

Checklist XX - Sources of Municipal and Personal Liability and Immunity

- See also extensive case law in this volume under the sections identified below, and in the introduction to Part XV.

A. Public highways

Subject matter	MA	COTA
<p data-bbox="181 506 708 541">Maintenance of highways and bridges</p> <p data-bbox="181 611 1032 793">Breach of duty - Municipality that fails to keep its highways or bridges in a state of repair that is reasonable in the circumstances, including character and location of highway or bridge is, subject to <i>Negligence Act</i>, liable for all damages any person sustains because of default.</p> <p data-bbox="181 810 1032 877">Defences - However, municipality is not liable for failing to keep highway or bridge in a reasonable state of repair if,</p> <ul style="list-style-type: none"> <li data-bbox="245 898 1032 1003">(a) it did not know and could not reasonably have been expected to have known about the state of repair of the highway or bridge; <li data-bbox="245 1024 1032 1087">(b) it took reasonable steps to prevent the default from arising; or <li data-bbox="245 1108 1032 1255">(c) at the time the cause of action arose, minimum standards of repair established by regulation applied to the highway or bridge and to the alleged default and those standards have been met. <p data-bbox="181 1276 1032 1346">Untravelled portions of highway — No action shall be brought against a municipality for damages caused by,</p> <ul style="list-style-type: none"> <li data-bbox="245 1367 1032 1430">(a) presence, absence or insufficiency of any wall, fence, rail or barrier along or on any highway; or <li data-bbox="245 1451 1032 1633">(b) any construction, obstruction or erection, or any siting or arrangement of any earth, rock, tree or other material or object adjacent to or on any untravelled portion of a highway, whether or not an obstruction is created due to the construction, siting or arrangement. <p data-bbox="181 1654 1032 1759">Sidewalks —Municipality is not liable for a personal injury caused by snow or ice on a sidewalk, except in case of gross negligence.</p> <p data-bbox="181 1780 1032 1881">10 day notice to municipality required — No action shall be brought for the recovery of damages against municipality unless, within 10 days after the occurrence of the injury, written notice</p>	44	42

<p>of the claim and of the injury complained of has been served upon or sent by registered mail to,</p> <ul style="list-style-type: none"> (a) the clerk of the municipality; or (b) if the claim is against two or more municipalities jointly responsible for the repair of the highway or bridge, the clerk of each of the municipalities. <p>Exceptions to notice requirement</p> <ul style="list-style-type: none"> • Death of the injured person as a result of the injury. • Reasonable excuse for the want or the insufficiency of the notice and that the municipality is not prejudiced in its defence. <p>Acts or omissions of others —No obligation or liability on municipality for act or omission of a person acting under a power conferred by law over which the municipality had no control unless,</p> <ul style="list-style-type: none"> (a) the municipality participated in the act or omission; or (b) the power under which the person acted was a by-law, resolution or licence of the municipality. <p>Particular loss or damage required— No liability unless claimant suffered a particular loss or damage beyond what is suffered by that person in common with all other persons affected by the lack of repair.</p>		
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B. Liability for Exercise or non-exercise of powers

<p>Powers of a natural person — Municipality has capacity, rights, powers and privileges of natural person for purpose of exercising its statutory authority.</p>	9	7
<p>Exercise of business powers A municipal corporation has a variety of functions, some legislative, some with also a quasi-judicial component, and some administrative or ministerial, which may be better categorized as business powers. In exercising the latter, a municipality may undoubtedly (subject to statutory qualification) incur liabilities in contract and in tort, including liability in negligence. There may, therefore, be an individualization of responsibility for negligence in the exercise of business powers which does not exist when a municipality acts in a legislative capacity or performs a quasi-judicial duty. A municipality at what may be called the operating level is different in kind from the same municipality at the legislative or quasi-judicial level where it is exercising discretionary statutory</p>		

authority. In exercising such authority, a municipality (no less than a provincial Legislature or the Parliament of Canada) may act beyond its powers in the ultimate view of a Court, albeit it acted on the advice of counsel, without resulting in liability to third parties. The risk of loss from the exercise of legislative or adjudicative authority is a general public risk and not one for which compensation can be supported on the basis of a private duty of care. The situation is different where a claim for damages for negligence is based on acts done in pursuance or in implementation of legislation or of adjudicative decrees: *Welbridge Holdings Ltd. v. Greater Winnipeg (Municipality)* (1970), 22 D.L.R. (3d) 470 (S.C.C.).

