Argument

Although a municipality is generally not responsible for lateral sewer lines in that:

- an owner has no remedy against the municipality for damages caused by blockage through his or her failure to maintain his or her drain even though it may be on public property

- that the municipality does not become liable for the upkeep of that part of the private drains which lie under the street

- a municipality is not responsible for a condition of non-repair of a sewer not known to it

- a B.C. municipality does not have duty of care under s. 288 of the *Local Government Act* (now s. 744 of the *Local Government Act*, R.S.B.C. 2015, c. 1) to regularly inspect and maintain storm service laterals

an argument to have direct sewer access from your property may nonetheless be maintained on the basis that municipality is obliged to furnish sewer services to those within their jurisdiction to those who seek it. Moreover, a municipality has duty of care to maintain and repair a storm drainage system once a problem is located.

Further, where a municipality has undertaken to provide storm sewer service to its residents under the permissive provisions of the statute, and where the responsibility of the property owner is to complete the drainage system with laterals connecting to the main sewer, if no access was provided by the municipality to inspect or repair the sewer laterals other than by digging up the ground to expose the lateral, the cost of said excavation should at least in part be borne between the owner the municipality on a split fault basis. This is in keeping with the facts of the case at bar.

Lateral Sewers – Summary of Findings

1. Where sewers have been installed by a municipality, it has been held that the municipality is obliged to furnish sewer services to all those who apply for it.

2. Construction and maintenance of lateral drainage or sewage lines, which join the public works, are not the responsibility of the municipality and it owes no duty of care with respect to them.

3. It is negligence for a municipality to construct a sewer, the capacity of which is not sufficient to take care of all sewage and water contributed by subsidiary sewers and private drains lawfully connected with it under all conditions that might reasonably have been apprehended or provided against.

4. Where a sewer is of sufficient capacity at the time of its construction to meet all normal and anticipated needs but subsequently becomes overcharged by sewage contributed in later years, the municipality is not liable without proof of negligence.

5. The fact that the sewer system later became inadequate due to the increase in building in the neighbourhood did not mean that the City was negligent if the private connection to the City's sewer system *beyond the plaintiffs' property line* was done by the City's sewer department *at the request* of the plaintiffs.

6. Para. 5 may not apply if the connection to the City's storm sewer was made at a time when such a connection was *probably mandatory* due to health and safety concerns or the existence of mandatory by-laws requiring hookups.

7. While backflow might be due to the main sewage line, this must be proven. If the damaging backflow is due to inappropriate matter, such as rags, being thrown into the lateral line, the municipality will not be found negligent. The situation may be different if the municipality had reasonable knowledge of the condition of non-repair or if it ought to have known of such condition or other the likelihood of its occurring and had an opportunity to remedy it. A municipality is not responsible for a condition of non-repair of a sewer not known to it.

8. Where a municipality is not under a statutory or common law duty to provide the means of drainage to the premises and the owner voluntarily assumes the risk by connecting his or her drain with the permission of the municipality, there is no liability to the municipality.

9. Similarly, there is no obligation on the part of a municipality to maintain a connecting drain laid by an owner. An owner has no remedy against the municipality for damages caused by blockage through his or her failure to maintain his or her drain even though it may be on public property.

10. Where property owners are permitted by a municipality to construct drains connecting their premises with a municipal sewer, and do this work at their own expense, but under the supervision of the municipality, the municipality does not become liable for the upkeep of that part of the private drains which lies under the street.

11. Where the municipality has considered, but for reasons of cost and practicality, has decided against, inspecting storm service laterals, the authorities are clear that, in general, inspection and maintenance systems are matters of policy, thus immunizing the municipality from negligence.

12. A B.C. municipality does not have duty of care under s. 288 of the *Local Government Act* (now s. 744 of the *Local Government Act*, R.S.B.C. 2015, c. 1) to regularly inspect and maintain storm service laterals. It does have duty of care to maintain and repair storm drainage system once a problem is located.

13. Where the defendant B.C. municipality undertook to provide storm sewer service to its residents under the permissive provisions of the statute, and with the responsibility of the property owner to complete the drainage system with laterals connecting to the main sewer, if no access was provided by the municipality to inspect or repair the sewer laterals other than by digging up the ground to expose the lateral, the cost of said excavation should at least in part be borne between the owner the municipality on a split fault basis.

