Citation: ☼

Date: ☼
File No: 9794
Registry: Port Coquitlam

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

MARYN & ASSOCIATES

CLAIMANT

AND:

CITY OF PORT MOODY

DEFENDANT

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE T. S. WOODS

Counsel for the Claimant:	Michael P. Maryn
Counsel for the Defendant:	Erica Toews
Place of Hearing:	Port Coquitlam, B.C.
Date of Hearing:	February 3, 2012
Claimant's written submission filed:	April 2, 2012
Defendant's written submission filed:	April 30, 2012
Claimant's written reply submission filed:	May 14, 2012
Date of Judgment:	August 1, 2012

INTRODUCTION

The Law Firm's Claim

[1] Michael Maryn ("Mr. Maryn") is a lawyer and the principal of the claimant Maryn & Associates (the "Law Firm"). The Law Firm brings action against the defendant City of Port Moody (the "City") in negligence. It submits that occasionally over a period of years, dating back to the autumn of 1997, it has suffered flood damage resulting from the flow of rainwater into the building it has occupied since early that year at 2613 St. Johns Street in Port Moody (the "Building"). The Building, in fact, belongs to a holding company owned by Mr. Maryn called Nestor Shake-a-Paw Holdings Ltd. ("Nestor Holdings").

[2] Specifically, the Law Firm alleges that municipal works carried out in 1996 by a contractor on behalf of the City in proximity to the Building caused the partial crushing of a portion of flexible, perforated and water-permeable perimeter drainage piping (the "O-pipe") that runs underground, east to west, on Nestor Holdings' private land along the north fronting of the Building, adversely affecting the pipe's ability to carry and disperse rainwater, especially at times of heavy rainfall.

[3] The Law Firm further alleges that, in an attempt to remedy the problem that it *knew* it had created by crushing the O-pipe, the City put in place (at the time of the municipal works in 1996) a pipe installation (the "T-junction Diverter") at the east side of the Building to divert some roof rainwater from a downspout into an existing service connection to the City's storm sewer system and thereby lessen the rainwater flow into the compromised O-pipe. The Law Firm argues, however, that the T-junction Diverter—

which still allowed rainwater to flow into the O-pipe but also allowed it to flow into the City's storm sewer system when it reached a certain level—was negligently designed because the level which water in the system had to reach in order to enter the pipe leading out to the municipal storm sewer was higher than the level of a basement sump in the Building. Thus, the Law Firm contends, on days of exceptional rainfall when the east downspout flows from the roof were particularly heavy, that rainwater overwhelmed the Building's perimeter drainage system with its crushed and compromised O-pipe and, instead of flowing out into the City's storm sewer system, when it reached a certain level the excess rainwater in fact entered the basement through the sump. The Law Firm submits that water that entered the Building that way has damaged some of its files that were stored in the basement there.

[4] While it contends that it experienced occasional flooding from and after the autumn of 1997, the Law Firm says that it was not until 2008, when investigating a recurring problem of noxious fumes entering the Building through its basement sump and associated perimeter drainage system, that it discovered the cause of the flooding.

[5] The Law Firm submits that in 2008, while attempting to identify the source of its ongoing odour problems, it engaged Trasolini Contractors Ltd. ("Trasolini") to dig down and expose the drainage-related piping at the east corner of the Building. When it did so, it says it discovered the T-junction Diverter for the first time. A short while before that, the Law Firm had engaged Roto-Rooter to conduct a visual inspection of the condition of the O-pipe by use of a snake-mounted video camera. It contends that that inspection revealed that the O-pipe was crushed at a location slightly east of the point where a connecting pipe from the Building's basement sump ties into the O-pipe.

[6] Believing that with the benefit of the intelligence gained from the investigative work conducted by Trasolini and Roto-Rooter it had correctly diagnosed the cause of its basement flooding problem, the Law Firm directed Trasolini to reconfigure the T-junction Diverter so that it diverted *all* of the rainwater passing through the east downspout directly into the City's storm sewer system, thus ensuring that it would bypass the crushed O-pipe altogether and eliminate the risk that rainwater flowing down the east downspout would enter the Building at the sump. The Law Firm led evidence to show that, in fact, Trasolini failed to reconfigure the T-junction Diverter properly on the first attempt, but did so successfully on the second attempt without charging any extra. The contractor's initial invoice for the reconfiguration came to $4,186.35 and that, coupled with filing and service fees, constitutes the quantum of the Law Firm's claim against the City.

