Citation:

Date:
File No: 36053
Registry: Kamloops

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
Civil Division

BETWEEN:

KEN DHALIWAL and DAYL DHALIWAL

CLAIMANTS

AND:

CITY OF KAMLOOPS

DEFENDANT

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE CLEAVELEY

Counsel for the Claimants:	S. Dev Dley, Q.C.
Counsel for the Defendant:	A.G. Atherton
Place of Hearing:	Kamloops, B.C.
Dates of Hearing:	January 25, 26, 2007; February 7, 2007; March 1, 2007
Date of Judgment:	May 30, 2007

[1] The Claimants, Ken Dhaliwal and Dayl Dhaliwal, (hereinafter referred to as the "Dhaliwals"), seek to recover repair costs to their home of $15,977.24 as a result of water runoff from the streets owned by the Defendant. The Dhaliwals allege that the Defendant breached their duty of care to the Dhaliwals because of the faulty design or the improper maintenance of its nearby streets.

[2] In response, the Defendant argues that the Dhaliwals have not proven on a balance of probabilities that any act or omission of the Defendant caused the damages claimed.

[3] The Defendant also takes the position that the claim is barred because of section 3(2)(a) of the Limitation Act, R.S.B.C. 1996, c.266 and section 286 of the Local Government Act, R.S.B.C. 1996, c. 323.

BACKGROUND:

[4] From the Agreed Statement of Facts:

1. The Dhaliwals own and reside at their home on 2097 Sifton Avenue, Kamloops, B.C. ('the property').
2. Sifton Avenue is a road that is owned by the Defendant.
3. A catch basin is located at the curb of Sifton Avenue at the front of and in the centre of the driveway leading from Sifton Avenue to the property.
4. The property has suffered settlement at the location of the concrete slab located below the house.
5. In approximately August, 2005, the Defendant repaved Sifton Avenue using a paving contractor.
6. On August 30, 2005, there was a sewer backup at the property. The Dhaliwals' insurer settled with them for repairs and cleanup following the backup.
7. Between approximately August 30 and November 30, 2005, the Dhaliwals engaged a contractor to perform repairs at the property.
8. During the investigation and repairs, the following was observed:

   (a) approximately eight to ten inches of raw sewage in the middle and lower levels of the house;

(b) some self-levelling mortar on the middle floor which indicated previous work to repair the concrete slab;

(c) a large crack in the foundation wall between the middle level and garage;

(d) during the tracking of the crack to the footings of the wall, water was seen percolating up through the crack and through the opening on the wall where the sewer pipe and water pipe came through the wall;

(e) water was discovered in the basement of the house coming in through a crack around the sewer pipe;

(f) using a camera sewer line, a break in the line just outside the foundation wall under the garage and front concrete slab was seen;

(g) chipping out the opening of the foundation wall around the sewer and water line entry, a large void was found around the sewer line just outside the foundation wall; and

(h) the exterior concrete slab, brick fence and garage slab at this location had sunk approximately 2.5 inches.

9. The contractor performed repairs which included the removal and replacement of the concrete slab at the basement and garage of the house and the installation of a new sewer line. The cost, $15,977.24, is the amount the Dhaliwals seek to recover from the Defendant.

10. In the period from 1998 to November 2, 2005, the Dhaliwals made no complaints to the Defendant about water flowing from City land onto their property.

11. On November 2, 2005, counsel for the Dhaliwals first provided the Defendant with written notice that they may claim from the Defendant damages to the property as a result of water flowing from the Defendant's land onto their property.

EVIDENCE ON BEHALF OF THE CLAIMANTS:

[5] Ken Dhaliwal testified that his family has owned this four-level split home for the past twenty-two years. From the front door of his residence you can look directly up Fleming Drive, which slopes directly down to Sifton Avenue and the Dhaliwal residence.

[6] The house is located approximately thirty feet from the curb which runs the length of property. There is a catch basin on the Avenue, but it is located within the curb and is generally ineffective

because water would run into a crack between the pavement and the curb. This crack also runs the entire length of the Dhaliwal property.

[7] In 1994, the Dhaliwals noticed that the third floor of their home had sunk and there was also some settling in the north corner of the garage. Believing that the house and garage had finished settling, the Dhaliwals believed it was appropriate to level the floors. A contractor was hired and self-levelling mortar was installed. After this improvement was completed, there was no further movement.

[8] . Also in 1994, a drain was installed in front of the garage.

[9] By 1996 Mr. Dhaliwal knew that water was coming over the curb on Sifton, running down his driveway and then ultimately onto the property owned by his next door neighbours, the Campbell's. At about this time Mr. Dhaliwal and Mr. Campbell installed an underground drainage pipe between their houses to help collect run-off from extreme rainfalls.

[10] Mr. Dhaliwal had never seen water flow from Sifton towards his house and they never had water in the house. Mr. Dhaliwal believed that the drain in front of the garage corrected the problem.

[11] Mr. Dhaliwal testified that he had no reason to believe that any damage was occurring to his property. Consequently, he had no reason to contact the City to complain about water problems.

[12] Following the installation of a crown on Sifton Avenue, no water has flowed from Sifton Avenue onto the Dhaliwal property.

[13] Colin Campbell testified that he lives at 2095 Sifton Avenue, the house to the north of the Dhaliwals'. Mr. Campbell has lived at that location for twenty years.

