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Poorkid Investments v Ontario: Re-setting the Hurdle to Bad Faith Claims in Tort Against the Provincial Crown

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Following Huscroft JA's decision in *Poorkid Investments Inc v Ontario (Solicitor General)*, claimants will need leave of the Superior Court to advance proceedings in tort against the provincial Crown for the bad faith or misfeasance of its servants.[2] In *Poorkid*, the Court of Appeal unanimously determined that s. 17 of the *Crown Liability and Proceedings Act, 2019*—which creates a leave requirement for any claims in tort based on the bad faith or misfeasance of Crown servants—is constitutional.[3] As a result of this decision, claimants must prove their proceedings in tort against the Crown are brought in good faith and have a reasonable chance of succeeding.[4] Claimants must therefore carefully consider whether a potential claim in tort against the Crown involves bad faith or misfeasance. Otherwise, they may find their claim stopped in its tracks very early on in the litigation process.

Section 17 and the Leave Requirement

Since the CLPA came into force, proceedings against the Crown in tort based on bad faith or misfeasance require leave of the Superior Court.[5] This requirement is found in s. 17(2), which reads:

> **17**(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.

This applies to proceedings described in section 17(1), which states:

> **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.[6]

Section 17(2) therefore stays any claim in tort against the Crown based on bad faith conduct,

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[2] 2023 ONCA 172 [*Poorkid*].
[3] *Ibid*, para. 64; SO 2019 c 7 Sched 17 (CLPA).
[4] CLPA, *ibid* at s 3.
[5] *Ibid*, s 17(2).
[6] *Ibid*, s 17(1).

as well as any claim for the tort of misfeasance in public office "from the time that it is brought."[7]

A party seeking leave to bring a claim in tort based on bad faith or misfeasance must bring a motion.[8] They must persuade the Court that they have brought the proceeding in good faith, and that there is a "reasonable possibility" that the proceeding will be resolved in their favour.[9] If it fails to convince the court that either part of this test is met, the claim is nullified.[10]

Section 17 appears to be based upon concerns expressed by appellate courts about bald pleadings in cases alleging some form of abuse in office or bad faith against Crown servants. For example, in *St. John's Port Authority v Adventure Tours Inc.*, Stratas JA stated:

> The concern in *Merchant* was that it is all too easy for a plaintiff who is aggrieved by governmental conduct to assert, perhaps without any evidence at all, that "the government" acted, "knowing" it did not have the authority to do so, "intending" to harm the plaintiff. Such a bald and idle assertion is insufficient to trigger the defendant's obligation to file a defence, let alone its later obligation to disclose its documents and produce a witness for examination in discoveries.[11]

Section 17 obviates the need for the Crown to defend a claim in tort based on bad faith, and potentially bald assertions of bad faith, unless the claimant shows that the proposed action is based on sufficient material facts and brought for a proper reason.

The Background and Procedural History of *Poorkid*

Section 17 was one of the more noteworthy changes when the CLPA replaced the former *Proceedings Against the Crown Act*.[12] PACA did not have a similar provision, leading some to view this new requirement as onerous.[13] In 2021, a group of claimants argued that s. 17 was incompatible with section 96 of the *Constitution Act, 1867* and of no force and effect.[14]

The claimants brought a class action on behalf of property and business owners in Caledonia, Ontario, as well as those who agreed to buy homes in a subdivision development known as McKenzie Meadows.[15] The McKenzie Meadows dispute is well-documented, and led to road closures, railway blockades, and an occupation of the land by Indigenous protesters.[16] According

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[7] *Ibid*, s 17(2).
[8] *Ibid*.
[9] *Ibid*, s 17(7).
[10] *Ibid*, s 17(10)(a).
[11] 2011 FCA 198 at para 63 [*Adventure Tours*].
[12] RSO 1990, c P27 (PACA).
[13] While the claimants in *Poorkid*, and the motion judge (Broad J), certainly expressed these concerns, section 17 of the CLPA received media attention as well. See for example Lucas Powers, "Ontario PCs want to make it next to impossible to sue the government" (14 April 2019) online: CBC News <https://www.cbc.ca/news/canada/toronto/proceedings-against-the-crown-act-repeal-replace-pcs-1.5097205>, in which various lawyers and legal scholars expressed concerns over the effect of the leave requirement.
[14] *Poorkid Investments Inc. v HMTQ,* 2022 ONSC 883 at para 11 [*Poorkid ONSC*].
[15] *Ibid*, para 2.
[16] *Ibid*, para 3. The underlying dispute is sometimes referred to as the "McKenzie Meadows Dispute" or "1492 Land Back Lane". A discussion about the dispute is beyond the scope of this article.

