

Manitoba Ombudsman

REPORT UNDER

THE OMBUDSMAN ACT

CASE 2013-0102 (web version)

THE LAKE MANITOBA FINANCIAL ASSISTANCE PROGRAM THE FLOOD APPEALS COMMISSION

REPORT ISSUED ON MARCH 28, 2014

CASE SUMMARY:

The complainant applied for disaster financial assistance (the Lake Manitoba Financial Assistance Program) regarding a well he believed was contaminated by the 2011 Lake Manitoba flood. His application was denied following an assessment conducted over the telephone by a hydrologist working on behalf of the Manitoba Water Management Branch (Groundwater Management) who was assisting the program administrator for the Lake Manitoba Financial Assistance Program, Manitoba Agriculture Services Corporation (MASC). The complainant believes the decision to refuse him financial assistance was unfair.

During the telephone assessment, the complainant requested that an on-site inspection of his well be conducted but this request was denied by the hydrologist. The complainant subsequently appealed the decision by MASC to refuse his financial assistance application to the program appeal body, the Flood Appeals Commission (appeals commission). The appeals commission upheld the decision to deny financial compensation, however it did suggest that MASC conduct on-site inspections in the future. The complainant believes the appeals commission's decision is unfair because an on-site inspection of his well was not conducted in order to determine why it had failed.

After a review of the evidence presented to the appeals commission, as well as the relevant legislation and the terms and conditions for applying for disaster financial assistance, Manitoba Ombudsman has concluded that the decision of the appeals commission was not clearly wrong or unreasonable pursuant to section 23(2) of *The Ombudsman Act*.

OMBUDSMAN JURISDICTION

Manitoba Ombudsman is an independent office of the Legislative Assembly of Manitoba, reporting to the assembly through the office of the speaker. The responsibilities and authority of the ombudsman are set out in *The Ombudsman Act*, *The Freedom of Information and Protection of Privacy Act*, *The Personal Health Information Act*, and *The Public Interest Disclosure (Whistleblower Protection) Act*.

Under *The Ombudsman Act*, Manitoba Ombudsman investigates administrative actions and decisions made by government departments and agencies, municipalities, and their officers and employees. Investigations may be undertaken on the basis of a written complaint from a member of the public, or upon the ombudsman's own initiative.

This complaint pertains to a decision of an administrative tribunal authorized to hear appeals regarding the Lake Manitoba Financial Assistance Program pursuant to *The Emergency Measures Act* and *The Manitoba Agricultural Services Corporation Act*.

While our office has a mandate to investigate complaints, the investigative process we follow is non-adversarial. We carefully and independently consider the information provided by the complainant, the decision maker, 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.

In outlining the jurisdiction of Manitoba Ombudsman, it is important to address the statutory threshold or benchmark for our review of discretionary decisions made by tribunals, such as the appeals commission. The statutory threshold for our review of the decisions of the appeals commission is the "clearly wrong or unreasonable" test set out in section 23 of *The Ombudsman Act*.

Limitation on review of discretionary powers

23(2) Where, in the course of or after an investigation of any decision, act or omission, done or omitted by a department, agency of the government or municipality, or any officer or employee thereof in the exercise of a discretion vested in that department, agency, municipality, officer, or employee, the Ombudsman is satisfied that the decision, act or omission is not clearly wrong or unreasonable, the Ombudsman shall make no further investigation of the matter and shall report to the complainant that he is so satisfied.

The threshold or benchmark of clearly wrong or unreasonable is a significantly higher test than allegations of administrative errors or omissions. A difference of opinion regarding the application of legislation, policy, or the weight given to evidence would not constitute a finding of clearly wrong or unreasonable. There must be conclusive evidence that readily and plainly identifies the imputed error, and that error must be shown to significantly affect the result or decision.

THE COMPLAINT

The complainant believes that a decision of the Flood Appeals Commission (the appeals commission) to refuse disaster financial assistance was unfair because the decision was based largely upon evidence gathered from an assessment conducted over the telephone and not an on-site inspection.

