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University of Calgary Press

Ingleson, A. (Ed.). (2019). Environment in the courtroom. Calgary, AB: University of Calgary Press.

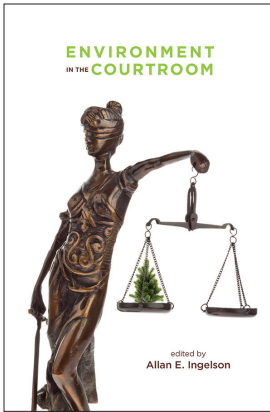
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ENVIRONMENT IN THE COURTROOM

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ISBN 978-1-55238-986-7

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Regulatory Negligence in Environmental Law

LYNDA COLLINS AND JASMINE VAN SCHOUWEN

Introduction

Canada enjoys a strong regulatory regime of statutory environmental law, ranging from municipal bylaws to nation-wide pollution provisions enacted by the federal government. Statutory environmental law covers the full universe of environmental issues, including waste management, toxic substances, natural resources, and air, land, and water pollution. In addition, Canadians benefit from the efforts of thousands of specialized public servants who work in the various environmental and natural resource ministries across the country, including prosecutors. Despite these laudable efforts, Canada's environmental performance ranks quite poorly in comparison to other developed nations, and available data indicates a disturbing persistence of hazardous contaminants in environmental media and human bodies.¹ One of the reasons for the dissonance between the stated goals of Canadian environmental legislation and the reality of widespread contamination is the non-enforcement of environmental laws in Canada.

This chapter will consider the civil liability of governments for environmental non-enforcement, with a focus on negligence. It should be noted at the outset that absent a showing of malice or impropriety, specific decisions as to whether or not to prosecute a particular polluter for a particular incident will likely remain immune from tort liability given the high degree of deference accorded to prosecutorial decision making.² However, plaintiffs in environmental non-enforcement cases frequently base their tort claims on the cumulative impact of a pattern of both acts and omissions resulting in harm. In these cases, the claim amounts to an assertion that, while government had

discretion as to choice of regulatory tool, it had a duty to act with due care in its regulation of polluting enterprises.³

Why Sue Government?

Suits against government defendants make up a significant area within the law and practice of toxic torts. Because government enjoys the unique ability to regulate the characteristics of both products and contaminant emissions, it has significant exposure to toxic tort liability. In the environmental arena, for example, government is the only actor that can substantially influence the ambient air or water quality in a region. Any individual emitter is simply one contributor to the overall problem. Thus, if a plaintiff's illness results from the accumulation of emissions in a given air- or watershed, it is unsurprising that recourse would be sought from the regulator. Similarly, where government has approved a particular toxic pharmaceutical or food product, plaintiffs will frequently join the regulator as a co-defendant along with the product's manufacturer. In addition to its regulatory liability, governments also carry out large-scale infrastructure projects and other activities (e.g. energy production) that may result in losses to private individuals, and, therefore, attract liability in tort.⁴

Although a variety of civil causes of action are theoretically maintainable against environmental regulators (including novel theories in breach of public trust and s. 24 damages for environmental *Charter* violations, for example), by far the most common tort claim against government is that of negligence. The tort of negligence includes the elements of duty of care, breach of the relevant standard of care, factual causation, proximate causation (i.e. the absence of remoteness), and actual loss. The elements of causation, remoteness, and actual loss are generally unchanged in government negligence actions as opposed to suits involving private parties only. Although the governmental standard of care analysis is somewhat unique, the single most distinctive characteristic of the government negligence action is the duty analysis.

Duty of care involves a two-stage inquiry, which asks first whether there is a *prima facie* duty owed by the defendant to the plaintiff, and second whether such duty should be negated or limited due to policy considerations. Step one includes the criteria of foreseeability of harm and proximity, and it is this latter factor that has most often defeated negligence actions against government defendants. Courts have frequently held that there is inadequate proximity between the regulator and the plaintiff because there is no difference between the plaintiff and the general public in relation to whom the entity in question regulates. This of course was the result in *Cooper v. Hobart*,⁵ and has likewise

defeated a number of prominent toxic tort claims against government. In claims involving West Nile virus, Severe Acute Respiratory Syndrome (SARS), and regulation of drugs and medical devices, courts have refused to hold that the regulator's general statutory duty crystallized into a private law duty to the particular plaintiff at issue.

