Court File No.: **CV-21-00000012-0000**

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

POORKID INVESTMENTS INC., THE COACH PYRAMIDS INC., and BRIAN HAGGITH

Applicants

- and -

SOLICITOR GENERAL OF ONTARIO SYLVIA JONES, ONTARIO PROVINCIAL POLICE COMMISSIONER THOMAS CARRIQUE, ONTARIO PROVINCIAL POLICE CHIEF SUPERINTENDENT JOHN CAIN, ONTARIO PROVINCIAL POLICE INSPECTOR PHILIP CARTER and HER MAJESTY THE QUEEN IN THE RIGHT OF ONTARIO

Respondents

FACTUM OF THE RESPONDENTS HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO ET AL.

September 24, 2021

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I. OVERVIEW

1. This constitutional challenge to s. 17 of the *Crown Liability and Proceedings Act, 2019* ("CLPA") should be dismissed. Requiring litigants who allege that the Crown or its officers or employees have acted in bad faith to demonstrate that their claim has a reasonable possibility of success does not affect any part of the core jurisdiction of superior courts or prevent litigants from accessing superior courts. Rather, it ensures that scarce judicial resources are reserved for meritorious claims with a reasonable possibility of success.

2. The applicants argue that s. 17 imposes both legal and financial barriers to accessing superior courts. On the issue of whether s. 17 imposes a legal barrier, the good faith/reasonable possibility of success standard imposed by s. 17 does not limit access to superior courts at all since s. 17 requires a party to bring a motion for leave to superior court and it is the superior court that will decide what the standard requires and whether it is met in a particular case. It is therefore not analogous to the hearing fees that were struck down in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)* ("*Trial Lawyers*"), which prevented litigants from accessing superior courts entirely.

3. The applicants also allege that s. 17 raises a financial barrier to accessing the court because bringing a motion for leave under s. 17 would cost them between $50,000–$100,000 in legal fees. Even if the affiant's estimate of the costs of a motion under s. 17 were accurate, Ontario submits that this evidence cannot support a finding that s. 17 of the CLPA prevents litigants from accessing superior courts. First, legal fees are qualitatively different from the hearing fees that were struck down in *Trial Lawyers.* Legal fees limit access to legal services, not access to courts. In *Christie,* the Supreme Court held that the cost of legal services does not give rise to a constitutional claim even when those costs are increased by government action. Second, and in

any event, the applicants' evidence does not establish that the costs of a motion under s. 17(2) prevent any litigants from accessing the courts because it includes no analysis of the applicants', or any other litigants', capacity to pay the costs of a motion for leave under the CLPA.

4. Turning to the applicants' other arguments, the unwritten constitutional principle of the rule of law is not an independent basis for striking down legislation. Even if it were, there is no evidence that s. 17 prevents litigants from accessing the courts and therefore no potential rule of law issue. On the contrary, the rule of law requires the court to apply validly enacted laws to the disputes that come before the court.

5. Finally, there is no merit to the applicants' challenge under s. 7 of the *Charter*. It is well established that s. 7 does not protect economic rights such as the right to bring a civil action for damages against the Crown. It is also well established that the security of the person interest protected under s. 7 is not engaged by the stresses that ordinarily attach to administrative and judicial processes. There is no evidence in this application of any psychological stress on the applicants. In any event, even if s. 7 of the *Charter* were engaged, the applicants have not identified any principle of fundamental justice that is not respected by requiring them to seek leave of the court before bringing their proceeding against the Crown.

6. Ontario therefore respectfully requests that the court dismiss this application.

II. FACTS

(a) The claim

7. The applicants are plaintiffs in a proposed class action ("the Action") that seeks damages against the Crown and other defendants for misfeasance in public office, nonfeasance in public office, negligence, and nuisance. The plaintiffs allege that they suffered damages because of how the defendants responded (or failed to respond) to protests and obstructive activity in Caledonia.

8. There are three plaintiffs listed in the Statement of Claim. The plaintiff Poorkid Investments is a franchisee of Pita Pit Limited and carries on a retail business selling fast food. The plaintiff Coach Pyramids Inc. is a vendor of women's fashion accessories. Both are located in Caledonia. The plaintiff Brian Haggith is an individual who owns property in Caledonia.

9. On March 19, 2021, a case management conference was held in the Action before Justice Broad. The parties agreed that the Action is subject to an automatic stay pursuant to s. 17(2) of the CLPA and that the plaintiffs may proceed only with leave of the court obtained on a motion. The plaintiffs were to deliver their motion materials as required by subsection 17(3) of the Act. Instead of delivering a motion for leave to proceed, the Plaintiffs served the Notice of Application herein, seeking a declaration that s. 17 of the CLPA violates s. 96 of the *Constitution Act, 1867*.

(b) Section 17 of the *Crown Liability and Proceedings Act, 2019*

10. Section 17 of the CLPA requires claimants whose proceedings include a claim against the Crown (or an officer or employee of the Crown) based on misfeasance in public office or another tort based on bad faith to seek leave of the court to bring those proceedings.

Crown Liability and Proceedings Act, 2019, SO 2019, c 7, Sch 17, ss 17(1), (2) ["CLPA"]

11. The court shall not grant leave unless it is satisfied that the proceeding is being brought in good faith and there is a reasonable possibility that the proceeding would be resolved in the plaintiff's favour.

