

THE CANADIAN BAR REVIEW

LA REVUE DU BARREAU CANADIEN

Vol. 71

March 1992 mars

No. 1

NEW DIRECTIONS FOR THE CIVIL LIABILITY OF PUBLIC AUTHORITIES IN CANADA

Larry A. Reynolds, David A. Hicks*
Edmonton

Following a trend which began in the late 1970s in England, Canadian courts are becoming increasingly willing to expand the scope of civil liability for decisions made by public authorities. The authors suggest that this trend is the result of a shift in philosophy by the Supreme Court of Canada from allowing decisions of public authorities to be reviewed solely by the electorate to the review of these decisions by the courts. Tracing recent developments of the law relating to the liability of public authorities in Canada, the authors summarize the current state of the law and examine early legislative responses.

Suivant la tendance qui a vu le jour en Angleterre à la fin des années soixante-dix, les tribunaux canadiens sont de plus en plus disposés à repousser les limites de la responsabilité pour ce qui est des décisions prises par les autorités publiques. D'après les auteurs cette tendance serait due au changement de point de vue de la Cour suprême du Canada qui, après avoir considéré que les décisions des autorités publiques ne pouvaient être jugées que par l'électorat, en est arrivée à les soumettre au jugement des tribunaux. Les auteurs suivent le développement des changements du droit au Canada en matière de responsabilité des autorités publiques et décrivent à grands traits l'état actuel du droit et les premières réactions qui apparaissent dans la législation.

* Larry A. Reynolds and David A. Hicks, of Brownlee Fryett, Barristers and Solicitors, Edmonton, Alberta.

The authors wish to acknowledge the valuable contributions provided by the Municipal Law Department of Brownlee Fryett, Barristers and Solicitors, and in particular the input of Mr. Thomas D. Marriott.

Introduction

Traditionally the only form of liability to which public authorities in Canada were generally exposed as a result of their decisions was the wrath of a discontented electorate at the ballot box.¹ However, in recent years the courts have seen fit to transfer some of the power of review of decisions made by local public authorities out of the hands of the electorate and place it within the judiciary.

Following a trend begun in England in the late 1970s² Canadian courts are becoming increasingly willing to expand the scope of civil liability for decisions made by public authorities.³ Ironically, while recent Supreme Court of Canada decisions have adopted and even expanded upon the English position, the House of Lords has halted the trend in England, at least with respect to situations involving pure economic loss.⁴

This article will examine the law as it relates to the review of decisions made by public authorities and in particular local public authorities such as municipalities. First, the legal philosophies upon which such review is founded will be considered. Second, the application of these philosophies to decisions in Britain and Canada will be discussed. Third, the impact of recent Canadian decisions will be examined. Finally, future directions for liability of public authorities in Canada will be considered.

I. Philosophical Foundations

The debate over whether review of public authority decision-making should take place through the political process or through the courts is founded upon two competing legal philosophies.

First, there is a legal philosophy which holds that decisions made by elected officials are by their nature political decisions, and as such should be susceptible to political rather than judicial scrutiny. This view was set out by Lord Wilberforce in *Anns v. Merton London Borough Council*:⁵

¹ Subject to the requirement that the decision be made in good faith and in the absence of bias or malice.

² See in particular the decision of the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.).

³ The trend began with *Barratt v. North Vancouver*, [1980] 2 S.C.R. 418, (1980), 114 D.L.R. (3d) 577; and continued with *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, (1984), 10 D.L.R. (4th) 641; *Laurentide Motels v. City of Beauport*, [1989] 1 S.C.R. 705, (1989), 94 N.R. 1; *Just v. British Columbia*, [1989] 2 S.C.R. 1228, (1989), 64 D.L.R. (4th) 689; *Rothfield v. Manolagos*, [1989] 2 S.C.R. 1259, (1989), 63 D.L.R. (4th) 449.

⁴ *Murphy v. Brentwood District Council*, [1991] 1 A.C. 398, [1990] 2 All E.R. 908 (H.L.).

⁵ *Supra*, footnote 2, at pp. 754 (A.C.), 501 (All E.R.). Lord Wilberforce's reference to *Kent v. East Suffolk Rivers Catchment Board* is found at, [1940] 1 K.B. 319, at p. 338, [1939] 4 All E.R. 174, at p. 184 (C.A.).

As was said, public authorities have to strike a balance between the claims of efficiency and thrift (du Parcq L.J. in *Kent v. East Suffolk Rivers Catchment Board* . . .): whether they get the balance right can only be decided through the ballot box, not in the courts.

The rationale for this view is well summarized by Professor Lewis Klar:⁶

There are several reasons why the courts traditionally have been unwilling to expose the political activities of government to ordinary tort law scrutiny. The first relates to the separation of functions between the judicial, legislative, and executive branches of government. It is felt that those who engage in political decision-making ought to have the quality of their decisions judged by their electorate, and not "second guessed" by the judiciary. Officials are elected to assess what is in the best interests of the collective, and in this process decisions may cause harm to private individuals. It is not that the judiciary cannot assess these decisions based on their own standards of "reasonableness" which is the point, but that they ought not to.

The second concern is more pragmatic and administrative. Since policy formulation by public bodies involves difficult decision making, the balancing of conflicting interests, the weighing of competing claims of efficiency and thrift, which in turn demand access to and the analysis of information by those with special backgrounds and expertise, courts are naturally reluctant to "get involved". Judges do not want to spend their time acting like city councillors, examining "impact studies", listening to lobby groups, and pouring through financial reports. Finally, if tort law review of political decisions were possible, there is the fear that this would lead to a flood of suits, intimidate decision-makers, and impede progress.

It is difficult to reconcile this view with the second philosophy, that of tort law which places a responsibility on the courts to shift the burden of loss from the victim to the tortfeasor. In the case of a public authority in Canada this may mean distributing the burden of loss to persons residing within the geographic boundaries of the public authority through taxation or spreading the burden throughout society by way of the vehicle of insurance. This view was expressed by Lord Denning in *Dutton v. Bognor Regis Building Co.*,⁷ where, in imposing liability upon a local public authority for a negligently performed building inspection, he observed:

... Mrs. Dutton has suffered a grievous loss. The house fell down without any fault of hers. She is in no position herself to bear the loss. Who ought in justice to bear it? ... [Council] were entrusted by Parliament with the task of seeing that houses were properly built. They received public funds for the purpose. The very object was to protect purchasers and occupiers of houses. Yet, they failed to protect them. Their shoulders are broad enough to bear the loss.

A similar view was expressed by La Forest J. in *Tock v. St. John's Metropolitan Area Board*.⁸ In a minority opinion La Forest J. agreed with the position taken earlier in Britain in the *East Suffolk* and *Anns* cases

⁶ Lewis N. Klar, *The Supreme Court of Canada: Extending The Tort Liability of Public Authorities* (1990), 28 Alta. L. Rev. 648, at p. 650. See also B. Feldthusen, *Economic Negligence* (2d ed., 1989), p. 284.

⁷ [1972] 1 Q.B. 373, at pp. 397-398, [1972] 1 All E.R. 462, at p. 475 (C.A.).

⁸ [1989] 2 S.C.R. 1181, (1989), 64 D.L.R. (4th) 620.

that "... public authorities have to strike a balance between the claims of efficiency and thrift..."⁹ However, rather than allowing the political process to determine whether the proper balance had been struck, La Forest J. took the view that the judicial process should be invoked to ensure that the cost of damages incurred by an individual as a result of the local government's decision should be borne by the community at large, rather than by the individual alone.¹⁰

In an effort to reconcile these two competing legal philosophies the courts have attempted to distinguish between decisions of public authorities which are of a "policy" nature and for exclusive review by the electorate, and those which may be characterized as "operational" and which may be reviewed by the courts.¹¹ This distinction was adopted by the Supreme Court of Canada in *Barratt v. North Vancouver*¹² and has appeared in various forms in the cases which followed.¹³

While this distinction between policy and operational decisions may be appealing from a philosophical perspective, its practical application is proving to be difficult. This difficulty was noted by Wilson J. in *City of Kamloops v. Nielsen*¹⁴ in the context of decisions taken by a municipality for the enforcement of a municipal by-law:

It may be, for example, that although the building inspector had a duty to enforce the by-law, the lengths to which he should go in doing so involved policy considerations. The making of inspections, the issuance of stop orders and the withholding of occupancy permits may be one thing; resort to litigation, if this became necessary, may be quite another. Must the City enforce infractions by legal proceedings or does there come a point at which economic considerations, for example, enter in? And if so, how do you measure the "operational" against the "policy" content of the decision in order to decide whether it is more "operational" than "policy" or vice versa? Clearly this is a matter of very fine distinctions.

