

## Walter, Penny

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**Subject:** FW: Email - Request to Speak - Douglas Tompson - Housing Accelerator Fund - Accessory Dwelling Units - CK 4350-63 x 750-4  
**Attachments:** 4.4 - email - Doucglas tompson Housing Fund - Redacted.pdf; Capture.JPG

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**From:** Web NoReply <[web-noreply@Saskatoon.ca](mailto:web-noreply@Saskatoon.ca)>

**Sent:** Sunday, April 21, 2024 12:18 AM

**To:** City Council <[City.Council@Saskatoon.ca](mailto:City.Council@Saskatoon.ca)>

**Subject:** Email - Request to Speak - Douglas Tompson - Housing Accelerator Fund - Accessory Dwelling Units - CK 4350-63 x 750-4

--- Replies to this email will go to [REDACTED]

Submitted on Sunday, April 21, 2024 - 00:17

Submitted by user: [REDACTED]

Submitted values are:

**I have read and understand the above statements.:** Yes

**I do not want my comments placed on a public agenda. They will be shared with members of Council through their online repository.:** No

**I only want my comments shared with the Mayor or my Ward Councillor.:** No

**Date:** Saturday, April 20, 2024

**To:** His Worship the Mayor and Members of City Council

**First Name:** Douglas

**Last Name:** Tompson

**Phonetic spelling of first and/or last name:** Douglas Tompson

**Phone Number :** [REDACTED]

**Email:** [REDACTED]

**I live outside of Saskatoon:** No

**Saskatoon Address and Ward:**

**Address:** [REDACTED] Temperance Street, Temperance Street

**Ward:** Ward 6

**Name of the organization or agency you are representing (if applicable):** None

**What do you wish to do ?:** Request to Speak

**If speaking will you be attending in person or remotely:** In person, Remotely

**What meeting do you wish to speak/submit comments ? (if known):** Wednesday April 24th 2024 at 18:00 City Council Public Hearing

**What agenda item do you wish to comment on ?:** 4.4 Housing Accelerator Fund - Accessory Dwelling Units [MPC2024-0305]

**Comments:**

I would like to submit a YouTube video to accompany the letter that I previously sent to City Council.

chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://pub-saskatoon.escribemeetings.com/filestream.ashx?DocumentId=210974

**Will you be submitting a video to be vetted prior to council meeting?:** Yes

**Publicly viewable / shareable link from YouTube:** <https://youtu.be/9qb3Y4Wdg24>

## Dutchak, Shantelle

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**Subject:** FW: Email - Communication - Douglas Tompson - Housing Accelerator Fund - Garage Suites - CK 4350-63  
**Attachments:** Housing Accelerator Fund - Municipal Planning Commission - Garden Suites - April 8th 2024.pdf

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**From:** Web NoReply <[web-noreply@Saskatoon.ca](mailto:web-noreply@Saskatoon.ca)>  
**Sent:** Monday, April 8, 2024 1:14 PM  
**To:** City Council <[City.Council@Saskatoon.ca](mailto:City.Council@Saskatoon.ca)>  
**Subject:** Email - Communication - Douglas Tompson - Housing Accelerator Fund - Garage Suites - CK 4350-63

--- Replies to this email will go to [REDACTED] ---

Submitted on Monday, April 8, 2024 - 13:12

Submitted by user: Anonymous

Submitted values are:

**I have read and understand the above statements.:** Yes

**I do not want my comments placed on a public agenda. They will be shared with members of Council through their online repository.:** No

**I only want my comments shared with the Mayor or my Ward Councillor.:** No

**Date:** Monday, April 08, 2024

**To:** His Worship the Mayor and Members of City Council

**Pronouns:** He/him/his

**First Name:** Douglas

**Last Name:** Tompson

**Phonetic spelling of first and/or last name:** [REDACTED]

**Phone Number :** [REDACTED]

**Email:** [REDACTED]

**I live outside of Saskatoon:** No

**Saskatoon Address and Ward:**

**Address:** [REDACTED] Temperance Street, Temperance Street

**Ward:** Ward 6

**Name of the organization or agency you are representing (if applicable):** Tompson Solutions Inc

**What do you wish to do ?:** Submit Comments

**What meeting do you wish to speak/submit comments ? (if known)::** April 11th 2024

**What agenda item do you wish to comment on ?:** Municipal Planning Commission - Garage Suite

**Comments:**

Thank you for to the Varsity View Community Association Facebook Page for posting the details of this meeting.

I would like to request that the City of Saskatoon look at their current construction bylaws surrounding excavation and compaction regulations with a particular focus on impact vibration and work performed in close proximity to building structures.

I would be grateful if the attached letter explaining the issues could be provided to the authorities to help communicate the importance of updating the construction bylaws to prevent damage to adjacent properties with the increase in excavation/compaction that will be occurring with an increase in permits for Garage Suites.

The topic of impact vibration damage is not hypothetical since it has already been raised in the local courts following a challenging and litigious Garage Suite project in Varsity View.

Many of the problems encountered could have been mitigated with some updates to the construction bylaws regarding the requirement to select low impact excavation and compaction practices while working in close proximity to building structures.

THANK YOU for considering my request.

