Civic Legal LLP

QUESTIONS OF DUTY, DISCRETION AND LIABILITY[1]

WHEN EVERY BYLAW CANNOT BE EFFECTIVELY ENFORCED EVERYWHERE ALL AT ONCE

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I. INTRODUCTION

A local government bylaw enforcement officer will be aware of many bylaw contraventions within their community. The responses from the community and the local government to these contraventions may differ widely. Some contraventions will be the source of many complaints, whereas others will only be noticed by local government staff. Some contraventions will be committed by difficult, defiant individuals, whereas other contraveners will attract sympathy. And some contraventions will raise significant safety concerns, whereas other contraventions appear to be harmless breaking of the rules. These differences, combined with budgetary and other resource limitations, require the exercise of discretion in enforcement, with some contraventions being prioritized over others. The courts have repeatedly recognized the need for such discretion in effective local government regulation, but the courts have also identified some important limits. These limits include (increasingly rare) statutory duties to enforce bylaws, as well as the obligation

[1] This paper draws on the paper "Liability Claims for Ineffective Enforcement - What's Scary and What's a Scare Tactic" presented by the author with David Giroday at the MIABC Annual Conference in 2023, as well as a paper, "Bylaw Enforcement: Duty vs. Discretion", presented by the author with Barry Williamson at the LGCEA Annual Conference in 2016. The author would like to thank Aidan Andrews for his helpful research and editing.

to make reasonable decisions in good faith. The exercise of discretion in enforcing bylaws also raises some challenging issues when compliance with those bylaws affects a different legal duty of a local government, or when a discretionary decision is alleged to be negligence. This paper addresses several questions that commonly arise with regard to when and how bylaw enforcement action should be taken.

II. PRELIMINARY QUESTIONS THAT MEMBERS OF THE PUBLIC MIGHT ASK

Discretionary decisions regarding whether, when and how a bylaw should be enforced is in part responsive to questions that members of the public might ask a bylaw enforcement officer.

A. "Shouldn't Every Law Always be Enforced?" – The General Discretion to Enforce

Courts in Canada have repeatedly recognized that local governments retain a general discretion in most bylaw enforcement decisions.[2] The need for such discretion is viewed as a consequence of a number of policy-driven factors that affect a local government. These factors include budgetary restraints, varying assessments of the strength of the case against the contravener and political prioritization. Courts do not expect a local government to be able to respond to every contravention with the same amount of vigour.

For example, in *Myer Franks Agencies Ltd. v. Vancouver (City)*, the Court considered a claim made by a commercial landlord regarding a "cash corner" for day labourers on the street outside his property. The landlord complained that the regular gathering of people resulted in obstruction of vehicle and pedestrian traffic, fights, drug and alcohol consumption and urination in public places. The landlord applied to the Court for injunctive orders, including an order seeking to compel City of Vancouver police to enforce "free passage" provisions of the City's street and traffic bylaw and the anti-soliciting section of the provincial *Safe Streets Act*.[3] In response to the application, the Court observed that this type of remedy was only available if the Court was satisfied that the police and City were under a duty to act. 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

[2] See, e.g., *Polai v. Toronto (City)*, [1973] SCR 38 [*Polai*]; *Dusevic v. Columbia Shuswap (Regional District)* (1989), 44 MPLR 160 (BCSC) [*Dusevic*]; *Myer Franks Agencies Ltd. v. Vancouver (City)*, 2010 BCSC 1637 [*Myer Franks Agencies*]; *Wirth v. Vancouver (City)*, [1990] 6 WWR 225 (BCCA) [*Wirth*]; *Whistler Services Park Ltd. v. Whistler (Resort Municipality)* (1990), 50 MPLR 233 (BCSC); *Westcoast Landfill Diversion Corp. v. Cowichan Valley (Regional District)*, 2009 BCSC 53 [*Westcoast Landfill*].

[3] SBC 2004, c. 75.

> frustrated with the response it has received so far from that quarter, but that in itself does not give the court jurisdiction to intervene.[4]

The *Myer Franks Agencies* case involved bad behaviour on public property, but this general discretion in enforcement applies equally to bylaw contraventions on private property.

B. "Why Don't You do Something?" – Corporate Enforcement Action vs. Enforcement Action

This paper generally discusses discretion and duty in the case of bylaw enforcement action as carried out by the local government corporation as a whole entity. However, readers will recognize that only certain people or entities within the local government can take certain enforcement actions. It is bylaw enforcement officers, licence inspectors and building officials who conduct site investigations, send demand letters and issue bylaw notices or municipal ticket informations. However, it is the municipal council or the regional board who must authorize the commencement of injunctive proceedings or the imposition of remedial action requirements. The laying of a long-form information or the imposition of direct enforcement as authorized by bylaw is technically an individual decision, but often requires departmental approval because of the associated additional cost to the local government.

This distribution means that there are individual decisions that involve their own discretion. Should a bylaw enforcement officer issue a ticket or make a recommendation to council that court action be commenced? Should a building inspector recommend a section 57 notice be placed on title or recommend a remedial action requirement? Should a councillor vote in support of multiple court proceedings as part of a major crackdown, or should they vote in favour of just one? All these decisions reflect the fact that effective enforcement often requires a co-ordinated and consistent effort. A bylaw enforcement officer who makes a significant effort to enforce a bylaw through demand letters and tickets may find they are getting nowhere if effective enforcement requires an injunctive court proceeding.

C. "Everybody is Doing it, Why Can't I?" – Enforcement Has to Start Somewhere

A frequent position taken by contraveners faced with enforcement action is to claim that because other people are committing similar contraventions they should be allowed to do so as well. Judges regularly hear and reject these claims. For example:

> This is a case of persistent and defiant infringement. The defence really amounts to a claim for immunity until the [deferred enforcement] list is disregarded and

[4] *Myer Franks Agencies* at para 19.

