



HACIO LAW
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Indexed as:

Oosthoek v. Thunder Bay (City)

Between

**Dirk Oosthoek and Lubbertina Oosthoek, Plaintiffs, and
The Corporation of the City of Thunder Bay, Defendant**

And Between

**Maurice Nadeau, Plaintiff, and
The Corporation of the City of Thunder Bay, Defendant**

And Between

**Dwain Bennett and Glenys Bennett, Plaintiffs, and
The Corporation of the City of Thunder Bay, Defendant**

And Between

**Leonard Edwards and Lenore Edwards, Plaintiffs, and
The Corporation of the City of Thunder Bay, Defendant**

[1994] O.J. No. 2619

17 C.L.R. (2d) 217

24 M.P.L.R. (2d) 25

File Nos. 2246/91, 2874/92, 4583/93, 1220/91

Ontario Court of Justice - General Division
Thunder Bay, Ontario

Kurisko J.

November 3, 1994.

(80 pp.)

[Ed. note: See Appendix for Table of Contents.]



*Municipal law -- Liability of municipalities -- Negligence -- Standard of care, construction and maintenance of water lines, **sewers** and drains -- Enforcement of bylaws -- Nuisance -- Water runoff, inadequate **sewer** system.*

Action against the City of Thunder Bay for damage caused to private property due to flooding. In 1991, 200 basements flooded because of backup of storm and sanitary **sewers**. Between 1985 and 1993 there were 1,018 water pipe failures because of leaking, bursting or corroded iron pipe installed by the City. Alleging both nuisance and negligence, city residents sued for damage to their properties and the City raised defences of statutory authority and policy decision.

HELD: Actions allowed. The City was liable in negligence and nuisance for the damage caused as a result of the flooding caused by the backup of water from the **sewers** operated and maintained by it. The City had, because of budgetary constraints, implemented only one-third of the storm construction plan recommended by engineers and had not enacted the recommended bylaw prohibiting the connection of rainwater roof leaders to the **sewers** until 1985. There was no explanation for this delay and there was no evidence that the City had ever enforced its bylaw. The City's defence of policy decision failed because inaction for any reason was not a policy decision taken in the bona fide exercise of discretion. Consequently the City was negligent for failure to enforce its own bylaws. With respect to the damage caused by the escape of water from the municipal waterworks system, the City was liable in nuisance only. Policy decision was not a defence to a nuisance claim and the City failed to prove the defence of statutory authority. The City was unable satisfy the onus on it to show that the construction of the **sewers** was in strict compliance with the statutory requirements of the Public Health Act and that the flooding that occurred was an inevitable consequence of the exercise of such statutory authority.

Statutes, Regulations and Rules Cited:

Fort William Act, 1907, s. 13.

Municipal Act, R.S.O. 1897, c. 223, s. 554.

Municipal Matters Act, 1887.

Municipal Waterworks Act, 1897.

Ontario Water Resources Commission Act, 1956, 1957, 1960, 1970, 1980.

Ontario Water Resources Commission Act, 1957, ss. 30, 31(1), 31(2).

Ontario Water Resources Commission Act, R.S.O. 1990, c. O.40, s. 59.

Planning Act, S.O. 1983, c. 1, s. 31, 31(2).

Public Health Act, 1882, 1895, 1912, 1914, 1927, 1937, 1950.

Public Health Act, 1895, s. 30(1), 30(2), 30(3).

Public Health Act, 1912, 89(1), 89(2).

Public Health Act, R.S.O. 1950, c. 306, s. 101.

Public Utilities Act, R.S.O. 1990, c. P.2.

Laird S. **Scrimshaw**, for the Plaintiffs.

David W. Eryou, for the Defendant.

KURISKO J.:-

PART I - OVERVIEW

INTRODUCTION

1 On June 26, 1991 approximately 200 basements in the South Ward of the City of Thunder Bay (the City) were flooded during a rain storm which, although heavy, was not of unusual intensity. Of this number all except seven resulted from the backup of combined sanitary and storm **sewers** (combined **sewers**) constructed by the City of Fort William during the first quarter of this century. Between 1985 and 1993 there were 1018 water pipe failures in the City of Thunder Bay due to bursting, leaking, or corrosion. Approximately 80 per cent of the failures occurred in the 211 kilometres of cast iron pipes installed prior to 1970. Nearly 65 per cent of the failures arose between the months of November and April when frost has penetrated the ground. Many of these pipe failures resulted in water damage to private property.

2 These actions are test cases to determine whether the City is liable for the flooding. They are founded in negligence and nuisance. The City denies negligence. It admits the flooding caused interference with the property of the plaintiffs amounting to nuisance but does not concede this constitutes actionable wrong.

3 The Court is indebted to counsel for expediting the trials which were all heard at the same time. An Agreed Statement of Facts and an Agreement as to Documents were filed for each case. Additional exhibits were filed on consent. Counsel waived the need to call the authors of engineering reports and studies as well as manuals, guidelines and standards for **sewer** and water installation. Well organized books of statutes and case law were submitted at the outset of careful and thorough submissions. Because of their good sense and skill in compiling and then agreeing to the admission of the foregoing material, the factual and legal complexity of the cases became manageable. A trial that would otherwise have dragged on more than a month lasted four days. On this aspect of the litigation all the clients are clear winners.

ISSUE

4 The issue is whether the defences of statutory authority and policy decision protect the City against liability to the plaintiffs whose properties were damaged, in Oosthoek and Nadeau (the **sewer** cases) as a result of flooding caused by the backup of water from combined **sewers** operated and maintained by the City, and in Bennett and Edwards (the water cases) by the escape of water from the municipal waterworks system.

DECISION

5 The City is liable in the **sewer** cases both in nuisance and negligence in the operational non-enforcement of a by-law passed in 1985 prohibiting connection of rainwater roof leaders to the combined **sewers**. Liability in the water cases is founded in nuisance. In Edwards the City also failed to establish the water main was constructed pursuant to statutory authority.

SUMMARY OF REASONS IN THE **SEWER** CASES

Negligence

6 Because of budgetary constraints the City has implemented only one third of the storm **sewer** construction recommended in 1965 and 1970 by consulting engineers (Wardrop & Associates) as the solution to the flooding problem in the South Ward caused by over-loading of undersized combined **sewers** installed in the early part of this century. No action was taken to implement an alternative solution of constructing underground holding tanks recommended in 1987 (Theil and Associates). Having been based on budgetary constraints the forging constituted policy decisions that clothe the City in immunity for negligence in failing to take the recommended remedial steps.

7 Despite the unequivocal recommendation of Wardrop & Associates in 1965 to enact a by-law prohibiting the connection of rainwater roof leaders to the combined **sewers**, nothing was enacted until 1985. There is no explanation for this delay. The prohibition was not enforced. There is no evidence the matter of enforcement was ever considered by the City. A policy decision is open to challenge on the basis it has not been made in the bona fide exercise of discretion. Inaction for no reason cannot be a policy decision taken in the bond fide exercise of discretion. On that ground it can be concluded the City was negligent.

8 The rainwater roof leaders connected to the combined **sewers** was an effective cause of overloading the combined **sewers** during the heavy rainfall on June 26, 1991. The negligence of the City in failing to enforce the by-law prohibiting the rainwater roof leaders is not immune to tortious liability. The City is liable for the flooding caused by the overloaded combined **sewers**.

Nuisance

9 Policy decision is not a defence to nuisance which is a separate and distinct actionable wrong based on unreasonable interference with use and enjoyment of property. The defence to nuisance is statutory authority. The leading case on this subject is the 1989 decision of the Supreme Court of Canada in *Tock vs. St. John's Metropolitan Area Board*¹. Despite some uncertainty resulting from three disparate reasons for judgment (none with a clear majority) unanimously finding the municipality liable in nuisance damage resulting from a blocked **sewer** during a rainstorm, *Tock* can be applied to the **sewer** and water cases as follows.

10 To sustain the defence of statutory authority the onus is on the City to prove (i) the legislation was specific as to the location and manner of construction of the **sewers**, and (ii) the **sewers** were actually constructed in the location and manner specified by the legislation. If the City meets these requirements it must then establish the flooding on June 26, 1991 was the inevitable consequence of the exercise of such statutory authority.

11 The Public Health Act in force at the time of installation of the **sewers** in Oosthoek (1908) and Bennett (1925) had the effect of dictating the specific location and manner of constructing these **sewers**. The evidence in Bennett meets the strict standard for proving compliance with these statutory requirements. The evidence in Oosthoek falls short of establishing such compliance.

12 On the issue of inevitable consequence there is no evidence as to the state of knowledge concerning the likelihood of future flooding at the time of installation of the Oosthoek and Nadeau **sewers**. Consequently, the City has failed to prove that the flooding on June 26, 1991 was the inevitable result of such installation.

SUMMARY OF REASONS IN THE WATER CASES

Negligence

13 The annual allocations for maintenance and upgrading the water works are based on budgetary considerations. This establishes the defence of policy decision which protects the City against negligence, if any, for failure to upgrade the water works in accordance with the higher engineering standards that have been developed since the water mains were installed.

Nuisance

14 There is no evidence in either of the water cases that all proper care was taken in installing the water mains and that there was no other feasible way in which the installation could have been carried out so as to avoid creating the nuisance. Thus the City has failed to satisfy the onus of demonstrating (on a balance of probabilities) that the breaks which occurred cases were an inevitable consequence of the installation of these pipes.

FORMAT OF THE FOLLOWING REASONS

- 15** PART II deals the **sewer** cases and PART III with the water cases. The factual considerations outlined in each PART are based on the Agreed Statement of Facts (unless otherwise indicated). Legal considerations are summarised separately under the headings of case law and statutory provisions (dating back as early as 1882). The submissions of counsel relating to negligence, nuisance, policy decision, and statutory authority are then set out followed by my analysis and decision.
- 16** PART IV comprises obiter concerning the broad effect of the leading cases discussed in the reasons relating to the defences of policy decision and statutory authority. Finally there is an explanatory note amplifying and explaining the provisions of the rainwater roof leader by-law.

* * * *

PART II - SEWER CASES
FACTUAL CONSIDERATIONS

Knowledge at the time of installation

- 17** There is no evidence concerning the knowledge or planning of the City of Fort William at the time of the installation of the Oosthoek combined **sewer** in 1908.
- 18** There is some evidence relating to these matters prior to the construction of the Nadeau combined **sewer**. A letter dated August 30, 1912 to "The Mayor and Corporation City of Fort William Ont." from T. Aird Murray (a consulting engineer) stated:

While in Fort William I conferred with the Mayor and Chairman of the Finance Committee relative to a general report upon the whole question of sewerage. It appears to me to be very advisable that you instruct me to undertake a full enquiry and report upon the sewerage question along with my enquiry into the water distributing system.

There can be very little doubt but that at some time in the future the City will be called upon to so dispose of the sewage, that, at least, the solids will be retained from discharging either into the River or Bay. The growth of the City will in time cause such a demand to be made by the Citizens when the nuisance becomes a substantial one and appreciable, as it is bound to do, apart from any legal demand which may be exerted by outside authorities.

The layout of the City sewerage and especially its bearing relative to taking storm water will materially affect any future method of dealing with the sewage. The question of **sewer** flooding relative to cellars by providing extensions for suburban districts is also of very great importance.

