COURT OF APPEAL FOR ONTARIO

CITATION: Bowman v. Ontario, 2022 ONCA 477
DATE: 20220621
DOCKET: C68939 & C69690

Pepall, Brown and Coroza JJ.A.

BETWEEN

Dana Bowman, Grace Marie Doyle Hillion, Susan Lindsay and Tracey Mechefske

Plaintiffs (Appellants)

and

Her Majesty the Queen in Right of Ontario

Defendant (Respondent)

Stephen Moreau, Lara Koerner-Yeo and Kaley Duff, for the appellants

Christopher P. Thompson, Chantelle Blom, Zachary Green, Ravi Amarnath and Adam Mortimer, for the respondent

Jennifer Hunter, Jennifer O'Dell and Lucy Sun, for the intervener Canadian Civil Liberties Association

Heard: February 2, 2022 by video conference

On appeal from the order of Justice Stephen T. Bale of the Superior Court of Justice, dated November 30, 2020, with reasons reported at 2020 ONSC 7374.

Brown J.A.:

I. OVERVIEW

[1] In April 2017, the Government of Ontario initiated a basic or minimum income program in three urban areas of the province (hereafter the “Basic Income Pilot Program” or “BI Program”). Announcements made at the time described the pilot program as one that would run for three years.

[2] The appellants, Dana Bowman, Grace Marie Doyle Hillion, Susan Lindsay, and Tracey Mechefske, enrolled in the BI Program and received benefits thereunder (“BI Payments”). Prior to enrolling in the BI Program, some of the appellants had received benefits under other provincial support programs. The BI Program payments replaced and exceeded the benefits previously received by the appellants from various sources, including the Ontario Disability Support Program.

[3] Following an election and a change in government, in July 2018 Ontario announced that it planned to terminate the BI Program before three years had elapsed. In the result, final payments were made in March 2019 to those who had enrolled in the BI Program.

[4] By Statement of Claim issued March 28, 2019, and amended October 23, 2019 (the “Amended Claim”), the appellants, as representative plaintiffs, commenced this proceeding against Ontario under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the “*CPA*”). The Amended Claim defines class members as

all persons who were enrolled by Ontario in the BI Program as part of the "Payment Group", which the Amended Claim, in turn, defines as "the group of individuals who were enrolled in the Basic Income Pilot Project and who were approved for the payment of BI Payments and who thereafter received BI Payments until the Final Payment Date" of March 25, 2019.

[5] As will be described in more detail later in these reasons, in their Amended Claim the appellants seek damages for what they allege was the wrongful termination of the BI Program before the expiry of three years. The claims for damages sound in breach of contract, breach of undertaking, negligence, breach of a public law duty,[1] and breach of s. 7 of the *Canadian Charter of Rights and Freedoms*. The damages sought included various financial obligations the appellants had assumed in reliance on the BI Program, including obtaining loans and enrolling in educational programs.

[6] The appellants moved under s. 5(1) of the *CPA* for certification of their action as a class proceeding and related relief.[2] Ontario opposed the motion, although

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[1] This claim was not pursued on appeal.
[2] The portions of s. 5(1) relevant to this appeal are:

> 5 (1) The court shall, subject to subsection (6) and to section 5.1, certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
> …
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues
> …

the parties agreed that the certification criteria set out in *CPA* s. 5(1)(b) – an identifiable class – and s. 5(1)(e) – the existence of a representative plaintiff – were met. Ontario took the position that the appellants had failed to establish that: (i) their pleadings disclosed a cause of action (*CPA* s. 5(1)(a)); (ii) the claims of the class members raised common issues (*CPA* s. 5(1)(c)); and (iii) a class proceeding would be the preferable procedure for the resolution of the common issues (*CPA* s. 5(1)(d)).

[7] By order dated November 30, 2020, the certification judge dismissed the appellants' certification motion (the "Dismissal Order"). He concluded that the appellants' Amended Claim did not disclose a reasonable cause of action and therefore failed to satisfy s. 5(1)(a) of the *CPA*. The certification judge's reasons unfortunately did not address the commonality or preferability criteria of the *CPA* s. 5(1) certification test.

[8] The appellants appeal. They ask this court to set aside the Dismissal Order and certify their action.

[9] For the reasons set out below, I would allow the appellants' appeal in part and set aside that part of the Dismissal Order which refused to certify their breach of contract claim. I would remit the issue of commonality and preferable procedure in respect of the breach of contract cause of action to the certification judge for determination.

[10] These reasons are structured as follows. First, I will provide a summary of the BI Program. Next, I will review the legal principles governing appellate review of a decision refusing to certify an action as a class proceeding. Finally, I will examine the certification judge's treatment of each of the appellants' pleaded causes of action.

II. OVERVIEW OF THE BASIC INCOME PILOT PROJECT PROGRAM

[11] The BI Program was not the creature of statute or regulation. Instead, it was implemented through a series of documents administered by the Minister of Children, Community, and Social Services (the "Minister") and the Ontario Ministry of Children, Community, and Social Services (the "Ministry").

[12] The following description of the BI Program is taken from the facts pleaded in the Amended Claim.

[13] In its 2016 budget, the Government of Ontario announced its intention to establish a pilot project to study the value of implementing a basic income for residents of Ontario. The government hired Mr. Hugh Segal to advise on how to implement a pilot project. In August 2016, Mr. Segal delivered a discussion paper to then-Premier Kathleen Wynne and the Minister containing advice and recommendations for the design and implementation of a basic income pilot project.

[14] In April 2017, Premier Wynne announced the commencement of the BI Program in three urban areas: Hamilton/Brantford, Lindsay, and Thunder Bay. In her speech announcing the program, the Premier stated that people participating in the three pilot communities “will receive a minimum amount of income each year – a basic income, no matter what.” She described the pilot as a three-year project in the selected communities.

[15] In late April 2017 the Ministry issued a news release and published a webpage that described the BI Program.

[16] The Amended Claim pleads that in May 2017, the Ministry developed an information booklet for use by Ministry representatives in their interactions and meetings with eligible participants to persuade them to apply for acceptance into the Basic Income Pilot Project. The booklet was accompanied by application forms and other materials.

[17] Each class member signed an application form to apply for enrolment into the BI Program and, if chosen, to receive BI Payments as part of the Payment Group. In the result, over 4,000 class members were enrolled into the BI Program as part of the Payment Group. By April 2018, approximately 2,000 additional individuals were enrolled into the BI Program as part of what the Amended Claim describes as the “Control Group”, namely the group of individuals who were

enrolled in the BI Program but who did not receive Bl Payments. Those in the Control Group do not form part of the proposed class.

[18] The Amended Claim pleads that the amounts paid in BI Payments were greater than the amounts class members would have received under other social welfare benefit programs but for their acceptance into the BI Program.

[19] In June 2018, a provincial election was held. The Progressive Conservative Party formed a new majority government.

[20] In late July 2018, Ontario announced that it was terminating the BI Program. All BI Payments ceased as of March 25, 2019.

