CASELAW UPDATE

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Negligence & Core Policy Decisions – *Nelson (City) v. Marchi*, 2021 SCC 41

- In January 2015, the City of Nelson experienced a heavy snowfall and began plowing the streets
- When clearing the snow from angled parking stalls on Baker Street, the City created a snowbank between the parking stalls and the sidewalk, but did not clear an access to the sidewalk
- Ms. Marchi parked her car in one of the stalls and attempted to cross the snowbank to sidewalk, but she fell through the snow and significantly injured her leg
- Ms. Marchi sued the City in negligence, seeking $1 million in compensation

Nelson (City) v. Marchi, 2021 SCC 41

BC Supreme Court concluded:

- The City was not liable because its snow removal decisions were “policy decisions” and, therefore, immune from liability

BC Court of Appeal :

- Concluded that the trial judge did not properly analyze the distinction between policy and operational decisions
- Ordered a new trial

City appealed to the Supreme Court of Canada

Nelson (City) v. Marchi, 2021 SCC 41

Two Part Negligence Test:

- "parties owe a duty of care to those whom they ought reasonably to have in contemplation as being at risk when they act"

- "If there is sufficient proximity to ground a *prima facie* duty of care, it is necessary to proceed to the second stage of the *Anns/Cooper* test, which asks whether there are residual policy concerns outside the parties' relationship that should negate the *prima facie* duty of care"

Nelson (City) v. Marchi, 2021 SCC 41

Just v. BC (SCC):

- Core policy decisions are "decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith"

- Operational decisions are "the practical implementation of the formulated policies" or "the performance or carrying out of a policy"

Nelson (City) v. Marchi, 2021 SCC 41

- Supreme Court of Canada concluded that the City owed Ms. Marchi a *prima facie* duty of care: it was reasonably foreseeable that negligent snow removal practices could cause physical harm to those using City streets and sidewalks
- SCC then considered whether the City was immune from liability, on a policy decision grounds

Nelson (City) v. Marchi, 2021 SCC 41

- SCC concluded that the City's snow removal decisions were not core policy decisions, and therefore, the City was not immune from negligence liability
- "routine part of the City's snow removal process, to which little thought was given"
- SCC ordered a new trial to determine whether the City was negligent and liable to Ms. Marchi for her injuries

Nelson (City) v. Marchi, 2021 SCC 41

- SCC sets out 4 factors relevant to determining whether a decision is policy or operational:

  (1) the level and responsibility of the decision-maker;

  (2) the process by which the decision was made;

  (3) the nature and extent of budgetary considerations; and

  (4) the extent to which the decision was based on objective criteria

- The Court then went on to assess each of these factors in relation to the City's snow removal decisions

Approving Officer Liability & Section 219 Covenant Releases

- In 2004, a land developer applied to the District of Sechelt for a development permit and subdivision approval for a 28-lot subdivision within the District
- The District and developer were aware of soil instability issues, including land slip, sinkholes and the emergence of springs
- The District's approving officer required the developer to provide a geotechnical engineering report and a section 219 covenant

Approving Officer Liability & Section 219 Covenant Releases

- Over time, sinkholes emerged
- In 2019, the mayor declared a state of emergency and ordered homeowners to evacuate
- Homeowners commenced a court action against the developer, various engineering firms, the District and the approving officer

Approving Officer Liability & Section 219 Covenant Releases

- In 2020, the BC Supreme Court concluded:
  - Section 219 of the *Land Title Act* did not authorize the inclusion of a release in the covenant and that the release in the covenant did not cover the subject claims against the District
  - The approving officer did not owe a duty of care to land owners and was also immune from liability as a "local public officer" under section 738(2) of the *Local Government Act*
- The District appealed on the release, and the property owners appealed on approving officer liability

Goy v. Sechelt (District), 2021 BCCA 349
The Covenant Release (Goy 1)

Section 219(2)(a) and (6)(a) of the *Land Title Act* state:

> (2) A covenant registrable under subsection (1) may be of a negative or positive nature and may include one or more of the following provisions:
>
> (a) provisions in respect of
>
> (i) the use of land, or
>
> (ii) the use of a building on or to be erected on land;
>
> (6) A covenant registrable under this section may include, as an integral part,
>
> (a) an indemnity of the covenantee against any matter agreed to by the covenantor and covenantee and provision for the just and equitable apportionment of the obligations under the covenant as between the owners of the land affected

Goy v. Sechelt (District), 2021 BCCA 349

- The Section 219 Covenant included the following indemnity and release:

> The Covenantor, for himself and his successors and assigns, hereby releases, saves harmless and indemnifies the Municipality for any damage, loss claim, demand, cost (including legal cost), whether as a result of injury or death to any person, or damage to property of any kind, including any claims by third parties, arising from or in connection with the construction of any structures on the Lands or use of the Lands, whether or not construction is in accordance with the geotechnical assessments referred to herein, including without limitation any subsidence, settling of any structure including any utility or road infrastructure, loss of slope stability, or any similar matter.

