Court File No.: C70397

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

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

Appellants

– and –

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

Respondents

APPELLANTS' FACTUM

April 22, 2022

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PART I – THE APPELLANT AND THE DECISION APPEALED FROM

1. This is an appeal by Her Majesty the Queen in Right of Ontario ("Ontario") from the order of Broad J. of the Superior Court of Justice declaring that s. 17 of the *Crown Liability and Proceedings Act, 2019,* SO 2019, c 7, Sch 17 ("CLPA") is invalid and of no force and effect.

PART II – THE NATURE OF THE CASE AND THE ISSUES

2. Section 17 of the CLPA requires claimants to seek leave of the court where their proceeding includes a claim against the Crown or its servants in respect of a tort of misfeasance in public office or a tort based on bad faith. The proceeding is stayed unless leave of the court is granted. 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 claim would be resolved in the claimant's favour. Subsection 17(6) provides that "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."

3. The application judge held that s. 17 of the CLPA was inconsistent with s. 96 of the *Constitution Act, 1867* because it unconstitutionally interfered with access to a superior court. In particular, the application judge held that the fact that the defendant was not subject to discovery was unconstitutional:

> 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.
>
> *Poorkid Investments Inc. v. HMTQ*, 2022 ONSC 883 at para. 123 [Application judge]

4. Ontario submits that the application judge erred in declaring s. 17 of the CLPA to be invalid and that the appeal should be allowed.

5. At common law, the Crown is immune from suit in tort and is immune from discovery. The Supreme Court of Canada has recently confirmed that "Crown immunity is deeply entrenched in our law" and that "to override this immunity, which originated in the common law, requires clear and unequivocal legislative language." The Crown is liable in tort and is obliged to submit to discovery only to the extent provided for by statute, "the scope of which Parliament remains free to change." The application judge turned this principle on its head in finding that the statute was unconstitutional because it did not go far enough in subjecting the Crown to discovery.

Canada (Attorney General) v. Thouin, 2017 SCC 46 at paras. 1 and 23

6. Neither Crown liability generally nor the Crown's obligation to submit to discovery are part of the "core jurisdiction" of superior courts protected by s. 96 of the *Constitution Act, 1867*. Nor does s. 17 of the CLPA prevent litigants from accessing the superior courts. "Access to the court" means the ability of litigants to present their case to court for determination in accordance with the applicable law. This principle does not prescribe the substantive content of the applicable law. No litigant is prevented by s. 17 of the CLPA from accessing the court.

Babcock v. Canada (Attorney General), 2002 SCC 57 at para. 60

7. The application judge held that "the rule of law, which informs a proper interpretation of s. 96," required that litigants must have "the right to present material evidence" obtained through discovery on a motion for leave under s. 17 of the CLPA. But the rule of law cannot be used to invalidate a statute because of its content and does

not guarantee that civil actions must be "governed by customary rules of civil procedure and evidence." The application judge erred in invoking the rule of law as a basis to find that the statute was invalid.

Application judge at para. 94
British Columbia v. Imperial Tobacco Canada Ltd., 2005 SCC 49 at para. 67

8. Neither s. 96 of the *Constitution Act, 1867* nor the rule of law establishes a constitutional right to conduct examinations for discovery in a civil action in order to determine whether or not a plaintiff has a tenable claim. The application judge's decision calls into question the constitutionality of every statutory measure that imposes limits or conditions on the commencement of a superior court proceeding. The appeal should be allowed.

PART III – SUMMARY OF THE FACTS

A. The applicants

9. The applicants are plaintiffs in a proposed class action. They allege that they suffered damages because of the way in which the Ontario Provincial Police responded to protests by Indigenous activists in Caledonia. The proposed class includes residents and business owners in and around Caledonia as well as persons who entered into an agreement of purchase and sale for units in a development that has not proceeded because of the protests.

Statement of Claim, paras. 15-18, 114-128

10. The claim alleges that the Solicitor General, the Commissioner of the Ontario Provincial Police, the Chief Superintendent of the Ontario Provincial Police, and the OPP Inspector in charge of the Cayuga detachment failed to carry out their duties under

the *Comprehensive Ontario Police Services Act*, failed to prevent crimes and other offences, and did not effectively enforce injunctions against the protests issued by the courts.

Statement of Claim, paras. 44-49

11. The plaintiffs allege that the defendants' response to the protests was carried out in accordance with the OPP's "Framework for Police Preparedness for Aboriginal Critical Incidents". This publicly-available document sets out the OPP's approach to responding to policing situations involving Indigenous persons. The plaintiffs claim that the implementation of the Framework was "an act of willful misfeasance and nonfeasance in public office by the Defendants" because the defendants "should be concentrating solely on deterring or stopping crimes and protecting innocent victims of them".

Statement of Claim paras 107 and 112

B. The *Crown Liability and Proceedings Act, 2019*

12. Because their proceeding includes a claim of misfeasance in public office, the plaintiffs were required to bring a motion for leave under s. 17 of the CLPA.

13. Section 17 of the CLPA applies to claimants who bring proceedings against the Crown or an officer or employee of the Crown. These claimants must obtain leave of the court if their proceedings 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 of employee's duties or functions.

CLPA, ss. 17(1), (2) and (14)

14. The court shall not grant leave unless it is satisfied that (1) the proceeding is being brought in good faith, and (2) there is a reasonable possibility that the claim in respect of a tort of misfeasance in public office or a tort based on bad faith would be resolved in the plaintiff's favour.

CLPA, s. 17(7)

15. The leave requirement in s. 17 is modeled on s. 138.8 of the *Securities Act*, which also requires

> …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.

Theratechnologies Inc. v. 121851 Canada Inc., 2015 SCC 18 at para. 38
Securities Act, R.S.O. 1990, c. S.5, s. 138.8

16. This mechanism ensures that only claims with a reasonable possibility of success go through the potentially time-consuming and expensive discovery process, which in turn reduces costs and furthers the most efficient and expeditious resolutions of disputes. As with defendants to securities actions under s. 138.8 of the *Securities Act*, the Crown as defendant under s. 17 of the CLPA is permitted but not required to lead evidence, and no oral or documentary discovery or examinations (except of a person who has sworn an affidavit) are permitted.

CLPA, ss. 17(5)-(6)
Kwong v. iAnthus Capital Holdings, Inc., 2022 ONSC 1400 at para. 5

C. The application

17. Instead of bringing a motion for leave under CLPA s. 17(2), the plaintiffs brought a free-standing application under Rule 14 seeking a declaration that s. 17 was invalid. Their arguments were directed at two aspects of s. 17. The first aspect was the requirement in s. 17(8) for each party to bear its own costs of the leave motion. The applicants argued that this represented an economic barrier to accessing the courts. The application judge rejected this argument.

