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Some Thoughts on Drainage Complaints

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SOME THOUGHTS ON DRAINAGE COMPLAINTS

The purpose of this paper is to provide something of a framework to enable the reader to analyze a problem involving an allegation of harm being caused by defective stormwater management, from the point of view of a solicitor advising a municipality. This does not purport to provide definitive answers to the questions posed within it. Indeed, the paper will maintain that the state of the law as the writer found it is such that definitive answers are not available at this stage in the evolution of the common law.

The framework will be established by stating a problem and then tracing through potential areas of law that affect municipalities that could have an impact on any potential resolutions of the problem.

The Problem

A resident of the City complains to the City that the stormwater no longer drains from their backyard in the manner in which it has done for the previous 20 years that the resident owned her house. She has lived in the same house for almost 20 years and, throughout that time, her yard never failed to drain in a manner that was satisfactory to the resident. However, the neighbours have put in a swimming pool. The resident believes that the presence of the swimming pool is preventing her lot from draining as it did before.

Some Preliminary Considerations

Investigation

In the experience of the writer, there is no form of municipal complaint quite like the drainage complaint for generating contradictory facts and conflicting theories as to what the source of the problem might be. The evidence to analyze the problem is not necessarily readily available. The lot may be dry by the time the inspector arrives. Other evidence may require specialized expertise to establish. For example, a survey may be required to actually prove that the swimming pool is affecting the drainage of the complainant's lot. The survey may uncover that the water actually flows off the complainant's lot in the opposite direction from the lot with the pool. As will be outlined below, the investigation may also indicate that the problem is difficult to attribute to one particular event or action.

In investigating these complaints it must also be borne in mind that there seems to be a growing consensus that rain events are increasing in intensity and may well be causing flooding in lands that previously didn't flood, simply because of this increase in intensity. The standing water the complainant is concerned about is the result of a change brought about by the actions of nature and not a change brought about by the actions of humankind.

Municipal Interest

There is a legitimate school of thought that questions whether the municipality should be involved with matters of this type at all; the argument being that the common law provides a remedy to the property owner and that the property owner should pursue that

remedy. At the same time, issues of this type are recognized as a matter of actionable nuisance at common law; and many of the powers that are vested in municipalities relate to the control of matters which would constitute nuisances at common law. The municipality is essentially providing an affordable means for an individual resident to address drainage or flooding issues, to those who follow the school of thought that a drainage or flooding complaint is simply another type of nuisance complaint for the municipality to engage in resolving.

Certainly, during the course of the writer's career, the answer municipalities he worked for gave to a person with this type of problem was that the City had no remedy for this type of problem and that the complainant should pursue her common law rights through the courts.

The Problem with Self-Help

The central problem with self-help, of course, is the cost of litigation. But, self-help does have the advantage of enabling the complainant to have complete control of the effort to resolve the problem.

General Statement of the Law

The following is a general statement of the law of surface waters which appears to be generally accepted.

The case of Edwards v. Scott (Rural Municipality) [1934] 3 D.L.R. 793 aff. [1934] 3 D.L.R . 796 is an early example of a municipality attempting to resolve a drainage complaint. The case took place in rural Saskatchewan. Edwards was the owner of Lot 21. To the west of Lot 21 was a road allowance owned by the rural municipality. To the west of the road allowance lay Lot 20. Rainwater flowed from Lot 20 across the road allowance to Lot 21. Some of that water traversed the road allowance by means of a culvert.

The rainwater accumulated on Lot 21. Edwards did not like the accumulation of the water. Edwards built a dam along the eastern boundary of the road allowance, some 200 feet long. The dam prevented water from crossing from Lot 20 over the road allowance onto Lot 21.

The municipality became concerned about damage to the road caused by it being flooded by reason of the dam. Representatives of the municipality entered Edwards' land and breached the dam. This state of affairs remained in place for a period of some five years until, when heavy rains occurred, Edwards restored his dam to its former state thereby causing the road to flood once again.

Representatives of the municipality attended upon Edwards and suggested that the municipality was once again going to arrange for workers to enter Edwards' land to breach the dam.

Edwards began a court action seeking an injunction restraining the municipality from entering his land to breach the dam. His action was dismissed. He appealed.

The first line of defense that the municipality entered was that Edwards had blocked water flowing into a well defined watercourse; something which is forbidden at common law. (para. 5). However, the Appeal Court found that the evidence did not support such a finding. The court found that the balance of the evidence, including the evidence of the only expert that testified at the trial, supported the finding that there was no defined channel. (para. 12).

The court then engaged in an extensive review of the law of surface waters, as it was then known. and came to the conclusion that:

> *"A right of drainage of surface water does not exist jure naturae and the plaintiff was within his rights in attempting by the erection of the dam on his own property to keep the surface water which had accumulated on sec. 20 and on the road allowance from draining on to sec. 21".*

An injunction was issued restraining the municipality from entering Edwards' land to breach the dam. The Decision of the Saskatchewan Court of Appeal was upheld by the Supreme Court of Canada.

Thus, we have a general principle of the law concerning stormwater management. The downward owner is not obligated to receive stormwater onto his land and may return it from where it came. That general principle being stated, here are some examples of the general principle in practical application.

Some cases in which we can see these principles of operation in the modern context include the following:

Smith v. Seewald [1978] 1 A.C.W.S. 545

In this case, Smith was the owner of a residential property located at 361 Clyde Road. Seewald was the owner of 355.

The court described the situation as follows:

> *"Both properties are on the south side of Clyde Road and 361 is east of and immediately adjacent to 355. Both are at the bottom of a valley, or perhaps more correctly, a saucer, the property line between them being the lowest part of the saucer. To the south of them is a parcel of raw land, rising……."*

There was no issue at the properties until 1967, at which time Seewald built an apartment building on 355. (In 1966 the municipality had installed a catchbasin on Clyde Road and both properties drained into this system.) The Smiths were concerned about drainage issues that could be caused by the new apartment building. Negotiations between the municipality and the property owners resulted in a swale being established on 355, such that all water from the east side of the apartment building, a paved area immediately to the east of the apartment building, an area described as the terraced area, and the water of 361 ran into the swale to the municipal catchbasin.

All was well until 1975 when Seewald raised the level of the terraced area to a level three or four feet higher than 361; filled that area with asphalt; and put a five inch curb along the edge of the pavement which was supposed to prevent stormwater from flowing onto 361 (the Smith property).

At paragraph 6, the court makes its first observation concerning the application of law to the facts before it.

> *"As to the swale, there is no question that it was not a natural watercourse, on the plaintiff's own evidence, it was dug at about the time the apartment building was erected. On the evidence of all parties, drainage in the area flowed from South to North... The swale must have received at least some of the water flowing into it from the south, and from 361 although it appears on all the evidence that most of that water came from the downspouts of the apartment building and the paved area immediately above the terrace. If the water in the swale had all come from the south or from 361, and if the owners of 355 had done nothing other than fill in the swale, with the intent to keep water from the south and from 361 from flowing over their lands, there would be no cause of action to the plaintiffs.*
>
> *This is not the case here. I find in all the evidence that some, if not most, of the water running in the swale came from the land of the defendants and that filling up the swale contributed in part to flooding the plaintiffs' lands. If the defendants had placed a retaining wall along the border of the plaintiffs' lands and stopped up the swale at the south to prevent water coming onto their land, I would have found that (the defendants) were not liable for any damages to the plaintiffs for so doing."*

The court went on to comment that these improvements also resulted in liability for the defendants, in nuisance. (paras. 7-11).

Wood v. Langley 2015 BCSC 1020 is the very kind of case the writer envisioned when he embarked upon the course of inquiry that resulted in this paper. It is a case in which a municipality approved a development and a neighboring property owner alleged that the municipality had caused damage to his property by means of that approval.

The plaintiff owned the property that was to the north of property owned by the defendant Township. Further to the north were lands that had been developed as a townhouse development. The Township had approved the development of the townhouse lands. The approval process included the usual approval of drainage works and lot grading.

The defendant alleged that the approval of the townhouse development had caused significant increases in the amount of stormwater flowing onto his lands and that the accumulation of stormwater was substantially interfering with his enjoyment of his lands.

The defendant argued its case in nuisance. The court found the law of nuisance to be as follows: (starting at para. 64)

"Justice Cromwell, writing for the Court in Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation), 2013 SCC 13 (S.C.C.), explained the two elements of the claim in nuisance at para. 19:

> *The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both substantial and unreasonable. A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances. This two-part approach found favour with this Court in its most recent discussion of private nuisance and was adopted by the Court of Appeal in this case, at para. 80.*

65 As Cromwell J. explained, a substantial interference is one that is non-trivial and amounts to more than a slight annoyance or trifling interference. To justify compensation, however, the non-trivial interference must also be unreasonable. The reasonableness of the interference must be assessed in light of all the relevant circumstances, which may include such considerations as the severity of the interference; the character of the neighbourhood; the sensitivity of the claimant; the frequency and duration of the interference; and, the utility of the defendants conduct: Antrim Truck Centre Ltd. at para. 26. Ultimately, the focus of the balancing exercise is on whether the interference is such that it would be unreasonable in all of the circumstances to require the claimant to suffer it without compensation: Antrim Truck Centre Ltd. at para. 25.

66 The plaintiff bears the initial onus with respect to proving a substantial interference with his use or enjoyment of his land. Once that is shown, the onus then shifts to the defendant to establish that his use was not unreasonable: British Columbia v. Salt Spring Ventures Inc. 2012 BCSC 1862 (B.C. S.C.) at para. 44."

Applying the law as set out above, the court found that the plaintiff had failed to prove substantial interference with his use of the property. There was no evidence of the plaintiff being unable to rent the two houses located on the property; and the pooling complained of was found to be of a minor nature. (paras. 103 through 106). It may also have been a factor in the court's reasoning that the plaintiff appeared to be trying to inflate the nature of the impact of the townhouse development to further his own development agenda in negotiations with the municipality. (para. 74).

In the case of Farinha v. South Okanagan Lands Irrigation District [1989] B.C.J. No. 1490 the plaintiffs owned lands which were bounded by the defendant's irrigation canal. The general flow of water was towards the plaintiffs' land. There was a stream which flowed towards the plaintiffs' land. The end of the stream was an alluvial fan that

included the lot which abutted the defendant's irrigation canal on the opposite side. There was a culvert installed underneath the irrigation canal for the purpose of directing water which flowed onto the lands of the defendant, under the irrigation canal and onto the lands of the plaintiffs.

The waters which flowed in the stream, historically, were dispersed by the alluvial fan. This meant that the culvert was never used.

In 1983, a massive flooding event occurred which sent torrents of mud and water hurtling down the stream towards the defendant's irrigation canal. The culvert under the canal was stopped up by the mud and, in any event, was inadequate to handle the flows. In order to save the irrigation canal, and to relieve the lands on the opposite side of the canal from the burden of the flood, the defendant constructed a temporary spillway across the canal. The temporary spillway drained the lands on the opposite side of the canal from the plaintiffs' lands, onto the plaintiffs' lands.

The plaintiffs' lands were known as Lot 261. Lot 261 is bounded on the west by the Defendant's irrigation canal. Lot 982 abuts the same canal to the west opposite Lot 261. Water flows west to east.

The spillway was made permanent through a provincial licensing process.

The new load of water upon the plaintiffs' orchards caused trees to die.

The plaintiff sued and lost at first instance. The plaintiff appealed.

The Court of Appeal set out the crux of the reasoning of the trial judge at paragraphs 9,10 and 11 of its Reasons:

> *"9 The work done by SOLID on its own property included ditching and banking in order to guide the water to the spillway. The trial judge found that SOLID, in carrying out that work, was indifferent to where the creek would otherwise have run and that its only concern was the protection of the irrigation system. He said:*
>
> > *... The ditching and banking of the flow of water, if it happened to be in the area of the creek bed, was not in an effort to keep water in the creek bed, but simply to keep the water in one channel so that it could be directed across the canal. Nor was S.O.L.I.D. concerned with where the water would go after it crossed the canal. The officials of S.O.L.I.D. were totally absorbed by the task at hand which they saw as being the protection of the irrigation system. They did not deliberately set out to damage Mr. Farinha's orchard or any other property and in fact assisted Mr. Farinha in diverting the water so that it did not enter his home.*
>
> *10 The crucial finding of the trial judge, upon which he based his conclusion that the action should be dismissed, was this:*

> *On the whole of the evidence, I find that S.O.L.I.D. not by design but simply by accident, directed the water to flow in what was the creek's own bed as it found its way to the culvert.*

11 *At a later point in his reasons he said this:*

> *... Notwithstanding that S.O.L.I.D. knew or ought to have known that the water would traverse the plaintiff's orchard and knew that a continual run of water would damage the trees, I find that S.O.L.I.D. acted reasonably in the whole of the circumstances. In deciding whether they acted reasonably I consider the severity of the harm to the plaintiffs' orchard, the character of the orchard, and the fact that the trees could stand some water but not a continuous flow.*
>
> *I also consider the utility of S.O.L.I.D.'s conduct. As I said earlier, I find that it was only by accident and not by design that S.O.L.I.D. confined the course of the stream to its original course but in the circumstances I find that S.O.L.I.D. is entitled to the benefit of that accident. If I had found that S.O.L.I.D. changed the course of the stream I would have found them liable notwithstanding the overwhelming evidence that the general benefit to all of the orchardists, including the plaintiffs, mandated that the plaintiff's orchard be damaged to save the irrigation system. That is, it, to save the irrigation system, S.O.L.I.D. had created a nuisance or otherwise breached any duty to the plaintiffs I would have found S.O.L.I.D. liable and the members of S.O.L.I.D. would have been obliged to pay for the damage suffered by the plaintiffs as a cost of saving their irrigation system."*

The Court of Appeal went on to reason that: (And the writer submits that this rather lengthy passage is worthy of the reader's attention as it illustrates how important careful research of the facts appears to be in this type of litigation.)