> everybody else prosecuted…. The City, in this action, is seeking to protect and enforce a public right, and should not be denied the remedy of injunction merely because others, in addition to the defendant, are guilty of similar violations and have not been restrained.
>
> Justice Judson in *Toronto (City) v. Polai*[5]

> …the defendant cannot rely on the fact others are breaking the law to justify her own breach of the law.
>
> Justice Greyell in *Burnaby (City) v. Oh*[6]

> The Owners argue others are also building illegal suites in Surrey. However, that does not excuse the Owners' conduct. They deliberately continued with construction even after being told multiple times to stop all work. The public interest favours the enforcement of municipal laws.
>
> Justice Chan in *Surrey (City) v. Singh*[7]

Another example is the case of *T.S.G. Sales Ltd. v. Vancouver (City)*, in which Justice Voith emphasized that enforcement action had to start with someone:

> As in *Polai*, the Petitioners now seek "immunity" until each of the Other Stores is prosecuted. There is no principled basis for any such immunity. … Still further, in this case, the City has confirmed its intention to require that the Other Stores comply with the Regulatory Regime. Thus, the present concern of the Petitioners, in real terms, is not that the City is not enforcing the Regulatory Regime against the Other Stores, but rather that the Premises are the first Adult Retail Store against which such enforcement action has been brought. How and when the City requires compliance with the Regulatory Regime from the Other Stores, recognizing that it has various enforcement options available to it, is within its discretion.[8]

A policy of working through similar contraventions in series may be prudent, but that will not necessarily stop grumbles from the first person selected for enforcement or from complainants who are upset that their concerns are not being immediately addressed.

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[5] *Polai* at pp 40 to 41.
[6] 2010 BCSC 1970, aff'd 2011 BCCA 222 at para 26.
[7] 2023 BCSC 2161 at para 36.
[8] 2012 BCSC 1177 at paras 71 and 74.

III. SO WHEN IS THERE A DUTY TO ENFORCE, AND TO WHOM IS THAT DUTY OWED?

The general rule is that there is no common law duty to members of the public to enforce a particular bylaw. This absence of a duty explains the exercise of discretion discussed in the next part. In considering potential exceptions to the general rule, it is important to consider what is meant by "duty" and to whom that duty is owed. The question of whether a local government and its bylaw enforcement officers have a duty to enforce can be viewed in four different contexts.

A. The Statutory Duty under an Enactment to Enforce a Particular Bylaw for the Benefit of the Person the Enactment Seeks to Protect

Despite the absence of a common law duty, a statute or bylaw can create a duty to enforce. This duty can also be self-imposed on a local government by an express term or terms in its own bylaw. However, the wording of the statute or the bylaw is not a court's only consideration 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 *Nelson (City) v. Marchi*,[9] subject to residual policy concerns that would negate a duty of care.

Part VII of this paper discusses some steps that can be taken to avoid an unintended statutory duty to enforce. The presence of such a duty in British Columbia is an increasingly rare phenomenon. Historically, however, building bylaws in Canada often contained provisions stating a building inspector or building official "shall" or "must" enforce the provisions of the bylaw, thereby imposing an express duty. Several Supreme Court of Canada cases found that this language constituted a statutory duty to enforce building code and other building safety requirements, such that the local government could be found liable in negligence for unsafe or unsound construction.[10] The Supreme Court of Canada wrestled with questions regarding whether the duty extended to an owner who was responsible for the unsound construction or to a subsequent purchaser of the property. In any event, the financial risk associated with being such insurers or warrantors of safe construction has meant that building bylaws now avoid using any language that describes an obligation to enforce or a duty of care to builders, owners or anyone else.

Statutory duties regarding enforcement can still be found in a few Provincial statutes. For example, section 26(1) of the *Fire Services Act* provides that: "A municipal council must provide for a regular

[9] 2021 SCC 41 [*Marchi*] at paras 17-19.
[10] *Kamloops (City) v. Neilsen*, [1984] 2 SCR 2 [*Kamloops*]; *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 SCR 298 [*Tutkaluk*].

system of inspection of hotels and public buildings in the municipality."[11] The *Fire Services Act* does not impose a particular standard of inspections, which means that a municipality may still decide how frequent and how thorough such mandatory inspections will be as a matter of policy. The impact of "true policy" decisions is discussed in greater detail in Part V.

Another example of a statutory duty to enforce a requirement is found in section 83 of the *Public Health Act*.[12] This section requires a local government to either report or to take action to respond to a "health impediment" or a "health hazard". These terms are defined in the *Public Health Act* and generally refer to hazards or conditions that might affect a large section of the local population. Consequently, if a contravention of a bylaw resulted in a public health hazard, a local government would have a statutory duty to respond. Of course, a local government would ideally want to respond to such hazards as a matter of public safety.

B. The Council or Regional Board's Duty to Affirm its Bylaws to its Citizens

Local governments owe a broad duty to citizens to affirm the bylaws the local government enacts, at least until the bylaw is struck down or repealed. The courts' description of this duty more closely resembles a principle rather than a specific legal obligation, as illustrated in the following passage from *Re Cornenki and Tecumseth (Township)*:

> While there is undoubtedly a duty towards the citizens on the part of a municipal council to look to enforcement of the by-laws it enacts, the particular time, place and mode of enforcement must be left, except under most exceptional circumstances, to the discretion of the elected council and is not the type of duty that can be enforced by mandamus in the very general way requested in this application.[13]

Although there may be no legal entitlement to enforcement in most cases, there remains a political value to the above-described duty to citizens, as it means that citizens can call on their elected officials to enact bylaws in the public interest and then call on them again to pursue enforcement of those bylaws.

Tecumseth was cited in *Dusevic v. Columbia Shuswap (Regional District)*, a case in which the Court considered a claim that a regional district was required to take enforcement action against a heli-skiing operation that was allegedly contravening a zoning bylaw. In rejecting that claim and finding that the regional district could decide not to take enforcement action, Justice Mackzo held:

> This is not a case of a municipality adopting a general policy not to enforce its restrictive zoning by-laws. Due consideration was given to the question of whether or not the Regional District would enforce this particular by-law against Purcell.

[11] RSBC 1996, c. 144.
[12] SBC 2008, c. 28.
[13] [1971] 3 OR 159 (HC) [*Tecumseth*] at para 4.

> Because of bona fide policy reasons for which the Regional District is entitled to receive the benefit of the doubt, I conclude that it acted with the public interest in mind when it passed the resolution at issue.[14]

The Court's conclusion in *Dusevic* emphasizes that if a local government adopts a bylaw, principles of government prevent that local government from deciding, by resolution, to never enforce a bylaw against anyone ever. Such a decision would be tantamount to repealing the bylaw without going through the required statutory process for repeal. This prohibited decision should be distinguished from instances in which a local government suspends enforcement of a bylaw pending consideration of its repeal or determination of its constitutionality. The prohibited decision of never ever enforcing should also be distinguished from a decision to prioritize the enforcement of all other bylaws.

