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THE INS AND OUTS OF DRAINAGE

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THE INS AND OUTS OF DRAINAGE

I. INTRODUCTION

The law of drainage, as it applies to local governments in British Columbia, is drawn from two sources: the common law and statute. The first part of this paper will discuss the common law of drainage which draws heavily from English common law. Many of the cases discussed in the first part of this paper cite English precedents from the 19th century or earlier which, except as they have been modified by statute or superseded by the jurisprudence of British Columbia, have the force of law here.

An understanding of the common law of drainage is important to understanding the rights and obligations given to and imposed upon local governments under their home statutes: the *Local Government Act,* RSBC 2015, c 1 (the "*LGA*") and the *Community Charter,* SBC 2003, c 26. As such, the latter part of this paper will discuss the intersection of common law and statute, as well as discuss some of the powers available to local governments to regulate drainage.

II. THE COMMON LAW OF DRAINAGE

A. Nuisance

One feature of the cases discussed in this paper is that the majority of claims for liability with respect to drainage and surface runoff are made under the tort of private nuisance. That is, an actionable interference with an owner or occupier's use and enjoyment of land, which is unreasonable in the circumstances (see *Antrim Truck Centre Ltd v Ontario (Transportation)*, 2013 SCC 13 at para 19). Unlike a claim in negligence, which is also claimed in some of the following cases, there is no need to show that the defendant's conduct fell below a standard of care. Rather, the focus of nuisance is on the harm suffered by the plaintiff. As such, a local government may conduct itself entirely non-negligently and still be liable for a nuisance.

B. Water Flowing in Watercourses vs. Surface Water

The common law of drainage recognizes a distinction between the drainage rights and responsibilities of owners whose lands contain water flowing in a natural watercourse and owners whose lands contain surface water. This distinction was discussed and played a key factor in the outcome of *Lee v Arthur (Rural Municipality)*, [1964] MJ No 36 (QB).

In *Lee*, the Court held that a channel that followed the same course for many years, but flowed only on average every two of three years for an average of two to three weeks at a time, was a watercourse, and that the Municipality's raising of its road and replacement of an existing culvert under the road with a smaller one resulted in a decrease in the amount of water that

flowed underneath the road in the natural watercourse. During heavy rain, the water backed up behind the roadway and damaged the plaintiffs' crops. The municipality was held liable in nuisance because it had altered or interfered with the natural watercourse by in effect damming it and had deprived the upper owner of the natural flow of the watercourse.

However, the municipality successfully appealed on the basis that the evidence did not establish that the water was a natural watercourse: [1965] MJ No 51 (CA). Specifically, the water in question did not have a source nor an outlet. Since the municipality had not obstructed a natural watercourse and had no obligation to accept the drainage from an upper owner, both tenets of the law of drainage to be discussed below, the plaintiff's action failed.

Another case in which the distinction between surface water and water flowing in a natural watercourse is discussed is *Groat v Edmonton (City)*, [1928] SCR 522. In summarizing some of the different rights and responsibilities, the Court said:

> No doubt a riparian owner may not divert the water of a natural stream to the injury of the lower riparian owners. He may, while the water flows through his land, put it to any lawful use for reasonable purposes, but he must return it to its regular course in the stream beyond the property. Diversion of drainage, however, is quite a different thing from the diversion of a stream. While riparian owners have rights on and to the water flowing in a natural stream, they can claim no right to water in undefined channels or percolating through the earth. Owners, though they may be entitled to drain their lands in a water-course, are evidently not under any obligation to do so.

In *Groat*, the plaintiff claimed for damages and an injunction to prevent the City from polluting the waters flowing through a ravine which traversed their land. The City had constructed a large storm sewer with an outlet in the ravine above the plaintiffs' land. The City's works collected surface water from streets in the catchment area and discharged it into the stream in the ravine. However, it also collected "the filth of the streets", which polluted the water entering the ravine. The plaintiffs complained about the quality of water entering into the ravine and also claimed that works constructed by the City in subsequent years that diverted elsewhere some of the drainage that drained into the stream had reduced the amount of surface drainage which in prior years had diluted the filth.

The Court held that as an upper riparian owner, the City was entitled to drain surface water into a ravine. Furthermore, the plaintiffs had no right to demand that the City cease the diversion such that the increased surface water would dilute the filth entering the ravine – although upper riparian owners have a right to drain surface water into a stream, they have no obligation to do so and no action lies against one who refuses to do so. However, the lower riparian owners did have a right to receive the water in the stream in the quality in which it had always arrived, and by discharging "the filth of the streets" into the stream the City had contravened that right. In the words of the Court, "Pollution is always unlawful, and in itself, constitutes a nuisance."

