IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *3311876 Nova Scotia Limited v. Town of Trenton*, 2021 NSSM 32

Date: 20210907
Claim: No. SCP 495719

Between:

3311876 Nova Scotia Limited

CLAIMANT

And

Town of Trenton

DEFENDANT

Adjudicator:	Raffi A. Balmanoukian, Adjudicator
Heard:	June 7 and 8 and July 14, 2021, in New Glasgow, Nova Scotia **Via Teams**
Final Written Submissions:	July 8, 2021
Counsel:	Jason Kay, corporate principal, for the Claimant Natasha Puka, for the Defendant

Balmanoukian, Adjudicator:

[1] I have every confidence that any decision I make in this proceeding will be appealed. Given the dearth of binding authority in this Province on the issues of statutory construction at stake, perhaps any decision should be. Those with more epaulettes than have I would then have occasion to weigh in.

[2] That notwithstanding, it falls to me to dispose of this case on a proper review of the evidence and application of the facts to the law, as I understand them.

[3] Originally, there were two proceedings: this one, and a separate one against the Municipality of the County of Pictou. There was significant pre-trial discussion as to whether this violated the "split claim" prohibition in Section 13 of the *Small Claims Court Act*, RSNS 1989 c. 430, as amended. I decided that the matters would be heard on common evidence, with the issue of whether they resulted in separate or an aggregate dollar limit (be that by virtue of s. 13, or by virtue of the *Tortfeasors Act*, RSNS 1989 c. 471) to be argued separately. As it turns out, the "County Action" was settled before this hearing, on undisclosed terms, and it was not argued or pursued whether that settlement should impact the recoverable quantum (in the event of Claimant's success). It forms no part of my analysis.

[4] The substantive evidence and argument were heard over three nights; in addition, both parties presented comprehensive briefs and extensive exhibits. Much of this was tendered by consent without need of formal proof, a most helpful exercise given the nature of the reports, official records, etc. As well, while the Claimant was self-represented (in the sense that Mr. Kay is the Claimant's principal and a non-lawyer), it presented extensive charts and summaries which were of considerable assistance. Finally, both he and defence counsel proceeded with exemplary mutual courtesy and professionalism, to each other and to the Court. This is a case where tempers could easily have been inflamed or time and resources consumed with externalities and angst, particularly in a virtual environment. Although this is a Court of considerable informality, it is not UFC and while people may be attending from their living rooms, a Court it still be; it is not a living room to be spoken in as such. With some inevitable and minimal repetition on some points, both cases were presented efficiently, professionally, and courteously. It was a privilege to preside over such a hearing.

[5] I will outline a summary of facts as I find them, followed where necessary with a brief recount of specific witnesses' testimony and the documentary evidence. I will then discuss the applicable law as I understand or derive it. While

I may not refer to each and every document or piece of testimony, the parties may rest assured that I have reviewed them in their entirety.

Background and Findings of Fact

[6] Although the hearing was lengthy (by Small Claims standards) and the material considerable, the dispute is fairly simple and many facts are not in dispute. Where needed, I interpolate such findings as I must for the purposes of my analysis.

[7] The Claimant corporation owns a property which, while entirely in the Town of Trenton ("Trenton," "the Town," or "The Defendant"), abuts the (former) frontier between the Town and the Municipality of the County of Pictou. It also, unhappily, is bounded by Lowden Brook which frequently – one may say routinely – crests its banks, sometimes considerably. The Brook had originally been part of the Town-County boundary as well, but this was altered in part in 1989.[1]

[8] Lowden Brook[2] also traverses North Main Street, more or less perpendicularly. To that end, a culvert runs beneath the street; there was uncontradicted evidence that although this is approximately four feet square at

[1] Claimant's Book of Exhibits, Tab 6, surveyor's note 1
[2] Sometimes referred to as "Lowden's Brook" – see for example Defendant's Book of Exhibits Tab 6; I use what appears to be the proper nomenclature as derived from plans and other documentation in evidence.

entrance, it narrows considerably under the street, to perhaps as little clearance as 2.5'. As a result, at times a 'bottleneck' develops and water volume overwhelms this culvert, causing ponding and even a backup. The consequences to the Claimant's property are the subject of this dispute.

