Court File No. CV-19-00000035-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

DANA BOWMAN, GRACE MARIE DOYLE HILLION, SUSAN LINDSAY and TRACEY MECHEFSKE

Plaintiffs
(Moving Parties)

and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendant
(Responding Party)

FACTUM OF THE PLAINTIFFS
(MOTION TO CERTIFY CLASS ACTION)

April 23, 2020

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PART I - INTRODUCTION

1. This is a motion by four Plaintiffs for certification of this class action. The Plaintiffs are Lindsay residents. They are four of around 4,000 "Class Members" who participated in a human research study known as the Basic Income Pilot Project [the "BI Pilot"].

2. The BI Pilot was a novel initiative launched by the Defendant to study whether providing the Class a guaranteed basic income over three years would lead to improved results measured by changes to the Class's mental health, food security, job security, education, and other metrics that could only be measured through a long-term experiment on how the Class reacted to long-term guaranteed payments.

3. The Plaintiffs contend that the BI Pilot was a contract between each Class Member and the Defendant through which the Defendant contracted to pay three years' worth of basic income payments ["BI Payments"] and, in exchange, the Class agreed to make themselves the subjects of an invasive study. The Class gave up a great deal to become part of it: many gave up the social benefits with which they were familiar for guaranteed BI Payments and the Class had to put their lives under the microscope by subjecting themselves to answering intrusive, personal surveys about their private lives. They had to – and did – put their complete faith and hope in the certainty of three years' of payments so that their responses could be accurately studied.

4. The reason the BI Pilot was a contract that guaranteed three years of BI Payments was that it had to be. Anything less would have meant that the researchers, instead of studying how people react to a truly guaranteed basic income, would be studying how people act when given tenuous monies in a program that could be cancelled at any time.

Such a study would not have studied how a basic income works and, thus, would not have accomplished the purposes the Defendant set out to achieve.

5. As a consequence, the Class put their very heart into the BI Pilot. They put their complete trust in the Defendant because anything less would not do. They did so, as the pleadings state, in response to clear, consistent promises of guaranteed BI Payments.

6. Despite this, approximately one year after the BI Pilot began, the Defendant cancelled it and ceased making the BI Payments.

7. The present class action is not concerned with whether a basic income is good policy or whether the BI Pilot was a good study or a good use of tax dollars. These are the concerns of politics, policy, and expert debate on how to conduct a proper human research study. The class action simply alleges that, once the Defendant made the decisions it made, promised the BI Payments as a guarantee over three years, and promised these in such a way as to draw the Class in, the Defendant could not as a matter of law "go back". The class action claims that the BI Pilot became a contract, that the Defendant undertook to make the payments no matter what and that, in failing to do so, acted negligently, in breach of its undertakings, in breach of a novel public duty, and in breach of s. 7 of the Canadian *Charter of Rights and Freedoms* [the "*Charter*"].

8. The current motion seeks certification. Certification is not concerned with the merits of the case but with whether, as a procedural matter, the Amended Statement of Claim should be allowed to proceed as a class action.

9. Certification motions are decided on a "low bar" test the Plaintiffs easily meet. That

low bar test is concerned largely with whether the Claim discloses a reasonable cause of action and whether there is some minimal basis on the Record to say that the questions the case raises can be answered once for the benefits of the Class.

10. The Plaintiffs meet this low bar test because the pleading discloses reasonable causes of action – five, in fact. These include well-known breach of contract and negligence claims.

11. The Plaintiffs also meet this low bar test because the Record leaves no doubt that each Class Member shares common features that make the questions surrounding the BI Pilot's administration and cancellation ones that can be answered in common. For instance, whether the BI Pilot was a contract, what the terms of it were, whether there was a breach, are questions each Class Member shares an interest in having answered. The class action allows the Court at a later trial to answer these questions once and for all for all 4,000 Class Members.

12. For ease of reference, the sixteen (16) common issues the Plaintiffs seek to have certified are found at both TAB A of their main Motion Record and as an appendix to this factum.

13. Other elements of the certification test are ones the Defendant concedes the Plaintiffs meet.

14. The Court ought therefore to certify the class action at this early stage and allow it to proceed to a common issues trial.

PART II - SUMMARY OF FACTS

15. This summary is based on the Amended Statement of Claim found at TAB 1 to the Joint Supplementary Record [the "Claim"]. The Claim sets out 33 pages of detailed factual allegations and incorporates many documents. Accordingly, the present summary makes reference at points to some of those documents and others found in the Record.

A. Some Comments on Social Benefits in Ontario

16. Prior to the BI Pilot, the Ontario Disability Support Program [“ODSP”] and Ontario Works [“OW”] were the two main social benefit programs available to Ontarians. These programs are governed by statute.

> ***Ontario Works Act*, 1997, SO 1997 c 25, Sched A; *Ontario Disability Support Program Act*, 1997 ("ODSP Act"), SO 1997 c 25**

17. Both ODSP and OW are entitlement programs that provide monthly income support to eligible individuals. The amounts paid depend on a variety of factors, including family size, income and housing costs. Both programs also provide for other benefits, such as prescription drug coverage. To qualify for OW and ODSP, applicants must demonstrate financial need. ODSP claimants must also prove that they have a “substantial physical or mental impairment” that is continuous or recurrent. All claimants must regularly report their income and employment activities to an administrator.

> ***ODSP Act*, ss. 4(1), 23, and 38(1); *Ontario Works Act*, ss. 7 and 28; Burke-Benn Affidavit ("Burke-Benn Aff"), ¶¶8-9, *Responding Certification Record of the Defendant ("DR"),* TAB 1A, p.3; Mechefske Affidavit ("Mechefske Aff"), Ex. 26, *Motion Record of the Plaintiffs ("MPL")*, Tab D26, p. 825**

18. One document in the Record concludes that one of OW's and ODSP's many faults is that neither “allow, in and of themselves, individuals to be lifted out of poverty".

> **Mechefske Aff., Ex. 26, *MPL*, Tab D26 p. 814**

B. Ontario Proposes Starting a Basic Income Pilot

19. In 2016, the Defendant announced its intention of establishing a pilot project to study the value of implementing a basic income for Ontario residents.

20. In order to determine how to conduct one, the Defendant hired former Senator Hugh Segal for advice. Mr. Segal set out a summary of recommendations in a discussion paper, recommending a pilot with three phases: a planning phase, distribution phase, and an evaluation phase. He described how, in phase two, a basic income should be automatically disbursed to participants. He recommended that a third party be retained to conduct surveys to examine the pilot's impact on longer-term outcomes such as participants' health (including mental health), work productivity, and housing security. As well, Mr. Segal opined that the researchers would examine net economic and community outcomes such as food bank usage and healthcare spending.

Mechefske Aff., Ex. 26, *MPL*, TAB D26, pp. 812, 15, and 817

21. Importantly, Mr. Segal reiterated no less than six times that the pilot must last, *at a minimum*, three years: a long, specified period was needed to effectively measure the proposed outcomes. Mr. Segal added that, in order to study how an individual's behaviour might change when provided with a basic income, the individual must understand how long their payments will last. This is due to the fact that, if the participant is uncertain as to when payments will end, it is far less likely that they will change their behaviour. In short, to actually study a basic income, the basic income payments had to be a certainty.

Mechefske Aff., Ex. 26, *MPL,* TAB D26, p. 827

C. Ontario Starts the BI Pilot

22. Relying on Mr. Segal's expertise, the Defendant decided to implement the BI Pilot. On April 24, 2017, Ontario's Premier announced that Ontario would be commencing the BI Pilot. In announcing it, Premier Wynne described the Pilot as a "three-year" project that would provide participants with "a minimum amount of income each year – a basic income, **no matter what**".

> **Amended Statement of Claim ("Claim") at ¶58, Joint Supplementary Motion Record ("JSMR"), Tab 1, p. 16; Mechefske Aff., Ex. 27, *MPL*, TAB D27, p. 835; Text of Premier's Speech, Burke-Benn Aff., *DR*, TAB A, Ex. 3, pp. 97-102 [Emphasis Added]**

23. The Premier continued by explaining why this guaranteed income would have to be offered as a guarantee over a three-year period:

> Some of the outcomes of job retention, retention in education, better health outcomes, those will take a little bit of time to demonstrate…that's why it's three years. If we could figure it out in six months, we would figure it out in six months, but it takes a bit longer than that. By the end of the three years, we will have a good idea of where it is going and be able to talk about what comes next.
>
> **Claim, at ¶60, JSMR Tab 1, pp. 16-17**

24. That same day, the Defendant published a news release describing in similar terms how the BI Pilot, would operate. This news release added that the BI Pilot would provide more than 4,000 Ontarians with a basic income in three areas: (a) Hamilton, Brantford, and Brant County; (b) Thunder Bay and surrounding area; and, (c) Lindsay. As with virtually every document associated with the BI Pilot, the news release underscored the seriousness with which the Defendant was taking it, telling the readers that advisors and a full consortium of researchers were being hired to conduct the study.

> **Claim, at ¶61, JSMR Tab 1, p. 17; News Release, Ex. 30 to Mechefske Aff., MPL, TAB D30, pp. 856-857**

25. Over the next several months, the Defendant worked to complete “phase one”. It recruited around 4,000 participants. These participants are described in the Claim as the "Class" of persons who fell within the "Payment Group" of persons who the Claim pleads were guaranteed the payment of monies (called "BI Payments") over three years.

Claim, at ¶¶1, 54, and 76, JSMR Tab 1, pp. 14 and 21

26. A further 2,000 Ontarians were recruited into a "Control Group" comprised of persons who would not receive BI Payments but who would be studied as well to provide a proper comparator with the Class.

Claim, at ¶¶1, 5, 61, 62, and 77, JSMR, Tab 1, pp. 3, 6, 17, 22

27. The Claim refers to extensive documentation and statements the Defendant produced – including websites, Hansard, social media, and statements made at recruiting sessions – telling Class Members that the BI Pilot would run for three years and that they would receive BI Payments throughout this period in exchange for their completion of very personal surveys.

Claim, at ¶¶61-72, JSMR Tab 1, pp. 17-21

28. Every document and statement associated with the BI Pilot consistently provides that the BI Pilot will run for three years, with Class Members receiving payments throughout that period. These documents include Study Protocols, instruments hiring persons to provide advice in relation to the BI Pilot, reports to an independent research ethics board called "Veritas", and the contract Ontario signed with the third-party research group hired to review survey results.

See Transcript, Burke-Benn Cross-Examination, QQ 208-11, *JSMR*, TAB 3D, pp. 198-199, where the affiant admits that the researchers' contract was for three years (October 2017 – October 2020) but could be extended, by the Defendant, for a fourth year (to October 2021, well past the last date of the last BI Payment).

29. Consistent with this, the person in charge of the BI Pilot, Karen Glass (an Assistant Deputy Minister) told a gathering at the 2017 North American Basic Income Guarantee Congress in New York that the BI Pilot would ensure that each Class Member would know that they would receive "consistent and predictable support" for three years. This was stated in a PowerPoint presentation where Ms Glass added that “informed consent” from all participants would be secured so that participants would be “aware that the Pilot is for three years”. Ms Glass made it plain in the PowerPoint presentation that she was making these statements in her capacity as Assistant Deputy Minister.

PowerPoint Presentation, Regehr Aff., Ex. 4, *MPL*, Tab I3 at pp. 1394-1396, 1416, 1425, and 1431

30. Frankly, even if the most hardened sceptic were to conduct an exhaustive search for any document to confirm their suspicions that there must be some "catch" and that a three-year guarantee was not being offered, they would come away empty-handed. No such document exists in the Record. No such document has been found.

31. This is understandable given the fact that the kind of basic income study Ontario intended to complete could not be conducted unless a guarantee of payments over a fixed three-year period was offered. Consistent with this, not one document associated with the BI Pilot states that the Defendant reserves the right to: (a) end the BI Pilot early; or, (b) cease making the BI Payments before the end of the three-year period.

D. The Information Booklet and Application Forms

32. With the requisite BI Pilot architecture firmly in place, the Defendant began advertising the BI Pilot to potential participants in June 2017. Consistent with Premier Wynne's guarantee of three years of BI Payments "no matter what" and Ms Glass's written

comments that Class Members would all be told that they would consent to receive "consistent and predictable support" for three years, the Defendant drafted two sets of documents given to every Class Member that said just that.

33. Initially, the Defendant sought to enroll participants using a mail-out application package. This mail-out package included a letter that explained the eligibility criteria for the BI Pilot, an Information Booklet with detailed information regarding the “three-year" BI Pilot, and an application form attached to the Information Booklet.

Burke-Benn Aff., at ¶¶59-61 and Ex. 21, *DR*, TAB A at pp. 17-18 and Tab 21 at p. 410

34. Later on, Class Members were mainly enrolled at in-person sessions managed by employees and agents of the Ministry of Community Services, or MCSS (now the Ministry of Children, Community, and Social Services, or "MCCSS"). All told, however enrolled, each Class Member came across the Information Booklet and associated application form or a revised single Application Form later developed for the BI Pilot.

