

# Manitoba Ombudsman

## **REPORT UNDER**

### ***THE OMBUDSMAN ACT***

#### **CASE 2013-0381**

#### **CITY OF WINNIPEG**

#### **CORPORATE FINANCE / RISK MANAGEMENT DIVISION**

**REPORT ISSUED ON MAY 15, 2014**

### **CASE SUMMARY**

A restaurant owner alleged that street work adjacent to his restaurant resulted in lost income when access to his premises was restricted, as well as caused damage to his building and parking lot by construction and by tree roots. He maintains that the City of Winnipeg did not consult with him prior to construction. He filed a claim with the city for compensation for his losses and raised his concerns with his city councillor, a local community organization, and the news media.

The City of Winnipeg has a three-level claims process available when there is an allegation that the city's actions have caused damages. The complainant made such a claim, which the city investigated and denied at the initial stage. The complainant appealed, and following further investigation by an independent adjuster hired by the city, the claim was denied once again. The final level of appeal to the city's chief financial officer was similarly unsuccessful.

The complainant alleges that he was not dealt with fairly by the city during the course of the roadwork and again during the claims investigation process. He alleges that the city did not adequately consult with him to minimize the interruption to his business; that the city's contractors damaged his premises and have failed to take responsibility; and that the investigation process was flawed and/or unfair.

The city's obligations to residents with respect to the potential impact of street work were determined to have been met in this case. The city's contractor complied with the requirement to give notice of the street work to affected businesses within the required timeframe. The complainant had adequate opportunity to engage in the process, but chose instead to contact his city councillor under the mistaken assumption that this was all that was required of him.

With the exception of his claim of damage from tree roots, his claim was fairly investigated by the city, which based its decision on reasonable and relevant facts and law. The city will consider the tree root claim and communicate its decision to the complainant in due course.

## **OMBUDSMAN – ROLE AND RESPONSIBILITIES**

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, and 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.

The actions and decisions complained about are matters of administration arising from street work undertaken by the City of Winnipeg pursuant to *The City of Winnipeg Charter*, and from a claim against the City of Winnipeg made by a resident for alleged losses.

Ombudsman investigations typically assess actions taken or decisions made against a benchmark established by government. Sometimes that benchmark is provincial legislation or a municipal by-law. On other occasions, it is written policy or established procedures implemented to give effect to legislative purpose. In cases concerning an impact on individual rights or benefits, we also examine the fairness of the action or decision. A complaint can raise questions of procedural fairness, substantive fairness or relational fairness. Procedural fairness relates to how decisions are reached; 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.

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.

The goal of administrative investigations is to determine the validity of complaints and to identify areas requiring improvement. If a complaint is supported by a finding of maladministration, the ombudsman may make recommendations pursuant to section 36 of *The Ombudsman Act*.

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.

## THE COMPLAINT

The complainant operates a restaurant located on a busy Winnipeg street in the core of the city. In the fall of 2012, the city undertook remedial street work on the street and sidewalk on the west side of the complainant's business, which is the street his customers must use to access his parking lot. During the course of the work, which lasted approximately 6 ½ weeks, the city resurfaced the street and replaced the sidewalks and curbs. This necessarily meant that access to the complainant's restaurant by pedestrians, and to his parking lot by vehicles, was at times restricted. There was parking available on the residential side street to the west, as well as on the larger street to the north of the business, although this is restricted during peak traffic hours.

The complainant alleged that the work performed by the city's contractor caused him losses in the following ways:

- Loss of business income when customers could not or would not access his restaurant, which the complainant believes could have been minimized had he been provided with more advance notice of the work and an opportunity to suggest ways to maintain access to his lot;
- Damage to his parking lot caused by tree roots;
- Cracks in his business' floor which resulted from the vibrations of heavy equipment.

The total value of his claim was estimated by him to be \$11,479.12. He filed a claim against the city using the city's internal claims process and the claim was denied.

The complainant sought the ombudsman's review of the handling of his claim with regard to the following issues:

- That the city was obligated to consult with him prior to the beginning of construction in order to minimize the interruption of his business;
- That the city caused him damages and failed to take responsibility;
- That no representative of the city attended to inspect his premises during the course of the investigation of his claim, resulting in an unfair investigation.

