Item	01
Manager's Report No.	34
Council Meeting	15/12/03

TO: CITY MANAGER 2003 DECEMBER 10

FROM: CITY SOLICITOR

SUBJECT: **COMMUNITY CHARTER**

PURPOSE: To provide Council with information on the Community Charter as enacted

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RECOMMENDATION:

1. **THAT** Council receive this report for its information.

REPORT

As Council is aware, Bill 14, the Community Charter, was enacted as a statute of the Province of British Columbia last spring. It is to be brought into force by regulation, which is anticipated to occur shortly.

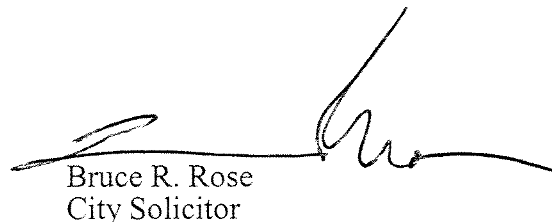
The Charter, as enacted, has undergone some change since it was initially introduced as a Bill. Certainly, there are also questions as to the extent to which the Charter reflects what the Province said it would in earlier announcements and statements.

The Mayor felt that Council should have the opinion of an expert on the Charter as to some of these issues, and authorized staff to obtain and retain such a person to provide an opinion.

Staff retained Colleen Burke, of the law firm of Murdy & McAllister to provide the opinion. Murdy & McAllister is a well-known and respected firm whose practice is restricted to serving and representing Local Governments.

Ms. Burke's opinion letter is attached to this report. Her background in dealing with the Charter is set out in pages 1 and 2 of her letter.

As Ms. Burke points out in her letter, it may take a few years of working under the Charter before Local Governments are in a position to truly assess the extent to which the Charter has or has not benefitted them, or met the initial promises of the Provincial Government.



Bruce R. Rose
City Solicitor

BRR:pt
Attach.

Copy to Director Planning
Director Finance
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December 8, 2003

VIA FAX

Mayor and Council
City of Burnaby
Legal Department
4949 Canada Way
Burnaby, B.C.
V5G 1M2

Dear Mayor and Council:

Re: Community Charter, 2003
Our File No. 3586

This letter responds to your request for a status report on the *Community Charter* ("Charter") from an outside lawyer who has been involved in reviewing and analyzing this legislation as it has progressed through to enactment. A general opinion for information purposes have been sought on the following matters:

1. the current status of the Charter and when it is expected to come into force;

2. whether the status and powers of local government under the Charter are significantly different and in which areas. Does the final product deliver what the Province initially promised?

3. whether the Charter has in any way decreased local government autonomy;

4. any transitional problems that are expected;

5. any anticipated difficulties in operating under both the Charter and the *Local Government Act* ("LGA");

6. if we are able to determine, why has the City of Vancouver opted to stay with the *Vancouver Charter* rather than access the new Charter?

You have also asked us to describe the writer's background in dealing with the Charter. At Murdy and McAllister, I have provided legal research and analysis of the Charter since the Community Charter Council produced the draft legislation in May, 2002: *The Community Charter, A New Legislative Framework for*

Local Government ("Discussion Paper"), pursuant to its legislative mandate. Aside from assisting the partners of this firm, Chris Murdy and Michael McAllister, in preparing presentations respecting the Charter for organizations such as the Union of B.C. Municipalities ("UBCM") Technical Committee to the Charter Council, the Local Government Managers' Association, and Pacific Business and Law Institute, we have responded to numerous requests from local government clientele for analysis as to how the Charter will affect particular matters.

As an active member of the Canadian Bar Association (B.C.) Municipal Law Section, the writer has contributed to its Submission of August, 2002 to the Ministry of Community, Aboriginal & Women's Services ("MCAWS"); and as current secretary for the Section, arranged for a special meeting concerning the Charter held last month. I also attended and spoke at a conference of the Pacific Business & Law Institute on May 7, 2003 on issues of governance and procedure under the Charter.

During my articling year I assisted in preparing a paper "A Comparison of New and Proposed Municipal Acts of the Provinces" for the 1999 conference of the Federation of Canadian Municipalities. This study was based on principles articulated by UBCM in its 1991 policy paper, "Local Government and the Constitution". UBCM's recommendations for local government autonomy were summarized as follows:

- Guaranteed access to provincial decision making;
- Consultation on all matters affecting local governments;
- An amending formula for local government legislation;
- Joint decision making on areas of shared responsibility;
- Negotiation of conflicts;
- Ensuring local government jurisdiction is respected by provincial ministries, corporations and agencies; and
- Ensuring adequate financial resources are provided for any new delegated responsibilities.

The above principles may help to provide a contextual background for the opinions expressed in this letter.

SUMMARY

1. The Charter has now received Royal Assent and is expected to come into force on January 1, 2004.

2. The Charter does not, in contrast to current legislation, appear to significantly enhance the status or autonomy of municipalities as governing bodies.

   As with the LGA, it does not have general priority over other legislation. Provincial regulatory powers continue with substantially the same scope and extent as in the LGA. Corporate, service and regulatory provisions are organized in the Charter

as "spheres" of fundamental powers, but, as in the LGA, these powers are limited by restrictions appearing elsewhere in the Charter and other statutes.

