CITATION: Raubvogel et al v. The City of Vaughan et al, 2016 ONSC 7478
NEWMARKET COURT FILE NO.: CV-13-115774-00
DATE: 20161130

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Dr. Shy Raubvogel and Lesley Raubvogel Plaintiffs	Mark Shapiro and Adam Grant, for the Plaintiffs
– and –	
The City of Vaughan, The Regional Municipality of York, The Corporation of the Town of Markham, The Corporation of the Town of Thornhill, The Regional Municipality of Peel, The City of Toronto, The Corporation of the Town of Newmarket, The Corporation of the Town of Richmond Hill, and XYZ Municipality Defendants	Andrew Heal and Catherine DiMarco, for the Defendant, The City of Vaughan
	HEARD: May 16, 18 and 20, 2016

DECISION FROM TRIAL

SUTHERLAND J.:

Overview

[1] Early in the morning of October 25, 2007 and then again in the early morning of January 4, 2010, the plaintiffs were awoken by the sound of water gushing down their driveway into the basement of their home, 172 King High Drive, Thornhill, Ontario.

[2] The plaintiffs are husband and wife and commenced two actions to recover the resulting damages to their home, personal property and vehicles from the breakage of the water main in front of the entrance to their driveway.

[3] On October 25, 2013 Mullins J. ordered that this proceeding (the "2013 action") and CV-10-098527 (the "2010 action") be tried together or one after another, as the trial judge may direct.

[4] Both actions were tried together. All defendants in the 2013 action have been discontinued against, save and except for the City of Vaughan. The only defendant in the 2010 action is the City of Vaughan.

[5] The plaintiffs and the City of Vaughan have agreed on the quantum of damages. The amount of the damages agreed upon is $480,000, inclusive of interest.

[6] The questions to be answered from this trial are:

(i) Is the City of Vaughan responsible for the damages sought by the plaintiffs?

(ii) If so, were the plaintiffs contributory negligent and if the plaintiffs were contributory negligent, the percentage of that contributory negligence?

[7] For the reasons below, I find that:

(i) The City of Vaughan is responsible for the damages sought by the plaintiffs.

(ii) There is no contributory negligence.

Brief Factual Background

[8] The plaintiff, Lesley Raubvogel bought the home in 2004. The plaintiffs resided in the home with their three children. It was their dream home. It was spacious and was on a beautiful lot. It was their intention to live in the home long term, with their children and after their children left. They liked the area. The home was their third purchased house in the area. As Dr. Raubvogel stated the home was "their home".

[9] The home has a sloped downward driveway from the road. The entrance of the driveway is at road level.

[10] The plaintiffs sold their home in May 2011 because of the two incidents of breakage of the water main at the entrance to their driveway.

[11] The plaintiffs purchased another house a few streets away from King High Drive.

[12] The water main on King High Drive is a cast iron water main.

[13] There is approximately 1,000 kilometres of water mains in the City of Vaughan. Of the 1,000 kms, 120 kms are metallic water mains, which are water mains constructed of cast iron or duct tile.

[14] These metallic water mains were mainly installed in the 1960s and 1970s. Cast iron has a life span of 70-80 years. The remaining cast iron water mains in the City of Vaughan are on average 40-50 years of age.

[15] The water main on King High Drive is approximately 800 metres long.

[16] Water mains are now mainly constructed of PVC. PVC is lighter, easier to handle, is more resistant to damage during installation and does not corrode. Metallic water mains, during installation, could be damaged with nicks that cause weak spots in the water main that over time accelerates the corrosion process which contributes to breakages.

[17] In 2004, the King High Drive water main had 10 recorded breaks. By 2006, the water main on King High Drive had 13 recorded breaks. By 2008, there were 15 recorded breaks. By 2010 before the breakage on January 4, there were 16 recorded breaks. By 2011, before replacement, there were 18 recorded breaks.

[18] The water main on King High Drive had the highest number breaks of water mains in the City of Vaughan, before replacement. There were water mains that had less breaks than King High Drive that were replaced before the King High Drive water main.