Enforcement of building standards by-law - Once a municipality made a policy decision to enact a property standards by-law, it could be liable to property owners for the negligent enforcement of its by-law. However, a municipality has a broad discretion in determining how it will enforce its by-laws, as long as it acts reasonably and in good faith. The manner of enforcement ought not to be left to the whims or dictates of property owners: *Foley v. Shames*, 2008 ONCA 588, 2008 CarswellOnt 4769 (C.A.).

Once a municipality chose to exercise its discretion to enter upon premises to inspect renovations being conducted, it owed a duty of care to all persons who it was reasonable to conclude might be injured by the negligent exercise of that power. The owner's negligent conduct in obtaining the building permit after construction had already started was not determinative of whether a duty of care was owed by the municipality, and did not absolve the municipality of its duty to take reasonable care. However, such failure by the owner could be considered in the apportionment of fault, so as to reduce the municipality's percentage liability vis-à-vis the owner and the contractor: *Ingles v. Tutkaluk Construction Ltd.*, 8 M.P.L.R. (3d) 1, [2000] 1 S.C.R. 298 (S.C.C.).

Restrictive by-laws In the absence of bad faith, a municipality is not liable in tort for the enactment, implementation or enforcement of its by-laws. The court must pay considerable deference to a municipal council with respect to its right to enact a by-law, particularly where the by-law is passed pursuant to specific enabling legislation. A municipal council, in making a decision of a legislative nature as opposed to an administrative decision, is under no duty to act with procedural fairness in any

<p>event. The passage of any restrictive by-law will have a negative effect upon some businesses or individuals: <i>Thirsty's Bar & Grill v. Waterloo (Regional Municipality)</i> (2000), 2000 CarswellOnt 2858, 14 M.P.L.R. (3d) 207 (S.C.J.), additional reasons at (2001), 2001 CarswellOnt 1834 (S.C.J.).</p> <p>Business contracts - Municipalities are bound by their business contracts. If they break them, they must pay compensation to the other party barring an express statutory provision denying any form of compensation or damages. However, contracts concerning the exercise of legislative powers involve other legal rules and policy considerations. Nor are municipalities free to break non-contractual understandings on mere whim. There remain legal protections against a municipality that acts in bad faith. Businesses know that dealing with a municipal government is different from dealing with a purely private corporation. No "indoor management rule" protects someone dealing with a municipality from having to ensure that proper procedures were followed with respect to the contract, unlike the situation with a private corporation: <i>Pacific National Investments Ltd. v. Victoria (City)</i>, [2000] 2 S.C.R. 919</p>		
<p>Unjust enrichment - Municipalities often make demands that are not strictly authorized and developers do what they are asked to do because in the end they get the zoning they want. In the ordinary case, such arrangements will not be unwound on the basis of the doctrine of unjust enrichment. Where an agreement between the municipality and a developer was set aside on grounds of <i>ultra vires</i> on the part of the municipality, the agreement could not be used by the municipality to avoid liability for unjust enrichment for work done by the developer: <i>Pacific National Investments Ltd. v. Victoria (City)</i>, 2004 SCC 75.</p>		
<p>Negligent misrepresentation - A distinction must be made between the legislative and quasi-judicial acts of a municipality, for which there is no liability to any particular person, and operational acts, for which the municipality can be held liable in negligence on the basis of the principles in <i>Hedley Byrne: Moin v. Blue Mountains (Town)</i> (2000), 13 M.P.L.R. (3d) 1 (Ont. C.A.).</p>		
<p>Occupier's liability - In fulfilling its duty as an occupier under s. 3(1) of the <i>Occupiers' Liability Act</i>, a municipality is not required to guard against every possible accident that might occur. A municipality was only required to exercise care against dangers that were sufficiently probably to be included in the category of contingencies normally to be foreseen: <i>Doyle v. Petrolia (Town)</i> (2005), 2005 CarswellOnt 1925 (C.A.). See</p>		