In *Eliopoulos v. Ontario*,⁶ for example, the Court of Appeal held that Ontario had no private law duty of care to Mr. Eliopoulos, who died from West Nile Virus from a mosquito bite.⁷ The plaintiffs argued that since the province had developed a plan to prevent the spread of the virus, and Mr. Eliopoulos still became ill, this was an operational failure and liability should lie. Ruling that this was a new duty of care, the court was prepared to assume foreseeability, but held that there was no proximity, since the statutory powers of the Ontario government⁸ were to be exercised in the “general public interest,” not for the benefit of any particular individual.⁹ In terms of broader policy implications (the second branch of *Anns/Cooper*), “to impose a private law duty of care ... would create an unreasonable and undesirable burden on Ontario that would interfere with sound decision-making in the realm of public health. Public health priorities should be based on the general public interest.”¹⁰ Similar results and rationales were given in the SARS cases¹¹ and in several drug or medical device regulation cases.¹²

One significant difference between the duty of care analysis involving private defendants and that involving regulators is that the latter often begins with a consideration of the statutory scheme under which the entity operates in order to determine whether the statute creates a private duty of care distinguishable from the government's duty to the public as a whole.¹³ The analysis of this factor aims to determine whether there is something in the statute that distinguishes the relationship between this plaintiff and the regulator from the relationship that exists between the regulator and all those affected by the regulator's actions.¹⁴ The analysis of the wording of the statutory scheme is, however, intended to be a single factor among many in establishing proximity; it is not a necessary source of proximity, and is unlikely to be a sufficient source of proximity alone, although “it may play a positive role in establishing proximity, provided the resulting duty would not conflict with the statutory scheme.”¹⁵

This being said, some courts have focused on the regulator's enabling statute as the sole potential source of proximity and have concluded that “there is no sufficient proximity in the circumstance of a regulatory failure to enforce a statute or regulation of public rather than private interest.”¹⁶ Despite acknowledging the statute as one factor among many, these courts tended to

focus almost exclusively on the text of the enabling statute, often ending their analysis after concluding that the statutory scheme does not give rise to a private duty of care.¹⁷ Claims for regulatory non-enforcement were struck on this basis in environmental class actions in *Pearson v. Inco* (contamination from nickel refinery) and *MacQueen v Sidbec Inc.*¹⁸ (Sydney Tar Ponds).

Jurisprudence from the Supreme Court of Canada, however, counsels that factors to be considered in evaluating proximity go beyond the relevant statute(s) and include “expectations, representations, reliance, and the property or other interests involved.”¹⁹ A recent line of cases clarifies the role of government representations in establishing proximity; although these cases are not specifically environmental in character, they clarify the general principles to be applied in assessing proximity in government negligence suits.

In *Sauer v. Canada*, cattle farmers suffered loss as a result of the emergence of “mad cow disease” in Canadian herds. The plaintiffs alleged that the federal government was negligent in continuing to permit the addition of ruminant remains in cattle feed. The court made a finding of proximity, noting in particular Canada’s “many public representations” that it regulates cattle feed to protect “commercial farmers among others.”²⁰ In *Taylor v. Canada*,²¹ Justice Cullity certified a class action involving plaintiffs injured by temporomandibular implants (TMJ implants). Justice Cullity held that on the facts alleged, there was sufficient proximity between the parties to meet the duty of care requirement, relying in part on the 2007 decision in *Sauer*. In 2008, the Ontario Court of Appeal dismissed appeals in *Drady v. Canada (Minister of Health)*²² involving TMJ implants, and *Attis v. Canada (Minister of Health)*,²³ involving breast implants. The court declined to find proximity in these cases, distinguishing them from *Sauer* on the basis that there was an absence of the kinds of government representations alleged by the cattle farmers in *Sauer*. The Supreme Court of Canada denied leave to appeal in both cases. In the 2009 decision in *Knight v. Imperial Tobacco Canada Ltd.*,²⁴ the BC Court of Appeal found that there was a sufficient allegation of proximity against the federal government in a suit based on negligent misrepresentation and negligent development of tobacco strains for mild and light cigarettes.

