Civic Legal LLP

Liability Claims for Ineffective Enforcement - What's Scary and What's a Scare Tactic

Presented at MIABC Risk Management Conference, April 6, 2023

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I. INTRODUCTION

Local governments regularly receive complaints from members of the public regarding non-compliance with local bylaws. While complainants usually expect the local government to take enforcement action in response to their concerns, from time to time a complainant will also warn that they will hold the local government liable if effective enforcement action is not promptly taken. Similarly, staff and elected officials may also raise concerns that the local government will be sued if someone is hurt or suffers a loss in connection to an ongoing bylaw contravention. It can be difficult to distinguish the situations in which liability is a real legal concern from those in which claims of potential liability are overblown and used to scare local governments into prioritizing a particular enforcement action. This paper discusses the legal principles that relate to the duties and discretions of a local government in conducting bylaw enforcement and how the risk of a successful claim being proven in court in relation to ineffective enforcement can depend significantly on where the contravention occurs.

II. DUTY TO ENFORCE BYLAWS GENERALLY VS. DISCRETION IN ENFORCING A BYLAW IN A PARTICULAR SITUATION

Under the *Community Charter*[1] and the *Local Government Act*,[2] local governments have the authority to regulate, prohibit and impose requirements through bylaws adopted in relation to a wide variety of matters. Local governments are under a general positive duty to enforce the bylaws they adopt. That is to say, a local government cannot resolve to completely and permanently stop all enforcement of a regulatory bylaw as that would be tantamount to attempting to repeal a bylaw by resolution.[3] However, at common law local governments do enjoy a broad discretion in determining how they choose to enforce their bylaws in response to particular contraventions. Examples of this discretion are shown when a local government chooses between a complaints-based investigation policy and an active investigation policy, or makes a choice among available enforcement options such as voluntary compliance, self-help remedies and commencing prosecutions or legal proceedings. The timing of enforcement action also reflects a discretion: does the local government wait for voluntary compliance or does it seek an immediate resolution?

The difference between a discretion to enforce and a duty to enforce is relevant to potential liability claims for non-enforcement because a person who is suing a local government in negligence must show that the local government owes them a duty of care in the circumstances. Proving a duty of care is not the whole story with a negligence claim. If there is a duty of care, the court will also consider whether the standard of care was met, whether there was a consequent loss that was not too remote and whether a residual policy concern affects the imposition of liability. As demonstrated by the case law discussed below, it is often challenging for the plaintiff to show that a local government's decisions regarding enforcement are subject to an established duty of care or have sufficient proximity and foreseeable harm to support a novel duty of care. Furthermore, such decisions regarding enforcement are often otherwise immune from liability as "core policy" decisions.

The general test for whether and when local government conduct is immune from negligence liability as a core policy decision was reviewed by the Supreme Court of Canada in *Nelson (City) v. Marchi*, 2021 SCC 41 [*Marchi*]. In *Marchi*, the local government decision at issue was not whether and how to exercise and enforce a bylaw but rather a decision as to how the municipality should clear snow from roads and sidewalks. The question of whether this was an operational decision or a core policy decision was relevant for determining whether the municipality was liable for injuries suffered by someone who had attempted to cross a snow pile created by the City's snow removal team in accordance with a City policy. In distinguishing core policy decisions from operational decisions, the Supreme Court of Canada in *Marchi* emphasized that "a sphere of government

[1] S.B.C. 2003, c. 26
[2] R.S.B.C. 2015, c. 1
[3] *Dusevic v. Columbia Shuswap (Regional District)* (1989), 44 M.P.L.R. 160

decision-making should remain free from judicial supervision based on the standard of care in negligence".[4] This sphere includes "decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors."[5]

An allegation by a plaintiff that a local government had a duty of care to take enforcement action can reflect a sentiment that a local government was legally obliged to "do something" about a particular bylaw contravention or is liable to compensate for losses for failing to "do enough". A similar sentiment is engaged when a member of the public seeks a *mandamus* order from the court compelling a local government to take enforcement action. In such cases, the complainant must show that the local government is required to take action to enforce the bylaw in a particular way. Although a member of the public may go to court alleging that a local government has failed to pursue the enforcement action that the person feels they were owed, generally the court has held that decisions involving choices among bylaw enforcement methods are discretionary matters of policy that should be left to the local government.

1. Mandamus orders

The court has recognized a local government's discretion in the enforcement of its bylaw in proceedings in which a private party has sought a *mandamus* order – an order of the court compelling a local government to take enforcement action. For example, in *Burke v. Sunshine Coast Regional District*, 2011 BCSC 1636 [*Burke*] the petitioner sought an order compelling a regional district to take enforcement action to prevent the petitioner's neighbours from operating a car repair business on their residentially-zoned property. Justice Burnyeat declined to issue such an order, finding:

> In reviewing the *Community Charter* which governs the [Regional] District, I am satisfied that the Court cannot require the enforcement of a bylaw of the District. Reviewing the *Community Charter*, the District may make bylaws (s. 260), may establish penalties (s. 263), and may enjoin an action after a conviction has been entered (s. 263(1)).[6] However, there is no requirement that the District do any of those acts. The provisions are permissive. In the absence of a requirement under the *Community Charter* that the District undertake a particular action, the Court is not in a position to require them to do so. Rather, it is left in the discretion of the District to decide whether they are going to enact a bylaw. After a bylaw has been enacted, it is within the discretion of the District as to whether they will prosecute under that bylaw.

[4] *Marchi* at para 2
[5] *Marchi* at para 2
[6] These regional district powers are set out in Part 12, Division 1 of the *Local Government Act*

> As counsel for the District has stated, there are a number of matters which go to exercising that discretion, including budgetary constraints and the evidence available. In that regard, the District states that it does not have the necessary evidence to result in a successful enforcement of Bylaw 310 against Mr. Linder and Ms. Revell. I am not in a position to "second guess" that decision. It is up to the District to decide whether it will prosecute or not, just as it is up to the electorate to decide who will be on the Council of the District.
>
> In the absence of evidence of bad faith, it is not available to the Court to review the decision taken by the District. Bad faith is not alleged here. The enforcement of a bylaw is a matter of discretion. The Court cannot force the District to enforce its bylaw in the absence of a requirement that the District is required at law to do so. I cannot find that here.[7]

The court's recognition of a local government's discretion to enforce its bylaws in *Burke* showed it was cognizant of the variety of public policy considerations that a local government must take into account in pursuing a particular enforcement remedy. If the court was to order a local government to take certain enforcement action, such as the commencement of injunctive proceedings, and to order that the local government obtain a result by a particular time, the court would likely be taking very significant administrative and budgetary decisions out of the hands of elected officials. The court would also be doing so at the urging of one resident or a group of residents whose preferences regarding what the local government should do might not be shared by the electorate.

