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Government liability for policy decisions following *Nelson (City) v. Marchi*

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A recent major winter storm dropped approximately 55 cm of snowfall across Toronto in 16 hours.¹ As pedestrians navigated high snow banks, it brings to mind the recent case of *Nelson (City) v. Marchi*, [2021 SCC 41 \(CanLII\)](#), where the Supreme Court returned to the issue of how to distinguish a “core policy” decision from government activities that could be subject to negligence claims. The case arose from a typically Canadian event – the creation of a snowbank in the City of Nelson after a heavy snowfall in January 2015. Under Canadian tort law, governments may be held liable for damage caused by their negligence in appropriate circumstances in the same way as private defendants.

At the same time, however, governments are generally protected from negligence claims that relate to public policy decisions. Governments 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. In the Supreme Court of Canada’s words, “Accountability for that harm is found in the ballot box, not the courts.”²

The tension that plays out in the courts concerns the precise scope of government decision-making that should remain free from the judicial scrutiny of what standard of care must be met. The seminal case of *R. v. Imperial Tobacco Canada Ltd.*, [2011 SCC 42](#), [2011] 3 S.C.R. 45, identified “core policy” government decisions that were shielded from liability in negligence, namely “decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors.”

In the *Nelson* case, the City started plowing and sanding the streets to respond to the snowfall, including the clearing of snow in angled parking stalls on a street located in the downtown core. Employees plowed the snow to the top of the parking spaces, creating a snowbank along the curb that separated the parking stalls from the sidewalk. Having created the snowbank, the City did not clear an access route to the sidewalk for drivers parking in the stalls.

The plaintiff parked in one of the angled parking stalls on a block of a downtown street in the City of Nelson and was attempting to access a business, but the snowbank created by the City blocked her route to the sidewalk. She decided to cross the snowbank. As her right foot stepped onto it, however, she dropped through the snow, stepped directly into an area which bent her forefoot up, and seriously injured her leg.

¹ <https://www.toronto.ca/news/city-of-toronto-continues-snow-removal-operations/>

² *Nelson* at para. [1](#)

The plaintiff sued the City for negligence. The parties agreed that she had suffered \$1 million in damages.

The City disputed liability however. Since 2000, the City relied on a written document called “Streets and Sidewalks Snow Clearing and Removal” (Policy), which broadly stated that snow removal, sanding, and plowing will be carried out “on a priority schedule to best serve the public and accommodate emergency equipment within budget guidelines.” The Policy set out priorities regarding emergency routes and the downtown core; transit routes; plowing hills; cross streets; and dead end streets.

The Policy provided specific guidelines that snow plowing will occur during the early morning hours and that snow removal may be carried out as warranted by buildup levels. It did not specifically mention clearing parking stalls or creating snowbanks.

In addition to the written Policy, the City had several unwritten practices such as plowing, sanding, and removing snow from the designated sidewalk route and the various stairs located in the City. It focused on the streets in the downtown core for snow removal, but to ensure safety, City workers begin to remove snow from other areas, including the civic centre and around schools, when the downtown core starts to get busy (typically around 11:00 a.m.). The City did not remove snow from the downtown core overnight due to noise complaints received in the past as well as the cost of overtime.

Throughout the snowfall, the City’s public works supervisor followed the Policy and made decisions about how many employees should be on snow removal shifts. 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 core was completely cleared of snow, and all snowbanks were removed, three days after the plaintiff’s injury.

The trial judge dismissed the action in part on the basis that the matter of snow removal was a “core policy” decision. The trial judgment was overturned by the British Columbia Court of Appeal and the matter found its way to the Supreme Court of Canada.

On appeal to the Supreme Court of Canada, the central issue was whether the City owed the plaintiff a duty of care relating to the snow removal decisions or whether such decisions were immune from negligence liability.³

In Canada, a duty of care for the purpose of negligence is founded on the “neighbour principle” established in *Donoghue v. Stevenson*, [1932 CanLII 536 \(FOREP\)](#), [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”.⁴

³ The decision also involved the issues of the standard of care and causation which this paper shall not address.

⁴ *Rankin (Rankin’s Garage & Sales) v. J.J.*, [2018 SCC 19](#), [2018] 1 S.C.R. 587, at para. 16.

The neighbour principle applies to private and public defendants, subject to any contrary statutory provision or common law principle.⁵

In order to determine whether a duty of care arises, the first issue to be addressed is whether the plaintiff's claim falls within or is analogous to an established duty of care or whether the claim is novel because proximity has not been recognized before (the “*Anns/Cooper* test”).⁶

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.⁷

In the case at hand, the Supreme Court determined that the City owed the plaintiff a *prima facie* duty of care based on the earlier decision of *Just v. British Columbia*, [1989 CanLII 16 \(SCC\)](#), [1989] 2 S.C.R. 1228, where a plaintiff was injured by a boulder that fell from a slope above a public highway onto his car.