This already difficult distinction between policy and operational decisions is becoming further blurred by the courts as they struggle with the philosophical issue of which decisions of public authorities should properly be reviewed by the electorate through the political process and which should be reviewed by the courts through application of tort law.

⁹ See *supra*, footnote 5.

¹⁰ *Supra*, footnote 8, at pp. 1200-1201 (S.C.R.), 646 (D.L.R.).

¹¹ *Anns v. Merton London Borough Council*, *supra*, footnote 2, at pp. 754 (A.C.), 500 (All E.R.).

¹² *Supra*, footnote 3.

¹³ In *Canada v. Swanson*, [1991] F.C.J. No. 452 (not yet reported), at p. 6, Linden J.A. notes that "policy" decisions have also been variously referred to by the courts as "legislative", "judicial", "quasi-judicial", "planning" and "discretionary". "Operational" decisions have been called "administrative", "routine", "housekeeping", "implementation" and "business powers". See also Peter J. Hogg, *Liability of the Crown* (2d ed., 1989), p. 124, and S. Makuch, *Canadian Municipal and Planning Law* (1983), p. 140.

¹⁴ *Supra*, footnote 3, at pp. 23 (S.C.R.), 672 (D.L.R.).

It is submitted that the courts' continuing attempts to define and redefine what constitutes policy and operational decisions is more a reflection of the courts' attempts to apply the legal philosophy to which they subscribe at any given point in time than an attempt to determine what constitutes policy and operational decisions in the empirical sense. Thus, it may be argued that the distinction between policy and operational decisions may be little more than a legal fiction given life by the competing legal philosophies.

The following three sections of this article trace the evolution of the law as it relates to the development of the review of public authority decision-making through both the political process and the courts.

II. Historical Context

An analysis of the law relating to the review of public authority decision-making must begin in England. Two decisions from the English House of Lords provide the historical context within which recent developments have taken place in Canada.

The first decision was rendered in 1940 in *East Suffolk Rivers Catchment Board v. Kent*.¹⁵ The plaintiffs owned and occupied land near a tidal river. Walls of clay and stone had been erected along the river to prevent flooding of adjoining land. One such wall bordered the plaintiffs' property. An exceptionally high tide caused the river waters to spill over and break through the walls in many places, thereby flooding the plaintiffs' land.

The Defendant Catchment Board had been established pursuant to the Land Drainage Act, 1930.¹⁶ Various powers were granted to the Board under the legislation, including a power to repair the walls and banks along the river. Pursuant to this authority the Board attempted to repair the breach in the wall near the plaintiffs' land. The evidence indicated that the method of repair adopted by the Board was completely ineffective and one which "no reasonable man would have adopted".¹⁷

At trial¹⁸ the plaintiffs argued that the Land Drainage Act, 1930, while granting the power to undertake repairs in discretionary terms, imposed upon the defendant Board a positive duty at common law to intervene and undertake the repair of any breach of a wall along the river. This argument was rejected at trial and was not pursued further on appeal. Instead, the plaintiffs appealed on the basis that the Board had exercised its discretion to undertake repairs, and in carrying out the repairs it had acted negligently. The House of Lords concluded that the parties were

¹⁵ [1941] A.C. 74, [1940] 4 All E.R. 527 (H.L.).

¹⁶ 20 & 21 Geo. 5, c. 44.

¹⁷ *Supra*, footnote 15, at pp. 98 (A.C.), 539 (All E.R.).

¹⁸ [1939] 2 All E.R. 207 (K.B.D.).

not in the same position as private individuals contracting for repairs. Rather, the legislation granted a power to undertake repairs in permissive terms. Where Parliament has granted a power in such terms the public authority cannot be held liable for damage sustained by members of the public as a result of failure to exercise the power. The only liability to which the public authority could be exposed would be for damages caused by negligent actions in the exercise of its powers. Citing the dissenting opinion of du Parc L.J. in the Court of Appeal,¹⁹ Viscount Simon set out the rule in the following terms:²⁰

... when Parliament has left it to the public authority to decide which of its powers it shall exercise, and when and to what extent it shall exercise them, this may raise "a question involving the consideration of matters of policy and sometimes the striking of a just balance between the rival claims of efficiency and thrift".

In the *East Suffolk* case the damage was caused by the flood waters entering the plaintiffs' land as a result of the forces of nature. The Board exercised its discretion and attempted to effect repairs in order to abate the flooding. While the repairs were carried out in an incompetent fashion, they did not in any way increase the damage which had either already been caused or would have been caused to the plaintiffs' land even if the Board had not intervened. Accordingly, the plaintiffs' claim was dismissed.

The decision in the *East Suffolk* case clearly demonstrates the court's refusal to impose civil liability upon public authorities for a failure to act where the legislature has expressly conferred upon the public authority the power to use its own discretion to make such a decision. In *East Suffolk* the court was prepared to leave to the electorate the review of the public authority's decision regarding whether or not to exercise that discretion.

The second decision of importance in setting the historical context is *Anns v. Merton London Borough Council*.²¹ The plaintiffs were lessees of buildings which had been constructed within the jurisdiction of the defendant local authority. At the time of construction, the Public Health Act, 1936,²² conferred a wide range of duties and powers upon local public authorities for the purpose of protecting the public health. One such power enabled local authorities to make by-laws for the purpose of regulating the construction of buildings, including provisions for the giving of notices to, the depositing of plans with, and the inspection of work by, the local authority. Pursuant to this power a by-law was passed requiring builders to submit plans to the local authority and to give notice at various stages

¹⁹ [1940] 1 K.B. 319, [1939] 4 All E.R. 174 (C.A.).

²⁰ *Supra*, footnote 15, at pp. 86 (A.C.), 532 (All E.R.).

²¹ *Supra*, footnote 2.

²² 26 Geo. 5 and 1 Edw. 8, c. 49.

of construction. The by-law also required foundations of buildings to be taken down to a sufficient depth to safeguard the building from damage through swelling or shrinking of the subsoil. The builder provided plans as required. The plans indicated that the foundation would be taken to a depth of three feet. The plans were approved, but the building's foundation was actually only taken to a depth of two feet six inches. There was uncertainty as to whether an inspection was actually performed by the local authority and the substandard foundation depth was not noticed, or whether the local authority simply failed to carry out the inspection which it was empowered to do pursuant to the legislation.

Some eight years following construction, structural movements began to occur which caused walls to crack and floors to slope. The plaintiffs alleged that the damage to the building was caused by the fact that the foundation was not taken to the depth required by the plans. It was the plaintiffs' further contention that the local authority was liable for the damage because it carried out its inspection negligently, or, in the alternative, failed to carry out an inspection at all. The action proceeded to the House of Lords for the determination of a preliminary point of law regarding whether or not the local authority was under any duty to the plaintiffs to use reasonable care to discover whether the building conformed with the approved plans and by-laws.

