Court of Appeal File No.: M52388
Court File No.: CV-17-573091-00CP

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

MARC LEROUX AS LITIGATION GUARDIAN OF BRIANA LEROUX

Plaintiff/Proposed Appellant

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO

Defendant/Proposed Respondent

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE MOVING PARTY/PROPOSED APPELLANT
(Motion for Leave to Appeal returnable in writing)

KOSKIE MINSKY LLP
900-20 Queen St. W.
Toronto ON M5H 3R3

Kirk M. Baert LSO#: 30942O
Tel: (416) 595-2092 / Fax: (416) 204 2889
kmbaert@kmlaw.ca

Celeste Poltak LSO#: 46207A
Tel: (416) 595-2701 / Fax: (416) 204-2909
cpoltak@kmlaw.ca

Lawyers for the Plaintiff/Proposed Appellant

TO: **MINISTRY OF THE ATTORNEY GENERAL**
Crown Law Office – Civil
8th Flr - 720 Bay Street
Toronto, ON M7A 2S9

Robert Ratcliffe LSO#: 18941A
robert.ratcliffe@ontario.ca
Zachary Green LSO#: 48066K
zachary.green@ontario.ca
Vanessa Glasser LSO#: 58580C
vanessa.glasser@ontario.ca
Brent McPherson LSO#: 23884S
brent.mcpherson@ontario.ca

Tel: (416) 326-4128 / Fax: (416) 326-4181

Lawyers for the Defendant/Proposed Respondent

AND TO: **LERNERS LLP**
2400-130 Adelaide Street West
Toronto, ON M5H 3P5

Jennifer Hunter LSO#: 52563F
Tel: (416) 601-2659 / Fax: (416) 867-2417
junter@lerners.ca

Jacqueline Palef LSO#: 75184B
Tel: (416) 601-2387 / Fax: (416) 867-2423
jpalef@lerners.ca

Lawyers for the Proposed Intervener, Canadian Civil Liberties Association

TABLE OF CONTENTS

PART I - OVERVIEW

1. While it rarely occurs, there are exceptional occasions where a Court abdicates its responsibility to provide timely and fulsome Reasons for Decision. Unfortunately, this is one of those cases. The Divisional Court's failure to address virtually all grounds of appeal below, grounds for which leave was specifically granted, requires this Honourable Court's intervention, especially in a case of such tremendous public import concerning financial supports for developmentally disabled Ontarians.

2. The Plaintiff/Proposed Appellant now moves pursuant to Rule 61.03.1 of the *Rules of Civil Procedure* for leave to appeal the decision of a divided Divisional Court, which vacated the certification order granted pursuant to the *Class Proceedings Act, 1992* (the "CPA") of an experienced class proceedings case management judge and dismissed the action for failing to disclose a reasonable cause of action.

3. Despite the Divisional Court appeal being one respecting certification, including a *Charter* issue, and the first appellate court to consider the applicability of the new *Crown Liability & Proceedings Act* (the "CLPA") (deemed to be of sufficient import to grant the Canadian Civil Liberties Association (the "CCLA") intervenor status),[1] the Reasons below contain only a Rule 21 analysis concerning the causes of action. Nothing more, despite an over nine-month reserve. The Supplementary Reasons for Decision issued over a year after the appeal was heard contain no further analysis of the certification criteria or the CLPA either.

4. The heart of the majority's judgment is premised on the following erroneous point of law:

---

[1] Reasons of Favreau J. dated February 3, 2020 re CCLA Intervention (hereinafter "**Favreau Reasons**"), Motion Record of the Moving Party/Proposed Appellant (hereinafter "**MPMR**"), Tab 8, p. 67.

managing and implementing a benefits program is a core policy decision.[2] While not only irreconcilable with the Supreme Court of Canada's articulation of the policy-operational distinction,[3] the Divisional Court's pronouncement that the "management" or "implementation" of a benefits program are core policy decisions cannot stand together with this Court's very recent decision in *Francis v. Ontario* where the Court came to the diametrically opposite conclusion: implementation of a policy is operational and therefore actionable.[4]

5. Given the subject matter of this proceeding, the vulnerability of the class members and the erroneous principles espoused by the Divisional Court, serious and important question issues present themselves to this Honourable Court. The Defendant/Proposed Respondent has conceded that this action raises issues of fundamental importance, specifically in class proceedings involving allegations of systemic negligence and *Charter* breaches.[5] On the intervention motion, the Court itself characterized this matter as one "raising matters of public importance".[6]

6. The dismissal of this action has significant implications and enduring ramifications for all class proceedings involving a public entity and a claim in negligence, of which there are hundreds extant in this Province. If claims for negligent administration or operation are no longer sustainable at law, lower courts require this Honourable Court's imprimatur as it otherwise represents a total aberration from the Supreme Court of Canada's policy/operational distinction.

---

[2] Reasons for Decision of the Divisional Court, dated March 26, 2021 (hereinafter "**Divisional Court Reasons**"), para. 133, MPMR, Tab 4, p. 47.

[3] *R v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42 at para 74, Book of Authorities of the Moving Party/Proposed Appellant (hereinafter "**MPBOA**"), Tab 28.

[4] *Francis v. Ontario,* 2021 ONCA 197 at paras. 131, 135-136, 139, 141, MPBOA, Tab 14.

[5] Factum of the Crown on motion for leave to appeal to the Divisional Court, dated February 1, 2019, paras. 3, 13, 107, 108.

[6] Favreau Reasons, para. 27, MPMR, Tab 8, p. 72.

7. It is not an overstatement to assert that an injustice has occurred below, one that cannot be left standing without this Court's intervention given the subject matter of the action:

(a) following a nine-month reserve on a procedural appeal of a 2018 decision,[7] the majority's decision consists of simply twenty-three (23) paragraphs;

(b) in the result, the majority addressed only one component of the five-part certification test and nothing regarding the *Charter* or applicability of the CLPA;

(c) while the Divisional Court adjourned the original appeal return date on its own motion, over the objections of the parties, precisely so that the motions judge could consider the applicability of the CLPA, that statute was ignored on appeal;

(d) while the Crown's appeal was one regarding a certification order made at first instance, the Divisional Court's Reasons are bereft of any mention, let alone analysis, of the statutory certification criteria;

(e) the majority dismissed the action outright even though such relief is prohibited, without more, by the CPA;

(f) by way of Supplementary Reasons for Decision issued over a year after the hearing of the appeal, the Court seemingly reversed the dismissal of the action and personal claim and decided to "leave it to the parties to address this issue between themselves".[8]

8. Unfortunately, not only did the Divisional Court make serious errors of law in a case raising serious matters of public importance, it actually failed to do its job at all. In the result, the Plaintiff/Proposed Appellant respectfully requests that this Honourable Court intervene and hear the matter afresh. This is appropriate here because the errors upon which leave is sought are pure

[7] In a case concerned with the delay of disability benefits, the action itself has suffered many delays, none of which were the cause or fault of the parties. Certification was granted in December 2018. Leave to appeal to the Divisional Court was granted to Ontario in May 2019. The appeal was perfected in July 2019. In the meantime, the CLPA was passed by the Ontario legislature on July 1, 2019. An intervention motion was heard in January 2020. The Divisional Court certification appeal was set down for March 2 and 3, 2020. At the very return of the appeal on March 2, 2020, the Court declined to hear the appeal and adjourned the matter *sine die*, remanding the CLPA issue back to the motions judge at first instance. The parties appeared before Justice Belobaba to hear the CLPA issue at first instance on March 24, 2020. The Reasons for Decision on the CLPA were released on April 6, 2020. The parties immediately sought new appeal dates from the Divisional Court. The appeal was then set to be heard on June 17 and 18, 2020. The appeal was argued in June 2020 but Reasons for Decision were not released for over nine months later, on March 26, 2021. Despite the adjournment of the March 2020 appeal for a CLPA determination at first instance, the Divisional Court failed to address the statute. The Divisional Court then proceeded to issue Supplementary Reasons for Decision on June 23, 2021, more than a year after the return of the appeal.

[8] Supplementary Reasons for Decision of the Divisional Court, dated June 25, 2021 (hereinafter "**Supplementary Reasons**"), at para. 13, MPMR, Tab 2, p. 14.

questions of law, reviewable upon a standard of correctness as the Divisional Court only decided the cause of action criteria, no certification principles and no CLPA issues whatsoever.

