Court of Appeal File No.: C70224

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

MARC LEROUX AS LITIGATION GUARDIAN OF BRIANA LEROUX

Plaintiff
(Appellant)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO

Defendant
(Respondent)

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE PLAINTIFF (APPELLANT)
(Appeal from the Orders of the Divisional Court dated March 26, 2021 and June 23, 2021)

KOSKIE MINSKY LLP
900-20 Queen St. West
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 (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 (Respondent)

TABLE OF CONTENTS

PART I - OVERVIEW OF THE APPEAL 1

PART II - THE FACTS GIVING RISE TO THIS APPEAL 2

A. Background: Services and Supports For Adults with Developmental Disabilities 2

B. Indeterminate Waitlists and Prioritization: The Flaw in the Delivery of Services and Supports by DSO Offices 3

C. The Class Proceeding 4

D. Certification Motion Granted – December 2018 5

E. The Divisional Court Appeal – 2:1 Decision Vacating Certification (March 2021) 6

PART III - QUESTIONS ON APPEAL 8

PART IV - ISSUES AND THE LAW 8

A. The Standard of Review – Correctness 8

B. Cause of Action Criterion – Rule 21/Section 5(1) of the CPA 9

(a) Established Rule 21 Jurisprudence Ignored by the Divisional Court Majority 10

i. The Prevailing Test To Strike –Neither Articulated Nor Applied Below 10

(b) The Well-Settled Test Was Wholly Ignored – Decision Reads Like The Merits Phase 12

i. The Majority's Failure To Correctly Apply The Test To Strike 12

(c) Majority Failed To Understand The Pleading and Misapprehended the Case 14

(d) Supreme Court of Canada & Court of Appeal Policy-Operation Distinction Ignored by Majority 17

C. *Crown Liability & Proceedings Act* does not apply 18

D. The Section 7 *Charter* Claim – Improperly Stuck On Appeal 21

E. Balance of the Certification Test Ignored By Divisional Court 26

(a) Commonality Properly Found to Exist By Motions Judge 26

(b) Preferable Procedure Finding Discretionary & Appropriate 29

PART V - ORDER REQUESTED 30

SCHEDULE "A" - LIST OF AUTHORITIES 1

SCHEDULE "B" – RELEVANT STATUTES 1

PART I - OVERVIEW OF THE APPEAL

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.[1]

1. At the end of 2021, the Supreme Court of Canada clarified once more the correct approach to the policy-operational distinction. By so doing, the Court explained the very *raison d'être* informing that distinction: "protecting the legislative and executive branch's core institutional role and competencies necessary for the separation of powers [which] should serve as an overarching guiding principle in the analysis".[2] However, the decision of the majority of the Divisional Court on this point is bereft of any analysis concerning how the failure to provide approved social assistance on a timely basis could possibly intrude upon any core legislative or executive competencies.

2. In *Marchi*, the Supreme Court of Canada confirmed that the practical implementation of formulated policies or the carrying out of a policy is decidedly "operational" and therefore outside the sphere of protected policy.[3] As such, the Divisional Court's decision is premised on a fundamentally erroneous point of law: that managing and implementing a benefits program is a core policy decision.[4]

---

[1] Reasons for Decision of Belobaba J., dated December 14, 2018 (hereinafter "**Certification Reasons**"), at para. 8, 2018, [emphasis added], Appeal Book & Compendium (hereinafter "**ABC**"), Vol. 1 of 3, Tab 10, pp. 80-81.

[2] *Marchi v. City of Nelson*, 2021 SCC 41, at para. 49, Book of Authorities of the Plaintiff (Appellant) (hereinafter "**ABOA**", Vol. 3 of 5, Tab 25.

[3] *Marchi v. City of Nelson*, 2021 SCC 41, at para. 52, ABOA, Vol. 3 of 5, Tab 25.

[4] Reasons for Decision of the Divisional Court, dated March 26, 2021 (hereinafter "**Divisional Court Reasons**"), para. 133, ABC, Vol. 1 of 3, Tab 4, p. 45.

3. This is inconsistent with numerous Supreme Court of Canada's articulations of the policy-operational distinction.[5] The Divisional Court's pronouncement that the "management" or "implementation" of a provincial benefits program is a core policy decision cannot stand together with this Court's very recent decision in *Francis v. Ontario.* In *Francis*, this Court applied Supreme Court of Canada jurisprudence to arrive at a correct, albeit diametrically opposite conclusion to that of Divisional Court: the implementation of a policy is operational and therefore actionable.[6]

4. As the Divisional Court determined that claims for negligent administration or operation are not sustainable at law, its decision is a complete departure from all prevailing jurisprudence respecting the policy/operational distinction and ought to be overturned.

PART II - THE FACTS GIVING RISE TO THIS APPEAL

A. Background: Services and Supports For Adults with Developmental Disabilities

5. In 2008, Ontario enacted the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act 2008* ("*2008 Disabilities Act*")[7] 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: (a) residential services and supports; (b) activities of daily living services and supports; (c) community participation services and supports; (d) caregiver respite services and

---

[5] *R v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42, at para 74, ABOA, Vol. 4 of 5, Tab 32; *Marchi v. City of Nelson*, 2021 SCC 41, at paras. 49, 52, ABOA, Vol. 3 of 5, Tab 25; *Just v. British Columbia*, [1989] 2 S.C.R. 1228, ABOA, Vol. 3 of 5, Tab 23.

[6] *Francis v. Ontario,* 2021 ONCA 197, at paras. 131, 135-136, 139, 141 ABOA, Vol. 2 of 5, Tab 15.

[7] *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008*, S.O. 2008, c. 14, Plaintiff's Certification Factum, ABC, Vol. 1 of 3, Tab 22, p. 347.

supports; (e) professional and specialized services; and (f) person-directed planning services and supports.[8]

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

6. After applying at a DSO office and satisfying eligibility requirements, an adult with a developmental disability is placed on an indeterminate waitlist for those services and supports.[9] Ontario refers to this process as "prioritization".[10] There are a total of ten (10) waitlists across five (5) service areas which are managed by the Crown.[11]

7. However, waitlists and prioritization are not authorized by statute. Although the *2008 Disabilities Act* contains provisions regarding prioritization and waitlisting, these provisions do not come into force until July 1, 2023.[12] As such, waitlisting has been, and remains, illegal. Rather than proceeding on a linear "first-come-first-served" model or a "needs-based" model, Ontario arbitrarily "prioritizes" certain eligible individuals over others.[13] As described by the motions

---

[8] Transcript from the Cross-examination of Barbara Simmons held March 29, 2018, Q. 195-200 (hereinafter "**Simmons Transcript**"), ABC, Vol. 2 of 3, Tab 24G, pp. 567-568; Affidavit of Barbara Simmons sworn December 15, 2017 (hereinafter "**Simmons Affidavit**"), Exhibit "C", ABC, Vol. 2 of 3, Tab 25C, p. 914; Simmons Affidavit, Exhibit "D", ABC, Vol. 2 of 3, Tab 25D, p. 952; *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, ABC, Vol. 1 of 3, Tab 22, p. 347.

