

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

B E T W E E N :

**MARC LEROUX AS LITIGATION GUARDIAN  
OF BRIANA LEROUX**

Plaintiff

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF THE  
PROVINCE OF ONTARIO**

Defendant

Proceeding under the *Class Proceedings Act, 1992*

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**STATEMENT OF DEFENCE**

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1. The defendant, His Majesty the King in right of the Province of Ontario (“Ontario”), admits the allegations contained in paragraph 17 of the Amended Statement of Claim (the “Claim”). Ontario also admits that paragraph 11 correctly states the definition of the class provided for in the Order of Justice Belobaba dated December 14, 2018 certifying this action as a class proceeding. With respect to paragraphs 12-16, 18 and 20-22 of the Claim, Ontario pleads and relies upon the provisions of the legislation in their entirety for the full terms and effect thereof.

2. Ontario denies each and every allegation contained in the Claim except to the extent admitted herein or referred to in paragraph 3 below, and specifically denies that the plaintiff or any other class member (together, the “Class Members”) are entitled to any of the relief sought in paragraph 1 and elsewhere in the Claim.

3. Ontario has no direct knowledge of the allegations made in paragraphs 7, 25-30, 50 and 55 of the Claim.

### **Overview**

4. The plaintiff seeks damages and other relief against Ontario on the basis that wait times for Class Members seeking adult developmental disability services or supports under the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008* (the “2008 Disabilities Act”) or direct funding under the *Ministry of Community and Social Services Act* (the “MCSSA”) during the class period were unreasonable, and that Ontario was negligent and breached s. 7 of the *Charter* with regard to the design and public administration of its system for prioritizing applications and allocating its limited resources amongst competing applicants.

5. Ontario pleads that the plaintiff’s negligence claim is not tenable and should be dismissed for the following reasons:

- a) pursuant to ss. 5 of the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27 (“PACA”) Ontario is only subject to vicarious liability in tort in respect of a tort committed by an officer, employee or agent of the Crown. The plaintiff has not pleaded an actionable tort claim against any identifiable person for whom Ontario could be vicariously liable, and Ontario denies that any Class Member has such a claim;
- b) neither Ontario nor any of its servants at any time owed any Class Member a private duty of care with regard to the government’s design or public administration of its discretionary public benefit programs or the manner in which any government official carried out their public duties, as alleged;

- c) at all material times any operational activities relating to the intake, assessment and prioritizing of Class Member applications, interacting with Class Members, coordinating the delivery of services, supports and funding to Class Members and managing service registry waitlists were performed by independent application entities as defined in the *2008 Disabilities Act*, not Ontario, and accordingly Ontario has no liability in respect of the matters raised in the Claim; and
- d) the negligence claim against Ontario concerns core policy decisions of government relating to developing policies and systems for prioritizing applications and allocating scarce resources amongst competing applicants under Ontario's discretionary public benefit programs. As such it is barred by common law core policy immunity and is extinguished by ss.11(4) of the *Crown Liability and Proceedings Act, 2019*.

6. The plaintiff's s. 7 *Charter* claim is also not tenable. The plaintiff has not pleaded any facts that if proven would establish that any Class Member has been deprived of a right that is protected under s. 7 of the *Charter*, and Ontario denies that there has been any such deprivation. A delay in the receipt of benefits under a discretionary government benefits program does not give rise to a s. 7 *Charter* claim or any remedies under the *Charter*.

### **Background Facts**

7. Ontario has established numerous programs which provide services, supports and funding for eligible children and youth with developmental disabilities until they reach the age of 18.

8. Upon reaching the age of 18, persons with developmental disabilities as defined under the *2008 Disabilities Act* may be eligible for other services, supports or direct funding, including under the following programs:

- (a) Income support benefits and employment support under the Ontario Disability Support Program (“ODSP”) pursuant to the *Ontario Disability Support Program Act, 1997*, which provides assistance intended for basic needs, shelter and some costs related to a person’s disability;
- (b) Developmental services and supports from a service agency under the *2008 Disabilities Act*; and
- (c) Direct “Passport” funding under the Passport Program under the MCSSA, which provides direct funding to eligible adults with developmental disabilities which can be used to purchase eligible services and supports.

