

A HANDBOOK FOR PRACTITIONERS | CANADA

Civil Liability for Human Rights Violations



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*The authors are grateful to **Darby O'Hara** for his tireless research support in preparing this country report.

FREQUENTLY USED ABBREVIATIONS

CEPA	Canadian Environmental Protection Act
Charter	Canadian Charter of Rights and Freedoms
Québec Charter	Québec's Charter of Human Rights and Freedoms

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Publication Information: This country report is one of the 19 reports prepared for a [comparative project on civil liability for human rights violations](#) led by the Bonavero Institute of Human Rights. It follows a unified template, and some terms in this report were defined consistently for the purposes of the project. To access other country reports and introduction from the project team, please [click here](#).

All online resources cited and/or referenced in this report were accessed on 1 April 2022. Publication Date: October 2022

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CONTENTS



RETURN TO THIS
TABLE OF CONTENTS




VIEW THE START OF
THE CURRENT SECTION



INTERACTIVE

TABLE OF CONTENTS

Page	Content	Average Read Time
P4	Overview of Jurisdiction	1 minute 
P5	Introduction	2 minutes
P6	General Questions	1 minute
P7	Question 1	20 minutes
P19	Question 2	4 minutes
P22	Question 3	2 minutes
P23	Question 4	3 minutes
P24	Question 5	4 minutes
P27	Question 6	5 minutes
P29	Question 7	1 minute
P30	Question 8	2 minutes
P32	Case Scenarios	1 minute
P33	Case Scenario 1	6 minutes
P36	Case Scenario 2	8 minutes
P40	Case Scenario 3	3 minutes



CANADA



There are many legal traditions in Canada including the common law, civil law, and numerous types of Indigenous law. However, Canada is still typically described as a bijural country composed of 14 jurisdictions. Québec is the only province using the civil law system for private law matters. All other provinces and territories operate under the common law and federal laws must be interpreted harmoniously with both legal systems. Across these jurisdictions, remedies may be available through a complex web of statutory provisions, common law and civil law causes of action, and pursuant to guarantees entrenched in the *Canadian Charter of Rights and Freedoms*. The Canadian legal system is generally considered fair and free from political interference. However, the high cost of litigation significantly limits access to redress for human rights violations.

4

INDICES

12/167

Democracy Index
2021 Ranking

98/100

Freedom House
2022 Score

13/180

Transparency International
Corruption Index 2021 Ranking

The focus jurisdictions within the scope of the project have been selected to maximise diversity and representativeness. They reflect both common law and civil law traditions, a wide geographic distribution, different political systems, and varying levels of socio-economic development. The latter factors may impact the overall efficacy of the law on civil remedies and respect for the rule of law as a value. To provide useful context about the jurisdiction, each report indicates the relevant ranking or score of that jurisdiction in three leading global indices on democracy and the rule of law: [Democracy Index](#) by the Economist Intelligence Unit (measures the state of democracy in 167 states and territories); [Freedom House](#) (rates people's access to political rights and civil liberties with 100 being an optimal score); and [Transparency International Corruption Index](#) (ranks 180 countries by their perceived levels of public sector corruption).



CIVIL LIABILITY FOR HUMAN RIGHTS VIOLATIONS

Introduction

1. The Canadian legal system includes a diversity of protections for human rights. The most foundational source, the [Canadian Charter of Rights and Freedoms](#) (the 'Charter'), is constitutionally entrenched and guarantees a range of fundamental rights and freedoms from government interference (eg the freedoms of conscience and religion, expression, assembly, and association; democratic rights; protections against certain deprivations of life, liberty and security of the person; rights specific to the criminal justice system; the right to equality; and official language rights). Human rights are also guaranteed in both public and private relations through human rights legislation enacted federally as well as in every province and territory, although the focus of this legislation is typically anti-discrimination.
2. With respect to the specific human rights violations under study – assault or unlawful arrest and detention; environmental harm; and harmful or unfair labour conditions – remedies are available through a complex array of statutory provisions, common law and civil law causes of action, and Charter guarantees.
3. International human rights law influences Canadian law in a variety of ways, notably: customary international law is directly incorporated into Canadian law, unless displaced by statute (which has recently opened up the possibility of novel tort claims grounded in violations of international peremptory norms); Canadian legislation is presumed to conform with Canada's international customary and treaty commitments; fundamental values, including international human rights norms, structure the exercise of discretionary powers; and courts have affirmed that Charter rights should be interpreted to provide at least as robust guarantees as those found in international human rights documents that Canada has ratified.
4. While the Canadian legal system is generally considered fair and free from political interference, the high cost of litigation is a significant barrier to those seeking reparations through civil litigation. Further, the incidence of human rights violations continues to disproportionately impact marginalised communities: eg Indigenous and racialised people face heightened rates of criminalisation and incarceration, and their communities are all too often subjected to environmental harms. For these reasons and many others, including several discussed in paragraphs [19]-[20], [25], [34], [42]-[43], and [46]-[57] below, Canada often falls short on providing adequate protection to those who need it most.
5. With respect to private law, all provinces and territories in Canada except Québec are common law jurisdictions – Québec is a civil law jurisdiction. While it is not possible to canvass the law in each of Canada's 14 jurisdictions, there are broad similarities in the law of civil remedies in Canada's common law jurisdictions. Thus, we have endeavoured to illustrate the law primarily by way of examples from the federal system and from Ontario, Canada's most populous province. We have also included some brief discussion of the more salient aspects of Québec's civil law system. However, for the purpose of the Case Scenarios, only federal law and the law of Ontario were applied due to project limitations (we also have not examined the intricacies of whether, for particular factual contexts either or both levels of government would have jurisdiction, but have simply assumed jurisdiction). Finally, this text does not address Canada's many Indigenous legal traditions.

General Questions





Can a claim under the law of civil remedies in your jurisdiction be brought against public bodies, corporations and/or individuals when one of the three defined harms results in human rights violations?

Assault or unlawful arrest and detention

6. Plaintiffs who have experienced an attack inflicting physical harm, credible threats of injury, or have had their movements restricted may seek a remedy through the following common law torts, which can be brought against individuals, corporations, and public bodies outside of Québec:
- **Battery** may be available when a person directly¹ and ‘intentionally [or negligently²] causes a harmful or offensive contact with another person³ (or an extension of that person⁴). For example, if a police officer unlawfully grabs and pushes a person.⁵
 - **Assault** may be available when a person directly and intentionally creates the apprehension of imminent harmful or offensive contact (ie the threat of imminent battery).⁶ Battery will usually include assault unless it is committed by surprise, but assault can also occur in the absence of battery if contact is never made.⁷
 - **False imprisonment or arrest** may be available when a person intentionally⁸ and directly detains or ‘confines another person within fixed boundaries⁹ even where that person does not use physical force¹⁰ or the threat of force (eg through assertion of legal authority).¹¹ A person who intentionally and without legal justification stops or restrains another person commits a false arrest.¹² False arrest is one form of the tort of false imprisonment. Thus, an unlawful arrest (an arrest made without legal authority) qualifies as both a false arrest and a false imprisonment.¹³
 - **Negligence** may be available when a person owes a duty of care to another but fails to meet the required standard of care (ie behaves carelessly) causing reasonably foreseeable injury or loss. Negligence can take many forms in this context; for instance, claims can be made against police officers and other public officials for

1 *Non-Marine Underwriters, Lloyd's of London v Scalera* 2000 SCC 24 (Supreme Court of Canada) [8].

2 Despite the tort commonly being defined with reference to intent, negligent battery is possible. *ibid* [125]–[126].

3 *Shaw v Shaw* 2012 ONSC 590 (Superior Court of Justice of Ontario) [45] citing Allen Linden and Bruce Feldthusen, *Canadian Tort Law* (8th edn, LexisNexis Butterworths 2006) 44.

4 *Parrett v Vanderford et al* 2001 BCSC 23 (Supreme Court of British Columbia) [82] citing Philip H Osborne, *The Law of Torts* (Irwin Law 2000) 1 (eg grabbing a person by their clothing or snatching something from their hands).

5 *Figueiras v Toronto* (Police Services Board) 2015 ONCA 208 (Court of Appeal for Ontario) [140]–[153].

6 *McLean v McLean* 2019 SKCA 15 (Court of Appeal for Saskatchewan) [59] citing Allen Linden and Bruce Feldthusen, *Canadian Tort Law* (10th edn, LexisNexis 2015) 49; *Calin v Calin* 2019 ONSC 3564 (Superior Court of Justice of Ontario) [20].

7 Philip H Osborne, *The Law of Torts* (6th edn, Irwin Law 2020) 273. However, actions only in assault have become uncommon and awards for damages are likely to be modest in the absence of battery or factors justifying an award of punitive damages (at 274).

8 There is some debate about whether false imprisonment must be intentional. *ibid* 275.

9 *Albanese v Franklin et al* 2016 ONSC 6479 (Superior Court of Justice of Ontario) [113] citing Allen M Linden, *Canadian Tort Law* (7th edn, Butterworths 2001).

10 *Kovacs v Ontario Jockey Club* 1995 CanLII 7397 (Ontario Court (General Division)) [47].

11 *Campbell v SS Kresge Co Ltd et al* 1976 CanLII 1275 (Supreme Court of Nova Scotia, Trial Division) 718–719; Osborne (n 7) 275.

12 David Grant Boghosian, *Canadian Law of First Responders' Liability* (LexisNexis Canada 2020) [4].

13 *Jensen v Stemmer et al* 2007 MBCA 42 2007 (Court of Appeal of Manitoba) [64] (concurring reasons of Hamilton JA) referring to Lewis N Klar, *Tort Law* (3rd edn, Thomson Carswell 2003) 55; *Hejls v Breuker* 2020 PECA 7 (Prince Edward Island Court of Appeal) [51]–[52] citing *Kovacs* (n 10) [39].

negligent use of force,¹⁴ negligent investigation,¹⁵ or negligent treatment while in custody (eg for not providing medical treatment).¹⁶

7. While we cannot canvass all possible causes of action in detail here, we note that other causes of action may be available if the circumstances permit, including:
 - **Conspiracy** takes two forms in Canada: predominant purpose conspiracy and unlawful means conspiracy. Predominant purpose conspiracy may be established where ‘the predominant purpose of the defendant’s conduct is to cause injury to the plaintiff using either lawful or unlawful means, and the plaintiff does in fact suffer loss caused by the defendant’s conduct’.¹⁷ On the other hand, unlawful means conspiracy does not require a predominant purpose to injure, but ‘requires that the unlawful conduct in question be directed toward the plaintiff, that the defendant should know that injury to the plaintiff is likely to result, and that the injury to the plaintiff does in fact occur’.¹⁸
 - **Malicious prosecution** will only succeed against prosecutors in ‘exceptional circumstances’ due to the need to protect Crown discretion.¹⁹ Nevertheless, malicious prosecution offers access to remedies to protect the rights of accused persons and qualifies the general rule of prosecutorial immunity.²⁰
 - **Misfeasance in public office** takes two forms: (1) when a public official undertakes conduct specifically intended to injure the plaintiff; and (2) when a public official acts, knowing they lack the legal power to act, and that the act is likely to injure the plaintiff.²¹ In Ontario, leave of the court is required to allege misfeasance in public office.²²
8. Special considerations apply to establishing liability of law enforcement (principles that are more broadly applicable to public bodies are discussed further below at [25]):
 - **Liability of law enforcement:** Police will not incur civil liability if they can demonstrate that their actions were authorised by law (eg through sections 495 or 25 of the Criminal Code,²³ or the common law²⁴). For instance, in the case of assault or battery, paragraph 25(1)(b) of the Criminal Code provides that a police officer is justified in doing what they are required or authorised to do and in using as much force as necessary if they are acting upon reasonable grounds.²⁵
 - In some provinces, provincial officers are also given a form of limited immunity to civil actions. This is the case in British Columbia, where subsection 21(2) of the Police Act will bar civil claims against officers for actions taken in the performance of their duties unless the conduct amounts to dishonesty, gross negligence, or

14 *Robertson and Robertson v Joyce* [1948 CanLII 88](#) (Court of Appeal for Ontario); *Boghosian* (n 12) [59]–[71].

15 *Hill v Hamilton-Wentworth Regional Police Services Board* [2007 SCC 41](#) (Supreme Court of Canada).

16 *Lipscsei v Central Saanich (District)* [1994 CanLII 16701](#) (Supreme Court of British Columbia); *Boghosian* (n 12) [198]–[202].

17 *Pro-Sys Consultants Ltd v Microsoft Corporation* [2013 SCC 57](#) (Supreme Court of Canada) [74].

18 *ibid* [80].

19 *Ontario (Attorney General) v Clark* [2021 SCC 18](#) (Supreme Court of Canada) [36] citing *Proulx v Québec (Attorney General)* [2001 SCC 66](#) (Supreme Court of Canada) [4]. For elements of malicious prosecution, see *Miazga v Kvello Estate* [2009 SCC 51](#) (Supreme Court of Canada) [3].

20 *Clark* (n 19) [34]–[39], [60].

21 *Odhavji Estate v Woodhouse* [2003 SCC 69](#) (Supreme Court of Canada) [23] (In this case the Court declined to strike a claim in misfeasance in public office for police officers’ failure to cooperate with an investigation into a fatal police shooting).

22 Crown Liability and Proceedings Act, [2019, SO 2019, c 7, sch 17](#), s 17 (This is also so in the case of other torts against the Crown based on bad faith).

23 Criminal Code, [RSC 1985, c C-46](#), ss 25 and 495.

24 *Fleming v Ontario* [2019 SCC 45](#) (Supreme Court of Canada) [43]–[48]; *R v Reeves* [2018 SCC 56](#) (Supreme Court of Canada) [77]–[78]; *Boghosian* (n 12) [20]–[28].

25 Criminal Code (n 23) para 25(1)(b). See elements of para 25(1)(b) as explained in *R v Melo* [2018 ONCJ 292](#) (Ontario Court of Justice) [84].

malicious or wilful misconduct (subject to other exceptions).²⁶ However, because most of the torts described in this section are intentional torts, this may not bar access to a remedy.²⁷

9. The next cause of action, which might be described as a constitutional tort, is only available in relation to government action²⁸ because it falls under the umbrella of public law. It is available in all Canadian jurisdictions, including Québec:

- **Subsection 24(1) of the Charter**²⁹ is a constitutional remedy available where there has been a violation of the plaintiff's Charter rights (eg section 9 of the Charter protects against arbitrary detention). In such circumstances, courts are granted a broad discretion to award a remedy 'the court considers appropriate and just in the circumstances' (which may include damages).³⁰

SPOTLIGHT: VANCOUVER (CITY) V WARD

Police received information that someone would be attempting to throw a pie at the Prime Minister during a ceremony.³¹ Police mistakenly identified the plaintiff as the would-be pie thrower. He was arrested, strip-searched, and held in lockup while his car was impounded. He was released shortly thereafter.

At trial, the plaintiff alleged assault, battery, false imprisonment, and negligence, as well as violations of his Charter rights including section 7 (life, liberty, and security of the person); section 8 (unreasonable search or seizure); and section 9 (arbitrary detention or imprisonment).³²

On appeal before the Supreme Court of Canada, the only remaining issue was whether a remedy for Charter breaches should have been awarded, and if so, what quantum.