[9] The Claimant, for its part, purchased the damaged-but-not-destroyed property in question some time before August 2017.[3] There was some discussion about whether a building permit for renovations should have been issued, given the flooding issues in the area; it was established to my satisfaction that this was a "renovation" (as noted in the permit) rather than a construction permit, given that the number of units and building footprint remained unchanged and the prior damage to the building did not meet the threshold to cross from "renovation" to "construction."[4] I do not place any weight on the permit process in analyzing the Town's liability in this matter.[5]

[10] The Claimant received its occupancy permit in August 2018.[6]

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[3] Date of application for building Permit, Claimant's Book of Exhibits, tab 32; see also Defendant's Book of Exhibits, Tab 10. According to the Defendant's pre-hearing brief, it was in fact 2015.
[4] Parenthetically, it may have been a legal non-conforming use at the time of the permit but is now a permitted use in the current R-3 zone.
[5] The Defendant suggests in its pre-hearing brief that the Claimant was 'on notice' of propensity for flooding given a 2016 conflagration. I place no weight on this as (a) that flooding was an apparent result of a 'weather bomb' with widespread damage in Nova Scotia and (b) it appears to pre-date the replacement of weeping tile and drainage, which were approved by the Town. See Claimant's Book of Exhibits, Tab 24.
[6] Claimant's Book of Exhibits, tab 33.

[11] The Claimant proceeded to lease the apartments. The demised premises included basement-level units, which by all photographic evidence appear to be pleasant, well-appointed, and nicely finished.

[12] In January 2019 and again in July 2019, conflagrations[7] caused Lowden Brook to overflow, and the culvert was inadequate to disburse the water. To cut a long story short, the evidence was that this overflow at least reached the point where the house's drainage pipe for its weeping tile system exited. With nowhere for weeping tile discharge – not to mention brook flooding – to go, the basement flooded and damaged the lower units. There was also some indication that the weather events caused a sewage system owned and operated by the Municipality of the County of Pictou to fail, and as a result both storm water and waste water infiltrated the house[8]. This was partially but not entirely segregated; as noted, the claim against the County was settled before trial; the Claimant made a valiant effort to segregate which damages were for the account of the "waste water" damage and of the "storm water" damage, and which could reasonably be allocated (or shared) to which, net of recoveries[9]. Although disputed, this was not a focal

[7] Defendant's Book of Exhibits, Tabs 8, 11, 13.
[8] January 21, July 1, and July 28, 2019 according to the Claimant.
[9] As I have said, the "County Action" was settled on undisclosed terms; naturally this would apply against any amounts the Claimant purports to have allocated to the "County" responsibility. I do not know if these are equal to, less than, or over the amounts the Claimant allocated to the County in these proceedings. In addition, there was an

point of challenge by the Defendant and given my conclusion I will return to it but summarily later in these reasons.

[13] The evidence was also that while there were significant weather events on these two occasions, the brook floods are not rare events.

[14] There was also substantial and uncontradicted evidence that the Town was aware of this flooding, and several studies and infrastructural inventories identified the Lowden Brook culvert as inadequate for its purpose. It has been 'triaged' for repair or replacement, but this has not been done.

[15] Much of the evidence surrounded this point. I perhaps do that evidence an injustice by saving the gentle reader a chapter-and-verse discourse in favour of a summary thereof. Given my conclusions, it is sufficient to say that it was well established, and I so find that

- The Town was aware of the problem well before the 2019 events.

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allusion that the Claimant had been under the impression that it had, but in fact did not have, insurance coverage for the types of loss at hand. While the insinuation was that this was a broker error, the Claimant did not pursue any action in this regard. The Claimant seeks reimbursement net of what it ultimately did receive by way of such insurance coverage, according to how it allocates line items between "Town" and "County." It is trite but worth mentioning that such issues of insurance have no bearing on the liability of a tortfeasor, except insofar as an indemnitor may be subrogated to the Claimant. There appear be no such subrogation issues here given the issue of coverage and none were argued before me. The net claim still exceeds this Court's jurisdiction and for those reasons, such issues need form no part of my analysis. They do not do so.

- Various third party studies, whether engaged volitionally by the Town or by being "frogmarched" into participation therein by the Provincial Government, corroborated this fact and that the culvert should be a priority for repair.

- The Town of Trenton, to put it bluntly, is broke from an operational perspective, although it appears to have borrowing capacity (in the sense that its long term debt is below provincial governance thresholds). Its capital infrastructure budget is similarly constrained.

- The Town is an old one. It has a storied past, but like many Towns built on steel or other heavy industry, it has seen more prosperous days. With the vicissitudes of time, its infrastructure is aged and in places beyond the end of its economic life; these converge to make for a municipal budget wholly inadequate to make anything but a small dent in the 'wish list' annually, even under the best management.