In *Just*, the Court affirmed that users of a public highway are in a sufficiently proximate relationship to the province because in creating public highways, the province creates a physical risk to which road users are invited. Further, the province or department in charge can also readily foresee a risk to road users if highways are not reasonably maintained.

At the second stage, the Court in *Just* found that the duty of care should apply to public authority defendants unless there is a valid basis for its exclusion based on any applicable statutory provisions that exempt the defendant from liability, or immunity for “true” policy decisions.

While true policy decisions are generally exempt from negligence claims, the operational implementation of policy may be subject to a duty of care in negligence. Examples of “operational” rather than “true policy” decisions in *Just* were stated to include decisions like the frequency of inspections for trees and the manner in which cutting and scaling operations were carried out – essentially the *implementation* of the policy decision.

For the Court, it was most important that immunity for core policy decisions made by government defendants be well understood and fully explore where the nature of the claim calls for it. The onus is on the public authority to establish that it is immune from liability because a core policy decision is at issue rather than a decision that relates to the operation or implementation of the policy.

The question, then, is what is a “core policy” decision? The Supreme Court affirmed its earlier definition of core policy decisions as “decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided

⁵ *Cooper v. Hobart*, [2001 SCC 79](#), [2001] 3 S.C.R. 537, at para. [22](#).

⁶ *Cooper*, at para. [36](#).

⁷ *Cooper*, at para. [30](#).

they are neither irrational nor taken in bad faith.”⁸ Put another way, the focus is on the fundamental nature of the decision at issue.

Core policy decisions are immune from negligence liability because the legislative and executive branches of government 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.

The Court acknowledged that there is no magic formula or litmus test to determine whether a government decision is part of core policy or merely operational. However, the Court provided a new framework analysis to aid in the determination. In order to assess whether a decision was “core policy” rather than operational, the Supreme Court unanimously set out four factors to assess 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.

In *Nelson*, the City did not claim any statutory exemption from a duty of care, and there was no suggestion that it acted irrationally or in bad faith. Accordingly, the Court turned to the assessment of whether there was immunity based on the nature of the decision challenged by the plaintiff.

The City argued that its written and unwritten snow clearance and removal policies were core policy decisions because they involved allocating scarce resources in circumstances where not all stakeholders can be satisfied at once.

Conversely, the plaintiff argued that the claim was not about the written policy’s priority schedule for plowing and sanding or the City’s snow clearance and removal policies generally, which are unchallenged. Rather, at issue is the clearing of snow from the parking stalls on the street in question and the creation of a snowbank along the curb without ensuring safe access to sidewalks. The plaintiff argued that even assuming that the City’s written snow clearing policy was “core policy,” the clearing of parking stalls and the creation of snowbanks was not mandated by any of the City’s documents; it was the operationalization or implementation of snow removal.

The Supreme Court agreed with the plaintiff. In the Court’s view, the City’s clearing of snow from the parking stalls by creating snowbanks along the sidewalks – thereby inviting members of the public to park in those stalls – without concurrently ensuring direct access to sidewalks,

⁸ *R. v. Imperial Tobacco Canada Ltd.*, [2011 SCC 42](#), [2011] 3 S.C.R. 45, at [para. 90](#).

was not the result of a core policy decision immune from negligence liability. Rather, this was a routine part of the City's snow removal process, to which little thought appeared to have been given.

Further, the City's decision bore none of the "hallmarks" of core policy. Firstly, the implementation of the City's snow clearing operations was made by the City's public works supervisor rather than a democratically-elected official. Secondly, the method of plowing the parking stalls did not result from a deliberative decision involving any prospective 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. Thirdly, while budgetary considerations were involved, these were not high-level budget decisions but rather the day-to-day budgetary considerations of individual employees. Lastly, the City's chosen method of plowing the parking stalls could be readily assessed based on objective criteria.

As a result, the Supreme Court found that the City's "core policy" defence failed and that it was not immune from the plaintiff's negligence claim. The plaintiff's appeal was allowed and a new trial was ordered on the issues of whether the City had breached the applicable standard of care and causation of damages.

The decision provides an important framework for assessing whether impugned government conduct is subject to negligence claims or is immune as being a core policy decision.

Going forward, governments will need to develop mechanisms to determine whether a given decision falls within policy immunity. If the decision is determined to be operational, governments will require a proactive due diligence framework to bolster their policy immunity defences claims. These authors suggest that matrix analysis may assist on both these levels.

