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

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

Plaintiffs
(Moving Parties)

and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendant
(Responding Party)

PLAINTIFFS' REPLY FACTUM

June 9, 2020

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TABLE OF CONTENTS

Page No.

A. Introduction

1. In this Reply Factum, the Plaintiffs address several of the arguments raised by the Defendant in their certification factum.

B. The Defendant's Misunderstanding of How Contractual Interpretation Works Post-*Sattva* and Its Misunderstanding as to What is Pled

2. The Defendant's primary attack on the contract cause of action is that: (a) the Amended Statement of Claim [the "Claim"] essentially claims the presence of many individualized contracts; (b) each contract is potentially different; and, therefore, (c) the case cannot proceed as a class action.

3. This argument reflects a total misunderstanding of the state of the law regarding what a contract is and how it is interpreted. It also reflects a misreading of the Claim.

(i) How Contractual Interpretation Works

4. The Supreme Court, in its 2014 *Sattva* decision, held that contractual interpretation is a matter of fact because it involves interpreting the alleged contractual instrument and its words by "hav[ing] regard for the surrounding circumstances of the contract — often referred to as the factual matrix…".

> ***Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at ¶46, Plaintiffs' Reply Book of Authorities ("RBOA"), Tab 1**

5. The Court explained that this "factual matrix" includes any key words, the words of the contract as a whole, the purpose of the agreement, and the "surrounding circumstances". Interpreting words consistent with the factual matrix is done because the key words do not have a fixed, immutable meaning apart from the circumstances in which the words are found. Isolating key words and interpreting those alone is not to be done.

> ***Sattva Capital Corp. v. Creston Moly Corp., ibid.* at ¶¶47-49**

6. The Court intervened in this area again in *Resolute FP*. *Resolute FP* emphasizes that the exercise of contractual interpretation is objective but adds that the factual matrix or surrounding circumstances that matter are those the parties knew about or "ought reasonably to have been within [their] knowledge".

> ***Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60 at ¶¶74-80, RBOA Tab 2**

7. It is apparent, then, that in pleading and advancing a contract claim, it is not enough to simply point to one document and rely on its words in a vacuum. The Claim properly references the core documents but pleads the context. We now turn to the Claim.

(ii) The Claim Reflects Sattva; It Is Clear About What the Contract Is

8. First, the Defendant is simply wrong in asserting that the Claim does not land on any particular documents as the primary sources of the core contractual language. The Claim in fact does do so in explaining what the moment of formation looked like.

9. As ¶¶73-74 of the Claim articulate, it was the Information Booklet and application forms that formed an "offer" and "representation" and it was, on completing or submitting the application forms, that the Class Member thereby applied. Right after that [at ¶75], the Claim pleads that those presenting and receiving the forms to and from Class Members had authority to enter into a contract with the Class. Paragraphs 73-75 therefore plead that these moments constituted the formation of a contract.

10. While it is true that the Claim, prior to pleading ¶¶73-75, outlines the largely publicly available information about the BI Pilot, it must be remembered that those pleas precede the pleadings that concern the moment the Class Member contracts with the Defendant. In other words, just because the Claim pleads background information does not take away

from the fact that any reasonable reader of the Claim would understand that, until a Class Member actually signs an Application Form to enter into the BI Pilot, the act of entering into a contract has not taken place. The background is pled without reference to any Class Member somehow entering into a contract the moment they heard Premier Wynne's speech or heard about the BI Pilot on Facebook.

11. In any event, if the Claim outlines the background, this is because that is precisely what the case law requires. No exercise of contractual interpretation would be complete otherwise. On this point, we repeat what the Supreme Court held in *Resolute FP*: the words of a contract are to be read in light of the "objective evidence of the background facts at the time of the execution of the contract, that is, knowledge that was **or reasonably ought to have been** within the knowledge of both parties at or before the date of contracting".

***Resolute FP, supra* at ¶77 [Emphasis Added]**

12. This principle could not be more important when it comes to interpreting the contract the Plaintiffs alleged was formed. Beginning in March 2018, the Defendant started using the second Application Form. In it, all applicants checked numerous boxes to certify their understanding and acceptance of the conditions. Critically, at the end of that Application Form, every Class Member had to sign one final time certifying that they "understand what it means to be part of the Ontario Basic Income Pilot".

Basic Income Pilot Application and Consent Form, Affidavit of Debbie Burke-Benn, Exhibit 15, Defendant's Record ("DR") at p. 361

13. Since Class Members signing this application form certify that they know what constitutes the BI Pilot, all that the Claim does is outline, consistent with *Resolute FP*, what was present publicly to fill in that certified understanding.

14. All told, the Claim properly pleads how the particular contracts were entered into (the Class Member filled out an Application Form supplied by the Defendant, accepted an offer by signing and returning it, and those managing this had authority to enter into a contract) while outlining what made up the context and background the Supreme Court says must form part of the contractual interpretation exercise.

(iii) The Defendant's Assertion the Plaintiffs Seek to "Dissuade" an Interpretive Exercise

15. Before leaving this point, the Plaintiffs reject entirely the Defendant's assertion, at ¶32 of its factum, that the Plaintiffs' first factum sought to "dissuade" the Court from reviewing the Information Booklet or the Application Forms. In the Plaintiffs' main factum, those documents are reviewed in detail for the elements that support the Plaintiffs' argument that these documents were in substance contracts.

See Plaintiffs' Main Factum, ¶¶35-36 and 64-66

16. What the Plaintiffs stated in their first factum [at ¶¶35-36] is that certification is not the time to review those documents to see if those documents – *on the merits* – support the Plaintiffs' interpretation.

17. However, the Plaintiffs are quite happy, for the sake of completeness, to join issue with the Defendant's seriously flawed interpretation and engage in the contractual interpretation now to demonstrate that the Information Booklet and Application Forms – properly read as a whole complete with the factual matrix – provided for the guarantee of three years of payments so long as the Class Member complied with her obligations.

18. This interpretive exercise is conducted in Section I., below.

C. The Common Contractual Background and Commonality Found Here

(i) Brief Overview

19. The Defendant's arguments that the presence of multiple sources from which the alleged contract can be interpreted means that commonality is lacking ignores the fact that all of the potential sources of interpretation are all consistent. In other words, just because Class Member 714 only saw the Information Booklet and associated Application Form while Class Member 3,567 saw these items and read the BI website, does not change the reality that every element outside of the primary contractual instruments is the same on the key points. There is some basis in fact to say these two Class Members entered into the same contract.

(ii) The Background Was Consistent; And the Defendant Does Not Suggest Otherwise

20. We have already reviewed in the Plaintiffs' first factum how these sources were are all consistent about the BI Pilot's features. The Claim – deemed to be true – likewise pleads that all of these sources were consistent concerning the key terms.

> **Plaintiff's Main Factum at ¶¶21-31; Amended Claim at ¶¶57-72, Joint Supplementary Motion Record ("JSMR"), pp. 15-21**

21. The Defendant does not even allege in its factum [at ¶¶227-239] that the background sources are inconsistent such that, if an individualized inquiry were to be done, the contractual result would be any different for any Class Member. In other words, simply listing a whole series of sources of information about the BI Pilot does not translate into a conclusion that there is a potential that there are many individualized contracts. For that, the many potential sources of information would have to be inconsistent. They are not inconsistent, nor does the Defendant allege inconsistency.

22. As the Plaintiffs' first factum outlines, even if the case at bar turned on over 4,000 variations of "who heard what", where the "what" is consistent, as it is here, courts readily certify the Class Action.

Plaintiffs' Main Factum, at ¶¶150-155 and 160-161

23. It is only in cases where the alleged contract is based *solely* on individual interactions *and* where the evidence is that those interactions differed from person-to-person that a class action will not be appropriate. Thus, in the primary case the Defendant relies on regarding commonality, *Penney*, the alleged contract there was based *solely* on what thousands of different Bell Canada representatives told 30,000-50,000 persons on a phone call concerning when they could expect a service to be installed. In *Penney*, the evidence was also that different Bell Canada representatives told these 30,000-50,000 customers different things about the expected service date. There was no common contractual documentation there. Unsurprisingly, with a Record that indicated there were indeed many different contracts, the claim was not certified.

***Penney v. Bell Canada*, 2010 ONSC 2801, RBOA Tab 3**

24. *Penney* was distinguished in *Wellman* because, there, the terms of telephone service the Class alleged were breached could be found in a series of documents (far, far more than the two documents that form the core of the contract in the case at bar). Conway J. held that, despite the fact that these terms were accompanied by an array of different service plans and interactions, there was "some basis in fact" to certify the contract cause of action given some common features found in the many documents that formed the contract being allegedly breached.

***Wellman and Corless v. TELUS and Bell*, 2014 ONSC 3318, RBOA Tab 4**

25. What *Wellman* tells us is that, when the alleged contractual terms are found in a series of commonly used documents, the contractual cause of action ought to be certified. *Wellman* is just one of the many such cases relied on in the Plaintiffs' main factum for the proposition that breach of contract claims anchored in some documents, a common background, or both, are in fact ideal for certification.

26. It must be remembered that *every* Class Member filled out one of two application forms, be it by mail or in person, and so *every* contract will be anchored in those forms. This is a classic situation ideally suited for a class action.

27. It is also peculiar to see the Defendant placing reliance on *Penney* when it did not proffer any of the kinds of evidence Bell Canada put forward to establish that its contract's terms were different. In *Penney*, Bell Canada put into its Record different scripts given to its thousands of representatives and various communications (such as automated messages) given to the 30,000-50,000 class members at different times, all to establish that each class member's alleged contractual terms were different.

28. Unlike *Penney,* the Defendant in the case at bar put forward no evidence to suggest that its mere 20-30 representatives were saying different things about the BI Pilot at different times to different people. As ADM Glass wrote in her PowerPoint presentation, the BI Pilot was set up so that this would not happen because enrollment would be "administered centrally". Consistent with this, Ms Burke-Benn, in cross, accepted that the "team" working on the BI Pilot was a small one of 20-30 people.