The line of demarcation between a natural watercourse and surface drainage was drawn by the Saskatchewan Court of Appeal in *Scott (Rural Municipality) v Edwards*, [1933] SJ No 76 (CA), which was affirmed by the Supreme Court of Canada in [1934] SCR 332:

> A watercourse is defined as a stream, usually flowing in a definite channel, having a bed and sides or banks and discharging itself into some other stream or body of water. It must be something more than surface water, spread over a tract of land, caused by unusual freshets or other extraordinary causes. A depression or natural draining which merely carries water in a rainy season is not a watercourse; nor is a ravine which at certain seasons facilitates the drainage of the country a watercourse. A watercourse must have the characteristics of a flowing stream, it must have source, outlet and channels; the water need not, however, flow continually.

With that distinction in mind, we turn to cases which further illustrate the rights and responsibilities of upstream and downstream owners in relation to natural watercourses and surface water.

C. Rights and Responsibilities of Owners in Respect of Natural Watercourses

Upstream owners of land abutting a natural watercourse:

- Have a right to drain into the natural watercourse;
- Have a right to use the water for domestic purposes; but
- May be held liable by a downstream owner if they dam or divert water from the watercourse because the downstream owner has a right to quantity and quality of the flow.

Downstream owners of land abutting a natural watercourse:

- Have a right to the quantity and quality of the flow of the natural watercourse;
- Must accept the water flowing onto their land in a natural watercourse; and
- May be held liable to an upstream owner if they dam the watercourse.

There are several cases in which local governments have been found liable to downstream owners for altering or interfering with a natural watercourse by discharging water collected from drainage catchment areas into the watercourse. In *Scarborough Golf & Country Club v. Scarborough* (City), [1986] OJ No 696 (HC), aff'd [1988] OJ No 1981 (CA), the Club sued the City for damages sustained when the watercourse flowing through the golf course eroded its lands and reduced the playability of the golf course.

The golf course was constructed in 1927 in an area of the City dominated by agricultural lands. Eight of the holes in the golf course abutted a natural watercourse. In the 1950s, heavy development occurred in the agricultural areas upstream of the golf course. The City constructed storm drainage works to control and direct the run-off caused by the development. In addition, it acquired all of the flood plain lands above the Club's property and a conservation authority acquired those lands below it. The City undertook works on its lands to widen and deepen the bed of the watercourse in order to accommodate drainage flows caused by development.

Heavy rains in 1976 and 1977 resulted in flows that both flooded the golf course and eroded its lands. The Club commenced negotiations with the City as to remediation and cost sharing. When the negotiations broke down the Club sued the City. The City argued that it was entitled to use the natural capacity of the watercourse, and the watercourse included the flood plains on which some of the fairways were constructed. Since the capacity of the flood plains was never exceeded, the capacity of the watercourse was never exceeded and therefore the City was not liable. The Court rejected that argument, holding that the capacity of the watercourse will be exceeded if the watercourse cannot handle the flow without damaging itself through erosion.

The Court held that although the City was entitled as an upper riparian owner to drain from its lands abutting the stream, drainage brought to the stream by artificial means from other lands, some a considerable distance from the creek, which was described by the Court as "foreign water", that exceeded the natural capacity of the stream constituted an unreasonable use. The Court said it was "very nearly an inherent consequence of a drainage system such as this one, which collects "foreign water", that where the City is an upper riparian owner, it will be denied any "defence" of reasonable use." The Court held that the City's discharge of "foreign" water into the creek was an unreasonable use and a nuisance for which the City was liable.

The next case that tested a municipality's common law right to drain into a natural watercourse was *Peace Portal Properties Ltd v Surrey (District)*, [1989] BCJ No 533 (SC), aff'd [1990] BCJ No 1113 (CA). In *Peace Portal*, drainage increases due to development increased flows into Fergus Creek, a natural watercourse, which ran through the plaintiff's golf course. The increased flows damaged the plaintiff's concrete flume. The plaintiff attempted to reach a cost sharing agreement with the municipality, but when the negotiations proved fruitless it installed a new flume at its cost. It then sued the municipality claiming nuisance and unjust enrichment. The trial judge held that the increased flows due to development had exceeded the natural capacity of the creek. Furthermore, the judge held that flooding need not occur for a finding that the natural capacity of a watercourse has been exceeded – evidence of erosion, as was found in *Scarborough Golf & Country Club,* is evidence that the natural capacity of the creek being exceeded. The judge held that the evidence of damage to the plaintiff's old concrete flume was

sufficient to establish that the increased flows were eroding the bed of the creek and that its natural capacity had been exceeded. The District was held to have created a nuisance, but the nuisance claim was found to be barred by the 10-year limitation period. However, because the new flume had just been installed, the plaintiff's claim that the District was enriched by the improved flume which formed part of the District's drainage system was successful.

In *Kerlenmar Holdings Ltd v Matsqui (District)*, [1989] BCJ No 1601 (SC), aff'd [1991] BCJ No 3123 (CA), the plaintiff's lands were flooded by water overtopping a creek. The lands were located in a flood plain reclaimed by a system of dikes. Heavy upstream development permitted by the districts of Matsqui and Abbotsford and the consequential loss of permeable surfaces led to increased drainage flowing into a creek which passed through the plaintiff's lands. The plaintiff claimed that the flooding caused by the increased drainage rendered their land useless for agriculture. The districts argued that they had a common law right as an adjacent owner to drain into the creek and were not responsible for any detriment caused to downstream owners.

