# Regulatory Negligence and Administrative Law*

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*The law of negligence has been a growth industry for lawyers since the* Donoghue v. Stevenson *decision. While defining its contours has always been a difficult task, the application of negligence principles to public authorities has been especially hard. In Canada, public authorities must not only be aware of their obligations to the public as these are defined in legislation and other public instruments, but must temper their behaviour and use of public power in order to — in some cases — look after the interests of a particular person or segment of the population. This paper explores the reach of negligence principles to public authorities in Canada, with emphasis on when it is that such authorities owe individuals a duty of care and suggests that liability in negligence remains very uncertain to predict, suggesting that authorities must be proactive in attempting to reduce the scope of potential liability.*

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*Depuis la décision* Donoghue c. Stevenson, *la négligence représente un domaine du droit en pleine croissance pour les avocats. Alors que ses contours ont toujours été difficiles à cerner, l'application des principes de la négligence aux autorités publiques a particulièrement été ardue. Au Canada, les autorités publiques doivent non seulement connaître leurs obligations envers le public prévues par la législation et d'autres instruments publics, mais également tempérer leurs réactions et leur utilisation du pouvoir public dans le but, dans certains cas, de protéger les intérêts d'une personne ou d'un segment de la population en particulier. Le présent article traite de la portée des principes de négligence sur les autorités publiques au Canada et met l'accent sur le moment où celles-ci ont un devoir de diligence envers des personnes. Les auteurs soutiennent que l'obligation liée à la négligence demeure très difficile à prévoir, suggérant par là que les autorités devraient être plus proactives afin de réduire la portée de leur possible responsabilité.*

## 1. INTRODUCTION

Why should regulators, administrative lawyers, and tribunal members care

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about tort law? Administrative law is concerned with the exercise of public powers, and tort law provides private law remedies. However, when administrative bodies harm members of the public due to the negligent discharge of statutory powers, individuals increasingly turn to the courts seeking damages. Liability in negligence is an important aspect of accountability for public authorities. Further, lawsuits have a significant reputational effect, even where the courts find no liability. The commencement of a lawsuit may undermine public confidence in the functioning of an administrative body, affect stakeholder relations, and draw unwanted media attention. Regulators and governments create and manage risks. Citizens rely upon governments and regulators to protect them from harm, and understandably look for compensation when public authorities fail to deliver. The courts face a delicate task — balancing the discharge of public obligations with the rights and interests of individual members of the public. Tort liability is uncertain, and the law is evolving. It is important for those who work with administrative bodies to understand the types of actions that may lead to liability, and design governance tools, policies, and procedures to reduce the zone of tort liability.

Unfortunately, courts do not make it easy for administrative actors, tribunals, and public authorities to understand the scope of their potential liability. In the decade following the famous *Donoghue v. Stevenson* decision, the House of Lords bemoaned that "[t]he case law as to the duties and liabilities of a statutory body to members of the public is in a state of lamentable obscurity and confusion".[1] To some extent, this state of confusion exists to this day. For some commentators, the trend in Canada has been described as one towards severely limiting the type of situations where public authorities can be liable in negligence.[2] This paper argues that, more recently, that trend may have been attenuated somewhat, although, overall, the law remains mired in a "lamentable state of obscurity and confusion". At a minimum, liability in negligence continues to be a real possibility, the result of which ought to be increased vigilance and oversight on the part of public authorities in how they discharge their duties.

The scope for liability for substandard administrative action may have increased in light of the Supreme Court of Canada's 2010 decision in *Fullowka*,[3] in which the Court held that the government owed a duty to mine workers to protect them from a bomb explosion during a bitter labour relations dispute. In the last decade, the Court has released a number of significant decisions relating to tort liability of public authorities. These and other decisions provide important lessons for administrative bodies interested in reducing tort liability. The Court in *McCullock Finney c. Barreau (Québec)*[4] appeared to expand the scope for regulatory negligence even in the face of a good faith immunity clause. In *Hill v.*

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1 *Kent v. East Suffolk Rivers Catchment Board* (1939), [1940] 1 K.B. 319 at p. 322 (Eng. C.A.).

2 For example, L.N. Klar, "The Tort Liability of the Crown: Back to Canada v. Saskatchewan Wheat Pool" (2007) 32 Advocates' Q. 293.

3 *Fullowka v. Royal Oak Ventures Inc.*, 2010 SCC 5, 2010 CarswellNWT 10, 2010 CarswellNWT 9 (S.C.C.) [*Fullowka*].

4 *McCullock Finney c. Barreau (Québec)*, [2004] 2 S.C.R. 17, 2004 SCC 36, 2004 CarswellQue 1338, 2004 CarswellQue 1337 (S.C.C.) [*Finney*].

*Hamilton-Wentworth (Regional Municipality) Police Services Board*,[5] the Supreme Court recognized the tort of negligent investigation, a significant concern for administrative bodies. In *Holland v. Saskatchewan (Minister of Agriculture, Food & Rural Revitalization)*[6] the Court confirmed that there is no tort of breach of statutory duty, but recognized "negligent implementation of a judicial decree", an obscure issue, as a potential head of liability for public authorities. At the same time, courts have dismissed claims against public authorities in relation to areas as diverse as SARS, West Nile, special education, tobacco regulations and medical devices.

In this paper we discuss the potential scope of regulatory negligence for Canadian public authorities, reviewing recent Canadian case law. Our overall conclusion is that the Supreme Court *Fullowka* decision does have the potential of casting the negligence liability net wider, although this is somewhat tempered by the Court's subsequent decision in *Elder Advocates of Alberta Society v. Alberta*.[7] With the notable exceptions of the *Sauer* and *Adams* appeal judgments discussed below, appellate courts had been shutting down negligence cases against regulators fairly routinely in the five years prior to *Fullowka*. *Fullowka* appears to adopt a strand of reasoning more consistent with *Sauer* and *Adams*. It is this strand of reasoning that has recently found favour in the Ontario Court of Appeal in *Taylor v.Canada (Attorney General)*, a decision in which the court holds that Health Canada might owe patients who suffered damage due to the implantation of joint implants comes negligence duties of care. *Taylor* at minimum strikes a different tone from, and certainly carries a different result than, the more conservative decisions of the Court of Appeal pre-*Fullowka* denying the existence of any such duty.[8] At best, courts continue to experience enormous difficulty reconciling the various strands of jurisprudence and in saying when it is that a regulator does or does not owe a negligence duty to particular individuals.[9]

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5 *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, [2007] 3 S.C.R. 129, 2007 SCC 41, 2007 CarswellOnt 6266, 2007 CarswellOnt 6265 (S.C.C.) [*Hill*].

6 2008 SCC 42, 2008 CarswellSask 431, 2008 CarswellSask 432 (S.C.C.) [*Holland*].

7 *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, 2011 CarswellAlta 764, 2011 CarswellAlta 763 (S.C.C.) [*Elder Advocates*].

8 2012 ONCA 479.

9 The best example of this is *Taylor*, which the Court of Appeal last year described as having "a tortured procedural history" [*Taylor v. Canada (Attorney General)*, 2011 ONCA 181, 2011 CarswellOnt 1255 (Ont. C.A. [In Chambers]). *Taylor* — a class action involving negligence by Health Canada over their approvals of a defective jaw implant — was: (1) certified in 2007 [*Taylor v. Canada (Minister of Health)*, 285 D.L.R. (4th) 296, 2007 CarswellOnt 5541 (Ont. S.C.J.); leave to appeal refused 2007 CarswellOnt 8122 (Ont. Div. Ct.) in reasons that applied *Sauer*; (2) revisited and struck out in early 2010 (before *Fullowka* was decided) [2010 ONSC 4799]; (3) certified a second time after the plaintiff amended the claim to incorporate the wording accepted in *Sauer* (particulars of representations) [*Taylor v. Canada (Attorney General)*, 2010 ONSC 4799, 2010 CarswellOnt 10538 (Ont. S.C.J.)]. This "tortured procedural history" has now hopefully drawn to a close with the court's decision, *supra* fn 8, that Health Canada may owe duties of care in negligence.

We also address practical issues for regulators and tribunals, including proactive responses to limit the scope for regulatory negligence lawsuits. Given the fractured and uncertain state of the negligence jurisprudence, the best approach is the proactive one, to avoid liability and prevent a situation whereby a duty of care will be owed to particular members of the public.

