COURT OF APPEAL FOR ONTARIO

CITATION: Poorkid Investments Inc. v. Ontario (Solicitor General), 2023 ONCA 172
DATE: 20230315
DOCKET: C70397

Huscroft, Harvison Young and Sossin JJ.A.

BETWEEN

Poorkid Investments Inc., The Coach Pyramids Inc., and Brian Haggith

Applicants (Respondents)

and

Solicitor General of Ontario Sylvia Jones, Ontario Provincial Police Commissioner Thomas Carrique, Ontario Provincial Police Chief Superintendent John Cain, Ontario Provincial Police Inspector Philip Carter and Her Majesty the Queen in the Right of Ontario

Respondents (Appellants)

S. Zachary Green and Ryan Cookson, for the appellants

W. Peter Murray, for the respondents

Heard: August 18, 2022

On appeal from the order of Justice David A. Broad of the Superior Court of Justice, dated February 10, 2022, with reasons reported at 2022 ONSC 883.

Huscroft J.A.:

OVERVIEW

[1] The respondents, Poorkid Investments Inc., The Coach Pyramids Inc., and Brian Haggith, are the named representative plaintiffs in a class action brought against the appellants, which include the Crown, the Solicitor General of Ontario,

the Ontario Provincial Police ("OPP") Commissioner, the OPP Chief Superintendent, and an Inspector of the OPP (collectively the "Crown"). They seek damages arising out of the OPP's response to protests by Indigenous activists in Caledonia, Ontario and plead four grounds of liability: misfeasance in public office, nonfeasance, negligence, and nuisance. In essence, the respondents allege that the appellants failed to carry out their legal duties.

[2] Proceedings brought against the Crown or an officer or employee of the Crown that include a claim for misfeasance in public office or bad faith in the exercise of public duties or functions are deemed to be stayed by operation of s. 17 of the *Crown Liability and Proceedings Act, 2019*, S.O. 2019 c. 7, Sch. 17 ("*CLPA*"), and can proceed only with leave of the court. To obtain leave a plaintiff must establish that the proceeding is brought in good faith and that there is a reasonable possibility the claim will succeed.

[3] The respondents did not seek leave under the *CLPA* to bring their proceedings. Instead, they brought an application for a declaration that s. 17 of the *CLPA* violates s. 96 of the *Constitution Act, 1867* and is of no force and effect. The application judge found that the financial cost of bringing a motion for leave under s. 17 – almost exclusively legal fees – did not violate s. 96 of the *Constitution Act, 1867*. However, he found that the procedure established by s. 17 violated s. 96 because it bars claimants from presenting the evidence necessary to satisfy the

court that there is a reasonable possibility that a claim will succeed, and so prevents them from having “meaningful access” to the superior courts. The Crown appeals.

[4] I conclude that s. 17 of the *CLPA* is a valid exercise of provincial lawmaking authority under s. 92(14) of the *Constitution Act, 1867* and does not violate s. 96. Although s. 17 of the *CLPA* makes it more difficult to bring proceedings against the Crown, the leave requirement and associated rules established by s. 17 do not touch on the core jurisdiction of superior courts, still less infringe it.

[5] I would allow the appeal for the reasons that follow.

BACKGROUND

[6] The respondents seek damages from the Crown on behalf of property owners and businesses in Caledonia, Haldimand County, and the vicinity, as well as those who entered agreements of purchase and sale for homes to be built in a proposed subdivision known as McKenzie Meadows. The damages were alleged to have been incurred as a result of the closure of public highways and a railway line, occupation of the subdivision, and an interruption of hydro service.

[7] The claim alleges that the OPP failed to carry out their duties under the *Comprehensive Ontario Police Services Act, 2019*, S.O. 2019, c. 1, and wrongly acted in accordance with the OPP’s “Framework for Police Preparedness for

Aboriginal Critical Incidents". Among other things, the OPP are alleged to have failed to prevent crime and failed to enforce injunctions against the protests.