The Charter does not guarantee notification of, or consultation with, affected municipalities for provincial decisions on all matters which may affect those municipalities. There are obligations to consult with UBCM representatives on a limited number of specified matters, (e.g., LGA or Charter statutory repeals or amendments; revenue transfer reductions under the *Local Government Grants Act*;). UBCM representatives may be held to confidentiality agreements. Consultation obligations do not include any express duty to accommodate municipal concerns, and are only enforceable by UBCM or the government itself, not by affected local governments.

Intermunicipal and provincial-municipal dispute resolution procedures have been included in the Charter at Part 9, Division 3. This Division applies to the City of Vancouver as well as other municipalities. Intermunicipal dispute procedures may trigger mandatory arbitration at the instance of one of the parties, engaging dispute resolution officers and lists of arbitrators appointed by government.

Provincial respect for municipal authority is stated as a principle of relationship, balanced by the need for municipalities to respect Provincial authority. A principle is not a requirement, so it is unclear how or when mutual respect is in operation.

Similarly, while the Charter describes this as a principle of relationship between the Province and municipalities, it does not clearly *require* the Province to provide financial or other resources when it newly assigns responsibilities to municipalities.

Many procedural and approval requirements will continue to apply, but in some cases have been renamed. For example, counter-petition opportunities are "elector approval" under the Charter.

The Charter appears to enhance municipal autonomy in areas such as service agreements and disconnection, roads, park lands, certain kinds of tax exemptions, seizure of animals, entry warrants, adoption of standards, and imposing requirements for some matters. In some cases, procedural requirements are relaxed, such as for closed meetings, emergency response and reserve fund designations. Elector approval thresholds have increased from 5 percent to 10 percent. Changes in language from the LGA in areas of increased autonomy are often subtle, so that a detailed analysis is likely to be necessary to determine the precise extent of any increased autonomy in these and other matters.

3. In some cases, municipal regulatory powers are more restricted than is currently the case under the LGA or the common law, and their exercise will be encumbered by more statutory conditions precedent. Additional restrictions and requirements may result in more grounds for attacking a bylaw under the Charter.

Some of the "fundamental powers" under the Charter may not be used to do anything that is specifically authorized in Parts 26 (Planning and Land Use Regulation) or Part 27 (Heritage Conservation). Therefore, the existing LGA, and any amendments to it, may vitiate authority under s. 8 of the Charter for making bylaws for business regulation, signs, municipal services, public places, trees, fireworks, weapons, cemeteries, etc., public health, natural environment protection, nuisance, animals, structures, and soil deposit and removal. See s. 8(7)(c).

"Concurrent jurisdiction" in the Charter means that provincial approval, or a specific authorizing regulation continues to be required for a number of matters, including public health and soil deposit and removal, or an agreement with the minister (which amounts to approval). New requirements for provincial regulation, approval or agreement will apply to building standards, natural environment protection and "wildlife" animals. Ultimately, the Province will determine such matters. The local government's shared role involves initiation and enforcement.

Council will be required to provide reasons for exercising its legislative discretion on a number of "fundamental power" bylaws. Changes in business regulation will require hearing opportunities for anyone who considers himself or herself to be affected by them.

4. Difficulties are expected in reading the *Community Charter Transitional Provisions, Consequential Amendments and Other Amendments Act, 2003*, S.B.C. 2003, c. 52 ("Transitional Provisions") coherently with the Charter and the LGA. Commencement of various sections of the Transitional Provisions occurs at various times, some in conjunction with other legislation. Some are retroactive, including, among others, interim regulations that Cabinet may make with respect to the Charter or to address transitional difficulties. Thus, a solicitor's interpretation provided one day may be outdated the next, and decisions made on the strength of them might be rendered anomalous. The Transitional Provisions will amend a few sections of the Charter and many sections of the LGA, as well as the expected "housekeeping" provisions included as consequential amendments.

5. While much of the LGA will continue to apply only to regional districts, some parts and sections will continue to apply to municipalities, notably Part 26 [Planning and Development] and Part 27 [Heritage Conservation]. These provisions will need to be reviewed carefully before exercising "fundamental" powers under the Charter, s. 8(3) to (6), as explained above. Other LGA provisions are incorporated into the Charter by reference made in its own provisions, e.g. amalgamation procedures [s. 279]. Since it is likely that the Transitional Provisions frequently will be relevant as well, it will be necessary to have all three documents at hand for reference, as well as any other legislation that may apply, to determine the law as to any particular matter.

6. The City of Vancouver will be subject to the Charter in some areas, notably the dispute resolution procedures of Part 9. In other areas, it might be expected that

the City would prefer the status quo, not only for the familiarity and known consequences of the *Vancouver Charter*, but also because it is viewed generally as a more empowering document than either the LGA or the Charter. Given that the Charter will reduce many aspects of municipal independence that might be found in the LGA, especially respecting regulatory authority, it would surprise us if Vancouver were to reject its own governing statute in favour of the Charter.

