File No.________________

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

BETWEEN:

CITY OF NELSON

APPLICANT
(Respondent)

AND:

TARYN JOY MARCHI

RESPONDENT
(Appellant)

APPLICATION FOR LEAVE TO APPEAL
pursuant to subsections 40(1) and 43(1.1) of the *Supreme Court Act*, RSC 1985, c S-26

ALLEN / MCMILLAN LITIGATION COUNSEL
1550 – 1185 West Georgia Street
Vancouver, BC V6E 4E6
Fax: 604.628.3832

GREG J. ALLEN
Tel: 604.282.3982 | greg@amlc.ca
LIAM BABBITT
Tel: 604.282.3988 | liam@amlc.ca

Counsel for the Applicant, City of Nelson

DAROUX LAW CORPORATION
1590 Bay Avenue
Trail, BC V1R 4B3
Tel: 250.368.8233
Fax: 800.218.3140

DANIELLE K. DAROUX
Email: dd@darouxlaw.ca

Counsel for the respondent, Taryn Joy Marchi

TABLE OF CONTENTS

	Page #
NOTICE OF APPLICATION FOR LEAVE TO APPEAL	1
LOWER COURT JUDGMENTS	
➢ Reasons for Judgment, *Marchi v Nelson (City of)*, 2019 BCSC 308	4
➢ Order After Trial of The Honourable Mr. Justice McEwan, pronounced March 8, 2019	24
➢ Reasons for Judgment, *Marchi v Nelson (City of)*, 2020 BCCA 1	25
➢ Order of the British Columbia Court of Appeal, pronounced January 2, 2020	36
MEMORANDUM OF ARGUMENT	
➢ Part I — Statement of facts	37
➢ Part II — Statement of the questions in issue	42
➢ Part III — Statement of argument	42
➢ Part IV — Submissions in support of order sought concerning costs	52
➢ Part V — Order or orders sought	52
➢ Part VI — Table of authorities	53
➢ Part VII — Legislation	54

MEMORANDUM OF ARGUMENT

PART I - STATEMENT OF FACTS

Overview

1. This case involves the application of the public authority policy defence and the standard of appellate review applicable to same, as well as the interaction, if any, between the proximity analysis in tort and the "last clear chance" common law doctrine.

2. The applicant City of Nelson ("City") seeks leave to appeal the decision of the British Columbia Court of Appeal in order to clarify the confines of the policy defence and clearly establish the standard of appellate review to a trial judge's finding that the policy defence applies to immunize a public authority from liability in tort. The City also seeks leave to appeal in order to bring clarity to the availability of the "proximate cause" defence to negligence claims in light of wording in various provincial negligence statutes designed to eliminate the last clear chance doctrine.

Background facts

3. 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. The City engaged in snow removal activities pursuant to both written and unwritten policy.[1] The City's written snow removal policy had been in place since July 1, 2000. The written and unwritten snow removal policies were informed by budgetary, social and economic factors, which included consideration of the availability of manpower and equipment.[2]

4. 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. Once snow was cleared from the streets of the downtown core and various priority routes, but before the cleared snow was

[1] *Marchi v. Nelson (City of)*, 2019 BCSC 308 [Trial Court Decision] at paras 4-6 & 13.
[2] Trial Court Decision at para 7

hauled away, the policy's focus shifted 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.[3]

5. Early on January 5, 2015, the City began snow removal operations pursuant to these policies. As an inevitable side effect of plowing streets, the City created various snowbanks around the City, including in the 300 block of Baker Street.[4] The City began removing the snow from the downtown core during the morning of January 6, 2015, and had fully removed all snow from the downtown core by January 9, 2015.[5]

6. Unfortunately, during the evening of January 6, 2015, the respondent Taryn Joy Marchi was seriously injured when she attempted to cross a snowbank after parking her car in the 300 block of Baker Street in the City's downtown core. Ms. Marchi elected to traverse the snowbank rather than walk along the road to a nearby area that provided cleared access to the sidewalk.[6] She also did not consider parking on an adjacent block which had already been fully cleared of snow by the time of her incident.[7]

7. In her claim, Ms. Marchi alleged that the City was negligent in creating the snowbank through its snow clearing activities, and the City's negligence had caused her injuries.