**Attachments:**

- [Housing Accelerator Fund - Municipal Planning Commission - Garden Suites - April 8th 2024.pdf](#) 255.83 KB

**Will you be submitting a video to be vetted prior to council meeting?:** No

[REDACTED] Temperance Street  
Saskatoon, Saskatchewan  
S7N [REDACTED]  
[REDACTED]

Monday April 8<sup>th</sup> 2024

City of Saskatoon Council  
222 – 3<sup>rd</sup> Avenue North  
Saskatoon, Saskatchewan  
S7K 0J5

Dear City of Saskatoon Council,

**RE: Request for revised City of Saskatoon construction bylaw on low impact excavation and compaction practices in close proximity to residential structures for infill construction and renovation(s) especially Garden Suites and Garage Suites.**

I urge the City of Saskatoon to make some beneficial changes to the construction bylaws in order to prevent similar types of impact vibration damage from occurring to other residents living in close proximity to infill construction.

This request for improved construction bylaws seems especially appropriate in light of the new Federal Housing Accelerator Fund and the associated infill construction bylaws that are allowing multi-unit dwellings with taller structures built closely to existing homes.

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## LACK OF INFORMATION ON IMPACT VIBRATION WITHIN CITY CONSTRUCTION BYLAWS

The current City of Saskatoon construction bylaws do not address impact vibrations or any mitigating practices to protect buildings in close proximity to excavation and compaction operations:

- *The City of Saskatoon Contractor Environmental Guidelines*<sup>1</sup> discusses all types of other issues including fill and dust management but the issue of impact vibration is conspicuously absent.
- Section 08025 “*Water and Sewer Connections Construction, Revised 2023-02-02*”<sup>2</sup> makes reference to a variety of specifications, including material and maximum lift depth, but does not specify whether high impact or low impact methods should be utilized in close proximity to buildings.
- Section 02015 -2 “*Earthworks – Subgrade Compaction (Equipment), Revised 2022-02-04*” simply states “All tools, machinery, plant and equipment used in executing any part of the work shall be suitable for the work carried out and shall be maintained in efficient working order and where any of the machinery, plant or equipment is found to be unsatisfactory, it shall be improved or replaced, by the contractor, to the satisfaction of the Engineer.”<sup>3</sup>

Common sense dictates that low impact excavation and compaction processes should be used in close proximity to building structures. Unfortunately, there is an absence of municipal legislation that results in everything being allowed and common sense being questioned in the courts and subsequently discarded. Due to a glaring omission of specificity on the method of excavation and compaction, every type excavation and compaction complies with the City of Saskatoon construction standard of care expected of a contractor even if it causes an adjacent building structure to shake.

It’s a matter of chance whether an excavation contractor decides to use common sense or not. If there is an additional cost, the most cost effective method is typically pursued. It shouldn’t surprise anyone that the most cost effective method is also the high impact method of excavation and compaction that risks damage to structures in the immediate vicinity.

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<sup>1</sup> [Contractor Environmental Guidelines - February 2019 \(saskatoon.ca\)](https://www.saskatoon.ca/contractor-environmental-guidelines)

<sup>2</sup> [Water and Sewer Connections Construction \(saskatoon.ca\)](https://www.saskatoon.ca/water-and-sewer-connections-construction)

<sup>3</sup> [Subgrade Compaction \(saskatoon.ca\)](https://www.saskatoon.ca/subgrade-compaction)

## JS Held: “The Impact of Construction Vibration on Adjacent Structures”

I strongly urge you to read an excellent paper<sup>4</sup> on the subject of impact vibrations in densely populated areas:

“*The Impact of Construction Vibration on Adjacent Structures*” by JS Held.

This paper explains that in the state of Florida, the Florida Department of Transportation requires vibration monitoring on nearby structures. Most notably<sup>5</sup>:

“In addition, when performing roadway compaction operations, all nearby structures within 75 feet of vibratory compaction operations must be surveyed and monitored for settlement.”

When my former neighbors connected their water-and-sewer, the excavation and compaction operations were within forty<sup>6</sup> feet of their neighbor’s home at █████ Temperance Street. Although the street excavations were for █████ Temperance Street, it was █████ Temperance Street that was the closest structure to the excavation and compaction operations.

## FLAWED ARROW ENGINEERING PLANS

My goal with my injunction application was to prevent damage and/or encroachment to my property as a result of the heavily flawed underground Garage Suite utility plan that was designed, reviewed and approved along the east side of █████ Temperance Street – adjacent to my property.

If I did not have a background in directional drilling, I would have likely made the same mistake as the city in trusting the signed and stamped engineering drawing by Arrow Engineering.

## FAILED INJUNCTION APPLICATION, 2019 SKQB 163

On July 10<sup>th</sup> 2019, my injunction application failed<sup>7</sup> but it did shine light on various important issues and contained a warning to the Scissons, the City of Saskatoon and Arrow Engineering.

