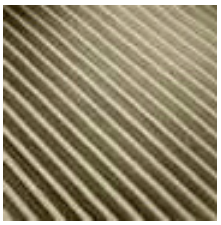

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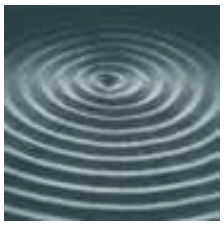

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The Case Against Municipalities: the Post Delta Blues – Where do we go from here?

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THE STATE OF LEAKY BUILDING LITIGATION

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The Case Against Municipalities – the Post Delta Blues

WHERE DO WE GO FROM HERE?

The Owners, Strata Plan NM3341, et al. (Riverwest) v. Canlan Ice Sports Corp., et al, represented the first time the B.C. courts tackled a trial in what has become a mushrooming industry in this province: leaky condo litigation. In fact, it appears to be the first time such an action has gone to trial in Canada.

In *Riverwest*, Mr. Justice Grist found the Corporation of Delta, the developer, the designer and the contractor liable in negligence and awarded damages in the amount of $3,151,572.65, plus interest, to the plaintiff strata corporation, representing 85 condominium owners, for the repair and remediation of the leaky condominium project known as Riverwest Estates. A separate damage award of $62,500 was made against a structural engineer and the contractor for structural defects.

The various defendants, and particularly the approving municipality, were held liable for the design and construction of the building, which was constructed using a face-seal exterior design consisting of stucco on building paper and sheathing with no provision for

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drainage. The focus of the judgment in *Riverwest* was on the liability of the municipality, likely because of all the defendants only the municipality came to the trial and mounted a full defence.

The significance of this decision to other actions and potential actions in the province lies in the treatment by the court of Delta's responsibilities vis-à-vis the B.C. Buidling Code. This decision has also served to bring municipalities to the forefront of the plaintiffs' attacks in similar litigation, often to remedy the difficulty in collecting against defunct developer corporations, inadequately insured professionals, and various other defendants with limited or no resources to pay the substantial damages claimed.

The starting point in any analysis in the area of municipal liability remains *Anns v. Merton London Borough Council*, [1978] A.C. 728, *Kamloops v. Nielson* [1984] 5 W.W.R. 1, and *Just v. B.C.* [1989] 2 S.C.R. 1228. If a plaintiff is able to establish a close or proximate relationship between the municipality and the injured plaintiff which allows for a reasonable forecast of injury to the plaintiff should the municipality negligently perform its duties, the plaintiff has overcome the first hurdle in asserting its claim against the municipality.

Once the plaintiff overcomes this first hurdle, the plaintiff must address whether there are any policy reasons to allow the municipality to avoid liability.

Fundamental to this analysis is a consideration of whether the municipality's duty originated in either a responsibility imposed by statute or a responsibility arising from the adoption of a duty under a permissive statutory authority. This reasoning is critical in attaching

liability to municipalities as municipalities typically adopt the BC Building Code pursuant to the permissive authority of the *Local Government Act*.

Where a municipality makes a policy decision to adopt the BC Building Code, or enter into the regulation of construction in any way, the municipality must be very careful to properly discharge its obligations. Municipalities will be relieved of liability for losses which flow from genuine policy decisions. The hallmarks of a policy decision include the following considerations: financial, social, economic and political considerations. However, the trial judge in *Riverwest* was quite forceful in his Reasons wherein he asserted that the decision of Delta to adopt the BC Building Code and require inspections of construction at specific points in time was the policy decision at issue. Having made that policy decision, it was not open to Delta to inadequately, or improperly discharge the burdens it had assumed in entering the field of construction regulation. It was not open to Delta to decide that it would only enforce some sections of the Code and not all, or perform some inspections but not all. Delta's duty of care arose on the enactment of the relevant bylaws which governed construction.

The reasoning in *Riverwest* is equally applicable to all municipalities under the *Local Government Act* where those municipalities have enacted bylaws to regulate the construction, alteration, repair or demolition of buildings and structures pursuant to the powers provided to municipalities under s. 694 of the *Local Government Act*

.

Leaving aside Vancouver, which has its own issues, a municipality's power to regulate construction originates in Part 21 of the *Local Government Act (formerly the Municipal Act)* R.S.B.C. 1996 c.323**.** Section 694 enables a municipality to regulate construction,

authorize occupancy, and prescribe conditions generally governing the issue of validity of permits, inspection of works, buildings and structures. As noted by Grist J. in the *Riverwest* decision, "the provision is permissive. Municipalities, which adopt regulation of building standards in their districts, enact bylaws accepting the jurisdiction and delegating powers to their officials."