<u>Trial reasons</u>

8. Ms. Marchi's claim was heard in 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 taken pursuant to a *bona fide* policy, 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.

9. 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

[3] Trial Court Decision at paras 4, 5, and 11
[4] Trial Court Decision at para 6
[5] Trial Court Decision at para 24
[6] Trial Court Decision at paras 29 and 30
[7] Trial Court Decision at para 43

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]”[8].

10. The trial judge went on to find that the City had nevertheless met the standard of care expected of it in the circumstances. The trial judge noted that the City’s obligation was one of reasonableness, and it was not expected to remove every possible danger or risk.[9]

11. In his reasons, the trial judge reviewed the various other ways that the City could have prioritized snow 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.[10] Moreover, and in any event, the trial judge concluded that the removal of the snowbanks in the 300 block of Baker Street between January 5 and 6, 2015 would not have been possible under any standard of care short of perfection.[11]

12. Lastly, the trial judge noted that in order for the legal causation aspect of the negligence analysis to have been met, the City must be a proximate cause of Ms. Marchi’s injuries. He relied on two recent British Columbia cases for the proposition that liability in negligence could not be found if a plaintiff was the proximate cause of his or her own injuries.[12]

13. The trial judge then extensively reviewed the facts with respect to the Ms. Marchi’s awareness of the applicable risks and her decision to assume those risks by stepping into the snowbank.[13] 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.[14]

---

[8] Trial Court Decision at para 15
[9] Trial Court Decision at para 19
[10] Trial Court Decision at para 25
[11] Trial Court Decision at para 40
[12] *Wickham v. Cineplex Inc.*, 2014 BCSC 850 and *Robson v. Spencer*, 2006 BCSC 1240
[13] Trial Court Decision at para 43
[14] Trial Court Decision at para 45

14. 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.

Appeal reasons

15. Ms. Marchi appealed, and her appeal was heard by the British Columbia Court of Appeal on November 12, 2019. On January 2, 2020, the Court of Appeal released its reasons in which it granted Ms. Marchi's appeal and ordered a new trial.

16. The Court of Appeal, per Willcock JA, first addressed the trial judge's decision 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 the appropriate standard of review on findings of whether particular decisions were policy decisions or operational decisions was palpable and overriding error. Ms. Marchi took no position as to the applicable standard of appellate review on such questions.

17. 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.

18. In the result, Willcock JA held that the trial judge had erred in accepting the City's submissions that all of its impugned actions with respect to snow removal were policy decisions.[15] 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.

19. However, Willcock JA stopped short of holding that the trial judge had erred in determining that these specific decisions were policy decisions. Rather, Willcock JA stated that the trial judge had failed to engage the accepted analytical approach to this defence as set out in *Just v. British Columbia*.[16] Willcock JA did not identify what aspects of the analysis in *Just* had

[15] *Marchi v. Nelson (City of)*, 2020 BCCA 1 [Appeal Court Decision] at para 13.
[16] *Just v. British Columbia* [1989] 2 SCR 1228 [*Just*]

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.

20. Willcock JA then moved on to the question of standard of care. He concluded that the trial judge had inappropriately discounted the evidence of witnesses from neighbouring municipalities, and the trial judge's approach to the tort analysis was "coloured" by his conclusion that the policy defence applied.[17] Beyond these statements, Willcock JA made no conclusion that the trial judge had erred in holding that the City had met the applicable standard of care.

21. Lastly, Willcock JA addressed the question of proximate cause. On this issue, he relied on *Skinner v. Fu* for the following proposition:

> 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.[18]

22. 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 <u>person even if another person had the opportunity of avoiding the consequences of that act and negligently or carelessly failed to do so.</u>
>>
>> [Emphasis in original.]

[17] Appeal Court Decision at para 22 and 24

[18] Appeal Court Decision at para 28, citing *Skinner v. Fu*, 2010 BCCA 321 [*Skinner*] at para 20

PART II: QUESTIONS IN ISSUE

23. Do one or all of the following issues constitute issues of sufficient public importance to warrant the City's application for leave to appeal be granted?