## KEY ISSUES

1. Is the city obligated to consult with residents or businesses prior to undertaking street work that may have an impact on access to property?

2. Did the city's claim investigation adequately address the claims of the complainant? Specifically, the complainant alleges that:
  - he was not consulted about the street work;
  - he suffered a loss of income when access to his business was restricted;
  - his parking lot was damaged by tree roots;
  - his restaurant floor was damaged.
  
3. Was the city's claims process and investigation conducted in a fair and impartial manner?

## **BACKGROUND INFORMATION**

### **The Legislation**

The city has the sole authority, and responsibility, to maintain roadways within Winnipeg. This is set out in *The City of Winnipeg Charter*: (underlining added)

#### *STREETS*

##### ***Control of streets***

136 *Subject to this and any other Act, the city has the control and management of streets within the city.*

##### ***Possession and control vests in city***

137 *Where the city has the direction, control and management of a street and title to the land on which the street is situated is vested in the Crown, the title remains so vested but the possession and control of the street is vested in the city.*

##### ***City is traffic authority***

138 *The city is the traffic authority under The Highway Traffic Act in respect of streets of which it has direction, control and management and, in respect of those streets, it has all the powers granted to, or enjoyed by, and the duties charged on, a traffic authority under that Act.*

##### ***Streets to be kept in repair***

475(1) *The city must*

(a) *construct every street to a standard that is appropriate for the use to which the city expects the street to be put; and*

(b) *keep every street in repair.*

In fulfilling this obligation to maintain the streets of Winnipeg, the city is permitted to engage contractors as it sees fit. These contractors, and their sub-contractors, are required to meet all relevant duties imposed on the city, be they by statute, by-law, ordinance, regulation, code, or order. The city requires contractors to indemnify them from liability for damages that are caused to residents by reason of the contractor's own negligence. This is standard practice among Canadian municipalities and reflects established law and policy.

### **The Claims Process**

The city has a three-level claims process to claim for damages arising from road work. This process also applies to other types of property damage, such as water damage. The process provides the city an opportunity to investigate and address claims, and governs the city's actions in responding to a claim.

In this situation, the city does not act as an insurer of private property, but rather in investigating a claim, it will determine if it will accept legal liability for damages. The city expects that claimants will participate in the process and places an onus on them to provide sufficient evidence to substantiate the claim they have made.

A resident begins a claim by calling the city's 311 service, or going to the city's website, and obtaining a claim form to fill in and return to the city's Risk Management office. The city's standards dictate that confirmation of receipt of a claim will take place within 20 days, and that within 60 days an adjuster will conduct an initial investigation and contact the claimant. A final decision is to be made within 120 days in most cases.

The initial investigation is conducted by one of the city's adjusters. These individuals are governed by the Insurance Council of Manitoba, which is responsible for the licensing and oversight of all Manitoba insurance adjusters. If the investigation reveals that damage may have been done by a private contractor engaged by the city, the city may refer the claim to the contractor to handle, as provided for in the contract between them. At this first stage, a claim may be accepted, denied, or liability may be apportioned between the city and other parties.

The first decision may be appealed by a claimant to the city's corporate risk manager, who will review the claim. This appeal must be done in writing. A claimant is afforded the opportunity to present new evidence and arguments. Further investigation may be conducted by the city, if it determines there is a need to do so.

The final level of appeal is to the office of the chief financial officer of the city. A written appeal must be made, and again further evidence may be submitted. If that appeal fails, the city informs the claimant that they are entitled to have the administration of their claim reviewed by the Manitoba Ombudsman.

Standard practice is that when the city responds initially to a claim, or issues a denial of a claim, it includes written instructions describing what avenues of appeal are available. Also included is a statement that the claimant is entitled to seek legal representation if they deem it necessary.

At any time in the investigation of a claim, the city may engage the services of outside investigators or adjusters. This occurs infrequently, typically only once or twice a year. These independent persons are selected based on the nature of the claim and the expertise of the available persons. This is typically done in situations where there is an allegation of bias on the part of the city, or where the city believes the specifics of the case warrants the involvement of an independent adjuster.

## **THE CONSTRUCTION PROJECT**

### **Construction Timeline**

The project was for the re-pavement of 1,175.37 feet of the larger (“Priority 3”) street to the north of the complainant’s business. Included in this was replacement of the curbs and approaches leading to parking lots along the street. It was estimated that the project would take 6 weeks to complete. The project was awarded to a contractor through the standard contract tendering process.

