

THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Westcoast Landfill v. CVRD***,
2009 BCSC 53

Date: 20090130
Docket: S45757
Registry: Nanaimo

Between:

Westcoast Landfill Diversion Corp.

Plaintiff

And

**Cowichan Valley Regional District, Richard Hughes, John Middleton,
Lorne Duncan, Derek York and Frank Raimondo**

Defendants

Before: The Honourable Mr. Justice Shabbits

Reasons for Judgment

Counsel for the Plaintiff:

R.S. Tindale, J.M. Duncan

Counsel for the Defendants:

D.E. Gruber, R.W. Millen, J.L. Oliver

Date and Place of Trial:

July 31, August 1, 2, 3, 7, 8, 9, 10, 13, 14,
15, 16, 17, 20, 21, 22, 23, 24, 27, 28,
September 4, 17, 18, 19, 20, 21, 24, 25, 26,
27, 28, October 9, 10, 11, 12, 15, 16, 17,
18, 19, 22, 23, 24, 25, 26, 29, 30, 31,
November 1, 2, 5, 6, 7, 8, 9, 2007, January
29, 30, 31, February 1, 4, 5, 6, 7, 8, 11, 12, 13,
June 23, 24, 25, 2008
Nanaimo, B.C.

Introduction

[1] The plaintiff (“Westcoast”) is a British Columbia Company. In 1999 and 2000, Westcoast constructed a Herhof in-vessel composting facility within the Cowichan Valley Regional District (“CVRD”). The venture was a financial disaster. Westcoast now seeks to recover from CVRD all of what it lost and other damages, including loss of profit and punitive damages.

[2] Westcoast has discontinued its claim as against the five personal defendants. Westcoast now proceeds against CVRD alone for negligent misrepresentation, for breach of contract, for unlawful

interference with economic relations, and for negligence. Westcoast claims punitive damages because it alleges that CVRD acted in bad faith.

[3] CVRD denies that it entered into an agreement with Westcoast and CVRD denies that it made any misrepresentations to Westcoast. Although CVRD concedes that the actions of its personnel minimally interfered with Westcoast's economic relations, CVRD denies that it acted unlawfully or that it intentionally interfered with Westcoast's economic relations. CVRD also denies that it is liable to Westcoast in negligence. Furthermore, CVRD submits that Westcoast is advancing claims that are not actionable against it and that Westcoast is advancing claims that are unsound in law. Finally, CVRD submits that it acted in the public interest, in good faith and without malice.

[4] A list of acronyms used in these reasons or used in the exhibits referred to in these reasons is at Appendix A.

The Plaintiff

[5] 571873 B.C. Ltd. was incorporated on September 17, 1998 under the *Company Act* ^[1] of British Columbia.

[6] 571873 B.C. Ltd. changed its name to Westcoast Landfill Diversion Corp. on July 5, 1999.

[7] Westcoast Landfill Diversion Corp. changed its name back to 571873 B.C. Ltd. on May 9, 2000.

[8] Meadowlark Technologies Inc. was incorporated on December 13, 1999 under the *Company Act* of British Columbia.

[9] 597427 B.C. Inc. was incorporated on December 13, 1999 under the *Company Act* of British Columbia.

[10] 597427 B.C. Inc. changed its name to Westcoast Landfill Diversion Corp. on May 15, 2000.

[11] This proceeding was commenced on July 10, 2003 by Westcoast Landfill Diversion Corp. incorporation number BC0597427.

[12] 571873 B.C. Ltd. incorporation number BC0571873 and Westcoast Landfill Diversion Corp. incorporation number BC0597427 were amalgamated as one company under the *Business*

^[2]
Corporation Act on March 23, 2006 under the name Westcoast Landfill Diversion Corp. and under the amalgamation (incorporation) number BC0752546.

[13] Westcoast Landfill Diversion Corp. incorporation number BC0752546 and Meadowlark Technologies Inc. incorporation number BC0597425 were amalgamated as one company under the *Business Corporation Act* on March 28, 2007 under the name Westcoast Landfill Diversion Corp. and under the amalgamation (incorporation) number BC0786784.

Westcoast's Principals

[14] Mr. Denis Maurice Cuerrier, Ms. Marie Claude Boucher and Mr. Alan Brooks were principals of Westcoast or of one or more of its antecedent corporations.

Denis Maurice Cuerrier

[15] Mr. Cuerrier was born on May 10, 1964. ^[3] He received a bachelor's degree in Economics from the University of Ottawa in 1986. He obtained employment with the Canadian Dairy Commission

in human resources activities in 1986. By 1988 he was undertaking assignments for Agriculture Canada within its human resources department as a human resources officer. He advanced in that department and was a senior human resources officer by the time he left Agriculture Canada in 1992.

[16] After leaving Agriculture Canada, Mr. Cuerrier became manager of human resources at Energy, Mines and Resources Canada. He described his responsibilities as manager of human resources at Energy, Mines and Resources. It was a senior position. He was responsible for 35 employees and for a budget of close to one million dollars. Following an amalgamation of departments in 1995, Mr. Cuerrier received a buy out and severance package. Under the terms of his buy out, Mr. Cuerrier was not allowed to work for the Federal Government for two years.

[17] Prior to leaving in 1995, Mr. Cuerrier was involved in the organization of a trade fair. There he met Ms. Boucher and Mr. Brooks. They were there because HUWS was participating in the event. After the buy out, Mr. Cuerrier moved to Victoria to do consulting work, but also became a commissioned sales agent for HUWS.

[18] Mr. Cuerrier explained that he had received training in Canadian securities, and in real estate. In Victoria he did contract consulting work for the Provincial Government. From 1995 to 1997 he sat on a composting committee with the CRD. He said that one of the purposes of that committee was to assess why a composting facility had not yet been constructed within the CRD.

[19] Mr. Cuerrier went to trade shows, participated in conferences and seminars, and generally attempted to become knowledgeable in waste disposal. One of his objectives was to sell facilities for HUWS. He said that although he generated interest from municipalities, he did not complete any sales. Mr. Cuerrier testified that by early 1998 he understood waste management in the CRD and he decided to locate a composting plant in the CRD.

Marie Claude Boucher

[4]

[20] Ms. Boucher testified that she is 59 years of age . She graduated from the University of Ottawa with a Bachelor of Arts degree, and received a law degree from the University of Manitoba in 1972. She articulated in Manitoba for six months and was then employed there as a lawyer for a further six months. She joined the Department of Justice in Ottawa in 1973. While at the Department of Justice, she worked with the Privy Council office drafting regulations and statutes for the Government of Canada and for its various departments. She gave opinions on interpretations of regulations and statutes to government departments and to the Privy Council.

[21] She transferred to the Department of Supply and Services where she was assigned as legal counsel to the Canadian Commercial Corporation under the administration of the Department of Supply and Services. She handled bids received and prepared bid proposals on behalf of Canadian Corporations to bid on foreign contracts, usually with foreign governments. She did that until 1978, when she left to work as a corporate lawyer with Magna International. At Magna she handled government programs. She prepared proposals for the Government of Canada and acted for Magna in its negotiations with the Federal Government. In 1984 she went to work as a broker for Burns Fry Limited in Toronto. She worked as a securities broker until 1988 when she set up a wood recycling plant with her brother-in-law within the regional municipality of Peel. Ms. Boucher worked with Mr. Allan Brooks in the wood recycling plant.

[22] In 1991 Ms. Boucher travelled to Germany with Mr. Brooks and became familiar with Herhof composting technology.

[23] After returning from Germany, Ms. Boucher changed the name of her company from J.C. Environmental to HUWS Corporation. She explained that that was an acronym for Herhof Urban Waste Systems. She thought the name change was made about 1994 or 1995. After that Ms. Boucher became involved in the promotion of Herhof's composting technology in North America through her own corporate vehicle which, in turn, had a licensing arrangement with Herhof of Germany. Ms. Boucher said that by 1994 or 1995 HUWS had purchased exclusive rights to market

the Herhof composting system in Canada. She said that she negotiated an option on rights for the whole of the United States by about the end of 1995.

Allan Ward Brooks

[24] Mr. Brooks said at trial that he was 44 years of age and resident in Duncan. [5] Mr. Brooks obtained a degree in Chemical Engineering in 1997 from the University of Waterloo. He was in a co-op program at the University of Waterloo, where he received a broad range of training experience, including employment in plastics testing, developing toners for copy machines, and upgrading computerization of sensors at a petroleum refiner and at a paper mill.

[25] In 1989, Ms. Boucher hired Mr. Brooks for employment at the waste wood recycling project in which she was involved. Mr. Brooks was employed for about a year to help complete its construction.

[26] Ms. Boucher then hired him again for her company, J.C. Environmental. Mr. Brooks travelled with Ms. Boucher to Germany and over a period of time became familiar with waste management and Herhof's in-vessel composting technology.

[27] Mr. Brooks was involved with a J.C. Environmental project in the Region of Peel, Ontario, in which J.C. Environmental installed two of the Herhof composting biocells. That project finished in the mid-90s. Mr. Brooks became involved in various promotional activities for his employer company which eventually changed its name to HUWS. Mr. Brooks became its vice president. He said that Ms. Boucher dealt with financial matters and that he dealt with technology issues. He was not a shareholder of HUWS.

[28] Mr. Brooks also testified that he met Mr. Denis Cuerrier at the job fair in Ottawa and that Mr. Cuerrier became a commission sales representative for HUWS. Mr. Brooks travelled to Western Canada on more than one occasion and involved himself in various proposals being advanced by Mr. Cuerrier.

[29] Mr. Cuerrier showed Mr. Brooks the Cobble Hill site that is the subject of these proceedings in about May 1999. Mr. Brooks then re-attended in British Columbia in connection with the Cobble Hill project at about the end of October. He said that Meadowlark Technologies Inc. was incorporated around the end of 1999 as a vehicle for construction of the Cobble Hill plant. Mr. Brooks said that he was the majority shareholder of Meadowlark. Mr. Brooks became involved in the Cobble Hill project on a full-time basis in about February 2001.

The Defendant

[30] CVRD is a regional district incorporated by Letters Patent pursuant to the *Local Government Act* of British Columbia [6]

[31] CVRD has a professional staff.

[32] There are four municipalities and nine electoral areas within the CVRD.

[33] The municipalities are the City of Duncan, the District of North Cowichan, the Town of Lake Cowichan and the Town of Ladysmith.

[34] Each of the nine electoral areas is identified by a letter and by a geographical name or names.

[35] The plaintiff constructed its facility within Area C, Cobble Hill.

[36] There are fifteen directors on the CVRD Board. There is one director elected from each electoral area and six directors who are appointed by the municipalities.

[37] There were minutes kept of all board meetings. The minutes were available to the public

(other than in camera minutes).

[38] Mr. Frank Raimondo was the Chief Administrator of CVRD from 1983 until his retirement at the end of December, 2007. Mr. Raimondo attended meetings of the board, serving as advisor to the board chair.

[39] Mr. Raimondo gave evidence explaining CVRD's structure and its operation while he was Chief Administrator. He testified that regional districts are quite different than are other local government municipalities.

[40] For example, the chief executive officer of a municipality is a mayor elected at large. The chairperson of the board of a regional district is elected by the directors of the board. The chairperson remains the director or representative of an electoral area or municipality.

[41] Directors of a regional district do not always have a common interest on any given issue. A common interest on issues is typical for the members of a municipal council whose members are elected at large.

[42] Mr. Raimondo said that the elected area directors of a regional district have more autonomy and exercise more independence than do council members of a municipal council.

[43] CVRD had standing committees established by bylaw. A committee established by bylaw had any authority that may have been delegated to it by the bylaw.

[44] The chairperson of CVRD established other committees by announcing them. The number of those committees and their names and their mandates and their membership changed from year to year. Those committees were advisory to the board. They made recommendations to the board. They had no delegated authority. The chairperson could not delegate board authority.

[45] One of CVRD's committee's in 1999 was CRRC. CRRC's authority extended only to making recommendations to the board for its consideration. The general terms of reference of CRRC were:

To review composting and recycling initiatives and develop a strategy for the board's consideration on the implementation, regulation and monitoring of the processing of organic material and recyclables.

[46] The members of CRRC for 1999 were directors J. Clarkson, J. Allan, R. Hughes, R. Hutchins, M. Marcotte and D. Robinson. Mr. Clarkson was chairperson.

[47] Mr. Raimondo testified that he had twelve 12 department heads who reported to him. Each of them was responsible for a department. The departments included engineering services and development services. Each department head was responsible for the committee(s) whose mandate fell within their department. Each department head attended committee meetings serving their role of advisor to the committee chair. Mr. Raimondo also frequently attended committee meetings as an observer.

[48] There were minutes kept of all committee meetings. The minutes were available to the public (other than in camera minutes).

CVRD's Personnel

[49] Mr. Frank Raimondo was the Chief Administrator of CVRD from 1983 until his retirement at the end of December, 2007.

[50] Mr. Derrick Stanley York was the manager of engineering services. He is now retired.

[51] Mr. Brian William Dirk Dennison was the deputy manager of engineering services. He is now its manager.

[52] Mr. Thomas Robert (Tom) Anderson is the manager of development services.

[53] Mr. Robert Alan (Bob) MacDonald is the deputy manager of solid waste and environment.

[54] Mr. Richard Hughes was the elected director for Area C, Cobble Hill from December of 1992 to November of 2002.

[55] A number of CVRD's former or present directors testified at the trial. Those directors included Mr. Hughes, Mr. Joseph Glendon (Joe) Allan, Mr. John Clarkson, Mr. Robert Roy (Rob) Hutchins, Ms. Mary Marcotte and Mr. Donald Harvey (Don) Robinson.

The Plaintiff's Final Submissions

[56] Westcoast particularized its claims in its pleadings. Its pleaded claims are noted in the introduction of these reasons.

[57] In its final submissions, Westcoast summarized its claims as follows:

Negligent Misrepresentation

1. This claim focuses on the representations made by the CVRD that they would do the following:
 - a. designate the plaintiff and IBR as the only authorized designated sites to accept organic waste,
 - b. implement and enforce a ban on industrial, commercial and institutional organic waste and prohibit its facilities from accepting such waste coincidental with the opening of the plaintiff's facility.
 - c. implement a prohibition-style ban on yard and garden waste and enforce the ban coincidentally with the opening of the plaintiff's facility, and finally
 - d. ensure through what has been characterized as an Administrative Agreement that the waste would flow to Westcoast.

Negligence

2. This claim deals primarily with the defendant's failures to enforce the bans in a timely and effective manner. Promises were made to Westcoast regarding the implementation of bans before the plant was built. These same promises were made again during the period of construction to the plaintiff and the plaintiff's financiers. The promises made were essentially that CVRD would ban and refuse to accept ICI organics and that CVRD would ban and refuse to accept yard and garden waste. A system of enforcement was enacted by bylaw in late 2000 for this purpose. With respect to ICI, the material was prohibited by the bylaw and a set of policies were put in place to govern enforcement. These policies of enforcement were ignored and were negligently applied when they were followed which resulted in clear loss of ICI feedstock by the plaintiff. With respect to the yard and garden, the material was never termed as "prohibited". Instead, it was classified as recyclable. As a result, yard and garden continued to be deposited at CVRD transfer stations and "small loads" could be deposited with normal garbage again resulting in a clear loss of potential feedstock by the plaintiff.

Interference with Economic Relations

3. This claim deals with the actions of CVRD to stop Westcoast from accepting biosolids despite the fact that Westcoast had the appropriate zoning in place to

do so. These include the threatened down-zoning of Westcoast, the contacting of the Capital Regional District and having it suspend business dealings with Westcoast for a period of time, the implementation and cancellation of the 90 day Pilot Project with the District of North Cowichan and the various acts of defamation in regional newspapers and one town hall meeting. Most if not all of this occurred because of alleged odour issues which have not been proven and even though the CVRD clearly knew it had no jurisdiction over such matters.

Breach of Contract

[58] The original Statement of Claim was filed on July 9, 2003. It does not directly plead that a contract was concluded between Westcoast and CVRD. However, it does plead that CVRD [10] represented it would do specific things to ensure Westcoast's financial viability.

[59] On August 8, 2003, Westcoast delivered particulars of the original Statement of Claim. [11] In those particulars, Westcoast claimed that it had been promised a commercial organics ban and a yard and garden waste contract in exchange for constructing the facility and fixing a tipping fee at \$5.00 below that charged at Bings Creek (one of CVRD's waste facilities). Westcoast did not claim that CVRD had promised authorized designation status nor did it claim that Westcoast had promised a total organics ban.

[60] An Amended Statement of Claim dated June 8, 2003 was filed on July 9, 2003. [12]

[61] In paragraph 40 of the Amended Statement of Claim Westcoast claimed that after April 1999, Hughes, York and Raimondo, on behalf of CVRD, agreed to do a number of things. In paragraph 42, Westcoast alleged that it relied on those commitments in making the decision to locate its facilities in CVRD.

[62] In paragraphs 148 and 149 of the Amended Statement of Claim, Westcoast claimed that Hughes, York and Raimondo, with the knowledge of and on behalf of CVRD, intentionally, recklessly, dishonestly or negligently made "the aforesaid commitments", and that the commitments constituted a collateral warranty or collateral contract.

[63] Westcoast's Second Further Amended Statement of Claim was filed on July 14, 2006. [13] The Second Further Amended Statement of Claim replaced the Amended Statement of Claim. Some, but not all, of the allegations in paragraphs 40 and 41 of the Amended Statement of Claim are repeated in paragraph 32 of the Second Further Amended Statement of Claim. However, paragraph 32 refers to the communications on which it relied as representations, not agreements.

[64] Paragraphs 55 to 60 of the Second Further Amended Statement of Claim relate to Westcoast's breach of contract claim.

[65] In paragraph 55 Westcoast pleads that an agreement was formed between CVRD and Westcoast in or about September 1999. Westcoast pleads that in consideration for it agreeing to build, own and operate the composting facility, and in consideration for it agreeing to cap its tipping fee for organic waste at \$5 less than the amount charged from time to time by CVRD at its waste transfer station, CVRD, in or about September of 1999 agreed (a) to designate Westcoast as one of two approved facilities for receiving and composting of organic waste, (b) to implement and enforce a ban on the dumping of yard and garden waste and ICI waste at all facilities other than Westcoast, and (c) to pay a reasonable tipping fee to Westcoast for its receipt of organic materials.

[66] Paragraphs 56, 58 and 59 of the Second Further Amended Statement of Claim particularize breaches of that contract.

