GOVERNMENT LIABILITY: TENSION BETWEEN THE LEGISLATURE AND THE COURTS

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Overview

Historically, the Crown enjoyed immunity from civil suits for tort liability. While the Crown continues to enjoy immunity in respect of claims arising from government policy decisions, in the 1950's, the federal and provincial governments enacted statutes permitting claims in tort against Crown entities arising from operational decisions of those governments and their agents.

Since then, a body of caselaw has been developed around what decisions relate to matters of policy, which are immune from liability, and what decisions relate to operational matters, which are not. The courts have also developed the law around when government actors can be held liable to private citizens through the tort of misfeasance in public office.

With the *Crown Liability and Proceedings Act*[2] ("*CLPA*"), the government of Ontario has attempted to push back the boundaries of Crown immunity established by the courts to a more expansive scope. Sections 11 and 17 of the *CLPA,* in particular, directly expand the limits of Crown immunity as compared to the common law.

Ontario's courts are now struggling with this new legislation, and the tension between the narrower view of Crown immunity developed by the courts and the broader scope of immunity provided for in the *CLPA*. There have been multiple recent instances of the Ontario courts refusing, using an array of different legal devices, to give effect to the broader immunity provisions of the *CLPA*, and the tension over government immunity has spilled into the municipal context as well. It remains to be seen whether the courts or the legislature will ultimately prevail, but it appears that the legal battle between the two is just heating up.

In this article, we aim to put this tension in its historical and present-day context, in order to provide a clearer understanding of the conflicting viewpoints. We will review

[2] *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sched. 17 ["*CLPA*"].

the history of Crown liability, and its evolution in both the legislation and the common law. We will review the legal framework of the various causes of action against government agencies and actors, including statutory causes of action, civil remedies, and statutory defences. We will then discuss the circumstances of when a government entity or actor may owe a duty of care to a private citizen, including the application of the *Anns/Cooper* test.

Coming to the present day, we will review the enactment of the *CLPA*, and the government's attempt therein to expand the scope of its immunity in tort. We will discuss recent decisions interpreting the *CLPA,* the court's refusal to give effect to the *Act*'s expanded Crown immunity, and the tension between the legislature and the judiciary that has played out in these decisions. Finally, we review the spread of this tension to government liability at the municipal level in recent decisions.

History of Crown Liability

Historically, the Crown was immune at common law from civil suits for tort liability. However, beginning in the 1950's, the federal and various provincial governments enacted statutes that permitted tort claims by private citizens against the Crown in certain circumstances. Prior to the enactment of the *CLPA*, Crown liability was governed by its predecessor, the *Proceedings Against the Crown Act* ("*PACA*"), which was originally enacted in 1963. *PACA* was grounded in the *Uniform Model Act* of 1950, which was prepared by the Commissions on Uniformity of Legislation in Canada.

Pursuant to section 5(1)(a) of the Uniform Model Act, the Crown "[…] was subject to all those liabilities in tort to which, if it were a person of full age and capacity, it would be subject […] in respect of a tort committed by any of its officers or agents."[3] Essentially, this section made the Crown vicariously liable for torts committed by its servants or agents. As presently interpreted, the individual Crown servant may, but does not need

[3] Uniform Model Act 1950, "An Act respecting Proceedings against the Crown" in Conference of Commissioners on Uniformity of Legislation in Canada, *Proceedings of 1950,* 76.

to be, added as a defendant[4]. In *Liability of the Crown*, Hogg, Monahan and Wright noted that the courts have largely ignored the vicarious nature of liability pursuant to *PACA*, and other similar statutes. The Crown is typically treated as though it is directly liable for torts.[5]

Jurisdiction & Framework of Statutory Causes of Action against Government Entities

When initiating a claim against a public body, the threshold question is which level of government to sue. This is usually a straightforward analysis. However, there are circumstances where the appropriate level of government to sue may be unclear. For example, a claim for environmental damages could involve Federal or Provincial government actors, and accordingly different applicable legislation, depending on the nature of the claim. For claims such as these, the subject matter of the action needs to be considered to determine the appropriate branch of government to sue, and the governing legislation.

Federal Government

For claims against the Federal Crown, the provisions of the Federal *Crown Liability and Proceedings Act* ("F-*CLPA*") govern.[6] The relevant sections pertaining to claims against the Federal government are generally set out in ss. 2 – 5 of the F-*CLPA*. Section 2 of the F-*CLPA*, defines liability as "extracontractual civil liability" in the province of Quebec or "liability in tort" in any other province (including Ontario).

Section 3 of the F-*CLPA* governs liability against Federal government entities and actors. Specifically, section 3(b) states that the Crown is liable for the damages for which if it were a person it would be liable, for:

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[4] *Francis v. Ontario*, 2021 ONCA 197 ["*Francis*"] at para 145.
[5] Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011), (ch 6).
[6] *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50.

(a) a tort committed by a servant of the Crown; or
(b) a breach of duty attaching to the ownership, occupation, possession or control of property.

Section 4 of the F-*CLPA* contains specific provisions relating to the liability of the Federal Crown relating to motor vehicles.

Provincial Government

The Provincial government is governed by the provisions of the *CLPA*. Section 8 of the *CLPA* states that the Crown is subject to all liabilities in tort for which it would be liable if it were a person:

> (a) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property;
> (b) in respect of a breach of an employment-related obligation owed to an officer or employee of the Crown; and
> (c) under any Act, or under any regulation or by-law made or passed under any Act.

Municipalities

Like the Federal and Provincial governments, municipalities no longer enjoy absolute immunity. Municipalities, like private corporations, are subject to liability for tortious conduct.

The *Municipal Act*[7] imposes general statutory duties on municipalities, and imposes specific statutory duties of care. General statutory liability for municipalities arises from the operation of s. 448 of the *Municipal Act*. Section 448(2) states that a municipality is not relieved from liability "…to which it would otherwise be subject in respect of a tort committed by a member of council or an officer, employee or agent of

[7] *Municipal Act*, 2001, S.O. 2001, c. 25 ["*Municipal Act*"].

the municipality or a person acting under the instructions of the officer employee...". Section 44 of the *Municipal Act* codifies a duty of care for the maintenance and repair of bridges and highways, the failure of which could result in a municipality being liable pursuant to the *Negligence Act*.