[19] The City of Vaughan had in place a 5 year Pavement Management Plan. The Pavement Management Plan dealt only with road construction and did not specifically deal with water main replacement. Prior to 2011, there was no water main specific replacement program. Prior to 2011, in the City of Vaughan a water main was replaced for two main reasons. The first because there was scheduled road work. The second, a substantial number of water main breaks made it necessary to replace the water main. A water main could also be replaced because of required roadwork that was not scheduled or extension of a water main due to construction development in the area.

[20] The number of breaks that the City of Vaughan would measure to determine when a water main is required to be replaced is in or around 10 breaks for the life expectancy of the water main. Ten or more breaks in the lifespan of a water main, is an absolute must to replace that water main.[1]

[21] In an email dated January 19, 2006, George Sayewell, a the City of Vaughan employee who is responsible for providing recommendations for water main replacement, indicated 33 areas of water mains that required future replacement. Of the 33 areas listed only three were not metallic water mains. King High Drive was one of the areas recommended for replacement. Of the areas listed, the King High Drive water main had the second highest number of breaks. The highest amount of water main breaks was at Thornbank Road and the water main was replaced. Other water mains were replaced that had significantly fewer breaks than King High Drive. For example, water mains on Monsheen Drive, Tayok Drive, James Street and William Street were replaced even though the number of breaks did not meet the barometer of in or around 10 breaks per

[1] Examination for Discovery of B. Ciampichini on pages 30, 32, 36, 55 and 56.

lifetime of the water main and the streets were not scheduled for road work under the Pavement Management Program.

[22] The City of Vaughan utilizes a computer program to monitor the need for road construction. In that program, prior to 2011, the City of Vaughan did not input data dealing specifically with water mains, namely, the incidences of breakage. After 2011, the City of Vaughan started inputting incidences of water main breakage in its monitoring computer program.

[23] The City of Vaughan presently has a plan to replace 6 kms of metallic water mains annually with an end time of 20 years to replace all the metallic water mains.

[24] In 2010, the City of Vaughan decided to replace the King High Drive water main, after the January 4, 2010 breakage. On April 5, 2011, the City of Vaughan passed a resolution awarding the construction work which included the replacement of the water main to Coco Paving Inc. The water main was replaced thereafter in 2011.

Law and Analysis

Is the City of Vaughan responsible for the damages sought by the plaintiffs?

[25] To determine if the City of Vaughan is responsible for the damages sought by the plaintiffs, a three-step analysis is required. The first step is to determine if the City of Vaughan owed a duty of care to the plaintiffs. If the City of Vaughan does owe a duty of care to the plaintiffs, is this duty of care negated in law? If the duty of care owed by the City of Vaughan is not negated, the third step is to determine if the City of Vaughan breached its duty of care to the plaintiffs and was negligent in its failure to replace the King High Drive water main ("King High water main") before 2011 and/or was it negligent in its repair of the water main breaks in 2007 and 2010 and/or was negligent in its installation of the King High water main.

Does the City of Vaughan owe a duty of care to the plaintiffs?

[26] In determining whether a duty of care is owed by the City of Vaughan in the circumstances of this case, the court must examine the test established in *Anns v. London Borough of Merton*[2], as adopted by the Supreme Court of Canada in *Nielsen v. Kamloops (City)*[3].

[27] Two questions must be asked to determine if a duty of care exists. These two questions are[4]:

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[2] [1978] A.C. 728, [1977] 2 W.L.R. 1024 (H.L.)
[3] [1984] 2 SCR 2
[4] *Kamloops, supra,* para. 40.

1. Is there a sufficiently close relationship between the parties so that carelessness on part of the City of Vaughan might cause damages to the Plaintiffs? And if so,

2. Are there any considerations which out to negate or limit (a) the scope of the duty and (b) the class of persons to whom a duty if owed or (c) the damages to which a breach of it may give rise?

[28] At the first stage, proximity is best understood as: was the harm that occurred, the reasonably foreseeable consequence of the City of Vaughan's act? In negligence, it is the type of relationships in which a "duty of care to guard against foreseeable negligence may be imposed."[5]

[29] The City of Vaughan has conceded that a close relationship exists between it and the plaintiffs so that it was reasonably foreseeable that carelessness on its part might cause damages.

