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An Introduction to British Columbia Local Government Law

Basic Principles

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CHAPTER ONE: INTRODUCTION

The purpose of these written materials is to provide the reader with the basic principles of local government law. The goal is to provide enough information so as to be capable of identifying when further investigation into a specific legal problem is necessary. These materials will not provide a comprehensive review of all the law related to any identified topic and should not be read in such a manner. Further, these materials are not intended to provide a comprehensive review of the *Community Charter*. This legislation will be touched on throughout these materials but will not be reviewed in detail.

When we speak of municipal or local government law it should be noted that this is a bit misleading, as in its simplest form this would involve only the interpretation of the *Local Government Act*. In reality, local government law is a complex combination of public and private law concepts that engage virtually all facets of law except perhaps family law and immigration law. This complexity should not be surprising, as in addition to broad corporate powers, a local government has broad legislative powers which routinely impact the lives of its residents.

Further, as the *Community Charter* demonstrates, local government is being given an expanded role through further provincial delegation. This will complicate an already broad set of legislative and regulatory responsibilities.

CHAPTER TWO: LEGISLATIVE FRAMEWORK

This chapter identifies the key provincial statutes creating and affecting local governments. The Community Charter and the Local Government Act serve as the primary framework for the existence and continuance of local governments. Other topic-specific legislation, including statutes regulating the environment, land use and financial authority are also important to local governments. Some statutes of general application cover issues like privacy and access to information, limitations on court actions, and statutory interpretation.

2.1. The *Local Government Act*

The *Local Government Act* (“LGA”) (formerly the *Municipal Act*) is the provincial statute that creates municipalities and regional districts and, together with the *Community Charter*, enables them to perform their assigned responsibilities and obligations.

2.2. The Role of Other Legislation

Despite the breadth of subjects contained within the *Community Charter* and the *Local Government Act*, these statutes do not stand alone. Other statutes and regulations that

give power to or limit the power of local governments can be classified into two general categories: statutes of general application and statutes of specific application.

Some important statutes of general application include statutes that regulate court proceedings like the *Supreme Court Act*, the *Court of Appeal Act*, the *Evidence Act*, and statutes that aid in the interpretation of legislation. For example, the *Interpretation Act* contains direction on the interpretation of all B.C. statutes (including bylaws) and provides additional definitions beyond those contained in section 5 of the *Local Government Act*.

Subject-specific statutes also impact the authority and obligations of local governments. These statutes are too numerous to list in their entirety but include the *Land Title Act*, *Strata Property Act*, *Freedom of Information and Protection of Privacy Act*, *Environmental Management Act*, *Health Act*, *Farm Practices (Right to Farm) Protection Act* and *Motor Vehicle Act*.

2.3. The *Community Charter*

The *Community Charter* (“CC”), which provides for municipal governance and powers, was proclaimed an Act on May 9, 2003 and came into force on January 1, 2004.

Phase 2 of the development of the *Community Charter*, with respect to regional districts, land use, heritage regulation, regional growth strategies and elections, will be addressed by way of consultation and legislation development in the future. The *Local Government Act* provisions dealing with regional districts, land use, heritage, elections and regional growth will remain in force until Phase 2 of the *Community Charter* is in force.

The Provincial government has introduced a large number of consequential and transitional provisions to deal with the validity of current bylaws, regional district cross references with the *Community Charter* provisions, amendments to other Acts and other provisions necessary to make way for the *Community Charter*.

The Province has enacted a number of regulations, including the “concurrent authority regulations” to address such matters as building standards, wildlife and environmental protection.

2.4. The *Charter of Rights and Freedoms*

The *Charter of Rights and Freedoms* constitutionally guarantees a set of civil liberties that are regarded as so important that they receive protection from state action. This set of fundamental civil liberties receives in our constitution a special place among laws - it is the supreme law of the land. In short, all Federal, Provincial and local government laws must comply with the protected rights contained within the *Charter of Rights and Freedoms*.

The safeguards granted by the *Charter of Rights and Freedoms* are not absolute. The *Charter of Rights and Freedoms* contains a “notwithstanding” clause, which allows the legislature of a province to declare expressly in a statute that certain protected rights in section 2 or sections 7 through 15 of the *Charter of Rights and Freedoms* do not apply. However, the “notwithstanding clause” is rarely employed. Of greater significance is the limiting effect of section 1 of the *Charter of Rights and Freedoms*, which is considered whenever a law is in conflict with a *Charter* right. In short, the *Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” The Supreme Court of Canada developed a test in the hallmark case of *R. v. Oakes*, [1986] 1 S.C.R. 103 to determine whether or not a fundamental right can be infringed.

It is essential that all municipal bylaws comply with the rights and freedoms established under the *Charter of Rights and Freedoms*. It is not uncommon for municipal bylaws to be challenged under the *Charter*, particularly on the ground that the impugned bylaw infringes a citizen’s right to freedom of expression. In *Hardie v. Summerland (District)* (1985), 68 B.C.L.R. 244 (S.C.) the B.C. Supreme Court determined that since municipalities derive their existence from an act of the provincial legislature, local government “matters” are within the authority of the legislature and subject to the *Charter of Rights and Freedoms*.

In *R. v. Guignard*, [2002] 1 S.C.R. 472 the Supreme Court of Canada struck down a sign bylaw as being an unreasonable intrusion into a homeowner’s freedom of expression. However in *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, the Supreme Court of Canada found that a bylaw that prohibited loudspeakers from broadcasting into the street was a justifiable infringement of that same right. The bylaw was valid because the benefits of noise reduction to the public justified the restriction of this particular form of expression. In *Vancouver v. Zhang*, 2010 BCCA 450, the BC Court of Appeal ruled that section 71 of Vancouver’s *Street and Traffic By-law*, which prohibited structures constructed for political expression from streets and sidewalks, infringed upon Zhang and Falun Gong’s freedom of expression, and was therefore of no force or effect. The court found that the bylaw’s negative effects on freedom of expression were disproportionate to the salutary effects of preserving the utility and aesthetics of public streets. In *Victoria (City) v. Adams*, 2009 BCCA 563 the BC Court of Appeal upheld the decision of the lower court in finding that the City’s bylaw prohibiting homeless people from erecting temporary structures violated s. 7 of the *Charter* (right to life, liberty and security of the person). The Court’s conclusion was based on a finding that the number of homeless in Victoria far exceeded the number of available shelter beds. The holding of the Court only applies to rules absolutely preventing homeless people from erecting temporary shelter on public land, and local government may still impose certain conditions for temporary shelters, such as times of day when temporary shelters are not permitted and other regulations.

Several cases dealing with freedom of religion and zoning bylaws have also gone before the courts. In *Congregation of the Followers of Rabbis of Belz to Strengthen Torah v. Municipality of Val Morin* [2008] J.Q. No. 2459, the Quebec Court of Appeal concluded that the rights to freedom of religion under s. 2(a) of the *Charter of Rights and Freedoms* does not allow places of worship to be built contrary to zoning regulations. This decision supports local government authority to regulate the location of places of worship in the public interest. The Supreme Court of Canada reached a similar conclusion in *Congregation of Jehovah's Witnesses of St. Jerome-Lafontaine v. Lafontaine (Village)*, [2004] S.C.J. No. 45.

CHAPTER THREE: STRUCTURE

This chapter explains the basic principle of delegation and how local governments derive their powers. It uses the doctrine of ultra vires to demonstrate how the main levels of governance in Canada interact. This section also explains the different forms of local government corporations including the classes of municipalities, regional districts, and quasi-municipalities (e.g. Islands Trust). Basic differences in the governance systems of these types of corporations are identified.

3.1. Creatures of Statute—*Ultra Vires* Doctrine & Delegation

Canada, as we all know, is a federal state. As such, legislative powers are divided in our Constitution between the federal and provincial governments. This is usually referred to as the “division of powers”. The *Constitution Act, 1867*, makes no specific reference to local governments except in section 92(8) where municipalities are placed under provincial jurisdiction.

The doctrine of *ultra vires* is used to describe the method in which Canada's levels of government (federal, provincial, municipal, and First Nations) divide responsibility for certain subject matters. Under the *Constitution*, some matters like banking and telecommunications are strictly in the domain of the federal government. On the other hand, matters of a purely local nature are the responsibility of each province or territory. The provinces therefore have the ability to create legislation, such as the *Local Government Act*, which further delegates specific regulatory and administrative powers to local governments. If any level of government passes a law for which it lacks authority over the subject matter, that law will be *ultra vires*. A declaration of *ultra vires* makes the law or act void.

The traditional approach taken by Canadian courts has been one of rather strict and narrow interpretation of the allowed sphere of authority for local governments.

Commonly called “Dillon’s Rule”, this approach can be summarized as allowing local governments only those powers that are expressly conferred by statute, those powers necessarily implied by the express power, and those powers that are essential, not just convenient, to the effectuation of the local government’s purposes.

In *Greenbaum v. Toronto*, [1993] 1 S.C.R. 674 (*Greenbaum*), the Supreme Court of Canada declared: “municipalities are entirely the creatures of provincial statutes. Accordingly, they can exercise only those powers which are explicitly conferred upon them by a provincial statute.” The Court further directed that courts examine the purpose and wording of provincial enabling statutes (the *Local Government Act* or *CC* in B.C.) when deciding whether or not a municipality may enact a certain bylaw. This is a test of strict application. Even a bylaw that only slightly exceeds a municipality’s jurisdiction will be declared *ultra vires*.

So how do courts “read” bylaws to determine if they are within the municipality’s jurisdiction? The Court in *Greenbaum* determined that municipal bylaws are “to be read to fit within the parameters of the empowering provincial statute where the bylaws are susceptible to more than one interpretation. However, a court must be vigilant in ensuring that municipalities do not impinge upon the civil or common law rights of citizens in passing *ultra vires* bylaws.”

The approach used in *Greenbaum* demonstrates a relaxation of the stricter “Dillon’s Rule” approach, a shift that was continued with legislative attempts to move towards an even broader municipal power. This resulted in section 4(1) of the *Community Charter*, which states:

The powers conferred on municipalities and their councils by or under this Act or the *Local Government Act* must be interpreted broadly in accordance with the purposes of those Acts and in accordance with municipal purposes.

In *Nanaimo (City) v. Rascal Trucking*, [2000] 1 S.C.R. 342, the Supreme Court of Canada held that the appropriate way for courts to approach legislation affecting municipalities was with a broad, purposive and benevolent construction to ascertain the legislature’s intent.

In *United Taxi Drivers Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, the Supreme Court of Canada examined the jurisdiction of a provincial government granting municipalities broad spheres of authority and power, and discussed how such grants of power are to be interpreted and applied by the courts. Although this case will be of interest to B.C. local governments, the wording of the *Community Charter* is broader than that of the Alberta legislation.

3.2. Local Government Models

There are primarily two types of local governments within British Columbia. The predominant structure of local government is the municipality. Municipalities are described as villages, towns, districts, cities, and in some cases, townships. The classification is usually premised upon the population of the municipality. The *Local Government Act* also provides for resort municipalities and island municipalities. Examples of these are the Resort Municipality of Whistler and Bowen Island.

The second primary type of local government is the regional district. Regional districts are a relatively recent creation, having only come into existence in 1965. Part 24 of the *Local Government Act* allows for the establishment of regional districts, their corporate structure, governance procedure, service and their power to create bylaws. Regional districts are a unique form of governmental model in that they incorporate elected officials (elected from electoral areas which are outside municipal boundaries) and appointments from the member municipalities who are themselves elected officials of the member municipal councils.

The *Local Government Act* also allows for the creation of improvement districts pursuant to Part 23. The primary role of improvement districts is to regulate the distribution of water, electricity or other services provided to the residents of the improvement district.