1. What is the proper approach to the distinction between policy decisions and operational decisions in the context of the public authority policy defence;

2. 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; and

3. Is it a complete defence to negligence for a trial judge to determine that the plaintiff was the proximate cause of his or her injuries, or has the removal of the "last clear chance" doctrine by the British Columbia *Negligence Act*[19] extinguished this defence?

PART III: ARGUMENT

What is the proper approach to the distinction between policy decisions and operational decisions in the context of the public authority policy defence?

24. The leading cases on the public authority policy defence remain *Just* and *Brown v. British Columbia (Minister of Transportation and Highways)*.[20]

25. The 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 CanLII 81 (SCC), [1989] 1 S.C.R. 705; *Barratt v. District of North Vancouver*, 1980 CanLII 219 (SCC), [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

[19] *Negligence Act* RSBC 1996, c 333.
[20] *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 SCR 420 [*Brown*].

> 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.[21]

26. In *Just*, Cory J wrote that "[t]he functions of government and government agencies have multiplied enormously in this century."[22] In the decades since *Just* and *Brown* were decided, the scope of activities engaged in by Canadian public authorities has broadened even further, and with it the depth and breadth of policies designed to allocate scarce public resources within those areas of activity. However, despite this, the law remained governed for many years by the narrow and largely inscrutable distinctions between policy decisions and operational decisions as explained in *Just* and *Brown* and applied in subsequent cases. This approach was described as "unworkable" by the House of Lords.[23]

27. Years of application of these authorities revealed that the *Just* and *Brown* analysis does not provide sufficient guidance to trial and appellate courts in navigating the distinction between policy and operational decisions. This Court attempted to address the concerns with the *Just* and *Brown* framework in its decision in *R v. Imperial Tobacco Canada Ltd*.[24] In that case, the Court was tasked with addressing the question of what constituted a true policy decision in the context of an application to strike pleadings.

28. Writing for a unanimous Court, then Chief Justice McLachlin noted that in the years since *Just* and *Brown*, "much judicial ink has been spilled" on the question of what constitutes a policy decision, and courts "have found it notoriously difficult to decide whether a particular government decision falls on the policy or operational side of the line."[25]

---

[21] *Brown* at 441.
[22] *Just* at 1239.
[23] *Stovin v. Wise*, [1996] AC 923 (HL).
[24] *R v. Imperial Tobacco Canada Ltd*, 2011 SCC 42 [*Imperial Tobacco*].
[25] *Imperial Tobacco* at paras 72, 78.

29. Following a review of authorities from other jurisdictions, most notably the United States Supreme Court, Chief Justice McLachlin reached the following conclusion with respect to the policy vs operational dichotomy:

> [88] Policy, used in this sense, is not the same thing as discretion. Discretion is concerned with whether a particular actor had a choice to act in one way or the other. Policy is a narrow subset of discretionary decisions, covering only those decisions that are based on public policy considerations, like economic, social and political considerations. Policy decisions are always discretionary, in the sense that a different policy could have been chosen. But not all discretionary decisions by government are policy decisions.
>
> …
>
> [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, 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.

30. Despite the efforts of this Court to clarify the analysis in *Imperial Tobacco*, lower courts remained confused as to how the public authority policy defence should apply in the years that followed. For example, in *Paradis Honey Ltd v. Canada*,[26] Stratas JA of the Federal Court of Appeal wrote that *Imperial Tobacco* "provides little tangible direction" and "has spawned a fresh wave of academic criticism".[27]

31. In *Paradis Honey*, Stratas JA provided the following criticism of the conceptual framework put forward at paragraph 90 of *Imperial Tobacco*, excerpted above:

> [107] In the first sentence of this paragraph, we are told that "decisions…based on public policy considerations" are immune. But most decisions are based on

[26] *Paradis Honey Ltd v. Canada*, 2015 FCA 89 [*Paradis Honey*], leave to appeal refused [2015] SCCA No 227.
[27] *Paradis* at para 125.

