Federal Court  Cour fédérale

**Date: 20150507**

**Docket: T-210-12**

**Citation: 2015 FC 592**

**Ottawa, Ontario, May 7, 2015**

**PRESENT: The Honourable Madam Justice Kane**

**BETWEEN:**

**JENNIFER MCCREA**

**Plaintiff**

**and**

**THE ATTORNEY GENERAL OF CANADA AND THE CANADA EMPLOYMENT INSURANCE COMMISSION**

**Defendants**

## ORDER AND REASONS

[1] This is a motion brought by Jennifer McCrea [plaintiff] to certify an action as a class proceeding in accordance with Rule 334.16 of the *Federal Courts Rules*, SOR/98-106 [*Rules*] against Her Majesty the Queen [defendant], named as representative of the Canada Employment Insurance Commission [Commission], Service Canada and the Minister of Employment and Social Development Canada [Minister or ESDC], formerly the Minister of Human Resources and Skill

Development [HRSDC]. The Commission is responsible for the oversight of the Employment Insurance Program and reports to Parliament annually. On behalf of the Commission, ESDC and Service Canada carry on the administration and management of the *Employment Insurance Act*, SC 1996, c 23 [*EI Act* or *Act*], which provides benefits to eligible claimants, for example, those who have lost their employment or who are away from their workplace or employment on maternity or parental leave or due to illness or caring for critically ill children.

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**Overview**

[2] The background to this action was previously described in *McCrea v Canada (Attorney General)*, 2013 FC 1278 [*McCrea 2013*] and is repeated and elaborated on below.

[3] The plaintiff, Ms McCrea, proposes to represent others who, like herself, were contributors to the EI program, gave birth to a child, and were in receipt of parental benefits. Some EI recipients became ill, applied to convert their parental benefits to sickness benefits during the period of illness, and were denied the sickness benefits. Other EI recipients who became ill were advised by representatives of the Commission or Service Canada that they were ineligible for the benefits and, therefore, did not apply to convert their parental benefits to sickness benefits. The plaintiff asserts that claimants were denied sickness benefits because of the strict interpretation of paragraph 18(b) of the *Act*, as it read at the relevant time, which required that the claimant be otherwise available for work. Claimants already on maternity or parental leave, caring for a child and receiving benefits, were considered not to be available for work. The plaintiff submits that the wording of paragraph 18(b) makes it impossible for such claimants to receive the sickness benefits to which they are entitled and to which the 2002 amendments intended that they be entitled. The plaintiff points out that if the illness had occurred prior to the birth of their child, the claimants would have been entitled to up to 15 weeks of benefits because they would have been otherwise (i.e., but for their illness) available for work. This would have been followed by their maternity and parental benefits after the birth of their child.

[4] The plaintiff notes that the *Act* was amended in 2002 as Part 3 of the *Budget Implementation Act*, 2001, SC 2002, c 9 [formerly Bill C-49] to, among other things, respond to the decision of the Canadian Human Rights Tribunal [CHRT] in *McAllister-Windsor v Canada (Human Resources Development)*, [2001] CHRD No 4 [*McAllister-Windsor*]. The CHRT found that the "anti-stacking" or capping of sickness, maternity and parental benefits at 30 weeks (the cap in existence at that time) discriminated against women who became ill before or during the maternity and/or parental leave period.

[5] The plaintiff claims that the 2002 amendments were intended to provide that those on parental leave who become ill either before, during, or after their parental leave would be eligible to receive sickness benefits and that this would extend their benefit period by up to 15 weeks. The plaintiff therefore claims that the *Act* was not implemented as intended.

[6] The plaintiff notes that many of those denied sickness benefits appealed their decisions to the Board of Referees and some also appealed to the EI Umpire. Although the majority of the claimants were unsuccessful, two (Ms Rougas and Ms Kittmer) were successful before the EI Umpire.

[7] On March 24, 2013, amendments to the Act included in former Bill C-44 (*Helping Families in Need Act*, SC 2012, c 27) came into force. Claimants after that date (i.e. those EI recipients who became ill and applied to convert their benefits to sickness benefits) are eligible to extend their benefits by up to 15 weeks assuming that the other criteria for eligibility are met. This amendment ensures that claimants after March 24, 2013, in similar circumstances to the

plaintiff and proposed class members will not be denied sickness benefits due to their unavailability for work.

[8] The plaintiff seeks certification of this proposed class action and $450 million in damages for negligence, negligent misstatement, misfeasance in public office, and unjust enrichment. The action is limited to the period starting on March 3, 2002, the date of the coming into force of amendments to the *Act* included in the former Bill C-49 (the *Budget Implementation Act*, 2001, SC 2002, c 9) [referred to as the 2002 amendments] and ending on March 24, 2013, the date of the coming into force of amendments to the *Act* enacted by the former Bill C-44 (*Helping Families in Need Act*, SC 2012, c 27). Among other amendments to the *Act*, the *Helping Families in Need Act* amended one of the key provisions at issue in the proposed class action, section 18, to provide that those in receipt of parental benefits under section 23 were not disentitled to sickness benefits due to their unavailability for work.

[9] The defendant strongly opposes this class action. The defendant argues that it is plain and obvious that the causes of action pleaded have no reasonable prospect of success and also disputes every other aspect of the test to determine whether the action should be certified as a class action.

[10] The plaintiff and defendant have advanced arguments with respect to each aspect of the test for certification, and many of the same arguments arise with respect to more than one aspect of the test. As a result, there is a considerable amount of repetition in the reasons as each argument is analyzed.

[11] For the reasons that follow, and in accordance with the findings made, I will grant the motion for certification and certify the action, in part, as a class proceeding. The cause of action in negligence and some common questions which arise from that cause of action are certified. Ms McCrea is an appropriate representative plaintiff for Category 1 class members. The Litigation Plan is approved as an interim plan. A revised Litigation Plan will be required to reflect the cause of action and common questions certified and the management of the litigation.

[12] I will also grant the defendant's motion to strike the plaintiff's amended statement of claim, in part. The causes of action for negligent misrepresentation, unjust enrichment and misfeasance in public office are struck as they have no reasonable prospect of success.

**The Plaintiff's Overall Position**

[13] The plaintiff submits that the proposed class action meets the threshold for certification. In the Amended Statement of Claim (the amendment was to remove Ms Kasbohm as a plaintiff and make consequential grammatical changes) [Claim], the Plaintiff pleads that Parliament amended the *Employment Insurance Act*, SC 1996, c 23 in 2002 to permit persons in receipt of EI parental benefits to claim EI sickness benefits. The plaintiff claims that, although the defendant took several positive steps to implement these amendments, they did not do enough and, due to their negligent and other tortious conduct, some of the amendments were not properly interpreted, implemented or administered. As a result, EI sickness benefit claims were denied and Commission representatives advised some claimants that their claims would not succeed and so they did not apply. All of the denials and representations are claimed to result

from the same error concerning the right of claimants to collect EI sickness benefits during a parental leave.

[14] The plaintiff submits that the Claim discloses reasonable causes of action.

[15] The plaintiff pleads causes of action in negligence, negligent misrepresentation, misfeasance in public office, and unjust enrichment. The plaintiff seeks compensable damages and general damages for inconvenience, loss of time, frustration, anxiety, mental distress and emotional upset arising from the quest for the EI sickness benefits.

[16] With respect to the other aspects of the test for certification, the plaintiff notes that the threshold is low. The plaintiff submits that the Claim sets out clear and objective criteria for defining who is a class member. The Claim raises several common issues, leaving only a few issues, the majority of which are straight forward, to be litigated individually. The class proceeding is the preferable procedure as there are no alternatives that could provide real access to justice and Ms McCrea is an appropriate class representative.

[17] The plaintiff proposes objective criteria to define the class members. The class members, during the class period (March 3, 2002-March 24, 2013), were in receipt of EI parental benefits and suffered from an illness, injury or quarantine during that parental leave. They either applied for EI sickness benefits and were denied [Category 1] or inquired about sickness benefits and were advised by the defendants that they would not qualify, relied on that advice and did not

apply for EI sickness benefits [Category 2]. The plaintiff notes that the majority of the class members were women, although parental benefits are also available to men.

[18] The Claim describes Ms McCrea's situation and that of Ms Kasbohm as typical or similar to many others; the women were pregnant, gave birth, went on EI parental leave, became ill during this leave, and sought to convert their claim to EI sickness benefits. Their experiences with the claims process were almost identical, as were the results of that process.

[19] The plaintiff's Claim sets out the history of the *EI Act*, including the impact of the *McAllister-Windsor* decision, the 2002 amendments, and various statements made about the purpose of the 2002 amendments. It also describes how the Department, Commission and Service Canada, on behalf of ESDC (formerly HRSDC) and the Government administered the *Act* and adjudicated claims.

[20] The plaintiff claims that following the 2002 amendments, the defendant took some positive steps to implement them, but did not properly implement the amendments regarding sickness benefits for claimants on parental leave. The plaintiff describes the defendant's actions as a "top down" and systemic failure which prevented claimants from receiving the benefit of the 2002 amendments.

[21] The plaintiff alleges that the defendant's failure included: inadequate staff training; outdated and inaccurate reference materials for adjudicative purposes; an outdated or inaccurate

public website; and the failure to update the key "Digest of Benefit Entitlement Principles" guidance document.

[22] The plaintiff notes that the website information available to the public misrepresented the amendments and included inaccurate information; for example, that sickness benefits would be available after a parental benefit claim, when that would be impossible or highly unlikely because the requisite number of hours of insurable earnings would not be sufficient. The plaintiff also asserts that the 2002 amendments were touted (by Members of Parliament and by Minister McCallum who was responsible for the *Budget Implementation Act*) to be for the purpose of providing EI sickness benefits to claimants "during" their parental leave.

[23] The Plaintiff contends that there was a consistent pattern of denials of sickness claims to those similarly situated to Ms McCrea, and in particular, Ms Kasbohm and Ms Rougas. As described above, the claimants were on parental leave, caring for an infant and became ill, some very seriously. The claimants contacted Service Canada, which is responsible for administering the *Act*, to inquire about sickness benefits. In the case of Ms McCrea, Ms Rougas and Ms Kasbohm, at least one employee initially advised them that they could convert their parental claims to sickness claims at some later point. However, when the claimants made their applications, the conversion was denied because the claimants were not otherwise available for work because they were on parental leave.

[24] The plaintiff notes that the process was the same for these three claimants and for all those seeking conversion and began with the initial claim for maternity and parental benefits.

The forms include a page entitled "Rights and Responsibilities" which describes how the "right to receive [EI] benefits is a shared responsibility between Service Canada and [the claimant]". The stated responsibilities of Service Canada include that it must: "advise you of the programs and services available to you"; establish a claim for benefits, if qualifying conditions are met; and, "give you accurate information about your claim". The claimants' undertakings include to accurately report all periods of incapacity, provide required information and documents and report all employment. Claimants sign or otherwise acknowledge on the online form that they have read and understand the Rights and Responsibilities.

[25] The plaintiff alleges that the Commission and Service Canada have not met their responsibilities.

[26] With respect to the process that led to the denial of benefits, the plaintiff outlines that upon inquiring about sickness benefits, Service Canada opened a "conversion to sickness" form which gathers information from the claimant. This form asks: "[i]f not for your illness, would you be available for and capable of work?" The form also refers to the need for the claimant to provide proof of "inability to work".

[27] The plaintiff adds that the Commission orchestrated the appeal process by providing only the specific provision, paragraph 18(b), to the Umpire rather than the overall context of the 2002 amendments to the *Act*. Given that most claimants were unrepresented and did not make the efforts that Ms Rougas made to highlight the inconsistency in the *Act*, the appeals consistently resulted in failure to provide sickness benefits to Class Members.

[28] The plaintiff's record reveals, and it is not disputed, that out of 124 appeals taken by claimants to the Board of Referees and/or Umpire, only four were successful. Ms Rougas, who was successful in the matter of the *Employment Insurance Act and Natalya Rougas*, CUB 77039, June 30, 2011 [*Rougas*], was represented by Counsel, unlike the vast majority of other claimants, and fully argued her appeal, provided documents obtained pursuant to Access to Information and Privacy [ATIP] requests, and raised the issue of the interpretation of paragraph 18(b) within the context of the *Act* as a whole.

[29] The plaintiff states that the record supports her pleadings; the defendants failed to properly implement the amendments and the required forms and documents focused the attention on the requirement to be available for work, consistently leading to denial of claims on the basis of non-availability.

[30] The plaintiff disputes the defendant's argument that there is no commonality among the class members because there were independent interactions between the claimants and the EI Commission, different people may have been told different things, and officers of Service Canada and the Commission may not have relied on the same materials. The plaintiff argues that this ignores the claim; all officers and agents were trained in the same way and followed the same guides and used the same forms. The Class Members had common circumstances, followed the same process, and had the same experience and the same results.

[31] The plaintiff estimates the possible number of claimants that may have been denied sickness leave benefits with reference to the affidavit of the defendant's witness, Mr Michael

Duffy, a recently retired senior official at ESDC. Mr Duffy's information revealed that from 2002 to 2011, 3,177 claimants who applied for EI sickness benefits were denied due to non-availability for work (and this estimate does not include Quebec parental insurance claimants for the period 2006-2011).

[32] There is no reliable information regarding the number of claimants who were dissuaded from applying for sickness benefits based on advice from the Commission. However, the plaintiff points out that at the time of the amendments in 2013, the Government publicly stated that an estimated 6,000 persons each year would benefit. The record indicates how that figure was estimated using several sources of data and several assumptions. The plaintiff suggests that the difference between 6,000 future beneficiaries each year and the 3,177 claimants denied from 2002-2011 provides some indication of the number of claimants who would have been dissuaded from applying for conversion of their benefits.

[33] The plaintiff also notes that in the aftermath of the *Rougas* decision, the defendant did not seek judicial review of the Umpire's decision and then paid Ms Rougas her sickness benefits.

[34] Other claimants who had appealed the decision of the Commission to deny their sickness benefit claims either to the Board of Referees or the Umpire were also paid the sickness benefits to which they were entitled. The defendant's witness, Mr Michael Duffy, in cross-examination, explained that the Government did not contest the appeals and, therefore, had the authority to pay the benefits it would otherwise not have had the authority to pay.

[35] Mr Duffy agreed that the data indicates that from 2003-2011, an average of 330 "D 33" letters, which indicates denial of sickness benefits to claimants on parental leave, were issued each year. However, in 2012 that number dropped to 52 and in 2013, to zero. The plaintiff suggests that this indicates the number of claimants who were paid their sickness benefits.

[36] Mr Duffy acknowledged that after the *Rougas* decision a policy was put in place to allow appeals of denied benefits to either the Board of Referees or the Umpire to proceed uncontested. However, this approach did not provide any benefits to Ms McCrea or other class members. Ms McCrea was denied in September 2011, after the *Rougas* decision and the defendant's decision not to seek judicial review of that decision. Ms McCrea launched an appeal, but subsequently requested to adjourn that appeal in December 2011.

[37] In summary, the plaintiff pleads that as a result of the defendant's actions and their negligence, she and other class members were improperly denied their sickness claims or were dissuaded from making a claim and, as a result, suffered damages.

**The Defendant's Overall Position**

[38] The defendant submits that none of the elements of the test for certification have been met. First and foremost, the defendant argues that it is plain and obvious that the plaintiff's claim does not disclose any cause of action.

[39] The defendant characterizes the plaintiff's claim as one of conspiracy on the part of the Department and the Commission to deny benefits to claimants by misinterpreting and misapplying the provisions of the *Act* from 2002 to 2013.

[40] The defendant submits that the claim for $450 million in compensatory and general damages is grossly exaggerated, and the general damages claimed are afterthoughts. The defendant argues that the plaintiff has "dressed up" her action in tort and equity, but the essential character of the claim is simply for Employment Insurance benefits. The plaintiff and others should pursue administrative appeals if these remedies are not barred by *res judicata* or limitation periods.

[41] The defendant further submits that the plaintiff's stated cause of action – that the defendant "negligently administered and failed to implement the EI Act" – is not a recognized cause of action.

[42] The defendant submits that the *Act* was unambiguous and the Commission/Service Canada interpreted and applied the *Act* correctly and this correct interpretation was confirmed by the majority of decisions of the EI Umpire.

[43] The defendant suggests that the plaintiff relies on a single Umpire ruling (*Rougas*) to support her view that, rather than follow the law as enacted, the defendant should have ignored the clear words of paragraph 18(b). However, Umpire decisions are not binding and cannot support the plaintiff's theory.

[44] The defendant characterizes the *Rougas* decision as a specific response to that specific case because the Umpire did not agree with the rigid application of the *Act* and sought to provide benefits despite the clear language and despite lacking jurisdiction to do so. The Umpire read the words, "[n]otwithstanding the provisions of s. 18" into section 23 in order to craft a remedy. In the alternative, the Umpire held that Parliament should amend the legislation. The defendant points out that the *Rougas* decision was contrary to decisions of the Commission, the Board of Referees and Umpires between 2002 and 2011.

[45] The defendant acknowledges that *Rougas* was the catalyst for the 2013 amendments to the *Act* which exempt those in receipt of parental benefits from having to satisfy the availability for work requirement of paragraph 18(b). The defendant also suggests that the *Rougas* decision was the catalyst for the plaintiff's action. The defendant acknowledges that it did not appeal the *Rougas* decision but argues, nonetheless, that the Umpire had no jurisdiction to read words into the *Act*.

[46] Of note, after the *Rougas* decision, the Commission paid out sickness benefits to other claimants on parental leave who had previously been denied. These benefits were paid prior to the 2013 amendments.

[47] Ms McCrea and the other members of the proposed class were not in the group of claimants who were paid their sickness benefits after the *Rougas* decision. Ms McCrea was denied benefits in September 2011 and sought to appeal that decision, but later requested that her appeal be adjourned.

[48] The defendant submits that the principles of statutory interpretation – particularly the plain meaning rule – support the Commission's interpretation of paragraph 18(b). Simply put, the Commission had no choice but to apply paragraph 18(b) and deny benefits to those not otherwise available for work.

[49] The defendant's position is that the 2002 amendments were intended only to respond to the *McAllister-Windsor* decision which found that the anti-stacking provisions were discriminatory. That decision was not about sickness benefits arising after the birth of the child or while the claimant was on maternity or parental leave. The 2002 amendments did not amend paragraph 18(b) and the requirement for the claimant to be otherwise available for work remained in the *Act* and was correctly applied by the EI Commission and Service Canada.

[50] The defendant characterizes this action as a "dressed up" claim for benefits rather than an action in tort and argues that when viewed as such, the current action cannot proceed for several reasons, including that it is barred by *res judicata* or issue estoppel. The defendant argues that the proper remedy would be to pursue the appeals established in the *Act* and ultimately judicial review, although the limitation period to do so may preclude this remedy. For those who were advised not to apply to convert their benefits to sickness benefits, the proper approach would be to request to file a late claim, referred to as antedating, await a decision, and seek to appeal to the now created Social Security Claims Tribunal if denied. The defendant's submissions with respect to the other elements of the test for certification take the same approach; that this is only a claim for benefits.

[51] The defendant also submits that the plaintiff's own claim has no merit and, therefore, it cannot be the basis of the proposed class action, given that there are no material facts to support the causes of action and the plaintiff suffered no damages. Where an individual claim cannot succeed, the same claim cannot be repackaged as a class action.