DISCUSSION

Current Status

Bill 14, 2003, which introduced the *Community Charter*, to the Legislature on March 11, 2003, passed Third Reading on May 8th and received Royal Assent on May 29, 2003; indexed as Community Charter, S.B.C. 2003, c. 26, It will come into force on a day to be named by regulation. This date is expected to be January 1, 2004 (*Hansard*: April 29, 2003, Vol 14, No.10).

Bill 76, 2003, replaced Bill 67, 2003, as the Transitional Provisions. Bill 76 was introduced on October 9th and received Royal Assent on October 23rd , 2003. Various parts of the Transitional Provisions come into force at different times; some of which are retroactive, and some that will come into force simultaneously with other statutes. See s. 550.

Among the consequential amendments affecting various statutes, including the *Community Charter* itself (sections 39 – 42, amending Charter sections 169(2)(3); 220; 224; and adding s. 193.1), the Transitional Provisions at s. 162 substantially amends the *Local Government Act* by removing provisions that appear in the *Community Charter* and by rewriting LGA provisions. The Charter references the LGA in several provisions, and the LGA will continue to apply to municipalities as well as regional districts, in respect of a number of matters.

Early Vision & Evolution

The *Community Charter* originated as a private member's bill: Bill M222, 1995, in the Legislature on July 12, 1995. *Hansard*, Vol. 21, No. 28, records its introduction by MLA Mr. Gordon Campbell, as he then was, as follows:

> "The *Community Charter* establishes a new relationship...between municipalities and the provincial government. It prohibits downloading. It requires all provincial Crown corporations to pay full property tax. It means less bureaucracy, less administration and less regulation. It eliminates unnecessary provincial interference in local decision-making. It means more accessible, more accountable and more affordable government for all British Columbians."

Bill M222 is available online at http://www.legis.gov.bc.ca/1995/1st_read/mem222-1.htm. Of particular interest, for comparison with the corporate, service and regulatory powers under the current Charter, are sections 34 to 36, which provide for spheres of powers.

The *Community Charter Council Act*, S.B.C. 2001 c. 35, was enacted to establish a Council to make recommendations to Cabinet to establish a new foundation for municipal government and to draft a Community Charter. The preamble of this Act states the purpose of its enactment:

> Whereas the Provincial government believes that
>
> (a) municipalities should have greater autonomy,
> (b) municipalities should have a wider range of tools to reduce reliance on property tax revenues, and
> (c) the Provincial government should not reduce its costs by transferring responsibilities to municipalities;

In introducing Bill 12, the Minister of State for the Community Charter stated:

> "For a long time local governments have asked for greater autonomy over decision-making powers that impact their local citizens. The community charter will do exactly that... The charter will give local governments greater autonomy. It will stop provincial downloading and prohibit forced amalgamations, and the charter will give local governments greater abilities to create financial resources."
>
> *Hansard*, August 20, 2001, Afternoon Sitting, Vol. 1, Number 21.

At second reading the Minister states:

> "One of the values that the charter strongly represents is for the provincial government not to impose its will onto local governments.

His statement was supported by the Minister of Community, Aboriginal and Women's Services, who added:

> "I think we want to remember why the *Community Charter Council Act* is being put forward here today, why the concept of the community charter has been advocated by this government. It is to enhance local autonomy, and it is to prevent downloading of responsibilities from the province without consultation and without corresponding resources."

Voicing support for Bill 12, the Attorney General referred to a document prepared in 1991 by the Union of British Columbia Municipalities ("UBCM") and Mr. Campbell as a "bill of rights" for local governments:

> "The *New Era* document talked about outlawing off-loading of provincial government costs onto the backs of local property taxpayers. That was a

commitment we made in the election campaign. The member asked the question about that commitment, and in fact, it is a commitment we made and intend to keep... "

See *Hansard*, August 23, 2001, Morning Sitting Vol. 2, Number 22.

The Community Charter Council produced draft legislation in May, 2002: *The Community Charter, A New Legislative Framework for Local Government* ("Discussion Paper"). This document was accessible to the public and the government invited comment from interested persons or groups. Apparently, it received many submissions. [The only legal commentary of which we are aware was submitted by 15 members of the Municipal Section of the Canadian Bar Association, British Columbia., to which this writer contributed Appendix 5].

After Bill 14, 2003, was introduced to the Legislature on March 11, 2003, and during subsequent debate, new restrictions, ministerial approval requirements, and amendments that appear to suggest loss of local government autonomy were explained by a need to balance new powers against other interests and the need for more accountability. See *Hansard*, Vol. 14, No. 10 (Second Reading) and Vol. 15, No. 5, (Committee of the Whole House). Certainly there are several additional obligations on Council under the Charter which will enhance accountability – positive duties to consider the public interest, tracking and disclosing gifts, preparing additional annual reports, etc. References to "balance" hint that local autonomy and control in the exercise of a regulatory power cannot be taken too far, arguably even by highly accountable councils.

Many of the Charter powers and provisions for status and accountability described by either side of the House as "new" already exist in the LGA, which was substantially amended during the period between 1997 and 2000. The average lay person or politician can hardly be blamed for not appreciating this fact. Municipal legislation is admittedly complex, and years of continuous study may be necessary to become readily familiar with all of its aspects. Complexity of application is likely to continue, however, under the Charter and related legislation, such as the Transitional Provisions and the LGA. All three statutes and their regulations will continue as governing legislation in a number of areas.