Where a municipality enacts such bylaws under s. 694, the reasonableness of a person's reliance on the municipality to properly enforce such bylaws is underscored by the opening language of the section. Section 694 highlights that the power of the municipality to enact such bylaws is based on the intention of the municipality to provide for the "health, safety and protection of persons and property." Particularly in the context of leaky condo litigation, the health and safety of the persons living in seriously deteriorated buildings is of great concern. As municipalities are creatures of statute, they are bound by the responsibilities in the *Local Government Act*. Any failure to properly enforce bylaws enacted specifically to protect health and safety will be considered in the context of the circumstances as a whole. In today's environment, the health and safety concerns of residents in compromised structures ought to be known to municipalities, and plaintiffs will be able to argue that given the known health and safety concerns it was incumbent upon municipalities to properly enforce the Code and their own bylaws.

An additional consideration is the effect of s. 692(2) of the Act. Although the language in s. 694 of the *Local Government Act* is permissive in enabling a Municipality to adopt regulation of building standards, s. 692(2) of the *Act* incorporates the Provincial Building Code as having the same force and effect as a validly enacted bylaw of a municipality:

s. 692(2):

> The building code and other regulations under subsection (1) apply to all municipalities and to regional districts or parts of them not inside a municipality, and has the same force and effect as a validly enacted bylaw of the municipality.

As such, the standards to be applied in regulating construction are stipulated by the province through the British Columbia Building Code. These standards have a mandatory effect, province-wide, by virtue of s. 692(2) of the *Local Government Act*. In addition, s. 692(3) provides that a municipal council accepting the regulation of construction through its own by-laws must not provide regulatory standards inconsistent with the Code.

In the result, enforcement of the Building Code is not permissive, but rather mandatory within each municipality. Furthermore, the specific bylaws of any given municipality in the province of British Columbia cannot prescribe a standard any less stringent than that prescribed in the Provincial Building Code. The only exception may be the City of Vancouver, where the *Local Government Act* does not apply by virtue of s. 2.1(2) of the *Vancouver Charter*, S.B.C. 1953, c. 55.

The Building Code is divided into a number of parts, which focus on different aspects of a building's design. The standards for larger residential buildings are regulated under Parts 3, 4, 5, and 6 of the Code. The standards for these more complicated structures are expressed as design objectives, rather than required minimum criteria, as with single family residential buildings.

The establishment of minimum criteria are really more geared to smaller construction projects, typically single family homes, where municipal inspectors are better able

to assure compliance with such criteria. In larger residential projects, the concept of design objectives recognizes that ensuring a satisfactory design may require professional expertise beyond the abilities of municipal building departments.

The difficulties in dealing with more complicated structures is addressed through s. 695 of the *Local Government Act*, which provides for an option of allowing certification the of design and inspection of construction by certified professionals. Most municipalities have adopted by-laws which provide for such a scheme in an attempt to shift liability for the design and construction of these projects to the professional certifying the project. However, the municipality retains responsibility for ensuring that the required professionals were retained and properly certified the work done.

Delta is an example of a municipality which adopted the BC Building Code. What is underscored in the *Riverwest* decision is the exposure of municipalities which choose to enter into this field of regulation, even by such an apparently benign act of adopting the provincial Code. In Delta's case, the preamble to the Delta building bylaw provided:

> WHEREAS Section (694) of the "***Municipal Act***", being Chapter 290, R.S.B.C. 1979, and amendments thereto, provides for the Minister to make regulations for the establishment of a Building Code for the Province which shall apply to all municipalities thereof and which shall have the same force and effect as a validly enacted By-law of the Municipality.
>
> AND WHEREAS it is deemed expedient to make provision for the administration and enforcement of the said Building Code within the Municipality of Delta and to regulate building generally in respect of those matters not included in the said Building Code.
>
> NOW THEREFORE the Council of the Corporation of Delta in open meeting assembled, ENACTS AS FOLLOWS.

The express reference to s. 694 in the preamble underscores the health and safety purpose of the bylaw.

Delta adopted the BC Building Code and required enforcement by its inspectors. Its exposure in *Riverwest* arose in the failure of its staff at the Delta building department to actually ensure that buildings were compliant with the Code, and in particular with Part 5 of the Code. Part 5 of the Code prescribes the design objectives relating to wind, water and vapour protection for larger residential structures.

