



## **Municipal Liability for Sewer and Water Pipe Failures** **... Despite Statutory Authority and Immunity**

### **Introduction**

There is nothing more fundamental to human society than access to water and safe disposal of human waste and wastewater. In the January 2007 edition of the *British Medical Journal*, readers of that publication considered the introduction of clean water and sewage disposal piping systems as the greatest medical advance since 1840.<sup>1</sup> In most Canadian urban areas, these fundamental services are provided by municipalities through sewer and water pipes, some over 100 years old. These billions of dollars of buried infrastructure normally serve us so well that they are overlooked, "out of sight, out of mind". They are rarely top tier political issues, and when budgets are tight it is tempting to defer their inspections, maintenance, repair or replacement. The backlog of repairs and replacement has been characterized by Ontario's Ministry of Public Infrastructure Renewal as a 'water infrastructure deficit'.<sup>2</sup> The water infrastructure deficit in Ontario has been estimated by the Province's own Expert Strategy Water Panel as between \$30 and \$40 billion.<sup>3</sup> As a result, many experts fear a deluge of pipe problems and failures, including water main breaks and leaks, and sewer breaks, blockages and backups. Some such failures may be seen as a temporary inconvenience and have relatively few impacts on third parties and the environment, but others cause huge losses and damages. In the Toronto area in 2006 two separate sink holes had estimated repair costs of several million dollars each, quite apart from the disruption to homeowners and the lost business of nearby stores and restaurants.

On February 8, the *New York Times* published an article highlighting the problems of our aging pipeline infrastructure.<sup>4</sup> The author states that "thousands of miles of century-old underground water and sewer lines are springing leaks, eroding and — in extreme cases — causing the ground above them to collapse. Though there is no master tally of sinkholes, there is consensus among civil engineers and water experts that things are

---

<sup>1</sup> More than 11,300 readers of the *British Medical Journal* chose the introduction of clean water and sewage disposal—"the sanitary revolution"—as the most important **medical milestone since 1840**, when the *BMJ* was first published. Readers were given 10 days to vote on a shortlist of 15 **milestones**, and sanitation topped the poll, followed closely by the discovery of antibiotics and the development of anaesthesia. The work of the 19th century lawyer Edwin Chadwick, who pioneered the introduction of piped water to people's homes and sewers rinsed by water, attracted 15.8% of the votes, while antibiotics took 15%, and anaesthesia took 14%.

<sup>2</sup> See Ontario Budget Papers, page 123 accessible via the internet at [http://www.ontariobudget.ca/english/pdf/papers\\_all.pdf](http://www.ontariobudget.ca/english/pdf/papers_all.pdf)

<sup>3</sup> In July 2005, the **Water Strategy Expert Panel** released its final report to the Ontario government entitled, *Watertight: The case for change in Ontario's water and wastewater sector*. The report addresses a number of challenges being faced in Ontario's water and wastewater sector. It can be accessed at [www.waterpanel.ontario.ca](http://www.waterpanel.ontario.ca)

<sup>4</sup> William Yardley, *Gaping Reminders of Aging and Crumbling Pipes*.



getting worse." The article also showed graphic photos of sinkholes that had swallowed trucks and cars. In the US, it is estimated that nearly 50% of pipes will be in poor condition (or worse) by 2020. At the same time, demand on the system is increasing. Sound familiar?

Burst watermains may flood homes and businesses; sinkholes may disrupt traffic, utility services and businesses; and sewer backups that flood basements and lakes with human waste. Even mere leaks can create risks to human health, for example through contamination of surface water and drinking water. Due to the building boom and the skyrocketing property prices across many cities across Canada there appears to be a dramatic shift of the population into high rise office towers and residences. All of these high rises rely on high pressure water sprinkler systems as their first and often only line of defence against fire. In an ironic twist, this increased reliance comes at a time when the average age of watermains in the City of Toronto, for example, is rapidly approaching and in many cases has surpassed their maximum life expectancy.

When these "accidents" happen, do municipalities have to pay for the harm caused? If so, should they be spending more on inspection, maintenance, repair and replacement of their water and sewer infrastructure?<sup>5</sup>

At first blush, municipalities should not have much to worry about. In some provinces such as Ontario, they benefit from both statutory authority and statutory immunity. Yet despite these twin defences, municipalities still risk being held liable, criminally or civilly, for malfunctions of their sewer and water pipes. This is the subject of this article.

### **Examples of liability imposed on municipalities for sewer and water pipe problems.**

The courts are much more willing to impose liability on municipalities than they have been to impose similar liability on more senior governments. Examples that specifically relate to sewer and water pipes include:

- In *Port Alberni (City) v. Moyer*,<sup>6</sup> the plaintiff successfully sued the City after flooding from a sewer backup damaged his basement. The City had a program, accepted by City council, of video inspection and sewer flushing, for both preventative maintenance and for emergency response. The City's program was supposed to flush 10% of the lines each year; by the year of the incident, they should have inspected all lines, but had not done so. The plaintiff succeeded even

---

<sup>5</sup> An instructive article that assists in pointing out the lack of clarity even in defining the term "infrastructure" and challenges in identifying infrastructure needs as well as the scope of infrastructure debt or deficit is CG Vander Ploeg's *Municipal Infrastructure in Canada: Issues of terminology and methodology*. (Canada West Foundation, November 2003) available at [http://www.infrastructure.gc.ca/research-recherche/result/alt\\_formats/pdf/rs05\\_e.pdf](http://www.infrastructure.gc.ca/research-recherche/result/alt_formats/pdf/rs05_e.pdf) (accessed February 7, 2007). Infrastructure (as defined by the City of Edmonton) "is the physical assets developed and used by a municipality to support the community's social and economic activities". (at p2) This, of course, includes water and sewer pipes.