Significantly, legislative debate during the introduction of the Charter did not include references to the various statutes that will limit, qualify or override the powers under the LGA and the Charter. Several new bills were introduced after the Charter that would subordinate local governments status. Some of these new bills will be discussed herein under "Other Legislation".

Guiding Principles

Interpretive Provisions

Constitutionally, municipalities remain a "creature of the province" and as such are always susceptible to provincial preferences as to delegation of power. In both the LGA and the Charter, the "order of government" is qualified by the phrase "*within its jurisdiction*". The extent of this jurisdiction is determinable by the provincial government, expressed through various legislative enactments.

That aside, in s. 1 of the Charter, a local government is no longer described as an "*independent* order of government" as in the LGA, s. 1, but simply as an "order of government...that is autonomous, etc.". It is difficult to predict how subtle changes in language will be interpreted by the courts, but if a judge with an interest in grammatical description reads the change as significant, it is our view that the Charter could result in a reduction of status for municipalities.

The Supreme Court of Canada interpreted s. 3 of the LGA as broadly empowering municipalities, at least in the area of corporate power applicable to proprietary and business purposes: *Pacific National Investments v. Victoria (City)* [2000] 2 S.C.R. 919, para. 53. See also *Nanaimo (City) v. Rascal Trucking Ltd.* [2000] 1 S.C.R. 342, which deals with regulatory power. The wording of LGA s. 3 was amended for the Charter, s. 4. It is not certain that a court would still interpret municipal power as broadly, given the new language and the context of other qualifying provisions in the Charter such as s-s. 8(7) through (11), and sections 9 through 11. Arguably, adding the phrase "that aspect of the general power that encompasses the specific power may only be exercised subject to any conditions and restrictions established in relation to the specific power" to s. 4 of the Charter may result in a more restrictive interpretation of the general power than is presently the case in the LGA, s. 3.

Also new are the following principles:

- *municipal governments respect provincial authority*: s. 2(1)(a) and 2(2)(a), as well as for the Province to respect municipal authority [why was it necessary to explicitly state this?]
- *harmonization of provincial and municipal laws, policies and programs*; [this suggests provincial control of and through municipal processes – a municipality has no power to make the Province "harmonize" by making its laws compatible with municipal enactments. See discussion herein on Bills 65 and 75]
- *consideration of municipal interests in interprovincial, national or international discussions*; and
- *attempts at dispute resolution by consultation, negotiation and facilitation.* [See Part 9 for requirements].

Other than the above changes, which may yet be significant, there is little that appears to distinguish Part 1 of the Charter from Part 1 of the LGA. The need for municipal consultation, powers to draw on resources, flexibility, and balancing of provincial interests, etc. have been stated as principles of provincial-municipal relationships since 1998.

Downloading & Consultation

The principle of "no downloading" apparently has evolved over time into "no downloading without consultation", finally to become "no reduction of specified revenue transfers or changing specified Acts or regulations without consulting UBCM representatives".

Despite the principled statement in s. 2 of a need to consult on matters of mutual interest, the only actual requirement for consultation in the Charter is found in Part 9, s. 276. The requirement is not general and is not directed to affected municipalities. The obligation to consult is specific to reductions in transfers under certain statutes and regulations and it is fulfilled on consulting with UBCM representatives, who might also be sworn to confidentiality. It does not arise, for example, to government funding cuts in services or programs not covered by the *Local Government Grants Act* or regulation. As the Minister explained in Committee of the House on May 7, 2003, if such a service is cut, the local governments are not required to assume responsibility for it:

> "Its totally a local decision. Let me illustrate...Last year we decided not to cut the grass along the highways. The provincial government, in its process of finding the funds for important projects that we are working on, was looking for a saving of $5 million, so we stopped cutting the grass. Some municipalities wanted to continue to see the grass cut, and they did it themselves. Or the communities just let it grow and had no problem with that." [*Hansard*, Vol 15, No. 5, p. 6565-6].

Presumably, communities experiencing *severe* conditions might still be able to call on provincially funded services in emergency situations, such as where summer drought, lightning or human activity, in combination with a factor such as uncut grass, may result in community-scale fires. Emergency procedures are facilitated under the Charter in that a local council may deal with one merely by a majority resolution, rather than having to adopt a bylaw with a 3/4 vote of all the members, as under the LGA.

It is not totally certain that a local government need not assume a formerly provincially funded service, for example court services, for the purpose of bylaw enforcement. See the discussion herein respecting Bill 65, *Bylaw Notice Enforcement Act*, 2003, under the heading, "Other Legislation".

Note that the Discussion Paper, at s. 278, gave local governments that are affected by a s. 276 reduction in funding the right to enforce the s. 276 obligation to consult. That right was removed from Bill 14, 2003. In the Charter, only the UBCM or the provincial government itself has the right to enforce consultation: s. 278.

