COURT OF APPEAL FOR ONTARIO

CITATION: National Steel Car Limited v. Hamilton (City), 2025 ONCA 765
DATE: 20251112
DOCKET: COA-24-CV-0971

2025 ONCA 765 (CanLII)

Pepall, Lauwers and Dawe JJ.A.

BETWEEN

National Steel Car Limited

Plaintiff (Respondent)

and

The Corporation of the City of Hamilton*, ArcelorMittal Dofasco Inc,** and Hamilton Port Authority

Defendants (Appellant*/Respondent**)

Eli S. Lederman, Jonathan Chen and Christine Windsor, for the appellant

David Trafford, for the respondent National Steel Car Limited

Jordan Diacur, for the respondent ArcelorMittal Dofasco Inc.

Heard: September 11, 2025

On appeal from the amended judgment of Justice Michael R. Gibson of the Superior Court of Justice, dated July 24, 2024, with reasons reported at 2024 ONSC 4120 and 2024 ONSC 5418.

**Dawe J.A.:**

[1] National Steel Car Limited ("National") owns a plant in an industrial area of Hamilton, south of the harbour, where it manufactures rail cars. For more than 20

years, National's property has been periodically flooded during heavy rainstorms by wastewater from the adjacent Kenilworth Avenue Drainage Channel ("the Channel"), which runs north along the west side of National's property and drains into the harbour.

[2] Ownership of the Channel is divided between the Corporation of the City of Hamilton ("the City"), which owns the southern end, and National's neighbour, ArcelorMittal Dofasco Inc. ("AMD"), which owns the northern end. During heavy rainstorms, excess stormwater and sewage from the City's sewer system is diverted to flow along the Channel to the harbour. However, because the City and AMD both stopped maintaining their portions of the Channel many years ago, it has become clogged with sediment and other obstructions. As a result, during heavy rainstorms water and sewage now sometimes flows onto National's property.

[3] National sued the City, AMD, and a third defendant, the Hamilton Port Authority ("the HPA"), seeking damages and injunctive relief. At the end of the trial, the action against HPA was dismissed.

[4] The trial judge found the City and AMD both liable in nuisance, negligence, and under the rule in *Rylands v. Fletcher*, [1868] UKHL 1, L.R. 3 H.L. 330. He awarded National compensatory damages of approximately $5.3 million, and held that "[t]he City and AMD are each 50% liable for this amount". The trial judge also

2025 ONCA 765 (CanLII)

awarded punitive damages against both defendants, ordering the City to pay $400,000 and AMD to pay $500,000. Finally, the trial judge granted a permanent and mandatory injunction that requires the City and AMD to undertake various remediation and maintenance efforts with respect to the Channel.

[5] The City appeals, but only on issues of remedy, and raises four issues. First, with respect to the compensatory damages award, the City contends that the trial judge should not have found the City and AMD equally liable, arguing that on apportionment AMD was more blameworthy. Second, the City argues that the trial judge erred by not finding that National had failed to mitigate its damages by not taking steps to build a flood wall. Third, the City argues that the trial judge erred by ordering that it pay any punitive damages. In the alternative, the City argues that the $400,000 award was excessive and should be reduced. Fourth, the City takes issue with the terms of the injunction ordered by the trial judge, arguing that one of its terms should be varied.

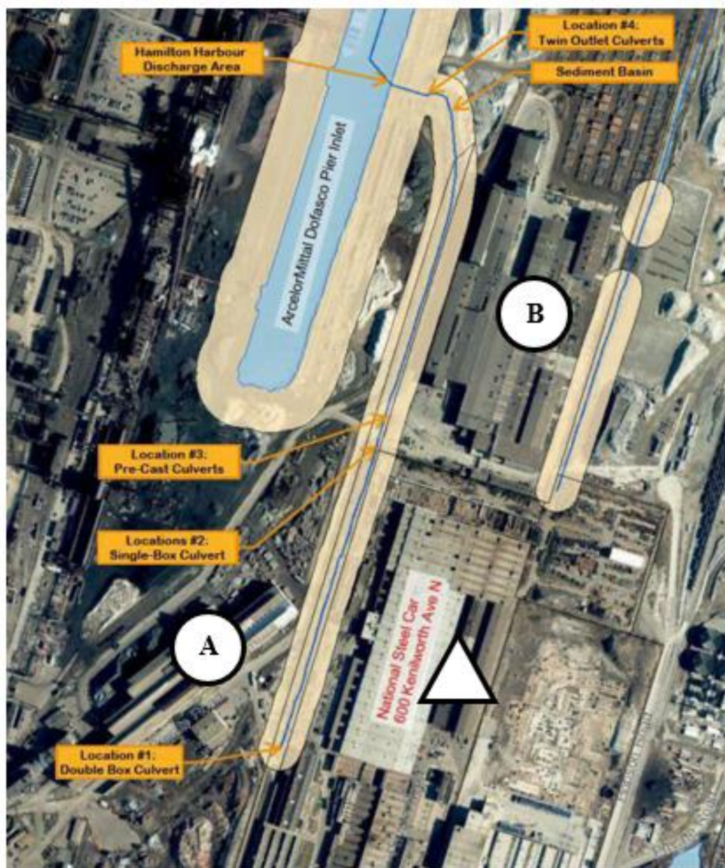
[6] For the following reasons, I would allow the City's appeal only on the last of these grounds, and would vary one paragraph of the trial judge's injunction to clarify its meaning. In all other respects I would dismiss the appeal.

