

CANADA / JUDGMENT

Whitehead v. Tucker

2025 ONCA 674

COURT

Court of Appeal for Ontario

DECIDED

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Whitehead v. Tucker

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Roberts, Lois B.; Miller, Bradley; Zarnett, Benjamin

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COURT OF APPEAL FOR ONTARIO

CITATION: Whitehead v. Tucker, 2025 ONCA 674

DATE: 20250929

DOCKET: COA-24-CV-1136

Roberts, Miller and Zarnett JJ.A.

BETWEEN

Robert Arthur Whitehead and

The Estate of Catherine Margaret Whitehead, deceased,

by its Estate Trustee Robert Arthur Whitehead

Plaintiffs (Appellants)

and

Janine Tucker and Curtis Tucker

Defendants (Respondents)

Paul Ingrassia, for the appellants

Evan A. Argentino and Shanti E. Barclay, for the respondents

Heard: June 23, 2025

On appeal from the order of Justice James A. Ramsay of the Superior Court of Justice, dated October 8, 2024.

Roberts J.A.:

A. Overview [1] The parties have been neighbours for 25 years. For almost all that time, the parties have engaged in a dispute about the respondents' interference with the flow and drainage of water from the appellants' adjacent property.

[2] The appellants[1] commenced an action against the respondents by way of statement of claim issued on February 11, 2003. They obtained judgment against the respondents on February 2, 2012. Among other things, the respondents were enjoined from interfering with the flow of water from the appellants' property and ordered to take steps within three months of the 2012 judgment to restore it, failing which the appellants could bring a motion for contempt. The appellants brought a motion before the trial judge in 2024 for an order that the respondents were in contempt of the 2012 judgment. The appellants' motion was dismissed with costs to the respondents of \$25,000.

[3] The appellants appeal the dismissal of their contempt motion against the respondents. They maintain that the motion judge erred in his interpretation of the 2012 judgment, misapprehended the appellants' expert evidence and the respondents' admissions, and misapplied the test for civil contempt.

[4] For the reasons that follow, I accept the appellants' grounds of appeal and would allow the appeal.

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B. Factual background [5] The grounds of appeal are intertwined and depend heavily on the uncontested evidence and the motion judge's findings of fact from the first trial. It is therefore necessary to set out the factual background in some detail.

(i) Chronology of events up to trial

[6] The following factual background is taken from the trial judge's findings of fact at the 2012 trial.

[7] The appellants purchased their property in 1974 (the "Whitehead property"). Initially, there was a channel that drew water from the Whitehead property through the respondents' property ("the Tucker property") and drained into a system south of both properties. The channel was about four feet wide and a foot and a half deep.

[8] When prior owners of the Tucker property constructed a shop in 1988, they built up the land leading to the shop for a driveway. In this process, they covered up the channel but installed a four-inch pipe underground to keep the water draining. In 1994, the pipe was damaged, and the Whitehead property flooded. The appellants and Mr. D'Angelica, the neighbour to the north from 1993 to 1998, solved the drainage issue by laying a six-inch pipe next to the damaged pipe.

[9] The uncontroverted evidence at trial, which the trial judge accepted, was that the Whitehead property did not flood excessively until the respondents bought the Tucker property and did work to the driveway leading to the shop. After the respondents completed their work, water no longer flowed sufficiently to drain the Whitehead property. This evidence was supported by two previous owners of the Tucker property, Greg Wild and Linda Breen, as well as by Noble McCune, the neighbour who lived to the north of the Whitehead property between 1998 and 2004, and by Cory Harris, a technician from the Conservation Authority who inspected the Whitehead and Tucker properties in 2001 because of the flooding problem.

[10] The appellants' expert, Adi Irani of A.J. Clarke and Associates Ltd., provided a report, dated January 28, 2009. The expert noted that the Tuckers had erected a rubber fence along the common property line of the Whitehead and Tucker properties and opined that the fence blocked surface drainage from the Whitehead property onto the Tucker property. It was the further opinion of the expert that "[t]he drainage problem on the Whitehead property is a rather complex one and has been aggravated due to the grading of the neighbouring Tucker property to the south." The expert explained that the current drainage problem was "the direct result of the blockage of the natural drainage from the Whitehead property across the Tucker property." According to the expert, as shown in photographs taken in January 2008, "the problem is not caused by a high ground water situation (due to frozen winter conditions), but rather is a surface drainage problem caused by the Tucker property obstructing the natural flow of surface water from north to south." The expert recommended the following drainage solution: that two 250mm culverts be installed across the Tucker property, from the north limit of the Tucker property to the pond on the Schaivone/Fraser property to the south of the Tucker property.

