FRANCIS V ONTARIO: CAN THE CROWN RESTORE ITS OWN IMMUNITY?

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Introduction

In *Francis v Ontario*,[1] the Court of Appeal for Ontario had its first opportunity to weigh in on the Ontario *Crown Liability and Proceedings Act, 2019* [*CLPA*].[2] The Act, which was introduced as part of an omnibus bill, purports to expand the scope of Crown immunity in tort to include not just policy decisions but also "the manner in which a program, project or other initiative is carried out,"[3] which seems to include what are commonly known as "operational" matters. While the plain wording of the statute thus seems to expand Crown immunity, early interpretations avoided that implication in a number of ways.[4] In *Francis*, the Court of Appeal relied heavily on the interpretive presumption that the common law "remains unchanged absent a clear and unequivocal expression of legislative intent,"[5] which has been applied specifically to past attempts to narrow Crown immunity.[6] The court also suggested that, if the legislation were given effect in the way that Ontario suggested, it would be counter

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1 2021 ONCA 197 [*Francis* ONCA], aff'g 2020 ONSC 1644 [*Francis* ONSC].

2 SO 2019, c 7, Sch 17 [*CLPA*].

3 *Ibid*, s 11(5)(c).

4 See Section III, *below*, for more on this topic.

5 *Francis* ONCA, *supra* note 1 at para 127.

6 *Canada (AG) v Thouin*, 2017 SCC 46 [*Thouin*].

to the historical trajectory and fundamental purposes of Crown liability legislation.

Francis involved a class proceeding related to practices of administrative segregation in Ontario's correctional facilities. The class was comprised of two groups that were allegedly harmed by these practices: inmates suffering from serious mental illness and those who were placed in administrative segregation for 15 or more consecutive days (referred to in the decision as "Prolonged Inmates"). They brought claims in negligence and under sections 7 and 12 of the *Charter of Rights and Freedoms*. The Court of Appeal upheld the decision of the motion judge, Justice Perell, to award aggregate *Charter* damages of $30 million, and this portion of the judgment is not discussed further here. I will limit my discussion to the negligence claim, which was based on alleged systemic negligence in the practice of administrative segregation, including over-reliance on administrative segregation for administrative purposes, failing to investigate or report harm, failing to adequately supervise employees, and failing to remove class members from segregation in a timely manner.[7] As discussed below, the court concluded that these were properly categorized as matters of operational negligence which, prior to the *CLPA*, would have been subject to tort liability under the common law. The court went on to find that, if the purpose of the *CLPA* had been to oust this common law liability, the language of the statute was not sufficiently express to do so.

In this comment, I will review the relevant portions of the *CLPA* and their early interpretations in the Superior Court of Justice. With one exception,[8] they have rejected Ontario's arguments that the statute expands Crown immunity to cover matters of a more operational nature, either through their fastidious interpretation of the statute's wording or by employing broader arguments about the rule of law and access to the superior courts. With the Court of Appeal's decision in *Francis*, it is now clear that, whatever the provincial government's intentions may have been, the *CLPA* has not altered the common law when it comes to Crown liability for operational matters. Nevertheless, there are remaining questions about what language would be sufficient to restrict Crown liability, and about whether this is even possible in light of modern conceptions of the rule of law.

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7 *Francis* ONCA, *supra* note 1 at para 100.

8 *Seelster Farms v Ontario*, 2020 ONSC 4013 [*Seelster Farms*]. See also *Bowman v Ontario*, 2020 ONSC 7374 (a certification motion relating to the provincial government's cancellation of the Basic Income Pilot program, where the government's decisions were found to be matters of "core policy" under the traditional common law test).

1. Brief History of Crown Liability in Ontario

The *CLPA* is successor legislation to the *Proceedings Against the Crown Act* [*PACA*],[9] which was enacted in 1963 and has governed provincial Crown liability since. Prior to *PACA*, the provincial Crown enjoyed relative immunity in tort.[10] *PACA* was based on the Uniform Model Act of 1950, prepared by the Commissioners on Uniformity of Legislation in Canada.[11] The most relevant provision for present purposes is section 5(1)(a), which indicated that,

> the Crown is subject to all those liabilities in tort to which, if it were a person of full age and capacity, it would be subject,
>
> (a) in respect of a tort committed by any of its officers or agents.

This section effectively makes the Crown vicariously liable for torts committed by its servants or agents. The individual Crown servant may, but need not, be added as a defendant.[12] Nevertheless, as observed by Hogg, Monahan and Wright in *Liability of the Crown*, the vicarious nature of liability under *PACA* and similar statutes has largely been ignored by the Canadian courts, and the Crown is often treated as though it were directly liable.[13]

The most common tort action against the Crown is negligence, and it is here that the distinction between policy and operational matters arose.[14] As Chief Justice McLachlin wrote in *R v Imperial Tobacco Canada Ltd*,[15] "[t]he question of what constitutes a policy decision that is generally protected from negligence liability is a vexed one, upon which much judicial ink has been spilled." I do not intend to repeat that vexed discussion

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9 RSO 1990, c P.27 [*PACA*].

10 For a more detailed history, see Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011), ch 6 [Hogg, Monahan & Wright, *Liability of the Crown*]. Injured persons could, however, sue the individual Crown servant who caused the harm.

11 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.

12 Hogg, Monahan & Wright, *Liability of the Crown*, *supra* note 10 at 176.

13 *Ibid* at 185–187. See Section V, *below*, for more on the issue of vicarious liability.

14 See *Kamloops (City) v Nielsen*, [1984] 2 SCR 2, 10 DLR (4th) 641, where the distinction entered Canadian law.

15 2011 SCC 42 at para 72 [*Imperial Tobacco*].

here.[16] Suffice it to say that Chief Justice McLachlin defined "'core policy' government decisions protected from suit [as] decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith."[17] The common law immunity of government actors from tort liability for policy decisions reflects the separation of powers, and leaves the executive and legislature to govern without being second-guessed by the courts. However, if government actors are negligent in the implementation or "operationalization" of policy decisions, their actions can be subject to claims by those who are thereby injured. While the line between policy and operational decisions is notoriously difficult to draw,[18] the general concept of the policy/operational dichotomy is a sensible one.