The Court found the defendant districts liable in nuisance. The Court adopted the statement of the law in *Scarborough Golf & Country Club* and held that where an upstream owner's conduct results in the natural capacity of the stream being exceeded and causes damage to a downstream owner, the upstream owner has caused a nuisance.

On the basis of the findings in *Scarborough Golf & Country Club* and *Kerlenmar*, a local government may, as an upper owner, direct drainage into a natural watercourse, but if the natural capacity of the watercourse is exceeded such conduct will be considered unreasonable and the local government will be liable in nuisance.

Note that the common law right of a municipality to drain into a stream has been modified in BC by the enactment of the *Water Sustainability Act* SBC 2014, c15. Section 11 of that Act prohibits a person from making "changes in and about a stream" without an authorization. "Changes in and about a stream" is defined to include "any modification to the nature of a stream… or to the flow of water in a stream". Although there is an exemption from the requirement to obtain an authorization for storm sewer outfalls, the exemption only applies if the outfall is designed by a professional engineer and the outfall does not obstruct or cause erosion of the stream channel.

D. Rights and Responsibilities of Owners in Respect of Surface water

A downstream owner of land containing surface water:

- Has no right of action against an upstream owner for surface water that drains naturally from the upstream lands; but
- Has no obligation to accept the drainage and can construct works, including berms, dikes etc. to protect the downstream owner's land.

An upstream owner of land containing surface water:

- Is not liable for water draining from his land in the natural way; but
- May be held liable to a downstream owner if the owner constructs works that direct drainage onto the downstream owner's lands.

In *Scott (Rural Municipality) v Edwards*, [1933] SJ No 76 (CA), the plaintiff had constructed a dam on his property to prevent the flow of surface water from the municipality's road allowance. The dam was so effective in holding back the water that the road flooded in 1927. The municipality cut a channel through the dam, which was repaired by the plaintiff, and later a second channel was cut. The result was the flooding of 75 acres of the plaintiff's land. After a few dry years, in 1933 the plaintiff built up the dam in anticipation of the land flooding. When the municipal council threatened to open the dam to let the water drain the plaintiff applied for an injunction to restrain them from doing so.

The Court held that the succession of sloughs and depressions where surface water collected did not constitute a defined watercourse on the municipality's property, citing the definition of natural watercourse referred to previously. The Court then extensively reviewed the English common law rights of drainage, which were accepted into Saskatchewan's common law as they stood in 1870. The Court concluded that an owner has no obligation to accept drainage and that the plaintiff was within his rights to build the dam to protect his land. The Court granted an injunction to restrain the municipality from interfering with the dam, a decision that was upheld by the Supreme Court of Canada: *Scott (Rural Municipality) v Edwards*, [1934] SCR 332.

McPhee v Plympton (Township), [1987] OJ No 1623 (Dist Ct), is another case that illustrates the proposition that an owner has no obligation to accept surface drainage. In *McPhee*, the plaintiff's property was located adjacent to a public highway with a drain. Historically, water on the plaintiff's land drained into the drain located on the Township's highway. After reconstructing and raising the grade of the highway the drain was too high and the accumulation of water on the plaintiff's land damaged their home. The Court found in favour of the Township, holding that the owner of lands of higher elevation has no right to drain surface water onto the lands of his neighbour. The Court concluded "In raising the road, the [defendant] did no more than it was entitled to do. Having the jurisdiction and control of the road… it is in the same position as an individual with the right to raise its land to repel the plaintiff's surface water… Since it has the right to do this, no action would lie in nuisance."

The mere fact that a road is constructed and by its construction diverts water onto an owner's land will not, on its own, result in liability to a municipality. In *Allen v Severn (Township)*, [1999] OJ No 1251 (Gen Div), the plaintiff argued that the roadway acted as an artificial channel that directed drainage from the roadway onto his driveway and damaged his home. The Court held

that there was no evidence that the road was constructed in a manner to drain water onto the plaintiff's land to a greater extent than the land upon which the road was built would have drained onto the plaintiff's land. The Township escaped liability because there was found to be no collection or diversion on its part.

In *Medomist Farms Ltd v Surrey (District)*, [1990] BCJ No 1499 (SC), aff'd [1991] BCJ No 3591 (CA), the plaintiff claimed that upstream development permitted by the District that drained into a ditch running parallel to its farm damaged its crops. The developed lands were located at a higher elevation than the plaintiff's lands and due to development had fewer permeable surfaces than before. Thus, increased amounts of drainage reached the ditch, which eventually resulted in the ditch overflowing and flooding the plaintiff's lands. The trial judge found that the development permitted by the District resulted in the increased flows and that the District ditch overflowing onto the plaintiff's land was a nuisance.