## 2. THE NEGLIGENCE FRAMEWORK

Since the enactment of Crown liability statutes across Canada, it has been clear that almost all statutory decision-makers and public authorities in Canada are subject to the general principles of negligence law. Pursuant to *Saskatchewan Wheat Pool*,[10] there is no tort of breach of statutory duty, although proof of the statutory breach causing damage may be evidence of negligence, and the statutory duty may provide evidence of the relevant standard of care. Although Crown liability statutes have opened the door for lawsuits against public authorities, some, though few, public authorities continue to enjoy judge-made absolute or near absolute immunity from lawsuits in certain cases.[11]

A plaintiff pursuing a regulatory negligence claim against a public body must establish the common law requirements for a private law action in negligence:

- A duty of care;
- Standard of care;
- Breach of the standard of care;
- Causation; and,
- Damage or loss that is not too remote or unforeseeable.

While the last four common law requirements are important, a decision in favour of the plaintiff or regulator on these issues is heavily dependent on the facts. Whether a regulator can potentially be liable or not in negligence today is the province of the "duty of care" analysis which this paper breaks down and analyzes in

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10 *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, 1983 CarswellNat 92, 1983 CarswellNat 521 (S.C.C.).

11 For instance, recent cases have held that: judges and tribunal members should not be named in judicial reviews or appeals [*Foerster v. Anderson* (November 17, 2009), Doc. M38162, M38092, M38161, [2009] O.J. No. 5751 para. 7 (Ont. C.A. [In Chambers])]; the Ontario Labour Relations Board is incapable of being sued even where bias is alleged [*Royal Shirt Co. v. Ontario (Labour Relations Board)*, [1999] O.J. No. 1930, 1999 CarswellOnt 1711 (Ont. C.A.); leave to appeal refused [1999] S.C.C.A. No. 359, 2000 CarswellOnt 1812, 2000 CarswellOnt 1813 (S.C.C.)]; and a high threshold malice test must be met in order to sue a Crown prosecutor in malicious prosecution [*Kvello v. Miazga*, [2009] S.C.J. No. 51, 2009 SCC 51, 2009 CarswellSask 718, 2009 CarswellSask 717 (S.C.C.)]. Despite the Supreme Court's clear statement that the *Miazga* high threshold malice test is limited to Crown prosecutor defendants, some defendants have tried to extend the high threshold to police and other defendants, once successfully [*Symington v. Halifax (Regional Municipality)*, 2011 NSSC 474, 2011 CarswellNS 905, 2011 NSSC 474 (N.S. S.C.)], and the other time unsuccessfully [*Pate v. Galway-Cavendish & Harvey (Township)*, 2011 ONCA 329, 2011 CarswellOnt 7802 (S.C.C.); leave to appeal refused 2012 CarswellOnt 4061, 2012 CarswellOnt 4060 (S.C.C.)].

the following sections.

## (a) Policy vs. Operational Decisions

For decades, Canadian negligence law around the existence (or not) of a duty of care focussed on whether a regulatory action or decision was "operational" or "policy" in nature: an "operational" decision was more likely to attract a negligence duty of care while activities at the level of "policy" generally would not. Today, the debate focuses to a much greater extent on "proximity" and the existence of a duty of care.[12]

Since the House of Lords case of *Anns v. Merton London Borough Council*,[13] adopted in Canada in *Nielsen v. Kamloops (City)*,[14] the prevailing wisdom was that public bodies should not be liable for "policy" decisions, but merely for the implementation of such decisions as an operational matter. The Supreme Court in *Brown v. B.C.*[15] identified the factors that led to the categorization of a decision as "policy" or "operational":

> True policy decisions involve social, political and economic factors. In such decisions, 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.
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> The operational area is concerned with the practical implementation of the formulated policies. It mainly covers the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.[16]

It is important to remember, however, that bad faith or irrational regulatory policy decisions (including failures to act) are actionable in negligence. As stated by Cory J. in *Brown*:

> It will always be open to a plaintiff to attempt to establish, on a balance of probabilities, that the policy decision was not *bona fide* or was so irrational or unreasonable as to constitute an improper exercise of governmental discretion. This is not a new concept. It has long been recognized that government decisions may be attacked in those relatively rare instances where the policy decision is shown to have been made in bad faith or in circumstances where it is so patently unreasonable that it exceeds governmental discretion. The test to be applied when a policy decision is questioned is set out in *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, at p. 24, by Wilson J. in these

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12 See Aloke Chatterjee, Neil Craik and Carissima Mathen, "Public Wrongs and Private Duties: Rethinking Public Authority Liability in Canada" (2007) 57 U.N.B.L.J. 1.

13 [1977] 2 All E.R. 492 (U.K. H.L.) [*Anns*].

14 [1984] 2 S.C.R. 2, 1984 CarswellBC 821, 1984 CarswellBC 476 (S.C.C.) [*Kamloops*].

15 *Brown v. British Columbia (Minister of Transportation & Highways*, [1994] S.C.J. No. 20, 112 D.L.R. (4th) 1, 1994 CarswellBC 128, 1994 CarswellBC 1236 (S.C.C.) [*Brown*].

16 *Ibid.* at para. 38.

words:

> In my view, inaction for no reason or inaction for an improper reason cannot be a policy decision taken in the *bona fide* exercise of discretion. Where the question whether the requisite action should be taken has not even been considered by the public authority, or at least has not been considered in good faith, it seems clear that for that very reason the authority has not acted with reasonable care.[17]

Notwithstanding the Supreme Court's decision in *Just*[18] labelling the policy/operational distinction as the "bright line" in the area of regulatory negligence, the distinction has proven very difficult to maintain in practice. All decisions of public bodies are constrained, to some extent, by the very real problems of limited resources and social/political factors. Most decisions will have both policy and operational aspects, and the courts have been unable to establish any approach that would bring predictability to the policy/operational categorization.

### (b) A *Prima Facie* Duty of Care?

As a result of the difficulty distinguishing between policy and operational decisions, much of the contemporary battle takes place in the discussion of "proximity" and whether there should be a *prima facie* duty of care in light of the nature of the relationship between the regulator and the plaintiff, in contrast to general duties owed to the public at large which will not form the basis for a duty of care.

There are two steps in the duty of care analysis. As stated by McLachlin C.J. for the majority in *Hill*, and confirmed later in *Fullowka*:

> The test for determining whether a person owes a duty of care involves two questions: (1) Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care; and (2) If so, are there any residual policy concerns which ought to negate or limit that duty of care?[19]

The first aspect of the test involves a determination of whether the case falls in a category of cases in which a duty has previously been recognized. If not, the issue is whether a new duty of care should be recognized. This requires consideration, first, whether it was reasonably foreseeable that the actions of the defendant public authority would cause harm to the plaintiff, and secondly, whether there is a "close and direct relationship of proximity or neighbourhood" sufficient to give rise to a legal duty of care. In terms of proximity, the issue is whether the actions of the defendant have a close and direct effect on the alleged victim (plaintiff), such that the defendant ought to have had the plaintiff in mind as a person who would be potentially harmed by the defendant's actions.

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17 *Ibid.* at pp. 15-16.

18 *Just v. British Columbia*, [1989] 2 S.C.R. 1228, 1989 CarswellBC 234, 1989 CarswellBC 719 (S.C.C.) [*Just*].

19 *Hill*, *supra* note 5 at para. 20.

In *Cooper*,[20] the Court held that proximity is a question of policy and the balancing of interests; the proximity analysis involves examining the relationship at issue considering factors such as:

- Expectations;
- Representations;
- Reliance; and
- Property and other interests involved.

If the relationship is sufficiently proximate to found a *prima facie* duty of care, then the analysis shifts to residual policy concerns that may negate the duty.

Now, we would like to examine the application of this general framework to specific cases, to illustrate issues in tort law of concern to administrative lawyers.

## 3. CASE REVIEW

### (a) *Cooper v. Hobart*

The Supreme Court of Canada's 2001 decision in the *Cooper* case is critical, largely because *Cooper* determined that the factors giving rise to proximity for the purposes of the private law duty of care owed by a public body must be found in the governing statute. The case involved the Registrar of Mortgage Brokers, a statutory regulator which suspended a mortgage broker's licence and issued a freeze order over assets provided by investors which were allegedly used by the broker for unauthorized purposes. The plaintiff in the proposed class proceeding was an investor who had advanced money to the broker. The allegations against the Registrar were that the Registrar was aware and should have acted earlier to suspend the broker's licence and notify investors that the broker was under investigation, thereby avoiding or reducing the loss to investors. The Court held there was no duty of care owed by the Registrar to the investors.

The Court held specifically that, when dealing with a public authority, in this case the Registrar of Mortgage Brokers:

> *[t]he factors giving rise to proximity, if they exist, must arise from the statute under which the Registrar is appointed.* That statute is the only source of his duties, private or public. Apart from that statute, he is in no different position that the ordinary man or woman on the street. If a duty to investors with regulated mortgage brokers is to be found, it must be in the statute.[21]

The Court reviewed relevant statutory provisions, determining that the statute did not impose a duty of care on the Registrar to investors; rather, the Registrar's duty is to the public as a whole. Since a duty to individual investors would potentially conflict with the Registrar's overarching duty to the public, the Court found that there was insufficient proximity between the investors and the Registrar to ground a *prima facie* duty of care.