The Supreme Court of Canada upheld the trial judge's award of CAD 5,000 against the province because the strip search was a violation of section 8 of the Charter.³³ However, the Court found that a declaration that the city violated the plaintiff's section 8 rights by improper seizure of his car was sufficient to meet the objectives of vindication and deterrence.

26 Police Act, [RSBC 1996, c 367](#), s 21.

27 *Ward v Vancouver (City of)* [2003 BCSC 1158](#) (Supreme Court of British Columbia) [12]-[13].

28 *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component* [2009 SCC 31](#) (Supreme Court of Canada) [15]-[16]; *Eldridge v British Columbia (Attorney General)* [\[1997\] 3 SCR 624](#) (Supreme Court of Canada) [35]-[44].

29 Canadian Charter of Rights and Freedoms, part I of the [Constitution Act, 1982](#), being schedule B to the Canada Act 1982 (UK), 1982, c 11, s 24 [Charter].

30 *Doucet-Boudreau v Nova Scotia (Minister of Education)* [2003 SCC 62](#) (Supreme Court of Canada) [52]-[59]; *Vancouver (City) v Ward* [2010 SCC 27](#) (Supreme Court of Canada) [16]-[21].

31 *Vancouver (City)* (n 30).

32 *Ward v City of Vancouver* [2007 BCSC 3](#) (Supreme Court of British Columbia) [3], [35]-[36].

33 *Vancouver (City)* (n 30) [78]-[79]. Charter damages awards can be more significant: see *Elmardy v Toronto Police Services Board* [2017 ONSC 2074](#) (Superior Court of Justice of Ontario) where the plaintiff was awarded CAD 50,000 for violations of the Charter ss 8, 9, 10, and 15, when police racially profiled and unlawfully detained him.

10. Québec’s private law primarily operates under a civil code:

- **The basis for civil liability:** In Québec, a single principle set out in article 1457 of the Civil Code of Québec³⁴ forms the basis for most of the civil remedy regime. The principle requires that the plaintiff demonstrate three constitutive elements of this general principle of civil liability, namely fault, injury, and causal connection.³⁵ Fault is established by reference to an objective standard of conduct – that of the reasonable person.³⁶ This general liability regime applies to corporations, individuals, and public bodies (including police officers using force and making arrests).³⁷
- **Québec’s Charter of Human Rights and Freedoms³⁸ (‘Québec Charter’)** is a quasi-constitutional instrument which applies exclusively in Québec. The Québec Charter applies to disputes between private individuals and between individuals and public bodies. Section 49 of the Québec Charter provides for a variety of remedies for prejudice caused by unlawful interference with the rights safeguarded by the Québec Charter.³⁹ In the context of this harm, the Québec Charter may be invoked by a plaintiff who has suffered physical harm, or threat of injury. For instance, physical or psychological harm may be characterised as an interference with the plaintiff’s security and inviolability under section 1 of the Québec Charter.⁴⁰ When an individual is alleged to have interfered with another’s rights, proof of the general elements of civil liability (fault, injury and causality) will typically be required in order to award compensatory damages (as discussed directly above).⁴¹ However, the Québec Charter may still be used to put an end to ongoing action or practice that is incompatible with the Québec Charter even in the absence of these elements as such intervention is considered ‘in no way related to the law of civil liability’.⁴²

Environmental harm

11. The following causes of action, available at common law, apply to individuals, corporations, and public bodies and are the torts commonly used to establish civil liability in the environmental context:

- **Private nuisance** may be available when an act indirectly causes physical injury to land or substantially interferes with the use or enjoyment of land (or interest in land), where, in light of all the surrounding circumstances, the injury or interference is unreasonable.⁴³ For example, a defendant was found liable in nuisance when dry

³⁴ Civil Code of Québec, [CQLR c CCO-1991](#), art 1457.

³⁵ Jean-Louis Baudouin, Patrice Deslauriers and Benoît Moore, *La responsabilité civile: Principes généraux* (vol 1, 9th edn, Éditions Yvon Blais 2021) [1-101]–[1-104]; Vincent Karim, *Les obligations* (vol 1, 4th edn, Wilson & Lafleur 2015) [2465]–[2466].

³⁶ Baudouin, Deslauriers and Moore (n 35) [1-161], [1-165]; Stéphane Beaulac and Jean-François Gaudreault-Desbiens, ‘Common Law and Civil Law: A Comparative Primer’ (2017) Federation of Law Societies of Canada 20.

³⁷ *Kosioian v Société de transport de Montréal* [2019 SCC 59](#) (Supreme Court of Canada) [42]–[51].

³⁸ Charter of Human Rights and Freedoms, [CQLR c C-12](#). Note that the Québec Charter referred to here is distinct from the Canadian Charter of Rights and Freedoms. Both are applicable in Québec.

³⁹ *ibid* s 49.

⁴⁰ *ibid* s 1.

⁴¹ *Bou Malhab v Diffusion Métromédia CMR inc* [2011 SCC 9](#) (Supreme Court of Canada) [23]; *de Montigny v Brossard* (Succession) [2010 SCC 51](#) (Supreme Court of Canada) [44]; Baudouin, Deslauriers and Moore (n 35) [1-265]; Christian Brunelle and Mélanie Samson, ‘La mise en œuvre des droits et libertés en vertu de la Charte québécoise’ in École du Barreau (ed), *Droit public et administratif: Collection de droit 2019-2020* (vol 8, Yvon Blais 2020) 111–112. However, some authors question whether this is an unduly narrow conception of the impact of the Québec Charter on the availability of compensation (eg Manon Montpetit, *L’atteinte illicite: repenser le droit de la responsabilité en fonction de ses sources* (Éditions Yvon Blais 2015) 191–202.

⁴² *Québec (Commission des droits de la personne et des droits de la jeunesse) v Communauté urbaine de Montréal* [2004 SCC 30](#) (Supreme Court of Canada) [26].

⁴³ *Smith v Inco Limited*, [2011 ONCA 628](#) (Court of Appeal for Ontario) [42] citing *St Pierre v Ontario (Minister of Transportation and Communication)* [\[1987\] 1 SCR 906](#) (Supreme Court of Canada) [10].

cleaning chemicals sank into the ground on the defendant's property and were eventually transmitted by groundwater onto the plaintiff's land, contaminating the plaintiff's groundwater and soil.⁴⁴

- **Trespass to property** may be available when an intentional or careless act causes direct and physical intrusion onto land in the possession of another.⁴⁵ This may include discharging a substance onto land, as long as the requirement of directness is satisfied.⁴⁶ For example, a company was found liable in trespass for spraying the plaintiffs' property with pesticides by airplane.⁴⁷
- **Rylands rule** (strict liability rule from *Rylands v Fletcher*)⁴⁸ may be available when an occupier of land has brought or kept on their land an exceptionally dangerous or mischievous thing in extraordinary or unusual circumstances which escapes causing damages to another's property (or, 'probably', their person);⁴⁹ liability attaches regardless of whether the occupier acted negligently or intentionally.⁵⁰ For example, a construction company was found liable under the *Rylands* rule when gasoline from an underground storage tank leaked and was transported by groundwater to a nearby retail property.⁵¹

SPOTLIGHT: SMITH V INCO

The plaintiffs sought damages through nuisance, trespass, and strict liability against a nickel refinery which had released nickel exhaust fumes, causing nickel to be deposited into the soil of the surrounding properties.⁵² The trial judge rejected that a claim in trespass was established because the intrusion was not direct.⁵³ On appeal, the Court overturned the trial judge's finding of liability in nuisance because the plaintiffs had not demonstrated any harm (ie any detrimental effect on the land or its use by its owners resulting from the accumulation of nickel in the soil).⁵⁴ The plaintiffs also lost their claim under the *Rylands* rule (strict liability) on appeal for the same reason, and because the operation of a nickel refinery was not found to be an extra-hazardous activity constituting a non-natural use of the property,⁵⁵ nor had the nickel particles 'escaped'.⁵⁶

44 *Huang v Fraser Hillary's Limited* 2017 ONSC 1500 (Superior Court of Justice of Ontario) [51]–[55], [118]–[142], upheld on appeal in 2018 ONCA 527 (Court of Appeal for Ontario).

45 *Smith v Inco* 2010 ONSC 3790 (Superior Court of Justice of Ontario) [37], citing *Grace v Fort Erie (City of)* 2003 CanLII 48456 (Superior Court of Justice of Ontario) [86] and *R & G Realty Management inc v Toronto (City)* [2005] OJ No 6093, 2005 CarswellOnt 7857 (Superior Court of Justice of Ontario) [40]. The judgment in *Smith v Inco* 2010 was later reversed on other grounds in *Smith* (n 43).

46 *Smith* (n 45) [38] (explaining 'directness'), reversed on other grounds in *Smith* (n 43). However, trespass has been established in other cases that do not appear to meet this standard of directness: *Doucette v City of Charlottetown* 2022 PECS 11 (Supreme Court of Prince Edward Island) [11]–[28], [33]–[41]; *Canadian Tire Real Estate Ltd v Huron Concrete Supply Ltd* 2014 ONSC 288 (Superior Court of Justice of Ontario) [284]–[294].

47 *Friesen et al v Forest Protection Limited* 1978 CanLII 2759 (New Brunswick Supreme Court, Queen's Bench Division) [1], [33].

48 (1868) LR 3 HL 330 (House of Lords). The *Rylands* rule is discussed in further detail in [38]–[40] of the English report. To access all country reports, please [click here](#).

49 *Smith* (n 43) [68], [84].

50 *ibid* [68]–[113].

51 *Canadian Tire Real Estate Ltd* (n 46) [9]–[11], [284]–[294], [297]. See also *Doucette* (n 46) [113].

52 *Smith* (n 45) overturned in part on appeal in *Smith* (n 43).

53 *ibid* [42] overturned on other grounds in *Smith* (n 43).

54 *ibid* [103] overturned on this point in *Smith* (n 43) [55]–[59].

55 *Smith* (n 43) [103].

56 *ibid* [112]–[114].

- **Negligence** in relation to environmental harm may also be available when a person fails to meet the required standard of care, causing reasonably foreseeable losses or injury to another.⁵⁷ For example, in one case a company that delivered oil used for heating was found to be negligent for having overfilled another company's oil tank despite the existence of an alarm indicating when to stop, causing oil to spill and contaminate the foundation and soil below.⁵⁸ In nearly all provinces, the common law of negligence is qualified by statute, eg Ontario's Negligence Act dealing with contributory negligence and apportionment of damages.⁵⁹
12. The following causes of action may also be available in the context of environmental harm, though more exceptionally:
- **Battery**, as mentioned above at [6], may be available when a person directly causes a harmful or offensive contact with another person. For example, in one case, the Court recognised that a claim in battery brought by tenants had merit because the landlord had kept silent about what he knew were 'unacceptable levels' of arsenic in the water supply, in order to obtain rental income (but the Court did not decide as between negligence or battery in finding liability).⁶⁰
 - **Public nuisance** is similar to private nuisance but arises from 'any activity which unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience'.⁶¹ For a private party to establish public nuisance, they must also satisfy an additional condition: either the private party must prove special damages (beyond those experienced by everyone) or the action must be brought with the Attorney General's consent.⁶² However, in Ontario, this condition has been displaced by statute for persons who have suffered or may suffer direct economic loss or direct personal injury as a result of a public nuisance that caused harm to the environment.⁶³
 - **Riparian rights** may be asserted by a plaintiff whose property borders a natural watercourse because they are 'entitled to have the natural flow of the water without sensible diminution or increase [...] and without sensible alteration in its character or quality'.⁶⁴
13. Beyond the common law, additional rights and corresponding remedies are available by statute. The following causes of action are available under the [Canadian Environmental Protection Act](#) ('CEPA'):
- **Sections 39 and 40 of CEPA** allow a person to bring an action in relation to any contravention of that Act (section 39 provides for injunctive relief for existing or anticipated losses or damage; section 40 provides for compensation).⁶⁵

57 *Mustapha v Culligan of Canada Ltd* [2008 SCC 27](#) (Supreme Court of Canada) [3].

58 *Park Place Centre Ltd v Ultramar Ltd* [2010 NSSC 39](#) (Supreme Court of Nova Scotia) [35], [47], [50]–[51].

59 Negligence Act, [RSO 1990, c N.1](#).

60 *MacDonald v Sebastian* [1987 CanLII 5371](#) (Supreme Court of Nova Scotia, Trial Division) [1]–[3].

61 *Ryan v Victoria (City)* [\[1999\] 1 SCR 201](#) (Supreme Court of Canada) [52] citing Lewis N Klar, *Tort Law* (2nd edn, Carswell 1996).

62 *Sutherland v Vancouver International Airport Authority* [2002 BCCA 416](#) (Court of Appeal for British Columbia) [28]–[29]; *Ryan* (n 61) [52].

63 Environmental Bill of Rights, 1993, [SO 1993, c 28](#), s 103(1).

64 *Mihaylov v Long Beach Residents' Association* [2018 ONSC 14](#) (Superior Court of Justice of Ontario) [11] citing *KVP Co v McKie* [\[1949\] SCR 698](#) (Supreme Court of Canada) 703; Jamie Benidickson, *Environmental Law* (5th edn, Irwin Law 2019) 119; In some Canadian common law jurisdictions, riparian rights have been extinguished by statute – see *Saik'uz First Nation and Stelat'en First Nation v Rio Tinto Alcan inc* [2015 BCCA 154](#) (Court of Appeal for British Columbia) [43]–[47], referring to what is now s 5 of the Water Sustainability Act, [SBC 2014, c 15](#).

65 Canadian Environmental Protection Act, 1999, [SC 1999, c 33](#) ss 39–40.

- **Section 22 of CEPA** creates a cause of action for individuals who have applied to the Minister of the Environment for an investigation,⁶⁶ where ‘the Minister failed to conduct an investigation and report within a reasonable time’; or ‘the Minister’s response to the investigation was unreasonable’.⁶⁷ When the investigative process fails in one of these ways, a person is entitled to bring an action against a defendant who committed an offence under CEPA that ‘caused significant harm to the environment’. These environmental protection actions do not require the plaintiff to have *personally* incurred any loss or harm.
14. Statutory causes of action and remedies have also been enacted by the provinces. For example, in Ontario, the following statutory causes of action are also available:
- **Section 99 of Ontario’s Environmental Protection Act** imposes strict liability for losses caused by spills, failure to carry out a duty under the Act, and more.⁶⁸
 - **Section 84 of Ontario’s Environmental Bill of Rights** provides a right of action against a person who has or will imminently contravene specified acts, regulations or instruments regulating environmental matters⁶⁹ and in doing so has caused or will cause significant harm to a public resource of Ontario.⁷⁰ However, like section 22 of CEPA, the plaintiff must first apply for an investigation.⁷¹
15. On the other hand, provinces have also enacted statutes that limit civil liability for environmental harms. For instance, most provinces have enacted legislation limiting nuisance claims in relation to farm operations.⁷²
16. In Québec, the civil regime and specific legislation dictate the remedies available:
- **Article 1457 of the Civil Code of Québec** provides the basis for civil liability and requires fault, injury, and a causal connection between the fault and injury (discussed above at [10]).⁷³ Article 1457 remains available in the environmental context where these elements can be established.⁷⁴
 - **Article 976 of the Civil Code of Québec** can be used to put an end to ‘abnormal neighbourhood disturbances’ and is therefore similar to the tort of nuisance.⁷⁵ As with nuisance, the focus is on the effect of the conduct rather than the conduct itself, and thus, a remedy may be available regardless of fault (ie the general rules of civil liability mentioned earlier do not apply under article 976).⁷⁶
 - **Article 1465 of the Civil Code of Québec** creates a specific liability scheme for injury resulting from the ‘autonomous acts of a thing’.⁷⁷ A thing may be said to be acting autonomously simply through the laws of physics.⁷⁸ For example, a pipe bursting would amount to an autonomous act of a thing. The provision creates

66 *ibid* s 17(1).