<sup>6</sup> [1999]B.C.J. No. 423 (B.C. Supreme Court)



though B.C.'s *Municipal Act* (as it then was) gave municipalities statutory immunity in an action based on nuisance or the rule in *Rylands v. Fletcher* if the damages arise "directly or indirectly, out of the breakdown or malfunction of (a) a sewer system..."<sup>7</sup>

- In *Carson v. Gloucester (City)*,<sup>8</sup> a resident successfully sued the City for flooding from a nearby drainage ditch, following a thaw and heavy rainfall. Carson had called the City, which advised him to obtain a second sump pump; he did this and also tried himself to open the culvert (and failed). A City worker attended on site and did nothing. Another City employee improperly attempted to clean out the clogged ditch, and no one inspected his work. Ontario's *Drainage Act*<sup>9</sup> provides that, in the absence of negligence on the part of the City, the City is not liable in damages for damage caused by drainage works blocked by snow or ice and overflowing onto a person's lands.
- In *Canada v. Ottawa-Carleton*,<sup>10</sup> a water main in downtown Ottawa burst and flooded several large office buildings. The building occupants (including the federal government) successfully sued the City. While the cast iron main had operated without incident since 1917, and had been properly installed and operated, it had been defective when originally manufactured, many decades before the City took over the road. The Court found the City liable in nuisance; the criterion of inevitability relates to what is possible according to the state of scientific knowledge at the time.
- In *Clemmens v. Kenora (Town)*,<sup>11</sup> Kenora was successfully sued for a sewer backup. The Town had a program to assess its sewer and watermain needs and to make repairs, through systematic video inspection. The inspection revealed a broken pipe near the plaintiff's home; the Town's workers had begun repair work, but stopped at the onset of frost. Spot repairs were not done because of the added expense; the sewer line later backed up.
- In *R. v. City of Barrie*,<sup>12</sup> the City was convicted of discharging raw sewage into a creek when sewage overflowed from a pumping station. The pumping station was blocked with construction debris dumped into a manhole by unknown builders. Initial attempts to find the overflow were unsuccessful until daylight.
- In *Laurentide Motels Ltd. c. Beauport (Ville)*,<sup>13</sup> water was not available at fire hydrants for 45 minutes after a fire started. The City was held responsible<sup>14</sup> for

---

<sup>7</sup> Section 288

<sup>8</sup> [2000] O.J. No. 3863 (Ont Sup Ct of Justice)

<sup>9</sup> R.S.O. 1990, c. D-17, s. 79(3)

<sup>10</sup> (1988) 65 O.R.(2d) 79 (Ont Sup Ct, HCJ); aff'd (1991) 5 O.R.(3d) 11 (Ont CA)

<sup>11</sup> (1999) 6 M.P.L.R. (3d) 59 (Ont Sup Ct Justice)

<sup>12</sup> Unreported (June 25, 2002, Ont C.J.)

<sup>13</sup> [1989] 1 S.C.R. 705

property damage caused by the failure of municipal firefighters to put out the fire. It had not taken sufficient care to ensure that all fire hydrants were always kept in working order.

- In *McLaren v. Stratford (City)*,<sup>15</sup> a severe rainstorm caused widespread flooding with both sewage and storm water. The City received 445 property damage reports. The Province refused to provide disaster relief because the damage was from a sewer backup. The plaintiffs successfully had a class action certified against the City, asserting that the City was responsible to maintain storm and sanitary sewers in the area, and had negligently failed to take action despite past flooding.

And the most famous case of all:

- In *Tock*<sup>16</sup> the plaintiff's basement was damaged when the municipality's storm sewer became blocked on a day of unusually heavy rainfall. Water backed up and flooded the plaintiff's basement. The plaintiff sued alleging negligence, nuisance and the rule in *Rylands v. Fletcher*. ...

### **Municipalities - Legal structure, powers and responsibilities**

What is the basis for all these claims? And should municipalities expect more of them as climate change increases the intensity of rainfall and other stresses?

In general, the duty of care under tort law applies to municipalities in the same way that it applies to any ordinary corporation. Typical torts claimed in pipe cases are nuisance, negligence and *Rylands v. Fletcher*. Municipalities also have the same responsibilities as other corporations to comply with environmental statutes, e.g. to prevent, report and cleanup spills.

But municipalities have statutory powers and duties that corporations do not have, plus unique financing opportunities and constraints and two major defences that corporations rarely have: the defence of statutory authority, and the defence of statutory immunity.

### **Statutory Powers and Duties in Municipal Statutes**

Powers are optional; duties are mandatory. Municipalities are clearly authorized by statute to provide sewer and water services.<sup>17</sup> Strictly speaking, this is usually a power and not a duty,<sup>18</sup> but there is no practical alternative in urban areas.<sup>19</sup>

---

<sup>14</sup> While the City was held responsible under Quebec's Civil Code, the case is of interest to the common law provinces as it was a Supreme Court of Canada decision, the principles of which apply across the country

<sup>15</sup> (2004), 50 C.P.C. (5th) 310 (Ont. S.C.J.); add'l reasons in (2005), 13 C.P.C. (6th) 113

<sup>16</sup> *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181

<sup>17</sup> Provincial enabling legislation, such as Ontario's *Municipal Act, 2001*, provides municipalities with this authority and with powers to fulfill their roles as public authorities.

The *Municipal Act, 2001* makes municipalities responsible and accountable for matters within their jurisdiction; they are given powers and duties under this and other Acts for purposes that include providing services and other things the municipality considers necessary and desirable for the municipality, and fostering the current and future economic, social and environmental well-being of the municipality.<sup>20</sup>

Municipalities are also authorized to exercise regulatory authority over water and sewer pipes that connect to municipal utilities.<sup>21</sup> Municipalities have general<sup>22</sup> and specific<sup>23</sup> powers. Municipalities have general powers to make by-laws concerning matters within several broad spheres of jurisdiction, including waste management, public utilities and drainage and flood control (except storm sewers).<sup>24</sup> A public utility is defined to include a system that provides water and sewage services for the public, as well as the service that is provided.<sup>25</sup> Under these general powers, municipalities can regulate or prohibit respecting a matter (e.g., water or sewer systems), provide for a permit or licence system, and impose conditions for obtaining licences and approvals.<sup>26</sup> Municipal powers are interpreted broadly and within their context and statutory limitations, unless there is express direction to the contrary in the legislation.<sup>27</sup> A municipality may also regulate matters not specifically provided for in any Act purposes related to the health, safety and well being of its inhabitants.<sup>28</sup>

Statutes for individual cities or regions may also give specific powers that relate to water and sewer services.<sup>29</sup> For example, the *City of Toronto Act, 2006*<sup>30</sup> includes special

---

<sup>18</sup> Under the *Municipal Act, 2001*, Ontario municipalities have the discretion to provide certain systems and services, such as sewage and waterworks. The language used in the statute is permissive ("the municipality *may* pass by-laws"). For example, see s. 11 of the Act

<sup>19</sup> In some cases, a municipality is mandated to provide services. For example, under s. 86 of the *Municipal Act, 2001*, a municipality must supply a building with a water or sewage public utility under certain conditions. This is required, for example, when the building lies along a supply line; if there is a sufficient water supply (water public utility) or sufficient capacity for handling sewage from the building; and if any person requests the supply in writing (with some exceptions).

