SCC File No. 39108

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

CITY OF NELSON

APPELLANT
(Respondent)

AND:

TARYN JOY MARCHI

RESPONDENT
(Appellant)

FACTUM OF THE APPELLANT

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

ALLEN / MCMILLAN LITIGATION COUNSEL
1550-1185 West Georgia Street
Vancouver, BC V6E 4E6

Greg J. Allen
Liam Y. Babbitt
Suzy Flader

Tel: 604.569.2652
Fax: 604.628.3832
Email: greg@amlc.ca
liam@amlc.ca
suzy@amlc.ca

Counsel for the Appellant, City of Nelson

GIB VAN ERT LAW
148 Third Ave
Ottawa, ON K1S 2K1

Gib van Ert

Tel: 613.408.4297
Fax: 1.613.651.0304
Email: gib@gibvanertlaw.com

Ottawa Agent for Counsel for the Appellant, City of Nelson

DAROUX LAW
1590 Bay Avenue
Trail, BC V1R 4B3

Danielle K. Daroux

Tel: 1.888.470.6084
Email: dd@darouxlaw.ca

MURPHY BATTISTA LLP
2020-650 West Georgia Street
Vancouver, BC V6B 4N7

Joseph E. Murphy, QC

Tel: 604.683.9621
Email: Murphy@murphybattista.com

Counsel for the Respondent, Taryn Joy Marchi

MICHAEL J. SOBKIN
33 Somerset Street West
Ottawa, ON K2P 0J8

Michael J. Sobkin

Tel: 613.282.1712
Email: msobkin@sympatico.ca

Ottawa Agent for Counsel for the Respondent, Taryn Joy Marchi

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. This case presents an opportunity for this Court to provide much-needed guidance on two areas of tort law – (1) the immunity from tort liability for *bona fide* policy decisions of a public body, and (2) whether a plaintiff can recover in tort when he or she has been found to be the proximate cause of his or her injuries.

2. Both of these areas have been fraught with confusion and uncertainty in the jurisprudence. The policy defence in particular has bedevilled lower courts and academics since it was outlined in *Just*[1] and *Brown*,[2] despite this Court's attempt to provide clarity in *Imperial Tobacco*.[3] It remains a test defined by its vagaries, providing little direction to both counsel seeking to advise clients and litigants seeking to assess risk.

3. The facts of the case are straightforward. Upon exiting her vehicle, the respondent, Ms. Taryn Joy Marchi, injured herself by attempting to traverse a snow windrow[4] which had not yet been cleared because the appellant, City of Nelson (the "City"). The City had been conducting snow removal operations in other areas pursuant to its *bona fide* snow clearance and removal policy. There is no dispute that the snow clearance and removal policy was *bona fide* and, the City submits, no reasonable dispute that it was followed.

4. The facts are similarly straightforward with respect to the issue of proximate cause. Ms. Marchi made the conscious decision to park her vehicle in a block which had not yet been cleared of windrows, even though adjacent blocks had been cleared. She did not try to find a parking spot on an adjacent block. She then made a further conscious decision to attempt to traverse the snow windrow despite knowing it was potentially unsafe. For the City's part, it had cleared the road and sidewalk in the area of Ms. Marchi's fall, as well as removed snow

[1] *Just v. British Columbia*, [1989] 2 SCR 1228 [*Just*].
[2] *Brown v. British Columbia*, [1994] 1 SCR 420 [*Brown*].
[3] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 [*Imperial Tobacco*].
[4] A snow windrow is the pile of snow left at the curb of a road after a snowplow has plowed the road and pushed the fallen snow from the road surface.

windrows in adjacent blocks. The trial judge found, rightly, that Ms. Marchi was the proximate cause of her own injuries.

5. Moreover, the City submits that the Court of Appeal for British Columbia erred with respect to the standard of care analysis, ignoring the trial judge's clear application of the proper principles and erroneously concluding that he replaced the concept of "reasonableness" with that of "rationality". The City submits that it met the applicable standard of care, and the trial judge's conclusion in this regard should be restored.

Background facts

A. The snow removal policy

6. The City has operated under its "Streets and Sidewalks Snow Clearing and Removal" policy (the "Policy") since January 1, 2000.[5] The trial judge's assessment of the Policy was critical to his determination of this case, and particularly the question of whether the City's impugned conduct constituted a policy decision or an operational decision.

7. The key terms of the Policy are as follows:

> **POLICY:**
>
> Snow removal, sanding and plowing of City streets shall be carried out on a priority schedule to best serve the public and accommodate emergency equipment within budget guidelines.
>
> **PROCEDURE:**
>
> **Plowing, Sanding and Clearing Priorities shall be:**
>
> 1st emergency routes and the downtown core.
>
> 2nd the transit routes
>
> 3rd plowing hills (up/down)
>
> 4th cross streets
>
> 5th dead end streets

[5] *Marchi v Nelson (City of)*, 2019 BCSC 308 [Trial Court Decision] at para 4.

DOWNTOWN

- Snow plowing in the downtown area will be undertaken during the early morning hours
- Removal of snow from the downtown areas may be carried out in conjunction with any of the above priorities and as warranted by build up levels.[6]

8. The trial judge held that the City engaged in snow clearance and removal activities pursuant to both the Policy as well as certain unwritten policies.[7] The City's unwritten snow clearance and removal policies included policies relating to clearing sidewalks, inspections and the timing of snow removal operations from the downtown core so as to reduce noise pollution.[8] The trial judge further held that the City's written and unwritten snow clearance and removal policies were informed by budgetary, social and economic factors, which included consideration of the availability of manpower and equipment.[9]

B. Snow event and Ms. Marchi's injuries

9. Between January 4 and 6, 2015, a significant volume of snow fell in the City. By January 6, 2015, there were 36 centimetres of snow on the ground. As noted above, the City's snow removal policies dictated a priority sequence for the clearing of streets and the eventual removal of snow from the City's downtown core. Early on January 5, 2015, the City began snow clearance and removal operations pursuant to the aforementioned written and unwritten policies. Once snow was cleared from the streets of the downtown core and various priority routes, but before the cleared snow was hauled away, the City's focus shifted, as required under the Policy, to clearing snow from other streets outside of the downtown core to permit residents to safely travel to the downtown core to work and shop.[10]

10. Once streets were cleared as required by the Policy, the City turned to hauling plowed snow away. At trial, Karen MacDonald, the City's Public Works and Parks Supervisor at the material time, testified that hauling snow from downtown was done on a priority sequence per

[6] Appeal Record of the Appellant, vol 1, p 56
[7] Trial Court Decision at paras 4-6 & 13.
[8] Trial Court Decision at para 5.
[9] Trial Court Decision at para 7.
[10] Trial Court Decision at paras 4, 5, and 11.

the Policy, with priority given to bus routes, the Civic Centre, medical clinics, the fire hall and the police station before snow was hauled from any other blocks.[11]

11. As an inevitable side effect of plowing streets in accordance with the aforementioned priority sequence, the City's snow removal teams had created various snow windrows around the City, including in the 300 block of Baker Street.[12] The City did not pile plowed snow into specific parking spots or collection areas, as it was not feasible to do so.[13]

12. The City began hauling the plowed snow from the downtown core pursuant to the Policy during the morning of January 6, 2015, and had fully removed all snow from the downtown core by January 9, 2015.[14] In particular, the City commenced the process of removing snow windrows during the morning of January 6, 2015 on the priority sequence set out in the Policy. Ms. MacDonald's uncontroverted evidence at trial was that hauling snow from one city block can take 10-20 individual truck trips, and as a result snow windrows in many non-priority blocks remained in place as of the evening of January 6, 2015.[15]

13. Unfortunately, during the evening of January 6, 2015, Ms. Marchi was seriously injured when she attempted to traverse a snow windrow after parking her car in the 300 block of Baker Street.

14. Ms. Marchi parked on the north side of the 300 block of Baker Street, which is not a designated emergency route and was therefore not targeted for priority snow removal under the

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[11] Transcript page 56, lines 44-47 and page 57, lines 1-47.
[12] Trial Court Decision at para 6.
[13] The evidence of Ms. MacDonald in particular cast doubt on the feasibility of moving plowed snow into specific areas. She testified that the City typically stores piled snow up against amenity areas on Baker Street, but this is not feasible on the north side of the 300 block of Baker Street, as that part of the street has catch basins which could cause flooding if covered by melting snow. She also testified that piling snow in parking spots had the potential to create problems with sight lines, which could impact driver safety. See Transcript page 66, lines 15-31, page 67, line 5-44.

[14] Trial Court Decision at para 24.
[15] Transcript page 112, lines 44-47, page 113, lines 1-2.