- The Town did have at least some access to some funds at other levels of government, most particularly the Municipal Rural Infrastructure Fund.[10] Again to cut a long story short, regulatory and environmental conditions and

[10] Claimant's Book of Exhibits, Tab 28, 29

the ‘strings attached’ in terms of timing and scope of project resulted in the Town resiling from this enterprise.

- Town governance, both electoral and administrative, was questioned at various stages of the proceeding; a study presented by the Claimant also raised concerns.[11]

- The uncontradicted evidence is that the Town periodically visited, and deferred, the issue of the culvert and the resultant flooding. While again I do not intend to give short shrift to the extensive evidence on the point, the so-called “Dillon Study,”[12] the Municipal Climate Change Action Plan[13], the Storm Sewer Separation Project,[14] and the Town’s own planning strategies and corporate plan[15] all reach fundamentally the same conclusions. The Claimant succinctly summarizes these at its Tab 27. The topographic evidence is that the area in question is neither flat nor steep so as to call for special attention.

[11] The so-called “Ramsay study” at tab 39 of the Claimant’s Book of Exhibits; tab 7 of the Defendant’s Book of Exhibits.
[12] Claimant’s Book of Exhibits, Tab 25 and 26; Defendant’s Book of Exhibits, Tab 2.
[13] Claimant’s Book of Exhibits, Tab 40 – apparently commissioned by regulatory edict
[14] Claimant’s Book of Exhibits, Tab 30; Defendant’s Book of Exhibits, Tab 3
[15] Claimant’s Book of Exhibits, Tabe 36, 37, 41.

[16] The Claimant repaired, and ultimately re-let the damaged units. It claims for various losses, including lost rent without abatement for any vacancies that would have resulted but-for the damage (ie vacancies between tenants) or expenses that would be associated with full occupancy (e.g. landlord-borne utilities). It also claimed $7200 for the January 21 events, which was estimated as being what Mr. Kay's time was worth ($50 per hour for 60 hours) and that of a helper for 24 hours at the same rate[16]; he further claims costs including $621.17 in printing and $19.03 in other disbursements.

[17] It also, as I have noted, attempts with considerable ingenuity to accrue which alleged losses are for the account of the County and of the Town, and for which event (January or July 2019).

Additional evidence

Jason Kay

[18] Mr. Kay is the corporate Claimant's principal. He presented in a coherent and rational manner and, to repeat, with utmost courtesy to opposing counsel and witnesses. His preparation was meticulous and his material both voluminous and

[16] This adds up to $4200, not $7200.

organized. Much of it appears to have been acquired through dint of perseverance through various municipal officials and FOIPOP[17] applications. He gave a new meaning to "fighting city hall" for over two years.

[19] He reviewed and authenticated the exhibits tendered, to the extent not admitted by consent. These included photographs of the premises at various times, Lowden Brook, the offending culvert, and placement and construction of the house's drainage system (weeping tile and discharge pipe). When Lowden Brook overflows, it interferes with the weeping tile discharge pipe and activates a backwater valve; this stops sewage from getting in, or out. He walked the Court through an "experiment" which established what backups came from where[18]. I accept the validity of his methodology.

[20] He took the Court through the various studies and council/administrative actions (or inactions) to which I have referred. It is adequate to reiterate that I am fully satisfied that the Town knew of the inadequacy of the culvert and repeatedly listed it as a priority item, only for it to be deferred or cancelled time and again. These reasons ranged from budgetary (which was the case most of the time) to regulatory (changes in whether storm water, household waste water, both, or

[17] *Freedom of Information and Protection of Privacy Act*, SNS 1993 c. 5 as amended.
[18] Claimant's Book of Exhibits, Tab 22.

neither could be discharged into the East River and with whose approval) to logistical (timeline and requirements for provincial government funding).

[21] Post-diluvian correspondence and claims against the Town came to naught.[19]

[22] On cross-examination, Mr. Kay confirmed that his Tab 27 was a "subjective summary" which focused on what he considered relevant and did not cover every event or project He also confirmed that he did not know the point of infiltration of water (notwithstanding his experiment) and that he is not an engineer. The restoration quote in evidence was for the purpose of the Court's assessment of damages; the estimated work was not completed.

[23] The culvert did not overflow during the events of January 28, 2019; there was no rain.

[24] The culvert does not overflow every time it rains.

[25] The Dillon report, according to Mr. Kay, implies but does not outright state that culvert replacement will stop the flooding.