to the claimants, the Ontario Provincial Police failed to carry out its duties under the *Comprehensive Ontario Police Services Act, 2019*, and wrongly acted in accordance with the OPP's "Framework for Police Preparedness for Aboriginal Critical Incidents".[17] They also accused the OPP of failing to prevent crime in and around the occupation zone and enforce injunctions against occupiers.[18]

However, rather than seek leave under s. 17, the claimants brought a constitutional challenge. They argued that s. 17 prevented them from accessing the evidence they needed to prove their claims, thereby preventing meaningful access to the courts. They argued that s. 17 therefore violated s. 96 of the *Constitution Act, 1867*.[19]

In first instance, Broad J. of the Superior Court agreed with the claimants, relying upon *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*.[20] Broad J stopped short of declaring any leave requirement as unconstitutional. He based his decision on the "one-sided" discovery rules enshrined in s. 17.[21]

The Crown successfully appealed.

The Court of Appeal's Decision

Huscroft JA began with an overview of the role and jurisdiction of s. 96 courts, and quickly determined that the question before him was "whether this procedural change is tantamount to a removal of the superior courts' core jurisdiction."[22] He held that Broad J misapprehended *Trial Lawyers*:

> *Trial Lawyers* is an exceptional decision that is expressly limited in its reach. The Supreme Court did not hold that the hearing fees infringed s. 96 of the *Constitution Act, 1867* simply because they prevented some individuals from accessing the superior courts. Nor could it have done so. Section 96 is a structural provision of the Constitution; it does not establish individual rights and in particular does not establish an individual right of access to the superior courts. It would be a mistake to conclude that because a structural provision of the Constitution exists for the benefit of persons – because it serves the common good by establishing the judicial system or the institutions of government – it establishes a justiciable individual right. The hearing fees impugned in *Trial Lawyers* were found to impermissibly infringe the core jurisdiction of the superior courts because they deprived the superior courts of their ability to hear and determine disputes otherwise within that jurisdiction. This was a matter of impairing the function of a superior court as an institution charged with

[17] *Poorkid*, *supra* note 2 at para 7.
[18] *Ibid*.
[19] *Ibid*.
[20] 2014 SCC 59 [*Trial Lawyers*]. *Trial Lawyers* dealt with daily hearing fees in British Columbia courts. McLachlin CJC held that the fees were so high that they prevented the business of the courts from being done, depriving them of their ability to serve as courts of inherent jurisdiction. This largely turned on the fact that litigants who were not eligible for an exemption but could not afford the fees effectively prevented them from resolving their disputes in the courts.
[21] *Poorkid*, *supra* note 2 at para 38.
[22] *Ibid*, para 29.

> delivering the common good, not a violation of an individual's constitutional rights. The difference is significant: the focus of the Supreme Court's analysis was necessarily on the courts as an institution rather than on individual rights.[23]

He went on to determine that the *Trial Lawyers* exception rises to the level of constitutional infringement only if it prevents superior courts from exercising their core jurisdiction:

> *Trial Lawyers* specifically rejected the argument that hearing fees are unconstitutional per se. Although McLachlin C.J. did not explain when hearing fees become sufficiently high as to infringe the core jurisdiction of the superior courts, it is plain from the language of the decision that quantum matters. Hearing fees are impermissible when they "prevent" disputes from coming to the courts; "deny" or "effectively [deny]" disputes coming before the superior courts; "[bar] access" to the superior courts; and so on …. In other words, financial impediments to access to the superior courts rise to the level of a constitutional infringement only if they have the effect of *preventing the superior courts from exercising their core jurisdiction.*[24]

Huscroft JA found that s. 17 did not meet the *Trial Lawyers* threshold because it does not bar, deny, or prevent access to the superior courts, nor did it stop the Superior Court from exercising its core jurisdiction.[25] Huscroft JA found two principal issues with Broad J's reasoning on this point: first, he found that there was no concrete evidence that the leave requirement actually made it more difficult for claimants to bring bad faith or misfeasance claim against the Crown.[26] Specifically, he found that Broad J based this conclusion on academic commentary, which Broad J took as "fact without proof."[27] Second he found that Broad J was incorrect to base his findings on whether s. 17 prevented "meaningful access" to the courts, finding instead that leave decisions are determined only after claimants have "failed to satisfy the courts as to the strength of their case".[28]