The *Crown Liability and Proceedings Act, 2019*

[8] The *CLPA* replaced the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27. Like that Act, the *CLPA* imposes liability on the Crown for tortious conduct from which it would otherwise be immune at common law. The *CLPA* preserves various immunities for the Crown and officers, employees, and agents of the Crown with respect to the performance of certain duties and governs the conduct of proceedings in which the Crown is a party. The Act maintains some procedural provisions similar to those in the *Proceedings Against the Crown Act* but effects a significant change concerning some torts. Specifically, s. 17 of the *CLPA* establishes a screening procedure that applies to claims against the Crown, or an officer or employee of the Crown, for misfeasance in public office or a tort based on bad faith respecting anything done in the exercise or intended exercise of powers, duties, or functions.

[9] Proceedings concerning the tort of misfeasance in public office or torts based on bad faith in the exercise or intended exercise of public authority are deemed stayed, unless leave to bring the proceeding is granted pursuant to s. 17(2) of the *CLPA*:

> (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.

[10] The *CLPA* sets out a detailed leave procedure that limits the evidence that may be adduced by the parties in ss. 17(3)-(7):

> (3) On a motion for leave under subsection (2), the claimant shall, in accordance with section 15 if applicable, serve on the defendant and file with the court,
>
> > (a) an affidavit, or such other document as may be prescribed, setting out a concise statement of the material facts on which the claimant intends to rely; and
> >
> > (b) an affidavit of documents, or such other document as may be prescribed, disclosing, to the full extent of the claimant's knowledge, information and belief, all documents relevant to any matter in issue in the proceeding that are or have been in the claimant's possession, control or power.
>
> (4) On a motion for leave under subsection (2), the defendant may serve on the claimant and file an affidavit, or such other document as may be prescribed, setting out a concise statement of the material facts on which the defendant intends to rely for the defence, but is not required to do so.
>
> (5) No person may be examined or summoned for examination on the contents of an affidavit or prescribed document referred to in subsection (3) or (4) or in relation to the motion for leave, other than the maker of the affidavit or prescribed document.
>
> (6) The defendant shall not be subject to discovery or the inspection of documents, or to examination for discovery, in relation to the motion for leave.
>
> (7) The court shall not grant leave unless it is satisfied that,

> (a) the proceeding is being brought in good faith; and
>
> (b) there is a reasonable possibility that the claim described in subsection (1) would be resolved in the claimant's favour.

[11] In summary, claimants must file an affidavit setting out the material facts on which they intend to rely, along with an affidavit of documents; the defendant may file an affidavit but is under no obligation to do so; no one is to be examined or summoned for examination in regard to the affidavit, affidavit of documents, or in relation to the motion for leave except for the maker of the affidavit or prescribed document; and the defendant is not subject to discovery or the inspection of documents, or to examination for discovery. The constitutionality of this screening process is the question at the heart of this appeal.

The application judge's decision

[12] The respondents brought an application seeking a declaration that s. 17 of the *CLPA* violates s. 96 of the *Constitution Act, 1867* and is of no force or effect. The application was supported by two affidavits, one from a practicing litigation lawyer, David Thompson, and the other from the CEO of a company that provides consulting services to lawyers and law firms including in relation to class actions, David Johnson. Neither was tendered or qualified as an expert witness. Mr. Johnson's affidavit included quotations from the Premier of Ontario, Doug Ford, and the press secretary for the Attorney General of Ontario, taken from media sources. The Crown cross examined Mr. Thompson but not Mr. Johnson,

and filed no evidence in response to the application. There was, in short, little evidence before the application judge.

[13] The application judge framed the question before him as whether s. 96 of the *Constitution Act, 1867* is "infringed by legislation that requires persons seeking to pursue an action against the Crown (or its agents) alleging bad faith or misfeasance in public office to obtain leave of the court to do so in circumstances where the defendant Crown is not obliged to make any documentary discovery or to submit to any oral examination".