67 *ibid* s 22.

68 Environmental Protection Act, [RSO 1990, c E.19](#), s 99. For examples of application, see *Midwest Properties Ltd v Thordarson* [2015 ONCA 819](#) (Court of Appeal for Ontario); *Huang* (n 44).

69 General, [O Reg 73/94](#), ss 9–11.1

70 Environmental Bill of Rights (n 63) s 84.

71 *ibid* s 84(2).

72 Ontario’s Farming and Food Production Protection Act, 1998, [SQ 1998, c 1](#) s 2(1).

73 Civil Code of Québec (n 34).

74 Marie-Claude Desjardins and H el ene Mayand, ‘Recours des citoyens en vertu du droit commun’ in *JurisClasseur Qu ebec*, col *Droit public*, vol *Droit de l’environnement*, fasc 18 (Lexis Nexis 2012) (loose-leaf updated 2022) [18]–[19].

75 Civil Code of Qu ebec (n 34) art 976.

76 *St Lawrence Cement inc v Barrette* [2008 SCC 64](#) (Supreme Court of Canada) [86].

77 Civil Code of Qu ebec (n 34) art 1465.

78 Baudouin, Deslauriers and Moore (n 35) [1-953]–[1-956].

a *presumption* of fault: plaintiffs must only prove that the defendant was the custodian of the thing and that the injury was caused by the autonomous act of the thing.⁷⁹ To escape liability, the defendant may rebut the presumption of fault.⁸⁰

- **The Québec Charter** may also provide recourse for environmental harm. Since its adoption in 2006, section 46.1 of the Québec Charter explicitly provides for the right ‘to live in a healthful environment in which biodiversity is preserved, to the extent and according to the standards provided by law’.⁸¹ In addition, section 6 guarantees that every person has a right to the peaceful enjoyment and free disposition of their property.⁸² A person that unlawfully interferes with these rights may be ordered to stop the interference, and to compensate the victims for the prejudice suffered.⁸³
- **The Environment Quality Act** recognises the right of every person ‘to a healthy environment and to its protection, and to the protection of the living species inhabiting it, to the extent provided for by [the] Act’ and instruments adopted under it.⁸⁴ Injunctions are available to ‘prohibit any act or operation which interferes or might interfere’ with the exercise of this right.⁸⁵ Standing to seek such an injunction is very broadly defined: any ‘natural person domiciled in Québec frequenting a place or the immediate vicinity of a place in respect of which a contravention is alleged’, the Attorney General and ‘any municipality in whose territory the contravention is being or about to be committed’ may apply.⁸⁶ Various public enforcement mechanisms exist to address contraventions of the Act: eg monetary administrative penalties can be imposed;⁸⁷ permits can be amended, suspended, or revoked;⁸⁸ and penal sanctions apply for the contravention of specific provisions.⁸⁹

Harmful or unfair labour conditions

17. In Canada, working conditions are regulated through a complex web of federal, provincial, and territorial statutes. As such, civil remedies have been largely displaced in favour of administrative regimes. These complex schemes vary across Canadian jurisdictions but tend to share important features. We provide only a brief overview of the most salient aspects.
18. The rights of workers are primarily governed by the Canada Labour Code⁹⁰ (for federally regulated workers), and provincial statutes such as Ontario’s Employment Standards Act⁹¹ or Québec’s Act Respecting Labour Standards⁹² (for workers under provincial jurisdiction, which is the case for the majority of workers).

79 *ibid* [1-935]; Karim (n 35) [3100].

80 Baudouin, Deslauriers and Moore (n 35) [1-974]; Karim (n 35) [3087].

81 Charter of Human Rights and Freedoms (n 38) s 46.1.

82 *ibid* s 6.

83 *ibid* s 49.

84 *ibid* s 19.1.

85 Environment Quality Act, [CQLR c Q-2](#), s 19.2.

86 *ibid* s 19.3. See also Michel Bélanger and Paule Halley, ‘Accès à la justice pour protéger l’environnement au Québec: réflexions sur la capacité à agir des particuliers et des groupes environnementaux’ (2017) 62(3) McGill Law Journal 603, 608–609.

87 Environment Quality Act (n 85) ss 115.13–115.28.

88 *ibid* ss 115.5–115.12.

89 *ibid* ss 115.29–115.47.

90 Canada Labour Code, [RSC 1985, c L-2](#).

91 Employment Standards Act, 2000, [SO 2000, c 41](#).

92 Act Respecting Labour Standards, [CQLR c N-1.1](#).

- **Minimum standards**, such as minimum wage standards, are provided for by these statutes.⁹³ The standards are minimums in the sense that provisions in employment contracts that attempt to circumvent these minimums standards will be rendered void.⁹⁴ While workers are free to agree to additional benefits,⁹⁵ the reality is that, outside of unionised workers, these statutes are the primary source of protection for the majority of workers.⁹⁶
 - Minimum standards are usually enforced through administrative systems – and workers may seek compliance through complaint mechanisms⁹⁷ or may seek ordinary civil remedies (but not both).⁹⁸ Those who investigate complaints typically have broad investigatory powers⁹⁹ and may impose penalties or order employers to rectify the situation in various ways, including by way of monetary compensation.¹⁰⁰
 - In Québec, a civil claim to recover unpaid wages or other amounts may be brought by employees themselves¹⁰¹ or by an administrative commission in its own name or on behalf of the employee.¹⁰² The commission also receives and conducts inquiries into complaints regarding conduct proscribed by the Act;¹⁰³ disputes are then adjudicated by an administrative tribunal (in which the commission may, in most instances, represent the employee).¹⁰⁴ Employees are not generally barred from pursuing parallel complaints and civil claims.¹⁰⁵

19. However, certain categories of workers, including individuals who may be particularly vulnerable, are excluded entirely from these statutes (eg in Ontario, inmates are excluded from the Employment Standards Act¹⁰⁶) or from certain key protections they confer (eg although farm employees are subject to Ontario's Employment Standards Act, certain employees are not entitled to a host of protections, including the minimum wage, daily and weekly limits on hours of work, time off between shifts, overtime pay, etc¹⁰⁷).¹⁰⁸

20. The safety of employees in the workplace is also statutorily regulated, federally, by part II of the Canada Labour Code, and in the provinces and territories often in separate statutes (eg Ontario's Occupational Health and Safety Act¹⁰⁹ and Québec's Act Respecting Occupational Health and Safety¹¹⁰).

93 Employment Standards Act (n 91) s 23. For Québec, see Act Respecting Labour Standards (n 92) s 40 and its Regulation Respecting Labour Standards, [N-1.1, r. 3](#), ss 3–4.

94 Employment Standards Act (n 91) s 5(1). For Québec, see Act Respecting Labour Standards (n 92) s 93.

95 Employment Standards Act (n 91) s 5(2). For Québec, see Act Respecting Labour Standards (n 92) s 94.

96 Geoffrey England, Roderick Wood, and Innis Christie, *Employment Law in Canada* (4th edn, LexisNexis Butterworth 2005) (online) [8.4].

97 Employment Standards Act (n 91) s 96. For Québec, see Act Respecting Labour Standards (n 92) ss 102–108, 123, 123.6 and 124.

98 Employment Standards Act (n 91) ss 8(1) and 97.

99 *ibid* s 91. For Québec, see Act Respecting Labour Standards (n 92) ss 109–110.

100 Employment Standards Act (n 91) s 103 (order to pay wages).

101 Civil Code of Québec (n 34) art 1372.

102 Act Respecting Labour Standards (n 92) ss 39(8)–(10), and 98–99; Robert Gagnon and Langlois Kronström Desjardins, *Le droit du travail du Québec* (7th edn, Éditions Yvon Blais 2013) [253]–[255].

103 See Act Respecting Labour Standards (n 92), regarding prohibited practices (ss 122–123.5), psychological harassment (ss 123.6–123.16), and dismissals made without good and sufficient cause (ss 124–131).

104 *ibid*, ss 121.5–121.6, 123.4–123.5, 123.12–123.13, and 126–126.1.

105 Gagnon and Langlois Kronström Desjardins (n 102) [261]. For example, in the context of a dismissal, an employee may seek a remedy pursuant to the Act Respecting Labour Standards ss 122–123 (prohibited practices) and 124 (dismissal without good and sufficient cause) (n 92), as well as a civil remedy based on article 2091 of the Civil Code of Québec (n 34).

106 For inmates in Ontario subject to provincial jurisdiction, see Employment Standards Act (n 91) s 3(5). See instead Ministry of Correctional Services Act, [RSO 1990, c M.22](#), s 25; and General, [RRO 1990, Reg 778](#), s 18. Similarly, inmates under federal jurisdiction are not subject to part III of the Canada Labour Code (n 90). See instead Corrections and Conditional Release Act, [SC 1992, c 20](#), s 78(1) and the discussion in *Guérin v Canada (Attorney General)* 2018 FC 94 (Federal Court) [64], [112]–[116], [140]. See also Alberta Civil Liberties Research Centre, 'Keeping the Peace: Prisoners' Rights and Employment Programs' (ACLRC 2014) 102. In Québec, inmates are also excluded from the Act Respecting Labour Standards (see Act Respecting the Québec Correctional System, [CQLR c S-40.1](#), s 202).

107 Exemptions, Special Rules and Establishment of Minimum Wage, [O Reg 285/01](#), s 2(2). In Québec, different working conditions apply to farm workers with respect to overtime, weekly rest period and the right to refuse to work (Act Respecting Labour Standards (n 92) ss 54, 59.0.1 and 78).

108 England, Wood and Christie (n 96) [8.81].

109 Occupational Health and Safety Act, [RSO 1990, c O.1](#).

110 Act Respecting Occupational Health and Safety, [RLRQ, c S-2.1](#).

- **The right to refuse dangerous work**, in theory, provides employees with a right to avoid working conditions that they have reason to believe are unsafe.¹¹¹ In practice, however, economic realities or lack of knowledge may undermine this.
 - **Standards:** These laws also establish a variety of standards, relating for instance, to the minimum age required for a person to work.¹¹² While an Internal Responsibility System seeks to make everyone responsible for their safety and that of their colleagues,¹¹³ the rules are also enforced externally through inspections,¹¹⁴ and ultimately prosecution¹¹⁵ if deemed necessary (among other approaches to ensuring compliance).
21. Workers injured in the course of their employment are compensated through a no-fault insurance system (eg Ontario's Workplace Safety and Insurance Act¹¹⁶).¹¹⁷
- **No-fault workers compensation systems** provide for state-administered no-fault insurance for accidents and diseases. In other words, to receive compensation, workers do not need to prove the negligence of their employer, nor that of any other party.¹¹⁸
22. The compromise with respect to workplace safety is that these schemes replace causes of action that would otherwise be available (ie most claims related to injury or death in the course of employment such as negligence are barred by statute).¹¹⁹ Evidently, this bar does not apply to workers that are not captured by the insurance scheme, such as independent operators and sole proprietors outside of the construction industry.¹²⁰

Novel causes of action that may be generally relevant to the human rights under study

23. Novel causes of action grounded in peremptory norms of customary international law may be available with respect to certain instances of the harms discussed above (eg torture or forced labour):¹²¹

111 Occupational Health and Safety Act (n 109) s 43(3). For Québec, see Act Respecting Occupational Health and Safety (n 110) s 12.

112 In Ontario, these standards are industry-specific: eg Ontario regulations concerning the minimum age to work in underground mines, which is 18 years (Mines and Mining Plants, [RRO 1990, Reg 854](#), s 8); and regulations concerning the minimum age to work in an industrial establishment other than a factory (such as retail stores and restaurant serving areas), which is 14 years (Industrial Establishments, [RRO 1990, Reg 851](#), s 4(1)). For Québec, see Act Respecting Labour Standards (n 92) ss 84.2–84.5: while there is no general minimum age to work, a child cannot perform work that is disproportionate to the child's capacity, or 'that is likely to be detrimental to the child's education, health or physical or moral development' (s 84.2). Written parental consent is required for a child under 14 to work (s 84.3). Further, those children who are required to attend school may not be made to work during school hours (s 84.4). See also Gagnon and Desjardins (n 102) [234].

113 England, Wood and Christie (n 96) [9.23]–[9.34]; Ontario, Ministry of Labour, Training and Skills Development, 'Guide to the Occupational Health and Safety Act: [The Internal Responsibility System](#)' (updated 4 November 2019).

114 Occupational Health and Safety Act (n 109) Part VIII. For Québec, see Act Respecting Occupational Health and Safety (n 110) Chapter X.

115 Occupational Health and Safety Act (n 109) ss 66(1). For Québec, see Act Respecting Occupational Health and Safety (n 110) Chapter XIV and more specifically s 242.

116 Workplace Safety and Insurance Act, [1997, SO 1997, c 16 sch A](#).

117 The federal workers compensation statute applies only to employees of the federal government. England, Wood and Christie (n 96) [9.56].

118 For Québec, see the Act Respecting Industrial Accidents and Occupational Diseases, [CQLR c A-3.001](#), s 1.

119 Workplace Safety and Insurance Act (n 116) ss 26–28. See eg *Decision* No 642/13 [2013 ONWSIAT 1507](#) (Ontario's Workplace Safety and Insurance Appeals Tribunal) [6]–[17]. For Québec, see Act Respecting Industrial Accidents and Occupational Diseases (n 118) ss 438–439 (subject to very specific exceptions: ss 441–442).

120 Workplace Safety and Insurance Act (n 116) ss 11(1), 12.2(1).

121 With respect to the possible existence of environmental *jus cogens* norms, see Louis Jacobus Kotzé, '[Constitutional Conversations in the Anthropocene: In Search of Environmental Jus Cogens Norms](#)' in Maarten den Heijer and Harmen van der Wilt (eds), *Netherlands Yearbook of International Law 2015: Jus Cogens – Quo Vadis?* (TMC Asser Press 2016).

- **Violations of peremptory norms of customary international law (*jus cogens*)** may constitute an independent cause of action in Canada. In *Nevsun Resources Ltd v Araya*,¹²² a 2020 pre-trial decision, Canada's highest court found that it was not 'plain and obvious' that violations of peremptory norms of customary international law (eg forced labour) could not be causes of action,¹²³ including where, as in that case, the perpetrator is a corporation.¹²⁴ Through the doctrine of adoption,¹²⁵ customary international law is automatically (ie without the need for legislation), incorporated into Canadian law, and since 'where there is a right, there must be a remedy', courts may be able to develop domestic remedies.¹²⁶ However, the parties settled the case before it could be heard on the merits, and as such, it will be important to monitor developments in this area.

