CITATION: Bowman v. Ontario, 2020 ONSC 7374
COURT FILE NO.: CV-19-00000036-00CP
DATE: 20201130

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Dana Bowman, Grace Marie Doyle Hillion, Susan Lindsay and Tracey Mechefske	)	Stephen Moreau, Kaley Duff and Lara Koener-Yeo, for the plaintiffs
Plaintiffs	)	
– and –	)	
Her Majesty the Queen in Right of Ontario	)	Christopher Thompson, Zachary Green, Chantelle Blom and Ravi Amarnath, for the defendant
Defendant	)	

HEARD: June 24 and 25, 2020

S.T. BALE J.

1. This action is for damages the plaintiffs allege were suffered as a result of the early termination of a basic income pilot project established by the Government of Ontario in 2017.

2. The plaintiffs move for an order certifying the action as a class action, under the *Class Proceedings Act, 1992.*

Background facts

3. The following is a summary of the background facts alleged in the amended statement of claim.

4. In its 2016 budget, the defendant announced its intention to establish a pilot project to study the value of implementing a basic income for residents of Ontario.

5. The defendant hired former senator Hugh Segal, a well-known advocate for basic income, for advice on how to implement such a project.

6. In August 2016, Mr. Segal delivered a discussion paper containing advice and recommendations for the design and implementation of a basic income pilot. Particulars of the advice and recommendations included:

- the pilot should replace the policing, control, and monitoring elements associated with ODSP and Ontario Works with a basic income disbursed automatically in order to determine the net effect of doing so on certain measurables such as poverty reduction, the reduction of stigmatization, health,

work productivity, housing outcomes, educational outcomes, and net economic and community outcomes in a targeted area;

- the pilot should be divided into three phases, being a planning phase, distribution phase, and an evaluation phase; during the second (distribution) phase, basic income payments should be distributed for a period of at least three years, with the pilot adopting an operational duration or period to enable the payment of money over three (3) years; and,
- participants should be extensively surveyed and their data collected for study in a manner that respects certain privacy norms.

7. In April 2017, following further consultations, the government announced the commencement of a three-year basic income program during which participants "will receive a minimum amount of income each year – a basic income, no matter what."

8. In a news release, the defendant provided the following information about the pilot:

- it would be a three-year program, with the defendant investing $50 million per year … for each of the three years of the pilot;
- a third-party research consortium and an advisory group would ensure the pilot is conducted with the utmost integrity, rigour and ethical standards; and
- the pilot will ensure that participants receive certain fixed amounts per year.

9. The defendant published a web page entitled "Ontario Basic Income Pilot" which contained the following information:

- there would be a "Payment Group" and a "Control Group";
- persons in the Payment Group are receiving monthly basic income payments for up to a three-year period;
- the Control Group has been established for comparison purposes, with persons who will be compensated for completing surveys, but who will not receive basic income payments; and,
- the pilot will test how basic income payments might help people with their basic needs while improving outcomes in, for example, food security, stress and anxiety, housing stability, and labour market participation.

10. During meetings held in 2017 and 2018, government representatives met with individuals to persuade them to apply for acceptance into the basic income pilot (BI Pilot). During the meetings, it was represented that participants would be guaranteed the receipt of basic income payments, for a three-year period. That representation was repeated in an information booklet and application forms provided to potential participants. In the end, over 4,000 people were enrolled in the pilot as members of the Payment Group, and approximately 2,000 as members of the Control Group.

11. In 2018, the government contracted with Veritas IRB to serve as an external research ethics board. The board was established because the Class Members were human research subjects and the government was required to adhere to ethical standards associated with such research.

12. The Class (being the Payment Group) experienced significant benefits by participating in the BI Pilot. In addition to receiving consistent basic income payments that increased their income, the Class members:

- did not need to report their activities as they did if enrolled in ODSP or Ontario Works;
- could plan their future;
- could afford more basic goods to satisfy their basic needs, including food, clothing, drugs, therapy, medical supplies, and improved housing;
- enrolled in courses of study;
- took steps to build or establish businesses;
- undertook independent responsibility for their own finances;
- made key purchases or investments to improve their life circumstances more generally; and,
- could feel pride in being part of a novel, significant experiment whereby the sharing of their personal information and activities could provide them and others with hope that delivery of social services in Ontario might thereafter be set on a very different, and perhaps more positive, footing.

