

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Haines v. Rossland (City)*,  
2018 BCSC 253

Date: 20180221  
Docket: S11317  
Registry: Rossland

Between:

**Daniel Haines and Monalee Haines**

Plaintiffs

And

**The City of Rossland  
John Doe Contracting Ltd.  
John Doe doing business as  
John Doe Contracting, and John Doe**

Defendants

Before: The Honourable Mr. Justice McEwan

## **Reasons for Judgment**

Counsel for the Plaintiffs:

R.W. Sookorukoff

Counsel for The City of Rossland:

J.M. Mitchell

Place and Dates of Trial/Hearing:

Rossland, B.C.  
December 5-7, 2017

Place and Date of Judgment:

Rossland, B.C.  
February 21, 2018

[1] This action relates to a connection that the defendants made in a drainage pipe coming from the plaintiffs' property to a French drain the City of Rossland had installed on the street.

[2] The drainage was established by the connection of the plaintiffs' drain to the body of the French drain but it was not accomplished by a hard connection.

[3] The connection was made in 2006. It was in the spring of 2010 that the plaintiffs noticed water bubbling up at the surface of their driveway. They had never had problems with water in their driveway before. Mr. Haines testified that he had installed the old drainage system in 1985. Mr. Haines replaced the old drainage system, the carport foundation and slab before it could be seen and inspected by the City or any of its experts.

[4] In 2006, the City undertook certain works which included the French drain. During the course of this work the City encountered a pipe which appeared to be a drain pipe at the edge of the plaintiffs' property. Mr. Albo, the City's works foreman, said that he had no concern about connecting this pipe to the drain work of the French drain as he was confident that the void spaces in the drain were more than enough to handle the flow from this pipe. The pipe was "stuffed" into the drain rock.

[5] In February 2011, Mr. Haines noticed that there was "crunching" in the joists above the carport and that the pony wall was leaning.

[6] In March of 2011, the plaintiffs noticed that their driveway was cracking and becoming soft enough that cars sunk in the driveway. They also noticed that the concrete slab was cracking. In March and April 2011, the plaintiffs took photos of the damage.

[7] By August 2011, the plaintiffs decided to repair the water damage and submitted a building permit to the City of Rossland.

[8] From August 2011 to October 2011, the plaintiffs repaired the carport foundation wall and slab and removed and replaced the old system. During this time

the plaintiffs' contractors uncovered a white pipe. The plaintiffs were not there when it was opened and they did nothing more than take a photo of it. There were other pipes unearthed from the old drainage system. Some were filled with dirt but other than taking photographs of these pipes, the plaintiffs did not undertake any other inspections or investigations of them.

[9] The remains of the old drainage system, carport and carport slab were destroyed around this time.

[10] Mr. Haines had Seymour Plumbing scope the drain in May 2012. He got an engineering report from Norman Deverney on July 13, 2012 and gave notice pursuant to the *Local Government Act* on July 23, 2012.

[11] Mr. Haines gave some unreliable testimony. He said the work on the drain was done in 2009, not 2006. He later amended his pleadings. The drawing Mr. Haines provided to Mr. Deverney, which Mr. Haines said accurately depicted the old drainage system, in particular the photograph, Exhibit 1, Tab 5, p. 17, which shows that there was not a pipe going from the northeast corner of the house, across the driveway to the west side as depicted in the drawing.

[12] Mr. Haines said he never modified the old drainage system, yet the white pipe shown in the photographs, and which was excavated in 2011 was not the type of pipe used by the City and must have been placed by Mr. Haines.

[13] The plaintiffs testified that:

- a) Mr. Haines initially recalled that the Victoria Avenue upgrades occurred in 2009, rather than 2006, and he issued a Notice of Civil Claim in January of 2013 on that basis. It was not until after Examinations for Discovery of Mr. Albo, conducted in May of 2015, that Mr. Haines realized this error and later amended his Notice of Civil Claim to correct that 3 year discrepancy.
- b) The drawing Mr. Haines provided to Mr. Deverney, which Mr. Haines said accurately depicted the Old Drainage System (Exhibit 2, Tab 1, at p. 27) does not comport with the available pictures of the Old Drainage System, in particular the photograph at Exhibit 1, Tab 5, p. 17, which shows that there was not a drain pipe going from the northeast corner of the house,

across the driveway to the west side of the driveway, as depicted in his drawing.

- c) Mr. Haines testified that he never modified the Old Drainage System, yet the white pipe shown in Exhibit 1, Tab 5, p. 108, which was apparently excavated in 2011, was not a type of pipe that the City used, and therefore must have been placed by Mr. Haines.
- d) Mr. Haines testified that:
  - i. the pipe in the Old Drainage System that ran the length of the west side of the driveway “disappeared” at some point;
  - ii. the wooden frame of the Inspection Port also “disappeared”;
  - iii. the drain rock he placed around the drainage pipes of the Old Drainage System “disappeared”;
  - iv. that the plastic he had wrapped around the drain rock in the Old Drainage System had also disappeared.

The City submits that it is highly unlikely that these components simply “disappeared.” It is much more likely that Mr. Haines removed them, yet he has no recollection of this. Despite this, Mr. Haines was adamant that the drainage was constructed in 1985 as per the drawing provided to Mr. Deverney in 2012.

[14] It is highly unlikely that these things “disappeared”, and there is no one else who could realistically have removed them.