Application judge at para. 78

18. The second aspect was the requirement in s. 17(7) for the plaintiffs to demonstrate that their claim has a reasonable possibility of success. The applicants argued that the "reasonable possibility" standard meant they had to show "some evidence" that their claim would succeed. They argued that they could not meet this standard without access to internal communications within the possession and control of the Crown. However, they alleged that access to such internal communications is prevented by ss. 17(5) and (6), since these provisions do not require the defendants to file an affidavit on a motion for leave, prohibit examining or summoning for examination any person other than the author of an affidavit or other document that is required or may be filed on the motion for leave, and prohibit discovery of the defendants in relation to a motion for leave.

19. The applicants' evidence consisted of two affidavits. The first affidavit was from David Thompson, a lawyer. Mr. Thompson's affidavit provided an estimate of the costs of bringing a motion for leave under the CLPA. However, as Mr. Thompson admitted and as the application judge affirmed, Mr. Thompson's estimate was based only on his own experience as a lawyer and not on any empirical evidence about the cost of motions

for leave under the CLPA or motions for leave more generally. The application judge rejected this evidence, holding that "the applicants' evidence relating to the costs of the motion under s. 17 suffers from serious deficiencies."

> Application judge at paras. 12-15 and 83-85
> Affidavit of David Thompson sworn on June 29, 2021

20. The second affidavit was from David Johnson, the CEO of a company providing consulting services to lawyers and law firms. Mr. Johnson was not qualified as an expert. Mr. Johnson's brief affidavit opined on the importance of class actions as a tool for access to justice and attached a newspaper article relating statements made by the Attorney General of Ontario and the Premier about the purpose of the CLPA. That newspaper article also included two paragraphs referring to an online journal article published by Dean Erika Chamberlain. The affidavit itself did not contain any reference to this journal article or attach the journal article itself.

> Application judge at paras. 12-13
> Affidavit of David Johnson sworn on June 29, 2021

21. The application judge rejected the argument that s. 17 imposed an unconstitutional economic barrier to accessing the court. However, the application judge found that s. 17 posed an unconstitutional *procedural* barrier for the following reasons:

> 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.
>
> Application judge at para. 105

PART IV – ISSUES AND ARGUMENT

22. Ontario submits that the appeal raises the following issues:

(a) Is s. 17 of the CLPA inconsistent with s. 96 of the *Constitution Act, 1867*?

(b) Is s. 17 of the CLPA inconsistent with the unwritten principle of the rule of law?

(c) Does the unavailability of discovery on a motion for leave under s. 17 of the CLPA prevent claimants from demonstrating that their claims have a reasonable possibility of success?

23. Ontario submits that all three questions should be answered in the negative.

A. No inconsistency with *Constitution Act, 1867* s. 96

24. Section 17 of the *CLPA* is not inconsistent with s. 96 of the *Constitution Act, 1867*. The statute does not impair the core jurisdiction of superior courts and does not interfere with access to superior courts. Section 17 enacts a procedural rule applicable only in certain tort proceedings against the Crown. Its legal effect is far removed from the interests protected by s. 96 of the *Constitution Act, 1867*.

1. No impairment of the core jurisdiction of superior courts

25. Section 96 has been interpreted by the Supreme Court as "guaranteeing a nucleus to the superior courts" of historic jurisdiction and core jurisdiction:

> This means that neither the provinces nor the federal government may confer functions reserved to the superior courts on other courts to which s. 96 does not apply…If a province or the federal government could, by statute, confer the essential functions of the superior courts on another court, the role of the superior courts as the cornerstone of the judicial system would evidently be eroded and the system's unitary nature would, in turn, be undermined.
>
> *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27 at para. 41

26. The principles underlying s. 96 are national unity and the rule of law. National unity is furthered by protecting the functions of federally-appointed courts from being transferred to provincial appointees. The rule of law is furthered by protecting the powers of superior courts "to control their own process and enforce their orders,…to review exercises of public power for legality and to ensure that citizens are protected from arbitrary government action,…[and to] hear any matter that has not been assigned to a statutory court." These purposes and principles are very far removed from the interests at stake in the plaintiffs' claim in this case.

Reference re Code of Civil Procedure (Que.), art. 35, 2021 SCC 27 at paras. 42-51

27. There are three branches of s. 96 jurisprudence. The first branch includes cases (such as *Re Residential Tenancies Act*) that are concerned with preventing the creation of parallel provincial courts or tribunals to hear the kinds of disputes that at Confederation were heard exclusively by federally-appointed superior courts. This branch has no application here, since this appeal does not involve the exercise of judicial powers by any administrative body or inferior court.

Reference re Residential Tenancies Act (Ontario), [1981] 1 SCR 714
Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (NS), [1989] 1 SCR 238

28. The second branch of s. 96 jurisprudence involves legislative transfers or removals of "core jurisdiction" from superior courts, as in *Macmillan Bloedel*, where the power to punish young offenders for *ex facie* contempt of court was purportedly given exclusively to an inferior court, or as in *Reference re Code of Civil Procedure (Que.)*, where the power to hear cases valued at less than $85,000 was purportedly given exclusively to an inferior court. This second branch of s. 96 jurisprudence also has no application to this

appeal. Section 17 of the *CLPA* does not purport to transfer any powers, let alone "core jurisdiction" powers, from a superior court to an inferior court or provincial appointee.

MacMillan Bloedel Ltd. v. Simpson, [1995] 4 SCR 725
Reference re Code of Civil Procedure (Que.), art. 35, 2021 SCC 27

29. Nor does the impugned provision remove anything from the "core jurisdiction" of superior courts. Core jurisdiction includes those "critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system." These defining features enable a superior court "to fulfil itself as a court of law" and are derived not from legislation, but "from the very nature of the court as a superior court of law."

Reference re Code of Civil Procedure (Que.), art. 35, 2021 SCC 27 at para. 65

30. The core is "a very narrow one which includes only critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system." This core includes the inherent jurisdiction and inherent powers of a superior court, namely, review of the legality and constitutional validity of laws, enforcement of its orders, control over its own process, and its residual jurisdiction as a court of original general jurisdiction.

Ontario v. Criminal Lawyers' Association of Ontario, 2013 SCC 43 at para. 19
Reference re Amendments to the Residential Tenancies Act (N.S.), [1996] 1 SCR 186 at para. 56, per Lamer C.J.
Reference re Code of Civil Procedure (Que.), art. 35, 2021 SCC 27 at para. 68.

31. Section 17 of the CLPA does not affect any part of the core jurisdiction of superior courts or remove any jurisdiction from superior courts. Section 17 of the CLPA is a

leave requirement for plaintiffs who want to commence certain tort claims against the Crown. It has nothing to do with the inherent jurisdiction of the superior court or the powers of the court to review the legality of laws, to enforce its orders, to control its processes, or to act as a court of original jurisdiction.

32. Crown liability in tort is a creature of statute, not a part of the core jurisdiction of superior courts. At common law, the Crown was and remains immune from liability in tort. The Supreme Court of Canada and the eminent authorities agree that provincial superior courts had no jurisdiction to entertain tort claims against the Crown until this jurisdiction was granted by statute in the mid-twentieth century. Today, the Crown is only liable in tort to the extent permitted by and subject to the exceptions, defences and limitations contained in Crown liability statutes.