Affidavit of Sheila Regehr, Plaintiffs' Record, TAB I, Exhibit 4, p. 1432; Cross-Examination of Debbie-Burke Benn, JSMR, TAB D, QQ 147, p 180

29. It is no surprise, then, that the Defendant put forward no evidence of different statements by different people at different times.

30. In its Record, the closest we get to any such evidence are two sentences in Ms Burke-Benn's affidavit. At ¶72 of her affidavit, she swears that she personally attended eight enrolment sessions. Ms Burke-Benn does not give evidence that, at those sessions, different Ministerial representatives stated different things. She does not exhibit different scripts, different training materials, or anything else given to the Defendant's agents that might suggest that different MCCSS representatives were saying different things at different times about the BI Pilot.

31. Keeping in mind that the certification test is a "low" one where the Plaintiffs need only establish "some basis in fact" that there are common contractual documents and/or there is a common contractual background, the fact the Defendant can point to no evidence of different representations means that the some basis in fact test is easily met.

(iii) The Class's Subjective Understanding is Irrelevant

32. It also bears noting that the Defendant, in its factum, appears less concerned with the objective communications that were made about the BI Pilot (because there is some basis in fact to say these were consistent) and instead focuses on each Class Member's subjective understanding of the alleged contract. They then rely on these subjective understandings to suggest that commonality is lacking.

33. Thus, the Defendant observes: (a) that Plaintiff Susan Lindsay was "not sure" in 2020 as to what her personal expectations in early 2018 were with respect to how long she expected to receive BI Payments for; (b) that Plaintiff Dana Bowman assumed she

would receive three years of payments but did not remember where this assumption originated from; and, (c) that the promise of three years of payments may or may not have been a reason why some of the Plaintiffs applied.

Defendant's Factum ¶¶75-78

34. The Defendant's assertion that the Claim sets up over 4,000 separate contracts because each Class Member might have subjectively taken away a different understanding of what the alleged contract was and/or because each Class Member's source for this subjective understanding may have been different or unknown completely misreads what matters in contractual interpretation.

35. In interpreting a contract, it is irrelevant what any one contracting party subjectively thought the contract meant. Contractual interpretation is an objective exercise based on the words used in the contract and the surrounding circumstances known or reasonably known to the contracting parties. Different subjective understandings are irrelevant and are no reason to refuse certification.

See especially *Wellman and Corless v. TELUS and Bell*, *supra*, RBOA Tab 4 at ¶57, citing *Sattva*, *supra* at ¶59. In the US, where certification is much harder to obtain, attempts by Defendants in similar cases to point to different subjective understandings to defeat commonality routinely fail: see, for instance *Gillis v. Respond Power, LLC*, 677 Fed.Appx. 752 (2017) (3rd Circ.) at p 756, RBOA Tab 5

36. Thus, a contracting party's subjective understanding of what they thought the contract meant is irrelevant to the question of what the contract provides for. If Ms Bowman thought that she would receive four years of payments and, on the objective evidence, she was entitled to three, her entitlements would be dictated by the latter, not the former.

37. The fact that the alleged common contract is rooted in documents and an objective interpretation of what those provide for is why courts routinely certify breach of contract claims. As our first factum outlines, such claims are ideally suited for class actions for that reason. The Defendant's attempt to point to differences in what Class Members understood and to then use this to try and defeat the case on lack of commonality grounds ignores the fact that these subjective differences do not matter.

D. A Reminder: The Plain and Obvious Test Governs

38. In the next sections, we address some of the Defendant's arguments to defeat the contract claim, such as the absence of an appropriation or alleged absence of authority to make a contract.

39. Before doing so, it is critical to remember that the present motion is not the place to rule that, for instance, a section in the *Financial Administration Act* [R.S.O. 1990, c. F.12, as am. to 2019, c. 7, Sched. 34, s. 2] defeats the contract claim. It must be plain and obvious, and beyond doubt, that the Claim is doomed to fail because of such a legislative provision.

40. This is especially important to keep in mind here because virtually all of the Defendant's contractual arguments are made either without reference to authority or, on the few occasions where an authority is referred to, the authority is equivocal at best and, on a deeper reading of the authorities on the question the Defendant never refers to, does not reflect the actual state of the law.

41. For instance, while the Defendant relies on Prof. Hogg's text for the proposition that governments cannot be liable in contract due to federal legislative provisions that

make an appropriation a term of a contract, Prof. Hogg's views are decidedly equivocal: "s. 40 of the [federal] Financial Administration Act **seems to** make the absence of an appropriation an excuse for non-performance…" [emphasis added]. "Seems to" is a far cry from "plain and obvious and beyond doubt".

P. Hogg *et al.*, *Liability of the Crown*, 4th ed., Toronto: Carswell, 2011, at p. 317 [Defendant's Book of Authorities "DBOA," Tab 75]

42. In any event, as we will expand upon, two years after Prof. Hogg's publication of an equivocal and non-binding opinion in a textbook that has not been updated, the Supreme Court (in a decision curiously missing from the Defendant's factum) held that one need only look to another section of Ontario's *Financial Administration Act* [s. 13] to find that, where a Court makes a money order, that effectively becomes an appropriation and the Legislature must pay it. This conclusion echoes conclusions found in other appellate decisions reflecting on that statute and a related provision in the *Proceedings Against the Crown Act*. Here again, the appellate authorities that have made short work of the Defendant's arguments are nowhere to be found in the Defendant's factum.

E. The "No Authority" to Contract Argument

43. The Defendant, at ¶¶145-163 of its factum, alleges that the contract claim cannot succeed because the alleged contractual documents do not meet the "formal requirements" of a government contract. The argument rests largely on the fact that, because the Information Booklet, Application Forms, and the letters informing the Class Members of their acceptance were not signed, that invalidates the alleged contract.

See especially, Defendant's Factum, at ¶161 and fn 165

44. While some statutes in Canada contain strict contractual formalities that must be adhered to for a Court to enforce the contract, there are no signature requirements in any relevant Ontario statute, including the one cited by the Defendant.

45. The Ministerial statute contains a broad grant of power enabling any kind of contract in relation to social services. That grant is not dependent on the contract assuming any particular form or containing any particular feature like a signature:

> 12. The Minister may enter into agreements with organizations, municipalities or other persons or corporations respecting the provision of social services …
>
> ***Ministry of Community and Social Services Act*, RSO 1990, c M.20, s. 12**

46. From there, s. 5(1) – in equally broad enabling legislation – allows the Minister to delegate these contract making powers to a delegate:

> 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.

47. As with s. 12, s. 5(1) does not prescribe a particular form the delegates' contracts must take nor does it require – as the Defendant contends – a signature on any of the alleged contractual instruments. When legislation requires a signature or other formality in order to create a valid contract, it says so in express terms.

> ***Statute of Frauds*, R.S.O. 1990, c. S.19, ss. 1(1), 2, 9, 10, and 11; *Family Law Act*, R.S.O. 1990, c. F.3, s. 55(1) ["signed by the parties"]; *Consumer Protection Act, 2002*, S.O. 2002, c. 30 Sched. A, ss. 22, 27, 30(1), and 49**

48. The Defendant also argues that those charged with drafting, explaining, handing out the BI Pilot contractual instruments to the Class, and forming the alleged contract

(from ADM Glass and the Director, Debbie Burke-Benn, down to the small group of MCCSS representatives that formed the BI Pilot team) did not have the necessary delegated authority to enter into a contract with the Class.

49. This argument ignores the pleadings in the Claim and the broad delegation – by statute and judicially recognized delegation principles – of the Minister's powers (including contracting powers).

50. Returning to s. 12, the text alone gives the Minister wide contract-making powers. As the Divisional Court held in *Byl*, s. 12 affords the Minister "broad latitude".

> ***Byl (Litigation Guardian of) v. Ontario*, [2003] O.J. No. 3436 (Div. Ct.) at ¶85, RBOA, Tab 6**

51. Then, as s. 5(1) adds, those broad powers can be delegated to "any person". Section 5(1), far from placing serious fetters on who can enter into a contract, affords alleged delegates wide latitude. And, s. 5(1) does not state that, in order for the "person" to enter into a specific contract, the Minister must, in some delegation instrument, expressly authorize that person to enter into *that* contract. Once the Minister "appoints in writing" the "person" or "class of persons", that person or class of persons acquires the Minister's s. 12 powers of contract generally. The only requirements in s. 5(1) are: (a) an appointment generally; and, (b) that the appointment be "in writing".

52. As Prof. Hogg points out, statutory delegation words are usually interpreted as "empowering" rather than "restricting" of a delegate's powers. He adds that it takes "very clear language" to displace the ordinary rules of agency applicable to the Crown.

> **P. Hogg *et al.*, *Liability of the Crown*, *supra*, at p. 323 [DBOA, Tab 75], cited in *Wind Power Inc. v. Saskatchewan Power Corp.*, 2002 SKCA 61 at ¶65, RBOA Tab 7**

53. In the case at bar, the Defendant has yet to serve a Defence or point to any evidence to the effect that those with ostensible authority who allegedly contracted with the Class either: (a) were not appointed by the Minister to their roles in writing [s. 5(1)]; or, (b) the appointment contained relevant "limitations, restrictions, conditions and requirements" [s. 5(1)]. All that we know from the Record is that the BI Pilot was administered centrally by a small team of some 20-30 people, and that these people were all employees within the Ministry who identified themselves as being with the "Basic Income Pilot Branch" and/or with the "Ministry of Community and Social Services".

Affidavit of Sheila Regehr, Plaintiffs' Record, TAB I, Exhibit 4 [p. 1432 of the Record]; Burke-Benn Cross QQ 147-154; Plaintiffs' Record pp. 958, 968, 987-989, and 1010-1013

54. The Claim, which is deemed true for the purposes of the certification motion, pleads at ¶75 that the Defendants' employees and agents all had authority and capacity to enter into what is alleged was the contract with each Class Member. The effect of the Claim's plea that the Defendant's employees and agents entered into a contract and had the authority to do so, combined with the statutory provisions referred to above, is that it is not plain and obvious that the Defendant's agents/employees lacked authority to the point that the alleged contract was void *ab initio*.