- [11] The appellants' expert evidence was unchallenged and accepted by the trial judge. The respondents filed no expert evidence.
- [12] The respondent, Janine Tucker, purchased the Tucker property in 2000. Since then, she has lived there with her husband, Wavell Tucker, and their son, the respondent, Curtis Tucker. Wavell and Curtis Tucker testified at trial. They agreed that when the Tucker property was purchased, there was no apparent flooding problem and that the Whitehead property flooded the next year, after they had made changes to the slope of the driveway to the shop on the Tucker property by adding six 26-ton loads of gravel. In the process of making these changes, the respondents damaged the drainage pipe. The respondents also put up a rubber dam along the northern property line. The trial judge found that, as a result of these actions, a significant portion of the appellants' backyard was under water for significant portions of the year.
- [13] After a four-day trial, on February 2, 2012, judgment was granted in favour of the appellants in the following terms:
1. The appellants have an easement over the Tucker property "for the purposes of drainage of water through a pipe under [the respondents'] driveway, extending the width of the property and into the intake of the pond to the south of [the Tucker] property."
 2. The appellants may register this easement and this injunction on the [Tucker property] title.
 3. The respondents "are enjoined from doing or permitting anything that would interfere with the drainage of water through this pipe. In particular they are enjoined from driving any vehicle over the pipe."
 4. The respondents "are ordered to take the necessary steps to restore the flow of water within three months, failing which [the appellants] may move to cite [the respondents] for contempt of court, or restore the flow of water [themselves] and enter upon [the respondents'] property to do so, or both."
 5. The appellants were awarded \$20,000 for nuisance against both respondents jointly and severally, without pre-judgment interest.
 6. The respondents were ordered to pay partial indemnity costs of the trial to the appellants in the amount of \$20,000.
- [14] The trial judge based his judgment largely on his acceptance of the evidence given by Mr. Whitehead, whom he found to be an honest witness. He found his evidence plausible and supported by the former neighbours and the technician from the Conservation Authority. He also found that the appellants' conclusions were supported by the expert evidence of their expert engineer. He concluded: "I find then that the [respondents] interfered with the drainage of the [appellants'] land." He entirely rejected Wavell Tucker's evidence which he characterized as "biased, argumentative and hyperbolic". Similarly, he did not accept Michael Schiavone's evidence that the Whitehead property has consistently been subject to

flooding since Mr. Schiavone purchased his property in 1995. As the trial judge concluded:

The simple fact is that there was no problem until [the respondents] dropped a great deal of gravel onto the underground pipe, and since they did that, the water does not drain anything like sufficiently as it always did. When asked to make a simple repair they declined. When the appellant tried various other ways to drain his land they build a rubber dam to keep his water from getting away.

[15] The trial judge went on to find that the appellants had a right to an easement, namely, that:

[T]he owner of the property of lower level is claiming a right to drain water through a defined channel...It was never changed. An open channel was simply enclosed in the pipe and buried. It performed the same function, drained the same amount of water...In summary the right to drain water through a defined channel is recognized as capable of forming the subject matter of an easement. The easement is defined and limited in scope. It consists of a pipe that follows the same path as the old open channel.

(ii) Post judgment chronology of events and evidence on the contempt motion

[16] The respondents paid the appellants \$40,000 in satisfaction of the damages and costs awarded under the judgment.

[17] On February 27, 2012, the respondents commenced an appeal to the Divisional Court. They abandoned the appeal on June 3, 2013.

[18] From about February 2012 to about May 2013, the parties through their counsel exchanged correspondence in order to finalize the arrangements to restore the water flow and resolve the drainage problem on the Whitehead property. Specifically, appellants' counsel asked that the respondents provide the details of the proposed installation so that their expert could review it.