> *"The cornerstone of the appeal is the submission that the trial judge erred in principle in assuming, as the quoted passages indicate he did, that the creek had a "bed" or "channel" beyond the end of the canyon and, more particularly, at the lower end of SOLID's property where it abuts with that of the plaintiffs'. That, it is submitted, was to treat the creek below the canyon as being a watercourse. The correct approach, it is submitted, would have been to determine first whether the creek was a watercourse within the definition stated by the Saskatchewan Court of Appeal in Edwards v. Rural Municipality of Scott, [1934] 1 W.W.R. 33 at p. 38:*
>
> > *A watercourse is defined as a stream usually flowing in a definite channel, havving [sic] a bed and sides or banks and*

> *discharging itself into some other stream or body of water. It must be something more that surface water, spread over a tract of land caused by unusual freshets or other extraordinary causes. A watercourse must have characteristics of a flowing stream, it must have source, outlet and channel; the water need not flow continually.*

I accept that Tin Horn Creek, at least beyond the end of the canyon, could not satisfy that definition of a watercourse. But I do not think that the judge, in referring to the creek bed, or the creek's own bed, was directing his mind to a creek bed in the sense of a watercourse. That question, in my view, is irrelevant to the issue in this case and was so treated by the trial judge. The question whether a stream is a watercourse, in the sense of the definition quoted above, arises in relation to mattes [sic] such as riparian rights which have no application here. Clearly, the flow of water across SOLID's property on May 28, 1983 was a flow of surface water. It was a most unusual flow - one which can be expected to occur only once or twice in a century. That circumstance created a peculiar difficulty in determining the facts but did not alter the nature of the issue which arose from the opposing contentions of the parties, which I state in a somewhat oversimplified form. The position of the plaintiff was that the water flowing beyond the end of the canyon would, had there been no intervention by SOLID, have flowed across Lot 982 in no particular course with much, if not all, of it flowing to the north of the plaintiff's property in the direction of Lot 260 and Road No. 7. But, by reason of the intervention by banking, ditching and construction of the spillway, the flow of water was artificially concentrated with the result that it poured on to Lot 261 in a stream which damaged the plaintiffs' property. The case for the defendant, which depended heavily on the thesis that there was a natural depression which would bring the water flowing from Tin Horn Creek to the boundary of Lot 261 at the point where the culvert was installed in 1920 and where the spillway was constructed on May 29, 1983, was essentially that the work done by SOLID on its property to contain the flow resulted in the water reaching the plaintiffs' property in the same way it would have done had there been no canal and no work done after the flood began.

The law relating to surface water is summed up thus in La Forest, Water Law in Canada, pp. 379-380:

> *Of fundamental importance, then, is the common law rule imposing liability on one who diverts surface water so as to cause it to flow across and injure adjoining property. Numerous cases have held that the owner whose land is afflicted by unfortunate circumstances cannot transfer the burden to his neighbour by chasing water from his land onto his neighbor's land. A person who constructs ditches, drains or culverts for the purpose of diverting water onto adjacent land may be sued by his injured neighbour for damages, or may be made subject to an injunction restraining his action*

> *where it is of a continuing nature, or both, whether the construction is effected by the owner or occupier of the land, or by someone else with his consent. Similarly, any enlargement or deepening of a natural depression in the surface of the land so as to facilitate the flow of water onto adjacent property is actionable; here, however, it is relevant to determine whether the excavation amounts to an interference with the natural state of the land, so as to be classed as an actionable diversion, or whether it amounts to a restoration of the land to its natural state.*

In my view, the trial judge, in considering whether SOLID had diverted surface water, identified the correct issue. The question for us is whether, in finding as a fact that SOLID did not divert the flow of surface water, he reached a conclusion which was wrong in the sense of being affected by palpable and overriding error.

The substance of the finding of fact is that the flow of water from the foot of the canyon followed the same course which, at intervals of the order of thirty to one hundred years, had been followed by flows of similar magnitude and that the water would have taken that course had there been no intervention by SOLID. The significant question was not so much as to the precise route taken by the water as it flowed across Lot 982 as it was whether the construction of the spillway, and SOLID's action in channeling the flow on to it, amounted in the closing words of the passage from La Forest (quoted supra) to a "restoration of the land to its natural state". The finding of the trial judge was, in essence, that had the canal never been built and had Lot 982 remained in all other respects in its natural state, the extraordinary flow from the creek would have reached Lot 261 at the same point as it did after the installation of the spillway. That is tantamount to finding that what was done had the effect of returning the land to its natural state.

The evidence principally relied upon by the trial judge was that of Mr. Garrish, a neighbour of the plaintiffs who had lived in the area since 1934 and was intimately acquainted with its history and characteristics. His evidence included this passage:

> *Q: You said in your evidence once or twice that the water was flowing in the creek bed. In the early days, say in the 1930's, you said, as I understand your evidence, that you never seen the creek run. Was there any identifiable creek bed in those days?*
>
> *A: Yes. On every one of those culverts there was a sort of, on both sides of it, a sort of a dry gulch, nothing of any great significance, they were gulches that had been formed unquestionably by early runoffs. You can't call them creeks, they were just string-offs that had washed out these various*

> *things, which of course, made the geographic feature that had caused them to put culverts in there in the first place because there were these dry creek beds. And presumably they had run at one time that even only one year out of a hundred they had to be provided for.*

It was in the sense of that answer that the judge referred to the water flowing in "the creek's own bed." There was other evidence, apart from the fact of the construction of the culvert in the same location in 1920, which tended to support the conclusion of the trial judge. As one example, there was a statement by Mr. Dobson, a professional engineer in the employment of the Ministry of the Environment, who observed the water flowing on May 29, 1983 and who said, on the basis of his observations on that day and certain photographs put to him in cross-examination, that:

> *...I assume where the creek was running for the most part where they did establish it, was a permanent running creek right down to the canal, right down to the Okanagan River.*

The strongest evidence for the plaintiffs was that of Dr. Michael Quick, a highly qualified expert called by them. While his evidence, and some of the other evidence in the case, undoubtedly could have supported a conclusion in favour of the plaintiffs, it is far from conclusive. In the passage most relied upon by appellant's counsel, Dr. Quick said this:

> *In my opinion, while it is true, that there is a shallow depression of the land in Lot 261, it is equally possible that before No. 7 Road was constructed, the creek could have flowed just as readily to the north of Lot 261 and 260. When viewing from higher on the debris fan, above Lot 982 and 983, it is apparent that the creek could have flowed by various routes depending on the most recent deposition of debris.*

In the nature of things, the evidence on this question was necessarily full of uncertainties. The advantage of the trial judge in assessing those uncertainties was substantial. I cannot say that he erred in concluding that the activities of the defendant on its own land resulted in no diversion of the course which the water would otherwise have taken.

I turn to the matter of the spillway. The finding that there was no diversion created by the banking and ditching activities on SOLID's property leads to the conclusion that it would have reached the eastern boundary of that property at the point where the spillway was constructed. But without that intervention, the water would first have flowed into the canal and, once SOLID cleared the canal for its own purposes, would for the most part have been carried away in the canal rather than flowing on to the plaintiffs' land. The effect of constructing the spillway was to restore the course of the waterway to what it would have been had there been no canal. The

installation of the permanent spillway was approved by the Regional Water Manager under s. 7 of the Water Act, R.S.B.C. 1979, c. 429. That brings into effect this provision of the Act:

> *18(1) Every licensee and person who has obtained approval under s. 7 shall exercise reasonable care to avoid damaging land, works, trees or other property, and shall make full compensation to the owners for damage or loss resulting from the construction, maintenance, use or operation of the licensee's works.*

It is common ground that that section is essentially declaratory of the common law and that, in respect of the temporary spillway, the defendant was under the same responsibility to avoid damaging the land and trees of the plaintiffs. In the passages from the reasons of the trial judge quoted above, he found the conduct of the defendant to have been reasonable. In light of his prior finding that there had been no diversion by the defendant of what the course of the water would otherwise have been, I see no error in that conclusion.

The plaintiffs also submitted that the defendant was not entitled to deprive them of the benefit of the irrigation canal as a protection against flood waters. In support of that proposition, we were referred to the decision of the Nova Scotia Court of Appeal in Loring v. Brightwood Golf & Country Club 44 D.L.R. (3d) 161 at 168. That decision appears to depend upon a prescriptive easement, a right not recognized by the law of this province. (See s. 24 of the Land Title Act, R.S.B.C. 1979, c. 129.) In any event, I do not think that the reasoning applicable to the removal of a stone wall, which is what was involved in that case, could apply to require SOLID not to protect its canal from being rendered useless for its purpose. The canal, unlike the wall in Loring, had never before May 28, 1983 performed the function of preventing the flow from Tin Horn Creek from reaching Lot 261."

The case demonstrates the proposition that liability will not be found in a situation in which the upland owner does no more than direct water off his property that would otherwise enter the downland property in its natural state. What the court found that happened in Farinha was that SOLID had, quite inadvertently, diverted the natural flows over its property onto the plaintiffs' property.

The case serves as a reminder of how fact specific the results of cases in this area of law seem to be. (The reader is invited to review the dissenting judgment at the Court of Appeal and the Reasons of the court in the subsequent Motion to Reconsider that came before the British Columbia Court of Appeal ([1989] B.C.J. 1974). It also demonstrates the importance of historical research in preparing a defense.

Di Gregorio v. Osborne [2004] O.J. No. 2156

It was the reading of this case that inspired the writer to select the topic of today's paper.

The plaintiff and defendant were neighbours. The defendant's land was situated to the west of those of the plaintiff. The lands were part of a series of residential lots that drained to the north or rear of the properties and then to the west by means of the swale at the rear of the properties. The downward slope of the swale from east to west ended at the defendant's land.

The dispute between the parties began when the plaintiff built a fence. The construction featured a curb and two pipes which were intended to ensure that the plaintiff's property continued to drain to the swale and across the defendant's property. The defendant responded by piling earth and concrete objects against the fence. In doing so, he blocked the swale.

There was also evidence that the plaintiff had modified his driveway and put in some flowerbeds that had the effect of slightly increasing the amount of water being directed into the swale by his lot.

These events took place in 1994.

In 1995, the defendant complained to the municipality, claiming that the actions of the plaintiff were flooding his land. As a result of the complaint, a catchbasin was installed in the rear of the defendant's lot. The expense was shared equally between the defendant and the municipality (Toronto). The Defendant used the soil that resulted from the excavation for the catchbasin to create a berm to block the flow of water from the lands to the east, by means of the swale. The result was ponding of water at the rear of the plaintiff's lot.

The plaintiff made an argument that the swale at the rear of the lots was a watercourse. The court found that the was no evidence of any watercourse or defined channel. (para. 9).

The plaintiff made two further arguments. The first was that the plaintiff is entitled to a prescriptive easement to drain into the swale and the second, which the court described as interesting, is set out in the following passage:

> *"12 A related and interesting submission by the plaintiff is that the classic authorities in this area of the law - which hold that, absent a stream or defined channel watercourse or an easement, the owner of lower land may block surface waters from coming upon his land from higher adjacent land where the flow of those surface waters follows the natural contours of the land - relate to lands having natural contours and that, typically, such lands are rural or agricultural and not urban land in built-up areas the development of which was, or is, subject to subdivision control. The plaintiff submits that the lands here in question were parts of a development that was subject to municipal subdivision control under which subdivision could not have taken place without municipal approval of the plan of subdivision, and that the required approvals always included approval of a scheme for the handling of the flows of surface water.*

> *These submissions include the assertion that in the circumstances the natural contours of the land are often radically altered by the developers' bulldozers and therefore that the surface water provisions approved by the municipality ought to be seen as governing. These submissions were not clearly developed independently of the assertion of an easement, and they are subject to the added difficulty that no subdivision agreement or agreement or order relating to surface waters was produced at trial, nor was any municipal planning official called as a witness by either party."*

It is this very passage that caused the writer to begin the research that resulted in this paper. Is this passage the beginnings of a change in the common law such that, when property is located within the context of a modern municipal subdivision, a context which almost invariably involves some form of lot drainage control, the downstream land owner will no longer be free to simply send stormwater back to the place it came from?

