CITATION: Poorkid Investments Inc. v. HMTQ, 2022 ONSC 883
COURT FILE NO.: CV-21-12
DATE: 20220210

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
POORKID INVESTMENTS INC., THE COACH PYRAMIDS INC. and BRIAN HAGGITH	)	W. Peter Murray and Caitlin Elizabeth Murray, for the Applicants
	)	
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 RIGHT OF ONTARIO	)	Daniel Huffaker, for the Respondents
	)	
Respondents	)	
	)	
	)	**HEARD:** December 21, 2021

D. A. BROAD, J.

Background

[1] The applicants are the named representative plaintiffs in a class proceeding, not yet certified, brought against the respondents (collectively the "Crown") in a Statement of Claim issued February 19, 2021 (the "Claim").

[2] In the Claim the applicants seek damages against the Crown on behalf of all businesses and residents of the community of Caledonia, Haldimand County and surrounding areas, including a claim for damages by prospective residents who had purchased new homes to be built in a proposed subdivision known as McKenzie Meadows (the "subdivision").

[3] The Claim arises from a blockade of three public highways and a railway line serving Caledonia and the occupation of the subdivision within Caledonia by protesters.

[4] The Claim pleads four grounds for liability on the part of the Crown, namely, misfeasance in a public office, nonfeasance, negligence and nuisance.

Stay of the Claim pursuant to s. 17 of the *Crown Liability and Proceedings Act, 2019*

[5] The claim has been deemed to be stayed by the operation of 17 of the *Crown Liability and Proceedings Act, 2019*, S.O. 2019 c. 7, Sched. 17 (the "CLPA") which provides as follows:

> 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.
>
> (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.
>
> (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.

(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.

(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.

(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.

(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.

(8) Each party to the motion for leave shall bear its own costs of the motion.

(9) The granting of leave under subsection (2) lifts the stay of the proceeding.

(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.

(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.

(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.

(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.

(14) This section does not apply if the claimant is the Crown.

(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.

(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.

(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.

Summary of s. 17 of the CLPA

[6] In summary, the pertinent provisions of s. 17 of the CLPA provide that a proceeding brought against the Crown or a Crown officer or employee which includes a claim for misfeasance in public office or which is based on bad faith is automatically stayed and may proceed only with leave of the court. Such leave shall not be granted unless it is found that the proceeding is 1) being brought in good faith and 2) that there is a reasonable possibility that the claim would succeed.

[7] A motion for leave must be supported by an affidavit setting out a concise statement of the facts upon which the claimant intends to rely as well as an affidavit of documents disclosing all documents relevant to any matter in issue in the proceeding that are or have been in the claimant's possession, control or power.

[8] The defendant (the Crown, Crown officer or employee) may, but is not required to, file an affidavit in response to the motion for leave. The maker of the affidavit filed on behalf of the claimant, and the maker of any responding affidavit filed by the Crown, are subject to examination on their contents, but the defendant is not subject to discovery or inspection of documents, or to examination for discovery, in relation to the motion for leave.

[9] There is no provision in the section for a plaintiff to apply for leave to obtain documentary or oral discovery from the defendant.

[10] Thus it will be seen that, although the claimant must provide evidentiary support that their claim against the Crown for bad faith or misfeasance in public office is brought in good faith and has a reasonable possibility of succeeding, and may be compelled to submit to cross-examination, there is no corresponding obligation on the Crown to give any documentary or oral discovery in response.

Application for a declaration that s. 17 of the CLPA is of no force and effect

[11] The applicants have brought this application for

(a) a declaration that s. 17 of the CLPA violates section 96 of the *Constitution Act, 1982*, being schedule B. to the *Canada Act, 1982* (U.K.) c. 11; and

(b) a declaration pursuant to section 52(1) of the *Constitution Act, 1982*, that section 17 of the CLPA is of no force and effect.

Evidence on the application

[12] The application is supported by two affidavits, summarized as follows:

(a) affidavit of David Thompson, a lawyer called to the bar in Ontario in 1988 and practising primarily commercial and class-action litigation in the City of Hamilton, deposing to the following:

(i) at the request of counsel for the applicants, he prepared an estimate of legal fees a plaintiff might reasonably expect to incur to prepare for and attend on argument of a motion for leave pursuant to section 17 of the CLPA, including preparation of the notice of motion, the affidavit(s) disclosing the facts upon which the plaintiff intends to rely, the affidavit of documents, and preparation for and argument of the motion itself;

(ii) although at the time that he swore the affidavit there were no reported decisions concerning section 17, the test set out to lift the stay, namely that the action is brought in good faith and there is a reasonable possibility the misfeasance claim will be resolved in the plaintiff's favour, is contained in several provincial securities acts as a screening mechanism for obtaining leave to commence an action alleging breach of continuous disclosure obligations against issuers by secondary market purchasers;

(iii) the Supreme Court of Canada in *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106 found, in reference to the meaning of the words "reasonable possibility" in reference to s. 225.4 of Part XXIII.1 of the *Securities Act* CQLR. c V-1.1 of Quebec, that the test was more than a "speed bump" and required the plaintiff to offer a plausible analysis of the legislative provisions and provide credible evidence to support the claim. Assuming this reasoning will apply to s. 17 of the CLPA, counsel wishing to lift the stay imposed by the section will be required to put their "best foot forward", and the legal work required to be done in connection with such a motion would have to be incredibly thorough, careful and well done; and

(iv) he would estimate the fees likely to be incurred by the plaintiff to bring an arguable motion to lift the stay to be in the range of $50,000-$100,000, and, should the Crown exercise its right to cross-examine, the fees incurred would increase to cover time incurred to prepare for and attend on the examinations. In making this estimate, he assumed the issues to be of at least average complexity and an hourly rate charged by experienced counsel. His estimate did not consider any additional cost for an appeal of the initial motion ruling.

(b) affidavit of David Johnson, Chief Executive Officer of PRO-C Limited ("PRO-C"), a company providing consulting services to lawyers and law firms, with experience providing consulting in relation to class actions, deposing, *inter alia,* to the following:

(i) PRO-C has been retained by counsel for the applicants to consult in all aspects of the class action commenced against the Crown;

(ii) PRO-C provided class-action consulting services to the law firm representing the plaintiffs in a 2006 class action styled *KRP v Haldimand* in reference to the occupation by protesters of a residential subdivision in Caledonia then under construction known as the Douglas Creek Estate, the circumstances of which are almost identical to those referenced in the current class action relating to McKenzie Meadows;

(iii) in June 2006 the class action in reference to Douglas Creek Estate was filed alleging three grounds of liability namely nuisance, negligence and (following amendment) misfeasance in a public office. The class action survived a rule 21 challenge, was subsequently certified as a class action, and was settled by the Ontario government in 2012;

(iv) while the Attorney General of Ontario characterized the CLPA as "legislative housekeeping" aimed at bringing an outdated law into line with recent Supreme Court decisions, the Ontario Premier was quoted in the April 16, 2019 edition of *The Globe and Mail* as explaining that its purpose is to deter lawsuits against the Crown by "special-interest groups." The Premier was quoted as follows:

> "you even look sideways and some special-interest groups out there is *(sic*) trying to sue you, you know. It's ridiculous. I've never seen anything like it. It's tying up the courts. I want to clear up the courts until real lawsuits can go through, for real people, for things that really matter. There's a lot of frivolous nonsense going on right now in the courts."

