



Lorena Staples, Q.C.

August 30, 2012

Chief Len Garis, President
Fire Chiefs' Association of British Columbia

Dear Chief Garis,

Re: Statutory Immunity

1. Fire Services claims experience in BC

Over the course of the past 25 years since the Municipal Insurance Association (MIA) came into being (as a result of the insurance "crisis" in the mid 80s, when local governments could not get coverage for the building departments and premiums rose to unaffordable rates for many), there have been about 130 claims against fire services in BC, including rescue operations. The cost of those claims totaled almost \$8,000,000, with one claim amounting to a third of that amount.

2. Recent target of claims

At the same time that the insurance crisis was unfolding, the fire services found themselves a target of claims, something from which they had previously been isolated. Whether it was the high regard held by the public for firefighters or for other reasons, it was unheard of prior to the 1980s for fire departments to be sued. I know this from my own nearly 20 years of experience practicing municipal law when the first cases occurred in the Maritimes and Quebec. No doubt that accounts for immunity provisions for municipalities in the Nova Scotia and New Brunswick statutes, referred to in the table at the end of this letter.

3. Affected by all classes of claims

Fire departments are affected not only by claims against themselves and other fire service organizations, but by the entire class of claims against local government. Those claims are very substantial and have led to sometimes crippling levels of caution on the part of local governments in BC. This extreme caution, in turn, has resulted in either shifting resources away from other much needed services or abandoning efforts at risk management as being too costly.

4. Joint and several liability

MIA has focused its legislative reform efforts on changing the system of "joint and several liability" in BC. That system encourages claimants and insurance companies to look for a party with deep pockets when the defendant responsible for all or most of the blame has empty pockets. For example, if there is a fire and the building owner has few or no assets, the claimant's insurer names the municipality as a third party defendant if



the building comes within a municipal service, such as fire or building inspection or fire suppression. Then they try to prove any small amount of liability against the municipality, knowing the municipality, under joint and several liability, will have to pay the whole amount of the judgment.

Unfortunately, the plaintiff bar wants to preserve this system and the defence bar wants to get rid of it; a classic standoff, if ever there was one.

5. Risk averse local governments

My impression is that the relatively small number of fire service claims defended by MIA that went to court over the past 25 years is the result of local governments becoming aware of the liabilities imposed by the courts (becoming "risk averse") and undertaking risk management programs.

However, in addition to the resources directed at those programs, local governments often spend considerable time and resources, as defendants and third parties, responding to unfounded claims that do not make their way into the MIA's statistics.

The 1980s produced an unusual number of worldwide catastrophes, some man made and others nature's doing, that led to huge insurance claims and large payouts by insurers who were unprepared for the magnitude of the problem. This, coupled with a surge in the numbers of lawyers (all trying to make a living and many doing so handsomely in this tsunami of litigation) and badly injured claimants in many jurisdictions, led to the insurance crisis of unaffordably high premiums or no coverage for some classes of claims.

The insurers had to do something because their reserves were depleted. To add fuel to the fire, the very high inflation and interest rates of the late 1970s and early 80s, was followed by a severe recession and falling stock prices, which further exacerbated the insurance crisis. The insurers' major solutions were to raise premiums, cherry pick the best clients and refuse to cover the activities that had the highest and most numerous claims. For example, to this day, local governments cannot obtain coverage for hazardous contamination, even from MIA.

The result for local governments is a very risk averse environment.

6. FCABC's solution

FCABC's members are looking for a solution to this waste of time and resources so they can be redirected to the core business of the fire services in BC. Their aim is to persuade the Province to extend immunity from claims for damages beyond the municipal public officers protected by the Local Government Act to local government corporations and other bodies and organizations providing fire protection in BC.

7. BC's immunity provisions

Most of BC's corporate immunity provisions are directed towards administrative decision makers, such as tribunals and governing boards, and individuals, such as the local government officials ("municipal public officers") listed in section 287 of the Local Government Act. Even in those instances, the immunity is subject to exceptions, such as "guilty of malice or wilful misconduct in relation to the subject matter of the action" under the Emergency Communications Corporations Act and "guilty of dishonesty, gross negligence or malicious or wilful misconduct" under the Local Government Act. The exceptions mean that these parties are not immune from being sued since claimants will



test for the exception by suing them.