[9] Affidavit of B. Tovee, sworn September 14, 2017 (hereinafter "**Tovee Affidavit**"), para. 7, ABC, Vol. 1 of 3, Tab 17, p. 198.

[10] Factum of the Appellant/Respondent, dated July 16, 2019 (hereinafter "**Crown Divisional Court Factum**"), para. 14, ABC, Vol. 3 of 3, Tab 28, p. 1063.

[11] Simmons Transcript, Q. 108-116, ABC, Tab 24G, pp. 543-545; Simmons Affidavit, Exhibit "G", ABC, Vol. 2 of 3, Tab 25G, p. 961.

[12] *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008*, S.O. 2008, c. 14, ss. 18-21, Crown Divisional Court Factum, ABC, Vol. 3 of 3, Tab 28, pp. 1092-1093.

[13] Affidavit of M. Leroux, sworn September 6, 2017 (hereinafter "**Leroux Affidavit**"), para. 15, ABC, Vol. 1 of 3, Tab 16, p. 175; Affidavit of Margehory Chehade, sworn September 12, 2017 (hereinafter "**Chehade Affidavit**"), para. 13, ABC, Vol. 1 of 3, Tab 18, p. 292; Affidavit of Hazel Taylor, sworn September 13, 2017 (hereinafter "**Taylor Affidavit**"), para. 11, ABC, Vol. 1 of 3, Tab 19, p. 296; Affidavit of Shirley Judd, sworn September 14, 2017 (hereinafter "**Judd Affidavit**"), para. 13, ABC, Vol. 1 of 3, Tab 21, p. 303; Affidavit of Anna Willson, sworn September 13, 2017 (hereinafter "**Willson Affidavit**"), para. 12, ABC, Vol. 1 of 3, Tab 20, p. 300; Simmons

judge, "[t]he 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."[14]

8. These inherent systemic flaws in Ontario'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."[15]

(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.[16]

(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 between need and availability of resources is profound and a symptom of a system in crisis.[17]

C. The Class Proceeding

9. Marc Leroux commenced this class proceeding in 2017.[18] 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.[19] Briana is non-verbal and functions at the

---

Transcript, Q. 160-162, 167-173, 177, 182, ABC, Vol. 2 of 3, Tab 24G, pp. 557, 560-561, 562, 564-565; Simmons Affidavit, Exhibit "H", ABC, Vol. 2 of 3, Tab 25H, p. 963.

[14] Certification Decision of Justice Belobaba, at para. 5, 2018, emphasis added, ABC, Vol. 1 of 3, Tab 10, P. 80.

[15] Tovee Affidavit, Exhibits "C" and "D", ABC, Vol. 1 of 3, Tabs 17C & 17D, pp. 204, 251.

[16] Tovee Affidavit, Exhibit "E" ABC, Vol. 1 of 3, Tab 17E, p. 254.

[17] Tovee Affidavit, Exhibit "F", ABC, Vol. 1 of 3, Tab 17F, p. 285.

[18] Amended Statement of Claim dated January 18, 2019 (hereinafter "**Amended Claim**"), para.1, ABC, Vol. 1 of 3, Tab 13, pp. 123-124.

[19] Leroux Affidavit, para. 2, ABC, Vol. 1 of 3, Tab 16, p. 173.

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.[20] Briana's developmental disability will present itself for the rest of her adult life.[21]

10. 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.[22] 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.[23] He also applied for emergency support which was capped after two (2) applications despite Briana's ongoing urgency for support.[24] The evidence on the motion revealed that this experience was common to class members across Ontario.[25]

D. Certification Motion Granted – December 2018

11. Having had the benefit of a two-day certification hearing, Justice Belobaba exercised his discretion weighing the evidence available to him on the motion against the language of section 5(1) of the CPA.[26] Ultimately the learned motions 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**

[20] Leroux Affidavit, paras. 4-6, ABC, Vol. 1 of 3, Tab 16, pp. 173-174.
[21] Leroux Affidavit, para. 6, ABC, Vol. 1 of 3, Tab 16, p. 174.
[22] Leroux Affidavit, para. 17, ABC, Vol. 1 of 3, Tab 16, p. 176.
[23] Leroux Affidavit, Exhibit "B", ABC, Vol. 1 of 3, Tab 16B, p. 180.
[24] Transcript from the Cross-examination of Marc Leroux held March 28, 2018 (hereinafter "**Leroux Transcript**"), ABC, Vol. 1 of 3, Tab 24C, p. 434.
[25] Chehade Affidavit, Taylor Affidavit, Judd Affidavit, Willson Affidavit, ABC, Vol. 1 of 3, Tabs 18, 19, 21, 20, pp. 290, 294, 301, 298.
[26] Certification Reasons, paras. 29 & 59, ABC, Vol. 1 of 3, Tab 10, pp. 84, 90.

> **on my experience as a class action judge and in the exercise of my discretion, that the preferability requirement is satisfied**.[27]

12. With respect to the cause of action in pleaded in negligence, Justice Belobaba, at first instance, and Regional Senior Justice Edwards (dissenting in the Divisional Court) 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",[28] leading them to conclude 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.[29]

13. In the result, Justice Belobaba and Regional Senior Justice Edwards would have allowed the claim to proceed in negligence and would have certified the action as a class proceeding, on this basis.

E. The Divisional Court Appeal – 2:1 Decision Vacating Certification (March 2021)

14. Following the certification order made in December 2018, Ontario sought leave to appeal the decision to the Divisional Court, which was granted in May 2019. On July 1, 2019, Ontario passed the *Crown Liability and Proceedings Act*[30] (the "CLPA") which, amongst other things,

---

[27] Certification Reasons, paras. 80-81, ABC, Vol. 1 of 3, Tab 10, p. 95. [emphasis added]

[28] Certification Reasons, para. 25, ABC, Vol. 1 of 3, Tab 10, p. 83.

[29] Certification Reasons, paras. 13, 32, 33, 44, ABC, Vol. 1 of 3, Tab 10, pp. 81, 84-85, 87. [emphasis added]

[30] *Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50, Factum of the Plaintiff (Appellant), Schedule B, Tab B.

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 retroactively barred the certified claim in negligence.

15. At the return of the appeal on March 2, 2020, over the objection of both parties, the Divisional Court determined that it ought not to hear the appeal without a decision from the motions judge on the CLPA issue.[31] In the result, the parties reconvened before Justice Belobaba to have him determine whether or not the CLPA now barred the negligence claim.

