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Rain, Rain, Go Away: Municipal Defences to Flooding Claims

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Rain, Rain, Go Away
Municipal Defences to Flooding Claims

Introduction:

The purpose of this paper will be to provide practical advice to assist municipal lawyers in defending flooding claims brought against a municipality. In particular, I will discuss the defences of statutory authority, statutory immunity, and policy decision immunity with reference to recent case law.

Systems

Municipalities perform public works with regard to water systems, sewage systems, and the management of surface water using both open and closed drainage systems. Generally, sanitary sewer systems are closed systems that connect into pumping stations. Closed drainage systems consist of pipes between two manholes that may carry sewage, stormwater, or both combined. Open ditch systems are found outside of the municipal service area which is usually delineated through a by-law. An open ditch system directs storm water through a series of ditches and driveway culverts into a nearby lake, river, stream or brook. Homes located outside the service area are hooked up to a septic tank for sewage disposal.

Flooding may result from the operation of these systems as well as through land development which can redirect the flow of surface water. There are numerous causes of municipal flooding such as water main breaks, lateral obstructions, and tree root interference. Open ditch systems can get clogged with ice, snow and debris impeding the flow of the water. After a heavy rain, rivers and lakes can overflow their banks and flood the surrounding homes. The most common cause for flooding seems to be the overflow of storm water from open ditch drainage systems.

Investigation

When presented with a flooding claim, the municipal lawyer should contact the municipal engineers and public works staff to determine the source of the flooding. If the flooding originates from within a home, the problem is often not municipal. Such backups may be the result of tree roots blocking the pipes or a build up of heavy detergent in the line. Small video cameras can be snaked into the lines to record the source of the problem. It is also important to get a copy of the monthly weather report from Environment Canada which will show the amount of snow and rainfall that fell each day during the relevant month, as flooding claims often arise after heavy rains. If there is some indication that there has been an extremely heavy rain or snowstorm near the time of the flooding, it is often helpful to retrieve articles and pictures from the local papers which depict and describe the intensity of the storm.

Nuisance

Nuisance claims are often brought against municipalities for flooding to a building or land. The rule in **Rylands v. Fletcher**[1] states that anything that escapes from your property onto your neighbour's property and causes damage is an actionable nuisance. This applies even though you have acted reasonably and without negligence. Under this rule, there is no defence, and the party that suffers damage is entitled to compensation from the party from whose property the water escaped.

Statutory Authority

A public body may be able to use the defence of statutory authority in answer to a nuisance claim. The principle behind this defence is that a municipality is not liable for a nuisance if the nuisance is the inevitable result of authority delegated to it by statute.

The defense of statutory authority, also known as the defence of inevitable consequence, supported the position that legislatures were entitled to authorize actions which would otherwise give rise to actionable claims as noted by Viscount Dunedin in **Manchester (Borough) v. Farnworth**,[2]:

> *"When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense."* [3]

This position was adopted in a number of subsequent decisions in Canada.[4]

The defence emerged in the Victorian era in England at a time of rapid urban expansions, when

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1 (1868), L.R. 3 H.L. 330

2 [1930] A.C. 171

3 Ibid at p. 183.

4 *City of Campbellton v. Gray's Velvet Ice Cream Ltd.* (1981), 127 D.L.R. (3d) 436 (N.B.C.A.), *City of Portage La Prairie v. B.C. Pea Growers Ltd.*, [1966] S.C.R. 150, *Schenck v. Ontario (Minister of Transportation and Communications)*, [1987] 2 S.C.R. 289, *Royal Anne Hotel Co. v. Ashcroft*, [1979] 2 W.W.R. 462 (B.C.C.A.), *Temple v. City of Melville* (1979), 105 D.L.R. (3d) 305 (Sask. C.A.).

municipalities and other public authorities were responsible for constructing infrastructure, such as railways, sewer and water delivery systems, which was vital to sustaining the industrial revolution.

> "*It has been theorized that fear of adverse judgments hampering such development led the judiciary to fashion an immunity from liability in nuisance for public authorities. The philosophy of the day was that harm to one or a few individuals had to be tolerated in order to achieve the greater public good.*
>
> *That philosophy, or at least the defence to which it gave rise, was incorporated into Canadian jurisprudence without significant debate until, quite unexpectedly, the Supreme Court of Canada effectively eviscerated the defence in its 1989 decision in* ***Tock v. Saint John's****."* [5]

In **Tock et al. v. Saint John's Metropolitan Area Board**[6], the plaintiffs brought an action against the public authority when a blocked storm sewer resulted in their basement being flooded after an extremely heavy rainstorm. In the absence of negligence, the case focused on whether the defence of statutory authority was available to shield the local board from liability. The traditional statutory authority rule stated that liability would not be imposed if an activity was authorized by statute, and the defendant proved that the nuisance was the inevitable result or consequence of exercising that authority. The rational for the defence is that if the legislature expressly and explicitly says that work can be carried out which can only be done by causing a nuisance, then the legislation has authorized an infringement of private rights. If no compensation provision is included in the statute, all redress is barred.[7]

The Supreme Court of Canada held that the defence of statutory authority was not available to the public authority under the circumstances. Three separate reasons were advocated by the Court regarding how the defence should properly be applied. Mr. Justice LaForest and Chief Justice Dickson took the view that the defence of statutory authority should be abolished entirely unless there is an express statutory exemption from liability.

Justice Wilson held that the defence only applies to cases of statutory authority and not cases where the legislature has imposed statutory immunity. Wilson J reasons:

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[5] David Boghosian and Murray Davison, The Law of Municipal Liability in Canada,, Butterworths, Toronto, 2000, p. 2.50, para 2.111.

[6] [1989] 2 S.C.R. 1181

[7] Fleming, The Law of Torts (6th ed. 1983), at p. 407, and *City of Campbellton v. Gray's Velvet Ice Cream Ltd.*, supra 4, at p. 439

> *"In my view, these principles make a great deal of sense. The inevitability doctrine represents a happy judicial compromise between letting no one who has suffered damage as a consequence of the statutorily authorized activities of public bodies recover and letting everyone so suffering damage recover. Recovery will be allowed unless it is shown that the interference with the plaintiff's rights was permitted by either:*
>
> > *(1) express language in the statute such as a provision specifying that no action for nuisance may be brought for any damage caused: see, for example, the decision of this court in* ***District of North Vancouver v. McKenzie Barge & Marine Ways Ltd.****, [1965] S.C.R. 377; or*
> >
> > *(2) by necessary implication from the language of the statute coupled with a factual finding that the damage was the inevitable consequence of what the statute ordered or authorized the public body to do."* [8]

Mr. Justice Sopinka took a different approach favouring the traditional application of the defence:

> *"I have had the privilege of reading the reasons for judgment of my colleagues Justice La Forest and Justice Wilson. Regrettably, I am unable to agree with the reasons of either. I agree with Wilson, J.'s comment that the approach proposed by La Forest, J. would virtually abrogate the defence of statutory authority and would do nothing to assist public bodies to make a realistic assessment of their exposure in carrying out their statutory mandate.*
>
> *On the other hand, I am concerned that her approach would have the same consequences for the defence of statutory authority. She would eliminate it in respect of legislation that is permissive. Modern legislation authorizing the provision of the type of works which frequently give rise to nuisances is almost invariably permissive. This would expose public authorities to the same liability for nuisance as private enterprise. While this might assist them in estimating their exposure, that exposure would open the floodgates to the same extent as the approach proposed by La Forest, J.."* [9]

After the decision in **Tock**, the law pertaining to the applicability of the defence became uncertain.[10] In the years that followed, judicial decisions by both trial and appellant courts across

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[8] Supra 6, at para. 66.