(v) The press secretary for the Attorney General of Ontario Doug Downey issued a statement quoted in the July 22, 2019 edition of *Law Times*, a

weekly publication aimed at legal professionals, stating, *inter alia*, the following:

> [The CLPA] "does not present any insurmountable access to justice barriers" in class action law, and that the purpose of the CLPA was to correct the present system "which enables well-funded lawyers to constantly bring expensive lawsuits over principles of law long settled by the Supreme Court of Canada."
>
> "These frivolous lawsuits result in tens of millions of dollars in legal costs for the taxpayer each year. Each dollar spent defending against a baseless lawsuit brought by an expensive lawyer is a dollar that could have gone to services like healthcare or education."

[13] The Crown led no evidence in response to the application and did not cross-examine Mr. Johnson on his affidavit. Accordingly, the quotations from Premier Ford and the press secretary for the Attorney General of Ontario referenced in his affidavit remain unchallenged.

[14] At the request of the court Crown counsel filed various extracts from Hansard reporting on proceedings in the Legislature and in legislative committee in which the provisions of "Bill 100, An Act to implement budget measures and to enact, amend and repeal various statutes" - including the proposed CLPA, were referenced. However, these extracts do not disclose any statement by the Attorney General of Ontario explaining the purpose of the proposed enactment. The Crown led no evidence of any written or oral public explanation by any representative of the government concerning the legislative purpose of s. 17 of the CLPA aside from the statements attributed to the Premier and the office of the Attorney-General referred to above.

[15] David Thompson was cross-examined on his affidavit, during which he acknowledged the following:

(a) lawyers' fees typically are or can be a large part of the actual costs of a motion;

(b) the fees will depend on the lawyer's hourly rate;

(c) a litigant can hire more or less experienced counsel with a greater or lesser hourly rate and can set limits on a retainer for a law firm;

(d) a law firm could delegate more or less work to a less senior associate or to non-lawyers where it is appropriate to do so;

(e) these are factors that can affect the actual cost of a proceeding or a step in a proceeding;

(f) there is no data available about the actual cost to plaintiffs of bringing a motion under s. 17 of the CLPA;

(g) he did not provide any data about the cost of civil motions, in general, or of motions for leave, in particular;

(h) he did not conduct any research into the cost of civil motions but rather the estimate in his affidavit is based upon his 30-plus years of experience;

(i) he did not conduct or gather any empirical evidence of the costs of a motion for leave; and

(j) he did not conduct any analysis of the representative plaintiffs' or class members' ability to pay for the costs of a motion under s. 17.

Position of the Applicants

[16] The applicants submit that, beyond conferring on the federal government the power to appoint judges of the superior courts in each province, s. 96 of the *Constitution Act, 1867* also protects the "core jurisdiction" of the superior courts from either federal or provincial abolition or removal, and that the core jurisdiction of the superior courts includes arbitrating and resolving private law disputes, including private law disputes involving the Crown.

[17] The applicants make reference to the following passage from the reasons of McLachlin, C.J. in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 32 which expands upon the characterization of the core jurisdiction of superior courts which is protected by s. 96:

> The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*.

[18] While acknowledging that provinces may legislate on Crown immunity pursuant to their exclusive powers to make laws in reference to the administration of justice in each province under s. 92(14) of the *Constitution Act, 1867*, the applicants submit that they must do so in a manner harmonious with the Constitution as a whole, and in particular, with s. 96. Citing *Trial Lawyers* at para. 40 the applicants say that legislation which effectively denies people the right to take their cases to court create significant concerns about the maintenance of the rule of law.

[19] Prior to the enactment of s. 17 of the CLPA, if the Crown determined that a misfeasance case brought against it was without merit, it had the option to bring a motion under r. 21 of the *Rules of Civil Procedure* R.R.O. 1990, Reg. 194 to strike out a claim as disclosing no reasonable cause of action. The onus would be on the Crown to show that it was "plain and obvious" that the plaintiff's case would fail. In a class action the Crown could take the position that the pleadings do not disclose a cause of action as required by s. 5(1)(a) of the *Class Proceedings Act, 1992*, S.O. 1992, c.6.

[20] The applicants submit that, by imposing an automatic stay which can only be lifted by a successful motion for leave, s. 17 reverses the onus and in essence renders a plaintiff seeking to hold the Crown accountable for wrongdoing a presumptive vexatious litigant.

[21] The test under r. 21 of requiring a defendant to show that it is plain and obvious the plaintiff cannot succeed is replaced under s. 17 of the CLPA with a requirement that the plaintiff to show "a reasonable possibility" of success. As exemplified in *Theratechnologies* this requirement is not a "speedbump" and evidence is required. It is therefore a much higher barrier than rule 21.

[22] The "reasonable possibility" of success test is equivalent to that required to be met under section 138 of the *Securities Act.* However, unlike s. 17, the *Securities Act* provision requires the defendant as well as the plaintiff to produce affidavits setting out the facts they intend to rely upon, to make documentary production and to submit to oral examinations.

[23] The applicants point out that a main element of the tort of misfeasance in public office is bad faith, which can often only be found in internal communications within the possession and control of the Crown. As the Crown does not have to disclose such evidence under s. 17, the plaintiff can only speculate about bad faith and will likely not succeed in meeting the test. In this respect the applicants cite the following passage from the commentary on CLPA by Western Law School Dean and author of the text *Misfeasance in a Public Office in Canada* (2016) Carswell, Erika Chamberlain, in an online publication entitled "*Ontario Government Seeking to Insulate Itself from Lawsuits,"* The Conversation (online) May 27, 2019:

> … In lawsuits involving bad faith, plaintiffs must now get permission from a court before they can sue and show that their claim has a reasonable possibility of success. During this process, the Crown can examine the plaintiff, but need not produce any documents or witnesses itself.
>
> This puts plaintiffs in a tough position. Bad faith is essentially a state of mind, so it's typically difficult to prove without at least some evidence from the defendant. For

> instance, it may require disclosure of internal communications showing that an official was acting for an improper purpose or with bias against the plaintiff.
>
> Without the disclosure of these documents or the ability to question government officers, plaintiffs will only be able to speculate that bad faith was involved. This may not be sufficient to get a court's permission to proceed.