[14] The application judge found that the rule of law, which informs a proper interpretation of s. 96, requires not simply access to the superior courts but *meaningful* access, which he described as "ensuring that a litigant's claim is determined on its merits, including the right to present material evidence". The application judge found that s. 17 precluded this, taking judicial notice of what he described as facts in published comments on the legislation by Professor Erika Chamberlain, who he quoted as follows:

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

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

[15] Based on this commentary, the application judge concluded that bad faith is a state of mind; it is difficult to prove in the absence of evidence from a defendant; and it may require disclosure of a defendant's internal communications.

[16] The application judge acknowledged that the implementation of a robust deterrent screening mechanism to prevent unmeritorious claims against the Crown from proceeding is a valid legislative objective that does not, by itself, prevent access to the superior courts in a manner contrary to s. 96 of the *Constitution Act, 1867*. But relying on *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, the application judge noted that the legislature's power to establish screening mechanisms is not unlimited. In a key passage in his decision, the application judge stated:

> 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.

[17] Thus, the application judge concluded that s. 17 is unconstitutional because it establishes a barrier to "meaningful" access to the superior courts, while denying a realistic and effective means of overcoming that barrier by relieving the Crown from being subject to documentary and oral discovery.

[18] The application judge went on to find that the remedies of reading in, reading down, or severance were not appropriate because it could not be assumed that the Legislature would have passed the tailored provision, and there was no basis to determine the specifics of a discovery mechanism. He concluded that the appropriate remedy was to issue a declaration that s. 17 is of no force or effect, leaving it to the Legislature to enact a new, constitutionally compliant provision should it wish to do so.

DISCUSSION

[19] I begin with a brief discussion of the role and jurisdiction of superior courts before addressing the issues in this case.

The role and jurisdiction of superior courts

[20] Although Canada's constitutional structure is premised on federalism, Canada's judicial system is unitary in nature: the judges of provincial superior courts are appointed by the federal government. In *Reference re Residential*

Tenancies Act, [1981] 1 S.C.R. 714, at p. 728 ("*Residential Tenancies*"), Dickson J. (as he then was) described the judicature provisions of the *Constitution Act, 1867* as supporting a "strong constitutional base for national unity". In *Reference re Code of Civil Procedure (Que.),* art. 35, 2021 SCC 27, 459 D.L.R. (4th) 555 ("*Quebec Reference*"), the Supreme Court emphasized that the judicature provisions, along with s. 92(14), were designed by the Fathers of Confederation to strike a balance between provincial initiatives on the administration of justice and the need to respect the status of the superior courts as the centrepiece of the unitary judicial system. The Court added that the fundamental principles underlying s. 96 and the organization of Canada's judiciary are national unity and the rule of law: *Quebec Reference*, at paras. 1-2,4.

Provincial legislative authority

[21] Section 92(14) of the *Constitution Act, 1867* establishes the exclusive authority of the provinces over the administration of justice, which includes prescribing the procedure that must be followed in civil matters. As the application judge noted, Ontario has established various procedural mechanisms that govern the ability of litigants to bring their disputes to the superior courts for adjudication, including r. 21.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which permits matters to be determined prior to trial; r. 20 of the *Rules of Civil Procedure*, which establishes a summary judgment procedure to resolve matters without a

trial; rr. 2.1.01 and 2.1.02 of the *Rules of Civil Procedure* and s. 140 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43, which preclude frivolous or vexatious proceedings; and the *Class Proceedings Act,* 1992, S.O. 1992, c. 6, which permits class actions by named plaintiffs but requires preliminary motions to certify the proceedings and appoint a representative plaintiff.

[22] There is no question that the *CLPA* is within Ontario's legislative authority. However, Ontario's authority to enact the *CLPA* must be considered alongside other constitutional provisions to ensure the consistent operation of the Constitution as a whole. Provincial legislative authority under s. 92(14) cannot be exercised in a manner that infringes s. 96 and the core jurisdiction of superior courts that it has been held to protect.

Protecting the core jurisdiction of the superior courts

[23] Section 96 of the *Constitution Act, 1867* is ostensibly a simple provision governing the appointment of judges to the superior courts – courts of inherent jurisdiction. It provides as follows:

> 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.