The City's Admissions and Defences

[7] The City, for its part, admits that as a municipal authority it stood in a relationship of legal proximity to the Law Firm, the occupier of the Building in Port Moody in front of which certain works (including a sidewalk and retaining wall upgrade and replacement of the storm sewer main) were indeed carried out in 1996 by independent contractors operating at the City's behest. The City also admits that in the circumstances it owed a duty of care to the Law Firm.

[8] Further, the City does not dispute that the $4,186.35 claimed was actually incurred by the Law Firm as the cost of rectifying the allegedly faulty design and installation of the T-junction Diverter.

[9] The City denies, however, that it has breached its duty of care to the Law firm and, in the alternative, if a breach of that duty of care has been established it denies that its acts or omissions caused the losses claimed by the Law Firm. More particularly, the City submits that the evidence led at trial by the Law Firm has, *inter alia*, failed to discharge its onus as claimant to prove, on a balance of probabilities, that:

(a) The municipal works carried out by contractors on behalf of the City in 1996 in front of the Building caused "crushing" damage to the O-pipe that forms part of the perimeter drainage system on Nestor Holdings' private land immediately adjacent to the Building; and

(b) In a failed attempt to remedy the problem created by the crushing of the O-pipe, the City installed the T-junction Diverter.

[10] The City also raises defences denying causation and vicarious liability for any alleged acts and omissions of its contractors.

THE ALLEGED NEGLIGENT CONDUCT: A THRESHOLD POINT

[11] Negligence actions brought against municipal authorities in British Columbia are notoriously complex. They involve intricate webs of fact, law and public policy that differ in subtle ways from one case to the next. However, in all such cases, after it has been established that the municipal defendant stands in a relationship of proximity to the claimant and owes that claimant a duty of care—both of which have been admitted by the City here—the analysis quickly turns to a threshold point, that is, the municipal defendant's alleged negligent conduct. The court must then ask: What does the

claimant say the municipal defendant did, or failed to do, that constitutes the negligent conduct allegedly causing the claimant's loss? If the claimant proves the commission by the municipal defendant of certain alleged acts, or the omission by the municipal defendant to act in circumstances where it was under a duty to act, then the analysis proceeds further.

[12] As can be seen from the brief outline above of the City's defences, in the case at bar the City submits initially that the Law Firm has failed to prove to the civil standard of a balance of probabilities that the City committed either of the two related acts that the Law Firm alleges it committed. If the City's arguments in this regard are accepted, the Law Firm's action in negligence must fail and the analysis need not proceed further.

[13] It is important to note that the Law Firm's case against the City with respect to both alleged negligent acts is based upon circumstantial evidence. There is no direct evidence to prove that the City crushed the Law Firm's O-pipe or that it installed the T-junction Diverter, either as a remedy to address the problems caused by the alleged crushing of the O-pipe or otherwise. Rather, the Law Firm invites the court to infer both acts from other facts that it says are established by the evidence adduced at trial.

[14] I turn now to an analysis of the evidence regarding the two allegedly negligent acts committed by the City.

The Crushing of the O-pipe

[15] Fundamental to the claim brought by the Law Firm against the City is the Law Firm's contention that, when contractors carried out the municipal works in front of the

Building in 1996, they crushed the O-pipe that runs underground, east to west on Nestor Holdings' land along the north side of the Building. Those municipal works included, *inter alia*, the installation of a retaining wall and a sidewalk that also run east to west along the north side of the Building, overtop the O-pipe that had been installed and buried there on private land some time prior to the 1996 project. As I have noted, there is no evidence before the court that constitutes direct proof that the actions of the City's contractors crushed the Law Firm's O-pipe.

(a) Has the O-pipe been proven to be crushed at all?

