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Judicial Review of Administrative Law Gets Real: *Ali v Peel (Regional Municipality)*

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The Ontario Court of Appeal's recent decision in *Ali v Peel (Regional Municipality)*[1] is of interest to administrative lawyers for two reasons, one of which is familiar, the other new. On the one hand, the application of deference in this case appears to be the all-too-familiar deference to the administrative body's final decision, rather than the administrative body's *decision-making*. But on the other hand, the Court of Appeal's recognition of the importance and legitimacy of real-world context and facts signals a positive, and potentially transformative, avenue for administrative law.

Background Facts and Statutory Scheme

The appellant, Mumtaz Ahmed Ali, applied to the Regional Municipality of Peel (the "Region") for special priority status on the waitlist for subsidized — rent-geared-to-income — housing in Peel. Before making her application, Ms. Ali had worked as a live-in caregiver after emigrating to Canada in 2015. Ms. Ali lived with her employer and his family, providing care to her employer's mother. But during the course of her employment, Ms. Ali was subjected to abusive, controlling behaviour by her employer and his wife. In short order, her employer forced her to leave the home, and Ms. Ali moved into a shelter for abused women.

While at the shelter, Ms. Ali applied to the Region for subsidized housing, and further requested special priority status on the waiting list on the basis that she had been abused by her former employer. In her application to the Region, Ms. Ali also noted that she was making a claim against her former employer for wrongful dismissal and unpaid wages.

The Region is designated as a service manager under O. Reg. 367/11, Sched. 2, made under the *Housing Services Act, 2011*. Section 47(1) of the Act directs the service manager to establish "a system for selecting households from those waiting for rent-geared-to-income assistance in the housing projects in the service manager's service area." Section 47(2) provides that the system must include, *inter alia*, "priority rules for households waiting for rent-geared-to-income assistance." Under s. 48(1), the service manager is to determine priority status, per s. 48(2), in accordance with prescribed provincial priority rules.

At the time of Ms. Ali's application, "abuse" was a requirement for special priority status, and the definition of abuse included, but was not limited to, "controlling behaviour." The key regulation on which Ms. Ali's application turned was the prescribed list of people who can be considered abusers, and that list included a "person on whom the individual is emotionally,

[1] 2023 ONCA 41.

physically or financially dependent."[2] This includes situations where the application was made within three months of the person no longer living with the abuser.

Ms. Ali appeared to meet all of these criteria. But the Region disagreed.

The Region's Administrative Decision

While the Region found that Ms. Ali met the criteria for rent-geared-to-income housing, the Region denied her request to be placed on the expedited special priority waiting list. By way of a letter to Ms. Ali, the Region stated that she did not merit special priority status because she was "not in a relationship with the alleged abuser" and because the "abuser was identified as [her] employer."[3]

Ms. Ali requested an internal administrative appeal of the decision. Her appeal was denied by a Housing Programs Manager with the Region because Ms. Ali was in a "business relationship," not a "family relationship" with her abuser.[4]

The Divisional Court's Decision

The Divisional Court found that the Region's decision was reasonable and dismissed Ms. Ali's application for judicial review. The Divisional Court explained that it was reasonable for the Region to interpret the regulations in such a way that special priority for victims of abuse does not extend to employment relationships given the history and purpose of special priority status. The Divisional Court — *not the Region*, a point I will return to below — further explained that the original focus of the program was to help abused women to escape domestic violence. The Divisional Court added that the Region's role is to allocate scarce resources among people with competing interests:

> Here, the issue is where the applicant will stand on a waitlist. This requires the decision-maker to balance the competing interests of others on the waitlist, who are not before the court, and raises public policy issues about rationing scarce resources. This decision accords with the purposes ***and public realities*** of the housing priority scheme, which enables applicants whose safety is at risk to separate permanently from their abuser as soon as possible.[5]

Finally, the Divisional Court explained that the financial dependence in the context of an employment relationship ends with the end of the employment relationship.