[14] Over the years Mr. Campbell saw that rainstorm runoff would cross his front lawn, down his driveway and drain between his home and the Dhaliwals.

[15] Runoff would also disappear in a crack or separation between the curb and the asphalt on Sifton. This would occur even during a light rainstorm. Mr. Campbell testified that runoff from car washing would run into the crack. It would continue, in this manner, all the way down Sifton until it disappeared completely.

[16] Mr. Campbell observed that on his property there were at least three areas that suffered from the soil sinking: the left hand side of his driveway, in front of his garage, and the front step to his residence also sank every year.

[17] Mr. Campbell testified that since the road was repaved there has been no shifting in these areas.

[18] In 2000, the Defendant did a cold patch repair to the gap between the curb and the asphalt on Sifton. During the repairs, Mr. Campbell's vehicle was parked on the Avenue and the City crew worked around it. This area of Sifton was not repaired. Mr. Campbell further testified that the cold patch deteriorated and the crack reappeared within a year.

[19] Mr. Campbell knew that his neighbour to the north, Al Ford, was speaking to the City regarding the water problem. He never the contacted them.

[20] During severe rainstorms Mr. Campbell knew that water would run from the Dhaliwal property onto his and pool. During such storms Mr. Campbell would use a shovel to divert the water away from his home and between his and the Dhaliwals'.

[21] Mr. Campbell also confirmed the placement of a drainage pipe between his home and that of the Dhaliwals' in order to catch excess water from rainstorms. Mr. Campbell testified that this system assisted with regard to ordinary storms, but not torrential downpours. Despite this remedial work, Mr. Campbell's driveway continued to sink.

[22] In cross-examination Mr. Campbell testified that shortly after moving into his home in 1987, it was obvious that water was flowing onto his property. This water would pool for approximately one hour or so. Mr. Campbell testified that in the late 1980s he recognized that pooling was occurring and he took steps to prevent this. This problem was discussed with the Dhaliwals and they jointly installed the drainage pipe between their properties.

[23] Al Ford has lived at 2093 Sifton Avenue for the past six years.

[24] He is a foreman for a local road construction company and has extensive experience in the maintenance and paving of roads. In 2002, during a good-sized rainstorm, Mr. Ford saw water running down Fleming Drive, over the catch basins and curbs, onto the Campbell property, and then his.

[25] Mr. Ford testified that in 2002 he phoned the City complaints department and voiced his concern about this problem. He was informed that someone from the City would attend and inspect the site. No one called him back and approximately three to four months later he phoned the City again and spoke to another City worker. Again, he was never contacted by the City.

[26] In 2003, Mr. Ford phoned the City with the same complaint. This call was very abrupt.

[27] Again in 2003, Mr. Ford wrote a letter to the City addressing his complaints. He requested that they inspect the property. He was not contacted by anyone from the City.

[28] On the east side of his house, the ground settled and an electrical box was pulled off the side of the house. At the front of his home, Mr. Ford landscaped the property so as to prevent the water from running directly down into the house. This project was completed in 2003-2004. In addition, the left side of his driveway settled. Mr. Ford repaired the driveway by putting a swale in place to direct the water elsewhere. On the far left-hand side of Mr. Ford's driveway the retaining wall started to lean and, ultimately, came to rest up against a nearby tree.

[29] During the course of his work with the City, Mr. Ford met Loris Pellizzon, who was the Field Services Supervisor for the Defendant's engineering department. Mr. Ford spoke to him about the street water running onto his property and causing damage to both his and the Campbell's property. Mr. Ford also testified that he told Mr. Pellizzon about the crack between the curb and the pavement along Sifton Avenue. Mr. Ford testified that Mr. Pellizzon reported to him that he was aware of the poor condition of the street and that it was a priority.

[30] During the course of their conversations regarding this issue, Mr. Pellizzon told Mr. Ford that he was not surprised that no one from the City had followed up with him on this concern. Ultimately, Mr. Pellizzon said that he would speak to someone at the City and also drive by and inspect the problem.

[31] In 2005, Mr. Ford again spoke to Mr. Pellizzon about his concerns. They inspected the road and Mr. Pellizzon acknowledged to Mr. Ford that there was a road design problem. Mr. Pellizzon told Mr. Ford that he was going to look into some changes.

[32] Following the crown being installed on Sifton, there has not been any water runoff onto his property and the shifting has stopped.

[33] Mr. Ford described the cold-mix solution used by the City to repair Sifton as a temporary patch or a band-aid solution.

[34] In cross-examination, Mr. Ford indicated that there were two occasions when he saw water flow into his yard. These events occurred during storms which were heavier than usual. During normal storms water did not flow onto his property.

[35] Mr. Ford also testified that Mr. Pellizzon told him that this type of complaint was not within his department.

[36] Mr. Ford acknowledged that his driveway was sinking because of the deterioration of the retaining wall. It does not have the holding power it once had. As for the retaining wall itself, Mr. Ford testified that he did not know its age or whether it was engineered. He also acknowledge that wood is not the appropriate material with which to construct a retaining wall.

[37] Mr. Ford was not aware if water was flowing onto the Dhaliwal property.

