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CASELAW UPDATE

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CASELAW UPDATE

At this point in the Young, Anderson Seminar, most readers are recovering from over-indulging on the meaning of "reasonableness", a difficult to digest discussion of bias and too much free information on freedom of information. As such, this case law update is intended as a *digestif*, to help the reader relax and unwind, before moving back to novels and the latest non-fiction about the future of humanity. Following is a short selection of some important local government court decisions from the past year.

I. MUNICIPAL NEGLIGENCE & CORE POLICY DECISIONS – *NELSON (CITY) V. MARCHI*, 2021 SCC 41

In its October, 2021 decision in *Nelson (City) v. Marchi*, 2021 SCC 41, the Supreme Court of Canada again examined the distinction between government policy decisions, which do not attract liability in negligence, and operational decisions, which can attract liability in negligence. While it remains difficult to draw in bright line between policy and operational decisions, this case does provide some useful guidance.

The Court introduced its decision with the following statement:

> Under Canadian tort law, there is no doubt that governments may sometimes be held liable for damage caused by their negligence in the same way as private defendants. At the same time, the law of negligence must account for the unique role of public authorities in governing society in the public interest. Public bodies set priorities and balance competing interests with finite resources. They make difficult public policy choices that impact people differently and sometimes cause harm to private parties. This is an inevitable aspect of the business of governing. Accountability for that harm is found in the ballot box, not the courts. Courts are not institutionally designed to review polycentric government decisions, and public bodies must be shielded to some extent from the chilling effect of the threat of private lawsuits.

In this case, the Court considered whether such a public body "liability shield" should apply to certain City snow clearing decisions. After heavy snowfall in January of 2015, City of Nelson employees plowed a group of angled parking spaces along Baker Street in a manner that created a snowbank between the parking spaces and the adjacent sidewalk. The City did not clear a pathway for people who parked in the spaces to access the sidewalk. The plaintiff, Ms. Marchi, parked her car in one of the spaces on Baker Street and then attempted to cross the snowbank to reach the sidewalk. However, she fell through the snow and significantly injured her leg. Ms. Marchi sued the City in negligence, seeking $1 million in compensation.

The B.C. Supreme Court concluded that the City was not liable because its snow clearing decisions were policy decisions. The Court of Appeal subsequently allowed the appeal and ordered a new trial, finding that the trial judge did not properly analyze the distinction between policy and operational decisions. The case then made its way to the Supreme Court of Canada.

The Supreme Court of Canada began by reviewing the law of negligence, noting that: "The foundation of the modern law of negligence is the neighbour principle established in *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), under which "parties owe a duty of care to those whom they ought reasonably to have in contemplation as being at risk when they act". The Court then referred to the "*Anns/Cooper* test", stating: "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".

With respect to Ms. Marchi's claim, the Court concluded that the City did owe a *prima facie* duty of care, finding that it was reasonably foreseeable that negligent snow removal practices could cause physical harm to those using City streets and sidewalks.

The Court then turned to whether residual policy concerns negated this *prima facie* duty of care and referred to its earlier decision in *Just v. British Columbia*, [1989] 2 S.C.R. 1228, which considered the Provincial government's duties and liability for maintenance and safety of its highways:

> The Court found that the duty of care should apply to public authority defendants "unless there is a valid basis for its exclusion". The Court referred to two such bases: first, statutory provisions that exempt the defendant from liability, and second, immunity for "true" policy decisions. While such policy decisions are exempt from claims in negligence, the operational implementation of policy may be subject to the duty of care in negligence.

The Court stated there is no "magic formula or litmus test" for determining when a decision is a "core" policy decision but that "Core policy decisions, shielded from negligence liability, 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"".

As to 'operational' decisions, the Court stated:

> Activities falling outside this protected sphere of core policy -- that is, activities that open up a public authority to liability for negligence -- have been defined as "the practical implementation of the formulated policies" or "the performance or carrying out of a policy" …. Such "operational" decisions are generally "made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness."

