SCC File No. 39108

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

BETWEEN:

CITY OF NELSON

APPLICANT
(Respondent)

AND:

TARYN JOY MARCHI

RESPONDENT
(Appellant)

MEMORANDUM OF ARUMENT OF THE RESPONDENT
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

DAROUX LAW CORPORATION
1590 Bay Avenue
Trail, B.C. V1R 4B3
Tel: (250) 368-8233
Fax: (800) 218-3140

Danielle K. Daroux
Email: dd@darouxlaw.ca

Counsel for the Respondent, Taryn Joy Marchi

MICHAEL J. SOBKIN
33 Somerset Street West
Ottawa, ON K2P 0J8
Tel: (613) 282-1712
Fax: (613) 288-2896

Michael J. Sobkin
Email: msobkin@sympatico.ca

Agent for Counsel for the Respondent

MURPHY BATTISTA LLP
#2020 - 650 West Georgia Street
Vancouver, B.C. V6B 4N7
Tel: (604) 683-9621
Fax: (604) 683-5084

Joseph E. Murphy, Q.C.
Email: murphy@murphybattista.com

Counsel for the Respondent, Taryn Joy Marchi

ALLEN / MCMILLAN LITIGATION COUNSEL
#1550 – 1185 West Georgia Street
Vancouver, B.C. V6E 4E6
Tel: (604) 569-2652
Fax: (604) 628-3832

Greg J. Allen
Tele: (604) 282-3982 / Email: greg@amlc.ca

Liam Babbitt
Tel: (604) 282-3988 / Email: liam@amlc.ca

Counsel for the Applicant, City of Nelson

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The applicant City of Nelson ("City") submits that leave should be granted because there is lingering confusion as to the difference between policy and operational decisions in cases of public authority liability in tort. It cites four decisions in support of this proposition. None of those cases demonstrate any confusion on the part of the lower courts. Moreover, a survey of cases that are similar to the one at bar shows courts have no trouble understanding and applying this Court's jurisprudence. This Court has provided ample, and recent, guidance on point and the City's claim of confusion is not made out.

2. The City also submits that this Court should grant leave to resolve a conflict in the lower courts over the standard of review applicable to a finding that the government has made a policy decision. This alleged conflict is based on three decisions, one of which the City admits does not even explicitly reference the standard of review, leaving the City to speculate as to what that court actually decided. The other two decisions are not in conflict. There is no reason for this Court to address standard of review.

3. The final issue raised by the City concerns the trial judge's finding that "legal causation" was not met in this case because the respondent, in crossing a snowbank created by the City's employees, assumed the risk of injury and was "the author of her own misfortune." As the Court of Appeal pointed out, the trial judge's analysis suggests that the respondent's decision to cross the snowbank was dispositive of the question of the defendants' negligence. That clearly is not the case. Both a plaintiff and defendant can be responsible for causing an accident in which case it is necessary to apportion liability. This is elementary torts law. The trial judge failed to appreciate this basic fact and the Court of Appeal was required to correct the error.

4. The City fastens on to the Court of Appeal's reference to s. 8 of British Columbia's *Negligence Act*. That section extinguished the "last clear chance" doctrine by which a defendant would escape liability for its negligence if it could establish that the plaintiff had the opportunity to avoid the consequences of the defendant's negligence and negligently or carelessly failed to do so. Concluding that the respondent cannot recover because she understood the risk of crossing the snowbanks created by the City's employees, and proceeded anyway, smacks of the last clear

chance doctrine. The British Columbia Court of Appeal has consistently stated that courts should not employ "last chance" analysis when determining questions of causation. It has done so again here, correctly, and there is no reason for this Court to intervene.

5. While the above is dispositive of this leave application, the respondent adds that even if the City had raised unresolved issues of tort law of such pressing public importance that this Court should consider them, this would not be an appropriate case to do so. The trial judge largely copied the City's written submissions at trial leaving it unclear where, if at all, he engaged in independent reasoning. On the policy/operational question, there is considerable doubt that the trial judge ever engaged in the analysis called for by this Court's decisions on whether a decision by government should be characterized as policy or operational. The reasons show no exploration of the difference between the two kinds of decisions in light of the evidence adduced in this case. The Court of Appeal did not usurp the role of the trial judge but instead sent the matter back for a new trial where factual findings can be made and the law applied to the facts. Thus, there is no detailed exploration by either of the courts below as to the distinction between policy and operational decisions, making this an entirely inappropriate case for this Court to further explore the distinction.

