MGA DEFENCES:
Your Statutory Shield

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Overview

1. Brief overview of the *MGA* defences
2. *Ellis v Lethbridge*
3. *Pulkinen v Crowsnest Pass*
4. *Ekman v City of Brooks*, et al.
5. *Pyke v Calgary (City)*
6. *Legare v Acme (Village)*
7. *Marsten v the City of Grande Prairie*
8. *Kuryluk v Municipality of Crowsnest Pass*
9. *Revelstoke (City) v Gelowitz*
10. Best Practices

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 v City of Lethbridge, 2019 ABPC 276

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 (2020 ABQB 783)

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 v Crowsnest Pass (Municipality), 2020 ABPC 53

Facts:

- Plaintiff homeowners alleged a curb under the care and control of the municipality had slumped
- Excess rainfall allegedly caused damage to Plaintiffs' property after water flowed over slumped curb
- Municipality performed annual assessments as part of its curbside replacement program
- Municipality knew about slump but considered it minor with no need for repair
- It was their policy to deal with the "most substantial damage or disrepair" first
- Policy motivated by budgetary constraints

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

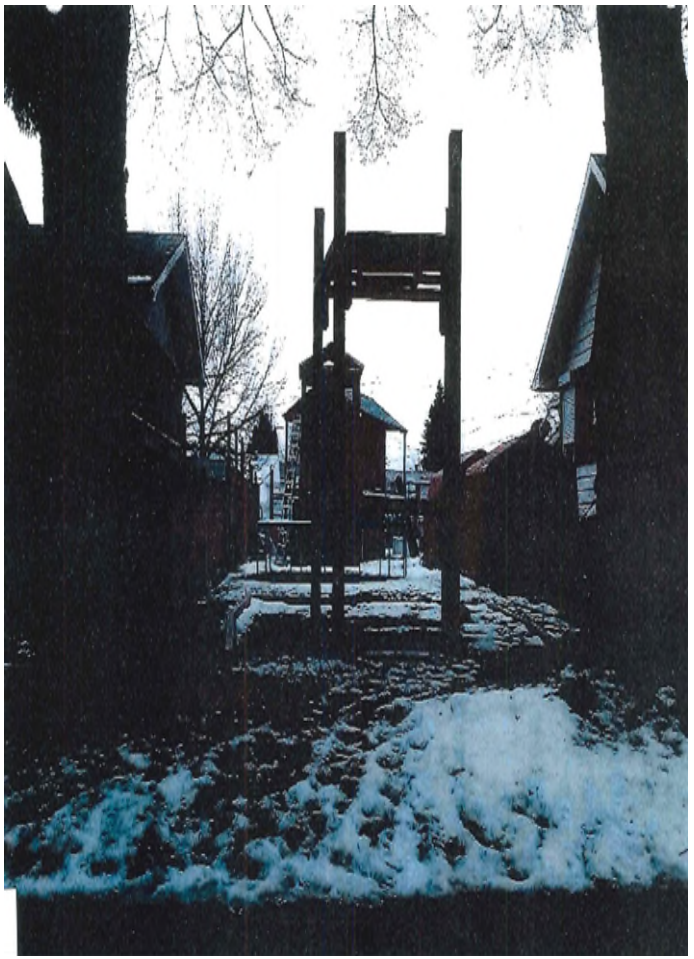
- S. 533 indicates that a municipality is not liable for damages caused by the presence or absence of a curb along or on a road:

  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 v Brooks (City)

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:

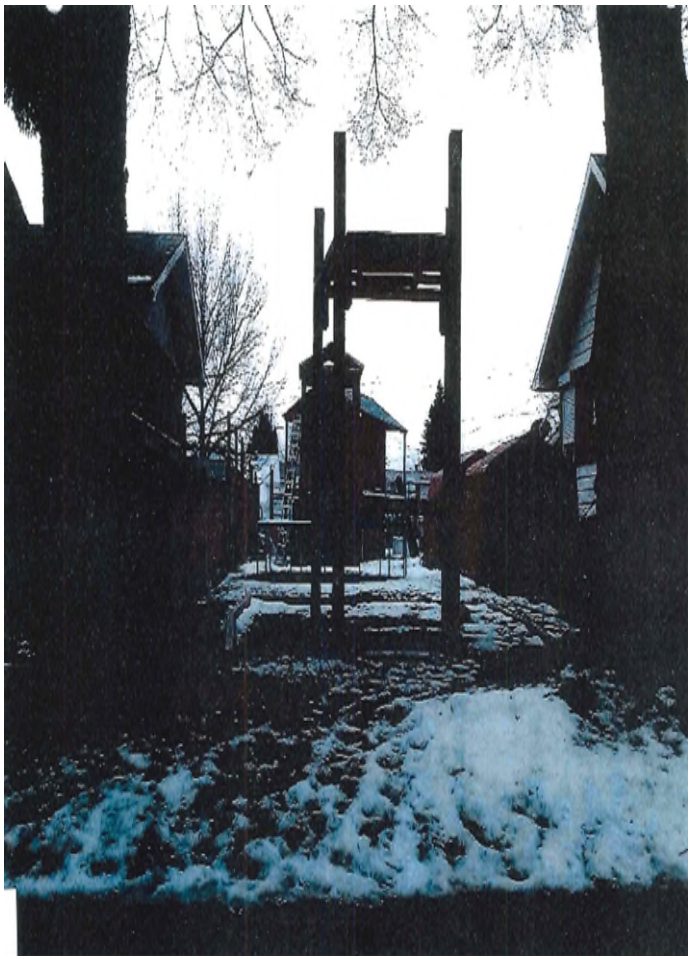
    1. Portable shelters were to be removed
    2. Play structure in front yard was to be removed
    3. Remaining play structures must meet standard of the Alberta Building Code
    4. Play structures cannot exceed a height of 4.5 meters
    5. Fence must be installed to partially screen play structures

- 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

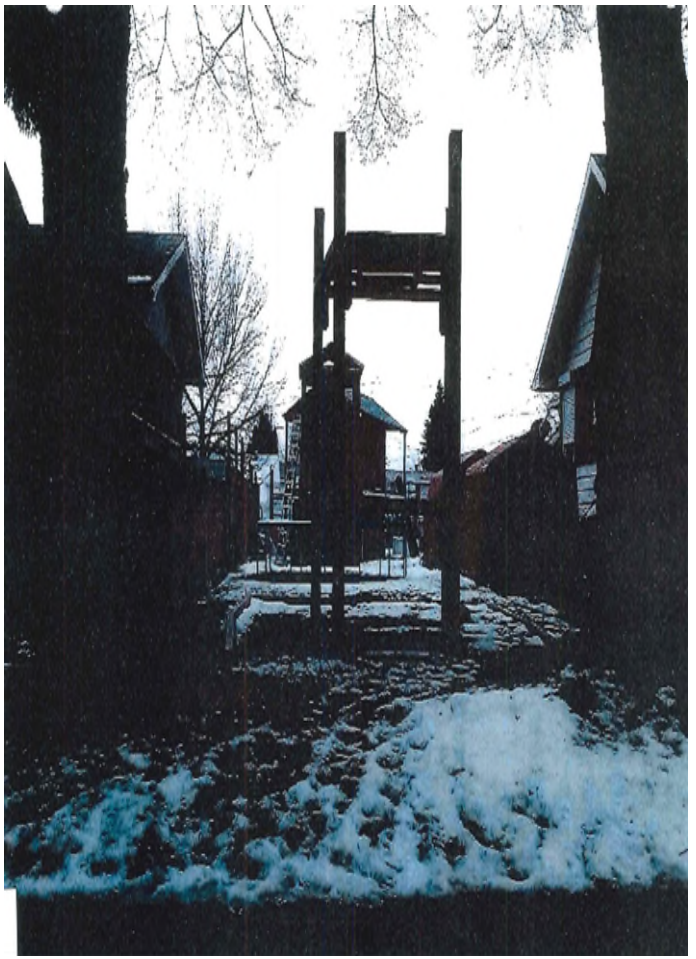
- City entered the property on April 2015 to remove play structure from front yard and then the remainder of the structures in October 2015