Relying on previous decisions that have assessed the policy and operational divide, the Court set out four factors relevant to assessing a decision:

- The level and responsibility of the decision-maker;
- The process by which the decision was made;
- The nature and extent of budgetary considerations; and
- The extent to which the decision was based on objective criteria.

The Court's discussion of these four factors is helpful, and reproduced below:

> First: the level and responsibilities of the decision-maker. With this factor, what is relevant is how closely related the decision-maker is to a democratically-accountable official who bears responsibility for public policy decisions. The higher the level of the decision-maker within the executive hierarchy, or the closer the decision-maker is to an elected official, the higher the possibility that judicial review for negligence will raise separation of powers concerns or have a chilling effect on good governance. Similarly, the more the job responsibilities of the decision-maker include the assessment and balancing of public policy considerations, the more likely this factor will lean toward core policy immunity. Conversely, decisions made by employees who are far-removed from democratically accountable officials or who are charged with implementation are less likely to be core policy and more likely to attract liability under regular private law negligence principles.
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> Second: the process by which the decision was made. The more the process for reaching the government decision was deliberative, required debate (possibly in a public forum), involved input from different levels of authority, and was intended to have broad application and be prospective in nature, the more it will engage the separation of powers rationale and point to a core policy decision. On the other hand, the more a decision can be characterized as a reaction of an employee or groups of employees to a particular event, reflecting their discretion and with no sustained period of deliberation, the more likely it will be reviewable for negligence.
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> Third: the nature and extent of budgetary considerations. A budgetary decision may be core policy depending on the type of budgetary decision it is. Government decisions "concerning budgetary allotments for departments or government agencies will be classified as policy decisions" because they are more likely to fall within the core competencies of the legislative and executive branches. On the other hand, the day-to-day budgetary decisions of individual employees will likely not raise separation of powers concerns.

> Fourth: the extent to which the decision was based on objective criteria. The more a government decision weighs competing interests and requires making value judgments, the more likely separation of powers will be engaged because the court would be substituting its own value judgment. Conversely, the more a decision is based on "technical standards or general standards of reasonableness", the more likely it can be reviewed for negligence. Those decisions might also have analogues in the private sphere that courts are already used to assessing because they are based on objective criteria.

Ultimately, the Court concluded that the core policy defense was not available in this case:

> … the City's clearing of snow from the parking stalls in the 300 block of Baker Street by creating snowbanks along the sidewalks -- thereby inviting members of the public to park in those stalls -- without ensuring direct access to sidewalks was not the result of a core policy decision immune from negligence liability. Instead, as we shall explain, it was a routine part of the City's snow removal process, to which little thought was given.

The Court explained its conclusion by applying the four above factors:

> … the City's decision bore none of the hallmarks of core policy. Although the extent to which the supervisor was closely connected to a democratically-elected official is unclear from the record, she disclosed that she did not have the authority to make a different decision with respect to the clearing of parking stalls (the first factor). In addition, there is no suggestion that the method of plowing the parking stalls on Baker Street resulted from a deliberative decision involving any prospective balancing of competing objectives and policy goals by the supervisor or her superiors. Indeed, there was no evidence suggesting an assessment was ever made about the feasibility of clearing pathways in the snowbanks; the City's evidence is that this was a matter of custom (the second factor). Although it is clear that budgetary considerations were involved, these were not high-level budgetary considerations but rather the day-to-day budgetary considerations of individual employees (the third factor).
>
> Finally, the City's chosen method of plowing the parking stalls can easily be assessed based on objective criteria (the fourth factor) … In this case, the court would be well-equipped to determine whether the snowbanks posed an objectively unreasonable risk of harm (the standard of care question). The safety of a road or sidewalk can be measured based on objective or commonly accepted standards as it is in the private sector…

It is important to note that the Court simply held that the City's decisions on parking space snow clearing in case were not core policy decisions and, as such, the City was not shielded from potential negligence liability. The Court did not, however, make any finding as to whether the City was negligent in its snow clearing of the Baker Street parking spaces or that this was the cause of Ms. Marchi's injury. Instead, the Supreme Court of Canada ordered a new B.C. Supreme Court trial for determination as to whether the City was negligent and liable to compensate Ms. Marchi for her injuries.