[38] Garry Shyiak, a commercial estimator with N & H Contracting Ltd., supervised the repairs to the Dhaliwal residence. See Joint Book of Documents, Tab 6(a). During his time at the Dhaliwal property, Mr. Shyiak observed that two applications of self levelling mortar had been installed on the third level of the house. As well, it was also used in the garage. Mr. Shyiak described this as a band-aid solution, because this involves adding more weight to an already sinking slab. Mr. Shyiak testified that had he been asked to inspect the property at the time the mortar was added, he would have sought out the cause of the settling of the slab.

[39] During the repairs, a large crack was discovered in the foundation wall and the material was excavated away from the wall down to the footings. Water was discovered percolating up through the

crack and an opening in the wall where the sewer and water pipes enter the residence. After it was determined that the copper waterline was not leaking, Mr. Shyiak hired another company to have the sewer line inspected by way of a camera. During this procedure, a break in the sewer line was found on the outside of the foundation wall and under the garage and front concrete slab. Subsequently a large void was discovered around the sewer line. This line was replaced and material hauled in to provide the proper support and allow for the appropriate drainage. Supports were also put in place for the sewer line.

[40] While on site Mr. Shyiak observed the effects of a torrential downpour. The water washed down Fleming and onto the Dhaliwal property, including the driveway.

[41] Mr. Shyiak testified that immediately after the sewer line was repaired, the percolating water stopped.

[42] Mr. Shyiak retained the services of Don Powell, a geo-technical engineer, to inspect the soils beneath the floor and to give an opinion as to the needed repairs.

EVIDENCE ON BEHALF OF THE DEFENDANT:

[43] Chris Jackson has been employed by the Defendant from 1976 to 1990 and then again from 1994 to the present day. Most recently Mr. Jackson has been the operations and maintenance supervisor for one year. Prior to that he was the construction and rehabilitation supervisor for twelve years.

[44] Mr. Jackson's duties are to oversee the construction and rehabilitation of capital and operational projects, i.e., installation and repairs to water, sewer and drainage projects.

[45] During the years 2002 to 2005 Mr. Jackson worked alongside Loris Pellizzon. Mr. Pellizzon was responsibe for capital projects for roads, water, and sewer and storm drains. Mr. Jackson oversaw the supervision of the City employees working on such projects, whereas Mr. Pellizzon oversaw contracted out work. The City had control of the smaller projects, whereas the larger ones were let out to contractors.

[46] Mr. Jackson also testified as to how complaints are received by the City. Generally, complaints are directed to a receptionist who notes the complaint and then directs it to the supervisor in charge. Thereafter the supervisor would give the complaint to a crew leader or someone charged with investigating the complaint. Following this investigation, a determination would be made as to the size of the project. For example, if the cost of a project was under $5,000.00, it would be dealt with internally or on an operational basis, whereas if the cost was over $5,000.00, it became a capital project. Capital project items are prioritized in terms of their cost, potential for damage, and the number of occurrences.

[47] Mr. Jackson also testified if a complaint call was transferred directly to a supervisor, then he or a crew leader would investigate. Such a call would likely not be documented by a receptionist.

[48] He checked the computer logs and could find no record of water complaints regarding Sifton Avenue. In addition, he did not recall any complaints like this.

[49] Mr. Jackson could offer no explanation for Mr. Ford's evidence regarding complaints. He also went on to say that he found it difficult to believe that this would slip through a crack.

[50] In cross-examination, Mr. Jackson testified that following a complaint and subsequent inspection, it is expected that there will be communication with the landowner. This could be done by leaving a message on an answering machine, or phoning back, either to the home number or a work

number, if one was obtained. These follow-up efforts would be documented. However, Mr. Jackson is aware that some complaints have not been responded to. It has happened in his department.

[51] Don Funk has worked for the Defendant since 1991 as a civil engineer. Mr. Funk has worked in the land development, design and drainage departments. In his capacity as a design and drainage engineer, Mr. Funk supervises staff, is involved in the planning and capital budgeting for the City and prioritizing projects.

[52] If a problem/project with the City has a bigger scope or cost implication, i.e., in excess of $5,000.00, then Mr. Funk gets involved. In such a case, he would make a site assessment of damage, the scope of area involved, and look at the infrastructure with a view to improvements. The tentative project would be prioritized as high, medium or low. Each year, 2-3 capital items are inserted into the budget.

[53] The highest priority is given to houses which are frequently flooded. In determining priority the City considers combining projects, such as water, sewer and drainage, when roads are being rehabilitated. Mr. Funk testified that the City has a system in place regarding pavement inspection and road quality. Each year an a meeting is held to determine which roads need rehabilitation and also to determine what other projects can be combined with the road rehabilitation project.

[54] Mr. Funk, in theory, confirmed the City's complaints process.

[55] Mr. Funk was not aware of the Sifton Avenue problems until he was told of this court case. He was surprised not to have known about the problem given its magnitude. Generally he knows of problem sites within the City.

[56] Mr. Funk testified that had a complaint been received of water flowing onto a property because of a low crown, the first step would have been to determine whether this was an unusual event or beyond the City's capacity to plan. If remedial steps were to be taken in the area, the City would look to include drainage in such a project.

[57] Mr. Funk testified that in 1999 another residence within the City was experiencing a drainage problem. After researching the drainage issue, the City took one year to develop a plan. The work was then budgeted for and completed in 2001 at a cost of $50,000.00.

