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The Community Charter changes the scope of municipal powers in the province

The British Columbia Community Charter: What is Going On and What Does it Mean for You? Part III

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On May 8, 2003, the Province of British Columbia passed the *Community Charter*, with the stated goal of having it come into force on January 1, 2004. The *Community Charter* changes the scope of municipal powers in the province.

This *Legal Update*, the third in a series, will review:

- what has led to the *Community Charter*;
- what the *Community Charter* does;
- what powers have been dropped, relative to the May 2002 exposure bill;
- the remaining stages in the province's program for revising municipal powers;
- the concerns that the business community has expressed regarding the *Community Charter*;
- alternative approaches; and
- additional sources of information, and your opportunity for feedback.

The Origins of the Community Charter

The Relationship Between the Province and Municipal Governments

The *Community Charter* is part of an on-going re-appraisal of the appropriate roles of various levels of government. The issue is not unique to British Columbia. The changes made to municipal legislation across Canada have some commonalities, and some substantial differences.

The commonalities include a trend towards more broadly stated powers. Under the traditional model, municipalities were given relatively precise and specific powers that were expanded upon or varied from time to time as the province considered appropriate. The complexities and cost of provincial involvement (both in time and resources), and the evolving sophistication of local governments, have resulted in a trend to give broader and more general powers.

The differences between the provinces' new acts have reflected the varying political philosophies of the

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provincial governments involved. Canada’s constitution does not recognize municipalities as a separate order of government, and hence the scope of municipal powers is ultimately always a matter of provincial policy.

Reforms in Ontario in the late 1990s, for example, dramatically amalgamated school boards to control provincial government spending on education, significantly reduced the number of municipalities and put pressure on municipal government to finance welfare and other social policies.

In British Columbia, the province’s stated objectives in enacting the *Community Charter* have three elements:

- to broaden powers, so that municipalities have the flexibility to structure their activities in ways that reflect the diversity, size, economic conditions and wishes of the local community;
- to increase local accountability. This in part is an off shoot of the first element, because local communities will get to (and will have to) live with the results of their increased autonomy from the province. It has other aspects as well, however, being accountability to individuals (including individual businesses). This involves issues of checks and balances; and
- to improve intergovernmental relations, by way of on-going dialogue between the province and municipalities over the functions of the two levels of government, and the further evolution of municipal powers.

**The Relationship Between
Government and the Private
Sector**

The *Community Charter* is itself part of a larger government agenda, as set out in the “New Era” platform released before the May 2001 election. Item 3 of the ten items that formed the “Vision” of the Liberal Party was “a thriving private sector economy that creates high paying job opportunities.” Listed specifics included:

- reducing “red tape” and the regulatory burden on British Columbia business, and
- protecting private property rights to prevent government expropriation without fair compensation.

Again, these objectives speak to the issue of accountability mechanisms.

What the *Community Charter* Does

The *Community Charter* substantially broadens and enhances municipal powers. The minister, in introducing the legislation, called it “the most empowering local government statute” in Canada.

Municipal “Spheres of Jurisdiction”

Rather than providing roughly 120 relatively precise powers to municipal governments to deal with specific matters (as the *Local Government Act* currently does), the *Community Charter* gives jurisdiction to municipalities to legislate regarding a number of broadly stated “spheres of jurisdiction.”

Sections 8(3)(a) to (h) of the *Community Charter* provide that council may by bylaw “regulate, prohibit and

impose requirements” in relation to a variety of matters, including:

- municipal services (which are defined as any services the municipality wishes to provide);
- persons, property, things and activities in, on or near a public place;
- trees;
- the protection of persons and property as regards various categories of matters; and
- the protection and enhancement of community well-being in relation to numerous matters including:
 - » nuisances,
 - » disturbances (defined as noise, vibration, odour, dust, illumination or any other matter that is liable to disturb the quiet, peace, rest, enjoyment, comfort or convenience of individuals or the public), and
 - » other objectionable situations (including emissions, and offensive business activity).