[9] Supra 6, at para. 1223-24.

[10] *Cranmer v. Sudbury (Regional Municipality),* (1996), 33 M.P.L.R. (2d) 116 (Ont.Gen.Div.) (rejected the defence after considering the application of the three sets of reasons in *Tock*); *Rideau*

Canada failed to achieve a consensus view of the proper application of this important defence.[11]

Responding to the **Tock** decision, provincial legislatures quickly enacted limited statutory exemptions with respect to a public body's liability for nuisance. The statutory exemptions provided immunity from liability in nuisance and required the defendant to prove negligence.

Ten years after it had repealed the statutory authority defence, the Supreme Court of Canada resurrected it in its 1999 decision **Ryan v. Victoria City** [12]. Although the statutory authority defence did not ultimately prevail in **Ryan**, it is of great significance in reviving the traditional defence which was left for dead following **Tock**.[13] This is particularly true in those jurisdictions which did not enact legislation effectively overruling **Tock** in respect of escapes from municipal sewer and water systems and in respect of nuisances outside of the scope of the legislative protections.[14]

In **Ryan v. Victoria (City)[15],** Ryan was injured when he was thrown from his motorcycle while crossing railway tracks which ran down the centre of a Victoria street. He sued the city and the railway companies which owned and operated the tracks. The trial judge held the railways and the city liable in negligence, and the railways liable in nuisance and rejected the defence of statutory authority. The Court of Appeal found that the defence of statutory authority had been established. The Supreme Court of Canada held that the railways were negligent with respect to the width of the flange ways used in the track along the street. The tracks created an unreasonable interference with the public's use and enjoyment of the street, and therefore constituted a public nuisance. The Court of Appeal erred in permitting the railways to assert the defence of statutory authority against the claim for nuisance. The railways' discretionary decisions to exceed the minimum flange way width, and not to install flange way fillers, were not the inevitable result of constructing the tracks pursuant to the authorizing legislation.[16]

Falls Generating Partnership v. Ottawa (City), (1999), 174 D.L.R. (4th) 160 (Ont.C.A.).

[11] M. Rick O'Connor, *The Confusing Defence of Statutory Authority Revisited: Saint John's City v. Lake, Municipal Liability Risk Management, January, 2001 Vol. II, No. 2 at page 28.*

[12] [1999] 1 S.C.R. 201.

[13] David G. Boghosian, J. Murray Davison, Q.C. and M. Rick O'Connor, *Environmental Liability of Local Governments: Nuisance Claims*, Municipal Liability Risk Management, May , 2000, Vol. I No.4 at page 62.

[14] The Law of Municipal Liability in Canada, supra 5, at p.2.57-2.58

[15] Supra 12.

[16] For an excellent review of *Ryan* see M. Rick O'Connor, *From Tock to Ryan, The Narrow Defence of Statutory Authority*, Municipal Liability Risk Management, November 19, 1999, Vol I, No. 1 page 5.

Major J., writing for a unanimous court wrote:

> *"Statutory authority provides, at best, a narrow defence to nuisance. The traditional rule is that liability will not be imposed if an activity is authorized by statute and the defendant proves that the nuisance is the 'inevitable result' or consequence of exercising that authority. See* ***Lord Mayor, Aldermen and Citizens of the City of Manchester v. Farnworth****,* ***City of Portage La Prairie v. B.C. Pea Growers Ltd.,Schenck v. Ontario (Minister of Transportation and Communications).***[17] *An unsuccessful attempt was made in* ***Tock,*** *to depart from the traditional rule. Wilson J. writing for herself and two others, sought to limit the defence to cases involving either mandatory duties or statutes which specify the precise manner of performance. La Forest J. (Dickson C.J. concurring) took the more extreme view that the defence should be abolished entirely unless there is an express statutory exemption from liability. Neither of those positions carried a majority.*
>
> *In the absence of a new rule, it would be appropriate to restate the traditional view, which remains the most predictable approach to the issue and the simplest to apply. That approach was expressed by Sopinka J. in* ***Tock*** *..."* [18]

The Supreme Court of Canada adopted the following words of Sopinka J's. minority reasons in **Tock** as a correct statement of the law with respect to inevitable consequence.

> *"The defendant must negative that there are alternate methods of carrying out the work. The mere fact that one is considerable less expensive will not avail. If one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance. It is insufficient for the defendant to negative negligence. The standard is a higher one. While the defence gives rise to some factual difficulties,*
> *in view of the allocation of burden of proof, they will be resolved against the defendant."* [19]

The Court held that the test is whether it was "practically impossible" for the defendant to avoid the nuisance. It is clearly a high onus on the defendant, and establishing lack of negligence or the reasonableness of the defendant's decisions will not suffice to establish the defence of inevitable consequence.

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[17] *Lord Mayor, Aldermen and Citizens of the City of Manchester v. Farnworth,* [1930] A.C. 171 (H.L.), at p. 183*; City of Portage La Prairie v. B.C. Pea Growers Ltd.,* [1966] S.C.R. 150; *Schenck v. Ontario (Minister of Transportation and Communications),*[1987] 2 S.C.R. 289.

[18] Supra 12, at p. 238.

[19] Supra 12, at p. 55.

One of the first cases to discuss the defence of statutory authority post **Ryan** was **St. John's City v. Lake**[20]. A rain gutter froze permitting the water to flow down the street and into the plaintiff's basement. The city dispatched a grader to clear the ice and snow and the flooding ceased. Chief Justice Clyde Wells discussed the Supreme Court of Canada's earlier decisions in **Tock** and **Ryan,** and concluded that in order to correctly apply the defence of statutory authority reference must be had to the original ruling of Mr. Justice Sopinka in **Tock**. The majority of the court held that the defence of statutory authority was available to the city because the removal of snow from the sidewalk to the gutter from every street in the city to avoid flooding was not practically feasible in situation and expense.