Burke-Benn Aff., at ¶¶59-73, *DR*, TAB A at pp. 17-21 and Tab 21 at p. 410; Vanderhuim Affidavit, ¶23 (located at Mechefske Aff, Ex. 11, *MPL*, TAB D, p. 176)

35. Since the present motion is not concerned with the merits of the Claim, it is not necessary to review the Information Booklet and Application Forms extensively for the wording the Plaintiffs rely on for the proposition that – on the merits – the Defendant contracted and promised to pay three years of monthly BI Payments to the Class. The Information Booklet (and associated application form) in use from June 2017 to February 2018 is found at Ex. "14" of the Defendant's affidavit. The application form that replaced these two is found at Ex. "15" of the Defendant's affidavit.

Claim at ¶¶72-73, JSMR, Tab 1, pp. 21

36. Simply put, the Claim alleges that the Information Booklet and its associated application form and the Application Form that replaced these two documents all accomplished the purpose the BI Pilot's director (Ms Glass) stated would be accomplished: to inform Class Members that they would receive the guaranteed monthly BI Payments for three years in exchange for the consideration the Claim pleads the Class gave in return (such as withdrawal from OW/ODSP and responding to surveys).

E. The BI Pilot Works Well

37. As pleaded, the BI Pilot operated as promised. Participants (Class Members and those in the "Control Group") did their part: they filled out the invasive surveys and Class Members received monthly BI Payments. Consistent with the Claim's pleading that the surveys were highly personal and intrusive, the one copy of the baseline survey in the Record asks 63 questions about health, "emotional problems", income, depression and sadness, pain, hunger, and housing.

Baseline Survey, *MPL*, TAB D, at pp. 1318-1339

38. The BI Payments provided the Class with more money than they would have received from the Defendant but for the BI Pilot. Class Members benefitted. For example, while enrolled, they: (a) could afford basic necessities; (b) were able to enrol in courses or obtain work; (c) secured their freedom from constantly reporting their activities to an OW or ODSP case worker; and (d) achieved a kind of freedom and pride hitherto denied them. While the Claim pleads that the Class had to expose their private lives and make themselves human research subjects, this highly invasive consideration was given by Class Members knowing that they were participating in "a novel, significant experiment whereby the sharing to their personal information and activities could provide them and

others with hope that the delivery of social services in Ontario might thereafter be set on a very different, and perhaps more positive, footing".

Claim, at ¶¶83 and 92, JSMR, Tab 1, pp. 23 and 25

F. The BI Pilot is Cancelled

39. However, all of these positive changes came to a crashing halt when, on July 31, 2018, the Defendant announced it was terminating the BI Pilot early.

Burke-Benn Aff., Ex. 27, *DR,* TAB A, pp. 485-486

40. While the BI Pilot was officially cancelled on July 31, 2018, moves to cancel it began much earlier. Within days of being elected, the Government met to make transition plans. A few weeks later, in late June 2018, Orders-in Council revoking the appointment of BI Pilot advisors were made. The new MCCSS Minister conceded that this cancellation broke a campaign promise to continue the BI Pilot when elected, a promise made while Class Members were receiving their guaranteed BI Payments.

Vanderhuim Aff., ¶¶27-29 and Exs. N and O, found in Mechefske Aff., Ex. 11, *MPL,* TAB D, pp. 177-178 and 401-411; Star Article, Ex. 37 of Mechefske Aff., *MPL*, TAB D, pp. 885-890

41. The final BI Payment was issued on March 25, 2019.

G. The Judicial Review Proceedings

42. The Plaintiffs launched a judicial review of the cancellation decision. In defending the Application, the Defendant stated in its factum that the harm resulting from the BI Pilot's cancellation should be addressed in the "civil action forum".

Factum, Mechefske Aff., Ex. 12, *MPL*, TAB D, p. 451

H. Notes on the Claim and the Record

43. The Claim was then issued and amended. The Claim pleads, in addition to the loss of the BI Payments themselves, that the Class suffered significant health-related

harms (panic attacks, suicidal ideation, *etc*) and losses for monies thrown away on things like tuition and business expenses.

Claim at ¶¶117-121, JSMR, Tab 1, pp. 30-32

44. The Plaintiffs subsequently brought the present certification motion. Despite the fact this motion is not the place to argue the merits, the Defendant, in its affiant's affidavit, offer certain conclusions and opinions masquerading as evidence that can only be relevant to the merits. These include the affiant's statements that "[t]he monthly…payments that the [Class] received was the research intervention" and a list of the circumstances which might result in BI Payments being discontinued, notably recommendations by the researchers that the BI Pilot should be ended. The affiant refers to no sources and, conspicuously, no sources in the documents, for these conclusions.

Burke-Benn Aff., ¶¶38 and 58, *DR*, TAB A, at pp. 11 and 16-17

45. Quite apart from the fact that affidavit evidence on a motion should be confined to fact and not opinions/conclusions, for whatever it is worth, these statements are either false or irrelevant.

> ***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 4.06(2); *Toronto Dominion Bank v. Schrage*, [2009] O.J. No. 3636 (S.C.J.), Plaintiff's Book of Authorities ("BOA"), Tab 1; *Metzler Investment GMBH v. Gildan Activewear Inc.*, 2009 CanLII 43106 (S.C.J.), at ¶43, BOA Tab 2; *Chopik v. Mitsubishi Paper Mills Ltd*., [2002] O.J. No. 2780 (S.C.J.), at ¶¶26&50, BOA Tab 3; *Markowa v. Adamson Cosmetic Facial Surgery Inc.*, 2012 ONSC 1012, at ¶77, BOA Tab 4; *Evans v. Holroyd*, [1988] O.J. No. 1705 (H.C.J.), at ¶ 17, BOA Tab 5; *Cameron v. Taylor* (1992), 10 O.R. (3d) 277 (Gen. Div.), at ¶7, BOA Tab 6; *Canada (Board of Internal Economy) v. Canada (Attorney General)*, 2017 FCA 43 at ¶30, BOA Tab 7; *McCracken v. Canadian National Railway Company,* 2012 ONCA 445 at ¶110, BOA Tab 8**

46. First, while the affiant states that the BI Payments might end if the researchers decided that the BI Pilot should end, this scenario was never presented to the Class (or anyone) in any statement or document. Even if the Defendant had it in mind that it could

cancel the BI Pilot and the BI Payments at any time (something not found anywhere in the Record), this would hardly affect what constituted the contract between the Defendant and the Class as nobody told the Class of this newly opined right to cancel.

47. Second, while the affiant describes the BI Payments as the "research intervention", the initial Study Protocol commissioned by the Defendant describes the "research intervention" not as payments in some general sense but as the "guarantee" of payment. The Defendant's affiant's characterization of the research intervention could give the impression that the Defendant had some discretion to make or discontinue the BI Payments. Such a characterization should not be given when the "guarantee" of BI Payments is what is presented in BI Pilot documentation.

Study Protocol, Burke-Benn Aff., Ex. 11, *DR,* TAB A, p. 191

48. All told, where the Defendant's affiant offers statements about the BI Pilot's terms and conditions, those conclusions have no value when measured against the Defendant's own contemporaneous documents.

49. In the Argument sections that follow, the Plaintiffs rely largely on the Claim (the allegations in which are deemed to be true for the purposes of this motion) and the contemporaneous documents found in the Records. The Court should as well.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

ARGUMENT OVERVIEW AND CERTIFICATION TEST

50. The motion raises only one issue: should the Claim be certified as a class action? The Plaintiffs submit that it should.

51. As the *Class Proceedings Act, 1992* is remedial in nature, it should be given a large, liberal interpretation to widen access to our courts in appropriate circumstances. The court should "err on the side of people who have a right of access to the courts".

> ***Legislation Act, 2006*, c. 21, Sched. F, S. 64(1); *Bendall v. McGhan Medical Corp* (1993), 14 OR (3d) 734 (Gen Div), at p. 16, BOA Tab 9; *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35 at ¶¶8-9, BOA Tab 10**

52. The *Class Proceedings Act, 1992* [the "*CPA*"] is entirely procedural. It exists to offer persons judicial efficiency, access to the courts, and the chance to secure behaviour modification on the Defendant's part. If subsections (a) through (e) of section 5(1) of the CPA are satisfied, certification is mandatory. The section 5 test is as follows:

(a) do the pleadings disclose a reasonable cause of action?;

(b) is there is an identifiable class of two or more persons who would be represented by the representative plaintiff?;

(c) do the claims of the Class Members raise common issues?;

(d) is a class proceeding the preferable procedure for the resolution of the common issues?; and,

(e) is there is a proper representative plaintiff?

> ***Class Proceedings Act*, 1992, SO 1992, c. 6 [the "CPA"], s. 5; *Hollick v Toronto (City)*, 2001 SCC 68, *supra*, at ¶¶27-29, BOA Tab 11; *L'Oratoire Saint-Joseph du Mont-Royal v. J.J., supra* at ¶¶7-8 and 108, BOA Tab 10**

53. For all the attention given to certification motions, the reality is that certification

presents a "low" bar. The first element is met on a consideration of the Claim alone to see if it is plain and obvious that the causes of action pleaded are doomed to fail. The Plaintiffs can then meet the remaining procedural criteria by merely providing "some basis in fact" for each. The certification test is concerned with form and is not a test of the merits. It is a determination as to whether the Claim can proceed as a class action.

> ***Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at ¶99, BOA Tab 12; *Cloud v. Canada (Attorney General)*, 2004 CanLII 45444 (Ont. C.A.) at ¶50, BOA Tab 13; *Hollick v. Toronto (City)*, supra at ¶16, BOA Tab 11; *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, supra at ¶¶7-8, 108-109, and 171, BOA Tab 10**

54. We review below each of the five s. 5(1) elements against the low bars set by the case law: each element is satisfied and, accordingly, the Claim ought to be certified.

ELEMENT (A): CAUSES OF ACTION EXIST

A. The Plain and Obvious Test

55. The test applicable to s. 5(1)(a) of the *CPA* mirrors the Rule 21 motion to strike test. The Court, on a generous review of the pleadings, and assuming the facts pleaded are true, asks if it is "plain and obvious" that the action cannot possibly succeed? Unless it is plain and obvious it cannot, element (a) is met.

> ***Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959 at p. 975, BOA Tab 14; *Condon v. Canada*, 2014 FC 250 at ¶31, BOA Tab 15; *Shah v. LG Chem Ltd.*, 2018 ONCA 819 at ¶¶20-24, BOA Tab 16. The test in relation to Quebec's procedural code is described as a frivolousness test: *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, *supra* at ¶56, BOA Tab 10**

56. If there is any chance of success, a reasonable cause of action exists. The inquiry here is whether the requisite elements of each cause of action have been properly pled.

> ***Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at ¶20, BOA Tab 17; *Le Corre v. Canada (Attorney General)*, 2005 FCA 127 at ¶9, BOA Tab 18**

57. This test sets a "very low" bar: novel causes of action and cases where the law is

unsettled or uncertain are nonetheless ones that disclose a reasonable cause of action.

> ***R. v. Imperial Tobacco Canada Ltd*., [2011] 3 S.C.R. 45 at ¶68, BOA Tab 19; *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.*, 2012 ONSC 6083 at ¶¶56-58; aff'd 2014 ONCA 90, BOA Tab 20; *Fehr v. Sun Life Assurance Company of Canada*, 2018 ONCA 718 at ¶41, BOA Tab 21**

58. The Claim carefully pleads, in detail, every element of five causes of action: breach of contract, negligence, breach of undertaking, a public law tort, and breaches of s. 7 of the *Charter*. All of these causes of action have been recognized as viable. A review of the Claim confirms that the "very low" bar test is met in the present case.

B. The Breach of Contract Claim Meets the Very Low Bar Test Here

59. Government liability in contract is chiefly governed by the same principles applicable to private parties sued in contract. Governments are in the same position as any natural person capable of entering into a contract. It could thus historically be sued in contract long before Crown liability legislation was enacted. This legislation preserves the common law right to sue the Crown in contract. To succeed, a plaintiff must prove the existence of a contract (an offer, acceptance, the terms, intention to form legal relations, and consideration) and a breach of the contract.

> **K. Horsman eds., *Government Liability, Law and Practice*, Toronto: Thomson Reuters, 2019, at 2.10 and 2.20.20(1), BOA Tab 111; *J.E. Verreault & Fils Ltee v. Quebec (Attorney-General)*, [1977] 1 S.C.R. 41 at p. 47, BOA Tab 22; *Attorney General of Quebec v. Labrecque and al*., [1980] 2 S.C.R. 1057 at p. 1082, BOA Tab 23; *Bank of Montreal v. Quebec (Attorney General)*, [1979] 1 S.C.R. 565 at p. 574, BOA Tab 24; Ontario Law Reform Commission, *Report on the Liability of the Crown* (1989), at p. 35, BOA Tab 112; *Crown Liability and Proceedings Act, 2019,* S.O. 2019, c. 7, Sch. 17, s. 16(1); *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at ¶47, BOA Tab 25; *Ledcor Construction Ltd v Northbridge Indemnity Insurance Company*, 2016 SCC 37 at ¶¶46-48, BOA Tab 26.**

60. While ordinary contractual principles apply to contracts with the Crown, breaches by the Crown of their contracts are considered especially egregious:

> … although the general principles for assessing damages in breach of contract cases should be applied where the government is one of the contracting parties, that does not mean that courts should ignore how uniquely disconcerting a contract breach is when it is the state that breaks a bargain with one of its citizens.
>
> … When governments breach their agreements with a member of the public, they do more than violate contractual obligations; they also impair that person's legitimate expectations that the state will respect and comply with its legal obligations.
>
> **A*gricultural Research Institute of Ontario v. Campbell-High*, [2002] O.J. No. 996 (C.A.), per Abella J.A. (as she then was), BOA Tab 27; *Ontario First Nations (2008) Limited Partnership v. Aboriginal Affairs (Ontario*), 2013 ONSC 7141 at ¶24, BOA Tab 28**

61. Thus, far from being plain and obvious that the claim in contract is doomed to fail, by pleading a breach of contract claim, the Claim outlines a long-accepted cause of action that can be advanced against the Crown.