CLPA, s 17(7)

12. The CLPA also enacts various parameters in relation to a motion for leave under s. 17(2) of the CLPA:

(a) On a motion for leave under s. 17(2) of the CLPA the claimant is required to serve on the defendant and file with the court (1) an affidavit setting out a concise statement of the material facts on which the claimant intends to rely and (2) an affidavit of documents (or such other document as may be prescribed) disclosing, to the full extent of the claimant's knowledge, information, and belief, all documents relevant to any matter in issue in the proceeding that are or have been in the claimant's possession, control or power.

CLPA, s 17(3)

(b) On a motion for leave under s. 17(2) the defendant may, but is not required to, serve on the claimant and file with the court an affidavit setting out a concise statement of the material facts on which the defendant intends to rely for the defence.

CLPA, s 17(4)

(c) Only the affiant, or the author of a prescribed document, may be examined or summoned for examination on the contents of an affidavit or other prescribed document for the purposes of the motion for leave.

CLPA, s 17(5)

(d) The defendant is not subject to discovery, the inspection of documents, or to examination for discovery in relation to a motion for leave under s. 17(2) of the CLPA.

CLPA, s 17(6)

(e) Each party to a motion for leave under s. 17(2) of the CLPA bears its own costs of the motion.

CLPA, s 17(8)

III. LAW AND ARGUMENT

(1) Section 96 of the *Constitution Act, 1867*

13. The Supreme Court of Canada has interpreted s. 96 of the *Constitution Act, 1867* as protecting the core jurisdiction of superior courts. However, within this general framework, there are several distinct branches of s. 96 jurisprudence. The first deals with grants of jurisdiction that historically belonged exclusively to superior courts.[1] The second deals with grants of jurisdiction that fall within the "core" of superior court jurisdiction.[2] The third deals with barriers to accessing superior courts.

14. In Ontario's submission, only the last of these branches has any application to the applicant's challenge to s. 17 of the CLPA. The first and second branches are not relevant in this case because s. 17 does not remove any jurisdiction from a superior court or transfer any jurisdiction to a court staffed by provincially appointed judges or an administrative tribunal. In any event, rules relating to Crown liability in tort did not fall within the exclusive jurisdiction of superior, district or county courts at Confederation. Crown liability in tort is a statutory creation that dates from 1962 and therefore does not fall within the core jurisdiction of superior courts.

> *Babcock v. Canada (Attorney General)*, 2002 SCC 57 ("*Babcock*") at para. 60. See also *R. v. McFarlane* **(**1882) 7 S CR 216 at 238-240; *Rudolph Wolff & Co. v. Canada*, [1990] 1 SCR 695 ("*Rudolph Wolff*") at 699–700
> Karen Horsman & Gareth Morley, *Government Liability: Law and Practice* (Toronto: Thomson Reuters, 2017) (loose-leaf updated 2019, release 33) ("Horsman & Morley) at 1.30.20(2)
> Hogg, Monahan & Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 154

[1] This branch includes cases such as the *Reference re Residential Tenancies Act (Ontario)*, [1981] 1 SCR 714 and *Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (NS)*, [1989] 1 SCR 238, and led to the development of the three-part test in the *Reference re Residential Tenancies Act* as modified by subsequent decisions.
[2] This branch includes cases such as *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 SCR 725 in which the Court held that a youth court cannot be granted exclusive jurisdiction to punish young offenders for *ex facie* contempt of a superior court order; *Crevier v. Québec (Attorney General)*, [1981] 2 SCR 220, and *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 SCR 307. The Supreme Court also recently added a multi-factor test that applies when determining whether a grant of jurisdiction to a court staffed by provincially appointed judges infringes the core jurisdiction of superior courts: *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27.

15. With respect to the third branch of s. 96 jurisprudence, the Supreme Court of Canada has held that s. 96 prohibits barriers that prevent litigants from bringing legitimate claims before superior courts.

16. The constitutional right to access courts that is affirmed in this branch is based upon the Court's decisions in *B.C.G.E.U. v. British Columbia (Attorney General)*, in which the Court upheld the Chief Justice of British Columbia's authority to issue an injunction restraining picketing activities that interfered with access to the courts; *Christie v. British Columbia (Attorney General)*, in which the Court recognized a fundamental right to access the courts, subject to certain limits, and held that increasing the cost of legal fees did not interfere with access to the courts; and *Trial Lawyers*, in which a majority of the Court held that hearing fees that prevented litigants of modest means from accessing any court at all violated s. 96.

> *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 SCR 214
> *British Columbia (Attorney General) v. Christie*, 2007 SCC 21 ["*Christie*"]
> *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 ["*Trial Lawyers*"]

17. In *Trial Lawyers*, the majority struck down B.C.'s hearing fee regime because there was evidence that it prevented a substantial number of people from taking their legitimate disputes to any court at all. The regime in question required the party setting down a matter for trial to pay a hearing fee that was a function of the number of days that the trial was expected to last. While the hearing fee regime contained an exemption, this exemption only applied to impoverished persons. The evidence before the court established that the hearing fees caused undue hardship to litigants of modest means who did not qualify for the exemption but nonetheless could not afford to pay the hearing fees. As a result, they were deprived of access to the superior court and could not bring their legitimate disputes to any other court because no other court had jurisdiction.

