

Take it or leave it: Leave requirement for misfeasance claims against Ontario is constitutional

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In 2019, Ontario overhauled the legislation governing the Crown’s (i.e., the government’s) liability to civil claims. The new legislation introduced a merits-based “screening” mechanism for misfeasance and other tort claims against the government—now, claimants must obtain leave of the court before they can pursue these claims.

In *Poorkid Investments Inc. v. Ontario (Solicitor General)*¹, the Court of Appeal concluded that this new leave requirement is constitutional. The Court explained that “there is no constitutional right to have one’s civil trial governed by customary rules of civil procedure and evidence.”

What you need to know

- **Governments can adopt screening mechanisms and other procedural rules that deter claims against the Crown.** Legislatures can amend substantive laws or customary rules of civil procedure—even in drastic ways—so long as the new laws do not prevent the superior courts from exercising their core jurisdiction under the *Constitution Act, 1867*. Because the screening mechanism at issue does not interfere with this core jurisdiction, the Court held that it is constitutional.
- **“Meaningful access to the court” is not an element of the rule of law.** The Court rejected an attempt to invalidate the legislation based on the concept of “meaningful access to the court.” While meaningful access to the court may be a desirable aspect of a legal system, it is not part of the unwritten constitutional principle of the rule of law—and in any event, unwritten principles cannot be used to impugn legislation.
- **Misfeasance claims against the Crown remain difficult to pursue.** Because the leave requirement was upheld, claimants will continue to face procedural obstacles when suing the Crown. Before bringing a misfeasance claim against the Crown, a claimant must establish (without evidence from the Crown) that their claim has a reasonable possibility of success.

Background: *Crown Liability and Proceedings Act, 2019*

In 2019, Ontario’s *Crown Liability and Proceedings Act, 2019* (CLPA) came into force, marking a major shift in how certain claims could be brought against the Ontario government. While the CLPA preserved the ability to sue the Crown for certain torts, it also made certain actions against the Crown more procedurally complex and onerous.

In particular, section 17 of the CLPA established a new screening mechanism for certain claims. Before claims of misfeasance in public office or tort claims based on bad faith can be advanced against the Crown, claimants must obtain leave of the court. The court can only grant leave if it is satisfied that the proceeding is being brought in good faith and that there is a reasonable possibility that the claims will be resolved in the claimant's favour. To support their motion for leave, the claimant must serve an affidavit setting out the material facts of their claim, and they must disclose all relevant documents. The defendant Crown has no reciprocal obligation and is not subject to discovery on this motion.

The *Poorkid* litigation: is the leave requirement in the CLPA constitutional?

In *Poorkid*, the plaintiffs commenced a proposed class action against the Ontario government relating to the Ontario Provincial Police's response to protests by Indigenous activists in Caledonia, Ontario. Rather than seek leave to bring their misfeasance claims, the plaintiffs challenged the constitutionality of the CLPA's section 17 screening mechanism.

At first instance, the plaintiffs succeeded. The application judge held that the screening mechanism violated section 96 of the *Constitution Act, 1867*, which protects the core jurisdiction of Canada's provincial superior courts. Relying on the unwritten principle of the rule of law, the application judge concluded that litigants must have "meaningful access" to the courts. In his view, section 17 created a barrier to meaningful access by insulating the Crown from discovery, which makes it difficult for litigants to gather sufficient evidence to obtain leave.

Court of Appeal upholds leave requirement for misfeasance claims

The Court of Appeal for Ontario overturned the application judge's decision and concluded that section 17 of the CLPA is constitutional.

The Court of Appeal explained that section 96 of the *Constitution Act, 1867* does not bestow individual rights on litigants, including a right of access to the superior courts. Rather, it protects the institutional role of the superior courts. Legislation will only be inconsistent with section 96 where it prevents the superior courts from "exercising their core jurisdiction." The Court emphasized that the concept of "core jurisdiction" is narrow, encompassing only those functions that are necessary to the "essential business" of the superior courts. For example, legislation preventing the superior courts from hearing and determining disputes that are within their jurisdiction would likely be unconstitutional.

The Court concluded that section 17 of the CLPA, which is a procedural provision that regulates the way in which certain disputes are brought before the superior courts, does not prevent those courts from hearing and determining those disputes. The Court of Appeal acknowledged that section 17 could make it more difficult to advance certain claims against the Crown. But the Court emphasized that there is no constitutional right to have all litigation treated the same way, nor is there a right to have a claim adjudicated according to customary rules of civil procedure.

Finally, the Court of Appeal concluded that the unwritten constitutional principle of the rule of law could not be used to invalidate section 17. "Meaningful access" to the superior courts may be desirable, but it is not an element of the rule of law. The Court held that "[t]he rule of law is not a repository of all things considered desirable in a legal system", and, moreover, that unwritten constitutional principles cannot be used to invalidate legislation. Section 17 of the CLPA was validly enacted by the Ontario Legislature, and the rule of law therefore required that it be given effect.

Implications: misfeasance claims against the Crown remain challenging

Unless there is a further appeal to the Supreme Court of Canada, the leave requirement for claims against the Ontario government is here to stay. This screening mechanism may result in fewer misfeasance or bad faith claims proceeding against the Crown or its officers and employees. When deciding whether to bring these claims, litigants should consider whether they have sufficient evidence to show that they have a reasonable possibility of success

(knowing that they will not be able to obtain evidence from the Crown).

At a broader level, the Court's decision confirms the Legislature's power to tailor substantive causes of action and impose procedural hurdles in proceedings against the Crown. As cases under the CLPA continue to make their way through the courts, we expect further developments in the law of Crown liability.

FOOTNOTES

[1. 2023 ONCA 172.](#)

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