> public policy considerations; indeed, all considerations to be taken into account by decision-makers under legislation are public policy considerations.
>
> [108] Also in the first sentence, we are told that examples – not exhaustive – of public policy considerations are "economic, social and political factors." But that covers just about everything on the legislative books in the area of regulation. Read literally, the first sentence immunizes a broad zone of bureaucratic activity quite contrary to fundamental principles of accountability in public law, and many decided cases too, including many from the Supreme Court: see the discussion in *Slansky v. Canada (Attorney General)*, 2013 FCA 199, 364 D.L.R. (4th) 112 at paragraphs 313-314.
>
> [109] But the first sentence does not stand alone. Four follow. They whittle the definition down essentially to nothing, telling us immunity may or may not apply, and any certainty is "likely chimerical." What should be immunized from liability is said to be "readily identifiable," but no criteria for identification are supplied. Again, we are left to fend for ourselves.
>
> [110] I conclude that *Imperial Tobacco* does not stand for any clear proposition that dooms the beekeepers' claim to failure. If anything, *Imperial Tobacco* leaves us more uncertain than ever as to when the policy bar will apply.[28]

32. The concerns raised by Stratas JA in *Paradis Honey* have been echoed by other lower courts as well as academic commentary on this subject.[29]

33. Notably, neither the trial judge nor the Court of Appeal in the present case relied on the analytical approach to the public authority policy defence set out in *Imperial Tobacco*. Both relied instead on *Just*, which provides just as little guidance to lower courts as *Imperial Tobacco* on how to distinguish a policy decision from an operational decision.

34. The City respectfully submit that *Imperial Tobacco* has failed to clarify the law in this area, and in fact has resulted in further confusion. The City submits that it is proper and appropriate for the Supreme Court of Canada to reconsider and clarify the tests in *Just* and *Brown* so that litigants and lower courts will have sufficient clarity on the policy vs operational divide.

---

[28] *Paradis Honey* at para 106-110.

[29] See *George v. Newfoundland and Labrador*, 2016 NLCA 24 [*George*]; *Waterway Houseboats Ltd v. British Columbia*, 2018 BCSC 606 at paras 53-62; *Patrong v. Banks et al*, 2015 ONSC 3078 at paras 71-78. See also Paul Daly, "The Policy/Operational Distinction – a View from Administrative Law" (2015), 69 SCLR (2d) 17-40

<u>What is the aps 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?</u>

35. There is a relative dearth of case law establishing and applying the standard of appellate review on the question of immunity from liability for policy decisions. However, the limited amount of jurisprudence does reveal that there is dissent amongst provincial appellate courts as to the applicable standard of review. The City submits that the Supreme Court of Canada should exercise its discretion to grant leave to appeal in this case in order to clarify the appropriate standard of appellate review on such questions.

36. As a starting point, there are three appellate decisions (not including the case at bar) post-*Just* in which provincial appellate courts have considered the applicable standard of appellate review in this area. The first is the Alberta Court of Appeal's 2003 decision in *Gibbs v. Edmonton (City of)*.[30] In *Gibbs*, the court was unequivocal 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.[31]

37. In 2008, the New Brunswick Court of Appeal addressed the issue in *Adams v. Borrel*.[32] 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 pursuant to *bona fide* policy decisions, and therefore the federal government was immune from liability in tort.

38. 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":

---

[30] *Gibbs v. Edmonton (City of),* 2003 ABCA 138 [*Gibbs*].
[31] *Gibbs* at para 3
[32] *Adams v. Borrel*, 2008 NBCA 62 [*Adams*].

> [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…[33]

39. While the aforementioned statement references only the negation of a private law duty of care by policy considerations, the full reasons of Robertson JA make clear that a correctness review should apply to the trial judge's conclusion that certain decisions were policy decisions, as the Court of Appeal was ostensibly "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".[34]

40. Third, in *George*,[35] the Newfoundland Court of Appeal reviewed a trial judge's finding that certain steps taken to reduce moose-vehicle collisions in Newfoundland and Labrador were *bona fide* policy decisions.

41. After criticizing the policy-operation distinction as "inherently uncertain" and "notoriously difficult",[36] 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.[37]

---

[33] *Adams* at para 22.
[34] 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."
[35] *George*.
[36] *George* at para 120.
[37] *George* at para 148.