> *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27 at para 69

(2) The leave provisions in the CLPA are distinguishable from the hearing fees struck down in *Trial Lawyers*

(a) Section 17 does not prevent anyone from accessing superior court

18. As the Supreme Court of Canada subsequently explained, the hearing fees in *Trial Lawyers* prevented middle-class litigants from accessing superior courts at all. In contrast, s. 17 of the CLPA does not prevent anyone from accessing superior court. On the contrary, it directs litigants with certain kinds of claims to obtain leave from the superior court before proceeding with those claims. The applicants' arguments as to the good faith/reasonable possibility standard enacted by the CLPA are not arguments about access, but arguments about the procedure for bringing a claim in tort based on bad faith against the Crown before the superior court. This clearly sets s. 17 apart from the hearing fee regime in *Trial Lawyers*.

Reference re Code of Civil Procedure (Que.), art. 35, 2021 SCC 27 at para 69

19. Section 17 requires claimants to establish that their claim is brought in good faith and has a reasonable possibility of success to obtain leave to continue with the proceeding. Contrary to the applicants' arguments, s. 17 does not require a claimant to establish bad faith on the part of the Crown or its officers or employees on the motion for leave, but to establish that there is some basis for a claim of bad faith. The purpose of s. 17 is to ensure that public and judicial resources are not spent on allegations of bad faith that are themselves not made in good faith or which have no reasonable possibility of succeeding. Ontario submits that the full interpretation of how to apply the standard enacted by s. 17 of the CLPA should be left to a court deciding a s. 17 motion that is directly confronted with the issue of whether the applicants' evidence meets the standard. However a future court may decide that issue, s. 17 does not raise an issue of access to superior courts because it will be the superior court which determines what the standard should be and whether it is met.

20. Holding that *Trial Lawyers* prevents changes to the procedural or substantive law of how superior courts decide tort claims would go beyond guaranteeing a right of access to superior courts and impose a significant, and unwarranted, limitation on the province's jurisdiction over the "Administration of Justice in the Province" and "Property and Civil Rights." Nothing in s. 96 strips the provinces of their plenary jurisdiction to determine the substantive and procedural content of tort (or delict in Québec) law, including the ability and procedure for suing the Crown in tort. For example, statutory provisions that create immunity from damages for good faith decisions or actions are common throughout the statute book, but no court has ever held that these provisions deny access to the courts contrary to s. 96 of the *Constitution Act, 1867*.[3] Similarly, provinces have created no-fault automobile insurance schemes and completely replaced tort law in some areas such as workers' insurance, but these changes to the substantive law have not been treated as depriving litigants of access to the courts because they changed the law that the court applies to the dispute before it.

(b) The cost of a motion under s. 17 of the *Crown Liability and Proceedings Act* does not prevent litigants from accessing superior courts

21. The applicants also argue that s. 96 imposes a financial or economic barrier to accessing the superior court. However, the jurisprudence demonstrates that legal fees are not analogous to hearing fees. Second, even if they were, the applicants' evidence does not establish that the legal

[3] See, e.g., *Health Care Consent Act, 1996*, SO 1996, c 2, Sch A, s. 30: " A person who gives or refuses consent to a treatment on another person' s behalf, acting in good faith and in accordance with this Act, is not liable for giving or refusing consent."; *Highway Traffic Act*, RSO 1990, c H.8, s. 134.1(4): " No action or other proceeding for damages shall be brought against a police officer, a police force, a police services board, any member of a police services board, the Crown, an employee of the Crown or an agent of the Crown for any act done in good faith in the performance or intended performance of a duty under this section, or in the exercise or intended exercise of a power under this section, or any neglect or default in the performance or exercise in good faith of such duty or power."; *Health Protection and Promotion Act*, RSO 1990, c H.7, s. 95(4): "No action or other proceeding shall be instituted against a person for making a report in good faith in respect of a communicable disease or a disease of public health significance in accordance with Part IV."

costs of bringing a motion under s. 17(2) of the CLPA prevent litigants from accessing superior courts.

22. First, legal fees are not analogous to the hearing fees that were struck down in *Trial Lawyers*. Unlike hearing fees, the costs of a motion under s. 17(2) are not within the government's control. The applicant's affiant acknowledged that a major driver of legal costs is the hourly rate the lawyer or lawyers providing the legal services and that litigants may exercise some control over this cost by hiring less (or more) expensive lawyers or setting limits on a retainer. In contrast, the majority in *Trial Lawyers* took issue with the fact that hearing fees increased "arbitrarily" with the length of the trial, which was not in the sole control of the plaintiff, even though a long trial might be necessary and indeed efficient.

> Cross-examination of David Thompson, qq 17–23
> *Trial Lawyers, supra* at para 55

23. Moreover, unlike hearing fees that limit access to the courts themselves, legal fees impact access to private legal services. The difference between a right of access to courts and a right of access to legal services was explained in the Supreme Court's decision in *Christie*. In that case, the Supreme Court upheld a 7 per cent tax on legal services despite a finding of fact in the court below that the tax prevented some litigants from retaining Mr. Christie as their lawyer. While the applicants in *Christie* did not rely on s. 96, they did assert that the rule of law included a right to have a lawyer in relation to court and tribunal proceedings:

> First, it is argued that access to justice is a fundamental constitutional right that embraces the right to have a lawyer in relation to court and tribunal proceedings. This argument is based on B.*C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214, where this Court affirmed a constitutional right to access the courts, which was breached by pickets impeding access. It is argued that a tax on legal services, like pickets, prevents people from accessing the courts. It follows, the argument concludes, that a tax on legal services also violates the right to access the courts and justice.
>
> *Christie, supra* at para 16

24. The majority explained that the right of access to the courts recognized in the Court's earlier decision in *B.C.G.E.U. v. British Columbia (Attorney General)* was not absolute.