City of Toronto Act

The City of Toronto is exempted from the *Municipal Act*, and is governed by its own Act, The *City of Toronto Act* ("*COTA*"). The *COTA* contains provisions that essentially replicate the liability provisions of the *Municipal Act*. **Section 391(2)** of the *COTA* replicates the provision of the *Municipal Act* providing for general liability in torts (i.e. s. 448(2)). Furthermore, s. 42 of *COTA*, much like s. 44 of the *Municipal Act*, provides for statutory duties of care relating to the maintenance and repair of highways and roadways within its jurisdiction.

Specific Statutory Causes of Action & Civil Remedies

Certain specific causes of action against government bodies have been codified in statutes and legislation, in order to ease tension in interactions between the government and private citizens. For example, in the *Municipal Act*, section 44 obligates municipalities to keep highways and bridges within their jurisdictions in a reasonable state of repair, and provides for the establishment of regulations setting out a minimum standard of maintenance in this regard. Section 44(2) states that a municipality that defaults on this maintenance obligation is liable to any person who sustains damages as a result.

However, there is currently no recognized cause of action against a municipality for breach of an obligation under a statute or municipal by-law.[8] While it is well-established that statutes and by-laws create general standards which are owed to the public, and that government entities have a duty to comply with and enforce these

[8] Mark Charron & Stephanie Doucet, "Municipal Liability 101 Navigating the Intricate Landcsape of Municipal Liability in Personal Injury Actions" (Toronto: CanLII, 2019) ["Charron & Doucet"]at p. 3.

standards, municipalities and other government entities, may not be liable for damages or losses arising because a legislated standard was not met or enforced.[9]

The Supreme Court of Canada has upheld the principle that the mere breach of a statutory duty does not, in and of itself, constitute a tort or an independent cause of action for legal liability in a civil action.[10] Unless a statutory provision expressly imposes civil liability on a government entity or actor for breaching an obligation under a statute or by-law, a plaintiff would need to establish that the government owed them a private law duty of care in the circumstances in order to have a valid cause of action in negligence.[11]

The same statutes that establish government liability also frequently provide for certain statutory defences. For example, section 44(3) of the *Municipal Act*, provides for three statutory defences to the liability created by section 44(2), discussed above. Pursuant to section 44(3), and notwithstanding section 44(2), the municipality will not be liable if it did not and could not reasonably have known about the state of disrepair, if it took reasonable steps to prevent the default from arising, or if it had met the minimum maintenance standards, if applicable.

Private Law Duty of Care

Government entities and actors have also been held to owe a private law duty of care, such that they can be held liable to private citizens in negligence in certain circumstances. As with negligence of any kind, to establish a cause of action, a plaintiff must first demonstrate that they were owed a duty of care by the defendant.

In the case of government entities, a duty of care may arise as a matter of common law through the specific interactions between the government entity and private

[9] *Vlanich v. Typhair*, 2016 ONCA 517 at para 30.
[10] Charron & Doucet at pg. 3. See: *R v. Saskatchewan Wheat Pool*, [1983] 1 SCR 205, 1983 CarswellNat 92; *Holland v. Saskatchewan (Minister of Agricultural, Food & Rural Revitalization)*, 2008 SCC 42.
[11] *Ibid* at p. 4.

citizens.[12] Where courts have recognized a duty of care in a specific context, such as the duty owed to inmates at correctional facilities[13], plaintiffs need not re-establish the existence of the duty in that context.[14]

However, in novel claims where no statutory duty of care exists and a duty of care has not yet been recognized by the courts in similar circumstances, whether a government entity owes a private law duty of care to a private citizen is determined by applying the two-stage test established in *Anns v. Merton London Borough Council*[15] as summarized and adopted for Canadian jurisprudence in *Cooper v. Hobart*, 2001 SCC 79.

Stage I – Proximity & Foreseeability

At the first stage of the *Anns/Cooper* test, the court asks whether the harm that occurred was a reasonably foreseeable consequence of the defendant's conduct, or in other words, whether there is a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. If so, the court will find that there is a *prima facie* duty of care between the parties.[16]

As mentioned above, this first part of the *Anns/Cooper* need not be undertaken if there is a statutory duty of care, or a duty of care has already been recognized by the courts. Where it is undertaken, "proximity" is used to characterize the type of relationship in which a duty of care may arise. Proximity is determined by assessing the expectations, representations, reliance, and other factors to determine the "closeness" of the relationship between the parties.[17] The court then asks whether it is "just and fair" in regards to the relationship to impose a duty of care in law. [18]

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[12] *R. v. Imperial Tobacco*, 2011 SCC 42 at paras 43-45.
[13] *Francis* at para 102.
[14] *Nelson (City) v. Marchi*, 2021 SCC 41 ["*Marchi*"] at para 29.
[15] *Anns v. Merton London Borough Council*, (1977), [1978] A.C. 728 (UKHL) at pp. 751 – 752.
[16] *Marchi* at para 17.
[17] *Cooper v. Hobart*, 2001 SCC 79 at paras 30 – 31.
[18] *Ibid* at para 34.

Stage II – "Operational" versus "Policy" Decisions

At the second stage of the *Anns/Cooper* test, the court asks whether there are residual policy concerns outside the parties' relationship that should negate the *prima facie* duty of care.[19]

In this vein, government agencies and actors may be exempt from the application of the traditional tort law duty of care if an explicit statutory exemption exists, or if the proposed claim arises from a governmental policy decision.[20] This "core policy defence" has been codified in many of the statutes dealing with government liability, including the *Municipal Act*, and the *CLPA*[21]. Typically, however, operational decisions, which involve the practical implementation of a government policy, will not attract immunity.