The project began on the 11<sup>th</sup> of September, 2012, when notices were hand delivered to affected businesses, including that of the claimant.

On September 14<sup>th</sup>, excavation began. The approach to the complainant’s lot on the residential side street was removed, leaving a gravel path. No vehicular access to the parking lot was possible on this day. Construction barricades were erected in various places, but vehicular traffic to the lot was permitted after that day. Gravel replacement of the entire remediation area was completed by September 27, 2012.

On October 1, 2012, the north side sidewalk and approach were removed, and replaced with gravel that same day. The curb and gutter concrete was poured the next day. Until this point, vehicular traffic onto the complainant’s lot was possible, although restricted, as drivers were required to navigate the construction area. On October 3, 2012, the west sidewalk on the residential street was removed, with the result that access to the complainant’s lot was no longer possible by vehicle. Access was not restored until the 31<sup>st</sup> of October when the fresh concrete was set. Construction barricades were left open to allow customers to park on the streets adjacent to the restaurant and pedestrian access was largely possible.

Full vehicular access to the complainant’s parking lot was restored on October 31, 2012.

### **Communication with the Complainant**

A representative of the contractor spoke to the complainant on September 11, 2012, when a notice was delivered to the complainant. The contractor’s representative described the project generally, and explained the restriction of access to the premises that would occur, and informed him of how to contact them. At this time the complainant did not raise any concerns or make any suggestions to the contractor’s representative respecting the proposed project.

The complainant did not recall the content of this conversation, but stated that it lasted only a short time and denied that he was advised how to engage the contractor in the process. Nevertheless, he agrees that he did not at that time suggest any alternate ways to maintain access to his parking lot.

The notice letter given to the complainant on September 11, 2012 states, in part:

*We recognize the fact that this project will cause you some inconvenience and disruption during its course and apologize for this. Should you have any questions concerning the project or accessibility needs at this time or during construction, please contact the undersigned at [redacted]. Your patience during construction is greatly appreciated.*

On September 27, 2012, the day on which gravel was laid on the site, a worker of the contractor states that a discussion took place between he and the complainant, who was informed that his patrons could park on the gravel surface of the residential side street. The worker maintains that the complainant raised no concerns with him at the time. The complainant recalled that there was a conversation with a worker around this date but he could not recall what was discussed.

The complainant says he did not make any attempts to discuss any alternate plans to maintain access to his parking lot with the contractor, or call the person named in the notice.

The city's file shows that on November 2, 2012, the contractor's representative met with the complainant on his parking lot, where they discussed the parking lot surface bordering on the new sidewalk that would be re-paved. It was determined that the new pavement would be extended an additional one to two meters from where it was initially proposed, in order to satisfy the wishes of the complainant, who was of the opinion this was needed in order to better repair the damage caused by construction. The contractor reported to the city that at the time the complainant was in agreement with this decision. The complainant recalls that this conversation took place, and that the surface area of the parking lot that was re-paved was extended from where the contractor had initially proposed.

### **Early Resolution Attempts**

During the course of construction, sometime in the days prior to September 26, 2012, the complainant emailed his city councillor's office. He was concerned about heavy construction equipment on his lot and the ongoing construction. In reply, his councillor's office informed him that the contractor had complied with a request by the councillor's office to remove the equipment. Further, it was requested that the complainant send pictures of the issues he had raised and the complainant declined, instead asking that a city representative attend to view the project personally.

Sometime in late September or early October, the complainant sought the assistance of the West End Biz in relation to the construction project, which he said was affecting his business and preventing customers from attending. He also alleged that there was damage to his parking lot.

A representative from West End Biz visited the project site and took some pictures of the ongoing construction. In the West End Biz's short undated report, it states that the complainant sought to be compensated by the city.

At this point, while the complainant sought the assistance of his city councillor and the West End Biz, he did not raise his concerns with either the city's Public Works Department, or the contractor.

