CITATION: Leroux v. Ontario, 2020 ONSC 1994
COURT FILE NO.: CV-17-573091-CP
DATE: 20200406

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **Marc Leroux as Litigation Guardian of Briana Leroux** / Plaintiff

And

Her Majesty the Queen in Right of the Province of Ontario / Defendant

And

The Canadian Civil Liberties Association / Intervener

Proceeding under the *Class Proceedings Act, 1992*

BEFORE: Justice Edward Belobaba

COUNSEL: *Kirk Baert and Celeste Poltak* for the Plaintiff

Robert Ratcliffe, Zachary Green, D. Brent McPherson, Vanessa Glasser and Ravi Amarnath for the Defendant

Jennifer L. Hunter and Jacqueline Palef for the Intervener

HEARD: March 24, 2020

ADDENDUM TO CERTIFICATION DECISION

[1] In December 2018, I certified this claim against the provincial government as a class action.[1] The class action alleges, among other things, that the defendant was

[1] *Leroux v. Ontario,* 2018 ONSC 6452.

negligent in its operation of a social assistance program for developmentally disabled persons. I concluded that the "operational negligence" claim cleared the "cause of action" hurdle in s. 5(1)(a) of the *Class Proceedings Act* ("CPA").[2] I found that it was not plain and obvious that the allegation of operational negligence was doomed to fail.[3] I noted that the defendant could well prevail on the merits when the common issues were tried, but at the certification stage the relatively low "cause of action" hurdle was easily cleared.[4]

[2] The defendant appealed the certification decision to the Divisional Court.

[3] Before the appeal was heard, the provincial legislature enacted the *Crown Liability and Proceedings Act*[5] ("CLPA"). The CLPA repealed the *Proceedings Against the Crown Act*[6] ("PACA") and arguably reversed almost six decades of case law that would have allowed the operational negligence claim to proceed against the Crown based on the well-developed distinction between a "true policy decision" and its implementation.[7]

[4] The CLPA provides that "no cause of action arises" and "no proceeding may be brought or maintained" against the Crown or its officers, employees or agents for any negligence respecting a "policy matter."[8] "Policy matter" is defined to include not only matters that are typically understood as policy matters (relating to the design or funding of a government program, policy or initiative) but also "the manner in which a program, project or other initiative is carried out."[9] In other words, one can no longer sue the provincial government for the harm caused by the negligent operation of a government program, project or initiative because operational negligence is now a "policy matter". The legislation took effect in July 2019 with retroactive application.[10]

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[2] *Class Proceedings Act,* 1992, S.O. 1992, c. 6.

[3] *Supra,* note 1, at paras. 30 to 37.

[4] *Supra,* note 1, at paras. 24 and 37.

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

[6] *Proceedings Against the Crown Act,* R.S.O. 1990, c. P.27.

[7] *Just v. British Columbia*, [1989] 2 S.C.R. 1228, at paras. 16,18 and 27.

[8] CLPA, *supra,* note 6, ss. 11(4) and (7).

[9] *Ibid.,* ss.11(5)(a), (b) and (c).

[10] *Ibid.,* s. 31(4).

[5] On the appeal to the Divisional Court, the defendant government argued that under the newly enacted CLPA, the certified negligence claim has been retroactively extinguished. The responding plaintiff disagreed and responded with submissions about retroactivity, vested rights, conflicts with the CPA, and statutory interpretation in general. The plaintiff, with the support of the intervener, also challenged the constitutionality of certain provisions of the CLPA based on s. 96 of the *Constitution Act, 1867.*

[6] The Divisional Court panel hearing the appeal decided that it would benefit from the views of the certification judge with respect to the CLPA and s. 96 issues. The Court remitted the matter back to me "for a determination at first instance".

[7] There is no dispute that the appropriate focus on this rehearing is the cause of action requirement in s. 5(1)(a) of the CPA. My task is to answer two questions: (i) Is it plain and obvious that the operational negligence claim is statute-barred by the CLPA and is thus doomed to fail? and (ii) Is it plain and obvious that the s. 96 constitutional challenge is doomed to fail?