[52] The defendant takes the position that the plaintiff has not satisfied the other four elements of the test for certification. The defendant challenges the proposed definition of the class and also argues that the proposed common issues are both few and overbroad and would require extensive individual fact finding.

[53] The defendant adds that Ms McCrea is not an appropriate representative plaintiff and did not suffer any loss, as she went back to work as scheduled following her surgery when her sickness benefits were denied.

[54] The defendant adds that a class proceeding is not the preferable procedure due to the large number of individual issues which greatly exceed the few, if any, potential common issues that could be certified. The class proceeding will not achieve savings in terms of costs, access to justice or efficiency.

[55] The defendant, therefore, submits that the motion for certification should be dismissed and the Statement of Claim should be struck, noting that if the motion for certification fails, the causes of action cannot proceed.

**Relevant Statutory Provisions**

*Employment Insurance Act*

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| 10 (13) If, during a claimant's benefit period,<br>(a) regular benefits were not paid to the claimant,<br>(b) benefits were paid to the claimant for more than one of the reasons mentioned in paragraphs 12(3)(a) to (e) and at least one of those benefits was paid for fewer than the applicable maximum number of weeks established for those reasons, and<br>(c) the maximum total number of weeks established for those reasons is greater than 50,<br>the benefit period is extended so that those benefits may be paid up to that maximum total number of weeks. | 10 (13) Si, au cours de la période de prestations d'un prestataire, aucune prestation régulière ne lui a été versée, que des prestations pour plus d'une des raisons prévues aux alinéas 12(3)a) à e) lui ont été versées pour un nombre de semaines inférieur au nombre maximal applicable pour au moins une de ces raisons et que le nombre maximal total de semaines de prestations prévu pour celles-ci est supérieur à cinquante, la période de prestations est prolongée du nombre de semaines nécessaire pour que ce nombre maximal total soit atteint. |
| […] | […] |
| 12 (3) The maximum number of weeks for which benefits may be paid in a benefit period | 12 (3) Le nombre maximal de semaines pendant lesquelles des prestations peuvent être versées au cours d'une période de prestations est : |
| (a) because of pregnancy is 15; | a) dans le cas d'une grossesse, quinze semaines; |
| (b) because the claimant is caring for one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption is 35; | b) dans le cas de soins à donner à un ou plusieurs nouveau-nés du prestataire ou à un ou plusieurs enfants placés chez le prestataire en vue de leur adoption, 35 semaines; |
| (c) because of a prescribed | c) dans le cas d'une maladie, |

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| illness, injury or quarantine is 15; | d'une blessure ou d'une mise en quarantaine prévue par règlement, quinze semaines; |
| (d) because the claimant is providing care or support to one or more family members described in subsection 23.1(2), is six; and | d) dans le cas de soins ou de soutien à donner à un ou plusieurs membres de la famille visés au paragraphe 23.1(2), six semaines; |
| (e) because the claimant is providing care or support to one or more critically ill children described in subsection 23.2(1), is 35 | e) dans le cas de soins ou de soutien à donner à un ou plusieurs enfants gravement malades visés au paragraphe 23.2(1), trente-cinq semaines. |

Section 18 as it read up until March 23, 2013 and the provision at issue in this action stated:

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| 18. A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was | 18. Le prestataire n'est pas admissible au bénéfice des prestations pour tout jour ouvrable d'une période de prestations pour lequel il ne peut prouver qu'il était, ce jour-là : |
| (a) capable of and available for work and unable to obtain suitable employment; | a) soit capable de travailler et disponible à cette fin et incapable d'obtenir un emploi convenable; |
| (b) unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work; or | b) soit incapable de travailler par suite d'une maladie, d'une blessure ou d'une mise en quarantaine prévue par règlement et aurait été sans cela disponible pour travailler; |
| (c) engaged in jury service. | c) soit en train d'exercer les fonctions de juré. |

Section 18 was amended in 2013 and effective, March 24, 2013 provides:

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| 18. (1) A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was | 18. (1) Le prestataire n'est pas admissible au bénéfice des prestations pour tout jour ouvrable d'une période de prestations pour lequel il ne peut prouver qu'il était, ce jour-là : |
| (a) capable of and available for work and unable to obtain suitable employment; | a) soit capable de travailler et disponible à cette fin et incapable d'obtenir un emploi convenable; |
| (b) unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work; or | b) soit incapable de travailler par suite d'une maladie, d'une blessure ou d'une mise en quarantaine prévue par règlement et aurait été sans cela disponible pour travailler; |
| (c) engaged in jury service. | c) soit en train d'exercer les fonctions de juré. |
| (2) A claimant to whom benefits are payable under section 23 is not disentitled under paragraph (1)(b) for failing to prove that he or she would have been available for work were it not for the illness, injury or quarantine. | (2) Le prestataire à qui des prestations doivent être payées en vertu de l'article 23 n'est pas inadmissible au titre de l'alinéa (1)b) parce qu'il ne peut prouver qu'il aurait été disponible pour travailler, n'eût été la maladie, la blessure ou la mise en quarantaine. |
| [Emphasis added] | [non souligné dans l'original] |

Section 21 refers to sickness benefits, (but only to limit availability)

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| 21. (1) A minor attachment claimant who ceases work because of illness, injury or quarantine is not entitled to receive benefits while unable | 21. (1) Si la cessation d'emploi d'un prestataire de la deuxième catégorie résulte du fait qu'il est devenu incapable de travailler par suite d'une |

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| to work for that reason. | maladie, d'une blessure ou d'une mise en quarantaine, il n'est pas admissible au bénéfice des prestations tant qu'il est incapable de travailler pour cette raison. |
| (2) If benefits are payable to a claimant as a result of illness, injury or quarantine and any allowances, money or other benefits are payable to the claimant for that illness, injury or quarantine under a provincial law, the benefits payable to the claimant under this Act shall be reduced or eliminated as prescribed. | (2) Lorsque des prestations doivent être payées au prestataire par suite d'une maladie, d'une blessure ou d'une mise en quarantaine et que des allocations, prestations ou autres sommes doivent être payées pour cette maladie, blessure ou mise en quarantaine en vertu d'une loi provinciale, les prestations qui doivent lui être payées en application de la présente loi sont réduites ou supprimées de la manière prévue par règlement. |
| (3) If earnings are received by a claimant for a period in a week of unemployment during which the claimant is incapable of work because of illness, injury or quarantine, subsection 19(2) does not apply and, subject to subsection 19(3), all those earnings shall be deducted from the benefits payable for that week. | (3) Si le prestataire reçoit une rémunération pour une partie d'une semaine de chômage durant laquelle il est incapable de travailler par suite d'une maladie, d'une blessure ou d'une mise en quarantaine, le paragraphe 19(2) ne s'applique pas et, sous réserve du paragraphe 19(3), cette rémunération est déduite des prestations afférentes à cette semaine. |

Subsection 22(1) provides for pregnancy benefits (i.e. maternity benefits)

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| 22(1) Pregnancy - Notwithstanding section 18, but subject to this section, benefits are payable to a major | 22(1) Grossesse - Malgré l'article 18 mais sous réserve des autres dispositions du présent article, des prestations |

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| attachment claimant who proves her pregnancy. | sont payables à la prestataire de la première catégorie qui fait la preuve de sa grossesse. |
| [Emphasis added] | [non souligné dans l'original] |

Subsection 23 (1) provides for parental benefits:

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| 23. (1) Notwithstanding section 18, but subject to this section, benefits are payable to a major attachment claimant to care for one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption under the laws governing adoption in the province in which the claimant resides. | 23. (1) Malgré l'article 18 mais sous réserve des autres dispositions du présent article, des prestations sont payables à un prestataire de la première catégorie qui veut prendre soin de son ou de ses nouveau-nés ou d'un ou plusieurs enfants placés chez lui en vue de leur adoption en conformité avec les lois régissant l'adoption dans la province où il réside. |
| [Emphasis added] | [non souligné dans l'original] |

[56] The defendant points out that as a result of more recent amendments, the *Act* now includes "compassionate care benefits" for leave when a family member has a serious medical condition with a significant risk of death, regardless of whether the claimant is available for work under section 18. In 2013, an additional special benefit was added to provide benefits to a claimant who ceases work to care for a critically ill child. These provisions are not at issue in this proceeding.

**The Issues**

[57] The overall issue raised in this motion is whether the action should be certified as a class proceeding under Rule 334.16 of the *Rules*. As noted, each element of the test for certification has been challenged by the defendant.

[58] Rule 334.16(1) of the *Rules* governs motions for certification of class proceedings and provides:

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| 334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if | 334.16 (1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies : |
| (a) the pleadings disclose a reasonable cause of action; | a) les actes de procédure révèlent une cause d'action valable; |
| (b) there is an identifiable class of two or more persons; | b) il existe un groupe identifiable formé d'au moins deux personnes; |
| (c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members; | c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre; |
| (d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and | d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs; |
| (e) there is a representative plaintiff or applicant who | e) il existe un représentant demandeur qui : |

| | |
|---|---|
| (i) would fairly and adequately represent the interests of the class, | (i) représenterait de façon équitable et adéquate les intérêts du groupe, |
| (ii) has prepared 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 as to how the proceeding is progressing, | (ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement, |
| (iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and | (iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs, |
| (iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record. | (iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier. |

**Do the Pleadings Disclose Reasonable Causes of Action? *Rule* 334.16(1) (a)**

**Overarching Issues**

[59] The defendant raised several overarching or broad issues regarding the plaintiff's claim that have been considered both at the outset and again in the context of the specific causes of action pleaded; negligence (including negligent misrepresentation), misfeasance in public office, and unjust enrichment.

**The Plaintiff's Submissions**

[60] The plaintiff notes that the first element of the test for certification focuses on the Claim; whether it is plain and obvious that the causes of action pleaded have no chance of success. The other four elements of the test require "some basis in fact" which requires resort to the record (*Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 99, [2013] 3 SCR 477 [*Pro-Sys*]; *Hollick v Toronto (City)*, 2001 SCC 68 at para 16, [2001] 3 SCR 158 [*Hollick*]).

[61] The plaintiff claims three causes of action: negligence (including negligent misstatement with respect to the proposed Category 2 class); misfeasance in public office; and unjust enrichment.

[62] The plaintiff submits that it is not plain and obvious that the claims disclose no reasonable cause of action, noting that if there is *any* chance of success, there is a reasonable cause of action. The plain and obvious test is based on the Claim, and assumes that the pleadings are true (*Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at p 975, [1990] 6 WWR 385 [*Hunt*]; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 [2011] 3 SCR 45 at para 22 [*Imperial Tobacco*]).

[63] The plaintiff disputes the defendant's contention that this action is a dressed up benefits claim or a judicial review disguised as an action. The plaintiff notes that appeals to the Board of Referees or Umpire (or now the Social Security Tribunal or "SST") would not provide any mechanism to address the negligence issues as those bodies lack jurisdiction to decide the issues.

[64] In response to the defendant's argument that the presumption that the facts pleaded are true is not applicable to pleadings of conclusions of law, the plaintiff submits that the certification stage is not the time to resolve this or any question of law. The meaning of the *Act* and its key provisions are live issues that should be decided at trial.

[65] The plaintiff notes that there are only conflicting Umpire decisions, which are not binding on the Court, regarding the application of the *Act*. There is nothing more to support the defendant's assertions that the *Act* was correctly interpreted and applied.

[66] The plaintiff also disputes the defendant's argument that the statute was unambiguous and correctly interpreted. The plaintiff notes that this Court disagreed with the defendant's argument in *McCrea 2013* at para 55 and dismissed the defendant's Rule 220 motion which raised this very issue.

[67] On the Rule 220 motion, the defendant also argued that a more complete record was needed regarding the meaning of the *Act*. The plaintiff submits that this supports the view that her interpretation of the *Act* is not certain to fail.

[68] The plaintiff acknowledges that the Court cannot read words into legislation if it is clear. It is not clear, however, given that subsections 23(3) and 12(3) (regarding parental benefits and the extension of the cap) are inconsistent with section 18. This ambiguity permits the consideration of extrinsic evidence to determine the meaning of the *Act*.

[69] The plaintiff argues that the legislative history of the 2002 amendments and the public statements made at the time demonstrate that these amendments were meant to benefit claimants who were ill while pregnant *and* claimants who were ill while on parental leave. The plaintiff characterizes the more recent 2013 amendments as a clarification of the 2002 law and not a real change.

[70] The plaintiff notes that the Government paid sickness benefits to Ms Rougas based on the Umpire's decision and also paid sickness benefits to more than 330 others, yet continued to deny other claimants, including the plaintiff. The plaintiff questions why it would then amend the *Act* if it was in fact unambiguous.

[71] The plaintiff also disputes that the claim is for breach of a statutory duty; rather, it is for the negligent implementation of the legislation. In this case, the Commission took positive steps to implement some aspects of the 2002 amendments, but was negligent in implementing other aspects of the amendments, in particular, those relating to sickness benefits while on parental leave.

[72] The plaintiff also disputes that *res judicata* and issue estoppel bar the claims. The Board and Umpire could not address the issues raised in this claim. The Court found previously that the Board and Umpire decisions have no precedential value and that *res judicata* does not apply (*McCrea 2013* at paras 67, 73 and 79). Also, the Supreme Court of Canada rejected the argument that a claim cannot proceed because the Class must exhaust their appeals and judicial review rights before claiming negligence (*Canada (Attorney General) v Telezone Inc*, 2010 SCC 62,

[2010] 3 SCR 585 [*Telezone*]). Three companion cases held that these principles should also apply to Federal Court actions (*Manuge v R*, 2010 SCC 67 at paras 17-24. [2010] 3 SCR 672 [*Manuge 2010*]; *Parrish & Heimbecker Ltd v Canada (Agriculture and Agri-Food)*, 2010 SCC 64 at para 18, [2010] 3 SCR 639 [*Parrish*]; *Nu-Pharm Inc v Canada (Attorney General)*, 2010 SCC 65 at para 17, [2010] 3 SCR 648 [*Nu-Pharm*]).

**The Defendant's Submissions**

[73] The defendant submits that it is plain and obvious that all the claims will fail.

[74] The defendant adds that the material facts pleaded regarding the plaintiff, Ms McCrea's, own circumstances do not support the causes of action.

[75] The defendant argues that the plaintiff cannot use a negligence, misfeasance and unjust enrichment claim to "dress up" a judicial review of what is, in essence, a claim for EI benefits given that the statute provides for appeal routes and remedies. The *Act* provides that eligibility and entitlement decisions be determined by the Commission and reviewed by the Board of Referees and Umpire (and now the SST) and ultimately the Federal Court of Appeal. The Court should use its residual discretion and stay the proceedings (*Telezone* at para 78).

[76] The defendant argues that Ms McCrea's own actions reveal that this is simply a benefits claim. Ms McCrea adjourned her appeal to the Umpire (as of December 2011) to bring this class action, although she could have had her benefit claim resolved by now by recourse to the Umpire and by subsequently seeking judicial review, if necessary.

[77] The defendant submits that the claim, now totaling $450 million, includes other damages as afterthoughts and is an attempt to convert the benefits claim into a tort claim. However, once these are stripped off, all that remains is a benefits claim.

[78] The defendant notes the importance of the principles of finality and that circumventing the appropriate recourse is harmful to the justice system. The clear wording of the *EI Act* and the principle of *res judicata* bar the plaintiff from using a class procedure to receive benefits already denied in accordance with the legislation (*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 20, [2001] 2 SCR 460 [*Danyluk*]; *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 33, [2003] 3 SCR 77; *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 at paras 28-30 and 34, [2011] 3 SCR 422 [*Figliola*]).

*Conclusions of law cannot be pleaded*

[79] The plain and obvious test focuses on whether, within the context of the law and the litigation process, there is any reasonable prospect of success.

[80] The defendant notes that the plaintiff's pleadings are all based on allegations of improper or illegal interpretation of the *Act* which are conclusions of law. The defendant argues first, that the *Act* was properly interpreted as confirmed by the decisions of the Board of Referees and Umpires, and second, that the presumption that the facts pleaded are true does not apply where a conclusion of law is pleaded.

[81] The defendant acknowledges that conclusions of law may be pleaded but their truth must be proved (*Imperial Tobacco* at para 21).

*The statute was interpreted correctly*

[82] The defendant's position is that the Commission's interpretation was correct; the words of the *Act* are clear and the Commission properly applied the relevant provisions. The Commission was bound to apply the "otherwise available" condition in paragraph 18(b) to claimants who requested conversion to sickness benefits while they were receiving parental benefits.

[83] Even if this interpretation is only a reasonable one, the defendant argues that the causes of action should be struck.

[84] The modern rule of statutory interpretation requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." (*Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at paras 26-29, [2002] 2 SCR 559 [*Bell Expressvu*]).

[85] The words of paragraph 18(b) are clear; claimants must prove they are available for work, or, but for illness, would be otherwise available for work. The defendant notes that other special benefits – pregnancy, parental and compassionate care benefits – are stated to be available to claimants "notwithstanding section 18". However, no such wording is included in section 21 for sickness benefits. The maxim *expressio unius est exclusio alterius* applies in this case.

[86] The defendant submits that the Court's role is to ensure the interpretation is consistent with the intention of Parliament and that intention is clear in this case.

[87] Given that the provisions of the *Act* are unambiguous, extrinsic evidence, such as the legislative history, should not be used to aid in interpretation (*Bell Expressvu* at paras 26-29). The defendant also cautions that Hansard and other government documents may not assist in determining the intention of Parliament.

[88] The defendant notes that although Parliament changed the law, it did so only on a prospective basis. The transitional provisions of the 2012 *Helping Families in Need Act*, which amended the *EI Ac*t to permit conversion of parental benefits to sickness benefits regardless of availability to work, make it clear that the amendment to section 18 is prospective only, effective from March 24, 2013, and would not apply to any potential class member before that date.

[89] The defendant explains that Parliament was aware of the scope of the 2002 amendments and was aware of the decision of the Umpire in *Rougas*, yet still provided for only a prospective change.

[90] The defendant also notes that the decision of the Umpire in *Rougas* is not binding and is contrary to the principle that the Court should not read words into a clear statute. The defendant acknowledges that it did not seek judicial review of the *Rougas* decision, leaving the decision of the Umpire as the final decision which provided the authority for the Commission to pay Ms Rougas her sickness benefits, although the clear words of the *Act* did not.

[91] The defendant further explains that around the time of the decision not to seek judicial review of the *Rougas* decision (2011-12), other claimants in receipt of parental leave who were initially denied sickness benefits were paid their sickness benefits. As noted above, where claimants sought to appeal their denied claims, the defendant did not oppose. Alternatively, if the Board of Referees allowed an appeal, the defendant did not seek to appeal to the Umpire.

[92] The defendant argues, in response to the plaintiff's submissions that public statements were made by Parliamentarians about the intended purpose of the 2002 amendments, that such statements do not matter. Rather, the clear words of the *Act* guided the Commission in the manner it interpreted and applied the *Act*.

[93] The defendant adds that the Minister responsible for the 2012 amendments (which came into force in 2013) was aware of the narrower scope of the 2002 amendments and of the *Rougas* decision and the need to respond to the gap highlighted by *Rougas*. Although the Minister may have referred to the amendment to section 18 as "clarifying" and "codifying", these comments do not mean that the amendments reflected or clarified the *status quo*.