8. Other provinces

Most of the other provinces have addressed the problem by providing local governments with varying forms of immunity, some directed explicitly to the fire services. These immunities are subject to the simple "acting good faith" condition.

New Brunswick Statutes

New Brunswick (NB) is where the first successful judgment was rendered against a fire service. It made the other provinces sit up and take notice. NB took clear action to provide immunity for all of its fire service providers, corporations and individuals alike. Nova Scotia enacted similar provisions.

MUNICIPALITIES ACT

IMMUNITY - FIRE PROTECTION SERVICES AND NON-FIRE RELATED RESCUE SERVICES

193.3 No action or other proceeding for damages shall be instituted against any of the following bodies or persons for any loss, injury or damage suffered by reason of anything in good faith done or omitted to be done by a **member or former member of a fire department, brigade or association that provides fire protection** and non-fire related rescue services within a municipality, rural community or local service district, by reason of the member or former member acting as a member of the fire department, brigade or association:

- (a) Her Majesty in right of the Province;
 - (b) the Minister;
 - (c) **a municipality;**
 - (d) a rural community;
 - (e) the fire department, brigade or association;
 - (f) a member or former member of the fire department, brigade or association; or
 - (g) the legal representatives or heirs of a person referred to in paragraph (f).
- (emphasis in bold is mine - LS)

Nova Scotia Statutes

FIRE SAFETY ACT

No action lies against crown or officials

47 No action lies or shall be instituted against Her Majesty in right of the Province or an officer or employee of Her Majesty, the Fire Marshal or any person acting under the Fire Marshal's authority, a deputy fire marshal, a provincial inspector, a local assistant or a delegate or a designate of a local assistant, a fire chief, a fire department or an officer, member or employee of a fire department, including a member empowered by that department to direct fire-suppression activities, a municipality or an officer or employee of a municipality, a municipal fire inspector, a member of the Council or a member of a committee of the Council, the Board, a division of the Board or a member of the Board, or any person acting under the authority of, or as an agent of, any person or body referred to in this Section, where the person or body is acting pursuant to the authority of this Act, the regulations, the Fire Code or an order made pursuant to this Act, the regulations

or the Fire Code for any loss or damage suffered by a person because of an act or omission done in good faith by the person or body

(a) pursuant to, or in the exercise or supposed exercise of, a power conferred by this Act, the regulations or the Fire Code; or

(b) in the carrying out, or supposed carrying out, of a function or duty imposed by this Act, the regulations or the Fire Code. 2002, c. 6, s. 47.

Newfoundland Statutes

Newfoundland has protected firefighters from personal liability and provided indemnity but leaves local governments on the hook for their firefighters' torts.

Firefighters' Protection Act

Definitions

2. In this Act

(a) "fire department" means a fire department organized under the *Municipalities Act*, the *City of St. John's Act* or the *City of Corner Brook Act* and includes a fire department established in an unincorporated area of the province; and

(b) "firefighter" means a full-time or part-time employee of a fire department, or a volunteer member of a fire department, whether or not the volunteer receives a nominal consideration or honorarium for his or her services.

Protection from personal liability

3. An action or other proceeding for damages shall not be instituted against a firefighter for an act done in good faith in the execution or intended execution of his or her duty or for any neglect or for any alleged neglect or default in the execution in good faith of his or her duty.

Indemnification of firefighters

4. (1) A firefighter who acted in good faith in the execution of his or her duties shall be indemnified for reasonable legal costs incurred

(a) in the defence of a civil action, if the firefighter is not found to be liable;

(b) in the defence of a criminal prosecution, if the firefighter is found not guilty; and

(c) in respect of another proceeding in which the firefighter's execution of his or her duties is an issue, if the firefighter acted in good faith.

(2) Indemnification under subsection (1) shall be made, in the case of a firefighter in a municipal fire department or local service district fire department, by that municipal corporation or local service district committee.

