Local Government Liability issues presented by the Waste Management Amendment Act, 1993, (Bill 26) and the Contaminated Sites Regulation, Second Draft, August 30, 1994.

Commentary Prepared For:

Mr. L.T. Hubbard, P.Eng.
Director
Industrial Waste and
Hazardous Contaminants
Ministry of Environment
Lands & Parks
British Columbia

By:

Michael C. Woodward
Barrister & Solicitor
Thompson & McConnell

Patricia Houlihan
Barrister & Solicitor
West Coast Environmental
Law Association

Reece Harding
Barrister & Solicitor
Lidstone Young Anderson

May 25,1995

In letters dated January 31, March 28, and April 19, 1995, Mr. L.T. Hubbard, P.Eng., submitted a number of specific liability issues (quoted within) to a committee of selected experts in Municipal Law and Environmental Law for opinion and comment.

This is the report of the Committee.

Assumptions

We infer, from the language of Bill 26 (including section 20.94 and the language of the Second Draft of the Contaminated Sites Regulation) that there is a legislative intention that Local Governments and their Approving Officers function essentially in the role of "information clearing houses". We further infer that, except in cases where a Local Government ownership interest in land is involved, the legislative intention is that Local Governments and Approving Officers have no liability, provided they have acted honestly and without corruption.

It is on the basis of the above assumptions respecting legislative intention that the balance of this commentary proceeds.

Overview Summary

The potential for Local Government liability arises in each of the two roles which local government will play under Bill 26:

(a) The role of responsible person
(b) The administrative role

Section 20.94 does not provide any special immunity to Local Government in its role as responsible person. Local Government will have the same potential liability (as a responsible person) as the private land owner, except in the rare case of an involuntary land acquisition. It is our understanding that this reflects the legislative intention behind Bill 26.

The second role which Local Government will play involves identifying the circumstances in which site profiles are required, and the subsequent receiving, processing and forwarding of those site profiles. Errors and omissions in the course of carrying out this administrative role can have significant financial consequences in circumstances where development occurs on contaminated sites which have not been properly identified as a result of an error or omission. Section 20.94 is directed at errors and omissions by Local Government in carrying out this second, or administrative role under Bill 26.

As detailed below, we are of the view that there are some significant deficiencies in the scope of the immunity currently provided in section 20.94 of Bill 26 and in the regulations. We have described how, in our view, these deficiencies are rectifiable by way of legislative amendment, and we have provided a suggested

form of section 20.94 for your consideration. Although the potential for liability increases with the increase in administrative duties, if section 20.94 is amended as suggested, it is our view that Local Government liability will be substantially reduced. Under the amended section 20.94, Local Governments will only be liable where there is dishonest, malicious or wilful misconduct.

The question remains whether, if section 20.94 is not amended from its current form, Local Government could still be said to be better off than it would be (in terms of the scope for financial liability in negligence) if section 20.94 and its companion provisions in the regulations did not exist at all. The simple answer to this question is yes, section 20.94 and the companion provisions and the regulations do remove some of the scope for liability which would otherwise arise. At the same time, and as more particularly described in our discussion of Issue No. 1 below, there are some large areas of liability not caught by section 20.94. In the final analysis, we do not believe that section 20.94 achieves the expansive scope of the immunity for Local Government which the legislature intended.

You have also asked that we comment on the possibility of negative consequences of inserting immunity provisions within Bill 26. This was discussed by the representative of the Ministry of Attorney General, Mr. Cliff Prowse, at the April 6, 1995, UBCM conference in Vancouver. In general, concerns with Crown immunity have no application to Local Government as Local Government is given only the protection provided in statutory immunities. However, Mr. Prowse's concerns are well taken and we certainly agree that any immunity provision must be drafted carefully so as to avoid unintended consequences. Immunity provisions are invariably interpreted narrowly by the Courts.