<sup>20</sup> section 2

<sup>21</sup> By-laws may be enacted by municipalities to provide for standards that must be met for public or private sewer connections, such as standards for methods and materials used in their construction (e.g., these must resist root entry, acid/alkali damage), restrictions in the number of service connections, and may specify that sewer connections meet requirements determined by the municipality from time to time. For example, see the City of Toronto Sewer Use By-law (681-11) Sewer connections (at p. 681-26ff); available at [http://www.toronto.ca/legdocs/municode/1184\\_681.pdf](http://www.toronto.ca/legdocs/municode/1184_681.pdf) (accessed February 7, 2007)

<sup>22</sup> Part II of the Act, ss. 8-23

<sup>23</sup> Part III of the Act, ss. 24-149

<sup>24</sup> *Municipal Act, 2001*, s. 11.

<sup>25</sup> *Municipal Act, 2001* s. 1(1)

<sup>26</sup> *Municipal Act, 2001* s. 9

<sup>27</sup> Section 9 of the Act. See also *Croplife Canada v. Toronto (City)* [2005] O.J. No. 1896 (Ont CA); lv to appeal to Supreme Court refused [2005] S.C.C.A. No. 329

<sup>28</sup> This power has been interpreted broadly, eg. to authorize a bylaw prohibiting the cosmetic use of pesticides. Section 130 of the Act

<sup>29</sup> Some municipalities have statutes specific to themselves, under Ontario's *Municipal Act, 2001*. These are defined stipulate that, unless expressly provided or by necessary implication, the Municipal Act does



powers for the municipality, as well as provisions that mirror the statutory immunity in the *Municipal Act, 2001*.

While these statutes do not specifically require municipalities to keep their sewer and water infrastructure in good repair, it is possible that this could be implied because of the essential nature of these utilities to an urban population.

### **Statutory Duties to maintain infrastructure**

Some statutes expressly require municipalities to maintain infrastructure. For example, Ontario's *Safe Drinking Water Act, 2002* ("SDWA"),<sup>31</sup> mandates that "potable" water must meet the minimum requirements of prescribed drinking-water quality standards, despite any other Act or regulation.<sup>32</sup> The SDWA has stringent requirements for owners and operators of drinking water systems.<sup>33</sup> For example, it requires that the owner of any drinking water system, including a municipal drinking water system, *ensure* that *all* water provided by the system as drinking water meet certain prescribed quality standards, and that the system be maintained in good repair and operated in accordance with the requirements under the Act.<sup>34</sup>

The *Ontario Water Resources Act*, ("the OWRA") provides that sewage works *shall* at all times be maintained and kept in good repair, and operated in a manner and with facilities as may be directed by a Director appointed under the Act.<sup>35</sup> As well, a Director may report to a municipality that it is necessary in the public interest for water or sewage works (or any part) be established, maintained, operated, improved, extended, enlarged, altered, repaired or replaced. The municipality *shall* forthwith do everything in its power to implement Director's report.<sup>36</sup> While municipalities have some power to delegate these duties,<sup>37</sup> they cannot entirely avoid responsibility for ensuring that the duties are carried out.

---

not limit or restrict the powers of a municipality under a special Act.; nor does a special Act limit or restrict a municipality's powers under the *Municipal Act, 2001* (s. 7 of the *Municipal Act*)

<sup>30</sup> at ss 390 through 393. By comparison, neither the *City of Kawartha Lakes Act, 2000*, nor the *Regional Municipality of Peel Act, 2005* contain such provisions.

<sup>31</sup> S.O. 2002, c. 32

<sup>32</sup> s 10

<sup>33</sup> Note that a "drinking water system" is defined in s. 2(1) to mean "a system of works, excluding plumbing, that is established for the purpose of providing users of the system with drinking water and that includes, (a) any thing used for the collection, production, treatment, storage, supply or distribution of water,...". Plumbing is defined as "a system of works, (a) that comprise a "water system" for the purposes of the definition of "plumbing" in...the *Building Code Act, 1992*, other than equipment installed in plumbing to treat water, and (b) that are connected to a drinking-water system."

<sup>34</sup> s 11

<sup>35</sup> s 61

<sup>36</sup> s 62

<sup>37</sup> For example the Ontario Clean Water Agency has the power to make agreements with municipalities for the provision of water service or sewage service. The Agency may exercise any or all of the powers conferred by general statute on a municipality respecting the establishment, construction, maintenance or operation of water works or sewage works. *Ontario Water Resources Act*, R.S.O. 1990, C. O40 at sections 10-12. See also s. 63, which provides that the Agency may enter into binding agreements with



The *OWRA* also provides that any person may complain to the Ontario Municipal Board that a municipality is constructing, maintaining or operating sewage works or has control of these works, and has failed to do anything required under any Act (or regulation under any Act), or by any order or direction or agreement with the municipality, or has done such thing improperly. The complaint must include that this action (or inaction) is causing deterioration, loss, injury or damage to property. The Board may make any order, award or finding in respect of any such complaint as it considers just.<sup>38</sup>

The *Drainage Act*<sup>39</sup> imposes duties on a municipality to inspect, maintain and report on its drainage works.<sup>40</sup> A municipality has a duty to maintain and repair drainage works<sup>41</sup> and may be liable for non-repair. Where ice or snow blocks the drainage works, causing property damage, a municipality may be liable if this occurred due to negligence.<sup>42</sup> Also

---

municipalities to provide and operate water/sewer services. agreements The Act (at s. 1(1)) defines “sewage works” as any works for the collection, transmission, treatment and disposal of sewage or any part of such works, but does not include plumbing to which Ontario's *Building Code Act, 1992* applies. It defines “water works” as any works for the collection, production, treatment, storage, supply and distribution of water, or any part of such works, and also excludes plumbing to which Ontario's *Building Code Act, 1992* applies. Note that “plumbing” under this latter Act has been interpreted to mean “a drainage system”, that is, the pipes, fittings and fixtures *on the property*. It is not clear precisely where “plumbing” ends and “sewage” begins. See *Parry Sound (Town), Re*, [1997] O.E.A.B. No. 21

<sup>38</sup> s 57

<sup>39</sup> R.S.O. 1990, c.D.17

<sup>40</sup> The following definitions bring municipalities into the scope of this Act. At section 1:

“**drainage works**” includes a drain constructed by any means, including the improving of a natural watercourse, and includes works necessary to regulate the water table or water level within or on any lands or to regulate the level of the waters of a drain, reservoir, lake or pond, and includes a dam, embankment, wall, protective works or any combination thereof;

“**public utility**” means a person having jurisdiction over any water works, gas works, electric heat, light and power works, telegraph and telephone lines, railways however operated, street railways and works for the transmission of gas, oil, water or electrical power or energy, or any similar works supplying the general public with necessities or conveniences.