55. Moreover, any Ministerial employee would have had the power to enter into a contract with the Class on the basis of an implicit delegation. In the *Huron Perth CAS* case, the Applicant Children's Aid Societies complained that a regulatory power given only to the Minister of Community and Social Services to approve their budgets could not be exercised by certain Regional Directors appointed by the Minister.

***Huron Perth Children's Aid Society v. Ontario*, 2012 ONSC 5388, BOA Tab 8**

56. The Divisional Court, after holding that s. 5(1) of the Ministerial statute permitted the delegation to these Regional Directors, added that, even if it did not, it is implicit in the sweeping grant of powers to the Minister and in ensuring the proper functioning of a modern bureaucratic state that the power be regarded as implicitly delegated to any responsible officials in her department.

***Huron Perth Children's Aid Society v. Ontario, supra* at ¶¶113-116**

57. The Divisional Court's sound observations that the very Minister's powers who are at issue in the case at bar are implicitly delegated to all responsible officials lest the massive machinery of government sit idle while waiting for the Minister's signature should put paid to the Defendant's arguments. If the Defendant's arguments were accepted, nearly $100 million was appropriated by the Legislature for a BI Pilot that was being administered daily by officials with no powers to enter the many agreements we know, from the Record, were entered into to bring it to fruition. These include agreements to secure Study Protocols and the agreement with the third party researchers.

58. Before leaving this point, it should not escape notice that the Defendant's "no authority" arguments rest solely on: (a) a reading of ss. 5(1) and 12 of the Ministerial statute without any reference to the authorities just cited that interpreted those provisions as broad grants of power and not as restrictions; (b) ignoring the implicit delegation doctrine adopted by *Huron Perth*, a doctrine the Divisional Court adopted from reasoning handed down from a Supreme Court decision also conveniently not referred to by the Defendant; and, (c) an 1898 Supreme Court of Canada decision the Defendant reassures us is irrelevant in a footnote when, on reading it, one finds that it supports enforcing any

contract entered into by an ostensible agent of the Crown save where express statutory language invalidates the contract.

> ***The Queen v. Henderson*** **(1898) 28 SCR 425 at p. 433 ["It is obvious that the every day business of the railways and canals of the country … could not be carried on, if for every small article required, every nail to be bought, accident or no accident, emergency or no emergency, necessity or no necessity, the officers of the department on the spot could not legally contract for the Crown."], RBOA Tab 9**

59. In sum, it is not "plain and obvious" that none of the Minister's employees holding themselves out as her employees had no authority to enter into contracts

F. The "No Appropriation" Defence

60. The Defendant argues that, because the last appropriation in relation to the BI Pilot ended March 31, 2019, the lack of any further appropriation of monies negates the contract claim. Stripped to its essentials, if such an argument were accepted, every government contract could be breached with impunity by non-payment and no court could order a remedy.

61. As noted earlier, the Defendant cites only one source for this argument: Prof. Hogg's 2011 textbook comment that statutory appropriation requirements "seems to" excuse non-performance – a far cry from meeting the plain and obvious test.

62. In any event, a review of the authorities reveals that the Defendant, if it breached a contract as alleged, faces liability and a judgment. It is not plain and obvious and beyond doubt that this is not so.

(i) Interpretation of the Financial Administration Act

63. The Defendant is correct that all government expenditure must be authorized by the Legislature. This is a foundational principle enshrined in the *Constitution Act, 1867*

[s. 126] and found in s. 11.1(1) of the *Financial Administration Act* [the *"FAA*"] with respect to expenditure generally and sub.-ss. 11.3(1)-(2) with respect to government contracts more specifically.

64. Section 11.1(1) of the *FAA*, its predecessors, and parallel provisions federally and provincially have never, however, served to invalidate contracts. A government cannot escape contractual liability by refusing to appropriate the funds needed. If a contract is breached, the court will still order a declaration and damages.

> ***Verreault (J.E.) & Fils Ltée v. Attorney General (Quebec)*, [1977] 1 S.C.R. 41 – Book of Authorities to the Plaintiff's Main Factum, Tab 22; *R. v. Transworld Shipping Ltd.*, [1976] 1 F.C. 159 (C.A.), RBOA Tab 10; *Forest Oil Corp. v. Canada*, [1997] 1 F.C. 624 (T.D.) at p 7, RBOA Tab 11**

65. Naturally, as a practical reality, the Court cannot enforce such an order. In addition to the need for an appropriation to physically pay monies owing pursuant to damages, if a government simply refuses to pay, Ontario's Crown proceedings legislation will not permit property seizure or specific enforcement.

> ***Proceedings Against the Crown Act*, R.S.O., c. P.27, ss. 14, 15, and 21(1)**

66. Thus, the court is not expected to physically detain property or seize a bank account. However, it can and should make an order and expect it to be paid:

> It is not for me to scour the statutes of Canada in search of Parliamentary authority for repayment of an amount that I determine to be due … I do not read section 26 of the [federal] *Financial Administration Act* as precluding me from pronouncing the judgment that I consider to be proper, just and in accordance with law. Rather, section 26 speaks to the Executive. If an appropriate authority cannot be found, then it will be for the Executive arm of Government to determine how to proceed in order to comply with my judgment.
>
> ***Forest Oil Corp. v. Canada, supra* at p 7, RBOA Tab 11**

67. The expectation that the Court's judgment in damages will be paid and obeyed is a fundamental first principle. As the Supreme Court forcefully declared:

> Canada has evolved into a country that is noted and admired for its adherence to the rule of law as a major feature of its democracy … courts play an essential role since they are the central institutions to deal with legal disputes through the rendering of judgments and decisions. But courts have no physical or economic means to enforce their judgments. Ultimately, courts depend on both the executive and the citizenry to recognize and abide by their judgments.
>
> Fortunately, Canada has had a remarkable history of compliance with court decisions by private parties and by all institutions of government. That history of compliance has become a fundamentally cherished value of our constitutional democracy; we must never take it for granted but always be careful to respect and protect its importance, otherwise the seeds of tyranny can take root.
>
> ***Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at ¶¶31-32, RBOA Tab 12**

68. Put simply, provisions in the *FAA* requiring an appropriation to physically pay monies are no reason to refuse to certify the contract cause of action or even give final judgment. Were it otherwise, all governments could turn its unilateral decision not to pay into total immunity from contractual liability.

(ii) Other Statutory Sections Provide a Simple Answer

69. Quite apart from these first principles, Ontario has in place two statutory provisions that provide that, where the Court orders damages against the Defendant, these must be paid. Whenever the Defendant in other cases has raised s. 11 of the *FAA* as a defence, these other sections have been interpreted to give this Court the necessary power to order damages with the expectation that these will be paid.

70. Thus, s. 22 of the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27 succinctly provides that:

> The Minister of Finance shall pay out of the Consolidated Revenue Fund the amount payable by the Crown,
>
> > (a) under an order of a court that is final and not subject to appeal…[1]

71. To like effect, section 13 of the *FAA*, just two sections after the sections the Defendant relies upon, adds that:

> If any public money is appropriated by an Act for any purpose or is directed by the judgment of a court or the award of arbitrators or other lawful authority to be paid by the Crown or the Lieutenant Governor and no other provision is made respecting it, such money is payable under warrant of the Lieutenant Governor, directed to the Minister of Finance, out of the Consolidated Revenue Fund…

72. When faced with arguments in other cases that this Court's jurisdiction to order one thing does not extend to ordering that a certain amount be paid or that the Defendant pay it, this Court, the Court of Appeal, and the Supreme Court have referred to s. 13 of the *FAA* and/or s. 22 of the *Proceedings Against the Crown Act* to ground a monetary order. Such orders have been granted in direct response to the very s. 11.1 *FAA* arguments the Defendant relied on now.

> ***R. v. Cairenius*, [2008] O.J. No. 2323 (S.C.J.) at ¶69, RBOA Tab 13; *R. v. Russel*, 2011 ONCA 303 at ¶¶48-52, RBOA Tab 14; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, per Fish J. (dissenting, but not on this point), at ¶130, RBOA Tab 15; *Mason v. Ontario*, [1998] O.J. No. 1866 (C.A.), at p. 13, RBOA Tab 16**

73. Of some note, the *Mason* case involved a subrogated action brought by OHIP against the Defendant alleging negligence on the part of the very same Minister that is the subject of the present Action. Laskin J.A. held that OHIP could, in the name of Mr.

[1] The *Proceedings Against the Crown Act* was replaced by the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sched. 17. The language of section 22 of the former is preserved in s. 28 of the latter. Technically, it is the former s. 22 that governs the case at bar because the *Crown Liability and Proceedings Act, 2019* expressly provides in s. 31(3) that the *Proceedings Against the Crown Act* governs.

Mason, bring an Action against the Defendant for the Minister's alleged negligence and expect, pursuant to statute, to see any damages ordered and paid.

74. Neither s. 13 of the *FAA* nor s. 22 of the *Proceedings Against the Crown Act* is cited by the Defendant in its factum. They cite Prof. Hogg's views on ss. 11.1 and 11.3 of the *FAA* but fail to mention that, in section 9.4 of his text, Prof. Hogg opines that s. 22 of the *Proceedings Against the Crown Act* offers a full answer:

> In all Canadian Jurisdictions, the United Kingdom and New Zealand, the Crown proceedings statute requires or authorizes the payment of a judgment debt in terms that make it clear that no further appropriation is necessary … the Crown proceedings statute is, in effect, a permanent appropriation of funds for the satisfaction of judgments, and it ensures that a judgment creditor will be paid…
>
> **P. Hogg *et al.*, *Liability of the Crown*, *supra* at p. 317**

75. Sum total, there is no basis to refuse to certify the contract claim on some theory that, because only the Legislature can appropriate monies, the Court is somehow precluded from declaring a contract, declaring it was breached, ordering damages, and expecting its orders to be paid. It is not plain and obviously the opposite.

G. The "No Consideration" Arguments

76. The Defendant argues that the pleaded consideration (*ex.* completing surveys, exposing one's private life, and withdrawing from OW and ODSP) is not legally sufficient to create a binding contract. They also argue that, since the Control Group received $50.00/survey, the Class cannot claim the value of the BI Payments when they were completing the same surveys (and were to receive some monies for doing so).

