The Dispute Resolution Officer issued a decision on March 18, 2020, finding that Ms. Fineberg received water from Halifax Water as per the meter readings and that Halifax Water had not violated its approved *Regulations* during the provision of service. The Dispute Resolution Officer issued an order disallowing the complaint and directing the customer to pay her water bill.

[3] Under s. 78I(2) of the *Regulations*, an order issued by the Dispute Resolution Officer is binding on the complainant and Halifax Water. Section 78J(1) of the *Regulations* permits either party to appeal to the Nova Scotia Utility and Review Board within 30 days.

[4] Ms. Fineberg filed an appeal with the Board on June 2, 2020. The appeal was filed 76 days after the date of the Dispute Resolution Officer's decision and order. Ms. Fineberg acknowledged that the appeal was filed later than 30 days but said that she had been dealing with several other issues relating to the COVID-19 pandemic.

[5] Halifax Water submitted that its *Regulations* are mandatory and binding. It said that an appeal must be filed within 30 days, and if it is not, the Board does not have the authority to extend the appeal period. Halifax Water also said that the Board's ability to investigate or inquire into matters relating to Halifax Water under the *Public Utilities Act*, R.S.N.S. 1989, c. 380, may only be invoked when no other avenues are available for the investigation or inquiry, or when the Board suspects neglectful, illegal, unreasonable or unjustly discriminatory behavior. Halifax Water said that neither condition for invoking these powers exists in the present appeal.

[6] The Board finds that it has the jurisdiction to extend the appeal period in Halifax Water's Board approved *Regulations*. In the circumstances of the present case, the Board also finds that it is appropriate to exercise its discretion to extend the appeal period and accepts the present matter as a validly constituted appeal.

2.0 ISSUE

[7] Does the Board have the jurisdiction to extend the appeal period under Halifax Water's *Regulations*, and if so, should it exercise its discretion to do so in the present case to permit this appeal to proceed?

3.0 BACKGROUND

[8] Ms. Fineberg lives in the South end of Halifax and has been in the home she currently occupies for more than 25 years. The house itself is about 125 years old. She receives water service from Halifax Water.

[9] Ms. Fineberg was told by Halifax Water that it had observed a dramatic increase in her consumption of water in the Fall of 2019. Compared to a normal consumption of 112 litres per day, Halifax Water noted water consumption of 9,684 litres

per day. Ms. Fineberg said that the problem seems to have corrected itself because her rate of water consumption returned to lower levels without her doing anything. The period of abnormally high consumption spans from late October to the middle of December.

[10] On September 27, 2019, shortly before the spike in consumption occurred, Halifax Water replaced Ms. Fineberg's water meter with an Automated Meter Infrastructure (AMI) meter. Halifax Water removed and tested the AMI meter on January 13, 2020, and the meter appeared to pass testing at that time.

[11] Ms. Fineberg now has a water bill that is extraordinarily high, and she is at a loss to understand how she could have consumed that much water. She does not have children living with her and says that she does not own higher water consuming devices such as a dishwasher or washing machine. She had a plumber inspect the property, but he found no evidence of any leak.

[12] Ms. Fineberg contacted the Dispute Resolution Officer appointed by Halifax Water under its *Regulations*. After an investigation, the Dispute Resolution Officer issued a decision on March 18, 2020, finding that the property received water from Halifax Water as per the meter readings and that Halifax Water had not violated its approved *Regulations* during the provision of service. The decision letter noted that Ms. Fineberg had 30 days to appeal to the Nova Scotia Utility and Review Board. On the same date, the Dispute Resolution Officer issued an order disallowing the complaint and directing the customer to pay the high water consumption invoices.

[13] Ms. Fineberg, by way of a letter dated June 1, 2020, filed an appeal with the Board on June 2, 2020.

4.0 ANALYSIS

[14] The Board is a creature of statute, and as such, obtains its jurisdiction from its enabling legislation. The Board may exercise only those powers that are expressly or implicitly conferred on it by statute (*East Hants (Municipality) v. Nova Scotia (Utility and Review Board)*, 2020 NSCA 41, para. 34-38).