<sup>41</sup> Ontario's *Drainage Act*

s. 74 Any drainage works constructed under a by-law passed under this Act or any predecessor of this Act, relating to the construction or improvement of a drainage works by local assessment, **shall be maintained and repaired by each local municipality through which it passes**, to the extent that such drainage works lies within the limits of such municipality, at the expense of all the upstream lands and roads in any way assessed for the construction or improvement of the drainage works and in the proportion determined by the then current by-law pertaining thereto until, in the case of each municipality, such provision for maintenance or repair is varied or otherwise determined by an engineer in a report or on appeal therefrom.

<sup>42</sup> *Drainage Act* provisions:

#### **Power to compel repairs**

79. (1) Upon...notice in writing served by any person affected by the condition of a drainage works, upon the head or clerk of the local municipality whose duty it is to maintain and repair the drainage works, the municipality is compellable ... to exercise the powers and to perform the duties conferred or imposed upon it by this Act as to maintenance and repair or such of the powers and duties as to the referee appears proper, **and the municipality is liable in damages to the owner whose property is so injuriously affected.** [emphasis mine]

#### **Municipality liable for damages caused by non-repair**



under this Act, the municipality must appoint a superintendent to inspect every drainage works and to report to council on the condition of the works.<sup>43</sup>

A prescribed standard of care for municipal drinking water systems has been passed, but is not yet in force;<sup>44</sup> this will legislate a duty on the part of municipalities and their employees to exercise a level of care, diligence and skill that a reasonably prudent person would be expected to exercise in a similar situation, and to act honestly, competently and with integrity. This could be a very difficult standard of care to meet.

The *Fire Protection and Prevention Act, 1997*<sup>45</sup> requires every municipality in Ontario to provide such fire protection services as it determines may be necessary in accordance with its needs and circumstances<sup>46</sup>. Virtually every municipality has interpreted this obligation to require a network of watermains and fire hydrants in urban areas. In the event that the system is inadequate in any manner, the Fire Marshal has certain powers to monitor and review the fire protection services provided by municipalities to ensure that municipalities have met their responsibilities and, if the Fire Marshal is of the opinion that, as a result of a municipality failing to comply with its responsibilities, a serious threat to public safety exists in the municipality, he or she may make recommendations to the council of the municipality with respect to possible measures the municipality may take to remedy or reduce the threat to public safety. If the municipality ignores the Fire Marshal's recommendations, the Minister charged with administering this Act may recommend that regulations be made that establish fire protection service standards in municipalities and require municipalities to comply with the standards.<sup>47</sup>

Breach of a statutory duty is presumptive evidence of negligence. Municipalities that fail to maintain infrastructure when required by statute to do so may face administrative liability (i.e. be subject to regulatory orders), civil liability (lawsuits for damages) or even prosecution. For example, it will be a serious offence under the SDWA to fail to meet the

---

(2) Despite subsection (1), the local municipality whose duty it is to maintain and repair drainage works shall not become liable in damages to any person affected by reason of the non-repair of the drainage works until after service by or on behalf of such person of the notice referred to in subsection (1) upon the head or clerk of the municipality, describing with reasonable certainty the alleged lack of maintenance and repair of the drainage works.

**No liability where drainage works blocked by ice or snow**

(3) The local municipality whose duty it is to maintain and repair a drainage works is not liable in damages for any injury caused by reason of a drainage works being blocked by snow or ice and overflowing the lands of any person **without negligence on the part of the municipal corporation**. [emphasis mine]

<sup>43</sup> s. 94(1) The drainage superintendents appointed by the council of a local municipality shall inspect every drainage works for which the municipality is responsible and shall report periodically to council on the condition of the drainage works in the municipality.

<sup>44</sup> s. 19

<sup>45</sup> S.O. 1997, Chapter 4

<sup>46</sup> s. 2(1)

<sup>47</sup> ss.2(1)–2(10)



new standard of care for delivery of safe drinking water. Penalties may be significant; individuals may face jail.<sup>48</sup>

### **Environmental statutes**

Prosecution is also a favoured tool under environmental statutes. Several environmental statutes impose duties on everyone, including municipalities, to avoid pollution that could occur through, e.g., inadequate maintenance of sewers.

For example, s. 36 of the *Fisheries Act* forbids any discharge of a deleterious substance into water frequented by fish. Numerous cases confirm that raw sewage is a deleterious substance.

Ontario's *Environmental Protection Act* ("EPA")<sup>49</sup> contains a general prohibition against discharging contaminants, which are defined to include any solid, liquid, gas, odour or combination that result directly or indirectly from human activities and that causes or may cause an adverse effect.<sup>50</sup> An "adverse effect" is defined under the Act to include injury or damage to property or plant/animal life; harm or material discomfort to any person; loss of enjoyment of normal use of property or interference with normal conduct of business.<sup>51</sup>

A spill of sewage into the natural environment breaches this prohibition, and engages the spills provisions of the EPA<sup>52</sup>. A municipality is considered to have "control" over sewage in its pipes, and must prevent it from being spilled into the environment.<sup>53</sup> The EPA also places a duty to mitigate and restore the natural environment on the municipality, as owner/person having control of the spilled pollutant; this duty arises as soon as the municipality knows or should have known the pollutant was spilled and is likely to cause an adverse effect.<sup>54</sup> A similar prohibition is found in s. 30 of the *Ontario Water Resources Act*, ("the *OWRA*").

The penalties for such spills can be very substantial. Every person who contravenes the Act is guilty of an offence; in serious matters, conviction on a first offence can bring fines of up to \$6 million per day of the offence for corporations (this could include municipalities) and up to \$4 million per day and/or up to 5 years in jail for individuals. The monetary penalty increases for subsequent offences.<sup>55</sup> As well, in determining a

---

<sup>48</sup> ss 141 to 144

<sup>49</sup> R.S.O. 1990, c. E19

<sup>50</sup> s. 6; definition in s. 1(1)

<sup>51</sup> s 1(1)

<sup>52</sup> at ss. 91 ff

<sup>53</sup> The term "spill" means a discharge of a pollutant into the natural environment, from or out of a structure (pipes would be considered structures) and that is abnormal in quantity/quality in light of the circumstances of the discharge (in this case, freely flowing sewage would be considered abnormal).