16. 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 (as Ontario had not delivered a Statement of Defence):

> 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**….[32]

17. Having already considered and characterized the identical pleading at the return of the original certification motion in 2018 as "operational negligence", Justice Belobaba held that, 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".[33]

18. On June 17 and 18, 2020, the certification and CLPA issues returned to the Divisional Court. Following a nine (9) month reserve, a split decision was rendered on March 26, 2021,

---

[31] Addendum to Certification Decision of Justice Belobaba, dated April 6, 2020 (hereinafter "**Certification Addendum**"), para. 6, ABC, Vol. 1 of 3, Tab 5, p. 51.

[32] Certification Addendum, at paras. 29 & 31, ABC, Vol. 1 of 3, Tab 5, p. 56. [emphasis added]

[33] Certification Addendum, para. 15, ABC, Vol. 1 of 3, Tab 5, pp. 52-53.

vacating the certification order on the basis of the cause of action criterion alone. The Divisional Court decision failed to confront any of the other statutory criteria for certification, and instead dismissed the action outright.[34] By way of further reasons dated June 23, 2021, the Divisional Court stated that its 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."[35] In August 2021, the Appellant moved for leave to appeal to this Court, which was granted on January 10, 2022.[36]

PART III - QUESTIONS ON APPEAL

19. The Appellant submits that the following fundamental question is squarely raised by, and ought to be determined on, this appeal is: did the Divisional Court err in law by striking the claim and dismissing the action? The Appellant respectfully submits "yes" and that it did so err.[37] The balance of the statutory certification criteria is satisfied on the basis articulated by the motions judge, revealing no palpable or overriding error warranting review or intervention by this Court.

PART IV - ISSUES AND THE LAW

A. The Standard of Review – Correctness

20. As the sole focus of the decisions below was on the cause of action criterion, the fundamental issue on this appeal is a pure question of law, reviewable on a correctness standard.[38]

---

[34] Divisional Court Reasons, ABC, Vol. 1 of 3, Tab 4, p. 17.

[35] Supplementary Reasons for Decision of the Divisional Court, released June 23, 2021 (hereinafter "**Supplementary Reasons Divisional Court**"), at paras. 11, 13, ABC, Vol. 1 of 3, Tab 2, pp. 11, 12.

[36] Disposition of Court of Appeal for Ontario, dated January 10, 2022.

[37] Notice of Appeal, January 17, 2022, ABC, Vol. 1 of 3, Tab 1, p. 1.

[38] *Marchi v. City of Nelson*, 2021 SCC 41, at para. 71, ABOA, Vol. 3 of 5, Tab 25; *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 at para. 24, ABOA, Vol. 1 of 5, Tab 1.

B. Cause of Action Criterion – Rule 21/Section 5(1) of the CPA

21. Two fundamental errors of law are plain from the Divisional Court's decision below: (a) a prohibited consideration of the merits; and (b) a misapprehension of the policy-operational distinction.

22. 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.[39] Furthermore, the law is also clear that the Ontario bore the burden of demonstrating that the claim could not possibly succeed. As this Court has expressed, it is not necessary for a plaintiff to demonstrate that she *will in fact succeed*.[40]

23. For perhaps the first time in Canada, an appellate court determined that "implementing and administering a benefits program is a core policy decision of government."[41] This finding conflates entirely policy and operational decisions, which is wrong in law. Since 1994, the Supreme Court of Canada has applied the following definition of policy versus operation, one which expressly defines "implementation" as one of operation, not policy and therefore actionable:

> 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.

---

[39] *Hollick v. Toronto (City)*, 2001 SCC 68, at para. 16, ABOA, Vol. 3 of 5, Tab 21; *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, at para. 4, ABOA, Vol. 5 of 5, Tab 38.
[40] *Addison Chevrolet Buick GMC Limited v. General Motors of Canada Limited*, 2016 ONCA 324, at para. 23, ABOA, Vol. 1 of 5, Tab 2, leave to appeal to SCC refused, 37115 (2 February 2017).
[41] Divisional Court Reasons, para. 131, ABC, Vol. 1 of 3, Tab 4, p. 45.

> **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.[42]

24. Just last year, this Court itself confirmed that the implementation of a program or policy is decidedly operational in nature and therefore, subject to suit.[43] In *Francis*, this Court said 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."[44]

25. More recently, the Supreme Court of Canada held this to be the correct approach: decisions made by those "who are charged with implementation are less likely to be core policy and more likely to attract liability under regular private law negligence principles".[45] *Marchi* went on to explicitly hold that activities which fall well outside the protected sphere of "policy", plainly include the practical implementation of formulated policies or the carrying out of a policy,[46] precisely what the Divisional Court majority erroneously called a "policy" decision.

(a) Established Rule 21 Jurisprudence Ignored by the Divisional Court Majority

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

26. Time and time again appellate courts, including the Supreme Court of Canada, have confirmed the prevailing test applicable to strike a pleading. This is one of the most entrenched

---

[42] *Brown v. British Columbia (Minister of Transportation & Highways),* [1994] 1 S.C.R. 420, at p. 441, ABOA, Vol. 1 of 5, Tab 7 [emphasis added].

[43] *Francis v. Ontario,* 2021 ONCA 197, at para. 100, ABOA, Vol. 2 of 5, Tab 15.

[44] *Francis v. Ontario,* 2021 ONCA 197, at paras. 131, 136, ABOA, Vol. 2 of 5, Tab 15.

[45] *Marchi v. City of Nelson*, 2021 SCC 41, at para. 62, ABOA, Vol. 3 of 5, Tab 25, citing *Just v. British Columbia*, [1989] 2 S.C.R. 1228, ABOA, Vol. 3 of 5, Tab 23; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, ABOA, Vol. 4 of 5, Tab 32.

[46] *Marchi v. City of Nelson*, 2021 SCC 41, at para. 52, ABOA, Vol. 3 of 5, Tab 25.

legal doctrines in Canada. This test is difficult to overcome. The Divisional Court majority misstated the applicable test and thus committed an error of law.

27. On a Rule 21 motion these 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.[47]

28. At its essence, the test has been aptly described as

> 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.[48]

29. If there is a *chance* the plaintiff *might* succeed, the plaintiff ought not be driven from the judgment seat. Where possible, cases should be disposed of on their merits.[49] In 2020, the Supreme Court of Canada affirmed, yet again, that the "threshold to strike a claim is therefore high" and a claim shall not be struck unless it is doomed to failure.[50] As this Court has also consistently held,

---

[47] *R v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42, at paras. 17, 19, 21, 22, ABOA, Vol. 4 of 5, Tab 32; *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959, at p. 980, ABOA, Vol. 3 of 5, Tab 22; *Nash v. Ontario*, 27 O.R (3d) 1, ABOA, Vol. 4 of 5, Tab 28; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, at paras. 87-90, ABOA, Vol. 1 of 5, Tab 4; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, at para. 15, ABOA, Vol. 4 of 5, Tab 30.