[24] However, s. 96 has come to be understood as performing a much more significant role: "protecting the special status of the superior courts of general jurisdiction as the cornerstone of our unitary justice system": *Quebec Reference*,

at para. 4. Doctrine has developed with a view to protecting the special status of the superior courts – ensuring that their jurisdiction is not usurped by Parliament or a provincial legislature, whether by transferring their core powers to inferior courts and administrative tribunals or removing them altogether. If this were to occur, the superior courts would lose their essential nature and the federal-provincial structural balance fundamental to Canada's justice system would be lost.

[25] Where legislation seeks to establish adjudicative authority in an administrative tribunal or inferior court, the three-part test set out in *Residential Tenancies* applies. The court asks:

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:
2) Whether, in its institutional context, the power, function, or jurisdiction is judicial in nature. If it is, the court asks:
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.

[26] In essence, the *Residential Tenancies* test permits administrative tribunals and inferior courts to exercise authority once exercised by s. 96 courts so long as

the exercise of that authority is not the sole or central function of the tribunal or inferior court, such that it is operating like a s. 96 court: *Residential Tenancies,* at p. 736. The *Residential Tenancies* test thus aims to protect the historical jurisdiction of superior courts: *Quebec Reference*, at paras. 55-59.

[27] In *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, the Supreme Court added that while adjudicative authority can, in some circumstances, be established outside the context of the superior courts, on no account can the inherent or core jurisdiction of the superior courts be transferred exclusively to another court or removed. Lamer C.J., writing for a majority of the Court, acknowledged that the core jurisdiction concept was difficult to define, but said that it is of "paramount importance" to the existence of the superior courts. He endorsed a broad conception set out by I.H. Jacob in "The Inherent Jurisdiction of the Court" (1970), 23 Curr. Legal Probs. 23, in which Jacob described the power of superior courts to maintain their authority and prevent their process from being obstructed as "intrinsic" and the "very life-blood" and "very essence" of superior courts. "Without such a power", Jacob wrote: "the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law": at p. 27.

[28] Thus, core jurisdiction is defining of the superior courts and must be guarded jealously. In *MacMillan Bloedel*, Lamer C.J. put the matter this highly: removal of

any part of the core jurisdiction, he said, “emasculates the court, making it something other than a superior court”: at para. 30.

[29] There is no claim that the *CLPA* has transferred the core jurisdiction of the superior courts to another body; jurisdiction over the relevant tort claims continues to lie with the superior courts. The procedure governing the adjudication of those actions has changed, however, and the question is whether this procedural change is tantamount to a removal of the superior courts’ core jurisdiction. The application judge held that it was, likening the effect of the screening procedure to the hearing fees at issue in *Trial Lawyers*. As I explain below, the trial judge’s reasoning is premised on a misreading of that case.

Trial Lawyers

[30] *Trial Lawyers* concerned a challenge to the constitutionality of hearing fees – charges for the daily use of the court – set out in the rules applying to proceedings in the Supreme Court of British Columbia. McLachlin C.J., writing for a majority of the Court, held that the hearing fees were so high as to prevent people from coming to the courts to have their disputes resolved. This, she said, prevented the business of the courts from being done; it infringed the core jurisdiction of superior courts by depriving them of their ability to serve as courts of inherent general jurisdiction. She reasoned as follows:

> The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. As a result, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts: at para. 32.

[31] *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 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.

[32] The Supreme Court confirmed this understanding of *Trial Lawyers* recently in the *Quebec Reference.* A majority of the Court characterized the problem in *Trial Lawyers* this way: those who could not afford the hearing fees but were not eligible for an income-based exemption from paying them "fell through the cracks in the judicial system; their disputes could no longer be resolved by the law, which jeopardized the maintenance of an actual order of positive laws and thus the rule of law": at para. 69.