Lateral Sewer Lines – Authorities/Discussion

"Authority to construct sewers is generally conferred in permissive terms. An area defined in a by-law which in the opinion of counsel derives special benefit from a sewer cannot include and beyond the territorial limits. It is clear as a matter of law that a municipality is not bound to provide drainage for the property within its limits nor is it, in laying out a street, obliged to install a sewer. So it is discretionary for a city to provide public drains in its streets to enable property owners to discharge their private drains into them.

Where sewers are installed, however, it has been held that the municipality is obliged to furnish sewer service to all its inhabitants who apply for it, but not to a person residing outside the municipal limits." (*Herman Brothers Ltd. v. Regina* 1977 Canlii 1436 SK CA) (I.M. Rogers, *The Law of Municipal Corporations*, second ed., Vol. 2 (looseleaf), at para. 158.1)

"Construction and maintenance of lateral drainage or sewage lines, which join the public works, are not the responsibility of the municipality and it owes no duty of care with respect to them." (I.M. Rogers, *The Law of Municipal Corporations*, second ed., Vol. 2 (looseleaf), at para. 171.4, citing *Sombra v. Chatham* (1891), 18 O.A.R. 252, rev'd in part 21 S.C.R. 305)

In *Sombra*, a drain was constructed that benefitted the adjacent landholders who were assessed pro rata for its costs. The drain was defective, causing water to back up in the drains of the nearby plaintiff municipality.

In an action for damages, it was held by the Ontario Court of Appeal that the defendant municipality was not a proper party to the action. The Court held that damages should not be assessed against all the ratepayers other than those who were assessed for the original construction of the drain. If recoverable at all, such damages were chargeable pro rata upon the lands liable for assessment for the original work.

It has been held that it is negligent for a municipality to construct a sewer, the capacity of which is not sufficient to take care of all sewage and water contributed by subsidiary sewers and private drains lawfully connected with it under all conditions that might reasonably have been apprehended or provided against. The case of *Montreal (Ville) c. Salaison Maisonneuve Ltée*. 1954 CarswellQue 45, [1954] S.C.R. 117, was an action for damages sustained by the respondent company when an ice jam in the St. Lawrence River, into which the appellant's sewers emptied, caused the contents of the sewers to back up into the defendant's premises.

The action was maintained by the trial judge and by the majority in the Court of Appeal, holding the City liable. The Supreme Court of Canada dismissed the appeal.

Kellock J. (with whom two other Justices agreed) said that "[l]iability could, therefore, be discharged by the appellant [municipality] only by establishing that the occurrence which caused the backing up of the sewer, was not, on its part, reasonably avoidable." (para. 12)

As to the municipality's contention that this was a private drain and the responsibility of the plaintiff, Justice Kellock held at para. 16:

> With respect to the appellant's contention that the private drain of the respondent should have been fitted by it with a valve which would have automatically operated to prevent the backing up of the contents of the sewer into his premises, it was necessary for the appellant to show that the respondent was guilty of faute in failing to foresee that flooding from such a cause was likely. I do not think this has been made out on the evidence. It is one thing for the city, the sewers being "under its care", to be expected to have regard to the probability of their being rendered inoperative by a rise in the level of the river, but quite another thing for a householder to expect that the instrumentality which carries away waste from his property will suddenly become the means of introducing thereto the river, the nature of the connection of the sewers with which he may, and probably does not, know anything about….

It has been held that where a sewer is of sufficient capacity at the time of its construction to meet all normal and anticipated needs but subsequently becomes overcharged by sewage contributed in later years, the municipality is not liable without proof of negligence. In *Mishaw v. Toronto (City)*, 1939 CarswellOnt 14 (C.A.), the sewer system was adequate at the time that it was built. At that time, there was no obligation upon the property owner to connect with the sewer. The sewer system later became inadequate due to the increase in building in the neighbourhood.

Following a storm, the plaintiffs, who were tenants, had a flood in their basement, despite the fact that "the waterfall was within the calculated capacity of the sewer". However,

there was a back-flow from the sewer in the street due to the storm water.

The appellate court, overturning the trial judge's decision, dismissed the action on the ground that the City was not negligent with respect to the sewer system. At paragraph 23, Henderson J.A. on behalf of the court stated the reason:

> It is settled law that the adequacy of a sewer system is to be judged as of the time at which it was built, and if constructed in a neighbourhood which is afterwards built up, thereby greatly increasing the amount of sewage to be taken care of, and where, as here, there is no obligation on the part of the property owner to connect with the sewer, the city corporation incurs no further liability where, by reason of these events, the system becomes inadequate.

