Municipal Liability Prevention in Planning and Land Use Development: A Canadian View of the Law

Basile Chaisson, David G. Boghosian and Catherine Virgo
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I. INTRODUCTION

Municipalities perform functions that require them to take multiple and sometimes conflicting interests into consideration.¹ Nowhere is this more obvious than in land use matters where urbanization fuels fundamental changes in local communities and challenges local governance.² It is axiomatic that different human activities in close proximity can and will lead to conflicts. Planning has been a responsive means of solving them.

Land use conflicts beget litigation, the bane of local governance. Municipal liability risk management attempts to reduce exposure to liability by providing a regulatory framework conducive to harmonious development. At times, even local authorities themselves are targeted by litigation arising from contentious zoning and subdivision approvals. That raises issues of potential municipal liability in damages for negligent planning and development. This paper will discuss various possible avenues of municipal liability in this context, legislative immunity under Welbridge, negligence under the Anns test, abuse of public office, and negligent misrepresentation as well as the continuing controversy of whether a plaintiff must exhaust his administrative law remedies prior to commencing an action for damages.

II. THE DYNAMICS OF CONTENTIOUS LAND USE ISSUES IN THE MUNICIPAL CONTEXT

Private promoters are often at loggerheads with municipal planners. Nonetheless, municipal governments are mandated to express public policy choices in zoning matters and subdivision approvals. The recurring and vexing central issue is often

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how to balance short-term economic benefits with longer term environmental and health consequences for future inhabitants if such consequences are foreseen.3

Modern day developers must adhere to multiple prerequisites before local authorities approve their project. This approach to development, while driving up development costs, affords the municipality opportunities to shape the direction of development, to avert catastrophes and to minimize local conflicts. It is, however, no panacea!4 Of course, the threat of liability should not eliminate policy choices that reflect the values and priorities of municipal residents.

Against this background, courts have acknowledged that local councils are entrusted with policy-making roles in matters of local importance. Local governments being closest to the members of the public who live or work in their territory and therefore, more sensitive to the problems experienced by those individuals, courts must respect the responsibility of elected municipal bodies who serve the people who elected them.5 Thus, local government is of social and political importance.6

Courts must exercise caution to avoid substituting their views of what is best for those on municipal councils. Various legal devices have been implemented to safeguard the policy making role of municipal councils. Zones of immunity have even been carved out by case law.7

The seminal case in Canada on the topic of municipal immunity in exercising legislative powers is Welbridge Holdings Ltd. v. Winnipeg (Greater)8, a case predating the modern era of tort liability of public authorities. The Supreme Court of Canada held

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4 Ibid., at page 5-1
6 Louis Sylva Escaping from the Straight Jacket that Baffled Houdini – Analysis of the Myths and Realities of Empowering Toronto through a City Charter in Master of Public Administration, Research Report, 2005, at p. 6
7 Shell Canada Products Ltd. v. Vancouver (City) [1994] 1 S.C.R. 231, McLaughlin, J., at p. 244
that a municipality could not be held liable for the negligent adoption of a zoning by-law since it was acting in furtherance of a legislative power. That principle was later extended to negligent subdivision approvals.⁹ Canadian law on negligent municipal approval of subdivision seems to prohibit absolutely any right of recovery to aggrieved parties; however, a close examination of this feature of municipal liability reveals a more ambivalent legal environment.

III. CANADIAN MUNICIPAL LIABILITY AND IMMUNITY: A WORK IN PROGRESS

In 1984, the Supreme Court of Canada set forth an expansive policy of municipal tort liability in negligence in the landmark case of Kamloops (City) v. Nielsen¹⁰ adopting the test set out in Anns v. Merton London Borough of Council.¹¹

The two-stage analysis of public authority tort liability with the twin towers of policy decisions and operational decisions are now defining the Canadian landscape of municipal liability and was recently reaffirmed by the Supreme Court of Canada in Design Services Ltd. v. Canada.¹² The Anns analysis holds in part that local authorities benefit from a general immunity when they make policy decisions. It follows that a private duty of care cannot be attributed to a local authority in that context and therefore, there cannot be any liability in negligence.¹³

There is, however, a weakness with the Anns analysis in that the distinction involved in the twin towers dichotomy flowing from the second branch of the Anns test is one of degree and therefore, susceptible to confusion. If the test offers fairly theoretical

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¹⁰ [1984] 2 S.C.R. 2 ("Kamloops")
¹¹ [1977] 2 All E.R. 118 (H.L.) ("Anns")
clarity, it is more often than not confusing in practice because of the blurring of the line between the two branches of the dichotomy.\textsuperscript{14}

The issue of negligent municipal subdivision approvals is a case in point. They can be seen under an \textit{Anns} analysis to result from true policy decisions and therefore, municipal authorities should not owe a private duty of care for them. They also could be exempted from liability because of the zone of immunity afforded by \textit{Welbridge} and \textit{Bowen}\textsuperscript{15}. The judicial landscape, however, affords no such clarity of result.

**EVOLUTIONARY CONTEXT OF THE LAW**

The largest shift toward broader liability exposure for public authorities in the common law world first came with \textit{Anns}. Public authority liability was placed on the same footing as liability for private parties by allowing liability as long as a loss was proximate and foreseeable, with immunity available only if it could be justified on public policy grounds.

In \textit{Anns}, Lord Wilberforce set out a two-stage analysis for determining whether a duty of care existed. Since the first stage of the analysis does not treat public authorities differently from private defendants, justifications for shielding public bodies from the imposition of duty of care, and therefore, liability will normally arise only in the second stage. However, long before \textit{Anns}, the Supreme Court of Canada issued the decision of \textit{Welbridge}.

**THE WELBRIDGE LEGISLATIVE IMMUNITY**

In \textit{Welbridge}, the plaintiff corporation had suffered damages after relying on a zoning by-law amendment that was quashed because the municipal council had passed it

\textsuperscript{14} Pawella v. Winnipeg [1984] M.J. No. 69 (Man.Q.B.). Hanssen J. commented, at paragraphs 1 and 3, that the extent of a public body's liability at common law for negligence was unclear and that the guiding principles laid down in Anns were difficult to apply in practice. This criticism holds true to this day.

\textsuperscript{15} See note 9
without a proper hearing. The plaintiff urged the court to impose a liability in negligence upon the municipal authority not on a vicarious basis resting upon default of a servant or agent of the defendant, but rather an original, independent liability proceeding from a perceived duty of the municipal defendant, in enacting a rezoning by-law, to exercise reasonable care to see that the procedures upon which a valid enactment depended were followed. The plaintiff argued that this duty was owed especially to those persons having or obtaining an interest in the affected land, which enabled them to exploit those possibilities.

The Supreme Court of Canada unanimously dismissed the corporation's claim. Mr. Justice Laskin, on behalf of the court, stated that the plaintiff's liability claim depended on whether the defendant City, when enacting a zoning by-law, had the duty to exercise reasonable care to follow procedures that were essential to its validity.

Laskin held that since council was performing a legislative or quasi-judicial function, no duty of care could arise:

"A municipality at what may be called the operating level is different in kind from the same municipality at the legislative or quasi-judicial level where it is exercising discretionary statutory authority. In exercising such authority, a municipality (no less than a provincial legislature or the Parliament of Canada) may act beyond its powers in the ultimate view of a court, albeit it acted on the advice of council. It would be incredible to say in such circumstances that it owed a duty of care giving rise to a liability in damages for its breach. “Invalidity is not the test of fault and should not be the test of liability”….”

Laskin J. acknowledged that the plaintiff's claim was not based only on the invalidity of the by-law but more specifically in council's failure to carry out procedural requirements that were a condition of the by-law's validity. Although these requirements

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16 See note 8, par. 20 (Quicklaw edition)
existed because council was acting quasi judicially when passing the by-law, Laskin J. did not consider this material to whether a duty of care could arise. It was not the specific nature of the error but that it occurred in the course of performing a legislative or quasi-judicial role that mattered. Hence, Laskin held that the risk of loss from the exercise of legislature or adjudicative authority was a general public risk and not one for which compensation could be supported on the basis of a private duty of care.