2. Negligence claims

The finding of no common law duty of care that requires a local government ensure effective enforcement of a bylaw in a particular circumstance has also precluded claims of negligence against local governments. In *Westcoast Landfill Diversion Corp. v. Cowichan Valley (Regional District)*, 2009 BCSC 53 [*Westcoast Landfill*], a commercial compost facility operator complained that a regional district's failure to enforce a bylaw regarding waste disposal resulted in the operator receiving much lower compost volumes than expected. The court rejected the claims regarding negligent enforcement of bylaws, with Justice Shabbits holding:

> The enforcement of Bylaw No. 2108 was at CVRD's discretion. Its enforcement was a matter of policy. CVRD enforced the bylaw in good faith and in the public interest. Its objective was to enforce in a manner that achieved the cooperation of the public and maximum compliance. I find that Westcoast has no cause of action against

[7] *Burke* at paras. 7 to 9

> CVRD for its alleged failure to enforce the bylaw. CVRD owed Westcoast no duty of care in the enforcement of the bylaw.[8]

In *Westcoast Landfill*, the court cited the case of *Froese v. Hik* (1993), 78 B.C.L.R. (2d) 289 (S.C.) [*Froese*]. *Froese* involved a permit issued by the District of Matsqui to an individual, which allowed him to remove gravel under the municipality's soil removal and deposit bylaw. The bylaw required the permittee to perform certain restorative work to the lands after the soil's removal. The plaintiffs, who owned land from which gravel had been removed, complained that this restorative work was incomplete and that the District of Matsqui had failed to require anything be done further despite obligations imposed on the permittee by bylaw. The court dismissed the plaintiff's claim against the municipality for negligent enforcement of its bylaw, with Justice Shabbits commenting:

> The bottom-line of this unfortunate saga is that the reliance of Mr. and Mrs. Froese on Matsqui's regulatory scheme was misplaced. Municipalities do not insure or guarantee everything included in applications filed to obtain permits under regulatory schemes. They do not even insure or guarantee compliance with by-laws, unless the by-law or the enactment authorizing that by-law creates a statutory duty to enforce some or all of its provisions.[9]

The exceptional circumstances of a bylaw creating a statutory duty referred to in *Froese* are discussed in further detail later in this paper.

3. Claims in nuisance

Plaintiffs who complain about the consequences of ineffective or unenforced bylaws have also framed their claims against local governments in the tort of nuisance. In *Lebourdais v. British Columbia (Public Guardian and Trustee)*, 2022 BCSC 281 [*Lebourdais*], the plaintiff sued a number of parties with regard to damage caused by a flood. The plaintiff claimed that the flood was caused by a concrete slab falling into and blocking a creek and alleged that the Thompson Nicola Regional District had taken ineffective enforcement action to prevent such construction within a setback imposed by bylaw. In the *Lebourdais* case, a plaintiff complained that a regional district had identified that unlawful construction had occurred on a property, but responded by only registering a *Community Charter*, s. 57 notice. The regional district declined to commence legal proceedings. The court struck the plaintiff's claims in both negligence and nuisance against the regional district. With regard to the claim of nuisance, Justice G.C. Weatherill held:

> The plaintiff has plead that the other defendants were responsible for constructing, approving, and maintaining the 2012 Crossing. There is no plea that the TNRD had

[8] *Westcoast Landfill* at para 361
[9] *Froese* at para 46

> any involvement in the approval, design, or construction of the 2012 Crossing. Rather, the allegation is that the TNRD "could have foreseen" and "did foresee" the potential for the 2012 Crossing to cause a nuisance in the future and that it failed to take steps to abate it.
>
> The plaintiff has provided no authority for the proposition that a claim in nuisance can arise against a government body for failing to take steps to abate a potential hazard resulting from the actions of others.
>
> In my view, it is plain and obvious that the plaintiff's claim in nuisance in respect of the 2012 Crossing has no prospect of success and should be dismissed.[10]

Similarly, in *Anmore Development Corp. v. Burnaby (City)* 2005 BCSC 1477 [*Anmore*] , a claim in nuisance against the City of Burnaby was dismissed on the basis that it was insufficient to simply allege that the City could have taken more action to prevent a nuisance from occurring. *Anmore* involved the sloughing of a waste pile and Justice Bennett summarized the claim against the City as follows:

> Anmore also claims against the City for nuisance for failing to stop Ech-Tech and the Thandis when it had the ability to do so.
>
> Anmore submits that the City adopted the waste pile that was created on its lands by allowing it to continue and by failing to take reasonable steps to bring the nuisance to an end.
>
> First, as noted above, it has not been established that waste fell onto Anmore lands from City lands. Given the situation of the properties, it is more likely that the new debris on the Anmore lands came from the Thandi lands.
>
> Anmore states that the City could have stopped Ech-Tech. This is true. However, Anmore also had legal rights that it could enforce against the Thandis and Ech-Tech. Anmore, like the City, reasonably relied on the representations that the waste would be cleaned up. When it was clear that it would not be cleaned up, the City took action to have the waste cleaned up.
>
> Further, a municipality cannot be held liable for not enforcing a bylaw violation unless it does so in bad faith.[11]

Although the City might have been liable had the waste emanated from City-owned lands, in the case of a spillage emanating from private lands, the City was not responsible for the nuisance. The

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[10] *Lebourdais* at paras 46 to 48

[11] *Anmore Development Corp. v. Burnaby (City)* 2005 BCSC 1477 at paras 137 to 141

fact that the City could have (potentially) stopped the spillage through enforcement action did not mean that the City shared in liability for the nuisance.

III. LIMITS TO THE DISCRETION TO ENFORCE

It is important to emphasize that this paper's discussion of the discretion to enforce is limited to decisions that are reasonable and made in "good faith" in circumstances in which there is no statutory duty to take enforcement action. The discretion to enforce relates to decisions about whether to take enforcement action, what type of action and when. Enforcement action that is taken, must still be done with reasonable care. Where a limit on the discretion is allegedly engaged, the court will typically review the applicable legislation and the steps taken by the local government to determine whether the decisions and actions warrant judicial scrutiny.

1. Statutory duty or other duty of care to a regulated party

A local government's discretion with regard to whether, when and how to enforce against a bylaw contravention does not apply when a statute imposes an express positive duty that requires enforcement by the regulator. This duty can also be self-imposed on a local government by its own bylaw. The wording of the statute or the bylaw is not the only consideration of the court when determining whether a regulator has a duty of care to a plaintiff. A statutory regulatory regime could also create a relationship that is sufficiently proximate such that a novel duty of care could arise under the "*Anns/Cooper* test" described in *Marchi*, subject to residual policy concerns that would negate a duty of care.[12] This novel duty of care would be an exception to the general conclusions of no-duty-of-care-to-anyone-to-enforce-bylaws made by the court in *Westcoast Landfill* and *Froese.*

In *Waterway Houseboats Ltd. v. British Columbia*, 2020 BCCA 378 [*Waterway Houseboats*], Justice Butler and Justice Abrioux for the Court of Appeal provided the following summary of the proximity analysis in a case that raised the question of whether the Province had a duty of care to certain plaintiffs under the [former] *Water Act*:[13]

> There are two stages to the proximity analysis when determining whether a duty of care is owed by a government regulator. At the first stage, the task is to determine whether the statutory scheme discloses a legislative intention to exclude or confer a private law duty of care. At the second stage, if the legislation is not determinative, courts must look to the interaction between the regulator and the

[12] *Marchi* at paras. 17-19
[13] R.S.B.C. 1996, c. 483

> plaintiff to determine whether a sufficiently close and direct relationship exists to impose a prima facie duty of care.[14]

The Court of Appeal in *Waterway Houseboats* also held that if the legislative scheme is not determinative, then the court should consider the fact-specific circumstances of the interactions between the regulator and the plaintiff to determine if a close and direct relationship exists sufficient to establish proximity. This includes a consideration of relationships involving physical closeness, direct relationships or interactions, or the assumption of responsibility; or may turn on expectations, representations, reliance, or the nature of property or other interests involved.

Some examples of when a regulator might create or be placed in a sufficiently proximate relationship include when the regulator:

> 1) steps outside the role of regulator, and assumes the role of designer of the thing that has caused the loss;[15]
>
> 2) acquires knowledge of serious and specific risks to the person or property of a clearly defined group that the statutory scheme was intended to protect;[16]
>
> 3) makes a specific misrepresentation to the regulated party - apart from a regulatory statement - that invites reliance;[17] and
>
> 4) the regulator and the regulated party interact in such a way as to give rise to a clear expectation that the regulator will consider the interests of the regulated party.[18]

These relationships between the regulator and the regulated party are all defined in the abstract, but they can still be distinguished from the general duty of a local government to enact and enforce bylaws in the public interest. This latter general duty affords the local government, at common law, discretion as to what bylaws to adopt, what steps to take to enforce them and the timing of the enforcement action. The concern that the *Waterway Houseboats* analysis potentially raises, is that where a bylaw is adopted to regulate for the benefit of a particular class of persons, then this increases the likelihood of a private law duty of care being created.