CHAPTER FOUR: MUNICIPAL GOVERNANCE

This chapter provides an overview of some of the important legal issues affecting the governance of local governments. It addresses the election process and the legal roles of mayors and councillors. This chapter also discusses some of the common situations where acts of individual elected officials are challenged based on conflict of interest and allegations of bias. The last subsection identifies one of the many important aspects of council and board meetings: the need for most meetings to be open to the public.

4.1. Elections

General local elections for the offices of mayor, councillors, and regional district directors must be held on the third Saturday of November every third year (section 36 of the *LGA*). An appointed Chief Election Officer is responsible for conducting an election (section 41 of the *LGA*), the cost of which is the responsibility of the municipality or regional district subject to any agreements between local governments or boards of school trustees (section 40 of the *LGA*).

The requirements and disqualifications for candidacy for office as a member of a local government are contained in sections 66 and 67 of the *Local Government Act*. Candidates must meet age, citizenship and residency requirements. Judges and most employees or

salaried officers of municipalities and regional districts are disqualified under section 67. Volunteers who do not receive compensation for their services are not considered employees for the purposes of section 67, but volunteers who do receive even a minimal amount of compensation are disqualified under section 67 : *Baziuk v. Shelley*, 2012 BCSC 295. Local government employees must take leave from their salaried positions to run for office, and must resign from their salaried positions before making the oath of office if successfully elected. At any given time, a person must not be nominated for or hold more than one elected office in the same local government (section 68 of the *LGA*).

It was determined in *Campbell v. British Columbia (Attorney General)* (2000), 79 B.C.L.R. (3d) 122 (S.C.) that section 3 of the *Charter of Rights and Freedoms* does not give all citizens the right to vote in municipal elections. Nor does it give non-Nisga'a individuals the right to vote in Nisga'a territory.

Voting is clearly a personal right and therefore cannot be exercised by a corporate entity or a personal representative on behalf of a corporation (section 49(3) of the *LGA*). In general, voting is restricted to those persons falling within one of two mutually exclusive categories: resident electors and non-resident electors. The key requirement for resident elector status is that a person under this category must be a resident of the jurisdiction for at least 30 days prior to election day (section 50(1)(d) of the *LGA*). The key requirement for non-resident elector status is that a person must be a registered owner of real property in the jurisdiction for at least 30 days prior to the election (section 51(1)(e) and (e.1) of the *LGA*). The rules for determining residency are established in section 52 of the *Local Government Act*.

Voting registration requirements are contained in sections 53 to 65 of the *Local Government Act*. The case of *Coalition of Progressive Electors et al. v. Deputy Chief Electoral Officer of the City of Vancouver* (2002), 35 M.P.L.R. (3d) 260 (B.C.S.C.) noted that a statutory declaration as to a person's identity and residence must be accepted as a document providing evidence of identity and residence for the purpose of voting day registration. However, it appears that election officials are not required to administer or provide a form of statutory declaration as to a person's identity.

A prerequisite to the right to vote is strict compliance with the procedural terms of the *Local Government Act* that regulate election processes. For example, in *MacDonald v. Invermere (District)* (1985), 30 M.P.L.R. 25 (B.C. Co. Ct.) numerous forms authorized by the Act, which permitted qualified electors to cast a vote notwithstanding that their name was not on the list of electors, were held to be irregular. It was discovered that a candidate for mayor pre-signed blank forms as a "witness" to save potential voters the time of having the forms properly witnessed, as was required. This action constituted electioneering and demonstrated gross bad faith. Since the number of irregular votes exceeded the plurality of votes between candidates, the irregularity materially affected the election outcome.

In *Rose v. Cranbrook (City)* (1982), 133 D.L.R. (3d) 474 (B.C.S.C.), two unsuccessful candidates “called into question” the validity of the election. The Court held that this phrase is broad and encompasses any proceeding aimed at casting doubt on the results of an election, such as this particular challenge, and that the appropriate method of appeal was under the statutory scheme provided in the *Municipal Act* (now the *Local Government Act*), not through the *Judicial Review Procedure Act*. The policy reasons for time limits on impeachment of elections contained in the *Local Government Act* were upheld as being reasonable and sound.

The two important legal tests for challenging election results can be summarized as:

- 1) The *Rose v. Cranbrook* test for an invalid election: the onus of establishing significant irregularities or failures to comply with the statutory requirements is on the person challenging the election. Once an error is established, the onus shifts to the other party to show that the irregularities did not materially affect the election results.
- 2) The *MacDonald v. Invermere* test for material irregularity: in assessing whether the irregularity materially affected the election results, the Court will presume that every irregular vote went to the successful candidate (a “worst case” assumption).

4.2. Roles of Mayor and Council

In general, directors of a regional board have powers and obligations that parallel those of the mayor of a municipality.

Section 218 of the *LGA* designates the mayor as Chief Executive Officer of the municipality. The mayor holds the same rights and obligations as council members. As a member of council, the mayor can participate in debate and can vote without restrictions: *Silverado Land Corp. v. Courtenay (City)* (2000), 15 M.P.L.R. (3d) 279 (B.C.S.C.). Subject to the special duties of the chair, contained in sections 218 and 219 of the *Local Government Act*, and of the mayor, contained in sections 116, 131 and 151 of the *Community Charter*, neither the mayor alone nor any single council member has the authority to act for the municipal corporation unless quorum is established.

Some of the important duties of the chair or mayor can be summarized as:

- To preside over council meetings (section 227 of the *LGA* and 116 of the *CC*);
- To preserve order at council meetings and eject those persons displaying improper conduct (section 133 of the *CC*);
- To see that the law, the improvement and good government of the municipality is carried out (sections 218 of the *LGA* and 116 of the *CC*);

- To direct the conduct of municipal officers and employees, including the suspension, reinstatement, or dismissal of employees (sections 218 of the *LGA* and 151 of the *CC*); and
- To communicate to council information and measures as may assist the peace, order and good government of the municipality in relation to its powers (*Enfield (Rural Municipality) v. London Guarantee Company*, [1926] 2 W.W.R. 737 (Sask. C.A.)).

Council members occupy positions of duty, trust and authority: *R. v. Sheets*, [1971] S.C.R. 614. They are legislative officers of the municipal corporation but possess no individual ministerial duties. The powers of council are dependent upon the existence of quorum, procedural regularity and statutory compliance in exercising authority as a collective. As a collective, “council has all necessary power to do anything incidental or conducive to the exercise or performance of its powers, duties, and functions” (section 114(4) of the *CC*).

Two or more councillors can request the mayor to call a special council meeting and, if the mayor refuses or neglects to do so, they may call the meeting themselves (section 126 of the *CC*). Section 899 of the *Local Government Act* gives municipal councils and regional districts the power to appoint all members of their boards of variance. Section 899 also authorizes the appointment of joint boards of variance between local governments. The Province traditionally exercised such powers and these legislative provisions are indicative of the “downloading” of control over local matters from the provincial level to the local government level.

Councillors cannot abstain from voting if they are present when a vote is taken. A council member who is present but does not vote is deemed to have voted in the affirmative (section 123(4) of the *CC*).

4.3. Conflict of Interest and Bias

Councillors faced with a potential or real situation of conflict of interest or bias may be faced with two types of disqualification: disqualification from voting on the particular matter and/or disqualification from office. The tests for conflict of interest and for bias arise from the common law, as do many of the legal consequences. The *Community Charter* also contains important provisions prohibiting councillors affected by a conflict from participating in discussion and voting.

The Supreme Court of Canada in *Edmonton (City) v. Hawrelak*, [1976] 1 S.C.R. 387, described the municipal actor’s duty as follows: “No one entrusted with duties of a fiduciary nature may enter into any transaction in which his personal interest is or may be in conflict with the interest of his principal.”

Municipal officers have a fiduciary duty to act in the best interest of the municipal corporation. Actions which are in conflict of interest or which demonstrate bias are not in the best interest of the municipality.

The common law recognizes two types of conflict of interest: non-pecuniary private or personal interest and pecuniary interest.

Non-pecuniary conflicts arise in situations of proximate personal relationships. The court examines whether there is a reasonable apprehension that the member is biased—would a reasonable person find it likely or probable that the member would favour one position or party over another? For example, in the Alberta case of *Starr et al. v. City of Calgary* (1965), 52 D.L.R. (2d) 726 (Alta. S.C.), two city council members who also sat on the board of directors for the Calgary Stampede were disqualified from voting on any matter before council that affected the Stampede.

Sections 100 and 101 of the *Community Charter* have codified common law prohibitions against situations of pecuniary conflict of interest. Directness of the pecuniary interest in question is not a relevant consideration—the Act clearly states that a council member must not participate in discussions of any matter or vote on a question regarding any matter because the member has either a direct or indirect pecuniary interest. In fact, council members with such a conflict must make a declaration to this extent (section 100(2)), after which time four requirements of section 101(2) must be met:

- The member must leave the meeting while the matter is under consideration;
- The member must not participate in discussion at all;
- The member must not vote on a question in respect of the matter; and
- The member must not attempt in any way to influence voting on the matter.

A council member in a situation of conflict must take these steps regardless of whether or not he or she made the declaration as statutorily required. Contravention of the four requirements under section 101(2) of the *Community Charter* disqualifies that council member from continuing to hold office unless the contravention was inadvertent or the result of a good-faith error in judgment (section 101(3) of the *CC*). A court would render the vote of a councillor invalid if made in contravention of these provisions.

What constitutes a “pecuniary interest”? Based on the great number of cases on this subject, it appears one of the most frequently alleged situations of pecuniary conflict of interest arises when a matter before council involves a developer or another party from whom a councillor has accepted campaign donations. Cases like *King v. Nanaimo (City)* (2001), 94 B.C.L.R. (3d) 51 (C.A.), however, suggest that there must be a fairly strong

correlation between the matter of the vote and the councillor's personal interest, and sufficient evidence showing the campaign contribution affected the councillor's vote.

The restrictions on participation in debate and on voting are exempted in the following situations contained in section 104(1) of the *Community Charter* if:

- (a) The pecuniary interest of the council member is a pecuniary interest in common with the electors of the municipality generally;
- (b) In the case of a matter that relates to a local service, the pecuniary interest of the council member is in common with other persons who are or would be liable for the local service tax;
- (c) The matter relates to the remuneration or expenses payable to one or more council members in relation to their duties as council member;
- (d) The pecuniary interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence the member in relation to the matter; or
- (e) The pecuniary interest is of a nature prescribed by resolution.

Even where there may not be a common law or statutory conflict of interest, evidence of bias can negate the vote of a councillor, or in some cases, an action of the local government.

For evidentiary and policy reasons, courts have determined that a challenger need not prove actual bias to be successful. Thus, the threshold for setting aside a vote or decision on this ground is whether or not there is a "reasonable apprehension of bias".

In *Old St. Boniface Residents' Association Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, the Supreme Court of Canada held that there are two types of bias: personal interest bias and prejudice. Like situations of conflict of interest, a reasonable apprehension of personal interest bias may arise out of pecuniary relationships or interpersonal relationships. The party alleging bias bears the onus of proving it. If council is exercising a power that is legislative in nature, such as passing a bylaw, the alleging party must show the councillor prejudged the matter to the extent of being no longer capable of persuasion: *Save Richmond Farmland Society v. Richmond (Township)*, [1990] 3 S.C.R. 1213. However, if council is exercising an adjudicative function, such as declaring a building unsafe, the standard is less stringent – the alleging party must show that council was not completely open to a fresh evaluation of the evidence and the submissions made to them: *McLaren v. Castlegar (City)*, 2011 BCCA 134.

4.4. Council and Board Meetings

There are several types of council and board meetings contemplated under the *Community Charter*. The Act itself does not provide much direction on the procedure and conduct of council meetings. Such structure is provided largely by the meeting procedure bylaw that each municipality must adopt (section 124 of the *CC*). This section discusses the statutory requirement to hold certain meetings open to the public.