The fact that the sewer system later became inadequate due to the increase in building in the neighbourhood did not mean that the City was negligent, because the connection of the plaintiffs' cellar to the City's sewer system *beyond the plaintiffs' property line* was done by the City's sewer department *at the request* of the plaintiffs.

Justice Henderson J.A., noted:

> I refer to *Johnson v. City of Toronto* (1894), 25 O.R. 312, and I quote from the judgment of Mr. Justice Ferguson, at p. 317, a quotation taken by him from the judgment in *Johnston v. District of Columbia* (1886), 6 Sup. Ct. Rep. (U.S.) 923 at p. 924:
>
> > "The duties of the municipal authorities in adopting a general plan of drainage and determining when and where sewers shall be built, of what size and at what level, are of quasi judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health, and general convenience throughout an extensive territory, and the exercise of such judgment and discretion in the selection and adoption of the general plan or system of drainage is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land. But the construction and repair of sewers, according to the general plan so adopted, are simply ministerial duties; and for any negligence in so constructing a sewer, or keeping it in repair, the municipality which has constructed and owns the sewer, may be sued by a person whose property is thereby injured."

In *Lissack v. Toronto (City)*, 2008 CarswellOnt 8281 (S.C.J.) the plaintiff lived in a bungalow in North York, formerly referred to as Willowdale. In August of 2005 during a heavy rain storm he suffered a serious flood in his basement. That was the first flood. The water mixed with sewage was twenty inches deep throughout the basement, which Mr. Lissack estimated to be about 2,000 square feet. His Insurer paid for a portion of the damages.

Then, one year later, on July 23rd, 2006 Mr. Lissack's basement was once again flooded with water but apparently without sewage. The sewer was a combined sewer, combining

both waste water from Mr. Lissack's home and storm run-off. It was constructed in 1960 or 1961. The water and sewage had backed up as a result of a "backup" in the City's sanitary and storm sewer.

The Court distinguished the *Mishaw* decision because in *Lissack*, the connection of the plaintiff's sewer pipe to the City's storm sewer was made at a time when such a connection was *probably mandatory*. Making such connections voluntary would have posed a serious health and safety hazard for Mr. Lissack and his neighbours.

Further, the Toronto *Municipal Code - Property Standards*, applicable to Mr. Lissack's property before the two storms in question occurred, *required* the following measures to be taken with respect to plumbing in the basement:

> #629 — 37 — Plumbing
>
> H. Basements or cellars that have concrete floors shall have an adequate number of trapped floor drains that are maintained in good repair and *connected to the sewage system*.

While backflow might be due to the main sewage line, this must be proven. If the damaging backflow is due to inappropriate matter, such as rags, being thrown into the lateral line, the municipality will not be found negligent. (I.M. Rogers, *The Law of Municipal Corporations*, second ed., Vol. 2 (looseleaf), at para. 171.4)

In *Grondin v. Red Harbour (Town),* 2015 CarswellNfld 233 (Prov. Ct.), the plaintiff brought an action in negligence against the defendant municipality after his sewer backed up and flooded his basement. The claim was dismissed.

The Court found that it was more probable than not that the sewer had backed up because of a blockage in the lateral sewer pipe running from the plaintiff's residence to the town sewer main. An obstruction was encountered at 35 feet from the access point in the residence to the lateral. After the plaintiff had cleared the obstruction, cloths, rags, and/or wipes were found at the lower part of the lateral, before the point where the lateral fed into the town sewer main.

The mayor and the town clerk/manager had tried to help the plaintiff. They recommended that he rent a "snake" to clear his lateral, and they covered the lateral so as to prevent debris from getting into the town sewer main system. These actions did not make the town liable for the obstruction in the lateral sewer pipe.

Further the Court found that there was no evidence of any duty of care owed to the plaintiff by the town for the maintenance of his lateral sewer pipe. Nor was there any evidence of negligence on the part of the town. Finally, there was no evidence that any of the actions or inaction of the town had caused any loss suffered by the plaintiff.