I would suggest that in making a report I take into cognizance the future development of the City and so prepare a scheme which will be on modern scientific lines with reference to (a). Proper sanitary conditions. (b). Self Cleansing conditions. (c). Control over all parts and lengths so that street surfaces may not be subject to interference in the future after a **sewer** is once laid. (d). The economic and practical method of separating road and storm water from domestic sewage. (e). The general design to meet conditions which may meet sewage treatment if called for in the future. If the Corporation has such a uniform and consistent scheme to work to, then the question of extensions would simply become a part of the whole from time to time. It is most important that such a general scheme be prepared before much expense is entailed on road surfaces, as otherwise the matter becomes more difficult and expensive to deal with. We have examples in Winnipeg, Regina, Calgary etc., where hundreds of thousands of dollars are now being spent in altering sewerage systems to meet new conditions which might have been saved if such had been anticipated at an early date.

(my emphasis)

19 A letter dated April 5, 1915 from the City Engineer of the City of Fort William to T. Aird Murray stated that a resolution had been passed by Council accepting the offer "to give the City a full report upon the sewerage problems of the city...". The letter continues in part as follows:

In the study of the sewerage and sewage disposal problem of this city I have come to certain conclusions and am relating same here so that you will be in a position to take them into consideration in your general report.

As far as existing **sewer** areas are concerned I am convinced that the combined system at present in use will have to remain. I take this view for the following reasons.

(a) In no case have we suffered from **sewer** flooding excepting where the **sewers** were found to be choked and with the exception of one occasion when a precipitation of .328 inch per hour for ten hours occurred: and as far as I have checked up the discharge capacities of **sewers** in existence we have good provision for handling storm water. (my emphasis)

20 There is no evidence concerning the outcome of the above correspondence or the considerations that were involved in the planning and installation of the combined **sewer** in Nadeau. The City has been unable to discover any documents between 1915 and 1965 showing what steps, if any, were taken by the City of Fort William to deal with the problem of basement flooding.

1965 Wardrop Report

21 In response to a request to investigate the storm **sewer** system and recommend a solution to current flooding problems, W. L. Wardrop & Associates, submitted an engineering report dated March, 1965 entitled "Storm Drainage Facilities for the City of Fort William" (1965 Wardrop Report). The Introduction states:

In recent years, extensive basement flooding has occurred during major rainstorms. Although the business district has probably experienced the most severe conditions, the entire city has been affected to some degree.

Ironically, the occurrence of flooded basements in the City of Fort William is a result of progress. With a continued paving program and the expansion of the drainage area through new development, the quantity of storm water reaching the **sewer** system is constantly increasing. Since the existing **sewer** system is of the combined type, designed in the original instance to carry less storm water than is currently being experienced, extensive basement flooding has resulted.

22 The Wardrop Report made three major recommendations: (1) Institute a program to construct storm relief **sewers** in order to prevent the flooding; (2) Disconnect rainwater roof leaders in all residential areas; (3) Prior to commencement of a paving program consider storm drainage requirements.

23 The total cost of an initial relief system was estimated at \$3,315,000. During the following ten to fifteen years a second stage was proposed that would cost \$4,400,000.

24 The reason for recommending that rainwater roof leaders be disconnected is set out in the following explanation of the effect of rainwater leaders on a **sewer** system in residential areas:

It is an established fact that the connection of house rainwater leaders to the combined **sewer** system has a considerable effect on the flooding condition within the **sewers**. When the rainwater leaders are connected, the water that falls on the roof of each house rapidly flows into the **sewer** system, whereas if the rainwater leaders were disconnected from the **sewer** system and discharged to the surface at the front of the house, some of the roof drainage would be absorbed by the lawn and would never reach the **sewer**. Also, it would take the water longer to run across the lawn than it would to travel through a **sewer** connection. In order to appreciate the significance of this time differential, it must be understood that flooding in a **sewer** system is generally caused by a large volume of water reaching the **sewers** within a short period of time. If some of this water could be temporarily delayed, the total volume could be handled without flooding.

To illustrate the effect of connected rainwater leaders, let us consider what takes place during a

rainstorm. During a heavy rain, the water that falls on the pavement flows along the gutters to the street catch basins and thence into the **sewers**. The travel time of this water is approximately two minutes. It takes about the same time for the roof drainage to flow through the house connection and into the **sewer** system. Therefore, we have both the pavement and roof drainage reaching the **sewer** system at the same time. However, if the rainwater leaders were disconnected from the **sewer** system and the roof drainage discharged to the front lawn, it would take approximately five minutes for the rainwater to travel from the roof to the **sewer**. Because of this time lag and since some of the roof drainage would be absorbed by the lawn, the flow in the **sewers** during the peak of the rainstorm would be reduced. By calculating the flow conditions during an actual rainstorm, it can be shown that flow in the lateral **sewers** is almost doubled when the rainwater leaders are connected to the **sewer** system. A large number of communities have recognized the relative economics and the practicability of disconnecting the residential rainwater leaders and have passed by-laws to this effect.

(my emphasis)

25 The explanation for the recommendation that storm drainage requirements should be considered prior to the commencement of a paving program is as follows:

Many of the flooding problems that are currently being experienced throughout the Fort William **Sewer** System are a result of the paving program which has taken place in recent years. As further paving is carried out, the flooding problems will become more acute. The major reason for this is that any water that falls on the road section is quickly drained into the **sewers** and adds to the capacity requirements. However, on gravelled roads, it takes longer for the rainwater to get to the storm **sewer** system and also an appreciable quantity of water percolates into the road surface and never reaches the **sewers**. Consequently, the intensity of the run-off is considerably reduced. The first stage **sewers**, as shown in red on Plan No. 64124-4, are required at the present time to solve the current flooding problems and the second stage **sewers** are dependent on the extent of future paving programs. In view of the fact that the paving has a definite effect on the required capacity of a **sewer** system, it is therefore obvious that the storm relief systems should be installed prior to the paving program.

1970 Wardrop Study

26 The purpose of this "Water Pollution Control Study" (1970 Wardrop Study) was "to outline a long range **sewer** program which will minimize basement flooding throughout the Fort William sector of the City of Thunder Bay and at the same time result in the eventual elimination of pollution reaching the receiving streams through the **sewer** system."

27 The flooding portion of this Study updated the 1965 Wardrop Report and reiterated its

recommendations:

At the same time as more information is becoming available on the polluttional implications of combined **sewers**, basement flooding is occurring throughout the Fort William **sewer** system with increased frequency. This basement flooding is caused by an existing combined **sewer** system which is no longer capable of handling the increased storm run-off occurring as a result of surface paving programs. In order to relieve overloaded combined **sewers**, a network of storm relief **sewers** is required. Such a network of relief **sewers** was proposed by W.L. Wardrop and Associates Limited in a Storm Drainage Report which was submitted to the City of Fort William in 1965.

1987 Theil Study

28 This "Master Drainage Strategy Study" (1987 Theil Study) dealt with lands within the City of Thunder Bay (1) to plan for future development and (2) " to determine the extent of the flooding problems within the South Ward area and recommend remedial works to alleviate the flooding problems."

29 In establishing the design parameters for the Theil Study rainfall pattern research by the Canadian Atmospheric Environmental Services for a number of areas within Canada were adjusted using the rainfall distribution information from the weather records at the Thunder Bay Airport to estimate the intensities of storms in the past as the basis for theorizing the intensity of storms that can be expected to occur in Thunder Bay every two years, five years, and ten years. These are not predictions of the time or frequency during which such storms will actually occur.

30 A questionnaire prepared for the 1987 Theil Study showed that about 1000 homes in the South Ward area had experienced basement flooding typically caused by flows backing up within the combined **sewers** and entering the homes.

31 Of several conclusions contained in the 1987 Theil Study the following are relevant to the **sewer** cases:

The existing program of **sewer** separation started in the mid sixties has succeeded in reducing a number of basement flooding problems within the South Ward of Thunder Bay. There remains, however, a large percentage of the South Ward still serviced by inadequate combined **sewers** for major storm events, thus causing basement flooding. Modelling results for the combined **sewer** area show several locations will experience basement and road flooding for storms equalling the 2 year design storm. These are considered to be the most sensitive areas for basement flooding. More widespread flooding occurs for the 5 and 10 year storms as trunk **sewers** reach capacity. Flooding problems would seem to be due to undersized lateral **sewers**,

limited **sewer** system capacity and shallow pipes.

32 The main recommendation of the 1987 Theil Study was the construction of underground tanks to hold excess storm water during peak flows which would be discharged into the system at a rate commensurate with the design capacity of the system. This was recommended for 93 per cent of the area requiring remedial measures. In the remaining areas **sewer** separation was recommended. The capital cost to provide a two, five, and ten year level protection based on 1987 construction costs was estimated at \$3,176,000.00, \$7,056,000.00, and \$7,750,000.00 respectively. As a comparison to these costs the costs for completion of **sewer** separation works necessary to alleviate the basement flooding as recommended by the 1965 Wardrop Report was estimated to be \$25,500,000.00 in 1987 dollars.

Additional Facts

33 The Agreed Statement of Facts confirms much of the foregoing as well as the following additional facts.

34 The plaintiffs are residents of the City. They pay water bills and municipal taxes in exchange for City services including **sewer** and water. There is no claim of contribution, or contributory fault by the Plaintiffs or that they were responsible in any way for their losses. (These admissions also apply to the water cases.)

35 Construction and maintenance of the **sewers** were the responsibility of the City and the City of Fort William which was amalgamated into the City of Thunder Bay in 1970.

36 The reason the **sewer** surcharged and flooded on June 26, 1991 was that the combined sanitary storm **sewer** system did not have the capacity to handle the additional water from the rainstorm of that date. There is no evidence there was any obstruction in any **sewer** pipe which caused the backups.

37 Although the City believes the triggering event that overloaded the combined **sewers** was the intensity of the rainfall on June 26, 1991, it does not say the rainfall was a storm of unforeseeable intensity. The weather records kept at the airport do not necessarily show the intensity of rain a few miles away in the parts of the City that were flooded and there are no such records in existence.

38 Since the installation of the combined **sewers** in Oosthoek and Nadeau the streets were paved and the present catch basins were installed in the curbs of the pavement. Except for this, the system remained unchanged at the time of the basement backups on June 26, 1991.

39 Flows into the combined **sewers** are of two types. One flow is water which comes down the house connection including rainwater from roof leaders, ground water from weeping tiles and sanitary sewage and waste water generated by the occupants. The second type of flow entering the **sewer** main is surface water run off which is collected by the leads from the catch basins on the street.

40 The flows into the combined **sewers** increased after the Oosthoek and Nadeau were installed. More and more homes were constructed with weeping tiles. Some homes that were not originally

constructed with basements or weeping tiles were retrofitted with weeping tile systems which were then tied into the house connection. Homes without weeping tiles often had a basement sump with a sump pump that discharged into the house connection.

