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Corralling Public Policy:

The Supreme Court of Canada provides criteria to identify what constitutes ‘core policy’

By [Robert Fischer](#) and [Bronwen Black](#)

The unruly horse of private law negligence actions against public entities has long been a challenge to bridle.¹ At times, Courts branded decisions as ‘core policy’ in the absence of express discussion of the elements that made that decision policy at its ‘core’.² In stride, litigants challenged the minutiae of a public body’s actions in their efforts to characterize decisions as operational, on the policy/operational continuum, for the purpose of persuading jurists to find that the decision was inherently operational.³ Recently, in *Nelson (City) v. Marchi*, [2021 SCC 41 \(CanLII\)](#) (“*Marchi*”), the Supreme Court of Canada (“SCC”) took up the ‘core policy’ taxonomy challenge. The *Marchi* decision will likely have broad implications.

In *Marchi*, the SCC noted the “continued confusion”⁴ in the decade since *R. v. Imperial Tobacco*, [2011 SCC 42](#). In *Imperial Tobacco*, the SCC explored further the application of the *Anns-Cooper* test to public entities, and sought to clarify the policy/operations continuum. In *Imperial Tobacco*, the SCC noted that this continuum was “notoriously difficult” to apply in novel situations, and not always helpful as a “stand-alone” test.⁵ As a result, in *Imperial Tobacco*, the SCC suggested that jurists should not focus on any continuum but should approach the issue contextually based on the true character of the decision or action at issue.⁶ After *Imperial Tobacco*, it is “core policy” matters that are protected from suit.

¹ *Richardson v Mellish* (1824), 2 Bing 229 at 252, 130 ER 294 (CP) Burrough J, noting public policy “is a very unruly horse, and when once you get astride it you never know where it will carry you.”

² See for example the fine line drawn regarding whether the frequency of inspections is a policy or operational decision in *Barratt v. District of North Vancouver* (1980) 114 D.L.R. (3rd) 577, *Just v. British Columbia*, [1989] SCJ No 121 [“*Just*”], and *Brown v. British Columbia (Minister of Transport and Highways)* (1994) 112 D.L.R. (4th) 1.

³ The drawing of a policy/operational continuum allows the judiciary to stray into the arena of governmental decision-making when the government strays from her policy, economic, and social prerogative to find her liable. See Alope Chatterjee, Neil Craik & Carissima Mathen, “Public Wrongs and Private Duties: Rethinking Public Authority Liability in Canada” (2007) 57 UNBLJ 1 at 1-2:

“...courts must balance the idea of equality before the law, which militates against governmental immunity from tortious liability, with parliamentary supremacy and judicial deference for the policy choices of statutory decision-makers. The policy/operational distinction provides a basis for delineating those decisions that ought not be subject to judicial oversight... . To disturb those decisions through a finding of negligence is to allow the court to substitute its decision for that of the legislature’s chosen delegate”.

⁴ *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 3](#).

⁵ *R. v. Imperial Tobacco Canada Ltd.*, [2011] S.C.J. No. 42 [“*Imperial Tobacco*”] at [para 78](#) and [para 86](#), 2011 SCC 42 (S.C.C.).

⁶ *Imperial Tobacco*, at [para 90](#).

W—T

Following *Imperial Tobacco*, it became clear that there was a need to define ‘core policy’; *Imperial Tobacco* itself received criticism.⁷ *Marchi* may provide needed clarification. In *Marchi*, Justices Karakatsanis and Martin, for a unanimous court, explained that the key issue of policy immunity “requires the Court to clarify how to distinguish immune policy decisions from government activities that attract liability for negligence.”⁸ In so doing, the SCC provided guidance on (a) the *Anns-Cooper* test, and (b) how litigants can distinguish core policy decisions from government activities attracting liability.

Marchi: Factual Background

Following significant snowfall, the City of Nelson, in British Columbia, started plowing and sanding streets according to written policies and unwritten practices. City workers cleared snow from angled parking stalls on streets in the downtown core. City workers plowed the snow to the top of the parking spaces, creating a continuous snowbank along the curb, separating the parking stalls from the sidewalk. No access route was cleared to provide access to the sidewalk for drivers parking in the stalls. The Plaintiff Taryn Joy Marchi parked in an angled parking stall, attempting to access a business, but the snowbank blocked her route to the sidewalk. Ms. Marchi decided to cross the snowbank and seriously injured her leg in the process.