Goy v. Sechelt (District), 2021 BCCA 349

- The BC Court of Appeal concluded that section 219 of the *Land Title Act* authorizes the inclusion of a release in a section 219 covenant
- The broad language used in section 219(2)(a) contemplates the inclusion of a release in a covenant:

  "provisions in respect of the use of land"

Goy v. Sechelt (District), 2021 BCCA 350 Approving Officer Liability (Goy 2)

- Were approving officer and landowners in a relationship of sufficient 'proximity', such that imposing a duty of care on the approving officer would be just in the circumstances?
- With regard to approving officer statutory framework (*Land Title Act* provisions)
- "where regulator acts in the public interest, courts will be reticent to recognize a private duty of care lest it conflict with that objective"

Goy v. Sechelt (District), 2021 BCCA 350

- Approving officer is a "creature of statute" - Part 7 of *Land Title Act*
- 91(1): A subdivision or reference plan must not be deposited by the registrar unless it has first been approved by the approving officer
- 86(1)(d): Approving officer may refuse to approve a subdivision plan if the approving officer considers that the land is, or could reasonably be expected to be, subject to flooding, erosion, land slip or avalanche
- 85(3): approving officer may refuse to approve the subdivision plan if the approving officer considers that the deposit of the plan is against the public interest

Goy v. Sechelt (District), 2021 BCCA 350

- "statutory scheme of the LTA precludes, by necessary implication, a private law duty of care for the reasons explained above. Accordingly, a *prima facie* duty of care cannot be established"

- Court dismissed the homeowners' appeal and upheld the Supreme Court's decision that the District's approving officer did not owe the homeowners a duty of care

Conflict of Interest – *Redmond v. Wiebe*, 2021 BCSC 1405

- Mr. Wiebe was a council member in the City of Vancouver
- Councillor Wiebe was also part owner of a restaurant and a bar each operating in the City
- In May 2020, the City considered the implementation of a temporary patio program to help alleviate some of the impacts the COVID-19 pandemic has had on restaurants and bars
- Councillor Wiebe attended a committee meeting and a council meeting which discussed the temporary patio program and he voted in favour of the program
- 15 electors petitioned the BC Supreme Court seeking disqualification for conflict of interest

Redmond v. Wiebe, 2021 BCSC 1405
Vancouver Charter

Restrictions on Participation if in Conflict

145.3(1) This section applies if a Council member has a direct or indirect pecuniary interest in a matter, whether or not the member has made a declaration under section 145.2 (2).

(2)The Council member must not

(a) remain or attend at any part of a meeting referred to in section 145.2 (1) *[disclosure of conflict]* during which the matter is under consideration,

(b) participate in any discussion of the matter at such a meeting,

(c) vote on a question in respect of the matter at such a meeting, or

(d) attempt in any way, whether before, during or after such a meeting, to influence the voting on any question in respect of the matter.

(3) A person who contravenes this section is disqualified from holding office as described in section 145.911 unless the contravention was done inadvertently or because of an error in judgment made in good faith.

Redmond v. Wiebe, 2021 BCSC 1405
Vancouver Charter

Exceptions from conflict restrictions

145.6(1) Sections 145.2 to 145.5 do not apply if one or more of the following circumstances applies:

(a) the pecuniary interest of the Council member is a pecuniary interest in common with electors of the city generally

Redmond v. Wiebe, 2021 BCSC 1405

- The Court summarized a two-step approach to determine whether a council member should be disqualified for a conflict of interest:

  (1) Petitioner (electors) must prove on a balance of probabilities that the council member has a conflict of interest by establishing that they had a direct or indirect pecuniary interest in the matter before council

  (2) Respondent (council member) must prove that they (a) acted inadvertently, (b) made an error of judgment in good faith, or (c) are exempt under one of the circumstances under section 145.6 of the *Vancouver Charter*

Redmond v. Wiebe, 2021 BCSC 1405

- At the first stage of the analysis, the Court concluded that Councillor Wiebe had a financial interest in the temporary patio program, and therefore, he violated section 145.3(2) of the *Vancouver Charter*
- Councillor Wiebe's financial interest "was his ownership stake in a restaurant and bar that potentially stood to benefit from the program"

Redmond v. Wiebe, 2021 BCSC 1405

- The Court next had to determine whether Councillor Wiebe's pecuniary interest was one in common with electors of the City generally

- The petitioner alleged that "electors generally" referred to all electors in Vancouver

- Councillor Wiebe argued that "electors generally" could refer to a subset of electors

Redmond v. Wiebe, 2021 BCSC 1405

- The Court referred to various cases that indicated that, at least under the common law, the "community of interest" exception could apply where the "comparator group" is less than all electors

- The Court concluded that Councillor Wiebe did not contravene the conflict of interest provisions of the *Vancouver Charter* because his financial interest in the temporary patio program was one in common "with electors of the City generally"

Redmond v. Wiebe, 2021 BCSC 1405

"I conclude that the comparator for applying s. 145.6(1)(a) in this case is the 3,127 holders of restaurant and bar licences issued in 2019. I recognize that this group represents businesses rather than people and one person (such as the respondent) can have an interest in more than one business. However, using that comparator is, again, consistent with the authorities. The petitioners' approach of using the 453,190 people who voted in the 2018 election is not consistent with the authorities and it essentially predetermines the issue in favour of the petitioners. That is, of course a large proportion of the total electors in Vancouver would not receive the same benefit as the respondent and it is difficult to imagine a sensible application of that comparison group."