41 There were at least eight reports of basement flooding on same street as the Bennett residence as a result of the rain-storm. There are a number of factors why some homes flooded, and neighbouring homes did not flood. The level of the basement floor is a prime consideration. If the house connection from the home was partially full by reason of infiltration or weeping tile flow, the house connection would have little capacity to handle any flow from a roof leader. If no roof leader was involved, the home may have been close to a catch basin which would not be taking water because the leads were surcharged by the intensity of the rainstorm. The surcharged lead would load up the **sewer** main and force water back up the house connection. The amount of grade on the house connection is another factor. Each home has a unique combination of these factors. The array of these factors affects the flow into the combined **sewer** and the combination of all houses on the street determines the remaining capacity in the **sewer** main.

42 Prior to 1925 in the City of Fort William many rainwater roof leaders discharged into the house connection. It was not until 1985 that the City passed a by-law directing that rainwater leaders then installed be disconnected and prohibiting any future connection. This by-law also required (in the section of the City in which the Oosthoek and Nadeau homes are situated) that weeping tiles be disconnected from the house connection and prohibited weeping tiles from discharging into any storm **sewer**. The City is responsible for the enforcement of City by-laws.

43 The Wardrop Reports of 1965 and 1970 remain the basis upon which the combined **sewers** in the Fort William portion of the City are being separated. The primary reason for separation of sanitary **sewers** and storm **sewers** is to alleviate the risk of flooding in basements. The other reason is to reduce and avoid pollution of the river waters. For each decision to spend funds to separate the combined **sewer** system, the Council of the City made a decision based upon criteria such as availability of funds, budget priorities, pressure from the citizens and pressure from the Provincial Government to respond to pollution concerns. The only reason the City has not completed the **sewer** separation program is lack of funds.

44 The risk of surcharging the storm **sewer** system cannot be reduced to a level approaching zero unless an extremely large amount of money is committed to such a project. When designing storm **sewers** it is expected there will be storms that will exceed the design capacity, and the result will be surcharging of the storm **sewer** and flooding. Even on the most conservative storm **sewer** design there will still be a risk of some surface flooding.

45 The Agreed Statement of Facts in Oosthoek and Nadeau each state that "if the only flow from homes on the street were the sanitary waste generated by the residents, and the flow from any weeping tiles which flow into the house connection, the City would have a high degree of confidence that the risk

of basement flooding would be reduced almost to zero by the separation of storm **sewers** and sanitary **sewers**. However, the connection of roof leaders which allows rainfall immediate and direct access to the **sewer** via the house connections and the sanitary **sewer** main, enhances the risk of basement flooding due to high intensity rainfall."

LEGAL CONSIDERATIONS

The defence of policy decision

46 The leading authorities on this general subject are *Just v. British Columbia*², *Brown v. British Columbia*³, and *Swinamer v. Nova Scotia*⁴. (Brown and Swinamer were released on the same date during the time these reasons were under reserve.) *City of Kamloops v. Nielsen*⁵, and *Laurentide Motel v. City of Beauport*⁶ deal with policy and operational decisions in relation to municipal by-laws. All these cases are decisions of the Supreme Court of Canada.

47 The basic principles set out in these cases may be summarized as follows. A public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social, or political factors or constraints. Thus, budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. But the standard of care for determining whether a duty of care has been breached can be applied to operational decisions. The dividing line between "policy" and "operation" is difficult to fix⁷, yet it is essential that it be done.

In *Brown Cory J.* summarized the foregoing principles as follows⁸: [The Court did not number this paragraph]

As a general rule, the traditional tort law duty of care will apply to a government agency in the same way that it will apply to an individual. In determining whether a duty of care exists the first question to be resolved is whether the parties are in a relationship of sufficient proximity to warrant the imposition of such a duty. In the case of a government agency, exemption from this imposition of duty may occur as a result of an explicit statutory exemption. Alternatively, the exemption may arise as a result of the nature of the decision made by the government agency. That is, a government agency will be exempt from the imposition of a duty of care in situations which arise from its pure policy decisions.

In determining what constitutes such a policy decision, it should be borne in mind that such decisions are generally made by persons of a high level of authority in the agency, but may also properly be made by persons of a lower level of authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors. As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions. Further, it must be recalled that a policy decision is open to challenge on the basis

that it is not made in the bona fide exercise of discretion. If after due consideration it is found that a duty of care is owed by the government agency and no exemption by way of statute or policy decision-making is found to exist, a traditional torts analysis ensues and the issue of standard of care required of the government agency must next be considered.

48 Cory J. noted that "[i]t will always be open to a plaintiff to attempt to establish, on a balance of probabilities, that the policy decision was not bona fide or was so irrational or unreasonable as to constitute an improper exercise of governmental discretion.⁹" He said the test to be applied when a policy decision is questioned is set out by Wilson J. in Kamloops. This test is fully discussed under the heading.

Municipal by-laws and policy/operational decisions

49 In Kamloops the defendant city had a statutory power to regulate a construction by-law. It did not have to do so. It exercised this power in favour of regulating construction in accordance with a by-law which, inter alia provided for the depth of footings. The by-law also imposed a duty on the city's building inspector to enforce the by-law. The inspector issued a stop work order after discovering the footings had not been constructed in accordance with the by-law. The house was completed despite the order. No legal proceedings were taken to enforce the by-law. No occupancy permit was ever issued. The defective foundation was discovered three years later by a subsequent purchaser who sued the city and the original owner from whom the home had been purchased.

50 In dissenting reasons (concurring in by Estey J.) McIntyre J. said that at common law, a municipality has no duty to enforce its by-laws by court proceedings¹⁰:

The matter is discretionary. Failure to exercise enforcement powers in court does not give rise to a private cause of action in negligence to those suffering harm from non-enforcement.¹¹

51 The majority judgment of Wilson J. dealt with the enforcement issue in terms of the "policy/operations" dichotomy. She said the decision to pass the by-law and impose a duty on the city's building inspector to enforce its provisions was a policy decision, the effect of which was to place the city in the "position where in discharging its operational duty it must take care not to injure persons such as the plaintiff whose relationship to the city was sufficiently close that the city ought reasonably to have had him in contemplation."¹² In other words, having made the policy decision to regulate construction, the City of Kamloops owed a common law duty of care to all who it was reasonable to conclude might be injured by the negligent exercise of its powers¹³.

52 In response to the city's argument it was guilty of non-feasance rather than misfeasance Wilson J. said this did not matter because the building inspector was under a duty to do the thing he failed to do. However, she continued, the inspector did have a discretion how to go about it and the lengths to which he should go involved policy considerations. The making of inspections, the issuance of stop work

orders and the withholding of occupancy permits were operational. Resort to litigation, if this became necessary, was another type of decision within the operational context. She described these kinds of decision as "secondary policy considerations i.e, policy considerations at the secondary level"¹⁴. She said¹⁵:

... the city could have made policy decision either to prosecute or to seek an injunction. If it had taken either of those steps, it could not be faulted. Moreover, if it had considered taking either of those steps and decided against them, it could likewise not be faulted. But not to consider taking them at all was not open to it. In other words, ... the city at the very least had to give serious consideration to taking the steps toward enforcement that were open to it. If it decided against taking them, say on economic grounds, then that would be a legitimate policy decision within the operational context and the courts should not interfere with it.

53 There was no evidence to support a finding the city gave serious consideration to legal proceedings and decided against them on policy grounds. There was evidence the city was aware that the work on the house was progressing in violation of the by-law but dropped the matter because one of the aldermen was intending to purchase the home from the builder as his retirement home. After noting these facts Wilson J. said: (p. 673)

In my view inaction for no reason or inaction for an improper reason cannot be a policy decision taken in the bona fide exercise of discretion. Where the question whether the requisite action should be taken has not even been considered by the public authority, or at least has not been considered in good faith, it seems clear that for that very reason the authority has not acted with reasonable care. I conclude, therefore, that the conditions for liability of the city to the plaintiff have been met.

54 Laurentide Motel applied the principle in Kamloops. Pursuant to discretionary legislation the City of Beauport established a fire department and installed fire hydrants throughout the City. Various employees were responsible for maintenance and repair of the hydrants. However, neither the City Council nor its employees had ever adopted any formal inspection system. Rather, the evidence indicated that as a matter of practice the hydrants were checked every summer and cleared of snow every winter. The Fire Department responded to a fire at the Laurentide Motel but was unable to extinguish the blaze because the nearby fire hydrant was inoperable.

55 The issue was whether the City's failure to keep the fire hydrants in functioning condition constituted a breach of duty owed to the plaintiff. Beetz J., writing for the majority, applied the principles set out in *Anns v. London Borough of Merton*¹⁶ and *Kamloops* and concluded the city had breached its duty. The Court stated that policy decisions may take various forms including discretionary decisions within the operational sphere. The only obligation imposed upon a municipality in making

these policy decisions was to make the decision responsibly and in accordance with the object of the relevant legislation. Beetz J. said:¹⁷

Therefore, in the absence of a policy decision to which the omission alleged to have caused damage can be attributed, the inspection and repair of the fire hydrants must be taken to be in the operational sphere, since they are the practical execution of the municipalities policy decision to allocate personnel and money to the maintenance of the system. Private law standards therefore apply to the municipality's conduct.

56 Dealing with the question of how such policy decision is to be manifested L'Heureux-Dubé said:¹⁸

Certainly the city could, for lack of resource or some other reason, limit its service or even decide not to establish such a service, but if that were its decision it would be a policy-making decision that it would have to embody in specific by-law.

57 Beetz J., stated that the form of effecting policy decisions may vary. He said:¹⁹

Anns v. Merton London Borough Council, supra, *City of Kamloops v. Nielsen*, supra, indicate that the form such policy decisions may take varies, ranging from by-laws and resolutions to internal directives, administrative decisions and even a discretion in the execution of activities within the operational sphere. The only duty incumbent upon the authority in the policy sphere is to make its decisions responsibly and in accordance with the objects of the Act which conferred the power.

58 In *Rivercourt Farms Ltd. v. Niagara-on-the-Lake*²⁰ Kovacs J. (O.C. (G.D.)) concluded there was a duty of care owing by public authorities to improve the water supply system which was known to be inadequate for fire-fighting purposes. However, the decision of the municipality not to expend money to improve the system, was a policy decision barring an action for damages based on negligence. In making the finding of fact that such policy decision had been made Kovacs J. was first required to consider how such decision can be made. He said:²¹

Applying the majority decision in the *Laurentide Motels* case, I hold the defendant town did not have to specifically pass a by-law to escape liability when for budgetary reasons it did not follow the recommendations to upgrade the water system. By considering the recommendations of staff at a public meeting and allocating the budget bona fide at a public meeting (as Redekopp [the director of public works for the town] testified) in varying priorities, the council was making a policy decision, albeit not by way of by-law.

The defence of statutory authority

59 In *Tock* the Supreme Court of Canada held that although a municipality which operated and maintained a **sewer** was not negligent, it was liable in nuisance to a person whose property was damaged as a result of flooding caused by a random blockage of the **sewer**. In reaching this conclusion three disparate judgments were written expounding the law of statutory authority.

Reasons of Wilson J.

