

BRIEFING NOTE

Tort Immunity for “True Policy Decisions” – A Tougher Defence for Municipalities?

I. Summary

In *Nelson v. Marchi*, 2021 SCC 41, the Supreme Court of Canada revisited the legal principles first set out in *Just v. British Columbia* and provided an updated guiding framework for assessing whether a municipality’s decision can be characterized as a “true policy decision” (which enjoys core policy tort immunity) or an operation or government activity (which can attract tort liability).

The SCC affirmed the principle that where operations intersect with policies, the operation decision is not immune from negligence. Moreover, the SCC emphasized that courts must engage in a deeper analysis into the impugned decision, to ensure that tort immunity attaches only to core policy decisions, which ought to be treated as a “narrow subset of discretionary decision”.

II. Background

In *Marchi*, the City crew had plowed the street and created a snowbank along the curb of a downtown sidewalk, but without any access from the street to the sidewalk. The City’s snow clearing policy did not refer specifically to clearing parking stalls or creating snowbanks, but its practice (and the supervisor’s decisions in implementing the policy) was to remove the snowbanks after all snow plowing had completed.

The plaintiff had parked her vehicle in an angled parking stall in one of these downtown streets. To access one of the businesses along the street, the plaintiff decided to walk through the snow bank in an area where other individuals appeared to have created a “path” (as there was no other access point). While doing so, she dropped through the snow and seriously injured her leg (the parties agreed that damages were around \$1 million).

The plaintiff sued the City for negligence. The City argued that it should not have to pay any damages to the plaintiff, because snow clearing decisions are “core policy decisions” that are immune from negligence claims.

Guild Yule^{LLP}

BARRISTERS AND SOLICITORS

2100 – 1075 Georgia Street

Vancouver, BC V6E 3C9

www.guildyule.com

P 604 688 1221

F 604 688 1315

E feedback@guildyule.com

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III. Judicial History

A. B.C. Supreme Court – action dismissed

The trial judge dismissed the action on the basis of the City’s policy defence. He found the City’s actions were the result of core policy decisions about the sequence for clearing snow from roadways. In the alternative, if the decisions were operational in nature, negligence was not made out under the standard tort analysis, in part because the plaintiff was the “author of her own misfortune” and the plaintiff’s own negligence was the sole proximate cause of her own injury, thus breaking the chain of causation.

B. Court of Appeal – overturned; new trial ordered

The plaintiff appealed. The Court of Appeal overturned the trial decision. The Court of Appeal agreed with the plaintiff’s argument that the focus was not on the policy *per se*, but on the City’s creation of a snowbank along the curb without ensuring safe access to sidewalks, which was operational in nature. The Court held it was an error to accept the City’s characterization that this decision was a policy decision without analyzing whether the actions were indeed policy or operations. It further found it was an error to characterize the plaintiff’s conduct as the proximate cause of her injury, which was contrary to s. 8 of the *Negligence Act*.

C. Supreme Court of Canada – appeal upheld; City’s decision was operational and not a true policy; new trial ordered

The City appealed to the SCC. The SCC upheld the Court of Appeal decision and dismissed the appeal. The SCC found the City had not proven that its decision to clear the snow from the parking stalls where the plaintiff parked, creating snowbanks along the sidewalks without providing direct access to sidewalks, was a core policy decision immune from liability in negligence.

The SCC stated that even if the snow removal written policy was a core policy, this did not mean that *the creation of snowbanks without clearing pathways for direct sidewalk access* was a matter of core policy. The decision or conduct at issue *must be described with*

Guild Yule_{LLP}

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precision to ensure that immunity attaches *only* to core policy decisions. The failure to do so is an error of law. To this end, the SCC held the trial judge erred when he merged all of the City's snow removal decisions and activities as "policy" without analyzing the impugned conduct in question.

IV. The Legal Framework Emerging from *Marchi*

The following principles can be distilled from *Marchi*:

- The onus is always on the public authority to establish that it is immune from liability because a core policy decision is at issue [para. 35].
- Once a plaintiff proves that her case falls within the *Just* category, a duty of care will be imposed, unless the public authority can show that the relevant government decision is protected by core policy immunity [para. 35].
- Certain policy decisions should be shielded from liability for negligence, as long as they are not irrational or made in bad faith. The primary rationale for shielding core policy decisions from liability in negligence is to maintain the separation of powers [paras. 41-42].
- Core policy decisions are a "**narrow subset of discretionary decision**" "...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" [paras. 51, 67].
- The fact that it is labelled as a "policy" is not determinative. The focus must remain on the nature of the decision itself rather than the format or the government's label for the decision [paras. 59].
- The fact that the decision involves budgetary considerations is also not determinative, as all decisions, even operational ones, involve some consideration of budget [paras. 78].
- Operational activities are the practical implementation of the formulated policies or "the performance or carrying out of a policy that are "generally made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness" [paras. 52].

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- The legal test of core policy immunity and, by extension, whether a duty of care arises, is a question of law and the standard of review must be correctness [paras. 71].

Most importantly, the SCC set out a practical legal framework, which includes an assessment of **four additional factors**, to assist courts in determining whether certain decisions were policy decisions or operational activities:

(1) Level and responsibilities of the decision-maker

- Usually (but not always), a true policy decision is made “by persons of a high level of authority” [paras. 54].
- **Favours a policy decision:** 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 it is a true policy decision. 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 [paras. 62].
- **Favours an operational activity:** Decisions made by employees who are far-removed from democratically accountable officials or who are charged with implementation are less likely to be found to be core policy decisions and thus are more likely to attract liability under regular private law negligence principles [paras. 62].

(2) Process by which the decision was made

- **Favours a policy decision:** 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 [paras. 63].
- **Favours an operational activity:** 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 [paras. 63].

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(3) Nature and extent of budgetary considerations

- The mere presence of budgetary, financial, or resource implications does not determine whether a decision is a core policy decision [paras. 58].
- **Favours a policy decision:** 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 [paras. 64].
- **Favours an operational activity:** Day-to-day budgetary decisions of individual employees will likely not raise separation of powers concerns [paras. 64].

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

- **Favours a policy decision:** 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 [paras. 65].
- **Favours an operational activity:** The more a decision is based on “technical standards or general standards of reasonableness”, the more likely it can be reviewed for negligence [paras. 65].

In short, the SCC held that the City had not shown that the way it plowed the parking stalls was the result of a “proactive, deliberative decision, based on value judgments to do with economic, social or political considerations.”

On the issue of contributory negligence, the SCC affirmed that a plaintiff’s contributory negligence was not a complete bar to recovery, but rather should be considered in the apportionment of fault. In other words, the fact that a plaintiff is contributorily negligent does not bar a finding that the defendant is also at fault.

What does this mean for municipalities?

Marchi provides a clearer framework and delineation between true policy decisions and operational activities. What is clear from *Marchi* is that a true policy defence likely only applies in narrow circumstances. Courts must give close scrutiny to the specific impugned activity/decision, to determine whether the decision fits within a “narrow subset of discretionary decisions” to which immunity applies.

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From a risk management issue, municipalities might wish to revisit their existing policies, with consideration of the factors enumerated in *Marchi*, to identify risks arising from what would likely be deemed operational decisions in nature; or to better protect true policy decisions in the event of a challenge.

For more information, please contact:



Kristal M. Low
Direct Line: 604-844-5513
Email: klow@guildyule.com



Jordan A. Bank
Direct Line: 604-844-541
Email: jbank@guildyule.com

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