[30] Given the concession of the City of Vaughan in the close relationship between the parties, a *prima facie* duty of care exists between the City of Vaughan and the plaintiffs.

[31] However, the City of Vaughan takes the position any duty of care is negated due to policy considerations.

Is the duty of care owed by the City of Vaughan negated?

[32] The City of Vaughan argues that notwithstanding the allegations of the plaintiffs, it is exempted from any claim of the plaintiffs pursuant to sections 449 and 450 of the *Municipal Act*[6] ("the *Act*") and at common law.

[33] Section 449(1) states:

> No proceeding based on nuisance, in connection with the escape of water or sewage from sewage works or water works, shall be commenced against,
>
> (a) A municipality or local board;
>
> (b) A member of a municipal council or of a local board; or
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> (c) An officer, employer or agent of a municipality or local board.

[34] Section 449(2) defines water works as "facilities for the collection, production, treatment, storage, supply or distribution of water, or any part of the facilities."

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[5] *Cooper v. Hobart*, 2001 SCC 79, paras 30, 31, 32 and 33
[6] S.O. 2001, c. 25, as amended

[35] Section 450 reads:

> No proceeding based on negligence in connection with the exercise or non-exercise of a discretionary power or performance or non-performance of a discretionary function, if the action or inaction results from a policy decision of a municipality or local board made in good faith exercise of discretion, shall be commenced against,
>
> (a) A municipality or local board;
>
> (b) A member of municipality council or local board; or
>
> (c) An officer, employee or agent of a municipality or local board.

[36] The Statement of Claim in the 2010 action does not seek damages against the City of Vaughan based on nuisance. The Statement of Claim in the 2010 action seeks a remedy based on negligence and breach of duty of care owed by the City of Vaughan to the plaintiffs. The Statement of Claim in the 2013 action does seek damages based on nuisance along with negligence and breach of duty of care. The plaintiffs conceded that they are not seeking damages based on nuisance and thus, section 449 of the *Act* does not apply. However, section 450 of the *Act* does apply based on the claims of the plaintiffs' in both actions.

[37] The issue that must be determined is whether the action or inaction of the City of Vaughan, as alleged by the plaintiffs, is the result of a policy decision the City of Vaughan made in a good faith exercise of discretion. There is no issue that the exercise of discretion of the City of Vaughan was made in good faith. There was no evidence lead to indicate that the exercise of discretion was not made in good faith. The issue in contention is whether the action or inaction of the City of Vaughan was a policy decision or an operational decision.

[38] The Supreme Court of Canada in *Kamloops, Just v. The Queen in Right of British Columbia*[7] and *Cooper v. Hobart*[8], examined whether a governmental action or inaction may be liable for negligence. The decisions of the Supreme Court held that a distinction needs to be drawn between policy decisions and operational decisions.

[39] In *Just,* the Supreme Court of Canada stated that:

> ... True policy decisions should be exempt from tortious claims so governments are not restricted in making decisions based upon social, political or economic factors. However, the implementation

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[7] [1989] 2 SCR 1228
[8] 2001 SCC 79

> of those decisions may well be subject to claims in tort. What guidelines are there to assist courts in differentiating between policy and operation?[9]

[40] In analyzing the distinction between policy and operational decisions, the Supreme Court of Canada reviewed guidelines in the Australian High Court decision in *Sutherland Shire Council v. Heyman*[10]:

> The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognize that *a public authority is under no duty in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints.* Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. *But it may be otherwise when courts are called to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.* [emphasis added][11]

[41] In *Just,* the Supreme Court of Canada further stated that the exercise of discretion must be reasonable and that the government agency "must specifically consider to inspect and, if so, the system of inspection must be a reasonable one in all the circumstances of the offer."

[42] In summarizing, the Supreme Court stated, at para 29 in *Just* that such decisions are generally made by persons of a high level of authority but not always. It is the characteristic of the decision that is critical not the actors. Decisions of budgetary allocation will generally be classified a policy decisions but such decisions are open to challenge on the basis it is not made in the bona fide exercise of discretion.