Importantly, the Supreme Court of Canada has been wary of government arguments attempting to expand the category of core policy decisions that are immune from suit. In *Just v British Columbia*,[19] for example, Justice Cory commented on the multiplication of government functions over the twentieth century and the constant interaction of citizens with government agencies. This meant that "early governmental immunity from tortious liability became intolerable."[20] While he acknowledged that "the Crown… must be free to govern and make true policy decisions without becoming subject to tort liability," he cautioned that "complete Crown immunity should not be restored by having every government decision designated as one of 'policy'."[21] Similarly, in *Imperial Tobacco*, Chief Justice McLachlin opined that "Exempting all government actions from liability would result in intolerable outcomes."[22]

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16 Readers new to the subject may wish to consult *Brown v British Columbia (Minister of Transportation and Highways)*, [1994] 1 SCR 420, 112 DLR (4th) 1; *Stovin v Wise*, [1996] UKHL 15, [1996] AC 923; *Wynberg v Ontario* (2006), 82 OR (3d) 561 (CA), 269 DLR (4th) 435; and *Paradis Honey Ltd v Canada*, [2016] 1 FCR 446, 2015 FCA 89.

17 *Imperial Tobacco*, *supra* note 15 at para 90.

18 See e.g. SH Bailey & MJ Bowman, "The Policy/Operational Dichotomy—a Cuckoo in the Nest" (1986) 45:3 Cambridge LJ 430; Paul M Perell, "Negligence Claims Against Public Authorities" (1994) 16 Adv Q 48; Lewis N Klar, "*R. v. Imperial Tobacco Ltd.:* More Restrictions on Public Authority Tort Liability" (2012) 50:1 Alta L Rev 157; Bruce Feldthusen, "Public Authority Immunity from Negligence Liability: Uncertain, Unnecessary, and Unjustified" (2013) 92 Can Bar Rev 211.

19 [1989] 2 SCR 1228, 64 DLR (4th) 689 [*Just*].

20 *Ibid* at 1239.

21 *Ibid.*

22 *Imperial Tobacco*, *supra* note 15 at para 76.

2. The *CLPA*

The *CLPA* was introduced as part of omnibus budget legislation in 2019,[23] and thus was subject to little debate. The provincial government produced mixed messaging about the objectives of the statute. Attorney General Caroline Mulroney indicated that the legislation was meant to codify and clarify the existing common law on Crown immunity for policy decisions. She explained 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 Canada's decision that government policy decisions cannot give rise to liability for negligence. This is an established principle of law.[24]

However, in a press conference, Premier Doug Ford complained,

> You even look sideways and some special-interest groups out there trying to sue you, you know … It's ridiculous. I've never seen anything like it. 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. There's a lot of frivolous nonsense going on right now in the courts.[25]

As discussed below, Mulroney's comments became an important aspect of the Court of Appeal's interpretation of the *CLPA* in *Francis*; the court took the legislative debates into account when concluding that there was no clear legislative intention to expand Crown immunity.

The *CLPA* created several new procedural hurdles for plaintiffs seeking to sue the provincial Crown, including a requirement to obtain leave of a court to bring a claim involving allegations of bad faith.[26] For present purposes, the relevant provisions relate to immunity for so-called policy decisions and, more importantly, what appears to be an attempt to expand the category of such decisions.[27] Sections 11(4) and 11(5) read:

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[23] Bill 100, *An Act to implement Budget measures and to enact, amend and repeal various statutes*, 1st Sess, 42nd Parl, Ontario, 2019.

[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* (16 April 2019), online: <www.theglobeandmail.com> [perma.cc/V8EC-3RLZ] [White, "Lawyers sound alarm"].

[26] *CLPA*, *supra* note 2, s 17.

[27] The legislation also creates immunity for "regulatory decisions," and defines what is meant by those decisions: *Ibid*, ss 11(2) and (6). This immunity, not at issue in *Francis*, could well be the subject of another article.

(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.

(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 …

While the matters in subsections 11(5)(a) and (b) align with the traditional common law concept of "core policy" decisions (i.e., the creation and funding of government programs), the matters in subsection 11(5)(c) seem, based on the literal language of the provision, to fall into the category of operational decisions. Indeed, the legislation purports to provide immunity for "the manner in which a program … is carried out," which seems, by definition, to involve the implementation of policy. On its face, this appears to be an attempt to expand Crown immunity; nevertheless, early interpretations and the Court of Appeal's decision in *Francis* indicate that it will not have this effect.

3. Early Interpretations of the New Legislation

There have been only a handful of decisions interpreting and applying section 11(5) of the *CLPA* to date. With one exception,[28] the decisions have declined to apply the expanded Crown immunity that appears to flow from the language of section 11(5)(c). This has sometimes been done in creative ways. For example, in *Leroux v Ontario*,[29] Justice Belobaba seized on the word "decision" in section 11(4), and concluded it was not plain and obvious that the plaintiffs' allegations of operational negligence could be categorized as "decisions" rather than "say, benign neglect or systemic indifference that cannot be attributed to any one person."[30] The claim in *Leroux* stemmed from alleged negligence in the province's operation of social services for developmentally disabled adults, and involved complaints about indeterminate waitlists, bad databases, and flawed computer programs for prioritizing eligible recipients.[31] As discussed in Section V below, Justice Belobaba also saw merit in the plaintiffs' argument that the *CLPA* was an attempt to reduce access to the superior courts, contrary to section 96 of the *Constitution Act, 1867*.[32]

Despite his conclusions regarding the inapplicability of the *CLPA* to the plaintiffs' operational negligence claims, Justice Belobaba did recognize the potential impact of the *CLPA*. He conceded that, on a plain reading, the Act did much more than simply codify or clarify the

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28 *Seelster Farms, supra* note 8.

29 2020 ONSC 1994 [*Leroux*], rev'd 2021 ONSC 2269 (Div Ct) [*Leroux* (Div Ct)].