The failures of Delta were summarized as follows:

a. At the building permit application stage, the project design changed from the original drawings, which had in fact been prepared by an architect, and the new drawings were no longer sealed by a professional architect. These permit drawings were theoretically intended to show important and necessary construction details. Delta took no steps to examine the plans for approval, but nevertheless approved the plans and issued the building permit.

b. Delta's bylaws required inspections at various stages of the construction. Delta failed to complete the required inspections.

The evidence of the Delta Director of Permits and Licenses at trial was that the building department at Delta did not undertake any process to ensure compliance with Part 5 of the Building Code, either by requiring plans that showed construction details designed to accomplish the objectives or on-site inspections, or by requiring certification (letter of assurance) by a registered architect that these parts of the Building Code had been complied with.

Any municipality which operates in a manner similar to Delta would face the same liability imposed on Delta in *Riverwest*. In other words, it is not enough to simply enact

bylaws which adopt the Building Code. The onus is on the municipality to ensure that either the Code is complied with in fact, i.e. that the structure actually does meet the requirements of the Code, or to ensure that the project has retained the appropriate professionals for the project and that those professionals have properly certified the design and the work done.

The City of Vancouver is a slightly different animal than the other municipalities in the province. Vancouver operates pursuant to its own Charter and is exempt from the *Local Government Act*. The *Charter* also enacts a scheme similar to s. 695 of the *Local Government Act* for the approval of design and inspection of construction by certified professionals, on whom liability would rest instead of the City of Vancouver:

> **306.** The Council may make by-laws
>
> …
>
> (z) (i) for establishing a system to permit an architect or engineer recognized as qualified by the City Building Inspector and retained by a person seeking a building permit, to certify:
>
> (A) that plans describing a building comply with the Building By-law; and
>
> (B) that a building as built conforms to plans which were accepted by the city or certified as complying with the Building By-law by an architect or engineer;
>
> (ii) such a system may establish the form of such certificates and the City Building Inspector may accept a certificate as satisfactory evidence of compliance and conformity;
>
> (iii) the system established may also provide for any of the following:
>
> (A) that in order to be recognized as qualified by the City Building Inspector, an architect or engineer must provide evidence satisfactory to the City Building Inspector that he is covered by public liability insurance, and must attend a course or courses approved by the City Building Inspector and, or in the alternative, attain a designated mark in an examination approved by the City Building Inspector;
>
> (B) that an architect or engineer so recognized as qualified may be disqualified by the City Building Inspector;
>
> (C) that a qualified architect or engineer shall, prior to issuing a certificate, obtain from qualified professional engineers all necessary assurances as to the building's electrical, mechanical and structural safety and fire protection;
>
> (D) that a specified portion of the fees to be charged for a building permit in respect of which a qualified architect or engineer has issued the certificate of compliance may be refunded upon receipt of the certificate of compliance and record drawings of the completed building;

> (E) that persons wishing to retain an architect or engineer to certify the compliance of plans and buildings shall enter into such undertakings and assurances as the City Building Inspector may prescribe; and
>
> (F) that a permit may be revoked and no work on a building shall be permitted to continue where an architect or engineer retained to certify compliance and conformity has been discharged or resigns, except with the approval of the City Building Inspector;
>
> (iv) where the City Building Inspector accepts the certificate of a qualified engineer or architect pursuant to a system established under this section neither the city nor the City Building Inspector nor any other city employee shall be liable for any loss, damage or expense caused or contributed to because a building in respect of which a certificate is issued is unsafe or does not comply with the Building By-law or other applicable by-laws;

The big difference between Vancouver and the municipalities governed by the *Local Government Act* lies in the immunity provisions of the relevant legislation. The present common opinion at the bar is that the different language in the Vancouver Charter, and the effect given to that language by the courts, provides Vancouver with immunity from the type of liability facing other municipalities in British Columbia for failure to enforce the Building Code. The relevant provision of the Vancouver Charter is s. 294(8), which purports to immunize Vancouver from negligence arising from the failure to enforce bylaws:

> Limitation of actions
>
> 294.(8) The city, or any officer or employee thereof, in inspecting and approving plans or in inspecting buildings, utilities, structures or other things requiring a permit for their construction, has no legal duty, on which a cause of action can be based, to ensure that plans, buildings, utilities, structures or other things so constructed, comply with the by-laws of the city or any other enactment. The city, or any officer or employee thereof is not liable for damages of any nature, including economic loss, sustained by any person as a result of neglect or failure of the city or officer or employee thereof to discover or detect contraventions of the by-laws of the city or other enactment or from the neglect or failure, for any reason or in any manner, to enforce such a by-law or enactment or for any damage from a failure to recommend, or resolve to file a notice in the land title office pursuant to section 336D.