C. The Fulfillment of a Statutory or Common Law Duty of Another Type that Involves Bylaw Enforcement (a.k.a. an *Abdi*-Duty)

Local governments have other statutory and common law duties that one might view as being separate from questions of effective enforcement of bylaws. These duties include obligations to maintain roads and sidewalks at common law, obligations as an "occupier" to provide safe premises under the *Occupiers Liability Act* ,[15] and obligations as a landlord to a tenant regarding the suitability of rental premises. The case of *Abdi v. Burnaby (City)*,[16] a very problematic decision for local governments, calls this compartmentalized view into question. In the *Abdi* case, which is discussed in greater detail in Part V of this paper, the Court found that the City of Burnaby was liable in negligence for burns from an unsafe fire pit on residential rental property owned by the City. Critical to the finding of liability was the fact that the City's fire department had previously attended the property and found the unsafe fire pit but had not taken enforcement action under its fire bylaw that resulted in the pit's removal. This failure to enforce a bylaw enacted under its fire safety regulatory authority meant that the City was liable for negligence in its other role as a landlord. Therefore, there can be situations in which a local government "must" enforce a bylaw, not because there is a duty to enforce that particular bylaw, but because a failure to enforce will mean a consequent failure to fulfil another legal duty.

In certain circumstances a local government might also owe a duty of care to the suspect being inspected for a bylaw contravention. This potential duty, which is discussed in Part VI of this paper, relates to enforcement that is harmful rather than ineffective.

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[14] *Dusevic* at para 23.
[15] RSBC 1996, c. 337.
[16] 2020 BCCA 125 [*Abdi*].

D. The Bylaw Enforcement Officer's Duty to the Employer

Finally, an employment duty to take enforcement action might arise from the bylaw enforcement officer's appointment. Whether and how a local government requires a bylaw enforcement officer to take action to enforce a bylaw as matter of an employment contract is distinct from the legal duties to members of the public at large and is not discussed in this paper.

IV. IN CIRCUMSTANCES WHERE THIS NO DUTY TO ENFORCE, HOW CAN DISCRETION IN ENFORCING A BYLAW BE EXERCISED?

As mentioned above, a local government has in most cases a discretion to decide whether, when and in what way to enforce a particular bylaw in a particular case. This discretion enables local governments to prioritize the deployment of staff resources to the enforcement of some bylaws over others and to favour issuing tickets and bylaw notices in response to some contraventions while pursuing injunctions and prosecutions for others.

If a local government is faced with multiple similar contraventions, its staff and elected officials may decide to pursue an injunction or prosecution against the most notorious or egregious contravener. Alternatively, the local government might identify the simplest "test case" for enforcement and, once effective enforcement action is taken against that property or contravener, move on to contraventions that are expected to be harder to prove or subject to fiercer resistance. This exercise of discretion reflects the fact that a local government cannot seek to enforce all of its bylaws, all at the same time and with the same aggressiveness.

A. Decision Must be Reasonable

Like any municipal decision, a choice to pursue a particular method of bylaw enforcement or to refrain from taking any action for a period must be a reasonable decision made in good faith. Reasonableness has a particular legal meaning (see *Canada (Minister of Citizenship and Immigration) v. Vavilov*[17]) and a reasonable decision must not be made arbitrarily or on an indefensible factual basis.

If a bylaw enforcement-related decision is challenged for being unreasonable, courts may look at the decision, the reasons behind the decision (if any) and how the decision was reached. For example, in *Central Saanich (District) v. McHattie*, the British Columbia Court of Appeal considered enforcement action taken by a local government on the basis of an alleged contravention of its bylaws.[18] In short, the individuals subject to the enforcement action claimed that the municipality unreasonably concluded that they had unlawfully removed trees and that they must replant them.

[17] 2019 SCC 65.

[18] *Central Saanich (District) v. McHattie*, 2023 BCCA 461 [*McHattie*].

The Court of Appeal noted that not all statutory decision makers will be required to provide formal reasons for their decisions. If reasons are provided, the courts can focus on the decision maker's reasoning process and the outcome; "without formal reasons, the focus will inevitably be on the outcome of the decision, rather than the reasoning process."[19] Either way, the courts will seek to confirm that the decision reflects an internally coherent and rational chain of analysis, such that the decision is justified in relation to the facts and law that constrain the decision maker.

To do this, courts may look at many factors relating to the decision maker, including:

(1) the governing statutory scheme;

(2) other relevant statutory or common law;

(3) the principles of statutory interpretation;

(4) the evidence before the decision maker and facts of which the decision maker may take judicial notice;

(5) the submissions of the parties;

(6) the past practices and decisions of the administrative body; and

(7) the potential impact of the decision on the individual to whom it applies.[20]

These factors may appear to involve a more complicated and formal process than simple property attendance by a bylaw enforcement officer in response to a complaint. Nevertheless, such an interaction may require the bylaw enforcement officer to consider which bylaw applies, what they observe on the property, what excuses the property owner gives and what impact a decision to take enforcement action will cause. In the *McHattie* case, the Court of Appeal found that the interpretation of the bylaw that the local government sought to enforce was flawed. This flaw was sufficient to render the decision to take enforcement action through a demand letter an unreasonable one.

B. Decision Must be Made in Good Faith

A discretionary decision regarding bylaw enforcement must not be made in bad faith. A prohibited bad faith decision includes where the motive for making the decision is malicious or to pursue an improper or ulterior purpose.[21] The Supreme Court of Canada case of *Polai v. Toronto (City)* involved facts that the Court found did not show bad faith, but which should nevertheless be considered problematic. The City of Toronto commenced enforcement proceedings against a property owner, alleging that the owner had converted a single-family dwelling into a quadplex

[19] *McHattie* at para 33.
[20] *McHattie* at para 37.
[21] *MacMillan Bloedel Ltd. v. Galiano Island Local Trust Committee* (1995), 126 DLR (4th) 449 (BCCA).

in contravention of the applicable land use bylaw. In defence, the property owner claimed that the City was not taking enforcement action against other similar properties. In fact, a City committee maintained a secret "deferred list" of infringers against whom no action would be taken. The Supreme Court of Canada was not prepared to find that the committee acted in bad faith or arbitrarily in preparing this list and instead affirmed the Ontario Court of Appeal's finding that the list was an attempt to manage the enforcement workload. The Supreme Court of Canada would have very likely found bad faith if the basis for preparing the deferred list was to grant political favours or to effect some other secret bias towards certain owners.

The famous Canadian case of *Roncarelli v. Duplessis* provides an example of a bad faith decision made on capricious or malicious grounds.[22] In that case, a Provincial minister revoked a restauranteur's liquor licence because of the restauranteur's financial support of Jehovah's Witnesses who faced prosecution for contravening municipal bylaws related to distributing religious pamphlets. The licence revocation was unrelated to liquor regulation, but rather for the purpose of harming the licensee.