30 *Ibid* at para 14.

31 For additional details of the alleged negligence, see *Leroux v Ontario,* 2018 ONSC 6452.

32 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.

existing common law: "Section 11 alone radically alters the common law of Crown immunity as developed over the last six decades. On its face, s. 11 intends to close the courtroom door to any existing or future tort claim against the provincial government, full stop."[33] He opined that this would have a "profound" impact, particularly on class proceedings against the government regarding institutional harms.[34] Given the widespread implications, Justice Belobaba concluded that it would be inappropriate to decide on the full scope of the *CLPA* on a pleadings motion.

This decision was reversed by a majority of the Divisional Court, but not on the basis of the *CLPA*. Rather, the Divisional Court concluded that the plaintiffs' claim was not about operational negligence, but about core policy matters relating to the design and funding of support programs for developmentally disabled adults. It involved decisions about the allocation of a limited pool of resources, and thus was properly categorized as a "policy" decision under traditional common law principles.[35] The Divisional Court accordingly did not address the alleged expansion of Crown immunity under the *CLPA*.[36]

Only one decision, *Seelster Farms v Ontario*,[37] has ruled in favour of Ontario's arguments. The claim in *Seelster Farms* arose from the provincial government's cancellation of the Slots and Racetracks Programs (SARP), which had been designed to improve attendance and generate new shared revenue at Ontario's racetracks. The plaintiffs, breeders of standardbred horses, claimed that they were given insufficient notice of the cancellation to make related adjustments in their five-year breeding cycles, and thereby suffered catastrophic economic loss.[38] They sued for breach of contract,[39] negligence, and negligent misrepresentation. The government brought a motion for summary judgment on the basis that the action was extinguished by the *CLPA*'s expanded immunity provisions for policy decisions. The decision to cancel SARP was triggered by the provincial debt situation, and the government had decided to prioritize health and

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33 *Leroux*, *supra* note 29 at para 27.

34 *Ibid* at para 28. See also Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms: Final Report* (Toronto: July 2019) at 109–110.

35 See *Leroux* (Div Ct), *supra* note 29 at paras 127–128.

36 *Ibid* at para 133.

37 *Seelster Farms*, *supra* note 8.

38 *Ibid* at paras 4–7.

39 *Ibid* at paras 204–207, Emery J (the breach of contract claim was made out, as there was an implied obligation of good faith that required reasonable notice be given prior to termination. Emery J invited submissions as to an appropriate amount of damages).

education rather than diverting funds to or "subsidizing" the horseracing industry.[40]

Justice Emery clearly expressed the view that the *CLPA* had created a "changed legal landscape" and did not "merely codify what the common law has developed as lines between liability and immunity from liability for the Crown in right of Ontario."[41] The plaintiffs' negligence claim was captured by the *CLPA*'s new, broader definition of policy decisions. Justice Emery distinguished *Leroux* because Justice Belobaba had concluded that it did not involve a "decision." Importantly, Justice Emery accepted Ontario's argument that the *CLPA* had effectively removed the distinction between policy and operational matters, and reasoned that "[t]he lines of analysis have been moved by the *CLPA* for the purpose of determining Crown immunity from questioning whether the decision was one of policy or if it was operational in nature, to whether it was made in good faith."[42] Justice Emery's analysis therefore focused on whether the government's decision to cancel SARP was a good faith decision. He found that the decision was made for financial reasons as part of the government's Modernization Plan, and that, while it was abrupt, there was no evidence to support the argument that the cancellation was arbitrary or irrational.[43]

The result in *Seelster Farms* may well have been the same even prior to the *CLPA*. In line with *Just,* cancelling a revenue-sharing program during a time of economic exigency would probably be considered a policy decision that was immune from negligence liability unless made in bad faith.[44] Nevertheless, *Seelster Farms* is the only decision, so far, to accept at face value the expansive language of section 11(5) and the apparent expansion of Crown immunity in the *CLPA*.

4. The Decision in *Francis*

As described above, *Francis* involved a claim about the practices of administrative segregation in Ontario's correctional facilities, specifically as they related to inmates who were seriously mentally ill or who were held in segregation for 15 or more consecutive days. Unlike in the federal

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40 See *ibid* at para 69, Emery J (quoting a speech by then Ontario Finance Minister Dwight Duncan). While the parties disagreed as to whether SARP amounted to a subsidy, Emery J ultimately concluded that this was irrelevant to the claim. See *ibid* at para 139.

41 *Ibid* at para 100.

42 *Ibid* at para 117.

43 *Ibid* at paras 131–132.

44 See also *Cirillo v Ontario*, 2020 ONSC 3983, aff'd 2021 ONCA 353, Morgan J (the plaintiffs' claim regarding inordinate delays in Ontario's bail system related to core policy decisions as defined by traditional common law principles, and so arguments about the potentially expanded definition of policy in the *CLPA* were irrelevant).

class proceedings on administrative segregation,[45] in which the negligence claim was dismissed because it was considered a matter of core policy, the claim in *Francis* made allegations of negligence in the operation of segregation (e.g., failing to supervise employees and institutions, failing to remove inmates in a timely manner, failing to report or investigate harms suffered by class members). Justice Perell and the Court of Appeal accepted that these were decisions of an operational nature.[46] Nevertheless, Ontario argued that these matters fell within the *CLPA*'s new definition of policy decisions, and that any claims based on such decisions were retroactively extinguished by the Act.[47]

The Court of Appeal rejected the province's arguments, relying on two main principles of statutory interpretation: that the words of a statute should be read in their context and "harmoniously with the scheme… [and] object of the Act;" and that legislation does not change the common law absent "a clear and unequivocal expression of legislative intent."[48] On the latter principle, the Court of Appeal found that the province's suggested interpretation would "dramatically change the current state of the [common] law," and that the statutory language did not clearly and unequivocally support that dramatic change.[49]

Interestingly, the case cited by the Court of Appeal for this principle, *Canada (AG) v Thouin*,[50] dealt with legislative provisions that were alleged to *restrict* Crown immunity. Specifically, it asked whether the Quebec *Code of Civil Procedure*, which provided for discovery of a non-party to litigation in some circumstances, also applied to the Crown by virtue of section 27 of the federal *Crown Liability and Proceedings Act*.[51] That section reads, "[e]xcept as otherwise provided by this Act or the regulations, the rules of practice and procedure of the court in which proceedings are taken apply in those proceedings." The Supreme Court of Canada ultimately found that section 27 only applied to proceedings *against* the Crown, and thus did not require the Crown to submit to discovery as a non-party.