The Court held that even if there had been sufficient proximity, the duty

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20 *Cooper v. Hobart*, 2001 SCC 79, 2001 CarswellBC 2502, 2001 CarswellBC 2503 at para. 35 (S.C.C.) [*Cooper*].

21 *Ibid.* at para. 43 (emphasis added).

would have been negatived at the second stage for overriding policy reasons. These included:

- The determination to suspend a mortgage broker involves both policy and quasi-judicial elements, which require balancing public and private interests;
- The Registrar is deciding, as an agent of the executive branch of government, what the policy should be;
- In the regulatory quasi-judicial role (decision to suspend or revoke a licence), the Registrar owes duties of fairness to the broker which are inconsistent with a duty of care to investors;
- The Registrar makes discretionary policy decisions;
- The spectre of indeterminate liability — there is no limit in the Act, and the Registrar has no means of controlling the number of investors or the amount of money invested in the mortgage brokerage system; and,
- To impose a duty of care would be to effectively create an insurance scheme for investors at great cost to the taxpaying public.[22]

### (b) *Edwards v. Law Society of Upper Canada*[23]

*Edwards v. Law Society of Upper Canada* was released as a companion case to *Cooper*. This case was a proposed class action by individual investors allegedly victimized by a gold delivery fraud in which the investors deposited money to a lawyer's trust account pursuant to a "Gold Delivery Contract". No gold was delivered, the investors were out $9 million, and they claimed against the Law Society for damages. The solicitor had written to the Law Society with respect to the trust account improprieties, and the Law Society commenced an investigation. The investors claimed the Law Society had a duty to ensure the solicitor operated his trust account according to regulations once it became aware of the improprieties or, alternatively, to warn the investors that it had "chosen to abandon its supervisory jurisdiction".[24] Again, the Court found there was insufficient proximity, no *prima facie* duty of care, and even if there had been a prima facie duty it would have been negated by residual policy considerations.

Once again, the Court held that the *Law Society Act* did not reveal any "legislative intent to expressly or by implication impose a private law duty on the Law Society on the facts of this case".[25] The Law Society's investigative and disciplinary powers over its members is geared to the protection of clients and thereby the public as a whole: it does not owe a private law duty of care to members of the

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22 For an interesting criticism of *Cooper* in the context of the case *James v. British Columbia*, 2005 BCCA 136, [2005] 8 W.W.R. 417, 2005 CarswellBC 552 (B.C. C.A.); see Russell Brown and Shannon Brochu, "Once More Unto the Breach: James v. British Columbia and Problems with the Duty of Care in Canadian Tort Law" (2008) 45 Alta. L. Rev. 1071.

23 2001 SCC 80, 2001 CarswellOnt 3962, 2001 CarswellOnt 3963 (S.C.C.) [*Edwards*].

24 *Ibid.* at para. 3.

25 *Ibid.* at para. 13.

public who deposit funds into a solicitor's trust account.

The Court noted that clients are protected and compensated through the Compensation Fund and Lawyers' Professional Indemnity Company insurance, which were means chosen to compensate for economic loss in lieu of the private tort duty.

The Court placed great weight on the statutory immunity clause, a typical Ontario clause providing that no action or other proceedings for damages shall be instituted "for any act done in good faith in the performance or intended performance of any duty or in the exercise or in the intended exercise of any power", or "any neglect or default in the performance or exercise in good faith of any such duty or power".[26] The Court held that the good faith immunity clause "precludes any inference of an intention to provide compensation in circumstances that fall outside the lawyers' professional indemnity insurance and the lawyers' fund for client compensation".[27]

Overall, the Court's two major decisions on negligence law at the start of the 21st Century signalled a significant tightening of the duty of care analysis by: (1) focussing the analysis almost exclusively on whether or not the legislation imposed a duty; and, (2) as part of that analysis, giving strong effect to statutory immunity clauses. While prior case law had rightly recognized that statutes, by their very nature, are *not* written in the language of duty and obligation (they are written with the language of discretion and power), and while prior case law had found duties of care in the face of such language, the *Cooper/Edwards* cases signalled a retrenchment by basing duties of care on what was contained in statutory language when such language is not written to create such duties.

### (c) *Finney v. Barreau du Quebec*[28]

The Supreme Court's 2004 decision in *Finney v. Barreau du Quebec* involved a different Law Society, and a very different result. Notwithstanding a good faith statutory immunity clause, the Barreau was found liable for what was essentially gross regulatory negligence in failing to act with diligence to suspend a rogue lawyer from practice. The significant facts were the delay by the Barreau in responding to the lawyer's incompetence, egregious conduct issues brought to the Barreau's attention regarding his performance, and complaints made by the individual plaintiff to whom damages were awarded.

A brief chronology of the Law Society's relations with the lawyer Belhassen and the plaintiff help illustrate the factors that led the Court to find the Barreau liable to pay damages in this case:

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| 1978 | B. Called to the bar of Quebec; |
| 1981–87 | Barreau finds B. guilty on three occasions of disciplinary offences; |
| 1985 | Inspection Committee initiates investigation into B's competence (five years to complete investigation); |

26 *Ibid.* at para 16, relying on the *Law Society Act*, s. 9.

27 *Ibid.* at para. 17.

28 *Finney*, *supra* note 4.

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|---|---|
| 1990 | Inspection Committee report to the Executive Committee that B. is incompetent; recommends that B's right to practice be suspended, and he be required to redo his bar training; |
| 1992 | Executive Committee does not suspend B. After a hearing, it instead directs he take a refresher course and practice law under a tutor (supervising lawyer); |
| 1991–1993 | Finney and her lawyer file several complaints against B. with Barreau, and complain to oversight body re delay of Barreau; |
| 1993 | Due to B.'s flurry of unmeritorious litigation, Superior Court in Quebec summons all parties including a Barreau representative, and Court orders any proceeding brought by B. is to be subject to a special review; |
| 1993 | B's tutor (supervising lawyer) resigns; |
| 1993 | Oversight body asks Barreau re delay in dealing with complaints; |
| 1994 | Lawyer acting for Finney's son complains to Barreau about B.'s actions; the son is not interviewed until 1996; |
| 1994 | B. is provisionally struck off the rolls in relation to 23 counts; |
| 1996 | Finney commences action in damages against Barreau for breach of its obligation to protect the public in handling of complaints against B; |
| 1998 | B. is struck off the rolls for five years (retroactively to 1994) after being found guilty on 17 counts by Discipline Committee. |

The Court of Appeal found that the lawyer posed a "grave and imminent danger to the public" and the Barreau was aware of this danger. The Court found the delay between the complaints in early 1993 and striking him provisionally off the rolls in 1994 was "unacceptable and inexcusable".

The Barreau was protected by a good faith immunity clause. The Supreme Court of Canada held that "gross or serious carelessness is incompatible with good faith",[29] and that an immunity provision is intended to give professional orders the scope, latitude and discretion they need in order to perform their duties. It is not meant to exclude liability for gross carelessness or serious negligence, the standard it found the Barreau to have met. The "virtually complete absence of the diligence" required in the situation meant the Barreau did not meet the standards of its fundamental mandate, which is to protect the public.

The Court held that:

> The attitude exhibited by the Barreau, in a clearly urgent situation in which a practising lawyer represented a real danger to the public, was one of such negligence and indifference that it cannot claim the immunity conferred by s. 193. The serious carelessness it displayed amounts to bad faith, and it is liable for the results.[30]

29 *Ibid.* at para. 40.

30 *Ibid.* at para. 43.

The Supreme Court emphasized that the case was not restricted to the Quebec civil code, stating that the Barreau would have been liable under the analysis set out in *Cooper* and *Edwards*. The Court concluded by stating that:

> The decisions made by the Barreau were operational decisions and were made in a relationship of proximity with a clearly identified complainant, where the harm was foreseeable. The common law would have been no less exacting than Quebec law on this point.[31]

In the result, the Court awarded Ms. Finney damages for moral injury, assessed at $25,000, together with costs on a solicitor-client basis.

### (d) *Syl Apps Secure Treatment Centre v. B.D.*[32]

In *D. (B.) v. Children's Aid Society of Halton (Region)* the Supreme Court upheld the striking out of a negligence claim against a treatment centre and a social worker on the grounds of proximity, statutory immunity, and residual policy considerations. Here, a teenager was removed from the home and placed in a treatment centre because of alleged parental abuse. The family sued the Children's Aid Society, the treatment centre, and the social worker for wrongly depriving them of their relationship with their child, in part due to the relevant statute which recognized the importance of family relationships.