The immunity provision in the Vancouver Charter, s. 294(8), received Royal Assent on July 16, 1987 and has been considered by our courts on at least two occasions since.

The immunity effect of s. 294(8) is illustrated in the case of *Kaiser* v. *Bufton's Flowers Ltd.*, [1994] B.C.J. No. 1976. Mr. Kaiser's home was destroyed by a fire on Christmas day in 1988. A claim was brought against the City of Vancouver for failing "to require Mr. Kaiser's home to be installed with sprinklers, pursuant to the city's own applicable bylaws, and it approved building plans which did not include sprinklers. Further, it failed to demand, through its inspection process, that sprinklers be installed." Hutchison J. noted that the purpose of subsection 294(8) was to eliminate the effect of the decision of the Supreme Court of Canada in *Kamloops (City of)* v. *Nielsen*, [1984] 2 S.C.R. 2 (hereinafter *Kamploops*) and found that the section achieved two results: firstly it relieves Vancouver from any legal duty and secondly it relieves Vancouver from any liabilities for damage. In this particular case, the house was built prior to the enactment of ss. 294(8), but the Court held that the subsection eliminated damages for a breach of duty, irrespective of when that breach of duty might occur, and the duty itself was terminated as of the date of coming into force of the subsection. As such, Mr. Kaiser's claim against the City of Vancouver was held to be statute barred.

Mr. Kaiser appealed the decision of the Supreme Court (*Kaiser* v. *Vancouver (City)*, [1995] B.C.J. No. 309), claiming that the acts or omissions of negligence of the City of Vancouver occurred before the enactment and as a result there is no removal of liability for the damages as stipulated in the section. The Court of Appeal disagreed and held that there was no complete cause of action until after the enactment of the provision and that the cause of action was subsequently abolished by virtue of the enactment.

The other municipalities in the province do not enjoy the same expansive immunity as that bestowed upon Vancouver. Section 289 of the *Local Government Act* provides:

> **289** 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 bylaw under Part 21 or a regulation under section 692 (1).

As discussed above, Part 21 of the *Local Government Act* deals with building regulations and s. 692(1) of the *Act* entitles the Minister to make regulations relating to construction and buildings. Similarly to s. 294(8) of the *Vancouver Charter*, this provision was also enacted in 1987 by S.B.C. 1987, c. 14, ss.7, assented to May 26, 1987, initially as an amendment to the *Municipal Act* (s. 755.2), which is now the *Local Government Act*.

However, s. 289 of the *Local Government Act* omits the express language in the beginning clauses of s. 294(8) of the *Vancouver Charter* which relieves the City of Vancouver and its officers or employees of 'any legal duty on which a cause of action can be based'.

The distinction in s. 289 of the *Local Government Act* is underscored by the decision of Skipp J. in *Wilson* v. *Robertson*, [1991] B.C.J. No. 351. In *Wilson*, the plaintiff sued the Municipality of Delta for issuing a permit to build the plaintiff's house on unstable soil and for approving the remedial work. Delta sought a summary dismissal, relying on what was then s. 755.2 of the Municipal *Government Act* on the basis that it precludes liability being imposed upon a municipality or any of its employees for any failure to enforce By-laws. Skipp J. refused to dismiss the claim as against Delta:

> I find no merit in this submission. Section 755.2 refers to the liability of a municipal body for its failure to enforce a by-law by the institution of a proceeding, either civil or criminal. That is not the situation here.
>
> The negligence alleged here by the Plaintiff against the Delta defendants is one of failure to act with the necessary care and skill in the exercise of their duties as servants of the municipality and of its constituents. The acts complained of are those of commission rather than omission. Delta through its employees chose to act upon its operation duties as imposed by the by-law, and it is alleged that it did so negligently and without due care.

As such, the court has limited s. 289 to providing immunity for a municipal body if it fails to enforce a bylaw by the institution of a proceeding, either civil or criminal. Section 289 of the *Local Government Act* does not bar a claim in negligence against a municipality in fulfilling its operational duties created by its own bylaws, whether it be approving a subdivision, issuing an original building permit, inspecting foundations or issuing a permit for remedial work.