Unfortunately for all concerned, as noted above, there was not a lot of evidence about the background of the subdivision and, the court ultimately was not satisfied that the swale in question had been put in place according to an approved grading plan. (paras. 26 and 27). From the point of view of municipal counsel it is interesting to note that the court also noted that there were no assertions of any breach of any municipal standard by the defendant in the reports of municipal officials that were put before the court. (para 29).

The court found in favour of the plaintiff. The reasoning employed in coming to this conclusion is set out in paragraphs 43 through 53 of the Decision. These paragraphs are reproduced below. The court can be seen to be making a reasoned approach to resolving the apparent contradiction between what appears in the case to be an unrestricted right to repel groundwater, with the restrictions on the conduct of landowners imposed by the law of nuisance.

> *"Opinion*
>
> *43 For reasons given below it is my opinion that the right of the defendant to block surface waters from coming onto his land is not absolute or unqualified even under land law cases (as distinguished from nuisance cases). Moreover, the law of nuisance with its integral elements of reasonableness and balancing of competing interests is, and should be, increasingly resorted to with respect to disputes as to surface waters. Values such as utility, reasonableness and an absence of malice properly have an important bearing on the results in such disputes.*
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> *Land Law Cases Importing Qualifications*
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> *44 A leading case in the Supreme Court of Canada on the subject of surface waters, Edwards v. Scott (Rural Municipality), supra, although it is often cited as authority for an absolute right in the owner of lower lands to block surface waters from coming onto his lands from higher adjacent lands, does include, at p.974, the following statement:*

> *. . . the lower proprietor may lawfully, in the proper use of his land, erect obstructions to prevent the water from overrunning his land, even if such obstruction has the effect of forcing water back on the lands of the upper proprietor. (Emphasis added)*

The phrase "in the proper use of his land" introduces a qualification. The blocking has to be done in pursuit of a proper, or reasonable, purpose and so cannot be merely the gratuitous or malicious assertion of a right without any regard to the interest of the neighbour. Such a qualification can stand on its own but it also serves as a bridge to the law of nuisance where balancing the interests of the parties is integral to the law.

45 In Loring, supra, there is, at p.178-9, a long quote from Fleming on Torts, 4th ed., p.358, which ends as follows:

> *The so-called 'common law' . . . rule permits the lower owner in rural as well as urban areas to put up barriers and pen back such surface water, provided he uses reasonable care and skill and does no more than is reasonably necessary to protect his own land.*

Here again the right to block surface water from coming onto the lower land is not stated as an absolute right but rather as a right that is qualified. In blocking the flow of surface waters the owner of the lower land is to do no more than is reasonably necessary to protect the lower land. In support of that position Fleming cites Edwards v. Scott (Rural Municipality), supra, and also Home Brewery Co. Ltd. v. William Davis & Co. (1986), [1987] 1 Q.B. 339 (Eng. C.A.), which applied Gartner v. Kidman (1962), 108 C.L.R. 12 (Australia H.C.), and expressly adopted the following passage at p.49:

> *Although he has no action against the higher proprietor because of the natural unconcentrated flow of water from his land, he is not bound to receive it. He may put up barriers and pen it back, notwithstanding that doing so damages the upper proprietor's land, at all events if he uses reasonable care and skill and does no more than is reasonably necessary to protect his enjoyment of his own land. But he must not act for the purpose of injuring his neighbour. It is not possible to define what is reasonable or unreasonable in the abstract. Each case depends upon its own circumstances.*

The Home Brewery case, with its acceptance of the above quoted from Gartner v. Kidman, is cited in Gale on Easements (17th ed. 2002, London, Sweet & Maxwell). In Gale, at p.263, the general proposition is stated as follows:

> *Similarly, the owner of lower land is not obliged to receive running water off higher land; he may put up barriers or otherwise pen it back even though this may cause damage to the occupier of the higher land, provided that he does no more than is reasonably necessary to protect his enjoyment of his own land, does not act for the purpose of injury to his neighbour and uses reasonable care and skill. If, however, it is established that the lower occupier's use of his land in taking such preventive steps went beyond what was reasonable and that the resultant damage to his neighbour's land was reasonably foreseeable . . . he will be liable in nuisance and or trespass.*

I agree with that statement and believe that it finds support in the above quotation from Edwards v. Scott (Rural Municipality). The above-mentioned trends suggest strongly that if that 1934 case were now being decided for the first time the decision would reflect the factors considered in Home Brewery and make it clear that, as a matter of land law, the right to block surface water is not an absolute right as contended by the defendant in this case.

Nuisance

46 In Home Brewery at p.350 the following appears:

> *The tendency of the law as it has developed over the last century has been to assimilate all these categories into the general law of nuisance, reaching its culmination in the judgment of the Court of Appeal in Leakey v. National Trust for Places of Historic Interest or Natural Beauty, [1980] Q.B. 485.*

With respect to the law of nuisance, the following statements appear in Fleming: The Law of Torts (9th ed.):-

- at p.457: . . . nuisance is a field of tort liability, rather than any particular type of tortious conduct.

. . . it [private nuisance] refers to invasions of an occupier's interest in the beneficial use and enjoyment of land.

- at p.458: This branch of the law is, therefore, primarily concerned with conflicts over competing uses of land. It defines obligations of neighbourliness.

- at p.463: In the field of public as of private nuisance the interference must be both substantial and unreasonable. For overriding all else is 'the law of give and take.'

- at p.464: *. . . the task is to weigh the utility of the defendant's activity against the inconvenience caused to others.*

- at p.467: *It is not enough to ask: is the defendant using his property in what would be a reasonable manner if he had no neighbour? The question is, is he using it reasonably, having regard to the fact that he has a neighbour?*

In Klar: Tort Law (3rd ed. 2003), and in Linden: Canadian Tort Law (5th ed.), nuisance is defined essentially as it is in Fleming, supra. In Klar, supra, at p.655, it is stated that:

> *In balancing conflicting uses of land courts will consider the utility of the parties' conduct and the bona fides of the parties themselves.*

In Linden, supra, at p.535, there appear two statements highly relevant to the facts of this case, viz:

> *[Although nuisance law is more concerned with the effect or result than with conduct] the character of the defendant's conduct can be most relevant if it is malicious.*
>
> *Malice can cause the defence of reasonable user to disappear.*

47 In Sharpe: Injunctions and Specific Performance, at para.408, the following statement appears:

> *In a sense a theory of absolute property rights can hardly be applied in nuisance cases.*

48 It is stated in Linden, supra, at p. 539, that there may still be an exception from liability in nuisance with regard to surface waters. Fleming, supra, and Klar do not find any such exception. With respect, I believe that the approach to surface waters in Home Brewery, supra, and Gartner v. Kidman, supra, which denies that the owner of the lower land has an absolute right to block surface waters coming from his neighbour's higher land and which includes a test of reasonableness - or at least a need to show that the lower owner is protecting an important practical use of his land, is the better approach. It clearly introduces the element of reasonableness and therefore the concept of the proper balancing of competing interests with respect to land. With that I believe that the way is open for the application of nuisance principles to the subject of surface waters.

49 Except as stated above, I agree with and adopt the above-quoted statements from Fleming, Linden, Klar and Sharpe.

Malice, Unreasonableness and Absence of Utility

50 It is sad that the lawyers initially involved in the dispute between the parties (not counsel at the trial) elected adversary positions from the outset. Clearly it would have been preferable, and much less expensive, to have had the problems of surface waters settled if not amicably at least on a practical basis that could have involved a catchbasin on the lands of the defendant financed by the City, the parties and perhaps the neighbours owning lots to the east of the plaintiff's lot.

51 As stated, I accept as correct the opinion of Mr. Nersesian that the catchbasin installed on the lands of the defendant had the capacity to handle, and drain off to the municipal storm sewer system, all of the surface water that would have come onto the lands of the defendant from the lots to the east and to the north of the defendant's lot. Half the costs of that catchbasin was paid by the City.

52 From the time the catchbasin was installed it was not reasonable for the defendant to block the surface waters that would have come onto the defendant's lands from the adjacent lands of the plaintiff. Within the meaning of the decisions in Home Brewery, supra, and Gartner v. Kidman, supra, the defendant was then not using reasonable care and skill and doing no more than was "reasonably necessary to protect his enjoyment of his own land." He must be taken to have been acting for the purpose of injuring the plaintiff or at least being reckless as to the real and serious harm he knew he was causing the plaintiff. In terms of the tests under the law of nuisance, where the utility of a defendant's actions is an important factor in the balancing exercise carried out by the courts, the utility of the defendant's conduct is essentially zero. Moreover, the large element of malice negates the defence of reasonable user of the defendant's lands.

53 It is clear from the authorities reviewed in Fleming, supra, Linden, supra, and Klar, supra, and from statements in those texts, that in these circumstances the plaintiff's remedies can include injunctions and damages."

The court went on to find the defendant liable in damages and granted an injunction requiring the defendant to remove the obstructions to the plaintiff's drainage. The defendant was permitted to offset one half of the cost to the plaintiff, of the catchbasin that had been installed by the municipality.

The Di Gregorio Decision dealt with facts in which there was no evidence of any kind of a municipal agreement addressing the matter of drainage, upon the title to the affected properties. This was regarded as a material fact by Sutherland J. (para. 38). The case Stroz v. Reid [1993] O.J. No. 2295 was a case which did involve a municipal agreement.

The case involved two neighboring properties in the then Borough of Etobicoke. They are identified as 45 and 45A Orchard Crescent. 45A Orchard Crescent was a part of a disused hydro corridor. The hydro corridor had been lower than number 45 and number 45 had drained onto it. Ontario Hydro sold the corridor to a developer who then applied

to the Committee of Adjustment to sever the parcel. One of the conditions of the severance required a development agreement. The development agreement required that *"the grading of the finished lot is to be in accordance with the drainage plan approved by the engineer."* (para. 5) The grading plan required, among other things, two swales and a retaining wall.

The plaintiff purchased 45A from the developer. There was no question that the plaintiff was aware of the drainage plan at the time of his purchase. (paras. 8, 9,and 10).

All was well between the two parties until the plaintiff removed the retaining wall which was described in the lot grading plan, which was a condition of the consent to sever lands. (para.4). After the retaining wall was removed from 45A, the rear yard of 45 began to flood.

For reasons known only to himself, the plaintiff decided to bring action seeking a declaration that he was entitled to ownership and possession of 45A. The defendant counterclaimed, seeking an order requiring the plaintiff to rebuild the wall that was required by the grading plan.

The claim was granted on consent; the counterclaim was decided in favor of the defendant. The plaintiff was required to rebuild the retaining wall.

The gist of the court's reasoning is set out in paragraphs 40 to 42 of the courts Reasons. They read as follows:

> *"40 The plaintiff also relies on the case of Heisel v. Stein, [1962] O.W.N. 51 (C.A.) to support the general principle noted above in a situation where the water which flooded the plaintiff's land was water which originated there. At p. 52 Schroeder, J.A. stated:*
>
> > *"The owner of land on which there is surface water which does not constitute a stream flowing in a definite channel, owes no obligation to the owner of higher land and unless the adjoining owner has acquired a prescriptive right he has no right to have it flow upon the lower land. The proprietor of that land is entitled to take measures to exclude the flow of such surface water onto his land from the higher level, and no action lies against him for damage suffered by a third party in consequence of an obstruction erected with a view to such exclusion."*
>
> *The operative words, as they apply here, are "unless the adjoining owner has acquired a prescriptive right," i.e., an adjoining owner at a higher level has no prima facie or jure naturae right to have the water flow upon the lower land.*
>
> *41 In the case at bar, however, Mrs. Reid as the owner of lot 45, the higher land, did, I find, acquire a "prescriptive right" to have her surface water continue to flow through 45A by reason of the development agreement reached with the City to the knowledge of Mr. Stroz.*

> *42 Judgment shall issue in favour of the defendant, plaintiff by counterclaim, for a mandatory order requiring Mr. Stroz to re-install and maintain a retaining wall and swale, including a bleeder swale to 45 Orchard Crescent on the eastern boundary of 45A Orchard Crescent to comply with the drainage scheme as required by the then Borough of Etobicoke and as interpreted in these reasons."*

The Decision was upheld by the Ontario Court of Appeal [(1998) CarswellOnt 3828)].

The case does not define the nature of the prescriptive right that the court awarded to the defendant. Is it an easement? Is it a license? A restrictive covenant? Would the owner of any other property whose drainage might be affected enjoy the same right?