[16] I begin with the evidence led at trial that goes to the question of whether the O-pipe was, indeed, crushed. That evidence is equivocal at best.

[17] Mr. Maryn, the only witness to testify on behalf of the Law Firm, gave evidence that (as noted) in 2008 he hired Roto-Rooter to serve as an independent investigator to attempt to find an explanation for the noxious smells that tended to enter from time to time into the Building from the basement sump. At his request a Roto-Rooter technician attended at the Building and fed a snake-mounted camera into the O-pipe and pushed it along inside it up to and past the point where a connecting pipe ties the basement sump into the O-pipe. Mr. Maryn's evidence was that the technician called him later and showed him a video display of the snake-scoping of the O-pipe and that that display revealed to him that the O-pipe was "compressed" and "had a small gap in it but was otherwise compressed".

> "Q And I'm wanting to know what your evidence is about what you actually saw?

> A *I saw the camera that had gone inside the O-pipe in front of the house*. It went the distance approximately to where the doors were in front of the house. And we can go back to the photographs and see that in a moment. And there we saw that this pipe was compressed. It had a small gap in it, but it was otherwise compressed."
>
> *Transcript,* February 3, 2012, at p. 18, emphasis added (see also, page 17)

[18] I approach this evidence with considerable caution. I cannot see, for example, how Mr. Maryn—not having been present during the snake-scoping process—could, without drawing upon what he was told by the technician who did the snake-scoping in his absence, be able to pinpoint the location of the alleged crusing relative to other landmarks (like "the doors in front of the [Building]". He did not expand on this in his testimony; neither did he call the Roto-Rooter technician who did the snake-scoping as a witness to testify first hand about the operation that he or she (the technician) conducted.

[19] Moreover, Mr. Maryn's evidence on this point was given by a witness who, though undoubtedly schooled and experienced in the ways of the law, has no comparable knowledge or experience known to the court regarding the interpretation of remote video images of the interiors of perimeter drainage systems or the diagnosis of problems in those systems, assisted by remote video equipment.

[20] The Law Firm's evidence that the O-pipe in front of the Building was crushed may have been stronger had it called evidence from the Roto-Rooter technician it engaged to investigate the problem. As I have noted, it did not do so; neither did it tender as evidence the video recording of the snake-scoping of the O-pipe and its alleged compressed or crushed section that Mr. Maryn was able to view on the camera monitor

after the fact. The puzzling absence of this important material from the evidence that the Law Firm led against the City in this case stands unexplained.

[21] Representatives of the City did their own video scoping of the same portion of the O-pipe (apparently using equipment that did not record the process). They also came to court to testify and be cross-examined about that video scoping.

[22] The City witnesses' testimony was not entirely consistent on the subject of the shape of the pipe in the subject location. The divergence speaks to the fact that, even to experienced eyes, remote video images of the interiors of perimeter drainage systems can be challenging to interpret. City witness Daniel Ieraci ("Mr. Ieraci") could not remember seeing whether the O-pipe was crushed or not, whereas City witness Paul LeBlanc ("Mr. Leblanc") testified that while the bottom part was obscured by mud and debris, the top part of it appeared "round" (see *Transcript*, pp. 52 and 79, respectively). Using common sense, one would expect that if, as the Law Firm contends, the carrying out of municipal works *above* the buried O-pipe had deformed that pipe by compression, it would be the *top* portion of the O-pipe that would show the deformation most clearly.

[23] Importantly, the City witnesses made reference to the need to maintain perimeter drainage systems through periodic flushing (*Transcript*, pp. 61 and 81). Mr. Maryn confirmed during cross-examination that the perimeter drainage system at the Building was not subject to maintenance (*Transcript*, p. 39). Both Mr. Ieraci and Mr. LeBlanc (and, indeed, Mr. Maryn) acknowledged that there was a substantial amount of accumulated mud and debris inside the O-pipe in the area in question which—apart

from providing an alternative possible explanation to crushing for drainage water flow interruptions and backups—also limited visibility within the O-pipe during the snake-scoping operation and, as a consequence, limited as well the conclusions one can draw from such observations.

