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

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**

BETWEEN:

**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)

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# FACTUM OF THE RESPONDING PARTY, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

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Date: May 26, 2020

**MINISTRY OF THE ATTORNEY GENERAL**
Crown Law Office – Civil
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9
Fax: (416) 416-326-4181

**Christopher P. Thompson** (LSO No. 46117E)
Tel: (416) 605-3857
christopher.p.thompson@ontario.ca

**Zachary Green** (LSO No. 48066K)
Tel: (416) 992-2327
zachary.green@ontario.ca

**Chantelle Blom** (LSO No. 53931C)
Tel: (647) 467-7762
chantelle.blom@ontario.ca

**Ravi Amarnath** (LSO No. 66824K)
Tel: (647) 649-5623
ravi.amarnath@ontario.ca

Lawyers for the Responding Party

**TO: CAVALLUZZO LLP**
474 Bathurst Street, Suite 300
Toronto, ON M5T 2S6

**Stephen J. Moreau** (LSO No. 48750Q)
**Kaley Duff** (LSO No. 74986A)

Tel: (416) 964-1115
Fax: (416) 964-5895

Lawyers for the Moving Parties

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## PART I – OVERVIEW

1. The Plaintiffs bring this proposed class action seeking $200M in damages arising from the wind down of the Ontario Basic Income Pilot ("OBIP" or "Pilot").

2. On this motion to certify the proposed class action the parties are in agreement that the certification criteria set out in s. 5(1)(b) and (e) of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 ("*CPA*") are met. The only issues for determination on this certification motion are: (1) Whether the Amended Statement of Claim ("Amended Claim") discloses a reasonable cause of action (s. 5(1)(a) of the *CPA*); (2) whether the claims of the class members raise common issues (s. 5(1)(c) of the *CPA*); and (3) whether a class action is the preferable procedure for resolution of the class members' claims (s. 5(1)(d) of the *CPA*).

3. The OBIP was a pilot social assistance program and research project that sought to study the effects of giving participants basic income payments, whether the effect be positive, negative, or neutral. There was an intervention group that received the basic income payments, and a control group which did not.

4. The OBIP was described as a three-year Pilot or research study. Applicants were advised that if eligible and placed in the intervention group payments under the Pilot would be for "up to" three years. Prior to a full three years Cabinet made the policy choice to end the social assistance Pilot thereby ending the research and the research intervention (i.e. OBIP payments).

5. Despite the end of the research, this civil action in effect seeks a continuation of the research intervention (i.e. OBIP payments), and further damages allegedly arising from the cessation of the research intervention.

6. The Plaintiffs' claim that the Province was legally obligated to continue the research

intervention for three years and breached that obligation through Cabinet's policy choice to end the Pilot. Several strained legal theories or causes of action are pled in the Amended Claim to support an alleged legal obligation to make Basic Income ("BI") payments for three years. Specifically, the Plaintiffs plead that the "termination of BI Payments amounts to a breach of contract, breach of undertaking, negligence, a public law tort, and…a breach of s. 7 of the *Charter*." [1] All the causes of action turn on the one fact that Cabinet ended OBIP payments prior to three years.

7. None of these strained legal theories give rise to a reasonable cause of action or have a reasonable prospect of success as required for certification under s. 5(1)(a) of the *CPA*. The essence of the Amended Claim is a challenge to the non-justiciable policy decision of Cabinet to end the OBIP and is precluded by the *Crown Liability and Proceedings Act* and the common law. The Plaintiffs' contract claim further fails to plead facts to turn the OBIP social program into a $200M contractual liability. Among other issues, the claim does not identify what the contract is comprised of, is contrary to the applicant study documentation incorporated into the claim that payments would be for "up to" three years and not three years, and fails to plead facts to meet the statutory requirements for a binding contract on the Crown including execution requirements and the requirement of a legislative appropriation for the "contract". Schedule "C" to this Factum summaries the multitude of reasons the claim does not give rise to a reasonable cause of action.

8. Furthermore, the common issues criteria in s. 5(1)(c) of the *CPA* is not met. While the class members were all part of the same government program, the proposed common issues are not capable of common proof. Inevitably both liability and damages would need to be determined on an individual basis.

9. The Amended Claim seeks to prove the alleged legal obligation to make BI payments for three

[1] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, para 11, page 7

years based on various oral or written public announcements, alleged oral representations to applicants, and in the alternative, through the contrary applicant study documentation. This approach inevitably involves individual inquiries into what each class member heard or read, what representations were made to them, what reliance they placed on them, and whether in each applicant's particular circumstances that reliance was reasonable.

10. Additionally, the Amended Claim and Plaintiffs' Factum ignore what happened during the study. During the study, numerous participants in the BI payment group became ineligible to receive basic income payments due to various reasons (e.g. increased incomes). In addition, aside from the eligibility criteria there were many other reasons for not making BI payments (e.g. participant not filing income taxes to enable determinations of eligibility and/or the calculation of BI payments). Such participants could have no legal right to continued BI payments and an individual inquiry would be required for each participant. Furthermore, while noted here as a common issues problem, these facts belie the claim that applicants were guaranteed three years of payments.

11. Ultimately, the means by which the Plaintiffs' seek to prove that three years of payments was required is not capable of common proof, and even if such a requirement could be proved, the entitlement of each class member to such payments is not capable of common proof.

12. With respect to preferable procedure, the Crown does not take the position that there is an alternative procedure available for a class resolution. Rather, having regard to the above, a class action would not be a fair, efficient and manageable procedure such that it does not satisfy the preferable procedure criteria.

## PART II – THE FACTS

### 1. The Ontario Basic Income Pilot ("OBIP")

#### *A) Background*

13. A Basic Income Pilot was first outlined as a government priority in the 2016/2017 Ontario Budget Speech in the area of social assistance reform. [2]

14. On April 24, 2017, the Honorable Kathleen Wynne announced the launch of OBIP. The OBIP was a social assistance pilot program and research project that was to be used to study the impact of a basic income payment on persons' food security, stress and anxiety, mental health, health and healthcare usage, housing stability, education and training, and employment and labour market participation so as to determine if it was an approach to social assistance that should be expanded across the province. [3]

15. OBIP was piloted in Thunder Bay and the surrounding area, Hamilton/Brantford/Brant County, and Lindsay. [4]

16. Participants in all three pilot sites were randomly assigned to an intervention group or a control group in the model of a randomized controlled trial. [5] Lindsay later became a saturation like site where all participants were placed in the intervention group and provided intervention payments. The Lindsay saturation site sought to evaluate the community/system level outcome of the intervention payments (e.g. crime rates, labour market) by comparing data about the town of Lindsay to data from a similar town where no intervention payments were introduced. [6]

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[2] 2016/2017 Budget Speech Excerpt, Responding Certification Motion Record ("Crown's Motion Record"), Tab 1, Affidavit of Debbie Burke-Benn, sworn November 28, 2019 ("DBB Affidavit"), para 17, page 7, Exhibit 2, pages 92-95
[3] DBB Affidavit, Crown's Motion Record, Tab 1, para 18, page 7
[4] April 24, 2017 Wynne Speech and OBIP News Release, Crown's Motion Record, Tab 1, DBB Affidavit, para 18, page 7, Exhibits 3-4, pages 97-107
[5] DBB Affidavit, Crown's Motion Record, Tab 1, paras 34-37, page 11
[6] Approved Study Protocols, Crown's Motion Record, Tab 1, DBB Affidavit, para 40, page 12, Exhibits 11-13, pages 185-304

17. The research project was more particularly described in Study Protocols that were approved by the Veritas Independent Review Board, ("Veritas"), a research ethics board that provided guidance on the delivery of the research components of the OBIP. The study protocols changed over time. The first study protocol was updated two times for a total of three study protocols. [7]

18. There were three phases to the study: enrollment, intervention, and evaluation and reporting. [8]

19. With respect to the intervention phase, the first study protocol dated May 1, 2017 does not address the duration of the intervention payments. The second two study protocols dated January 22, 2018 and March 19, 2018 state as follows for the duration of the intervention payments:

> Study Intervention
>
> Active Intervention
>
> Participants in the intervention group or the saturation site will receive a basic income (modelled as a tax credit) for up to 3 years. [9]

***B) OBIP Structure***

20. In addition to Veritas referenced above, two Orders-in-Council ("OICs") were passed on June 28, 2017 creating:

> a) A Basic Income Pilot Ministers' Advisory Council ("MAC"). The mandate of MAC was to provide advice about the delivery of OBIP [10]; and
>
> b) A Research and Evaluation Advisory Committee Chair ("REAC"). The mandate of REAC was to provide advice on how to best evaluate the outcome of OBIP. [11]

21. Each OIC and the associated Terms of Reference were for terms described as "not to exceed

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[7] Approved Study Protocols, Crown's Motion Record, Tab 1, DBB Affidavit, para 29, page 9, Exhibits 11-13, pages 185-304

[8] DBB Affidavit, Crown's Motion Record, Tab 1, para 31, page10

[9] January 22, 2018 and March 19, 2018 Approved Study Protocols, Crown's Motion Record, Tab 1, DBB Affidavit, para 29, page 9, Exhibits 12-13, pages 239-241, 283-285

[10] Minister's Advisory Council Order-in-Council and Terms of Reference, Crown's Motion Record, Tab 1, DBB Affidavit, para 26, page 9, Exhibits 7-8, pages 153, 158-159, 164. See also Letter appointing members of the MAC for a "term not exceeding three years" as referenced in the Statement of Claim-(f), Crown's BOA, Tab 76

[11] Research and Evaluation Advisory Committee Chair Order-in-Council, Crown's Motion Record, Tab 1, DBB Affidavit, para 27, page 9, Exhibits 9-10, pages 166-183; See also Order-in-Council appointing a Research and Evaluation Advisory Chair for a "term not exceeding three years' as referenced in the Statement of Claim at para 69(b)-(f), Crown's BOA Tab 77

three years" or "up to three years". [12]

22. On October 2, 2017, Ontario retained Providence St. Joseph's and St. Michael's healthcare as represented by the Centre for Urban Health Alternatives, independent third-party researchers that were to collect and analyze the research data that was to be used to answer the OBIP research questions. The contract was for three years so that the evaluation and reporting phase of OBIP was to be completed within three years. [13]

23. The research study had been approved by Veritas until May 2, 2019. This was the "study expiration date", subject to further approvals. [14]

24. The projected study closure date, assuming continuation of the study, was May 27, 2021. To close out the study the Ministry was required to perform additional work such as responding to any participant inquiries, potential further communications with participants regarding the results of the study, and the issuance of T5 tax forms to participants. In addition, the Ministry was responsible for the administration of study data and related information including the archiving of 6,005 individual participant files (electronic and hardcopy) and collecting and archiving all data held by the researchers in accordance with the data security and confidentiality requirements as set out in the Study Protocol. [15]

***C) Applicant Enrollment***

25. Applicants were enrolled in the OBIP between July 2017 and April 2018. [16] While the

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[12] Note that pursuant to the Agencies and Appointments Directive under the *Management Board of Cabinet Act*, R.S.O. 1990, c. M.1, s. 3(3), such appointments are at pleasure and must "not exceed three years", Crown's Book of Authorities, Tab 1

[13]Transcript of the Cross-examination of Debbie Burke-Benn, Joint Supplementary Motion Record, Tab D, Q 203-204, 207-211, pages 196, 198-199.

[14] May 1, 2018 letter from Veritas, Crown's Motion Record, Tab 1, DBB Affidavit, para 32, page 10, Exhibit 16, page 364

[15] Study Protocol Version 2.2 dated March 19, 2018 and May 1, 2018 letter from Veritas, Crown's Motion Record, Tab 1, DBB Affidavit, para 33, page 10, Exhibits 13 & 16, pages 294-295, 364-372

[16] DBB Affidavit, Crown's Motion Record, Tab 1, paras 60 & 76, pages 18 & 22

Amended Claim relies on alleged oral representations made at in-person enrollment sessions, enrollment commenced by mail.

**(i) Mailed Application: June 2017 to November 2017**

26. From June 2017 to September 2017 applicants applied to OBIP through mailed application packages sent to randomly selected individuals in Thunder Bay and the surrounding area and in Hamilton/Brantford/Brant County. The mailed application packages included a letter, the Basic Income Pilot: Information Booklet dated May 2017 ("Information Booklet" or "Booklet"), and related Application Form that referenced back to the Booklet. [17]

27. From September 2017 to November 2017, the Ministry stopped mailing the Booklet and related Application Form, and instead mailed a short letter about OBIP with included information about OBIP on the envelope inviting interested persons to contact the Ministry to apply. Interested individuals who contacted the Ministry were sent the Booklet and related Application Form. [18]

**(ii) In-Person Application: October 2017 to April 2018**

28. Ministry employees attended local agencies (e.g. Brantford Food Bank, Hamilton Early Years Centre), and handed out information to anyone who was interested in applying, including application packages to be filled out and sent in later, or potentially completed at the time. [19]

29. The Ministry also asked local agencies to inform their members and clients about in-person enrollment sessions. Anyone who was interested was able to register for an enrollment session through an online portal or sign up for an in-person enrollment session over the phone (i.e. "Referral

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[17] OBIP mail-out application letter, Booklet, and Application Form, Crown's Motion Record, Tab 1, DBB Affidavit, para 60, page 18, Exhibit 21, pages 403-444

[18] OBIP Envelope Insert, Crown's Motion Record, Tab 1, DBB Affidavit, paras 63 & 70, pages 19 & 21, Exhibit 24, pages 470-473. Starting in or about November 2017, the Ministry stopped mailing application packages or the short letter about OBIP with information about OBIP but continued to process any completed applications received by mail and mailed and processed application packages if requested via phone or email.

[19] DBB Affidavit, Crown's Motion Record, Tab 1, para 65, page 19

Session"). [20] Later, in-person enrollment sessions were opened to anyone that lived in the designated locations for the OBIP (i.e. "Open Call Sessions") and applicants could drop-in or register for a session online or over the phone. [21] During the March-April 2018 enrollment period a revised Application Form was used that did not depend on the Booklet for content.

**(iii) Applicant Study Documentation: Information Booklet and Application Forms**

30. As set out in the Amended Claim, the Plaintiffs' rely upon numerous public announcements regarding the OBIP preceding the enrollment process, and alleged oral representations made by Crown employees, representatives and agents to applicants at in-person enrollment sessions. [22]

31. The only substantive written study documentation distributed to applicants by mail or at in-person enrollment sessions was the Information Booklet and Application Forms. The Booklet and the Application Forms are referenced in the Amended Claim and by law are incorporated into the Amended Claim as if "fully quoted in the pleadings". [23]

32. Remarkably, despite the text of these documents forming a part of the Amended Claim at law "as if fully quoted in the pleadings", the Plaintiffs' Factum seeks to dissuade the Court from reviewing the documents. The Plaintiff's Factum states that "…it is not necessary to review the Information Booklet and Application Forms extensively for the wording the Plaintiffs rely upon for the proposition that – on the merits – the defendant contracted and promised to pay three years of monthly BI Payments to the Class." [24] Indeed, a review of the wording reveals that no such guarantee is made

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[20] OBIP in-person enrollment sessions, Crown's Motion Record, Tab 1, DBB Affidavit, para 66, page 20, Exhibit 25, pages 475-481
[21] OBIP in-person enrollment sessions, Crown's Motion Record, Tab 1, DBB Affidavit, para 71, page 21, Exhibit 25, pages 475-481
[22] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, paras 55-73, pages 15-21
[23] *Trillium Power Wind Corp. v Ontario (Ministry of Natural Resources)*, 2013 ONCA 683 at paras 30-31, Crown's BOA, Tab 2; *Web Offset Publications Ltd. v Vickery*, [1999] OJ No 2760 at para 3 (CA), leave to appeal dismissed [1999] SCCA No 460, Crown's BOA, Tab 3; *Re Collections Inc. v Toronto-Dominion Bank*, 2010 ONSC 6560 at para 107, Crown's BOA, Tab 4
[24] Plaintiff's Factum, para 35

contrary to the misstatements attributed to the documents in the Amended Claim.

**(iv) Application Form and Information Booklet**

33. The Application Form contains some of the same information as in the more detailed Booklet and an acknowledgement that the applicant has read the Booklet. [25] The Booklet is described below.

**(a) Duration of Study and Duration of Intervention Payments Under the Study**

34. On the first page of the Booklet following the table of contents the OBIP is described as a three-year study. Also, on the same page participants are advised that they could be placed in a Control Group and not receive any basic income payments, or in the Basic Income Group and receive basic income "payments for up to a three-year period" [Emphasis added]. Specifically, the Information Booklet states:

> **Two Groups Participating in the Research Study**
>
> At the start, the Pilot will select two groups of eligible applicants who will be asked to participate in the research study:
>
> 1. One group will receive monthly basic income payments for up to a three-year period. This group is called the **Basic Income Group**.
>
> 2. One group will **not** receive monthly basic income payments that will actively participate in the research study. This group is called the **Control Group**. [26]

35. The OBIP was later described in the Booklet as being for "up-to three years". Participants were advised that when the OBIP enters its "final" year payments would be reduced. Participants were further cautioned that participation is "temporary" and that "[a]ny decisions you make about your future based on the amount you receive from Basic Income should take this into account". [27] The Booklet further described the study to applicants.

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[25] OBIP Application and Consent Form, Crown's Motion Record, Tab 1, DBB Affidavit, Crown's Motion Record, para 30, pages 9-10, Exhibit 14, page 343

[26] Basic Income Pilot: Information Booklet, Crown's Motion Record, Tab 1, DBB Affidavit, para 30, pages 9-10, Exhibit 14, page 311

[27] Basic Income Pilot: Information Booklet, Crown's Motion Record, Tab 1, DBB Affidavit, para 30, pages 9-10, Exhibit 14, page 324

**(b) Randomized Controlled Trial**

36. The Booklet explained that the two groups were required because the study would follow what is called a randomized controlled trial with participants randomly selected for each group as above. Applicants were advised that they would be required to complete surveys periodically throughout the Pilot and provide personal information collected from other government services and programs. [28]

**(c) Eligibility**

37. There were three eligibility requirements to commence participation in OBIP: a) participants had to be between the ages of 18 to 64; b) they had to have been resident in one of the three designated pilot sites for 12-months or longer; and c) their previous' years income had to have been less than: $33,978 for single people; $48,054 for couples; $45,978 for single people with a disability; $60,054 for couples where one person has a disability; and $72,054 for couples where both people have a disability. [29]

38. Unlike Ontario Works and the Ontario Disability Support Program, participants did not have to work or look for work, participate in job training, or go to school, to receive payments. [30]

**(d) OBIP Intervention Payments**

39. The amount of the intervention payment depended on whether the participant was single or part of a couple, their previous years' income, and whether they and/or their spouse or common law partner had a disability. [31]

40. OBIP intervention payments ranged from a maximum of $16,989 for an individual without a

[28] Basic Income Pilot: Information Booklet, Crown's Motion Record, Tab 1, DBB Affidavit, para 30, pages 9-10, Exhibit 14, pages 312, 318-319
[29] Basic Income Pilot: Information Booklet, Crown's Motion Record, Tab 1, DBB Affidavit, para 30, pages 9-10, Exhibit 14, pages 312-313
[30] DBB Affidavit, Crown's Motion Record, Tab 1, para 48, page 14
[31] Basic Income Pilot: Information Booklet, Crown's Motion Record, Tab 1, DBB Affidavit, para 30, pages 9-10, Exhibit 14, pages 312-313

disability and a maximum of $36,027 for a couple with both adults with a disability. [32]

41. OBIP payments were calculated using a "Negative Income Tax" approach. OBIP payments were reduced by 50% of employment earnings (e.g. income from employment, compensation for services rendered including self-employment, farming and rental income), and 100% for other income (e.g. employment insurance, including parental leave benefits, pension payments, including CPP disability benefits, Old Age Security, Workplace Safety and Insurance payments, and investment earnings such as Registered Retirement Savings Plan income). [33]

**(e) Ongoing Expectations to Receive Payments and Impacts on Other Government Benefits**

42. Participants were advised that to participate in the Pilot they would be required to complete their income taxes every year of participation to enable determinations of eligibility. Participants were further advised that they would be required to complete surveys. [34] Participation in OBIP was voluntary and participants were free to opt out at any time. [35]

**(v) Application Form**

43. Starting in March 2018, a new more substantive Application Form was used. The Application Form does not refer to the Booklet or contain an acknowledgement that the Booklet was read.