13. In July 2018, following an election and change of government, the defendant announced that it would be terminating the Bl Pilot early. In the month following, the defendant announced that the final payment date would be March 25, 2019.

14. The plaintiffs plead that the early termination of the payments amounted to a breach of contract, a breach of undertaking, negligence, a public law tort, and a breach of s. 7 of the *Canadian Charter of Rights and Freedoms*, and that as a result they have suffered damages.

Judicial review proceedings

15. An application by the plaintiffs for judicial review was dismissed, see *Bowman v. Ontario (Minister of Children, Community and Social Services)*, 2019 ONSC 1064 (Div. Ct.). At para. 60, the court said that its order "has no effect on the Applicants' class action for damages for breach of duty of care, breach of contract and/or other private law remedies. This order only addresses the question of whether the court can quash the government's decision."

***Class Proceedings Act,* test for certification**

16. Section 5(1) of the *Class Proceedings Act, 1992*, (CPA) provides as follows:[1]

> **5** (1) The court shall, subject to subsection (6) and to section 5.1, certify a class proceeding on a motion under section 2, 3 or 4 if,
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> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

[1] As it read prior to the amendments which came into effect on October 1, 2020.

> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

17. The parties agree that the certification criteria set out in s. 5(1)(b) and (e) of the Act are met. The issues for determination on this motion are therefore whether the amended statement of claim discloses a reasonable cause of action, whether the claims of the class members raise common issues, and whether a class action is the preferable procedure for resolution of the class members' claims.

18. The test applicable to s. 5(1)(a) of the CPA mirrors the test in a rule 21.01(1)(b) motion to strike out a pleading on the ground that it discloses no reasonable cause of action. A claim will be struck where it is plain and obvious that it does not disclose a reasonable cause of action, or put another way, where the claim has no reasonable prospect of success: *R. v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at paras 17, 21; *Trillium Power Wind Corp. v. Ontario (Ministry of Natural Resources)*, 2013 ONCA 683, at paras 30-31.

19. All facts pleaded are assumed to be true, unless they are patently ridiculous, manifestly incapable of proof or amount to bald conclusory statements, unsupported by material facts: *Wright v. Horizons ETFS Management (Canada) Inc.*, 2020 ONCA 337, at para. 58. However, a critical analysis is required to prevent untenable claims from proceeding, given "this age of scarce judicial resources and systemic delay": *Rayner v McManus*, 2017 ONSC 3044, at paras 25-26 (Div. Ct.).

20. The pleading must be read generously to allow for drafting deficiencies and the plaintiff's lack of access to key documents and discovery information. The court should err on the side of permitting an arguable claim to proceed to trial. Cases that are unique or novel, that involve matters of law that are unsettled or that require a detailed analysis of the evidence should not be resolved without a full factual record: *Wright*, at para. 58.

21. With respect to s. 5(1)(a), the plaintiffs plead the following as causes of action:

- breach of contract;
- breach of undertaking;
- negligence;
- breach of public law duty; and
- breach of s. 7 of the *Charter*.

Claim in contract

22. The plaintiffs plead that the defendant and the Class entered into a contract for the provision of basic income payments for a three-year period.

23. Their position is that the facts pleaded establish a contract pursuant to which the government agreed to make basic income payments to the Class for a three-year period. In return, Class members agreed to assume a number of obligations which they say are the required contractual consideration, including:

- completing surveys at a rate of pay, per survey, that was lower than the amounts given to those in the Control Group;
- disclosing their tax and other financial information on an ongoing basis;
- exposing their personal and private lives to scrutiny through surveys;
- forgoing ODSP and Ontario Works benefits; and,
- allowing themselves to be human subjects in a major scientific experiment.

24. In oral argument, counsel said that the plaintiffs do not rely upon anything that may have been said to them by individuals with whom they interacted in applying for the BI Pilot. Rather, they reply upon the information booklet and application forms considered in the context of the facts surrounding the creation of the project, including the Segal report, various announcements made by the Premier and ministers, and the project web site.