The effect of the “disturbances” provision, on its face, is to avoid any need for the municipality to establish that the “disturbance” is a “nuisance” at common law. It would seem to allow a municipality to set a zero tolerance standard, if it wishes, as regards any of the matters listed.

The broad power to “impose requirements” is unique in Canada. It means, using trees as an example, that council can now go beyond regulating how tree cutting can occur, and can actively require that a private property owner plant trees when, where and how

the municipality sees fit. In the “disturbance” context, would seem to authorize a municipality to require a business to construct or provide whatever works the municipality wants, and to carry out whatever operations the municipality wants, to address neighbour concerns about the listed matters.

The general authority to prohibit is also a significant expansion of municipal power.

Section 8(4) provides that councils may “regulate and impose requirements” with regards to signs. No power is given to prohibit signs.

Section 8(5) provides that council may pass bylaws to “regulate” business. No power is given to prohibit or impose requirements on business.

Flexibility of Action in the Exercise of Municipal Powers

In addition to expanding the scope of municipal powers, the *Community Charter* also significantly increases the flexibility and subtlety with which the regulations, requirements and prohibitions may be imposed.

Variations

Section 12 provides that a municipal bylaw may (i) make different provisions for different areas, times, conditions or circumstances, (ii) establish different classes of persons, places, activities, property or things, and (iii) make different provisions for different classes.

Security

Section 17 enhances the broadened power to impose requirements by providing that if the requirement is not carried out, the municipality can carry out the requirement at the person’s expense.

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The province is presently working within the affected ministries to accommodate municipal involvement in the new areas of jurisdiction

Section 19 makes clear that the power to impose requirements includes the power to require security.

In the “disturbance” context, this means that security could be required to ensure that the works that the municipality has decided to require, and the operations the municipality has decided must be carried out, are provided, maintained and carried out.

Approval Requirements

Section 15 provides that municipalities may establish a system of licenses, permits or approvals in the listed “spheres of jurisdiction”, and prohibit any activity until such a license, permit or approval has been granted. Licenses, permits and approvals can also establish terms and conditions, and can be cancelled where the terms and conditions are not met.

Fees

Section 194 creates a broadened power to charge fees to recover costs incurred:

- in exercising the powers to regulate, prohibit and impose requirements;
- for use of municipal property; and
- for municipal services.

Topping up Provincial Standards

Where there is an overlap between a municipal and a provincial regulation in one of the municipal “spheres of jurisdiction”, section 10(2) of the *Community Charter* provides that the municipal bylaw will only be invalid if it requires that a provincial standard be violated. Thus, municipalities may “top up” any standards the province has imposed.

Natural Person Powers

Section 8(1) gives municipalities “natural person” powers. This conveys no additional regulatory authority (because people have no power to regulate), but significantly relaxes previous restraints on business dealings and administration.

Joint Municipal Regulation

Section 14 gives municipalities the ability to exercise their powers jointly with other municipalities, through inter- municipal schemes.

“Spheres” Where Municipalities will have “Concurrent Jurisdiction” with the Province

Sections 8(3)(i) to (m) of the *Community Charter* establish other “spheres” as matters of “concurrent jurisdiction” between municipalities and the province. These include:

- public health;
- protection of the natural environment;
- wildlife;
- building regulation, insofar as it relates to building standards; and
- the prohibition of soil removal, and the prohibition of soil deposit based on quality of the soil including contamination.

In these spheres, the municipal bylaw must be approved by the province, either directly or by agreement or by regulation.

The requirement for provincial approval is not as broad as it might initially appear. As an example, notwithstanding that the “natural

environment” is an area of concurrent jurisdiction, municipalities have an unfettered jurisdiction as regards nuisances, disturbances, emissions and other such matters under section 8(3)(h).

The province is presently working within the affected ministries to accommodate municipal involvement in the new areas of jurisdiction.

Property

The *Community Charter* transfers the title to all non-arterial roads and parks in each municipality to the municipality.