**(a) Duration of Study and Duration of Intervention Payments Under the Study**

44. The Application Form makes no reference to the duration of the study. With respect to the duration of the intervention payments, like the Booklet, participants were advised that payments to the intervention group would be made for "up to" three years. The Application Form contained a tick box for Applicants to so acknowledge:

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[32] OBIP Booklet, Crown's Motion Record, Tab 1, DBB Affidavit, para 46, pages 13-14, Exhibit 14, page 323
[33] OBIP Booklet, Crown's Motion Record, Tab 1, DBB Affidavit, para 46, pages 13-14, Exhibit 14, pages 322-323. For additional detailed information on the calculations for BI Payments see Schedule "E".
[34] OBIP Booklet, DBB Affidavit, Crown's Motion Record, Tab 1, paras 39-41, pages 11-12, Exhibit 14, page 324
[35] OBIP Booklet, DBB Affidavit, Crown's Motion Record, Tab 1, para 46, pages 13-14, Exhibit 14, pages 312, 320 & 324

**Research and Evaluation**

**I/we understand the following:** …

[ ] All participants living in Lindsay will receive Basic Income payments for up to a three-year period. [36]

[ ] Participants living in Hamilton, Brantford, Brant County or Thunder Bay and surrounding area will be assigned to two groups. One group receives Basic Income payments for up to a three-year period. The other group is called the Comparison Group, and they do not receive Basic Income payments. [Emphasis added] [37]

45. While at this time applications were in-person, applicants could still request to be mailed the Application Form and return same by mail. [38]

***D) Application Process***

46. Applicants filled out the applicable Application Form and submitted it along with necessary accompanying documents. For a detailed explanation of the application process by mail and in-person see Schedule "E". Following determinations of eligibility applicants were asked to complete a Baseline Survey for which they were paid $50. [39] After the survey was complete, a letter was sent to eligible applicants confirming their eligibility and informing them if they had been placed into the control group, or the intervention group. If placed in the intervention group, the letter advised that they would be compensated $30 for the completion of each additional survey. The letter also included a monthly BI payment amount and a payment schedule ending June 2018. [40]

47. With respect to enrollment of the affiants, affiant Ms. Paskoski applied through the mail in July 2017 using the Information Booklet and Application Form. [41] Ms. Mechefske applied through an in-

[36] By this time Lindsay had been designated a saturation site so all participants would be in the payment group: Study Protocol 2.1, Crown's Motion Record, Tab 1, DBB Affidavit, para 37, page 11, Exhibit 13, pages 274-275
[37] OBIP Application Form, Crown's Motion Record, Tab 1, DBB Affidavit, para 30, pages 9-10, Exhibit 15, page 359
[38] DBB Affidavit, Crown's Motion Record, Tab 1, para 70, page 21
[39] DBB Affidavit, Crown's Motion Record, Tab 1, para 69, page 20
[40] Letters sent to Participants, Crown's Motion Record, Tab 1, DBB Affidavit, para 73, page 21, Exhibit 23, pages 460-463
[41] Application letter received by Susan Paskoski, Motion Record of the Plaintiffs, Vol 3, Tab H, Affidavit of Susan Paskoski sworn August 20, 2019, paras 16-18 & 30, pages 1118-1119 & 1121, Exhibit 1, pages 1130-1132

person enrollment session in October 2017 using the Information Booklet and Application Form. [42] Ms. Bowman applied through an in-person enrollment session in October 2017 using the Information Booklet and Application Form. [43] Ms. Lindsay applied through an in-person enrollment session in March 2018 using the revised Application Form. [44] Ms. Hillion-Doyle applied through an in-person enrollment session in April 2018 using the revised Application Form, and had been shown the Booklet by a relative. [45]

***E) End of Enrollment***

48. As of the end of April 2018 participant enrollment was complete. Already, 102 intervention group participants had become ineligible to receive payments. Seventy-Five had withdrawn (75), sixteen (16) became deceased, and eleven (11) reached the age of 65. As of the end of April 2018, 4,001 households (i.e. individuals and their spouse or common law partner) remained in the intervention group. [46] 2,000 households were in the control group. [47]

***F) Administration and Participant Experience in the OBIP***

49. Once enrolled a participant's eligibility for BI payments could have ended, or the amount of the payment could have been adjusted due to several circumstances, including:

a. Voluntary withdrawal;

b. Participant reaching the age of 65;

c. Participant or couple exceeding the low-income eligibility thresholds;

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[42] Motion Record of the Plaintiffs, Vol 1, Tab D, Affidavit of Tracey Mechefske sworn August 21, 2019, paras 12, 14-16, & 23, pages 73-76; Mechefske Application Form dated October 12, 2017, Joint Supplementary Motion Record, Tab I, Transcript of the Cross-Examination of Tracey Mechefske, page 392, Exhibit 1, page 408

[43] Bowman OBIP Application, Motion Record of the Plaintiffs, Vol 3, Tab 2, Affidavit of Dana Bowman sworn August 23, 2019, para 8, page 1030, Exhibit 2, pages 1030-1041; Joint Supplementary Motion Record, Tab H, Transcript of the Cross-Examination of Dana Bowman, pages 381-382, Qs 21-24

[44] Lindsay OBIP Application dated March 20, 2018, Motion Record of the Plaintiffs, Vol 3, Tab F, Affidavit of Susan Lindsay sworn August 21, 2019, para 10, pages 1054-1055, Exhibit. 4, page 1075

[45] Doyle-Hillion OBIP Application dated April 18, 2018, Motion Record of the Plaintiffs, Vol 3, Tab G, Affidavit of Grace Marie Doyle-Hillion sworn August 23, 2019, paras 3, 4, & 7, pages 1098-1099, Exhibit 1, page 1105

[46] DBB Affidavit, Crown's Motion Record, Tab 1, para 76, page 22

[47] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, para 5, page 6

d. Change of income (e.g. employment income, investment earnings, etc., or benefits such as employment insurance, workplace safety and insurance benefits etc. for participant or spouse or common law partner);

e. Change in relationship status (marriage, divorce, separation, or the start or end of a common law relationship);

f. Participant or spouse or common law partner qualifying for and enrolling in ODSP or OW after enrolling in OBIP;

g. Change in disability status;

h. Incarceration of participant or spouse or common law partner;

i. Change of address to outside of Ontario;

j. Non-completion of surveys;

k. Failure to file Income Tax Return by participant or spouse or common law partner;

l. Late filing of Income Tax Return by participant or spouse or common law partner;

m. Misrepresentation or mistake in the information provided to OBIP administrators or the Canada Revenue Agency by participant or spouse or common law partner;

n. Discrepancies between information provided by participant or spouse and common law partner to the Canada Revenue Agency and OBIP administrators impeding the ability to determine eligibility; and

o. Death of the participant or spouse or common law partner. [48]

50. Many of these circumstances occurred. During the course of the study, 713 payment group participants (households) became ineligible to receive payments. This was due to increases in income (119), voluntary withdrawal (75), death (17), reaching the age of 65 (11), failure of a participant or his or her spouse or common law partner to file their 2017 Income Tax Return to enable determinations of ongoing eligibility (372), or a participant's provision of information in their 2017 Income Tax Return that did not match OBIP records such that ongoing eligibility could not be determined (119). [49]

[48] DBB Affidavit, Crown's Motion Record, Tab 1, para 58, pages 16-17
[49] DBB Affidavit, Crown's Motion Record, Tab 1, paras 76, 81-84, pages 22, 23-25

51. The study could also have been modified or ended based on recommendations by Veritas, the MAC, REAC, or the researchers, such as due to concerns about the welfare of the intervention or control group participants or the quality of the research. Research becoming redundant due to research from other jurisdictions could also have resulted in an end to the study. Finally, changes in government policy regarding social assistance delivery could and did end the study. [50]

***G) Wind Down of OBIP***

52. On July 31, 2018, citing the increased number of Ontarians forced into social assistance, the lengthy reliance on social assistance programs and the cycle of poverty many Ontarians face, Ontario's newly elected government announced that it would replace the previous government's policy on social assistance with a different system to "stabilize people in need and support them to succeed". As part of the announcement, the government announced that it would increase support rates for recipients of Ontario Works and the Ontario Disability Support Program payments by 1.5% and proceed with other measures to provide relief to low income families such as reducing gas prices, lowering hydro rates, and providing tax relief. As part of the social assistance reform the government further announced that it would wind down OBIP to "focus resources on more proven approaches" to social assistance that would be available to all Ontarians and not just those who lived in the three pilot sites. [51]

53. On August 31, 2018, Ontario provided further details about the wind-down of OBIP in an announcement noting that the Pilot itself does not help the nearly two million Ontarians trapped in the cycle of poverty. The announcement also referenced the "extraordinary cost for Ontario taxpayers" of implementing a policy of basic income throughout Ontario, and a Ministry of Finance

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[50] DBB Affidavit, Crown's Motion Record, Tab 1, para 58, pages 16-17; *Bowman et al. v Her Majesty the Queen*, 2019 ONSC 1064, Crown's BOA, Tab 6

[51] July 31, 2018 News Release, Crown's Motion Record, Tab 1, DBB Affidavit, para 79, page 23, Exhibit 27, pages 485-488

estimate that it would require increasing the HST from 13 percent to 20 percent. [52]

54. The announcements were followed up with letters and phone calls to each participant. [53] No surveys had been completed beyond the initial Baseline Survey completed during the application process. [54]

55. Despite the change in policy, the Province continued providing participants in the intervention group with full unreduced monthly basic income payments until the end of March 2019 (i.e. eight months from the July 31, 2018 announcement of the wind-down). [55]

56. Payments continued to participants that were eligible, and to participants whose eligibility could not be determined because they or their spouse or common law partner did not file their 2017 Income Tax Return (372), or because they or their spouse or common law partner filed their 2017 Income Tax Return, but the information did not match OBIP records to confirm eligibility (119). Furthermore, the incomes of 1,401 participants or their spouses or common law partners had increased from the income initially reported such that their OBIP payments should have decreased if OBIP had continued. Nevertheless, these participants were paid at the same rate. Participants were also advised that they could contact the Ministry during the wind-down period to report any substantial change in circumstances for the Ministry to recalculate participants' monthly payments. [56]

57. These continued payments were to provide participants with time to transition out of OBIP by finding or increasing their employment, or for those eligible, to transition back to receiving payments under social assistance programs (e.g. Ontario Works and the Ontario Disability Support Program). [57]

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[52] August 31, 2018 News Release, Crown's Motion Record, Tab 1, DBB Affidavit, para 80, page 23, Exhibit 28, page 490
[53] Letters to Participants, Crown's Motion Record, Tab 1, DBB Affidavit, para 85, page 25, Exhibit 30, page 494-501
[54] DBB Affidavit, Crown's Motion Record, Tab 1, para 86, page 25
[55] DBB Affidavit, Crown's Motion Record, Tab 1, para 84, page 25
[56] DBB Affidavit, Crown's Motion Record, Tab 1, para 85, page 25
[57] DBB Affidavit, Crown's Motion Record, Tab 1, para 80, page 23

58. Following the eight months of continued payments, many participants did transfer back to the ODSP and OW pursuant to a streamlined process. [58] For example, three of the four proposed representative plaintiffs have returned to ODSP. [59] The fourth proposed representative plaintiff, Ms. Doyle-Hillion, is a college student and was not receiving ODSP or OW benefits prior to her enrollment in the OBIP. [60]

***H) Financial Appropriation for OBIP***

59. In accordance with the end of the OBIP payments there was no legislative appropriation for the OBIP for the 2019/2020 fiscal year. Total appropriations for the Crown are reflected in the *Supply Act* which represents legislative control over public spending. The appropriations authorized through the *Supply Act* are detailed in the Expenditure Estimates for each Ministry. In 2016/2017, $5,001,000 was appropriated for the OBIP. In 2017/2018, $41,494,600 was appropriated for the OBIP. In 2018/2019, $44,192,300 was appropriated for the OBIP. These appropriations are all reflected in a specific line item for the OBIP in the Expenditure Estimates. For the fiscal year 2019/2020, the OBIP line item was removed and there was no legislative appropriation for the OBIP. [61]

**2. Amended Statement of Claim**

60. For the purposes of resisting certification on s. 5(1)(a) grounds (i.e. no reasonable cause of action), the alleged facts as pled in the Claim are assumed to be true. Those alleged facts follow.

61. The essence of the Amended Claim is an alleged guaranteed right of the class to three years of

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[58] DBB Affidavit, Crown's Motion Record, Tab 1, paras 88-90, page 26

[59] Affidavit of Tracey Mechefske, Motion Record of the Plaintiffs, Vol 1, Tab D, para 49, page 81; Affidavit of Dana Bowman, Motion Record of the Plaintiffs, Vol 3, Tab E, para 15, page 1021; Affidavit of Susan Lindsay, Motion Record of the Plaintiffs, Vol 3, Tab F, para 17, page 1056; Affidavit of Susan Paskoski, Motion Record of the Plaintiffs, Vol 3, Tab H, para 62, page 1126

[60] Cross-Examination of Grace Marie Doyle-Hillion, Joint Supplementary Motion Record, Tab F, Qs 51-58, page 317-318

[61] MCSS Expenditure Estimates 2016/2017 and MCCSS Expenditure Estimates 2018/2019, Crown's Motion Record, Tab 1, DBB Affidavit, paras 22-23, Exhibits 1 & 6, pages 44-61 &129-151

BI Payments. It is alleged that Cabinet's policy choice to cease BI Payments prior to three years gives rise to five causes of action. The Amended Claim states:

> The Defendant's early termination of BI payments amounts to a breach of contract, breach of undertaking, negligence, a public law tort, and, further or in the alternative, a breach of s. 7 of the *Canadian Charter of Rights and Freedoms*. [62]

62. The Plaintiffs claim $200M in general damages for the class in addition to an undisclosed amount for special damages, and other ancillary costs. [63] More particularly, the Plaintiffs claim "damages measured as the amount of BI Payments they and the Class have lost or of which they and the Class have been improperly denied", [64] damages for "expenses incurred and amounts paid that will have to be foregone" due to the decision, [65] damages for inconvenience, loss of time, frustration, anxiety, mental distress, psychological injury, and emotional upset, and damages to offset the impact of any court award of BI Payments or other damages on their ODSP benefits, OW benefits, other benefits, or taxes. [66]

63. The right to a guaranteed three years of payments is alleged to arise from three sources: public announcements; oral representations to applicants; and the Information Booklet and Application Forms.

***A) Pre-Enrollment Public Announcements***

64. The Amended Claim relies upon numerous public announcements regarding the OBIP from Crown consultants (i.e. Hugh Segal), a speech of the former Premier in Hamilton, a Ministry news release, a Crown webpage, and statements in the Legislature by Ministers. [67]

65. The Amended Claim pleads that Mr. Segal recommended a Pilot divided into three phases: a

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[62] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, para 11, page 7
[63] *Ibid*, para 2, page 5
[64] *Ibid*, para 117, page 30
[65] *Ibid*, para 118, page 30
[66] *Ibid*, paras 119-121, pages 30-32
[67] *Ibid*, paras 55-65, pages 15-18

planning phase, a distribution phase, and an evaluation phase. He recommended that the Pilot include a three-year distribution phase for payments. [68]

66. "Following further consultations", the Pilot was announced by the former Premier as a three-year Pilot. Additional statements are pled that the Pilot would be for three years. [69] The only statement pled from a government source on the duration of payments (i.e. distribution phase) is that payments under the Pilot would be for "up to" three years. [70] From these statements, the Amended Claim concludes that the Crown repeatedly represented that BI Payments would be made for three years. [71]

***B) Oral Representations***

67. The Amended Claim makes numerous bald statements that unnamed Crown employees, unnamed Crown "agents", and other unnamed Crown "representatives", made repeated oral representations to unnamed potentially eligible applicants, that if placed in the Payment Group, they would be "guaranteed" to receive BI Payments for three years. [72] The number of such representations, and where and when such representations were made, are also not identified.

68. The Amended Claim states that participants "relied on" and applied to be in the Pilot "on the strength" of such oral representations. [73]

69. The Amended Claim also relies on the OICs and Terms of Reference referred to above as being consistent with representations of a guaranteed right to three years of payments. To make this claim the Amended Claim inaccurately states the content of the OICs the text of which is incorporated by

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[68] *Ibid*, paras 56-57(d)(e), pages 15-16
[69] *Ibid*, paras 58-64, pages 16-28
[70] *Ibid*, para 62(b), page 18
[71] *Ibid*, paras 65-66, pages 18-19
[72] *Ibid*, paras 66-67 & 71, page 19 & 20
[73] *Ibid*, paras 7, 68, 102, & 104, pages 6, 19, 26-27

law into the Amended Claim. [74] The Amended Claim states that the terms specified in these documents are for a fixed three-year period, although as above the terms specified are terms "not exceeding three years" or "up to three years". [75]

### *C) In the Alternative: Information Booklet and Application Forms*

70. For the source of the alleged guaranteed right to three years of BI Payments, the Amended Claim "[f]urther or in the alternative" relies upon the Information Booklet and Application Forms. The content of these materials is addressed above which provide that payments would be for "up to" three years, not three years. As noted above, the content of the Booklet and Application Forms by law are incorporated into and form part of the Amended Claim. [76]

71. Class Members in the Payment Group were sent a letter advising that they would receive BI Payments. The letter identified the amount of each payment and included a payment schedule until June 2018. [77]

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[74] *Trillium Power Wind Corp. v Ontario (Ministry of Natural Resources)*, 2013 ONCA 683 at paras 30-31, Crown's BOA, Tab 2; *Web Offset Publications Ltd. v Vickery*, [1999] OJ No 2760 at para 3 (CA) leave to appeal dismissed [1999] SCCA No 460, Crown's BOA, Tab 3; *Re Collections Inc. v Toronto-Dominion Bank*, 2010 ONSC 6560 at para 107, Crown's BOA, Tab 4

[75] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, para 69, page 19-20; Minister's Advisory Council Order-in-Council and Terms of Reference, Crown's Motion Record, Tab 1, DBB Affidavit, para 26, page 9, Exhibits 7-8, pages 153, 158-159, 164. See also Letter appointing members of the MAC for a "term not exceeding three years" as referenced in the Statement of Claim-(f), Crown's BOA, Tab 76; Research and Evaluation Advisory Committee Chair Order-in-Council, Crown's Motion Record, Tab 1, DBB Affidavit, para 27, page 9, Exhibits 9-10, pages 166-167, 169-183; See also Order-in-Council appointing a Research and Evaluation Advisory Chair for a "term not exceeding three years' as referenced in the claim at para 69(b)-(f), Crown's BOA, Tab 77. While superficially these documents would seem to support the Crown's position as opposed to the Plaintiffs, the Crown does not rely on them. Such appointments are pursuant to the general Agencies and Appointments Directive under the *Management Board of Cabinet Act*, R.S.O. 1990, c. M.1, s. 3(3), and pursuant to the Directive such appointments are at pleasure and must "not exceed three years", Crown's BOA, Tab 1

[76] *Trillium Power Wind Corp. v Ontario (Ministry of Natural Resources)*, 2013 ONCA 683 at paras 30-31, Crown's BOA, Tab 2; *Web Offset Publications Ltd. v Vickery*, [1999] OJ No 2760 at para 3 (CA), leave to appeal dismissed [1999] SCCA No 460, Crown's BOA, Tab 3; *Re Collections Inc. v Toronto-Dominion Bank*, 2010 ONSC 6560 at para 107, Crown's BOA, Tab 4

[77] Enrollment Letters, Crown's Motion Record, Tab 1, DBB Affidavit, para 61, pages 18-19, Exhibit 23, pages 460-468

## 3. Moving Party Evidence

### *A) Evidence of the Proposed Representative Plaintiffs and Additional Participant*

72. Most notable from the affidavits of the four proposed representative plaintiffs and additional participant affidavit on this certification motion is what is not stated.

73. None of these affiants claim to have heard or been privy to any of the public announcements as set out in the Amended Claim. [78]

74. None of the affidavits claim that an oral representation was made to them that BI payments would be made for three years. No affiants allege such a representation was made to them, save for Ms. Doyle-Hillion, who made the allegation for the first time when cross-examined. [79]

75. In fact, despite the claim for BI Payments, none of the affidavits have any paragraphs that address or make any allegation regarding the duration of BI payments. None of the participant affidavits state that they applied for OBIP because of a promise of three years of OBIP payments. None of the participant affidavits allege that they would not have applied for OBIP absent a guarantee of a specific three years of BI Payments.

76. Furthermore, it is notable that when asked how long Ms. Lindsay expected to receive payments, her answer was that she was "not sure". [80]

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[78] Affidavit of Tracey Mechefske, Motion Record of the Plaintiffs, Vol 1, Tab D, pages 71-91; Cross-Examination of Tracey Mechefske, Joint Supplementary Motion Record, Tab I, , Qs 35-42, pages 397-398; Affidavit of Dana Bowman, Motion Record of the Plaintiffs, Vol 3, Tab E, pages 1019-1024; Cross-Examination of Dana Bowman, Joint Supplementary Motion Record, Tab H, Qs 42-46, page 386; Affidavit of Susan Lindsay, Motion Record of the Plaintiffs, Vol 3, Tab F, pages 1053-1061; Cross-Examination of Susan Lindsay, Joint Supplementary Motion Record, Tab G, Qs 5-8, pages 322-323; Affidavit of Grace Marie Doyle-Hillion, Motion Record of the Plaintiffs, Vol 3, Tab G, pages 1098-1103; Cross-Examination of Grace Marie Doyle-Hillion, Joint Supplementary Motion Record, Tab F, Qs 7 and 47-49, pages 310, and 316-317; Affidavit of Susan Paskoski, Motion Record of the Plaintiffs, Vol 3, Tab H, pages 1116-1128; Cross-Examination of Susan Paskoski, Joint Supplementary Motion Record, Tab B, Q 6, page 41

[79] Affidavit of Grace Marie Doyle-Hillion, Motion Record of the Plaintiffs, Vol 3, Tab G, pages 1098-1103; , Cross-Examination of Grace Marie Doyle-Hillion, Joint Supplementary Motion Record, Tab F, Qs 7 and 47-49, pages 310 and 316-317

[80] Cross-Examination of Tracey Mechefske, Joint Supplementary Motion Record, Tab I, Qs 35-42, pages 397-398

77. Ms. Bowman had reviewed the Booklet and stated that her expectation was that payments would be for "up to" three years. Her assumption was that the start date for the Pilot was April 2017, that she enrolled past that date, and that payments would be made to April 2020. She could not source this assumption. [81]

78. Ms. Mechefske stated that she expected to receive payments for three years. When asked to source this information she referred to the Information Booklet and stated that she recalled seeing "three years more often than [up] two (sic) [three years]". [82] She stated that she assumed she would receive payments for three years from when she enrolled in October 2017. She could not identify a source for this assumption. [83]

79. Despite the above, with respect to the Information Booklet and Application Forms, when asked all affiants acknowledged that payments "up to" three years means a maximum of three years, not a minimum. [84]

***B) Evidence of Shelia Regehr***

80. Ms. Regehr was <u>not a participant or an administrator</u> in the OBIP. Tellingly, this is the <u>only</u> affidavit that alleges that BI payments were "guaranteed" and would be for made for three years. The alleged "guarantee" comes from Ms. Regehr's views as to basic income in general, although she has written that a basic income means different things to different people. [85] The allegation that three years of payments would be made is sourced to a speech of the Premier and related press release, the

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[81] Cross-Examination of Dana Bowman, Joint Supplementary Motion Record, Tab H, Qs 42-46, page 386
[82] Cross-Examination of Tracey Mechefske, Joint Supplementary Motion Record, Tab I, Q 36, page 397
[83] Cross-Examination of Tracey Mechefske, Joint Supplementary Motion Record, Tab I, Q 38-42, pages 397-398
[84] Cross-Examination of Tracey Mechefske, Joint Supplementary Motion Record, Tab I, Qs 22-23, pages 395-396; Cross-Examination of Dana Bowman, Joint Supplementary Motion Record, Tab H, Q 31, page 384; Cross-Examination of Susan Lindsay, Joint Supplementary Motion Record, Tab G, Qs 31-32, pages 327-328; Cross-Examination of Grace Marie Doyle-Hillion, Joint Supplementary Motion Record, Tab F, Qs 37-38, pages 314-315; Cross-Examination of Susan Paskoski, Joint Supplementary Motion Record, Tab B, Q 23-24, page 44
[85] Affidavit of Susan Regehr, Motion Record of the Plaintiffs, Vol 3, Tab I, para 7, pages 1372-1373; Cross-Examination of Susan Regehr, Joint Supplementary Motion Record, Tab C, Qs 20-21, page 60

text of which does not make such a commitment, along with other unidentified documents. [86]

81. The Plaintiffs' Factum in perhaps its furthest reach for a claim prominently features a slide deck from a presentation given by a Ministry representative in New York City in June 2017 at a Basic Income conference. This slide deck does not state that BI Payments would be guaranteed for three years, and in any event, no participant affiants testify they were even aware of it.