62. In the case at bar, the Claim pleads in detail all of the elements of an enforceable contract. After outlining the backdrop [Claim, ¶¶55-65], the Claim pleads that the BI Pilot was administered in such a way that: (a) offers were made to the Class of three years of guaranteed payments in exchange for participation; (b) the Class agreed to these terms; and, (c) the essential terms were all outlined in specific documents, namely the Information Booklet and Application Forms [Claim, ¶¶66-88].

63. Following this, the Claim generally pleads the existence of a contract and its breach [Claim, ¶¶89-90] before pleading the elements of a breach of contract claim: (a) an offer and acceptance of specific contractual terms and conditions [Claim, ¶¶91-92]; (b) the consideration Class Members gave in exchange for the guaranteed BI Payments [Claim, ¶¶92-93]; (c) the Defendant's breach in terminating the BI Pilot and the BI Payments early [Claim, ¶94]; and, (d) damages for breach of contract [Claim, ¶95].

64. The Claim incorporates by reference the Information Booklet and the Application Forms all Class Members signed to join the BI Pilot, documents that critically outline what the Claim pleads formed essential parts of the contract. Those documents are written in the language of contract, with words of offer, condition, expectation, duty/obligation (as opposed to discretion), consent, agreement, and acceptance festooned throughout.

65. For instance, the Information Booklet: (a) tells the reader "what you can expect"; (b) outlines the benefits payable "if you are accepted"; (c) uses words of offer [Class Members were "asked to participate" and "invited to apply"]; (d) describes the payments as ones the Class "will receive"; (e) sets out the Class Members' "Ongoing Expectations to Receive Payments"; (f) outlines "eligibility criteria"; (g) lists a series of steps the Class had to take throughout the BI Pilot to remain eligible ["For ongoing eligibility…you will be asked to complete your taxes" and "surveys"]. The Information Booklet likewise goes to many lengths to explain the seriousness of the BI Pilot by informing the reader of the various third parties retained to evaluate and advise on its progress.

Information Booklet, Burke-Benn Aff., Ex. 14, *DR*, TAB A, pp. 308, 309, 311, 312, 315, 317, 318, 321, and 324

66. The application forms, in turn, emphasize the importance of understanding the Information Booklet and demand that the applicant certify the truth of their statements. These forms also require that the applicant check boxes to provide their consent, understanding, and agreement, all consistent with an application, acceptance, and contract.

Application Forms, Burke-Benn Aff., Ex. 15, *DR*, TAB A, pp. 340-341, 343-344, 353 ["I agree to participate"], and 358-361 ["I/we consent", "I/we understand, and "I/we consent and agree"]

67. In short, the Claim does not simply plead a bald – albeit long-recognized – contract

claim. It spells out in significant detail what the terms were and, notably, that at its core, the contract guaranteed the payment of BI Payments for a three-year period.

68. Later, in Section H., the Claim particularizes the damages claimed as the BI Payments that were not made [Claim, ¶¶117-121]. This measure of damages, based on the Class's expectation that BI Payments would be made, is the recognized measure of contractual damages ("expectation damages", or damages to place the Class in the position they would have been in had the contract been performed). This measure of damages is no different when a Crown contracting party is involved.

> ***Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43 at ¶¶25-26, BOA Tab 29; *Horsman, supra* at 2.40.10, BOA Tab 111; *Agricultural Research Institute of Ontario v. Campbell-High, supra* at ¶¶28-31, BOA Tab 27**

69. While this should be sufficient to demonstrate that it is not plain and obvious that this long recognized contract claim is doomed to fail, a survey of the case law reveals that governments have previously been held liable in contract for promises that do not even rise to the level of specificity and clarity that characterizes the BI Pilot. In prior cases, courts have held that a contract existed when governmental promises were set out in a mix of far less detailed policy instruments, announcements, and correspondence.

70. Thus, courts have enforced as governmental contracts: (a) a one page letter offering "assurances" of "best efforts" to assist a plaintiff achieve certain production levels [*CAE*]; (b) a letter signed by a Deputy Minister committing to funding if the Plaintiff established its business in the affected Province [*Somerville Belkin*] (c) a verbal undertaking by a Minister not to shut down certain boarding homes if the owners took steps to renovate [*Duggan*]; (d) verbal promises made to a resident that were consistent with an internal memo [*Mentuck*]; and, (e) a price stabilization program that prospective

beneficiaries could apply to in a simple application form [*Grant*].

> ***CAE Industries Ltd. v. R.*, [1986] 1 F.C. 129 (C.A), BOA Tab 30; *Somerville Belkin Industries Ltd. v. Manitoba* (1988), 51 Man. R. (2d) 232 (C.A.), BOA Tab 31; *Newfoundland v. Duggan*, 107 Nfld & PEIR 33 (Nfld. S.C.), BOA Tab 32; *Mentuck v. Canada*, 1986 CarswellNat 63 (F.C.), BOA Tab 33; *Grant v. New Brunswick*, 1973 CarswellNB 38 (C.A.), BOA Tab 34**

71. Further, even if one treats the BI Pilot as a component of Ontario's delivery of social benefits, the social or policy goals underlining the BI Pilot do not change the nature of the BI Pilot itself as a contract. The use of a contractual tool to further social goals does not change the nature of the tool and courts will enforce the promises as contracts.

> ***Dikranian v. Quebec (Attorney General)*, 2005 SCC 73 at ¶53, BOA Tab 35**

72. As the Claim pleads, it was in fact necessary for Ontario, in order to achieve its goals of studying a basic income, to set up a BI Pilot that was contractual in nature. Ontario had to bind itself to making guaranteed payments over a three year period so that certain behaviour and outcomes could be studied. This was explained by the Premier in announcing the BI Pilot in language consistent with a contractual guarantee.

> **Claim, at ¶¶58-60, JSMR, Tab 1, p. 16**

73. Finally, and for good measure, the Claim pleads that the necessary capacity to enter into a contract with the Class and the necessary authority to bind the Crown to the contract was present [Claim, at ¶¶75 and 89-95]. Capacity and authority are not controversial issues, as: (a) the Crown has inherent capacity to contract through her agents and employees; and, (b) anyone holding himself out as someone with some authority can inherently bind the Crown to a contract.

> **For a summary of the key principles, see *Horsman*, *supra*, at 2.20.20(1), 2.20.30-2.20.30(1), BOA Tab 111**

74. Here, the relevant Minister had, while the BI Pilot was ongoing, wide statutory authority to do anything within her power, including powers to appoint any employee to

do anything within her power. Moreover, for added clarity, the Minister's statute excluded the application of the *Executive Council Act* section that relieves the Crown of liability in contract unless the contract is signed by the Minister, a Deputy Minister, or a "delegate".

> **_Ministry of Community and Social Services Act_, R.S.O. 1990, c. M.20 (as am. to S.O. 2017, c. 14, Sched. 4, s. 5); _Executive Council Act_, R.S.O. 1990, c. E.25, s. 6**

75. In short, it is not plain and obvious that the Defendant enjoys some sort of technical defence that it is not bound by the contracts the Claim pleads its Ministry, Minister, Deputy Minister, employees, and/or agents entered into with each Class Member.

76. In any event, the Defendant's affiant outlines, with reference to the supporting *Supply Acts*, that a clear chain of authority for and appropriations to support the BI Pilot were in place here. She states that: (a) Treasury Board of Cabinet approved government expenditures for the BI Pilot; (b) monies in *Supply Acts* were allocated to the MCCSS for the BI Pilot; and, (c) mechanisms were in place so that the Ministry of Finance, as a service-provider to the MCCSS, could make BI Payments to Class Members.

> **Burke-Benn Aff., _DR_, TAB A, at ¶¶19-24 and at Exs. 1 [the Expenditure Estimates], 5 [the relevant _Supply Acts_], and 6**

77. The legal framework relied on by the Defendant's affiant confirms the chain of authority necessary to bind the Defendant to what the Claim pleads were contracts properly entered into with Class Members.

78. Sum total, the Claim meets the very low bar test for pleading a viable cause of action in contract against the Defendant.

C. The Negligence Claim Also Meets the Very Low Bar Here

79. The Claim also pleads that, in undertaking to pay three years of guaranteed BI

Payments and in the manner the Defendant administered the BI Pilot, the Defendant owed the Class a duty in negligence not to cease payments early. As with the contract claim, the same type of damages is sought for breach of this duty as are damages for any harm caused by the early cessation of BI Payments [Claim, ¶¶117-121].

80. Negligence contains the following elements: a duty of care owed by the Defendant to the Class; that the Defendant did not meet the standard of care required in the circumstances; and, that this failure to meet the standard caused the Class damages.

> ***Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, at ¶114, BOA Tab 36**

81. All of these elements are pleaded. However, while negligence is a recognized cause of action, public authorities have resisted certification of some negligence claims on the ground that it is plain and obvious that the public authority did not owe the Class a duty of care in negligence. We therefore focus our submissions on this point.

82. Applying the legal tests set by the Supreme Court, the very low bar test is met here: it is not plain and obvious that the Defendant did not owe a duty of care in negligence when it explicitly undertook a duty to provide three years of guaranteed BI Payments.

(i) The Two-Part Duty of Care Test

83. Whether the Defendant owed such duties depends on the results of a two-stage analysis. At stage one, the Court considers foreseeability and proximity *i.e.* whether the Defendant ought reasonably to foresee that, due to its actions, the Class would suffer damage (foreseeability) and whether the relationship is so close and direct that the Defendant ought to be mindful of the Class's interest (proximity). Proximity is viewed through the lens of expectations, representations, reliance, and the interests at stake.

Where foreseeability and proximity are present, a *prima facie* duty of care arises.

> ***Cooper v. Hobart*, 2001 SCC 79 at ¶¶23-34, BOA Tab 37**

84. At stage two, the court asks whether there are policy reasons outside of the relationship that ought to negate this *prima facie* duty. To negate a *prima facie* duty, the policy must be a "compelling" one. It must not be "speculative": a "real potential for negative consequences must be apparent".

> ***Cooper v. Hobart*, supra at ¶¶36-37, BOA Tab 37; *Hill v. Hamilton-Wentworth*, supra at ¶¶47-48, BOA Tab 36; *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5 at ¶57, BOA Tab 38**

(ii) Not Plain and Obvious No Duty of Care

85. Applying the Supreme Court's duty of care analysis (foreseeability, proximity, policy) points in favour of a reasonable claim that a negligence duty was owed here.

86. Although public authorities like the Defendant often derive their powers from statute, a duty of care will frequently arise based on the authority's direct interactions with the Class, albeit informed by any applicable statutory grant of power. According to the Supreme Court, where the alleged duty is based on conduct and interactions, as in the case at bar, "ruling a claim out at the proximity stage may be difficult":

> So long as there is a reasonable prospect that the asserted interactions could, if true, result in a finding of sufficient proximity, and the statute does not exclude that possibility, the matter must be allowed to proceed to trial, subject to any policy considerations that may negate the *prima facie* duty of care at the second stage of the analysis.

> ***R. v. Imperial Tobacco Canada Ltd.*, supra at ¶¶42-47, BOA Tab 19**

87. Or, as the Supreme Court held in *Fullowka*, "personal dealings" and "contact" between a government Defendant and the Plaintiff is a "significant" factor in considering

whether the relationship was "close and direct" *i.e.* proximate.

***Fullowka v. Pinkerton's of Canada Ltd.*, supra at ¶44, BOA Tab 38**

88. The Claim is precisely about "personal dealings" and "contact" between the Class and the Defendant, characterized by a Class that: (a) included many who were already receiving social assistance and thus already in the Defendant's system; (b) interacted extensively with the Defendant's agents to receive advice and information about the BI Pilot the Defendant controlled completely; and, (c) applied to the Defendant directly for BI Payments using the information and forms the Defendant drafted.

89. In this case, foreseeability of harm is present: it is foreseeable that depriving Class Members of promised BI Payments would deprive them of promised monies and, as a consequence, the Class would not recoup the payments and suffer the pleaded harms associated with the sudden, early, cancellation of the BI Pilot and the BI Payments.

90. As for proximity, since the key element is a "close and direct" relationship, the presence of direct contact with and personal dealings between the Class and Defendant grounds a reasonable assertion of proximity. The Class would have expected that the Defendant would administer the BI Pilot according to its terms and consistent with the uniform representations that BI Payments would be made over a three-year period.