This issue had been dealt with some years earlier by the Court of Appeal in *Dutton v. Bognor Regis Building Co.*²³ In *Dutton* the court stated, in *obiter*, that the neighbourhood principle from *Donoghue v. Stevenson*²⁴ applied to impose a duty upon a local authority to use reasonable care to intervene to ensure compliance with its by-laws in order to protect members of the public from loss caused by third parties. The court was of the view that such a duty arises as a result of the control which a local authority has over activities governed by its by-laws. This control carries with it a duty to take reasonable care to ensure compliance with its by-laws.²⁵ In so holding, the court distinguished the *East Suffolk* case as being a case of non-feasance rather than mis-feasance.²⁶

The issue which faced the House of Lords in *Anns*, therefore, required a review of the decision of the Court of Appeal in *Dutton*. In *Anns* it was held that determination of whether or not a defendant owed a duty of care to a plaintiff involved a two-step process:²⁷

First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neigh-

²³ *Supra*, footnote 7.

²⁴ [1932] A.C. 562 (H.L.).

²⁵ *Supra*, footnote 7, at pp. 391-392 (Q.B.), 470 (All E.R.).

²⁶ *Ibid.*, at pp. 402-403 (Q.B.), 480 (All E.R.).

²⁷ *Supra*, footnote 2, at pp. 751-752 (A.C.), 498 (All E.R.).

bourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter—in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or class of person to whom it is owed or the damages to which a breach of it may give rise. . . .

In setting out this test, Lord Wilberforce was clearly relying upon the principle from *Donoghue v. Stevenson*. However, the *Donoghue v. Stevenson* principle was based upon a duty to avoid infliction of physical injury.²⁸ The application of this principle to the facts in *Anns* required its extension to economic loss, an extension which caused the House of Lords significant difficulty thirteen years later.²⁹ Applying this test, the House of Lords found that a local authority with power to regulate building and construction was in a sufficiently proximate relationship with owners and occupiers of buildings in the area to give rise to a *prima facie* duty of care.

Having found a *prima facie* duty to exist, Lord Wilberforce went on to discuss the scope of this duty. It was recognized that a local authority is a public body, discharging functions under statutes, and as a result, its powers and duties are defined in terms of public law. The implementation of those powers and duties, however, is governed by private law. It is for this reason that a distinction is made between a public body's policy-making power and its operational acts. Lord Wilberforce discussed the distinction in the following terms:³⁰

Most, indeed probably all, statutes relating to public authorities or public bodies, contain in them a large area of policy. The courts call this "discretion" meaning that the decision is one for the authority or body to make, and not for the courts. . . . [I]n addition to the area of policy or discretion, there is an operational area. Although this distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree; many "operational" powers or duties have in them some element of "discretion". It can safely be said that the more "operational" a power or duty may be, the easier it is to superimpose on it a common law duty of care.

Applying these principles to the Public Health Act, 1936, the House of Lords stated that the decisions of the local public authority relating to the system and frequency of inspections were policy decisions. Citing the judgment of du Parcq L.J. in the *East Suffolk* case, Lord Wilberforce stated:³¹

As was well said, public authorities have to strike a balance between the claims of efficiency and thrift . . . whether they get the balance right can only be decided through the ballot box and not through the courts.

²⁸ *Supra*, footnote 24, at p. 579, per Lord Atkin.

²⁹ See Part IV, *infra*.

³⁰ *Supra*, footnote 2, at pp. 754 (A.C.), 500 (All E.R.).

³¹ *Ibid.*, at pp. 754 (A.C.), 501 (All E.R.).

Notwithstanding these comments, however, the House of Lords noted that with respect to policy decisions, a local public authority cannot avoid exposure to liability simply by deciding not to inspect at all. Rather, there is a threshold duty, even in the policy area, to give proper consideration to the question of whether to inspect or not. As a result, on the facts in *Anns* it was held that the local public authority could be liable to the plaintiffs if, in failing to carry out inspections, the local authority had not properly exercised its discretion,³² or if in carrying out inspections the inspector had not used reasonable care to ensure compliance with the by-laws and approved plans.

The *Anns* decision, therefore, was a shift away from the position in the *East Suffolk* case which gave public authorities absolute immunity from civil liability for discretionary decisions. Even pursuant to *Anns*, however, only a small portion of such decisions would potentially be subject to tort liability. In making this shift, the House of Lords attempted to develop a method of determining which decisions would be reviewable by the courts and which would remain within the exclusive purview of the electorate. The method which was developed involved distinguishing between the "policy" and "operational" decisions of the public authority. Thus, if the public authority addressed the policy considerations in a *bona fide* manner, there would be no exposure to civil liability for a decision made within the policy sphere.

III. Development of Canadian Law

The development of the law with respect to the review of public authority decision-making in Canada begins in *Barratt v. District of North Vancouver*,³³ where the Supreme Court of Canada dealt with the question of whether or not a municipality's system of road inspection was open to review by the courts. The plaintiff was injured as a result of striking a pothole while riding his bicycle on a street in North Vancouver. The relevant legislation conferred upon the municipality a power to maintain and improve roadways within its boundaries.³⁴ Pursuant to this legislative authority the municipality implemented a well-organized system of road inspections wherein all roads within the municipality were inspected every two weeks. The evidence indicated that the road on which the plaintiff was injured had been inspected one week prior to the accident, and the pothole in question had not been discovered.

There was no suggestion that the inspection itself had been performed in a negligent manner. Rather, the plaintiff argued that the municipality

³² Put another way, the local authority failed to make a *bona fide* decision.

³³ *Supra*, footnote 3.

³⁴ Municipal Act, R.S.B.C. 1960, c. 255, s. 513(2).

ought to have had a more frequent system of inspection in place. The Supreme Court of Canada, relying upon the decision of the House of Lords in *Anns*, stated that a municipality that had been granted a power by the legislature in discretionary terms was under no duty to exercise that power. Any decisions on whether or not to exercise the power, or the manner in which the power would be implemented if exercised, were matters of policy to be decided by the municipality, not by the courts. It was only if municipal employees acted negligently and caused injury in the actual implementation of the policy that liability could be imposed. As a result, the court stated that the municipality of North Vancouver could not be held liable for its decisions regarding the nature or frequency of its inspection system, since these were matters of policy. There was nothing to suggest that the municipality's employees were negligent in carrying out the inspection, and therefore the municipality could not be held liable to the plaintiff.

In essence, the decision in *Barratt* represented the Supreme Court of Canada's adoption of the method outlined in *Anns* for determining which decisions of a public authority would be subject to review by the courts, and which would be within the exclusive purview of the electorate. After *Barratt*, it appeared clear that all aspects of a system of inspection set up by a public authority would fall within the policy sphere, thereby precluding judicial intervention.

The issue was again considered by the Supreme Court of Canada in *City of Kamloops v. Nielsen*.³⁵ In that case section 714 of British Columbia's then Municipal Act,³⁶ gave the City of Kamloops the discretion to regulate the construction of buildings by by-law. The municipality decided to exercise its regulatory power and passed a by-law which prohibited construction without a building permit, provided for a scheme of inspections at various stages of construction, prohibited occupancy without an occupancy permit and, perhaps most important, imposed upon the building inspector a duty to enforce the provisions of the by-law.

A contractor placed the foundation of a house he was building on loose fill, contrary to the requirements of approved construction plans which required that the foundation be constructed upon a solid base. Pursuant to the by-law the municipal building inspector made three inspections of the construction site and then issued a stop-work order pending submission of a plan to correct the structural deficiencies. A plan was submitted, but the deficiencies were not corrected, with work continuing to completion of the house despite the stop-work order being in effect.

The house was subsequently sold to the contractor's parents who in turn resold it to an unsuspecting purchaser. Upon discovering the defect

³⁵ *Supra*, footnote 3.

³⁶ *Supra*, footnote 34.

the purchaser brought an action in negligence against both the contractor and the municipality. The City of Kamloops subsequently appealed to the Supreme Court of Canada a decision of the British Columbia Court of Appeal which upheld a finding at trial that the municipality was twenty-five per cent liable.

The Supreme Court dismissed the City's appeal, holding, *inter alia*, that the City's decision to regulate construction was a "policy" decision which imposed an "operational" duty on the building inspector to enforce the provisions of the by-law. In discharging its operational duty the City was required to take care not to cause injury to persons such as the plaintiff purchaser. In coming to this conclusion, the court undertook an extensive review of the issues relating to the liability of public authorities in negligence.