[48] *Dalex Co. v. Schwartz Levitsky Feldman*, 19 O.R. (3d) 463, at para. 6, ABOA, Vol. 2 of 5, Tab 12.

[49] *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959, at p. 980, ABOA, Vol. 3 of 5, Tab 22; *Atlantic Lottery Corp. Inc. v. Babstock*, , 2020 SCC 19, at para. 88, ABOA, Vol. 1 of 5, Tab 4; *R v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42, at paras. 17, 21, ABOA, Vol. 4 of 5, Tab 32.

[50] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, at para. 90, ABOA, Vol. 1 of 5, Tab 4.

it is an error in 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".[51]

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

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

30. At every turn, the majority's decision offends each of the rules applicable to the Rule 21/section 5(1)(a) 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.

31. Amongst other things, the majority strayed far beyond the boundaries of what is legally correct or appropriate on such a motion when it relied on **trial** decisions and 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."[52]

32. In stark contrast, both the dissenting decision of Regional Senior Justice Edwards and the decision of the motions judge approached the test correctly by finding, respectively, that:

(a) Dissent of Regional Senior Justice Edwards:

> 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.
>
> 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*** …

[51] *Lysko v. Braley*, 79 O.R. (3d) 721, at para. 34 ABOA, Vol. 3 of 5, Tab 24.
[52] Divisional Court Reasons, at para. 138, ABC, Vol. 1 of 3, Tab 4, pp. 46-47 [emphasis added].

> 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.[53]

(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*.[54]

33. Both Regional Senior Justice Edwards and Justice Belobaba's reliance on the decision in *Just v. British Columbia* underscores the correctness of their holdings:[55] "[t]he ultimate determination by the motions judge in this case reflected the Supreme Court of Canada's analysis dating back to 1989 in *Just*".[56] This was precisely the same starting point of the analysis in *Francis* in this Court and in *Marchi*, in the Supreme Court of Canada, respectively.[57]

---

[53] Divisional Court Reasons, paras. 18, 49, 51, 66, 87, 88, 90 (respectively), ABC, Vol. 1 of 3, Tab 4, pp. 20, 27, 28, 30, 35-36 [emphasis added].

[54] Certification Reasons, paras. 32, 33, ABC, Vol. 1 of 3, Tab 10, pp. 84-85 [emphasis added].

[55] Certification Addendum, at para. 23, ABC, Vol. 1 of 3, Tab 5, pp. 54-55; Divisional Court Reasons, paras. 63, 64, 65, 66, 83, ABC, Vol. 1 of 3, Tab 4, pp. 29-30, 33-34.

[56] Divisional Court Reasons at para 83, ABC, Vol. 1 of 3, Tab 4, pp. 33-34.

[57] *Francis v. Ontario,* 2021 ONCA 197, at paras. 123, 128, 135, 136 ABOA, Vol. 2 of 5, Tab 15; *Marchi v. City of Nelson*, 2021 SCC 41 at paras. 14, 20 – 30, 33 – 36, 38, 39, 41, 43, 50, 54, ABOA, Vol. 3 of 5, Tab 25.

34. If the same claim is considered by four judges and two of those judges determine that 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. This underscores the error in the decision of the majority. The majority's decision represents a marked, and erroneous, shift respecting the proper test for motions to strike and the policy-operational distinction, a shift which cannot stand in light of decisions of both the Supreme Court of Canada and this Court.

(c) Majority Failed To Understand The Pleading and Misapprehended the Case

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

36. This failure is revealed by the following critical passages of the majority's 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.[58]

[58] Divisional Court Reasons, paras. 123(a), (b), 126, ABC, Vol. 1 of 3, Tab 4, pp. 43, 44.

37. Conversely, Regional Senior Justice Edwards in the dissent (and Justice Belobaba at certification) properly accepted the following pleadings to be true:

> 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 for further services but was then subjected to a procedurally unfair and arbitrary interruption of ongoing services…[59]
>
> 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.[60]

38. Accordingly, two errors arise: (a) the pleading expressly and specifically states that the class members are approved and entitled to the benefits at issue; (b) the action does not seek to compel Ontario to establish benefits for disabled adults - Ontario decided to do so years ago. Recourse to the pleaded language below demonstrates that the majority either failed to review the pleading, ignored its express terms 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:

[59] Divisional Court Reasons, para. 104, ABC, Vol. 1 of 3, Tab 4, p. 38 [emphasis added].

[60] Certification Reasons, para. 5, ABC, Vol. 1 of 3, Tab 10, p. 80 [emphasis added].

…

(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*;

(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.[61]

39. A review of both the dissenting opinion and the motions judge's reasons 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. …[62]
>
> 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… [63]
>
> 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**.[64]

40. The reasons of Regional Senior Justice Edwards in dissent and Justice Belobaba are consistent. They cannot be reconciled with the reasons of the Divisional Court majority. Each set two judges appears to consider a totally different pleading. Had the majority had regard for the pleading alone and assumed the facts pleaded to be true, it could not have plausibly arrived at the

---

[61] Amended Claim, paras. 6, 24(e), 28, 44, 45, 47, 48, 49, ABC, Vol. 1 of 3, Tab 13, pp. 124-125, 129, 130, 137-139 [emphasis added].

[62] Divisional Court Reasons, paras. 73, 78, 79, ABC, Vol. 1 of 3, Tab 4, pp. 31, 32, 33.

[63] Divisional Court Reasons, paras. 73, 78, 79, ABC, Vol. 1 of 3, Tab 4, pp. 31, 32, 33.

[64] Divisional Court Reasons, paras. 73, 78, 79, ABC, Vol. 1 of 3, Tab 4, pp. 31, 32, 33; Certification Reasons, para. 52, ABC, Vol. 1 of 3, Tab 10, p. 89: "they [the class] are requesting services that they have been receiving and that **they have been approved to continue to receive**" [emphasis added].

conclusions that it did.

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

41. The majority decision imbued the definition of "policy" with too broad a meaning, one that includes implementation, administration and operation.[65] This interpretation cannot stand in 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".[66]

42. Even though *Francis* pertained to a summary judgment appeal (or merits determination), this Honourable Court nevertheless reverted to the pleading in that case in order to properly characterize the core claim. In so doing, this 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 …[67]

[65] Divisional Court Reasons, at paras. 121, 122, 131, ABC, Vol. 1 of 3, Tab 4, pp. 43, 45.
[66] *Francis v. Ontario,* 2021 ONCA 197, at para. 128, ABOA, Vol. 2 of 5, Tab 15 [emphasis added].
[67] *Francis v. Ontario,* 2021 ONCA 197, at paras. 100, 131, 136, ABOA, Vol. 2 of 5, Tab 15 [emphasis added].