Even where constitutional rights may be at stake, such as those of Aboriginal groups, a right to consultation does not necessarily include a right to be

accommodated or a right to veto. The extent of a duty to consult, in such a context, depends on the degree of impact, the importance of the right that may otherwise be violated, and the need to balance other interests: *Heiltsuk First Nation v. B.C. (Minister of Sustainable Resource Management* 2003 BCSC 1422. Having no constitutional right of its own, a municipality should never assume that a right to consultation involves any right of accommodation, much less a right of veto.

One example of consultation results obtained by the UBCM Executive is found in its letter to the Minister of State for Deregulation, dated November 24, 2003, which was copied to various municipalities. It is in regard to Bill 75, *Significant Projects Streamlining Act, 2003* (described further herein). The UBCM President notes with disappointment that "Once again, you have rejected every amendment proposal we have put forward."

Thus, consultation does not appear to increase local government status or power. In practical terms, its potential benefits may depend on securing the good will of the government by political harmonization.

Natural Person Powers

This common law phrase describes a corporate ability to enter contracts as if the corporation were an individual. It is difficult to predict how s. 8 (1) will dramatically increase the powers of a municipality beyond what is currently authorized under the LGA, s. 176. Note that individuals do not have equivalent powers of regulation to that of a local government, so that the term is unlikely to expand ordinary regulatory powers. The courts are unlikely to disregard the special nature of the municipal corporations in considering either contractual functions: *Silver's Garage v. Bridgewater (Town)* [1971] S.C.R. 577; or regulatory functions: *United Taxi Drivers Fellowship v. Calgary (City)* 2003 ABCA 117 (Alta. CA, leave to appeal to SCC granted [2002] S.C.C.A. 318) .

As in the LGA, corporate as well as regulatory power may be qualified or negated elsewhere in the statute or by other legislation. See the Charter, s. 8(10). Potentially, corporate powers could be interpreted more restrictively than is currently the case under s. 176, given the new stipulation in the Charter, at s-s. 8(10)(b) that "powers provided to municipality under this section...*must be exercised in accordance with this Act* unless otherwise provided." In view of traditional court interpretations of municipal power, this kind of limit would normally be implicit. In the Charter, however, the phrase appears as an express reminder that having "natural person" corporate power or "fundamental" regulatory powers does not mean a Council may go beyond the authority derived from statute. See also Part 3 for limits on power.

Regulate, Prohibit and Impose Requirements

The powers to regulate, prohibit and impose requirements in the Charter appear to be distinct from each other. Section 8(7)(a) states that they are separate powers that may be exercised independently of each other. "Regulate" is defined in the Schedule as including "authorize, control, inspect, limit and restrict, including by establishing rules respecting what must or must not be done, in relation to the persons, properties, activities, things or other matter being regulated." The traditional understanding continues in the Charter that the power to regulate does not include the power to prohibit unless expressly stated.

The Charter authorizes all three kinds of powers – regulation, prohibition, and imposing requirements - for enacting bylaws for some matters. For others, such as signs and other advertising, council may only regulate and impose requirements. For business bylaws, council may only "regulate" as a fundamental power under s. 8(6).

Section 15, however, allows for establishing terms and conditions for licensing. Read together with s. 12, they are similar to the LGA provisions for business licensing in s. 658.

Because the Charter does not separately define the term "imposing requirements", it is not entirely clear how this will be different from "regulating". Potentially there is a distinct authority to impose positive obligations such as planting trees, paying charges, fees or taxes, providing amenities, clear sidewalks of snow, etc. - some of these are already authorized under the LGA for various matters.

LGA Planning, Zoning & Heritage Provisions

A new provision, not included in the Discussion Paper, appears to significantly limit fundamental powers in the Charter in a number of areas:

> 8 (7) The powers under subsections (3) to (5) to regulate, prohibit and impose requirements, as applicable, in relation to a matter
>
>> (c) may not be used to do anything that a council is specifically authorized to do under Part 26 *[Planning and Land Use Management]* or Part 27 *[Heritage Conservation]* of the *Local Government Act*.

Subsections 8(3) to (5) include municipal services, public places, trees, fireworks, weapons, cemeteries, etc., public health, natural environment protection, nuisance, animals, structures, and soil deposit and removal, signs and other advertising, and business regulation.

In *Peters v. Chilliwack (District)* [1987] B.C.J. 1968, a swine control bylaw, enacted under a "miscellaneous powers" provision authorizing animal control,

prohibited the keeping of swine on some lands. Mr. Peters challenged the bylaw's validity as being, in effect, a zoning bylaw enacted without the requisite public hearing. Our Court of Appeal reasoned that since the miscellaneous provision authorized the bylaw and did not require a public hearing, the bylaw was still good, even though it dealt with the regulation and use of land.

In light of this liberal judicial interpretation of municipal power, s-s. 8(7)(c) would appear to explicitly restrict what the courts would otherwise allow when different provisions appear to authorize regulation of the same matter.

To determine whether bylaws otherwise authorized under s. 8(3) to (6) are exercisable, reference must be made to the planning, zoning or heritage powers of the LGA. Any restrictions that apply in the LGA provisions will, of course, determine the extent of Council's power where Parts 26 and 27 specifically authorize something that would also be authorized under the Charter, s. 8(3) to (6).