[58] Mr. Funk also testified that between the years 2002 and 2005 the City's priority regarding drainage was a residence on Maple Street where there was no water outlet and the water was flowing into the ground causing flooding in the carport and threatening the house. This particular project was in the City's budget for three years before being completed. The Maple project was a medium priority. Mr. Funk went on to say that if in 2002 to 2005 a complaint like the Sifton properties was received, it would have been investigated, contemplated in conjunction with other work being done in the area and combined with the necessary paving. This approach is taken to improve the economy of scale and would involve the same contractor doing all of the work.

[59] Without an investigation he could not categorize the Sifton Avenue project in terms of priority.

[60] Mr. Funk testified that the Sifton project (with a cost of approximately $50,000.00) would not have been put ahead of the Maple project because of its history of problems.

[61] Mr. Funk also testified that a cold patch is a temporary remedy, generally applied in the winter and then fixed in the summer. As an engineer he would have expected that the filling of the gap with

cold fill would have been completed in its entirety, or in other words, without leaving a gap because of a parked vehicle.

[62] In about 1998, Mr. Funk began compiling a list of calls for service. The list indicated hot spots within the City which he was aware of and for others which were documented. Mr. Funk also testified that his list likely did not include all complaints.

[63] Loris Pellizzon testified that he worked for the Defendant for thirty-three years. For the years 1982 to 2005 he was the field service supervisor for the City's engineering department. One of his duties included being the project manager for road rehabilitation.

[64] Mr. Pellizzon explained that the City's road policy involves a consultant preparing a report, which includes assessing the condition and rating all roads. A committee of eight employees who meet to discuss concerns, problems and then funding for the projects. Following that stage, priorities are assigned.

[65] Mr. Pellizzon testified that he had two conversations with Mr. Ford in 2004 and 2005. In 2004 Mr. Ford called him regarding water from the roadway flowing onto his property. Mr. Pellizzon directed Mr. Ford to phone the central maintenance yard and voice his complaint. Mr. Pellizzon took no further steps because Mr. Ford's complaint was not within his department.

[66] In 2005, Mr. Ford told him that no one from the City addressed his concern. At Mr. Ford's request, Mr. Pellizzon inspected the Ford retaining wall. He saw that the wall was leaning and that it had lost its stability. Mr. Pellizzon could not conclude that the problems with the wall were caused by the water running off of Sifton Avenue. He had no further conversations with Mr. Ford and he never passed on Mr. Ford's complaint. He told Mr. Ford how to do it.

[67] Mr. Pellizzon inspected Sifton Avenue and noted that the road was constructed with the catch basins on the low side. He recognized that if there was an unusual event, there could be a water problem.

[68] Mr. Pellizzon was the contract administrator for the Sifton Avenue project in 2005. At that point the road was approximately twenty-eight years old and was worn out. This project had been in the planning stages for approximately three to four years.

[69] When Sifton Avenue was being rehabilitated, Mr. Pellizzon was responsible for the crowning of the road so as to divert the majority of the water to the high side of the road.

[70] Mr. Pellizzon testified that the information provided to him by Mr. Ford would not have changed the City's priorities in regards to road rehabilitation. There were more pressing needs than Sifton Avenue.

[71] In cross-examination, Mr. Pellizzon confirmed that he is aware of ground water issues in the Aberdeen area of the City. He also knew that in Aberdeen the City had to be careful in regards to surface water.

[72] Mr. Pellizzon considered the Ford problem to be one of surface water and not ground water.

[73] When Mr. Pellizzon inspected the Ford property and Sifton Avenue, he became concerned that there was a possibility of water damage on the lower side of Sifton Avenue. He came to accept Mr. Ford's position that repairs would be a good use of taxpayers' money and it was a good plan to split the water by crowning Sifton Avenue.

[74] Mr. Pellizzon testified that the City's prioritization was not indicated on a scale indicating low, medium and high, but that roads were rated one through ten.

[75] Don Powell, a geo-technical engineer, was called as an expert to offer an opinion as to the cause of the settlement at the Claimant's property.

[76] Mr. Powell testified that he was hired by N & H Contracting to inspect the soil below the floor and to offer an opinion as to how to repair the void between the floor slab and the soil, which had collapsed.

[77] During the course of his inspection, Mr. Powell saw that a levelling course had been placed on top of the original floor slab. This levelling course indicated to Mr. Powell that there had been some type of settlement previously. He testified that a levelling course does not remedy the cause of the settlement and is quite often only a band-aid solution. Mr. Powell opined that it is necessary to find out what the floor is sitting on to determine if a levelling course is going to be a benefit.

[78] Mr. Powell testified that the probable cause of the settlement was that the material below the floor slab, at the time of construction, was not adequately compacted. Later, the material could have become consolidated when moisture was added from some source. In addition, the settlement could have been caused by moisture adversely affecting a fully compacted floor.

[79] Although not retained to identify the source of the water, Mr. Powell was of the opinion that ground water, which is an issue in this area of the City, or water leaking from a ruptured sewer line was a possibility.

[80] Mr. Powell thought it unlikely that surface water could be a contributing cause to the collapse, because soils in this area have a very low ability to accept water. In other words, water does not tend to drain into this type of fine grained soil very quickly.

