

Ontario's *Crown Liability and Proceedings Act, 2019* and its Effects on Class Actions

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On May 29, 2019, the Lieutenant Governor of Ontario granted Royal Assent to a bill repealing and replacing the *Proceedings Against the Crown Act*, a 56-year-old piece of legislation that defines the circumstances under which the Ontario government can be sued. The replacement legislation, the *Crown Liability and Proceedings Act, 2019* (the "Act") was included as Schedule 17 of Ontario's omnibus Bill 100, the *Protecting What Matters Most Act (Budget Measures)*. The Act operates retroactively against existing actions, fundamentally limits the circumstances under which the Government of Ontario can be found liable in a private action and introduces significant procedural hurdles to actions against it. These changes will have important implications on current and future class actions involving the Province as a party.

The Act came into force on July 1, 2019. The key legislative changes are as follows:

1. Extinguishment of Causes of Action Respecting Certain Government Functions (Section 11)

Currently, regulatory negligence class actions in Ontario may be brought against the government by a plaintiff class seeking compensation for loss, injury or damages arising from careless conduct by provincial officials, agents and servants as long as the conduct concerns the implementation or operational level of a policy decision, and not the core policy decision itself. That status is derived from long-settled common law in the UK and Canada.

Section 11 of the Act, however, extinguishes causes of action against the Crown or any 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.

Subsection 11(5)(c) in particular shields the Crown from actions concerning "the manner in which a program, project or other initiative is carried out." The section significantly expands the scope of government immunity to circumstances beyond policy decisions to the *carrying out* of policy, immunizing itself from claims for negligence or failure to take reasonable care in making and carrying out operational decisions. In other words, negligence in exercising government power is now largely beyond scrutiny.

Further, subsections 11(5)(e) and (f) provide that in addition to the immunity for regulatory decisions and policy matters, the scope of that immunity is subject to unlimited expansion through regulation.

2. Full Disclosure Leave Requirement in Proceedings for Torts of Misfeasance or Bad Faith (Section

17)

Section 17 of the Act introduces a completely new provision which will require a plaintiff class to obtain leave of the Court in all proceedings against the Crown for claims based on torts of misfeasance or bad faith. Subsection 17(2)(b) will further fix the plaintiff class with the obligation to serve and file an affidavit of documents at the outset of the action in addition to an affidavit on the merits. The threshold for bringing a misfeasance or bad faith claim is raised even higher by subsection 17(7), which precludes any award of costs on a successful motion for leave.

3. Extinguishment of Causes of Action is Retroactive (Sections 11, 30 and 31)

Several provisions of the Act provide that new provisions will apply not only to new proceedings, but to proceedings that have already been commenced. In other words, the Act applies retroactively, such that elements of any existing class action implicating the Ontario Crown may be extinguished.

This Act, which involves litigation against the Ontario Crown generally, will have a significant impact on class actions, as there are several common bases for class proceedings that involve the Crown either as a party or regulator. Not only will it become difficult to bring such claims in the first instance, but existing actions will be complicated as the “landscape” of ongoing actions – *Pierringer* agreements, common interest privilege agreements, etc. – may shift due to the Crown’s new, independent basis upon which to escape the proceeding. At a minimum, it will likely be more expensive and complex to bring negligence claims against the government, or to name it as a third party in defending a class proceeding, and Crown counsel will have new tools to seek the dismissal of existing claims on the basis of this new legislation.

If you have an existing class action involving the Government of Ontario in any capacity as a party, please consider reaching out to your counsel for advice as to how this new development may change the status of your proceeding.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.