The court clearly adopted the approach taken by the House of Lords in *Anns*. While this is not surprising in light of the earlier decision in *Barratt*, the court in *Kamloops* undertook a detailed analysis of *Anns* which it had not done in *Barratt*. The Supreme Court clearly indicated its support for the two-step approach outlined in *Anns* to determine whether a duty of care exists. Having established that such a duty was present, the court then discussed the distinction between the policy and operational spheres. Wilson J., writing for the majority, indicated that generally decisions based upon considerations of policy are not reviewable by the courts, provided that such a decision constitutes the *bona fide* exercise of discretion. This requires a responsible decision made for reasons that accord with the purpose of the statute pursuant to which the decision was made. These policy decisions will often give rise to implementation of the policy at an operational level. The actions of public officials within the operational sphere are governed by ordinary principles of negligence.

The court also recognized that within the operational sphere there may still be many discretionary decisions to be made. It is within this area that most of the difficulty arises, since some of these decisions will still be governed by policy considerations, whereas others will not. Those decisions at this level which are governed by policy considerations were referred to by Wilson J. as "secondary policy" decisions.³⁷ With respect to secondary policy decisions, the public authority is held to the same standard as it is with "pure policy" decisions; namely, the discretion must be exercised in a *bona fide* manner for reasons that accord with the statutory purpose. However, no attempt was made to set out a test which could be used in distinguishing between decisions at the operational level which are governed by policy considerations and those which are not.

In applying these principles to the case at hand, the court noted that the relevant legislation did not impose a duty upon the City to regulate

³⁷ *Supra*, footnote 3, at pp. 26 (S.C.R.), 674 (D.L.R.).

construction. A policy decision was made when the City enacted the by-law which permitted it to regulate this area. The by-law imposed upon the building inspector a duty to enforce its provisions, but did not specifically outline how this was to be done. This duty and the discretionary decisions involved in the method of enforcement fell within the operational sphere, since they related to the implementation of the policy decision to regulate construction. The court was able to avoid the question of whether the discretionary decision of the inspector was governed by policy considerations or not, since neither the inspector nor the City gave any consideration to whether or not to enforce. Accordingly, even if such a decision would have been governed by policy considerations, it was not within the limits of discretion *bona fide* exercised to fail to make a decision at all, and liability could therefore result.

The court also dealt with the distinction which had traditionally existed between mis-feasance and non-feasance. The City argued that even if the court was to accept the principle in *Anns*, it should not be applied to the case at hand since even if the City was guilty of non-feasance there was no mis-feasance. In considering this issue the court first referred to its earlier decision in *Barratt*, noting that in that case no reference was made to a distinction between non-feasance and mis-feasance. According to Wilson J., if such a distinction had been significant the actions of the municipality in *Barratt* in failing to inspect more frequently would have been characterized as non-feasance.³⁸ To appreciate the court's reasoning it should be noted that if it is found that a public authority owes a duty to a plaintiff, then this duty could take one of two forms. First, the duty might be to avoid injuring the plaintiff through the actions of the public authority itself. Second, the duty might be to take active steps to intervene to prevent a third party from injuring the plaintiff, or at the very least to make a conscious policy decision not to act. Breach of the latter form of duty would necessarily involve non-feasance. Accordingly, the court in *Kamloops* held that if a duty is found to exist then the distinction between non-feasance and mis-feasance is irrelevant.

Finally, the court dealt with the argument that imposing a private law duty on public authorities should be discouraged on the ground that it would "open the floodgates" to claims against public authorities. Wilson J. rejected this argument and stated that she did not believe that the floodgates would be opened because the *Anns* decision had built-in barriers to prevent such an occurrence. These barriers include the fact that the applicable legislation must impose a private law duty on the public authority before the *Anns* principle applies, and that the principle will not apply to pure policy decisions made in the *bona fide* exercise of discretion. According to Wilson J., these safeguards were sufficient to ensure that the floodgates

³⁸ *Ibid.*, at pp. 20 (S.C.R.), 670 (D.L.R.).

to claims against public authorities would not be opened. However, Wilson J. did recognize that with respect to secondary policy decisions there may be "scope for honest concern".³⁹

Following *Kamloops* it was clear that municipalities would face exposure to liability for their decisions in areas which had not previously been of concern. However, it also appeared that some solace could be taken from the fact that Wilson J. indicated that the principle in *Anns* would not apply to decisions based on policy considerations made in the *bona fide* exercise of discretion, whether such decisions fell within the policy or operational spheres. As a result, potential liability appeared to be restricted to actions and decisions within the operational sphere to which ordinary principles of negligence would apply.

Between 1984 and 1989 the Canadian courts attempted to interpret and apply the principles set out in *Kamloops*. Then, in 1989, the Supreme Court of Canada canvassed these issues again in its decision in *Laurentide Motel v. City of Beauport*.⁴⁰ This case arose out of Quebec, but because of the court's interpretation of various articles in the Quebec Civil Code, it was held that the issue of whether or not a duty arose was determined by principles similar to those of the common law. Accordingly, the Supreme Court was again faced with the issue of the review of decisions of a local public authority within the context of the policy/operational dichotomy.

In *Laurentide*, the Cities and Towns Act⁴¹ gave authority to municipalities, in discretionary terms, to pass by-laws for the purpose of protecting lives and property from accidents by fire. These provisions also permitted municipalities to organize a fire department and to install and maintain fire hydrants. Pursuant to this authority, the City of Beauport established a fire department and installed fire hydrants throughout the City. Various employees of the City were responsible for maintenance and repair of the hydrants. However, neither the City Council nor its employees had ever adopted a formal inspection system. Rather, the evidence indicated that, as a matter of practice, hydrants were checked every summer and cleared of snow every winter. The plaintiff ran a hotel complex in the City of Beauport. This complex caught fire as a result of the actions of a careless smoker. The City of Beauport Fire Department attended and attempted to extinguish the fire but found that the nearby fire hydrants were inoperable. As a result of the faulty hydrants, there were significant delays in extinguishing the fire which eventually largely destroyed the hotel complex.

The issue to be resolved was whether the City's failure to keep the fire hydrants in functioning condition constituted a breach of duty owed

³⁹ *Ibid.*, at pp. 25 (S.C.R.), 674 (D.L.R.).

⁴⁰ *Supra*, footnote 3.

⁴¹ R.S.Q. 1977, c. C-19, ss. 412, 413.

to the plaintiff. Beetz J., writing for the majority, applied the principles set out in *Anns* and *Kamloops* in concluding that the City had breached its duty. In so doing, the court reaffirmed that policy decisions should be reviewed by the electorate and not by the courts:⁴²

Where the legislator confers a power upon a public authority, the conferral of power is usually couched in terms of a discretion. The discretionary power is necessary to allow the public authority latitude in which to make decisions that can be categorized as policy decisions: decisions of a political nature for which the authority should be accountable not before the Courts but before the electorate or the legislature.

The court stated that policy decisions may take various forms, including discretionary decisions within the operational sphere.⁴³ The only obligation imposed upon a municipality in making these policy decisions is to make the decision responsibly and in accordance with the object of the relevant legislation. Applying these principles to the case at hand, Beetz J. noted that while the City had adopted a practice of hydrant maintenance, no formal policy had been adopted. He stated that "[t]here is no doubt that the municipality could have, as a matter of policy, established some scheme of inspection and repair".⁴⁴ However, because no policy decision regarding such a system had ever been made the case fell within the ambit of the principle set out in *City of Kamloops v. Nielsen*:⁴⁵

[I]naction for no reason or inaction for an improper reason cannot be a policy decision taken in the *bona fide* exercise of discretion.

Further, the court held that since no policy decision regarding a system of inspection had been made, the system which was implemented fell within the operational activities of the City, because it constituted the practical implementation of the City's policy decision to maintain the hydrants.

