CITATION: Leroux v. Ontario, 2018 ONSC 6452
COURT FILE NO.: CV-17-573091-CP
DATE: 20181214

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Marc Leroux as Litigation Guardian of Briana Leroux / Plaintiff

AND:

Her Majesty the Queen in Right of the Province of Ontario / Defendant

Proceeding under the *Class Proceedings Act, 1992*

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Kirk Baert, Jody Brown and Janeta Zurakowski* for the Plaintiff

Robert Ratcliffe, Rochelle Fox, Vanessa Glasser and Teresa Yang for the Defendant

HEARD: October 30 and 31, 2018

MOTION FOR CERTIFICATION

[1] This is a motion for the certification of a proposed class action against the defendant government in its operation and administration of a provincial social assistance program for developmentally disabled persons. The action is being brought by the father of a disabled person in his capacity as her litigation guardian.

Background

[2] Briana Leroux is 20 years old and lives in Timmins, Ontario with her father and litigation guardian. Briana is developmentally disabled. She was diagnosed with a rare brain disorder when she was two. Brianna remains non-verbal and functions at the level of a three-year-old. She requires constant care for everything from eating, basic mobility and personal hygiene. Briana will be developmentally disabled for the rest of her life. Her father counts on the financial support and social services provided by the defendant provincial government.

[3] For the first 18 years of her life, her family's application for social assistance fell under the rubric of the Ministry of Children and Youth Services ("MCYS"). With the enactment in 2008 of the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008*[1] ("the 2008 Disabilities Act"), developmentally disabled persons who turn 18 are required to apply to the Ministry of Community and Social Services ("MCSS") to continue the receipt of support and services.

[4] Although a meaningful milestone for many, turning 18 has no medical or other significance for developmentally disabled persons. Nothing changes when they become 18 – they remain disabled, with the same mental age and the same need for support and services. The only difference is that now they have to deal with the MCSS.

[5] According to the material that is before the court, the experience of parents and families in dealing with the MCSS on behalf of disabled loved ones has "pushed [them] to the brink of disaster." The problem is not in the governmental application process -- there are relatively few complaints about the process to establish eligibility or obtain approval for continuing support and services. The problem arises *after* the developmentally disabled person has been formally assessed and approved to receive government support and services. The evidence is that the families are then "are dropped off a cliff" and nothing happens - for a very long time.

[6] When Briana turned 18 and her family was required to deal with the MCSS, she was duly assessed and approved for support and services by the appropriate Developmental Services Office ("DSO"). She was then placed on waitlists with no estimate as to how long she would have to wait for the approved services. Her father's evidence, when he swore the affidavit in this action a year ago, was that Brianna at that point had been without services for one and a half years.

[7] Given that no support or services were forthcoming from the MCSS, the plaintiff tried to provide the round-the-clock care himself. His evidence is that, even with his flexible work schedule as a realtor in Timmins, he was quickly driven to the breaking point and had to apply for emergency support. The application for emergency support was successful, but was capped after two extensions, despite the ongoing urgency.

The proposed class action

[8] The plaintiff believes that his experience with the MCSS is one that is common to thousands of Ontario families. He brings this proposed class action on behalf of all developmentally disabled persons who have turned 18 and have been governmentally

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[1] S.O. 2008, c. 14.

approved to receive support and services but have then been relegated to indeterminate waitlists, inconsistent prioritization processes for the waitlisted services and poor matching programs. The complaint, in a nutshell, is about the negligent operation of a social assistance system that has approved the delivery of much-needed support and services but then fails to follow up.

[9] The proposed class action is limited to the alleged negligence affecting developmentally disabled persons who have been assessed and approved to receive support and services under one of the following three programs – the "residential" program, the "caregiver respite" program and the "Passport" program – and were then placed on indeterminate waitlists, described by the defendant as "service registries."

[10] The plaintiff advances three causes of action: negligence, breach of fiduciary duty and breach of s. 7 of the *Canadian Charter of Rights and Freedoms*.

[11] Before I turn to the certification analysis, several preliminary observations are in order. The observations that follow will expedite my consideration of the certification criteria that are set out in s. 5(1) of the *Class Proceedings Act, 1992* ("CPA").[2]

Preliminary observations

(1) The plaintiff's complaint is not about inadequate funding

[12] The plaintiff and his counsel understand that, generally speaking, funding is a government policy decision and government policy decisions are not judicially reviewable. The design and funding of a statutory social assistance scheme is a matter for the legislature and not the courts. As Cullity J. noted in *Wareham*:[3]

> If the legislature has created a system [of social assistance] that cannot be administered effectively without a significant further allocation of resources, or otherwise, the remedy lies in the political process rather than in the civil law of negligence.