### **CLAIM FILED BY THE COMPLAINANT**

The complainant filed a written claim with the city on October 31, 2012, prior to the completion of the street work. He alleged that the street work had the following impacts on his business:

1. access to parking lot restricted, resulting in significant drop in business from September 10 to October 31, 2012, for a total loss of \$4,979.12;
2. damage to south end of parking lot caused by tree roots, with an estimated repair cost of \$3,500.00;
3. cracks in floor appeared as a result of vibration and shaking caused by construction activity; with an estimated repair cost of \$1,500.00.
4. delay in return of customer base - \$1,500.00

The total value of the claim filed by the complainant was \$11,479.12.

### **CLAIM INVESTIGATIONS**

On the same day that the city received the complainant's claim, it sent a letter to him acknowledging that it was opening a file and that an investigation was underway. It was requested that he send any photos that he thought would assist them.

The claim was referred to the city's Engineering Branch for investigation, and overseen by the supervisor of claims and risk control services at the city. The Engineering Branch contacted the contractor to obtain information about the matter. The issues of parking, access to the premises, and parking lot damage were canvassed.

The contractor provided pictures it had taken of the complainant's lot prior to the beginning of the project, and provided a timeline of events with specific reference to parking and access.

The supervisor handling the claim sought the input of the city's legal advisors with respect to liability for losses suffered due to business interruption. It was their opinion that the city was not liable, based on their interpretation of the facts, statutes and of the common law.



On November 9, 2012, the city engineer attended at the complainant's premises and viewed the repairs that had been made to the complainant's parking lot by the contractor. The complainant was not made aware of this visit.

### **The First Denial of the Claim**

On December 6, 2012, the city sent a letter to the complainant informing him that it was denying liability for any lost business income. The city pointed out that at all times during the project, pedestrian traffic was maintained and that alternate parking was available within a reasonable distance from the restaurant. It stated,

*The city is required to keep streets in good repair as outlined in the City of Winnipeg Charter under section 475(1). The City of Winnipeg manages these works in a reasonable manner to accommodate businesses and does not provide compensation for interruption of business because of necessary work ...*

*While we recognize that the construction may have caused some inconveniences, street repairs are a necessary part of urban development. The City of Winnipeg is not unique in taking the position that compensation will not be paid to business owners because of street repair construction projects.*

*Based on the information you have provided and the information we have on file, we maintain that the City Street work was not responsible for the shortfall in your expected revenue and deny any liability in this matter.*

*If you have any additional information or documentation which was not submitted or made available to us previously, you can submit this along with your request for a review of your claim to ...*

It should be noted that the letter does not address that portion of the complainant's claim respecting the damage to his parking lot and his building.

The claim denial was subsequently appealed by the complainant to the first level of appeal.

### **The Second Investigation and Denial of the First Appeal**

By way of written submission dated December 17, 2012, the complainant initiated a review of his claim by the corporate risk manager. He disagreed with the city's denial of liability for his lost income, and pointed out that the city had failed to address his claims of property damage.

Documents obtained from the city's file show that the corporate risk manager considered the complainant's allegations of property damage to be "new" allegations raised in his appeal, despite their having been included in his original claim. Manitoba Ombudsman has since been advised by the city that the complainant's allegations of property damage had been initially overlooked due to an oversight on their part.

It was decided by the corporate risk manager in late December 2012 that it would be prudent to engage the services of an outside adjuster to conduct further investigation. This was due to the complainant's stated plan to go to the media and the mayor with his concerns, and his allegations that the city was acting in "reprehensible" ways to prevent him from being fairly compensated.

The city sent a letter to the complainant on January 2, 2013, stating that there would be further investigation into the allegations of physical damage. It further stated that the city would not reconsider the issue of lost income due to business interruption, as the city's position in that respect had not changed.

In mid-January 2013, the claim was referred to an independent, arm's-length adjuster for investigation. That adjuster contacted the complainant by email on January 28, 2013, to set up a meeting to view his restaurant. By mutual agreement, the adjuster met with the complainant on March 5, 2013. The various aspects of the claim were discussed, the premises were inspected, and photos taken of the alleged damage.

