



Comments on the proposed  
*Crown Liability and Proceedings Act, 2019*  
in Schedule 17 of *Bill 100, What Matters Most Act (Budget  
Measures), 2019*

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Submitted by: Ontario Bar Association



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BAR ASSOCIATION  
A Branch of the  
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BARREAU DE L'ONTARIO  
Une division de l'Association  
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## Introduction

The Ontario Bar Association (“**OBA**”) appreciates the opportunity to provide this submission relating to Schedule 17 of the *Protecting What Matters Most Act (Budget Measures), 2019* (“**Schedule 17**”).

## The OBA

Established in 1907, the OBA is the largest voluntary legal organization in Ontario, representing lawyers, judges, law professors and students from across the province, on the frontlines of our justice system and in no fewer than 40 different sectors. In addition to providing legal education for its members, the OBA assists government and other decision-makers with numerous legislative and policy initiatives each year, both in the interest of the profession and in the interest of the public.

## Overview

Schedule 17 introduces a new *Crown Liability and Proceedings Act, 2019* (the “**Act**”), which addresses Crown liability, including the limits on it, the procedural rules that apply in proceedings involving the Crown and repeals the *Proceedings Against the Crown Act*.

In the time permitted, this submission provides the OBA’s advice to government and recommended amendments relating to three elements of the Act proposed in Schedule 17:

1. The extinguishment of causes of action respecting certain government functions (Section 11);
2. The requirement for leave of the court in proceedings for torts of misfeasance or bad faith (Section 17); and
3. The application of the Act to new and existing claims and proceedings (Sections 11, 30 and 31).

**Appendix A** of this submission provides specific recommended amendments to Schedule 17.



These amendments are essential for the government to better achieve its public interest objective and avoid unintentionally and unacceptably shielding itself from critical accountability to the people it serves.

The OBA would be pleased to respond to any questions and provide any further assistance to the government to effectively address the issues raised.

## Recommendations

The OBA recognizes that democratically elected governments function at the apex of public policy making and must be able to carry out that critical public interest role without undue exposure to tort liability. This ensures that our democratically elected governments have the discretion to be responsive to the people and introduce policy that is reflective of the needs and desires of the communities they represent, while taking into account economic, social and political considerations of the day. It is a long-standing principle in law that government policy decisions are non-justiciable. As the Supreme Court of Canada has stated:

There is general agreement in the common law world that government policy decisions are not justiciable and cannot give rise to tort liability ... The weighing of social, economic, and political considerations to arrive at a course or principle of action is the proper role of government, not the courts. For this reason, decisions and conduct based on these considerations cannot ground an action in tort.<sup>1</sup>

At the same time, the Court has been careful to caution against casting the net of immunity for government too broadly because:

[I]t 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 ...

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<sup>1</sup> *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, paras 72 and 88.



governments may attract liability in tort where government agents are negligent in carrying out prescribed duties.<sup>2</sup>

The government's stated objective underlying the provisions incorporated in Section 11 is "to codify the common law to clarify and simplify the process for lawsuits brought by or against the government" and to "reduce frivolous and unmeritorious claims, saving time and money for the courts and taxpayers."<sup>3</sup>

Our members are cognizant of the ways in which the current legislation and court processes may already provide effective avenues for adjudicating the kinds of claims that Schedule 17 addresses. While there would not be a consensus in the profession that legislative changes will be beneficial, the OBA recognizes that the government has a laudable and important interest in seeking to reduce frivolous or unmeritorious claims, which would benefit the justice system and the people it serves.

If the government wishes to proceed with Schedule 17 changes, the following sections outline the essential amendments that should be adopted to better achieve its public interest objective.

### **1. *Extinguishment of causes of action respecting certain government functions*** **(Section 11)**

Section 11 extinguishes causes of action against the Crown or an officer, employee or agent of the Crown respecting negligence in relation to acts of a legislative nature, specified regulatory decisions, and decisions respecting policy matters.

#### **Comments - Subsection 11(5)(c)**

Subsections 11(5)(a), (b), and (c) set out three categories of policy matters for which no cause of action shall exist. Each subsection enumerates specific instances of policy matters that are included.

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<sup>2</sup> *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, para 76.

