

Manitoba Ombudsman

**REPORT UNDER
THE OMBUDSMAN ACT
CASE 2012-0238
DISASTER ASSISTANCE APPEAL BOARD
REPORT ISSUED ON JUNE 17, 2016**

CASE SUMMARY

On August 13, 2012, a complainant advised our office that the Disaster Assistance Appeal Board (the board) had denied his appeal of the Emergency Measures Organization (EMO) decision to reject his application for disaster financial assistance.

The complainant advised that his basement had been damaged by water seepage and subsequently by sewer backup during the 2011 flood. In denying his application, EMO and the board relied on the “principle of concurrent causation,” explaining that because some of the damage was caused by sewer backup, which is insurable, assistance is not available through the disaster financial assistance program.

Manitoba Ombudsman questions the manner in which EMO and the board applied the “principle of concurrent causation” to the complainant’s claim. Our office presented these concerns to the board, but the board did not directly address them.

As a result of our investigation, our office makes two recommendations in this matter:

- Recommendation 1: The Emergency Measures Organization should provide more clarity on the principle of concurrent causation by developing a written policy. The policy should address the meaning of “concurrent” and set out the circumstances under which uninsurable damages are deemed to be insurable.
- Recommendation 2: Once EMO has completed its review and made any amendments needed, the Disaster Assistance Appeal Board should consider whether reconsideration of the complainant’s application is warranted.

EMO advised our office that it accepts Recommendation 1 and will review its interpretation of concurrent causation. The board advised that it is reviewing Recommendation 2.

OMBUDSMAN JURISDICTION AND ROLE

As set out in section 15 of the Ombudsman Act, Manitoba Ombudsman investigates administrative actions and decisions made by government departments and agencies, municipalities, and their officers and employees:

Investigations

15 The Ombudsman may, on a written complaint or on his own initiative, investigate

(a) any decision or recommendation made, including any recommendation made to a minister, or any act done or omitted, relating to a matter of administration in or by any department or agency of the government, or by any officer, employee or member thereof, whereby any person is or may be aggrieved; [...]

The investigative process we follow is non-adversarial. We carefully and independently consider the information provided by the complainant, the decision maker(s), and any witnesses we determine to be relevant to the case. Administrative investigations can involve an analysis of statute or by-law provisions, document reviews, interviews and site visits.

A complaint can raise questions of procedural fairness, substantive fairness or relational fairness. Procedural fairness relates to how decisions are reached including the steps followed before, during and after decisions are made. Substantive fairness relates to the fairness of the decision itself and relational fairness relates to how people are treated during the decision-making process.

The ombudsman may make recommendations pursuant to section 36 of the Ombudsman Act if there is finding of maladministration.

Administrative investigations can also identify areas where improvements may be suggested to a government body without a finding of maladministration. Such suggestions are made to support and help government bodies achieve better administration, often through the adoption of best practices. Improved administrative practices can improve the relationship between government and the public, and reduce administrative complaints.

POSITION OF THE COMPLAINANT

The complainant advised our office that the Disaster Assistance Appeal Board had denied his application for disaster financial assistance. The complainant indicated that at the appeal hearing the board declined to view his video evidence of the causes and progression of damage to his basement. He is of the view that if the board had viewed the video evidence, it would have realized that the damage to his basement had occurred from water seepage and overturned the Emergency Measures Organization's rejection of his application for disaster financial assistance.

POSITION OF THE DISASTER ASSISTANCE APPEAL BOARD

The board accepts some of the damage to the complainant's basement occurred as a result of water seepage. However, the board is of the view that the damage to the complainant's basement occurred from a combination of sources, including sewage backup which is insurable and therefore ineligible for coverage under the plan. It therefore relies on what it terms the "principle of concurrent causation" to deny the claim.

KEY ISSUE

Our office investigated the following key issue:

- **Has the board reasonably applied what it terms the "principle of concurrent causation" to the complainant's claim?**

SCOPE OF THE INVESTIGATION

Our investigation of this complaint included the following:

- Review of the information and evidence provided by the complainant, including photos and video;
- Review of the audio recording of the hearing;
- Review of the Emergency Measures Act and the Disaster Financial Assistance Policies and Guidelines (Private Sector) Regulation;
- Interviews with senior staff at the Emergency Measures Organization;
- Consultation with the Disaster Assistance Appeal Board;
- Consultation with Manitoba Ombudsman legal counsel.

BACKGROUND TO THE COMPLAINT

Disaster Financial Assistance

Through the disaster financial assistance program, the Manitoba government helps Manitobans in their recovery from natural disaster by providing support for uninsurable losses to basic and essential property. The program recognizes that disasters cause damage beyond what individuals "may reasonably be expected to bear on their own."

Pursuant to the Disaster Financial Assistance Policies and Guidelines (Private Sector) Regulation, assistance is not available if the loss was insurable, regardless of whether insurance was purchased. Disaster financial assistance was made available for losses arising from flooding in 2011. At that time, water seepage was not insurable in Manitoba.

