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BULLETIN

SUPREME COURT ATTEMPTS TO CLARIFY POLICY/OPERATIONAL ANALYSIS

The Supreme Court of Canada has released its highly anticipated reasons for judgement in [Nelson \(City\) v. Marchi](#). The *Marchi* case stems from a heavy snowfall that occurred in the City of Nelson (the “City”) in January of 2015. In accordance with the City’s snow removal policy, the City had plowed the snow along Baker Street in the downtown core. However, in doing so it created a snowbank along the curb that separated the parking stalls from the sidewalk. The City had not cleared an opening from the parking stalls to the sidewalk. When Ms. Marchi parked her car on Baker Street, she attempted to cross the snowbank to access the sidewalk, but in doing so, she dropped through the snow and significantly injured her leg.

The BC Supreme Court ([2019 BCSC 308](#)) concluded that the City’s snow removal decisions were core policy decisions, and therefore, the City did not owe Ms. Marchi a duty of care. Furthermore, the Court held that the City did not breach the standard of care, and even if there had been a breach of the standard of care, Ms. Marchi “was the proximate cause of her own injuries”. Subsequently in 2020, the Court of Appeal allowed Ms. Marchi’s appeal and ordered a new trial ([2020 BCCA 1](#)).

On October 21, 2021, the Supreme Court of Canada concluded that the City did in fact owe Ms. Marchi a duty of care and ordered a new trial to assess the standard of care and causation assessment.

The distinction between policy decisions and operational implementation is significant, as core policy decisions are immune from negligence liability. In its seminal 1989 decision in *Just v. British Columbia*, the Supreme Court of Canada laid out criteria for distinguishing between policy and operational decisions. While recognizing that the dividing line between what is policy and what is operational is difficult to fix, the Court stated that it is essential that it be done. The *Marchi* case gave the Supreme Court the opportunity to reconsider and potentially reformulate the policy/operational distinguishing criteria first laid out in *Just*.

The Court, in *Marchi*, noted four factors that are important to consider in assessing the nature of a government’s decision as either policy or operational:

- (1) level and responsibility of the decision maker;
- (2) process by which the decision was made;

- (3) nature and extent of budgetary considerations; and
- (4) extent to which the decision was based on objective criteria.

These four factors were not presented by the Court as an entirely new formula for determining which side of the policy/operational divide a particular decision lies. Rather, they were said to emerge from the Supreme Court's previous jurisprudence. The Court quoted from its 2011 decision in *R v. Imperial Tobacco Canada Ltd.* in summarizing "core policy decisions" as "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".

The Court downplays the significance of the "budgetary considerations" or allocation of resources as not being determinative on its own in stamping a decision as "policy". Municipalities and other public bodies have enjoyed a fair degree of success persuading courts to apply the policy defence based on the argument that there was a policy decision guided by financial, budgetary or resource allocation considerations. Following *Marchi* it is now clear that "budgetary considerations" are but one factor among many to be considered by the court. The Court further diminished the significance of budgetary considerations by suggesting that while a budgetary allotment at a department level is a decision "that would be miserable for a judge to attempt to unravel", budgetary or financial resource allocation decisions at the individual employee level would not be similarly difficult for a judge to assess.

In the case at bar, the Court assessed each of the four factors that are relevant in assessing the nature of a government's decision and concluded that the City did not meet the burden of establishing that its snow removal decisions were core policy decisions immune from liability.

First, regarding the level and responsibility of the decision maker, the Court noted that the public works supervisor in the City's case "did not have the authority to make a different decision with respect to the clearing of parking stalls". Second, in assessing the process by which the City made its snow removal decisions, the Court noted that there was no indication that the City took into consideration the possibility of creating openings from the street to the sidewalk. Thirdly, in terms of the budgetary considerations taken into account by the City in making its snow removal decision, they were day-to-day considerations of individual employees rather than high-level considerations, such as budgetary allotments at a department level. In respect to the fourth factor, the Court concluded that the City's snow removal approach could be assessed on objective criteria. The Court concluded "the City [did not show] that the way it plowed the parking stalls was the result of a proactive, deliberative decision, based on value judgements to do with economic, social or political considerations". Therefore, the City did in fact own a duty of care to Ms. Marchi, as the City's snow removal decisions were not true policy decisions.

Barry Williamson & Sarah Strukoff