

Yesterday, the Supreme Court of Canada released its decision in the City of Nelson snow clearing case,¹ in which it confirmed and clarified the principle of policy immunity that can shield government bodies from claims in negligence.

On the facts of the case, the Court unanimously rejected the City's policy defence, and ordered a new trial on standard of care and causation.

Background

During a heavy snowfall, the City's crews began plowing the streets in accordance with its written snow clearing policies and its unwritten practices. Crews cleared snow in angled parking stalls on a street in the City's downtown core. Crews pushed the snow to the top of the parking spaces, creating a continuous snowbank along the curb between the parking stalls and the sidewalk. They did not clear an access route through the snowbank to access the sidewalk from the street. The plaintiff parked in one of the angled parking stalls and decided to cross the snowbank, seriously injuring her leg in the process. She sued the City for negligence.

Lower Court Decision

The City argued that it was immune from liability because its decision not to clear the snowbanks right away was a core policy decision based on budgetary constraints – in essence, the City argued that it chose to deploy its staff to other tasks rather than to provide access through the snowbanks, in accordance with its policies and long-standing practice. As such, it should not be required to pay damages to the plaintiff.

The trial judge agreed with the City.

The plaintiff appealed, and the BC Court of Appeal found in her favour. The City then appealed to the Supreme Court of Canada.

Supreme Court of Canada Decision

The Court unanimously held that the City's decision to clear the snow from the parking stalls by creating snowbanks along the sidewalks without ensuring direct access to sidewalks was not a core policy decision. In explaining its decision, the Court confirmed that the following criteria are relevant to determining whether a particular decision is a core policy decision:

1. The level and responsibility 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.

The Court noted that none of these factors are determinative on their own, and courts must assess all the circumstances. The Court also noted that the fact that a local government calls something a "policy decision" is not determinative.

¹ *Nelson (City) v. Marchi*, 2021 SCC 41

On application of these criteria, the Court found that the City's decision bore none of the hallmarks of a core policy decision, because:

- The public works supervisor testified that she did not have the authority to make a different decision with respect to the clearing of parking stalls.
- There was no suggestion that the method of plowing the parking stalls resulted from a deliberate decision involving any balancing of competing objectives and policy goals by the supervisor or her superiors.
- There was no evidence suggesting an assessment was ever made about the feasibility of clearing pathways in the snowbanks.
- Although it was 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 City's chosen method of plowing the parking stalls can easily be assessed based on objective criteria (e.g. a review of other local governments' practices).

Accordingly, the City's policy defence failed, and the Court ruled that the City owed the plaintiff a duty of care.

To be clear, the Court did not rule on whether the City was in fact negligent, or whether the City's actions caused the injury – those will be the issues at a new trial.

Takeaways

The main takeaway from this decision is that the policy defence has been narrowed somewhat and local governments cannot expect to be able to rely on anything other than a comprehensive written policy adopted by elected officials or, at least, senior management. Unwritten departmental "policies" based on staff choices about how to prioritize scarce resources, or on long-standing practice, are very unlikely to form the basis of a successful defence.

We recommend that local governments review and update all of their policies for winter snow and ice clearing activities, as well as for other areas with high liability potential where the policy defence is commonly invoked. These include road/sidewalk maintenance and infrastructure repair/replacement.

Local governments should incorporate all important aspects of these activities into a written policy, leaving nothing important in the realm of "unwritten practice". The resulting draft policy should be debated and adopted at a high level – preferably, by the council or board – with consideration given to overarching economic, social and political concerns, as well as objective standards.

Questions? Contact a member of our experienced [Local Government Law Team](#):



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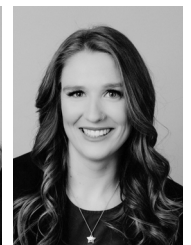
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