> *Canada (Attorney General) v. Thouin*, 2017 SCC 46 at para. 23:
>
> Today, Crown immunity still exists at the federal level in the context of civil proceedings, but only within the limits set in the [*Crown Liability and Proceedings Act*] and the *Federal Courts* Act, R.S.C. 1985, c. F-7, the scope of which Parliament remains free to change.
>
> *Babcock v. Canada (Attorney General)*, 2002 SCC 57 at para. 60; see also *R. v. Ahmad*, 2011 SCC 6 at paras. 62-64:
>
> In Canada, superior courts operated since pre-Confederation without the power to compel Cabinet confidences. Indeed, at the time of Confederation, no court had any jurisdiction regarding actions against the Sovereign.
>
> Paul M. Perell and John W. Morden, *The Law of Civil Procedure in Ontario*, 4th ed (Toronto: Lexis Nexis, 2017) at 4.12 (footnotes omitted):
>
> Under the common law and in the absence of some statutory authority, no process may be issued against the Crown (Her Majesty) in any of the sovereign's courts.

> Horsman & Morley, *Government Liability: Law and Practice* (Toronto: Thomson Reuters, 2017) (loose-leaf updated 2019, release 33) at 1.40.20:
>
> It is important to note that the old Crown prerogative immunities continue to exist, where they have not been modified by the Crown proceeding statutes.
>
> *Rudolph Wolff v. Canada*, 1990 1 SCR 695 at 699-700:
>
> The impugned sections of the *Federal Court Act* were enacted in 1970. They made provision for the bringing of such actions exclusively in the Federal Court rather than the provincial superior courts. The impugned provisions do not seek to limit or restrict rights in any way, rather they confer rights which did not exist at common law and designate the court in which these rights may be exercised.

33. In 1963, the *Proceedings Against the Crown Act* created a statutory cause of action in tort against the Crown in right of Ontario. As an action in tort against the Crown in Ontario is a creature of statute that did not exist until 1963, it can hardly be said that the leave requirement in s. 17 destroys the superior court's "essential character" or impairs a jurisdiction "essential to the existence of a superior court."

> *Proceedings Against the Crown Act, 1962-63*, SO 1962-63, c. 109
> *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para. 19, citing *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 SCR 725 at paras. 30 and 38

34. Superior courts in Ontario were able to exist and discharge their essential functions for almost a century prior to the enactment of any Crown liability statute. Their existence and essential functions cannot be imperiled by the leave requirement in s. 17 of the *CLPA*. The leave requirement does not "maim the institution which is at the heart of our judicial system" and is not "tantamount to abolishing the superior courts of general jurisdiction, which is impermissible without constitutional amendment."

> *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 SCR 725 at para. 37

2. No barrier to accessing the superior court

35. The third branch of s. 96 jurisprudence is about barriers to accessing superior courts. These cases have examined physical barriers preventing access to the courthouse (as in *BCGEU*) and financial barriers to bringing a case to trial (as in *Trial Lawyers*). This appeal involves an alleged *procedural* barrier to accessing superior courts.

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

36. The application judge found that the impugned provision was inconsistent with s. 96 because it "prevent[s] 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." This conclusion was incorrect.

> Application judge at para. 105

37. Requiring plaintiffs to seek leave *from the superior court* before commencing a tort action against the Crown is not a barrier to accessing the superior court. "Access to the court" means just that – the ability of parties to bring themselves before the Court for a hearing and a decision in accordance with the applicable law. Access to the court does not mean relief against the legal burdens or legal prerequisites that a statute may place on a litigant before that litigant is entitled to a remedy.

38. In *BCGEU*, access to the court was impeded by a picket line that obstructed litigants from physically entering the courthouse to advance their claims. In *Trial Lawyers*, access to the court was impeded by prohibitively expensive hearing fees that denied litigants the opportunity to advance their claims at a trial. The good faith of those

litigants in pursuing their claims, the probability of success of their claims and the legal strength of their arguments were all irrelevant to the barriers presented in *BCGEU* and *Trial Lawyers*.

39. The barriers at issue in *BCGEU* and *Trial Lawyers* had nothing to do with the legal burden on a plaintiff or the elements of a tort or any other legal prerequisite to obtaining a remedy – rather, they effectively stopped litigants from getting in the courthouse door no matter what their legal position. This is very different from the effect of s. 17 of the *CLPA*, which permits plaintiffs to seek leave to bring an action on the basis that their action is brought in good faith and has a reasonable possibility of success.

40. The need to protect access to the courts does not stipulate the substantive content or necessary legal prerequisites of any particular cause of action and cannot mean that a particular cause of action can never be extinguished, limited or made subject to statutory conditions by the Legislature. 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*.

> 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*, R.S.O. 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.

41. If the statutory limitation or extinguishment of a particular cause of action amounted to an interference with access to the courts, then limitation periods, the abolition of common law torts, the elimination of the right to sue in workers' compensation regimes, no-fault insurance schemes, and the exclusive jurisdiction of labour arbitrators where a collective agreement is in place would all equally deny access to the superior court. Statutory changes to common law torts that add new elements or impose requirements on plaintiffs would also presumably be invalid, since they impose new legal burdens on plaintiffs over and above those that superior courts would have applied at common law.

> *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469 at para. 13
> *Frame v. Smith*, [1987] 2 SCR 99 at paras. 6 and 31
> *Hernandez v. Palmer*, [1992] O.J. No. 2648 (Gen. Div.)
> *Weber v. Ontario Hydro*, [1995] 2 SCR 929 at paras. 36 and 76
> *Workplace Safety and Insurance Act, 1997*, SO 1997, c 16, Sch A, ss. 26-31
> *Libel and Slander Act*, RSO 1990, c L.12
> *Occupiers' Liability Act*, RSO 1990, c O.2, s. 2

42. The application judge confused *access to the court*, which is the ability to present oneself to court for a decision in accordance with the applicable law, whatever that law is from time to time, with *the granting of appropriate and effective remedies by the*

court, which occurs only after a litigant has satisfied the court that they have met their legal burdens under the applicable law:

> 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."
>
> Application judge at para. 96

43. But there are no "appropriate and effective remedies" for litigants who have not satisfied the necessary legal prerequisites for their claims. This is particularly true where a litigant seeks a remedy in a statutory proceeding but has not satisfied the requirements set out in that statute. This is not because such a litigant has been denied "access to the court", but rather because *upon accessing the court* a judge has found that the litigant has failed to satisfy their legal burden.

44. In this case, the legal burden on a claimant includes the need to obtain leave of the court by satisfying the court that the proceeding has been brought in good faith and there is a reasonable possibility that the claim will be resolved in the claimant's favour. Litigants who cannot meet this legal prerequisite will not proceed to trial, but then neither will litigants in actions where the statutory limitation period has elapsed or where the matter is governed by a collective agreement or a worker's compensation or no-fault insurance scheme or where the action in question has been extinguished by statute. None of these results means that the litigant has been denied "access to the courts" in the sense contemplated by *BCGEU* or *Trial Lawyers*.