Liability

5. Section 4 of the Act does not relieve a municipal corporation or local service district committee of liability in respect of a tort committed by a firefighter to which the municipal corporation or local service district committee would otherwise be liable.

PEI Statutes

Individuals, but not corporate bodies, are covered here:

Municipalities Act



66. The members of a council or a committee thereof, the administrator and any other person acting on their instructions or under the authority of this Act, are not personally liable for any loss or damage suffered by any person by reason of any act done or not done by any of them in good faith in the exercise or purported exercise of the powers conferred under this Act.

Ontario Statutes

Ontario's approach has been to regulate the fire services in detail, provide personal immunity from liability and indemnification for individuals, but not relieve the province and the municipalities from liability for their own and their employee's actions. The Municipal Act provides general immunity for officers and employees from claims for damages but none for the municipality.

MUNICIPAL ACT

448.(1) No proceeding for damages or otherwise shall 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 this 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. 2001, c. 25, s. 448 (1).

Liability for torts

(2) Subsection (1) 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. 2001, c. 25, s. 448 (2).

FIRE PROTECTION AND PREVENTION ACT, 1997

Municipal responsibilities

- 2.(1)** Every municipality shall,
- (a) establish a program in the municipality which must include public education with respect to fire safety and certain components of fire prevention; and
 - (b) provide such other fire protection services as it determines may be necessary in accordance with its needs and circumstances.

Methods of providing services

- (2)** In discharging its responsibilities under subsection (1), a municipality shall,
- (a) appoint a community fire safety officer or a community fire safety team;
 - (b) establish a fire department.

Services to be provided

- (3)** In determining the form and content of the program that it must offer under clause (1) (a) and the other fire protection services that it may offer under clause (1) (b), a municipality may seek the advice of the Fire Marshal.

Review of municipal fire services

- (7)** The Fire Marshal may monitor and review the fire protection services provided by municipalities to ensure that municipalities have met their responsibilities under this section and, if the Fire Marshal is of the opinion that, as a result of a municipality failing to comply with its responsibilities under subsection (1), a

serious threat to public safety exists in the municipality, he or she may make recommendations to the council of the municipality with respect to possible measures the municipality may take to remedy or reduce the threat to public safety.

Failure to provide services

- (8) If a municipality fails to adhere to the recommendations made by the Fire Marshal under subsection (7) or to take any other measures that in the opinion of the Fire Marshal will remedy or reduce the threat to public safety, the Minister may recommend to the Lieutenant Governor in Council that a regulation be made under subsection (9).

Regulation

- (9) Upon the recommendation of the Minister, the Lieutenant Governor in Council may make regulations establishing standards for fire protection services in municipalities and requiring municipalities to comply with the standards.

Same

- (10) A regulation under this section may be general or specific in its application and may be restricted to those municipalities specified in the regulation. 1997, c. 4, s. 2.

Protection from personal liability

- 74.(1) No action or other proceeding for damages shall be instituted against a **firefighter**, a fire co-ordinator, a community fire safety officer, a member or employee of the Fire Safety Commission, an assistant to the Fire Marshal, the Deputy Fire Marshal, the Fire Marshal, or a person acting under his or her authority, for any act done in good faith in the execution or intended execution of his or her power or duty or for any alleged neglect or default in the execution in good faith of his or her power or duty.
(emphasis in bold is mine - LS)

Crown, municipality not relieved of liability

- (2) Despite subsections 5 (2) and (4) of the *Proceedings Against the Crown Act*, subsection (1) does not relieve the Crown or a municipal corporation of liability in respect of a tort committed by a person referred to in subsection (1) to which they would otherwise be subject. 1997, c. 4, s. 74.

Manitoba Statues

Manitoba regulates fire service and training (not all are included in these excerpts), and it provides a clear immunity for individuals and a not so clear one for local authorities. In the context of s. 41, "any other person" may be limited to individuals but it could also include corporations, such as municipalities. Corporations are included in the definition of person in the Manitoba Interpretation Act, as it is in BC's.