Concurrent Authority

The Charter, s. 9 prohibits the independent enactment of bylaws by a local Council for public health, natural environment protection, wildlife (animals), building standards and soil removal or deposit except where a provincial regulation specifically authorizes such a bylaw. Otherwise, agreement or approval of the minister responsible will be necessary.

Thus, s. 9 leaves the ultimate determination of a number of "fundamental power" matters to the provincial government. The only "concurrent" aspect of the authority will be that a municipality may initiate the process and propose a bylaw. Once the Province has specifically determined whether and to what extent a matter may be so regulated, the time and resources involved in enforcement may be left with the municipality.

In *Spraytech v. Hudson (Town)* [2001] 2 S.C.R. 241, the Supreme Court of Canada held that protection of the natural environment was of sufficient importance that it was a matter for all levels of government – municipal, provincial and federal – to be concerned with in the exercise of a regulatory power. It also affirmed the long-standing principle that to regulate anything, a municipality must be able to rely on statutory authority for the matter, even if the power is stated generally (as in the Quebec legislation). The Charter's prohibition on adopting bylaws to protect the natural environment without a specific authorizing provincial regulation or agreement or approval of a minister is, by contrast, a significant *general restriction* on any such municipal power in British Columbia.

Procedural Requirements

Municipal procedures are commonly criticized for being unduly obstructive and time-consuming. Obtaining approval, agreement, or specific regulatory authority from another level of government tends to absorb time and

resources and may result in uncertainty for business planning purposes as well as for ordinary citizens and councils.

Despite this, many requirements for ministerial approval or specific authority by provincial legislation or regulation that currently appear in the LGA continue to appear in the Charter – e.g., matters of public health, soil deposit and removal, and transfers of development cost charges or park land funds to other reserves. As discussed above, some matters will require approval that previously could be regulated independently.

Aside from notice procedures, hearing opportunities, elector approval (formerly counter-petition opportunities), public hearings, and assent of the electors continue as requirements under the Charter for many of the same matters.

The Charter s. 8(7)(c) may result in the necessity to observe statutory procedural requirements such as public hearings, ministerial approvals, etc. where a Charter power under s. 8(3) to (6) might also be specifically authorized in Parts 26 and 27 of the LGA. See discussion above.

Section 59 requires council to notify and provide hearing opportunity to persons who consider themselves affected by business regulation before a business bylaw is adopted. This requirement does not appear in the LGA, but was introduced in the Discussion Paper.

The courts typically read procedural requirements strictly against municipalities as "conditions precedent" to the validity of a bylaw, so that failure to observe a statutory requirement may be fatal.

Requirement to Explain Bylaws

Section 8(9) Council must provide reasons for making policy / legislative decisions related to "fundamental" regulatory powers set out in s. 8 (3) to (6). This did not appear in the Discussion Paper. No doubt it was included in Bill 14 in order to increase the accountability of local governments.

This requirement may be more than strictly procedural in nature, such as might be the subject of scrutiny under principles of "procedural fairness".

Section 8(9) may provide a basis for attacking the validity of a municipal bylaw on a variety of grounds, e.g., the purpose is *ultra vires* the power of the municipality. Of course, bylaws must be in compliance with the Charter, other provincial legislation and the Constitution (federal division of powers or the *Canadian Charter of Rights & Freedoms*). Given that council members may each have different reasons for voting to adopt a bylaw, however, the practical application of s. 8(9) may prove to be time-consuming, difficult and uncertain.

Traditionally, a lawmaking body is not legally required to explain its legislative choices. The courts have assumed that in making policy decisions elected

decision-makers act in good faith according to their views of the public welfare within their jurisdiction. As a matter of administrative law, reasons are normally only required in a judicial or quasi-judicial context, where a law is not being enacted, but rather interpreted and applied in light of particular facts and an individual's interest or rights. Thus, s. 8(9) is an anomalous requirement, particularly in a context of an exercise in legislative power that is described as "fundamental". In this sense, the requirement reduces the status of local government to the equivalent of an administrative board.

Other Legislation

It is common to find "prevailing clauses" in statutes such as the *Agricultural Land Commission Act*, the *Hydro & Power Authority Act*, the *Assessment Act*, the *Freedom of Information & Protection of Privacy Act*, and the Hu*man Rights Code* (to name a few). Despite the Charter s. 1 description of municipalities and their councils as an order of government that is autonomous, there is no *general* priority clause in either the LGA or the *Community Charter* that would override other provincial acts.

As an example of promises yet to be fulfilled in respect of taxation, any Charter or LGA requirement for all provincial Crown corporations to pay full property tax would need a concurrent amendment to the *Hydro & Power Authority Act*, wherein s. 32 immunizes that body from being bound by any statute or statutory provision of British Columbia, despite any specific provision in any Act to the contrary.

What is less obvious is that the powers of municipalities may also be subject to various regulations established by Cabinet. Once the power to regulate on a matter is included in a statute, the regulation may be enacted without the need for the Legislature's specific attention or debate. The powers of Cabinet to enact regulations under the Charter appear in Division 2 of Part 9. They are similar to those that currently exist in the LGA, but some are additional.