The writer submits that it is unlikely that the court was describing a prescriptive right that arose by the passage of time and user; a right that arises by way of limitations. There is no reference to the requirements for an easement or right that arises from these factors in the Reasons of the court. The writer submits that this particular aspect of the court's reasoning will be of particular interest going forward, as the majority of lands in Ontario, and as the writer understands it, in the rest of Canada, are held under Torrens of the Land Titles system which do not permit easements and other rights to arise by passage of time and user.

A more recent case which involved the use of a municipality's approved drainage scheme was the case of Dankiewicz v. Sullivan [2011] O.J. No. 2908. In that case, the plaintiff alleged that the defendant had filled in a swale that ran across the backyards of both the plaintiff and the defendant. The plaintiff claimed that the actions of the defendant had caused the plaintiff to experience flooding.

The swale was a part of a drainage plan approved by the City of London as part of the subdivision process that created the lots of both the plaintiff and the defendant. (paras. 3, 8, 9). Subdivision approval had taken place in 1992. In Ontario, at that time, a new subdivision would have had to have been approved under Ontario's Land Titles land registration system. The Land Titles system is a Torrens system. Rights cannot arise from long term use.

It should be noted that the plaintiff had, herself, made changes to her property which affected the drainage. (paras. 9 and12).

Nevertheless, the court was satisfied that liability should flow based on the tort of nuisance. The swale had been prescribed by the City in the lot grading plan associated with the subdivision. Although the evidence showed that the grades were never exactly as set out in the plan, the drainage scheme had worked satisfactorily for more than ten years. It was only when the defendant filled in the swale that flooding began to occur. (para. 17).

The defendant was ordered to take whatever steps were necessary to ensure that the plaintiff's surface water drains across his property. (para. 32).

Thus, we see that the prescriptive right described in Stroz v. Reid arises from the drainage schemes that are approved by municipalities at the time that the creation of lots is approved.

Municipal Liability

Another aspect of the problem under examination is whether or not the complainant may have an action against the municipality itself.

Enforcement of By-laws, Agreements or other Regulatory Instruments

In Ontario, as in many provinces, the local municipalities are responsible for the enforcement of Building Codes. Liability can flow if a municipality fails to properly enforce the Building Code. (Ingles) There are provisions in the Ontario Building Code which relate to stormwater. (For example see Sentence 9.14.6.1(1) of the Ontario Building Code O. Reg. 332/12.)

By-laws

The case of Oosthoek v. Thunder Bay [1996] O.J. No. 3318 is a Decision of the Ontario Court of Appeal. In that case, the City of Thunder Bay had a known flooding problem in a particular neighbourhood. As part of its efforts to address that problem, the Council of the City enacted a by-law requiring, among other things, the disconnection of roof water leaders from the stormwater drainage system.

The by-law was never enforced.

On these facts, the Court of Appeal found that the City of Thunder Bay was liable in negligence to the owners of properties which were subsequently flooded in the neighbourhood, which had previously experienced flooding problems.

In the case of Foley v. Shamess [2008] ONCA 588, the Ontario Court of Appeal dealt with a claim against the Town of Parry Sound. Parry Sound had torn down a building. The building consisted of two units under separate ownership. Shamess, who owned one side, did not maintain it. Foley, who owned the other, made effort to maintain that side.

The Chief Building Official of the Town declared the entire building unsafe. The Town made an effort to try to get the two owners to agree on how to restore the building. Shamess did not want to restore the building; Foley did. They could not agree. The Town tore down the entire building. Foley sued Shamess and the Town. At trial, the court found for Foley and divided liability between the Town and Shamess.

Both defendants appealed.

The Court of Appeal dismissed the action as against the Town and upheld the finding of liability against Shamess. The court found that, while the municipality had a duty to enforce its Property Standards By-law, it was not required to enforce it exactly as Foley wanted it to be enforced. It was only required to be reasonable. On the record, the Town's actions were found to be reasonable.

From the point of view of this paper, the important point in this case is that the municipality was found to have a duty to enforce the Property Standards By-law.

Another case which involved municipal enforcement and liability which the writer submits is of relevance to analyzing the subject fact situation, is that of Sharpe v. London 2003 CarswellOnt 6468.

Sharpe owned the house on the north side of Gainsborough Road in the City of London. The driveway of the house sloped to the north downward. It was approximately one foot lower than Gainsborough Road itself. Gainsborough Road was graded such that the expectation was stormwater would flow along Gainsborough Road to a catchbasin to the west of the property.

However, during heavy rains, stormwater would stream into Sharpe's garage and flood his house. (The garage was attached.)

It was established that the reason water did not flow to the catchbasin as planned was that a developer, in response to complaints from the City of London concerning persons turning on the gravel shoulder of Gainsborough Road, had constructed asphalt pad on the shoulder of Gainsborough Road. The design of this pad was not approved by the City of London. However, London was aware of it because the developer advised London as to what it had done after it (the developer) had installed the pad, and London's graders had to lift their blades when grading the shoulder of Gainsborough Road.

The City of London was found to be liable to Sharpe in both negligence and nuisance. The court did not accept that the stormwater in question was merely surface water. The court found that the water was flowing in a, albeit rudimentary, defined channel, thereby obligating London to ensure that it reached a proper outlet.

So far as nuisances are concerned, the court ruled that London was causing an unreasonable interference with Sharpe's reasonable use of his property.

The City of London had claimed over against the developer. That claim was dismissed. The court's reasoning was as follows:

> *"Negligence*
>
> *55 The Statutory right of a municipality to construct highways carries with it the duty to use care in the exercise of such right. If provision for surface drainage is inadequate that may constitute negligence. James v. Bridgeburg (1907) 9 O.W.R. 189. S. 284 Municipal Act.*
>
> *56 The concept of proximity applies to the City in relation to the Sharpes as owners of low level abutting lands. The City, having collected and transported this water, owed a duty of care to the Plaintiffs to make reasonable provision to convey it to the catchbasin.*
>
> *57 With no inspection or maintenance of the original containment system and with no alternate ditch or channel in place, the probability of*

flooding harm to the Plaintiffs resulting from a breach of that duty of care was reasonably foreseeable. It is not necessary that the precise nature of the result and consequent damage be foreseeable.

58 The damage was readily avoidable by construction and maintenance of an adequate containment system. The City, being aware of the pad, failed to consider and react to the drainage issue. The City failed to take reasonable precautions in the existing circumstances.

> *- By failing to remove the pad to enable maintenance of the channel and berm by proper grading procedures, and*
>
> *- By failing to make alternate provision for containment of the water collected in the channel.*

59 Although the Plaintiff does not rely on this being a "defined" channel, the fact remains that the water had been confined within the defined northern limit being the berm and the defined southern limit being the slope of the shoulder. Although poorly defined, those limits did exist and function. There was a channel with those visibly identifiable boundaries.

60 Allowing surface water to escape in the way provided by nature is not actionable. Rogers on Municipal Corporations (Carswell 1971 Page 916). As provided in Scott Rur. Mun. v. Edwards, [1934] 1 W.W.R. 33, [1934] 3 D.L.R. 793 (S.C.C.) by Martin, J.A., for the Saskatchewan Court of Appeal which reasons were accepted by the Supreme Court of Canada, [1934] S.C.R. 332:

> *"I cannot but conclude that the weight of authority in the Provinces of Canada where the English common law prevails is that the principles which apply to water flowing in a defined channel do not apply to surface water - water of a temporary and casual character - which does not flow in any regular channel and has no certain course but which merely squanders itself over the surface of the ground."*

61 As provided in Heisel v. Stein [1962] O.W.N. 51 (Ont. C.A.), at p. 52, different considerations apply to water flowing in a defined channel.

> *"It is well settled by the law of Ontario that as to mere surface water there is no right of drainage jure naturae, and that as long as surface water is not found flowing in a defined channel with visible edges or banks approaching one another and confining the water therein, a lower proprietor owes no servitude to an upper to receive the natural drainage."*

62 An owner has the right to drain his land by defined channel provided that the water is carried thereby to a sufficient outlet without damaging other owners. Gambo v. Dwyer [1990] N.J. No. 71.

63 That the burden to transport to an outlet extends to Municipalities is found in Law v. Niagara (1884), 6 O.R. 467

> *"It is clear, as a matter of law, that the municipality is not bound to provide drainage for the property within its limits: that if it construct drains or sewers to gather up the water, and they are so negligently constructed, or knowingly permitted to fall into or remain in a state of disrepair, or to be obstructed so as to prevent the water so gathered up finding a proper outlet, and thereby such water is brought upon property upon which it would not otherwise come, they are responsible for such damages as may ensue."*

64 This water lost its temporary and casual character as surface water with no certain course. It became water following a certain course as it flowed in the channel en route to the catchbasin.

65 The Plaintiffs have proved on a balance of probability that the City's negligence in failing to take reasonable steps to contain this water was a substantial factor contributing to their loss. Athey v. Leonati (supra).

66 There is no residual policy issue requiring that this tort liability should not be recognized. Cooper v. Hobart, [2001] 3 S.C.R. 537, Edward v. Law Society of Upper Canada, [2001] 3 S.C.R. 562., Haskett v. Equifax (2003), 63 O.R. (3d) 577.

Contributory Negligence

67 The Plaintiffs are alleged to have negligently contributed to their loss by storing equipment in the garage and by failing to have a sump pump. Until the third flood they were unaware of the source of the water. Thereafter they installed sump pumps in the fruit cellar and in the crawl space. Following the floods Mr. Sharpe used high volume pumps for extended intervals to pump water from his house. There is no evidence to suggest that a sump pump could have coped with flooding to the extent experienced in these episodes.

68 After fourteen years with no floods, the Sharpes were not negligent either in storage of their equipment or in failing to provide a sump pump.

69 There is no basis for a finding of contributory negligence.

Nuisance

70 Nuisance is an unreasonable interference with the use and enjoyment of the property of another. Causation of physical damage bespeaks such interference.

71 The City collected, contained and transported water to the Plaintiffs' driveway with no provision to carry the water beyond the driveway. The resulting flooding constituted an unreasonable interference with the use and enjoyment of the Plaintiffs' property.

72 That constituted a nuisance for which the City must bear responsibility. Hartford v. Oshawa, [1961] O.W.N 363.

73 This was surface water as opposed to an "escape" from sewage works or water works. The City is not exempted from liability insurance by s. 331.2(1) of The Municipal Act which provides:

> *(1) No proceeding based on nuisance, in connection with the escape of water or sewage from sewage works or water works, shall be commenced against,*
>
> *a) a municipality or local board,*
>
> *b) a member of a municipal council or of a local board;*
>
> *c) an officer, employee or agent of a municipality or local board.*

Special Damages

74 A detailed brief of special damages was filed. Neither the defendant nor the third party called evidence on the damage issue. The challenge to special damages was mounted in argument, more so than in evidence.

75 Damages, based on actual cost and prices from suppliers, are claimed as follows:

Contents of house and garage	
Replacement pending	*$ 5,045.56*
Replacement	*$ 5,413.24*
Clean-up expenses	*$ 1,655.00*
Basement repairs	*$10,946.10*
Total	*$23,059.90*

76 The City contends:

- Considering depreciation, the claim for damage to contents pending replacement should be reduced from $5,045.56 to $4000.00.

- Considering depreciation on a four year old clothes dryer and an 18 year old furnace and by denying claims for two sump pumps and piping, the claim for damages for replacement of contents should be reduced from $5,413.24 to $3800.00.

- The cleanup claim be reduced from $1655.00 to $500.00.

- The claim for basement repairs be reduced from $10,946.10 to $4,387.48. These were the amounts of two estimates for work to be done.

77 The third party contends

- for a 50% reduction in the claim for $410.00 for bifold doors

- that the $5,045.56 be reduced to $2500.00;

- the furnace be reduced by $1500.00;

- sump pumps and paint be reduced by $90.00 and $180.00 respectively;

- the claim for ten minutes per day, at the rate of $10.00 per hour, from April 1st to October 31st representing Mr. Sharpe's time expended in maintaining the trench be reduced;

- that various items should have been cleaned rather than replaced. In net result the third party suggests special damages of $10,875.90.

78 The Plaintiffs claimed special damages estimated at $15,000.00. Proof was tendered at trial in the amount of $23,039.90. No objection was made to that excess during the trial or in written submissions.

79 This five day trial with a relatively modest amount in dispute involved three litigants, a third party claim and written submissions. The entire process is weary from a costs perspective. Without formal motion the prayer for special damage is increased to $23,059.90.

80 The choice between cleaning and replacement is a judgment call for the Plaintiffs. There is no basis in evidence upon which to find the plaintiffs acted unreasonably. Mr. Sharpe impressed as candid, forthright and reliable.

81 The lower estimate for basement repairs did not include all of the work. The Plaintiffs rely on the estimate for $10,946.10 which addresses all of the damage. There was no evidence that the higher estimate was excessive.