Policy.[16] Ms. Marchi elected to traverse the snow windrow rather than walk along the road to a nearby area that provided cleared access to the sidewalk.[17]

15. Ms. Marchi also did not consider parking on either the 400 or 500 block of Baker Street, both of which had been fully cleared of plowed snow at the time of her injury.[18] Ms. Marchi's evidence was that she turned into the 300 block of Baker Street and took the only parking spot she saw. She did not circle the block and did not look anywhere else. She did not spend any time or effort looking for parking spots without snow windrows, which were presumably available a block away.[19]

16. Ms. Marchi's case hinges on the assumption that she was forced into an unsafe situation because of the City's alleged negligence. This is not the case. Ms. Marchi had every opportunity to find a safer parking spot in the adjacent blocks or otherwise seek a safer path to her chosen destination and elected not to do so.

Trial reasons

17. Ms. Marchi's claim was heard over the course of a three-day trial in October 2018. Prior to trial, the parties agreed on quantum of damages, and the trial proceeded on the issue of liability alone. At trial, the City defended Ms. Marchi's claim on three main bases: (1) that its actions were *bona fide* policy decisions, which provided it immunity from tort liability, (2) in the alternative, that it had met the applicable standard of care, and (3) in the further alternative, that Ms. Marchi was the proximate cause of her own injuries.

18. In his reasons, the trial judge held that the City's actions had been carried out pursuant to a *bona fide* policy, and therefore the City was immune from liability in tort. The trial judge held that the City had followed its policy, and to divert more resources to snow removal in the downtown core would have risked a "dangerous situation on the tops of the steep and snowy streets in [the City]."[20].

[16] Appeal Record of the Appellant, vol 1, p 62.
[17] Trial Court Decision at paras 29 and 30.
[18] Trial Court Decision at para 43; see also Transcript page 71, lines 8-13.
[19] Transcript page 19, lines 33-43.
[20] Trial Court Decision at para 15.

19. The trial judge went on to find in the alternative that the City had nevertheless met the standard of care expected of it in the circumstances. The trial judge noted repeatedly that the City's obligation was one of reasonableness, and it was not expected to remove every possible danger or risk.[21]

20. The trial judge reviewed the various other ways that the City could have prioritized snow clearance and removal operations, and held that the approach the City had taken (namely, placing the physical removal of snow from the downtown core lower in priority than the clearing of outer streets and clearing sidewalks/staircases of snow) was reasonable in the circumstances given the nature and gravity of the various risks posed by the snow event in the circumstances.[22] Moreover, and in any event, the trial judge concluded that the removal of the snow windrows in the 300 block of Baker Street between the onset of the snow event and the time of Ms. Marchi's injury would not have been possible under any standard of care short of perfection.[23]

21. Lastly, and in the further alternative, the trial judge noted that in order for negligence to be established, the City must be a proximate cause of Ms. Marchi's injuries. He relied on two British Columbia cases for the proposition that liability in negligence is not established if a plaintiff is found to be the proximate cause of his or her own injuries.[24]

22. The trial judge then extensively reviewed the facts with respect to Ms. Marchi's awareness of the applicable risks and her decision to assume those risks by attempting to traverse the snow windrow.[25] Ultimately, the trial judge concluded that Ms. Marchi had "assumed the risk of crossing the snowbank", and the City accordingly could not bear liability for her injuries.[26]

23. In the result, the trial judge dismissed Ms. Marchi's claim on the basis that the policy defence applied to immunize the City from liability, the City had nevertheless met its standard of care, and Ms. Marchi had been the proximate cause of her own injuries.

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[21] Trial Court Decision at para 19.
[22] Trial Court Decision at para 25.
[23] Trial Court Decision at para 40.
[24] *Wickham v. Cineplex Inc.*, 2014 BCSC 850 and *Robson v. Spencer*, 2006 BCSC 1240.
[25] Trial Court Decision at para 43.
[26] Trial Court Decision at para 45.

Appeal reasons

24. Ms. Marchi appealed, and her appeal was heard on November 12, 2019. On January 2, 2020, the Court of Appeal allowed Ms. Marchi's appeal and ordered a new trial.

25. The Court of Appeal, per Willcock JA, first addressed the trial judge's conclusion that the City was immune from liability by application of the policy defence. The Court of Appeal did not specify whether it reviewed the trial judge's decision in this regard on a standard of correctness or a standard of palpable and overriding error. The City had taken the position that a trial judge's finding as to whether a particular decision was a policy decision or an operational decision was reviewable on a palpable and overriding error standard. Ms. Marchi took no position as to the applicable standard of appellate review.

26. As discussed at further length below, the City submits that a close reading of the Court of Appeal's reasons suggests that the Court engaged in a correctness review on this issue.

27. Willcock JA held that the trial judge had erred in accepting what he described as the City's submission that all of its impugned actions with respect to snow clearance and removal were policy decisions.[27] Willcock JA stated that certain of the impugned decisions "may properly have been characterized as operational in nature", and described certain decisions as "[a]rguably" operational. He did not reach any conclusions as to which specific decisions were policy and which were operational.

28. In fact, Willcock JA stopped short of holding that the trial judge had erred in determining that specific decisions were policy decisions. Rather, he stated that the trial judge had failed to engage the accepted analytical approach to this defence as set out in *Just*. Willcock JA did not identify what aspects of the analysis in *Just* had not been followed by the trial judge, nor did he make a finding as to whether a proper application of the analysis in *Just* would have led to a different result.

29. Willcock JA then moved to the question of standard of care. He concluded that the trial judge had inappropriately discounted the evidence of witnesses from neighbouring

[27] *Marchi v. Nelson (City of)*, 2020 BCCA 1 [Appeal Court Decision] at para 13.

municipalities, the trial judge's approach to the tort analysis was "coloured" by his conclusion that the policy defence applied, and the trial judge had applied a standard of "rationality" rather than "reasonableness" when assessing the applicable standard of care.[28] Willcock JA did not conclude that the trial judge had erred in holding that the City had met the applicable standard of care, but such a conclusion is necessarily implicit in his decision to remit the matter to a new trial.

30. Lastly, Willcock JA addressed the question of proximate cause. On this issue, he relied on the Court of Appeal's decision in *Skinner v Fu* for the following proposition:

> [20] The judge's use of the term "proximate cause" in this case, diverted the analysis from the correct approach, the "but for" test. The judge must have employed a last clear chance analysis when he used the term "proximate". That term implies a finding of no liability based on a determination that the appellant could have entirely avoided the accident if only he had been more attentive to the road ahead of him. The judge found that the defendant was negligent. Indeed he could hardly have found otherwise. The respondent did create an unreasonable risk of harm by remaining stationary in the way he did.[29]

31. On the basis of the holding in *Skinner,* Willcock JA concluded as follows with respect to the question of proximate cause:

> [29] It follows that it was not open to the judge to treat his finding that the appellant assumed the risk of crossing the snowbank as dispositive of the question of the respondent's negligence. Such reasoning is clearly precluded by s. 8 of the *Negligence Act*, R.S.B.C. 1996, c. 333, which reads:
>
> > This Act applies to all cases where damage is caused or contributed to by the act of a person even if another person had the opportunity of avoiding the consequences of that act and negligently or carelessly failed to do so.[30]

32. By way of conclusion, Willcock JA stated that the trial judge had failed to appropriately consider the acts or omissions of the City that should have been subject to judicial scrutiny and

[28] Appeal Court Decision at para 22 and 24.
[29] *Skinner v. Fu*, 2010 BCCA 321 [*Skinner*] at para 20.
[30] Appeal Court Decision at para 29.

did not properly apply a standard tort analysis to any such acts or omissions. As a result, Willcock JA, for the court, allowed the appeal and ordered a new trial.

PART II: STATEMENT OF ISSUES

33. This appeal raises the following issues:

(a) Were the City's decisions with respect to snow clearance and removal during the early January 2015 snow event policy decisions or operational decisions?

(b) What is the appropriate standard of appellate review to be applied to a trial judge's finding that a particular decision (or suite of decisions) is a policy or operational decision?

(c) In the event that the impugned decisions are not immune from tort liability as policy decisions, did the City breach the applicable standard of care?

(d) Is the trial judge's finding that Ms. Marchi was the sole proximate cause of her own injuries a complete defence to Ms. Marchi's claim, despite the removal of the "last clear chance" doctrine by operation of the British Columbia *Negligence Act,* RSBC 1996, c 333?