The Supreme Court found that there was insufficient proximity given the governing statute. The primary objective of the legislation is protection of the best interests of the child. Recognition of the private law duty of care to the parents raised a potential for conflicting duties, and the legislative intent embodied in the statutory scheme had primacy. The Court states:

> The deciding factor for me, as in *Cooper* and *Edwards*, is the potential for conflicting duties: imposing a duty of care on the relationship between the family of a child in care and that child's court-ordered service providers, creates a genuine potential for "serious and significant" conflict with the service providers' transcendent statutory duty to promote the best interests, protection and well-being of the children in their care.[33]

Other relevant factors negating a duty were administrative remedies available to the family and the statutory immunity provisions.

### (e) *Hill v. Hamilton Wentworth Regional Police Services*[34]

This 2007 decision is significant in that the Court recognized a new category of relationship sufficiently proximate to give rise to a duty of care — police officer/suspect under investigation, and a new tort — the tort of negligent investigation.

In the proximity analysis, the Court identified a "personal, close and direct" relationship between an officer and a particularized suspect. Another important consideration was the interest of the suspect: there was no personal representation

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31 *Ibid.* at para. 46.

32 [2007] S.C.R. 83, 2007 CarswellOnt 4790, 2007 CarswellOnt 4789 (S.C.C.) [*Syl Apps*].

33 *Ibid.* at para. 41.

34 *Hill*, *supra* note 5.

or reliance at issue. Rather, the Court emphasised that the targeted suspect's interests at stake included "his freedom, his reputation and how he may spend a good portion of his life", noting that these "high interests" support a finding of proximate relationship.[35]

Other factors included: the lack of existing alternative remedies, the public interest in ensuring that appropriate investigations are undertaken given the serious problems of wrongful convictions and institutionalized racism; and, that the duty would be consistent with the values underlying the *Charter of Rights and Freedoms*.[36]

The Court carefully considered a number of arguments raised to negate the duty of care, including the argument that a duty of care to an individual suspect conflicted with the police's overarching public duty to prevent crime. The Court limited the scope of the conflict argument as follows:

> A *prima facie* duty of care will be negated only when the conflict, considered together with other relevant policy considerations, gives rise to a real potential for negative policy consequences. This reflects the view that a duty of care in tort law should not be denied on speculative grounds.[37]

The Court considered and rejected a number of policy arguments raised to negate the duty of care at Stage 2 of the *Anns/Kamloops* test:

- The "quasi-judicial" nature of police duties;
- The potential for conflict with other police duties;
- The discretion inherent in police work;
- The potential for a chilling effect on the investigation of crime; and
- Flood of litigation.

The standard of care was held to be that of a reasonable police officer in similar circumstances, applied in a manner that gives due recognition to the discretion inherent in police investigation. The Court found that the investigation met the standard in light of police practices at the time.

The Ontario Court of Appeal has recently held, however, that family members of victims of alleged police misconduct do not have a right to sue the Special Investigations Unit for negligent investigation when the SIU chose not to lay charges against the officer in question.[38] Sharpe J.A. for the Court relied on a *Cooper* analysis of the duty of care, and distinguished *Fullowka* as follows:[39]

> This case is distinguishable from *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5 (CanLII), [2010] 1 S.C.R. 132, where the court found, at paras. 42–45, that the government regulator owed a duty of care flowing from its statutory duties to inspect a mining operation in favour of fatally injured

35 *Ibid.* at para. 34.

36 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

37 *Hill, supra* note 5 at para. 43.

38 *Wellington v. Ontario*, 2011 ONCA 274, 2011 CarswellOnt 2334 (Ont. C.A.); leave to appeal refused 2011 CarswellOnt 10441, 2011 CarswellOnt 10440 (S.C.C.).

39 *Ibid.* at para. 49.

> miners. The miners were held to be a narrow and clearly-defined group relating directly to the statutory duties of the mining inspectors. This was held, at paras. 46-47, to be analogous to the duties of building inspectors towards property owners and purchasers recognized in Kamloops. The duties of the SIU in investigating crimes committed by police officers stand in sharp contrast. Those duties are not focused on the protection or promotion of victims' interests but instead relate to protecting the public at large.

Other courts, following *Hill* or *Finney*, have concluded that particular plaintiffs who were the subject of administrative investigations were owed a duty of care. In *Alevizos*, the Manitoba Court of Queen's Bench confirmed that a chiropractor who had been subject to a preliminary investigation into his conduct by his college could sue the investigator in negligence.[40] In Quebec, lawyers have been successful in suing their law society in negligence over the handling of disciplinary proceedings against them.[41]

In *River Valley Poultry Farm Ltd. v. Canada (Attorney General)*,[42] the court held that neither Health Canada nor the Canadian Food Inspection Agency owed a duty of care to the plaintiff to conduct a timely and competent investigation of whether a farm's flock of hens and chicks were infected with salmonella. Canada won similar motions in 2008 over alleged negligent failures to properly regulate breast and other surgical implants.[43]

On the other hand (and confusingly), Canada was successfully sued in 2008 over allegations it negligently responded to a potato virus in the Maritimes. In *Adams*,[44] the New Brunswick Court of Appeal held that Canada owed duties to conduct a timely investigation to identify a virus in the plaintiffs' potatoes. Having chosen to investigate in the first place, the duty to conduct a timely investigation was imposed. These cases illustrate the difficulty in predicting whether liability will be found, but they are important illustrations of the types of issues to which administrative bodies must pay heed.

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40 *Alevizos v. Chiropractors Assn. (Manitoba)*, [2009] M.J. No. 154, 2009 CarswellMan 199 (Man. Q.B.); additional reasons 2010 CarswellMan 101 (Man. Q.B.) [*Alevizos*].

41 For example, *Bohémier c. Barreau du Québec*, [2009] J.Q. No. 5005, 2009 CarswellQue 5057 (Que. S.C.); leave to appeal refused 2009 CarswellQue 8551 (Que. C.A.).

42 2009 ONCA 326, 2009 CarswellOnt 2053 (Ont. C.A.); leave to appeal refused 2009 CarswellOnt 6909, 2009 CarswellOnt 6910 (S.C.C.) [*River Valley*].

43 *Attis v. Canada (Minister of Health)*, [2008] O.J. No. 3766, 2008 CarswellOnt 5661 (Ont. C.A.); leave to appeal refused 2009 CarswellOnt 2344, 2009 CarswellOnt 2343 (S.C.C.) [*Attis*]; and *Drady v. Canada (Minister of Health)*, [2008] O.J. No. 3772, 2008 CarswellOnt 5662 (Ont. C.A.); leave to appeal refused 2009 CarswellOnt 2346, 2009 CarswellOnt 2345 (S.C.C.) [*Drady*].

44 *Adams v. Borrell*, [2008] N.B.J. No. 327, 2008 CarswellNB 425, 2008 CarswellNB 424 (N.B. C.A.); leave to appeal refused 2009 CarswellNB 67, 2009 CarswellNB 66 (S.C.C.) [*Adams*].

### (f) *Sauer v. Canada (Attorney General)*[45]

The *Sauer* case is the "mad cow" class action. In 2003, a cow in Alberta was diagnosed with mad cow disease, as a result of which the borders to the United States, Mexico and Japan were closed to Canadian cattle and beef products with catastrophic economic consequences for the commercial cattle industry. Cattle farmers commenced a class action against the government for grossly negligent regulation of the cattle industry, as well as against the manufacturer of allegedly contaminated feed. The claim against the government was for gross negligence in the design of a 1990 regulation which permitted the use of ruminant meat and bone meal in cattle feed, and for not passing a ruminant feed ban regulation until 1997. Of interest is that the plaintiff pleaded specific, public representations by the government that it regulated cattle feed content to protect commercial farmers, among others. This pleading was critical, in that the Court held that the representations by government could result in a "public assumption of a duty to Canadian cattle farmers to ensure the safety of cattle feed", and thus a *prima facie* duty.

The government argued that the decisions were purely legislative, and legislative action or inaction cannot form the basis for a claim in tort. The government also argued that the regulation and feed ban decisions were policy rather than operational decisions. However, the Court held that it was not plain and obvious that the decisions were "policy", and there was an evidentiary onus on the Crown to so establish. Finally, *Sauer* pleaded that even if the decisions were policy decisions they were bad faith exercises of the discretion to regulate or not. Given the pleadings, the Ontario Court of Appeal held that it was not "plain and obvious" that the claim would fail, and allowed the claim to proceed. The Supreme Court of Canada refused leave from this decision.