Issue No. 1

> **Does section 20.94(1) of the Waste Management Amendment Act, 1993 or any provision of the *Municipal Act* or the *Vancouver Charter* protect local government for negligence and/or failure to perform its administrative functions under Bill 26, the Regulations, and the related provisions in the *Municipal Act* (i.e. sections 999 and 1000) and/or the *Vancouver Charter*?**
> **For example: Is local government protected in cases where they review a site profile, decide not to forward it to a manager, and they are negligent in reaching that decision?**

Commentary

It is our view that the *Municipal Act* and analogous statutes provide immunity to public officers, but not to municipal corporations.

Neither the *Municipal Act* nor the *Vancouver Charter* provide a generalized corporate immunity from liability in negligence.

There are some very context-specific corporate immunities in these statutes. By way of example we refer to section 755.2 of the *Municipal Act* which provides, in certain circumstances, a generalized (ie. corporate and individual) immunity for failure to enforce building bylaws. Another example is section 972 of the *Municipal Act* which, in certain circumstances, immunizes a municipal corporation from liability to pay compensation for "injurious affection" which would result from zoning and official community plan bylaw designations.

Aside from context-specific corporate immunities such as those above, there is no generalized corporate immunity under the *Municipal Act* or the *Vancouver Charter*, and there is no corporate immunity in these acts which would protect the corporation from the consequences of maladministration of sections 999 and 1000 of the *Municipal Act* and 571B of the *Vancouver Charter*.

So far as sections 755.1 of the *Municipal Act* and 294 of the *Vancouver Charter* are concerned, these sections specifically preserve any vicarious liability which the Local Government corporation will have for the negligent acts or omissions of individuals acting within the corporate umbrella. *(See Municipal Act section 755.1(4) and Vancouver Charter section 294(6)).*

Section 20.94(1) of Bill 26, which refers to "powers, duties and functions under this Part" clearly will not protect the parties identified from liability under sections 999 and 1000 of the *Municipal Act*, section 571B of the *Vancouver Charter* or section 85.1 of the *Land Title Act*.

In view of our understanding of the legislative intention at work here, it would be entirely appropriate to replace the word "Part" with the words "Part, under any regulations enacted under this Part, under sections 999 and 1000 of the *Municipal Act*, under section 571B of the *Vancouver Charter* or under section 85.1 of the Land Title Act".

Additionally, the term "bad faith" as used in section 20.94(1) usually has a broad connotation in the law, and is judicially interpreted to include certain conduct which is perfectly honest. This is to say that Local Governments have been found to have acted in bad faith where, in deciding whether to act or how to act in a given situation, a decision is made honestly but on the basis of information or considerations which, in the final analysis, are found by a Court to be not strictly relevant to the making of the decision.

"Bad Faith" in the legal sense includes more than simply improper or dishonest motives. It can include:

(i) the making of a decision based, in part, on extraneous considerations or irrelevant information; and

(ii) using a given power for other than its intended objective.

We offer the following case references (the underlining is ours):

(i) Re Coquitlam By-Laws 918, etc. and Karamanolis (1977) 3 B.C.L.R. 341 (S.C.) at 347:

"The evidence in this case, and in particular the extracts which I have quoted, has satisfied me that the Council in By-Law 1516 has attempted to do that which it has not the authority to do, namely to prevent the owner from making any use of lot 74. Although the By-Law was adopted with the best of intentions the Council did not act in good faith in the special sense in which that phrase is used in the decided cases."

(ii) MacMillan Bloedel v. Galiano Islands Trust Committee (1993) 16 M.P.L.R. (2nd) 229 (B.C.S.C.) at 252:

"As I have said, the test of bad faith seems to be used in a somewhat broad sense in the jurisprudence, and it does not refer only to factors such as bribery or pecuniary interest. It has been defined to be the actions of a Council which are other than frank and impartial (Hollett v. Halifax (City) (above)), and the fact that a Council may believe itself to be acting with good intentions does not justify an otherwise unwarranted discrimination."