<p>also <i>Alehimowicz v. Schram</i> (1999), [1999] O.J. No. 115, 1999 CarswellOnt 83 (C.A.), leave to appeal refused (1999), 133 O.A.C. 198 (note) (S.C.C.).</p>		
<p>Public nuisance - A public nuisance has been defined as any activity which unreasonably interferes with the public’s interest in questions of health, safety, morality, comfort or convenience, Essentially, the conduct complained of must amount to an attack upon the rights of the public generally to live their lives unaffected by inconvenience, discomfort and other forms of interference. An individual may bring a private action in public nuisance by pleading and proving special damage. Such actions commonly involve allegations of unreasonable interference with a public right of way, such as a street or highway. Statutory authority provides, at best, a narrow defence to nuisance. The traditional rule is that liability will not be imposed if an activity is authorized by statute and the defendant proves that the nuisance is the “inevitable result” or consequence of exercising that authority. The defendant must negative that there are alternate methods of carrying out the work. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance. It is insufficient for the defendant to negative negligence. The standard is a higher one. While the defence gives rise to some factual difficulties, in view of the allocation of the burden of proof they will be resolved against the defendant: <i>Ryan v. Victoria (City)</i>, [1999] 1 S.C.R. 201, 50 M.P.L.R. (2d) 1 (S.C.C.).</p>		

C. Liability of Municipal Council Members and Staff

<p>Liability of members for diversion of funds - If a council applies any money raised for a special purpose or collected for a sinking or retirement fund otherwise than permitted by this Act, each member who votes for the application is personally liable for the amount so applied which may be recovered in a court of competent jurisdiction.</p>	424	255
<p>Discrimination - The decision of a council not to contract with a certain class of persons is reviewable by a court. In the absence of such a decision, any attempt to have the staff refuse to deal with a private party on the basis of a “wink and a nod” would be vulnerable to attack on the basis of absence of authority from council and would expose the staff to civil liability: <i>Shell Canada Products Ltd. v. Vancouver (City)</i>, [1994] 1 S.C.R. 231 (S.C.C.)</p>		

<p>Negligent misrepresentation - Imposing an absolute liability on municipal officers if their assurances or representations turn out to be wrong would put an end to all open communication with municipal officers. While municipal officers must be careful and skilful and reasonably competent, and if they are not they may be liable in negligence, it is not true that they must be right in their representations or they and their municipality will both be liable to compensate anyone who suffers loss by acting on an incorrect representation: <i>Inland Feeders Ltd. v. Viridi</i> (1981), [1982] 1 W.W.R. 551 (B.C. C.A.). See also <i>Evenchick v. Ottawa (City)</i> (1998), 46 M.P.L.R. (2d) 303 (Ont. C.A.).</p>		
<p>Immunity re highways and bridges - No proceeding shall be commenced against a member of Toronto city council or an officer or employee of the City for damages based on the default of the City in keeping a highway or bridge in a state of repair that is reasonable in light of all of the circumstances, including the character and location of the highway or bridge.</p> <ul style="list-style-type: none"> • This does not apply to a contractor with the City, including any officer or employee of the City who is acting as a contractor, whose act or omission caused the damages. 		392