[21] The Amended Claim identifies the damages suffered by class members as: (i) the amount of the BI Payments improperly denied by reason of the early cancellation of the BI Program; (ii) expenses incurred and amounts paid that will have to be foregone due to the BI Program's early cancellation; (iii) general damages for inconvenience, loss of time, frustration, anxiety, mental distress, psychological injury and emotional upset related to the early cancellation; and (iv) consequential losses relating to the loss of other social welfare benefits or tax advantages.

III. APPLICATION FOR JUDICIAL REVIEW

[22] Prior to the Final Payment Date, the appellants initiated in the Divisional Court an application for judicial review to quash the decision to cancel the

BI Program. The Divisional Court dismissed the application: *Bowman et al. v. Her Majesty the Queen*, 2019 ONSC 1064, 58 Admin. L.R. (6th) 327 (Div. Ct.) (hereafter "*Bowman* 2019").

[23] The Divisional Court held that the authority to implement the BI Program was based on the Crown's common law spending powers. In choosing to wind down the BI Program, the Cabinet made a policy decision regarding the allocation of public resources. Such a decision did not give rise to enforceable rights on judicial review; a government cannot be required by the court to make or continue to fund an expenditure, as the distribution of government funds is a political, not a judicial, function: at paras. 35-38.

[24] At the conclusion of its reasons, the Divisional Court noted that its order had no effect on the appellants' class action for damages; it only addressed the question of whether the court could quash the government's decision: at para. 60.

IV. GOVERNING LEGAL PRINCIPLES REGARDING CERTIFICATION

[25] The principles regarding the certification of a class proceeding are well-established:

> (i) In Ontario, s. 5 of the *CPA* contains the criteria for certifying class actions. The *CPA* should be construed generously in a way that gives full effect to the benefits foreseen by the drafters: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at paras. 14-15;

(ii) The onus is on the representative plaintiff to show why the certification criteria have been met;

(iii) The certification stage is decidedly not meant to be a test of the merits of the action. The certification stage focuses on the form of the action. The question is not whether the claim is likely to succeed but whether the suit is appropriately prosecuted as a class action: *Hollick*, at para. 16; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 102.

(iv) The plaintiff must show "some basis in fact" for each of the certification criteria, other than the requirement that the pleadings disclose a cause of action: *Hollick*, at paras. 25-26; *Pioneer Corp. v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295, at para. 27; *Shah v. LG Chem Ltd.*, 2018 ONCA 819, 142 O.R. (3d) 721, at para. 22, leave to appeal refused, [2018] S.C.C.A. No. 520; *Fehr v. Sun Life Assurance Company of Canada*, 2018 ONCA 718, 84 C.C.L.I. (5th) 124, leave to appeal refused, 2019 CanLII 37480 (SCC), at para. 41;

(v) The certification requirement under *CPA* s. 5(1)(a) – the pleadings or notice of application discloses a cause of action – is the same as the test in r. 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, under which a party seeks to strike out a pleading on the ground it discloses no reasonable cause of action: *Cirillo v. Ontario*, 2021 ONCA 353, 486 C.R.R. (2d) 25, at para. 32, leave to appeal refused, [2021] S.C.C.A. No. 296. Accordingly, in assessing whether the representative plaintiff has met s. 5(1)(a)'s criterion, the court must ask whether, taking the pleaded facts to be provable and true, it is "plain and obvious" that the pleading discloses no reasonable cause of action (or cause of action supportable at law), or the claim has no

> reasonable prospect of success: *Hollick*, at para. 25; *Pioneer Corp.*, at para. 27; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, 447 D.L.R. (4th) 543, at para. 14; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 17, 22; and *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 4. While the approach must be generous and err on the side of permitting a novel but arguable claim to proceed, at the same time a claim will not survive an application to strike simply because it is novel. If a court would not recognize a novel claim when the facts as pleaded are taken to be true, the claim is plainly doomed to fail and should be struck: *Imperial Tobacco*, at para. 21; *Atlantic Lottery*, at para. 19.

[26] The standard of review on appeal for each particular certification question depends on the nature of the question: *Pioneer Corp.*, at para. 28. Whether a plaintiff has a cause of action is a question of law reviewable on a standard of correctness: *Pioneer Corp*., at para. 57. Whether the certification judge has identified the appropriate standard for certifying loss as a common issue is also a question of law: *Pioneer Corp.*, at para. 94. Otherwise, substantial deference is owed to a certification judge's application of the test for certification and determination of the common issues. On such questions, appellate court intervention should be restricted to matters of general principle: *Fehr*, at para. 39.

V. CLAIM FOR BREACH OF CONTRACT

The claim pleaded

[27] In their Amended Claim, the appellants plead that Ontario entered into a contract with class members for the provision of BI Payments to each class member for a three-year period commencing on the date each class member received their first payment. The contract resulted from an offer by Ontario to the class of "the benefit of BI Payments in exchange for their acceptance by way of signature, which acceptance was given, resulting in the formation of a contract." In support of that allegation, the Amended Claim pleads that:

- Statements made by the then-Premier, statements contained in a Ministry press release, and statements posted on the Ministry's webpage advised that the Program would run for three years;
- Representations made by Ministry representatives to potentially eligible participants, including representations contained in information booklets and application forms provided to eligible participants, stated that "if chosen to be part of the Payment Group, those participants would be guaranteed the receipt of BI Payments over a three-year period";
- Each class member signed an application form to apply for enrolment into the BI Program and, if chosen, to receive BI Payments as part of the Payment Group;

- The persons presenting “the application form and the Bl Pilot more generally to the Class had authority from the [Ministry] to execute a contract with the Class Member for their enrolment in the Bl Pilot and to provide for Bl Payments to such Class Member if such Class Member was chosen to be part of the Payment Group”;
- As a result, over 4,000 class members were enrolled into the BI Program as part of the Payment Group;
- Ontario sent a letter to each class member “to advise them that they had been selected for enrolment and that they ‘will receive’ BI Payments in the amount specified in the letter”;
- Ontario paid the class members their promised BI Payments beginning shortly after their accepted enrolment into the BI Program and continued making those payments on a regular basis; and
- Ontario cancelled the BI Program before the expiration of three years, thereby breaching the contract.

[28] The Amended Claim also pleaded that an exchange of consideration underpinned the contract:

> 92. Further, the Class accepted the offer of Bl Payments by agreeing to assume a number of obligations, including agreeing to, *inter alia,*
>
> > (a) complete surveys at a rate of pay, per survey, that was lower than the amounts given to those in the Control Group;

> (b) disclose of [*sic*] their tax and other financial information on an ongoing basis;
>
> (c) expose their personal and private lives to scrutiny through surveys;
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> (d) forego ODSP and OW benefits; and,
>
> (e) make themselves human subjects in a major scientific experiment.
>
> 93. By virtue of the exchange of BI Payments for the assumption by the Class of the obligations set out above, consideration for the contract was exchanged between the Parties.