[19] Without providing the specifications requested by appellants' counsel and their expert, new counsel for the respondents wrote to the appellants' counsel on May 9, 2013, advising that a pipe to restore water flow was scheduled to be installed by Allen's Landscape & Excavating Ltd. ("the contractor") between their clients' properties on May 24, 2013. On May 24, 2013, the contractor replaced, in the same location, the original damaged 6-inch pipe with another 6-inch pipe encased in a steel culvert pipe. The contractor advised the respondents in their contract that the slope was determined by the grade of the north property leading south to the upper grade of the pond so no water would run back from the pond and that he would "try for a 3 percent slope if possible".

[20] By letter dated May 28, 2013, appellants' counsel set out a number of problems with the new installation which would prevent drainage from the appellants' property. In particular, they noted the following:

i. the pipe intake was not installed at the lowest point of the appellants' property;

ii. if the intake was placed anywhere above the lowest point in an area where water regularly collects, any water below the intake would not enter the pipe and would remain on the appellants' property;

iii. the 6-inch diameter size of the pipe would prevent a steady flow of water;

iv. drainage would be improved if the opening of the intake were left exposed and properly protected with stone so that water could flow freely into the pipe.

[21] Appellants' counsel repeated their request for details of the slope of the pipe, as well as the location and exposure of its outlet in order to allow their expert to consider and fully comment on it. The respondents did not provide the requested information.

[22] By correspondence dated May 29 and June 18, 2013, appellants' counsel indicated that the new drainage system failed to drain the water from the Whitehead property as it had before the respondents damaged the pipe.

[23] In his responding letter dated June 19, 2013, respondents' counsel suggested that the appellants have their expert look at the photographs taken by the contractor, consider the work required to correct any deficiencies, and provide an estimate for this work.

[24] Correspondence between counsel ensued over several years without resolution.

[25] The appellants brought a motion for contempt. They filed expert evidence and affidavits sworn by Mr. Whitehead.

[26] The appellants' expert provided a report dated November 30, 2016 about his site visit for drainage issues. The appellants served this report on the respondents on December 8, 2016. The expert said his original report had proposed a 250mm culvert encased in concrete with an invert elevation of 99.42m at the Whitehead property and that the 150mm culvert installed by the contractor was 11 inches higher than its proposed design elevation and did not allow for an adequate drainage outlet to permit the Whitehead property to drain properly. The expert provided the following three reasons explaining why the flow of water had not been adequately restored by the new pipe:

1. [The respondents] have not provided pipe(s) of sufficient diameter and capacity to adequately handle the flows. Only one 150mm diameter pipe has been installed rather than at least one, (and preferably two), 250mm diameter pipes we had recommended.
2. The invert [lowest part] of the 150mm diameter pipe installed at the south limit of your property limit is approximately 0.28m (11") higher than the suggested elevation of the 250mm diameter pipe we had suggested at that location. This does not allow for adequate drainage of your lands.
3. [The respondents] have further impeded the drainage from your lands at your south property line by installing a rubber barrier at the bottom of the fence such that the surface flows are blocked from flowing across the property line.

- [27] The expert opined that the following steps needed to be carried out in order to restore the flow of water across the properties:
1. Remove any rubber barrier along the bottom of the property line fence.
 2. Investigate the condition of the outlet pipe between the Tucker property and the Schiavone/Fraser property, and determine if a suitable outlet is available. This would involve excavation of the Tucker property to make the outlet pipe visible and obtain measurements of the size, inverts, etc.
 3. Install one (or preferably two) 250mm diameter (CSP, PVC or concrete) culverts as shown on our engineering drawing (Drainage Plan, K-08-011, Sht. 1, dated May 2008), modified, if necessary, to suit outlet conditions.
- [28] In a December 14, 2017 report, which incorporated the November 30, 2016 report, the appellants' expert gave details about a further site attendance and observations: a 150mm diameter PVC pipe had been installed; and the invert of the installed pipe was at an elevation of 99.70m. The appellants' expert had proposed a lower invert elevation of 99.42m.
- [29] Mr. Whitehead deposed in his December 28, 2017 affidavit that the respondents' "conduct has caused and continues to cause significant pooling and flooding in the rear yard to [his] property." More particularly, Mr. Whitehead deposed that since the time that the judgment was issued in 2012, his property continues to be affected by significant flooding as a result of the defendants' initial interference with the flow of water and that the flow of water has not been restored. He attached photographs of his flooded property dated April 7, 2017.
- [30] Mr. Whitehead deposed in his February 12, 2024 affidavit that the pooling and flooding of water had continued. He attached a photograph taken on December 6, 2023, evidencing the ongoing flooding and pooling of water in his rear yard.
- [31] On behalf of the respondents, the affidavit of a student-at-law at their counsel's office was filed in response to the appellants' contempt motion. She set out the exchange of correspondence between counsel to attempt to resolve the remediation issues during the period of May 28, 2013 to January 22, 2018.
- [32] In further response to the appellants' contempt motion, Ms. Tucker filed two affidavits sworn January 29, 2018 and March 4, 2024. She deposed in her January 29, 2018 affidavit that the new pipe was installed in the same ditch as the original pipe and the new inlet pipe was installed in the same location as the original pipe and connected to the original connection in the pond. She noted, however, in her March 4, 2024 affidavit, that Mr. Schiavone was of the opinion that the current pipe was approximately 2 inches deeper than the previous pipe. She deposed that as of January 29, 2018, and since the new pipe was installed, the appellants had made the following changes to their backyard: they changed the landscape of the backyard by building a wooden corral; dug a new ditch on the property; changed the location of the discharge of their sump pump; and placed debris against the fence on their side of the property. In her supplementary affidavit, she set out the unsuccessful