The Trial Decision

At the trial level, [2019 BCSC 308](#), Ms. Marchi’s claim, framed in negligence, was dismissed. The trial judge accepted the City’s submission that it owed no duty of care to the Plaintiff because actions regarding snow removal resulted from core policy decisions.⁹ In the alternative, the trial judge found that if decisions were operational in nature, negligence was not made out under the standard tort analysis (in other words, there was no breach of the standard of care).¹⁰ In the further alternative, if there was a breach, Ms. Marchi’s conduct was the proximate cause of her own injuries.

The Court of Appeal Decision

At the appellate level, [2020 BCCA 1](#), the Court held that the trial judge erred on all three of the above conclusions and ordered a new trial. The court held that where an action is brought against a public authority and that public authority argues that it had no duty of care based on the policy defence, the court must undertake the analysis in *Just*.¹¹ The Court of Appeal held that the trial judge erred in accepting the public authority’s submission that

⁷ See as but one example Justice Stratas’s *obiter* critique in *Paradis Honey Ltd. v. Canada*, [2015 FCA 89](#) (CanLII), [2016] 1 FCR 446 [*Paradis*] at [paras 106](#) to [110](#).

⁸ *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 3](#).

⁹ *Marchi v Nelson (City of)*, 2019 BCSC 308 (CanLII), [para 7](#).

¹⁰ *Marchi v Nelson (City of)*, 2019 BCSC 308 (CanLII), [para 25](#).

¹¹ *Marchi v Nelson (City of)*, [2020 BCCA 1](#) at [para 20](#); *Just*, *supra* note 2.

W—T

its snow removal decisions were policy decisions when a proper analysis would have shown the impugned decisions were operational.¹²

The Issues in *Marchi* and the SCC's Findings

The following three issues were raised on appeal to the SCC:

1. whether the City owed the Plaintiff a duty of care because its snow removal decisions were core policy decisions immune from negligence liability;
2. whether the learned trial judge erred in his standard of care analysis; and
3. whether the learned trial judge erred in his causation analysis.

The City acknowledged that the onus of proving that the decision was one of core policy fell to it. The SCC held that the City did not meet its burden of proving that Ms. Marchi was challenging what was a core policy decision immune from negligence liability. Accordingly, the City owed Ms. Marchi a duty of care. The standard of care and causation assessments required a new trial.

The SCC clarifies *Just*

Subject to the existence of any statutory provisions that provide otherwise, the *Anns-Cooper* test governs the analysis as to whether any party, including a public entity, owes a private law duty of care to a member of the public or a public group.¹³ This test has two steps. The first requires the Court to consider whether the nature of the relationship between the plaintiff and defendant, having regard to *both* foreseeability and proximity, will give rise to a *prima facie* duty of care. The second step of the *Anns-Cooper* test arises where a *prima facie* duty of care is found, but the Court must consider whether policy considerations exist to negate the *prima facie* duty of care.

The foreseeability aspect of the first step of the test is often easily met as against public entities. Where a statutory measure fails, it is generally considered foreseeable that injury might flow from this failure.¹⁴ The key consideration becomes whether a relationship of sufficient proximity exists between the parties. In making this determination, the court must consider whether the subject relationship falls within an established category of relationship where a duty of care exists, or whether the relationship is sufficiently analogous to an existing category.¹⁵

¹² *Marchi v. Nelson (City of)*, 2020 BCCA 1 at [para 20](#).

¹³ *Cooper v Hobart*, 2001 SCC 79 at [para 22](#).

¹⁴ *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 31](#).

¹⁵ *Just*, supra note 2.