[67] Mr. Cuerrier testified that Westcoast only decided to embark on the project after CVRD said it

would take specific measures to ensure a flow of feed stock to Westcoast's facility. His evidence in respect of a contract was not entirely clear. He said there was no "formal agreement" but there were representations that if "he" built, CVRD would do what it said it would do. ^[14] Ms. Boucher testified ^[15] that there was no signed legal agreement but that obligations arose outside of a legal agreement.

Ms. Boucher testified Westcoast did agree to a tipping fee of \$5 less than that of CVRD. She also testified that she understood that administrative agreements between CVRD's municipalities were still required. She said they were administrative acts that did not involve CVRD's board, although she also [16] testified that she did not know what such administrative agreements entailed. Ms. Boucher did say that she understood those administrative acts would ensure the flow of feedstock to Westcoast.

[68] Westcoast pleaded that the contracts were concluded with statements made by Mr. Hughes and Mr. Raimondo. Westcoast submitted that the minutes of CRRC meetings were evidence contracts had been concluded. The CRRC meetings that are of relevance are those of September 13, [17] and September 20, 1999. [18]

[69] Mr. Hughes, Mr. Raimondo, Mr. York and Mr. Dennison all deny that they had agreed to a contract for the CVRD.

[70] On March 22, 2000, Mr. Cuerrier wrote Ms. Echle at BDC stating: [19]

The current situation is such that the Cowichan Valley Regional District (CVRFD) is proceeding towards implementing an organic ban for the Commercial and Institutional sector. The organic ban will benefit WLDC directly by guaranteeing a flow of material to the site and will increase the margin of profitability. Having the Cowichan Valley Regional District implement a ban means that haulers will be oblige (sic) to bring the organic material to WLDC instead of the transfer station. The tipping fee cost for WLDC will no longer be a mean (sic) of attracting haulers to the facility. The ban will enable WLDC to increase the tipping up to \$85/tonne instead of \$65/tonne. This represents an estimated increase in profitability of 24%.

[71] This letter was written during construction of the facility. That was after the date of the pleaded agreement, and before CVRD is alleged to have breached it. This letter belies Westcoast's pleaded allegation that it had agreed to a fixed tipping fee. Clearly, Westcoast did not consider it was bound by a tipping fee agreement. I infer that was because it had not agreed to a tipping fee. This letter also suggests that it was a lower tipping fee that was to attract haulers to the facility, and not an agreement between Westcoast and CVRD.

[72] Westcoast pleads that CVRD agreed to implement and enforce a ban on the dumping of yard and garden waste and ICI waste at all facilities other than Westcoast's facility. [20] Such an agreement is entirely inconsistent with Westcoast being permitted to charge whatever tipping fee it wished. In my opinion, even if CVRD could have enacted legislation requiring its residents to dispose of organic waste only at Westcoast's facility (and Mr. Raimondo doubted that it could) it is inconceivable that either CVRD's staff or its elected representatives would have agreed to implement and enforce legislation requiring CVRD residents to deliver waste to Westcoast at a tipping fee left to Westcoast's discretion.

[73] The **Municipal Act** R.S.B.C. 1996 c. 323 applied to CVRD in 1999. This act was renamed the **Local Government Act** effective June 12, 2000.

[74] Section 174 of the **Act** provides that the governing body of a regional district is its board, and that the powers, duties and functions of the regional district are to be exercised and performed by its board unless the **Act** or any other act provided otherwise.

[75] The **Act** allows CVRD to authorize persons to enter into contracts on its behalf by resolution of the board pursuant to s.791. Resolutions must be decided by a majority of the votes cast. Section 791(7)(e) provides that resolutions and bylaws authorizing persons to enter into contracts on behalf of the regional district must be in accordance with s.791(6), which relates to the voting entitlements of board directors.

[76] CVRD did not pass any resolutions or enact any bylaw authorizing anybody to enter into any contracts with Westcoast on its behalf. Neither Director Hughes nor Mr. Raimondo nor Mr. York nor Mr. Dennison could bind the board or CVRD. CRRC was an advisory body. It could make recommendations to the board. It could not bind the board or CVRD.

[77] In ***Pacific National Investments Ltd. V. Victoria (City)***, (2000) 2 S.C.R. 919, LeBel J. writes for the majority of the Supreme Court of Canada. At paragraph 68 he states:

[N]o indoor management rule protects someone dealing with a municipality from having to ensure that proper procedures were followed with respect to the contract, which is quite different from the situation with a private corporation; . . . The record shows that as an experienced developer, PNI (the plaintiff) was aware of the special legal and political risks attendant on dealing with a municipality. Developers choose to take those risks.

[78] ***Pacific National*** stands for the proposition that legislative powers are an integral part of government that municipalities cannot give up. One municipal council cannot fetter the discretion of successor councils to engage in the legislative process without undue influences. In ***Pacific National*** the majority declares that legislative powers are entrusted to municipalities for the public good and that municipalities must always be in a position to exercise them as the public good requires. A municipality may engage in business and proprietary contracts, but it cannot agree to terms that fetter

[\[21\]](#)

its legislative power.

[79] The British Columbia Court of Appeal arrive at the same result earlier in ***Vancouver v. Registrar, Vancouver Land Registration District***, (1955) 2 D.L.R. 709, in which Davy, J.A., writing for the majority of the court, states that any contract entered into by a municipality which covenants in advance that its council will pass a bylaw involving the exercise of discretion is contrary to public policy and not enforceable. He clarifies that such a contract is illegal because it restricts the freedom of the individual councillor to decide the merits of the bylaw solely on the relevant circumstances as the law requires.

[80] If CVRD had entered into an agreement; (i) to enact a bylaw banning the delivery of commercial organics to Bing's Creek; or (ii) to pass a bylaw prohibiting the dumping of yard and garden waste at all facilities other than those of Westcoast and IBR, or (iii) to enact a bylaw or pass a resolution designating Westcoast as one of only two authorized sites to receive organic wastes, those agreements would have fettered the discretionary legislative powers of the directors. The residents of CVRD, including those in its municipalities, were entitled to have their legislators determine issues relating to the disposal of waste with regard to the public good and without regard to outside influences. Neither staff nor any individual director had the power to decide for the directors or for the board what legislation should be enacted.

[81] I am of the view that Westcoast's claim for damages for breach of contract cannot succeed for three reasons.

[82] First, the alleged contracts, if they were concluded, were *ultra vires* (or illegal) and of no effect because there was no bylaw or resolution of CVRD authorizing CVRD or any delegate to enter into them on its behalf.

[83] Second, even if the board had agreed to enact and enforce bans and even if it had agreed in advance to the designation of authorized sites, the agreements would not have been enforceable because they would have been an illegal fettering of the discretion of CVRD's board members to decide later on what bylaws or resolutions should be enacted and maintained in force.

[84] Third, in my opinion, Westcoast did not establish on a balance of probabilities that it and CVRD had entered into a contract. I find that there was no contract.

[85] I dismiss Westcoast's claim for damages for breach of contract.

Odour

[86] Odour is generated when organic materials decompose. The composting process was described by Westcoast in its proposal to CVRD, [22] and by Mr. Al Spidel in his Compost Facility Review of Westcoast's facility. [23]

[87] Compost odour is of concern to the composting industry and to municipal planners and to government. The smell can become a nuisance to neighbours of composting facilities.

[88] CVRD had encountered earlier odour difficulties with Hydroxyl, a septic sludge composting facility that had been located in the Koksilah Industrial Park near Duncan. Mr. Hughes testified that CVRD's enactment of certain zoning bylaw amendments and the creation of CRRC were related to CVRD's goal of promoting composting and recycling in a non-polluting and innocuous manner.

[89] Westcoast was well aware of compost odour concerns. Odour control was a feature of the Herhof system. Mr. Cuerrier had prepared a number of proposals responding to municipal requests for proposals. The proposals stressed that the Herhof system that was distributed by HUWS [24] eliminated problems with compost odour. Westcoast's proposal to CVRD included the claim that: "Odour control is the key success factor of the Herhof composting process."

[90] Westcoast's response to CVRD's call for proposals was completed in May, 1999. [25] It states: [26]

The proposed Herhof facility will receive and pre-process all organic material from residential and IC & I in an enclosed building. The building's negative atmospheric pressure retains any possible odours from incoming waste within the building. This eliminates potential odours from leaving the site during the receiving and shredding stages. Equipment within our facility are electrically powered, thereby reducing both noise and air pollution from the facility.

[91] The proposal also states that one of several special vector control measures would be that all incoming waste "will be delivered within the pre-processing building." [27]

[92] The system that Westcoast was then proposing was broken down into nine steps. Step two relates to the receiving bunker and it is described in the proposal as follows:

The source separated organic material is weighed at the scale and delivered to the facility, where the waste is dumped into an enclosed concrete bunker. The facility's door would then be closed to maintain the building's negative pressure and any odours.

[93] After Westcoast's facility opened, its composting activities led neighbours to complain about noxious odours. There were complaints to Mr. Hughes, to CVRD, and to MWLAP (later renamed MOE). Some complainants demanded that steps be taken to eliminate the odours.

[94] A good portion of the evidence at this lengthy trial related to odour and leachate issues involving Westcoast's facility.

[95] For the most part, Westcoast denied that there was a compost odour problem. Ms. Boucher, Mr. Cuerrier and Mr. Brooks all minimized odour concerns. Ms. Boucher alleged that Mr. Hughes and CVRD and its staff invited odour complaints, and that publicity about unwarranted complaints generated other unfounded allegations. Westcoast alleged that some of the offending odours were not caused by its operations at all, but were caused by neighbouring operations. Overall, Westcoast submits that the odour difficulties with their facility were transitory and addressed by it in a timely and appropriate manner and of no real account.

[96] Westcoast submits that odour issues were under the jurisdiction of MWLAP (now MOE) and that CVRD was without authority to deal with the odour complaints. Much of CVRD's activity in respect of compost odour complaints was therefore tortuous, according to Westcoast.

[97] For almost all of the period of time relevant to this proceeding, Section 799 of the *Municipal Act* provided as follows: (1) A regional district may, by bylaw, establish and operate one or more of the following extended services: (b) control of pollution, nuisances, . . . unsightly premises, unwholesome or noxious materials, odours.

[98] CVRD did have the jurisdiction to enact and enforce a bylaw controlling odour. Its difficulty might have been a practical one—that of crafting a bylaw that was certain and capable of enforcement.

[99] Section 799 of the *Local Government Act* was repealed and replaced by the *Community Charter Transitional Provisions, Consequential Amendments and other Amendments Act*, S.B.C. 2003, c. 52, s. 353.

[100] The *Environmental Management Act* was enacted by S.B.C. 2003, c. 53. That legislation allowed CVRD to enact a bylaw that required this facility to make physical changes to address odour and leachate concerns.

[101] Exhibits 506, 507, 508 and 509 record an extensive history of the escape of compost odour from Westcoast's facility. [\[28\]](#)

[102] Exhibits 506 and 508 record complaints received by MWLAP. Exhibit 506, Tab 85 summarises 49 odour complaints received by MWLAP from June 12, 2002, to December 11, 2003. Those complaints describe the odour emanating from the facility as smelling like “dead animals” or “rotten eggs” or “septic” or “sewage” or “rotten”.

[103] Exhibits 507 and 509 record complaints received by CVRD. Exhibit 507 Tab 12 summarizes odour complaints received by CVRD between November 29, 2000 and September 4, 2001. There were 21 complaints, including two complaints from a neighbouring greenhouse operation that on two occasions one or more workers were sent home because of the effect of the odour from Westcoast facility.

In its written submissions, CVRD said that a total of 194 complaints were recorded by CVRD and MOE from the date of Westcoast's opening to mid-2005.

[104] The evidence at trial as to compost odour included that of Cindy Little. Ms. Little lives with her husband and two children at a residence about one-quarter of a mile from Westcoast's facility.

[105] Ms. Little testified that from late 2001 or early 2002 she smelled very strong bad rotting compost smells that she said came from Westcoast's facility. She said she and her husband complained to CVRD and MOE.

[106] Ms. Little said that nothing happened as a result of her complaints, and so she stopped filing them because it seemed pointless. Ms. Little testified that after Westcoast stopped its operations the odours became non-existent.

[107] Catherine James testified that she lives with her husband and two children at a site about half a kilometre away from the facility. Ms. James said that from "around 2000", Westcoast's operations resulted in their being "stunk out" of their yard. She described the smell as being "like someone had vomited up sour milk" and testified that the smell was not there before Westcoast began its operations.

[108] She said the offensive odour was often about in the evening and during the night. She said they made complaints to CVRD and MOE, but nothing happened. Like Ms. Little, Ms. James said she eventually stopped making complaints because she felt that nothing was ever going to be done about them.

[109] Ms. James said that after reading a newspaper article in which a Minister of the provincial government said that complaints were decreasing in number, she wrote a letter to the editor in which

[\[29\]](#)

she said this:

I can tell you right now, complaints likely have dropped off because your ministry is doing nothing about them. Personally, I am sick and tired of faxing my odour incident report to your ministry only to have it filed in some cabinet never to be acted upon. I have never received any feedback or contact from your staff regarding these reports. What do you do with them anyhow? Scrap paper?

She also wrote:

Yes, we hardly ever fax your ministry anymore, because we know your ministry does nothing with our faxes and that sentiment is echoed by the other people in our neighbourhood who are bombarded by the dreadful odour on a nightly basis.

[110] Ms. James said the letter accurately summarizes her views.

[111] On May 23 and May 24, 2001, Mr. Simpson, of CVRD Bylaw Enforcement, wrote these notes

[\[30\]](#)

in his continuation report:

May 23/2001

Call from Margaret Peterson 743-5903

Westcoast Diversion – Foul smells on May 8, 9, 10, 11, 12, 22 and 23. Real bad on May 12. Had to send her staff home. Complained of headaches.

May 24, 3:00 p.m.

Denis Cuerrier to office. Discussed latest (complaints). Admitted receiving & grinding area may not be the answer. May have to build receiving bay with neg. airflow but money is a problem at this time.

[112] On October 5, 2001, Herhof expressed the opinion that it was either the manner in which

Westcoast was operating the facility that was causing an odour nuisance or it was because Westcoast was composting material it should not be composting such as septage. [31]

[113] Herhof wrote Westcoast to arrange for a Herhof staff member to attend at the facility “to help in finding a solution”. [32] Westcoast would not agree to a representative of Herhof visiting its facility for an assessment. HUWS and Herhof were embroiled in litigation in Ontario at the time which is one reason why Ms. Boucher may have refused to co-operate with Herhof.

[114] The Spidel review of Westcoast’s facility took place between September, 2002 and January, 2003. Westcoast did not permit Mr. Spidel to access the facility. For that reason some of the conclusions in the report are of limited use.

[115] The report noted that if composting is contained in a controlled environment, the rate of composting can be accelerated and compost odour can be kept to a minimum. It said that leachate is the other issue of concern at composting facilities.

[116] The report contains a chronological sequence of odour related events from February 7, 1999 to October 1, 2002. [33]

[117] Spidel Consulting authored a number of biweekly progress updates before it authored the Compost Facility Review. [34] The progress report for September 20, 2002-October 7, 2002, says: “Odours from improper and or ineffective handling of materials have been reported and substantiated at the Westcoast site on a number of occasions”, and “The actual number of occurrences is not the important issue”. [35]

[118] On June 11, 2003, an information note [36] about Westcoast’s facility was prepared by Mr. Duncan A. McLaren, an environmental protection officer. In it Mr. McLaren suggests that unpleasant odour by itself may not be sufficient to be legally considered an air contaminant or pollutant for the purposes of enforcement of provincial legislation. Mr. McLaren said that Westcoast had been diligent in responding to complaints, but that due to the nature of their operations, odours would be generated despite all reasonable control efforts.

[119] Westcoast may have been diligent in responding to complaints in the sense that it responded with inspections or denials or statements or explanations, but Westcoast did not address the source of the complaints. The issue was not that composting creates odours-it was that Westcoast did not stop the escape of compost odour from its property.

[120] Mr. McLaren said that some of the issues with Westcoast’s facility were related to land use and zoning. He said that CVRD could regulate the facility through land use and zoning bylaws. He said that CVRD could develop bylaws to regulate the management of composting facilities, pursuant to the WMA.

[121] On December 11, 2003, Mr. McLaren wrote that Ministry staff had devoted a substantial amount of time in dealing with issues regarding Westcoast’s facility and that their focus on this operation had been to the detriment of resources better spent on discharges with higher environmental risk. [37]

[122] On March 22, 2004, Mr. Bill Barrisoff, Minister of WLAP, wrote [38] Mr. Robert Smethurst, President of the Arbutus Ridge Residential Rate Payers Association. Mr. Barrisoff noted that his Ministry’s authority to address odour complaints flowed from provincial legislation including the OMRR and the WMA, and that the legislation does not prohibit odours from leaving property. He said that odour can be addressed under provincial legislation if it can be shown to be creating pollution, but

establishing that an odour constitutes pollution is difficult. He noted that odour problems can sometimes be addressed by municipalities which have the authority to enact bylaws to control odours.

[123] MWLAP may have been correct in concluding that the legislation it was enforcing did not allow it to require that Westcoast take measures to prevent the escape of compost odour from its property. That issue was not explored at this trial. MWLAP did establish a protocol for receiving odour complaints, but it did not or could not have the source of the complaints eliminated. That appears to

have been a source of frustration for CVRD. Mr. Tom Anderson wrote two letters [39] to MWLAP in December of 2001 in which he demanded action from MWLAP, and Mr. Hughes wrote a letter [40] to the News Leader that was published on October 23, 2002 in which he was critical of MWLAP.

[124] The provisions of the *Environmental Management Act* that are of relevance to this proceeding came into force on July 8, 2004, by B.C. Reg. 722/2004.

[125] CVRD enacted facility licence legislation pursuant to the *Environmental Management Act*. CVRD's Bylaw No. 2570 was read a first time on September 29, 2004. The bylaw was adopted on [41] August 25, 2005.

[126] In its written submission, Westcoast submits that there were "alleged" odour issues that have not been proven. I disagree. In my opinion, the evidence that Westcoast's compost operations generated offensive odours that were a frequent nuisance to others was overwhelming.

[127] I find that there was offensive compost odour, and that the odour is the reason for the contemporaneous written record of numerous complaints from a significant number of complainants, [42] including complainants who had no involvement with CVRD, its staff or its directors.

[128] I infer that one reason why Westcoast refused a review by Mr. Spidel and an assessment by Herhof (who Westcoast had always acknowledged was the expert in the operation of the biocells Herhof had designed and built) was that Westcoast did not really need a review or advice. In my opinion, Westcoast's failure to control the escape of compost odour was not because it did not know how odours might be controlled, but because it lacked the financial resources to build the structure necessary to do that. Furthermore, the only explanation that I can see for Westcoast not installing a concrete pad for leachate control during the curing process was a lack of funds.