42. Although Barry JA does not explicitly reference the applicable standard of care, it can be argued 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 faith. However, he also concluded at para 163 of his reasons that "[n]othing hinges" on standard of review, which strongly suggests that he would 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.

43. In the present case, as noted above, the British Columbia Court of Appeal appears to have applied a correctness standard to the trial judge's conclusion as to the applicability of the public authority policy defence. Willcock JA concludes that the trial judge erred by accepting that all of the impugned decisions were policy decisions, but does not explain why this constituted an error by the trail judge, nor does he engage in any sort of analysis to determine whether the error was of a palpable and overriding nature. In essence, Willcock JA simply replaces the trial judge's conclusion with that of his own, which indicates that no deference was given to the trial judge's own conclusion and a correctness standard was applied.

44. In summary, *Gibbs* clearly states that the applicable standard of review is palpable and overriding error, and *Adams* states that the applicable standard of review is correctness. Both *George* and the present case are somewhat equivocal but suggest a correctness standard of review. In any event, there is plainly disagreement between appellate courts on this issue, and parties are left to guess what standard may be applied by the appellate court of their own province.

45. The City therefore respectfully requests the Supreme Court of Canada grant leave to appeal in order to clarify this key question and return uniformity and clarity to the appellate level on this issue.

<u>Is it a complete defence to negligence for a trial judge to determine that the plaintiff was the proximate cause of his or her injuries, or has the removal of the "last clear chance" doctrine by the British Columbia *Negligence Act* extinguished this defence?</u>

46. Traditionally, 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 that befell him or her, but chose not to do so.[38] The last clear chance doctrine has been abolished in British Columbia by the passage of the *Negligence Act*.[39]

47. In this case, Willcock JA held that the trial judge had erred in concluding that Ms. Marchi's own negligence made her the sole proximate cause of her own injury, thus breaking the chain of causation and severing the City from liability in tort.[40]

48. Willcock JA went on to cite *Skinner* for the proposition that the trial judge "must have" employed a last clear chance analysis when he used the term "proximate", as the term "proximate" was used to imply that no liability could be found if the plaintiff had been more attentive to the surrounding circumstances.[41]

49. Per *Skinner*, Willcock JA concluded 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".[42]

50. The City respectfully submits that Willcock JA's conclusion is not an accurate statement of the law. Despite the abolition of the "last chance doctrine" in the British Columbia *Negligence Act* and many other provincial negligence statutes, it is still open for trial judges to conclude that a defendant is not liable if a plaintiff is the sole proximate cause of his or her own injuries.

51. It is not an application of the last clear chance doctrine to find a plaintiff's own conduct was the proximate and sole cause of their injury, even if but for defendant's negligent conduct, the injury would not have occurred. This is rather a proper application of causation theory:

> One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is

---

[38] *Lawrence v. Prince Rupert (City),* 2005 BCCA 567 [*Lawrence*] at paras 73 and 74.
[39] *Dyke v. British Columbia Amateur Softball Assn.*, 2008 BCCA 3, para 31.
[40] Appeal Court Decision at para 27 to 29
[41] Appeal Court Decision at para 28, citing *Skinner* at para 20
[42] Appeal Court Decision at para 29

> proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident.[43]

52. In *Lawrence*, the British Columbia Court of Appeal was presented with a case where the plaintiff had tripped over a power pole which was left in plain sight and suffered injuries. The trial judge had determined that BC Hydro, the owner of the pole, was not liable for the plaintiff's injuries because the plaintiff was the proximate cause of her own injuries.

53. In his majority reasons, Finch CJBC was clear that it was open to the trial judge to find that the defendant was not liable on the basis that the plaintiff was the proximate cause of her own injuries, and that this was not an application of the "last clear chance" doctrine:

> [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.
> >
> > [Emphasis added.]

[43] *Stapley v. Gypsum Mines Ltd.,* [1953] A.C. 663 at 681, cited with approval in *Lawrence* at para 42.