Section 89(1) of the *Community Charter* provides the general rule that meetings of council (and other committee meetings as noted in section 93 of the *CC*) must be open to the public. Section 90 of the *Community Charter* contemplates certain subject matters which, because of their sensitive private nature or relevance to current or impending litigation, are exempt from this general rule and which may be discussed in an *in camera* meeting.

The Supreme Court of Canada considered an Ontario *Municipal Act* provision identical to B.C.'s *Community Charter* section 90(1)(m) in *London (City) v. RSJ Holdings Inc.*, [2007] 2 S.C.R. 588. The section allows Council to hold a closed meeting on a matter that, under another enactment, is such that the public may be excluded from the meeting. In the *RSJ Holdings* case, the City argued that an Ontario *Planning Act* provision allowed the City to waive the requirements of notice and a public hearing. The Supreme Court held that the *Planning Act* provisions in no way affected the statutory requirement to hold open meetings to adopt and debate bylaws. The Court regarded the City's duty to give advance notice and to hold a public meeting as entirely distinct from its obligation to hold its meetings in public.

In the Ontario case of *Farber v. Kingston (City)* (2007), 31 M.P.L.R. (4th) 31 (Ont. C.A.), the Court of Appeal held that if meetings are to be conducted *in camera*, council must provide a description of the matter to be discussed to the public. The Court felt that this would ensure that transparency and openness are present in local governments. Section 92 of the *Community Charter* requires that councils state "the basis under the applicable subsection of section 90 on which the meeting or part is to be closed". It appears that in B.C. local governments will only need to cite the applicable subsection of section 90 of the *Community Charter*, rather than giving a full description for the *in camera* meeting, as is required in Ontario.

Municipal councillors must be careful to respect the private nature of closed meetings, and the right to privacy of the subjects of confidential reports. In *R. v. Skakun*, 2011 BCPC 0098, a municipal councillor was convicted of violating section 30.4 of the *Freedom of Information and Protection of Privacy Act*, which prohibits the unauthorized disclosure of personal information by an employee, officer, or director of a public body. Skakun leaked a report containing personal information about named individuals to the CBC. The court refused to recognize Skakun as a whistleblower. The court said to be

entitled to that defence Skakun should have moved council to make the report public, or brought his concerns to the attention of the city manager.

As the case law in Canada suggests, the most contentious problems are not in classifying the subject matter of a meeting, but rather in determining when in fact a meeting is a meeting.

In *Southam Inc. v. Ottawa (City)* (1991), 10 M.P.L.R. (2d) 76 (Ont. Div. Ct.), the Court was asked to determine if a councillors' "retreat" at a nearby resort constituted a meeting that was required to be open to the public. The location, time or other formalities were not conclusive indicia of whether a gathering of councillors (with or without administrators and staff) is a meeting. Instead:

The key would appear to be whether the councillors are requested to attend (or do, in fact, attend without summons) a function at which *matters which would ordinarily form the basis of Council's business are dealt with in such a way as to move them materially along the way in the overall spectrum of a Council decision. In other words, is the public being deprived of the opportunity to observe a material part of the decision-making process?* (emphasis added)

Similarly, in *City of Yellowknife Property Owners Association v. Yellowknife (City)* (1998), 49 M.P.L.R. (2d) 65 (N.W.T.S.C.) a weekly "briefing" of aldermen by senior administrators was held to be a meeting that was required to be open to the public since the subject matters discussed and procedures undertaken at those sessions were dealt with in such a way as to move the public issues materially along the way in the overall spectrum of a Council decision.

CHAPTER FIVE: POWERS AND FUNCTIONS

This chapter begins with an explanation of the legal status of a local government as a corporation and how this affects its ability to enter contracts. The Community Charter addresses these issues and the most substantive change is identified. This chapter continues with an overview of municipalities' basic functions and some of the common legal issues associated with the provision of services, the creation of regulatory schemes and the important roles of zoning, development planning and regional growth.

5.1. The Municipality as a Corporate Entity

5.1.1. Contract Powers

Sections 173 of the *Local Government Act* and 6(1) of the *Community Charter* make it clear that each municipality and regional district is a corporation. Sections 174 of the *Local Government Act* and 114 of the *Community Charter* state that the power, duties and

functions of the local government are to be exercised and performed by its council or board unless any Act provides otherwise. The “otherwise” usually means that the power may be delegated from council to a municipal public officer. An example of this would be the delegation of the power to suspend or revoke a business licence from council to a business licence inspector.

A local government has the power to enter into contracts, to sue and to be sued. Section 176(1)(d) of the *Local Government Act* provides the authority to acquire, hold, manage and dispose of lands, improvements, personal property or other property and any interest or right in or with respect to that property. This power is very broad given the definition of “manage” in section 5 of the *Local Government Act*. “Manage” includes the power to conserve, use, develop, construct, improve, operate, administer and maintain.

As mentioned above, local governments are governed by the decisions of their councils and boards. This means that most contracts have to be specifically authorized by council or board resolution. If such a step is not taken, then the other party to the contract may be left with an unenforceable agreement. Local governments have not historically been subject to what is known as the “indoor management rule” where the other party is entitled to presume that the contracting party has taken the necessary steps to create an enforceable contract. This defence has created opportunities for local government to escape contractual liability in significant breach of contract cases brought against local government. See *Amalgamated Recreational Engineers Ltd. v. Sidney* (1978), 7 M.P.L.R. 217 (B.C.S.C.).

Under section 8(1) of the *Community Charter*, municipalities have been given natural person powers. That is, instead of having a list of delineated corporate powers, municipalities are given broader powers to contract. Although this may be a welcome expansion of a local government’s corporate powers, it comes with a downside. As mentioned above, local governments have historically taken advantage of case law and escaped contractual liability on the basis of a failure by the opposing contractual party to ensure that the local government met all the statutory requirements to create an enforceable contract. Since the *Community Charter* provides a local government with the powers of a natural person for contractual purposes, it remains to be seen whether this defence will be available to local governments. Therefore, those parties contracting with local government should be able to assume that all internal affairs of the local government have been taken care of to bind both parties to the terms of the contract.

5.1.2. Restrictions on Contracting

Despite local government’s broad power to contract, section 175 of the *Community Charter* imposes restrictions on the time frames for such agreement if the local government incurs a liability under the agreement for more than five years or for a period that by exercising rights of renewal or extension could exceed five years. In these situations, the council must not incur the liability (i.e., not enter the contract) unless it has

the approval of the electors. This limitation on long-term liability has caused legal liability for local governments. In *Robson v. Maple Ridge*, (2002) 2 B.C.L.R. (4th) 257 (C.A.), the B.C. Court of Appeal found that a significant downtown development, which had already been constructed, was illegal because the contract between the District and the developer was found to extend the liability of the municipality beyond five years and no counter petition had been offered.

5.2. Service Powers

Section 8(2) of the *Community Charter* provides that a municipality may operate any service council considers necessary or desirable for all or part of the municipality. “Service” is broadly defined in the Schedule to the *Community Charter* to include activities, works or facilities undertaken or provided by or on the behalf of the municipality. This authority includes the authority to operate a service in an area outside of the municipality itself. The service may be operated by the municipality or through another public authority, person or organization. A service must be established by bylaw.

To date, our courts have interpreted the meaning of service broadly. In *Coquitlam (City) v. Gemex Developments Corp.* (2001), 21 M.P.L.R. (3d) 40 (B.C.S.C.), the City’s provision of a river crossing was determined by the court to be a service. Although municipalities have been providing services such as water, sewer, garbage, police, fire protection and recreational services since their statutory inception, section 8 of the *Community Charter* will allow municipalities to provide a broader range of services if they so choose.

5.3. Regulatory Powers

Along with the general power to establish services within a municipality, there is further authority in section 8(3) of the *Community Charter* to “regulate” in relation to prescribed services. A bylaw establishing the service may also establish different classes of persons, places, activities or things and make different provisions for those different classes and for different areas within the municipality. This is the legislated sanctioning of the municipality’s ability to discriminate between different classes of persons, places and activities within its jurisdiction (section 12 of the *CC*).

The council is also given the express power by bylaw to regulate in relation to the service, which specifically includes the power to prohibit (section 8(3)(a) of the *CC*). In addition, the municipality is given broad authority to set up a system of licences, permits and approvals in relation to the service. This includes the authority to prohibit any activity until a licence, permit, or approval is granted.

5.4. Business Regulation and Licensing

Local governments have the authority under sections 8(6) and 59 of the *Community Charter* to pass bylaws that regulate businesses, business activities and persons engaged in business. However, the municipal power to regulate business does have limits. In the 2007 case of *Royal City Jewellers & Loans Ltd. v. New Westminster (City)* (2007), 36 M.P.L.R. (4th) 48 (B.C.C.A.), the B.C. Court of Appeal quashed a New Westminster bylaw regulating second-hand dealers and pawnbrokers. The Court found that local governments do not have authority under section 59(1) of the *Community Charter* to compel the collection and transmission of certain information, in this case information about buyers and sellers of goods, to the police.

While the current Act contains a definition of “business” in the Schedule to the *Community Charter*, the case of *Vancouver School Teachers’ Medical Services Association v. City of Vancouver* (1960), 21 D.L.R. (2d) 355 (B.C.C.A.) suggests that what actually constitutes business in a particular case is contextual and may vary. In that case, the plaintiff was a non-profit health insurance society registered under the *Societies Act*. It claimed that the City wrongly assessed it for business tax since it was forbidden from carrying on any trade, industry or business under the *Societies Act*. The Court agreed that while the Association may carry on business in a broad sense, it was not carrying on business for profit or with a view for profit.

Issues regarding business licence suspension and revocation have been simplified under the *Community Charter*. Section 60 of the *Community Charter* now provides that a business licence may be suspended or cancelled for reasonable cause. However, section 60(5) enables a person whose licence has been suspended or cancelled by the designated municipal officer or employee to have the council reconsider the matter.

Under Section 60, the power to suspend or revoke a business licence resides with council unless, in accordance with Section 60(4) of the Act, council has delegated the power to suspend or cancel a business licence to a designated municipal officer (i.e., the business licence inspector). It is likely that where the power to suspend or cancel a business licence has been delegated to a municipal officer, the municipal officer must exercise his discretion independently. The fundamental approach to business licence revocation, as outlined by the Court of Appeal in *Sunshine Valley Cooperative Society v. Grand Forks*, [1949] 1 W.W.R. 163 (B.C.C.A.) remains applicable:

Whether the council's decision was right or wrong on the merits is not, I think, our concern. It is the prerogative of the council to make the decision one way or the other provided its discretion is exercised within the limitations imposed by law and is not activated by indirect or improper motives or based upon irrelevant or alien grounds, or exercised without taking relevant facts into consideration.

The standard of review when considering municipal licensing decisions used to be patent unreasonableness (*377050 B.C. Ltd. dba the Inter-City Motel v. City of Burnaby*, [2007] B.C.J. No. 661 (QL) (C.A.)). However, the Supreme Court of Canada determined in *Dunsmuir v. New Brunswick*, 2008 SCC 9 that the appropriate standard of review for decisions that are not reviewed on a standard of correctness is reasonableness. The B.C. Court of Appeal decision in *377050 B.C. Ltd.* remains relevant in regard to the standard of review for licensing decisions. In that case, the Court pointed out that municipal councils are not courts, and so their reasons should not be scrutinized under the same criteria as court-issued reasons. The Court found that a council's reasons may take into account the public interest or political considerations and still be reasonable.

5.5. Building Regulation

One of the most important services provided by local governments is that of building regulation. Local governments are empowered by section 8(3)(1) of the *Community Charter*, by bylaw, to regulate buildings and other structures, however, section 9(1)(d) of the *Community Charter* makes this a concurrent authority with the provincial government. The *Buildings and Other Structures Bylaw Regulation*, B.C. Reg. 86/2004 established under section 9(4)(a) of the *Community Charter* is significant in relation to which municipalities and regional districts may adopt bylaws without further ministerial approval. Generally, the Regulation preserves a ministerial veto over all matters of substance in the field of building regulation. In addition, there are numerous companion statutory powers to this general power that result in the enactment of complex building regulation bylaws where local government employees enforce and inspect residential, commercial, and in some cases, industrial construction for the purposes of compliance with the building bylaw and the *British Columbia Building Code*.