PART III: STATEMENT OF ARGUMENT

I. The City's decisions with respect to snow clearance and removal during the early January 2015 snow event were policy decisions which are immune from tort liability

A. The policy/operational dichotomy

34. Traditionally at common law, the Crown enjoyed almost complete immunity from tort liability on the basis that the judiciary lacked jurisdiction over the Crown. This broad Crown immunity eroded over time as the scope of government activity grew and diversified, and views as to the individual's proper role within the state developed.[31]

35. As the modern state became more complex and engaged in more consistent intrusions into the lives of ordinary citizens, its immunity from tort liability retreated pursuant to both legislative initiatives (such as Crown proceedings legislation in various provinces) and the development of the common law. As noted by Cory J in *Just*:

> The functions of government and government agencies have multiplied enormously in this century… The increasing complexities of life involve agencies of government in almost every aspect of daily living. Over the passage of time the increased government activities gave rise to incidents that would have led to tortious liability if they had occurred between private citizens. The early governmental immunity from tortious liability became intolerable. This led to the enactment of legislation which in general imposed liability on the Crown for its acts as thought it were a person. However, the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions.[32]

36. The development of public body tort immunity in Canada has been an effort to balance to these two competing concepts – the intolerability of Crown immunity to the average citizen, and the inability of public bodies to exercise their governmental function if exposed broadly to tort liability.[33] There is widespread agreement in the common law world that government policy decisions are not justiciable, as well as widespread agreement that governments may be liable in

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[31] Nicholas W. Woodfield, "The Policy/Operational Dichotomy in Intra-State Tort Liability: An Example of the Ever-Continuing Transformation of the Common Law" (2000), 29 Denv. J. Int'l L. & Pol'y 27 at 31-33.
[32] *Just* at p 1239.
[33] Lorian Hardcastle, "Recovering Damages Against Government Defendants: Trends in Canadian Jurisprudence" (2015) 69 SCLR (2d) 77 at 79 [Hardcastle]; see also *Imperial Tobacco* at para 76.

tort if they are negligent in carrying out certain duties.[34] However, as the jurisprudence in this area makes clear, these divergent concepts do not lend themselves easily to reconciliation through a uniform legal test.

37. Inherent in this analysis is the fact that private law duties of care do not graft particularly well onto public bodies. Public bodies must carry out obligations placed on them by legislatures and, in so doing, allocate scarce resources while balancing the needs of diverse constituencies. The private law concepts of foreseeability and proximity are also difficult to apply to public bodies with obligations toward large groups of people.[35] To this end, the policy-operational distinction has been described as a "well-intentioned alteration fashioned to try to make the private law of negligence work for public authorities".[36]

38. The policy-operational distinction has been criticized as "ambiguous and elastic", and sufficiently malleable so as to be used to support any stakeholder's pre-existing notion of the appropriate scope of the immunity from tort liability afforded to public bodies.[37] This Court itself has described the dividing line between policy decisions and operational decisions as "difficult to fix"[38] and a question of "degree",[39] and has acknowledged that the policy/operational distinction "does not work very well as a legal test".[40]

B. What constitutes a policy decision

39. The classic distinction between a policy decision and an operational decision was summarized as follows by Cory J in *Brown*:

> In distinguishing what is policy and what is operations, it may be helpful to review some of the relevant factors that should be considered in making that determination. These factors can be derived from the following decisions of this Court: *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R.

[34] *Imperial Tobacco* at para 72.
[35] The Hon. David Stratas, "The Liability of Public Authorities: New Horizons" (2015) 69 SCLR (2d) 1 at 2 [Stratas].
[36] Stratas at 4.
[37] Halsbury's Laws of Canada (online), *Negligence*, "Special Problems of Negligence", VII(3)(2) at HNE-129 "Policy vs. Operational Decisions".
[38] *Just* at 1239.
[39] *Kamloops v Nielsen*, [1984] 2 SCR 2 at pp 9 & 23, citing *Anns v Merton London Borough Council*, [1978] AC 728 at 754.
[40] *Imperial Tobacco* at para 78.

> 705; *Barratt v. District of North Vancouver*, [1980] 2 S.C.R. 418; and *Just*, *supra*; and can be summarized as follows:
>
> > True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints.
> >
> > 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.[41]

40. In *Brown*, Cory J went on to state that policy decisions can be made by persons in all levels of authority, and the proper analytical metric was the nature of the decision itself, rather than the position of the person who made the decision.[42]

41. Seventeen years after *Brown*, Chief Justice McLachlin took a fresh look at what constitutes a policy decision of a public body in *Imperial Tobacco*. In her reasons, she acknowledged that this question "is a vexed one, upon which much judicial ink has been spilled".[43]

42. First, Chief Justice McLachlin identified two competing approaches to the issue in different jurisdictions, one focused on discretion and one focused on policy. The "discretion" line of authority holds that it is "preferable and sufficient to simply recognize immunity that extends to every *bona fide*, *intra vires* exercise of public discretion", so long as the exercise of discretion is not carried out irrationally.[44]

43. By contrast, the "core policy" line of authority focuses instead on "true" or "core" policy decisions, which are a subset of the various discretionary decisions made by a public body which engage social, economic or political considerations.[45]

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[41] *Brown* at 441.
[42] *Brown* at 442.
[43] *Imperial Tobacco* at para 72.
[44] Bruce Feldthusen, "Failure to Confer Discretionary Public Benefits: The Case for Complete Negligence Immunity" (1997) 5 Tort L Rev 24 at 24.
[45] *Imperial Tobacco* at paras 73-74.

44. The Chief Justice rejected the notion that all discretionary decisions made by public bodies are policy decisions, as well as the notion that the two concepts could be used interchangeably.[46] She noted that the "discretion" line was prone to overbreadth, as many decisions could be described as discretionary which nevertheless did not engage the social, economic or political considerations inherent to "core" policy decisions.[47]

45. In further exploring the "discretion" line and the "core policy" lines of authority, the Chief Justice went on to examine jurisprudence from other common law jurisdictions. Here, she cited the United States Supreme Court decision in *Gaubert*, wherein Justice Scalia in his concurring reasons had concluded that a decision made by a public body should be considered a policy decision if it "ought to be informed by considerations of social, economic, or political policy and is made by an officer whose official responsibilities include assessment of those considerations."[48]

46. Although not specifically cited in *Imperial Tobacco*, the majority reasons of Justice White in *Gaubert* contain perhaps the clearest distillation of what constitutes a policy decision and in what circumstances a lower level employee engaged in carrying out a public body's policy will be deemed to have made a policy decision:

> Under the applicable precedents, therefore, if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected, because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation. *See Dalehite, supra,* at 346 U. S. 36. If the employee violates the mandatory regulation, there will be no shelter from liability, because there is no room for choice, and the action will be contrary to policy. On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.
>
> Not all agencies issue comprehensive regulations, however. Some establish policy on a case-by-case basis, whether through adjudicatory proceedings or through administration of agency programs. Others promulgate regulations on some topics, but not on others. In addition, an agency may

[46] *Imperial Tobacco* at para 88.
[47] *Imperial Tobacco* at para 77.
[48] *Imperial Tobacco* at paras 82-83, citing *United States v Gaubert*, 499 US 315 (1991) [*Gaubert*].

> rely on internal guidelines, rather than on published regulations. In any event, it will most often be true that the general aims and policies of the controlling statute will be evident from its text.
>
> When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion.[49]

47. As explained further below, the City submits that this approach is consistent with existing Canadian jurisprudence on the policy/operational dichotomy and should be adopted by this Court. It is particularly apposite to the facts of the present case.

48. Relying heavily on the approach taken to defining policy decisions in *Gaubert*, the Chief Justice concluded as follows with respect to the proper definition of a policy decision:

> [87] Instead of defining protected policy decisions negatively, as "not operational", the majority in *Gaubert* defines them positively as discretionary legislative or administrative decisions and conduct that are grounded in social, economic, and political considerations. Generally, policy decisions are made by legislators or officers whose official responsibility requires them to assess and balance public policy considerations. The decision is a considered decision that represents a "policy" in the sense of a general rule or approach, applied to a particular situation. It represents "a course or principle of action adopted or proposed by a government": *New Oxford Dictionary of English* (1998), at p. 1434. When judges are faced with such a course or principle of action adopted by a government, they generally will find the matter to be a policy decision. The weighing of social, economic, and political considerations to arrive at a course or principle of action is the proper role of government, not the courts. For this reason, decisions and conduct based on these considerations cannot ground an action in tort.[50]

49. With this definition in mind, the Chief Justice went on to provide a new articulation of the policy defence which focuses on "core policy" decisions that bear the *Gaubert* criteria for a policy decision:

> [90] I conclude that "core policy" government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors,

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[49] *Gaubert* at 324.
[50] *Imperial Tobacco* at para 87.