45. It must be remembered that, in the absence of the *CLPA*, no cause of action against the Crown in tort would exist at all. The Crown's liability in tort is a creature of

statute, and the Supreme Court has held that "Crown immunity still exists…in the context of civil proceedings, but only within the limits set in the [Crown liability statutes], the scope of which Parliament remains free to change." Crown liability statutes "do not seek to limit or restrict rights in any way, rather they confer rights which did not exist at common law and designate the court in which these rights may be exercised."

> *Canada (Attorney General) v. Thouin*, 2017 SCC 46 at para. 23
> *Rudolph Wolff v. Canada*, 1990 1 SCR 695 at 699-700

46. Just as appeals are creatures of statute and may be subject to statutory leave requirements, and just as other statutory proceedings may be subject to leave or certification requirements, so too may tort actions against the Crown be subject to statutory preconditions without running afoul of the constitutional guarantee of access to the courts. In the absence of a constitutional right that requires the Legislature to enact a Crown liability statute in the first place, there can be no constitutional right to a Crown liability procedure that the plaintiffs consider more favourable than the leave requirement in s. 17 of the *CLPA*.

> *Cavanaugh v. Grenville Christian College*, 2013 ONCA 139 at para. 11
> See e.g. *Securities Act*, RSO 1990, c S.5, s. 138.8; *Class Proceedings Act, 1992*, SO 1992, c 6, s. 5
> *Flora v. Ontario Health Insurance Plan*, 2008 ONCA 538 at paras. 103-104

47. For the same reason, the application judge's concern that a motion for leave under s. 17 does not permit "access to any documentary or oral discovery from the defendant" was misplaced. The Supreme Court has recently reiterated that at common law "the Crown was historically exempt from the obligation to submit to discovery in proceedings in which it was a party" and that this immunity from discovery is presumed to continue today unless the Legislature clearly and unequivocally expresses otherwise.

Application judge at paras 98, 105
Canada (Attorney General) v. Thouin, 2017 SCC 46 at paras. 16-19 and 43

48. Far from clearly and unequivocally lifting this Crown immunity, the unambiguous effect of s. 17(6) of the *CLPA* is to assert that the Crown is not subject to discovery for the purposes of the leave motion. Given the Supreme Court's recent confirmation that the Crown's immunity from discovery "is deeply entrenched in our law" and that "to override this immunity, which originated in the common law, requires clear and unequivocal legislative language", it was an error for the application judge to circumvent this result by invoking the constitutional guarantee of "access to the courts" provided by s. 96 of the *Constitution Act, 1867*.

Canada (Attorney General) v. Thouin, 2017 SCC 46 at para. 1

B. No inconsistency with the rule of law

49. The application judge held that 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." This holding was in error.

Application judge at para. 94

50. The Supreme Court of Canada has held that the rule of law is not a basis for invalidating legislation because of its content and does not guarantee the right to have a civil trial "governed by customary rules of civil procedure and evidence." These holdings should have precluded any reliance on the rule of law as a basis to invalidate s. 17 of the CLPA.

British Columbia v. Imperial Tobacco Canada Ltd., 2005 SCC 49 at paras. 63-77
Toronto (City) v. Ontario (Attorney General), 2021 SCC 34 at para. 63

51. While the rule of law is a "fundamental postulate" of Canada's constitutional structure, it is "not an invitation to trivialize or supplant the Constitution's written terms. Nor is it 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." The text of the Constitution expressly assigns to the Province the power to legislate in relation to "procedure in civil matters." Section 17 of the CLPA conforms to the text of the Constitution, including s. 96, and the rule of law should not have been invoked as a basis to find that the statute is constitutionally invalid.

Roncarelli v. Duplessis, 1959 CanLII 50 (SCC), [1959] S.C.R. 121 at 142
British Columbia v. Imperial Tobacco Canada Ltd., 2005 SCC 49 at para. 67
Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, s. 92(14)

52. 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 between the state and the individual be regulated by law. The import of these principles was explained by the Supreme Court in *Imperial Tobacco*:

> The first principle requires that legislation applied to all those, including government officials, to whom it, by its terms, applies. The second principle means that legislation must exist. And the third principle, which overlaps somewhat with the first and second, requires that state officials' actions be legally founded.

British Columbia v. Imperial Tobacco Canada Ltd., 2005 SCC 49 at para. 59

53. The rule of law requires that there be a positive order of laws and that government action must be justified by reference to these laws. It also implies that there must be an independent body that determines whether government actions are in accordance with the law. In Canada, except where the law validly confers jurisdiction on another court or tribunal, superior courts are that body because of their constitutional status, nationwide presence, and inherent jurisdiction to control their own processes.

Reference re Code of Civil Procedure (Que.), art. 35, 2021 SCC 27 at paras. 48-51

54. But the rule of law does not go further and dictate the actual content of the laws that are adjudicated by courts. On the contrary, the Supreme Court has held that "it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation…based on its content. That is because none of the principles that the rule of law embraces speak directly to the terms of legislation."

British Columbia v. Imperial Tobacco Canada Ltd., 2005 SCC 49 at para. 59

55. In particular, the Supreme Court has already rejected the arguments that the rule of law means that legislation must not confer special privileges on the government and must ensure a fair civil trial "governed by customary rules of civil procedure and evidence." To the contrary, the Supreme Court held that "there is no constitutional right to have one's civil trial governed by such rules." The Supreme Court noted that such purported requirements of the rule of law would be "simply broader versions of rights contained in the *Charter*:"

> For example, the appellants' proposed fair trial requirement is essentially a broader version of s. 11(d) of the *Charter*, which provides that "[a]ny person charged with an offence has the right . . . to . . . a fair and public hearing." But the framers of the *Charter* enshrined that fair trial right only for those "charged with an offence". If the rule of law constitutionally required that all legislation

> provide for a fair trial, s. 11(d) and its relatively limited scope (not to mention its qualification by s. 1) would be largely irrelevant because everyone would have the unwritten, but constitutional, right to a "fair . . . hearing".

British Columbia v Imperial Tobacco Canada Ltd, 2005 SCC 49 at paras 65 and 76

56. This reasoning ought to have been fatal to the applicants' arguments based on the rule of law, but the application judge did not purport to distinguish *Imperial Tobacco* or explain how he was free to come to the contrary conclusion that the rule of law required "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" in a civil proceeding for damages.

57. As in *Imperial Tobacco*, here the asserted "right to present material evidence" in an action for damages against the Crown is simply a broader version of the fair trial rights guaranteed by the *Charter* to accused persons in criminal cases. The rule of law does not afford a legitimate basis to extend these fair trial rights to a civil action.

58. Indeed, there is no constitutional right to bring a civil action in damages at all. This Court has held that s. 7 of the *Charter* "does not embrace the right to bring an action for the recovery of damages for personal injury. A civil action is economic and proprietary in nature and as such outside the range of interests protected by s. 7." It would be anomalous if the Constitution permitted the Legislature to extinguish a cause of action in damages altogether but did not permit the Legislature to make a cause of action contingent on the leave procedure set out in s. 17 of the CLPA.