*Sauer* and its progeny are a hard lesson for regulators to take enormous care in the content of their representations. Regulators have little choice but to communicate with stakeholders, as the failure to communicate at all could be problematic in a legal and public policy sense depending on the circumstances. Once regulators "speak", they open themselves up to potential actions in negligence framed in part as "negligent misrepresentation" cases. Regulators would do well, in looking at their communications, to study *Sauer* and subsequent decisions that have held that representations gave rise or could give rise to duties of care,[46] and those that held that the representations/communications did not rise to the level where particular

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45 2007 ONCA 454, [2007] O.J. No. 2443, 2007 CarswellOnt 3996 (Ont. C.A.); leave to appeal refused 2008 CarswellOnt 4316, 2008 CarswellOnt 4315 (S.C.C.) [*Sauer*]. This has now become a national certified class action against the Attorney General (see *Sauer v. Canada (Minister of Agriculture)*, [2008] O.J. No. 3419, 2008 CarswellOnt 5081 (Ont. S.C.J.); leave to appeal refused 2009 CarswellOnt 680, [2009] O.J. No. 402, 246 O.A.C. 256 (Ont. Div. Ct.), and *Sauer v. Canada (Attorney General)*, [2010] O.J. No. 3381, 2010 ONSC 4399, 2010 CarswellOnt 5814 (Ont. S.C.J.)).

46 For instance, *Taylor*, *supra* at note 9; *Ault v. Canada (Attorney General)*, 2011 ONCA 147, 2011 CarswellOnt 1126 (Ont. C.A.); leave to appeal refused 2011 CarswellOnt 10862, 2011 CarswellOnt 10861 (S.C.C.); *O.P.S.E.U. v. Ontario*, 2005 CarswellOnt 1809 (Ont. S.C.J.); and, *Manufacturers Life Insurance Co. v. Pitblado & Hoskin*, 2009 MBCA 83, 2009 CarswellMan 408 (Man. C.A.); leave to appeal refused 2010 CarswellMan 117, 2010 CarswellMan 116 (S.C.C.).

plaintiffs could reasonably rely on them as imposing a duty from the regulator to look after their interests.[47]

### (g) *Holland v. Saskatchewan*[48]

The Supreme Court's 2008 decision in *Holland v. Saskatchewan* is of particular interest to administrative law lawyers, as it illustrates an interesting relationship between administrative law remedies and civil liability. A group of game farmers refused to register in a federal program aimed at preventing chronic wasting disease ("CWD"), because they objected to a broadly worded indemnification and release clause in the registration form. As a result of their refusal to sign the form, the game farmers lost the CWD-free herd certification level previously obtained by them under provincial rules, before the merging of the federal and provincial programs. As a result of the downgrading of certification, both their ability to market their game and the price of their product was reduced, causing a financial loss to the farmers.

The farmers initially commenced an application for judicial review, and established that the impugned indemnification and release clauses had been invalidly included on the registration form. The Queen's Bench judge on judicial review found that the Minister had no legislative authority to make acceptance of these clauses a condition to participate in the CWD program. The applications judge declared that if the applicants otherwise met the certification program conditions, the court's declarations would "serve to remove the earlier impediments", that is, the offending indemnification and release provisions. The government did not appeal from the judicial review decision.

However, even though the applications judge had declared that the government's reduction of the herd status was invalid, the government did not take steps to reconsider the farmers' certification or compensate the farmers for lost revenue. The farmers commenced a class action; at the Supreme Court of Canada the issue was whether the negligence claim could proceed.

To the extent that the claim alleged failure to comply with a statutory duty — that the government and its employees were under a duty of care to ensure the statute/regulations were administered in accordance with law and not to operate in breach of them — the Supreme Court of Canada held that there is no cause of action in tort, citing *Saskatchewan Wheat Pool*.[49] However, the Court upheld the claim to the extent that it was a claim for "negligent failure to implement an adjudicative decree".[50] The Chief Justice held:

> Policy decisions about what acts to perform under a statute do not give rise to liability in negligence. On the other hand, once a decision to act has been made, the government may be liable in negligence for the manner in which

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47 For example, *Abarquez v. Ontario*, 2009 CarswellOnt 2380 (Ont. C.A.); leave to appeal refused 2009 CarswellOnt 7965, 2009 CarswellOnt 7964 (S.C.C.); and *Williams v. Canada (Attorney General)*, 2009 ONCA 378, 2009 CarswellOnt 2378 (Ont. C.A.); leave to appeal refused 2009 CarswellOnt 7963, 2009 CarswellOnt 7962 (S.C.C.).

48 *Holland*, *supra* note 6.

49 *Supra* note 10 at paras. 8-9.

50 *Ibid.* at para. 12.

> it *implements* that decision . . . Public authorities are expected to implement a judicial decision. Consequently, implementation of a judicial decision is an "operational" act. It is therefore not clear that an action in negligence cannot succeed on the breach of a duty to implement a judicial decree.[51]

Whether the citizens of Canada would agree that it makes sense that there will be no tort liability where the government decides not to operate in accordance with laws, but there be will for failure to implement a Court order, we leave to another day. However, it is part of the lamentable state of confusion evident in this area of the law.

### (h) *Fullowka v. Royal Oak Ventures Inc.*

*Fullowka*[52] is a significant decision of the Supreme Court, which appears to expand the scope of liability of public authorities. The issue was in part whether the Government of the Northwest Territories would be liable to families of miners killed when a striking miner exploded a bomb in a mine shaft in Yellowknife during a strike. The trial court held the Government liable.[53] The Court of Appeal held that an action could not be maintained because the cause of the deaths was the intentional criminal act of a third party.[54] The Supreme Court decided that the Government did owe a duty of care in negligence, but was not liable on the facts of this case primarily due to the receipt of legal advice.

*Fullowka* involved a violent strike by miners. The striking workers took control of much of the mine, entered the mine on occasion, threatened replacement workers, engaged in acts of arson, vandalism, and other violent acts, and damaged property using explosive devices. Ultimately, a fired striker who had evaded security surreptitiously entered the mine and set an explosive device which was detonated by a trip wire and killed nine miners. The survivors sued the mine owner, its security firm, and the Government of the Northwest Territories as regulator, for failing to prevent the murders. The union was also sued.

With respect to the Government, the plaintiffs alleged that the Government and its individual officers (Minister of Safety and Public Services, and Chief Inspector Mines), failed in their duties to the murdered miners to adopt and implement policies and procedures that would maintain safe working conditions in the mine, and to order cessation of work at the mine until it was safe. Section 42 of the *Mining Safety Act* contained mandatory language that a mining inspector "shall . . . order the immediate cessation of work in . . . a mine . . . that the inspector considers unsafe", and the inspectors also had a duty under s. 43 to give notice of management of "any matter, thing or practice . . .that, in the opinion of the inspector, is

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51 *Ibid.* at para. 14.

52 *Fullowka*, *supra* note 3.

53 *Fullowka v. Royal Oak Ventures Inc.*, [2005] N.W.T.J. No. 57, 2005 CarswellNWT 55, 2005 NWTSC 60 (N.W.T. S.C.).

54 *Fullowka v. Royal Oak Ventures Inc.*, [2008] N.W.T.J. No. 27, 2008 CarswellNWT 32 (N.W.T. C.A.); additional reasons 2008 CarswellNWT 71 (N.W.T. C.A.); affirmed 2010 CarswellNWT 9, 2010 CarswellNWT 10 (S.C.C.).

dangerous".[55]

The Supreme Court held that the Government did owe a duty of care to the miners, based on both the statute and the day-to-day actions of the mining inspectors during the strike. The Court considered the three aspects of a duty of care analysis: foreseeability, proximity, and residual policy considerations that might negate a duty of care. On the issue of foreseeability, the Court upheld the trial judge's finding that the killing of miners "was the very kind of thing that was likely to happen", given the awareness of the mine safety division of the prior violence, including explosions, at the site. Thus, the harm was foreseeable.

The Court then held there was a sufficiently close and direct relationship between the inspectors and the miners (proximity) to found a duty of care. Emphasizing that the statute is the source of a duty, the Court looked to the legislation governing workplace safety in mines, which gave inspectors and the Government the power to shut down the mine if it proved unsafe. As importantly, the Court relied on the actual relationship between Government mine inspectors and the deceased miners in holding that this relationship gave rise to a duty of care. The Court found that the relationship between the inspectors and the miners was considerably closer and more direct than the relationships at issue in the *Edwards* and *Cooper* cases. The Court relied on three primary factors:

> (1) The group of mine workers to whom the duty was owed was a smaller and more clearly defined group than was in the case in *Cooper* or *Edwards*, where the duties would have been to the public at large — all clients of all lawyers and mortgage brokers;
>
> (2) The mining inspectors had much more direct and personal dealing with the deceased miners, and "the existence, or absence, of personal contact is significant". Visits by inspectors to the mine during the strike were "almost daily" occurrences, 11 official inspections were conducted, and during tours of the mine, an inspector was accompanied by a member of the occupational health and safety committee; and
>
> (3) The inspectors' statutory duties related directly to the conduct of the miners themselves, whereas the Law Society in *Edwards* and the Registrar in *Cooper* had no direct regulatory authority over the claimants who were the clients of the regulated lawyers and mortgage brokers.