> provided they are neither irrational nor taken in bad faith. This approach is consistent with the basic thrust of Canadian cases on the issue, although it emphasizes positive features of policy decisions, instead of relying exclusively on the quality of being "non-operational". It is also supported by the insights of emerging jurisprudence here and elsewhere. This said, it does not purport to be a litmus test. Difficult cases may be expected to arise from time to time where it is not easy to decide whether the degree of "policy" involved suffices for protection from negligence liability. A black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical. Nevertheless, most government decisions that represent a course or principle of action based on a balancing of economic, social and political considerations will be readily identifiable.[51]

50. Four years after *Imperial Tobacco*, in *Hinse*,[52] this Court was careful to clarify that *Imperial Tobacco* does not impose any strict rule that only "true" core policy decisions are immune from tort liability.[53] The *Imperial Tobacco* analysis does not impose a black and white test, but rather requires a contextual analysis of the nature of the decision to determine whether it fits within the subset of discretionary decisions that fit the definition of "policy".[54]

C. Recent approaches to the policy/operational dichotomy

51. The policy/operational dichotomy has been the subject of vociferous criticism among lawyers, the judiciary and academics, particularly in recent years. Critics allege that the vagueness inherent in the definition of what constitutes a policy decision "immunizes a broad zone of bureaucratic activity quite contrary to fundamental principles of accountability in public law", and results in an "inherently uncertain" and "slippery" exercise.[55] Academic commentary has been critical of *Imperial Tobacco* in particular, suggesting that the Chief Justice may have failed in her attempt to provide clarity on the policy/operational dichotomy.[56]

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[51] *Imperial Tobacco* at paras 88, 90.
[52] *Hinse v. Canada (Attorney General)*, 2015 SCC 35 [*Hinse*].
[53] *Hinse* at para 24.
[54] *Hinse* at paras 23-24.
[55] *Paradis Honey Ltd v. Canada*, 2015 FCA 89 [*Paradis Honey*], leave to appeal refused [2015] SCCA No 227; Bruce Feldthusen, "Public Authority Immunity from Negligence Liability: Uncertain, Unnecessary, and Unjustified" (2014) 92 Can Bar Rev 211 at 214 & 216.
[56] Lewis N Klar, QC, "*R v Imperial Tobacco Ltd*: More Restrictions on Public Authority Tort Liability" (2012) 50:1 Alta L Rev 157 at 166.

52. Some have suggested that this Court do away with the policy defence entirely and adopt a new approach to public body tort liability which is informed by the law of judicial review.[57] Commentators suggest that this approach would be consistent with the inexorable march of administrative law into the political sphere, through which decisions that are traditionally viewed as discretionary or policy decisions are nevertheless subject to scrutiny in the form of judicial review.[58]

53. In this appeal, the City does not advocate for the replacement of the policy-operational analysis. Though it is necessarily a difficult test to apply given that the concepts of "policy" and "operational" are not watertight compartments into which all decisions neatly fit, the policy defence remains an effective way to protect public bodies from tort liability for decisions which engage their sacrosanct policy-making function. As the Chief Justice stated in *Imperial Tobacco*, the difficulty in defining what constitutes a policy decision does not detract from widely accepted principle that "core" policy decisions should be protected from negligence liability.[59] Put another way, the fact that a clearly defined, easy to apply test is "likely chimerical" does not undermine the efficacy or importance of the test.[60]

54. It is worth noting that in recent years Canadian courts have gradually shifted away from their previous over-reliance on the policy/operational dichotomy to define the tort duties owed by public bodies. Instead, courts increasingly rely on other factors in the second stage of the test for a duty of care from *Cooper*[61] which negate a *prima facie* duty of care, such as the risk of indeterminate liability, the presence of conflicting governmental duties and any potential chilling effect on government decision-making.[62] On one analysis, the number of government tort liability decisions that addressed these other factors in 2002 was just 18%, but that number had risen to 79% by 2013.[63]

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[57] Stratas at 6-7; *Paradis Honey* at para 132; see also Paul Daly, "The Policy/Operational Distinction: A View From Administrative Law" (2015) 69 SCLR (2d) 17 at 18-19 [Daly].
[58] Daly at 34.
[59] *Imperial Tobacco* at para 85.
[60] *Imperial Tobacco* at para 90.
[61] *Cooper v Hobart,* 2001 SCC 79 [*Cooper*].
[62] Hardcastle at 88.
[63] Hardcastle at 96.

55. Courts' increasing willingness to circumscribe the scope of public bodies' potential tort liability through a robust analysis of other factors at play in the second part of the *Cooper* test corrects some of the incongruence which results from applying the policy/operational dichotomy to the common law of negligence. In particular, courts can be free to focus on the "core" policy analysis as described in *Imperial Tobacco* without fear that a narrow approach to the policy/operational dichotomy will result in liability being found against a public body for a decision which, though not strictly "core" policy, should nevertheless not result in tort liability against a government actor.

56. There is, of course, the potential for the policy/operational analysis and the analysis of other factors under the second stage of the *Cooper* test to lead to the same result. This was the case in *Imperial Tobacco*, wherein the Chief Justice held that the *prima facie* duty of care had been negated both because the impugned decision was a "core" policy decision and because there was a substantial risk of indeterminate liability if the impugned duty of care had been recognized.[64]

57. The City submits that the most reasonable and practical path forward is for this Court to reiterate its commitment to the policy/operational dichotomy, and to apply the concept of tort immunity for the policy decisions of public bodies in a manner that is both faithful to the principles expressed in *Imperial Tobacco* and consistent with this Court's presumptively deferential approach to the decisions of public bodies as seen in the administrative context in *Vavilov*.[65]

D. Analysis

58. The City submits that the facts of the present case are a clear example of a core policy decision which should be immune from tort liability. Per *Imperial Tobacco*, the operative inquiry is whether the decision in question is one of "core" policy, namely a discretionary decision made in good faith which engages public policy considerations such as economic, social and political factors.

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[64] *Imperial Tobacco* at paras 97-101.
[65] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

59. There can be no doubt that both the City's written and unwritten snow clearance and removal policies constitute policy decisions, as found by the trial judge. These policies plainly engage in a balancing of interests among competing stakeholders and attempt to allocate scarce resources in a situation where not all stakeholders can be satisfied at once. This is the core of a political decision – allocating scarce resources based on a good faith exercise of discretion.

60. The Policy is explicit in this regard, stating that snow removal, sanding and plowing of City streets "shall be carried out on a priority schedule to best serve the public and accommodate emergency equipment within budget guidelines". What follows in the Policy is a series of priorities and guidelines which are designed to accomplish these policy goals.

61. The Policy is supplemented by unwritten policies as found by the trial judge. These unwritten policies contain further attempts to prioritize certain areas of the City for snow clearance and removal, allocate City resources in an efficient and effective manner, and reduce disruption to residents caused by these operations.[66]

62. As noted above, the primary concern identified by the Court of Appeal is that the trial judge had erred in finding that decisions which were "[a]rguably" operational in nature had been policy decisions. In particular, the Court of Appeal identified two such decisions: the decision to not further extend the hours of snow clearing and the decision to not move snow into particular parking spots to create access to the sidewalk.[67]

63. With respect to the City's alleged failure to extend the hours of snow clearance, the Court of Appeal appears to have found this as a fact of its own accord. It is not referenced in the trial judgment. More importantly, the City had in fact asked crews to stay late following the afternoon shift on January 5, 2015 to deal with the snow event. Three City workers on the afternoon shift worked a total of five hours of overtime on snow clearance and snow removal operations. In total, 15 of the City's crew members worked overtime on January 5, 2015 due to the snow event.[68]

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[66] Trial Court Decision at para 5.
[67] Appeal Court Decision at para 20.
[68] Transcript page 59, lines 25-46 and Appeal Record of the Appellant, vol 2, p 77 to 139.

64. Six crew members came in two hours early for their shift on January 6, 2015 to specifically attend to snow removal in the downtown core, and four casual workers were called in to work on January 6, 2015.[69] There was no evidence at trial that the City had failed to call upon any workers available to it on either January 5 or 6, 2015. This evidence was raised with the Court of Appeal and set out explicitly in the City's factum but appears to have been overlooked by the Court of Appeal.

65. The City submits that there is no evidentiary basis for the conclusion that the City somehow failed to extend snow clearance and removal operations to properly respond to the snow event. However, even if the Court of Appeal was correct in finding this as a fact, any such decision by the City would have been a policy decision based on the allocation of scarce resources and the need to strike a balance between preserving budget for future snow events and responding to the early January 2015 snow event as quickly and forcefully as possible.

66. The decision to have workers stay overtime and to engage on-call workers was a decision of Ms. MacDonald, and, later, her lead hand. As noted in *Gaubert*, "if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected".[70] Even if Ms. MacDonald and/or the lead hand, Mr. Szabo, had made a decision to refrain from allocating overtime or on-call resources to the snow event (which they did not), any such decision would have been consistent with the stated object of the Policy, which was to "best serve the public and accommodate emergency equipment within budget guidelines".

67. This is consistent with *Just*, in which Cory J held that as a general rule, "decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions".[71] On January 5 and 6, 2015, Ms. MacDonald and Mr. Szabo were faced with a decision as to how to allocate resources to the snow event in light of the City's annual snow clearance and removal budget.

68. Ms. MacDonald testified that she could not overuse budgetary resources in response to the first snow event of the year, as she could not predict how many snow events the City would

[69] Transcript page 59, lines 25-46 and Appeal Record of the Appellant, vol 2, p 77 to 139.
[70] *Gaubert* at 324.
[71] *Just* at 1245.

face over the course of the year.[72] The decisions made by Ms. MacDonald and Mr. Szabo in light of these budgetary considerations is a quintessential policy decision even though it is not taken by an executive-level official at the City, and cannot be the subject of a tort action.