Stan Vaschal

[19] Claimant's Book of Exhibits, Tabs 42 and 43.

[26] Mr. Vaschal is a retired industrial engineer. From April 1987 he was the manager and operator of the water treatment plant for the Town of Trenton, and was the director of public works for 9 years, retiring in June 2020. He is not the "Town engineer" or a civil engineer.

[27] He testified that he had a single conversation with Earl MacKenzie (the Town of New Glasgow's engineer who had some role in Trenton as well) about increasing the capacity of the Lowden Brook culvert; he testified that MacKenzie was becoming frustrated with time limits; he (Vaschal) had no involvement with any proposed projects. He testified as to the change in regulatory requirements in discharging storm water, waste water, both, or neither into a tidal watercourse (of which the East River is in part, including at or very close to where the water in question here would have been discharged). Although he had some knowledge of the SNC Lavalin report[20], the "Dillon Report" was not brought to his attention.

[28] On cross-examination, Mr. Vaschal testified that it took "about six years" for the water separation project to be completed and to alleviate overflows at the sewage treatment plant (which was under scrutiny from the Department of the Environment). Much of the "triage" was prompted by a new subdivision (which

[20] Defendant's Book of Exhibits, Tab 3; Claimant's Book of Exhibits, Tab 30.

had to have storm water disbursement before it could be developed) and by climate change concerns to prevent water dumping (when prohibited) into the East River.

[29] The Smelt Brook culvert was replaced during the time in question as a priority item; it was partially collapsed and is on the main thoroughfare from New Glasgow to Trenton. This took "two to three years" from attention to completion.

[30] He testified that although the Lowden Brook culvert was old and may have "sunk" over the years, "different councils have different priorities" and it is not uncommon for a council to get a report and not to act on it.

Eric Jordan

[31] Mr. Jordan is an engineer and the expert retained by the Claimant. His report was tendered as Tab 33 of the Claimant's Book of Exhibits. His report lists, and he testified to, a series of "tasks" on which he embarked on or with regard to the subject property. The upshot was that he concluded that the Lowden Brook culvert was unlikely to handle a 1:1 storm (that is, an annual event) much less a 1:100 event (ie a once-in-a-century extreme weather disaster), and that the activation of the backflow valve (from blockage of the drain pipe) would lead to

backflow of black water from within the building.[21] He testified that if the culvert was fixed, the problem would 'go away,' and that a sump pump would be an inadequate solution.

[32] On cross-examination, he confirmed that he did not examine the sanitary sewer, was not at the property during the January or July 2019 events, and that there was no rain at the time of his inspection. He confirmed that storm water can infiltrate a house in various ways, and that the discharge pipe is an adequate part of the house's weeping tile system. He did not know by whom it was installed.

Roland Burek

[33] Mr. Burek is the former planning officer for the Town of Trenton, among other municipal units; he had previously been with the Pictou County District Planning Commission, which handled related matters for various municipalities within Pictou County until August of 2013. He testified that he had read the Dillon Report when it was presented, but was not the lead on it.

[34] He testified that the property in question (which he did not walk in person) had neither significant "low slope" nor "critical slope" (that is, under 2% or over

[21] He added that very little of the damage at issue with the building was from sewage as in effect it is an 'inside job' rather than an incursion from the public sewer.

25% slope), and that he was unaware of anything that could cause flooding on the premises "one way or the other." He did not dispute that the inadequate culvert could be such a cause.

[35] He testified that the Secondary Planning Strategy[22] is particular to the Town and part of its "official documents," while the Municipal Planning Strategy[23] is a type of document produced by various municipalities. The 2015 versions are still in effect and "similar" policies to those under consideration may have existed before; both documents identify policies to "upgrade the existing sewer system"[24] and "ensuring the proper operation and maintenance of the existing [sewer] system"[25]. Mr. Burek could not provide any explanation why the Lowden Brook culvert was not replaced or why the Town did not follow the implementation plan.

[36] He also confirmed that the building permit was for repairs not an expansion, was an "as of right" permit in the zone, and as such did not trigger an environmental impact assessment.

[22] Claimant's Book of Exhibits, Tab 37
[23] Claimant's Book of Exhibits, Tab 36
[24] Claimant's Book of Exhibits Tab 36, Policy M1-19
[25] Claimant's Book of Exhibits, Tab 37, Policy T-MI-16

[37] On cross-examination, Mr. Burek confirmed that the Climate Change Action Plan was mandated by the Province to prepare this plan[26] and it was not "voluntary." The decision of whether or not to follow an engineer's report was that of council.