25. The plaintiffs argue that contractual language of offer and acceptance, and consideration, can be found in the information booklet and application forms. At the hearing, plaintiffs' counsel reviewed the information booklet and application form in an attempt to illustrate such language:

- that one must "apply" for the program by submitting an "application form";
- one group "will receive" monthly Basic Income payments for up to a three-year period;
- "You will be asked to complete these surveys periodically during the pilot period";
- "You must meet all of the criteria here to participate … eligibility criteria";
- "For ongoing financial eligibility and evaluation purposes, you will be asked to complete your taxes in every year …";
- eligible applicants "will receive" additional information and materials to complete before "being accepted" into the Pilot;
- "consent" for the sharing of personal information will be requested;
- "You will be asked to complete surveys";
- "Ongoing Expectations to Receive Payments";
- "Participation in the Basic Income Pilot is entirely voluntary – no one is required to participate, and they can choose to leave the Pilot at any time and do not need to offer any reason for doing so";

- applicants have to sign to say they "understand" what they are getting into and that they "agree to participate"; and
- applicants have to sign to say that they understand that they must also participate in a research study.

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

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

- "The three-year Ontario Basic Income Pilot (OBIP) will study …";
- "The Pilot will run for up to three years";
- "Your participation in the Pilot is temporary. Any decisions you make about your future based on the amount you receive from Basic Income should take this into account. Participants will get notifications about the close of the Pilot in advance";
- "I/we understand … All participants living in Lindsay will receive Basic Income payments for up to a three-year period"; and
- "Participants living [elsewhere] will be assigned to two groups One group receives Basic income payments for up to a three-year period. The other group is called the Comparison Group, and they do not receive Basic Income payments."

28. The plaintiffs argue that the language of "up to a three-year period" is not inconsistent with their position that they were guaranteed payments for a full three years. In support of that argument, they rely upon *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways),* 2010 SCC 4 and *Canada Square Corp. v. VS Services Ltd.* (1982), 34 O.R. (2d) 250, 1991 CanLII 1893 (C.A.). However, in my view, neither case supports their argument.

29. In *Tercon,* the issue was the effect of an exclusion clause in a highway tendering agreement. The court held that the clause did not exclude a damages claim resulting from the province unfairly permitting an ineligible bidder to participate in the tendering process. The interpretation of "up to" in the present case cannot be compared to an exclusion clause in a highway tendering agreement.

30. In *Canada Square Corp.,* the defendant argued that an agreement to lease was not enforceable. One of the issues was whether a provision of the agreement that the defendant would lease up to 600 sq. ft. on the mezzanine floor of a building to be constructed was sufficiently certain. The court held that "having regard to commercial realities as opposed to what was theoretically possible, the minimum size would probably not be too far below 600 square feet. Anything significantly less would have hardly been worthwhile and not reasonably within the contemplation of the parties. The words "up to", in this particular context, fall into the same category as "approximating to", "approximately" and "about" … and do not render the agreement uncertain" (citations omitted). The court also noted that the defendant had

requested information on the location and area and was given a drawing showing the space to be 576 sq. ft. The court held that this evidence "supports the view that the parties did not regard this particular feature of the agreement as being a matter requiring negotiation." I do not find *Canada Square Corp.* to be of assistance in determining the meaning of "up to a three-year period", in the present case. In my view, those words should be interpreted using their ordinary meaning.

31. The plaintiffs argue that the fact that a government program has a social policy dimension does not preclude a contractual relationship. In support of that argument, they rely upon *Dikranian v. Quebec, (Attorney General),* 2005 SCC 73. In that case, the appellant had obtained student loans and had completed his studies. In accordance with the loan certificate signed with his financial institution, he began repaying the loan upon the expiration of the exemption period. However, as a result of legislative amendments that later came into force, the financial institution charged him interest that under the certificate was supposed to have been paid by the government. On appeal, the court held that the appellant's rights vested when the loan contract was signed, and that it is presumed, in the absence of a clear indication to the contrary, that the legislature did not intend to violate the principle against interference with vested rights. While there can be no doubt that the fact that a government program has a social policy dimension does not preclude a contractual relationship, *Dikranian* does not assist the plaintiffs in arguing that the relationship between the government and the participants in the BI Pilot was contractual.