9. This action pertains to a serious operational flaw in the Crown's delivery of essential services to eligible adults with developmental disabilities. The Crown undertook to provide for the basic needs of class members through the delivery of various developmental services and supports. As described by the motions judge, "[t]he problem is not in the governmental application process … The problem arises **after** the developmentally disabled person has been formally assessed and **approved to receive** government support and services."[9] However, even after deeming class members approved for such supports, they are placed on indeterminate waitlists, placing many families on the edge of financial disaster.[10] [emphasis added]

10. The action was certified as a class proceeding in negligence and section 7 *Charter* claims in December 2018.[11] By a 2:1 decision of the Divisional Court, certification was vacated in March 2021 (the "Decision"). Accordingly, two judges (Justices Belobaba and Regional Senior Justice Edwards) found the certification criteria had been satisfied, while two other judges (Justices Corbett and Penney) determined that there was no reasonable cause of action on the face of the pleading.

11. These compelling facts underscore that there is a strong case to be made that there is every reason to doubt the correctness of the Decision below and that interests beyond those of these immediate parties are squarely at stake. Can a cause of action really be so obviously radically

[9] Reasons of Justice Belobaba dated December 14, 2018 (hereinafter "**Certification Reasons**"), para. 5, MPMR, Tab 9, p. 77.
[10] Certification Reasons, para. 5, MPMR, Tab 9, p. 78.
[11] Certification Reasons, MPMR, Tab 9, p. 77.

defective on its face or enjoy no chance of success where two judges found it survived Rule 21 yet two others found it failed Rule 21?

12. As described below, "[t]he 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."[12] The class is seeking that the pre-existing services Ontario undertook to provide are implemented in a reasonable, fair and rational manner, eminently justicable causes of action. Justice Belobaba found that the Respondent's claim was not about inadequate funding or the need for a greater allocation of governmental resources, but about the negligent utilization and administration of **existing** resources in a program where eligibility had already been determined.[13] Justice Edwards in dissent agreed.

13. Unfortunately, even though the Defendant had obtained leave to appeal on every aspect of certification, the Divisional Court majority and dissent only addressed the section 5(1)(a) cause of action requirement. The majority's twenty-three paragraph decision is silent on, and makes no reference to, the following matters upon which the Defendant was granted leave: (i) the Rule 21 legal test, (ii) the statutory certification test, (iii) class definition, commonality or preferability, (iv) the section 7 *Charter* claim or (v) the application of the CLPA.

14. In this way, the appeal decision reads like it was strictly involving Rule 21 rather than certification or application of the CLPA. The Plaintiff/Proposed Appellant therefore seeks leave on the following determinations:

(i) striking of the causes of action in negligence and for section 7 of the *Charter*;

---

[12] Certification Reasons, para. 8, MPMR, Tab 9, pp. 78-79.
[13] Certification Reasons, para. 13, MPMR, Tab 9, p. 79.

(ii) the failure to provide adequate Reasons for Decision by failing to opine on the four statutory certification criteria;

(iii) the failure to provide any analysis on the CLPA; and

(iv) the dismissal of the action without notice to the class in violation of the CPA.

PART II - THE FACTS GIVING RISE TO THIS MOTION

A. Background: Delivery of Community-Based Services and Supports to Adults with Developmental Disabilities in Ontario

15. In 2008, the government of Ontario enacted the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act 2008* ("*2008 Disabilities Act*")[14] which created new services and supports to adults with a developmental disability and a new process for the delivery of those services and supports. The new legislation required an individual to submit an application at a Developmental Services Ontario ("DSO") office for up to six (6) types of services and supports which include: (i) residential services and supports; (ii) activities of daily living services and supports; (iii) community participation services and supports; (iv) caregiver respite services and supports; (v) professional and specialized services; and (vi) person-directed planning services and supports.[15]

B. Indeterminate Waitlists and Prioritization: The Flaw in the Delivery of Services and Supports by DSO Offices

16. After applying at a DSO office and meeting eligibility requirements for adult services and supports, an adult with a developmental disability is placed on an indeterminate waitlist for those

---

[14] *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008*, S.O. 2008, c. 14, Plaintiff's Certification Factum, MPMR, Tab 22, p. 349.

[15] Transcript from the Cross-examination of Barbara Simmons held March 29, 2018, Q. 195-200 (hereinafter "**Simmons Transcript**"), MPMR, Tab 24G, pp. 569-570; Affidavit of Barbara Simmons sworn December 15, 2017 (hereinafter "**Simmons Affidavit**"), Exhibit "C", MPMR, Tab 25C, p. 916; Simmons Affidavit, Exhibit "D", MPMR, Tab 25D, p. 954; *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008*, S.O. 2008, c. 14, s. 4; Plaintiff's Certification Factum, MPMR, Tab 22, p. 349.

services and supports.[16] The Crown refers to this process as "prioritization".[17] There are a total of ten (10) waitlists across five (5) service areas which are managed by the Crown.[18]

17. However, waitlists and prioritization are not statutorily authorized. Although the *2008 Disabilities Act* contains provisions regarding prioritization and waitlisting, these provisions do not come into force until July 1, 2023.[19] As such, waitlisting is illegal. Rather than proceeding on a linear "first-come-first-served" model or a "needs-based" model, the Crown arbitrarily "prioritizes" certain eligible individuals over others.[20] The inherent systemic flaws in the Crown's waitlist procedure are well-documented in public reports:

(a) ***Report of the Select Committee on Developmental Services (July 2014).*** The Committee found, amongst other things, that the cut-off for services at that time inherently arbitrary and unfair with many families feeling pushed to the brink of financial disaster. Only when they are forced into crisis are they able to access desperately needed assistance. When that happens, others are bumped further down the waitlists."[21]

(b) ***Report of the Auditor General (2014).*** This Report included a chapter titled "Residential Services for People with Developmental Disabilities" which concluded as follows: (i) waitlists are lengthy and increasingly growing in size; (ii) individuals with high priority needs are not prioritized before others; (iii) the MCSS-run DSCIS database was not fully-functional and inconsistently prioritized individuals.[22]

(c) ***Ontario Ombudsmen Report (2016).*** This Report concluded: (i) present demand for services and supports outstrips supply leaving thousands stranded on waitlists; (ii) there is marked inconsistency in how limited funds are prioritized and distributed; (iii) the gap

---

[16] Affidavit of Brittany Tovee, sworn September 14, 2017 (hereinafter "**Tovee Affidavit**"), para. 7, MPMR, Tab 17, p. 200.

[17] Factum of the Appellant, dated July 16, 2019 (hereinafter "**Appellant's Factum**"), para. 14, MPMR, Tab 28, p. 1065.

[18] Simmons Transcript, Q. 108-116, MPMR, Tab 24G, pp. 545-547; Simmons Affidavit, Exhibit "G", MPMR, Tab 25G, p. 963.

[19] *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008*, S.O. 2008, c. 14, ss. 18-21; Factum of the Moving Party/Proposed Appellant, Schedule B, Tab B.

[20] Affidavit of Marc Leroux, sworn September 6, 2017 (hereinafter "**Leroux Affidavit**"), para. 15, MPMR, Tab 16, p. 177; Affidavit of Margehory Chehade, sworn September 12, 2017 (hereinafter "**Chehade Affidavit**"), para. 13, MPMR, Tab 18, p. 294; Affidavit of Hazel Taylor, sworn September 13, 2017 (hereinafter "**Taylor Affidavit**"), para. 11, MPMR, Tab 19, p. 298; Affidavit of Shirley Judd, sworn September 14, 2017 (hereinafter "**Judd Affidavit**"), para. 13, MPMR, Tab 21, p. 305; Affidavit of Anna Willson, sworn September 13, 2017 (hereinafter "**Willson Affidavit**"), para. 12, MPMR, Tab 20, p. 302; Simmons Transcript, Q. 160-162, 167-173, 177, 182, MPMR, Tab 24G, pp. 559, 562-563, 564-565, 566-567; Simmons Affidavit, Exhibit "H", MPMR, Tab 25H, p. 965.

[21] Tovee Affidavit, Exhibits "C" & "D", MPMR, Tabs 17C & 17D, pp. 206 & 253.

[22] Tovee Affidavit, Exhibit "E" MPMR, Tab 17E, p. 256.

> between need and availability of resources is profound and a symptom of a system in crisis.[23]

C. The Class Proceeding

18. Marc Leroux commenced this class proceeding in 2017.[24] At two (2) years of age, Mr. Leroux's daughter, Briana Leroux, was diagnosed with agenesis of the *corpus callosum*, a rare birth defect resulting in her developmental disability.[25] Briana is non-verbal and functions at the level of a three (3) year old requiring constant daily care for all of her activities of daily living, including eating, basic mobility and hygiene.[26] Briana's developmental disability will present itself for the rest of her adult life.[27]

19. The aftermath of Briana's 18th birthday was devastating: Briana was waitlisted for eligible services and supports for over one and a half (1.5) years.[28] As Briana's primary caregiver, Mr. Leroux provided the necessary care to sustain his daughter's life at the expense of his mental, physical, emotional and financial health.[29] He also applied for emergency support which was capped after two (2) applications despite Briana's ongoing urgency for support.[30] The evidence on the motion revealed that this experience was common to class members across Ontario.[31]

D. Certification Motion Granted

20. Having had the benefit of a two day certification hearing, Justice Belobaba exercised his

---

[23] Tovee Affidavit, Exhibit "F", MPMR, Tab 17F, p. 287.