69. Also per *Gaubert*, the fact that Ms. MacDonald and Mr. Szabo were afforded the discretion to engage further resources as they saw fit "creates a strong presumption that [their discretionary act] involves consideration of the same policies which led to the promulgation of the regulations".[73] Again, this militates strongly in favour of the conclusion that the decisions made with respect to overtime and on-call workers were policy decisions for which the City is immune from tort liability.

70. With respect to the alleged decision to not move snow into particular parking spots to create access to the sidewalk, as noted above, Ms. MacDonald testified that piling snow into particular parking spots in the 300 block of Baker Street was not feasible as it would interfere with drainage which would potentially result in flooding, and obscure sight lines for drivers on Baker Street which would create additional risks for citizens. In addition, it stands to reason that a decision to clear windrows by piling snow into particular parking spots would have taken scarce resources away from other snow clearance and removal operations elsewhere in the City.

71. There is nothing in either the Policy or the unwritten policies as found by the trial judge which suggests that snow windrows on non-emergency routes are to be cleared by piling snow into particular parking spots. Ms. MacDonald's decision to refrain from taking this additional step was consistent with the *bona fide* policy put in place by the City and also consistent with her desire to avoid potential flooding and creating a dangerous obstruction to drivers' sight lines.

72. With respect, the Court of Appeal fell into error when it suggested that the decision to not pile snow into particular parking spots was "[a]rguably operational". If Ms. MacDonald had taken this step, it would have been in violation of the priority sequencing in the Policy and the City's unwritten policies. As such, the Court of Appeal's true criticism relates to the written and unwritten policies themselves, which are *bona fide* policies put in place by a public body to balance competing economic, social and political interests, and thus immune from judicial

[72] Trial Court Decision at paras 8-10.
[73] *Gaubert* at 324.

scrutiny. The fact that the policies do not mandate the piling of snow into particular parking spots may be a failing of the policies themselves, but any such failing is immaterial given the City's immunity from liability in tort for policy decisions. This does not, however, render Ms. MacDonald's decision not to direct City crews to pile snow windrows into particular parking spots an operational failure in the carrying out of the policies. To the contrary, Ms. MacDonald was carrying out the policies to the letter.

73. Further, as discussed below, the appropriate standard of review for a trial judge's assessment of whether a particular decision is operational or policy is palpable and overriding error. Accordingly, the Court of Appeal's conclusion that the City's actions were "[a]rguably operational" is not sufficient grounds to overturn the trial judge's decision with respect to the policy/operational dichotomy.

74. The City respectfully requests that this Court allow its appeal on this issue and set aside the Court of Appeal's order. The City's actions in this case were protected policy decisions undertaken rationally and in good faith, and the City should enjoy the benefit of the tort immunity afforded to it for such decisions under common law.

II. The appropriate standard of appellate review to be applied to a trial judge's finding that a particular decision (or suite of decisions) is a policy or operational decision is palpable and overriding error.

75. There is a relative dearth of case law establishing and applying the standard of appellate review on the question of whether a particular decision constitutes a policy decision or an operational decision under the *Imperial Tobacco* framework.

76. The limited amount of jurisprudence in this area does reveal an inconsistency among provincial appellate courts as to the applicable standard of review. The City submits that this inconsistency is unwarranted, as the question is plainly one of mixed fact and law that does not engage an extricable legal principle. The standard of review is palpable and overriding error.

77. There are three decisions (not including the case at bar) which post-date this Court's decision in *Just* in which provincial appellate courts have considered the applicable standard of appellate review in this area.

78. The first of these cases is the Alberta Court of Appeal's 2003 decision in *Gibbs*.[74] The court in *Gibbs* correctly applied the principles from *Housen v Nikolaisen*[75] and reached the conclusion that a palpable and overriding error standard will apply to appellate review of trial decisions on the applicability of the public authority policy defence:

> At best, the decision whether these particular omissions or acts were policy or operational is one of mixed fact and law, for which the standard of review lies along a spectrum: *Housen v. Nickolaisen* 2002 SCC 33, 211 D.L.R. (4th) 577, 286 N.R. 1 (at para. 36). The issue on appeal involves the trial judge's interpretation of the evidence and its application to whether the actions taken at the "four junctures" were operational or policy decisions. The trial judge properly considered all the required elements of the legal test, and therefore the decision is properly subject to the palpable and overriding error standard: *Housen*, supra, at para. 36.[76]

79. The second case to address the standard of review is a 2008 decision of the New Brunswick Court of Appeal in *Adams*.[77] In *Adams*, the trial judge held that the federal government's response to the presence of a PVYn virus in potatoes and tobacco crops was carried out pursuant to *bona fide* policy decisions, and therefore the federal government was immune from liability in tort.

80. In *Adams*, the Court of Appeal held that a correctness standard would apply to questions of "whether the government is immune from liability for a particular decision or action":

> [22] It is not difficult to assess the trial judge's determinations as to whether AgCan owed the appellant farmers a *prima facie* duty of care and whether that duty was negated by policy considerations such as indeterminate liability to an indeterminate class. Such issues are largely questions of law for which the applicable review standard is correctness. Hence, this Court is in as good a position as the trial judge to rule on whether the government is immune from liability for a particular decision or action…[78]

81. While the aforementioned statement references only the negation of a private law duty of care by policy considerations under the second stage of the *Cooper* test for negligence, the full

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[74] *Gibbs v. Edmonton (City of),* 2003 ABCA 138 [*Gibbs*].
[75] *Housen v. Nikolaisen*, 2002 SCC 33 [*Housen*].
[76] *Gibbs* at para 3.
[77] *Adams v. Borrel*, 2008 NBCA 62 [*Adams*].
[78] *Adams* at para 22.

reasons of Robertson JA strongly suggest that the standard of correctness was applied to the trial judge's conclusion that certain decisions were policy decisions, as Robertson JA concluded that the Court of Appeal was "in as good a position as the trial judge to rule on whether the government is immune from liability for a particular decision or action".[79]

82. The third case in this area is *George*,[80] in which the Court of Appeal of Newfoundland and Labrador reviewed a trial judge's finding that certain steps taken to reduce moose-vehicle collisions in Newfoundland and Labrador were *bona fide* policy decisions. Although, like *Adams*, the court's reasoning is not clear, a close reading suggests that the court applied a correctness standard.

83. In *George,* after criticizing the policy-operation dichotomy as "inherently uncertain" and "notoriously difficult",[81] Barry JA went on to conclude as follows:

> [148] The trial judge had correctly concluded, at paragraph 46, on the basis of the *Swinamer* analysis, that because the decision to adopt the MVC risk mitigation strategy was a rational policy decision taken in good faith and did not involve errors of implementation, it did not fall within an established category of proximity as between users of the highway and government. I see no reason to interfere with this reasoning. The present case is clearly one where the scale and manner in which the mitigation measures were to be exercised was left for the discretion of government. The circumstances must be distinguished from those cases where statutory provisions give rise to a duty of care to individuals in the course of exercising statutory powers for the common good. In other words, no proximity has been shown to arise between government and individuals from the statutes in question.[82]

84. Although Barry JA does not explicitly reference the applicable standard of care, it can be inferred that he applied a correctness standard, given his conclusion that the trial judge had "correctly concluded" that the impugned decisions were rational policy decisions made in good

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[79] It must be noted that the conclusions with respect to standard of appellate review in *Adams* appear to be *obiter dicta*, as the Court of Appeal held at paragraph 32 that the trial judge's conclusions on this issue failed to refer to the arguments or evidence adduced by the parties and were "oracular or conclusionary findings that are owed no deference."

[80] *George v Newfoundland and Labrador*, 2016 NLCA 24 [*George*].
[81] *George* at para 120.
[82] *George* at para 148.

faith. Notably, however, Barry JA also concluded at para 163 of his reasons that "[n]othing hinges" on standard of review,[83] which suggests that he may have reached the same ultimate conclusion regardless of whether he had concluded that the applicable standard of review on the public authority policy defence was correctness or palpable and overriding error.

85. In the case at bar, as noted above, the Court of Appeal appears to have applied a correctness standard to the trial judge's conclusion as to whether impugned decisions were policy decisions or operational decisions. In particular, Willcock JA concluded that the trial judge erred by accepting that all of the impugned decisions were policy decisions, but did not explain why this constituted an error by the trial judge, nor did he engage in any sort of analysis to determine whether the error was of a palpable and overriding nature.

86. In the result, Willcock JA simply replaced the trial judge's conclusion with his conclusion that the trial judge was "[a]rguably" incorrect, which indicates that no deference was given to the trial judge's own conclusion and a correctness standard was applied.

87. Of the four decisions in this area, including the case at bar, *Gibbs* is the only decision made with specific reference to *Housen* and the applicable standards of appellate review.

88. The decision in *Gibbs* is consistent with the principles of *Housen*. As noted repeatedly by this Court, the question of whether a particular decision is a policy decision or an operational decision is a fact-specific inquiry which hinges on the nature of the impugned decision, the decision-maker's role, the decision-maker's level of discretion and the various social, economic and political interests at play.

