

## FACTSHEET: STORMWATER DRAINAGE / SURFACE WATER RUNOFF

**\*This Factsheet is not a substitute for good legal advice.  
Always consult a lawyer if a professional legal opinion is needed.\***

There is probably no subject that generates more disputes than surface drainage coming from one landowner's property to another's. The following is a synopsis of the various schools of thought regarding this controversial issue.

There are, generally speaking, three schools of thought or doctrines that may be applicable when determining the 'right' and 'wrong' of a drainage issue. All are interpretive and all have been applied completely, partially or in combination in court cases.

### **"COMMON LAW" RULE.**

Common Law forms the basis of our legal system. It always applies, unless it is specifically altered by a statute. Common Law disputes are arguments between landowners, that if cannot be mutually resolved, final solutions must be determined through the courts.

Landowners are considered equal under Common Law, whether they be private citizens, companies, road authorities, Federal, State or local governments. So, if you get advice on Common Law drainage problems from a drainage contractor, a drainage Engineer, a lawyer, a Conservation Authority, or a Government Agency, **remember it is not their responsibility to solve the problem. Only the courts can make the final decision in a dispute. To obtain a ruling by a court, a civil action must be initiated by the damaged party.**

Previous Common Law court decisions established precedents in drainage disputes. From these precedents, a set of rules or principles have been developed that apply to water rights. These rules under Common Law can change as customs change and as new precedents are set. Also, the rules differ significantly between natural watercourses and surface water.

### Natural Watercourses

The simplest definition of a natural watercourse is found in the Latin; "*aqua currit et debet currere*", or "water flows naturally and should be permitted thus to flow". A natural watercourse is defined generally as "a stream of water which flows along a defined channel, with a bed and banks, for a sufficient time to give it substantial existence". It must, on casual examination, "present the unmistakable evidence of the frequent action of running water". It is not essential that the supply be continuous, or form a perennial living source for flora or fauna. It is enough if "the water rises periodically from natural causes and reaches a plainly defined channel of a permanent character". One can usually identify a natural watercourse on an aerial photo or a topographic map. **A natural watercourse "does not cease to be such if at a certain point it spreads out over a level area and flows for a distance without defined banks before flowing again in a defined channel". Often, it is "the valley through which the stream runs, and not its low level or low water channel, which is the water course".** If water is in a natural watercourse, it must be permitted to flow.

### Surface Water

Surface water has no defined course. It is "the water that falls as precipitation, but which finds its way to a natural watercourse by percolation or flow". Common Law can be confusing when it comes to surface water because, under most circumstances, it has no right of drainage and the law appears to deny the right of water to flow downhill.

If surface water has no right of drainage, neighbors can either choose to keep their water on their property, or allow it to pass along onto property at a lower elevation. Similarly, property owners at a lower elevation can either accept the water from neighbors above them or reject it. However, once the water reaches a natural watercourse it must be allowed to continue to flow through all properties.

### Discharge of 'Collected' Surface Water

Examples of collecting water include: private ditches that are not natural watercourses, swimming pool water, foundation drain-tiles, roof downspouts, road ditches, irrigation water, water collected in catch basins, or runoff from parking lots and yard areas.

These are all considered surface water, and accordingly, have no right of drainage. Therefore, the landowner of the lower property could dam the water at the property line to protect his property. However, because water is being collected and deposited on the lower property, the landowner could take legal action against the higher property landowner. The lower property landowner would have to prove that the higher property landowner is collecting water, dumping it on him, and causing damage that can be assessed a dollar value.

When a landowner discharges surface water from their property, they are obliged to take this collected water to a sufficient outlet. When trying to find a sufficient outlet, they should follow the path the water would follow. Then, they should ask themselves if a reasonable person would think that water could flow down this path and not cause any harm to any land or road. If so, this is probably a sufficient outlet, and many potential disputes can be avoided.

### Private Ditches or Swales

If a landowner has a **private** ditch or swale on their property (not constructed under any regulation, such as a Subdivision Drainage Easement), they are not obliged to clean it out for his neighbor's benefit. That is, they do not have to clean out a private ditch to accommodate the surface water from a neighbor on higher ground. Also, a neighbor is not permitted to trespass on another property to clean the private ditch, or to dig a new ditch without the property owner's permission, unless there was some previously arranged, written agreement.

### **"CIVIL LAW" RULE**

"Civil Law" rule is otherwise known as the natural flow rule. This rule states that between owners of higher and lower land, the higher property landowner has a right or easement over the property of the lower property landowner, upon which a duty or servitude to receive the water is visited. The servitude on the lower property landowner extends only to those waters flowing onto them in their natural, diffused state. This duty on the lower landowner estate extends even if there is no natural outlet to relieve them from the waters of the dominant, upper landholder. The lower property landowner has the right to repel or obstruct water that is concentrated and/or diverted by the higher property onto them.

### **"REASONABLE USE" RULE**

The third surface water doctrine is generally known as the rule of reasonable use. A few jurisdictions, finding it undesirable to apply either the 'common law' or 'civil law' doctrines in their rigid or extreme forms whereby the higher property landowner has either no right of drainage or an absolute right of drainage have evolved a rule of reasonable use which attempts to determine the rights of the parties with respect to the disposition of surface waters by an assessment of all the relevant factors. Simply speaking, the 'reasonable use' doctrine is, a landowner may exercise his own right on his land as he pleases, provided he does not interfere with the rights of others.

More thoroughly, the 'reasonable use' rule generally holds that in effecting a reasonable use of his land for a legitimate purpose a landowner, acting in good faith, may drain his land of surface waters and cast them as a

burden upon the land of another, although such drainage carries with it some waters which would otherwise have never gone that way but would have remained on the land until they were absorbed by the soil or evaporated in the air, if (a) there is a reasonable necessity for such drainage; (b) if reasonable care be taken to avoid unnecessary injury to the land receiving the burden; (c) if the utility or benefit accruing to the land drained reasonably outweighs the gravity of the harm resulting to the land receiving the burden; and (d) if, where practicable, it is accomplished by reasonably improving and aiding the normal and natural system of drainage according to its reasonable carrying capacity, or if, in the absence of a practicable natural drain, a reasonable and feasible artificial drainage system is adopted. However, any interference with natural drainage injurious to the land of another and not reasonable is unjustifiable.

In any particular case, what is a reasonable use or management becomes a question of fact to be determined in each case under a consideration of all the relevant circumstances, including such factors as the amount of harm caused, its foreseeability, the purpose or motive with which the act was done, and the consideration whether the utility of the use of the land out-weighed the gravity of the harm resulting.

## **IN CONCLUSION**

Stormwater drainage or surface water runoff is a naturally occurring and generally unavoidable event. Water will always follow the rules of gravity. Higher property landowners should consider how their lot grading and discharge of surface water may potentially impact the lower property. Lower property landowners should recognize the natural rules of drainage while considering the impact of restricting runoff from a higher property. A reasonable and cooperative compromise will serve both parties and foster a neighborly attitude that may be enjoyed for years to come. However, when disputes arise that cannot be resolved between the affected landowners; it is incumbent upon the injured party to seek resolution through the court system.