E. Highways

One intersection of common law and statute which should be considered is the transfer of ownership in highways from the province to municipalities. Pursuant to section 35 of the *Community Charter,* municipalities are granted ownership and possession of the highways within their boundaries (with a number of exceptions, including arterial highways). With this vesting of ownership in highways, the *Community Charter* also provided for the vesting of title to all statutory right of ways ("SRW") and easements for drainage and surface runoff, previously held by the provincial government, in those local governments vested with ownership in the highways. Municipalities benefit from these SRWs and Easements as they provide certain rights with respect to drainage and the discharge of surface runoff from the highways over private lands to watercourses or other drainage works.

However, due to this statutory grant of ownership, one potential liability arises for municipalities where, prior to the transfer of ownership in highways, the province constructed drainage works for highways (ditches, culverts, etc.) which collect water and discharge it over private lands, without securing the necessary SRWs or easements. As has been discussed, where surface runoff is directed over private property through the construction of works, without securing rights to do so, the private owner is both entitled to block the flow and to damages for the collection and discharge of flows onto their private land.

Similarly, the SRWs granted to the province often contain obligations to maintain and repair drainage works associated with highways which impact the private property over which the SRW is granted. Where this is the case, the affected municipality may be required to carry out such work if such an owner enforces their rights under the instrument.

III. STATUTORY MODIFICATIONS OF COMMON LAW

As discussed, the common law imposes on local governments fairly significant rights and responsibilities with respect to drainage and surface runoff. While a municipality is under no obligation to provide drainage services, development will inevitably lead to increasing flows of water being discharged over land and into natural waterways and watercourses.

To help alleviate the potentially unlimited liability of local governments with ever increasing development, the legislature introduced limited statutory protections, two of which will be discussed below.

A. Statutory Protections from Nuisance Claims

In response to requests from the Union of British Columbia Municipalities, stemming from increasing insurance premiums, the Government of British Columbia responded with a statutory limitation on liability, designed to balance protecting local governments against certain nuisance claims, and the individual property owner's rights to be compensated for damage caused to their property. This response was the introduction of what is now section 744 of the *LGA*:

> A municipality, municipal council, regional district, regional district board, improvement district or greater board is <u>not liable</u> in any action based on <u>nuisance</u> or on the <u>rule in the Rylands v. Fletcher</u> case if the damages arise, directly or indirectly, out of the breakdown or malfunction of
>
> (a) a sewer system,
>
> (b) <u>a water or drainage facility or system</u>, or
>
> (c) a dike or a road.

In the City of Vancouver, section 294(9) of the *Vancouver Charter* provides similar protections as those afforded under the *LGA*, but extending further to also include injurious affection (a statutory cause of action against public bodies when their activities interfere with a person's use or enjoyment of land – see *Antrim Trucking Ltd v Ontario (Transportation), Supra* at paras 4-5).

While providing some protection against nuisance claims, the statutory protections are limited to breakdowns or malfunctions of such a system. This of course does not protect a local government from a negligence claim where the damage arises because of a faulty design, poor

construction, or a failure of the maintenance program/policy. As such, where a properly designed, constructed and maintained water or drainage facility or system causes a nuisance (ie. by overflowing and causing flooding), a municipality is afforded some degree of protection from any aggrieved downstream private owner. The extent of this protection has been, to some extent, delineated in a number of court cases.

In *British Columbia v Vancouver (City)*, 2005 BCSC 747, Mr. Justice Goepel considered the extent of these statutory protections where a City of Vancouver sewer backed up, due to an unknown blockage, and subsequently flooded a BC liquor store. Although this was a failure of a sewer system rather than a drainage system, the facts are analogous to drainage systems.

In this case, the province having suffered damages from the flood, brought an action against the City in nuisance, claiming that the statutory protections against nuisance, contained in what are now section 294(9) of the *Vancouver Charter*, did not apply in the circumstances. In considering this case the Court looked extensively at the legislative history which preceded the enactment of what is now section 744 of the *LGA* (substantially the same as section 294(9) of the *Vancouver Charter*), noting that intent of the legislature was to provide a balance between protecting local governments from excessive liability claims and protecting private property owners. Thus, the Court interpreted the intent of the Legislature to be that the protection was not complete, but rather to be balanced on the facts.

In interpreting the words of what is now section 744 of the *LGA*, the Court, looking at the definitions of breakdown and malfunction, found that a blockage of the sewer was a malfunction within the scope of the statute, and as such, the City was not liable for nuisance in this case. In essence, the sewage pipe was designed to convey sewage from one point to another, and although a blockage was not a breakdown, it was a malfunction in that the pipe was impaired from functioning to convey sewage as designed. This was succinctly summarized by Mr. Justice Goepel, as follows:

> 23 "Breakdown" and "malfunction" convey different meanings. The Canadian Oxford Dictionary defines "breakdown" as a "mechanical failure", while "malfunction" is defined as a "failure to function in a normal or satisfactory manner". "Function", in turn, is defined as an "activity by which a thing fulfils its purpose".
>
> 24 The purpose of a sewer system is to take sewage from point "A" to point "B". In this case, because of an unknown obstruction, the sewer system failed to take sewage from point "A" to point "B". The obstruction prevented the system from fulfilling its purpose in a normal or satisfactory manner, which by definition constitutes a malfunction. This situation can be readily contrasted with that in Medomist Farms where the drainage ditch continued to function.