[43] The issue of *bona fide* exercise of discretion was discussed by the Supreme Court of Canada in *Brown v. British Columbia (Minister of Transportation and Highways).*[12] In deciding whether a duty of care was owed by the Ministry and whether that standard of care was breached, Cory J., writing for the majority, quoted Wilson J. from *Kamloops:*

> In my view, inaction for no reason or inaction for an improper reason cannot be a policy decision taken in the *bona fide* exercise of discretion. Where the question whether the requisite action

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[9] *Just, supra,* para. 18
[10] (1985), 60 A.L.R. 1, 59 A.L.J.R. 564
[11] *Just, supra,* para 19.
[12] [1994] 1 S.C.R. 420

> should be taken has not ever been considered by the public authority, or at least has not been considered in good faith, it seems clear that very reason the authority has not acted with reasonable care.

[44] Turning to the case at bar, was the decision of the City of Vaughan to not replace the water main until in 2010, after the 18th breakage, a policy decision or an operational decision?

[45] The City of Vaughan provided substantial evidence indicating the procedure generally utilized by the City of Vaughan in determining which roads should be remedied, repaired or replaced. It takes approximately one or two years to obtain upon approval of Council to allocate funds to a remedy/replacement project, and for the work to take place. Numerous steps must be taken such as, the obtaining of quotes from third party contractors, parameters from the engineering department, and sometimes public consultation. Once all the steps are taken a recommendation is made to Council and Council decides to allocate funds or not. If the allocation of funds is approved, a contract is granted to a third party contractor and the work is completed.

[46] It is clear that when the breakage that occurred in this case in 2007 and 2010, there was no City of Vaughan program that specifically dealt with the replacing of metallic water mains. It is also clear that to make a decision to replace roads and water mains deals with the allocation of funds by the City Council. The City of Vaughan does not have the required amount of funds at hand to replace all the metallic water mains in the City of Vaughan. It will take years, if not decades, to replace all the metallic water mains. A program does exist today for that purpose.

[47] The City of Vaughan, however, was monitoring the number of breakages of its water mains and especially its metallic water mains. The City of Vaughan staff did create a list of areas that required immediate replacement based on their barometer of 10 or more breakages in the lifespan of a water main.

[48] The evidence indicates that water mains with 10 or more breakages and even water mains with less breakages then the King High water main were replaced. But why was the King High water main not replaced until after the 18th breakage in 2010 and was the failure to do so an exercise of the City of Vaughan's discretion on a policy decision? If so, any action or inaction of the City of Vaughan is exempted from negligence. If not, the City of Vaughan may be liable for negligence.

[49] The City of Vaughan has not provided any evidence to indicate that it considered replacing the King High water main before 2010 and because of a policy consideration, it did not do so. The City of Vaughan has not provided any evidence to specifically deal with the decision-making process as it pertains to the King High water main. The court is satisfied that to replace roads and water mains requires an allocation of substantial monetary funds. Is the inaction by the City of Vaughan not to allocate such funds prior to 2010 a policy decision?

[50] Based on the evidence provided, the court cannot find that the inaction by the City of Vaughan was a policy decision. The evidence lends the court to conclude that the City of Vaughan did not exercise its discretion to allocate or not allocate funds to replace the water main. The City of Vaughan was well aware the number of breakages of the water main. The City of Vaughan was well aware that the number of breakages of the King High water main exceeded its own barometer of more than 10 breakages in the life span of the water main. Notwithstanding, all this evidence, the City of Vaughan did not exercise its discretion to replace or not replace the water main. The City of Vaughan took no action and made no decision to replace the King High water main until after the 18th break, contrary to its own barometer. It seems to this court that this decision to not replace the water main on King High Drive was not a policy decision considered by the City of Vaughan but an operational decision. The inaction to take a step or make a decision by the City of Vaughan for no apparent reason "cannot be a policy decision taken in the *bona fide* exercise of discretion"[13].

[51] Thus, the action commenced by the plaintiffs against the City of Vaughan is not negated by section 450 of the *Act.*

Did the City of Vaughan breach its standard of care?