[24] Amended Statement of Claim dated January 18, 2019 (hereinafter "**Amended Claim**"), para.1, MPMR, Tab 13, pp. 125-126.

[25] Leroux Affidavit, para. 2, MPMR, Tab 16, p. 175.

[26] Leroux Affidavit, paras. 4-6, MPMR, Tab 16, pp. 175-176.

[27] Leroux Affidavit, para. 6, MPMR, Tab 16, p. 176.

[28] Leroux Affidavit, para. 17, MPMR, Tab 16, p. 178.

[29] Leroux Affidavit, Exhibit "B", MPMR, Tab 16B, p. 182.

[30] Transcript from the Cross-examination of Marc Leroux held March 28, 2018 (hereinafter "**Leroux Transcript**"), MPMR, Tab 24C, p. 436.

[31] Chehade Affidavit, Taylor Affidavit, Judd Affidavit, Willson Affidavit, MPMR, Tabs 18, 19, 21, 20, pp. 292, 296, 303, 300.

discretion weighing the evidence available to him on the motion against the language of section 5(1) of the CPA.[32] Ultimately the learned motion judge found that a class proceeding was the preferable procedure because:

> "(T)here 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. **I find based on my experience as a class action judge and in the exercise of my discretion, that the preferability requirement is satisfied**."[33] [emphasis added]

21. With respect to the cause of action in pleaded in negligence, the motions judge (and Justice Edwards of the Divisional Court dissent) determined that "the core complaint [was] not about inadequate funding but about defects or problems in the operation and administration of a social assistance system",[34] leading them both to conclude that the claim in negligence was not doomed to fail:

> "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 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. …
>
> 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. …
>
> At this point in the proceeding, however, it is enough if the plaintiff can show a possible pathway."[35]

---

[32] Certification Reasons, paras. 29 & 59, MPMR, Tab 9, pp. 82, 88.

[33] Certification Reasons, para. 80, MPMR, Tab 9, p. 93.

[34] Certification Reasons, para. 25, MPMR, Tab 9, p. 81.

[35] Certification Reasons, paras. 13, 32, 33, 44, MPMR, Tab 9, pp. 79, 82-83, 85.

22. In the result, both Justices Edwards and Belobaba allowed the claim to proceed in negligence and certified the action as a class proceeding.

E. The Divisional Court Appeal

23. Following the Certification Order made in December 2018, the Defendant sought leave to appeal the decision to the Divisional Court which was granted in May 2019. On July 1, 2019, Ontario passed the CLPA which, amongst other things, purports to retroactively abolish causes of action in negligence by expanding the definition of "policy matters" well beyond the judicial treatment of same codified in the common law. As a result, for the first time on appeal Ontario took the position that the new statute now barred the certified claim in negligence.

24. At the return of the original appeal on March 2, 2020, the Divisional Court determined that it ought not adjudicate on the appeal without a decision at first instance from the motions judge on the CLPA issue.[36] In the result, the parties reconvened before Justice Belobaba to have the court determine whether or not the CLPA now barred the claim in whole or part.

25. By Reasons dated April 6, 2020, applying the Rule 21/section 5(1)(a) test, the motions judge determined that the CLPA could not operate now to bar the certified claim in negligence, before the pleadings were even closed:

> "This uncertainty on the part of the defendant government's own counsel about the intended impact of the new law provides further support to the proposition that **the scope and content of the CLPA should be decided on a complete record with full argument on the certified common issues either at trial or on a motion for summary judgment**…. The defendant may well prevail on the merits when the CLPA and s. 96 issues are fully argued at trial or on a motion for summary judgment. But that is where these issues must be decided. "[37] [emphasis added]

---

[36] Addendum to Certification Decision of Justice Belobaba (hereinafter "**Certification Addendum**") dated April 6, 2020, para. 6, MPMR, Tab 5, p. 53.

[37] Certification Addendum, at paras. 29 & 31, MPMR, Tab 5, p. 58.

26. Having already considered and characterized the identical pleading at the return of the original certification motion in 2018 as "operational negligence", His Honour found that in this case, on the face of these pleadings, "it cannot be said that the operational negligence claim does not disclose a cause of action under s. 5(1)(a) of the CPA".[38]

27. On June 17 and 18, 2020, the appeal of certification and the CLPA was argued before the Divisional Court. Following a nine (9) month reserve, a split decision was rendered on March 26, 2021 vacating the certification order, even though the Decision fails to confront any of the statutory criteria for certification, and dismisses the action outright.[39] By way of further Reasons dated June 23, 2021, the Divisional Court opined that is Decision was "unchanged by these recent decisions from the Court of Appeal [*Francis* and *Cirillo*]" and held that it is up "to the parties to address the [dismissal] issue between themselves or to pursue it as they see fit in the court below."[40]

PART III - QUESTIONS PROPOSED TO THE COURT

28. If leave to appeal is granted by this Honourable Court, the plaintiff proposes that the following questions be answered on appeal:

(i) did the Court err in holding that the implementation of a policy decision is not operational and therefore not actionable?

(ii) are persons eligible and entitled to receive provincial benefits permitted to bring suit against the Province for failures in the administration, implementation and management of that scheme?

(iii) can section 7 of the *Charter* extend to persons who have been deprived of the necessities of life financial supports (to which they are entitled) either by state inaction or delay?

(iv) did the Court err in law by the failure to provide adequate Reasons on all issues upon which leave to appeal was granted, including certification and the CLPA?

---

[38] Certification Addendum, para. 15, MPMR, Tab 5, pp. 54-55.

[39] Divisional Court Reasons, MPMR, Tab 4, p. 19.

[40] Supplementary Reasons, at paras. 11, 13, MPMR, Tab 2, pp. 13, 14.

29. On this motion, the only question to be decided is whether the Plaintiff/Proposed Appellant has satisfied the test codified in Rule 62.02 for leave to appeal the decision below. The Plaintiff/Proposed Appellant respectfully submits that the answer to this question is "yes".

PART IV - ISSUES AND THE LAW

A. The Test For Leave To Appeal Is Satisfied

30. Leave to appeal an order of the Divisional Court will be granted where the decision below has "bearing on the critical issue in the litigation."[41] Here, certification is the crucial high-water mark of this case as it dictates whether this action lives or dies. Simply put, without certification, there will be no action by which disabled persons can compel Ontario to pay them the financial supports for which they have already been deemed entitled. Instead, their families like Mr. Leroux will continue to languish and suffer devastating financial consequences simply because the Province cannot implement its own benefits scheme in a timely fashion.

31. Pursuant to the well-settled test for leave to appeal propounded by this Honourable Court in the *City of Sault Ste. Marie*,[42] this matter presents arguable and serious questions of law requiring the Court's consideration: (i) the clarification or interpretation of the ground breaking new policy-operational distinction applied below, and (ii) the points at issue involve questions that transcend these particular parties but engage larger implications of public importance, namely, the ability of any Ontarian to bring suit against the Province respecting its operation, management and implementation of a system built for vulnerable persons.

---

[41] *Stoicevski v. Casement*, [1983] O.J. No. 3186 (C.A.) at p. 3, MPBOA, Tab 39.
[42] *Re Sault Dock Co. Ltd. and City of Sault Ste. Marie*, [1972] O.J. No. 2069 (C.A.) at paras. 8-9, MPBOA, Tab 34.

32. Moreover, given the abject failure of the Divisional Court to provide adequate Reasons, such an error of law cannot be left undisturbed. It is a matter of public importance to the administration of justice itself that this failure be corrected as courts who abdicate their fundamental responsibility to provide adequate Reasons ought to be subject, as matter of course and principle, to rigorous appellate review.

(a) Arguable Questions Of Law Exists Respecting The Pleadings Analysis Below

33. ***Impermissible Consideration of the Merits***. The prohibited treading into the merits of the proceeding by the Divisional Court reveals a plain error of principle, *a fortiori* here as those impermissible merits determinations coloured the entirety of the court's Rule 21 analysis. As a matter of law, there is no question that certification courts are prohibited from making merits findings.[43] Furthermore, the law is also clear that the moving Defendant bears the burden of demonstrating that the claim could not possibly succeed. As this Court has clearly expressed, it is not necessary for a plaintiff to demonstrate that he/she *will in fact succeed*.[44]

34. ***The Policy-Operation Distinction***. For perhaps the first time in Canada, an appellate court determined below that "implementing and administering a benefits program is a core policy decision of government."[45] On its face, this finding conflates entirely policy and operational decisions which is wrong in law. In fact, since as early as 1994, the Supreme Court of Canada has adopted and applied the following working definition of policy-operation, one which expressly defines "implementation" as one of operation, not policy and therefore actionable:

---

[43] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16, MPBOA, Tab 16; *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 4, MPBOA, Tab 40.
[44] *Addison Chevrolet Buick GMC Limited v. General Motors of Canada Limited*, 2016 ONCA 324 at para. 23, MPBOA, Tab 1, leave to appeal to S.C.C. ref'd [2016] S.C.C.A. No. 317.
[45] Divisional Court Reasons, para. 131, MPMR, Tab 4, p. 47.