In both earlier and later cases, *Moffat v White Rock (City),* (1992) 13 MPLR (2d) 283 (BCSC) and *Craxton v North Vancouver (District)*, 2006 BCPC 212, the courts have similarly found that the statutory protection applies to a variety of known blockages, including tree roots growing into the sewer piping.

As a side note, provided the blockage (i.e. tree roots) was not caused by the negligent application of the municipalities maintenance and inspection policies, it is unlikely that a claim in negligence will succeed against a local government where a sewer backs up due to a blockage (*Craxton v North Vancouver (District), Supra*).

In the more recent decision of *Drader v Abbotsford (City)*, 2012 BCSC 873, the trial judge also dismissed a claim against the city for nuisance on the basis of what is now section 744 of the *LGA*, where the City's ditch overflowed on two separate occasions because of blocked culverts, which were also owned by the City. Although there were a number of other issues addressed in this case, like *British Columbia v Vancouver (City), Supra,* the blockage of the culverts constituted a malfunction within the scope of the statutory protection of the *LGA*, thus protecting the municipality from the nuisance claim. This decision was later affirmed by the BC Court of Appeal (2013 BCCA 376).

These decisions can be contrasted against *Medomist Farms, Supra* and *Kerlenmar Holdings Ltd., Supra,* where the courts found that the subject municipalities were not entitled to rely the statutory exemption from liability for nuisance. In these cases, the systems did not break down or malfunction, rather, the drainage works functioned as intended, conveying water from point A to point B, but lacked the capacity to hold the waterflow within their respective banks. The common feature was increased development of lands uphill from the flooded properties, and increased drainage of those developed lands into the municipal drainage works. As such, where a local government authorizes uphill development, care must be taken to ensure that drainage works have the capacity to carry that surface runoff away under all conditions (including rain and melt).

B. District Municipalities and Highway Drainage Works

Another possible source of protection against liability (not just nuisance) is found in section 639 of the *LGA,* which provides that a district municipality may collect water from a highway by means of drains or ditches, convey it, and discharge it in a convenient natural waterway or watercourse. Where a district municipality relies on this section to construct drains and ditches over private lands adjacent to highways, section 639(2) and (3) impose fairly specific notice requirements on the district municipality. That is, the notice, containing the prescribed information, must be published in a newspaper once a week for four consecutive weeks.

One interesting aspect of these notice requirements is that all claims for compensation arising out of the construction, maintenance and operation or use of the works must be filed with the municipality within one month from the last newspaper publication, after which time, all those who may suffer damages or seek compensation arising from the works, will be statute barred.

Where a request for compensation is received within the allowed time period and the municipality proceeds with the works, the compensation must be determined in accordance with division 4 of part 3 of the *Community Charter* [expropriation and compensation].

Interestingly, in addition to the statutory bar to additional claims for compensation where works are constructed under the authority of this section, there is additional protection, contained in section 639(7), against all forms of liability which may arise from certain highway drainage works:

> 639…
>
> (7) No action arising out of, by reason of or in respect of the construction, maintenance, operation or use of a drain or ditch authorized by this section, whenever the drain or ditch is or was constructed, may be brought or maintained in a court against a district municipality.

This protection extends beyond nuisance to other causes of action (like negligence), but is constrained to those works authorized under the section. That is those works which "collect the water from any highway by means of drains or ditches, and convey the water to, and discharge the water in, the most convenient natural waterway or watercourse", whenever they are constructed. The courts, in interpreting the predecessors to section 639 (which were fairly similar) have stated that a district municipality need not give notice pursuant to subsections 639(2) and (3) in order to rely on subsection 639(7) for immunity (See *North Vancouver (District) v McKenzie Barge & Marine Way Ltd,* [1965] SCR 377; *Bavelas v Copley,* 2001 BCCA 160). In *Bavelas v Copley,* 2001 BCCA 160, the Court noted that provided, in the context of district municipalities, the facts fit within the wording of the statute, they are immune from liability.

This succinct, and somewhat self-explanatory statement of law, was applied in *Drader v Abbotsford (City), Supra*, in the context of an overflowing ditch causing damage, by finding that the City of Abbotsford came within the wording of the statute. Justice Watchuk, in finding the immunity applicable to the City, succinctly stated:

> 305 The city is therefore immune from liability under ss. 315.2(7) if the water in question was collected from a highway and then discharged into the most convenient natural watercourse or waterway.