In *Thouin*, the Supreme Court took its starting point as section 17 of the *Interpretation Act*,[52] which provides, "No enactment is binding on Her

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45 *Brazeau v Canada (AG)*, 2020 ONCA 184 (the plaintiffs were successful in their claim for damages under sections 7 and 12 of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11).

46 *Francis* ONCA, *supra* note 1 at paras 100–101.

47 *Ibid* at paras 116–117.

48 *Ibid* at para 122.

49 *Ibid* at para 127.

50 *Thouin*, *supra* note 6.

51 RSC 1985, c C-50.

52 RSC 1985, c I-21 [*Interpretation Act*].

Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment."[53] This provision has the effect of preserving the Crown's historical immunity except as expressly altered by legislation. While the Court accepted that section 27 of the *Crown Liability and Proceedings Act* meant that the Crown was subject to the rules of procedure in the relevant provincial superior court when proceedings were taken against it, there was no "clear and unequivocal" language in the *Code of Civil Procedure* that required the Crown to submit to discovery in proceedings taken against some other party.[54] The Court reviewed the statutory context of section 27 (which was included in the part of the Act dealing with the initiation of proceedings against the Crown, defences, and applicable procedures),[55] as well as the parliamentary history of the provision (where the relevant Minister referred to rules of practice "*when the Crown is a party to litigation*").[56] *Thouin* is thus authority for the rule that Crown immunity cannot be abrogated except through clear and unequivocal language.

In contrast, *Francis* dealt with legislation that purported, in several ways, to expand, or *restore*, Crown immunity. It is not entirely obvious that the same rationale applies in this reverse scenario. While the Ontario equivalent[57] to section 17 of the *Interpretation Act* is not formally in play (clearly the *CLPA* is meant to bind the Crown[58]), the requirement for "clear and unequivocal" language was established to *protect* the Crown from losing its historical immunities and prerogatives against unconscious or surreptitious encroachment by legislation of general application.[59] The presumption was not meant to protect other persons from the effects of Crown immunities.[60] Thus, the underlying reasons for the presumption in *Thouin* are not as persuasive with respect to the *CLPA*.

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53 *Thouin*, *supra* note 6 at para 20, citing *Interpretation Act*, *supra* note 52, s 17.

54 *Ibid* at para 25. See also *ibid* at para 27.

55 *Ibid* at para 30.

56 *Ibid* at para 35 (emphasis in original).

57 *Legislation Act, 2006*, SO 2006, c 21, Sch F, s 71 [Ontario *Legislation Act*].

58 *CLPA*, *supra* note 2, s 2(1) (it expressly says as much).

59 See Hogg, Monahan & Wright, *Liability of the Crown*, *supra* note 10 at 399ff. The presumption that statutes are not binding on the Crown applies in situations where the legislation would prejudice the Crown. See especially *Province of Bombay v Municipal Corporation of Bombay* (1946), [1946] UKPC 41, [1947] AC 58 (PC India), which has been approved of by the Supreme Court of Canada (*Alberta Government Telephones v Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 SCR 225, 61 DLR (4th) 193).

60 There is also an exception to the requirement of "clear and unequivocal language" where there is a "necessary implication" that legislation binds the Crown. See *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 88 DLR (4th) 1.

Nevertheless, outside the realm of Crown immunity, there is a broader tenet of statutory interpretation that statutes should not be construed as altering established common law principles unless there is clear and unambiguous language to that effect.[61] It is, therefore, possible for statutes to supplement the common law without over-riding it.[62] In the Court of Appeal's view in *Francis*, the language of the *CLPA* was not sufficiently clear to over-ride the common law distinction between policy and operational decisions. If that were truly the province's intention, the court suggested that more appropriate wording in section 11(5)(c) would have been, "… the manner in which a program, project or other initiative is carried out, including operational decisions regarding [the various decisions set out in that section]."[63] This is not an especially convincing argument by the court. While it is true that the court's suggested wording is less equivocal than the language in the *CLPA*, the province could make a reasonable argument that the phrase, "the manner in which a program, project or other initiative is carried out" is meant to refer to the implementation or "operationalization" of a government decision. It is certainly not a stretch to understand the natural meaning of the words in that way.

Turning to the second issue of statutory interpretation in *Francis*: the Court of Appeal purported to apply the so-called "modern" rule of interpretation, that "[t]he words of an Act are to be read 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 Parliament."[64] In the court's view, the overarching purposes of Crown liability legislation is to *permit* the government to be sued, not to prevent it.[65] Thus, the province's interpretation of section 11(5) of the *CLPA* as expanding the scope of Crown immunity was inconsistent with the overall purposes of the legislation. This argument was explained in more detail by the motion judge, who wrote:

> The purpose of this *Act* and its predecessor was to intrude upon the principle of Crown immunity and to define the limits of that intrusion. Ontario's interpretation of s. 11 would eliminate the intrusions. Given the very expansive definition it promotes for what counts as a policy decision, Ontario's interpretation would extinguish actions against the Crown for negligence, but that would be contrary

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61 Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, ON: LexisNexis, 2014) at 538–539.

62 See e.g. *Gonder v Gonder Estate*, 2010 ONCA 172 (concluded that the Ontario *Trustee Act* complemented but did not replace the Equitable principles relating to trusts, including the inherent jurisdiction of the courts to supervise the administration of trusts).

63 *Francis* ONCA, *supra* note 1 at para 127 (emphasis in original).