91. As *Cooper* observes, a relationship of proximity is found where there are representations of a certain outcome, where reliance on such representations is involved, and/or where expectations are created. This is precisely what the Claim pleads in detail: a pattern of representations to the Class that induced reliance, be they the Premier's April 2017 announcement that the BI Pilot would "guarantee" three years of BI Payments to

the numerous pleaded and consistent representations made in the BI Pilot's own core documents that three years of BI Payments were assured.

***Cooper v. Hobart*, supra at ¶¶23-34, BOA Tab 37**

92. It is thus reasonable to allow the negligence claim to proceed.

93. A few other factors and facts found in the Claim support a reasonable claim of proximity. *First*, the interests at stake for the Class were significant. The promised BI Payments were the promise of a basic income to alleviate poverty, and when the payments were terminated early, the Class's mental and physical health was severely compromised. *Second*, as pleaded, all communications around the BI Pilot were consistent about the guarantee of three years of payments. *Third*, as the Claim states, communications around the BI Pilot were designed to show that the BI Pilot was to be taken seriously, as government represented that it had contracted with experts and third parties to administer it properly. *Fourth*, the courts in *McCrea*, *Luo* and *Goddard*, in holding that a duty to administer the EI system non-negligently exists, relied on factors present in the case at bar, namely, claimant inquiries, representations, and the vulnerability of claimants seeking important payments while unemployed. *Fifth*, the Class agreed to give and did in fact give consideration in exchange for the BI Payments, thus bringing the relationship closer to one of contract, the presence of which itself gives rise to reasonable expectations by one party that the other will fulfil its part of the bargain; and, (f) the Class would have a heightened expectation that those charged with implementing a pilot providing for social benefits or a substitute for social benefits would take reasonable care. On this last point, courts have assiduously interpreted social benefits legislation liberally, with doubt favouring the interests of the Class.

Claim, at ¶119; *McCrea v. Canada (Attorney General)*, 2015 FC 592; var'd, but not on this point, 2016 FCA 285, BOA Tab 39; *Goddard v. Canada*, [2001] F.C.J. No. 1708, BOA Tab 40; *Luo v. Attorney General (Canada)* (1997), 33 O.R. (3d) 300 (Div. Ct.), BOA Tab 41; *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21 at ¶¶27-29, BOA Tab 42; *Hills v. Canada (Attorney General)*, [1988] 1 SCR 513 at ¶¶37-38, BOA Tab 43; *Leroux v. Canada Revenue Agency*, 2012 BCCA 63 & 2014 BCSC 720, BOA Tab 44; *Harrison v. XL Foods Inc.*, 2014 ABQB 431, BOA Tab 45; *Quinte v. Eastwood Mall*, 2014 ONSC 249, BOA Tab 46; *Canada (Attorney General) v. Keeping*, 2003 NLCA 21, BOA Tab 47; *Gray v. Ontario (Disability Support Program, Director)*, [2002] O.J. No. 1531 at ¶¶8-12 (C.A.), BOA Tab 48; *Gagnon v. Administrator, Ontario Works, Sudbury*, 2018 ONSC 1079 at ¶¶26-28 (Div. Ct.), BOA Tab 49

94. The proposed duty is analogous to cases where Governments have placed themselves in close proximity to plaintiffs by subjecting them to tax audits [*Leroux*] or negligently inspecting meat products [*Harrison*] or a mall plaintiffs frequented [*Quinte*] or advising plaintiffs that steps would be taken in relation to the pension which took place sometime thereafter, allegedly negligently [*Jost*]. In a different case also called *Leroux*, Belobaba J. held that a duty might arise from the alleged negligent operation of Ontario's social assistance program for developmentally disabled persons. All of these cases, like the case at bar, involved governmental operational interactions that gave rise to expectations that certain duties would be discharged non-negligently. As Prof. Feldthusen summarizes in a recent article, the failure to confer a benefit can be a breach of a negligence duty when the duty to confer is associated – as is claimed in the Claim – with undertakings to confer the benefit.

***Leroux v. Canada Revenue Agency*, *supra*, BOA Tab 44; *Harrison v. XL Foods Inc.*, supra, BOA Tab 45; *Quinte v. Eastwood Mall*, supra, BOA Tab 46; *Jost v Canada (Attorney General)*, 2019 FC 1356, BOA Tab 50; *Leroux v. Ontario*, 2018 ONSC 6452, additional reasons 2020 ONSC 1994, BOA Tab 51; B. Feldthusen, "*Bungled Police Emergency Calls and the Problems with Unique Duties of Care*" (2017), 68 U.J.B.L.J. 169, esp. at pp. 173-179, BOA Tab 113. For a review of the UK authorities which hold that an assumption of responsibility akin to what is pleaded in the Claim can ground a negligence duty, see: D. Nolan, "*The Liability of Public Authorities for Failing to Confer Benefits*" (2011), 127 L.Q.R. 260 at pp. 279-284, BOA Tab 114**

95. In 2015, the Federal Court in *McCrea* held that it is not plain and obvious that those

administering the employment insurance system do not owe claimants a duty in negligence to pay out benefits in accordance with the program's promised terms. In 2017, the Ontario Court of Appeal in *Castrillo* held that officials administering the WSIB program may owe a duty of care in negligence to those allegedly wrongfully denied the full extent of benefits to which they were entitled. In both *McCrea* and *Castrillo*, similar claims pleading interactions between government officials charged with administering social benefits regimes and the Class were sufficient to establish a potential negligence claim.

> ***McCrea v. Canada (Attorney General)*, *supra*, BOA Tab 39; *Castrillo v. Workplace Safety and Insurance Board*, 2017 ONCA 121, BOA Tab 52. See also: *Granger v. Canada (Employment and Immigration Commission)*, [1986] 3 F.C. 70 at ¶36 (C.A.); aff'd [1989] 1 S.C.R. 141, BOA Tab 53; *Goddard v. Canada*, supra, BOA Tab 40; *Luo v. Attorney General (Canada)*, supra, BOA Tab 41; *Yaholnitsky v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 639, BOA Tab 54**

96. The Court should readily conclude that it is not plain and obvious and beyond doubt that the Claim, in pleading a detailed set of promises and undertakings to provide three years of BI Payments, fails to disclose a relationship of proximity the Defendant created by its own representations. The Defendant itself engendered the expectations of payment and should be held to its word.

97. In *Imperial Tobacco*, McLachlin C.J.C. cautioned that, where the interactions give rise to a potential *prima facie* relationship of proximity, proximity could be lost if there exists conflicting duties in statute that might negate a proximate relationship. For instance, in *Syl Apps*, an overarching statutory duty to promote the best interests of children in foster care was held to override an otherwise proximate relationship between the CAS and parents subject to a CAS investigation.

> ***R. v. Imperial Tobacco Canada Ltd.*, supra at ¶45, BOA Tab 19; *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, BOA Tab 55**

98. A potential that recognizing a duty to the Class will create a conflict with some overarching statutory duty to the public cannot exist here. This is because the negligence claim arises entirely *outside* of a statutory regime. Here, the BI Pilot was carried out pursuant to authority derived from Treasury Board decisions and subsequent allocations of monies in *Supply Acts*. There is no "Basic Income Act" which outlines an overarching duty to the public which might conflict with any duty owed to Class Members.

99. If anything, if one places the BI Pilot and the BI Payments within the context of the two social benefits regimes the Defendant sought to replace temporarily (ODSP and OW), it is fitting that a private law duty of care to make good on the promised BI Payments should be recognized. The statutes governing ODSP and OW make plain that these regimes are *entitlement* regimes.

> ***Ontario Disability Support Program Act, 1997*, SO 1997, c 25, Sch B, s. 1 and s. 3(1) ["Income support shall be provided to a person with a disability"] and the *Ontario Works Act, 1997*, SO 1997, c 25, Sch A, s. 7(1) ["Income assistance shall be provided in accordance with the regulations to persons who satisfy all conditions of eligibility…"]**

100. And, while persons receiving ODSP or OW benefits can access the Social Benefits Tribunal to compel payment, the BI Pilot was not set up with a remedial mechanism. Compelling the Defendant to comply with its self-undertaken duty to make the BI Payments by recognizing a negligence cause of action is thus necessary, absent any other means of redress.

101. Finally, we observe that many statutes protect public authorities from negligence actions, imposing liability only for bad faith actions. Such clauses are indicators that a duty of care is not owed. Tellingly, there exists here no statutory good faith immunity clause (or any immunity clause for that matter) which might negate the recognition of a

prima facie duty of care here. Such a clause, albeit somewhat limited, exists to protect the MCCSS's agents in the administration of the OW and ODSP regimes.

> ***Edwards v. Law Society of Upper Canada*, 2001 SCC 80 at ¶¶16-17, BOA Tab 56; *Ontario Works Act*, 1997, *supra* at s. 77; *Ontario Disability Support Program Act*, 1997, supra, s. 58**

102. In sum, a reasonable cause of action in negligence here.

(iii) A Note on Stage Two of the Negligence Test (Policy)

103. While the Plaintiffs reserve the right to rebut any attempt by the Defendant to invoke public policy reasons to negate a *prima facie* duty, a few comments are in order.

104. First, as noted previously, there exists no overriding duty that would conflict with the recognition of a duty to the Class to make good on the promised BI Payments. In the case at bar, one would think that the public would share an interest with the Class in ensuring that governments are held to account for their undertakings.

> ***Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at ¶¶40-43, BOA Tab 36 [the public would share an accused person's interest in being fairly investigated for crime]**

105. Second, one policy reason that is sometimes invoked to negate a negligence duty is the fear of indeterminacy, that recognizing a duty could expose the defendant to liability "in an indeterminate amount for an indeterminate time to an indeterminate class".

> ***Hercules Management Ltd. v. Ernst & Young*, [1997] S.C.J. No. 51 at ¶31, BOA Tab 57, quoting from *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y.C.A. 1931), at p. 444, BOA Tab 58**

106. This policy reason plays no role here because the Class was limited and is well-known to the Defendant. The Defendant essentially created the Class by creating the BI Pilot and drawing the Class into its ambit. This is far from a situation of indeterminate liability that might negate the existence of a duty to the narrow, well-defined Class here.

> **Claim, at ¶76, JSMR, Tab 1, p. 21**

(iv) Conclusion on Negligence

107. The Claim pleads a viable cause of action in negligence. The Plaintiffs clear the very low bar imposed here and should be permitted to advance their negligence claim.

D. The Breach of Undertaking Claim Meets the Very Low Bar Here

108. The Claim further pleads that the Defendant is liable for undertaking to provide the BI Payments and reneging on the undertaking.

Claim, at ¶¶96-99, JSMR, Tab 1, p. 26

109. There exists a series of authorities which indicate a judicial willingness to consider an associated claim that the Defendant breached an undertaking it gave that induced reliance on the part of the Plaintiff or that caused the Plaintiff harm.

Allen Linden & Bruce Feldthusen, *Canada Tort Law*, 8th ed. (Markham: LexisNexis, 2006) at pp. 325-328, BOA Tab 115 and in Angela Swan and Jakub Adamski, *Canadian Contract Law*, 3rd ed. (Markham: LexisNexis, 2012) at §§2.194, 2.198, 2.224, and 2.252-2.254, BOA Tab 116

110. Thus, in *OPSEU*, this Court certified a cause of action in a case where the plaintiff, on behalf of a class of registered nurses, alleged that Ontario had induced the class to join a second pension when their employment was transferred. The plaintiff alleged that Ontario made a "no loss" promise and was liable in damages to make the class whole and fulfil the promise. Ontario was not the class's employer, nor did it have a contract with the class. It was merely acting as a regulator facilitating a reorganization in the home care sector. In concluding that a cause of action arose, the Court held that consideration may or may not have passed from the class, yet the Action could proceed nevertheless on the basis of an undertaking that induced some reliance.

***Ontario Public Service Employees Union v. Ontario*, 2005 CanLII 15465 (S.C.J.), BOA Tab 59; See also *Alexander v Ontario*, 2016 ONSC 7059, BOA Tab 60**

111. It is not plain and obvious, or beyond doubt, that this cause of action is doomed to

fail. Here, the Claim pleads an undertaking that was relied upon but not fulfilled. This claim should be allowed to proceed.

E. The Public Law Tort Claim Meets the Very Low Bar Here

112. The Claim also alleges that the decision to cancel the BI Pilot and end the BI Payments falls within a newly articulated public law tort framework developed by Stratas J.A. in *Paradis Honey*.

> ***Paradis Honey Ltd. v. Canada*, 2015 FCA 89, leave to appeal dismissed 2015 CanLII 69423 (S.C.C.), BOA Tab 61**

113. In *Paradis Honey*, after refusing to strike a novel negligence claim against the Government of Canada over a decision banning the importation of honeybees, Stratas J.A. opined that, where a public authority is sued, courts should consider applying administrative law principles and, in the right case, award damages for governmental action that falls short on administrative law grounds:

> ***Paradis Honey Ltd. v. Canada*, supra, at ¶¶130-134, BOA Tab 61**

114. In the Claim, the Plaintiffs plead that the decision to cancel the BI Pilot and cease the BI Payments is reviewable largely on the same grounds a court would apply while sitting on judicial review. The Claim pleads that the cancellation and cessation of payments in the face of undertakings of guaranteed payments was unreasonable, unfair, and breached an expectation the Defendant created. Borrowing the words of public authority principles summarized in *Paradis Honey*, the Claim pleads that the decision ending payments is indefensible on any concept of public law accountability.