The critical components of immunity are thus (1) that the municipality be a district municipality, and (2) that the subject works fit within the wording of subsection 639(1) and (7). Note that it is unlikely that the statutory protection extends to drainage collected from a large catchment area, conveyed to drainage works located in a highway, then discharged into a natural watercourse.

IV. REGULATING DRAINAGE

A. Installation and Regulation of Drainage Works

1. Construction and Development

Section 69 of the *Community Charter* gives municipalities broad powers with respect to the regulation of drainage, sewage and dikes. These powers are not limited to setting requirements and standards for public owned land, but extend onto private property and onto private works. Generally, these powers, which are exercisable by bylaw, include:

- Regulating design and installation of drainage and sewerage works;
- Setting requirements for connecting buildings and structures to drainage and sewerage works;
- Imposing requirements on owners undertaking construction of works to maintain the proper flow of water in a stream, ditch, drain or sewer in the municipality;
- Imposing requirements on owners undertaking construction to reclaim or protect parts of land mass of the municipality from erosion by any cause;
- Imposing requirements with respect to dikes; and
- Allowing municipalities to make a watercourse part of the municipal drainage system, whether on private or public land.

Similar powers applicable to regional districts can be found in Part 9 - Division 3 of the *LGA* (see sections 306 – 314). Provided a local government has set standards and imposed requirements by bylaw, that local government will have the power to ensure that drainage is sufficient for the use of private property within their jurisdiction. One useful application of this section is the ability to impose requirements on owners and their contractors to prevent sediment and other contamination, which results from construction, from entering drainage works or otherwise impacting the proper flow of a watercourse.

Interestingly, these provisions are in addition to those found in Part 14 of the *LGA,* which provide more specific powers to regulate drainage as part of subdivision and development approvals. Under Part 14 – Division 11 of the *LGA,* local governments are permitted, as part of subdivision servicing requirements, to, <u>by bylaw</u>, require the construction of drainage works in accordance with the municipality's standards and requirements (*LGA,* S 506(1)(c)). Under

subsection 507(2) of the *LGA*, a local government may also require that an owner of land which is to be subdivided or developed provide drainage works to land other than that land which is to be subdivided or developed as an excess or extended service. Where extended services are required by a local government, the latecomer charges and cost recovery provisions set out in sections 507(3) and 508 of the *LGA* will also be applicable.

Where a local government operates their own drainage works, such a local government is further empowered under section 506(6) of the *LGA* to require that a development's drainage system or works, required under section 506(1)(c), be connected to the local government's system in accordance with the requirements set out by bylaw.

A further tool available to local governments, particularly where there are discrete areas within a local government's jurisdiction which are more susceptible than others with respect to drainage issues, is to designate a development permit area under Part 14 – Division 7 of the *LGA.* Designating a development permit area for the protection of the natural environment or for protection of development from natural hazards, pursuant to section 488(1)(a) and (b) of the *Local Government Act*, allows a local government to set requirements and guidelines with respect to drainage. Where a development permit area has been designated under section 488(1)(a) [protection of the natural environment], that development permit may require certain protection measures, such as adding or maintaining vegetation and trees, to control drainage (*LGA*, s 491(1)(e)). Whereas, if the area contains unstable soil or water subject to degradation and is designated under section 488(1)(b) [protection of development from natural hazards], the local government may require that a drainage system be constructed (*LGA,* s 491(2)(b)).

With the designation of a development permit area, the local government may also, by resolution, issue a development permit which varies or supplements a bylaw enacted under Part 14 – Division 11 of the *LGA* (*LGA,* s 490(1)(a)). This provides greater flexibility for local governments in enhancing or relaxing drainage subdivision and servicing requirements in particular geographical areas. The ability to issue a development permit under section 490, may be delegated.

As such, any time construction of buildings, structures, or works are undertaken on private land that impact drainage, the local government has the power to impose requirements.

These provisions are consistent with the *Land Title Act*, which permits approving officers to refuse to approve a subdivision plan if the approving officer determines that there is inadequate drainage, if the land is (or reasonably could be) subject to flooding, or where any highway shown in the plan is not drained properly (*Land Title Act,* s 86(c)(iii), (iv), and (v)). Thus, highlighting the importance of robust servicing and subdivision bylaws.

2. Runoff Control Requirements

In locations with significant rainfall, control of surface runoff and storm water is a critical consideration when considering any new development. Whether considering risks from increased volume and velocity of water in adjacent watercourses, leading to erosion and other geotechnical hazards, or pollutants, like gas and oils from motor vehicles, which are carried by surface runoff into sensitive environments, there are significant hazards associated with surface runoff. As has been discussed, a local government which fails to act with respect to surface runoff, could face liability for nuisance and damages done to downstream or downhill properties.

To address these concerns, the *LGA* provides local governments with powers, exercisable by bylaw, to impose requirements with respect to controlling runoff and storm water on and from lands where the owner is constructing paved or roofed areas (impermeable surfaces). In reality, every major construction project or development will likely fall within this category, making these powers applicable to a broad range of circumstances.