## A. FACTUAL BACKGROUND

[7] National's plant is located in an industrial area bounded by Burlington Street to the south and Hamilton Harbour to the north. In the aerial photo reproduced

2025 ONCA 765 (CanLII)

below, National's property is marked with a triangle. AMD operates a steel plant on industrial sites to the north and west of National's property, both marked with circles labelled as "A" and "B". The Channel starts at the point on the map marked as "Location #1" and runs north between the western boundary of National's property and the eastern boundary of AMD's property to the west. It then continues north before turning west at the "Sediment Basin" and draining into a harbour inlet through twin outlet culverts marked as "Location #4". There are two other culverts in the Channel at the points marked as Locations #2 and #3.




1 Aerial map (modified from Exhibit 30)

2025 ONCA 765 (CanLII)

[8] AMD owns the northern portion of the Channel, including the areas marked on the photo as the Sediment Basin and the twin outlet culverts at Location #4. Before the start of the trial, the City denied that it owned any part of the Channel. However, the City ultimately conceded that it owns the southern part of the Channel at least to a point 3,300 feet north of Burlington Street, which is some distance north of the culverts at Locations #2 and #3.

[9] The double box culvert at Location #1 serves as an outlet for the City's sewer system. Wastewater from the city sewers is ordinarily sent to a treatment plant, but during heavy rainstorms the flow can exceed this plant's capacity. When this happens, the excess wastewater – a mixture of storm water and untreated sewage – is discharged into the Channel through the Location #1 double box culvert. The maximum volume of wastewater that can pass through the Location #1 culvert is 11.7 million liters per hour, and during a major storm discharges of this volume can continue for several hours.

[10] When the Location #1 culvert was originally installed in 1922, it fed into a natural harbour inlet called Ogg's Inlet. However, over the years AMD and its predecessor, which for a time owned National, infilled and "channelized" the inlet. The culverts at Locations #2 and #3 were installed by AMD to support roads that it built to connect its properties on either side of the Channel. Although both culverts are on land that the City now acknowledges it owns, AMD built them without obtaining the City's permission.

2025 ONCA 765 (CanLII)

[11] The wastewater that flows through the Channel contains sediment, and over time this sediment has obstructed the culverts. The trial judge found that the Location #4 culverts on AMD's property were 90 to 95 percent blocked by sediment, and that the Location #2 and #3 culverts on the City's land were obstructed to lesser degrees.

[12] For many years neither the City nor AMD took any steps to keep the Channel free of obstructions. AMD sold its interest in National in 1994, and that same year it stopped dredging its part of the Channel. As mentioned, until the start of the trial, the City denied that it owned any part of the Channel or had any obligation to maintain it, even though it continued to use the Channel as an outlet for stormwater and sewer runoff. The City took the position that maintaining the Channel was either AMD or National's responsibility, but it took no action to enforce a municipal bylaw that prevents property owners from obstructing watercourses on their land and gives the City authority to compel the removal of any obstructions.

[13] National maintains that between September 2010 and October 2021 its property flooded fifteen times. It claimed compensatory damages of $5,287,325.58 for its labour and clean-up costs, lost inventory, and costs relating to a pump and cistern system it had installed, as well as the future cost of building a proposed flood wall. National also sought punitive damages against both the City and AMD.

2025 ONCA 765 (CanLII)

## B. THE TRIAL JUDGMENT

### 1. Findings on liability

[14] The trial judge found both the City and AMD liable in nuisance, negligence, and under the rule in *Rylands v. Fletcher.*

#### a. Liability for Nuisance

[15] The trial judge concluded that the City and AMD were both liable in nuisance. He found that the periodic floods had forced National to cease operations, damaged its inventory and equipment, and required some of its employees to spend time and effort cleaning up. The trial judge held that this interference with National's use and enjoyment of its property by the City and AMD was substantial and unreasonable.