In 2010, on a motion to decertify in *Taylor*, Justice Cullity found that he could not distinguish the pleadings before him from those in *Attis* and *Drady* and struck the plaintiffs’ statement of claim with leave to amend. Justice Cullity later upheld Taylor’s fresh statement of claim, which included allegations that Health Canada had made various representations that the regulatory scheme governing medical devices was intended to protect individual consumers like

the plaintiffs. Finally, the Supreme Court of Canada ruled in the *Knight v. Imperial Tobacco* appeal that Canada did not owe a *prima facie* duty of care to consumers of low-tar cigarettes. The statute did not impose a private law duty, there were no specific interactions between Canada and the class members, and Canada's statements to the general public regarding the characteristics of light cigarettes did not suffice.²⁵

In an attempt to reconcile the disparate holdings in regulatory negligence jurisprudence, the Ontario Court of Appeal accepted a special case in *Taylor* posing the question as to what allegations are necessary to establish a viable argument for proximity in a regulatory negligence action. In reasons released in July 2012, the court explained that in regulatory negligence actions, "the proximity inquiry will focus initially on the applicable legislative scheme and secondly on the interactions, if any, between the regulator or governmental authority and the putative plaintiff."²⁶ If the applicable legislation imposes or forecloses a private law duty of care,²⁷ this is the end of the inquiry. If the legislation leaves the question of tort liability open, then the court proceeds to examine the interaction between the parties.²⁸ The court noted that cases in which a finding of proximity has been made involve a relationship with the plaintiff that is "distinct from and more direct than the relationship between the regulator and that part of the public affected by the regulator's work."²⁹ Secondly, the proposed private law duty must not be inconsistent with the regulator's public duties.³⁰ The court held that the existence of particular representations to the plaintiff may give rise to proximity, and this factor will not be satisfied by general public representations concerning the regulator's public duties.³¹

However, the Court of Appeal clarified that specific representations to the plaintiff are not *necessary* for a finding of proximity, and the court will look at the totality of the interactions between the plaintiff and defendant, including the defendant's public representations.³² Noting Chief Justice McLachlin's admonition in *Imperial Tobacco* that "where the asserted basis for proximity is grounded in specific conduct and interactions, ruling a claim out at the proximity stage may be difficult,"³³ the court upheld the plaintiffs' statement of claim in *Taylor*. It held that the proximity requirement could be met by the combined effect of allegations that (i) Health Canada erroneously represented that the certain implants had met regulatory requirements, (ii) Health Canada was informed of defects in the implants and resulting harm to patients, (iii) Health Canada took no adequate steps in response to this information, (iv) Health Canada represented throughout that it monitored and ensured the safety of

medical devices, and (v) the plaintiffs relied on these representations.³⁴ Health Canada's misrepresentation as to regulatory compliance, and its failure to correct this misrepresentation, were clearly salient. The defendants did not seek leave to appeal the Ontario Court of Appeal's decision to the Supreme Court of Canada, and the *Taylor* action is accordingly ongoing.

The Ontario Court of Appeal's decision in *Taylor* notes that proximity has been found where the regulator was aware of a specific threat against a relatively small and well-defined group and where the defendant has a statutory obligation to monitor and protect.³⁵ This suggests that proximity in environmental cases is most likely to be found where plaintiffs are harmed by a specific polluting facility that posed foreseeable risks of harm to its neighbours. This is particularly true where the plaintiff has solicited advice or assurances from the regulators and has relied on the information provided. Although prosecutorial discretion itself is generally non-reviewable, a pattern of non-prosecution coupled with an absence of alternative effective measures to curb pollution may give rise to liability. The Supreme Court of Canada's decision in *Fullock*³⁶ suggests that when regulatory officials have visited a particular site and are aware of specific hazards, proximity is more likely to be recognized. Thus, when a particular facility has a pattern of environmental non-compliance that has impacts on a discrete geographic area, a finding of proximity appears likely. Where an environmental regulator has not only failed to enforce relevant standards in statute and/or regulation but has also affirmatively facilitated the harmful conduct by issuing specific pollution permits, the argument for proximity is even stronger.