The decision in *Laurentide* is significant for its affirmation that the Supreme Court of Canada, as of April 20, 1989, maintained a consistent approach to the distinction between decisions which could be reviewed by the courts and those which ought to be left to the electorate. Consistent with its decision in *Barratt*, the court held that it would have been possible for the City to have made a policy decision regarding the system of inspection and maintenance of its hydrants. If such a policy decision had been made as a *bona fide* exercise of discretion, then presumably the City would have avoided liability. However, consistent with *Kamloops*, the court stated that failure to make a policy decision at all would not be a proper exercise of discretion and the policy immunity would be inapplicable. These areas of consistency are significant in light of the subsequent approach taken by the Supreme Court of Canada.

⁴² *Laurentide Motels v. City of Beauport*, *supra*, footnote 3, at pp. 722 (S.C.R.), 18 (N.R.).

⁴³ *Ibid.*

⁴⁴ *Ibid.*, at pp. 726 (S.C.R.), 24 (N.R.).

⁴⁵ *Supra*, footnote 3, at pp. 24 (S.C.R.), 673 (D.L.R.).

Eight months after *Laurentide*, the Supreme Court of Canada released its decisions in *Just v. British Columbia*⁴⁶ and *Rothfield v. Manolakos*.⁴⁷ In *Just* the court revisited the issue of which decisions of a public authority could be reviewed by the courts and which must be left to the electorate. An attempt was made to resolve the uncertainty through a restructuring of the policy/operational dichotomy. In *Rothfield* the court simply applied the principles set out in *Just* to the now familiar building permit situation. The *Rothfield* case was complicated, however, by the contributory negligence of the property owner. Since the court's approach in *Rothfield* to the policy/operational approach is consistent with the principles set out in *Just*, we propose here to deal with the *Just* decision only.

In *Just*, the Highway Act⁴⁸ conferred upon the British Columbia Minister of Highways the discretionary authority to maintain highways in the province. Pursuant to this authority the British Columbia Legislature passed the Ministry of Transportation and Highways Act⁴⁹ by which the Minister accepted responsibility for repair and maintenance of highways. The legislative scheme placed the Minister of Highways and the Department of Highways in a similar position to that of the Municipality of North Vancouver in the *Barratt* case. In *Just* the Department of Highways was divided into a number of subdepartments. One of these subdepartments, the "rock work section", was responsible for inspecting rock slopes along highways and determining whether or not repair or maintenance was necessary. The Minister of Highways had given the rock work section absolute discretion over the establishment of standards and the system of inspection. Once it was determined by the rock work section that repairs were necessary, a second department, the "rock scaling crew", was given responsibility for carrying out the actual repairs. It appears that the rock scaling crew was given no discretion in the method of maintenance or repair.

In January, 1982 the plaintiff and his daughter were travelling along a highway in British Columbia when a large boulder fell from a slope above and struck the plaintiff's vehicle, injuring him and killing his daughter. The plaintiff commenced an action against the Province of British Columbia alleging negligence in failing to properly maintain the highway.

At trial⁵⁰ and on appeal⁵¹ it was determined that the rock work section was given absolute discretion over the system of inspection. It was held that this discretion required it to make decisions based upon considerations of policy, which were, accordingly, not reviewable by the courts. In light of the earlier decisions in *Kamloops* and *Laurentide*, and especially in *Barratt*,

⁴⁶ *Supra*, footnote 3.

⁴⁷ *Supra*, footnote 3.

⁴⁸ R.S.B.C. 1979, c. 167, s. 8.

⁴⁹ R.S.B.C. 1979, c. 280, s. 14.

⁵⁰ [1985] 5 W.W.R. 570, (1985), 64 B.C.L.R. 349 (B.C.S.C.).

⁵¹ [1987] 2 W.W.R. 231, (1986), 10 B.C.L.R. (2d) 223 (B.C.C.A.).

one would have assumed that the decision of the lower courts would have been upheld. The Supreme Court of Canada, however, (Sopinka J. dissenting) rejected the approach taken in the lower courts, allowed the appeal and ordered a new trial.

Cory J., writing for the majority, applied the two-step test in *Anns* to determine whether a duty of care existed. It was found that in the circumstances a *prima facie* duty arose, subject to any statutory or common law exemptions. While there was no relevant statutory exemption, such an exemption may have existed at common law if the action or decision in question fell within the realm of "pure policy". As a result, Cory J. was faced with the task of attempting to distinguish between the policy and operational spheres of public authority decision-making.

In distinguishing between policy and operational decisions, Cory J. relied upon the decision of the High Court of Australia in *Sutherland Shire Council v. Heyman*.⁵² In that case Mason J. indicated that policy decisions are those decisions dictated by financial, economic, social or political factors. It is unlikely that this "test" would come as a surprise to most in the legal community, since it is consistent with statements in the previous decisions.⁵³ In *Just* the decision at trial indicated that the number and quality of inspections required an allocation of scarce resources and a balancing of needs and priorities.⁵⁴ If one accepts the statements of the trial judge in this regard, it is difficult to imagine how the system of inspection set up by the Highways Department in *Just* could be anything other than a series of decisions based upon policy considerations, even adopting the test set out by Cory J.

Notwithstanding the foregoing comments, however, it was found that the system of inspection in question fell within the operational sphere and was subject to review on the basis of a private law duty of care. In coming to this conclusion the court faced the significant hurdle of avoiding the application of its earlier decision in *Barratt*. It will be recalled that in *Barratt* the Supreme Court held that the nature and frequency of the system of inspection adopted by the municipality was a matter falling within the policy sphere to which no liability could attach. The majority of the Supreme Court in *Just* accomplished the task of avoiding *Barratt* and subjecting the system of inspection to a private law duty of care in two ways. First, it was held that the earlier decision had gone too far and was incorrect in its statement that the system of inspection was a matter of policy. It was stated that the court in *Barratt* had already found that the system of inspection was well organized and eminently reasonable. If such was the case, then no liability could attach to the municipality whether a duty arose or not. With respect, it is submitted that the majority's dismissal of the statement

⁵² (1985), 60 A.L.R. 1.

⁵³ See, for example, *City of Kamloops v. Nielsen*, *supra*, footnote 3, at pp. 9 (S.C.R.), 662 (D.L.R.), citing *Anns v. Merton London Borough Council*, *supra*, footnote 2.

⁵⁴ *Supra*, footnote 50, at pp. 576 (W.W.R.), 355 (B.C.L.R.).

in *Barratt* as being "unnecessary" to the final determination of the case is incorrect. Surely it makes more sense when analyzing a case of alleged negligence to determine whether or not a duty of care arises before determining whether or not the standard of care has been met. It appears clear that in *Barratt* the court adopted this approach and found that no duty of care arose because the system of inspection fell within the policy sphere.

This dismissal of Martland J.'s reasoning in *Barratt* is even more difficult to accept in light of the fact that Wilson J. in *City of Kamloops v. Nielsen*⁵⁵ cited substantially the same passage as that quoted by Cory J. in *Just*, and thereafter stated:

[I]t seems to be central to his [Martland J.'s] judgment that no duty was imposed upon the municipality. It was in the discretion of the municipality whether or to what extent it exercised its maintenance power. The courts could not therefore interfere in the absence of negligence in the implementation of the policy it adopted with respect to inspection. This, it appears to me, is the ratio of the decision in *Barratt*.

The second method used by the majority of the court in *Just* to define the system of inspection as one which fell within the operational sphere and subject to a private law duty of care was through purported reliance on the *Anns* and *Kamloops* cases. Cory J. stated:⁵⁶

The decisions in *Anns v. Merton London Borough Council* and *Kamloops v. Nielsen* indicate that a government agency in reaching a decision pertaining to inspection must act in a reasonable manner which constitutes a bona fide exercise of discretion. To do so, they must specifically consider whether to inspect and if so, the system of inspection must be a reasonable one in all the circumstances.