B. Background

6. There was a heavy snowfall in Nelson, British Columbia overnight on January 4-5, 2015. The City's work crews plowed the snow in the 300 block of Baker Street early in the morning of January 5th. They did so in a manner which created snowbanks or "windrows" along the curb and onto the sidewalk, running along the entire block of Baker Street.[1]

7. The City's snow clearing and removal policy is set out in a document entitled "Streets and Sidewalks Snow Clearing and Removal" and provides that "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".[2] "Removal of snow from the

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[1] Trial Reasons, para 6(a); Court of Appeal Reasons, para 4, Agreed Statement of Facts, para 12 (Response Book, Tab 2); Evidence of Karen MacDonald, Public Works Supervisor for the City, Transcript, p. 76, ll. 40-47 (Response Book, Tab 3).

[2] Trial Reasons, para. 4; Agreed Statement of Facts, para. 7 (Response Book, Tab 2).

downtown areas may be carried out in conjunction with any of the above priorities and as warranted by the build up levels."[3]

8. Baker Street is located in the downtown core and is the main commercial street in Nelson.[4]

9. In the early evening of Tuesday, January 6, 2015, the respondent parked her car in an angled metered parking spot on the north side of the 300 block of Baker Street in order to access the sidewalk to walk to a business in that block.[5]

10. At that time, the City had removed the snowbanks from the 400 block and 500 block of Baker Street, but not the 300 block.[6] It was not until January 9th that all of the snow was hauled away from the downtown core.[7]

11. When the respondent left her car, she encountered the snowbank that had been left by the respondent's work crews a day and a half previously. She considered walking on the road to the end of the block to access the sidewalk that way but rejected that idea as dangerous because she was wearing dark clothes and traffic on the road was heavy.[8]

12. The City recognized that the snowbanks they created in the 300 block of Baker Street posed a hazard to pedestrians or motorists who tried to walk over them. The City also recognized that it would be unsafe for a pedestrian in these conditions to walk down the roadway on Baker Street to the nearest intersection in order to access the sidewalk that way.[9]

13. Seeing no other means to get to the sidewalk, the respondent tried to cross the snowbank. As she did, her right foot dropped through the snowbank and onto something that bent her forefoot up. The snow locked her leg in place, and she fell forward suffering a serious injury.[10]

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[3] Trial Reasons, paras. 4-5; Agreed Statement of Facts, Document B (Response Book, Tab 2).
[4] Agreed Statement of Facts, para. 3 (Response Book, Tab 2).
[5] Trial Reasons, para. 29; Agreed Statement of Facts, para. 2 (Response Book, Tab 2)
[6] Trial Reasons, para. 6(m).
[7] Trial Reasons, para. 6(o).
[8] Trial Reasons, para. 29; Court of Appeal Reasons, para. 4.
[9] Evidence of Karen MacDonald, Public Works Supervisor for the City, Transcript, p. 76, ll. 5-26 (Response Book, Tab 3).
[10] Court of Appeal Reasons, para. 4

14. The respondent sued the City in negligence. Damages were agreed and the matter proceeded to trial on liability only.[11]

15. The trial judge dismissed the action. An appeal was allowed and a new trial ordered on account of a number of legal errors made by the trial judge. These will be reviewed below.

PART II – STATEMENT OF ISSUES

16. The only question on this leave application is whether the applicant has raised questions of such public importance that this Court ought to grant leave. The respondent submits there are no such issues and that the leave application should be dismissed.

PART III – STATEMENT OF ARGUMENT

A. Insufficiency of Trial Reasons Makes this Case Inappropriate for Further Review

17. At the Court of Appeal, the respondent argued that the trial judge's reasons are functionally insufficient, having substantially reproduced large portions of the City's submissions (40 of 46 paragraphs) and having misstated and failed to consider the respondent's arguments at trial or the jurisprudence upon which she relied.[12]

18. The Court of Appeal found it unnecessary to address this argument in light of other errors that it found. But problems with the trial reasons are relevant to this leave application because the City is seeking to have this Court review a judgment that is unclear as to the reasoning of the trial judge on the main issue raised in the leave application, namely the proper approach to determining whether decisions are policy or operational.

19. The trial judge started off his analysis by saying that "Governments do not owe a duty of care in tort if it can be established that their actions are *bona fide*."[13] This is an erroneous statement of law. It is only where a governmental decision is characterized as a policy decision and not as an operational decision will it be immune from liability. There is no immunity just because the government acted *bona fide*. The Court of Appeal pointed out this error.[14]

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[11] Trial Reasons, para. 2.
[12] Court of Appeal Reasons, para 2(b)
[13] Trial Reasons, para. 3.
[14] Court of Appeal Reasons, para. 7.

20. Later, the trial judge stated a public authority is not liable in negligence for a policy decision "unless it was made in bad faith or was so irrational as not to be a proper exercise of discretion".[15] In addressing this issue, the trial judge said (at para. 7):

> The policy decisions made by the City were *bona fide*, according to the City. The decisions could not be characterized as made in bad faith or so irrational as not be a proper exercise of discretion. These decisions were governed by factors including budgetary social and economic factors, which included the availability of manpower and equipment.