[13] The statement of claim, however, makes clear that the plaintiff's complaint is not about inadequate funding or the need for a greater allocation of governmental resources but about the negligent utilization and administration of existing resources. The plaintiff points to the indeterminate delays in the waitlisted services, the flawed computer programs and bad databases and the poor prioritization and matching of available resources.

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[2] S.O. 1992, c. 6.
[3] *Wareham v. Ontario (Community and Social Services)* [2008] O.J. No. 166 at para. 26.

[14] The statement of claim pleads, in essence, that the defendant government, as architect and overseer of the statutory scheme set out in the 2008 Disabilities Act, regulates and controls the DSOs by way of funding agreements, policy directives, internal guidelines and otherwise, and is therefore responsible for the management and operation of a social assistance system that includes indeterminate waitlists, flawed prioritization procedures and bad computer databases. Paragraph 24(d) of the statement of claim alleges that the defendant failed to create "a cohesive system" to "rationally and efficiently allocate pre-existing resources to Class Members on DSO Waitlists", pleading (again) that the complaint is not one of funding but the negligent operation of the existing system.

(2) Service registries are waitlists

[15] The defendant initially resisted the suggestion that its "services registries" were in fact waitlists. Fortunately, this self-evident point was conceded by the defendant during cross-examinations and, in any event, s. 19 of the 2008 Disabilities Act itself refers to "wait-lists." The interchangeability of the two words is no longer a matter of serious dispute.

[16] I note that in his proposed common issues, the plaintiff refers to "service registries" rather than "waitlists" to better reflect current usage.

[17] There is a further point about the service registries or waitlists. For reasons that are not readily apparent, several provisions of the 2008 Disabilities Act, including s. 19 which specifically authorizes prioritization and waitlists, will only come into force on July 1, 2023. The plaintiff therefore pleads that at the present time, and for another five years, the very language of the 2008 Disabilities Act "does not provide for the creation of DSO Waitlists for approved Developmental Services." In other words, says the plaintiff, the current waitlists are illegal.

(3) There is sufficient evidence of class-wide commonality

[18] The plaintiff has filed several recent public reports that make clear that the problems identified by the plaintiff and his four co-affiants are systemic and are shared by literally thousands of Ontario families whose loved ones include developmentally disabled persons.

[19] The *Report of the Select Committee on Developmental Services* (2014) catalogued parents' frustrations, after their applications for certain services were approved, in having "to spend years on waitlists to access those services" and being "pushed to the brink of disaster."

[20] The *Annual Report of the Auditor General of Ontario* (2014) also noted the "long" waitlists, the problems in prioritization, "numerous problems" with the Ministry's

database and "data integrity" and the "significant shortcomings" in the Ministry's computer system.

[21] In its 2016 report entitled *Nowhere to Turn: Investigation into the Ministry of Community and Social Services' Response to Situations of Crisis Involving Adults with Developmental Disabilities*, the Ontario Ombudsman described the "interminable wait lists" and the problems in prioritization as "systemic flaws":

> I believe that the Ministry is well intentioned and earnest, but recognize that systemic flaws persist. I intend to closely monitor the Ministry's success in meeting existing system challenges.

[22] The evidence before the court included evidence that the waitlists do not proceed on a linear chronological progression. Instead, the defendant manages the manner in which individuals on waitlists are prioritized for services. In 2011, the defendant distributed Interim Guidelines for prioritization. In 2017, an algorithm was introduced in the centralized DSCIS database to create a more consistent method of prioritization.

[23] Unfortunately, the prioritization process continues to be plagued by problems and individuals are given no estimate as to potential wait times. These are not funding problems, repeats the plaintiff. They are operational or administrative deficiencies that can be addressed and resolved within current resources and ministry budgets.

[24] The defendant has not yet filed its statement of defence and the plaintiff may be proven wrong as this action proceeds. Each of the alleged deficiencies – the waitlists, the bad databases, flawed computer programs and faulty prioritization and matching processes - may all be traced eventually to inadequate funding but at this stage in this proceeding there is no evidence from the defendant that this is in fact the case.

[25] In short, at this point in this proceeding, there is ample evidence before the court that the core complaint is not about inadequate funding but about defects or problems in the operation and administration of a social assistance system that have class-wide commonality.

[26] I can now turn to the certification criteria set out in s. 5(1) of the CPA.

Certification analysis

(1) Section 5(1)(a) - Cause of action

[27] As already noted, the plaintiff advances three causes of action: negligence, breach of fiduciary duty and breach of s. 7 of the *Canadian Charter of Rights and Freedoms* (primarily "security of the person").

[28] The law as it applies to this first criterion is not in dispute. Assuming the facts as pleaded are true, is it plain and obvious that the claim cannot possibly succeed and is doomed to fail? If there is any chance of success, even if the cause of action is novel, the s. 5(1)(a) hurdle is cleared.[4]

[29] In my view, there is enough in the pleadings, generously interpreted, to support at least a possibility of success for two of the claims, the negligence claim and the s. 7 Charter claim. The breach of fiduciary duty claim does not clear the s. 5(1)(a) hurdle. I will discuss each of these causes of action in turn.