[33] *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: *Trial Lawyers*, at paras. 32-37. 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.*

[34] The core jurisdiction concept has, from the outset, been understood as "very narrow", including "only critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its fundamental role within our legal system": *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186, *per* Lamer C.J. (concurring), at p. 224. The Supreme Court confirmed the narrow scope of the concept in the *Quebec Reference*, noting that it focuses on the essential business of the superior courts: "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": at para. 68. For their part, Wagner C.J. and Rowe J. (dissenting in part) emphasized that the superior courts' core jurisdiction involves only "critically important" jurisdictions, the deprivation of which would deprive the superior courts of the ability to play their central and unifying role in the constitutional order and to uphold the rule of law: at para. 233.

[35] This case is nothing like *Trial Lawyers*. Section 17 of the *CLPA* does no more than regulate the way in which disputes come before the superior courts. It does not prevent disputes from being heard and determined by the superior courts

and in no way infringes – let alone "emasculates" – the core jurisdiction s. 96 protects.

Section 17 of the *CLPA* does not infringe the core jurisdiction of the superior courts

[36] Much of the confusion in this case arises out of the misreading of *Trial Lawyers* and s. 96 caselaw outlined above. Section 96 caselaw is concerned with protecting the status of superior courts and the core of their adjudicative authority from legislative and executive encroachment. It is not concerned with the ability of individuals to access the superior courts and does not establish an individual right of access to the superior courts. Limitations on access to the superior courts are matters of constitutional concern under s. 96 of the *Constitution Act, 1867* only in so far as they impermissibly infringe the core jurisdiction of the superior courts. Nothing of the sort has occurred in this case.

[37] The application judge errs at the outset of his analysis by characterizing s. 17 of the *CLPA* as establishing a "barrier" to accessing the superior courts. Nothing in s. 17 bars, denies, or otherwise prevents access to the superior courts and their core function of adjudicating disputes. Section 17 establishes a screening process – a procedure that allows the superior courts to screen out unmeritorious claims. The operation of the screening process is determined by the superior courts themselves: they determine whether or not a claim may proceed based on

their interpretation and application of the criteria set out in s. 17. In other words, the superior courts continue to exercise their core jurisdiction – hearing and resolving disputes.

[38] According to the application judge, the absence of documentary and oral discovery prevents meritorious claims against the Crown from proceeding, essentially because s. 17 makes it too difficult to obtain leave. I set out the key passage from the judgment again:

> 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.

[39] There are two problems with this passage, both of them fatal to a finding of inconsistency with s. 96. The first is that, even taking the argument on its own terms, there was no evidentiary basis to support the conclusion that prohibiting documentary and oral discovery in the screening process deprives individuals of access to the superior courts. The most that could be said on the record before the application judge was that s. 17 makes it more difficult to pursue particular types

of claims against the Crown by establishing an additional procedural step. However, there is no evidence as to how easy or difficult it is to satisfy this procedural step. Secondly, and more fundamentally, even assuming that it is difficult to satisfy the procedural step, mere difficulty in proceeding with a claim cannot be equated with preventing the superior courts from exercising their core jurisdiction in the manner contemplated by *Trial Lawyers*. I address each of these problems below.

There is no evidence that the law prevents access to the superior courts

[40] As noted above, the application judge made findings of fact based on academic commentary, which asserted that bad faith is a state of mind that is difficult to prove without evidence from the defendant and that proving bad faith may require disclosure of the defendant's internal communications. This commentary entered the litigation in a roundabout way: it was published in an online publication and referenced in an online news article that was attached as an exhibit to Mr. Johnson's affidavit. The affidavit itself did not refer to the original online publication nor did it attach the publication itself.

[41] The application judge erred in taking judicial notice of the statements made in this commentary. There was no evidence before the application judge concerning the necessity of discovery for purposes of establishing a claim of bad faith or misfeasance in public office – a factual vacuum created by the respondents'

choice not to bring a leave motion pursuant to s. 17 of the *CLPA*. The commentary quoted by the application judge was not factual in nature; it was the expression of an opinion and there was no basis for the application judge to take judicial notice of its conclusions and assumptions as statements of fact. As the Crown notes, it is not the claimant's burden under s. 17 of the *CLPA* to establish bad faith in any event: claimants need only establish a reasonable possibility that their claim will succeed, and the respondents did not even attempt to meet that burden in this case.