[24] In addition to the procedural barrier imposed by s. 17 which relieves the Crown from disclosing relevant evidence on a motion for leave, the applicants submit that the section imposes a huge economic barrier to plaintiffs seeking to hold government and government officials to account, by requiring them to present their cases almost in their entirety at the leave stage or risk not even getting into court.

[25] The section imposes a further economic barrier by providing that the plaintiff and Crown shall bear their own costs incurred in the motion for leave. The applicants point out that the Crown will likely have minimal costs, whereas the plaintiff's costs will likely be substantial. The inability to recover any portion of the fees incurred by way of a costs award will act as a deterrent to a plaintiff coming forward with the claim. This feature of s. 17 is to be contrasted with s. 138 of the *Securities Act* which does not alter or interfere with the usual principle that costs follow the event.

[26] The applicants submit that the legal and economic barriers set up by section 17, taken individually or collectively, infringe s. 96 and offend the rule of law. They make reference to the following passage from the reasons of Dickson, C.J. in *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 at para. 31:

> There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice.

[27] The applicants submit that, by setting legal and economic barriers so high that few plaintiffs can overcome them, and then providing that the Crown can waive the barriers, s. 17 does what the foregoing passage warns against.

[28] The applicants acknowledge that, as recently confirmed by the Supreme Court of Canada in *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, unwritten constitutional principles such as democracy and the rule of law cannot be used on their own to invalidate legislation. However, they are part of the law of the Canadian Constitution in the sense that they form part of the context and backdrop to the Constitution's written terms (see *Toronto (City)* at para 50).

[29] The applicants therefore submit that the rule of law may be used as an interpretive aid to support a finding that s. 17 of the CLPA offends s. 96. The rule of law is engaged in at least two important respects in reference to this application. First, everyone should be subject to the same law and there is no good reason why a public official who deliberately harms a citizen is on a different level from a private citizen who commits the same act, and second, s. 17 presents a significant barrier to every plaintiff, rich or poor, who seeks access to the superior court for a hearing on the merits of the case.

Position of the Crown

[30] The respondents, represented by the Crown, agree that the Supreme Court of Canada has interpreted s. 96 of the *Constitution Act, 1867* as protecting the core jurisdiction of superior courts, but point out that there are distinct branches of s. 96 jurisprudence namely,

One: - dealing with grants of jurisdiction that historically belong exclusively to superior courts;

Two: - dealing with grants of jurisdiction that fall within the "core" of superior court jurisdiction; and

Three: - dealing with barriers to accessing superior courts

[31] The Crown submits that only the third branch has any application to the applicants' challenge to s. 17 of the CPLA. The first and second branches are not relevant in the case at bar because s. 17 does not remove any jurisdiction from the superior court or transfer

any jurisdiction to a court staffed by provincially appointed judges or an administrative tribunal.

[32] The constitutional right of access to courts affirmed in the third branch are founded upon the Supreme Court of Canada's decisions in *B.C.G.E.U.*; *Christie v. British Columbia (Attorney General)*, 2007 SCC 21, [2007] 1 S.C.R. 873; and *Trial Lawyers.*

[33] In *B.C.G.E.U.* 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. In *Christie* the Court recognized a fundamental right to access the courts, subject to certain limits, and held that increasing the cost of legal fees through the imposition of a tax did not interfere with access to the courts.

[34] *Trial Lawyers* was concerned with legislation that required a party setting a matter down for trial to pay a hearing fee based upon the number of days that the trial was expected to last. Although the regime contained an exemption, it only applied to impoverished persons, and the Court found on the evidence that the hearing fees caused undue hardship to litigants of modest means who did not qualify for the exemption. These litigants were thereby deprived of access to the Superior Court with no ability to bring their legitimate disputes to any other court because no other court had jurisdiction. The Court found that the hearing fees regime thereby violated s. 96.

[35] The Crown submits that the leave provisions in s. 17 of the CLPA are distinguishable from the hearing fees struck down in *Trial Lawyers* on two bases:

(a) Section 17 does not prevent anyone from accessing Superior Courts; and

(b) the cost of a motion under s. 17 does not prevent litigants from accessing Superior Courts.

[36] In reference to the first basis the Crown noted that in *Trial Lawyers* the court found that the hearing fees prevented middle-class litigants from accessing superior courts at all, whereas s. 17 of the CLPA does not prevent anyone from accessing the Superior Court,

but rather requires litigants with certain types of claims to obtain leave from the Superior Court itself before proceeding with those claims. The Crown asserts that the applicants' arguments respecting the "good faith/reasonable possibility" standard enacted by s. 17 are not about access, but rather are about the procedure for bringing claims in tort against the Crown based on bad faith.

[37] Moreover, the Crown submits that the full interpretation of how to apply the good faith/reasonable possibility standard should be left to a court deciding a s. 17 motion for leave. The section does not raise an issue of access to superior courts because it will be the Superior Court that determines what the standard should be and whether it is met.

[38] The Crown submits that a finding 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 would impose an unwarranted limitation on the province's jurisdiction over the "administration of justice in the province" and "property and civil rights."

[39] With respect to the second basis for distinguishing *Trial Lawyers*, the Crown points out that the jurisprudence demonstrates that legal fees are not analogous to hearing fees, such as those with which *Trial Lawyers* was concerned. Unlike hearing fees, the legal costs of the motion for leave under s. 17 are not within government's control.

[40] Moreover, unlike hearing fees that limit access to the courts themselves, legal fees impact access to private legal services. The majority in *Christie* noted at para. 17 that the right of access to the courts recognized in *B.C.G.E.U.* is not absolute, that the power of a provincial legislature to pass laws in relation to the administration of justice under s. 92(14) implies the power of a province to impose at least some conditions on how and when people have a right to access the courts, and that every limit on access to the courts is not automatically unconstitutional.

[41] The majority in *Christie* also rejected the argument that the rule of law requires or guarantees a general right of access to legal services. The *Charter* only recognizes the right to counsel in certain specific situations (see paras. 10, 17, 21-26).

[42] The Crown also submits that there is no evidence from the applicants that the cost of a motion for leave under s. 17 prevents them, or any other litigant, from accessing the Superior Court. The evidence of the costs of a motion under s. 17 of the CLPA led by the applicants suffers from serious deficiencies and the court should be cautious before relying upon it. Moreover, even if the applicants' estimate of the costs of the motion is accurate, this cannot support a finding that s. 17 of the CLPA prevents litigants from accessing superior courts. The applicant provided no analysis of the plaintiffs' ability to pay the estimated costs of the motion, or any analysis more generally of other claimants' abilities to pay the costs of such a motion. This may be contrasted with the evidence in *Trial Lawyers* where the British Columbia Court of Appeal and the majority of the Supreme Court relied on expert economic evidence, upon which the majority of the court relied to find that a "segment of society is effectively denied the ability to bring their matter before the Superior Court."