[81] It was also unlikely that the ponding of water against the foundation of the home could be the cause. This would require a large body of water over several days to give it sufficient time to percolate down through the soil and below the level of the basement. This scenario is even more unlikely in the Dhaliwal home because of a perimeter drain along the foundation line of the home.

[82] Mr. Powell also testified that it was unlikely that the settlement was caused from water flowing through the large crack at the curb in front of the Dhaliwal property. It was Mr. Powell's opinion that water flowing into such a crack would more than likely come to the surface as opposed to flowing into the soil. This is even more likely considering that the property sloped downwards towards the house.

[83] Mr. Powell also testified that if water flowing underneath the curb caused the Dhaliwal settlement, he would have expected the curb to settle as well.

[84] It was also Mr. Powell's opinion that it was impossible to tell whether the soil above the sewer line caused it to break or whether it was caused by the settlement of the slab. He also doubted that surface water or water from the curb gap could have caused the sewer line to rupture because of the volume of water needed to saturate the soil and initiate a settlement of the soil.

[85] Mr. Powell also testified that soil settlement on nearby properties is not helpful to him in determining the cause of the Dhaliwal problem because soil conditions may vary significantly from lot to lot in Kamloops.

[86] In cross-examination, Mr. Powell acknowledged that he was not comfortable in giving opinions as to what happened in respect to the Dhaliwal property. He acknowledged that he could not tie down the cause and could only give possibilities as to what happened.

[87] In addition, Mr. Powell was not in a position to testify as to what particular type of soil exists throughout the Dhaliwal property.

[88] Mr. Powell also acknowledged that the possibilities testified to are based on the theory that there was an over-the-ground flow of sewage. However, there were other reasons for some of the damage but Mr. Powell could not determine the cause.

[89] Mr. Powell also testified that a homeowner would not know what is going on beneath the foundation or footings if there was not any shifting of the house. Furthermore, a homeowner would only become aware of damage of this type after an excavation.

[90] Mr. Powell also confirmed that the water percolating up through the crack in the wall was not from the water line (transcript page 25, line 47). As well, Mr. Powell said that it is very difficult to differentiate between ground water, City water and sewer. A chlorine test is ineffective because the soil causes it to dissipate very quickly. Sewer can sometimes be detected because of the smell.

[91] Mr. Powell did agree that there would be a connection between the cessation of water flowing onto property and further displacement of soil, provided it is very obviously an area where water has been flowing. In this example, it would be obvious that the flow of water was a major factor in soil settlement. Mr. Powell went on to say that in many residential properties poorly compacted fill is also a consideration. Nevertheless, the flow of water coming off the street would act as a trigger.

[92] In his cross-examination evidence Mr. Powell maintained that a course of levelling, even if there is no further movement for a period of ten years, it still a band-aid solution because movement could be triggered at some point by an external source.

[93] Mr. Powell also confirmed that whether the water came from a sewer rupture inside or outside of the Dhaliwal residence, his opinion would be unchanged.

THE POSITION OF THE CLAIMANT:

[94] The Dhaliwals assert that this circumstantial case is very similar to a local case *Barratt v. Kamloops (City)* BCSC 1994 Carswell BC 2124. In the *Barratt* case, water was found in the basement of the residence and the issue was whether the water originated from a ruptured copper pipeline belonging to the City or naturally occurring ground water. Within a day or two of the copper line being crimped, water stopped flowing into the basement. The Court, in holding the City responsible, said that "...he(the City employee) did not explore sufficiently the real possibility that the 19mm copper water line was a contributing cause."

[95] In this case, the Dhaliwals point to the body of evidence which clearly indicates that following the installation of the crown on Sifton Avenue, water stopped flowing onto the Dhaliwal and nearby properties, with the result that soil settlement ceased.

[96] In asserting a breach of duty of care because of faulty design or improper maintenance of Sifton Avenue and Fleming Drive, the Dhaliwals argue that the evidence clearly indicates that the City knew of the problem, i.e., water flowing over the curb and through the crack between the pavement and the curb, and did not act. The City also knew that there was damage to Mr. Ford's property. See *Neilsen v.*

Kamloops (City) 1984 Carswell BC 476, para 67. To paraphrase, the City was aware of the drainage problem and the resulting damage and it was not open to them to do nothing.

[97] In submissions the Dhaliwals directed me to the case of *Goodwin v. Main Road North Island Contracting Ltd.*, 2007 BCCA 81, para. 12, where Madam Justice Newbury quotes from *Brown v. British Columbia (Ministry of Transportation and Highways)* 1994 1 SCR 420 where Cory J. was quoted, in part:

> It follows that once the duty to repair or to maintain is assumed by a government then it must fulfill that obligation in a manner that is not negligent. That is the duty that rests upon the Respondent in this case.

[98] Furthermore, it is only common sense that "water flows downhill" and expert evidence is not needed on the issue of causation. See *Earnshaw v. Despins*, 1989 Carswell BC 1349; *Homolka v. Harris* 2002 Carswell BC 821.

[99] Lastly, the Dhaliwals submit that based on the authority as contained in *Athey v. Leonati*, [1996] 3 SCR 458, causation has been established in this case because the Dhaliwals have established on the balance of probabilities that the City caused or contributed to the injury. While the ground water or water percolating from the sewer line may have been the cause of the collapse, the City has also been negligent because they failed to act sooner. The Dhaliwals furthermore submit that the City "materially contributed" to the damage to their house.