[52] The plaintiffs in their Statement of Claims plead that the City of Vaughan breached its standard of care and were negligent on three separate occasions. These occasions are:

1. In the installation of the water main in 1963.

2. In its response to the breakages in 2007 and 2010.

3. In failing to replace the water main before 2010.

[53] I will deal with the first two occasions.

Did the City of Vaughan breach its standard of care and was negligent in the installation of the watermain and in its response in 2007 and 2010?

[54] The plaintiff has provided no evidence that the installation of the water main in 1963 was negligent in any way.

[55] Further, the evidence provided by the City of Vaughan of the response by its employee to the 2007 and 2010 breakages indicates to this court that the response was reasonable in the circumstances. The employee had to take into several facts into consideration: the weather, the use of the water main (distillable water) by other residents in the area, to minimize disruption to other residents as they get ready in the morning and, the pressure in which the water flows through the system. Again, the plaintiffs have not provided any

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[13] *Brown, supra*

evidence to indicate that the conduct by the City of Vaughan in its response to the breakages in 2007 and 2010 breached its standard of care and was negligent in anyway.

[56] Accordingly, I find that the City of Vaughan did not fall below its standard of care and was not negligent in the installation of the water main in 1963 or in its response to the breakages in 2007 and 2010.

Did the City of Vaughan breach its standard of care and was negligent in its failure to replace the water main before 2010?

[57] The City of Vaughan knew that there were breakages with its water mains and specifically with its metallic water mains. The City of Vaughan was monitoring the number of breakages in its water main system, and especially its metallic water mains. The City of Vaughan concluded that water mains with a history of more than 10 break ages since their installation required immediate replacement. The City of Vaughan complied with this barometer and replaced water mains with more than 10 breakages and others that approached 10 breakages.

[58] The City of Vaughan knew that the number of breakages on the King High water main was 10 in 2004, 13 in 2006, 15 in 2007 and 18 in 2010. In 2009, Council approved and budgeted the resurfacing of the road on King High Drive but did not budget for the replacement of the water main and there was no evidence provided why the replacement of the water mains was not part of this approval or if it was even considered.

[59] The City of Vaughan directs the court to the decision of the Ontario Supreme Court in *Canadian Pacific Railway Company v. The City of Toronto.*[14] This case involves an action for damages caused to the property and equipment of the plaintiffs on the basis of negligence in the installation of the water main and the incompetence of an employee of the defendant in failing to turn the water off as quickly as possible. The claim flows from a break in a 36 inch water main and the failure to turn off the water approximately 180 minutes after the breakage. The basis of the negligence in the installation of the water main was that prior to the installation of the water main there existed research that questioned the strength of cast iron pipes under modern traffic conditions. Judson J. accepted the evidence of the defendant's engineer and found no negligence in the installation of the water main pipe. Judson J. also found that the employee of the defendant did not do his job incompetently or negligently.

[60] The factual matrix that Judson J. adjudicated is significantly different than the case before this court. I do not accept the submissions of the City of Vaughan that the "same analysis" of Judson J. "shows why this court should be slow to narrowly focus one aspect of water main replacement (in our case the number of breaks) as dictating when to remove an unsuitable pipe."[15] Judson J.'s analysis was based on the facts and evidence before him. The facts and evidence or lack of evidence in this case is significantly

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[14] 1954 CarswellOnt 66, [1954] 3 D.L.R. 742, [1954] O.R. 535
[15] Factum of the City of Vaughan, para 93(a)

different. I agree with the reasoning of Judson J. in the case before him that it is the evidence before him that determined his decision.

[61] The evidence before this court shows that the City of Vaughan did not consider the King High water main replacement until the work to replace the road was approved and budgeted, and later deferred. No evidence has been provided on why the replacement of the water main was not considered for approval or budget earlier than 2010.

[62] The consequences of failing to replace the King High water main were further breakages. It was foreseeable that further breakages could result in damages to home owners on King High Drive including the plaintiffs. The City of Vaughan was aware of the breakages since 1982, but did not provide a reason for its failure to consider the replacement of the King High water main until after January 2010.

[63] Notwithstanding the knowledge that the City of Vaughan had, it did not consider the water main on King High Drive for replacement or not until after the second break in front of the plaintiffs' home in 2010 and has provided no evidence on why it was not considered, put forth to Council to consider allocating funds for its replacement until after January 2010.