V. WHAT CLAIMS AND MIGHT BE ALLEGED IN REGARD TO A FAILURE TO EFFECTIVELY ENFORCE A BYLAW?

In practice, the broad public interest in the enforcement of bylaws is not the only driving force for deciding whether, when and how to take enforcement action. 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. Presumably, a local government's primary goal is to prevent harmful contraventions, however, if a local government seeks, for policy reasons, to prioritize preventing contraventions that have a higher risk of legal liability, then several factors come into play. As discussed below, the mere fact of harmful consequences of a contravention is insufficient to create liability; there must be a legal basis for the claim.

A. Examples of Types of Claims

Persons aggrieved by ineffective enforcement of a bylaw or statute have sought damages or injunctive awards for claims in nuisance, in negligence and on judicial review. Although these claims rely on different legal bases, the courts' recognition of a discretion to enforce can be sufficient to excuse the local government.

[22] [1959] SCR 121.

1. Nuisance

The tort of nuisance typically involves a claim that another person, often a neighbouring property owner, has unreasonably interfered with an owner or occupier's enjoyment of land. Some plaintiffs who have made claims in nuisance have also alleged that local governments contributed to the nuisance through ineffective bylaw enforcement. In *Lebourdais v. British Columbia (Public Guardian and Trustee)*,[23] the plaintiff sued a number of parties in response to a damaging flood of their lands. 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 construction within a setback imposed by bylaw. The regional district had identified a contravention but its only response at the time was to register a notice on title under section 57 of the *Community Charter*. The Court dismissed the claim in nuisance, with Justice G.C. Weatherill holding:

> 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 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.[24]

Similarly, in *Anmore Development Corp. v. Burnaby (City)*,[25] 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 onto neighbouring property 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.

[23] 2022 BCSC 281 [*Lebourdais*].
[24] *Lebourdais* at paras 46 to 48.
[25] 2005 BCSC 1477 [*Anmore*].

> 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.[26]

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 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.

2. Negligence

The more common claim related to ineffective bylaw enforcement is the tort claim of negligence. To succeed in such a claim, the plaintiff must show that the local government owed them a duty of care, the local government failed to meet the standard of care and there was consequent loss, which loss was neither too remote nor a consequence for which a residual policy concern should excuse a finding of liability.

In seeking to prove a duty of care, a plaintiff may claim that the local government owed them a previously recognized duty or that the court should recognize a novel duty. As mentioned earlier, historic building bylaws often imposed a duty to enforce which made it significantly easier for a plaintiff to claim that a local government was liable for not effectively detecting or enforcing against building contraventions. 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. In *Kamloops (City) v. Nielsen*, 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

[26] *Anmore* at paras 137 to 141.

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*,[27] 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 and gave inappropriate directions regarding the steps to be taken to confirm the safety of the retaining wall. The wall later collapsed and damaged neighbouring property.

Finally, in *Ingles v. Tutkaluk Construction Ltd.*, the Supreme Court of Canada found that Ontario legislation (which should be distinguished from British Columbia's) 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. Justice Bastarache 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."[28] The 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.

Subsequent to these decisions, the Supreme Court of Canada refined the application of the duty of care analysis in *Kamloops* so that it no longer includes protection from harm that, while foreseeable, is insufficiently proximate or should be negated for policy reasons.[29] 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*. In *Marchi*, the local government decision at issue was not whether and how to 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

[27] [1989] 2 SCR 1259 [*Manolakos*].
[28] *Tutkaluk* at para 25.
[29] *Cooper v. Hobart*, 2001 SCC 79.

of Canada in *Marchi* emphasized that "a sphere of government decision-making should remain free from judicial supervision based on the standard of care in negligence".[30] 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."[31]

The finding of no common law duty of care that requires a local government to ensure effective enforcement of a bylaw in a particular circumstance has precluded claims of negligence against local governments. Most recently in *Hill v. Herd*,[32] the plaintiffs were successful in making a claim in nuisance against a neighbouring gas station that was emitting odours and noise. However, the plaintiffs failed in their claim of negligence against two local governments for failing to prevent the nuisance. Justice Lyster held:

> I agree with Village's and the RDKB's submissions with respect to the absence of a duty of care. The Hills have alleged nothing beyond the breach of statutory duties by either local authority. There is nothing alleged that would take this case outside of the holdings in *Wu* and *Suncourt*. The negligence case against both the Village and the RDKB falls at the first hurdle, as sufficiently analogous precedents exist that definitively found the non-existence of a duty of care in these circumstances. Neither local government owed the Hills a private law duty of care in the administration or enforcement of its bylaws.[33]

In *Westcoast Landfill Diversion Corp. v. Cowichan Valley (Regional District)*, 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 CVRD for its alleged failure to enforce the bylaw. CVRD owed Westcoast no duty of care in the enforcement of the bylaw.[34]

In *Westcoast Landfill*, the Court cited the case of *Froese v. Hik*.[35] *Froese* involved a permit issued by the District of Matsqui to an individual, which allowed him to remove gravel under the

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[30] *Marchi* at para 2.
[31] *Marchi* at para 2.
[32] 2024 BCSC 797 [*Hill*].
[33] *Hill* at para 510.
[34] *Westcoast Landfill* at para 361.
[35] (1993), 78 BCLR (2d) 289 (SC) [*Froese*].

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 plaintiffs' claim against the municipality for negligent enforcement of its bylaw, with Justice Huddart 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.[36]

It can be difficult for residents to accept that their local government adopt and enforce bylaws for the general public benefit, but that does not mean they will personally be guaranteed such a benefit.

3. Mandamus Orders

In some circumstances a person aggrieved by perceived non-enforcement of a bylaw will attempt to obtain a court order compelling a local government to act and to act effectively. The *Myer Franks Agencies* case discussed earlier provides an example of how recognition of the discretion to enforce can cause a court to decline to issue such orders. A similar example is *Burke v. Sunshine Coast Regional District*.[37] In that case, 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)).[38] 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

[36] *Froese* at para 46.
[37] 2011 BCSC 1636 [*Burke*].
[38] These regional district powers are set out in Part 12, Division 1 of the *Local Government Act.*

> enacted, it is within the discretion of the District as to whether they will prosecute under that bylaw.
>
> 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.[39]

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 a court were 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, it 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.

4. Lost Court Ordered Remedies

Case law has repeatedly established that a local government need not enforce against all contraveners of bylaws equally and may take action to enforce a bylaw even if the contravention has been tacitly tolerated for years if not decades. Delay or haphazard enforcement may, however, affect some of the remedies that a local government might seek.