On July 11<sup>th</sup> 2019, I made another FOIP application since I was confident that the previous utility plan would not be attempted following the warning from the court. I was confident that my FOIP application for the revised Garage Suite Utility Plan wouldn’t be rejected based on the comments<sup>8</sup> from the court:

[33] The refusal of the City to share with Mr. Tompson the details of the engineered utility plan of the Scissons filed in support of the building permit applications citing The Local Authority Freedom of Information and Protection of Privacy Act and stating that “it contains technical information supplied in confidence by a third party to the City of Saskatoon in support of an application of a permit” is to me, and I expect for the public at large, inexplicable and the antithesis of freedom of information. How it can be reasonably argued that technical details of utility installations can be classified as confidential information, which a concerned neighbour is not entitled access to, was not explained. This refusal likely contributed to the level of Mr. Tompson’s frustration.

## STOP WORK ORDER #2

On September 25<sup>th</sup> 2019, my former neighbors pursued a new underground utility plan along the west side of 1011 Temperance Street – adjacent to █████ Temperance Street.

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<sup>4</sup> [The Impact of Construction Vibration on Adjacent Structures \(jsheld.com\)](https://jsheld.com) PDF: [Perspectives The-Impact-of-Construction-Vibration-on-Adjacent-Structures.pdf \(imgix.net\)](https://imgix.net)

<sup>5</sup> Page 2, Vibration Analysis, JS Held Perspectives, “The Impact of Construction Vibration on Adjacent Structures”

<sup>6</sup> Fuller v Gerow-Scissons, 2023 SKPC 54 (CanLII), at para 16, <https://canlii.ca/t/k1dvcv#par16>

<sup>7</sup> Tompson v Gerow-Scissons, 2019 SKQB 163 (CanLII), <https://canlii.ca/t/j1kb4>

<sup>8</sup> Tompson v Gerow-Scissons, 2019 SKQB 163 (CanLII), at para 33, <https://canlii.ca/t/j1kb4#par33>

Due to the absence of a FOIP response following my July 11<sup>th</sup> 2019 application, I made inquiries with the City of Saskatoon and it was determined that my former neighbor and their excavation contractor were attempting a connection without any engineered drawings or permission from the City of Saskatoon.

A second<sup>9</sup> STOP WORK order was issued by the City of Saskatoon.

## DAMAGE TO 1009 TEMPERANCE STREET

The property owner at [REDACTED] Temperance Street reported impact vibration damage to her home immediately following the unpermitted street excavations.

The property owner at [REDACTED] Temperance Street was advised<sup>10</sup> to submit a legal claim to the City. This claim was subsequently denied because the The Cities Act protected the City of Saskatoon from any liability. The damage to the owner of [REDACTED] Temperance Street was considered a civil matter between neighbors.

## SMALL CLAIMS COURT OF SASKATCHEWAN

The damage, albeit alleged, to [REDACTED] Temperance Street, was eventually litigated<sup>11</sup>.

Despite conducting excavations in close proximity to [REDACTED] Temperance Street, there was insufficient evidence to draw any conclusion with respect to causation that would compel the owner of 1011 Temperance Street and their licensed City of Saskatoon water-and-sewer contractor to pay for the cost of the repairs.

## PALPABLE ERRORS OF THE COURT

In the unusual case of [REDACTED] Temperance Street, it was very disappointing to read the palpable errors of the court albeit from my layperson perspective.

Since the City of Saskatoon construction bylaws do not require low impact excavation and compaction practices in close proximity to residential structures, the Scissons and their licensed water-and-sewer contractor were deemed to have performed their tasks using the “normal” standard of care. This standard of care was performed without authorization or a revised engineering drawing. The excavation operations on September 25<sup>th</sup> 2019 yielded an immediate STOP WORK order but the activities were considered to be within the standard of care based on the broad language contained within the City of Saskatoon construction bylaws.

The court commented:

[133] Mr. Brunner explained the process of filling the hole and compacting the dirt. There are two options typically available to Brunner for jobs of this size. One uses a vibratory plate tamper and the other uses a backhoe bucket. Brunner has routinely used the backhoe bucket for 48 years. On occasion, the City will require the use of a plate tamper. According to Mr. Brunner, both methods have been proven to achieve the required soil densities. The digging, replacement and compression in this project was the same as they have done for approximately fifteen other residences on Temperance Street.

However, the court also comments<sup>12</sup>:

[48] Mr. Tompson observed work being done on Temperance Street on March 16, 2022 where a backhoe was used for excavation and a compactor rather than a backhoe was used to fill the hole. No vibration was felt. A drinking water advisory

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<sup>9</sup> Fuller v Gerow-Scissons, 2023 SKPC 54 (CanLII), at para 76, <https://canlii.ca/t/k1dcv#par76>

<sup>10</sup> Fuller v Gerow-Scissons, 2023 SKPC 54 (CanLII), at para 91, <https://canlii.ca/t/k1dcv#par91>

<sup>11</sup> Fuller v Gerow-Scissons, 2023 SKPC 54 (CanLII), <https://canlii.ca/t/k1dcv>

<sup>12</sup> Fuller v Gerow-Scissons, 2023 SKPC 54 (CanLII), at para 48, <https://canlii.ca/t/k1dcv#par48>



notice was placed in his mailbox in relation to this work. I note that this incident is not related in any way to the matters in this proceeding and there is no context for the nature of that work.

## ERROR #1: EXCLUDE MARCH 16<sup>th</sup> 2022 LOW IMPACT EXCAVATION & COMPACTION

It's confusing to see the court acknowledge street excavations done by the same firm using different excavation and compaction techniques but state that "*there is no context for the nature of that work*".