[43] The Crown also submits, as acknowledged by the applicants, that the constitutional principle of the rule of law is not an independent basis for striking down legislation, although it may be relevant to interpreting s. 96 of the *Constitution Act, 1867.*

[44] In any event, the Crown argues that the principle of the rule of law does not assist the applicants as they have not established that s. 17 of the CLPA prevents litigants from accessing the Superior Court.

[45] The Crown also submits that the Supreme Court of Canada has explicitly held that the rule of law does not include a principle that government cannot change the substantial law that applies to the Crown, citing the case of *British Columbia v. Imperial Tobacco Canada Ltd.*,, 2005 SCC 49, [2005] 2 S.C.R. 473 at paras. 7-9, 63-64 and 73-75.

Issues

[46] The following issues are raised by the application:

(1) Is s. 17 of the CLPA constitutionally valid?

(2) If not, what is the appropriate remedy?

[47] The determination of issue (1) rests upon whether s. 96 of the *Constitution Act, 1867* is infringed by legislation that requires persons seeking to pursue an action against the Crown (or its agents) alleging bad faith or misfeasance in public office to obtain leave of the court to do so in circumstances where the defendant Crown is not obliged to make any documentary discovery or to submit to any oral examination.

[48] In a comparable fashion to *Trial Lawyers*, this question engages the questions of a) the limits of the scope of provincial authority over the administration of justice under s. 92(14) of the *Constitution Act, 1867* and b) whether that authority, by the enactment of s. 17 of the CLPA, can be exercised harmoniously with the core jurisdiction of the provincial superior courts protected by s. 96.

Analysis

(a) Guiding principles respecting s. 96 protection of access to superior courts

[49] Section 96 of the *Constitution Act, 1867* provides as follows:

> **96. Appointment of Judges**
>
> The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

[50] As indicated above, it is undisputed that s. 96 goes beyond the question of jurisdiction to appoint superior court judges. It also protects the core jurisdiction of the superior courts which includes arbitrating and resolving private law disputes, including disputes involving the Crown. The jurisprudence demonstrates that an important aspect of the protection guaranteed by s. 96 is in relation to barriers, including barriers erected by legislation, to the ability of litigants to access superior courts, as exemplified by the Supreme Court of Canada decisions in *B.C.G.E.U.*, *Christie*, and *Trial Lawyers*.

[51] In *B.C.G.E.U.* the Chief Justice of the Superior Court of British Columbia issued an *ex parte* injunction, on his own motion, restraining picketing at courthouses in the province during a legal strike by the British Columbia Government Employees' Union against the executive branch of the government. The *B.C.G.E.U.* brought an application for an order setting aside the injunction which was dismissed by the Chief Justice. An appeal by the union to the British Columbia Court of Appeal was dismissed, and its further appeal to the Supreme Court of Canada was also dismissed.

[52] The following observations of Dickson, C.J., writing for five of the six judges who participated in the judgment (McIntyre, J. writing separate concurring reasons) respecting the connection between access to the courts and the rule of law at para. 31 are worth repeating at this juncture:

> There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice.

[53] At para. 32 Dickson, C.J. adopted the following passage from the judgment of the British Columbia Court of Appeal (see [1985] B.C.J. No. 193 at para. 25):

> We have no doubt that the right to access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens. It is the preservation of that right with which we are concerned in this case. Any action that interferes with such access by any person or groups of persons will rally the court's powers to ensure the citizen of his or her day in court. Here, the action causing interference happens to be picketing. As we have already indicated, interference from whatever source falls into the same category.

[54] At issue in *Christie* was a 7% tax on the purchase price of legal services imposed by the Province of British Columbia. The applicant was a lawyer who worked with poor and low-income people. The chambers judge found that some of the applicant's clients could not obtain needed legal services due to the tax and inferred that the imposition of the tax in fact denied access to justice in some cases of low-income clients. The chambers judge

declared the Act imposing the tax *ultra vires* the province to the extent that it applied to legal services provided for low-income persons. The majority of the Court of Appeal accepted the chambers judge's findings and her legal conclusion that there is a fundamental constitutional right to core aspects of access to justice.

[55] The Supreme Court of Canada allowed the appeal, concluding that there is no "constitutional entitlement to legal services in relation to proceedings in courts and tribunals dealing with rights and obligations" (see para. 29).

[56] In considering the effect of *B.C.G.E.U.* in relation to the question of "whether access to justice is a fundamental constitutional right that embraces the right to have a lawyer in relation to court and tribunal proceedings," the Court stated at para. 17:

> 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.

[57] At para. 23 the Court observed:

> The issue, however, is whether general access to legal services in relation to court and tribunal proceedings dealing with rights and obligations is a fundamental aspect of the rule of law. In our view, it is not. Access to legal services is fundamentally important in any free and democratic society. In some cases, it has been found essential to due process and a fair trial. But a review of the constitutional text, the jurisprudence and the history of the concept does not support the respondent's contention that there is a broad general right to legal counsel as an aspect of, or precondition to, the rule of law.

[58] As indicated above, *Trial Lawyers* was concerned with legislation in the Province of British Columbia that imposed court hearing fees which the court found had the effect of depriving many people of modest means of access to the courts.

[59] McLachlin C.J. began her analysis by observing that the provincial legislature, through the exercise of its power to pass laws in relation to the administration of justice in the province under s. 92(14), may impose hearing fees to defray some of the cost of administering the justice system, to encourage the efficient use of court resources, and to discourage frivolous or inappropriate use of the courts (see para. 21).

[60] However, the power of the province to impose hearing fees is not unlimited. McLachlin, C.J. noted at para 24 that this power "must be consistent with s. 96 of the *Constitution Act, 1867* and the requirements that flow by necessary implication from s. 96."

[61] At para. 30 McLachlin C.J. stated that s. 96 restricts the legislative competence of both provincial legislatures and Parliament to enact legislation that abolishes the superior courts or removes part of their core or inherent jurisdiction. At para 31 she cast the question for determination as "whether legislating hearing fees that prevent people from accessing the courts infringes on the core jurisdiction of the superior courts."

[62] McLachlin C.J. answered this question in the affirmative by the passage at para. 32 of her reasons quoted at para. 17 above.

[63] At paras. 33-37 McLachlin C.J.C. demonstrated that the jurisprudence under s. 96 supports the court's conclusion, making specific reference to *Reference re Residential Tenancies Act (Ontario),* [1981] 1 S.C.R. 714; *MacMillan Bloedel Ltd. v. Simpson,* [1995] 4 S.C.R. 725*;* and *Crevier v. Quebec (Attorney General),* [1981] 2 S.C.R. 220 and noted at para. 33 that the thread throughout these cases is that laws may impinge on the core jurisdiction of the superior courts by denying access to the powers traditionally exercised by them.

[64] At para. 36 McLachlin C.J. stated that "the province's powers under s. 92(14) must be exercised in a manner that is consistent with the right of individuals to bring their cases to the superior courts and have them resolved there."