negotiations between the parties and their counsel between January 28, 2018 and September 30, 2019 to resolve the drainage issues.

- [33] The respondents also filed an expert report from Amad Najm of Ashenhurst Nouwens & Associates Inc. dated November 28, 2017. Their expert looked at the property and the replaced pipe and concluded, in agreement with the appellants' expert, that flooding may occur in the parts of the backyard of the Whitehead property where the ground elevation is less than 99.74m. He referenced the May 2015 and November 30, 2016 reports by the appellants' expert that the existing 150mm diameter PVC pipe is inadequate to drain the water from the backyard of the Whitehead property and that the appellants' expert recommended the installation of two 250mm diameter culverts as per the original proposal. The respondents' expert noted that during his July 2017 survey that the water level of the pond was 99.25m and the outlet of the existing 150mm diameter pipe was not visible because it was under water. He observed that the invert level of the 250mm diameter overflow pipe was 99.45m and the outlet level installed by the contractor was 99.48m. During his October 2017 survey, he noted that the invert level of the pipe at the respondents' property was 99.74m and 98.909m at the outlet at the pond. He saw the existing PVC 150mm pipe was exposed. He concluded that the water in the pond at the appellants' property would be drained by infiltration and evaporation processes and through the overflow 250mm diameter pipe when the water table level is higher than 99.48m and that the existing pipe has an inlet level of 99.74m which seems to be higher than some areas of the property backyard.

(iii) The decision below

- [34] On October 8, 2024, the motion judge dismissed the appellants' contempt motion. He found that the replacement of the pipe did not solve the drainage problem because "for one thing the intake valve on the Schiavone [property] is too high...[b]ut Schiavone is not a party." He concluded that the appellants did not prove contempt beyond a reasonable doubt and that "[t]here was no deliberate breach of [his] order." The core of his reasoning was expressed as follows:

The intent of my order was to put [the appellants] into the position they would have been in before [the respondents] interfered with the easement by damaging the pipe. They complied with the order by restoring the pipe. They were not obliged to improve the drainage. The order says "restore." In this context "restore" means "repair or renovate (a building, work of art, vehicle, etc.) so as to return it to its original condition." Furthermore, paragraph 4 of my order must be read in the context of paragraph 1, which says, "This court declares and adjudges that the [Whitehead] property has an easement over [the respondents'] property for drainage of water through a pipe under [the respondents'] driveway, extending the width of the property and into the intake of the pond to the south of [the respondents'] property."

[35] The motion judge agreed that “the optimal solution would be to lay two lines” or “allow the [appellants] to implement [their] south ditch proposal” by running a pipe to the south ditch, at the appellants’ expense. He dismissed the contempt motion and awarded the respondents \$25,000 in costs.

C. Issues [36] This appeal raises the following issues:

1. Did the motion judge misinterpret the intent of the 2012 judgment?
2. Did the motion judge misapprehend the appellants’ expert evidence and admissions from respondents’ counsel that the respondents were not in compliance with the 2012 judgment?
3. Did the motion judge misapply the legal test for civil contempt?
4. If the motion judge erred, what order should this court substitute?

D. Analysis Elements of civil contempt

[37] The grounds of appeal require the consideration of the test for civil contempt. It is therefore useful to set out the elements for civil contempt at the outset of my analysis.