It is difficult to reconcile these statements with statements in *Anns*, cited with approval in *Kamloops*,⁵⁷ which indicate that all facets of the inspection system are decisions which are to be made by the public body, not by the courts. It is submitted that, contrary to the suggestion by Cory J., the *Anns* and *Kamloops* cases do not require the system of inspection to be reasonable. Rather, only the actual inspections themselves must be carried out in a reasonable manner.⁵⁸

The next, and perhaps most, significant issue which was dealt with by the majority of the court in *Just* is the extent to which courts can review decisions of public authorities falling either within the realm of policy or operation. Prior to *Just*, it appeared clear that a discretionary decision based upon considerations of policy would not be reviewed by the courts, provided that the decision constituted a bona fide exercise of discretion. Such a test appeared to be satisfied if it could be proven that a discretionary decision was made responsibly and for reasons that were in accordance with the

⁵⁵ *Supra*, footnote 3, at pp. 20 (S.C.R.), 670 (D.L.R.).

⁵⁶ *Just v. British Columbia*, *supra*, footnote 3, at pp. 1242 (S.C.R.), 706 (D.L.R.).

⁵⁷ *Supra*, footnote 3, at pp. 9 (S.C.R.), 661-662 (D.L.R.).

⁵⁸ *Ibid.*, at pp. 10 (S.C.R.), 662 (D.L.R.).

purpose of the relevant statute.⁵⁹ It also appeared clear that within the operational sphere there may be many discretionary decisions made which are also based upon policy considerations. With respect to these decisions, labelled "secondary policy decisions" by Wilson J. in *City of Kamloops v. Nielsen*,⁶⁰ the same protection appeared to apply. Finally, all other decisions and actions fell within the operational sphere, since they were not based upon policy considerations. These operational decisions and actions were assessed according to ordinary principles of negligence.

The effect of the majority's decision in *Just* appears to permit review of all decisions within the operational sphere (whether so-called "secondary policy decisions" or not) on the basis of ordinary principles of negligence. It is submitted that the effect of this shift by the Supreme Court of Canada is to allow courts to substitute their discretion for that of the public authority in areas which had not previously been reviewable by the courts. Indeed, it is conceivable that the majority in *Just* could even be taken as suggesting that all decisions of public authorities, even "pure policy" decisions, are subject to review by the courts on the basis of ordinary principles of negligence, when Cory J. states:⁶¹

Thus a true policy decision may be made at a lower level provided that the government agency establishes that it was a reasonable decision in light of the surrounding circumstances.

One must question how this statement can be justified in light of the passages in the judgment which indicate that pure policy decisions are immune to review by the courts provided that they constitute a *bona fide* exercise of discretion. Is Cory J. suggesting that a decision will only be a *bona fide* exercise of discretion if it accords with a court's assessment of reasonableness in the circumstances? Surely not, for if so, then the distinction between policy and operational decisions is completely eradicated.

It is unclear at present how the Canadian judiciary will now deal with and interpret the Supreme Court of Canada's decision in *Just*.⁶² However, it is submitted that what is clear is that the Supreme Court has significantly narrowed the scope of those decisions which can be made by a public authority and which will be free from judicial scrutiny.

⁵⁹ See *Anns v. Merton London Borough Council*, *supra*, footnote 2, at pp. 754-755 (A.C.), 501 (All E.R.), and *City of Kamloops v. Nielsen*, *supra*, footnote 3, at pp. 25 (S.C.R.), 673-674 (D.L.R.).

⁶⁰ *Ibid.*, at pp. 25-26 (S.C.R.), 674 (D.L.R.).

⁶¹ *Just v. British Columbia*, *supra*, footnote 3, at pp. 1243 (S.C.R.), 707 (D.L.R.).

⁶² While *Just* has recently been followed on several occasions (see, for example, *Canada v. Swanson*, *supra*, footnote 13, and *Swinamer v. Nova Scotia*, [1991] N.S.J. No. 87 (not yet reported) (N.S.S.C.T.D.)), additional judicial interpretation of the decision will be required in order to obtain a clearer understanding of the approach that the courts will adopt in applying the principles enunciated in *Just*.

IV. Recent Developments

On July 26, 1990, less than eight months after the Supreme Court of Canada's decision in *Just*, the House of Lords released its decision in *Murphy v. Brentwood District Council*.⁶³ This case permitted the House of Lords to reconsider the question of which decisions of a public authority will give rise to a duty of care and be subject to review by the courts. The facts in *Murphy* are similar to those in *Anns*. As with *Anns*, a builder submitted plans to a local authority for approval pursuant to the provisions of the Public Health Act, 1936.⁶⁴ The authority retained independent experts who advised that the design was appropriate. Pursuant to the plans the builder constructed a number of houses, one of which was purchased by the plaintiffs. Eleven years later cracks began to appear in the walls of the house and other defects were also noted. It was discovered that the original design was improper. The plaintiff commenced an action against the local authority for damages representing the decrease in value of the house as a result of the defects.

Five separate judgments were delivered in the House of Lords. However, several common elements can be extracted from them. First, the two-step approach outlined in *Anns* was rejected as a universal principle in the determination of whether a defendant owes a duty of care. Their Lordships pointed out that using the *Anns* approach the first step required application of the *Donoghue v. Stevenson* principle. Prior to *Anns* there was no authority for the application of the principle to situations beyond a plaintiff's action for recovery for physical injury or consequential property damage. Application of this principle to situations in which a plaintiff seeks recovery for costs of repairs is an extension of the principle to situations involving pure economic loss. Several of their Lordships indicated that the authorities on the issue of pure economic loss had, prior to *Anns*, required more than mere foreseeability of the loss in order to give rise to a duty on the part of the defendant. Rather, a special relationship beyond mere foreseeability was required. It was held that such requirements do not exist as between a local public authority regulating construction and a plaintiff who becomes the owner or occupier of property at some point in time after actual construction is completed.

As a result, the House of Lords rejected *Anns* to the extent that it imposed a duty upon public authorities to use reasonable care to intervene and prevent economic loss to individuals who may later purchase or occupy the buildings constructed. This rejection also required the rejection of all cases which followed *Anns*. Their Lordships were careful to indicate that their decision applied only to cases of pure economic loss, and no opinions were expressed as to whether the *Anns* approach would be equally inap-

⁶³ *Supra*, footnote 4.

⁶⁴ *Supra*, footnote 22.

plicable to cases of personal injury or consequential property loss. However, in light of the reasoning expressed in *Murphy*, it would appear that when faced with the issue a strong argument will exist that the *Anns* approach will be appropriate in cases of personal injury and consequential property loss.

It should be noted that the *Murphy* decision did not constitute an unexpected shift in direction by the House of Lords. Rather, the case is the culmination of a series of earlier decisions which had expressed serious reservations about the *Anns* principle.⁶⁵ Interestingly, the House of Lords noted with regret the fact that other Commonwealth jurisdictions, including Canada, have followed and even expanded upon the *Anns* principle. In Australia *Anns* was rejected in *Sutherland Shire Council v. Heyman*,⁶⁶ and much reliance was placed upon the reasoning in that case to justify their Lordships' conclusion in *Murphy*.

In light of the fact that *Anns* was the foundation for the decisions of the Supreme Court of Canada in *Barratt, Kamloops, Laurentide* and *Just*, an argument might be raised that since the House of Lords has now retreated from its position in *Anns*, at least with respect to cases involving pure economic loss. Canadian courts should follow this lead. In this respect it is interesting to note that the *Kamloops* case is the only one of the series of the Supreme Court of Canada decisions applying the *Anns* principle in a situation involving recovery for the cost of repairs or pure economic loss. Each of the other cases involve personal injury or consequential property loss, situations specifically avoided by the House of Lords in *Murphy*. Accordingly, if *Murphy* was to be followed in Canada, it would arguably only require overturning *Kamloops*. It is difficult to imagine, however, that the Supreme Court of Canada would now alter its stance on *Anns*, even in situations of recovery for pure economic loss, in light of the statements made in December, 1990 in the *Just* decision. Cory J., while acknowledging some of the doubt expressed about *Anns* in other jurisdictions, stated that the two-step approach:⁶⁷

... is a sound approach to first determine if there is a duty of care owed by a defendant to the plaintiff in any case where negligent misconduct has been alleged against a government agency.