[129] Bylaw No. 2570 prohibited the operation of a facility where recyclable waste was managed [43] unless the operator complied with a valid and subsisting *Facility Licence*. This permitted CVRD to require that the offending operations be enclosed in a structure. It also addressed leachate control [44] concerns. CVRD delayed the enforcement of this bylaw until the end of 2006 in order to give waste processors time to make the changes needed for compliance.

[130] Westcoast sold the facility during this proceeding. The facility is now being operated by a third party within an enclosed structure without apparent complaint.

[131] I conclude:

1. Westcoast's composting facility created strong obnoxious compost odour that caused significant discomfort, inconvenience and unpleasantness to its neighbours.
2. Westcoast could have constructed its facility in a manner that would have reasonably contained odour created by its composting activities. Westcoast could have later taken remedial measures to contain the odour. The technology to reasonably contain compost odour was not only available but actually known to Westcoast and its principals.
3. Westcoast's failure to construct a facility that adequately contained compost odour and its failure to take remedial steps to correct the deficiencies in its control of compost

odour was probably due to financial limitations.

4. WLAP considered that provincial legislation did not allow it to compel Westcoast to contain the compost odour that was the source of public complaint. WLAP personnel thought that CVRD had the authority to do that through bylaws relating to land use and zoning.
5. CVRD had a legitimate land use interest in taking measures to reduce or eliminate the nuisance to its residents caused by Westcoast's facility. CVRD had the authority to enact bylaws to achieve that end.
6. CVRD eventually enacted a bylaw that eliminated the escape of problematic compost odour from the facility and that addressed leachate control concerns.

Vicarious Liability

The Statements and Actions of Mr. Hughes

[132] In support of Westcoast's claim that the CVRD is liable to Westcoast in negligence, negligent misrepresentation and for unlawful interference with economic relations, the plaintiff relies on Mr. Hughes' conduct and on statements that it ascribes to him.

[133] As an elected area director, Mr. Hughes was answerable to the electorate of his area. Neither CVRD nor its board nor its staff had control or direction over Mr. Hughes. On the other hand, Mr. Hughes had no particular control over CVRD or its board or its staff. He was entitled to vote at board meetings. But his influence and power at board meetings was the same as that of all other board members. Aside from voting, Mr. Hughes could do no more at CVRD board meetings than attempt to persuade others to his point of view.

[134] It seems likely that in respect of matters that had particular significance to his area, Mr. Hughes' views and opinions at board meetings would have had particular persuasive force. It also seems likely that CVRD staff would have paid particular attention to his input in respect of matters of special concern to his area. Perhaps it is that to which Mr. Raimondo was referring when he said that as an elected area director of CVRD, Mr. Hughes had more autonomy and exercised more independence in relation to matters pertaining to his area than did other members of the board. Perhaps that also explains why Ms. Boucher said that Area C was Mr. Hughes' fiefdom. But Mr. Hughes' position and authority was never more than that of an elected member of CVRD and whatever authority was delegated to him by CVRD. There is no reason to think that Westcoast or its principals ever thought he had more authority than that. Mr. Hughes spoke for himself. He did not speak for CVRD.

[135] Mr. Hughes met with Ms. Boucher and Mr. Cuerrier and Mr. Brooks and others at a meeting at the Arbutus Ridge Golf Club in April of 1999. Westcoast submits that Mr. Hughes made representations to them at that meeting that are binding on CVRD, including that CVRD was supportive to the concept of the facility being built within CVRD's district.

[136] I find that Mr. Hughes attended this meeting as the elected director for Area C and not as CVRD's authorized representative. Ms. Boucher and Mr. Cuerrier were experienced in government and had advised government. I am satisfied that they and the others present at that meeting knew that Mr. Hughes was there as an elected director of CVRD.

[137] On May 19, 1999, Mr. Hughes wrote a letter to Mary Ellen Echle of BDC. Ms. Echle was the account manager dealing with Westcoast's application for financing. The letter was a letter of support for the project.

[138] Mr. Hughes did not write on CVRD letterhead.

[139] He opened his letter by saying "As the Cowichan Valley Regional District Electoral Representative for Cobble Hill, I am pleased to endorse and support Westcoast Diversion

Corporation's planned Herhof Composting Facility at 1355 Fisher Road".

[140] Mr. Hughes then identified reasons why he endorsed the project.

[141] He ended the letter by saying "This project is timely and important to all of us. If you have questions regarding this letter, please feel free to call me . . . Sincerely Richard Hughes, Director Electoral Area "C"."

[142] This letter speaks for itself. Mr. Hughes wrote as an elected director, and not for CVRD or its board. The opinions he expressed were his own.

[143] Westcoast submits that Mr. Hughes made various representations to Mr. Guerrier and Ms. Boucher that have particular relevance to its causes of action in negligence and in negligent misrepresentation, including representations at meetings that occurred between September and December 1999.

[144] Westcoast submits that Mr. Hughes also made a number of statements after the facility was constructed that relate to its claim for damages arising from unlawful interference with economic relations. Mr. Hughes made those statements to the press and to the public. Westcoast alleges the statements dissuaded others from doing business with Westcoast and that injured Westcoast's reputation.

[145] CVRD denies some of the statements Westcoast attributes to Mr. Hughes. Beyond this, CVRD submits that it is neither bound by, nor liable for, any statements made by Mr. Hughes nor any of his actions.

[146] The statements and actions that Westcoast complains about were spoken or done by Mr. Hughes in his capacity as a director of CVRD. The issue is whether CVRD is vicariously liable for what Mr. Hughes said or did.

[147] In asserting that CVRD is vicariously liable for statements and actions of Mr. Hughes, Westcoast states in its written submissions:

As for the directors themselves, the multiple acts of unlawful interference including illegal regulation and defamation by Richard Hughes appear to have taken place in circumstances where he was speaking or acting for CVRD and had apparent authority to speak or act on behalf of CVRD. CVRD never disclaimed his words or actions or corrected his views in any way. In fact, it appears other directors held the same views and supported him in doing so. As such, the Plaintiff submits that the CVRD ought to be found vicariously liable for the actions of its directors as well.

[148] Mr. Hughes' authority, derived from statute, was that of an elected member of the council of a local government. The **Municipal Act** did not authorize an elected member of a regional board to speak for or act for the regional district or the board.

[149] In **Rogers, The Law of Canadian Municipal Corporations**, Second Edition, Volume II, paragraph 32.3, the authors state that a member of a council is not an agent or employee of the municipal corporation in any legal sense. Members are not employed by or in any way under the control of the local authorities while in office, and have no authority to act for the corporation except in conjunction with other members constituting a quorum at a legally convened meeting.

[150] Mr. Hughes testified that he never spoke nor acted other than as an individual director of CVRD, nor did he ever purport to speak or act for CVRD or the board.

[151] In my opinion, Mr. Hughes had no inherent authority to speak for or act for CVRD.

[152] I note that Westcoast does not claim that Mr. Hughes was authorized by bylaw or resolution of CVRD or its board to speak or act for them. I find that there was no such specific authorization.

[153] In **Rogers, The Law of Canadian Municipal Corporations**, *supra* at paragraph 256.4, the authors state that although a municipality may be liable for the wrongful acts of its council as a whole, it cannot be held liable in damages for injuries consequent upon the negligent or wrongful act of

individual members of its council except in cases where they had been expressly commissioned by the council to oversee particular work on its behalf and the injury was a result of their negligence in discharging such a duty. This statement of the law was adopted by D.S. Crane J. of the Ontario Supreme Court of Justice at paragraph 267 of *St. Elizabeth Home Society v. Hamilton (City)* 2005 OJ No. 5369.

[154] On the facts of the case before him, Crane J. refused to find a municipal corporation liable for the acts of a municipal councillor. He held that a significant indicator of liability is the level of control held by the defendant over the councillor. He concluded in that case that the municipality did not bear the risk of a tort committed by its elected representative.

[155] In *P. (N.I.) v. B. (R.)* (2000), 193 D.L.R. 4th 752, Bouck J. of this court dismissed a sexual assault action against the Crown brought by a plaintiff who alleged that she was assaulted while a recipient of a public housing benefit. The plaintiff claimed that the Crown was vicariously responsible because the alleged assailant was a member of the provincial legislative assembly and provincial cabinet.

[156] At paragraph 16 Mr. Justice Bouck states that for vicarious liability to exist the employer must have effective control over the employee. In support of this conclusion he cites *Montreal v. Montreal Locomotive Works Ltd.* [1947], 1 D.L.R. 161 (P.C.) at 169, and *A. (C.) v. C. (J.W.)* 1998 60 B.C.L.R. (3d) 92 at 121 (BCCA).

[157] He says at paragraph 18 that to prove vicarious liability on the part of the Crown, the claimant must establish on a balance of probabilities that the alleged sexual assault was connected with the defendant's duty as a Crown employee, and that the connection between the assault and his duties as a Crown employee was of such a nature that the assaults could be seen as ways, even improper ways, of performing his duties. The Crown is not vicariously responsible for sexual assaults that are independent acts done outside the course of his employment.

[158] Bouck J notes that under the *Crown Proceeding Act*, R.S.B.C. 1996 c.89, the plaintiff's right to bring the action against the provincial Crown limited the nature of remedy she could recover from the Crown. If the Crown and the defendant did not have a master/servant relationship when the alleged assaults occurred, the Crown could not be found vicariously liable for his actions.

[159] CVRD and Mr. Hughes were not in a master/servant relationship. Mr. Hughes' actions and statements were those of an elected director of CVRD. Mr. Hughes had no authority to act for or bind CVRD. He did not purport to do so.

[160] In my opinion the preponderance of the evidence is that Mr. Hughes did not speak or act in any capacity other than that of the elected director of Cobble Hill Area C. Westcoast has not established that Mr. Hughes ever spoke or acted in circumstances where he had CVRD's apparent authority to do so.

[161] Westcoast's submission that other directors of CVRD held the same views as Mr. Hughes and supported Mr. Hughes, even if true, does not advance its position. There is no allegation that the members together caused the board to do anything of which Westcoast complains.

[162] Westcoast submits that CVRD never disclaimed Mr. Hughes' statements or actions nor corrected his views. There was no duty on the board or CVRD to do anything of the sort. There is no obligation for the board or council of a municipal corporation to monitor or comment upon statements or actions of its members. It is not deemed to have adopted the statements or actions of its individual members unless those statements or actions are formally considered and rejected. CVRD can not, by default, be vicariously liable for everything its elected members say or do.

[163] For all of those reasons, I find that CVRD is not vicariously responsible for Mr. Hughes' statements or actions.

Negligent Misrepresentation

[164] The Supreme Court of Canada discussed the tort of negligent misrepresentation in **Queen v. Cognos Inc.** 1993 1 S.C.R. 87.

[165] At page 110, Sopinka and Iacobucci J.J. set out the five required elements for a successful claim for the tort of negligent misrepresentation:

1. There must be a duty of care based on a “special relationship” between the representor and the representee;
2. The representation in question must be untrue, inaccurate, or misleading;
3. The representor must have acted negligently in making the misrepresentation;
4. The representee must have relied, in a reasonable manner, on the negligent misrepresentation;
5. The reliance must have been detrimental to the representee in the sense that damages resulted.

[166] At page 129 the two note that authorities exist supporting the view that only misrepresentations of existing facts, and not those relating to future occurrences, can give rise to actionable negligence. They do not proffer an opinion on the correctness of that view.

[167] Westcoast’s claim in negligent misrepresentation focuses on four representations: (i) that CVRD would designate Westcoast and IBR as the only sites designated and authorized to accept organic waste; (ii) that CVRD would implement and enforce a ban on ICI waste and prohibit its own facilities from accepting ICI organic waste; (iii) that CVRD would implement a prohibition style ban on yard and garden waste and enforce the ban coincidentally with the opening of Westcoast’s facility; and (iv) that CVRD would make administrative agreements to ensure that waste would flow to Westcoast.

[168] Mr. Cuerrier testified that he thought it improbable that IBR would actually construct a competing composting facility, and that the effect of the designation set out in (i) would be that Westcoast would be the only designated site authorized to accept organic waste. That is consistent with Westcoast’s pleading at paragraph 55 d of its Further Amended Statement of Claim that CVRD had agreed to enforce a ban on the dumping of yard and garden waste at all facilities other than that of Westcoast.

[169] CVRD published a list of places that took waste for recycling or processing. ^[45] The list was informational. The list advised residents where specified wastes could be left. I find that the list was also a representation by CVRD that those places were acceptable recipients of those wastes.

[170] Westcoast’s position at trial was that the designation it expected was one that would have required the organic waste that was to be banned at CVRD’s facility at Bings Creek to be delivered to it.

[171] Mr. Raimondo seemed surprised by that concept. He said that none of the designated sites were “authorized”. He said a designation was simply a listing telling people where they could take ^[46] waste if CVRD would not take it.

[172] Mr. Raimondo said it would have been impossible for CVRD to have guaranteed that there would be only two sites that would be permitted to take organic waste. He said anyone could set up ^[47] shop at any point. ^[48] He testified that CVRD had no control over where people took waste.

[173] There is a fundamental difference between acknowledging that a site is available and acceptable for the receipt of waste, and implementing and enforcing a policy requiring CVRD’s residents to deliver waste to a specific private site, particularly when the site is being operated for profit and receives waste at prices that it fixes. Mr. Raimondo was unsure whether CVRD even had the authority to require its residents to deliver waste to a specific private site. Westcoast’s position

does not pay any regard to the interests or rights of the operators of other sites. In order to give effect to the designation claimed by Westcoast, competing operations, including sites already in operation, would have had to be closed. Mr. Raimondo testified that he was certain that he did not tell Mr. Cuerrier that CVRD would designate Westcoast as the only authorized site to receive organic wastes.

[174] During the RFP process, Westcoast and IBR were short listed by CRRRC. Mr. Cuerrier took the position that the short listing meant that only Westcoast and IBR were authorized sites for receiving organic waste, even for non RFP purposes. Mr. Cuerrier seemed to think that the designation was irrevocable.

[175] The RFP did not result in a contract. In my view, CRRRC's RFP short listing of Westcoast and IBR did not mean organic waste had to be delivered to Westcoast or IBR, and it did not mean other sites could not be designated by CVRD as being acceptable sites for the receipt of organic waste.

[176] The enactment and enforcement of a requirement that waste be delivered to Westcoast could only have been effected by CVRD-if it could have been effected at all-with a bylaw or resolution of the board.

[177] The implementation of a prohibition on the delivery of yard and garden waste to CVRD's sites would also have required a bylaw or resolution of the board.

[178] Mr. Raimondo, who had used the term "administrative agreement" in committee, said that by administrative agreement he meant an informal and short term arrangement whereby staff of CVRD could direct the flow of small amounts of organic waste that was within the control of staff.

[179] Mr. Raimondo denied that he told Mr. Cuerrier that yard and garden waste from CVRD would flow to Westcoast's facility and he denied telling him that CVRD was going to implement a region wide

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ban on its receipt of organic waste.

[180] Mr. Raimondo denied telling Mr. Cuerrier that CVRD was going to implement bans in

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exchange for Westcoast building the facility.

[181] Mr. Raimondo denied telling Ms. Boucher that the only thing remaining in the RFP process was an administrative agreement.

[182] Mr. Cuerrier and Ms. Boucher did not know what an administrative agreement entailed. It might have related to an agreement between Westcoast and CVRD, or it might have related to an agreement between CVRD and its municipality members. In either case, there was no agreement yet concluded. Finch C.J.B.C. discussed the enforceability of alleged agreements in *Flint v. Taggar*, 2008 BCCA 504. An agreement must be certain to be enforceable.

[183] CVRD did not conclude an agreement with Westcoast. Westcoast would have known if it had entered into such an agreement, and it knew it had not.

[184] An agreement with a municipality would have required authorization from CVRD's board and from the council of the agreeing municipality. Neither CVRD's board nor any of CVRD's municipalities authorized a CVRD/municipality "administrative" agreement. There was no agreement between CVRD and any of CVRD's municipalities.

[185] I am of the opinion that Westcoast's evidence in respect of "administrative agreements" does not assist it in this proceeding. Ms. Boucher said CVRD had agreed to make administrative agreements. CVRD did not make any agreements ensuring the flow of feedstock to Westcoast. Westcoast claims CVRD had agreed to enter into agreements. An agreement to agree is not enforceable.

[186] Westcoast's claim in negligent misrepresentation includes the assertions that CVRD represented that it would enact, maintain and enforce bylaws banning the delivery of ICI organic waste and yard and garden waste to its own facilities and enter into administrative agreements ensuring the flow of organic waste to Westcoast.

[187] In ***Pacific National***, the Supreme Court of Canada considered a claim by a developer that the City of Victoria was bound by an implied term in an agreement to keep zoning in place for a number of [\[51\]](#) years and that it was liable in damages if it did not.

[188] Writing for the majority of the court, LeBel J. states at paragraph 38 that zoning is a legislative power, and that the *Municipal Act* (B.C.) did not give a municipal council the ability to constrain the future use of that legislative power. He holds municipal legislative powers are an integral part of governance that municipalities cannot give up. Local authorities have no power to enter into an agreement the effect of which would be to restrict or divest the legislative powers of succeeding councils in respect of any matter affecting the public at large. He also notes that the legislature had generally considered that municipalities should not pay damages for how they used their legislative power.

[189] LeBel J. writes at paragraph 55:

As the authorities make clear, a limitation on a municipality's legislative power is a very serious matter. As Rogers, ***the Law of Canadian Municipal Corporations, supra***, puts it at para. 199.4, "Unless expressly authorized to do so local authorities have no power to enter into an agreement the effect of which will be to restrict or divest the legislative powers of succeeding councils in respect of any matter affecting the public at large." Rogers goes on to note that this does not mean that a council acting in its proprietary or business capacity cannot make contracts. But it does mean that a council cannot somehow give up its legislative powers.

[190] He goes on at paragraph 56 to declare that municipal councils cannot fetter the discretion of successor councils to engage in the legislative process without undue influences.

[191] At paragraph 64, LeBel J. notes that the plaintiff claimed compensation precisely because the City exercised its legislative powers in a particular way. He states that a municipality's choice to use its legislative powers to rezone land so that zoning continues to reflect the municipality's best wisdom is a legitimate choice and a choice that is very much part of the municipality's legislative power. He takes note that the plaintiff never attacked the new zoning bylaw as illegal. He holds that a duty to compensate private parties for a particular legislative choice would necessarily make that legislative choice subject to considerations other than an objective examination of what is best for the entire community.

[192] The plaintiff submits that CVRD represented that it would implement and enforce bans on industrial, commercial and institutional organic wastes and yard and garden waste.