82 The replacement estimates do provide for upgrading sheet panelling in the family room to tongue and groove panelling. Replacement of shelving in the fruit cellar is excessive at $560.00.

83 In light of the City's refusal to remove the pad the expenditure for sump pumps and piping is reasonable. Mr. Sharpe's efforts in maintaining the channel were reasonable as are his estimate of time required and the hourly rate.

84 The meagre evidence relating to a depreciation allowance for furnace, clothes dryer, shelving, upgraded panelling and damage to camshaft assembly kits stored in the garage does not lend itself to precise calculation.

85 Making the best use of the available evidence, the claim for special damages is reduced by $1,500.00 to $21,559.90

General Damages

86 Each flood precipitated a stressful emergency clean-up of rooms and contents with intensive follow-up. The Plaintiffs endured much in terms of frustration and inconvenience. They have been deprived of the use of the family room for three years. Enjoyment of their home has been substantially impaired. General damages are assessed at $7,000.00.

Injunction

87 The pad should be removed promptly. In closing submissions the City offered to "undertake to remove the pad on its own regardless of the outcome of the case"

88 Fulfillment of that offer would be a reasonable disposition. The City will be held to its' offer. No injunction will issue. A reasonable opportunity for removal is determined to be 45 days from release of these Reasons for Judgment.

Judgment

89 There will be judgment for the plaintiffs against the City as follows:

- *Special damages - $21,559.90*

- *General damages - $ 7,000.00.*

- *Pre-judgment interest in accordance with the Courts of Justice Act.*

The Third Party Action

90 The City claims indemnity from Randa under a general indemnity clause in the subdivision agreement dated September 27, 1994:

"The subdivider covenants that it will indemnify and save harmless the City from any and all claims, demands, actions and causes of action, whether the same shall be successful or unsuccessful and from all costs to which the City may be at, suffer or be put to in respect of any such action, cause of action, claim or demand in any way arising out of or alleged to arise out of any work, service, operation or thing constructed, installed, repaired, maintained or done or omitted to be done or negligently done by the subdivider, his servants, agents, contractors or subcontractors under them, in respect of the said works and services, whether or not the same shall be required to be done under the terms of this agreement, and including (without limited the generality of the foregoing) the alteration of any grade or existing level construction, maintenance or repair of any street."

91 The City knew that:

- Randa was chronically late with performance of its obligations under the Subdivision Agreement,

- It did not comply with the October 1st deadline for completion of this road improvement,

- It did not obtain design criteria from the City,

- It did not submit construction drawings for City approval,

- As described in the City's letter of August 30, 1999, the "functionality in keeping the dust down" was questionable at best. The letter made no reference to surface water concerns.

- As stated in that letter, it was questionable "whether it (the pad) accomplishes anything because it covers such a small area".

92 The City did not:

- Inspect the pad following notification of its existence,

- Compensate for the design deficiencies by altering the pad,

- Remove the pad knowing that it did not conform to City standards

- Take steps to provide for surface water management with the pad remaining in place.

> *93 Although Randa was negligent in the constructing the pad without provision for surface water management and without prior city approval, that negligence was a sine qua non in relation to the damage suffered by the Plaintiffs. That negligence was severable from the City's subsequent negligence. The proximate cause of the plaintiffs' loss was the City's failure to respond in reasonable manner to circumstances well within its knowledge.*
>
> *94 There was ample time for remedial or preventive action. Rather than adapt to the changed circumstances, the City ignored the situation. The pad was not taken seriously by Randa, and no more so by the City. By its complacency and inactivity, the City became author of its misfortune. That inactivity amounted to condonation of Randa's action.*
>
> *95 This claim is not within the indemnity provision for "any work service operation or thing constructed, installed, repaired, maintained or done ... by the subdivider ... in respect of the said works and services"*
>
> *96 The third party action is dismissed."*

London appealed the dismissal of its third party claim against the developer that constructed the pad. The Court of Appeal held that, having found that the developer was also negligent, the trial judge should have apportioned liability as between the developer and London. The developer was found 50% liable. That finding, coupled with an indemnity agreement between the City and the developer, required the developer to indemnify the City of London for 50% of the damages awarded at the trial ([2005] O.J. No. 657). (It strikes the writer as repugnant that a party who trespassed upon public lands; broke City by-laws; and caused damage in so doing, would be able to require the taxpayers to contribute to the cost of the wrongdoer so doing. However, the law apparently sees no irony in this result.)

In light of these Decisions and the reasoning within them, it would appear to be sound practice for counsel advising municipalities to make inquiries as to the nature and extent of any interactions between the complainant and staff concerning the condition complained of. Potential sources of causes of action would include site plans, by-laws, lot grading by-laws and swimming pool by-laws.

Agreements as a Source of a Cause of Action against the Municipality

We have seen in the cases analyzed above that a landowner can use an agreement related to lot creation to fix liability on a person who creates a nuisance. Can the municipality be forced to enforce that agreement? Can the municipality be found liable for declining to enforce the agreement?

Some Thoughts

When deliberating over the facts before the courts in the cases presented above, the courts confined their analysis of the situation to the action of the stormwater, of the parties before the Court. It has been the experience of this writer that, when faced with this kind of situation, municipal staff who have expertise in drainage matters seldom are

willing to blame flooding upon one simple cause. Frequently, in Niagara Falls, by the time the City receives a drainage complaint, staff may be faced with a set of facts that does not conveniently lead to the conclusion that a particular individual is responsible for the problem complained of.

For example, the writer has been exposed to more than one case in which a party who filled in a swale that was clearly illustrated in a plan of subdivision complained about the flow of water created, when another party filled in the same swale. Surely the "clean hands" doctrine would shield the City from having to act unless action is taken against both complainant and would-be defendant.

Kay v. Caverson 2011 ONSC 4528 is a case consisting of a claim in nuisance and negligence based upon alleged interference with a swale. The swale was located between neighbouring houses. The swale did not actually function to carry water to the municipal drainage system, however, it did serve to carry water away from the two houses and allowed the water to disburse in a manner that was satisfactory, for many years.

The defendant obtained a Building Permit from the City of Mississauga to expand his house. Subsequently, there was flooding associated with the swale. The plaintiff blamed the flooding on the renovations to the defendant's house. The plaintiff sued the defendant and the City of Mississauga. It was alleged that Mississauga should not have approved the drainage plan associated with the renovations. The plaintiff further alleged that the City failed to conduct proper building inspections and failed to make reasonable efforts to enforce its Property Standards By-law.

The case ultimately failed. The evidence presented failed to persuade the court that damage has occurred. (see paras. 189, 197 and 231). Accordingly, the comments of the trial judge with respect to the duties of the City of Mississauga might be regarded as obiter.

Nonetheless, certain passages in the case may be helpful to the solicitor representing a municipality. Paragraphs 200 through 228 should prove very helpful to counsel representing municipalities. They read as follows:

> *"200 The plaintiff in her amended pleading has asserted the following causes of action against Mississauga:*
>
> *(1) negligent building and site plan approval and negligent inspection;*
>
> *(2) nuisance; and*
>
> *(3) strict liability pursuant to Rylands v Fletcher.*
>
> *201 Mississauga denies liability in negligence and asserts that in any event the plaintiff has failed to establish that any damages complained of were caused by its negligence.*

202 When examining a claim in negligence, it must first be determined whether a duty of care existed, and if so the applicable standard of care and whether a breach of that standard of care occurred. The determination of factual causation arises after it has been first determined that a defendant has breached the applicable standard of care: Randall (Litigation Guardian of) v. Lakeridge Health Oshawa, 2010 ONCA 537 (CanLII); Bafaro v. Dowd, 2010 ONCA 188 (CanLII), 2010 ONCA 188 (Ont.C.A.).

203 As to its duty of care, Mississauga, as a municipality, does not owe a duty at common law to provide drainage or drainage facilities for surface water: Edwards v. Scott Rural Municipality (1933), 1933 CanLII 188 (SK CA), [1934] 1 W.W.R. 33 (Sask. C.A.), aff'd 1934 CanLII 59 (SCC), [1934] S.C.R. 332.

204 Similarly, Mississauga owes no common law duty to the plaintiff to ensure that the swale located on private property between the properties was fully functional and drained to the municipal ditch.

205 Mississauga does however from have a duty of care to the public related to building and site plan approval and inspections.

206 The scope of the duty owed with respect to work involving renovations of an existing home is contained in the Owner's Guide (Exhibit "Q"). Resolution 109, as referred to by the plaintiff's expert, Barker, did not apply to the Caversons' renovation as it did not involve the construction of a home on undeveloped land, as a result of a division of land, and/ or a variance granted by the committee of adjustment as referred to by the Resolution.

207 The Owner's Guide specifies that a "lot grading certificate" could be required depending on the nature of the renovation. Witnesses on behalf of Mississauga testified that as the Caversons' renovation was small, neighbouring properties were a significant distance away, and the houses were elevated as compared to the low-lying area along the property line, it was determined that a "lot grading certificate" was not required and that a "lot grading deposit" of $2,000 was sufficient.

208 No evidence was offered that had a "lot grading certificate" been obtained that it would have altered Mississauga's site plan and building approval process. Similarly there is no evidence that a "lot grading certificate" would have impacted on Mississauga's approval of the changes made to the Caversons' roof and its determination that no perceptible change to the grade or drainage pattern had occurred on the property.

209 Although the plaintiff's expert, Barker, testified that a "lot grading certificate" should have been obtained, he conceded that this decision was within the discretion of Mississauga.

210 I find on the evidence that Mississauga acted within its duty and that there is no evidence of any breach of that duty relating to its decision not to require a "lot grading certificate."

211 As to the installation and placement eavestroughs and downspouts, Mississauga's duties with respect to the oversight and approval of these is found in the Code.

212 Section 9.26.18.2 (1) of the Code reads:

> *Where downspouts are provided and are not connected to a sewer, extensions shall be provided to carry rainwater away from the building in a manner that will prevent soil erosion.*

213 It was the uncontradicted testimony of witnesses on behalf of Mississauga and other witnesses on behalf of the defendants that as part of the Caversons' renovation, downspouts were fitted with extensions which carried rainwater away from their residence. Although Mississauga initially had concerns regarding soil erosion where the extensions from the downspouts on the east side of the Caversons' home discharged water, this was subsequently remedied by the Caversons by the installation of splash pads.

214 Section 9.14.6.1 (1) of the applicable the Code reads:

> *The building shall be located or the building site graded so that water will not accumulate at or near the building and will not adversely affect adjacent properties.*

215 The plaintiff testified that in March 2003 ponding occurred resulting in a pond 24 feet wide in the area of the swale and extending onto her property. Surprisingly, in spite of having taken a number of other photographs at different times since this dispute arose, she testified that it did not cross her mind that she should take a picture of this large pond area. In view of the inaccuracies, exaggeration and conflicting evidence offered by the plaintiff I cannot accept her evidence as to the existence of this pond occurring in March 2003 as she described it.

216 Evidence of both lay and expert witnesses supports the conclusion that water does not accumulate at or near either the plaintiff's or the Caversons' homes.

217 The evidence is that, both before and after the renovations carried out at the Caversons' home, water has temporarily collected at times in the shared swale between the properties.

218 Further, the evidence is clear from both lay and expert witnesses that there has been no change to the drainage pattern or grade between the properties nor the grade of the Caverson property. Even if an adverse effect has occurred to the plaintiff's property due to water collecting in the

shared swale, I cannot conclude on the evidence and on the balance of probabilities that the accumulation of water in the swale has in any way increased in either frequency or volume.

219 As to the standard of care owed by Mississauga in its inspections of the Caversons' property, it is not required to ensure during the inspections that the most minute deviations from the approved plans were remedied. Its duty is to act reasonably in conducting its inspections. The gravity of the harm that may result is a factor to be considered in determining whether Mississauga acted reasonably: Ingles v. Tutkaluk Construction Ltd., 2000 SCC 12 (CanLII), [2000] S.C.J. No. 13.

220 It was asserted on behalf of the plaintiff that Mississauga was negligent and in breach of its duty with respect to its enforcement of its Property Standards By-Law 654-98 which at section 28 reads in part:

> *All exterior property areas, including vacant land, shall be maintained in a clean and reasonable condition so as to prevent fire, accidents or health hazard and more particularly:*
>
> *...*
>
> *(2) Any part of a yard that is low-lying or has been excavated so that it accumulates water, shall be drained, filled and graded so that water drains to a storm sewer or ditch. Swimming pools, ornamental pools and agricultural ponds shall not be included in this requirement.*

221 While the evidence is clear that from time to time water has accumulated within the confines of the swale separating the properties both before and after the renovations carried out at the Caversons' home, no evidence was presented which demonstrated that the accumulation of water in the swale might foreseeably cause accidents or pose a health hazard as contemplated by the property standards by-law. Further, I accept the position of Mississauga that if the swale needed to be excavated so that water could drain to the municipal ditch it would be the responsibility of the plaintiff and the Caversons to complete such work. The swale between the properties was not constructed by Mississauga nor is it within its property, possession, or control.