II. APPROVING OFFICER LIABILITY & LIABILITY RELEASES UNDER SECTION 219 COVENANTS – GOY 1 AND GOY 2

In September 2021, the B.C. Court of Appeal released two concurrent decisions involving homeowner claims against the District of Sechelt and the District's approving officer for negligent subdivision approval and building and occupancy permit issuance, in connection with significant geotechnical instability of resulting lots. Both decisions are favourable to local government, as the Court of Appeal confirmed that (1) an approving officer does not have a duty of care to (and consequential exposure to negligence claims from) future lot owners in connection with the approving officer's approval of a subdivision and (2) a covenant in favour of a local government under section 219 of the *Land Title Act* may contain a release from the owner of a property, binding upon subsequent property owners, releasing the local government for liability associated with matters contained in the covenant.

In 2004, a developer applied to the District of Sechelt approving officer for approval of a 28-lot subdivision. At that time, the developer and the District were aware of slope stability issues with the site, including land slip, sinkholes and the emergence of springs. Accordingly, the approving officer required that the developer provide a geotechnical engineer report confirming that the site was suitable for the proposed development. The developer provided a report confirming that the land could be safely used for intended purposes, if developed in accordance with certain conditions identified in the report. An addendum to the report specifically addressed sinkholes, outlining remedial measures to make building sites safe for development, but noting that, "until a soil collapse occurs, the presence of a (potential) sinkhole is generally undetectable. The occurrence is random". The approving officer also required, and the developer granted, a covenant to the District under section 219 of the *Land Title Act* requiring development in accordance with the geotechnical report. The covenant also included an indemnity and release of the District with respect to claims arising from the construction of structures on the land and the use of the land. In 2006, the approving officer approved of the subdivision.

Sinkholes eventually emerged and, in February 2019, the mayor declared a local state of emergency. Residents were evacuated and the development fenced and closed off. The B.C. Supreme Court, in its decision referred to below, highlighted the seriousness of the situation: "The subdivision remains fenced off and is a ghost town, or at least a ghost subdivision. As noted above, the mayor issued the Declaration because the land is unstable. It appears at this stage to be a geotechnical disaster."

Several landowners sued the District, the approving officer, the developer and various engineering firms involved in the development. By way of two initial court applications: (1) the plaintiffs sought a declaration that the "release" contained in the covenant on title to the properties did not apply to them, and (2) the District applied to strike the claims against the approving officer. In *Goy v. Sechelt (District)*, 2020 BCSC 1242, the B.C. Supreme Court held that section 219 of the *Land Title Act* did not authorize the inclusion of a release in a covenant and that, in any event, the wording of release in this case did not cover the subject claims. The Court did, however, strike the claims against the approving officer, holding that the approving officer did not owe the plaintiffs a private law duty of care and that the approving officer was immune from liability as a "local public officer" under section 738(2) of the *Local Government Act*.

The property owners appealed the Court's decision respecting the approving officer's liability and the District appealed the decision regarding the covenant release.

A. Goy No. 1 – The Covenant Release - *Goy v. Sechelt (District)*, 2021 BCCA 349

In *Goy v. Sechelt (District)*, 2021 BCCA 349 the Court of Appeal allowed the District's appeal, finding that section 219 of the *Land Title Act* authorized the inclusion of a release and that the release covered the claims in this case. This is an important result, because prior to the *Goy* decisions there was uncertainty as to whether section 219 authorized releases, given that section 219(6)(a) expressly authorizes indemnities, but is silent with respect to releases:

> (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,

In finding that section 219 authorizes releases, the Court of Appeal relied on the broad wording of section 219(2)(a) of the *Land Title Act*, which provides as follows:

> (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

The Court, in referring to "provisions in respect of the use of land", held that, "By choosing such broad language, it appears to me that the legislature contemplated the inclusion of a release in a covenant as a provision "in respect of the use of land"".