21. The first sentence is clearly a statement of the City's position. But the second and third may or may not be. Given the massive copying of the City's written submissions at trial, it is difficult to know whether anything in this part of the judgment constitutes independent decision-making or is a mere recitation of the arguments made by counsel for the City.

22. In this part of the judgment the trial judge does describe the City's actions as policy decisions.[16] Yet at the very end of this part the trial judge concludes: "According to the City, it owed no duty of care in the circumstances."[17] Then, at the beginning of the next section he says "If the City does not have a policy defence it owes a duty of care and the standard tort analysis applies."[18] Was everything that preceded this the independent reasoning of the trial judge, and an actual decision on the merits, or was it mere recitation of the City's position?

23. The case proceeded in the Court of Appeal on the basis that the trial judge had found the City immune because its impugned conduct constituted policy decisions. However, the trial judge's large-scale copying of the City's written submissions and the suggestion at the end of this part of the judgment that he was merely describing the City's position, makes it unclear whether the judge ever put his mind to the question of whether the conduct could be considered operational and, if not, why not.[19] While this Court has made it clear that excessive copying is not an error of law *per se*, it has also said that such a practice should be discouraged because it

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[15] Trial Reasons, para. 13
[16] Trial Reasons, paras. 14-15.
[17] Trial Reasons, para. 16.
[18] Trial Reasons, para. 17.
[19] Later the trial judge discusses policy again but in the context of considering the standard of care: see paras. 35-36 of the Trial Reasons.

calls into question whether the judge exercised independent decision-making on the issues before him or her.[20]

24. It was against this backdrop that the Court of Appeal had to consider the respondent's argument that the trial judge had erred in finding that all of the City's decisions were policy and not operational in nature. What was clear to the Court of Appeal was that the trial judge's reasons did not engage with the issue of whether, under the governing jurisprudence, any of the impugned conduct constituted operational decisions. Rather it just reproduced a list, taken verbatim from the City's submissions, said to be "policy decisions respecting snow removal."[21]

25. The Court of Appeal stated (at para. 20):

> Certain of the impugned decisions of the street clearing crew may properly have been characterized as operational in nature. Arguably, the decision not to further extend the hours of snow clearing and the decision not to move snow into particular parking spots, leaving access to the sidewalk open in other areas along the street, were operational. In my view, it was an error on the part of the trial judge to accept the City's submission that all its snow removal decisions were policy decisions without engaging in the analysis called for by *Just*.

26. The significance of this passage is that the Court of Appeal did not hold that the actions outlined there are operational in nature. These were arguable points raised by the respondent, and the judge was obliged to consider whether they were policy or operational and to provide reasons for that decision. As the trial judge did not do that, and as the Court of Appeal did not decide whether they were or were not operational, this would not a proper case to further explore the distinction between the two kinds of decisions.

27. The City runs into the same problem with its standard of review argument. The City says the Court should grant leave to determine "the appropriate standard of review to be applied to a trial judge's finding that a particular decision (or suite of decisions) is a policy or operational decision."[22] The trial judge in this case did not address the respondent's argument that the City's employees had made operational decisions. As the Court of Appeal put it, the reasons for judgment are "marked by a failure to identify the types of government decisions that should be

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[20] *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at paras. 36, 50

[21] Court of Appeal Reasons, para. 10, referring to Trial Reasons, para. 5(a)-(h).

[22] Applicant's Memorandum of Argument, heading above para. 35.

insulated from judicial scrutiny."[23] That is why his decision could not stand. The standard of review issue as framed by the City is not engaged in this case.

28. It should be noted that the trial judge made a number of other errors. He said the City exceeded its budget for snow plowing and removal for the three previous years when it in fact was under budget for those years. The trial judge also erred in saying that the respondent called all three witnesses who testified as to the way snow was removed in other municipalities when in fact the City had called two of those witnesses.[24] These errors were conceded by the City at the Court of Appeal.

29. In summary, this is not an appropriate case in which to explore questions concerning the policy/operational distinction even assuming there are outstanding issues of importance for this Court to address. As the next two sections show, the City has not identified any such issues.

B. Lower Courts are not "Confused" by Law on Policy and Operational Decisions

30. The City notes that the law on policy versus operational decisions is set out and explained in *Just v. British Columbia* and *Brown v. v British Columbia (Minister of Transportation and Highways)*.[25] It says further that this Court sought to clarify the analysis in *R. v. Imperial Tobacco Canada Limited*.[26] However, it says, lower courts remain "confused as to how the public authority policy defence should apply", and it cites four cases to support that claim.[27]

31. Before looking at the four cases cited by the applicant it is useful to review the law on policy and operational decisions as set out in *Just*, *Brown* and *Imperial Tobacco*.