The adjuster issued his report on March 11, 2013. He pointed out that the complainant had not provided any independent reports addressing the causation of and quantification of the damages he had claimed, and that it seemed unlikely that the construction activity was the source of the damage. It was pointed out that the damage itself amounted to an estimated repair value of between \$500 and \$1000, for the repair to four cracked floor tiles and possibly some small repair to the parking lot. Overall the report concluded that there was no basis for liability. The report stated:

*We find very little evidence to suggest that there is any liability owing to the City of Winnipeg and that the complaint seems to be solely resting around the fact that [the complainant] was not consulted with directly regarding access to his parking lot and that he would have been able to easily provide City engineers and experienced contractors with better options to allow continual access to his parking lot. On the face of the case there is certainly no liability owing to the City of Winnipeg and it would be our recommendation that any claim be resisted that [the complainant] wishes to advance for legal reasons.*

The city wrote to the complainant on March 18, 2013, and denied his appeal based on the report of the independent adjuster. The city stated that it was not legally obligated to consult with residents prior to street work, and that it had found no negligence on the part of the contractor that led to loss of business income. The city repeated its reliance on the terms of the *City of Winnipeg Charter*, s.475(1). The denial stated,

*We confirmed that the contractor remedied any damage to your lot done during their work. In addition, conditions of the lot prior to the work indicate pre-existing wear and tear consistent with exposure to freezing and thawing cycles and general use. It is not clear how the damage you are referring to may have been caused by street work.*

The city concluded by stating that it was open to receiving further information or evidence from the complainant to substantiate his claim at the next level of appeal and advised that he could also obtain legal advice if he so chose.

### **The Second Appeal and Denial**

The second claim denial was appealed to the city's chief financial officer (CFO). Following a further period of investigation and collection of information, the denial of the claim was upheld, based on the same rationale as the previous decisions. Notably, the complainant had not presented any new evidence in support of his claim.

In reply to the denial, the complainant wrote to the city's CFO on July 15, 2013, disagreeing with the denial and expressing his displeasure with the fact that, in his opinion, nobody on behalf of the city had come to view his property during the course of the investigation.

In final reply, the city's CFO wrote a letter to the complainant, dated September 18, 2013, indicating that the complainant had not provided any evidence to support his claim of damages in order to refute the conclusions of the city's investigation. The letter stated that it was up to the claimant to pursue legal action if he saw fit, and that it was an option to file a complaint with Manitoba Ombudsman in respect of the administration of his claim.

## **POSITION OF COMPLAINANT**

### **Consultation with Residents**

The complainant believes that the city is obligated to consult with residents, especially small businesses, in order to allow for a collaborative approach to the planning of the construction projects to minimize the interruption of business. He alleges that no attempt was made by the city or its contractor to engage him in such an effort. He says that the notice provided by the contractor was inadequate.

### **Loss of Income - Business Interruption**

The complainant states that in addition to the notice of pending street work being inadequate, he contacted his city councillor's office with respect to his concerns about maintaining access to his parking lot. He is of the view that by doing so, he was relieved from any further obligation to contact the city, or the contractor, about the matter. The complainant believes that it was the duty of his councillor to take steps to remedy the situation.

### **Damage to Property**

Parking Lot Damage:

The complainant states that the damage to his lot has been caused by roots that spread from a tree on city property, prior to construction.

He says that this damage is distinct from damage which resulted from the removal and replacement of the sidewalk and some roots under the pavement. The complainant believes that it is the city's responsibility to replace a much larger portion of his lot (an area in excess of what was replaced by the contractor).

#### Damage to Tiles:

The complainant alleges that the tiles in the front entrance of his restaurant were damaged (cracked) as a result of the operation of heavy construction equipment which generated vibration. He maintains that no representative of the city came to view this damage, although he agrees that the independent adjuster hired by the city did inspect them and took photos. He believes that the city has a responsibility to repair the damaged tiles.

## **POSITION OF THE CITY**

### **Consultation with Residents**

The city takes the position that it is not obligated to consult with residents about how it chooses to carry out maintenance of the roads in Winnipeg. It states that for large projects, it might do so, but that for relatively small ones such as the one in this case, doing so would be logistically impractical and unrealistic. However, the city does provide notice to residents in advance of road work and welcomes input as to how to minimize interruption, as do contractors on their behalf. The city maintains that in this case, the complainant was properly notified within the 24-hour period set out in its contract with the contractor, and that he was afforded opportunity to provide input. The city pointed out that the complainant chose not to participate in that process.