Finally, Huscroft JA rejected the "rule of law" as a reason to invalidate s. 17. He found that Broad J's decision impermissibly invoked the rule of law doctrine to enforce his meaningful access principle, using the doctrine to alter or supplement the text of the Constitution:

> The written aspects of the Constitution are carefully crafted, reflecting constitutional settlements that courts must respect. Unwritten constitutional principles may provide interpretive guidance for understanding the nature of particular constitutional settlements, but that guidance is ultimately limited by constitutional text and design. Courts cannot rely on unwritten constitutional principles to alter or supplement the text of the Constitution; constitutional text has "primordial" importance and can be changed only by constitutional amendment ….
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> Although the application judge acknowledged that the rule of law could not be

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[23] *Ibid*, para 31.
[24] *Ibid*, para 33 [references omitted, emphasis in original].
[25] *Ibid*, para 39.
[26] *Ibid*, paras 40-43.
[27] *Ibid*, para 42.
[28] *Ibid*, para 47.

> invoked to invalidate legislation, his decision that s. 17 of the *CLPA* is inconsistent with s. 96 rests largely on the "meaningful access" principle he identified as an element of the rule of law, which he relied on in interpreting s. 96. In effect, the application judge's interpretation so alters s. 96 doctrine that it directly enforces his "meaningful access" principle.[29]

As a consequence of the Court of Appeal's decision, s. 17 continues to have full force and effect.

Section 17 and *Residential Tenancies*

While I argue that the Court of Appeal decided *Poorkid* correctly, it did so in a roundabout way because s. 17's constitutionality could have been dealt with under the first criterion set out in *Re Residential Tenancies Act*.[30]

Courts use the *Residential Tenancies* criteria to determine whether s. 96 prevents the Legislature or Parliament from usurping a core jurisdiction of a superior court.[31] The criteria for determining whether s. 96 protects a superior court's jurisdiction are:

> (1) Whether the power, function, or jurisdiction purported to be conferred conforms to the power, function, or jurisdiction exercised by s. 96 courts at the time of confederation. If it does, the court asks:
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> (2) Whether, in its institutional context, the power, function, or jurisdiction is judicial in nature. If it is, the court asks:
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> (3) Whether, having regard to the tribunal's function as a whole, the power is a sole or central function of the tribunal, such that it is operating like a s. 96 court.[32]

The Supreme Court of Canada has made clear that "if a jurisdiction concerning a subject matter did not exist in 1867 then it is not a jurisdiction that our case law requires be exercised by a s. 96 superior court judge."[33] At the time of Confederation, the courts had no jurisdiction to hear an action in tort against the Crown.[34] In fact, the jurisdiction to hear tort claims against the Crown was only granted in 1963 through the *Proceedings Against the Crown Act*.[35] Before that, this jurisdiction did not exist. Since hearing tort claims against the Crown was not a power, function, or jurisdiction conferred to the Superior Court at time of Confederation, s. 17 cannot satisfy the first criteria in *Residential Tenancies*.

A discussion of the rule of law was also not necessary in *Poorkid*. The legislature may, and has many times in the past, created, modified, or extinguished causes of action.[36] Furthermore, in

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[29] *Ibid*, paras 61, 63.
[30] [1981] 1 SCR 714 [*Residential Tenancies*].
[31] *Poorkid*, *supra* note 2 at para 24.
[32] *Ibid* at para 25, citing *Residential Tenancies*.
[33] *Residential Tenancies, supra* note 30 at para 36.
[34] *Rudolph Wolff & Co. v. Canada*, [1990] 1 SCR 695 at 699-700.
[35] *Proceedings Against the Crown Act 1962-1963*, SO 1962-1963 c 109.
[36] For a recent example, see the *Supporting Ontario's Recovery Act, 2020*, SO 2020 c 26, Sched 1, s 2, which eliminated claims based on infection or exposure to COVID-19 provided that the act or omission occurred after a

relation to federal Crown liability, Parliament has validly assigned claims in tort to be heard by the Federal Court.[37] Given that the Crown, be it through Ontario or Canada, can change both the existence of and venue for claims against the Crown in tort, altering the procedure for bringing bad faith claims cannot offend s. 96. In fact, when the legislature changes the law, the courts must apply lest they "recognize a constitutional guarantee not of judicial independence, but of judicial governance."[38] Huscroft JA appears to have been aware of this issue—he correctly noted that the rule of law cannot be used to invalidate laws.[39]