60 Wilson J. wrote the majority reasons (Lamer J. (as he then was) and L'Heureux-Dubé concurring). After outlining the historical development of the law of statutory authority in England she reiterated the "inevitable consequences" doctrine articulated by Viscount Dunedin in *Manchester Corp. v. Farnworth*:²²

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

61 On the basis of the foregoing, Wilson J. said the principles to be derived from the foregoing authorities would seem to be as follows:²³

If the legislation imposes a duty and the nuisance is the inevitable consequence of discharging that duty, then the nuisance is itself authorized and there is no recovery in the absence of negligence; (Situation A²⁴)

If the legislation, although it merely confers an authority, is specific as to the manner or location of doing the thing authorized, and the nuisance is the inevitable consequence of doing the thing authorized in that way or in that location, then likewise the nuisance is itself authorized and there is no recovery absent negligence. (Situation B)

However:

If the legislation confers an authority and also gives the public body a discretion, not only whether to do the thing authorized or not, but how to do it and in what location, then if it does decide to do the thing authorized, it must do it in a manner and at a location which will avoid the creation of a nuisance. If it does it in a way or at a location which gives rise to a nuisance, it will be liable therefor, whether there is negligence or not. (Situation C)

In other words, in the situations described in (a) and (b) above, the inevitability doctrine is a good defence to the public body absent negligence. In situation (c), it is no defence at all, and it is unnecessary for the plaintiff to prove negligence in order to recover.

62 Wilson J. went on to say that the Legislature can always bar recovery for damages suffered as a consequence of statutorily authorized activities of public bodies "by express language in the statute, specifying that no action for nuisance may be brought for any damage caused²⁵."

63 Wilson J. said that in Canada the courts (including the Supreme Court of Canada) have gone off the tracks by applying the inevitable consequences doctrine to works authorized by purely permissive legislation:²⁶

What the more recent cases reveal, it seems to me, is that the inevitable consequences doctrine is now being applied without regard to the type of statutory authority conferred on the public body. In other words, two distinct tests seem to have developed for relieving public bodies from liability for nuisance, the one to find in the authorizing legislation express or implied authority to create the nuisance, and the other to find that the damage was the inevitable consequence of what the legislation has authorized regardless of the form of the authorizing legislation.

64 She advocated a return to the law where it once was, stating:²⁷

In my view, to the extent that some of the more recent cases are inconsistent with the early principles, they should not be followed. I find no acceptable rationale for the extension of the inevitable consequences doctrine to cases where the public body was perfectly free to exercise its statutory authority without violating private rights. It is only in cases where the public body has no choice as to the way in which or the place where it engages in the nuisance-causing activity that the inevitable consequences doctrine protects it. For only in such cases can it be said that the Legislature has authorized any nuisance which is the inevitable consequence of the public body's carrying out its mandate.

65 Addressing the legislation at issue in *Tock* she said:²⁸

The legislation in this case was purely permissive within the meaning of these cases. It authorized a sewage system to be constructed but did not specify how or where it was to be done. The respondent was accordingly obliged to construct and operate the system in strict conformity with private rights. It did not do so. The defence of statutory authority is not available to it, and the appellants are entitled to recover.

Reasons of LaForest J.

66 LaForest J. (Dickson C.J.C. concurring) regarded the doctrine of inevitable consequence as a "legacy of the Victorian age" flawed by failure to "take due account of the fact that 'inevitable' damage is often nothing but a hidden cost of running a given system²⁹." He said that however one may seek to rationalize the defence "there is an air of unreality and contrivedness to the defence of statutory authority³⁰." Eschewing conventional tenets of legislative intent and inevitable consequences, he said the cost of random and inevitable mishaps amounting to nuisance should be borne by the public at large rather than the hapless victims. The question should be whether, in the circumstances, it is reasonable to refuse to compensate the aggrieved party for the damage he has suffered. The factors he mentioned which ought to be considered in balancing the plaintiff's right to compensation against the defendant's freedom to carry out its activity without this added cost include such things as the nature of the defendant's conduct, the alternatives available to it, the cost of avoiding the damage, the nature of the plaintiff's damages in terms of its severity and frequency, and the utility of the activity.

Reasons of Sopinka J.

67 Sopinka J. said the changes proposed by his colleagues in the law of nuisance "as it being applied at present ... are not an improvement on the present law of nuisance, imperfect though it may be."³¹ He recited the same statement of the inevitable consequences doctrine quoted by Wilson. J,³² and alluding to the criticism that the term "inevitable consequences" is too vague and uncertain, he said:³³

The burden of proof with respect to the defence of statutory authority is on the party advancing the defence. It is not an easy one. The Courts strain against a conclusion that private rights are intended to be sacrificed for the common good. The defendant must negative that there are alternate methods of carrying out the work. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance. It is insufficient for the defendant to negative negligence. The standard is a higher one. While the defence gives rise to some factual difficulties, in view of the allocation of the burden of proof they will be resolved against the defendant.

Statute law

68 The statute law relating to the **sewers** includes the Municipal Matters Act, 1887, the Fort William Act, 1907 (which incorporated the City of Fort William), the Public Health Act of 1882, 1895, 1912, 1914, 1927, 1937, 1950, and the Ontario Water Resources Commission Act of 1956, 1957, 1960, 1970, 1980 and 1990.

Authority to install **sewers**

69 The Municipal Act of 1897³⁴ stated that municipalities "may" pass by-laws to construct and

maintain **sewers**. The City of Fort William Act (1907) granted the City of Fort William all the rights and powers of a city incorporated under the Municipal Act. Section 13 stated "It may be lawful for the Council to construct common **sewers** ... required for sanitary purposes." Section 29 provided that section 13 "shall be deemed to have been in full force since the first day of January 1905 and shall apply to all **sewers** undertaken or constructed after that date ...".

70 The Public Health Act, 1882 established the Provincial Board of Health (Provincial Board of Health). This Act was amended by the Public Health Act, 1895 to provide that construction of a **sewer** could not be started before submitting the plans to the Provincial Board of Health and obtaining written approval for such construction. The legislation imposed a duty on the Provincial Board of Health to satisfy itself the proposal met health requirements and authorized the Board to impose changes in the plans³⁵. These provisions were carried forward in subsequent Public Health Acts until it was transferred to the Ontario Water Resources Commission Act, 1957³⁶.

Retroactive statutory authority

71 Section 59 of the Ontario Water Resources Commission Act R.S.O. 1990 Chap O. 40 provides as follows:

Sewage works that are being or have been constructed, maintained or operated with the approval of the Department of Health or the Commission and in accordance with the terms and conditions imposed in any order, direction, report or regulation of the Department of Health or of the Commission, of the Minister of Health or of the Board under the authority of this Act or any predecessor of any provision of this Act, so long as the sewage works are being so constructed or are so constructed, maintained or operated, shall be deemed to be under construction, constructed, maintained or operated by statutory authority.

Statutory compensation provisions

72 Between 1925 and 1956 the Public Health Act and after 1956, the Ontario Water Resources Commission Act contained an internal compensation scheme giving the Ontario Municipal Board jurisdiction to make any order award or finding in respect of any claim for damage or injury caused by the construction, maintenance, or operation of any sewerage project. Counsel says these internal legislative provisions for compensation are an indicia of statutory authority. It is not contended these provisions oust the jurisdiction of the court³⁷. In view of the position I adopt on statutory authority these provisions need not be recited.



SUBMISSIONS RE NEGLIGENCE AND POLICY DECISION

Counsel for the Plaintiffs

73 The 1987 Theil Study noted there had been a dramatic improvement in the one third area of the South Ward where **sewer** separation had been completed under the program started in the mid-sixties recommended by the 1965 Wardrop Report. In light of this observation the failure of the City to complete the program constitutes gross negligence. The continued program of street paving, the failure of the City to pass a by-law prohibiting rainwater roof leaders until 1985, and the non-enforcement of the by-law is further evidence of a total disregard of its duty to prevent foreseeable harm to the plaintiffs.

Counsel for the City

74 The foregoing allegations do not constitute negligence. If the court holds otherwise, the decision of the City not to implement the recommendations was based on budgetary considerations. This was a policy decision which protects the City from liability for negligence.

ANALYSIS RE NEGLIGENCE AND THE DEFENCE OF POLICY DECISION

75 As Cory J. succinctly stated in Brown "[W]e must first determine if a prima facie duty of care exists, and then determine whether the imposition of this duty is excluded by statute or because the decision at issue is one of policy."³⁸

Duty of Care

76 There was (and there continues to be) a relationship of sufficient proximity between the users of the **sewers** and the City to warrant the imposition of a duty of care on the City to prevent or at least mitigate foreseeable harm to the users of the system. This duty included taking reasonable steps to allay the over-loading of the combined **sewers** during rainstorms in order to prevent damage from **sewer** backups. The 1965 Wardrop Report and the 1970 Wardrop unequivocally recommended that the City (1) Institute a program to construct storm relief **sewers**; (2) Disconnect rainwater roof leaders in all residential areas; and (3) Consider storm drainage requirements prior to commencement of a paving program. The 1987 Theil Study recommended the installation of underground tanks to store excess storm water.

77 There being no express statutory provision exempting the City from liability for negligence in the operation or maintenance of the sewerage system, it is necessary to determine whether the duty of care owing to the users of the **sewers** has been abrogated by policy decision in relation to each of these recommendations.

Construction of separate storm **sewers**

78 The 1987 Theil Study established that flooding problems had been alleviated in approximately one third of the South Ward as a result of carrying out the recommendations of the 1965 Wardrop Report. Failure to complete the installation in the rest of the affected area is clear evidence of a breach of duty to these users of the combined **sewers**. However, the Agreed Statement of Facts asserts:

For each implementation, that is, each decision to spend funds to separate the combined **sewer** system, the Council of the City made a decision based upon criteria such as availability of funds, budget priorities, pressure from the citizens and pressure from the Provincial Government to respond to pollution concerns. The only reason the City has not completed the **sewer** separation program is lack of funds.

79 The fact that a by-law has not been passed confirming these were policy decisions does not derogate from the conclusion these are classic policy decision grounds which clothe the City in immunity for breach of its duty of care in failing to install separate storm **sewers** throughout the South Ward.

80 The decision by the City to embark on the storm **sewer** installation program rather than the holding tank concept recommended by the 1987 Theil Study also falls in the category of policy decision.

Disconnect rainwater roof leaders

81 The recommendation of the Wardrop Reports that the City enact a by-law regulating the connection of rainwater roof leaders to the combined **sewers** is unequivocal:

If some of this water [rainwater entering the **sewers** from roof leaders] could be temporarily delayed the total volume could be handled without flooding. . . . A large number of communities have recognized the relative economics and the practicability of disconnecting the residential rainwater leaders and have passed by-laws to this effect.

82 There is no doubt the City had discretionary authority to implement this recommendation as part of its duty to regulate and maintain the sewage system in a manner that would not cause damage to the users of the system. For reasons which are not explained, it was not until 1985 the City passed a by-law directing that all rainwater roof leaders and weeping tiles then installed be disconnected and prohibiting any future connection to the **sewers**.

83 The enactment of the rainwater roof leader by-law was a policy decision to regulate the connection of rainwater roof leaders to the combined **sewers** as part of the operation and maintenance of the sewerage system. In coming to this conclusion I apply the following words of Wilson J. in Kamloops:³⁹

...it is fair to say the City of Kamloops had a statutory power to regulate construction by by-law. It was in its discretion whether to do so or not. It was in other words a "policy decision."