[94] The defendant also submits that the 2002 amendments were only intended to respond to the decision in *McAllister-Windsor* and not more. In that case the issue was the capping or stacking of benefits. Ms McAllister-Windsor had received sickness benefits while pregnant, then received maternity benefits after the birth of her child but was denied parental benefits because she had already received 30 weeks of benefits (the maximum benefits at that time) and her benefits were "capped".

[95] The 2002 amendments were designed only to extend the maximum period to permit sickness benefits to be claimed *before* maternity and parental benefits. In such cases, the claimant would have been available for work but for their illness.

[96] The defendant also posits that it would have been possible to receive sickness benefits *after* maternity or parental leave as long as the claim fell within the benefit period and the claimant was otherwise eligible, including having sufficient hours of insurable earnings.

[97] In addition, the defendant suggests that it could have been possible to receive sickness benefits *during* parental leave where those benefits had been split between two parents, and the one claiming sickness benefits was otherwise available for work.

[98] The defendant also notes that the Federal Court of Appeal found no discrimination in the capping provisions of the Act in *Sollbach v R*, [1999] FCJ No 1912, 94 ACWS (3d) 202 [*Sollbach*] and in several other cases that followed *Sollbach* both before and after the *McAllister-Windsor* decision.

*No cause of action for breach of statute*

[99] The defendant emphasizes that there is no cause of action for breach of statute and that the law does not recognize an action against a government authority for negligent breach of statutory duty by acting outside of or contrary to the law (*Holland v Saskatchewan*, 2008 SCC 42 at paras 7-9, [2008] 2 SCR 551 [*Holland*]. The defendant notes that the basis for the plaintiff's claim is that the defendant adopted an incorrect interpretation of the statute and systematically

administered the scheme in accordance with that interpretation. In other words, the plaintiff is alleging failure to implement the statute or breach of the statute, for which there is no liability.

[100] The defendant again argues that the principle that a Court must assume that the facts pleaded can be proved does not apply where what is pleaded is a statement of law or legal conclusions that cannot be proved (*Operation Dismantle Inc v R*, [1985] 1 SCR 441 at para 108, [1985] SCJ No 22).

**Conclusion on Overarching Issues Regarding the Cause of Action**

[101] The parties agree that the test for whether there is a reasonable cause of action is the same as in a motion to strike: whether it is "plain and obvious" that the plaintiff's statement of claim discloses no cause of action (*Le Corre v Canada (Attorney General)*, 2005 FCA 127 at para 9, [2005] FCJ No 590).

[102] I have carefully considered the broader or overarching issues raised by the defendant to argue that the plaintiff's claim has no prospect of success, and the same issues have been considered with respect to each cause of action.

[103] The Court must assume that the facts alleged in the Statement of Claim, read as a whole, and generously construed, are true. Even where the claims are novel, or the law is unsettled, the test remains the same. The jurisprudence establishes that the onus on the party seeking to strike out the claim is heavy and the Court should be very cautious in striking out a claim unless it is clearly satisfied that the claim is sure to fail at trial. Where the issues raise serious questions of

law, or mixed questions of fact and law which are better left to the trial judge, the motion to strike should be rejected (*Hunt*).

[104] In *Hunt*, at para 36, the Supreme Court of Canada held that in determining whether it is plain and obvious that the plaintiff's claim fails to disclose a reasonable cause of action, the Court must assume that the facts alleged in the plaintiff's claim can be proved. The Court need only consider whether there is any or some chance of success, or put the other way, whether it is certain to fail.

[105] More recently, in *Imperial Tobacco*, the Supreme Court of Canada described the test as follows:

> [17] … A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt; Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

[106] The Court added that the motion to strike should be used with care, noting at para 21 that: "Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial."

[107] The Court emphasized at para 22 that: "It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim". The assessment of the possibility of success is based on the facts pleaded.

[108] These well-known principles are the starting point for the consideration of the broad issues raised by the defendant in an effort to foreclose this action.

[109] The plaintiff's obligation is to plead the facts that give rise to the claims. In this case, the plaintiff has set out facts based on the common experiences of the plaintiff and at least three other known persons (and of other potential class members) and the process followed by the Commission for EI benefit claims. The plaintiff has also pleaded an interpretation of the relevant provisions of the *Act* that differs from the defendant's position.

[110] The defendant argues that the claim should be struck in its entirety for several reasons: the claim is in essence a claim for benefits; the plaintiff has pleaded only a conclusion of law which cannot be taken as true; the Commission's interpretation of the statute was correct; and, the cause of action is for breach of a statute.

[111] The defendant asks the Court to exercise its discretion and stay this proceeding, relying on *Telezone*, where the Supreme Court explained at para 78 that courts have a residual discretion to stay a proceeding "because in its essential character, it is a claim for judicial review with only a thin pretence to a private wrong".

*This is not simply a claim for benefits*

[112] The defendant's argument that this claim is simply a dressed up claim for EI benefits overlooks the plaintiff's extensive pleadings regarding negligence and negligent misrepresentation, misfeasance in public office and unjust enrichment.

[113] As an overall finding (and at this stage), I am not prepared to conclude that this is simply a benefits claim. As noted in the same paragraph of *Telezone* relied on by the defendant: "Generally speaking the fundamental issue will always be whether the claimant has pleaded a reasonable private cause of action for damages. If so, he or she should generally be allowed to get on with it."

[114] In *Manuge 2010* at para 19, Justice Abella, referred to *Telezone*, noting that the essential character of the claim must be the focus:

> The exercise of the discretion to stay an action in this context is dependent on an identification of the essential character of the claim as an assertion of either private law or public law rights. I agree with the Crown that some of Mr. Manuge's claims raise issues that are amenable to judicial review. However, the question is not just whether some aspects of Mr. Manuge's pleadings could be addressed under ss. 18 and 18.1 of the *Federal Courts Act*, but what, in their essential character, his claims are for.

[115] In this case, some aspects of Ms McCrea's claim and perhaps a few other claimants could be addressed by judicial review, but as discussed below, judicial review would not be an effective approach for the remaining, and arguably, from the plaintiff's perspective, more important issues. The essential character of what is pleaded is not simply a claim for benefits, although the benefits denied are an aspect of the damages claimed.

[116] As noted in *Imperial Tobacco*, the approach should be generous and err on the side of permitting a "novel but arguable claim" to proceed.

*The conclusion of law relied on by the plaintiff is not incapable of proof*

[117] The defendant argues that conclusions of law require proof and the conclusion relied on by the plaintiff, that the *Act* was incorrectly interpreted and applied, which is the basis for all the plaintiff's claims, is incapable of proof and, therefore, all causes of action must be struck.

[118] As a general proposition designed to foreclose this action, I do not agree that the plaintiff has pleaded only a conclusion of law. I also do not agree that the facts pleaded, which assert that the *Act* was incorrectly interpreted and improperly and negligently implemented, are incapable of proof. That proof may be difficult (and may turn out to be impossible), but it is not "manifestly incapable of being proven". The plaintiff's pleadings regarding the interpretation of the *Act* are not merely speculative or based on assumptions; some evidence does exist to support either the plaintiff's or defendant's interpretation.

[119] In *Operation Dismantle*, Justice Dickson qualified the principle that the facts pleaded should be taken as true, at para 27:

> We are not, in my opinion, required by the principle enunciated in *Inuit Tapirisat*, *supra*, to take as true the appellants' allegations concerning the possible consequences of the testing of the cruise missile. The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be

> improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven.

[120] In *Imperial Tobacco*, as noted above, the Chief Justice referred to *Operation Dismantle* at para 22 in summarizing the principle that the "facts pleaded are true unless they are manifestly incapable of being proven".

[121] Contrary to the defendant's submission that the "Achilles heel" of the plaintiff's pleadings is that they are based on a conclusion of law that cannot be taken as true and cannot be proven, I am of the view that, to the extent that the pleadings are based on a conclusion of law, that conclusion of law could be proven as either correct or not. The outcome of that determination is uncertain and it is not to be made at this stage of the proceeding.

[122] In my view, it is not impossible to prove whether the *Act* was intended to provide for sickness benefits before, during or after maternity/parental benefits, but in the long run, it may prove to be impossible to do so. There could be evidence of what was intended and whether that intention was reflected in the drafting of the statute. However, some of that information may be protected by Cabinet Confidence.

[123] To conclude now that this could not be proven would be tantamount to determining that the *Act* was unambiguous and reflected the clear intention of Parliament as stated by the defendant, without having the benefit of considering evidence on this issue which, of course, is not to be considered at this stage. No evidence is admissible on this motion.

[124] As noted in *Imperial Tobacco* at para 22: "The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted."

[125] And at para 23:

> Whether the evidence substantiates the pleaded facts, now or at some future date, is irrelevant to the motion to strike. The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show. To require the judge to do so would be to gut the motion to strike of its logic and ultimately render it useless.

[126] In this case, the plaintiff has pleaded facts in sufficient detail, including facts arising from her assertion of the intended interpretation of the law. The plaintiff may be in a position to prove these assertions of fact and law at trial.

[127] The defendant's argument that the Commission's interpretation of the *Act* was correct because it was confirmed by the Board of Referees and Umpire in 99 % of all decisions that denied sickness benefits is not persuasive. The defendant acknowledged that decisions of the Board of Referees and Umpire are not binding and emphasized this point particularly with respect to the Umpire's decision in *Rougas* which found that sickness benefits were available and, therefore, did not confirm the Commission's decision to deny sickness benefits.

*The statute is not unambiguous*

[128] The defendant submits that the premise for the plaintiff's claims – that the *Act* was incorrectly or "unlawfully" interpreted – has no merit because the statute was unambiguous and the modern rule of statutory interpretation requires that the clear words of an *Act* be given effect, leaving no room for extrinsic evidence to be considered to assist in interpreting the *Act* or the provision at issue.

[129] The defendant agrees, however, that the modern rule of statutory interpretation requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."(*Bell Expressvu* at paras 26-29; *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at paras 21 and 22, [1998] SCJ No 2)

[130] To isolate paragraph 18(b) rather than to attempt to situate and reconcile that provision with the provisions governing the benefit period and eligibility for benefits means that the plain meaning rule trumps the principle that a statute should be read harmoniously and in its entirety.

[131] Paragraph 18(b) may appear clear when read on its own, however it should be read with the related provisions – sections 10, 12 and 23 – to determine if and how the provisions can coexist.

[132] As the plaintiff noted, I found in *McCrea 2013* at para 55 that the related provisions of the *Act* were not unambiguous:

> I do not share the view that the statute is unambiguous. The Act is long and is difficult to comprehend. The provisions are interrelated and cannot be read in isolation. Some appear to be internally inconsistent and more explanation about how the provisions operate will be helpful, quite apart from whether the records that may address the intention of the legislators are admissible.

[133] Although the defendant notes that the provisions should be read in the context of the intention of the legislator, which the defendant submits is clear, the defendant also argues that Hansard and statements made by Parliamentarians are not determinative of the legislative intent.

[134] Without some extrinsic evidence, it may not be possible to determine the legislative intent (i.e. whether the 2002 amendments intentionally or inadvertently did not address the situation of those who become ill during their maternity or parental leave).

[135] As I noted in the decision on the Rule 220 motion in *McCrea 2013* at paras 56-57, the plaintiff's record included a wide range of documents, some of which were created before the enactment of the 2002 amendments and others after, and some of which were targeted to the broader public in plain language and were not designed to guide statutory interpretation. The point is that the admissibility of these and other documents that may exist and the weight to attach to them should be addressed by the trial judge.

[136] The defendant's submissions that the 2002 amendments were designed only to address the particular decision in *McAllister-Windsor* suggests that the defendant failed to consider the other possible combinations of benefits that could comprise the extended benefit period.

[137] In response to the Court's question that the 2002 amendments to the *Act* seemed to extend the benefit period to permit all three special benefits to be claimed, yet take away that possibility with respect to sickness benefits for those in receipt of parental benefits by application of section 18, the defendant responded that the manner in which the provisions were drafted was clear and deliberate. For all other special benefits, the wording of "notwithstanding section 18" was included, but not so for sickness benefits during parental benefits.

[138] I note, however, that section 21, which refers to sickness benefits, is drafted in a very different way than the other provisions that provide special benefits. Section 21 does not in fact provide for sickness benefits, rather it limits them. The only other reference to sickness benefits appears to be in subsection 12(3) which refers to the number of weeks of benefits a claimant could receive for each type of special benefits. The defendant's argument based on *expressio unius est exclusio alterius* does not assist the defendant given the significant differences in how the provisions are drafted.

[139] The defendant simply rejects the possibility that the need to either amend paragraph 18(b) or to add clarifying wording to the parental leave provisions to permit sickness benefits "notwithstanding section 18" was overlooked in the 2002 amendments. The defendant's argument that the fact that section 18 was not amended in 2002 shows an intention to treat claimants on parental leave who become ill differently from those who become ill before maternity or parental leave is not persuasive. There is no dispute that paragraph 18(b) is necessary and must apply more generally for other benefits; claimants receiving EI benefits must

be available for work. The issue is whether other refinements to that provision were overlooked when other provisions that extended benefits were amended.

[140] I remain of the view that when the related provisions governing special benefits and the extension of the benefit period are read together, it cannot be said that the relevant provisions of the *Act* are unambiguous. The interpretation of the *Act* will be determined by the trial judge.

[141] With respect to the use of extrinsic evidence or reliance on statements made by Parliamentarians about the purpose of the 2002 amendments, I do not agree with the defendant that those statements should be dismissed as meaningless. In the event that extrinsic evidence is admitted to expand on the meaning of the relevant provisions, such statements could shed light on the intention of the legislators. Again, the admissibility and weight of any extrinsic evidence is a matter for the trial judge. For the purposes of this motion, I am not persuaded by the defendant's arguments that the *Act* is clear and unambiguous and that this should determine the fate of the plaintiff's action.

[142] I would add that in my view, the *Sollbach* line of cases, relied on by the defendant, are not helpful in supporting the position that there is no unfairness or discrimination in the capping of benefits in the current circumstances (i.e., to preclude the benefit period to be extended to 65 weeks to allow for up to 15 weeks of sickness benefits). *Sollbach* and the cases which followed it, decided both before and shortly after *McAllister-Windsor*, are not analogous to the circumstances of the plaintiff or proposed class members. In *Sollbach*, the Court of Appeal found that the 30 week cap in existence at that time was not discriminatory, noting at para 9:

> We find that the Applicant has failed to show that pregnant women are discriminated against as a group under the legislation. Pregnant women are treated exactly the same as men and women on parental leave and the same as men and women who suffer from a disability. All are limited to a maximum of 30 weeks of compensation.

[143] The present action is not grounded in discrimination on the basis of gender or disability. The issue here is that claimants were treated differently depending on when their claim for sickness benefits arose; those claiming sickness benefits before their maternity and parental leave were not capped while those claiming sickness benefits while on parental leave were capped.

*The plaintiff does not plead breach of a statute*

[144] The defendant also relies on *Holland* to argue that the causes of action are in essence for breach of a statute and should, therefore, be struck.

[145] The issue for the Court in *Holland* was whether the Saskatchewan Court of Appeal had erred in striking out the plaintiff's cause of action on the basis that no action exists against public authorities for negligently acting outside their lawful mandates. The Supreme Court of Canada characterized the claim as breach of statutory duty and agreed that it disclosed no cause of action recognized by law. The Supreme Court noted that the question of whether a new kind of duty of care arises requires resort to the *Anns* test and agreed with the approach taken by the Court of Appeal which found that even if proximity were established, the residual policy considerations (identified as the chilling effect and the risk of indeterminate liability) negate against recognizing a new cause of action.

[146] However, the Court distinguished the plaintiff's other cause of action, which was the negligent failure to implement an adjudicative decree. The Court noted that a policy decision about what acts to perform under a statute would not give rise to a cause of action in negligence. However, once a decision to act is made, the government may be liable in negligence for how it implements that decision. The Court found that implementation of a judicial decision is an "operational act". The Court concluded that it was "not clear that an action in negligence cannot succeed on the breach of a duty to implement a judicial decree." (*Holland* at para 16)

[147] In this case, the plaintiff pleads the negligent implementation of the *Act*. The plaintiff acknowledges that some aspects of the 2002 amendments were implemented but argues, however, that her circumstances and those of others similarly affected show that other aspects of the amendments, i.e., the availability of sickness benefits while on parental leave, were not. If this is indeed the case, then the cause of action is not for breach of the *Act*.

[148] Because I have found that the conclusion of law pleaded is not incapable of proof, the theory or premise of the plaintiff's action can be characterized as negligent implementation of the Act rather than a failure to implement or a breach of that statute.

**Negligence and Negligent Misrepresentation**

**The Plaintiff's Submissions**

[149] The Claim alleges that a duty of care was owed and was breached by the defendant's negligent conduct in administering the EI scheme, and in particular the 2002 amendments. The

Claim goes on to allege that it was foreseeable that this would cause damages to class members, that class members were in a relationship of proximity as a result of their previous dealings with their maternity and parental benefits, that the defendants communicated directly with class members, and that class members were in a position of reliance upon the Commission.

[150] With respect to negligence, the plaintiff alleges that the defendant breached the duty of care to "properly ascertain the scope of its statutory authority and implement the Employment Insurance Program with reasonable diligence." The Claim includes particulars of this negligence, for example, that the defendant fostered a description of the *Act* after March 2002 that "recklessly or wilfully disregarded the defendant's own knowledge of the intent of the 2002 amendment", that the training of employees included inaccurate representations about the 2002 amendments, that the public website was negligently maintained and included inaccurate and misleading statements, that the defendant negligently failed to update the Digest of Benefit Entitlement Principles, and the defendant's aggressive approach to denying claims then opposing appeals of those same decisions.

[151] The Claim includes that the plaintiff has suffered damages.

[152] With respect to negligent misrepresentation, the plaintiff alleges that she and class members relied to their detriment upon the negligent misrepresentations of the defendants.

[153] The Claim describes the communications with each class member as including, verbal representations at in person meetings (at Service Canada locations), over the telephone, written

correspondence, and written advisements in public materials including website information and the Digest.

[154] The Claim asserts that the negligent misrepresentations of the defendants were inconsistent and included one or a combination of messages: class members were not entitled to sickness benefits because they had not proven they were available for work; benefits under subsection 10(13) could only be accessed by those who claimed sickness benefits either *before or after maternity leave*; benefits under subsection 10(13) could only be accessed by those who claimed sickness benefits either *before or after maternity or parental leave*; and, sickness benefits could be obtained by making a claim *after parental leave*.

[155] The plaintiff alleges that the defendants, by making these inconsistent and inaccurate statements, should have reasonably foreseen that class members would rely on them and, therefore, owed them a duty of care. This duty was breached by making these representations "negligently, carelessly, or wilfully and recklessly ..." given their expertise, knowledge and mandate.

[156] The Claim adds that class members relied on these representations to their detriment including by foregoing claims, and making claims after parental leave which were denied legitimately (for example, due to insufficient hours of insurable earnings at that stage) and suffered a loss as a result.