Is there any hope for injured plaintiffs within Vancouver? In the case of *Strata Plan LMS 1400* v. *Objekt Properties Corp.*, [2002] B.C.J. No. 2305 a challenge was made to the immunity of the City of Vancouver. The plaintiff pleaded that the City of Vancouver was in breach of its common law duty to warn. Simply put, where the bylaws of a municipality require a building to conform to applicable standards such as the provincial Building Code, and the municipality requires building permits and occupancy permits to be issued confirming compliance with the Code, a purchaser or owner could reasonably expect the building to in fact comply with the Code. If Vancouver takes the position that it will not enforce the Code, and will not ensure compliance at the time of permit issuances, then it is incumbent on Vancouver to warn owners and purchasers of this position. It is incumbent upon Vancouver to clearly advise interested parties that Vancouver has taken no steps to ensure compliance with the Code and, arguably, its own bylaws, or cannot give assurances that the buildings have been built in

accordance with the Building Code. A suggestion has been made that such a notice could be registered on title to the property. Failure to provide such a warning could give rise to liability.

Objekt was a motion similar to *Kaiser*, where the City of Vancouver sought to strike the claims against them, relying on s. 294(8) of the *Vancouver Charter*. The Court in *Objekt* was quick to follow *Kaiser* and strike the claims against the City for negligent inspection and breach of the duty of care owed to the plaintiff. However, the Court was not as quick to strike the pleading relating to the duty to warn, which was pleaded as follows:

> The Defendants, and each of them, owe a duty to warn the Plaintiff of any potential or actual defects, deficiencies and/or damages in the construction of the Building. In breach of their duty to the Plaintiff, the Defendants, and each of them, failed to warn the Plaintiff of the Defects and Deficiencies which were known to the Defendants and each of them. As a result of the said failure to warn, the Plaintiff has suffered damages.

The City of Vancouver took the position that s. 294(8) was drafted broadly enough to capture causes of action based upon a failure to warn, citing the language in the last sentence of s. 294(8) which says that the City is not liable for any damage from a failure to recommend or resolve to file a notice in the land title office pursuant to section 336D. The Court did not find that the Plaintiff's claim was bound to fail in light of this argument and allowed the pleading to stand:

> This section, and I paraphrase, says this:
>
> 336D.(1)
>
> Where, during the course of carrying out his duties, the City Building Inspector observes a condition, with respect to ... a building ... that he considers
>
> (a)
>
> to be a contravention of a by-law or regulation relating to the construction or safety of buildings ... or
>
> (c)

> the contravention is of a nature that a purchaser, unaware of the contravention, would suffer a significant loss or expense if the by-law were enforced against him
>
> he may, in addition to any other action that he is authorized or permitted to take, recommend to Council that a resolution under subsection (2) be considered.
>
> (2)
>
> ... the Council may confirm the recommendation of the City Building Inspector and may pass a resolution directing the City Clerk to file a notice in the land title office stating that
>
> (a)
>
> a resolution relating to that land has been made under this section, and
>
> (b)
>
> further information respecting it may be inspected at the offices of the City Clerk. ...
>
> Section 336D is permissive in nature and enables the City to give constructive notice to the world of a condition with respect to a building that may be in contravention of a building by-law or regulation. As such, it is a form of warning. The question is this: Is the exclusion of liability, as a result of failure to recommend or resolve to file a notice, sufficient to discharge the defendant, City of Vancouver, upon its duty to warn of a defect of which it knows (or reasonably should know)? The law is that a party possessed of knowledge of danger in the continuing use of a mechanical device has, from the moment that that party becomes seized of that knowledge, a duty to warn those to whom that mechanical device has been supplied. Moreover, the failure to warn constitutes an independent tort and renders the party liable for the economic loss directly attributable to the failure to warn (*Rivtow Marine Limited* v. *Washington Iron Works*, [1973] 6 W.W.R. 692 (S.C.C.)).
>
> While I am satisfied that s. 294(8) extinguishes the liability of the City for damage arising from a failure to recommend or resolve to file a notice under s. 336D, I am not satisfied that it goes so far as to extinguish any cause of action for damages arising from a more generalized failure to warn of a defect of which the City knew (or should have known). My task is to determine whether it is "plain and obvious" that there is no cause of action on the facts alleged in the pleadings, which I must assume to be capable of proof. There is, in my opinion, a chance that the plaintiff might succeed in its claim arising out of the failure of the defendant, City of Vancouver, to warn of a defect or danger of which it knew (or reasonably should have known)