82. In any event, the evidence of Ms. Regehr is inadmissible. It is irrelevant expert evidence from a basic income advocate. [87] Ms. Regehr acknowledges that she is a basic income advocate. She further relies on her "policy expertise" and provides evidence concerning past basic income programs outside the knowledge of a lay person. Her affidavit, generally consisting of her views, impressions and beliefs with respect to the concept of a basic income generally, or the OBIP in which she was not a participant or an administrator, are irrelevant.

**4. Litigation History: *Bowman et al. v. Her Majesty the Queen*, 2019 ONSC 1064 (Div. Ct.)**

83. The same proposed representative Plaintiffs in this action brought a public law Application for Judicial Review claiming that they relied on the OBIP to their detriment and alleging that the decision to end the OBIP was irrational and made in bad faith. The Divisional Court dismissed the Application stating as follows:

> Government cannot be required by the court to make or continue to fund an expenditure, as the distribution of government funds is a political not a judicial function…
>
> Moreover, the fact that funds were provided in the past does not mean government must continue to offer the same level of service nor does the decision to reduce or eliminate funding alone, create enforceable rights…
>
> This is because courts have no power to review the policy considerations which motivate Cabinet decisions. The responsibility for the management of public funds rests with the government and not the court, as does the correctness of the government's decisions and

[86] Affidavit of Susan Regehr, Motion Record of the Plaintiffs, Vol 3, Tab I, paras 19-20, page 1376; Cross-Examination of Susan Regehr, Joint Supplementary Motion Record, Tab C, Qs 26-30, pages 61-62; April 24, 2017 Wynne Speech and Press Release, Crown's Motion Record, Tab 1, DBB Affidavit, para 18, page 7, Exhibit 3-4, pages 96-107

[87] *Lockridge v Director, Ministry of the Environment*, 2012 ONSC 2316 at paras 93-100 (Div Ct), Crown's BOA, Tab 5

> policies. . .
>
> . . . the decision to cancel the Pilot Project is not justiciable. [88]

84. With respect to a claim that the Applicants' legitimate expectations were breached the Divisional Court stated as follows:

> Nor does the Respondent's decision deprive the Applicants of a "legitimate expectation" within the meaning of the law. There is no legitimate expectation to be consulted on policy decisions to fund. Nor is there any obligation to hold public hearings or consult with stakeholders…
>
> As Nordheimer J. (as he then was) noted: "While it may sometimes seem unfair when rules are changed in the middle of a game; that is the nature of the game when one is dealing with government programs"…there is no right to procedural fairness or any legitimate expectation to be consulted on policy decisions. [89]

## PART III – ISSUES AND THE LAW

85. The Crown's position on this motion is that the s. 5(1)(a)(c) and (d) *CPA* requirements for certification of the action are not met.

### ISSUE I: No Reasonable Cause of Action

86. The test under s. 5(1)(a) of the *CPA* for whether a claim discloses a reasonable cause of action is the same as the test under Rule 21 of the *Rules of Civil Procedure* for whether a claim discloses a reasonable cause of action. [90]

#### *1. Test and Principles for s. 5(1)(a) or Rule 21*

87. A claim will be struck where it is plain and obvious that the claim does not disclose a reasonable cause of action, or put another way, where the claim has no reasonable prospect of success. [91]

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[88] *Bowman et al. v Her Majesty the Queen*, 2019 ONSC 1064 at paras 38-40 & 57 (Div Ct), Crown's BOA, Tab 6
[89] *Bowman et al. v Her Majesty the Queen*, 2019 ONSC 1064 at paras 46-47 (Div Ct), Crown's BOA, Tab 6
[90] *Arora v Whirlpool Canada LP*, 2012 ONSC 4642 at para 126, aff'd 2013 ONCA 657 at paras 13-16, leave to appeal denied, [2013] SCCA No 498, Crown's BOA, Tab 7; *Re Collections Inc. v Toronto-Dominion Bank*, 2010 ONSC 6560 at para 102, Crown's BOA, Tab 4
[91] *R. v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras 17, 21, 22, Crown's BOA, Tab 8; *Trillium Power Wind Corp. v Ontario (Ministry of Natural Resources)*, 2013 ONCA 683 at paras 30-31, Crown's BOA, Tab 2

88. The Ontario Divisional Court has added that a "critical analysis" is required to prevent untenable claims from proceeding, given "this age of scarce judicial resources and systemic delay". [92]

89. In conducting the critical analysis, the facts pled in the claim are assumed to be true, save for facts that are patently ridiculous, incapable of proof, or bald conclusory statements of fact unsupported by material facts. [93]

90. Documents referenced in the claim are incorporated into it and the court may read and rely on the terms of the documents as if fully quoted in the pleadings. [94]

91. The Supreme Court of Canada has emphasized the advantage of resolving issues where possible at an early stage of the proceeding:

> The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
>
> This promotes two goods – efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. [95]

92. In a decision of the Ontario Superior Court of Justice, upheld by the Court of Appeal, wherein leave to appeal to the Supreme Court of Canada was denied, Justice Perell struck a contract claim and exhaustively canvassed the jurisprudence on decisions considering whether the plaintiff has pled a reasonable cause of action:

> I find the argument that complex and important issues should only be decided on a full record after trial problematic and an invitation to shirk the court's obligation under s. 5 (1)(a) of the *Class Proceedings Act, 1992*…

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[92] *Rayner v McManus*, 2017 ONSC 3044 at paras 25-26 (Div Ct), Crown's BOA, Tab 9
[93] *Trillium Power Wind Corp. v Ontario (Ministry of Natural Resources)*, 2013 ONCA 683 at paras 30-31, Crown's BOA, Tab 2; *R. v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras 17, 21, 22, Crown's BOA, Tab 8
[94] *Trillium Power Wind Corp. v Ontario (Ministry of Natural Resources)*, 2013 ONCA 683 at paras 30-31, Crown's BOA, Tab 2; *Web Offset Publications Ltd. v Vickery*, [1999] OJ No 2760 at para 3 (CA) leave to appeal dismissed [1999] SCCA No 460, Crown's BOA, Tab 3; *Re Collections Inc. v Toronto-Dominion Bank*, 2010 ONSC 6560 at para 107, Crown's BOA, Tab 4
[95] *R. v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras 19-20, Crown's BOA, Tab 8

> A review of all three categories of cases reveals that in complex and important cases, appellate courts, on pleadings motions, frequently decide whether a cause of action does or does not exist without waiting for a full trial record. [96]

93. As recognized by the Supreme Court of Canada in *Hryniak*, there is a need for a culture shift to move cases away from the conventional trial in favour of procedures tailored to the needs of the particular case. [97] A s. 5(1)(a) determination is appropriate for this case. No party is served by the court allowing a claim to proceed, with its attendant financial and other costs, that has no reasonable prospect of success or does not disclose a reasonable cause of action.

***2. Causes of Action***

94. The triggering of all the causes of action is the termination of BI Payments prior to three years. Specifically, the Amended Claim states that the "termination of BI Payments amounts to a breach of contract, breach of undertaking, negligence, a public law tort, and…a breach of s. 7 of the *Charter*." [98] The essential issue for the court is whether the Crown was legally required to continue with the research intervention (i.e. BI payments) despite the end of the research.

95. The Amended Claim is unsustainable factually and legally.

96. Factually, the OBIP was represented as a three-year study and ended prior to three years. However, the relief sought in this case is not the continuation of the study for a full three years. That relief was sought and denied by the Divisional Court. Rather, the claim is for the BI intervention payments under the study.

97. The Crown cannot comment on the allegation that unidentified Crown employees, agents and representatives made oral representations to unidentified applicants at unknown times and unknown

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[96] *Arora v Whirlpool Canada LP*, 2012 ONSC 4642 at paras 133-137, 149-150, 153-155, aff'd 2013 ONCA 657 at paras 87, 89-90, 94, leave to appeal denied [2013] SCCA No 498, Crown's BOA, Tab 7
[97] *Hryniak v Mauldin*, 2014 SCC 7 at paras 2 & 27-28, Crown's BOA, Tab 10
[98] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, para 11, page 7

places, that BI Payments were "guaranteed" for three years. [99] Other public announcements pled further do not make any such guarantee. With respect to written representations, the Amended Claim relies on the Information Booklet and Application Forms which simply do not contain a "guarantee" of BI Payments for three years. On their face, they state that BI Payments are for "up to" three years (i.e. a maximum of three years of BI Payments, not a minimum). The misstatements on these documents and sheer repetition of a guarantee of three years of BI Payments in the Plaintiffs' Amended Claim and Factum cannot make it so.

98. Legally, the kitchen sink approach of pleading five causes of action to respond to the sole event of ending BI Payments betrays the reality that none of the causes of action fit. Two of the causes of action are not even recognized causes of action at law (i.e. breach of public law duty and breach of undertaking). Ultimately, it was not unlawful for Cabinet to end the Pilot. It was not a breach of contract, breach of undertaking, breach of public law duty, negligent, or breach of s. 7 of the *Charter*.

***3. No infringement of Charter s. 7***

99. To establish a breach of *Charter* s. 7, a claimant has the onus to prove: (1) that the law or state action deprives the claimant of life, liberty or security of the person; and (2) that this deprivation is contrary to the principles of fundamental justice. [100] It is plain and obvious that the Plaintiffs cannot establish either part of the test.

**A) No deprivation of life, liberty or security of the person**

100. Section 7 of the *Charter* restricts the state's ability to *deprive* individuals of their life, liberty or security of the person. If a claimant cannot establish a state deprivation of life, liberty or security of

[99] *Ibid*, Tab A, para 71, page 20
[100] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 93, Crown's BOA, Tab 11; *Carter v Canada*, 2015 SCC 5 at paras 54-55 and 70, Crown's BOA, Tab 12

the person, "the s. 7 analysis stops there." [101] In this case, Ontario's decision to cancel the OBIP is not a deprivation of any interest protected under *Charter* s. 7. The *Charter* s. 7 claim has no reasonable prospect of success.

101. The wind down of the OBIP puts the Plaintiffs back in the same position they were in prior to 2017 and in the same position as every other person in the Province. The Plaintiffs have access to the same social assistance programs available to everyone else in Ontario, and indeed, as set out above at paragraph 58, three of the four Plaintiffs have resumed receiving ODSP. It can hardly be a deprivation of the Plaintiffs' constitutional rights that they are no longer receiving a different and more generous form of assistance than everyone else in the Province. Far from being harmed by their participation in the OBIP, the Plaintiffs benefited from their participation in the OBIP by receiving enhanced assistance for the duration of their participation. The fact that this enhanced assistance has now come to an end is not a deprivation of any constitutionally-protected interest.

102. Despite their assertions to the contrary, the Plaintiffs' claim that the wind down of the OBIP infringed their *Charter* rights is really a claim to a positive right to the continuation of the OBIP. If Ontario infringed the *Charter* by terminating the OBIP, it must follow that the *Charter* requires the continuation of the OBIP. However, as the Supreme Court held in *Gosselin*:

> Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to *deprive* people of these. [102]

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[101] *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 47, Crown's BOA, Tab 13
[102] *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at para 81 (emphasis in original), Crown's BOA, Tab 14

103. *Charter* s. 7 does not include a right to the provision of life-saving medical treatment, [103] to a minimum level of social assistance, [104] to the provision of therapeutic services for children with autism, [105] or to the provision of adequate shelter. [106] It would be anomalous if *Charter* s. 7 included a constitutional right to continued participation in a pilot project established for the first time in 2017, and then only for selected participants in three locations in the Province.

104. The Court of Appeal for Ontario has held repeatedly that "in the absence of a constitutional right that requires the government to act in the first place, there can be no constitutional right to the continuation of measures voluntarily taken, even where those measures accord with or enhance *Charter* values." [107] If there is no *Charter* obligation on the state to act in the first place, then "as far as the requirements of the constitution are concerned…the legislature is free to return the state of the statute book to what it was before the [repealed statute], without being obligated to justify the repealing statute under section 1 of the *Charter*." [108] If this is true of a statute, it must be all the more true of an exercise of the executive spending power such as the OBIP.

105. There is a long and unbroken line of authority establishing that a change in the law or government policy does not itself constitute a "deprivation" under *Charter* s. 7, even if the previous law or policy was more enhancing of life, liberty or security of the person. In *Flora*, the Court of Appeal held that a restriction on a previously-available life-saving benefit was not a deprivation

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[103] *Flora v Ontario Health Insurance Plan (General Manager)*, 2008 ONCA 538 at para 108, Crown's BOA, Tab 15
[104] *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at paras 75-83, Crown's BOA, Tab 14; *Masse v Ontario (Ministry of Community and Social Services)*, [1996] OJ No 363 at paras 69-73 (O'Driscoll J), 165-173 (O'Brien J, concurring) (Div Ct), leave to appeal ref'd [1996] OJ No 363 (CA), Crown's BOA, Tab 16
[105] *Wynberg v Ontario*, [2006] OJ No 2732 at paras 218 (CA), leave to appeal ref'd [2006] SCCA No 441, Crown's BOA, Tab 17
[106] *Tanudjaja v Attorney General (Canada)*, 2013 ONSC 5410 at para 59, aff'd 2014 ONCA 852, leave to appeal ref'd [2015] SCCA No 39, Crown's BOA, Tab 18
[107] *Lalonde v Ontario (Commission de restructuration des services de santé)*, [2001] OJ No 4767 at para 94 (CA), Crown's BOA, Tab 19; *Flora v Ontario Health Insurance Plan (General Manager)*, 2008 ONCA 538 at paras 103-104, Crown's BOA, Tab 15
[108] *Ferrel v Ontario (Attorney General)*, [1998] OJ No 5074 at para 66 (CA), leave dismissed [1999] SCCA No 79, Crown's BOA, Tab 20

within the meaning of s. 7, holding that "a Charter violation cannot be grounded on a mere change in the law." [109] In *ETFO*, the Divisional Court held that "A change in the law or government policy alone does not constitute deprivation of a right even if the previous law provided greater life, liberty or security of the person." [110] In *Barbra Schlifer*, this Court held that the repeal of the long-gun registry was not a deprivation under s. 7, even though the repeal was said to remove "life-saving protections." [111] In *Canadian Doctors*, the Federal Court held that the elimination of a federal program providing health insurance to refugee claimants did not engage s. 7. [112] In *Tanudjaja*, this Court held that the reduction of affordable housing programs did not engage s. 7. [113] In *Dunmore*, Sharpe J. (as he then was) held that "if the legislature is free to decide whether or not to act in the first place, it cannot be the case that once it has acted in a manner that enhances or encourages the exercise of a Charter right, it deprives itself of the right to change policies and repeal the protective scheme." [114]

106. The Plaintiffs cite none of these cases – even though the Court of Appeal's decisions in *Flora*, *Lalonde* and *Ferrel* are all binding on this Honourable Court. Instead, at paragraph 121 of their factum, the Plaintiffs argue that the "scope of s. 7's reach is not frozen and should be revisited to respond to new situations." [115] However, this Court is bound to follow the precedents of the Court of Appeal, which has held that *Charter* s. 7 is to be interpreted "only as restricting the state's ability to deprive individuals of life, liberty or security of the person." [116] Appellate courts across Canada have

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[109] *Flora v Ontario Health Insurance Plan (General Manager)*, 2008 ONCA 538 at paras 103-104, Crown's BOA, Tab 15
[110] *ETFO et. al v Her Majesty the Queen*, 2019 ONSC 1308 at para 139, Crown's BOA, Tab 21
[111] *Barbra Schlifer Commemorative Clinic v Canada*, 2014 ONSC 5140 at paras 28, 39-45, Crown's BOA, Tab 22
[112] *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at paras 552-563, Crown's BOA, Tab 23
[113] *Tanudjaja v Attorney General (Canada)*, 2013 ONSC 5410 at para 38, aff'd 2014 ONCA 852, leave to appeal ref'd [2015] SCCA No 39, Crown's BOA, Tab 18
[114] *Dunmore v Ontario (Attorney General)*, [1997] OJ No 4947 at para 15 (Gen Div), aff'd [1999] OJ No 1104 (CA), rev'd on other grounds 2001 SCC 94, Crown's BOA, Tab 24
[115] Plaintiff's Factum, para 121
[116] *Wynberg v Ontario*, [2006] OJ No 2732 at para 220 (CA), leave to appeal ref'd [2006] SCCA No 441, Crown's BOA,

similarly struck out claims for positive rights under *Charter* s. 7 on their pleadings. [117]

107. The Plaintiffs' arguments raise what Justice Morgan has called "the baseline problem": a "prior piece of legislation cannot form a constitutional baseline for all further revisions and amendments to the legislative policy." [118] The same is true of executive action, as was held in *Flora*, *Canadian Doctors* and *Tanudjaja*:

> [G]overnment does not create [a *Charter*] obligation when it acts to ameliorate an apparent inequity in our society. The policy of one government to respond to such a situation may not be the policy of its successor. The program may be changed. The benefits extended may be lowered or removed without opening up the proposition that there has been a breach of s. 7 of the *Charter*…It cannot be that by acting where there is no obligation to do so the government creates a right that obtains protection under the *Charter* that otherwise would be unavailable. [119]

108. The fact that the Plaintiffs feel aggrieved or distressed by the Government's change in policy cannot itself mean that the wind down of the OBIP is a "deprivation" under *Charter* s. 7. To accede to the Plaintiffs' claims would be to constitutionalize the OBIP, such that its cancellation infringes the *Charter* and requires justification under s. 1. But the OBIP was not constitutionally entrenched. It was not in place in Ontario prior to 2017 and it is not in place in any of the other provinces in Canada, to which (needless to say) the *Charter* applies equally. Whatever its merits, the OBIP was a creature of government policy and not immune from repeal or replacement. [120] If the *Charter* did not require its creation, the *Charter* cannot require its continuation.

109. At paragraph 122 of their factum, the Plaintiffs cite *Leroux v. Ontario* for the proposition that the Court should not refuse certification of *Charter* s. 7 claims even where the claim will "probably

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Tab 17; *Flora v Ontario Health Insurance Plan (General Manager)*, 2008 ONCA 538 at paras 105-106, Crown's BOA, Tab 15

[117] *Sagharian v Ontario (Education)*, 2008 ONCA 411 at para 52, aff'g *Sagharian v Ontario (Education)*, [2007] OJ No 876 at paras 41-42 (Sup Ct), leave to appeal ref'd [2008] SCCA No 350, Crown's BOA, Tab 25; See also *Scott v Canada (Attorney General)*, 2017 BCCA 422 at paras 83-90, leave to appeal ref'd [2018] SCCA No 25, Crown's BOA, Tab 26

[118] *Barbra Schlifer Commemorative Clinic v Canada*, 2014 ONSC 5140 at paras 39-45, Crown's BOA, Tab 22

[119] *Tanudjaja v Attorney General (Canada)*, 2013 ONSC 5410 at paras 38 and 110, aff'd 2014 ONCA 852, leave to appeal ref'd [2015] SCCA No 39, Crown's BOA, Tab 18

[120] *Baier v Alberta*, 2007 SCC 31 at para 38, Crown's BOA, Tab 27

not succeed on the merits." [121] However, *Leroux*, unlike the Court of Appeal's decisions in *Flora*, *Ferrel* and *Lalonde* referred to above, is not binding on this Court, and the Divisional Court has granted leave to appeal from that decision (the appeal is scheduled to be heard on June 17-18, 2020). In any event, *Leroux* is distinguishable, since it did not involve the cancellation of any elective benefits program (let alone a pilot research project operating in only three sites throughout the entire Province) but rather allegations of delays and maladministration in an ongoing province-wide program for the provision of adult developmental services and supports in which the plaintiffs had been assessed as eligible to receive those services and supports.