> The right affirmed in *B.C.G.E.U.* is not absolute. The legislature has the power to pass laws in relation to the administration of justice in the province under s. 92(14) of the Constitution Act, 1867. This implies the power of the province to impose at least some conditions on how and when people have a right to access the courts. Therefore *B.C.G.E.U.* cannot stand for the proposition that every limit on access to the courts is automatically unconstitutional.
>
> *Christie, supra* at para 17

25. Furthermore, the majority rejected the argument that the rule of law requires or guarantees a general right of access to legal services. It noted that the *Charter* only recognizes a right to counsel in certain specific situations (i.e., when a person is charged with an offence, or when the principle of fundamental justice that proceedings whereby the state deprives an individual of life, liberty, or security of the person must be fair requires representation by a lawyer).

> *Christie, supra* at paras 10, 17, 21–26

26. Second, there is no evidence from the applicants that the cost of a motion for leave under s. 17 of the CLPA prevents them (or any other litigant) from accessing superior court.

27. In Ontario's submission, the applicants' evidence of the costs of a motion under s. 17 of the CLPA suffers from serious deficiencies and the court should be cautious before relying on this evidence. The evidence:

(a) Is one lawyer's assertion as to the probable cost of litigating a motion under s. 17(2) of the CLPA, which was not tendered or qualified as expert evidence;

(b) Does not describe in any detail how the affiant arrived at an estimate of $50,000–$100,000 in legal costs for a motion under s. 17(2). The affiant does not provide any breakdown of these costs, including the number of hours of legal services that this would represent or the hourly rate of counsel on the motion; and

(c) While the evidence apparently proceeds by an analogy either to motions under provisions in the *Securities Act* that are said to be similar to s. 17(2) of the CLPA or by analogy to civil motions of average complexity, it does not include any analysis of the costs or average costs of either motions under the *Securities Act* provisions or civil motions of average complexity more generally.

28. Furthermore, even if the applicants' estimate of the cost of a motion under s. 17(2) were accurate, Ontario submits that it cannot support a finding that s. 17 of the CLPA prevents litigants from accessing superior courts. The applicants' evidence does not include any analysis of the plaintiffs' ability to pay the estimated cost of the motion, or any analysis more generally of other claimants' ability to pay the costs of a motion under s. 17(2). The affiant did not have any information about the plaintiffs' (two of which are corporations) financial situation or even whether the plaintiffs would be expected to pay the costs of the motion (for example, because of a contingency fee arrangement between the plaintiffs and their lawyers).

Cross-examination of David Thompson, qq 8–10, 24–34

29. This is in contrast to the evidence in *Trial Lawyers*. The plaintiff in *Trial Lawyers* was involved in a family law dispute. She was required to pay a hearing fee of roughly $3,600 for a 10-day trial. The fee was payable to the state, not to a private service provider she had chosen to retain. She was not impoverished and therefore did not qualify for the exemption in the statute, but her financial means were limited and she therefore could not afford the hearing fee in addition to the $23,000 in legal fees that she had incurred.

Trial Lawyers, *supra* at para 55

30. However, it was not the fact or amount of the fee alone but evidence of the effect of the hearing fee on middle-class litigants more generally that carried the day in *Trial Lawyers*. The

trial court, the B.C. Court of Appeal, and the majority of the Supreme Court all relied on expert evidence from an economist. This evidence took the hearing fees for a 10-day trial as a starting point and applied those fees to the population of people who would not qualify for the statutory exemption because their income was above a given measure of poverty (the "Market Basket Measure") by a specified amount. The import of this evidence was that roughly 188,000 households in British Columbia—plus up to half of all single people in the province—would not qualify for the exemption but would have significant difficulty affording the hearing fees. Moreover, First Nations people, recent immigrants, and the disabled were "certain to be over-represented" in this group. Based on this evidence, the majority of the Court found that "a segment of society is effectively denied the ability to bring their matter before the superior court". As well, the hearing fees were payable by all litigants, whether represented by counsel or self-represented.

Trial Lawyers, supra at paras 52–53, 35

31. This evidence in this case cannot meet the *Trial Lawyers* threshold of establishing that a substantial number of litigants would be subjected to "undue hardship" to access the court.

Trial Lawyers, supra at paras 45-46

32. In *Christie*, the Court also commented on the adequacy of the evidentiary record before it. It accepted the Attorney General of British Columbia's submission that the costs of legal services may be affected by a wide variety of factors and that for this reason expert economic evidence is needed to establish that the cost of legal services has an adverse effect on access to justice. The same comments could be made of this case:

> This conclusion makes it unnecessary to inquire into the sufficiency of the evidentiary basis on which the plaintiff bases his claim. However, a comment on the adequacy of the record may not be amiss, in view of the magnitude of what is being sought—the striking out of an otherwise constitutional provincial tax. Counsel for Mr. Christie argued before us that the state cannot constitutionally add a cost to the expense of acquiring counsel to