89. Contrary to the conclusion of Robertson JA in *Adams*, an appellate court is not "in as good a position as the trial judge" to make these fact-specific determinations. Deference should therefore be extended to the findings of fact which inform the policy/operational analysis. As found in *Gibbs*, the issue is one of mixed fact and law, as a trial judge is tasked with applying facts to an existing legal standard. Also, as per *Gibbs*, there is no extricable legal principle, and therefore conclusions on the policy/operational dichotomy must be reviewable on a standard of palpable and overriding error.

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[83] *George* at para 153.

90. The City submits that the Court of Appeal erred in impliedly applying a standard of correctness, and in so doing failed to afford the necessary deference to the trial judge's findings on what constituted policy decisions by the City. Had the appropriate standard of appellate review been applied, the Court of Appeal would have had no basis to interfere with the trial judge's findings in this regard. This is an independent reason upon which to allow the appeal and set aside the order of the Court of Appeal.

III. Even if the City is not immune from tort liability by operation of the policy defence, it nevertheless met the applicable standard of care

A. The applicable standard of care

91. If an impugned decision is found to be an operational decision rather than a policy decision, the public body does not have tort immunity and a "traditional tort analysis" must be undertaken to determine if liability will be imposed. The first step in this analysis is determining whether the public body has met the applicable standard of care.

92. The standard of care which applies to a public body is different from that of an individual. When assessing the standard of care that applies to a public body, courts must assess all of the surrounding circumstances, including budgetary pressures and the availability of personnel and equipment to address and remedy the alleged hazard. These contextual factors were discussed by Cory J as follows in *Just*:

> Let us assume a case where a duty of care is clearly owed by a governmental agency to an individual that is not exempted either by a statutory provision or because it was a true policy decision. In those circumstances the duty of care owed by the government agency would be the same as that owed by one person to another. Nevertheless the standard of care imposed upon the Crown may not be the same as that owed by an individual. An individual is expected to maintain his or her sidewalk or driveway reasonably, while a government agency such as the respondent may be responsible for the maintenance of hundreds of miles of highway. The frequency and the nature of inspection required of the individual may well be different from that required of the Crown. In each case the frequency and method must be reasonable in light of all the surrounding circumstances. The governmental agency should be entitled to demonstrate that balanced against the nature and quantity of the risk involved, its system of inspection was reasonable in light of all the circumstances including budgetary limits, the personnel and equipment available to it and that it had met the standard duty of care imposed upon it.

> …
>
> The manner and quality of an inspection system is clearly part of the operational aspect of a governmental activity and falls to be assessed in the consideration of the standard of care issue. At this stage, the requisite standard of care to be applied to the particular operation must be assessed in light of all the surrounding circumstances including, for example, budgetary restraints and the availability of qualified personnel and equipment.[84]

93. The above-noted passage from *Just* remains the law with respect to the standard of care that applies to a public body in the position of the City. The law acknowledges that numerous competing obligations, budgetary pressures and limitations in personnel and resources place public bodies in a situation where they cannot remedy existing hazards completely and immediately. So long as a public body has a reasonable system of inspection and reacts reasonably when it becomes aware of a hazard, it has acted in accordance with its standard of care and is not liable for the harm that befalls a plaintiff.

94. Put another way, the operative question is whether a public body has acted reasonably within the inherent constraints of its policy framework. The standard of care cannot be used as a different route to criticize otherwise immune policy decisions.

95. These principles are particularly apposite when a public body is faced with Canadian winter conditions. In *Brown*, Cory J made an oft-cited statement about the inherent risks posed by Canadian winter conditions, and specifically noted that it would be an impossible task for any public body to completely prevent the hazards caused by these conditions:

> Ice is a natural hazard of Canadian winters. It can form quickly and unexpectedly. Although it is an expected hazard it is one that can never be completely prevented. Any attempt to do so would be prohibitively expensive.[85]

96. Although this statement was made with specific reference to icy road conditions, it has been applied in cases assessing the standard of care applicable to public bodies clearing ice and

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[84] *Just* at 1244-1245.
[85] *Brown* at 439.

snow from pedestrian areas.[86] Put simply, Canadian winters are inherently dangerous. The expectation placed on public bodies by the common law is that they take reasonable steps to minimize the danger to users of their roads and sidewalks in light of budgetary pressures, available personnel and available equipment. They cannot guarantee safety. The standard is not perfection, and no public body should be placed in the untenable situation of acting as insurer.

B. Analysis

97. In the present case, the trial judge expressly acknowledged these principles, citing *Ryan*[87] for the proposition that conduct is negligent if it creates an "objectively unreasonable risk of harm".[88] The trial judge then went on to analyze, at length, the steps that the City had taken to minimize the risk of harm to the plaintiff in light of its budgetary and other constraints. Given the importance of these paragraphs from the trial judge's reasons to the issue of standard of care, they have been reproduced in their entirety:

> [20] An occupier is not an insurer against every eventuality that may occur on a premises. The standard of care is of reasonableness not perfection. The test is not whether anything could have been done to prevent the injury, using 20/220 hindsight but whether the steps taken by the occupier were reasonable in all the circumstances.
>
> [21] While the snowback presented a potential risk of harm it did not do so in circumstances that constitute an objectively unreasonable risk of harm. If that is not so, the City submits that it took reasonable steps to protect users of the sidewalk on Baker Street from risk.
>
> [22] The January 5 snowfall was heavy. The City has 122 kms of roads to plow, sand and clear and has 21-22 kms of sidewalks and 73 sets of staircases. The City removes snow from these locations within the downtown core and in accordance with a long established policy.

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[86] See *Knodell v. New Westminster (City of)*, 2005 BCSC 1316 at para 37: "While [the above-noted observation from Cory J in *Brown*] was made in relation to icy roads, it also applies to the clearing of ice and snow from sidewalks. It would not be reasonable to expect the City to devote the workforce and resources to clear the sidewalks immediately upon snow falling and to ensure that they remained clear as snow fell. The City need not take all measures that may be possible to ensure the safety of those who use its sidewalks. The standard is reasonableness."

[87] *Ryan v. Victoria (City of)*, [1999] 1 SCR 201 [*Ryan*].
[88] *Ryan* at para 28.

[23] The City completes all of these tasks within the context of budgetary restraints, equipment availability, regulatory requirements and other factors such as concerns and complaints of citizens and businesses.

[24] After the January 5, 2015 snowfall the City began removing snow from the downtown core in the early morning of Thursday, January 6 and finished it by Friday, January 9, four days after the snowfall ended.

[25] The City's approach is reasonable for the following reasons:

(a) If the City started removing windrows that are created by snow plows before the snow stopped falling, it would have to duplicate the work again after the snow stopped falling;

(b) It would be problematic to remove windrows from the downtown core while downtown streets are being plowed;

(c) Some of the equipment used to plow and clear streets is used to remove/haul snow from the downtown core (e.g. loaders);

(d) Most of the City employees/positions that plow, sand and clear streets are the employees/positions that complete snow removal/hauling from the downtown core. Thus, if the City was to start snow removal/hauling from the downtown core prior to the completion of road plowing, sanding, and clearing priorities, the City would need to hire additional workers;

(e) Further, it is not a matter of simply adding an extra shift. If an extra shift is added, either additional workers would need to be hired, or the number of people working in the other shifts would have to be reduced.

[26] Another option would be to prioritize the snow removal/hauling from the downtown core over the clearing/removal of snow from sidewalks and staircases. The City submits that this would be unreasonable for the following reasons:

(a) The potential gravity of harm posed by delaying the clearing of sidewalks and staircases is much greater; and

(b) It would hinder the ability of pedestrians to move safely in the City.

[27] Here, the City experienced a heavy snowfall which started in the evening of Sunday, January 4, 2015. The City commenced plowing, sanding and clearing of the roadways early on January 5, 2015. By 5:00pm Tuesday, January 6, 2015, 18 hours after the snowfall stopped, the City commenced

> the removal of windrows and the hauling of snow from the downtown core. The City submits that in all the circumstances its response was reasonable.[89]

98. Later in his reasons, the trial judge concluded that the removal of snow windrows on Baker Street between January 5, 2015 and January 6, 2015 was "not possible under any standard of care, short of perfection."[90]

99. The trial judge's conclusions in this respect are buttressed by a substantial amount of evidence adduced at trial that did not make its way into his reasons. As noted above, the City had asked crews to work overtime following the afternoon shift on January 5, 2015 to address hazardous conditions caused by the snow event. Three City workers on the afternoon shift worked overtime on snow clearance and snow removal operations, and 15 of the City's crew members worked overtime on January 5, 2015 due to the snow event.[91] Six crew members were called in early for their shift on January 6, 2015 to conduct snow removal operations in the downtown core, and four casual workers were called in to work on January 6, 2015.[92] There was no evidence at trial that any available personnel were available but not called upon on either January 5 or 6, 2015.

100. Per the analysis in *Just*, the City's standard of care must be assessed in light of budgetary concerns, personnel limitations, equipment limitations and other applicable circumstances. Here, the City did everything it could to minimize the hazards caused by the snow event within the context of limited personnel, limited equipment and its desire to not use a substantial portion of its 2015 snow clearance and removal budget in the first week of 2015. The City acted reasonably and met its standard of care.