> "True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints.
>
> **The operational area is concerned with the practical implementation of the formulated policies,** it mainly covers the performance or **carrying out** of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness."[46] [emphasis added]

35. Earlier this year, this Honourable Court itself confirmed that the implementation of a program or policy is decidedly operational in nature and therefore, subject to suit.[47] In particular, this Court determined in *Francis* that "manifestations of the implementation of the policy decision to inspect and were operational in nature" and "how the policy is actually applied, that is, its process at ground level, is not a policy matter. That is an operational matter."[48]

36. ***Failure to Provide Adequate Reasons***. The Defendant obtained leave to appeal the certification decision on the following seven issues: (i) presence of a reasonable cause of action in negligence, (ii) the presence of a reasonable cause of action for an alleged *Charter* breach, (iii) whether an identifiable class existed, (iv) whether the claims of the raise sufficient commonality of law or fact, (v) whether a class proceeding is the preferable procedure, (vi) adequacy of the representative plaintiff, (vii) the application of the CLPA. The majority decision opined on only one of these seven issues presented on appeal and wrote only twenty-three paragraphs to overturn the certification order and dismiss the proceeding. On its face, this is not an acceptable or

---

[46] *Brown v. British Columbia (Minister of Transportation & Highways),* [1994] 1 S.C.R. 420 at p. 441, MPBOA, Tab 3 (emphasis added).

[47] *Francis v. Ontario,* 2021 ONCA 197 at para. 100, MPBOA, Tab 14.

[48] *Francis v. Ontario,* 2021 ONCA 197 at paras. 136, 131, MPBOA, Tab 14.

appropriate result and constitutes an error of law in and of itself.[49]

37. ***No Deference Is Owed – De Novo Review Appropriate***. Moreover, given that these questions engage errors of law or principle, if leave is granted, this Court would not have to afford the same degree of deference typically owed to certification courts. The application of the wrong test below constitutes an error of principle and the resulting decision attracts no deference:[50] "legal errors by the motion judge on matters central to a proper application of section 5 of the CPA displace the deference usually owed to the certification motion decision."[51]

(b) *The Proposed Questions For Appeal Engage Issues Of Public Import*

38. Since its inception, this action has been characterized as one engaging matters of public import, which transcend the interests of these particular parties, both by the Defendant itself and by the Court.[52] Indeed, the very essence of this case concerns (i) the delivery of benefits to thousands of Ontario families with disabled children, (ii) the ability of Ontario to be liable for delaying into perpetuity the receipt of these life-saving necessities, (iii) the proper limits of the policy-operational distinction, (iv) the scope and constitutionality of the CLPA and (v) a section 7 *Charter* claim. Where state conduct impacts measures intended to protect vulnerable persons, the public interest is squarely engaged as are broader societal concerns and questions of public and constitutional law.

---

[49] *Dulku v. Dulku*, 2017 ONSC 840 at paras. 28, 32, MPBOA, Tab 13, relying also upon *Sahota v. Sahota*, 2015 ONSC 2640, MPBOA, Tab 37 and *R. v. Sheppard*, 2002 SCC 26, MPBOA, Tab 30.

[50] *Cloud v. Canada*, [2004] O.J. No. 4924 (C.A.) at para. 46, MPBOA, Tab 11, leave to appeal to S.C.C. ref'd [2005] S.C.C.A. No. 50.

[51] *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781 at para. 23, MPBOA, Tab 10, leave to appeal to S.C.C. ref'd [2008] S.C.C.A. No. 15.

[52] Favreau Reasons, para. 27, MPMR, Tab 8, p. 72; Factum of the Crown on motion for leave to appeal to the Divisional Court, dated February 1, 2019, para 3, 13, 107, 108.

B. There Is Good Reason To Doubt The Correctness Of The Decision Below

39. This component of the leave to appeal test is satisfied where "a judge of the Court of Appeal would have to suspect that the motion judge misdirected herself in law, did not observe the applicable principles, or misapprehended the evidence to a point where an injustice would result."[53] The threshold for finding that the correctness of an order is in doubt, is a very "low" one.[54] That principle applies here with even more force given that, if leave is granted, the Court of Appeal would be reviewing pure questions of law affording no deference to the court below.

40. Where, as here, the court below failed to determine the CLPA issue and the remaining four statutory certification criteria, there was an abdication of its duty to provide any Reasons, let alone adequate ones. As this constitutes an error of law on its face, "for that reason alone, the leave judge has a basis to doubt the correctness of the decision … [and] the correctness of the decision is open to serious debate to satisfy the first part of the test under Rule 62.02(4)(b)."[55]

(a) Established Rule 21 Jurisprudence Ignored by Majority

i. The Prevailing Test To Strike –Neither Articulated Nor Applied Below

41. Time and time again appellate courts, including the Supreme Court of Canada, have reiterated and confirmed the prevailing test to overcome to strike a pleading. This may be one of the most entrenched and well-known legal doctrines in Canada. In fact, there is an overwhelming body of jurisprudence on this test, a test which is incredibly onerous to overcome and one that has

---

[53] *Bulmer-Woodward v. Bulmer,* [2006] N.B.J. No. 363 (C.A.) at para. 13, MPBOA, Tab 6; *Canadian Broadcasting Corporation v. New Brunswick Broadcasting Co. Ltd.,* [2000] N.B.J. No. 450 (C.A.) at para. 26, MPBOA, Tab 7.
[54] *Silver v. IMAX Corp*., 2011 ONSC 1035 at paras. 4-5, MPBOA, Tab 38; *Pate v. Sinclair et al.*, 2011 ONSC 5401 at para. 22, MPBOA, Tab 27.
[55] *Dulku v. Dulku*, 2017 ONSC 840 at paras. 28, 32, MPBOA, Tab 13.

not changed in decades. Accordingly, the Divisional Court majority had no excuse whatsoever to misdirect itself on this issue and commit the error of law that it did.

42. The prevailing jurisprudence has repeatedly iterated that on a Rule 21 (section 5(1)(a) of the CPA) motion or at certification, the following rules conjunctively apply:

> (a) a claim may only be struck it is plain and obvious that it discloses no reasonable cause of action or it is plain the claim has no prospect of success;
>
> (b) novelty alone is not a reason to strike a claim;
>
> (c) any potential for the defendant to present a strong defence has no bearing on the question;
>
> (d) a claim may only be struck if it contains a radical defect making it certain to fail;
>
> (e) no evidence may be averted to in deciding whether to strike; and
>
> (f) the pleaded facts must be accepted as true, the pleading must be read generously to accommodate for any drafting deficiencies and leave to amend must be granted if the defect is curable.[56]

43. At its essence, the test has been aptly described as the following:

> "In order to foreclose the consideration of an issue past the pleadings stage, the moving party must show that there is an existing bar in the form of a decided case directly on point from the same jurisdiction demonstrating that the very issue has been squarely dealt with and rejected by our courts. Only by restricting successful attacks of this nature to the narrowest cases can the common law have a full opportunity to be refined or extended."[57]

44. If there is a ***chance*** the plaintiff ***might*** succeed, the plaintiff ought not be driven from the judgment seat because where possible, cases should be disposed of on their merits.[58] Just last year, the Supreme Court of Canada affirmed, yet again, that the "threshold to strike a claim is therefore

---

[56] *R v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42 at paras. 17, 19, 21, MPBOA, Tab 28; *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959 at p. 980, MPBOA, Tab 17; *Nash v. Ontario*, [1995] O.J. No. 4043 (C.A.), MPBOA, Tab 23; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at paras. 87-90, MPBOA, Tab 2; *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 15, MPBOA, Tab 26.

[57] *Dalex Co. v. Schwartz Levitsky Feldman*, [1994] O.J. No. 1388 at para. 4, MPBOA, Tab 12.

[58] *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959 at p. 980, MPBOA, Tab 17; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 88, MPBOA, Tab 2; *R v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42 at paras. 17, 21, MPBOA, Tab 28.

high" and a claim shall not be struck unless it is doomed to failure.[59] As this Court has consistently determined, it is an error of principle to apply a technical approach to pleadings on a motion to strike and "if there is a defect, the remedy is not to strike out the plea but merely to require an amendment or the delivery of particulars".[60]

ii. The Majority's Failure To Correctly Apply The Test To Strike

(a) The Well-Settled Test Was Wholly Ignored – Decision Reads Like The Merits Phase

45. At every turn, the Decision below offends each of the rules applicable to the Rule 21/section 5(1)(a) reasonable cause of action test:

(a) the allegations in the pleading were not taken to be true on their face;
(b) the pleading was not read generously and leave to amend was not provided;
(c) the merits were considered in striking the claim;
(d) the claim was fundamentally misinterpreted by the Court.