Rogers v. Faught, 2002 CanLII 19268 (ON CA) at para. 34
Authorson v. Canada (Attorney General), 2003 SCC 39 at para. 9

59. The application judge erred in relying on this Court's decision in *R. v. Domm* as support for the proposition that s. 17 of the CLPA was inconsistent with s. 96. The issue in *R. v. Domm* was whether an accused in a prosecution for disobeying a court order should be prevented from challenging the constitutional validity of the court order by way of collateral attack. "Meaningful access" to the court in that case meant that there had to be some process to review the constitutional validity of the underlying court order; ultimately, however, this Court concluded that a collateral attack on the validity of that court order was impermissible in the prosecution for disobeying the order.

> Application judge at para. 95
> *R. v. Domm*, (1996) 1996 CanLII 1331 (ON CA), 31 O.R. (3d) 540 (C.A.) at para. 12

60. The issues at stake in *R. v. Domm* were nothing like the issues in this case. Here, the plaintiffs in the underlying action do not seek constitutional review and a *Charter* remedy but rather monetary damages in a tort claim. Moreover, they are not prohibited from seeking those damages but are merely subject to the leave requirement in s. 17. Section 17 has no application to a claim for *Charter* relief and does not prevent anyone from accessing the court to ensure the constitutional validity of government action. The application judge took this Court's language about the rule of law in *R. v. Domm* out of context and applied it to support the novel proposition that examination for discovery is constitutionally required in a tort case against the Crown. This was an error.

61. As the Supreme Court of Canada has recently confirmed, "protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of the Constitution, but in its text and at the ballot box." There is no textual basis in the Constitution for a right to conduct examinations for discovery in a

civil action in damages against the Crown. The application judge erred in holding that the rule of law implied such a right.

British Columbia v. Imperial Tobacco Canada Ltd., 2005 SCC 49 at para. 66
Toronto (City) v. Ontario (Attorney General), 2021 SCC 34 at para. 59

C. Discovery is not necessary for claimants to establish a reasonable possibility of success

62. The application judge erred in finding that s. 17 of the CLPA was inconsistent with s. 96 of the *Constitution Act, 1867* and erred in finding that the unwritten principle of the rule of law provided any basis to declare the statute invalid or to find that there was a constitutional right to examination for discovery in a tort case against the Crown. This is sufficient to allow the appeal and reverse the order below.

63. Nonetheless, this Court should not dispose of the appeal without correcting the application judge's erroneous conclusion that, without "any documentary or oral discovery of the defendant," moving parties under s. 17 lack "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." The application judge's analysis on this point was in error and should be corrected.

Application judge at para. 105

64. Plaintiffs in an action are required to plead the material facts that support their claim in advance of any documentary or oral discovery. If the facts alleged in the Statement of Claim do not disclose a reasonable possibility that the claim will succeed, the pleading can be struck under Rule 21 without any discovery. As Copeland J. (as she then was) held, a "plaintiff is not entitled to use discovery as a fishing expedition to find

her claim if she is unable to plead material facts to support the cause of action." It is "not an answer to the defendant's motion to strike" to assert that the plaintiff "will be in a position to provide more detail on the allegations through the discovery process."

Currie v. Gledhill et al., 2018 ONSC 775 at para. 27
Prince v. Attorney General of Ontario, 2018 ONSC 750 at para. 23

65. If the plaintiffs "at the outset do not have knowledge of facts giving rise to the allegations, then it is inappropriate for the allegations to be in a Statement of Claim" at all. It is "not appropriate for Plaintiffs to take the position that material facts may be learned through examination for discovery." If a plaintiff has no knowledge of facts that would render their claim tenable, then the claim should never proceed to discovery.

Bilotta et al v. Barrie Police Services Board et al, 2010 ONSC 622 at para. 25

66. The rules of pleading require that where an allegation of bad faith is made, "the pleading shall contain full particulars." This Court has held that a pleading that does no more than contain the words "bad faith" is "wholly inadequate to sustain a pleading of bad faith. Bad faith must be pled with particularity." Recently, this Court held that a claim of misfeasance in public office against the Crown should be struck because the statement of claim only contained "bald allegations" of bad faith and lacked "material facts pleaded that could plausibly support a finding of bad faith." A plaintiff who is able to provide full particulars of bad faith in its pleadings ought to be in a position to lead some evidence that their claim has at least a reasonable possibility of success.

Rules of Civil Procedure, Rule 25.06(8)
Portuguese Canadian Credit Union v. 1141931 Ontario Ltd., 2012 ONCA 274 at para. 9
The Catalyst Capital Group Inc. v. Dundee Kilmer Developments Limited Partnership, 2022 ONCA 168 at paras. 25–31

67. On the other hand, a plaintiff who has no evidence of bad faith has no legitimate basis to allege bad faith, no prospect of providing full particulars in a pleading, and no reasonable possibility of success. To declare that such plaintiffs must nonetheless be allowed to use discovery as an attempt to find out whether or not they have a legitimate claim is contrary to the purpose of discovery.

68. The purpose of discovery is not for a plaintiff to find out whether or not their claim has a reasonable possibility of success. As Strathy J. (as he then was) held, the purpose of discovery "is well known: to enable the examiner to know the case to be met; to obtain admissions; to define and narrow the issues; to promote settlement." These purposes are beneficial for expediting the conduct of trials, but they are unnecessary to demonstrate that a claim has been brought in good faith and has a reasonable possibility of success.

> *Ramdath v. George Brown College of Applied Arts and Technology*, 2012 ONSC 2747 at para. 26

69. The application judge erred in holding that s. 17 was "without precedent in Canadian law" because it requires plaintiffs "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." In fact, s. 17 is not without precedent in this respect. To the contrary, it is well-established that "plaintiffs seeking leave under s. 138.8 of the *Securities Act* have no entitlement to documentary or oral discovery. Defendants are not required to lead any evidence on a leave motion."

> Application judge at para. 77
> *Kwong v. iAnthus Capital Holdings, Inc.*, 2022 ONSC 1400 at para. 5
> *Johnson v. North American Palladium Ltd.*, 2018 ONSC 4496 at para. 21
> *Ainslie v. CV Technologies Inc.*, 2008 CanLII 63217 (ON SC) at paras. 14-25

Sharma v. Timminco Ltd., 2010 ONSC 790 at para. 34
Abdula v. Canadian Solar Inc., 2014 ONSC 5167 at para. 64

70. The application judge misunderstood s. 138.8 of the *Securities Act*, holding that this "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." The application judge cited no authority for this statement, nor did he cite the many authorities (referred to in paras. 16 and 69 above) that have held exactly the contrary:

> No onus is placed upon proposed defendants by s. 138.8. Nor are they required to assist plaintiffs in securing evidence upon which to base an action under Part XXIII.1. The essence of the leave motion is that putative plaintiffs are required to demonstrate the propriety of their proposed secondary market liability claim before a defendant is required to respond.

