



Policy v. Operational Decisions

In a recent British Columbia case, *Marchi v. Nelson*, the City of Nelson has been granted leave to appeal to the Supreme Court of Canada (SCC). This case involves distinguishing between decisions made by a municipality that are operational and policy decisions. Policy decisions do not attract liability for a municipality, but operational decisions may.

When municipalities are involved in a claim alleging negligence, they may avail themselves of a defence that the damages arose out of a policy decision as opposed to an operational decision. Examining the cases to follow will assist in explaining the difference between policy decisions and operational decisions.

Just v. British Columbia

The seminal policy decision case, *Just v. British Columbia* was heard by the SCC in 1989.

The Plaintiff in the *Just* case was on the road to Whistler Mountain to take his daughter skiing. The mountain road on which he was travelling was busy and when the Plaintiff was forced to stop due to the volume of traffic, a boulder became dislodged from the mountain slope and landed

on his vehicle. The Plaintiff's daughter was killed, and the Plaintiff suffered serious injuries. The Plaintiff commenced a claim against the Province alleging that they had negligently maintained the highway.ⁱ

The Province was responsible for maintaining the stretch of road travelled by the Plaintiff. The Department of Highways, on behalf of the Province, had a system in place for inspection and maintenance of the rock slope from which the boulder had fallen. Engineers would inspect the slope and make recommendations to the rock scaling crew who would perform the necessary work. Also, if a rock fall had occurred or there was a history of instability, the rock engineer would physically climb the slope to do the inspection. Highway personnel were also instructed to carry out informal inspections when driving along the highway. The Province of British Columbia's defence was that, pursuant to common law, they could not be found liable for damages arising out of a policy decision.

The Judge opined that policy decisions made in good faith are immune from review because they usually entail not only a decision to do something but also some call upon the public purse. A policy decision may create liability for the province

ⁱ *Just v. British Columbia*, 1989 CanLII 16 (SCC), [1989] 2 SCR 1228

if it was not made in good faith. The Judge found that the system of inspection and subsequent maintenance was a policy decision and the province could not be held liable. On appeal, the Court upheld the decision of the Trial Judge. The SCC decided that the decisions concerning inspection and maintenance made by the Department of Highways were not, in fact, policy decisions. They did, however, find that the standard of care required for operational decisions was reasonable and that the Department's system was reasonable. The SCC decided in favour of the Province and found that it was not liable for the Plaintiff's injuries.

Marchi v. City of Nelson

After a heavy snowfall, pursuant to their policy, the City cleared the downtown streets piling snow along the edge of the sidewalk. The Plaintiff parked her vehicle on the road and was trying to reach the sidewalk by stepping into a snowbank that had been created by the City when she was injured.

The City argued that its decision to plow an angled-parking area on a downtown street, leaving windrows over the curb, was its policy which was a decision made in good faith and the City was, therefore, not liable for the Plaintiff's injuries.

The Judge in this case referred to the *Just v. British Columbia* Supreme Court decision above. He said; "In determining what constitutes [a] policy decision, it should be borne in mind that such decisions are generally made by persons of a high level of authority in the agency, but may also properly be made by persons of a lower level of authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors. As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions. ..."

The Judge further quoted *Brown v. B.C.*; "The operational area is concerned with the practical implementation of the formulated policies, it mainly covers the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness." and "If a decision is identified as a policy decision, the public authority is excluded from liability for negligence (and other torts), unless it was made in bad faith or was so irrational as not to be a proper exercise of discretion." "But if a decision is identified as an operational decision, the public authority may be liable in negligence..."ⁱⁱ

Appeal

The Trial Judge determined that the City did not owe a duty of care because its decision was *bona fide*. This decision was favourable for municipalities but, unfortunately, it was overturned on appeal and a new trial was ordered.

The Appeal Judge found that the exemption only applies to *bona fide* policy decisions not all *bona fide* decisions. He stated: "The reasons for judgment are, in my view, marked by a failure to identify the types of governmental decisions that should be insulated from judicial scrutiny."

The City was granted leave to appeal this decision to the SCC.

Supreme Court of Canada Decision

The SCC Judge found that the City had not met its burden of proving that Marchi seeks to challenge a core policy decision immune from negligence liability.

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. Core policy decisions are immune from negligence liability because the legislative and executive branches have core institutional roles and competencies that must be protected from interference by the judiciary's private law oversight. 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.ⁱⁱⁱ

The mere presence of budgetary, financial, or resource implications does not determine whether a decision is core policy. Further, the fact that the word "policy" is found in a written document, or that a plan is labelled as "policy" may be misleading and is certainly not determinative of the question.

The SCC decided that the City's winter maintenance policy did not constitute a core policy decision so regular principles of negligence law apply in determining whether the City breached the duty of care and, if so, whether it should be liable for Marchi's damages. The standard of care and causation assessments require a new trial.

Takeaways

Experts in municipal law advise that when determining whether or not a municipality's actions were reasonable, evidence of the practice of similarly situated municipalities

ii *Brown v. British Columbia* (Minister of Transportation and Highways), 1994 CanLII 121 (SCC), [1994] 1 S.C.R. 420 at 441

iii <https://www.canlii.org/en/ca/scc/doc/2021/2021scc41/2021scc41.pdf>

concerning the activity in issue is relevant in determining the standard of care expected in the circumstances. Proof that a defendant failed to conform with the custom or practice will raise a strong presumption of negligence on his or her part whereas conformance with a custom or practice will usually, although not necessarily, exonerate the defendant.^{iv}

Although the decision was overturned, we can learn about the elements that will be considered when determining if a decision made by a municipality is an operational decision or a policy decision. All decisions made by a municipality are not policy decisions and they cannot be transformed into policy decisions simply by designating them as such.

Policy decisions, which are excluded from liability, involve:

- Good faith
- Persons of high level and authority
- Decisions concerning budgetary allotments for departments or government agencies
- A decision to do something as well as some call upon the public purse
- Decisions which are dictated by financial, economic, social or political factors

The SCC Judge in *Marchi v. Nelson* found that four factors emerged that help 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;
3. the nature and extent of budgetary considerations; and
4. the extent to which the decision was based on objective criteria

Operational decisions, which may attract liability, are concerned with:

- Practical implementation of formulated policies
- Performance or carrying out of a policy
- Administrative direction
- Expert or professional opinion
- Technical standards or general standards of reasonableness

Even when a decision is not favourable, useful information can be gleaned from the Judge's reasons and opinion that can assist in determining whether a decision is a policy or an operational decision. If a policy decision is made in good faith and the policy was followed, a municipality may be able to avoid liability for third party damages.

^{iv} David G. Boghosian in *The Law of Municipal Liability in Canada*, at para. 2.96, p. 2.54