The issue of whether a claim arises from a "pure policy" decision, as opposed to an operational decision, is considered under the second prong of the *Anns/Cooper* test. The Supreme Court of Canada in *Cooper* stated the following (at para 38):

> It is at this second stage of the analysis that the distinction between government policy and execution of policy falls to be considered. It is established that government actors are not liable in negligence for policy decisions, but only operational decisions. The basis of this immunity is that policy is the prerogative of the elected Legislature. It is inappropriate for courts to impose liability for the consequences of a particular policy decision. On the other hand, a government actor may be liable in negligence for the **manner** in which it **executes or carries out the policy** […] **The exclusion of liability is better viewed as an immunity imposed because of considerations outside the relationship for policy reasons – more precisely, because it is inappropriate for courts to second-guess elected legislators on policy matter.** [emphasis added]

More recently, the Supreme Court of Canada clarified that even where the first stage of the *Anns/Cooper* test has already been established, either through a statutory or

[19] *Ibid* at para 30.
[20] *Just v. British Columbia*, [1989] 2 SCR 1228.
[21] See s. 450 of the *Municipal Act*, and s. 11 of the *CLPA*.

previously recognized duty of care, an analysis of the nature of the impugned decision must take place to determine whether it is a policy or operational decision, whenever a government entity raises the policy immunity defence:

> Regardless of where policy immunity is located in the duty of care framework, the same principles apply in determining whether an immune policy decision is at issue. Those principles apply in any case in which a public authority defendant raises core policy immunity, whether the case involves a novel duty of care, falls within the *Just* category, or falls within another established or analogous category. **What is most important is that immunity for core policy decisions made by government defendants is well understood and fully explored where the nature of the claim calls for it [emphasis added]**.[22]

It is accordingly now a stand-alone rule of law that the policy or operational nature of an impugned decision must be determined by the court whenever the policy immunity defence is raised by the government, and not only when the full *Anns/Cooper* test is engaged.

Prior to the Supreme Court of Canada's decision in *Nelson (City) v. Marchi*, courts considered several factors to distinguish a policy decision from an operational decision. True policy decisions were typically found to be those dictated by financial, social, or political factors or constraints, whereas operational decisions were concerned with the practical implementation of formulated policies.[23] However, as discussed below, the Supreme Court in *Marchi* provided a new framework for the determination of this issue.

Enactment of *CLPA*

On April 1, 2019, the government introduced the *Crown Liability and Proceedings Act*, *2019* as part of Bill 100. *CLPA* repeals and replaces the *Proceedings Against the Crown Act*. On May 29, 2019, Bill 100 received Royal Assent, and came into force on July 1, 2019.

[22] *Marchi* at para 36.
[23] *Brown v. British Columbia (Minister of Transportation and Highways*), [1994] 2 SCR 420 at para 38.

CLPA was subject to much debate, largely because the provincial government presented mixed messages about the objectives of the statute. Attorney General Caroline Mulroney stated that the intent of the legislation was to codify the existing common law on Crown immunity for policy decisions. Attorney General Mulroney explained the following to the Legislature:

> Principles of law that have been emphasized over and over again by the Supreme Court of Canada are now being codified into our law […] The proposal, if adopted, will enshrine the Supreme Court of Canadas decisions that government policy decisions cannot give rise to liability for negligence. This is an established principle of law.[24]

Alternatively, in a press conference, Premier Doug Ford stated the following:

> You even look sideways and some special-interest group out there is trying to sue you, you know […] It's tying up the courts. I want to clear up the courts until real lawsuits can go through, for real people for things that really matter […].[25]

CLPA Seeks to Restore a Measure of Government Immunity

The enactment of the *CLPA* garnered much attention and varying predictions for the future of government liability.[26] The first reaction was concern by commentators at the government's attempt to insulate itself from liability by including controversial provisions, particularly s.11 and s. 17 of the *Act*.[27] Section 11 broadly defines "policy matters" and "regulatory decisions" to create immunity for government agencies and actors. Section 17 introduces a requirement to obtain leave to sue the Crown government

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[24] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 42-1, No 94 (16 April 2019) at 4401 (Hon Caroline Mulroney).
[25] Patrick White, "Lawyers sound alarm over new law that could limit lawsuits against Ontario government," *The Globe and Mail* (15 April 2019), online: <https://www.theglobeandmail.com/canada/article-lawyers-sound-alarm-over-new-law-that-could-limit-lawsuits-against/>.
[26] Sakina Babwani & Ranjan Agarwal, "Negligence Claims Aimed at Core Govenrment Policy Decisions are Insulated from Liability in Tort, Rules Ontario Court of Appeal, *Bennett Jones* (8 June 2021), online: < https://www.bennettjones.com/Blogs-Section/Negligence-Claims-Aimed-at-Core-Government-Policy-Decisions-are-Insulated-from-Liability-in-Tort>.
[27] *Ibid*.

for bad faith, and removes a plaintiff's ability to compel evidence from the Crown as part of the motion for leave.

Where *PACA* was silent on the policy/operational dichotomy, ss. 11(4) and (5) of *CLPA* provides Crown immunity for decisions made in good faith with respect to "policy matters". Where the common law has recognized Crown immunity for policy decisions, *CLPA* provides a broad definition of what constitutes a "policy matter" in s. 11(5).

Subsections 11(5)(a) and (b) align with the long-established common law concept of "core policy" decisions (i.e. creation and funding of government programs).[28] However, subsection 11(5)(c), at least on a literal interpretation of the provision, appears to encroach directly upon matters that would been considered squarely within the category of an operational decision at common law.[29]

The **legislation provides immunity for "the manner in which a program…is carried out"** which by definition, involves the implementation of policy.[30] On its face, this section by all accounts appears to be an attempt by the legislators to significantly expand Crown immunity.[31]

These provisions of the *CLPA* read as follows:

> **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.

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[28] Erika Chamberlain, *Francis v Ontario: Can the Crown Restore its own Immunity?* The Canadian Bar Review: Vol. 99 No. 3 (2021) ["Chamberlain"] at p. 651.
[29] *Ibid.*
[30] *Ibid*.
[31] *Ibid*.

Same, policy matters

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

(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; [emphasis added].[32]

Thus far, however, the courts' have mostly declined to give effect to this expanded scope of immunity, underlining and in some respects ratcheting up the ongoing tension between the legislators and the courts over the scope of government liability and immunity.

Early Interpretation of *CLPA* by Canadian Courts

Since the enactment of the *CLPA,* there have been a handful of decisions interpreting and applying ss. 11(4) and (5). Thus far, the courts have mostly avoided giving effect to the expanded Crown immunity called for in s. 11(5)(c) of *CLPA*. Indeed, the courts have interpreted this section in creative ways to avoid the expansion of Crown immunity, as demonstrated in the cases outlined below.

[32] *CLPA* s. 11(5)(c).