KEY ISSUES

- 1. Was the evidence in support of the complainant's claim given reasonable consideration by the appeals commission?**
- 2. Was the decision of the appeals commission to uphold MASC's denial of financial assistance to the complainant clearly wrong or unreasonable?**
- 3. Did MASC implement the suggestion by the appeals commission that going forward site inspections should be part of the assessment process?**

THE LAKE MANITOBA FINANCIAL ASSISTANCE PROGRAM

In order to address the key issues it is important to understand the process by which applicants can file a claim with the Lake Manitoba Financial Assistance Program. It is also necessary to understand the legislative and administrative framework used to process and assess flood claims.

The Lake Manitoba Financial Assistance Program was launched by the Emergency Measures Organization (EMO) following the Lake Manitoba flood in 2011. The program is governed by *The Emergency Measures Act* and *The Manitoba Agriculture Corporation Act*. The Manitoba Agriculture Services Corporation (MASC) was responsible for administering the program which included assessing applications for disaster financial assistance (DFA). MASC carried out this responsibility by working alongside other provincial government agencies with the necessary expertise to assess flood claims.

EMO which administers DFA and is funded by the federal and provincial governments, began accepting applications for financial assistance as result of the 2011 Lake Manitoba flood, subject to the terms and conditions of the DFA program.

MASC subsequently became the program administrator for the Lake Manitoba Financial Assistance Program. The regular function of MASC, when not responding to disasters, is to assess agricultural insurance claims and agricultural risk management.

The eligibility criteria for applying for financial assistance as a result of the 2011 Lake Manitoba flood was covered in the documentation made available to applicants by EMO. The disaster financial aid information package (dated April 2011) sets out the following criteria for filing an application. The criteria included:

- Private residential property owners and tenants impacted by Lake Manitoba flooding.
- Eligible costs related to general assistance for “Restoration Costs” which also included the “Loss and repair of essential moveable and chattels”.
- Ineligible costs were determined to be insurable losses that could have been insured at a reasonable and available rate.

Applicants, such as the complainant, whose flood claims were denied by MASC were entitled to file an appeal with the Flood Appeals Commission.

The Flood Appeals Commission

The structure of the Flood Appeals Commission and the hearing process is set out in statute. Pursuant to *The Manitoba Agriculture Services Corporation Act*, the appeals commission is comprised of twenty-one members of which three are selected to sit at each hearing. All appeals commission members are appointed by the Lieutenant Governor in Council.

The appeals commission is an administrative tribunal. In making its decisions, it considers written submissions and hears oral evidence from the parties involved. The appeals commission has the authority to conduct site inspections and can adjourn a hearing if warranted.

In accordance with the terms and conditions of the appeal hearing, both the appellant (complainant) and respondent are required to submit the evidence that they will be presenting at the hearing no less than 10 days from the date of the scheduled hearing. The submissions are then disclosed to the other party. If either the respondent or the appellant plan to have legal representation or call upon expert witnesses to testify at the hearing, that must also be disclosed no less than 10 days of the scheduled hearing.

The appeals commission provides both the appellant and respondent with a written decision once the matter has been adjudicated.

Pursuant to section 44 of the act the appeals commission is mandated to hear and decide appeals relating to the Lake Manitoba Financial Assistance Program. The following sections of the act set out the duties and responsibilities of the Flood Appeals Commission:

Duties and powers of appeal tribunal

41(1) The appeal tribunal must inform itself fully of the facts concerning each appeal or matter before it. For that purpose, the appeal tribunal

- (a) has the powers of a commissioner under Part V of The Manitoba Evidence Act; and
- (b) must give full opportunity to the person appealing and the corporation to present evidence and make submissions.

Hearings

42(1) The appeal tribunal may hold a hearing orally or in writing, or partly orally and partly in writing. An oral hearing may be held by means of a conference telephone call or by another method of communication that permits the appeal tribunal and the parties to communicate with each other simultaneously.

Investigations and inspections

42(2) The appeal tribunal may, before or during a hearing, carry out any investigation or inspection or refer any question for an expert opinion that it considers necessary or advisable. The appeal tribunal must give the person appealing and the corporation a reasonable opportunity to examine and copy information it obtains as a result of an investigation or inspection and any expert opinion it obtains.

It is important to note that pursuant to section 43 of the act, all decisions of the appeals commission are final and binding on both the applicant and respondent.