84 It is apparent from the Agreed Statement of Facts the rainwater roof leaders continue to be a cause of the overloading of the combined **sewers**:

The City acknowledges that the connection of roof leaders allows rainfall immediate and direct access to the **sewer** via the house connections and enhances the risk of basement flooding during high intensity rainfall. It is the view of the City Engineering Department that a high intensity rainfall can surcharge the sanitary system (with resultant flooding of basements) by reason of the direct access rainfall has to the sanitary **sewer** through illegal roof leaders flowing into the house connections.

(my emphasis)

85 There is a further admission that enforcement of the by-law is the responsibility of the City and that "in the years after 1985 employees of the Thunder Bay engineering department have observed roof leaders connected to house connections". There is no evidence to support a finding the City gave any consideration to enforcement of the by-law and decided against doing so on policy grounds (i.e. "policy considerations at the secondary level" per Wilson J. in Kamloops⁴⁰.)

86 I find the ongoing connection of rainwater roof leaders to the combined **sewers** was an effective cause of overloading the combined **sewers** during heavy rainfalls. I also find the City failed to take any action to enforce its policy decision to prohibit connection of rainwater roof leaders to the combined **sewers**.

87 The lack of evidence of any reason for this inaction permits me to conclude there was no reason for the inaction. Inaction for no reason cannot be a policy decision taken in the bond fide exercise of discretion. The City did not act with reasonable care and the conditions for liability of the City to the Plaintiffs have been met.

88 The City was negligent in the operational enforcement of the rainwater roof leader by-law as a result of which the rainwater from the roofs continued to be an effective cause of overloading the combined **sewers** during the heavy rainfall on June 26, 1991. Such negligence is not immune to tortious liability.

Consider storm drainage requirements before paving

89 The 1965 Wardrop Report stated:

Many of the flooding problems that are currently being experienced throughout the Fort William **Sewer** System are a result of the paving program which has taken place in recent years. As further paving is carried out, the flooding problems will become more acute. The major reason for this is that any water that falls on the road section is quickly drained into the **sewers** and adds to the capacity requirements.

90 The onus is on the plaintiffs to establish that the failure to carry out the recommendation, if such be the case, contributed to the overloading that caused the backups in the **sewer** cases. The Plaintiffs having failed to adduce such evidence, there is no need to consider whether the policy decision defence applies to this recommendation.

Conclusions

91 The evidence establishes that the heavy cost of installing storm **sewers** was the reason the City did not implement the recommendations of the 1965 Wardrop Report and the 1970 Wardrop Study. The same applies to the 1987 Theil Study. These were policy decisions based on budgetary considerations which clothe the City in immunity for negligence for not implementing the recommended remedial steps.

92 After enacting the by-law prohibiting the connection of rainwater roof leaders to the combined **sewers** the City was negligent in the operational enforcement of the by-law. The excess water from the roof leaders continued to be a cause of overloading the combined **sewers** and this resulted in the flooding of the plaintiffs' basements during the rainstorm on June 26, 1991.

93 Although the City is liable in negligence, the alternate ground of nuisance and the defence of statutory authority will be considered because apart from the fact the foregoing "policy/operational" decision falls in a very contentious area of the law⁴¹, policy decision is not a defence to the separate and distinct action for damages caused by nuisance.

SUBMISSIONS RE NUISANCE AND STATUTORY AUTHORITY

Counsel for the plaintiffs

94 The **sewers** were constructed pursuant to permissive legislation. Therefore the City was required to carry out these undertakings in a manner and at a location that would avoid the creation of a nuisance. Having failed to do so the City is liable whether or not there was negligence. (This is Situation C enunciated by Wilson J. in Tock.)

95 If the court concludes the flooding was an inevitable consequence of the installation of the **sewers** (which is denied), the plaintiffs ask this court to adopt the reasoning of LaForest J. in Tock and treat these mishaps as a cost of running the system to be borne by the public at large rather than the hapless victims. In the circumstances of these cases it would be unreasonable to deny compensation.

Counsel for the City

96 The permissive wording of the legislation that conferred authority to construct **sewers** is illusory because the Public Health Act made it unlawful to undertake construction without obtaining approval from the Province through the Provincial Board of Health for the location and manner of construction of

the **sewers**. This legislative requirement of prior approval was tantamount to specifically legislating the location and manner of doing the work authorized by legislation. The inevitable consequence of the construction of such **sewers** was nuisance. Having been authorized to construct the Oosthoek and Nadeau **sewers** by statute there is no liability for nuisance. (This is Situation B enunciated by Wilson J.)

97 In any event, the legislation retroactively granting statutory authority to **sewers** constructed in the past makes it clear the Legislature intended that the defence of statutory authority applies to the installation of the in the **sewer** cases.

ANALYSIS RE NUISANCE AND THE DEFENCE OF STATUTORY AUTHORITY

The effect of Tock

98 A majority of the Court (as opposed to a clear majority) concurred in the reasons of Wilson J. defining the situations in which the defence of statutory authority provides a defence to nuisance. However, a clear majority adopted the "inevitable consequences" doctrine articulated by Viscount Dunedin in *Manchester Corp. v. Farnworth*.

99 On the basis of the majority opinion of Wilson J. the onus is on the City to prove the facts of the **sewer** cases come within situation (B) namely, the legislation was specific as to the manner and location of the construction of the **sewers** and the **sewers** were actually constructed in the manner and location specified by the legislation. The clear majority support for the inevitable consequences doctrine as stated by Viscount Dunedin in *Manchester Corp. v. Farnworth*, requires the City to establish that the flooding on June 26, 1991 was the inevitable consequence of the exercise of such statutory authority.

100 The evidence will now be considered to determine whether the City has met the foregoing onus.

Proof of construction pursuant to statutory authority

101 The combined **sewer** that caused the flooding in Nadeau was constructed in 1925. As outlined under Legal Considerations⁴² the Municipal Act of 1897 and the City of Fort William Act (1907) authorized the construction and maintenance of **sewers**. Under the Public Health Act in force at the time, every municipality was compelled to submit all plans to the Provincial Board of Health before proceeding with construction of a **sewer** or sewage system. The work could not be undertaken prior to receiving the approval of this Board, which had authority to impose any changes or conditions it deemed necessary or advisable in the public interest. These mandatory requirements of the Public Health Act amounted to legislation that dictated the specific manner and location of the **sewer** construction.

102 The City has produced the documents that were mandatory under the then current Public Health Act. As a condition of approval, detailed information was required concerning the location, size, and depth of the **sewers** as well as additional specific information as a condition of approval. These

documents were completed by the City and filed with the Provincial Board of Health. The certificate issued by the Provincial Board of Health authorizing such installation in accordance with the foregoing information was filed as an exhibit. This evidence establishes the Nadeau **sewer** was actually constructed in the location and manner specified by the Public Health Act.

103 I therefore conclude the Nadeau **sewer** was constructed pursuant to statutory authority. This finding is reinforced by the deemed statutory authority provisions of section 59 of the Ontario Water Resources Commission Act⁴³.

104 The combined **sewer** that caused the flooding in Oosthoek was constructed in 1907. The comments made above regarding the effect of the legislation, including the Public Health Act, apply. However, the City has not been able to locate the forms that were filed or any certificate from the Provincial Board of Health authorizing or approving installation of this **sewer**. Many documents were filed in an attempt to support the inference that the location and manner of installation of this **sewer** was pursuant to requirements imposed by the Provincial Board of health. The evidence falls short of proving this fact. The City has failed to establish this **sewer** was constructed pursuant to statutory authority.

105 Section 59 of the Ontario Water Resources Commission Act does not avail the City because in order to apply it must be shown the sewage work was constructed with the approval of the Board of Health which is precisely what the City has failed to do.

Proof of inevitable consequence

106 In satisfying this test the City must prove that according to the state of knowledge at the time of the installation of the **sewers**, the nuisance of June 26, 1991 was inevitable. What evidence has the City adduced to meet this test?

107 The 1965 Wardrop Report and the 1970 Wardrop Study as well as the Thiel Study of 1987 identified undersized combined **sewers** as the cause of flooding of basements during heavy rainfalls. The Thiel Study stated that a majority of the area of the South Ward of Thunder Bay is serviced by combined **sewers** that were installed commencing in the early 1900's. A questionnaire prepared for the Thiel Study showed that about 1000 homes in the South Ward area have experienced basement flooding.

108 On the basis of the foregoing evidence it can be concluded as a certainty that flooding of basements during heavy rainfalls has been and will continue to be the inevitable consequence of the combined **sewers** system in the South Ward. This evidence establishes the knowledge of inevitability since the 1965 Wardrop Report, not at the time the **sewers** were installed.

109 There is no evidence establishing the planning or the state of knowledge available to the City of Fort William at the time of the installation of the Oosthoek combined **sewer**.

110 The only evidence shedding any light on the considerations that might have been brought to the attention of the City prior to the time of the Nadeau installation is the correspondence between the consulting engineer T. Aird Murray and the City of Fort William. In the letter dated August 30, 1912 to "The Mayor and Corporation City of Fort William Ont."⁴⁴ Mr. Murray urges the importance of planning for future development which shows he was thinking into the future. The letter from the City engineer 1915⁴⁵ to Mr. Murray indicates there were no flooding problems and suggests the state of the combined **sewers** at that time was adequate to meet future requirements. There is no evidence as to what transpired after the foregoing correspondence and more particularly what planning or considerations were involved ten years later in the installation of the Nadeau **sewer**.

111 Indeed, the information gap extends from 1915 until the 1965 Wardrop Report when, with the benefit of hindsight, it was established that developments subsequent to the installation of the combined **sewers** rendered them inadequate. The Agreed Statement of Facts sets out several factors that contributed to the overloading of the combined **sewers**: the number of new homes added to the system, rainwater from roof leaders and weeping tiles connected to the combined **sewers**, paving of roads with curbs and drains that direct surface water during storms into the **sewers**, paving of private property (parking lots and lane ways) all of which prevent absorption of rainwater into the ground and add to the flow of water into the streets, and hence into the catch basins. The foregoing is confirmed by the 1970 Wardrop Study and the 1987 Theil Study.

112 In short, there is no evidence of the state of "scientific" knowledge concerning **sewer** design or the likelihood of flooding in the future at the time of installation of the Oosthoek and Nadeau **sewers**. Thus there is no evidence that the flooding on June 26, 1991 was the inevitable result of the authorized location and manner of installation of these the **sewers** at the time they were installed.

Conclusions

113 The City has met the burden of proving the Nadeau **sewer** was constructed in accordance with the requirements of the Public Health Act in effect at the time but has failed to do so in Oosthoek. The City has failed to establish that the nuisance resulting from the flooding on June 26, 1991 was the inevitable consequence of the construction of the **sewers** in either Oosthoek or Bennett.

114 The defence of statutory authority fails. The City is liable in nuisance for the damage caused by the flooding.



	PART II	WATER	CASES	
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FACTUAL CONSIDERATIONS

Edwards water main break

115 On November 17, 1990 an eighteen inch cast iron water main on Sprague Street burst, releasing water which entered the Edwards basement to a depth of one foot. There was no allegation of negligence by the City in promptly shutting off the water and repairing the main.

116 This water main was installed in 1909 in accordance with engineering principles applicable at that time. A report conducted by a testing laboratory for the City establishes that the cause of the break was a latent flaw in the pipe. The flaw should have been detected at the factory. It would not have been detectable by visual inspection at the time of installation. I find the City of Fort William was not negligent by reason of installing the defective water main.