### **Loss of Income - Business Interruption**

The city advises that it does not accept responsibility for loss of business income claims in these situations. The city is obligated by the *City of Winnipeg Charter* to maintain roadways and is under no legal obligation to compensate for the non-negligent interruption of business that may occur as a consequence of carrying out their statutory duty. This position is consistent across municipalities in Canada. The city says its contractor acted with due care and in compliance with notice requirements and therefore rejects the claim.

### **Damage to Property**

#### Parking Lot Damage:

The city advises that the contractor remedied any damage that was done during the street work, and that the contractor re-paved an area of the complainant's lot larger than was required, in order to address the concerns that had been raised. The city therefore denies further liability.

### Damage to Tiles:

The city advised that its investigation concluded that the apparent damage was not a result of the construction and that the complainant has not presented evidence to support his position. The city advised that it relied on the evidence that was gathered during its investigation and made a decision to deny the claim on that basis.

The city asserted that the claims investigation process was fair, especially given that the city took the extraordinary step of engaging an independent adjuster. It did this to demonstrate the investigation was independent in an effort to address the complainant's concerns respecting the fairness of the investigation. The city clarified that several people inspected the complainant's parking lot and the independent adjuster inspected the restaurant. The city is of the view that its conclusions are reasonable and consistent with a proper interpretation of the known facts and law.

## **SCOPE OF THE INVESTIGATION**

This investigation included the following:

- A review of *The City of Winnipeg Charter Act* and city policies;
- A review of the City of Winnipeg claims process;
- A review of the file materials of the complainants claim, as well as the two appeals;
- A review of the investigative report of the independent adjuster hired by the city;
- An interview with the City of Winnipeg corporate risk manager;
- An interview with the complainant and site inspection of his property.

## **ANALYSIS OF ISSUES AND EVIDENCE**

### **Duty to Consult with Residents**

The city has stated that it would be logistically difficult and unrealistic to consult with residents prior to the commencement of street work; in the city's opinion, doing so would inhibit its ability to meet its responsibilities under *The City of Winnipeg Charter*, as well as delay projects and increase costs. The city's policy is that 24-hours notice is required prior to the commencement of work that will interrupt or inconvenience a resident or business. Manitoba Ombudsman agrees that there is no legal obligation for any consultation, and agrees that it would be unreasonable to expect that the city should be required to seek consultation with residents prior to undertaking street work on small scale projects.

### **Loss of Income - Business Interruption**

We acknowledge the complainant's view that there are situations where street work will impact the ability or willingness of customers to access a business that is surrounded by construction. In this regard the city is obligated by law to act reasonably (that is, without negligence) to minimize these losses by planning the project appropriately. However, street work will almost always result in some degree of inconvenience for those whose property is nearby, for which the city is not obligated to provide compensation.

In this case, it has been shown that the city's contractor provided a written notice to the complainant during a face-to-face meeting on September 11, 2012, at the beginning of the street work and in advance of vehicular access to the complainant's parking lot being restricted. The notice specifically provided a contact person that the complainant could have called in order to discuss the project and to provide his input as to how to best minimize the interruption to his business. The complainant chose not to do this, instead opting to call his city councillor and external parties including the West End Biz and news media.

### **Damage to Property**

#### Parking Lot Damage:

Manitoba Ombudsman concludes that the city's contractor acted appropriately by repairing the damage that resulted from the replacement of the sidewalk on the west side of the complainant's restaurant. We note that the complainant filed his claim with the city before the contractor had finished the construction project. Further, when the contractor was nearing completion of the project, a consultation with the complainant took place, after which the contractor agreed to extend the boundary of the new pavement to accommodate the complainant.

However, the city has not adequately addressed the complainant's claim that a larger portion of his lot was damaged by tree roots, prior to the beginning of the street work. On the original claim form, it states that compensation was sought for:

*damage to south end of parking lot due to longstanding water and tree roots which are now visible and known. (underlining added)*

At the first level, this allegation of damage was missing from the city's investigation; this resulted in the first letter of denial omitting the claim completely. When the claimant appealed, his written submission contained the following respecting the parking lot damage:

*Part of my claim also included damage to my parking lot from tree roots, which could clearly be seen, because the sidewalk and part of the pavement on the city side was removed and the roots could clearly be seen.*

The second investigation, involving the independent adjuster, did not include any inspection of the parking lot, due to snow and ice. The adjuster's report does not address the issue of tree root damage and it does not appear the topic was discussed at the in-person interview.