BACKGROUND INFORMATION

In the summer of 2011, the complainant applied to the Emergency Measures Organization (EMO) for disaster financial assistance. The Flood Recovery Office working on behalf of Manitoba Agricultural Services Corporation (MASC) received the complainant's application. On November 17, 2011, the Flood Recovery Office denied the application for financial assistance because it did not believe the complainant's well was contaminated as a result of flooding from Lake Manitoba. The complainant was advised that he could appeal the decision to the appeals commission. The complainant was supplied with the *Appeals Commission Rules of Procedure* which set out the terms and conditions of the appeal process.

The complainant filed an appeal with the Flood Appeals Commission on November 17, 2011 and submitted evidence in support of his case. On February 6, 2012, the appeals commission heard the appeal and afforded both the complainant and representatives of MASC an opportunity to be heard and to have their evidence considered. As per the appeal guidelines, MASC and the complainant were required to submit all documentary evidence ten days prior the hearing. This evidence was shared with both the complainant and MASC.

SCOPE OF THE INVESTIGATION

Our investigation of this complaint included the following:

- Interview with the complainant and a site visit of the complainant's property (well).
- Interview with the assessor from Groundwater Management.

- Interviews with representatives from the Flood Appeals Commission, the Flood Recovery Office, the Office of Drinking Water, Emergency Measures Organization, and Manitoba Agriculture Services Corporation.
- A review of applicable legislation including *The Emergency Measures Act, Disaster Financial Assistance Policies and Guideline Regulations (C.C.S.M c. E80)* and *The Manitoba Agriculture Services Corporation Act*.
- A review of the case summary report of the appeals commission, dated February 14, 2012.
- A review of all the documentary evidence submitted as part of the appeal process.

ANALYSIS OF ISSUES AND EVIDENCE

1. Was the evidence in support of the complainant's claim given reasonable consideration by the appeals commission?

As part of the appeal process, the complainant provided a 10-page written submission which included the following evidence for the Flood Appeals Commission to consider:

- That flooding of abandoned wells caused the aquifer to become contaminated and subsequently resulted in the complainant's well becoming contaminated.
- An independent contract driller's report, dated September 16, 2011, which suggested that the "well problems were related to high water levels in his area." The report also confirmed the presence of sediment in the well water.
- An independent mechanical contractor's report, dated January 20, 2012, which confirmed that the well casing had been examined and concluded that the casing was intact. The report states, "I found no well drill fillings on top of pump and therefore concluded that the casing was not rotten". Further the report indicated that a check of the well system discovered, "large amounts of debris coming from well stream, appears to be wood parts, sand and unknown white fibers". The complainant believed this report supported his assertion that the well mechanics were not an issue but rather the problem was the aquifer feeding his well.

During the appeal hearing the complainant elected to present oral evidence to the appeal commission but chose not to challenge the MASC representative or any of the evidence submitted by MASC.

After reviewing the appeals commission's written decision, our office is of the view that the complainant's submission was given due consideration by the appeals commission. In its report, the appeals commission acknowledged the following points raised by the complainant:

- That the complainant began finding foreign material in his well water in June 2011 which included small pieces of wood and a white material, followed by a bad odour.

- That the complainant had expected the hydrologist with Manitoba Water Stewardship would attend and inspect the well to determine why it had failed.
- That the complainant believed the well had been contaminated as a result of floodwaters travelling in the underground aquifer.
- That the well's pump continued to become jammed and the water began to smell more over time.
- That the complainant drilled a new well in November 2011 that is 120 feet deep and approximately 50 feet away from the old well and that the quality of water immediately improved.

2. Was the decision of the appeals commission to uphold MASC's denial of financial assistance to the complainant clearly wrong or unreasonable?

As part of the appeal process, MASC submitted the following evidence for the appeals commission to consider:

- A well assessment report which contained a brief narrative of the consultation between the complainant and the hydrologist on October 6, 2011.
- A well information report which provided facts about the complainant's well. This report contained data pertaining to the well, including the date the well was registered, the well's depth, the well's apparatus, and the constitution of the aquifer that feeds the well.