Special considerations with respect to the liability of corporations and public bodies in relation to the three defined harms

24. Liability of corporations is typically established through *vicarious* liability (discussed in greater detail at [41]), instead of *direct* liability – because vicarious liability covers most situations in which direct liability could be found, and is ordinarily far easier to establish.¹²⁷ However, establishing the *direct* liability of a corporation remains possible:

- **For a corporation to be *directly* liable in tort**, the person who committed the tort must be the 'directing mind' of the corporation. The wrongful act of a representative who amounts to the 'directing mind' of the corporation is, in effect, the act of the corporation (including for intentional torts).¹²⁸

25. The civil liability of the Crown is highly complex and nuanced and cannot be fully explored beyond what is discussed throughout, and in the following overview:

- **Applicability of legislation to the Crown:** The federal Crown Liability and Proceedings Act¹²⁹ and equivalent provincial statutes have been interpreted to bind the Crown to all relevant statutes in the context of proceedings against the Crown 'by virtue of their adoption by the Crown proceedings statute'.¹³⁰
- Outside of proceedings against the Crown, the Crown is not bound by statute unless explicitly stated in legislation or by necessary implication¹³¹ (by virtue of the common law, and statutes codifying it. See for example, the federal Interpretation Act,¹³² and that of provinces, such as Ontario.¹³³).
- **Crown immunity from tort** at common law has been displaced by statute in all Canadian jurisdictions. When seeking to hold the federal government liable in tort, section 3 of the Crown Liability and Proceedings Act establishes that the Crown is

122 *Nevsun Resources Ltd v Araya* [2020 SCC 5](#) (Supreme Court of Canada).

123 *ibid* [122], [132].

124 *ibid* [68].

125 *ibid* [90].

126 *ibid* [120].

127 J Anthony VanDuzer, *The Law of Partnerships and Corporations* (4th edn, Irwin Law 2018) 299.

128 *ibid* 300; *Nelitz v Dyck* [2001 CanLII 24090](#) (Court of Appeal for Ontario) [33].

129 Crown Liability and Proceedings Act, [RSC 1985, c C-50](#).

130 *Mason v Ontario* [1998 CanLII 1316](#) (Court of Appeal for Ontario).

131 *Canada (Attorney General) v British Columbia Investment Management Corp* [2019 SCC 63](#) (Supreme Court of Canada) [48].

132 Interpretation Act, [RSC 1985, c I-21](#), s 17.

133 Legislation Act, 2006 [SO 2006, c 21, sch F](#), s 71.

liable 'for the damages for which, if it were a person, it would be liable' in respect of torts committed by a servant of the Crown, and breaches of duties attaching to the ownership, occupation, possession or control of property.¹³⁴ Provincial Crown liability statutes follow a similar structure, but in addition to the two categories of liability recognised under federal law, also tend to enable liability arising out of the Crown's duties as an employer and liability under statutes, regulations, and by-laws.¹³⁵

- **The Crown can be found *only* vicariously liable** in most Canadian jurisdictions.¹³⁶ In practice, this is not particularly significant, especially because it is not necessary for plaintiffs to identify the Crown's particular servant for vicarious liability to be found.¹³⁷
- **Special considerations** usually apply when alleging that a public body committed a tort. For example: a qualified immunity applies to public bodies, such that they are not liable in negligence for 'core policy' decisions provided they are neither irrational nor taken in bad faith, but they can be liable for operational decisions;¹³⁸ and the defence of statutory authority has barred nuisance claims, though it has been heavily circumscribed.¹³⁹
- **As for Québec**, article 1376 of the Civil Code of Québec specifically states that the rules of the Civil Code, 'apply to the State and its bodies, and to all other legal persons established in the public interest, subject to any other rules of law which may be applicable to them'.¹⁴⁰ Those rules of law include the qualified immunity of public bodies for core policy decisions which are not reckless or made in bad faith.¹⁴¹ The federal government may also be liable under the civil law of Québec by virtue of section 3 of the federal Crown Liability and Proceedings Act.¹⁴²

134 Crown Liability and Proceedings Act (n 129) s 3.

135 Ontario's Crown Liability and Proceedings Act (n 22) s 8.

136 Crown Liability and Proceedings Act (n 129) s 10; Ontario's Crown Liability and Proceedings Act (n 135) s 8. Conversely, direct liability may be available in British Columbia, given the open-ended statutory language used in the Crown Proceeding Act s 2(c), *RSBC 1996, c 89: JCR (Litigation Guardian) v British Columbia* [2007 BCCA 496](#) (Court of Appeal for British Columbia) [28].

137 *Markesteyn v Canada* [\[2001\] 1 FC 345](#) (Federal Court) [31].

138 *Nelson (City) v Marchi* [2021 SCC 41](#) (Supreme Court of Canada) [37]–[59]; *Just v British Columbia* [\[1989\] 2 SCR 1228](#) (Supreme Court of Canada) 1240–1241.

139 *Sutherland* (n 62) [63]–[75]; the defence was not successful in *Ryan* (n 61) [54]–[56]. The defence is only available where the nuisance is the inevitable consequence of the exercise of statutory authority.

140 Civil Code of Québec (n 34) art 1376.

141 *Ressources Strateco inc c Procureure générale du Québec* [2020 QCCA 18](#) (Court of Appeal of Québec) [67]; *Québec (Ville de) c Équipements EMU ltée* [2015 QCCA 1344](#) (Court of Appeal of Québec) [163]; *Hinse v Canada (Attorney General)* [2015 SCC 35](#) (Supreme Court of Canada) [21]–[53]; Baudouin, Deslauriers and Moore (n 35) [1-152].

142 Crown Liability and Proceedings Act (n 129) s 3.



What are the elements of the civil remedies that you have identified above that have to be established by a claimant seeking the remedy?

Battery

26. The elements of battery that the plaintiff must prove are:

- The defendant directly caused contact or interference with the plaintiff¹⁴³ (or an extension of the plaintiff, eg their clothing¹⁴⁴).
- The contact was physically harmful or offensive to a person's reasonable sense of dignity (ie tapping someone on the shoulder to get their attention is not actionable).¹⁴⁵

27. In Canada, the onus is on the defendant to establish that their act was neither intentional nor negligent (ie without fault).¹⁴⁶ There is no requirement that damages be proven.¹⁴⁷

Assault

28. The elements of assault that the plaintiff must prove are:

- The defendant directly created the apprehension of imminent harmful or offensive contact.¹⁴⁸
- The plaintiff must demonstrate that they had 'reasonable grounds to believe they were in danger of violence from the tortfeasor'.¹⁴⁹

29. In Canada, the onus is on the defendant to establish that their act was neither intentional nor negligent (ie without fault).¹⁵⁰ There is no requirement that damages be proven.¹⁵¹

False imprisonment and false arrest

30. The elements of false imprisonment that the plaintiff must prove are:¹⁵²

- The plaintiff was totally deprived of their liberty (ie the restriction was complete or total).
- The deprivation of liberty was against the will of the plaintiff.
- The defendant caused the plaintiff's deprivation of liberty.

143 *Shaw* (n 3) [45] citing *Linden and Feldthusen* (n 3).

144 *Parrett* (n 4) [82] citing *Osborne* (n 4).

145 *Figueiras* (n 5) [143]-[144].

146 *M(K) v M(H)* [1992] 3 SCR 6 (Supreme Court of Canada) 25-26. See *Osborne* (n 7) 270.

147 *McLean* (n 6) [63].

148 *ibid* [59] citing *Linden and Feldthusen* (n 6).

149 *Deluca v Bucciarelli* 2021 ONSC 7094 (Superior Court of Justice of Ontario) [67].

150 *M(K)* (n 146) 25-26 (invoking this principle for both battery and assault). Negligent assault should be possible because the tort of assault has its origins in the tort of trespass and negligent trespass is a recognised tort in Canadian law. See Lewis N Klar and Cameron SG Jefferies, *Tort Law* (6th edn, Thomson Reuters 2017) 50-51 (note 93); Allen M Linden, Bruce Feldthusen, Margaret Isabel Hall, Erik S Knutsen and Hilary AN Young, *Canadian Tort Law* (11th edn, LexisNexis 2018) § 2.1 (note 1).

151 *McLean* (n 6) [63].

152 *VAH v Lynch* 2008 ABQB 448 (Court of Queen's Bench of Alberta) [182] citing *Klar* (n 13) 54-61.

31. There is only one element to false arrest that must be proven by the plaintiff:
- The plaintiff must prove that the defendant caused the plaintiff to be arrested.¹⁵³
32. In each case, the onus then switches to the defendant to prove that the imprisonment or arrest was lawful.¹⁵⁴ There is no requirement that damages be proven.¹⁵⁵ Note that whether false imprisonment can be negligent is subject to debate.¹⁵⁶

Charter damages (under subsection 24(1) of the Charter)

33. Plaintiffs seeking Charter damages under Subsection 24(1) of the Charter must show that:¹⁵⁷
- The defendant public body unjustifiably infringed a Charter right.
 - Damages are a just and appropriate remedy, having regard to whether they would fulfil one or more of the three related functions of (a) compensation for the personal loss caused by a breach, (b) vindication of the Charter right, and/or (c) deterrence of future breaches.
34. The government (be it federal or provincial) may establish countervailing factors to defeat the functional considerations that support a damage award and render damages inappropriate or unjust.¹⁵⁸ For example, where an act is carried out pursuant to a duly enacted law that is subsequently declared unconstitutional, in the absence of conduct that is 'clearly wrong, in bad faith or an abuse of power', damages will not be awarded.¹⁵⁹ This immunity does not apply in relation to policies that are found unconstitutional.¹⁶⁰

Negligence

35. The elements of negligence that the plaintiff must prove are:¹⁶¹
- *Duty of care*: The defendant owed the plaintiff a duty of care.
 - New duties of care are established using the *Anns/Cooper* jurisprudential framework.¹⁶² For public bodies, additional considerations apply (see [25] above, discussing immunity for 'core policy' decisions).
 - *Fault*: The defendant's behaviour breached the standard of care.
 - *Injury or loss*: The plaintiff sustained damage.
 - *Causation*: The damage was caused, in fact and in law, by the defendant's breach.

153 *Kolosov v Lowe's Companies inc* 2018 ONSC 7541 (Superior Court of Justice of Ontario) [235] citing *Lloyd v Toronto (City) Police Services Board* 2003 CanLII 15846 (Superior Court of Justice of Ontario) [36]-[37].

154 *Hermiz v Canada* 2013 FC 288 (Federal Court) [90]. See also *Kolosov* (n 153) [235]-[236].

155 *Michalishen v Urbanoski* 2016 SKQB 78 (Court of Queen's Bench for Saskatchewan) [20] citing *Trew v 313124 Saskatchewan Ltd* 2005 SKQB 79 (Court of Queen's Bench for Saskatchewan) [19].

156 Osborne (n 7) 275 (note 26).

157 *Vancouver (City)* (n 30) [16]-[31]; *Conseil scolaire francophone de la Colombie-Britannique v British Columbia* 2020 SCC 13 (Supreme Court of Canada) [167].

158 *Vancouver (City)* (n 30) [32]-[43].

159 *Conseil scolaire francophone de la Colombie-Britannique* (n 157) [168], citing *Vancouver (City)* (n 30) [39].

160 *ibid* [179].

161 *Mustapha* (n 57) [3].

162 The *Anns/Cooper* framework is the test used by courts to determine whether a duty of care exists. See an example of its application in *Childs v Desormeaux* 2006 SCC 18 (Supreme Court of Canada).

- *Causation in fact*: But for the defendant's breach of the required standard of care the defendant would not have incurred the injury or loss.
- *Causation in law*: The injury or loss is of such kind that a reasonable person should have foreseen it as a real risk (ie that the damage is not too remote to be viewed as legally caused by the negligence).¹⁶³

Private nuisance

36. The elements of private nuisance that the plaintiff must prove are:¹⁶⁴

- The defendant *substantially* interfered with the plaintiff's use or enjoyment of the property (ie the interference was not trivial).¹⁶⁵
- The interference is *unreasonable* in all of the circumstances (established through the balancing of factors).¹⁶⁶

37. It flows from these two elements that damages must be proven.¹⁶⁷ Whether the interference results from intentional, negligent or are otherwise faultless conduct is without consequence.¹⁶⁸ Where the plaintiff alleges physical injury to the property (as opposed to interference with the use or enjoyment of the property) establishing that the interference is unreasonable will usually be less onerous.¹⁶⁹

Trespass to property

38. The elements of trespass to property that the plaintiff must prove are:¹⁷⁰

- The defendant's direct and physical intrusion onto land.
- The land intruded upon is in the possession of the plaintiff.
- The defendant's act was voluntary (but not necessarily intentional).

39. There is no requirement that damages be proven.

Rylands rule (strict liability)

40. The elements of *Rylands* rule that the plaintiff must prove are:¹⁷¹

- The defendant was engaged in a 'non-natural' use of their land.
- The defendant brought on to their land something that was likely to make mischief if it escaped.
- That thing in fact subsequently escaped.
- Damage was caused to the plaintiff's property as a result of the escape.

¹⁶³ *Mustapha* (n 57) [13].

¹⁶⁴ *Antrim Truck Centre Ltd v Ontario (Transportation)* 2013 SCC 13 (Supreme Court of Canada) [18]-[19].

¹⁶⁵ *ibid* [22]-[24].

¹⁶⁶ *ibid* [26].

¹⁶⁷ *Smith* (n 43) [55]-[59].

¹⁶⁸ *St Lawrence Cement* (n 76) [77].

¹⁶⁹ *Antrim Truck Centre* (n 164) [50].

¹⁷⁰ *Smith* (n 45) [37], reversed on other grounds in *Smith* (n 43) citing *Wallington Grace* (n 45) [86] and *R & G Realty Management inc* (n 45) [40]. These cases identify as a fourth element the following proposition: 'While some form of physical entry onto or contact with the plaintiff's land is essential to constitute a trespass, the act may involve placing or propelling an object, or discharging some substance onto the plaintiff's land can constitute trespass.' However, for clarity, we suggest this is better understood as a qualification of the first element, than as a distinct element of the tort.

¹⁷¹ *Kirk v Executive Flight Centre Fuel Services Ltd* 2019 BCCA 111 (Court of Appeal for British Columbia) [86] citing *Smith* (n 43) [68]-[71].



Does the law of your jurisdiction recognise civil liability for complicit or accessory conduct (or a similar concept) in relation to the three defined harms?