- An appeal of this case will be argued in June 1995.

(iii) Elsom v. Dickinson and The Corporation of Delta December 8, 1993, B.C.S.C. New Westminster Registry No. S0-9781:

"Operating definitions of the term 'bad faith' tend to be context specific. A definition extracted from company law jurisprudence would not necessarily be appropriate for this case. The parties have each advanced a definition of 'bad faith' and I find them both acceptable. They are to some extent overlapping.

"The appellants submit that if the approving officer, in the exercise of his discretion, took into account irrelevant extraneous matters, the decision would be tainted by bad faith. In support of this proposition they cite Campeau Corpn. v. Calgary (1978), 7 Alta. L.R. (2d) 94 (Alta. C.A.). The respondents draw their definition from the case of Oak Bay Manor Limited v. Corporation of Delta et al. (1981), 15 M.P.L.R. 40 (B.C.S.C.) wherein, at p. 48, Catliff J. wrote that bad faith exists where, 'the approving officer acted without a rational appreciation of the intent and purpose of the relevant statutes or that he acted with any improper intent for an alien purpose'."

Rather than using the term "bad faith", some serious consideration should be given instead to the tracking of the more expansive language in section 755.1(3)(a) of the *Municipal Act* and its companion provision in section 294(5) of the *Vancouver Charter*. Section 755.1 of the *Municipal Act* provides significant immunity to certain elected and appointed Local Government Officials (but as

discussed above, not to Local Government Corporations themselves), and reads as follows:

> 755.1(1) No action for damages lies or shall be instituted against a municipal public officer or former municipal public officer for anything said or done or omitted to be said or done by him in the performance or intended performance of his duty or the exercise of his power or for any alleged neglect or default in the performance or intended performance of his duty or exercise of his power.
>
> (3) Subsection (1) does not provide a defence where
> (a) the municipal public officer has, in relation to the conduct that is the subject matter of the action, been guilty of dishonesty, gross negligence or malicious or wilful misconduct, or
> (b) the cause of action is libel or slander.

If section 20.94(1) is amended so as to meet the above concerns, some consideration might also be given to the possibility of repealing section 20.94(2) which, it could be argued, would be somewhat redundant and would take away from the general scope of the immunity intended to be provided in subsection 20.94(1). Alternatively, subsections (2) and (3) of section 20.94 might be amended by inserting the opening words "Without limiting the generality of subsection (1),...".

Concerning the use of the words "good faith" in section 20.94(3), our comments above respecting the tracking of language in section 755.1 of the *Municipal Act* and section 294(3) and (5) of the *Vancouver Charter* should also be taken into consideration.

Issue No. 2

> **Are discretionary and voluntary actions (e.g. "pre-application" advice, training, etc.) included as activities in the terms "...powers, duties and functions..." in section 20.94(1) of Bill 26?**

Commentary

We do not believe that section 20.94(1) will include, within its ambit, discretionary and voluntary actions such as the provision of pre-application advice.

Issue No. 3

> **Is it the effect of the language that local government be responsible (and liable) for determining when a site profile is required as per section 1000(b) of the *Municipal Act* and/or section 571B(b) of the**

***Vancouver Charter*, when section 20.11 of Bill 26 puts the onus on the applicant to provide a site profile? Is local government then (and also) liable for issuing approval(s) without a site profile, should one be "required"?**

Commentary

In our view, notwithstanding section 20.11 of Bill 26, sections 1000(b) of the *Municipal Act* and section 571B(b) of the *Vancouver Charter* do create separate obligations, which arise over and above Local Government's duties imposed under what will become Part 3.1 of the *Waste Management Act*.

If left as presently worded, section 20.94(1) will not provide a defence to a breach of the duty created by sections 999 and 1000 of the *Municipal Act* and 571B of the *Vancouver Charter*. The reason for this is that section 20.94 does not eliminate liability arising under other statutes, such as the *Municipal Act* and *Vancouver Charter*. In short, an immunity provision in one statute does not "spill over" to effect liability under a second statute, except through express and unequivocal references. Section 20.94 does not meet this test.