This possibility has been confirmed by the Ontario Superior Court of Justice's recent decision in *Swaita v Her Majesty the Queen in Right of Ontario (Environment)*.³⁷ In this case, the Ontario Ministry of the Environment became involved in the cleanup of an oil spill affecting the plaintiff's property. The ministry decided where the excavation of contaminants should stop and erred in failing to ensure that the contaminants were contained; as a result, the plaintiff's property became contaminated, and the plaintiff sustained damages. The court dismissed the defendant's motion to strike the plaintiff's claim, concluding that:

Once the defendant embarks on a course of action (whether obliged to do so under a legislative scheme, or has chosen to do so under discretionary powers) the defendant is obliged to carry out that course of conduct without negligence. There is then a sufficient proximity for the basis of a private law duty of care.³⁸

However, the Alberta Court of Appeal has recently indicated that it may not be willing to recognize a duty of care, even in such circumstances: In *Ernst v Alberta (Energy Resources Conservation Board)*,³⁹ the Alberta Energy Resources Conservation Board, tasked with overseeing hydraulic fracturing (fracking) in Alberta, allegedly failed to conduct proper investigations into fracking-related contamination in Rosebud, Alberta, after the plaintiff raised concerns about methane contamination of her well water.⁴⁰ When the board intervened to conduct an investigation into the contamination, it allegedly did not follow a sampling protocol, used unsterilized equipment when taking samples, committed sampling errors, lost, destroyed, or otherwise disposed of data, failed to test water wells for various substances that could be indicative of industry contamination, and failed to test or investigate specifically identified gas wells that potentially caused water contamination.⁴¹ In its decision granting the board a motion to strike the claim, the Court of Appeal of Alberta concluded:

Forcing the Board to consider the extent to which it must balance the interests of specific individuals while attempting to regulate in the overall public interest would be unworkable in fact and bad policy in law. Recognizing any such private duty would distract the Board from its general duty to protect the public, as well as its duty to deal fairly with participants in the regulated industry. Any such individualized duty of care would plainly involve indeterminate liability, and would undermine the Board's ability to effectively address the general public obligations placed on it under its controlling legislative scheme.⁴²

Should the plaintiff survive the proximity hurdle, proving the foreseeability of physical harm is generally unproblematic, and the inquiry therefore proceeds to stage two of the *Anns/Childs* analysis. This step of the duty test addresses “residual policy considerations,” or those that are unrelated to the relationship between the parties.⁴³ One such factor is the character of the government decision at issue; if it is one of “policy,” then no liability will attach. If the decision is found to be “operational” in nature, then the duty may be sustained.⁴⁴ In *Brown v. British Columbia (Minister of Transport and Highways)*, the court held that policy decisions “involve social, political and economic factors, [and ...] 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.”⁴⁵ By contrast, operational decisions are “concerned with the practical implementation of the

formulated policies” and “will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.”⁴⁶ Although the policy–operational dichotomy has been strongly criticized as a touchstone for liability, the test has persisted in Canadian negligence law. In order to establish tort liability for environmental non-enforcement, plaintiffs will be required to show that the regulator had a policy of pursuing environmental protection and/or enforcing the relevant standards and that the failure to do so was an operational one, rather than a decision of policy. This has proven problematic for plaintiffs in previous cases.

In *Pearson v. Inco*,⁴⁷ for example, the plaintiff class alleged that as a result of the Ministry of Environment’s (MOE’s) negligent regulation of an Inco metals refinery over a period of decades, they had been exposed to unsafe levels of air emissions and their properties had become contaminated. On a motion to strike, the court found that the plaintiffs could not succeed in their claim against the Crown because they failed to allege that the MOE was negligent in the implementation of any “policy, practice or procedure” regarding Inco.⁴⁸ Prior to the certification hearing, the plaintiffs amended their claim to allege (*inter alia*) that during the course of its operations, the ministry had made hundreds of investigations of the refinery and issued more than 70 Certificates of Approval affirmatively permitting Inco’s activities.⁴⁹ Indeed, the MOE conceded that it had issued approvals, performed hundreds of investigations, received complaints from members of the public, closely monitored Inco’s emissions, and “encouraged Inco to abate both its air emissions and water emissions, either by voluntary or regulatory means such as control orders.”⁵⁰

Although the court allowed claims based on the negligent implementation of affirmative policies of inspection, approvals, etc., it struck the cause of action based on the MOE’s failure to enforce the *Environmental Protection Act*.⁵¹ Indeed, the court treated this claim as a challenge to prosecutorial discretion and found that unless malice was alleged the claim must fail.⁵² This decision predates *Fallowka*, however, and might have been decided differently had that authority been available at the time.