101. In his reasons, the trial judge plainly engaged in a review of the applicable standard of care, followed by an extensive analysis of whether the City's actions met the applicable standard of care. In this analysis, he made specific reference to factors such as budgetary restraints and equipment availability, consistent with the direction of Cory J in *Just*. The trial judge ultimately

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[89] Trial Court Decision at paras 20-27.
[90] Trial Court Decision at para 40.
[91] Transcript page 59, lines 25-46 and Appeal Record of the Appellant, vol 2, p 77 to 139.
[92] Transcript page 59, lines 25-46 and Appeal Record of the Appellant, vol 2, p 77 to 139.

concluded that the plaintiff's injuries could not have been prevented on any standard short of perfection, and as a result the City had met the applicable standard of care.

102. In reaching this conclusion, the trial judge discounted the evidence of employees from three other local governments, noting that the "difference in snow loads each year" between the local governments in question "make comparisons difficult", and as a result the comparison "was not very useful".[93] He also noted that the main street in one of the comparator local governments was a provincial highway, and had been modified so that it was quite different from Baker Street.[94] As was his prerogative, the trial judge gave little weight to this evidence when assessing the standard of care.

103. The Court of Appeal criticized the trial judge for providing little weight to the evidence of similarly situated local governments, but made no reference to the trial judge's finding that differences in road layouts and snow loads made the comparisons "difficult" and "not very useful". The Court of Appeal made no attempt to assess the trial judge's conclusion with respect to the applicable standard of care in light of the proper standard of appellate review, which is palpable and overriding error.[95] There is no basis for a conclusion that the trial judge committed a palpable and overriding error in giving little weight to the evidence from similarly situated local governments.

104. The Court of Appeal, per Willcock JA, went on to conclude as follows with respect to the trial judge's standard of care analysis:

> [24] Thus, even the "standard tort analysis" was coloured by the trial judge's view that a policy defence was available to the City and that rationality, rather than reasonableness, was the applicable standard.[96]

105. With great respect, there is no basis for this conclusion whatsoever. The trial judge correctly cited *Ryan* for the proposition that the applicable standard of care is that which "would be expected of an ordinary, reasonable and prudent person in the circumstances".[97] The trial

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[93] Trial Court Decision at paras 35-36.
[94] Trial Court Decision at para 35.
[95] See *Galaske v. O'Donnell*, [1994] 1 SCR 670 at 690-691; see also *Strata Plan NW 3341 v. Delta (Corp)*, 2002 BCCA 526 at para 19, citing *Housen* at 578.
[96] Appeal Court Decision at para 24.
[97] *Ryan* at para 28.

judge expressly referenced the standard of reasonableness at paragraphs 18, 19, 20, 21, 25, 26, 27, 37, 38 and 39 of his reasons, and stated explicitly at paragraph 19 of his reasons that "the test is one of reasonableness".[98]

106. By contrast, the only references to "rationality" in the trial judge's reasons are made with respect to whether the policy in question and the policy decisions made by the City were rational. This is in accordance with *Brown*, in which Cory J notes that the tort immunity which attaches to policy decisions does not apply if the impugned decision was irrational or made in bad faith.[99] It is unrelated to the trial judge's standard of care analysis, and does not constitute an error.

107. The City respectfully submits that the Court of Appeal mischaracterized the trial judge's conclusions with respect to the standard of care. This is an error which has no foundation in the trial judgment and ignores the applicable standard of appellate review, namely palpable and overriding error. The trial judge's findings, particularly when coupled with the evidence adduced at trial as to the City's decision to extend shifts, call in casual workers and pay dozens of hours of overtime, make clear that the City acted reasonably in the circumstances. Even if this Court finds that the City's conduct was operational rather than policy in nature, it should nevertheless find that the standard of care was met. The appeal should be allowed, and the plaintiff's claim dismissed.

IV. The trial judge's finding that Ms. Marchi was the sole proximate cause of her own injuries is fatal to her claim and does not constitute an application of the "last clear chance" doctrine

A. Legal causation

108. Factual causation and legal causation are two distinct elements of the test for negligence which both must exist in order for negligence to be established. Factual causation is a purely factual inquiry. Legal causation, also known as proximate cause or cause in law, is synonymous with remoteness and is a legal inquiry.

109. Professor Klar describes the difference between factual causation and legal causation as follows:

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[98] Trial Court Decision at paras 18-21, 25-27, 37-39.
[99] *Brown* at 442.

> The first is the issue of "cause-in-fact". That is, before a defendant can be held accountable to the plaintiff, it must be established by the plaintiff that the defendant's alleged misconduct was, as a matter of fact, causally connected to the harm suffered. Negligence law does not concern itself with unreasonable conduct in the abstract. It is only because the conduct has resulted in consequences complained of that it is of concern in a private right of action for damages… The second aspect of the causal connection is proximate cause, or "cause-in-law". Having determined that the defendant's conduct was, as a matter of fact, causally connected to the plaintiff's harm, the court must then determine the limits of the defendant's liability.[100]

110. Factual causation is determined on the "but for" test, and the plaintiff must demonstrate on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred.[101]

111. Justice Linden et al describe the exercise of assessing legal causation, or determining the "limits of the defendant's liability" in the following terms:

> Simply stated, the issue here is whether the defendant, whose conduct has fallen below the acceptable standard of the community, should be relieved from paying for some unusual damage that his or her conduct helped to bring about.[102]

112. The courts must attempt to balance the degree of a defendant's fault with the magnitude of the damage. The person at fault should bear the loss except where fault is so insignificant or damage so extensive that fault and damage are utterly out of proportion to one another.[103] In order to satisfy legal causation, there must be a "real risk" of harm which is sufficiently foreseeable to occur in the mind of a reasonable person in the position of the defendant and not be brushed aside as far-fetched.[104]

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[100] Lewis N. Klar, Q.C., *Tort Law*, 5th Ed (Toronto: Thomson Reuters Canada Limited, 2012) at 446-447.
[101] *Clements v. Clements*, 2012 SCC 32 at para 8.
[102] The Hon. Allen M. Linden et al, *Canadian Tort Law*, 11th Ed (Toronto: LexisNexis Canada, 2018) Ch. 7 at 7.60 [Canadian Tort Law].
[103] Canadian Tort Law Ch. 7 at 7.69.
[104] *Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27 at para 13 [*Mustapha*], citing *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.*, [1967] AC 617 (PC) at 643.

B. Last clear chance

113. Historically, the "last clear chance" doctrine provided a complete defence to a negligence claim if a defendant could demonstrate that the plaintiff had an opportunity to fully avoid the accident in question but elected not to do so.[105]

114. The last clear chance doctrine arose as a qualification to the concept of contributory negligence. In essence, the last clear chance doctrine dictated that if both parties had been careless, the party which was afforded the final opportunity to avoid the consequences of the other's carelessness (and did not do so) was solely liable.[106]

115. The last clear chance doctrine was abolished in British Columbia with the passing of what is now section 4 of the *Negligence Act* in 1970.[107] Section 4 reads as follows:

> **Liability and right of contribution**
>
> 4(1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.
>
> (2) Except as provided in section 5 if 2 or more persons are found at fault
>
> (a) they are jointly and severally liable to the person suffering the damage or loss; and
>
> (b) as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.[108]

116. Section 4 requires an apportionment as between those whose fault has caused loss. It does not, however, absolve the court from engaging in the aforementioned causation analysis. Rather, it presumes that the causation analysis has already been completed and both factual and legal causation found ("[i]f damage or loss has been caused…") before apportionment takes place. Put another way, the abolition of the last clear chance doctrine and the adoption of statutorily

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[105] *Lawrence v. Prince Rupert (City)*, 2005 BCCA 567 [*Lawrence*] at paras 73-74.
[106] Donald G. Casswell, *Avoiding Last Clear Chance*, 1990 69-1 Canadian Bar Review 169 at 133.
[107] *Lawrence* at paras 53-68.
[108] *Negligence Act*, RSBC 1996, c 333 at s 4.

mandated apportionment has had no impact on a plaintiff's burden to prove his or her injuries were legally caused by the defendant.