The decision leads one to conclude that it is important for a municipality to identify the specific legislation which authorizes it to perform the work in question and demonstrate that the statute is particular with respect to the way in which the work is to be done in order to qualify for the defence of statutory authority. Further, the municipality must show that the nuisance that occurred was the inevitable result of the statutory undertaking. The mere fact that one method is considerably less expensive will not avail as set out by Justice Sopinka in **Tock**. Therefore, cost is not an overriding determinant. Despite this, the municipality should show that it used the best available materials, equipment and technology in order to meet the high onus to prove that the nuisance was the inevitable consequence of the legislative undertaking.[21]

The city of Ottawa's reliance upon the statutory authority defence failed in **Rideau Falls Generating Partnership v. Ottawa (City)**[22]. In making its determination, the Court discussed both **Tock** and **Ryan**. This case clarifies the respective onuses of proof on a defendant in establishing statutory authority and on the plaintiff in proving negligence. The Court of Appeal held at paragraph 10 that "the onus was on the defendant to prove the nuisance was unavoidable, whereas for the claim in negligence, the plaintiff had to establish that the defendant breached its duty of care and the breach caused the damage." As the outcome of this case demonstrates, the result of these respective burdens for each party could be that a city may not be held liable in negligence for a flooding incident, but could still be found not to have established the defence of statutory authority for the same incident.

In **Spika v. Port Alberni (City)**[23], storm water backed up into Spika's crawlspace from the municipal storm sewer. He reported the incident to the City's Public Works Department which sent an employee to inspect. The city requested that Spika excavate and expose his storm service lateral so that the city could inspect it for a blockage. The employee gave Spika a card that indicated the location of the storm drain lateral, but the location proved to be incorrect, and Spika

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20 (2000), N.J. 268 (Nfld. S.C.A.D.)

21 Supra 11, at p.32.

22 (1999), 1 M.P.L.R. (3d) 158 (Ont.C.A.)

23 (2002), B.C.J. No. 980 (QL)(B.C.S.C.)

needlessly excavated his driveway. The card was marked with a warning that it was not necessarily accurate or complete. Spika could not locate the storm service lateral and retained a contractor who located it and arranged for it to be excavated. The city cut into the exposed storm service lateral, inserted a sewer snake into the pipe and cleared the blockage. It admitted that the blockage was located on its side of the property line but claimed that it was exempt from liability in nuisance.

The City of Port Alberni applied for dismissal of the claim with a number of defences, including the defence of statutory authority. The trial judge held as follows:

> *"If the backup of storm water constitutes a nuisance, was the nuisance the inevitable consequence of exercising a statutory authority such that the defence of inevitable consequence resulting from the exercise of statutory authority is made out?"* [24]

The court held that the City did not have a duty of care to regularly inspect and maintain storm service laterals, but it did have a duty of care to maintain and repair its storm drainage system once the problem was located. Wong J. rejected the defence of statutory authority and held that the nuisance was not the inevitable result of performing the work. He further suggested that the case should have been settled on a split fault basis instead of going to trial. Wong J.'s decision was based upon the following premise:

> *"The defence of inevitable consequence, ie., the loss or damage being the inevitable consequence of the exercise of statutory authority, is merely an unusual form of the defence of statutory immunity. The statute in these cases does not expressly provide immunity, and the question whether there is an implied grant of immunity involves a determination of those circumstances in which the Legislature may be said to have concluded that the public interest requires a private sacrifice from an effected individual."* [25]

It has been suggested that this decision lends credence to the Supreme Court of Canada's original view in **Tock** that pleading such statutory defences, "gives rise to some factual difficulties" for municipal defendants. As such, the court's practical advice is one that risk managers may wish to consider before seeking another judicial ruling on the defence of statutory authority.[26]

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[24] Ibid, at para. 11(d).

[25] Hillel David, Thompson Rogers on Municipal Liability (Aurora: Canada Law Book, 1996) at p. 111.

[26] M. Rick O'Connor, *The Defence of Inevitable Consequence: Spika v. Port Alberni (City),* Municipal Liability Risk Management, September, 2002, Vol. 3, No. 6.

In **Rollins v. Charlottetown City Water and Sewer Commission,**[27] the Rollins sued the city for damages to their basement when the sewer main in front of their property became blocked and caused a back flow into their basement. A previous blockage had occurred in the sewer main a couple of years prior. The blockage which had caused the flooding resulted from solidified kitchen fat that had accumulated in the system adjacent to the residence. The city held that the back check valve within the home must not have closed as intended, and that it was not possible to avoid blockages in mains even if unlimited funding sources were available. The city relied on the defence of statutory authority.

The court held that the plaintiffs could not rely on the case **Port Alberni City v. Moyer**[28] which had been decided in reliance on ***T*ock** and was no longer good authority with regard to the defence of statutory authority.[29] In rendering its decision, the court relied upon **Ryan** and found that it was practically impossible for the city to have avoided the backup which caused the flooding of the plaintiffs' basement because it was practically impossible for the utility to predict or avoid blockages in the sewer mains.

A municipality intending to rely on the defence of statutory authority should note that the traditional statutory authority rule as expressed by Sopinka, J. in **Tock** is what should be followed.[30] The Supreme Court of Canada has made it clear in **Ryan** that the decisions by Wilson, J. and LaForest, J. in **Tock** no longer apply. Therefore, Canadian case law predating **Tock** may be used to establish the statutory authority defence post **Ryan.**[31]

In order for the defence of statutory authority to succeed, a municipality must prove on the balance of probabilities that it had the statutory authority to construct or maintain the work which caused the nuisance. Secondly, it must also show that the nuisance was the inevitable consequence of operating the system and that there were no other practically feasible methods available to carry out the work. Cost is not a factor. The burden remains high on a municipality to prove this defence as it must establish that it was practically impossible to avoid the nuisance.

Cases decided between the 1989 decision in **Tock** and its l999 reversal in **Ryan** should be approached with caution as these cases adopted a very restrictive approach of the statutory authority defence.[32] The case law suggests that its success will largely depend on the facts in

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27 (2003) P.E.I.J. No. 2 (P.E.I.S.C. - T.D.)

28 (1999), 65 B.C.L.R. (3d) 352 (B.C.S.C.)

29 Supra 27, at para. 13.

30 For a further discussion on the defence of statutory authority see Rogers, The Law of Canadian Municipal Corporations, (2d) Carswell (2002) at para 253.

31 See *Bonenfant v. St-Francois de Madawaska (Village),*(1987) 80 N.B.R. (2d) and 202 A.P.R. 197

32 Supra 5 at para. 4.10.

each particular case. It is much easier for a municipality to rely on the defence of statutory immunity when defending a nuisance claim.

Statutory Immunity

The powers of a municipality are set out in its enabling legislation. A municipality is authorized by statute to perform drainage works within its boundaries. Statutes governing municipalities contain a variety of provisions intended to restrict what actions may be brought, and thus make the municipality immune against certain types of claims. Most of these provisions are intended to bar claims that would otherwise be available at common law. In order for liability to be found, the plaintiff must establish that the municipality was negligent. The legislation has removed all other causes of action against the municipality.

A number of provinces, including Alberta, Manitoba, Newfoundland, Nova Scotia and Ontario have enacted legislation barring or restricting actions in cases involving the treatment, storage, supply and distribution of water.[33]

British Columbia

Legislation in British Columbia provides statutory immunity for a municipality from liability in nuisance if the damage is due to a breakdown or malfunction of a drainage work.[34]

In **Port Alberni (City) v. Moyer**[35], the court considered whether section 288 of the Local Government Act[36] provided statutory immunity to the municipality in a situation where gravel build up in the sewer system had resulted in flooding, but there was no actual breakdown or malfunction of the sewer line as stipulated in the legislation. The court held that the municipality's decision to maintain and inspect a sewer system was a policy decision, and therefore immune from scrutiny unless it can be shown that the decision was not taken in a bona fide exercise of discretion. The court strictly construed the statutory immunity clause in deciding that the municipality could not rely on the defence of statutory immunity because the flooding was not attributed to a breakdown or malfunction in the line.