[16] On the issue of causation as an aspect of the test for nuisance, the trial judge explained:

> Where two or more parties jointly create or continue a nuisance, each of them is liable in nuisance. While the negligence 'but for' test is focused on whether the defendant's fault caused the loss, in nuisance, the question is whether, but for the defendant's use of their land, the plaintiff would not have suffered the flooding. In this case, this is abundantly clear. If the City does not discharge 11.7 million liters per hour of contaminated stormwater and sewage collected from its Kenilworth [Combined Sewer Outlet] and diverted into the double box culvert at Location 1, knowing that it can never reach the Harbour, National does not flood. If the City and AMD take usual, proactive and preventative maintenance steps, National does not flood. If AMD does not

2025 ONCA 765 (CanLII)

> substantially alter its lands and channelize the water course reducing the Channel's hydraulic capacity and directing flood waters onto the National property, National does not flood. The use of their respective lands has clearly caused the ongoing substantial and unreasonable interference with National's property.

**b. Liability for negligence**

[17] The trial judge also found the City and AMD both liable in negligence, finding that they had each failed to meet the accepted standard of practice for maintaining the Channel to prevent flooding.

[18] With respect to the City, the trial judge found that the City had known since October 2000 that it owned at least the first 3,300 feet of the Channel north of Burlington Street, and had obtained an expert report in 2017 that confirmed this. Nevertheless, the City had not taken any steps to maintain its portion of the Channel.

[19] With respect to AMD, the trial judge found that it had been negligent in various ways, including by allowing the culverts at Location #4, on AMD's property, to become completely submerged in sediment and severely blocked. Since 1994 AMD had made no attempt to maintain its portion of the Channel and keep these culverts unobstructed.

[20] With respect to causation, the trial judge applied the material contribution test in *Clements v. Clements,* 2012 SCC 32, [2012] 2 S.C.R. 181, and found that the City's and AMD's negligence had materially contributed to the flooding of

2025 ONCA 765 (CanLII)

National's property, and thus to its damages. The City had contributed to the flooding and damage by diverting as much as 11.7 million liters per hour of sediment-bearing wastewater out of Location #1 during rainstorms, knowing that the water would not drain into the harbour because the Channel was obstructed; by failing to maintain the part of the Channel it owned; and by failing to enforce its bylaw and require AMD to maintain its part of the Channel.

2025 ONCA 765 (CanLII)

[21] For its part, AMD had contributed to the flooding of National's property and its resulting damages by infilling and "channelizing" Ogg's Inlet, including installing the culverts at Locations #2, #3, and #4, which have limited the Channel's capacity to drain the wastewater that was poured into it by the City; by failing to maintain its own portion of the Channel, including the Sediment Basin and the culverts at Location #4; and by raising portions of its own property and building haul roads and berms that cause water to flow onto National's property.

[22] The trial judge found that National had demonstrated that its loss would not have occurred "but for" the collective negligence of the City and AMD. The trial judge also found that the negligence of either the City or AMD alone would have been sufficient to cause the loss.

### c. Strict liability under the rule in *Rylands v. Fletcher*

[23] The trial judge found further that National had established the essential elements for the City and AMD to be held strictly liable under the rule in *Rylands*

*v. Fletcher*. He found that both defendants had made a “non-natural” or “special” use of their properties that had allowed wastewater to escape onto National’s property, where it had caused damage.

**2. Remedies**

[24] The trial judge rejected the City’s argument that National should have done more to mitigate its damages, discussing the steps National had taken or attempted. He accepted National’s evidence that it had suffered damages of $5,287,325.58, including the future cost of building a flood wall, and found that the City and AMD were each liable for half of this amount. The trial judge later awarded National an additional $936,094.20 as prejudgment interest, which he also apportioned equally between the City and AMD.

[25] The trial judge also ordered both the City and AMD to pay punitive damages to National. He ordered that AMD pay $500,000, but reduced the award against the City to $400,000 “in recognition of National’s own misconduct in withholding taxes in an attempt to leverage and punish the City.”

[26] The trial judge also granted injunctive relief, ordering the City and AMD to undertake work to remediate and maintain their parts of the Channel.

[27] I will discuss the remedies granted by the trial judge in greater detail when I address each of the City’s grounds of appeal.

2025 ONCA 765 (CanLII)

## C. ANALYSIS

### 1. Apportionment of liability between the City and AMD

[28] The trial judge found that the City and AMD were each liable for half of the $5,287,325.28 compensatory damages award. The City's first ground of appeal is that the trial judge erred by failing to conduct a separate apportionment analysis. According to the City, if the trial judge had properly considered the issue of apportionment by examining the City and AMD's relative blameworthiness, he "would have found that the City is significantly less blameworthy than AMD and liable for only 20% of the damages."