History of the Complaint

The complainant's house in Southwestern Manitoba was damaged during the 2011 flooding. The complainant first became aware of water damage to his basement on April 8, 2011. On April 14, the complainant's insurance agent inspected his basement and "found no evidence of sewer back-up but rather water seepage into the basement through cracks." As the insurer does not cover seepage or leakage below the surface of the ground, the claim was denied. The insurer advised the complainant to apply for disaster financial assistance.

On June 3, 2011, a power outage caused the complainant's sump pumps to stop operating for a few hours. During that time, additional water accumulated in his basement.

On June 5, 2011, EMO received the complainant's disaster financial assistance application. Inspectors visited the complainant's property on June 11, 2011.

In a letter dated August 24, 2011, EMO denied the complainant's claim for disaster financial assistance. The letter advises that "[t]he specific losses and damages you incurred are determined as insurable, and therefore you are not eligible under the policies and guidelines of the DFA [disaster financial assistance] program." The complainant requested a review of the decision.

In a letter dated January 5, 2012, EMO advised the complainant it had reviewed the denial and had concluded that he was not entitled to disaster financial assistance. The letter states that the review focused on the issue of insurable loss because that was the reason the claim had been denied. The letter explains that sewer backup is considered an insurable loss and coverage for it is available from Manitoba insurers. The letter goes on to state:

That in some cases, water entering a home may result from a combination of sources such as overland flood and backing-up/escape of water from a sewer. In these cases the legal principle of concurrent causation applies. Simply stated, concurrent causation means that when a property loss occurs as a result of two causes (one that is covered and one that is not covered), then the policy shall provide coverage [...]

The letter goes on to advise that given the amount of water in the basement, some backup must have occurred. As a result, the letter concludes that the entire loss was insurable and the claim must be denied.

Appeal to the Board

The complainant appealed to the board and the hearing was held in Brandon on June 21, 2012. At the hearing, the complainant explained that the damage to the basement had begun with seepage in April 2011 and was exacerbated when the sump pumps stopped in June 2011 due to the hydro power outage. He provided the insurer's letter of April 2011, which advised that the damage was the result of seepage. The complainant also explained that he had video evidence of the damage for the panel to review; however, the chair indicated that the panel did not need to see the evidence. The (now former) director of EMO reiterated EMO's position: some of the damage was from sewer backup and thus all of the damage was considered insurable under the principle of concurrent causation. The application was therefore denied.

In the board decision dated June 29, 2012, the complainant's appeal was denied. The decision provides the following reasons:

1. *Damage in [the complainant's] basement was the result of a combination of sources at least one of which was insurable;*
2. *That the principal of concurrent causation would apply in this situation and that [the complainant's] losses are insurable;*
3. *That insurance was available at reasonable cost; and*
4. *The damages claimed by [the complainant] are therefore not eligible for assistance.*

After the board issued its decision, the complainant contacted his insurer. The insurer reiterated that the inspection in April 2011 had found seepage to be the cause of the damage. The insurer does not cover seepage and the complainant's insurance claim remains denied.

The complainant then contacted our office on August 13, 2012.

ANALYSIS

The board accepted some of the damage to the complainant's basement occurred as a result of water seepage. However, the board relied on EMO's interpretation of the principle of concurrent causation, from the 2001 Supreme Court case of *Derksen v 539938 Ontario Ltd.*, to deny the claim.

EMO's decision review letter to the complainant dated January 5, 2012, explains the principle as follows: "when a property loss occurs as a result of two causes (one that is covered and one that is not covered), then the policy shall provide coverage. Therefore where there is evidence of backing-up/escape from a sewer, then the entire loss is considered insurable." The disaster financial assistance regulations state that assistance is not available if insurance coverage was available for the damage, regardless of whether the individual actually had insurance.¹

The (now former) director of recovery at EMO advised in an email to our office dated July 19, 2013, that

In the cases of concurrent sources of water mingling, as many claims to DFA in 2011 involved, there is no means to distinguish between water damage resulting from back-up and water damage resulting from seepage. Therefore EMO's decisions in this matter have been to deny claims for this damage as insurable.

In an interview with a manger from the disaster financial assistance program on February 6, 2014, our office questioned whether damage from water seepage in April 2011 and subsequent

¹ *Disaster Financial Assistance Policies and Guidelines (Private Sector) Regulation*, Man Reg 177/99, s. 5.4.1(a)

damage in June 2011 from sewer backup could be considered “concurrent.” Specifically, we asked:

- Does the amount of time between the causes of damage influence “concurrency”?
- Does the amount of damage from the differing causes matter to “concurrency.” For example, if a basement already had to be gutted after water seepage, would it matter that the damage was worsened two months later by sewer backup?

The manager advised that EMO has not sought legal advice as to the application of what it terms the “principle of concurrent causation” and while it applies the principle, it has no guidelines on how it does so. The manager did not want to speculate on the application of the principle, but he indicated he did not believe concurrency depended on the length of time between the causes of damage. He also indicated that he did not know how the principle would apply if a property had so much damage from a first cause that it would need to be replaced before being damaged by a second cause.