> obtain access to justice when that cost serves no purpose in furthering justice. This assumes that there is a direct and inevitable causal link between any increase in the cost of legal services and retaining a lawyer and obtaining access to justice. However, as the Attorney General of British Columbia points out, the economics of legal services may be affected by a complex array of factors, suggesting the need for expert economic evidence to establish that the tax will in fact adversely affect access to justice. Without getting into the adequacy of the record in this case, we note that this Court has cautioned against deciding constitutional cases without an adequate evidentiary record: *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713, at pp. 762 and 767–68, per Dickson C.J.; *MacKay v. Manitoba*, 1989 CanLII 26 (SCC), [1989] 2 S.C.R. 357, at p. 361; *Danson v. Ontario (Attorney General)*, 1990 CanLII 93 (SCC), [1990] 2 S.C.R. 1086, at p. 1099.
>
> *Christie, supra* at para 28 [emphasis added]

33. Similarly, the British Columbia Court of Appeal recently rejected a s. 96 challenge to B.C.'s post-*Trial Lawyers* court fees regime on the basis that the appellants had not adduced any evidence of their inability to pay the fees. The underlying proceeding in that case was a constitutional challenge (*Charter* ss. 7, 15) to provisions of B.C.'s *Medicare Protection Act*. The plaintiffs were required to pay court fees of more than $52,000 under B.C.'s post-*Trial Lawyers* regime. They challenged these fees pursuant to s. 96 of the *Constitution Act, 1867*. The Court of Appeal found that there was no evidence that the court fees posed an obstacle to the appellants:

> The corporate appellants conceded they could afford to pay court fees. There was no evidence from the individual appellants about their financial situation or ability to pay court fees. Nor was there any evidence with respect to the impact of fees upon specific litigants in other constitutional cases, or upon the ability of aggrieved citizens to bring constitutional challenges generally.
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> *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2018 BCCA 385 at para 5
> See also *Prairies Tubulars (2015) Inc. v. Canada (Border Services Agnecy)*, 2021 FC 36

34. Even if this court does not accept that *Christie* and *Trial Lawyers* require a distinction to be drawn between hearing fees and legal fees, the same result must follow in this case in the absence of any evidence that the cost of a motion under s. 17 prevents litigants in general, much less these particular litigants, from accessing the superior courts.

(3) The rule of law is not an independent basis on which to strike down legislation and does not assist the applicant in any event

35. The applicants also refer to the constitutional principle of the rule of law. Although the principle of the rule of law may be relevant to interpreting s. 96 of the *Constitution Act, 1867*, it is not an independent basis for striking down legislation and does not assist the applicants in any event.

36. The rule of law embraces three principles—the supremacy of the law over government officials as well as private individuals; the requirement for the creation and maintenance of an actual order of positive laws; and the requirement that the relationship and the individual be regulated by law.

> *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para 58 ["*Imperial Tobacco*"]

37. As an unwritten constitutional principle, the rule of law cannot be used to invalidate legislation. The Court of Appeal has held that unwritten constitutional principles, including the rule of law, "do not invest the judiciary with a free-standing power to invalidate legislation."

> *Toronto (City) v. Ontario (Attorney General)*, 2019 ONCA 732 at paras 88, 89
> *J. Cote & Son Excavating Ltd. v. City of Burnaby*, 2018 BCSC 1491 aff'd in *J Cote & Son Excavating Ltd v Burnaby (City)*, 2019 BCCA 168 at para 69

38. Unwritten constitutional principles can be used as an interpretive aid where the constitutional text is unclear or where legislation is genuinely ambiguous. However, outside of the unique context of judicial independence, they cannot be used independently to strike down legislation.

> *Christie*, *supra* at paras 24–27
> *Imperial Tobacco*, *supra* at paras 35–36
> *Campisi v Ontario*, 2017 ONSC 2884 at para 55 (aff'd 2018 ONCA 869)

39. With respect to the rule of law in particular, the Supreme Court of Canada has written that the rule of law is not "a tool by which to avoid legislative initiatives of which one is not in

favour. On the contrary, it requires that courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text."

Imperial Tobacco, supra at paras 57–67
Campisi, supra at para 55

40. In any event, the principle of the rule of law does not assist the applicants given that they have not established that s. 17 of the CLPA prevents litigants from accessing superior courts. In *Trial Lawyers*, the majority of the Court discussed the relationship between s. 96 and the rule of law. The majority explained that access to superior courts is essential to the rule of law because the creation and maintenance of an actual order of positive laws would be for no purpose if there were no way to enforce those laws by allowing litigants to bring their legitimate issues to court. Where, however, litigants can bring their legitimate issues to court, then the principle of the rule of law is not infringed.

Trial Lawyers, supra at paras 40, 41

41. Finally, the Supreme Court of Canada has explicitly held that the rule of law does not include a principle that government cannot change the substantive law that applies to the Crown. In *Imperial Tobacco* (2005), the Supreme Court of Canada upheld a provincial law that created a cause of action which allowed the province to sue tobacco companies for health care expenditures. The legislation provided that the province could pursue such a claim on an aggregate basis (i.e., in respect of the population of people on behalf of whom the government either had made or could reasonably be expected to make health care expenditures). Where the province made a claim on an aggregate basis, it did not need to identify or prove the cause of disease or prove the expenditures made in respect of any individual member of the population. Moreover, the government enjoyed a reversed burden of proof with respect to certain elements of the claim. Notwithstanding these advantages the Supreme Court of Canada upheld the law and

rejected the appellants' argument that by conferring these advantages on itself the Crown had violated the rule of law.

Imperial Tobacco, *supra* at paras 7–9, 63–64, 73-75

(4) Section 17 does not engage s. 7 of the *Charter*

42. Finally, the applicants' s. 7 challenge should be dismissed because a requirement to bring a motion for leave does not engage the plaintiffs' life, liberty, or security of the person interests. Even if it did, the applicants have not identified any principle of fundamental justice that is violated by requiring litigants with certain types of claims to seek leave under s. 17.