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[33] The Municipal Government Act, S.A.1994, c. M-26.1, s. 528, Municipal Act, S.M. 1996, c. 58, s. 395., Municipalities (amendment) Act, S.N. 1996, c. 25, s. 20, adding s. 447.1 to the Municipalities Act, R.S.N. 1990, c. M-23. Municipal Act, R.S.O. 1990 c. M. 45, s. 331.2, as A.M. by The Better Local Government Act, S.O. 1996, c. 32, s. 55, Municipal Government Act, R.S.N.S. 1998, c.18, s. 318, s.513-515.

[34] Local Government Act, R.S.B.C. 1996, c.323, as am. by S.B.C. 2000, c.14, s.1.

[35] (1999), 65 B.C.L.R. (3d) 352 (B.C.S.C.)

[36] Supra. 33.

In **Bavelas v. Copley**[37]**,** the Municipality of Saanich appealed a decision finding it liable for a nuisance created on its land by a third party. The plaintiff owned land adjacent to the defendant's property. Copley built a second home on his property, but heavy rains caused water to back-up on his property. While Bavelas was away, Copley dug a ditch across Bavelas's land. Although Bavelas complained to the municipality, the situation was not remedied. The trial judge found that the municipality had contributed to the unreasonable interference of Bavelas's enjoyment of her property. The court rejected the municipality's defence under section 596(6) of the Municipal Act [38] which provided that no action could be brought against a municipality with respect to the construction, maintenance, operation or use of a drain or ditch. In allowing the appeal, the court of appeal held that s.596(6) provided the municipality with absolute protection to the plaintiff's claim. The municipality was afforded full immunity from liability.

In **Moffat v. White Rock (City)**[39], the plaintiffs were not aware that the previous owner of the home knowingly installed an illegal crossover between the sewer line that led from his house and the sump that collected water from his drain tile and roof spouts. This water was pumped by a sump pump into the storm sewer in front of the house. A back-up in the sanitary sewer caused by roots and plastic bags flooded the plaintiffs' basement with eight inches of raw sewage. The action was dismissed because the city had a policy of preventative maintenance for all sewer lines over private land which was better than other local municipalities. Further, the court held that the municipality was not liable for damages resulting from the sewer blockage because such a blockage constituted a malfunction within the meaning of the legislation.

In **McKenzie Barge and Marine Ways Ltd. v. Vancouver (Mun. Corp.)**[40]**,** the municipality had constructed a ditch to drain highways in the area. A delta was eroded at the mouth of a creek which caused an overflow of water and silt onto the plaintiff's land and interfered with the conduct of its business. The Supreme Court of Canada allowed the appeal and dismissed the action against the municipality. Section 529 of the Municipal Act, coupled with the powers granted to the municipality by s. 527, prevented anyone from making any claims for damages against the municipality in respect of any ditch which it constructed under the legislative powers granted to it. The Supreme Court of Canada held that a complete defence was afforded to the municipality by the legislation.

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37 [2001] B.C.J. No. 387, (B.C.C.A)

38 The title of the Municipal Act was repealed and replaced with the title Local Government Act by the Local Government Statutes Amendment Act, S.B.C. 2000, ch. 7, s. 1. Section 596(1) is now s. 549 under the newly titled Act.

39 (1992), 13 M.P.L.R. (2d) 283 (B.C.S.C.)

40 (1965) 51 W.W.R. 193 (S.C.C.)

Alberta

Section 528 of the Alberta Municipal Government Act [41] states:

> *"A municipality is not liable in an action based on nuisance or any other*
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> *tort that does not require a finding of intention or negligence, if the damage arises, directly or indirectly, from roads or from the operation or non-operation of (a) a public utility; or (b) a dyke, ditch or dam."*

Public utility is defined broadly to include the provision of water for public consumption, sewage disposal, irrigation, and other drainage and waste works. This section has been successful in advancing the defence of statutory immunity.[42]

Saskatchewan

Even prior to **Tock**, Saskatchewan had legislative provisions limiting municipal liability since 1984. The section protects against liability from broken or severed sewer pipes. But, the section has been narrowly interpreted to exclude liability relating to rusted pipes.[43]

Ontario

There are no reported decisions regarding section 331.2 of Ontario's Municipal Act [44] which states that no proceeding based on nuisance, in connection with the escape of water or sewage from such works, shall be commenced against a municipality.

Nova Scotia

In Nova Scotia, sections 513 to 515 of the Municipal Government Act[45] were codified to protect municipalities in Nova Scotia from liability. The Nova Scotia statute provides that any damages caused directly or indirectly by the operation, maintenance, repair, breakage or malfunction of a sewage or water system, or interference of the supply of water through a water system must be shown to have been caused by the negligence of the municipality, its officers or employees. This

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41 Municipal Government Act, S.A. 1994, c. M-26.1, s. 528

42 *Stachniak. v. Thornhild, (County No. 7)* [2001] A.J. No. 423 (Alta.. Prov. Ct.) (Q.L.); and *Guard v. Trochy (Town),* [2001] A.J. No. 1240 (Q.B.)(Q.L.)

43 See *Johnson v. Saskatoon City*, (1986)35 M.P.L.R. 23 at p. 26 (Sask. Q.B.) and *Stene v. Shellbrook Town*, (1997) S.J. No. 150 (S.M. C.L.C.T.)

44 R.S.O. 1990, c. M-45, 331.2

45 R.S.N.S. 1998, c. 18

section provides immunity from liability in nuisance and requires the defendant to prove negligence.

Newfoundland

In **St. John's City v. Lake**[46], the court discussed section 179 of the City of Saint John's Act [47] which states that the city shall not be liable for a loss or damage to property resulting from flooding due to rainstorms, thaws, or the breaking of a water main or sewer pipe for a cause over which the city has no control. The Newfoundland Court of Appeal held that the statutory immunity provision in the City of Saint John's Act[48] provided the city with a statutory exemption from liability for the flooding of the basement in the respondent's home. In rendering its decision, the Court of Appeal held as follows:

> *" Another form of immunity from liability, which is not specifically based on, or implied from, the statutory authority to take an action, is provided for by statute. That is an explicit exemption from liability, that might otherwise exist, for consequences of specified events or occurrences. Such exemptions are frequently qualified or otherwise made subject to conditions specified in the statutory provision. Section 179 of the City of St. John's Act, creates such an exemption. The section does not explicitly provide for immunity from liability arising from any action mandated or authorized by the City's constating statute, nor does it do so implicitly. Rather, it exempts the City from liability for damages resulting from specified circumstances, notwithstanding that the City may have been otherwise liable in nuisance at common law, if the circumstances giving rise to the nuisance are those specified in the exemption. Section 179 must be applied in that context and not in the context of the defence of statutory authority."*[49]

Statutory immunity clauses are strictly construed because they limit the rights of action of citizens. The defence of statutory immunity will only be enforced to the extent that it is clearly and unambiguously conferred. A municipality cannot confer immunity upon itself by by-law, as this would be ultra vires its statutory powers.[50]

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46 Supra 20.