> [44] As a question of fact for the jury, causation is a question of common sense judgement. In this case, I think the judge applied that approach to the causation issue. He said:
>
> > [40] In my opinion, the failure of BC Hydro to place a barricade around the pole was not an effective cause of the plaintiff's accident. It may be true that, if the pole had not been put there, the accident would never have happened. But in my opinion, that is not sufficient to establish a causal connection. The fact that the plaintiff had an opportunity to avoid the consequences of the defendant's negligence, but failed to do so due to negligence, no longer leads automatically to a dismissal of the plaintiff's claim. But in my view, when the plaintiff saw the pole ahead of her, and had the opportunity and ability to easily avoid tripping over it, <u>the risk created by BC Hydro lost its potential to cause the plaintiff to trip and fall as she did</u>. It might be otherwise, if the plaintiff had been proceeding along the sidewalk at night, holding on to the guardrail, and then either failed to see the log ahead of her, or failed to see it in time to avoid tripping over it. But that is not what happened here.
> >
> > [Emphasis added.]
>
> [45] Hydro clearly had a duty not to create unreasonable risks to pedestrians using the sidewalk. However, the only risk created by Hydro in these circumstances, where there was 9.5 feet of unobstructed sidewalk, was that someone might not see the pole and might as a result trip over it. In the circumstances of this case, when the plaintiff saw the pole and knew that she must step around it, the risk of injury from Hydro's conduct ceased to be a proximate cause of the accident.
>
> [46] Although in my view it would have been preferable in this case to dismiss the plaintiff's action on the ground that no breach of duty by Hydro was proven, the decision of the trial judge to dismiss on the basis that causation had not been made out, is one that was open to him to make. He did not misdirect himself on the law in this regard, and his factual decision is one which a properly instructed and reasonable jury could well have made.[44]

54. *Lawrence* stands for the clear proposition that despite the doctrine of last clear chance being abolished, it is still open for a judge to find, notwithstanding a defendant failing to meet its standard of care, that the defendant's conduct was not a proximate or culpable cause of the plaintiff's injury. As such, the conclusion of Willcock JA in the present case is a legal error which has the capability of confusing the law in this area for both litigants and trial courts in years to come.

---

[44] *Lawrence*.

55. The City submits that it is important for the Supreme Court of Canada to explicitly confirm that the abolishment of the last clear chance doctrine does not make a defendant liable for all that may arise following a breach of standard of care. Causation must still be proven, and causation requires finding that the defendant was a proximate cause of the plaintiff's injuries.

56. The City submits that the conclusion of the Court of Appeal in this case with respect to causation undermines the importance of legal causation to the negligence analysis. In order to establish negligence, a plaintiff must establish proximity, and cannot do so if he or she is the sole proximate cause of the injury in question. While this factual finding may be rare, it is nevertheless available to trial judges in certain circumstances and must operate to sever liability when found.

PART IV: SUBMISSIONS AS TO COSTS

57. The City does not seek costs in this application.

PART V: NATURE OF THE ORDER SOUGHT

58. The City respectfully seeks an order that leave to appeal be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver, British Columbia this 27th day of February, 2020.

______________________	____________________________
Liam Y. Babbitt	Greg J. Allen

Counsel for the Applicant, City of Nelson

PART VI: TABLE OF AUTHORITIES

Jurisprudence	**Paragraph(s)**
Adams v. Borrel, 2008 NBCA 62	37-38, 44
Brown v. British Columbia (Minister of Transportation and Highways), [1994] 1 SCR 420	24-28, 34
Dyke v. British Columbia Amateur Softball Assn., 2008 BCCA 3	46
George v. Newfoundland and Labrador, 2016 NLCA 24	32, 40-42, 44
Gibbs v. Edmonton (City of), 2003 ABCA 138	36, 44
Just v. British Columbia [1989] 2 SCR 1228	19, 24-28, 33-34, 36
Lawrence v. Prince Rupert (City), 2005 BCCA 567	46, 51-54
Marchi v. Nelson (City of), 2019 BCSC 308	3-6, 9-11 & 13
Marchi v. Nelson (City of), 2020 BCCA 1	18, 20-21, 47-49
Paradis Honey Ltd v. Canada, 2015 FCA 89	30-32
Paradis Honey Ltd v. Canada, [2015] SCCA No 227 [Book of Authorities Tab 1]	30
Patrong v. Banks et al, 2015 ONSC 3078	32
R v. Imperial Tobacco Canada Ltd, 2011 SCC 42	27-31, 33-34
Robson v. Spencer, 2006 BCSC 1240	12
Skinner v. Fu, 2010 BCCA 321	21-22, 48-49
Stapley v. Gypsum Mines Ltd., [1953] AC 663	51
Stovin v. Wise, [1996] AC 923 (HL)	26
Waterway Houseboats Ltd v. British Columbia, 2018 BCSC 606	32
Wickham v. Cineplex Inc., 2014 BCSC 850	12
Secondary Sources	
Paul Daly, "The Policy/Operational Distinction – a View from Administrative Law" (2015), 69 SCLR (2d) 17-40 [Book of Authorities Tab 2]	32