[157] The plaintiff points out that the elements of the negligence test are included in a negligent misrepresentation claim, with the added requirement that there must also be reasonable reliance to prove negligent misrepresentation (*Cooper v Hobart*, 2001 SCC 79 at para 36, [2001] 3 SCR 537 [*Cooper*]; *Manufacturers Life Insurance Co v Pitblado & Hoskin*, 2009 MBCA 83 at paras 74-81, 2009 MJ No 304 (CA)).

[158] The plaintiff submits that her pleadings set out the particulars of the duty of care owed by the defendants to the Class in administering the EI Act; that they did not meet that duty of care; and, that their failure caused the Class compensable loss (*Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para 114, [2007] 3 SCR 129 [*Hill*]).

[159] The plaintiff alleges that there was a systematic failure to fully implement the 2002 amendments that began with the training of staff and the development of public information, including websites and digests which guided the defendant's Officers and affected the information they provided to claimants and how claims were adjudicated.

[160] The plaintiff states the question more generally as "whether the Defendants owed the Class duties to exercise non-negligent standards of care in the manner of implementing the 2002 amendments, including in how they represented the amendments directly to the Class, in what they asked of the Class as they considered a conversion claim, and how they otherwise implemented the 2002 amendments through the claims and appeals process they controlled."

[161] The plaintiff submits that a duty of care on the part of the defendant has already been recognized and, as a result, this is not a novel claim, and no duty of care analysis is required (*Granger v Canada (Employment and Immigration Commission)*, 1986 3 FC 70 at para 36 (FCA), aff'd 1989 1 SCR 141 [*Granger*]; *Yaholnitsky v Canada (Minister of Employment and Immigration)*, 1993 FCJ No 639 at para 15, 65 FTR 83; *Goddard v Canada*, 2001 FCJ No 1708 at paras 9-10, 2001 FCT 1248; *Luo v Attorney General (Canada)* (1997), 33 OR (3d) 300 (Div Ct) at p 17-19, [1997] OJ No 1581 [*Luo*]).

[162] However, if the Court determines that this claim is novel, the plaintiff argues that the duty of care analysis will lead to the same result; the foreseeability and proximity aspects of the test have been established. The foreseeability of harm would be obvious; if the defendant provided wrong information or denied the claims negligently, claimants would suffer the harm of not receiving the benefits they should have received. The defendant should have reasonably foreseen that, due to their actions, the class would suffer damage. The relationship between the plaintiff and defendant was close and direct.

[163] There were many personal dealings and contacts between the Class and the defendants. The claimants were already in the EI system as they had qualified for maternity and parental benefits. The Commission had obligations to claimants which were described on the form submitted by the claimants, including the right to receive correct information and prompt service. The defendant's own Employment Insurance Digest indicates that the Commission is the authoritative source on the meaning of the *Act*, yet it was out of date. The plaintiff also notes that

the defendant's website, despite the claims to be an authoritative source, was out of date and inaccurate in many respects.

[164] Class members interacted with the Commission in person or by telephone. Based on the information provided by the Commission, class members either applied to convert their parental benefits to sickness benefits or were dissuaded from making such an application.

[165] The plaintiff also notes other circumstances that support proximity, including the overall purpose of the *Act* and the vulnerability of the claimants who were unemployed and ill. Some claimants were simply not able to mount an appeal because they were both caring for a child and were ill. The plaintiff submits that it was reasonable for the claimants to rely on the proclaimed authoritative source – i.e. the Commission.

[166] The plaintiff submits that the legislation itself supports the claim that a duty was owed. The EI program is similar to insurance. Workers pay premiums and the fund is financed exclusively by those premiums without any government contributions. In addition, the legislative scheme (comprised of the *EI Act* and the statute setting up the Department and the Commission) does not negate the duty arising from interactions, but rather confirms that a duty to properly administer the *EI Act* for claimants exists. The plaintiff points to the statutory provisions that impose strict duties on the Commission to pay qualified claimants. Although many statutes protect public authorities from negligence with clauses that indicate that a duty of care is not owed (*Edwards v Law Society of Upper Canada*, 2001 SCC 80 at paras 16-17, [2001] 3 SCR 562), in this case neither statute protects the defendants with such a clause. The plaintiff notes in

contrast that the new Social Security Tribunal is protected by such a clause (*Department of Employment and Social Development Act*, SC 2005, c 34, s 50).

[167] The plaintiff argues that the defendant has not met the onus to show that it is plain and obvious that the duty of care is negated by policy reasons which are compelling and not speculative. There is no real potential for negative consequences.

[168] The plaintiff disputes the defendant's contention that any duty of care would create a conflict with its statutory mandate. The purpose of the *Act* is to pay benefits to those who qualify. All workers who pay premiums should share the same interest to have accurate information and non-negligent service from the defendant, as would all members of the public (*Hill* at paras 36-41).

[169] Contrary to the defendant's assertion that finding a duty of care would have a chilling effect on the Commission's officers and staff, the officers and staff are directed to follow the *Act* and the established policy. Their role is to properly adjudicate claims. The plaintiff adds that, as in *Hill*, if imposing a duty makes the defendant more cautious, this is a good result.

[170] The plaintiff also disputes the defendant's argument that certification would open up the floodgates and lead to indeterminate liability. The proposed class includes only those who were in the EI system and who were denied sickness benefits while on parental leave and those who received misinformation that they relied on and that the officers and agents of the EI

Commission knew they would rely on. The alleged negligence and negligent misrepresentations arose from direct interactions with known people.

[171] The plaintiff adds that the existence of a statutory appeal does not negate the duty of care. A statutory appeal would not provide an adequate remedy because the Board of Referees and Umpire could not address the questions of law (*Tétreault-Gadoury v Canada (Employment and Immigration Commission)*, [1991] 2 SCR 22, [1991] SCJ No 41 [*Tétreault-Gadoury*]). In addition, the experience of claimants demonstrates that the appeal process was futile. Appeals were vigorously opposed, claimants had no legal representation, the Commission controlled all the materials provided to the Board of Referees or Umpire and those representing the Commission never mentioned the 2002 amendments. The plaintiff notes that there was no appeal process at all for those who were dissuaded from making a claim.

[172] In addition, the class need not exhaust their appeal and judicial review rights before claiming negligence. The presence of a reasonable cause of action is sufficient to allow the damages claim to proceed, notwithstanding the presence of a statutory issue that could be dealt with using administrative and judicial review mechanisms (*Telezone* at paras 63-64 and 76).

[173] The Plaintiff notes that this principle applies equally to Federal Court actions (*Manuge 2010* at paras 17-24; *Parrish*; *Nu-Pharm*). The plaintiff notes that in *Manuge 2010*, the Supreme Court of Canada upheld the certification because the plaintiff pleaded reasonable causes of action, despite the presence of several statutory interpretation issues that could have been dealt with on judicial review.

[174] The plaintiff also responds that *res judicata* and issue estoppel do not bar the claims. The claims are based on negligent implementation of the *Act*. As noted, the plaintiff emphasizes that the EI appeals process – the Board of Referees and the Umpire – do not have jurisdiction to address the questions of law raised in the claim (*Tétreault-Gadoury*).

[175] The plaintiff submits any issue regarding the application of limitation periods should be addressed after certification, particularly due to the fact that no Defence has been filed. The plaintiff adds that the only applicable limitation period would be the six year period in two federal statutes (*Federal Courts Act*, RSC 1985, c F-7, s 39; *Crown Liability and Proceedings Act*, RSC 1985, c C-50, s 32).

**The Defendant's Submissions**

[176] The defendant submits that it is plain and obvious that there is no cause of action for negligence or negligent misrepresentation.

[177] The defendant highlights that all the plaintiff's causes of action are based on illegality of the Commission's actions. For example, the plaintiff asserts: "deliberate efforts":

> "misapplication of the act", "negligent misrepresentations", and benefits "improperly denied". The plaintiff cannot prove this illegality and cannot rely on the presumption that facts pleaded are true, and therefore all the causes of action should fall.

[178] The defendant disputes that an established relationship with a recognized duty of care exists. The application of the two stage test demonstrates there is no proximity and that policy reasons would preclude the imposition of a duty of care in these circumstances.

[179] The starting point is to look at the statute (*Syl Apps Secure Treatment Centre v BD*, 2007 SCC 38 at paras 27 and 32, [2007] 3 SCR 8, [*Syl Apps*]). Neither the *EI Act* nor the *Department of Employment and Social Development Act* creates a relationship of proximity between the plaintiff and the Commission.

[180] The statutory duty on the Commission is to determine entitlement to benefits. That duty is owed to the public. The *Act* describes three roles for the Commission: information provider, decision-maker and adversary (when there is an appeal). There is an inherent conflict; the Commission cannot owe the plaintiff a duty given that it would also be tasked with determining her entitlement to benefits and opposing any appeals that the plaintiff may pursue. The defendant, relying on *Syl Apps and Khalil v Canada*, 2007 FC 923, [2007] FCJ No 1221 [*Khalil*], argues that where such a conflict could arise, no private law duty of care can exist.

[181] The plaintiff's allegations of contact are insufficient to create a sufficiently close and direct relationship between her and the Commission to establish proximity.

[182] With respect to the residual policy concerns, the defendant argues first, that imposing a duty of care to EI claimants would be incompatible with the statutory schemes of the *EI Act* and the *Department of Employment and Social Development Act* (*Syl Apps and Khalil* at paras 193-208).

[183] Second, there is a potential for the creation of unlimited liability to an indeterminate class. Because the plaintiff's concerns arise from the Commission's interpretation and

implementation of certain benefit provisions of the *Act*, taken to its absurd conclusion, this would result in the Commission owing a duty of care to every claimant whose claim it initially rejects, even though claimants have administrative remedies to challenge the decision.

[184] Third, the defendant suggests that the imposition of a duty of care would create a chill on the Commission's front-line employees; they would be reluctant to assist claimants over the phone, in person or by their website out of fear of being held responsible for the information provided.

[185] The defendant notes that the testimony of the plaintiff's witness, Mr Gordon McPhee, indicates that front-line staff does their best and always encourages rather than discourages those who inquire to make claims. Imposing a duty of care would halt those efforts.

[186] The defendant further submits that the plaintiff has not pleaded the other necessary elements of her negligent misrepresentation claims: i.e., a representation that is untrue, inaccurate, or misleading; that the Commission acted negligently in making the representation; that the plaintiff reasonably relied to her detriment on the misrepresentation; and that she suffered some financial loss.

[187] The defendant adds that the plaintiff has not established a "special relationship" between herself and the Commission which requires that reliance is reasonably foreseeable and reasonable in the circumstances (*Queen v Cognos Inc*, [1993] 1 SCR 87 at para 33, [1993] SCJ No 3 [*Cognos*]).

[188] The defendant submits that the claim does not include material facts to demonstrate that anyone who made inquiries relied on the alleged misstatements and was dissuaded from applying to convert their benefits and suffered a loss. The defendant disputes that Ms McRea's circumstances put her in Category 2 and also argues that, regardless, Ms McRea suffered no damages.

**It is not plain and obvious that the cause of action in negligence has no reasonable prospect of success**

[189] The overall question is whether it is plain and obvious that the pleadings disclose no reasonable cause of action in negligence i.e. that the Claim has no reasonable prospect of success or is certain to fail.

[190] As noted in *Imperial Tobacco* at para 21, a motion to strike should be used with care, and "The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial." The focus of the assessment is on the pleadings (para 23).

[191] I agree with the defendant that some of the jurisprudence relied on by the plaintiff is not persuasive in establishing that a duty of care on the defendant has already been recognized. For example, in *Granger* at para 10, the Court concluded that Umpires must apply the law and have no discretion to do otherwise. The Court did not conduct any duty of care analysis. Moreover, the statement relied on by the plaintiff appears to be *obiter*.

[192] However, the plaintiff also relies on *Luo*, where the Ontario Divisional Court found that the EI Commission did owe a duty of care to the claimant and the facts pleaded disclosed negligent misrepresentation by the Commission toward the plaintiff. The Court set out several factors that supported the duty of care including the importance of the benefits, the plaintiff's vulnerability and the plaintiff's direct dealings with the Commission.

[193] Although the defendant suggests that *Luo* cannot be relied on to find an established duty of care and should be distinguished because the rules of pleading in the Small Claims Court (the Court of first instance) are relaxed, that issue had no bearing on the Divisional Court's analysis of the factors supporting a duty of care, many of which are present here. The Divisional Court noted that, although the plaintiff pleaded negligence and had not specifically pleaded negligent misrepresentation, the facts pleaded supported the claim of negligent misrepresentation. The Court considered several factors in finding a duty of care based on a "special relationship" including that the claimant was unemployed, financial assistance was of great importance, it was not a situation where the claimant "simply sought routine information from a government servant", he had made numerous inquiries, and he was vulnerable.

[194] The analysis of "special relationship" is analogous to the proximity test. Therefore, even if *Luo* should not be relied on to conclude that a duty of care has been previously recognized, the factors noted by the Court are relevant to the application of the two-stage test in the present circumstances.

[195] The Court must determine whether a private law duty of care is owed by applying the test set out in *Anns v Merton*, adopted in *Cooper* (and often referred to as the *Anns*/*Cooper* test) which has been consistently applied by the Supreme Court, including more recently in Imperial Tobacco. (*Anns v Merton London Borough Council*, 1978 CanLII 745 (AB QB), [1978] AC 728; *Cooper*)

[196] The two stages were described in *Imperial Tobacco* at para 39:

> At the first stage of this 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 (CanLII), [2007] 3 S.C.R. 129.

[197] The first stage of the test examines whether there is a sufficient degree of proximity and foreseeability to establish a *prima facie* duty of care. The second stage examines whether any such duty is negated by policy reasons. In *Syl Apps* the Supreme Court of Canada noted that policy considerations come into play at both stages. At the proximity stage, the policy considerations focus on the particular relationship between the plaintiff and the defendant. At the second stage, the policy considerations examine the effect that recognizing a duty of care would have on other legal obligations, the legal system and society more generally.

[198] In *Hill*, the Court commented on proximity, noting, at para 24, that the factors relevant to proximity are diverse; "Generally speaking, the proximity analysis involves examining the relationship at issue, considering factors such as expectations, representations, reliance and

property or other interests involved: Cooper at para. 34. Different relationships raise different considerations."

[199] With respect to potential conflict negating the duty of care at the proximity stage, the Court noted at para 40:

> … Second, on the test set forth in *Cooper* and subsequent cases, conflict or potential conflict does not in itself negate a *prima facie* duty of care; the conflict must be between the novel duty proposed and an "overarching public duty", and it must pose a real potential for negative policy consequences.

[200] The Court reiterated at para 43: "… A *prima facie* duty of care will be negated only when the conflict, considered together with other relevant policy considerations, gives rise to a real potential for negative policy consequences."

[201] In applying these principles, I agree with the plaintiff that the plaintiff and class members had a relationship with the Commission. They were all "in the EI system" given that they had made claims and received maternity and parental benefits. The plaintiff and class members had ongoing contact with the Commission via their applications and specific contacts with individual Commission staff to inquire about and/or apply to convert their benefits to sickness benefits. Bearing in mind the considerations noted in *Hill*, they had expectations to receive accurate information and to receive any benefits to which they might be entitled.

[202] As the plaintiff emphasized, at the foreseeability/proximity stage, where the claim has to do with a public authority's dealings with the class, although it is informed by statute, "ruling a claim out at the proximity stage may be difficult", as noted at para 47 of *Imperial Tobacco*:

> …where the asserted basis for proximity is grounded in specific conduct and interactions, ruling a claim out at the proximity stage may be difficult. So long as there is a reasonable prospect that the asserted interactions could, if true, result in a finding of sufficient proximity, and the statute does not exclude that possibility, the matter must be allowed to proceed to trial, subject to any policy considerations that may negate the *prima facie* duty of care at the second stage of the analysis.

[203] The pleadings disclose interactions and contacts between the plaintiff and defendant which, if taken as true, disclose a relationship of proximity. It would be foreseeable that the plaintiff would be harmed if the defendant failed to take reasonable care in interpreting and administering the *Act* and processing claims, and acted negligently as alleged.

[204] I have considered the policy reasons asserted by the defendant to determine if these concerns or potential implications negate the particular relationship of proximity between the plaintiff and defendant and whether these may constitute residual policy considerations that should negate any duty of care. I have concluded that the defendant has not established that it is plain and obvious that the duty of care is negated.

[205] The defendant argues that there is an inherent conflict which negates proximity; the Commission cannot owe a duty to the plaintiff and also act as the initial arbiter of entitlement to benefits, and act as an adversary in appeal procedures later. The defendant suggests that if a duty of care was owed, the Commission would have no choice but to approve every claim to avoid the conflict. However, this theory overlooks that the duty is to provide benefits to those claimants who are entitled. The underlying issue in this action is the interpretation of the *Act* and whether

the plaintiff and class were entitled. The plaintiffs do not assert than everyone who claims benefits should receive them.

[206] I also do not share the view that the conflict exists because the Commission that may deny benefits would also have to defend against claims that it breached a duty of care. This situation exists in many other contexts; the party who allegedly breaches a duty of care must defend such allegations. Otherwise, there would be no remedy for breach of a duty. If the defendant is referring to the current approach regarding the statutory appeal mechanisms in the *EI Act* where the Commission defends its own decisions, that process may be unique. However, that process cannot address the causes of action, including negligence, as claimed by the plaintiff.

[207] The defendant also argues that residual policy concerns negate the duty of care, including: incompatibility with the statutory scheme; the potential for unlimited liability; and, the potential chill on the Commission to provide information and service.

[208] With respect to the statutory scheme, unlike some other statutes, the *EI Act* does not include a statement of purpose or principles from which one could conclude that there are conflicting duties. The plaintiff suggests that the purpose of the *Act* is to pay benefits to those who are entitled. That may be one purpose, but the scope of the *Act* suggests that there may be others. However, nothing in the *Act* suggests a clear conflict with finding a duty of care. In addition, the *Act* does not include a provision to protect the Commission from negligence.

[209] With respect to administrative appeal mechanisms in the *Act*, the plaintiff has pointed to the futility of those mechanisms in addressing the claims now asserted due to lack of jurisdiction and due to the dismal track record of claimants before the Board of Referees or Umpire given the lack of a comprehensive record regarding the *Act* and the interrelationship of its provisions.

[210] With respect to the potential for unlimited liability, I agree with the plaintiff that liability is not open ended to all those who apply for benefits. The claimants are limited to those already in the EI system who became ill and then also inquired about sickness benefits and either abandoned making an application or applied for sickness benefits and were denied.

[211] The defendant's submission about the potential chill – that imposing a duty of care would result in the Commission or Service Canada shutting down its public information and communication with claimants to avoid potential liability for breach of the duty of care – is a troubling admission. The Commission and Service Canada may likely be guided by service standards. The motto on the website and other material is "Serving Canadians" and "People Serving People" and the very name of the organisation which many Canadians rely on for a wide range of programs, "Service Canada", suggests that this is more than "propaganda" or advertising, despite the defendant's submission otherwise. Any potential chill would not go so far as to prevent the Commission from discharging its duties or aiming to live up to its name. The plaintiff's witness, Mr McPhee, indicated that the Commission and Service Canada staff are hard-working and dedicated.

[212] The defendant pointed to *Syl Apps* and *Khalil* as examples of where the Court found that policy considerations would negate the duty of care, particularly the potential for conflict. I have carefully considered these decisions, and while the principles provide guidance, the circumstances are not analogous.