Defendant's Factum, at ¶¶168-180

77. The Defendant cites no authorities for any of these propositions.

78. Even a cursory review of the facts and authorities disposes of these arguments. In other words, it is not plain and obvious, and beyond doubt, that the contract claim fails for want of consideration.

79. *First*, as a matter of fact, members of the Control Group were promised more per survey to complete the surveys ($50.00) than Class Members. The Defendant admits that Class Members were initially promised nothing to complete each survey and then, later, were promised less per survey than those in the Control Group ($30.00 per survey). If the Defendant's argument depends on both the Control Group and Class being promised the same per survey, then, as a matter of fact, that did not happen.

80. *Second*, as another matter of fact, if the Defendant's argument depends on the Class providing more consideration than the Control Group, they did. Unlike the Control Group, every Class Member's tax return information would be sent to the Defendant to verify income, an intrusion into the Class's private lives the Class agreed to in order to receive the BI Payments. And, for those Class Members on ODSP or OW, they would have to give these up, while the Control Group would not. Further, the Information Booklet lists a plethora of things that could negatively impact the Class but never the Control Group, namely: increases to rent payments for those receiving rent-geared-to-income assistance; potential non-eligibility for the Trillium Drug Program; the loss of Healthy Smiles Ontario benefits; an adjustment downwards of the Child Care Fee Subsidy; and, a lowering of any of six federal/provincial tax credits.

Information Booklet, Affidavit of Debbie Burke-Benn, DR, Exhibit 14, pp. 327-332

81. *Third*, as a matter of legal principle, it takes virtually nothing to satisfy the consideration requirement. That is, even *de minimis* consideration passing to the Defendant will suffice. Or, put another way, if the Defendant specified that it wanted surveys, then that fact alone means the surveys are consideration. Consider this quote from the House of Lords involving the question of whether used candy wrappers given to Nestle in exchange for a discounted object could be consideration flowing to Nestle:

> I think they are part of the consideration … "They", the wrappers … are … described in the record itself—"all you have to do" to get each NEW STARS record is to send three wrappers from Nestlé's 6d. Milk Chocolate bars, together with postal order for 1/6." This is not conclusive but, however described, they are, in my view, in law part of the consideration. It is said that when received the wrappers are of no value to Nestlé's. This I would have thought irrelevant. A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn.
>
> ***Chappell & Co Ltd v Nestle Co Ltd,* [1960] AC 87 at p. 114, RBOA Tab 17**

82. These conclusions that consideration can be worth as little as a thrown away candy wrapper and that the Court will not inquire into the quality/quantity of what the Defendant specified as the consideration reflects Canadian law. If the Defendant, here, offered BI Payments in exchange for giving up OW/ODSP, in exchange for surveys, in exchange for risks Class Members took with their rent, tax credits, or other benefits, then any of those things, alone or together, make up lawful consideration in Canadian law.

> **A. Swan, *Canadian Contract Law*, at ¶2.45, RBOA Tab 35; G.H.L. Fridman, *The Law of Contract in Canada*, pp 90-92, RBOA Tab 36**

83. Similarly, even the promise to do something can be enough to ground a legally binding contract. This is true even where the promised act is not for the benefit of the promisor.

> **S.M. Waddams, *The Law of Contracts*, pp 79-80, RBOA Tab 34**

84. Moreover, the Defendant's own documents related to the BI Pilot accepted that the act of completing the highly personal surveys could cause distress. Thus, the Information Booklet warns Class Members of risks of "emotional discomfort". Further, in its own Study Protocol, the Defendant acknowledged that the BI Pilot came with a number of "risks" to the Class, risks which would be explained to any applicant.

Affidavit of Debbie Burke-Benn, DR, Exhibit 12, Study Protocol and Information Booklet, p 220; Exhibit 15, p 318

85. In short, while the Defendant in its factum is quick to downplay the Class's contribution to the functioning of the BI Pilot, the Class was asked to take risks, the Defendant's own documents say that risks were being taken, and the Class thus gave consideration to receive the BI Payments.

86. In fact, the consideration of being human research subjects whose private lives come under the microscope was significant consideration. Yet, how significant it was does not matter. What matters is that it is not plain and obvious, and beyond doubt, that no consideration passed when consideration is not even measured by the courts and where it is the Defendant that specified the consideration pled in the Claim.

H. The "Intent To Create Contractual Relations" Complaints

87. The Defendant argues that the Claim does not disclose a contract cause of action because it does not contain a form of words alleging that the Defendant intended to be contractually bound.

88. To the contrary, the Claim repeatedly pleads that the alleged guarantee of three years of payments took on the form of an offer by persons authorized to enter into a contract [for instance, Claim, at ¶¶73-75] before pleading that the Defendant "entered into

a contract" [Claim, ¶¶89-90], and that the Defendant offered to enter into a contract that was signed, thus "resulting in the formation of a contract" [Claim, ¶91]. The reader could only take away from the many pleas of the efforts made by the Defendant to offer and form a contract that they intended to form a contract.

89. The Claim pleads a foundational set of facts that lead up to, and include, the kind of mutual interchange that is consistent with an intent to form a contract. Or, to be more precise, it pleads facts from which to conclude it is not plain and obvious, and beyond doubt, the Defendant never intended to contract.

90. A "cause of action" means the material facts necessary to support a claim:

> A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court …
>
> ***Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44 at ¶54, RBOA Tab 18. See also: *1100997 Ontario Limited v. North Elgin Centre Inc*., 2016 ONCA 848 at ¶19, RBOA Tab 19**

91. In other words, if the Claim contains the "material facts" that support a cause of action, a cause of action is pled. As the Court of Appeal observed recently, the *Rules* impose a modest burden on the Plaintiff at an early stage to plead enough material facts to enable a Defendant to fairly respond. The Court added that pleadings must be read generously as well, a point made in our first factum in the context of certification motions.

> ***Rowland v. Stephan*, 2017 ONSC 7276 at ¶2, RBOA Tab 20; *Khan v. Lee*, 2014 ONCA 889 at ¶¶13-18, RBOA Tab 20**

92. If the Claim had simply baldly asserted offer, acceptance, consideration, and an intent to enter into a contract, that would not have been sufficient because such boiler plate allegations are insufficient.

> ***Cadieux v. Cadieux*, 2016 ONSC 4446 at ¶¶27-31, RBOA Tab 22**

93. Yet, that seems to be the Defendant's complaint: "[t]he Amended claim both does not baldly claim an intent to be contractually bound…".

Defendant's Factum at ¶166

94. This is a superficial complaint because the Claim pleads material facts that support an intent to create a contract and not just a boiler plate assertion of a conclusion. The Defendant knows what facts are alleged against it and know the case it has to meet.

95. If, despite the high level of factual detail in the Claim, a form of words such as "the Plaintiffs plead that the Defendant intended to create contractual relations with the Class" is needed, the remedy is not to strike the Claim but is to grant the Plaintiffs leave to amend to add the form of words the Defendant would like to see. Rule 26.01 provides that leave to amend is mandatory.

***Rules of Civil Procedure*, R.R.O. 1990. Reg. 194, Rule 26.01**

96. The Defendant's complaint about the Claim should be disregarded or, if required, the Plaintiffs should be granted leave to add the form of words to the Claim the Defendant seems to ask of them.

I. The Defendant's Merits Arguments – "Up To" Three Years

97. The Defendant argues that it is "plain and obvious" the contract claim will fail because: (a) the crucial words in the contract offer "up to" three years of BI Payments; (b) "up to" means an absolute discretion to provide as much as three and as few as zero; and, (c) by giving Class Members 12-18 months of BI Payments, the Defendant complied with its obligation to give "up to" three years of BI Payments. To make this argument, the

Defendant quotes the two words in isolation, making no reference to the other words in the very documents "up to" are found in.

98. In other words, it ignores the context completely.

99. The fact the Defendant can only find support for its interpretation by incorrectly isolating two words suggests that its interpretation is fundamentally flawed on the *Sattva* framework and is a complete misreading. It is not plain and obvious that the Defendant's flawed reading sourced from a flawed methodology is the correct one.

(i) The Correct Methodology

100. As set out earlier, under the *Sattva* methodology, the words of an alleged contract must not be read in isolation. They must be interpreted alongside the other words and the "factual matrix", including the surrounding circumstances that could reasonably have been known to the Class and Defendant at the time the contract was entered into.

101. With this correct methodology in mind, we turn to the two sets of alleged contracts. We repeat that we need only show that it is not plain and obvious, and beyond doubt, that the Defendant's "we could stop the payments at any time even if you fulfil your part of the bargain" is correct.

(ii) The Contract Before March 2018

102. Before March 2018, the core contractual documents were the Information Booklet and the short application form attached to that booklet the Class Member completed and returned to join the BI Pilot. In completing the form, the Class Member was told of some aspects of the BI Pilot and that the BI Pilot conditions they needed to complete the form

were largely found in the Information Booklet. They then signed certifying that they "[h]ave read the Information Booklet and understand the eligibility criteria". Any *Sattva*-compliant interpretation would therefore depend on the entirety of what is in this application form and the Information Booklet.

Application Form (attached to Information Booklet), DR, pp. 339-341 and 343

103. While the Defendant focuses exclusively on two words in the Information Booklet ["up to"], in completing the application form, the Class Member at several points is told that they will receive the payments for the duration of the BI Pilot if they fulfil their obligations. The Class Member is told they will "receive Basic Income payments" before being told that the payments will be made "for the duration of my/our participation in the Pilot". The latter words were added to explain why the Class Member is giving their consent for disclosure of their CRA information to verify their income during the duration of the whole BI Pilot. The only mention of a situation where the Class Member might not receive all of their BI Payments apart from failing to comply with their obligations is a right given exclusively to the Class Member to withdraw ["participation in the Pilot is voluntary and I/we can leave the Pilot at any time"].