As discussed above in Issue No. 1, there is not a general immunity under the *Municipal Act* or the *Vancouver Charter* which will immunize the municipal corporation from liability for a negligent failure to carry out the duties being imposed in *Municipal Act* sections 999 and 1000 and *Vancouver Charter* section 571B. Only the individuals named in *Municipal Act* section 755.1 and *Vancouver Charter* section 294 will have a personal immunity in negligence, but those local government corporations will remain vicariously liable for the negligent acts and omissions of their employees.

Issue No. 4

Does section 20.94(1) of Bill 26 protect approving officers? In some instances, approving officers are not employees of local government. Who then, will be held liable -- the officer personally? the municipality? the province? Can approving officers also rely on approvals and certificates of compliance in section 20.94(2), as can municipalities and their employees?

Commentary

While there is some uncertainty as to whether section 20.94(1) of Bill 26 will protect an Approving Officer who is also a Municipal employee, it is quite clear that the section will not protect Approving Officers who are not Municipal employees.

As you have correctly identified, this situation does occur in this Province, and we know of at least one British Columbia City whose Approving Officer is not an

employee, but is instead a planning consultant who also operates as that City's Director of Planning.

This situation can be rectified by merely adding the words "an Approving Officer" in the list of those identified in the opening words of subsections 1, 2 and 3 of section 20.94.

Issue No. 5

> **Is local government protected in section 20.94 of Bill 26 from negligence on the part of the province (e.g. a certificate issued in error, failure to advise municipalities of conditions the province was aware of, etc.)?**

Commentary

We believe that section 20.94 will protect Local Government from liability for any negligence on the part of the Province where Local Government duties under Part 3.1 are concerned.

However, as discussed in Issue No. 1, the section as presently worded will not protect Local Government from liability under section 1000 of the *Municipal Act*, section 571B of the *Vancouver Charter* or section 85.1 of the Land Title Act.

Issue No. 6

> **Can local government rely on "determinations" in section 20.3 of Bill 26 that a site is (or is not) a contaminated site? Approvals and certificates are specifically mentioned in 20.94(2) and 20.94(3). There is a concern that a "written notice" of a determination (e.g. a "memo") carries less weight, may go missing, etc.**

Commentary

The specific reference, in subsections 20.94(2) and (3) to approvals in principle, certificates of compliance, and conditional certificates of compliance means, in our view, that any other type of determination, such as a manager's "preliminary determination" or "final determination" referred to in section 20.94(3) is not included within the scope of section 20.94(2) or (3).

There are circumstances where a municipal official or corporation must rely on a "determination", and these arise where a manager has made a "final determination" under section 20.3(2)(d) that a site is not a contaminated site.

Section 1000(d) of the *Municipal Act* provides that a Municipality will not approve a development application unless it has received a site profile, forwarded it to the manager, and then either received a valid approval in principle, conditional certificate of compliance or certificate of compliance, or:

(d) has sent a site profile to the manager under section 20.11(5)(b) of the Waste Management Act but the Municipality has not received notice that a site investigation under section 20.2 of that Act will not be required.

Section 571B(d) of the *Vancouver Charter* and 85.1 of the *Land Title Act* will have the same effect.

It appears, under Bill 26, that this "notice that a site investigation under section 20.2 of that Act will not be required" can only be a "final determination" given under section 20.3(2)(d) of Bill 26.

Approvals in principle, certificates of compliance, and conditional certificates of compliance are, under Bill 26, concepts that apply only to contaminated sites. However, under Bill 26 it is also open to a manager, following receipt and analysis of a site profile, to determine that a site is not contaminated by issuing a "final determination" to that effect under section 20.3(2)(d). When such a final determination is made, the manager becomes obliged to give notice of that final determination to the Municipality and/or Approving Officer who initially forwarded the site profile. Under the scheme of the Bill, the delivery to a Municipality or Approving Officer of a final determination that a site is not a contaminated site appears to "open the gate" so that the particular development application may then proceed towards its ultimate conclusion.