Debbie Kampen

[38] The Defendant called Ms. Kampen, the former CAO of the Town from 2001 through to 2007 or 2008. Although her most frequent answer was "I don't know" or "I can't recall," the general tenor of her evidence was that money in Trenton was "non-existent" in some areas, including needed capital infrastructure renewal or repairs. She testified that the Town's financial situation was dire and that it was not permitted to run an ongoing operating deficit. Although borrowing room was available through the Municipal Finance Corporation or a commercial lender, "we had to weigh every project."

[39] She was aware of the Dillon Study but did not recall its details; such reports, said she, were "taken into account" by council for prioritization. Given the Town's

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[26] Claimant's Book of Exhibits, Tab 40, Page 3

financial predicament and a total operating budget of approximately one million dollars[27], she said that "paving always took priority" and added that the "town was always swimming uphill[28]."

[40] The Lowden Brook project was thus a "significant undertaking" for the Town; as I have noted, while the Town attempted to obtain co-funding from the Province, the associated deadlines and regulatory requirements resulted in the Town abandoning that modality[29]

[41] On cross-examination, Ms. Kampen confirmed she left the Town's employ in approximately 2007 and could not speak to the Town's affairs in 2019. She was CAO when the Town sold the municipal airport, but could not speak to the associated revenue.

Earl MacKenzie

[42] Mr. MacKenzie, to whom I have already referred, was called by the Defendant. Although his employ was with the Town of New Glasgow, he also served as the director of Trenton's department of Public Works from 2001 to 2009.

[27] The 2019 financial statements show revenues of $4,222,808. I have no evidence of what they were during Ms. Kampen's tenure.
[28] I assume this was a slip for "upstream."
[29] Claimant's Book of Exhibits, Tab 28; Defendant's Book of Exhibits, Tab 6.

He managed a “very small” crew and water works, calling the capital planning exercise a “wish list” which prioritized regulatory compliance and health and safety. He confirmed that Town operational funds could not be allocated for capital renewal, at least not without council or CAO direction. Capital expenditures are an overall budget category and not subdivided into, for example, storm water management versus other capital projects.

[43] He reiterated the evidence I have recounted above that the Lowden Brook culvert project was a major undertaking, neither “shovel ready” nor subject to easy approval from relevant authorities (which may have included such ministries as Fisheries and Oceans, Environment, Transportation and Infrastructure Renewal, etc.)

[44] On cross-examination, he testified that “water on the road” such as might occur in a 1:1 storm at Lowden Brook was not considered as critical an issue as other failed or inadequate infrastructures which may require refurbishment or replacement to a 1:100 standard. He also testified that today’s flood modeling may differ from that contained in the Dillon Study due to climate change. Consequently, in his view the July 1, 2019 flood was not a “culvert issue” but instead a result of heavy rainfall in a low-lying area, and the resultant road flooding would not in itself raise the triage priority of the project. As he put it, “the more

[health and safety] benefits we can demonstrate, the better the chance of being funded."

Cathy MacGillivray

[45] Ms. MacGillivray was the Defence's penultimate witness. She was employed with the Defendant in ever-increasing roles, rising to Interim CAO in 2008 and then CAO from 2010 through to retirement in 2017. She was again interim CAO in 2019 at the time of the January events in question. She remembered the January 28, 2019 event because "the rain was pouring in" to her own home, causing significant living area damage.

[46] She described the Town's financial status as "broke," including a $200,000 deficit in 2019 which had to be rectified by the next fiscal year;[30] the capital budget was "depleted." Among other things including a salary freeze and a moratorium on accessibility projects, the Lowden Brook project was shelved. In making these decisions, Public Works' recommendations to council were considered by that latter body.

[30] The financial statements in evidence show this as $324,069. He also referred to $100,000 at one point in his evidence; this may be due to internal adjustments or cash versus accrual items. While this discrepancy is significant, it does not change the ultimate analysis.

[47] Ms. MacGillivray also reviewed the "Governance Study" in some detail. This included the impact of the Town losing both its CAO and public works director more or less simultaneously.

[48] The airport sale was used to pay down other debt.

[49] She did not know whether the Town reconsidered the Lowden Brook project after her departure. The new CAO, Brian White, "had access" to all of Ms. MacGillivray's files.