64 See *Rizzo & Rizzo Shoes Ltd (Re)*, [1988] 1 SCR 27 at para 21, 154 DLR (4th) 193 [*Rizzo & Rizzo Shoes Ltd*].

65 *Francis* ONCA, *supra* note 1 at para 128.

> to one of the major purposes of the *Proceedings Against the Crown Act* and its replacement statute, the *Crown Liability and Proceedings Act, 2019*. These Acts did not create or establish Crown Immunity, they were designed to restrict it and to bring the Crown more in line with the other defendants in Ontario who are not protected by immunities for their tortious conduct.[66]

This approach to Crown liability legislation was similarly applied by the Ontario Court of Appeal in *Mattick Estate v Ontario (Minister of Health)*,[67] which discussed the 60-day notice period for suits against the Crown contained in section 7(1) of *PACA*. The court concluded that there was no specific form that this notice had to take, as long as it contained sufficient facts to allow the Crown to investigate and prepare its response to the claim. In reaching this conclusion, the court noted that the purpose of *PACA* was to displace the Crown's historical immunity from suit:

> This statutory right to sue the Crown has thus become an accepted part of our legal landscape. Even if the legislated move away from Crown immunity might, in the beginning, have suggested a strict approach to construing the Act, there now seems … to be no reason to depart from normal principles of statutory interpretation.[68]

A potentially interesting response from the province would be to argue that, while *PACA* was meant to displace Crown immunity, the overarching purpose of the *CLPA* is to restore it. Indeed, notwithstanding section 8(1) of the *CLPA*, which affirms Crown liability in tort, the majority of its provisions set barriers to claims against the Crown. Section 11 retroactively extinguishes all claims against the Crown arising from policy, regulatory, and legislative decisions (or failure to make such decisions). Section 17 requires a party alleging bad faith or misfeasance in a public office against the Crown to first obtain leave of a court, and leave is only to be granted where there is a "reasonable possibility" that the claim will "be resolved in the claimant's favour."[69] In that leave application, the Crown is not required to provide any affidavit in response to the claim, or to submit to discovery or inspection of documents. The remainder of the *CLPA* largely preserves the Crown's procedural immunities, such as notice requirements, public interest immunities, and protection from injunctions and specific performance. Further, the Premier stated his own desire to "clear up the courts until real lawsuits can go through, for real people, for things that really matter."[70] Thus, whatever the purpose of the

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66 *Francis* ONSC, *supra* note 1 at para 505.

67 (2001), 52 OR (3d) 221 (CA) at para 14, 195 DLR (4th) 540.

68 *Ibid* at para 14, Goudge J.

69 *CLPA*, *supra* note 2, s 17(7).

70 See White, "Lawyers sound alarm", *supra* note 25.

original *PACA* in 1963, the *CLPA* could well be interpreted as having the objective of retrenching Crown liability.[71]

Finally, the Court of Appeal supported its conclusions regarding the interpretation of the *CLPA* by referring to Attorney General Mulroney's own statements that the statute was meant to "codify" and "clarify" the existing law on Crown immunity for policy decisions. The court found that the province's submissions in *Francis* "would require a conclusion either that the Attorney General, at the time, did not understand the effect of the legislation being introduced, or that she misled the Legislature as to its intention and effect."[72] The Court was not willing to accept either of those conclusions, and so decided that section 11(5)(c) did not alter the Crown's existing liability for operational decisions. In effect, they elevated Hansard above the plain meaning of the statute.[73] While reference to Hansard is acceptable according to the modern rule of statutory interpretation,[74] it sits uneasily when the Minister's words seem contrary to the literal meaning of the provision, and when the statute itself was passed with limited debate.

5. Is it Possible for the Crown to Restore its own Immunity?

The question left hanging by *Francis* and especially by related decisions on the *CLPA* is whether, even if "clear and unequivocal" language were used, the Crown would be able to pull back on the liability to which it subjected itself beginning in the 1960s. In principle, Crown liability legislation, like any other legislation, could be repealed without the obligation to introduce any kind of successor legislation.[75] As the Crown is only liable to the extent that it voluntarily subjects itself to liability, presumably it could decide to return to its prior state of immunity. (To adapt Job's idiom,[76] "What the

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71 See Randal N Graham, *Statutory Interpretation: Theory and Practice* (Toronto: Emond Montgomery, 2001) at 218–226 (critique of the "modern" approach to statutory interpretation and particularly the use of legislative purpose; Graham argues that the courts are unclear as to when the purpose of a statutory provision is even relevant to its interpretation, and further that the purpose can be defined broadly or narrowly to suit the construction that the court prefers).

72 *Francis* ONCA, *supra* note 1 at para 129.

73 For a recent instance of statutory interpretation that instead promoted the plain meaning of the text, see *R v Walsh*, 2021 ONCA 43, Miller JA, dissenting (concluding that "recording" of an intimate video does not include live-streaming).

74 See *Rizzo & Rizzo Shoes*, *supra* note 64 at para 35.

75 See Ontario *Legislation Act*, *supra* note 57, s 7(1) ("Every Act reserves to the Legislature power to repeal or amend it and to revoke or modify any power or advantage that it confers." This is consistent with the principle of Parliamentary sovereignty, in that a legislature cannot bind a future legislature).

76 *New International Version* (Biblica) Job 1:21 ("The Lord gave, and the Lord has taken away").

Crown gave, the Crown may take away.") The broader question, one with possible constitutional implications, is whether we could, in light of nearly 60 years of jurisprudence, return to a position of Crown immunity from liability in tort. This issue has been broached but not firmly decided in some of the lower court decisions interpreting the *CLPA*.