Negligence

[30] Both sides agree that the existence of a duty of care owed by the Crown must be determined by an application of the two-part test that was set out by the House of Lords in *Anns v. Merton London Borough Council*[5] and refined by the Supreme Court in *Cooper v. Hobart.*[6] The two-part Anns-Cooper test requires the plaintiff to establish (i) the presence of foreseeability and proximity, and (ii) the absence of any policy considerations that would negate the imposition of a duty of care.[7]

[31] ***Proximity.*** It is not plain and obvious that foreseeability or proximity cannot be established given the relationship that developed between the parties herein on the facts as pleaded. As the Court of Appeal noted in *Taylor*:[8]

> [C]ertain factors will routinely take a central role in the proximity analysis. These include any *representations* made by the defendant, especially if made directly to the plaintiff, *reliance* by the plaintiff on the defendant's representations, the nature of the plaintiff's property or other interest engaged, the specific nature of any *direct contact* between the plaintiff and the defendant, and the nature of *the overall relationship* existing between the plaintiff and the defendant. [Emphasis added.][9]

[32] The plaintiff pleads that every proposed class member directly interacted with the defendant through the receipt of developmental services before turning 18 and had further and direct contact after turning 18 and receiving formal approval for continuing support and services. Representations were obviously made over the course of this relationship and there was direct contact and reliance. There is therefore at least a chance that the requisite level of proximity can be established as this matter proceeds. In any event, as the

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[4] *Cloud v. Canada (Attorney General)* (2004) 73 O.R. (3d) 401 (C.A.) at para. 41.
[5] *Anns v. Merton London Borough Council* [1977] 2 All E. R. 492 (H.L.).
[6] *Cooper v. Hobart* [2001] 3 S.C.R. 537.
[7] *Ibid.* at para. 30.
[8] *Taylor v. Canada (Attorney General)* 2012 ONCA 479.
[9] *Ibid.* at para. 69.

Supreme Court noted in *Imperial Tobacco,* "...where the asserted basis for proximity is grounded in specific conduct and interactions, ruling a claim out at the proximity stage may be difficult".[10]

[33] ***Policy.*** Nor is it plain and obvious that there are policy considerations that would negate a duty of care on the facts as pleaded. The complaint as pleaded is not about insufficient funding (a policy decision that would preclude a duty of care finding) but the allegedly deficient and negligent operation of a social assistance system within existing resources. The viability of a negligence claim that focuses on operational deficiencies as opposed to inadequate funding issues in the context of a challenge to a social assistance program was acknowledged by this court in *Wareham*[11] and by the Court of Appeal in *Wynberg.*[12]

[34] In *Wareham,* a case that involved the denial of benefits under the Ontario Disabilities Support Program, Cullity J. suggested a number of ways in which a negligence claim could be viable (see the portions highlighted below):

> In connection with the claims based on negligence, there is no suggestion that the ODSP has not been operated in accordance with the statutory scheme, or that the delays resulted from defaults of Crown employees who administered the program. There is no suggestion that the program as enacted is capable of being administered more efficiently without a further allocation of personnel and resources. The claim is essentially that the ODSP, as enacted, regulated and maintained, is inefficient and inadequate to serve the legislative purpose.[13] [Emphasis added].

[35] In *Wynberg,* a case involving the provincial government's refusal to fund autistic children beyond age 6, the Court of Appeal made a similar point - that policy concerns would not negate a duty of care where the negligence claim is about "operational failures in the implementation of a government program".[14] This makes sense. It would not be a legitimate government "policy" to promulgate or condone on-going negligence or other operational failures in the implementation of a social assistance program.

[36] The allegations that were not advanced in *Wareham* or *Wynberg* are being advanced herein: (i) the waitlists are not being operated in accordance with the statutory scheme; (ii) the delays are a result of the defaults of Crown employees who administer the program in question herein; (iii) the program as enacted is capable of being

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[10] *R. v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42 at para. 47.
[11] *Wareham, supra* note 3.
[12] *Wynberg v Ontario,* 2006 O.J. No. 2732 (C.A.).
[13] *Wareham, supra* note 3 at para. 24.
[14] *Wynberg, supra* note 12 at para. 254.

administered more effectively without a further allocation of resources; and (iv) the focus of the complaint are the operational failures in the implementation of a government program.

[37] For these reasons, I cannot find that it is plain and obvious that the negligence claim has no chance of success.

Breach of fiduciary duty

[38] The same cannot be said about the breach of fiduciary duty claim. To his credit, the plaintiff agrees that this is the weakest of the three causes of action that are pleaded.