43. The analysis under s. 7 of the *Charter* proceeds in two stages. The first question is whether the impugned law infringes life, liberty, or security of the person. If the answer to that question is yes, the second question is whether the infringement is in accordance with the principles of fundamental justice.

Ontario (Attorney General) v. Bogaerts, 2019 ONCA 876 at para 46[*"Bogaerts"*]

44. Section 7 of the *Charter* does not protect economic rights and the ability to bring a civil action for damages is an economic right. The Court of Appeal for Ontario has held that "a civil action is economic and proprietary in nature and as such outside the range of interests protected by [*Charter*] s. 7." By extension, *Charter* s. 7 does not protect a right to bring a civil action for damages without the need to seek leave of the court or a right to have part of one's costs reimbursed on a motion for leave.

Siemens v. Manitoba (Attorney General), 2003 SCC 3
Vysek v. Nova Gas International Ltd., 2002 ABCA 112 at paras 13, 15
Rogers v. Faught, 2002 CanLII 19268 (ONCA) at para 34
Filip v. Waterloo (City), 1992 CanLII 8652 at para 8 (ONCA)

45. The applicants also appear to argue that s. 17 deprives them of their security of the person because it imposes serious psychological stress on litigants who cannot seek redress for

intentional torts because they cannot afford to bring a motion for leave. To the extent that this argument simply repeats the assertion that s. 7 protects an economic right, it should be rejected for the reasons above.

46. To the extent that it is a distinct argument premised on the requirement for leave causing psychological stress, there is no evidence in this proceeding of any psychological stress on the applicants. Furthermore, and in any event, the requirement to seek leave to bring certain types of claims against the Crown should not be held to engage the applicants' security of the person interest based on the jurisprudence of the Supreme Court of Canada in this area. In *Blencoe v. British Columbia (Human Rights Commission)*, the Supreme Court of Canada rejected a claim that the stress caused by delayed human rights proceedings against the claimant engaged his security of the person, even though he had been accused of sexual harassment, removed from his position in Cabinet and in the NDP caucus, and suffered severe depression. Moreover, the Court warned against "stretching the meaning" of the right under s. 7 by accepting lesser levels of stress as engaging the security of the person interest. If what the Court described in *Blencoe* did not engage security of the person, then it is clear that security of the person is not engaged by a requirement to bring a motion for leave and demonstrate a claim has some merit before proceeding with it. Finally, and in any event, the applicants do not identify any principle of fundamental justice that is infringed by s. 17 of the CLPA.

Blencoe v. British Columbia (Human Rights Commission), 2000 SCC 44 at paras 83, 86
Bogaerts, *supra* at para 53

IV. Order Sought

47. Ontario respectfully requests that this court dismiss the application with costs.

ALL OF WHICH IS RESPECTUFLLY SUBMITTED THIS 24TH DAY OF SEPTEMBER, 2021

Daniel Huffaker

Schedule "A"

***Crown Liability and Proceedings Act,* 2019, S.O. 2019, c. 7, Sched. 17**

17 (1) This section applies to proceedings brought against the Crown or an officer or employee of the Crown that include a claim in respect of a tort of misfeasance in public office or a tort based on bad faith respecting anything done in the exercise or intended exercise of the officer or employee's powers or the performance or intended performance of the officer or employee's duties or functions. 2020, c. 11, Sched. 7, s. 1.

Leave to proceed required, automatic stay
(2) A proceeding to which this section applies that is brought on or after the day section 1 of Schedule 7 to the Smarter and Stronger Justice Act, 2020 comes into force may proceed only with leave of the court and, unless and until leave is granted, is deemed to have been stayed in respect of all claims in that proceeding from the time that it is brought. 2020, c. 11, Sched. 7, s. 1.

Documents on motion for leave
(3) On a motion for leave under subsection (2), the claimant shall, in accordance with section 15 if applicable, serve on the defendant and file with the court,

(a) an affidavit, or such other document as may be prescribed, setting out a concise statement of the material facts on which the claimant intends to rely; and

(b) an affidavit of documents, or such other document as may be prescribed, disclosing, to the full extent of the claimant's knowledge, information and belief, all documents relevant to any matter in issue in the proceeding that are or have been in the claimant's possession, control or power. 2020, c. 11, Sched. 7, s. 1.

Response by defendant
(4) On a motion for leave under subsection (2), the defendant may serve on the claimant and file an affidavit, or such other document as may be prescribed, setting out a concise statement of the material facts on which the defendant intends to rely for the defence, but is not required to do so. 2020, c. 11, Sched. 7, s. 1.

Limit on examinations
(5) No person may be examined or summoned for examination on the contents of an affidavit or prescribed document referred to in subsection (3) or (4) or in relation to the motion for leave, other than the maker of the affidavit or prescribed document. 2020, c. 11, Sched. 7, s. 1.

No discovery of defendant
(6) The defendant shall not be subject to discovery or the inspection of documents, or to examination for discovery, in relation to the motion for leave. 2020, c. 11, Sched. 7, s. 1.

Requirements for leave
(7) The court shall not grant leave unless it is satisfied that,

(a) the proceeding is being brought in good faith; and

(b) there is a reasonable possibility that the claim described in subsection (1) would be resolved in the claimant's favour. 2020, c. 11, Sched. 7, s. 1.