The first principal objection to the government's alleged objectives in the *CLPA* is that Crown liability has become so entrenched in Canada that it would be unconstitutional to roll it back now. This argument was hinted at by Justice Perell in his decision in *Francis:*

> the right to sue the Crown is arguably another principle of fundamental justice as a basic tenets (sic) of the Canadian legal system. If that argument is true, then it may be that Ontario cannot now constitutionally restore and revive an absolute immunity from tort liability.[77]

To date, the Ontario courts have not expressly grounded this argument in a particular constitutional principle, such as the rule of law. Rather, they have pointed to socio-political changes in the modern welfare state that, in their view, would render a return to traditional Crown immunity untenable. For example, the Court of Appeal in *Francis* relied on Justice Cory's statements from the early policy/operational decision of *Just v British Columbia*, quoted earlier:

> 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".[78]

Another popular quotation for those who support this argument is from Chief Justice McLachlin's opinion in *Imperial Tobacco*, which states that "it is important for public authorities to be liable in general for their negligent conduct in light of the pervasive role that they play in all aspects of society. Exempting all government actions from liability would result in intolerable outcomes."[79]

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77 *Francis* (ONSC), *supra* note 1 at para 479, Perell J (stated he did not need to decide that question in his ruling).

78 *Just*, *supra* note 19 at 1239, cited at *Francis* (ONCA), *supra* note 1 at para 123.

79 *Imperial Tobacco*, *supra* note 15.

While these quotations explain the socio-political justifications for Crown liability in negligence, they do not provide an obvious legal justification for their entrenchment. The legal justification would presumably need to emanate from the unwritten constitutional principle of the rule of law, as expounded by the Supreme Court of Canada in cases like the *Reference re Manitoba Language Rights*[80] and the *Reference re Secession of Quebec*.[81] I will not provide a comprehensive discussion of this complex principle here,[82] but will only sketch out the shape such an argument might take with respect to the *CLPA*.

The most relevant aspects of the rule of law seem to be that government actors must be subject to the law and that their actions can be reviewed by an independent judiciary.[83] In Canada, these principles are perhaps most famously illustrated in *Roncarelli v Duplessis*,[84] in which the Premier of Quebec was held liable for exceeding his powers by ordering the revocation of the plaintiff's liquor licence as retribution for his religious activism. From an administrative perspective, this was simply void as an *ultra vires* action based on irrelevant considerations. However, Justice Rand's leading judgment grounded liability more broadly in the rule of law:

> That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.[85]

This passage could be read as suggesting that the rule of law dictates some kind of civil recourse when an individual is harmed by the unlawful acts of a public officer. Indeed, this principle has its origins in the work of English constitutional lawyer AV Dicey, who famously wrote, "every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any

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80 [1985] 1 SCR 721, 26 DLR (4th) 767 [*Reference re Manitoba Language Rights*].

81 [1998] 2 SCR 217, 161 DLR (4th) 384 [*Quebec Secession Reference*].

82 For a concise summary, see Peter W Hogg & Cara F Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) 55:3 UTLJ 715.

83 See *ibid* at 718. See also *Reference re Manitoba Language Rights*, *supra* note 80 at 748 ("law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power").

84 [1959] SCR 121, 16 DLR (2d) 689.

85 *Ibid* at 142.

other citizen."[86] In other words, public officers are subject to the same common law as everyone else. This is the theoretical basis of Crown liability legislation in most Commonwealth jurisdictions, which provide that the Crown can be sued as though it were a person of ordinary age and capacity.

But does this mean that legislation like the *CLPA*, which restricts Crown liability, is unconstitutional as being contrary to the rule of law? This seems an unlikely conclusion, whether viewed from a constitutional or a private law perspective. On the constitutional side, the Supreme Court of Canada's decisions in *British Columbia v Imperial Tobacco Ltd*[87] and *British Columbia (AG) v Christie*[88] suggest that the unwritten constitutional principle of the rule of law cannot, on its own, be used to invalidate legislation whose content is perceived as objectionable.[89] In the former case, Justice Major wrote that the rule of law is not "a tool by which to avoid legislative initiatives of which one is not in favour."[90] In addition, the court concluded that legislation conferring special rights on the Crown did not, for that reason, violate the rule of law.[91] Finally, Justice Major explained that the rule of law does not trump other constitutional principles, especially democracy and constitutionalism, which

> very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution … [I]n a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box.[92]

Given that there is no express constitutional provision mandating Crown liability, and that Crown liability was created by an ordinary statute, it does not seem that the unwritten constitutional principle of the rule of law

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86 AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London, UK: Macmillan & Co Ltd, 1959) at 193.

87 2005 SCC 49 [*BC v Imperial Tobacco*].

88 2007 SCC 21.

89 Nevertheless, the rule of law may be an important consideration when applying other constitutional provisions, like section 96 of the *Constitution Act, 1867*, which is discussed below. See also *Toronto (City) v Ontario (AG)*, 2021 SCC 34 (a more recent decision where the majority affirmed that unwritten constitutional principles—in that case, democracy—cannot be used as independent bases on which to invalidate legislation that is otherwise constitutional).

90 *BC v Imperial Tobacco*, *supra* note 87 at para 67.

91 *Ibid* at paras 73–76. See especially *Authorson v Canada (AG)*, 2003 SCC 39 (the impugned legislation extinguished any claims by disabled veterans for interest on their pensions accrued before 1990).

92 *BC v Imperial Tobacco, supra* note 87 at para 66.

would be sufficient to invalidate legislation like the *CLPA*, even if it had the unambiguous effect of extinguishing liability for operational negligence.

The same result flows from a more historical or private law-oriented perspective. When Dicey wrote of equality before the law, he was specifically referring to the liability of individual officers, not of the Crown itself. This individual liability pre-dated *PACA* and has not been extinguished.[93] Even now, the text of the Crown liability legislation in most provinces provides for a form of vicarious liability for the acts of Crown officers and agents, not for the direct liability of the Crown.[94] As explained above,[95] this aspect of the legislation is glossed over by most courts, and it is common practice to sue the Crown without naming the specific Crown agent who committed the tortious acts. Nevertheless, nothing in *PACA* or the *CLPA* expressly immunizes individual Crown agents, and there is nothing precluding a plaintiff from suing them directly. On Dicey's terms, whatever the *CLPA* accomplishes in terms of Crown liability, it does not necessarily mean that the officers, themselves, are above the law. Indeed, individual officers are expressly protected by the new procedures dealing with allegations of bad faith in section 17. The Crown could presumably also restore its former practice of "standing behind" Crown servants who committed torts while acting in the scope of their employment (i.e., defending them and paying any damages), so injured plaintiffs would not be without remedies.