117 It is the recollection of persons employed by the City that in the last thirty years there has been one break in the 1200 foot eighteen inch water main. There is nothing in writing to indicate the location of the break or the date of the break.

Bennett water main break

118 On February 28, 1993 a cast iron water main located on Victoria Avenue burst, flooding the Bennett basement with six feet of water. There is no allegation the City failed to respond appropriately.

119 This water main was installed in 1956 under the boulevard on the south side of Victoria Avenue at a depth of approximately six feet. The frost was in the ground to a depth of about 2.5 feet. The break was approximately in the middle of the length of the pipe. On observation of the break there was no noticeable corrosion or any defects apparent in the metal. The fracture of this pipe was a typical circumferential structural failure commonly found in cast iron pipe failures in the City. To repair the pipe, a 2.5 foot piece of the pipe was cut out and replaced with another piece of pipe which was bolted with clamps to the existing pipe.

120 The City records show that on December 15, 1992 there was a break in the same feeder line approximately 200 feet to the east which did not cause any property damage because the water was noticed coming up in the curb and the repair was made before the pipe totally failed. This fracture in the pipe was a small circumferential fracture. Available City records show no other breaks in the feeder main.

Cast iron pipe and ductile pipe

121 At the time of the installation of the water mains in Edwards and Bennett cast iron pipe was the

preferred industry standard. Ductile iron pipe was available in 1961 but was new to the industry and did not gain acceptance in Fort William until the late 1960's and early 1970's. Cast iron pipe has not been used by the City for installation of new water mains since the early 1970's. Any remaining supplies of cast iron pipe are used to repair existing cast iron pipe lines. There are 211 kilometres of cast iron pipe still in use in the Fort William part of the City.

122 Cast iron pipe has longevity and good flow capacity. It is strong, tough, and resistant to internal and external corrosion but can be brittle. The normal fracture of cast iron pipe is circumferential. A condition of tension and shear will lead to a circumferential crack.

123 Ductile iron has all the desirable characteristics of cast iron except resistance to corrosion. Ductile iron pipe that was installed 20 years ago is now beginning to fail at an increased rate due to its susceptibility to corrosion. Concrete lined ductile pipe improves corrosion resistance thereby reducing the probability of breakage of any kind and eliminating circumferential fracture. Since the late 1960's most municipalities have used ductile iron pipe in place of cast iron pipe to reduce failures and because of less weight.

Depth of bury of water mains

124 The depth at which pipe is buried is related to protection from frost penetrating the ground. As indicated in earlier applications by the City of Fort William to the Provincial Board of Health dating back to 1914, water mains were installed at a level of five feet below the surface. The Bennett water main was installed in 1956 at a depth of five feet in accordance with then acceptable engineering practice. Since 1956 the street has been paved and material deposited on the boulevard. That is the most probable reason why the pipe was found to be six feet below the surface in 1993.

125 Between 1956 and 1978 the depth of burying water mains changed. As of 1978 the City has been going to a depth of at least seven feet to gain greater frost protection. Beginning in 1979 the Ministry of the Environment began issuing Guidelines For the Design of Water Distribution Systems (Ministry of the Environment Water Distribution Guidelines). In 1984 these Guidelines were amended to call for pipe to be buried at a depth of 6.5 feet.

Frost and bursting of water mains

126 An excerpt from the American Waterworks Association Research Foundation Guidance Manual states:

Recent research by the Ductile Iron Pipe Research Association into the effects of frost on water main earth loads indicates that frost penetration of two feet can double the earth load on a main. This doubling of the earth load is caused by expansion of the frozen moisture.

Frost loads, while significant, do not alone explain the increase in winter break patterns. The external load is not sufficient to cause failure for a well supported, sound cast iron main. Conversely, poorly supported mains which have suffered corrosion may be particularly vulnerable to frost effects. A main may be able to carry the normal earth load, but fail under the increased frost load.

A combination of thermal contraction, additional frost loads, unsupported bedding, and main wall loss from corrosion all contribute to the high winter break patterns.

Leakage and Water main Bedding:

The presence of leakage often determines whether or not a main may be fully supported. As discussed previously, mains are designed to be fully supported by the trench bedding. In reality, the soil supporting the main may be washed away due to leakage, causing the main to be unsupported and subjected to beam conditions. A main in a beam condition is more susceptible to failure due to the external loads acting upon it.

(my emphasis)

127 The Ministry of the Environment Water Distribution Guidelines states⁴⁶:

Recent studies have shown that the penetration of frost into the ground caused increases on the earth load on buried pipes. These studies indicated that earth loads roughly doubled despite the fact that the frost penetration did not reach the tops of the pipes.

These increased external loads caused by frost may cause beam breaks in the pipe when bedding is non-uniform. This points to the need for proper attention to the installation of the pipe bedding. It also suggests that great care must be taken in the selection of pipe materials, pipe classes, bedding types and the proper compaction of the bedding to the springline.

(my emphasis)

Corrosion and bursting of water mains

128 In 1991 the City of North York retained Proctor & Redfern Limited to prepare a report concerning municipal water supply cast iron corrosion practices (Corrosion Report). Sixty survey forms were sent out to municipalities with a focus on Ontario municipalities and larger cities in Western and Eastern provinces. The response to the survey was forty eight per cent and represented approximately eight million water consumers in Canada. The Northern Ontario cities that responded were Sudbury, Sault Ste. Marie and Thunder Bay.

129 The Corrosion Report states that records of water distribution breaks were kept by 93 per cent of

the municipalities that responded to the survey. One of the questions of the survey requested the percentage of breaks that were (a) structural failures, (b) corrosion failures or (c) other types of failures. On average 82 per cent of all breaks were cast iron. The municipalities with the highest corrosion rates were checked for their response to the type of failures that were occurring. All except two reported that breaks due to corrosion were less than 50 per cent of the total breaks.

130 The Corrosion Report concludes that the cause of water main breaks were attributed more often to structural pipe failure than failure due to corrosion. It draws the obvious conclusion that as cast iron portions of water mains age, they will break with greater frequency as corrosion continues to deteriorate pipe wall thickness. The very costly solution to this problem is to replace the water main with new pipe. In many cases the installation of cathodic protection on water mains reduces break frequency and halts the process of corrosion for the life of the anode⁴⁷ thereby extending the service life of water main. (There is no evidence as to whether the City is using cathodic protection.)

131 The Corrosion Report states that the "break rate can be dependent upon the material composition of the distribution system, the corrosivity of the pipe bedding and surrounding soil and the internal water."

Bursting of water mains in Thunder Bay

132 Generally, frost begins to enter the ground in November and comes out of the ground by May. Historically, 65 per cent of all pipe breaks occur between the months of November and March. City records show that between 1985 and November, 1993 Thunder Bay had 1,018 water pipe failures. Pipe failures include fractures and bursting and leaking either at joints or through corrosion. Of these failures, 810 were cast iron (80 per cent) and 103 were ductile iron pipe (10 per cent). The remainder were other types of pipe.

133 Factors relevant to frost initiated fractures of buried cast iron pipe are the depth of frost penetration into the soil, the depth the pipe is buried in the soil, the constant flow of water through the pipe and the brittleness of the pipe material. The pipe in Bennett was a feeder main which means it had a constant flow of water in the pipe. There is nothing in the records of Thunder Bay to indicate any surge in water pressure which would have caused the pipe to fail.

134 In Bennett it is most probable that the action of frost in the ground exerted forces on the unfrozen soil surrounding the buried pipe. The buried pipe likely became subject to a force which snapped the brittle cast iron pipe.

Maintenance and upgrading costs

135 The City budgets \$307,000.00 per year to repair failed water mains and \$350,000.00 to \$400,000.00 to replace and upgrade water mains of all types, that is cast iron, ductile, steel, hy-pressure concrete pipe, and asbestos cement pipe. Over \$350,000.00 was budgeted in 1993 to protect ductile iron pipe from corrosion failures.

136 The Agreed statement of Facts states that "the water distribution system in Thunder Bay is not leak proof nor burst proof. To the knowledge of Thunder Bay, no municipality in Canada has been able to construct a water main system in which the watermains do not occasionally structurally fail."

LEGAL CONSIDERATIONS

Statute law

137 The statute law relating to waterworks includes the Municipal Waterworks Act of 1897, the Public Health Act and the Ontario Water Resources Commission Act during the years recited above under the statute law for **sewers**.

138 The Municipal Waterworks Act of 1897 stated that "the corporation of every city, town, or incorporated village shall have power to construct, build, purchase, improve, extend, hold maintain, manage and conduct waterworks...". This authority was carried forward in the Municipal Matters Act 1897 and subsequent similar legislation and now appears in Part I of the Public Utilities Act R.S.O. 1990 Chap. P. 2.

139 The Public Health Act 1895 which required a municipality to file plans for a sewerage system and obtain prior approval before construction⁴⁸, also contained a provision requiring the municipality "to submit to the Provincial Board of Health, together with the plans, an analysis of the water from the proposed source or sources of supply, and an affidavit stating that the water analyzed is taken from the proposed source and that the analysis submitted to the Board exactly represents the condition of the sample examined." The section went on to authorize the Board of Health to prohibit use of this source of water supply without first obtaining authorization from the Board of Health⁴⁹.

140 It was not until 1912 that the Public Health Act was amended to prohibit construction of waterworks until both the source of supply and the plans were approved by the Provincial Board of Health⁵⁰.

141 It is important to note there is no legislation similar to section 59 of the Ontario Water Resources Commission Act⁵¹ deeming waterworks to have been constructed, maintained or operated by statutory authority.

Case law

142 In *Dressew Supply Limited. v. Vancouver (City)*⁵² Wallace J.A. considered the effect of facts and circumstances very similar to the water cases. He said⁵³:

In meeting the onus of demonstrating that the break in the pipe was the inevitable result of the authorized work, the city adduced evidence to the general effect that one cannot design a water

system that is fool-proof unless untold amounts of money are spent - further that all water systems are subject to unpredictable failures.

....

However, this general response fails to address the issue of whether the city has satisfied the onus of demonstrating, on a balance of probabilities, that the particular break which occurred in this instance was an "inevitable consequence" of the installation of the water system in the sense, of demonstrating that all proper care was taken in installing the pipe and that there was no other feasible way in which the installation could have been carried out so as to avoid creating the nuisance.

In addressing this issue, the city is faced with the same difficulty which confronted the plaintiff - namely, that no one knows how this pipe was installed or which of many possible causes resulted in the differential settlement of the ground in the area of the break. The defence of statutory authority clearly imposes on the city the onus of proving "inevitability" in the sense previously stated. The city must show that "they used reasonable diligence or took all reasonable steps and precautions to prevent the resulting nuisance" (Martland J. in *Portage la Prairie v. B.C. Pea Growers Ltd.* [1966] S.C.R. 150, 54 W.W.R. 477, 54 D.L.R. (2d) 503 at 153 [S.C.R.]) and, in addition thereto - to establish the defence of statutory authority - the City "must do more than prove it acted carefully in the circumstances. It must prove that there was no feasible way of carrying out the legislative mandate and avoiding a nuisance" (*Gray's Velvet Ice Cream v. Campbellton* (1981), 36 N.B.R. (2d) 288, 94 A.P.R. 288, 127 D.L.R. (3d) 436 (C.A.) at 441 [D.L.R.]).