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[14] *Waterway Houseboats* at para 243

[15] See *Imperial Metals Corporation v. Knight Piésold Ltd.*, 2018 BCSC 1191

[16] See *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5

[17] See *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42; *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 (S.C.C.)

[18] See Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General), 2015 BCCA 163

2. Bad faith and other unreasonable enforcement decisions

The common law recognizes that local governments owe a duty of good faith decision-making to the public as a whole. While local governments generally have discretion in deciding what enforcement action to take with respect to its bylaws when responding to a contravention, the decision of the local government must be made in good faith. An enforcement decision made in bad faith, if proven, will expose a local government to a potential claim for damages from an injured party.

What might constitute bad faith decision-making is highly fact specific. The Court of Appeal in *MacMillan Bloedel Ltd. v. Galiano Island Local Trust Committee* (1995), 126 D.L.R. (4th) 449 (BCCA) canvassed a laundry list of conduct that could be considered bad faith. These included dishonesty, fraud, bias, conflict of interest, discrimination, abuse of power, corruption, oppression, unfairness, unreasonable conduct as well as conduct based on an improper motive, or undertaken for an improper, indirect or ulterior purpose.

The case of *Davis. v. Royal Bank of Canada*, 2016 BCSC 1993 [*Davis*] provides an example of an allegation of bad faith in a negligence claim, albeit an unsuccessful one.[19] The case involved a residential property in the District of Sechelt that was foreclosed upon by the Royal Bank of Canada. The plaintiff's property was sold by the bank, but the sale price was insufficient to cover the plaintiff's mortgage balance. The plaintiff sued multiple parties, including the District of Sechelt. The claims against the other parties including the bank were struck at a preliminary stage of the action for showing no triable issue, however, the claim against the District went to trial. The plaintiff claimed that a decision by the District of Sechelt to not take enforcement action against a neighbouring unsightly premises had reduced the value of the plaintiff's property sold through foreclosure. The court found at a pre-trial hearing that the allegation that: "[t]e plaintiff filed a complaint with the District of Sechelt who did not take the matter seriously causing a loss to my home"[20] raised the issue of bad faith.

At trial, the court in *Davis* reviewed the actions taken and not taken by the District, with Justice McEwan concluding:

> Having reviewed the evidence, it cannot really be said that the District did not take the matter seriously. It expended considerable time and effort to try to get the situation to improve. It took advice on its options and never did see a way to do something more decisive. The context involved a balance between individual property rights and the rights of members of the community to the standards set out in the bylaw. The District was always walking a line between what it was

[19] See also *Grosz v. Royal Trust Corporation of Canada*, 2020 BCSC 128

[20] *Davis* at para 8

> authorized to do, and what would amount to actions in excess of its authority. All of its activities in this regard were undertaken in the valid exercise of its objectives, disappointing as those efforts were to the plaintiff. There was, however, nothing in the behaviour of the District that could be described as bad faith. On that basis the plaintiff's claims must be dismissed.[21]

The plaintiff has the onus of proving the local government acted in bad faith in the enforcement of its bylaw. This is a high hurdle for the plaintiff to overcome. The court has rejected the suggestion that it is evidence of bad faith if a local government has taken enforcement action against one property while contraventions continue to exist unchallenged on other properties (*Polai v. Toronto (City)*, [1973] S.C.R. 38; *Whistler Services Park Ltd. v. Whistler (Resort Municipality)* (1990), 50 M.P.L.R. 233 (B.C.S.C.)). From a practical perspective, if a local government is going to tackle multiple bylaw contraventions, it must start somewhere. Seeking to take equal enforcement action against every offender concurrently would likely be an extremely costly and complicated undertaking.

3. Negligence during the implementation of the enforcement scheme

The court has held that despite a local government having the discretion in the enforcement of a bylaw, the local government has a duty to exercise reasonable care in the implementation of its bylaw enforcement regime.[22] This duty presumably describes the lower level "on the ground" decisions that are the operational side of enforcement. However, it is often very difficult to separate the operational decisions from the policy decisions when the claim is that a bylaw could have been more effectively enforced. For example, the fact that a municipal bylaw enforcement officer assigns a high priority to responding to an alleged bylaw contravention may not result in effective enforcement if the municipal council declines to authorize court proceedings to obtain an injunction. Similarly, if a municipal bylaw department is slow to respond to every complaint because it is understaffed, is a failure to respond promptly to a particular complaint reflective of a low-level (staff) operational failure or a high-level (council) budgetary decision?

Assessing what this duty of reasonable care is, as distinct from discretionary enforcement can be challenging as noted by Justice Huddart in *Froese* when considering the District of Matsqui's implementation of a soil removal permitting scheme:

> But a breach of the duty of reasonable care cannot be decided in a vacuum. In the circumstances of this case, I find myself in some difficulty in considering the nature and extent of that duty. It is difficult to discern from the statement of claim what Matsqui is alleged to have done or failed to do in breach of its duty of reasonable

[21] *Davis* at para 21
[22] *Froese* at para 38

> care in the implementation of its by-law. The proposed pleadings say only that Matsqui failed to ensure that Mr. Hik complied fully and properly with the by-law, the permit, and the drawings and specifications. I have already indicated that a deliberate decision about enforcement made in good faith does not of itself constitute a breach of the duty of reasonable care.[23]

A more robust assessment of what a municipality did or did not do in enforcing a bylaw was undertaken in *Butterman v. Richmond (City)*, 2013 BCSC 423 [*Butterman*]. Although the court recognized that "the jurisprudence establishes that the City is afforded broad discretion to determine how it will enforce its own bylaws", the court nevertheless reviewed the evidence to assess the plaintiff's claims that her dog would not have been bitten by two "dangerous dogs" if, as the plaintiff alleged, the City of Richmond and its contractor, the Richmond Animal Protection Society, had done more to investigate the dogs' risk to the public earlier, had located the dogs and had seized them under the *Community Charter* . The court's review of the evidence included assessing whether the taking or not taking of multiple enforcement related steps was reasonable. The court found that the defendants acted reasonably, with Justice Bernard holding:

> Having regard to the foregoing, I am satisfied that the steps taken by Mr. Burnham [the animal control officer] to locate Mr. Meir [the owner of the dangerous dogs] were reasonable, in all the circumstances. Mr. Burnham acted quickly upon receipt of the German complaint and he explored all reasonable avenues in his efforts to locate Mr. Meir, including the City's records. Even if there were other potential avenues available to him, I am satisfied that neither the nature of the complaint nor an awareness of the dogs' history would have made it reasonable for him to take them. Such would have amounted to extraordinary steps not warranted in all the circumstances. Similarly, I am not persuaded that the City would have investigated the matter differently.
>
> Even if Mr. Meir and his [dangerous] dogs were found within the 18-day period between the German report and the Butterman incident, I am not persuaded that the Butterman incident would have been averted. Aside from the very limited time frame, s. 49(2) of the *Community Charter* only permits seizure in specific circumstances which, unquestionably, did not exist here. This provision requires that an animal control officer may seize a dog only if the officer believes, on reasonable grounds, that the dog: (a) has killed or seriously injured a person; (b) has killed or seriously injured a domestic animal, while in a public place or while on private property, other than property owned or occupied by the person responsible

[23] *Froese* at para 40

> for the dog; or, (c) is likely to kill or seriously injure a person. Virtually the same grounds must exist before a Justice may issue a warrant to seize a dog.[24]

Although the City and the animal protection society were found to have acted reasonably, the question is nevertheless raised: if the City's investigation had alerted the City to circumstances that would justify a seizure of the dogs under section 49 of the *Community Charter*, would the court have found that "reasonable care" required the City to take steps to seize the dog, or would seizure remain among the potential enforcement options from which the City retains a discretion to choose?