[24] All of this evidence must be considered and weighed as a whole and I will say now that I cannot find that it is sufficiently clear, compelling and unequivocal to support a finding that—beyond being partially clogged with mud and debris—the O-pipe was crushed or compressed.

[25] That the City through its 1996 municipal works *crushed* the O-pipe, impairing its function, is the first essential element of the Law Firm's claim against the City (which is tied inextricably to the second essential element of the claim, that being the installation of the negligently designed T-junction Diverter to remedy the problems caused by the alleged crushing) is surely beyond all doubt, given this exchange:

> "THE COURT: So you're pointing, I think, to the alleged sources of a problem that affected your building. The first is some operations that resulted in the flattening or the crushing of your drainage pipe, and the second is the construction of other piping in proximity to your drainage piping that --
> MR. MARYN: That was placed there by the City.
> THE COURT: Yes.
> MR. MARYN: And was incorrectly attached. Instead of having it run off directly to the street, it ran into the O-pipe that was -- that had been crushed. And I photographed to show you how that all looks.
> THE COURT: So you have a pipe that doesn't allow as much flow because of crushing?
> MR. MARYN: Yes.
> THE COURT: And then you have additional flow burden on the crushed pipe as a result of -- you say -- of an improperly constructed set of other piping?

> MR. MARYN: Yes. And the backup would occur because there was a connection from the sump inside the building to the piping at a place -- at a location before the crush itself...."
> THE COURT: 'Before' meaning?
> MR. MARYN: In a location -- if the water's coming down, and then it's supposed to go along the pipe, the crush was here, but the sump was here. So when it would back here, it would back into the sump and into the house."
>
> *Transcript*, pp. 5-6

[26] That essential element of the Law Firm's claim—that is, that the O-pipe was crushed—has simply not been proven.

(b) By what mechanisms might buried O-pipe be crushed?

[27] Beyond its having failed to lead persuasive evidence that the O-pipe was crushed, the Law Firm has also failed to prove with admissible evidence that any actions of the City carried out during the 1996 municipal works caused, or were capable of causing, such crushing.

[28] The Law Firm's written submissions on this issue are telling. They state, at paras. 12 and 13, the following:

> "12. When asked on cross-examination whether heavy machinery sitting on 2 feet of soil would crush an O-pipe underneath, Mr. Ieraci answered, 'I cannot see a machine getting that close to your property sir.' Despite the fact that machinery obviously came to the very edge of the building and Mr. Ieraci's admission that the City dug four feet down during construction, his answer was non-responsive.
>
> Transcript, page 73, lines 36
>
> 13. Mr. Maryn gave evidence that during construction on the project the City made a number of modifications including placing a sidewalk right up against the building and retaining walls right up against the foundation of the building. Machinery was used in this construction.

Transcript, page 10, lines 23-31
Transcript, page 11, lines 22-36"

[29] There is no evidence before the court in this action that "heavy machinery" was in use on the ground directly overtop the O-pipe running along the north side of the Building during the course of the 1996 municipal works carried out there. Mr. Maryn infers that it must have been, given the nature of those works, but he could not get any City witness to confirm that such machinery would "get that close" to the Building.

[30] Inferences drawn from proven facts are one thing; speculation is another. I cannot substitute conjecture for the rigour of inference-drawing based on facts proven by admissible evidence. As Lord Wright stated for the House of Lords in ***Caswell v. Powell Duffryn Associated Collieries Ltd.***, [1940] A.C. 152 "... if there are no positive proved facts from which the inference can be made, *the method of inference fails and what is left is mere speculation or conjecture*" (at 170, emphasis added). See also, ***Hall v. Cooper Industries*** (2005), 40 B.C.L.R. (4th) 257 at paras. 47-48 (C.A.), leave to appeal denied, [2005] S.C.C.A. No. 351 (S.C.C.). To track that language, there are no "positive proved facts" in this case from which the inference can be drawn that heavy machinery operated on the ground directly overtop the O-pipe whose condition is now at issue.