[64] Consequently, I find that the City of Vaughan fell below its standard of care to the plaintiffs and was negligent by its inaction and in its failure to follow its own internal barometer to consider the King High water main for replacement before 2010. The City of Vaughan took no action before 2010 to replace the King Drive water main even when it had the knowledge of the number of breaks sustained by the water main and its internal barometer that over 10 breaks over the lifetime of a metallic water main requires replacement.

[65] As Cory J. stated in *Brown*[16]:

> I cannot accept these submissions. I will deal first with the suggestion that there is no obligation to repair highways and that liability cannot arise from a failure to act but only from an act negligently performed. It seems to me that any distinction between negligence founded on misfeasance or nonfeasance will often be unnecessary or inappropriate. More importantly, as long ago as 1885, this Court in *Town of Portland v. Griffiths* (1885), 11 S.C.R. 333 held that a statute which placed public streets and highways under the control of a municipality imposed upon that municipality the duty of keeping them in repair. It follows that once the duty to repair or to maintain is assumed by a government then it must fulfil that obligation in a manner that is not negligent. That is the duty that rests upon the respondent in this case.

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[16] *Brown,* supra, 439-440

[66] I find that reasoning compelling in this case

[67] The Ontario Court of Appeal in *Oosthoek v. Thunder Bay (City)*[17] upheld the trial judge's decision in negligence against the City of Thunder Bay in failing to enforce the by-law when the City of Thunder Bay had knowledge of the offences contrary to the by-law. Carthy J.A. at paragraph 27 wrote:

> The City's inspectors knew the purpose of the by-law and they knew of the offences. There is no evidence that any consideration was given to the question of enforcement or nonenforcement, and, as expected, the offending drains contributed to the flooding. I agree with the trial judge that this founds a claim in negligence.

[68] Given that the City of Vaughan took on the duty to maintain, repair and replace water mains, its inaction to follow its own internal barometer and maintain or replace the King High water main with the information and knowledge in its possession, I find was negligent.

[69] The damages that resulted to the plaintiffs from the City of Vaughan's negligence were foreseeable to the City of Vaughan. The negligence of the City of Vaughan resulted in the plaintiffs suffering damages in the amount agreed upon by the plaintiffs and the City of Vaughan.

[70] I therefore find that the City of Vaughan is liable for the damages suffered by the plaintiffs.

Were the plaintiffs contributory negligent and if the plaintiffs were contributory negligent, the percentage of that contributory negligence?

[71] The City of Vaughan has pleaded contributory negligence. There was some evidence lead concerning the use of a sump pump by the plaintiffs to remove water from the bottom of their driveway.

[72] The City of Vaughan made allegations in its pleading that the plaintiffs failed to properly maintain their property, the plumbing or water service, including the sump pump.

[73] However, no evidence was lead for this Court to come a finding that the plaintiffs were contributory negligent in any way.

[74] Consequently, on the basis of the lack of evidence provided at trial, I cannot and do not find that the plaintiffs were contributory negligent.

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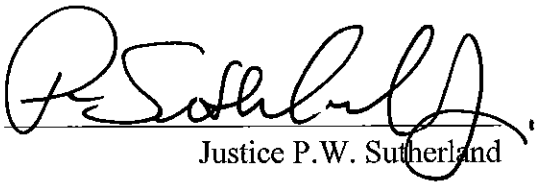
[17] 1996 CarswellOnt 3513, [1996] O.J. No. 3318 (CA)

Disposition

[75] I therefore grant judgment in favour of the plaintiffs in the amount agreed upon, $480,000 inclusive of interest.

[76] If the parties cannot agree on costs, the plaintiffs to serve and file their costs submissions within thirty days from the date of this decision, and the City of Vaughan will have thirty days thereafter to serve and file its submissions. The submissions to be no more than five pages, double spaced, exclusive of any cost outline, case law and offers to settle. Submissions are to be filed with the court. If no submissions are received within the time period set out herein, an order will be made that there will be no costs.



Justice P.W. Sutherland

Released: November 30, 2016