How did the Court deal with the fact that section 219(6) expressly provides for indemnity, but does not mention releases? The Court gave subsection (6) a 'belts and suspenders' interpretation, stating:

> Indeed, the possibility that a covenant may include an indemnity is expressly contemplated by s. 219(6). I do not think that one can infer from the express authorization of the inclusion of an indemnity in a covenant that the legislature by implication should be taken to have excluded a release. To the contrary, I take it that the express reference to an indemnity, while probably not strictly necessary, removes any doubt that might otherwise exist. It is understandable that the legislature made express reference to an indemnity in s. 219(6) because it, like the other provisions in that subsection, imposes positive obligations on the landowner to expend money. As the Province points out, a release is not a positive obligation and does not require the expenditure of money. I agree with the District and the Province that authorizing an indemnity but not a release would result in an absurdity, effectively requiring a plaintiff to indemnify the covenantee for the financial consequences of its negligence.

The Court went on to find that the wording of the release was sufficiently broad to apply to the plaintiffs' negligence claims against the District and issued a declaration that the plantiffs had released the District from all of the claims alleged or damages sought in the subject court actions.

Accordingly, the B.C. Court of Appeal has confirmed that a section 219 covenant may include a release of claims by a property owner against a local government, and that such a release will be binding on future owners of the affected property.

B. Goy No. 2 – Approving Officer Liability - *Goy v. Sechelt (District)*, 2021 BCCA 350

In the second decision, *Goy v. Sechelt (District)*, 2021 BCCA 350, the Court of Appeal dismissed the landowners' appeal, upholding the decision on approving officer liability.

The key issue for a finding of approving officer negligence in this case was whether the approving officer and the landowner plaintiffs were in a relationship of sufficient 'proximity', such that imposing a duty of care on the approving officer would be just in the circumstances. The Court made the following comments on this 'proximity analysis' in the case of public officials performing statutory functions:

- "Primarily, the proximity analysis in claims against government officials is grounded in the governing statutory framework."
- "Proximity is found where there exists between the parties a close and direct relationship, having regard to the parties' expectations, representations, reliance on one another, and the property or other interests involved."
- "Courts will more readily find a private law duty of care where the regulator is under a statutory duty to act, as opposed to exercising only permissive powers … In contrast, where a regulator acts in the public interest, courts will be reticent to recognize a private duty of care lest it conflict with this objective."

The Court then commented on the discretionary and "public interest" nature of the approving officer's powers under the *Land Title Act*:

> Part 7 of the LTA curtails the common law right to subdivide land, and affords an approving officer with wide discretion to refuse to approve a subdivision where it is against the public interest. That involves balancing and weighing risks and competing interests, including those of neighbouring landowners, the municipality and lot owners in the subdivision, to arrive at an overarching determination that is in the public interest.

In relation to geotechnical issues, the Court stated:

> …the officer is under no obligation to decline to approve a subdivision if there exists a risk, even a high one, of geotechnical problems. Section 86(1)(c) provides that geotechnical risks are one ground of many upon which an approving officer "may" refuse to approve a subdivision. Section 86(1)(d) makes clear that a subdivision may be approved despite the existence of those risks, as it provides the approving officer may mitigate risk by requesting from a subdivider as a condition of approval a geotechnical assessment and/or a covenant pursuant to s. 219 of the LTA, both of which were requested and provided in this case. The ability of an approving officer to place future lot owners, such as the appellants,

> on notice of geotechnical risks and to request assurances from applicants as a condition of approval does not support a finding of a private law duty of care owed to future lot owners.

The Court concluded, "I am of the view the 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."

III. THE "COMMUNITY OF INTEREST" EXCEPTION TO CONFLICT OF INTEREST – *REDMOND V. WIEBE*, 2021 BCSC 1405

The B.C. Supreme Court's decision in *Redmond v. Wiebe*, 2021 BCSC 1405, is rare B.C. case where the Court considers the scope of the "community of interest" exception to council member conflict of interest restrictions. This exception allows a council member to continue to participate in a matter before council in which the council member has a personal financial interest, where that interest is one held in common with electors of the municipality generally.