[31] Nor is there any evidence before me, expert or otherwise, that would explain the dynamics by which underground piping might be crushed by events above ground and how the actions or omissions of the City might engage those dynamics. This is not, in my judgment, an aspect of the Law Firm's claim that the court can properly evaluate without the assistance of expert opinion. What effect, if any, would the composition of

the soil/overburden, the state of its compaction, and so forth have upon the vulnerability of O-pipe to crushing? What forces are required to damage O-pipe in that way and how might they be transmitted downward? How far down would those forces reach? Would the weight and actions of pieces of mobile construction equipment, like a bobcat or a roller, be able to transmit forces sufficient to compromise O-pipe buried below them (assuming that proof existed that such devices actually operated directly above the O-pipe, which fact was not proven here)?

[32] Plainly, perimeter drainage pipe is buried underground as part of perimeter drainage systems in other locations in this province—some of it of a vintage and with characteristics comparable to the O-pipe at issue here. Not all above-ground activity will disturb its shape and thus its function. As the City submits, these are matters that are beyond the ken of the layperson and evidence about them cannot be interpreted properly by the court without the assistance of a properly qualified testimonial expert: see, generally, ***R. v. Mohan***, [1994] 2 S.C.R. 9, ***Expert Evidence in British Columbia Civil Proceedings,*** 3rd ed. (Vancouver: CLEBC, 2011) at pp. 25-28 and, more particularly, ***Seiler v. Mutual Fire Insurance Co. of British Columbia***, [2003] B.C.J. No. 2879 (C.A.) at para. 15. The Law Firm called no expert evidence in this or in any other area.

[33] Thus, even if there were evidence to prove that the O-pipe on Nestor Holdings' private property running along the north fronting of the Building had been crushed (which there is not), there is not a body of evidence before me in this case from which I could properly find or infer that it was the actions or omissions of the City that caused that crushing.

The Installation of the T-junction Diverter

[34] The Law Firm's case that the City installed the T-junction Diverter during the course of the 1996 municipal works in front of the Building is similarly speculative. It rests mainly upon Mr. Maryn's belief that the City *realised* that its operations had crushed the O-pipe when those operations were underway, and his belief that it took the step of installing the T-junction Diverter in an inept effort to counteract the problem it knew was likely to result from its forces having damaged the O-pipe: *Transcript*, pp. 16-17. Secondarily, the Law Firm's case in this regard rests upon similarities in appearance that Mr. Maryn discerns between the piping materials that route downspout rainwater into the service connections to the City's storm sewer system at the east and west corners of the Building: see, for example, *Transcript*, p. 20.

(a) City knowledge of the crushing of the O-pipe

[35] Mr. Maryn, when giving his evidence and making argument, cited no admissions, testimony, documents or other evidence relating to City personnel that would substantiate his belief that the City realised it had created a problem with the O-pipe and sought to fix it in 1996 by installing the T-junction Diverter. As I have noted, the evidence before me is insufficient to prove that any deformation actually exists in the radial profile of the O-pipe, much less that such a deformation was knowable by and known to the City.

(b) Similarities in colouring of pipe and fittings

[36] The two passages from Mr. Maryn's testimony quoted below are revealing:

> "A. Okay. So the problem here is that -- and *I believe* this is what happened. The City, *I believe*, was aware of the crushed O-pipe. And the reason I say that is because if you look at what they actually put in, they put in this pipe that we see that is blue, and then it has a joiner, a T join. It goes to the left blue, and then it whites, and then that pipe that you see here, right here, that's -- that's a pipe that the City put in for drainage into the drainage -- into their sewer system." (emphasis added)
>
> *Transcript*, p. 15

> "A ... But what they did is they, instead, put this T in there, which makes absolutely no sense.
> Q And what sense do you make of that?
> A *I think* that they thought -- that they knew that the O-pipe was crushed. And I'll -- I'll show you where I think I know that in a moment -- and they thought that it would simply -- they would simply remedy the backing up of the O-pipe by putting this T in there, so any backup would then overflow into the T, and then into the street directly. That would be how it worked in theory. But there's a sump there, and so water always goes to the lowest point, and the sump is the lowest point. So instead of backing up to the T, it flooded my basement." (emphasis added)
>
> *Transcript*, p. 21
> (see also, p. 20)

[37] With respect, Mr. Maryn's reasoning as reflected in these passages is tautologous. It is circular. He sees pipe and fittings that are white and blue at one end of the Building and pipe and fittings that are white and blue at the other end of the Building and he concludes that they must have been installed at the same time and by the same actor in order to remedy the problem the actor knew it had created. Mr. Maryn is assisted in reaching that conclusion by his belief that the O-pipe was crushed, must have been crushed at the time of the 1996 municipal works and that the City, knowing that, chose—in order to remedy the problem it had caused—to install the T-junction Diverter.