32. The plaintiffs argue that some of the leading breach of contract cases against government are similar to the facts of the present case: a new government, a change of policy and a repudiation of a contract or program, resulting in an award of damages for breach of contract. They cite *Agricultural Research Institute of Ontario v. Campbell-High,* (2002), 58 O.R. (3d) 321 (C.A.), and *J.E.Verreault & Fils Ltee v. Quebec (Attorney-General),* [1977] 1 S.C.R. 41.

33. However, neither *Campbell-High* nor *J.E. Verrault* assists the applicants in establishing that the relationship between the government and the Class was contractual. In *Campbell-High*, the existence of a contract was not in issue and liability was admitted. The issue on appeal was quantum of damages. In *J.E. Verrault,* the issue was whether the Minister of Social Welfare could award a contract for a building intended for use as a home for the aged, without an authorization from the Lieutenant Governor in Council.

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

35. Ontario raised two further issues in relation to the contract claim. It argues that BI Pilot administrators lacked the necessary authority under the *Executive Council Act* or the *Ministry of Community and Social Services Act* to enter into a contract with program participants, and that the appropriation required under the *Financial Administration Act* was absent. If I had found that the statement of claim otherwise raised a reasonable cause of action, I would not have given effect to those arguments, at this stage in the litigation. In my view, they are issues that Ontario should plead by way of defence, and that the plaintiffs should have an opportunity to explore by way of discovery.

Claim for breach of undertaking

36. The plaintiffs plead that Ontario undertook to provide basic income payments to the Class for a three-year period, and that by cancelling the BI Pilot early, it caused them to suffer damages.

37. In support of this claim, the plaintiffs rely upon *Ontario Public Service Employees Union v. Ontario,* 2005 CanLII 15465 (S.C.J.). However, that case does not support their claim, and in my view, no such cause of action exists.

38. In *OPSEU,* the plaintiffs alleged that Ontario had undertaken to ensure that they would not suffer a loss of pension rights, as a result of the substitution of one pension plan for another. They said that they had not opposed the substitution on the strength of that undertaking. As a result, they said, the government's promise was a binding contractual undertaking, and that in failing to ensure that employees would suffer no pension losses, the government was liable for breach of contract. In certifying the claim, the court said: "There may well be a question whether, as has been pleaded, the Crown's promises are to be considered to have been made in return for consideration moving from the employees – as part of a bargain with them – or whether the promises are to be enforced on the basis simply of the employees' subsequent reliance on them."

39. However, with respect, neither the court in *OPSEU* nor the plaintiffs cite any authority for the proposition that such a promise will be enforceable in the absence of an existing legal relationship between the parties. My understanding is that the law is to the contrary. For example, see *Reclamation Systems Inc. v. Rae,* [1996] O.J. No. 133 (Gen. Div.), at paras 133-162. In that case, the plaintiff argued that "there is an evolving legal wrong referred to as "non-bargain contract". The assertion is that the law will now enforce a promise where there is no consideration received by the promisor, but there is detrimental reliance by the promisee." However, the court disagreed and found that the statement of claim failed to disclose a cause of action; and struck it pursuant to rule 21.01(1)(b).

40. I do not accept that by informing the public of the benefits available under a social benefits program and outlining the eligibility requirements for the receipt of those benefits, the government has made a promise or given an undertaking precluding it from discontinuing the program. As quoted by the Divisional Court in *Bowman:* "While it may sometimes seem unfair when rules are changed in the middle of a game; that is the nature of the game when one is dealing with government programs": *Skypower CL 1 LP v. Ontario (Minister of Energy),* 2012 ONSC 4979 (Div. Ct.), at para. 84.

41. In the result, I conclude that it is plain and obvious that the plaintiffs' claim for breach of undertaking does not disclose a reasonable cause of action.