Poorkid Investments Inc. v. HMTQ

In *Poorkid Investments Inc. v. HMTQ*[33], the Ontario Superior Court declared that the mandatory stay arising from section 17 of *CLPA* was of no force or effect due to its inconsistency with section 96 of the *Constitution Act*, 1867. While the relative merits of the constitutionality aspect is beyond the scope of this paper, *Poorkid* demonstrates just how far the tension between the legislators and judiciary has progressed in a short period of time, using the *CLPA* as its battlefield.

In *Poorkid*, the applicants were named representative plaintiffs in a class action arising from Caledonia's road and rail blockade by protestors in 2020, resulting in significant economic loss for businesses and residents.

By virtue of s. 17 of the *CLPA*, the claim was automatically stayed. Section 17 of the *CLPA* provides that a proceeding brought against the Crown that includes claims for misfeasance in public office or those based on bad faith may only proceed with leave of the court and, unless and until leave is granted, is deemed to be stayed.[34] Leave will only be granted if the Court is satisfied that (1) the proceeding is being brought in good faith; and (2) there is a reasonable possibility that the claim described in subsection (1) would be resolved in the claimant's favour.[35]

The applicants challenged s. 17 of the *CLPA*, and argued that it imposed procedural and economic barriers that infringed s. 96 of the *Constitution Act* and offended the rule of law. Pursuant to s. 17, the Crown is relieved from disclosing internal communications and relevant evidence on the motion for leave. It was argued that these provisions deprived prospective plaintiffs of any opportunity for meaningful discovery, which in turn meant they could only speculate about bad faith, one of the main elements

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[33] *Poorkid Investments Inc. v. HMTQ*, 2022 ONSC 883 ["*Poorkid*"].

[34] *CLPA* s. 17.

[35] *Ibid.*

of the tort of misfeasance in public office.[36] Without disclosure, a complainant would likely be unable to meet the legislation's "reasonable possibility" of success test. Additionally, it was argued that s. 17 would be economically onerous on claimants by effectively requiring them to present their entire case at the leave stage.

The Court found that the provisions of the *CLPA* relieving the Crown from being subject to any documentary or oral discovery were inconsistent with s. 96 of the *Constitution*.[37] These provisions are an integral part of the screening mechanism in s. 17, and deprives claimants with meritorious claims from having an opportunity to access sufficient and necessary evidence to satisfy the court that a claim may succeed. [38] The Court accordingly ordered that s. 17 of the *CLPA* was of no force or effect, and lifted the stay of proceedings.

Leroux v. Ontario

The claim in *Leroux v. Ontario*[39] concerned a proposed class action against the provincial government for negligence in the administration of social assistance programs for persons living with developmental disabilities. Section 11(4) of *CLPA* bars a claim arising from good faith "policy decisions" of the Crown, but the Crown may still be liable for "operational decisions".

On certification, the motion judge held that the plaintiff's claim satisfied the low threshold required by s. 4(1)(a) of the *Class Proceedings Act* because the claims were grounded in "operational negligence", and therefore did not attract Crown immunity. The government appealed the decision to the Divisional Court.

The Divisional Court reversed the motion judge's decision, and found that, "…devising, implementing and administering a benefits program is a core policy

[36] *Poorkid.*
[37] *Ibid*.
[38] *Ibid* at para 123.
[39] *Leroux v. Ontario*, 2021 ONSC 2269.

decision of [the] government".[40] As such, the Divisional Court dismissed the plaintiffs' action based on government immunity for "core policy" decisions. The Divisional Court did not, however, comment on the apparent expansion of Crown immunity pursuant to s. 11 of the *CLPA*.

Seelster Farms v. Ontario

Seelster Farms v. Ontario[41] was one of the first non-class action decisions to consider the application of the *CLPA*. In *Seelster Farms*, the plaintiffs were horse breeders that supplied horses to race tracks in Ontario.[42] The action arose as a result of a decision by the Ontario Lottery and Gaming Corporation ("OLG") to terminate the Slots at the Racetrack Program ("SARP"), which was introduced to incentivize racetracks to allow slot machines on their premises to increase revenue.[43] The revenue from the slot machines were then shared with the government. Justice Emery considered whether the plaintiff's claim against the provincial government was barred pursuant to *CLPA*.[44]

Justice Emery found that the *CLPA* has dramatically altered the law with respect to the plaintiff's right to maintain certain causes of action against the Crown. He determined that the *CLPA* does not merely codify the existing common law on the application of the policy immunity defence, but changes the legal landscape.[45] Justice Emery noted that the expanded scope of the term "policy matter" under s. 11(5)(c) of the *CLPA* blurs, if not eliminates, the distinction between policy decisions and decisions that are operational in nature.[46]

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[40] *Ibid* at para 131.
[41] *Seelster Farms v. Ontario*, 2020 ONSC 4013.
[42] *Ibid* at paras 4- 7.
[43] *Ibid*.
[44] *Ibid*.
[45] *Ibid* at para 34 – 39.
[46] *Ibid.*

The plaintiffs' claims against the government in breach of contract were successful on summary judgment. However, as a result of his interpretation of the *CLPA*, Justice Emery dismissed the plaintiffs' claims in negligence.

To date, *Seelster Farms* is the only decision to give effect to the plain language of section 11(5) of *CLPA*, and the expanded Crown immunity therein. However, the bold statements made by Justice Emery in *Seelster Farms* must be read in the context of the Court of Appeal's decision in *Francis v. Ontario*, discussed below, and likely no longer stand after that decision.

Francis v. Ontario

The decision in *Francis v. Ontario* was the first review of section 11 of the *CLPA* by the Ontario Court of Appeal. *Francis* also arose in the context of a class action proceeding. The representative plaintiff, who was a seriously mentally ill inmate in an Ontario prison, was placed in administrative segregation twice for refusing to take his mental health medication.

In 2017, the representative plaintiff commenced a class action seeking declarations that the class members' rights under the *Charter* had been infringed by Ontario's system of solitary confinement, and that Ontario was liable in negligence. On summary judgment, the motion judge found that (i) Ontario had breached its duty of care to the plaintiffs in the manner of implementation of the program of administrative segregation; and (2) Ontario's system of administrative segregation breached the plaintiffs' *Charter* rights. The government appealed the motion judge's decision.