Analysis

(1) It is not plain and obvious that the operational negligence claim is statute-barred by the CLPA and doomed to fail

[8] As was done at the appeal, the plaintiff again made submissions to this court about retroactivity, vested rights, conflicts with the CPA and statutory interpretation in general. The defendant's response to each of these points, however, was precise and persuasive.

[9] As the hearing before me was concluding, the plaintiff added this final submission - that even if the defendant prevails on each of these points when the action is tried on the merits, it cannot be said at this stage that *all* of these arguments are doomed to fail and that *none* of them have even a chance of success. Perhaps so, but I don't have to decide this because there is a better reason why the operational negligence claim clears the "cause of action" hurdle in s. 5(1)(a) of the CPA.

[10] The analysis involves s. 11(4) of the CLPA. This issue was discussed at the hearing and the defendant was unable to provide a satisfactory response. Section 11(4) of the CLPA immunizes the provincial government against negligence claims that relate to the making of, or the failure to make, a *decision* respecting a policy matter:

> 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. (Emphasis added.)

[11] When coupled with s. 11(5)(c), which defines "policy matter" to potentially include even operational negligence, s. 11(4) of the CLPA, in essence, is saying this:

> No cause of action arises against the provincial Crown in respect of any negligence in the making or failing to make a decision respecting the manner in which a program, project or initiative was carried out.

[12] Here, as I noted in the certification decision, the actual instances of operational negligence as alleged by the plaintiff were: "the indeterminate waitlists, the bad databases, flawed computer programs and faulty prioritization and matching processes".[11]

[13] The plaintiff did not plead, and did not have to plead, that the defendant or its employees or third-party contractors were negligent in making or failing to make specific *decisions* that resulted in the listed instances of operational negligence. The plaintiff didn't have to plead this because when the action was commenced, and again when it was certified, the CLPA had not yet been enacted and the s. 11(4) "decision" requirement in the context of an operational negligence claim did not exist.

[14] Today, as I reconsider the s. 5(1)(a) analysis, I have before me the plaintiff's amended statement of claim that pre-dated the CLPA and a copy of the newly enacted CLPA. The defendant has not yet filed a statement of defence. Based on the limited material before me, I cannot assume that the listed instances of operational negligence - the indeterminate waitlists, the bad databases, the flawed computer programs and the faulty prioritization and matching processes – were the result of specific governmental decisions or specific failures to make a decision and not just the result of, say, benign neglect or systemic indifference that cannot be attributed to any one person.

[15] In other words, given the "decision" requirement in s. 11(4), it is possible that the CLPA may not even apply on the facts herein. Or, the defendant may still plead that the alleged instances of operational negligence were in fact the result of specific decisions (or of failures to make a decision) by certain individuals.[12] At this stage of the proceeding,

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[11] *Supra,* note 1, at paras. 13 and 24.

[12] The defendant government may (or may not) find it awkward to name names and plead, for example, that "Crown employee X decided it was okay to use the bad database or the flawed computer program" or that "X failed to make a decision to do anything about the indeterminate waitlists or the faulty matching process".

however, it cannot be said that the operational negligence claim does not disclose a cause of action under s. 5(1)(a) of the CPA.

[16] In my view, it is not plain and obvious that the operational negligence claim is doomed to fail - even in the face of ss. 11(4) and (5) of the CLPA.

(2) Nor is it plain and obvious that the s. 96 constitutional challenge is doomed to fail

[17] Most lawyers understand that legislatures can pass wrong-headed, unfair and even "draconian" legislation provided it is otherwise constitutionally valid and Charter-compliant.[13] Here, the challenge to the CLPA is based on s. 96 of the *Constitution Act, 1867*. The plaintiff filed a Notice of Constitutional Question to this effect in August 2019, immediately after the CLPA was proclaimed in force. The Canadian Civil Liberties Association ("CCLA") was granted intervener status by a judge of the Divisional Court to assist with this constitutional argument.[14]

[18] The typical s. 96 challenge involves comparing the superior court's core jurisdiction at the time of Confederation with the jurisdiction that is arguably being taken away under the impugned federal or provincial law. If the jurisdiction in question was not exercised by the superior courts in 1867, "that is the end of the matter."[15]

[19] Here, the defendant government makes the following argument. Crown liability is a creation of statute. At the time of Confederation, no court had any jurisdiction regarding actions against the sovereign.[16] At the provincial level, it was only in 1963 with the enactment of the PACA that superior courts began to hear claims in tort against the provincial Crown. The CLPA, and PACA before it, are laws in relation to the Crown's liability in tort, a matter that was not part of the core jurisdiction of superior courts at Confederation. This fact alone, says the defendant, is fatal to the s. 96 argument.