47 City of St. John's Act, R.S.N. 1990, c. C-17

48 R.S.N.1990, c.C-17

49 Supra 20 at para 32-33.

50 *Laurentide Motels v. Beauport (Ville)* [1989], 1 S.C.R. 705 at page 756-57.

Act of God

A municipality may also rely on the act of God defence as a response to a claim in nuisance where the flooding was a consequence of unusually heavy rains. In **Stachniak v. Thornhild (County No.7)**[51], the municipality relied upon the defences of statutory authority and act of God with regard to flooding of the plaintiff's land. Even though the act of God defence failed, the court noted, "that where it is found that the weather event that precipitated the flooding was of such a force, and so unexpected, that no engineering work could be justified on any grounds to protect against it, liability will not be invoked, even if the defence of statutory authority fails. The defence of vis major or act of God is the reason."[52]

To succeed with the defence that the damage occurred through exceptional rainfalls amounting to a vis major, it must be clearly proved that the injuries complained of must have happened independently of negligence. A municipality relying on the defence must show that it discharged its duty to repair.[53] There seems to be no universal standard for the application of the act of God defence in Canada. Different jurisdictions have applied the defence with varying degrees of rigger.[54]

Negligence

The common law does not impose a duty on a municipality to perform works to provide for the drainage of surface water. However, a municipality that provides drainage works must take reasonable care in doing so. The law of negligence requires the plaintiff to establish fault on the part of the defendant. In the case of flooding, the plaintiff would have to show that the faulty design, construction or maintenance of municipal works resulted in the flooding.

Policy Decision Defence - Policy Versus Operational Decisions

Policy decisions of government are immune from the application of private law standards of tort liability. True policy decisions are exempt from tort claims so that governments at all levels are not restricted in making decisions based upon social, political or economic factors. A municipality is immune from liability for decisions taken in the exercise of their statutory powers, which involve policy considerations such as budgetary, personnel, resource and social or political constraints.

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[51] (2001) A.J. No. 423 (Alb.Prov.Crt.)

[52] Ibid. at para. 56.

[53] Law of Canadian Municipal Corporations, Rogers (2d) Carswell (2002) at paragraph 171.6

[54] David G. Boghosian, J. Murray Davison, Q.C. and M. Rick O'Connor, *Environmental Liability of Local Governments: Nuisance Claims*, Municipal Liability Risk Management, May , 2000, Vol. I No.4 at page 62.

The policy decision immunity from liability in negligence has been successfully invoked in cases involving decisions concerning the nature and extent of repair and maintenance, including the amount and type of equipment available. Operational decisions are those that are made while carrying out policy decisions. In the absence of negligence, a municipality will be immune from liability in a course of carrying out its policy decisions.

In **Anns v. Merton London Borough Council**,[55] an action was brought against the municipality for the negligent approval and inspection of a row of town houses by city inspectors. Lord Willberforce established a two pronged test regarding the municipality's duty of care as follows:

1. *Is there a sufficiently close relationship between the parties such that, in the reasonable contemplation of the alleged tortfeasor, carelessness on its part might cause damage to the other person?*

2. *If the answer to question 1. is yes, are there any considerations which ought to negative or limit (a) the scope of the duty, (b) the class of persons to whom it is owed, or (c) the damages to which a breach may give rise?*[56]

Under the *Anns* test, true policy decisions are exempt from civil liability. This ensures that governments are not restricted in making decisions based upon political or economic factors.

> "*A distinction has been drawn as discussed in the **Anns** case between policy or planning decisions and operational decisions. The question of policy is a matter for public law not for the intervention of the law of negligence... whether or not a legislative body has exercised a power to legislate, or has done so carefully, is not something that can be questioned by a means of an action for negligence, so a decision whether or not to adopt a particular policy is also not amenable to the jurisdiction of the courts by an action for damages...*" [57]

The test in **Anns** was adopted by the Supreme Court of Canada in **City of Kamloops v. Nielsen**[58]. The existence of a duty of care must be considered in light of all relevant circumstances, including any applicable statutes or regulations. Thus, a legislative exemption from liability can negate a duty of care in circumstances where that duty would otherwise arise. A policy decision is made in such cases to prevent the law of negligence from regulating certain relationships or relieving

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55 [1977] 2 All.E.R. 492 (H. L.)

56 Ibid. at 498.

57 Friedman On Torts, 1st edition, (1990) at page 308, paragraph 12.62

58 [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641 (S.C.C)

certain injuries, notwithstanding a finding of proximity between the parties. This may reflect the need to shield specific activities from judicial control, or the wish to prevent the "floodgates of litigation" from opening into areas of potentially unlimited liability.

In determining standard of care, the courts consider the "policy" and "operational" distinction. The Supreme Court of Canada in **Just v. British Columbia**[59] held that the dividing line between policy and operational factors centers on the fact that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. The courts recognize competing values which attempt to balance the safety of the public against economic reality. Cory, J. notes: .

> *"The decisions in **Anns v. Merton London Borough Council** and **City of Kamloops v. Nielsen** indicate that a government agency in reaching a decision pertaining to inspection must act in a reasonable manner which constitutes a bona fide exercise of discretion. To do so they must specifically consider whether to inspect and, if so, the system of inspection must be a reasonable one in all the circumstances."*[60]

In **Swinamer v. Nova Scotia Attorney General et al**[61], the plaintiff brought an action in negligence
after he was rendered a paraplegic when a tree overhanging the public highway fell on his vehicle. The Court discussed whether the province was liable in negligence for breaching the standard of care in carrying out its tree inspection and removal program. In the course of rendering its decision, the Supreme Court of Canada reviewed its own decisions in **Brown v. British Columbia**[62], **Just v. British Columbia**[63] and **Kamloops v. Nielsen** [64]. In referring to its decision in **Just,** the court noted:

> *"As a general rule, the traditional tort law duty of care will apply to a government agency in the same way it will apply to an individual. In determining whether a duty of care exists, the first question to be resolved is whether the parties are in a relationship of sufficient proximity to warrant the imposition of such a duty. In the case of a government agency, an exemption*

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59 (1989), S.C.J. 121 (S.C.C.)

60 Ibid at para 21.

61 (1994), 129 N.S.R. (2d) 321 (S.C.C.)