The Fires Prevention and Emergency Response Act

Local authorities to enforce fire code

- 20. Within its boundaries, a local authority must, in accordance with the procedures of this Act, enforce the *Manitoba Fire Code* as it is prescribed for the part for the province in which the local authority is situated.

Local authority must inspect prescribed buildings

- 21(1) Subject to subsection (3), a local authority must



(a) establish a system for conducting regular fire safety inspections of prescribed buildings within its boundaries; and

(b) ensure that its local assistant, or a person exercising the powers, duties and functions of a local assistant, carries out those inspections.

Protection from liability

41 No action or proceeding may be brought against the fire commissioner, a designate or **any other person** acting under the authority of this Act for anything done or not done, or for any neglect,

(a) in the performance or intended performance of a duty under this Act or the regulations; or

(b) in the exercise or intended exercise of a power under this Act or the regulations;

unless the person was acting in bad faith.

(emphasis in bold is mine - LS)

Saskatchewan Statutes

Saskatchewan includes municipalities in the immunity granted in s. 41 to members of fire departments and others.

The Fire Prevention Act, 1992

Owner responsibilities

28. Every owner of a building, structure or premises shall ensure that the building, structure or premises is designed, constructed, erected, placed, altered, repaired, renovated, demolished, relocated, removed, used or occupied in accordance with this Act and the regulations.

Effect of municipal bylaws

33. Where a municipality has passed a bylaw in accordance with The Municipalities Act, The Cities Act or The Northern Municipalities Act, 2010 respecting the prevention and suppression of fires and the provisions of the bylaw are more exacting than the provisions of this Act or the regulations, that bylaw governs and applies to all properties within the boundaries of that municipality.

Immunity from liability

34. No action lies or shall be instituted against the minister, a fire inspector, a **municipality**, a **fire department** or a **member of a fire department**, or peace officer, where the minister, fire inspector, municipality, fire department or member of a fire department, or peace officer is acting pursuant to the authority of this Act, the regulations or an order made pursuant to this Act, for any loss or damage suffered by reason of anything in **good faith** done, caused, permitted or authorized to be done, attempted to be done or omitted to be done, by any of them, pursuant to or in the exercise or supposed exercise of any power conferred by this Act or the regulations or in the carrying out or supposed carrying out of any order made pursuant to this Act or any duty imposed by this Act or the regulations.

(emphasis in bold is mine - LS)

Alberta Statutes

The Verification of Compliance in Alberta's Quality Management Plans (QMP) refers to the immunity provisions of Alberta's Safety Codes Act, which governs fire protection,

amongst other matters. This provides not merely immunity for municipal officials and employees, leaving the employers on the hook for liability; it is extended to "accredited municipalities". If a municipality applies for and obtains accreditation, it must employ one or more safety codes officers, who have to be certified under this Act.

SAFETY CODES ACT

Liability exemption

- 12(1) No action lies against the Crown, the Council, members of the Council, safety codes officers, accredited municipalities or their employees or officers, accredited regional services commissions or their employees or officers, accredited agencies or their employees or officers 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, **an accredited municipality**, an accredited regional services commission and an accredited agency **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 and an accredited regional services commission that engage the services of any 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.
(emphasis in bold is mine - LS)

Employment

- 33 (1) In accordance with the *Public Service Act*, there may be appointed safety codes officers for the administration of all or part of this Act anywhere in Alberta.
- (2) A **local authority** shall provide for safety codes officers for the purpose of administering all or part of this Act that **an accredited municipality** is authorized to administer.
- (3) An accredited regional services commission shall provide for safety codes officers for the purpose of administering all or part of this Act that it is authorized to administer.



- (4) An accredited corporation shall provide for safety codes officers for the purpose of administering all or part of this Act that it is authorized to administer.
- (5) An accredited agency shall provide for safety codes officers for the purpose of providing services under this Act that it is authorized to provide.

(emphasis in bold is mine - LS)

Comment:

Alberta has granted immunity for fire protection services, but accompanies it with the safeguards of accreditation of the municipality and certification of its officers, as well as limiting the immunity to actions carried out in "good faith", which is similar to making an exception to immunity for malice, dishonesty, etc in BC's Local Government Act. I suspect the fire service insurance and claims experience in Alberta is very similar to BC's.