[193] During its final submissions, Westcoast did not submit that CVRD had agreed to enact those bylaws, rather Westcoast submitted that CVRD had negligently misrepresented that it would enact those bylaws. In ***Pacific National***, the Supreme Court of Canada refused to award damages to the plaintiff for the defendant municipality's alleged breach of an implied term in an agreement to keep zoning in place. The Court held that council members of council have to be free to exercise their discretion to rezone without regard to the consideration that the municipality might be liable in damages if it changes zoning.

[194] Westcoast asserts that CVRD ought to have enacted a bylaw prohibiting CVRD's facilities from receiving yard and garden waste and requiring the delivery of that waste to the plaintiff's facility. Such a bylaw would have had far reaching effects. The transfer of yard and garden waste to the plaintiff's Cobble Hill facility would have entailed inconvenience and expense. Either the individual residents of CVRD would have had to transport their waste to Westcoast, or CVRD or the municipalities would have had to collect that waste and transport it at somebody's expense.

[195] The bylaws that Westcoast asserts ought to have been enacted relate to matters of importance to the residents of CVRD. As mentioned previously, CVRD includes the municipalities of Duncan, North Cowichan, Lake Cowichan and Ladysmith. CVRD's member municipalities have their own waste collection systems and related bylaws.

[196] Those are political decisions. *Pacific National* held that the responsibility of a municipal council to address such matters in the public interest can not be fettered by concerns about claims for damages by municipal vendors.

[197] I am of the opinion that this aspect of Westcoast's claim against CVRD is not actionable; that is to say, CVRD's alleged negligent misrepresentation that it would implement bylaws is not actionable at the suit of the plaintiff. If a concluded agreement is not enforceable, then neither is a representation to implement such an agreement.

[198] In my view, Westcoast's claims in negligent misrepresentation must fail for a number of reasons.

[199] First, I am of the view that CVRD can not be held liable in damages for misrepresenting that it would make site recipient designations or that it would enact and maintain bans or that it would legislate the enforcement of bans. CVRD's board has to be left with the discretion to make designations or to enact bans or to enforce bans, without being concerned that CVRD might be liable in damages to Westcoast if it did not do those things.

[200] Second, I find as a fact that neither CVRD nor any of its representatives ever did agree that CVRD would implement or enforce bans or designate Westcoast as one of only two authorized recipients of organic waste. It was, from time to time, the recommendation of employees of CVRD, and of its advisory committees, that such bans should be introduced and enforced. CVRD did resolve to implement some bans and it did introduce a ban of ICI organics. CVRD did tell representatives of Westcoast and it told Westcoast's lender, BDC, of its intention to implement an ICI ban when Westcoast's facility opened, but CVRD did not agree to do that.

[201] Third, I find that Westcoast did not act on any CVRD representation in deciding to build its facility. In my opinion, the preponderance of evidence is that Westcoast decided to build a composting facility on Vancouver Island for its own commercial purposes, and that its decision to do so within the boundaries of CVRD was dictated by location and by its purchase of an acceptable site at an attractive price.

[202] I do not think it possible the meetings that Mr. Guerrier and Ms. Boucher said took place actually took place in the way they described with Mr. Guerrier and Ms. Boucher misapprehending what Mr. Hughes and Mr. Raimondo told them. The evidence of Mr. Guerrier and Ms. Boucher was unequivocal. Ms. Boucher's evidence is that she initiated a meeting with Mr. Raimondo to confirm information given to her by Mr. Guerrier. A meeting that was held in those circumstances could not have led to error. The evidence of Mr. Guerrier and Ms. Boucher is that Mr. Hughes and Mr. Raimondo deliberately made specific representations to them that caused Westcoast to build the facility. The evidence of Mr. Hughes and Mr. Raimondo is also clear – they say they did not make those representations. In my opinion, there could not have been some misunderstanding that might have given rise to the evidence of Mr. Guerrier and Ms. Boucher.

[203] I have had reference to a number of considerations in deciding that no such meetings occurred and that no such representations were made.

[204] The first consideration is the evolution of the plaintiff's pleadings.

[205] The Statement of Claim in this proceeding was filed on July 9, 2003. At paragraph 6, the Statement of Claim alleges that the plaintiff was induced by the false, negligent, deceitful and dishonest misrepresentations of Hughes and CVRD to purchase the Cobble Hill site on which it constructed the composting plant.

[206] In particulars filed August 8, 2003, Westcoast describes an agreement. It does not allege that Westcoast had been promised an administrative agreement or authorized designation status or a total organics ban. It does not explicitly allege any representations by Mr. Raimondo prior to Westcoast's decision to build.

[207] In its Second Further Amended Statement of Claim filed July 14, 2006 the plaintiff pleads that an agreement was concluded in or about September of 1999.

[208] It is the defendant's submission that the plaintiff's allegation that an agreement was formed in September 1999 was advanced only after it became aware through document disclosure in this proceeding that the minutes of two of the meetings of CRRC could be misused by it to advance a false claim that Director Hughes and Chief Administrator Raimondo made representations to Mr. Cuerrier and Ms. Boucher in the fall of 1999 that caused it to construct the facility.

[209] In my view, the pleaded September 1999 agreement is of great import to the plaintiff's case. The plaintiff's failure to even refer to the events that it later alleged took place in or about September of 1999 in the original Statement of Claim as particularized leads me to infer that no such events occurred.

[210] Westcoast's evidence advanced at the trial was not that the plaintiff purchased the Cobble Hill site because of neglect or dishonesty or deceit on the part of Hughes and/or CVRD. That pleading was at the heart of the claim as originally filed.

[211] In my opinion, the evolution of the pleadings leads to the inference that the pleadings are not based on what occurred, but were tailored to the proceeding as it unfolded. In short, the pleadings are based on what the plaintiff thought might lead to a successful prosecution of its claim.

[212] The second consideration is that there are a number of documents that lead me to the conclusion that Westcoast made its decision to build a composting facility at Cobble Hill long before the fall of 1999. Furthermore, I find that before the fall of 1999, both Mr. Cuerrier and Ms. Boucher wrote or said that the decision to build had been made.

[213] On July 27, 1995, a "License and Know-how Contract" was completed between Herhof and J.C. Environmental Inc. Under the agreement, J.C. is given the exclusive license to produce, use and [\[52\]](#) sell Herhof's composting boxes in Canada.

[214] On April 29, 1997, Mr. Cuerrier prepared a business plan for "BioKomp." BioKomp was a non-registered trade name used by Mr. Cuerrier. In the business plan, Mr Cuerrier wrote that in order to [\[53\]](#) make the first sale of a composting facility, BioKomp needed to operate the facility.

[215] On February 27, 1998, Herhof and HUWS entered into an "Additional Agreements to Licence Contract of 27.07.95". Under this contract, it was agreed that "In case no licensed businesses will be achieved in 1998, Herhof has the right to cancel the licence contract of 27.07.1995 and the contract of option, dated 28.07.1995 by one party per 31.12.1998. In this case, the remaining balance will be due immediately. A payment by HUWS without license business in order to avoid cancellation of the [\[54\]](#) contract is not possible".

[216] On April 3, 1998, BioKomp submitted a reply to a RFP issued by RDN on behalf of BioKomp, HUWS and Herhof. [\[55\]](#)

[217] On September 7, 1998, Mr. Cuerrier co-authored a business plan for a compost facility in Langford. Pages 26 to 28 identify the source of the feedstock. This observation is made at page 27 "the low tipping fee will serve as the main incentive for haulers and landscapers to come to the [\[56\]](#) facility."

[218] On November 18, 1998, Herhof sent HUWS a price quote on parts for "project of Victoria." The letter refers to Ms. Boucher's fax of November 11, 1998, which was not submitted as evidence at [\[57\]](#) the trial.

[219] On December 17, 1998, Herhof wrote HUWS Re: "Victoria" and said in part
We are very happy and would like to congratulate you for placing a new plant in North-America respectively in Canada. In our opinion, it is very important that it has been

succeeded for the first time to build such a plant at Canada's West Coast. [\[58\]](#)

[220] I draw the inference from this evidence that by December of 1998 HUWS (through Ms. Boucher) had advised Herhof of the decision to build a compost facility on the West coast referred to as "project Victoria". HUWS had to sell a facility in 1998 in order to avoid losing its licence rights from Herhof.

[221] On February 7, 1999, Mr. Cuerrier wrote WLAP for approval to operate a commercial organic disposal facility in Langford. He said "The construction of the first Herhof Technology will begin as [\[59\]](#) soon as all approvals have been obtained from the Ministry of Environment.

[222] I see no reason to doubt Mr. Cuerrier's assertion that the decision had been made to build a facility.

[223] On February 18, 1999, Herhof wrote HUWS asking for detailed information on the Victoria project. Herhof reminded HUWS

We kindly asked to look into this matter and make the according arrangements. In accordance with the additional agreement, we reserve the right, to cancel the licence contract for 31 December 1998 by one party, if in 1998 no licences will be handled. Before we assert this right, we expected detailed information on the basis of all points [\[60\]](#) mentioned above.

[224] As president of HUWS, Ms. Boucher wrote the following to Mr. Michael Koch of Herhof on February 19, 1999 in reference to the Victoria project.

- Ms. Boucher wrote as follows:

Dear Michael,

Believe me, I am as concerned as you that the progress on the projects is very slow. But better slow progress than no progress at all!

I am surprised that Herhof feels that it has not been involved in the Victoria project. Dr. Carten Schnorr was intimately involved in the preparation of the pricing which was formulated via correspondence Nov. 11-98, Nov. 15-98, Nov. 18-98 and by the subsequent visit of Alan and Sean to Germany in January 99 for technical conferencing with Arno lauber and others because we felt uneasy about the pricing and technical aspects of the new air system which will be required for this project. Alan and Sean felt that the week spent with the technical staff of Herhof was very productive.

We had really stuck our necks out by accepting a Purchase Order on the Victoria project without full verification of pricing. But due to our contractual obligations we felt we had no other option.

After Alan returned we were finally able to begin verifying the pricing that had already been given to the customer. These are very difficult circumstances under which to work and create a very risky financial situation for us.

We are currently re pricing some of the air components in North America and will soon be able to determine which components will be purchased from Herhof and which will be purchased here.

The Project is now under environmental permitting. The plant will be located at 979 Henry Eng Place, Langford BC and will service the Greater Victoria ICI and Commercial sector as well as participating area cities. A copy of the covering letter for the Application for the Environmental Permit is attached.

The plant is being built as a commercial venture that is there is no official guarantee of flow to the plant. The plant will have to operate at a tip fee lower than the government operated landfill to attract the waste. Attached is a sample of the relationships that are being developed by the client to attract flow to the plant. In addition, several municipalities are now going to their boards for approval for short term contracts to collect source separated organic waste and deliver it to the plant.

More and more, the municipalities in Canada are issuing Requests for Proposals where they are asking the private sector to set up plants without any guarantees of flow of waste and without investment by the community (viz. Nanaimo, BC). This creates an opportunity for private investment.

My view is that Canada is gradually moving towards a system that will be similar to the US system where the governments will not control the flow of waste. This is seen in the fact that municipalities are willing more and more to contract with existing facilities as opposed to setting up their own. Municipalities are concerned about 2 things: that technologies will change and that they will be struck with an obsolete technology and that they will lose a lot of money because the technology they have chosen is bad.

The Victoria project is going ahead on the basis that if the facility exists, the municipalities will come. There is 110,000 T of organic waste in the Victoria district and very strict regulations governing the operations of composting sites have been implemented which will take effect in the year 2000. These regulations incorporate a lot of the suggestions we made when we participated in the bid process there in 1995 which will make it difficult for companies to set up plants that have less environmental controls.

Initially, the plant will be set up to receive 12,000 T/yr. but it is expected that this plant will be expanded rapidly. It is projected that the plant will initially operate at the break even point and will begin making money only when it is expanded. The site could receive as much as 40,000 T/yr. at maximum expansion capacity.

We expect that all permits will have been issued so that construction will begin no later than May 1999.

[225] The letter continues with reference to other projects.

[226] In my opinion, this letter explains the basis on which HUWS participated in the Cobble Hill project.

[227] The project was not being built on the basis that there would be any guarantees of flow of waste from the municipalities. The project was envisioned to be a commercial venture with no official guarantee of waste flow.

[228] I see no reason to doubt Ms. Boucher's assertion on February 19, 1999 that the decision had been made to build a facility.

[229] An agreement dated March 27, 1999 was completed between Westcoast and HUWS for the construction of a compost facility.

[230] On April 27, 1999, Westcoast made an offer to purchase the Fisher Road site in Cobble Hill. [\[61\]](#)

[231] On May 7, 1999, Westcoast applied to Ministry of Environment Lands and Parks for a permit to operate at 1355 Fisher Road, Cobble Hill, British Columbia.

[232] Mr. Cuerrier wrote:

All designs, plans and finance are now in place. The construction of the first Herhof Technology will begin as soon as all approval have been obtained from the Ministry of Environment.

We look forward to hearing from you no later than June 15, 1999. The purchase of the land is subject to approval from the Ministry of Environment. [62]

[233] On May 12, 1999, Westcoast submitted an application for financing to BDC. [63]

[234] Although the application for financing does not identify the site, BDC's preliminary assessment (letter of intent) that followed, dated June 29, 1999, relates to Westcoast's "first organic composting facility in Cobble Hill B.C." [64] The assessment is based on Westcoast's representations that the facility would be receiving organic material from CRD, CVRD and RDN. [65]

[235] On May 24, 1999, Ms. Boucher wrote Herhof Re: "Victoria British Columbia" to ask about pricing of the biocells. [66]

[236] On June 14, 1999, the subject condition on the offer to purchase the land for MOE approval for an in-vessel composting facility was removed. [67]

[237] On June 15, 1999, HUWS wrote BDC confirming its intention to invest \$450,000 in the shares of Westcoast. [68]

[238] On June 22, 1999, Mr. Cuerrier attended a CRRC meeting. For reasons that I explain below, I find that he told those present that Westcoast would be building the facility, and that construction was not dependant on anything that CVRD did or did not do. [69]

[239] On July 30, 1999, Westcoast completed its purchase of the Fisher Road property. [70]

[240] The minutes of another meeting of CRRC, this one held on August 19, 1999, record that Mr. Cuerrier said that he would be building the facility with or without a CVRD commitment to supply the feedstock, although a commitment would make things easier for him. [71]

[241] There is a logical explanation why Mr. Cuerrier told CVRD directors that Westcoast would be building without a RFP agreement. It is because by June of 1999 there was considerable interest from others in building a compost facility in CVRD. If CVRD awarded a RFP contract to a third party, that party might well build a facility in CVRD that would have been in competition to the facility that Westcoast intended to build. It was obvious to everybody, including Mr. Cuerrier, that if Westcoast intended to build its facility without CVRD guaranteeing it feedstock, that CVRD was unlikely to guarantee it feedstock. There would be no reason why CVRD would assume that risk.

[242] I have concluded that the reason why Mr. Cuerrier told the CVRD directors on the CRRC that he was going to build with or without a RFP agreement was because that was true. Westcoast did not think it would have any difficulty in attracting a sufficient supply of feedstock to its facility and it had decided to build. Mr. Cuerrier decided to tell the CRRC members of the decision to build in order to discourage the construction of a competing facility. This is not to say that Mr. Cuerrier did not want a RFP agreement. He did, and he continued to do what he could to obtain one. Such an agreement would have been of benefit to Westcoast, but Mr. Cuerrier's dealings with CVRD and CRRC after June 22, 1999 played no part in Westcoast's decision to build.

[243] Westcoast's decision to build a composting facility at Cobble Hill was made by June 22, 1999. Westcoast still had to obtain financing and investment funds and it still had to work out construction details. The project may not have gone ahead, but if it had not it was not because of any lack of intent on the part of Westcoast, or Ms. Boucher or Mr. Cuerrier. They had decided to build, and nothing said

by CVRD or its staff or its directors in the fall of 1999 played any part in that decision.

[244] On July 15, 1999, Mr. Cuerrier wrote the following in a memo to BDC: ^[72]
“Please be reminded that we have not address (sic) 1% of the total organic waste available within the three proposed Regional District and that two of the three Regional District need to export their waste outside their Region’.

Getting the feedstock is not the problem”.

[245] That memo confirms that there was only one facility contemplated, and that it was to receive material from all three regional districts-CRD, CVRD and RDN.

[246] The memo also confirms that Westcoast was not concerned about getting a feedstock guarantee from CVRD.

[247] On August 24, 1999 CIC Innovation Consultants Inc. submitted a market and technical assessment report for Westcoast.

[248] At page 19 of the report, the authors referred to Westcoast’s tipping fees as being “attractive.” At page 24 they noted that Westcoast had designed its facility to accommodate 1% of the total organic waste generated in CRD, CVRD and RDN. They concluded that that was a reasonable projection. ^[73]

[249] On September 7, 1999, Mr. Brown, an investor in Westcoast and a Chartered Accountant, wrote BDC enclosing a statement of projected cash flow. Mr. Brown’s documentation must refer to the Cobble Hill project, as that is the loan that BDC was assessing, and the Cobble Hill project was the only project then under consideration. Mr. Brown wrote that “It appears that a February 1, 2000, completion start date is more realistic.” ^[74]

[250] On September 8, 1999, Westcoast wrote a cheque to BDC for the \$7,500 “complex zone study fee.” ^[75] I think it unlikely that Westcoast would have paid for this study before it decided to build.

[251] On September 9, 1999, Mr. Brown sent updated cash flow projections to BDC. He assumed the loan would be fully funded in December, 1999, on completion of construction. ^[76]

[252] On September 10, Ms. Boucher wrote BDC to confirm that HUWS would finance Westcoast’s third biocell on certain terms. ^[77]

[253] On September 13, 1999, HUWS ordered equipment from Herhof for delivery on November 30, 1999. ^[78]

[254] All of those events occurred before Westcoast says CVRD made the representations to it causing it to build.

[255] On September 27, 1999, BDC sent Mr. Cuerrier a commitment for financing. ^[79]

[256] On November 18, 1999, BDC increased the program to be financed due to the addition of a third biocell. ^[80]

[257] On November 29, 1999, the TD Bank sent Mr. Cuerrier a commitment for financing of \$250,000. ^[81]

[258] After concluding various agreements relating to the shareholders, Westcoast went ahead with construction.

[259] I am of the view that the pre-construction documents do not support Westcoast's claim that it decided to build because of statements made from September 13/14 1999 to December 1999.