9. The Claim relates only to the delivery of: (a) residential services and supports and care giver respite services and supports provided under the *2008 Disability Act*; and (b) direct funding (or Passport funding) provided under the MCSSA (together, the “Developmental Benefits Program”). It does not concern ODSP.

10. The Developmental Benefits Program is not an entitlement program. It is a discretionary benefit program, meaning that while applicants may apply for and be deemed eligible to receive services, supports or funding, they do not have an entitlement to receive those benefits.

11. Throughout the class period, requests for services, supports and funding under the Developmental Benefits Program significantly exceeded available resources, and accordingly the Ministry of Children, Community and Social Services (“MCCSS”) established a system

for the prioritization of requests based upon the many variables that made up each individual applicant's profile, needs, circumstances and risks. Resources would then be allocated by independent application entities to eligible individuals based upon many considerations, including a review of the priority scores assigned to each applicant seeking the same services or supports at the same time and place and the available resources to meet those requests. Those that could not be matched immediately with a particular service or support due to high demand or unavailability of some or all of those resources at that time would be placed on a service registry for that service or support by an application entity and would be required to wait. Prioritization for services and funding is not based on a first come, first served basis, rather prioritization is based on relative need and availability of resources at any given time.

### **Role of the Crown under the Developmental Benefits Program**

12. MCCSS has developed policies, guidelines and directives related to the administration of the Developmental Benefits Program, including with respect to how regional application entities called Developmental Services Ontario offices ("DSOs") and Passport Agencies which administer the Passport Program confirm the eligibility of applicants, the factors and tools to be used by DSOs in assessing the needs, risk, and circumstances of each applicant, and the tools to be used by the DSOs in conducting the process of prioritization of each application.

13. Ontario does not interact directly with applicants under the Developmental Benefits Program at any stage of the eligibility determination, assessment, prioritization or allocation processes, and does not carry out any of the activities related to processing individual applications or interacting with applicants. These activities are undertaken by the DSOs who interact with applicants and work with independent service agencies who match applicants

with available services and supports. There are nine DSOs in Ontario.

### **Role of Developmental Service Ontario Offices**

14. DSOs are agencies independent of government that serve as the single point of access and primary contact for applicants under the Developmental Benefits Program. Throughout the class period the DSOs' responsibilities included:

- (a) receiving applications and confirming each applicant's eligibility for services, supports and funding under the Developmental Benefits Program;
- (b) meeting and working with eligible applicants to complete a standard application package and conducting detailed assessments of each applicant's needs, wants, risks, and any medical and behavioural information relevant to their support needs;
- (c) liaising with third party service agencies to determine the availability of services, supports or funding for applicants, and where possible matching and linking eligible applicants with available services, supports and funding using the priority score determined by the provincial standardized tool; and
- (d) where resources are not available to meet an applicant's request or assessed need for services, supports or funding immediately, or where the applicant is not ready to receive the requested benefits, maintaining service registry waitlists for each service, support or funding that may have been requested.

15. Throughout the class period applicants were assessed by the DSOs based on a standard assessment and application process that considers each applicant's unique circumstances. Once the assessment process was complete, information from the completed application package was used to prioritize individuals. This process has always involved reviewing

identified risk factors to assess how urgent each applicant's need for the services, support or funding was as compared to other applicants seeking the same service, support or funding. In cases of urgency DSOs could arrange for immediate steps to address the needs of the applicant. In fact, the plaintiff received services and supports on an urgent basis soon after completing her applications process.

16. Since DSOs serve as the single point of access for all eligible applicants, individuals who requested direct funding through Passport were directed to one of the eleven MCCSS funded Passport Agencies in the province. Passport Agencies administer funding agreements with individuals in receipt of Passport and manage the service registry for direct funding requests.