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[2] *Ibid* at para 32 [emphasis in original].
[3] *Ibid* at para 14.
[4] *Ibid* at para 15.
[5] *Ibid* at para 18 [emphasis added].

The Court of Appeal's Decision

(a) Deference Displaced

Importantly, the Court begins its analysis by rehearsing its role in an appeal from the Divisional Court on judicial review. The Court of Appeal is to conduct a *de novo* review of the administrative decision-maker's — the Region's — decision by stepping into the shoes of the Divisional Court to make sure the Divisional Court applied the appropriate standard of review — here, reasonableness — correctly.[6] As the Court further explained, citing *Vavilov,* the Court of Appeal's focus must be "on the decision actually made by the decision maker, including both the decision maker's reasoning and the outcome."[7]

After reviewing the statutory scheme, the Court of Appeal turns to the Region's decision, and its rationale. The former is clear; the latter, less so. The Court notes that "it is evident"[8] that the Region rejected Ms. Ali's request for special priority status not only because she was not in a family relationship with her abuser, but also because she was in an employment relationship with him. As the Court adds, "[t]his is evident from the original August 4, 2016 letter from the Region[.]"[9]

Contrast the Court of Appeal's use of "evident" above with its latter — and sole — reference to the Region's *rationale*: "As the Region explained in its appeal decision, '[s]pecial priority is only given under very limited circumstances.'"[10] That is helpful, but hardly definitive.

Most of the Court of Appeal's *de novo* review of the administrative decision is actually a review of the Divisional Court's efforts to rationalize, rather than review, the Region's final decision, the administrative outcome.

For example, Ms. Ali argued that the Region's conclusion that the abuse ended when her employment relationship ended ignored the provision — section 54(2) — allowing victims of abuse to apply for special priority status up to three months after they leave an abusive household. This is a reasonable claim calling for an administrative rationale, but as the Court of Appeal notes, "this provision was not specifically addressed by the Region or the Divisional Court."[11] The Court of Appeal immediately proceeds to fill this gap by providing its own reasonable interpretation of the purpose of the three-month window, contrary to its stated role on an appeal from a Divisional Court judicial review.

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[6] *Ibid* at para 23.
[7] *Ibid* at para 25, citing *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 at para 83.
[8] *Ibid* at para 37.
[9] *Ibid* at para 37.
[10] *Ibid* at para 40.
[11] *Ibid* at para 43.

To cite another example, Ms. Ali argued that the *Housing Services Act, 2011* is remedial, and the Region must accordingly interpret "financially dependent" broadly, not narrowly. The Court of Appeal, however, disagreed, citing the reasoning, not of the Region, but of the Divisional Court on behalf of the Region: "In this context, as held by the Divisional Court, the Region must allocate scarce resources amongst competing interests."[12]

A further example: Ms. Ali argued that the scarcity of subsidized housing should not affect how the Region interprets and applies the criteria for special priority housing. Once again, the Court of Appeal cites the Divisional Court's rationale: "In this case, as noted by the Divisional Court, the Region's decision 'accords with the purposes and ***public realities*** of the housing priority scheme, which enables applicants whose safety is at risk to separate permanently from their abuser as soon as possible.'"[13]

I will return to the Court of Appeal's crucial point about "practical realities" in a moment. Before doing so, however, it is important to note that Ms. Ali argued — unsurprisingly, given the foregoing account — before the Court of Appeal that the Divisional Court "improperly amplified the Region's decision by providing a rationale that the Region itself did not provide."[14] The Court of Appeal rejects Ms. Ali's argument, but the Court's review summarized above offers strong evidence in support of her argument.

Indeed, the Court of Appeal appears to be aware of this tension, if unable or unwilling to avoid it. The Court once again cites *Vavilov*, this time for the proposition that "the reasons of an administrative decision maker do not have to be perfect and they must also be understood in the context in which they were made."[15]

This is a useful corrective to the notorious problem of "disguised correctness review" of courts, but its application here sets the bar far too low for administrative decision-makers.