The Court also discussed a number of negligent inspection cases, which established that once a delegate elects to exercise a statutory power (such as an inspection), there is a duty at the operational level to use care in doing so. Thus, the public actor owes a duty of care to all who might be injured by a negligent inspection. The Court also reviewed cases illustrating that where a decision to act or exercise a power is discretionary, "inaction for no reason or inaction for an improper reason cannot be a policy decision taken in the *bona fide* exercise of discretion".

The Court found that the inspectors had a "clear and well-substantiated belief

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55 *Mining Safety Act*, R.S.N.W.T. 1988, c. M-13; *Mining Safety Regulations*, R.R.N.W.T. 1990, c. M-16.

that the mine was unsafe", and concluded that:[56]

> To sum up, the mine inspectors had a statutory duty to inspect the mine and to order the cessation of work if they considered it unsafe. In exercising this statutory power, the inspectors had been physically present in the mine on many occasions, had identified specific and serious risks to an identified group of workers and knew that the steps being taken by management and Pinkerton's to maintain safe working conditions were wholly ineffectual. In my view, the trial judge did not err in finding that there was a sufficiently close and direct relationship between the inspectors to give rise to a *prima facie* duty of care.

The Court then held that there were no broad policy considerations that would make the imposition of a duty of care unwise in this case. The Court held that "In order to trump the existence of what would otherwise be a duty of care (foreseeability and proximity having been established), these residual policy considerations must be more than speculative. They must be compelling; a real potential for negative consequences of imposing the duty of care must be apparent".[57] The Court rejected the concern about "indeterminate liability", since the duty here was to a "finite group of miners working in the mine which the inspectors had inspected repeatedly". The Court also rejected the concern about conflicting duties, holding that any such conflict must be between the duty proposed and an overarching public duty, and it must pose a real potential for negative policy consequences, and cannot be speculative.[58]

The most remarkable aspect of the *Fullowka* decision may be in the express recognition that the statute setting out a public authority's powers and discretion is **not** the only source of a public authority's private law duties. Thus, in less than ten years after releasing its watershed *Cooper* and *Edwards* decisions, the Supreme Court has delicately shelved the more definitive *Cooper* and *Edwards* language to the effect that the statute is the only source of a public actor's private duties. It is this strand of reasoning that was taken up recently in *Taylor*, with the court there holding (as the present paper argues forcefully earlier) that statutes, of course, rarely contain the language of duty and rarely can be looked to as the source of a private law duty of care.[59] In that case, the Court of Appeal, after an exhaustive analysis of the legislation and regulations governing Health Canada, concluded that these did not impose on Health Canada a duty to look after patients being implanted with medical devices coming under Health Canada's mandate to oversee the safety of those devices.[60] Having so found, the court held that the applicable legislative scheme does set out the groundwork for the duty of care analysis, but where this legislation does not foreclose the existence of a duty of care, the existence of any duties depends on "the interactions between the regulator and the plaintiff", an inquiry the court held as "necessarily fact-specific".[61] In so holding,

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56 *Fullowka*, *supra* note 3 at para. 55.

57 *Ibid.* at para. 57.

58 *Ibid.* at para. 73.

59 *Supra* note 8 at para. 78.

60 *Ibid.* at paras. 49-62.

61 *Ibid.* at paras. 79-80.

the Court of Appeal had to deal with the delicate task of explaining how it is that Health Canada in *Taylor* might owe negligence duties to patients when it had held in *Attis* and *Drady*[62] that Health Canada could not owe such duties (Remarkably, the *Drady* case concerned the same type of medical device, and Mr. Drady had at one time been a co-representative plaintiff with Mr. Taylor.) Ultimately, the court concluded that the *Attis* and *Drady* Statements of Claim had simply failed to allege any facts which might show interactions between Health Canada and the plaintiffs, and it was this failure that distinguished those cases from *Taylor*.[63]

Returning to *Fullowka*, the Supreme Court ultimately found that the Government had not breached its duty of care. Essentially, the Government was found not to be liable because it had relied in good faith on legal advice that the Government lacked the power to shut down the mine in the circumstances. The legal advice was essentially that an order to close the mines was outside the jurisdiction of the Mine Safety Division, because as strike-related violence, the order would more properly be made by the R.C.M.P. (as a criminal matter), or by the Labour Board (as a labour relations matter.) The Supreme Court agreed with the trial judge that the legal advice was erroneous. The legislation states that an inspector "shall . . . order the immediate cessation of work in . . . a mine . . . that the inspector considers unsafe". Justice Cromwell stated:

> I am not at all persuaded that it was beyond the statutory jurisdiction of the inspectors to act in the extraordinary situation that presented itself here. They had a clear and well-substantiated belief that the mine was unsafe. As they put it in a report more than three months before the fatal blast, "the lack of security at the mine site is endangering the occupational health and safety of employees".

However, the Court held that: "It will rarely be negligent for officials to refrain from taking discretionary actions that they have been advised by counsel, whose competence and good faith in giving the advice they have no reason to doubt, are beyond their statutory authority".[64]

This has the potential to create ethical issues for counsel advising public bodies on their jurisdiction, since it now appears that legal advice may be a powerful shield against claims of negligence. Further, the decision raises significant concerns as to the burden of the loss caused by negligent administrative action. As between the families of deceased miners who lost their loved ones due to clearly bad legal advice and the government that took that advice and would have, but for the advice, shut down the mine, the Court places the loss caused by those lawyers on the families' shoulders. One would think that lawyers do not have the power to make legal what is not by simply saying that they think it is legal. Typically courts (including the Supreme Court) will not allow legal advice to be used as a defence but will allow the defendant who takes negligent advice to claim contribution against the lawyer.[65]

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62 *Supra* note 43.

63 *Supra* note 8 at paras. 92–94.

64 *Ibid.* at para. 89.

65 *Beals v. Saldanha*, [2003] S.C.J. No. 77, 2003 CarswellOnt 5102, 2003 CarswellOnt 5101 at paras. 36, 69, and 126 (S.C.C.); *Taubner-De Pape v. De Pape*, [1998] M.J. No.

### (i) *R. v. Imperial Tobacco Canada Ltd.*

In *Knight v. Imperial Tobacco Canada Ltd.*,[66] the Supreme Court heard a joint appeal from two related British Columbia cases: *Canada v. Imperial Tobacco Canada Ltd.*[67] and *British Columbia v. Imperial Tobacco Canada Ltd.*[68] By way of background, the first case from the British Columbia Court of Appeal, *British Columbia v. Imperial Tobacco Canada Ltd.*,[69] was in relation to British Columbia's *Tobacco Damages and Health Care Costs Recovery Act*. The British Columbia government, under this legislation, sought recovery of health care costs from Imperial Tobacco. Imperial Tobacco, in turn, sought to have Canada added as a third party, as they believed the actions of the Canadian government caused or contributed to the damages being claimed. Canada had promoted and benefitted from advertising certain types of cigarettes as light and mild that were just as harmful as other cigarettes. Imperial Tobacco argued on that basis that Canada's liability was the same as its own. The lower court struck the third party notice. The Court of Appeal restored it on the basis that it was not plain and obvious that Canada did not owe duty of care to British Columbia.

The second case, *British Columbia v. Imperial Tobacco Canada Ltd.*,[70] was a class action by people who had smoked Imperial Tobacco's light and mild cigarettes. They were seeking a refund of monies paid for these cigarettes on the basis that Imperial Tobacco had misrepresented the relative safety of those cigarettes. As above, Imperial Tobacco sought to have Canada added as a third party for the same reasons as above. The lower courts struck the third-party notice but the Court of Appeal restored it, again, because it was not plain and obvious that Canada did not owe a duty of care to persons who smoked those cigarettes.

On appeal from both decisions, the Supreme Court considered directly whether there was a sufficiently proximate relationship either between Canada and consumers or between Canada and tobacco companies to find a *prima facie* duty of case in either case. The Court's analysis in this case is therefore instructive as to the extent to which government regulators could be liable for promoting certain activities to the public at large or to working with an industry to promote seemingly less harmful products.

With regard to the first of these relationships (Canada and tobacco consumers), the Court simply notes that Canada had no direct interactions with members of the plaintiff class other than statements to the general public that low-tar cigarettes

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317, 1998 CarswellMan 281 (Man. C.A.); *Cervo v. Raimondo*, [2006] O.J. No. 4378 2006 CarswellOnt 6735 at paras. 44–47 (Ont. C.A.); and, *Bank of Nova Scotia v. Omn Construction Co.*, [1983] S.J. No. 279, 1983 CarswellSask 151 (Sask. C.A.).