At para. 37 the Court says:

In *Arif v. Fredericton (City)* (1986), 77 N.B.R. (2d) 34 (N.B. Q.B.), Stevenson J. dismissed a claim for damage due to backing up of sewer into plaintiff's basement. At paragraph 5, he said as follows:

> There is no suggestion that the sewer was not properly constructed or that it had insufficient capacity. A municipality is not responsible for a condition of non-repair of a sewer not known to it. *Rogers on the Law of Canadian Municipal Corporations*, 2nd ed., para. 248.52 at p. 1402. To succeed in a case such as this a plaintiff must establish that there is a likelihood of a blockage occurring without more frequent flushing or cleaning of the sewers. Undoubtedly, the greater the frequency of maintenance, the lesser the danger of blockages. But a municipality is not required to observe a standard of perfection. In the absence of any evidence that the defendant's maintenance fell short of an acceptable standard or of what one would expect of the reasonable municipality I cannot find any negligence on the part of the City or its employees.

The decision in *Grondin* may have been differently decided if the municipality had reasonable knowledge of the condition of non-repair or if it ought to have known of such condition or other the likelihood of its occurring and had an opportunity to remedy it.

In *Gerofsky v. Hamilton*, [1960] O.W.N. 525 (Co. Ct.), the plaintiffs were carrying on business in ladies' sportswear in leased premises and used the basement as a storage room etc. After a moderately heavy rainfall the basement was flooded and the plaintiffs suffered damages estimated at $842 which they claimed. Located immediately in front of their premises was a catch basin and it was discovered by the corporation workmen that the drain from the basin to the sewer containing a trap had been obstructed by a large board and an empty bottle. Surface water had found its way through the loose mortar in the wall of the catch basin and seeping under the sidewalk reached the plaintiffs' foundation entering the plaintiffs' basement. It was established that the manhole was otherwise in good condition and that the defendant had a regular routine practice to service this manhole and others by inspecting them from the surface. The plaintiffs alleged that the defendant was negligent in being content with its repair service by inspection from the surface only.

The action was dismissed. The Court found as a fact that the blockage was caused by the act of a third party and that the municipality had no notice of it until damage occurred and that it acted expeditiously to avoid further loss. The learned Judge decided that the City was not liable for a blockage caused by an act of a third party unless it knew of it and failed to take remedial steps and affirmed the *ratio* of the sewer back-up case of *O'Brien et al. v. Town of Collingwood*, [1934] O.W.N. 12, that:

> To make the municipality liable the plaintiffs must affirmatively prove that the sewer had become obstructed and that the municipality had negligently omitted to remove the obstruction within a reasonable time after notice ...

In *Nipawin (Town) v. Karle*, 2011 SKQB 228 (CanLII), the appellant, the Town of Nipawin (the Town), appealed from a decision of the Provincial Court in a small claims proceeding concerning a claim by the plaintiff Jolene Karle that she suffered damage when waste water entered the basement of her house. A blockage of water flow had occurred in the service line between her own property and the main sewer line.

The blockage was on that portion of the service line statutorily deemed to be under the management and control of the Town, although the precise nature, origin or cause of the blockage remained unknown. The blockage prevented waste water from flowing through the service line to the main sewer line.

The Court found the uncontroverted evidence which showed that the connecting sewer line, constructed to enable a flow of waste water so that householders such as Ms. Karle might enjoy their land, was blocked in the Town portion. Waste water then interfered with the plaintiff's enjoyment of her property and caused damage. This latter event represented the occurrence of a nuisance.

The appeal was dismissed. Since the occurrence of the plaintiff's damage, *The Municipalities Act* had been amended to exclude municipal liability based on nuisance in relation to, *inter alia*, sewers.

In *Danku v. Town of Fort Frances et al.*, (1977), 14 O.R. (2d) 285 (Dist. Ct.), the defendant municipality's sewer system backed up into plaintiffs' basement causing damage. The back-up was caused by a break in a private sewer system owned by a trailer park and joined to the municipal system. In an action for damages against the town and the trailer park.

The action was dismissed against the town and allowed against the trailer park.

The Court found that there was no negligence of any kind attributable to the town either in the design or in the operation of its sewage disposal system. Nor was the trailer park shown to be negligent in the construction or inspection of its sewer system.