43. Similarly, at the end of 2021, the Supreme Court of Canada restated the very same fundamental fault line between policy and operation in the following manner:

> Activities falling outside this protected sphere of core policy — that is, activities that open up a public authority to liability for negligence — have been defined as "**the practical implementation** of the formulated policies" or "the performance or carrying out of a policy" (*Brown*, at p. 441; see also *Laurentide Motels*, at p. 718). Such "operational" decisions are generally "made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness" (*Brown*, at p. 441).[68]

44. Accordingly, based on *Marchi, Francis* and the prevailing Rule 21 test to strike a claim as having no chance of success, as the pleading herein contained precisely the same allegations impugning the "implementation", "operation", "management",[69] the action ought to have been permitted to proceed to the merits stage. Even Ontario 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".[70] It is trite law that once a governmental decision is *implemented*, a private law duty of care may arise concerning its operation.[71] In the result, the Divisional Court's holding is simply wrong on its face.

C. *Crown Liability & Proceedings Act* does not apply

45. Despite having adjourned the original appeal so that the motions judge could make a determination regarding the applicability of the CLPA (as its passage occurred after the original certification determination in 2018), the Divisional Court did not even refer to the CLPA and its reasons are bereft of any such consideration. Accordingly, this Court must review the holding of

---

[68] *Marchi v. City of Nelson*, 2021 SCC 41, at para. 52, ABOA, Vol. 3 of 5, Tab 25 [emphasis added].
[69] Amended Claim, paras. 44, 45, 47, 48, 49, ABC, Vol. 1 of 3, Tab 13, p. 137-139.
[70] Crown Divisional Court Factum, at paras. 2, 4, ABC, Vol. 3 of 3, Tab 28, p. 1058, 1059-1060.
[71] *Just v. British Columbia*, [1989] 2 S.C.R. 1228, at pp. 1240-1242, ABOA, Vol. 3 of 5, Tab 23.

Justice Belobaba on the CLPA to determine if it is correct in light of *Francis*[72] (the first appellate treatment of the CLPA) and *Marchi*, the latest opinion on the policy-operational distinction from the Supreme Court of Canada.[73]

46. The CLPA decision at the motions level accords entirely with the principles and reasoning in both *Francis* and *Marchi*. With the Amended Statement of Claim being the only pleading before him, Justice Belobaba correctly determined that it is *possible*, on a full record, that the CLPA may not even apply, let alone bar the claim in its entirety at this stage:

> Today, as I reconsider the s. 5(1)(a) analysis, I have before me the plaintiff's amended statement of claim that pre-dated the CLPA and a copy of the newly enacted CLPA. The defendant has not yet filed a statement of defence. **Based on the limited material before me,** I cannot assume that the listed instances of operational negligence – the indeterminate waitlists, the bad databases, the flawed computer programs and the faulty prioritization and matching processes – were the result of specific governmental **decisions** or specific failures to make a decision and not just the result of, say, benign neglect or systemic indifference that cannot be attributed to any one person.[74]

47. Before section 11(4) of the CLPA may apply to bar a claim, it must be crystal clear on the face of the pleading that the decisions at issue are "decisions" within the meaning of the statute. Without that – the trigger of a "decision" – there cannot be immunity. There were and are no pleaded facts before this Court that such a "decision" was ever made. Therefore, the CLPA is not engaged.

48. *Marchi* confirms that this is the correct approach. The Supreme Court of Canada determined there that in the policy-operational sphere, "the key focus must remain on the nature of the decision". *Marchi* provides helpful guidance for courts to assess the nature of a "decision". It lists four factors by which to characterize such decisions. These factors are useful on an

---

[72] *Francis v. Ontario,* 2021 ONCA 197, ABOA, Vol. 2 of 5, Tab 15.
[73] *Marchi v. City of Nelson*, 2021 SCC 41, ABOA, Vol. 3 of 5, Tab 25.
[74] Certification Addendum, at para. 14, ABC, Vol. 1 of 3, Tab 5, p. 52 [emphasis added].

"ultimate" merits analysis. They may only be properly examined on a full evidentiary record as "[None] of the factors is necessarily determinative alone and … courts must assess all the circumstances."[75]

49. *Francis* rejected Ontario's statutory immunity interpretation and ultimately found that it must be construed in accordance with the prevailing common law and fundamental principles of Crown immunity:

> It is s. 11(5)(*c*) of the *CLPA* that is at the heart of the interpretive issue. **We would not give it the broad interpretation that Ontario urges in this case. …** there is a presumption that the common law remains unchanged absent a clear and unequivocal expression of legislative intent. In our view, the combination of ss. 11(4) and (5) fails to achieve that clear and unequivocal expression. Subsection 11(4) expressly references matters of policy. Subsection 11(5) then purports to define what a policy matter may include. It follows that **this definition must be predicated on maintaining the policy/operational separation.**....
>
> Second, to adopt Ontario's expansive meaning of s. 11(5)(*c*) of the *CLPA* would directly offend the purpose behind statutes limiting Crown immunity, as explained by Cory J. in *Just.* **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".** Indeed, this is precisely the conclusion reached in *Seelster Farms*. The difficulty with that approach is aptly expressed by McLachlin C.J.C. in *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45, [2011] S.C.J. No. 42, 2011 SCC 42, at para. 76: "[e]xempting [page 534] all government actions from liability would result in intolerable outcomes.[76]

50. In the result, this Court ought to reject Ontario's reliance upon section 11(5) of the CLPA on the same basis as in *Francis*.

---

[75] *Marchi v. City of Nelson*, 2021 SCC 41, at para. 66, ABOA, Vol. 3 of 5, Tab 25, the four factors are: (i) level and responsibility of the decision-maker; (ii) process by which the decision was made; (iii) the nature and extent of budgetary considerations; and (iv) the extent to which the decision was based on objective criteria, at paras. 62 – 65.

[76] *Francis v. Ontario,* 2021 ONCA 197, at paras. 127 – 128, ABOA, Vol. 2 of 5, Tab 15 [emphasis added].

D. The Section 7 *Charter* Claim – Improperly Stuck On Appeal

51. The Appellant also pleaded a section 7 *Charter* violation for an alleged breach of her right to security of the person.[77] Consistent with the principle that "where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*,"[78] this claim was correctly sustained by the motions judge at first instance:

> 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**.[79] [emphasis added]

52. Cognizant of the Rule 21 standard, Justice Belobaba refused to strike the section 7 claim, finding that at this stage, "it is enough if the plaintiff can show a possible pathway".[80] Given the applicable legal test, this was the correct approach. If there is a chance of success, even if improbable, the action must be allowed to proceed to a merits determination.