41. One party can be held responsible for the actions of another pursuant to the following doctrines and concepts:

- **Concerted tortious action** can lead to one party being held liable for the actions of another. Parties will be held to be joint tortfeasors where there is concerted action between them toward a common end (see also the tort of conspiracy, briefly discussed at [7] above).¹⁷² It has been said that knowingly assisting, encouraging, inciting, or even merely being present may suffice.¹⁷³ Nevertheless, courts have resisted describing the precise connection to the tortious act necessary to establish concerted action liability, noting that the inquiry must depend on the circumstances of each case.¹⁷⁴ For example, in a case where a group had trespassed onto land to cut down trees for the purpose of obtaining an ocean view, the Court held that all defendants were liable, including one for whom there was no evidence he had cut any trees nor any evidence he directed the loggers to cut the trees.¹⁷⁵
- **Vicarious liability** provides for one party to be held responsible for the tortious act of another, typically where an employee-employer or agent-principal relationship exists.¹⁷⁶ The relationship between the tortfeasor and the person to be held vicariously liable must be sufficiently close, and the tort must be 'sufficiently connected to the tortfeasor's assigned tasks that the tort can be regarded as a materialisation of the risks created by the enterprise'.¹⁷⁷ This is a particularly useful way to establish liability of a corporation.
- In Québec, the existence of vicarious liability as a general concept is set out in the third paragraph of article 1457 of the Civil Code of Québec¹⁷⁸ and elaborated in articles establishing specific liability regimes, including article 1463 which provides for employer-employee relationships.¹⁷⁹
- **Non-delegable duties** may prevent parties from avoiding liability through independent contractors. While vicarious liability will not *typically* apply to those hiring independent contractors,¹⁸⁰ in some circumstances, those who hire independent contractors, may nevertheless be found liable through the doctrine of non-delegable duty.¹⁸¹ A non-delegable duty arises when the *performance* of the duty may be delegated, but *responsibility* cannot – it is a duty 'to ensure that the independent contractor also takes reasonable care'.¹⁸²

¹⁷² *Rutman v Rabinowitz* 2018 ONCA 80 (Court of Appeal for Ontario) [33]–[35].

¹⁷³ *ibid* [34] citing John G Fleming, *The Law of Torts* (C Sappideen and Prune Vine (eds), 10th edn, Thomson Reuters 2011) 302.

¹⁷⁴ *Rutman* (n 172) [35].

¹⁷⁵ *Horseshoe Bay Retirement Society v SIF Dev Corp* 1990 CanLII 8047 (Supreme Court of British Columbia) [9], [16].

¹⁷⁶ *Blackwater v Plint* 2005 SCC 58 (Supreme Court of Canada) [20].

¹⁷⁷ *KL B v British Columbia* 2003 SCC 51 (Supreme Court of Canada) [19].

¹⁷⁸ Civil Code of Québec (n 34) art 1457.

¹⁷⁹ *ibid* art 1463.

¹⁸⁰ 671122 Ontario Ltd v Sagaz Industries Canada inc 2001 SCC 59 (Supreme Court of Canada) [33]–[35].

¹⁸¹ *Lewis (Guardian ad litem of) v British Columbia* [1997] 3 SCR 1145 (Supreme Court of Canada) [17].

¹⁸² *ibid* [50].

Q4

When can a parent company be held liable under the law of civil remedies for the wrongful acts and/or omissions of a subsidiary or independent contractor in a supply chain?

42. In Canada, the liability of corporate subsidiaries may be addressed either through piercing the corporate veil (which courts are reluctant to do) or perhaps by the recognition of a direct duty of care in negligence (which recent jurisprudential developments suggest may be a more promising avenue):

- **Piercing the corporate veil** is the act of disregarding the separate legal personality of a corporation to impose liability where it otherwise would not be found, including liability for shareholders. However, academics,¹⁸³ courts,¹⁸⁴ and even empirical analysis¹⁸⁵ conclude that the law demonstrates ‘no consistent principle’. Generally, courts are extremely reluctant to pierce the corporate veil, but are more likely to do so when there are few or only one shareholder,¹⁸⁶ and when the corporation is private rather than public.¹⁸⁷
- The corporate veil may be pierced in the following narrow circumstances¹⁸⁸ (the ‘*Transamerica* test’¹⁸⁹):
 - When doing so is required by contract or statute;
 - When the court is satisfied that a company is a ‘mere façade’ concealing the true facts (which requires that there be complete control of the subsidiary and that the subsidiary was incorporated for a fraudulent or improper purpose or used by the parent as a shell for improper activity); or
 - When it can be established that the company is an authorised agent of its controllers or its members, corporate or human.
- Similarly, under the Civil Code of Québec, the corporate veil may only be pierced in the precise and limited circumstances where the juridical personality of a legal person is invoked ‘to dissemble fraud, abuse of right or contravention of a rule of public order’.¹⁹⁰ In other words, the corporate veil may only be pierced when the following conditions are met:
 - The legal person has been manipulated by the shareholder, administrator or director and is a mere façade or an alter ego; and
 - The company’s juridical personality has been diverted from its economic purpose in order to commit a fraud, an abuse of right or a contravention of a rule of public order to the detriment of another person.¹⁹¹

183 VanDuzer (n 127) 148.

184 *Kosmopoulos v Constitution Insurance Co* [1987] 1 SCR 2 (Supreme Court of Canada) [12].

185 See generally, Mohamed F Khimji and Christopher C Nicholls, [Piercing the Corporate Veil in the Canadian Common Law Courts: An Empirical Study](#) (2015) 41(1) *Queen’s Law Journal* 207.

186 *ibid* 242.

187 *ibid* 232.

188 *Yaiguaje v Chevron Corporation* 2018 ONCA 472 (Court of Appeal for Ontario) [65].

189 *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co* 1996 CanLII 7979 (Ontario Court (General Division)).

190 Civil Code of Québec (n 34) art 317.

191 Raymonde Crête and Stéphane Rousseau, ‘Les exceptions au principe de la personnalité juridique distincte: le soulèvement du voile corporatif’ in Raymonde Crête and Stéphane Rousseau, *Droit des sociétés par actions* (4th edn, les Éditions Thémis 2018) [257]–[258], [277].

- However, as in common law jurisdictions, Québec courts are generally reluctant to pierce the corporate veil¹⁹² and whether they will do so is highly unpredictable.¹⁹³
- **Parent corporations may be liable to those affected by their subsidiaries** following the pre-trial decision in *Choc v Hudbay Minerals inc*,¹⁹⁴ which suggested that a parent corporation could potentially owe a duty of care to those affected by its subsidiary's operations abroad.¹⁹⁵ As a pre-trial decision, the decision only indicates that it was not 'plain and obvious' that the plaintiffs' claim would fail for disclosing no reasonable cause of action in negligence.¹⁹⁶ With respect to domestic subsidiaries, the Ontario Court of Appeal recently allowed a similar claim to advance to trial in *Avedian v Enbridge Gas Distribution inc (Enbridge Gas Distribution)*.¹⁹⁷ This could allow plaintiffs to establish *direct* rather than vicarious liability in negligence – the most used and versatile tort in Canada – and would not require piercing the corporate veil to do so.

43. Lack of corporate due diligence legislation remains an issue in Canada. There is currently no legislation requiring companies to conduct due diligence with respect to human rights in their supply chains.¹⁹⁸ There is a Canadian Ombudsperson for Responsible Enterprise whose mandate is to advise companies and encourage them to follow responsible business practices, as well as to review complaints about possible human rights abuses by Canadian companies working outside Canada in the garment, mining, and oil and gas sectors.¹⁹⁹ However, the Ombudsperson does not have any significant remedial power beyond the ability to make recommendations.²⁰⁰



What remedies are available under the law of civil remedies to victims of the three defined harms in your jurisdiction?

44. The following are monetary remedies:

- **Compensatory damages** are typically divided into general damages and special damages. Special damages are readily ascertainable past pecuniary damages. General damages include both future pecuniary losses (eg future healthcare costs)

192 Jean-Louis Baudouin and Yvon Renaud, *Code civil du Québec annoté* (24th edn, Wilson & Lafleur 2021) art 317. See also *P Talbot inc c Entreprises Mirgil inc* 2004 CanLII 17854 (Court of Appeal of Québec); *8781435 Canada inc c Maison3D.com inc* 2020 QCCO 1088 (Court of Québec, Small Claims Division) [62]; Stéphane Rousseau and Nadia Smaïli, 'La "levée du voile corporatif" en vertu du Code civil du Québec: des perspectives théoriques et empiriques à la lumière de dix années de jurisprudence' (2006) 47(4) *Les Cahiers de droit* 815, 859–860.

193 Rousseau and Smaïli (n 192) 819.

194 *Choc v Hudbay Minerals inc* 2013 ONSC 1414 (Superior Court of Justice of Ontario).

195 *ibid* [50]–[75].

196 *ibid* [55], [75].

197 *Avedian v Enbridge Gas Distribution inc* 2021 ONCA 361 (Court of Appeal for Ontario) [16]–[23].

198 However, [Bill S-211](#), which is currently before Parliament, would establish reporting obligations related to human rights in supply chains. In its current form, Bill S-211 would, among other things, require government bodies and businesses (meeting certain requirements) to submit annual reports to the government outlining 'the steps the entity has taken [...] to prevent and reduce the risk that forced labour or child labour is used at any step of the production of goods in Canada or elsewhere by the entity or of goods imported into Canada by the entity'. However, the Bill does not require that any such steps be taken. See failed attempts to enact relatively modest obligations of this kind such as [Bill S-216](#) (2020), [Bill S-211](#) (2020, a previous version of Bill S-211), and [Bill C-423](#) (2018). See also [Bill C-300](#) (2009), which would, among other things, have withdrawn federal funding from Canadian extractive companies operating in developing countries that are found to have violated corporate social responsibility guidelines. See also Canada's Corporate Social Responsibility Strategy: Global Affairs Canada, '[Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad](#)' (Government of Canada, 14 November 2014) (last modified 13 May 2021).

199 Canadian Ombudsperson for Responsible Enterprise, '[About the Canadian Ombudsperson for Responsible Enterprise](#)' (Government of Canada).

200 Order in Council, [PC Number: 2019-1323](#) (6 September 2019).

and any non-pecuniary losses (eg pain and suffering).²⁰¹ In the environmental context, compensatory damages may mean the cost of remediating the property rather than the loss of property value.²⁰² In addition, aggravated damages (a form of general non-pecuniary damages) may be available to compensate for conduct that is 'reprehensible or outrageous'.²⁰³

- In Québec, a plaintiff can claim compensatory damages 'for bodily, moral or material injury which is an immediate and direct consequence' of a defendant's fault.²⁰⁴ The term 'direct' does not mean that only the direct victim who suffered the immediate consequences of the injury is entitled to compensation. The 'victims by *ricochet*' are also entitled to compensation for their injuries where the causal link between the fault and the injury is direct enough.²⁰⁵
- **Punitive (or exemplary) damages** are exceptionally awarded for the purpose of punishing, deterring, or denouncing certain acts.²⁰⁶ As such, they are only awarded when compensatory damages are insufficient to meet those objectives and where the conduct is 'malicious, oppressive and high-handed' and 'offends the court's sense of decency'.²⁰⁷
- In Québec, punitive damages can be awarded only where they are expressly provided for by law.²⁰⁸ Article 1621 of the Civil Code of Québec explicitly stipulates this precondition.²⁰⁹ For example, section 49 of the Québec Charter (a general provision establishing the availability of remedies for non-legislative breaches of the Québec Charter) provides for, and is the most used legislative basis for, punitive damages.²¹⁰
- **Nominal damages** are symbolic monetary awards given to those whose rights have been infringed but who have not proven any loss.²¹¹ They are only available for those torts in which proof of damages is not required (eg available for battery, but not for negligence).

45. Beyond monetary remedies, the following other remedies may also be available in relation to the three defined harms:

- **Injunctions** are orders to do something (a mandatory injunction) or not do something (a prohibitory injunction). An interlocutory injunction is granted before a determination of the case. The test for an interlocutory injunction is the *RJR-MacDonald* test²¹² which requires plaintiffs to demonstrate that there is (a) a serious question to be tried, (b) that they will suffer irreparable harm (ie which cannot be compensated with money) unless the injunction is issued, and (c) the balance of convenience (ie relative harms to the plaintiff, defendant, and the

201 *McKnight v Ontario (Transportation)* 2018 ONSC 52 (Superior Court of Justice of Ontario) [48] citing *Ryan v Sun Life Assurance Co of Canada* 2005 NSCA 12 (Nova Scotia Court of Appeal) [29]–[33].

202 *Midwest Properties* (n 68) [57]–[70].

203 *Whiten v Pilot Insurance Co* 2002 SCC 18 (Supreme Court of Canada) [116].

204 Civil Code of Québec (n 34) art 1607. See also art 1457.

205 *Baudouin, Deslauriers and Moore* (n 35) [1-130]–[1-139]. See also *Hôpital Notre-Dame de l'Espérance c Laurent* [1974] CA 543 (Court of Appeal of Québec), confirmed in [1978] 1 SCR 605 (Supreme Court of Canada) 606.

206 *Whiten* (n 203) [43], [68]–[69].

207 *Filice v Complex Services inc* 2018 ONCA 625 (Court of Appeal for Ontario) [57] citing *Whiten* (n 203) [36].

208 *Beaulac and Gaudreault-Desbiens* (n 36) 23.

209 Civil Code of Québec (n 34) art 1621.

210 Charter of Human Rights and Freedoms (n 38) s 49. *Beaulac and Gaudreault-Desbiens* (n 36) 23.

211 *Skrynyk v Crispin* 2010 BCSC 140 (Supreme Court of British Columbia) [18].

212 *RJR-MacDonald inc v Canada (Attorney General)* [1994] 1 SCR 311 (Supreme Court of Canada) 348–349.

public) favours granting the injunction.²¹³ The test is more difficult to meet when a mandatory injunction is sought, requiring that plaintiffs demonstrate a strong prima facie case instead of a serious question to be tried.²¹⁴

- A permanent injunction is granted after the decision on the merits and a different test applies. The plaintiff must establish: '(1) its legal rights; (2) that damages are an inadequate remedy; and (3) that there is no impediment to the court's discretion to grant an injunction'.²¹⁵
- In addition, some statutes provide for an injunction as a remedy, for example, section 39 of CEPA allows a person who has suffered or is about to suffer loss or damages as a result of a violation of that Act or its regulations to seek an injunction.²¹⁶
- Finally, while Crown liability statutes typically bar injunctive relief,²¹⁷ injunctions are nevertheless available against Crown officers when they exceed their powers²¹⁸ or against Crown servants and agents acting unconstitutionally.²¹⁹
- **Declarations** are 'judicial statement[s] confirming or denying a legal right of the applicant.'²²⁰ Declarations are discretionary remedies and the exercise of the discretion to grant a declaration is appropriate when the court has jurisdiction; the dispute is real and not theoretical; the party raising the issue has a genuine interest in its resolution; and the responding party has an interest in opposing the declaration being sought.²²¹
- **Subsection 24(1) of the Charter** provides an extremely broad remedial jurisdiction which is limited only to what courts consider 'appropriate and just in the circumstances' – at least in theory.²²² In practice, while courts have occasionally granted creative remedies,²²³ traditional remedies (eg damages, injunctions, and declarations) are likely to be the most common remedies for the situations discussed here. As discussed above at [9] and [33], subsection 24(1) only applies when there has been an underlying Charter violation (which can only occur through government action).
- **Restoration plans** can be ordered pursuant to statute. For example, where a plaintiff succeeds on an environmental protection action pursuant to section 84 of Ontario's Environmental Bill of Rights,²²⁴ the court may (among other things) 'order the parties to negotiate a restoration plan in respect of harm to the public resource resulting from the contravention and to report to the court on the negotiations within a fixed time'²²⁵ and if the court is not satisfied, it may take charge of the plan.²²⁶ A similar remedy is also available under paragraph 22(3)(d) of CEPA.²²⁷

213 *R v Canadian Broadcasting Corp* [2018 SCC 5](#) (Supreme Court of Canada) [12] citing *RJR-MacDonald* 334–335, 348 (n 212).