In only adducing evidence that the pipe was likely laid in accordance with their usual practice - because no record was kept of how the pipe was installed - the city was unable to show it employed all proper means and took all proper care to see that no unnecessary risk of harm was created when the water system was installed. Furthermore, the city cannot say that the method of installation was the only feasible way in which the pipe could be installed.

And at p. 287:

In the absence of knowledge as to how the pipe was laid it is impossible for the city to establish that the method of installation could not reasonably have been improved or that the type of failure of this particular pipe was an inevitable consequence of the water system (my emphasis)



	SUBMISSIONS OF COUNSEL	
Negligence		

143 Counsel for the plaintiffs says the City negligently failed to inspect, repair and upgrade the water system. The cast iron water mains should have been upgraded to conform to the 1979 Ministry of the Environment Water Distribution Guidelines.

144 Counsel for the defendant says there is no duty at law requiring the municipality to upgrade the water system because of the subsequent change in water system standards.

Nuisance

145 The submissions of counsel relating to the defence of statutory authority are essentially the same as those advanced in the **sewer** cases and will not be repeated.

146 In addition, counsel for the plaintiffs points out there is no legislation (retroactive or otherwise) comparable to the **sewer** enactments, granting deemed statutory authority exemption from liability for waterworks; nor is there is any legislation expressly authorizing the nuisance.

	ANALYSIS	
Negligence		

147 The upgrading suggested by counsel for the plaintiffs would require a massive capital expenditure for replacing the cast iron pipe with ductile pipe to a depth of 6.5 feet. The City allocates between \$350,000.00 and \$400,000.00 annually to replace and upgrade water mains of all types. In 1993, \$350,000.00 was budgeted to protect ductile iron pipe from corrosion failures. Even if it can be said the City is negligent in failing to upgrade the water works system as suggested by counsel for the plaintiffs, these expenditures were obviously based on budgetary considerations and as such provide the basis for the defence of policy decision.

Nuisance

148 The same approach to this question will be adopted as in the **sewer** cases. The City must establish the water mains were constructed pursuant to statutory authority i.e. there was legislation that was specific as to the manner and location of the construction of the water mains and the water mains were actually constructed in the manner and location specified by the legislation. If the City meets these requirements it must then establish the flooding in the water cases was the inevitable consequence of the exercise of such statutory authority.

Proof of construction pursuant to statutory authority

149 It was not until 1912 that the Public Health Act was amended to prohibit construction of waterworks without prior approval by Provincial Board of Health as to the location and manner of

installation. The water main in Edwards was constructed three years prior to the enactment of this legislation. Retroactive approvals were subsequently granted but the City has been unable to find any approvals reaching back as far as 1909. The Edwards construction was therefore undertaken pursuant to permissive legislation. This meant the municipality was required to do the work in a manner and at a location which would avoid the creation of a nuisance. (This is Situation C stated by Wilson J. in Tock⁵⁴.) Having failed to do so the City is liable for the damage caused by the nuisance.

150 With respect to Bennett section 101 of the Public Health Act R.S.O. 1950 chap. 306 prescribes that no waterworks system may be proceeded with until the Department of Health has approved the location and manner of installation of the system. Documents filed by the City establish the water main was constructed in 1956 in accordance with these requirements.

Proof of inevitable consequence

151 The City has established the water distribution system in Thunder Bay is neither leak proof nor burst proof and that no municipality in Canada has been able to construct a system in which water mains do not occasionally structurally fail. I am satisfied that bursting of pipes is an inevitable in a waterworks system.

152 However, (to paraphrase the words of Wallace J.A. in Dressew Supply Limited quoted above⁵⁵) "this general response fails to address the issue of whether the city has satisfied the onus of demonstrating, on a balance of probabilities, that the particular break which occurred in this instance was an inevitable consequence of the installation of the water system in the sense of demonstrating that all proper care was taken in installing the pipe and that there was no other feasible way in which the installation could have been carried out so as to avoid creating the nuisance."

153 The Agreed Statement of Facts states "it is most probable that the action of the frost in the ground exerted forces on the unfrozen soil surrounding the buried pipe." This does not preclude the pipe bursting as a result of the frost acting on improper installation, soil conditions or settlement of the ground.

154 In Dressew Supply Limited the court noted that the municipality was faced with the same difficulty that confronts the City in this case - namely "that no one knows how this pipe was installed or which of many possible causes resulted in the differential settlement of the ground in the area of the break."⁵⁶ The court also said that "[I]n the absence of knowledge as to how the pipe was laid it is impossible for the city to establish that the method of installation could not reasonably have been improved or that the type of failure of this particular pipe was an inevitable consequence of the water system."⁵⁷ In Tock Sopinka J. said that "while the defence of statutory authority gives rise to some factual difficulties, in view of the allocation of the burden of proof they will be resolved against the defendant"⁵⁸.

155 Applying these statements to the water cases I find the City has failed to establish the pipe failures

were inevitable consequences of the installation of the water mains in either of the water cases.

Conclusions

156 The defence of policy decision protects the City against negligence, if any, for failure to upgrade the water system in accordance with higher standards that have been developed since the water mains were originally installed. The defence of statutory authority fails in the water cases because the City has failed to establish that the broken water mains were the inevitable consequences of the installation of these water mains. In addition, in *Edwards* the City has failed to prove the location and manner of installing the water main was carried out in accordance with specific statutory requirements.

OBITER

KAMLOOPS, JUST AND THE DEFENCE OF POLICY DECISION

Expanded liability of municipalities

157 The pre-Kamloops liability immunity of municipalities for non-enforcement of by-laws (as outlined in the minority opinion of McIntyre J. in *Kamloops*⁵⁹) has been superseded by a duty of care to all who it is reasonable to conclude might be injured by negligence relating to the non-enforcement of by-laws. Inaction for no reason or inaction for an improper reason cannot be a policy decision which protects the municipality against liability for negligence. The municipality must give bone fide consideration to the enforcement of a by-law and responsibly decide against doing so on policy grounds (policy consideration at the secondary level). If it fails to do so, the non-enforcement falls within the operational domain which is not immune from tortious liability.

158 It has been said Just heralded a new approach which allows courts to review "pure policy" decisions on the basis of ordinary principles of negligence and substitute judicial discretion for that of the public authority in areas which had not previously been reviewable by the courts; as a result of this approach the scope of decisions which can be made by a public authority free from judicial scrutiny has been significantly narrowed⁶⁰.

Limiting the effect of Kamloops and Just

159 Although the outcome in *Brown and Swinamer* indicates the Supreme Court is exercising restraint in carrying out such review, there can be no doubt that Just and *Kamloops* have expanded the vulnerability of public authorities to tort action. However, these cases also indicate steps can be taken by the public authority to negate liability for negligence. Policy considerations dictated by budgetary constraints is a prime example. Clear and identifiable secondary policy decisions based on other grounds is another.

160 Furthermore, it is within the power of the Legislatures to curtail civil liability for public authority

decision-making by enacting legislation that affords statutory protection.

TOCK AND THE DEFENCE OF STATUTORY AUTHORITY

Implications of no clear majority

161 Although only a majority of the Court (as opposed to a clear majority) concurred in the reasons of Wilson J., the hierarchical facet of the doctrine of stare decisis makes the ratio decidendi of her reasons binding on this court. This principle appears to have been overlooked in *Ratko v. Woodstock (City) Public Utilities Commission*⁶¹ where the court applied the reasons of LaForest J. in holding the defendant Commission liable for a nuisance resulting from a burst water main.

162 Although Wilson J. did not particularise the onus and standard of proof that must be met by a public authority seeking to escape liability for nuisance on the basis of inevitable consequence there can be no doubt the explanation by Sopinka J. is in accord with the law as it has been consistently applied⁶².

163 The horizontal aspect of stare decisis (i.e. whether the Supreme Court of Canada is bound to follow its own judgments) has no bearing on my decision. However, it does give rise to some uncertainty as to binding effect of Tock in the future. I do not believe there is any principle preventing a majority of the Court from adopting either of the minority opinions⁶³. This could happen because there are presently five Supreme Court judges who did not participate in Tock⁶⁴. Thus, the reasons of LaForest J. or Sopinka J. could prevail over the reasons of Wilson J. The reasons of Sopinka J. portend such a possibility. He said:⁶⁵

If we are to depart from this state of the law, so recently confirmed by two decisions of this Court, there should be very strong ground for so doing. Moreover, there should be substantial unanimity. It is apparent from the reasons in this appeal that there is little unanimity as to whether we should retrench, advance or stay the same.

164 Any uncertainty concerning the future of Tock has no bearing on the outcome in the water and **sewer** cases because the outcome would not be different if the reasons of Sopinka J. had been applied. (The reasons of LaForest J. would impose liability in any event.) The lack of clear majority support for the reasons of Wilson J. relates only to the circumstances under which the defence of statutory authority comes into play. Both Wilson J. and Sopinka J. - a clear majority of the Court - said that if the defence is available, the onus is on the public authority to establish the nuisance was the inevitable consequence of the undertaking. Having held the City failed to discharge this onus, the decision in the **sewer** and water cases is the same under judgments of both Wilson J. and Sopinka J.

165 Until the Supreme Court of Canada asserts the law of statutory authority with a clear majority the following analysis of the practical effect of Tock on the liability of municipalities for nuisance by Lewis N. Klar Professor of Law, University of Alberta, is noteworthy⁶⁶:

The major issue of the case was the defence of statutory authority and it is here where the judgment will have its greatest impact. Despite the fact that the three judgments in the case took decidedly different approaches to the defence, they each, in their own way, restricted its application, making it very unlikely that the defence will be successful in future cases. The approach taken by the Justices to the defence of statutory authority is consistent with the cost distribution goal which underlies the decision.

Wilson J.'s approach to restrict the defence's application to the case of "mandatory" statutory provisions only will significantly limit its scope. As pointed out by Sopinka J., "modern legislation authorizing the provision of the type of works which frequently give rise to nuisances is almost invariably permissive".

Even Sopinka J.'s approach, however, which on the surface is much more receptive to the defence's application, is very restrictive. The public authority is given the almost impossible task of establishing the doctrine of "inevitable consequences". As pointed out above, the defendant will have to prove that there were virtually no alternative ways of conducting the activity in order to be able to utilize the defence. The damage must have been "practically impossible" to avoid. The doctrine demands a standard of care greater than that of ordinary negligence law. As we have seen from numerous previous cases, defendants have invariably failed to discharge this burden. It is difficult, in fact, to find a recent nuisance case in which the defence has succeeded. Sopinka J.'s decision thus gives public authorities a somewhat "Pyrrhic victory".⁶⁷

Limiting the effect of Tock

166 The effect of the Tock and Kamloops decisions can be minimised. In appropriate circumstances municipalities can articulate policy decisions which involve or are dictated by financial, economic, social, or political factors or constraints and thereby negate liability. As with the Just case there can be legislative intervention if liability becomes too great a concern for public bodies.

167 It is within the power of the Legislature to enact legislation which avoids liability either by drafting exemption provisions, or by mandating in specific terms what public authorities are to do, and how they are to do it.