[38] In *Carey v. Laiken*, 2015 SCC 17, [2015] 2 S.C.R. 79, at paras. 32-35, Cromwell J. for the court set out the elements of civil contempt, which must be proven beyond a reasonable doubt:

- i. the existence of a clear and unequivocal order setting out what should or should not be done;
- ii. the alleged contemnor had actual knowledge of the order; and
- iii. the alleged contemnor must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.

[39] The threshold question in this case is whether the 2012 order was clear and unequivocal. There is no dispute that the respondents had actual knowledge of the order. However, the respondents could not intentionally do the act that the 2012 judgment prohibits or intentionally fail to do the act that the 2012 judgment compels, in a manner that constitutes contempt, if the 2012 judgment was not clear and unequivocal.

[40] An order may be found to be unclear, if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language, or if external circumstances have obscured its meaning: *Culligan Canada Ltd. v. Fettes*, 2010 SKCA 151, 326 D.L.R. (4th) 463, at para. 21.

[41] A failure to comply with an order of the court will not be contempt if there are genuine, unresolved issues between the parties with respect to the manner in which it is to be carried into operation. A finding of contempt will not be made for breach of an order unless its meaning and requirements in the particular circumstances are clear and unambiguous: *Bell ExpressVu Limited Partnership v. Corkery*, 2009 ONCA 85, 94 O.R. (3d) 614, at para. 28.

- [42] The ultimate test of the clarity of a court order is a reviewing court's capacity to apply the order to the facts: *Culligan*, at para. 28
- [43] In order to answer this threshold question and apply the test for contempt, the motion judge was required to interpret the 2012 judgment: *Culligan*, at para. 16. As I shall explain, the motion judge erred because he failed to interpret the 2012 judgment in its entirety and as informed by his trial findings.
- [44] When interpreted in light of his previous findings, the clear intent of the 2012 judgment was to require the respondents to restore the flow of water from the Whitehead property. Further, even if there were genuine, unresolved issues regarding the method of compliance with the order, paragraph 3 is clear and unequivocal that the respondents were required to remove the rubber dam that interferes with the drainage of water.
- (1) Did the motion judge misinterpret the intent of the 2012 judgment? [45] As noted, in determining whether the respondents were in contempt of the 2012 judgment, the motion judge, quite rightly, had to ensure that the terms of the 2012 judgment were sufficiently clear to support a finding of contempt. This is a question of law, reviewable on a standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8; *Culligan*, at para. 18.
- [46] In so doing, the motion judge was required to interpret his decision and reasons. A motion judge's interpretation of his own decision and reasons is entitled to considerable deference on appellate review: *Boily*, at para. 70.
- [47] However, the provisions of a court order must be read in light of the purpose and design of the order: *Sweda Farms Ltd. v. Ontario Egg Producers*, 2011 ONSC 3650, at paras. 19 and 21, *aff'd* 2012 ONCA 337. Deference to the motion judge's interpretation of his own decision does not allow for an interpretation that does not accord with the purpose of the order. As the Supreme Court instructed in *Baxter Travenol Laboratories of Canada Ltd. v. Cutter (Canada) Ltd.*, [1983] 2 S.C.R. 388, at p. 398, per Dickson J.: "[o]nce reasons for decision have been released, any action which would defeat the purpose of the anticipated injunction undermines that which has already been given judicial approval. Any such action subverts the processes of the Court and may amount to contempt of court."
- [48] The motion judge misinterpreted his 2012 judgment in a manner which undermined its purpose.
- [49] First, the motion judge interpreted the 2012 judgment in a manner that ignored the evidence that he accepted and his findings at the 2012 trial. In 2012, the motion judge had accepted the undisputed evidence that until the respondents had interfered with the water drainage by not only crushing the pipe but also by dramatically changing the slope of their driveway and installing a rubber dam on their property, the appellants did not have a drainage problem.