[20] The s. 96 argument, as advanced by the plaintiff and developed in more detail by the intervener, focuses on the "core jurisdiction" analysis to be sure, but adds an

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[13] *City of Toronto v Ontario (AG),* 2018 ONSC 5151, at para. 15, citing *Babcock v Canada (Attorney General)*, [2002] 3 S.C.R. 3, at para. 57.

[14] *Leroux v. Her Majesty the Queen in Right of the Province of Ontario*, 2020 ONSC 730.

[15] *Re Residential Tenancies Act*, [1981] 1 SCR 714 at 734.

[16] *Babcock, supra,* note 12, at para. 60. See also *R. v. McFarlane* (1882) 7 SCR 216 at 238-240.

important refinement that, in my view, was not satisfactorily rebutted by the defendant. The refinement is based on the three-part proposition, reaffirmed by the decision of the Supreme Court of Canada in *Trial Lawyers,*[17] that (i) s. 96 constitutionally protects the core jurisdiction of superior courts; (ii) this core jurisdiction includes access to these courts; and (iii) provincial legislation that denies access to these courts may constitute an impermissible infringement on that core jurisdiction.[18]

[21] The Supreme Court has made clear that s. 96 is intended to protect access to the country's superior courts in order to preserve the rule of law and the notion of government accountability, both of which are central to a democratic system. Here is how McLachlin C.J.C. put it in the *Trial Lawyers* decision:

> 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.[19]
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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 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.[20]

[22] The plaintiff and the CCLA characterize ss. 11(4) and (5)(c) of the CLPA as legislation that, among other things, denies access to superior courts for operational negligence claims against the provincial government. Reversing almost 60 years of PACA-based judicial decisions that allowed such claims to proceed, the CLPA on its face appears to restore complete governmental immunity and it does so by defining "policy matters" to include even operational negligence.

[23] The Supreme Court has specifically addressed both of these points. In the *Just* decision, the Court noted that in modern times "complete governmental immunity" has

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[17] *Trial Lawyers Association of British Columbia v. British Columbia (AG),* 2014 SCC 59.

[18] *Ibid.,* at paras. 2 and 40.

[19] *Ibid.,* at para. 39.

[20] *Ibid.,* at para. 40.

become "intolerable".[21] In *Imperial Tobacco*,[22] the Court emphasized again that "exempting all government actions from liability would result in intolerable outcomes".[23] More to the point, the Court cautioned in *Just* that "complete Crown immunity should not be restored by having every government decision designated as one of policy".[24]

[24] In my view, for purposes of constitutional argument, it is certainly possible to link (i) what the Court has said about the importance of the "access to the courts" component of s. 96 with (ii) what the Court has said about complete governmental immunity being intolerable and that it should not be restored by defining every government decision to be a policy matter. This linkage is at least constitutionally arguable and, if it succeeds, may lead to a "reading down" or some other appropriate measure.

[25] I therefore conclude that at this stage of the proceeding it cannot be said that the plaintiff's s. 96 challenge to the impugned sections of the CLPA is plainly and obviously doomed to fail.

(3) The meaning and constitutionality of the CLPA should not be decided on a s. 5(1)(a) pleadings motion

[26] There are two further and overarching reasons why the content and constitutionality of the CLPA should not be decided on a s. 5(1)(a) pleadings motion.

[27] The first reason relates to the CLPA itself. Counsel advise that this may well be the first case to consider the scope and content of the CLPA. And there is no dispute that the potential impact of this new law may be enormous. On its face, the CLPA does not simply "codify and clarify" the common law as former Attorney General Caroline Mulroney told the legislature when it was being enacted. 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.

[28] In the class action area, the impact of this new Crown liability statute will be profound. For example, cases alleging negligence in the implementation of government

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[21] *Ibid.*

[22] *R v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42.