IV. CONTRAVENTIONS OCCURING ON PRIVATE PROPERTY

The decisions discussed above regarding the discretion to enforce typically involve a contravention occurring on private property. Given the breadth of regulatory powers held by local governments there are various circumstances in which a person might claim that if a municipality had done a better job of enforcement, then the loss or harm that the person suffered would have been avoided or reduced. This connection is usually insufficient to establish the requisite duty of care necessary to advance a legal claim, although there is a historic exception in the jurisprudence with respect to identified failures by local governments to enforce building regulations through building permit regimes.

1. Bylaw contraventions on private property that are a community concern

British Columbia courts have considered a number of cases in which residents complained about disturbances caused by local activities and in which they sought relief that would require the local government to take enforcement action.

In *Dusevic v. Columbia Shuswap (Regional District)* (1989), 44 M.P.L.R. 160 (B.C.S.C.) [*Dusevic*], the petitioners sought an order compelling a regional district to exercise its powers to restrain a noisy heli-skiing operation that the petitioners said contravened the regional district's land use bylaw. The petitioners were dissatisfied with the regional district's decision not to enforce its land use bylaw pending an active rezoning application. The court dismissed the petition after finding that the regional district was not required to take enforcement action:

> The by-law in the case at Bar is silent on the question of enforcement. In this statutory vacuum the existence of a duty to enforce must be determined according to the common law, which seems to dictate that the responsibility for by-law enforcement is in fact no more than a "power" and is therefore discretionary.
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> ...

[24] *Butterman* at paras 48 to 49

> I find that the regional district considered the question of whether to enforce the by-law and made a policy decision not to enforce it, pending the outcome of the rezoning application. Section 751 of the *Municipal Act* [now section 420 of the *Local Government Act*] gives the regional district a discretion and the Courts should not interfere with the clear intention of the Legislature.[25]

In *Rimmer v. North Cowichan (Municipality)*, 2018 BCSC 1750 [*Rimmer*] the court considered whether residents could, by notice of civil claim, seek an order compelling a municipality to enforce its bylaws to prevent the operation of a noisy racetrack. The court declined to issue such an order with Justice Macintosh holding:

> The Plaintiffs are asking the Court, in their requested declarations, to interpret the two Bylaws differently from how the Municipality interprets them. In the other two paragraphs, paragraphs 2 and 4, the Plaintiffs are asking the Court to enforce compliance with the Bylaws on the Plaintiffs' behalf. The Municipality's position, noted earlier, is that the other Defendants are not violating the Bylaws. The Municipality is not intending to enforce the Bylaws as the Plaintiffs would like, or any differently from how they are being administered by the Municipality at present. The only reason the Municipality is a party is because of this fact, that the Plaintiffs are seeking enforcement of the Bylaws contrary to how the Municipality is deciding to apply them.[26]

The *Rimmer* decision, like *Burke*, discussed previously in this paper, contains a frank recognition of the plaintiffs' displeasure with administrative decisions made by their local government and an example of the court actions that may be taken against local governments by aggrieved members of the public as a result. These cases demonstrate that the court will generally defer to a local government's discretion on enforcement, subject of course to the previously described limits to that discretion.

2. Bylaw contraventions creating unsafe conditions

The question of whether a local government owes a person a duty of care to effectively enforce its bylaws has an added tension where the contravention causes or creates an unsafe condition and a risk to health and safety. Sympathy for a person who is injured or who has sustained property damage, allegedly as a result of non-enforcement of a bylaw, may embolden an argument that the local government was obliged to have done more to prevent loss.

While the *Lebourdais* case provides one example regarding property damage from allegedly ineffective enforcement of a bylaw in the municipal context, a recent post-*Marchi* decision

[25] *Dusevic* at paras. 14 to 15
[26] *Rimmer* at para 8

involving the federal government illustrates that exercising a regulatory power that is intended to protect the general public from dangerous situations does not alone equate to a private law duty of care to protect an individual from a particular risk. In the case of *Canada (Attorney General) v. Frazier*, 2022 BCCA 379,[27] the British Columbia Court of Appeal struck the damages claim made by a plaintiff against the federal government in relation to the enforcement of explosives regulations.

The plaintiff claimed that she had been injured by an explosion that occurred at a residence near a business she was visiting. The plaintiff's claim was essentially that the Minister responsible for the *Explosives Act*, R.S.C. 1985 c. E-17 "knew or ought to have known the explosives located at the residence were a risk to public safety and could cause serious injury and loss to persons and/or property" and "failed to supervise or protect or adequately supervise and protect the Plaintiff from harm."[28] The plaintiff alleged numerous failures by the Minister in regulating, inspecting and protecting against the risk of explosion on private property.

The federal government applied to strike the claim as disclosing no reasonable claim. With such an application, the court is obliged to assume all the alleged facts in the pleading are true, including in this case the claim that the Minister knew about the risk to public safety and failed to protect the plaintiff from the explosion. The British Columbia Supreme Court declined to strike the claim, finding that there was an arguable case for a novel duty of care. That decision was reversed on appeal. In striking the claim, the Court of Appeal found that even though the statutory scheme regarding explosives regulation had the purpose of protecting the public, it was not intended to create a private law duty of care to the plaintiff. The Court of Appeal applied the first stage of the *Waterway* analysis and found that the legislation was determinative of this question:

> Turning to the statutory scheme, we agree with the judge that the purpose of the scheme is to protect the safety of the general public by regulating the use of a dangerous commodity: *Frazier* at para. 16, citing *R. v. O'Connor* [1979], 63 C.C.C. (2d) 430, 1979 CanLII 2949 (Ont. C.J.).
>
> Under the *Explosives Act*, the Minister has the authority to issue licenses, permits, and certificates: ss. 7 and 9. Inspectors have discretionary authority to enter premises and conduct inspections where there are reasonable grounds to believe explosives are present, and impose conditions and directions, including prohibiting an operator from using any building, structure, or vehicle that the Minister considers to constitute a special danger: ss. 12, 14, 14.2. There is no statutory duty to inspect.

[27] This decision is subject to an application for leave to appeal to the Supreme Court of Canada at the time of writing

[28] *Canada (Attorney General) v. Frazier*, 2022 BCCA 379 [*Frazier*] at paras 7 and 8

...

> As the judge recognized, the legislative scheme exists to advance the public good in a general manner. It does not protect the private interests of an identifiable class of individuals. A statutory scheme aimed at promoting the public good does not generally provide sufficient basis to create proximity with individuals who are affected by the scheme. As stated in *Wu*, "[t]his is so, even if a potential claimant is a person who benefits from the proper implementation of the scheme": at para. 56. This general duty to the public weighs against a finding that the statutory scheme implies a private law duty because such a duty could prevent the state actor from effectively carrying out its duties to the general public: *Imperial Tobacco* at para. 47; *Syl Apps* at para. 28. Furthermore, the Minister is under no statutory duty to act.
>
> There is no indication in this legislative scheme that Parliament intended to create a private relationship of proximity between the regulator and individual members of the public. As recognized by the judge, the public purpose of the *Explosives Act* and *Explosives Regulation* and the absence of any positive legislative duty to act imposed on the regulator are factors that militate against a finding that Parliament intended to create private law duties.[29]

A similar conclusion would likely be reached with respect to a local government's power to impose remedial action requirements in response to an unsafe condition. Sections 72 and 73 of the *Community Charter* confer powers on every British Columbia municipal council and regional district board[30] that can be used to put an end to certain hazardous conditions on private property. These statutory powers permit a local government to make orders against either the owner or the occupier or both. The elected body of a local government may conclude that the public interest in matters of safety warrants such powers being exercised in a particular case, but in the absence of a statutory duty to act, those discretionary regulatory powers do not create a private law duty of care to prevent harm by those who might be injured by the unsafe condition.