[65] She went on at para. 37 to observe that the right of Canadians to access the superior courts flows by necessary implication from the express terms of s. 96 of the Constitution,

and accordingly, the province does not have the power under s. 92(14) to enact legislation that prevents people from accessing the courts.

(b) Guiding principles respecting the rule of law, as an unwritten constitutional principle, and access to the superior courts

[66] Although the foregoing analysis sufficed to resolve the fundamental issue of principle in the appeal namely consistency of the hearing fees scheme with s. 96, McLachlin C.J. went on to address considerations relating to the rule of law, noting at para. 38 that access to the courts is essential to the rule of law. At para. 39 she stated that "as access to justice is fundamental to the rule of law, and the rule of law is fostered by the continued existence of the s. 96 courts, it is only natural that s. 96 provide some degree of constitutional protection for access to justice."

[67] Citing the reasons of Newbury, J.A. of the British Columbia Court of Appeal in *Christie* at paras. 68-69, McLachlin C.J. made the following observations at para. 40:

> If people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. And the balance between the state's power to make and enforce laws and the courts' responsibility to rule on citizen challenges to them may be skewed.

[68] McLachlin C.J. reached the following conclusion at para. 43:

> s. 92(14), read in the context of the Constitution as a whole, does not give the provinces the power to administer justice in a way that denies the right of Canadians to access courts of superior jurisdiction. Any attempt to do so will run afoul of the constitutional protection for the superior courts found in s. 96.

[69] As noted above, the Supreme Court of Canada recently dealt with the role of unwritten constitutional principles, including the rule of law, in the interpretation of the

Constitution. In *Toronto (City)* Wagner C.J. made the following observations at para. 75 respecting the use of the rule of law in *Trial Lawyers*:

> The rule of law was used in *Trial Lawyers Association of British Columbia* as an interpretive aid to s. 96, which in turn was used to narrow provincial legislative authority under s. 92(14). The rule of law was not being used as an independent basis for invalidating the impugned court fees. In this way, McLachlin C.J.'s reasoning simply reflects a purposive interpretation of s. 96 informed by unwritten constitutional principles.

(c) Legislative screening mechanisms which affect access to the courts

[70] It can be observed that, in pursuance of their power to pass laws in relation to the administration of justice under s. 92(14) of the *Constitution Act, 1867*, provinces have often enacted legislation or promulgated regulations that implement screening mechanisms that may affect or limit the ability of litigants to bring their disputes to superior courts for adjudication, or to utilize certain procedures of the court, including trials, in order to do so. The following is a non-exhaustive list of some of the notable screening mechanisms that have been enacted in Ontario:

(a) Rule 21.01 of the *Rules of Civil Procedure* by which a party may move to have a proceeding or issue in a proceeding, determined prior to trial. Para. 21.01(1)(a) permits a question of law raised by a pleading to be determined under certain specified circumstances and para. (b) permits a pleading to be struck out on the ground that it discloses no reasonable cause of action or defence;

(b) Rules 2.1.01 and 2.1.02 of the *Rules of Civil Procedure*, which afford the court authority, on its own initiative, to stay or dismiss a proceeding or a motion if the proceeding or motion appears on its face to be frivolous or vexatious or otherwise an abuse of the process of the court;

(c) The *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 140 which provides that where judge of the Superior Court is satisfied that a person has persistently and without

reasonable grounds instituted vexatious proceedings in any court or conducted a proceeding in any court in a vexatious manner, the judge may order that no further proceedings be instituted by the person in any court, or a proceeding previously instituted by the person not be continued, except by leave of the judge of the Superior Court;

(d) Rule 20.04(2) of the *Rules of Civil Procedure*, which directs the court to grant summary judgment (i.e. without a trial) if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; and

(e) The *Class Proceedings Act*, 1992, which requires a person who commences a class proceeding on behalf of members of the class to make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing the person representative plaintiff.

[71] The legislative screening mechanism that is most analogous to s. 17 of the CLPA is subsection 138.8(1) of the *Securities Act*, which affects actions commenced under s. 138.3 of the Act based upon alleged misrepresentation in the secondary securities market. It is apparent that the "good faith/reasonable possibility of success" test in s. 17 of the CPLA was modelled on the test in subsection 138.8(1) of the *Securities Act*. The subsection provides as follows:

138.8(1) Leave to proceed

No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,

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

(b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

138.8(2)

> Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely.
>
> 138.8(3)
>
> The maker of such an affidavit may be examined on it in accordance with the rules of court.

[72] Each of the screening mechanisms referred to above includes safeguards to ensure meaningful access to the court.

[73] Rule 21.01 permits a litigant to have their claim or defence determined on its merits by presuming the facts alleged in the impugned pleading to be true for the purpose of the motion to strike.

[74] With respect to rules 2.1.01 and 2.1.02 and s. 140 of the *Courts of Justice Act*, McLachlin, C.J. noted at para. 47 of *Trial Lawyers* that "there is no constitutional right to bring frivolous or vexatious cases, and measures that deter such cases may actually increase efficiency and overall access to justice." In any event, rules 2.1.01 and 2.1.02 preserve meaningful access by providing that the plaintiff, applicant or moving party be given notice and an opportunity to make written submissions to the court prior to the making of an order staying or dismissing a proceeding or motion on the basis that it is frivolous or vexatious or an abuse of process. Section 140 provides that a litigant who has been found to have initiated vexatious proceedings or conducted a proceeding in a vexatious manner may apply for leave to bring a further proceeding or to continue a proceeding.

[75] On motions for summary judgment under r. 20.04, responding parties are afforded the opportunity to respond by affidavit, conduct cross examinations of the moving party and of non-parties, and to make full submissions. Summary judgment will only be granted if it is found that there is no genuine issue requiring a trial and the judge is able to reach a

fair and just determination on the merits (see *Hyrniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 49).

[76] Notably, s. 138.8 of the *Securities Act* also includes procedural safeguards to ensure meaningful access by a claimant to the court. The plaintiff and the defendant on a motion for leave are each required to file affidavits setting out the facts they intend to rely upon, and every affiant may be required to submit to cross-examination. Moreover, s. 138.8 does not alter or override s. 131(1) of the *Courts of Justice Act* respecting costs, and in particular, that the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the general rule that costs follow the event.

[77] Aspects of section 17 of the CPLA appear to be without precedent in Canadian law. The Crown pointed to no other legislative screening mechanism requiring a plaintiff who intends to proceed with an action, whether against the Crown or otherwise, to first satisfy the court that there is a reasonable possibility that their claim would succeed while denying to the claimant any right to documentary or oral discovery from the defendant.

(d) Challenge to s. 17 based on economic grounds

[78] I am not satisfied that the constitutional protection of access to the courts afforded by s. 96 is engaged by the financial cost, comprised almost exclusively of legal fees, to the applicants and other litigants of bringing motions for leave pursuant to s. 17 of the CLPA.