[260] In my opinion, the documentary evidence created before September 13, 1999 and the evidence as to what Mr. Cuerrier and Ms. Boucher said before September 13, 1999 leads to these conclusions:

- In 1998 Ms. Boucher and Mr. Cuerrier decided to build a Herhof in-vessel composting facility on Southern Vancouver island;
- Their original plan was to build in Langford (CRD);
- In 1999 they decided to change the site of the facility from Langford (CRD) to Cobble Hill (CVRD);
- They always intended to build only one facility to process feedstock from CRD, RDN and CVRD;
- The decision to build a facility and the decision to build it in CVRD were both made before September 13, 1999.

[261] The third consideration that leads me to reject Westcoast's claim in negligent misrepresentation is that, in my opinion, neither Mr. Cuerrier nor Ms. Boucher were reliable witnesses.

[262] Mr. Cuerrier denied he had said at CRRC meetings that Westcoast would build with or without a RFP agreement. The minutes of two meetings record that he did say that. Mr. Dennison's contemporaneous notes also record Mr. Cuerrier saying that. The CRRC directors who were in

[82] attendance also testified that he Mr. Cuerrier said that. They remembered it because it was such a startling statement.

[263] I find that Mr. Cuerrier did say that Westcoast would build with or without an RFP agreement. His denial that he did reflects poorly on his reliability as a witness.

[264] In Westcoast's Reply to CVRD's RFP, Mr. Cuerrier claimed to have a Bachelor of Commerce

[83] [84] degree from the University of Ottawa . He admitted at trial that he did not. I do not accept the explanation for that false statement that Mr. Cuerrier gave at the trial.

[265] Exhibit 62 is an agreement dated September 13, 1999 between 597427 BC INC and HUWS relating to the construction of the facility. It is a document that is of critical importance in this proceeding. Mr. Cuerrier testified at an examination for discovery that it was prepared in or about

[85] September 13, 1999. It was not. That numbered company was not incorporated until December 13, 1999. Exhibit 62 could not have been drawn and signed before incorporation because its name on the agreement is the incorporation number and the incorporation number was not known before December 13, 1999. On or about September 13, 1999 is when Mr. Cuerrier says he got the assurances from CVRD's representatives that made him decide to build. It is difficult to see how he could have been mistaken when asserting that the agreement to build was made at the same time. Both events-his receipt of the assurances that caused him to build, and his signing of the written agreement whereby Westcoast agreed to pay over three million dollars to build the facility-are not ones Mr. Cuerrier are likely to have forgotten. CVRD submits Exhibit 62 was created long after the fact to bolster a false assertion that Mr. Cuerrier had received important representations on September 13, 1999. It submits that when Mr. Cuerrier testified that the agreement was made on or about September 13, 1999 Mr. Cuerrier did not realize that it would become apparent that that couldn't be so.

[266] I think it more probable than not that that is the reason why Mr. Cuerrier gave that incorrect

evidence at the examination for discovery. I infer that this document was created after the fact to support a false claim.

[267] Ms. Boucher devised an elaborate VCC scheme in order to improperly obtain provincial tax credits to partially fund the facility. [86] The scheme involved attributing “soft cost” investments to Westcoast’s “investors” and then having them claim tax credits on those “investments”. Those “investors” did not in fact make those cash investments, and they were therefore not entitled to tax credits. Once received, the provincial tax credits were made available to Westcoast.

[268] A provincial audit and review of the scheme found that Mr. Cuerrier had filed reports containing false and misleading information [87]. The scheme was Ms. Boucher’s.

[269] Ms. Boucher’s evidence in respect of odour issues defied belief.

[270] After listening to Mr. Cuerrier and Ms. Boucher testify at length over several days about a variety of matters, I conclude that neither of them was a reliable witness. I did not consider either of them to be trustworthy. I have, in fact, concluded that they fabricated their evidence in respect of having met with CVRD representatives in the fall of 1999 and on having decided to build the facility on representations they received in those meetings.

[271] Furthermore, Westcoast did not disclose relevant documents.

[272] Westcoast did not initially disclose an agreement dated March 27, 1999.

[273] On the first day of this trial, CVRD applied to dismiss this proceeding for failure to produce documents. [88]

[274] Counsel for CVRD submitted that an examination of the documents that were then available led to the inference that Westcoast had entered into a written agreement to build the facility before entering into the agreement dated September 13, 1999, and that Westcoast had not disclosed the earlier agreement.

[275] Counsel for Westcoast submitted: “So it’s really not clear first of all that there is another agreement floating out there that hasn’t been produced”. [89]

[276] There could not be any documents more important to this proceeding than Westcoast’s written agreements to have it built. Westcoast knew of the existence of the March 27, 1999 agreement. [90] It was a party to it. It was signed by Mr. Cuerrier and Ms. Boucher. It was created early in 1999. That had to be so because Westcoast used it to apply to BDC for the Cobble Hill financing. It was provided to Westcoast’s VCC solicitor in or about December of 1999. The agreement was produced during the trial by Westcoast’s VCC solicitor but only after he was served with a subpoena. [91] It was produced after Westcoast’s counsel told the court it was not clear that it existed. Mr. Cuerrier and Ms. Boucher knew that it had existed, although they might not have realized that a copy of it was still available.

[277] Westcoast did not disclose the document whereby it first ordered the biocells. The biocell order was never produced.

[278] The number of documents that were disclosed by Westcoast during the trial numbered in the dozens.

[279] I have concluded that Westcoast did not disclose relevant documents because the documents are adverse to its claims.

[280] The conduct imputed to Mr. Hughes and Mr. Raimondo that they misrepresented that CVRD had already agreed to enact and enforce bans is most improbable.

[281] Mr. Hughes and Mr. Raimondo both knew that the enactment and enforcement of bans was a

board decision that was of concern to all of the directors and to the CVRD municipalities. These were political decisions.

[282] Mr. Hughes, Mr. Raimondo, Mr. York, Mr. Dennison and the directors of CVRD who testified stated that CVRD never agreed to do anything to entice Westcoast to build its facility.

[283] In my opinion there is no real air of reality to the misrepresentation evidence of Mr. Cuerrier and Ms. Boucher. They were knowledgeable and sophisticated investors. Mr. Cuerrier drafted Westcoast's proposal to the RFP. It was detailed and thorough. Ms. Boucher is a trained lawyer. Both of them had advised governments. I think it inconceivable that they would have embarked on a multi-million dollar venture on the strength of the verbal statements that they said were made to them. The documentation that Westcoast did create for the project in or about December of 1999, including [92]

the VCC documents , was sophisticated and complicated. I do not accept that at that same time Mr. Cuerrier and Ms. Boucher did not think to even check to see if CVRD had in fact passed resolutions relating to their project, or that they did not consider that they needed anything from CVRD in writing before proceeding. I am satisfied that Ms. Boucher, in particular, would have insisted on obtaining written confirmation of CVRD's undertakings and agreements if the facility truly was being built in consideration of CVRD having represented or agreed that it would do certain things.

[284] I conclude that Westcoast did not build its facility because of any representations made by Mr. Hughes or Mr. Raimondo or Mr. York or Mr. Dennison to Mr. Cuerrier or to Ms. Boucher. Westcoast decided to build a facility in 1998 and it decided to build that facility at Cobble Hill in 1999 because it purchased a suitable site there.

[285] Westcoast decided to build its facility in CVRD long before the time that it submits that negligent misrepresentations were made to it. Westcoast did not build on the basis of any negligent misrepresentations.

[286] I have concluded that the meetings that Mr. Cuerrier said took place between him and Director Hughes and Mr. Raimondo on or about September 13th or 14th 1999 at which Mr. Cuerrier said misrepresentations were made did not take place. I have concluded that Mr. Cuerrier's evidence that there were such meetings was fabricated.

[287] I have concluded that Ms. Boucher's evidence that she met with Mr. Raimondo and Mr. Hughes in or about December of 1999 to confirm the representations that Mr. Cuerrier said had been made to him was fabricated. I have concluded that no such meetings took place.

[288] I dismiss the plaintiff's claims in negligent misrepresentation.

Negligence

[289] In its written submission Westcoast's negligence claim primarily deals with CVRD's failure to enforce bans in a timely and effective manner. Westcoast submits that CVRD promised before and during construction to implement both yard and garden waste bans and ICI organics bans. Westcoast submits that instead of creating a ban as promised, CVRD classified yard and garden waste as recyclable rather than prohibited and continued to receive yard and garden waste. Westcoast submits that after having prohibiting its receipt of ICI waste by bylaw and after enacting a policy of enforcement, CVRD ignored and/or negligently applied its policy of enforcement in respect of its ICI

[93] Westcoast claims it suffered recoverable damages arising from its loss of potential feedstock that resulted from CVRD's negligent enforcement.

[290] Paragraphs 80 and 81 of the Second Further Amended Statement of Claim contain particulars of Westcoast's negligence allegations.

[291] Paragraph 80 alleges that CVRD owed a duty of care to Westcoast to ensure that their actions were reasonable in all cases and would not harm Westcoast's economic interests.

[292] That pleading is not helpful. A duty of care is one recognized as such at law. CVRD did not have a duty of care to Westcoast not to do anything that might harm its economic interests. For example, Westcoast submits that CVRD was negligent in not enacting bylaws relating to bans. But waste bans themselves would have imposed costs on others, thereby harming their economic interests. Westcoast does not disagree that CVRD was entitled to enact bylaws that might harm the economic interests of others.

[293] Paragraph 81 alleges CVRD is liable to it in negligence for having initiated a rezoning of Westcoast's land.

[294] CVRD was entitled to reconsider its zoning decisions. It is not liable for damages for initiating a rezoning. If rezoning occurred, Westcoast was entitled to challenge its validity. Westcoast instead entered into an agreement with CVRD to avoid the proposed rezoning. Westcoast did not have to enter into the agreement with CVRD. It was not operating under duress. But having done so, it was bound by the agreement, and CVRD is not liable to Westcoast for Westcoast's costs of compliance with the agreement. In my opinion, CVRD is not liable to Westcoast in damages for having "initiated" a rezoning of Westcoast's land.

[295] Paragraph 81 pleads other causes in negligence. There was evidence at the trial relating to those pleadings, but they were not addressed by Westcoast in its written submissions.

[296] In my opinion, Westcoast's claims in respect of those other causes were not proven at trial. CVRD was legally entitled to consider rezoning Westcoast's property, and it was Westcoast's choice to enter into an agreement with CVRD relating to zoning. Westcoast did not establish that the other grounds in negligence that it pleaded in paragraph 81 are actionable or that they caused it loss.

[297] I have set out the reasons why I am of the view that Westcoast can not succeed in its claim that CVRD is liable for not enacting bylaws. For those same reasons I am of the view that CVRD can not be held liable to Westcoast in negligence for not enacting a bylaw prohibiting its receipt of yard and garden waste or for not enacting a bylaw prohibiting the deposit of waste anywhere other than at Westcoast's facility. In my opinion those claims are not actionable. See ***Pacific National***.

[298] I am, in any event, of the opinion that CVRD acted reasonably and in good faith when enacting legislation relating to yard and garden waste. It appears to me to have been in the best interests of the public that yard and garden waste be classified as a recyclable material and not as a prohibited waste. It was not practical to expect the residents of CVRD to find a place other than CVRD's facilities to deposit their material, which in many cases would have been very small amounts. Requiring all of the residents to deliver their yard and garden waste to Westcoast was unreasonable. Residents of Ladysmith or Duncan, for example, should not be required to drive their lawn clippings to Cobble Hill. CVRD tendered its contracts for composting the yard and garden waste within its control. To do otherwise would have been unreasonable. Westcoast's competitors were entitled to compete for this material. The only exception to tendering that CVRD contemplated was allowing Westcoast to receive the yard and garden waste that was within CVRD's control at no tipping charge-an offer that, if accepted, would not likely have been the subject of complaint by others. It appears to me that CVRD's motive was to facilitate Westcoast in obtaining green material for the composting process. Westcoast did not have to accept that arrangement, and it did not accept it. In my opinion, the fact that the proposal was made does not demonstrate unreasonableness on the part of CVRD.

[299] Westcoast submits that CVRD did not enforce or negligently enforced the ICI ban that it did implement.

[300] A municipality can be held liable in negligence for a failure to enforce its bylaws. It is necessary to review the bylaw in question and its history.

[94]

[301] The bylaw at issue is bylaw No. 2108. CVRD adopted Bylaw 2108 on September 13, 2000. It prohibited delivery of ICI waste to CVRD's facilities.

[302] Some of the provisions of Bylaw No. 2108 that are relevant to this proceeding are set out below.

[303] “Engineer” is defined as meaning “the Manager, Engineering Services Department of the CVRD or his/her authorized designate”.

[304] The bylaw’s definition of “Prohibited waste” includes 36 kinds of waste. “Commercial organic waste” falls under the category of prohibited waste.

[305] The bylaw provides that “Recyclable materials” means “Marketable, Source-separated waste”. The definition includes 21 kinds of waste. “Yard and garden waste” is one of those types of recyclable materials.

[306] The bylaw includes CVRD’s Bings Creek complex and its Peerless Road and Meade Creek drop off depots in its definition of “Disposal facility”.

[307] Condition 3(e) of the bylaw provides that the recyclable materials would be accepted at the disposal facility for no charge unless such material was specified in Schedule B.

[308] Schedule B provides that the charge for depositing yard and garden waste is \$35.00/tonne.

[309] Condition 3(f) of the bylaw provides that “No person shall deposit a Prohibited Waste” . . . “at the Disposal facility”.

[310] Provision 5 of the bylaw is captioned “Violations and Penalties.”

[311] Provision 5(b) provides that:

Every person who contravenes this bylaw by doing any act which the bylaw forbids, or omits to do any act which the bylaw requires to be done, may be required at the discretion of the *Engineer*. . . to pay double the applicable charge for Loads, . . .to remove and properly dispose of *Contamination* . . .bylaw, . . .to pay for clean-up charges to remove and properly dispose of the *Contamination*, . . . to pay for any damages or injury to personal property incurred by CVRD as a result of a contravention of this Bylaw, . . and to be prohibited from depositing Solid waste at the *Disposal facility*.

[312] Westcoast submits that CVRD did not reasonably enforce bylaw 2108 and that Westcoast received less organic waste at its facility than it would have received had the bylaw been reasonably enforced. Accordingly, Westcoast submits that CVRD is liable to it in damages for its failure to reasonably enforce its legislated prohibition of receipt of commercial organics.

[313] The enactment of Bylaw No. 2108 followed earlier board resolutions that the board adopted following its consideration of committee reports.

[314] At a meeting held May 10, 1999, the ESC considered a staff report dated May 6, 1999, regarding disposal bans. At the meeting, Mr. York reviewed the staff report and explained that “zero”

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tolerance would gradually be phased in and discretion would be used.

[315] Following that meeting of ESC, the ESC reported and recommended to the board that CVRD adopt a “zero” tolerance policy applied with discretion for contaminated loads of garbage, and double the regular tipping fee be charged for loads considered contaminated. Where practical, the ESC recommended CVRD “make provision” for an offending hauler to remove and dispose of contaminates

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in a rejected load, and for covering the actual costs of clean up for rejected loads.

[316] Those recommendations of ESC were considered by CVRD’s board at a regular meeting held May 12, 1999. It was at that meeting that the board approved those recommendations, and further approved the listing of the proposed bans, charges and penalties governing disposal of materials at CVRD waste management facilities. The approved recommendations were to be included in the new

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CVRD bylaw that was to be developed and presented to ESC at a later date.

[317] At a regular CVRD meeting held on June 23, 1999, the CVRD board adopted a resolution that its tipping fee for yard and garden waste be set at \$35 per tonne for large quantities, with a \$5

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minimum, and a charge of \$10 for a pickup load. At the same meeting, the board resolved to consider a disposal ban on organics from the commercial waste stream.

[318] It was a consistent recommendation of CVRD staff that materials not be banned from CVRD's disposal sites without there being an alternative for disposal.

[319] On April 12, 2000, the CVRD Board, at a regular meeting, adopted a motion that CVRD implement a bylaw to ban residential yard and garden waste and commercial/institutional waste from the waste stream to coordinate with the opening of Westcoast's composting facility. [99]

[320] On May 12, 1999, ESC made a Committee Report to the board recommending a "zero" tolerance with discretion and proposed penalties. [100]

[321] On June 30, 2000, Mr. Bob McDonald, CVRD's Solid Waste Reduction Program Coordinator, issued a news release explaining the proposed bylaw 2108. [101]

[322] The release noted that CVRD would be taking a step additional to those introduced in CRD and in RDN. The additional step was the introduction of a disposal ban on commercial organic material. The release said that the ban was intended to divert items such as stale or expired food stocks from grocers and restaurants for composting. The news release noted that CVRD staff would be working with the public as well as with commercial and municipal garbage haulers during the phase-in period.

[323] Mr. McDonald testified that the phase-in included verbal warnings, written warnings, and eventual fines or penalties.

[324] A notice published by CVRD on July 24, 2000 explained the waste disposal ban being introduced. [102]

[325] The notice said that enforcement would be phased in over several months, with warnings being issued to haulers or those depositing contaminated loads. It said that enforcement would be based on a policy of "zero tolerance to be applied with discretion." If a CVRD attendant identified any notable amount of contamination in the load, the hauler would be subject to a penalty. Alternatively, if deemed appropriate by the attendant, the hauler would be permitted to remove contamination from a load – thereby avoiding the penalty.

[326] Mr. McDonald testified that CVRD effected wide publicity of the commercial organic ban. [103]

[327] On or about December 1, 2000, CVRD published notice that as of January 1, 2001, Bylaw 2108 would be enforced. [104]

[328] On December 15, 2000, Mr. York, Manager, Engineering Services, issued a memorandum to staff at its three waste sites relating to the implementation of Bylaw 2108. [105]

[329] Mr. York advised that the phasing in of the bylaw was being done to ensure that everyone was well informed of the disposal restrictions so that financial penalties would not have to be used. He said the penalties were severe and only intended to be used as a last resort.

[330] The policy outlined by Mr. York was that from January 1, 2001, all loads would be subject to a visual inspection, and warnings would be issued for loads reaching the "trigger points" but without penalties.

[331] He wrote that full and meticulous implementation of the bylaw was scheduled to begin as of April 1, 2001. He said that if everyone was made aware of the bylaw restrictions, penalties would not

be required.

[332] In reference to “zero tolerance,” Mr. York said it was at the CVRD’s “discretion” as to how much, if any, contamination is permitted, and at what point penalties are applied. He said the key to the introduction of the bylaw was consistency. He wrote “[w]hen discretion is applied, it is being based on the policy of not allowing any ‘notable’ quantities that demonstrate a ‘blatant disregard for compliance’ of bylaw restrictions, and can be ‘removed’ with minimal effort.” He made special note of commercial organic waste.