Implications of *Poorkid*

Poorkid has several implications for those considering bringing a claim in tort based on bad faith or misfeasance against the Crown both in terms of the substance of their claim, and the procedure they will have to follow.

First, potential claimants should carefully consider how they are pleading their claims in tort against the Crown. If the conduct or attempted conduct that grounds their claim is based in some sort of bad faith conduct, they could unwittingly find their claim stayed by s. 17(2). Claimants should consider whether they are pleading a set of facts which in substance could be considered bad faith. Furthermore, potential claimants bringing claims with mixed bad faith and non-bad faith allegations might consider proceeding only on the non-bad faith allegations, provided they believe they have a reasonable chance of success on the latter and could reasonably be made whole if successful.

Second, potential claimants will need to ensure they have all the material facts and documents they need to persuade a court that they could succeed. They cannot rely on discovery to fill any gaps or supplement their claim. Practically, this means that claimants will succeed or fail on their bad faith or misfeasance claims based on what they know and arguably could prove at the time they start proceedings. Things to consider on this front include the sufficiency of the material facts plead and the availability of supporting evidence and supporting documents. Furthermore, claimants should endeavour to predict whether the Crown has, or could have, its own evidence to rebut the allegations of bad faith or misfeasance. They should consider making a Freedom of Information request before starting a bad faith or misfeasance claim in tort, which would allow potential claimants to have, and review, as many relevant documents as possible. These documents would help them make a more informed decision about whether sufficient material facts exist, and whether these material facts support their allegations.[40]

Third, potential claimants should be aware that costs are not recoverable on a motion for leave, even if they are successful. Section 17(8) states that each party bears its own costs on such a motion. Potential claimants therefore bring these motions at their own risk.

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person made a good faith effort to act in accordance with public health measures and did not constitute gross negligence.

[37] *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 at para 42.

[38] *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at para 53.

[39] *Poorkid*, *supra* note 2 at para 55 citing *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 63.

[40] These requests are made pursuant to the *Freedom of Information and Protection of Privacy Act*, RSO 1990 c F31.

Finally, potential claimants should also consider negotiating a waiver of the motion for leave with the Crown. Section 17(13) obviates the need for leave where the Crown waives the application of s. 17(2).[41] While it is not clear when the Crown would be willing to forego this safeguard, one could imagine that a clearly meritorious claim brought in good faith may motivate the Crown to skip the leave step—especially considering the Crown is also barred from recovering costs under s. 17(8). This underscores the need to carefully review and screen potential bad faith and misfeasance claims before bringing them.

Conclusion

Section 17 screens proceedings against the Crown in tort based on bad faith and misfeasance to ensure that time, money, and other resources are not spent on unmeritorious proceedings. It does not make it impossible to sue the Crown. In a province where civil courts remain backlogged, s. 17 provides an additional tool for courts to dispose of unmeritorious claims in a faster and more efficient way.[42] To borrow once again from Stratas JA: "it is all too easy for a plaintiff who is aggrieved by governmental conduct to assert, perhaps without any evidence at all, that 'the government' acted, 'knowing' it did not have the authority to do so, 'intending' to harm the plaintiff." Unmeritorious claims in tort based on bad faith contribute to backlogged civil courts, and it is fair for the legislature to address this facet of the problem. While s. 17 could fairly be described as an additional "hurdle" to tort claims based on bad faith or misfeasance, claimants still have their opportunity to show the court that their allegations are grounded in provable, material facts.

[41] *Ibid*, s 17(12).
[42] See Suzanne E. Chiodo, "Ontario Civil Justice Reform in the Wake of COVID-19: Inspired or Institutionalized (2021) 57:3 OHLJ 801 at 805, who notes severe increases in the time it takes to have a civil matter disposed of in the wake of *R v Jordan*, 2016 SCC 27, and the subsequent increase in resources dedicated to criminal matters.