The city's second denial of the claim, based on the adjuster's report, denies further liability to repair the parking lot. The denial states,

*It is not clear how the damage you are referring to may have been caused by the street work.*

Manitoba Ombudsman concludes that the city denied this aspect of the claim on the basis that the alleged damage was not the result of the street work; however, this was not the claim made by the complainant. He claimed that the damage resulted from tree roots, not the street work.

Manitoba Ombudsman concludes that the complainant is entitled to have the city consider and reply to his allegation that tree roots from a tree on city property damaged his parking lot prior to the street work being performed. Manitoba Ombudsman raised this issue with the city, which has agreed to investigate and respond to this aspect of the complaint. The normal avenues of appeal of this decision, once made, will be available to the complainant.

Damage to Tiles:

Manitoba Ombudsman has concluded that the city acted reasonably when it relied on the report it commissioned from the independent adjuster. The independent adjuster considered the relevant facts and law, and came to a conclusion that the damage to the tiles was unlikely to have been caused by the construction work. The complainant did not present evidence to substantiate his claim that the tiles were damaged by the city contractor's actions.

### **Fairness of the Claims Process**

During the course of our investigation the entirety of the claims process at the city was reviewed. Manitoba Ombudsman is satisfied that the process, which provides for two levels of appeal, is a fair one. In this case, the city adhered to all relevant laws, policies, and guidelines in handling the claim.

Additionally, the city took the unusual step of engaging the services of an independent adjuster in an effort to ensure that not only was the claim handled impartially, but to ensure that it was seen to be handled impartially. There is no evidence to suggest that the complainant was denied due process; in fact, the evidence suggests that his concerns were handled fairly.

The complainant maintains that prior to Manitoba Ombudsman's investigation, no representatives on behalf of the city attended to view his restaurant in order to investigate his claim. However, he does not dispute that the city's independent adjuster attended and viewed his restaurant, took pictures, and interviewed him.

The city has informed Manitoba Ombudsman that on several occasions during the investigation, professionals from several departments within the city inspected the complainant's restaurant parking lot, albeit without the knowledge of the complainant. This includes a final site inspection on November 9, 2012, and visits in the spring of 2013 during the claim investigation.

This communication breakdown appears to have resulted in the complainant forming the belief that no inspection happened. In this regard, the city could have communicated its intentions more clearly to the complainant.

Manitoba Ombudsman concludes that the city acted reasonably when it sent its independent adjuster to inspect the complainant's restaurant and interview him. Unfortunately, the complainant seems to have misunderstood that, in fact, this adjuster was acting on behalf of the city, and therefore questions the legitimacy of the claim investigation.

## **CONCLUSION**

Manitoba Ombudsman cannot conclude that the actions of the city's contractor to maintain access to the complainant's business were unreasonable when the complainant failed to contact the contractor to make known his concerns or to present any alternatives respecting access to his property.

Manitoba Ombudsman also finds the city's interpretation of the *City of Winnipeg Charter* to be reasonable, and agrees that absent negligent behaviour, the city has the justification to refuse liability for the largely unavoidable consequences of street work that, under the charter, the city is obligated to perform.

The actions of the city's contractor in repairing the complainant's parking lot were reasonable, as was the city's reliance on the conclusions of its independent adjuster. The issue of tree root damage will be addressed by the city following further investigation.

Manitoba Ombudsman concludes that the complainant was dealt with fairly by the city and throughout the claim process, with the exception of the issue of the tree root damage.

## **Suggestions / Going Forward**

Manitoba Ombudsman suggests that the city revisit the appropriateness of its "24-hour notice" policy when businesses will be affected by repair work. This policy currently applies whether the street work will last one week, or one year. It is reasonable to assume that the longer the duration of the street work and the longer a business will be affected, the more a business would benefit from having notice further in advance than 24 hours, if possible. It is appreciated that there is a certain unpredictability to the start date of many projects (for example, due to weather), especially smaller projects, but for many it will be possible to give more notice.

It is further suggested that the city, in the context of a property damage claim, inform claimants that an inspection of the property in question has taken place. This will prevent a claimant from assuming that no inspection has taken place, as was the case in this complaint, and shows the claimant that the city is acting diligently in the investigation of the claim.

**MANITOBA OMBUDSMAN**

**MAY, 2014**