Claim in negligence

42. A defendant will be liable in negligence where it owes a duty of care to the plaintiff, it fails to meet the required standard of care, and as a result, the plaintiff suffers damages.

43. In *R. v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42, at para. 39, the court describes a two-stage test for determining the existence of a duty of care:

> At the first stage of the test, the question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. If this is established, a *prima facie* duty of care arises and

> the analysis proceeds to the second stage, which asks whether there are policy reasons why this *prima facie* duty of care should not be recognized: *Hill v. Hamilton-Wentworth Regional Police services Board,* 2007 SCC 41, [2007] 3 S.C.R. 129.

44. In the present case, the plaintiffs argue that the government's interaction with the class established the necessary proximity for a duty of care, and that it was reasonably foreseeable that class members would suffer damage as a result of its early cessation of payments. They say that although the government's decision to cancel the pilot was a policy decision, the actual cessation of the basic income payments was operational.

45. Ontario does not dispute the claim on the basis of proximity or foreseeability. Rather, it argues that even if it owed a *prima facie* duty of care to program participants, that duty is negatived at the second stage of the analysis, because the decision to cease funding the program was a non-judiciable policy decision, under both the common law and the *Crown Liability and Proceedings Act, 2019* (CPLA).

Crown common law immunity for policy decisions

46. On the question of what constitutes a policy decision immune from judicial review, the court in *Imperial Tobacco* said the following, at paras. 72 and 90-91:

> **72** The question of what constitutes a policy decision that is generally protected from negligence liability is a vexed one, upon which much judicial ink has been spilled. There is general agreement in the common law world that government policy decisions are not justiciable and cannot give rise to tort liability. There is also general agreement that governments may attract liability in tort where government agents are negligent in carrying out prescribed duties. The problem is to devise a workable test to distinguish these situations.
>
> **90** I conclude that "core policy" government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. This approach is consistent with the basic thrust of Canadian cases on the issue, although it emphasizes positive features of policy decisions, instead of relying exclusively on the quality of being "non-operational". It is also supported by the insights of emerging jurisprudence here and elsewhere. This said, it does not purport to be a litmus test. Difficult cases may be expected to arise from time to time where it is not easy to decide whether the degree of "policy" involved suffices for protection from negligence liability. A black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical. Nevertheless, most government decisions that represent a course or principle of action based on a balancing of economic, social and political considerations will be readily identifiable.
>
> **91** Applying this approach to motions to strike, we may conclude that where it is "plain and obvious" that an impugned government decision is a policy decision, the claim may properly be struck on the ground that it cannot ground an action in tort. If it is not plain and obvious, the matter must be allowed to go to trial.

47. The plaintiffs plead that Ontario owed a duty of care to class members that was breached by its "negligent conduct in administering the Basic Income Pilot Project including, notably, by cancelling BI Pilot payments early."

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

49. The plaintiffs argue that the two-stage test for determining the existence of a duty of care arose at the time when the pilot project was first implemented, but not at the time when the government decided to cease making the payments. They say that once the policy decision to implement the program was operationalized, it became too late to cancel the payments early. They put it this way at paragraph 134 of their reply factum:

> [If] the Claim had alleged that the 2016 Budget announcement to start a Basic Income Pilot had not been carried through and then the government, the year after, reneged on its budgetary promise, what at most was a governmental policy in 2016 could not be said to ground a duty in negligence to make BI Payments. A duty of care would never get off the ground. However, once the Defendant operationalized its policy announcements … it could not "turn back", even if the source of the "turning back" was a change in policy.

50. In support of their argument, the plaintiffs cite *Castrillo v. Workplace Safety and Insurance Board*, 2017 ONCA 121 and *Wright v. Horizons ETFS Management (Canada) Inc.*, 2020 ONCA 337. However, neither case is authority for the proposition that the two-stage analysis is not applicable to a government decision to cancel a program.