[100] In *Athey*, Mr. Justice Major wrote:

> As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

[101] On November 2, 2005, Mr. Dley wrote to the City giving it notice of the damage suffered and that an action would be commenced to recover those costs.

[102] This action was commenced on January 11, 2006.

[103] The Dhaliwals submit that the notice was delivered and that the action was commenced within the appropriate time frame. Mr. Dhaliwal testified that he had no reason to believe that any damage was occurring underneath his home. In addition, this position was confirmed by Mr. Powell.

[104] Alternatively, the Dhaliwals argue that the limitation period, because of this evidence, has been postponed.

[105] Furthermore, the City has not been prejudiced in its defence by failure to give notice in a more timely manner. See: *Myriad Projects Ltd. v. Vernon (City)*, 1994 Carswell BC 533, see paras. 14 to 21.

THE POSITION OF THE DEFENDANT:

[106] The City takes the position that this case, as pleaded in negligence, alleges "faulty design or improper maintenance" by the Defendant.

[107] The City argues that there is no evidence before the Court of "faulty design". The City also takes the position that the roads in question were not designed and constructed by the City or by entities hired by the City. The roads were designed and constructed by the private developer. Therefore the City is not legally responsible for them. I agree with the submission that there is no evidence of faulty design.

[108] In regards to the theory of the Dhaliwals that the damage occurred as a result of either water flowing over the curb or water flowing through the crack between the curb and the gutter, the City argues that neither of these theories have been substantiated by expert evidence (as was submitted to the

Court in the *Barrett* case) or can they be reasonably inferred from the evidence. The Dhaliwals have failed to prove on a balance of probabilities that the negligence of the Defendant is causative of the Claimant's loss. See *Canadian National Railway v. Canada*, 2003 BCSC 1558 paras. 174-181.

[109] In the absence of such causative evidence, liability cannot be found against the City. See *Brown v. British Columbia (Minister of Transportation and Highways)* 89 BCLR (2d) 1 (SCC), para. 42.

[110] In support of its position regarding the lack of any helpful evidence on the causation issue, the City directs me to the evidence of Mr. Powell and his opinion that it was unlikely surface water or water flowing through the street crack caused the settlement. In addition, there is no evidence that there was any ponding of water sufficient to cause the damage.

[111] Also, there is no basis to infer that any act or omission by the City caused the damage to the Dhaliwal home.

[112] The City also takes issue with the allegation of the Dhaliwals that they breached any duty because of a cold patch in 2000 and by failing to respond appropriately to the Ford complaints.

[113] The City takes the position that the Dhaliwal settlement took place in 1994, therefore there is no temporal link between the alleged negligence and the damage.

[114] Furthermore, the Ford complaints would not have been acted upon any sooner due to budgetary constraints and other priorities. Specifically, the Sifton Avenue project would have had to have been the subject of an assessment, it would not have been put ahead of the Maple project because of its history of problems, and the Maple project had been in the City's budget for three years before being completed.

[115] The City also argues that this action is statute barred pursuant to s. 3(2)(a) of the ***Limitation Act***, RSBC 1996, c. 266 and s. 286 of the ***Local Government Act***, RSBC 1996, c. 323.

LEGISLATION:

[116] Section 3(2)(a) of the ***Limitation Act*** states:

> 3 (2) After the expiration of 2 years after the date on which the right to do so arose a person ay not bring any of the following actions:
>
> (a) subject to subsection (4) (k), for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty;

and sections 6(3), 6(4) and 6(5) state:

> 6 (3) The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):
>
> (a) for personal injury;
>
> (b) for damage to property;
>
> (c) for professional negligence;
>
> (d) based on fraud or deceit;
>
> (e) in which material facts relating to the cause of action have been wilfully concealed;
>
> (f) for relief from the consequences of a mistake;
>
> (g) brought under the *Family Compensation Act*;
>
> (h) for breach of trust not within subsection (1).
>
> (4) Time does not begin to run against a plaintiff with respect to an action referred to in subsection (3) until the identity of the defendant is known to the plaintiff and those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
>
> (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
>
> (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.
>
> (5) For the purpose of subsection (4),

(a) **"appropriate advice"**, in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require.

(b) **"facts"** include

(i) the existence of a duty owed to the plaintiff by the defendant, and

(ii) that a breach of a duty caused injury, damage or loss to the plaintiff,

(c) if a person claims through a predecessor in right, title or interest, the knowledge or means of knowledge of the predecessor before the right, title or interest passed is that of the first mentioned person, and

(d) if a question arises about the knowledge or means of knowledge of a deceased person, the court may have regard to the conduct and statements of the deceased person.

[117] The City argues, based on Mr. Dhaliwal's evidence of the 1994 house settlement, that a two-year limitation period is applicable. Because the action was commenced in 2006, the action is out of time unless the postponement provisions of the ***Limitation Act*** are applicable.

[118] According to *Krusel v. Firth*, 1991 58 B.C.L.R. (2d) 145, the Dhaliwals must show due diligence in establishing the identity of a potential defendant, and when could they have reasonable discovered the facts from which it could be concluded that a successful action may be brought.