[29] The starting point for the City's argument is s. 1 of the *Negligence Act,* R.S.O. 1990, c. N.1., which provides:

> Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

[30] Section 4 of the *Negligence Act* provides further that:

> If it is not practicable to determine the respective degree of fault or negligence as between any parties to an action, such parties shall be deemed to be equally at fault or negligent.

In *Martin v. Listowel Memorial Hospital* (2000), 51 O.R. (3d) 384 (C.A.), at para. 22, this court noted:

2025 ONCA 765 (CanLII)

> Although it may be difficult, and often is, for the trier of fact to determine what role the negligence of each wrongdoer played in causing or contributing to the ultimate damage suffered when a number of mistakes together created the problem for the plaintiff, s. 4 is intended to apply only when it is fair to apportion responsibility equally.

[31] The jurisprudence in Ontario and in other provinces with similar legislation distinguishes between fault and causation. In his majority reasons for the British Columbia Court of Appeal in *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 B.C.L.R. (3d) 219 (C.A.), at paras. 18-19, Lambert J.A. held that it is an error for a trial judge to apportion liability "based on an assessment of relative degrees of causation", explaining:

> I think that such an approach to apportionment is wrong in law. The *Negligence Act* requires that the apportionment must be made on the basis of "the degree to which each person was at fault". It does not say that the apportionment should be on the basis of the degree to which each person's fault caused the damage. So we are not assessing degrees of causation, we are assessing degrees of fault. In this context, "fault" means blameworthiness. So it is a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all the circumstances. [Emphasis in original.]

These comments were adopted by Lang J.A., writing for this court on this point, in *Rizzi v. Marvos*, 2008 ONCA 172, 236 O.A.C. 4, at para. 49, leave to appeal refused, [2008] S.C.C.A. No. 200. See also *Heller v. Martens*, 2002 ABCA 122, 4 Alta. L.R. (4th) 51, at para. 31.

2025 ONCA 765 (CanLII)

[32] In *Parent v. Janandee Management Inc.*, 2017 ONCA 922, at para. 14, this court noted that "[f]ault is different than causation", and added at para. 15:

> The notion of fault involves a consideration of the blameworthiness of the actions of each of the defendants who have contributed to the damages suffered. As Professor Klar says in his text (L. N. Klar, *Tort Law*, 5th ed, (Toronto: Carswell, 2012)), at p. 582:
>
> > [A]ssessing degrees of fault or the extent of a person's responsibility must relate to the relative culpability or blameworthiness of the parties. The apportionment decision depends upon which of the defendants failed most markedly to live up to the standards of conduct expected.

[33] The City did not expressly ask the trial judge to conduct a separate apportionment analysis. However, the main thrust of the City's closing submissions at trial was that AMD and National itself were entirely responsible for the flooding, and that the City was blameless. I accept that once the trial judge rejected this argument it became his task to apportion liability between the City and AMD based on the correct legal principles.

[34] That said, we cannot infer that the trial judge necessarily failed to do so merely because he did not show all of his work. As this court noted in *Ault v. Canada (Attorney General)*, 2011 ONCA 147, 274 O.A.C. 200, at para. 56, leave to appeal refused, [2011] S.C.C.A. No. 206, quoting from Bastarache J.'s judgment

2025 ONCA 765 (CanLII)

in *Ingles v. Tutkaluk Construction Ltd.*, 2000 SCC 12, [2000] 1 S.C.R. 298, at para. 57:

> The test for appellate interference with a trial judge's apportionment of liability is an exacting one: "The apportionment of liability is primarily a matter within the province of the trial judge. Appellate courts should not interfere with the trial judge's apportionment unless there is demonstrable error in the trial judge's appreciation of the facts or applicable legal principles" (citations omitted).

2025 ONCA 765 (CanLII)

[35] A trial judge's reasons, considered as a whole, may make it clear that liability was properly apportioned based on the parties' comparative blameworthiness, even when this is "not explicitly stated": *Heller,* at para. 52. Moreover, although causation and blameworthiness are analytically distinct concepts, in a particular case they may align with one another. It is accordingly not an error *per se* for trial judges' apportionment of liability to match their assessment of causal responsibility.

[36] In this case, the trial judge's factual findings show that he apportioned liability equally between the City and AMD because he considered them both to be equally blameworthy.