Ainslie v. CV Technologies Inc., 2008 CanLII 63217 (ON SC) at para. 15
Application judge at para. 22

71. The application judge accepted that "implementing a robust deterrent screening mechanism to prevent unmeritorious claims against the Crown based on bad faith or misfeasance in public office from proceeding…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*." But it would be inconsistent with this admittedly valid legislative objective if a plaintiff who could not demonstrate a reasonable possibility that their claim could succeed was nonetheless able to demand examination and discovery of the Crown in the hopes of finding some evidence that might support their claim.

Application judge at para. 103
Theratechnologies inc. v. 121851 Canada Inc., 2015 SCC 18 at paras. 38-39

72. Courts applying s. 138.8 of the *Securities Act* have been attentive to the fact that the leave motion proceeds without discovery or the ability to compel evidence from defendants, and their application of the "reasonable possibility of success" standard has been "tempered by the recognition that there has been no discovery and that the analysis is conducted on a paper record with all its attendant limitations."

> *Silver v. Imax Corporation*, 2009 CanLII 72342 (ON SC) at 324-326, 385-386
> *Bayens v. Kinross Gold Corp*., 2013 ONSC 6864 at para. 41

73. As Chief Justice Strathy has recently noted, a judge on a leave motion may consider the evidence "keeping in mind the relatively low merits-based threshold, and the limitations of the record before him." There is no evidence or reason to suppose that courts applying the same standard under s. 17 of the CLPA will be any less attentive to this context or will deny meritorious claims the chance to proceed.

> *Mask v. Silvercorp Metals Inc*., 2016 ONCA 641 at para. 45

74. Nor is s. 138.8 of the *Securities Act* the only context in which the court assesses the merits of a case without oral or documentary discovery. Other such procedures include motions to dismiss frivolous or vexatious claims under Rule 2.1, motions to strike under Rules 21.01 and 25.11, summary judgment motions under Rule 20.04, and applications for judicial review under Rule 68. None of these procedures grant claimants the right to full documentary and oral discovery before an assessment of the merits of the claim, and yet these methods of adjudication are no less legitimate than trials.

> *Rules of Civil Procedure*, Rules 20.04, 21.01, 25.11, 68
> *CCSAGE Naturally Green v. Director, Sec. 47.5 EPA et al*., 2018 ONSC 237 at para. 69

75. As the Supreme Court noted in *Hryniak*, "the best forum for resolving a dispute is not always that with the most painstaking procedure." The "culture shift" required in *Hryniak* "entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case."

> *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 2 and 27-28
> *Theratechnologies inc. v. 121851 Canada Inc.*, 2015 SCC 18 at para. 34

76. There was no evidence before the application judge that discovery is necessary before a plaintiff can establish that a claim of bad faith or misfeasance in public office has a reasonable possibility of success. Instead of making factual findings based on evidence, the application judge purported to take judicial notice of certain "facts" stated in an online journal article excerpted in a newspaper article attached as an exhibit to the affidavit of a non-expert. These "facts" of which judicial notice was taken were 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.

> Application judge at paras. 23 and 100

77. There was no basis to take judicial notice of these "facts", which are not notorious facts at all, nor matters capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy, but really just legal opinions. Taken at their highest, these propositions state that it may be difficult to *prove* bad faith without discovery. But a claimant's burden under s. 17 is not to prove bad faith (that is

the plaintiff's burden at trial) but only to show a reasonable possibility of success. There is no evidence or reason to believe that claimants cannot do so under s. 17 as enacted.

78. Indeed, in this case, the plaintiffs have not sought leave under s. 17 of the CLPA at all. Their failure to even attempt to meet the standard for leave in s. 17 is not evidence that this standard can never be met.

PART V – ORDER REQUESTED

79. Ontario respectfully requests that the appeal be allowed and the application dismissed, with costs of the appeal and of the application below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

April 22, 2022

S. Zachary Green, Daniel Huffaker and Ryan Cookson

Of counsel for the Appellant, Her Majesty the Queen in Right of Ontario

Court File No.: C70397

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

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

Appellants
(Respondents)

– and –

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

Respondents
(Applicants)

CERTIFICATE

I estimate that 2.5 hours will be needed for oral argument. An order under Rule 61.09(2) (original record and exhibits) is not required).

April 22, 2022

S. Zachary Green (LSO No. 48066K)
Of Counsel for the Appellants

SCHEDULE A

Case Law

1. *Poorkid Investments Inc. v HMTQ*, 2022 ONSC 883
2. *Canada (Attorney General) v. Thouin*, 2017 SCC 46
3. *Babcock v. Canada (Attorney General)*, 2002 SCC 57
4. *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49
5. *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18
6. *Kwong v. iAnthus Capital Holdings, Inc.*, 2022 ONSC 1400
7. *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27
8. *Reference re Residential Tenancies Act (Ontario)*, [1981] 1 SCR 714
9. *Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (NS)*, [1989] 1 SCR 238
10. *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 SCR 725
11. *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43
12. *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 SCR 186
13. *R. v. Ahmad*, 2011 SCC 6
14. *Rudolph Wolff v. Canada*, 1990 1 SCR 695
15. *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 SCR 214
16. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59
17. *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469

18. *Frame v. Smith*, [1987] 2 SCR 99

19. *Hernandez v. Palmer*, [1992] O.J. No. 2648 (Gen. Div.).

20. *Weber v. Ontario Hydro*, [1995] 2 SCR 929

21. *Cavanaugh v. Grenville Christian College*, 2013 ONCA 139

22. *Flora v. Ontario Health Insurance Plan*, 2008 ONCA 538

23. *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34

24. *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121

25. *Rogers v. Faught*, 2002 CanLII 19268 (ON CA)

26. *Authorson v. Canada (Attorney General)*, 2003 SCC 39

27. *R. v. Domm*, (1996) 1996 CanLII 1331 (ON CA), 31 O.R. (3d) 540 (C.A.)

28. *Currie v Gledhill* et al., 2018 ONSC 775

29. *Prince v. Attorney General of Ontario*, 2018 ONSC 750

30. *Bilotta et al v. Barrie Police Services Board et al*, 2010 ONSC 622

31. *Portuguese Canadian Credit Union v. 1141931 Ontario Ltd.*, 2012 ONCA 274

32. *The Catalyst Capital Group Inc. v. Dundee Kilmer Developments Limited Partnership*, 2022 ONCA 168

33. *Ramdath v. George Brown College of Applied Arts and Technology*, 2012 ONSC 2747

34. *Johnson v. North American Palladium Ltd.*, 2018 ONSC 4496

35. *Ainslie v. CV Technologies Inc.*, 2008 CanLII 63217 (ON SC)

36. *Sharma v. Timminco Ltd.*, 2010 ONSC 790

37. *Abdula v. Canadian Solar Inc.*, 2014 ONSC 5167

38. *Silver v. Imax Corporation*, 2009 CanLII 72342 (ON SC)