In light of these statements it is submitted that *Anns* is well entrenched in Canadian law, and will not be departed from on the basis of the *Murphy* decision.⁶⁸

⁶⁵ See, for example, *D. & F. Estates Ltd. v. Church Comrs. for England*, [1989] A.C. 177, [1988] 2 All E.R. 922 (H.L.); *Yuen Kun Yeu v. A.G. Hongkong*, [1988] A.C. 175, [1987] 2 All E.R. 705 (P.C.).

⁶⁶ *Supra*, footnote 52.

⁶⁷ *Just v. British Columbia*, *supra*, footnote 3, at pp. 1235 (S.C.R.), 701 (D.L.R.).

⁶⁸ Several recent decisions appear to bear out this conclusion. See, for example, *Fentiman v. University of Regina* (1991), 90 Sask. R. 241 (Sask. C.A.); *Arsenault v. Charlottetown* (1991), 90 Nfld. & P.E.I.R. 44 (P.E.I.S.C.T.D.); *Petrie v. Groome* (1991), 4 M.P.L.R. (2d) 182 (B.C.S.C.).

V. Current State of the Law in Canada

Following the Supreme Court of Canada's decision in *Just*, several conclusions can be drawn regarding the liability exposure of a public authority within the context of the policy/operational dichotomy. First, it would appear that the "pure policy" decisions of public authorities will continue to be immune from review by the courts, provided that these decisions constitute a *bona fide* exercise of discretion. While there may be some doubt about this conclusion in light of statements contained in *Just*⁶⁹ which indicate that decisions on pure policy matters must be reasonable in all the circumstances, it is submitted that the better view is that these decisions will not be reviewed by the courts on the basis of ordinary principles of negligence. *Just* also held that decisions will be characterized as falling within the pure policy sphere if based upon social, economic or political factors.⁷⁰ As a result, it was held that generally, pure policy decisions are made only at the highest levels of the public authority.

Second, all decisions and actions which cannot be labelled "pure policy" will be characterized as falling within the operational sphere, including those matters which had previously been characterized as "secondary policy decisions". These matters will be subject to the review of the courts on the basis of a private law duty of care. It would appear, given the general statements by Cory J. in *Just*, that all aspects of a system of inspection and maintenance will fall within the operational sphere.⁷¹ Some of Cory J.'s comments, however, indicate that notwithstanding these general statements there may be decisions made regarding the system of inspection which are governed by budgetary considerations.⁷² It would appear that in these circumstances the courts will classify the decision as being within the pure policy sphere.^{72a}

Finally, notwithstanding the recent position taken by the House of Lords in *Murphy*, the proper starting point when determining whether a

⁶⁹ See the text, *supra*, at footnote 61.

⁷⁰ *Supra*, footnote 3, at pp. 1240 (S.C.R.), 708 (D.L.R.).

⁷¹ *Ibid.*

⁷² Such as, for example, reducing the frequency of inspections so that resources can be allocated to a different program; see *ibid.*, at pp. 1243 (S.C.R.), 707 (D.L.R.).

^{72a} The courts already appear to be experiencing difficulty in implementing the guidelines set out by Cory J. At the retrial of *Just v. British Columbia* (1991), 60 B.C.L.R. (2d) 209, at p. 224 (B.C.S.C.), Donald J. observed:

A major theme developed by the defense was the system-wide implication of any finding I might make adverse to the defendant. This strategy was designed to throw a protective ring of "policy" around the issue of the appropriate standard of care. I confess that I do not know how to express a succinct and comprehensive formula that divides a policy from an operational result in determining the standard a public authority must meet in order to discharge a duty of care.

public body owes a duty of care is to use the two-step approach from *Anns*. If the public authority ought reasonably to foresee the infliction of loss or damage upon a person, then it will owe a *prima facie* duty of care to that person. A public authority may be exempted from this duty of care if an exemption exists in legislation or the common law. A common law exemption will apply if the decision in question can be characterized as falling within the "pure policy" sphere and constitutes a *bona fide* exercise of discretion.

As already noted, it is submitted that the Supreme Court of Canada's decision in *Just* represents a substantial shift toward eliminating the scope of a public authority's decisions which will be free from judicial scrutiny. The decision in *Murphy* indicates that the House of Lords in England has begun to move in the opposite direction. Further, the *Just* decision represents a shift by the Supreme Court of Canada from the position that was taken just eight months earlier in *Laurentide*. In *Laurentide* Beetz J. stated that the power given to a public authority by legislation is generally conferred in discretionary terms, and that this discretion is necessary to permit the authority to make decisions based upon political considerations for which it can be held accountable only before the electorate and not the courts. He went on to state:⁷³

[T]he form such policy decisions may take varies, ranging from by-laws and resolutions to internal directives, administrative decisions and even a discretion in the execution of activities within the operational sphere. The only duty incumbent upon the authority in the policy sphere is to make its decision responsibly and in accordance with the object of the Act which conferred the power.

Even more significant, it appeared that the City of Beauport in *Laurentide* could have, as a matter of policy, adopted a system of inspection which would have been immune from review by the courts. The lesson in *Laurentide* is not that a system of inspection is reviewable, but rather than an otherwise unreviewable policy of inspection will be reviewable unless the public authority can point to a specific policy decision by which the system of inspection was adopted.⁷⁴

A gradual shift to increasing judicial intervention into the decision-making of public authorities can be traced from *East Suffolk* through to *Just*. The justification for the original position taken in *East Suffolk* was that the legislature in granting power to a public authority in discretionary terms must be taken to have intended that the discretion was to be exercised by the public authority itself. It is the electorate which ought to have the ability to review these decisions, not the court. Surely this was the intent of the legislature in enacting legislation which confers power upon elected public authorities in discretionary terms. The shift which has taken

⁷³ *Laurentide Motels v. City of Beauport*, *supra*, footnote 3, at pp. 722 (S.C.R.), 18-19 (D.L.R.).

⁷⁴ *Ibid.*, at pp. 726 (S.C.R.), 24 (N.R.).

place, however, now enables the court to substitute its discretion for that of an elected public authority and to undermine the decision-making process which was apparently intended by the legislation. On this issue, Sopinka J., in dissent in *Just v. British Columbia*⁷⁵ stated:

If a court assumes the power to review a policy decision which is made in accordance with a statute, this amounts to an usurpation by the court of a power committed by statute to the designated body.

In light of this shift to increasing judicial intervention, it is interesting to reflect upon the statements of Wilson J. in *Kamloops*. In dealing with the argument that the adoption of the *Anns* principle in Canada would open the floodgates to claims against public authorities, Wilson J. indicated that she did not believe that this would occur, because *Anns* contains "...its own built-in barriers against the flood".⁷⁶ One cannot help but wonder whether or not these barriers have now been knocked down by the Supreme Court of Canada.

VI. Legislative Response

While the present state of the law is still somewhat unclear, it is apparent that the Supreme Court of Canada has embarked upon a course designed to increase the accountability of public authorities for their decisions through increased exposure to civil liability. This is particularly significant in light of the fact that through increasing financial pressures and a recognition that many government functions are most effectively carried out at a local level there is a trend across Canada for senior levels of government to delegate broader areas of responsibility to local public authorities such as municipalities. The front cover of the Second Discussion Draft of Alberta's proposed new "Municipal Government Act"⁷⁷ summarizes this trend with the caption "Local Autonomy, You Want It, You Got It". As a result, in the absence of statutory protections, local public authorities across Canada may find themselves exposed to a great degree of civil liability for decisions made in an increasing number of areas of responsibility.

In apparent anticipation of this situation, the Supreme Court has sent a clear message to legislators across Canada that if they do not approve of the expansion of civil liability for public authority decision-making their recourse is to provide public authorities with statutory protections.