[37] On the one hand, the trial judge found that AMD was responsible for: (i) "channelizing" Ogg's Inlet; (ii) installing the culverts at Locations #2, #3, and #4 that created bottlenecks along the Channel; (iii) installing the Location #2 and #3 culverts on land owned by the City, without the City's permission, and then failing

to maintain them and keep them unobstructed; (iv) since 1994, failing to maintain the part of the Channel AMD itself owned, including keeping the twin outlet culverts at Location #4 from becoming blocked with sediment; and (v) elevating its own property and building haul roads and berms that caused water to be directed onto National's property. While these findings were all relevant to the issue of causation, they also had a bearing on the issue of AMD's blameworthiness, since it was readily foreseeable that AMD's actions and inaction would likely harm its neighbour, National.

[38] On the other hand, the trial judge also made findings about the City's actions and inaction and state of knowledge that bore both on the issue of causation and on the City's degree of fault. The trial judge found that the City: (i) knew since October 2000 that it owned at least the first 3,300 feet of the Channel; (ii) adopted a deliberate strategy of denying ownership of any part of the Channel in order to avoid maintenance costs; (iii) knew that the Channel was not being properly maintained, and that this was causing periodic flooding of National's property; (iv) continued to allow wastewater from its sewer system to discharge into the Channel, knowing that this would cause flooding; (v) knew that this wastewater contained sediment, which would exacerbate the existing drainage problems in the Channel; (vi) failed to enforce its bylaw requiring property owners, including AMD, to clear obstructed waterways; and (vii) failed to comply with this bylaw itself in relation to the part of the Channel it owned.

2025 ONCA 765 (CanLII)

[39] In light of these findings, there is nothing "jarring" about the trial judge's final conclusion that the City and AMD were equally liable: *Ault,* at para. 98.

[40] The conclusion that the trial judge viewed the City and AMD as equally blameworthy is reinforced by his decision that they should both pay punitive damages, and by the size of the punitive damages awards he made against each defendant. While it is true that the trial judge made the punitive damages award against the City smaller than the award against AMD, it is clear from his reasons as a whole that he reduced the award against the City by $100,000 to sanction National for its own misconduct in withholding tax payments from the City. His reasons suggest that but for this he would have made the punitive damages awards against AMD and the City the same. This implies that the trial judge did not see any meaningful difference between the defendants' overall blameworthiness.

[41] The City's claim that the trial judge should have found the City significantly less blameworthy than AMD rests in part on its argument that the trial judge made a palpable and overriding factual error by finding that the City knew as of October 2000 that it owned the southern part of the Channel. The City also relies on this alleged factual error to support its punitive damages ground of appeal.

[42] It is now undisputed that the City owns a 66-foot wide strip of land extending from the end of Kenilworth Avenue N. to a point at least 3,300 feet north of Burlington Street ("the Kenilworth Road Allowance"). The southern part of the

2025 ONCA 765 (CanLII)

Channel runs along this City-owned land. The parties at trial disagreed about whether the Kenilworth Road Allowance extends even further, to a point 4,480 feet north of Burlington Street, but the trial judge did not find it necessary to resolve this dispute.

[43] The trial judge based his finding that the City knew by October 2000 that it owned the Kenilworth Road Allowance on a memo dated October 17, 2000 that was prepared by the manager of the City's Survey & Mapping Department, Gord McGuire, and addressed to a lawyer in the City's legal department, Deborah Edwards ("the McGuire Memo"). In this memo, Mr. McGuire summarized his review of the historical record, and concluded that the City did not own the land "north of the Kenilworth". The trial judge interpreted this as referring to the land north of the Kenilworth Road Allowance, and reasoned that the McGuire Memo thus implied that the City had retained ownership of the Kenilworth Road Allowance itself, meaning that it owned the southernmost portion of the Channel. The trial judge concluded:

> By October 17, 2000, there is no doubt the City was aware that it was the owner of, at least, the first 3,300 feet of the Kenilworth Road Allowance and the portion of the Channel therein north of Burlington Street. On October 17, 2000 the City's Manager of the Survey and Mapping Department, Mr. Gord McGuire, provided a memorandum on the ownership of the Channel to Ms. Edwards (the "McGuire Memo"). The memorandum follows the historical conveyances of the subject properties in a similar way to both expert real estate

2025 ONCA 765 (CanLII)

> opinions generated in this action, including a reference to the 1791 Crown survey of Barton Township, which definitively establishes that the Kenilworth Road Allowance is no less than 3,300 feet north of Burlington Street.
>
> The McGuire Memo concludes that the City has "no interests in that [sic] lands north of the Kenilworth" [Road Allowance]. As noted below, the expert evidence, undisputed surveys, and land titles establish that the Kenilworth Road allowance ends 4,400 feet north of Burlington.
>
> Nonetheless, regardless of the determination as to where the Kenilworth Road Allowance ends and its extension begins, it is clear that the City knew and understood that it owned the Channel no less than 3,300 feet north of Burlington Street and, therefore, owned the Channel to the north of Locations 2 and 3.

