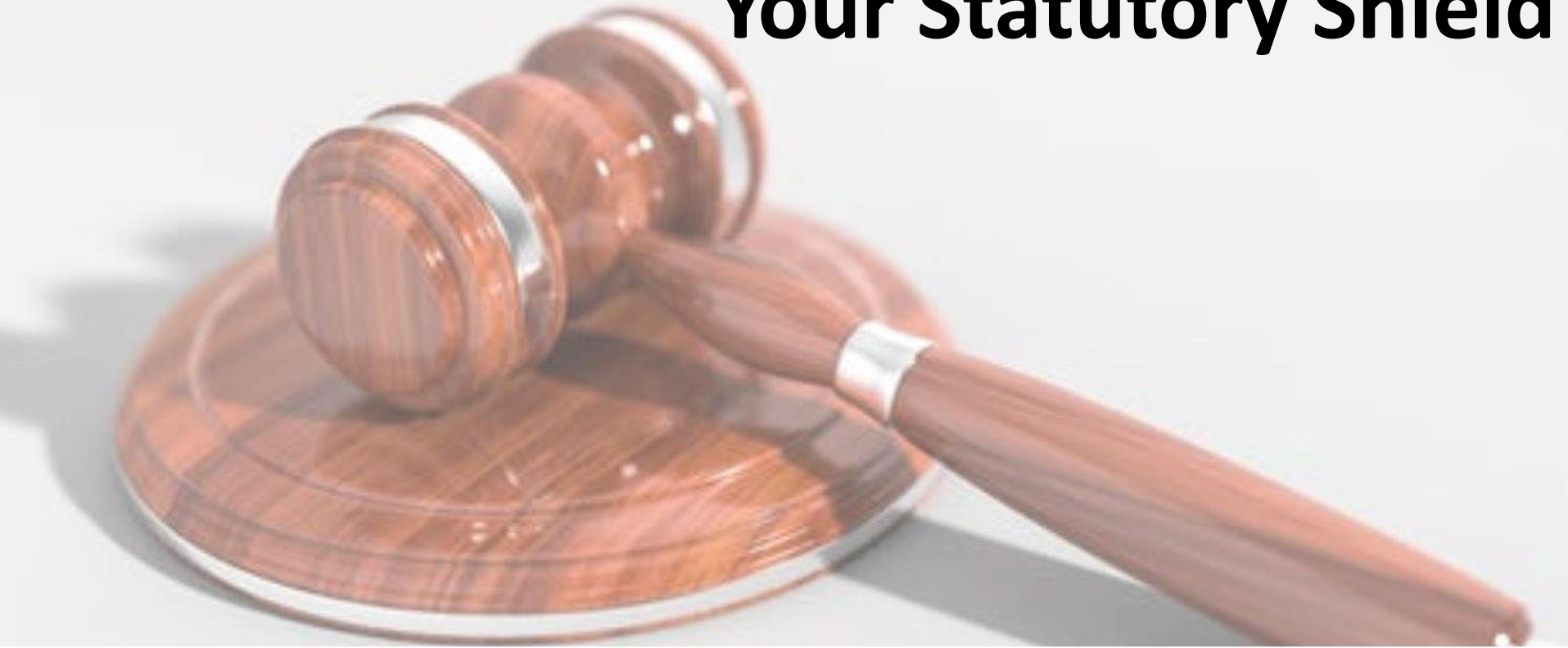


MGA DEFENCES: Your Statutory Shield



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Overview

1. Brief overview of the *MGA* defences
2. *Ellis v Lethbridge*, 2019 ABPC 276 (aff'd 2020 ABQB 783)
3. *Pulkinen v Crowsnest Pass*, 2020 ABPC 53
4. *Ekman v City of Brooks*, et al. (ABQB 2021)
5. *Pyke v Calgary (City)*, 2022 ABQB 198
6. *Legarge v Acme (Village)*, 2022 ABPC 54
7. Best Practices
8. Questions



The MGA

- Municipalities are treated differently in certain circumstances when compared to other litigants
- The *MGA* provides numerous defences to municipalities
- These sections of the *MGA* that provide defences have not been overly litigated leaving room for judicial interpretation and application