51. In *Castrillo*, the plaintiff's complaint was with the board's interpretation of a policy relating to the effect of pre-existing impairments. In my view, this would not be a "core policy" government decision based upon a balancing of economic, social and political considerations as described in *Imperial Tobacco.* In relation to the claim in negligence, the issues before the court were whether the claim had been properly pleaded and whether the plaintiff was precluded from pursuing the claim by the privative clause in the governing legislation. The question of whether there were residual policy reasons for not imposing a duty of care on the board was not before the court. The court mentioned that residual policy reasons could oust a *prima facie* duty of care, but noted, at paras. 81-83, that the analysis had not been undertaken by the motion judge or the parties.

52. In *Wright*, the question was whether a fund manager owes a duty of care to investors. It did not involve Crown immunity in negligence for policy decisions and I do not find it to be helpful in the analysis of the present case.

53. Ontario decided to cease making the basic income payments as part of its decision to cancel the program. In order to decide whether Ontario's common law immunity applies to the making of that decision, one must apply the two-stage test. Based upon the relationship between the government and the program participants at that time, Ontario owed a *prima facie* duty of care to those participants. But it is then necessary to proceed to the second stage of the analysis and ask whether there are policy reasons why this duty of care should not be recognized.

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

Crown Liability and Proceedings Act, 2019

55. Ontario argues that its decision to end the basic income payments is not actionable in negligence because it was a policy decision about when to end a government program.

56. Section 11(4) of the CLPA provides:

> No cause of action arises 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.

57. Section 11(5) the Act provides that for the purposes of s. 11(4), "policy matter" includes:

> …
>
> (b) the funding of a program, project or other initiative, including,
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> (i) providing or ceasing to provide such funding;
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> …
>
> (iv) reducing or cancelling any funding previously provided or committed in support of the program, project or other initiative";
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> …
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> (d) the termination of a program, project or other initiative, including the amount of notice or other relief to be provided to affected members of the public as a result of the termination;"
>
> …

58. Section 11(7) of the Act provides: "No proceeding may be brought or maintained against the Crown or an officer, employee or agent of the Crown in respect of a matter referred to in subsection (1), (2) (3) or (4).

59. While "policy decision" includes "cancelling any funding" or the "termination of any program", the plaintiffs argue that the s. 11(4) immunity does not extend to the cancellation of the funding, itself. They agree that any negligence surrounding a decision to cancel the funding is immunized, but not the actual cancellation, pursuant to that decision, because the cancellation of the funding is operational. I disagree. The immunity given to government for policy decisions to cease funding programs, projects or other initiatives would be illusory, if it could not implement those decisions by cancelling the funding.

60. In support of their position, the plaintiffs cite *Francis v. Ontario*, 2020 ONSC 1644 and *Leroux v. Ontario,* 2020 ONSC 1994. However, they do so for the proposition that operational decisions which would not attract common law immunity remain actionable under the CLPA. This does not assist them in arguing a dichotomy between the policy decision to cease funding the program, and actually ceasing to make the payments.

61. Section 11(8) of the CLPA provides: "A proceeding that may not be maintained under subsection (7) is deemed to have been dismissed, without costs, on the day on which the cause of action is extinguished under subsection (1), (2), (3) or (4). The plaintiffs' claim in negligence is such a proceeding and is therefore deemed to have been dismissed.

Breach of public law duty

62. The plaintiffs plead that Ontario undertook to provide them with basic income payments for a three-year period, and that the termination of the payments "was unreasonable on any standard of public law accountability." As a result, they say, the Class has suffered damages.

63. In support of their position, the plaintiffs rely upon *Paradis Honey Ltd. v. Canada,* 2015 FCA 89, leave to appeal refused, 2015 CanLII 69423 (S.C.C.).

64. In *Paradis Honey,* Stratas J.A. commented, in *obiter,* that the law of liability for public authorities should be governed by principles of public law rather than private law. At para. 132, he said the following:

> What are the principles of the underlying public law? Today, they are found primarily in administrative law, in particular the law of judicial review. Broadly speaking, we grant relief when a public authority acts unacceptably or indefensibly in the administrative law sense and when, as a matter of discretion, a remedy should be granted. These two components - unacceptability or indefensibility in the administrative law sense and the exercise of remedial discretion - supply a useful framework for analyzing when monetary relief may be had in an action in public law against a public authority.