[119] On the identity issue, the City states that the Dhaliwals knew the identity of the owner of the streets from the date of their purchase in the early 1980s. On the "discovery of facts" issue the City argues that the Dhaliwals knew, in the 1990s, that water was flowing onto an adjoining property and their own. The Dhaliwals failed to exercise due diligence in failing to investigate the cause of the settlement in 1994 and following the application of the self-levelling mortar. At that time it was incumbent upon the Dhaliwals to have an expert investigate the cause of the settlement as opposed to the band-aid solution used.

[120] Consequently by failing to act for over a decade, the Dhaliwals have not shown due diligence and the action should be dismissed based upon the provisions of the ***Limitation Act.***

STATUTORY NOTICE PURSUANT TO SECTION 286 OF THE *LOCAL GOVERNMENT ACT*:

LEGISLATION:

[121] Section 286, subsections (1) and (3) of the ***Local Government Act*** states:

> 286 (1) A municipality is in no case liable for damages unless notice in writing, setting out the time, place and manner in which the damage has been sustained, is delivered to the municipality within 2 months from the date on which the damage was sustained.
>
> (3) Failure to give the notice or its insufficiency is not a bar to the maintenance of an action if the court before whom it is tried, or, in case of appeal, the Court of Appeal, believes
>
> (a) there was reasonable excuse, and
>
> (b) the defendant has not been prejudiced in its defence by the failure or insufficiency.

[122] With respect to this legislation, the City argues that the Dhaliwals must establish that they had a reasonable excuse for not providing notice within the two month period. See: *Griffiths* and *Schmidt v. Prince Rupert (City)*, 1960 Carswell BC 55. The City takes the position that no evidence has been adduced by the Dhaliwals of a reasonable excuse.

[123] Alternatively, if a reasonable excuse has been established by the Dhaliwals for failing to give the two month notice, it is further submitted by the City that it has suffered prejudice. There is actual prejudice to the City because remedial work was done to Sifton Avenue prior to the notice being received. Consequently the City had no opportunity to investigate the cause of the settlement.

[124] Lastly, prejudice may be inferred when there has been an inordinate delay in providing notice under s. 286 of the Act. See *Griffiths*, para. 19. In this case, a delay of at least a decade is inordinate.

ANALYSIS:

1. LIMITATION ISSUE:

(a) *Limitation Act:*

[125] Despite the evidence of Mr. Dhaliwal, confirmed to some degree by Mr. Powell, that he had no reason to believe that any further damage was occurring underneath his home, the weight of the evidence in this case establishes that the application of the self-levelling mortar was only a temporary fix. As Mr. Shyiak described, adding more weight to an already sinking slab is a band-aid solution. Similarly, Mr. Powell used the same words to describe the application of the self-levelling mortar. He went on to say that this does not remedy the problem. It is necessary to conduct a subfloor investigation, because movement could be triggered at some point by an external source.

[126] Therefore, based on the opinions of Mr. Shyiak and Mr. Powell, who have considerable experience in the construction field, the only reasonable conclusion that can be reached on the facts is that the Dhaliwals ought to have had the appropriate expert investigate the cause of the settlement in 1994. To do otherwise, is a failure in due diligence.

[127] As a consequence of this finding the action is *prima facie* commenced out of time and it is necessary to determine if the claim is appropriately postponed by operation of s. 6 of the ***Limitation Act***.

[128] In the *Krusel v. Firth* decision the British Columbia Court of Appeal very clearly set out how s. 6(3) and (4) of the ***Limitation Act*** is to be interpreted. The first test relates to a potential defendant's identity and the second test concerns the discoverability of facts and when could the Dhaliwals have reasonably made that assessment and commenced an action.

[129] On the evidence of Mr. Campbell, the Dhaliwals likely knew as early as the late 1980s or the early 1990s of the water flow problem. Mr. Dhaliwal's evidence is that he knew, at least by 1996, that water was coming onto their property from City-owned property.

[130] Based on my findings above regarding due diligence and the steps I believe it would have been reasonable for the Dhaliwals to pursue in 1994, there is no basis to find that due diligence, as required by s. 6(4) of the ***Limitation Act***, has been met.

[131] I therefore find that the action is statute barred and must be dismissed.

(b) Statutory Notice – *Local Government Act:*

[132] It is my view that the Notice delivered to the City on November 2, 2005, does not comply with s. 286 of the ***Local Government Act***.

[133] On the evidence, I cannot find that the Dhaliwals had a reasonable excuse for not providing notice within the two-month period. I believe that notice should have been delivered to the City within two months of the settlement in 1994, because of the knowledge that the Dhaliwals likely had and what could have been available to them had an investigation been undertaken. If I am wrong on this point, it is very clear that notice should have been given in 1996 when Mr. Dhaliwal actually knew of the water problem. Furthermore, the Dhaliwals, who bear the burden on the issue of notice, led little or no evidence regarding the delay.

[134] In *Myriad v. Vernon*, it appears that the notice issue was resolved primarily because the City had not been prejudiced in its defence. Another consideration was that the City had only recently became aware of the role they played in the loss. I don't find this decision to be helpful in resolving the issues before me.

[135] Lastly, there is some evidence of actual prejudice to the City. The remedial work was complete by the time the City received the notice on November 2, 2005. At that point, the City could not have conducted a meaningful investigation into the cause of the settlement.