Common Defences

529: Exercise of discretion

*A municipality that has the discretion to do something is not liable for deciding not to do that thing in **good faith** or for not doing that thing.*

533: Things on or adjacent to roads

(1) *A Municipality is not liable for damage caused by:*

- (a) by the presence, absence or type of any wall, fence, guardrail, railing, **curb**, pavement markings, traffic control device, illumination device or barrier adjacent to or in, along or on a road, or*



Common Defences

530: Inspections and Maintenance

(1) A Municipality is not liable for damage **caused** by:

- (a) a system of inspection, or the manner in which inspections are to be performed, or the frequency, infrequency or absence of inspections, and
- (b) a system of maintenance, or the manner in which maintenance is to be performed, or the frequency, infrequency or absence of maintenance.



Statutory Duty (s. 532)

532: Repair of roads, public places and public works

(1) Every road or other public place that is subject to the direction, control and management of the municipality, including all public works in, on or above the roads or public place put there by the municipality or by any other person with the permission of the municipality, **must be kept in a reasonable state of repair by the municipality**, having regard to:

a) *The character of the road, public place or public work, and*

a) *The area of the municipality in which it is located.*

(2) The municipality is liable for damage caused by the municipality failing to perform its duty under subsection (1).



Statutory Defences (s. 532)

532: Repair of roads, public places and public works

(5) A municipality is not liable under this section in respect of acts done or omitted to be done by persons exercising powers or authorities conferred on them by law, and over which the municipality has no control, if the municipality is not a party to those acts or omissions.

(6) A municipality is liable under this section only if the municipality knew or should have known of the state of repair.

(7) A municipality is not liable under this section if the municipality proves that it took reasonable steps to prevent the disrepair from arising

...

(9)-(10) Must notify municipality within 30 days after occurrence of incident. Failure to notify will bar the action unless the claimant provides a reasonable excuse and the municipality is not prejudiced.



Ellis

FACTS:

- P stepped into slightly sunken sprinkler head
- Occurred in a beer garden area of a municipal park during a dragon boat festival
- 1,800-2,000 sprinkler heads in park
- Municipality knew sprinkler heads would occasionally sink over time
- Employees instructed to be vigilant for slightly sunken sprinkler heads



Ellis

Municipality Argued:

1. It kept the park reasonably safe for its visitors through its system of inspection (i.e. no breach of the *Occupiers' Liability Act*).
2. The municipality's decision to employ its system of maintenance was motivated by budgetary concerns and protected as a policy decision.
3. S. 530 provided a complete defence.



Ellis

Judge Found:

- Beer garden area was unsafe due to presence of depression
- The system of maintenance employed was deficient for the circumstances (i.e. beer garden/higher foot traffic)
- The common law policy defence is inapplicable when there is a positive statutory duty (such as the one found in the *Occupiers' Liability Act*)
- Municipality was in breach of the *Occupiers' Liability Act* and would have been liable had it not been for s. 530
- S. 530 applied because the plaintiff's damages arose directly and were causally connected the municipality's system of maintenance and inspection
- Plaintiff appealed



Ellis: Appeal

Plaintiff Raised New Argument on Appeal:

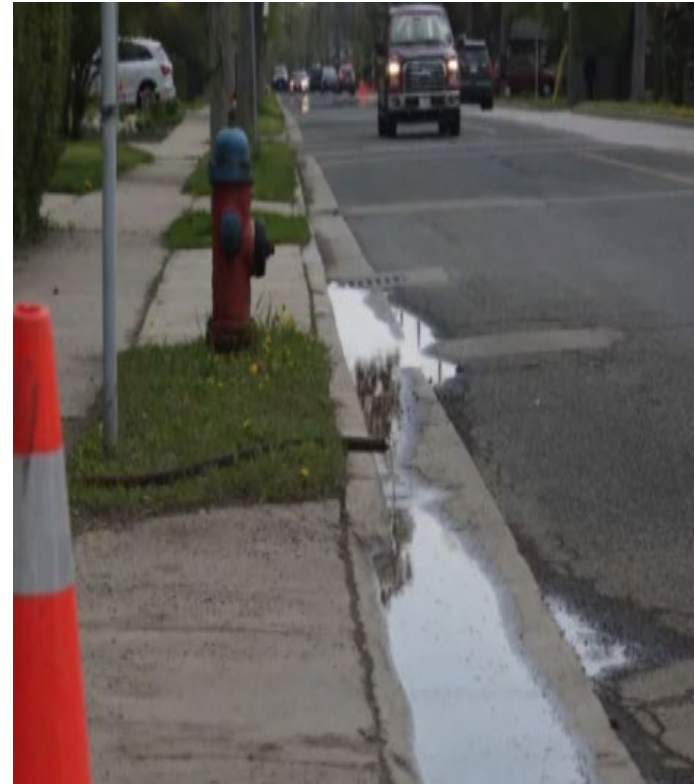
- Section 532 created liability for the Municipality due to the sprinkler system being left in a state of disrepair

Justice Mandziuk (Appeal Justice) found:

- Section 532 (6) states the municipality is only liable for the state of disrepair if the municipality knew or should have known of the state of repair
- Court found evidentiary record at trial did not support a finding of liability under section 532
- Lower court decision upheld trial decision but potentially leaves the door open for section 532



Pulkinen



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Pulkinen

Municipality Argued:

- S. 530 applied as its system of annual inspection and curbside replacement program was sufficient
- The municipality's policy was financially motivated and protected from common law liability as a policy decision
- The municipality had other more serious areas to repair
- S. 533 applied as the plaintiff's damages arose from the presence of a curb



Pulkinen

Judge Held:

- No liability under the *Occupiers' Liability Act* and s. 530 was “determinative” (relying on *Ellis*):

The Municipality is entitled to immunity from liability in relation to their system of inspections and maintenance, or lack thereof, unless it can be proven that those systems were implemented in a negligent manner, or not in good faith.

- S. 529 protected the municipality from its “discretionary” choices as long as those choices were made in good faith
- S. 533 indicates that a municipality is not liable for damages caused by the presence or absence of a curb along or on a road:

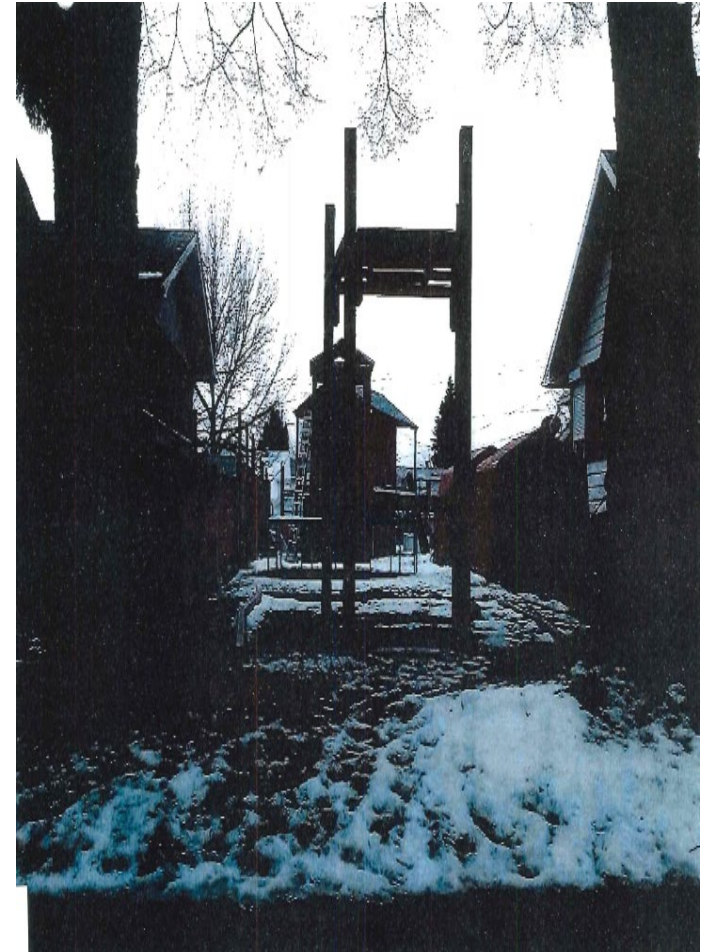
It is a clear statutory provision that overrides any obligation under common law. If the Municipality is not liable for the presence or absence of a curb it is hard to imagine how they could be responsible for a curb that has slumped.