[333] Mr. York wrote that the intent of the disposal restriction relating to commercial organic waste was to keep larger quantities of waste that could be composted from disposal. He said, “A notable amount would be boxes or bags of almost entirely organic waste (e.g. Lettuce cores from a restaurant, spoiled oranges from a grocer, coffee grounds and orange halves from a café, stale loaves of bread from a baker, etc.)”. Mr. York concluded his detailed policy advisory with a suggestion that Mr. McDonald should be contacted for clarification or with concerns.

[334] Ms. Moira Walker was qualified as an expert in waste composition analysis and waste diversion feasibility. [106]

[335] Ms. Walker testified that after a waste ban has been implemented, there is a long period of time before maximum compliance is achievable. She said that that time frame is one that is measured in years. [107]

[336] Mr. McDonald testified about limitations on the enforcement of Bylaw 2108. He said there were potential health risks in opening bags of garbage, and that the public objected to their bags of garbage being opened for display. [108]

[337] Mr. McDonald said that workers could not see organics in a truck before it was tipped, and that once a load was tipped there were practical limitations as to what could be done in respect of enforcement. There were time limitations and safety issues.

[338] Mr. McDonald testified that CVRD hired summer students to assist with enforcement, and that CVRD did issue notices, letters and tickets by way of enforcement.

[339] Mr. McDonald testified that CVRD’s enforcement policy of bylaw 2108 has proven successful. Successes have been incremental over several years.

[340] Westcoast advanced evidence of non-compliance with the bylaw in support of its position that CVRD was in breach of a duty to divert organics from its sites.

[341] Westcoast submits that because CVRD issued relatively few warnings and levied relatively few fines to haulers for commercial organic waste contamination, that the inference to be drawn is that CVRD did not reasonably enforce bylaw 2108. CVRD submits that the low number of warnings and fines is evidence of the success of compliance and not of lack of enforcement.

[342] CVRD submits that it did not owe Westcoast a private law duty of care to enforce Bylaw No. 2108. It submits that the creation and enforcement of the ICI ban did not create any private right that gave Westcoast a cause of action or the ability to enforce the underlying bylaw by private suit. It submits that no private action lies for bylaw enforcement.

[343] In *Orpen v. Roberts*, [1925] S.C.R. 364 the Supreme Court of Canada considers whether a bylaw prescribing building setbacks was enforceable by action brought by a neighbour. Duff J. (later C.J.) wrote for the majority of the court. He states at page 370 that to answer that question the object and provisions of a statute as a whole must be examined with a view to determining whether it is a part of the scheme of the legislation to create rights enforceable by action for the benefit of an individual, or whether the remedies provided by the statute are intended to be the sole remedies available.

[344] He concludes that the sole remedy in respect of an infringement of that bylaw lay in

proceedings for the enforcement of the penalties prescribed by the bylaw. He finds that it would be an unfortunate construction of the statute to conclude that the non-compliance of the bylaw vested a right in all who suffered loss and injury to recover damages in respect of the loss.

[345] In *Orpen v. Roberts*, the plaintiff advanced a claim against the person who had erected a structure that was not in compliance with the bylaw. In this case, Westcoast claims against CVRD for non-enforcement. It does not claim damages against those who did not comply with the bylaw. I did not understand that Westcoast submits that the haulers of commercial organic waste had a duty of care to Westcoast to deliver to its facility. It does submit that CVRD had a duty to Westcoast to refuse receipt of commercial organic waste.

[346] In *Caldwell v. City of Saskatoon and Sisters of Presentation* (1969), 71 W.W.R. 152, MacDonald J. of the Court of Queens Bench of Saskatchewan states that the law in respect of the right of a rate payer to apply for a restraining order where there has been an infraction of a zoning bylaw was settled by Duff J. in *Orpen v. Roberts*. MacDonald J. concludes that the rights of the plaintiff were restricted to laying a charge of failure to comply with the bylaw (if such is the case) or appealing the decision of the city to issue a development permit (provided that the legislation allowed for the appeal). The plaintiff's rights were restricted to remedies set out in the statute.

[347] The history of the implementation of Bylaw No. 2108 and its substantive content are not consistent with it having been created for the benefit of Westcoast.

[348] CVRD's board resolved at its regular meeting of May 12, 1999 to accept an ESC recommendation made on May 10, 1999 to adopt a "zero" tolerance policy with discretion in respect of the enforcement of waste bans.

[349] On June 23, 1999, CVRD's board at a regular meeting resolved to accept a June 14, 1999 ESC committee recommendation to implement a commercial organic ban. The recommendations that were adopted by the board arose from committee meetings held prior to Westcoast's first announcement that it would be building the facility.

[350] An examination of the content of Bylaw No. 2108 leads to the conclusion that it was not enacted to benefit Westcoast. The bylaw applied to all of the residents of CVRD, including those in four municipalities. It was a measure to control many kinds of waste for the common good. The bylaw relates to many kinds of waste other than commercial organic waste. In my opinion, the bylaw could not have been enacted for Westcoast's benefit when it is clear that many parts of the bylaw and the inclusion of other wastes in the definition of prohibited waste were not for Westcoast's benefit.

[351] Notwithstanding CVRD's implementation of the bylaw at a time approximately coincidental with the opening of Westcoast's facility, I find that the purpose of Bylaw No. 2108 was not to benefit Westcoast. The ban relating to commercial organics was put in place at that particular time because CVRD did not want to ban its receipt of commercial organic waste without being sure that there were places for its deposit, such as Westcoast, but it was not enacted for the purpose of benefiting Westcoast.

[352] I am of the opinion that Westcoast has no private right of action arising from the non-enforcement of Bylaw No. 2108 nor does Westcoast have the ability to enforce the bylaw by private suit. I would, for that reason alone, dismiss its suit in negligence for non-enforcement of Bylaw No. 2108.

[353] In my opinion, there are other reasons why this claim cannot succeed.

[354] A government body, including a municipality or regional district, can only owe a duty of care when engaged in operational decision making. When making policy decisions, "a government agency will be exempt from the imposition of a duty of care" regardless of whether a relationship of proximity exists that would ground a duty of care in other situations. If a government body engages in operational decision making and a negligence suit ensues, a traditional torts analysis ought to follow, being that if sufficient proximity exists and a duty of care applies, then the courts must go on to inquire into the requisite standard of care in the given circumstances. See: *Just v. British Columbia*, (*Just*) [1989] 2 S.C.R. 1228 at paragraphs 28 to 30.

[355] The first issue is whether CVRD's decisions surrounding the enforcement of the bylaw were operational or policy decisions.

[356] The issue is complicated in that liability in negligence may arise if loss occurs as a result of the implementation of policy decisions on an operational level. See *Kamloops v. Neilson*, [1984] 2 S.C.R. 2 at 45.

[357] At paragraph 19 of *Just* the court describes policy decisions as "those which involve or are dictated by financial, economic, social or political factors or constraints". One factor that differentiates policy from discretion is the amount of discretion enjoyed by the decision maker.

[358] In *Kamloops v. Neilson*, the Supreme Court of Canada finds that the city had negligently applied its building inspection laws. The building inspection decision was operational, and therefore subject to a duty of care. The bylaw at issue said that the building inspector "must" inspect. There was no discretion in the building inspector's decision making process.

[359] *Kamloops v. Nielson* was distinguished in *Dusevic v. Columbia Shuswap (Regional District)* (1989), 44 M.P.L.R. 160 (B.C.S.C.) at 166, where Maczko J. states:

I conclude that the *Kamloops* decision is not of assistance, as it can be distinguished from the case at Bar... in the *Kamloops* case, a provision of the building by-law... stated "The building inspector shall enforce the provisions of this by-law"... The by-law in the case at Bar is silent on the question of enforcement. In this statutory vacuum the existence of a duty to enforce must be determined according to the common law, which seems to dictate that the responsibility for by-law enforcement is in fact no more than a "power" and is therefore discretionary.

[360] In *Froese v. Hik* (1993), 78 B.C.L.R. (2d) 289, paragraph 28 Huddart J., (then of the Supreme Court of British Columbia,) said that "[t]he decision whether to use the enforcement provisions of a by-law to obtain compliance and to what extent to do so is a policy decision to be made in good faith in the public interest." She concludes that the defendant municipality

. . .was not under any duty to enforce its by-law, in a timely fashion or otherwise... Municipalities... do not even insure or guarantee compliance with by-laws, unless the by-law or the enactment authorizing that by-law creates a statutory duty to enforce some or all of its provisions.

[361] The enforcement of Bylaw No. 2108 was at CVRD's discretion. Its enforcement was a matter of policy. CVRD enforced the bylaw in good faith and in the public interest. Its objective was to enforce in a manner that achieved the cooperation of the public and maximum compliance. I find that Westcoast has no cause of action against CVRD for its alleged failure to enforce the bylaw. CVRD owed Westcoast no duty of care in the enforcement of the bylaw

[362] There is a final reason why Westcoast's claim in negligence for non-enforcement of this bylaw cannot succeed. In my opinion, CVRD's actions in the enforcement of its bylaws were discharged reasonably.

[363] In *Foley v. Shamess*, 2008 ONCA 588, the Ontario Court of Appeal states at paragraph 29 (emphasis added):

...it is one thing to say a municipality has a duty to enforce its by-laws. The way it enforces them is quite another thing. As I read the case law, a municipality has a broad discretion in determining how it will enforce its by-laws, as long as it acts reasonably and in good faith. That makes common sense. The manner of enforcement ought not to be left to the whims or dictates of property owners.

[364] The standard of care that is of application here was discussed by the Supreme Court of Canada in *Ingles v. Tutkaluk*, [2000] 1 S.C.R. 298 at paragraph 20. It is what would be expected of

an ordinary, reasonable and prudent body in the same circumstances.

[365] CVRD publicized the bylaw and it advised the public of its enforcement policy. It notified major waste haulers directly. Enforcement was phased in so as to promote compliance with the ban. CVRD warned offenders verbally. It also issued written warnings, wrote letters and levied fines.

[366] Mr. Tom McDonald gave extensive evidence about the measures CVRD took in enforcement. [\[109\]](#)

[367] I find that CVRD acted reasonably and in good faith in its enforcement of Bylaw No. 2108.

[368] CVRD submits that a critical causal link in Westcoast's negligence claim has not been made out. It submits that there is no evidence that increased enforcement would have increased the organics being delivered to Westcoast's facility. There were competing recipients for this material. The amount of material that would have been diverted with increased enforcement is a matter of speculation. The evidence at the trial did not provide any sound basis for assessing or measuring Westcoast's claimed loss.

Interference with Economic Relations

[369] Westcoast claims that CVRD unlawfully interfered with Westcoast's economic relations by: (i) threatening to down zone Westcoast's land; (ii) contacting CRD and DNC to have them suspend business dealings with Westcoast; (iii) implementing and cancelling a pilot project with DNC; and (iv) engaging in acts of defamation.

[370] The tort of unlawful interference with economic relations is an economic tort. To establish [\[110\]](#) liability, the plaintiff must prove three elements.

1. The defendant intended to injure the plaintiff.
2. The defendant engaged in unlawful conduct when it interfered with the plaintiff's economic relations.
3. The plaintiff suffered economic loss or injury as the result of the defendant's intentional unlawful conduct.

[371] The first element is that the defendant must have intended to injure the plaintiff.

[372] In ***Correia v. Canac Kitchens*** (2008), 294 D.L.R. (4th) 525, the Ontario Court of Appeal notes at paragraph 101 that the requirement for intentionality for this economic tort may be stricter than for the tort of intentional infliction of mental distress, where the foreseeability of the consequences of reckless conduct can amount to intent. The court finds the difference in approach to the two types of tort justified. Economic torts, such as unlawful interference with economic relations, are strictly limited in purpose and effect in the commercial world.

[373] At paragraph 106 the court unanimously finds:

A similar analysis applies to the tort of intentional interference with economic relations. Neither (defendant) intended to cause harm to the appellant by conducting a negligent investigation. Their conduct was not intentional – at most it was negligent. To the extent that they were reckless as to the consequences of their negligent conduct, recklessness does not amount to an intention to cause harm sufficient to make out the tort.

[374] Intentionality in this context requires that a defendant direct its action against the plaintiff. See ***R. v. Cheticamp Fisheries Co-operative Ltd.***, [1995] 123 D.L.R. (4th) 121. The defendant's conduct must be targeted at the particular plaintiff.

[375] In ***O.B.G. Ltd. v. Allan (O.B.G.)***, [2007] 2 W.L.R. 920 (H.L.), the House of Lords refers to the intentionality requirement at paragraph 62 stating:

It is necessary to distinguish between ends, means and consequences. One intends to cause loss even though it is the means by which one achieves the end of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it, but merely a foreseeable consequence of one's actions.

[376] Mere knowledge that one's actions are unlawful or recklessness as to whether or not they are unlawful is not sufficient evidence of intention to do harm. In ***Gerrard v. Manitoba*** (1992) 98 D.L.R. (4th) 167 (Man. C. A.) the court held that in the absence of malice or deliberate conduct calculated to interfere with economic or trade relations to the detriment of the plaintiff, there can be no liability.

[377] The second element of the tort requires that the defendant engaged in unlawful conduct when it interfered with the plaintiff's economic relations.

[378] There are conflicting views as to the meaning of "lawfulness".

[379] In ***O.B.G.*** the House of Lords adopted a narrow approach to the definition of unlawfulness. It considered a defendant's conduct unlawful only if the third party involved could bring an action against the defendant for its conduct.

[380] At paragraph 51, the House of Lords states:

Unlawful means, therefore, consists of acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause losses to the claimant.

[381] In ***O.B.G.*** the court explained the rationale in its narrow definition of unlawfulness by stating at paragraph 56:

The common law has traditionally been reluctant to become involved in devising rules of fair competition . . . in my opinion, the courts should be similarly cautious in extending a tort which was designed only to enforce basic standards of civilized behaviour in economic competition.

[382] By way of example, under the ***O.B.G.*** definition of unlawfulness, unless CRD could bring an action against CVRD for CVRD's conduct in contacting CRD and requesting CRD to suspend business dealings with Westcoast, Westcoast would not have a cause of action against CVRD for unlawful interference with economic relations.

[383] In ***Correia*** the court said that what amounts to "unlawful means" is a question that has caused the most difficulty for judges and scholars. The court made reference to ***O.B.G.*** but also to Canadian authorities that define unlawfulness more broadly. It referred to acts that the tortfeasor was "not at liberty to commit" and to "unacceptable means" and to conduct that was "in breach of a legal or equitable obligation under civil or criminal law". It did not decide the unlawfulness issue but decided the case on other grounds.

[384] In ***Reid v. British Columbia (Egg Marketing Board)***, 2007 BCSC 155, H. Holmes J. of this court states at paragraph 151 that a fairly broad approach is applied to the definition of unlawfulness. She accepts that unlawfulness refers to conduct that the defendant was "not at liberty to commit" or to behaviour "not authorized by law" or to an "act without lawful justification."

[385] The third element of the tort requires that the intentional unlawful interference with economic relations caused the plaintiff economic loss or injury. The claim is pecuniary.

[386] There is a further consideration. It arises from the following comments of the Ontario Court of Appeal at paragraph 107 of ***Correia***:

The contention of the appellant is that the negligent investigation conducted by Aston

and Kohler constituted the unlawful means. As discussed above, although Aston may be held responsible in law for such negligence, Kohler may not. Therefore, on any definition, Aston's conduct could amount to unlawful means if it was intended to cause harm to the appellant. The same conduct by Kohler could not. However, again as discussed above, Aston's alleged negligence is directly actionable by the appellant, based on duty of care and foreseeability principles. There is no need to interpose the tort of intentional interference to obtain redress against Aston. The intentional torts exist to fill a gap where no action could otherwise be brought for intentional conduct that caused harm through the instrumentality of a third party.

[387] The tort of unlawfully interfering with economic relations is a distinct tort. The Ontario Court of Appeal suggested that it is not meant to address wrongs that are directly actionable. That would include the tort of defamation.

(l) The Threatened Downzoning of Westcoast's Land

[388] Because of CVRD's negative experience with Hydroxil, the septic processing plant in the Koksilah Industrial Park in Duncan that had caused compost odour complaints, CVRD was sensitive to the issue of odour caused by composting sewage sludge.

[389] Westcoast received its approval under PUCR to operate its facility on July 7, 1999. That approval did not allow Westcoast to compost "sludge, septage, biosolids" without a permit under the [\[111\]](#) WMA.

[390] In November, 2000, Westcoast accepted biosolids from DNC for composting. It did this [\[112\]](#) despite not yet having received a permit under the WMA allowing it to do so.

[391] CVRD considered rezoning Westcoast's land. It was entitled to rezone. It was also entitled to enact bylaws to control pollution, nuisances and odour.

[392] On December 13, 2000, CVRD and Westcoast agreed that CVRD would not rezone and [\[113\]](#) Westcoast would not accept and process sewage sludge or septage at its facility for six months.

[393] Westcoast's claim against CVRD for unlawful interference with its economic relations by threatening to rezone must fail for several reasons. In my opinion, none of the three required elements of this economic tort are present.

[394] First, CVRD's intention was not to harm Westcoast but to ensure that Westcoast's operations did not permit the escape of unacceptable amounts of compost odour by composting sewage sludge or septage.

[395] Second, CVRD did not act unlawfully. It was lawfully entitled to consider rezoning Westcoast's property.

[396] Third, Westcoast did not suffer economic loss as a result of CVRD's actions. CVRD did not rezone. It considered rezoning but it did not rezone.

[397] Westcoast agreed not to accept and process sewage sludge or septage for six months. Westcoast's submission is that the threatened rezoning caused it to enter into a six month suspension agreement. Westcoast did not operate under duress. It is bound by its agreement. It is not entitled to recover damages for its "loss" in not processing that material in that six month time period.

[398] Westcoast was not permitted to process sewage sludge or septage without a MWLAP permit. [\[114\]](#) MWLAP issued the permit on June 12, 2001. Westcoast was not lawfully entitled to process biosolids before the permit was issued. It suffered no recoverable loss because it could not have lawfully processed biosolids during the currency of the agreement.

[399] Finally, I am not persuaded that this economic tort is of application at all. If Westcoast has a cause of action in respect of rezoning issues, surely it is one that should be advanced directly. Rezoning does not directly involve third parties. It cannot be said that when CVRD considered rezoning Westcoast's land that it was interfering with Westcoast's business relations.

*(II) The Contacting of CRD and DNC and having them Suspend Business Dealings with Westcoast and
(iii) The Implementation and Cancellation of a Pilot Project with DNC.*

[400] In early July, 2001, Westcoast accepted sewage sludge from CRD Salt Spring Island. The delivery caused odours. The CVRD began to haul sludge from its Salt Spring Island facility to Westcoast in 2001. The CRD did not have a contract with Westcoast. It delivered sludge on a load by load basis, paying Westcoast tipping fees.