Of course, the restoration of the *status quo ante* would leave substantial gaps in liability, particularly in situations where (a) the plaintiff could not identify a specific agent who acted negligently, and/or (b) the negligence was systemic in nature.[96] The latter gap is especially relevant for modern claims against the provincial Crown, a good number of which are class proceedings based on widespread programs or the operation of provincial institutions. In that vein, Justice Perell's decision in *Francis* included a lengthy analysis of systemic negligence in the provincial system of administrative segregation, concluding that: "Systemic negligence claims are about the breakdown of systems, and systems may be designed at a policy level, but they may breakdown at an operational level across the system, which is what occurred in the immediate case."[97] Outside of these gaps, however, to the extent that Dicey's equality principle is considered

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93 See Hogg, Monahan & Wright, *supra* note 10 at 154.

94 The exceptions are Quebec and British Columbia. *Ibid* at 159ff.

95 See text accompanying note 13, *above*.

96 On these gaps, see Ontario Law Reform Commission, *Report on the Liability of the Crown* (Toronto: Ontario Law Reform Commission, 1989) at 17, 25 (that Ontario's then *PACA* be amended to include direct liability of the Crown. Some plaintiffs would otherwise be left uncompensated).

97 *Francis* (ONSC), *supra* note 1 at para 471.

sacrosanct and articulates a particular view of the rule of law, it would not be disturbed by the *CLPA*.

The second constitutional objection to the government's aims in the *CLPA* is that it restricts access to the superior courts. This objection is rooted in section 96 of the *Constitution Act, 1867*, and was put forward by both the plaintiffs and the intervener Canadian Civil Liberties Association in *Leroux*.[98] It is a relatively nuanced argument. The jurisprudence on section 96 was most recently consolidated in *Reference re Code of Civil Procedure (Que), art 35*,[99] which affirmed the two main ways that a law can run afoul of section 96: by usurping the *historical* jurisdiction of the section 96 courts, or by impairing the *core* or *inherent* jurisdiction of those courts.

The "historical jurisdiction" test emanates from the Supreme Court of Canada's decision in *Re Residential Tenancies Act, 1979*.[100] That case examined Ontario's constitutional authority to create a Residential Tenancy Commission with authority to evict tenants and to require landlords and tenants to comply with their statutory obligations; that is, whether a province could legitimately transfer jurisdiction from a superior court to a provincial summary court or tribunal. The Supreme Court created a three-step test for section 96 challenges, the first step being a historical inquiry into "whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation."[101] The court indicated that the purpose of this step was not to "turn[] back the clock" to 1867; nevertheless, "If the historical inquiry leads to the conclusion that the power or jurisdiction is not broadly conformable to jurisdiction formerly exercised by s. 96 courts, that is the end of the matter."[102] In *Leroux*, the provincial government understandably seized on this first stage of the test from *Re Residential Tenancies Act, 1979*: Crown liability could not possibly have been part of the superior courts' core jurisdiction at the time of the *Constitution Act, 1867*, since it was not even created by statute until 1963. It followed that removing Crown liability from the superior courts' consideration through the *CLPA* was not inconsistent with the historical jurisdiction test in *Re Residential Tenancies Act, 1979*.

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98 *Leroux*, *supra* note 29 at paras 17ff.

99 2021 SCC 27 [*Reference re Code of Civil Procedure*].

100 [1981] 1 SCR 714, 123 DLR (3d) 554.

101 *Ibid* at 734. The other steps are an inquiry into the nature of the function (is it "judicial"?); and an examination of the tribunal's function as a whole (i.e., in its institutional context). Neither of those steps is relevant to the current analysis.

102 *Ibid*.

The argument under the "core jurisdiction" test is more complex. This test comes from the 1995 decision in *MacMillan Bloedel Ltd v Simpson*,[103] which challenged provisions of the *Young Offenders Act* that gave youth courts exclusive jurisdiction to try youths for *ex facie* contempt of superior courts.[104] A majority of the Supreme Court found that this violated section 96, as it stripped the superior courts of the ability to enforce their own orders and, thus, to administer justice and uphold the rule of law. These are essential features of the superior courts, which cannot be removed without constitutional amendment.[105] As summarized in *Reference re Code of Civil Procedure (Que)*, "[t]he core jurisdiction test prevents the legislature from transferring to other courts the features that are essential to the role of the superior courts as the centrepiece of the unitary justice system and the primary guardians of the rule of law …"[106] More relevantly to *Leroux*, the core jurisdiction test "also curbs impermissible interference by the legislature with the exercise of the jurisdiction and powers that constitute the very essence of the superior courts in order to prevent these courts from being 'maim[ed]'."[107]

The plaintiffs and interveners in *Leroux* argued that the core jurisdiction of the superior courts also "includes access to these courts; and… provincial legislation that denies access to these courts may constitute an impermissible infringement on that core jurisdiction."[108] This is particularly so when the legislation at issue prevents the superior courts from determining government accountability, which is central to the rule of law. The presiding judge, Justice Belobaba, agreed with this argument and cited Chief Justice McLachlin in *Trial Lawyers Association of British Columbia v British Columbia (AG)*[109] in support:

> The s. 96 judicial function and the rule of law are inextricably intertwined … As access to justice is fundamental to the rule of law, and the rule of law is fostered by the continued existence of the s. 96 courts, it is only natural that s. 96 provide some degree of constitutional protection for access to justice.
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> In the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract

103 [1995] 4 SCR 625, 130 DLR (4th) 385 [*MacMillan Bloedel*].
104 *Young Offenders Act*, RSC 1985, c Y-1, s 27(2).
105 *MacMillan Bloedel*, *supra* note 103 at paras 37–38.
106 *Reference re Code of Civil Procedure*, *supra* note 99 at para 66.
107 *Ibid*, citing *MacMillan Bloedel*, *supra* note 103 at para 37.
108 *Leroux*, *supra* note 29 at para 20.
109 2014 SCC 59 [*Trial Lawyers*].