[38] Mr. Maryn has no direct knowledge that the City's forces installed the T-junction Diverter, any more than he has direct knowledge that the City's forces crushed the O-

pipe that runs underground in front of Building. He was the Law Firm's only witness and he did not elicit such evidence from any City witness. He "thinks" and "believes" these things (his words), but I say again that those thoughts and beliefs are the end product of an exercise of circular conjecture on his part.

[39] The Law Firm's written submissions refer, at para. 15, to the T-junction Diverter being "made of the same material" as piping installed by the City in 1996 at the west corner of the Building. The Law Firm advances this argument in support of its contention that the T-junction Diverter was installed by the City's contractor when it carried out the 1996 municipal works in front of the Building. But it is important to note that Mr. Maryn's evidence on the point did not address the composition of the piping and related fittings. It did not point out identifying codes or labels or municipal sourcing practices. Mr. Maryn's testimony about the features of the piping and fittings went only to their colour.

[40] I will spend little time on the contention that a similarity of colour as between pipe and pipe fittings found at different locations at a building stands as proof that they were installed by the same installer at the same time. Similarities in colour, by themselves, do not furnish persuasive, let alone conclusive, proof that the piping work at either side of the Building was done by the same installers at the same time. The court has no evidence before it to suggest that the particular colouring of the pipe and fittings in question is in some way unique so as to tie that pipe and those fittings to a particular installer or situate their installation at a precise point in time. Such evidence can be imagined, but none has been tendered.

[41] Beyond that, it is not disputed that the T-junction Diverter is located over the property line and on Nestor Holdings' private land that lies immediately in front of the east corner of the Building—that is to say, *not on City land*. The City's witnesses were uniform, clear and unshaken in their evidence that the City and its contractors do not carry out such installations on private land: see *Transcript*, p. 63 and, more generally, pp. 49 and 81. Responsibility for such installations falls at the feet of the property owner, not the municipal authority. (This is why Trasolini, and not the City, reconfigured the T-junction Diverter to feed rainwater solely into the service connection leading to the municipal storm sewer system and did so at the Law Firm's direction and expense.)

[42] Importantly, the *viva voce* evidence of the City witnesses is consistent with the as-built drawing filed as evidence by the City (Exhibit 2, tab 1) that shows that, as of the time of completion of the 1996 municipal works, the service connection to the storm sewer system that is located near the east corner of the building was capped and not tied into anything on the Building. As-built drawings are of course not infallible but there is no persuasive evidence before me to suggest that the as-built drawings exhibited at trial—upon which the City relies routinely—should be questioned as inaccurate in this or any other detail.

[43] While Mr. Maryn does not believe that the T-junction Diverter was installed after the municipal works of 1996 were completed, he is not omniscient regarding these matters. The Law Firm did not actually take up occupancy of the Building until early 1997, given the need to make extensive renovations to prepare it to function as a law office. It is possible therefore, on the evidence, that the installation occurred after the

1996 municipal works were completed but before the Law Firm began operating as a going concern there in 1997.

[44] It is also possible that the T-junction Diverter was installed after the Law Firm took up occupancy of the Building but outside Mr. Maryn's knowledge. Recall that in 2008 Trasolini was able to fully execute a faulty attempt to remedy the configuration of the T-junction Diverter without Mr. Maryn discovering the error until the job was done. Moreover, Mr. Maryn testified that when he engaged Roto-Rooter to snake-scope the O-pipe, the Roto-Rooter technician did so at a time when Mr. Maryn was not present. The technician showed him a video display of the scoping after the fact.