[213] In *Syl Apps*, the Court noted at para 28 that: "Where an alleged duty of care is found to conflict with an overarching statutory or public duty, this may constitute a compelling policy reason for refusing to find proximity (*Cooper* at para 44; *Edwards* at para 6). Such a conflict exists where the imposition of the proposed duty of care would prevent the defendant from effectively discharging its statutory duties."

[214] In *Syl Apps*, the family of a child who had been found to be in need of protection, placed in treatment and ultimately made a Crown ward, brought an action in negligence against the treatment facility and social worker. The Supreme Court of Canada allowed the appeal which had overturned the motion to strike the cause of action. The Court explored the duty of care and found a conflict between the duty owed to the child, which was firmly established in the governing statute and placed the child's best interests front and centre, and to the parents who hoped for a return of their child.

[215] Although the principles applied in *Syl Apps* are relevant, the facts and circumstances are different. In *Syl Apps*, the conflict was quite obvious; the child's best interests were paramount. The child would not remain in care if the parents could meet the child's best interests and particular needs. In the present case, the *Act* does not set out any statement of purpose that assists

in identifying where the priorities of the Commission lie. It would appear that one of the purposes of the *Act* would be to provide benefits to those who are entitled and not to deny benefits despite entitlement or eligibility. Here the claimants are members of the same public that the *Act* is meant to serve. There is no obvious conflict.

[216] I have also considered *Khalil* where this Court considered the issue of foreseeability of harm in the context of allegations of delay in processing an application for permanent resident status pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27. The Court considered the purposes of that Act and found no proximity. The Court also found that residual policy considerations would negate any duty, among other reasons, because the plaintiff had not pursued the statutory relief available that could have been effective to ensure applications were processed in a timely way and the potential of indeterminate liability if a duty existed to ensure no delay. The Court applied the principles from the jurisprudence, including *Syl Apps*.

[217] As noted by the defendant, the governing statute is the starting point and each case depends on its facts and the applicable statute. The principles applied in *Syl Apps* and in *Khalil* do not lead me to find in the present circumstances that it is plain and obvious that policy considerations negate the finding of proximity or that residual policy considerations would prevent the Commission from discharging its statutory duties. As noted, the type of clear conflict found in *Syl Apps* is not found here and the statutory relief that could have been effective in *Khalil* has not been shown to be effective for the plaintiff and proposed class members.

**The plaintiff's claim for negligent misrepresentation has no reasonable prospect of success**

[218] To establish negligent misrepresentation, the plaintiff must establish a special relationship between herself and the Commission where reliance is reasonably foreseeable and reasonable (*Cognos*) and this requires the same analysis as the first stage of the *Anns*/*Cooper* test. As noted above, I have found proximity and concluded that it was not plain and obvious that no duty of care exists.

[219] The allegations of negligent misrepresentation pertain only to Category 2 class members who may have had direct dealings and interactions with the Commission to make inquiries or may have consulted the public information material and the website and based on that information did not make a claim. The pleadings also allege that some made claims after the expiration of their parental leave, based on inaccurate information and these were also denied. However, the plaintiff, Ms McCrea, and the others who made claims and were denied did not rely on the alleged negligent misstatements.

[220] The defendant argues that the plaintiff has not pleaded all the elements of negligent misrepresentation and has not pointed to material facts to demonstrate that anyone made inquiries, relied on the misrepresentation, was dissuaded from making a claim and suffered a loss. The defendant continues to rely on the somewhat circular argument that there was no misrepresentation because the Commission properly construed the *Act* and correctly applied paragraph 18(b), yet that remains in dispute and is the key issue in this action. As noted above, I

cannot conclude whether the *Act* was or was not properly interpreted and applied; that is the role of the trial judge if the action is certified.

[221] The plaintiff has pleaded most of the elements of negligent misrepresentation, which share the elements of negligence, in a general way. The plaintiff asserts both verbal representations by identifiable or specific persons and written representations, including public material, the website, and the Digest, which the plaintiff asserts were inaccurate. However, the pleadings refer only in general to class members' reliance on such representations, without referring to anyone's particular experience.

[222] Although Ms McCrea received inaccurate information – that she could convert her benefits to sickness benefits – which turned out not to be the case, and this supports the plaintiff's submission that the officers of the Commission or Service Canada provided different information to different potential claimants with similar questions and circumstances, it does not sufficiently ground the negligent misrepresentation claim pleaded. The plaintiff pleads the opposite – that Category 2 class members were advised that they could not convert their benefits to sickness benefits and that based on this, they did not do so. No one has been identified who received this advice and acted on it to their detriment.

[223] The plaintiff herself was not dissuaded from making a claim; she and Ms Kasbohm were advised that they *could* convert their benefits and they made claims but were later denied.

[224] Although it seems logical that if the claims were denied to those who applied based on an incorrect interpretation and negligent implementation of the *Act*, some would-be claimants were likely dissuaded due to the same negligent implementation. However, the flaw in the pleadings is that no one has been identified as falling within this class.

[225] I agree with the defendant that the pleadings do not include material facts to demonstrate that any specific person received the alleged misrepresentations (i.e. advising them that they could not apply to convert their benefits), relied on that information, did not make a claim and suffered a loss.

[226] However, I do not agree with the defendant that the plaintiff, Ms McCrea, suffered no loss. Her loss was the result of being denied sickness benefits (if she was entitled to them) and not as a result of failing to make a claim based on the alleged misrepresentations.

[227] Based on the pleadings, I find that it is plain and obvious that the claim for negligent misrepresentation has no reasonable prospect of success. Although the elements of negligence have been pleaded with sufficient particularity, the pleadings do not specify anyone who received the misrepresentation and relied on it to their detriment.

**Misfeasance in Public Office**

**The Plaintiff's Submissions**

[228] The plaintiff acknowledges that misfeasance in public office is an evolving area of the law, but based on the pleaded facts, which are assumed to be true, submits that it is not plain and obvious that this claim will fail.

[229] The plaintiff alleges that the defendant engaged in a deliberate effort to implement the 2002 amendment in a manner that did not accord with the purpose, effect and text of the *Act*. The claim asserts that the defendant's agents undertook to operationalize the 2002 amendments within their roles as public officers and as employees. The defendants and their "agents with responsibilities in respect of legislative policy" are alleged to have had intimate knowledge of the intent of the 2002 amendments due to their role in its development and drafting. After the coming into force of the 2002 amendments, these agents pursued an implementation program "which they knew was unlawful and did not properly encompass the scope of the 2002 amendment".

[230] The claim identifies the defendants responsible for misfeasance as including the persons, department or branch responsible for: legislative policy; training; drafting, implementing and overseeing the website; and, developing the EI Commission's response to class members' inquiries and appeals of claims "that the defendants had knowledge were allowable under the 2002 amendment".

[231] The claim further alleges that the defendants knew or ought to have known that their misapplication of the *Act* would cause damages to the class members.

[232] The plaintiff submits that the three elements of the claim as established in *Odhavji Estate v Woodhouse*, 2003 SCC 69 at paras 22-24, [2003] 3 SCR 263 [*Odhavji Estate*], are present; deliberate unlawful conduct by a public officer, knowing it to be unlawful and knowing it would cause damage. The plaintiff submits that the knowledge element can be established through proof of recklessness or wilful blindness.

[233] The plaintiff adds that the notion of "public officer" has a broad scope and would include anyone performing a statutory duty or power, including anyone deciding an entitlement pursuant to statute (*O'Dwyer v Ontario Racing Commission*, [2008] OJ No 2219, 2008 ONCA 446). The plaintiff also acknowledges that in *Collins v Canada*, 2014 FC 307, 240 ACWS (3d) 846, Justice Gleason expressed doubt that a front-line Canada Revenue Agency employee was a public officer. However, that case was decided on basis that there was no evidence of deliberate misfeasance. The plaintiff notes that she is not alleging misfeasance by the front-line officers, rather by those that provided guidance to them.

**The Defendant's Submissions**

[234] The defendant highlights that the tort of misfeasance of public office should be used cautiously to avoid straying into the realm of political decision-making, among other concerns (*Powder Mountain Resorts Ltd v British Columbia*, [2001] BCJ No 2172, 2001 BCCA 619). The tort is intended to address unlawful conduct by a public officer who deliberately causes harm to a

plaintiff in a manner inconsistent with the role of government. The defendant submits that the elements of the tort as identified in *Odhavji Estate* at paras 22-23 are not present here and it is plain and obvious that the claim is certain to fail.

[235] Although the plaintiff alleges that the acts were "unlawful" and "not in accordance with the (*EI Act*)", the defendant again argues that these are conclusions of law which have not been proven. Moreover, in appropriate circumstances, public officers have the authority to make decisions that are adverse to the interests of some people.

[236] The defendant further submits that the plaintiff has not pleaded any material facts to support the allegation that the conduct was deliberate. The mere allegation that the officers interpreted the *Act* differently than the plaintiff does not make the officers' conduct unlawful or deliberate.

[237] The defendant points to a practical application of the *Odhavji Estate* analysis in *Cadnet Productions Inc v Canada*, 2004 FCA 79, [2004] FCJ No 361, where the Court of Appeal concluded that the tort had not been made out in circumstances where officers of HRDC erred in issuing third party demands to the plaintiff's bank to collect overpayments. The Court agreed, at para 4, that there was "no evidence in the record that HRDC or its agents engaged in deliberate and unlawful conduct in their capacity as public officers or must have been aware both that their conduct was unlawful and that it was likely to harm the appellants."

[238] The defendant notes that merely being wrong does not constitute misfeasance of public office (*Canus Fisheries Ltd v Canada (Customs & Revenue Agency)*, [2005] NSJ No 413, 2005 NSSC 283 at para 50). The tort requires the element of bad faith or dishonesty consisting of an intentional illegal act and an intent to harm the defendant. The plaintiff has not identified any public officer with the subjective state of mind to commit the alleged harmful act. Bald assertions are not sufficient.

**It is plain and obvious the claim for misfeasance in public office has no reasonable prospect of success**

[239] Based on the pleadings, I find that it is plain and obvious that the claim for misfeasance in public office has no reasonable prospect of success.

[240] Misfeasance in public office is an intentional tort and all elements must be present.

[241] In *Odhavji Estate*, Justice Iacobucci summarized the elements of the tort at para 32:

> To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

[242] Justice Iacobucci also considered the scope of the tort at paras 26-29, noting that misfeasance in public office is not directed at a public officer who inadvertently or negligently

fails to adequately discharge the obligations of his or her office, nor is it directed at a public officer who is unable to discharge his or her obligations because of factors beyond his or her control. Rather, it is directed at "a public officer who could have discharged his or her public obligations, yet willfully chose to do otherwise" (at para 26).

[243] Justice Iacobucci elaborated on the requirements for deliberate conduct and bad faith or dishonesty at paras 28 and 29:

> The requirement that the defendant must have been aware that his or her conduct was unlawful reflects the well-established principle that misfeasance in a public office requires an element of "bad faith" or "dishonesty". In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A public officer may in good faith make a decision that she or he knows to be adverse to interests of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office. [Emphasis added]
>
> The requirement that the defendant must have been aware that his or her unlawful conduct would harm the plaintiff further restricts the ambit of the tort. Liability does not attach to each officer who blatantly disregards his or her official duty, but only to a public officer who, in addition, demonstrates a conscious disregard for the interests of those who will be affected by the misconduct in question. This requirement establishes the required nexus between the parties. Unlawful conduct in the exercise of public functions is a public wrong, but absent some awareness of harm there is no basis on which to conclude that the defendant has breached an obligation that she or he owes to the plaintiff, as an individual. And absent the breach of an obligation that the defendant owes to the plaintiff, there can be no liability in tort. [Emphasis in original]

[244] Even if the pleadings taken as true assert knowledge by officers, identified in only general terms, that the *Act* provided for sickness benefits to claimants during parental leave, the

pleadings do not assert any blatant disregard for official duties, bad faith or conscious disregard for the interests of those affected, i.e., the claimants. The claim alleges that some officers had intimate knowledge of the intended scope of the amendments and knew or ought to have known that their misapplication of the *Act* would cause damages. However, the plaintiff has not sufficiently identified those officers with this intimate knowledge. All or most other officers, who are also broadly identified, would have been acting based on factors beyond their control and/or without any willful or deliberate conduct to avoid their obligations. Although the claim asserts that officers acted deliberately, it does not allege any bad faith or dishonesty. An allegation of bad faith cannot be implied from the other pleadings.

[245] In addition, the pleadings do not identify with any particularity the officers alleged to have engaged in misfeasance. The pleadings only identify categories of officers who are alleged to be responsible for misfeasance, and in a very broad manner. The claim does not include or identify any of the front-line officers with which the known plaintiffs had direct contact. It instead refers to categories of those responsible for policy, training of front-line officers and for public information. It also includes as a category "the persons, department or branch responsible for developing the Commission's response to Class Members' inquiries and appeals of claims that the defendants had knowledge were allowable under the 2002 amendments". That category is potentially enormous and makes inquiries into the subjective state of mind and bad faith, which are required elements of the offence (although, not pleaded), which would be impossible to prove.

[246] Although the potential class members that had direct contacts with different officers at various Service Canada offices may be too numerous to name or otherwise pinpoint, and the other proposed categories of responsible officers, in an organization as large as ESDC, may be challenging to find/identify by job title or branch, the plaintiff's approach is simply too broad and vague.

[247] As noted by Justice Mosley in *Swareth v Canada*, 2014 FC 75, 237 ACWS (3d) 71, which was not a class action:

> [11] Moreover, the allegations of misfeasance in public office, at paragraph 31 of the claim, fail in any way to identify the responsible officials. The plaintiffs are required, under Rule 174, to plead material facts. The identities of the individuals who are alleged to have engaged in misfeasance are material facts that must be pleaded. The claim refers to six years of correspondence with Health Canada in an effort to have the direction set aside. This presumably put the plaintiffs in possession of the names of the individuals or groups that were dealing with the matter, or at least their job positions, branches or offices. Identification of at least that level of particularity would have been sufficient: *Merchant Law Group v Canada (Revenue Agency)*, 2010 FCA 184. However, particulars of that nature do not appear in the claim.

[248] In *Merchant Law Group v Canada (Revenue Agency)*, 2010 FCA 184, 192 ACWS (3d) 663, Justice Stratas considered the requirement to identify the individuals alleged to have engaged in misfeasance in public office in a proposed class action. Justice Stratas highlighted the need to plead the particulars of the tort including those responsible, given that the state of mind of those responsible is a key element. He noted at para 36 that the claim implicated entire departments and potentially others in the Government of Canada and failed to identify, "with any particularity, the officials allegedly involved in the misfeasance."

[249] With respect to the need to plead material facts including the identity of the alleged wrongdoers, Justice Stratas canvassed how particular that identification should be, noting at para 38:

> … In many cases, it may be impossible for a plaintiff to identify by name the particular individual who was responsible. However, in cases such as this, a plaintiff should be able to identify a particular group of individuals who were dealing with the matter, one or more of whom were allegedly responsible. This might involve identifying job positions, an organizational branch, an office, or a building in which those dealing with the matter worked. Often such information is readily available from the oral and written communications and dealings among the parties that gave rise to the claim. In cases such as this, identification at least at this level of particularity will usually be sufficient. The purposes of pleadings will be fulfilled: the issues in the action will be defined with reasonable precision, the respondents will have enough information to investigate the matter and the respondents will be able to plead adequately in response within the time limits set out in the Rules.

[250] In the present case, I accept that naming the individuals responsible for the alleged misfeasance in public office may not be possible. However, some greater particularity than that pleaded remains essential. The plaintiff and other known claimants had direct dealings and interactions with several officers, as described in the pleadings, yet none are identified as part of any particular branch, section, location or by name. Although these front-line officers may not be the target of the claim and, as the plaintiff submitted, those responsible for policy at more senior levels are, the plaintiff has not identified these officers or groups with sufficient precision. As the state of mind, deliberate conduct and "conscious disregard" are at issue, it is important that the pleadings provide sufficient information to permit the defendant to respond.

[251] In addition, although the plaintiff seeks to include those responsible for legislative policy, it is Parliament that is ultimately responsible for such policy.

**Unjust Enrichment**

**The Plaintiff's Submissions**

[252] The plaintiff submits that although the jurisprudence on unjust enrichment is evolving, it is not plain and obvious that her unjust enrichment claim cannot succeed.

[253] The plaintiff pleads that the defendants' conduct has resulted in the defendants' unjust enrichment and a corresponding deprivation to the class members and, that there is no juristic reasons for the enrichment. (*Garland v Consumers' Gas Co*, 2004 SCC 25 at para 30, [2004] 1 SCR 629 [*Garland*]

[254] The plaintiff submits that the Class was deprived of EI sickness benefits and that the defendant saved the amount of those benefits by not paying the claims, deposited the revenue in the Consolidated Revenue Fund and, as a result, was enriched.

[255] The plaintiff notes that EI premiums paid by contributors like the class members are credited to the Employment Insurance Fund (and since 2009, to the "Employment Insurance Operating Account") which is part of the Consolidated Revenue Fund [CRF]. The plaintiff argues that non-payment of benefits to the class would result in a surplus in the CRF

(*Confédération des syndicats nationaux v Canada (Attorney General)*, 2008 SCC 68 at pp 540 and 544, [2008] 3 SCR 511 [*Confédération*]. This in turn results in the defendants' enrichment.

[256] The plaintiff's deprivation included the amount of improperly denied sickness benefits or the amount of sickness benefits for which they were improperly advised not to apply and to which they were entitled.

[257] The plaintiff asserts that there is no juristic reason why the defendant should retain the surplus amounts.

[258] The plaintiff disputes the defendant's allegation that she did not suffer any loss or damages because she returned to work. She suffered loss, because, but for the denial, she would have received some benefits. In addition, she suffered damages by foregoing her recovery time and returning to work.

**The Defendant's Submissions**

[259] The defendant submits that the plaintiff has not pleaded material facts to establish the elements of unjust enrichment. Any sickness benefits which might have been paid to the plaintiff if she were eligible still remain in the CRF. This does not deprive the plaintiff of funds to which she is entitled nor does it enrich the defendants.

[260] In addition, because the plaintiff, Ms McCrea, returned to work in October 2011 as she originally planned, she did not suffer any loss of employment income. She had a responsibility to mitigate her losses, and did so.

[261] The defendant notes that the allegations of unjust enrichment are again based on the plaintiff's view that the denial of benefits was improper, unlawful or contrary to the *Act*. The defendant reiterates that this conclusion of law cannot be accepted as true in assessing the viability of her cause of action.

[262] The defendant further argues that the plaintiff has failed to establish the absence of a juristic reason for the denial of benefits and the retention of any amounts that could have been paid out; rather, simply asserts that there is no juristic reason. The defendant submits that established categories of juristic reasons, such as a disposition of law or statutory obligation, should apply here (*Garland*).

[263] The public duty on the Commission was to do its best to implement and administer the *Act*. The Commission believed that it acted within the *Act* and this provides the juristic reason to retain the amounts, which remain in the Fund available to be disbursed if the Commission's decision is reversed on appeal. The defendant submits that denial of benefits made in good faith based on the legitimate interpretation of paragraph 18(b) cannot ground a claim for unjust enrichment.

**It is plain and obvious that the claim for unjust enrichment has no reasonable prospect of success**

[264] I agree with the defendant that it is plain and obvious that the cause of action for unjust enrichment has no reasonable prospect of success.