The Court of Appeal explains that the Region draws on its expertise and on the legislative context in which it operates when administering the waitlist for subsidized housing. But according to the Court of Appeal, the Region "does not have to spell out the scope of that context in every decision."[16]

Why not? Would that not materially enhance the Region's decision-making? After all, the Divisional Court managed to do so on the Region's behalf in just a few concise paragraphs. Bear in mind that most administrative matters will not, and *should not*, be reviewed by courts. Indeed, the very point of *Vavilov* is "to develop and strengthen a culture of justification in

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[12] *Ibid* at para 44.
[13] *Ibid* at para 45 [emphasis added].
[14] *Ibid* at para 47.
[15] *Ibid* at para 49, citing *Vavilov, supra* note 7 at para 91.
[16] *Ibid* at para 50.

administrative decision making."[17] The opposite of "perfect" reasons ought not be no reasons at all. Here, deference is displaced; real respect is holding an administrative body to account and demanding that it do its job properly, not stepping in and doing a key part of its job for it.

The urgent public policy objective of strengthening administrative decision-making is undermined, however, when courts supply their own reasonable justifications for final administrative decisions they happen to agree with. That is exactly what the Divisional Court did in this case. As the Court of Appeal itself explains,

> the Divisional Court gave legislative and factual context to the Region's reasons for denying Ms. Ali's request. For example, the Divisional Court referred to the number of people on the waitlist, ***a fact that would have been known to the Region***. Also, the Divisional Court explained that the Region had to make a decision in the context of competition for scarce resources, which, again, was ***part of the factual and legislative context that would have been self-evident to the Region***.[18]

The better remedy in this case would have been for the Court of Appeal to remand the matter back to the Region for reconsideration, with the aid of the Court's legislative guidance.[19]

This recommendation finds further support in the Supreme Court's rationale for establishing reasonableness — including judicial deference — as the default standard of review in administrative law. The Supreme Court's rationale for doing so does not stem from administrative expertise. Rather, it stems from the legislative choice — and the practical necessity — to allow administrative decision-makers to have the final word on administrative matters. Reviewing courts undermine both legislative intent and administrative efficiency when they substitute their own reasoning, however reasonable and compelling, as in the case at bar.[20]

(b) Practical Realities

Notwithstanding these reservations about the Court of Appeal's displaced and misapplied judicial deference to administrative bodies, its recognition of the adjudicative importance and

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[17] *Vavilov, supra* note 7 at para 2.
[18] *Ali v Peel*, *supra* note 1 at para 51 [emphasis added].
[19] See *e.g.* the decision of the Federal Court of Appeal in *Safe Food Matters v Canada (Attorney General)*, 2022 FCA 19. For a commentary on that decision appearing in these pages, see Jason MacLean, "Judicial Review and Administrative Law Reform: *Safe Food Matters Inc v. Canada (Attorney General),*" *Toronto Law Journal* (April 2022).
[20] In Stockwoods' commentary on the Court of Appeal's decision in its *Administrative & Regulatory Law Case Review*, they rightly note that "[d]epending on how it is applied moving forward, the Court of Appeal's decision could be viewed as a slight reopening of the door that *Vavilov* attempted to close in terms of allowing reviewing courts to uphold decisions based on facts or reasoning not contained in the [administrative body's] reasons." See Stockwoods, *Administrative & Regulatory Law Case Review,* Issue No. 35, March 2023 at 7. In full fairness to the Court of Appeal, Stockwoods also points out (at 6) that the Court of Appeal found that the applicant's interpretation of the regulatory scheme was also reasonable, and that it would have been open to the Region to accept it, making the Court's decision a clear — and, I would add, extremely rare — application of the administrative law principle that an administrative body may choose between two or more reasonable interpretations of a statute or a regulation.