214 *Canadian Broadcasting Corp* (n 213) [15]–[18].

215 *Google inc v Equustek Solutions inc* [2017 SCC 34](#) (Supreme Court of Canada) [66].

216 Canadian Environmental Protection Act (n 65) s 39.

217 Crown Liability and Proceedings Act (n 129) s 22(1); Ontario's Crown Liability and Proceedings Act (n 135) s 22(1).

218 *Smith v Attorney General (NS)* [2004 NSCA 106](#) (Nova Scotia Court of Appeal) [6], [105]–[107].

219 *Canada (Attorney General) v Saskatchewan Water Corp* [1993 CanLII 9138](#) (Court of Appeal for Saskatchewan) [77].

220 *Makara v Canada (Attorney General)* [2017 FCA 189](#) (Federal Court of Appeal) [16] citing Lazar Sarna, *The Law of Declaratory Judgments* (4th edn, Thomson Reuters 2016) 1.

221 *Ewert v Canada* [2018 SCC 30](#) (Supreme Court of Canada) [81].

222 *Doucet-Boudreau* (n 30) [52]–[59]; *Vancouver (City)* (n 30) [17].

223 *Doucet-Boudreau* (n 30) [87]–[88].

224 Environmental Bill of Rights (n 63) s 84.

225 *ibid* para 93(1)(b).

226 *ibid* s 98(1).

227 Canadian Environmental Protection Act (n 65) para 22(3)(d).



What are the advantages and disadvantages of using civil claims as a means of human rights protection in your jurisdiction?

46. There are many advantages and disadvantages to using civil claims as means of human rights protection. We briefly identify some general ones:

- **The cost of litigation** is a major barrier to civil remedies as a mechanism for enforcing rights.²²⁸ Even if an individual plaintiff can bring a claim for one of the defined harms, they will likely remain financially disadvantaged. For instance, in the context of environmental law, issues relating to access to justice are exacerbated by the fact that polluters are typically well-resourced while individual plaintiffs are often not. Class actions may be helpful in this respect, especially because the effects of environmental harm will often affect a number of individuals directly. Indeed, more generally, '[w]ithout class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims'.²²⁹
- In all Canadian jurisdictions, the losing party in a civil lawsuit must generally pay some portion of the winner's legal costs – this is a double-edged sword as it can support litigation by those with fewer resources or can be a significant burden for such litigants.²³⁰
- **Compensation may be inadequate** even where a plaintiff is successful. At least in the context of personal injury, the quantum of non-pecuniary awards has long been limited.²³¹ In 2022, accounting for inflation, these damages are capped at around CAD 400,000 – an amount that may not necessarily compensate for loss. Nevertheless, the ability to be compensated at all may be seen as advantage.
- **The discovery process** may be considered as an advantage because parties are required to answer questions and disclose all documents relevant to the lawsuit, often including confidential documentation (which is protected from use for ulterior purposes²³²) This process can help plaintiffs better understand what occurred (within limits, ie plaintiffs cannot go on what is commonly referred to as a 'fishing expedition'). On the other hand, this process can be weaponised against plaintiffs with fewer resources by delaying litigation which may make it difficult to financially sustain the lawsuit.

Assault or unlawful arrest and detention

47. In Canada, the perpetrator of this harm will often be law enforcement. While all of the causes of action described with respect to this harm apply to law enforcement in the execution of their duties, plaintiffs will typically face additional obstacles to succeeding against law enforcement because the tortious act cannot have been authorised by law (see [8] above).

228 See generally, Trevor CW Farrow, Ab Currie, Nicole Aylwin, Les Jacobs, David Northrup and Lisa Moore, [Everyday Legal Problems and the Cost of Justice in Canada: Overview Report](#) (Canadian Forum on Civil Justice: Toronto 2016). See also Thomas A Cromwell, [Access to Justice: Towards a Collaborative and Strategic Approach](#)' (2012) 63 University of New Brunswick Law Journal 38.

229 *Western Canadian Shopping Centres inc v Dutton* 2001 SCC 46 (Supreme Court of Canada) [28]–[29]. Despite the fact that class actions are a theoretically promising approach to environmental issues, climate change class actions have not found particular success in Canada to date – often failing at the certification step. However, it has been argued that a Charter- rather than torts-based approach may be more promising (see Jasminka Kalajdzic 'Climate Change Class Actions in Canada' (2021) Supreme Court Law Review, 2d, 100, 29). Furthermore, justiciability is also an obstacle to successful class actions due to the view that that courts are not the appropriate forum for adjudication of these disputes (*ibid* at 44–46). For an example of such judicial reticence, see *Environnement Jeunesse c Procureur général du Canada* 2021 QCCA 1871 (Court of Appeal of Québec).

230 Ontario's Rules of Civil Procedure, [RRO 1990, Reg 194](#), rules 57–58.

231 *Andrews v Grand & Toy Alberta Ltd* [1978] 2 SCR 229 (Supreme Court of Canada) 233.

232 *Kitchenham v Axa Insurance Canada* 2008 ONCA 877 (Court of Appeal for Ontario) [28]–[32]; Ontario's Rules of Civil Procedure (n 230) rule 30.1.

Environmental harm

48. For the sake of brevity, we mention only four shortcomings of traditional civil liability regimes with respect to addressing environmental harms:
- i. It may be difficult for plaintiffs to establish damages when the science is inconclusive.²³³
 - ii. Certain causes of action rely on directness (eg trespass, battery) but harm in the environmental context is typically caused indirectly.²³⁴
 - iii. Causation may be difficult to establish where a substance increases the probability of a disease that can arise in different ways (eg cancer) – to make matters worse, there is often latency between exposure and consequent harm.²³⁵
 - iv. More broadly, some core concerns of environmental protection (eg long-term and diffuse environmental degradation through climate change or loss of biodiversity) may be removed from traditional harms protected against by traditional civil liability regimes (eg injury to proprietary, economic, or bodily interests).
49. Environmental protection statutes may be more effective at providing redress by providing causes of action that are specifically tailored to environmental harm. These causes of action are frequently embedded into the regulatory framework, for example, by creating a cause of action for failure to comply with statutory obligations.²³⁶

Harmful or unfair labour conditions

50. As noted above at [17], [21] and [22], employment standards and workers' compensation regimes significantly displace traditional civil remedies, in favour of administrative systems and no-fault compensation schemes. While, in principle, these approaches further better access to justice through simplified procedures and compliance through oversight mechanisms, they have also been subject to critique.
51. Some of Canada's most vulnerable workers nevertheless face barriers to enforcing employment standards through the complaints systems because of 'well-founded fears of employer reprisal, direct and opportunity costs of the claim process, difficulties presenting and documenting their claims, and lack of access to professional advice or representation'.²³⁷ Of course, these concerns would likely be heightened in the context of judicially enforced civil remedies. As mentioned earlier at [19], other vulnerable workers may be excluded from these protections in whole or in part.
52. Similarly, prior to the implementation of the no-fault insurance scheme for injuries that occur in the course of employment, workers had difficulty securing compensation in tort for a variety of reasons, including the high cost and slow pace of litigation.²³⁸ Thus, while the statutory bar against tort claims (discussed at [22]) can be controversial, especially when conduct is blameworthy, 'few would today argue for a full-fledged return to the tort system'.²³⁹ Some commentators advocate, instead, for allowing workers to pursue parallel civil remedies in certain circumstances.²⁴⁰

233 Benidickson (n 64) 121.

234 *ibid* 118; *Smith* (n 45) [38]–[42] (Here the trial judge rejected that a claim in trespass was established because the emission of nickel particles from a refinery was not a direct intrusion despite contaminating neighbouring soil.)

235 Benidickson (n 64) 121.

236 Environmental Protection Act (n 68) para 99(2)(a).

237 Kevin Banks, 'Employment Standards Complaint Resolution, Compliance and Enforcement: A Review of the Literature on Access and Effectiveness' (Ministry of Labour, 2015) 6 in Labour Law Casebook Group, *Labour and Employment Law: Cases, Materials, and Commentary* (9th edn, Irwin Law 2018) 1016–1017.

238 England, Wood and Christie (n 96) [9.59].

239 *ibid* [9.71]–[9.72].

240 *ibid* [9.72]–[9.73].

Corporations

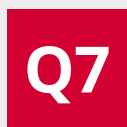
53. The main obstacle to establishing corporate liability is that claimants must operate within a regime designed specifically to limit liability, and corporations typically take full advantage of the tools offered by the regime to further limit their liability through complex corporate structures involving multiple layers of subsidiaries (often across jurisdictions). Thus, the reluctance of Canadian courts to pierce the corporate veil will often limit recovery, even in cases where the subsidiary is wholly owned and wholly controlled.

Public bodies

54. As discussed earlier at [25], claimants may face significant additional hurdles when seeking to establish the liability of a public body. For instance, the defence of statutory authority prevents liability for damages for a nuisance that is the inevitable consequence of discharging a statutory duty.²⁴¹

55. In addition, public policy considerations have often resulted in modified tests to establish a cause of action. For instance, it is more difficult to establish that a regulatory authority owes a duty of care to a particular individual under the *Anns/Cooper* framework.²⁴²

56. On the other hand, the availability of damages for violations of the Charter is a powerful tool that is only available with respect to government action.



Can civil claims be brought against a foreign defendant and if so, what are the rules for that?

57. It can be very difficult to hold a foreign defendant (or the Canadian parent corporation of a foreign subsidiary) liable in Canada. We highlight four issues to consider in this context: jurisdiction; the appropriateness of the forum (ie *forum non conveniens*); choice of law (ie *lex loci delicti*); and the legal separation between subsidiary and parent corporations.

- **Jurisdiction** over foreign defendants may be established when there is a 'real and substantial connection' between the forum and the defendant or subject matter of the dispute (through consideration of a variety of connecting factors).²⁴³ In cases where the defendant is a parent corporation with its head office in Canada, the court will always have jurisdiction.²⁴⁴
- **The appropriateness of the forum** may be challenged through a *forum non conveniens* motion, even where jurisdiction exists. As a matter of discretion, the court seized with the issue may decline jurisdiction if it finds another forum is clearly more appropriate to decide the matter in dispute (through consideration of a variety of factors).²⁴⁵

241 *Ryan* (n 61) [54]–[56].

242 See eg *Taylor v Canada (Attorney General)* [2012 ONCA 479](#) (Court of Appeal for Ontario) [76]–[97]; *Ernst v Alberta (Energy Resources Conservation Board)* [2014 ABCA 285](#) (Court of Appeal of Alberta) [16]–[18].

243 *Club Resorts Ltd v Van Breda* [2012 SCC 17](#) (Supreme Court of Canada) [80]–[100].

244 *ibid* [86].

245 *Garcia v Tahoe Resources inc* [2017 BCCA 39](#) (Court of Appeal for British Columbia) [48]–[131]. This case is decided on the basis of s 11 of British Columbia's Court Jurisdiction and Proceedings Transfer Act, [SBC 2003, c 28](#), which the Supreme Court of Canada has found to be a complete codification of the common law in this regard; *Teck Cominco Metals Ltd v Lloyd's Underwriters* [2009 SCC 11](#) (Supreme Court of Canada) [22].

- **Choice of law** is generally governed by the principle of *lex loci delicti*, which holds that ‘the law to be applied in torts is the law of the place where the activity occurred’.²⁴⁶ In practice, it may be difficult to characterise the wrongful activity as having occurred in Canada when the injury itself occurs outside of Canada.²⁴⁷
- **The legal separation between a foreign subsidiary and a Canadian parent corporation** can be difficult to overcome due to the courts’ reluctance to pierce the corporate veil. Currently, the best approach appears to be to assert *direct* liability in negligence of the parent corporation headquartered in Canada, as was done in *Choc v Hudbay*.²⁴⁸ These topics are discussed in further detail at [42] above.



Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

General

Open-access resources

- Canadian Judicial Council, [‘Civil Law Handbook for Self-Represented Litigants’](#)
- [CanLII](#) (database containing jurisprudence, legislation, and open-access works)
- Law Society of Ontario, [‘Continuing Legal Education Articles’](#)
- Library of Parliament, [‘Canadian Parliamentary Historical Resources’](#)
- Stéphane Beaulac and Jean-François Gaudreault-Desbiens, [‘Common Law and Civil Law: A Comparative Primer’](#) (Federation of Law Societies of Canada 2017)
- Supreme Court of Canada, [‘Sources of Legal Information Available to the General Public’](#) (links to a variety of resources across all provinces)

Closed-access resources

- Canadian Encyclopedic Digest and Halsbury’s Laws of Canada (legal encyclopedias)
- Jean-Louis Baudouin, Patrice Deslauriers and Benoît Moore, *La responsabilité civile*, 9th ed, vol 1, Principes généraux, Montréal, Éditions Yvon Blais, 2021
- Philip H Osborne, *The Law of Torts* (6th edn, Irwin Law 2020)
- Vincent Karim, *Les obligations*, (4th edn, vol 1, Montréal, Wilson & Lafleur, 2015)
- Penelope Simons and Heather McLeod-Kilmurray, *Canada: Backsteps, Barriers and Breakthroughs in Civil Liability for Sexual Assault, Transnational Human Rights Violations and Widespread Environmental Harm* in Ekaterina Aristova and Uglješa Grušić (eds), *Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions* (Hart Publishing 2022).

²⁴⁶ *Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon* [1994] 3 SCR 1022 (Supreme Court of Canada) 1045–1050.

²⁴⁷ *Das v George Weston Limited* 2018 ONCA 1053 (Court of Appeal for Ontario) [80]–[99].

²⁴⁸ *Choc* (n 194). The plaintiffs asserted that security forces working for the defendant’s subsidiary committed a variety of human rights abuses in Guatemala. The Court found that a parent corporation could potentially owe a duty of care to those affected by its subsidiary’s operations – and it was therefore not plain and obvious that a claim in negligence establishing direct liability of the defendants would fail.