[15] The Board's jurisdiction and powers under the *Public Utilities Act* are determined in accordance with the modern principle of statutory interpretation that "[t]he words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the legislation, the object of the legislation, and the intention of legislator (*Rizzo & Rizzo Shoes Ltd.(Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, para. 21). In addition, s.116 of the *Public Utilities Act* states:

Interpretation and construction of Act and powers of Board

116 (1) This Act shall be interpreted and construed liberally in order to accomplish the purposes thereof, and where any specific power or authority is given the Board by the provisions of this Act, the enumeration thereof shall not be held to exclude or impair any power or authority otherwise in this Act conferred on the Board.

(2) The Board hereby created shall have, in addition to the powers in this Act specified, mentioned and indicated, all additional, implied and incidental powers which may be proper or necessary to carry out, effect, perform and execute all the said powers herein specified, mentioned and indicated.

(3) A substantial compliance with the requirements of this Act shall be sufficient to give effect to all the rules, orders, acts and regulations of the Board, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto.

[16] Section 18 of the *Public Utilities Act* charges the Board with the general supervision of public utilities. In respect of the rates and charges of a utility, the Board has, subject to the objects and purposes of the *Act*, the ability to make such orders as it deems just, and the ongoing ability to amend or rescind those orders, and to replace them with new ones:

Orders by Board respecting rates and charges of utility

44 The Board may make from time to time such orders as it deems just in respect to the tolls, rates and charges to be paid to any public utility for services rendered or facilities provided, and amend or rescind such orders or make new orders in substitution therefor.

[17] The statute also provides the Board with a broad authority to investigate or inquire into complaints made by customers against public utilities under the *Public Utilities Act*. Section 19 authorizes the Board to investigate rates, charges, services or any other matter relating to any public utility under the *Act*.

19 Whenever the Board believes that any rate or charge is unreasonable or unjustly discriminatory, or that any reasonable service is not supplied, or that an investigation of any matter relating to any public utility should for any reason be made, it may, on its own motion, summarily investigate the same with or without notice. [Emphasis added]

[18] Under s. 83 of the *Act*, the Board must make such investigation as it deems necessary or expedient when certain complaints are made against a public utility by a municipal corporation or any five persons, firms or corporations:

83 (1) Upon complaint made to the Board against any public utility by any municipal corporation or by any five persons, firms or corporations, that any of the rates, tolls, charges or schedules are in any respect unreasonable or unjustly discriminatory or that any regulation, measurements, practice or act whatsoever affecting or relating to the operation of any public utility is in any respect unreasonable, insufficient or unjustly discriminatory or that the service is inadequate or unobtainable, the Board shall proceed, with or without notice, to make such investigation as it deems necessary or expedient, and may order such rates, tolls, charges or schedules reduced, modified or altered, and may make such other order as to the modification or change of such regulation, measurements, practice or acts as the justice of the case may require, and may order on such terms and subject to such conditions as are just that the public utility furnish reasonably adequate service and facilities and make such extensions as may be required, but no such order shall be made or entered by the Board without a public hearing or inquiry first had in respect thereof.

(2) The Board, when called upon to institute an investigation, may, in its discretion, require from the complainants the deposit of a reasonable amount of money or other security to cover the costs of the investigation, which money or security shall be dealt with as the Board directs, should the decision be given against the complainants.

[19] Under s. 65 of the *Public Utilities Act*, the Board is also required to approve all rules and regulations proposed by a public utility that in any way relate to its schedule of rates. Halifax Water's *Regulations* are approved by the Board under this provision:

65 (1) A public utility shall submit for the approval of the Board with and as part of any schedule of rates all rules and regulations that in any manner relate to such schedule.

(2) Upon such rules and regulations being approved by the Board they shall be filed with the Board as part of the schedules of such public utility and thereafter shall be the lawful rules and regulations of such public utility until altered or modified by order of the Board.

[20] In 2016, the Board approved amendments to Halifax Water's *Regulations* establishing the position of the Dispute Resolution Officer to investigate complaints relating to the service provided by Halifax Water to its customers. The Dispute Resolution Officer acts independently of Halifax Water (and the Board) and costs in respect of dispute resolution processes are funded from the utility's regulated revenues.