> **Claim at ¶¶107-111, JSMR Tab 1, p. 28**

115. *Paradis Honey* adds that, within this public authority liability framework, courts would have discretion to award damages in appropriate circumstances:

> Courts inform their remedial discretion by examining the acceptability and defensibility of the decision, the circumstances surrounding it, its effects, and the public law values that would be furthered by the remedy in the particular practical circumstances of the case…
>
> It is striking how often courts have awarded monetary relief against public authorities where they have not fulfilled a clear and specific duty to act – i.e., where, using the language of public law, the failure to act was unacceptable or indefensible in the administrative law sense and there are circumstances of specific undertakings, specific reliance or known vulnerability of specific persons that trigger or underscore an affirmative duty to act …
>
> …one must assess the circumstances surrounding the public authority's conduct, its effects, and whether the granting of monetary relief would be consistent with public law values…
>
> ***Ibid.* at ¶¶138-146, BOA Tab 63**

116. The Claim offers a perfect illustration of where a public duty breach could result in damages under this framework. Here, after summarizing some of the questionable reasons Ontario gave for cancelling the BI Pilot, the Divisional Court held that the separation of powers did not permit it to quash the cancellation. In so holding, the Court expressed the view that a more appropriate remedy, if liability is established, might be monetary (and obtained by the present Action).

> ***Bowman et al. v. Her Majesty the Queen*, 2019 ONSC 1064 at ¶¶53-60 ["This order has no effect on the Applicants' class action for damages … This order only addresses the question of whether the court can quash the government's decision"], BOA, Tab 62**

117. As Stratas J.A. observes in *Paradis Honey*, a monetary award would serve to make the Defendant accountable to its promises and undertakings, ones that induced reliance on the part of a vulnerable Class, as pleaded.

118. While *Paradis Honey* sets out a novel framework for public law liability, the Supreme Court declined an attempt to appeal the decision, leaving the framework in place

for future adoption or rejection. Courts have, since then, declined to strike claims like the Claim that allege similar improper actions on the part of public authorities.

For instance, *Patrong v. Banks*, 2015 ONSC 3078 *esp.* at ¶¶77-78, BOA Tab 63; *Apotex Inc v Ambrose*, 2017 FC 487, BOA Tab 64

119. Accordingly, it is not plain and obvious, or beyond doubt, that the Claim is doomed to fail when applied against the nascent *Paradis Honey* public liability framework.

F. The Section 7 Charter Claim Meets the Very Low Bar Here

120. The Claim further pleads that the Defendant's decision to prematurely terminate the BI Pilot and cease BI Payments breaches Class Members' s. 7 *Charter* rights to personal security. It is not plain and obvious that the impugned state action did not violate s. 7 and, accordingly, that such a violation does not warrant an award of damages pursuant to s. 24(1) of *Charter*.

(i) Section 7(1) is in Development

121. The scope of s. 7's reach is not frozen and should be revisited to respond to new situations. A "degree of flexibility" in interpreting s. 7 recognizes that s. 7 expresses fundamental basic values worthy of protection.

***Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 at ¶82, BOA Tab 65; *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44 at ¶188, BOA Tab 66**

122. Echoing this theme, Belobaba J., in *Leroux*, held that, on the "plain and obvious" standard, courts should be cautious about refusing to certify s. 7 claims, even where the court feels that the allegations will “probably not succeed on the merits”.

***Leroux, supra,* at ¶¶44-46 and 56, BOA Tab 44**

123. In the present case, while the scope of s. 7 is in development, the kinds of values it promotes fall squarely within the idea of offering remedies to the most vulnerable (here,

the Class) who suffer physical or psychological harms as a result of impugned state action. On this point, courts have consistently held that the s. 7 analysis "must be informed by the principles and purposes of the equality guarantee to ensure the law responds in an appropriate way to the needs and circumstances of … disadvantaged individuals".

> ***Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 at ¶¶374-377, BOA Tab 67; *New Brunswick (Minister of Health and Community Services) v. G.J.*, [1999] 3 S.C.R. 46 at ¶112, BOA Tab 68**

124. Here, as well, awarding damages for the breach of the Class' right to security of the person flowing from the loss of promised basic social assistance monies would comply with Canada's international human rights obligations to provide citizens with an adequate standard of living through its social assistance system. Canada's international human rights obligations inform the court's interpretation of the *Charter*, including s. 7. Courts should presume that the Charter provides the same level of rights protection as these obligations.

> ***Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at p. 349, BOA Tab 69; *Health Services and Support – Facilities Subsector Bargaining Assn. v. BC Health Service*, 2007 SCC 27 at ¶70, BOA Tab 70; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at ¶¶46 and 59, BOA Tab 71. For Canada's relevant international commitments, see ICESCR, 993 U.N.T.S. 3, arts. 9, 11 (see also arts 2, 3, 10); Committee on Economic, Social and Cultural Rights, General Comment No. 19 The right to social security (art. 9), UN Doc. E/C.12/GC/19 (4 February 2008; Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of Canada, UN Doc. E/C.12/CAN/CO/6 (23 March 2016), ¶30, BOA Tab 118**

(ii) The Claim Does Not Allege a Positive State Obligation

125. While the s. 7 jurisprudence is evolving, the Plaintiffs recognize that courts generally hold that s. 7 does not impose on the State positive obligations to, for instance, provide a particular program. However, the Plaintiffs do not claim a right to a basic income

or another pilot. Thus, the case here is unlike *Masse* or *Gosselin* where the claim to social assistance was advanced as an open-ended positive obligation to social assistance. Nor is the case akin to *Tanudjaja,* where the applicants asserted that "the *Charter* includes a positive obligation…to see that the rights included in the *Charter* [here, to social housing] are provided for". Yet, the Supreme Court has held that s. 7 could impose positive state obligations in certain circumstances. Here, the positive obligation in this case is distinct as it is narrowly confined to Class Members and arises from their participation in "essentially a social science experiment" (as described by the Divisional Court), where the Defendant promised to provide BI Payments outside any on-going social assistance benefit scheme for a finite period of time, drew the Class in, then caused them harm by unexpectedly ceasing the BI Payments.

> ***Abbotsford (City) v. Shantz*, 2015 BCSC 1909 at ¶177, BOA Tab 72; *Tanudjaja v Attorney General (Canada)*, 2014 ONCA 852, BOA Tab 73; *Gosselin v. Quebec (Attorney General), supra* at ¶¶2-3 and 82, BOA Tab 65; *Masse v Ontario*, 1996 CanLII 12491 at ¶1 (Div. Ct.), BOA Tab 74; *Victoria (City) v. Adams*, 2009 BCCA 563 at ¶¶90-96, BOA Tab 75; *Bowman, supra* at ¶23, BOA Tab 62**

(iii) The Section 7 Violation

126. Section 7 protects "[e]veryone" from state action that violates their "security of the person" unless the violation is "in accordance with the principles of fundamental justice". The Defendant's actions engaged the Class's "security of the person". The right to security of the person is engaged by "state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering". The security of the person interest is triggered if: (1) the Class Members are subject to "'state imposed' harm"; and, (2) the harm is serious.

> ***Carter v Canada (AG)*, 2015 SCC 5 at ¶64, BOA Tab 76; Blencoe, supra at ¶¶56-57, BOA Tab 66; Abbotsford (City) v. Shantz, 2015 BCSC 1909 at ¶¶182 and 206-208, BOA Tab 72; Inglis, supra at ¶380, BOA Tab 67**

127. Here, the Defendant controlled the BI Pilot, represented the guarantee of BI Payments, drew in the Class, and caused them harm by stopping the alleged guaranteed BI Payments. Where “the government exercises a substantial degree of control over [a program], then its conduct is likely subject to *Charter* scrutiny”. The Defendant exercised full control over the BI Pilot and BI Payments. It follows that it is not plain and obvious that the cessation of BI Payments is not a form of state action subject to *Charter* scrutiny.

> ***Leroux*, ¶45, BOA Tab 44; *Single Mothers Alliance of BC Society v British Columbia*, 2019 BCSC 1427, ¶¶100-112, BOA Tab 77; *Gosselin v Quebec (Attorney General)*, *supra* at ¶216, BOA Tab 65; *Canada (Attorney General) v. PHS Community Services Society ("Insite")*, 2011 SCC 44 at ¶105, BOA Tab 78; *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, *supra* at ¶26, BOA Tab 70**

128. Where impugned state action makes a claimant more vulnerable to serious harm or exacerbates or perpetuates the risk of serious harm, this is sufficient to make out a deprivation where a "security of the person" interest is engaged. The Claim sets out that Class Members' physical and psychological suffering results from the impugned state action. By ceasing BI Payments, Class Members were denied guaranteed access to basic necessities and experienced related forms of physical and psychological harms. The harms stem not from Class Members being vulnerable low-income people, but from having been promised BI Payments and then deprived of such BI Payments prior to the expiry of the term. Taken as true, this meets the threshold of a "sufficient causal connection" between the harms and impugned state action.

> ***Canada (Attorney General) v. Bedford*, 2013 SCC 72 ¶¶74-78, BOA Tab 79**

129. The Claim as pleaded establishes that the cessation of BI Payments barred Class Members from guaranteed access to basic daily necessities and had devastating impacts for Class Members, including severe physical and psychological harms such as manic

episodes, suicidal ideation, isolation, heart attack, stroke, sensations of impending danger, panic or doom, an increased heart rate, and hyperventilation. To engage the s. 7 security of person interest, the seriousness of the impact on a claimant's psychological integrity "need not rise to the level of nervous shock or psychiatric illness, but it must be greater than ordinary stress or anxiety". The loss of guaranteed access to BI Payments for the duration of the BI Pilot triggered physical and psychological suffering that far exceeds that of "ordinary stress or anxiety" and meets the requisite level of seriousness, in some cases amounting to debilitating forms of mental illness.

> **_G.J., supra_ at ¶60, BOA Tab 70; _Inglis, supra_ at ¶395 and 405-411, BOA Tab 67; _Chaoulli v Quebec (AG),_ 2005 SCC 35 at ¶¶204-205, BOA Tab 80; _Bowman, supra,_ at ¶29, BOA Tab 62; _PHS, supra,_ ¶¶97-106, BOA Tab 78; _Single Mothers, supra_, ¶¶106-107, BOA Tab 77**

130. State action that is arbitrary, overbroad or has consequences that are grossly disproportionate to their object is action that is not "in accordance with the principles of fundamental justice" – a s. 7 violation.

> **_Carter_, _supra_ at ¶¶72, and 81, BOA Tab 77; _Bedford_, _supra_ at ¶¶94-96, 123, and 127, BOA Tab 79; _Inglis_, _supra_ at ¶413, BOA Tab 67**

131. Here, we lack a Defence or a stated objective in the Record for the impugned state action. For the "low bar" test, the best we can do is pick an example of how the cessation of BI Payments in the context described above cannot be justified on s. 7 principles. Here, one such posited objective in stopping the BI Pilot and ceasing payments was the objective of getting social assistance to more low-income people. While this objective could have been achieved by changing the OW or ODSP eligibility criteria, ceasing promised BI Payments promised outside of existing social programs does not fit within such an objective: if that was the objective, the cessation of BI Payments had grossly disproportionate consequences and appears, by that measure, arbitrary.

132. To the extent that the Defendant submits that the cessation of BI Payments is a matter of policy, the Defendant "cannot simply… [cancel a social assistance study] on the basis of policy *simpliciter*; insofar as it affects *Charter* rights, [the] decision must accord with the principles of fundamental justice". Courts expect a "clean connection" between the objective of violating the Class's s. 7 rights and this potential broader objection of helping everyone on social assistance.

> ***Inglis*, *supra* ¶¶422-428, 450 and 459-460, BOA Tab 67; *Insite, supra* at ¶¶103-104 and 128, BOA Tab 79; *Carter, supra* at ¶¶73, 74-78, and 8083, BOA Tab 77; *Bedford, supra* at ¶¶108, 111 and 123, BOA Tab 79; *Chaoulli, supra* at ¶¶129-131, BOA Tab 80**

133. It is not plain and obvious that the Class's security of the person is not engaged. Therefore, the *Charter* claim should be allowed to proceed to see if Class Members' personal security was violated in accordance with fundamental justice.

(iv) Final Comments on ss. 1 and 24 of the Charter

134. While the Defendant could try and save a s. 7 violation under s. 1, s. 1 can only "rescue" a s. 7 infringement in the face of exceptional circumstances "such as natural disasters, the outbreak of war, epidemics and the like". The impugned state action did not occur in exceptional circumstances. The low bar is met here: any infringement is not saved by s. 1.

> ***Inglis, supra* at ¶¶632-633, BOA Tab 67**

135. Courts can award s. 24 *Charter* damages for *Charter* violations, including s. 7 violations. To do so, it must be "just and appropriate" to award these, having regard to whether damages would "fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches".