**B) In the alternative, no inconsistency with fundamental justice could be established**

110. In any event, even if it were not plain and obvious that the Plaintiffs have not been deprived of any interest protected by *Charter* s. 7 (which is denied), it is evident that any such deprivation is not arbitrary or grossly disproportionate contrary to the principles of fundamental justice.

111. The threshold for finding a law or state action arbitrary is high: there must be "no rational connection between the object of the law and the limit it imposes on life, liberty or security of the person." [122] An arbitrary law is "not capable of fulfilling its objectives." [123] The Court of Appeal has emphasized the "heavy onus on the party challenging the legislation to establish that there is no connection between the effect of the law and its purpose." [124]

112. Here, there is an evident connection between the deprivation alleged (the cessation of OBIP benefits) and Ontario's purpose of cancelling the OBIP. Once the Government had decided that it did not intend to implement a guaranteed basic income program, no further purpose was served by

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[121] Plaintiff's Factum, para 122, citing *Leroux v Ontario*, 2018 ONSC 6452
[122] *Carter v Canada*, 2015 SCC 5 at para 83, Crown's BOA, Tab 12; *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 98-100, 108, 111, 119-120, Crown's BOA, Tab 11
[123] *Carter v Canada*, 2015 SCC 5 at para 83, Crown's BOA, Tab 12
[124] *R. v Long*, 2018 ONCA 282 at para 76, leave to appeal ref'd [2019] SCCA No 330, Crown's BOA, Tab 28

continuing the pilot project, and it could hardly be "arbitrary" to end the project once the Government no longer supported it. Winding up payments to participants cannot be said to have "no rational connection" to the purpose of terminating the pilot.

113. The Plaintiffs' real complaint is not that the Government's actions were inconsistent with its own purposes but rather that the Government should have had a different purpose than it did. But fundamental justice "does not evaluate the appropriateness of the objective"; rather, the "court must take the legislative objective 'at face value' and assume that it is appropriate and lawful." [125] Otherwise, *Charter* s. 7 review would simply be a review of the policy merits of the government's purposes. The principles of fundamental justice "do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system." [126] They are not a licence for litigants to substitute their policy preferences for those of the elected Government.

114. Nor did the wind down of the OBIP offend the rule against gross disproportionality, which "only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure":

> This idea is captured by the hypothetical of a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk. The connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society. [127]

115. The wind down of the OBIP and the transition of the Plaintiffs to the social assistance programs that are available to all other low-income persons in the Province does not begin to approach the "draconian impact" of a law that imprisons people for life for spitting on the sidewalk. To hold otherwise would trivialize the important protections of the *Charter*. The Plaintiffs are not prohibited

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[125] *R. v Safarzadeh-Markhali*, 2016 SCC 14 at para 29, Crown's BOA, Tab 29; *R. v Moriarity*, 2015 SCC 55 at para 30, Crown's BOA, Tab 30
[126] *Re B.C. Motor Vehicle Act*, [1985] SCJ No 73 at 503, Crown's BOA, Tab 31
[127] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 120, Crown's BOA, Tab 11

from going anywhere or doing anything, and indeed many continue to be recipients of government support and benefits.

**C) *Charter* damages are unavailable**

116. Even if they could potentially establish an infringement of *Charter* s. 7, the Plaintiffs cannot meet the high threshold to obtain *Charter* damages. In *Mackin*, the Supreme Court held that governments have a qualified immunity from damages for state conduct subsequently declared to be constitutionally invalid:

> Thus, the government and its representatives are required to exercise their powers in good faith and to respect the "established and indisputable" laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. [128]

117. There is no allegation of bad faith in the pleadings, and nothing that could support the conclusion that the Government's decision to cancel the OBIP was an abuse of power or "clearly wrong" in the sense of being contrary to the "established and indisputable" laws that define the constitutional rights of individuals. Nor could the wind down of the OBIP be characterized as a "clear disregard for the claimant's *Charter* rights." [129] There are no judicial decisions that have held that the termination of a social assistance pilot program infringed *Charter* s. 7, and indeed there are many appellate decisions (including *Gosselin* from the Supreme Court and *Masse* from the Divisional Court, cited above at paras 102-103) that have held that *Charter* s. 7 does not protect a right to social assistance at all.

118. Decisions to create, maintain or cancel a basic income pilot project are question of public policy about which reasonable people may disagree. Such questions involve competing views about distributive justice, economic efficiency, labour market participation, and the best use of finite public resources. They cannot plausibly be said to admit of only one correct legal answer mandated by the

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[128] *Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13 at para 78, Crown's BOA, Tab 32
[129] *Brazeau v Canada (Attorney General)*, 2020 ONCA 184 at paras 66 and 87, Crown's BOA, Tab 33

Constitution. Indeed, the Divisional Court has already confirmed that the Government's policy decision to cancel the OBIP was not unlawful. It is therefore plain and obvious that the claim for *Charter* damages must be struck.

### *4. No Negligence*

119. The claim in negligence is based on the allegation that the Crown owed a duty of care to the class and that the standard of care was breached by ending payments prior to three years causing damages to the class. [130]

#### **A) *Crown Liability and Proceedings Act***

120. The decision to end payments prior to three years was a policy decision. [131] It was a decision about when to end a government program and so is not actionable in negligence pursuant to s. 11 of the *Crown Liability and Proceedings Act*.

121. Section 11(4), titled "Policy decision", states that no cause of action arises against the Crown "in respect of any negligence or failure to take reasonable care in the making of a decision in good faith respecting a policy matter…".

122. "Policy matter" is expansively defined in s. 11(5) and includes "the funding of a program, project or other initiative", including "ceasing to provide such funding", and "cancelling any funding previously provided or committed in support of the program, project or other initiative" (s. 11(5)(b)(i)(iv), as well as the "termination of a program, project or other initiative" (s. 11(5)(c)(d)).

123. No proceeding may be brought or maintained in negligence or for failure to take reasonable care against the Crown in respect of a policy matter, and such proceeding is deemed to have been dismissed (s. 11(7)(8)).

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[130] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, paras 100-105, pages 26-27
[131] *Bowman et al. v Her Majesty the Queen*, 2019 ONSC 1064 at para 35 (Div Ct), Crown's BOA, Tab 6

124. Cabinet's policy decision to end OBIP is a decision in respect of a "policy matter". By statute this claim in negligence is precluded. The *CLPA* is dispositive of the negligence claim and the Court need go no further. [132] However, there are other legal basis upon which to dismiss the negligence claim.

**B) Crown Not Liable in Negligence for Policy Decisions at Common Law**

125. Section 11 of the *CLPA* expressly states that nothing in s. 11 shall be read as abrogating or limiting any defence or immunity which the Crown may raise at common law.

126. At common law, the Crown is not liable in negligence for policy decisions, absent irrationality and bad faith, which is not pled. As the Supreme Court of Canada stated in *Imperial Tobacco*:

> There is general agreement in the common law world that government policy decisions are not justiciable and cannot give rise to tort liability…
>
> The weighing of social, economic, and political considerations to arrive at a course or principle of action is the proper role of government, not the courts. For this reason, decisions and conduct based on these considerations cannot ground an action **in tort**…
>
> I conclude that "core policy" government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith…
>
> Applying this approach to motions to strike, we may conclude that where it is "plain and obvious" that an impugned government decision is a policy decision, the claim may properly be struck on the ground that it cannot ground an action in tort. [133] [emphasis added]

127. It is plain and obvious that the decision to end the OBIP was a policy decision, as further found by the Divisional Court. [134] The Amended Claim that the policy decision to end OBIP was negligent cannot ground an action in tort. The policy decision is not justiciable.

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[132] Note *The Catalyst Capital Group Inc. v Dundee Kilmer Developments Limited Partnership*, 2020 ONCA 272 at para 115, Crown's BOA, Tab 34, wherein the Ontario Court of Appeal stated "…a restrictive interpretation of *PACA* s. 2(2)(b) would unnecessarily foster a multiplicity of litigation and would deprive the Crown of the section's stated purpose of protecting it from a proceeding if the section's conditions are met". Note that *PACA* [*Proceedings Against the Crown Act*] is the Crown proceedings legislation that preceded the *CLPA*

[133] *R. v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras 72, 90, 91, Crown's BOA, Tab 8

[134] *Bowman et al. v Her Majesty the Queen*, 2019 ONSC 1064 at paras 6, 35& 57 (Div Ct), Crown's BOA, Tab 6

### *5. No Breach of Public Law Duty*

#### A) Proposed Cause of Action is Unrecognized

128. A cause of action of breach of public law duty was first proposed by Justice Stratus in *obiter* in the Federal Court decision of *Paradis Honey*. [135] Justice Pelletier in the same decision disagreed with the *obiter* and the creation of such a cause of action. [136]

129. The Ontario Court of Appeal in April 2020 expressly declined to recognize a "*Paradis Honey*-type claim" and struck the claim. [137] The Court of Appeal relied upon its decision in *Merrifield v Canada (Attorney General)*, wherein it declined to recognize a proposed tort of harassment. The Court of Appeal rejected the public law duty claim in part noting that in *Merrifield* it "discussed at length the conditions supporting and the process required for the recognition of a new tort", and that the *Merrifield* decision "stressed the importance of the incremental development of the common law and the grounding of any new tort in the emerging acceptance in the case law of a new type of claim". [138] The Court of Appeal, labelling the pled public law tort "misconduct by a civil authority" wrote:

> Here, the conditions, at least as argued, do not support the recognition of a new tort of "misconduct by a civil authority". Catalyst relies on a single case, *Paradis Honey*, where comments were made in *obiter*… [139]

130. The Court of Appeal also held that this proposed cause of action was not applicable on the facts because unlike in *Paradis Honey*, administrative law remedies were not available. [140] The same

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[135] *Paradis Honey Ltd v Canada*, 2015 FCA 89 at paras 129-146, leave to appeal ref'd 2015 SCCA No 227, Crown's BOA, Tab 35
[136] *Paradis Honey Ltd v Canada*, 2015 FCA 89 at para 70, leave to appeal ref'd 2015 SCCA No 227, Crown's BOA, Tab 35
[137] *The Catalyst Capital Group Inc. v Dundee Kilmer Developments Limited Partnership*, 2020 ONCA 272 at paras 104-105, Crown's BOA, Tab 34
[138] *The Catalyst Capital Group Inc. v Dundee Kilmer Developments Limited Partnership* at para 105, Crown's BOA, Tab 34; *Merrifield v Canada (Attorney General)*, 2019 ONCA 205 at paras 19-26, 37-43, 49-53, leave to appeal ref'd, [2019] SCCA No 174, Crown's BOA, Tab 36
[139] *The Catalyst Capital Group Inc. v Dundee Kilmer Developments Limited Partnership*, 2020 ONCA 272 at paras 104, 105, Crown's BOA, Tab 34
[140] *The Catalyst Capital Group Inc. v Dundee Kilmer Developments Limited Partnership* at paras 95-98 & 105, Crown's

conclusion is applicable in the present case.

**B) Public Law Cause of Action Not Applicable on the Facts and *Res Judicata***

131. At issue in *Paradis Honey* was a bureaucratic administrative guideline that prevented beekeepers from exercising their legal right to apply for honeybee importation permits on a case-by-case basis under the Federal *Health of Animals Regulations.* The Court found that "the facts the beekeepers allege could prompt an award of administrative law remedies against the guideline". [141]

132. The majority of the court endorsed a proposed public law cause of action instead of a judicial review remedy as an alternate means of redress. By public law cause of action the court explained that it is a cause of action for breach by a public authority of public law/administrative law principles. This was further described as a public authority acting unacceptably or indefensibly (i.e. the merits of the public law decision are not reasonable). [142]

133. This proposed cause of action is not applicable on the facts pled in the Amended Claim and the cause of action is further *res judicata*.

134. *Paradis Honey* dealt with a bureaucratic administrative guideline subject to judicial review. The Cabinet policy decision to wind-down OBIP is a non-justiciable Cabinet policy decision not subject to judicial review (i.e. public/administrative law). The merits or reasonableness of this decision are not justiciable. Accordingly, the proposed public law/administrative cause of action as an alternative to judicial review remedies is not applicable to the Cabinet policy decision to wind-down the OBIP.

135. Indeed, as above, the same Plaintiffs in this action brought a public law application for judicial review in the Divisional Court challenging the Cabinet policy decision to wind-down the OBIP. The

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BOA, Tab 34

[141] *Paradis Honey Ltd v Canada*, 2015 FCA 89 at paras 82-85 & 148, leave to appeal ref'd 2015 SCCA No 227, Crown's BOA, Tab 35

[142] *Paradis Honey Ltd v Canada*, at paras 129-146, Crown's BOA, Tab 35

Divisional Court dismissed the public law application on the basis that the policy decision was not justiciable. The Divisional Court further concluded that there is no legitimate expectation to be consulted on Crown policy decisions. [143] The Plaintiffs' claim that there was a breach of public law is *res judicata*. [144]

136. The claim of breach of public law duty is an unrecognized cause of action, inapplicable on the facts, and *res judicata* due to the Divisional Court's dismissal of the public law application for judicial review involving the same parties and the same subject matter.

**C) Policy Decision Not Justiciable at Common Law**

137. As a policy decision, similar to the claim in negligence, at common law, the claim that Cabinet ending the OBIP prior to three years is a breach of a pubic law duty is not justiciable and cannot ground an action in tort since it is a non-justiciable core policy decision. [145]

**D) Claim Based on Policy Decision Precluded by the *CLPA***

138. Similar to the claim in negligence, this claim that Cabinet ending the OBIP prior to three years is a breach of a pubic law duty is precluded by s. 11 of the *CLPA* which "extinguish[es]" "causes of action" against the Crown for any alleged negligence or a "failure to take reasonable care" in the making of a policy decision (s. 11(4-5), (7-10)).

***6. No Breach of Contract***

139. The decision to end the OBIP was a policy decision that is not justiciable and cannot ground a claim in tort at common law or under statute. And so the Plaintiffs, in an effort to circumvent this

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[143] *Bowman et al. v Her Majesty the Queen*, 2019 ONSC 1064 at paras 46-47 & 53 (Div Ct), Crown's BOA, Tab 6; *Gigliotti v Conseil d'Administration du College des Grands Lacs*, [2005] OJ No 2762 at paras 62-63 (Div Ct), Crown's BOA, Tab 37

[144] *EnerNorth Industries Inc. (Re)*, 2009 ONCA 536 at paras 53-54, leave to appeal ref'd [2009] SCCA No 383, Crown's BOA, Tab 38; *McQuillan v Native Inter-Tribal Housing Co-Operative Inc.*, [1998] OJ No 4361 at paras 8-16 (CA), Crown's BOA, Tab 39

[145] *R. v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras 72, 90, 91, Crown's BOA, Tab 8

authority, reach to label the Pilot a commercial contract.

140. The Crown resists the pleading of breach of contract on three grounds: (1) the pleading does not satisfy the pleading requirements for breach of contract; (2) The pleading does not plead facts to establish an enforceable contract; and (3) in the alternative, on the facts pled there was no breach of contract.

**A) Pleading Requirements for a Contract Not Met**

141. The Amended Claim states "[b]y virtue of the facts pleaded above" there was a contract. [146] It is unclear what of the 88 preceding paragraphs is supposed to be the contract.

142. For example, are the pleaded Ministers' statements in the Legislature part of the contract? By way of other examples, are the political announcements of the Pilot by the Premier and Ministers alleged to form a contract or part of a contract? Are the pleaded Orders-in-Council part of the contract? What is the alleged contract comprised of?

143. While the claim identifies some of the basic requirements for pleading a contract such as the parties, and the alleged term that was breached, [147] the Amended Claim simply does not identify what the contract is. Accordingly, it is not possible to plead to this breach of contract claim and it should be struck on this basis.

**B) No Enforceable Contract**

144. The Amended Claim does not plead facts to establish an enforceable contract. Specifically, the Amended Claim does not plead facts to establish: (a) consideration for a contract; (b) an intent to enter into contractual relations; and (c) that a contract, even if formed, would meet the statutory requirements to be binding on the Crown. This latter position will be addressed first.

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[146] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, para 89, page 24
[147] *Re Collections Inc. v Toronto-Dominion Bank*, 2010 ONSC 6560 at para 108, Crown's BOA, Tab 4

***(i) Pleading Does Not Satisfy the Statutory Requirements for a Binding Crown Contract***

145. At common law, the Supreme Court of Canada in *J.E. Verreault* held that a person acting within the scope of their ostensible authority can bind the Crown. [148] However, statute can regulate the creation and enforceability of government contracts. As Professor Hogg explains in the seminal text of "Liability of the Crown":

> "…in all jurisdictions there are statutory provisions and regulations governing the making of government contracts, and there are rules and practices developed by the government itself, including standard terms and conditions of contracting. These rules are designed to ensure that government contracting decisions are made under appropriate bureaucratic supervision and control. . . [149] [Emphasis added]

146. The interplay between the common law and statute is explained in the text "Government Liability Law and Practice":

> The result is that, if no enactment speaks to the matter, a person appearing to have authority to act on behalf of the Crown will have such authority, and a contract entered into by them will be binding…
>
> The rule in *Verreault* that anyone can bind the Crown as long as they appear to have authority can be displaced by enactment. Moreover, enactments limiting who may contract on behalf of the Crown are considered mandatory. [150]

147. As the same authors note Ontario has a comprehensive legislative regime restricting who may contract on behalf of the Crown:

> Ontario has a comprehensive legislative regime restricting who may contract on behalf of the Crown. The *Executive Council Act* provides that no contract in Ontario is binding on the Crown unless approved by the Lieutenant Governor-in-Council (*i.e.*, the Cabinet) or signed personally by a Minister. This rule is then modified by the statutes creating the various ministries, which all provide that the Minister can delegate his or her power to enter into contracts to officials and employees in the Ministry. As a result, in Ontario, a Crown contract could be invalid if the Minister did not, in fact, delegate the authority to enter into the contract

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[148] *J.E. Verreault & Fils v* The *Attorney General of Quebec*, [1977] 1 SCR 41, Crown's BOA, Tab 40; Horsman, Karen and Gareth Morley, eds. *Government Liability, Law and Practice*, (loose-leaf). Toronto: Thomson Reuters, 2019, at chapter 2.20.30(1)(2), Crown's BOA, Tab 74

[149] Hogg, Peter W., Patrick J. Monahan and Wade K. Wright. *Liability of the Crown*, 4th ed. Toronto: Carswell, 2011, page 304, Crown's BOA, Tab 75

[150] Horsman, Karen and Gareth Morley, eds. *Government Liability, Law and Practice*, (loose-leaf). Toronto: Thomson Reuters, 2019, at chapter 2.20.30(1)(2), Crown's BOA, Tab 74

to the signatory for the Crown. [151]

148. The relevant statutes for the present case are the *MCSS Act* and the *Executive Council Act.* Section 12 of the *MCSS Act* states that the Minister may enter into contracts. Section 5(1) of the *MCSS Act* states that the Minister's powers may be exercised by a delegate whom the Minister "appoints in writing". Section 5(2) states that "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)." [152]

149. Accordingly, a contract executed under an authorization by the Minister's delegate would be an enforceable contract. However, absent a contract executed under an authorization by the Minister's delegate, s. 6 of the *Executive Council Act* applies. It states: "[n]o…contract…is binding on Her Majesty… 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". [Emphasis added] [153]

150. Section 5 of the *MCSS Act* concerns legislative restraints on the authority of persons to assume contractual liabilities on behalf of the Crown (i.e. the Minister or the Minister's delegate appointed in writing). Section 6 of the *ECA* specifies the consequences for the enforceability of a contract in the absence of such authority (i.e. contract is not binding). These sections ensure that before the Crown binds itself to a contractual liability, in this case an alleged approximately $200M contractual liability, an authorized person considers it, and complies with the formal requirements to bind the Crown.

151. As further noted by Professor Hogg on the statutory requirements for Crown contracts:

> A contract within the power of a government representing the Crown will bind the Crown only if it is made by a servant or agent of the Crown who is acting within the scope of his or her authority…Where there are statutory restrictions on the authority of servants or agents to

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[151] Horsman, Karen and Gareth Morley, eds. *Government Liability, Law and Practice,* (loose-leaf). Toronto: Thomson Reuters, 2019, at chapter 2.20.30(2); See also 2.10, Crown's BOA, Tab 74
[152] *MCSS Act*, ss. 5 & 12
[153] *ECA*, s. 6; *Canada v Alexis Nihon Ct.*, [1970] Ex CR 93 at paras 17-18, Crown's BOA, Tab 401

> bind the Crown, those restrictions must of course be complied with, and no actual, ostensible or usual authority can override a statutory prohibition. [154]

152. By way of example, in *South Yukon Forest Corp. v Canada*, the Federal Court found that Crown officials represented and promised that there would be an adequate and long-term supply of timber for a mill if the Plaintiffs built the mill. The Court found that this promise was accepted upon the Plaintiffs building the mill, creating a binding contract. [155] The supply of timber was inadequate and the court found a breach of contract.