THE TROUBLE WITH WELBRIDGE

_Welbridge_ remains one of the leading cases with respect to public bodies exercising legislative powers in Canada despite the modern municipal liability era. In fact, it has been suggested that Laskin's contrasting of the municipal immunity at the legislative or quasi-judicial level with an exposure to liability and negligence when acting pursuant to its business powers or acting at the “operational level” appeared to anticipate the policy/operational distinction later described in _Anns_ and accepted by _Kamloops_.

Although an argument could be made that _Welbridge_ is consistent with the later _Anns_ and _Kamloops_ decisions in some respects, it also contradicts them in one important respect.

_Welbridge_ offers a zone of immunity at the legislative or quasi-judicial level. The need to protect decisions made at that level may be obvious because this is where municipalities carry out quintessentially governmental functions. Therefore, at first blush, it appears that exemption of a duty of care at this level satisfied the second stage of the _Anns_ analysis. But a closer consideration of the conceptual underpinning behind the _Welbridge_ analysis shows its critical incompatibility with the conceptual framework of analysis in _Anns_. _Anns_ offers essentially a purposive test. _Welbridge_, however, requires the classification of the nature of the function being performed thus promoting a categorical and formalistic approach.

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17 _Entreprises Sibeca Inc. v. Frelighsburg (Municipality)_ [2004] 3 S.C.R. 304 (“Entreprises Sibeca”)
Anns' analysis only allows policy reasons and not past precedent or categorical exceptions to defeat a prima facie duty of care. Lord Wilberforce had explained that the purpose of the second stage was a desire to protect the freedom of public authorities to exercise their discretion. He was also careful not to strictly categorize decisions as either policy or operational by cautioning that although the distinction is convenient, many operational powers or duties have some element of discretion. This emphasizes that the overriding consideration for determining the appropriateness of judicial review of a decision on grounds of negligence should not be the level or identity of the decision maker, but rather the purpose and nature of the decision.

If the purposive approach suggested by Lord Wilberforce in Anns had been applied in Welbridge, it would not have been an impediment to a finding that council owed a duty of care to the plaintiff. The reason for this stems from the fact that since council had no discretion over the minimum procedures required by law to pass a valid zoning by-law, imposing a duty of care would not have interfered with decisions properly made by councils, and not the courts. In Welbridge, the substance of the proposed zoning by-law and the decision to further it through the legislative process were policy decisions by council since they were quintessential government functions. To execute these policy decisions, council had to comply with the procedural requirements imposed by law. Since the practical execution of a policy decision is a hallmark of an operational decision and is separate from decisions about the substance of policy, a failure to comply with procedural requirements would be considered an operational decision that would have been the subject of a duty of care.

**THE WELBRIDGE LEGACY: BOWEN**

The appealing features of Welbridge were followed in Bowen. The Alberta Supreme Court Trial Division allowed the City to escape liability even though it had negligently ignored soil instability in approving a subdivision.

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19 See note 9
The City had approved a subdivision abutting the east side of the North Saskatchewan River in an area where the riverbank was both high and steep. The Glamorgan Height Subdivision, however, sat on unstable soil.

A landslide eventually occurred affecting undeveloped lot number 9. The owners of lot 9 were left with a parcel of land without any marketable value. Again, as in Welbridge, the plaintiffs were trying to anchor the liability of the municipal authority on the negligent failure to follow statutory procedures and guidelines. As the plaintiffs were successors in title to the owners, they asserted that they had bought lot 9 for the purpose of residential construction in reliance of the fact that the area had been subdivided by a re-plot for residential housing by or with the approval of the City and that it could not be used or sold by them for that purpose by reason of the negligence on the part of the City.

The plaintiffs were alleging negligence on the basis of a violation of statutory duties established by Section 16 of the 1963 Planning Act of Alberta. They were arguing that such duty extended not only to the proponents of the subdivision, but beyond them to their successors. The plaintiffs were claiming that their claims were not yet barred by any applicable period of limitation.

The court framed the issue in light of the statutory framework applicable to the case at hand. If there were actionable negligence on the part of the City according to the court, it laid in authorizing, approving, or registering the re-plot Plan without the engineering studies and recommendations of a consulting engineer referred to in an earlier decision of the provincial planning advisory board for the province of Alberta. The question of negligence and its possible consequences in law had to be considered in light of the subdivision provisions of the relevant statute. Section 16 of the Planning Act, S.A., 1963, C. 63, provided as follows:

"16  Land shall not be subdivided unless
(a) the land, in the opinion of the approving authority, is suited to the purpose for which the subdivision is intended and may reasonably be expected to be used for that purpose within a reasonable time after a plan or other instrument effecting the subdivision is registered."

The court readily acknowledged the negligence of the City in its subdivision approval:

"I am of the view that the City was negligent in ignoring the matter of soil instability when such ought reasonably to have been of concern in considering approval of the re-plotting scheme."\(^20\)

Would damages follow? The court introduced this topic by examining the nature of the negligence and whether it gave rise to a cause of action by the plaintiff. The court was aware of the House of Lords decision of *Anns* and *Welbridge*.

The trial judge held at paragraph 48 that zoning and subdivision approvals were both protected by a zone of immunity:

"*Welbridge Holdings* proceeded on a footing that zoning and rezoning and proceedings ancillary to these acts are quasi-judicial or legislative in nature... I am of the opinion that this ratio applies equally to subdivisions... The two are intertwined and the subject matter of soil instability is common to both."

The trial court noted that in *Welbridge*, the negligence in the ancillary judicial or quasi-judicial steps leading to the amending by-law were such as to invalidate it, but the invalidity was not of itself the gist of the claim. The court then concluded as follows at paragraph 50:

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\(^20\) See note 9, par. 35
"It is true that a negligent omission which I have found against the City rests on a different duty of care, but I do not think that this can serve as a valid distinction. Here, the omission was ancillary to the exercise of a quasi-judicial function. I do not think that the resolution of City Council of June 26, 1967, followed by registration of Plan 5414 NY Riverbend, amounted to an actionable representation that the City had given adequate consideration to all of the matters to which subdivision planning is directed, including soil instability, any more that then enactment of a zoning by-law amounts to an actionable representation that it has been validly enacted. To hold otherwise would, it seems to me, contravene the principle in *Welbridge Holdings* or at least reduce its application to confusion."

It followed that the state of the law in Canada with respect to the private duty of care of local authorities when dealing with zoning and subdivision approvals is founded on a case predating *Anns* of the House of Lords and its two-step analysis of a duty of care and *Kamloops*. *Welbridge* is an anachronism in modern case law, but it is nonetheless sound and relevant law.

*Bowen* highlights the inherently inadequacy of *Welbridge*. The City was shielded from liability because of the legislative or quasi-judicial immunity defense even if it had prior knowledge of soil instability when it approved a subdivision. In effect, the end result of *Bowen* in applying *Welbridge* was to shift the burden of the loss resulting from the municipality's failure to act upon its knowledge on the victim with no right of recourse to remedy the damages sustained as a result thereof.

The zone of immunity created by *Welbridge* and upheld by *Bowen* had limits, however, as expressed in *Gibbs v. Edmonton (City)*\(^{21}\).

THE LIMITS OF THE WELBRIDGE INFLUENCE: \textit{GIBBS}

The matter was revisited 25 years after in \textit{Gibbs}, where another negligent approval of a subdivision was cause for action but with different results.

In \textit{Gibbs}, the municipality was found liable for damages suffered by a plaintiff who had purchased a new home, which had been partly built on disturbed soil caused by the much earlier excavation of the lands by the City for a sewer tunnel. The court rejected the City's argument that it could rely on a policy defense predicated on \textit{Anns}. The court found the City liable for approving the subdivision, redistricting the land, closing the road and selling the road to the developer. The court found that even though these decisions were made by a high-level authority such as the municipal council, they did not qualify as policy decisions. The decisions were not based on financial, economic, social, and political factors. Further, the provincial regulations required that the City consider soil characteristics and related issues in considering the application for a subdivision. The court concluded that:

"Clearly the nature of the backfilled soil, and the resulting potential for subsidence were matters which should have been considered by the City before approving the subdivision. The duty of the City is even stronger in this case, where it had special knowledge of the hidden danger, and where the danger was not a naturally existing one, but rather one created by the City in the construction of a storm sewer."