222 It was submitted on behalf of Mississauga that even if the collection of water in the swale posed a potential hazard and it had some control over the location, the enforcement provisions contained in By-Law 654-98 are discretionary and as such the court may not interfere with the exercise of municipal discretion in the enforcement of the by-law. In my view, this is not an entirely accurate statement of the law.

223 When a municipality makes "a policy decision to enact a property standards by-law, it could be liable to property owners for the negligent

enforcement of its by-law": Foley v. Shamess, 2008 ONCA 588 (CanLII), [2008] O.J. No. 3166, Laskin J.A. at para. 26.

224 In considering a municipality's decision with respect to the enforcement of a property standards by-law, Laskin J.A. stated in Foley at para. 29:

> *In my view, finding the Town negligent for failing to undertake a partial demolition of the building was unreasonable. Although the Town owed a duty to the Foleys to enforce its property standards by-law, it owed no duty to them to undertake a partial demolition. For it is one thing to say a municipality has a duty to enforce its bylaws. The way it enforces them is quite another thing. As I read the case law, a municipality has a broad discretion in determining how it will enforce its by-laws, as long as it acts reasonably and in good faith. That makes common sense. The manner of enforcement ought not to be left to the whims or dictates of property owners.*

225 Thus, while Mississauga owed a prima facie duty to the plaintiff, the Caversons and other persons who may be affected, to enforce its property standards by-law, the standard of care applicable to the municipality's conduct is whether it acted reasonably and in good faith in all the circumstances.

226 I conclude that Mississauga did act reasonably and in good faith so far as its enforcement of Property Standards By-Law 654-98 is concerned. There was no evidence whatsoever that the temporary accumulation of water in the swale between the properties could reasonably be foreseen as a potential cause of accident or health hazard such that the city was bound to take active steps to ensure that the swale was excavated so that water could drain through the swale to the municipal ditch.

227 Mississauga personnel attended at the properties on several occasions following the plaintiff's initial complaint in the spring of 2003. There is no evidence whatsoever of any observations of significant water accumulation in the swale on those visits or any evidence of risk of accident or health hazard present.

228 As such, I conclude that Mississauga did not fail to properly enforce Property Standards By-Law 654-98."

It would appear then that the municipality can successfully discharge its duty so long as it acts reasonably in response to the flooding complaint. The actions of Mississauga in Kay v. Caverson can be contrasted with the actions of the Township of North Dumfries in the case of 706686 Ontario Inc. v. North Dumfries [1995] O.J. No. 3177.

In that case, North Dumfries permitted eight abutting lots to be developed by way of severance. The project was originally going to proceed by way of plan of subdivision,

however, for reasons known only to the Township, the severance procedure was adopted. Lots were required to be subject to a common grading plan. A development agreement was entered into with the Township (described as the "standard subdivision agreement" para.6). The agreement was registered on title. Each purchaser of one of the eight lots created by the severances was required to sign an acknowledgment of the existence of the lot grading plan and an agreement to comply with the plan.

The lots were sold and construction commenced. During the same timeframe, the plaintiff purchased lands abutting the subject eight lots from the developer of the eight lots. Prior to agreeing to buy the abutting lands, it carefully made inquiries of the municipality concerning, among other things, the drainage plan for the eight lots. (para. 16).

The municipality, for whatever reason, declined to cause the owners of the eight lots to bring them into compliance with the lot grading plan. As a result, rainwater flowed onto the lands of the plaintiff and caused damage. Negotiations ensued. Various alternative solutions were proposed. However, there seems to be one basic point of disagreement; the Township felt the plaintiff should resolve the problem while the plaintiff thought the Township should.

The Township took the position that it would not issue any permits for the subdivision the plaintiff was developing on the abutting lands that it had purchased from the original developer of the eight lots. After some protest, the ban was restricted to those lots of the new subdivision which immediately abutted the eight lots which had been created by severance. (para.32).

The Township then provided certificates of compliance to the owners of the eight lots which were created by severance. The certificates were issued despite the fact that the Township was advising the plaintiff that the eight lots did not, in fact, comply with the lot grading plan. The court found that this action on behalf of the Township precluded the plaintiff the opportunity to seek relief directly from the owners of the eight lots. (para. 33).

The plaintiff brought action in negligence in contract against the Township and the Township advisers.

The plaintiff was successful.

The essence of the court's ruling is found at paragraph 39 of its Reasons:

> *"39 On the evidence heard and the submissions of counsel, the court records the following findings at this time:*
>
> > *1. The remaining defendants (the Township, Philips and DePodesta) are liable to the plaintiff in damages for negligence and/or breach of contract by failing to require the owners of the upper lots (Parts 1-8 inclusive) to allow drainage work to be carried out on their lands, as they had agreed to do when the lots were acquired by them;*

2. The remaining defendants are also liable to the plaintiff in damages for failing to require such owners to observe all the terms of the subdivision agreement entered into by them with the Township;

3. The remaining defendants are also liable to the plaintiff in damages for issuing certificates of compliance with respect to the subdivision agreement, and for releasing such owners and their lands from further responsibility under the terms of the subdivision agreement at a time when such owners were in default under the terms of the agreement;

4. The remaining defendants are also liable to the plaintiff in damages for failing to ensure that standards of the Township for drainage works were adhered to in drainage works within the upper lots and the subject property;

5. The amount of damages recoverable by the plaintiff must be reduced by reason of the failure of the plaintiff to take any steps to mitigate its loss by correcting the effect of erosion caused to the subject lands within a reasonable time after the damages had occurred;

6. The amount of damages recoverable by the plaintiff must also be reduced by reason of the plaintiff having assumed risk by proceeding with work before final approval had been given by the Township, and by reason of leaving land which had been freshly graded unprotected against the risk of erosion. Although the rainfall which occurred in early 1987 was unprecedented, the volume of the work undertaken and the condition of the soil, which should have been apparent to the plaintiff, made the risk of loss from that cause foreseeable;

7. The Township and Philips is each liable to the plaintiff for the negligence of DePodesta."

Leave to appeal the Decision was refused. (1998) 82 A.C.W.S. (3d) 379.

It is submitted that counsel advising the municipality should be able to avoid the result in this case simply by being reasonable. The actions of the municipality in the 706686 Ontario Inc. v. North Dumfries case appear, on the face of the Decision, to be most highhanded. It seems as if the municipality was trying to avoid offending the purchasers of the eight lots at the expense of the plaintiff. If that was its goal, it failed miserably.

When dealing with cases such as Kay v. Caverson in which agreements related to development are the basis of the claim, one issue that will have to be addressed is that of limitations. If the landowner whose land is subject to a development agreement fills in the swale contrary to the drainage plan attached to that agreement, when does the limitations clock start to run?

A related question is how long does the agreement bind successive landowners? This is a particularly interesting question in most parts of Ontario where, historically, subdivision agreements had 20 year sunset clauses. The agreements specifically provided that they were of no force and effect after 20 years.

A case which explores these issues is that of Brown v. Belleville 2013 ONCA 148. In that case, Brown's predecessor in title had entered into an agreement which required a predecessor municipality to the City of Belleville (Thurlow), to maintain a storm sewer system that it had constructed on and near the predecessor in title's land.

The agreement was entered into in 1953. As of 1959, Thurlow had stopped all efforts to perform the work required under the agreement. The original signatory to the agreement died in 1966. His successors in title attempted to induce the municipality to carry out its obligations in 1980. The municipality unilaterally repudiated the agreement at that time. In the late 1990s, Thurlow amalgamated with Belleville. Belleville became the successor to Thurlow.

In 2003, the Browns became the owner of the subject lands. They became aware of the agreement and approached the municipality with a view to having the agreement honoured. The municipality refused and, again, unilaterally reputed the agreement.

The agreement provided that it enured to the benefit of the successors and assigns. (para. 13).

It is important to note that the agreement was not registered upon the title to the lands that were the subject of the agreement. (para. 14).

There was no express assignment of the agreement to the Browns. (para.15).

After protracted negotiations, the Browns sued Belleville. They sought specific performance of the agreement or damages, in the alternative. The City defended, arguing that the claim was statute barred; that the Browns could not enforce it because there was no privity of contract between the Browns and the City and; finally, that the agreement was contrary to public policy and hence, unenforceable.

The Browns won at trial. Belleville appealed. The Appeal was dismissed.

It is significant that the matter was argued as a special case. This may have affected the outcome, as the Court was unwilling to find that the successive landowners had abandoned the contract in the absence of a complete record of facts. (para 58).

Be that as it may, on limitation defense the court found that the essential issue was whether or not the repudiation of the contract by the municipality had ever been accepted by any of the predecessors in title of the Browns or by the Browns themselves. (para. 42 through 48).

The court found the law to be as follows:

> *"42 A repudiatory breach or an anticipatory repudiation of contract does not, in itself, terminate or discharge a contract. In Guarantee Co. of North*

America v. Gordon Capital Corp., 1999 CanLII 664 (SCC), [1999] 3 S.C.R. 423, at para. 40, the Supreme Court explained:

> *Contrary to rescission, which allows the rescinding party to treat the contract as if it were void ab initio, the effect of a repudiation depends on the election made by the non-repudiating party. If that party treats the contract as still being in full force and effect, the contract "remains in being for the future on both sides. Each [party] has a right to sue for damages for past or future breaches" (emphasis in original): Cheshire, Fifoot & Furmston's Law of Contract (12th ed. 1991), by M.P. Furmston at p. 541. If, however, the non-repudiating party accepts the repudiation, the contract is terminated, and the parties are discharged from future obligations. Rights and obligations that have already matured are not extinguished. Furmston, supra, at pp. 543-44.*

See also Canada Egg Products, Ltd. v. Canadian Doughnut Co. Ltd., 1955 CanLII 90 (SCC), [1955] S.C.R. 398, at pp. 406-7; Place Concorde East Limited Partnership v. Shelter Corp. of Canada Ltd., 2006 CanLII 16346 (ON CA), [2006] O.J. No. 1964 (C.A.), 270 D.L.R. (4th) 181, at para. 49.

43 In his leading textbook, The Law of Contracts (Toronto: Irwin Law Inc., 2005), John D. McCamus refers to the election right of the innocent party on repudiation as an option to disaffirm or affirm the contract. Disaffirmation of the contract, in this sense, constitutes an election to terminate the contract in the face of the non-innocent party's repudiation of the contract. In the applicable authorities, it is frequently said that an election to disaffirm the contract is an 'acceptance'[1] or 'adoption' of the repudiation. On this view, an election to affirm the repudiated contract constitutes rejection or denial of the repudiation and a decision to treat the contract as subsisting and on-going.

44 Professor McCamus puts it this way, at p. 654:

> *[I]n the context of a repudiatory breach of an agreement, the victim of the breach is entitled either to affirm or disaffirm the agreement and, in either event, pursue remedies for breach of contract. Similarly, in the context of anticipatory repudiation, the effect of the repudiation is to confer an option upon the innocent party either to disaffirm or affirm the contract. Thus, although the innocent party is entitled to disaffirm the agreement immediately and sue, that party may prefer to affirm the agreement and encourage or insist upon performance by the repudiating party or, more passively, simply wait and see whether the repudiating party does in fact eventually refuse to perform his or her contractual obligations when they fall due. [Citations omitted.]*

45 It appears to be settled law in Canada that where the innocent party to a repudiatory breach or an anticipatory repudiation wishes to be discharged from the contract, the election to disaffirm the contract must be clearly and unequivocally communicated to the repudiating party within a reasonable time. Communication of the election to disaffirm or terminate the contract may be accomplished directly, by either oral or written words, or may be inferred from the conduct of the innocent party in the particular circumstances of the case: McCamus, at pp. 659-61.

46 In American National Red Cross v. Geddes Bros. (1920), 1920 CanLII 6 (SCC), 61 S.C.R. 143, rev'g 47 O.L.R. 163 (S.C. (A.D.)), the Supreme Court of Canada addressed the means by which the adoption of a repudiation may be effectively communicated. Sir Louis Davies said, at p. 145:

> *The question then, it seems to me, in every such case must be whether under the proved facts adoption of one party to a contract of its repudiation by the other party may be inferred from the proved facts, or whether an actual notice of acceptance or adoption must be given by the party receiving notice of the repudiation to the party repudiating.*
>
> *It seems to me from reading the authorities that such an actual notice of acceptance or adoption is not necessary but that adoption may be reasonably inferred from all the circumstances as proved.*

47 In American National, Davies C.J. concluded, at p. 147, that a direct communication to the repudiating party of the election to disaffirm the repudiated contract is not essential "where facts proved allow of a fair inference of acceptance of renunciation [repudiation in this context] being drawn". This view was endorsed by a majority of the Supreme Court in Kamlee Construction Ltd. v. Town of Oakville (1960), 26 D.L.R. (2d) 166, at 182.