[21] The Dispute Resolution Officer is the first level of appeal for all complaints that cannot be resolved between the customer and Halifax Water. The Dispute Resolution Officer has the authority to investigate complaints and issue an order that is binding on the customer and Halifax Water. An order may, however, be appealed to the Board under s. 78J of the *Regulations*:

78J (1) Despite subsection 78I(2), the complainant or the Commission may appeal within thirty days of an order of the DRO to the Board.

(2) The Board shall inquire into the matter *de novo* and make such inquiries and receive such information as the Board deems appropriate.

[22] It is not disputed that Ms. Fineberg filed the present appeal more than 30 days after the Dispute Resolution Officer's order. Ms. Fineberg said she was unable to do so because of the COVID-19 pandemic:

I got his [the Dispute Resolution Officer's] letter dated March 18. Then COVID-19 happened and my life turned upside down as did many others. I have my own business and I have found being unemployed stressful. I had managed to rearrange my life, however when I received the DRO's letter I could not believe what I read. I had just closed my store and then came home to this. Just for one second please try to understand my point of view and understand how frustrated I must be. And once again COVID has changed things for me and I was too busy taking care of a lot of things. I have 3 children and 3 grand-children and a 90 yr old mother who has needed me as well. Needless to say, I have felt very torn in the last 3 months.

[Exhibit F-1, pp. 3-4]

[23] Before proceeding with the matter, the Board sought Halifax Water's position on whether the Board was able to, and should proceed to, consider the matter under the circumstances. In its response, Halifax Water said that the appeal was filed outside the authority of the *Regulations* and, therefore, outside of the Board's jurisdiction.

Halifax Water stated:

Any reasons for why the Customer did not file the appeal within the 30-day appeal period cannot be considered because the Halifax Water Regulations do not grant authority to the Board to extend the appeal period.

The jurisdiction to hear the Customer's appeal has expired. The Board cannot hear this appeal.

[Exhibit F-2, p. 2]

[24] In support of its position, Halifax Water referenced the Board's decisions in *Re Smyth*, 2012 NSUARB 40 and *Re Chisholm*, 2000 NSUARB 99. In these cases, the Board determined that it was unable to proceed with appeals from decisions of the Regional Assessment Appeal Court that were filed beyond the appeal period in the *Assessment Act*.

[25] The question before the Board, in the present case, is fundamentally different than what was addressed by the Board in *Smyth* and *Chisholm*. As a statutory tribunal, the Board only has the authority that is given to it by legislation. As was noted in both *Smyth* and *Chisholm*, there was nothing in the *Assessment Act* giving the Board the authority to extend the appeal period established by the Legislature.

[26] The period to appeal to the Board from an order of the Dispute Resolution Officer is not a statutory appeal period established by the Legislature. The Board considers that its authority to approve an appeal period in Halifax Water's *Regulations* implicitly includes the authority to extend that same appeal period as part of the Board's general supervision of public utilities under s. 18 of the *Public Utilities Act*.

[27] Furthermore, the Board's approval of the *Regulations* does not override the Board's authority to consider complaints under either s. 19 or s. 83. The Board's authority under these provisions is not limited to instances where a complainant has no other recourse. Nor is it limited to only those cases where the Board suspects neglectful, illegal, unreasonable or unjustly discriminatory behavior on behalf of Halifax Water. As set out in s. 19, the Board may, subject to the objects and purposes of the *Act*, proceed with an investigation whenever it believes "that an investigation of any matter relating to any public utility should for any reason be made."

[28] The Board recognizes that there have been instances in the past where, in response to a late filed appeal, the Board has declined to proceed with the appeal indicating that it does not have the jurisdiction to do so. Strictly speaking, the Board finds that it has the jurisdiction to proceed with an appeal that is filed beyond the 30-day appeal period set out in s. 78J(1) of Halifax Water's *Regulations*. Whether the Board should exercise that jurisdiction is a different matter.