For example, in the Charter, the provisions for mandatory binding arbitration set out in s. 286 apply to a number of specifically mentioned items, but then also to *any* matter that might be prescribed by regulation of the Lieutenant Governor in Council (Cabinet): 286(1)(b) and 282(2)(g). Thus, some decisions as to whether and how an intermunicipal dispute may be resolved may no longer be made autonomously by a particular Council. Instead, a process may be initiated by the disputing Council to have a minister-appointed dispute resolution officer direct the dispute to binding arbitration by an arbitrator chosen from a list established by the minister (after consultation with UBCM). If the officer considers the parties unable to agree as to the choice of arbitration process, the officer may direct the process.

Other regulatory powers that, if exercised, may potentially reduce or eliminate municipal authority over a particular matter have appeared in new legislation. Some of the more notable bills introduced this year include:

- ***Significant Projects Streamlining Act*** (Bill 75, 2003). This Act would prevail over the Charter and LGA (among others) in case of conflict. Where a project is designated as significant by Cabinet, and the proponent considers any local government "measures" – bylaws, requirements, policy, etc. – to impede the project or its operation, the proponent and the local government must attempt to reach agreement as to replacing the constraints with replacement measures. Failing agreement, the minister may, after consulting both parties, order any replacement measures he or she deems appropriate. Bill 75 is not confined to major, intermunicipal transportation infrastructure. *Hansard* debates suggest its application to independent power and waste treatment facilities, and similar projects where local government requirements, including amenity agreements and development charges, are viewed as impediments to progress. Likely to increase uncertainty generally, and, where it applies, to reduce control by local government.

- ***Bylaw Notice Enforcement Act*** (Bill 65, 2003). As the Attorney General explained during debate [re s. 4(2)], "in any jurisdiction where this scheme was in effect, then the matters to be dealt with in the scheme would be provided for and listed and identified in the regulations, and at that point that would be the only way you as a municipality could enforce that bylaw...if you have opted into this system for a particular category of bylaws, then you don't as a local government get to choose which ticketing system you're going to use." [*Hansard*, October 20, 2003, Vol. 17, No. 2, Committee of the Whole House].

  Although at present this new system would appear to be optional, the minister may prescribe which municipalities are subject to the Act: There appears to be no "opting out" provision; and then the minister may determine by regulation which bylaw matters may be enforced through the processes of the Act.

- ***Integrated Pest Management Act*, 2003** ("IPMA"). Under the current *Pesticide Control Act,* s. 3, local government bylaws were valid as long as they are not in conflict with, repugnant to, or inconsistent with that Act. The Supreme Court of Canada's decision in *Spraytech v. Hudson (Town)* held that a local bylaw would only be inconsistent with or in conflict with another Act if one law prohibited what the other mandates – making it impossible to comply with both. Section 3 was removed from the IPMA, which received Royal Assent in October this year. When it comes into force, Cabinet may enact a regulation to prevent a municipality or regional district from enacting pesticide control bylaws: s. 37(2)(b). Note that the "fundamental power" to regulate against nuisance in the *Community Charter*, s. 8(3)(h) is referable to a specific list of matters, set out in s. 64. In any case, pesticide control might be seen as a matter of public health protection, requiring provincial approval, agreement, or specific regulation under s. 9.

Increased Autonomy

The authority to impose requirements in respect of some matters, as positive obligations, might serve to enhance the "fundamental powers" of s. 8 if

viewed as separate from and additional to the current powers of regulation, licensing and permit issuance. Note that courts tend to construe any interference with established civil or common law rights strictly against the regulatory authority.

Approval of the electors (equivalent to counter-petition process under LGA) in the Charter increases the threshold of elector opposition from 5 percent to 10 percent. Thus, a larger minority is needed to prevent a municipal council from doing what the majority of all of the citizens impliedly empowered their representatives to do, via the general election process. This will increase the independence of council somewhat.

There appears to be more autonomy in matters concerning highways. The general authority appears in s. 36. Reference must still be made, however, to the *Motor Vehicle Act*, the *Highway Act*, the *Greater Vancouver Transportation Act*, and the *Utilities Commission Act,* etc., in exercising any authority under the Charter.

Non-arterial highways will vest in the municipality, although vesting is subject to certain conditions, such as those listed in s. 35(7). If it is necessary to restrict the common law right of passage by the public on such roads, s. 36(3) appears to authorize that. As well, s. 38 expressly allows a council to temporarily restrict or prohibit traffic on a highway, and to authorize any person to control traffic. Additional powers in relation to highways are expressly provided in s. 39 as well.

Road closures will still involve a number of conditions and procedures, although it appears that it will no longer be necessary to obtain provincial approval unless the road is within 800 metres of an arterial highway. See sections 40 and 41.

The list of subject matters that may be discussed in a closed meeting has increased somewhat under the Charter, s. 90. Section 91 expressly authorizes Council to allow municipal officers and employees to attend a closed meeting, or to exclude them.

There will likely be a higher degree of flexibility in granting permissive tax exemptions for charities and NPO's under s. 224.

Animal control bylaws may provide for seizure of animals in certain circumstances: s. 48.