Wayne Teasdale

[50] Mr. Teasdale was the final defence witness. He was the Defendant's CAO from 2018 through to 2021 (although there appears to have been an interregnum given Ms. MacGillivray's role in 2019). He testified that the CAO establishes capital and operating budgets for Council approval; that the Town's financial situation in 2019 was "bad" to "broke," requiring a 17% property tax hike with no operating or capital reserve. Covering the deficit was the first priority for the subsequent year. He reviewed the Town's financial statements[31] and taxation base, which may best be referred to as "constrained." He testified that in 2019-21 the

[31] Defendant's Book of Exhibits, Tab 1

only major capital projects were roadworks from the "gas tax fund." There were no storm water projects.

[51] His cross-examination focused on the Claimant's various requests for documentation and FOIPOP applications, which I have already discussed.

Summary of Argument

[52] The Claimant says, in brief, that the Town knew of the inadequate culvert and did nothing about it; having repeatedly prioritized and then deferred the project it did not "follow its own rules" and thus breached the "operational duty of care" at common law; and the Claimant, having suffered damages (as allocated by it) as a consequence, is entitled to recovery.

[53] The Defendant says that the decisions to defer the Lowden Brook culvert are "policy" decisions and thus immune from liability, as is the decision "not to borrow" to fund it; and that in any event, the *Municipal Government Act*, SNS 1998 c. 18 as amended ("MGA") provides various fountainheads of immunity for the Town. While it did not spend any considerable time challenging the evidence of the damages calculated by the Claimant or their allocation, it did not admit them.

[54] I propose to address these arguments first by considering common law liability; if there is no such responsibility by the Town in negligence, in my view the statutory protections in the MGA are irrelevant, except to the extent it may colour the very existence of a duty of care at law; if however the Town is liable "but for" statutory protections, the latter require examination, given ordinary principles of statutory interpretation.

The failure to repair – policy or operation decision?

[55] In *Kamloops v. Nielsen*, [1984] 2 SCR 2, and again in *Cooper v. Hobart*, 2001 SCC 79, our highest Court adopted and discussed the seminal House of Lords decision in *Anns v. London Borough of Merton*, [1977] 2 All E.R 492 (HL). These cases are so well entrenched in our law as to require only perfunctory review. The Claimant relied heavily on *Kamloops* in its submissions.

[56] The *Anns* test, as imported to our law, involves two components.

[57] The first consideration, the so-called "proximity" test, requires an analysis of whether the loss is a reasonably foreseeable consequence of the Municipality's actions (or inaction); and whether there is a "sufficient relationship of proximity" between the parties.

[58] The second test, the "policy" analysis, is engaged if the proximity test is met. At this stage, at the risk of oversimplification, the relevant question is whether the act or omission is the result of a policy (or political) decision of the relevant body, or a faulty implementation of an operations decision. For example, a municipality may not be liable for failure to maintain a public work if it has made the "policy" decision not to prioritize that asset. However, if it does the repair but makes a hash of it and a person sufficiently proximate suffers a loss as a result, there could be liability (subject to any statutory immunity or limitation).

[59] In *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2011 NSCA 43, Farrar JA for the Court found there was an interplay between statutory immunity and proximity – namely the first militates against a finding of the second (paras. 28-35). That is all well and good. But it is not conclusive. For current purposes, I am hard-pressed to envisage a more "proximate" – literally and figuratively – Claimant than the one at bar.

[60] Specifically, I have no problem whatsoever here with the "proximity" branch of the test. In fact, the Defendant (subject to discussion of statutory immunity) largely concedes the point, at para. 53 of its pre-hearing brief.

[61] The property abuts Lowden Brook; the overflow is frequent and at times dramatic and has been identified as an issue since at least 2003. The repeat nature of the problem has been set forth already; and the Municipal officials approved the renovation which included laying and placement of the drainage pipe whose blockage is, as I find, a cause of at least some of the water infiltration.

[62] It is the second part of the test – namely "policy versus operation" – in which, in my opinion, the Claimant fails at common law.

[63] It is tempting to follow the Claimant's line of reasoning – that the Town, having identified the Lowden Brook culvert for renewal, and having repeatedly kicked the can down the road, "did not follow its own rules" and, as a consequence, is liable (subject to statute) for a faulty "operational" decision. Rephrased, it knew the problem, marked it for repair, and having not done so, this falls under "decisions made but not carried through properly, with resultant damage to a sufficiently proximate Claimant."