Ekman

Facts:

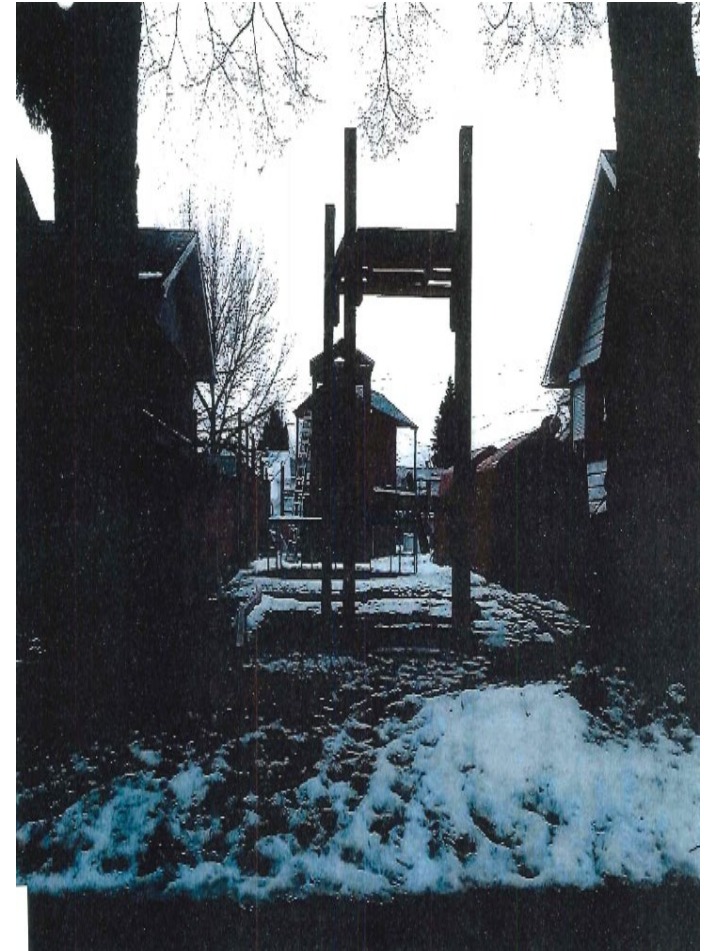
- Plaintiff homeowners built 5 elaborate wooden structure in their front/back yard with zip line and also had 2 temporary structures on property for storage (tools and materials)
- City began enforcement process and requested plaintiffs apply for a development permit or the City would remove the structures
- Plaintiff homeowners wrote a threatening letter to City
- City applied to Court for an Order allowing access to property to tear down structures
- Justice Tilleman granted Order but gave the Plaintiff opportunity to apply for development permit and appeal development permit before City could enter property



Ekman

Development Permit:

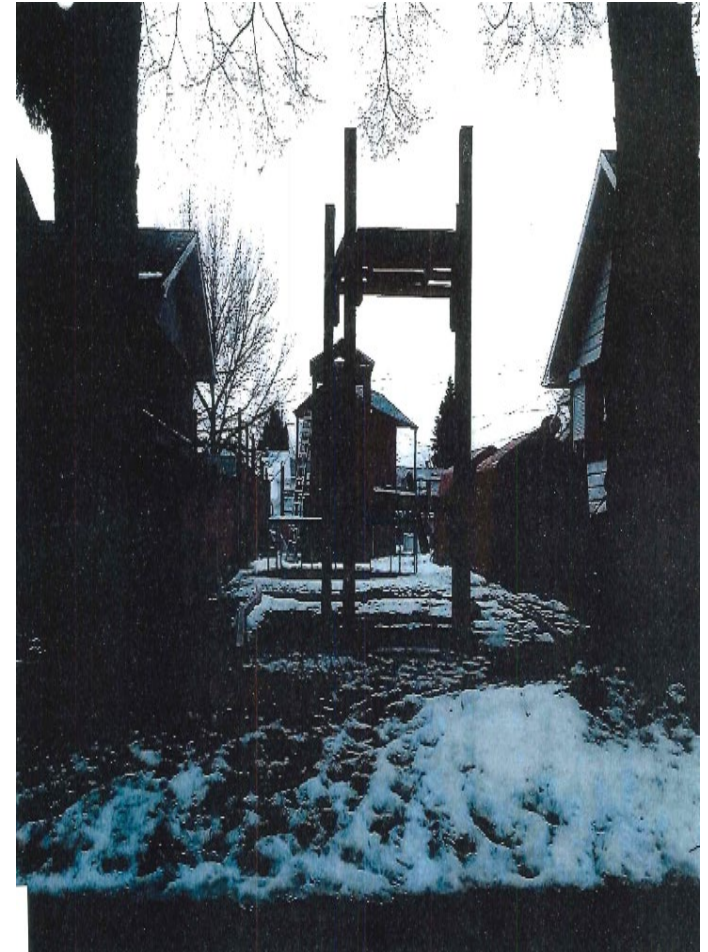
- City grants development permit to Plaintiff upon 5 conditions:
 1. Portable shelters were to be removed
 2. Play structure in front yard was to be removed
 3. Remaining play structures must meet standard of the Alberta Building Code
 4. Play structures cannot exceed a height of 4.5 meters
 5. Fence must be installed to partially screen play structures
- Plaintiff appealed development permit to SDAB
- SDAB upheld development permit as valid
- Plaintiff fails to appeal SDAB decision to Court of Appeal and provided no evidence to the City it was trying to satisfy the development permit conditions
- City entered the property on April 2015 to remove play structure from front yard and then the remainder of the structures in October 2015



Ekman

Plaintiff sues City for :

- Negligence for placing unreasonable conditions on the Plaintiff's development permit (specifically the Alberta Building Code condition)
- Trespass to property
- "Targeting" (not a tort)
- Abuse of public office

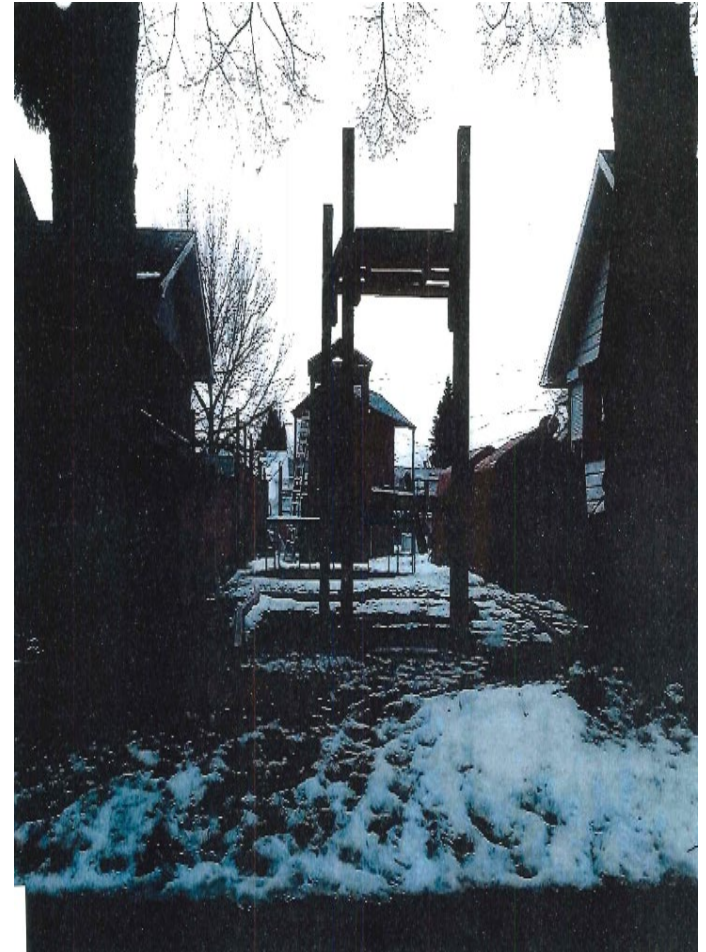


Ekman

Summary Judgment:

Master Farrington found:

1. The lawsuit was a collateral attack on the SDAB's decision
 - Section 688 of the MGA required the plaintiff to appeal the SDAB's decision upholding the development conditions (rather than start a collateral law suit)
 - "Results Matter"
2. There was no merit to the Plaintiff's claims

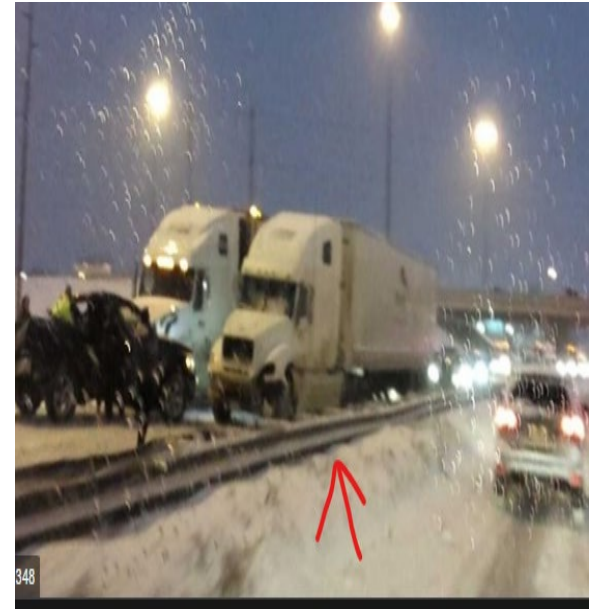


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Pyke (2022): New Uncertainty?

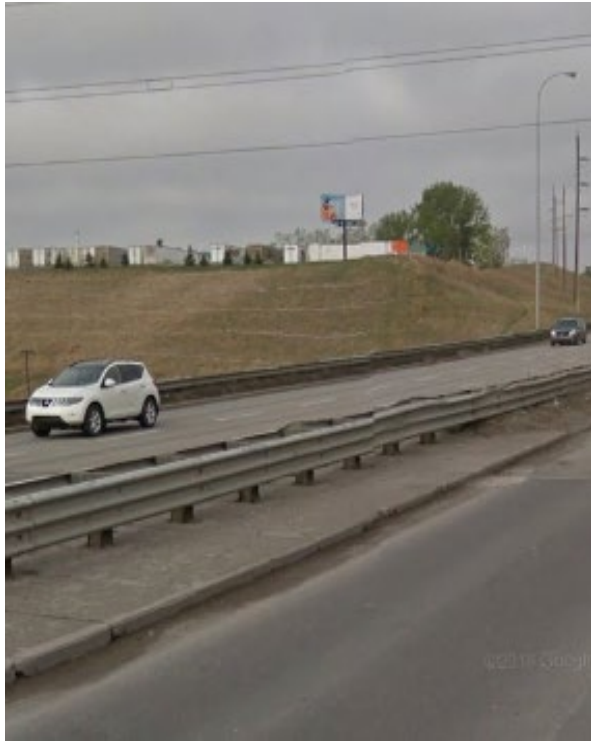
Facts:

- February 2014: The Plaintiff (defendant in original action) lost control of the vehicle and struck the barrier causing it to launch over and into an oncoming vehicle
- Barrier in question was designed and built in 1987: Median Thrie Beam Barrier Placed in the middle of a protective curb
- The Plaintiff argued the City bore some liability for the barrier for failing to meet applicable engineering standards and for failing to keep the barrier in a reasonable state of repair, in breach of section 532 of the *Municipal Government Act*
- The Parties applied for a judicial determination of whether the City bore any liability for the Accident



Pyke (2022): Future Uncertainty?