32. In *Just* a boulder fell from a rocky hill above a highway onto the appellant's car, causing him serious injury and killing his daughter. He sued the Province of British Columbia for negligent failure to maintain the highway. This Court held that in deciding whether the government owes a duty of care in such circumstances it is necessary to decide whether the

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[23] Court of Appeal Reasons, para. 8.
[24] Trial Reasons, paras. 10, 35.
[25] [1989] 2 S.C.R. 1228 [*Just*] and [1994] 1 S.C.R. 420 [*Brown*].
[26] 2011 SCC 42 [*Imperial Tobacco*].
[27] Applicant's Memorandum of Argument, paras. 24, 27, 30.

impugned government conduct was a policy decision or operational decision. If the former it was immune from liability.

33. In deciding whether a decision is policy or operational, Cory J. for the majority found assistance in the decision of the Australian High Court in *Council of the Shire of Sutherland v. Heyman* where Mason J. said:

> The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognize that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.[28] [Emphasis added by Cory J.]

34. Building on this statement, Cory J. provided the following guidance:

> In determining what constitutes such a policy decision, it should be borne in mind that such decisions are generally made by persons of a high level of authority in the agency, but may also properly be made by persons of a lower level of authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors. As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions. Further, it must be recalled that a policy decision is open to challenge on the basis that it is not made in the *bona fide* exercise of discretion. If after due consideration it is found that a duty of care is owed by the government agency and no exemption by way of statute or policy decision-making is found to exist, a traditional torts analysis ensues and the issue of standard of care required of the government agency must next be considered.[29]

35. Five years later the issue came before the Court again in *Brown*. In that case, a car skidded on an icy patch of road and went over an embankment. An action was commenced against the Province of British Columbia for negligence. It was alleged the Province failed to respond in a timely fashion to reports of icy conditions and to remedy those conditions, and also failed to maintain the section of road in question so that ice would not form on it. The action was dismissed and the British Columbia Court of Appeal upheld that decision. A further appeal to this Court was dismissed.

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[28] [1985] H.C.A. 41, (1985) 157 C.L.R. 424 at para. 39, quoted at p. 1242 of *Just*.
[29] *Just* at 1245.

36. Cory J. for the majority provided the following guidance on the difference between policy and operational decisions:

> 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.[30]

37. The issue came before the Court again in *Imperial Tobacco*. In *Just* and *Brown* the allegation of negligence was in relation to a service provided by the government in maintaining roads. This is similar to the case at bar. In *Imperial Tobacco* the issue was different. In that case, tobacco manufacturers sued the government for negligent misrepresentation in relation to representations that low-tar and light cigarettes were less harmful than other cigarettes.

38. In considering whether the government owed the tobacco manufacturers a duty of care the Court discussed the distinction between policy and operational decisions. It said that the question is a "vexed one".[31] It also noted that the House of Lords had said in an earlier decision that it was "unworkable" but in a more recent case had "affirmed that both the policy/operational distinction and the discretionary decision approach are valuable tools for discerning which government decisions attract tort liability".[32]

39. After looking at the approaches adopted in the United Kingdom, Australia and the United States, this Court reaffirmed the dichotomy as an essential feature of Canadian law. It concluded: "The difficulty in defining such decisions does not detract from the fact that the cases keep coming back to this central insight." This is consistent with *Just* where this Court had said: "The dividing line between 'policy' and 'operation' is difficult to fix, yet it is essential that it be done."[33]

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[30] *Brown* at 441.
[31] *Imperial Tobacco*, para. 72.
[32] *Imperial Tobacco*, para. 79.
[33] *Just* at 1239.

40. The fact that the dividing line is difficult to fix does not mean courts are "confused" as to how to approach these cases, as the City argues. The four cases relied upon by the City does not show any such confusion.

41. The first case is *Paradis Honey Ltd v. Canada*.[34] That was a proposed class action by a group of commercial beekeepers regarding a ban on the importation of honey bees from the United States. It was argued that the government was liable in negligence for the manner in which it handled the ban. The government applied to strike the claim on the basis that it owed no duty of care to the beekeepers. A judge of the Federal Court of Appeal struck the claim. The Federal Court of Appeal, in a 2-1 decision, allowed the appeal, concluding it was not plain and obvious that the claim could not succeed.

42. Stratas J.A. for the majority considered that "*Imperial Tobacco* leave us more uncertain than ever as to when the policy bar will apply" and on that basis he was unable to conclude that the beekeepers' claim was to doomed to failure.[35] For Stratas J.A. the main problem is that "most decisions are based on public policy considerations" and that the examples provided by the court – economic, social and political considerations – "covers just about everything on the legislative books in the area of regulation." He notes that no further criteria are provided to help guide courts in this area.