Conclusion

Although negligence actions against regulators fail more often than they succeed, liability for environmental non-enforcement remains a live issue. Particularly in cases where regulators are both failing to protect environmental quality and affirmatively authorizing harmful pollution, plaintiffs could plausibly succeed in clearing the hurdle of duty of care. Assuming there is further

evidence linking unreasonable conduct with a resulting harm on a balance of probabilities, liability would ensue. For now, liability for environmental non-enforcement remains an emerging area in Canadian tort law.

NOTES

- 1 See generally Office of the Auditor General, *The 2004 Report of the Commissioner of the Environment and Sustainable Development* (Ottawa: Minister of Public Works and Government Services, 2004); Jana Neuman et al, *Toxic Nation: A Report on Pollution in Canadians* (Toronto: Environmental Defence, November 2005); OECD, *OECD Environmental Performance Reviews: Canada* (Paris: OECD Publications, 2017), online: <<http://www.oecd.org/environment/oecd-environmental-performance-reviews-canada-2017-9789264279612-en.htm>>.
- 2 See, e.g., *Pearson v Inco* (2002), 115 ACWS (3d) 564 [*Pearson* (2002)] [affirmed on appeal to the Divisional Court in *Pearson v Inco Ltd* (2004), 128 ACWS (3d) 875, overturned by the Ontario Court of Appeal on other grounds in *Pearson v Inco Ltd* (2005) 143 ACWS (3d) 973]; *Werring v British Columbia*, [1997] BCJ No 2952 (QL), and more recently *Ernst v Alberta* 2014 ABCA 285 (Energy Resources Conservation Board) [*Ernst*] (affirmed in *Ernst v Alberta Energy Regulator*, 2017 SCC 1), and *MacQueen v Sidbec Inc*, 2006 NSSC 208 [*MacQueen*].
- 3 See, e.g., *Procureur général du Québec v Girard*, [2003] JQ no 9105 at paras 414, 417–419, varied on appeal in *Girard v 2944-7828 Québec inc*, [2004] JQ No 13624.
- 4 See, e.g., *Sydney Steel Corporation v MacQueen*, 2013 NSCA 5 at paras 6–7.
- 5 *Cooper v Hobart*, 2001 SCC 79, [2001] 3 SCR 537.
- 6 *Eliopoulos v Ontario* (2006), 82 OR (3d) 321 (CA) [*Eliopoulos*], leave to appeal refused [2006] SCCA No 514.
- 7 *Ibid* at para 12: “There is plainly no category of cases that supports the respondents’ assertion that Ontario owes a private law duty to protect all persons within its boundaries from contracting a disease.”
- 8 Under the *Health Protection and Promotion Act*, RSO 1990, c H.7.
- 9 *Eliopoulos*, *supra* note 6 at paras 17, 20.
- 10 *Ibid* at para 33.
- 11 See, e.g., *Williams v Canada (Attorney General)*, 2009 ONCA 378, 310 DLR (4th) 710, leave to appeal refused [2009] SCCA No 298; *Abarquez v Ontario* (2005), 257 DLR (4th) 745 (Ont Sup Ct), varied on appeal 2009 ONCA 374, 310 DLR (4th) 726; *Jamal Estate v Scarborough Hospital – Grace Division*, [2005] OTC 726 (Ont Sup Ct), varied on appeal 2009 ONCA 376, 95 OR (3d) 760.
- 12 *Klein v American Medical Systems Inc* (2006), 84 OR (3d) 217 (Div Ct); *Attis v Canada (Minister of Health)*, 2008 ONCA 660, 93 OR (3d) 35, leave to appeal refused [2008] SCCA No 491 (government regulation of breast implants—chilling effect on public health mandate and spectre of indeterminate liability if government seen as guarantor of public health).
- 13 *R v Imperial Tobacco Canada Ltd*, [2011] 3 SCR 45, 2011 SCC 42 at paras 43–45; *Klein v American Medical Systems Inc* (2006), 84 OR (3d) 217; 278 DLR (4th) 722 at paras 23–25.
- 14 *Taylor v Canada (Health)*, 2009 ONCA 487, 309 DLR (4th) 400 at para 104.
- 15 Peter W Hogg, QC, Patrick J Monahan and Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 231.
- 16 *MacQueen*, *supra* note 2 at para 48.