[79] As noted above, the Supreme Court of Canada in *Christie* determined that general access to legal services in relation to court and tribunal proceedings dealing with rights and obligations is not a fundamental aspect of the rule of law.

[80] In my view, under the authority of *Christie*, legislation enacted pursuant to the legislature's jurisdiction over the administration of justice, which may have the effect of causing represented litigants to incur high legal costs is not vulnerable to constitutional challenge under s. 96 on that basis.

[81] In the event that I am wrong in the foregoing conclusion, I nevertheless find that there is an insufficient evidentiary foundation on the record to support the applicants' constitutional challenge to s. 17 of the CLPA based on the estimated costs of bringing a motion for leave.

[82] In the case of *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2018 BCCA 385, (leave to appeal refused [2018] S.C.C.A. No. 526) Willcock J.A., writing for the panel at para. 53, adopted the following passages from the reasons of Trudel J.A. in *Canada v. Stanley J. Tessmer Law Corporation.*, 2013 FCA 290, (leave to appeal refused [2014 CarswellNat 1115 (S.C.C.)], at paras. 9 and 10:

> . . . The Supreme Court of Canada has made clear that "Charter decisions should not and must not be made in a factual vacuum" (*MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at page 361). As well, in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099 [Danson], the Supreme Court of Canada affirms that it has been vigilant "to ensure that a proper factual foundation exists before measuring legislation against the provisions of the Charter, <u>particularly where the effects of impugned legislation are the subject of the attack</u>" [Emphasis added by Trudel J.A.].
>
> …in *Christie*, the Supreme Court cautioned against deciding constitutional cases without an adequate evidentiary record (at paragraph 28).

[83] I am persuaded by the submissions of Crown counsel that the applicants' evidence relating to the costs of the motion under s. 17 suffers from serious deficiencies including:

(a) the cost estimate provided is one lawyer's assertion as to the probable cost of litigating such a motion and was not tendered or qualified as expert evidence;

(b) no detail is provided on how the estimate was arrived at, such as a breakdown of the costs, including the number of hours of legal services that it would represent or the hourly rate of counsel;

(c) while the evidence apparently proceeds by an analogy to motions under the *Securities Act*, it does not include any analysis of the average costs of motions under that legislation or of civil motions of average complexity more generally;

(d) the evidence does not include any analysis of the applicants' ability to pay the estimated costs of the motion or more generally of other claimants' ability to pay such costs. No information was provided about the applicants' (two of which are corporations) financial situation or even whether they would be expected to pay the costs of the motion, for example, because of a contingency arrangement between the applicants and their lawyers.

[84] The economic evidence led by the applicants contrasts markedly from the expert evidence led by the applicant in *Trial Lawyers* that the trial judge accepted in making a factual finding that the hearing fees scheme placed an undue hardship on litigants and impeded the right of British Columbians to bring legitimate cases to court (see para. 50).

[85] In *Christie*, the Court made reference, at para. 28, to the lack of sufficiency of the evidentiary basis on which the plaintiff based his claim, particularly in view of the magnitude of what was being sought, namely, the striking out of an otherwise constitutional provincial tax. The court went on to add the following comments:

> …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. Videoflicks Ltd*., [1986] 2 S.C.R. 713 (S.C.C.), at pp. 762 and 767-68, per Dickson C.J.; *MacKay v. Manitoba,* [1989] 2 S.C.R. 357 (S.C.C.), at p. 361; *Danson v. Ontario (Attorney General),* [1990] 2 S.C.R. 1086 (S.C.C.), at p. 1099.

(e) Challenge to s. 17 based on procedural grounds

[86] The second ground for the applicants' constitutional challenge to s. 17 of the CLPA is that it imposes a procedural barrier to litigants seeking to hold government and government actors to account having meaningful access to the Superior Court to have their cases determined on their merits.

[87] In *B.C.G.E.U.* a physical and psychological barrier represented by union picketing outside courthouses was found to constitute an unlawful barrier to access to the superior courts on the basis that it interfered with the rule of law.

[88] The Supreme Court in *Trial Lawyers* found that a financial barrier, represented by hearing fees imposed by legislation which had the effect of depriving litigants of modest means of access to the Superior Court was unconstitutional, by infringing section 96 of the *Constitution Act, 1867*.

[89] In the case at bar the Crown acknowledged implicitly in its Factum, and explicitly in submissions, that unconstitutional barriers to access to the Superior Court which could be imposed by legislation may be procedural in nature. I see no reason in principle why this should not be the case.

[90] As indicated above, Dickson C.J. in *B.C.G.E.U.* adopted the following observation in the judgment of the British Columbia Court of Appeal:

> Any action that interferes with [access to the courts] by any person or groups of persons will rally the court's powers to ensure the citizen of his or her day in court. Here, the action causing interference happens to be picketing. As we have already indicated, interference <u>from whatever source</u> falls into the same category (underling added).

[91] Barriers to access to the Superior Court may exist on a spectrum. Many such barriers represent legitimate exercises of the power of the legislature to impose some conditions on how and when people have a right to access the courts pursuant to its constitutional

power to pass laws in relation to the administration of justice in the province. This was recognized by the Supreme Court of Canada in *Christie* in the passage quoted at para. 55 above. The screening mechanisms referred to above serve as examples of the legitimate exercise of this provincial power. Moreover, these screening mechanisms can be seen as having among their objects the enhancement of access to the courts on a societal level, thereby promoting overall access to justice.

[92] At the other end of the spectrum may exist legislative barriers, such as the hearing fees in *Trial Lawyers*, which are inconsistent with s. 96 of the *Constitution Act, 1867* and the requirements that flow by necessary implication from s. 96, and are therefore unconstitutional (see *Trial Lawyers* at para. 24).

[93] I am unable to accept the Crown's submission that there may be no interference with access to the Superior Court occasioned by s. 17 of the CLPA because litigants are directed by the section to seek leave to proceed with claims based on bad faith and misfeasance in public office from the Superior Court itself and that it will be the Superior Court that determines what the standard should be for the granting of leave and whether it is met.

[94] In my view the rule of law, which informs a proper interpretation of s. 96, is met, not by mere access to the court in the sense affording litigants the simple right to make submissions, but rather by meaningful access to the court in the sense of ensuring that a litigant's claim is determined on its merits, including the right to present material evidence.

[95] In the case of *R. v. Domm*, (1996) 31 O.R. (3d) 540 (C.A.) at para. 12 Doherty, J.A., citing *B.C.G.E.U.* among other authorities, reinforced the principle that the rule of law demands meaningful access to courts as follows:

> Judicial orders are one manifestation of the law with which the state and the individual must comply. The rule of law, however, does more than demand compliance with the law. To validate this demand, the law must provide individuals with meaningful access to independent courts with the power to enforce the law by granting appropriate

> and effective remedies to those individuals whose rights have been violated: *Re B.C.G.E.U.*, supra, at 298-299; *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at 195-96: *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236 at 250; *Kourtessis v. Minister of National Revenue* (1993), 81 C.C.C. (3d) 266, per La Forest J. at 309-310: P. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at 1263. [Emphasis added.]