The administrator responsible for the Lake Manitoba Financial Assistance Program, Manitoba Agriculture Services Corporation (MASC), relied upon experts with Water Science and Management Branch (Groundwater Management) to determine if the complainant's well was contaminated from the 2011 Lake Manitoba flood. Through consultation with the assessor, who conducted a telephone assessment with the complainant on October 6, 2011, MASC concluded there was no evidence to substantiate the complainant's claim and therefore determined it was unnecessary to conduct a site visit. The decision of MASC was based on the assessor's knowledge of the local subterranean hydrology (which is slow moving water and subsequent slow moving debris) and subterranean geology.

The hydrologist provided the following testimony to the appeals commission at the appeal hearing:

- The aquifer is a low yield carbonate one, which means, the fissures in the limestone are very small and therefore water moves very slowly through it.

- That it may take 20 years for water to move as little as ½ mile in this aquifer and if a well ½ mile from [the complainants] was contaminated it would likely take 20 years to get to his well.

MASC maintained that the assigned assessor sought tangible evidence from the complainant that the well was damaged by Lake Manitoba flooding, such as the well being submerged in flood water. Following a telephone assessment with the complainant, the assessor concluded that the well's mechanics had failed based upon the well's age and the symptoms the complainant described (such as debris and silt being in the water). MASC noted that the well was installed in 1977 and its components (galvanized tube and pump) have a lifespan of approximately 20-30 years.

Further, MASC indicated that the complainant provided no locations of abandoned local wells which allegedly caused his well to become contaminated. MASC pointed out that Groundwater Management maintains current records of all known wells, including those that have been discovered abandoned since the 1960s. MASC concluded that if the well had been contaminated as a result of the underground aquifer, the new well should have experienced similar symptoms.

The appeals commission confirmed in writing the rationale for its decision:

- That [the complainant's] well was a low yield carbonate aquifer and that contaminated water is very unlikely to have travelled from the flooded area to [the complainant's] well in the matter of a month or two. In fact the Appeals Commission believes that if that had been the case the new well would also be contaminated.

The appeals commission further noted that the complainant had requested an assessor inspect the well and that his request had been denied. In their written decision the appeals commission wrote, "While Water Stewardship made a very strong case that the well was not contaminated by floodwaters, [the assessor], by not attending the site and inspecting the well did not serve either [the complainant] or the Flood Recovery Office well."

The appeals commission went on to state, "the commission strongly suggests that in the future when someone makes such a claim such as this, there is a physical inspection done and every attempt is made to determine the reason of loss".

3. Did MASC implement the suggestion by the appeals commission that going forward site inspections should be part of the assessment process?

In response to inquiries we made with MASC, we were advised that the Disaster Financial Assistance Program was a work in progress at the time the complainant filed an application for compensation and changes have since been made. MASC explained that in response to any future disasters, independent appraisers will be utilized and physical inspections will be carried out by the independent appraisers.

CONCLUSION

It should be noted that administrative tribunals, such as the Flood Appeals Commission, are empowered with the responsibility of considering submissions, giving weight to the evidence submitted, and making a determination on the basis of its interpretation of the appropriate legislation and policies.

We have concluded that the appeals commission provided sufficient opportunity for both the complainant and MASC to present evidence and make arguments in support of their positions. While the complainant did not agree with the decision and may have placed more weight on certain pieces of evidence, such as the contractor reports, it is within the appeals commission's discretion to determine the weight and significance it attributes to the evidence.

We note that the appeals commission did respond to the complainant's concern regarding MASC's decision not to conduct a site inspection of his well. On that point, it appears that MASC has implemented the suggestion of the appeals commission and is committed to conducting on-site assessments in the future. This practice will help ensure that decisions are not only found to be fair but are seen to be fair by the public.

Based on our investigative findings, Manitoba Ombudsman is satisfied that the decision of the appeals commission was not clearly wrong or unreasonable pursuant to Section 23(2) of *The Ombudsman Act* which states the following:

Limitation on review of discretionary powers

23(2) Where, in the course of or after an investigation of any decision, act or omission, done or omitted by a department, agency of the government or municipality, or any officer or employee thereof in the exercise of a discretion vested in that department, agency, municipality, officer, or employee, the Ombudsman is satisfied that the decision, act or omission is not clearly wrong or unreasonable, the Ombudsman shall make no further investigation of the matter and shall report to the complainant that he is so satisfied.

In conclusion, there are no grounds upon which Manitoba Ombudsman can make a recommendation in this case and our investigation of this matter is now closed.

MANITOBA OMBUDSMAN