[265] The Supreme Court of Canada set out the elements of unjust enrichment in Garland at para 30:

> As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment (*Pettkus v. Becker*, 1980 CanLII 22 (SCC), [1980] 2 S.C.R. 834, at p. 848; *Peel (Regional Municipality) v. Canada*, 1992 CanLII 21 (SCC), [1992] 3 S.C.R. 762, at p. 784).

[266] With respect to the plaintiff's allegation that the defendant was enriched by retaining the class members' premiums but not paying out the class members sickness benefits, a similar issue was canvassed in *Garland*. The Court noted at para 36:

> …Where money is transferred from plaintiff to defendant, there is an enrichment. Transfer of money so clearly confers a benefit that it is the main example used in the case law and by commentators of a transaction that meets the threshold for a benefit (see Peel, supra, at p. 790; *Sharwood & Co. v. Municipal Financial Corp.* (2001), 2001 CanLII 24066 (ON CA), 53 O.R. (3d) 470 (C.A.), at p. 478; P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (1990), at p. 38; Lord Goff and G. Jones, *The Law of Restitution* (6th ed. 2002), at p. 18)

[267] The plaintiff argues that, relying on *Garland*, the payment of premiums which are held in the EI Account results in more or surplus revenue in that account. At first impression, this might suggest an enrichment of the defendant. However, the CRF is comprised of revenue from various

sources. The EI Account has been explained as a separate account within that fund. Premiums are paid by many individuals that may never make a claim for EI benefits. Can that be argued that this serves to enrich the defendant or simply to ensure the fund has sufficient resources to pay eligible claimants? On the other hand, some contributors may over time receive EI benefits that far exceed the amounts they contributed. This would not be considered as creating a deficit in the account. The premiums are pooled to provide for the payment of benefits to eligible claimants if and when required. The amounts to be paid to eligible claimants as benefits would be deducted from that account and taken from the fund. These amounts would have to be paid to eligible claimants regardless of balance in the fund. The notion of a surplus in the EI Account suggests that there is balance greater than the amount of claims required to be paid out. However, the amount in the account varies depending on demand (i.e., eligible claims) and receipt of premiums. The Commission would have to pay benefits to eligible claimants even if the EI Account was in a deficit. Can the Government be said to be enriched by amounts withheld from claimants pending a determination of their eligibility when those amounts are retained in the Account to be used to pay benefits to claimants determined to be eligible and entitled?

[268] I agree with the defendants that they are not enriched by not paying out the claims of class members because the benefit claims would be paid to eligible claimants in the event that the decisions to deny their benefits are overturned.

[269] With respect to a juristic reason, the defendant's position is that the *Act* was properly interpreted and this provides a juristic reason in the event that the other elements of unjust enrichment are found. Again, this raises the same circular argument that underlies the plaintiff's

claim. If it is ultimately found that the *Act* was properly interpreted and the defendant's was not negligent in administering the *Act*, then the juristic reason is clear. However, that conclusion cannot yet be reached. Moreover, it needs not be addressed because of the finding that the defendants have not been enriched.

[270] I find that it is plain and obvious that the cause of action for unjust enrichment has no reasonable prospect of success because the defendant is not enriched by not paying out the claims the plaintiff alleges should have been paid. The amounts remain in the fund available to be paid to claimants in the event that their claims are ultimately allowed.

**The Claim for Damages**

**The Plaintiff's Submissions**

[271] The plaintiff claims compensatory damages for the amounts lost due to improperly denied sickness benefits or sickness benefits that were foregone or abandoned due to the claimants' reliance on alleged misrepresentations.

[272] The plaintiff also claims general damages "for inconvenience, loss of time, frustration, anxiety, mental distress and emotional upset" arising from the failed efforts to obtain sickness benefits. The pleadings describe the situation of class members, some of whom were seriously ill, seeking sickness benefits while caring for infants and often without the energy and ability to defend their entitlement. The plaintiff notes that Ms Kasbohm declared personal bankruptcy, due in part to the denial of her sickness benefits.

[273] The plaintiff notes that such damages are not unprecedented. For example, in *McAllister-Windsor* the Canadian Human Rights Tribunal awarded the plaintiff $2,500 based on her testimony that she was "hurt and angered as a result of being denied parental benefits" (*McAllister-Windsor* at para 82).

[274] The plaintiff submits that at this stage it is not known how many class members suffered far more than simply ordinary annoyances, however, the general damages claimed are not speculative and the class should be permitted to prove their damages at trial.

**The Defendant's Submissions**

[275] The defendant reiterates the argument that the representative plaintiff, Ms McCrea, did not suffer any damages because she returned to work as planned and, on this basis, it is plain and obvious that all the causes of action will fail.

[276] The defendant's position, as noted above, is that the claim is in essence a claim for EI benefits; the pleadings which describe the compensatory damages as the denied sickness benefits make this abundantly clear. The total amount claimed is grossly exaggerated, which further supports the defendant's argument that this is a benefits claim "dressed up" as a tort claim.

[277] The defendant also submits that the general damages claimed amount to merely annoyances and inconveniences which are not compensable.

**The claim for and scope of the damages should be addressed at trial**

[278] The damages claimed include both the denied EI benefits and general damages.

[279] As indicated above, I do not find this to be simply a claim for benefits disguised as a tort. However, the claim for benefits is likely a significant part of the total damages.

[280] In *Odhavji Estate*, the Supreme Court of Canada noted at para 40, that compensation for psychiatric damages is available where the plaintiff suffers from a "visible and provable illness" or "recognizable physical or psychopathological harm". The Court added: "But the causation and magnitude of psychiatric damage are matters to be determined at trial. At the pleadings stage, it is sufficient that the statement of claim alleges that the plaintiffs have suffered mental distress, anger, depression and anxiety as a consequence of the alleged misconduct."

[281] In *Mustapha v Culligan of Canada Ltd*, 2008 SCC 27, [2008] 2 SCR 114, the Supreme Court of Canada considered the type of psychological effects that would amount to compensable personal injury, noting at para 9:

> This said, psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness: see *Hinz v. Berry*, [1970] 2 Q.B. 40 (C.A.), at p. 42; *Page v. Smith*, at p. 189; Linden and Feldthusen, at pp. 425-27. The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. The need to accept such upsets rather than seek redress in tort is what I take the Court of Appeal to be expressing in its quote from *Vanek v. Great Atlantic & Pacific Co. of Canada*

> (1999), 1999 CanLII 2863 (ON CA), 48 O.R. (3d) 228 (C.A.): "Life goes on" (para. 60). Quite simply, minor and transient upsets do not constitute personal *injury*, and hence do not amount to damage.

[282] Given the impact on some of the members of the class, some of whom were very ill and undergoing surgery or treatment and who may have been anxious about their longer term prognosis or recovery while on parental leave caring for an infant, and some caring for older children as well, the added frustration of pursuing entitlement to benefits and being given inconsistent or inaccurate information and ultimately not receiving benefits cannot be ruled out at this stage as simply inconveniences or ordinary annoyances.

[283] As noted in *Odhavji Estate*, at the pleadings stage, the issue is what the plaintiff have alleged. Here the plaintiff has alleged inconvenience, loss of time, frustration, anxiety, mental distress and emotional upset. Excluding inconvenience and loss of time, the other aspects of the damages claimed could be compensable. The issues regarding whether the damages claimed are serious and prolonged and rise above the day to day anxieties that one must accept, as well as their magnitude and causation, should be determined at trial.

**Have the Remaining Tests for Certification Been Met? Rule 334.16(1)(b)-(e)**

[284] As found above, it is not plain and obvious that the cause of action in negligence has no prospect of success or is destined to fail. In addition, the scope of damages arising from any negligence that may be established should be addressed by the trial judge.

[285] The remaining elements of the test for certification must now be considered.

[286] The defendant submits that the plaintiff has not met the burden of establishing some basis in fact for each of the remaining certification requirements. The defendant cautions that more than a superficial analysis is required; there must be sufficient facts to demonstrate that each element of the test is met (*Pro-Sys* at paras 103-014).

**Is there an Identifiable class of two or more persons? Rule 334.16(1) (b)**

**The Plaintiff's Submissions**

[287] The plaintiff submits that she has established that: there is an identifiable class of two or more persons as distinguished from an identified class; the class is not unlimited; and, it can be defined by reference to the proposed objective criteria (*Hollick* at para 21; *Sander Holdings Ltd v Canada (Minister of Agriculture)*, 2006 FC 327 at para 41, [2006] FCJ No 451).

[288] The plaintiff argues that it is not necessary to identify each or any particular class member noting that the purposes of the test are to identify persons with a potential claim, define who will be bound by the results, and describe who is entitled to notice (*Sun Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58 at para 57, [2013] 3 SCR 545).

[289] The plaintiff's proposed definition of class member uses three objective criteria. The class member must have first, been in receipt of parental benefits and, second, suffered from an injury, illness, or quarantine during her parental leave. Third, the class member must have either applied for EI sickness benefits and been denied based on unavailability, or not applied because they

relied on a representation from the defendants that they would not be eligible for those benefits because of their unavailability to work.

[290] The plaintiff submits that it is not difficult to establish that a claimant applied for and received parental benefits. Receipt of parental benefits can be established through the defendant's records (e.g. benefit statements). The defendant is required to retain these records in accordance with its own document retention policy for 12 years, in addition to the requirement to retain records for the period of litigation. Nor is it difficult to prove illness or injury; illness can be proved with medical records or a doctor's note which has generally been accepted by the defendant for other types of claims.

[291] The fact that Category 1 claimants applied and were rejected is also established by the letters sent to them which bear the code D 33, indicating the denial of sickness benefits while on parental leave and the reason for denial as non-availability for work.

[292] The plaintiff, Ms Kasbohm and Ms Rougas were on parental leave, became ill, contacted the defendant, applied to convert their parental benefits to sickness benefits and were denied because they were unavailable to work. The record shows that they met the objective criteria. Therefore, an identifiable class of two or more persons exists.

[293] With respect to Category 2, the plaintiff submits that if she and others had not applied to convert their benefits because they were dissuaded from doing so, the defendant would have records of telephone calls or other inquiries of these contacts. The plaintiff notes that the

defendant had records of such inquiries from her and Ms Kasbohm. The record also includes the testimony of Mr Duffy indicating that notes are generally taken and recorded in the appropriate system.

[294] The plaintiff notes that the Commission has accepted verbal assertions and statutory declarations or attestations from claimants in the context of requests to make a late claim (referred to as antedating) and suggests that the defendant should accept such declarations on the part of Category 2 claimants to indicate that they did not make a claim due to information from the Commission that dissuaded them. In this case, a possible claimant could swear that this was their situation: they were in receipt of parental benefits, became ill and were told by the Commission that they could not convert their benefits. The plaintiff reiterates that the threshold to establish this identifiable class is low.

[295] The plaintiff disputes that it must identify the three people who contacted the plaintiff's law firm who would fall within Category 2; there is no obligation to name these people. All that is needed is an identifiable class (*Singer v Shering Plough Canada Inc*, 2010 ONSC 42 at paras 107 and 131, [2010] OJ No 113 [*Singer*]).

[296] The plaintiff is critical of the defendant's lack of efforts in identifying potential class members for Category 2 and suggests that data bases could be searched to reveal the members, regardless of how onerous this may be. The plaintiff also submits that the defendants had some obligation to investigate the size of the class but did not do so.

[297] The plaintiff indicates that her counsel and his firm have been contacted by 25 people, and the firm has been in contact with approximately 40 people. With respect to Category 1, the plaintiff notes that 3,229 claimants received “D 33” letters from 2002-2011 denying their conversion; on average 330 per year, excluding Quebec claimants and self-employed persons. However, the defendant stated that 6,000 people would benefit from the 2013 amendments. The plaintiff argues that given this gap, some of these 6,000 people would represent those who had been advised they were not eligible and did not apply.

[298] The plaintiff reiterates that approximately 3,229 potential Class Members have been identified for Category 1. At least three people appear to fall within Category 2, and although the number of members is not known, there are many more. The plaintiff notes that Rule 334.15(5)(c) only requires that the parties provide the number of class members involved to the best of their knowledge.

[299] The proposed criteria meet the "identifiable class" test: the criteria allow the parties to contact and give notice to potential Class Members using criteria that will clearly convey to recipients that they may be Class Members, there are at least two or more persons in the class and the criteria ensure that the class is not unlimited.

[300] The plaintiff disputes that she did not suffer any financial loss. She acknowledges that she returned to work in October 2011 despite her doctor's advice that she needed six weeks to recover from her surgery, but explains that if she had received the benefits, she would have

continued on parental leave and returned to work six weeks later. The plaintiff calculates her damages at $1,534.60, but acknowledges that this amount may be overestimated by $109.

[301] In response to the defendants' argument that provincial limitation periods would apply to some claimants and would reduce the class, the plaintiff submits that in most certification motions, the issue of limitation periods is to be dealt with later, particularly as in this case, where no defence has been delivered. The plaintiff argues that the six year limitation period in the *Federal Courts Act*, section 39 and *Crown Liability and Proceedings Act*, section 32 would govern apply, but how it applies to class members can only be dealt with after certification as this requires findings of fact (*Markevich v Canada*, 2003 SCC 9 at para 11, [2003] 1 SCR 94; *Hislop v Canada (Attorney General)*, 2008 OJ No 793 (SCJ) at para 14; *Doig v Canada*, 2011 FC 371 at para 31, 199 ACWS (3d) 1359).

[302] The plaintiff disputes the defendant's argument that claimants who appealed to the Umpire or did not appeal within the statutory limitation period are barred by *res judicata* and should be carved out of the class. *Res judicata* does not apply because the Board of Referees and Umpire have no jurisdiction to decide the questions of law raised in the plaintiff's claim.

**The Defendant's Submissions**

[303] The defendant argues that there is no basis in fact for the existence of an identifiable class of two or more persons and the classes cannot be certified as defined.

[304] The defendant acknowledges that the criteria proposed to identify Category 1 are objective (although some refinement may be needed) but still must fail because the class includes claimants with claims barred by issue estoppel and *res judicata*. Except for Ms McCrea and Ms Kasbohm and the unnamed third person, all other claims are final and barred by *res judicata*. The defendant also argues that Ms McCrea has no viable claim.

[305] The defendant notes that the class period ends with the amendments to the *Act* proclaimed into force on March 24, 2013. Therefore the 30 day time limit to file an appeal pertaining to a claim made prior to March 24, 2013 has expired. Category 1 claimants have either had appeals heard and final decisions rendered or did not appeal.

[306] The defendant submits that the same question is being raised, i.e., the entitlement to benefits, among the same parties, who all had final decisions. There are no exceptional circumstances to exercise discretion and avoid the application of issue estoppel (*Danyluk*; *Figliola*). The principle of finality should be respected.

[307] This leaves only three possible members of Category 1. However, there is no basis in fact that these three claimants have a viable claim.

[308] The defendant argues that Ms McCrea has no claim based on her own pleaded facts. Ms McCrea worked for two weeks during her parental leave in June 2011 to help out her employer. The defendant submits that if the Commission had known she worked and that she was available

for work, her sickness leave may not have been denied on the basis of non-availability for work when she applied to convert her benefits in August.

[309] In addition, there is no basis in fact that Ms McCrea suffered a financial loss. She returned to work as planned when her sickness benefits were denied. The damages claimed for lost benefits confirm this is simply a benefits claim and the general damages do not go beyond ordinary annoyances, are otherwise speculative and are not compensable.

[310] The defendant also submits that the plaintiff has not established that anyone exists who received the alleged misrepresentation and relied on it. There is no evidence on the record to show the existence of any person with a claim for negligent misrepresentation (Category 2) and speculation is not sufficient. The uncontradicted evidence of Mr McPhee and Mr Duffy indicated that Service Canada/Commission front-line officers provide only general advice and are guided to advise a claimant to apply for benefits rather than not apply. Moreover, these front-line officers do not make entitlement determinations. The defendant also points to Ms McCrea's evidence indicating that she did not know of anyone in Category 2.

[311] The defendant notes that the affidavit of Mr Wright (a partner at the plaintiff's counsel's firm) stating that three people received advice from the defendant and, as a result, did not claim benefits, is not evidence. The defendant emphasizes that there is no way to test whether these three possible claimants fall within the sub-class or Category 2.

[312] The defendant submits that if Category 2 exists, it should, at most, be a sub-class, in accordance with Rule 334.16(3). However, regardless of whether the two categories are separate classes or one is a subclass, neither meets the requirements for the class definition.

[313] The defendant also argues that the proposed class definition is overbroad and lacks objective criteria, pointing to some inaccuracies in the claim, such as the failure to note the end date of the class period, and the reference to sickness leave rather than sickness benefits.

[314] Although limitation periods are ultimately an individual issue, the class should be limited to claimants who applied for conversion and that conversion was denied within six years prior to certification of this action, if it is certified (*Crown Liability and Proceedings Act*, s 32).

[315] The defendant submits that class members whose claims are barred by limitation periods or *res judicata* should not be in the class. The class should only include those who will be able to advance their claims.

[316] The defendant also submits that discoverability is not an issue. Ms Rougas had an opportunity to access Hansard and seek documents through ATIP and she did so. Any class member could have raised the same issues and provided the same evidence to the Board of Referees or Umpire as did Ms Rougas. This evidence would have been available in 2002. The limitation period, therefore, runs from the date of denial of the claim. The Federal Court Rules do not permit the "tolling' of limitation periods (*Tihomirovs v Canada (Minister of Citizenship and Immigration)*, 2006 FC 197, [2006] FCJ No 235). Therefore, the class does not include

persons who learned of a possible claim only after the success of Ms Rougas or at some other time.

**An identifiable class exists for Category 1**

[317] The onus is on the plaintiff to establish "some basis in fact" that there is an identifiable class which is not unlimited and which is defined by objective criteria.

[318] The standard of some basis in fact was elaborated on in *Pro-Sys* at para 101 and *AIC Limited v Fischer*, 2013 SCC 69, at paras 40-43 [2013] 3 SCR 949 [*AIC*]).

[319] As the Supreme Court of Canada noted in *AIC* at para 41:

> Helpful elaboration of the "some basis in fact" standard may be found in the reasons of Winkler C.J.O. in *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445, 111 O.R. (3d) 745:
>
> > The "some basis in fact" principle is meant to address two concerns. First, there is a requirement that, for all but the cause of action criterion, an evidentiary foundation is needed to support a certification order.
> >
> > Second, in keeping with the procedural scheme of the CPA, the use of the word "some" conveys the meaning that the evidentiary record need not be exhaustive, and certainly not a record upon which the merits will be argued. This legislative intention is reflected in s. 2(3)(a) of the CPA, which - although honoured more often in the breach - requires the proposed representative plaintiff to bring a motion for certification within 90 days of the filing of, or the expiry of the time for filing of, a statement of defence or notice of intent. Thereafter, leave of the court is required to bring the motion: see s. 2(3) (b). [Emphasis added; paras. 75-76.]

[320] The Court added at para 42, that the requirement to establish "some basis in fact" should not lead to "a more fulsome assessment of contested facts going to the merits of the case."