- [50] Thus, the solutions proposed by the appellants were not, as the motion judge suggested in his endorsement, aimed at improving the appellants' drainage to a level not previously enjoyed prior to the respondents' modifications to the property. Rather, the solutions were aimed at resolving the problem created by the material changes carried out by the respondents, including the damage to the pipe. According to the unchallenged evidence of the appellants' expert that the motion judge accepted at trial, given the changes carried out by the respondents, the mere replacement of the former pipe would not resolve the problem that they had created. Rather, at least one 250mm pipe had to be installed at a depth of at least 11 inches. In that respect, it is significant that the motion judge did not define the size of the pipe that had to be installed.
- [51] Further, his interpretation narrowly focused on paragraphs 1 and 4 without regard to paragraph 3 of the 2012 judgment. Paragraph 3 is clear and unambiguous: the respondents were "enjoined from doing or permitting anything that would interfere with the drainage of water through this pipe". At trial, the motion judge accepted the appellants' and their expert's evidence that the rubber dam installed on the Tucker property by the respondents interfered with the drainage of water from the Whitehead property, causing water to pool. The uncontroverted evidence of the appellants' expert on the contempt motion was that the rubber dam was still in place and continued to interfere with the drainage of water. The motion judge erred by failing to advert to and enforce paragraph 3 of the 2012 judgment by requiring the respondents to remove the rubber dam.
- [52] The intent of the 2012 judgment was not simply to put the appellants in the position they would have occupied had the pipe not been damaged. That was not consistent with the findings at trial about what caused the drainage problem. Rather, the intent was to put the appellants in the position they had occupied prior to the respondents' interference with their drainage, not only by their damage to the pipe but due to their changes to the slope of the property and the installation of the rubber dam.
- [53] The only way that the appellants could have been returned to their position before the respondents' interference is by the implementation of the appellants' expert's recommendations. The motion judge's reference to only the replacement of the pipe ignored his findings concerning the other steps that he found the respondents had taken that interfered with the appellants' drainage and caused flooding. Specifically, paragraph 3 of the 2012 judgment imposes a blanket injunction against the respondents interfering with the Whitehead property drainage. The words "in particular" include but do not limit the injunction to driving over the pipe.
- (2) Did the motion judge misapprehend the appellants' expert evidence and the respondents' admissions? [54] As I have explained, the motion judge's misinterpretation of the 2012 judgment represents a material misapprehension of or failure to consider his previous findings and the effect of the undisputed evidence that he accepted at the 2012 trial. I also accept the appellants' submission that the motion judge similarly misapprehended the effect of the evidence filed on the contempt motion in a way that was inconsistent with the 2012

trial findings and judgment.

- [55] The standard of review for findings of fact is that a judge's assessment of facts is not to be reversed unless there has been a palpable and overriding error: *Housen*, at para. 10.
- [56] Appellate intervention is justified where a judge has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it: *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114, at p. 121.
- [57] Findings that are made in conflict with accepted evidence are palpable factual errors: *Waxman v. Waxman*, (2004) 186 O.A.C. 201 (C.A.), at para. 295. Where a finding is in conflict with accepted evidence and there is no given reason for failing to take such evidence into account, this court has found a palpable and overriding error of fact: *Austin v. Bell Canada*, 2020 ONCA 142, 150 O.R. (3d) 21, at para. 24.
- [58] That is what occurred here. The expert evidence proffered by the appellants' and respondents' experts established that the drainage problem caused by the respondents' actions had not been resolved by the installation of a six-inch pipe. The appellants' expert explained that the size and depth of the pipe were inadequate to restore the water flow and the respondents' expert agreed that the depth of the pipe was insufficient. Moreover, the appellants' expert repeated the requirement that the respondents remove the rubber dam from their property.
- [59] As supported by his expert's evidence, Mr. Whitehead's undisputed evidence was that the drainage problem had not been resolved. This was not a new drainage problem but the same problem that was caused by the respondents' actions prior to the 2012 trial. In other words, the same drainage problem existed, which was illustrated by the photographs filed at the 2012 trial and on the contempt motion.
- [60] The motion judge's observation that the appellants' existing drainage problem may have resulted from other factors, such as, "for one thing the intake valve on the Schiavone [property] is too high...[b]ut Schiavone is not a party" represents a misapprehension of the evidence from the 2012 trial and the contempt motion and a deviation from his findings at the 2012 trial. The location of the intake valve on the Schiavone property was not new evidence on the contempt motion but was before the motion judge at the 2012 trial. The appellants' expert was aware of the location of the intake valve on the Schiavone property; however, it was irrelevant to the expert's opinion that the drainage problem was caused by the respondents' actions of driving over the pipe, changing the slope of the property and installing a rubber dam on their property. Having accepted this expert evidence and absent fresh or different expert evidence, it was not open to the motion judge to make a finding contrary to the findings that supported the 2012 judgment.