[39] The breach of fiduciary duty claim is much easier to establish in the context of a governmental social assistance program when the persons needing support and services are being housed and cared for in governmental institutions and are therefore under the government's direct control. Here, the persons in need are living in the community and the focus of the complaint, as already noted, is about negligent implementation. This may well amount to a negligence claim but not necessarily a breach of fiduciary duty claim.

[40] It is beyond dispute that discretion and vulnerability can exist without triggering a fiduciary standard. Many obligations of the Crown are created and imposed for the benefit and protection of members of the community who find themselves vulnerable to, and dependent on, the Crown's exercise of its discretionary powers. However, these duties or obligations are not thereby converted into fiduciary duties.[15]

[41] In my view, the breach of fiduciary duty claim is doomed to fail and must be struck for at least three reasons. First, tracking two of the requirements set out in *Elder Advocates of Alberta Society v Alberta,*[16] there is no basis for the claim that the defendant gave an undertaking of responsibility to act in the best interests of a beneficiary. More specifically, there is no legislated obligation for the defendant to conduct itself in the best interest of individuals who have been approved for eligible services. Second, there is no basis for the claim that the degree of discretionary control on the facts herein is "equivalent or analogous to direct administration of that interest".[17] Thirdly, and in any event, the plaintiff has failed to plead that the Crown put its own interests ahead of the plaintiff's in committing the alleged breach of fiduciary duty.[18]

[42] In short, I agree with the defendant that the breach of fiduciary duty claim is doomed to fail and should be struck.

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[15] *Drady v Canada (Minister of Health)* [2007] O.J. No. 2812 (ONSC) at para. 28; aff'd 2008 ONCA 659.
[16] *Elder Advocates of Alberta Society v Alberta* 2011 SCC 24.
[17] *Ibid.* at para. 53.
[18] *Ibid.* at para. 30.

Breach of s. 7 of the Charter of Rights

[43] Section 7 provides that: "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." The applicable law is not in dispute. In order to establish that there has been a violation of a s. 7 right, the individual must show that the state has deprived her of her right to life, liberty or security of the person *and* that the deprivation is contrary to a principle of fundamental justice.[19]

[44] The defendant devoted a large part of its factum to parsing the s. 7 claim and showing that the case law as it has developed to date on the facts as pleaded would probably not support this alleged breach of the Charter. That may be so. Indeed, I will go further and acknowledge that the plaintiff's s. 7 claim will probably not succeed on the merits. At this point in the proceeding, however, it is enough if the plaintiff can show a possible pathway – that the s. 7 claim has at least some chance of success. In my view, the plaintiff has done this.

[45] ***State conduct.*** If an institution is set up to serve as an instrument of government policy, or if the government exercises a substantial degree of control over it, then its conduct is likely subject to *Charter* scrutiny.[20] The plaintiff pleads that the DSO offices are created and funded by the defendant, operated pursuant to written policy directives and guidelines from the defendant, have staffing qualifications dictated by the defendant and use information directly managed in the defendant's proprietary computer system (DSCIS). Therefore, it is not plain and obvious that there is no state conduct on the facts as pleaded.

[46] ***Deprivation.*** In an effort to show that, again on the facts as pleaded, the plaintiff was not "deprived" of any security of the person, the defendant took this court on a lengthy tour of the s. 7 case law as it pertains to positive or affirmative obligations, the termination of government benefits and the generally accepted meaning of "deprivation." I acknowledge that the plaintiff may have difficulty establishing a breach of s. 7 when the matter is argued on the merits. But, again, at this stage, the plaintiff only has to show a possible pathway (my words) – and, in my view, he has done this.

[47] Given that the focus of the core complaint is operational negligence not inadequate funding, it is not plain and obvious that the conduct of the defendant and those under its direct or indirect control have not deprived the plaintiff of some measure of security of the person. I say this for two reasons. First, the definition of "deprive."

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[19] Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (2012) at 21-22.
[20] *Ibid.* at 25-26.

[48] In *Gosselin,*[21] the following dictionary definition, referenced by Arbour J. in her dissenting reasons, was not disputed by the majority:

> *The Shorter Oxford English Dictionary* ... defines the term "deprive" in such a way as to include, not only active taking away, divesting, or dispossession, but also mere "keep[ing] out *of* [or] debar[ing] *from*". In other words, the concept of deprivation is sufficiently broad to embrace withholdings that have the effect of erecting barriers in the way of the attainment of some object.[22]

[49] Second, there is some support in the case law for the proposition that governmental delay can sometimes constitute a deprivation as intended and understood under s. 7 of the Charter. Recall again, that here the core complaint is not about the denial of anticipated benefits but about the indeterminate delay in the receipt of authorized benefits. Delay in the receipt of government-authorized benefits (or protections) can sometimes amount to a deprivation. Here again is an observation about the Supreme Court decision in *Blencoe*[23] that was made by Arbour J. in *Gosselin*[24]- an observation that was not disputed by the majority:

> [S]tate-caused delay might sometimes constitute a s. 7 violation, even if "only in exceptional cases" (*Blencoe*, at para. 83). In other words, *Blencoe* held that state-caused delay -- the inertia (or lack of action) in moving a case forward -- was not in itself incompatible with the s. 7 requirement that the impugned harm must result from "actions of the state". *Blencoe* does not hold that all s. 7 protection is limited to cases in which one's life, liberty or security of the person is violated by positive state action. Quite the contrary, it implies that such protection will sometimes be engaged by mere state inaction.