On appeal, the Court of Appeal upheld the motion judge's decision and dismissed the appeal. With respect to the issue of Ontario's negligence, Ontario argued that section 11 of the *CLPA* barred the claim against it in negligence for the manner of implementation of its program of administrative segregation.

The Court of Appeal determined that notwithstanding the plain language of section 11(5)(c) of the *CLPA*, section 11 of the *CLPA* merely codified the existing common law distinction between policy and operational decisions for the purposes of Crown immunity. Having decided that section 11(5)(c) was, *inter alia*, inconsistent with the object of the legislation, the Court refused to apply it, and instead analyzed the policy/operational dichotomy based on previous common law principles. As Ontario's decisions with respect to the implementation of its program of administrative segregation would be considered operational at common law, they did not attract immunity, and so the claim in negligence was not barred.

Commentary on Francis

The authors respectfully submit that the Court of Appeal's interpretation of section 11(5)(c) of the *CLPA* in *Francis* represents significant judicial overreach into the legislative domain, and is likely incorrect at law.

It is very clear from a plain reading of section 11(5) what it means, and what it purports to do. It statutorily defines certain specific matters as "policy matters" for the purposes of whether liability may attach to government decisions relating to those matters. Some of the specified matters in section 11(5), most notably those outlined in section 11(5)(c), are matters that at common law would likely have been considered operational in nature.

In support of a literal interpretation of section 11(4) and (5), and section 11(5)(c) in particular, Ontario argued that the intention of section 11(5)(c) was to clarify what constitutes a policy matter, as opposed to an operational matter[47]. In response to this submission, the Court stated "[w]ith respect, the above language does not clarify the policy/operational dichotomy; it eliminates it."[48]

[47] *Francis* at para 116.
[48] *Ibid* at para 118.

The Court went on to conclude that it could not have been the legislature's intention to eliminate the distinction developed at common law between policy decisions, which are immune from tort liability, and operational decisions, which are not. The Court offered three arguments in support of this conclusion.

First, the Court relied on the presumption that the common law remains unchanged by legislation unless there is a clear and unequivocal expression of legislative intent to change it, which the Court found to be lacking in section 11 of the *CLPA*. Second, the Court found that accepting a literal interpretation of section 11(5)(c) would offend the purpose of statutes limiting Crown immunity. Finally, the Court relied on Hansard evidence of the comments of the Attorney General at the time the *CLPA* was introduced as an indicator of the legislative intent behind section 11(5)(c) of the *CLPA*.[49]

In the authors' respectful view, the Court's starting premise, and each of the arguments offered in support of their conclusion, appear to be flawed and perhaps purpose-driven. With respect to the starting premise that the language of section 11(5)(c), taken on its face, would eliminate the distinction between policy and operational decisions and render all decisions of government officials immune from tort liability, it is submitted that this is a significant and important overstatement.

Certainly, section 11(5)(c) significantly expands the scope of what constitutes a policy decision that is immune from liability into the realm of decisions that would have been considered operational decisions at common law. It is clear that in doing so, the *CLPA* purposely expands the ambit of tort immunity for government decisions.

However, taking section 11(5)(c) on its face, the Venn Diagram of policy and operational decisions under it is not a perfect circle, nor would this section serve to eliminate government liability in negligence. First, it should be noted that not all claims for government negligence involve "decisions". Accidental breaches of duty by

[49] *Ibid* at paras 127-129.

government actors (e.g., a prison guard who forgets to remove an inmate from administrative segregation) would likely not be immune from liability in negligence under section 11(5)(c).

Second, section 11(5)(c) is concerned with decisions as to the *manner in which* a program, project or other initiative is carried out. So while decisions as to implementation of a program at the program-wide level will be immune from liability, not all decisions made by Crown servants at an individual level would be.

For example, the decision as to the amount of time prisoners can be kept in administrative segregation generally, and the development of guidelines for determining how long to keep a given inmate in administrative segregation, would be immune from liability. However, the decision of an individual prison guard or administrator to keep a particular inmate in administrative segregation for longer than the program guidelines permit likely would not be.

In short, the Court's assessment that section 11(5)(c) eliminates the policy/operational dichotomy is an overstatement of the likely intent and effect of the legislation. Instead, it is argued that section 11(5)(c) represents a statutory expansion of what constitutes a "policy matter" to now encompass some, but not all, of what had previously been considered operational matters at common law.

With respect to the Court's first argument against a literal interpretation of section 11(5)(c), that the common law remains unchanged absent a clear and unequivocal expression of legislative intent, this is of course a well-established principle of statutory interpretation. However, section 11(5)(c) explicitly refers to matters that are plainly operational in nature, and specifically states that they are to be considered "policy matters" for the purposes of tort immunity.

The Court states that had the legislature wanted to make it unequivocal, they could have added the words "including operational decisions" to the wording of section

11(5)(c). However, the subject matter of section 11(5)(c) is already plainly operational in nature. It literally and explicitly speaks to the manner in which an initiative is "carried out". Adding the words "including operational decisions" to the language of section 11(5)(c) would be akin to adding the word "round" before a reference to a circle: it would just be redundant, and wouldn't make the reference to a circle (or operational decisions) any clearer or more unequivocal.

In short, although legislation needs to be clear and unequivocal to override the common law, section 11(5)(c) is, on its face, sufficiently clear and unequivocal. It is not at all evident why the precise words from the common law would need to be used to override it where, as here, the intention to override is clear based on the plain language used.

With respect to the Court's second argument, that a literal interpretation of section 11(5)(c) would offend the purpose of statutes limiting Crown immunity, the Court relies on the dictum of Cory J. in *Just v. British Columbia*[50], in which he stated:

> The early governmental immunity from tortious liability became intolerable. This led to the enactment of legislation which in general imposed liability on the Crown for its acts as though it were a person. However, the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions. On the other hand, complete Crown immunity should not be restored by having every government decision designated as one of "policy".

The Court cites this statement as authority for the proposition that legislation imposing liability on the Crown must not treat every government decision as a policy decision that is immune from tort liability.