As part of the provincial government's focus on climate change and related environmental policies, the government has enacted preliminary legislation regarding green buildings. The *Housing Statutes Amendment Act, 2008*, ("HSAA") made changes to the *LGA* and the *Community Charter* as the first step in an ongoing initiative known as "Green the BC Building Code.". See sections 692 and 694 of the *Local Government Act*, and sections 53 and 55 of the *Community Charter* for further details. The initiative aims to change the *Building Code*, and to reduce the environmental footprint of buildings throughout their lifespans.

As most of us are keenly aware, the area of building regulation has led to significant municipal liability. Many of the leading cases establish principles upon which local governments have been held responsible for damages to property.

Local governments have been held by the courts to owe a duty of care in carrying out their building regulation function not only to innocent third parties (where those third parties are neighbours or subsequent purchasers or occupiers of the deficient building) but also to owner-builders. Courts have imposed such liability on local governments in

cases involving the negligent failure to enforce building bylaws, to negligent approval of building permits and the negligent inspection of construction. All local government administrators should be familiar with the cases of *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, *Rothfield v. Manolagos*, [1989] 2 S.C.R. 1259 and *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298.

5.6. Zoning, Development and Growth Management

The vast majority of a local government's powers pertaining to land use control are contained within Part 26 of the *Local Government Act*, which is entitled "Planning and Land Use Management".

One of the main tools to control development is the official community plan. Under section 875 of the *Local Government Act*, an official community plan is a statement of objectives and policies to guide planning and land use management decisions. Official community plans are distinct from land use zones. Rather than designating the permissible uses on a particular parcel of land, development plans provide a guide for future redevelopment of the land. In *Canadian Pacific Railway Co. v. Vancouver (City)* (2006), 18 M.P.L.R. (4th) 1 (S.C.C.), the Supreme Court of Canada held that a plan that designated a railway line a public thoroughfare was not equivalent to zoning the land a public street. Instead of changing the current zoned use of the railway line, the plan merely limited the line's redevelopment potential with the effect that it may make it easier for the city to convert the rail line into a street or other type of public thoroughfare in the future.

A local government is not required to adopt an official community plan except in the circumstances where a regional growth strategy is in effect. However, not to adopt an official community plan means that certain development tools such as development permits, temporary use permits and heritage conservation areas are not available.

Section 877 of the *Local Government Act* requires official community plans to include statements and maps for the area covered by the plan respecting six matters. These are: (a) the location, amount, type and density of residential development required to meet anticipated housing needs over a period of at least five years; (b) location, amount and type of present and proposed commercial, industrial, institutional, agricultural, recreational and public utility land uses; (c) location and areas of sand and gravel deposits that are suitable for future extraction; (d) restrictions on the use of land that is subject to hazardous condition or that is environmentally sensitive to development; (e) location and phasing of any major roads, sewer and water systems; and (f) location and type of present and proposed public facilities including schools, parks and waste treatment and disposal sites.

Section 879 of the *Local Government Act* requires that in developing an official community plan, the local government "must provide one or more opportunities it

considers appropriate for consultation with persons, organizations and authorities it considers will be affected.” In *Gardner v. Williams Lake (City)* (2006), 21 M.P.L.R. (4th) 191 (B.C.C.A.), the Court of Appeal explained that consultation “anticipates bi-lateral communication in which the person consulted has the opportunity to question, to receive explanation and to provide comment to the local government upon the proposal.” Although some procedures require formal public hearings, the Court found that section 879 allowed local government to decide the manner in which meaningful consultation with the public would be offered.

Section 884(2) of the *Local Government Act* states that after the adoption of an official community plan, all bylaws and works undertaken by the council or the board must be consistent with the plan.

An important function of an official community plan is the designation of development permit zones. Local governments wishing to use the development permit tool must designate these zones in their official community plan. The types of development permit areas a local government may use are set out in section 919.1 of the *Local Government Act*. Development permit zones may be created for the protection of the natural environment, its ecosystems and biological diversity; protection of development from hazardous conditions; protection of farming; revitalization of an area in which a commercial use is permitted; establishment of objectives for form and character of intensive residential development; and establishment of objectives for the form and character of commercial, industrial and multi-family residential development.

Section 920 of the *Local Government Act* makes it mandatory to obtain a development permit before undertaking development in a development permit area. Specific development activities cannot be undertaken unless an exception from a development permit can be found in the official community plan or a development permit has been obtained. These activities are subdivision of land; construction of, addition to or alteration of a building or structure; alteration of land in an area designated for the protection of the natural environment or from hazardous conditions; and the alteration of land or a building or structure in an area designated for revitalization in which a commercial use is permitted.

Of course, the zoning bylaw is the primary legislative tool used to implement local government land use plans. The authority to “regulate the use of land” is one of several powers that are provided for in section 903 of the *Local Government Act*. Of interest, the zoning power extends to areas that are covered by water, because the definition of “land” in section 5 of the *Local Government Act* includes the surface of water. The B.C. Court of Appeal confirmed that land use bylaws apply to areas covered by water, including areas designated as federal navigable waters, in the 2008 case of *Salt Spring Island Local Trust Committee v. B&B Ganges Marina Ltd. et al.*, (2008) 52 M.P.L.R. (4th) 64. The Court held that only in instances where the federal government has enacted its own land

use regulation, or where the land use regulation directly conflicts with or impairs federal regulation of the water body, would the land use bylaw be inapplicable.

The basic power to regulate the use of land in section 903 allows for the division of the local government territory into zones and the regulation of various aspects of land use within those zones. Allowing zoning bylaws to include different regulations for different uses within the zone itself further enhances these powers.

There are general rules in sections 312 of the *Local Government Act* and 33 of the *Community Charter* that require local governments to compensate individuals for any injurious effects to their land caused by the exercise of a local government power. However, section 914 of the *Local Government Act* provides that compensation is not payable for any reduction in the value of an interest in land that results from the adoption of an official community plan or a zoning bylaw unless the bylaw restricts the use of land to a public use.

Since 1993, the *Local Government Act* has authorized local governments in British Columbia to permit zoning density bonuses in exchange for the provision of amenities or affordable or special need housing. Previously, these types of agreements occurred between owners of land or developers in a local government by means of informal agreements, but this has been specifically authorized and regulated in section 904 of the *Local Government Act* to recognize the reality of negotiations between property owners and local governments during the rezoning of property.

Subdivision, which involves the creation of new lots by subdividing larger ones, is an important part of growth management. Subdivision requirements supplement zoning bylaws by designating conditions that may have to be met before land can be subdivided for the uses permitted under the zoning bylaw. These requirements usually involve the provision of public services such as water, sewer and roads. The *Land Title Act* requires each municipality to designate an approving officer, while in a regional district the District may appoint the approving officer. If the Regional District chooses not to provide an approving officer, an employee of the Ministry of Transportation and Highways will assume the duties.

The important thing to remember about subdivision is that the local government sets the standards for land use through subdivision servicing bylaws and other land use control bylaws such as zoning bylaws, but a decision to approve an application to subdivide land must be made by the approving officer. It is not for the municipality, or its council, to dictate what land can or cannot be subdivided once the approving officer decides that the application fits within the local government's bylaws.

CHAPTER SIX: FINANCES AND TAXATION

This section provides an examination of the legal rights and obligations of local governments when creating and collecting revenue. It starts with the basic rules of taxation, particularly property taxation, and how this is incorporated in financial planning. Fees and levies are discussed with respect to local government powers and liabilities. The financial plan provisions of the Local Government Act and the Community Charter are also examined

6.1. Taxation

6.1.1. Assessment

The *Assessment Act* contains provisions that designate the B.C. Assessment Authority as the agent responsible for the valuation of real property for taxation purposes. This Act also creates appeal rights for property owners to challenge their property valuation and the regulatory framework for the creation of assessment rolls to be given to taxing bodies. B.C. Assessment inspects and determines the taxation value of property in nine different categories: residential, utility, unmanaged forest, managed forest, farm, major industry, light industry, business, and other (recreation/non-profit).

The *Local Government Act* and the *Community Charter* interact with the *Assessment Act* by providing the framework for the imposition and collection of property and other taxes. Parts 10 and 10.1 of the *Local Government Act* contain the provisions relating to assessment and imposition of taxes in special cases such as forestry land and with certain utility companies, and Part 11 contains provisions relating to the annual municipal tax sale. Part 7 of the *Community Charter* deals with municipal revenue.

There are numerous types of property exempted from taxation under sections 220 to 223 of the *Community Charter*, and they are divided into those exemptions embodied in provincial policy and those that may be provided as a result of municipal policy. While too many to list, some important exemptions include:

- Lands and improvements held by provincial or municipal governments—note, however, that grants-in-lieu of taxes are often paid on these lands
- Land and improvements for public libraries, cemeteries, places of public worship, public hospitals, sewage treatment plants, and others
- Utility companies—note, however, that they do pay a 1% utility tax in lieu of general tax

Provisions dealing with property tax exemptions that may be granted by the municipality have been somewhat simplified: exemptions may now in most cases be granted by a simple majority vote (section 224 of the *CC*). The exemption may be for the period and

subject to the conditions contained in the specific bylaw. However, there is a notice requirement, and the notice must contain an estimate of the amount of taxes that would be imposed on the property in the first year of the exemption and the following two years (section 227 of the *CC*).

The categories for exemption are again numerous and range from parks grounds to museums to private hospitals (see section 224(2) of the *CC*). Exemptions for heritage, riparian use, golf courses, cemetery property and property being used to deliver a municipal service under a partnering agreement are dealt with in section 225 of the *Community Charter*.

Under section 223 of the *Community Charter*, the Lieutenant Governor in Council is able to pass regulations exempting categories of industrial or business property, community ports and airports.

Designated farmlands and lands owned by or held in trust for Indians are two particularly complex categories of land subject to several legislative frameworks in multiple levels of government.

Revitalization tax exemptions are set out in section 226 of the *Community Charter*. The focus of these exemptions is to promote new improvements and building alterations as part of the municipality's area revitalization program. There is a more complex procedure for granting the exemption by bylaw, involving a tax exemption agreement and issuance of a tax exemption certificate. Areas of a municipality may be designated for special tax treatment under either the financial plan or the official community plan and this exemption may be for a maximum of ten years, divided into two five-year terms.

6.1.2. Taxation

The method of property taxation in British Columbia is called "variable rate taxation." B.C. Assessment provides notice of the full value of properties to all local governments, whose councils then have the ability to set the tax rate applied to each of the nine classes of property. Tax rates are set as a dollar figure per \$1,000 of assessed value. Council establishes the tax rate by examining how much revenue must be generated from each of the nine classes.

General taxation is usually imposed on the assessed value of land and improvements (variable rate method), though the *Community Charter* also contains two options for council: phasing and averaging (section 198). The *Assessment Averaging and Phasing Regulation* (B.C. Reg. 370/2003) permits the imposition of rates on averaged or phased assessments. A council bylaw that selects the method of evaluation and sets the tax rates must be passed after the adoption of the financial plan but before May 15 each year (section 197 of the *CC*).

This variable tax rate system was at issue in *Catalyst Paper Corporation v. North Cowichan (District)*, 2012 SCC 2. In 2009, Catalyst brought proceedings in the B.C. Supreme Court for judicial review of the Tax Rate Bylaws enacted by each of the four municipalities in which Catalyst operated pulp and paper operations (with North Cowichan being held first). The B.C. Supreme Court upheld the Tax Rate Bylaw as not being unreasonable, a decision which was affirmed by the Court of Appeal and by the Supreme Court of Canada. In the reasons for judgment, the Supreme Court of Canada held that in reviewing bylaws for reasonableness, courts must respect the decisions of elected representatives, and should intervene only if the bylaw is one no reasonably body, informed by a myriad of facts, could have made.