legitimacy of facts known and self-evident to administrative decision-makers is potentially transformative. Judicial review of administrative law is, by design, a highly constrained species of adjudication. Subject to limited exceptions, the evidentiary record is limited to facts that were before the administrative decision-maker when it made its decision, and under this regime, administrative bodies often have a strong incentive to interpret that standard as narrowly as possible.[21] As a result, the real-world facts and context — the public and practical realities — of administrative decision-making are often entirely excluded from the evidentiary record on judicial review.[22]

Following the Court of Appeal's decision in this case, applicants for judicial review and administrative bodies can now reasonably seek to adduce a broader array of facts to support their arguments, be they for or against an impugned decision.

A brief example will illustrate the potential of the Court of Appeal's decision to expand and enhance the judicial review of administrative decision-making. Consider the pending application for judicial review made by the environmental organization Safe Food Matters, which requested the Pest Management Regulatory Authority (PMRA) to appoint an independent review panel under its controlling statute to review PMRA's authorization of the controversial pesticide glyphosate. In its application for judicial review, Safe Food Matters seeks to broaden the traditionally narrow factual context of judicial review by making the following illustrative claims:

> 103. The Minister must be attentive to and consider the presence of factors that are suggestive to an informed member of the public that the Minister's ability to fulfil the statutory function would be enhanced by receiving recommendations from an independent panel. These might include:
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> - A regulated entity that maintains significant control or influence over the evidence or information used by PMRA to render the decision to be reviewed;
> - A relative lack of diversity of information sources;
> - A regulated entity or sector that that has a long-term relationship with PMRA leading up to the decision to be reviewed;
> - The presence of staff secondments or transition of staff between PMRA and the regulated entity or its agents;
> - Any influence of the regulated entity on PMRA funding or finances;
> - Relative scientific expertise as between PMRA and the regulated entity or sector;
> - Imbalance of resources as between PMRA and the regulated entity or sector;
> - Past or present substantive irregularities in decisions involving

[21] The case at bar is an exception to the general rule.
[22] MacLean, *supra* note 19, in which I distinguish between "real-world" facts and "judicial review facts."

> the regulated entity (such as administrative delay or lack of transparency or public consultation in decision-making);
> - Administrative or institutional capacity limitations or concerns currently identified or under consideration.
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> 104. In determining whether scientific advice independent of PMRA would assist in fulfilling his or her statutory mandate, the Minister must have regard to considerations involving bureaucratic infirmity, lethargy, incapacity or inadequacy of any type on the part of the PMRA, including consideration of regulatory capture. In this context, this assessment would involve looking at the relationship between Monsanto (including its agents) and PMRA, and whether a reasonable person would have a basis to believe, in the whole of the context, that the advice of independent expert scientists of the type set out in s.4 of the *Regulations* would "assist" the Minister.[23]

Independent of the outcome of this judicial review, the consideration of the foregoing contextual factors, whatever their specific factual contents may be, would go a long way toward taking proper account of the public and practical realities of administrative decision-making. Depending on future courts' willingness to follow the largely positive precedent set by the Court of Appeal, *Ali v Peel* may help transform administrative law.

[23] *Safe Food Matters Inc. v Attorney General of Canada and Minister of Health,* Amended Notice of Application, Court File No. T-2292-22 (Federal Court) at paras 103-104. Disclosure: I have been retained as an expert witness by Safe Food Matters' legal counsel in this matter.

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

David Westcott, Lawyer[1]

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.

