An Ontario Perspective on *Nelson (City) v. Marchi* 2021 SCC 41

PRESENTED TO THE INTERNATIONAL MUNCIPAL LAWYERS ASSOCIATION CANADIAN CONFERENCE
MAY 31, 2022

David Boghosian and Christina Wang
Boghosian + Allen LLP
Litigation Counsel

I. Overview

There was quite a hullabaloo in the national media when the Supreme Court's decision in *Nelson (City) v. Marchi*[1] was handed down last October, with all kinds of takes on it that clearly did not reflect the limited practical and even legal significance of the decision. To read some popular media accounts, the Supreme Court had mandated that all municipalities across the country had to clear windrows as fast as they cleared the traveled lanes on their roads following any significant snowfall. As I had to spend an inordinate amount of time over the following days and weeks explaining to my municipal clients, nothing could be further from the truth.

As this paper will explain, the Supreme Court's decision deals only with the narrow issue of the so-called "policy decision immunity", and even then only reiterating, and perhaps also narrowing the scope of that "defence." Moreover, the decision has even less application to highway winter maintenance cases in provincial jurisdictions such as Ontario with statutory duties of repair of highways, in respect of which the courts have long held are not subject to the policy decision "defence".

II. Facts

The basic fact pattern in *Marchi* is a common one that we defenders of municipal liability claims have seen over the years. The City of Nelson was hit with a snowstorm on January 4th and 5th, 2015. The City began plowing and sanding in response to the snowfall. The plowing out of on-street parking bays created a windrow or snowbank along the curb that separated the parking stalls from the sidewalk. The City did not clear the windrow or create an access route through the snowbank to the sidewalk for drivers by the day after the storm had ended. On the evening of January 6, 2015, the plaintiff parked in the on-street parking area and decided to cross the snowbank, instead of walking along the road to the nearest street corner. In the process of doing so, the plaintiff fell, causing serious injuries to her leg.

Since 2000, Nelson had relied on a written procedures document called "Streets and Sidewalks Snow Clearing and Removal" ("the Document"). The Document stated that snow removal, sanding and plowing would be carried out "on a priority schedule to best serve the public

[1] 2021 SCC 41.

and accommodate emergency equipment within budget guidelines". As such, the City first cleared snowbanks in the downtown core, then next removed snowbanks from other areas, including around civic centres and around schools, before addressing snowbanks on secondary streets.

Throughout the snowfall, the City's public works supervisor followed the direction provided in the Document and made decisions about how many employees should be on snow removal shifts based on it. Her evidence was that all streets in the City are first cleared of snow, and snowbanks are only removed after all snow plowing is complete. The downtown snowbanks were completely removed on January 9, 2015, just four days after the end of the heavy snowstorm.

III. When is a decision a "core policy" and covered by an immunity defence?

The sole issue, as framed by the Supreme Court, was whether the City's decision not to clear pathways through windrows such as to permit drivers who parked vehicles in parking spots on the road to safely access the sidewalks and adjoining businesses was a "core policy decision" as defined by the SCC in *Just v. British Columbia*[2] and refined in *R v. Imperial Tobacco.*[3]

Core policy decisions are decisions as to a course 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. A court must consider the extent to which a government decision was based on public policy considerations and the extent to which the considerations impact the rationale for core policy immunity.

It is important to note that the mere presence of budgetary, financial, or resource implications does not determine whether a decision is a core policy. Further, the fact that the word "policy" is found in a written document, or that a plan is labelled as "policy", is not determinative of the question.

Four factors assist in assessing the nature of a government's decision:

1. The level and responsibilities of the decision-maker;
2. The process by which the decision was made;

[2] [1989] 2 SCR 1228.
[3] [2011] 3 SCR 45.

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

The Court reminded readers that the purpose of "core policy" immunity in negligence is to protect the legislative and executive branch's core institutional roles and competencies necessary for the separation of powers. This rationale must serve as the overarching guiding principle in weighing the factors in the analysis. In this case, the Court found:

1. The City's public works supervisor admitted that she did not have the authority to make a different decision with respect to the clearing of parking stalls than what the Document set out;
2. There was no suggestion that the method of plowing the parking stalls resulted from a deliberative decision involving prospective balancing of competing objectives and policy goals by the supervisor or her superiors;
3. Although it is clear that budgetary considerations were involved, these were not a high-level budgetary consideration but rather the day-to-day budgetary considerations of individual employees;
4. The City's chosen method of plowing the parking stalls can easily be assessed based on objective criteria.

The Court found that the City's clearing of snow without ensuring direct access to sidewalks was not the result of a core policy decision immune from negligence liability but was a routine part of the City's snow removal process. Therefore, the City's core policy defence failed and that it owed the Plaintiff a duty of care. The Court also found that the trial judge erred regarding the standard of care and in analyzing causation. The Court declined to substitute its own findings of fact for that of the Trial Judge and remanded the case back to the British Columbia Supreme Court for a new trial.