43. The first thing to note about this commentary is that it addresses the test for policy decisions in the specific area of the exercise of regulatory authority. *Paradis* was such a case. *Imperial Tobacco* was such a case. The case at bar is not. As noted above, this case concerns the distinction as it applies in cases where government provides a service and the issue is whether its conduct is properly labelled as policy or operational in nature. In this area the courts have had no difficulty applying this Court's case law, as discussed further below.

44. Second, Stratas J.A.'s critique of the "conceptual framework" is the same that had been made other courts prior to *Imperial Tobacco*. There is nothing new here. This Court in *Imperial Tobacco* acknowledged this commentary but reaffirmed the policy/operational dichotomy for Canadian law nonetheless. As the Court put it:

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[34] 2015 FCA 89 [*Paradis Honey*].
[35] *Paradis Honey* at para. 110 (emphasis added).

> Difficult cases may be expected to arise from time to time where it is no 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 proceed is likely chimerical. Nevertheless, most government decisions that represent a course of principle of action based on a balancing of economic, social and political considerations will be readily identifiable.[36]

45. Third, Stratas J.A. did not mention this Court's decisions in *Just* and *Brown* where guidance is provided as to what constitutes an operational decision.

46. Fourth, Stratas J.A.'s actual decision in *Paradis Honey* may well have been correct. Unless it is possible to determine on the pleadings whether a decision is policy or operational then the claim cannot be struck and the matter must proceed to trial. This Court said just that in *Imperial Tobacco*.[37]

47. Fifth, Stratas J.A.'s *obiter* commentary does not show any confusion, as the City alleges, but rather expresses a concern that the considerations relevant to the analysis of what constitutes a policy decision could immunize "a broad zone" of government activity from tort liability.[38] However, this Court has consistently maintained that the law should not develop in a way that will provide the government with a blanket immunity in tort cases.[39] There is no suggestion in the cases cited by the City that this has occurred.

48. Not surprisingly then, this Court denied leave to appeal in *Paradis Honey*.

49. None of the three other cases cited by the City demonstrate any "confusion" amongst the lower courts as to the proper approach to the policy/operational distinction.

50. In *George v. Newfoundland*,[40] the Newfoundland and Labrador Court of Appeal upheld the trial judge's dismissal of a class action brought against the government on behalf of residents injured or killed in motor vehicle collisions with moose. On the policy/operational issue, the Court found that the trial judge had correctly applied this Court's decisions in *Imperial Tobacco*,

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[36] *Imperial Tobacco* at para. 90.
[37] *Imperial Tobacco* at paras. 70, 91.
[38] *Paradis Honey* at para. 108.
[39] *Just* at 1239; *Imperial Tobacco* at para. 76.
[40] 2016 NLCA 24 [*George*].

Brown and *Just* in holding that the impugned conduct was policy and not operational. No "confusion" is evident in the court's analysis of the applicable principles.[41]

51. In *Waterway Houseboats Ltd v. British Columbia*,[42] the plaintiffs brought an action against a number of defendants, including governmental actors, for remediation work done following a flood. A second flood caused damage to their houseboat rental business and they claimed damages for negligence in the design, authorization and construction of the remediation work. The defendants applied to strike the action. The court dismissed the motion. On the question of whether government approvals were policy decisions the court said the following:

> . . . there is nothing here to confirm that the Approvals were the result of a true policy decision. Indeed, all of the facts pleaded are quite evidently aimed at proving they were not. If, for example, the facts proven at trial establish that the Province's engineers went beyond conducting regulatory approvals into providing what was effectively professional advice, the Approvals may not be a policy decision. Similarly, if the facts underlying the failure to act in good faith allegation are established, the policy defence would not apply: *Imperial Tobacco*.[43]

52. There is no confusion here. The court applied *Imperial Tobacco* and declined to strike the claim.

53. The final case cited by the applicant is *Patrong v. Banks*.[44] This was also a motion to strike. In that case, the plaintiff was shot by a violent criminal who was the subject of an arrest order. Police officers failed to undertake an arrest of the shooter when they saw him because they had not been told about the arrest order. The court allowed the action to proceed. The court had no trouble applying the distinction between policy and operational decisions:

> The Supreme Court of Canada has ruled, for example, that governments will not be held liable for losses that are inflicted when the government or an official makes a pure policy decision. Government policy, by definition, will favour some peoples' interests over others. It would defeat government policy then, for a court to hold the government liable

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[41] *George* at paras. 120-25, 131-32, 138, 140, 153-58. The City incorrectly states (at para. 41 of its argument) that the Court in *George* criticized the policy-operational distinction as "inherently uncertain" and "notoriously difficult". That was the view of Professor Feldthusen noted at para. 120 of *George*.

[42] 2018 BCSC 606

[43] *Ibid*. at para. 62.

[44] 2015 ONSC 3078 [*Patrong*].