Ms. Fuller's position was on September 25<sup>th</sup> 2019, Brunner chose a high impact vibration method and failed in providing her with the appropriate duty of care that was provided to me on March 16<sup>th</sup> 2022 -using a much more suitable low impact vibration method. I wonder if Brunner considered the risk of damaging my home before choosing a low-impact excavation and compaction method.

The judge stated<sup>13</sup>:

[193] In assessing the reasonableness of the risk posed by Brunner, the Court must consider the standard to which a skilled water and sewer contractor ought to be held in the performance of its work when connecting private water and sewer service to the public infrastructure. The standard is that which would be expected from a reasonable and prudent water and sewer contractor in similar circumstances.

It would seem most appropriate to compare and contrast the different methods used between the excavation and compaction methods on either side of my home at [REDACTED] Temperance Street. One method took place on September 25<sup>th</sup> 2019 and another method took place on March 16<sup>th</sup> 2022.

The same contractor was used in both excavation operations.

The judgement acknowledged the shaking of Ms. Fuller's house<sup>14</sup>:

[221] I do not doubt that Ms. Fuller felt her house shake while Brunner was working on September 25, 2019 and October 16, 2019 and that she subsequently observed cracks in her house. However, that does not necessarily mean Brunner was negligent in the performance of its work, by falling below the requisite standard. The evidence is insufficient to establish that conclusion.

The judgement also comments on the absence of shaking in my home during similar excavation operations using a different low impact method<sup>15</sup>:

[48] Mr. Tompson observed work being done on Temperance Street on March 16, 2022 where a backhoe was used for excavation and a compactor rather than a backhoe was used to fill the hole. No vibration was felt. A drinking water advisory notice was placed in his mailbox in relation to this work. I note that this incident is not related in any way to the matters in this proceeding and there is no context for the nature of that work.

**I respectfully submit that it was a mistake of the court not to admit the March 16<sup>th</sup> 2022 excavation operations as evidence of the appropriate standard of care and then later explain that the owner of 1009 Temperance Street failed to provide any evidence that has established a breach in the standard of care and causation.**

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<sup>13</sup> Fuller v Gerow-Scissons, 2023 SKPC 54 (CanLII), at para 193, <https://canlii.ca/t/k1dcv#par193>

<sup>14</sup> Fuller v Gerow-Scissons, 2023 SKPC 54 (CanLII), at para 221, <https://canlii.ca/t/k1dcv#par221>

<sup>15</sup> Fuller v Gerow-Scissons, 2023 SKPC 54 (CanLII), at para 48, <https://canlii.ca/t/k1dcv#par48>

## SHAKING AN ADJACENT HOUSE APPEARS TO BE ALLOWED IN SASKATOON

A reasonable person might believe that a house shaking, as a direct result of Brunner's high impact excavation and compaction, would be a clear sign of causation. However, the defendants successfully argued that their methods were allowed according to the City of Saskatoon construction bylaws.

Brunner was not held responsible because they complied with the rules – which I respectfully suggest require updating.

[6] The defendant, Brunner, replied that all work it performed was in strict compliance with construction standards and denies that its actions caused damage to Ms. Fuller's property. Alternatively, Brunner's position is that if it complied with the City of Saskatoon's specifications and authorizations, it is entitled to the same statutory immunity as the City.<sup>16</sup>

To be clear, there are no construction standards with respect to excavation and compaction methods. As such, anything is allowed regardless of whether it results in the shaking of adjacent structures.

It should be noted that on March 16<sup>th</sup> 2022, Brunner exercised their discretion to use a vastly different method of excavation when working on 1017 Temperance Street, see attachment<sup>17</sup>.

## REQUEST FOR NEW CONSTRUCTION BYLAW TO PREVENT SIMILAR PROPERTY DAMAGE

Since Brunner successfully argued they were in "*strict compliance with construction standards*" and that they were also entitled "*to the same statutory immunity as the City*", I believe that revising the City of Saskatoon construction bylaws could prevent similar damage to other property owners.

Brunners is aware of the low impact excavation and compaction methods since they were used with another adjacent neighbor on March 16<sup>th</sup> 2022.

[133] Mr. Brunner explained the process of filling the hole and compacting the dirt. There are two options typically available to Brunner for jobs of this size. One uses a vibratory plate tamper and the other uses a backhoe bucket. Brunner has routinely used the backhoe bucket for 48 years. On occasion, the City will require the use of a plate tamper. According to Mr. Brunner, both methods have been proven to achieve the required soil densities. The digging, replacement and compression in this project was the same as they have done for approximately fifteen other residences on Temperance Street.<sup>18</sup>

It is pure chance whether an adjacent property owner is given impact vibration protection when "*the City will require the use of a plate tamper.*" Both the high impact bucket compaction and low impact plate tamper are approved so they both demonstrate a duty of care and a lack of negligence. Since there are no rules, when the high impact bucket excavation and compaction is used in close proximity to a residential structure, the contractor can successfully argue that they have "*complied with the City of Saskatoon's specifications and authorizations*" and "*is entitled to the same statutory immunity as the City.*"

The City of Saskatoon needs to update the construction bylaws to prevent high impact vibration excavation and compaction processes in close proximity to building structures.