Harmful or unfair labour conditions

Open-access resources

- Federally and provincially maintained webpages on employment standards: [Canada](#); [Alberta](#); [British Columbia](#); [Manitoba](#); [New Brunswick](#); [Newfoundland and Labrador](#); [Northwest Territories](#); [Nova Scotia](#); [Nunavut](#); [Ontario](#); [Prince Edward Island](#); [Quebec](#); [Saskatchewan](#); [Yukon](#)

Closed-access resources

- Robert Gagnon, *Le droit du travail du Québec* (8th edn, Yvon Blais 2022)
- G England, R Wood and I Christie, *Employment Law in Canada* (4th edn, LexisNexis Butterworth 2005) (loose-leaf or online)
- Labour Law Casebook Group, *Labour and Employment Law: Cases, Materials, and Commentary* (9th edn, Irwin Law 2018)

Environmental harm

Open-access resources

- Allan E Ingelson and others, [Environment in the Courtroom](#) (University of Calgary Press 2019)
- Michel Bélanger and Paule Halley, '[Accès à la justice pour protéger l'environnement au Québec: réflexions sur la capacité à agir des particuliers et des groupes environnementaux](#)', (2017) 62:3 McGill Law Journal 603

Closed-access resources

- Jamie Benidickson, *Environmental Law*, (5th edn, Irwin Law 2019)
- JurisClasseur Québec, col '*Droit public*', vol '*Droit de l'environnement*' (Lexis Nexis 2012) (loose-leaf updated 2022)
- Lynda Collins and Heather McLeod-Kilmurray, *The Canadian Law of Toxic Torts* (Canada Law Book 2014)

Assault or unlawful arrest and detention

Open-access resources

- Justice Canada, '[Charterpedia](#)' (Continually updated page containing summaries of the jurisprudence surrounding Charter rights and remedies)

Closed-access resources

- David Grant Boghosian, *Canadian Law of First Responders' Liability* (LexisNexis Canada 2020)

Corporate, public bodies, and other

Closed-access resources

- J Anthony VanDuzer, *The Law of Partnerships and Corporations* (4th edn, Irwin Law 2018)
- Penelope Simons and Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage* (Routledge 2014) 286
- Peter Hogg, Patrick Monahan, and Wade Wright, *Liability of the Crown* (4th edn, Carswell 2011)
- Raymonde Crête and Stéphane Rousseau, *Droit des sociétés par actions* (4th edn, les Éditions Thémis 2018)

Case Scenarios

1 Case Scenario

A wave of peaceful anti-government protests in the capital city of X Country denounced controversial legislation reforming electoral law. X Country's police responded to the peaceful protests with violence and brutality. The protesters were beaten and tear gassed. Some were detained for several days without charge or access to the lawyers. Human rights activists reported alleged torture and other ill-treatment in detention.

The protesters gathered in the market square where many shops and office buildings are located. Security Co is a private company providing security to the premises and personnel of the shops and offices. There is no evidence that personnel of the Security Co were involved in the violence that injured protesters. There is, however, evidence that on several occasions personnel of Security Co provided X Country's police with vehicles, equipment, and water. [READ MORE](#)

2 Case Scenario

X Group is a group of extractive companies. Parent Co is the parent company of X Group which is responsible for the overall management of X Group's business. X Group's extractive operations are carried out by its subsidiaries. Every subsidiary is incorporated as a separate legal entity and is responsible for an individual project. Subsidiary Co is a licence holder and operator of a major extractive project. Parent Co is the sole shareholder of Subsidiary Co.

X Group has been accused of severe environmental pollution arising from oil spills caused by Subsidiary Co's extractive project. Oil extracted by Subsidiary Co leaked and flowed into local rivers and farmland in the neighbourhood of the project site, destroying crops and killing fish. The result was that the food and water supplies of the local population were severely affected, and in addition members of the local community also experienced breathing problems and skin lesions. Journalists

and environmental activists publicised the harm done to the local environment and community. Parent Co has made no statements about the oil spills but, in a recent report to its shareholders, Parent Co repeated that the X Group was committed to its policy of operating in an environmentally sound manner and ensuring the health and safety of its workers and those affected by its business operations. [READ MORE](#)

3 Case Scenario

Factory Co owns a garment factory that supplies many large international clothing retailers. The working conditions in Factory Co's factory have generally been poor and exploitative and have included physical abuse for non-compliance with production targets, sexual harassment of female workers by male supervisors, and compulsory unpaid overtime. Local trade unions have regularly accused Factory Co of poor factory workplace safety, including a lack of emergency procedures, ineffective fire safety equipment and few emergencies medical supplies. Two months ago, during a fire at Factory Co's garment factory, seventy-six workers died and fifty-eight were injured, many seriously. Preliminary investigations suggest that employees suffocated or were burned alive because windows were barred, emergency exits closed, smoke alarms did not work, and supervisors did not implement safety protocols and fire evacuation procedures.

Brand Co is the major purchaser of clothes produced by Factory Co's garment workers. It has been an enthusiastic and very public advocate for human rights standards and expressed its commitment to responsible business practices. Several civil society organisations wrote an open letter to the CEO of Brand Co calling on Brand Co to demonstrate leadership in preventing, addressing, and remedying adverse human rights impacts in its supply chain. [READ MORE](#)



CaseScenario 1

Q1

Could injured or unlawfully arrested protesters bring civil claims against the police and or Security Co (and/or its personnel) in your jurisdiction? Please also indicate the key elements of liability that would need to be shown by the claimants to hold the perpetrators liable.

Claims against the police

58. The following claims may be brought against the police:

- **Assault and battery** may both be available to a person who was beaten or subjected to some other form of contact which was physically harmful or offensive to their reasonable sense of dignity (eg tear gas), and apprehended the harm (eg they could see an officer charge at them). On the other hand, a person who was beaten without ever apprehending imminent harm (eg hit from behind) would only have an action in battery.
- **False imprisonment and false arrest** would likely be available to claimants who were detained or arrested. Prima facie false imprisonment and arrest could be established by the fact that the protesters were held for several days (presumably they were also arrested). Thus, a prima facie case for false imprisonment and/or false arrest could be established, at which point the police would be entitled to establish they had legal authority for the detention or arrest. Furthermore, those who kept the protesters imprisoned longer than reasonably necessary may also be liable in false imprisonment.²⁴⁹
- **Violations of the peremptory norms of customary international law** may also form the basis of an action (see [23]). For example, in this case, it is possible that plaintiffs could seek redress for torture, cruel, inhuman or degrading treatment, or arbitrary deprivation of liberty, the prohibitions against which are peremptory norms of customary international law.²⁵⁰ However, such actions would be novel (and may be less attractive given the range of existing private and Charter remedies available).
- Subsection 24(1) of the Charter could provide a remedy for the violation of many Charter rights at issue in this scenario, including:
 - freedom of expression (subsection 2(b));
 - the right to peaceful assembly (subsection 2(c));
 - the right to life, liberty, and security of the person (section 7);
 - the right not to be arbitrarily detained or imprisoned (section 9);

249 *Costain v Ryhorchuk and Hubbell* 58 Sask R 81 (Court of Queen's Bench for Saskatchewan) [54].

250 *Nevsun Resources Ltd* (n 122) [103], [126]–[129], [171]; *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 (Supreme Court of Canada) [152]; United Nations General Assembly, Report of the Working Group on Arbitrary Detention, UNGAHR DOC A/HRC/22/4 (24 December 2012) [75].

- the right to retain and instruct counsel without delay (subsection 10(b)); and
 - the right not to be subjected to any cruel and unusual treatment or punishment (section 12).
- Once it is established that a Charter right was unjustifiably infringed, the protester must demonstrate that an award for Charter damages is ‘appropriate and just in the circumstances’, by reference to the functions of subsection 24(1), namely compensation, vindication, or deterrence.²⁵¹ All three functions would likely be served here.²⁵²
 - The government would have the opportunity to introduce any countervailing considerations (eg concerns for good governance or the existence of alternative remedies). For instance, overlapping successful claims in tort may adequately address the Charter breaches and duplicative awards would not be granted.²⁵³
59. **Statutory immunity** will usually be the largest obstacle to overcome when making claims against the police. Besides the provincial statutory bars (eg in British Columbia), law enforcement will not incur civil liability if they can demonstrate that their actions were authorised by law (as explained at [8], above). For instance, pursuant to section 25 of the Criminal Code, police can use as much force as is necessary in the execution of their duties.²⁵⁴ To be brief, most, if not all of the actions set out in the scenario would not be authorised by law. Indeed, even a justification based on pre-empting a breach of peace by arresting protesters would fail because a person cannot be arrested simply to prevent a breach of peace committed by others.²⁵⁵

Claims against Security Co

60. It is unlikely that Security Co would be found to be liable if it merely provided the police with vehicles, equipment, and water. However, it may be possible with significant factual assumptions:
- **Negligence** would be difficult to establish against Security Co. It is unlikely that Security Co owes a duty of care to protesters when providing equipment to police. In our view, the primary obstacle to establishing such a duty is that courts may be reluctant to impose a duty of care in relation to aiding police. This is especially so given that it is an offence in Canada to omit, without reasonable excuse, to assist a public officer or peace officer in the execution of their duty in arresting a person or in preserving the peace, after having reasonable notice that one is required to do so.²⁵⁶ Furthermore, even if such a duty were to exist, simply providing equipment to police is very unlikely to amount to a breach of the standard of care, and any harm that subsequently arises would be difficult to characterise as a reasonably foreseeable. However, it might be possible to establish these elements if Security Co gave the police equipment that Security Co had seen the police use in unambiguously unlawful activities (eg if police used vehicles to hit the protesters and were subsequently given vehicles by Security Co).

251 *Vancouver (City)* (n 30) [24]-[31].

252 *ibid* [30].

253 *ibid* [35]-[36].

254 Criminal Code (n 23); *Fleming* (n 24) [114]-[119].

255 *Fleming* (n 24) [64], [102].

256 Criminal Code (n 23) s 129(b). There is very little, if any, case law on this specific provision of the Criminal Code (on this point, see Larry C Wilson, ‘Obstructing a Peace Officer: Finding Fault in the Supreme Court of Canada’ (2000) 27(2) *Manitoba Law Journal* 273, 277).

- **Concerted action:** Security Co could be found to be a joint tortfeasor in similar circumstances as those described directly above, for instance, if there was some planning or coordination between Security Co and the police. As explained earlier, courts have been reticent about the extent to which a defendant must be connected to the tortious act, stating, each case ‘must depend on its own circumstances’.²⁵⁷ That said, without some shared design that is illegal or could foreseeably become illegal, it is unlikely that Security Co would be held liable.

Q2

If civil claims would not be the preferred route for holding perpetrators in Case Scenario 1 to account, please indicate any other legal avenues available to the protesters.

61. The perpetrators may also be held to account via bodies mandated to investigate police behaviour, for instance, in Ontario, the Special Investigations Unit.²⁵⁸

Q3

Are there any high-profile lawsuits in your jurisdiction that are relevant to Case Scenario 1?

62. Many lawsuits arose in response to the actions of police officers at protests in relation to the 2010 G20 summit in Toronto.²⁵⁹ Among them, two class actions relating to the behaviour of law enforcement toward protesters during the summit have been settled after certification.²⁶⁰
- **Stewart v Toronto (Police Services Board):**²⁶¹ The plaintiff refused to submit to a search of his backpack that police had imposed as a condition of entry to a park that was serving as a collection point for protests related to the G20 summit. As a result, he was forcibly restrained and searched. The plaintiff alleged assault, battery, false imprisonment, false arrest, negligence, misfeasance in public office, and trespass. The plaintiff sought a remedy under subsection 24(1) for violations of subsection 2(b) (freedom of expression), section 7 (right to life, liberty, and security of the person), section 8 (right to be secure against unreasonable search or seizure), section 9 (right not to be arbitrarily detained or imprisoned), and section 15 (right to equality) of the Charter. Ontario’s Court of Appeal found that the police violated the plaintiff’s Charter rights and awarded CAD 500 in Charter damages for vindication and deterrence.
 - **Figueiras v Toronto (Police Services Board):**²⁶² During the G20 summit, police told the plaintiff as he was walking down the street to either submit to a search or leave the area. He did not submit to the search and was subsequently pushed by an officer and told leave the area, which he did. The plaintiff sought a declaration that the officers committed battery and violated his Charter rights, notably subsections

257 *Rutman* (n 172) [35].

258 The governing legislation for this is the Special Investigations Unit Act, [2019, SO 2019, c 1, sch 5](#).

259 See the National Union of Public and General Employees and Canadian Civil Liberties Association, ‘[G20 Toronto: A Citizens Inquiry Into Policing and Governance](#)’ (CCLU 2011).

260 *Good v Toronto (Police Services Board)* [2016 ONCA 250](#) (Court of Appeal for Ontario). See terms of these settlements: [Toronto G20 Summit Class Actions Settlement](#).

261 *Stewart v Toronto (Police Services Board)* [2020 ONCA 255](#) (Court of Appeal for Ontario).

262 *Figueiras* (n 5).

2(b), and 2(c) (freedom of peaceful assembly), and section 7. Ontario's Court of Appeal declared the police had violated his common law right to travel unimpeded on a public highway and his Charter right to freedom of expression. In addition, the Court declared that one of the officers had committed the tort of battery.



CaseScenario 2

Q1

Could the local community, or its representatives, or someone acting on their behalf, bring civil claims against Parent Co and Subsidiary Co in your jurisdiction? Please also indicate the key elements of liability that would need to be shown by the claimants to hold the perpetrators liable.

Liability of Subsidiary Co

63. A number of avenues for civil claims may be weighed to hold Subsidiary Co to account. Each would require particular elements to be considered.

- **Negligence** could likely be established against Subsidiary Co. First, Subsidiary Co owes a duty of care to its neighbours and likely to the local community more generally.²⁶³ The scenario does not provide sufficient detail to weigh a possible lapse in the standard of care; however, legislation relevant to the way the oil spilled would be relevant to the determination because '[t]he fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness' (and vice versa).²⁶⁴ Thus, legislation on, for instance, the drilling or storage of oil and gas operations (such as Ontario's Oil, Gas and Salt Resources Act²⁶⁵) could help to determine whether Subsidiary Co breached the standard of care.
- Causation could be established where 'but for' the careless act (ie the failure to meet the standard of care), the local community would not have suffered these damages. For instance, the farmers could establish damages in relation to their crops but would need to demonstrate how the breach in the standard of care caused that damage.
- Continuing from the same example, a reasonable person would foresee lost crops as a real risk created by the careless extraction and storage of oil – establishing that the injury was not too remote.

²⁶³ Huang (n 44) [160].

²⁶⁴ Ryan (n 61) [29].

²⁶⁵ Oil, Gas and Salt Resources Act [RSO 1990, c P.12](#).