For example, a court may grant an injunction but may decline to give a local government its costs due to the lengthy delay in enforcement (*Saltspring Island Local Trust Committee v. Mussell*[40]). Delay might influence a court's decision on whether to grant an interlocutory injunction. In *British Columbia v. Adamson*, Justice Hinkson responded as follows to the claim that a homeless

[39] *Burke* at paras 7 to 9.
[40] 2006 BCSC 741.

encampment outside Victoria's courthouse should be removed pending trial because of the damage it caused to public property:

> The plaintiffs permitted the Encampment to exist for many months before seeking injunctive relief. … The fact remains that most of the damages alleged by the plaintiffs have already crystallized. Any further costs or damage that would be occasioned by the ongoing presence of the Encampment would, as I will discuss below, simply take place somewhere else in the City of Victoria if the injunction sought were issued.[41]

Delay or a tacit acceptance can negatively impact a local government, even if delay in enforcement does not mean that a local government regulation is rendered unenforceable. That said, bylaw enforcement staff should be attuned to the possibility that if bylaw enforcement proceedings are not taken against current infringers others may join their ranks.

B. Consideration of Where the Contravention is Occurring

In exercising discretion regarding bylaw enforcement decisions, a local government should consider whether the contravention is occurring on public or private property. If the contravention is occurring on local government property, there is a higher risk of a collateral duty of care (an *Abdi*-duty) being affected by non-enforcement.

1. Contraventions 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, 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 historical exception in the jurisprudence with respect to identifiable failures by local governments to enforce building regulations through building permit regimes.

a) Bylaw Contraventions on Private Property that are a Community Concern

British Columbia courts have considered several cases in which residents complained about disturbances caused by local activities and sought relief that would require the local government to take enforcement action. In *Dusevic*, discussed above, the petitioners complained about a noisy heli-skiing operation. In *Rimmer v. North Cowichan (Municipality)*,[42] the Court considered whether residents could, by notice of civil claim, seek an order compelling a municipality to enforce its

[41] 2016 BCSC 584 at para 59.
[42] 2018 BCSC 1750 [*Rimmer*].

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.[43]

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 provides an example of the legal action that may be taken against local governments by aggrieved members of the public as a result. These cases demonstrate that the courts will generally defer to a local government's discretion on enforcement, subject, of course, to the previously described limits to that discretion.

b) 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 because of non-enforcement of a bylaw, may embolden an argument that the local government was obliged to do 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 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*,[44] the British Columbia Court of Appeal struck the plaintiff's claim for damages against the federal government in relation to the enforcement of explosives regulations.

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[43] *Rimmer* at para 8.

[44] 2022 BCCA 379 [*Frazier*]. This decision is, at the time of writing, subject to an application for leave to appeal to the Supreme Court of Canada.

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*[45] "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."[46] 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, a 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 held that there was neither an express statutory duty to inspect nor an intention by the legislature to create a private law duty of care:

> 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.
>
> …
>
> 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.[47]

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

[45] RSC 1985, c. E-17.
[46] *Frazier* at paras 7 to 8.
[47] *Frazier* at paras 42 to 43 and 46 to 47.

district board 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.[48] 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 the unsafe condition is one that was or could have been identified during a building permit inspection.

c) 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 within this paper local governments in British Columbia have generally been able to avoid claims that these regulatory regimes impose a private law duty of care to aggrieved plaintiffs. This was also the case in *Suncourt Homes Ltd. v. Cloutier*,[49] 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.

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

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

[49] 2019 BCSC 2258 [*Suncourt*] at para 157.

> 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.
>
> 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.[50]

Again, a local government should be expected to enforce its bylaws, but a local government usually does not have duty to enforce a bylaw for a particular person's benefit.

d) Bylaw Contraventions that are Bad for Business

The effectiveness of enforcement action by local governments may be called into question by businesses who believe 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 courts have also considered whether

[50] *Suncourt* at paras 163 to 165.

a duty of care attaches to preventing these economic losses. In principle, these are particularly difficult claims to make because the courts have identified relatively narrow circumstances in which economic loss is recoverable in a claim in negligence.[51]

The case of *Cambridge Plumbing Systems Ltd. v. Vancouver (City)* involved a plaintiff who was a plumbing contractor. [52] The plaintiff's pipe replacement service was facing competition from businesses that applied epoxy coating to corroded pipes as an alternative to 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."[53] 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)* that alleged that in issuing a building permit, the City of Vancouver had failed to require the plaintiff's neighbour to 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 British Columbia 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.[54]

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

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[51] See *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35, citing *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 SCR 85.
[52] 2002 BCSC 530 [*Cambridge Plumbing*].
[53] *Cambridge Plumbing* at para 4.
[54] *Wirth* at para 24.

neighbours, competing businesses and many others the local government might consider are served by the regulation.

2. Bylaw Contraventions Occurring on 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 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.

a) 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*.[55] Although the *Occupiers Liability Act* provides an exemption from the statutory duty of care under that Act in relation to municipal occupation of highways,[56] municipalities continue to have a common law duty to reasonably maintain their roads.[57] This latter duty could be affected by bylaw contraventions.

b) Public Interactions

The case of *Myer Franks Agencies* 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 Agencies* 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

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

> council and the public officials under their supervision. The plaintiff may be frustrated with the response it has received so far from that quarter, but that in itself does not give the court jurisdiction to intervene.[58]

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.

c) General Duty to Maintain Roads and Sidewalks

The cases of *Lichy v. Surrey (City)* and *Lawrence v. Prince Rupert (City)* provide examples of how the dangerous consequences of a person's bad behaviour on a highway, as well as behaviour that contravenes a bylaw and the *Community Charter*, can have a potential impact on a municipality's duty of care regarding highway maintenance.[59] Municipalities generally set, as a matter of policy, inspection and maintenance standards applicable to carrying out this duty,[60] and so it is the carrying out of that duty, rather than the effectiveness of bylaw enforcement, that a 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 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 when a person tripped 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

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[58] *Myer Franks Agencies* at para 19.
[59] 2016 BCPC 55 [*Lichy*]; 2003 BCSC 465 [*Lawrence*].
[60] The Supreme Court of Canada considers the difference between "core policy" and other day-to-day decisions in *Marchi.*

low priority to enforcement action against contraventions on sidewalks and highways risks liability in relation to maintenance duties.

d) 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 or a statutory duty of care imposed by the *Occupiers Liability Act*.[61] 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 at 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 that 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.