> to pay compensation to all those whom its policy choice made under a valid law might foreseeably hurt. But governments can be held liable for operational decisions i.e. decisions made to carry out (or declining to carry out) policy decisions. This case involves a pure operational decision. Detective Banks is alleged to have failed to follow a lawful order to require the arrest of Riley if he entered Scarborough in breach of two court orders. Detective Banks was not exercising a policy choice given to him by a statute or regulation. Rather, the plaintiffs allege that he had an operational duty to carry out his orders and he and others wrongfully failed to do so.[45]

54. It was noted above that the case at bar is not one of regulatory negligence like in *Paradis Honey* and *Imperial Tobacco*. Here the government provided a service and the question is whether the impugned conduct by government workers was policy or operational in nature. A review of cases dealing with that question also show the lower courts have no difficulty applying *Just* and *Brown*.[46]

55. In short, there is no confusion in the law. The cases cited by the City, and the additional ones cited by the respondent, demonstrate that courts understand the task they have to carry out in deciding whether a decision is policy or operational.

C. Standard of Review is not an Issue of Public Importance

56. The City says there is a "dearth" of case law on the standard of appellate review on questions of immunity from liability for policy decisions.[47] In the respondent's submission, this shows that standard of review is not an issue of concern in the lower courts.

57. The City says in the "limited" jurisprudence there is conflict requiring this Court's intervention. The cases cited do not support this assertion.

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[45] *Patrong* at para. 31.

[46] *Fox v. City of Vancouver*, 2003 BCSC 1492 (applies *Just* and *Brown* in finding that a sidewalk inspection system was a policy decision); *Binette v. Salmon Arm (City)*, 2017 BCSC 302 (applies *Just* and *Brown* in finding that city's sidewalk inspection and signage removal policy was a true policy decision but city was liable in negligence because of how it had implemented the policy); *Lowe v Sidney (Town of)*, 2020 BCSC 335 (applies *Just* and *Brown* in holding that plaintiff's complaint was with city's policy for snow and ice removal and not with the manner in which it was carried out).

[47] Applicant's Memorandum of Argument, para. 35.

58. In *Gibbs v. Edmonton (City of)* the Alberta Court of Appeal said the question of whether a decision is policy or operational "is one of mixed fact and law, for which the standard of review lies along a spectrum".[48] In that case, the standard of review was found to be palpable and overriding error as the trial judge had considered all the requirement elements of the legal test.

59. In *Adams v. Borrel* the issue was whether to recognize a novel of duty of care using the *Anns/Cooper* analysis. The New Brunswick Court of Appeal said this "largely" raises questions of law.[49] This is correct. As this Court recently affirmed, whether to recognize a duty of care is a question of law.[50] Later, when looking at whether a *prima facie* duty of care was negated by the fact that government had made policy decisions, the court in *Adams* overturned the judge's decision because there was no evidence to support it.[51] This is a traditional ground for appellate intervention.

60. In the third case, *George*, the City admits that the court "does not explicitly reference the applicable standard of care [review?]" and thus it can only be "argued" that it applied a correctness standard.[52] The fact that the City is driven to rely on such a case to establish an alleged conflict underscores the lack of merit in this leave application.

61. In dealing with the case at bar, the applicant says the Court of Appeal simply replaced the trial judge's conclusions on the policy/operational question with its own.[53] It thus applied a standard of correctness, the City maintains. This is not correct. The Court of Appeal did not decide that conduct which the trial judge had labelled as policy should have been characterized as operational, using a correctness standard. Rather, as noted above, it decided that the judge had erred by failing entirely to address why certain conduct which was alleged to constitute implementation of the policy was not operational under the *Just* and *Brown* standard. Whether that conduct is operational will be for the new trial judge.[54]

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[48] 2003 ABCA 138 at para. 3.
[49] 2008 NBCA 62 at para. 22 [*Adams*].
[50] *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19 at para. 19.
[51] *Adams* at para. 72.
[52] Applicant's Memorandum of Argument, para. 42.
[53] Applicant's Memorandum of Argument, para. 43.
[54] On one aspect the Court of Appeal did apply a correctness standard and that was in relation to the trial judge's erroneous statement of law that governments do not owe a duty of care if their

D. Court of Appeal's Error Correction on "Legal Causation" does not Warrant Further Review by this Court

62. The trial judge found that the respondent appreciated there was some risk that in walking over the snowbank she could slip and fall.[55] Proceeding in the face of that knowledge meant that she was the proximate cause of her own injuries. Thus, according to the trial judge, the test for "legal causation" was not met.[56]

63. The Court of Appeal found this reasoning to be problematic for two reasons,[57] relying on its previous decision in *Skinner v. Fu*.[58] First, the correct test for causation is the "but for" test. Proximate cause is synonymous with remoteness of damages. Using "proximate cause" in a case of this nature is unhelpful because it can divert attention from the task at hand, namely to determine whether the defendant's actions caused or contributed to a plaintiff's injuries.