Application Form (attached to Information Booklet), DR, pp. 343-344

104. In addition to this wording supportive of a guarantee of three years of BI Payments in the application form itself, the wording in the Information Booklet points to a similar guarantee. It describes the BI Pilot as "[t]he three-year Ontario Basic Income Pilot" before stating (two sentences later), that the Class Member "will receive a basic annual income" "[t]hrough the Pilot". The Defendant, in its factum, references the general description of

the BI Pilot on this page of the Information Booklet but skips over the "[t]hrough the Pilot" and "will receive" wording, as if it is not there.

Information Booklet, DR, p. 311

105. While this wording is followed by words indicating that the Class Member will receive BI Payments for "up to a three-year period", all of the wording that follows tells the Class Member that the guarantee of three years of payments is conditional on the Class Member fulfilling her part of the bargain.

106. Right after the "up to" wording, the Class Member is told to expect to complete surveys "periodically during the pilot period". They are also told several times that they can opt out at any time. They are not told that the Defendant can opt out.

Information Booklet, DR, pp. 312 and 320

107. Three pages later, the Information Booklet explains that persons with a disability will receive an extra maximum of $6,000 "per year". It adds that completing tax returns "every year you are participating in the Pilot" is required. The words "you are participating" thus reinforce the prior opt out wording to the effect that the only way the BI Payments will end is if the Class Member chooses to withdraw.

Information Booklet, DR, p. 315

108. The Booklet then states that the Class Member must first complete the baseline survey before telling them that, if selected, they "will receive monthly Basic Income payments". They are then told to expect multiple follow-up surveys during the course of the entire BI Pilot.

Information Booklet, DR, pp. 317-318

109. Consistent with the notion that a commitment of years was made, the Booklet explains how much each person "will" receive on an annualized basis and how much of the annual amount will be reduced if the Class Member earns income, reviewed annually.

Information Booklet, DR, p. 322-323

110. Having then explained that the annualized calculation depends on income verification, the Information Booklet explains that, as an "[o]ngoing [e]xpectation to [r]eceive [p]ayments", the Class Member must complete tax returns "every year". The "every year" wording is qualified by "you are participating" and not by "we are deciding to keep the BI Pilot active".

Information Booklet, DR, p. 324

111. As our first factum pointed out, what is notable in reading the many pages of the Information Booklet and associated application form is the complete absence of any termination or exclusion of liability language permitting the Defendant to end the BI Payments at any time for any reason, including any of the reasons Ms. Burke-Benn, in her affidavit, opine could have led to the end of payment. The Defendant never spells out the "price" of an early termination.

112. In *Tercon Contractors*, the Supreme Court reviewed a narrow exclusion of liability clause the Province of British Columbia inserted in a tendering RFP. After holding that any contracting party, including government, can set out in clear language that contracts can be ended by government unilaterally and without further liability (though very express language is called for), the Court compared the somewhat modest clause involved there with unequivocal, clearer clauses in other contracts and held that the modest clause did not exclude the claim.

***Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, *esp*. at ¶73, RBOA Tab 23**

113. It is not plain and obvious that the trier of fact in our case will, after noting that governments can successfully draft clear termination or exclusion clauses, somehow conclude that it was implicit in *silence* in the case at bar that the Defendant here gave itself an unfettered "out" from making the BI Payments. If the Province, in *Tercon*, could not escape contractual liability despite drafting such a clause on the theory that they could have drafted something clearer, the gaping silence found in the Information Booklet and associated application form should lead to the same result.

114. It is in this context that the wording "up to" needs to be understood in order for a *Sattva* compliant reading to yield the correct result. With the many references to the Class Member receiving three years of BI Payments and with the only situations outlined where that would not be so being ones entirely dependent on the Class Member's actions, the "up to" wording simply tells the Class Member that, if they do not do their part, the BI Payments will end. Thus, "up to", read contextually, means: (a) you will receive three years of payments; (b) but whether you do or not is entirely up to you and not at all up to us; and, (c) you will not get more than three years of BI Payments.

115. Previous decisions have interpreted the preposition "up to" to mean that the party in the position of the Class Member is the one that defines the quantity. In *Canada Square*, the Defendant tenant leased premises from the Plaintiff described as a rooftop restaurant and "up to a gross amount of 600 square feet" in the lobby. The lobby space was being leased out for the Plaintiff's benefit: if the Defendant could make more sales in the food areas placed in the "up to" space, the Plaintiff would earn additional rent.

***Canada Square Corp. et al v. VS Services Ltd. et al,* 1981 CanLII 1893 (ON CA), RBOA Tab 24**

116. The Defendant argued in that case that this "up to" wording was too uncertain and the contract thereby unenforceable. The Court of Appeal held it was certain. What it meant, in the context of the whole contract, was that the Plaintiff – like the Class here – could choose the size of the space, albeit to a maximum of 600 square feet. The Court added that, when the realities are considered (the Plaintiff would want more space used), "up to … 600" meant around 600:

> As far as the size of the area is concerned I think that the agreement, read in its proper context, is sufficiently certain …The maximum size is fixed. The scope for possible uncertainty lies in its minimum size but, having regard to commercial realities as opposed to what was theoretically possible, the minimum size would probably not be too far below 600 square feet. Anything significantly less would have hardly been worthwhile and not reasonably within the contemplation of the parties. The words "up to", in this particular context, fall into the same category as "approximating to", "approximately" and "about"…

***Canada Square Corp. v. Versafood Services Ltd., supra* at p. 19**

117. Just as the election of how much of the 600 square feet to use meant the Plaintiff – and only the Plaintiff – could choose as little or as much as they wanted, and just as the "realities" (as the court put it) would mean the Plaintiff there would choose nearly 600 square feet, the BI Pilot documentation, by placing the BI Payments' duration entirely in the Class's hands, signals that "up to" three years means an amount that is "up to" the Class (to a maximum of three years). And, just as the "commercial realities" in *Canada Square* were relied on to hold that "up to" meant "approximately" 600 sq. ft., the realities of an intent to study a guaranteed basic income was that the question of how much of the three year guarantee would be paid had to be placed in each Class Member's hands,

unconditionally. The Class had knowledge they would get three years of payments, guaranteed, in order for their long-term behaviour patterns to be properly studied.

118. All told, the pre-March 2018 contract guaranteed three years of BI Payments to the Class Member and the "up to" wording reinforces this fact. More precisely for present purposes, it is not plain and obvious, and beyond doubt, that the Defendant's isolated reading of "up to" to mean "*we the Defendant* could cancel the BI Payments at any time for any reason" reflects the terms.

(iii) The March/April 2018 Contract

119. In the last two months of enrolment, Class Members executed a more extensive application form. As with the prior application, the Class Member consented to disclosing tax information for each year of the BI Pilot and declared that they understood that they (and only they) can opt out. The application form adds that the Class Member will also complete surveys throughout the duration of the BI Pilot. Critically, this form closes with a signed certification where the Class Member certifies that she "understands what it means to be part of the [BI Pilot]".

March/April Application Form, DR, pp. 358-361

120. As argued in Section B., above, this certification, along with the *Sattva* / *Resolute FP* guidance to the effect that the Court will look elsewhere for the conditions of the BI Pilot, means that we need to look elsewhere for the terms of contract entered into in March/April 2018.

121. By March/April 2018, the Information Booklet could still be reviewed and yield the three year guarantee result just put forward.

122. The only other description of the BI Pilot available at that time was found on the Defendant's BI Pilot webpage. That webpage uses wording entirely consistent with the Information Booklet and, in fact, some sharper wording of ensuring three years of BI Payments, including: (a) words repeated many times that the BI Payments will "ensur[e] a minimum income level" and "will ensure" specified annual maximums; (b) a statement that Class Members "are receiving" BI Payments for "up to" three years; (c) an emphasis on how Class Members must complete surveys for the three-year period; and, (d) a statement that Class Members must be aged 18-64 for the entire three-year period. The Class Member may also, via that webpage, have seen the April 2017 news release announcing the BI Pilot. The news release states that the three-year study "will ensure" a maximum amount of pay per year during the BI Pilot.

News Release and BI Pilot Webpage, Plaintiffs' Record, pp. 856-863

123. As with the pre-March 2018 interpretive exercise, the "up to" wording would yield the same result when read alongside the full panoply of documents known or reasonably known to the Class Members as of March/April 2018. It is certainly not "plain and obvious and beyond doubt" that the Defendant's interpretation will succeed.

(iv) A Note on Ambiguity

124. If for any reason the common issues trial judge were to find that the "up to" wording creates a degree of uncertainty, the fact that the Defendant drafted all of the BI Pilot documents means that the documents will be interpreted *contra proferentem*, and in favour of the Class. In *Austin*, the Court of Appeal recently held that, had impugned wording in a pension plan drafted by Bell Canada been held to have been "awkward", the interpretation favouring the Class would govern.

***Austin v. Bell Canada*, 2020 ONCA 142 at ¶31 [citations omitted], RBOA Tab 25**

125. The Defendant's "up to" interpretation suffers from a fundamental failure to read the wording in context. Read the way *Sattva* requires, it is not plain and obvious that the Plaintiffs' interpretation is wrong. Even if "up to" creates some ambiguity or awkwardness, the result on a "plain and obvious" test should not change.

J. The "Policy" Negligence Arguments Have No Merit

126. The Defendant makes a superficial argument that the sum total of the negligence claim comes down to an allegation that the Minister's policy decision to cancel the BI Pilot caused the Class the harm claimed and, since government is immune from harm caused by policy decisions, that ends the inquiry.

127. The reason this argument is superficial is that, in drawing the policy/operational distinction, what the Supreme Court is saying is that policy decisions alone cannot ground *the existence of a duty* to take care. The Supreme Court is not saying that, once a duty exists, the defendant authority is free to breach it so long as the *breach* is the result of a policy decision. The role of policy in the negligence case law is limited to the inquiry as to whether a duty of care has been established in the first place. This can be seen by way of a series of quotes from the only decision the Defendant cites in support of its argument that nothing flowing from a policy *decision* is actionable (*Imperial Tobacco*):

> At the first stage of [the duty of care] test, the question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. If this is established, a *prima facie* duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this prima facie duty of care should not be recognized…

> …the matter must be allowed to proceed to trial, subject to any policy considerations that may negate the *prima facie* duty of care at the second stage of the analysis. […]
>
> The only question at this point of the analysis is whether policy considerations weigh against finding that Canada was under a duty of care to the tobacco companies to take reasonable care to accurately represent the qualities of low-tar tobacco.