- [61] I do not accept the respondents' submission that the appellants had taken steps following the 2012 judgment that contributed to the drainage problem. Even if the appellants had made changes to their property, there was no expert evidence that these steps contributed to the drainage problem and the expert evidence filed by the parties did not identify any such changes as contributing to the drainage problem.
- [62] Similarly, the motion judge erred in failing to give effect to the respondents' admissions that informed the 2012 judgment and supported the appellants' expert evidence. As earlier reviewed, these admissions included: the changes the respondents made to the property and the damage to the drainage pipe; the absence of any flooding prior to their making those changes; the continuation of flooding on the appellants' property; the failure to follow the appellants' expert's recommendations, including the installation of too small of a pipe at an insufficient depth; and the failure to remove the rubber dam from their property.
- [63] Accordingly, the motion judge erred in misapprehending the evidence.
- (3) Did the motion judge misapply the legal test for civil contempt? [64] The motion judge misapplied the legal test for civil contempt because of his misinterpretation of the 2012 judgment.
- [65] The 2012 judgment contained very broad language in paragraph 4 as to what the respondents were required to do to restore the flow of water across the Whitehead property. For ease of reference, I repeat the relevant provisions: "[The respondents] are ordered to take the necessary steps to restore the flow of water within three months, failing which [the appellants] may move to cite [the respondents] for contempt of court, or restore the flow of water [themselves] and enter upon [the respondents'] property to do so, or both."
- [66] As I earlier reviewed, based on his acceptance of the appellants' expert evidence and his factual findings at trial, the motion judge's conclusion on the contempt motion that simply replacing the damaged pipe complied with the 2012 judgment was manifestly wrong, because doing so was insufficient to restore the flow of water. This is because the causes of the drainage problem were not limited to the damaged pipe, and also included the changes to the slope of the Tucker property and the installation of the rubber dam.
- [67] The broad wording of para. 4 of the 2012 judgment clearly required removal of the rubber dam, but there was more than one way recommended by the appellants' expert to restore the flow of water. Each method included the installation of at least one 250mm pipe at a certain depth. While the appellants' expert's evidence in this respect was accepted at trial, the 2012 judgment did not reflect the specifications of the pipe installation, as well as the other steps, required to restore the flow of water to the extent enjoyed by the appellants prior to the respondents' interference with it. This lack of precision in the judgment may to some extent have led to the differing views about how to comply with it expressed between counsel.

- [68] That said, the absence of specifications from the judgment did not, by itself, relieve the respondents from proper compliance. The 2012 judgment was clear and unequivocal: the respondents had to restore the flow of water. How the respondents accomplished that requirement was open-ended, but the requirement still had to be met. They could have followed the recommendations of the appellants' expert or followed a different method if it achieved the same result. But they had to restore the flow of water. As I have already reviewed, the evidence before the motion judge demonstrated that the steps taken by the respondents were inadequate to restore the flow of water as required under the 2012 judgment.
- [69] As a result of his misinterpretation of his judgment, the motion judge misapplied the concept of deliberateness. In this case of restoring the flow of water, deliberateness for the purpose of determining civil contempt meant that the respondents must have intentionally failed to do what the judgment compelled, namely, failed to have taken the requisite steps to restore the flow of water.
- [70] While it is clear that respondents' counsel endeavoured to resolve the drainage problem, it is also clear that the respondents did not follow any of the recommendations of the appellants' expert. The respondents' expert on the motion effectively indicated that the steps taken by the respondents were insufficient to stop the flooding: "[t]he inlet level of the existing pipe... is 99.74[m] and flood may occur in part of the backyard of [the property] where the ground elevation is less than 99.74[m]." This conclusion accords with the appellants' expert report, which stated that the invert level of 99.70m was 0.28m higher than recommended. Further, the respondents knew that the solution implemented by the respondents' contractor did not resolve the drainage problem because it did not address the changes to the slope or remove the rubber dam. In this way, they intentionally chose not only to disregard the solution offered by the appellants' expert, but to disobey the 2012 judgment.
- [71] Additionally, even if there were genuine, unresolved issues between the parties with respect to the manner in which paragraph 4 was to be carried into operation, there can be no question that paragraph 3 was clear and unambiguous. The injunction contained in paragraph 3 is broad and not limited to driving a vehicle over the pipe: "[The respondents] are enjoined from doing or permitting anything that would interfere with the drainage of water through this pipe. In particular they are enjoined from driving any vehicle over the pipe."
- [72] Accepting the appellants' expert evidence, the motion judge found as a fact at the trial that one of the reasons for the drainage problem was the respondents' installation of the rubber dam on their property. The respondents have failed to remove the rubber dam. As a result, they have deliberately failed to comply with paragraph 3 of the judgment. The motion judge erred in failing to give effect to paragraph 3 of the judgment.
- [73] The motion judge's dismissal of the appellant's motion cannot stand.