> ***Vancouver (City) v Ward,* 2010 SCC 27 at ¶¶15-57, BOA Tab 81; *Brazeau v Canada (Attorney General)*, 2020 ONCA 184 at ¶¶36-38, BOA Tab 82**

136. In the previous section discussing *Paradis Honey*, we outline how damages might fulfil these goals in the case at bar and need not repeat it here.

137. All told, it is not plain and obvious that a s. 7 *Charter* claim cannot succeed given the unique circumstances here where Class Members' personal security was gravely affected by state action drawing them into the BI Payment and into its promise of anti-poverty BI Payments for three years, only to have these prematurely taken away.

G. Conclusion on s. 5(1)(a) – The Very Low BarTest is Met

138. Returning to the "very low bar" set by the courts in order to meet the requirements of s. 5(1)(a) of the *CPA*, the Claim sets out properly pleads five causes of action that could succeed. It is not "plain and obvious" and "beyond doubt", that the five causes of action are doomed to fail. At this early stage, the Claim should be allowed to proceed.

ELEMENT (B) – AN IDENTIFIABLE CLASS EXISTS

139. The Plaintiffs propose the following Class definition:

> **All persons who were enrolled by the Defendant in the Basic Income Pilot Project as part of the Payment Group.**

140. The Defendant concedes that the Plaintiffs' proposed Class definition properly identifies the Class with the kinds of limited, objective criteria required.

> ***Hollick v. Toronto (City)*, *supra* at ¶21, BOA Tab 11; *Sander Holdings Ltd. v. Canada (Minister of Agriculture)*, 2006 FC 327 at ¶41, BOA Tab 83; *Western Canadian Shopping Centres v. Dutton*, 2001 SCC 46 at ¶38, BOA Tab 84**

141. The Class definition meets the low bar identifiable class test here.

ELEMENT (C) –SOME BASIS IN FACT TO SAY THAT COMMON ISSUES EXIST

142. Section 5(1)(c) of the *CPA* requires that the proposed class proceeding raise common issues of fact or law. According to the Supreme Court, in framing commonality, the guiding question should be "whether allowing the suit to proceed as a representative one would avoid duplication of fact-finding or legal analysis". In other words, would resolution of the common issues significantly advance the Action? Common issues need not resolve the issue of liability: they need only move the litigation forward. It is also not necessary that the common issues predominate over individual ones.

***Rumley v. British Columbia*, 2001 SCC 69 at ¶¶29-30, BOA Tab 85**

143. This third criterion is met if there is "some basis in fact" in the Record to conclude that there are these common issues. This is a "low bar" test. Notably, an issue can be common even if it does little towards resolving the liability issues, leaving more individual issues, even substantial ones, to be resolved in the end. Thus, even the presence of just one common issue is sufficient to meet the test. Fortunately, the Claim here presents a large number of common issues, leaving few issues that will need, if the Action succeeds, to be resolved on an individual basis.

***Carom v. Bre-X Minerals Ltd. (2000)*, 51 O.R. (3d) 236 at ¶¶39-42, BOA Tab 86; *Cloud v. Canada (Attorney General)*, *supra* at ¶¶52-53; BOA Tab 13; *Hollick*, *supra* at ¶30, BOA Tab 11**

144. In plain English, it is not for the Court now to conclude that "there was a contract". The Court need only conclude that there is some basis in fact taken from the Record that, when this matter proceeds to trial, the common issues trial judge might be able to give common answers like: "yes there was a contract", "the terms of the contract were X", "a duty of care was owed", or "s. 7 of the *Charter* was breached".

145. A common issue is one whose resolution will avoid duplication of fact-finding or legal analysis. An issue is "common" only where its resolution is necessary to the resolution of each Class Member's claim. That said, the common issues do not have to determine the question of liability for all Class Members but must have sufficient significance in relation to the claim such that their resolution will advance the litigation in a meaningful way.

> ***Western Canadian Shopping Centres Inc. v. Dutton*, *supra*, at ¶¶39-40, BOA Tab 84; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, *supra* at ¶108, BOA Tab 12**

146. What is clear from the above is that, while the issues must be common to all Class Members, the issues may vary in importance to each Class Member. In other words, they need not all have the *same* interest in all the issues; rather, it is enough that they have *an* interest in the same issues.

147. For ease of reference, we have appended to this Factum a list of the 16 proposed common issues [hereafter, the "PCIs"]. In what follows, we group the PCIs and show how there is some basis in fact to conclude that the PCIs are common issues. Overall, some basis in fact is present because each Class Member was treated largely the same. The Record shows a pattern of consistent, similar representations made about the BI Pilot, the use of only two sets of forms for everyone (the Information Booklet and Application Form), and a consistent pattern of interaction between the Defendant and each Class Member through the enrollment process. All told, the Record shows that the BI Pilot was administered consistently for each Class Member. The BI Pilot had to be uniform, in fact, to secure accurate survey results and data for study. To this point, the Defendant has proffered no evidence that Class Members were treated differently: for instance, that

some were told some things about the BI Pilot while others were told different things.

A. PCIs 1 – 3: Breach of Contract

148. PCIs 1-3 ask whether there was a contract, what were its terms, and whether these terms were breached. In other breach of contract class actions, these kinds of questions have been certified.

> ***Lam v. University of British Columbia*, 2010 BCCA 325, BOA Tab 87; *Sankar v. Bell Mobility*, 2013 ONSC 5916 [see Appendix], BOA Tab 88; *Fehr v. Sun Life Assurance Company of Canada*, 2018 ONCA 718 at ¶77, BOA Tab 21; *Trillium Motor World Inc. v. General Motors of Canada Limited*, 2011 ONSC 1300, at ¶¶131-133, BOA Tab 89; *Quizno's Canada Restaurant Corporation v. 2038724 Ontario Ltd.*, 2010 ONCA 466 at ¶17, BOA Tab 90; *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444 at Appendix, BOA Tab 91; *Berg et al v CHL* et al, 2019 ONSC 2106 (Div. Ct.) at Appendix, BOA Tab 92**

149. In cases where there are alleged common representations or a common pattern of documents that might be regarded as forming an alleged common contract, courts have readily certified such cases. Thus, in *Austin*, this Court recently certified a class action that depended on the interpretation of a pension plan to which each class member was contractually bound. In doing so, Morgan J. noted that contractual cases are "easily" certified when a contract claim is properly pled and that certifying common issues like PCIs 1-3 here is a "straightforward" matter.

> ***Austin v Bell Canada*, 2019 ONSC 4757 at ¶¶10-17, BOA Tab 93; *Lam v University of British Columbia, supra* at ¶56 ["contract-based class actions have found favour with courts where the proposed common issues call for interpretation of a standard form contract or a common representation"], BOA Tab 87; *De Wolf v. Bell ExpressVu Inc.*, 2008 CanLII 5963 (Ont. S.C.J.), at ¶32, per Strathy J. (now C.J.O.), BOA Tab 94**

150. The Record here demonstrates there is "some basis" factually to conclude that each Class Member's alleged contractual relationship with the Defendant was largely, and almost certainly entirely, the same. Crucially, every Class Member signed one of two application forms, with the first one being attached to the Information Booklet. The

Defendant's affiant properly admits to this, as did the Defendant's affiant on the judicial review application. This fact is corroborated by the experiences of multiple Class Members as set out in the Plaintiffs' Record. Put simply, what forms most if not the entirety of the alleged contract is the same for each Class Member.

> **Burke-Benn Affidavit, ¶¶59-73, *DR*, TAB A, pp. 17-21; Vanderhuim Aff., ¶23 (located at Mechefske Aff., Ex. 11, *MPL*, TAB D, p. 176); For evidence from Class Members confirming the same Information Booklets and application forms were used, see *MPL*, pp. 74-75, 545, 558, 582, 626-633, 656, 683-712, 726, 758-789, 1030-1041, 1067-1088, 1105-1114, 1118-1119, 1209-1240, and 1344-1361**

151. The sameness of the Class Member / Defendant relationship was then certified by the Defendant itself when, on May 1, 2018, the Defendant formally reported to the BI Pilot's research ethics board (Veritas IRB) that each Class Member was recruited into the BI Pilot using the same set of materials. The author then lists, in this memo, the Information Booklet and application forms as recruitment materials. That author happens to be the Defendant's affiant on this motion who, in cross, accepted that she endeavoured, in completing this memo, to be entirely truthful.

> **Memo to Veritas Dated May 1, 2018, Mechefske Aff.t, Ex. 39, *MPL*, TAB D, esp. at pp. 950-952; See Transcript, Burke-Benn Cross-Examination, QQ 218-225, *JSMR*, TAB D**

152. The Claim pleads that the aforementioned documents are key contractual instruments that outline the terms of the alleged contract. Thus, since these key instruments were the same for each Class Member, this should dispose of the issue: there is some basis in fact to certify the contract questions as common issues.

153. Insofar as the contractual interpretation exercise will depend on a review of a broader range of statements and documents forming part of the factual matrix from which the alleged contract will be interpreted, the Record establishes that *every* such document

consistently presented the BI Pilot in similar language. *Every* document – be it Study Protocols, news releases, websites, social media, the Premier's speech, Ministers' statements in the Legislature, and the PowerPoint document presented by the person in charge of the BI Pilot – consistently tells the reader about the things one reads in the Information Booklet and applications forms, such as that: (a) the BI Pilot is for three years; (b) BI Payments will be made for three years; (c) Class Members must complete surveys and file tax returns to remain eligible; (d) Class Members in OW or ODSP must withdraw from these; (e) Class Members may see some benefits altered (for instance, rental assistance and tax credits) and others unchanged (such as drug benefits).

> **For examples, see *MPL*, at pp. 501, 533-534, 542, 678, 808, 856-857, 861-863, 872, 876-881, 922-926, 959, 963-966, 980, 991-992, 996, 1010, 1342, 1327, and1394-1444**

154. From there, the Record confirms that each Class Member received the same letter notifying them that they had been accepted into the BI Pilot's Payment Group and telling them of their fixed payment schedule, the same reminder to complete surveys, the same reminder that they should file their 2017 tax return, and the same notice that the BI Pilot had been cancelled. In cross, the Defendant's affiant admitted that the BI Pilot's administration was tightly controlled: a select group of 20-30 MCSS (now MCCSS) employees conducted all of the in-person enrolments.

> **For examples, see *MPL*, at pp.76, 126-127, 129-133, 138-139, 165-166, 498-501, 503, 507-508, 523-524, 528-529, 550, 552-553, 560-562, 564-565, 571-572, 619, 638-640, 645-646, 650-651, 658-660, 662-663, 667-668, 714-715, 717-718, 723-724, 730, 734, 738-740, 744-745, 750-751, 791-792, 794-795, 798-799, 1044, , 1046-1047, 1090-1091, 1095-1096, 1169-1171, 1175-1176,, 1189, 1204, 1242, 1247, 1258-1259, 1261, 1271, 1288-1290, and 1300-1301; See Transcript, Burke-Benn Cross-Examination, QQ 147-154, *JSMR*, TAB D**

155. All told, there is some basis in fact to answer all of the contractual questions and, more broadly, to make findings of fact as to how the BI Pilot was conceived,

communicated, administered, and cancelled. PCIs 1-3 should be certified.

B. PCIs 4 – 5: Breach of Undertaking

156. PCIs 4-5 ask whether an enforceable undertaking was made and breached. The same evidence that supports certifying the breach of contract PCIs, it is submitted, supports certifying these questions.

157. These PCIs were drafted based on the elements Cullity J. held in *OPSEU* might give rise to liability for breach of undertaking.

158. There is some basis in fact in the Record to certify these PCIs: the "low bar" test should be met here.

C. PCIs 6 – 8: Negligence

159. PCIs 6 – 8 ask whether the Defendant owed a duty in care in negligence, what the content of that duty was, and whether the duty was breached. This triumvirate of duty, standard, and breach questions are assiduously certified in negligence class actions.

> **See, for example, *Rumley v. British Columbia,* supra, at ¶¶27-32, BOA Tab 85; *Cloud v. Canada, supra* at ¶¶55-56, BOA Tab 13; *KRP Enterprises Inc. v. Haldimand (County)*, 2007 CanLII 29975 (ON SC), at ¶¶24-31, BOA Tab 95; *Pearson v. Inco Ltd.*, [2005] O.J. No. 4918 (C.A.), BOA Tab 96; *Gay v. New Brunswick (Regional Health Authority 7)*, [2014] N.B.J. No. 117 (C.A.), at ¶112, BOA Tab 97; *Baroch v. Canada Cartage*, 2015 ONSC 40, at ¶¶43-48, BOA Tab 98; *McCrea supra*, 2016 FCA 285, at ¶15, BOA Tab 39**

160. The same pattern of representations, promises, offers, and undertakings that make up the Record reviewed above in support of certifying the contractual PCIs support the certification of PCIs 6 – 8. In the case at bar, the pattern of consistent representations evidenced by the Record lasted for a narrow period, from around April 24, 2017 (when the Premier made her speech) until April 2018, when the last Class Member was enrolled

into the BI Pilot. In *Carom*, a consistent misrepresentation over a four-year period in a series of 160 documents was enough to ground a common, certified, negligent misrepresentation issue. In *Campbell*, the common misrepresentation was repeated over 10-15 years, and certification was ordered.