Pursuant to section 523 of the *LGA*, a local government may by bylaw:

- Require owners to provide for the ongoing disposal of surface runoff and storm water in accordance with the local government's bylaw;
- Establish maximum surface areas which may be covered by impermeable material; and
- Establish different standards under (1) and (2) for different uses, areas, sizes, conditions and zones.

With the ability to impose requirements with respect to "ongoing disposal", local governments may require owners to connect to a municipal storm sewer or to manage surface runoff onsite with various solutions like retention or detention ponds, oil and silt separators, and rock gardens. Having the flexibility built into runoff control bylaws to impose different requirements for different circumstances will be a valuable tool to address circumstances when connecting to municipal drainage works is impractical or impossible.

Where no bylaw has been adopted under section 523 of the *LGA*, it may be possible for a municipality to rely on section 2.1.2.2 of the British Columbia Plumbing Code, which requires, that every storm drainage system be connected to a public storm sewer, a public combined sewer, or a designated storm water disposal location. However, with the ability to impose requirements under the *LGA* and *Community Charter,* it would not necessarily be wise to rely solely on this provision which may be challenging to enforce.

3. Varying Drainage Bylaw Requirements

An owner of land affected by a drainage bylaw enacted pursuant to Part 14 – Division 11 or Division 13 of the *LGA*, may apply to a local government for a development variance permit which will vary the requirements of bylaws enacted under those divisions (*LGA,* s 498). As such, servicing requirements and runoff control provisions may be varied upon application, provided the local government's board or council approves the variance by resolution. If a local government proposes to issue such a permit, they will need to comply with the notice provisions set out in section 499 of the *LGA*.

It is important to note that the power to grant a development variance permit cannot be delegated by a board or council, and must be exercised solely by that board or council (*LGA*, s 498(4)).

4. Drainage Easements and Covenants

Where a local government requires drainage works as part of a subdivision or development, that surface water and runoff will need to go somewhere. This may be into onsite works, or directly into a watercourse or a municipal storm sewer system, however, where these are not practical options, that runoff will likely need to be discharged over adjacent parcels of land. As such, many approving officers will, as a condition of subdivision, require that the owner of the land obtain an easement (a drainage easement) from the adjacent owner. Since the developer will generally own the adjacent parcels of land within a subdivision, this is not necessarily an onerous task.

Taking a step back, an easement is a legal instrument, which is registrable in the Land Title Office, which gives one property owner (the "dominant tenement") certain rights over another property owners land (the "servient tenement") (see *Nordin v Faridi,* [1996] 5 WWR 242 (BCCA) at paras 31-32). These rights are persistent, in that the easement runs with the land, and as such, the dominant tenement will continue to be bound by the easement despite changes in ownership of the land. Thus, a drainage easement provides an ongoing right for the dominant tenement to legally discharge water over the servient tenement, in accordance with the terms of the easement.

Unfortunately, this legal tool comes with some significant limitations. One particular limitation of easements is that any positive obligations imposed on the owner of the servient tenement, to act or to pay, cannot run with the land (see *The Owners, Strata Plan LMS 3905 v Crystal Square Parking Corporation,* 2017 BCSC 71 at paras 44-45). As such, with an easement by itself, any new owner (other than the original owner) of the property receiving drainage, is not required to <u>do</u> anything to maintain the drainage works.

Likewise, an easement cannot impose positive obligations on the dominant tenement (the person discharging drainage onto the neighbouring servient tenement). As such, the owner of the dominant tenement, who has the advantage of the easement, cannot be obligated to maintain the works. For this reason, an owner of a servient tenement may insist on the

easement being terminable if the dominant owner does not fulfill its positive obligations in the easement. Obviously, this is not ideal from the local government's perspective and should be avoided by refusing to issue the permit/approval required for the development.

A further disadvantage, given that an easement can have an impact on the market value of the servient tenement and an easement may be discharged by the owner of the dominant tenement, is that where all the parcels of land within a development are still owned by a developer after subdivision it may be to the developer's advantage to discharge the easements required by the approving officer following the approval of the subdivision. If this were to happen, it could leave the properties without the right to discharge water onto adjacent parcels.

However, easements may be able to be secured by a local government with a section 219 covenant (of the *Land Title Act*), which can impose certain positive obligations with respect to the land and can further prohibit the easement from being discharged without the local government's approval. A section 219 covenant runs with the land on which it is registered and can bind subsequent owners of the land by its terms, provided those terms comply with the requirements set out in the *Land Title Act*. In addition to the ability to impose positive obligations, pursuant to section 219(6)(a) of the *Land Title Act,* a local government requiring an easement combined with a section 219 covenant can also request/demand an indemnity, providing a further layer of protection for the local government against present and future owners.

B. Addressing Existing Drainage Issues

Although it is easier and, potentially, less expensive to address drainage issues at the development and subdivision stage, the reality is that local governments will face existing or unforeseen drainage challenges which must be addressed. Both the *Community Charter* and the *LGA* provide a number of statutory mechanisms to address existing drainage issues.