In no way, shape or form did the Supreme Court purport to pass judgment on the reasonableness of the City's approach to snow-clearing – that was left to be decided at the new trial.

IV. Why *Marchi* does not affect the development of liability for highway non-repair and occupiers' liability in Ontario.

The SCC decision in *Marchi* essentially has no impact on two of the most common types of claims faced by municipalities in Ontario, highway non-repair and occupiers' liability, for three reasons:

1. Ontario municipalities have never had recourse to the "policy decision defence" in the highway non-repair and occupiers' liability context because of the mandatory statutory duties of care set out in s. 44 of the *Municipal Act, 2001* and s. 3 of the *Occupier's Liability Act.* respectively*;*

2. The Supreme Court did not rule on the reasonableness or unreasonableness – and therefore negligence – of the City of Nelson's actions in relation to clearing windrows or creating paths through the windrow to facilitate motorists parked on the road to access the sidewalk; rather, it ordered a new trial where that issue will be determined;

3. The analyses outlined by the Supreme Court with respect to the standard of care and causation were already well-established law.

Section 450 of the *Municipal Act, 2001*[4] codifies the policy decision defence available to Ontario municipalities as follows:

Policy decisions

450. No proceeding based on negligence in connection with the exercise or non-exercise of a discretionary power or the performance or non-performance of a discretionary function, if the action or inaction results from a policy decision of a municipality or local board made in a good faith exercise of the discretion, shall be commenced against,

(a) a municipality or local board;

(b) a member of a municipal council or of a local board; or

[4] S.O. 2001, c. 25.

(c) an officer, employee or agent of a municipality or local board.

The key aspects of s. 450 are that it applies only to "proceedings based on negligence" and only related to a "discretionary power" or "discretionary function". The statutory cause of action for highway non-repair in Ontario does not fall within any of these categories since it is not an action in negligence but one based on statutorily codified cause of action and the maintenance of highways is not an "exercise of power" that is discretionary. For these reasons, Ontario courts have held that the policy immunity at common law has no application to the statutory duty to maintain highways in a state of repair.[5] This is also true, in the highway non-repair context, in provinces that, like Ontario, have statutory duties of care, as opposed to those in which the duty is found in the common law of negligence such as British Columbia.[6]

V. Does *Marchi* Say Anything of Relevance to Ontario Municipalities?

Despite the fact that the policy decision immunity does not apply in the context of two of the most common types of claims faced by municipalities in Ontario, the policy decision immunity remains relevant to many other high-level policy decisions by public authorities, including municipalities. These include decisions regarding building inspection, planning and zoning, water and wastewater, non-highway infrastructure construction and maintenance and environmental regulation, to name but a few areas of municipal activity. In these cases, the policy considerations such as budget, labour standards, safety considerations, environmental impact etc.

Furthermore, unlike jurisdictions such as British Columbia where the policy decision immunity is available such that the mere proof that a rational policy exists can be sufficient to absolve the municipality from liability for highway non-repair, whereas in Ontario, municipalities

[5] See: *Restoule v. Strong (Township)*, 1999 CanLII 2320 where the Ontario Court of Appeal rejected a municipality's reliance on the policy decision immunity given the existence of the mandatory duty of care for the repair of highways set out in s. 284 of the former *Municipal Act* (which is materially identical to s. 44 of the current legislation); *Cooney v. Kingston (City)*, 2005 CanLII 18858.

[6] This includes Alberta, Manitoba, Saskatchewan, Northwest Territories, Yukon Territory and Nunavut, in addition to Ontario. The rest of the provinces, including British Columbia, the law of which was examined in *Marchi*, look to the common law to define the duty and standard of care for highway non-repair rather than a statute. For a detailed discussion of this point, see D.G. Boghosian and J.M. Davison, *The Law of Municipal Liability in Canada* (loose-leaf; LexisNexis Butterworths), paras. 3.303.35. Notably, the Supreme Court in *Marchi* cites this textbook approvingly in the course of its Reasons: see 2021 SCC 41, para. 38. The British Court of Appeal also cited this textbook on a different point in its Reasons in this case.

need to establish that its policy is reasonable, it has long been held that policy considerations are still relevant in the highway non-repair context to assist judges in deciding what is "reasonable" in any given case.[7]

VI. Conclusion

The SCC's decision in *Marchi* clearly signals that lower courts should assume they have jurisdiction to review decisions of public authorities of a policy nature based on the private law duty of care, except in the clearest of cases. This decision will have the effect of narrowing the policy decision immunity compared to how it has been applied by trial courts in recent years.

The outcome in *Marchi* and the four-factor test for the application of the policy decision immunity will be critically important for future municipal and other government defendants and counsel when assessing the availability of the policy decision immunity in applicable cases. It is however, of no significance to the development of liability for highway non-repair and occupier's liability in Ontario, or anywhere else where the governing legislation provides for both a mandatory duty and sets out the applicable standard of care for the repair of highways and premises, respectively.

[7] See eg., *Greenhalgh v. Douro-Dummer*, 2009 CanLII 71014.