[23] *Ibid.,* at para 76.

[24] *Just, supra,* note 7, at para. 16

policies or in the operation of government-run institutions that in the past have been routinely certified[25] may now be statute-barred. In its recent *Class Actions Report*, the Law Commission of Ontario considered the potential impact of the CLPA and said this:

> It remains to be seen how courts will interpret this legislation. Simply stated, the *Crown Liability and Proceedings Act, 2019* could prevent some or potentially all negligence claims against the Province of Ontario, including some or all potential class actions. This situation could create significant if not insurmountable barriers to justice, to judicial economy and to behaviour modification in class actions.[26]

[29] Counsel for the defendant government tried to argue otherwise but when he was pressed by the court, he could not satisfactorily explain what tort claims would be extinguished and what tort claims would be allowed to proceed. This uncertainty on the part of the defendant government's own counsel about the intended impact of the new law provides further support to the proposition that the scope and content of the CLPA should be decided on a complete record with full argument on the certified common issues either at trial or on a motion for summary judgment.

[30] The second overarching reason relates to the s. 96 constitutional challenge. It is well understood that constitutional cases should not be decided in a factual vacuum. Unless the constitutional claim is clearly doomed to fail (not the case here) it should be decided on a complete evidentiary record with full argument – and not on a s. 5(1)(a) pleadings motion.

[31] The defendant may well prevail on the merits when the CLPA and s. 96 issues are fully argued at trial or on a motion for summary judgment. But that is where these issues must be decided.

(4) The need to add a common issue

[32] If the plaintiff succeeds on the certification appeal and the class action continues, the parties have agreed that a further common issue should be added to address the CLPA directly.

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[25] For example, the negligent implementation of provincial social assistance programs; the negligent operation of provincially-run schools for the blind, deaf, or disabled (and alleged physical, emotional and sexual abuse of students) or provincial correctional facilities (and alleged inmate over-crowding).

[26] Law Commission of Ontario, *Class Actions - Objectives, Experiences and Reforms: Final Report,* (July 2019), at Sched. F.

[33] I am pleased to certify the following additional issue on consent:

> Does the *Crown Liability and Proceedings Act*, 2019, S.O. 2019, c. 7, Sched. 17 (the "CLPA") bar, in whole or in part, the Plaintiff's claim in negligence and is such claim deemed to have been dismissed under the provisions of the CLPA?

[34] I have attached the revised list of certified common issues in the Appendix.

Disposition

[35] The certification of the operational negligence claim remains intact.

[36] A new common issue, as set out above, has been added on consent.

[37] The costs incurred on this rehearing should be included in the determination of the overall cost award when the appeal to the Divisional Court is completed. Costs are therefore deferred to the Divisional Court.

[38] I am obliged to all counsel for their assistance.

Signed: *Justice Edward P. Belobaba*

Notwithstanding Rule 59.05, this Judgment is effective from the date made and is enforceable without any need for entry and filing. As per Rules 77.07(6) and 1.04, no formal Judgment [Order] need be entered and filed unless an appeal or a motion for leave to appeal is brought to an appellate court. Any party to this Judgment may submit a formal Judgment [Order] for original signing, entry and filing when the Court returns to regular operations.

Date: April 6, 2020

Appendix

Certified Common Issues (Revised)

(1) Does the *Crown Liability and Proceedings Act*, 2019, S.O. 2019, c. 7, Sched. 17 (the "CLPA") bar, in whole or in part, the Plaintiff's claim in negligence and is such claim deemed to have been dismissed under the provisions of the CLPA?

(2) By its operation or management of the service registries for Developmental Services, did the defendant breach a duty of care it owed to the class to protect them from actionable harm?

(3) By its operation or management of the waitlists for Developmental Services, did the defendant breach the class members' Charter rights under s. 7?

i. If the answer to common issue (3) is "yes", can the breach be saved by s. 1 of the Charter?

ii. If the answer to common issue (3) is "yes", and the answer to common issue (3)(i) is "no", are the class members entitled to damages pursuant to s. 24(1) of the Charter?

(4) If liability is established under common issues (1) and (2), and/or (3) does the defendant's conduct justify an award of punitive damages?

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