

## An Update on Tort Immunity Under the *Crown Liability and Proceedings Act*

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The Ontario *Crown Liability and Proceedings Act, 2019* (“CLAPA”) came into force in July of 2019, replacing the *Proceedings Against the Crown Act*. CLAPA received industry-wide scrutiny based on the provisions limiting Crown liability.

Whereas the former *Proceedings Against the Crown Act* provided that the Crown was subject to all liabilities in tort as if it were a regular person,<sup>1</sup> CLAPA provides broad immunity for the Crown, or an officer, employee or agent of the Crown, in respect of actions brought against it arising out of acts of a legislative nature,<sup>2</sup> in the making of regulatory decisions<sup>3</sup> and in the making of policy decisions.<sup>4</sup>

Moreover, CLAPA defines policy decisions and regulatory decisions broadly to include, among other things, the creation of and implementation of programs, the enforcement of legislation, and investigations carried out pursuant to an Act.

Finally, CLAPA also provides for a dismissal of any proceeding prohibited by operation of the Act.

Subsequent to its enactment, critics largely agreed that, as compared to the *Proceedings Against the Crown Act*, CLAPA demonstrated a clear legislative intention to significantly restrict Crown liability in tort. However, it remained to be seen how the Courts would interpret and apply the Act and how broadly the immunity provisions would be applied.

In *Francis v Ontario*, 2020 ONSC 1644, Justice Perell, in the context of a motion of summary judgment in a class action case, considered the application of CLAPA. The

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<sup>1</sup> *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27 s. 5.

<sup>2</sup> *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sched. 17 s. 11(1).

<sup>3</sup> *Ibid* s. 11(2).

<sup>4</sup> *Ibid* s. 11(4).

plaintiffs alleged negligence and breach of *Charter* rights in relation to the Government of Ontario's policies and procedures regarding administrative segregation of prison inmates.

The Crown advanced various arguments in respect of Crown immunity, including that s. 11 of *CLAPA* operated to dismiss the plaintiffs' claim. Section 11 reads in part:

**Acts of a legislative nature**

11 (1) No cause of action arises against the Crown or an officer, employee or agent of the Crown in respect of any negligence or failure to take reasonable care while exercising or intending to exercise powers or performing or intending to perform duties or functions of a legislative nature, including the development or introduction of a bill, the enactment of an Act or the making of a regulation.

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**Policy decisions**

(4) No cause of action arises against the Crown or an officer, employee or agent of the Crown in respect of any negligence or failure to take reasonable care in the making of a decision in good faith respecting a policy matter, or any negligence in a purported failure to make a decision respecting a policy matter.

**Same, policy matters**

(5) For the purposes of subsection (4), a policy matter includes,

(a) the creation, design, establishment, redesign or modification of a program, project or other initiative, including,

(i) the terms, scope or features of the program, project or other initiative,

(ii) the eligibility or exclusion of any person or entity or class of persons or entities to participate in the program, project or other initiative, or the requirements or limits of such participation, or

(iii) limits on the duration of the program, project or other initiative, including any discretionary right to terminate or amend the operation of the program, project or other initiative;

(b) the funding of a program, project or other initiative, including,

(i) providing or ceasing to provide such funding,

- (ii) increasing or reducing the amount of funding provided,
  - (iii) including, not including, amending or removing any terms or conditions in relation to such funding, or
  - (iv) reducing or cancelling any funding previously provided or committed in support of the program, project or other initiative;
- (c) the manner in which a program, project or other initiative is carried out, including,
- (i) the carrying out, on behalf of the Crown, of some or all of a program, project or other initiative by another person or entity, including a Crown agency, Crown corporation, transfer payment recipient or independent contractor,
  - (ii) the terms and conditions under which the person or entity will carry out such activities,
  - (iii) the Crown's degree of supervision or control over the person or entity in relation to such activities, or
  - (iv) the existence or content of any policies, management procedures or oversight mechanisms concerning the program, project or other initiative;
- (d) the termination of a program, project or other initiative, including the amount of notice or other relief to be provided to affected members of the public as a result of the termination;
- (e) the making of such regulatory decisions as may be prescribed; and
- (f) any other policy matter that may be prescribed.

The plaintiffs argued that s. 11 of *CLAPA* merely codified the law as it applied under the *Proceedings Against the Crown Act* and the common law. Under this law, the court has to consider whether the government conduct is: (a) a core policy decision dictated by financial, economic, social or political factors or constraints, for which statutory actors or public authorities are accountable to the electorate; or (b) operational conduct based on administrative direction, expert or professional opinion, technical standards, or general standards of reasonableness, for which the public authority may be liable for negligence

The Supreme Court of Canada has stated that true policy decisions should be exempt from tort claims so that governments are not restricted in making decisions based on social, political or economic factors. However, public authorities may be liable for their

negligent operational decisions and for careless conduct in implementing legislation or policy.

In reaching his decision, Justice Perell considered various statements of the legislature in the course of the enactment of *CLAPA*, as well the legal presumption that the common law remains unchanged absent a clear and unequivocal expression of legislative intent.<sup>5</sup>

Justice Perell held that the purposes of *CLAPA*, as well as the former *Proceedings Against the Crown Act*, was to reduce Crown immunity as it would otherwise exist by virtue of the common law.

He agreed with the plaintiffs and held that s. 11 of *CLAPA* merely codified the scope of intrusion on Crown liability and reflected the state of the law following *Knight v Imperial Tobacco*<sup>6</sup> leaving intact the distinction between core policy matters, for which the Crown is insulated from liability, and operational decisions, for which the government is exposed to liability.

In addition, Justice Perell held that the Government of Ontario's arguments pursuant to *CLAPA* failed for another reason: s. 11 of the *Act* insulates the Crown with respect to negligent decision making but, in the case at bar, Justice Perell found that the government conduct at issue went far beyond negligent decision making.

Accordingly, despite what many believed to be a clear legislative intention to limit the scope of Crown liability, the decision in *Francis v Ontario* demonstrates that the law with respect to Crown liability may not have, in fact, been altered significantly by virtue of the enactment of *CLAPA*.

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<sup>5</sup> *Francis v Ontario*, 2020 ONSC 1644 at para 502.

<sup>6</sup> *Knight v Imperial Tobacco*, 2011 SCC 42.