17. The fact that any Class Member may have been placed on one or more service registries and was required to wait for a service, support or funding does not in and of itself mean that their application was handled incorrectly or that there was any impropriety, negligence or breach of s. 7 of the *Charter*. In this regard many applicants, including some or all Class Members, often apply for multiple services, supports or funding when in fact they either do not require all of those benefits or, in many cases, they do not in fact need some or all of those benefits at the time they applied. It is not uncommon for an applicant to decline a service once it becomes available because they are not ready to accept it or no longer want the service.

### ***No Private Duty of Care***

18. Ontario denies that the applicable legislation creates a statutory duty of care owed by Ontario or its servants to any Class Member personally or that that any Class Member was at any time in a relationship of sufficient proximity with Ontario or any of its servants to establish a private duty of care as alleged in paragraph 46 and elsewhere in the Claim, and puts the

plaintiff to the strict proof thereof.

19. Ontario expressly denies that at any material time it owed a private duty of care to any Class Member relating to the design or public administration of the Developmental Benefits Program generally, or relating specifically to any aspect of how the Class Member's application was processed. Ontario further denies that the Minister of MCCSS (the "Minister") or any of its other servants owed any Class Member a duty of care.

20. With respect to paragraphs 23, 24 and 46 to 49 of the Claim, Ontario denies that Ontario, the Minister or any of its other servants owed any Class Member a duty to reduce or eliminate wait times or service registries or with respect to the design or administration of any aspect of the Developmental Benefits Program, including in particular its policies and system for prioritizing applications and allocating its limited resources amongst competing applicants.

21. With respect to paragraph 20 of the Claim, Ontario expressly denies that the use of service registries or "waitlists" was at any material time prohibited by the *2008 Disabilities Act*.

### ***No Breach of Duty***

22. Ontario denies that Ontario, the Minister or any of its other servants breached any duty they may be found to have owed to any Class Members in respect of any of the matters raised in the Claim. At all material times, Ontario and its servants met the applicable standard of care and acted in a reasonable and prudent manner and in good faith.

### ***Core Policy Immunity***

23. The Claim is barred by core policy immunity. The Claim seeks to impugn matters of core policy relating to the government's core competency in the public administration of a



government benefits program, including funding decisions, the allocation of limited government resources amongst competing users of a government benefit program, and decisions involving the weighing of social, political, economic and financial interests and considerations. These matters are not justiciable.

24. Further, Ontario pleads that the negligence claim is barred by section 11(4) of the *Crown Liability and Proceedings Act, 2019* (the “CLPA”), which precludes any cause of action against the Crown or an officer, employee or agent of the Crown in respect of any negligence or failure to take reasonable care in the making of a decision in good faith respecting a policy matter, or any negligence in a purported failure to make a decision respecting a policy matter. The negligence claim concerns the making of a policy decision or failure to make a decision in respect of a “policy matter” as defined in ss. 11(5) of the CLPA. Ontario at all times acted in good faith.

#### ***Crown Immunity against Direct Claims in Tort***

25. Ontario pleads that it is immune from liability in tort, save and except to the extent that this immunity has been expressly lifted by statute, and that this immunity applies to bar the plaintiff’s negligence claim.

26. Ss. 5(a) of PACA partially lifts the Crown’s immunity from direct liability in tort to permit claims framed in vicarious liability in respect of a tort committed by an officer, employee or agent of the Crown. However, ss. 5(a) does not permit the plaintiff’s negligence claim because the Claim fails to plead a tenable cause of action in negligence against an identifiable Crown servant for whom Ontario could be vicariously liable. Ontario denies that any of its officers, employees or agents committed a tort for which it could be vicariously liable and puts the plaintiff to the strict proof thereof.