The City had argued that any negligence on its part could not lead to damages since \textit{Bowen} had earlier decided that on account of the execution of a legislative power, these decisions were shielded from tort liability as policy decisions. Municipal liability or lack thereof hinged on whether the court would follow the \textit{Welbridge} approach or the other decisions of the Supreme Court of Canada that had adopted the \textit{Anns} approach. The trial judge chose not to follow \textit{Bowen} and \textit{Welbridge}. Why?
One of the critical factual differences between *Gibbs* and *Bowen* is that in *Gibbs*, the cause of the soil instability was not natural but rather the result of the interference by the City. The other difference lied in the analytical context. The Supreme Court of Canada in *Just* had indicated that *Anns* “represented a fundamental shift from a focus on the decision-maker to a focus on the decision being made”.

*Gibbs* was challenged on appeal on the basis of the policy defense immunity.

The Alberta Court of Appeal dismissed the appeal.\(^\text{22}\) It approved the approach of the trial judge who, following *Just*, had found as a fact that the City had chosen to use the planning department as a clearinghouse for subdivision applications. Thus, the City's later communications to and from its clearinghouse were operational in nature and could not protect the City from this negligence claim. The Court of Appeal said:

"Besides, the heart of the City's negligence is failure to warn. A warning would have cost very little. A policy decision not to warn and to conceal the danger would be extraordinary and no one suggested here that such a policy existed. The failure to warn here was thoughtless oversight, the opposite of a policy decision." \(^\text{23}\)

One of the consequences of the *Gibbs* case was to raise at the level of an Appellate Court in Canada the question of the relevancy of the earlier cases of *Welbridge* and *Bowen*. Another Court of Appeal had concluded otherwise. The British Columbia Court of Appeal had earlier sided with *Welbridge* in *Birch Builders Ltd. v. Esquimalt (Township)*\(^\text{24}\) holding that the principle in *Just* did not apply to cases where what was under attack was the legislative function of municipal councils. *Birch Builders Ltd.* dealt with a claim in negligence for failure to adopt a resolution necessary to authorize a development permit. The British Columbia Court of Appeal described both the act of adopting the resolution and the failure to do so as a legislative function rather than

\(^{22}\) *Gibbs v. Edmonton (City)* [2003] A.J. No. 493
\(^{23}\) Ibid., par. 11
\(^{24}\) [1992] 4 W.W.R. 391
operational as the concept had been developed in *Just*\(^{25}\). Recently, the Supreme Court of Canada in *Enterprises Sibeca*\(^{26}\) re-affirmed *Welbridge*, describing it as one of the leading cases for determining the rules governing the liability of public bodies exercising a legislative power.

This opened the door for *City Sand and Gravel Ltd. v. Newfoundland (Municipal and Provincial Affairs)*\(^{27}\), where, this time, the Newfoundland and Labrador Court of Appeal dealt with allegations of negligent subdivision approvals in the context of the *Anns* analysis.

**CITY SAND: THE PREVALENCE OF ANNS ANALYSIS**

City Sand had operated a quarry in St. John's since 1971. When operations began, there was a small residential development nearby. Over the years, as the quarry continued to grow, so did the residential development.

The St. John's Metropolitan Board was responsible for the area where the quarry and the residential development were located. The Department of Municipal and Provincial Affairs assumed responsibility for this area under provincial legislation. In 1984, the developer of Elizabeth Park, a residential area near the quarry, applied to extend the development. Jane Heights Development was eventually approved even if it encroached in a provincially mandated 300-metre buffer zone. In 1986 and 1988, the local authority at that time, the Metropolitan Board, received complaints from residents regarding the blasting operations of the quarry. Following the 1986 complaints, City Sand was ordered to implement warning protocols. In 1988, fly-rock from the blasting landed in the buffer zone. Blasting operations were subsequently prohibited in certain areas of the quarry. Finally, in July 1998, two Jane Heights residences were damaged as a result of fly-rock.

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\(^{25}\) Ibid., page 8 (QuickLaw version)

\(^{26}\) See note 1

City Sand was then required to revise its blasting plan to minimize the potential for fly-rock at significantly increased costs. It sued in early 1998, claiming that the local authority should be held liable in tort for damages to City Sand as a result of the increased costs incurred from the revised blasting plan.

City Sand suggested that if a municipality or public authority permitted the development of a residential subdivision in close proximity to a quarry operation where blasting operations were carried out, which creates a public danger, the municipality or public authority should bear the cost of removing the danger to the public.

The trial judge reframed the issue in a more conventional way by dissecting the various components of the legal debate. According to the judge, the primary issue was whether or not the Crown is liable in tort for damages arising as a result of additional costs incurred by the plaintiff in ensuring that fly-rock did not endanger the public, particularly the residents of Jane Heights. This raised the question of whether or not Metro Board, whose obligations had been assumed by the defendant, owed a duty of care to the plaintiff and, if so, did it fail in that duty? If there was a duty of care, two further questions needed be answered:

1. What was the appropriate standard of care to be applied to the operational aspect of the government activity?

2. Was the Crown negligent in allowing a 225-metre buffer zone between the plaintiff's quarry operation and Elizabeth Park, Phase 2B (Jane Heights)?

The trial judge noted that policy decisions by a public authority are not subject to review by a court so long as the policy constitutes a bona fide exercise of the authority's discretion. There is presumption in the absence of evidence to the contrary
that a policy decision undertaken by a public authority is bona fide. In Ingles v. Tutkaluk Construction Ltd., the Court had said "true policy decisions are exempt from civil liability to insure that governments are not restricted in making decisions based upon political or economic factors." 

In Brown, Corey J. had reviewed some of the relevant factors that should be considered in making a determination between policy and operation where he stated:

"True policy decisions involve social, political, and economical factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economical, social, and political factors or constraints.

The operational areas concerned with practical implementation of the formulated policies, it mainly covers the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness."

The trial judge concluded that the plaintiff had not established that a sufficient relationship of proximity or neighbourhood existed between the plaintiff and the defendant whereby a duty of care can be said to have arisen. The municipal buffer zone held no fertile grounds of liability benefiting City Sand:

"The buffer zone (...) is a safety mechanism in the sense that should fly-rock or debris be ejected from the quarry site, as a result of blasting or other techniques, the likelihood of injury or damage to others is
minimized (...) it cannot be said there was any carelessness on the part of the defendant.”

With respect to the issue of sound planning in urban development, the trial judge said:

"[60] On the issue of foreseeability, I am satisfied (...) that none of the parties foresaw any danger might be created. In the circumstances, there could be no reasonable contemplation of damages arising from carelessness, thus creating a prima facie duty of care on the part of the defendant to the plaintiff."

The trial judge then went a step further and found that the buffer zone was a policy decision rather than an operational one on the basis of how the buffer zone was established over time particularly as that there was no suggestion of an inspection mechanism and that the buffer zone was in its early developmental inception at the time of the first conflict between the development and the quarry.

City Sand appealed, making much about a factual error by the trial judge with respect to the buffer zone. The Court of Appeal, while agreeing that the trial judge had made factual errors in respect to the buffer zone, chose another variation on the same theme benefiting local authorities and refocused the legal debate as the analysis of the approval of the development in accordance with Anns, Just and other relevant authorities.

This preferred approach by the Court of Appeal enabled it to deal head-on with a recurring municipal issue involving municipal liability, or lack thereof, for authorizing a residential development. The Court noted that in Just, Cory J., in discussing guidelines to assist in differentiating between policy and operations, had quoted with approval Mason J. in Sutherland Shire Council v. Heyman:
"The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognize that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.”31

The Court of Appeal then concluded that the approval was a conscious policy decision to authorize the development and was not merely administrative direction or other examples of an operational decision as outlined in the above ruling by Mason J. and the City was therefore exempt from the imposition of tort law duty of care. The Court finally found it unnecessary to resolve issues as to whether the local authority owed a duty of care both to the residents of Jane Heights and to City Sand.

According to the Court, a municipal authority reviewing a proposed residential development may owe a duty of care to future residents in respect of known hazards. Although the Plaintiff had emphasized that point, it had not acknowledged directly that its blasting, which entailed the inherent risk of fly-rock, exposed it also to liability in tort to those same residents. As City Sand had no right to eject fly-rock outside the quarry site, Metro Board owed no duty of care to City Sand. City Sand carried on a legitimate but inherently dangerous operation. It constituted a danger to persons and property outside the quarry site. Prior to the development of Jane Heights, neither the owner of the land comprising that development, nor Metro Board, found it necessary to take legal action in respect of fly-rock landing outside the quarry site. City Sand could not however

31 (1985), 60 A.L.R. 1 (H.C.A.)
compel Metro Board to restrict development of adjacent land so that a public danger would not be created.