While the variable tax rate system and the additional alternatives may appear to give a local government council *carte blanche* to establish any tax rate desired, the province has statutory authority to create regulations to control the degree of shift from year to year or to cap tax rates (section 199 of the *CC*).

If Council adopts a parcel tax bylaw (section 200), the *Community Charter* provides that an assessment roll may be produced (section 202) and a local parcel tax roll review panel must be established (section 204). The *Community Charter* also provides ratepayers with rights to appeal parcel tax assessments, appear before the court of revision, and even appeal to the B.C. Supreme Court.

The parcel tax provisions of the *Community Charter* were examined in *O’Flanagan v. City of Rossland*, 2009 BCCA 182. In that case the City had established a local service area to construct a water reservoir for the benefit of an area of the municipality. The City proposed to recover service costs by way of a parcel tax calculated on the “full parcel building out (maximum permitted units)” for each parcel. Two property owners within the service area petitioned the Court for a declaration that the mechanism was unlawful because the tax was based on zoning and not on the physical characteristics of land as contemplated in the *Community Charter*. The Court of Appeal affirmed the Supreme Court decision that zoning density bylaws may, in certain circumstances, form the basis for the imposition of a parcel tax. In *O’Flanagan*, because the zoning was based on physical characteristics, it followed that the parcel tax was also based on physical characteristics. This decision gives local governments wide discretion in setting the taxable area and frontage of parcels for the purpose of imposing parcel taxes, provided that the determination is, at least to some extent, based on the physical characteristics of the land.

6.1.3. Collection

Local governments collect taxes not only for their own use but also for local school boards (if approved by referendum), provincial schools, regional districts, regional health districts, B.C. Transit, the Municipal Finance Authority, and B.C. Assessment.

Under the general taxation scheme, property taxes for the year are due on July 2nd (section 234 of the *CC*). Council may alter this date, change the assessment procedure, and offer discounts and penalties for early and late payment by enacting a bylaw (section 235 of the *CC*).

Taxes not paid by December 31 of the year imposed become taxes in arrear (section 245 of the *CC*). If still unpaid by December 31 of the year following the year of imposition, taxes are delinquent (section 246 of the *CC*). The local government has an obligation to notify the assessed owner of taxes in arrear or delinquent taxes within a specific time frame (section 248 of the *CC*) and provide documentation of outstanding amounts (section 249 of the *CC*).

Section 231(1) of the *Community Charter* provides local governments with the right to recover outstanding taxes by an action in debt. With council approval, the tax collector may also exercise a legal remedy called “distress” wherein goods and chattels may be seized to satisfy the debt (section 252 of the *CC*).

Another option to recover delinquent taxes is through the annual tax sale, which must be a public auction held at 10:00 am on the last Monday in September in Council chambers (section 403 of the *LGA* applicable to municipalities under section 254 of the *CC*). At a tax sale, the local government may also bid on the property up to a maximum bid set by council (section 406 of the *LGA*). If the property is not sold, the local government becomes the default purchaser (section 407(4) of the *LGA*).

Section 417 of the *Local Government Act* provides a one-year period of redemption for the registered owner of the property or a charge holder against the property to re-purchase the property for the upset price, costs, and current taxes owing plus interest. However, the law is generally very cautious when extinguishing a former property owner’s proprietary interest. As such, the Act provides specific methods of notification, redemption, instalment payment schemes, and a general right of former owners of property sold at tax sale to apply to the B.C. Supreme Court to have the sale set aside and declared invalid. These provisions set the grounds on which a claim must be brought:

- The property was not liable to taxation;
- The taxes for which the property was sold were fully paid;
- Irregularities existed in the method of imposition of taxes;
- The sale was not fairly and openly conducted; and
- The collector did not give the owner required notice.

A recent decision from the Supreme Court of Canada has shed some insight on situations where taxes are collected unlawfully. In *Kingstreet Investments Ltd. v. New Brunswick*

(*Finance*) (2007) 276 D.L.R. (4th) 342, the Court stated that in situations where money is collected under legislation that is *ultra vires*, the government collecting the money may not retain it. The case involved nightclub operators in New Brunswick who bought their alcohol from the provincial liquor corporation's retail stores. In addition to the retail price, the nightclub operators also paid a user charge for the alcohol under a provincial regulation. The user charge was found to be an indirect tax, which is unconstitutional, because only the federal government can impose indirect taxes. However, the province argued that despite the unconstitutionality of the regulation, they should be able to keep the money collected because the nightclubs had passed on the tax to their customers. This argument under the doctrine of "unjust enrichment" is known as the "passing-off" defence. The Court sided with the nightclubs and found that restitution, or the right of the taxpayer to recover the money, is generally available for the recovery of all monies collected under legislation that is subsequently declared to be *ultra vires*. This means that when a local government is considering the imposition of taxes and charges of dubious validity, it must remember that if the tax is ultimately found to be *ultra vires*, any money collected will have to be refunded.

6.2. Fees, Levies and Other Sources of Funds

Local governments obtain revenue from three principle sources: property taxes, service sales, and grants from other governments.

Section 363 of the *Local Government Act* is the general authorization for a local government to impose fees or charges in respect to the provision of its services and the exercise of its regulatory authority. The reforms relating to the imposition of fees are preserved in section 194 of the *Community Charter*, with the addition of the express authority to impose a fee in respect of the use of municipal property.

Although the *Community Charter* only explicitly authorizes the imposition of fees, the definition of "fee" in the schedule includes a charge. For this reason, the absence of an explicit authorization of charges is not significant. A fee levied under the *Community Charter* for work done or services provided to land or to improvements qualifies as "special" fees or charges (section 258(1) of the *CC*) with the status of taxes, therein constituting charges or liens on the land and its improvements (section 364(2) of the *LGA* and section 259(2) of the *CC*). This has particularly important ramifications on the priority of these outstanding amounts, the rights of the property owner to appeal and object, and the ability of a local government to collect through tax sale mechanisms.

Fees levied under either section 363 of the *Local Government Act* or 194 of the *Community Charter* must be justifiable to the public—sections 363(4) and 194(4), respectively, preserve the "transparency" objective by requiring the local government to provide a report, if requested, regarding how a fee or charge was determined.

The subject matter of fees and charges is fairly open-ended and the Act provides only that council cannot adopt a fee bylaw that relates to elections or voting, or that relates to any matter for which the Act specifically authorizes a certain fee or charge (section 363(3) of the *LGA* and section 194(3) of the *CC*). For example, development cost charges are specifically authorized under section 933 of the *Local Government Act* and council would therefore be restricted from using its plenary power to enact a bylaw under section 363 of the *Local Government Act*. The *Community Charter*, however, has initiated a new specific prohibition on municipal highway tolls, except as expressly permitted by a federal or provincial law (section 194(5)).

The most important limiting factor on a local government's ability to impose fees comes from the case law. In *Re: Eurig Estate*, [1998] 2 S.C.R. 565, the Supreme Court of Canada clarified the differences between taxes and fees, and ruled that governments may only demand fees that relate to the actual cost of providing a service. There must be a nexus between the cost of the service and the amount levied for it to be considered a fee, though precise matching is not required and a reasonable connection will suffice. The differentiation of taxes and fees is of great legal import, as taxes must result from a specific delegation of taxing authority. Improper classification may lead to constitutional challenges for lack of jurisdiction to impose taxes.

In the recent decision of *620 Connaught Ltd. v. Canada (Attorney General)*, [2008] S.C.J. No. 7 (Q.L.), Rothstein J. of the Supreme Court of Canada reviewed the differences between regulatory charges, taxes, user fees and proprietary charges. The Court held that taxes have the broadest purpose: they are for general revenue raising purposes. Regulatory charges on the other hand, have a narrower purpose: they are imposed in order to finance regulatory schemes or alter behaviour. The purpose of user fees is to allow governments to recover costs for the use of government services or facilities. The purpose of proprietary charges is to raise revenues from the use of public property by private parties.

To further distinguish between taxes and regulatory charges, Rothstein J. explained that regulatory charges are present where, first, a relevant regulatory scheme can be identified in relation to the fee payor, and second, there is a proper relationship between the fee and that regulatory scheme. The consequence of this case for local governments is that they must carefully consider whether fees they impose could be construed as taxes, and by extension, declared unconstitutional.

Shortly after the Supreme Court of Canada decided *620 Connaught*, the B.C. Court of Appeal released its decision in *Greater Vancouver Sewerage and Drainage District v. Ecowaste Industries Ltd.*, [2008] B.C.J. No. 495 (Q.L.). In *Ecowaste*, the appellants unsuccessfully argued that disposal fees levied by the Greater Vancouver Sewerage and Drainage District amounted to an unconstitutional tax because a complete, detailed code of regulation was absent and the District was not able to demonstrate how revenues from the fees matched up with the costs of regulation. The Court of Appeal upheld the trial

judge's decision and found that a complete, detailed code of waste management regulation existed, that the District had attempted to correlate fee revenue with costs, and that in fact the District had been operating at a deficit.

In light of the *620 Connaught* and *Ecowaste* cases, local governments should carefully consider the following aspects of fees they levy. First, are the fees imposed in relation to an identifiable, complete and detailed regulatory scheme? If not, the fees could be construed by a court to be a tax, and therefore unconstitutionally imposed. Second, are fee payors connected to the regulatory scheme in an obvious manner? Do they benefit from the scheme or is their behaviour meant to be altered by the scheme? Third, what is the relationship between the fee itself and the regulatory scheme? That is, was the amount of the fee set in order to cover the costs of the regulatory scheme or was it set in order to create a surplus? Furthermore, if surpluses have been generated from fee revenue, how frequently are they generated? Generation of a consistent surplus year after year indicates the existence of a tax. Failure to consider these factors may result in local government fees being declared unconstitutionally imposed taxes.

Finally, local governments should keep in mind the requirement to have available to the public a report respecting how any fee was determined, in order to comply with s. 194(4) of the *Community Charter*.

6.3. Financial Plans

The *Community Charter* requires local governments to have a financial plan which sets out the following information for each year of the five-year planning period (section 165):

1. Proposed expenditures;
2. Proposed funding sources; and
3. Proposed transfers to or between funds.

Note that specific requirements for the amounts that must be listed in each of the three categories are enumerated in sections 165(6)-(8) of the *Community Charter*. One year's deficit must be included in the next year's financial plan as an expenditure in that year (section 165(9) of the *CC*).

Financial plans may be amended by bylaw at any time (section 165(2) of the *CC*). Prior to enactment of the annual property tax bylaw, however, council must ensure that the financial plan is adopted by bylaw (sections 165(1) of the *CC*).

According to section 166 of the *Community Charter*, "a council must undertake a process of public consultation regarding the proposed financial plan before it is adopted." The Act does not disclose what type of public consultation is necessary to fulfill this

requirement, nor have there been any reported cases on this point. Conversely, the Act contains specific obligations on local governments to prepare and audit annual financial statements (section 167 of the *CC*) and even a statutory right for electors to complain about the accounting reports of the local government (section 172 of the *CC*).

CHAPTER SEVEN: LOCAL GOVERNMENT AND THEIR INTERACTION WITH THE COURTS

In this chapter we will review the three basic manners in which local governments interact with the courts. First, we will review generally the court's role in supervising the legality of bylaws and resolutions enacted by a local government. Second, we will look at the more common ways that local governments in their corporate capacity are sued in negligence, nuisance or abuse of office and the protections for municipal public officers from personal liability. Third, we will look at the way that local governments can enforce their bylaws with particular emphasis on injunctions and direct enforcement.