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[61] 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.

e) 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 respect to maintenance and repair of tenanted premises. In *Abdi v. Burnaby (City)*, 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 when 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 British Columbia 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.
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> ...
>
> 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.
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> ...
>
> 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.[62]
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> [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 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 out by the municipality, the fire department should apparently also be

[62] *Abdi* at paras 79 to 82, 84 to 85 and 88.

mindful of the consequences of ineffective enforcement on the municipality's statutory duties as landlord.

VI. WHAT RISK OF CLAIMS CAN ARISE FROM CHOOSING TO TAKE ENFORCEMENT ACTION?

The discretion to enforce governs decisions of whether, when and how to enforce a bylaw. Once a local government decides to take enforcement action, there is a risk that a party makes a claim on the basis that the action was somehow improper. These claims are made separately from any court proceeding initiated by the local government and can be in the form of judicial review or a negligent enforcement claim. Although the courts have been reluctant to find negligent enforcement in bylaw enforcement action, the fact that judges have in some instances gone into great detail as to what a local government employee did or did not do might be seen as eroding the discretion in enforcement.

A. Judicial Review

Some contraveners of bylaws will accept that bylaw enforcement is warranted. Persons who want to challenge a local government's discretionary decisions usually must wait until a proceeding (e.g., bylaw notice, municipal ticket information, long form prosecution or civil claim) is commenced by the local government to present their defence to an adjudicator. If enforcement is taken through a self-help remedy, such as a remedial action requirement, the affected person may seek judicial review of that decision.[63] If a local government issues an order that, if not complied with, entitles the local government to take action in default, then such an order would be clearly subject to judicial review, as the local government's entitlement to take action only arises if the order is both valid and disobeyed. More controversially, the British Columbia Supreme Court held in *McHattie v. Central Saanich (District)* that a "cease and desist letter" contains a decision that is judicially reviewable.[64] The Court considered whether the legal position underlying the demand was reasonable and concluded that it was not.

The *McHattie* (SC) case engaged the preliminary question as to whether the recipient was even able to ask the Court to "review" a demand letter. The issuing local government argued that a demand letter is informational in the sense that an objecting recipient can ignore it and wait to see whether a proceeding is commenced or a binding order is issued. The Court found that the letter was a sufficient exercise of a statutory power to warrant judicial review. This conclusion raises a number of questions regarding whether and when a simple statement or warning by a

[63] See, e.g., *North Vancouver (District) v. Wilson*, 2022 BCSC 2014.
[64] 2023 BCSC 175 [*McHattie* (SC)]. This aspect of the decision was not challenged before the Court of Appeal in *McHattie*, discussed earlier in this paper.

local government staff member regarding a perceived contravention is judicially reviewable. Those questions and analysis of judicial review proceedings are beyond the scope of this paper.

B. Malicious Prosecution and Misefeasance in Public Office

Malicious prosecution and misfeasance in public office are tort claims that could conceivably arise because of enforcement action taken in bad faith. In the case of the tort of misfeasance in public office, the bad faith decision can manifest itself within two categories:

> "Category A", which involves conduct specifically intended to injure a person or class of persons, even if the conduct is otherwise within the public officer's powers; and
>
> "Category B", which involves a public officer who acts knowing that he or she lacks power to do the act in question and that the act is likely to injure the plaintiff.[65]

Given the expectation that bylaw enforcement officers will act in good faith, this paper will not go into a detailed discussion regarding these torts.

C. Negligent Investigation and Enforcement

Decisions regarding whether and how to enforce a bylaw are sometimes the subject of a claim of negligent enforcement. This can be a claim that if a local government decides to enforce, it has a duty to pursue enforcement to a particular standard and is liable for losses to a person harmed if the local government does not meet the standard. This type of claim can be difficult to distinguish from the claims of ineffective enforcement discussed above.

A person bringing a negligent enforcement action may claim that the standard of care associated with an alleged duty of care meant that the local government should have identified that no contravention was occurring. The courts have recognized a tort claim arising from the negligent investigation of police on the basis that, even though the police must be able to investigate crime, they still owe a duty of care to the suspect being investigated with regard to how they conduct their investigation.[66] This tort has been applied to the laying of charges in a municipal bylaw prosecution regarding fire offences.[67] Assuming the local government was acting in good faith, such a claim might also be seen as a challenge to the discretion of local governments in the enforcement of bylaws, because it alleges a private law duty that would result in financial liability to someone who is the subject of unsuccessful enforcement action.

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[65] *Rain Coast Water Corp. v. British Columbia*, 2019 BCCA 201, citing *Odhavji Estate v. Woodhouse*, 2003 SCC 69.
[66] *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41.
[67] *Flood v. Boutette*, 2021 ONCA 515.

1. Claims by a Person who Wanted More Effective Enforcement

The case of *Butterman v. Richmond (City)* provides an example of the Court recognizing that there is discretion in enforcement, but also finding that there is still a duty to act with reasonable care in any steps taken to enforce a bylaw:

> Similarly, it is not in issue that the manner of enforcement of the bylaw in question is a matter of policy within the discretion of the City. There has been neither a suggestion that there is an express statutory duty obliging the City to enforce the bylaw nor any argument that such is implicit. In the absence of such a positive duty, the jurisprudence establishes that the City is afforded broad discretion to determine how it will enforce its own bylaws, and that the manner of enforcement is not to be left to the whims or dictates of the citizenry (see *Foley v. Shamess*, *supra*, at para. 29).
>
> Where enforcement of a bylaw is discretionary, as it is here, the City is obliged to: (a) act in good faith in relation to its decisions as to how the bylaw will be enforced; and, (b) act with reasonable care in any steps it takes to enforce the bylaw (see *Foley v. Shamess*, *supra*, at para. 29; *Froese v. Hik*, [1993] B.C.J. No. 731 (B.C.S.C.)). As Huddart J. (as she then was) succinctly stated in *Froese*, *supra*:
>
> > ... 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. Municipalities in the position of Matsqui owe a duty of good faith decision-making to the public as a whole and a duty to take reasonable care in the implementation of a regulatory scheme to those in sufficient proximity to merit that duty. The precise nature and extent of that duty is determined on a case by case basis, taking into account the nature and purpose of the authorizing legislation, the nature and purpose of the subordinate legislation, and the relationship between the municipality and the person asserting its obligation of care. It may be that such a duty does not extend to encompass purely economic loss (and there may be other policy reasons limiting the scope of the duty of care). These are the principles I extract from *Kamloops*, *supra* and *Manolakos*, *supra*.
>
> Notwithstanding the plaintiff's complaint that the City and RAPS acted as two solitudes, there has been no suggestion that the City acted without good faith in its decision-making as to how, generally, it would enforce the bylaw in question; thus, the remaining live issue is whether the City and/or RAPS failed to act with reasonable

> care in relation to the steps they took to enforce the bylaw, upon receipt of the German complaint.[68]

This duty to exercise reasonable care 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.