39. *Bayens v. Kinross Gold Corp.*, 2013 ONSC 6864

40. *Mask v. Silvercorp Metals Inc.*, 2016 ONCA 641

41. *CCSAGE Naturally Green v. Director, Sec. 47.5 EPA et al.*, 2018 ONSC 237

42. *Hryniak v. Mauldin*, 2014 SCC 7

Secondary Sources

43. Paul M. Perell and John W. Morden, *The Law of Civil Procedure in Ontario*, 4th ed (Toronto: Lexis Nexis, 2017)

44. Horsman & Morley, *Government Liability: Law and Practice* (Toronto: Thomson Reuters, 2017) (loose-leaf updated 2019, release 33)

SCHEDULE B

Statutes

1. *Crown Liability and Proceedings Act, 2019,* SO 2019, c 7, Sch 17, s. 17
2. *Constitution Act, 1867 Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss. 92(14) and 96
3. *Securities Act*, R.S.O. 1990, c. S.5, s. 138.8
4. *Health Care Consent Act, 1996*, SO 1996, c 2, Sch A, s. 30
5. *Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 134.1(4)
6. *Health Protection and Promotion Act*, RSO 1990, c H.7, s. 95(4)
7. *Workplace Safety and Insurance Act, 1997*, SO 1997, c 16, Sch A, ss. 26-31
8. *Occupiers' Liability Act*, RSO 1990, c O.2, s. 2
9. *Class Proceedings Act, 1992*, SO 1992, c 6, s. 5
10. *Rules of Civil Procedure*, Rules 20.04, 21.01, 25.06(8), 25.11, 68

Crown Liability and Proceedings Act, 2019, **SO 2019, c 7, Sch 17, s. 17**

Proceedings re misfeasance, bad faith

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.

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.

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.

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.

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.

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.

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.

Costs

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

Effect of granting leave

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

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.

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.

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.

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,

Non-application to Crown claimant

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

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.

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.

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.

Constitution Act, 1867 Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, ss. 92(14) and 96

VI. Distribution of Legislative Powers

Subjects of exclusive Provincial Legislation

92 In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

> **14.** The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

VII. Judicature

Appointment of Judges

96 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.

***Securities Act*, R.S.O. 1990, c. S.5, s. 138.8**

Leave to proceed

138.8 (1) 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.

Same

(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.

Same

(3) The maker of such an affidavit may be examined on it in accordance with the rules of court.

Copies to be sent to the Commission

(4) A copy of the application for leave to proceed and any affidavits and factums filed with the court shall be sent to the Commission when filed.

Requirement to provide notice

(5) The plaintiff shall provide the Commission with notice in writing of the date on which the application for leave is scheduled to proceed, at the same time such notice is given to each defendant.

Same, appeal of leave decision

(6) If any party appeals the decision of the court with respect to whether leave to commence an action under section 138.3 is granted,

(a) each party to the appeal shall provide a copy of its factum to the Commission when it is filed; and

(b) the appellant shall provide the Commission with notice in writing of the date on which the appeal is scheduled to be heard, at the same time such notice is given to each respondent.

***Health Care Consent Act, 1996*, SO 1996, c 2, Sch A, s. 30**

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.

***Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 134.1(4)**

Removal of vehicle, debris blocking traffic

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.

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.

***Health Protection and Promotion Act,* RSO 1990, c H.7, s. 95(4)**

Protection from liability for reports

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.

***Workplace Safety and Insurance Act, 1997*, SO 1997, c 16, Sch A, ss. 26-31**

No action for benefits

26 (1) No action lies to obtain benefits under the insurance plan, but all claims for benefits shall be heard and determined by the Board.

Benefits in lieu of rights of action

(2) Entitlement to benefits under the insurance plan is in lieu of all rights of action (statutory or otherwise) that a worker, a worker's survivor or a worker's spouse, child or dependant has or may have against the worker's employer or an executive officer of the employer for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer.

Application of certain sections

27 (1) Sections 28 to 31 apply with respect to a worker who sustains an injury or a disease that entitles him or her to benefits under the insurance plan and to the survivors of a deceased worker who are entitled to benefits under the plan.

Same

(2) If a worker's right of action is taken away under section 28 or 29, the worker's spouse, child, dependant or survivors are, also, not entitled to commence an action under section 61 of the *Family Law Act*.

Certain rights of action extinguished

28 (1) A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. Any Schedule 1 employer.
2. A director, executive officer or worker employed by any Schedule 1 employer.

Same, Schedule 2 employer

(2) A worker employed by a Schedule 2 employer and the worker's survivors are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. The worker's Schedule 2 employer.
2. A director, executive officer or worker employed by the worker's Schedule 2 employer.

Restriction

(3) If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury, subsection (1) applies only if the workers were acting in the course of their employment.

Exception

(4) Subsections (1) and (2) do not apply if any employer other than the worker's employer supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers to operate the motor vehicle, machinery or equipment.

Liability where negligence, fault

29 (1) This section applies in the following circumstances:

1. In an action by or on behalf of a worker employed by a Schedule 1 employer or a survivor of such a worker, any Schedule 1 employer or a director, executive officer or another worker employed by a Schedule 1 employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.

2. In an action by or on behalf of a worker employed by a Schedule 2 employer or a survivor of such a worker, the worker's Schedule 2 employer or a director, executive officer or another worker employed by the employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.

Same

(2) The employer, director, executive officer or other worker is not liable to pay damages to the worker or his or her survivors or to contribute to or indemnify another person who is liable to pay such damages.

Determination of fault

(3) The court shall determine what portion of the loss or damage was caused by the fault or negligence of the employer, director, executive officer or other worker and shall do so whether or not he, she or it is a party to the action.

Same

(4) No damages, contribution or indemnity for the amount determined under subsection (3) to be caused by a person described in that subsection is recoverable in an action.

Election, concurrent entitlements

30 (1) This section applies when a worker or a survivor of a deceased worker is entitled to benefits under the insurance plan with respect to an injury or disease and is also entitled to commence an action against a person in respect of the injury or disease.

Election

(2) The worker or survivor shall elect whether to claim the benefits or to commence the action and shall notify the Board of the option elected.

Same

(3) If the worker is or was employed by a Schedule 2 employer, the worker or survivor shall also notify the employer.

Same

(4) The election must be made within three months after the accident occurs or, if the accident results in death, within three months after the date of death.

Same

(5) The Board may permit the election to be made within a longer period if, in the opinion of the Board, it is just to do so.

Same

(6) If an election is not made or if notice of election is not given, the worker or survivor shall be deemed, in the absence of evidence to the contrary, to have elected not to receive benefits under the insurance plan.

Same, minor

(7) If the worker or survivor is less than 18 years of age, his or her parent or guardian or the Children's Lawyer may make the election on his or her behalf.

Same, incapable person

(8) If a worker is mentally incapable of making the election or is unconscious as a result of the injury,

(a) the worker's guardian or attorney may make the election on behalf of the worker;

(b) if there is no guardian or attorney, the worker's spouse may make the election on behalf of the worker; or

(c) if there is no guardian or attorney and if no election is made within 60 days after the date of the injury, the Public Guardian and Trustee shall make the election on behalf of the worker.

Same

(9) If a survivor is mentally incapable of making the election,

(a) the survivor's guardian or attorney may make the election on behalf of the survivor; or

(b) if there is no guardian or attorney and if no election is made within 60 days after the death of the worker, the Public Guardian and Trustee shall make the election on behalf of the survivor.