W—T

Where the category is pre-existing, meaning the duty of care at issue was previously determined to satisfy the full *Anns-Cooper* test, *Marchi* tells us that there is no need to proceed through the full two-stage framework.¹⁶ In determining whether a previously established category of duty applies, the Court must consider the factors that justified recognizing the prior category. For example, in *Just*, the key factors were the nature of the loss (personal injury), and whether the plaintiff and others were invited to use the subject public service (the highway).¹⁷

Where the relationship does not fall within an established category of proximity, a plaintiff may still argue that the relationship in question is sufficiently proximate to give rise to a private law duty of care. This is considered a “novel category” of proximity. Where the claim of proximity is a novel category, both steps of the *Anns-Cooper* test must be engaged. Should the novel category be accepted, the Court must then ask whether there are residual policy concerns beyond the relationship of the parties that should negate the *prima facie* duty of care.¹⁸ The SCC in *Marchi* clarified that this latter step *may* encompass the policy/operational analysis discussed below, but the core policy defence may arise separately and independently from the *Anns Cooper* test where the duty of care has previously been accepted.¹⁹

In *Marchi*, the court determined that the category of relationship giving rise to a duty of care recognized in *Just*²⁰ was sufficiently analogous to the relationship between the Plaintiff, Ms. Marchi, and the City. In making this determination, the Court considered the factors set out above, and concluded that proximity will be established where a public authority has undertaken to maintain a public road or sidewalk to which the public is invited, and a member of the public suffers personal injury as a result of the public authority’s failure to maintain the road or sidewalk.²¹ The Court further noted that the relationship was sufficiently close to satisfy a novel proximity test absent the *Just* category.

While the Plaintiff established that the City owed her a duty of care, it remained open to the City to show that its decision was protected from liability by reason of core policy immunity.

Core Policy

In *Marchi*, the SCC provided a framework to structure the analysis of identifying a core policy decision. Before doing so, the Court explained why core policy decisions are immune from liability as this rationale serves “as an overarching guiding principle in the analysis.”²²

¹⁶ *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 19](#).

¹⁷ *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [paras 27-28](#).

¹⁸ *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 18](#).

¹⁹ *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 33-34](#).

²⁰ *Just*, supra note 2.

²¹ *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 29](#).

²² *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 49](#).

W—T

In addition, the Court used leading public authority decisions (*Just*, *Imperial Tobacco*, and *Brown*) to ensure the hallmarks and factors that inform the analysis are assessed in light of the purpose that animates core policy immunity.²³ This culminated in clarifications²⁴ and the implementation of a framework to structure future analyses of whether a decision is a core policy decision.

The Court noted that the “primary rationale” for immunizing core policy decisions is to maintain the separation of powers.²⁵ The separation of powers protects all constitutional spheres, including the executive’s ability to execute laws, set priorities, and allot resources for good governance.²⁶ The rationale for immunity allows the legislature or executive to weigh “competing economic, social, and political factors and conducting contextualized analyses ... not based only on objective considerations but [requiring] value judgments...”²⁷ In setting out the rationale for core policy immunity, the Court expressly rejected the position that “private law principles of negligence are wholly incompatible with the role and nature of public authorities.”²⁸

The Court, citing *Imperial Tobacco*, defined the scope of a core policy decision as “decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith.”²⁹ The Court retracted from *Imperial Tobacco*’s desire to discard the policy/operational dichotomy. Instead, in *Marchi*, the SCC insists that the distinction remains useful as the juxtaposition of core policy and operational implementation clearly identifies decisions that should not be subject to oversight.³⁰

Before proceeding to provide the framework for analysis, the SCC provided two important clarifications. First, a public servant’s decision frequently involves financial implications, so the mere presence of budgetary, financial, or resource implications does not determine whether a decision is core policy.³¹ Second, “policy” has a range of meanings and the mere fact that the word is found in a written document or labelling a plan may be misleading. A core policy might be expected to be reduced to writing, but the focus must remain on the nature of the decision rather than the format or label.³²

²³ *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 54](#).

²⁴ *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 57](#).

²⁵ *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 42](#).

²⁶ *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 43](#).

²⁷ *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 44](#).

²⁸ *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 40](#).

²⁹ *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 51](#).

³⁰ *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 53](#).

³¹ *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 58](#).

³² *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 59](#).