<sup>3</sup> Lucas Powers, "Ontario PCs want to make it next to impossible to sue the government", CBC News, April 14, 2019 <https://www.cbc.ca/news/canada/toronto/proceedings-against-the-crown-act-repeal-replace-pcs-1.5097205>



Subsection 11(5)(c) relates to “the manner in which a program, project or other initiative is carried out.”

As noted above, the courts have distinguished legitimate government immunity for policy decisions from situations in which government agents are negligent in carrying out prescribed duties.

Since the focus of section 11(5)(c) is the manner of carrying out the enumerated items, it is contrary to the government’s purpose of codifying the common law. Instead, section 11(5)(c) significantly expands the scope of government immunity to circumstances that the courts have already recognized as being subject to Crown liability.

Accordingly, Subsection 11(5)(c) should be deleted in its entirety.

**Comments - Subsections 11(5)(e) and 11(5)(f)**

Subsections 11(5)(e) and (f) provide that in addition to the immunity for regulatory decisions and policy matters described in subsections 11(2), 11(3), and 11(5)(a)-(d), the scope of immunity is subject to unlimited expansion in the future through the making of regulations.

This is contrary to the government’s objective of codifying the common law into statute and undermines the certainty, predictability and fairness that Schedule 17 seeks to offer in defining the scope of immunity. Schedule 17 recognizes that if the government wishes to legislate immunity for government actions, the bill should at least be subject to debate and consideration through the legislative process.

Accordingly, Subsections 11(5)(e) and 11(5)(f) should be deleted in their entirety.

***2. The requirement for leave of the court in proceedings for torts of misfeasance or bad faith (Section 17)***

Section 17 proposed a completely new provision requiring leave of the court for all proceedings against the Crown for claims based on torts of misfeasance or bad faith.



Although the intent of section 17 is to reduce the number of frivolous cases against the Crown, and in turn reduce legal costs involved with such proceedings, the requirement is likely to result in the opposite outcome for several reasons.

First, the threshold for plaintiffs in proceedings that are addressed by section 17 is already high. In our view, a new leave requirement is not necessary, especially given the various procedures that the Crown can access to respond to frivolous actions, including Rule 2.1.01, Rule 20, and Rule 21 of the Rules of Civil Procedure and section 5(1)(a) the *Class Proceedings Act*.

Second, the requirement in subsection 17(2)(b) for plaintiffs to serve and file an affidavit of documents at the outset in addition to an affidavit on the merits, will increase time spent on procedural issues prior to deciding if leave should be granted. It is not clear why an affidavit on the merits alone would be insufficient, nor why the plaintiff should not be entitled to file such documents as it chooses to rely upon. The requirement to serve an Affidavit of Documents will result in an inefficient use of time and resources, contrary to the government's legislative objective.

Third, the requirement that the court be satisfied of a reasonable possibility that the proceeding would be resolved in the plaintiff's favour under (6)(b) is anticipated to result in prolonged legal challenges at the outset of a case before the issues have been properly focused by documentary exchange and oral discovery. The terms 'reasonable possibility' will be subject to court interpretation in the context of the Act and applied to the facts in each proceeding. Given the breadth of possible interpretations and factual issues that will need to be determined in the context of 'reasonable possibility' this requirement will increase the use of court time and Crown resources, prior to even determining if there is a valid proceeding before the court.

Fourth, the general rule in our courts is that costs follow the event. The courts have developed extensive principles dealing with costs which are well known to all participants. We have also the benefit of Rule 57 of the Rules of Civil Procedure, which gives the courts specific direction on costs. The proposed provision removing costs awards here creates a significant access to justice concern regarding claims made in good faith. If a party brings a motion against the Crown and is successful on the motion and the Crown opposed the motion, the plaintiff will be unfairly penalized for an erroneous Crown action that has a real and quantifiable cost.



Accordingly, section 17 should be deleted in its entirety.

### ***3. The application of the Act to new and existing claims and proceedings (Sections 11, 30 and 31)***

A number of sections of the Act relate to the application of the new provisions to new and existing proceedings. The rule of law is a fundamental aspect of our society and a cornerstone of our democracy. While the government may have authority to pass legislation that applies retroactively, it is a power that any government should exercise rarely to address exceptional circumstances. This promotes the essential tenets of our legal system – certainty, predictability and fairness – which not only relate to the treatment of individual litigants but serve as a broader signal of the business environment in Ontario that affects the confidence of those who are looking to invest here.