If the City of Saskatoon chooses not to update the construction bylaws, there will be more victims of property damage like 1009 Temperance Street that will be told that the contractor was simply following the rules.

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<sup>16</sup> Fuller v Gerow-Scissons, 2023 SKPC 54 (CanLII), at para 6, <https://canlii.ca/t/k1dcv#par6>

<sup>17</sup> Tompson Affidavit with exhibits signed March 17<sup>th</sup> 2022.

<sup>18</sup> Fuller v Gerow-Scissons, 2023 SKPC 54 (CanLII), at para 133, <https://canlii.ca/t/k1dcv#par133>

## ERROR #2: DEFENDANT TESTIMONY AS FACT REGARDING EQUIPMENT HYDRAULICS

I was prohibited from testifying as an expert witness<sup>19</sup> in my earlier unsuccessful injunction application to the court:

[49] I conclude with a caution to both the Scissons and the City in the hope that this matter does not unnecessarily come back before the court. Mr. Tompson filed an affidavit in which he sought to provide an expert opinion as to why the proposed directional drilling installation could not be effected in the manner the drawing M200 contemplates. I could not accept Mr. Tompson as an expert qualified to give the opinion evidence for the simple reason that as a party to the proceedings he is not, under our rules of evidence, entitled to be accepted by the court as an expert and to give opinion evidence.<sup>20</sup>

In Ms. Fuller's trial, the court made a number of incorrect inferences based on Mr. Brunner's testimony, as a defendant.

The court commented<sup>21</sup>:

[142] Mr. Brunner testified that a backhoe bucket will lower only so fast, regardless of how high it is lifted into the air, due to its hydraulics. It is the hydraulics, and not gravity, that controls the rate at which the bucket descends. No matter how high it is lifted the bucket hits the ground with the same force.

Upon reflection, it is clear that nobody in the courtroom except Mr. Brunner had a history of working with heavy equipment and hydraulics. Anyone with experience working with heavy equipment and hydraulics is able to see the half-truths in the testimony described in the judgement.

**The court made a mistake in accepting Mr. Brunner's testimony, relating to the backhoe bucket force, as fact.**

Mr. Brunner's testimony was partially truthful. The testimony conveniently doesn't mention that increasing the hydraulic flow rate will result in an increase to the bucket speed and the subsequent impact force/vibrations. The hydraulic flow rate is directly proportional to the engine speed that is controlled by the excavator operator. The hydraulic flow rate and bucket speed can be adjusted to barely crack an egg or smash through several inches of paved asphalt street.

Mr. Brunner's testimony failed to disclose that the excavator operator has complete control of the engine speed, hydraulic flow rate, subsequent bucket speed and resulting impact force that ultimately translates into the resulting ground vibrations.

Regrettably, this misrepresentation of the backhoe bucket operation had influence elsewhere in the court judgement<sup>22</sup>:

[209] Regarding the type of equipment used, Mr. Brunner testified that during the summer months, backhoes with a front-end loader bucket and an excavating bucket on the back are used, as was the case here. In winter, heavier equipment is needed to dig through the frost. He stated Brunner has routinely used the backhoe bucket for 48 years. Mr. Reynolds confirmed that there are several accepted methods for removing asphalt and excavation, including by backhoe.

[210] According to Mr. Brunner and Mr. Johnston, who had extensive experience in operating the backhoe, it is not gravity but the equipment's hydraulics that govern the force with which the backhoe bucket compacts the soil. Mr. Johnston used the same method for excavation on September 25 as he had always done for 11 years.

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<sup>19</sup> *The Queen's Bench Rules*, Duty of expert witness: Section 5-37(2)(a).

<sup>20</sup> *Tompson v Gerow-Scissons*, 2019 SKQB 163 (CanLII), at para 49, <https://canlii.ca/t/j1kb4#par49>

<sup>21</sup> *Fuller v Gerow-Scissons*, 2023 SKPC 54 (CanLII), at para 142, <https://canlii.ca/t/k1dvc#par142>

<sup>22</sup> *Fuller v Gerow-Scissons*, 2023 SKPC 54 (CanLII), at para 209, <https://canlii.ca/t/k1dvc#par209>

Mr. Brunner's testimony infers that backhoes with a front-end loader bucket and an excavating bucket on the back aren't used in the winter.

Backhoes with a front-end loader bucket and an excavating bucket on the back are used in the winter but they require the operator to increase the engine speed and associated hydraulic flow rate to provide a faster bucket speed to enable an increase in the impact vibration due to the frozen ground.

## ERROR #3: STANDARD OF CARE BASE ON EQUIPMENT HYDRAULICS TESTIMONY BY DEFENDANT

The court concluded that<sup>23</sup>:

[195] Much of Ms. Fuller's case relies on circumstantial evidence. Therefore, I must consider whether the evidence gives rise to inferences that support a finding of a breach of the standard of care and causation. I must weigh those inferences along with any direct evidence to determine whether, on a balance of probabilities, the plaintiff has established a breach. The defendant bears a strategic burden to present evidence to rebut the plaintiff's case: Metropolitan Toronto Condominium Corp. No. 1100 v A & G Shanks Plumbing & Heating Ltd., 2020 ONCA 67 at para 17 [A & G Shanks].