27. Ontario also denies that it is vicariously liable for any conduct of any DSOs, Passport Agencies, third party service agencies or their employees, and denies that the Class Members are permitted under PACA to claim against Ontario in respect of any tort that may have been committed by such entities or individuals.

**No Breach of s. 7 of the *Charter***

28. Ontario denies that it has deprived any Class Member of life, liberty and security of the person, contrary to *Charter* s.7.

29. Ontario submits that there is no deprivation in waiting for discretionary state-funded supports and services. Ontario also denies that any Class Member has suffered serious state-imposed psychological stress due to any actions or inactions by Ontario. Class members are not prohibited from taking any steps to meet their own needs.

30. In the alternative and in any event, Ontario denies that any deprivation is contrary to the principles of fundamental justice. In particular, Ontario denies that any of its actions are arbitrary. Ontario's objective is to allocate limited resources among eligible beneficiaries in circumstances where the demand for services and supports greatly exceeds their availability. Ontario denies that any impact on the plaintiff bears no connection to this objective.

31. In the further alternative, Ontario submits that any breach of s. 7 is justified under *Charter* s. 1. Lastly, if any Class Members' rights have been unjustifiably infringed under *Charter* s. 7, which is denied, Ontario submits that damages are not a just and appropriate remedy under s. 24(1) of the *Charter*.

**Limitation Periods**

32. Ontario pleads and relies upon the *Limitations Act*, 2002, S.O. 2002, c. 24, Sched. B. Ontario specifically pleads that any Class Member's claim which arose prior to April 10, 2017 is statute-barred or, alternatively, is precluded by the doctrine of *laches*.

**No Loss or Damages**

33. Ontario denies that any Class Member has suffered any loss or damages for which Ontario could be liable. In the alternative, if any Class Member has suffered any loss or damages, such loss or damages were not caused or contributed to by any actionable act or omission by Ontario and were caused or contributed to by the negligence of the Class Member or their caregiver, the full particulars of which are not known to Ontario. Ontario pleads and relies on the *Negligence Act*.

34. With regard to the plaintiff's claim, the plaintiff was provided with significant services and supports on an urgent basis soon after completing her application process. Accordingly, the plaintiff suffered no loss for which Ontario could be liable.

35. In any event, the Class Member's claims for damages are excessive, exaggerated and too remote to be recoverable at law.

36. If any Class Member has suffered any loss or damages as alleged or otherwise, which is not admitted but denied, such Class Member has failed to mitigate their damages and are therefore precluded from claiming same against Ontario.

37. Ontario states that nothing in its conduct warrants an award of punitive or exemplary damages.

### **Aggregate Damages are not Appropriate**

38. An aggregate assessment of damages would not be appropriate in the circumstances of this case. Issues regarding why any particular Class Member may have been required to wait longer than another Class Member or applicant for a particular service or support, whether any aspect of the assessment, prioritization and allocation processes affected them positively, negatively or not at all, or whether they suffered any loss or damages will be fact specific and will require proof by that Class Member. The fact that a Class Member may have been required to wait for services, supports or funding they had been assessed as eligible to receive in a discretionary system does not in and of itself mean that there was any impropriety or error for which Ontario should be liable.

### **Legislation Relied Upon**

39. The Crown pleads and relies on the provisions of the following legislation:

- a) *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act*, 2008, S.O. 2008, c. 14;
- b) *Ministry of Community and Social Services Act*, R.S.O 1990, c. M. 20;
- c) *Limitations Act*, 2002, S.O. 2002, c. 24;
- d) *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27;
- e) *Negligence Act.*, R.S.O. 1990, c. N.1;
- f) *Class Proceedings Act*, 1992, S.O. 1992, c. 6;
- g) *Interpretation Act*, R.S.O. 1990, c. I.11;
- h) *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c.7.

40. Ontario requests that this action be dismissed with costs payable to Ontario.

DATE: September 29, 2023

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SUPERIOR COURT OF JUSTICE  
Proceeding commenced at TORONTO

**STATEMENT OF DEFENCE**

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