- (4) What order should this court substitute? [74] Notwithstanding the respondents' deliberate failure to comply with the 2012 judgment, a contempt order does not necessarily follow.
- [75] A judge retains the discretion not to make a finding of contempt. The contempt power should not be "reduced to a mere means of enforcing judgments...rather, it should be used cautiously and with great restraint. It is an enforcement power of last rather than first resort": *Carey*, at para. 36, citing *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065, at p. 1078.
- [76] The court should consider whether it is necessary to make a finding of contempt or an order that the party breached the order and should comply with it. Justices are bound to exercise discretion to determine if proceeding in contempt meets that high standard or if other remedies such as a declaration of breach of the order in question or other responses would suffice. Failure to consider that discretion constitutes an error of law warranting appellate intervention. See: *Chong v. Donnelly*, 2019 ONCA 799, 33 R.F.L. (8th) 19, at paras. 8-12; *Moncur v. Plante*, 2021 ONCA 462, 57 R.F.L. (8th) 293, at para. 19; *Schafer v. Schafer*, 2025 ABCA 99, at para. 5; *Miner v. Cooke*, 2025 ABCA 226, at para. 14.
- [77] As a result of his misinterpretation of the 2012 judgment, the motion judge erred here in failing to consider whether an order short of a contempt order would be appropriate to ensure compliance with the 2012 judgment. Again, it is clear from the undisputed evidence that the respondents have not restored the flow of water, such as by taking the requisite steps as recommended by the appellants' expert, including the removal of the rubber dam on their property. They should be required to do so without further delay.

E. Disposition [78] I would allow the appeal and set aside the motion judge's order.

- [79] Mr. Whitehead is over 80 years old. The parties have been in litigation for a quarter of a century. It is high time that this dispute came to an end.
- [80] Accordingly, I would order that:
- i. Within three months of the release of these reasons, the respondents shall implement at their own expense the steps necessary to restore the flow of water to the state it was prior to the respondents' interference with it, as set out in paragraphs 1 to 3 on page 4 of the appellants' expert's November 30, 2016 report. For greater clarity, in respect of the steps set out in para. 1 of that report, the respondents are to install two 250mm diameter pipes, as optimally recommended, unless the appellants' expert opines that one pipe will suffice.
 - ii. If the respondents fail to implement the necessary steps as required in paragraph (i) herein, the appellants may implement those steps at the respondents' expense.
 - iii. For the purposes of paragraph (ii) herein, the respondents shall permit the appellants and persons retained by the appellants to perform or advise on the work, to enter onto the respondents' property with 24 hours' notice.

iv. If the appellants undertake the work in accordance with para (ii) hereof, the respondents shall pay the appellants for the cost of the restoration of the water flow within one month of the work's completion as certified by the appellants' expert. As security for the payment of the restoration cost, the appellants shall have the right to register a lien in the estimated amount of the restoration cost on title to the respondents' property. The appellants shall discharge the lien upon payment of the restoration cost by the respondents or failing payment by the respondents, the appellants may take the necessary steps to enforce their lien against the respondents' property.

v. Given the difficulties between the parties to-date, I shall remain seized of this matter as case-management judge to ensure compliance with this order.

[81] I would order the respondents to pay the appellants the costs of the contempt motion in the amount of \$25,000 and of the appeal in the agreed upon amount of \$10,000, both amounts all inclusive.

Released: September 29, 2025 "L.B.R."

"L.B. Roberts J.A."

"I agree. B.W. Miller J.A."

"I agree. B. Zarnett J.A."

[1] The appellant, Catherine Margaret Whitehead, sadly passed away before trial.

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Prepared on 28 October 2026 · Esheria