[321] With respect to Category 1, the evidentiary record of the plaintiff has certainly established "some basis in fact" that there is: an identifiable class of two or more persons; the class is not unlimited; and the class can be defined with reference to the proposed objective criteria. (*Hollick* at para 21)

[322] I also find that there is a rational relationship between the proposed common issues and the class definition; the Category 1 claimants are those whose claims will be advanced by the determination of the common issues (*Hollick* at para 21).

[323] Although the defendant suggests that there are only three possible members of Category 1 and that the representative plaintiff has no viable claim, that submission is based on the defendant's position that the claim is simply a benefits claim and that Ms McCrea could have been available for work and also that she suffered no loss. I do not agree.

[324] The plaintiff has established objective criteria for both Category 1 and Category 2 class members, although other barriers exist with respect to Category 2. In *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46, [2001] 2 SCR 534 [*Dutton*], the Supreme Court noted at para 3 that the definition of the class "is critical because it identifies the individuals entitled to notice, entitled to relief (if awarded), and bound by the judgment."

[325] The proposed criteria permit the class members to be identified (i.e. they are identifiable) and the definition is not overbroad to the extent that the class would be unlimited. The class is limited to those who were in receipt of EI benefits, specifically maternity or parental benefits, for which records exist, and who applied to convert these benefits to sickness benefits, but were denied. The D 33 letters provide a strong starting point to both determine who falls within the class and to ensure it is not unlimited. The plaintiff has also identified three specific members of the class, one of whom is Ms McCrea.

[326] The record shows that on average 330 "D 33" letters were sent each year over the proposed class period. In addition, the Government claimed that an estimated 6,000 claimants would benefit from the 2013 amendments. The Government must have some other data to rely on regarding claims previously denied in order to make this claim.

[327] I reject the defendant's submission that Ms McCrea has no viable claim because she could have received sickness benefits. Although she did work for two weeks during her parental leave, she was not available for work when she was diagnosed and underwent surgery, and subsequently applied for sickness benefits and was denied. The defendant's speculation is not borne out by the reality of what occurred. In addition, the defendant's position that she suffered no loss because, once denied her benefits, she returned to work as planned, ignores that she would have otherwise remained on leave to recover and that she has established through her records, some loss of income.

[328] With respect to other members of Category 1, I agree that the application of the relevant limitation period will limit the size of the class to those whose claims fall within the applicable limitation period. However, that will be decided on a case by case basis and does not prevent certification of the class.

[329] I do not agree that *res judicata* and issue estoppel will necessarily bar the majority of claims. The decisions of the Board of Referees or Umpire only dealt with claims for benefits and not the question of law and causes of action raised in the proposed action.

[330] With respect to Category 2, although the criteria would permit the category or class to be *identifiable*, no one has been *identified* that is a member of this class. As the defendant noted, Ms McCrea was not aware of anyone in this category. Although three people had contacted the plaintiff's counsel, they were not revealed. No one was identified that relied on the misrepresentation to their detriment. As such the cause of action cannot proceed.

**Do the claims raise common questions of law or fact? Rule 334.16(1) (c)**

**The Plaintiff's Submissions**

[331] The Plaintiff notes that the presence of common issues is decided on a low threshold, and even one common issue can be enough (*Carom v Bre-X Minerals Ltd* (2000), 51 OR (3d) 236 at paras 39-42, [2000] OJ No 4014 (CA) *Bre-X*; *Cloud v Canada (Attorney General)*, 2004 CanLII 45444 at paras 52-53, 73 OR (3d) 401 (Ont CA) [*Cloud*]; *Hollick* at para 30).

[332] A common issue is an issue that will be necessary to the resolution of each class member's claim (*Buffalo v Samson First Nation*, 2008 FC 1308 at paras 84-85, [2009] 4 FCR 3; aff'd 2010 FCA 165 [*Buffalo*]). The plaintiff submits that there are several common issues that will do so. The plaintiff proposes 23 common issues and submits that only a few issues will need to be resolved on an individual basis. Certification will avoid duplication of fact finding and legal analysis.

[333] The plaintiff groups the proposed common issues under 6 headings: A, EI Interpretation and Administration; B, General Negligence; C, Negligent Misrepresentation; D, Misfeasance in Public Office; E, Unjust Enrichment; and, F, Aggregate Damages, Vicarious Liability and Administration Costs.

[334] The plaintiff submits that the first two common issues in Group A, the interpretation of the *EI Act* and whether the defendants implemented the amendments in accordance with the terms of the *Act*, are common to all class members. Like those in *Manuge v Canada*, 2008 FC 624, [2008] FCJ No 787 [*Manuge 2008*], these are interpretation issues and should be certified.

[335] The plaintiff submits that the defendant cannot dispute that the interpretation of the *EI Act* is a common issue given that the defendant sought to have this same issue resolved in the Rule 220 motion on the basis that its resolution could dispose of the action.

[336] Groups B, C and D, the negligence, misfeasance and unjust enrichment issues, focus on the defendant's conduct and whether the defendant owed a duty and breached that duty; all are common to the Class.

[337] More generally, the plaintiff submits that the record shows a remarkable degree of commonality; all class members were on parental leave, all used the same forms for their initial benefits and for the conversion; all attested to be governed by the rights and responsibilities; the defendant has records setting out the weeks paid for each type of benefits; and, all claimants made inquiries about a sickness claim by phone or in person.

[338] The plaintiff points to the evidence of Mr McPhee indicating that all Service Canada/Commission employees were trained with common training materials in order to ensure a consistent approach to claims for benefits. In addition, the defendant used the same forms for benefit claims and maintained consistent records. For each class member that made a sickness claim, a conversion form was launched and the same form was used for all such claims. The form emphasized availability for work and inability to work. All claims to convert benefits were denied and all claimants received letters bearing the code “D 33”. The plaintiff submits that given the 3,229 "D 33" letters that were sent, it is clear that at least 3,229 claimants were denied their benefits. The existence of this group is evidence of common issues and the trial judge should see the pattern of systemic denials. The plaintiff points to jurisprudence where analogous issues, including systemic issues, were found to be common issues (*Cloud*; *Rumley v British Columbia*, [2001] 3 SCR 184, 2001 SCC 69 [*Rumley*]; *Gay v Regional Health Authority 7*, 2014

NBCA 10, [2014] NBJ No 117; *Fulawka v Bank of Nova Scotia*, 2012 ONCA 443, [2012] OJ No 2885 [*Fulawka*]).

[339] With respect to Group C, negligent misrepresentation, the plaintiff argues that the same misrepresentations were made to the class and provide the basis in fact to certify these as common issues.

**The Defendant's Submissions**

[340] The defendant submits that none of the originally proposed 17 common issues or revised list of 23 issues are appropriate common issues.

[341] Relying on the principles summarized in *Fulawka*, the defendant submits that the plaintiff has not adduced evidence to support the existence of common issues; more than assertions are required.

[342] The defendant argues that with respect to Group A, which includes the interpretation of the *Act* and the entitlement to receive sickness benefits, entitlement should be addressed through the administrative appeal routes provided by the *Act*. The individual circumstances of each class member must be examined to determine liability. Determining this issue will not advance any one member's claim.

[343] The defendant argues that there is no evidence that the *Act* was administered the same way in each case. Weeks of evidence will be needed to determine which officials were engaged

and on what materials those officials relied in providing an answer; for example, some may have consulted the Digest and others the *Act*.

[344] With respect to Group B, general negligence, the defendant argues that individual fact finding is required to answer each question. The determination whether a duty existed, the scope of that duty, whether any duty was breached and whether class members suffered any resulting damages requires an assessment of the interactions between various class members and the officers or employees with whom they had dealings. The defendant notes, as an example, that Ms McCrea spoke with at least six different people at the Commission and Ms Kasbohm spoke with three other people. More generally, the defendant disputes the plaintiff's submissions regarding the common patterns of treatment by the defendant with respect to the conversion claims.

[345] Similarly with respect to the Group C, regarding negligent misrepresentation, an individual assessment will be needed to determine whether those who allegedly made a misrepresentation relied on the training materials or other sources that the plaintiff claims were wrong or negligently prepared. The defendant notes that the plaintiff alleged three different misrepresentations. Individual inquiries would be needed to determine who said what and to whom and evidence would be required to establish reliance on the statements and the resulting damages.

[346] More importantly, the cause of action cannot succeed; the plaintiff has not shown a factual basis that the statements were untrue, inaccurate or misleading or that they were made to any particular identifiable person or that they were relied on and caused compensable loss.

[347] With respect to Group D, misfeasance of public office, the defendant again notes that the plaintiff has not established any basis in fact for the essential elements of this tort. In addition, these issues are too broad; there are thousands of employees, many of whom could have responded to requests for information or conversion claims; and, an individual assessment would be required to determine whether the person who allegedly made the misrepresentation did so with the awareness that it was unlawful or in bad faith or with an intention to cause harm.

[348] Similarly for Group E, unjust enrichment, the defendant again submits that there is no reasonable cause of action. Alternatively, an individual assessment would be required to determine eligibility and entitlement and to determine the reason for the denial, beyond simply the receipt of a letter with a "D 33" code.

[349] The common issues in Group F, whether general damages can be determined as aggregate damages, vicarious liability, payment of administration costs and interest, require individual assessment. The defendant argues that the plaintiff has not offered any methodology to assess aggregate damages. Damages flow from liability and liability cannot be determined as a common issue. Moreover, the damages claimed are not compensable. If aggregate damages are not common issues, then the other related issues would also not be common issues

**The plaintiff has established common issues**

[350] The principles from the jurisprudence regarding the establishment of a common issue are not in dispute, rather the application of the principles.

[351] In *Fulawka* at para 81, the Ontario Court of Appeal set out the principles noting the summary provided in *Singer*, which was based on a review of the relevant jurisprudence, including *Hollick*, *Dutton*, *Rumley* and *Cloud*. These principles are paraphrased below with the specific citations omitted:

- The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis;
- An issue can be a common issue 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;
- There must be a rational relationship between the class identified by the plaintiff and the proposed common issues;
- The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim;
- A common issue need not dispose of the litigation. It is sufficient that it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class;
- Success for one member must mean success for all. The answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class;
- A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant;
- The plaintiff must demonstrate with supporting evidence that there is a workable methodology for determining issues of causation or damages, if proposed, on a class-wide basis; and,
- Common issues should not be framed in overly broad terms.

[352] In *Fulawka*, the Court of Appeal also added at para 82, again with reference to *Singer*, that these principles are not exhaustive and that the motions judge must decide which principles

are pertinent with reference to the evidence adduced on the motion and then decide if there is some basis in fact to establish the common issues.

[353] In *Pro-Sys*, a 2013 decision, the Supreme Court of Canada again emphasized the relevant principles for certification and, with respect to commonality, reiterated the principles established in Dutton: that the underlying question is whether allowing the suit to proceed as a class action will avoid duplication of fact-finding or legal analysis; the commonality question should be approached purposively; a common issue is one where its resolution is necessary to the resolution of each class member's claim; class members need not be identically situated *vis-à-vis* the opposing party; common issues need not predominate but the class members' claims "must share a substantial common ingredient to justify a class action"; and, all members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[354] The plaintiff submits that the resolution of the common issues will avoid duplication of fact-finding or legal analysis and will apply to the resolution of each class member's claim. The plaintiff notes that the common issues do not have to determine the question of liability for all class members, but their resolution should advance the litigation in a meaningful way (*Dutton* at paras 39-40; *Buffalo* at paras 84-85; *Pro-Sys* at para 108).

[355] The plaintiff submits that the systemic issues raised in the present case are in many ways analogous to those in *Cloud*, where the Ontario Court of Appeal found that the class action should be certified.

[356] In *Cloud*, the members of a First Nation proposed a class action on behalf of approximately 1,400 students of a residential school and their families and sought damages for, among other things, assault, negligence and breach of fiduciary duty, over a 45 year period.

[357] The Court of Appeal found that the motions judge and the majority of the Divisional Court had not been guided by the principles from the leading cases, including *Hollick*, *Bre-X*, and *Rumley*, because they had focused on the aspects of the claim requiring individual assessment or determination, however the dissenting judge in the Divisional Court had taken the correct approach. The Court of Appeal noted at paras 55 and 56:

> On the other hand, I think Cullity J. approached the commonality issue correctly and reached the right result. As I have described, rather than focusing on how many individual issues there might be and concluding from that that there could be no common issues, Cullity J. analyzed whether there were any issues the resolution of which would be necessary to resolve each class member's claim and which could be said to be a substantial ingredient of those claims.
>
> Relying on Rumley, he found that a substantial part of each claim was the alleged breach of the various legal duties said to be owed to all class members. For the student class these duties are framed in negligence, fiduciary obligation and aboriginal rights. For the other two classes the claim is one of fiduciary obligation. The need to determine the existence of these duties and whether they were breached in respect of all class members [page416] is a significant part of the claim of each class member. Finally, he found that the claim for an aggregate assessment of damages for the breaches found and the claim for punitive damages for the respondents' conduct also met the commonality requirement. Thus he found that s. 5(1)(c) was met.

[358] The defendant submits that the plaintiff has not adduced sufficient evidence that common issues exist, but rather has simply speculated and made assertions in the pleadings, contrary to the principles set out in *Fulawka*.

[359] I find that the plaintiff has provided more than assertions and has established that a class proceeding will avoid duplication of fact-finding and legal analysis. This aspect of the test for certification is met if the resolution of a common question (either for or against the class members) will advance the litigation and its resolution can be applied or extrapolated to the class members.

[360] This aspect of the test is also a "low bar." In *Cloud* at paragraph 52, the Ontario Court of Appeal found that the test can be met if "after the trial of the common issue the many remaining aspects of liability and the question of damages would have to be decided individually".

[361] In the present case, a significant part of the claim of every Category 1 class member focuses on how the defendant interpreted and applied the *Act*, trained its officers, publicized the EI program and processed claims. The plaintiff has established that the process was the same in all significant respects for all claimants who were in receipt of EI maternity or parental benefits and then sought sickness benefits.

[362] The plaintiff has showed a basis in fact supporting her description of how the claims process was administered. The record establishes common claim forms, common refusal letters, and common experiences of class members.

[363] Whether the defendants correctly interpreted the *Act* and administered the benefits program is a key part of each Category 1 class member's claim. It would advance the litigation for all if this issue were determined.

[364] Although it will be necessary to individually establish the resulting damages for each class member, determining the lost benefit aspect of the damages should not be complicated given that the amount of weekly benefits for a given period is known and the number of weeks of sickness is capable of being established, assuming reliable medical records or doctor's notes exist.

[365] Rule 334.16(1) (c) acknowledges that the issue is whether common questions of law or fact are raised, whether or not the common question predominates.

**The common issues to be certified**

[366] The plaintiff has grouped the common issues into categories.

[367] Due to my findings above that the causes of action in negligent misrepresentation, unjust enrichment and misfeasance of public office have no reasonable prospect of success, common issues in group C, D and E will not be certified.

[368] With respect to Group A, the *EI Act* and its administration, the resolution of both issues will avoid duplication of fact finding and legal analysis for the claims of all members of the class. This issue is the basis or a substantial ingredient of each class member's claim. If the *Act* is found to have been correctly interpreted and applied, then none of the claims will succeed and the remaining common issues will not need to be addressed. On the other hand, if the *Act* is found not to have been correctly interpreted or applied, then the determination of the negligence and other issues can be determined. This issue can be determined without individual findings of

fact with respect to each class member. Resolution of the Group A issues will advance the litigation, one way or the other.

[369] As noted by the plaintiff, a question regarding the interpretation of the *Act* was the issue the defendant sought to have resolved in the Rule 220 motion on the basis that the determination of this question of law would dispose of the action. Therefore, I am not persuaded by the defendant's current arguments opposing this as a common issue.

[370] All the proposed common issues flow from the plaintiff's claim that the *Act* was incorrectly interpreted and administered incorrectly or negligently based on this incorrect interpretation.

[371] With respect to Group B issues, general negligence, some of these issues are common and others will require a more individual assessment. The general negligence issues flow from a determination on the Group A issues.

[372] The issue of whether the defendant owed a duty of care to class members in administering the *Act*, does not in my view, require an individual assessment of the interactions between specific people as argued by the defendant. The starting point for the determination of the negligence claim is to determine whether a duty was owed. Resolution of this issue will advance the litigation further and if such a duty is found, this will apply to all class members' claims.

[373] Similarly, the content or scope of the duty and which defendants owed this duty are also common issues and a substantial ingredient of each claim and resolution of these issues will advance the litigation. The scope or content of any duty owed should be consistent between the defendant – either the Commission, Service Canada or both – and class members.

[374] The remaining issues in Group B, whether and how the defendant breached the duty of care, whether the breach caused damages, and the quantum or measure of any such damages, will require individual findings of fact with respect to each class member. The issue of whether and how the defendant breached the duty of care may have common aspects, as this would follow from a finding regarding the interpretation of the *Act* and consideration of the concepts of foreseeability and proximity, but other aspects would require more individual assessment.

[375] Although individual assessment of who owed and who breached the duty may be required, the determination whether such a duty was owed will advance the litigation.

[376] The appropriate measure of damages may also have some common aspects. If benefits should have been provided, the calculation of those amounts would be fairly straightforward. Given that the defendant paid out sickness benefit claims to claimants in receipt of parental or maternity benefits after the *Rougas* decision and before the legislation was amended, there is obviously a method to determine the amounts owing. The other aspects of damages would require an individual assessment.

[377] With respect to Group F, whether the amount of damages claimed for general damages can be determined on an aggregate basis and if so, in what amount, I agree with the defendant that this requires individual assessment. The plaintiff has not proposed any methodology for the determination of aggregate damages.

[378] Contrary to the defendant's submission, the certification stage is not the time to comment on whether the damages claimed are compensable, i.e. whether any class members suffered damages over and above inconveniences and upset. This will require proof at trial.

[379] The issues proposed regarding the costs of administration and the distribution to the class meets several of the criteria for a common issue, particularly, this would avoid duplication of fact finding following any individual assessment of damages.

[380] Whether interest is payable to the class will depend on several factors and is best left for an individual assessment.

[381] The issue whether the defendant is vicariously liable for acts of their officers will not arise given that the causes of action in negligent misrepresentation, unjust enrichment and misfeasance in public office are not certified.

[382] The common issues that will be certified are set out below, using the numbering originally proposed by the plaintiff, and at the conclusion of this judgment for ease of reference.

A The *EI Act* Interpretation and Administration Issues

1. Were persons who, during the Class Period, were on parental leave and who suffered from an illness, injury or disability before or during their parental leave eligible to collect sickness leave benefits, all as defined under the EI Act?

2. If the answer to question A.1. is "yes", was the EI Act – during the Class Period –administered by the defendants in accordance with its terms when the defendants failed to approve the sickness leave benefits of the Class Members?

B General Negligence Issues

1. If the answer to question A.2. is "no", then did the defendants owe the Class Members a duty of care in administering the EI Act?