[50] The plaintiff in this proposed class action likewise pleads state-caused delay or inaction in the implementation of the 2008 Disabilities Act and the delivery of support and services that have been explicitly authorized. The plaintiff pleads that here the MCYS services were already in place prior to the class members turning 18. When they turned 18, the class members were "aged out", transferred over to the MCSS, explicitly approved for continued support and services and then placed on indeterminate waiting lists.

[51] The plaintiff points to *Chaoulli*[25] and the Supreme Court's observation that:

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[21] *Gosselin v Quebec (Attorney General)* 2002 SCC 84 at paras. 75-77 and 80-83.
[22] *Ibid.* at para. 321.
[23] *Blencoe v B.C. (Human Rights Commission)* 2000 SCC 44.
[24] *Gosselin, supra* note 21 at para. 326.
[25] *Chaoulli v Quebec (Attorney General)* 2005 SCC 35.

> [T]he Charter does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the Charter.[26]

[52] Here, says the plaintiff, the class members are not requesting services that they have never received. Rather, they are requesting that services that they have been receiving and that they have been approved to continue to receive should be provided in accordance with the guarantees set out in the *Charter of Rights.*

[53] I am not prepared at this stage of the proceeding to find it plain and obvious and beyond doubt that the plaintiff will not be able to establish some measure of state delay or inaction that may possibly amount to a deprivation under s. 7 of the Charter.

[54] ***Principles of fundamental justice.*** The plaintiff pleads two violations of fundamental justice (i) procedural unfairness and (ii) arbitrariness. The defendant takes issue with both of these alleged violations. First, says the defendant, the plaintiff fails to articulate how the service registries in question are procedurally unfair or arbitrary. There is no procedural unfairness arising from indeterminate waiting lists. Nor is there any arbitrariness. The deprivation of the security of the person will be arbitrary only where it "bears no connection to" the objective that lies behind the deprivation.[27] The service registries or, if you will, waitlists, and the process of prioritizing eligible adults based on risk, argues the defendant, cannot be said to bear no relation to allocating scarce resources to assist adults with developmental disabilities.

[55] These are compelling submissions. However, in my view, at this stage of the proceeding I am not prepared to find that the plaintiff's allegation of procedural fairness/arbitrariness has no chance of success. The plaintiff submits that the proposed class is not persons with a disability at large or the public at large. The class consists of those who were receiving services, were assessed as eligible for further services but who were then subjected to a procedurally unfair and arbitrary interruption of ongoing services because of "aging out". The plaintiff pleads that aging out of pre-existing services and placement on a waitlist is arbitrary because the class members' developmental disabilities and essential needs are unrelated to their chronological age. After individuals are assessed and approved for services known to be necessary for their basic needs, they are still placed on indeterminate waitlists.

[56] In my view, it is not plain and obvious that the plaintiff's allegation of procedural unfairness and arbitrariness has no chance of success. All the more so when the Supreme

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[26] *Ibid.* at para. 104.
[27] *Canada (Attorney General) v. Bedford* 2013 SCC 72 at para. 111.

Court has cautioned judges about the need to safeguard a degree of flexibility in the interpretation and evolution of the s. 7 guarantee:

> We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the Charter.[28]

[57] Accepting this admonition as I must, I am unable to find on the facts as pleaded that the s. 7 claim is plainly and obviously doomed to fail.

[58] The defendant has also raised a concern about the damages claim that is being advanced under s. 24(1) of the Charter and has presented a cogent recitation of the relevant case law. Here again, at this stage of the proceeding, it is sufficient to refer simply to the Supreme Court's decision in *Vancouver (City) v. Ward*,[29] and the observation that a court may award "constitutional damages" as a stand-alone remedy under the *Charter* where it is "just and appropriate" in the circumstances of a particular case. [30] Given the possibilities that are contemplated in this relatively wide-sweeping observation, I cannot find that it is plain and obvious that a damages claim under s. 24(1) has no chance of success.

[59] To sum up: two causes of action may proceed, the negligence claim which is probably viable and the Charter s. 7 claim which is possibly viable. The breach of fiduciary claim is doomed to fail and must be struck.