[29] The appellants included in their certification motion record copies of the various booklets and application forms referenced in their Amended Claim. As the certification judge noted in his reasons, at paras. 25 and 27, both parties pointed to language in those documents to support their respective positions as to whether the Amended Claim disclosed a cause of action for breach of contract, stating:

> The plaintiffs argue that contractual language of offer and acceptance, and consideration, can be found in the information booklet and application forms. At the hearing, plaintiffs' counsel reviewed the information booklet and application form in an attempt to illustrate such language:
>
> • that one must "apply" for the program by submitting an "application form";
>
> • one group "will receive" monthly Basic Income payments for up to a three-year period;
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> • "You will be asked to complete these surveys periodically during the pilot period";
>
> • "You must meet all of the criteria here to participate … eligibility criteria";

> • “For ongoing financial eligibility and evaluation purposes, you will be asked to complete your taxes in every year …”;
>
> • eligible applicants “will receive” additional information and materials to complete before “being accepted” into the Pilot;
>
> • “consent” for the sharing of personal information will be requested;
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> • “You will be asked to complete surveys”;
>
> • “Ongoing Expectations to Receive Payments”;
>
> • “Participation in the Basic Income Pilot is entirely voluntary – no one is required to participate, and they can choose to leave the Pilot at any time and do not need to offer any reason for doing so”;
>
> • applicants have to sign to say they “understand” what they are getting into and that they “agree to participate”; and
>
> • applicants have to sign to say that they understand that they must also participate in a research study.
>
> …

In addition, if the plaintiffs are relying upon the information booklet and application forms to supplement their statement of claim, the language quoted above should be read in tandem with other language included in those documents, including:

> • “The three-year Ontario Basic Income Pilot (OBIP) will study …”;
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> • “The Pilot will run for up to three years”;
>
> • “Your participation in the Pilot is temporary. Any decisions you make about your future based on the amount you receive from Basic Income should take this into account.

> Participants will get notifications about the close of the Pilot in advance";
>
> • "I/we understand … All participants living in Lindsay will receive Basic Income payments for up to a three-year period"; and
>
> • "Participants living [elsewhere] will be assigned to two groups One group receives Basic income payments for up to a three-year period. The other group is called the Comparison Group, and they do not receive Basic Income payments."

The certification judge's decision

[30] The certification judge proceeded to interpret the language in the information booklet and application forms,[3] concluding at para. 26:

> However, I do not interpret the language in the information booklet and application forms to be contractual. The documents set out the available benefits, and the eligibility conditions for participants, both initial and ongoing. What the plaintiffs argue to be contractual consideration are simply the conditions of ongoing eligibility. Such conditions are the normal stuff of social benefit programs.

[31] The certification judge then rejected the appellants' submission that the language in some of the BI Program's materials describing benefits payable "up to a three-year period" was not inconsistent with a guarantee of payments for a full three years. The certification judge distinguished the cases upon which the appellants relied and concluded that the words "up to a three-year period" should

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[3] As the certification judge noted at para. 24 of his reasons, in oral argument before him counsel advised that the appellants did not rely upon anything that may have been said to them by individuals with whom they interacted in applying for the BI Program.

"be interpreted using their ordinary meaning": at para. 30. He concluded, at para. 34:

> The facts pleaded in the statement of claim to establish a contract are conclusory. The plaintiffs have attempted to support those facts by reference to the information booklet and application forms referred to in the statement of claim. In my view, the facts pleaded, as supplemented by the terms of those documents, do not support a contractual relationship. The BI Pilot was a social benefits program with a research component. In these circumstances I conclude that it is plain and obvious that the statement of claim does not disclose a reasonable cause of action for breach of contract.

Positions of the parties

[32] The essence of the appellants' submission is that the certification judge exceeded the proper limits of the inquiry required by *CPA* s. 5(1)(a) in holding that their breach of contract claim did not disclose a cause of action. Given that their Amended Claim pleaded that the BI Program consisted of a series of documents which, when read together, in the context of the factual matrix, constituted a contractual guarantee of three years of BI Payments, the s. 5(1)(a) jurisprudence required the certification judge to accept those pleaded facts as true and permit the breach of contract claim to proceed. Instead, the certification judge performed a merits-based analysis of the pleaded breach of contract claim, an exercise inappropriate to a r. 21.01-type dispute, as this court cautioned in *The Catalyst Capital Group Inc. v. Dundee Kilmer Developments Limited Partnership*, 2020 ONCA 272, 150 O.R. (3d) 449. As the appellants put it in their factum:

> [The motion judge's] interpretive exercise should have been saved for the trier of fact, one who would interpret the alleged contract using the correct methodology…
>
> [C]ertification is not the place to conclusively determine whether there was or was not a contract or that its words promised a three-year BI Payment or not. The plain and obvious test governs.

[33] As an alternative submission, the appellants critique the interpretive exercise undertaken by the certification judge, arguing that it ignored the factual matrix within which the alleged contract was formed and departed from the jurisprudence regarding how certain words and phrases point to the formation of a contractual relationship.

[34] Ontario essentially argues that *CPA* s. 5(1)(a) permits a certification judge to engage in some consideration of the merits of a breach of contract claim. Here, the certification judge's conclusion that no contract arose between Ontario and class members is not tainted by reversible error.

Analysis

[35] I start by recalling the context in which a certification judge must conduct any *CPA* s. 5(1)(a) analysis. As the Supreme Court observed in *Hollick*, at para. 16, in its 1982 report the Ontario Law Reform Commission proposed that new class action legislation include a "preliminary merits test" as part of the certification requirements. That proposed test would have required a class representative to show that "there is a reasonable possibility that material

questions of fact and law common to the class will be resolved at trial in favour of the class."

[36] The Legislature did not adopt the proposed preliminary merits test when it enacted the *Class Proceedings Act, 1992*.[4]

[37] The consequence of that legislative choice was described by the Supreme Court at para. 16 of *Hollick*:

> Instead it adopted a test that merely requires that the statement of claim "disclos[e] a cause of action": see *Class Proceedings Act, 1992*, s. 5(1)(a). Thus the certification stage is decidedly not meant to be a test of the merits of the action: see *Class Proceedings Act, 1992*, s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding"); see also *Caputo v. Imperial Tobacco Ltd.* (1997), 34 O.R. (3d) 314 (Gen. Div.), at p. 320 ("any inquiry into the merits of the action will not be relevant on a motion for certification"). Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: see generally *Report of the Attorney General's Advisory Committee on Class Action Reform*, at pp. 30-33. [Emphasis added.]

[38] This policy, as applied to the s. 5(1)(a) criterion that a pleading must disclose a cause of action, has resulted in the adoption of the "plain and obvious" test. It is true that one formulation of the "plain and obvious" test employs language

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[4] By way of contrast, when the Legislature created through s. 138.3 of the *Securities Act*, R.S.O. 1990, c. S.5, a cause of action for liability for secondary market disclosure, the legislation required leave of the court to commence such an action, with leave to be granted only where "there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff": s. 138.8(1)(b).

seemingly tinged with merits-based phraseology – namely, the claim has no reasonable prospect of success. However, the jurisprudence teaches that in practice the focus of the "plain and obvious" test, as applied to criteria such as that found in *CPA* s. 5(1)(a), is better captured by the following comments by the Supreme Court in para. 4 of *Elder Advocates of Alberta*:

> This is not a decision on the merits of the action, but on whether the causes of action pleaded are supportable at law. The question is whether the pleadings, assuming the facts pleaded to be true, disclose a supportable cause of action. If it is plain and obvious that the claim cannot succeed, it should be struck out. [Emphasis added.]