> or theoretical. *If people cannot challenge government actions in court, individuals cannot hold the state to account—the government will be, or be seen to be, above the law.*[110]

The *Trial Lawyers* case involved British Columbia's levy of court hearing fees against litigants looking to secure trial dates. While the legislation[111] provided an exemption for those on public assistance or who were "otherwise impoverished," it did not provide a means of exempting litigants who were not "impoverished" but for whom the fees would nevertheless pose an undue hardship.[112] Notably, it is normally the plaintiff who has to pay the court hearing fee, and so, in theory, the fees could prevent individuals from challenging legislation or other state actions. This is where the rule of law argument seems strongest: if the government restricts access to the superior courts to only those with substantial means, then less wealthy citizens will lose the ability to hold the state to account. As Chief Justice Dickson wrote in *BCGEU v British Columbia (AG)*,[113] "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice."

There is some appeal to this argument with respect to the *CLPA*. If citizens cannot access the superior courts to sue the government when its negligence causes them harm, then society will lose an important measure of accountability and the government would appear to be above the law. At the same time, there is considerable force to the government's argument that Crown liability cannot be considered an aspect of the courts' core jurisdiction, as it is a creature of statute, enacted long after Confederation. A jurisdiction granted by statute is hard to characterize as being inherent to the courts' essence.

Further, one cannot ignore Justice Rothstein's acerbic dissent in *Trial Lawyers*. He was especially critical of the majority's reliance on unwritten principles of the Constitution, namely, what he viewed as the "nebulous"

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110 *Ibid* at para 40, cited at *Leroux*, *supra* note 29 at para 21 (emphasis added).

111 *Supreme Court Civil Rules*, BC Reg 168/2009, Rule 20-5(1); *Supreme Court Family Rules*, BC Reg 169/2009.

112 *Trial Lawyers*, *supra* note 109 at para 45 (the court did not find that court fees were *per se* unconstitutional, only those that effectively denied access to the superior courts. Cromwell J concurred in the result, but limited his decision to the administrative law grounds that the fees set by the regulations were *ultra vires*).

113 [1988] 2 SCR 214 at 230, 53 DLR (4th) 1. See also *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3, 150 DLR (4th) 577.

and "fundamentally disputed concept" of the rule of law.[114] In his view, the majority's decision inappropriately encroached on the legislature's jurisdiction to set court fees as a matter of policy.[115] He disagreed with the suggestion that the court fees infringed on the core or inherent jurisdiction of the superior courts of British Columbia: they did nothing to limit the "existence of the court as a judicial body or limit the types of powers it may exercise."[116] Further, he seemed to draw a distinction between access to the courts for the purposes of defending a criminal charge or vindicating one's *Charter* rights (both of which are expressly protected in the text of the Constitution)[117] from a more general right to access the superior courts. While he did not say as much, Justice Rothstein's judgment could be read as maintaining an individual's right to challenge state actions, and thus guarding against the arbitrary or abusive exercise of power that is indisputably an aspect of the rule of law.[118] This would be consistent with the enduring right to sue individual Crown servants, noted above, and the ability to sue the Crown when it makes decisions (policy or otherwise) in bad faith, which is preserved in the *CLPA*.

To be clear, I am a relatively ardent supporter of government liability in tort,[119] and I believe that the right to sue the government is an important feature of an accountable democracy. I enthusiastically welcomed the result in *Francis*. Nevertheless, I am struggling to find a firm foundation for the argument that Ontario's purported attempt to reduce the scope of Crown liability in the *CLPA* is somehow constitutionally impermissible. This argument seems to require acceptance that Crown liability legislation has achieved at least quasi-constitutional status, and thus requires something more than just clear language to be retrenched (or expanded). While the Court of Appeal did not go this far in *Francis* (because it did not consider the legislation even clear enough to alter the common law), Justice Perell's lower court decision and Justice Belobaba's decision in *Leroux* suggest that it will only be a matter of time before these constitutional arguments will need to be addressed by an appellate court.

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114 *Trial Lawyers*, *supra* note 109 at para 102. For critique of Rothstein J's dissent, and especially his focus on the Constitutional text as opposed to unwritten principles, see (Alyn) James Johnson, "*Imperial Tobacco* and *Trial Lawyers*: An Unstable and Unsuccessful Retreat" (2019) 57:1 Alta L Rev 29.

115 *Ibid* at para 87.

116 *Ibid* at para 90.

117 *Ibid* at para 101 (see, respectively, sections 11 and 24(1) of the *Charter*, *supra* note 45).

118 See *Reference re Manitoba Language Rights*, *supra* note 80 at 748.

119 See e.g. Erika Chamberlain, "Negligent Investigation: Tort Law as Police Ombudsman" in Andrew Robertson & Tang Hang Wu, eds, *The Goals of Private Law* (London, UK: Hart Publishing, 2009) 283 and Erika Chamberlain, "To Serve and Protect Whom? Proximity in Cases of Police Failure to Protect" (2016) 53:4 Alta L Rev 977.

Conclusion

The Court of Appeal for Ontario's decision in *Francis* is unlikely to be the last word on the scope of the *CLPA*, and there are other provisions (such as immunity for "regulatory decisions" in section 11(2)[120]) that will undoubtedly be challenged. For now, the Ontario courts are not willing to give effect to what appears to be the plain wording of the *CLPA*, and will use any combination of presumptions of statutory interpretation, narrow interpretations of the statute's wording (e.g., what amounts to a "decision"), and constitutional arguments to avoid the conclusion that the *CLPA* restricts Crown liability in tort. The courts seem, for the moment, intent on closely guarding an individual's ability to sue the provincial government in negligence. Since Crown liability has been part of the Canadian legal landscape for nearly 60 years, it might seem retrograde for a modern democracy to now restore the government's immunity from suit.

120 *Reynolds v Alcohol and Gaming (Registrar)*, 2019 ONCA 788 (raised, but not decided).