64. Second, a finding that a plaintiff could have avoided a situation created by the defendant is not dispositive of the defendant's liability. In the past it would have been dispositive if it was shown that the plaintiff had an opportunity to avoid the consequences of the defendant's act of negligence but negligently failed to take that opportunity. This was known as the "last clear chance" doctrine. However, that doctrine has been abolished by s. 8 of British Columbia's *Negligence Act*.[59] Trial judges must therefore be mindful of the doctrine's abolishment and not exonerate a defendant solely because the plaintiff failed to take steps to avoid the peril created by the defendant.

65. The Court of Appeal was correct on both fronts.

66. First, as this Court explained in *Deloitte & Touche v. Livent Inc. (Receiver of)*, "legal causation" or "proximate cause" has a particular meaning in tort law:

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conduct was *bona fide*. See Court of Appeal Reasons, para. 7. It was right to do, as the correctness of the trial judge's formulation of the law is a pure question of law.

[55] Trial Reasons, para. 43.

[56] See Trial Reasons at paras. 40-41 where the judge says that beyond establishing "factual causation" the respondent would need to show that the City was "liable for legal causation".

[57] See Court of Appeal Reasons, paras. 26-29.

[58] 2010 BCCA 321 [*Skinner*].

[59] R.S.B.C. 1996, c. 333.

> In a successful negligence action, a plaintiff must demonstrate that (1) the defendant owed him or her a duty of care; (2) the defendant's behaviour breached the standard of care; (3) the plaintiff sustained damage; and (4) the damage was caused, in fact and in law, by the defendant's breach (*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 3; *Saadati*, at para. 13). The principle of remoteness, or legal causation, examines whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable" (*Mustapha*, at para. 12, citing A.M. Linden and B. Feldthusen, *Canadian Tort Law* (8th ed. 2006), at p. 360; see also *Saadati*, at para. 34). It is trite law that "it is the foresight of the reasonable man which alone can determine responsibility" (*Mustapha*, at paras. 11-13, citing *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.*, [1961] A.C. 388 (P.C.), at p. 424). Therefore, injury will be sufficiently related to the wrongful conduct if it is a reasonably foreseeable consequence of that conduct.[60]

67. It is unhelpful to employ the terminology of "legal causation" when the court is not confronted with a remoteness of damages problem. The question in the case at bar is whether factual causation was established in the event that the City was not immune from liability. For that the "but for" test is determinative.[61]

68. Second, the proposition that a defendant is not liable if the plaintiff had an opportunity to avoid the consequences of the defendant's negligent act is precluded by s. 8 of British Columbia's *Negligence Act* which reads as follows:

> 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.[62]

69. Where, however, the court finds that the defendant negligent and the plaintiff contributorily negligent, then the court must apportion liability between the plaintiff and the defendant under s. 4 of the *Negligence Act*.[63]

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[60] 2017 SCC 63 at para. 77. See also *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 [*Mustapha*] at paras. 11-18.
[61] *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 13 ("Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury"). See also para. 17 where this Court said: "It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring." [Emphasis in original.]
[62] R.S.B.C. 1996, c. 333, s. 8.
[63] *Sweeney v British Columbia*, 2018 BCSC 1832 at para. 97.

70. The City therefore can argue that if it is found to be negligent the respondent should be found contributorily negligent. But it cannot argue that she is entirely at fault for the accident because she had the opportunity to avoid the consequences of the City's act by not attempting to cross the snowbank. This is elementary law in British Columbia.

71. The City insists that there is nothing wrong with finding that "a plaintiff's own conduct is the proximate and sole cause of their injury, even if but for defendant's negligent conduct, the injury would not have occurred."[64] With respect, this is a *non sequitur*. If the defendant's negligent conduct satisfies the "but for" test then liability is established, and the plaintiff's conduct cannot be the "sole cause" of the accident. Whether the plaintiff is contributorily negligent is a second question. Again, this is elementary law.

72. The City also relies on a 2005 decision of the British Columbia Court of Appeal, *Lawrence v. Prince Rupert (City) and B.C. Hydro & Power Authority*.[65] In that case, the plaintiff tripped over a power pole that had been left by BC Hydro on part of a sidewalk. Chief Justice Finch used the term "proximate cause" not in the sense of remoteness of damages, as used by this Court in *Livent*, but to mean factual causation. While the term is unhelpful when used for that purpose because it invites confusion as to the inquiry being undertaken, it is clear that Chief Justice Finch was speaking of factual causation. He said:

> 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.[66]

73. On the issue of factual causation Chief Justice Finch held as follows:

> 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.[67]

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[64] Applicant's Memorandum of Argument, para. 51.
[65] 2005 BCCA 567 [*Lawrence*].
[66] *Lawrence* at para. 41.
[67] *Lawrence* at para. 45.