D. Immunities from liability

Subject matter	MA	COTA
<p>Public utility - Municipality not liable for damages caused by interruption or reduction of amount of public utility supplied to municipality or to land of any person as a result of an emergency or a breakdown, repair or extension of its public utility if, reasonable notice of its intention to interrupt or reduce the supply is given.</p>	82	66
<p>Lack of bad faith - The adoption, amendment or repeal of a zoning by-law does not in itself trigger a municipality's liability even if the effect of that action is to reduce the value of the lands affected. In exercising its regulatory power, a municipality enjoys broad discretion in public law. That discretion is limited, however. In public law, a municipality may not be held liable for the exercise of its regulatory power if it acts in good faith or if</p>		

<p>the exercise of this power cannot be characterized as irrational. The declaration on judicial review that a by-law is invalid because it is founded on a misinterpretation of the law or on a consideration determined to be irrelevant does not necessarily expose the municipality to extra-contractual liability. A municipality has a margin of legitimate error. In public law, it is protected by what may be called relative immunity. The public law immunity that attaches to an exercise of legislative and regulatory power can be incorporated into the rules of liability applicable to public bodies: <i>Entreprises Sibeca inc. c. Frelighsburg (Municipalité)</i>, 2004 SCC 61.</p>		
<p>Tax sales - No action or other proceeding for damages can be brought against treasurer or any officer or employee of municipality acting under treasurer's authority as a result of any act done in good faith in performance or intended performance of any duty or in the exercise or intended exercise of any power under this Part or the regulations made under this Part or any neglect or default in the performance or exercise in good faith of such duty or power but any such action or proceeding may be brought against the municipality.</p>	386	357
<p>Personal immunity for acts done in good faith No proceeding for damages or otherwise may be commenced against a member of council or an officer, employee or agent of a municipality or a person acting under the instructions of the officer, employee or agent for any act done in good faith in the performance or intended performance of a duty or authority under the 2001 Act or a by-law passed under it or for any alleged neglect or default in the performance in good faith of the duty or authority.</p> <ul style="list-style-type: none"> • This does not relieve a municipality of liability to which it would otherwise be subject in respect of a tort committed by a member of council or an officer, employee or agent of the municipality or a person acting under the instructions of the officer, employee or agent. 	448	391
<p>Water and sewage overflow — No proceeding based on nuisance, in connection with the escape of water or sewage from sewage works or water works, shall be commenced against,</p> <ul style="list-style-type: none"> • a municipality or local board; • a member of a municipal council or of a local board; or • an officer, employee or agent of a municipality or local board. 	449	393

<p>Policy decisions — No proceeding based on negligence in connection with the exercise or non-exercise of a discretionary power or the performance or non-performance of a discretionary function, if the action or inaction results from a policy decision of a municipality or local board made in a good faith exercise of the discretion, shall be commenced against,</p> <ul style="list-style-type: none"> • a municipality or local board; • a member of a municipal council or of a local board; or • an officer, employee or agent of a municipality or local board. 	450	390
<p>Exemption from liability, calming measures - If a traffic calming measures by-law of the City of Toronto is in effect, no liability attaches to the City by reason of the passing of the by-law or anything done in accordance with it.</p>		392.1
<p>Limitations of statutory immunity - It is a well-established principle that an action may lie against any party, public or private, for doing that which the legislature has authorized, if it be done negligently. It follows that a party acting under statutory authority must still take such precautions as are reasonable within the range of that authority to minimize the risks which may result from its actions. Where a statute authorizes certain activities and strictly defines the manner of performance and the precautions to be taken, it is more likely to be found that compliance with the statute constitutes reasonable care and that no additional measures are required. By contrast, where a statute is general or permits discretion as to the manner of performance, or where unusual circumstances exist which are not clearly within the scope of the statute, mere compliance is unlikely to exhaust the standard of care: <i>Ryan v. Victoria (City)</i>, [1999] 1 S.C.R. 201, 50 M.P.L.R. (2d) 1 (S.C.C.).</p>		