Costs
(8) Each party to the motion for leave shall bear its own costs of the motion. 2020, c. 11, Sched. 7, s. 1.

Effect of granting leave
(9) The granting of leave under subsection (2) lifts the stay of the proceeding. 2020, c. 11, Sched. 7, s. 1.

Effect of refusing leave
(10) If leave is not granted under subsection (2),

(a) the proceeding is rendered a nullity; or

(b) if the proceeding contains any claims other than the claim described in subsection (1), the proceeding is rendered a nullity in respect of the claim described in that subsection and the stay is lifted with respect to the remainder of the proceeding. 2020, c. 11, Sched. 7, s. 1.

Waiver of leave requirement
(11) Despite subsections (2) and (10), the Crown may waive the application of subsection (2) in relation to a proceeding by giving notice of the waiver in writing to the claimant. 2020, c. 11, Sched. 7, s. 1.

Same
(12) The Crown may exercise its discretion under subsection (11) at any time before the hearing of a motion for leave under subsection (2), including before an intended proceeding is brought. 2020, c. 11, Sched. 7, s. 1.

Same
(13) If the Crown exercises its discretion under subsection (11) after a proceeding has been brought,

(a) the stay of the proceeding is lifted once notice of the waiver is given to the claimant; and

(b) the Crown shall give notice of the waiver in writing to the court. 2020, c. 11, Sched. 7, s. 1.

Non-application to Crown claimant
(14) This section does not apply if the claimant is the Crown. 2020, c. 11, Sched. 7, s. 1.

Transition

(15) This section, as it read immediately before the day section 1 of Schedule 7 to the Smarter and Stronger Justice Act, 2020 came into force, continues to apply with respect to a proceeding for which a motion for leave was made under this section before that day, except that the Crown may, at any time before the hearing of the motion, waive the requirement for leave by giving notice of the waiver in writing to the claimant and to the court. 2020, c. 11, Sched. 7, s. 1.

Same
(16) For greater certainty, if a proceeding for which leave was required under this section was brought without leave before the day section 1 of Schedule 7 to the Smarter and Stronger Justice Act, 2020 came into force, the proceeding was a nullity in respect of the claim described in subsection (1) from the time the proceeding was brought. 2020, c. 11, Sched. 7, s. 1.

Same
(17) For the purposes of any applicable limitation period,

(a) a proceeding to which subsection (15) applies shall be considered to have been commenced in respect of the claim described in subsection (1) when the motion for leave was made, despite any waiver of the leave requirement by the Crown; and

(b) a proceeding to which subsection (16) applies shall, despite being a nullity in respect of the claim described in subsection (1), be considered to have been commenced when the proceeding was brought. 2020, c. 11, Sched. 7, s. 1.

***Health Care Consent Act,* 1996, S.O. 1996, c. 2, Sched. A**

Person making decision on another's behalf
30 A person who gives or refuses consent to a treatment on another person's behalf, acting in good faith and in accordance with this Act, is not liable for giving or refusing consent. 1996, c. 2, Sched. A, s. 30.

***Highway Traffic Act,* R.S.O. 1990, c. H.8**

134.1 (1) Where a police officer considers it reasonably necessary,

(a) to ensure orderly movement of traffic; or

(b) to prevent injury or damage to persons or property,

he or she may remove and store or order the removal and storage of a vehicle, cargo or debris that are directly or indirectly impeding or blocking the normal and reasonable movement of traffic on a highway and shall notify the owner of the vehicle of the location to which the vehicle was removed. 2005, c. 26, Sched. A, s. 20; 2017, c. 2, Sched. 17, s. 10 (1).

Costs of removal
(2) The costs and charges for the removal and storage of the vehicle, cargo or debris removed are a debt due by the owner, operator and driver of the vehicle, for which they are jointly and severally liable, and the debt may be recovered in any court of competent jurisdiction and are a lien upon the vehicle, which may be enforced in the manner provided by the Repair and Storage Liens Act. 2005, c. 26, Sched. A, s. 20; 2017, c. 2, Sched. 17, s. 10 (2).

Conflict with other Acts
(3) In the event of a conflict with this section, the following prevail:

1. Part X of the Environmental Protection Act and the regulations made under it, with respect to a pollutant on a highway.

2. The Dangerous Goods Transportation Act and the regulations made under it. 2005, c. 26, Sched. A, s. 20.

Protection from liability
(4) No action or other proceeding for damages shall be brought against a police officer, a police force, a police services board, any member of a police services board, the Crown, an employee of the Crown or an agent of the Crown for any act done in good faith in the performance or intended performance of a duty under this section, or in the exercise or intended exercise of a power under this section, or any neglect or default in the performance or exercise in good faith of such duty or power. 2005, c. 26, Sched. A, s. 20.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 134.1 (4) of the Act is amended by striking out “a police force, a police services board, any member of a police services board” and substituting “any other member of a police service, a police service board, any member of a police service board”. (See: 2019, c. 1, Sched. 4, s. 24 (8))

Definition
(5) In subsection (2),

“operator” means,

(a) operator as defined in subsection 16 (1), and

(b) in the absence of evidence to the contrary, where there is no CVOR certificate or lease applicable to the commercial motor vehicle, the holder of the plate portion of the permit for the commercial motor vehicle. 2005, c. 26, Sched. A, s. 20; 2014, c. 9, Sched. 2, s. 37.