Although the Court in *Butterman* 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 claim 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

[68] 2013 BCSC 423 [*Butterman*] at paras 37 to 39.

> 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 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.[69]

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 have remained among the potential enforcement options from which the City retained a discretion to choose? There is a concern that the Court applied a duty of care that, in the words of the British Columbia Court of Appeal in *Wu v. Vancouver (City)*, was "nothing more than the public duty articulated as or converted into a private law duty of care."[70]

The Ontario case of *Dhillon v. Cambridge (City)* also related to a dog attack; following the lead in *Butterman*, the Court engaged in significant judicial scrutiny of decisions made by an animal control officer, including:

> In my view, [the animal control officer's] exercise of discretion not to enlist the assistance of the police in locating Ramirez and in identifying the dog involved in the March 2016 incident, when viewed through the lens of the Supreme Court of Canada's elucidation of the applicable standard of care which applies to the tort of negligent investigation, did not fall below the standard of a reasonable animal control officer in the circumstances. At worst, it represented an "error in judgment" which any reasonable professional animal control officer might have made.
>
> I also find that [the animal control officer's] exercise of discretion not to issue a ticket to Ramirez, even if that were open to him, did not fall below the applicable standard of care.[71]

The Court went on to find that even if the animal control officer's conduct did fall below an alleged standard of care, there was no causative link to the plaintiff's injuries:

> Even if I am in error and Animal Services did fail to meet the applicable standard of care, the plaintiffs' claim against Animal Services must fail due to a lack of proof of a causal link between Animal Services failure to enlist the assistance of the police or to issue a ticket to Ramirez and the plaintiff's injuries.

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[69] *Butterman* at paras 48 to 49.
[70] 2019 BCCA 23 at para 42.
[71] 2021 ONSC 7385 [*Dhillon*] at paras 54 to 55.

> It is speculative to suggest that, had [the animal control officer] persisted in his investigation to a degree deemed by the court to have been reasonable, he would have been ultimately successful in identifying the offending dog in the March 2016 incident and its owner. It is also speculative to suggest that the dog involved in the subject incident was the same dog involved in the March 2016 incident.
>
> Moreover, even if that dog involved in the March 2016 incident had been identified, the likely outcome at most would have been for Animal Services to designate the dog as a Dangerous Dog, leading to the issuance of a letter similar to the letter issued to Hadi in respect of "Asia" following the September 2015 incident, which would not have prevented the subject incident. Prevention of the subject incident would have required the dog to be impounded. It is unlikely that the dog would have been seized and impounded by Animal Services as the preconditions to impounding a dog in para. 11.1 of the Animal Control By-law, including the making of an order by the Regional Medical Officer of Health in accordance with the Health Protection and Promotion Act, R.S.O. 1990, c. H.7. under para. (d), would not have been satisfied. The other listed preconditions in the paragraph have no application.
>
> …
>
> I am unable to conclude that it is clear that Animal Services breached a duty of care owed to the plaintiff, thereby exposing him to an unreasonable risk of injury, such that the plaintiff's injury fell within the ambit of the risk created by Animal Control's breach, so as to bring this case with the category of extraordinary cases whether liability must be imposed, even though the "but for" test for causation is not satisfied.[72]

Although no liability was found in either *Butterman* or *Dhillon*, the court in both cases reviewed a series of actions and inactions before deciding it was too speculative to conclude that a local government could have and should have prevented an injury, such that it was liable for not doing so. Again, it appears very difficult to distinguish the identified "duty to take reasonable care" in enforcement actions from the recognized discretion in enforcement.

2. Claims by Someone who Said They Should not have Been Subject to Enforcement Action

A *Butterman*-type scrutiny of enforcement decisions also occurred in a negligence claim brought by a person subject to enforcement action in Ontario. In *Rausch v. Pickering (City)*,[73] the plaintiff claimed that local government enforcement actions, including a demand letter and the

[72] *Dhillon* at paras 56 to 58 and 60.
[73] 2017 ONSC 2634 [*Rausch*].

commencement (but not completion) of a prosecution, caused the plaintiff to kill her wild boars to avoid costly fees if the local government impounded the wild boars. The plaintiff complained that the bylaw was inapplicable to her due to an exemption under provincial "right to farm" legislation.

The plaintiff failed in her claim for malicious prosecution or misfeasance of public office because she failed to show that the prosecutor acted in bad faith or with a knowledge that the bylaw did not apply. However, the plaintiff was able to prove negligence on the basis that the local government officers did not know, but should have known, that the bylaw did not apply. This claim in negligence is distinguishable from one of negligent investigation because the plaintiff's alleged damages did not relate to the costs and consequences of an improper prosecution. Rather, it was the fact that she was convinced to kill her livestock to avoid prosecution that founded the claim in negligent enforcement.

The Court held:

> With respect to both the decision to send the compliance letter and the decision to commence the by-law contravention prosecution, the evidence is that none of the relevant involved Pickering employees or representatives considered the implications of *FFPPA* [*Farming and Food Production Act*]. The evidence is that, at the relevant times, none of those relevant involved employees or representatives were aware of *FFPPA* or had training with respect to *FFPPA*, exotic animals, or, in particular, wild boars. Accordingly, the relevant Pickering officers did not observe the standard of care when they sent the compliance letter and when they commenced the by-law contravention prosecution.
>
> I do not find any evidence of bad faith on the part of the involved Pickering employees or representatives. However, there were deficiencies in their training. There was evidence of farming, including the raising of animals, taking place on other properties in Pickering. The relevant employees and representatives should have had training about *FFPPA*. If they had such training, the employees and representatives would have realized that they had to consider whether the plaintiff's wild boar farm was caught under the umbrella of "a normal farm practice carried on as part of an agricultural operation" of s. 6 of *FFPPA* and, therefore, exempted from restrictions imposed by Pickering by-laws. It was unreasonable for Pickering not to have provided such training to the employees and representatives who were involved in the investigation of possible by-law contraventions where farms were involved. The failure of Pickering to provide such training led to the negligent conduct of its employees and representatives, specifically their failure to consider whether the plaintiff's wild boar farm was exempted from compliance with restrictions that might be imposed on the farm by Pickering by-laws.

> Pickering owed a duty of care to the plaintiff. I have found that Pickering (through its employees and representatives) breached the standard of care that was required to be observed.[74]

The Court then went on to consider the question of damages and found that the plaintiff was disentitled to compensation because of her own conduct.