Councillor Wiebe is a City of Vancouver council member. He is also part owner of a bar and a restaurant, each operating in Vancouver. In May 2020, the City was considering the implementation of a temporary patio program to help to alleviate some of the impacts of the COVID-19 pandemic on restaurants and bars by, among other things, allowing expanded outdoor seating. Councillor Wiebe attended a committee meeting and a council meeting at which the temporary patio program was discussed, and at each meeting he voted in favour of a motion in support of the program.

Fifteen Vancouver electors petitioned the Court seeking to have Councillor Wiebe disqualified from office on the basis that he had violated the conflict of interest provisions of the *Vancouver Charter*.

In relation to financial conflicts of interest, section 145.3 of the *Vancouver Charter* provides:

> (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 *[disqualification for contravening conflict rules]* unless the contravention was done inadvertently or because of an error in judgment made in good faith.

Section 145.6 sets out various circumstances where the restrictions do not apply including, in relation to this case, where "the pecuniary interest of the Council member is a pecuniary interest in common with electors of the city generally". The courts sometimes refer to this as the "community of interest" exception.

In order to determine whether a council member should be disqualified from holding office for a conflict of interest, the Court summarized a two-stage approach:

> At the first stage, a petitioner [in this case, the electors] has the burden of proving on a balance of probabilities that an official had a conflict of interest by establishing that he/she had a direct or indirect pecuniary interest in a matter, as set out in s.145.3(1) of the Vancouver Charter…
>
> At the second stage, the burden shifts to the respondent [councillor Wiebe] to prove that he/she acted inadvertently or made an error of judgment in good faith under s. 145.3(3) or that he/she is otherwise excused under one of the exceptions listed under s. 145.6(1).

At the first stage, with seemingly little difficulty, the Court held that Councillor Wiebe had a financial interest in the temporary patio program and had therefore violated the restrictions under section 145.3(2), when he attended, participated in and voted at the committee and council meetings relating to the program. The Court held that his financial interest "was his ownership stake in a restaurant and pub that potentially stood to benefit from the program".

The Court then turned to the second stage of analysis, whether Councillor Wiebe was nevertheless permitted to participate in these meetings because his financial interest was "in common with electors generally". The petitioners argued that "electors generally" referred to all Vancouver electors. Councillor Wiebe argued, in effect, that "electors generally" could refer to a subset of electors and that in this case "the comparator group is the holders of the 3,127 restaurant and bar licences ... because his interest in the discussion and vote on the opening/expansion of patio use was no different from other owners of restaurants and bars in Vancouver".

The Court referred to various cases and included some excerpts from those cases indicating that, at least under the common law, the "community of interest" exception could apply where the "comparator group" is less than all electors.

Interestingly, the Court did not refer to *Godfrey v. Bird*, 2005 BCSC 626, where the Court suggested that for the District of North Saanich, 100 properties would be the smallest comparator group. The Court did indicate that the B.C. Supreme Court decision in *Re Hoeppner*, [1976] 4 W.W.R. 481 (B.C.S.C), supported Councillor Wiebe's position, however, the Court did not discuss the specific circumstances of that case, which are helpful to councillor Wiebe's position. In *Re Hoeppner*, the Court found the community of interest exception to apply where a Vancouver alderman owned property that would be favourably affected by a zoning amendment, but the facts were also that "A large number of property owners will be favourably affected by the amendments to the zoning by-law because the amendments are applicable to properties zoned RT-2, throughout the whole of the City of Vancouver". In other words, the community of interest in that case was not with all electors.

The Court ultimately sided with Councillor Wiebe:

> "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."

Accordingly, the Court refused to disqualify Councillor Wiebe from office, finding that he did not violate the conflict of interest provisions of the *Vancouver Charter* because his personal financial interest in the temporary patio program was one in common "with electors of the city generally". This case is currently under appeal. If this result stands, it will represent a significant step in B.C. local government conflict of interest law, perhaps providing more confidence to elected officials when considering whether to participate where their personal financial interest is one in common with a group of electors, as opposed to all electors.

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