***R v. Imperial Tobacco Canada*, 2011 SCC 42, Book of Authorities to the Plaintiff's Main Factum, Tab 19, at ¶¶39, 47, and 69**

128. The reason why Imperial Tobacco's negligence action failed was that all of the governmental sources from which Imperial Tobacco derived an alleged duty to take care of them were representations and actions made at a high level of public policy, including policy-makers' representations that the tobacco companies should work with government to market allegedly safer smoking products. Or, put another way, Canada's actions never devolved down into an organized set of operational activities that gave rise to a duty of care. Had Canada been held to owe a duty of care in negligence but then to have breached it later because of a change in policy, and had the Supreme Court held that a policy-based *breach* negates the pre-existing duty itself, the Defendant's arguments might hold greater sway. However, that is not how policy is brought into the negligence analysis.

129. Consider, for instance, the highway maintenance cases. Those decisions tell us that, if a driver is injured because of a falling tree that fell because the government decided, as a policy matter, not to inspect trees, the resulting harm is due to a policy decision and is not actionable in negligence [*Swinamer*]. By contrast, if a driver is injured from a falling boulder after the government decided, as a policy matter, to carry out detailed inspections but then, operationally, did a poor job of it, a duty of care arises [*Just*].

***Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445, RBOA Tab 26; *Just v. British Columbia*, [1989] 2 S.C.R. 1228, RBOA Tab 27**

130. The key takeaway from these decisions is that policy served, in *Swinamer*, to negate the existence of a duty of care to begin with because the Plaintiff there could only trace their injuries to a policy decision to not get involved in tree inspections. Had the policy turned into action, an operational duty of care would have arisen, as in *Just*. None of these cases stand for the proposition that a public authority defendant that owes a duty of care can somehow later negate it by changing its policies.

131. Consider for instance the *Castrillo* case cited in our previous factum. There, the WSIB had, for years, utilized a written policy regarding pre-existing impairments whenever it adjudicated a non-economic loss claim. The Claim alleged that the WSIB adopted a "secret" policy directing its adjudicators to apply the written policy differently, allegedly harming the Class of WSIB claimants. This was a classic case of a change at the highest level of policy – the kind of change the Defendant in the case at bar alleges can ground no negligence claim.

***Castrillo v. Workplace Safety and Insurance Board*, 2017 ONCA 121,**
Book of Authorities to the Plaintiff's Main Factum, Tab 52

132. The Court of Appeal referenced all of the ways the WSIB interacted with claimants and held that an operational duty of care might arise to adjudicate WSIB claims a certain way. The Court then looked largely to the statute to see if any "policy" reasons existed to negate *the existence of the duty*. Having found none, the Court held that it was not plain and obvious and beyond doubt that the WSIB did not owe claimants a negligence duty of care when it changed policy course by adopting the "secret" policy to interpret its written policy.

***Castrillo*, *ibid*, at ¶¶76-86**

133. The key takeaway from *Castrillo* is that the Court did not, as the Defendant asks that the Court do now, treat the fact that the policy change – which could be said to be the source from which the WSIB "breached" its negligence duty – meant there could be no liability. "Policy", according to the Court of Appeal, could be found in the parties' relationship to see if there were policy reasons to negate any duty of care from *arising* in the first place. Having found none, a duty of care might be said to arise and, if breached by the WSIB policy change, could give rise to liability.

134. Applied to the case at bar, if the Claim had alleged that the 2016 Budget announcement to start a Basic Income Pilot had not been carried through and then the government, the year after, reneged on its budgetary promise, what at most was a governmental policy in 2016 could not be said to ground a duty in negligence to make BI Payments. A duty of care would never get off the ground. However, once the Defendant operationalized its policy announcements in the manner exhaustively analyzed in the prior factum, it could not "turn back", even if the source of the "turning back" was a change in policy.

135. Before leaving this issue, a newly released decision of the Court of Appeal is instructive on this point. On June 1, 2020, the Court released its *Wright* decision, where it explained how a defendant can be sued for causing harm for not carrying out a positive service it undertook to do and began carrying out. *Wright* is a class action. As the Court explained, citing a prior ruling,

> Accepting these allegations as true for the purposes of the s. 5(1)(a) test, Appleby [a Defendant] as a creator of the Gift Program arguably owed a duty of care to a prospective donor to ensure that the program

> would work and that the donor would receive a valid charitable donation receipt in return for his or her gift.
>
> ***Wright v. Horizons ETFS Management (Canada) Inc*., 2020 ONCA 337 at ¶102, RBOA Tab 28, quoting *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399 at ¶177, RBOA Tab 29**

136. The Court then added that the presence of a positive duty that must be carried out would depend on the presence of factors the Claim alleges occurred in the present case, including creating a scheme the plaintiffs participated in, having an interest in its conclusion, and undertaking to provide it in a suitable fashion. Where these elements are present, even if the alleged duty is novel, a class action based on such allegations meets the s. 5(1)(a) *Class Proceedings Act* test.

> ***Wright, supra* at ¶¶57-58 and 103-105, RBOA Tab 28**

137. The Court of Appeal's recent guidance on how one analyzes a claim in negligence concerning an alleged positive duty to complete a service should, in addition to the positive duty arguments in our first factum, explain that the presence of operational actions and undertakings to make the BI Payments means that it is not plain and obvious, and beyond doubt, that the negligence claim should be struck on policy grounds.

K. The Defendant's Argument That the *Crown Liability And Proceedings Act* is a Full Answer Ignores Two Recent Decisions That Say the Opposite

138. The Defendant cites the recently enacted *Crown Liability and Proceedings Act, 2019* ["*CLPA*"] and says, in a few sentences, that this provides a complete answer to the entire negligence cause of action.

139. Section 11(4) of the new *CLPA* states that no Action lies in negligence for "failure to take reasonable care in the making of a decision in good faith respecting a policy matter". This is a mere codification of the common law.

140. However, in s. 11(5), the *CLPA* defines what constitutes a "policy matter". These are defined to include "cancelling any funding previously provided or committed", "the termination of a program", and/or the amount and quality of notice given on termination. The Defendant argues that the BI Pilot was terminated and the BI Payments ceased, that this is a "policy matter" per statute, and that no Action in negligence therefore lies given the newly-enacted *CLPA*.

141. The fundamental problem for the Defendant – and one they fail to mention – is that the Superior Court has already disposed of these arguments against them. Sum total, Belobaba J. in *Leroux* has held that it is not plain and obvious the *CLPA* makes potentially valid negligence claims at common law disappear, while Perell J. in *Francis* held, on summary judgment, that the *CLPA* does not change the law of negligence.

> ***Leroux v. Ontario*, 2020 ONSC 1994, RBOA Tab 30; *Francis v. Ontario*, 2020 ONSC 1644, RBOA Tab 31**

142. In both *Francis* and *Leroux,* Ontario argued that because s. 11(5) defines "policy" matters broadly (to include actions that, at common law, were actionable as operational activity), it follows that the s. 11(4) extinguishment of "policy" negligence claims must mean that the government activity at issue (*i.e.* operational acts) cannot now ground a negligence claim. Belobaba J., in *Leroux*, assumed that one could, at first glance, read ss. 11(4)-(5) that way: "the *CLPA* on its face appears to restore complete governmental immunity and it does so by defining 'policy matters' to include even operational negligence".

> ***Francis* at ¶¶491 and 495, RBOA Tab 31; *Leroux* at ¶¶22, RBOA Tab 30**

143. However, as both Justices observed, ss. 11(4)-(5) do not in fact do that. While a "policy decision" now includes "cancelling any funding" or "the termination of a program",

the s. 11(4) immunity extends to the failure to take reasonable care "in the making of a decision … respecting a policy matter". In other words, it is not the act of cancelling the funding negligently that is immunized. It is any negligence surrounding a *decision* to cancel the funding that is immunized. If the present Claim alleged that the Minister, in cancelling, acted negligently by failing to consult Class Members, such an allegation would touch on a *CLPA* policy decision (negligence in "the making of a decision").

144. Having noted that ss. 11(4)-(5) are not nearly as wide as they first appear, Perell J. held that all that the sections do is codify the existing common law policy/operational dichotomy: if government takes operational action and is negligent, that is actionable under the *CLPA* just as it was before.

Francis at ¶¶493-494 and 504-507, RBOA Tab 31

145. Perell J. added, in *Francis*, that this codification interpretation accords with other principles, namely, that if ss. 11(4)-(5) actually immunized the Defendant's operational activities, such a change would amount to a massive increase in Crown immunity. For such a large increase, strong language would be needed as the *CLPA*'s purpose is to curb immunities.

Francis at ¶506, RBOA Tab 31

146. As it turns out, in explaining the *CLPA* to the Legislature, the Attorney General stated that it was being enacted merely to codify the existing state of the law. This confirms Perell J.'s conclusion that ss. 11(4)-(5)'s careful use of language did not change the law toward total Crown immunity.

Ontario Legislative Assembly, Official Report of Debates (Hansard), 42nd Parl., 1st Sess., No. 94 (16 April 2019), p. 4401, RBOA Tab 37; Ontario Legislative Assembly, Official Report of Debates (Hansard), 42nd Parl., 1st Sess., No. 97 (29 April 2019), p. 4555, RBOA Tab 38

147. Belobaba J.'s decision is helpful to the Court, as it was made in the context of a class action certification motion. Belobaba J. held that such a motion is not the place to strike a negligence claim on *CLPA* grounds given the reasons just outlined as to why ss. 11(4)-(5) may codify the common law and not immunize the Defendant when it engages in the kinds of operational activities pled in the Claim. It is not plain and obvious that a claim should not be certified, in other words, because of the *CLPA.*

***Leroux* at ¶¶26-31, RBOA Tab 30**

148. *Leroux* adds that if, as it turns out, ss. 11(4)-(5) immunize all operational negligence claims against government, those sections could be susceptible to a constitutional challenge for denying claimants access to the core accountability measure of Superior Court scrutiny as arguably protected by s. 96 of the *Constitution Act, 1867*. Such an "intolerable outcome" (quoting Supreme Court jurisprudence) should not be the result of the application of the "plain and obvious" test.