The claim for failure of duty to warn was also considered in the case of *Kimpton* v. *Canada (Attorney General)*, [2002] B.C.J. No. 2691, which was a certification hearing for a class action by Kimpton who claimed that the provincial and federal Crown were negligent in drafting the Building Code, negligently misrepresented the suitability of the Building Code and breached their duty to warn the plaintiff of risk or danger. The reasons of Macaulay J. focused on whether each defendant owed a duty of care to Ms. Kimpton. The test for establishing the

approach to determining the existence of a duty to care is established in *Cooper* v. *Hobart*, [2001] S.C.J. No. 76, which adopts the test set out in *Anns* v. *Merton London Borough Council*, [1978] A.C. 728:

> ... [I]n order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case the prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise. (pp. 751-52)

In applying the test from *Anns*, Macaulay J. concluded that the provincial and the federal government did not owe a duty of care to the plaintiff, but rather the duty was owed to the public as a whole. The Court followed a line of cases which develop the principle that no duty of care arises in respect of the exercise of legislative functions. That is, "the legislative policy decision that led to the enactment of the BC Building Code was intended to benefit the public. It was an act of governing. To the extent that the province negligently governs, the voting public may impose a political consequence at an election."

The Court also went on to canvass the second branch of the test in *Anns*, and that was to examine policy considerations that would result in a finding against the plaintiff. The conclusion was that indeterminate liability and the impact on the taxpayers of the province of a finding against the defendants was not an intended result of the legislation. As such, the class action was not certified. This decision of the B.C. Supreme Court has not been appealed.

The fact that the claim for failure of the common law duty to warn was not successful in *Kimpton* does not close the door on the potential success of such a pleading. The

claim in *Kimton* was denied because the plaintiff failed to disclose a cause of action against the provincial and federal governments, as the claim related to the exercise of legislative functions. However, the claim against municipalities for breach of the duty to warn arises from operational acts rather than the exercise of legislative/policy functions. The Court in *Objekt* was not willing to say that such a claim was bound to fail and the decision in *Kimpton* is clearly distinguishable from claims against municipalities.

The duty to warn remains an untested mechanism to maneuver around the *Vancouver Charter*. Although not cited by the Court in *Objekt*, the B.C. Court of Appeal has held in *Grewal* v. *Saanich (District)* that a failure to warn is akin to negligence "for which no existing legislative authority is available to make the act lawful", which would refute Vancouver's argument that the *Vancouver Charter* exempts Vancouver from its common law duty to warn.

The claim for breach of duty to warn as against a municipality would still have to overcome the second branch of the test in *Anns*, where a municipality may argue that the imposition of a duty of care on municipalities in this regard would amount to an insurance scheme at a great cost to taxpayers, a result surely not intended by the provincial legislation or the municipal bylaws.

However, any such objections raised by municipalities would be met by the comments of LaForest J. in *Rothefield* (1989), 63 D.L.R. (4th) 449:

> The inspection of plans and the supervision of construction increases the cost of construction for everyone. But I think that most rate payers, were they to give the matter any thought, would

> justify the increased expense as an investment in peace of mind; faulty construction, after all, is a danger to life and limb and may result in future expense and liability.

In *Rothfield v. Manolakas* the Court held that "when a building inspector authorizes a given project to proceed this must be taken as an indication that the inspector has satisfied himself that the project conforms to applicable standards. On what other basis could the building inspector acting prudently, authorize construction?" If a building, therefore, cannot be said to comply with the standards established and purportedly enforced by the City, then at common law, the City has a duty to warn occupiers and purchasers that the buildings may not conform to the required standard. If a municipality is charged with a duty and collects fees, including fees for filing drawings, obtaining building permits and occupancy permits, as well as collecting taxpayer revenue for the performance of that duty, how then can the municipality take the position that they ought not to be liable when they fail that duty?

This paper began with the question: where do we go from here? As against municipalities, there is ample scope to examine the actions or inactions of municipal authorities in the performance of their duties. The first step is to determine to what extent the municipality has become engaged in the construction process. For most municipalities in B.C., construction will be the subject of express regulation. In addition, the Building Code is deemed to be in effect in every municipality. Once the analysis of the underlying bylaws is complete, the actions of the municipality must be examined to determine whether the duties imposed by the bylaws and the Code were reasonably discharged by the municipal staff in all of the circumstances, including the likely risks to health and safety arising from inadequate enforcement. Where enforcement has been inadequate, if it is determined that there is a sufficient risk that the municipality will

be immune from its failure to properly discharge its duties, the plaintiff can consider advancing a claim for negligent failure to warn.

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