BC Statutes

BC does not provide any immunity in its Fire Services Act for firefighters or municipalities and regional districts. There is immunity for paid and volunteer firefighters in s. 287 of the Local Government Act, subject to the conditions in s. 287(3).

FIRE SERVICES ACT

Actions against officers

43 Without the leave of the Attorney General, an action or proceeding must not be brought or taken against the fire commissioner or a local assistant to the fire commissioner or an officer on the fire commissioner's staff for anything done or omitted in the performance or intended performance of duties under this Act.

Municipal bylaws

48 (1) Nothing in this Act prevents a municipality from making bylaws relating to a matter within the scope of this Act, but only so far as they are not repugnant to this Act or the regulations.

(2) Nothing in this Act absolves a municipality from its duty to enforce a law or regulation relating to a matter under this Act.

LOCAL GOVERNMENT ACT

Immunity for individual municipal public officers

287(1) In this section, "**municipal public officer**" means any of the following

- (l) an officer or employee of a municipality, regional district, improvement district, library board under the *Library Act*, a greater board referred to in paragraph (f), the trust council under the *Islands Trust Act* or the Okanagan Basin Water Board;
- (n) a volunteer firefighter or a special constable;
- (o) a volunteer who participates in the delivery of services by a



municipality, regional district or a body referred to in paragraphs (c) to (k) under the supervision of an officer or employee of the municipality, regional district or any of those bodies;

- (2) No action for damages lies or may be instituted against a municipal public officer or former municipal public office
 - (a) for anything said or done or omitted to be said or done by that person in the performance or intended performance of the person's duty or the exercise of the person's power, or
 - (b) for any alleged neglect or default in the performance or intended performance of that person's duty or exercise of that person's power.
- (3) Subsection (2) does not provide a defence if
 - (a) the municipal public officer has, in relation to the conduct that is the subject matter of the action, been guilty of dishonesty, gross negligence or malicious or wilful misconduct, or
 - (b) the cause of action is libel or slander.
- (4) Subsection (2) does not absolve any of the corporations or bodies referred to in subsection (1)(a) to (k) from vicarious liability arising out of a tort committed by any of the individuals referred to in subsection (1) for which the corporation or body would have been liable had this section not been in force.

9. Conclusion

There are examples in four other provinces (Alberta, Saskatchewan, Nova Scotia and New Brunswick) of statutory immunity provided for municipalities and other local government bodies, as well as private bodies providing fire services. BC would not be the pioneer in that regard.

All provide immunity for individuals employed by local governments. Most place a condition of acting in good faith or not acting in bad faith on that immunity. Some add the condition of acting within the scope of one's statutory authority and one (Nova Scotia) places only that as a condition on immunity.

Please see the Table on the attached page for a quick comparison.

Yours truly,

Lorena Staples, Q.C.



Provinces: Immunity for fire services providers

Province	Statute	Section	Individuals*	Corporate**	Condition
BC	Local Gov't Act	287	Yes	No	Yes
	Fire Services Act	43	Fire Comm'r; local ass'ts		Yes
Alberta	Safety Codes Act	12	Yes	Accredited municipalities	good faith
Sask.	The Fire Prevention Act	34	Yes, FD member	Yes, munies & indie FDs	good faith
Man.	The Fires Prevention and Emergency Response Act Interpretation Act	41	Yes	Yes ("person" includes a corporation = municipality)	good faith; w'in auth of the Act
		67			
Ont.	Fire Protection and Prevention Act	74(1)	Yes	No	good faith
NB	Municipal Act	448	Yes	No	good faith
	Municipalities Act	193.3	Yes	Yes, munies & indie FDs	good faith
NS	Fire Safety Act	47	Yes	Yes, munies & indie FDs	w'in auth of the Act
NFLD	Firefighters' Prot Act	411	Yes	No	good faith
PEI	Municipalities Act	66	Yes	No	good faith

* firefighters, members of FDs - munies and indies, volunteers

**Local governments (munies) and independent fire departments, brigades and associations (indies)