[136] I conclude that the action commenced by the Dhaliwals is statute barred.

2. DUTY OF CARE:

[137] I am satisfied on the evidence that as early as 2000, when the cold patch repair to the curb/asphalt was completed, that the City knew of a potential drainage issue in this area. On the evidence, it is also clear that this cold patch was a temporary fix and that the repair itself was incomplete.

[138] If there was any doubt about the City being aware of water flow problems on Fleming and Sifton, Mr. Ford took care of that when he began to complain to the City in 2002.

[139] The evidence led by the City regarding their internal complaints procedure was, to say the least, confusing. It is not surprising to me that the City let Mr. Ford's complaints slip through the cracks.

[140] To conclude, I am satisfied that the City breached its duty of care in regards to both failing to properly repair and maintain Sifton Avenue and by failing to respond to surface water complaints.

3. CAUSATION:

[141] On this issue both the Dhaliwals and the City, to some extent, rely on the evidence of Mr. Powell as to the cause of the settlement. This is unfortunate.

[142] Mr. Powell was retained by the contractor to offer an opinion as to how to repair the void between the floor slab and the collapsed soil.

[143] Mr. Powell was not retained to determine the source of the water which likely triggered the collapse. Mr. Powell was pressed into offering opinions or possibilities as to the source of this water.

[144] In their submissions, the Dhaliwals assert that the circumstantial evidence ought to be persuasive enough to establish liability on the part of the City. Specifically, soil settlement ceased on the Ford, Campbell and Dhaliwal properties after the installation of the crown on Sifton because the flow of water had been stopped. The position advanced by the Dhaliwals is that any layperson could then tell the cause of the problem, i.e., water flows downhill.

[145] While there are similarities between this case and the *Barratt* decision, it is very significant that in *Barratt* an expert opinion was obtained and identified the source of the water which caused the damage. That did not happen in this case.

[146] It is not enough to establish liability on the part of the City to simply assert these circumstantial factors. In this area of the City there are groundwater problems and varying types of soils. In addition, Mr. Powell also testified that the original floor may not have been adequately compacted and this may have contributed to the collapse.

[147] In my view, because of the many factors at play it was absolutely necessary for the Dhaliwals to offer expert evidence on the issue of causation.

[148] On the evidence it has not been established that the City caused or materially contributed to the loss suffered by the Dhaliwals by failing to properly repair and maintain Sifton or by not responding to surface water complaints.

[149] Furthermore, there is an insufficient temporal link established between any loss suffered by the Dhaliwals, in 1994 or at any subsequent time, and any alleged negligence on the part of the City.

4. POLICY CONSIDERATIONS:

[150] Mr. Funk testified that a capital cost project would begin with a thorough assessment, then prioritized. Project approval would depend on budgetary issues and overall priorities.

[151] It was also clear in Mr. Funk's evidence that had these steps been taken, the Sifton project would not have been given priority over a more pressing concern on Maple Street, which had been waiting approval for several years.

[152] In his evidence, Mr. Pellizon also confirmed that the Ford complaint would not have changed the City's priorities. There were other areas of the City that required more urgent action.

[153] In *Brown v. British Columbia (Minister of Transportation and Highways)*, 1994 Carswell BC, Mr. Justice Cory said at para. 23:

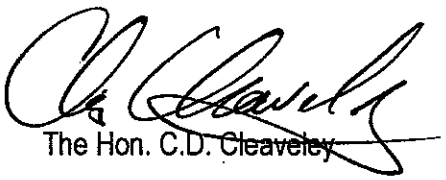
> Before attempting to apply these principles (in determining what constitutes a policy decision) to this case a preliminary matter should be considered. At the outset, the Court of Appeal considered that it had to determine whether or not the policy was bona fide and reasonable or rational. In the vast majority of cases such a consideration will not be necessary. It will always be open to a plaintiff to attempt to establish, on a balance of probabilities, that the policy decision was not bona fide or was so irrational or unreasonable as to constitute an improper exercise of governmental discretion. This is not a new concept. It has long been recognized that government decisions may be attacked in those relatively rare instances where the policy decision is shown to have been made in bad faith or in circumstances where it is so patently unreasonable that it exceeds government discretion. The test to be applied when a policy decision is questioned is set out in *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2, at p. 24 [[1984] 5 W.W.R. 1], by Wilson J. in these words:
>
> > In my view, inaction for no reason or inaction for an improper reason cannot be a policy decision taken in the *bona fide* exercise of discretion. Where the question whether the requisite action should be taken has not even been considered by the public authority, or at least has not been considered in good faith, it seems clear that for that very reason the authority has not acted with reasonable care.

[154] Mr. Justice Cory came to the conclusion that on the evidence in *Brown*, this was not a question that needed to be considered. In *Brown* the issue was whether the decision in question was one of policy or operation.

[155] On the evidence before me I find that the policy decision made by the City regarding road prioritization based on the factors of assessment and financial matters to be reasonable in the circumstances.

CONCLUSION:

[156] To conclude, the action is dismissed. In terms of costs, I am exercising my discretion and not ordering that the Dhaliwals pay to the City any costs and disbursements. The Dhaliwals did establish a breach of a duty owed to them by the City and I feel it is appropriate to recognize that by not ordering costs.



The Hon. C.D. Cleaveley