1. Authority to Enter and Use Property

Section 32 of the *Community Charter*, provides a broad set of tools to enter onto private land and construct or maintain works or otherwise address concerns related to municipal services. Specifically, in relation to the provision of one or more services (like drainage), a municipality may:

- Enter on, break up, alter and take or enter into possession of and use private property,
- Construct works on private property;
- Where the municipality is protecting a highway from water damage, they may construct works on adjoining private lands; and

- Mitigate costs and damages from injurious affection (the reduction in value of private property due to the construction of a public work) by entering the affected property and constructing works or making such repairs as required for that purpose.

This power may be exercised without the consent of the private owner, subject to the requirements under section 16 of the *Community Charter* [authority to enter on or into property].

However, these broad powers do not come without certain costs to the municipality wielding it. Where a municipality exercises their powers under this section on or near a private property, and causes a loss or damage to the owner of that private property, the municipality will be liable to pay compensation pursuant to section 33 of the *Community Charter* [Compensation for expropriation and other action].

2. Drainage Control Provisions

Similar to section 32, but more circumscribed, section 70 of the *Community Charter* provides a set of powers which can be exercised specifically to address surface runoff and drainage concerns. Under section 70 of the *Community Charter*, a municipality may enter onto private property, including property outside the municipality, for the purposes of undertaking the construction of certain drainage control works if the municipal council considers that:

- The drainage of surface water from outside the municipality into or through an area inside the municipality should be prevented, diverted or improved; or

- Drainage of or from an area in the municipality should be prevented, continued beyond the municipality, diverted or improved.

Section 70, appears to broaden the powers under section 32, by eliminating the need for the works to be in relation to a service of the municipality.

To undertake such works, council must consider whether it would be in the public interest that those drainage works be constructed, inside or outside the municipality, and must further propose to undertake those works themselves. Furthermore, council must give notice to all affected land owners or other local governments and provide those persons with an opportunity to make representations to council before carrying out such drainage control works.

Like the exercise of powers under section 32 of the *Community Charter,* a municipality exercising these powers may be liable to pay compensation pursuant to section 33.

3. Appropriating Watercourses

As previously noted, pursuant to section 69(d) of the *Community Charter,* municipalities may appropriate watercourses on private land to become part of the municipal drainage system (regional districts have equivalent powers under section 313 of the *LGA*). This power, despite being a power of expropriation, is one which may be exercised without compensation to the owner of land, provided the municipality complies with the requirements set out in section 34 of the *Community Charter.* That is, the municipality may appropriate the land constituting the channel or bed of a stream within the municipality, provided:

- It is done from the purpose of constructing certain works set out in section 34(1) such as dikes or those works for containing and controlling water;
- The bed of the stream or channel has been defined in a bylaw; and
- A certified copy of the bylaw and plan, showing the bed of the stream or channel, is filed in the Land Title Office.

This power may be somewhat limited, as many beds of watercourses and channels are owned by the Crown and are not privately owned. In addition, draining into a stream will likely require an authorization under the *Water Sustainability Act*, as such an activity likely constitutes “changes in and about a stream” under that Act.

4. Remedial Action Requirements

Another option council may consider, provided a particular issue fits within the narrow scope of remedial action requirements for drainage concerns, is imposing a remedial action requirement on the person responsible for causing the drainage issues. This can be a powerful and cost-effective tool for a local government to address those issues within its statutory scope.

In a situation where a person has obstructed, in any way, a ditch, drain, creek or watercourse constructed or improved pursuant to the *Community Charter* or the *LGA*, or has damaged or destroyed a work connected with that ditch, drain, creek or watercourse, it is open to council (note that this cannot be delegated to staff) to impose a remedial action requirement on that person by resolution (*Community Charter*, sections 72(1)(c) and 75). Where a remedial action requirement is imposed, council may require that person who caused the obstruction or damage to undertake restoration work in accordance with the directions of council, or the directions of a person authorized by council, such as a director of engineering.

If the person subject to a remedial action requirement fails to perform the restoration works, the local government is at liberty to have the work completed by municipal staff or a contractor on behalf of that person, at that person’s cost (*Community Charter,* section 17). Any cost incurred by the municipality in carrying out the remedial requirements can then be reclaimed in the same fashion as property taxes.

Alternatively, where the person fails to perform the works required, the municipality may choose to pursue a remedy through the courts for the failure to comply with the remedial action requirement.

If a decision is made to proceed with imposing a remedial action requirement, the local government will want to ensure that all procedural requirements under Part 3 - Division 12 of the *Community Charter* are strictly adhered to.

V. CONCLUSION

The law of drainage, based upon centuries of common law and modified more recently by statute, can appear complex and uncertain. As climate patterns change and drainage infrastructure reaches the end of its lifecycle and needs to be replaced, we hope that this paper may serve as a starting point for understanding a local government's rights and responsibilities and the potential sources of liability in respect of drainage.

NOTES