[42] There is, of course, nothing inappropriate about citing academic legal scholarship and much to be gained when it comes to better understanding legal concepts that may be relevant to judicial reasoning. But whether academic commentary or scholarship purports simply to describe the law or to explain it, it is not properly the subject of judicial notice – that is, it cannot be accepted as fact without proof. It is not subject to the sort of constraints that govern the use of evidence in the litigation process, and there is a risk that reliance on it may result in evidence being imported into judicial proceedings indirectly, bypassing the relevant evidentiary safeguards. See the helpful discussion of judicial notice by Brown J.A. in *R. v. J.M.,* 2021 ONCA 150, 154 O.R. (3d) 401, at paras. 29-38.

[43] Academic arguments should be assessed with the same sort of critical detachment as submissions from counsel. To the extent that academic arguments

have a normative purpose – to the extent they are concerned with what the law *ought* to be rather than what it is – they are inherently controversial and properly subject to critique and challenge from other scholars. Their significance and shortcomings cannot be understood without placing them in this context. But whether scholarship is ostensibly descriptive or normative, it is improper to take judicial notice of the facts asserted or the conclusions reached.

Leave requirements do not infringe the core jurisdiction of the superior courts

[44] The application judge described aspects of s. 17 of the *CLPA* as unprecedented in Canadian law, and on appeal the Crown says that the application judge erred in this regard: the leave requirement in s. 17 is modeled on s. 138.8 of the *Securities Act*, R.S.O. 1990, c. S.5. The respondents disagree, but there is no need to resolve this matter. Whether s. 17 of the *CLPA* is unprecedented is irrelevant to whether it impermissibly infringes s. 96 of the *Constitution Act, 1867*.

[45] The most that can be said is that, on its face, s. 17 of the *CLPA* makes it more difficult for some tort claims against the Crown to proceed than it was under the *Proceedings Against the Crown Act*. As a result it is conceivable, if not likely, that fewer claims will proceed than might otherwise be the case. But that is not relevant to whether s. 17 infringes s. 96 of the *Constitution Act, 1867*. Section 96 does not require that all tort claims be treated alike, much less litigation in general, and it has nothing to say about whether any particular claim should survive a

preliminary screening process conducted by the court. The core jurisdiction of superior courts under s. 96 is impermissibly infringed only if the superior courts are prevented from serving as courts of inherent general jurisdiction. Nothing in s. 17 of the *CLPA* has this effect.

[46] The application judge's error is apparent from the way in which he describes the alleged infringement of s. 96. He does not say that the leave requirements in s. 17 prevent superior courts from hearing disputes or fulfilling their constitutional role as a court of inherent general jurisdiction; he says the leave requirements prevent some claimants from having *meaningful* access to the superior courts. This is not an application of or even an expansion of the holding in *Trial Lawyers*; it is an unwarranted change to it. It subtly recasts s. 96 as an individual rights provision – a change neither required nor permitted by s. 96 jurisprudence or the *Constitution Act, 1867*.

[47] Section 17 of the *CLPA* does not interfere with the constitutional role of the superior courts. That some – perhaps even many – claimants will be denied leave to bring proceedings as a result of the screening mechanism does not mean that the constitutional role of the superior courts has been impermissibly infringed. Claimants will be denied leave to bring proceedings only after they have had access to the superior courts and failed to satisfy the courts as to the strength of their case. Superior courts are still able to hear the relevant tort claims and fulfill

their cornerstone role in Canada's unitary justice system. Whether it is considered good or bad policy to screen particular tort claims against the Crown is irrelevant; so long as the legislation does not prevent the superior courts from exercising their core jurisdiction, it does not impermissibly infringe s. 96 of the *Constitution Act, 1867*.