[39] Accordingly, the inquiry under *CPA* s. 5(1)(a) seeks to determine whether the facts pleaded (which are assumed to be true)[5] are capable of supporting a claim at law – that is, whether they can support a cause of action. That is not an inquiry into the factual merits of the claim but an inquiry into the legal tenability of the claim asserted that forms part of the larger s. 5(1) inquiry into the appropriate form the action should take – specifically, whether the suit is appropriately prosecuted as a class action.

[40] Where the claim asserted by the putative representative plaintiff is one for breach of contract, the analysis under *CPA* s. 5(1)(a) must remain faithful to the governing policy that certification does not involve a decision on the merits of the

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[5] Apart from the small number of cases where the facts pleaded are "manifestly incapable of being proven": *Imperial Tobacco*, at para. 22.

action. Accordingly, the task of the certification judge is not to determine whether the contract pleaded by the plaintiff was, in fact, formed and, if it was, the proper interpretation of the contract. That would draw the court into deciding the merits of the contractual claim, a question generally infused with a strong factual component which, since *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, courts must treat as a question of mixed fact and law: see, generally, the discussion in *Catalyst Capital Group*, at paras. 39-48.

[41] Instead, the task of the certification judge usually is to ascertain whether it is plain and obvious that the facts pleaded by the plaintiff (which must be taken to be true) cannot support, at law, a cause of action for breach of contract. If that is not plain and obvious, then the plaintiff has satisfied the s. 5(1)(a) criterion and the ultimate determination of the merits – was a contract formed and, if it was, what does it mean? – is a matter for another time.

[42] With respect, in the present case the certification judge lost sight of this distinction. Instead of limiting his analysis to the application of the “plain and obvious” test, he examined whether the appellants had established that a contract had been formed between class members and Ontario. That over-stepped the proper boundaries of a *CPA* s. 5(1)(a) analysis.

[43] I do not read the certification judge’s reasons as identifying any reason why the appellants’ pleaded contract claim could not be supportable at law. On the

contrary, in para. 31 of his reasons the certification judge acknowledges that "there can be no doubt that the fact that a government program has a social policy dimension does not preclude a contractual relationship." His reasons also proceeded on the basis that the Amended Claim had pleaded the requisite elements for a cause of action sounding in contract: offer; acceptance; consideration; and breach of a contractual term. What led him to refuse to certify the appellants' contract claim was his determination that in fact no contract had been concluded between the class members and Ontario. That constituted a determination of the appellants' contractual claim on the merits, a determination which exceeded the proper ambit of the s. 5(1)(a) inquiry he was tasked to conduct.

[44] For those reasons, I conclude that the certification judge erred in holding that the appellants' Amended Claim did not disclose a cause of action for breach of contract for purposes of *CPA* s. 5(1)(a).

[45] Although the certification judge concluded the appellants' breach of contract claim did not satisfy *CPA* s. 5(1)(a), he was not prepared to treat two arguments advanced by Ontario as relevant to the s. 5(1)(a) determination, namely that: (i) the BI Program administrators lacked the necessary authority to enter into the alleged contracts; and (ii) the necessary appropriations under the *Financial Administration Act*, R.S.O. 1990, c. F.12 were not made for BI Payments following the BI Program's cancellation. The certification judge stated, at para. 35:

> If I had found that the statement of claim otherwise raised a reasonable cause of action, I would not have given effect to those arguments, at this stage in the litigation. In my view, they are issues that Ontario should plead by way of defence, and that the plaintiffs should have an opportunity to explore by way of discovery.

[46] On this appeal, Ontario does not challenge the certification judge's holding that whether BI Program administrators lacked authority to enter into contracts was not suitable for a s. 5(1)(a) determination. However, Ontario continues to maintain that (i) the requirement of the *Executive Council Act*, R.S.O. 1990, c. E.25, that a binding contract with the Crown be signed by a person with authority, and (ii) the effect of the lack of post-cancellation appropriations for BI Payments, are proper issues for determination under *CPA* s. 5(1)(a). I am not persuaded by that submission. I agree with the certification judge that those matters go to any defence Ontario might assert, not to the issue of whether the Amended Claim discloses a cause of action.

VI. CLAIM FOR BREACH OF UNDERTAKING

The claim pleaded

[47] In their Amended Claim, the appellants seek damages for breach of undertaking, which they plead in the following manner:

> 96. By virtue of the facts pleaded above, the Defendant undertook to provide Bl Payments to each Class Member for a three-year period commencing on the date the Class Member received their first payment.

> 97. Further, or in the alternative, the Defendant undertook to provide BI Payments to each Class Member for a three-year period associated with the operation of the BI Pilot.
>
> 98. By cancelling the BI Pilot early, the Defendant failed to fulfil its undertakings.

[48] Before the certification judge, the appellants did not take the position that they were asserting a novel cause of action. Instead, they contended that authorities supported a cause of action founded on a government's breach of an undertaking given to a group of people.

[49] Specifically, the appellants relied on the decision of Cullity J. in *Ontario Public Service Employees Union v. Ontario* (2005), 13 C.P.C. (6th) 178 (Ont. S.C.). In that case, as a result of a change in government funding policies, the providers of certain home-care services became employed by new entities. The providers' participation in their former employers' pension plans terminated and they became members of pension plans administered for the new entities. Some employees commenced an action for which they sought certification. They alleged that the re-structuring of their pension plans had reduced their level of pension benefits and sought damages from Ontario. Their main cause of action sounded in negligent misrepresentation. However, the plaintiffs also advanced a claim against the government for breach of "binding contractual undertakings". Cullity J. concluded that it was not plain and obvious that those two claims could not succeed and certified the proceeding.

The certification judge's decision

[50] In the present case, the certification judge concluded that the appellants' reliance upon the *OPSEU* decision was misplaced and no cause of action for breach of undertaking as pleaded existed.

Positions of the parties

[51] While the appellants concede that the *OPSEU* decision provides the only jurisprudential support for their pleaded cause of action for breach of undertaking, they submit that absent a contractual or negligence claim, the cause of action should be permitted to proceed.

[52] Ontario argues that the *OPSEU* decision does not support the existence of a non-bargain-based breach of undertaking, such as that pleaded by the appellants.

Analysis

[53] I am persuaded by Ontario's submission. I read *OPSEU* as certifying a form of breach of contract claim, not permitting some sort of free-standing breach of undertaking claim to proceed. In *OPSEU*, the court concluded that it was not plain and obvious the pleaded claim of breach of "binding contractual undertakings" could not succeed. The court treated the pleaded claim as one asserting that the Crown had bound itself contractually to ensure that the employees would not lose pension benefits due to the re-organization of their employment: at para. 45.