Accordingly, final determinations do trigger a need for reliance by municipal officials and corporations.

Issue No. 7

Despite the provisions of section 5(2)(b) of the Regulations, might local governments nevertheless incur liability for failing to disclose or for negligently disclosing historical information about a property, as per the Freedom of Information and Protection of Privacy Act ("FOIPPA")?

In a situation where a Municipality has no duty under the FOIPPA to disclose the possession of a site profile, would section 5(2)(b) of the draft regulation enable a Municipality to refuse to disclose the site profile to protect against common law liability which was found in Hartnet v. Wailea?

Commentary

We believe that section 5(2)(b) of the Regulation will not protect Local Government from a negligent failure (or indeed, from any failure) to disclose historical information which relates to a contaminated site. In other words, a Local Government's disclosure duties and liabilities under the common law and under section 25 of the FOIPPA are not altered by the Regulations.

In view of the general wording of the duty to disclose in section 25(1) of the FOIPPA and the general application of this legislation, a court would likely treat the obligation under section 25(1) of the FOIPPA as being paramount to the provisions of the Regulations.

Section 25(1) of the FOIPPA reads:

> Whether or not a request for access is made, the head of a public body, must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> (a) about the risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.

However, section 73 of the FOIPPA provides a measure of liability protection when disclosure (or failure to disclose) is exercised under section 25(1). Section 73 reads:

> No action lies and no proceeding may be brought against the Crown, a public body, the head of a public body, an elected official of a public body or any person acting on behalf of or under the direction of the head of a public body for damages resulting from
>
> (a) the disclosure, or failure to disclose, in good faith of all or part of a record under this Act or any consequences of that disclosure or failure to disclose...

As you know, Local Governments are "public bodies" for the purposes of the FOIPPA. If Local Government discloses information taken from or related to a site profile in "good faith" under section 25 of the FOIPPA then it can claim the limited protection of section 73. Obviously, this does not mean that Local Government gains any protection from its common law disclosure duties and liabilities arising outside of its obligations under FOIPPA.

The precise legislative intention underlying section 5(2)(b) of the Regulation is not clear to us.

If the intention behind section 5(2)(b) of the Regulation is to protect the privacy of those persons submitting a site profile for processing to Local Government, then the Regulation will likely not be successful, given that Local Government is bound by the disclosure obligation in section 25(1) of the FOIPPA.

On the other hand, if the legislative intention is to preclude the disclosure of site profiles to the public by Local Government, then this state of affairs can be accomplished by simply eliminating the words "subject to" at the introduction of

section 5(2)(b) of the Regulation and replacing them with the word "notwithstanding".

Regarding the second half of Issue No. 7, it is our opinion that, in those particular circumstances, section 5(2)(b) of the Draft Regulation would enable a Municipality to refuse to disclose the site profile to persons other than the person who provided the site profile.

In considering this answer, however, it should be considered that both section 25(1) of the FOIPPA and the common law disclosure duty described in Hartnett would potentially apply where even a single question on the schedule 1 site profile was ticked with a "yes" answer.

Issue No. 8

Do the immunity provisions sufficiently protect local governments and their employees against contingent liability as potentially responsible persons?

Commentary

We believe that the combined effect of section 20.4(1)(g) of Bill 26 and sections 20 and 27 of the Regulation do sufficiently protect Local Governments and their employees against contingent liability as potentially responsible persons.

In our view the legislative intention is that Local Government not become liable as a responsible person in cases where it has acquired a property as a result of a property tax sale, and that intention is adequately spelled out in the legislative scheme.