***Leroux* at ¶¶17-25, RBOA Tab 30**

149. The Defendant argues that the *CLPA* is dispositive of the negligence claim. With respect, the Superior Court's interpretation of the *CLPA* in *Leroux* and *Francis* are dispositive.

L. The Fact Some Class Members May Ultimately Be Held to Have No Damages Is Irrelevant

150. The Defendant argues that commonality cannot be established because some Class Members who received BI Payments would have become disentitled to BI Payments and, potentially, damages, because of death, a move, or failing to file their tax

return. This argument is completely mistaken. It is common-place for class actions to be certified even if individual damages assessments might result in some class members having no damages.

151. This was put very clearly by Strathy J. (as he then was) in *Ramdath*, dealing with the same kinds of arguments the Defendant raises:

> George Brown's second objection to the class definition centres around the complaint that the Class is too broad because it includes members who do not share the common issues.
>
> First, George Brown says that 23 of the putative Class Members either withdrew from the Program or failed to graduate from the Program and they therefore have no cause of action, presumably because they suffered no damages…
>
> **The fact that a Class Member may ultimately not succeed in establishing damages is not a ground for refusing to include him or her in the Class.** Class Members may have withdrawn from the Program for a variety of reasons … Class Members in this case should be given an opportunity to prove the reasons for their failure to complete the Program. […]
>
> George Brown says that the four students who enrolled in the Program after the website was corrected in 2008 should be excluded from the Class. The Plaintiffs' answer is that … the fact that some members of the Class may not have a claim is not fatal to the Class definition. I agree. […]
>
> As Cullity J. noted in *Taylor* … the possibility that some class members will be unable to prove damages is a necessary result of the requirement that the class definition cannot be merits-based.
>
> ***Ramdath v. George Brown College*, 2010 ONSC 2019, at ¶¶88-89, 90, 93, and 95, RBOA Tab 32 *[Emphasis Added]*, citing *Taylor v. Canada (Health)*, [2007] OJ No 3312 (S.C.J.) at ¶62 ["The possibility that some class members will be unable to prove damages almost invariably exists"], RBOA Tab 33**

152. Indeed, the *Class Proceedings Act* – if a class action is certified – provides for aggregate or individual damages *assessments*. It does not necessarily lead to individual *damages* for each member of the Class. The fact some Class member may ultimately

fail to prove any damages following an individualized assessment is set out in the *CPA* itself, in the rights of appeal sections from the dismissal of an individual's claim post-trial.

> ***Class Proceedings Act*, 1992, S.O. 1992, c. 6, ss. 30(9), 30(10), and 30(11)**

153. If the Class action is certified because the "low" bar test of some basis in fact of commonality is established, the fact Class Member X died, for instance, can be assessed individually and, depending on the answer, their individual damages assessed.

154. The Defendant then complains that the individual issues are too complex to meet a commonality or preferability finding. With respect, the individual issue of quantum of damages rests largely on a series of very simple questions: did the Class Member die and when? did the Class Member leave Ontario and when? did the Class Member file their tax return? Did they turn 65?

155. As for quantum, the BI Pilot was designed so that the quantum of BI Payments would be easily assessed as the BI Payment less 100% of some income amounts and less 50% of other income amounts as reported on tax returns. This is quite easy to do.

> **See, for instance, Information Booklet and Second Application Form, Burke Benn affidavit, DR, pp. 320-324 and 358**

156. Our first factum has already referenced how far, far more complex damages and liability issues have been left to be decided on an individualized basis in other cases certifying residential abuse, systemic employer sexual harassment, and other such class actions. If those class actions can be certified, then there is some basis in fact to do so here and leave the more modest individual issues to be dealt with later.

M. Final Comments

157. In Schedule "D" of its factum, the Defendant proposes a more modest notice of certification than we propose in the Litigation Plan, with the Plaintiffs assuming the cost. In counsel's experience, the details around giving notice can often be worked out amongst counsel following certification, with a brief return to the Court by Case Management if needed (ideally with an agreed-to proposal). We respectfully suggest that the Court can defer consideration of such issues.

158. For now, we would say the Defendant has some good ideas on how to give effective but more modest notice, but we would need to discuss, for instance, issues like the quality of their mailing list and how updated it is before their helpful suggestions can be properly considered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of June, 2020.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53
2. *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60
3. *Penney v. Bell Canada*, 2010 ONSC 2801
4. *Wellman and Corless v. TELUS and Bell*, 2014 ONSC 3318
5. *Gillis v. Respond Power, LLC*, 677 Fed.Appx. 752 (2017) (3rd Circ.)
6. *Byl (Litigation Guardian of) v. Ontario*, [2003] OJ No 3436 (Div. Ct.)
7. *Wind Power Inc. v. Saskatchewan Power Corp*., 2002 SKCA 61
8. *Huron Perth Children's Aid Society v. Ontario*, 2012 ONSC 5388
9. *The Queen v. Henderson* (1898) 28 SCR 425
10. *R. v. Transworld Shipping Ltd.*, [1976] 1 F.C. 159 (C.A.)
11. *Forest Oil Corp. v. Canada*, 1996 CanLII 4096 (FC)
12. *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62
13. *R. v. Cairenius*, [2008] OJ No 2323 (S.C.J.)
14. *R. v. Russel*, 2011 ONCA 303
15. *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43
16. *Mason v. Ontario*, [1998] OJ No 1866 (C.A.)
17. *Chappell & Co Ltd v Nestle Co Ltd*., [1960] AC 87
18. *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44
19. *1100997 Ontario Limited v. North Elgin Centre Inc*., 2016 ONCA 848
20. *Rowland v. Stephan*, 2017 ONSC 7276
21. *Khan v. Lee*, 2014 ONCA 889
22. *Cadieux v. Cadieux*, 2016 ONSC 4446
23. *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4

24. *Canada Square Corp. v. Versafood Services Ltd*., , 1981 CanLII 1893 (ON CA)

25. *Austin v. Bell Canada*, 2020 ONCA 142

26. *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445

27. *Just v. British Columbia*, [1989] 2 S.C.R. 1228

28. *Wright v. Horizons ETFS Management (Canada) Inc.*, 2020 ONCA 337

29. *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399

30. *Leroux v. Ontario*, 2020 ONSC 1994

31. *Francis v. Ontario*, 2020 ONSC 1644

32. *Ramdath v. George Brown Colleg*e, 2010 ONSC 2019

33. *Taylor v. Canada (Health)*, [2007] OJ No 3312 (S.C.J.)

Secondary Sources

34. S. Waddams, *The Law of Contracts*, 7th ed., Toronto, 2017, Carswell, pp 79-80

35. A. Swan, *Canadian Contract Law*, 3rd ed., Markham, 2012, LexisNexis at ¶2.45

36. G.H.L. Fridman, *The Law of Contract in Canada,* 6th ed., Toronto, 2011, Carswell, pp 90-92

37. Ontario Legislative Assembly, Official Report of Debates (Hansard), 42nd Parl., 1st Sess., No. 94 (16 April 2019), p. 4401

38. Ontario Legislative Assembly, Official Report of Debates (Hansard), 42nd Parl., 1st Sess., No. 97 (29 April 2019), p. 4555

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. ***Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.)**

Appointment of Judges

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

126. Such Portions of the Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick had before the Union Power of Appropriation as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all Duties and Revenues raised by them in accordance with the special Powers conferred upon them by this Act, shall in each Province form One Consolidated Revenue Fund to be appropriated for the Public Service of the Province.

2. ***Rules of Civil Procedure***, **Consolidation Period:** From March 23, 2020 to the e-Laws currency date., Last amendment: 456/19.

RULES OF PLEADING — APPLICABLE TO ALL PLEADINGS

Material Facts

25.06 (1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. R.R.O. 1990, Reg. 194, r. 25.06 (1).

RULE 26 AMENDMENT OF PLEADINGS

GENERAL POWER OF COURT

26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment. R.R.O. 1990, Reg. 194, r. 26.01.

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

Appeals

Idem

30 (9) With leave of the Superior Court of Justice as provided in the rules of court, a class member may appeal to the Divisional Court from an order under section 24 or 25,

(a) determining an individual claim made by the member and awarding $3,000 or less to the member; or

(b) dismissing an individual claim made by the member for monetary relief. 1992, c. 6, s. 30 (9); 2006, c. 19, Sched. C, s. 1 (1).

Idem

30 (10) With leave of the Superior Court of Justice as provided in the rules of court, a representative plaintiff may appeal to the Divisional Court from an order under section 24,

(a) determining an individual claim made by a class member and awarding $3,000 or less to the member; or

(b) dismissing an individual claim made by a class member for monetary relief. 1992, c. 6, s. 30 (10); 2006, c. 19, Sched. C, s. 1 (1).

Idem

30 (11) With leave of the Superior Court of Justice as provided in the rules of court, a defendant may appeal to the Divisional Court from an order under section 25,

(a) determining an individual claim made by a class member and awarding $3,000 or less to the member; or

(b) dismissing an individual claim made by a class member for monetary relief. 1992, c. 6, s. 30 (11); 2006, c. 19, Sched. C, s. 1 (1).

4. ***Proceedings Against the Crown Act***, R.S.O. 1990, CHAPTER P.27, Note: This Act was repealed on July 1, 2019. (See: 2019, c. 7, Sched. 17, s. 33), Last amendment: 2019, c. 7, Sched. 17, s. 33.

No injunction or specific performance against Crown

14 (1) Where in a proceeding against the Crown any relief is sought that might, in a proceeding between persons, be granted by way of injunction or specific performance, the court shall not, as against the Crown, grant an injunction or make an order for specific performance, but in lieu thereof may make an order declaratory of the rights of the parties.