7.1. Judicial Supervision of Local Government Authority

In this section we are not speaking of actions for damages brought before the courts, but simply how to seek a declaration on the validity of a local government bylaw or resolution. In this process, an elector or affected person would seek a declaration as to the validity of the bylaw or resolution in the B.C. Supreme Court.

The first way to challenge a bylaw or resolution is by commencing an action in the British Columbia Supreme Court by way of writ of summons asking for a declaration of invalidity pursuant to the *Rules of Court*. Alternatively, a petition can be brought in British Columbia Supreme Court relying, again, on the *Rules of Court* or the process within sections 261 through 265 of the *Local Government Act*. These provisions set out certain time frames within which an elector of a local government may apply to the court to set aside certain bylaws and when an application must be heard. Generally speaking, short time frames are set to challenge a bylaw or resolution of the local government. From a policy perspective, this makes sense as financial bylaws or resolutions are usually acted upon quickly and if they are invalid the elector should take steps quickly to have the court determine the issue. Third, a petition can be brought in the B.C. Supreme Court under the *Judicial Review Procedure Act*. This is legislation of general application that allows the court to review decisions of a statutory body. Such an application can be brought after the time frames in section 262 of the *Local Government Act* have expired, but the court retains a residual discretion in the *Judicial Review Procedure Act* to not consider such an application due to the passage of time.

7.1.1. Standard of Review

Judicial interference with the actions of local governments is not guaranteed. Although the decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 replaced the “patently unreasonable” standard of review with one of reasonableness, the threshold for the courts to interfere with the decisions of elected officials remains high. Bastarache and LeBel JJ. wrote for the majority in *Dunsmuir* that “the move towards a single reasonableness standard does not pave the way for a more intrusive review by courts.” As they have been in the past, the courts should be slow to determine bad faith in the conduct of democratically elected officials unless there is no other rational conclusion.

Further, the Supreme Court of Canada has clearly stated that judicial review of a local government action should recognize that local governments are political bodies and accountable to the electors. Decisions that are within the jurisdiction of a local government should be reviewed on a deferential standard. In *Vernon (City) v. Sengotta*, 2009 BCSC 70, the B.C. Supreme Court concluded that the standard of reasonableness requires courts to respect the legislative choice to leave certain matters in the hands of elected municipal decision makers, and to respect the processes and determinations that draw on those decision makers’ particular expertise and experience.

The *Community Charter* specifically states that the powers conferred on municipalities and their councils must be interpreted broadly in accordance with the purposes of the *Act* and in accordance with municipal purposes. It seems likely that the court’s deferential standard will continue under the provisions of the *Community Charter*.

However, as the BC Supreme Court recently suggested in *Pucci v. City of North Vancouver*, 2010 BCSC 743, where a proceeding is adjudicative in nature, as opposed to legislative, serious and material error of fact (that is failure to take into account relevant facts) is subject to a correctness test in the same way as error of law.

7.1.2. Substantive Challenges

When local government bylaws and resolutions are challenged they are usually challenged on several specific grounds. For example, in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, a Council resolution was subject to judicial review because resolutions are acts which bind council and municipal officers until repealed. Resolutions must also be grounded in a statutory power and in this sense are subject to review on the same standard as bylaws.

7.1.2.1. Constitutional and Charter Challenges

Bylaws and resolutions can be challenged as being unconstitutional (i.e., the municipality lacks the delegated jurisdiction to legislate in a particular area) or as being in contravention of the *Charter of Rights and Freedoms* (i.e., the bylaw or resolution infringes a protected right or freedom). Local governments do have the power to regulate

activities and land uses within their geographical jurisdiction. Certain subject matters, however, are within the exclusive legislative domain of the federal government, regardless of their geographical location or impact. For example, in matters of space and aeronautics and in shipping and navigation, local government bylaws will be subject to the overriding federal power to regulate in this area. This was confirmed in *British Columbia (Attorney General) v. Lafarge Canada Inc.* [2007] S.C.J. No. 23 (Q.L.). The Supreme Court of Canada held that federal law covered a ship/barge unloading facility planned for the Vancouver waterfront, and therefore the municipal laws requiring development permits did not apply.

7.1.2.2. Bad Faith/Improper Purpose

Local government bylaws and resolutions must be adopted for the purpose of remedying or addressing a local government purpose within the permitted scope of powers granted to a local government. Council must not possess ulterior motives when adopting a bylaw or resolution.

For example, in *Shell* (above) the Supreme Court of Canada struck down a resolution not to deal with *Shell* while it conducted business under the apartheid regime in South Africa. The resolution was held to be enacted for an improper purpose outside of the allowed municipal powers.

7.1.2.3. Discrimination

One type of municipal regulation that is often subject to challenges based on claims of discrimination is zoning bylaws. The general principle is that a municipality cannot discriminate between individuals unless such discrimination is expressly, or by necessary implication, authorized by the enabling statute.

In *Tenants' Rights Action Coalition v. Delta (City)* (1997) 42 B.C.L.R. (3d) 259 (S.C.), the City passed a zoning bylaw with an "in-law suite" provision that prohibited the creation of apartments in houses zoned as single-family dwellings unless the apartment was for the exclusive use of a family member. The petitioners rented an apartment in their house to a non-relative and were charged with the bylaw infraction. The Court found authority for the municipality to pass zoning bylaws under what is now section 903 of the *Local Government Act*, but the legislation did not specifically authorize the city to distinguish between persons who may occupy apartments in single-family dwellings on the basis of familial relationship to the principal occupant of the unit. The subject provisions of the by-law were *ultra vires*.

However, in the case of *McIntosh Estates v. Surrey (City)* (2000), 9 M.P.L.R. (3d) 84, a bylaw that prohibited one developer from dividing one-acre lots into half-acre lots while all other property owners in the area could do so was not held to be *ultra vires*. The Court indicated that it found it hard to imagine a zoning bylaw that does not involve some

element of discrimination. Therefore, the onus was on the developer “to prove that any discrimination was carried out with an improper motive of favouring or hurting one individual and without regard to the public interest”. This case demonstrates the high degree of deference to decisions of municipal councils.

7.1.2.4. Vagueness & Uncertainty

All laws must be sufficiently clear and specific so that a reasonable person may determine whether or not his or her conduct is lawful. In *Service Corporation International (Canada) Inc. v. Burnaby (City)* (1999), 9 M.P.L.R. (3d) 242 (B.C.S.C.), (appeal allowed in part in (2001) 95 B.C.L.R. (3d) 301 (C.A.)), the Court of Appeal was asked to determine if a provision that required land to be “fully and suitable landscaped” was too vague or uncertain. The Court adopted the test of “whether the bylaw is so uncertain that it does not provide an adequate basis for reaching a conclusion about its meaning by reasoned analysis applying legal criteria and taking into account the context of the legislative enactment.”

7.1.2.5. Fettering

A local government cannot agree to terms that fetter its legislative power, directly or indirectly, unless there is legislation expressly permitting it to do so: *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919. Thus, while the *Local Government Act* provided Victoria with the power to enact zoning bylaws, it provided no power to constrain the future use of that power. The City did not have the capacity to make and be bound by an implied term to keep the zoning in place for a number of years or to pay damages if it rezoned, as the aggrieved developer argued. The Court held that any such agreement would have been *ultra vires* and contrary to public policy. In the case of *Loucks v. Abbotsford (City)* (2006), 30 M.P.L.R. (4th) 77, the B.C. Supreme Court relied on *Pacific National Investments* to hold that a local government cannot contract away its land use authority, or even enter into contracts that provide an option to do so. In *Loucks* the City had entered into a contract to buy land at a reduced price in exchange for amending its Official Community Plan in favour of the landowner.

7.1.2.6. Repugnancy

Bylaws, as types of subordinate legislation, must be within the sphere of authorized regulatory power. In *114957 Canada Ltée (“Spraytech”) v. Hudson (Town)*, [2001] 2 S.C.R. 241, two landscaping companies challenged the Town’s bylaw, which restricted the use of certain pesticides that were federally approved and for which the companies possessed valid provincial licences. Since the provincial enabling statute gave the town the ability to regulate general health and welfare, the Court held that the bylaw was properly enacted under an authorized regulatory power.

However, even if properly authorized, the Town bylaw would be read inoperative if it conflicted directly with provincial or federal legislation. The test for repugnancy is the “impossibility of dual compliance”—does one law compel a person to do what the other makes illegal? In *Spraytech*, the Court held that the local bylaw merely added another level to the pesticide regulatory scheme, and that since compliance with the bylaw did not make compliance with the other two levels impossible, the bylaw was valid. A local government can therefore impose more stringent requirements than a provincial or federal scheme, but cannot render those other schemes repugnant by making compliance at the local level result in non-compliance at a higher level. It should be noted that the *Community Charter* may change this area of law to some degree through the “concurrent authority” powers.

7.1.3. Procedural Fairness

As occasional quasi-judicial decision makers, local governments must comply with the principles of natural justice and ensure that all parties to a decision are heard, and that the decision-making process is impartial. For example, when considering the revocation of a business licence, the enactment of a section 698 demolition bylaw under the *Local Government Act*, or an owner-initiated site-specific rezoning application (see *Pucci*, above) these principles will be triggered.

There is a legal threshold that must be met before the principles of natural justice must be observed. The threshold is dependent upon several general considerations:

- **Nature of Decision:** Decisions that are strictly political in nature or highly discretionary, such as those made by legislators, generally fall below the necessary threshold for procedural fairness. However, in the case of *Homex Realty and Development Co. v. Wyoming (Village)*, [1980] 2 S.C.R. 1011, the Court was quick to point out that subordinate legislation (such as a bylaw in this case) which targets a certain party, problem or individual may not be legislative.
- **Nature of Statutory Scheme:** Provisions in the enabling statute may dictate what types of procedure (hearings, appeal rights, notice provisions) are available. If so, the statutory scheme overrules common law rights.
- **Importance of Interest at Stake:** Some interests may attract procedural fairness requirements while others do not. An important distinction is whether the aggrieved person is facing the forfeiture of rights (normally attracts procedural fairness) or whether he or she is applying for a privilege (generally no procedural fairness owed).

When this threshold is surpassed, local government bodies that perform quasi-judicial decision-making functions must conform to the principles of natural justice in the course of forming a decision. This includes the *audi alteram partem* rule, which encapsulates an

individual's right to not be punished or deprived of rights or property by operation of a judicial proceeding unless the individual has had the opportunity to be heard by the decision maker.

The *audi alteram partem* rule requires that a person whose rights will be affected by a quasi-judicial decision be notified of the case against him, be heard before the decision-maker with an opportunity to represent his case, and be given reasons for the decision. The ability to be represented by counsel, the right to cross-examine witnesses, the types of evidence that are admissible, and the right to receive written reasons, are additional considerations that some types of quasi-judicial decisions attract as components of procedural fairness.

A corollary of the *audi alteram partem* rule is the principle of *nemo iudex in sua causa debet esse*, or the rule against being the judge of one's own case. For example, it would be a breach of procedural fairness if a member of a board of variance appeared before her own board to dispute an application being made by her neighbour, and then participated in the decision-making process as well.

A breach of the duty of fairness is considered by the courts to be a jurisdictional error, an error that generally renders the decision made void. However, it is important to remember that our legal system is based on parliamentary supremacy, and specific statutory authorizations that breach common law principles of natural justice and procedural fairness are generally paramount. The *Community Charter* itself contains many such statutory overrides regarding procedural fairness. For example, section 57 of the *Community Charter* provides the specific course of action a local government must follow to file a notice against title of a property within its jurisdiction. There are provisions for inspection and investigation of potential charges, for notice to the property owner, for a hearing before council, for the availability of records, and even provisions for limiting the liability of certain local and provincial agencies or actors.