The Court reasoned that the sewage system owned and operated by the municipality was an undertaking lawfully carried on by the municipality for the general benefit of the community at large and it was therefore exempt from the strict liability to which, in the absence of statutory relief expressly or by necessary implication afforded to it, it would otherwise be liable under the rule in *Rylands v. Fletcher*. However, there was a fundamental difference between the defendants in this matter. The defendant municipality operated its sewage system solely for the benefit of the entire population whereas the defendant trailer park operated its system both for its own private purposes and for the benefit of a particular segment of the community, namely, its tenants. The system was operated as part of a scheme devoted to private profit and was therefore not

within the exception to the rule in *Rylands v. Fletcher* relating to the general benefit of the community.

It has been held that where a municipality is not under a statutory or common law duty to provide the means of drainage to the premises and the owner voluntarily assumes the risk by connecting his or her drain, there is no liability to the municipality. In *Woodward v. Vancouver (City)*, 1911 CarswellBC 79 (C.A.), the contractor for the excavation under the Woodward building connected with one of two drains available for the purpose of draining off water which had accumulated during the excavation, and which was dangerous to the city and to private property.

There was evidence that the drain was not, in the minds of the City or the plaintiff, to be of a permanent nature. The plaintiffs were not compelled or requested to drain their basement by connecting into the City drain. At most, they were only permitted to do so.

In *Stockinger v. The Town of Cobourg*, 1944 CanLII 90 (ON CA), it was held that where property owners are permitted by a municipality to construct drains connecting their premises with a municipal sewer, and do this work at their own expense, but under the supervision of the municipality, the municipality does not become liable for the upkeep of that part of the private drains which lie under the street. The right of the property owner is in the nature of an easement, and he is responsible for the maintenance of the drain, and cannot claim damages from the municipality if, without misfeasance on its part, the drain becomes blocked (in this case, by tree roots).

Gillanders J.A. said:

> There is no specific evidence to show by whom, or under what arrangement, the particular drain from the appellant's property to the sewer was constructed, but there is evidence of the Corporation Clerk that it has been the practice for many years for a property owner, wishing to connect a private drain with a sewer, to get a permit to do the necessary work in the highway. The work is then done by, and at the expense of, the private owner, but under the supervision and to the satisfaction of the Streets Department of the corporation... I think the limit of the corporation's liability respecting the drain, under the circumstances, may be succinctly stated in the words of Chief Justice Cameron (not used with reference to exactly the same circumstances, but still applicable) in *McConkey et al. v. The Town of Brockville* (1886), 11 O.R. 322 at 327:
>
> > "The principles that should govern in such a case are more like those applicable to the rights and obligations upon parties who avail themselves of a drain dug upon private property. In which case I take the law to be, there is no obligation to keep the drain free from obstruction on the part of the owners of the soil through which it passes. He who enjoys the easement or privilege is bound to repair the drain and remove the obstruction, and the owner of the soil would

> only be liable for some act of misfeasance injuring those above or below him. Non-feasance carries with it no responsibility."
>
> …
>
> Even if a duty to repair, after knowledge or notice, applied, the circumstances here would indicate no liability on the corporation. No previous trouble had been experienced. The condition of the drain was not known to either party, and the corporation co-operated in investigating, locating and removing the obstruction in the drain beneath the highway…. Permission having been given to the adjoining landowner to connect his private drain with the sewer, the obligation was on him to construct the drain of such material as would prevent tree roots from entering, if there was any danger of that occurring, or to see to it that the drain was kept open.

Laidlaw J.A. said:

> There is no reason to reject the evidence given on behalf of the defendant, showing satisfactorily that the Queen Street sewer was not blocked and did not cause flooding of the plaintiff's basement. That finding of fact ought to be accepted. But, even if the Queen Street sewer was blocked, the plaintiff could not, in my opinion, make the defendant liable in law for the damages sustained by him in the circumstances of this case. The essentials to establish such liability have not been shown. It has been held in *Welsh et ux. v. The City of St. Catharines* (1886), 13 O.R. 369 at p. 379, per Cameron, C.J.:
>
> > "To make a corporation liable for injury from the overflow of a drain I think it must be shewn affirmatively that the corporation required the property owners to use the public drain by connecting the private drains therewith secondly[.Secondly], that the drain or sewer has been improperly and negligently constructed and injury results in consequence of such negligent and improper construction, or that the same has become obstructed and the corporation has negligently omitted to remove the obstruction within a reasonable time after knowledge or notice of the obstruction, and injury results to the plaintiff after such reasonable time for removal after such knowledge or notice has been had by the corporation; or, third, the corporation brings to the plaintiff's land by means of the drain or sewer more water than would otherwise come to the same, and pours it wilfully upon the said land, or after bringing the water to the land negligently allows it to escape and flow over the land."