(2) Section 5(1)(b) - Class definition

[60] There is obviously an identifiable class of two or more persons. The proposed class definition, as revised, includes:

> All persons who were alive as of April 10, 2015, who are eligible for ministry-funded adult developmental services and supports and funding, have been assessed by an application entity (DSO) and placed, at any point between July 1, 2011 to the date of certification, on any one or more of the service registries for: (i) "residential services and supports",

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[28] *Blencoe, supra* note 23 at para. 188.
[29] *Vancouver (City) v. Ward* 2010 SCC 27.
[30] *Ibid.* at para. 4.

> (ii) "caregiver respite services and supports" under the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008*; and (iii) "Passport" funding under the *Ministry of Community and Social Services Act*.

[61] This class definition is narrower than the one that was originally proposed by the plaintiff. The revised class definition, as set out above, focuses only on class members that are affected by the alleged operational problems in three specified service registries. The class period begins on July 1, 2011, the day the 2008 Disabilities Act came into force and ends on the date of class certification.[31]

[62] The resolution of mass claims involving a large number of individuals requires a flexible approach to defining the class.[32] It is not necessary that everyone in the class share the same interest in the resolution of the asserted common issues.[33] Individual class members may ultimately have to prove limited individual issues at individual issue hearings. This does not mean that the class definition lacks a common interest, is individualistic, or overly broad.[34] In any event, s. 25 of the CPA provides the judicial machinery to deal with individual issues that do arise.

[63] The class members are unified by the 2008 Disabilities Act application and approval process. The defendant maintains a database of those waitlisted for services. Each class member will benefit from a judicial determination regarding the alleged breaches in the operation and administration of the program in question.

[64] The revised class definition passes muster and satisfies s. 5(1)(b).

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[31] The plaintiff issued his statement of claim on April 10, 2017. I am advised that the reference in the first line of the class definition to "all persons who were alive as of April 10, 2015" responds to the two-year limitation period applicable to estate trustees in s. 38 of the *Trustee Act.* The CPA tolled the limitation period on the date of issuance but if an individual on a waitlist in 2011 died in 2012, arguably s. 38 of the *Trustee Act* would limit the estate trustee's action to only those alive as of 2 years prior to issuance.

[32] See *Frohlinger v. Nortel Networks Corp.,* [2007] O.J. No. 148 (S.C.J.), para. 28, per Justice Winkler (as he then was): "[i]t must be remembered that the *CPA* is a procedural statute meant to provide a mechanism for the resolution of mass claims ...The statute must be interpreted liberally and a rigid approach to class definition based on concerns about over inclusiveness may well defeat its purposes."

[33] *Hollick v. Toronto (City)* 2001 SCC 68 at para. 21.

[34] *Ontario v. Mayotte*, 2010 ONSC 3765 at para. 66; *Kalra v Mercedes Benz*, 2017 ONSC 3795 at para. 36; *Crisante v. DePuy Orthopaedics Inc.*, 2013 ONSC 5186, at para. 37. See also *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at paras. 19 and 35.

(3) Section 5(1)(c) – Common issues

[65] The third criterion for certification is the common issues criterion. For an issue to be a common issue, it need only be a necessary and substantial ingredient in the resolution of each class member's claim. There can be significant individual issues which remain after the determination of the common issues.[35] As the Court of Appeal reaffirmed in *Hodge v Neinstein,*[36] "[E]ven a significant level of difference among the class members does not preclude a finding of commonality. If material differences do emerge, the court can deal with them at that time."[37]

[66] It is also important to remember that s. 6 of the CPA provides that the court "shall not refuse to certify a proceeding as a class proceeding" by reason of "a claim for damages that would require individual assessments." This statutory reminder reinforces the oft-repeated proposition in the case law that any individual issues which may remain after the common issues trial need not detract from the core commonality of the action.

[67] The six proposed common issues ("PCIs") are attached in the Appendix. I have already set out the evidence from the governmental studies that provide some basis in fact for class-wide commonality: recall above beginning at para. 18. I will now consider each of these proposed issues in turn.

[68] ***PCI (1) - breach of a duty of care.*** Whether the defendant owed and breached a duty of care is a threshold question common to all class members. It does not depend on the evidence of individual class members. Determining a duty of care requires a review of the defendant's behaviour and the duties established by law. PCI (1) can be determined in common because of the defendant's singular approach to developmental services. The interaction and relationship between the defendant government and the class is common by virtue of the centralized administration of the DSO regime. When a proposed proceeding concerns a defendant's singular conduct, common duty of care issues are certifiable[38] The issues of duty and breach "are a substantial and necessary factual link in the chain of proof leading to liability for every member of the class."[39] PCI (1) is certified as a common issue.

[69] ***PCI (2) - breach of a fiduciary duty.*** Because of my finding that this was not a viable cause of action, PCI (2) cannot be certified as a common issue.