66 *Knight v. Imperial Tobacco Canada Ltd.*, (sub nom. *British Columbia v. Imperia Tobacco Canada Ltd.)* 2011 SCC 42, 2011 CarswellBC 1969, 2011 CarswellBC 196( (S.C.C.).

67 [2010] S.C.C.A. No. 41, 2010 CarswellBC 1268, 2010 CarswellBC 1269 (S.C.C.); al lowed leave to appeal from 2009 BCCA 541, 2009 CarswellBC 3300 (B.C. C.A.).

68 [2010] S.C.C.A. No. 43, 2010 CarswellBC 1270, 2010 CarswellBC 1271 (S.C.C.); al lowed leave to appeal from 2009 BCCA 540, 2009 CarswellBC 3307 (B.C. C.A.).

69 2009 BCCA 540, 2009 CarswellBC 3307 (B.C. C.A.) [*Imperial Tobacco*].

70 2009 BCCA 541, 2009 CarswellBC 3300 (B.C. C.A.) [*Knight*].

were believed to be less hazardous than the conventional variety. Additionally, the court observes that "the relevant statues establish only general duties to the public, and no private law duties to consumers".[71] Citing with approval the Ontario Court of Appeal's decision in *Eliopoulos Estate*, the Court therefore concludes that the government's exercise of its discretionary powers in the public interest did not here result in any private-law duties to specific individuals.

With regard to the second relationship (Canada and tobacco companies), the Court's reasoning is considerably more nuanced. In its pleadings, Imperial Tobacco alleged that "Canada went beyond its role as regulator of industry players and entered into a relationship of advising and assisting the companies in reducing harm to their consumers".[72] Assuming this to be true, the Court found that "Canada's interactions with the manufacturers goes far beyond the sort of statements made by Canada to the public at large",[73] and would be sufficiently proximate to disclose a *prima facie* duty of care in negligent misrepresentation.

Nevertheless, the Court ultimately declined to find a binding duty of care in this case for policy reasons.[74] At its core, the Court felt that the government's actions stemmed from a broader policy initiative to direct smokers that could not be convinced to quit toward lower-tar cigarettes:

> In short, the representations on which the third-party claims rely were part and parcel of a government policy to encourage people who continued to smoke to switch to low-tar cigarettes. This was a "true" or "core" policy, in the sense of a course or principle of action that the government adopted. The government's alleged course of action was adopted at the highest level in the Canadian government, and involved social and economic considerations. Canada, on the pleadings, developed this policy out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease. In my view, it is plain and obvious that the alleged representations were matters of government policy, with the result that the tobacco companies' claims against Canada for negligent misrepresentation must be struck out.[75]

This holding is particularly interesting from the standpoint of a government regulator working closely with leaders in a particular industry, and underlines the statements made earlier that tort law is not meant to second-guess government policy initiatives that are reasonably enforced.

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71 *Imperial Tobacco*, *supra* note 69 at para. 50.

72 *Ibid.* at para. 51.

73 *Ibid.* at para. 54.

74 A very similar conclusion was reached in a recent case of the Nova Scotia Court of Appeal, where it was held that the province's promotion of gambling was explicitly a policy decision, and therefore was deemed immune from being the subject of a tort action by a gambling addict for his reasonably foreseeable losses, *Burrell v. Metropolitan Entertainment Group*, 2011 NSCA 108, 2011 CarswellNS 812 (N.S. C.A.). In particular, see para. 48.

75 *Ibid.* at para. 95.

## (j) Other Cases of Note

Following on the heels of *Fullowka*, the Supreme Court also released another regulatory negligence decision, *Broome v. Prince Edward Island*.[76] In this case, 57 plaintiffs brought an action against an orphanage for the physical and sexual abuse they sustained while residents at the orphanage, and an action against the Prince Edward Island government for negligently failing to ensure their safety. The court did not find that the circumstances of the case and the application of the *Anns/Kamloops* test justified the creation of a new category of a duty of care owed by the government to orphaned children. The court also determined that the orphanage was privately owned, not government funded or run. The court also held there was no statutory duty imposed by the legislation, nor a duty owed to all the children at the orphanage from the fact that the government placed some of their wards there.[77] However, the court distinguished an important point and ruled that there was a duty of care owed to the children placed in the home by the government. The precedential value of the case is limited as the Court emphasized that their findings were based on an extremely limited factual record and that this, in and of itself, limited the value of their findings.

The Supreme Court had granted leave to appeal last year in *Berensden v. Ontario*.[78] In this case, the owners of a dairy farm experienced difficulties with their cattle. This was allegedly because of water contamination that resulted from buried asphalt and concrete waste from a highway reconstruction project. Testing showed the water did not exceed the level of contaminants considered safe for human consumption. However, when the owners complained to the Ontario government, an alternate water source was provided. But, once the Ministry of Environment conducted further testing and declared the water from the original sources safe, the government stopped providing the alternate water source. The appellant sued the government for negligently depositing the waste and then failing to remove the contamination. The trial judge awarded damages of $1,732,400. When the government appealed to the Court of Appeal, the Court allowed the appeal, set aside the trial judgment, and dismissed the action. After *Fullowka*, it would have been particularly interesting to see where the Supreme Court went with this judgment, but unfortunately this case was discontinued, so we will not have the benefit of the Court's judgment.[79]

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76 2010 SCC 11, 2010 CarswellPEI 20, 2010 CarswellPEI 21 (S.C.C.).

77 This reasoning is consistent with the conclusion, though on different reasoning, in *Aksidan v. Henley*, 2008 CarswellBC 185, [2008] B.C.J. No. 178 (B.C. C.A.) where the court found that the government was not liable for acts of abuse students experienced while at a school. The school here was not under the direct control of the government. Contrast this with cases where the government defendant managed the school where the plaintiff attended, with courts holding that the government owed a negligence duty of care: *Seed v. Ontario* (2012), 2012 ONSC 2681, 2012 CarswellOnt 5544 (Ont. S.C.J.); affirming *Slark (Litigation guardian of) v. Ontario*, 2010 ONSC 1726, 2010 CarswellOnt 9465, 6 C.P.C. (7th) 168 (Ont. S.C.J.); leave to appeal refused 2010 ONSC 6131, 2010 CarswellOnt 9235, 6 C.P.C. (7th) 221 (Ont. Div. Ct.).

78 [2010] S.C.C.A. No. 24, 2010 CarswellOnt 3449, 2010 CarswellOnt 3448 (S.C.C.).

79 The notice of discontinuance was filed January 24, 2011.

Though on a slightly different point, the Supreme Court has recently released a series of six decisions, often referred to as the "to judicially review or sue" decisions.[80] All six of the cases involved the issue of whether a party had to apply for judicial review of an administrative/government decision before they could sue under private law. Three of the six cases involved negligence or negligent misrepresentation claims.[81] In all of the cases, the Supreme Court determined that it was not necessary to judicially review before suing. In *TeleZone*, for example, the Court determined that the remedies provided through judicial review would be insufficient, particularly where the claim was essentially about monetary loss. *TeleZone* also canvassed the issue of jurisdiction, and whether the Ontario Superior Court had concurrent jurisdiction to hear private law claims against a federal administrative body. After a lengthy analysis of the issue, the Supreme Court said that "the provincial superior court should not in general decline jurisdiction on the basis that the claim looks like a case that should be pursued on judicial review".[82]

Finally, on May 12, 2011 the Supreme Court released its decision in *Elder Advocates*, a proposed class action in which elderly residents of Alberta's long term care facilities alleged that the government artificially inflated the accommodation charges to subsidize the cost of medical expenses, and the Province of Alberta and Regional Health Authorities who administered and operated Alberta's health care regime failed to ensure that the accommodation charges were used exclusively for that purpose. On the negligence claim, the Court held that:

> The pleadings do not support a negligence claim. While the pleadings arguably evoke negligence in auditing, supervising, monitoring and administering the funds related to the accommodation charges, the legislative scheme does not impose a duty of care on Alberta. While the Minister has a general duty, under the *Alberta Health Insurance Act*, to provide insured health care services, the plaintiffs have failed to point to any duty to audit, supervise, monitor or administer the funds related to the accommodation charges. Similarly, the *Nursing Homes Act* and its regulations impose no positive duty on the Crown, but grant only permissive monitoring powers. The same is true of the *Regional Health Authorities Act* and the *Hospitals Act* and their accompanying regulations. Furthermore, in the absence of a statutory duty, the fact that Alberta may have audited, supervised, monitored and generally administered the accommodation fees objected to does not create sufficient proximity to impose a prima facie duty of care. The specific acts alleged fall under the rubric of administration of the scheme. The mere supplying of a service is insufficient, without more, to establish a relationship of proximity between the government and the claimants.

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80 See Angela J. Green, "To Judicially Review or Sue" (2010) 23 Can. J. Admin. L. & Prac. 211.