The Newfoundland and Labrador Court of Appeal conclusions in *City Sand* are not at odds with that of the Alberta Court of Appeal in *Gibbs*. The distinguishing factor between the two cases is prior knowledge of the hazard. If the hazard would have been known in *City Sand*, the City would have been found derelict in its duty of care as in *Gibbs*. Interestingly enough, *Welbridge* was neither brought to the attention of the Courts in City Sand nor was it given any consideration.

The issue of municipal negligence in subdivision approval was recently raised again in *Bowes v. Edmonton (City)*.  

**BOWES: NEGLIGENCE SAVED BY LIMITATION**

In *Bowes*, the subject lands were adjacent to a river in Edmonton. In 1978, a previous owner had executed a development agreement indemnifying the City for any cause of action or damages arising out of slippage or subsidence of the bank adjacent to the development site. After having built a home on these lands, he then applied to subdivide the lands and entered into another development agreement specifying what could and could not be constructed on the lands and requiring these covenants to run with the title to the lands. Previous to that, the City had commissioned geological reports that warned of the possibility of slides on the lands if more construction was undertaken.

The plaintiffs, subsequent owners of the lots developed or subdivided by the previous owner, were all aware of the riverbank's potential instability, but not of the City's geological report and they had received permits from the City to construct homes on their lots. In March 1999, more than 10 years after they had built their houses, the land immediately west of their homes collapsed.

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The trial judge held that the City owed the plaintiffs a duty of care in approving applications to develop and to build on the basis of the earlier case of *Cooper v. Hobart*[^33] where the Supreme Court of Canada had clarified the *Anns* and *Kamloops* analysis to be undertaken in determining whether a duty of care should be recognized in any particular situation.

The trial judge also held that the City owed a duty of care to the plaintiffs to use reasonable care in determining whether to approve their construction permits and was obliged to disclose any information it had which might bear on the risk associated with their proposed construction projects. In the end, the trial judge held the City had failed in its duty by not consulting and disclosing its geological report to the plaintiffs in approving their permit. The claims were however dismissed because they were statute barred as they had not been brought within 10 years from the date where the City had failed to consult the geological reports in 1977, a holding that was affirmed by the Alberta Court of Appeal[^34].

Having determined that the City owed a duty of care to the plaintiffs to exercise reasonable care in its review of development applications, the trial court then determined whether the City had breached its standard of care. The City argued that there was no reasonable way it could have known that a deep-seeded slide originating in the bedrock would occur. The court held that the City's duty was to take reasonable care in the issuance of the permits to develop and build. A reasonable careful municipality would have referred the material in its possession which might bear on the granting or refusal of the applications. That does not mean that the City is a guarantor of the safety or suitability of a proposed development. It does not mean that the City is responsible for every potential latent defect, no matter how foreseeable. The City is obliged to conduct itself...

[^33]: [2001] 3 S.C.R. 537
[^34]: [2007] A.J. No. 1500
carefully in granting or refusing permits. In this case, it should have reviewed the materials in its possession bearing on the plaintiffs’ applications. It should have uncovered the 1977 Hardy Report and disclosed it to the applicants.

In the end, one of the critical findings of the trial judge maintained on appeal was that the City had been negligent in what amounted to a failure to warn basis as in Gibbs. The failure was said to be the City's failure to adequately consider and disclose some information contained in a report or disclosing that report it had about the problem with the riverbank.

The defining feature in Bowes is that the City had prior knowledge of the soil instability along the riverbank. Having such knowledge, it was then under a duty of care to warn or share that information with the plaintiffs. That defining feature was also present in Gibbs, where to further compound the City's potential for liability, it had caused the subsidence of the soil because of the work it had done excavating a tunnel. The courts in Gibbs considered the Welbridge and Bowen legislative power immunity defense but refused to follow it. Bowes, however, led to a finding of municipal negligence without any consideration of that defense. In City Sand, the legislative immunity defense had not been pleaded, but the courts made critical findings of fact with respect to lack of knowledge or foreseeability on behalf of the local authority with respect to the problems later associated with fly-by rocks.

Bowes’ trial reasons and appellate reasons have been recently criticized for a perceived misunderstanding of the law of causation and the applicability of the Supreme Court of Canada decision in Resurface Corp. v. Hanke.

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36 [2007] 1 S.C.R. 333
IV. RECENT CASE LAW REGARDING NEGLIGENCE OF GOVERNMENT AUTHORITIES

Crawford v. Torbay\textsuperscript{37}

This is a recent Newfoundland trial decision in which the plaintiff purchased a residential property with an undeveloped wood/forested lot next to it. According to the Plaintiff, the entire reason for moving to this property from a typical subdivision lot was enhanced privacy and quietness.

At the time of the plaintiff’s purchase, the wooded lot was a separate, undeveloped parcel with a frontage of 47 feet owed by a neighbour with an additional 100 foot parcel immediately adjacent to it. The applicable zoning required a frontage of 100 feet in order to develop. A number of existing properties in the area had frontage of less than 100 feet. The existing lots were approved by a predecessor organization before the area became incorporated in the Town boundaries 4 years before the plaintiff purchased his property.

After purchasing the lot, the Plaintiff sought information from the Town Manager, the relevant person in regard to building permits and general development regulations of the Town, as to whether the wooded lot was likely to be developed. According to the Plaintiff, the Town Manager assured the Plaintiff that the wooded lot could not be developed without water and sewer services being brought into the area due to the zoning requirement of 100 foot frontage and the maximum allowable variance of 10%, or 10 feet. For reasons which are not indicated in the decision, the Town Manager was not called to testify at trial although he was available. Five years after the Plaintiff purchased his property, the neighbour proposed to subdivide his tract into two equal frontages of 75 feet and the purchaser would develop the wooded lot.

The application from the purchaser for the proposed construction was approved by Council on April 14, 2003. No application to subdivide was made. On May 2, 2003, the Plaintiff learned of the proposed building plans on the wooded lot and wrote to the

\textsuperscript{37} 2008 NLTD 161.
Town Manager advising that he wished to appeal. The Town Manager advised the plaintiff that the appeal would have to be filed within 14 days of the decision according to regulations and was therefore too late. He did not advise the Plaintiff when the approval had been granted. On May 26, 2003, after the letter from the Plaintiff had been tabled, the Town again approved the building permit for the wooded lot. No notice was given to the Plaintiff of this meeting or of the resulting decision.

On July 23, 2003, another neighbour on the street began a petition complaining about the purchaser’s building permit application for the wooded lot which the Plaintiff signed. The Plaintiff attended a Council meeting on August 4, 2003 on another matter and, without any advance notice, was invited to speak to Council regarding the wooded lot development. The Mayor subsequently wrote a letter to the Plaintiff stating his reasons for the approval and referred only to the July petition and not the Plaintiff’s May 2, 2003 letter. The reasons the Mayor gave were the existence of other lots with similar frontages in an existing residential area.

The Plaintiff submitted that the Town ought to be found liable on the following bases:

1. it negligently misrepresented the future development potential of the wooded lot;
2. it was negligent in failing to abide by its Development Regulations; and
3. it was negligent in its failure to provide Mr. Crawford with procedural fairness.

Adams, J. considered Anns v. Merton London Borough Council, Neilson v. Kamloops and Just v. British Columbia. He held that the test for liability at common law for damages by municipal authorities was summarized by Wilson J. in Neilson v. Kamloops as:

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38 [1978], A.C. 728 (H.L.).
1. is there sufficiently close relationship between the parties (the local authority and the person who has suffered the damage) so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so,

2. are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

Adams J. then quoted the appeal decision in City Sand and Gravel Ltd. et al. v. Newfoundland,41 which held that application of the Kamloops test requires an examination of the applicable statutory provisions to determine whether the impugned decision of the public authority was a policy or operational decision. Policy decisions are except from tortious claims as there is no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints.

Adams J. held that the decision to allow development of the wooded lot by the Torbay Town Council was a purely operational one with no larger social, political or economic factors at play. It was also held that the Town owed a duty of reasonableness to the Plaintiff. On this basis, there was a private duty of care owed to the Plaintiff.