Public Private Partnerships

Changes as regards public private partnerships include:

- an increase in the threshold required in order for citizens to require that a project be put to referendum, through the “counter petition” process, from five to ten per cent of electors;
 - the ability to have the counter petition opportunity for a project proceed at the conceptual level, rather than based on the actual agreement;
 - the ability to provide for disposal of land to a targeted partner;
 - a broadened power to provide assistance to business, to grant tax exemptions, and to grant exclusive franchises in respect of public transportation, sewage and energy supply systems, as well as water supply;
 - the ability to amend partnering agreements without requiring a counter petition opportunity; and
- provision for specifying by regulation agreements or types of liabilities that will not require a counter petition opportunity, and circumstances where borrowing limits will not apply or may be exceeded.

Revitalization Tax Exemption

The proposal in the May 2002 discussion paper to allow an exemption for business from property taxes in certain circumstances was replaced with a “revitalization tax exemption”. The new exemption relates to the increase in value resulting from the construction or alteration of an improvement in an area that has been designated for revitalization.

What has been Dropped, Relative to the May 2002 Exposure Bill

Our May 2002 *Legal Update* reviewed various concerns regarding the draft of the *Community Charter* that was released at that time. Subsequently, the Community Charter Business Coalition was formed, and presented a number of comprehensive submissions to the province.

A significant number of amendments were made this spring that remedied a number of particularly problematic provisions. The powers that were deleted from the *Community Charter* include the powers to:

- provide the “service” of regulating, prohibiting and imposing requirements as regards anything the municipality considered appropriate;
- impose requirements on business;
- prohibit business;

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An amendment that will provide municipalities with additional taxing powers is to be released as early as the fall 2003 sitting of the legislature

- regulate, prohibit and impose requirements on places open to the public;
- cut off utilities on a site by site basis, on grounds other than non-payment;
- close highways without accommodating utilities;
- require compensation as the municipality considered appropriate for what it deemed to be “extraordinary” traffic; and
- charge road tolls.

Clarifying provisions were also added to ensure that the broad powers given:

- do not impact land use regulation; and
- do not allow a municipality to side step limits imposed in relation to specific powers granted under municipal legislation.

Remaining Stages in the Legislative Program

Taxes

Municipal powers are inevitably intertwined with the funding that local government has to finance the carrying out of those powers.

The *Community Charter* that was enacted did not itself contain substantially different funding mechanisms than existed under the *Local Government Act*. The White Paper that the province released with its May 2002 exposure bill did however raise a number of potential funding options for discussion. An amendment that will provide municipalities with additional

taxing powers is to be released as early as the fall 2003 sitting of the legislature.

Discussions to date have indicated that two of the items included in the White Paper may be abandoned, being the hotel room tax, and the parking stall tax. Further consideration is apparently being given to a resort tax, a fuel tax, an amusement tax and the “fees as a tax” concept.

As regards both the “fuel tax” and the “amusement tax”, the concept appears to be that they would be targeted (fuel would be for transportation improvements only; amusement would be for investments in culture and sports only); there would be rate based limits (e.g., cents on fuel tax; five or six per cent on some base - for example ticket price - for amusement); and they would only be imposed if approved by a referendum.

The “fee as a tax” concept would apparently be restricted to sewer and water charges only. There would be no limit on amount, but a limit would be put in place such that the charge on a business could not be more than a specified multiple of the residential charge.

Land Use, Regional Districts and Elections

The changes relating to land use, regional districts and electoral reform are to come forward at a later stage, the timing of which is presently uncertain.

Concerns Expressed by the Private Sector

Core questions raised by the *Community Charter* include what protections, if any, citizens have from the exercise of local government powers. Does a citizen have any rights, other than the

collective right of going to the ballot box every three years? And, how do broader municipal powers fit with the larger provincial agenda of reducing regulatory burden?

Municipal Government as an Institution

A critical factor in determining the effect of giving a power to an institution is who the institution is accountable to. The geographic jurisdiction of local government is relatively small. Councils are accordingly particularly responsive to issues of concern to a motivated public. It is easier to saddle the blame for a particular decision on a councillor, for example, with the relatively narrow scope of issues and the relatively small constituency he or she faces, than it is to saddle blame on a particular MLA or MP.