[44] The City argues that the trial judge made two errors in relying on the McGuire Memo to find that the City had acquired knowledge that it owned the southern part of the Channel by as early as October 2000.

[45] The City's first argument is that without testimony from Mr. McGuire or Ms. Edwards, the trial judge could not properly interpret the reference in the McGuire Memo to land "north of <u>the Kenilworth</u>" as meaning land north of <u>the Kenilworth Road Allowance</u>. According to the City:

> [T]he McGuire Memo should have been interpreted as indicating that the City's interest ends at the north end of Kenilworth Avenue (i.e., Location #1) where the Channel (i.e. the water) then begins. There is no reference in the McGuire Memo to the City owning a road allowance that

2025 ONCA 765 (CanLII)

> extends 3,330 feet north from Burlington Street or any point beyond that.

The City also cites a passage in which Mr. McGuire states that he could find no case law "to support the theory that there is municipal road allowance under water" as further evidence that he believed that the City's ownership interest ended at the terminus of Kenilworth Avenue N., where it intersects with Burlington Street.

2025 ONCA 765 (CanLII)

[46] I do not agree that this is a supportable interpretation of the McGuire Memo when it is read as a whole. Mr. McGuire began his memo by noting that he was addressing "the title in front of Lots 2 & 3 in the Broken Front Concession" – that is, in front of National's property and the property owned by AMD that is marked with a circle labelled "A" in the above aerial photo, to the west of National's property. Lots 2 and 3 were both above water at the time of the original 1791 Crown survey, and are located north of what is now Burlington Street. Mr. McGuire noted that the 1791 survey map "shows that the road allowance between Lots 2 and 3 in the Broken Front Concession ended effectively where it is today", and that "the lands in front of the road allowance covered with water are considered water lot." Mr. McGuire was evidently using the term "in front" to mean "towards the harbour", or "to the north".

[47] Read in context, Mr. McGuire's comment that he could find no case law to "support the theory that there is municipal road allowance under water" can only be sensibly understood as his rejecting the possibility that the municipal road

allowance might have extended even further north, over land that would have been underwater in 1791. It cannot plausibly be read as reflecting a mistaken belief on his part that the Kenilworth Road Allowance stopped at Burlington Street, since he expressly recognized elsewhere in the memo that it continued between Lots 2 and 3, both of which are north of Burlington Street. Likewise, when the trial judge was interpreting Mr. McGuire's ambiguous reference to "the Kenilworth", he was not required to assume that Mr. McGuire had somehow come to the erroneous conclusion that the Kenilworth Road Allowance stopped at Burlington Street.

[48] I am accordingly not persuaded that the trial judge's interpretation of the McGuire Memo reflects any palpable error.

[49] The City's second argument is that even if the trial judge correctly interpreted the McGuire Memo, he erred by attributing knowledge of its contents to the City as a corporate entity: see *Aquino v. Bondfield Construction Co.*, 2024 SCC 31, 496 D.L.R. (4th) 613. According to the City, the evidence does not establish that either Mr. McGuire or the lawyer who received the memo, Ms. Edwards, were "directing minds" of the Corporation of the City of Hamilton, or that the information in the memo was shared with any other persons who were directing minds.

[50] In response, National argues that the common law corporate attribution doctrine should not apply to municipal corporations.

2025 ONCA 765 (CanLII)

[51] This is not an appropriate case for us to decide this latter issue, which neither the City nor National appear to have raised before the trial judge, and which was not fully argued before us. Even assuming, without deciding, that it was an error for the trial judge to attribute knowledge of the McGuire Memo to the City, I would not find this error to have been overriding in relation to his assessment of the City's fault and blameworthiness.

[52] Before Mr. McGuire wrote his memo in October 2000, the City had already staked out the position – which it now agrees was wrong – that it did not own any part of the Channel. The City maintained this position until the eve of trial in 2023, despite having received an expert report in March 2017 that confirmed that the City owned the southern part of the Channel at least as far as 3,330 feet north of Burlington Street.

[53] The trial judge found that there was extensive evidence, some in the City's possession, that contradicted the City's position on the issue of ownership. Among other things, he found that it "would have been clear since October 2010 from a search of Land Titles" that the City owned the Kenilworth Road Allowance; that this was confirmed by "[s]urveys in the City's possession and relied upon by their own expert"; and that for tax purposes the City treated "the entire 4,480-foot road allowance as municipal property". The City does not take issue with any of these findings by the trial judge.