46. Amongst other things, the majority strayed far beyond the boundaries of what is legally correct or appropriate on such a motion when it held that:

> "The **evidence** of an ongoing relationship between a claimant, her family, and Ontario, was much better established between Brenda Deskin and Ontario in *Wynberg* [a lengthy trial decision] that it is between the plaintiff, the proposed class members and Ontario. **This line of reasoning was firmly rejected at trial** and on appeal in *Wynberg* and is not available in the case at bar."[61] [emphasis added]

47. In stark contrast, the dissenting decision of the Divisional Court and the motions judge approached the pleading correctly by finding, respectively, that:

(a) Dissent of Justice Edwards:

---

[59] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 90, MPBOA, Tab 2.
[60] *Lysko v. Braley*, [2006] O.J. No. 1137 (C.A.) at para. 34, MPBOA, Tab 20.
[61] *Leroux v. Ontario,* 2021 ONSC 2269 at para. 138, MPBOA, Tab 19 (emphasis added).

> "it is well settled that **the court must accept the facts alleged as proven** and must read the statement of claim generously with allowance for inadequacies for drafting deficiencies."
>
> "in the event that there are any factual or real legal uncertainties that cannot be properly answered at this stage, the matter should proceed to trial on a fulsome record."
>
> "this court has to decide whether the **facts as pleaded in the statement of claim bring this case within the category of operational negligence referenced in *Just*** …"
>
> "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. … **There is at least a chance that the requisite level of proximity can be established** as this matter proceeds."
>
> "As the motion judge was required to do, he read the statement of claim generously and assumed the facts and particulars as pleaded to be true."
>
> "the **motion judge properly applied the principles laid down by the Supreme Court in both *Imperial Tobacco* and *Taylor***. It is not plain and obvious that the Plaintiffs will not succeed at trial."[62] [emphasis added]
>
> (b) Justice Belobaba:
>
> "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**."
>
> " 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* and by the Court of Appeal in *Wynberg*".[63] [emphasis added[

48. Most importantly, if the same pleading is considered by four judges and two of those judges determine there is no radical defect, it defies common sense and logic to accept that the same claim is obviously doomed to failure on its face, the threshold to strike. At very least, this underscores the degree to which there is serious reason to doubt the Decision below. Left undisturbed, the

---

[62] Divisional Court Reasons, paras. 18, 49, 51, 66, 87, 88, 90 (respectively), MPMR, Tab 4, pp. 22, 29, 30, 32, 37-38.
[63] Certification Reasons, paras. 32, 33, MPMR, Tab 9, pp. 82-83.

majority's Decision reveals a fundamental shift in this province respecting the proper test for motions to strike and the policy-operational distinction, a shift that cannot be reconciled with Supreme Court of Canada or this Court's long-standing jurisprudence.

(b) Majority Failed To Understand The Pleading & Misapprehended the Case

49. Despite the requirement that the Court take the pleadings to be true on their face, the majority decision utterly failed to do so and instead, erroneously characterized (or wrongly assumed without regard for the express language pleaded) it as a totally different case. This failure to accept the pleading as truthful further compounded the Court's errors of law.

50. This failure is revealed by the following passages of the Decision which presume – without more – that the action turned on the failure to provide benefits to disabled persons in Ontario **at all** and writ large:

> "It is not alleged, in this case, that the plaintiff is not receiving benefits to which she is 'entitled'. … In providing benefits and services to children with developmental disabilities, Ontario does not create for itself a duty to provide the same, or indeed any, benefits or services to those children when they become adults…
>
> What is being challenged in this case by way of a claim in common law negligence is the administration of discretionary benefits under Eligibility Programs for Adults who are 'eligible' but not 'entitled' to those benefits."[64]

51. However, conversely, Justice Edwards in the dissent properly accepted the following pleadings to be true, which further reveals how the majority failed to accept the fundamental claim, facts and pleading:

> "The Plaintiff is not a person with a disability **at large** nor is her interest identical to that of the **public at large**; she is a person who was receiving services, was assessed as eligible

[64] Divisional Court Reasons, paras. 123(a), (b), 126, MPMR, Tab 4, pp. 45, 46.

> for further services but was then subjected to a procedurally unfair and arbitrary interruption of ongoing services…"[65] [emphasis added]

52. Accordingly, two errors arise: (i) the pleading expressly and specifically states that the class members are approved and entitled to the benefits at issue; (ii) the action does not seek to compel Ontario to establish benefits for disabled adults, the Province decided to do so years ago. Recourse to the pleaded language below demonstrates that the Court either failed to review the pleading or misapprehended it entirely:

Excerpts of Relevant Paragraphs Contained In Amended Statement of Claim

Para 6.	Individuals with developmental disabilities who have been **approved** for Developmental Services are denied such services, which are necessary to meet their basic daily needs, safety and well-being.
Para. 24(e)	Failing to provide class members with Developmental Services which class members are **eligible and approved** for pursuant to the 2008 *Disabilities Act*.
Para. 28	The Plaintiff was **approved** for Developmental Services by the regional Developmental Services Ontario office in Timmins, Ontario. While the plaintiff was **eligible and approved**, she was subsequently placed on a waitlist.
Para. 44	The Crown created, **administered**, supervised and **managed** the DSO Waitlists during the Class period.
Para. 45	Amongst other things, the Crown was solely responsible for: (a) the **management, operation and administration** of MCSS during the Class Period …..
Para. 47	The Crown breached its duty of care to Class Members in its administration, management or supervision of the DSO Waitlists.
Para. 49	In particular, the Crown acted negligently by: … (c) failing to have a consistent and rational scheme of prioritization for Class Members on the DSO Waitlists; (d) failing to rationally and efficiently allocate pre-existing resources to Class Members on DSO Waitlists; (e) failing to provide Developmental Services for which class members are eligible and approved for pursuant to the 2008 *Disabilities Act*;

[65] Divisional Court Reasons, para. 104, MPMR, Tab 4, p. 40.

> (h) failing to properly exercise discretion in determining an appropriate length of time for Class Members be subjected to a DSO Waitlist for approved Developmental Services.[66]

53. A review of the dissenting opinion and the motions judge's Reasons (below) demonstrate that the majority was considering a claim that was simply not before it:

> "The Plaintiff before this court is indisputably eligible for the benefits available under the *Disabilities Act* and the MCSSA …. **As someone entitled to the benefits at issue**, the Plaintiff's claim is quite different from the Plaintiffs in *Wareham* where the issue of eligibility had not been determined. …
>
> The province did not, however, simply adopt a policy that a child entitled to benefits from the MCYS ages out of benefits at age 18 without further assistance from the government. Rather, the province adopted a policy requiring someone like Briana to apply for further assistance from a different arm of the government once she turned 18…
>
> Rather, Briana argues on behalf of the class that she been found eligible for support and that the claim is one relating to the operational failure in the implementation of a government program."[67] [emphasis added]

54. There is no cogent way that the Reasons of the motions judge and the dissenting opinion can be reconciled with the Reasons of the majority – each set of two judges appears to consider a diametrically opposed pleading. Both cannot be right at the same time. Had the majority only had regard for the pleading alone and assumed the facts pleaded therein to be true, as required at law, it could not have plausibly arrived at the conclusions it did.

(c) Supreme Court of Canada & Court of Appeal Policy-Operation Distinction Ignored by Majority

55. The majority decision imbued the definition of "policy" with such a broad meaning, one that includes implementation, administration and operation,[68] this interpretation cannot stand in

---

[66] Amended Claim, paras. 6, 24(e), 28, 44, 45, 47, 48, 49, MPMR, Tab 13, pp. 126-127, 131, 132, 139-141.

[67] Divisional Court Reasons, paras. 73, 78, 79, MPMR, Tab 4, pp. 33, 34-35; Certification Reasons, para. 52, MPMR, Tab 9, p. 87: "they [the class] are requesting services that they have been receiving and that **they have been approved to continue to receive**."