48 More recently, in White v. E.B.F. Manufacturing Ltd., 2005 NSCA 167 (CanLII), 239 N.S.R. (2d) 270, at para. 91, Saunders J.A. of the Nova Scotia Court of Appeal accepted the following description of what constitutes 'acceptance' of repudiation, set out in Chitty on Contracts, 28th ed. (London: Sweet & Maxwell, 1999), Vol. I, at p. 25-012:

> *Where there is an anticipatory breach, or the breach of an executory contract, and the innocent party wishes to treat himself as discharged, he must "accept the repudiation." It is usually done by communicating the decision to terminate [to] the party in default although it may be sufficient to lead evidence of an "unequivocal overt act which is inconsistent with the subsistence of the contract ... without any concurrent manifestation of intent directed to the other party"*

> *... Acceptance of a repudiation must be clear and unequivocal and mere inactivity or acquiescence will generally not be regarded as acceptance for this purpose. But there may be circumstances in which a continuing failure to perform will be sufficiently unequivocal to constitute acceptance of a repudiation. It all depends on "the particular contractual relationship and the particular circumstances of the case." [Emphasis added.]"*

Applying these principles, while noting that the onus is upon the party alleging repudiation to prove that repudiation, (para. 55), the court found no action that could be attributed to the Browns or any predecessor in title that indicated that they had accepted nonperformance on the part of either Thurlow or Belleville. (para.72).

The privity of contract argument included submissions to the effect that as the covenants in question were positive covenants (an obligation to install and maintain drainage works), they could not run with the land, and submissions to the effect that the Browns could not rely on the agreement, as there had been no formal assignment of the agreement to them. (para. 74).

The court was unwilling to give effect to these submissions, noting that the doctrine of privity of contract had been, over the years, considerably eroded by a growing list of exceptions to the rule (para. 79) and that the enurement clause clearly contemplated that the successors and so on of the original parties to the agreement would be bound by the agreement (paras. 80 through 94). The Court also found that it was not without significance that the City was, itself, original signatory to the contract. (para. 88).

The Court then concluded at paragraph 94 that:

> *"94 On these particular facts, the strict application of the doctrine of privity would ignore the nature, stated purpose and express terms of the Agreement and allow the City, as the original covenantor, to escape the covenants to which, as a matter of law, it must be seen to have expressly consented. In these circumstances, I conclude that the strict application of the doctrine of privity should not stand in the way of justice: London Drugs, at p. 446."*

The court also rejected an effort to defeat the contract with the doctrine of laches. The court found at paragraph 107:

> *"... no dispositive effect of delay by the Browns on the liability of the City in these circumstances."*

The court also found, and it is submitted, that this is a crucial finding in the overall reasoning of the case, that the municipality had provided no evidence that it was prejudiced by the 50 years of inaction of the beneficiaries of the agreement. (para. 108).

Finally, the court rejected the City's submissions that the agreement should not be enforceable on public policy grounds. The reasoning of the court employed in

dismissing this argument bears careful reading. It is found in paragraphs 112 through 115 of the Reasons and reads as follows:

> *"112 The City raises two public policy-based arguments as further impediments to the enforcement of the Agreement by the Browns. It argues that the Agreement is unenforceable as against it because a perpetual contract that admits of no right of termination offends public policy and is unconscionable. Further, the City says, the enforcement of perpetual obligations of the kind created under the Agreement offends public policy because it fetters the City's discretion regarding the future use of public roads and road allowances. In my opinion, these arguments cannot succeed on this record.*
>
> *113 With respect to the first argument, Question No. 4 on the Special Case reads: "Whether or not the Agreement, if properly interpreted as imposing a perpetual obligation, is invalid as contrary to public policy because it does impose a perpetual obligation". In respect of this question, the motion judge ruled: "[T]he Agreement, which imposes a perpetual obligation upon the City, is not invalid as contrary to public policy because it does impose a perpetual obligation."*
>
> *114 Although the City raised Question No. 4 in its Notice of Appeal, it did not challenge the motion judge's ruling on this issue or otherwise mention the matter in its factum. Instead, the City sought to advance this claim during oral argument. The procedural unfairness to the Browns arising from this tactic is manifest. In the circumstances, in my view, the City is precluded from attempting to raise this issue on appeal. To conclude otherwise would offend basic fairness.*
>
> *115 The City's second public-policy based argument fails for lack of evidentiary support. As the Browns submit, there is simply no evidence or agreed facts to support the City's assertion that its discretion regarding the future use of public roads and road allowances will be fettered or impeded if it is held to its obligations under the Agreement."*

In light of this reason, it is submitted that the public policy argument may be sustainable on a more complete record being presented to the court. Evidence of actual negative impacts upon the municipality may persuade the court that the agreement should not be upheld.

The court did note in paragraph 117 that it did not regard its Decision as bringing finality to the dispute between the Browns and the City. The City had pled other grounds in its defense. The court ruled that those other grounds of defense were still open to the City of Belleville.

The Di Gregorio Decision achieves a result that appears sensible and, perhaps, bordering on being something of a landmark. However, it is submitted that caution should be exercised when relying on this case. The facts of each situation seem to be

critical to the approach Trial Judges take to the application of the relevant legal principles to the cases before them.

British Columbia v. Salt Springs Ventures Inc. 2012 BCSC 1862 is a case where the Province of British Columbia sought to rely on Di Gregorio and will serve to illustrate this point.

Perhaps the most telling remark set out in the Reasons of the court appears at paragraph 28, where Judge Adair remarks that:

> *"Mr. Booth's (the defendant) concerns about staff not being objective about his plans were quite justified."*

The defendant was the owner of certain lands upon which had been constructed a ditch which fed into a pond. The ditch served to drain a considerable area of provincial lands including, a public highway. The ditches along the public highway were overgrown and the authorities seemed to have little enthusiasm for maintaining them. There was no reason to maintain these ditches so long as the ditch across the defendant's land drained the province's land.

The defendant was not inclined to drain the province's land. He dammed the ditch and put a culvert in the provincial ditch in order to provide an access to his land. His culvert was built in accordance with published instructions from the province. It was conceded that no permit was required to perform the work he did. Further, it was established that the culvert he put in place was adequate for its purpose.

Neighbouring property owners were incensed by his actions and protested to the province. At times, the police were summoned to deal with the dispute. Neighbouring property owners entered the defendant's land to breach the dam and cement up his culvert.

The province took the position that the defendant had no right to dam the ditch that crossed his property and refused to maintain the highway ditches in the area of his property, until such time as the dispute with the defendant was resolved.

Despite Di Gregorio, the defendant was found to have acted within his rights and the case was dismissed. Paragraphs 37 to 49 of the court's Reasons record the analysis undertaken to dismiss the claim:

> *"37 The plaintiffs say that the construction of the Dam was an unreasonable use of Lot 10, and constituted a nuisance. Although, in addition to the nuisance claim, the plaintiffs originally advanced causes of action in trespass and negligence, those claims were formally abandoned during the trial.*
>
> *38 The plaintiffs claim that the construction of the Dam caused them to suffer damages, in particular: the expenses to deal with the 34 alder trees, the expenses associated with Stantec's report and the expenses of implementing Stantec's recommendations. In addition, the plaintiffs seek a mandatory injunction requiring the defendants to remove the Dam.*

39 The defendants say that the construction of the Dam was a reasonable use of Lot 10 and, in any event, did not cause any physical injury to or substantial interference with the plaintiffs' lands that might be construed as being unreasonable. The defendants argue further that their actions have not caused the plaintiffs to suffer any damage.

40 The defendants say that, since (based on the parties' formal agreement as to the facts) the inlet to Lot 10 from the Province's land was not a natural watercourse, they had every right to block water from the Province's land from coming onto Lot 10. They rely in particular on Caplin v. Gill (1977), 84 D.L.R. (3d) 765 (B.C.S.C.), 1977 CanLII 253 (BC SC), 1977 CanLII 253, where Berger J. said at p. 766:

> *In British Columbia, in such a case, there is no cause of action. Until surface water reaches a watercourse the lower of two proprietors owes no servitude to the upper to receive the water naturally draining off the latter's land. He is at liberty to protect his own land, and is not liable for the damage which the other suffers from the exercise of such right: Graham v. Lister (1908), 14 B.C.R. 211 (Full Court).*
>
> . . .
>
> *If the water in the case at bar had been running in a natural channel, the defendants would have had no right to divert it. But this is surface water.*

41 The basic principles applicable to a nuisance claim are well-settled.

42 At common law, nuisance is a field of liability that focuses on the harm suffered rather than on prohibited conduct: see St. Lawrence Cement Inc. v. Barrette, 2008 SCC 64 (CanLII), [2008] 3 S.C.R. 392, at para. 77. In St. Pierre v. Ontario (Minister of Transportation and Communications), 1987 CanLII 60 (SCC), [1987] 1 S.C.R. 906, at pp. 914-915, the Court referred with approval to the following definition of the tort of nuisance from Street, The Law of Torts (6th ed., 1976) at p. 219:

> *A person, then, may be said to have committed the tort of private nuisance when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or of an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.*

See also Royal Anne Hotel Co. Ltd. v. Village of Ashcroft (1979), 95 D.L.R. (3d) 756 (B.C.C.A.), at p. 760.

43 In another leading case, Tock v. St. John's Metropolitan Area Board, 1989 CanLII 15 (SCC), [1989] 2 S.C.R. 1181, Mr. Justice La Forest wrote, at pp. 1190-1192:

> *Generically, as Salmond on the Law of Torts, 17th ed. by R. F. V. Heuston, at p. 50, notes, "nuisances are caused by an act or omission, whereby a person is unlawfully annoyed, prejudiced or disturbed in the enjoyment of land". . . .*
>
> *The assessment whether a given interference should be characterized as a nuisance turns on the question, simple to state but difficult to resolve, whether in the circumstances it is reasonable to deny compensation to the aggrieved party. . . . In effect, the law would only intervene to shield persons from interferences to their enjoyment of property that were unreasonable in the light of all the circumstances.*
>
> . . .
>
> *. . . In the presence of actual physical damage to property, the courts have been quick to conclude that the interference does indeed constitute a substantial and unreasonable interference with the enjoyment of property.*

44 The onus of proof that the defendant caused an unreasonable interference with the use and enjoyment of the plaintiff's land rests on the plaintiff, but once that is shown, the onus is on the defendant to establish that the use of the land is reasonable: see Linden and Feldthusen, Canadian Tort Law (8th ed., 2006), at p. 569.

45 The plaintiffs argue that Mr. Booth did not contact Highways before construction of the Dam and say that the only reason that Mr. Booth installed a 600-mm culvert in connection with the installation of the driveway access in 2007 was to handle the increased flow of water that resulted from the Dam. However, since the inlet carrying the water onto Lot 10 was not a natural watercourse, Mr. Booth had no legal obligation to contact Highways before constructing the Dam, and the installation of a 600-mm culvert was entirely consistent with the instructions in the Instruction Sheet. In any event, these points do not assist the plaintiffs in making out a claim in nuisance.

46 The plaintiffs argue that the principle stated in Caplin is limited to repelling water, whereas what the defendants did was to redirect water into the Park Drive ditch, rather than repel water from Lot 10. The plaintiffs say that the work Mr. Booth did in the ditches after construction of the Dam were all done with a view to facilitate the additional flow of water in the ditches. The plaintiffs argue that the right of a defendant to block surface water from coming onto his land is not absolute or unqualified, citing Di Gregorio v. Osborne, [2004] O.J. No. 2156 (S.C.J.), 20 R.P.R.

(4th) 181, at paras. 43-45, in support. The plaintiffs say that, accordingly, and in the light of all of the circumstances, the defendants have interfered with the plaintiffs' land in a manner that is unreasonable and that has caused them damage and expense.

47 I do not agree.

48 In my opinion, the plaintiffs had no legal right to discharge surface water from the Province's lands onto Lot 10, and (in accordance with the principle stated in Caplin), the defendants had no legal obligation to accept it. The problem – the "additional water" now in the Province's ditches and about which the plaintiffs complain – comes from the Province's own land. Highways may well have found it inconvenient to have to deal with the additional water, especially given the lack of maintenance on the ditches along Park Drive and Gustaf Road, and inconvenient and stressful to have to deal with complaints from neighbours in the area. But I do not think the plaintiffs can put the burden of dealing with water from the Province's own land on the defendants. It is unreasonable for the plaintiffs to attempt to do so. The plaintiffs have the responsibility for dealing with the water on their own land. In the circumstances, the defendants did not act unreasonably in constructing the Dam to prevent surface water from the Province's land coming onto Lot 10.

49 In my view, the plaintiffs have also failed to show that the construction of the Dam caused physical injury to land or substantially interfered with the plaintiffs' use or enjoyment of land. Apart from the evidence concerning some damage to some trees – the "weeds" as Mr. Galpin described them – there was really no evidence to support the conclusion that the construction of the Dam interfered with the plaintiffs' use or enjoyment of land."