[54] When *OPSEU* is understood in that fashion, the appellants' pleaded breach of undertaking claim collapses into, and is subsumed by, their claim for breach of contract, which I have concluded discloses a cause of action for purposes of *CPA* s. 5(1)(a).

[55] Apart from *OPSEU*, the appellants have not pointed to a body of jurisprudence that confirms a claim akin to their breach of undertaking pleading. Nor have they demonstrated the need for the creation of a novel legal remedy, given my conclusion regarding their cause of action sounding in contract: *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205, 145 O.R. (3d) 494, at paras. 25-26 & 41-42, leave to appeal refused, [2019] S.C.C.A. No. 174. Indeed, the appellants concede as much in their factum where they acknowledge "the *OPSEU* breach of undertaking tort may admittedly be redundant."

[56] Consequently, I see no error in the certification judge's conclusion that the appellants' plea of breach of undertaking does not disclose a cause of action for purposes of *CPA* s. 5(1)(a).

VII. CLAIM IN NEGLIGENCE

The claim pleaded

[57] The Amended Claim pleads a cause of action sounding in negligence in the following terms:

100. At all material times, the Defendant owed a duty of care to the Class Members that was breached by its negligent conduct in administering the Basic Income Pilot Project including, notably, by cancelling BI Payments early.

101. It was foreseeable by the Defendant that ceasing the BI Payments early would cause the Class Members to suffer damages and to suffer injury due to the frustration and emotional upset associated with being told that BI Payments were ceasing prematurely.

102. The Class Members were in a relationship of proximity to the Defendant. They entered into a special relationship with the Defendant by agreeing to become human research subjects under the BI Pilot on the strength of clear, consistent promises that certain BI Payments would be made for the fixed period and/or periods pleaded above. The Class entered into such a relationship with the assurance that the BI Pilot would be administered and monitored with all proper controls in place.

103. The Defendant communicated directly, specifically, and repeatedly with each Class Member in respect of their entitlements to BI Payments.

104. Further, all Class Members were in a position of reliance upon the Defendant and the representatives, agents and employees of the MCCSS that the Defendant and the MCCSS would administer the BI Pilot with reasonable diligence, especially as all members of the Class were persons in vulnerable positions as low income earners and as persons living with disabilities.

105. The Defendant breached its duty of care owed to the Class to pay BI Payments until the promised and agreed-upon final date of payment and to not cease payments early.

106. As particularized in Section H., below, the Plaintiffs and Class have suffered and will suffer damages as a result of the Defendant's negligence.

[58] On the certification motion below, the parties proceeded on the basis that the appellants were asserting a novel claim regarding the existence of a duty of care owed by Ontario and, consequently, the two-stage *Anns/Cooper*[6] test applied. The elements of that two-stage test were summarized recently by the Supreme Court of Canada in *Nelson (City) v. Marchi*, 2021 SCC 41, 463 D.L.R. (4th) 1, at paras. 17-18:

> Under the first stage, the court asks whether a *prima facie* duty of care exists between the parties. The question at this stage is whether the harm was a reasonably foreseeable consequence of the defendant's conduct, and whether there is "a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff" … Proximity arises in those relationships where the parties are in such a "close and direct" relationship that it would be "just and fair having regard to that relationship to impose a duty of care in law upon the defendant" …
>
> If there is sufficient proximity to ground a *prima facie* duty of care, it is necessary to proceed to the second stage of the *Anns/Cooper* test, which asks whether there are residual policy concerns outside the parties' relationship that should negate the prima facie duty of care … As stated in *Cooper*, at para. 37, the residual policy stage of the *Anns/Cooper* test raises questions relating to "the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally", such as:
>
> > Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an

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[6] *Anns v. Merton London Borough Council*, [1978] A.C. 728; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537.

> unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized? [Citations omitted.]

[59] Canadian jurisprudence has long recognized that reasons of broad policy applicable at the second stage of the *Anns*/*Cooper* test militate against recognizing a duty of care by public authorities for core policy decisions they make. Instead, at common law public authorities enjoy an immunity from suit for negligence for "true policy decisions": *Nelson*, at paras. 22-25.

[60] Ontario took the position it was plain and obvious that the appellants' negligence claim failed the second stage of the *Anns*/*Cooper* test because the claim sought to impugn a government policy decision which, under the common law of negligence, was immune from suit.

[61] In addition, Ontario argued that no cause of action could be asserted against it for the termination of the BI Program due to the immunity from suit provided by s. 11(4) of the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sched. 17 ("*CLPA*"), which states that "[n]o cause of action arises against the Crown … in respect of any negligence or failure to take reasonable care in the making of a decision in good faith respecting a policy matter …"

The certification judge's decision

[62] The appellants argued that Ontario made an operational decision, not a policy decision, by ending the BI Payments and, as a result, it was not plain and

obvious that their negligence claim would fail the second step of the *Anns/Cooper* test. The certification judge did not accept that characterization of their negligence claim; he regarded their claim as one in respect of a government policy decision. He wrote, at para. 48:

> [The appellants] emphasize that they are not saying that the decision to cancel the pilot is actionable; but rather, it was the ending of the payments seven or eight months later. In doing so, they seek to characterize the ending of the payments as an operational decision somehow divorced from the policy decision to cancel the program. However, the payments did not end by themselves. They were not cancelled by a ministry employee charged with operating the program. They were cancelled as a result of a cabinet-level decision to cancel the program. The fact that benefits continued to be paid for a period following that decision does not make it otherwise.

[63] The certification judge also was not persuaded by the appellants' submission that only the government's decision to initiate the BI Program constituted a policy decision for purposes of the *Anns/Cooper* test, whereas its decision to cease making the BI Payments was merely an operational one: at paras. 49-52. He concluded, at para. 54:

> In my view, it is plain and obvious that Ontario's decision to cancel the pilot project and cease making the basic income payments was a core policy decision for which Ontario may rely upon Crown common law immunity. It was a decision as to a course or principle of action based upon public policy considerations, including economic, social and political factors.

[64] The certification judge next addressed Ontario's submission that its decision to end the BI Program was not actionable pursuant to ss. 11(4) and (7) of the *CLPA* because it was a decision in good faith respecting a "policy matter", which s. 11(5)(b) of that Act defines to include "the funding of a program … including (i) providing or ceasing to provide such funding." He rejected the appellants' argument that the immunity from suit afforded by *CLPA* s. 11(4) did not extend to the cancellation of the funding writing, at paras. 59 and 61:

> While "policy decision" includes "cancelling any funding" or the "termination of any program", the [appellants] argue that the s. 11(4) immunity does not extend to the cancellation of the funding, itself. They agree that any negligence surrounding a decision to cancel the funding is immunized, but not the actual cancellation, pursuant to that decision, because the cancellation of the funding is operational. I disagree. The immunity given to government for policy decisions to cease funding programs, projects or other initiatives would be illusory, if it could not implement those decisions by cancelling the funding.
>
> …
>
> Section 11(8) of the *CLPA* provides: "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). The [appellants'] claim in negligence is such a proceeding and is therefore deemed to have been dismissed.