Giving a power to a municipality over a particular subject matter is essentially a determination that decisions regarding the subject matter should be made based on the perspective of local voters collectively. It elevates the importance of the perspective of the local voter relative, for example, to the perspectives of:

- individuals, including individual businesses;
- the region; and
- the province as a whole.

This is not to suggest that councils and councillors do not try to take individual interests and business interests into account, and balance matters, or that they do not act in good faith. Rather question is to whom the institution is accountable for the decisions it makes.

The *Local Government Act's* package of specific and precise powers had limits built in. These have been removed through the change to the broad powers approach.

Because the *Community Charter* has broadened and enhanced municipal powers without a balancing broadening of protections and limits, the *Community Charter* to a significant extent directs that resident voter pressures (and municipal financial needs) are to predominate over economic interests whenever and to whatever extent a council decides they should. Introducing balancing limits and protections would result in a different mix, to the extent of the protection or limit.

The Potential Impact of Broadening Municipal Powers

The potential impact of the broadening of municipal powers, in light of the nature of local government, can be seen through existing examples. One can look:

- on the financial side, at the variable tax rate; and
- on the regulatory side, at various cases.

Direct Financial Impacts

In 1995, BC introduced the variable tax rate. This enables a municipality to set different tax rates on different classes of assessed property, as it sees fit.

Because municipal councils tend to be the most focused on the resident voter, the result has been a set of tax rates that under-taxes homeowners (relative to the cost of services homeowners receive) and that over-taxes business and industry. It is now common for business and industry to pay four to six times as high a rate on the assessed

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value of their property than residents do. When the variable tax rate system was introduced, the ratio was between two and three.

One recent study concluded that residents of the City of Vancouver pay 50 cents for each \$1 of services they receive. Looking more broadly, other data collections show that British Columbia now has the lowest property tax rates on residential properties in Canada and the highest rates on business properties.

Regulatory Impacts

Our October 2001 *Legal Update* ran through a number of court decisions in the land use planning context where broad municipal powers have had harsh repercussions for private parties. As was noted at the time, while many of these cases involve developers, that does not mean that others have not faced the same experience. They have. The issue is in part that individuals generally do not have the resources to deal with such issues in court.

While the other cases are important as examples, they will not be repeated here. *PNI v. City of Victoria* will suffice to demonstrate the possible implications.

The City of Victoria entered into an arrangement with a developer under which the city would zone lands for development, and the developer would provide various amenities, including roads, park, a seawall and walking paths. The upzoning authorised five buildings, being three on land and two on water lots.

The developer's creation of landscaped parks and the newly constructed seawall resulted in what the court described as a peaceful and pleasant setting for the

initial residents and visitors, who subsequently became disturbed when the developer moved on to the development of the water lots. Those persons pressed council, and council responded with a downzoning to prevent the development of the water lots that the upzoning had provided for. Construction on the water lots was limited to one storey.

There were then two sets of court proceedings. The first dealt with whether the development agreement implicitly precluded the city from downzoning the property for the time contemplated for build out.

The case went all the way to the Supreme Court of Canada, which split four to three. The differences between the two sets of judgments crystallizes the issues underlying the debate on the *Community Charter*. Specifically:

- the three dissenting judges stated that it was contrary to business sense and to all obligations of fairness to say that the developer had to meet the pre-conditions to the upzoning, but that the upzoning was not protected in any way from unilateral retraction; while
- the four judges in the majority held that the key was what the legislation said. Municipal legislation in British Columbia gave council a broad power to zone land as it wished, and that power was not, and could not be, limited or fettered.

The decision left open the prospect of a suit for unjust enrichment, in which the developer could seek to recover the extra \$1 million it had spent to construct the park, seawall and other

amenities. The second court challenge then proceeded.

The British Columbia Court of Appeal's decision on that claim, which was more or less concurrent with the introduction of the *Community Charter*, decided the matter in the city's favour. The court held that the developer had contracted to give the amenities in order to obtain the upzoning, and that the upzoning had occurred. Beyond that, the core of the matter was the fact that:

"the Legislature had conferred upon [the city] the power to do the act of downzoning. The bylaw is of the same force and effect as if it had been enacted by the legislature itself and provides a complete answer to any and all claims arising out of it."