The rainwater leader by-law

168 After almost finishing these reasons I requested that a copy of the rainwater leader by-law be filed as an exhibit. I then discovered the rainwater prohibition was one of numerous provisions of a Property Standards By-law enacted under the authority of section 31 of the Planning Act 1983⁶⁸ which applies to a "building ... or structure ... whether heretofore or hereafter erected."

169 Clause 4.24.4 of the Property Standards By-law reads as follows:



All rainwater leaders discharging storm water from the roof of a building or other structure into any sanitary **sewer** or combined sanitary and storm **sewer** of the City shall be removed or disconnected to eliminate such discharge to the sanitary **sewer** or combined sanitary and storm **sewer** and no rainwater leaders discharging to a sanitary **sewer** or combined sanitary and storm **sewer** shall be hereafter installed therein or thereon.

170 The Planning Act contains broad provisions enabling the City to enforce the standards stipulated in the By-law. Sub-section 31(2) creates an offence punishable by a fine for failure to comply with an order directing compliance with the Property Standards By-law. In addition the municipality can carry out the necessary work and charge the cost to owner.

171 The discovery that the rainwater roof leader provision was not a free-standing by-law, as I originally thought, does not alter my conclusion the City was negligent in failing to enforce the prohibition against connecting rainwater roof leaders to the combined **sewers**. If anything my conclusions are strengthened because the rights of enforcement under the Property Standards By-law give the City even greater powers of enforcement than I originally thought were available.

KURISKO J.

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Counsel for the plaintiffs

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cp/d/mes/mjb/DRS/DRS/DRS

1 (1989), 1 C.C.L.T. (2d) 113

2 [1989] 2 S.C.R. 1228

3 [1994] 1 S.C.R. 420

4 Ibid., 445

5 (1984) 10 D.L.R. (4th) 641

6 [1989] 1 S.C.R. 705

7 Just and Brown illustrate how difficult it can be to fix the dividing line between "policy" and "operation". In Just the plaintiff and his daughter were stopped in a line of traffic by a rocky slope on a major highway in British Columbia. A boulder from a slope above the highway became dislodged and crashed down on their car killing the daughter and seriously injuring the plaintiff. The plaintiff sued the provincial Crown, alleging negligence in the operation of monitoring the situation and dealing with this potential hazard. Cory J. speaking for the majority, had little difficulty finding that a sufficient relationship of proximity existed between the province and the users of the highway in question so as to establish a prima facie duty of care. After a review of the legislation it was determined that no statutory exemption was provided. It was held that the allegations of negligence with respect to the manner and quality of the inspection system fell clearly within the operational aspects of the governmental activity.

In Brown the plaintiff was severely injured when his car went out of control on black ice that had been reported earlier to the Department of Highways which did not respond quickly because there was inadequate staff available as a result of a decision to maintain the summer schedule in effect at the time. Cory J. said:

In my view the decision of the Department to maintain a summer schedule, with all that it entailed, was a policy decision. Whether the winter or summer schedule was to be followed involved a consideration of matters of finance and personnel. Clearly the decision required the Department to discuss and negotiate the dates for the commencement of the summer and winter schedules with its unions This was a policy decision involving classic policy considerations of financial resources, personnel and, as well, significant negotiations with government unions. It was truly a governmental decision involving social, political and economic factors.

8 Ibid., 435

9 Ibid., 437

10 Above, note 5 at 658

11 One of the cases he cited in support of this proposition was *Brown v. City of Hamilton* (1902) 4 O.L.R. 249 where the City of Hamilton had passed a by-law which prohibited the setting off of fireworks in the city streets. The by-law had for many years been ignored by the public and, presumably, by the city. The plaintiff was injured by a Roman candle during a display of fireworks in the streets. He sued the city for damages arising from its failure to enforce its by-law. In the High Court, Chancellor Boyd said, at p. 251: "Having enacted such a by-law, there is no duty cast on the municipality to see to its enforcement." and at p. 252 he added:

The argument of the plaintiff was that a cause of action arose because the city had passed a by-law, and that the by-law was systematically disregarded to the knowledge of the officers of the city, and that no steps were ever taken to enforce it by the city.

This is a novel proposition, which has its sole sanction in the decisions of the Maryland courts, but is opposed to all other American, English and Canadian authorities.

In *City of Toronto v. Polai* (1969), 8 D.L.R. (3d) 689 (Ont. C.A.) Schroeder J.A. quoted Brown as authority for the statement that "... the mere passing of a by-law by a municipal corporation does not cast any legal duty on the municipality to see to its enforcement."

12 Above, note 5 at 664

13 See *Rothfield v. Manolakos*, [1989] 2 S.C.R. 1259 to the same effect.

14 Above, note 5 at 674

15 Above, note 5 at 672

16 [1978] A.C. 728, [1977] 2 All E.R. (H.L)



17 Ibid., 726-7

18 Ibid., 771

19 Ibid., 722

20 (1992), 9 C.C.L.T. (2d) 231 (O. C. G.D.)

21 Ibid., 254

22 [1930] A.C. 171 at 183

23 Above, note 1 at 131

24 This situation does not apply to the test cases herein.

25 Above, note 1 at 131

26 Above, note 1 at 137

27 Above, note 1 at 137-8

28 Above, note 1 at 138

29 Above, note 1 at 150

30 Above, note 1 at 148

31 Above, note 1 at 153

32 Above para. 60

33 Above, note 1 at 154

34 R.S.O. 1897 Chap. 223 sec. 554

35 These provisions read as follows:

30.-(2) Whenever construction of a common **sewer** or sewage system of public sewage shall be contemplated by the council of any city, town, or village, it shall be the duty of the said council to place itself in communication with the Provincial Board of Health, and to submit to the Board before their adoption all plans in connection with said **sewer** or sewage system. It shall be the duty of the Provincial Board of Health to enquire and report upon said **sewer** or system of sewerage, as to whether such is calculated to meet the sanitary requirements of the inhabitants of the said municipality; and as to whether such **sewer** or system of sewerage is likely to prove prejudicial to the health of the inhabitants of the said municipality or of any other municipality, liable to be affected thereby.

(3) The Provincial Board of Health may make any suggestions or amendments concerning the plans submitted or may impose any conditions with regard to the construction of such **sewer** or system of sewerage or the disposal of sewage therefrom as it may deem necessary or advisable in the public interest; and the construction of any common **sewer** or system of sewerage shall not be proceeded with without being reported upon and approved of by said Provincial Board of Health, and no change in the construction thereof or in the disposal of sewage therefrom liable to injuriously affect the public health shall be made without previous submission to and approval of said Board.

36 31.--(1) When any municipality or any person contemplates the establishment of any sewage works, or the extension of or any change in any existing sewage works, the plans, specifications and an engineer's report of the works to be undertaken, together with such information as the Commission may require, shall be submitted to the Commission, and no such works shall be undertaken or proceeded with and no by-law for raising money to finance such works shall be passed until the proposed works have been approved by the Commission.

(2) The Commission, upon an application for approval, may direct such changes to be made in the plans or specifications submitted as it deems necessary in the public interest. Commission in the above section means the Ontario Water Resources Commission established by the Ontario Water Resources Commission Act, 1956.

37 This was confirmed by the trial division of the Supreme Court of Ontario in *Burgess v. The City of Woodstock* [1954] O.W.N. 478, *Burgess v. The City of Woodstock* [1955] O.R. 814, and *Stephen v.*

The Village of Richmond Hill [1955] O.R. 806.

38 Above note 3 at 437

39 Above, note 1 at 664

40 Above, note 1 at 674

41 See Wilson J. in Kamloops at 672:

It may be, for example, that although the building inspector had a duty to enforce the by-law, the lengths to which he should go in doing so involved policy considerations. The making of inspections, the issuance of stop orders and the withholding of occupancy permits may be one thing; resort to litigation, if this became necessary, may be quite another. Must the City enforce infractions by legal proceedings or does there come a point at which economic considerations, for example enter in? And if so, how do you measure the "operational" against the "policy" content of the decision in order to decide whether it is more "operational" than "policy" or vice versa? Clearly, this is a matter of very fine distinctions.

42 Above para. 69

43 Above para. 71

44 Above para. 17

45 Above para. 18

46 At p. 17

47 The process that causes corrosion attacks the "sacrificial" anode (located proximate to the pipe) rather than the pipe thereby prolonging the life of the pipe.

48 Above para. 70

49 The entire provision reads as follows:

30.--(1) Wherever the establishment of a public water supply is contemplated by the council of any city, town or village, it shall be the duty of the said municipal council to submit to the Provincial Board of Health, together with the plans, an analysis of the water from the proposed source or sources of supply, the proposed source and that the analysis submitted to the Board exactly represents the conditions of the sample examined. In case the source of any proposed public water supply, does not in the opinion of the Provincial Board of Health, meet the sanitary requirements of the municipality, either by reason of the quality of the water, or because the water is likely, owing to the situation of the proposed source of supply, to become contaminated, it shall not be lawful to establish such waterworks without first obtaining from the Provincial Board of Health a certificate signed by the chairman and secretary stating that the proposed source is the best practicable, having regard to all the circumstances of the case, and that all proper measures have been taken to maintain the supply in the highest possible and practicable state of purity.

50 This provision reads as follows:

89.--(1) Whenever the council of any municipality ... contemplates the establishment of or the extension of or any change in the existing waterworks system, they shall submit the plans, specifications, and an engineer's report of the water supply and the works to be undertaken, together with such other information as may be deemed necessary to the Provincial Board [of Health] and no such works shall be undertaken or proceeded with until the source of supply and the proposed works have been approved by the Board.

(2) The Board upon the application for such approval may direct such changes to be made in the source of supply or in the plans as it may deem necessary.

This was carried forward until it was transferred to the Ontario Water Resources Commission Act, 1957 (section 30) and has been carried forward to the present time.

51 Above, para. 71

52 (1989), 45 M.P.L.R. 280 (B.C. C.A.)

53 *ibid.*, 286



54 Above para. 61

55 Above para. 142

56 Above, para. 142

57 Above, para. 142

58 Above, note 67

59 Above, note 50

60 Larry A. Reynolds, David Hicks: New Directions For the Civil Liability of Public Authorities in Canada, (1992), 71 Canadian Bar Review 1 at 18

61 (1994), 17 O.R. (3d) 427

62 See Dressew Supply Limited above at para 142 and the authorities recited therein which include the Supreme Court of Canada decision in Portage la Prairie v. B.C. Pea Growers Ltd.

63 I have been unable to find a case relating to the binding effect of the majority reasons in the Tock situation.

64 Justices Gonthier, Cory, McLachlin, Iacobucci and Major.

65 Above, note 1 at 154

66 "The Supreme Court of Canada: Extending the Tort Liability of Public Authorities" (1990) XXVIII Alberta Law Review 648

67 Professor Klar goes on to postulate that although LaForest J.'s reasoning seems to be the most restrictive it may be that in the final analysis his approach would give public authorities the greatest protection because he would compensate individuals in serious cases but relieve public bodies of liability for less serious nuisances. Professor Klar notes there are few guidelines provided in the judgment to determine how this balance may be struck.

68 S.O. 1983 Chap. 1, sec 31 now R.S.O. 1990 Chap. P. 13 subsec. 31(2)



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