62 (Minister of Transportation - Highways) (1994), 164 N.R. 161

63 Supra 59.

64 (1984), 10 D.L.R. 4th (641)

> *from this imposition of duty may occur as a result of an explicit statutory exemption. Alternatively, the exemption may arise as a result of the nature of the decision made by the government agency. That is, a government agency will be exempt from the imposition of a duty of care in a situation which could arise from its policy decisions.*
>
> *In determining what constitutes such a policy decision, it should be borne in mind that such decisions are generally made by persons of a high level of authority in the agency but may also properly be made by persons of a lower level of authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors. As a general rule, decisions concerning budgetary allotments for departments of government agencies will be classified as policy decisions..."* [65]

The Supreme Court disagreed with the trial judge finding that money could be found or that the needed inspection could be made at little cost. Such matters were all questions of expenditure and allocation of funds and they provide clear indication that it was a policy decision. Moreover, the fact that budgetary considerations are questions of policy is not challenged by the fact that the costs of the measures sought may be small. The Supreme Court of Canada went on to find that there was no negligence on the part of the Department of Transportation in carrying out the survey as it was a policy-making process which was exempt from tort liability.

In **O'Keefe v. Town of Glace Bay**[66], Clarke, J., considered a case where the plaintiff was injured as a result of a fall on a piece of ice on the street in the Town of Glace Bay. Evidence was adduced by the town to explain the policy and procedure of the town with respect to snow clearing. The court examined the Town's Act[67] and found that the words were discretionary with regard to the town's removal of snow and ice from sidewalks and gutters. The court further noted:

> *"That this Town should establish a policy providing for snow removal in certain places and at certain times and no policy for ice removal at any time is an exercise of the discretion which the Town Act permits. For me to say it was an improper exercise of its discretion would be to say that I do not like the policy of the Town which would be neither right nor judicial. In short, I am unable to determine that the Town*

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65 Supra 59, at pages 1239-1245.

66 (1985), 68 N.S.R. (2nd) 351 (N.S.S.C.)

67 R.S.N.S. 1967, c. 309, s. 171

exercised its discretionary policy making in bad faith."[68]

In **Kerlenmar Holdings Limited v. Matsqui (District)**[69], the court held that the town's system of inspecting and maintaining its drainage system was a matter of policy. Therefore, in the absence of nuisance or negligence in the operation of the system, the court would not impose any liability. In **Octa Evergreens Limited v. New Brunswick**[70], the court suggested that the two stage test in **Kamloops v. Nielson** was modified by two recent Supreme Court of Canada decisions: **Cooper v. Hobart**[71] and **Edwards v. Law Society of Upper Canada.**[72] The court held as follows:

> *"Under the **Kamloops v. Nielsen** test, once the foreseeability of harm was established then there was a presumption of a duty owed. This duty could then be limited or negated by policy considerations. The change suggested in the **Cooper v. Hobart** and **Edward** decisions is that an element of policy should also be considered as part of the first stage of the analysis. Once foreseeability is established, the court must inquire as a matter of proximity whether the duty sought to be established would constitute an extension of negligence law, and, if so, whether there are reasons of policy to refuse to recognize the existence of such a duty. Again, in the second stage, if the court were to find a presumption of duty then the duty could be limited or negated by further policy considerations.*[73]*"*

In **Cooper v. Hobart**, the court noted how proximity is to be interpreted:

> *"Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care and law upon the defendant. The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case.*[74]*"*

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68 Supra 66, at page 355.

69 (1990), 40 B.C.L.R. (2d) 230 (B.C.S.C.)

70 (2002) N.B.J. No. 196 (N.B.Q.B.)

71 [2002] 1 W.W.R. 221 (S.C.C.)

72 [2001] 3 S.C.R. 562 (S.C.C.).

73 Supra 70, at para. 86.

74 Supra 71, at para 34.

In **Carson v. Gloucester (City)**[75], the city unclogged the ditch outside of Carson's home after a thaw and heavy rain, but the operator did not clean the ditch out properly and did not return to check it. As a result, Carson's basement flooded. It was held that the city was negligent in failing to properly clean the drainage ditch. The decision to clear out the ditch was an operational decision which did not afford the city any protection from liability.

The policy decision defence establishes that a municipality cannot be compelled to perform works which they are not obligated to perform. A municipality does not have the financial resources, the equipment or the manpower to upgrade its drainage system on every street within its boundaries. A municipality, by public authority, may exercise its power to construct and maintain drainage systems, even though it is under no statutory duty to do so. Its method of exercising its power is a matter of policy to be determined by the municipality itself. A municipality cannot be held to be negligent because it formulated one policy of operation rather than another.

Once a policy decision has been made, the court may review the scheme of the decision to ensure it is reasonable and has been reasonably carried out in light of all the circumstances, including the availability of funds and the availability of qualified personnel and equipment, to determine whether the government agency has met the requisite standard of care. The reasonableness of the policy depends on the circumstances of each case.

The leading authority on whether or not a municipality owes a plaintiff a duty of care for inspection is **Ingles v. Tutkaluk Construction Limited**[76]. The homeowners sued their contractor, Tutkaluk, and the city of Toronto after their newly built home flooded. The Supreme Court of Canada considered whether the municipality was negligent when their inspectors did not carry out a proper inspection. The court noted its recent affirmation in **Ryan v. Victoria City** of the test set in **Anns v. Merton Borough Council,** as adopted in **Nielsen v. Kamloops,** as the appropriate test for determining whether a private or public actor owes a duty of care.[77]

In determining whether an inspection scheme by a municipality will be subject to a private law duty of care, the Court stated that the inspection scheme must be reviewed in order to determine whether it represents a policy decision, exempting it from liability, or an operational decision. This is frequently difficult to ascertain since most municipalities do not inspect their drainage works until they become aware of a problem-their inspection schemes are often *ad hoc*. Municipalities should heed this case in ensuring that there is a policy in place with regard to the inspection of drainage works. Even having such a policy will not immunize a municipality from liability where inspection of drainage works is provided by statute.

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75 (2000) O.J. No. 3863 (O.S.C.)

76 [2000], 1 S.C.R. 298.

77 Ibid at p.15, para. 16.

Case Law

The following is an overview of recent case law regarding municipal flooding claims:

In **Kennedy v. Charlottetown (City)**[78], Kennedy brought an action against the City of Charlottetown for damages in negligence and nuisance as a result of a water main break near Kennedy's residence. An engineering technician from the city inspected the residence and found no water in Kennedy's basement. But a month later, Kennedy found water in her basement and called the technician for another inspection to determine if there was another leak in the water main. The technician determined that the cause of the flooding was a backup in the ditch outside the home after a heavy rain. The technician reported the problem to the City's Public Works Department and the city cleaned out the culverts which appeared to solve the problem. The claim in negligence was allowed because. Kennedy's neighbour had previously complained of a water backup problem. The city was negligent in failing to act on those complaints in a timely manner. The damage could have been avoided by keeping the culverts clear.

In **Oosthoek v. Thunder Bay (City)**[79]**,** the City was sued in nuisance and negligence for damages caused by basement flooding to local residents. A heavy rainstorm flooded 200 basements as a result of a backup in sanitary and storm sewers. At trial, the City was found liable on the grounds that the combined sanitary storm sewer system did not have the capacity to handle the additional water from the rainstorm. A by-law requiring disconnection from houses of rainwater leaders, in order to relieve the sewer system, had been enacted, but was not enforced. At trial the municipality was held liable in nuisance, and, in respect of the sewer backups, in negligence. The Ontario Court of Appeal dismissed the appeal and held that in the absence of proof that the damage was the inevitable consequence of works authorized by statute, the municipality was liable in nuisance. Liability also lay in negligence for failure to enforce the by-law.