British Columbia on the National and International Stage

From the perspective of investment, British Columbia is one of many places where money can be invested. Potential investors can readily choose, for example, from ten provinces, as well as 50 states in the United States and 30 states in Mexico.

In terms of how British Columbia has been faring in that context, it can be noted that:

- the BC Progress Board ranked British Columbia fourth in 2001 among the provinces in the level of real GDP per capita, and tenth in the growth of real GDP per capita. Over the ten year period from 1992 to 2001, BC was last in the country; and
- an April 2003 Fraser Institute report on economic prosperity concluded that Ontario and

Alberta are outperforming all other provinces by a substantial margin.

Conclusions

Financial and Regulatory Impact

The variable tax rate example, and the *PNI* case, both show the tendency of broad powers to play out in a fashion that tends to:

- benefit the interests of the majority at the expense of the interests of the minority; and
- benefit residents collectively at the expense of businesses.

The Role of the Courts

The *PNI* decision also shows that from the courts' perspective:

- the court will put a limit on, or provide a remedy for, exercises of municipal powers where and to the extent that the legislature includes one in the legislation; and
- if the legislature has given municipalities broad powers, it must intend councils to be able to exercise those powers.

These principles of course extend beyond exercises of land use powers to the whole range of municipal powers.

The Ballot Box

The ballot box generally will not provide a remedy to deal with these impacts.

The resident voters that pressed for the regulatory and financial bylaw outcomes noted will support the council. If those outcomes do not occur, councillors risk not being re-elected.

Economic Impact

Investment, on the other hand, "votes" by moving to where it is most welcome.

While the "spheres of jurisdiction" in the Community Charter are the most broadly stated in the country, the balancing mechanisms noted above or variants of them, have generally not been incorporated into the Community Charter

The minister has expressed the view that the investment climate is a function of government attitudes at all levels, and that there is a desire to encourage all governments to reflect positive attitudes towards investment in their practices, without restricting their ability to govern appropriately

Given that the broadening and enhancement of municipal powers in the *Community Charter* is not accompanied by a balancing increase in limits and protections, one might anticipate that the legislation will play out in individual cases in a way that will negatively impact the investment climate in the province.

Alternative Approaches

Checks and Balances in Municipal Legislation in other Provinces

Our October 2001 *Legal Update* reviewed the mechanisms that exist in other jurisdictions to provide checks and balances. As noted therein, eight of the provinces subject various municipal decisions to overview by an appeal board, the role of which is to provide a counter balance to the weight of resident voter pressures and take broader interests into account. In addition:

- Ontario has a much more circumscribed business regulation power, which includes limits on the permitted purposes of business regulation, the scope of business regulation and the types of businesses that can be regulated, as well as notice and hearing requirements;
- Ontario has more restrictions governing how fees can be imposed; and
- Alberta has a *Bill of Rights*, and a *Personal Property Bill of Rights*.

Checks and Balances in the *Community Charter* as Enacted

While the “spheres of jurisdiction” in the *Community Charter* are the most broadly stated in the country, the

balancing mechanisms noted above, or variants of them, have generally not been incorporated into the *Community Charter*. Indeed, section 4 of the *Community Charter* tilts the balance even further in favour of resident voter pressures, by directing that the powers in the charter “must be interpreted broadly in accordance with... municipal purposes.”

The *Community Charter* did add requirements for:

- an annual Town Hall meeting;
- a minimal form of notice and public input prior to the passing of business regulation and licensing bylaws; and
- the municipality to provide, on request, a statement of council’s reasons for the bylaw it has passed.

None of these provisions, however, in any way restrain the scope of local government powers, or establish bottom line limits to protect individuals, including individual businesses.

Approaches to Achieving the Province’s “New Era” Goals

Underlying the debate regarding the *Community Charter* are some differing perspectives.