53. On appeal, only Regional Senior Justice Edwards grappled with the sustainability of the *Charter* claim. There was no dispute below that in order to establish a section 7 violation, a plaintiff must establish (a) state conduct; (b) deprival of a right; and (c) that the deprivation is contrary to the principles of fundamental justice. The fact of state conduct was not at issue.[81] In the result, the

---

[77] Amended Claim, paras. 2, 3, 6, 24(a), 24(b), 24(e), 25, 26, 30, 51, 52, 53, 54, 56, ABC, Vol. 1 of 3, Tab 13, pp. 124-125, 129, 130, 131, 139, 140.

[78] *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, at para. 104, ABOA, Vol. 2 of 5, Tab 10.

[79] Certification Reasons, paras. 49, 53, 56, ABC, Vol. 1 of 3, Tab 10, pp. 88, 89-90.

[80] Certification Reasons, para. 44, ABC, Vol. 1 of 3, Tab 10, p. 87.

[81] Divisional Court Reasons, para. 95, ABC, Vol. 1 of 3, Tab 4, p. 36-37.

decision focussed upon security of the person and deprival.

54. Ultimately, the section 7 claim was struck by the Divisional Court (without any reasons by the majority) primarily on the basis that *Charter* protection does not allegedly extend to the provision of basic human needs.[82] This finding is 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**.[83]

55. Moreover, given that the pleading refers to state interference with an individual's basic living necessities such as shelter, sustenance and safety,[84] it was an error of law to find that this did not *prima facie* attract section 7 protection, which encapsulates both the physical and psychological integrity of a serious and profound kind.[85]

56. Justice Edwards improperly relied upon merits decisions[86] to dismiss the *Charter* claim rather than confining his examination to the pleadings alone. This is 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,[87] the claim as pleaded does not seek to

---

[82] Divisional Court Reasons, para. 105, ABC, Vol. 1 of 3, Tab 4, p. 38.

[83] *Mathur v. Ontario*, 2020 ONSC 6918, at paras. 148, 158, ABOA, Vol. 4 of 5, Tab 27 [emphasis added], leave to appeal to ONCA refused 20-593 ML (25 March 2021).

[84] Amended Claim, paras. 51, 52, 53, 54, 56, 57(e), ABC, Vol. 1 of 3, Tab 13, pp. 139-140, 141.

[85] *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 at paras. 58, 59, ABOA, Vol. 4 of 5, Tab 29; *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 173, ABOA, Vol. 4 of 5, Tab 33.

[86] Divisional Court Reasons, para. 105, ABC, Vol. 1 of 3, Tab 4, p. 38, 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)*, 134 D.L.R. (4th) 20, ABOA, Vol. 3 of 5, Tab 26, leave to appeal to SCC ref'd 373 (4 September 1996); see also *Barbra Schlifer Commemorative Clinic v. Canada*, 2014 ONSC 5140, ABOA, Vol. 1 of 5, Tab 5.

[87] Divisional Court Reasons, para. 114, ABC, Vol. 1 of 3, Tab 4, p. 41.

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 to provide already approved financial supports arising from systemic inadequacies.[88] Having approved Briana for services, Ontario cannot then simply renege, *ad infinitem*, on those benefits in a manner that violates the *Charter*.

57. Canada's highest Court has held on a number of occasions that the right to security of the person protects both the "physical and psychological integrity of the individual".[89] This Court itself has echoed these sentiments by holding that the section 7 right to life, liberty and security "relate[s] to one's physical or mental integrity and one's control over these."[90] For some time in Canada, section 7 protection has been deemed to extend to, and include, psychological integrity or suffering.[91]

58. In terms of the degree or threshold of interference required, appellate jurisprudence confirms that "for an incursion into psychological integrity to amount to a deprivation of security of the person, it must interfere with the personal autonomy, dignity or privacy of the individual 'in an intimate and profound way'".[92] As such, this threshold will be satisfied for a deprivation of psychological security of the person "if it constitutes interference 'with an individual interest of fundamental importance', such as interference with 'profoundly intimate and personal choices of

---

[88] Amended Claim, paras. 25, 30, 51, 52, 53, 54, ABC, Vol. 1 of 3, Tab 13, pp. 130, 131, 139-140.

[89] *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 173, ABOA, Vol. 4 of 5, Tab 33; *Reference Re* ss. 193 & 195.1(1)(c) of the Criminal Code *(Man.)*, [1990] 1 S.C.R. 1123, at p. 1177, ABOA, Vol. 5 of 5, Tab 36; *Rodriguez v. British Columbia (Attorney General)*, [1999] 3 S.C.R. 46, at p. 587-588, ABOA, Vol. 5 of 5, Tab 37.

[90] *R. v. Videoflicks Ltd.*, 48 O.R. (2d) 395, at para. 70, ABOA, Vol. 4 of 5, Tab 35.

[91] *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46, at para. 58, ABOA, Vol. 4 of 5, Tab 29; *Carter v. Canada (Attorney General),* 2015 SCC 5 at para. 64, ABOA, Vol. 1 of 5, Tab 8.

[92] *R. v. Tinker*, 2017 ONCA 552, at para. 75, ABOA, Vol. 4 of 5, Tab 34.

an individual', including "the right to make decisions concerning one's body free from state interference'".[93] All such elements were pleaded below.[94]

59. 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".[95] If the degree of interference must be objectively assessed, that should only properly be done on a full evidentiary record, not at a certification motion. In any event, the pleadings here satisfy the meaning of "state-imposed psychological stress" which engages section 7 by rising above the "the ordinary level or stress or anxiety that a person of reasonable sensibility, assessed from an objective perspective, would suffer as a result of the state action".[96]

60. Since the Divisional Court's decision: (a) misinterpreted the protection as one of solely economic needs; (b) relied on judicial merits determinations rather than the pleadings, and (c) failed to adopt the jurisprudential recognition that section 7 may indeed encapsulate psychological or mental integrity, its decision on the proper content of "security of the person" was incorrect.