Positions of the parties

[65] The appellants advance several arguments about why the certification judge erred in failing to recognize that their Amended Claim disclosed a cause of action in negligence:

(i) Although on the certification motion below the appellants acknowledged that the two-stage *Anns/Cooper* test applied, they now contend that their pleaded duty of care is analogous to existing duties of care, thereby obviating the need to apply the *Anns/Cooper* test;

(ii) In any event, stage two *Anns/Cooper* considerations are only invoked to negate the existence "of a duty of care at the outset and not to excuse a breach";

(iii) Negligence law requires that once a defendant undertakes to engage in activities or takes control over situations in a way that future inactivity or failures might harm a plaintiff, a duty arises to ensure the plaintiff is not harmed; and

(iv) If the application of the common law leads this court to conclude that the appellants' negligence claim is not doomed to fail, then the immunity from suit found in *CLPA* s. 11(4) is not available to Ontario by reason of the decision of this court in *Francis v. Ontario*, 2021 ONCA 197, 154 O.R. (3d) 498.

[66] The intervener, Canadian Civil Liberties Association ("CCLA"), submits the *Francis* decision clarified that the phrase "policy matter" in s. 11(4) of the *CLPA* incorporates the jurisprudential distinction between policy and operational decisions. As well, it argues that the decision in *Nelson* requires that in any duty of care analysis the conduct at issue must be described with precision to ensure immunity only attaches to core policy decisions.

[67] Ontario responds that the certification judge was correct in holding that the decision to terminate and wind-down the BI Program was a government policy decision that was not subject to a duty of care. Further, it argues that the analysis and result in *Francis* do not remove the clear immunity from suit for policy matters regarding the cessation of funding for a program afforded by *CLPA* s. 11.

Analysis: Core policy immunity

[68] Canadian jurisprudence has long recognized that a sphere of government decision-making, consisting of core policy decisions, should remain free from judicial supervision based on the standard of care in negligence: *Nelson*, at para. 2. At common law, core policy decisions are immune from negligence liability, as long as they are not irrational or made in bad faith: *Nelson*, at paras. 3, 41.[7] Regardless of whether a plaintiff is asserting that a public authority owes it

[7] The Amended Claim does not allege that Ontario acted irrationally or in bad faith in terminating the BI Program and ceasing the BI Payments.

a duty of care under an established or analogous duty of care or a novel duty of care, it is open to the public authority to prove that the relevant government decision was a core policy decision immune from liability in negligence: *Nelson*, at paras. 24, 30. As explained by the Supreme Court at para. 36 in its *Nelson* decision:

> [W]e need not decide whether core policy immunity is best conceived of as a rule for how the *Just*[8] category operates, or whether it should be viewed as a stage two consideration under the *Anns/Cooper* framework even when an established category of duty applies. It makes no practical difference to the outcome of the appeal. Regardless of where core policy immunity is located in the duty of care framework, the same principles apply in determining whether an immune policy decision is at issue. Those principles apply in any case in which a public authority defendant raises core policy immunity, whether the case involves a novel duty of care, falls within the *Just* category, or falls within another established or analogous category. What is most important is that immunity for core policy decisions made by government defendants is well understood and fully explored where the nature of the claim calls for it. [Emphasis added.]

[69] Accordingly, the appellants' suggestion that immunity for core policy decisions does not apply where a duty of care has been recognized in analogous cases is misplaced.[9] *Nelson* teaches that a public authority may raise core policy

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[8] In *Just v. British Columbia*, [1989] 2 S.C.R. 1228, the Supreme Court determined that public authorities owe road users a duty to keep roads reasonably safe, but recognized that the duty was subject to a public authority's immunity for true policy decisions.

[9] I also do not accept the appellants' assertion that the jurisprudence recognizes a previously established or analogous category of duty of care that applies to their claim. The appellants point to the decisions in

immunity in both existing/analogous or novel duty of care cases. Where the public authority does so, as in the present case, the key focus is always on the nature of the government decision in issue: *Nelson*, at paras. 2, 54.

[70] The certification judge quite properly examined the Amended Claim to ascertain the nature of the government decision in issue in the appellants' negligence claim. He concluded that their claim rested on a Cabinet-level decision to cancel the BI Program and cease making the BI Payments thereunder: at paras. 48, 53 and 54. I see no error in that conclusion. It accurately captures the gist of the negligence complaint pleaded in the Amended Claim, which is reproduced in para. 57 above.

[71] Nor do I see any error in the certification judge's conclusion that "it is plain and obvious that Ontario's decision to cancel the pilot project and cease making the basic income payments was a core policy decision for which Ontario may rely upon Crown common law immunity": at para. 54. The Amended Claim discloses that that decision was made by democratically accountable persons with a high level of authority (the provincial cabinet), concerned budgetary allotments for government departments, and involved fundamental, value judgment-infused

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Castrillo v. Workplace Safety and Insurance Board, 2017 ONCA 121, 136 O.R. (3d) 654, and *Wright v. Horizons ETFS Management (Canada) Inc.,* 2020 ONCA 337, 448 D.L.R. (4th) 328, leave to appeal refused, [2020] S.C.C.A. No. 257. Neither case concerned a Cabinet-level decision to cease funding a social benefit program; indeed the defendant in *Wright* was not a public authority. Nor did *Castrillo* establish a duty of care owed by the defendant public authority; it merely held that it was not plain and obvious the claim as pleaded failed to disclose a reasonable cause of action in negligence.

public policy choices about the means by which to provide social assistance benefits to a large group of persons, hallmarks of a core policy decision: *Nelson*, at paras. 54, 60, 62, 65.[10]

[72] In *Bowman* 2019, the Divisional Court also characterized Ontario's decision to terminate the BI Program as a Cabinet policy decision, albeit approaching the issue from the perspective of whether the decision was subject to judicial review. The Divisional Court observed that: the authority to implement the BI Program was based on the Crown's common law spending powers; a government cannot be required by a court to continue to fund an expenditure as the distribution of government funds is a political, not a judicial, function; and courts have no power to review the policy considerations that motivate Cabinet decisions: *Bowman* 2019, at paras. 35, 38, 40.

[73] Finally, the appellants argue that once a defendant undertakes to engage in an activity, a duty arises to ensure the plaintiff is not harmed. The common law immunity of public authorities from liability for core policy decisions recognizes that such decisions may cause harm to private parties. Nevertheless, the principle of protecting the legislative and executive branch's core institutional roles and

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[10] In *Leroux v. Ontario*, 2021 ONSC 2269, 484 C.R.R. (2d) 67, leave to appeal to Ont. C.A. granted, M52388 (January 10, 2022), the Divisional Court held, at para. 131, that "devising, implementing and administering a benefits program is a core policy decision of government." In *Cirillo*, this court held that the negligence claims pleaded clearly were aimed at core policy decisions as they related to resource allocations for bail hearings and staffing and, as such, did not disclose a cause of action: at paras. 40, 44. See also *Heaslip Estate v. Ontario*, 2009 ONCA 594, 96 O.R. (3d) 401, at para. 29.

competencies necessary for the separation of powers means that the remedies for those decisions must be through the ballot box instead of the courts: *Nelson*, at paras. 47, 49.