- **Private nuisance** could be established if the oil leak either damaged or interfered with use and enjoyment of property in which the plaintiffs have a possessory interest. First, the interferences described are clearly not a 'slight annoyance or trifling interference'²⁶⁶ – they are substantial. Second, the plaintiffs would need to establish that the interference is unreasonable by reference to factors such as the severity of the interference, the character of the neighbourhood, and the sensitivity of the plaintiff.²⁶⁷ As mentioned earlier at [36], those plaintiffs who assert actual injury to their property will usually easily establish that the interference is unreasonable;²⁶⁸ destroyed crops and the types of personal injury described would also be likely to amount to unreasonable interference in the use and enjoyment of property.²⁶⁹
- **Riparian rights** could be invoked by property owners whose lands abut the polluted waterways. In this scenario, the oil spill results in a detectable alteration of the character or quality of the abutting waterways.²⁷⁰ The property owners could seek damages for the breach of their riparian rights.
- **Public nuisance** may be available where an oil spill flows into public areas, such as the local river described above. In Ontario, pursuant to subsection 103(1) of the Environmental Bill of Rights, a claim in public nuisance could be pursued without the Attorney General's consent and without any 'special damage'.²⁷¹ In other provinces, one of those two conditions must be met (see [12] above).
- **Rylands rule** may be available to establish strict liability. In these circumstances, the crux of the issue would be establishing whether Subsidiary Co made 'non-natural' use of the land. A court would consider 'where the use is made, the time when the use is made and the manner of the use' to determine whether the use of land is 'natural'.²⁷² On the one hand, the fact that Subsidiary Co was given a licence favours finding that it was a 'natural' use of land (assuming any terms of the licence were respected).²⁷³ On the other hand, storing and transporting large amounts of fuel has been found to be an unnatural use of land²⁷⁴ and many cases have found liability when underground fuel tanks leak.²⁷⁵ Thus, there is a reasonable prospect of success. Assuming these elements could be established, strict liability is 'probably' also available to those who only suffer personal damages.²⁷⁶
- **Section 40 of CEPA**²⁷⁷ creates a civil cause of action for violations of the Act or its regulations and could thereby provide a remedy to the local community. For instance, it would be a violation of section 201 of the Act not to 'repair, reduce or mitigate any negative effects on the environment or human life or health that result from the environmental emergency or that may reasonably be expected to result from it' or to fail to 'make a reasonable effort to notify any member of the public who may be adversely affected by the environmental emergency'.²⁷⁸

266 *Antrim Truck Centre Ltd* (n 164) [22].

267 *ibid* [26].

268 *ibid* [50].

269 Osborne (n 7) 419; *Antrim Truck Centre Ltd* (n 164) [23]: 'Nuisance may take a variety of forms and may include not only actual physical damage to land but also interference with the health, comfort or convenience of the owner or occupier'.

270 *Mihaylov* (n 64) [11]; *KVP Co* (n 64) 703. See also, Klar and Jefferies (n 150) 887-888.

271 Environmental Bill of Rights (n 63) s 103(1).

272 *Smith* (n 43) [97].

273 *ibid*.

274 *10565 Nfld inc v Canada (Attorney General)* [2017 CanLII 25468](#) (Supreme Court of Newfoundland and Labrador) [343]-[344].

275 *Canadian Tire Real Estate Ltd* (n 46) [8]-[11], [297]; *BC Tel Co v Shell Can Ltd*, [1987 CanLII 2777](#) (Supreme Court of British Columbia) [20]; *Doherty et al v Allen, Allen's Service Station Ltd and Irving Oil Ltd* [1987 CanLII 7271](#) (Court of Queen's Bench of New Brunswick) [25].

276 *Smith* (n 43) [68].

277 Canadian Environmental Protection Act (n 65) s 40.

278 *ibid* paras 201(1)(b) and (c).

CEPA includes in the definition of an 'environmental emergency' an uncontrolled, unplanned or accidental release of a prescribed substance (eg petroleum crude oil, diesel fuel, various oil fuels, etc).²⁷⁹

- **Section 99 of Ontario's Environmental Protection Act**²⁸⁰ is a promising avenue to seek compensation for an oil spill. It assigns liability to 'the owner of the pollutant and the person having control of the pollutant'. The section allows those who incur losses or damage as a direct result of the spill of a pollutant to be compensated (among other bases for liability) and does not depend on any fault or negligence.²⁸¹ Thus, members of the local community could seek compensation from Subsidiary Co who is both the owner as well as the person in control of the pollutant.

Claims against Parent Co

64. Distinct considerations relevant to claims against Parent Co arise as a result of the corporate structure.

- **Negligence** may be used to establish direct liability if it can be shown that Parent Co owed members of the local community a duty of care. As discussed above at [42], for the moment, there is a pre-trial decision establishing that it is not 'plain and obvious' that a corporation does not owe a duty of care to those affected by its subsidiary's operations. These facts are analogous to those in that decision: Parent Co made public representations about its commitment to operating in an environmentally sound manner and ensuring the health and safety of those affected by its business operations, creating an expectation, which can help establish the existence of a duty of care.²⁸²
- In another recent pre-trial decision,²⁸³ Ontario's Court of Appeal considered a similar question (in this case, as in these facts, the subsidiary was not foreign). There, improper replacement of gas regulators by individuals subcontracted by a subsidiary of the parent company was found to have led to an explosion and fire. The Court found that there was a triable issue as to whether the parent company had undertaken sufficient intervention in the management of its subsidiaries such that it assumed duty of care to third parties. The Court found that whether the parent company 'had undertaken an obligation to the customers of its subsidiaries to set standards for its subsidiaries and enforce them' was a triable issue. Thus, depending on the extent of Parent Co's control and the extent of their public representations, members of the local community may be able to establish direct liability of Parent Co through negligence.
- **Section 99 of Ontario's Environmental Protection Act**²⁸⁴ may or may not apply because it is not clear whether the defined term 'the person having control of the pollutant'²⁸⁵ could also apply to Parent Co. Courts have not foreclosed the possibility that a parent corporation could have 'control' of a pollutant within the meaning of subsection 99(2).²⁸⁶ If this is possible, then a claim pursuant to section 99 of Ontario's Environmental Protection Act could succeed.

279 *ibid* s 193; Environmental Emergency Regulations, 2019, [SOR/2019-51](#), s 2(1).

280 Environmental Protection Act (n 68) s 99.

281 *ibid* s 99(6).

282 *Choc* (n 194) [66]-[70].

283 *Avedian* (n 197).

284 Environmental Protection Act (n 68) s 99.

285 *ibid* s 99(2).

286 *United Canadian Malt Ltd v Outboard Marine Corp* [2000 CanLII 22365](#) (Superior Court of Justice of Ontario) [27]-[32].

- **The corporate veil would have to be pierced** for all other causes of action discussed with respect to Subsidiary Co to also give rise to liability for Parent Co. As discussed at [42], it is notoriously difficult to predict when a court would pierce the corporate veil. First, Parent Co must have had complete control of Subsidiary Co (ie more than just being the sole shareholder or merely operating closely – Subsidiary Co must have, *in fact*, not functioned independently).²⁸⁷ Second, Parent Co must have incorporated Subsidiary Co for a fraudulent or improper purpose or used by the parent as a shell for improper activity.²⁸⁸ However, it is not an improper purpose to incorporate in order to limit or shield against liability.²⁸⁹ Without more, a court would be unlikely to pierce the corporate veil based on these facts.



If civil claims would not be the preferred route for holding the perpetrators in Case Scenario 2 to account, please indicate any other legal avenues available to the local population.

65. Civil claims are the preferred route for the local population. However, such claims would run parallel to potential regulatory investigations and consequences under the relevant federal and provincial legislation. Under some statutes such as CEPA, members of the local population could apply for an investigation into an alleged offence.²⁹⁰



Are there any high-profile lawsuits in your jurisdiction that are relevant to Case Scenario 2?

66. In Canada, these cases tend to take the form of class actions, and once the class is certified, they are often settled out of court.²⁹¹ Thus, high profile events often do not correlate with high profile lawsuits. One of Canada's largest industrial disasters, the Lac-Mégantic disaster, was caused by an oil-carrying train that derailed in a small town, killing 27 people and destroying much of the town. It has been the subject of multiple claims, including the ongoing class action which was certified in *Ouellet v Rail World inc.*²⁹²
67. That said, *Kirk v Executive Flight Centre Fuel Services*,²⁹³ is more representative of environmental litigation. In *Kirk*, a tanker truck full of fuel overturned, spilling some 35,000 litres of helicopter fuel destined for a firefighting operation into Lemon Creek and connected waterways in the Kootenay region of British Columbia. The plaintiff brought a class action on behalf of all persons who owned, leased, rented, or occupied real property in the area. They are pleading negligence, nuisance, and the *Rylands* rule.²⁹⁴ The class was certified and the matter does not appear to have been settled.²⁹⁵

287 *Transamerica Life Insurance Co of Canada* (n 189).

288 *O'Reilly v ClearMRI Solutions Ltd* [2021 ONCA 385](#) (Court of Appeal for Ontario) [46]–[47].

289 *Clarkson Co Ltd v Zhelka* [1967] 2 OR 565 at 577, [1967 CanLII 189](#) (Ontario High Court of Justice).

290 Canadian Environmental Protection Act (n 65) s 17.

291 See the examples discussed in André Durocher, *Environmental Class Actions in Canada* (Carswell 2018) 2–16, 192–196, 709–711, 727–731 (discussing *Clark v 4107781 Canada inc* 2013 QCCS 4164 (Superior Court of Québec) 765–767, 767–784 (discussing *Anderson et al v Manitoba et al*, see [Manitoba Flood Class Action Settlement Agreement](#) (1 September 2017)) 825–832 (discussing *Blouin c Ste-Anne-de-Beaupré (Ville de)* 2008 QCCS 3793 (Superior Court of Québec)).

292 *Ouellet v Rail World inc* [2015 QCCS 2002](#) (Superior Court of Québec).

293 *Kirk v Executive Flight Centre Fuel Services* [2017 BCSC 726](#) (Supreme Court of British Columbia) remitted back to the chambers judge for reconsideration in part in *Kirk* (n 171), reconsidered in part in [2021 BCSC 987](#) (Supreme Court of British Columbia). See also, CBC News, [Lawsuit Filed Over Lemon Creek Jet Fuel Spill](#) (9 August 2013).

294 *Kirk* (n 293) [1]–[15].

295 *ibid* [160]–[162], [2021 BCSC 987](#) [47]–[50]; see the webpage for the [Lemon Creek Fuel Spill Class Action](#).

Case Scenario 3

Q1

Would it be possible to bring a civil claim against Factory Co and/or Brand Co? Please also indicate the key elements of liability to be shown by the claimants to hold Factory Co and/or Brand Co liable.

68. Workers in factories which manufacture textiles are part of schedule 1 set out in the General regulation under Ontario's Workplace Safety and Insurance Act.²⁹⁶ Therefore, those workers (and their spouses, children, and dependents) are barred from pursuing all rights of action in this context against Factory Co.²⁹⁷ Similarly, Brand Co would likely be captured by schedule 1 as a clothing retailer (Class I) or wholesaler of personal goods (Class H)²⁹⁸ and therefore cannot be sued by Factory Co's workers under Ontario's Workplace Safety and Insurance Act.²⁹⁹ This statute bar generally operates even where malice is involved.³⁰⁰ In lieu of a right of action, workers would be entitled to compensation as determined by the Workplace Safety and Insurance Board.

Q2

If civil claims would not be the preferred route for holding the perpetrators in Case Scenario 3 to account, please indicate any other available legal avenues available to the victims and/or their families?

69. The combined effect of facts such as the windows being barred, emergency exits closed, non-functional smoke alarms, and lack of safety protocols and fire evacuation procedures could lead to charges of criminal negligence (including criminal negligence causing death and criminal negligence causing bodily harm) among other charges.³⁰¹

296 General, [O Reg 175/98](#), sch 1 (Class E – Manufacturing).

297 Workplace Safety and Insurance Act, 1997, [SO 1997, c 16, sch A](#), ss 26(2) and 28(1).

298 General, [O Reg 175/98](#), sch 1.

299 Workplace Safety and Insurance Act (n 297) ss 26(2) and 28(1).

300 *Decision No 1227/19 2019 ONWSIAT 2324* (Ontario Workplace Safety and Insurance Appeals Tribunal) [49]–[51]. See also, *Ashraf v SNC Lavalin ATP inc 2013 ABOB 143* [25] (Court of Queen's Bench of Alberta).

301 Criminal Code (n 23) ss 219–221.

Q3

Are there any high-profile lawsuits in your jurisdiction relevant for Case Scenario 3?

70. The case of *Das v George Weston* arose from a building collapse in Bangladesh. In 2013, Rana Plaza, a building in Bangladesh which contained several clothing factories collapsed, killing 1,130 people and injuring many more. Shortly before the collapse, cracks were found in the building, and as a result, all employees were sent home. Later in the day, the owner announced that the building was safe and employees should return the next day. Injured workers and relatives of those who died commenced a class action lawsuit against Loblaws, a large retailer in Canada who purchased clothes from the manufacturers. The plaintiffs alleged that Loblaws was negligent, breached their fiduciary duty, and were vicariously liable for the negligence of the suppliers.³⁰² On a pre-trial motion, Ontario's Court of Appeal concluded that Bangladeshi law applied to the plaintiffs' claims and that many of the plaintiffs were barred from bringing the action due to Bangladesh's limitations legislation (ie the actions were brought too late).³⁰³ Furthermore, the Court found that it was plain and obvious that the negligence claims would fail under Bangladeshi law and that Loblaws could not be held vicariously liable.³⁰⁴
71. Turning to a workplace accident that occurred in Canada, in January 2012, an explosion and ensuing fire occurred at the Babine Forest Products Ltd ("Babine") sawmill in Burns Lake, British Columbia. The incident killed two workers and injured many more.³⁰⁵ A few months later, a similar explosion and fire killed two more workers and injured many others at the Lakeland Mills Ltd ("Lakeland") sawmill in Prince George, British Columbia.³⁰⁶ As an illustrative example of workers' compensation benefits, one of the workers at the Babine sawmill, who had been employed with the company for 35 years, was gravely injured and left permanently disabled in the incident. He was granted CAD 1,395,871.18 in compensation which included wage loss, health care, permanent total disability payments, and a pension reserve.³⁰⁷ The Workers' Compensation Board of British Columbia (which operates as WorkSafeBC) also imposed combined administrative penalties and levies on Babine and Lakeland totalling CAD 1,011,639.62³⁰⁸ and CAD 417,775.52³⁰⁹ respectively in relation to these incidents. No criminal charges were laid in relation to either incident due to flaws in WorkSafeBC's investigations.³¹⁰ Some of those affected have brought civil proceedings against WorkSafeBC, in relation to its investigations before and after the explosions (among other things).³¹¹

302 *Das v George Weston Limited* 2017 ONSC 4129 (Superior Court of Justice of Ontario) [117]–[127].

303 *Das* (n 247) [79]–[126].

304 *ibid* [129]–[216].

305 See the conclusions of WorkSafeBC's investigation: WorkSafeBC, 'Explosion and Fire at Sawmill in Burns Lake' (January 2012) (amended 2014).

306 See the conclusions of WorkSafeBC's investigation: WorkSafeBC, 'Lakeland Mills Incident Investigation Report' (April 2014) (amended 2014).

307 *A1601174 (Re)* 2017 CanLII 150280 (British Columbia Workers' Compensation Appeal Tribunal) [65]–[67] (see also additional descriptions of injuries and compensation [70]–[71], [73]–[78], [83]–[86]).

308 WorkSafeBC, [Penalty Summaries \(Babine Forest Products Limited\)](#) (2 April 2014) (search: "Babine" in year "2014").

309 WorkSafeBC, [Penalty Summaries \(Lakeland Mills Ltd\)](#) (29 July 2014) (search: "Lakeland" in year "2014").

310 Criminal Justice Branch of the BC Ministry of Justice, Media Statement 'No Charges Approved against Babine Forest Products' (10 January 2014); Criminal Justice Branch of the BC Ministry of Justice, Media Statement, 'No Charges Approved against Lakeland Mills Ltd' (14 April 2014).

311 *A1601174 (Re)* (n 307) [6]–[7], [17].