The Barrier



Before



After



***Pyke* (2022): Future Uncertainty?**

City Argued:

- The Claim was barred by the 10-year ultimate limitation period as the barrier had been designed and built in 1987
- The City was immune from liability by operation of sections 530 and 532 of the *Municipal Government Act*
- If the City did breach section 532, it could not be liable as it was unaware of the state of disrepair (532(6))



Pyke (2022): Future Uncertainty?

Ultimate Limitation Period:

- Court determined this was not a case turning on negligent design but rather on inadequate maintenance
- The failure to maintain the barrier properly allowed years of buildup of gravel and dirt along the barrier
- The Court found that this buildup of compacted dirt, gravel, plus snow caused the vehicle to launch over the barrier



Pyke (2022): Future Uncertainty?

Breach of Section 532?

- The Court found the City breached section 532 as it failed to keep the highway in a reasonable state of repair by permitting (1) gravel and dirt to build up along the barrier for 27 years, and (2) snow buildup
- Court broadening the definition of “disrepair” to include the buildup of gravel, snow and ice on a highway?



Pyke (2022): Future Uncertainty?

Section 532(6):

- City tried to rely on section 532(6) as a defence, because a municipality is liable only if it knew (or ought to have known) of the state of repair of the highway
- Court rejected this argument, finding the buildup of gravel and snow along the barrier was obvious
- City should have known of the buildup from a notorious accident on the highway in nearly the same manner, two months earlier
- City had internal policies that required it to maintain its medians for safety reasons but had not addressed the gravel build-up for 27 years



Pyke (2022): Future Uncertainty?



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Pyke (2022): Future Uncertainty?

Section 530:

- Issue: whether section 530 would save a municipality from liability under section 532?
- Influencing factor appears to be the City did not perform any maintenance for the subject barrier allowing gravel to build-up for 27 years
- However, Court made broad judicial determination that section 530 does not protect municipalities from section 532
- Court: If section 530 shielded municipalities from section 532, section 532 would have no effect, since all municipalities rely on some form of system of inspection and maintenance to maintain their roads



Pyke (2022): Future Uncertainty?



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Legarge (2022): Continued Uncertainty?

Facts:

- Provincial Court (lower court) decision which also determined that section 530 would not protect a municipality from 532 (does not reference *Pyke*)
- Plaintiffs' house suffered substantial damage due to a sewer block
- Later discovered that it was caused by tree roots growing into the municipality's lines
- Municipality was aware of tree root growth



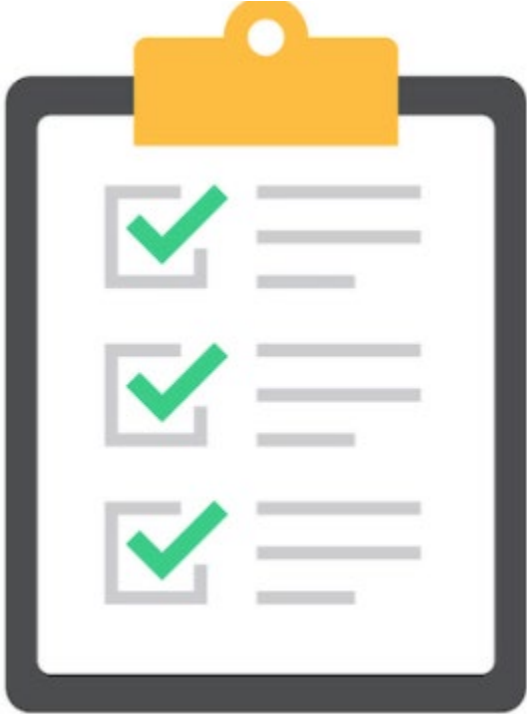
Legarge (2022): Continued Uncertainty?

Findings:

- Municipality found to have breached section 532 by installing undersized sanitary lines and permitting tree roots to grow into their lines
- Municipality only performed visual inspections and flushed the lines which would not reveal extent of tree root growth (needed the lines to be scoped)—Not a reasonable step to prevent disrepair!
- Court found sections 529 (good faith) and 530 would not protect a municipality from section 532



Best Practices



QUESTIONS?



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Feel Free to Reach Out



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