[64] Tempting indeed. There was substantial evidence of the staff and elected turnover at the Town of Trenton, of considerable disorganization and loss of corporate memory, and of general mismanagement – "incompetence," in places, is not too strong a word. The corporate governance report paints the Town as a poly-

sci case study of "what not to do." However, as Justice Brothers recently reminded us in *Bancroft v. Nova Scotia (Lands and Forestry)*, 2021 NSSC 234:

> [5] Elected officials on occasion make decisions, and use procedures, that leave some constituents feeling betrayed and even incensed. Where those officials exceed their power, judicial review may provide a remedy. But where the decisions are within their lawful authority, as in this case, the court cannot intervene. In such circumstances, if a remedy is sought by the public, the proper recourse in our constitutional democracy is not through the courts, but at the ballot box.

[65] So was the decision – decisions, really – to keep punting the Lowden Brook culvert a "policy" or an "operations" decision? With considerable empathy for the Claimant and reluctance from a fairness perspective, I must conclude the former. Whatever the cause or background, the ultimate facts are that the Town of Trenton has a crumbling infrastructure, is "broke as a joke" and has had more bad luck in its tax revenue base than Joe Btfsplk. If economics is the study of the allocation of limited resources to unlimited objectives, the Town of Trenton's capital budget is the study of the allocation of near non-existent resources to infrastructural collapse.

[66] To be sure, managerial issues abounded – but the ultimate prioritization to the water plant, paving, and regulatory compliance for a new subdivision is a policy decision. So is the decision not to use borrowing power for capital projects. So is the decision not to engage the shifting regulatory and timeline requirements that would have accompanied the Municipal Rural Infrastructure Fund requirements.

[67] I agree with the Claimant's submissions, citing *Just v. British Columbia*, [1989] 2 SCR 1228 and *Brown v. British Columbia*, [1994] 1 SCR 420 that where a Claimant establishes a lack of *bona fides* by the municipal authorities, irrationality or profound unreasonableness, or other impropriety, such can lead to a finding of an improper use of discretion and the resultant action (or inaction) can attract liability. The Claimant has not established this. Indeed, the evidence is that the Town did consider where to allocate what it had on hand, and did so. The Claimant understandably does not like the answer; but there was an answer.

[68] One may Monday-morning quarterback any or all of these decisions; but the Courtroom is neither a football field nor a school of public governance. For the *Anns* "policy" reason alone, I conclude that the Claimant's action must fail.

MGA Immunity

[69] The Defendant cites several sections of the MGA as excluding or limiting its liability to this Claimant. I take these in the order cited by the Defendant.

Section 513(2) MGA

[70] This Section reads:

> (2) Where an overflow of water from a sewer, drain, ditch or watercourse is a consequence of snow, ice or rain, a municipality, village or intermunicipal corporation created pursuant to Section 60 is not liable for a loss as a result of the overflow.

[71] While there are two reported Nova Scotia decisions on 513(1)[32] I have found only one reference to 513 as a whole; it is the general discussion – it may even consist of *obiter*- of Beveridge, JA in *Yarmouth (District) v. Nickerson*, 2017 NSCA 21. At Paras. 51-52, he stated for the Court:

> [51] *The Municipal Government Act* was enacted in 1998 (S.N.S. 1998, c.18). It is a large piece of legislation. There are 22 Parts with close to 600 sections. Section 504(3) is found in Part XXI entitled "GENERAL". There are four sections in Part XXI with the heading "No liability" (ss. 504, 513, 514, 515).
>
> [52] In ss. 513-515, the legislation directs that officers, employees and municipalities are not liable for failure to provide a service, or if they do provide it, for loss from a break, discontinuance or interruption of the service.

[72] Beveridge, JA was speaking in an overview of the MGA as a whole. It does not enlighten on the scope of s. 513(2) specifically. The Defendant submits that "sewer," being defined in s. 3(bp) of the MGA as including a "pipe or conduit" which conducts "sewage, groundwater, stormwater or surface runoff," includes the culvert; it also submits that a "watercourse" is defined in s. 3(r) as including a "stream…or other body of water."

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[32] *Austin v. Halifax*, 2008 NSSM 63 and *Bowden v. Withrow's Pharmacy Halifax (1999) Ltd.* 2008 NSSC 252, neither of which has application to the case at bar.

[73] Thus, in combination, the Defendant submits that the Municipality is not liable for an "overflow" from a "sewer" or "watercourse."

[74] I begin with a general principle: a provision which limits or excludes the rights of a citizen is strictly construed. The Court will not torture the meaning of the statute to encompass a particular situation; however, when the statute covers, it governs: See e.g. Boghosian and Davison, *The Law of Municipal Liability in Canada* at s. 2.163 (loose-leaf).