[48] In short, s. 96 immunizes neither the substantive content of the law nor the procedure governing litigation against legislative reform: the Legislature may establish, amend, or repeal causes of action, and may establish various procedural requirements. Section 96 protects the core jurisdiction of the superior courts, but procedural requirements that must be met before particular claims may be brought cannot be equated with depriving the superior courts of the ability to hear disputes and so preventing them from fulfilling their constitutional role – especially given that the superior courts will determine whether those procedural requirements have been met.

Section 17 of the *CLPA* is not inconsistent with the rule of law

[49] The application judge drew support for his "meaningful access" concept from the rule of law, which he said 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." Although he purported

to rely on the rule of law as an interpretive aid, as I will explain, his decision is at odds with the concept and the purpose for which it may be invoked.

[50] I will briefly outline the rule of law concept and the use of unwritten principles in constitutional litigation before addressing the application judge's error.

The nature of the rule of law

[51] The rule of law is a venerable principle of political philosophy – a complex, multifaceted ideal that informs legislative and judicial processes. It has ancient origins and has been developed in a tradition running through scholars such as Aristotle, Thomas Aquinas, Sir William Blackstone, and A.V. Dicey. The rule of law is the subject of a large and growing body of contemporary academic scholarship: see, for example, Kristen Rundle, *Revisiting the Rule of Law* (New York: Cambridge University Press, 2022); Frederick Schauer, "Lon Fuller and the Rule of Law" (2020) University of Virginia School of Law Public Law and Legal Theory Paper Series 2020-46; John Tasioulas, "The Rule of Law" in Tasioulas, ed., *The Cambridge Companion to the Philosophy of Law* (Cambridge: Cambridge University Press, 2019); and Brian Z. Tamanaha, "The History and Elements of the Rule of Law" (2012) Sing. J.L.S. 232.

[52] To say that the rule of law is respected in a legal order is to make a claim about the health of that legal order – that it is functioning in accordance with a range of criteria the concept may be understood as embracing. Lon Fuller famously

offered a list of eight rule of law principles he described as the “inner morality of law” in *The Morality of Law*, rev’d edn. (New Haven: Yale University Press, 1969), at pp. 33-38. According to Fuller, the law should be: 1) general in nature; 2) publicized; 3) prospective in operation; 4) understandable; 5) non-contradictory; 6) possible to comply with; 7) relatively constant; and 8) congruent with its administration. John Finnis offers a similar account in *Natural Law and Natural Rights*, 2nd ed. (Oxford: Oxford University Press, 2011), at pp. 270-71: “A legal system exemplifies the Rule of Law to the extent … that (i) its rules are prospective, not retroactive, and (ii) are not in any other way impossible to comply with; that (iii) its rules are promulgated, (iv) clear, and (v) coherent one with another; that (vi) its rules are sufficiently stable to allow people to be guided by their knowledge of the content of the rules; that (vii) the making of decrees and orders applicable to relatively limited situations is guided by rules that are promulgated, clear, stable, and relatively general; and that (viii) those people who have authority to make, administer, and apply the rules in an official capacity *(a)* are accountable for their compliance with rules applicable to their performance and *(b)* do actually administer the law consistently and in accordance with its tenor.”

[53] Contemporary accounts of the rule of law typically share a number of these commitments but may differ in important respects. This is to be expected: good faith disagreement about the essential nature of the rule of law flourishes in any

democratic order that aspires to the ideal: see Jeremy Waldron, “The Rule of Law as an Essentially Contested Concept” (2021) NYU School of Law Public Law and Legal Theory Research Paper Series, Working Paper No. 21-15. The rule of law has always served as a constitutional lodestar for lawmakers – an ideal to be aspired to, rather than a canonical set of rules that is subject to enforcement.

[54] The Supreme Court outlined the elements of the rule of law for adjudication purposes in the *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 and the *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217. Those elements are: 1) the supremacy of the law over the acts of government and private persons; 2) the creation and maintenance of an actual order of positive laws that preserves and embodies the more general principle of normative order; and 3) the requirement that the relationship between the state and the individual be regulated by law.