However, we would note that *CLPA* is not a statute that purports to expand the scope of government liability in tort. Rather, it appears to intend to narrow the scope of

[50] [1989] 2 SCR 1228.

that liability as compared to its predecessor legislation, the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.2, as evidenced, for example, by section 11(5)(c) itself[51]. In that respect, it is distinguishable from the legislation Cory J. referred to in *Just*. In short, while the object of the *PACA* and early Crown liability legislation was to expand government liability, the object of the *CLPA* appears to be aimed at controlling and restricting Crown liability[52].

More importantly, again, section 11(5)(c) does not purport to eliminate Crown liability for all government decisions, or to designate all such decisions as "policy" decisions. As discussed above, while section 11(5)(c) certainly expands the ambit of what constitutes a "policy" decision, it does not convert every decision a government actor can make to a "policy" decision.

It is here that the Court's overstatement of the effect of section 11(5)(c) becomes critical (and detrimental) to their analysis. The Court states that section 11(5)(c) cannot be taken to mean what it says on its face because this would eliminate the distinction between policy and operational decisions (and as a result, Crown liability), whereas the objective of the *CLPA* is to expand Crown liability, so there would be a fundamental mismatch between the objective of the Act, and its effect.

However, as outlined above, section 11(5)(c) does not eliminate Crown liability, but rather expands the scope of Crown immunity, which seems to have been the true objective of the legislation. Viewed this way, the plain meaning of section 11(5)(c) and the objective of the *CLPA* actually match quite well.

Finally, and most concerning, the Court's third argument relies heavily on Hansard records of the comments made by the Attorney General upon the introduction

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[51] See Chamberlain, *supra*.

[52] See, e.g., sections 11(5)(c) and 17 of the *CLPA*, and the comments of Doug Ford referred to above (and as cited in Chamberlain, *supra,* at pg. 649, who provides a helpful commentary on the Court's approach in *Francis*).

of the *CLPA*, to the effect that the *CLPA* simply "codifies existing case law that […] good faith policy decisions by governments are not judiciable", as support for the conclusion that it was not the legislature's intention with section 11(5)(c) to alter the common law distinction between policy and operational matters. Having made that assessment of the objective of the legislation, the Court proceeded with its analysis ignoring and effectively reading out of existence the specific text of section 11(5)(c) of the legislation.

Canadian courts have long cautioned against overreliance on Hansard evidence as an indicator of legislative intent. Most recently, in *R. v. Khill*[53], the Supreme Court of Canada stated:

> Extrinsic evidence is not more important than the legislative text. Extrinsic aids are just that, and their role should not be overstated. This Court has repeatedly warned against placing too much weight on Hansard evidence […] **This is even more important where general statements from Parliamentary debates are relied on to override specific text in legislation.**[54] [emphasis added]

In *Francis*, the Court of Appeal appears to have done precisely that, in relying on Hansard evidence of the Attorney General's statements to override the clear language of section 11(5)(c) of the *CLPA*. The Supreme Court's decision in *Khill* was released after the Court of Appeal's decision in *Francis*, and, in the authors' view, calls into question the validity of the Court of Appeal's decision and approach.

It is well established in our courts that the words of a statute must be interpreted in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the legislature[55]. Statutory interpretation cannot be founded on the wording of legislation alone.

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[53] 2021 SCC 37.
[54] *Ibid* at para 111.
[55] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27.

However, the plain language of the legislation cannot be ignored altogether in service of assumptions about legislative intent. Too great a degree of purposive interpretation creates the risk that the courts' own opinions as to the appropriate effect of legislation may override the legislature's actual intent, and undermine the legislature's ability and freedom to change the law as it sees fit.

The authors do not wish to be taken to be advocating in support of the expansion of tort immunity that was clearly intended with section 11(5)(c) of the *CLPA*. We share the opinion obviously held by the Court of Appeal that this expansion of immunity from liability is concerning and likely problematic.

However, in our view, it was not open to the Court in *Francis* to effectively read down section 11(5)(c) of the *CLPA* under the guise of statutory interpretation. The Court would have had to ground a refusal to give effect to this statutory provision in constitutional principles, as was so carefully done in *Poorkid Investments Inc. v. HMTQ*[56]. Otherwise, the Court was obligated to give effect to a statute properly and validly passed by the legislature. If there is harm done by that legislation (or other government policies), as the Supreme Court of Canada said in *Nelson (City) v. Marchi*, "Accountability for that harm is found in the ballot box, not the courts."[57]

Regardless of the authors' view of the approach and outcome in *Francis*, as long as it remains the law in Ontario, the policy and operational dichotomy remains an important distinction at common law, whenever government liability is considered.

***Nelson (City) v. Marchi* – "Policy" vs. "Operational" at Common Law**

Subsequent to the release of the Court of Appeal's decision in *Francis*, the Supreme Court of Canada released its decision in *Nelson (City) v. Marchi*.[58] In *Marchi*, the Supreme

[56] 2022 ONSC 883; see also Chamberlain, *supra*.
[57] *Marchi, supra* at para 1.
[58] *Marchi, supra*.

Court developed a framework to assist courts in distinguishing between "core policy" and "operational" decisions. The framework from *Marchi* arguably expands the scope of "operational decisions" at common law. Importantly, *Marchi* arose from British Columbia, and so did not involve the application of Ontario's *CLPA*.

The plaintiff, Ms. Marchi, parked her vehicle in the downtown core of the City of Nelson, in an angled parking spot during a heavy snowfall. The City had recently ploughed the parking lot, and in doing so, created a snowbank along the top of the parking stalls, creating a barrier between the parking lot and the sidewalk. The City did not clear a path for drivers parked in the parking lot to access the sidewalk without crossing the snowbank. Ms. Marchi was walking across the snowbank to reach the sidewalk when she fell through the snowbank, resulting in serious injuries.[59]

Canadian courts have previously recognized that a "legal duty of care" is owed to private citizens where public authorities or government entities have undertaken to maintain or repair public roads or sideways, to execute this maintenance in a non-negligent manner.[60]

The City of Nelson argued that even if it owed Ms. Marchi a duty of care, the duty should be negated because its approach to snow clearing arose from a "core policy decision", which is immune from a finding of negligence.[61]

The policy immunity defence reflects the separation of powers between the different branches of government. As mentioned previously, it allows elected public bodies to balance competing social, economic, political and other factors when creating policy, without fear of scrutiny by the Canadian court system.[62] However, "operational"

[59] *Ibid* at para 4 – 10.
[60] *Ibid* at para 19.
[61] *Ibid* at para 68.
[62] *Ibid* at para 85.

decisions, or decisions relating to the implementation of policy, do not attract the protection of immunity from claims in negligence by private citizens.