[96] Thus, the constitutionality of a legislative measure imposing a barrier will depend upon the effect of the barrier on the ability of litigants to access the Superior Court to have their disputes adjudicated on their merits. Adjudication on the merits is equivalent to the granting of "appropriate and effective remedies."

[97] In addressing the question of the sufficiency of the evidentiary foundation for a constitutional challenge, the Supreme Court in *Christie* spoke at para. 28 of the need for there to be a "direct and inevitable causal link" between the alleged barrier (in that case a tax on legal services) and obtaining access to justice.

[98] In my view a direct and inevitable causal link has been shown between the barrier of represented by section 17 of the CLPA which requires a plaintiff to show credible evidence to support a finding that they have a reasonable possibility of succeeding without access to any documentary or oral discovery from the defendant, and obtaining access to justice.

[99] As indicated previously, the good faith/reasonable possibility of success test in s. 17 is effectively identical to the test in s. 138.8 of the *Securities Act*. In *Theratechnologies* at paras. 38 and 39, the Supreme Court of Canada, held, in the securities context, that:

> …the threshold should be more than a "speed bump"… and the courts must undertake a reasoned consideration of the evidence to ensure that the action has some merit. In other words, to promote the legislative objective of a robust deterrent screening mechanism so that cases without merit are prevented from proceeding, the threshold requires that there be a reasonable or realistic chance that the action will succeed.

> A case with a reasonable possibility of success requires the claimant to offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim. This approach, in my view, best realizes the legislative intent of the screening mechanism: to ensure that cases with little chance of success — and the time and expense they impose — are avoided. I agree with the Court of Appeal, however, that the authorization stage under s. 225.4 should not be treated as a mini-trial. A full analysis of the evidence is unnecessary. If the goal of the screening mechanism is to prevent costly strike suits and litigation with little chance of success, it follows that the evidentiary requirements should not be so onerous as to essentially replicate the demands of a trial. To impose such a requirement would undermine the objective of the screening mechanism, which is to protect reporting issuers from unsubstantiated strike suits and costly unmeritorious litigation. What is required is sufficient evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the claimant's favour.

[100] In my view, the court can take judicial notice of the facts referred to by Dean Chamberlain in her commentary quoted at para. 23 above, that:

(a) bad faith is essentially a state of mind;

(b) bad faith is difficult to prove without at least some evidence from the defendant; and

(c) proving bad faith may require disclosure of internal communications of the defendant showing that an official was acting for an improper purpose or with bias against the plaintiff.

[101] Judicial notice is the acceptance by a court, without the requirement of proof, of any fact or matter that is so generally known and accepted in the community that it cannot be reasonably questioned, or any fact or matter that can readily be determined or verified by resort to sources whose accuracy cannot reasonably be questioned (see Paciocco and Stuesser, *The Law of Evidence* (rev. 5th ed.) p.469).

[102] As was observed by the Supreme Court in *Theratechnologies*, promoting a robust deterrent screening mechanism so that cases without merit are prevented from proceeding is a valid legislative objective in the context of claims based on alleged secondary securities market misrepresentation.

[103] Likewise, implementing a robust deterrent screening mechanism to prevent unmeritorious claims against the Crown based on bad faith or misfeasance in public office from proceeding also represents a valid legislative objective, and does not, by itself, prevent access to the Superior Court in a way that is contrary to s. 96 of the *Constitution Act, 1867*. As exemplified by the statements of the Premier and the office of the Attorney General referred to above, the valid legislative objectives of s. 17 of the CLPA include the enhancement of access to timely justice by clearing backlogs in the judicial system and reducing the cost of administering the judicial system, thereby permitting more public resources to be devoted to other government priorities.

[104] However, as was the case with hearing fees in *Trial Lawyers*, the legislature's power to erect screening mechanisms is not unlimited. The exercise of this power "must be consistent with s. 96 of the *Constitution Act, 1867* and the requirements that flow by necessary implication from s. 96" (see *Trial Lawyers* para. 24).

[105] In my view, prohibiting any documentary or oral discovery of the defendant as an integral part of the screening mechanism does prevent many claimants who may well have meritorious claims against the Crown based on bad faith or misfeasance in public office from having meaningful access to the Superior Court in a way that is inconsistent with s. 96 and the requirements that flow by necessary implication from s. 96. This inconsistency is brought about by barring such claimants from any realistic and effective means of presenting sufficient, credible and necessary evidence to satisfy the court that there is a reasonable possibility that their claims would succeed.

(f) Finding of Unconstitutionality

[106] For the foregoing reasons I find that s. 17 of the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sched 17 is inconsistent with s. 96 of the *Constitution Act, 1867*.

What is the appropriate remedy?

[107] The applicant seeks a declaration pursuant to s. 52(1) of the *Constitution Act, 1982*, that s. 17 of the CLPA is of no force and effect.

[108] That section reads:

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(a) Guiding principles

[109] The Supreme Court of Canada in the case of *Ontario (Attorney General) v G.*, 2020 SCC 38, gave direction on how s. 52(1) is to be applied by lower courts in crafting a remedy following a finding of inconsistency between a challenged law and the Constitution.

[110] Karakatsanis J., writing for the majority, stated that the first step in crafting an appropriate remedy in a given case, is determining the extent of the legislation's inconsistency with the Constitution (para. 108).

[111] The second step is determining the form that a declaration should take, as remedies other than full declarations of invalidity should be granted when the nature of the violation and the intention of the legislature allow for them. These alternate remedies, tailored to the breadth of the violation, should be employed when possible so that the constitutional aspects of legislation are preserved, and include the remedies of reading down, reading in, and severance (para. 112).

[112] Reading down "is when a court limits the reach of legislation by declaring it to be of no force and effect to a precisely defined extent" and is an appropriate remedy when "the offending portion of the statute can be defined in a limited manner" (para. 113).

[113] Reading in "is when a court broadens the grasp of legislation by declaring an implied limitation on its scope to be without force or effect" and is an appropriate remedy when the inconsistency with the Constitution can be defined as "what the statute wrongly excludes rather than what it wrongly includes" (para. 113).

[114] Severance "is when a court declares certain words to be of no force or effect, thereby achieving the same effects as reading down or reading in, depending on whether the severed portion serves to limit or broaden the legislation's reach." Severance is appropriate "where the offending portion is set out explicitly in the words of the legislation" (para. 113).

[115] At para. 114 Karakatsanis J. cautioned against granting these tailored remedies in the wrong circumstances, as they can intrude on the legislative sphere, noting that:

> …tailored remedies should only be granted where it can be fairly assumed that the legislature would have passed the constitutionally sound part of the scheme without the unsound part and where it is possible to precisely define the unconstitutional aspect of the law.