61. Justice Edward's decision is built entirely upon an erroneous premise: a notional section 7 case which imposes a positive obligation on the state to ensure security of the person.[97] Rather, the core complaint is *not simply denial* of benefits but **egregious and unjustified 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*",

---

[93] *R. v. Tinker*, 2017 ONCA 552, at para. 76, ABOA, Vol. 4 of 5, Tab 34.
[94] Amended Claim, paras. 51 – 54, 57(e), ABC, Vol. 1 of 3, Tab 13, p. 139-140, 141.
[95] *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46, at para. 60, ABOA, Vol. 4 of 5, Tab 29.
[96] *R. v. Tinker*, 2017 ONCA 552, at para. 73, ABOA, Vol. 4 of 5, Tab 34; Amended Claim, paras. 51 – 58, ABC, Vol. 1 of 3, Tab 13, pp. 139-141.
[97] Divisional Court Reasons, para. 114, ABC, Vol. 1 of 3, Tab 4, p. 41.

and that state caused delay may constitute a "deprivation". In other words, section 7 protection will sometimes be engaged by state **inaction**.[98]

62. In *Gosselin*, the Supreme Court stated that the "concept of deprivation is sufficiently broad to embrace withholdings that have the ***effect of erecting barriers***".[99] State conduct which withholds financial entitlements to approved disabled persons, causing an inability to "maintain basic hygiene, sustenance, shelter and safety",[100] and thus rising to the level of a "denial of basic necessities of life",[101] arguably constitutes the "erection of barriers" within the meaning of *Gosselin*. It was an error of law for the Divisional Court to find otherwise.

63. The motions judge held that a *prima facie* right to security of the person was evident on the face of the pleading. The requirement to prove (or at least plead at this stage) a state deprivation (erection of a barrier) of such a kind (delay/inaction) is to be determined on a full record:

> 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**. … 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 sometime amount to a deprivation.[102]

---

[98] *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, at paras. 52, 188, ABOA, Vol. 1 of 5, Tab 6.

[99] *Gosselin v. Quebec (Attorney General),* 2002 SCC 84, at paras. 75-77, 81, 83, 321, 326, ABOA, Vol. 3 of 5, Tab 19 [emphasis added].

[100] Amended Claim, at para. 52, ABC, Vol. 1 of 3, Tab 13, p. 139-140.

[101] Amended Claim, at para. 57(e), ABC, Vol. 1 of 3, Tab 13, p. 141.

[102] Certification Reasons, at para. 49, ABC, Vol. 1 of 3, Tab 10, p. 88 [emphasis added].

64. Against the backdrop of the pleading, Justice Belobaba's *Charter* analysis was correct and entirely consistent with appellate jurisprudence. The Supreme Court of Canada has issued a very specific directive on flexibility when interpreting section 7:

> But its [section 7] 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.[103]

65. Accordingly, the section 7 claim ought not to have been struck by the Divisional Court.

E. Balance of the Certification Test Ignored By Divisional Court

66. While the cause of action criteria encapsulated in section 5(1)(a) of the CPA is to be reviewed against the standard of correctness, the balance of the certification criteria is reviewable on a deferential basis. Experienced class actions judges are entitled to a high degree of deference at certification: "a reviewing court should only intervene with a motion judge's certification decision when the judge makes a palpable and overriding error of fact or otherwise errs in principle." [104]

(a) Commonality Properly Found to Exist By Motions Judge

67. Justice Belobaba determined that in support of the certification motion, the Appellant had filed "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

---

[103] *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44, at para. 188, ABOA, Vol. 1 of 5, Tab 6 [emphasis added].

[104] *Fischer v. IG Investment Management Ltd*., 2012 ONCA 47, at para. 40, ABOA, Vol. 2 of 5, Tab 13, citing *Pearson v. Inco Ltd*., 78 O.R. (3d) 641, at para. 43, ABOA, Vol. 4 of 5, Tab 31; *Cassano v. Toronto- Dominion Bank*, 2007 ONCA 781, at para. 23, ABOA, Vol. 1 of 5, Tab 9, leave to appeal to SCC refused 32434 (27 March 2007); *Cloud v. Canada (Attorney General)*, 73 O.R. (3d) 401, at para. 39, ABOA, Vol. 2 of 5, Tab 11, leave to appeal to SCC refused 30759 (12 May 2005).

have class-wide commonality".[105] With a full appreciation of the evidentiary foundation of the motion, Justice Belobaba properly applied this Court's jurisprudence:

> 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. As the Court of Appeal reaffirmed in *Hodge v Neinstein* '[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.
>
> 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.[106]

68. This particular holding is unassailable at law and in principle. Both this Court and the Supreme Court of Canada have repeatedly held that the existence of individual issues – even substantial ones – are no bar to certification[107] and that the "potential need for individual assessments does not undermine the utility of a class proceeding".[108] Sufficient commonality will be present wherever an issue constitutes a substantial ingredient of a claim:

> even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. … the task posed by s. 5(1)(c) is to test whether there are aspects of the case that meet the commonality requirement rather than to elucidate the various individual issues which may remain after the common issues trial.[109]

---

[105] Certification Reasons, at paras. 18, 25, ABC, Vol. 1 of 3, Tab 10, pp. 82, 83.

[106] Certification Reasons, at paras. 65 – 66, ABC, Vol. 1 of 3, Tab 10, p. 92.

[107] *Hollick v. Toronto (City)*, 2001 SCC 68, at para. 30, ABOA, Vol. 3 of 5, Tab 21.

[108] *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, at para. 96, ABOA, Vol. 2 of 5, Tab 16.

[109] *Cloud v. Canada (Attorney General)*, 73 O.R. (3d) 401, at para. 53, ABOA, Vol. 2 of 5, Tab 11.

69. The motions judge adopted and applied these appellate authorities in certifying breach of a duty of care as a common issue.[110] This was simply an application of the Court of Appeal's decision in *Cloud* where Justice Goudge stated:

> it is my view that whether the respondents owned legal obligations to the class members that were breached by the way the respondents ran the School is a **necessary and substantial part of each member's claim. No individual can succeed in his or her claim to recover for harm suffered because of the way the respondent ran the School without establishing these obligations and their breach**. The common trial will take these claims to the point where only causation and harm remain to be established.[111]

70. This Court has consistently directed that the central question the certification judge is to ask is whether, in the context of the entire claim, the resolution of the common issues will "significantly advance the action", weighing their *relative* importance against any individual issues.[112]

71. Justice Belobaba specifically heeded and applied these principles in his decision, revealing no error of principle. With respect to the *Charter* claim and the common issue of whether section 7 has been breached, Justice Belobaba relied on this Court's decision in *Good v. Toronto.*[113] *Good* approved the certification of *Charter* issues, based on what it coined as a "systemic" issue.[114] Certification of potential *Charter* breaches have been deemed quintessentially "common" as their determination does not turn upon the conduct, actions or characteristics of any one plaintiff or class member.[115]

---

[110] Certification Reasons, at para. 68, ABC, Vol. 1 of 3, Tab 10, p. 92.

[111] *Cloud v. Canada (Attorney General)*, 73 O.R. (3d) 401, at para 69, ABOA, Vol. 2 of 5, Tab 11.