- 17 *Klein v American Medical Systems Inc* (2006), 84 OR (3d) 217, 278 DLR (4th) 722 (Div Ct).
- 18 *Pearson (2002)* and *MacQueen*, both *supra* note 2.
- 19 *Cooper v Hobart*, *supra* note 5 at para 34.
- 20 *Sauer v Canada (Attorney General) et al*, 2007 ONCA 454 at para 62.
- 21 *Taylor v Canada (Attorney General)*, 2011 ONCA 181.
- 22 (2008), 300 DLR (4th) 443 (Ont CA).
- 23 (2008), 93 OR (3d) 35 (CA).
- 24 (2009), 313 DLR (4th) 695 (BCCA).
- 25 *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paras 49–50 [*Tobacco (2011)*].
- 26 *Taylor v Canada (Attorney General)*, 2012 ONCA 479 at para 75 [*Taylor (2012)*].
- 27 *Ibid* at para 77.
- 28 *Ibid* at para 79.
- 29 *Ibid* at para 80.
- 30 *Ibid* at para 88.
- 31 *Ibid* at para 95.
- 32 *Ibid* at para 96.
- 33 *Tobacco (2011)*, *supra* note 25 at para 47, cited in *Taylor (2012)*, *supra* note 26 at para 103.
- 34 *Taylor (2012)*, *ibid* at para 109.
- 35 See *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 74 OR (2d) 225 (Div. Ct.) and *Fallowka*, *infra* note 36.
- 36 *Fallowka v Pinkerton's of Canada Ltd*, 2010 SCC 5, [2010] 1 SCR 132 at paras 37–55.
- 37 2016 ONSC 5785 (CanLII).
- 38 *Ibid* at para 15.
- 39 *Ernst*, *supra* note 2 at para 17.
- 40 Amended Statement of Claim, *Ernst v EnCana Corporation, Energy Resources and Conservation Board and Her Majesty the Queen in Right of Alberta*, court file 0702-00120, online: <<http://www.ernstversusencana.ca/wp-content/uploads/2010/10/Statement-of-Claim.pdf>> at para 132.
- 41 *Ibid* at para 162.
- 42 *Ernst*, *supra* note 2 at para 18.
- 43 *Cooper v Hobart*, *supra* note 5 at para 37; see also *Childs v Desormeaux*, 2006 SCC 18, [2006] 1 SCR 643 at para 12.
- 44 See generally LM Collins, “Tort, Democracy and Environmental Governance: Crown Liability for Environmental Non-Enforcement” (2007) Tort L Rev 107.
- 45 *Brown v British Columbia (Minister of Transport and Highways)*, [1994] 1 SCR 420 at para 38.
- 46 *Ibid*.
- 47 See *Pearson (2002)*, *supra* note 2.
- 48 *Pearson v Inco*, [2001] OJ No 4990 at para 22 [*Pearson (2001)*]. As in *Cooper v Hobart*, *supra* note 5, Nordheimer J found that there was insufficient proximity to establish a duty of care (*ibid* at paras 30–31) but also held that the negligent claim was an impermissible attack on the MOE’s failure to adopt a particular policy with respect to *Pearson (2001)*, *ibid* at 24. The finding on proximity was apparently not fatal to plaintiffs’ claims; in the subsequent certification motion Nordheimer J permitted the plaintiffs to proceed with amended negligence claims alleging negligence in the implementation of policy. See *Pearson (2002)*, *supra* note 2 at paras 85–86, 109.
- 49 *Pearson (2002)*, *supra* note 2 at para 27.
- 50 *Ibid* at paras 62–65.
- 51 The court also allowed a claim for negligent misrepresentation based on communications from the MOE to residents allegedly suggesting that residents were not being exposed to a health threat from the refinery’s emissions. However, it found that such a claim could not be adjudicated as a class proceeding. See *ibid* at paras 66, 103.C.(iv), 109–112.
- 52 *Ibid* at para 86. Note, however, that the court ultimately dismissed the motion for certification on the grounds that the plaintiffs failed to satisfy the requirements under s 5(1) of the CPA.