153. This decision was overturned by the Federal Court of Appeal, leave to the Supreme Court of Canada denied. Legislation, in that case, the *Territorial Lands Act*, stated that the Governor in Council may authorize the sale, lease or other disposition of territorial lands. The Court of Appeal found that a "Timber Harvesting Agreement" could only be made under the authorization of an order in council by the Governor in Council in accordance with the Act. [156] The Court held that no binding contract had been formed stating the law as follows:

> Where a statute regulates the power to make contracts, as section 8 of the *Territorial Lands Act* does in this case, a contract binding on the Crown does not come into existence until the requirements of the statute are fulfilled…Where there are statutory restrictions on the authority of servants or agents to bind the Crown, those restrictions must be complied with, and no actual, ostensible or usual authority can override a statutory prohibition [157]

154. The Federal Court of Appeal in *South Yukon Forest Corp. v Canada* further relied upon the decision of *Wind Power Inc. v Saskatchewan Power Corp.* of the Saskatchewan Court of Appeal, leave to the Supreme Court of Canada denied. [158]

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[154] Hogg, Peter W., Patrick J. Monahan and Wade K. Wright. *Liability of the Crown*, 4th ed. Toronto: Carswell, 2011, pages 322, 323, Crown's BOA, Tab 75

[155] *South Yukon Forest Corp. v Canada*, 2012 FCA 165 at paras 2, 66-72; leave to appeal ref'd [2012] SCCA No 349, Crown's BOA, Tab 42; See also *Canada v Alexis Nihon Ct.*, [1970] Ex CR 93 at paras 14-18, Crown's BOA, Tab 40

[156] *South Yukon Forest Corp. v Canada*, 2012 FCA 165 at paras 58-59; leave to appeal ref'd [2012] SCCA No 349, Crown's BOA, Tab 42

[157] *South Yukon Forest Corp. v Canada*, 2012 FCA 165 at para 69; leave to appeal ref'd [2012] SCCA No 349, Crown's BOA, Tab 42

[158] *South Yukon Forest Corp. v Canada*, 2012 FCA 165 at paras 70-71; leave to appeal ref'd [2012] SCCA No 349, Crown's BOA, Tab 42

155. In that case, the Respondent Saskatchewan Power Corp. and the government of Saskatchewan repeatedly assured the Plaintiff and others that there was commitment to moving forward with a wind power project. [159] A request for proposals was issued and the winning bidder was chosen by the Saskatchewan Power Corp. However, under the *Power Corporation Act*, Saskatchewan Power Corp. was precluded from entering into a contract without approval of the Lieutenant Governor in Council. [160] Saskatchewan Power Corp. wrote to the Plaintiff and advised that due to a provincial election the announcement of the successful proponent would be delayed until after the election. [161] After the election, the Lieutenant Governor in Council withheld approval of the contract.

156. The Plaintiff argued that it was an implied term of the tender that Saskatchewan Power Corp. would enter into a contract. The Saskatchewan Court of Appeal held that such an implied term was in conflict with the statutory requirement for approval of the Lieutenant Governor in Council. The Court declined to find that a binding contract had been formed in the absence of the statutory condition being satisfied. [162]

157. In sum, absent compliance with statutory requirements for a binding contract there can be no binding contract.

158. Indeed, the statutory provisions at issue, both the requirements for <u>authority</u> to enter into a contract, and conditions for the <u>enforceability</u> of the contract, are perhaps clearest in that they

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[159] *Wind Power Inc. v Saskatchewan Power Corp.*, 2002 SKCA 61 at paras 13-16, 24, 28, leave to appeal ref'd [2002] SCCA No 283, Crown's BOA, Tab 43

[160] *Wind Power Inc. v Saskatchewan Power Corp.*, 2002 SKCA 61 at paras 34, 63-68, leave to appeal ref'd [2002] SCCA No 283, Crown's BOA, Tab 43

[161] *Wind Power Inc. v Saskatchewan Power Corp.*, 2002 SKCA 61 at paras 3-4, 25, 29-30, leave to appeal ref'd [2002] SCCA No 283, Crown's BOA, Tab 43

[162] *Wind Power Inc. v Saskatchewan Power Corp.*, 2002 SKCA 61 at paras 63-68, leave to appeal ref'd [2002] SCCA No 283, Crown's BOA, Tab 43; Similarly, per the Ontario *Municipal Act, 1991*, the powers of a municipality must be exercised by Council through a by-law. In the absence of a by-law there can be no binding contract. *Municipal Act*, ss. 5, 9; *Magical Waters Fountains Ltd. v Sarnia (City)*, [1990] OJ No 1856 at paras 14-15, 26-34 (Gen Div), rev'd on other grounds, [1992] OJ No 1320 (Div Ct), Crown's BOA, Tab 44; *Silver's Garage Ltd. v Bridgewater (Town)*, [1971] SCR 577 at para 19, Crown's BOA, Tab 45

expressly set out the legal consequences of non-compliance with the statutory conditions (i.e. a contract, even if formed, is not binding). While in general, circumstances may still give rise to causes of action of unjust enrichment, *quantum meruit* or negligent misrepresentation, there can be no claim in breach of contract.

***(ii) Application to the Facts***

159. In the present case, the statutory requirements for pleading an enforceable contract with the Ontario Crown are not met.

160. The Plaintiffs plead that unnamed "persons presenting the application form and the BI Pilot more generally to the Class had authority from the Ministry to execute a contract with the Class member…". [163] This pleading does not account for applicants that applied by mail. In any case, the Plaintiffs do not plead the statutory requirement that the Minister "appoint[ed] in writing" each Crown employee, agent or representative presenting application forms to exercise the powers of the Minister to enter into a contract with participants in the OBIP. [164]

161. Due to the vagueness of the Amended Claim it cannot be ascertained what exactly is the contract. A contract consisting of the Information Booklet and Application Forms pled in the Amended Claim would be a contract in writing. However, there is no signature executing the Information Booklet by an authorized Minister's delegate. There is further no signature executing the Application Form by an authorized Minister's delegate. [165] The statutory preconditions for a binding contract are not met.

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[163] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, para 75, page 21
[164] *Ministry of Community and Social Services Act*, R.S.O. 1990, c. M.20, ss. 5& 12
[165] Basic Income Pilot: Information Booklet dated May 2017 used from June 2017 to February 2018 and its related Application Form and Consent Form, Crown's Motion Record, Tab 1, DBB Affidavit, para 30, pages 9-10, Exhibit 14, pages 306-351; Application and Consent Form used from March 2018, Crown's Motion Record, Tab 1, DBB Affidavit, para 30, page 10, Exhibit 15, pages 352-362. The acceptance letter is also not signed, see: Crown's Motion Record, Tab 1, DBB Affidavit, para 61, pages 18-19, Exhibit 23, pages 458-468

162. If the contract is alleged to be oral entered into between applicants and Crown employees, agents or representatives, then it suffers from the commonality and preferable procedure issues identified in the sections below. [166]

163. The Plaintiffs plead an alleged $200M contractual liability. The formal contracting requirements of the Crown must be met, and these formal requirements to turn the OBIP social assistance program and research project into 4,001 individual commercial contracts are not pled.

***(iii) No Pleading of Intent or Facts to Support an Intent to be Contractually Bound***

164. In addition to offer, acceptance, and consideration, intention to enter into contractual relations is a requirement to create a contract. [167] As stated by Professor Hogg the intention to create contractual relations "takes on special importance in the case of the Crown because the role of government is so different from the role of private persons". [168] Professor Hogg further notes:

> Outside the context of an election campaign, governments often make promises that are unlike the promises found in private contracts. For example, a government may promise to grant a tax exemption or subsidy or provide some other governmental benefit or service. If the normal formalities of government contracting were not followed, the conclusion will usually be that the promise was a mere statement of government policy, evincing no intention to create contractual relations with anyone. In that case, no legal remedy will be available to those who are disappointed by a failure to fulfil the promise." [169]

165. Indeed, as above, the normal formalities of contracting are not pled for the income subsidy of the OBIP. Rather, the Amended Claim refers to the "promise" of three years of payments, cites

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[166] Note that there is authority considering a federal statute that emphasized the written nature of the contract, that the signature requirements to make a contract binding were not applicable to oral contracts (*Her Majesty the Queen and Henderson*, (1898) 28 SCR 425, Crown's BOA, Tab 46. Ontario's *ECA* contains different language which does not so emphasize the written nature of the contract, but in any event, the Court need not decide the issue and may decline to certify the contract claim on the basis that it is either written or not common, among the other grounds noted in this Factum.

[167] *BC (AG) v Esquimalt and Nanaimo*, [1950] AC 87 at para 4, Crown's BOA, Tab 47

[168] Hogg, Peter W., Patrick J. Monahan and Wade K. Wright. *Liability of the Crown*, 4th ed. Toronto: Carswell, 2011, page 307, Crown's BOA, Tab 75

[169] Hogg, Peter W., Patrick J. Monahan and Wade K. Wright. *Liability of the Crown*, 4th ed. Toronto: Carswell, 2011, page 309, Crown's BOA, Tab 77; Horsman, Karen and Gareth Morley, eds. *Government Liability, Law and Practice*, (loose-leaf). Toronto: Thomson Reuters, 2019, at chapter 2.10, Crown's BOA, Tab 75

various public announcements, oral representations, and the Booklet and Application Forms for these "promises", but does not plead the necessary facts to turn such alleged promises into binding contractual commitments. [170]

166. The Amended claim both does not baldly claim an intent to be contractually bound, nor the facts necessary to support such an intent.

167. Policy promises on their own do not create contracts. Governments can change course. Indeed, in the Divisional Court decision concerning this very matter the Court quoted from Justice Nordheimer in *Skypower* wherein he stated:

> While it may sometimes seem unfair when rules are changed in the middle of a game; that is the nature of the game when one is dealing with government programs…

***(iv) No Consideration***

168. A contract represents a bargain or an exchange of value. Accordingly, consideration is required to create contractual relations. It is not present on the pleading in this case.

169. The Amended Claim alleges BI payments were made in consideration of, or in other words, in exchange for:

1) "complet[ing] surveys at a rate of pay, per survey that was lower than the amounts given to those in the Control Group";
2) "expos[ing] their personal and private lives to scrutiny through surveys";
3) "mak[ing] themselves human subjects in a major scientific experiment";
4) "disclos[ing] of their tax and other financial information on an ongoing basis"; and
5) "forego[ing] ODSP and OW benefits". [171]

170. The first four consideration arguments are as summarized in the Plaintiffs' Factum as simply

[170] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, paras 6-7, 78-79, 102, 105, & 110, pages 7, 22, 26-28
[171] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, para 92, page 25

participation in the Pilot. [172] The first three consideration arguments are essentially the same and relate to participation through surveys, and the fourth argument is the provision of further information required to participate in the program like many other social programs.

171. Significantly, the facts of the Amended Claim incorporate the content of the Information Booklet and Application Forms.

172. For any applicant that applied pre-March 2018 under the Information Booklet and related Application Form, these forms advise that if the applicant applied and they were eligible, they could be placed in the control group and receive no payments, or the payment group and receive BI payments. [173] Applicants at this time did not apply to participate in exchange for BI payments.

173. Applicants that applied in March and April 2018 under that Application Form for Hamilton and Thunder Bay were similarly advised in the Application Form that they could be placed in the control group or the payment group. [174]

174. Applicants at that time for Lindsay were advised under the Application Form that they would be placed in the payment group. [175] Nevertheless, the "consideration" they allegedly provided (i.e. complete surveys, consent to the disclosure of their personal information, and complete annual income tax returns), was no different from the control group. It was not consideration for the BI payments.

175. Furthermore, payments to the 4,001 OBIP participants could increase, decrease or be

[172] Plaintiff's Factum, paras 62-63
[173]Mechefske Application Form dated October 12, 2017, Joint Supplementary Motion Record, Tab I, Transcript of the Cross-Examination of Tracey Mechefske, page 392, Exhibit 1, page 408; Motion Record of the Plaintiffs, Vol 1, Tab D, Affidavit of Tracey Mechefske sworn August 21, 2019, para 20, page 75
[174] Application and Consent Form, Crown's Motion Record, Tab 1, DBB Affidavit, para 30; pages 9-10, Exhibit 15, page 359
[175] Application and Consent Form, Crown's Motion Record, Tab 1, DBB Affidavit, para 30; pages 9-10, Exhibit 15, page 359

eliminated. Even if a participants' monthly intervention payment was reduced to $0 due to an increase in household income they would still be an OBIP participant and would be expected to participate including completing surveys and filing their income tax return each year. [176] Indeed, their continued participation, absent BI Payments, would have been important to the study.

176. In addition, applicants were paid $50 for the completion of the Baseline Survey. The fact that going forward payment group participants were to receive less for completing surveys than the control group, which in fact never occurred, is irrelevant. [177] Separate consideration was to be provided for subsequent surveys for both the payment group and the control group. [178] BI payments were not consideration or in exchange for completed surveys.

177. With respect to the fifth consideration argument, that participants foregone ODSP and OW payments, it is irrelevant for participants that were not formerly on ODSP and OW.

178. For participants formerly on ODSP or OW they could not continue to receive financial benefits under those programs and BI payments. Like other social programs the receipt of benefits under one social program can render an individual financially ineligible to receive benefits from another social program (e.g. ODSP benefit recipients are not also eligible to receive OW benefits). [179]

179. Furthermore, all those participants formerly on ODSP or OW, that went on OBIP to receive higher financial support and other benefits, [180] could transition back to ODSP or OW during the eight-

[176] OBIP Booklet, Crown's Motion Record, Tab 1, DBB Affidavit, para 30; pages 9-10, Exhibit 14, pages 311-312 & 318-319; Application and Consent Form, Crown's Motion Record, Tab 1, DBB Affidavit, para 30; pages 9-10, Exhibit 15, pages 359-360
[177] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, para 92, page 25
[178] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, para 92(a), page 25; OBIP Information Booklet, OBIP Information Booklet, Crown's Motion Record, Tab 1, DBB Affidavit, para 61, pages 18-19, Exhibit 23, pages 465-468
[179] DBB Affidavit, Crown's Motion Record, Tab 1, paras 13-14, page 5
[180] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, paras 8, 16-17, 35-36, 44-45, 82-83, pages 7, 8, 11, 12-13, 23

month wind-down of OBIP. There was no exchange of value. Indeed, the claim is that participants benefited from the BI payments as compared to ODSP or OW. [181]

180. Ultimately, BI payments were not made in exchange for the alleged consideration. Rather, BI payments were the research intervention, not payment for participation in the research.

**C) In the Alternative, No Breach of Contract**

***(i) Term of Payments Not Breached***

181. The Amended Claim alleges that there was a contractual term guaranteeing payments for three years. However, the Amended Claim's citation to the "facts pleaded above" [88 preceding paragraphs] does not identify what the contract is. Therefore, it is difficult to determine the source of its terms. [182]

182. In the "facts pleaded above", the Plaintiffs rely upon myriad oral and written public announcements, oral representations allegedly made on a myriad of occasions by Crown employees, agents, and representatives to various applicants, and upon the Booklet and Application Forms.

183. With respect to the unparticularized alleged oral representations of a guarantee of three years of payments made by unnamed Crown employees, agents and representatives, to unnamed applicants, in an unknown quantity, at unknown times and places, the Crown cannot plead. This allegation also suffers from a lack of commonality discussed further below so that to the extent that such oral representations are alleged to give rise to a claim in contract it cannot be certified.

184. With respect to the public announcements, they too suffer from a lack of commonality, could not possibly amount to a contract, but further, they simply do not represent that there would be a

[181] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, paras 8, 16-17, 35-36, 44-45, 82-83, pages 7, 8, 11, 12-13, 23
[182] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, para 89, page 24

guarantee of BI payments for three years. Rather, as pled they state that the research study would be for three years. [183] The subsequent inaccurate summary in the Amended Claim that the public statements guaranteed three years of payments cannot change the content of the pled statements. [184] To the extent that the public statements are relied upon as forming a contract, the words matter, and a guarantee of three years of BI payments is simply not in the representations.

185. With respect to the Booklet it expressly states that: 1) there was no guarantee of any payments since the applicant could be placed in the control group; and 2) that if placed in the Payment Group applicants would receive payments for "up to" three years. "Up to" plainly means a maximum of three years of payments, not a minimum. The related Application Form has no comment on the duration of BI payments.

186. The second Application Form used in March and April 2018 makes the same statements as in the Booklet for participants in the Thunder Bay and Hamilton Area. For participants in Lindsay, since there was no control group, the form simply states that BI payments will be for "up to" three years. No duration of the study is referenced in this Application Form. [185]

187. If there was a contract for payments, the term was for up to three years and payments were made for up to three years so there was no breach. The fact that the Amended Claim inaccurately summarizes the above documents as providing a guarantee of three years of payments cannot change the content of the statements in the documents which are incorporated into the claim by law. [186]

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[183] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, paras 57-64, pages 15-18
[184] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, paras 65-66, pages 18-19
[185] *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras 57, 58, 60, Crown's BOA, Tab 48; *MacDonald v Chicago Title Insurance Co. of Canada*, 2015 ONCA 842 at paras 33, 34, 37, 40, 41, leave to appeal ref'd [2016] SCCA No 39, Crown's BOA, Tab 49; *Ledcor Construction Limited v Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at paras 20, 24, Crown's BOA, Tab 50; *Spina v Shoppers Drug Mart Inc.*, 2012 ONSC 5563 at paras 116-130, Crown's BOA, Tab 51
[186] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, para 72, page 21

***(ii) Three Year Guarantee of BI Payments Contrary to the Design, Operation and Nature of the Pilot as a Research Study and Social Assistance Program***

188. Indeed, the allegation that there was a guarantee to make BI payments for three years, aside from being contradicted by the applicant study documents, makes no sense having regard to the design, operation of and nature of the Pilot as a research study, and nature of the Pilot as a social assistance program.

189. By way of design, there could be no guarantee of BI payments for three years even if the applicant was "potentially eligible", [187] because they could be placed in the control group, or become ineligible over the course of the Pilot (e.g. the participant's income increased to make them ineligible, they moved outside of Ontario etc.). There were also other potential bases for non-payment (e.g. not filing income taxes to enable determinations of eligibility and/or the calculation of the BI payment, not filling out surveys for the study etc.)

190. Furthermore, at the front-end enrollment for the three-year Pilot was phased occurring over many months. [188] At the back end, the final evaluation and reporting phase on the surveys was to be completed within the three-year Pilot. [189]

191. By way of operation of the study, consistent with the Booklet and Application Forms, the Study Protocols, which set out in detail all aspects of the study, state that BI Payments will be made for "up to" three years. [190]

192. There were also three phases to the study: enrollment, intervention, and evaluation and

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[187] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, paras 66 and 71, pages 19-20
[188] DBB Affidavit, Crown's Motion Record, Tab 1, paras 59-76, pages 17-22
[189] Joint Supplementary Motion Record, Tab D, Transcript from the Cross-Examination of Debbie Burke-Benn, Q 203-204, 207-211, pages 196, 198-199.
[190] OBIP Information Booklet, Crown's Motion Record, DBB Affidavit, Tab 1, para 30, pages 9-10, Exhibit 14, page 311; OBIP Study Protocol v2.1, Crown's Motion Record, DBB Affidavit, Tab 1, para 29, page 9 , Exhibit 12, page 239; OBIP Study Protocol v2.2, Crown's Motion Record, DBB Affidavit, Tab 1, para 29, page 9, Exhibit 13, page 283

reporting. [191] As noted in the Amended Claim Mr. Segal similarly recommended a Pilot divided into three phases: a planning phase, a distribution phase, and an evaluation phase. He recommended that the Pilot include a three-year distribution phase for payments, however, as noted in the pleading, "[f]ollowing further consultations", the entire Pilot was announced by the former Premier as a three-year Pilot. [192]

193. A guarantee of three years of payments is also inconsistent with the nature of the Pilot as a research study. While the hypothesis was that providing a basic income would improve outcomes in various areas, the result was unknown. [193] If the result was already known it would not be research. The result could be positive, neutral, or negative.

194. To assist with the study, as above, the Crown created a Minister's Advisory Council, and a Research and Evaluation Advisory Chair to provide advice and recommendations. The Crown also retained Providence St. Joseph's and St. Michael's Healthcare as represented by the Centre for Urban Health Alternatives to conduct the research, and the Veritas Independent Review Board to provide guidance on the delivery of the research components of OBIP.

195. A vision of the study as fixed and unalterable from the outset, providing for legally enforceable terms including a guaranteed right to three years of payments is contrary to the nature of the study.

196. Rather, the study could have been modified or ended based on advice or recommendations from the MAC, REAC, Veritas, or the researchers, due to concerns about the welfare of the intervention or control group participants, or the quality of the research. [194]

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[191] DBB Affidavit, Crown's Motion Record, Tab 1, para 31, page 10
[192] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, para 58, page 16
[193] OBIP Study Protocol, OBIP Study Protocol 2.1, OBIP Study Protocol 2.2, DBB Affidavit, Crown's Motion Record, Tab 1, paras 29, page 9, Exhibits 11-13, pages 194, 227, & 270-271
[194] DBB Affidavit, Crown's Motion Record, Tab 1, para 58(p), pages 16-17

197. Indeed, there were two updates to the Study Protocol. [195] Furthermore the study was only approved by Veritas up until May 21, 2019. This was the "study expiration date", subject to further and ongoing approvals. [196]

198. At root, the Plaintiffs seek to require the Province to continue to administer the research intervention (i.e. BI Payments), without the research. This makes no sense.

199. Finally, the Pilot was a Pilot government social assistance program or policy. Social programs and policies may be implemented, changed, wound down, cancelled, and followed by new social programs.

200. In conclusion, the argument that the OBIP was a fixed term contract with a guarantee for payments for three years, is inconsistent with the design, operation and nature of the Pilot as a research study, and nature of the Pilot as a social assistance program or policy.

201. For these reasons, the text of the study documentation does not provide a guarantee of three years of BI Payments. Rather, participants were advised that BI Payments would be for "up to" three years. In the context of this legal claim for a breach of contact, the words in the supposed contract are determinative. If there was a contractual obligation to make payments, it was for "up to" three years and has been met.