74. While upholding the decision on causation, Chief Justice Finch was at pains to point out that the "preferable" approach would have been to dismiss the action on the basis that BC Hydro had not been negligent in placing the pole where it did.[68] But, as Chief Justice Finch noted, BC Hydro did not appeal the finding it was negligent and thus the court was required to deal with the case as one of factual causation.[69]

75. *Lawrence* is an illustration of a case in which the court finds that factual causation is not met and that plaintiff is solely responsible for the accident. Indeed, this is how the case has been subsequently interpreted by the British Columbia Court of Appeal in *Chambers v. Goertz*.[70] But, as noted above, Chief Justice Finch accepted that a "last clear chance" analysis should not be employed. He simply did not find that this is what the trial judge had done.

76. Since the *Lawrence* decision, the Court of Appeal has been clear that use of the term "proximate cause" to deal with factual causation should be avoided because it is productive of confusion. It has also been clear that in examining causation courts must not apply the last clear chance doctrine.

77. In *Chambers*, the plaintiffs were struck by a car when they crossed the road after being refused entry to a taxi. The trial judge found the driver of the car that had struck them and the taxi driver were negligent and also that the plaintiffs were contributory negligent. On appeal, the taxi driver argued that the accident would not have happened but for the plaintiffs' negligence in crossing the road and that their negligence was the proximate cause of the accident.

78. The Court of Appeal commented that "proximate cause" was not the correct phraseology to use in this context:

> "Proximate cause" is a phrase ill-suited to the task of identifying culpable causes in negligence. It implies that the law recognizes only one cause and that this sole cause must be close in time and space to the event. As I have explained, these implications are not correct – every event has multiple historical factual causes. The phrase "proximate cause" is most often used in tort law synonymously with "remoteness", that is, "to inject some degree of restraint on the potential reach of causation": *R. v. Goldhart*, at para. 36. It suggests a limit on the scope of liability. . . .[71]

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[68] *Lawrence*, at paras. 34, 46.
[69] *Lawrence*, at para. 35.
[70] 2009 BCCA 358 [*Chambers*] at para. 32.
[71] *Chambers* at para. 29.

This is entirely consistent with what this Court said in *Livent* and *Mustapha*.

79. The Court of Appeal went on to reject the taxi driver's argument that the plaintiffs' actions in crossing the road were the sole cause of the accident. The trial judge's findings of multiple causes of the accident was dispositive.[72]

80. In *Skinner*, the Court of Appeal adopted the views expressed in *Chambers* on "the use and misuse of the term 'proximate cause.'"[73] In that case, the plaintiff's vehicle collided with the defendant's vehicle which had stopped on the road and remained stationary, without using any warning lights. The defendant had stopped after colliding with a coyote. The trial judge found the defendant was negligent but held that this negligence was not the proximate cause of the accident. This was because his car was visible to the plaintiff. The Court of Appeal allowed an appeal. After quoting from *Chambers* it said:

> 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.[74] [Emphasis added.]

81. In the case at bar, the Court of Appeal relied on *Skinner* and stated the following conclusion:

> 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 respondent's negligence. Such reasoning is clearly precluded by s. 8 of the *Negligence Act*.[75]

82. The City says this statement is in error because it is possible that a plaintiff will be found solely responsible for an accident notwithstanding s. 8.[76] However, the Court of Appeal does not say otherwise. What it says is that a court cannot treat as "dispositive" of the question of whether the City is liable the fact that the plaintiff "assumed the risk of crossing the snowbank." Section 8

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[72] *Chambers* at para. 34.
[73] 2010 BCCA 321 [*Skinner*] at para. 19.
[74] *Skinner* at para. 19.
[75] Court of Appeal Reasons, para. 29.
[76] Applicant's Memorandum of Argument, paras. 49-50.

of the *Negligence Act* precludes exoneration of a defendant solely because a plaintiff had an opportunity to avoid the consequences of the defendant's act. The trial judge did not consider s. 8 and did not mention the possibility of finding contributory negligence. The Court of Appeal was therefore correct to overturn the trial judge's decision on "legal causation."

83. In *Lawrence*, *Chambers* and *Skinner*, and now in this case, the British Columbia Court of Appeal has correctly stated that courts must not employ a "last clear chance" analysis in deciding the question of factual causation. Whether a trial judge has done so will depend on an assessment of the facts of the case and the judge's reasons for judgment. There is no reason for this Court to intervene in order to provide additional guidance on this topic.

PART IV – COSTS

84. The respondent seeks her costs of this leave application.

PART V – ORDER SOUGHT

85. The respondent seeks an order dismissing the leave application with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Danielle Daroux
Joe Murphy, Q.C.
Counsel for the Respondent
June 9, 2020

PART VI – TABLE OF AUTHORITIES

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