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[35] *Hollick, supra* note 32 at para. 18.
[36] *Hodge v. Neinstein* 2017 ONCA 494.
[37] *Ibid.* at para. 114.
[38] *Cloud, supra* note 4; *Good v. Toronto (Police Services Board)* 2016 ONCA 250.
[39] *Jones v. Zimmer GMBH* 2013 BCCA 21 at para. 36.

[70] ***PCI (3) - breach of s. 7 of the Charter.*** PCI (3) asks whether section 7 rights have been breached. In *Good v. Toronto Police Services Board,*[40] the Ontario Court of Appeal certified Charter issues based on what the Divisional Court described as "systemic" issues. The Divisional Court decision, affirmed by the Court of Appeal, noted that a Charter claim can be "the equivalent of a claim of a systemic wrong":

> It should also be remembered, on this point, that in order for an issue to be common, it does not have to resolve all issues that may exist in terms of establishing liability and damages. It need only advance the claim of each class member to a sufficient extent that it warrants being done on a collective, as opposed to individual, basis. The Charter claim here is, in essence, the equivalent of a claim of a systemic wrong.[41]

[71] As I have already noted, the plaintiff alleges that the defendant has structured the delivery of developmental services pursuant to the 2008 Disabilities Act in violation of the class members' s. 7 rights. Class members are provided essential care until the age of 18 due to their developmental disability but at age 18 pre-existing services are discontinued, and class members are placed on indeterminate waitlists. While on waitlists, emergency care is capped at 6 months. There is some basis in fact, i.e. some evidence, that the treatment of the class is common and that whether such treatment violates s. 7 rights is amenable to a common determination. PCI (3) is certified as a common issue.

[72] ***PCI (4) – aggregate damages.*** Section 24 of the CPA permits the court to determine the aggregate or part of a defendant's monetary liability to class members where it can reasonably be determined without proof by individual class members. Here, however, the impact of the indeterminate waitlists and the alleged delay will in all likelihood require detailed and nuanced individual assessments.

[73] The plaintiff is correct to note that in *Good* the Divisional Court and the Ontario Court of Appeal held that although damages may be different for each class member, it is open to a common issues judge to determine that there is a base amount of damages that each member of the class may be entitled to.[42] In *Good,* of course, all or nearly all of the class members were arrested and/or detained for many hours, the impact of which could plausibly result in some minimal, generalized measure of damages that could be awarded on a class wide basis. Here, however, as the defendant correctly points out, the impact of the waitlists and delays are not easily generalizable into some minimal, class-wide damages award:

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[40] *Good, supra* note 37.
[41] *Good v. Toronto Police Services Board* 2014 ONSC 4583 (Div. Ct.) at para. 44.
[42] *Good, supra* note 37 at para. 75.

> The time a person may be required to wait for developmental services or supports is dependent upon many factors unique to each applicant, including which specific services and supports have been requested, what resources are available in the location requested that are suitable for the applicant, and how the applicant has been prioritized based on their individual circumstances.

[74] In my view, a minimal, generalized aggregate damages award is not reasonably likely on the evidence that is before the court. Also, the certification of the aggregate damages issue would not advance the litigation. Nothing is lost if PCI (4) is deferred to be dealt by the judge who will decide the common issues. Indeed, as the Supreme Court noted in *Pro-Sys Consultants Ltd. v. Microsoft*:[43]

> The question of whether damages assessed in the aggregate are an appropriate remedy can be certified as a common issue. However, this common issue is only determined at the common issues trial after a finding of liability has been made. *The ultimate decision as to whether the aggregate damages provisions of the CPA should be available is one that should be left to the common issues trial judge*. [Emphasis added.][44]

[75] This is an approach that makes good sense on the facts herein. PCI (4) is not certified as a common issue.

[76] ***PCI (5) – the availability of punitive damages.*** The availability of punitive damages is a determination about the defendant's conduct that can be made without evidence from individual class members.[45] PCI (5) is certified as a common issue.

[77] ***PCI (6) – the amount of punitive damages.*** The Supreme Court made clear in *Whiten*[46] that punitive damages are only awarded if compensatory damages are insufficient to punish the defendant.[47] Here, the amount of the punitive damages award, if such an award is made, cannot be quantified until the completion of the individual proceedings. It therefore makes sense to defer the certification of PCI (6) to the judge hearing the common issues and supervising the individualized assessments, if any. PCI (6) is not certified at this stage of the proceeding.

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[43] *Pro-Sys Consultants v. Microsoft*, 2013 SCC 57.
[44] *Ibid.* at para. 134.
[45] *Rumley v. British Columbia*, 2001 SCC 69 at para. 34.
[46] *Whiten v. Pilot Insurance Co.*, 2002 SCC 18.
[47] *Ibid.* at para. 94.