### ***(iii) Statutory Deemed Terms for Contracts with the Crown: Appropriation***

202. It is a constitutional principle that all expenditures of public monies be authorized by the legislature. [197] In Ontario, this principle is codified in the *Financial Administration Act* wherein

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[195] OBIP Study Protocols, DBB Affidavit, Crown's Motion Record, Tab 1, paras 29, page 9, Exhibits 11-13, pages 185, 213, & 257

[196] May 1, 2018 letter from Veritas, Crown's Motion Record, Tab 1, DBB Affidavit, para 32, page 10, Exhibit 16, page 364

[197] Hogg, Peter W., Patrick J. Monahan and Wade K. Wright. *Liability of the Crown*, 4th ed. Toronto: Carswell, 2011, page 116, Crown's BOA, Tab 75; Horsman, Karen and Gareth Morley, eds. *Government Liability, Law and Practice*, (loose-leaf). Toronto: Thomson Reuters, 2019, at chapter 2.20.20(2)(c), Crown's BOA, Tab 74

payments of public moneys must be authorized by an Act of the Legislature. [198]

203. With respect to contracts, in *J.E. Verreault*, the Supreme Court of Canada cited with approval the following passage from Griffith & Street, Principles of Administrative Law (3 Ed. 1963), at page 271, on the necessity of an appropriation for a contract:

> ... It is usually stated that Crown contracts are invalid if Parliament has not made an express appropriation for the purposes of the contract. This is a misreading of the authorities… It is submitted that the law is as follows: a contract made by an agent of the Crown acting within the scope of his ostensible authority is a valid contract by the Crown; in the absence of a Parliamentary appropriation either expressly or impliedly referable to the contract, it is unenforceable. [emphasis added]

204. In other words, while a lack of appropriation does not invalidate a contract, a lack of appropriation expressly or impliedly referable to the contact makes it unenforceable. In *J.E. Verreault*, the Supreme Court of Canada went on to find a specific appropriation to make the contract legally enforceable. [199]

205. In Ontario s. 12 of the *MCSS Act* states that Minister may enter into agreements and "may direct out of money appropriated by the Legislature the payment of such expenditures as are necessary for such purposes."

206. The Ontario *Financial Administration Act* further codifies the law that an appropriation is required to make a contract enforceable. Section 11.3(2) of the *Act* states:

> **Agreements subject to appropriations**
>
> Every agreement providing for the payment of money by the Crown is deemed to contain a provision stating that the payment by the Crown of moneys that come due under the agreement shall be subject to,
>
> (a) an appropriation to which that payment can be charged being available in the fiscal year in which the payment becomes due; or
>
> (b) the payment having been charged to an appropriation for a previous fiscal year.

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[198] *FAA*, s. 11.1
[199] *J.E. Verreault & Fils v The Attorney General of Quebec*, [1977] 1 SCR 4, Crown's BOA, Tab 40

207. Absent an appropriation there can be no breach of contract for non-payment, since a contractual condition for payment is an appropriation.

208. Notably, Professor Hogg, while critical of such deemed contractual provisions in federal and provincial statutes, acknowledges that they excuse non-payment, or in other words, non-payment does not amount to a breach of contract due to the deemed contractual provision:

> . . . [b]y making the existence of an appropriation 'a term' of any contract providing for the payment of public monies, section 40 of the [federal] *Financial Administration Act* seems to make the absence of an appropriation an excuse for non-performance by the government"…Six provinces have a statutory provision similar to the federal provision, and although there is some variation in the statutory language, the absence of an appropriation is probably an excuse for non-performance in those jurisdictions…Elsewhere in Canada…the common law rule prevails…the common law rule is that the existence of an appropriation is not a condition precedent to the validity of a contractual obligation to pay public monies. [200]

209. The Amended Claim does not plead that the legislature appropriated moneys for OBIP beyond the fiscal year 2018-2019. Indeed, it is common ground that payments under the OBIP ceased at the end of the fiscal year 2018-2019 (end of March 2019), as per the Ministry Estimates wherein the line item for the OBIP does not continue for the 2019-2020 fiscal year. [201]

210. Accordingly, even assuming the OBIP created contracts with each participant, they incorporated a deemed term subjecting any payment to an appropriation. Since there is no appropriation past the fiscal year 2018-2019 there can be no breach of contract for non-payment. [202]

**D) Conclusion on Allegation of Breach of Contract**

211. The requirements for authority, a signature, and an appropriation are statutory requirements for

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[200] Hogg, Peter W., Patrick J. Monahan and Wade K. Wright. *Liability of the Crown*, 4th ed. Toronto: Carswell, 2011, pages 317-318, Crown's BOA, Tab 75; Note that the Consolidated Revenue Fund referenced in s. 28 of the *Crown Liability and Proceedings Act* is the appropriation for court judgments against the Crown. It is not applicable absent a breach of contract establishing liability. There being no breach it is not applicable. Finally, note that the appropriation requirement for contracts may not be applicable to claims in unjust enrichment, *quantum meruit*, or negligent misrepresentation.

[201] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, para 88, page 24; 2019/2020 Expenditure Estimates for MCCSS, Crown's Motion Record, DBB Affidavit, Tab 1, para 23, page 6, Exhibit 1, pages 63-90

[202] DBB Affidavit, Crown's Motion Record, Tab 1, paras 20-23, pages 7-8

Crown contracts. They are statutory checks and balances that prevent plaintiffs from cobbling together circumstances and *post facto* claiming that they amount to a contract (i.e. the very circumstances of this case).

212. Facts to establish consideration and intent are also lacking. Overall, the requirements for an enforceable contract are not made out on the facts in the Amended Claim, and even if they were, on the same facts there was no breach.

***7. No Breach of Undertaking***

213. The alleged breach of undertaking cause of action is both factually and legally unclear and untenable.

214. Similar to the breach of contract cause of action the Amended Claim states: "[b]y virtue of the facts pleaded above", there was an undertaking to make BI payments for three years. [203] It is unclear what of the 95 preceding paragraphs is supposed comprise the undertaking (e.g. Ministers' statements in the Legislature, political announcements of the Pilot by the Premier and Ministers, etc.). Without greater clarity as to the specific source of the alleged undertaking it is not possible to plead to the breach of undertaking claim.

215. Legally, the two decisions cited in support of this claim are both for breach of "contractual undertaking". No authority is cited at all for the Plaintiffs' claim styled "breach of undertaking".

216. With respect to the *OPSEU* decision on breach of contractual undertaking, the plaintiffs pled negligent misrepresentation and that there was a contract whereby the Crown was contractually bound to comply with a contractual undertaking:

> The Defendant's promises therefore constitute binding contractual undertakings that it is legally bound to respect. In failing to ensure that employees suffered no pension losses as a

[203] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, paras 96, 97, page 26

result of the transition, the government breached this contract with the Plaintiffs. [204]

217. Based on the pleading the Court refused to strike the claim for contractual undertaking under s. 5(1)(a) of the *CPA*.

218. The *Alexander* case was a similar related claim to the *OPSEU* case also seeking compensation regarding a pension transfer. The *OPSEU* decision is referenced in the *Alexander* decision as the McSheffrey action. The *Alexander* decision referenced in the Plaintiffs' Factum was to approve a class action settlement. The issue of a cause of action of breach of a contractual undertaking was not adjudicated, but was certified on consent. The cause of action for breach of contractual undertaking was described as analogous to a claim in promissory estoppel (i.e. a claim to enforce a promise on the basis that it was reasonably relied upon to the detriment of the reliant party). [205]

219. Notwithstanding the settlement of the *Alexander* action, the Supreme Court of Canada and the Ontario Court of Appeal have held that promissory estoppel can only be used as a "shield" and cannot be used as a "sword" to found a cause of action. [206] Indeed, this Court has struck out claims for a "non-bargain" contract in part on this basis. In *Reclamation Systems Inc.* Cumming J., after an exhaustive review of the authorities, struck out such a cause of action on the basis that it was a claim based on promissory estoppel which could not be asserted as a cause of action, and on the basis of a lack of a pre-existing contractual relationship. The Court relied on Fridman's text "The Law of Contract" stating that "the only true function of this doctrine [promissory estoppel] is to affect existing contractual rights, not to manufacture contracts out of such 'promises' or 'representations.'" [207]

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[204] *Ontario Public Service Employees Union v Ontario*, [2005] OJ No 1841 at para 45 (Sup Ct), Crown's BOA, Tab 52
[205] *Alexander v Ontario*, 2016 ONSC 7059 at paras 14, 23, and 37, Crown's BOA, Tab 53
[206] *Doef's Iron Words Ltd v Mortgage corporation Canada Inc.*, [2004] OJ No 4358 at para 2 (CA), Crown's BOA, Tab 54; *Reclamation Systems Inc. v Rae*, [1996] OJ No 133 at paras 133-162 (Gen Div), Crown's BOA, Tab 55; *Transamerica Life Insurance Co. of Canada v Canada Life Assurance Co.*, [1995] OJ No 2220 at paras 21-22 (Gen Div), Crown's BOA, Tab 56; *Canadian Superior Oil v Hambly*, [1970] SCR 932 at paras 13-15, Crown's BOA, Tab 57; *Gilbert Steel Ltd. v University Construction Ltd.* (1976), 12 OR (2d) 19 at para 13 (CA), Crown's BOA, Tab 58
[207] H.L. Fridman in The Law of Contract, 3rd ed. (Toronto: Carswell, 1994) at page 124 as quoted in *Reclamation Systems*

220. Alternatively, this breach of undertaking claim sounds like a claim in negligent misrepresentation (i.e. a duty of care, a representation, intent that it be relied upon, negligence in making the representation, and reasonable reliance causing damages). [208] This cause of action is not pled and we will not elaborate on the pleading and legal requirements for the tort or otherwise respond to it here. [209]

221. In any event, the cause of action of breach of undertaking has not been recognized. [210] The attempt to circumvent the law of promissory estoppel and negligent misrepresentation by applying a breach of undertaking label to the facts should be rejected.

**ISSUE II: Section 5(1)(c) Common Issues Requirement Not Met**

***1. Law of Common Issues Requirement***

222. The purpose of the common issues analysis is to determine whether allowing the action to proceed will avoid duplication of fact-finding or legal analysis. [211] An issue is not common if it is dependent upon individual findings of fact which will have to be made for each class member at individual trials. [212] To satisfy the common issue criteria, the proposed common issue must be a substantial ingredient of each class member's claim and its resolution must advance the litigation in a meaningful way. [213]

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*Inc. v Rae*, [1996] OJ No 133 at 133-162 (Gen Div), Crown's BOA, Tab 55; *Canadian Superior Oil v Hambly* [1970] SCR 932 at paras 13-15, Crown's BOA, Tab 57; *Gilbert Steel Ltd. v University Construction Ltd.* (1976), 12 OR (2d) 19 at para 13 (CA), Crown's BOA, Tab 58; Note: The exception is proprietary estoppel which is limited to interests in land: *Schwark v Cutting*, 2010 ONCA 59 at para 34, Crown's BOA, Tab 61

[208] *Queen v Cognos Inc*., [1993] 1 SCR 87 at para 33, Crown's BOA, Tab 60; *Hamilton v 1214125 Ontario Inc.*, 2009 ONCA 684 at para 35, Crown's BOA, Tab 61; *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 25.06(8)

[209] To the extent that "breach of undertaking" is pled as a kind of tort, the *CLPA* would need to be considered among other issues.

[210] See also the Court of Appeal's recent comments with respect to the creation of new torts in: *Merrifield v Canada (Attorney General)*, 2019 ONCA 205 at paras 19-26, 37-43, 49-53, leave to appeal ref'd [2019] SCCA No 174, Crown's BOA, Tab 36

[211] *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at paras 39-45, Crown's BOA, Tab 62

[212] *Bennett v Hydro One*, 2017 ONSC 7065 at para 80-83, aff'd 2018 ONSC 7741 at para 23 (Div Ct), Crown's BOA, Tab 63

[213] *Loveless v OLG*, 2011 ONSC 4744 at paras 63-68, 75, 81, Crown's BOA, Tab 64

223. Common issues must be capable of common proof. [214] It is not enough that theories of liability can be phrased commonly if the determination of liability for each class member can only be made upon an examination of their unique circumstances. As stated by the Ontario Court of Appeal:

> A core of commonality either exists on the record or it does not. In other words, commonality is not manufactured through the statement of common issues. The common issues are derived from the facts and from the issues of law arising from the causes of action asserted by class members and not the other way around. [215]

### *2.* Application *to the Facts*

#### ***A) Proposed Cause of Action Common Issues are Fatally Flawed***

224. The proposed common issues based on the causes of action all have at their core the issue of whether there was a legal obligation to make BI payments for three years. The proposed common issues suffer from the fatal flaw that they are not capable of common proof:

(1) The facts pled to prove a legal obligation to make BI payments for three years necessarily involves individual inquiries into what public announcements class members heard or read, what representations were made to them, what reliance they placed on any such representations, and whether that reliance was reasonable. As pled, proving a requirement to make three years of payments is not capable of common proof.

(2) Even if an obligation to make three years of payments could be proved in common, and there was such an obligation, whether a class member continued to be eligible for the payment could not be proved in common.

225. These issues will be explored further below.

#### ***B) Proposed Common Issues Not Capable of Common Proof***

226. While the fact that all class members are participants in the same Pilot provides a veneer of commonality, a class member's involvement in the pre-enrollment and enrollment phase, and participation in the Pilot, was individual.

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[214] *Penney v Bell*, 2010 ONSC 2801 at paras 90-96, Crown's BOA, Tab 65; *Marshall v United Warehouse Limited Partnership*, 2013 BCSC 2050 at paras 166-170, affirmed 2015 BCCA 252, leave to appeal ref'd [2015] SCCA No 326, Crown's BOA, Tab 66

[215] *McCracken v Canadian National Railway Co*, 2012 ONCA 445 at para 132, see also paras 101-103 & 128, Crown's BOA, Tab 67

**(i) Participant Pre-Enrollment and Enrollment**

227. The difficulty that arises from the Amended Claim is that proving the proposed common issue causes of action necessarily descends into individual inquiries into what public statements each class member heard or viewed, what oral representations may have been made to each class member, what they read, and what reliance, if any, they placed on any such representations and whether such reliance was reasonable. The causes of action are not capable of common proof.

228. The Plaintiffs plead reliance on the following:

(a) Public Announcements: A discussion paper by Hugh Segal to the Premier and Minister containing advice and recommendations for a Pilot; [216] A speech by the Premier in Hamilton; [217] A response to a question from the Mayor of Hamilton by the Premier following her speech; [218] A Ministry news release describing the Pilot; [219] An Ontario webpage; [220] A speech in the Legislature by the Minister of Municipal Affairs; [221] A speech in the Legislature by the Minister of Housing and Minister responsible for poverty reduction. [222] The Amended Claim further relies upon statements and other documentation alleged to be consistent with the public announcements. [223]

(b) Oral Representations Directly to Participants: Unnamed Crown employees, agents, and representatives, made oral representations to unnamed potentially eligible applicants, that if part of the payment Group they would be "guaranteed" to receive BI Payments for three years. [224]

(c) Participant Study Documentation: Information Booklet and Application Forms. [225]

**(a) Public Announcements and Oral Representations**

229. With respect to the public announcements, even if one or more of these public announcements could be interpreted as giving rise to a representation that participants were guaranteed three-years of OBIP payments, it does not advance the inquiry as the issue of whether each class member was privy

[216] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, para 57, pages 15-16
[217] *Ibid*, para 58, page 16
[218] *Ibid*, paras 59-60, page 16
[219] *Ibid*, para 61, page 17
[220] *Ibid*, para 62, pages 17-18
[221] *Ibid*, para 63, page 18
[222] *Ibid*, para 64, page 18
[223] *Ibid*, para 69, pages 19-20
[224] *Ibid*, paras 66, 67, 70-71, pages 19-20
[225] *Ibid*, paras 72-74, page 21

to the statement(s) is not capable of common proof. [226]

230. The pleading with respect to oral representations made by unnamed Crown employees, agents and representatives, to unnamed applicants at in-person enrollment sessions, that payments would be guaranteed for three years suffers from the same defect. Whether each class member was privy to the representation(s) is not capable of common proof.

231. By way of example some participants applied solely through the mail and thus did not participate in the in-person enrollment sessions in which the alleged oral representations were allegedly made. [227]

232. Notably, of the five participant affiants, none of their affidavits so much as claim awareness of any of the public announcements pled, and on cross-examination the affiants confirmed that their knowledge of the program was restricted to the content set out in their affidavit. Furthermore, none of the five participant affidavits allege that an oral guarantee was made at an in-person enrollment session that they would receive BI payments for three years. [228] This evidence is consistent with the evidence of the Crown's affiant that she did not provide such a guarantee at these sessions. [229] On cross examination, one affiant, Ms. Doyle-Hillion, did allege that she was told orally at an in-person enrollment session that she would receive BI payments for three years. [230]

233. The pled public announcements and alleged oral representations at in-person enrollment sessions are not a part of each class member's claim. To prove the causes of action individual

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[226] *Penney v Bell Canada*, 2010 ONSC 2801 at paras 91-92, Crown's BOA, Tab 65
[227] DBB Affidavit, Crown's Motion Record, Tab 1, paras 59-64, pages 17-19; The mailed applications also raise issues as to authority to contract
[228] Affidavit of Tracey Mechefske, Motion Record of the Plaintiffs, Vol 1, Tab D, page 71; Affidavit of Dana Bowman, Motion Record of the Plaintiffs, Vol 3, Tab E, page 1019; Affidavit of Susan Lindsay, Motion Record of the Plaintiffs, Vol 3, Tab F, page 1053; Affidavit of Grace Marie Doyle-Hillion, Motion Record of the Plaintiffs, Vol 3, Tab G, page 1098
[229] DBB Affidavit, Crown's Motion Record, Tab 1, para 72, page 21
[230] Cross-Examination of Grace Marie Doyle-Hillion, Joint Supplementary Motion Record, Tab F, Qs 47-49, pages 316-317

inquiries would be required for every class member as to what public announcements they heard or viewed, and what oral representations were allegedly made to them.

234. Strathy J. in *Penney v. Bell Canada* denied certification citing similar concerns. In *Penney*, technicians who installed wireline services for Bell Canada went on strike, compromising the defendant's ability to perform installations during the strike and for a considerable time thereafter. The proposed class plaintiffs alleged that Bell Canada had given them an installation date which was a contractual term, and that Bell's failure to install service on the promised date gave rise to a claim for damages for breach of contract. The court refused to certify on the basis that the breach of contract claim was not capable of common proof. The breach of contract claim would require individual examination of what each class member said to Bell, what Bell said to each class member, and what "agreement", if any, was reached as to the significance and consequences of the "scheduled" or "pre-arranged" installation date. [231] All important issues that were not capable of common proof.

235. In the present case, after determining what public announcement or oral representation, or specific combination thereof, were heard or viewed by each class member, it would need to be determined what reliance, if any, the class member placed on the statement, and whether that reliance was reasonable in the circumstances. There can be no tort liability flowing from a statement that was not reasonably relied upon. [232]

236. The Amended Claim asserts that class members "relied on" or applied to OBIP on the "strength of", a promise of three years of BI payments. [233]

237. Where allegations of reliance require individual determinations, they are not capable of being

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[231] *Penney v Bell Canada*, 2010 ONSC 2801 at paras 91-92, Crown's BOA, Tab 65
[232] *Queen v Cognos Inc*., [1993] 1 SCR 87 at para 33, Crown's BOA, Tab 60
[233] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, paras 7, 68, 102, 104, pages 6, 19, 26-27

resolved on a common basis. [234]

238. Further, inferred reliance on a representation is not appropriate in the present case as there is no basis in fact to support the plaintiffs' claim that it was the alleged promise of three years of payments that induced the participants to enroll into the program. Significantly, none of the participants' affidavits state that they were induced to apply to the program because of a promise that they would receive BI Payments for three years. [235] Even Ms. Doyle-Hillion, who alleges that a verbal representation was made to her that payments would be for three years, acknowledges that this representation was made after she had decided to attend a sign-up session for the purpose of applying to OBIP and while her application was being processed. [236] Even assuming a representation of BI payments for three years, whether it was this alleged representation that caused individual applicants to apply for the OBIP is a significant issue that cannot be adjudicated in common.

239. Ultimately, in order to resolve the proposed class claim, an individual inquiry would be required for every class member as to whether they in fact heard or viewed any public announcements, were the recipient of any oral representations, what the content of those announcements or representations were, whether they applied for the Pilot in "reliance on" or on "the strength of these representations", and, if so, whether such reliance was reasonable in each of their particular circumstances. None of this is common. [237]

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[234] *Musicians' Pension Fund of Canada (Trustees of) v Kinross Gold Corp,* 2014 ONCA 901 at paras 117-120 & 127-129, Crown's BOA, Tab 68

[235] Affidavit of Tracey Mechefske, Motion Record of the Plaintiffs, Vol 1, Tab D, page 71; Affidavit of Dana Bowman, Motion Record of the Plaintiffs, Vol 3, Tab E, page 1019; Affidavit of Susan Lindsay, Motion Record of the Plaintiffs, Vol 3, Tab F, page 1053; Affidavit of Grace Marie Doyle-Hillion, Motion Record of the Plaintiffs, Vol 3, Tab G, page 1098

[236] Cross Examination of Grace Marie Doyle-Hillion, Joint Supplementary Motion Record, Tab F, Qs 22-26 & 49, pages 312-313 & 316

[237] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, paras 7, 68, 102, 104, pages 6, 19, 26-27

**(b) Information Booklet and Application Forms**

240. The Amended Claim asserts "[f]urther, or in the alternative]", [238] that the Information Booklet and Application Forms guaranteed BI payments for three years. These documents are common to the class. However, the Amended Claim deliberately does not limit the claim to these documents and is pled much more broadly. Indeed, a claim limited to these documents fails because on their face they do not contain the alleged guarantee of three years of payments and therefore cannot ground the class action for the reasons outlined above under s.5(1)(a).