> ***Carom, supra*, BOA Tab 86; *Campbell v. Flexwatt Corp.*, [1997] B.C.J. No. 2477 (C.A.), BOA Tab 99**

161. The evidence of a pattern of consistent promises, undertakings, and representations concerning the BI Pilot, alone or combined with the pattern of consistent administration of the BI Pilot, should meet the low bar test of "some basis in fact" to say that the three negligence PCIs could be answered in common for the Class. They should likewise be certified.

D. PCIs 9 – 14: the *Paradis Honey* and *Charter* Causes of Action

162. The same factual matrix found in the Record will largely ground the arguments in support of certifying the remaining common issues, common issues designed to emulate the elements of the public law test in *Paradis Honey* and the s. 7 *Charter* test. Section 7 class action certification decisions have certified PCIs 12-14 previously.

> ***Reddock v Canada (Attorney General)*, 2018 ONSC 3914 at ¶5, BOA Tab 100; *Leroux v. Ontario*, supra at ¶71, BOA Tab 51; *Brazeau v. Canada*, supra, at ¶10, BOA Tab 82**

163. These two causes of action will likely focus on the reasons why the Defendant cancelled the BI Pilot, ceased the BI Payments, and thereby caused the pleaded harm to the Class. Were these reasons acceptable on a public law or judicial review standard (*Paradis Honey*) or did these reasons accord with fundamental justice (the s. 7 analysis)?

164. Given this, in addition to relying on the same kinds of evidence that ground certifying PCIs 1 – 8, PCIs 9 – 14 will require a review of what was a set of actions on the

part of the Defendant, actions that all occurred in a short time period following the 2018 election. This will thus mean a focus on the Defendant's conduct, reasons, and intentions over a short time-frame and not on answering questions whose answers might differ on a case-by-case, Class Member by Class Member basis. This kind of systemic analysis of a Defendant's conduct is particularly suited for class actions.

> ***Gay v. New Brunswick (Regional Health Authority 7)*, supra at ¶¶111-113, BOA Tab 97, citing *Rumley v. British Columbia*, supra at ¶27, BOA Tab 85; *Alberta v. Elder Advocates of Alberta Society*, supra at ¶100, BOA Tab 17; *Fresco v. Canadian Imperial Bank of Commerce*, supra, BOA Tab 91**

165. These PCIs should also be certified.

E. PCI 15: Aggregate Damages

166. PCI 15 asks: "[c]an the court make an aggregate assessment of damages"? While the Plaintiffs accept that many of the damages claimed will require an individualized assessment – albeit using the tools reviewed in the "Preferable Procedure" section below, tools which should make the individualized assessment relatively straightforward – it is possible that the common issues trial judge will be able to award aggregate damages pursuant to s. 24 of the *CPA*. For example, in *Brazeau*, the Court ordered baseline *Charter* damages in the aggregate to a class comprised of inmates who had been subject to lengthy solitary confinement as a result of an "administrative segregation", while affording the Class a process to prove any additional damages individual to themselves. This decision was upheld in 2020 on appeal.

> ***Brazeau v. Canada*, *supra*, BOA Tab 82**

167. It is appropriate to certify the issue of aggregate damages where there is some basis in fact to determine this in common. Here, it is possible that each Class Member will have experienced a common negative reaction to the premature cessation that an

aggregate baseline damages payment might be ordered.

> ***Pro Sys Consultants Ltd v Microsoft Corporation*, supra at ¶134, BOA Tab 12; *Good v Toronto (Police Services Board)*, 2016 ONCA 250 at ¶74, BOA Tab 101**

168. PCI 15 should be certified.

F. PCI 16: Administration

169. PCI 16 is technical: it seeks an order from the common issues trial judge pursuant to s. 26(9) of the *CPA* that the Defendant pay for the cost of administering any individualized assessment process. Such a PCI has been certified before and could be certified here.

> **For example, see *McCrea v. Canada, supra*, at Order [¶5(vi)], BOA Tab 39**

G. Conclusion on Common Issue Test

170. The Record amply demonstrates "some basis in fact" to certify all of the PCIs. The "low bar" s. 5(1)(c) test is satisfied here.

ELEMENT (D) - PREFERABLE PROCEDURE

171. The Defendant concedes that there is no alternative procedure that is preferable for the resolution of the common issues than the class action. We include in our Book of Authorities the leading cases on the preferability element should the Court require, in oral argument, that we walk through the test and apply it to the facts here. We would only add that, while some individual issues will remain even if the class action is certified (identity and some damages issues) courts at certification should adopt an attitude of "confidence" that the trial judge will be able to design a proper method to resolving individual issues knowing that the *CPA* affords flexibility in setting procedure.

> ***Carom, supra,* at ¶36, rev'd in part (2000), 51 O.R. (3d) 236 (C.A.), leave to appeal to SCC dismissed, BOA Tab 86; *Hollick v. Toronto (City),***

> ***supra*, at ¶¶28-29, BOA Tab 11; *Markson v. MBNA Canada Bank* (2007), 282 D.L.R. (4th) 385 at 69 (Ont. C.A.), BOA Tab 102; *Keatley Surveying Ltd. v. Teranet Inc*., 2014 ONSC 1677 at ¶104, BOA Tab 103, relying on *AIC v. Fischer*, [2013] S.C.J. No. 69 at ¶¶21-27, BOA Tab 104; *Barwin v. IKO*, 2012 ONSC 3969 at ¶85, BOA 105; *McCrea, supra*, at ¶¶384-430, BOA Tab 39; *Chace v. Crane Canada Ltd*., [1996] B.C.J. No. 1606 at ¶23 (S.C.); aff'd [1997] B.C.J. No. 2862 (C.A.), BOA Tab 106; *Fulawka v. Bank of Nova Scotia,* 2012 ONCA 443 at ¶¶142-167, BOA Tab 109; *Manuge v. Canada*, 2013 FC 341 at ¶13, BOA Tab 110**

172. Other courts, in cases where far more complex damages issues would remain, have readily embraced the class action, holding that complex individual issues can be resolved by affidavits [*Chace*], arbitrations paid for by the government defendant [*Manuge*], and/or by altering onuses/burdens of proof [*Fulawka*]. Courts have found class actions to be the appropriate vehicle even in cases involving intricate issues of psychological harm and *Charter* infringements arising out of repeated sexual harassment [*Tiller*] and prolonged solitary confinement [*Brazeau*]. Even in these cases, which involve deeply personal levels of harm, Courts and class counsel have been able to successful devise procedures that evaluate and compensate Class Members for their injuries.

> ***Chace v. Crane Canada Ltd.*, *supra*, BOA Tab 108; *Fulawka v. Bank of Nova Scotia, supra*, BOA Tab 109; *Manuge v. Canada, supra*, BOA Tab 110; *Tiller v. Canada*, 2019 FC 895, BOA Tab 111; and, *Brazeau v. Attorney General (Canada), supra*, BOA Tab 82**

173. In sum, the class action is the preferable procedure, affording a single forum that will resolve substantial common issues, leaving few issues to be decided individually.

ELEMENT (E) – PROPOSED REPRESENTATIVE PLAINTIFFS

174. The Defendant concedes that the Plaintiffs are appropriate representative plaintiffs.

175. They have presented a litigation plan that is quite detailed. It covers all the litigation steps to trial, including proposed notices to the Class if certified, methods for giving notice, a proposed opt-out process, and a plan to dispose of remaining individual issues. If there are concerns with it, the court is to certify the Action and the Plan can later be revisited.

> ***578115 Ontario Inc. v. Sears Canada Inc*., 2010 ONSC 4571 at ¶¶88-90, BOA Tab 112; *Cloud v. Canada (Attorney General)*, *supra* at ¶95, BOA Tab 13; Litigation Plan, *MPL*, TAB A, pp. 11-32**

176. All told, the Plaintiffs are suitable class plaintiffs who are equipped with a proper Plan that will resolve any remaining issues post-trial.

PART IV - ORDER REQUESTED

177. The Plaintiffs request that their motion be granted and that certification be ordered, with the Plaintiffs appointed as representative plaintiffs. They likewise seek costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of April, 2020.

Stephen J. Moreau

Kaley Duff

APPENDIX "A"

PROPOSED COMMON ISSUES

(the Capitalized terms are taken from the Amended Statement of Claim)

BREACH OF CONTRACT

1. Did the Defendant enter into a contract with the Class Members for the provision of BI Payments to each Class Member for a three-year period commencing on the date each Class Member received their first payment or, alternatively, for a three-year period associated with the operation of the BI Pilot?

2. If the answer to question 1 is yes, did the Defendant owe contractual duties and/or a duty of good faith to ensure that the Class Members were provided with BI Payments during the salient three-year period?

3. If the answers to question 1 and 2 are "yes", did the Defendant breach any of its contractual duties and/or a duty of good faith? If so, how?

Breach of Undertaking

4. Did the Defendant undertake to provide BI Payments to each Class Member for a three-year period commencing on the date the Class Member received their first payment, or, alternatively, to provide BI Payments to each Class Member for a three-year period associated with the operation of the BI Pilot?

5. If the answer to question 4 is "yes", did the Defendant fail to fulfil its undertaking?

Negligence

6. Did the Defendant owe the Class Members a duty of care in administering the BI Pilot?

7. If the answer to question 6 is "yes", then what is the content of the duty of care owed?

8. If the answer to question 6 is "yes", did the Defendant breach that duty of care?

Breach of a Public Law Duty

9. Did the Defendant owe the Class Members a public law duty to in administering the BI Pilot?

10. If the answer to question 9 is "yes", then what is the content of the public law duty of care owed?

11. If the answer to question 9 is "yes", did the Defendant breach that public law duty of care?

Breach of Section 7 of the Canadian Charter of Rights and Freedoms

12. By its operation or management of the BI Pilot, did the Defendant breach the Class Members' Charter rights under s. 7?

13. If the answer to question 12 is "yes", can the breach be saved by s. 1 of the Charter?

14. If the answer to question 12 is "yes" and the answer to question 13 is "no", are the Class Members entitled to damages pursuant to s. 24(1) of the Charter?

Damages and Administration Issues

15. Can the court make an aggregate assessment of damages suffered by all class members as part of the common issues trial?

16. Should the Defendant pay the cost of administering and distributing recovery to the Class?

SCHEDULE "A"

LIST OF AUTHORITIES

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4. *Markowa v. Adamson Cosmetic Facial Surgery Inc.*, 2012 ONSC 1012
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6. *Cameron v. Taylor (1992)*, 10 O.R. (3d) 277 (Gen. Div.)
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8. *McCracken v. Canadian National Railway Company*, 2012 ONCA 445
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10. *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35
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21. *Fehr v. Sun Life Assurance Company of Canada,* 2018 ONCA 718

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26. *Ledcor Construction Ltd v. Northbridge Indemnity Insurance Company*, 2016 SCC 37

27. *Agricultural Research Institute of Ontario v. Campbell-High*, [2002] O.J. No. 996 (C.A.)

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31. *Somerville Belkin Industries Ltd. v. Manitoba (1988)*, 51 Man. R. (2d) 232 (C.A.)

32. *Newfoundland v. Duggan*, 107 Nfld & PEIR 33, 1993 CanLII 3355 (Nfld. S.C.)

33. *Mentuck v. Canada*, 1986 CarswellNat 63 (F.C.)

34. *Grant v. New Brunswick*, 1973 CarswellNB 38 (C.A.)

35. *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73

36. *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41

37. *Cooper v. Hobart*, 2001 SCC 79

38. *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5

39. *McCrea v. Canada (Attorney General)*, 2015 FC 592; var'd, but not on this point, 2016 FCA 285

40. *Goddard v. Canada*, [2001] F.C.J. No. 1708

41. *Luo v. Attorney General (Canada) (1997)*, 33 O.R. (3d) 300 (Div. Ct.)

42. *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21

43. *Hills v. Canada (Attorney General)*, [1988] 1 SCR 513

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48. *Gray v. Ontario (Disability Support Program, Director)*, [2002] O.J. No. 1531 (C.A.)

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52. *Castrillo v. Workplace Safety and Insurance Board*, 2017 ONCA 121

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76. *Carter v. Canada (AG)*, 2015 SCC 5

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80. *Chaoulli v. Quebec (AG)*, 2005 SCC 35

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82. *Brazeau v. Canada (Attorney General)*, 2020 ONCA 184

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84. *Western Canadian Shopping Centres v. Dutton*, 2001 SCC 46

85. *Rumley v. British Columbia*, 2001 SCC 69

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SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY – LAWS

1. ***Class Proceedings Act*, 1992,** SO 1992, c. 6, S.O. 1992, CHAPTER 6, Consolidation Period: From June 22, 2006 to the e-Laws currency date. Last amendment: 2006, c. 19, Sched. C, s. 1 (1)**.**

Certification

5 (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

Idem, subclass protection

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

(a) would fairly and adequately represent the interests of the subclass;

(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and

(c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members. 1992, c. 6, s. 5 (2).

Evidence as to size of class

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class. 1992, c. 6, s. 5 (3).