Risk assessment requires a balancing of two fundamental concepts: "precautions taken to avoid the event" versus "systems to measure potential gravity of impact". The two categories can be used to generate a matrix that directs priorities in the taking of preventative steps.⁹ Matrix analysis determines what level of pro-active audit or investigation is appropriate, as illustrated in the following matrix:

⁹ *Profiting from Risk Management and Compliance* | by Todd L. Archibald and Kenneth E. Jull (Thomson Reuters 2021) Chapter 3. Compliance: Behavioural Theory, Gender and Diversity II. Applying the Matrix to Organizational Theory in Corporate Management, Figure A. Matrix Planning Applied to Specific Tasks.

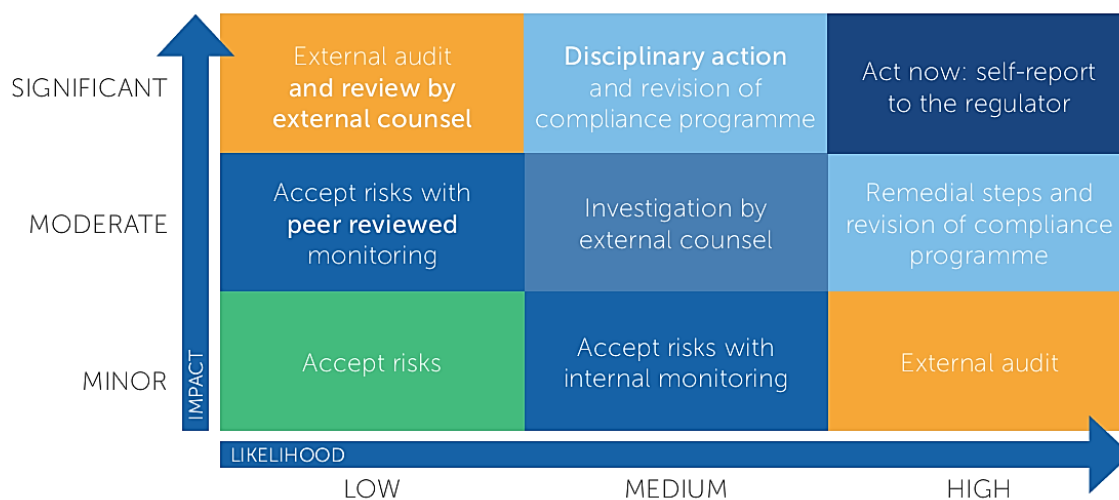


Figure A

The risk management matrix has been widely used within engineering and environmental fields for some time now. Matrix analysis is also used by the federal government. For example, the Treasury Board of Canada has developed a sophisticated corporate risk profile that colour codes a risk matrix and sets out plans of action based on the level of risk.¹⁰

A risk management matrix is grounded in the concepts of negligence law that form the basis of due diligence defences. Justice Linden summarized the concept with the equation of $PL=OC$:

Mr. Justice Learned Hand once attempted to express this notion in algebraic terms. He suggested that liability depended upon whether B is less than PL . P stands for the probability that the risk will eventuate, L represents the gravity of the loss if the injury results and B is the burden of adequate precautions. Professor (now Mr. Justice) Posner has argued that this is an “economic test”:

“The burden of precautions is the cost of avoiding the accident. The loss multiplied by the probability of the accident is the cost that the precautions would have averted. If a larger cost could have been avoided by incurring a smaller cost, efficiency requires that the smaller cost be incurred.”

This formula is helpful, but a more accurate one would split the burden factor in two—object and cost. The amended equation, therefore, is $PL=OC$. If the probability multiplied by the loss is greater than the object times the cost, liability ensues; conversely, if the probability times the loss is less than the object times the cost, the conduct is blameless.¹¹

¹⁰ <https://www.canada.ca/en/treasury-board-secretariat/corporate/risk-management/corporate-risk-profiles.html>

¹¹ A. Linden, *Canadian Tort Law*: 6th ed. (Toronto: Butterworths, 1997), at pp. 116-17.

The mathematical model that underlies the matrix has been applied in determining whether a given employee qualifies as a senior officer within the meaning of the *Criminal Code*.¹² The axis on the matrix juxtaposes the likelihood of an employee exercising a business decision against the severity of the consequences of decisions made by that employee.

The factors identified by the Court in *Nelson* could be grouped into the following competing axis:

Y Axis: Severity of impact: (1) the level and responsibilities of the decision-maker; (2) the nature and extent of budgetary considerations;

X Axis: Precautions taken to avoid the event: (1) the process by which the decision was made; (2) the extent to which the decision was based on objective criteria.

If it is determined by matrix analysis that a given decision may fall within the operational sphere, the next level of matrix analysis is to determine the appropriate level of proactive investigation or audit.

The decision in *Nelson* provides the new framework for analysis. We hope that matrix analysis will assist in applying this analysis, at least before the next major storm event.

¹² *Profiting from Risk Management and Compliance* | by Todd L. Archibald and Kenneth E. Jull (Thomson Reuters 2021) § 10:14. A Matrix to Determine Senior Officer Status.