VII. WHAT CAN BE DONE TO MITIGATE THE RISK OF CLAIMS?

In an ideal world, a well-funded, well-trained bylaw enforcement department who acts faultlessly will cause all bylaw contraventions to be effectively and efficiently addressed without any concerns over liability. Recognizing that this is unrealistic, the cases discussed above suggest some steps that a local government can take to avoid liability.

A. Do Not Act Rashly

The *McHattie* decisions suggest an increased scope for judicial review of decisions related to bylaw enforcement. The Court of Appeal has emphasized that many factors will need to be considered to confirm the reasonableness of a decision. Quick conclusions and action made without explanation are much less likely to be defensible.

B. Avoid Making Absolute Decisions Regarding Non-Enforcement

The *Dusevic* case confirms that a local government staff or council cannot absolutely refuse to investigate or take enforcement action against certain types of contraventions. A local government may use a policy, such as a complaints-based policy to prioritize its investigative powers. Similarly, a municipal council could not pass a resolution saying that a municipal bylaw will no longer be enforced as that would be tantamount to repealing the bylaw without taking the proper procedural steps. A council may still direct that enforcement action be temporarily suspended so as to allow council to consider the repeal of the bylaw.

While limited local resources means that a local government must give priority to some files over others, staff should avoid such a clear listing of who is or is not to be subject to enforcement proceedings to avoid the concerns raised in *Polai*. Although a fine distinction, a "deferred" list suggests that the enforcement proceedings will be delayed against some owners whereas a "preferred" list might suggest that those owners are to be effectively granted immunity.

Similarly, a local government may have a resident whose complaints are so frequent or baseless that local government staff want to ignore that person going forward or prohibit them from even making a complaint. Such an absolute decision would be problematic as it might be seen as

[74] *Rausch* at paras 47 to 49.

making the person exempt from the benefit of the bylaw (e.g., a contravener can offend the noise bylaw in their presence, because the person is not allowed to complain). A different approach, such as a policy of lowering the priority given to someone who has previously made baseless complaints is preferable.

C. Maintain Flexible Policies Regarding Enforcement Action

Local governments often adopt policies regarding bylaw enforcement to help manage workload or, for political reasons, to prioritize enforcement towards contraventions that are the subject of public complaints. A policy that is complaint-based or directs enforcement towards more serious contraventions should still avoid stating or suggesting that other contraventions should not be enforced. This helps avoid concerns regarding bad faith enforcement or a person subject to the complaint saying that it was unreasonable to take enforcement action against them in the absence of a complaint.

D. Avoid Unintended Duties of Care

A local government's discretion with regard to whether, when and how to enforce against a bylaw contravention does not apply when a regulatory regime imposes a positive duty that requires enforcement by the regulator. This can occur as a result of an express requirement in the bylaw or through a regulatory regime that contains sufficient proximity to support a novel duty of care. This novel duty of care would be an exception to the general conclusions of no-duty-of-care-to-anyone-to-enforce-bylaws found in *Westcoast Landfill* and *Froese.*

In *Waterway Houseboats Ltd. v. British Columbia*, Justices Butler and Abrioux, for the British Columbia 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*.[75]

> 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 plaintiff to determine whether a sufficiently close and direct relationship exists to impose a prima facie duty of care.[76]

The Court of Appeal in *Waterway Houseboats* also held that if the legislative scheme is not determinative, then a court should consider the fact-specific circumstances of the interactions

[75] RSBC 1996, c. 483.
[76] 2020 BCCA 378 [*Waterway Houseboats*] at para 243.

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; it may also 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;[77]
>
> 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;[78]
>
> 3) makes a specific misrepresentation to the regulated party – apart from a regulatory statement – that invites reliance;[79] or
>
> 4) interacts with the regulated party in such a way as to give rise to a clear expectation that the regulator will consider the interests of the regulated party.[80]

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, this increases the likelihood of a private law duty of care being created.

Carefully drafted bylaws and enforcement policies are useful in avoiding unwanted duties and encouraging the exercise of discretion in a reasonable and good faith manner. This potentially simple framework can, however, be complicated by factors that, while not specifically imposing a duty to enforce, may cause a local government to conclude that it ought to take enforcement action. The courts have recognized that, in instances in which it has a legal duty, a local government may adopt policies with respect to how the duty is carried out. In practice, this allows a local government to implement a reasonable program for carrying out its legal duty. If, however, the local government does not carry out that enforcement program to the standard required (or at all), the local government may still attract liability.

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[77] See *Imperial Metals Corporation v. Knight Piésold Ltd.*, 2018 BCSC 1191.
[78] See *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5.
[79] See *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42; *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63.
[80] See Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General), 2015 BCCA 163.

E. Consider Potential "Bylaw Immunity" to Supplement Statutory Immunity

Just as an enactment may create a duty of care that exposes a local government to more liability, an enactment may also operate to immunize a local government from liability. The Provincial Legislature may adopt statutory provisions that limit or eliminate private law claims. 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 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 immunize against 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.

The City of Richmond grounded its successful defence against a negligence claim on this provision in *Parsons v. Finch*.[81]

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 provisions 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 after receiving confirmation that a registered professional has endorsed the plans and construction. Immunity under section 743 of the *Local Government Act* can be complemented by a policy of reliance on external professionals to confirm construction is in accordance with 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.

Many British Columbia municipal councils and regional boards have responded to concerns about 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

[81] 2006 BCCA 513.

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 indicate 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 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*,[82] 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 should be noted that the harm to this complainant's property was much less serious than the collapsed retaining wall in *Manolakos*.

VIII. CONCLUSION

Local governments' ability to decide whether, when and how to enforce their bylaws in particular cases is critical for effective regulation. No local government can effectively enforce all their bylaws, everywhere all at once. This general discretion also enables local governments to avoid liability claims from those who complain that not enough was done to enforce a bylaw.

All of this seems fairly straightforward, however a number of court cases – most decided within the last 10 to 15 – suggest that bylaw enforcement decisions will be subject to more scrutiny. *McHattie* suggests that demand letters will be vulnerable to judicial review. *Abdi* indicates that a bylaw enforcement regime can affect the liability of a local government in its role as landlord. *Butterman* suggests that a court might still second-guess a local government's discretionary decisions if they are recast as "negligent enforcement". Finally, *Frazier* and *Waterway Houseboats* are reminders that a court might find a novel duty of care to enforce a bylaw in "proximate" circumstances that the regulator did not expect. These decisions likely raise more questions than they answer for a local government seeking to both effectively enforce its bylaws and avoid liability.

[82] 2021 BCPC 113.