The judge cited the relevant precedent on determining standard of care and inferences with circumstantial evidence<sup>24</sup>:

[17] In other words, where circumstantial evidence has been adduced, the trial judge must consider whether that evidence gives rise to an inference, or a series of inferences, that support a finding of a breach of the standard of care or of causation. The trial judge must then weigh any such inferences along with any direct evidence to determine whether, on a balance of probabilities, the plaintiff has established a breach of the standard of care or causation. Where a plaintiff has done so, the defendant bears a strategic burden to present its own evidence to rebut the plaintiff's case. The "legal burden of proof, of course, remains on the plaintiff throughout": Marchuk v. Swede Creek Contracting Ltd. (1998), 1998 CanLII 6280 (BC CA), 116 B.C.A.C. 318, at para. 10.

Mr. Brunner and Mr. Johnston's<sup>25</sup> testimony about the limitation on bucket speed was inferred as a matter of fact and to explain that there was no breach in the standard of care or a breach of duty. The judge, who is unlikely to have a background operating heavy equipment, misinterpreted the bucket speed testimony of the defendants and allowed it to play a pivotal role while misapplied it in her judgement.

While reading the 49 page, 254 paragraph judgement, the court seemed completely unaware that the equipment operator, who adjusts the hydraulics as part of his duties, determines the speed and impact force of the bucket/attachment.

**The breach in the standard of care was done with respect to the bucket speed, that was controlled by the operator via hydraulics, and subsequent magnitude of vibrations. These vibrations resulted in the adjacent home at [REDACTED] Temperance Street being shaken.**

**The court believed that [REDACTED] Temperance Street shook while Brunner was working on September 25<sup>th</sup> 2019 and October 16, 2019. Unfortunately, there were no City of Saskatoon construction bylaws to require low impact excavation and compaction practices. As such, the court concluded<sup>26</sup>:**

[220] Based upon the evidence presented to the Court, I am unable to find, on a balance of probabilities, that the actions of Brunner on either September 25, 2019 or October 16, 2019 fell below the standard of a reasonable and prudent

<sup>23</sup> Fuller v Gerow-Scissons, 2023 SKPC 54 (CanLII), at para 195, <https://canlii.ca/t/k1dcv#par195>

<sup>24</sup> Metropolitan Toronto Condominium Corporation No. 1100 v. A. & G. Shanks Plumbing & Heating Limited, 2020 ONCA 67 (CanLII), at para 17, <https://canlii.ca/t/j502t#par17>

<sup>25</sup> Kevin Johnston has been an employee of Brunner since August 14, 2011.

<sup>26</sup> Fuller v Gerow-Scissons, 2023 SKPC 54 (CanLII), at para 220, <https://canlii.ca/t/k1dcv#par220>

water and sewer contractor when connecting private water and sewer to the City's infrastructure. As such, there is insufficient evidence upon which I can conclude that Brunner's actions were negligent.

[221] I do not doubt that Ms. Fuller felt her house shake while Brunner was working on September 25, 2019 and October 16, 2019 and that she subsequently observed cracks in her house. However, that does not necessarily mean Brunner was negligent in the performance of its work, by falling below the requisite standard. The evidence is insufficient to establish that conclusion.

**The inference that the bucket speed was not controlled by the backhoe operator resulted in a series of errors of the court that resulted in a misunderstanding that the standard of care owed to Ms. Fuller had been breached.**

## REVERSE ONUS OF PROOF: Requires a breach of duty or standard of care

The owner of █████ Temperance Street readily acknowledged the challenges of her application as a plaintiff with the onus of proof being the burden of the plaintiff. The owner of █████ Temperance Street included an application for a reverse onus of proof that the court acknowledged but denied with an explanation based on the previous mistake in inference:

[228] The Court in Nowsco held that where a breach of duty has been established by the plaintiff and there is inherent evidentiary difficulty in proving causation, the onus shifts to the defendant. In other words, the proof of the breach of duty is prima facie proof of causation, leaving the defendants free to show that the damage was not caused by the breach on their part. [my emphasis]

[229] It is an important distinction that, unlike in the present case, in Nowsco, a breach had been established.

When the court mistakenly accepted Mr. Brunner's testimony that *"No matter how high it is lifted the bucket hits the ground with the same force"*, the court inferred that the backhoe operator didn't control the bucket speed or the resulting bucket force. The court was mistaken in this critical detail based on the half-truth testimony of a defendant that misled the court without anyone noticing.

In fairness to everyone present in the court, the defendant was likely the only person in the courtroom with an understanding of the backhoe hydraulic systems.