[underlining added]

In *Colin v. Outremont (Municipality)* (1959), [1959] Que. S.C. 411 (Que. S.C.), tree roots had blocked the residential drain leading from the residence to the main sewer system. The

drain was owned by the plaintiff even though it was found in part on City property.

The Court held that the plaintiff was responsible for its maintenance. The City was not bound to carry on the work of maintenance or unblocking of private drains even though they may be on City property.

Lateral Sewers - Policy decision immunity

In *Oosthoek v. Thunder Bay (City)*, (1994), 24 M.P.L.R. (2d) 25 (Ont. Gen. Div.), aff'd 30 O.R. (3d) 323 (C.A.); leave to appeal to S.C.C. refused [1996] S.C.C.A No. 577, 104 O.A.C. 240n, the municipality argued that it had made a policy decision not to adopt the recommen-dation of its consulting engineers to separate the storm and sanitary sewers because of budgetary constraints. It also argued that the failure to enforce a by-law prohibiting residents from connecting rainwater leaders to the combined sewers was a policy decision which was not open to review by the courts.

The trial judge was prepared to accept that the first of those decisions (not to separate the combined sewers) was a policy decision and therefore subject to immunity; however, the failure to enforce the by-law (as opposed to passing the bylaw) which was a policy decision) was held to be an operational decision. The Court of Appeal upheld the trial judge's decision since no evidence was led at trial to establish that a conscious decision not to enforce the by-law had ever been made.

The *Oosthoek* claims were test cases involving not only sanitary and storm sewers but also claims arising from broken water mains. The court held that the policy decision immunity doctrine was available for claims framed in negligence where policy decisions were made based on budgetary considerations relating to the maintenance and upgrading of water mains. With respect to actions framed in nuisance, the Court of Appeal made it clear that the policy decision immunity doctrine had no application.

In *Spika v. Port Alberni*, 2002 BCSC 700, the defendant municipality provided storm sewer services to the plaintiff's residence. A blockage occurred in the storm service lateral due to build-up of mineral rich water and the storm water backed up and flooded into plaintiff's house.

A municipal employee responding to plaintiff's complaint advised the plaintiff to excavate and expose the lateral for inspection, but provided incorrect information as to the location of the lateral. After digging in the wrong location, the plaintiff was forced to hire a contractor for the works.

Upon inspection, the employee removed blockage from the lateral line and released water.

Plaintiff brought action against municipality for damages for negligence and nuisance.

The action was dismissed on the basis that insufficient evidence was before court to determine whether municipality's conduct met standard of care, and as such summary judgment was not appropriate in the circumstances.

The court held that the municipality did not have duty of care under s. 288 of the *Local Government Act* (now s. 744 of the *Local Government Act*, R.S.B.C. 2015, c. 1) to regularly inspect and maintain storm service laterals (para. 17), but did have duty of care to maintain and repair storm drainage system once a problem was located (para. 18). The plaintiff suffered damages as result of excavating land in effort to stop ongoing damage to property resulting from blockage in municipality's portion of storm service lateral.

At paras. 50-54:

> The defendant undertook to provide storm sewer service to its residents under the permissive provisions of the statute. The statute does not mandate the way in which such sewer service was to be provided. It was therefore the responsibility of the defendant to design and implement the system. It did so in a manner involving sewer mains and lateral connections up to the private property lines, at which point it was the responsibility of the property owner to complete the drainage system. Manholes were provided so that the defendant could inspect and repair the functioning of the sewer mains. No access was provided to inspect or repair the sewer laterals other than by digging up the ground to expose the lateral. The defendant has not offered any evidence that they had no discretion in so designing the system. Had they designed the system to include a "cleanout" access in their portion of the lateral drain, the expense and inconvenience occasioned by a blockage of the defendant's lateral would be minimal. Furthermore, it might then be practically feasible to inspect or clean the defendant's portion of the lateral from time to time, or to allow the resident to do so.
>
> In the instant case, it was the defendant's portion of the lateral that sustained the blockage. The actual blockage might be viewed as an inevitable consequence, in that it is a likely but infrequent occurrence but not one whose location can be predicted. However, the extent of the damage suffered by the plaintiff was neither inevitable nor practically impossible to avoid. Had the system been designed with cleanout access, it would have been possible to abate the nuisance with little delay or expense. As it was, the blockage occurring in the defendant's portion of the service lateral occasioned the plaintiff having to dig up a large portion of his yard at considerable expense.
>
> In *Legault*, *supra*, the Ontario District Court considered whether the failure of lateral service pipes in a sewer system was an inevitable consequence of the exercise of statutory authority. In that case, a lateral had collapsed causing flooding of sewer water. The court found that such failures were inevitable because, given the state of scientific knowledge it was impossible to build a