[68] Divisional Court Reasons, at paras. 121, 122, 131, MRMP, Tab 4, pp. 45, 47.

the face of this Court's very recent admonitions: "there is, in fact, no limitation to the effect of the expansive meaning urged by Ontario in this case. Its logical conclusion would include virtually any step taken by the provincial government in carrying out any 'program, project or other initiative'. … The difficulty with that approach is aptly expressed by McLachlin C.J.C. in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 76: "exempting all government actions from liability would result in intolerable outcomes"'.[69]

56. Even though *Francis* pertained to a summary judgment appeal or merits determination, the Court of Appeal nevertheless returned to the pleading in that case in order to properly characterize the core claim. In so doing, this Honourable Court determined that:

> "the amended statement of claim in this case focuses on the **implementation** of administrative segregation in Ontario institutions. It relies on decisions and actions that are of an **operational** nature. Indeed, the amended statement of claim makes frequent reference to Ontario's responsibility for the 'operation' of its correctional facilities….
>
> manifestations of the **implementation** of the policy decision to inspect and were operational in nature" and "how the policy is actually applied, that is, its process at ground level, is not a policy matter. That is an operational matter …"[70][emphasis added]

57. Accordingly, based on *Francis* and the prevailing Rule 21/section 5(1)(a) test to strike a claim for having no chance of success, as the pleading herein contained precisely the same allegations impugning the "implementation", "operation", "management", [71] it ought to have been permitted to proceed to the merits stage. Even the Appellant Crown itself has conceded that this case is one that relates to its "structural **implementation**" of the statutory supports and services at issue or "its management, administration and supervisions of waitlists".[72] It is trite law that once a governmental decision is *implemented*, a private law duty of care may arise concerning its

---

[69] *Francis v. Ontario,* 2021 ONCA 197 at paras. 128, MPBOA, Tab 14.
[70] *Francis v. Ontario,* 2021 ONCA 197 at paras. 100, 136, 131, MPBOA, Tab 14.
[71] Amended Claim, paras. 44, 45, 47, 48, 49, MRMP, Tab 13, p. 139-141.
[72] Appellant's Factum, dated July 16, 2019 at paras. 2, 4, MRMP, Tab 28, p. 1060, 1061-1062.

operation.[73] In the result, not only is there good reason to doubt the correctness of the Decision below, the Court's holding was simply wrong on its face.

C. The Section 7 *Charter* Claim

58. The Plaintiff/Proposed Appellant also pleaded a section 7 *Charter* violation for an alleged breach of her right to security of the person,[74] a cause of action which was correctly sustained by the motions judge at first instance by a proper application of the Rule 21 test:

> "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.** … 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*. … 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 Court has cautioned judges about the need to safeguard a degree of flexibility in the interpretation and evolution of the s. 7 guarantee**."[75] [emphasis added]

59. While Justice Belobaba refused to strike the section 7 claim, his Honour nevertheless went on to hold that it "will probably not succeed on the merits" but at this preliminary certification stage, cognizant of the Rule 21 standard, "it is enough if the plaintiff can show a possible pathway".[76] Given the applicable legal test, this was the correct approach. If there is a chance of success, even if improbable, it must be allowed to proceed to a merits determination.

60. On appeal, only the dissenting judge grappled the sustainability of the *Charter* claim. There was no dispute below that in order to establish a section 7 violation, a plaintiff must establish (i) state conduct, (ii) deprival of a right and (iii) that the deprivation is contrary to the principles of

---

[73] *Just v. British Columbia*, [1989] 2 S.C.R. 1228 at paras. 18-20, MPBOA, Tab 18.

[74] Amended Claim, paras. 2, 3, 6, 24(a), 24(b), 24(e), 25, 26, 30, 51, 52, 53, 54, 56, MPMR, Tab 13, pp. 126-127, 131, 132, 133, 141, 142.

[75] Certification Reasons, paras. 49, 53, 56, MPMR, Tab 9, pp. 86, 87-88.

[76] Certification Reasons, para. 44, MPMR, Tab 9, p. 85.

fundamental justice. Nor was the fact of state conduct really at issue.[77] In the result, the dissent below focussed upon security of the person and deprival.

61. Ultimately, the claim in section 7 was struck by the Divisional Court (without any Reasons by the majority) primarily on the basis that *Charter* protection does not extend to the provision of basic human needs.[78] There is good reason to doubt this finding as erroneous as it does not reflect a modern approach or the evolving jurisprudence on section 7:

> "Since the enactment of the *Charter* in the early 1980s, section 7 jurisprudence has traditionally been tied to the penal system of the administration of justice. However, section 7 jurisprudence has since expanded into broader matters of social policy, starting with cases like *Chaoulli*…
>
> …the Supreme Court has also acknowledged that security of the person encompasses the right to be free from prospective harm."[79] [emphasis added]

62. Firstly, Justice Edwards relied upon merits decisions[80] to dismiss the *Charter* claim rather than confining his examination to the pleadings alone. This constitutes the first error. Secondly, while Justice Edwards characterized the claim as one seeking the 'provision of economic and human needs' or a positive obligation on behalf of the Province,[81] the claim as pleaded does not seek to impose any positive duty to ensure life, liberty or security. Rather, the section 7 claim relates to the interference with one's physical and psychological integrity arising from the failure

---

[77] Divisional Court Reasons, para. 95, MPMR, Tab 4, p. 38-39.

[78] Divisional Court Reasons, para. 105, MPMR, Tab 4, p. 40.

[79] *Mathur v. Ontario*, 2020 ONSC 6918 at paras. 148, 158, MPBOA, Tab 22 (emphasis added), leave to appeal order ref'd 2021 ONSC 1624.

[80] Divisional Court Reasons, para. 105, MPMR, Tab 4, p. 40, relying upon the following decisions which were decided on a full evidentiary record on their respective merits *Masse v. Ontario (Ministry of Community and Social Services)*, [1996] O.J. No. 363 (Div. Ct.), MPBOA, Tab 21, leave to appeal to S.C.C. ref'd [1996] S.C.C.A. No. 373 and *Barbra Schlifer Commemorative Clinic v. Canada*, 2014 ONSC 5140, MPBOA, Tab 4.

[81] Divisional Court Reasons, para. 114, MPMR, Tab 4, p. 43.

to provide already approved financial supports.[82] Having approved the Plaintiff for services, it cannot then simply renege, *ad infinitem*, on those benefits in a manner that violates the *Charter*.

63. As a general proposition, Canada's highest Court had held on a number of occasions that the right to security of the person protects both the "physical and psychological integrity of the individual".[83] This Honourable Court itself has echoed these sentiments by holding that the section 7 right to life, liberty and security "relates to one's physical or mental integrity and one's control over these."[84] For some time in Canada, section 7 protection has been deemed to extend to, and include, psychological integrity or suffering.[85]

64. Lastly, any analysis respecting the degree of interference required to establish a section 7 breach "must be assessed objectively with a view to their impact on the psychological integrity of a person of reasonable sensibility".[86] If the degree of interference must be objectively assessed, that can only properly be done on a full evidentiary record, not at a strike motion.

65. For these aforementioned reasons, (i) misinterpretation of the protection as one of solely economic needs, (ii) reliance on judicial merits determinations rather than the pleadings and (iii) failure to adopt the Supreme Court of Canada recognition and expansion that section 7 may indeed encapsulate psychological or mental integrity, there are many reasons to doubt the correctness of the holding below on the proper content of "security of the person".

---

[82] Amended Claim, paras. 25, 30, 51, 52, 53, 54, MPMR, Tab 13, pp. 132, 133, 141, 142.

[83] *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at p. 173, MPBOA, Tab 29; *Reference Re* ss. 193 & 195.1(1)(c) of the Criminal Code *(Man.)*, [1990] 1 S.C.R. 1123 at p. 1177, MPBOA, Tab 35; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at p. 587-88, MPBOA, Tab 36.

[84] *R. v. Videoflicks Ltd.*, [1984] O.J. No. 3379 at para. 70, MPBOA, Tab 31.

[85] *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 at para. 58, MPBOA, Tab 24; *Carter v. Canada (Attorney General),* 2015 SCC 5 at para. 64, MPBOA, Tab 9.

[86] *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 at para. 60, MPBOA, Tab 24.

66. Finally, with respect to Justice Edwards' holding on "deprivation", it is built entirely upon an erroneous premise: a section 7 case which imposes a positive obligation on the state to ensure security of the person.[87] Rather, the core complaint is *not denial* of benefits but **delay** in their receipt. *Blencoe* stands for the proposition that indeterminate delay in the receipt of already authorized benefits must be "provided in accordance with the guarantees set out in the *Charter*", that state caused delay may constitute a "deprivation" and section 7 protection will sometimes be engaged by state **inaction**.[88] A second Supreme Court of Canada decision has determined that the "concept of deprivation is sufficiently broad to embrace withholdings that have the effect of erecting barriers".[89] These are conflicting decisions on the section 7 question and good reason to doubt the correctness of the dissenting judge below (the majority provided no *Charter* analysis).