Issue No. 9

There is concern that most of the immunity provisions are in the regulations, whereas the statute itself contains less elaborate protections. Might the effectiveness of these provisions be reduced? (Section 35.1 of the Act for instance, makes no mention of immunity provisions).

Commentary

We do have a significant concern over the inclusion of the immunity provisions in the Regulation rather than in the body of Bill 26 itself. The Regulation making power in sections 35 and 35.1 of Bill 26 are certainly limited in terms of the Lieutenant Governor in Council's authority to include a provision curtailing or eliminating liability which would otherwise arise under the *Waste Management Act*. Further, should the issue of immunity be considered by the Courts, particularly where there is an apparent conflict between the provisions of the *Municipal Act* or the *Vancouver Charter* and the protection found in the

Regulation, it is our view that a Court would likely determine that the immunity in the Regulation is ineffective. We believe, however, that if our comments above (and below) respecting amendment to section 20.94 are acted upon, these concerns would be met.

Our additional comments

We believe that the above comments and concerns would be met if section 20.94 were repealed and replaced in its entirety with the following, which we offer for your consideration:

> 20.94(1) Except in the case of a responsible person, no action lies and no proceedings may be brought against the Crown, the minister, a municipality, a present or former approving officer, a present or former employee or elected official of the government, or a present or former municipal public officer as defined in section 755.1(2) of the *Municipal Act*, or a present or former civic public officer as defined in section 294(4) of the *Vancouver Charter*, because of any act, failure to act, advice, recommendation, failure to advise or to recommend, or any purported exercise or failure to exercise any powers, duties or functions arising under this Part, under regulations promulgated under this Part, under section 85.1 of the *Land Title Act*, under sections 999 or 1000 of the *Municipal Act*, or under section 571B of the *Vancouver Charter*.
>
> (2) Subsection (1) does not provide a defence where a person has, in relation to the conduct that is the subject matter of the action, been guilty of dishonesty, or malicious or wilful misconduct.
>
> (3) Without in any way limiting the generality of subsection (1) where a municipality, including its approving officer, employees, officers and elected officials, relies on the contents of a preliminary determination, final determination, approval in principle, certificate of compliance, or a conditional certificate of compliance honestly and without malicious or wilful misconduct, the municipality, its approving officer, employees, officers and elected officials, are not liable for damages arising from reliance on the preliminary determination, final determination, approval in principle, certificate of compliance, or conditional certificate of compliance.
>
> (4) Without in any way limiting the generality of subsection (1) where a municipality, including its approving officer, employees, officers and elected officials, enters into an agreement under section 20.91 enabling the Municipality to issue an approval in principle or a certificate of compliance, the municipality, its approving officer, its employees, officers and elected officials are not liable if they rely on an approval in principle or a certificate of compliance where the contents of the approval in principle or certificate of compliance have been prepared honestly and without malicious or wilful misconduct.

The foregoing does not reflect any legislative intention (see discussion of Issue No. 7) to remove liability for negligent failure to disclose site profiles. If there is

such an intention then the words "failure to disclose, disclosure" should be added after the word "recommend", in the above subsection (1).

We trust the foregoing information is of assistance to you and your staff in considering these complex Local Government liability issues.

Yours truly,

Michael C. Woodward
Barrister & Solicitor
Chair
Municipal Law Section
Canadian Bar Association
B.C. Branch
Thompson & McConnell
#300 - 1676 Martin Drive
White Rock, B.C. V4A 6E7
Telephone: 531-1421

Patricia Houlihan
Barrister & Solicitor
Co-Chair
Environmental Law Section
Canadian Bar Association
B.C. Branch
West Coast Environmental Law
Association
1001 - 207 W. Hastings St.
Vancouver, B.C. V6B 1H7
Telephone: 685-3163

Reece Harding
Barrister & Solicitor
Lidstone Young Anderson
1616 - 808 Nelson St.
Vancouver, B.C. V6Z 2H2
Telephone: 689-7400

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