system that was immune to failure. Moreover, given the then current state of technology, there was no way to inspect laterals and predict blockages without excavation. The plaintiff argued that, even if the blockage was inevitable, the use of a "Y" connection to join another residence to the lateral resulted in the higher property discharging sewage into the lower property once the lateral was blocked. The court found that this went to the extent of the nuisance, not its cause, and therefore did not affect the defence of inevitable consequence.

The result in *Legault* is distinguishable from the instant case. In this case, it is clear that the damage suffered by the plaintiff would not have been substantial and unreasonable if it were not for the difficulty in clearing the blockage. A small flood in the plaintiff's crawl space that was abated the next day might not have caused anything but trivial annoyance. The blockage might have been inevitable, but it does not follow that the nuisance was inevitable. [underlining added]

As to the duty to inspect and maintain lateral lines, the court said at paras. 55-61:

Is the defendant liable in negligence for failing to inspect and clear the blockage in the plaintiff's storm lateral?

i) *Does the defendant have a duty of care to inspect and maintain storm service laterals*? A municipality acquires a duty of care towards those in a relationship of sufficient proximity if the municipality makes a policy decision to exercise a statutory power but, at the operational level, does so negligently. (*Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.))

Section 517 of the *Local Government Act* conferred the power on the defendant to operate a municipal sewer system. It chose to do so, and so acquired a duty of care towards those who, in the reasonable contemplation of the municipality, might be damaged by carelessness on its part. A municipality is only liable for damage caused by negligence at the operational level or for damage caused as a result of a policy decision taken in bad faith or irrationally. Where the damage results from a policy decision taken *bona fide*, there is no liability. A policy decision may be made at the highest level, as in the decision to exercise a power. It may also be made at a lower level (a secondary policy decision). It is the nature of the decision, not the decision-maker that determines whether it is a policy decision. Typically, policy decisions involve social political or economic considerations. The operational area is concerned with the practical implementation of policies, and these decisions are made with reference to expert opinion, technical standards, and general standards of reasonableness. (*Brown v. British Columbia (Minister of Transportation & Highways)* (1994), 89 B.C.L.R. (2d) 1 (S.C.C.)).

In *Moyer*, *supra*, Burnyeat J. held that the defendant's decision to maintain and

> inspect a sewer system was a policy decision, and therefore immune from scrutiny unless it can be shown that the decision was not taken in a *bona fide* exercise of discretion.
>
> In *Kerlenmar Holdings Ltd. v. Matsqui (District)* (1989), 40 B.C.L.R. (2d) 230 (B.C. S.C.) [additional reasons at (1989), 40 B.C.L.R. (2d) 230 at 268 (B.C. S.C.)], reversed in part, (1991), 56 B.C.L.R. (2d) 377 (B.C. C.A.), the court held that Matsqui's system of inspecting and maintaining its drainage system was a matter of policy that, absent nuisance or negligence in the operation of the system, the court would not interfere with.
>
> In *Brown*, *supra*, the Supreme Court of Canada held that a highway inspection and maintenance program was a matter of policy.
>
> The defendant has indicated that it considered, but for reasons of cost and practicality, decided against, inspecting storm service laterals. The authorities are clear that inspection and maintenance systems, in general, are matters of policy, and that should be the result in this case.
>
> There is no allegation by the plaintiff that the defendant's maintenance and inspection program arose in other than a *bona fide* fashion or that it is so irrational as not to constitute a *bona fide* exercise of discretion. It follows that there is no basis for impugning the defendant's maintenance and inspection program. There is therefore no basis for imposing on the defendant a duty to inspect or maintain storm service laterals.

The action was dismissed on the basis that insufficient evidence was before court to determine whether municipality's conduct met standard of care, and as such summary judgment was not appropriate in the circumstances.

At para. 69, the Court said, however:

> From a practical stand point, rather than going to a full trial this case should be settled between the parties on a split fault basis. I would encourage the parties to do so.