<sup>54</sup> s 93

<sup>55</sup> As municipalities are often charged under other environmental statutes (e.g., the *Ontario Water Resources Act*, the *Nutrient Management Act*, 2002; and the *Pesticides Act*), it is significant that, in determining previous convictions, convictions under these statutes are taken into account. See ss 186-188.1

sentence, the court is required to consider aggravating factors, such as where an offence resulted in impairment of water quality, or where the party committing the offence was motivated by a desire to decrease costs.

### ***Powers: Policy versus Operational decisions***

When citizens sue municipalities over their powers (rather than their duties), much turns on whether the decision in question is one of policy or of operations.<sup>56</sup> Municipalities do *not* owe a private duty of care to citizens to take care in making discretionary *policy* decisions, and therefore cannot be sued, *if* that policy decision is made as a *bona fide* exercise of its discretion.<sup>57</sup> Policy decisions are:

“decisions of a political nature for which the authority should be accountable not before the courts but before the electorate or the legislature.”<sup>58</sup>

Thus, a municipality could refuse, as a matter of policy, to provide municipal water or sewer services, either generally or in a particular area. However, when a municipality decides to provide these services, it owes a duty to its citizens to take reasonable care in constructing and maintaining the system. Such acts are described as operational, and therefore can be the subject of a civil suit. Unfortunately, as it is often difficult to characterize a decision as purely “policy” or “operational”, it sometimes seems that the courts impose liability whenever they believe it is fair to do so.

For example, in *Just*, boulders fell onto a busy highway, killing the passenger of a car and injuring her father. The province had a system in place for inspecting rock slopes and carrying out remedial work on them. In suing the province for negligence in failing to maintain the highway, the father challenged the way in which the inspections were done, the frequency of inspections, and the manner in which remediation should have been carried out.

The *Just* court recognized the need to differentiate between *policy decisions* and their *operational implementation*. As a general rule, decisions concerning budgetary allotments are classified as policy decisions.<sup>59</sup> It is important to protect governments (and their officers and employees) from liability for policies because, otherwise, the courts would constantly interfere with what should truly be political decisions.<sup>60</sup> The “operational” aspect of a governmental activity includes that manner and quality of an inspection system, and the standard of care applied to a particular operation is assessed in light of all surrounding circumstances, including budgetary restraints, and the availability

---

<sup>56</sup> *Anns v. Merton*, [1978] A.C. 728 (H.L.)

<sup>57</sup> In *Just v. British Columbia*, [1989] 2 S.C.R. 1228, the court stated that once a policy is established, it is open to a litigant to attack that policy as not having been adopted in a *bona fide* exercise of discretion, and to show that, considering the circumstances, including budgetary restraints, the court should make a finding on the issue. (at para 15)

<sup>58</sup> *Laurentide Motels Ltd. c. Beauport (Ville)* [1989] 1 S.C.R. 705 (S.C.C.) at para 24

<sup>59</sup> *Just*, at para 29

<sup>60</sup> At para 17

of trained staff and the appropriate equipment.<sup>61</sup> The court cited an Australian case<sup>62</sup> as providing helpful guidelines:

The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognize that *a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints*. 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 it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness*. [emphasis added by the court in *Just*].

In *Just*, the manner in which inspections were carried out, and how remediation was undertaken, were held to be operational in nature. They involved matters related to administrative direction, expert or professional opinion, technical standards or general standards of care. As such, these inspections were subject to review by the court to determine whether the province had been negligent or had satisfied the standard of care. In *Just*, the court agreed that it was reasonable for the user of a highway to expect that it be maintained properly. The matter was referred for a new trial.<sup>63</sup> **If a duty of care is owed by the government agency to the individual, and no exemption (by statute or policy decision-making) is available, then a traditional torts analysis follows.**

Thus, once a municipality has decided to provide sewer or water service in a particular area, the actual provision of this service will probably be found to be operational, and therefore subject to civil lawsuits.

However, a municipality need not upgrade and expand its service to accommodate growth. In *Riverscourt Farms Ltd v. Niagara-on-the-lake (Town)*,<sup>64</sup> fire destroyed the plaintiff's building. The plaintiff sued the Town in negligence for failing to ensure that an adequate water supply was available to extinguish the fire. The defendant Regional Municipality of Niagara was responsible for supply, treatment and storage of water for local municipalities; the Town was responsible for distribution of water and maintenance of lines and water mains. The water system was outdated and both the Region and the Town knew that there was not enough water to fight a large house fire. Elements of negligence were established: the plaintiff was owed a duty of care by the Region and the

---

<sup>61</sup> *Just*, at para 30

<sup>62</sup> *Sutherland Shire Council v. Heyman* (1985), 60 A.L.R. 1, 59 A.L.J.R. 564, (per Justice Mason)

<sup>63</sup> On the other hand, the policy itself may not need to be sound. In *Barratt v. North Vancouver*, [1980] 2 S.C.R. 418, a case in which injury had occurred because of a pothole on a road, the Supreme Court of Canada determined that the City had established an inspection policy that was reasonable and proper. However, Justice Martland stated (in *obiter*) that the City could not be held negligent because it formulated one operational policy rather than another. He also said that if, in implementation of the policy, municipal employees acted negligently and caused damage, liability could arise. [See *Just* at para 15]

<sup>64</sup> 8 M.P.L.R.(2d) 13 (1992) Ont Ct Justice (Gen Div)

Town; damage to the plaintiff by fire was foreseeable due to the lack of water. There was sufficient relationship of proximity between the parties, where it was reasonable that carelessness on the part of the defendants would likely cause damage to the plaintiff. However, the Town exercised its discretionary power in establishing a fire department and in operating and maintaining waterworks; it had no statutory obligation to establish these services. It was exercising a policy decision in not upgrading its water system. It could not therefore be held liable in negligence.

A municipality can however still be liable for damages arising primarily from urban growth and increased loading of its systems. In *Oosthoek v. Thunder Bay (City)*,<sup>65</sup> four actions were brought as test cases to determine if a City was liable for flooding to private property. Two actions related to flooding from water due to backup from combined sewers and two cases were for damage when water escaped from burst, leaking or corroded cast iron watermains.