The Charter, s. 15(2), expressly authorizes the adoption or adaptation of provincial, national or international standards and codes where Council has the ability to regulate a matter.

These are some obvious examples of greater municipal independence under the Charter. Typically, a careful analysis is necessary to determine how far, in any particular area, the Charter may liberate a council beyond the boundaries of existing and former legislation. See discussion herein under "Other Legislation."

Dispute Resolution

A new dispute resolution process [Part 9] is described in the Legislature as liberating municipalities from cumbersome court processes. Many municipalities will probably appreciate this process, but ultimately its popularity with any particular local government may depend on the circumstances in which it is applied.

Mandatory procedures may be initiated unilaterally, leading to binding arbitration by an arbitrator chosen from a list of government appointees. A municipal council may be required to adopt a bylaw that reflects an arbitrator's decision rather than what council members may consider to be in the best interests of their constituents, failing which Cabinet might implement the arbitrator's order. See ss. 286 - 290.

Transitional Provisions

The Transitional Provisions include 20 sections relating to transitions to the Charter. The bulk of Bill 76 includes consequential amendments to over 90 other statutes, notably the LGA, the *Vancouver Charter*, and the Charter itself.

Transitional provisions are frequently (but not always) a difficult area for legal analysis. Those concerning the Charter can be expected to result in local governments dedicating higher than average amount of time and resources for sorting out their legal implications.

Section 550 provides for commencement of various Transitional Provisions at various times. Some provisions, such as sections 3 and 20, are retroactive to the date when the Charter was introduced in the Legislature on March 11, 2003.

Section 3 sets out the power for Cabinet to make regulations:

- for any matters that it "considers are not sufficiently provided for" in the Charter, the Transitional Provisions or another affected Act, up to December 31, 2005;
- where it considers advisable to more effectively bring the Charter or the Transitional Provisions into operation; or to address any transitional difficulties.
- to resolve any "errors, inconsistencies or ambiguities" in any Act that arise.

Section 3 regulations will prevail in any conflict with another enactment. There are dates when certain regulations will cease to have effect.

A "plain reading" or other legal interpretation of the Charter or a related enactment may be uncertain if a s.3 regulation enacted subsequently is inconsistent with that interpretation. Retroactivity is notorious for increasing uncertainty as to the state of the law at a given time, and may necessitate complex legal analysis. Decisions based on those interpretations may also be rendered anomalous by subsequent regulatory requirements or clarification by Cabinet as well as by retroactivity.

Retroactivity is also expressly authorized in s. 4(3) as to continuation of municipal bylaws where a local government wants to amend an existing bylaw that no longer has authority under a new enactment. A request can be made to the Lieutenant Governor in Council (Cabinet) to continue the former authority by regulation. If such requests are made often, considerable confusion may result, from the perspective of the average person, as to whether a particular bylaw is valid or not.

The Transitional Provisions amend the Charter both in Part 2, at sections 39 to 42, and in Part 3, at sections 530 to 549. Thus, they will need to be referred to, not only to sort out matters of transitional difficulty, but also to determine what the Charter says as a separate enactment.

Charter, LGA and Transitional Provisions

Many provisions of the LGA will continue to apply for municipalities as well as the Charter, e.g., Parts 26 and 27, as explained above. Other examples:

- The Schedule to the Charter includes definitions for the Charter, but LGA definitions may also apply. Section 2 of the Schedule provides that "Subject to the definitions established by section 1 of this Schedule, section 5 *[definitions]* of the *Local Government Act* applies to this Act."
- Part 2 of the LGA will continue to apply for establishing new municipalities or changing existing boundaries.
- Part 3 will continue to apply to general local elections and by-elections; and Part 4 to obtaining assent of the electors.
- Part 11 will apply to tax sales.
- Amalgamation may occur through a voting process under s. 8 of the LGA, modified by a requirement in s. 279(b) of the Charter for a majority vote in favour where the minister would recommend the incorporation of a new municipality to Cabinet.

The Transitional Provisions will of course be necessary, as explained above, to determine a number of matters, as well as the status and language of various parts of the Charter, the LGA, and other enactments that might be relevant.

All three enactments and their regulations will need to be kept close at hand, at least for the foreseeable future.

The *Vancouver Charter*

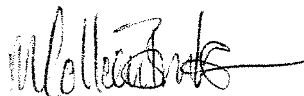
Vancouver will be subject to some provisions of the Charter, such as the dispute resolution procedures of Part 9.

The Transitional Provisions, sections 498 through 516, amend the *Vancouver Charter* so that provisions for conflicts and disqualification of council members, council meetings, dogs, trees, and other matters are compatible with the Community Charter.

Extensive analysis would be necessary to demonstrate how the *Vancouver Charter* tends to delegate broader powers to that City, giving it more independent authority than municipalities have enjoyed under the LGA. It is generally viewed as more empowering municipal legislation than the LGA. The writer was unable to interview persons in Vancouver City Hall in respect of the City's preferences. It would not be surprising, however, if, in light of the increased restrictions on regulatory power in the Charter from that which the LGA would allow, Vancouver would be somewhat reluctant to abandon its current governing statute.

Yours truly

MURDY & McALLISTER



M. Colleen Burke

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