7.2. Corporate and Personal Liability

Perhaps due to the fact that local government corporations play such an important role in their residents' daily lives and businesses, it comes as no surprise that local governments are often named in lawsuits by aggrieved residents. As noted on several occasions in this paper, local governments are unique corporations exercising legislative authority and private law powers such as contractual rights. Therefore, unlike natural persons, the powers, duties and responsibilities of a local government create a unique law related to local government liability.

On occasion, local government may stand in no different a place than that of an individual when dealing with liability issues. However, this general statement is subject to substantial qualification, most significantly that this level of government can rely on

“the policy defence” as well as several statutory immunities not available to individuals or other corporate entities.

We will review three specific torts (negligence, nuisance and abuse of office) below, but local governments are also liable in occupiers liability, defamation, breach of contract, and for intentional torts such as trespass, conspiracy, malicious prosecution and other equitable torts such as restitution and breach of trust.

7.2.1. Negligence

Local governments, like any individual or corporation, are responsible for their negligent behaviour. Therefore, if a local government employee drives a motor vehicle negligently and causes injury to person or property, the local government will be responsible for the damages associated with such negligence. However, because of the legislative and quasi-judicial nature of a local government, not all of its activities or decisions are subject to a negligence analysis nor in certain cases will it be subject to damage flowing from negligence if these damages are insulated by a “policy defence”.

It is important to understand that no duty of care exists between electors and members of the public and the legislative and quasi-judicial functions of a local government (See *Welbridge Holdings Ltd. v. Winnipeg (City)*, [1971] S.C.R. 957). When exercising legislative functions (i.e., the passage of a bylaw) or quasi-judicial functions (i.e., the revocation of a business licence) a municipality is acting in its public capacity and its decisions are based primarily on political, social, economic and other concerns that do not expose the municipality to damages in negligence.

In regard to the more usual functions of municipalities, such as construction and maintenance of highways, sidewalks, and parks, the employees of a local government may expose the local government to damages in negligence. However, consider the example of slips and falls in examining how the policy defence may help negate liability. The Supreme Court of Canada has recognized that ice is a natural hazard in Canadian winters (*Brown v. B.C.*, [1994] 1 S.C.R. 420). Attempts to remove ice and snow completely from streets and sidewalks will be prohibitively expensive. How far municipalities must go to deal with the hazards of ice and snow on sidewalks and roads depends on whether they have made reasonable policy decisions, to which they have adhered at the operational level.

In *Pastuck v. Village of Lake Cowichan* (1993), 37 B.C.A.C. 115, the plaintiff attacked the municipality’s decision to plough its streets and sidewalks but to sand and salt sidewalks only in the downtown commercial core. The trial judge was mindful of the substantial additional burden that would be imposed on the municipality to accept the plaintiff’s argument that the municipality should have gone further to completely clear sidewalks down to the bare pavement, considering that even clear sidewalks can become

hazardous in freezing temperatures. The Court recognized this policy defence and dismissed the claim.

In many recent cases, B.C. courts have held that local governments are not liable for injuries suffered on their sidewalks, roads, parks and other spaces if the municipality has a reasonable policy in place for dealing with hazards and inspecting the area and that policy is enforced. The courts have also set out that available budgets and manpower of local governments will be considered when determining if a policy is reasonable (see *Fox v. Vancouver (City)* (2003) 44 M.P.L.R. (3d) 236 (B.C.S.C.)). As the cases of *Garcha v. New Westminster (City)* (2005) 13 M.P.L.R. (4th) 188 (B.C.S.C.) and *Frost v. Whistler (Resort Municipality)* (2003) 35 M.P.L.R. (3d) 177 (B.C.S.C.) have shown, the local government policy does not need to be written for this rule to apply.

Local government officials may also render themselves and their employees liable for negligent misrepresentation. The elements necessary to establish an action in this regard are:

1. There must be a statement of fact, opinion, advice or information, made carelessly by the local government official;
2. The statement must be untrue, inaccurate or misleading;
3. The statement must be made by a person who is in a position where others may be reasonably expected to rely on his or her skill, judgment, or ability to give reliable advice;
4. The statement must be made by a person who knows or ought to know that the recipient will rely on it and will be induced to act upon it;
5. The person to whom the statement was made must in fact rely on it; and
6. That person must suffer loss or damage as a result of acting on the statement.

The classic example of a negligent misrepresentation is the planning clerk who negligently advises that a specific use is allowed in a given zone, when, in fact it is not. In reliance upon such a statement, the property owner develops the property only to be told later that the development is illegal. Damages may flow in such a case. Of course, the “policy defence” would not be available in these circumstances.

7.2.2. Nuisance

The tort of nuisance is difficult to define, as the behaviour that can lead to a nuisance is highly variable. However, when dealing with nuisances caused by local government two characteristics in determining whether a nuisance exists are always apparent. First, there must be an interference with a person’s rights, usually but not always involving the use or

enjoyment of their land, which must be unreasonable in nature. Second, there is available to a local government a special defence (once the unreasonable interference has been established) that the nuisance is the inevitable consequence arising from the local government's exercise of its statutory authority.

Nuisance can manifest itself in two forms – public or private. A public nuisance is one that affects the public at large, negatively affecting rights common to everyone. This can be contrasted with a private nuisance, which affects an individual occupier of land or a small group of landowners. The Supreme Court of Canada endorsed a definition of public nuisance in *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201:

The doctrine of public nuisance appears as a poorly understood area of the law. “A public nuisance has been defined as any activity which unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience”: See *Klar, supra*, at p. 525. Essentially, “[t]he conduct complained of must amount to...an attack upon the rights of the public generally to live their lives unaffected by inconvenience, discomfort and other forms of interference”... An individual may bring a private action in public nuisance by pleading and proving special damages. Such actions commonly involve allegations of unreasonable interference with a public right of way, such as a street or highway....

Whether or not a particular activity constitutes a public nuisance is a question of fact. Many factors may be considered, including the inconvenience caused by the activity, the difficulty involved in lessening or avoiding the risk, the utility of the activity, the general practice of others, and the character of the neighborhood.

As the operators of sewer, water and drainage systems as well as highways and other works such as landfills, it is inevitable that local governments will cause nuisances, whether public or private. In recognition of this certainty, a special immunity for local governments against certain nuisance actions has been enshrined by section 288 of the *Local Government Act*:

288. A municipality, council, regional district, board or improvement district, or a greater board, is not liable in any action based on nuisance or on the rule in the *Rylands v. Fletcher* case if the damages arise, directly or indirectly, out of the breakdown or malfunction of

(a) a sewer system,

(b) a water or drainage facility or system, or

(c) a dike or a road.

This provision protects local governments from nuisance damages associated with direct or indirect “breakdown or malfunction” of the enumerated works. As an example of where the immunity becomes effective, our courts have found that a blockage of a sewer line by an accumulation of roots and plastic bags was considered a “malfunction” of the sewer system itself. (See *Moffat v. White Rock (City)* (1993), 13 M.P.L.R. (2d) 283 (B.C.S.C.).)

In *Heyes v. Vancouver (City) et al.* 2009 BCSC 651, rev'd in part 2011 BCCA 77, the B.C. Supreme Court addressed allegations of negligent misrepresentation, negligence, and nuisance on the part of several defendants (the City of Vancouver, the Attorney General, Canada, the South Coast British Columbia Transportation Authority, or Translink, as well as two of its subsidiaries) related to the construction of the Canada Line. Heyes operated a clothing store adjacent to the route chosen for the Canada Line, and claimed she suffered business loss resulting from the duration and method of construction. The Court dismissed the claim of misrepresentation, finding that statements made about the intended construction were not untrue or inaccurate at the time they were made. The claim in negligence was also dismissed, as the Court found no negligent execution of the selected method of construction, and since the company's economic loss did not flow from any injury to person or property. The Court did find liability in nuisance against Translink and its subsidiaries, as there was substantial and unreasonable interference with Heyes' use of her premises. The City of Vancouver was found not liable because there was no evidence that it knew construction would proceed in a manner that would cause nuisance, and because the City did not have sufficient involvement with or knowledge of the specifics of the project. On appeal, the BC Court of Appeal went further to find that Vancouver was protected from liability by the defence of statutory authority. This defence grants immunity to a body created by statute, such as a local government, when it is doing what it is authorized by statute to do, and nuisance is the inevitable result of its actions..

7.2.3. Abuse of Power

The tort of abuse of power includes bad faith, acting for an improper or ulterior purpose and abuse of office. It is difficult to provide a concise definition of the tort. A definition is made additionally difficult by the use of different terms to define the same legal concept - abuse of power, discrimination, unreasonableness and bad faith are sometimes used interchangeably. The one common factor to all of them is that they are unjustified, ill motivated and unfair actions conducted by senior administrative officials or elected officials. Public officials who exercise their authority, where knowing that they either do not have the express power to do so or are doing so with the intent of injuring a person or property holder, will expose the local government to damages and potentially invalidate the local government bylaw. (See *Shields v. Vancouver (City)* (1991), 3 M.P.L.R. (2d) 48

(B.C.S.C.) The finding of liability for these torts may lead to general and punitive damages awards against the corporate local government and personal liability.

Generally, these are difficult torts to prove as is seen in the recent case of *Windset Greenhouses (Ladner) Ltd. v. The Corporation of Delta* (2006), 24 M.P.L.R. (4th) 50, affirmed on appeal [2007] B.C.J. No. 371 (B.C.C.A.) (QL). This case highlights the fact that a local government can raise a legal opinion as a shield from liability in an abuse of power claim, because the mere fact that legal advice was sought helps demonstrate that the municipality was acting prudently.

7.2.4. Immunities and Indemnification

According to section 287(2) of the *Local Government Act*, a “municipal public officer” as defined in section 287(1) of the *LGA* is immune from actions for damages allegedly created by something said or done or omitted to be said or done by the officer in performance of his or her duty or exercise of power. There is, of course, an important exception contained in section 287(3) of the *Local Government Act* wherein an officer may be subject to an action when he or she has been guilty of dishonesty, gross negligence, malicious or wilful misconduct, libel or slander. A municipal public officer would also be liable for any criminal or quasi-criminal offences except in very limited circumstances. (See section 287.2 of the *LGA*.) In the Alberta case of *Remmers v. Lipinski* (2000), 262 A.R. 295 (Q.B), affirmed on appeal (2001), A.R. 156 (C.A.), the Court of Appeal found a municipal administrator grossly negligent in performing his statutory duty to supervise a treasurer who had become involved in fraudulent investment of municipal funds. The administrator was held personally liable for \$2.3 million in damages.

Municipal officers can be indemnified for the consequences of their lawful acts, which is significant because legal fees and other costs may be considerable even where no liability exists. Municipal councils and regional boards have authority under section 287.2 to vote to provide an indemnity after the fact. This power only extends to strict or absolute liability offences, in which liability is incurred once the victim suffers damage, regardless of the intent of the person responsible. Consequently, where the officer intended the consequences of his or her act, the municipality cannot indemnify the officer.

In most cases the municipality will be liable for the damages caused by conduct of a municipal official that results in a claim against the municipality. The municipality can only seek an indemnity against the municipal official for claims of damages in cases where the municipal official was found to be dishonest, grossly negligent, or malicious or wilful in his or her misconduct.

7.2.5. Limitation Periods

For years, there were two lines of authority from the B.C. Supreme Court with respect to the application of the six-month limitation period to commence legal proceedings against local governments, established under s. 285 of the *Local Government Act*.

The first line of authority interpreted s. 285 broadly and held that the limitation period established under s. 285 applied to all local government action for which there is specific statutory authority. The second line of authority interpreted s. 285 on a narrow and literal reading and held that the limitation period applied only to local government action that was unlawful as a result of failure by the local government to satisfy specific statutory requirements.

In the companion cases of *Gringmuth v. North Vancouver* and *Pausche v. Maple Ridge* (2002), 98 B.C.L.R. (3d) 132, the Court of Appeal considered the scope of the six month limitation period established under s. 285 of the *Local Government Act* and clarified the application of that limitation period.