D. Balance of the Certification Test Ignored – Reasons Bereft Of Any Certification Analysis

67. Given the lack of analysis below respecting the balance of the certification test codified in section 5(1) of the CPA (identifiable class, common issues, preferability, representative plaintiff) or the application of the CLPA, it is impossible to discern what, if any, principles were applied. The correct approach would have been for the Divisional Court majority having found no reasonable cause of action, to nevertheless go on and engage with the balance of the certification criteria and the CLPA for the purposes of meaningful appellate review.

68. There are two reasons why this approach would have been the correct one: (i) in the event leave to appeal is granted, it would have been of invaluable assistance to the Court of Appeal to

---

[87] Divisional Court Reasons, para. 114, MPMR, Tab 4, p. 43.
[88] *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44 at paras. 52, 188, MPBOA, Tab 5.
[89] *Gosselin v. Quebec (Attorney General),* 2002 SCC 84 at paras. 75-77, 81, 83, 321, 326, MPBOA, Tab 15.

have Reasons for decision on the certification test, given that this was a certification appeal; (ii) the Defendant was required to obtain leave to appeal to the Divisional Court, it had no appeal as of right, and leave was expressly granted on all aspects of the statutory certification test. Furthermore, the CCLA was granted intervention status on the appeal in order to address the operation of the CLPA, a statute left entirely ignored by the Divisional Court. In the result, there was a failure below to confront and opine upon the vast majority of issues on appeal.

69. As described by the Supreme Court of Canada, this constitutes a breach of procedural fairness which is an error of law:"[w]here there are no reasons in circumstances where they are required, there is nothing to review."[90] If the failure to provide even *adequate* reasons is considered to be an error of law, the failure of the court "to determine the issue **at all** in those circumstances must also be considered an error in law."[91] [emphasis added]

70. Given this outcome, if leave to appeal is granted, this Honourable Court may consider the matter afresh and on a correctness standard given that the cause of action requirement is reviewable from such a standard, as are errors of principle with respect to the adequacy of the Reasons and failure to address the certification criteria or the application of the CLPA.

E. It Was Wrong For the Divisional Court Majority To Dismiss The Action

71. The order appealed below was a certification order made in 2018 governed in all respects by the terms of the CPA. That statute provides a comprehensive code and scheme governing the denial of certification or the terms upon which an action may be dismissed. Because the rights of

---

[90] *Newfoundland & Labrador Nurses' Union v. Newfoundland & Labrador (Treasury Board),* 2011 SCC 62 at para. 22, MPBOA, Tab 25.

[91] *Dulku v. Dulku*, 2017 ONSC 840 at paras. 28, 32, MPBOA, Tab 13, relying also upon *Sahota v. Sahota*, 2015 ONSC 2640, MPBOA, Tab 37 and *R. v. Sheppard*, 2002 SCC 26, MPBOA, Tab 30.

so many unknown class members are affected by any dismissal of a class proceeding, namely the resumption of a running limitation period, dismissals require terms and notice so that putative class members are aware of the impact on their rights and to afford and opportunity for leave to amend the pleading. As the Supreme Court of Canada has opined, the purpose of that tolling provision in the CPA "is to protect potential class members from the winding down of a limitation period until the feasibility of the class action is determined."[92]

72. Therefore, while the Divisional Court had the jurisdiction to allow the appeal and set aside the certification order, it did not have the jurisdiction to dismiss the action outright based upon sections 7, 19 and 28 of the CPA which it ultimately did.[93] Section 7 of the CPA addresses precisely this situation, a refusal to certify.[94]

73. Pursuant to section 28(1)(g) of the CPA, when a class proceeding is dismissed, the dismissal immediately triggers the resumption of the class' tolled limitation period. Accordingly, dismissal is prohibited without court approved notice flowing to the class:

> "Where there is a discontinuance, the terms of the court approval may include requiring the plaintiff to **give notice to the putative class members that they can no longer rely on a possible class proceeding** as the means to obtain access to justice and that they may need to bring individual actions."[95]
>
> "The motion judge would have to make **an order that notice be given to potential plaintiffs.** We note that the motion judge could have made an order requiring notice to potential plaintiffs at the same time he refused certification."[96]

---

[92] *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 at para. 60, MPBOA, Tab 8.

[93] Divisional Court Reasons, at para. 119, 142, MPMR, Tab 4, pp. 44, 49.

[94] **7** (1) If the court refuses to certify a proceeding as a class proceeding, the court shall consider whether notice of the refusal should be given under section 19, and whether such notice should include…: *Class Proceedings Act, 1992,* S.O. 1992, c. 6, s. 7 (emphasis added), Factum of the Moving Party/Proposed Appellant, Schedule B, Tab B. See also section 19 of the CPA respecting the requirement for notice.

[95] *R.G. v. The Hospital for Sick Children*, 2019 ONSC 5696 at paras. 55-56, 60, MPBOA, Tab 32, aff'd 2020 ONCA 414, MPBOA, Tab 33, leave to appeal to S.C.C. ref'd [2020] S.C.C.A. No. 398.

[96] *R.G. v. The Hospital for Sick Children,* 2020 ONCA 414 at para. 28, MPBOA, Tab 33, leave to appeal to S.C.C. ref'd [2020] S.C.C.A. No. 398.

74. In the result, if the Divisional Court wished to vacate the certification order, the proper means by which to accomplish this would have been to set aside the order and remand the matter back to the case management judge so that the issues presented by section 7, 19 and 28 of the CPA could be dealt with appropriately. The outright dismissal without regard for the terms of the statute or the absent class members' rights, was a further error of law.

75. The Divisional Court itself acknowledged its error by way of Supplementary Reasons for Decision issued months following the original appeal Decision, holding that: "[t]he panel will amend the decision rendered in March 2021 to delete the order that the proceeding be dismissed and in its place order that the appeal is allowed and the order certifying the proceeding as a class proceeding is set aside."[97] Simply another factor demonstrating that there is every reason to doubt the correctness of the Decision below.

PART V - ORDER REQUESTED

76. The Plaintiff/Proposed Appellant respectfully requests that this Honourable Court grant leave to appeal the order of the Divisional Court majority vacating the certification order and dismissing the action in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of August, 2021.

Kirk Baert
Celeste Poltak
Koskie Minsky LLP

Lawyer for the Moving Party/Proposed Appellant

[97] Supplementary Reasons, at para. 12, MRMP, Tab 2, pp. 13-14.

SCHEDULE "A" - LIST OF AUTHORITIES

TAB	CASELAW
1.	*Addison Chevrolet Buick GMC Limited v. General Motors of Canada Limited,* 2016 ONCA 324
2.	*Atlantic Lottery Corp. Inc. v. Babstock,* 2020 SCC 19
3.	*Brown v. British Columbia (minister of Transportation & Highways),* [1994] 1 S.C.R. 420
4.	*Barbra Schlifer Commemorative Clinic v. Canada*, 2014 ONSC 5140
5.	*Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44
6.	*Bulmer-Woodward v. Bulmer,* [2006] N.B.J. No. 363 (C.A.)
7.	*Canadian Broadcasting Corporation v. New Brunswick Broadcasting Co. Ltd.,* [2000] N.B.J. No. 450 (C.A.)
8.	*Canadian Imperial Bank of Commerce v. Green,* 2015 SCC 60
9.	*Carter v. Canada,* 2015 SCC 5
10.	*Cassano v. Toronto-Dominion Bank,* 2007 ONCA 781
11.	*Cloud v. Canada,* [2004] O.J. No. 4924 (C.A.)
12.	*Dalex Co. v. Schwartz Levitsky Feldman,* [1994] O.J. No. 1388
13.	*Dulku v. Dulku,* 2017 ONSC 840
14.	*Francis v. Ontario*, 2021 ONCA 197
15.	*Gosselin v. Quebec (Attorney General),* 2002 SCC 84
16.	*Hollick v. Toronto (City),* 2001 SCC 68
17.	*Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959
18.	*Just v. British Columbia,* [1989] 2 S.C.R. 1228
19.	*Leroux v. Ontario,* 2021 ONSC 2269
20.	*Lysko v. Braley,* [2006] O.J. No. 1137 (C.A.)
21.	*Masse v. Ontario (Ministry of Community and Social Services),* [1996] O.J. No. 363 (Div. Ct.)
22.	*Mathur v. Ontario,* 2020 ONSC 6918