Perspectives

The minister has expressed the view that the investment climate is a function of government attitudes at all levels, and that there is a desire to encourage all governments to reflect positive attitudes towards investment in their practices, without restricting their ability to govern appropriately.

The *Community Charter* Business Coalition has acknowledged that

broader municipal powers will significantly assist individuals, and assist in enabling investment, in those situations where private objectives overlap with municipal objectives. This relaxing of constraints is an important benefit of the *Community Charter*.

At the same time, however, the Business Coalition has expressed concern about the effect of the *Community Charter* where group and individual interests differ. When a specific case arises, resident voter pressures will often be a more important factor, given the nature of municipal accountability, than the impacts on a single business or Provincial government encouragement to be friendly to business generally.

The result is that the substantial investments businesses have made, or might otherwise make, are at risk. The individual cases that will come before council will typically involve one individual business versus multiple voters. The municipal decisions that will result will however together impact the investment climate.

NIMBY Conflicts

When the *Community Charter* went to committee, the minister was presented with a theoretical example involving a longstanding business after a significant new residential development has been approved across the street. The new residents started making “not in my back yard” objections to the business’ longstanding practices (operation impacts, delivery times, and the like). The minister’s comments included that the courts could be expected to intervene to ensure that the municipal response was reasonable.

There would not seem to be much room for that to occur under the *Community*

Charter. First, the powers set out in sections 8(3)(h) and 64(b) of the *Community Charter* are extremely broadly worded. Municipalities are given the power to regulate, prohibit and impose requirements in respect of effectively any matter that is liable to disturb individuals or the public.

Second, the interpretive principles, and the *PNI* case, provide that the court is to defer to municipal decisions that are made within the terms of the powers.

Taxes and Charges

A question was also raised in the House as to whether the minister expected the broadened powers to be exercised in the way that has resulted in the substantial divergence between business taxes and residential taxes in British Columbia.

The minister responded that giving municipalities additional taxing tools would relieve the pressure on property taxes.

The Business Coalition is concerned that adding charging powers may well simply make the situation worse. First, the variable tax rate (and the *PNI* case) is illustrative of how broad powers tend to be exercised, given the institutional pressures on local government. Second, the *Community Charter* broadens the power to charge fees, and the institutional pressures noted may well result in the new fees being focused more on business than on residents. Finally, new taxing powers, and a “fees as a tax” provision that allows an expansion in the gap between taxes on residents and business, could make matters worse still.

Possible Mechanisms

The Business Coalition has put forward proposals that have included putting more balance into the interpretive

The objective is to achieve a balance in municipal legislation that does not intrude upon the role of municipal government in the vast majority of situations, but that still provides mechanisms to prevent the kinds of extremes that can significantly damage investor confidence

principles sections, adding balancing restraints on the charging powers, adding a form of oppression remedy, and so on.

The objective is to achieve a balance in municipal legislation that does not intrude upon the role of municipal government in the vast majority of situations, but that still provides mechanisms to prevent the kinds of extremes that can significantly damage investor confidence.

One opportunity for addressing these issues further would be as part of the tax and charging package that is anticipated to come forward this fall. Issues of financial and regulatory burden are of course significantly interconnected.

Additional Information, and Opportunities for Feedback

You can obtain copies of our previous *Legal Updates* on the *Community Charter*, and related publications, by contacting us, or by checking the *Community Charter* link on our website.

Go to www.mccarthy.ca, and click on “media room.” Then scroll down to

the link relating to the British Columbia *Community Charter*. Alternately, click on “publications” and enter keyword “community charter”. The website contains a number of comprehensive analyses of the *Community Charter*, as well as other materials.

From time to time we will post updates on the link.

You can also provide comments to communitycharter@mccarthy.ca.

It is to be noted that each court decision referred to is decided on its particular facts, and application to any other situation must be considered in its complete context. There may also be protective measures that individual parties can take in individual cases.

Every effort has been made to ensure the accuracy and timeliness of this publication, but the comments in it are necessarily of a general nature. Clients are urged to seek specific advice on matters of concern and not to solely rely on the text of this publication.

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