REGULATORY NEGLIGENCE IN ENVIRONMENTAL LAW

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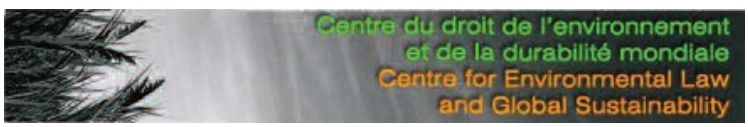

INTRODUCTION

Canada enjoys a strong regulatory regime of statutory environmental law, ranging from municipal by-laws 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 as compared 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 discussion paper 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 comprise 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

[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, 2004).

[2] See e.g. *Pearson v Inco* (2002), 115 ACWS (3d) 564 [*Pearson (2002)*]; *Werring v British Columbia*, [1997] BCJ No 2952 (QL).

[3] See e.g. *Procureur général du Québec c Girard*, [2003] JQ no 9105 at paras 414, 417-419.

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 is 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, 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, but 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

[4] See e.g. *Sydney Steel Corporation v MacQueen*, 2013 NSCA 5 (CanLII) 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."

the statutory powers of the Ontario government[8] 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 cases[11] and in several drug or medical device regulation cases.[12]

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".[13] 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.*[14] (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."[15] 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".[16] In *Taylor v. Canada*,[17] Mr. Justice Cullity certified a class action involving plaintiffs injured by temporomandibular implants (TMJ implants). Justice Cullity held

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[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 (Ont 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] *MacQueen v Sidbec Inc*, 2006 NSSC 208. at para 48.

[14] 2006 NSSC 208.

[15] *Cooper v Hobart*, *supra* note 5 at para 34.

[16] *Sauer v Canada (Attorney General) et al*, 2007 ONCA 454 at para 62.

[17] *Taylor v Canada (Attorney General)*, 2011 ONCA 181.

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)* (2008),[18] involving TMJ implants, and *Attis v. Canada (Minister of Health)* (2008),[19] 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.*[20] 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 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.[21]

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 of 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".[22] If the applicable legislation imposes or forecloses a private law duty of care,[23] 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.[24] The court noted that cases in which a finding of proximity has been made involve a relationship with the plaintiff that is

[18] 300 DLR (4th) 443 (Ont CA).
[19] 93 OR (3d) 35 (CA).
[20] (2009), 313 DLR (4th) 695 (BCCA).
[21] *R v Imperial Tobacco Canada Ltd*, [2011] 3 SCR 45 at paras 49-50 [*Tobacco (2011)*].
[22] *Taylor v Canada (Attorney General)*, 2012 ONCA 479 at para 75 [*Taylor (2012)*].
[23] *Ibid* at para 77.
[24] *Ibid* at para 79.

"distinct from and more direct than that the relationship between the regulator and that part of the public affected by the regulator's work."[25] Secondly, the proposed private law duty must not be inconsistent with the regulator's public duties.[26] 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.[27]

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.[28] 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",[29] 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.[30] 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.[31] 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 *Fullowka*[32] suggests that when regulatory officials have visited a particular site and are aware of specific hazards,

[25] *Ibid* at para 80.
[26] *Ibid* at para 88.
[27] *Ibid* at para 95.
[28] *Ibid* at para 96.
[29] *Tobacco (2011)*, *supra* note 21 at para 47, cited in *Taylor (2012)*, *supra* note 22 at para 103.
[30] *Taylor (2012)*, *ibid* at para 109.
[31] See *Doe* and *Fullowka*.
[32] *Fullowka v Pinkerton's of Canada Ltd*, 2010 SCC 5, [2010] 1 SCR 132 at paras 37-55.

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 affirmatively facilitated the harmful conduct by issuing specific pollution permits, the argument for proximity is even stronger.

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.[33] 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.[34] 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."[35] 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."[36] 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,*[37] for example, the plaintiff class alleged that as a result of the Ministry of Environment'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

[33] *Cooper v Hobart*, *supra* note 5 at para 37; see also *Childs v Desormeaux*, 2006 SCC 18 at para 12, [2006] 1 SCR 643.
[34] See generally "Tort, Democracy and Environmental Governance: Crown Liability for Environmental Non-Enforcement" (2007) Tort L Rev 107.
[35] *Brown v British Columbia (Minister of Transport and Highways)*, [1994] 1 SCR 420 at para 38.
[36] *Ibid.*
[37] See *Pearson (2002)*, *supra* note 2.

Inco.[38] 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 seventy Certificates of Approval affirmatively permitting Inco's activities.[39] 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."[40]

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.[41] Indeed, the court treated this claim as a challenge to prosecutorial discretion and found that unless malice was alleged the claim must fail.[42] This decision pre-dates *Fullowka*, 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.

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[38] *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.

[39] *Pearson (2002)*, *ibid* at para 27.

[40] *Ibid* at paras 62-65.

[41] 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.

[42] *Ibid* at para 86. Note, however, that the court ultimately dismissed the motion for certification on the grounds that.