TAB	CASELAW
23.	*Nash v. Ontario,* [1995] O.J. No. 4043 (C.A.)
24.	*New Brunswick (Minister of Health and Community Services) v. G.(J.),* [1999] 3 S.C.R. 46
25.	*Newfoundland & Labrador Nurses' Union v. Newfoundland & Labrador (Treasury Board),* 2011 SCC 62
26.	*Odhavji Estate v. Woodhouse,* 2003 SCC 69
27.	*Pate v. Sinclair,* 2011 ONSC 5401
28.	*R v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42
29.	*R. v. Morgentaler,* [1988] 1 S.C.R. 30
30.	*R. v. Sheppard,* 2002 SCC 26
31.	*R. v. Videoflicks Ltd.,* [1984] O.J. No. 3379
32.	*R.G. v. The Hospital for Sick Children,* 2019 ONSC 5696
33.	*R.G. v. The Hospital for Sick Children,* 2020 ONCA 414
34.	*Re Sault Dock Co. Ltd. and City of Sault Ste. Marie,* [1972] O.J. No. 2069 (C.A.)
35.	*Reference Re* ss. 193 & 195.1(1)(c) of the Criminal Code *(Man.),* [1990] 1 S.C.R. 1123
36.	*Rodriguez v. British Columbia (Attorney General),* [1993] 3. S.C.R. 519
37.	*Sahota v. Sahota,* 2015 ONSC 2640
38.	*Silver v. IMAX Corp.,* 2011 ONSC 1035
39.	*Stoicevski v. Casement,* [1983] O.J. No. 3186 (C.A.)
40.	*Vivendi Canada Inc. v. Dell'Aniello,* 2014 SCC 1

SCHEDULE "B" - RELEVANT STATUTES

***Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008*, S.O. 2008, c. 14.**

Part I

INTERPRETATION

Services and Supports

4(1) The following are services and supports to which this Act applies:

1. Residential services and supports.
2. Activities of daily living services and supports.
3. Community participation services and supports.
4. Caregiver respite services and supports.
5. Professional and specialized services.
6. Person-directed planning services and supports.
7. Any other prescribed services and supports.

2008, c. 14, s. 4 (1).

Definitions

(2) In this section and for the purposes of this Act,

"activities of daily living services and supports" means services and supports to assist a person with a developmental disability with personal hygiene, dressing, grooming, meal preparation, administration of medication, and includes training related to money management, banking, using public transportation and other life skills and such other services and supports as may be prescribed; ("services et soutiens liés aux activités de la vie quotidienne")

"caregiver respite services and supports" means services and supports that are provided to, or for the benefit of, a person with a developmental disability by a person other than the primary caregiver of the person with a developmental disability and that are provided for the purpose of providing a temporary relief to the primary caregiver; ("services et soutiens de relève pour fournisseurs de soins")

"community participation services and supports" means services and supports to assist a person with a developmental disability with social and recreational activities, work activities, volunteer activities and such other services and supports as may be prescribed; ("services et soutiens liés à la participation communautaire")

"host family residence" means the residence of a family, composed of one or more persons, in which a person with a developmental disability who is not a family member is placed by a

service agency to reside and receive care, support and supervision from the host family, in exchange for remuneration provided to the host family by the service agency; ("résidence de famille hôte")

"intensive support residence" means a staff-supported residence operated by a service agency,

(a) in which one or two persons with developmental disabilities reside, and

(b) in which each resident requires and receives intensive support that meets the prescribed requirements; ("résidence avec services de soutien intensif")

"person-directed planning services and supports" means services and supports to assist persons with developmental disabilities in identifying their life vision and goals and finding and using services and supports to meet their identified goals with the help of their families or significant others of their choice; ("services et soutiens liés à la planification gérée par la personne")

"professional and specialized services" includes services provided by a psychologist, psychological associate, adult protective service worker, social worker or speech language pathologist or such other services as may be prescribed; ("services professionnels et spécialisés")

"residential services and supports" means services and supports that are provided to persons with developmental disabilities who reside in one of the following types of residences and includes the provision of accommodations, or arranging for accommodations, in any of the following types of residences, and such other services and supports as may be prescribed:

1. Intensive support residences.

2. Supported group living residences.

3. Host family residences.

4. Supported independent living residences.

5. Such other types of residences as may be prescribed; ("services et soutiens résidentiels")

"supported group living residence" means a staff-supported residence operated by a service agency, in which three or more persons with developmental disabilities reside and receive services and supports from the agency; ("résidence de groupe avec services de soutien")

"supported independent living residence" means a residence operated by a service agency that is not supported by staff and in which one or more persons with developmental disabilities,

(a) reside alone or with others but independently of family members or of a caregiver, and

(b) receive services and supports from the service agency. ("résidence avec services de soutien à l'autonomie") 2008, c. 14, s. 4 (2); 2009, c. 33, Sched. 8, s. 6 (1).

Part V

ACCESS TO SERVICES AND SUPPORTS AND FUNDING

Prioritization

Note: Sections 18 to 21 come into force on July 1, 2023. See: 2017, c. 34, Sched. 38, s. 3(2).

18 (1) A funding entity shall develop a service and support profile for each applicant who is determined to be eligible for services and supports and funding under this Act. 2008, c. 14, s. 18 (1).

Contents

(2) A service and support profile shall set out the services and supports that may be provided by service agencies under this Act or for which direct funding may be provided under this Act, or both, as the case may be, based on the applicant's needs and the resources available under this Act. 2008, c. 14, s. 18 (2).

Development

(3) In developing a service and support profile for a person with a developmental disability, a funding entity shall apply the method of resource allocation specified in a policy directive to determine which services and supports may be provided to the person under this Act and the amount of funding available under this Act for those services and supports. 2008, c. 14, s. 18 (3).

Prioritization, waiting list

19 (1) A funding entity shall prioritize applications received under subsection 13 (1) for services and supports or for funding based on information contained in the applications and on the service and support profiles prepared under section 18. 2008, c. 14, s. 19 (1).

Rules respecting prioritization

(2) In prioritizing applications, a funding entity shall follow the rules for prioritizing applications set out in a policy directive. 2008, c. 14, s. 19 (2).

Waiting lists

(3) A funding entity may establish waiting lists for services and supports provided by service agencies under this Act and for direct funding and shall manage those lists in accordance with any applicable policy directives. 2008, c. 14, s. 19 (3).

Same

(4) If there are not sufficient funds available in a funding entity's geographic area to provide one or more services and supports specified in an applicant's service and support profile immediately or, if direct funding is requested, to provide the direct funding immediately, the funding entity may place the applicant on a waiting list for the services and supports or for the funding, as the case may be. 2008, c. 14, s. 19 (4).

Report

(5) A funding entity shall, on an annual basis within the time period specified by the Minister, report to the Minister the information that the Minister requires about the waiting lists referred to

in subsection (3) and the Minister shall, within 60 days after receiving the report, publish it in the manner that the Minister considers appropriate. 2008, c. 14, s. 19 (5).

Reassessment of service and support profiles, etc.

20 After a funding entity has developed a service and support profile for an applicant and prioritized the application, the entity may, subject to the procedures and rules for reassessment set out in a policy directive,

(a) reassess the profile in accordance with section 18; and

(b) in accordance with section 19, reassess the prioritization for services and supports or for direct funding, based on the reassessment of the profile under clause (a). 2008, c. 14, s. 20.

Notice of available services, etc.

21 (1) If a funding entity has placed an applicant on a waiting list for services and supports provided by service agencies or for direct funding, the entity shall,

(a) in the case of an application for services and supports from service agencies, give notice to a person described in subsection (2) when one or more of the services and supports becomes available and refer the applicant or person to the appropriate service agency; and

(b) in the case of an application for direct funding, give notice to a person described in subsection (2) when the funding becomes available. 2008, c. 14, s. 21 (1).

Same

(2) The funding entity shall give the notice mentioned in subsection (1) to the applicant, or to the person who submitted the application for services and supports on the applicant's behalf under subsection 13 (2), or to both. 2008, c. 14, s. 21 (2).

* * *

***Class Proceedings Act, 1992*, S.O. 1992, c. 6.**

Refusal to Certify

7 (1) If the court refuses to certify a proceeding as a class proceeding, the court shall consider whether notice of the refusal should be given under section 19, and whether such notice should include,

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding;

(c) any other prescribed information; and

(d) any other information the court considers appropriate. 2020, c. 11, Sched. 4, s. 10.

Proceeding may continue in altered form

(2) If the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for the purpose, the court may,

(a) order the addition, deletion or substitution of parties;

(b) order the amendment of the pleadings or notice of application; and

(c) make any further order that it considers appropriate. 2020, c. 11, Sched. 4, s. 10.

LEROUX **Plaintiff/Proposed Appellant**	**and**	**HMQ** **Defendant/Proposed Respondent**	**Court of Appeal File No. M52388** **Court File No.: CV-17-573091-00CP**

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at **TORONTO**

FACTUM OF THE MOVING PARTY/PROPOSED APPELLANT

KOSKIE MINSKY LLP
900-20 Queen St. W.
Toronto ON M5H 3R3

Kirk M. Baert LSO#: 30942O
Tel: (416) 595-2092
Fax: (416) 204-2889

Celeste Poltak LSO#: 46207A
Tel: (416) 595-2701
Fax: (416) 204-2909

Lawyers for the Plaintiff/Proposed Appellant