[401] The CRD received complaints from residents and neighbours of Westcoast about odour.

[402] CRD's Manager of Operations, Local Services, was David McFarland. Mr. McFarland testified that after CRD began delivering de-watered sewage sludge and de-watered septage to Westcoast's facility in 2001, he received complaints from CVRD residents about compost odour. He thought he

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had received three calls.

[403] Mr. McFarland said that the calls upset him because "we didn't want to send our problems somewhere else."

[404] Mr. McFarland said that shortly after that, on August 9, 2001, he received a call from Mr. Derek York of the CVRD. Mr. McFarland testified that Mr. York told him that they were having major odour problems at Westcoast's facility and that Mr. York requested that CRD not haul any more

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sewage sludge to the facility. Mr. McFarland said he told Mr. York they would not.

[405] Mr. McFarland said he had received a request not to ship sewage sludge to Westcoast, not a directive.

[406] Mr. McFarland said he received a further call from Mr. York on September 7, 2001, and he was told by Mr. York that CRD could ship to Westcoast. Mr. McFarland said "I told him that we would be doing that and told the staff that the next load would go to Westcoast."

[407] Mr. McFarland said that during the period of time between August 9, and September 7, there had been three loads of material shipped to an alternative location. If those loads had been shipped

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to Westcoast, Westcoast would have received about \$1,500.

[408] In my opinion, Mr. York's conduct in contacting Mr. McFarland and requesting that CVRD not send sludge to Westcoast was not unlawful. It was not an act Mr. York was "not at liberty to commit" nor was it an act "without lawful justification" nor was it "unacceptable". Mr. York's purpose was to reduce or eliminate compost odour problems that were causing discomfort to Westcoast's neighbouring residents.

[409] I am of also the view that there was no intention to injure Westcoast. There is no evidence Mr. York was motivated by malice or that his intention was to harm Westcoast's business. CVRD's staff was supportive of Westcoast's venture. They were in favour of composting. It was the compost odour that was objectionable

[410] Westcoast called evidence to show that CVRD's shipments did not resume until July 9, 2002. Mr. McFarland seemed surprised at trial when confronted with that evidence. Mr. McFarland testified that on September 18, 2001, he received a telephone call from Mr. Cuerrier in which Mr. Cuerrier told him that CVRD had no objection to Westcoast receiving further shipments.

[411] I find that CVRD did nothing to keep CRD from shipping to Westcoast after September 7, 2001.

[412] CVRD submits that Westcoast's claim arising from the non-delivery of approximately \$1,500 of CRD material is \$1,500 less the expenses it would have incurred in processing that material.

[413] Westcoast also submits that CVRD interfered with Westcoast's relationship with DNC.

[414] On May 30, 2001, Mr. McKay of DNC wrote to Director Hutchins asking if DNC could ship biosolids to Westcoast.

[415] In 2001, ESC agreed that a pilot project for processing DNC biosolids, under supervision, [\[118\]](#) would be appropriate. At a June 25, 2001 meeting, ESC recommended to the CVRD that DNC and Westcoast enter into a 90 day pilot project for sludge compost under the supervision of ESC staff.

[416] That recommendation was never approved by the CVRD board, but on June 28, 2001, Mr. Dennison wrote to Mr. McKay advising him of ESC's recommendation.

[417] On June 28, 2001, DNC received approval from MOE to ship biosolids from its Chemanius and Crofton Sewage and Treatment plants to Westcoast. It did not receive this approval until after [\[119\]](#) MOE issued a permit to Westcoast to accept biosolids septic and sludge.

[418] Following the difficulties relating to the July 6, 2001 receipt of Salt Spring Island sludge, the ESC recommended to the CVRD board in July 2001 that it suspend the 90 day pilot project. CVRD [\[120\]](#) adopted that recommendation on July 25, 2001. The DNC was advised of the board's resolution.

[419] At an in-camera ESC meeting on September 17, 2001, Mr. Raimondo said that the CVRD should not do or say anything to suggest that there is a bar to Westcoast's acceptance of stabilized [\[121\]](#) sludge. On September 24, 2001, Mr. McKay wrote to Mr. Walker, Chair of CVRD, confirming that [\[122\]](#) he had been advised by Westcoast that it was permitted to accept DNC's bio-solids.

[420] On October 22, 2001, Mr. Raimondo responded to Mr. McKay to confirm that Westcoast would not contravene land use regulations or MOE's approval permit by accepting DNC's biosolids. [\[123\]](#)

[421] Following communications between DNC and Westcoast in November and December 2001, DNC commenced shipping biosolids to Westcoast on February 2, 2002, and continued shipping until [\[124\]](#) Westcoast closed its facility.

[422] In my opinion, CVRD's conduct in respect of its dealings with DNC was not unlawful. DNC was one of its member municipalities, and it was DNC's decision not to ship biosolids between June 28, 2001 to October 22, 2001. DNC was well aware of Westcoast's odour problems.

[423] I am also of the view that Westcoast has not established an intention on the part of CVRD to harm Westcoast.

[424] Westcoast's claim relating to DNC and the pilot project relates to a period of about three months.

[425] From February 2, 2002 to September 23, 2005, a period of about 43 ½ months, DNC paid [\[125\]](#) Westcoast \$89,087.34, or \$2,034.48 a month to compost that kind of biosolids.

[426] I assess the amount of gross revenue lost by Westcoast as a result of the actions of CVRD's staff in asking CRD and DNC not to ship septage or sludge to Westcoast at \$10,000, that being about the worth of 3 shipments lost from CRD and of about four months of shipments lost from DNC.

[427] I find that most, if not all, of Westcoast's costs in that period of time were fixed. I do not see that by processing this material Westcoast would have had any expenses of note extra to the ones it

already had. If Westcoast was entitled to recover damages for its loss of these CRD and DNC shipments, and I am of the opinion that it is not, I would assess its damages at \$10,000.

(IV) *Acts of Defamation*

[428] When Westcoast first brought this suit on July 9, 2003, it claimed relief for defamation. ^[126] It provided particulars of its allegations of libel in particulars dated August 8, 2003. ^[127] At paragraph 9 of the particulars, it referred to a Pictorial article of October 6, 2002, a Pictorial article of January 6, 2002, and a Cowichan Valley Citizen article of April 10, 2002. It also referred to a public meeting of June 18, 2003.

[429] In the Amended Statement of Claim filed July 9, 2003 Westcoast claimed for damages for defamation ^[128]. That claim was advanced against Mr. Hughes and other personal defendants as well as against CVRD.

[430] In the Second Further Amended Statement of Claim filed July 14, 2006 Westcoast abandoned its suit in defamation, but claimed damages for unlawful interference with economic relations and in negligence based on its allegations of defamation.

[431] Westcoast's claims in defamation are directly actionable by it. As noted by the Ontario Court of Appeal in *Correia*, there is no need to interpose the tort of intentional interference with economic relations or the tort of negligence to obtain redress for defamation. The Ontario Court of Appeal wrote that the economic tort exists to fill a gap where no action could otherwise be brought for intentional conduct that caused harm through the instrumentality of a third party.

[432] In my view there is good reason why the tort of unlawful interference with economic relations should not be interposed with a claim in defamation. The principles of law that are of application to the economic tort are different than those that apply to defamation. The pleadings are different. There are differences in the applicability of *Rules of Court*. The defences are different. The assessments of damages are different.

[433] The economic tort of unlawful interference with economic relations is a vehicle ill-suited to assess the merits of a claim based on defamation.

[434] It may be that Westcoast abandoned its direct cause of action in defamation, and recast that cause of action as a claim for unlawful interference with economic relations by acts of defamation because it considered that it had a better chance of success or that it could advance a claim for a larger amount of damages.

[435] I do not accept that if Westcoast is not entitled to succeed in a direct claim in defamation that it is entitled to recover damages for the same acts by pleading that its cause of action is not that of defamation but that of unlawful interference with economic relations because of acts of defamation, nor do I accept that it might be entitled to recover more damages by claiming for unlawful interference with economic relations rather than for defamation.

[436] The defences that are available to CVRD include the defences available to it in respect of a suit for unlawful interference with economic relations. That must be so because Westcoast claims for unlawful interference with economic relations. In my view, CVRD also has available to it the defences of application for a suit in defamation. That is of relevance in this case because Westcoast submits that the reason why the acts of defamation were unlawful (a required element for the tort of unlawful interference with economic relations) is because they were defamatory. They could not be defamatory if there was a defence available to CVRD in respect of a claim brought directly for defamation.

[437] The Second Further Amended Statement of Claim does not particularize acts of defamation.

[438] Westcoast submitted that the acts of defamation include these incidents:

- a) The Pictorial, a community newspaper, published a news report on Sunday, July 29, 2001, in which director, Rob Hutchins of CVRD is reported to have said “we wouldn’t be discussing this today if they had put in an enclosed receiving area”. It is noted that Mr. Hutchins also said that the plant’s drop off bay is the source of many spill complaints. [\[129\]](#)
- b) In an article published on July 29, 2001 in the Cowichan Valley Citizen, the newspaper reports that the board of CVRD had voted to immediately suspend a pilot project in which DNC was disposing of septic sludge in Westcoast’s facilities. The article reports that the board vote was at Mr. Hughes instigation. Mr. Hughes said that he was left with no choice but to take action because of foul smells emanating from the compost facility that brought neighbours “to their knees”. Mr. Hughes said that an agreement between WLDC and the CVRD to have a 90 day trial run with septic sludge monitored by CVRD’s staff had been ignored by Westcoast. Mr. Hughes is quoted as saying “we were supposed to have a trial run then look at it long-term following a public process. That didn’t happen, they didn’t follow their agreement and if things don’t straighten up quick we will find a way to deal with it”. The newspaper report said that according to Mr. Hughes, Westcoast accepted a massive load of septic sludge from Salt Spring Island that stunk up the neighbourhood for several days and that it never should have accepted the load because it violated the pilot project agreement and that the stinky results prove [\[130\]](#) the facility was not ready to process septic properly.
- c) In an article published in the Cowichan Citizen on October 10, 2001, Mr. Hughes responded to accusations that he had acted in conflict of interest. He said he believed the conflict of interest allegation, made anonymously to CVRD’s board, was a political move that resulted from Westcoast’s facility difficulties. He is quoted as saying “Westcoast Landfill has been stinking the neighbourhood out and violating the bylaws. I have been standing up for the community’s interest and I intend to keep doing that.” Mr. Hughes is also quoted as saying “They are trying to cut me out of the play and they said they wouldn’t meet if I were there. These are the things that are driving it but I am not [\[131\]](#) going to back off.”
- (d) Mr. Tom Anderson, CVRD’s Development Services Department Manager, wrote [\[132\]](#) MULAP on December 12, 2001, and December 21, 2001. In the December 12, 2001 letter, Mr. Anderson particularized odour complaints and leachate concerns and referred to operational deficiencies. The letter concludes with this summary:
- The regional district is concerned that the continuous undesirable odour emissions and leachate discharge from the operation may begin to impact upon the health of the surrounding residents and has requested that your office take immediate steps to enforce the provisions of the **Waste Management Act** and the conditions of approval of June 12, 2001.
- Mr. Anderson’s letter of December 21, refers to other leachate and odour issues. It concludes with this:
- Under the circumstances, it is most urgent that steps now be taken to suspend the company’s operation or in the very least have the company proceed to immediately construct the required curing pad with leachate collection.
- (e) In an article published in Pictorial on Sunday, January 6, 2002, Mr. Hughes is

quoted as saying:

Under proper conditions it would be worth looking at Westcoast processing sludge. But we want some kind of track record first. Right now the community doesn't have any confidence. We want the Ministry of Environment to do its job, step in, intervene and enforce the permit.

[\[133\]](#)

- (f) In an article published in the Cowichan Valley Citizen on March 31, 2002, the newspaper reports that CVRD's board passed two motions relating to high fecal coliform counts at Westcoast's facility. Mr. Hughes is quoted as describing fecal coliform as:

an indicator of other pathogens that may be present like ecoli and salmonella.

And stating:

Obviously, we are very concerned about it. You can't help but think of Walkerton and it is crucial we move quickly and get absolute clarity in the integrity of the results.

In the same article, Mr. Brian Dennison, CVRD's Deputy Manager of Engineering Services is quoted as saying that the test results are cause for concern if they are accurate. Mr. Dennison is quoted as saying that the Ministry took seven different samples and then mixed them all together and that if a dog had pooped in one of those spots it would generate enormously high numbers.

The same article reports a ministry environmental protection officer as saying that the precision of this test is rather low and great caution must be exercised when interpreting the sanitary significance of coliform results.

In the same article, Ms. Boucher is quoted as saying that she believes the tests must have been flawed because the results indicate a higher fecal coliform count than was present in the composting material when it arrived at Westcoast's

[\[134\]](#)

facility.

- (g) In an article published in the Cowichan Valley Citizen on April 10, 2002, Mr. Hughes is reported to have commented on test results showing high nitrates in Westcoast's well. Director Hughes is quoted as having said:

They are supposed to have a leachate collection system and it is

[\[135\]](#)

supposed to be covered. Something is very wrong there.

- (h) In an article published in the Pictorial on Sunday October 6, 2002, Mr. Hughes comments about CVRD's decision to retain Mr. Spidel to address Westcoast's facility. Mr. Hughes is quoted as saying:

It is sort of a last gasp attempt to work as a mediator between the company, the province and the CVRD to come up with something, anything.

It has to be done in the absence of the province taking any action. It has done nothing but show callous disregard for the situation.

In the same article, a senior compliance officer with WLAP says complaints about

[\[136\]](#)

odours have dropped off considerably.

- (i) On October 23, 2002, Mr. Hughes wrote a letter to the News Leader. It was

published. In it Mr. Hughes alleges that Westcoast had been out of compliance with the **Waste Management Act** for well over a year, which has resulted in stinking odours throughout the area, a polluted well on the property, and the threat of polluting the aquifer that provides water to over 2,000 homes.

Mr. Hughes wrote that as the details and background information surrounding the tragic deaths surface from the Kamloops MWLAP office, it becomes increasingly

[137]

clear that this could have happened anywhere.

- (j) On June 18, 2003, Mr. McDonald and Mr. Anderson spoke at a town hall meeting in Cobble Hill. Westcoast alleges that Mr. Anderson said that Westcoast's facility was causing odour and was a source of potential contamination of the water supply.
- (k) In an article published in the Cowichan Valley Citizen on June 25, 2003, Mr. McDonald as CVRD's Waste Reduction Coordinator, commented about facility [138] licensing.

[439] I conclude that Westcoast cannot succeed in a claim against CVRD for unlawfully interference with economic relations because of acts of defamation for a number of reasons.

[440] First, I find that it was not the intention of any of the persons making those statements to harm Westcoast. As suggested by **Correia**, the intentionality threshold for the application of this economic tort is not the same as that required to establish liability for defamation. The directors and staff of CVRD were not in competition to Westcoast. They had no reason to harm Westcoast. CVRD and its directors and staff wanted Westcoast to succeed. Westcoast had created public concern by permitting the escape of unacceptable odour and by not constructing a curing pad to eliminate the potential of leachate contamination. CVRD's directors and staff were responding to public concern about the escape of odour and pollution. Even if their statements were defamatory, they did not speak in order to injure Westcoast.

[441] Second, as discussed above, CVRD is not responsible for the statements and acts of its elected directors.

[442] At least six of the allegations of defamation relate to statements and publications made by Director Hughes. One of them relates to statements imputed to Director Hutchins.

[443] In my opinion, a reading of the publications at issue confirms that the directors who spoke were speaking for themselves as politicians and directors of CVRD and not for CVRD. CVRD had no control over what they said. CVRD is not vicariously responsible for the statements of its elected directors.

[444] Third, in my opinion, Westcoast did not prove that it suffered economic loss or injury as a result of the statements. There was a good deal of evidence called at the trial explaining why prospective or past customers of Westcoast did not deal with it. The reasons they gave do not include acts of defamation.

[445] Westcoast's claim is pecuniary. The assessment of damages for unlawful interference with economic relations permits damages to be assessed "at large." That means that damages can be assessed even though damages can not be definitively calculated. However, even an at large assessment must be based on a finding that there was loss or injury caused by CVRD, and this Westcoast did not prove.

[446] In my opinion, the decisions of those who did not deal with Westcoast not to deal with Westcoast were based on economic and personal considerations and not because CVRD or its staff or directors made defamatory statements.

[447] Fourth, Westcoast did not establish on a balance of probabilities that it has a remedy for

defamation against CVRD. In my opinion, almost all of the statements have been shown to be true. Not all are defamatory. It was not proven that what Westcoast alleges was said at the public meeting was said. The defence of fair comment upon matters of public interest applies to some of the statements.

[448] Some of the publications refer to board meetings of CVRD. What the directors said at those meetings is subject to qualified privilege. The directors were under a duty to participate in the meetings. There is no evidence that any of the directors spoke there out of malice. Furthermore, CVRD is not vicariously responsible for what its elected directors say at board meetings.

[449] An examination of the publications at issue is helpful in considering these issues.

[450] The article of July 29, 2001, quotes Director Hutchins as saying: "We wouldn't be discussing this today if they had put in an enclosed receiving area," and that he noted the plant's drop-off bay was the source of many smell complaints.

[451] In my opinion, both of those statements were true. If the statements reflect an opinion, the opinion is fair comment.

[452] Westcoast's proposal in response to the RFP was to receive waste in an enclosed structure. There was widespread publicity at about the time the facility was being constructed that Westcoast would be receiving the material in an enclosed structure. Westcoast was not obliged at law to build an enclosed receiving area, and it did not build one. Nevertheless, it was Westcoast's own representations that it would build an enclosed structure that led to Director Hutchins' comment.

[453] In the same article, Director Joe Allan is quoted as saying "I think the Municipality is an unfortunate casualty, but the problem is that there is a mess out there," and "let's clean it up and get things going again." Those comments were true. They are also fair comment, to the extent they contain opinion. The statements demonstrate that Director Allan did not intend to injure Westcoast, but that he wanted to get the project back on track.

[454] The Cowichan Valley Citizen article of July 29, 2001, relates to an incident in which Westcoast received septic sludge from DNC that caused odour.

[455] This article starts with this observation "An ongoing dispute between Cobble Hill Director, Richard Hughes and the president of the composting facility heated up this week . . ." In this article Mr. Hughes is quoted as saying that he was left with no choice but to take action because of foul smells that brought neighbours "to their knees." He referred to measures to address the problem.