Adjournments

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence. 1992, c. 6, s. 5 (4).

Certification not a ruling on merits

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding. 1992, c. 6, s. 5 (5).

Judgment distribution

26 (1) The court may direct any means of distribution of amounts awarded under section 24 or 25 that it considers appropriate. 1992, c. 6, s. 26 (1).

Costs of distribution

(9) The court may order that the costs of distribution of an award under section 24 or 25, including the costs of notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment or may make such other order as it considers appropriate. 1992, c. 6, s. 26 (9).

2. ***Crown Liability and Proceedings Act,*** **2019,** S.O. 2019, c. 7, Sch. 17, *SCHEDULE 17****,*** Consolidation Period: From July 1, 2019 to the e-Laws currency date**.** Last amendment: 2019, c. 7, Sched. 17, s. 32**.**

Petition of right abolished

16 (1) Proceeding against the Crown by way of petition of right is abolished, and any claim against the Crown, regardless of when it arose, that may have been enforced by petition of right subject to the grant of a fiat by the Lieutenant Governor may be enforced as of right by a proceeding against the Crown in accordance with this Act.

No revival

(2) For greater certainty, subsection (1) does not subject the Crown to a proceeding in respect of a claim based on an act or omission occurring or existing before September 1, 1963 that would not, before that date, have been enforceable against the Crown by petition of right, subject to the grant of a fiat by the Lieutenant Governor.

Limitation periods, etc., still apply

(3) For greater certainty, a proceeding referred to in subsection (1) is subject to any bar in law to bringing the proceeding, or any defence, that is based on the passage of time.

3. ***Executive Council Act*****, R.S.O. 1990,** c E.25, *R.S.O. 1990, CHAPTER E.25* Consolidation Period: From November 6, 2013 to the e-Laws currency date**.** Last amendment**:** 2013, c. 10, s. 1**.**

Execution of contracts with Crown

6 No deed or contract in respect of any matter under the control or direction of a minister is binding on Her Majesty or shall be deemed to be the act of the minister unless it is,

(a) signed by the minister, the deputy minister of the ministry or an authorized delegate; or

(b) approved by the Lieutenant Governor in Council. 2006, c. 21, Sched. F, s. 111 (2).

Section Amendments with date in force (d/m/y)

2006, c. 21, Sched. F, s. 111 (2) - 19/10/2006

4. ***Legislation Act*, 2006,** c. 21, Sched. F, S.O. 2006, CHAPTER 21 SCHEDULE F, Consolidation Period: From December 10, 2019 to the e-Laws currency date**.** Last amendment: 2019, c. 14, Sched. 4, s. 1**.**

Rule of liberal interpretation

64 (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects. 2006, c. 21, Sched. F, s. 64 (1).

5. *Ministry of Community and Social Services Act*, R.S.O. 1990, c. M.20 (as am. to S.O. 2017, c. 14, Sched. 4)

Delegation by Minister

5 (1) Where, under this or any other Act, a power is conferred or a duty is imposed upon the Minister or upon an employee of the Ministry, such power or duty may be exercised and discharged by any other person or class of persons whom the Minister appoints in writing, subject to such limitations, restrictions, conditions and requirements as the Minister may set out in his or her appointment. R.S.O. 1990, c. M.20, s. 5 (1).

Exception

(2) **Section 6** of the ***Executive Council Act*** does not apply to a deed or contract that is executed under an authorization made under subsection (1). R.S.O. 1990, c. M.20, s. 5 (2).

6. ***Ontario Disability Support Program Act*, 1997,** SO 1997 c. 25, *SCHEDULE B,* Consolidation Period: From July 1, 2019 to the e-Laws currency date**.** Last amendment: 2019, c. 7, Sched. 17, s. 131**.**

Purpose of Act

1 The purpose of this Act is to establish a program that,

(a) provides income and employment supports to eligible persons with disabilities;

(b) recognizes that government, communities, families and individuals share responsibility for providing such supports;

(c) effectively serves persons with disabilities who need assistance; and

(d) is accountable to the taxpayers of Ontario. 1997, c. 25, Sched. B, s. 1.

Person with a disability

4 (1) A person is a person with a disability for the purposes of this Part if,

(a) the person has a substantial physical or mental impairment that is continuous or recurrent and expected to last one year or more;

(b) the direct and cumulative effect of the impairment on the person's ability to attend to his or her personal care, function in the community and function in a workplace, results in a substantial restriction in one or more of these activities of daily living; and

(c) the impairment and its likely duration and the restriction in the person's activities of daily living have been verified by a person with the prescribed qualifications. 1997, c. 25, Sched. B, s. 4 (1).

Appeal to Tribunal

23 (1) An applicant or recipient may appeal a decision of the Director within the prescribed period after an internal review by filing a notice of appeal that shall include reasons for requesting the appeal. 1997, c. 25, Sched. B, s. 23 (1).

Same

(2) The Tribunal may extend the time for appealing a decision if it is satisfied that there are apparent grounds for an appeal and that there are

reasonable grounds for applying for the extension. 1997, c. 25, Sched. B, s. 23 (2).

Same

(3) An appeal to the Tribunal shall be commenced and conducted in accordance with the regulations. 1997, c. 25, Sched. B, s. 23 (3).

Parties

(4) The Director, the applicant or recipient who requested the hearing and any other persons specified by the Tribunal are parties to the proceedings before the Tribunal. 1997, c. 25, Sched. B, s. 23 (4).

Notice to spouse

(5) If an appeal relates to a determination of an overpayment of which the Director has given notice to a dependent spouse under subsection 16 (4), the spouse shall be added as a party. 1997, c. 25, Sched. B, s. 23 (5); 1999, c. 6, s. 47 (6); 2005, c. 5, s. 50 (6).

Same

(6) A spouse who has been added as a party to the appeal of a determination may not commence an appeal in relation to that determination. 1997, c. 25, Sched. B, s. 23 (6); 1999, c. 6, s. 47 (7); 2005, c. 5, s. 50 (7).

Submission

(7) The Director may make written submissions in the place of or in addition to appearing at a hearing. 1997, c. 25, Sched. B, s. 23 (7).

Same

(8) If written submissions are to be made, the parties to the hearing shall be given an opportunity before the hearing to examine the submissions, as prescribed. 1997, c. 25, Sched. B, s. 23 (8).

Written or documentary evidence

(9) The parties to a hearing shall be given an opportunity before the hearing to examine any written or documentary evidence that a party proposes to introduce at the hearing, as prescribed. 1997, c. 25, Sched. B, s. 23 (9).

Onus

(10) The onus lies on the appellant to satisfy the Tribunal that the decision of the Director is wrong. 1997, c. 25, Sched. B, s. 23 (10).

Director's powers and duties

38 The Director shall,

(a) receive applications for income support;

(b) determine the eligibility of each applicant for income support;

(c) if an applicant is found eligible for income support, determine the amount of the income support and direct its provision;

(d) administer the provisions of this Act and the regulations;

(e) determine how the payment of the costs of administering this Act and providing income support is to be allocated;

(f) ensure that the appropriate payments are made or withheld, as the case may be; and

(g) exercise the prescribed powers and duties. 1997, c. 25, Sched. B, s. 38.

No personal liability

58 (1) No action or other proceeding in damages shall be instituted against the Ministry, the Director or a delivery agent, an officer, employee of any of them or anyone acting under their authority for any act done in good faith in the execution or intended execution of a duty or authority under this Act or for any alleged neglect or default in the execution in good faith of any duty or authority under this Act. 1997, c. 25, Sched. B, s. 58 (1).

Liability of Crown

(2) Subsection (1) does not, by reason of subsection 8 (3) of the *Crown Liability and Proceedings Act, 2019*, relieve the Crown of liability in respect of a tort committed by a person mentioned in subsection (1) to which it would otherwise be subject. 1997, c. 25, Sched. B, s. 58 (2); 2019, c. 7, Sched. 17, s. 131

7. ***Ontario Works Act*****, 1997,** SO 1997 c. 25, *SCHEDULE A,* Consolidation Period: From July 1, 2019 to the e-Laws currency date**.** Last amendment: 2019, c. 7, Sched. 17, s. 138**.**

Who receives income assistance

7 (1) Income assistance shall be provided in accordance with the regulations to persons who satisfy all conditions of eligibility under this Act and the regulations.

Who are the beneficiaries

(2) Income assistance shall be provided for the benefit of the eligible person and his or her dependants.

Appeal to Tribunal

28 (1) An applicant or recipient may appeal a decision of an administrator within the prescribed period after an internal review by filing a notice of appeal that shall include reasons for requesting the appeal. 1997, c. 25, Sched. A, s. 28 (1).

Same

(2) The Tribunal may extend the time for appealing a decision if it is satisfied that there are apparent grounds for an appeal and that there are reasonable grounds for applying for the extension. 1997, c. 25, Sched. A, s. 28 (2).

Same

(3) An appeal to the Tribunal shall be commenced and conducted in accordance with the regulations. 1997, c. 25, Sched. A, s. 28 (3).

Parties

(4) The administrator, the applicant or recipient who requested the hearing and any other persons specified by the Tribunal are parties to the proceedings before the Tribunal. 1997, c. 25, Sched. A, s. 28 (4).

Add party

(5) At any stage of an appeal, the Tribunal shall add the Director as a party, on his or her request. 1997, c. 25, Sched. A, s. 28 (5).

Notice to spouse

(6) If an appeal relates to a determination of an overpayment of which the administrator has given notice to a spouse under subsection 21 (4), the spouse shall be added as a party. 1997, c. 25, Sched. A, s. 28 (6); 1999, c. 6, s. 50 (5); 2005, c. 5, s. 54 (5).

Same

(7) A spouse who has been added as a party to the appeal of a determination may not commence an appeal in relation to that determination. 1997, c. 25, Sched. A, s. 28 (7); 1999, c. 6, s. 50 (6); 2005, c. 5, s. 54 (6).

Submission

(8) The administrator and the Director may make written submissions in place of or in addition to appearing at a hearing. 1997, c. 25, Sched. A, s. 28 (8).

Same

(9) If written submissions are to be made, the parties to the hearing shall be given an opportunity before the hearing to examine the submissions, as prescribed. 1997, c. 25, Sched. A, s. 28 (9).

Written or documentary evidence

(10) The parties to a hearing shall be given an opportunity before the hearing to examine any written or documentary evidence that a party proposes to introduce at the hearing, as prescribed. 1997, c. 25, Sched. A, s. 28 (10).

Onus

(11) The onus lies on the appellant to satisfy the Tribunal that the decision of the administrator is wrong. 1997, c. 25, Sched. A, s. 28 (11).

No personal liability

77 (1) No action or other proceeding in damages shall be instituted against the Ministry, the Director, a delivery agent, an officer or employee of any of them or anyone acting under their authority for any act done in good faith in the execution or intended execution of a duty or authority under this Act or for any alleged neglect or default in the execution in good faith of any duty or authority under this Act.

Liability of Crown

(2) Subsection (1) does not, by reason of subsection 8 (3) of the *Crown Liability and Proceedings Act, 2019*, relieve the Crown of liability in respect of a tort committed by a person mentioned in subsection (1) to which it would otherwise be subject. 1997, c. 25, Sched. A, s. 77; 2019, c. 7, Sched. 17, s. 138.

8. ***Rules of Civil Procedure*****,** R.R.O. 1990, Reg. 194, *Courts of Justice Act,* R.R.O. 1990, REGULATION 194*,* Consolidation Period: From March 23, 2020 to the **e-**Laws currency date. Last amendment: 456/19**.**

AFFIDAVITS

Format

4.06 (1) An affidavit used in a proceeding shall,

(a) be in Form 4D;

(b) be expressed in the first person;

(c) state the full name of the deponent and, if the deponent is a party or a lawyer, officer, director, member or employee of a party, shall state that fact;

(d) be divided into paragraphs, numbered consecutively, with each paragraph being confined as far as possible to a particular statement of fact; and

(e) be signed by the deponent and sworn or affirmed before a person authorized to administer oaths or affirmations. R.R.O. 1990, Reg. 194, r. 4.06 (1); O. Reg. 575/07, s. 1.

RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL

WHERE AVAILABLE

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b). R.R.O. 1990, Reg. 194, r. 21.01 (2).

To Defendant

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

Jurisdiction

(a) the court has no jurisdiction over the subject matter of the action;

Capacity

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

Another Proceeding Pending

(c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

Action Frivolous, Vexatious or Abuse of Process

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (3).

MOTION TO BE MADE PROMPTLY

21.02 A motion under rule 21.01 shall be made promptly and a failure to do so may be taken into account by the court in awarding costs. R.R.O. 1990, Reg. 194, r. 21.02.

FACTUMS REQUIRED

21.03 (1) On a motion under rule 21.01, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party. O. Reg. 14/04, s. 15.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 5.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 5.

(4) Revoked: O. Reg. 394/09, s. 5.

DANA BOWMAN et al.
Plaintiffs (Moving Parties)

-and-

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
Defendant (Responding Party)

Court File No. CV-19-00000035-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
LINDSAY

FACTUM OF THE PLAINTIFFS
(Motion to Certify Class Action)

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