In *Gringmuth* and *Pausche*, the Court of Appeal held that the narrow and literal reading of s. 285 adopted in the second line of authorities in the Supreme Court was the appropriate interpretation of s. 285. The Court, after considering both lines of authorities from the Supreme Court, held that the proper question to ask is whether, if the local government had complied with the existing statute law when it caused injury to the plaintiff, it could have done the harm lawfully (i.e., in accordance with the statute). If so, the limitation period of six months would be applicable. In this regard, the Court provided the example of a local government acting under a deficient expropriation bylaw as being a situation where the limitation period under s. 285 of the *Local Government Act* would be applicable.

Local governments should note that given the narrow and literal approach to s. 285, the Court of Appeal stated that it could not conceive of a case in which the limitation period established under s. 285 would be applicable in respect of a breach of a private or common law duty of care (i.e., in a case of negligence).

As a result of these decisions, it now appears that the courts will apply the limitation periods under the *Limitation Act* to the majority of claims made against local governments. In general, these limitation periods are two years for tort claims (e.g. negligence and nuisance) and six years for contract claims (e.g. breach of contract). However, a recent overhaul of the *Limitation Act* will result in significant changes to limitation periods – tort claims and breach of contract claims will both be subject to 2 year limitation periods. The *LGA* provisions (ss. 285 and 286) are unaffected by the new *Limitation Act*, which is set to come into force sometime in 2013.

7.3. Bylaw Enforcement

Section 260 of the *Community Charter* provides three distinct means of enforcing local government bylaws: both permanent and interlocutory injunction proceedings, in Supreme Court; quasi-criminal proceedings (prosecutions) in Provincial Court; and direct enforcement.

In selecting the appropriate form of enforcement procedure, several factors must be considered including the nature of the apparent violation and its seriousness; the cost of proceedings; the goal sought to be achieved by the local government (for example, fine or court order); and the urgency of the problem. It is important to note that local governments are not limited to any one of these options and may run different enforcement actions concurrently.

Until recently, local governments were able to demand entry to and inspect private residences for the purpose of investigating compliance with bylaws without requiring a warrant. In *Arkininstall v. Surrey (City)*, 2010 BCCA 250, the Court of Appeal significantly narrowed the circumstances in which this practice could continue. The Court of Appeal's decision suggests that local governments may no longer be able to demand entry to a residence that has been chosen for inspection because of an alleged bylaw contravention, unless the local government first obtains an entry warrant under section 16 of the *Community Charter* and / or section 268 of the *Local Government Act*. In determining whether or not an entry warrant is required, the Court may consider the level of privacy expected, the intrusiveness of the search, the stigma associated with the search, and the feasibility and practicality of obtaining an entry warrant. However, the Court of Appeal did state that an entry warrant is not required for an inspection in the context of a minimally intrusive spot-check in which a warrant would serve no function.

7.3.1. Injunctions

An injunction is a court order directing a person to do, or not to do, a specified act. Local governments gain their authority to enforce their bylaws, or a provision of their enabling Act, by civil proceedings (i.e., injunctions) pursuant to sections 274 of the *Community Charter*.

While injunction proceedings continue to be an option under the *Community Charter*, the distinction previously drawn by the *Local Government Act* between the enforcement of bylaws dealing with the construction and use of buildings and the use of land, on the one hand, and bylaws generally, has been removed.

The great majority of law relating to injunctions is case law. The burden of proof in injunctive proceedings requires the local government to prove, on a balance of probabilities, a breach of the bylaw. An injunction has traditionally been discretionary and the courts have been unwilling to grant an injunction where the person seeking the

order does not have "clean hands." In this regard, although the civil standard of proof on the balance of probabilities applies to injunctive proceedings, an injunction to enforce a bylaw has not been granted by the courts despite the fact that a breach of the bylaw had been proven where it was also proven that the local government had misled, or otherwise unfairly treated, the defendant. In recent years, the courts have moved away from applying "equitable standards" to the granting of injunctions to enforce local government bylaws.

In the case of *Maple Ridge (District) v. Thornhill Aggregates Ltd.* (1998), 47 M.P.L.R. (2d) 249 (B.C.C.A.), the B.C. Court of Appeal stated that:

Where an injunction is sought to enforce a public right, the courts will be reluctant to refuse it on discretionary grounds. To the extent that the appellant may suffer hardship from the imposition and enforcement of an injunction, that will not outweigh the public interest in having the law obeyed.

Interlocutory injunctions are injunctions that may be obtained during the interval between commencement of legal proceedings and the time of the trial. The burden of proof on interlocutory injunction proceedings requires that there is, at least, a reasonable question to be tried regarding a breach of the bylaw. Since an interlocutory injunction is an extraordinary remedy where a person is directed to do, or not to do, a thing prior to any finding of fault being made by the court, the party seeking an interlocutory injunction must generally give an undertaking to the court to pay damages suffered by the enjoined party if the case for the permanent injunction is not successful.

7.3.2. Prosecutions

Constitutionally, criminal law is a federal matter and thus true criminal offences are established in the federal *Criminal Code*. However, local governments have the right to enforce their laws as part of their law-making jurisdiction. In British Columbia, the Legislature has enacted the *Offence Act* to set out the procedure to be followed in prosecuting "quasi-criminal" acts against the state at the provincial or municipal level.

There are three general provisions that make the contravention of a local government bylaw an offence: section 267 of the *Local Government Act*, section 260 of the *Community Charter* and section 5 of the *Offence Act*. Most bylaws also contain a provision reiterating that doing something prohibited by the bylaw, or failing to do something required by the bylaw, constitutes an offence.

Prosecution proceedings are not commenced until an "information" under the *Offence Act* has been sworn. Although many local governments employ "bylaw violation notices" for bylaw violations, such notices are not enforceable except as specifically provided for by statute. However, it is legitimate for local governments to issue such notices and to

accept voluntary payments: *McCutcheon v. Toronto (City)* (1983), 22 M.P.L.R. 139 (Ont. H.C.J.); *R. v. Bonsall* (1989), Unreported, Van. Reg. CC890344 (B.C. Co. Ct.)

An alternate method to commence an information is through the municipal ticket information (“MTI”). The *Community Charter Enforcement Ticket Regulation* specifies that bylaws prescribing offences for firearms and speed limits cannot be enforced by an MTI under section 264 of the *Community Charter*. Once a bylaw has been designated for enforcement by MTI, subsections 263(1) and (2) of the *Community Charter* allow a “bylaw enforcement officer” to commence prosecution by means of a ticket. To qualify as a “bylaw enforcement officer”, a person must be designated by the Council or Board in a bylaw adopted under s.264(1)(b) of the *Community Charter*.

The distinctive feature of the MTI system is that the initial ticket information need not be prepared under oath or presented to a Justice of the Peace for approval; it is simply served on the accused person. Since August of 2007, the *Community Statutes Amendment Act, 2007* has made it easier for local governments to deem people guilty of bylaw offences. Under the new provisions, if a person fails to respond to a bylaw ticket, the person is automatically deemed to have pleaded guilty to the offence for which the ticket was issued. This means the fine amount on the ticket will be immediately payable to the local government. The amendments end the old requirement that a local government had to prepare an Affidavit of No Response and submit the ticket and affidavit for court approval. The new provisions also mean that the form for all municipal tickets has changed. The new forms are found in the *Community Charter Bylaw Enforcement Ticket Regulation*.

7.3.3. Local Government Bylaw Notice Enforcement Act

The *Local Government Bylaw Notice Enforcement Act* has added enforcement options to those that existed under the *Local Government Act* and the *Community Charter*. The *Local Government Bylaw Notice Enforcement Act* only applies to local governments designated by the Lieutenant Governor in Council. As of June 2012, the Act applied to approximately 57 local governments located throughout the province. The new adjudication scheme is expected to be simpler and more cost-effective. The two main features of the new *Local Government Bylaw Notice Enforcement Act* are a simple “front-end” process for initiating enforcement through the issuance of a bylaw notice and a local government forum for the adjudication of bylaw notice disputes, which replaces the Provincial Courts as the venue for resolving disputes.

A local government may designate bylaw contraventions that can be dealt with by means of a bylaw notice, which is a singular ticket that does not need to be delivered personally. All contraventions of bylaws may be enforced by local government bylaw notice, with the exception of bylaws relating to firearms and motor vehicles (section 3 of the *Bylaw Notice Enforcement Regulation*, B.C. Reg. 175/2004). An individual receiving a bylaw notice has the option to pay the penalty or request dispute adjudication. If a screening

officer is appointed by the local government they will review the bylaw notice and cancel it, confirm it, or enter into a compliance agreement with the individual. A compliance agreement is an alternative means of resolving the bylaw notice, and if the agreement is observed the bylaw notice is considered paid. If the screening officer does not resolve the matter, or the terms of the bylaw notice or compliance agreement are in dispute, then a local government may establish a bylaw notice dispute adjudication system.

The local government dispute adjudication system is made up of individuals from a roster of qualified dispute adjudicators who have taken an oath and are not government employees. The adjudication procedure is on an informal basis, legal representation is optional, the rules of evidence do not apply, and matters are decided on a balance of probabilities instead of beyond a reasonable doubt. The hearing must be open to the public and a determination is final and not subject to appeal.

In the discussions leading to the adoption of the *Local Government Bylaw Notice Enforcement Act*, local governments were concerned about the collection of outstanding fine debts and the cost of running the dispute adjudication system. Part 4 of the *Act* deals with the collection of bylaw notice penalties and if there is no response to a bylaw notice, the local government must first re-deliver a notice. Once a copy of the bylaw notice is delivered and the individual has not paid or met the requirements of the dispute adjudication process then the penalty is immediately due to the local government and may be recovered by filing a certificate in the Provincial Court within two years. A local government is responsible for the administrative work and costs, the remuneration and expenses of adjudicators, and the cost of administering a roster of adjudicators in the dispute adjudication system.

7.3.3. Direct Enforcement

Direct enforcement involves carrying out enforcement remedies (such as demolishing buildings or adding charges to municipal taxes) without the authorization of a court decision. Because direct enforcement involves punishing an offender or taking remedial action where there is no formal proof of guilt, local government must be careful in the manner in which they take direct action. Substantial damages may follow if it turns out that direct enforcement was unjustified.

The general direct enforcement power is set out in section 269 of the *Local Government Act* and section 17 of the *Community Charter*. In addition to the general direct enforcement powers, the governing legislation contains a number of specific direct enforcement powers including:

- Section 283 of the *Local Government Act* -- to recover gas, electricity, or water rates by distress and sale of personal property.

- Section 258 of the *Community Charter* -- special fees may be collected as property taxes.
- Section 252 of the *Community Charter* -- allows for the general remedy of distress to be used to collect taxes.
- Section 73(2) of the *Community Charter* -- to authorize remedial action requirements in respect of buildings and structures which contravene a bylaw or which council believes to create an unsafe condition.
- Section 57 of the *Community Charter* -- to file a notice on title to land, where the owner has allegedly not complied with the building regulation bylaw in given circumstances.
- Section 707 of the *Local Government Act* and section 48 of the *Community Charter* -- powers to seize, impound and destroy animals.
- Section 725(d), (e) and (f) of the *Local Government Act* and section 64(k), (e) and (i) of the *Community Charter* -- to force removal of graffiti, rubbish, weeds and insects.
- Section 74(1)(a) of the *Community Charter* -- to declare that buildings, structures and other things constitute a nuisance and to impose a remedial action requirement.

In most cases where direct enforcement is contemplated, the person affected must be given notice and an opportunity to be heard by the elected body Council before the decision to enforce directly is made. Where notice requirements are included in the statute, they must be strictly observed: See *Delta (District) v. Hartnett*, [1988] B.C.J. no. 1891 (S.C.) (QL).

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