W—T

With those cautions in mind, the previous principles and factors, when viewed with the primary rationale, provide a four-factor framework to help assess the nature of a government’s decision:

(1) the level and responsibilities of the decision-maker;

- how closely related is the decision-maker is to a democratically-accountable official who bears responsibility³³
- the more the job responsibilities of the decision-maker include assessing and balancing public policy considerations, the more likely it is a core policy³⁴
- decisions of employees far-removed from democratically accountable officials or who implement are more likely to attract liability³⁵

(2) the process by which the decision was made;

- the more the process for reaching the decision was deliberative, required debate (possibly in a public forum), involved input from different levels of authority, and was intended to have broad application and be prospective, the more it will be a core policy³⁶

(3) the nature and extent of budgetary considerations; and

- budgetary allotments for departments or government agencies will be classified as policy decisions³⁷
- day-to-day budgetary decisions of individual employees will likely not raise separation of powers concerns³⁸

(4) the extent to which the decision was based on objective criteria.

- more a government decision weighs competing interests and requires making value judgments, the more likely separation of powers will be engaged³⁹

As indicated above, protecting the legislative and executive branch’s core institutional roles and competencies necessary for the separation of powers permeates any analysis. Thus, the hallmarks and factors are assessed in light of the primary rationale.

Returning to the facts of *Marchi*, the SCC held that the City’s decision bore none of the hallmarks of a core policy. The City’s public works supervisor did not have the authority to

³³ *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 62](#).

³⁴ *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 62](#).

³⁵ *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 62](#).

³⁶ *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 63](#).

³⁷ *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 64](#).

³⁸ *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 64](#).

³⁹ *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII), at [para 65](#).

W—T

make a different decision concerning the clearing of the parking stalls. Further, there was no suggestion that the method of plowing resulted from a deliberative decision involving any prospective balancing of competing objectives and policy goals by the supervisor or her superiors. There was also no evidence of an assessment about the feasibility of clearing pathways in the snowbanks. The evidence was that of custom. The City presented budgetary evidence. However, the SCC noted that the evidence was not of high-level budgetary considerations but rather the day-to-day considerations of individual employees. Lastly, the City's chosen method of plowing could easily be assessed based on objective criteria. As a result, the City's core policy defence failed.

Implications of *Marchi*

On one hand, *Marchi* provides helpful guidance to assess the merits, or lack thereof, of tort claims brought against public entities:

1. The first step is to determine whether the allegations against the public authority relate to an existing or novel category of relationship giving rise to a duty of care.
2. If the claim concerns a novel category, the Court must proceed through the full *Anns-Cooper* test, and contemplate broad policy considerations that may negate the duty of care, which include the core policy decision defence.
3. If the claim concerns an already recognized category, the *Anns-Cooper* test can be abandoned, focusing instead of the core policy decision defence as an independent argument. By implication, the other broad policy factors set out in the second stage of the *Anns-Cooper* test to negate the *prima facie* duty of care are not relevant, as the SCC makes clear in *Marchi* that the full *Anns-Cooper* analysis would have been previously satisfied.
4. In determining whether the core policy defence applies, the Court may consider the following four factors, while having regard to the core institutional role and competency of the judiciary in our constitutional system:
 - a. The level and responsibilities of the decision-maker;
 - b. The process by which the decision was made;
 - c. The nature and extent of budgetary considerations; and
 - d. The extent to which the decision was based on objective criteria.
5. Even where a public entity is unable to rely on the core policy decision defence, it may still avoid liability by establishing that it met the standard of care owed in the

W—T

circumstances, and/or that its negligent conduct caused the plaintiff's alleged losses.

On the other hand, and despite the Court's goal of clarifying the principles that apply in liability claims against public bodies, *Marchi* may not resolve many of the difficulties faced by litigants and the tort bar in assessing whether a decision by a public authority is policy or operational.

Conclusion

It remains to be seen how Courts will handle the delicate task of categorizing, classifying, and commenting on the *Marchi* factors. It is yet to be determined if the decision will give parties the clarity that the Court set out to provide, or if this delicate task will continue to attract uncertainty and separation of powers critique.

Post-*Marchi*, public bodies may wish to seek legal advice to determine how this new framework impacts their existing and pending claims.

For more information, please contact a member of Whitelaw Twining's [Local Government Group](#) including [Robert Fischer](#), [Bronwen Black](#), [Daniel Shugarman](#), or [Lindsey Galvin](#).