**The court incorrectly inferred that bucket force was not controlled by the backhoe operator and could not result in being a source of causation with respect to the allegations of unacceptably high impact vibrations.**

The court determined that *"Ms. Fuller [had] not proven Brunner's conduct was negligent by breaching the standard of care. Therefore, her claim against Brunner must fail."*<sup>27</sup>

## ERROR #4: LITIGATION BY OTHER NEIGHBOR (ME) TO PROTECT HOME FROM UNDERGROUND UTILITY LINE DAMAGE WAS UNRELATED

The court also determined that *"it was apparent from the evidence that there was a contentious history between Mr. Tompson and the Scissons that had resulted in litigation not directly related to these proceedings."*

While the contentious history with the Scissons was accurate, I cannot understand the decision of the court that my prior litigation was not directly related to Ms. Fuller's case at █████ Temperance Street. The Queen's Bench of Saskatchewan summarized<sup>28</sup> my prior litigation as:

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<sup>27</sup> Fuller v Gerow-Scissons, 2023 SKPC 54 (CanLII), at para 237, <https://canlii.ca/t/k1dcv#par237>

<sup>28</sup> Tompson v Gerow-Scissons, 2019 SKQB 163 (CanLII), at para 30, <https://canlii.ca/t/j1kb4#par30>

[30] Mr. Tompson asks the court to accept his position that his property is at risk of harm by virtue of what he believes will or may happen in the course of installation of the sewer and water utility to the Scissons' garage suite. He wants injunctive relief to relieve his concerns. I understand why Mr. Tompson does not trust the Scissons, why he has concerns and why he is frustrated by the process and the City's reaction to his concerns.

I went to court to protect my property from damage that would arise from the Scissons's approved underground Garage Suite Utility Plan.

Ms. Fuller went to court to claim damages as an alleged result of the Scissons's unapproved underground Garage Suite Utility Plan.

I was able to demonstrate from "*a practical and common-sense perspective there appears to be substance to [my] concerns.*" I was able to prove a risk of damage to my property on "*a practical and common-sense perspective*" but Ms. Fuller was unable to prove the level of impact vibration since she had not installed vibration-sensing equipment<sup>29</sup> to record the vibrations prior to the unpermitted street excavation in close proximity to her home. Thankfully, the court recognized that "*could not have been done in this case.*"<sup>30</sup>

**I respectfully suggest that it was a mistake of the court not to admit my unsuccessful injunction judgement as evidence since it was directly related to Ms. Fuller's claim for damages arising from the attempt to connect the underground water-and-sewer connection(s).**

## ERROR #5: LACK OF EXPLANATION FROM COURT ON WHY NEIGHBOUR'S LITIGATION TO PROTECT PROPERTY FROM UTILITY LINE DAMAGE WAS UNRELATED TO SUBSEQUENT APPLICATION FOR DAMAGE DUE TO SAME UTILITY LINE INSTALLATION

I was unable to testify as an expert witness in my failed injunction application but it appears that the court accepted Mr. Brunner's testimony as fact when he explained the operation of an excavator and the speed limitation of the bucket.

None of this seems to concern the City of Saskatoon since it has no liability in the matter. As Ms. Fuller and I have been told, it is a civil matter between neighbors or between seller and buyer.

## COST OF APPEAL REQUIRES SIX DAYS OF COURT TRANSCRIPTS

Ms. Fuller was unsuccessful and fined \$1,000 for court costs following her attempts to have the Scissons repair the alleged impact vibration damages to her home.

I believe the judge made a number of errors in the judgement but the cost of the transcripts, as a requirement for an appeal, was too big a price to pay.

Credit is due where credit is earned. My former neighbour and their licensed water and sewer contractor won! Ms. Fuller, who owns [REDACTED] Temperance Street, lost!

The judgement stated<sup>31</sup>:

[216] The difficulty for Ms. Fuller is that she did not present any expert evidence of the standard to which Brunner ought to be held in these circumstances or evidence that its work fell below the requisite standard. While she asserted that Brunner's

<sup>29</sup> Fuller v Gerow-Scissons, 2023 SKPC 54 (CanLII), at para 61, <https://canlii.ca/t/k1dcv#par61>

<sup>30</sup> Fuller v Gerow-Scissons, 2023 SKPC 54 (CanLII), at para 225, <https://canlii.ca/t/k1dcv#par225>

<sup>31</sup> Fuller v Gerow-Scissons, 2023 SKPC 54 (CanLII), at para 216, <https://canlii.ca/t/k1dcv#par216>

use of the backhoe to excavate close to her property and the manner in which it compacted the filled holes were improper, there is no evidence against which to assess whether that was the case. In other words, she presented no evidence of the standard of care against which Brunner's work could be measured. There was no evidence of what a reasonable water and sewer contractor would have done or whether such a contractor would have acted differently in this situation. Neither was there evidence of the industry standard for work of this type. Any evidence in relation to the City's specifications made it clear that Brunner took reasonable care to comply.

**Mr. Nickolas Stooshinoff, KC did an exceptional job of defending Brunner and the Scissons<sup>32</sup> while aptly highlighting that the City of Saskatoon has no construction bylaw that specifies what method of excavation and compaction should be used in close proximity to residential structures.**

**The defendants successfully argued they never breached any duty of care despite the unfortunate STOP WORK order for working without engineering drawings or permission from the City of Saskatoon.**

- Why did Brunner choose to use low impact excavation and compaction methods on March 16<sup>th</sup> 2022 with one of my neighbors and high impact excavation and compaction methods on September 25<sup>th</sup> 2019 with Ms. Fuller?
- Should a contractor use a narrow blade with a small cross sectional area or an excavating bucket with a larger cross sectional strike area when excavating in close proximity to a building structure?
- Should a contractor use a backhoe bucket or a plate compactor for backfilling in close proximity to a building structure?
- Put simply, should a contractor be required to select excavation and compaction methods that prevent an adjacent building structure from shaking?