During a heavy rainstorm in June 1991, about 200 basements were flooded. The combined sewer systems were installed in 1907 and 1925 and during the subsequent years, urban development resulted in increased water loads on the system. In 1965 consultants recommended to the City that rainwater leaders (flow of water from eaves troughs) be disconnected from the system. It was not until 1985 that the City passed a by-law directing that existing rainwater leaders and weeping tiles be disconnected (homeowners to pay) and prohibiting any future connection to the storm sewer. The evidence at trial were that no attempts were made to enforce the 1985 by-law despite the fact that bylaw officials recognized from the outward appearance of homes that the disconnections had not been made. The agreed statement of facts clearly identified the flow from rainwater leaders as a contributing factor to the floods. At trial, the judge found that the City did not act with reasonable care, in its operational non-enforcement of the by-law. The policy decision not to enforce the by-law was successfully challenged on the basis that the decision was not made in the *bona fide* exercise of discretion. The City was found negligent. The judge rejected the municipality's argument that the sewer backups were an inevitable consequence of the original construction of the sewers; rather the backups were due to several factors that overloaded the system, including the extensive paving of roads and other surfaces, new homes being added to the system, and the fact that the leaders and weeping tiles had not been disconnected. The Court of Appeal upheld the decision at trial that the municipality was liable to the plaintiffs in both nuisance and negligence arising from the failure to take reasonable measures to enforce the 1985 by-law.

The watermain cases in *Oosthoek* are also of interest. These involved two cast iron watermains that flooded citizens' basements. One, installed in 1909, had a latent defect not detectable by visual inspection and burst in 1990. A second, installed in 1956, burst in 1993. The City was found liable in nuisance for the water cases because it was unable to establish that breaks in the watermain were an inevitable consequence of the

---

<sup>65</sup> 30 O.R. (3d) 323 (Ontario Court of Appeal)

installation of the watermains. The City was not liable in negligence, as its yearly allotments for maintaining and upgrading the waterworks were based on budgetary considerations, a basis for the defence of policy decision.

### **The Defence of Statutory Authority**

One traditional defence that municipalities have relied upon, especially in nuisance actions, is the *defence of statutory authority*. Government bodies regularly carry out activities that impose costs and constraints on some people, in the name of the larger public interest. The defence of statutory authority allows them to do so, without being sued, if the adverse impact on the victim could not be avoided without sacrificing the public interest:

The traditional rule is that liability will not be imposed if an activity is **authorized by statute** and the defendant proves that the nuisance is the "**inevitable result**" or consequence of exercising that authority." [emphasis added]<sup>66</sup>

Because of the importance of this traditional defence, the *OWRA* also provides that sewage works constructed, maintained or operated in compliance with the *OWRA*, Ontario's *Environmental Protection Act* (and applicable regulations), and with any orders, directions or approvals issued under authority of the *OWRA* shall be deemed to be under construction, constructed, maintained or operated by statutory authority.<sup>67</sup>

Unfortunately, statutory authority provides, at best, a narrow defence to nuisance. In *Ryan*, a motorcyclist was injured while trying to cross railway tracks located on a Victoria city street; the front tire of the vehicle became trapped in a flangeway gap that ran along the inner edge of the tracks. The plaintiff sued the applicable rail companies and the City, claiming that the flangeway created a hazard because it was unnecessarily wide; the railways denied liability on the ground that the tracks were authorized by, and complied with, all applicable statutes, regulations and administrative orders. The regulations prescribed a minimum width for the flangeways, but no maximum. The court examined whether the hazard created was an "inevitable result" of exercising statutory authority; that is, whether it was "practically impossible" for the Railways to avoid the nuisance from the gap. Since the maximum width of the flangeway was a matter of discretion on the part of the railways, it was not an "inevitable result" or "inseparable consequence" of complying with the regulations. The railways had decided not to install flange fillers when these became available after 1982. The Court found that the wide flangeways created a greater risk than was absolutely necessary, and that the defence of statutory authority was not available. A similar narrowing of the defence of statutory authority was expressed by the Ontario Court of Appeal in *Oosthoek*<sup>68</sup>, by applying the

---

<sup>66</sup> *Ryan v. Victoria (City)*, 168 D.L.R. (4<sup>th</sup>) 513, [1999] S.C.R. 201, at para 54

<sup>67</sup> s. 59

<sup>68</sup> *Oosthoek*, paragraph 35



burden of proof upon the defendants in the manner expressed by Justice Sopinka in *Tock*<sup>69</sup>.

### The Defence of Statutory Immunity

In the late 1980's, after four Supreme Court of Canada decisions<sup>70</sup> seemed to push municipal liability to unbearable lengths, several provinces amended their municipal statutes to provide a new *defence of statutory immunity*.<sup>71</sup> These amendments limit or exclude liability for municipalities, thereby reducing exposure to lawsuits and associated costs.<sup>72</sup> In particular, claims in nuisance are not available in several provinces. The statutes also provide for general immunity from personal liability, which, from a policy perspective, serves the public interest in that it encourages individuals not to fear seeking public office.<sup>73</sup>

For example, these statutory provisions may provide immunity from liability for:

- any act done in good faith in performance of a duty, or for any neglect or default in performance of that duty, although may not specifically exempt negligent acts;<sup>74</sup>
- in nuisance for escape of water and sewage from sewage works or water works;<sup>75,76</sup>

---

<sup>69</sup> *Tock*, at paragraph 94

<sup>70</sup> *Laurentide Motels Ltd. v. Beauport (Ville)*, [1989], 1 S.C.R. 705; *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181; *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Rothfield v. Manolakos*, [1989] 2 S.C.R. 1259

<sup>71</sup> Several of the cases listed above were decided before these amendments were made.

<sup>72</sup> For example, Ontario accomplished this in 1997 (Bill 86)

<sup>73</sup> *Gook Country Estates Ltd. v. Quesnel (City)* 2006 BCSC 1382, 26 M.P.L.R.(4<sup>th</sup>) 36, 48 R.P.R.(4<sup>th</sup>) 16 at para 97

<sup>74</sup> For example, Ontario's *Municipal Act, 2001* at Part XV "Municipal liability" provides

448. (1) No proceeding for damages or otherwise shall be commenced against a member of council or an officer, employee or agent of a municipality or a person acting under the instructions of the officer, employee or agent **for any act done in good faith in the performance or intended performance of a duty or authority** under this Act or a by-law passed under it **or for any alleged neglect or default in the performance in good faith of the duty or authority**.

[However, it also provides as follows]

(2) Subsection (1) **does not relieve a municipality of liability to which it would otherwise be subject in respect of a tort** committed by a member of council or an officer, employee or agent of the municipality or a person acting under the instructions of the officer, employee or agent. [emphasis mine]

<sup>75</sup> Ontario's *Municipal Act, 2001*

s. 449 (1) No proceeding based on nuisance, in connection with the escape of water or sewage from sewage works or water works, shall be commenced against,

(a) a municipality or local board;  
(b) a member of a municipal council or of a local board; or  
(c) an officer, employee or agent of a municipality or local board.