Of course, this does not mean that elected officials of a local government should ignore a hazardous condition. Rather, it means that the dominant concern for the council or the regional board would be community safety, not a fear of liability, in deciding whether and when to impose a remedial action requirement. If the unsafe condition is identified during a regulatory inspection, then that is more likely to raise the question of whether and what the inspector must do to take reasonable care in carrying out any operational decisions related to that inspection. Historically, a local government's exposure to liability for unsafe conditions on property has also increased when

[29] *Frazier* at paras. 42 to 43 and 46 to 47

[30] See section 305 of the *Local Government Act* for regional district boards

the unsafe condition is one that was or could have been identified during a building permit inspection.

3. Contraventions occurring during the building permit process

Despite the court's recognition of a discretion, rather than a duty, to enforce its bylaws, a local governments risk of exposure to liability claims can increase significantly when the question of compliance with bylaws is engaged by a building permit approval process. This is reflected by a trifecta of Supreme Court of Canada building inspection cases decided between 1985 and 2000 involving instances in which municipalities were found to have had a duty of care to detect and respond to a building being constructed in contravention of the applicable building codes. The enforcement failures in those cases were found to be related to operational rather than liability-immune policy decisions. A lingering question is the extent to which local governments can seek to immunize themselves from such claims while still regulating building construction.

In *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2 [*Kamloops*], a municipality was found liable because a house had been constructed with a defective foundation. The majority of the Supreme Court of Canada held:

> … it is fair to say that the City of Kamloops had a statutory power to regulate construction by by-law. It did not have to do so. It was in its discretion whether to do so or not. It was, in other words, a "policy" decision. However, not only did it make the policy decision in favour of regulating construction by by-law, it also imposed on the city's building inspector a duty to enforce the provisions of the By-law. This would be Lord Wilberforce's "operational" duty. Is the City not then in the position where in discharging its operational duty it must take care not to injure persons such as the plaintiff whose relationship to the City was sufficiently close that the City ought reasonably to have had him in contemplation?[31]

In *Kamloops* the duty was found in the bylaw: "The building inspector shall enforce the provisions of this by-law and administer the by-law." The municipality in *Kamloops* was found partially liable for losses incurred by a subsequent owner of the house as a result of defects in a foundation that were identified by the municipal inspector, but went uncorrected.

In *Rothfield v. Manolakos*, [1989] 2 S.C.R. 1259, the Supreme Court of Canada found that the duty imposed on the building inspector was also owed to the owner-builder who built negligently. In that case, the building inspector relied on inadequate sketches of a retaining wall. The building inspector also made inappropriate directions regarding the steps to be taken to confirm the safety of the retaining wall. The wall later collapsed and damaged the property of the neighbours.

[31] *Kamloops* at para 47

Finally, in *Ingles v. Tutkaluk Construction Ltd.*, 2000 SCC 12, the Supreme Court of Canada found that Ontario legislation (which is distinguishable from British Columbia's in this regard) created a building inspection scheme for the protection of public health and safety by enforcing safety standards for construction projects. The Supreme Court of Canada followed its decision in *Manolakos* and held that a municipality's building inspector owed a duty of care to conduct a building permit-related inspection of renovations on a home and to exercise reasonable care in doing so. Bastarache J held for the Court that: "the city could be found negligent if it ignored its own scheme and chose not to inspect the renovations. It could also be found negligent for conducting an inspection of the renovations without adequate care."[32] The Ontarian municipality was consequently liable for losses arising from a house being constructed with shallow underpinnings after the inspector relied on the contractor's inaccurate assurances that the underpinnings were code compliant.

Notably, the majority of the Supreme Court of Canada in these three cases did not struggle with the suggestion that the municipality owed a duty of care to someone as a result of the municipality conducting building inspections. Rather, the more challenging issues were assessing to whom the duty was owed (the applicant or all future owners), what the applicable standard of care was and to what extent the builder is to share in the blame. Although not a building inspection case, in *Cooper v. Hobart*, 2001 SCC 79 [*Cooper*] the Supreme Court of Canada later refined the application of the duty of care analysis in *Kamloops* so that it no longer included protection from harm that, while foreseeable, is insufficiently proximate or should be negated for policy reasons.

Cooper was decided a few months after *Cumiford v. Powell River* (*District*), 2001 BCSC 960 [*Cumiford*], a case in which the British Columbia Supreme Court considered the trifecta of building permit cases. In *Cumiford*, the municipality was found liable to a purchaser of a house because of its failure to take effective enforcement action against the builder. Justice Macaulay held:

> I am satisfied that the foundation and framing problems that were identified throughout the original house, as well as the addition, were of a type to place at risk the health and safety of occupants of the house. The inspectors knew or ought to have known of the defects in the foundation and framing. Those defects could easily have been prevented or rectified if they had carried out proper inspections or posted a stop work order until the owner demonstrated compliance. Reed [the building inspector] acted unreasonably, in particular, in not taking sufficient steps to enforce the by-law by failing to require more detailed drawings; conducting inadequate inspections; or failing to inspect at all when he knew that Stefanovic [the builder] was non-compliant; and finally, by failing to post stop work orders. It was, or should have been apparent to Reed that the project, as permitted, was

[32] *Ingles v. Tutkaluk Construction Ltd.*, 2000 SCC 12 at para 25

> seriously non-compliant and, as well, that the rear addition and upper storey were being built without any permit.
>
> While counsel for the municipality contended that the municipality must only be held liable for latent defects, I disagree. The test that I have set out includes, but is not limited to, cases of latent defects. In any event, the inspectors knew of the defects. Johanson reported serious problems with both the foundation and framing while construction was in process. Reed failed to act on those reports.
>
> …
>
> In the final result, I conclude that the municipality breached a duty of care owed to Cumiford when its building inspectors failed to take reasonable steps to enforce the building code and by-law in relation to the observed deficiencies in the foundations and framing. As well, the municipality is liable for the failure of its inspectors to take any enforcement steps respecting the unauthorized second storey and rear addition in spite of becoming aware of those structures before issuing an occupancy certificate for the dwelling.[33]

Some might view the *Cumiford* case as reflecting a "common sense" proposition that if an occupancy certificate has been issued for a building then a purchaser should be able to reliably conclude that the building was constructed safely. Local governments may nevertheless feel a tension between wanting to provide the benefit of building inspection services and wanting to avoid being a warrantor of safe construction.

a) The potential policy exception

Many British Columbia municipal councils and regional boards have responded to concerns related to liability for building inspections by amending their building bylaws to express a clear intention to limit or eliminate any private law duty of care that would arise from conducting building inspections. Ideally, from the local government's perspective, building inspections would be conducted in the general public interest and would provide an opportunity, but not an obligation, for building deficiencies to be identified during construction. Presumably the local government would not be liable to anyone in particular (who might otherwise be described as a sufficiently proximate person) if a deficiency was missed during inspection.

These amendments typically include granting building inspectors permissive powers to inspect construction. The amendments also describe the building inspection process as being solely an inspection made in the general public interest and that issuance of a building permit or occupancy permit is not a warranty or assurance of safe construction on which anyone else can rely. This

[33] *Cumiford* at paras. 90 to 91 and 95

approach seeks to avoid any interpretation of the regulatory regime as creating a duty of care for the benefit of a particular person or class of persons.