(4) Section 5(1)(d) – preferability

[78] There must be some basis in fact that a class proceeding is the preferable procedure for the resolution of the common issues. The preferability analysis is conducted through the lens of the three principal goals of class actions: access to justice (the primary goal), judicial economy and behaviour modification. The focus is not on the convenience or burden of a class action suit *per se*, but on the relative advantages of a class action suit over other forms of litigation.[48]

[79] Individual issues of specific causation and damages, which obviously abound herein and which will remain following the resolution of the common issues, are permissible.[49] Indeed, s. 25 of the CPA specifically provides for the judicial management of individual issues following the adjudication of the common issues.

[80] In my view there is some basis in fact that the access to justice objective alone would make the proposed class action the preferable procedure. The challenge to the legislation herein would never materialize if the litigation guardian of a developmentally disabled person had to incur the costs of litigation himself. By definition his family's financial resources are limited - hence the need for governmental support and services. Also, the resolution of the certified common issues, even if a substantial number of individual assessments remain, would advance the litigation for all class members in a meaningful fashion.

[81] I find, based on my experience as a class actions judge and in the exercise of my discretion, that the preferability requirement is satisfied.

(5) Section 5(1)(e) – Suitable representative plaintiff

[82] There is no suggestion that Briana's father, in his capacity as her litigation guardian, would not fairly and adequately represent the interests of the class. There is no evidence that his interests in having this matter determined on a common basis are in conflict with the other members of the class.

[83] The plaintiff has produced a reasonable and practical litigation plan that sets out a workable method of advancing the proceeding on behalf of the class and of notifying the class members of this proceeding. This litigation plan can be modified or adjusted over the course of the proceeding. Accordingly, the litigation plan need only be "workable in

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[48] *AIC Limited v. Fischer*, 2013 SCC 69, at para. 23, citing the decision of the U.S. 11th Circuit in *Klay v. Humana Inc.*, (2004) 382 F. 3d 1241 (U.S.C.A. 11th Cir.) at 1269.

[49] *Cloud, supra* note 4 at para. 75, citing *Hollick, supra* note 32 at para. 30.

its essentials" at the certification stage. As Justice Goudge noted in *Cloud v. Canada*, "litigation plans [are] something of a work in progress."[50]

[84] However, the defendant has spotted one problem. The proposed litigation plan refers to a valuation of damages that includes family law claimants. In this case, no family law claims have been pleaded; nor are family law claimants included in the class definition. I assume that the family law claim was added inadvertently and I direct the plaintiff to amend this portion of the litigation plan so that it complies with the pleadings and the class definition.

Conclusion

[85] For the reasons as set out above, the requirements for certification under s. 5(1) of the CPA have been satisfied.

Disposition

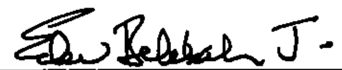
[86] The proposed class action is certified as a class proceeding.

[87] The causes of action are negligence and breach of s. 7 of the Charter. The certified common issues (as indicated in the attached Appendix) are those that ask about a breach of a duty of care, breach of s. 7 and the availability of punitive damages. Order to go accordingly.

[88] The question of costs may require some thought. Two of the three pleaded causes of action were sustained, one was struck. Only three of the six proposed common issues were certified. The class definition had to be revised and the litigation plan requires a further amendment.

[89] I encourage the parties to agree on costs. However, if costs cannot be resolved, I would be pleased to receive brief written submissions from the plaintiff within 14 days and from the defendant within 14 days thereafter.

[90] I thank counsel for their assistance.



Justice Edward P. Belobaba

Date: December 14, 2018

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[50] *Cloud, supra* note 4 at para. 95.

Appendix – Proposed Common Issues

[*Note: PCIs (1), (3) and (5) are certified; PCIs (2), (4) and (6) are not certified.*]

(1) By its operation or management of the service registries for Developmental Services, did the defendant breach a duty of care it owed to the class to protect them from actionable harm?

(2) By its operation or management of the service registries for Developmental Services, did the defendant breach a fiduciary duty owed to the class to protect them from actionable harm?

(3) By its operation or management of the waitlists for Developmental Services, did the defendant breach the class members' Charter rights under s. 7?

(i) If the answer to common issue (3) is "yes", can the breach be saved by s. 1 of the Charter?

(ii) If the answer to common issue (3) is "yes", and the answer to common issue (3)(i) is "no", are the class members entitled to damages pursuant to s. 24(1) of the Charter?

(4) If the answer to any of common issues (1) or (2) or (3) is "yes", can the court make an aggregate assessment of damages suffered by all class members as part of the common issues trial?

(5) If the answer to any of common issues (1) or (2) or (3) is "yes", does the defendant's conduct justify an award of punitive damages?

(6) If the answer to common issues (5) is "yes", what amount of punitive damages ought to be awarded against the defendant?

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