(2) In this section,

"sewage works" means all or any part of facilities for the collection, storage, transmission, treatment or disposal of sewage, including a sewage system to which the Building Code Act, 1992 applies;

- claims based on nuisance or the rule in *Rylands v. Fletcher*, if the damages are directly or indirectly due to breakdown or malfunction of a sewer system or a water or drainage facility or system;<sup>77</sup>
- claims based on damage resulting from performance of a discretionary power from any policy decision made *in good faith* by the municipality (e.g., inspections, lack of inspections);<sup>78,79</sup>
- no action against a current or former municipal public officer,<sup>80</sup> for anything he/she said, did or omitted in performance of his/her duty or exercise of his/her powers *unless* this person acted dishonestly, was grossly negligent<sup>81</sup> or their misconduct was malicious or wilful.<sup>82</sup> However, certain corporations (e.g., councils or regional board) will not be immune from tort liability committed by these persons, if that body would have been liable had the provision not been in force.<sup>83</sup>

---

“water works” means facilities for the collection, production, treatment, storage, supply or distribution of water, or any part of the facilities.

(3) Subsection (1) does not exempt a municipality or local board from liability arising from a cause of action that is created by a statute or from an obligation to pay compensation that is created by a statute.

(4) Subsection (1) does not apply if the cause of action arose before December 19, 1996.

<sup>76</sup> Alberta’s *Municipal Government Act*, R.S.A. 2000, c. M-26 goes further than this to exclude torts *not* based on negligence:

s. 528 A municipality is not liable in an action based on nuisance, or on any other tort that does not require a finding of intention or negligence, if the damage arises, directly or indirectly, from roads or from the operation or non-operation of (a) a public utility, or (b) a dike, ditch or dam.

The Act defines a “public utility” to include systems for water, sewer or drainage.

<sup>77</sup> *Local Government Act*, RSBC 1996, c. 323, s. 288

<sup>78</sup> Ontario’s *Municipal Act, 2001* provides:

450. No proceeding based on negligence in connection with the exercise or non-exercise of a discretionary power or the performance or non-performance of a discretionary function, if the action or inaction results from a policy decision of a municipality or local board made in a good faith exercise of the discretion, shall be commenced against,

- (a) a municipality or local board;
- (b) a member of a municipal council or of a local board; or
- (c) an officer, employee or agent of a municipality or local board.

<sup>79</sup> Alberta’s *Municipal Government Act* provides for discretion with respect to policy and operational matters:

529 A municipality that has the discretion to do something is not liable for deciding not to do that thing in good faith or for not doing that thing.

and

530(1) A municipality is not liable for damage caused by

- (a) a system of inspection, or the manner in which inspections are to be performed, or the frequency, infrequency or absence of inspections, and
- (b) a system of maintenance, or the manner in which maintenance is to be performed, or the frequency, infrequency or absence of maintenance.

<sup>80</sup> B.C.’s *Local Government Act*, RSBC 1996, c. 323. This term includes a council member, and an officer or employee of the municipality or regional district (s. 287(1))

<sup>81</sup> Note that the standard of “gross negligence” is much higher (and harder to prove) than mere “negligence”

<sup>82</sup> s. 287(2), (3)

<sup>83</sup> s. 287(4)

While somewhat controversial, statutory immunity provisions can be effective. For example, in *Bavelas v. Copley*,<sup>84</sup> construction on the Copley property caused silty water to drain more quickly into a roadside ditch owned by the City of Saanich. From there, the water flowed onto the Bavelas' property, and damaged a marsh. Neither the Copleys nor the city of Saanich would correct the problem. Dr. Bavelas sued them, and won at trial, but lost on appeal, because s.596 of B.C.'s *Municipal Act*<sup>85</sup> provided statutory immunity from liability for a nuisance created on municipal land by a third party. The relevant provision was:

596 (6) No action arising out of, by reason of or in respect of the construction, maintenance, operation or use of a drain or ditch authorized by this section, whenever the drain or ditch is or was constructed, may be brought or maintained in a court against a district municipality.

However, BC repealed this statutory immunity shortly afterwards.

Even when they are in force, statutory immunity provisions are not iron clad. As described above, the City lost in *Port Alberni (City) v. Moyer*,<sup>86</sup> where the plaintiff's basement was damaged by flooding from a sewer backup due to a buildup of gravel in the line. B.C.'s *Municipal Act* (as it then was) provided that a municipality is *not* liable in an action based on nuisance or the rule in *Rylands v. Fletcher* if the damages arise "directly or indirectly, out of the breakdown or malfunction of (a) a sewer system..."<sup>87</sup> The Court decided that a buildup of gravel in a sewer, causing a backup, was neither a "breakdown" nor a "malfunction", thus denying the City its statutory immunity defence.

Similarly, a statutory immunity defence was no help to the City of Gloucester when Carson's house was flooded.<sup>88</sup> Ontario's *Drainage Act*<sup>89</sup> provides statutory immunity only in the absence of negligence; the Court found the City negligent. Carson had called the City, which advised him to obtain a second sump pump; he did this and also tried himself to open the culvert (and failed). A City worker attended on site and did nothing. Another City employee improperly attempted to clean out the clogged ditch, and no one inspected his work.

## Negligence

To succeed in a claim of negligence, a plaintiff must prove the following:

---

<sup>84</sup> 2001 BCCA 160 (B.C. Court of Appeal)

<sup>85</sup> R.S.B.C. 1979, c. 290. At the time of trial in 1998 the section had been re-numbered as section 560. The *Municipal Act* was later repealed and replaced with the *Local Government Act*; Section 596(1) became s.549 under the new Act. This section, however, was repealed in 2003 (per [http://www.qp.gov.bc.ca/statreg/stat/L/96323\\_17.htm#section549](http://www.qp.gov.bc.ca/statreg/stat/L/96323_17.htm#section549))

<sup>86</sup> See footnote 3, above

<sup>87</sup> Section 288

<sup>88</sup> See footnote 5, above

<sup>89</sup> R.S.O. 1990, c. D-17, s. 79(3)



- The municipality owed that plaintiff a duty of care;
- The municipality breached that duty of care, by failing to meet the requisite standard of care; and
- Breach of that duty must cause damage to the plaintiff that was reasonably foreseeable.

Where a municipality chooses to provide a water, sewer and drainage system, it owes a duty to take reasonable care in construction, maintenance and operation of the system. By breaching this duty of care, such as by failing to have a reasonable inspection, maintenance and monitoring program in place, a municipality is vulnerable to a claim in negligence.