[116] At para. 116, Karakatsanis J. concluded that determining whether to strike down legislation in its entirety or instead to grant one of the tailored remedies, depends on whether the court can fairly conclude that the legislature would have enacted the law as modified by the court. This approach respects the differing roles of courts and legislatures, which are foundational to Canada's constitutional architecture. The court must determine whether the law's overall purpose can be achieved without violating rights and if a tailored remedy can be granted without intruding on the role of the legislature, as such a remedy will preserve the law's constitutionally compliant effects along with the benefit that law provides to the public. This serves the rule of law by ensuring that the legislation complies with the Constitution and by securing the public benefit of laws where possible (para.116).

[117] Beyond a consideration of whether a tailored remedy is appropriate in the circumstances, the court may also consider whether to delay the effect of a declaration of invalidity to enable the legislature to remedy the constitutional infringement.

[118] At para. 117 Karakatsanis J. observed that "there are times when an immediately effective declaration of invalidity would endanger an interest of such great importance

that, on balance, the benefits of delaying the effect of that declaration outweigh the cost of preserving an unconstitutional law."

[119] In the recent case of *R. v. Albashir*, 2021 SCC 48 Karakatsanis J., again writing for the majority, stated at para. 1 that a declaration of constitutional invalidity will be suspended to permit the legislature to respond only in "exceptionally rare cases." Such a suspension is only justified "where a compelling public interest, grounded in the Constitution, outweighs the harms of temporarily maintaining the unconstitutional law."

[120] At para. 31 Karakatsanis J. emphasized that only "a compelling public interest will warrant a suspension" which will be the case only in rare circumstances, and the suspension "must not last longer than is necessary for the government to address the constitutional infirmity."

(b) Application of the principles

[121] At the first step, the inconsistency of s. 17 of the CLPA with s. 96 of the *Constitution Act, 1867* lies not in the implementation of a screening mechanism requiring claimants proposing to bring an action against the Crown (including officers and employees) to satisfy the court that the action is brought in good faith and that there is a reasonable possibility of it succeeding. As indicated previously, it is not unusual for provincial legislatures, in the exercise of their jurisdiction over the administration of justice in the province, to impose screening mechanisms which may limit or affect a litigant's access to the court or to certain court procedures such as a trial. The screening methods are often directed to increasing access to justice generally and reducing the cost of the administration of justice by barring unmeritorious claims or defences, barring frivolous and vexatious claims, and streamlining court processes.

[122] Nor does the inconsistency derive from the provision exempting the Crown from any obligation to file an affidavit in response to a motion for leave. Such a provision does not impact the plaintiff's meaningful access to the Superior Court. The plaintiff's affidavit in support of the motion for leave may be so deficient or uncontroversial that delivery by the defendant of a responding affidavit may not be warranted. The provision requiring the

plaintiff to file an affidavit of documents on a motion for leave similarly does not affect the plaintiff's access to the Superior Court in an unconstitutional manner. Nor does the provision providing that each party to the leave motion bear their own costs.

[123] The inconsistency with s. 96 lies solely in the provisions relieving the Crown from being subject to any obligation to give documentary or oral discovery as an integral part of the screening mechanism implemented by s. 17, thereby depriving plaintiffs with meritorious claims from having any effective means of access to sufficient and necessary evidence to satisfy the court that the claim may possibly succeed.

[124] In my view, the utilization of one of the tailored remedies of reading in, reading down or severance is not warranted in the circumstances of this case. As noted above, the Supreme Court of Canada in *G.* cautioned against granting tailored remedies as they may intrude on the legislative sphere. I am unable to find that it can be fairly assumed that the legislature would have passed the constitutionally sound part of the scheme represented by s. 17 of the CLPA without the unsound part.

[125] In *Trial Lawyers* McLachlin C.J. noted at para. 66 that "reading in" is a remedy sparingly used and is available only when it is clear that the legislature, faced with a ruling of unconstitutionality, would have made the change proposed. She was not satisfied that this condition was met. She found at para. 68 that the proper remedy was to declare the hearing fees scheme as it stood unconstitutional and leave it to the legislature or the Lieutenant Governor in Council in that case to enact new provisions, should they choose to do so.

[126] In my view the same considerations apply in the case at bar. It is noted that the Crown made no submissions that a tailored remedy should be considered by the court in the event that s. 17 of the CLPA was found to be inconsistent with s. 96 of the *Constitution Act, 1867*.

[127] In order to make s. 17 constitutionally valid, subsections 17(5) and (6), which relieve the defendant from being subject to discovery or the inspection of documents, or to examination for discovery, would have to be read down and a provision read in affording

the claimant discovery rights against the defendant in order to permit the court to make a determination on the merits of whether there is a reasonable possibility that the claim would be resolved in the claimant's favour. It is for the legislature to define the specifics of an applicable discovery mechanism and not the court. In my view, as in *Trial Lawyers*, the appropriate remedy is to declare that s. 17 is of no force or effect, and leave it to the legislature to enact a new provision setting up a screening mechanism for claims against the Crown based on bad faith or misfeasance in public office, should they choose to do so.

[128] The Crown likewise made no submission that the court should consider suspending a declaration under s. 52(1) for any period of time to permit the legislature to respond. This is not one of those rare cases where there is a compelling public interest, grounded in the Constitution, that outweighs the harms of temporarily maintaining the unconstitutional law.

Disposition

[129] For the foregoing reasons it is ordered and adjudged that section 17 of the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sched. 17 is of no force or effect. The stay of the proceeding in file CV-21-00000003-00CP at Cayuga is lifted.

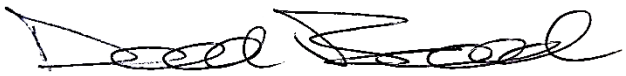
Costs

[130] The parties are strongly encouraged to agree on the costs of the application.

[131] If the parties cannot agree on costs, the applicants may make written submissions as to costs within 21 days of the release of these Reasons. The respondent Crown has 14 days after receipt of the applicants' submissions to respond. The applicants have a further seven days to make reply submissions. All such written submissions are to be forwarded to me care of the Trial Coordinator at Brantford at the same email address used for the release of these Reasons.

[132] The initial submissions of each side shall not exceed six (6) double-spaced pages, exclusive of Bills of Costs or Costs Outlines, and the reply submissions, if any, shall not exceed three (3) such pages.

[133] If no submissions are received within this timeframe, the parties will be deemed to have settled the issue of costs as between themselves.



D.A. Broad, J.

Released: February 10, 2022

CITATION: Poorkid Investments Inc. v. HMTQ, 2022 ONSC 883
COURT FILE NO.: CV-21-12
DATE: 20220210

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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 RIGHT OF ONTARIO

Respondents

REASONS FOR JUDGMENT

Broad, J.

Released: February 10, 2022