In **Ackerman v. Mount Pearl (City)**[80], the remnants of Hurricane Hortense deposited a heavy rainfall on the city. The sewer system carried off much of the rainfall but flooding occurred at various points throughout the municipality. The plaintiff's basement was flooded when the sanitary sewer overflowed.. This case provides an interesting insight into the general operation of a sewer system, and the effect of heavy rains on sanitary sewers. No statutory exemption from liability was pleaded by the municipality in this case. The court dismissed the plaintiffs' damages.

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78 (2003), P.E.I. J. No. 81 (Q.L.)

79 [1996] O.J. No. 3318 (Ont. C.A.)

80 (2000) N.J. No. 346 (N.F.C. - T.D.)

In **Wait v. Prince Albert**[81], a backup was found to be a clog comprised of grease, plastic and a cloth rag. The city maintained that it had a system of yearly cleaning and maintenance. The city raised the defences of statutory authority, or limitation of liability based on a city bylaw. The municipality argued that it was not liable in nuisance because of a by-law passed by the Town Council requiring back pressure valves to be installed in homes, and further stating that where back pressure valves were not in place, there could be no claim for damages against the municipality.

The court held that the City was not liable in negligence because it had a suitable system in place with respect to sewer maintenance. The defence of statutory authority failed because the building, maintenance and operation of the sewer system was not under the city's municipal legislation. The by- law which the city relied upon to limit its liability in nuisance was ultra vires. Such a by-law was not authorized in the Act. There were no statutory immunity clauses in the Municipal Act. The court found the City liable in nuisance as a result. The court considered both **Tock** and **Ryan** in rendering its decision.

The court in **Clemmens v. Kenora**[82] held that the legislation governing the municipality did not confer upon it the power to limit the availability of civil causes of action against it and that the limitation contained in the by-law was ultra vires. [83]

In **Par Holdings Limited v. Saint John City**[84], the city was found fifty percent negligent when it removed debris from an outlet screen in a pond after two days of heavy rain. After the debris was removed, there was a sudden excess of flow of water into the pond and the sewer system. The pond overflowed its banks and caused flooding to the properties around it. The plaintiff was fifty percent contributorily negligent in failing to erect a flood barrier and in storing vehicles in the basement, knowing that the building and its basement had a history of flooding.

In **Ackerman v. Mount Pearl (City)**[85], there was an action by a group of property owners against the City of Mount Pearl in negligence for flood damage resulting after a heavy rainfall. Some of the plaintiffs' basements were flooded when the sanitary sewer backed up. The city was aware of

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[81] (2003) S.J., No. 215

[82] (1999) 6 M.P.L.R. (3d) 59 (Ont. S.C.J.)

[83] The court quoted R v. Greenbaum, (1993) 1 S.C.R. 674 at page 687 that says municipalities are entirely the creatures of Provincial Statutes. Accordingly they can only exercise those powers which are explicitly conferred upon them by Provincial Statute.

[84] [l995] N.J. No. 285 N.S.C. - (2d)

[85] (2000) N.J. No. 346

the need to clear a clogged drainage ditch to prevent the ditch from overflowing and flooding adjacent houses. The ditch was not cleared and the basements of three houses flooded. The owners of these houses were not plaintiffs in this action. Some of the water in these houses was drained by the owners into the sanitary sewer system. The plaintiffs claimed that this caused the sanitary sewer system to back up and flood their basements. However, the amount of water drained by the owners was much less than the amount of water that filled the plaintiffs' basements. Other plaintiffs were on a different branch of the sewer system. There was no evidence as to how the storm water entered the sanitary sewer system and affected this other group of plaintiffs.

The action was dismissed. The city was negligent for not clearing the drainage ditch that caused the flooding of the three houses. However, that was not the flooding for which the plaintiffs claimed. The drainage of the water from the basements of these three houses was insufficient to cause the flooding complained of. The plaintiffs accordingly failed to establish causation. Furthermore, the conduct of the homeowners in dumping the water into the sanitary sewer system broke the chain of causation from the municipality. The plaintiffs on the other branch of the sewer system failed to prove that the city was negligent.

In **Cranmer v. Sudbury (Regional Municipality)**[86], there was an action in nuisance against the municipality for damages to the plaintiffs' basement caused by an alleged sewer back-up. The plaintiffs' basement was filled with water from the drain hole in the floor after a rain storm. The plaintiffs' house was connected to the sewer main by a lateral and connected to an easement running alongside their property. The heavy rain had caused a surcharge in the manhole at the plaintiffs' residence. There were no other reports of flooding on the plaintiffs' street. The defendant argued that statutory authority exempted it from liability under the Municipal Institutions Act. The court rejected the defence after considering the application of the three sets of reasons in **Tock**. The defendant had failed to establish that the sewer had been constructed according to the act, and therefore could not rely on the defence of statutory authority. It is important to note that this decision was decided in the years between Tock and Ryan when the law regarding the defence of statutory authority was unclear.

In **Malenfant et al. v. Edmundston, City** [87], there was an action in negligence and in nuisance for damage caused to the plaintiff's property by a back-up of waste water in the municipal sewer system. The sewer system contained both storm water and waste water. When clearing the back-up, workers discovered pieces of wood and plastic blocking the waste water. These had entered the sewer through an open-cover manhole. The plaintiff claimed the municipality was negligent in its clearing and maintenance of the system. The court held that the municipality had discharged its

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86 (1996), 33 M.P.L.R. (2d) 116 (Ont.Gen.Div.)

87 (1984), 51 N.B.R. (2d)

common law duty to keep the sewer system in good repair. The municipality could not be responsible for a random blockage as occurred here. The design of the system was not found to be negligent, as the system had handled heavy rains before this incident.

But, the court allowed the action in nuisance because the damage from the sewer system constituted an unreasonable interference with the plaintiff's property. The defendant claimed it was authorized by the Municipalities Act to operate the sewer system. It was not, however, authorized by statute to operate the system without any regard to whether a nuisance was caused. The municipality was obliged to prove that the nuisance was an inevitable consequence of its exercise of the power to operate the sewer system. It had to show that all reasonable care and skill, in the light of contemporary scientific knowledge, had been exercised. The Court considered that in evaluating what was possible and reasonable for the municipality to do, attention had to be given to the current state of scientific knowledge and by standards currently set down for the construction of similar works. Although the corrective measures would have been expensive, they were feasible, and the Court therefore held that the municipality had not taken all reasonable and practical steps it could have to operate the sewer system without creating a nuisance.

In **Bonenfant v. St. Francois de Madawaska (Village)**[88], a homeowner sued the village for damages resulting from liquid waste entering the plaintiff's basement during a heavy rainstorm. The defendant village operated a sewer system within its boundaries. The plaintiff had failed to install a gate valve between her house and the village sanitary sewer which was recommended by the defendant. The action for negligence was dismissed. The plaintiff argued that the backing up of waste during a torrential rain fall was proof of the sewer system's inadequate flow capacity for liquid waste. The court held that such an argument does not take into account the other possible causes for a backup, such as that of an accidental blockage in the sewer pipes. The plaintiff did not establish the true cause for the backup which caused the flooding of her basement. The court held that a municipality must be aware of a problem in the faulty construction, insufficient capability or poor condition of its system to be held liable for the damages it caused to the plaintiff. The existence of a blockage does not in itself prove negligence.[89].