Limitation on injunctions and orders against Crown servants

(2) The court shall not in any proceeding grant an injunction or make an order against a servant of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown that could not have been obtained in a proceeding against the Crown, but in lieu thereof may make an order declaratory of the rights of the parties. R.S.O. 1990, c. P.27, s. 14.

Order for recovery of property not to be made against Crown

15 In a proceeding against the Crown in which the recovery of real or personal property is claimed, the court shall not make an order for its recovery or delivery but in lieu thereof may make an order declaring that the claimant is entitled, as against the Crown, to the property claimed or to the possession thereof. R.S.O. 1990, c. P.27, s. 15.

Payment by Crown

22 The Minister of Finance shall pay out of the Consolidated Revenue Fund the amount payable by the Crown,

(a) under an order of a court that is final and not subject to appeal;

(b) under a settlement of a proceeding in a court;

(c) under a settlement of a claim that is the subject of a notice of claim under section 7; or

(d) under a final order to pay made by a competent authority under a trade agreement that the Crown has entered into with the government of another province or territory of Canada, the government of Canada or any combination of those governments. 1994, c. 27, s. 51; 2009, c. 24, s. 32.

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

Policy decisions

11(4) No cause of action arises against the Crown or an officer, employee or agent of the Crown in respect of any negligence or failure to take reasonable care in the making of a decision in good faith respecting a policy matter, or any negligence in a purported failure to make a decision respecting a policy matter.

Same, policy matters

11(5) For the purposes of subsection (4), a policy matter includes,

(a) the creation, design, establishment, redesign or modification of a program, project or other initiative, including,

(i) the terms, scope or features of the program, project or other initiative,

(ii) the eligibility or exclusion of any person or entity or class of persons or entities to participate in the program, project or other initiative, or the requirements or limits of such participation, or

(iii) limits on the duration of the program, project or other initiative, including any discretionary right to terminate or amend the operation of the program, project or other initiative;

(b) the funding of a program, project or other initiative, including,

(i) providing or ceasing to provide such funding,

(ii) increasing or reducing the amount of funding provided,

(iii) including, not including, amending or removing any terms or conditions in relation to such funding, or

(iv) reducing or cancelling any funding previously provided or committed in support of the program, project or other initiative;

(c) the manner in which a program, project or other initiative is carried out, including,

(i) the carrying out, on behalf of the Crown, of some or all of a program, project or other initiative by another person or entity, including a Crown agency, Crown corporation, transfer payment recipient or independent contractor,

(ii) the terms and conditions under which the person or entity will carry out such activities,

(iii) the Crown's degree of supervision or control over the person or entity in relation to such activities, or

(iv) the existence or content of any policies, management procedures or oversight mechanisms concerning the program, project or other initiative;

(d) the termination of a program, project or other initiative, including the amount of notice or other relief to be provided to affected members of the public as a result of the termination;

(e) the making of such regulatory decisions as may be prescribed; and

(f) any other policy matter that may be prescribed.

Definition, "regulatory decision"

(6) In this section,

"regulatory decision" means a decision respecting,

(a) whether a person, entity, place or thing has met a requirement under an Act,

(b) whether a person or entity has contravened any duty or other obligation set out under an Act,

(c) whether a licence, permission, certificate or other authorization should be issued under an Act,

(d) whether a condition or limitation in respect of a licence, permission, certificate or other authorization should be imposed, amended or removed under an Act,

(e) whether an investigation, inspection or other assessment should be conducted under an Act, or the manner in which an investigation, inspection or other assessment under an Act is conducted,

(f) whether to carry out an enforcement action under an Act, or the manner in which an enforcement action under an Act is carried out, or

(g) any other matter that may be prescribed.

Proceedings barred

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

Proceedings set aside

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

Common law defences unaffected

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

No inference of policy matters as justiciable

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

Payment by the Crown

28 The Minister of Finance shall pay out of the Consolidated Revenue Fund amounts payable by the Crown under,

(a) an order of a court that is final and not subject to appeal;

(b) the settlement or partial settlement of a proceeding;

(c) the settlement or partial settlement of a claim that is the subject of a notice of claim under section 18;

(d) the settlement or partial settlement of an anticipated proceeding or claim which, in the Attorney General's opinion, could result in a judgment or other finding of liability against the Crown;

(e) an order of an administrative tribunal or an arbitration award that is final and not subject to appeal, or the settlement or partial settlement of a matter or anticipated matter before an administrative tribunal or arbitrator; or

(f) a final order to pay made by a competent authority under a trade agreement that the Crown has entered into with the government of another province or territory of Canada, the government of Canada or any combination of those governments.

Application of former Act to existing proceedings

31(3) Subject to subsection (4), the *Proceedings Against the Crown Act*, as it read immediately before its repeal, continues to apply with respect to proceedings commenced against the Crown or an officer, employee or agent of the Crown before the day this section came into force, and to the claims included in those proceedings.

6. ***Financial Administration Act***, R.S.O. 1990, CHAPTER F.12, Consolidation Period: From July 1, 2019 to the e-Laws currency date. Last amendment: 2019, c. 7, Sched. 34, s. 2.

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.

How public money to be paid in certain circumstances

13 If any public money is appropriated by an Act for any purpose or is directed by the judgment of a court or the award of arbitrators or other lawful authority to be paid by the Crown or the Lieutenant Governor and no other provision is made respecting it, such money is payable under warrant of the Lieutenant Governor, directed to the Minister of Finance, out of the Consolidated Revenue Fund, and all persons entrusted with the expenditure of any such money or a part thereof shall account for it in such

manner and form, with such vouchers, at such periods and to such officer as the Minister of Finance may direct. R.S.O. 1990, c. F.12, s. 13; 1994, c. 17, s. 62 (2).

7. ***Financial Administration Act*****,** R.S.C., 1985, c. F-11

PART III.1 Contracts

Term of contract that money available

40 (1) It is a term of every contract providing for the payment of any money by Her Majesty that payment under that contract is subject to there being an appropriation for the particular service for the fiscal year in which any commitment under that contract would come in course of payment.

Public opinion research

(2) It is a term of every contract for public opinion research entered into by any person with Her Majesty that a written report will be provided by that person.

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(2) It is a term of every contract for public opinion research entered into by any person with Her Majesty that a written report will be provided by that person.

8. ***Ministry of Community and Social Services Act***, RSO 1990, c M.20, Consolidation Period: From July 1, 2019 to the e-Laws currency date, Last amendment: 2019, c. 7, Sched. 17, s. 105.

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).

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.

9. ***Statute of Frauds*****,** R.S.O. 1990, CHAPTER S.19, Consolidation Period: From December 9, 1994 to the e-Laws currency date., Last amendment: 1994, c. 27, s. 55.

Writing required to create certain estates or interests

1 (1) Every estate or interest of freehold and every uncertain interest of, in, to or out of any messuages, lands, tenements or hereditaments shall be made or created by a writing signed by the parties making or creating the same, or their agents thereunto lawfully authorized in writing, and, if not so made or created, has the force and effect of an estate at will only, and shall not be deemed or taken to have any other or greater force or effect.

How leases or estates of freehold, etc., to be granted or surrendered

2 Subject to section 9 of the *Conveyancing and Law of Property Act*, no lease, estate or interest, either of freehold or term of years, or any uncertain interest of, in, to or out of any messuages, lands, tenements or hereditaments shall be assigned, granted or surrendered unless it be by deed or note in writing signed by the party so assigning, granting, or surrendering the same, or the party's agent thereunto lawfully authorized by writing or by act or operation of law. R.S.O. 1990, c. S.19, s. 2.

Declarations or creations of trusts of land to be in writing

9 Subject to section 10, all declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by a writing signed by the party who is by law enabled to declare such trust, or by his or her last will in writing, or else they are void and of no effect. R.S.O. 1990, c. S.19, s. 9.

Exception of trusts arising, transferred, or extinguished by implication of law

10 Where a conveyance is made of lands or tenements by which a trust or confidence arises or results by implication or construction of law, or is transferred or extinguished by act or operation of law, then and in every such case the trust or confidence is of the like force and effect as it would have been if this Act had not been passed. R.S.O. 1990, c. S.19, s. 10.

Assignments of trusts to be in writing

11 All grants and assignments of a trust or confidence shall be in writing signed by the party granting or assigning the same, or by his or her last will or devise, or else are void and of no effect. R.S.O. 1990, c. S.19, s. 11.

10. ***Family Law Act*****,** R.S.O. 1990, CHAPTER F.3, Consolidation Period: From January 1, 2020 to the e-Laws currency date., Last amendment: 2019, c. 14, Sched. 9, s. 41-44.

Form and capacity

Form of contract

55 (1) A domestic contract and an agreement to amend or rescind a domestic contract are unenforceable unless made in writing, signed by the parties and witnessed. R.S.O. 1990, c. F.3, s. 55 (1).

11. ***Consumer Protection Act*****, 2002,** S.O. 2002, CHAPTER 30, SCHEDULE A, Consolidation Period: From December 10, 2019 to the e-Laws currency date., Last amendment: 2019, c. 14, Sched. 10, s. 4.

Requirements for future performance agreements

22 Every future performance agreement shall be in writing, shall be delivered to the consumer and shall be made in accordance with the prescribed requirements. 2002, c. 30, Sched. A, s. 22.

Requirements for time share agreements

27 Every time share agreement shall be in writing, shall be delivered to the consumer and shall be made in accordance with the prescribed requirements. 2002, c. 30, Sched. A, s. 27.

Requirements for personal development services agreements

30 (1) Every personal development services agreement shall be in writing, shall be delivered to the consumer and shall be made in accordance with the prescribed requirements. 2002, c. 30, Sched. A, s. 30 (1).

Requirements for consumer agreements

49 Every consumer agreement for loan brokering, credit repair or for the supply of such other goods or services as may be prescribed shall be in writing, shall be delivered to the consumer and shall be made in accordance with the prescribed requirements. 2002, c. 30, Sched. A, s. 49.

DANA BOWMAN et al.
Plaintiffs (Moving Parties)

-and-

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
KAWARTHA LAKES

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