Our office also approached the board regarding its understanding of EMO’s principle of concurrent causation. The secretary to the board advised that the board has relied on the explanation presented by EMO in hearings to interpret and apply the principle to claims.

In the absence of any policy or legal advice provided by EMO or the board, our office sought a legal opinion on concurrent causation and its application to the complainant’s case. The legal opinion we obtained identifies issues with the manner in which concurrent causation was applied to the complainant’s claim by EMO and, by extension, the board.

We are advised that concurrent causation is not a legal principle, but an “observation applied to factual circumstances to help determine whether particular losses or claims are or are not to be paid under an insurance policy.” The Supreme Court case of *Derksen v 539938 Ontario Ltd.*, which EMO referenced as support for its principle of concurrent causation, had different facts from the complainant’s circumstances. In that case, there was a single incident of damage caused by two sources in the same event. There was also no question as to whether the loss was insurable as there were two different insurance policies. That differs from the complainant’s matter where there were two distinct sources of damage, separated in time by more than three weeks, and the damage caused by one of the sources was uninsurable.

Further, we are advised that concurrent causation does not “make insurable that which is not, nor does it extend coverage to losses caused by risks that are outside of the coverage provisions of the policy.” When an event that is not insurable, such as water seepage, causes damage, a second event that is insurable, such as sewer backup, does not make the insurer liable for damage occurring from the first event. Rather, the insurer is only liable for the extent of damage caused by the insured event.

Consequently, our office has concerns regarding the manner in which EMO and the board have applied the EMO’s principle of concurrent causation to the complainant’s matter. As EMO does not have a written policy on concurrent causation, there are no criteria or guidelines against which to assess whether EMO’s principle applies to the complainant’s situation. This is

problematic. For instance, our office questions whether sources of damage that are separated in time by three weeks can be considered concurrent or whether uninsurable losses can be deemed insurable under the principle.

Further, our office is concerned that EMO and the board appear to have accepted that EMO's principle of concurrent causation applied to instances where damage was "caused by a combination of sources" rather than inquiring into whether the damage caused by different sources could be distinguished on a case-by-case basis. In this case, EMO made no inquiries with the complainant to determine whether any evidence existed that would assist in distinguishing between the damage caused in separate events. At the appeal hearing, evidence for assessing the damage caused by separate sources was available to the board, including the insurer's letter regarding the damage from April 2011, the complainant's video documenting the damage over time, and the results of EMO's inspection of the water damage. However, the board relied on EMO's principle in denying the appeal and did not attempt an assessment of the damage caused by water seepage.

In a letter dated January 22, 2015, our office advised the board of our concerns with its application of EMO's principle of concurrent causation to the complainant's circumstances. The board responded in a brief letter dated March 18, 2015, advising:

The original panel members and myself (the new Chairman) met, reviewed and studied the case and are satisfied with the process and the original Decision.

The board's response did not directly address the questions our office raised regarding EMO's principle or explain why the board was of the view that it had been properly applied to the complainant's claim.

FINDINGS AND RECOMENDATIONS

Our office questions the manner in which EMO and the board have applied what they term the "principle of concurrent causation" in this case. The legal advice received by our office raises concerns for us about EMO's and the board's understanding of the principle. EMO has no criteria or guidelines against which to assess whether the principle applies to the complainant's situation. Further, EMO and the board applied the principle to the complainant's claim without inquiring as to whether the damage caused by different sources in separate events could be distinguished.

Consequently, pursuant to section 36(1)(a)(vi) of the Ombudsman Act, I find that the board's decision in this matter was made in accordance with a practice that may be unreasonable.

Recommendation 1

In light of this finding, I make the following recommendation pursuant to section 36(2)(g):

- The Emergency Measures Organization should provide more clarity on the principle of concurrent causation by developing a written policy. The policy should address the

meaning of “concurrent” and set out the circumstances under which uninsurable damages are deemed to be insurable.

In a letter dated March 18, 2016, EMO advised our office that it accepts Recommendation 1:

To address the recommendation, EMO will review its current interpretation of “concurrent causation” by obtaining a legal opinion on the concept and by canvassing the insurance industry to get a sense of the operation of the concept in that business area. Any amendments in interpretation and policy will inform future decision making by EMO regarding concurrent causation and eligibility for disaster financial assistance. In the event of a future appeal on the issue of concurrent causation, any amendments in interpretation and policy would inform any presentation on that subject made to the Board.

Recommendation 2

Manitoba Ombudsman recognizes that there may be legislative restrictions that may affect the authority of the board to reconsider its decision in this matter. Nonetheless, where a decision has been made in accordance with a practice that may be unreasonable, we believe that it reasonable that the decision should be reconsidered. Therefore, I recommend pursuant to section 36(2)(a) that:

- Once EMO has completed its review and made any amendments needed, the Disaster Assistance Appeal Board should consider whether reconsideration of the complainant’s application is warranted.

The Disaster Assistance Appeal Board advises that it is reviewing the recommendation.

This report concludes our investigation of this complaint.

MANITOBA OMBUDSMAN