Despite the lack of testimony by the Town Manager, the Court held there was no negligent misrepresentation by the Town. It was held that the Town Manager accurately stated the Town’s regulations and it was the Plaintiff’s interpretation that it would never happen based on the topography of the area and the existing state of services. The Town Manager did not purport to bind the Town Council.

Justice Adams found that the Town had been negligent in failing to abide by its Development Regulations. It was found that the Development Regulations allowed the Town to refuse to issue a building permit or only conditionally approve the permit despite the conformity of the application with the requirements of the Development Regulations and that the Regulations allowed pre-existing lots that did not comply with the Regulations to have building permits issued in respect of them. Neither of the individual

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41 2007 NLCA 51, leave to appeal to the Supreme Court of Canada dismissed 2008 CanLII 1399 (S.C.C.)
regulations nor the combination of the regulations allowed a building permit to be issued for a new, non-conforming lot. Justice Adams held that if an application to sub-divide the property had been completed then proper notice of the process would have been given to the plaintiff. The plaintiff, therefore, would have had an opportunity to make his views known in a meaningful manner.

Justice Adams awarded $13,800.00 in damages including aggravated damages and awarded costs on a solicitor and client basis for the actions of the town in failing to abide by its regulations and thereby forcing the plaintiff to commence a civil action rather than an appeal of the Town Council’s decision.

As in City Sand and Gravel, there is no mention of the Supreme Court of Canada decision in Welbridge in Crawford. It could be argued that, in Crawford as in Welbridge, the exercise of the Town Council in voting to approve the building permit for the purchaser of the wooded lot was an exercise of a legislative power and regardless whether it was in breach of the Regulations in allowing the development of a non-conforming lot, liability cannot flow from that error.

Additionally, although the Court did not ultimately find liability on the basis of breach of the duty of procedural fairness, Adams, J. would have found such if he “were called upon to do so”. It is quite settled law that breach of the duty of procedural fairness does not give rise to damages. It is an administrative law remedy only i.e. it can be used to invalidate the impugned decision with an order that a new hearing be given in which the requirements of procedural fairness are followed.

The trial judge in Crawford found liability on the basis of the Town Council failing to follow its Development Regulations. There was a bare statement that the Town Council did not consider larger economic and social factors in its decision to allow the development of the neighbouring lot and, as such, it was therefore an operational decision not subject to any policy considerations such as to negate the duty of care. There was no further discussion about the factors leading to the decision. There was no evidence in

Crawford that the Town Council was acting in anything other than the Town’s best interests in deciding to allow the development of the wooded lot. While regulations were not followed with regard to the proper procedure for allowing the subdivision of the wooded lot, in the writer’s opinion, damages should not have followed from that failure. An administrative law remedy such as a declaration requiring the Council to abide by its own regulations and conduct the proper procedures to determine subdivision approval should have been the full extent of any finding against Torbay.

Crawford is a decision that condemns a municipality for failing to understand its own procedures and was therefore considered an operational decision. Equally, Torbay’s counsel did not appear to lead evidence of the nature of the decision (i.e. the factors that led the counsel to allow the development to proceed) or argue the legislative immunity doctrine, which still appears to be valid law in Canada under Welbridge Holdings. It may be trite to state that governments must make hard decisions that balance the needs of individuals, groups and the community at large all while taking into consideration budgetary constraints; however, it is troublesome that a municipality may be found liable in attempting to balance these concerns. There will always be citizens whose interests are negatively affected by the decisions made by a municipality just as there will be citizens conversely whose interests will be positively affected by such decisions.

Holland v. Saskatchewan

In stark contrast to the reasoning in Crawford is the Supreme Court of Canada’s decision in Holland v. Saskatchewan. While this decision is not in the planning and development context, it is the most recent Supreme Court of Canada discussion about negligence law as applied to government authorities and it discusses the Welbridge/Kamloops dichotomy.

A group of farmers refused to register in a federal program aimed at preventing chronic wasting disease because they objected to a broadly worded indemnification and

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43 As reflected by its favourable citation by the Supreme Court of Canada in Holland v. Saskatchewan, 2008 SCC 42.
44 2008 SCC 42.
release clause in the registration form. As a result, their herd status was down-graded to the lowest level, which reduced the market price of their livestock and diminished the farmers’ ability to sell them. On judicial review, the clauses were found to have been improperly included in the form and a declaration was made that the downgrading of the herd certification status had been unlawful. No action was taken by the government pursuant to the judicial ruling. The farmers then commenced a class action alleging i) negligence in requiring the farmers to enter into the broad indemnification agreement and downgrading the status of those who refused to do so; ii) misfeasance in public office; and iii) tort of intimidation.

On a motion to strike the plaintiff’s claim, the tort of intimidation was struck, the Plaintiffs were granted leave to amend the misfeasance in public office claim and the motion was dismissed in respect of the negligence claim. On appeal, the alleged fault in the negligence claim was characterized as the failure of the public authority to act in accordance with the authorizing acts and regulations. McLachlin C.J., for the Court, agreed with the Saskatchewan Court of Appeal that the negligence claim (as characterized above) disclosed no cause of action recognized by law and must be struck. The Court held that the viability of the action in negligence is to be determined by the Anns test as set out in Cooper v. Hobart and that the law has not recognized an action for negligent breach of statutory duty to date. The proper remedy for breach of statutory duty by a public authority is judicial review seeking a finding of invalidity, which the Plaintiffs had pursued and been granted in a previous proceeding. No parallel action was available in tort.

McLachlin C.J. proceeded to consider whether a new relationship of potential liability should be recognized under the Anns test i.e. whether or not the legislative and regulatory matrix established proximity under the first stage of the Anns test. She held that policy considerations, including the chilling effect and spectre of indeterminate

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46 Indeed, such a cause of action was expressly rejected in R. v. Saskatchewan Wheat Pool (1983), S.C.R. 205.
liability negated recognition of any such new relationship. In this regard, she quoted Richards J.A. in the Court of Appeal decision as follows:

…the respondent’s theory of liability would fundamentally shift the way in which the public and private spheres historically have carried the consequences or burden of government action which is shown to be ultra vires. I see no policy reason which would warrant such a dramatic revision in the shape of the law and, as indicated above, see much which cuts tellingly against shaping the law in the manner sought by the respondent.

The claim of negligence for acting outside the law or in breach of statutory duty was struck; however, the allegation of negligence for failing to implement the judicial review ruling was allowed to proceed. *Welbridge Holdings* was cited to recognize the possibility of an action for failure to implement a judicial decree and the distinction between “policy” and “operational” decisions was discussed. The Court held that public authorities are expected to implement a judicial decision and it is therefore an “operational” act. As a result, it was not clear that a claim in negligence could not succeed on the breach of duty to implement a judicial decree.

V. **ABUSE OF PUBLIC OFFICE**

**General Principles**

Another source of potential liability for municipalities in the planning and development context is the tort abuse of office, alternatively called abuse of power or misfeasance of office. Whereas misrepresentation is based in negligence, abuse of office is an intentional tort. The seminal case in respect of this cause of action in Canada *Roncarelli v. Duplessis*. The Quebec government attempted to stop the purportedly offensive work of Jevhovah’s Witnesses in the province. Roncarelli posted bail for 400 Jevhovah’s Witnesses that had been arrested and, in retaliation, the provincial government revoked his liquor license and barred him from obtaining any liquor license in the future. The Supreme Court of Canada held that discretion necessarily implies good

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faith in discharging public duty; there is always a perspective within which a statute is intended to operate and any clear departure from its lines or objects is just as objectionable as fraud or corruption.

The test for abuse of office was recently set out by the Supreme Court of Canada in *Odhavji Estate v. Woodhouse*, per Iacobucci J. as follows:

> the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside the deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.\(^{48}\)

Malice may not necessarily required to prove abuse of office - evidence that the officer was recklessly indifferent to the outcome may suffice. There is no distinction between the exercise of a statutory power that an official does or does not possess as long as the constitute elements of the tort are proved. The underlying purpose of the tort is to protect each citizen’s reasonable expectation that a public officer will not *intentionally* injure a member of the public through deliberate and unlawful conduct in the exercise of public functions. Courts have made no distinction between the municipality and its officials in abuse of public office decisions, i.e. pleading that the actions of particular individuals constituted abuse of public office does not preclude a cause of action against the municipality as well.