In the case of *Chaban v. City of West Kelowna*, 2021 BCPC 113, the British Columbia Provincial Court cited such duty-of-care-limiting language in finding that there was no relationship of proximity between a municipality and a neighbour who complained about unsafe construction resulting in the dwelling next door having a particularly smoky chimney. It is notable that the harm to this complainant's property was much less serious than the collapsed retaining wall in *Manalakos*.

b) Statutory immunity

It is also notable that two sections of the *Local Government Act* provide for statutory immunity to certain claims related to building inspection and enforcement. The first is section 742 of the *Local Government Act*, which provides:

> 742 A municipality or a member of its council, a regional district or a member of its board, or an officer or employee of a municipality or regional district, is not liable for any damages or other loss, including economic loss, sustained by any person, or to the property of any person, as a result of neglect or failure, for any reason, to enforce, by the institution of a civil proceeding or a prosecution,
>
> (a) the Provincial building regulations,
>
> (b) a bylaw under Division 1 *[Building Regulation]* of Part 9 *[Regional Districts: Specific Service Powers]*,
>
> (c) a bylaw under section 8 (3) (l) *[fundamental powers — buildings and other structures]* of the *Community Charter*, or
>
> (d) a bylaw under Division 8 *[Building Regulation]* of Part 3 of the *Community Charter*.

The critical words in this section are "not liable…for any…loss…as a result of neglect or failure…to enforce, by the institution of civil proceeding or prosecution". A municipality or regional district is not liable for losses that could have allegedly been avoided had that local government commenced a lawsuit against someone or prosecuted someone. With regard to the commencement of civil proceedings, this section appears to codify a local government immunity that is applicable to a common law discretion to choose among enforcement options and to decide when such enforcement options should be pursued. Technically, a prosecution requires an individual to elect to swear an information, so it less clearly falls within a council or regional board's discretion. However, a prosecution may only serve to punish an offender rather than compel correction of an unsafe condition. Section 742 of the *Local Government Act* does not exempt

liability that might allegedly arise from a local government approving construction through the building permit process.

Potential liability for approving non-compliant building permit plans is the focus of section 743(1)-(2) of the *Local Government Act*, which provides:

> 743 (1) If a municipality or regional district issues a building permit for a development that does not comply with the Provincial building regulations or another applicable enactment respecting safety, the municipality or regional district must not be held liable, directly or vicariously, for any damage, loss or expense caused or contributed to by an error, omission or other neglect in relation to its approval of the plans submitted with the application for the building permit if
>
> > (a) a person representing himself or herself as a professional engineer or architect registered as such under Provincial legislation certified, as or on behalf of the applicant for the permit, that the plans or the aspects of the plans to which the non-compliance relates complied with the then current Provincial building regulations or other applicable enactment to which the non-compliance relates, and
> >
> > (b) the municipality or regional district, in issuing the building permit, indicated in writing to the applicant for the permit that it relied on the certification referred to in paragraph (a).
>
> (2) Subsection (1) does not apply if the municipality or regional district knew that the person making the certification referred to in that subsection was not, at the time of certification, registered as a professional engineer or architect under Provincial legislation.

This provision was effectively relied on by the City of Richmond in defence to a negligence claim in *Parsons v. Finch*, 2006 BCCA 513.

Section 743 of the *Local Government Act* encourages a local government to expressly rely on a professional engineer or architect to certify whether building plans show a code compliant design. Local government building bylaws often include provision requiring similar certification that the building has been constructed in conformity with those plans. This arrangement is typically applied to "complex buildings" under the BC Building Code. Rather than issuing building and occupancy permits following the local government's inspection of plans and construction, the municipality issues such permits following confirmation that a registered professional has endorsed the plans and construction. Immunity under section 743 of the *Local Government Act* can be complimented by a policy of reliance on external professionals to confirm construction was in accordance with the professionally approved plans.

This arrangement still leaves those smaller and simpler buildings that are constructed without the comprehensive involvement of an architect or professional engineer. Local governments could conceivably, exempt such buildings from permit requirements, but the more common practice is to provide the service of plan checking and inspection, notwithstanding a lingering risk of creating a duty of care.

4. Other regulatory inspections

Local governments inspect, permit and regulate many other matters in addition to buildings and construction and adopt and enforce bylaws for those purposes. As indicated by the cases discussed in this paper regarding soil removal, dog control and waste disposal, British Columbia local governments have generally been able to avoid claims that these regulatory regimes impose a private law duty of care on aggrieved plaintiffs. This was also the case in *Suncourt Homes Ltd. v. Cloutier*, 2019 BCSC 2258 [*Suncourt*], in which Justice Watchuk considered the City of Kelowna's soil removal bylaw and found that:

> Nothing in the Soil Bylaw itself gives rise to the necessary proximity to support a duty of care. The Soil Bylaw contemplates a passive permitting regime, whereby individuals seeking to move or deposit soil are required to apply for a permit, or face certain penalties: s. 6.4 and 7. I accept that the City has a statutory duty to issue permits in accordance with the criteria set out in the bylaw. *Wu* is clear, however, that the mere existence of a statutory duty is not enough to give rise to a duty of care. Without something more, there is no proximity between an applicant under a permitting regime and the public regulator charged with administering that regime.[34]

Justice Watchuk also considered the relationship circumstances between the City and the plaintiffs and held:

> The plaintiff argues the City had specific knowledge of a serious risk to its property as a result of the Cloutiers' alleged violation of the Soil Bylaw. The only real knowledge the City had of the Cloutiers' project, however, arose out of its administration of the Building Bylaw, not the Soil Bylaw. As mentioned above, the Cloutiers never applied for a permit under the Soil Bylaw. Indeed, it is this very failure for which the plaintiff seeks to hold the City responsible. Apart from the Visinskis' letter sent months after construction had commenced, the City had no way of knowing about the potential breach of its bylaw, let alone acting upon it, except through its previous interactions with the Cloutiers under the Building Bylaw.

[34] *Suncourt* at para 157

> In effect, the plaintiff's argument is that City owed a duty of care in administering the Building Bylaw to prevent a potentially harmful violation of a separate bylaw. This is reflected in the plaintiff's submissions. The Building Bylaw requires owners to obtain a building permit from the City's building inspector before embarking on various construction projects. The Cloutiers applied for a building permit prior to commencing construction of the wall. The plaintiff submits that the building inspector knew the Cloutiers proposed to remove soil from and deposit soil on their property. He also knew that the Cloutiers had not applied for a permit under the Soil Bylaw. According to the plaintiff, the Cloutiers' failure to comply with the Soil Bylaw prohibited the building inspector from issuing a building permit. It is here, if anywhere, that the City breached any potential duty to enforce the Soil Bylaw.
>
> These circumstances do not, in my view, give rise to the necessary proximity to ground a private duty of care. They merely reflect the City's ordinary administration of the permitting regime under the Building Bylaw. As discussed above, this is not enough to ground a private duty of care. Moreover, the Building Bylaw specifically states it does not create a duty of care in respect of the "issuance of a permit under this bylaw": s. 1.4.1(a). It is for these reasons that the plaintiff abandoned its claim under the Building Bylaw.[35]

Nevertheless, this analysis of certain circumstances as more particularly described by the Court of Appeal in *Waterway Houseboats* describes several ways in which a private law duty of care relationship could be created if a local government is not careful.