Subrogation, Schedule 1 employer

(10) If the worker or survivor elects to claim benefits under the insurance plan and if the worker is employed by a Schedule 1 employer or the deceased worker was so employed, the Board is subrogated to the rights of the worker or survivor in respect of the action. The Board is solely entitled to determine whether or not to commence, continue or abandon the action and whether to settle it and on what terms.

Same, Schedule 2 employer

(11) If the worker or survivor elects to claim benefits under the insurance plan and if the worker is employed by a Schedule 2 employer or the deceased worker was so employed, the employer is subrogated to the rights of the worker or survivor in respect of the action. The employer is solely entitled to determine whether or not to commence, continue or abandon the action and whether to settle it and on what terms.

Surplus

(12) If the Board or the employer pursues the action and receives an amount of money greater than the amount expended in pursuing the action and providing the benefits under the insurance plan to the worker or the survivor, the Board or the employer (as the case may be) shall pay the surplus to the worker or survivor.

Effect of surplus

(13) Future payments to the worker or survivor under the insurance plan shall be reduced to the extent of the surplus paid to him or her.

If worker elects to commence action

(14) The following rules apply if the worker or survivor elects to commence the action instead of claiming benefits under the insurance plan:

1. The worker or survivor is entitled to receive benefits under the insurance plan to the extent that, in a judgment in the action, the worker or survivor is awarded less than the amount described in paragraph 3.

2. If the worker or survivor settles the action and the Board approves the settlement before it is made, the worker or survivor is entitled to receive benefits under the insurance plan to the extent that the amount of the settlement is less than the amount described in paragraph 3.

3. For the purposes of paragraphs 1 and 2, the amount is the cost to the Board of the benefits that would have been provided under the plan to the worker or survivor, if the worker or survivor had elected to claim benefits under the plan instead of commencing the action.

Determining amount

(15) For the purpose of determining the amount of benefits a worker or survivor is entitled to under subsection (14), the amount of a judgment in an action or the amount of a settlement shall be calculated as including the amount of any benefits that have been or will be received by the worker or survivor from any other source if those benefits,

(a) have reduced the amount for which the defendant is liable to the worker or survivor in the action; or

(b) would have been payable by the defendant but for an immunity granted to the defendant under any law.

Decisions re rights of action and liability

31 (1) A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act* may apply to the Appeals Tribunal to determine,

(a) whether, because of this Act, the right to commence an action is taken away;

(b) whether the amount that a person may be liable to pay in an action is limited by this Act; or

(c) whether the plaintiff is entitled to claim benefits under the insurance plan.

Same

(2) The Appeals Tribunal has exclusive jurisdiction to determine a matter described in subsection (1).

Finality of decision

(3) A decision of the Appeals Tribunal under this section is final and is not open to question or review in a court.

Claim for benefits

(4) Despite subsections 22 (1) and (2), a worker or survivor may file a claim for benefits within six months after the tribunal's determination under subsection (1).

Extension of time

(5) The Board may permit a claim to be filed after the six-month period expires if, in the opinion of the Board, it is just to do so.

***Occupiers' Liability Act*, RSO 1990, c O.2, s. 2.**

Common law duty of care superseded

2 Subject to section 9, this Act applies in place of the rules of the common law that determine the care that the occupier of premises at common law is required to show for the purpose of determining the occupier's liability in law in respect of dangers to persons entering on the premises or the property brought on the premises by those persons.

***Class Proceedings Act, 1992*, SO 1992, c 6, s. 5.**

Certification

5 (1) The court shall, subject to subsection (6) and to section 5.1, certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

Same

(1.1) In the case of a motion under section 2, a class proceeding is the preferable procedure for the resolution of common issues under clause (1) (d) only if, at a minimum,

(a) it is superior to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant, including, as applicable, a quasi-judicial or administrative proceeding, the case management of individual claims in a civil proceeding, or any remedial scheme or program outside of a proceeding; and

(b) the questions of fact or law common to the class members predominate over any questions affecting only individual class members.

Idem, subclass protection

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

(a) would fairly and adequately represent the interests of the subclass;

(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and

(c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members.

Evidence as to size of class

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class.

Adjournments

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence.

Certification not a ruling on merits

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding.

Existence of other class proceeding

(6) If a class proceeding or proposed class proceeding, including a multi-jurisdictional class proceeding or proposed multi-jurisdictional class proceeding, has been commenced in a Canadian jurisdiction other than Ontario involving the same or similar subject matter and some or all of the same class members as in a proceeding under this Act, the court shall determine whether it would be preferable for some or all of the claims of some or all of the class members, or some or all of the common issues raised by those claims, to be resolved in the proceeding commenced in the other jurisdiction instead of in the proceeding under this Act.

Same, considerations

(7) In making a determination under subsection (6), the court shall,

(a) be guided by the following objectives:

(i) ensuring that the interests of all parties in each of the applicable jurisdictions are given due consideration,

(ii) ensuring that the ends of justice are served,

(iii) avoiding irreconcilable judgments where possible,

(iv) promoting judicial economy; and

(b) consider all relevant factors, including,

(i) the alleged basis of liability in each of the proceedings, and any differences in the laws of each applicable jurisdiction respecting such liability and any available relief,

(ii) the stage each proceeding has reached,

(iii) the plan required to be produced for the purposes of each proceeding, including the viability of the plan and the available capacity and resources for advancing the proceeding on behalf of the class,

(iv) the location of class members and representative plaintiffs in each proceeding, including the ability of a representative plaintiff to participate in a proceeding and to represent the interests of class members,

(v) the location of evidence and witnesses, and

(vi) the ease of enforceability in each applicable jurisdiction.

Motion for determination under subs. (6)

(8) The court, on the motion of a party or class member made before the hearing of the motion for certification, may make a determination under subsection (6) with respect to a proceeding under this Act, and, in doing so, may make any orders it considers appropriate respecting the proceeding, including,

(a) staying the proceeding; and

(b) imposing such terms on the parties as the court considers appropriate.

***Rules of Civil Procedure*, Rules 20.04, 21.01, 25.06(8), 25.11**

Disposition of Motion
General

20.04 (1) REVOKED: O. Reg. 438/08, s. 13 (1).

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

Powers

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

Oral Evidence (Mini-Trial)

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

Only Genuine Issue Is Amount

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

Only Genuine Issue is Question of Law

(4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to an associate judge, it shall be adjourned to be heard by a judge.

Only Claim Is For An Accounting

(5) Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts.

Where Available
To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b).

To Defendant

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

Jurisdiction

(a) the court has no jurisdiction over the subject matter of the action;

Capacity

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

Another Proceeding Pending

(c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

Action Frivolous, Vexatious or Abuse of Process

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly.

Rules of Pleading — Applicable to all Pleadings
Material Facts

Nature of Act or Condition of Mind

25.06 (8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.

Striking out a Pleading or Other Document

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court.

Court File No.: C70397

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

COURT OF APPEAL FOR ONTARIO

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