[15] Mr. Haines testified that he never had water issues or damage in the driveway and carport from 1985 until 2011, yet he installed and then removed asphalt at least once after installing the old drainage system. In 2011, the driveway was simply dirt. Mr. Haines confirmed that the driveway is paved or asphalted in the photograph showing the little girl on the front lawn. Mrs. Haines confirmed that one of those little girls was born in 1983, the same year that one of the Haines’ daughter was born. This girl is at least 5 years old in the photograph, and therefore it must have been taken in 1988 or later, and shows that there was asphalt on the driveway after the installation of the old drainage system. Therefore, the driveway asphalt was replaced at least once since the installation of the old drainage system. The City submits that it is more likely than not that this replacement was made due to water issues. In any event, Mr. Haines did not provide any explanation for why the asphalt was removed.

[16] Mr. Haines testified that at the time of submitting the building permit application in 2011, he had no inkling or suspicion that something that the City did during the Victoria Avenue upgrades might have played a part in causing the water damage, despite that:

- i. He had previously questioned Mr. Albo about the connection in 2010; and
- ii. In the building permit application materials, he makes reference to that road work.

[17] The City submits that it does not make sense for Mr. Haines to say that he had no inkling or suspicion that the connection may have played a part in the water damage when he wrote this notation, especially having already talked to Mr. Albo about the connection.

[18] There are three different engineers who provided reports. Two of them favour the position of the plaintiffs but they show some weaknesses when examined alone and together. Mr. Armstrong blames the way the old drainage system was built. He says the use of drainage filter cloth would have made a difference. This was not done. He also blames the soil which he says could have become saturated regardless of a drainage system. He said it was possible the system became clogged with sediment and that the pipes may have frozen. Mr. Deverney confirmed that the latter two eventualities were possible.

[19] Mr. Deverney's report assumes that the white pipe was "fully packed with dirt." The white pipe is not satisfactorily described as part of the system, at all, and it was not established that it was packed with dirt. He also acknowledged that if the old drainage system was not constructed as Mr. Haines advised him it was, his opinion might change. He said if the pipes on the grass were filled with dirt, and if the white pipe was damaged while it was on the ground, and that if Mr. Haines used plastic wrap, his opinion might change.

[20] The summary of the evidence reveals some significant flaws in the narrative:

- (a) It is not clear what the state of the damage was to the old system in 2011 as it had been destroyed before any one could have looked at it.

- (b) It is not well established how the old drainage system was installed.
- (c) Neither the City nor the experts were able to examine the old drainage system to see what influence it had on the water damage.
- (d) The only evidence that the white pipe was full of dirt is the photographs.
- (e) The same is true for the other pipes on the ground.
- (f) Both Mr. Armstrong and Mr. Deverney give the sort of evidence one might expect where material evidence is missing or unreliable.
- (g) Mr. Deverney did not dispute Mr. Armstrong's conclusions.

[21] The bottom line in this case is that there was a great deal of preparation to bring the case to court but that it does not establish on a balance of probabilities that the negligent connection with the French drain was the cause of Mr. Haines' problems. Mr. Haines was three years out in his recollection of when the City connection was made, in 2006 rather than 2009.

[22] The drawing Mr. Haines provided to Mr. Deverney did not accurately depict the old drainage system. The "white pipe" was a mystery since the City never used that kind of pipe.

[23] Mr. Haines' testimony is that pipe in the old drainage system disappeared, as well as the wooden framed inspection post and the drain work and plastic he used to cover the systems. He has no explanation for these disappearances.

[24] The largest problem for the plaintiffs was that the old drainage system was destroyed before the City had a chance to inspect or examine it to determine what if any causal effect the old drainage system had on the water damages in 2011.

[25] The City also pleads s. 736 of the *Local Government Act*. It reads:

736 (1) A municipality or regional district is in no case liable for damages unless notice in writing, setting out the time, place and manner in which the damage has been sustained, is delivered to the municipality or regional district, as applicable, within 2 months from the date on which the damage was sustained.

(2) In case of the death of a person injured, failure to give the notice required by this section is not a bar to the maintenance of the action.

(3) Failure to give the notice required by this section or its insufficiency is not a bar to the maintenance of an action if the court before whom it is tried, or, in case of appeal, the Court of Appeal, believes

- (a) there was reasonable excuse, and
- (b) the defendant has not been prejudiced in its defence by the failure or insufficiency.

[26] The purpose of s. 736 of the *Local Government Act* was described in *Grewal v. Saanich (Regional District)*, 60 D.L.R. (4th) 583 (B.C.C.A.), where in dealing with the predecessor to s. 736 (s. 755) the court said as follows:

The object of the section ... is to provide an early opportunity for the municipality to examine the place where the damage has occurred, to interview witnesses, and to consider whether to settle or contest the matter.

[27] The damage was apparent in the spring of 2011 but notice was not given until July 23, 2012. There is no explanation for this lack of notice. Mr. Haines had questioned Mr. Albo about the connection in 2010 and his building permit mentions “the road”. The result is that the old drainage system was taken up and the City had no opportunity to check it or to make its own determination of the problem. For this reason as well the plaintiffs claim must be dismissed. I emphasize in saying this that I do not think the plaintiff has not got a claim. I simply note that the nature of the proof on offer is insufficient for a court to safely make the determination the plaintiff seeks. The gaps in the evidence between the pipe the workers thought they had connected and the actual connection; the unexplained appearance of the white pipe which Mr. Haines cannot say he ever used and which the City of Rossland never used; the inferences which can be drawn from the photographs taken after the repairs were done simply do not add up to a claim that can be verified to the extent necessary to satisfy the burden in this case. It fails on the proof offered and by reason of s. 736 of the *Local Government Act*.

[28] The plaintiffs’ action is therefore dismissed.

“McEwan J.”

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The Honourable Mr. Justice McEwan