Toronto Law Journal

The Pension Protection Act Receives Royal Assent

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Introduction

The *Pension Protection Act*, SC 2023, c 6 (the "Pension Protection Act"), was first introduced in the House of Commons by Marilyn Gladu, Member of Parliament for Sarnia-Lambton, on February 3, 2022. Despite being a private member's bill, the Pension Protection Act received broad support from sitting members of all political parties and, having passed a vote on the third reading in the Senate on April 18, 2023, ultimately received royal assent on April 27, 2023. The enactment of the Pension Protection Act amends the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "BIA"), and the *Companies' Creditors Arrangement Act*, RSC 1985 c C-36 (the "CCAA"), to ensure that claims in respect of solvency deficiencies and other unfunded liabilities of pension plans are paid in priority in the event of insolvency proceedings.

Background

The notion of granting "super priority" status for unfunded pension liabilities in the event of an employer's insolvency is not new. In response to well-publicized, large-scale insolvencies, including Nortel, Indalex, Eaton's, Grant Forest and Sears Canada, a number of private member's bills have been introduced since the early 2000s, with each aimed at improving the standing of pension plan members who historically have been unable to receive their full pension entitlement upon their employer's insolvency due to the priority afforded to claims of other creditors pursuant to the BIA or CCAA. As was noted in debates before the Senate, prior attempts to introduce similar legislation had been made with Bill C-501 in 2010, Bill C-405 in 2018, Bill C-253 and Bill C-259 in 2020, and most recently Bill C-225 in 2022.[1] However, prior to the Pension Protection Act, all attempts to introduce such legislation were ultimately unsuccessful. In designing this legislation, Ms. Gladu acknowledged that she drew inspiration from these previous bills, incorporating those portions that had received support from Members of Parliament and avoiding those elements that were deemed contentious.[2]

Effect of the Pension Protection Act

The BIA and CCAA provide super priority status to certain liabilities in insolvency proceedings, attaching superior interests over those of other secured and unsecured creditors.[3] Prior to the enactment of the Pension Protection Act, pension plan liabilities in Canada were granted super

[1] Bill C-228, "An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Pension Benefit Standards Act, 1985," 2nd reading, *Debates of the Senate*, 44-1, No 92 (14 December 2022) at 1610 (Hon. David Wells) online: <https://www.parl.ca/LegisInfo/en/bill/44-1/c-228>.
[2] Bill C-228, "An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Pension Benefit Standards Act, 1985," 2nd reading, *House of Commons Debates*, 44-1, No 51 (1 April 2022) at 1340 (Marilyn Gladu) online: <https://www.parl.ca/LegisInfo/en/bill/44-1/c-228>.
[3] See CCAA, ss 6(3) and 6(5); BIA, ss 60(1.1), 81.1 through 81.4.

priority status under the BIA and the CCAA over most other claims, but only in respect of (i) amounts deducted from an employee's remuneration for contribution into a pension fund, and (ii) unpaid "normal costs" (within the meaning of the *Pension Benefits Standards Regulations, 1985*, SOR/87-19) or other unpaid defined contribution amounts payable by an employer into a pension fund.[4]

The Pension Protection Act amends the BIA and the CCAA to extend the super priority status for pension plan liabilities to also include (i) "special payments" (as determined in accordance with the *Pension Benefits Standards Regulations, 1985*, SOR/87-19), required to be paid by an employer to the pension fund to liquidate an unfunded liability or a solvency deficiency, and (ii) any amount required to liquidate any other unfunded liability or solvency deficiency of the pension fund.[5]

This means that no CCAA plan of arrangement or BIA proposal can be approved unless such amounts are to be paid, and the Court is satisfied that the employer can and will make such payments.[6] Furthermore, security for such amounts will be granted over all assets of the debtor in the event of bankruptcy or receivership.[7] In the event of bankruptcy, claims in respect of pension amounts will nevertheless be subordinate to claims in respect of an employer's unremitted payroll source deductions and certain unpaid wages, as well as certain goods and products delivered to the employer.[8]

Scope of Changes

There has been some debate as to whether the scope of the Pension Protection Act is intended to apply in only federally-regulated pension plans, or whether the legislative intent is for the protections to also apply to provincially-regulated pension plans. In this respect, it is worth noting that amendments to the BIA and the CCAA apply to "prescribed pension plans". For purposes of both the BIA and CCAA, a pension plan is "prescribed" if it is regulated by an Act of Parliament *or* the legislature of a province.[9] Because the term prescribed encompasses both federally and provincially-regulated plans, this appears to indicate that Parliament's intent is for the amendments introduced by the Pension Protection Act to apply to any employer subject to the BIA or CCAA, irrespective of whether the pension plan that employer contributes to is subject to federal or provincial jurisdiction.