Analysis: Policy matter immunity under the *CLPA*

[74] The appellants advance a further argument: if the application of the common law leads this court to conclude that the appellants' negligence claim is not doomed to fail, then the immunity from suit found in *CLPA* s. 11(4) is not available to Ontario by reason of the decision of this court in *Francis v. Ontario*, 2021 ONCA 197, 154 O.R. (3d) 498. Since I have concluded the certification judge did not err in holding that the government decision which is the subject of the appellants' negligence claim involved a matter of pure policy, thereby attracting immunity from liability in tort, the premise upon which the appellants rest their *CLPA* argument is not present. Nevertheless, as the certification judge addressed the parties' *CLPA* arguments, I will comment briefly on the application of that Act to this case.

[75] The *CLPA* came into force after the appellants' action was commenced. Nonetheless, *CLPA* s. 31(4) provides that s. 11 of the Act applies to proceedings commenced against the Crown before s. 31 came into force, which was May 29, 2019.

[76] As mentioned, *CLPA* s. 11(4) provides that no cause of action arises against the Crown in respect of any negligence in the making of a decision in good faith respecting a policy matter. Section 11(5) provides that a "policy matter" includes:

- The funding of a program, project or other initiative, including ceasing to provide such funding (s. 11(5)(b)(i)); and
- The termination of a program, project or other initiative (s. 11(5)(d)).

CLPA s. 11(7) states that no proceeding may be brought or maintained against the Crown in respect of a matter referred to in s. 11(4). Section 11(8) deals with proceedings, such as the appellants', that were commenced before the *CLPA* came into force, by providing that a proceeding that may not be maintained under s. 11(7) "is deemed to have been dismissed, without costs, on the day on which the cause of action is extinguished" under s. 11(4). Finally, *CLPA* s. 11(9) states that nothing in s. 11 shall be read as abrogating any defence or immunity which the Crown may raise at common law.

[77] The plain language of those statutory provisions provides clear support for the certification judge's conclusion that Ontario's decision to terminate the BI Program and cease making BI Payments constituted a "policy matter" in respect of which no cause of action arose by reason of *CLPA* s. 11(4), with the consequence that the claim for negligence was deemed to have been dismissed under s. 11(8).

[78] The decision in *Francis* does not affect that conclusion. In *Francis*, the motion judge granted summary judgment against Ontario on the basis that it had breached a duty of care to class members arising from the operation of the system of administrative segregation in correctional institutions. This court dismissed the appeal from that judgment. The motion judge held that the government decisions in issue were operational, not policy, decisions, a finding with which this court agreed: at para. 104. Although *CLPA* s. 11(5)(c) included within the statutory definition of "a policy matter" (immunized from suit by s. 11(4)) the "manner in which a program, project or other initiative is carried out", in *Francis* this court concluded that s. 11(5)'s definition of "a policy matter" was predicated on maintaining the common law policy/operational separation: at para. 127. As a result, this court agreed with the motion judge that the government decisions in respect of which summary judgment was granted were not policy matters that enjoyed the immunity from suit provided by s. 11(4).

[79] The tension identified in *Francis* between the statutory language of *CLPA* s. 11(5)(c) and the unimpeached finding that the government decisions at issue in that negligence claim were operational simply does not arise in the present case. The inclusion in *CLPA* s. 11(5)'s definition of "a policy matter" of "the funding of a program…including…ceasing to provide such funding" (s. 11(5)(b)(i)) and "the termination of a program" (s. 11(5)(d)) fits snugly with the common law's conception of a pure policy decision, as I explained in paras. 68 to 71 above.

Summary

[80] For the reasons set out above, I see no error in the certification judge's holding that it was plain and obvious the Amended Claim did not disclose a cause of action in negligence against Ontario and, therefore, did not satisfy the criterion in *CPA* s. 5(1)(a).

VIII. CLAIM UNDER S. 7 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

The claim pleaded

[81] The appellants plead a claim for damages under s. 24(1) of the *Charter* alleging a breach of their rights guaranteed by s. 7 of the *Charter*. Section 7 of the *Charter* states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 24(1) provides: "Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

[82] The appellants' Amended Claim pleads:

> 112. By virtue of the facts pleaded above, the Defendant violated the basic essential human needs of the Class Members and, as such, interfered with their life and security of the person in violation of their rights under Section 7 of the *Canadian Charter of Rights and Freedoms.*

> 113. The BI Payments were essential to the Class Members to meet their basic daily needs. Further, the BI Payments were paid with the goal of potentially altering the Class Members' lives by supporting them as they met their basic needs.
>
> 114. The denial of BI Payments, violated the right of the Class to life, liberty and security of the person, contrary to section 7 of the *Charter.*
>
> 115. As particularized in Section H., below, the Plaintiffs and Class have suffered and will suffer damages as a result of the Defendant's breach of their rights under s. 7 of the *Canadian Charter of Rights and Freedoms.*
>
> 116. The Plaintiffs plead that the Class is entitled to damages pursuant to Section 24(1) of the *Charter.* There are no countervailing considerations that would render damages in this case inappropriate or unjust.

The certification judge's decision

[83] The certification judge concluded that that it was plain and obvious the appellants' claim under s. 7 of the *Charter* did not disclose a reasonable cause of action. He stated that to establish a claim for damages caused by a breach of s. 7 of the *Charter*, a claimant must prove: (1) that the law or state action deprives the claimant of life, liberty or security of the person; and (2) that the deprivation is contrary to the principles of fundamental justice.

[84] The certification judge construed the appellants' Amended Claim as alleging that Ontario's discontinuance of the BI Payments amounted to a breach of rights guaranteed to them under s. 7 of the *Charter* because the cessation of payments

denied them access to basic necessities and caused them to suffer forms of physical and psychological harm.

[85] Relying on the decisions of this court in *Flora v. Ontario Health Insurance Plan (General Manager),* 2008 ONCA 538, 91 O.R. (3d) 412, and *Ferrell v. Ontario (Attorney General)* (1998), 42 O.R. (3d) 97 (C.A.), leave to appeal refused, [1999] S.C.C.A. No. 79, the certification judge concluded that in the absence of a constitutional right requiring Ontario to provide the BI Payments in the first place, there could not be a constitutional right to the continuation of the BI Program. He regarded the appellants' claim as precluded by the law set out in *Flora*: *Bowman*, at para. 74.

[86] As well, the certification judge addressed the appellants' argument, advanced at the oral hearing, that the breach of s. 7 lay in the manner in which Ontario wound-down the BI Payments. The appellants had submitted that the deprivation of a s. 7 right stemmed from the discretionary winding down of payments, as that amounted to a breach of an undertaking to run the program for three years, an undertaking upon which the appellants had relied. The certification judge rejected that submission as the appellants had not provided any authority for the proposition that such an undertaking could form the basis of a constitutional right to a continuation of the payments.

Positions of the parties

[87] The positions advanced on this appeal by the appellants and the intervener, the CCLA, focus on the breadth of the right to “security of the person” in s. 7 and the allegation that the manner by which Ontario terminated the BI Program “deprived” class members of a right guaranteed by the opening clause of s. 7.