The City of Nelson heavily relied on written policies and unwritten practices to establish that snow removal fell within the scope of a "core policy" decision.[63] The Supreme Court rejected this argument, and found that the City's decision to remove snow from the parking stalls in the subject parking lot (and thereby inviting members to park in those stalls) without ensuring access to the sidewalk, was not a "core policy" decision. Instead, the Supreme Court found that this was an "operational" decision with respect to the snow removal process.

The Supreme Court summarized the law with respect to the policy immunity defence as follows:

- Core policy decisions are decisions as to a course or principle of action **that are based on public policy considerations** such as economic, social and political factors, and which are neither irrational, nor taken in bad faith. They are a "narrow subset of discretionary decisions". In other words, the mere presence of a choice is not a marker of a core policy decision.[64]

- Core policy decisions are immune from liability in negligence because the legislative and executive branches of government have core institutional roles and competencies, which must be protected from interference by the judiciary. A court must consider the extent to which a government decision was rooted in public policy considerations, and the extent to which these considerations influence the rational for core policy immunity.[65]

Most importantly, the Supreme Court articulated four factors to consider when determining if a decision is a "core policy decision":

1. the level and responsibilities of the decision maker;
2. the process by which the decision was made;
3. the nature and extent of budgetary considerations; and
4. the extent to which the declaration was based on objective criteria.[66]

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[63] *Ibid* at para 59.
[64] *Ibid* at para 51.
[65] *Ibid* at para 67.
[66] *Ibid* at paras 62 – 64.

The Supreme Court of Canada made it clear that the application of the policy immunity defence will only be successful if the decisions made by local governments are core policy decisions. In other words, only decisions which raise the risk of a court impeding or second-guessing decisions of the executive or legislative branches of government by substituting its own opinion on matters involving the balancing of social, economic, and political factors.

Application of the *CLPA* to the Facts of *Marchi*

Although not arising out of Ontario, we note that if the facts of *Marchi* were subject to the plain language of the *CLPA*, the City's decisions respecting plowing and removal of snow and snowbanks would likely fall within the expanded definition of a core policy decision pursuant to s. 11(5)(c). As stated above, s. 11(5)(c) of the *CLPA* expands the definition of a "policy" matter to include matters that that would likely have been considered as "operational" in nature at common law.

The City of Nelson, since 2000, relied on a written policy document titled the "Streets and Sidewalks Snow Clearing and Removal" (the "Policy"). The Policy stated, "[s]now removal, sanding and plowing of City streets shall be carried out on a priority schedule to best serve the public and accommodate emergency equipment within budget guidelines". The Policy also set out priority routes for plowing, sanding and clearing snow, which included emergency routes and the downtown core[67].

Pursuant to s. 11(4) of the *CLPA*, no cause of action arises against the Crown or an officer, employee or agent of the Crown in respect of any negligence respecting a policy matter. Section 11(5)(c) then goes on to state that for the purposes of subsection (4), a

[67] *Ibid* at paras 8-9.

policy matter includes "the manner in which a program, project or other initiative is carried out".

The City had developed a policy of winter maintenance of the streets within its jurisdiction. The City's decision not to clear the snow banks between parking stalls and sidewalks would arguably constitute a decision as to the "manner in which a program, project or other initiative [ie. the winter maintenance program] is carried out," and therefore constitute a "policy" decision under s. 11(5)(c) of the *CLPA*. Accordingly, had *Marchi* been subject to the plain language of the *CLPA*, it likely would have been barred.

Given that the circumstances of *Marchi* are not uncommon in Canada in the winter, this outcome may take on significance if in fact s. 11(5)(c) of the *CLPA* somehow survives the Court of Appeal's findings in *Francis*.

Francis* meets the *CLPA

As discussed above, the Court of Appeal in *Francis* did not apply the plain language of s. 11(5)(c) of the *CLPA* to the facts of the case to determine whether the impugned decision was a policy or operational decision.

It is worth noting here that had the Court of Appeal run the facts of *Francis* against the plain language definition of a "policy matter" pursuant to s. 11(5)(c) of *CLPA*, the analysis would likely have resulted in the conclusion that the impugned decisions were "policy", rather than "operational" decisions, and that the plaintiffs' claims in negligence were therefore barred.

The use of administrative segregation in Ontario's correctional facilities is authorized by *General Regulation 778* and promulgated under the *Ministry of Correctional Services Act*.[68] Regulation 778 grants the Superintendent of a correctional facility authority to place an inmate in administrative segregation in the following circumstances:

[68] *Francis* at para 4.

(a) in the opinion of the Superintendent, the inmate is in need of protection;
(b) in the opinion of the Superintendent, the inmate must be segregated to protect the security of the institution or the safety of other inmates;
(c) the inmate is alleged to have committed a misconduct of a serious nature; or
(d) the inmate requested to be placed in segregation.[69]

The policy for administrative segregation arguably falls within the expanded definition of a "policy matter" pursuant to s. 11(5) of *CLPA*. The manner in which administrative segregation program was carried out was in accordance with existing policies or management procedures under Regulation 778. Therefore, the "program" includes the legislative scheme authorizing the use of administrative segregation. Pursuant to Regulation 778, decisions by a Superintendent of a correctional facility are the means through which the policy is carried out, and are therefore policy decisions as defined in section 11(5) of the *CLPA*.

In *Francis,* the Court of Appeal effectively read out s. 11(5)(c) of *CLPA*, and therefore did not proceed to an analysis of the plain language of s. 11(5)(c) of *CLPA*. Had the Court completed this analysis, it would likely have come to the conclusion that the Superintendent's decision(s) were "policy matters".

***Municipal Act* as Another Battlefield**

The tension between the legislature and the courts is ongoing. In a recent Court of Appeal decision, we see this tension expand to government liability at the municipal level. In that case, rather than the *CLPA*, the *City of Toronto Act* (which contains very similar provisions to those found in the *Municipal Act*) was the battlefield to hash out this tension.