***Health Protection and Promotion Act,* R.S.O. 1990, c. H.7**

Protection from personal liability

95 (1) No action or other proceeding for damages or otherwise shall be instituted against the Chief Medical Officer of Health or an Associate Chief Medical Officer of Health, a member of a board of health, a medical officer of health, an associate medical officer of health of a board of health, an acting medical officer of health of a board of health or a public health inspector or an employee of a board of health or of a municipality who is working under the direction of a medical officer of health for any act done in good faith in the execution or the intended execution of any duty or power under this Act or for any alleged neglect or default in the execution in good faith of any such duty or power. 2007, c. 10, Sched. F, s. 18; 2009, c. 33, Sched. 18, s. 12 (11); 2011, c. 7, s. 4 (1).

Crown liability
(1.1) Despite subsection 8 (3) of the Crown Liability and Proceedings Act, 2019, subsection (1) does not relieve the Crown of liability for the acts or omissions of a minister of the Crown or a Crown employee referred to in subsection (1) and the Crown is liable under that Act as if subsection (1) had not been enacted. 2007, c. 10, Sched. F, s. 18; 2019, c. 7, Sched. 17, s. 84.

Persons acting under order
(1.2) No action or other proceeding lies or shall be instituted against any person acting pursuant to an order, direction or directive made under section 77.5, 77.6, 77.7, 77.8 or 77.9 for any act done in good faith in the exercise or performance, or the intended exercise or performance of any duty under an order, direction or directive or for neglect or default in the good faith exercise or performance of such a duty. 2007, c. 10, Sched. F, s. 18; 2011, c. 7, s. 4 (2).

Exception
(2) Subsection (1) does not apply to prevent an application for judicial review or a proceeding that is specifically provided for in this Act. R.S.O. 1990, c. H.7, s. 95 (2).

Board of health not relieved of liability
(3) Subsection (1) does not relieve a board of health from liability for damage caused by negligence of or action without authority by a person referred to in subsection (1), and a board of health is liable for such damage in the same manner as if subsection (1) had not been enacted. R.S.O. 1990, c. H.7, s. 95 (3).

Protection from liability for reports
(4) No action or other proceeding shall be instituted against a person for making a report in good faith in respect of a communicable disease or a disease of public health significance in accordance with Part IV. R.S.O. 1990, c. H.7, s. 95 (4); 2017, c. 25, Sched. 3, s. 1 (3).

Schedule "B"

1. *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 SCR 307
2. *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 SCR 214
3. *Babcock v. Canada (Attorney General)*, 2002 SCC 57
4. *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras 83, 86
5. *British Columbia (Attorney General) v. Christie*, 2007 SCC 21
6. *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para 58
7. *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2018 BCCA 385 at para 5
8. *Campisi v Ontario*, 2017 ONSC 2884 at para 55 (aff'd 2018 ONCA 869)
9. *Crevier v. Québec (Attorney General)*, [1981] 2 SCR 220
10. *Crown Liability and Proceedings Act, 2019, SO 2019, c 7, Sch 17, ss 17(1), (2)*
11. *Danson v. Ontario (Attorney General)*, 1990 CanLII 93 (SCC), [1990] 2 S.C.R. 1086, at p. 1099
12. *Filip v. Waterloo (City)*, 1992 CanLII 8652 at para 8 (ONCA)
13. *Health Care Consent Act, 1996*, SO 1996, c 2, Sch A, s. 30
14. *Health Protection and Promotion Act*, RSO 1990, c H.7, s. 95(4)
15. *Highway Traffic Act*, RSO 1990, c H.8, s. 134.1(4)
16. Hogg, Monahan & Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011)
17. *J. Cote & Son Excavating Ltd. v. City of Burnaby*, 2018 BCSC 1491 aff'd in *J Cote & Son Excavating Ltd v Burnaby (City)*, 2019 BCCA 168 at para 69
18. Karen Horsman & Gareth Morley, *Government Liability: Law and Practice* (Toronto: Thomson Reuters, 2017) (loose-leaf updated 2019, release 33)
19. *MacKay v. Manitoba*, 1989 CanLII 26 (SCC), [1989] 2 S.C.R. 357, at p. 361
20. *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 SCR 725
21. *Ontario (Attorney General) v. Bogaerts*, 2019 ONCA 876 at para 46

22. Paul M. Perell and John W. Morden, The Law of Civil Procedure in Ontario, 3rd ed.

23. *Prairies Tubulars (2015) Inc. v. Canada (Border Services Agnecy*), 2021 FC 36

24. *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713, at pp. 762 and 767–68

25. *R. v. McFarlane* (1882) 7 S CR 216

26. *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27.

27. *Reference re Residential Tenancies Act (Ontario)*, [1981] 1 SCR 714

28. *Rogers v. Faught*, 2002 CanLII 19268 (ONCA) at para 34

29. *Rudolph Wolff & Co. v. Canada, [1990] 1 SCR 695*

30. *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3

31. *Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal* (NS), [1989] 1 SCR 238

32. *Toronto (City) v. Ontario (Attorney General)*, 2019 ONCA 732

33. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59

34. *Vysek v. Nova Gas International Ltd.*, 2002 ABCA 112 at paras 13, 15

POORKID INVESTMENTS INC., THE COACH PYRAMIDS INC., and BRIAN HAGGITH	-and-	**HER MAJESTY THE QUEEN IN THE RIGHT OF ONTARIO et al.**
Applicant		Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE

FACTUM OF THE RESPONDENTS HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO ET AL.

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