[29] Having approved the Dispute Resolution Officer provisions in the *Regulations*, including establishing the binding nature of the Dispute Resolution Officer's order under the established process and the limited appeal period, the Board finds that these provisions should be respected unless there are compelling circumstances for providing relief. These provisions were intended to provide for a means of resolving disputes between Halifax Water and its customers by an independent party in a fashion that is less formal than a Board proceeding. Resolving disputes efficiently and with a sense of finality is important. Prolonging disputes also results in additional costs which, in the case of Halifax Water, are ultimately paid by ratepayers.

[30] To respect the Board approved process, the Board will not routinely grant extensions to the appeal period. The burden is on a proposed appellant to demonstrate that it is appropriate to do so under the circumstances.

[31] While not directly applicable, the Board finds it helpful, when considering whether an appeal period should be extended, to refer to the factors that may be considered by a court in determining whether a defense based on a missed limitation period should be disallowed. These factors are set out in s. 12(5) of the *Limitation of Actions Act*, S.N.S. 2014, c.15:

Disallowance or invocation of limitation period

12 (5) In making a determination under subsection (3), the court shall have regard to all the circumstances of the case and, in particular, to

- (a) the length of and the reasons for the delay on the part of the claimant;
- (b) any information or notice given by the defendant to the claimant respecting the limitation period;
- (c) the effect of the passage of time on
 - (i) the ability of the defendant to defend the claim, and
 - (ii) the cogency of any evidence adduced or likely to be adduced by the claimant or defendant;
- (d) the conduct of the defendant after the claim was discovered, including the extent, if any, to which the defendant responded to requests reasonably made by the claimant for information or inspection for the purpose of ascertaining facts that were or might be relevant to the claim;
- (e) the duration of any incapacity of the claimant arising after the date on which the claim was discovered;
- (f) the extent to which the claimant acted promptly and reasonably once the claimant knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to a claim;
- (g) the steps, if any, taken by the claimant to obtain medical, legal or other expert advice and the nature of any such advice the claimant may have received;
- (h) the strength of the claimant's case; and

- (i) any alternative remedy or compensation available to the claimant.

[32] In the circumstances of this case, the Board finds that the appeal period should be extended. Although the appeal was filed 46 days after the expiry of the 30-day appeal period, the timing of the Dispute Resolution Officer's decision coincided with the onset of personal and societal disruptions resulting from the COVID-19 pandemic. The initial order of the Chief Medical Officer of Health was issued on March 13, 2020, just a few days before the date of the Dispute Resolution Officer's decision. A few days later, on March 22, 2020, the Province of Nova Scotia declared a state of emergency. The Board accepts that Ms. Fineberg's ability to proceed with an appeal would have been impacted by the prevailing public health emergency which is still in effect.

[33] Additionally, the Board believes that the questions raised in Ms. Fineberg's appeal warrant additional investigation. The unusual period of significantly increased water consumption appears to have started and stopped without any apparent cause. The Board understands that the accuracy of Ms. Fineberg's meter was tested and was satisfactory, and while an investigation of abnormally high consumption on the customer side of the meter is not the responsibility of Halifax Water or the Board, the installation of a new AMI water meter shortly before the problem occurred raises questions that should be considered.

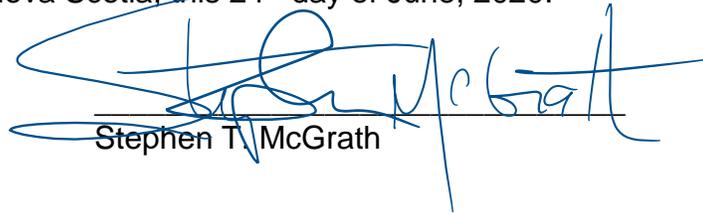
5.0 SUMMARY OF BOARD FINDINGS

[34] The Board finds that it has the jurisdiction to extend the 30-day appeal period for appeals to the Board from orders issued by the Dispute Resolution Officer under Halifax Water's *Regulations*.

[35] The Board finds that, in the circumstances of this case, it is appropriate to extend the appeal period to permit the filing of the present appeal.

[36] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 24th day of June, 2020.



Stephen T. McGrath