81 Those cases are: *Canada (Attorney General) v. TeleZone Inc.*, [2009] S.C.C.A. No. 77, 2009 CarswellOnt 3493, 2009 CarswellOnt 3492 (S.C.C.) [*TeleZone*]; *Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture & Agri-Food)*, [2010] S.C.J. No. 64, 2010 CarswellNat 4834, 2010 CarswellNat 4835 (S.C.C.); and, *Nu-Pharm Inc. v. Canada*, [2010] S.C.J. No. 65, 2010 CarswellNat 4836, 2010 CarswellNat 4837 (S.C.C.).

82 *Ibid.* at para. 76.

The Court struck out the claims in breach of fiduciary duty, negligence, and bad faith exercise of discretion, but allowed the unjust enrichment claim and a *Charter* s. 15 claim to proceed to trial.

In Ontario there have been some recent successes for plaintiffs outside of the *Hill/Finney* scenarios. In *Heaslip*,[83] the Ontario Court of Appeal held that the family members of a deceased child could sue Ontario for failing to follow its own policy manual in handling calls for medical assistance. Here, Ontario allegedly failed to follow its policies by negligently not calling for an air ambulance after the deceased injured himself tobogganing. In *Glover*,[84] a motions judge allowed the plaintiffs to proceed with a class action against the City of Toronto over allegedly negligently testing and maintaining a care home's water tower, which negligence supposedly contributed to a failure to detect an outbreak of Legionnaire's disease that killed 23 residents of that care home. In *Giroux*,[85] the parents and sister of a woman who married one of her teachers after she graduated have been allowed to claim that this teacher negligently inflicted emotional and psychological harm on them in using the sister to gain access to the teacher's now wife.

## (k) Cases to Watch

It will be particularly interesting to see how the Supreme Court rules in future cases in light of the very recent decision of the Ontario Court of Appeal, *Ault v. Canada (Attorney General)*.[86] In *Ault*, the Court of Appeal upheld a lower court judgment holding that Canada owed a duty of care to seven former employees, and was liable for negligently misrepresenting an opportunity to change employment which included a transfer of their pension monies to a private pension plan by way of a "reciprocal transfer agreement" at substantial benefit to the employees. However, after the employees changed employment at a substantially lower salary to a company called Loba, which had a reciprocal transfer agreement with Canada, the employees found out the arrangements were under investigation by the R.C.M.P. and the Canada Revenue Agency which was known to Canada. Loba's pension plan was ultimately revoked and the pension monies were never transferred. The Court of Appeal determined that the longstanding employment relationship between the employees and Canada grounded a duty of care,[87] as did Canada's role as administrator of the employee's pension plan.[88] Canada was found liable for negligent misrepresentation. The Supreme Court has since denied Canada's leave to appeal application.

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83 *Heaslip Estate v. Mansfield Ski Club Inc.*, 2009 ONCA 594, [2009] O.J. No. 3185, 2009 CarswellOnt 4401 (Ont. C.A.) [*Heaslip*].

84 *Glover v. Toronto (City)*, [2009] O.J. No. 1523, 2009 CarswellOnt 1985 (Ont. S.C.J.); leave to appeal refused 2010 CarswellOnt 2466, 2010 ONSC 2366 (Ont. Div. Ct.) [*Glover*].

85 *Giroux v. Doré*, 2010 ONCA 66, [2010] O.J. No. 289, 2010 CarswellOnt 353 (Ont. C.A.) [*Giroux*].

86 2011 ONCA 147, 2011 CarswellOnt 1126 (Ont. C.A.); leave to appeal refused 2011 CarswellOnt 10862, 2011 CarswellOnt 10861 (S.C.C.) [*Ault*].

87 *Ibid.* at para. 35.

88 *Ibid.* at para. 36.

It will also be interesting to see if the Supreme Court takes on directly the reasoning in *Taylor*, by either agreeing that Health Canada may owe patients duties to ensure the safety of medical devices in particular cases or by adopting the pre-*Taylor* more conservative strand of reasoning in *Attis* and *Drady* holding that such a duty could not arise.

Also interesting to follow will be *Canada (Attorney General) v. Anderson*.[89] The plaintiff in that case sought to certify a class action against the federal government for its funding and involvement with five residential schools in Newfoundland and Labrador over several decades. The action was certified at trial, and the Crown's appeal was recently denied by the Court of Appeal. In its decision, the Court specifically noted the "special constitutional relationship" between the federal Crown and Canada's aboriginal peoples, as well as the many operational and administrative obligations held by the federal Crown over the residential schools in question.

Finally, in *Leroux v. Canada (Revenue Agency)*, the British Columbia Court of Appeal held that the Canada Revenue Agency may owe duties to taxpayers to not negligently administer the *Income Tax Act* in assessing a taxpayer's potential tax liability.[90] If this finding is upheld after a trial, the implications for the administration of tax legislation could be substantial.

## 4. REDUCING THE ZONE OF POTENTIAL LIABILITY

While the cases are contradictory, in a state of lamentable confusion, and there is no legislative solution under consideration, the following are some general comments regarding steps that administrative decision-makers should consider to reduce the prospect of liability in negligence:

- *Complaints/Public Protection*: Any regulator with a public protection/licensing mandate must properly record, monitor and respond to complaints from the public (*Finney*);
- *Assumption of liability*: The courts look to representations from the regulator that a particularized group will be protected by the regulator (*Sauer* and its progeny). As a result, it is very important to train staff who deal with members of the public, and to record and monitor staff interactions with members of the public. All public statements (website, Chair and Minister's speeches, etc.) are important. The content and reach of rules, policies and guidelines may also be construed as an assumption of liability. Regulators may assume a liability through public statements over and above statutory duties;
- *Investigations*: Any regulator that conducts investigations and inspections will have to pay particular attention to proper conduct of investigations (*Hill*, *Fullowka*);
- *Enforcement of statutory requirements*: We hope that most regulators do enforce statutory requirements. That is why regulators are given powers

89 *Canada (Attorney General) v. Anderson*, 2011 NLCA 82, 2011 CarswellNfld 435 (N.L. C.A.).

90 [2012] B.C.J. No. 235, 2012 CarswellBC 241 (B.C. C.A.).

and duties. From a governance and accountability perspective, enforcement certainly is desirable. However, a regulator will not necessarily be liable for a policy decision to not act in accordance with a statute (*Holland*), or to not exercise its discretion to require compliance with statutory provisions. On this point, the Ontario Court of Appeal held in *Street v. Ontario Racing Commission*[91] that there was no duty of care owed where a statutory discretion permits, but does not require, enforcement, and where a decision respecting the extent of compliance required the Commission to consider a "myriad of objectives consistent with public rather than private law duties";

- *Policies and Procedures*: Establishing and following sensible policies and procedures in areas of statutory duties are important evidence of how the regulator met the standard of care in a particular case.

These suggestions are all elements of a proper risk management strategy. The key elements of any risk management strategy should be applied to the area of regulatory negligence — generally including identification, assessment and prioritization, management/addressing the risk, and review and reporting. Ultimately, this will improve the ability of the administrative body to provide better public services, and reduce the potential for harm resulting from substandard administrative action.

## 5. REFORM?

The reality is that the situation outlined above, and the need for pre-emptive action and vigilance, is not likely going to change any time soon. Attempts at reform in the United Kingdom, which resulted in a significant consultation paper published by its Law Commission in 2008 recommending some sweeping changes to public authority liability in negligence,[92] have largely been ignored. As of the date of publication, the Law Commission continues to inform the public that a response from Government has not yet been received.[93] Had the Commission's recommendations been adopted, a fairly sweeping reform to negligence law in favour of judging administrative actors' liability by reference to traditional principles of public law liability would have ensued, with liability being judged first by reference to whether the authorities' actions were invalid from a public law perspective. Without such reform in Canada, the uncomfortable application of private law principles to public authorities outlined above will continue to dominate the discourse.

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91 2008 ONCA 10, [2008] O.J. No. 37, 2008 CarswellOnt 42 (Ont. C.A.).

92 The Law Commission, Consultation Paper No. 187, *Administrative Redress: Public Bodies and the Citizen*, June 17, 2008.

93 For a more detailed account of the Law Commission's work and the arguments for and against the creation of a simplified "public law tort" compensating plaintiffs for essentially administratively invalid governmental action, see: M. Aronson, "Misfeasance in Public Office: A Very Peculiar Tort", (2011) 35 Melbourne U.L. Rev. 1 at pp. 2-3.

## 6. CONCLUSION

It is difficult to find the right balance in the modern regulatory state between protecting the rights of citizens and providing the necessary scope for government action. Continued vigilance by administrative lawyers is essential, to protect members of the public from harm, to discharge the statutory mandate, and to fulfill public expectations.