In a 2006 Ontario Court of Appeal decision, *L.(A.) v. Ontario (Minister of Community and Social Services)*,\(^{49}\) Sharpe J.A. restated the test from *Odhavji* and held that failure to discharge the functions of the office because of budgetary constraints does not amount to a deliberate disregard of a public officer’s duties. Rather, the tort is directed at a public official who *could* have discharged his or her public obligations, yet


wilfully chose to do otherwise. In this case, the Minister had chosen not to enter into any further agreements with parents of special needs children to provide needed services for budgetary considerations. An allegation in negligence was also dismissed and the class action was not certified. It was held that the allegation that terminating the agreements was unlawful may give rise to judicial review or an action for declaratory relief, there was no tort liability.

More recently, the Ontario Court of Appeal upheld a finding of liability against the Ontario Racing Commission for abuse of office. A Commission official called the racetrack and advised that if O’Dwyer was on the list of officials to be approved by the commission, it would not get approved. O’Dwyer was left off the list and was not hired as a result of what the racetrack official believed was a directive from the Commission. The Commission official was concerned that the racing season would not be able to commence if O’Dwyer was on the list and advised the racetrack to avoid delays in opening the season. While the trial judge found that the telephone call from the Commission was an illegal act, the Court of Appeal found that it was not “intentionally illegal” as the official believed it to be under the broad scope of his duties; however, the Commission then compounded the problem with a pattern of unresponsive and dismissive behaviour that blocked any appeal or review of the decision by O’Dwyer. The Commission was required by its enabling statute to consider the matter in a hearing but rather than doing so, it embarked upon a series of misleading and unhelpful correspondence over a period of months which prevented O’Dwyer from commencing employment with another racetrack. The Court of Appeal upheld the finding of liability and the damages awarded at trial.

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Application in the Planning and Development Context

Windset Greenhouses (Ladner) Ltd. v. The Corporation of Delta

The British Columbia Court of Appeal in Windset Greenhouses (Ladner) Ltd. v. The Corporation of Delta\(^{51}\) upheld the trial judge’s finding that Delta’s actions did not constitute abuse of office in regard to the issuance of three building permits and a business license by-law that purported to regulate artificial lighting and fuel types in greenhouses. The Municipality of Delta was considering a draft by-law to regulate artificial lighting, heat sources and habitat enhancement areas at the time of issuance of the first of 3 building permits for the development of large scale greenhouses by the Plaintiff. As a condition of issuing the first building permit while the draft by-law was under proposal, Delta insisted that restrictive covenants be registered on title. Initially, Windset refused but eventually agreed under protest. The by-law was not passed due to an Order in Council from the provincial government which required Delta to obtain Ministerial approval and 2 more building permits were issued under the same conditions, without protest regarding the registration of the restrictive covenants.

It was found that Delta did not have the authority to require that the restrictive covenants be registered and a second substantially similar business by-law was found to be *ultra vires*. However, Delta had obtained a legal opinion prior to passing the by-law stating that the municipality did not need ministerial approval for the by-law. While Delta had acted outside the scope of its statutory powers, it was found that Delta’s staff had an honest but mistaken belief that Delta was able to require the restrictive covenants. Windset had not shown that a member of Council or any other public officer of Delta acted with knowledge of, or with recklessly indifference to, the fact that there was no power to adopt the second business licence by-law. Delta was also entitled to rely upon the legal opinion it obtained regarding its power (or lack thereof as was later determined in another proceeding) to enact the by-law. It was also held by Tysoe J. that Delta was not negligent in requiring Windset to enter into the covenants or in adopting the business licence by-law.

\(^{51}\) 2007 BCCA 126
Windset appealed on the basis that the trial judge failed to consider all the evidence of Delta’s knowledge or reckless indifference. The Court of Appeal found that consideration of additional instances of lack of authority would not inevitably lead to the conclusion that Delta had knowledge or reckless indifference. Delta was pursuing its planning goals which were opposed to the interests of Windset; however, the court recognized that the pursuit of planning goals by a municipality will often be in contrary to the goals and interests of some of its citizens. The appeal on the grounds of negligence was also dismissed. The legal opinion upon which Delta relied was based on the mistaken assumption that there was conflict resolution under the statute which would have thereby allowed the requirement of the restrictive covenants. The trial judge emphasized that such confusion does not equate to negligence.

*Muskoka Mall Ltd. v. Huntsville (Town)*

An example of a municipality being found liable for abuse of power in regard to planning and zoning is *Muskoka Mall Ltd. v. Huntsville (Town)*. A developer obtained a zoning amendment from the Town allowing a shopping mall to be constructed. The Town apparently decided that the construction was moving too slowly and several years later, it passed by-laws purporting to repeal the earlier zoning amendment and downgrading the zoning. The stated basis for the change was the developer’s breach of its agreement with the Town. The Court found that the developer had not breached the agreement and the sole reason for the new by-laws was to punish the developer for what council thought were undue delays. The by-laws were quashed.

*Georgian Glen Development Ltd. v. Barrie (City)*

In *Georgian Glen Development Ltd. v. Barrie (City)*, Howden J. refused to grant summary judgment in favour of the defendant municipality dismissing the plaintiff’s action for abuse of public office. A genuine issue for trial was held to be present. The plaintiff developer, whose president, Mr. Scharf, was a veteran of six decades in the

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52 (1977), 3 M.P.L.R. 279 (Ont. H.C.)

development/building business, purchased land in Barrie designated for future development. Scharf met with the Director of Planning and the Mayor prior to the closing in 1988 and was assured that the City would fully cooperate. The land in question was adjacent to land where a new hospital was to be built and was therefore of great value for servicing that hospital. The required planning applications to amend the official plan and zoning were filed in 1989. Despite expectations that approval would be granted in 1992, final approval was not granted until 1998. Howden found that given the urban character of the lands and the lack of any unusual problems, it was an unusual length of time for the approval process.

The plaintiff claims that over a 12 year period there were repeated deliberate acts by City officials to thwart the development in furtherance of a City policy to extract benefits for the local community college, the new hospital and the City, none of which were authorized by law. The plaintiff additionally claimed that the demands from the City were made incrementally throughout the approval process, each time adding new costs and causing delay unless immediate compliance was given. 15 examples of misfeasance were set out by the Plaintiff, including the City allowing the development of the neighbouring college and hospital’s lands zoned for environmental protection subsequent to requiring the plaintiff to transfer title of its contiguous lands zoned for environmental protection without payment. The plaintiff alleged that this was a continuous pattern of behaviour from the early 1990’s until 2004 and therefore a continuous tort, thereby negating any limitation period for the earlier actions.

The live issues in regard to abuse of office were whether any public official engaged in deliberate, unlawful conduct and whether any such official had been aware that the conduct was unlawful and that it was likely to harm the plaintiff. On a Rule 20 Motion brought by the Defendant municipality, Howden J. found it significant that the municipality’s submissions did not take issue with the description of various items as lacking, or in excess of, the City’s authority in law. In discussing the Motion, he further held that:

“the context of the planning process is [not] a bar to this action being considered by the court. Like private
corporations, local authorities come within the general law, including tort law that requires individuals to be compensated for wrongs done to them...such damages may include punitive damages where the conduct of the officials of the municipality has been high-handed or arrogant.”

**Hartel Holdings Inc. Co. Ltd. v. Calgary City Council**

In *Hartel Holdings Inc. Co. Ltd. v. Calgary City Council*, City Council passed a resolution freezing the zoning of the Plaintiff’s land, which the City was planning to acquire for use as a park. The Supreme Court of Canada found that the actions of the Council were authorized by the Planning Act and were taken for a valid and legitimate planning purpose. The Court placed emphasis on the validity of the Council’s actions pursuant to the enabling statute. If the Council did not have authority to do so, the Court would have likely held that the zoning freeze was to keep the price down to benefit Council itself and that this would have constituted an abuse of its powers. One must keep in mind, however, that abuse of office is an intentional tort and therefore, to find abuse of office, the acting officials must know that the action is likely to injure the Plaintiff. If the Council legitimately thought that they had the power to act in this manner but were mistaken, abuse of office may not have been found.

**Whistler Service Park v. Whistler (Resort Municipality)**

The Plaintiffs were the major developer and largest local contractor in Whistler. They alleged an attitude of hostility, discrimination and bad faith by individual municipal employees who failed to enforce by-laws and award municipal contracts fairly. The Court found no malice and that one “cannot maintain an action for ‘bad attitude’”.