5. Bylaw contraventions that are "bad for business" or property values

The effectiveness of enforcement action by local governments may be called into question by residents or businesses who feel they are losing money or value due to others acting unlawfully. In addition to raising the question of whether a local government has a duty or a discretion to enforce the bylaw at issue (as was illustrated in *Westcoast Landfill*), the court has also considered whether a duty of care attaches to preventing these economic losses. In principle these are particularly difficult claims to make because the court has identified relatively narrow circumstances in which economic loss is recoverable in a claim in negligence.[36]

The case of *Cambridge Plumbing Systems Ltd. v. Vancouver (City)*, 2002 BCSC 530 involved a plaintiff who was a plumbing contractor. The plaintiff's plumbing replacement service was facing competition from businesses that applied epoxy coating to corroded pipes as an alternative to

[35] *Suncourt* at paras 163 to 165

[36] *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 citing *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85

replacement. The court struck the plaintiff's claim against the City of Vancouver after rejecting the plaintiff's suggestion that "the City has a duty of care to inspect for compliance of its code and that in breach of that duty the City has failed to require epoxy applicators to obtain permits, to insure that they are properly trained, to inspect plans and to inspect the work done.[37]" Notably the plaintiff was not complaining about inspections (or a lack thereof) of the plaintiff's work, but of a failure to take enforcement action that might prevent the plaintiff from suffering economic losses by more tightly regulating the plaintiff's competitors.

The court similarly rejected a claim in *Wirth v. Vancouver (City)* (1990), 47 B.C.L.R. (2d) 340 (C.A.) [*Wirth*], that alleged that in issuing a building permit, the City of Vancouver had failed to require the plaintiff's neighbour adhere to a building size restriction imposed by a zoning bylaw. The plaintiff alleged that the building's non-compliance with the zoning bylaw diminished the value of the plaintiff's property. Although the Court of Appeal recognized that duties of care can arise from building permit regulation, that was distinct from the neighbour's complaint regarding an ongoing zoning contravention. Justice Hollinrake for the majority held:

> I do not think there is any private law duty of care on the City in this case to protect the plaintiff from the economic loss resulting from the breach of this zoning bylaw by the neighbouring property owner and the negligence of the City. I say this assuming such loss can be said to be foreseeable, a proposition which I find is at best tenuous. In my opinion, this case is governed by the well established principle that where the only damage foreseeable is damage to another's pocket or estate and there is no foreseeable risk of personal injury or property damage there is no duty of care owed and no redress for that damage.[38]

These cases also illustrate that the multiple factors a local government must consider in regulating in the general public interest tend to negate a finding of a private law duty of care. The effectiveness of enforcement action against a particular individual will also impact affected neighbours, competing businesses and many others who the local government might consider are served by the regulation.

V. BYLAW CONTRAVENTIONS IN PUBLIC PLACES AND ON OTHER LOCAL GOVERNMENT PROPERTY

The question of whether a local government has a duty of care to enforce its bylaws gains an additional nuance when the person contravening a bylaw is doing so in a public place such as on a road, on a sidewalk, in a park or on other local government property such as a community centre or library. In such cases, a person who suffers an injury or loss because of another member of the

[37] *Cambridge Plumbing Systems Ltd. v. Vancouver (City),* 2002 BCSC 530 at para 4
[38] *Wirth* at para 24

public's bad behaviour can point to the additional fact that the defiant behaviour occurred on public lands owned or controlled by the local government. Although the same principle of a discretion, rather than a duty, to enforce continues to generally apply to bylaw enforcement, in some cases the bylaw contravening behaviour will affect a local government's ability to uphold another duty of care. This other duty of care may in turn require the local government take action to avoid liability.

1. Highways and sidewalks

Municipalities typically regulate by bylaw numerous aspects of private conduct on dedicated highways, including traffic control, vehicle parking and sidewalk obstructions. Municipalities also have the authority to enforce a prohibition on excavating in, causing a nuisance on, obstructing, fouling or damaging any part of a highway that is imposed by the *Community Charter*.[39] Although the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337 provides an exemption from the statutory duty of care under that Act in relation to municipal occupation of highways,[40] municipalities continue to have a common law duty to reasonably maintain their roads.[41] This latter duty could be affected by bylaw contraventions.

a) Public interactions

The case of *Myer Franks Agencies Ltd. v. Vancouver (City)*, 2010 BCSC 1637 [*Myer Franks*] provides an example of the general absence of a duty to enforce a bylaw in a particular way even when it applies to conduct on highways. In that case the plaintiff sought to compel enforcement of municipal bylaws and provincial statute to prevent individuals congregating at a particular intersection used as a "cash corner" where persons would gather in the hope of obtaining short term work for cash. The plaintiff complained that such behaviour obstructed vehicular and pedestrian traffic and was accompanied by littering, urination and defecation, fighting, noise and alcohol and drug use.

In the *Myer Franks* case, the court declined to issue an interlocutory order compelling the City of Vancouver to enforce its bylaws. Justice Smith held:

> I therefore must conclude that the question of whether, when and how the City will enforce its Street and Traffic by-law must be left to the elected members of city council and the public officials under their supervision. The plaintiff may be

[39] *Community Charter*, ss. 46(1), 274
[40] *Occupiers Liability Act*, s. 8(2)
[41] See *Marchi* and *Plakholm v. Victoria (City)*, 2009 BCCA 466

> frustrated with the response it has received so far from that quarter, but that in itself does not give the court jurisdiction to intervene.[42]

Similar to a general discretion to enforce with regard to activities on private property, this case is an example of a discretion to enforce in relation to bad behaviour on public property.

b) General duty to maintain roads and sidewalks

The cases of *Lichy v. Surrey (City),* 2016 BCPC 55 [*Lichy*] and *Lawrence v. Prince Rupert (City)*, 2003 BCSC 465 [*Lawrence*] provide examples of how the dangerous consequences of a person's bad behaviour on a highway, and behaviour that contravenes a bylaw and the *Community Charter*, can have a potential impact on a municipality's duty of care regarding highway maintenance. Municipalities generally set, as a matter of policy, inspection and maintenance standards applicable to carrying out this duty[43] and so it is the carrying out of that duty, rather than the effectiveness of bylaw enforcement, that the court should consider.

In the *Lichy* case, a pedestrian attempted to sue the City of Surrey for damages related to injuries suffered by his dog after the dog fell in a hole on a pedestrian path which had been created by the removal of a bollard. The City's position was that the removal of the bollard was unauthorized and likely related to the theft of the bollard's metal components.

The claim against the City was dismissed, but not for reasons of whether the City failed to enforce any bylaw prohibiting the interference with municipal property. Rather, the issue was whether the City had failed in its duty of care to users of the path. The court found that the City had carried out its inspection policy in good faith, met the standard of care, and should not have been found liable for failing to detect the missing bollard before the injury occurred.

In the *Lawrence* case, the City of Prince Rupert was similarly excused from liability arising from a person tripping over a wooden pole that BC Hydro had placed in a manner that obstructed passage over a sidewalk. The City was found not liable to the plaintiff because, as a result of its complaints-based sidewalk inspection policy, the City did not know about the pole until after the plaintiff's injury. The City's duty of care only required it to take action after the City learned of the obstructive pole.

Even though the respective municipalities avoided liability in both the *Lichy* and *Lawrence* cases, these decisions provide a caution to municipalities that relying on a discretion to enforce or giving low priority to enforcement action against contraventions on sidewalks and highways risks liability in relation to maintenance duties.

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[42] *Myer Franks* at para 19

[43] The Supreme Court of Canada considers the difference between "core policy" and other day-to-day decisions in *Marchi*

2. Parks and other local government facilities

In considering whether and how to take enforcement action in response to bylaw contraventions occurring on non-highway property to which the public is invited, local governments should be mindful of any duties of care that apply to the local government as owner or operator of the facility. Depending on the circumstances, this may be a common law duty of care [44] or a statutory duty of care imposed by the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337. Under section 3 of the *Occupiers Liability Act*:

> 3 (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.
>
> (2) The duty of care referred to in subsection (1) applies in relation to the
>
> (a) condition of the premises,
>
> (b) activities on the premises, or
>
> (c) conduct of third parties on the premises.