In *Laurentide Motels v. City of Beauport*⁷⁸ L'Heureux-Dubé J. made the following comments with respect to statutory immunity of local public authorities:

⁷⁵ *Supra*, footnote 3, at pp. 1252 (S.C.R.), 694 (D.L.R.).

⁷⁶ *City of Kamloops v. Nielsen*, *supra*, footnote 3, at pp. 25 (S.C.R.), 674 (D.L.R.).

⁷⁷ Alberta Municipal Statutes Review Committee, "The Municipal Government Act: Local Autonomy: You Want It, You Got It", Second Discussion Draft, Legislation Paper Nos. 1 to 6 (1990).

⁷⁸ *Supra*, footnote 3, at pp. 757 (S.C.R.), 62 (N.R.).

If the *Cities and Towns Act* does not confer an immunity on municipal corporations from their extra-contractual liability in respect of the operation of their water and firefighting services, it is clear that the Act also does not impose any specific liability in this regard. However, a municipality could not be exempted from civil liability unless the Act expressly exempted it, or authorized it, by an enabling provision, to exempt itself by way of by-law. A by-law, which is a secondary source of law, limiting or excluding the civil liability of a municipality, cannot validly alter the common law, which is the main source of law, unless an express provision of the Act allows it to do so. There is no such enabling provision in the *Cities and Towns Act*. There is thus the most complete "statutory silence", which in my opinion leaves the field open to the application of the principles of private law, which, as we have seen, is consistent with the common law principles applicable in Quebec and in the rest of Canada.

There are indications that provincial legislatures may be willing to incorporate express provisions into provincial legislation which would provide immunity to civil liability for the decisions of public authorities. For example, in developing new safety code legislation the Alberta Government announced its agreement in principle to provide Alberta municipalities with increased protection from civil liability.⁷⁹ This protection was subsequently enacted into law by section 12 of the Alberta Safety Codes Act,⁸⁰ which states:

12(1) No action lies against the Crown, the Council, members of Council, safety code officers, accredited municipalities or their employees or officers or Administrators for anything done or not done by any of them in good faith while exercising their powers and performing their duties under this Act.

(2) The Crown and an accredited municipality acting in good faith under this Act are not liable for any damage caused by a decision related to the system of inspections, examinations, evaluations and investigations, including but not limited to a decision relating to their frequency and the manner in which they are carried out.

(3) The Crown and an accredited municipality that engages the services of an accredited agency are not liable for any negligence or nuisance of the accredited agency that causes an injury, loss or damage to any person or property.

(4) Subject to this section, nothing done pursuant to this Act affects the liability of any person for injury, loss or damage caused by any thing, process or activity to which this Act applies.

Alberta appears prepared to go even further in its attempt to afford statutory protection from civil liability to its municipalities. In the Recommended Municipal Government Act released in March, 1991 the following protections are provided:⁸¹

⁷⁹ Speech delivered by the Honourable Elaine McCoy, Alberta Minister of Labour, at the Alberta Convention of Municipal Districts and Counties Spring Convention, March 27, 1991.

⁸⁰ S.A. 1991, c. S-0.5

⁸¹ Alberta Municipal Statutes Review Committee, "Municipal Government in Alberta: A Municipal Government Act for the 21st Century, Recommended Municipal Government Act, Legislation Paper.

315 Restriction on nuisance and other liability

A municipality is not liable for an action based on nuisance, or any other action which does not require a finding of negligence, when the damages arise, directly or indirectly, out of the breakdown or malfunction of

- (a) a sewer system,
- (b) a water or drainage facility or system, or
- (d) a dyke or roads.

317 Scope of duty

A municipality is not liable for failing to act when it has authority or is given authority to act but does not or decides not to act.

318 Restrictions on liability for municipal decisions

A municipality is not liable for damages caused by a decision made by the Municipality about

- (a) a system of inspection, or the manner in which inspections are to be performed or the frequency, infrequency, or absence of inspections, and
- (b) a system of maintenance, or the manner in which maintenance is to be performed, or the frequency, infrequency, or absence of maintenance.

A similar exemption from civil liability for public authorities is contemplated in Alberta's proposed Environmental Protection and Enhancement Act.⁸²

VII. Conclusions

As noted above,⁸³ it is possible to identify an underlying philosophy behind the shift by the Supreme Court of Canada toward increased judicial scrutiny of public authority decision-making. This shift will permit the courts to review decisions of a public authority which previously could only be reviewed by the electorate. It is submitted that behind the verbiage of the policy/operational dichotomy the Supreme Court of Canada is actually espousing a philosophy of increasing the accountability of public authorities for losses incurred by individuals as a result of the public authority's decisions.

While the recent Supreme Court decisions provide little insight into the reason for this shift in philosophy, it is suggested that it may reflect a change in the court's attitude with respect to the burden of loss which should be borne by public authorities in Canada. It appears that the Supreme Court is now of the view that public authorities, who by their nature are able to distribute the burden of loss to their residents and ratepayers, or to society at large through their insurers, must now be prepared to assume a greater proportion of that burden.

Perhaps the best expression of that philosophy can be found in the minority decision of La Forest J. in *Tock v. St. John's Metropolitan Area Board*.⁸⁴ *Tock* dealt with a claim against a municipality for damages caused by a sewer back-up into the plaintiffs' basement. The claim was originally

⁸² Bill 63 (1991), s. 209.

⁸³ *Supra*, Part I.

⁸⁴ *Supra*, footnote 8, released the same day as the Supreme Court of Canada's decision in *Just*.

framed on the basis of negligence, the rule in *Rylands v. Fletcher*⁸⁵ and nuisance, but the matter proceeded to the Supreme Court of Canada only on the basis of *Rylands* and nuisance.

The case is significant for its review of the law relating to the statutory authority defence to a nuisance action. The majority held that this defence did not apply and ruled that the plaintiffs were entitled to recover from the municipality on the basis of nuisance. La Forest J., however, would have permitted recovery on a different basis. After having found that the sewer back-up constituted actionable nuisance, La Forest J. rejected the traditional analysis of the defence of statutory authority in favour of broad statements of policy. He states:⁸⁶

At this remove from the 19th century, therefore, it would seem appropriate to reformulate the law in more functional terms.

He then states that the test for recovery from public authorities in nuisance should depend on whether, in all the circumstances, it is reasonable to refuse the plaintiffs recovery.⁸⁷ When, as a result of a service provided to all individuals in a municipality damage is inflicted upon only one individual, then this individual should be entitled to recover, since, if he is not, he will be unfairly shouldering a disproportionate amount of the cost of providing the public service. The justification for this approach is stated as follows:⁸⁸

[The public authority], unlike its hapless victim, is in a position to defray the cost by spreading it among all subscribers to the system. In the alternative, if the authority is to bear the costs of accidents of this nature, it may realize that it is more cost effective to forestall their occurrence by increasing the frequency of inspections.

Finally, La Forest J. suggests that where the damage complained of is an ordinary disturbance associated with the supply of a public utility and is spread widely among the subscribers rather than concentrated among a few, then the circumstances may justify a refusal of recovery.⁸⁹

While it is unlikely that La Forest J.'s reasoning will be expressly adopted by Canadian courts, it may provide insight into the philosophy to which the Supreme Court of Canada is adhering when analyzing claims against public authorities such as municipalities. If this philosophy continues to underlie judicial decision-making in this area, it is clear that a legislative response will be required if it is desired to protect public authorities from being subjected to the "open floodgates" of liability. Such a response appears to be forthcoming in Alberta and it will be interesting to monitor legislation in other jurisdictions to see if a similar approach is adopted.

⁸⁵ (1868), L.R. 3 H.L. 330.

⁸⁶ *Supra*, footnote 8, at pp. 1198 (S.C.R.), 644-645 (D.L.R.).

⁸⁷ *Ibid.*, at pp. 1201 (S.C.R.), 647 (D.L.R.).

⁸⁸ *Ibid.*, at pp. 1202 (S.C.R.), 648 (D.L.R.).

⁸⁹ *Ibid.*, at pp. 1203 (S.C.R.), 649 (D.L.R.).