PART VII: LEGISLATION

***Negligence Act*, RSBC 1996, c 333**

Apportionment of liability for damages

1 (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

(2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.

(3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

Awarding of damages

2 The awarding of damage or loss in every action to which section 1 applies is governed by the following rules:

(a) the damage or loss, if any, sustained by each person must be ascertained and expressed in dollars;

(b) the degree to which each person was at fault must be ascertained and expressed as a percentage of the total fault;

(c) as between each person who has sustained damage or loss and each other person who is liable to make good the damage or loss, the person sustaining the damage or loss is entitled to recover from that other person the percentage of the damage or loss sustained that corresponds to the degree of fault of that other person;

(d) as between 2 persons each of whom has sustained damage or loss and is entitled to recover a percentage of it from the other, the amounts to which they are respectively entitled must be set off one against the other, and if either person is entitled to a greater amount than the other, the person is entitled to judgment against that other for the excess.

Apportionment of liability for costs

3 (1) Unless the court otherwise directs, the liability for costs of the parties to every action is in the same proportion as their respective liability to make good the damage or loss.

(2) Section 2 applies to the awarding of costs under this section.

(3) If, as between 2 persons, one is entitled to a judgment for an excess of damage or loss and the other to a judgment for an excess of costs there is a further set off of the respective amounts and judgment must be given accordingly.

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.

Negligence of spouse in cause of action that arose before April 17, 1985

5 (1) In an action founded on fault or negligence and brought for loss or damage resulting from bodily injury to or the death of a married person, if one of the persons found to be at fault or negligent is the spouse of the married person, no damages, contribution or indemnity are recoverable for the portion of loss or damage caused by the fault or negligence of that spouse.

(2) The portion of the loss or damage caused by the fault or negligence of the spouse referred to in subsection (1) must be determined although that spouse is not a party to the action.

(3) This section applies only if the cause of action arose before April 17, 1985.

Questions of fact

6 In every action the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact.

Actions against personal representatives

7 (1) If a person dies who, because of this Act, would have been liable for damages or costs had the person continued to live, an action or third party proceedings that, because of this Act, could have been brought or maintained against the person who has died may be brought and maintained or, if pending, may be continued against the personal representative of the deceased person.

(2) The damages and costs recovered under subsection (1) are payable out of the estate of the deceased person in similar order of administration as the simple contract debts of the deceased person.

(3) If there is no personal representative of the deceased person appointed in British Columbia within 3 months after the person's death, the court, on the application of a party intending to bring or continue an action or third party proceedings under this section, and on the notice to other parties, either specially or generally by public advertisement, as the court may direct, may appoint a representative of the estate of the deceased person for all purposes of the intended or pending action or proceedings and to act as defendant in them.

(4) The action or proceedings brought or continued against the representative appointed under subsection (3) and all proceedings in them bind the estate of the deceased person in all respects as if a duly constituted personal representative of the deceased person were a party to the action.

(5) An action or third party proceeding must not be brought against a personal representative under subsection (1), or against a representative of the estate appointed under subsection (3), after the time otherwise limited for bringing the action.

Further application

8 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.

Definitions

9 In this Act:

"action" includes proceedings brought in the civil resolution tribunal under the *Civil Resolution Tribunal Act*;

"court" includes the civil resolution tribunal under the *Civil Resolution Tribunal Act*.