241. Accordingly, these documents are pled "in the alternative", with the Plaintiffs broadly relying on public announcements and alleged oral representations that founder on the common issues requirement. Taking the Amended Claim as it is broadly pled it is incapable of common proof.

**(ii) Participation in the Pilot**

242. While as pled an obligation to make three years of payments could not be proved in common, even if there was such an obligation, entitlement to such payments could not be proved in common. Specifically, payments were always conditional on the individual participant meeting eligibility requirements and the absence of any other individual bases for non-payment.

243. Indeed, the ongoing inquiry into participant eligibility and other individual bases for non-payment necessary to establish liability involves delving into the following for each single class member, and for class members participating as spouses or common law partners:

**Ongoing Basic Eligibility Requirements**

a) Maintaining residency in Ontario for the duration of the study.
b) Being less than 65 years of age.
c) An income below eligibility thresholds. Numerous factors are further relevant to the income criteria.
    a. Increases in income for single class members, or for spouses or common law

[238] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, para 72, page 21

partners, could render the single class member or spouses or common law partners ineligible. Increases in income could be from a variety of sources (e.g. employment income, investment income, or benefits such as employment insurance, workplace safety and insurance etc.)

b. For single class members that marry or enter into common law relationships, they may become ineligible due to the income of the spouse or common law partner.

c. For spouses or common law partners, divorce, separation or the end of a common law relationship, could result in one of the couple becoming ineligible due to personal income exceeding the eligibility threshold. [239]

**Other Potential Individual Bases for Non-Payment**

a) Failure to file income taxes by a single class member, or one or both spouses or common law partners, to enable calculation of BI payments;

b) Failure to complete surveys by a single class member, or one or both spouses or common law partners;

c) Voluntary withdrawal by a single class member, or spouses or common law partners: Notably in materials filed by the Plaintiffs citing a different basic income study it was noted that withdrawal is "common with research that extends over time – participants left the experiment, further reducing the participation" [240];

d) Death of a single class member. Death of a spouse or common law partner could also result in the remaining class member becoming ineligible due to personal income;

e) Incarceration of a single class member. Incarceration of a spouse or common law partner could also result in the remaining class member becoming ineligible due to personal income;

f) Discrepancies between information provided by participant or spouse and common law partner to the Canada Revenue Agency and OBIP administrators impeding the ability to determine eligibility; and

g) Misrepresentation or mistake in the information provided to OBIP administrators or the Canada Revenue Agency by a single class member, or one or both spouses or common law partners affecting eligibility. [241]

244. The above issues are not theoretical. With respect to participant eligibility and other individual bases for non-payment, at the time of the August 31, 2018 wind-down announcement, since the enrollment of the first participant in the intervention group:

a) 75 participants had voluntarily withdrawn from OBIP;

b) 17 participants had died;

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[239] DBB Affidavit, Crown's Motion Record, Tab 1, para 58, pages 16-17

[240] "Revisiting Manitoba's Basic Income Experiment", Winnipeg Free Press Article, Plaintiff's Motion Record, Affidavit of Sheila Regehr, Tab I, para 9, page 1373, Exhibit 1, page 1383

[241] DBB Affidavit, Crown's Motion Record, Tab 1, para 58, pages 16-17

c) 11 participants were no longer eligible because they had reached the age of 65;

d) 119 participants were no longer eligible to receive payments because they reported individual or household income (including spousal or common law partner income) in their 2017 Income Tax Return in excess of the OBIP thresholds;

e) 372 participants or their spouses or common law partners had not filed their income tax return for 2017 (due at the end of April 2018) as required to enable determinations of ongoing eligibility or amount of payments; and

f) Based on information received from the Canada Revenue Agency, OBIP information of 119 participants or their spouses or common law partners could not be fully verified against their respective 2017 Income Tax Return meaning that their ongoing eligibility could not be determined. [242]

245. These numbers are point in time numbers generated for this certification motion (i.e. August 31, 2018). Ministry document collection to operate the Pilot ceased with the end of the Pilot. Had the Pilot continued, these numbers would be expected to fluctuate on an individual basis.

246. This case has some similarities to the decision of *Bennett v Hydro One*. In that case the proposed representative plaintiff alleged that the defendant Hydro One's new billing and customer information system overcharged customers for electricity. In fact, some customers were overcharged, others were undercharged, and others received the correct bill. The motion judge and Divisional Court found that there was a "fatal flaw" underpinning all the common issues in that there was no "common harm" to the class. [243] The motion judge wrote:

> In the case at bar, any dispute about the accuracy of the bills eventually requires an individual inquiry, and this individuality distinguishes this case from the illegal interest, overtime miscalculation, or price-fixing class action cases that rely on systemic misconduct or a conspiracy, because in those cases, the systemic misconduct produced a potentially common (singular) adverse consequence for the class members. [244]

247. The Divisional Court in affirming the decision further wrote:

> The common facts that all 1.3 million customers of the respondents have the same contracts, the CIS generated bills to all of those customers, and the negligent design or implementation of the CIS caused risk of error to all customers and continues to present risk of future error to

[242] August 30, 2018 AIV Results, Crown's Motion Record, DBB Affidavit, Tab 1, para 82, page 23, Exhibit 29, page 492
[243] *Bennett v Hydro One*, 2018 ONSC 7741 at para 14 (Div Ct), Crown's BOA, Tab 63
[244] *Bennett v Hydro One*, 2017 ONSC 7065 at paras 85-86, *Bennett v Hydro One*, 2018 ONSC 7741 at para 40 (Div Ct), Crown's BOA, Tab 63

> all, do not meet the common issue criterion on the test for certification in relation to the proposed common issues of negligence, breach of contract, and unjust enrichment. Findings on those points are not substantial ingredients in the proposed class members' causes of action. [245]

248. Individual inquiries were certainly possible in that case, but this requirement was fatal to certification of the action as a class action.

249. Similarly, even assuming BI payments were required for three years, subject to eligibility or other reasons for non-payment, a lack of BI payments could result in liability to participants that were eligible, or no liability to participants that were no longer eligible and/or there were other reasons for non-payment. An individual inquiry for each participant would be required.

250. In *Loveless v OLG*, the proposed representative plaintiff claimed that the Ontario Lottery and Gaming Corporation had failed to protect consumers from retailers defrauding consumers of their winnings. Strathy J. refused certification observing:

> Every single class member with a claim will have to demonstrate that he or she was actually deprived of their winnings by a retailer…the individual issues are central to liability. [246]

251. Similarly, in the present case, every class member will have to prove ongoing eligibility and a lack of bases for non-payment, which are central to liability.

***(C) Conclusion on Proposed Cause of Action Common Issues***

252. The proposed cause of action common issues are not capable of common proof. Nor can the proposed cause of action common issues be fixed. They inevitably suffer from the fatal flaw that liability cannot be determined absent individual inquiries of every participant with respect to their experience pre-enrollment and at enrollment, and their participation in OBIP. Indeed, the necessary individual determinations are central to liability.

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[245] *Bennett v Hydro One*, 2018 ONSC 7741 at para 42 (Div Ct), Crown's BOA, Tab 63
[246] *Loveless v OLG*, 2011 ONSC 4744 at paras 64 & 90, Crown's BOA, Tab 64

### *3. Common Issue #15: Aggregate Damages*

253. Aggregate damages may be available under the *Class Proceedings Act* where the defendant's liability to at least some members of the class can be established through the resolution of the common issues, and damages can be assessed in the aggregate without proof from individual class members. [247]

254. As above, liability cannot be decided on a class wide basis. Likewise, damages cannot be determined in the aggregate without proof from individual class members. The Plaintiffs claim damages of BI Payments, expenses incurred, and general damages for inconvenience, loss of time, frustration, anxiety, mental distress, psychological injury, and emotional upset. [248]

255. With respect to BI Payments, many of the same factors affecting eligibility and other bases for non-payment, could also affect the amount of the class member's BI Payment provided the class member remained eligible:

(a) Changes in income for single class members, or for spouses or common law partners, could affect payments. Changes in income could be from a variety of sources (e.g. employment income, investment income, or benefits such as employment insurance, workplace safety and insurance etc.);

(b) For single class members that marry or enter into common law relationships, provided they remain eligible as a couple, payments may be affected;

(c) For spouses or common law partners, divorce, separation or the end of a common law relationship, provided each class member in the couple remains eligible based on their personal income, payments could be affected;

(d) Death of a spouse or common law partner could result in a reduction of BI payments for the remaining class member;

(e) Incarceration of a spouse or common law partner could result in a reduction of BI payments for the remaining class member;

(f) Late filing of income taxes by a single class member, or one or both spouses or common law partners, to enable calculation of BI payments;

(g) Misrepresentation or mistake in the information provided to OBIP administrators or the Canada Revenue Agency by a single class member, or one or both spouses or common law partners affecting the amount of payments; and

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[247] *Class Proceedings Act*, S.O. 1992, C. 6, s. 24(1)*; Loveless v OLG*, 2011 ONSC 4744 at paras 69-74, Crown's BOA, Tab 64; *Healey v Lakeridge Health Corp*, 2011 ONCA 55 at para 71, Crown's BOA, Tab 69

[248] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, paras 117-119, pages 30-31

(h) Change in disability status of a single class member, or one or both of spouses or common law partners could result in an increase or decrease in the amount of payments. [249]

256. Assuming eligibility and no other bases for non-payment, the amount of the class member's BI Payment over the claim period could vary. Damages for class member BI Payments are necessarily an individual issue and not appropriate for aggregate assessment.

257. Damages for BI Payments are also complicated by the fact that some participants went back on ODSP or OW for example. Benefit amounts under these programs along with any related government benefits would need to be set off from any BI Payments and related benefits. [250]

258. The claim for personal injury and special damages are particularly ill suited to aggregate assessment. Personal injury damages are inherently individualistic. In the present case, participants could respond to the wind-down without any personal injury or experience ordinary upset or disappointment that does not rise to the level of being legally compensable. [251]

259. Finally, the plaintiffs have further not put forth any expert evidence or any methodology [252] as to how aggregate damages could be assessed as a common issue. Indeed, this case is not appropriate for aggregate damages.

***4. Common Issue #16: Administration***

260. The proposed common issue of "[s]hould the Defendant pay the cost of administering and distributing the recovery to the Class" would be applicable to every class action. It is not a basis for certifying this or any other class action.

261. Indeed, this proposed common issue and the framing of the cause of action proposed common

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[249] Crown's Motion Record, Tab 1, DBB Affidavit, para 58, page x 2
[250] OBIP Information Booklet, Crown's Motion Record, Tab 1, DBB Affidavit, paras 8-9; page 3, Exhibit 14, pages 326-331
[251] *Healey v Lakeridge Health Corp*, 2011 ONCA 55 at para 71, Crown's BOA, Tab 69
[252] *Loveless v OLG*, 2011 ONSC 4744 at paras 71-74, Crown's BOA, Tab 64

issues inflate the number of alleged common issues. The proposed cause of action common issues contain redundancies, turn undisputed facts into issues, and/or obscure the nature of the claim as set out in the Amended Claim. If this action is certified they would need to be redrafted. For a further explanation see Schedule "D". In addition, see Schedule "D" regarding the proposed Litigation Plan.

**ISSUE III: Section 5(1)(d) Preferable Procedure Criteria Not Met**

262. It is not enough for the plaintiff to establish that there is no other procedure which is preferable to a class proceeding. The court must also be satisfied that a class proceeding would be fair, efficient and manageable. [253]

263. In the present case, the individual issues will make the case unmanageable such that any advantages to a common issues trial would be displaced by the inevitability of individual issue trials on liability and damages.

264. While noting that the inevitability of individual issue trials is not fatal to certification, the motion's judge in *Bennett v. Hydro One* stated:

> …in a given particular case, the inevitability of individual issues trials may obviate any advantages from the common issues trial and make the case unmanageable and thus the particular case will fail the preferable procedure criterion…
>
> Regardless of whom is correct about the extent of the overpricing, it is obvious that it would be prohibitively expensive for an individual to sue for a loss between $25 to $100. However, it does not follow that a class action will always be the preferable response to these circumstances or that a class action is always the necessary or feasible response to these circumstances. Sometimes, a class action, even if certified, leaves too much to be done at the individual issues trials and impedes rather than removes the barriers to access to justice…
>
> I appreciate that s. 25 of the *Class Proceedings Act, 1992* empowers the court to design expedient and efficient procedural mechanisms and that in an appropriate case that resource could be used to reduce the individual issues phase to a very simple fill-in-the-form-based procedure, but those efficiencies must be matched with a meaningful common issues phase and if simplified the procedure must still be procedurally fair to the defendant. The appropriate circumstances seem to have been present in cases like *Markson v. Markson v. MBNA Canada*

[253] *Loveless v OLG*, 2011 ONSC 4744 at para 122, Crown's BOA, Tab 64

*Bank* and *Lundy v. VIA Rail Canada Inc.*, but they are not present in the case at bar. [254]

265. Similarly, Justice Newbury writing for the British Columbia Court of Appeal in *Parsons v. Coast Capital Savings Credit Union*, provided the following caution when it comes to considering whether a class action is a preferable procedure:

> The relevance of individual circumstances to the plaintiff's proof of the claims or to defences asserted by Coast Capital should not in my view be brushed aside merely in order to fit the action into the mould of a class proceeding. Whilst the "flexibility" of the Act is an important feature and in some instances decertification or the creation of sub-classes may be useful procedural tools, the objectives of this remedial legislation will not be well served if the court at the certification stage routinely delays addressing structural difficulties that will inevitably arise, in the hope they can be dealt with "when the time comes" in the midst of a complex trial. [255]

266. To borrow a phrase of Strathy J. in *OLG*, the "heavy lifting" in this case is not in reviewing the Information Booklet and Application Forms, it is in the individual inquiries for each class member: what public announcements they heard or read; what oral representations were made to them; what they relied upon; whether that reliance was reasonable; whether they remained eligible during the term of the claim; whether there were other bases for non-payment during the term of the claim; what is the appropriate calculation of BI Payments; what expenses were incurred; and what personal injury damages would be warranted.

267. The design of this proposed class action would not be a fair, efficient and manageable procedure and would not meaningfully advance the goals of judicial economy and access to justice. Any advantages to a common issues trial would be subsumed by the inevitability of 4,001 individual assessments on liability and damages piercing any veneer of judicial economy from a class action.

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[254] *Bennett v Hydro One*, 2017 ONSC 7065 at paras 122, 127, 129, aff'd 2018 ONSC 7741 at paras 51-53 (Div Ct), Crown's BOA, Tab 63

[255] *Parsons v Coast Capital Savings Credit Union*, 2007 BCCA 247 at para 38, leave to appeal ref'd [2007] SCCA No 331, Crown's BOA, Tab 70; *Tiemstra v Insurance Corp. of British Columbia*, [1997] BCJ No 1628 at paras 4, 10, 17 (CA), Crown's BOA, Tab 71

## PART VI – ORDER SOUGHT

268. Ontario respectfully requests that this motion be dismissed with costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Date: May 26, 2020

**Christopher P. Thompson** (LSO No. 46117E)
**Zachary Green** (LSO No. 48066K)
**Chantelle Blom** (LSO No. 53931C)
**Ravi Amarnath** (LSO No. 66824K)

Lawyers for the Responding Party

## SCHEDULE "A"

**Authorities Relied Upon**

1. Agencies and Appointments Directive under the *Management Board of Cabinet Act*, R.S.O. 1990, c. M.1, s. 3(3)

2. *Trillium Power Wind Corp. v Ontario (Ministry of Natural Resources)*, 2013 ONCA 683

3. *Web Offset Publications Ltd. v Vickery*, [1999] OJ No 2760 (CA), leave to appeal dismissed [1999] SCCA No 460

4. *Re Collections Inc. v Toronto-Dominion Bank*, 2010 ONSC 6560

5. *Lockridge v Director, Ministry of the Environment*, 2012 ONSC 2316 (Div Ct)

6. *Bowman et al. v Her Majesty the Queen*, 2019 ONSC 1064 (Div Ct)

7. *Arora v Whirlpool Canada LP*, 2012 ONSC 4642, aff'd 2013 ONCA 657, leave to appeal denied [2013] SCCA No 498

8. *R. v Imperial Tobacco Canada Ltd.*, 2011 SCC 42

9. *Rayner v McManus*, 2017 ONSC 3044 (Div Ct)

10. *Hryniak v Mauldin*, 2014 SCC 7

11. *Canada (Attorney General) v Bedford*, 2013 SCC 72

12. *Carter v Canada*, 2015 SCC 5

13. *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44

14. *Gosselin v Quebec (Attorney General)*, 2002 SCC 84

15. *Flora v Ontario Health Insurance Plan (General Manager)*, 2008 ONCA 538

16. *Masse v Ontario (Ministry of Community and Social Services)*, [1996] OJ No 363 (Div Ct), leave to appeal ref'd [1996] OJ No 363 (CA)

17. *Wynberg v Ontario*, [2006] OJ No 2732 (CA), leave to appeal ref'd [2006] SCCA No 441

18. *Tanudjaja v Attorney General (Canada)*, 2013 ONSC 5410, aff'd 2014 ONCA 852, leave to appeal ref'd [2015] SCCA No 39

19. *Lalonde v Ontario (Commission de restructuration des services de santé)*, [2001] OJ No 4767 (CA)

20. *Ferrel v Ontario (Attorney General)*, [1998] OJ No 5074 (CA), leave dismissed [1999] SCCA No 79

21. *ETFO et. al v Her Majesty the Queen*, 2019 ONSC 1308

22. *Barbra Schlifer Commemorative Clinic v Canada*, 2014 ONSC

23. *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651

24. *Dunmore v Ontario (Attorney General)*, [1997] OJ No 4947 (Gen Div), aff'd [1999] OJ No 1104 (CA), rev'd on other grounds 2001 SCC 94

25. *Sagharian v Ontario (Education)*, [2007] OJ No 876 (Sup Ct), aff'd 2008 ONCA 411, leave to appeal ref'd [2008] SCCA No 350

26. *Scott v Canada (Attorney General)*, 2017 BCCA 422, leave to appeal ref'd [2018] SCCA No 25

27. *Baier v Alberta*, 2007 SCC 31

28. *R. v Long*, 2018 ONCA 282, leave to appeal ref'd [2019] SCCA No 330

29. *R. v Safarzadeh‑Markhali*, 2016 SCC 14

30. *R. v Moriarity*, 2015 SCC 55

31. *Re B.C. Motor Vehicle Act*, [1985] SCJ No 73

32. *Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13

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

34. *The Catalyst Capital Group Inc. v Dundee Kilmer Developments Limited Partnership*, 2020 ONCA 272

35. *Paradis Honey Ltd v Canada*, 2015 FCA 89, leave to appeal ref'd [2015] SCCA No 227

36. *Merrifield v Canada (Attorney General)*, 2019 ONCA 205, leave to appeal ref'd [2019] SCCA No 174

37. *Gigliotti v Conseil d'Administration du College des Grands Lacs*, [2005] OJ No 2762 (Div Ct)

38. *EnerNorth Industries Inc.(Re)*, 2009 ONCA 536, leave to appeal ref'd [2009] SCCA No 383

39. *McQuillan v Native Inter-Tribal Housing Co-Operative Inc.*, [1998] OJ No 4361 (CA)

40. *J.E. Verreault & Fils v The Attorney General of Quebec*, [1977] 1 SCR 41

41. *Canada v Alexis Nihon Ct.,* [1970] Ex CR 93

42. *South Yukon Forest Corp. v Canada,* 2012 FCA 165, leave to appeal ref'd [2012] SCCA No 349

43. *Wind Power Inc. v Saskatchewan Power Corp.,* 2002 SKCA 61, leave to appeal ref'd [2002] SCCA No 283

44. *Magical Waters Fountains Ltd. v Sarnia (City),* [1990] OJ No 1856 (Gen Div), rev'd on other grounds, [1992] OJ No 1320 (Div Ct)

45. *Silver's Garage Ltd. v Bridgewater (Town),* [1971] SCR 577

46. *Her Majesty the Queen and Henderson,* (1898) 28 SCR 425

47. *BC (AG) v Esquimalt and Nanaimo,* [1950] AC 87

48. *Sattva Capital Corp v Creston Moly Corp,* 2014 SCC 53

49. *MacDonald v Chicago Title Insurance Co. of Canada,* 2015 ONCA 842, leave to appeal ref'd [2016] SCCA No 39

50. *Ledcor Construction Limited v Northbridge Indemnity Insurance Co.,* 2016 SCC 37

51. *Spina v Shoppers Drug Mart Inc.*, 2012 ONSC 5563

52. *Ontario Public Service Employees Union v Ontario,* [2005] OJ No 1841 (Sup Ct)

53. *Alexander v Ontario,* 2016 ONSC 7059

54. *Doef's Iron Words Ltd v Mortgage corporation Canada Inc.*, [2004] OJ No 4358 (CA)

55. *Reclamation Systems Inc. v Rae,* [1996] OJ No 133 (Gen Div)

56. *Transamerica Life Insurance Co. of Canada v Canada Life Assurance Co.,* [1995] OJ No 2220 (Gen Div)

57. *Canadian Superior Oil v Hambly,* [1970] SCR 932

*58.* *Gilbert Steel Ltd. v. University Construction Ltd.* (1976), 12 OR (2d) 19 (CA)

59. *Schwark v Cutting,* 2010 ONCA 61

60. *Queen v Cognos Inc.*, [1993] 1 SCR 87

61. *Hamilton v 1214125 Ontario Inc.*, 2009 ONCA 684

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

63. *Bennett v Hydro One*, 2017 ONSC 7065, aff'd 2018 ONSC 7741 (Div Ct)

64. *Loveless v OLG*, 2011 ONSC 4744

65. *Penney v Bell*, 2010 ONSC 2801

66. *Marshall v United Warehouse Limited Partnership*, 2013 BCSC 2050, affirmed 2015 BCCA 252, leave to appeal ref'd [2015] SCCA No 326

67. *McCracken v Canadian National Railway Co*, 2012 ONCA 445

68. *Musicians' Pension Fund of Canada (Trustees of) v Kinross Gold Corp*, 2014 ONCA 901

69. *Healey v Lakeridge Health Corp*, 2011 ONCA 55

70. *Parsons v Coast Capital Savings Credit Union*, 2007 BCCA 247, leave to appeal ref'd [2007] SCCA No 331

71. *Tiemstra v Insurance Corp. of British Columbia*, [1997] BCJ No 1628 (CA)

72. *Lépine v Société Canadienne des postes*, 2009 SCC 16

73. *Markle v Toronto (City)*, [2004] OJ No 3024 (Sup Ct)

**Secondary Sources**

74. Horsman, Karen and Gareth Morley, eds. *Government Liability, Law and Practice*, (loose-leaf). Toronto: Thomson Reuters, 2019

75. Hogg, Peter W., Patrick J. Monahan and Wade K. Wright. *Liability of the Crown*, 4th ed. Toronto: Carswell, 2011

**Documents Incorporated by Law into the Amended Claim that are not Otherwise Included in the Motion Record**

76. Letters appointing members of the Basic Income Pilot Minister's Advisory Council Order-in-Council appointing a Special Advisor for the Basic Income Pilot Research and Evaluation Advisory Committee

## SCHEDULE "B"

**Legislation Relied Upon**

**1. *Executive Council Act,* R.S.O. 1990, c. E.25**

**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).

***

**2. *Ministry of Community and Social Services Act,* R.S.O. 1990, c. M.20**

**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).

**…**

**Agreements for the provision of services**

**12** The Minister may enter into agreements with organizations, municipalities or other persons or corporations respecting the provision of social services and community services including items, facilities and personnel relating thereto upon such terms and conditions as may be agreed and he or she may direct out of money appropriated by the Legislature the payment of such expenditures as are necessary for such purposes. R.S.O. 1990, c. M.20, s. 12.