65. The plaintiffs argue that the cessation of the basic income payments was unreasonable and unfair and that it is not plain and obvious that a claim for breach of public law duty cannot succeed. I disagree, for the following reasons.

66. First, for the reasons given in relation to the claim in negligence, the decision to cancel the basic income pilot and cease making the basic income payments was a non-justiciable policy decision for which Ontario has immunity under both the common law and the CLPA.[2]

67. Second, in *Bowman v. Ontario (Minister of Children, Community and Social Services),* 2019 ONSC 1064, while leaving open the question of whether the participants in the basic income program would have a private law remedy, the Divisional Court held, at para. 53, that they were not entitled to a public law remedy, because the decision to cancel the program was a core policy decision made by the government based upon political considerations or electoral expediency. In other words, the court held that the applicants were not entitled to a remedy based upon public law principles.

68. Third, in *Catalyst Capital Group Inc. v. Dundee Kilmer Developments Limited Partnership,* 2020 ONCA 272, the court upheld a motion judge's decision to strike a public law claim based upon the comments of Stratas J.A. in *Paradis Honey.* In doing so, the Court of Appeal

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[2] In *Catalyst Capital Group Inc. v. Dundee Kilmer Developments Limited Partnership,* 2020 ONCA 272, at para. 107, the Court of Appeal found that it did not need to decide whether s. 11 of the CLPA extinguishes in Ontario the kind of public law claim described by Stratas J.A. in *Paradis Honey.*

referred, at para. 105, to the lengthy discussion of the conditions supporting, and the process required, for the recognition of a new tort in *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205, leave to appeal refused, [2019] CarswellOnt 14956 (S.C.C.). In *Merrifield*, the court had stressed the importance of the incremental development of the common law and the grounding of any new tort in the emerging acceptance in the case law of a new type of claim. In *Catalyst*, the court held that "the conditions, at least as argued, do not support the recognition of a new tort of 'misconduct by a civil authority'". I have been provided with no reason to reach a different conclusion in the present case, and find that the plaintiffs' claim for "breach of public law duty" does not disclose a reasonable cause of action.

Claim under s. 7 of the *Charter*

69. The plaintiffs plead that by terminating the basic income payments, Ontario violated the rights of the Class to life, liberty and security of the person, contrary to s. 7 of the *Charter*. They claim a declaration to that effect and damages pursuant to s. 24(1).

70. To establish a breach of *Charter* s. 7, a claimant must prove: (1) that the law or state action deprives the claimant of life, liberty or security of the person; and (2) that the deprivation is contrary to the principles of fundamental justice.

71. However, in the absence of a constitutional right requiring government to act in the first place, there can be no constitutional right to the continuation of a program, even where the program accords with or enhances *Charter* values: *Flora v. Ontario Health Insurance Plan (General Manager)*, 2008 ONCA 538, at para. 104. In that case, the appellant sought OHIP reimbursement for a life-saving liver transplant that he had obtained in England. One of his arguments was that the government had deprived him of his s. 7 rights by amending a predecessor version of the applicable regulation that would have provided funding on the basis of medical necessity. In rejecting this argument, the court said the following:

> It seems to me that the decision of this court in *Ferrel v. Ontario (Attorney General)* (1998), 42 O.R. (3d) 97, [1998] O.J. No. 5074 (C.A.) is a full answer to this claim. In *Ferrel*, Morden A.C.J.O., writing for the court, confirmed that a *Charter* violation cannot be grounded on a mere change in the law. He said (at p. 110 O.R.): "If there is no constitutional obligation to enact [the legislation at issue] in the first place, I think that it is implicit, as far as the requirements of the constitution are concerned, that the legislature is free to return the state of the statute book to what it was before [the impugned legislation]." Subsequently, in *Lalonde v. Ontario* (Commission de restructuration des services de santé) (2001), 56 O.R. (3d) 505, [2001] O.J. No. 4767 (C.A.), at para. 94, this court reiterated this principle, stating: "[I]n the absence of a constitutional right that requires the government to act in the first place, there can be no constitutional right to the continuation of measures voluntarily taken, even where those measures accord with or enhance *Charter* values."