Like the provisions of the *Municipal Act* discussed above, section 42(2) of the *City of Toronto Act ("COTA")* provides that the City is liable for default in its obligation to

[69] *Ibid.*

maintain City roads. Section 42(6) limits that liability, however, by barring claims under s. 42(2) unless the claimant provides notice of the potential claim to the City within 10 days. Section 42(8) of the *COTA* further provides for relief against this 10-day notice period, if the claimant establishes a reasonable excuse for failing to provide notice within 10 days, and that the City is not prejudiced in its defence by the lack of notice during this time period.

In *Graham v. Toronto (City)*[70] the plaintiff tripped over a pothole in a pedestrian sidewalk in Toronto.[71] The plaintiff and her husband sued the City of Toronto, but the City moved for summary judgment dismissing the action because the plaintiff failed to provide notice of the potential claim to the City within 10 days.[72]

The motion judge dismissed the City's motion, holding that the failure to provide the 10-day notice did not bar the plaintiff's claim because the plaintiff met the two-part test for relief against the notice period, pursuant to s. 42(8) of the *Act*: that there was a reasonable excuse for the delay in providing notice; and that the City had not been prejudiced in its defence by the delay. The City of Toronto appealed on two grounds, one of which was whether the motion judge erred in applying the two-part requirements of s. 42(8) of the *Act.*

The Court of Appeal dismissed the appeal, finding that the motion judge had not erred in applying the two requirements of s. 48(2) of the *Act.* To determine if a plaintiff has demonstrated a **reasonable excuse** for failing to provide the required notice, a court must determine whether, in all of the circumstances, it was reasonable for the plaintiff not to give notice until she did. In this case, the plaintiff's excuse, which the motion judge had found to be reasonable, was that **she did not initially understand the extent of her injuries, and was unaware of the 10-day notice requirement.** The Court of Appeal found that the motion judge's reasons disclosed that she considered all the circumstances, did

[70] *Graham v. Toronto (City*), 2022 ONCA 149 ["*Graham"*].
[71] *Ibid* at para 1.
[72] *Ibid* at para 2.

not fail to appreciate the relevant evidence, did not misapprehend the evidence, or draw any unreasonable inferences. As a result, there was no basis for appellate intervention in the finding that the plaintiff had established a reasonable excuse pursuant to s. 42(8).[73]

With respect to the second requirement under s. 42(8), the City argued that it had been prejudiced, as it had repaired the pothole the plaintiff alleged that she tripped on, and did not take measurements of it before it was repaired.[74] The measurements of the pothole would have been highly relevant to the City's defence in proving that it was not liable for keeping the crosswalk in a reasonable state of repair, since at the time of the accident the City had met the minimum regulatory maintenance standards.[75] Having lost the opportunity to take those measurements, the City was effectively deprived of the defence of having met the minimum maintenance standards.

However, the Court identified other evidence about the pothole, and concluded that the delay in giving notice did not prejudice the City's defence, because of the availability of this other evidence.[76] The Court accordingly concluded that the plaintiff satisfied the "no prejudice to the City in its defence" element of s. 42(8).

Graham accordingly represents yet another instance of the courts' reluctance to uphold statutory government immunity provisions. In *Graham*, the City was able to point to specific prejudice caused by the plaintiff's delay in reporting her claim, in the subsequent repair of the pothole the plaintiff alleged she tripped over without recording its depth. Presumably, this was precisely the kind of prejudice the legislature was concerned with when it drafted s. 42 of the *COTA*. The courts' refusal to give effect to this

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[73] *Ibid* at paras 17 – 18.
[74] *Ibid* at para 20.
[75] *Ibid*.
[76] See para 20: (i) the plaintiff took photos of the pothole within the 10-day period; (ii) oral evidence that the pothole was inspected on the date of the accident and had an estimated depth of 6 inches; (iii) the City took photos of the pothole 17 days after the call, in response to a complaint by another person; (iv) the City field investigator that took the photos determined the pothole required repair; (vi) the respondents (plaintiffs) filed an expert report that opined on the dimensions of the pothole, but the City did not cross-examine the expert.

statutory language further demonstrates the tension between the legislature and the courts on the subject of government immunity.

Conclusion

The foregoing review of the history and most recent developments in the legal framework of Crown immunity highlights the present tension between the legislature's desire to expand the scope of government immunity to liability in tort, and courts' reluctance to give effect to that expansion.

Historically, the Crown was immune to civil suits for tort liability. In the 1950's, the federal and provincial governments enacted statutes that permitted tort claims against the Crown in the certain circumstances. In 1963, the *Proceedings Against the Crown Act* was enacted, codifying the scope of Crown liability. The enactment of *PACA* let the "genie out of the bottle," so to speak, with respect to Crown liability.

Fifty-six years later, in 2019, the legislature is trying to stuff the genie back in. It has tried to adjust the balance of Crown liability with the *Crown Liability and Proceedings Act*. As discussed, s. 11 and s. 17 of the *Act* attempted to expand the scope of government immunity in negligence for breaches of private law duties of care.

However, the Ontario courts have mostly refused to give the *CLPA* this interpretation, as demonstrated by *Poorkid* and *Francis*. In *Poorkid*, the Court concluded that s. 17 of *CLPA* is of no force and effect, effectively reading it out of the *Act.* In *Francis*, the Court concluded through an exercise of statutory interpretation that the *CLPA* does not alter the common law distinction between policy and operational decisions, and so did not give effect to the plain wording of s. 11(5)(c). *Francis* and *Poorkid* remain the state of law on the legislative effect of ss. 11 and 17 of *CLPA*, as at the time of writing.

Meanwhile, in the broader Canadian context, the Supreme Court of Canada in *Nelson (City) v. Marchi* has clarified and arguably contracted the ambit of government immunity to claims in negligence, by setting out a new framework for distinguishing

between policy and operational decisions at common law that will likely serve to render more government decisions as "operational" in nature, and therefore not immune from resulting liability.

Presently, it appears that the courts have the advantage in this dispute over the scope of government immunity. To date, the courts have given no effect to the language of ss. 17 and 11(5)(c) of the *Act*, and have even gone so far as to effectively remove them from the *Act* altogether. However, while the courts may have won some early battles, it seems clear that the war is not yet over. We look forward to watching the rest of it play out, and hope that this article provides a useful lens through which to view the ongoing tension between legislators and the courts as it relates to the scope of government liability and immunity.