## CITY OF SASKATOON SHOULD HAVE LOW IMPACT VIBRATION CONSTRUCTION BYLAW

Without any municipal construction bylaw stating that low impact excavation and compaction methods should/must be used in close proximity to building structures, the court determined that the Scissons and Brunner were not "*negligent by breaching the standard of care.*"<sup>33</sup>

I was able to argue from "*a practical and common-sense perspective*"<sup>34</sup> in the Queen's Bench of Saskatchewan but Ms. Fuller wasn't given the same opportunity since the City of Saskatoon provided an absence of regulation for excavation contractors to argue that they were not "*negligent by breaching the standard of care*".

The judgement also stated<sup>35</sup>:

[217] Although there are cases where the breach of the standard of care will be apparent without expert evidence, when a claim is brought on the basis of professional negligence, typically expert evidence of the standard of care is necessary: *Bergen v Guliker*, 2015 BCCA 283 at para 131, [2015] 11 WWR 258.

[218] Whether Brunner's conduct in excavation and compaction was reasonable is beyond the knowledge and experience of the ordinary person. Further, the actions of Brunner were not so egregious that its conduct obviously fell below the standard: *Krawchuk v Scherbak*, 2011 ONCA 352 at para 133; leave to appeal to SCC refused, 2011 SCCA No 319 (QL); *A & G Shanks*, para 4.

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<sup>32</sup> *Fuller v Gerow-Scissons*, 2023 SKPC 54 (CanLII), at para 253, <https://canlii.ca/t/k1dvc#par253>

<sup>33</sup> *Fuller v Gerow-Scissons*, 2023 SKPC 54 (CanLII), at para 237, <https://canlii.ca/t/k1dvc#par237>

<sup>34</sup> *Tompson v Gerow-Scissons*, 2019 SKQB 163 (CanLII), at para 51, <https://canlii.ca/t/j1kb4#par51>

<sup>35</sup> *Fuller v Gerow-Scissons*, 2023 SKPC 54 (CanLII), at para 217, <https://canlii.ca/t/k1dvc#par217>

[219] In A & G Shanks, where fire destroyed a historic mansion shortly after a plumber fixed a leaking pipe using a blowtorch and solder, the Court could infer negligence but it was open for the defendant to rebut such an inference by providing evidence of reasonable care. Because the plaintiff in that case presented no expert evidence that the requisite standard of care for plumbers was breached, the plaintiff's claim failed.

The court correctly recognized that Brunner's conduct was *"beyond the knowledge and experience of the ordinary person"* but the court did not allow, or provide an explanation, on why Brunner's street excavation on March 16<sup>th</sup> 2022 could not be presented to the court. Since the March 16<sup>th</sup> 2022 excavation and compaction operation used a different excavation and compaction method, it was an ideal opportunity to present evidence of reasonable care in stark contrast to the much different standard of care provided on September 25<sup>th</sup> 2019.

**Respectfully, the decision not to allow the March 16<sup>th</sup> 2022 excavation operation<sup>36</sup> as evidence by Ms. Fuller was a mistake by the court. Alternately, the judge erred by not providing an explanation on why a similar excavation operation, using a different procedure by the same defendant, was not related to the matter of establishing causation by Ms. Fuller.**

**The same defendant performed a similar task but extended a much greater standard of care to me by choosing a low impact excavation and compaction method. This greater standard of care on March 16<sup>th</sup> 2022 was deemed by the court to "not [be] related in any way to the matters". It was a mistake of the court not to recognize the greater standard of care shown by Brunner on March 16<sup>th</sup> 2022.**

How can the March 12<sup>th</sup> 2022 excavation operation *"not [be] related in any way to the matters in this proceeding and there is no context for the nature of that work"*<sup>37</sup> when the court later states *"[the] standard is that which would be expected from a reasonable and prudent water and sewer contractor in similar circumstances?"*<sup>38</sup>

## SUMMARY

On a positive note, my property at [REDACTED] Temperance Street was not damaged because of my advocacy. Unfortunately, the same cannot be said for Ms. Fuller's home at [REDACTED] Temperance Street.

I urge the City of Saskatoon to create a low impact vibration policy for excavation and compaction construction operations. If the current construction bylaw remains unchanged, there will be similar property damage especially in light of the new Federal Housing Accelerator Fund and the associated infill construction bylaws.

Thank you for your attention in this matter.

Yours,

[REDACTED]

Douglas Tompson  
Varsity View Resident

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<sup>36</sup> Fuller v Gerow-Scissons, 2023 SKPC 54 (CanLII), at para 48, <https://canlii.ca/t/k1dvcv#par48>

<sup>37</sup> Fuller v Gerow-Scissons, 2023 SKPC 54 (CanLII), at para 48, <https://canlii.ca/t/k1dvcv#par48>

<sup>38</sup> Fuller v Gerow-Scissons, 2023 SKPC 54 (CanLII), at para 193, <https://canlii.ca/t/k1dvcv#par193>