[112] *Cloud v. Canada (Attorney General)*, 73 O.R. (3d) 401, at para. 76, ABOA, Vol. 2 of 5, Tab 11; *Hodge v. Neinstein*, 2017 ONCA 494, at para. 144, ABOA, Vol. 3 of 5, Tab 20.

[113] *Good v. Toronto (Police Services Board)*, 2016 ONCA 250, ABOA, Vol. 2 of 5, Tab 18, aff'g 2014 ONSC 4583, ABOA, Vol. 2 of 5, Tab 17.

[114] *Good v. Toronto (Police Services Board)*, 2014 ONSC 4583, at paras. 44-45, ABOA, Vol. 2 of 5, Tab 17.

[115] *Good v. Toronto (Police Services Board)*, 2014 ONSC 4583, at paras. 35, 45, ABOA, Vol. 2 of 5, Tab 17, aff'd *Good v. Toronto (Police Services Board)*, 2016 ONCA 250, at paras. 34, 60, ABOA, Vol. 2 of 5, Tab 18; *Francis v.*

(b) Preferable Procedure Finding Discretionary & Appropriate

72. Determinations pursuant to section 5(1)(d) of the CPA are considered the most highly discretionary of all elements of the certification test, attracting the highest degree of deference upon review. The analysis at first instance plainly reveals that the motions judge properly directed himself:

> 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.[116]

73. Most importantly, the motions judge adhered to the Supreme Court of Canada's direction regarding the appropriate preferability analysis. In *Fischer,* the Court determined that certification courts are required to undertake the section 5(1)(d) preferability analysis with specific regard to access to justice and cost-benefit considerations.[117] Justice Belobaba did just that.

74. Justice Belobaba's reasons reveal a considered approach and application of the *Fischer* test:

> …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.[118]

75. Justice Belobaba's decision on negligence, the CLPA, the Charter and certification were all correct and do not reveal errors of law or principle. His decision should be restored.

Ontario, 2021 ONCA 197 at paras. 55, 56, 110, ABOA, Vol. 2 of 5, Tab 15, aff'g *Francis v. Ontario,* 2020 ONSC 1644, at paras. 324-326, 332-337, ABOA, Vol. 2 of 5, Tab 14.

[116] Certification Reasons, at para. 78, ABC, Vol. 1 of 3, Tab 10, p. 95, citing A*IC Limited v. Fischer*, 2013 SCC 69 at para. 23, ABOA, Vol. 1 of 5, Tab 3.

[117] A*IC Limited v. Fischer*, 2013 SCC 69 at paras. 24-38, ABOA, Vol. 1 of 5, Tab 3.

[118] Certification Reasons, at para. 80, ABC, Vol. 1 of 3, Tab 10, p. 95.

PART V - ORDER REQUESTED

76. The Appellant respectfully requests that the appeal be allowed, with the certification order restored, all with costs in this court and in the proceedings below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of February, 2022.

Kirk M. Baert
Celeste Poltak
Koskie Minsky LLP

Lawyer for the Plaintiff (Appellant)

CERTIFICATE

I, Celeste Poltak, counsel for the Appellant, certify that:

1. An Order under subrule 61.09(2) is not required; and,

2. The Appellant will require 4 hours for oral argument of the appeal, including reply.

February 18, 2022

Kirk M. Baert
Celeste Poltak
Koskie Minsky LLP

SCHEDULE "A" - LIST OF AUTHORITIES

1. *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35
2. *Addison Chevrolet Buick GMC Limited v. General Motors of Canada Limited*, 2016 ONCA.324, leave to appeal to SCC refused, 37115 (2 February 2017)
3. *AIC Limited v. Fischer*, 2013 SCC 69
4. *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19
5. *Barbra Schlifer Commemorative Clinic v. Canada*, 2014 ONSC 5140
6. *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44
7. *Brown v. British Columbia (Minister of Transportation & Highways),* [1994] 1 S.C.R. 420
8. *Carter v. Canada (Attorney General),* 2015 SCC 5
9. *Cassano v. Toronto- Dominion Bank*, 2007 ONCA 781, leave to appeal to SCC refused 32434 (27 March 2007)
10. *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35
11. *Cloud v. Canada (Attorney General)*, 73 O.R. (3d) 401, leave to appeal to SCC refused 30759 (12 May 2005)
12. *Dalex Co. v. Schwartz Levitsky Feldman*, 19 O.R. (3d) 463
13. *Fischer v. IG Investment Management Ltd.*, 2012 ONCA 47
14. *Francis v. Ontario,* 2020 ONSC 1644
15. *Francis v. Ontario,* 2021 ONCA 197
16. *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443
17. *Good v. Toronto (Police Services Board)*, 2014 ONSC 4583
18. *Good v. Toronto (Police Services Board)*, 2016 ONCA 250
19. *Gosselin v. Quebec (Attorney General),* 2002 SCC 84
20. *Hodge v. Neinstein*, 2017 ONCA 494
21. *Hollick v. Toronto (City)*, 2001 SCC 68
22. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959
23. *Just v. British Columbia*, [1989] 2 S.C.R. 1228
24. *Lysko v. Braley*, 79 O.R. (3d) 721
25. *Marchi v. City of Nelson*, 2021 SCC 41
26. *Masse v. Ontario (Ministry of Community and Social Services)*, 134 D.L.R. (4th) 20, leave to appeal to SCC ref'd 373 (4 September 1996)
27. *Mathur v. Ontario*, 2020 ONSC 6918, leave to appeal to ONCA refused 20-593 ML (25 March 2021)

28. *Nash v. Ontario*, 27 O.R (3d) 1
29. *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46
30. *Odhavji Estate v. Woodhouse*, 2003 SCC 69
31. *Pearson v. Inco Ltd*., 78 O.R. (3d) 641
32. *R. v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42
33. *R. v. Morgentaler*, [1988] 1 S.C.R. 30
34. *R. v. Tinker*, 2017 ONCA 552
35. *R. v. Videoflicks Ltd.*, 48 O.R. (2d) 395
36. *Reference Re* ss. 193 & 195.1(1)(c) of the Criminal Code *(Man.)*, [1990] 1 S.C.R. 1123
37. *Rodriguez v. British Columbia (Attorney General)*, [1999] 3 S.C.R. 46
38. *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).

Section Amendments with date in force (d/m/y)
2009, c. 33, Sched. 8, s. 6 (1) - 01/07/2010

* * *

PRIORITIZATION

Service and support profile

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).

Marc Leroux as Litigation Guardian of Briana Leroux **Plaintiff (Appellant)**	**and**	Her Majesty the Queen in Right of the Province of Ontario **Defendant (Respondent)**	**Court of Appeal File No. C70224**

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at **TORONTO**

FACTUM OF THE PLAINTIFF (APPELLANT)

KOSKIE MINSKY LLP
900-20 Queen St. West
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 (Appellant)