Given that parties in proceedings already before the courts have existing remedies at their disposal, the circumstances that Schedule 17 seeks to address do not warrant disregarding the principle that laws should not generally work retroactively.

Accordingly, Schedule 17 should at least provide for matters commenced before the date of proclamation to proceed through the courts under the current law, and matters commenced after that date to proceed in accordance with the new Act.

## **Conclusion**

The OBA appreciates the opportunity to provide input and would be pleased to respond to any questions and provide any further assistance to the government to effectively address the issues raised.



## Appendix A (Relevant Sections and Proposed Amendments)

This appendix sets out the relevant sections of the Act discussed in the OBA submission along with a red-line edit of the OBA's recommended amendments.

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### Extinguishment of causes of action respecting certain governmental functions

Acts of a legislative nature

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

Regulatory decisions

(2) No cause of action arises against the Crown or an officer, employee or agent of the Crown in respect of a regulatory decision made in good faith, where,

- (a) a person suffers any form of harm or loss as a result of an act or omission of a person who is the subject of the regulatory decision; and
- (b) the person who suffered the harm or loss claims that the harm or loss resulted from any negligence or failure to take reasonable care in the making of the regulatory decision.

Same, purported failure to make

(3) No cause of action arises against the Crown or an officer, employee or agent of the Crown in respect of a purported failure to make a regulatory decision, where,

- (a) a person suffers any form of harm or loss as a result of an act or omission of another person; and
- (b) the person who suffered the harm or loss claims that the harm or loss resulted from any negligence in a purported failure to make a regulatory decision in respect of that other person.

Policy decisions

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



Same, policy matters

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

- (a) the creation, design, establishment, redesign or modification of a program, project or other initiative, including,
  - (i) the terms, scope or features of the program, project or other initiative,
  - (ii) the eligibility or exclusion of any person or entity or class of persons or entities to participate in the program, project or other initiative, or the requirements or limits of such participation, or
  - (iii) limits on the duration of the program, project or other initiative, including any discretionary right to terminate or amend the operation of the program, project or other initiative;
- (b) the funding of a program, project or other initiative, including,
  - (i) providing or ceasing to provide such funding,
  - (ii) increasing or reducing the amount of funding provided,
  - (iii) including, not including, amending or removing any terms or conditions in relation to such funding, or
  - (iv) reducing or cancelling any funding previously provided or committed in support of the program, project or other initiative;
- ~~(c) the manner in which a program, project or other initiative is carried out, including,
  - ~~(i) the carrying out, on behalf of the Crown, of some or all of a program, project or other initiative by another person or entity, including a Crown agency, Crown corporation, transfer payment recipient or independent contractor,~~
  - ~~(ii) the terms and conditions under which the person or entity will carry out such activities,~~
  - ~~(iii) the Crown's degree of supervision or control over the person or entity in relation to such activities, or~~
  - ~~(iv) the existence or content of any policies, management procedures or oversight mechanisms concerning the program, project or other initiative;~~~~
- (d) the termination of a program, project or other initiative, including the amount of notice or other relief to be provided to affected members of the public as a result of the termination;
- ~~(e) the making of such regulatory decisions as may be prescribed; and~~
- ~~(f) any other policy matter that may be prescribed.~~

Definition, “regulatory decision”

(6) In this section,



“regulatory decision” means a decision respecting,

- (a) whether a person, entity, place or thing has met a requirement under an Act,
- (b) whether a person or entity has contravened any duty or other obligation set out under an Act,
- (c) whether a licence, permission, certificate or other authorization should be issued under an Act,
- (d) whether a condition or limitation in respect of a licence, permission, certificate or other authorization should be imposed, amended or removed under an Act,
- (e) whether an investigation, inspection or other assessment should be conducted under an Act, or the manner in which an investigation, inspection or other assessment under an Act is conducted,
- (f) whether to carry out an enforcement action under an Act, or the manner in which an enforcement action under an Act is carried out, or
- (g) any other matter that may be prescribed.