[456] Mr. Cuerrier is quoted in the same article as saying there was a foul smell. He is quoted as saying "it was an ugly smell for sure but we had no control over the situation." The article notes that Mr. Cuerrier questioned CVRD's authority to regulate Westcoast's facility.

[457] In my opinion, the statements attributed to Mr. Hughes in this article are true. Mr. Cuerrier himself admits in the article that there is a foul smell.

[458] It is clear from the article that Mr. Hughes is not speaking for CVRD.

[459] The article of October 10, 2001, relates to Mr. Hughes replying to allegations that he was in conflict of interest.

[460] Mr. Hughes is speaking personally. He is responding to an issue that relates to him and not to CVRD. CVRD is not responsible for anything that Director Hughes said on that occasion.

[461] Furthermore, what Mr. Hughes said was true. He insinuated that it was Westcoast that had anonymously advanced the allegation of conflict of interest. That has proven to be true. He alleged that Westcoast "has been stinking the neighbourhood out and violating the bylaws." The comment in respect of the odour was certainly true. This column was written after Westcoast was processing MSW to produce stabilite. CVRD maintains that Westcoast was in breach of its zoning bylaw in processing MSW. Ms. Boucher testified that her interpretation of the bylaw was that processing of MSW was permissible. In my opinion, the zoning bylaw was intended to permit composting of organics. It was not intended to permit the processing of solid waste. I am of the opinion that Mr.

Hughes' comment on that point was probably true, although I hasten to point out that this proceeding did not focus on the issue.

[462] The article concluded with the observation that CVRD's chair is seeking advice about the issue. The issue was the allegation of conflict of interest.

[463] The article of January 6, 2002, is a news report in which the reporter comments about ongoing "smell complaints" involving Westcoast. One of the by-lines of the article is "Hughes Unhappy." The article refers to him as being Cobble Hill Director, Richard Hughes. I do not see that anybody reading this article would perceive that the comments attributed to Mr. Hughes were those of CVRD. They were his personal views. In any event, in my opinion, the comments attributed to Mr. Hughes are true.

[464] The March 31, Cowichan Valley Citizen sets out views of Mr. Hughes and Ms. Boucher and Mr. Dennison. It is necessary to read the whole of this article to understand it. Mr. Dennison, CVRD's Deputy Manager of Engineering Services, advances opinions and statements by which he makes it clear that he disagreed with the level of concern expressed by Mr. Hughes. It is obvious that Mr. Hughes was speaking for himself.

[465] In the April 10 article Mr. Hughes is reported to have said that Westcoast is supposed to have a leachate collection system and its facility was supposed to be covered, and that something is very wrong there. Those comments are true, at least in the sense that "supposed to be" refers to representations or statements made by Westcoast before and during construction. The reference is to what Westcoast said it would do, and not to a legal obligation. The comments are those of Mr. Hughes and not CVRD.

[466] Mr. Hughes' comments in the October 6, 2002, article are essentially critical of the MWLAP. Mr. Hughes' comments in the article are true. They are also fair comment for a Director of the Regional District.

[467] The letter to the editor that Mr. Hughes wrote on October 23, 2002 is directed at MWLAP. Mr. Hughes wrote as a director of CVRD. CVRD is not responsible for what he wrote. Mr. Hughes testified that he believed what he wrote to be true. Mr. Hughes spoke for himself.

[468] Mr. Bob McDonald, as CVRD's Waste Reduction Coordinator, made comments in June, 2003, that were published in the Cowichan Valley Citizen on June 25, 2003. Mr. McDonald spoke about a bylaw being drawn up by CVRD pursuant to then recent enabling legislation under the provincial WMA that gave local governments authority to regulate waste disposal facilities. He said Westcoast's composting plant could be required to make changes. He said that before CVRD required anything they would work with Westcoast to identify any problems and solutions.

[469] I see nothing objectionable about Mr. McDonald's comments. In my opinion, they are not defamatory. The comments are true.

[470] In the same article, Director John Middleton, who succeeded Mr. Hughes as Director of Cobble Hill said that Westcoast's original specifications called for a concrete pad and leachate collection system and that Westcoast had not done that nor covered the material in the rain for leachate control. Those comments are true.

[471] In that article, Ms. Boucher is quoted as saying that the compost, as of that time, was being cured inside the cell, but that if a need to cure it outside the cells arose, Westcoast would put in a small pad of some kind.

[472] Ms. Boucher's comments acknowledged the need for a pad for full-scale operations. That was a condition of the initial governmental permitting.

[473] Westcoast did not install the pad when the facility was originally built, apparently because of a lack of finances. There was an initial requirement that the pad be installed, although MWLAP later waived that requirement for so long as curing was done within the cells.

[474] In the article, Mr. McDonald is quoted as saying that Westcoast would be fully consulted as the CVRD bylaw was being finalized to make sure important issues are identified and addressed. He said the idea was to support the proper licensed facilities, and he made the observation that

Westcoast conforming to the bylaw once it was passed should result in more public confidence in the facility and the likelihood that its business opportunities would increase. I find that nothing said there by Mr. McDonald was defamatory. It also demonstrates that Mr. McDonald did not intend to harm Westcoast.

[475] Mr. Anderson, Manager of the Development Services Department, wrote two letters to MWLAP. The letters were written in December, 2001. He asked that MWLAP take steps to enforce the regulatory laws that he said were of application to Westcoast. Mr. Anderson's letter was copied by him to a number of individuals, and received wide publication.

[476] In my opinion, the contents of those letters are true statements of fact and fair comment.

[477] When those letters were written, Westcoast was maintaining that it was MWLAP and not CVRD that had jurisdiction over the odour issue. MWLAP was investigating the issue but had not taken steps that actually reduced the escape of compost odour. CVRD was receiving complaints and demands that something be done. These letters were those of the staff member of CVRD who was dealing with the issue. The public had an interest in knowing what was being done. The letters explained what CVRD was doing-CVRD was demanding that WLAP act. The letters were a direct response to Westcoast's release of odour and to how westcoast had constructed its facility. I find that Mr. Anderson did not write with the intention of harming the plaintiff, but he wrote with the intention of eliminating a source of odour that was of considerable distress to a number of residents of CVRD. In my view, the economic tort of unlawful interference with economic relations was never intended to deal with letters of that kind. Furthermore, there is no evidence that the letters affected Westcoast's operations. WLAP did not act in response to the letters, and there is no evidence that Westcoast's business was in any way affected by them.

[478] Ms. Boucher and Mr. Brooks testified that Mr. Anderson made defamatory statements at the Town Hall meeting. Mr. Anderson denied saying anything defamatory. Mr. Nico Pfaffe [139], a hauler of materials to Westcoast, Ms. Jennifer McLarty [140], a reporter for the Cowichan News Leader, and Mr. York [141] all testified that Mr. Anderson did not say anything about Westcoast that was defamatory. Westcoast has not proven that Mr. Anderson said anything defamatory.

[479] For all of those reasons, I am of the view that Westcoast's claim for unlawful interference with economic relations based on its allegations of defamation has not been made out.

[480] The evidence at the trial canvassed the issue as to why some dealt with Westcoast and why others chose not to deal with Westcoast or later chose to stop dealing with Westcoast. As I have noted, I am of the opinion that it has not been shown that the statements that Westcoast says were defamatory played any role in those decisions. I am of the view that Ms. Boucher's and Mr. Cuerrier's original assessment of Westcoast's economic prospects was correct. The facility would receive feedstock if it was financially advantageous to prospective customers to deal with it. The venture did not fail because CVRD's directors or staff made statements about odour or contaminants.

[481] I am of the opinion that even if Westcoast was defamed, and I am of the opinion that Westcoast has not shown it was, the pecuniary loss to Westcoast was negligible or non-existent. Westcoast's claim of a loss of several million dollars arising from defamation is without factual foundation. Defamation was not a cause of the venture failing.

[482] In summary, there are several reasons why this economic tort claim has not been established.

[483] I have concluded that under either approach to the consideration of unlawfulness for the application of this tort, whether narrow or broad, CVRD's conduct does not qualify as unlawful.

[484] CVRD's jurisdiction extended to the use of land. CVRD not only had the jurisdiction to deal with odour and to take appropriate steps to ensure that the use of a parcel of land within its boundaries did not cause a continuing nuisance to those using surrounding parcels, but there was a legitimate expectation on the part of its residents that it would do so. CVRD acted justifiably and well

within its legal rights.

[485] CVRD did not act arbitrarily or in bad faith or unsavourily or unfairly or immorally.

[486] Furthermore, I am of the opinion that CVRD did not have the intention to harm the plaintiff, at least for the purposes of the application of this tort. CVRD acted in the public interest and to ensure the public good.

Bad Faith

[487] Westcoast claims that CVRD or its representatives intended to cause it harm. It claims that CVRD's conduct was harsh, vindictive, reprehensible and malicious, and that its planned and deliberate conduct persisted over a lengthy period of time.

[488] Westcoast's operations created odours that were an ongoing nuisance to Westcoast's neighbours. Westcoast's actions interfered with its neighbours' enjoyment of their property. The manner in which Westcoast built and operated its facility caused its neighbours to become concerned about the safety of their water supply and about environmental contamination.

[489] For the reasons that I have already expressed, I find that CVRD had legitimate community and environmental concerns that were the result of Westcoast's actions.

[490] CVRD's actions were not high-handed nor vindictive nor oppressive.

[491] CVRD welcomed Westcoast to its area. It thought that Westcoast's facility would be of benefit to its residents. CVRD and its staff took steps to deal with pollution and odour concerns. In my opinion, CVRD's actions were measured and appropriate.

[492] Westcoast has not established that CVRD acted unfairly.

Conclusion

[493] I order that this action be dismissed.

[494] CVRD has pleaded an entitlement to special costs that it intends to pursue against Westcoast and its principals personally. Formal notice ought to be given to those principals of the costs application.

[495] The costs application will be heard at a time fixed by the trial scheduler.

Mr. Justice S. J. Shabbits

APPENDIX A

ACRONYMS

ACRONYM	DESCRIPTION
BDC	Business Development Bank of Canada
CRD	Capital Regional District
CRRC	Composting / Recycling Review Committee
CVRD	Cowichan Valley Regional District
DNC	District of North Cowichan
ESC	Engineering Services Committee
EASC	Electoral Area Services Committee

Herhof	Herhof-Umwelttechnik GmbH
HUWS	Herhof Urban Waste Solution, Inc.
IBR	International Bio-Recovery Corporation
ICI / IC & I	Industrial, Commercial and Institutional waste
MOE	Ministry of Environment
MSW	mixed solid waste
MWLAP	Ministry of Water, Lands and Parks
OMRR	<i>Organic Matter Recycling Regulation</i>
PUCR	<i>Production and Use of Compost Regulations</i>
RFP	Request for Proposal
RDN	Regional District of Nanaimo
SWMP	Solid Waste Management Plan
TNRD	Thompson-Nicola Regional District
TR	Transcript of Proceedings at Trial
VCC	Westcoast Landfill Diversion (VCC) Inc.
WLDC	Westcoast Landfill Diversion Corp.
WMA	<i>Waste Management Act</i>

[1] R.S.B.C. 1999, c.27.

[2] S.B.C. 2002, c.57.

[3] The personal information relating to Mr. Cuerrier is taken from his evidence at trial. See TR August 1, 2007 pp. 13 to 33.

[4] The personal information relating to Ms. Boucher is taken from her evidence at trial. See TR August 20, 2007, p. 10 on.

[5] The personal information relating to Mr. Brooks is taken from his evidence at trial. See TR August 27, p 1 on.

[6] R.S.B.C. 1996, c.323.

[7] Exhibit 504.

[8] Ibidem.

[9] Ibidem .

[10] Exhibit 82.

[11] Exhibit 84.

[12] See Trial Record filed July 30, 2007.

[13] See Trial Record filed July, 30, 2007.

[14] TR August 10, 2007, p. 44.

[15] TR August 21, 2007, p. 72.

[16] TR September 25, 2007, p.7 and p. 8, l.8.

[17] The minutes of this meeting are at Exhibit 3, Tab 47.

- [18] Draft minutes notes relating to this meeting are at Exhibit 3, Tab 49.
- [19] Exhibit 3, Tab 66.
- [20] Second Further Amended Statement of Claim, Para. 55 d.
- [21] Paras. 55 – 66
- [22] Exhibit 10, p. 21.
- [23] Schedule “B” to Agreed Statements of Facts #5.
- [24] At p. 25.
- [25] Exhibit 10
- [26] Ibidem 3.5.
- [27] Para. 3.12.
- [28] Document Agreement No. 2 (Exhibit 505) is of application to these exhibits.
- [29] TR February 6, 2008 at p. 13
- [30] Exhibit 507, Tab 9, pp. 5 and 7.
- [31] Exhibit 569
- [32] Exhibit 144.
- [33] Agreed Statements of Facts #5, Schedule “B”, pp. 7 and 8.
- [34] These can be found at Schedule “A” of Agreed Statements of Facts #5.
- [35] At page 4.
- [36] Exhibit 506, Tab 58.
- [37] Ibidem, Tab 86.
- [38] Ibidem, Tab 90.
- [39] Exhibits 537 and 503.
- [40] Exhibit 585.
- [41] Exhibit 19, Tab 16.
- [42] Exhibit 506 refers to complaints from Ed Aiken, Anonymous, Catherine Baird, Mike Baird, Rob Erskine, Edward Gamboa, Richard Hughes, Catherine James, Ron Little, Brenda Lockhart, Doug Lockhart, Marlene Scheurkogel (Sheurkoyzl), Michael Vantreight and Loreen Vander Meulen. Exhibit 507 refers to complaints from Gunnell Borge, Home Hardware, Alvin Isaac, Larry Laban, Cindy Little, Margaret Pederson, Elizabeth Scott, and Joe Walsh. Some complainants are referred to on more than one occasion. Some complained to both agencies.
- [43] Exhibit 19, Tab 16, Adopted August 25, 2005.
- [44] Evidence of Robert McDonald TR October 26, 2007, pp. 44 to 49.

- [45] Exhibit 85 contains excerpts from CVRD's 2001 directory. Exhibit 411 contains excerpts from CVRD's 2005 Directory.
- [46] TR Jan. 29, 2008. p. 81
- [47] TR Jan. 30, pp. 2, 3
- [48] Ibidem p. 4
- [49] TR Jan. 30, 2008, p. 5
- [50] Ibidem, p. 5
- [51] At para. 30.
- [52] Exhibit 223.
- [53] Exhibit 29, p. 29.
- [54] Exhibit 379.
- [55] Exhibit 7.
- [56] Exhibit 29.
- [57] Exhibit 362.
- [58] Exhibit 220.
- [59] Exhibit 2, Tab 13.
- [60] Exhibit 382.
- [61] Exhibit 2, Tab 17.
- [62] Exhibit 2, Tab 18.
- [63] Exhibit 13.
- [64] Exhibit 38.4
- [65] Ibidem at p. 29..
- [66] Exhibit 380.
- [67] Exhibit 2, Tab 23.
- [68] Exhibit 108.
- [69] Exhibit 2, Tab 26.
- [70] Exhibit 3, Tab 43.
- [71] Exhibit 3, Tab 40.
- [72] Exhibit 51.
- [73] Exhibit 3, Tab 45

[74]

Exhibit 53

[75]

Exhibit 54

[76]

Exhibit 55

[77]

Exhibit 3, Tab 46

[78]

Exhibit 364

[79]

Exhibit 3, Tab 50 (and Exhibit 56)

[80]

Exhibit 388

[81]

Exhibit 3, Tab 54

[82]

Directors Clarkson, Marcotte, Hughes, Allen, and Johnson and Mr. Dennison testified Mr. Cuerrier made that statement. Recording secretary Johnson testified that the minute of the June 22, 1999 meeting was accurate.

[83]

Exhibit 10.

[84]

TR August 8, 2007, p. 83.

[85]

Tr August 10, 2007, p. 67.

[86]

Exhibit 61.

[87]

Exhibit 235.

[88]

TR July 31, 2007.

[89]

Tr July 31, 2007 at p. 62.

[90]

The agreement is at Exhibit 227.

[91]

Tr August 20, 2007, p. 1 to p.4. Mr. J. Hall explains the process of document production.

[92]

See, for example, Exhibit 328.

[93]

This cause of action is set out in an amendment at trial in an order entered June 25, 2008.

[94]

Exhibit 19, Tab 1

[95]

Exhibit 86.

[96]

Exhibit 2, Tab 20.

[97]

Exhibit 87.

[98]

Exhibit 2, Tab 30.

[99]

Exhibit 3, Tab 70.

[100]

Exhibit 2, Tab 20.

[101]

Exhibit 89.

[102]

Exhibit 2, Tab 20, pp. 6 and 7.

- [103] TR October 25, 2007, pp. 34 to 36; TR October 26, 2007, p. 18.
- [104] Exhibit 2, Tab 20, p. 9.
- [105] Exhibit 415.
- [106] Tr November 1, 2007, pp. 1 - 8
- [107] Tr November 2, 2007, p. 15
- [108] Tr October 26, 2007, pp. 5 - 6
- [109] Tr October 25 and 26 and November 7, 2007.
- [110] ***Daishowa Inc. v. Friends of the Lubicon et al.*** (1998), 158 D.L.R. (4th) 699 (Ont. Gen. Div.)
- [111] Exhibit 2, Tab 32.
- [112] See Mr. Cuerrier's evidence, Tr August 3, 2007, p. 36, l. 29 to p. 37, l. 10.
- [113] Exhibit 18.
- [114] Exhibit 122.
- [115] Transcript October 29, 2007, pp. 21 and 22
- [116] Transcript, October 29, 2007, p. 22
- [117] *Ibidem* at p. 24
- [118] Exhibit 441
- [119] Exhibits 122, 123
- [120] Agreed Statement of Facts #5 pars 10 - 13
- [121] Exhibit 5, Tab 119
- [122] Exhibit 5, Tab 118
- [123] Exhibit 489
- [124] Exhibit 27, pp 57-62
- [125] See Exhibit 27, pp. 47 to 52.
- [126] Exhibit 82
- [127] Exhibit 84
- [128] At paras. 134 to 136.
- [129] Exhibit 555.
- [130] Exhibit 566.
- [131] Exhibit 570.

[\[132\]](#) Exhibits 537 and 503.

[\[133\]](#) Exhibit 577.

[\[134\]](#) Exhibit 188.

[\[135\]](#) Exhibit 579.

[\[136\]](#) Exhibit 580.

[\[137\]](#) Exhibit 585.

[\[138\]](#) Exhibit 496.

[\[139\]](#) TR August 23, 2007, pp. 70 to 78.

[\[140\]](#) Tr October 25, 2007, pp. 63 and 64.

[\[141\]](#) Tr November 8, 2007, p. 26.