[4] See CCAA, s6(6)(a); BIA, ss 60(1.5), 81.5 and 81.6.
[5] Pension Protection Act, ss 2 through 5.
[6] CCAA, s 6(6)(a); BIA, s 60(1.5).
[7] BIA, ss 81.5 and 81.6.
[8] BIA, s 81.5(2).
[9] *Bankruptcy and Insolvency General Rules*, CRC, c 368, s 59.1; *Companies' Creditors Arrangement Regulations*, SOR/2009-219, s 3.

Transition

Although the Pension Protection Act has received royal assent, there is a transition period for pension plans existing as of the day before royal assent (April 26, 2023). This transition period will delay the enforceability of the amendments to the federal insolvency statutes for a period of four years, meaning that the super-priority afforded to pension plan funding deficiencies will not take effect until April 27, 2027. As noted in the House of Commons, the purpose of this transition period is to allow companies to get their "funds in order before implementing the priority".[10] However, pension plans introduced after April 26, 2023, will be subject to the new rules immediately. While not yet released, it is anticipated that further clarity regarding the application of the amendments introduced by the Pension Protection Act will be provided by way of regulations to the BIA and CCAA.

Implications

As echoed in debates before the House of Commons and Senate alike, the objective of the Pension Protection Act is to prioritize the payment of unpaid pension amounts and "protect Canadian workers."[11] However, the new super priority created by the Pension Protection Act in favour of unfunded pension amounts could have a significant impact on secured creditors, as well as employers who sponsor defined benefit pension plans, and may trigger negative and unintended consequences. For this reason, the introduction of the legislation was met with opposition by organizations representing lenders and employers with defined benefit pension obligations.[12]

Lenders and other secured creditors will ultimately be forced to stand further down in line to those pension priorities. As a result, lenders will face an increased risk of not obtaining full recovery against insolvent debtors who sponsor defined benefit pension plans.[13] It will also be challenging to monitor and quantify the associated risk associated with unfunded pension liabilities, which due to their fluctuating nature will likely be difficult to ascertain at any given time.[14]

From the perspective of employers who sponsor defined benefit pension plans, it may become more difficult to access capital through credit given the increased risk facing lenders. The adverse impacts facing such employers could include: (i) higher interest rates on loans, or lenders applying larger reserves, resulting in increased debt servicing costs, (ii) unfavourable terms being introduced in loan agreements, which impose burdensome covenants or events of

[10] *Supra* note 2 at 1340.
[11] *Supra* note 2 at 1335.
[12] Bill C-228, "An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Pension Benefit Standards Act, 1985," 3rd reading, *Debates of the Senate*, 44-1, No 112 (18 April 2023) at 2120 (Hon. David Wells) online: <https://www.parl.ca/LegisInfo/en/bill/44-1/c-228>.
[13] Bill C-228, "An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Pension Benefit Standards Act, 1985," 3rd reading, *Debates of the Senate*, 44-1, No 109 (28 March 2023) at 1710 (Hon. Diane Bellemare) online: <https://www.parl.ca/LegisInfo/en/bill/44-1/c-228>.
[14] *Supra* note 12 at 2150 (Hon. Tony Lafreda).

default tied to pension funding deficits, or (iii) an inability to borrow altogether if the employer is a non-investment grade company.[15] As a result, if employers wish to mitigate some of these unintended adverse consequences, they may turn to "converting" their defined benefit pension plans to defined contribution plans, or winding up their defined benefit pension plans altogether.