2025 ONCA 765 (CanLII)

[54] Even if the City did not have actual knowledge that it owned the southern part of the Channel as early as October 2000, this does not put the City in a substantially better position when assessing its level of fault or blameworthiness. Having regard to the trial judge's other factual findings, it would not have been difficult for the City to discover the truth. Moreover, the City continued to deny ownership for six years after the March 2017 expert report confirmed that it owned the Kenilworth Road Allowance between Lots 2 and 3. It did so knowing that wastewater from its sewage system was still regularly flooding National's property. The trial judge found that there were eight floods after the City received the March 2017 expert report, and that the City had continued to deny ownership in order to avoid the expense of maintaining the Channel, including the cost of disposing of the dredged material.

[55] In light of the trial judge's factual findings, even if the City fell short of having actual knowledge that it owned the southern part of the Channel as early as October 2000, it was at best negligent in not acquiring this knowledge sooner, before 2017. At worst, the City was wilfully blind and did not make further inquiries to avoid learning the truth. The City also continued to deny ownership for six years after 2017, after it knew that its position was unsupportable. In my view, none of these alternatives put the City in an appreciably better position when it comes to assessing its relative level of fault or blameworthiness as compared to that of AMD.

2025 ONCA 765 (CanLII)

2025 ONCA 765 (CanLII)

[56] Accordingly, even if I assume without deciding that the trial judge erred by finding that the City had actual knowledge of its ownership interest in the Channel as early as October, 2000, I am not persuaded that this error had a material bearing on his conclusion that the City and AMD were equally at fault.

[57] I would therefore not give effect to this ground of appeal. This makes it unnecessary for me to consider or address any potential implications for the attribution of fault analysis that arise from the trial judge's unchallenged conclusion that the City and AMD are both strictly liable under the rule in *Rylands v. Fletcher,* which does not require any finding of fault.

**2. Mitigation of damages by National**

[58] The trial judge reviewed the various steps National took over the years to try to deal with the periodic flood problem, and concluded that it had made adequate efforts to mitigate its losses. On appeal, the City disputes this conclusion. In particular, it argues that National should have done more to pursue the possibility of building a flood wall.

[59] The trial judge addressed this issue in his reasons, stating:

> In 2015 National hired Mr. George Thomas who recommended National reach out to Hamilton Conservation Authority ("HCA") to obtain approvals for remedial work. In an email dated January 4, 2016 copied to the City, the HCA advised that the City had to be involved as owner of the Channel. The City refused to be

> involved and never responded and this route to a resolution was frustrated.
>
> National's frustration reached a point where it instructed counsel to threaten the Defendants that it would proceed with building a flood wall, but this threat was met with continued inaction. National received legal advice that without HCA approval and given the prospect of a lawsuit due to potential harm to AMD, National could not proceed with the wall absent approvals.

2025 ONCA 765 (CanLII)

[60] While the City argues that there was "no evidence that National diligently investigated these issues", it was the City's burden to prove both that National had failed to make reasonable efforts to mitigate, and that mitigation was possible: *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, [2012] 2 S.C.R. 675, at para. 24. The trial judge was evidently not satisfied that the City had met its burden. The City has not shown that he made any palpable and overriding error in reaching this conclusion.

**3. The punitive damages award**

[61] The City argues that the trial judge erred by ordering that it pay punitive damages or, in the alternative, that the quantum of the punitive damages he awarded against the City was excessive and should be reduced.

[62] This ground of appeal rests in part on the City's argument that the trial judge erred by treating the McGuire Memo as giving the City actual knowledge in October 2000 that it owned the southern part of the Channel. As I have already discussed,

even if this was an error, the trial judge made other findings of fact that do not paint the City in a much better light, which the City does not challenge on appeal.

[63] As the trial judge noted:

> The City continued its denial of ownership throughout the prosecution of this action commenced in 2012 until four days prior to the commencement of trial [in 2023].

The City maintained this position up until the trial even though it had received an expert report in March 2017 establishing that it owned at least the first 3,300 feet of the Channel. As the trial judge observed:

> [T]he City continued to deny ownership in its pleading, including its Amended Statement of Defence, dated March 16, 2023, filed just before the commencement of trial and it refused to admit ownership of the Channel in response to a Request to Admit of the Plaintiff, delivered February 27, 2023.

[64] The trial judge found that there were eight more floods after March 2017, and concluded:

> Both Defendants still refuse to maintain their properties even after acknowledging ownership or control. They have completely abrogated their responsibilities as property owners, knowing that the employees of National will have to clean up the mess caused by the flooding.

[65] Even assuming without deciding that the trial judge erred by finding that the City acquired actual knowledge of its ownership of the southern part of the Channel as early as October 2000, his conclusion that an award of punitive damages was

2025 ONCA 765 (CanLII)

warranted would remain a rational determination based on his unchallenged findings about the City's conduct after 2017: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at paras. 100-101.