[88] The appellants submit their s. 7 claim should be allowed to proceed as it was not plain and obvious that the class members’ security of the person interests were not breached by the winding down and cessation of BI Payments in the special circumstances of the BI Program. They argue their Amended Claim pleaded that the cessation of BI Payments subjected class members to severe physical and psychological harms, which met the requisite level of seriousness for a s. 7 claim.

[89] The appellants concede that there was no constitutional obligation on Ontario to act in the first place to establish the BI Program. However, they contend the case law supports their allegation that the BI Program contained features creating “special circumstances” that required the winding up of the program to comply with s. 7 of the *Charter* and not “cause serious harms” to the class members.

[90] Although the CCLA nominally takes no position on the outcome of the appeal, in fact it advances a more aggressive position than the appellants on the

s. 7 *Charter* claim. The CCLA's submission focuses on the potential breadth of the right of "security of the person" contained in s. 7.

[91] The CCLA argues that it is not plain and obvious that s. 7 of the *Charter* does not impose on Ontario a positive obligation, in appropriate circumstances, to provide the means by which an individual may exercise their right to life, liberty, and security of the person. It contends that the jurisprudence of the Supreme Court of Canada[11] has left open the door to an interpretation of s. 7 rights, especially the right to the security of the person, that protects rights with an economic component. Accordingly, the CCLA submits the motion judge's decision was wrongly premised on an assumption that there is no constitutional right requiring a government to act to provide that which would allow individuals to achieve a basic level of subsistence.

[92] In response, Ontario's primary submission is that the certification judge properly applied the consistent jurisprudence that, in the absence of a constitutional right requiring a government to act in the first place, there is no constitutional obligation on the government to continue measures voluntarily taken. Further, the jurisprudence establishes that a change in the law or government policy does not constitute a "deprivation" for purposes of s. 7 of the

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[11] *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 1003; *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, at paras. 82-83; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 92; and *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, 462 D.L.R. (4th) 1, at para. 20.

Charter. Accordingly, the certification judge correctly concluded that the termination of the BI Program could not support a cause of action founded on the deprivation of life, liberty or security of the person.

Analysis

[93] The certification judge did not err in concluding that it was plain and obvious the appellants' claim under s. 7 of the *Charter* did not disclose a cause of action. That result does not turn upon the issue of whether the right to "security of the person" encompasses economic interests, or on the analytical relevance, if any, of the distinction between positive and negative rights, or on whether the appellants have pleaded a cognizable act of deprivation by Ontario. The result turns on the failure of the appellants to plead the required elements of a cause of action for breach of a s. 7 *Charter* right.

[94] Professor Hamish Stewart, in *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2019), at p. 23, succinctly summarizes the elements of a violation of s. 7 rights claim:

(i) There is some state conduct to which the *Charter* applies;

(ii) The claimant is a natural person or otherwise has standing to invoke a natural person's s. 7 rights;

(iii) The state conduct affects the claimant's life, liberty, or security of the person; and

(iv) The state conduct is not in accordance with the principles of fundamental justice.

[95] In his text, Professor Stewart describes at length the substantive and procedural principles of fundamental justice recognized to date by the jurisprudence under s. 7, as well as those proposed principles of fundamental justice courts have refused to recognize for purposes of establishing a s. 7 claim.

[96] While the appellants' Amended Claim pleads material facts relating to the first three elements of a s. 7 claim, it fails to plead how the alleged deprivation of their s. 7 rights – the termination of the BI Payments or the failure to continue the payments for three years that caused them serious harm – did not accord with the principles of fundamental justice.[12] It is not for a court to speculate which principles of fundamental justice might be in play in a proceeding; it is for the claimant to identify the operative principles of fundamental justice in its pleading. As acknowledged by appellants' counsel in oral argument, the Amended Claim does not particularize the principle of fundamental justice at play in the appellants' s. 7 claim. That is to say, their Amended Claim does not identify the principle or principles of fundamental justice offended by Ontario's termination of the BI Payments or which Ontario failed to follow when terminating the BI Payments.

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[12] In oral argument, appellants' counsel conceded that the Amended Claim did not particularize the relevant principle of fundamental justice.

[97] That omission in their Amended Claim is fatal to the appellants' appeal on this issue. Their Amended Claim fails to plead all the constituent elements of a claim for a violation of the s. 7 rights of class members. As a result, the Amended Claim does not disclose a cause of action and therefore the motion judge did not err in so holding.

IX. SUMMARY ON *CPA* s. 5(1)(a)

[98] By way of summary, I conclude the certification judge erred in holding that it was plain and obvious the Amended Claim did not disclose a cause of action for breach of contract and I would allow the appeal on that ground. I would otherwise dismiss the appeal as I see no error in the certification judge's holdings that it was plain and obvious the Amended Claim did not disclose causes of action for negligence, breach of undertaking or a violation of the class members' rights under s. 7 of the *Charter*.

X. THE REMAINING ISSUES OF COMMONALITY AND PREFERABILITY

[99] Having concluded it was plain and obvious that the Amended Claim did not disclose a cause of action, the certification judge unfortunately did not proceed to consider the other contested issues on the certification motion: namely, whether the claims of the class members raised common issues (*CPA* s. 5(1)(c)) and whether a class proceeding would be the preferable procedure for the resolution of the common issues (*CPA* s. 5(1)(d)).

[100] The appellants submit that in the event this court allows the appeal on the "discloses a cause of action" issue, we should decide the two remaining disputed certification issues. Ontario opposes such an approach, submitting that the commonality and preferable procedure issues should be remitted back to the certification judge for his consideration and decision.

[101] I would follow the approach adopted by this court in *Wright v. Horizons ETFS Management (Canada) Inc.*, 2020 ONCA 337, 448 D.L.R. (4th) 328, at para. 152, leave to appeal refused, [2020] S.C.C.A. No. 257, and remit the remaining certification issues to the certification judge. As Favreau J. (as she then was) observed in *McGee v. Farazli*, 2020 ONSC 7066 (Div. Ct.), at para. 41, a determination of the common issues and preferable procedure criteria in *CPA* s. 5(1) requires a comprehensive review of the relevant evidence, a matter more appropriately done by the certification judge.

XI. DISPOSITION

[102] For the reasons set out above, I would allow the appeal in part. I would set aside the Dismissal Order and substitute therefore an order that the Amended Claim discloses a cause of action for breach of contract that satisfies s. 5(1)(a) of the *CPA*. I would otherwise dismiss the appeal from the certification judge's s. 5(1)(a) determinations. I would remit the matter to the certification judge to determine whether the criteria for the certification of the remaining claim are met.

[103] Neither party sought costs of the certification motion below. There was mixed success on the appeal. In the event the parties are unable to agree upon the costs of the appeal, they may deliver written cost submissions of up to five (5) pages in length on or before Friday, July 8, 2022.

Released: June 21, 2022 SCP

J.A.

I agree. Sossepall JA

I agree. Groza J.A.