[75] Strict construction does not mean contortionate reasoning. The modern test for statutory interpretation is well-established. In *Nickerson*, supra, the Court put it this way:

> [49] There are a myriad of common law principles that can be enlisted to assist in statutory interpretation. The Supreme Court of Canada has designated Driedger's so-called modern rule as the preferred approach. Courts must look at the grammatical and ordinary sense of the words, read in their entire context, the scheme and object to the legislation. In *Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 42 Justice Iacobucci, for the court, wrote:
>
> > [26] In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):
> >
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
> >
> > Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, 1984 CanLII 20 (SCC), [1984] 1 S.C.R. 536, at p. 578, per Estey J.; *Québec (Communauté*

> *urbaine) v. Corp. Notre-Dame de Bon-Secours*, 1994 CanLII 58 (SCC), [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, per McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".
>
> [27] The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also *Stoddard v. Watson*, 1993 CanLII 59 (SCC), [1993] 2 S.C.R. 1069, at p. 1079; *Pointe-Claire (City) v. Quebec (Labour Court)*, 1997 CanLII 390 (SCC), [1997] 1 S.C.R. 1015, at para. 61, per Lamer C.J.)

[76] And so, here, what is the “grammatical and ordinary sense” of an enactment which excludes liability for an overflow from a watercourse or sewer, as these terms are defined? Does it include a culvert? And what if the culvert itself does not overflow, but the result of its bottleneck is that the watercourse or sewer has overflowed or backed up?

[77] To my thinking, absent any binding authority to the contrary, it would be too much an exercise in sophistry to say that the culvert is not part of the watercourse,

or that a culvert is not part of a "pipe or conduit." It may alter or direct the natural flow of water, but the person on the literal street standing atop the culvert would not say that s/he has a stream or sewer to the left and right, but not immediately beneath them. Similarly, the same person looking at a stream or sewer overflowing its boundaries would not differentiate between "a backup from a bottleneck" and an "overflow from a weather event." If the banks are breached, it's an overflow from one cause or the other.

[78] As dissatisfying as it may be from a fairness perspective, I am bound to conclude that the Town has statutory immunity under MGA s. 513(2).

Section 515(1) MGA

[79] Once again, there is "not much out there" on this section, which reads:

> 515 (1) Where a municipality, village or inter-municipal corporation created pursuant to Section 60 operates a utility or provides a service, it is not liable for a loss as a result of the breakage of a pipe, conduit, pole, wire, cable or a part of the utility or service or the discontinuance or interruption of a service or connection by reason of
>
> (a) accident;
>
> (b) disconnection for non-payment or non-compliance with a term or condition of service; or
>
> (c) necessity to repair or replace a part of the utility or service.

[80] Neither "service" nor "utility" is defined in the MGA. Absent binding authority otherwise, in my mind a culvert or watercourse comes within neither

meaning. The ordinary meaning of "service" does not include an inert fixture such as a culvert; and "utility" when used in the MGA is generally in the context of a benefit of general availability such as water. The fact s. 515(1) refers to "disconnection for non-payment" further implies that the Legislature was thinking of "utilities" in such a context, namely something that is provided for a fee, and likely for fees set by a regulatory authority such as the Utility and Review Board. I cannot conclude that this section assists the Defendant.

Section 514 MGA

[81] This may be dealt with briefly. Section 514 excludes liability on the part of the Town for a malfunction or breakage of a "stormwater system" (as defined in s. 3(bw) MGA) "unless the damages are shown to be caused by the negligence of the municipality." In other words, it excludes strict liability for such failures and incorporates general principles of negligence, as those principles apply to the Town.

[82] This brings us full circle to the question of "what is municipal negligence" – in other words, the *Anns* test as formulated in Canada. I have disposed of this above.

Damages

[83] As I have dismissed the claim, however churlishly, it is unnecessary for me to deal with damages. Given the different factors that the Claimant used in its calculation and allocation, it is tempting to do so provisionally. After careful consideration, however, I do not do so. They are outlined in exquisite detail in the exhibits and I have pointed out the basic methodology earlier in this decision. They also received rather cursory treatment at the hearing. In my opinion, a Justice on appeal is in every bit as good a position as am I to evaluate and assess damages in the event of Town liability, and can make their determination accordingly without any tint from this Court.

[84] The Claim is dismissed; in the circumstances, without costs.

Balmanoukian, Adj.