**Woestenburg v. Kamloops (City)**

The passage of a by-law enacting an official community plan that designated the plaintiff’s lot as a future roadway to service new lots on adjacent property (which also

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56 (1990), 50 MPLR 233 (B.C.S.C.).
provided for the subdivision of the adjacent property) was claimed to constitute an abuse of public office in *Woestenburg v. Kamloops (City)*. The City’s refusal to immediately purchase the lands was claimed to constitute a separate abuse of power. The Court was satisfied that there was no malice or favouritism towards the developer by the principal planning employees or anyone else involved in the decision. They were further held to have acted within their powers and for proper planning purposes for the community needs at large. The refusal to buy land immediately was also held not to constitute an abuse of power.

*Rowe v. De Salaberry (Rural Municipality)*

In *Rowe v. De Salaberry (Rural Municipality)*, no liability was found against the defendant municipality when a subdivision was approved and the developer was allowed to retain title to a buffer strip which required the plaintiff to come to an agreement with the developer in order for the Plaintiff to gain access to a portion of her adjacent property. No such agreement was able to be reached. A municipal councillor allowed the developer to advertise on his land and also visited the Plaintiff and advised her to accept the developer’s offer. The Plaintiff claimed that she was threatened by the Councillor; however, the Court was not satisfied that the Councillor threatened or intended to threaten the Plaintiff. The Court also found that the Councillor was acting in his capacity as a municipal councillor when he visited the plaintiff. While the municipality was found to have an interest in the development as it would add to the tax base, the Court found no deliberate breach of any law or improper use of statutory authority. Allowing the developer to retain title to the buffer strip of land was found to be bad practice but not illegal.

**VI. NEGLIGENT MISREPRESENTATION**

Zoning and building departments are subject to large numbers of inquiries for information on the status of current zoning, the potential for re-zoning, development and

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the requirements for a building permit to be issued on any individual building lot within the municipality’s jurisdiction. This combined with the substantial damages that can ensue from providing erroneous information in response to these inquiries has meant that negligent misrepresentation claims are a very active concern for municipalities in the planning and development context.

The test for negligent misrepresentation is set out by Supreme Court of Canada in *Queen v. Cognos Inc.* following the principles of *Hedley Byrne & Co. Ltd. v Heller & Partners*. The following five elements must be found for a finding of negligent misrepresentation:

1. the existence of a duty of care based on a special relationship between the representation and the representee;
2. the representation in question must be untrue, inaccurate or misleading;
3. the representor must have acted negligently in making the misrepresentation;
4. the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and
5. the reliance must have been detrimental to the representee in the sense that damages resulted from reliance on the misrepresentation.

The special relationship was brought into the general *Anns* duty of care analysis in *Hercules Management Ltd. v. Ernst & Young* and the Supreme Court of Canada further clarified the five general indicia of reasonable reliance as:

1. The defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made.
2. The defendant was a professional or someone who possessed a special skill, judgment, or knowledge.

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3. The advice or information was provided in the course of the defendant’s business.

4. The information or advice was given deliberately and not on a social occasion.

5. The information or advice was given in response to a specific inquiry or request.

Following *Hercules Management*, courts have limited findings of negligent misrepresentation against municipalities to instances where the information was provided by officials in the usual and ordinary course of their duties and on occasions in which the officials were acting in their official capacities. For instance, expressions of intent by the mayor were found not to be binding on the town or its council and could not lead to liability of the municipality where the mayor had expressed support for the purchase of land by one of the councilors for the purpose of constructing an abattoir and the lands were found not to be zoned for that purpose. When a mayor acted outside of his authority by authorizing, in writing, the commencement of construction of a driveway across an unopened road allowance and signed a purported draft agreement, his actions were held not to be binding upon a municipality as he was not authorized by council. Additionally, municipalities have been held not to owe a duty of care for the requirements of external organizations, such as local conservation authorities, in regard to the availability of building permits. Informal statements made on social occasions by a mayor which were not authorized by council have been held not to give rise to a special relationship between the mayor or the municipality and the developer when a mayor of a small community made statements in that context regarding the potential rezoning of lands upon which the plaintiff developer relied and purchased the lands in question.

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64 *Severn (Township) v. 934335 Ontario Ltd.* (1994), 23 M.P.L.R. (2d) 301.


The Ontario Court of Appeal found that a negligent misrepresentation had been made in *Moin v. Blue Mountains (Township)*\(^{67}\) on the basis of “special circumstances”. In this instance, the Reeve made statements regarding the Township’s intention to upgrade a road at three separate council meeting at which no other Councilors agreed but did not voice any disagreement. Relying upon the Reeve’s statements, the Plaintiff developed his lands, accessible only by the road in question. As the other councilors failed to voice objections, the Reeve’s statements were held to have become the statements of the Council as a whole.

Negligent misrepresentation in the governmental context has some unique defences. Policy decision immunity and immunity for legislative and quasi-judicial decisions as per *Welbridge Holdings* are two such defences. British Columbia has passed legislation providing statutory immunity for municipalities for negligent misrepresentation unless the public officer is guilty of dishonesty, gross negligence or malicious or willful misconduct.\(^{68}\) A municipality can also take advantage of a disclaimer clause to limit its liability unless it is under a duty in respect of the activity giving rise to the misrepresentation. The disclaimer must have either express language regarding the negligence or words used that are wide enough, in their ordinary meaning, to cover negligence on the part of the municipality. Interpretation of disclaimer clauses will invoice the *contra preferundum* rule. Municipalities must be careful to remember that misrepresentation can arise not only from written statements but also from verbal statements and can be inferred by conduct.

**VII. IS THERE A COMMON LAW BAR TO DAMAGE CLAIMS WHERE A PLAINTIFF HAS FAILED TO EXHAUST AVAILABLE ADMINISTRATIVE LAW REMEDIES?**

Tribunals, adjudicators and review boards are typically created because a particular type of dispute has been identified as requiring special expertise or process in order to best adjudicate the claim. When these entities are created, it is understood that it


\(^{68}\) *Local Government Act* R.S.B.C. 1996, c.323, as amended.
is preferred that the entity adjudicate disputes within its jurisdiction rather than through the Courts.

Consider this scenario – a landowner is denied an amendment to re-zone his land in order to enhance its development value by a municipal council. In Ontario, such a decision (and indeed any municipal decision denying a request relating to development approval) is appealable on a de novo basis to the Ontario Municipal Board, a specialized tribunal established to address land development issues within the province. In such a context, should provincial superior courts permit a landowner who declines to exercise the statutory right of appeal to the OMB be allowed to sue the municipality for damages for negligently refusing to grant the sought-after development approval?

In recent decisions, the issue has arisen as to whether a plaintiff who has available such an alternative adjudicative system must first exhaust this avenue prior to making a claim for damages in a superior court. Two recent decisions, *Grenier v. Canada* and *McArthur v. Canada*, have come to opposite conclusions. While both of these decisions deal with review of disciplinary action involving prison inmates, the conclusions made respecting that review mechanism apply to other adjudicative bodies.

**a) Grenier v. Canada**69 (F.C.A.)

Grenier was an inmate in the Donnacona maximum security penitentiary and was involved in an incident in which he threw documents at a correctional officer. The action was perceived as a threat and an attempt to strike the officer. The officer's co-workers intervened immediately and the inmate was returned to his cell. The institutional head placed Grenier in administrative separation for 14 days due to the perceived seriousness of the action. That decision was reviewed by the Segregation Review Board and upheld. Grenier was additionally found guilty of a charge of “creating a disturbance or any other activity that is likely to jeopardize the security of the penitentiary” and sentenced to 14 days of disciplinary segregation.

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69 2005 FCA 348 (CanLII).
The disciplinary segregation was challenged by way of judicial review and the Federal Court invalidated it prior to the current proceeding. In contrast, the administrative segregation was not challenged by way of judicial review within 30 days after the decision was first communicated to Grenier, as required by sections 18 and 18.1 of the Federal Courts Act, R.S.C. 1985, c. F-7. Instead, Grenier brought an action in damages against the federal government under section 17 some three years after that decision. The damages claimed were in respect of both segregations.