It remains to be seen whether the Pension Protection Act serves its stated objective of protecting workers and preserving pension benefits in the event of insolvency, and, if so, at what cost. While the intent behind enhanced pension protection is certainly laudable, it may be that the consequences of introducing such protections are so adverse to employers that the amendments to the BIA and CCAA serve the unintended result of spurning an accelerated move away from defined benefit pension plans in the private sector and eroding the very thing that the legislation was introduced to protect.

[15] Letter from the Association of Canadian Pension Management to the Honourable Peter Fonseca, Member of Parliament, Chair, House of Commons Standing Committee on Finance (17 October 2022) at pg. 2 online: <https://www.acpm.com/getmedia/92d90dde-b38b-4972-9234-a4a982037469/ACPM-C-228-Submission-Oct17-2022-Final.pdf>.

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Underused Housing Tax in Real Estate

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On June 9, 2022, the *Underused Housing Tax Act* (Canada) (the "UHTA") received royal assent and was deemed to come into force on January 1, 2022, and applies to most Canadian residential real estate.[1] The UHTA levies a 1% tax annually on the fair market or taxable value of properties that are categorized as underused or vacant homes.[2] While many taxes applicable to real estate are levied in respect of the property by the municipal taxing authority, the structure of the UHTA levies the applicable tax on the owners, targeting primarily those persons who are not Canadian citizens or permanent residents.[3] However, Canadian owners may also be subject to the tax in certain situations.

Affected Owners

All affected owners must file an Underused Housing Tax (UHT) return for each residential property they own in Canada.[4] Upon filing of the return, affected owners may indicate whether an exemption applies. The presence of an exemption to pay the tax, however, does not relieve them of the requirement to file. Affected owners includes, but is not limited to:

- individuals who are not Canadian citizens or permanent residents;
- Canadian citizens or permanent residents who own a residential property as a trustee of a trust (other than as a personal representative of a deceased individual);
- any person (including Canadian citizens and permanent residents) that owns a residential property as a partner of a partnership;
- a corporation that is incorporated outside Canada;
- a Canadian corporation whose shares are not listed on a Canadian stock exchange; and
- a Canadian corporation without share capital.[5]

Excluded Owners

Excluded owners that are exempt from filing a return and from payment of the applicable tax include, but are not limited to:

- Canadian citizens or permanent residents (unless included in the list of affected owners);

[1] A full overview of the UHTA can be found here: https://www.canada.ca/en/services/taxes/excise-taxes-duties-and-levies/underused-housing-tax.html
[2] *Underused Housing Tax Act*, SC 2022, c 5, s 6(3).
[3] *Underused Housing Tax Act*, SC 2022, c 5, s 6(3).
[4] *Underused Housing Tax Act*, SC 2022, c 5, s 7(1).
[5] *Underused Housing Tax Act*, SC 2022, c 5, s 2.

- any person that owns a residential property as a trustee of a mutual fund trust, real estate investment trust, or specified investment flow-through trust (SIFT);
- a Canadian corporation whose shares are listed on a Canadian stock exchange;
- a registered charity;
- a cooperative housing corporation; and
- an Indigenous governing body or a corporation wholly owned by an Indigenous governing body. [6]

Compliance

The deadline for filing the return and paying the tax for the 2022 taxable year was April 30, 2023.[7] However, no penalties or interest will be applied for returns and payments the Canada Revenue Agency (CRA) receives prior to November 1, 2023, to provide transitional relief.[8] A separate return must be filed by each owner for each applicable property. Failing to file a return on time subjects individuals to a minimum penalty of $5,000.00 and for corporations a minimum penalty of $10,000.00.[9]