2025 ONCA 765 (CanLII)

[66] The City's second argument is that the trial judge should have put more weight on National's own misconduct in withholding its payment of taxes, and "ought to have dismissed the punitive damages claim on the basis of this conduct alone", rather than merely reducing the award against the City.

[67] The trial judge recognized that "National does not come to this trial with entirely clean hands", and concluded that the punitive damages award against the City "must be leavened by recognition of National's own misconduct in withholding its taxes with regards to the City." While failure to pay its taxes was serious misconduct, it was for the trial judge to determine the appropriate reduction, and I see no reason to interfere with how he exercised his discretion.

[68] The City also argues that the trial judge "ought to have considered whether punitive damages were necessary, having regard to the significant compensatory damages awarded for past losses and anticipated future costs, the mandatory injunction and National's decision to withhold its property taxes of over $7 million." The trial judge expressly considered and weighed all of these factors, and concluded that it was still appropriate to make a reduced award of punitive

damages against the City. His reasons disclose no errors that would justify our interfering with his decision on this issue.

2025 ONCA 765 (CanLII)

### 4. The terms of the injunction

[69] In paras. 6(a) through (e) of his amended judgment, the trial judge made a permanent and mandatory injunction against the City and AMD that requires them to undertake various remedial and maintenance activities. The City takes issue with the wording of para. 6(d), which states:

> [F]ourthly, both ArcelorMittal Dofasco Inc and The Corporation of the City of Hamilton shall task their engineers with designing (with an engineer's stamp) an annual maintenance protocol for their respective portions of the remediated Kenilworth Avenue Drainage Channel so as to ensure [National's] property does not flood. [Emphasis added.]

[70] The City's concern is that the concluding words of para. 6(d) could be understood as requiring the City and AMD to design an annual maintenance protocol that ensures that National's property will never flood. The City argues that no matter how well the Channel is maintained, there can still be a freak storm that overwhelms its drainage capacity. The City also notes that although National has been awarded damages that are meant to compensate it for the cost of designing and constructing a flood wall around its property, the trial judge did not order National to actually build this flood wall. Moreover, even if National does build the

flood wall there is some uncertainty about how effective it will be at preventing flooding.

[71] National responds that the trial judge's amended judgment must "be understood by examining the text, context, and purpose of the provision in issue": *Business Development Bank of Canada v. 170 Willowdale Investments Corp.*, 2025 ONCA 251, 18 C.B.R. (7th) 1, at para. 24. National argues that when para. 6(d) is read in context, it should be understood as only requiring the City and AMD to design an annual maintenance protocol for the Channel that meets the accepted standard of practice, not one that guarantees that National's property will never flood again under any circumstances.

[72] I agree with National that the trial judge very likely did not intend para. 6(d) to require the City and AMD to ensure that National's property never floods again. I also agree that the concluding phrase in para. 6(d) could be read as simply clarifying the purpose of the annual maintenance protocol. However, this phrase can also be read broadly as requiring the City and AMD to guarantee that National's property "does not flood", and thus as exposing them to the risk of being found in breach of a court order if a flood ever occurs for any reason.

[73] I see no good reason not to address this latter risk by clarifying the terms of para. 6(d). In my view, the concluding phrase "so as to ensure [National's] property does not flood" is unnecessary, since it is already clear from the rest of para. 6 that

2025 ONCA 765 (CanLII)

the goal of the annual maintenance protocol is to reduce the risk of flooding, and that the protocol AMD and the City are required to design under para. 6(d) is to be "in keeping with the accepted standard of practice": see para. 6(a).

[74] Accordingly, I would vary para. 6(d) of the amended judgment by deleting the concluding phrase, so that the amended paragraph will now read:

> d. fourthly, both ArcelorMittal Dofasco Inc and The Corporation of the City of Hamilton shall task their engineers with designing (with an engineer's stamp) an annual maintenance protocol for their respective portions of the remediated Kenilworth Avenue Drainage Channel.

## D. DISPOSITION

[75] I would allow the City's appeal to the extent that I would vary para. 6(d) of the amended judgment, as discussed above. In all other respects I would dismiss the appeal.

[76] While the City has been partially successful on its appeal, the respondents National and AMD have been the more successful parties. Taking the mixed success into account, I would award National and AMD their costs on a partial indemnity basis, fixed at $30,000 each, all inclusive.

Released: November 12, 2025 "S.E.P."

"J. Dawe J.A."
"I agree. S.E. Pepall J.A."
"I agree. P. Lauwers J.A."

2025 ONCA 765 (CanLII)