Proceedings barred

(7) No proceeding may be brought ~~or maintained~~ against the Crown or an officer, employee or agent of the Crown in respect of a matter referred to in subsection (1), (2), (3) or (4).

~~Proceedings set aside~~

~~(8) A proceeding that may not be maintained under subsection (7) is deemed to have been dismissed, without costs, on the day on which the cause of action is extinguished under subsection (1), (2), (3) or (4).~~

Common law defences unaffected

(9) Nothing in this section shall be read as abrogating or limiting any defence or immunity which the Crown or an officer, employee or agent of the Crown may raise at common law.

No inference of policy matters as justiciable

(10) Nothing in this section shall be read as indicating that a matter that is a policy matter for the purposes of subsection (4) is justiciable.

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~~No proceeding for misfeasance, bad faith without leave~~

~~17 (1) No proceeding may, without leave of the court, be brought against the Crown or an officer or employee of the Crown in respect of a tort of misfeasance in public office or a tort based on bad faith respecting anything done in the exercise or intended exercise of the officer or employee's~~



~~powers or the performance or intended performance of the officer or employee's duties or functions.~~

#### ~~Required documents~~

~~(2) On a motion for leave under subsection (1), the plaintiff shall, in accordance with section 15 if applicable, serve on the defendant and file,~~

- ~~(a) an affidavit setting out a concise statement of the material facts on which the plaintiff intends to rely for the claim; and~~
- ~~(b) an affidavit of documents disclosing, to the full extent of the plaintiff's knowledge, information and belief, all documents relevant to any matter in issue in the proceeding that are or have been in the plaintiff's possession, control or power.~~

#### ~~Crown affidavit~~

~~(3) On a motion for leave under subsection (1), the Crown may serve on the plaintiff and file an affidavit setting out a concise statement of the material facts on which the Crown intends to rely for the defence, but is not required to do so.~~

#### ~~Examinations~~

~~(4) The maker of an affidavit referred to in subsection (2) or (3), but no other person, may be examined on the contents of the affidavit.~~

#### ~~No discovery of the Crown~~

~~(5) The Crown shall not be subject to discovery or the inspection of documents, or to examination for discovery, in relation to a motion for leave under subsection (1).~~

#### ~~Requirements for leave~~

~~(6) The court shall not grant leave unless it is satisfied that,~~

- ~~(a) the proceeding is being brought in good faith; and~~
- ~~(b) there is a reasonable possibility that the proceeding would be resolved in the plaintiff's favour.~~

#### ~~Costs~~

~~(7) Each party to a motion under subsection (1) shall bear its own costs of the motion.~~

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## Regulations

**30 (1)** The Lieutenant Governor in Council may make regulations,

- (a) respecting anything that, in this Act, may or must be prescribed or done by regulation;
- (b) defining any term or phrase used in this Act that is not defined in this Act.

### ~~Retroactive regulations~~

~~(2) If it so provides, a regulation made under subsection (1) is effective with reference to a period before the regulation was filed.~~

### Application to existing claims, ~~proceedings~~

(3) If it so provides, a regulation made under subsection (1) applies to claims ~~or proceedings~~ that existed before the regulation comes into force.

## Transition

### Application of Act to claims

**31 (1)** This Act applies with respect to a claim against the Crown or an officer, employee or agent of the Crown regardless of when the claim arose, except as provided in subsection (3).

### Application of Act to new proceedings

(2) This Act applies with respect to a proceeding commenced by the Crown, or against the Crown or an officer, employee or agent of the Crown, on or after the day this section comes into force, regardless of when the facts on which the proceeding is based occurred or are alleged to have occurred.

### Application of former Act to existing proceedings

(3) ~~Subject to subsection (4),~~ ~~t~~ The *Proceedings Against the Crown Act*, as it read immediately before its repeal, continues to apply with respect to proceedings commenced against the Crown or an officer, employee or agent of the Crown before the day this section came into force, and to the claims included in those proceedings.

### ~~Exception, extinguishment of causes of action~~

~~(4) Section 11 and the extinguishment of causes of action and dismissal of proceedings under that section apply with respect to proceedings commenced against the Crown or an officer, employee or agent of the Crown before the day this section came into force.~~