Exemptions

Affected owners may be exempted from paying the tax for a calendar year (but they must still file the return) if they qualify for an exemption.[10] Factors that need to be considered in determining the applicability of an exemption include: the ownership type, the availability of the residential property, the location of the property, the use of the property, and the occupant of the residential property.[11]

Type of owner

Their ownership may be exempt if they are:

- a specified Canadian corporation;
- a partner of a specified Canadian partnership, or a trustee of a specified Canadian trust;
- a new owner in the calendar year; or
- a deceased owner, or a co-owner or personal representative of a deceased owner.[12]

Availability of the residential property

Their ownership may be exempt if the property is:

- newly constructed;

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[6] *Underused Housing Tax Act*, SC 2022, c 5, s 2.
[7] Returns can be filed here: Ready to file (cra-arc.gc.ca).
[8] Government of Canada, "Underused Housing Tax" (1 June 2023), online: *Government of Canada* <Underused Housing Tax - Canada.ca>.
[9] *Underused Housing Tax Act*, SC 2022, c 5, s 47(1).
[10] *Underused Housing Tax Act*, SC 2022, c 5, s 6(7).
[11] *Underused Housing Tax Act*, SC 2022, c 5, s 6(7).
[12] *Underused Housing Tax Act*, SC 2022, c 5, s 6(7).

- not suitable to be lived in year-round, or seasonally inaccessible; or
- uninhabitable for a certain number of days because of a disaster or hazardous conditions, or renovations.[13]

Location and use of the residential property

Their ownership may be exempt if the property is a vacation property located in an eligible area of Canada and used by the individual or their spouse or common-law partner for at least 28 days in the calendar year.[14]

Occupant of the residential property

Their ownership may be exempt in either of the following situations:

- It is the primary residence for them or their spouse, common-law partner, or child who is attending a designated learning institution.[15]
- The ownership of the property encompasses at least 180 days throughout the calendar year as part of one or more qualifying occupancy periods.[16, 17]

Special rule for individual owners of multiple residential properties

If an individual and their spouse or common-law partner collectively own multiple residential properties, their ownership may not qualify for either the primary place of residence or qualifying occupancy exemption unless they file an election with the CRA to designate only one property for the exemption.[18]

Calculate Tax Owed

Multiply the value of the residential property by the 1% tax rate and then multiply that by the individual's ownership percentage of the property.[19] The value of the property is generally its taxable value. The person must file an election with the CRA if they want to use its fair market value instead and get a property appraisal by an accredited real estate appraiser.[20]

For the 2022 calendar year, a fair-market-value election for a residential property or an election to designate a residential property that is part of a late-filed UHT return is allowed if the return is filed by October 31, 2023.[21] For a fair market value election, the fair market value must be established between January 1, 2022, and April 30, 2023.[22]

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[13] *Underused Housing Tax Act*, SC 2022, c 5, s 6(7).
[14] See: https://apps.cra-arc.gc.ca/ebci/sres/ext/pub/ntrUhtExpnTl?request_locale=en_CA to determine if your residential property is located in an eligible area of Canada for the exemption.
[15] *Underused Housing Tax Act*, SC 2022, c 5, s 6(8).
[16] *Underused Housing Tax Act*, SC 2022, c 5, s 6(9).
[17] A qualifying occupancy period is at least one month in a calendar year during which a qualifying occupant has continuous occupancy of the residential property: *Underused Housing Tax Act*, SC 2022, c 5, s 6(9).
[18] *Underused Housing Tax Act*, SC 2022, c 5, s 6(10).
[19] *Underused Housing Tax Act*, SC 2022, c 5, s 6(3).
[20] *Underused Housing Tax Act*, SC 2022, c 5, s 6(4).
[21] Government of Canada, "Underused Housing Tax" (1 June 2023), online: *Government of Canada* <Underused Housing Tax - Canada.ca>.
[22] Government of Canada, "Underused Housing Tax" (1 June 2023), online: *Government of Canada* <Underused Housing Tax - Canada.ca>.