72. The plaintiffs say that their claim is not a claim for a positive right to a continuation of the program or the basic income payments. However, although the remedy they claim is not a continuation of the payments, the breach they allege is the discontinuance of the payments. The discontinuance of the payments could only be a breach if, at the point of discontinuance, the government had an obligation to continue them (or, as I will get to later, an obligation not to discontinue them in the manner in which they were discontinued).

73. In their factum, the plaintiffs make the following statements with respect to the state action complained of:

> Here, the Defendant controlled the BI Pilot, represented the guarantee of BI Payments, drew in the Class, and caused them harm by stopping the alleged guaranteed BI Payments.
>
> By ceasing BI Payments, Class Members were denied guaranteed access to basic necessities and experienced related forms of physical and psychological harms. The harms stem not from Class Members being vulnerable low-income people, but from having been promised BI Payments and then deprived of such BI Payments prior to the expiry of the term. Taken as true, this meets the threshold of a "sufficient causal connection" between the harms and impugned state action.

74. To this point, the difficulty with the plaintiffs' argument is that they are saying that the harm to them was caused by "stopping the alleged guaranteed BI Payments" and by having been deprived of promised payments prior to the expiry of the term. This argument is contrary to the law in *Flora* set out above.

75. However, in an apparent attempt to avoid the principle that there is no constitutional right to the continuation of a program, the plaintiffs developed their argument further at the hearing of the motion. They argued that the s. 7 breach was the manner in which Ontario wound the payments down. What was the "manner" complained of? They said that Ontario had undertaken to make the payments for three years, in the context of a novel basic income research study, and that they made fundamental life decisions going to their physical and psychological integrity, and well-being, in reliance upon the promise that those payments would be made. They say that the deprivation stems from the discretionary winding down of the payments, after the policy decision to terminate the pilot was made.

76. What the plaintiffs' theory amounts to, then, is that they relied upon what they say was an undertaking, that the termination of the payments was a breach of that undertaking, that the breach interfered with their well-being, and that as a result, they suffered damages.

77. However, while the giving of an undertaking by government may be relevant to a private law remedy, the plaintiffs have provided no authority for the proposition that such an undertaking can form the basis of a constitutional right to a continuation of the payments or, as the plaintiffs would have it, a constitutional right to not have the payments discontinued in the manner in which they were. In my view, it cannot.

78. The plaintiffs submit that the court should be reluctant to dismiss a s. 7 claim at the pleadings stage. In support, they cite *Leroux v. Ontario*, 2018 ONSC 6452, at para. 44, where the court said the following:

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

79. However, the plain and obvious test continues to apply. See, for example, *Tanudjaja v. Canada (Attorney General)*, 2013 ONSC 5410, aff'd 2014 ONCA 852, leave to appeal to S.C.C. refused, [2015] SCCA No. 39, where the motion judge held that it was plain and obvious that the applicant's *Charter* application disclosed no reasonable cause of action and had no reasonable prospect of success.

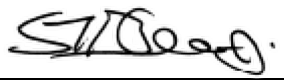
80. In the result, I have concluded that that it is plain and obvious that the plaintiffs' claim under s. 7 of the *Charter* does not disclose a reasonable cause of action.

Disposition

81. As I have found that the statement of claim does not disclose a reasonable cause of action, I need not address the questions of whether the claims or defences of the class members raise common issues or whether a class proceeding would be the preferable procedure for resolving common issues.

82. The motion to certify this action as a class proceeding is dismissed.

83. If the parties are unable to agree on costs, I will consider brief written argument provided that it is delivered to monica.mayer@ontario.ca, no later than December 31, 2020.



S.T. Bale J.

Released: November 30, 2020

CITATION: Bowman v. Ontario, 2020 ONSC 7374
COURT FILE NO. CV-19-00000035-00CP
DATE: 20201130

ONTARIO

SUPERIOR COURT OF JUSTICE

DANA BOWMAN and others

Plaintiffs

– and –

HER MAJESTY THE QUEEN
IN RIGHT OF ONTARIO

Defendant

REASONS FOR DECISION

S.T. BALE J.

Released: November 30, 2020