[55] These elements focus on the nature and purpose of the law rather than its substance, and are not independently enforceable in legal proceedings. As Wagner C.J. and Brown J., writing for a majority of the Supreme Court, explained in *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, 462 D.L.R. (4th) 1, at para. 58, to enforce unwritten constitutional principles would trespass on the legislature’s authority to amend the Constitution, raise concerns about the legitimacy of judicial review, and distort the separation of powers. Fundamentally, it would be at odds with the settlement reflected in the text of the Constitution itself.

Thus, they stated the conclusion categorically: “unwritten constitutional principles cannot serve as bases for invalidating legislation”: *Toronto (City)*, at para. 63. Nothing could be clearer.

[56] There is nothing new or surprising in this. The Court reached the same conclusion when considering the unwritten principle of the rule of law in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at paras. 59-60. Nevertheless, it is clear that the elements of rule of law identified by the Court may be invoked both as an interpretive aid and to help develop necessary structural constitutional doctrines: *Toronto (City)*, at paras. 55-56. The majority in *Toronto (City)* cites *Trial Lawyers* as an example of the rule of law informing a purposive interpretation of s. 96 of the *Constitution Act,* at para. 55.

[57] However, two distinct difficulties attend the use of the rule of law as an interpretive aid in adjudication. The first is the need to respect the scope of the elements of the rule of law identified by the Court. The second is the difficulty of maintaining the distinction between the use of rule of law as an interpretive aid, which is legitimate, and direct enforcement of the rule of law to invalidate legislation, which is not. The application judge’s decision illustrates both difficulties.

*"*Meaningful access to the court*" as described by the application judge is not an element of the rule of law*

[58] It seems reasonable that there should be "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", but the application judge's "meaningful access" concept is not required by the rule of law on that account, nor does it engage the aspect of the rule of law dealing with physical access to courts set out in *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214.

[59] The rule of law is not a repository of all things considered desirable in a legal system. None of the elements of the rule of law recognized in *Re Manitoba Language Rights and Reference re Secession of Quebec* speak directly to the terms of legislation: *Imperial Tobacco*, at para. 59.

[60] Indeed, it is noteworthy that in *Imperial Tobacco* the Supreme Court rejected several "fair civil trial" features asserted as protected by the rule of law in upholding the constitutionality of British Columbia legislation that went much further than s. 17 of the *CLPA*: it authorized actions by the provincial government against tobacco product manufacturers for the recovery of health care expenses incurred by the government, changed evidentiary requirements, permitted the government to establish aggregate claims, reversed the burden of proof in several respects, and operated retrospectively. The legislation changed the general rules of civil

litigation considerably, but, as the Supreme Court stated, there is no constitutional right to have one's civil trial governed by customary rules of civil procedure and evidence: *Imperial Tobacco*, at para. 76. That conclusion applies with equal force in this case.

The rule of law as an interpretive aid

[61] 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: *Quebec (Attorney General) v. 9147-0732 Québec Inc.*, 2020 SCC 32, 451 D.L.R. (4th) 367, at para. 11*; Toronto (City)*, at para. 65.

[62] Section 17 of the *CLPA* changes only the way in which some claims proceed in the superior courts. In doing so it does not offend the rule of law. On the contrary, the rule of law requires that s.17 be enforced as enacted. Whether it is considered good or bad policy – fair or unfair on some metric – is for the Legislature to determine. The political process is not to be bypassed by the courts.

[63] That is what occurred in this case. Although the application judge acknowledged that the rule of law could not be 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.

[64] The result is a decision that renders unconstitutional procedural rules properly made pursuant to s. 92(14) of the *Constitution Act, 1867*. The rule of law does not support this decision. On the contrary, both the Constitution and the rule of law require that s. 17 of the *CLPA* be given effect.

CONCLUSION

[65] I would allow the appeal**.**

[66] The appellants are entitled to costs of the appeal fixed in the amount of $30,000 and to costs on the application below of $49,908.40, both figures inclusive of HST and disbursements.

Released: March 15, 2023 "G.H."

"Grant Huscroft J.A."
"I agree. A. Harvison Young J.A."
"I agree. Sossin J.A."