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**3.** ***Financial Administration Act*, R.S.O. 1990, c. F.12**

**Appropriation required**

**11.1** (1) Money shall not be paid out of the Consolidated Revenue Fund and neither a non-cash expense nor a non-cash investment shall be recognized by the Crown unless the payment or the recognition is authorized by this or another Act of the Legislature. 2009, c. 18, Sched. 12, s. 4.

**...**

**Expenses limited to appropriations**

**11.3** (1) No agreement or undertaking shall be entered into in a fiscal year that would result in a charge to an appropriation for that fiscal year in excess of the amount available under that appropriation. 2002, c. 8, Sched. B, s. 2.

**Agreements subject to appropriations**

(2) Every agreement providing for the payment of money by the Crown is deemed to contain a provision stating that the payment by the Crown of moneys that come due under the agreement shall be subject to,
(a) an appropriation to which that payment can be charged being available in the fiscal year in which the payment becomes due; or
(b) the payment having been charged to an appropriation for a previous fiscal year. 2002, c. 8, Sched. B, s. 2.

**Same, non-cash expenses**

(3) Every agreement that would require the Crown to recognize a non-cash expense is deemed to contain a provision stating that the performance by the Crown of the obligation that would require it to recognize the non-cash expense shall be subject to an appropriation to which that non-cash expense can be charged being available in the fiscal year in which the obligation must be performed. 2010, c. 26, Sched. 7, s. 9.

**Same, non-cash investments**

(4) Every agreement that would require the Crown to recognize a non-cash investment is deemed to contain a provision stating that the performance by the Crown of the obligation that would require it to recognize the non-cash investment shall be subject to an appropriation to which that non-cash investment can be charged being available in the fiscal year in which the obligation must be performed. 2010, c. 26, Sched. 7, s. 9.

**Application**

(5) Subsections (3) and (4) apply in respect of fiscal years commencing on or after April 1, 2010. 2010, c. 26, Sched. 7, s. 9.

***

**4. *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, R. 25.06(8)**

**Nature of Act or Condition of Mind**

**25.06 (8)** Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred. O. Reg. 61/96, s. 1.

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**5. *Class Proceedings Act,* S.O. 1992, C. 6**

**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).

**Order respecting notice**

**17 (3)** The court shall make an order setting out when and by what means notice shall be given under this section and in so doing shall have regard to,

(a) the cost of giving notice;
(b) the nature of the relief sought;
(c) the size of the individual claims of the class members;
(d) the number of class members;
(e) the places of residence of class members; and
(f) any other relevant matter. 1992, c. 6, s. 17 (3).

**…**

**Aggregate assessment of monetary relief**

24 (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

(a) monetary relief is claimed on behalf of some or all class members;
(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members. 1992, c. 6, s. 24 (1).

## SCHEDULE "C"

**No Reasonable Cause of Action Summary**

**1. No infringement of s. 7 of the *Charter of Rights and Freedoms***

A. No deprivation of life, liberty or security of the person.

B. *Charter* s. 7 does not include a positive right to social assistance, and a reduction in social assistance is not a "deprivation" under s. 7 of the *Charter* (*Masse v Ontario (Ministry of Community and Social Services),* [1996] OJ No 363 (Div Ct), leave to appeal ref'd [1996] OJ No 363 (CA), and *Gosselin v Quebec (Attorney General),* 2002 SCC 84).

C. A change in a policy or benefit is not a "deprivation" even if the former policy provided a greater benefit (*Flora v Ontario Health Insurance Plan (General Manager),* 2008 ONCA 538 and *ETFO et. al v Her Majesty the Queen*, 2019 ONSC 1308 (Div Ct)).

D. No inconsistency with fundamental justice. The wind-down of the OBIP was neither arbitrary nor grossly disproportionate.

**2. No Negligence**

The claim that Cabinet ending the OBIP prior to three years is negligent is precluded by s. 11 of the *Crown Liability and Proceedings Act* which extinguishes causes of action against the Crown for any alleged negligence or a failure to take reasonable care in the making of a policy decision (s. 11(4-5), (7-10)).

The claim is also precluded by the common law doctrine that the Crown is not liable in tort for policy decisions. Such decisions are non-justiciable (*R. v Imperial Tobacco Canada Ltd.*, 2011 SCC 42).

**3. No Breach of Public Law Duty**

This proposed cause of action arises from *obiter* in the Federal Court of Appeal's decision in *Paradis Honey Ltd v Canada*, 2015 FCA 89, leave to appeal to SCC refused, 2015 SCCA No 227. A civil action for public law duty theoretically provides an alternative means of redress to applications for judicial review. In theory, a plaintiff could sue a public authority for making unreasonable public law / administrative law decisions instead of pursuing judicial review remedies.

In April 2020, the Ontario Court of Appeal declined to recognize this proposed cause of action as a cause of action (*The Catalyst Capital Group Inc. v Dundee Kilmer Developments Limited Partnership*, 2020 ONCA 272). The Court of Appeal further held that the proposed cause of action was not applicable on the facts of that case. The proposed cause of action is also not applicable on the facts of the present case. It is not applicable because the Cabinet policy decision to end the OBIP was not an administrative law decision subject to judicial review. It was a non-justiciable Cabinet policy decision. The merits of it are not reviewable.

Indeed, the Divisional Court in considering an application for judicial review by the same proposed representative Plaintiffs in this action already concluded that Cabinet's policy decision to wind-down the OBIP is not judicially reviewable. This cause of action is *res judicata*.

Furthermore, this claim that Cabinet ending the OBIP prior to three years is a breach of a pubic law duty is not justiciable at common law since it is a core policy decision (as found by the Divisional Court and per *R. v Imperial Tobacco Canada Ltd.*, 2011 SCC 42).

Finally, this claim that Cabinet ending the OBIP prior to three years is a breach of a pubic law duty is precluded by s. 11 of the *Crown Liability and Proceedings Act* which extinguishes "causes of action" against the Crown for any alleged negligence or a failure to take reasonable care in the making of a policy decision (s. 11(4-5), (7-10)).

**4. No Breach of Contract**

A. The alleged contract is unascertainable on the pleading and the cause of action should be struck on this basis. It is not sufficient to state that "by virtue of the facts pleaded above" (88 paragraphs) there was a contract.

B. On the facts pled there is no enforceable contract:

i) The statutory preconditions for an enforceable contract with the Crown are not pled.

1) Specifically, it is not pled that Crown employees, agents and representatives were "appointed in writing" to exercise the powers of the Minster including the power to contract (s. 12 and 5 of the *Ministry of Community Services Act*).

2) Furthermore, it is not pled that there is a signature executing the "contract" by the Minister or their authorized delegate so as to make any contract binding as required by s. 5 of the *Ministry of Community Services Act* and s. 6 of the *Executive Council Act*.

C. Facts supporting an intent to transform the OBIP social program into commercial contracts between the Crown and participants are not pled.

D. Facts necessary to establish consideration to create a contract are not pled.

E. In the alternative, assuming there was an enforceable contract, on the facts pled there was no breach of contract:

i) If there was a contract, there was no guarantee of any payments since applicants could be placed in the control group, but if payments were to be made, the term for payments was for "up to" three years. Payments were made for up to three years so there was no breach.

ii) Pursuant to s. 11.3(2) of the Ontario *Financial Administration Act*, it is a deemed term of every contract with the Crown that payment by the Crown of moneys due under a contract is subject to there being an appropriation to which that payment can be charged in the fiscal year in which the payment becomes due. If there is no appropriation non-payment is not a breach. There is no appropriation for the OBIP after the end of the 2018-2019 fiscal year and no such appropriation has been pled. Accordingly, non-payment post 2018-2019 is not a breach of contract.

**5. No Breach of Undertaking**

Breach of undertaking is not a recognized cause of action. This claim is factually and legally unsustainable. To the extent the claim is in breach of a "contractual undertaking" or a "non-bargain" contract, it is untenable. Such claims amount to claims in promissory estoppel which cannot be asserted as a free-standing cause of action, and in any event, reliance on the doctrine requires an existing contract.

## SCHEDULE "D"

**Proposed Cause of Action Common Issues**

1. The proposed cause of action common issues contain redundancies, turn undisputed facts into issues, and/or obscure the nature of the claim as set out in the Amended Claim. [256]

2. For example, if per issue #1 there was a contract to make payments for three years, issue #2 regarding whether contractual duties were owed is redundant. Furthermore, it is an undisputed fact that BI payments were not made for three years. If there was a contract for three years of payments issue #3 regarding whether there was a breach adds nothing. The same applies to issue #5 for whether there was a breach of undertaking.

3. The proposed common issues for negligence, public law duty, and the *Charter* obscure the nature of the claim. The allegation on which all the causes of action turn is the allegation that the Crown was legally required to make BI payments for three years despite the end of the Pilot. [257] Issues #7 and #10, obscure the real question of whether fulfillment of the duty required BI payments for three years. Issues #8 and #11, regarding whether there was a breach of duty add nothing. [258] Similarly, the proposed *Charter* issues obscure the right being asserted on which the claim turns (i.e. right to three years of payments).

4. If this action is certified the common issues should be redrafted to resolve these issues.

**Litigation Plan**

5. In class actions the Litigation Plan is a continual work in progress. The lack of critique of the proposed plan in this Factum should not be interpreted as full agreement. There is one matter

[256] Proposed Common Issues, Plaintiff's Motion record, Tab 1A, pages 8-10
[257] Amended Statement of Claim, Joint Supplementary Motion Record, Tab A, paras 11, 100, 105, 109, 114, pages 7, 26, 27, 28, 29
[258] Proposed Common Issues, Plaintiff's Motion record, Tab 1A, pages 8-10

that the Crown wishes to address in this Factum and that is the issue of notice to the class if this action is certified.

6. The Crown disagrees with the proposed plan for notice to the class. In the present case, the names, addresses, phone numbers, and email addresses of all participants are known to Ontario. This information is current as of March 2019. [259]

7. Considering the contact information of all class members is known, additional steps to effect notice are not required and will only serve to unnecessarily increase costs. [260]

8. The Crown also disagrees that this is an appropriate case to order the defendant to pay for the cost of notice. The expectation in class actions is that the representative plaintiff will bear the costs of notice. The exception is where the defendant does not dispute liability or where the size of the class is so large that the cost of notice should be shared by both parties. Neither exception applies on the facts of this case. [261]

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[259] Application Form and Consent Form, Crown's Motion Record, Tab 1, DBB Affidavit, para 57, page 16, Exhibit 14, page 339; Application and Consent Form, Crown's Motion Record, Tab 1, DBB Affidavit, para 57, page 16, Exhibit 20, page 393

[260] *Lépine v Société Canadienne des postes*, 2009 SCC 16 at para 43, Crown's BOA, Tab 72; *Class Proceedings Act*, S.O. 1992, C. 6, s.17(3)

[261] *Markle v Toronto (City)*, [2004] OJ No 3024 at para 5 (Sup Ct), Crown's BOA, Tab 73

## SCHEDULE "E"

**Calculation of Negative Income Tax BI Payments**

1. By way of example, the maximum individual BI payment was $16,989, this was reduced 50% for employment earnings, so a person earning $33,978 would receive $0 basic income (i.e. be ineligible because $16,989 – $16,989 (50% of $33,978 income) = $0). A person earning $15,000 would receive a basic income payment of $9,489 (i.e. $16,989 - $7,500 (50% of $15,000 income) = $9,489). [262]

2. Monthly Basic Income Payments were fixed, although there was an allowance for a change in earnings, change in family composition, or change in disability status. Absent the reporting of such circumstances, a participant's monthly income would be the amount they earned in that month, plus the Basic Income monthly payment calculated based on the prior year's annual income. [263] Per the above example, a participant's monthly income would be their present monthly income which could fluctuate, plus their monthly BI Payment based on the prior year's income (e.g. BI payment of $9,486 based on the prior year's income ($16,989 - $7,500 (50% of $15,000 income = $9,489 apportioned monthly).

3. Payments based on a participant's Declaration of Income instead of their Income Tax Return and Notice of Assessment were not necessarily accurate. For example, affiant Ms. Lindsay completed a "Declaration of Income" in which she reported her 2017 employment income to have been $3,200. Based on her declaration, she was deemed eligible for OBIP and received monthly OBIP payments of $1,784.92. However, according to her 2017 Income Tax Return, her

[262] OBIP Information Booklet, Crown's Motion Record, DBB Affidavit, Tab 1, para 46, pages 12-13, Exhibit 14, pages 321-323
[263] OBIP Information Booklet, Crown's Motion Record, DBB Affidavit, Tab 1, para 46, pages 12-13, Exhibit 14, pages 321-322

employment income for 2017 was $15,725.81, although the Canada Revenue Agency later changed her 2017 income to $4,369. While in her case she would have still been eligible to participate in OBIP based on either her reported or actual 2017 income, the amount of her monthly OBIP payment would have been lower. [264]

4. BI Payments commenced depending on when the person enrolled so that participants received their first payment on different dates with early enrollers receiving payments first. [265]

**Application Process**

5. For mail-in applications, applicants had to provide the Ministry with a completed Application Form, along with their previous year's Income Tax Return and Notice of Assessment, or prior year if not available, or they could arrange to provide a Declaration of Income, along with documentation to support disability status. Applicants with spouses or common law partners had to apply as a couple so spouses and common law partners had to provide the same information. [266]

6. Applicants deemed eligible were sent letters confirming their eligibility and asking them to complete the Collection, Use, and Disclosure of Personal Information Consent Form, the Baseline Survey, and the Direct Deposit Form. [267]

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[264] Crown's Motion Record, Tab 1, DBB Affidavit para 55, pages 15-16, Exhibit 19; Income Tax Return Information for Susan Lindsay dated February 17, 2020, Joint Supplementary Application Record, Exhibit 3 to the Cross-Examination of Susan Lindsay, Tab G(3), pages 373-376

[265] Letter to Tracey Mechefske, Motion Record of the Plaintiffs, Vol 1, Affidavit of Tracey Mechefske, Tab D, para 29, page 77, Exhibit 4, page 133; Letter to Dana Bowman, Motion Record of the Plaintiffs, Vol 3, Affidavit of Dana Bowman, Tab E, para 7, page 1020, Exhibit 1, page 1026; Letter to Susan Lindsay, Motion Record of the Plaintiffs, Vol 3, Affidavit of Susan Lindsay, Tab F, para 11, page 1055, Exhibit 1, page 1090; Letter to Grace Marie Doyle-Hillion, Motion Record of the Plaintiffs, Vol 3, Affidavit of Grace Marie Doyle-Hillion, Tab G, para 9, page 1099; OBIP Letter to Susan Paskoski, Crown's Motion Record, Tab 1, DBB Affidavit, para 45, page 11, Exhibit 17, pages 374-377

[266] Information Booklet, Crown's Motion Record, Tab 1, DBB Affidavit, paras 42 and 60, pages 12 and 18, Exhibit 21, page 313

[267] All social assistance programs in Ontario require the collection, use, and disclosure of personal information of participants in order to administer the program, including determining initial and ongoing eligibility to receive program benefits.

7. Participants were paid $50 through direct deposit to their bank account, or via cheque if they did not have a bank account, for completion of the Baseline Survey.[268] Following completion of the Baseline Survey and Consent Form, applicants were sent a letter confirming that they had been randomly selected for either the control group or the intervention group. The letter advised intervention group participants that they would be compensated $30 for the completion of each survey. [269] The letter also included a monthly BI payment amount and a payment schedule ending June 2018. [270]

8. For in-person enrollment sessions, at the start of each session (held in libraries and community centers for example), a Ministry employee generally outlined the OBIP eligibility criteria and information needed by the individual to complete the application, invited persons to complete the application, and noted that Ministry employees in the room could assist with questions. Attendees were then given the opportunity to complete the Application Form and the Consent Form pre-March 2018 or the Application Form from March 2018. [271]

9. Attendees then went to a station where an OBIP team member reviewed their completed applications including their prior year's Income Tax Return, Notice of Assessment or Declaration of Income, and disability documentation. If it appeared that the applicant was eligible for OBIP, they were asked to complete the Baseline Survey for which they were subsequently paid $50

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[268] Letters sent to Participants, Crown's Motion Record, Tab 1, DBB Affidavit, para 61, pages 18-19, Exhibits 22-23, pages 445-463

[269] Letters to Participants, Crown's Motion Record, Tab 1, DBB Affidavit, para 41, page 12, Exhibit 23, page 460-461; Note: Early enrollment intervention participants advised that they would not be compensated for further surveys (e.g. p. 374), however, the Ministry later advised that they would be compensated for further surveys at the rate of $30 per survey (p.460, 461). Control group participants were to receive $50 per survey. See also Ex. 12, Study Protocol 2.1, p. 243, Ex. 13, Study Protocol 2.2, p. 287. See for example the Letter to Dana Bowman, Plaintiff's Motion Record, Vol 3, Affidavit of Dana Bowman, Tab E, Exhibit 1, page 1026 as compared to the Letter to Susan Lindsay, Plaintiffs' Motion Record, Vol 3, Affidavit of Susan Lindsay, Tab F, Exhibit 5, page 1090

[270] Letters to Participants, Crown's Motion Record, Tab 1, DBB Affidavit, para 61, page 18, Exhibit 23, pages 460-468

[271] Crown's Motion Record, Tab 1, DBB Affidavit, para 68, page 20

through direct deposit or cheque. [272]

10. Completed applications with Income Tax Returns, Notices of Assessment, or Declarations of Income were forwarded to the Toronto Ministry office for review. A letter was then sent to each applicant confirming their eligibility and informing them if they had been placed into the control group or the intervention group. If placed in the intervention group, the letter advised that they would be compensated $30 for the completion of each survey and included a monthly BI payment amount and a payment schedule ending June 2018. [273]

[272] Crown's Motion Record, Tab 1, DBB Affidavit, para 69, page 20
[273] Letters to Participants, Crown's Motion Record, Tab 1, DBB Affidavit, para 73, page 21, Exhibit 23, pages 460-468

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| **BOWMAN ET AL.** | **and** | **HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO** |
| Moving Parties (Proposed Representative Plaintiffs) | | Responding Party (Defendant) |

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

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**

PROCEEDINGS COMMENCED IN LINDSAY

# FACTUM OF THE RESPONDENT, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO


**MINISTRY OF THE ATTORNEY GENERAL**
Crown Law Office – Civil
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9
Fax: (416) 326-4181

**Christopher P. Thompson** (LSO No. 46117E)
Tel: (416) 605-3857
christopher.p.thompson@ontario.ca

**Zachary Green** (LSO No. 48066K)
Tel: (416) 992-2327
zachary.green@ontario.ca

**Chantelle Blom** (LSO No. 53931C)
Tel: (647) 467-7762
chantelle.blom@ontario.ca

**Ravi Amarnath** (LSO No. 66824K)
Tel: (647) 649-5623
ravi.amarnath@ontario.ca

Lawyers for the Responding Party (Defendant), Her Majesty the Queen in right of Ontario