A discussion of the application of this statutory duty to local governments as owners and occupiers of public facilities is beyond the scope of this paper. However, it is important to note that the duty of care of the occupier to a visitor under the *Occupiers Liability Act* applies "in relation to the … conduct of third parties on the premises". If a person is contravening a bylaw regulating the use of that public facility and that contravention constitutes conduct that threatens the reasonable safety of users then a failure to take enforcement action could have a concurrent negative impact on the local government's fulfilment of a common law duty or the statutory duty of care under the *Occupiers Liability Act*. Although the question of whether third party conduct creates a safety risk is arguably distinct from the question of whether it contravenes a bylaw regulating conduct on a public facility, it may be that the adoption of the bylaw prohibiting such conduct (e.g. no running by the pool) within the facility makes it easier for the plaintiff to show the harm that arose from non-enforcement (e.g. an egregious "pool runner" slipping, falling and crashing into someone) was foreseeable. This concern is evident in the case discussed in the next section.

[44] See *Revelstoke (City) v. Gelowitz*, 2023 BCCA 139 regarding a duty of care relating to the safe use of private waterfront land adjacent to a public facility

3. Local government property rented to others

Landlords are subject to a duty of care under the *Occupiers Liability Act*, with section 6 of the Act particularizing the duty with regard to maintenance and repair of tenanted premises. In *Abdi v. Burnaby (City)*, 2020 BCCA 125, the court considered whether a visitor to rented premises could claim that the City of Burnaby owed her a duty of care under the *Occupiers Liability Act* after she was severely burned by the explosion of a fire in a backyard fire pit after the tenant poured motor oil on it.

The City's association with the fire was twofold. First the City was the owner and landlord of the premises and second the City regulated fire safety within the municipality by bylaw. The plaintiff visitor was burned in 2014, however the City's fire department had previously inspected the tenanted premises in 2008 in response to reports of an explosive fire.

The City claimed that it owed no common law duty of care to protect against dangerous fires lit in contravention of its bylaws, but that did not prevent the Court of Appeal from finding that the plaintiff could still make a claim in relation to a statutory duty of care applicable to the City as landlord. Justice Griffin held:

> The standard of care under s. 3 of the [*Occupiers Liability Act*] incorporates common law concepts of reasonableness. What steps will be reasonable will depend on the risk of harm. The greater the risk of harm, the greater the care required to protect against the risk: *Lawrence v. Prince Rupert (City)*, 2005 BCCA 567 (B.C. C.A.) at paras. 21 — 22; *Boyes (Litigation guardian of) v. Wong*, 2016 BCSC 1085 (B.C. S.C.) at para. 146.
>
> The question of what action by a landlord would be reasonable in the circumstances of a case, to keep a person on the premises reasonably safe, can be informed by the landlord's specific knowledge. For example, in *Jack v. Tekavec*, 2011 BCCA 464 (B.C. C.A.), leave to appeal ref'd [2012] S.C.C.A. No. 4 (S.C.C.), the landlord knew that the balcony railing was broken before the accident, but failed to repair it. The landlord was found liable to a person who leaned against the railing and fell when it gave way.
>
> An open fire is inherently dangerous because it can be unpredictable and difficult to control, and if it harms someone, there is a great risk that the injury will be severe. It is commonly known that injury by burns can cause death or permanent disfigurement and a lifetime of pain. Fire also creates a great risk of property damage. While some fires can be managed safely, the City would not know whether its tenants would act safely or recklessly with fire, and the risk of harm would be too great to allow tenants the freedom to hold fires at will. This is probably why

> the City had a bylaw prohibiting open fires, and a term in the tenancy agreement requiring the tenants to comply with all the City's bylaws.
>
> The City learned that the Bottomleys' 2008 fire was described by a neighbour of the Bottomleys as "huge", with 20-foot flames, and it resulted in the City's fire department being called to extinguish the fire. The City argues that this does not mean the fire was dangerous, but I disagree. At a minimum, because of the 2008 fire the City had reason to believe that a reckless and dangerous outdoor fire had been held by the Bottomleys at the City's property.
>
> …
> The evidence was that the fire pit was installed in 2008. since the complained-of fire was on December 31, 2008, it follows that the fire pit must have been there when the fire department members, who were City employees, attended at the property.
>
> The 2008 fire and neighbour's complaint put the City on notice that an unsafe outdoor fire had occurred at the rental property, in breach of the terms of the tenancy agreement and the City bylaw, which were in place to ensure safety. Thus with respect to the property at issue, the City knew or ought to have known of a dangerous condition — the fire pit — which enabled this conduct.
>
> …
>
> I see no error in the circumstances of this case in the conclusion that the City owed a duty of care to visitors to the premises, including Ms. Abdi. The statutory framework supports the finding of the duty of care without the necessity of examining whether there was also a common law duty of care. This duty of care was informed by the City's knowledge that there had been a dangerous outdoor fire held on the premises. Its duty was to take reasonable steps to care for the reasonable safety of persons on the premises. These reasonable steps included taking steps to inspect the property in question for safety, in particular regards to the ability to hold outdoor fires, and upon inspection, taking steps to require the Bottomleys to remove the fire pit.[45]
>
> [Emphasis added]

Presumably the fire in 2008 was unsafe regardless of whether it was prohibited by bylaw, but the fact that open fires were prohibited by bylaw may have made it easier for the Court of Appeal to confirm that the City had a duty to do something once it became aware of the fire pit. In any event, one of the significant consequences of the Court of Appeal's conclusion is the impact on

[45] *Abdi v. Burnaby (City)*, 2020 BCCA 125 at paras 79 to 82, paras 84 to 85 and para 88

the interplay between a municipal fire department and the municipality's real estate holdings. Although a fire department identifying a contravention on private property might have discretion in deciding how aggressively to take enforcement action, when that same fire department inspects property that is leased by the municipality, the fire department should apparently also be mindful of the consequences of ineffective enforcement on the municipality's statutory duties as landlord.

VI. CONCLUSION

The court's affirmation of a common law discretion to enforce recognizes the policy considerations that apply to bylaw enforcement. A requirement that local governments take enforcement action against all identified contraventions, concurrently and in a manner that brings each contravention to an end as soon as possible, could become a massive and very unpopular expense imposed on ratepayers. It could also encourage a repeal of regulations on the basis that there is nothing to enforce against if nothing is prohibited. Local governments need discretion so they can prioritize certain enforcement actions over others and allocate resources as budgets, public sentiment and other policy considerations allow.

This discretion at common law that a local government generally has with respect to the enforcement of its bylaws can consequently rebut claims by someone that the local government should be compelled to take enforcement action and be held liable for losses that arise if the local government does not. Of course, that premise, where it applies, should not be viewed as a justification for light enforcement.

The common law discretion also has its limits. Duties imposed by statute can require a local government take effective enforcement action. The discretion cannot be used to make a decision in bad faith, and a local government can also be found negligent in its implementation of bylaws once it has elected to take action. A local government should also be mindful that a discretion to enforce as a regulator does not exempt it from fulfilling its other obligations it may have, for example as a landlord or as maintainer of roads. These other obligations might require the local government to take effective enforcement action to address a bylaw contravention to avoid liability. Notwithstanding the general principles discussed in this paper, the question of whether a local government will be liable if it fails to take prompt and effective enforcement action still requires an assessment of the particular factual and legislative circumstances.