The result in Salt Spring Ventures Inc. would seem to be somewhat at odds with the result in Lanark v. Morrow [2011] ONSC 4028. In that case, Lanark had diverted the stream while establishing a road. The work took place in 1969. Morrow bought the land the stream was diverted across in 1994. In 2010, he dammed the stream. This caused water to black up on adjoining properties and to undermine the road.

Lanark staff met with Morrow and attempted to get him to enter into an easement agreement with the municipality. Morrow refused. Lanark applied for an injunction seeking to force Morrow to remove his dam. Lanark was successful. Morrow appealed. ([2012] ONCA No. 64. The Appeal was dismissed. Leave was sought to appeal to the Supreme Court of Canada. Leave was refused. [(2012) 437 N.R. 400 (Note)]

The reasoning of the court in this case, in contrast to the reasoning of the court in Salt Spring Ventures Inc., concentrates almost exclusively upon the law of nuisance. As can be seen from the excerpts from the case reproduced here, the defendants' property rights did not seem to trouble the court. Perhaps the length of user was a factor in why the court decided the way it did. Certainly, this writer would be more comfortable with

the Decision that appears to pay such short shrift to the property rights of the defendants, were the courts to articulate a prescriptive right to use the ditch in favour of either the County or the neighbouring property owners which had drained through the ditch for a period of almost 25 years, before the defendants bought the property with the ditch visibly in place and functioning.

> *"Issues*
>
> *19 The main issue, in my view, is whether the actions taken by the respondents in damming the ditch amount to a public nuisance.*
>
> *20 A public nuisance is any activity which unreasonably interferes with the public's interests in questions of health, safety, morality, comforts or convenience. See Ryan v. Victoria (City) [1999] CarswellBC 79 p.19. A public nuisance is conduct which amounts to an attack upon the rights of the public generally to live their lives unaffected by inconvenience, discomfort or other forms of interference. Such actions commonly involve allegations of unreasonable interference with a public right of way, such as a street or highway.*
>
> *21 A number of factors are relevant when determining whether a particular activity is a public nuisance, including:*
>
> *a. the inconvenience caused by the activity;*
>
> *b. the difficulty involved in lessening or avoiding the risk associated with the activity;*
>
> *c. the utility of the activity;*
>
> *d. the general practice of others conducting the same activity; and*
>
> *e. the character of the neighbourhood.*
>
> *22 Whether a particular activity constitutes a public nuisance is a question of fact. "Nuisance is a tort of almost infinite variety and, broadly speaking, covers acts unwarranted by law which, in the case of public nuisance, cause inconvenience or damage to the public in the exercise of rights common to all persons. Nuisance includes the escape of water which inflicts damage, injury and inconvenience on all who come with the ambit of the nuisance." (Torino Motors (1975) Ltd. v. Kamloops (City) (1988), 1988 CanLII 2881 (BC CA), 44 C.C.L.T. 278, 1988 Carswell BC 243 (B.C.C.A.) at p. 4).*
>
> *23 In Newmarket (Town) v. Halton Recycling Ltd., (2006), 25 M.P.L.R. (4th) 249, 2006 CarswellOnt 5920 at p.14, A. Bryant J. relied on excerpts from Professor Klar in Tort Law (3rd ed.) as follows:*

> *Whether enough members of the public were detrimentally affected by nuisance in order to constitute the activity as a public nuisance is a question of fact.*
>
> *and*
>
> *...that so long as the activity interfered with the comfort and convenience of life of the persons residing in or coming within the sphere of influence of that which has been done by the defendants as their works.*

24 The next issue to consider is whether an injunction, temporary or permanent, can be issued on the fact situation in this case.

25 Once a nuisance is established, unless special circumstances can be demonstrated by the defendant, an injunction should issue. In Walker v. The McKinnon Industries Limited, 1949 CanLII 105 (ON SC), [1949] O.R. 549, 1949 CarswellOnt 262 (Ont. H.C.J.) at p.3, McRuer C.J.H.C. held that:

There remains to be discussed what form the relief should take. I had occasion to review the principles on which the Court acts in granting an injunction in cases of this sort in McKie v. The K.V.P. Company Limited, 1948 CanLII 93 (ON SC), [1948] O.R. 398 at 416, [1948] 3 D.L.R. 201. This judgment was affirmed in the Court of Appeal in [1948] O.W.N. 812, [1949] 1 D.L.R. 39 with a slight variation in the terms of the injunction. In that case I followed the judgment of Lord Lindley in Shelfer v. City of London Electric Lighting Company; Meux's Brewery Company v. The Same, [1895] 1 Ch. 287 at 314 where he quoted from the judgment of Lord Kingsdown in Imperial Gas Light and Coke Company v. Broadbent (1859), 7 H.L. Cas. 600, 11 E.R. 239, as follows:

The rule I take to be clearly this: if a plaintiff applies for an injunction to restrain a violation of a common law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law; but when he has established his right at law, I apprehend that unless there be something special in the case, he is entitled as of course to an injunction to prevent the recurrence of that violation.

26 The Supreme Court of Canada in RJR MacDonald Inc. v. Canada (Attorney General), 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311, 1994 CarswellQue 120, at p. 11, para. 40 and p. 12, para. 46, applied a three-part test in determining an application for interlocutory injunction:

- *a. is there a serious question to be tried;*
- *b. will failure to grant the injunction result in irreparable harm to the applicant; and*

c. does the balance of convenience favour granting the injunction.

27 In RJR, supra, the Court also held that the threshold when determining if there are serious issues to be tried is a low one. A prolonged examination of the merits is neither necessary nor desirable.

28 In this case, the issue to be tried is whether or not the respondents are committing the tort of public nuisance.

29 When determining the issue of 'irreparable harm', Sharpe J. in Omega Digital Data Inc. v. Airos Technology Inc. (1996), 32 O.R. (3d) 31, 1996 CarswellOnt 5491 (Ont. C.J. (Gen.Div.)), at p.9 referred to Evans Marshall & Co. v. Bertola S.A., [1973] 1 W.L.R. 349 [1973] 1 All E.R. 992 where Lord Justice Sachs asked, [I]s it just to leave the applicant to its remedy of damages in the circumstances?

30 Irreparable harm will be suffered, not just by the applicant, but by the general public, if the injunction is not granted. Damages caused by flooding may be repaired, but the safety of individuals using the Road should not be put at risk on the basis that any damages suffered could be compensated for in damages.

31 The balance of convenience favours granting the injunction as the applicant is acting in the interest of the general public to forestall potential irreparable harm, while no harm would come to the respondents if the injunction was granted.

32 Fleming, Law of Torts (4th ed., 1971) at p. 346, puts it this way:

It is not enough to ask: Is the defendant [respondent] using his property in what would be a reasonable manner if he had no neighbour? The question is, Is he using it reasonably, having regard to the fact that he has a neighbour?

Analysis and Decision

33 I have no difficulty in finding on the affidavit evidence before me that the steps taken by Steven Morrow in 2010 in blocking the drainage ditch on his property, and the consequent flooding of adjoining properties in 2011, amount to a public nuisance. Property rights have always been sacrosanct at common law, but those rights have to be balanced against the property rights of other parties and the public interest.

34 I find that Mr. Morrow's deliberate actions in blocking the drainage ditch have interfered with the natural flow of the water over his property which had been in effect for decades prior to his ownership. In this regard I note the affidavit evidence of Glen Buchanan, located at Tab 5 of the Second Supplementary Record of the applicant. Mr. Buchanan has lived on his property which is to the east of the Morrow property for 63 years.

> *He deposed that he "has never seen flooding like there was this year". He further deposed that if the water had risen any further, "it would have been over the top of my septic bed". However, a thaw of the ice in the ditch on the Lee property on March 30, 2011 "allowed the water to flow through and across the Morrow property despite the dam".*
>
> *35 I find further that the respondents' attempt to distinguish between a private and a public ditch is irrelevant in these circumstances. The actions of the respondents in blocking the flow of water would be actionable even if there were no ditch."*

It would appear then that each case has to be approached with a view to balancing the competing rights of the parties and examining them using the age old test of reasonableness. The Salt Spring Ventures Inc. case, perhaps, serves as a reminder that objectivity is required when assessing reasonableness.

Another possible distinction between the contrasting Decisions could be that Lanark went out of its way to make clear to the court that private interests were at stake. The Salt Spring Ventures Inc. case appears to have been perceived by the court as more of a contest between the province and the private landowner. In addition, in the Salt Spring Ventures Inc. matter, the province seems to engage in tactics such as refusing to clear out their own ditches rather than attempt a negotiation with the person who blocked the drainage, as Lanark did.

Finally, it appears that on the facts of Salt Spring Ventures Inc. the provincial ditches were a ready substitute for the ditch that had been blocked. There does not seem to have been a ready substitute for the ditch that was at issue in the Lanark case. Surely, a factor in assessing the reasonableness of the actions of a property owner that blocks a drainage ditch is whether or not there is a readily available path for the divergent stormwater to follow. If, as appears to have been the case in Salt Spring Ventures Inc., the divergent water can be readily transported through publicly owned ditches without damage to public or private property, the actions of Salt Spring Ventures Inc. can be seen to be reasonable.

It is submitted that a key phrase to keep in mind when evaluating a client's position in this area of law appears in paragraph 33 of the Reasons of The Hon. Mr. Justice Michael J Quigley in Lanark v. Morrow:

> *"Property rights have always been sacrosanct at common law, but those rights have to be balanced against the property rights of other parties and the public interest."*

Municipal intervention

Should the municipality like to intervene, there are a number of mechanisms available.

Lot Grading By-laws

A very direct method of intervention is by way of a by-law which forbids altering the grade of land except in accordance with specified procedures. If the parties alter the

grade without following the procedures and offense has occurred, the by-law can be used to cure the offense. The drawback with this procedure is that, unless the person is caught in the act, it can be an expensive exercise to prove that the defendant, in fact, altered the grade. At the very least, evidence of persons other than municipal employees will be required.

Municipal Agreements

As outlined above, it would appear the municipality may be able to enforce the grading requirements associated with subdivision, site plan and development agreements against property owners to require them to return the property to its original, approved grade or, at the very least, to provide the degree of drainage that the original approved grade provided.

When evaluating this kind of case, it should be borne in mind that the prospective party may not be the only one who has violated the terms of the original agreement. There may be some inequity upon imposing all of the burden of the deviation from the agreement upon one property owner. Another factor to consider is that some development agreements have a sunshine clause. It may be impossible to enforce the agreement after the expiration of the sunshine provision. However, note that the court in Di Gregorio did not require an agreement. All that was required was an urban setting and a drainage pattern that worked.

Note that some municipal agreements are drafted as building schemes; a series of mutual covenants between the purchasers of the lots in the subdivision. It is submitted that when such an agreement is in place, every owner in the subdivision can enforce the agreement.

Statutory Drainage Mechanisms

In Ontario, drains could be established through procedures under the *Drainage Act,* R.S.O. 1990, c. D.17, and by means of what is known as a local improvement. (See O.Reg. 586/06). It is beyond the scope of this paper to delve into the details of these particular remedies. However, they are available and might be worth considering. That said, such programs impose a cost upon all of the affected landowners, some of whom may be less than enthusiastic about participating because, while their participation may be required to make the scheme viable, they have no drainage problem at all.

Public Nuisance

As was observed in the County of Lanark case, the municipality can function as the plaintiff in a case founded in public nuisance. Public nuisance actions are generally brought by the Attorney General. [Canadian Encyclopedic Digest, Nuisance III 3(b)]. However, in the writer's experience, the Attorney General has been willing to assign the right to bring the action to a municipality. In Ontario, an individual may bring an action for public nuisance, where the nuisance causes harm to the environment. [Environmental Bill Of Rights, 1993, S.O. 1993, c. 28 s.103(1)].

Some Final Points

- Know your flow.
    - Know as much about the existing flow of water as possible.
- Obtain as much historic geographic data as is possible.
    - The Farinha case is an illustration of the importance of such.
- Have data concerning rainfalls.
    - The flooding may simply be the result of unusual weather.
- Have data concerning the soils, if possible.
    - Absorption may be causing the flooding, as much as the grade. Repelling water by rendering land impermeable may also attract liability. (See Berry v. Trinidad Leaseholds [1953] 4 D.L.R. 504).
- If defending, be ready with other suggestions as to causation to try to force the plaintiff to produce expert witnesses to support its theory. Suggesting other possible means by which the flooding could have taken place may enable you to be in a position to nonsuit the plaintiff. The main submission being that there must be some connection made between the damage complained of and the actions of, or the property of, the defendant. It should not be enough simply to say, "I've got water in my yard. There was no water there before, therefore, the municipality must be liable."

K. L. Beaman

08/31/15