The first level decision of the Federal Court found no fault in the appellant's decision-making in relation to the disciplinary segregation. However, the Prothonotary found that the institutional head's decision concerning the administrative segregation was arbitrary and that the federal government was therefore liable. Damages of $5000.00 were awarded.

The issue before the Federal Court of Appeal was whether Grenier should have applied for judicial review of the decision of the institutional head instead of bringing an action in damages. The Court followed the reasoning of Madam Justice Desjardins in Canada v. Tremblay70 which was held to be the conclusion sought by Parliament and mandated by the Federal Courts Act. Desjardins J. held that a litigant who seeks to impugn a federal agency's decision is not free to choose between a judicial review proceeding and an action in damages; he must proceed by judicial review in order to have the decision invalidated as Parliament thought it was appropriate to grant and reserve to the Federal Court exclusive jurisdiction to review the lawfulness of the decisions made by any federal board, commission or other tribunal in section 18 of the Federal Courts Act. Under section 17 of the Federal Courts Act, the Federal Court has concurrent jurisdiction with the courts of the provinces to try a claim for damages under the Crown Liability and Proceedings Act.

70 2004 FCA 172 (CanLII).
The Court held that the principle of the finality of decisions also required that, in the public interest, the possibilities for indirect challenges of an administrative decision be limited and circumscribed, especially when Parliament has opted for a procedure for direct challenge of the decision within defined parameters. It was held that it was especially important not to allow an action for damages, as allowed under Section 17, to become a mechanism for reviewing the lawfulness of a federal agency’s decisions when this indirect challenge to the decision is used to obviate the mandatory judicial review provisions in subsection 18(3).

The Federal Court of Appeal held that Grenier could not indirectly challenge the lawfulness of the decision of the institutional head ordering administrative segregation by way of an action for damages. Grenier had to apply directly to have that decision nullified or invalidated by way of judicial review pursuant to section 18 of the Federal Courts Act. The federal government’s appeal was granted and the action was dismissed.

b) McArthur v. Canada71 (Ont. C.A.)

Four appeals were consecutively argued before the Ontario Court of Appeal, each raising the same issue - whether the jurisdiction over each plaintiff's claim lies in the Superior Court of Ontario, or in the Federal Court. In each case, the plaintiff had commenced an action for damages in the Superior Court. In McArthur, the plaintiff's claim was for damages for false imprisonment and breach of his Charter rights to be protected from cruel and unusual punishment. In none of the four cases did the plaintiff seek to set aside the underlying administrative decision. The other three actions also claimed damages for breach of contract and misfeasance in public office. Relying on Grenier, the Crown asserted that jurisdiction lay in the Federal Court because an essential element of each plaintiff's claim involved an attack on the decision of a federal administrative board or tribunal and that it was therefore necessary for the plaintiff to first seek a prerogative

71 2008 ONCA 892 (CanLII) also cited as Telezone Inc. v. Attorney General (Canada).
remedy in the Federal Court, as under s. 18(1) of the *FCA*, that court has exclusive jurisdiction to grant prerogative remedies in respect to decisions of federal tribunals. The decisions at first instance were split as whether the Superior Court could assume jurisdiction.

Borins J.A. for the Court of Appeal held that as there are not concepts such as partial, inchoate or contingent jurisdiction, either the Superior Court has jurisdiction or it does not. Nothing in the *Courts of Justice Act* or the *Rules of Civil Procedure* precluded the Superior Court from having jurisdiction to hear any claim that is substantively adequate. The superior court is a court of general jurisdiction having inherent jurisdiction to adjudicate claims consisting of virtually any subject matter.

Borins J.A. held that the proper approach is to determine whether the Superior Court has jurisdiction to adjudicate the plaintiff's claim. If it does, that ends the matter unless there is legislation, or there is an arbitral agreement, that clearly and unequivocally removes that jurisdiction. As a court of general jurisdiction, the Superior Court has jurisdiction over every conceivable claim, unless it is shown that it does not constitute a reasonable cause of action. Hence, jurisdiction lies in the Superior Court in each case unless removed by section 18 of the *FCA*. Borins J.A. held that section 18 does not remove the Superior Court's jurisdiction as it deals with remedies, not with jurisdiction.

The exclusive jurisdiction provision of the *FCA*, which was central to all of the appeals, is located in section 18 which provides the Federal Court with exclusive original jurisdiction to issue a prerogative remedy or grant declaratory relief "against any federal board, commission or other tribunal". To maintain that the Superior Court lacks jurisdiction over any of the claims, the Crown must fit the plaintiffs' claims squarely within section 18(1). Borins J.A. held that the Crown failed to do so. Section 18 does not give the Federal Court the power to take away the jurisdiction of the Superior Court except for the remedies it emanates. Section 18 does not deal with procedure but with remedies. None of the appeals sought a remedy that comes within the prerogative writs or extraordinary remedies of section 18. Section 18 does not empower the Federal Court to
award the damages that were being sought in each of the four cases. Borins J.A. held that to the extent that *Grenier* supports the position of the Crown, it was wrongly decided and not binding.

Borins J.A. held that *Grenier* was not correctly decided nor was it binding on the Ontario Court of Appeal. He was particularly concerned with the practical implications of Grenier and stated that the procedure advocated in *Grenier* would take litigants back to the days of *Bleak House* where they had to go from court to court until they were finally able to obtain their remedy. Moreover, if generally accepted, *Grenier*’s insistence that actions in provincial superior courts against the Crown are precluded without a prior application for judicial review would have far-reaching implications with respect to principles of Crown liability. In particular, the Crown's position as based on *Grenier* would require split or multiple proceedings in different forums, waste scarce judicial resources, impose huge additional costs on plaintiffs and subject every tort and contract claim against the Crown to a draconian 30-day limitation period.

The Federal Court of Appeal considered the *McArthur* decision in a 2009 decision, *Canada v. Manuge*72. Letourneau J.A., the author of the decision in *Grenier*, stated that the Ontario Court of Appeal departed from a basic modern rule of statutory interpretation by using a literal approach rather than the contextual approach used by the Federal Court of Appeal. Letourneau J.A. accused the Ontario Court of Appeal of ignoring Parliament’s intention and that the spirit and provisions of the *Federal Court Act* which are simply part of the modern reality of a federal state allowing for timely and centralized review of federal decisions and policies rather than slow and piecemeal decisions in the various provincial jurisdictions.

The decisions in *Grenier* and *McArthur* present opposite conclusions regarding an applicant’s ability to by-pass an adjudicative body created to determine the merits of a claim. Ontario must currently follow *McArthur* while the superior courts of the other provinces are left to choose between two conflicting appellate court rulings.

72 2009 FCA 29 (CanLII).
Leave to appeal to the Supreme Court of Canada from the Ontario Court of Appeal decisions has been granted, which should soon provide some clarification in this area.

While the foregoing decisions apply only to federal decision making bodies and considered only the narrow issue of whether the Federal Courts Act requires plaintiffs to first seek – time remedies when seeking to impugn federal administrative body decisions the same policy issues underlying the debate between the Federal Court of Appeal and the Ontario Court of Appeal arise in respect of provincial specialized tribunals or administrative bodies, such as the Ontario Municipal Board. Rather than being considered in the context of a statute like the FCA, these issues arise with respect to provincial decision-making bodies in the Courts’ consideration of public policy grounds that may bar recovery under the second branch of the “Anns test” for determining whether a duty of care in negligence is owed at common law. A number of decisions in the late 1980s and 1990s suggested that the availability of administrative remedies may negate a duty of care that otherwise may be applicable, such as Wirth v. Vancouver (City)\textsuperscript{73}, Comeau’s Sea Foods Ltd. v. Canada (Ministry of Fisheries and Oceans)\textsuperscript{74} and Morgan v. Canada\textsuperscript{75}. Grenier and McArthur have re-opened the debate of whether a plaintiff should be allowed to circumvent specialized processes and organizations that were set up to deal with the very issues and concerns about which these court actions were commenced. It is hoped that the Supreme Court of Canada will broaden its consideration of whether plaintiffs can bypass administrative review procedures and proceed directly to civil actions for damages from merely legislative considerations and examine broader public policy concerns when it hears the appeals in McArthur et al.

\textsuperscript{74} (1995), 123 D.L.R. (4th) 180 at 191-193 (F.C.A.)
\textsuperscript{75} (1998), 119 W.A.C. 296 at 304 (B.C.C.A.)