The Supreme Court of Canada affirmed that the "Anns/Kamloops" test is the appropriate one to determine whether a body owes a duty of care.<sup>90</sup> As stated by Justice Bastarache in *Ingles v. Tutkaluk Construction Ltd.*<sup>91</sup> :

These cases provide the basis for determining whether the law can impose on a public authority a private law duty towards individuals, enabling individuals to sue the authority in a civil suit, and for determining whether a duty of care is owed by a public authority in particular circumstances. To determine whether a private law duty of care exists, two questions must be asked....

(1) is there a sufficiently close relationship between the parties (the local authority and the person who has suffered the damage) so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so,

(2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

Once it is determined that a municipality owes a duty of care to a person (or class of persons, such as citizens), the next step of the analysis is to determine the applicable standard of care and whether the municipality met this standard. To avoid liability, a municipality must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person under the same circumstances.<sup>92</sup> The facts of each case determine what is "reasonable", and consideration may include the likelihood of a foreseeable harm occurring, the seriousness of that harm, and the cost burden of

---

<sup>90</sup> In *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 (S.C.C.), the Supreme Court of Canada affirmed the test set in *Anns v. Merton London Borough Council*, [1977] 2 All E.R. 492 (U.K. H.L.), that it had adopted in *Nielsen v. Kamloops (City)* [1984] 2 S.C.R. 2 (the "Anns/Kamloops" test)

<sup>91</sup> [2000] 1 S.C.R. 298 (at para 17)

<sup>92</sup> *Ryan* at para 28



preventing the injury. External indicators of reasonable conduct may also be considered, for example, customary practice in the industry and statutory or regulatory standards.

The standard of care for providing and maintaining water and sewer infrastructure may vary somewhat from municipality to municipality, but would involve regular inspection of water and sewer lines, installation and maintenance of pipes according to industry specifications (e.g., with respect to materials used, method of installation), as well as competent operation of the system. If inspections are to be made, these must be reasonable and made properly. The court may review the inspection scheme to determine if it is reasonable and has been carried out reasonably in light of all the circumstances, in order to determine if the municipality has met the required standard of care.<sup>93</sup>

Adequate training and knowledge on the part of municipal employees engaged in servicing the system would be required. One example of how municipalities ought to deal with infrastructure is contained in a recent article by an infrastructure engineer for the City of Calgary.<sup>94</sup> The article includes a comparison of PVC versus metallic distribution mains with respect to corrosion rates, and examines locations and causes of documented PVC main failure in the City over several years. It stresses the importance that inspections are done to rigorous standards.

Thus, a municipality may be found liable in negligence if

- It failed to have an inspection system in place;
- It failed to ensure the system was reasonably maintained;
- Its employees (or agents) were careless in constructing, inspecting and maintaining the system;
- It failed to respond to complaints in a timely manner (e.g., if a flood or sewer backup occurred due to slow response time by a city crew).

### **Can a municipality refuse to inspect?**

Unless there is a statutory duty to act, or unless they have undertaken to act, governments may make a *policy* decision not to inspect, maintain, or repair its water and sewer infrastructure. In *Ingles*, Justice Bastarache stated:

While I have stated above that a government agency will not be liable for those decisions made at the policy level, I must emphasize that, where inspection is provided for by statute, a government agency cannot immunize itself from liability by simply making a policy decision never to inspect.<sup>95</sup>

---

<sup>93</sup> See para 23 of *Just*

<sup>94</sup> Roy Brander, “Minimizing failures to PVC watermain” (undated) Available at <http://www.pvc4pipes.org/documents/files/PXII/sess4a/Brander.pdf>

<sup>95</sup> *Ingles v. Tutkaluk Construction Ltd* [2000] 1 S.C.R. 298 (Justice Bastarache, at para 19)



However, it is difficult to imagine that a municipality can escape having a duty to act in this area. As described above, several environmental and other statutes impose relevant duties, including the duties to provide safe water, to keep sewage works in repair, and to prevent pollution.

Despite the above, where inspection is *not* mandated by statute, a municipality may make a *policy* decision *not* to inspect. It would consider all relevant circumstances (e.g., cost of inspections, age of infrastructure, likely consequences of line breaks, allocation of scarce funding) and (according to the caselaw) would not be liable in negligence for that *policy* decision. For example, in *Vizbaras v. Hamilton (City)*<sup>96</sup> the plaintiff tripped in her driveway over the cap of a service barrel leading to the City's water supply. The cap is normally flush with the surface of the driveway, but popped up due to heaving of the frozen ground. The City had 125,000 similar installations, and its policy was to respond to pop-up complaints, but not to inspect. The Court found that the policy decision had been made in good faith and that general practice among municipalities supported its reasonableness.

## Conclusion

Municipal councils are understandably resistant to devoting huge sums to invisible pipes. Costs of water and sewer service have already skyrocketed, due to post-Walkerton changes such as the *Safe Drinking Water Act*. The companion Bill, intended to ensure that adequate funding is available, has not yet been proclaimed.<sup>97</sup> A recent Toronto Star article highlighted the fact that Toronto needs to raise \$800 million to replace its aging pipes and to overhaul treatment plants.<sup>98</sup> The City is trying to come up with a way to balance rates charged to residents and businesses. This is a huge political issue: if rates are hiked too much, businesses will flee the City, depriving it of income. If residents have to pay too much for services, they may vote out the Council.

Nevertheless, despite the apparent protection provided by statutory immunities, municipalities risk civil suits and prosecutions if they fail to adequately inspect, maintain, repair and replace their underground infrastructure. After all, our society depends on it.

February 20, 2007

Jackie Campbell, B.Sc. (Pharm.), LLB

---

<sup>96</sup> (2005) 20 M.P.L.R.(4<sup>th</sup>) 131 (Ont Sup Ct Justice)

<sup>97</sup> Ontario's *Sustainable Water and Sewerage Systems Act, 2002*,<sup>97</sup> which is not yet in force, will require water supply operators to assess the full cost of providing services, and to implement full cost recovery plans. Water and wastewater services are broadly defined to include source protection measures related to distributing water, and collecting and discharging waste at ss 1(2), (3)

<sup>98</sup> "Big water users up in arms – industries, schools seek relief from 9% rate hike as city looks for way to spread the cost of urgent repairs between residents and businesses" John Spears, Toronto Star, January 16, 2007



Dianne Saxe, Ph.D. in Law, Certified Specialist in Environmental Law

(both of Saxe Law Office, Toronto)

Frank Zechner, B.A.Sc., P.Eng., LLB

(Executive Director, Ontario Sewer and Watermain Construction Association)