[45] I have no doubt that Mr. Maryn was being truthful when he testified that he did not believe the T-junction Diverter was installed after completion of the 1996 municipal works. However, the points covered above show that he was not always directly engaged in handling problems associated with the Building's perimeter drainage problems in real time. Others involved with the Law Firm (including the receptionist who directed City employees to the basement sump so they could investigate an odour complaint, and whoever it was who oversaw Trasolini's initial but unsuccessful repair and Roto-Rooter's snake-scoping at first instance) took some measure of day-to-day responsibility for such matters. As the only witness called to testify on behalf of the Law Firm, Mr. Maryn—with his limited personal knowledge—was unable to give either (a) conclusive evidence, or (b) evidence proving other facts from which the court can rationally infer, that the T-junction Diverter was in fact installed by the City in the course of carrying out the 1996 municipal works.

[46] That being the case, the Law Firm has correspondingly failed to prove, on a balance of probabilities, that the T-junction Diverter was installed by the City in the course of carrying out the 1996 municipal works, contrary to what is represented in the City's as-built drawing.

CONCLUSIONS

[47] As I noted at the beginning of these reasons, negligence claims against municipal authorities tend to be labyrinthine and difficult. But, here it has not been necessary for me to delve into all of the areas of fact, law and policy that make such actions so complex. This is because the Law Firm, as claimant, has grounded its action upon the commission of two negligent acts by the City that it has failed to prove.

[48] The Law Firm has failed to prove that the O-pipe that forms part of the underperforming perimeter drainage system that surrounds the Building was crushed, either by the City contractors carrying out the 1996 municipal works or at all. The Law Firm has also failed to prove that the T-junction Diverter that it says was negligently installed and for that reason unable to effectively divert east downspout rainwater away from the Building's underperforming perimeter drainage system was installed by or on behalf of the City.

[49] Proof of these allegedly negligent acts is a threshold requirement of the Law Firm's action that it has not been able to fulfil. That being so it is not necessary for me to venture further into the labyrinth and consider the other interesting issues raised by this case including, but not necessarily limited to:

(a) Causation;

(b) Vicarious liability of the City for the acts and omissions of its contractors;

(c) The Law Firm's standing to bring this claim in relation in part to alleged physical harms caused to the Building's perimeter drainage system in circumstances where that structure is owned by the non-party, Nestor Holdings;

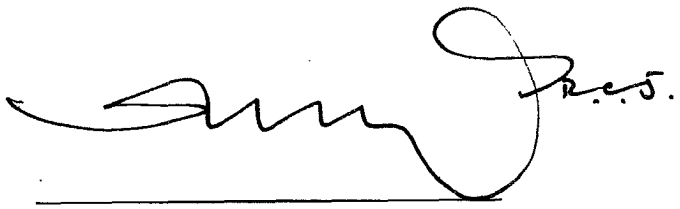
(d) Whether any remnant of the doctrine of *res ipsa loquitur* survives the decision of the Supreme Court of Canada in ***Fontaine v. British Columbia***, [1998] 1 S.C.R. 424;

(e) Whether—there having been no expert evidence led by the claimant concerning the design and installation of the T-junction Diverter, or evidence of actual measurements of the relative depths below ground of the Building's basement sump and the point where the T-junction Diverter joins the service connection leading out to the City's storm sewer system—the Law Firm's claim is susceptible of adjudication, having regard to authorities such as ***Cheng v. Moorley***, [2011] B.C.J. No. 2299 (S.C.), ***Sigurdur v. Fung***, [2007] B.C.J. No. 1746 (Prov. Ct.), ***Olivier v. Dr. B. Cervienka Inc.***, [2011] B.C.J. No. 2500 (Prov. Ct.) and ***Poy v. Dr. Edward Coates Inc.***, [2009] B.C.J. No. 2671 (Prov. Ct.); and

(f) The proper measure of damages suffered by the Law Firm (as distinct from the expenses that may have been suffered by the non-party owner of the Building, Nestor Holdings).

[50] For all of the foregoing reasons, the Law Firm's action against the City stands dismissed.

[51] Order accordingly.



Thomas S. Woods, P.C.J.