In **Mazerolle v. Town of Grand Falls**[90], the plaintiff brought an action against the municipality to recover the cost of flood damages to his basement apartment from dirty water flowing into his bathtub via the drainpipe. He unscrewed the cap to see if that was where the water was coming

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88 (1987), 80 N.B.R. (2d) and 202 A.P.R. 197

89 See also Dalpé v. City of Edmunston (1979) , 25 N.B.R. (2d) 102; Royal Anne Hotel Co. Ltd. v. Village of Ashcroft (1979), 95 D.L.R. (3d) 756; Gray's Velvet Ice Cream Limited v. City of Campbellton (1981), 36 N.B.R. (2d) 288, and Malenfant v. City of Edmundston (1984), 51 N.B.R. (2d) 1.)

90 (1979), 26 N.B.R. (2d) 675

from. As a result of doing this, a torrent of water flowed through the sewer pipe into his basement. The municipal lines were clear, but the plaintiff's sewer was obstructed by rocks. The action was dismissed. The plaintiff had failed to prove that the sewer system was defective and that the flood occurred for any other reason than his own carelessness in unscrewing the sewer pipe. The rocks in his own sewer line may well have caused the water to back flow into his home.

In **Glover v. Gander (Town) and Newfoundland and Labrador Housing Corp.**[91], there was an action brought by the plaintiff homeowners for extensive damages resulting from repeated flooding of their basement caused by the backing up of storm sewers. The plaintiffs alleged negligence of the defendant through the improper construction, installation or maintenance of its storm sewer system. The defendant denied all liability and argued that if liability was found it rested squarely with the third party who constructed the storm sewer. In response to the numerous complaints of the homeowners, the defendant hired a firm equipped to televise the interior of utility pipes for inspection purposes. The firm found numerous defects and made recommendations regarding repairs. The head of the Department of Public Works and Engineering testified that the defendant was not involved in the construction of the system or its inspection or supervision while being built.

The action was allowed. The floodings were mainly caused by the defects in the storm sewer system. The capacity of the system was substantially less than the two year storm period for which it was designed. The municipality was at fault because it inadequately maintained the system. Further, it accepted the system with many construction faults and deficiencies without insisting on proper inspection and assurances from the third party in conformity with the general practice prevailing in the construction trade.

In **Wamback Memorial Chapel v**. **Bridgewater**[92], the appellants claimed for damages arising from the flooding of their premises. A small brook originating in a swamp and flowing into the appellants property where it entered a pipe had been part of the natural drainage system for many years. The appellants premises were located at the end of the drainage system. A 24" pipe was installed by the town under the appellants' building to carry the brook to the side lawn where it flowed in a defined channel before crossing the street. One night there was a heavy storm which caused the brook to overflow its banks and flood the appellant's garage and yard. The appellants brought an action against the town alleging that it had increased the water flowage in the brook and had failed to provide adequate drainage facilities to carry off the water caused by development in the area. The trial judge found that the town had not interfered with the brook and that there was no negligence on the part of the town with respect to the drainage system. The Court of Appeal agreed with the trial judge's decision and dismissed the appeal.

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91 (1988), 69 Nfld. & P.E.I.R. and 211 A.P.R. 8

92 (1979), 32 N.S.R. (2d) 181 (NSSC-AD)

In **Krohnert et al** v. **Regional Municipality of Halton**[93] the plaintiff's house was flooded due to the obstruction of an inlet to a storm sewer that had been constructed by the defendant to divert a natural watercourse on the plaintiff's land. The diversion was authorized by the proper conservation authority but the defendant failed to produce a specific written approval. The plaintiff brought an action for the damage caused by the flooding ascertaining that the defendant was liable in nuisance as a riparian owner, and in negligence. The court held that the action should be dismissed because the defendant was deemed to have statutory authority for the diversion of the watercourse. No negligence was proved in the design or maintenance of the inlet and consequently the damage was an inevitable result of the carrying out of an undertaking authorized by statute, and the defendant was not liable. Under the Regional Municipality of Halton Act, it stated that the municipality had the authority to undertake drainage works including sewage works such as storm sewers. As a result, the court found that the municipality had the statutory authority to construct the drainage system. It is noteworthy that this case was decided pre-**Tock**.

In **McPhee et al** v. **Township of Plympton et al**[94], the plaintiff experienced flooding due to municipal road construction. The court held that the drain next to the road was inadequate, but not in disrepair, and that the municipality was not liable in negligence for the flooding that occurred.

Overview

Generally, the law suggests that a municipality will be held liable for a flood if they have increased the overflow of a watercourse by adding to the volume of water, in excess of the watercourse's natural capacity.[95] The following are important considerations for a municipality in the performance of drainage works:

(1) The manner in which the municipality will or will not perform any upkeep or inspection on the drainage or sewage system, including its response to flooding incidents.

(2) Whether the municipality knowingly caused the private land owner harm to his land and did nothing about it.

(3) Whether the municipality in any way caused the capacity of a watercourse to increase beyond its regular flow resulting in a flood. If so, the municipality may be found liable.

(4) Whether there had been flooding in the area in the past, and if so, whether that flooding is just a natural occurrence in that particular watercourse. The courts generally impose no liability on the

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93 (1989), 70 O.R.(2d) 430) (Ont.D.C.)

94 (1987), 61 O.R. (2d) 508 (Ont. Div.C.)

95 Rogers, The Law of Canadian Municipal Corporations, paragraph 254.28.

municipality under these circumstances.

If a municipality installs drainage that can accommodate the natural flow of the watercourse and a flood occurs then it will not be found liable. If flooding results because the drainage pipe is blocked or is significantly too small to support the natural flow of the water, then the municipality may be found liable. If the sides of the watercourse are damaged due to the fact that the municipality has increased the capacity and rate of flow of the watercourse, then liability may be imposed if flooding results. If the sides of the watercourse are eroded by the natural flow of the water and natural erosion, then the Municipality will not be found responsible. [96]

Conclusion

Defences to municipal liability for flooding claims is a complex area of law which is complicated even more by the variations found in provincial municipal legislation. When performing drainage works, it is recommended that a municipality establish policies regarding the operation and maintenance of the system in order to rely on the policy decision defence available to municipalities. Once these policies are established, they should be strictly adhered. As long as the work that gave rise to the flood was done without negligence and in compliance with the municipality's enabling legislation, the municipality should be free from liability. The success of a municipality's reliance upon the defences of statutory authority, statutory immunity, and policy decision immunity will largely depend upon the facts in each case.

[96] See also the article by David G. Boghosian, J. Murray Davison, Q.C. and Frederick P. Crooks entitled "*Interfering With The Flow of Surface Water in Natural Streams: Riparian Rights, Municipal Liability Risk Management, November, 2001 Vol. III No. 1.*