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

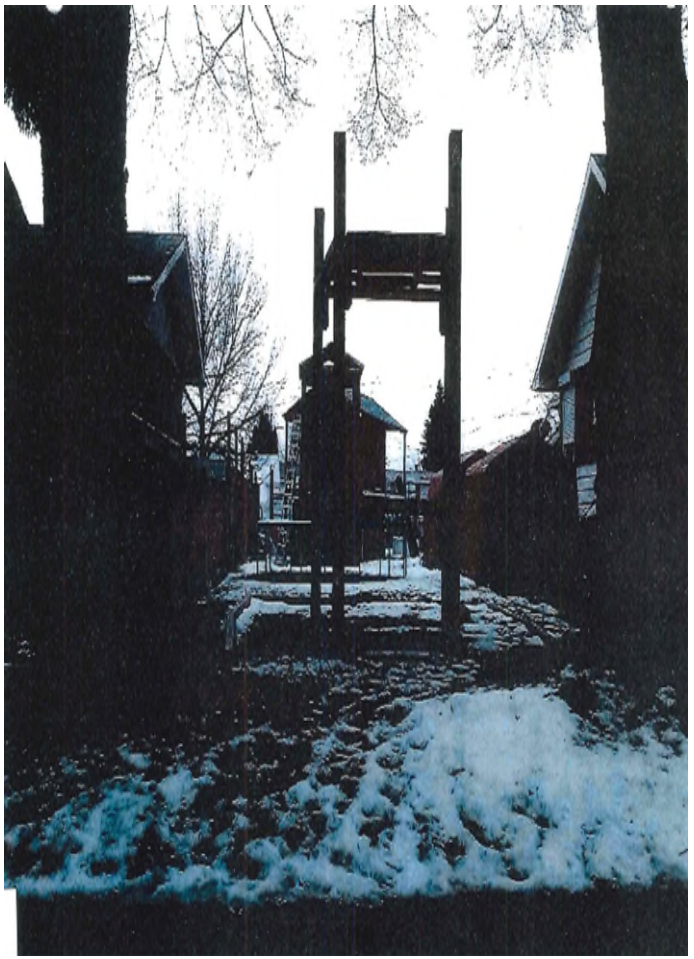
Summary Judgment:

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"

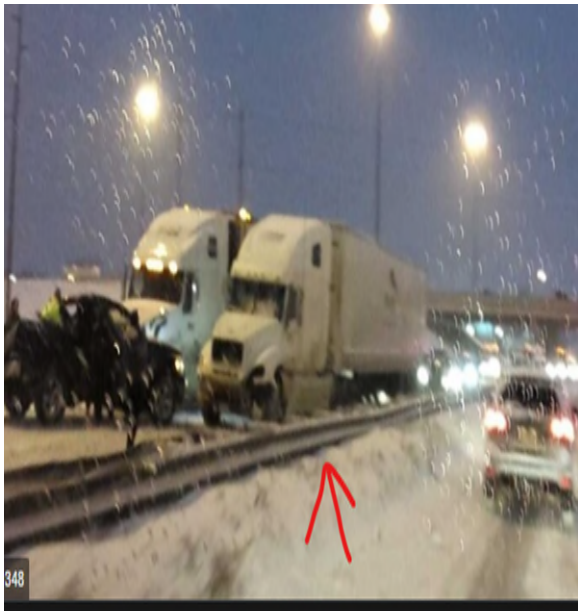
2. There was no merit to the Plaintiff's claims



Pyke v Calgary (City), 2022 ABQB 198: 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: Future Uncertainty?

The Barrier

Before

After

Pyke: 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: 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: 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: 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: Future Uncertainty?

Section 533

- City argued the presence of the curb caused the Accident and, thus, it was protected from liability by section 533

- Court decided that the curb did not cause the Accident—the buildup of gravel and snow along the barrier did. The Court was of the view that section 533 protects a municipality's decision-making process for roadway infrastructure, but not its failure to maintain road infrastructure

- Section 533 should receive a narrow interpretation to avoid limiting the scope of section 532

Pyke: 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: Future Uncertainty?

Future Impacts?

- Based on *Pyke*, municipalities will be unable to rely on sections 530 and 533 to avoid liability under section 532 and will have to look towards subsections 532(6) and (7) as a defence

- Municipalities will have to prove their system of inspection and maintenance was a reasonable step to prevent the despair to rely on section 532(7)

- Section 532 worded broadly and applies to all “public places”--could result in severe limitation of section 530

- State of despair broadened to include build-up of snow and gravel on a highway

- <u>Decision under appeal!</u>

Legare v Acme (Village), 2023 ABKB 145

Background:

- Provincial Court (lower court) decision which also determined that section 530 would not protect a municipality from 532
- Plaintiffs' house suffered substantial damage due to a sewer block—sought stigma damages
- Later discovered that it was caused by tree roots growing into the municipality's lines
- Municipality was aware of tree root growth and undersized pipes but only completed a yearly inspection

Legare

Court of King's Bench:

- Agreed with lower Court and that section 530 would not protect the municipality from section 532 (same judge who decided *Pyke*)

- In these circumstances, the municipality would have had to gone above the "norm"

- "once the Village was aware of the state of disrepair, it had a choice; it could either upgrade the sewer line to the required standard or it could implement a heightened regimen of inspection and maintenance"

- Stigma damages upheld

Marsten v the City of Grande Prairie, 2022 ABPC 236

Facts:

- Provincial Court (small claims) decision which determined that the Municipality was not liable for damages due to road disrepair
- Plaintiff suffered vehicle damage due to pothole on municipal road
- Later claimed the Municipality knew about the pothole and failed to repair it
- Municipality operated a “complaint-based” system for road repairs

Marsten

Findings:

- Municipality found they knew, or ought to have known, of state of road disrepair (s.532(6) *MGA*)

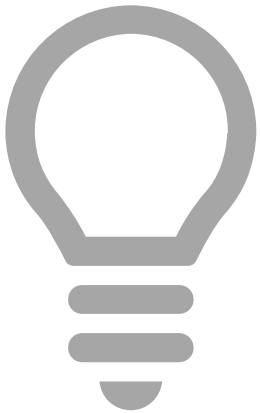
- BUT, reasonable steps were taken by Municipality to prevent disrepair from arising (s. 532(7) *MGA*)
  - Immunity from liability

- Section 530 *MGA* not relied on in argument
  - Court still critiqued Municipality for not having more rigorous system in place

Marsten

Takeaways:

- Municipalities not held to a standard of perfection
- Keep proper records of reports received and repairs completed
- Increase frequency of existing system of inspection and maintenance as needed
- Importance of arguing multiple defences – only need one to be successful



Kuryluk v Municipality of Crowsnest Pass, 2023 ABPC

Facts:

- Case regarding unsightly condition of property in contravention of Municipality's Community Standards Bylaw
- Enforcement Order obtained – Plaintiff failed to comply
- Municipality remedied situation, charges added to Plaintiff's tax roll
- Plaintiff filed Claim seeking damages from Municipality for fees charged back

Kuryluk

Findings:

- Plaintiff's Claim was dismissed
- No tort of negligence or trespass for statutory breach
- Municipality satisfied *MGA* requirements
  - No evidence of damages
- Plaintiff was required to pursue judicial review for charges on tax roll
- It was recommended that notice/Court Order be completed prior to enforcement

Revelstoke (City) v Gelowitz, 2023 BCCA 139

Facts:

- Plaintiff was camping at Williamson Lake Park, owned by the Municipality
    - Park operated by contractor
- Plaintiff dove into a shallow part of the lake, suffered catastrophic injuries
    - **NOTE:** Plaintiff dove into lake from land owned by third party
- Plaintiff brought claim against Municipality
    - Failure to post warning signage

Revelstoke

Lower Court:

- Found Municipality was negligent (35%)
    - Municipality encouraged users of park to also use the lake
    - Aware that users dove of land accessed via the park
    - Obligation to warn potential users
- Plaintiff was contributorily negligent (65%)
- Municipality appealed

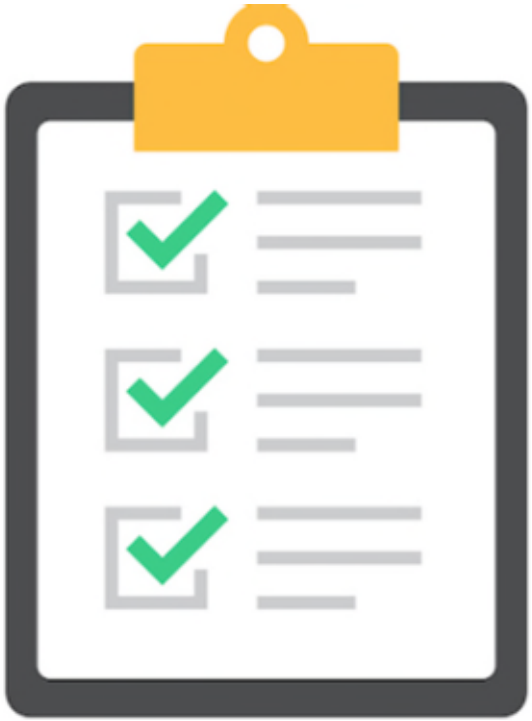
Revelstoke

Appeal Findings:

- Decision upheld
  - Municipality owed Plaintiff a duty of care
  - Municipality had duty to warn users of park of risks associated with its use
  - Failing to have visible signage warning against diving was breach of standard of care
  - Plaintiff's injury was foreseeable

Best Practices

- Have a Policy/System!
- Consider your budgetary constraints (and other factors) before implementing policy
- Ensure policy is implemented and being followed (municipalities can be found liable when they fail to follow their own policy)
- Policy should be documented
- Ideally, there is written evidence that the system of maintenance and inspection is being followed
- Be cognizant of collateral attacks and previously adjudicated matters



QUESTIONS?

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