C. The relationship between last clear chance and proximate cause

117. In its 1997 report on the last clear chance doctrine, the Alberta Law Reform Institute reached this same conclusion. Its statement on the relationship between the last clear chance doctrine and legal causation was as follows:

> In the absence of a "last clear chance" rule, the common-law rules of causation will apply. The law will treat fault, including a plaintiff's contributory negligence and a defendant's fault, as a cause of a loss if the loss would not have occurred but for the fault, or alternatively, it will treat fault as a cause of the loss if the fault "materially contributed" to the loss. However, in order to attract liability, the fault must have been the "proximate cause", or a "proximate cause" of the loss.
>
> It is not easy to forecast when a court will decide that a defendant's fault or plaintiff's contributory negligence was a "proximate" cause, and when it will decide that a defendant's fault or a plaintiff's contributory negligence was too "remote" to be a "proximate" cause. However, it is not possible to legislate for all of the myriads of different circumstances that may obtain, and it has to be left to the courts to determine "proximity" and "remoteness" in each individual case. The proximity/remoteness rule covers the ground and enables the courts to do what is fair and just in the circumstances. There is no need for another rule which covers some of the same ground in an inconsistent way, and the "proximity" rule is more flexible and less arbitrary than the "last clear chance" rule.[109]
>
> [Emphasis added]

118. In *Wickberg*, Picard JA, writing for a unanimous Alberta Court of Appeal, succinctly explained the lack of any relationship between the last clear chance doctrine and legal causation:

> [28] One possibility is that [last clear chance] has a role to play in determining causation which is, after all, the reason it was created. But as Professor Klar says at p. 371 of his text, *Tort Law, supra:*
>
> > "Whether a party's negligent conduct should be described as proximate or remote in view of the intervening act of negligence of a subsequent party cannot be resolved on the basis of who had the last clear chance to avoid the injury."

[109] Alberta Law Reform Commission, *Report 75: Last Clear Chance Rule* (August 1997) at p 11.

> If a party's conduct has not been the factual and proximate cause of the injuries, that party is not negligent. If the party's conduct meets the two tests, the party is negligent and the degree of fault must be determined. Unfortunately last clear chance has become confused with the analysis for remoteness referred to earlier. But it has nothing to add to modern causation analysis.[110]

119. A similar conclusion was reached by Finch JA, as he then was, in dissent in *Lawrence*. In that case, the defendant BC Hydro had left a wooden power pole on a sidewalk. The plaintiff had seen the power pole unobstructed on the sidewalk, attempted to move past it, and tripped over it, causing her serious injuries. The trial judge concluded that he could not apply the last clear chance doctrine, as it had been abolished in British Columbia, but held that the defendant's conduct was not an "effective cause" of the accident and dismissed the plaintiff's claim as a result. In his reasons, Finch JA addressed the relationship between the last clear chance doctrine and the proximate cause analysis:

> [41] In this case, whether Hydro's act of negligence was a proximate cause of damage is not an application of the "last clear chance" doctrine. It is rather a factual determination on the issue of causation.
>
> …
>
> [43] Applying that approach in *March v. Stramare Property Ltd.* (1991), 171 C.L.R. 506 (H.C.A.). Justice Deane said at p. 524:
>
> > … the question whether conduct is a "cause" of injury remains to be determined by a value judgement involving ordinary notions of language and common sense.
> >
> > … it should be apparent that nothing in what is written above should be read as indicating a view that a plaintiff is entitled to recover compensation under apportionment legislation in circumstances where his or her own negligence was, as a matter of ordinary common sense, the sole real cause of the accident. Even under apportionment legislation, it is an element of the tort of negligence that the injury sustained by the plaintiff be caused by the defendant's breach of duty. In a case where, as a matter of ordinary common sense, the "sole" cause of the plaintiff's injury was his or her own negligence, that element of the tort will be lacking.[111]
>
> [Emphasis added.]

[110] *Wickberg v Patterson*, 1997 ABCA 95 at para 28.
[111] *Lawrence* at paras 41, 43.

D. Analysis

120. In his reasons, the trial judge correctly noted that the City's conduct must be a proximate, or reasonably foreseeable, cause of the plaintiff's injuries for negligence to be established.[112] He cited two factually similar cases[113] in which plaintiffs had elected to traverse over risky pathways and had been found to be the proximate cause of their own injuries. He then proceeded to recite the plaintiff's own evidence and make factual findings supportive of the conclusion that the plaintiff was the proximate cause of her own injuries, including but not limited to the following findings:

(a) the plaintiff had lived her entire life in the Kootenays and was familiar with snow windrows on the edge of roadways;

(b) the plaintiff was wearing running shoes at the time of her injury;

(c) the plaintiff took the first and only parking spot she could see, having driven down just one block of Baker Street, and simply assumed no other parking was available;

(d) the plaintiff did not look to see whether snow windrows had been removed from other blocks of Baker Street;

(e) the plaintiff was aware that the snow windrow was approximately two feet high and two or three feet deep;

(f) the plaintiff was aware there was a curb under the snow windrow and could not tell where it was;

(g) the plaintiff made no effort to determine the location of the curb other than to "step slowly";

(h) the plaintiff did not test the density of the snow windrow before putting her foot in; and

[112] Trial Court Decision at para 41.
[113] *Wickham v Cineplex Inc*, 2014 BCSC 850 and *Robson v Spencer*, 2006 BCSC 1240.

(i) the plaintiff was aware there was risk of injury in walking over the snow windrow.[114]

121. In the result, the trial judge concluded that the plaintiff was the "author of her own misfortune", and would have dismissed the claim for failure to establish legal causation had he not already determined that the impugned decisions were immune from tort liability and the City had met the applicable standard of care.[115]

122. On appeal, Willcock JA held that the trial judge had erred in concluding that legal causation had not been established, and in particular in concluding that the plaintiff's decision to assume the risk of crossing the snow windrow was "dispositive of the question of the [City's] negligence."[116] Willcock JA suggested that the trial judge must have employed a last clear chance analysis when reaching his conclusion with respect to proximate cause.[117]

123. Willcock JA concluded that the plaintiff's decision to traverse the snow windrow despite the risks should be addressed by way of a fault apportionment per section 8 of the *Negligence Act*, and not used as the basis to reject liability altogether on a proximate cause analysis.[118]

124. Again, the Court of Appeal does not appear to have engaged in an assessment of the applicable standard of appellate review for the trial judge's conclusion with respect to proximate cause. Proximate cause is a legal inference made from a set of facts, and is reviewable on a palpable and overriding error standard.[119] There is no suggestion in the reasons of Willcock JA that the trial judge made a palpable and overriding error when he concluded that the plaintiff was the proximate cause of her own injuries.

125. Even if this Court finds that the applicable standard of appellate review for the trial judge's conclusion with respect to proximate cause is correctness, the trial judge was nevertheless correct in his conclusion. The evidence established that the City had conducted extensive snow clearance and removal operations following the onset of the January 5, 2015 snow event and prior to the plaintiff's injury during the evening of January 6, 2015. During that

[114] Trial Court Decision at paras 43-44.
[115] Trial Court Decision at para 45.
[116] Appeal Court Decision at paras 28-29.
[117] Appeal Court Decision at para 28.
[118] Appeal Court Decision at para 29.
[119] *Milliken v Rowe*, 2012 BCCA 490 at para 43.

time, the City had successfully cleared many roads, sidewalks and staircases, and through the deployment of excess personnel and resources had been able to fully remove all snow from several blocks of Baker Street, including the 400 and 500 blocks adjacent to the block where the plaintiff's injury occurred.

126. At the time of the plaintiff's injury, the City had cleared the roadway on Baker Street, the sidewalks on Baker Street, and had removed all snow from the blocks immediately adjacent to the 300 block of Baker Street.

127. It was not reasonably foreseeable that an individual living in a city prone to snow events would (a) park on the 300 block of Baker Street without seeking parking in an adjacent block that had no snow windrows, (b) decline to walk to the end of the block for easy access to the cleared sidewalk, (c) elect to traverse a two foot high snow windrow in running shoes, and (d) make no attempt to test the density of the snow windrow or locate the curb underneath the snow windrow before stepping into the snow windrow. Put in the parlance of *Wagon Mound No. 2*, as adopted by this Court in *Mustapha*, a reasonable person in the position of the City would have brushed this possibility aside as far-fetched and would not have viewed it as a real risk.[120] A Canadian local government must be able to assume that its residents have some familiarity with winter conditions, and expect that they will use reasonable caution in such conditions.

128. The City submits that the trial judge was correct in his conclusion that the plaintiff was the proximate cause of her own injuries, and the City could not be held liable for her loss and damage as a result. There is no indication in his reasons that he fell into error by applying the defunct last chance doctrine, as suggested by the Court of Appeal. The City submits that the plaintiff was, indeed, the proximate cause of her own injuries, and her claim should be dismissed as a result.

PART IV: COSTS

129. The City seeks costs of the appeal and the costs of all proceedings below.

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[120] *Mustapha* at para 13.

PART V: ORDER SOUGHT

130. The City seeks an order allowing the appeal, setting aside the order of the Court of Appeal for British Columbia and dismissing the plaintiff's claim.

PART VI: SUBMISSIONS ON CONFIDENTIALITY

131. The City confirms that there is no sealing or confidentiality order, publication ban, classification of information in the file as confidential under legislation, or restriction on public access to information in the file that could impact the Court's reasons in this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver, British Columbia this 13th day of November 2020.

Liam Y. Babbitt

Greg J. Allen

Suzy Flader, Articled Student

Counsel for the Applicant, City of Nelson

PART VII: TABLE OF AUTHORITIES

Legislation	**Paragraph(s)**
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