2. If the answer to question B.1. is "yes", then what is the content of the duty, and which defendants owed such a duty?

3. If the answer to question B.1. is "yes", did the defendants who owed such a duty breach that duty of care?

F Aggregate Damages, Vicarious Liability and Administration Costs Issues

3. Should the defendants pay the cost of administering and distributing recovery to the Class?

**Is a class proceeding the preferable procedure for the just and efficient resolution of common questions? Rule 334.16(1) (d)**

[383] In determining whether the class proceeding is preferable, as required pursuant to Rule 334.16(1) (d), further guidance is provided by Rule 334.16(2):

| | |
|---|---|
| (2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether | (2) Pour décider si le recours collectif est le meilleur moyen de régler les points de droit ou de fait communs de façon juste et efficace, tous les facteurs pertinents sont pris en compte, notamment les suivants : |

| | |
|---|---|
| (a) the questions of law or fact common to the class members predominate over any questions affecting only individual members; | a) la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres; |
| (b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings; | b) la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées; |
| (c) the class proceeding would involve claims that are or have been the subject of any other proceeding; | c) le fait que le recours collectif porte ou non sur des réclamations qui ont fait ou qui font l'objet d'autres instances; |
| (d) other means of resolving the claims are less practical or less efficient; and | d) l'aspect pratique ou l'efficacité moindres des autres moyens de régler les réclamations; |
| (e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means. | e) les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d'autres mesures de redressement. |

**The Plaintiff's Submissions**

[384] The plaintiff submits that there is some basis in fact that a class action is the preferable procedure.

[385] The plaintiff argues that the class action provides one forum to resolve the many common issues leaving only a few individual issues. The only possible alternative procedures would be

Small Claims Court actions or very late EI claims for Category 2. These alternatives are wholly inadequate due to cost and other barriers.

[386] Rule 334.16(2) directs the Court to consider several factors. However it is not necessary that all factors support the class action. Common issues need not predominate over the individual issues. The fact that individual issues remain does not preclude certification.

[387] The plaintiff notes that the Court must look at the comparative practicality of alternatives: judicial economy, access to justice, and behaviour modification (*Markson v MBNA Canada Bank*, 2007 ONCA 334 at para 69, 282 DLR (4th) 385 [*Markson*]; *Cloud* at para 76; *Condon v R*, 2014 FC 250 at paras 110, 113, 239 ACWS (3d) 28 [*Condon*]).

[388] Access to justice is the most important factor. Where the cost of an alternative procedure outweighs the value of the claim, that alternative procedure is not preferable (*Keatley Surveying Ltd v Teranet Inc*, 2014 ONSC 1677 at para 104, 119 OR (3d) 497; *Barwin v IKO*, 2012 ONSC 3969 at para 85, 218 ACWS (3d) 255).

[389] In this case, the damage claims are all less than $7,515 (a maximum of 15 weeks' sickness benefit at the weekly maximum of $501 during the class period). Ms Rougas' EI claim was worth $5,940. Ms Rougas' legal fees, on the other hand, would have cost over $30,000 if her law firm had not worked *pro bono*. Ms McCrea's claim would be worth approximately $1,500 and Ms Kasbohm's would be $4,140. The cost of pursuing individual claims is an insurmountable barrier.

[390] The plaintiff notes that there are no alternatives for class members to pursue their remedies except a class action. Even if the costs of notification of class members, administration of the claims, and resolution of individual issues are high, these costs are far lower than for countless Small Claims, EI claims, EI appeals, and EI antedate requests.

[391] In addition, the time limit to pursue appeals to the Board or Umpire has passed, and these appeal routes could not address the claims now made. The Small Claims Court process remains the only other possible option, but the legal costs to pursue an action would be far greater than the claim. It is unreasonable to expect counsel to pursue these cases *pro bono*.

[392] The plaintiff argues that administrative or statutory appeal routes have been barriers to successful claims because the defendants controlled the appeal process and the record provided to the Board of Referees and Umpire and did not refer to the 2002 amendments in the record. Other barriers to pursuing individual claims include limitation periods for appeals and the requirements of antedating a claim, which, even if allowed, would lead to judicial review if denied.

[393] The plaintiff also submits that the common issues predominate over individual issues. The remaining individual issues that would be easy to prove are identity, illness during the parental leave, the weekly rate of benefit and any income received during the benefit period as a possible offset. Again, the plaintiff submits that such proof will be simple, particularly since claimants are in the EI system and records exist. To prove illness, if medical records or a doctor's note is not available, an affidavit could be sufficient.

[394] The plaintiff disputes the list of individual issues provided by the defendant, and notes that many are repetitive. However, the plaintiff acknowledges that the more difficult individual issues would include proof of general damages. With respect to psychological damages, the trial judge can establish the threshold. If general damages are not certified as common issues, declarations and descriptions of how the defendants' actions affected the Class Member could be provided. Even if more is required on an individual basis to prove damages, there will still be advantages to the class procedure.

[395] As noted previously, the application of limitation periods is an individual issue, but it should not be raised at this stage given that the defendant has not filed a statement of defence.

[396] The plaintiff notes that the Courts have certified class actions even though more complex individual issues were present (*Cloud* at para 90; *Chace v Crane Canada Ltd*, 1996 BCJ No 1606 at para 23, [1996] BCWLD 2137(SC); *Fulawka* at paras 142-167).

[397] The plaintiff disputes the defendant's argument that there is a lack of evidence that claimants wish to pursue their claims. The question is whether there is a significant number of individuals that want to control their own process. There is no evidence of such individuals.

[398] In response to the defendant's argument that the Social Security Tribunal [SST] is the preferable process, the plaintiff notes that only Category 2 claimants could possibly avail themselves of the SST and only after requests for antedating a claim for benefits are resolved.

This is not simply a claim for benefits; the SST and its predecessors cannot resolve questions of law.

[399] In response to the defendant's vague reference to a test case as an alternative, the plaintiff notes that the defendant has not provided any details of what it proposes. The defendant appears to suggest a test case for only one or a few claimants or reliance on the SST after claims for antedating are decided. This is a speculative submission that would not provide any relief. Moreover, there would be no ability for a question of law to be determined. If the defendant has an alternative process it must provide some evidence of what it would be (*AIC* at para 49).

**The Defendant's Submissions**

[400] The defendant submits that the resolution of common issues would not advance the litigation; certification should be denied.

[401] The individual issues are overwhelming; individual assessments would be needed for almost all the issues. The causes of action pleaded must be proven on an individual basis, the application of limitations will limit the class size and individual assessments of facts for each proposed class member must be determined before liability could be found. With respect to entitlement to EI benefits, each claimant's circumstances are different.

[402] With respect to damages, the defendant argues that proof of actual loss must first be determined. The defendant again argues that Ms McCrea returned to work at the end of her

benefit period; therefore, there is no liability and no entitlement to any damages. Others may have done the same.

[403] Medical evidence will be needed to establish that the claimants in Category 1 were ill and lengthy individual trials would be necessary to provide that evidence. In addition, there may be different reasons for the denial of benefits other than non-availability for work.

[404] The defendant argues that the Rule 334.16(2)(b) factor relates to whether the class would be better served by advancing or controlling separate individual actions and the viability and financial ability of individuals to bring their own actions (*Condon* at para 101, *Canada (Citizenship and Immigration) v Hinton*, 2008 FCA 215 at para 9, [2008] FCJ No 1004). The defendant argues that in this case, the class members had the option of an accessible, specialized and affordable appeal mechanism that they could have and should have pursued and they would have been better served by this mechanism. For those that did not do so, this class action is not the way to seek a second chance (*Lauzon v Canada (Attorney General)*, 2014 ONSC 2811 at paras 59-60, 241 ACWS (3d) 31 (SCJ)).

[405] The defendant again notes that the principles of finality and certainty must be considered in the determination of preferable procedure and reiterates that the decisions of the Board of Referees and Umpire were lawfully made and are final. In *AIC* at para 19, the Court indicated that whether the class members' claims are effectively resolved by an alternative process should be considered even if the alternative process is not a perfect match.

[406] With respect to the comparative practicality (Rules 334.16(2)(d) and (e)), the defendant argues that the administrative appeal route (i.e. the Board of Referees and Umpire and now the SST) is the preferable procedure for those who are not estopped. However, the defendant submits that most class members are estopped and others are barred by limitation periods.

[407] Even if the Board of Referees and Umpire and the SST cannot determine the causes of action now raised by the plaintiff, they can determine the entitlement to benefits which is the essence of the claim.

[408] However, the defendant also submits that although administrative appeals to the Board of Referees and to the SST are preferable for resolving the claims of the class, only claimants still in the EI system could pursue this option.

[409] At the oral hearing, the defendant raised for the first time that it is always amenable to test cases and that this option should be considered by the Court. The defendant suggests that the Court could stay the current proceedings to permit the SST to decide a potential class member's benefit claim.

[410] The defendant appears to suggest that because Ms McCrea and Ms Kasbohm's appeals to the Umpire were adjourned, these could still proceed to the SST and, depending on the decision, could subsequently be judicially reviewed. However, the defendant also states that it would assert issue estoppel where applicable.

[411] The defendant acknowledges that, comparatively, each process presents hurdles. The administrative route will not be available to those barred by issue estoppel and limitation periods. On the other hand, the costs of a class action are very high coupled with the costs of individual issues trials.

[412] The plaintiff has not met her onus to establish that a class action is preferable. The real issue is entitlement to benefits and there is no added value to a trial to determine benefits. When the two processes are compared, the defendant submits that the SST process is favourable.

**The Class Proceeding is the preferable procedure**

[413] In my view, the resolution of the current claims is not ideally suited for either the administrative remedies or the proposed class proceeding. However, the class proceeding is the preferable procedure.

[414] The class proceeding will be long and complicated and costly. However, there are no acceptable or feasible alternatives. The administrative remedies or mechanisms cannot address the questions of law and the causes of action in negligence. The defendant clearly indicated that if the administrative mechanisms were pursued, it would argue *res judicata*, issue estoppel and limitation periods. This would leave few, if any, claimants able to pursue the benefits to which they may have been entitled. It would clearly not provide any way to resolve the issues the plaintiff has raised about the interpretation of the Act and its administration. Comparatively, the class proceeding is not only the better option, but the only feasible option for the class members to reach a determination of the cause of action that has some prospect of success.

[415] The jurisprudence puts the focus on the comparative practicality of alternatives, bearing in mind three goals: judicial economy; access to justice; and, behaviour modification. (*Markson* at para 69; *Cloud* at para 76; *Hollick*; *AIC*)

[416] In this case, the goals of access to justice and judicial economy are relevant. Behavior modification does not appear to be an issue given that the legislation was amended in 2013 to provide for sickness benefits to those on parental leave that are ill, regardless of their unavailability to work. However, these amendments did not benefit the proposed class members.

[417] In *AIC*, the Supreme Court of Canada focused on the access to justice goal of the preferable procedure element of the class action criteria. The Court noted at para 22, that there was no requirement that the proposed class action actually achieves the three goals and the plaintiff does not bear the burden of proving all three goals will be achieved. At para 23, the Court added that it should consider the extent to which the proposed class action may achieve the goals, but it is not necessary that all three goals be achieved; the issue is whether the alternative means of resolving the claim are preferable. The relative advantages of each option must be considered.

[418] With respect to access to justice, the Court noted:

> [26] A class action will serve the goal of access to justice if (1) there are access to justice concerns that a class action could address; and (2) these concerns remain even when alternative avenues of redress are considered: *Hollick*, at para. 33. To determine whether both of these elements are present, it may be helpful to address a series of questions. These questions must not be considered in isolation or in a specific order, but should inform

> the overall comparative analysis. I will set out the questions and comment briefly on each.

[419] The Court went on to consider four questions: what are the barriers to access to justice; what is the potential of the class proceedings to address those barriers; what are the alternatives to class proceedings; to what extent do the alternatives address the relevant barriers; and, how do the two proceedings compare?

[420] At para 38 the Court concluded that: "At the end of the day, the motions court must determine whether, on the record before it, the class action has been shown to be the preferable procedure to address the specific procedural and substantive access to justice concerns in a case. As set out in Hollick, the court must also, to the extent possible within the proper scope of the certification hearing, consider the costs as well as the benefits of the proposed class proceeding in relation to those of the proposed alternative procedure."

[421] In the present case, when these questions are considered, it is apparent that the administrative appeal route would not achieve access to justice for many, if any, claimants. Putting aside the financial claim, the administrative route would not resolve the question of law or the underlying principle at stake, which appears to be a significant concern from an access to justice perspective for the proposed class members. In addition, the cost-benefit considerations favour the class proceeding.

[422] In *Manuge 2008*, Justice Barnes highlighted the importance of the access to justice factor noting at para 28: "Where it is not economical for any one person to prosecute a claim and where

the Crown has not indicated a willingness to indemnify Mr. Manuge or anyone else for the costs required to prosecute a binding test case, the argument for a class proceeding is enhanced…"

[423] Similarly, in this case, the cost of individual claims is disproportionately high.

[424] The defendant's reference to a test case as an alternative is an eleventh hour proposal that lacks any detail or clarity and does not appear to be an alternative at all to resolve the causes of action or to even address the aspect of the benefit claims of the class. The defendant has acknowledged that it will assert *res judicata* and issue estoppel and limitations and that any resort to the SST could only address benefit claims. The uncertainty about antedating claims remains. Moreover, the administrative route would not likely resolve the statutory interpretation issue and would not address the negligence claims.

[425] If the defendant had a serious proposal it would have been preferable to have advanced it earlier and with more specific details, rather than alluding to an alternative approach at the last minute. The proposal is too vague for the Court to consider the defendant's suggestion to stay the current action and allow a test case to proceed to the SST. It is not known how many claims could be "tested" or whether the defendant intends to indemnify the costs of the test plaintiff. Given the defendant's acknowledgement that it would assert issue estoppel and/or *res judicata* and the applicable limitation periods, and given that this could only address entitlement to benefits, likely without the necessary consideration of the underlying questions of law, this alternative would not provide access to justice.

[426] I note that, with respect to the benefit claims, the defendant did not propose as an alternative to the class action that some similar arrangement to the sickness benefits paid out to claimants after the *Rougas* decision and prior to the 2013 amendments could be considered for the class members. Although the defendant explained that *Rougas* provided the authority to pay the benefits to claimants although the legislation did not, it did not propose other creative approaches for the class members, despite that such an approach would only address lost benefits and not other damages and would not resolve the interpretation of the *Act*, which has subsequently been amended to conform with the plaintiff's view.

[427] Although individual issues remain, these are not overwhelming and do not foreclose the class procedure. The class proceeding will advance several common issues that otherwise would require determination in individual actions at likely much greater costs, which are disproportionate to the outcome. Judicial economy and access to justice both favour the class procedure.

[428] The class proceeding will provide one forum to resolve many claims which on their own are of relatively small monetary value, but significantly higher non-monetary value. It would be disproportionate and likely futile for an individual claimant to proceed in Small Claims Court to pursue their cause of action, including lost benefits to which they may have been entitled, which would be at most 15 weeks at approximately $500 per week and perhaps much less depending on the number of weeks of illness. Although legal representation may not be essential, it would be beneficial, particularly to advance arguments regarding the interpretation of the *Act*. As the plaintiff noted, counsel fees for Ms Rougas, who was successful before the Umpire, would have

been approximately $30,000 if they had not been provided *pro bono*. It is unrealistic to expect counsel to represent other claimants on a *pro bono* basis.

[429] There is no evidence that any individual seeks to control their own individual claim. Finally, the alternatives encouraged by the defendant are vague and would not provide access to justice.

[430] Considering all the factors applicable to this assessment, the plaintiff has established that a class action is the preferable procedure. The threshold, once again at this stage, is low, despite the many factors at play.

**Is Ms McCrea an appropriate representative plaintiff? (Rule 334.16(1) (e)**

**The Plaintiff's Submissions**

[431] The plaintiff, Ms McCrea, submits that she is a proper class plaintiff and satisfies all of the criteria in Rule 334.16(1) (e): she is motivated; has competent counsel; has the ability to bear the costs; would fairly and adequately represent the interests of the Class; has prepared a litigation plan; does not have any conflicting interest and has provided the agreement respecting fees and disbursements between her and counsel. The plaintiff adds that Ms McCrea shares all the characteristics of Category 1 and almost all the characteristics of Category 2, except that she was not dissuaded from making a claim.

[432] The plaintiff disputes the defendant's argument that she could have been eligible to receive benefits. The fact that she returned to work for several days while on parental leave would not have made her eligible for benefits. She applied once she was diagnosed with cancer to convert her parental benefits to sickness benefits and she was denied because she was on parental leave and not available for work. She experienced the same consequences as other members of the class. Even though she returned to work in October 2011, because she was denied benefits, she would have been entitled to some EI benefits with appropriate deductions to account for her return to work.

[433] The plaintiff notes that she chose to adjourn her appeal in order to try and obtain remedies for the Class. Putting her own interests aside to pursue the proposed Class Action.

[434] The plaintiff disputes the defendant's criticism of the inadequacy of the Litigation Plan, noting that it is a work in progress. The proposed Plan, supplemented by the record, is sufficiently detailed and addresses: the form and manner of notice of certification and the right to opt out; the timing of documentary production and examinations; and, how experts' reports, if any, will be dealt with. The Plan, as supplemented by the record, also refers to proof of illness, reliance, and general damages. The plaintiff submits that she has included the essential elements in the proposed plan (*Cloud* at para 95; *Buffalo* at para 151). The litigation plan would be amended to reflect the issues certified and other details can be addressed by case management.

[435] The plaintiff indicates that her counsel has consulted with and proposes to rely on an experienced administration firm and, in due course, a detailed proposal would be developed including regarding notice to claimants, evidence and proof.

**The Defendant's Submissions**

[436] The defendant submits that Ms McCrea cannot be the representative plaintiff as she lacks commonality with the class she proposes to represent on essential issues and does not have a viable claim (*Bre-X*). The defendant again argues that Ms McCrea could have been eligible for benefits because she worked for two weeks in June 2011 and that she really suffered no loss because she returned to work as planned when her benefits were denied.

[437] The defendant also argues that the Litigation Plan is inadequate as it does not assist the Court in determining whether the class proceeding is the preferable procedure and whether the litigation is manageable (*Buffalo* at paras 149 and 151). The defendant claims that courts should not certify and leave the litigation plan until later, especially where the suitability of the representative plaintiff is at issue (*Pearson v Inco Ltd*, [2002] OJ No 2764 at paras 148-149, 115 ACWS (3d) 564).

[438] Although litigation plans can be amended at a later time, the defendant submits that this is not the case to do so. The plaintiff has only set out the basic steps required for all types of civil litigation. It is not well thought out or sufficiently detailed for the management of such complex litigation, nor does it provide a workable method for the adjudication of individual issues.

**Ms McCrea is a proper representative plaintiff for Category 1**

[439] Ms McCrea meets the criteria to be a proper representative plaintiff. She has established that she is motivated to pursue this action, she has no conflict of interest with the class, she has shown the agreement with her counsel regarding fees and disbursements, and she has established that she falls within Category 1.

[440] The defendant's argument that Ms McCrea does not have a viable claim because she could have been entitled to sickness benefits because she had worked for a two week period is completely speculative and ignores the reality that in June 2011, when she did work for two weeks, she was not ill. When she sought sickness benefits following her diagnosis and surgery in August-September 2011, she was not available for work because she was both ill and on parental leave. She was denied her benefits. The defendant's speculation is not borne out by the evidence. Ms McCrea's circumstances were typical of other class members who became ill while in receipt of parental benefits and were not available for work and, as a result, were denied sickness benefits.

[441] The proposed Litigation Plan meets only the bare minimum criteria. Amendments will be necessary to reflect the common issues certified and to address other details.

[442] As noted by Justice Anne Mactavish in *Buffalo* at para 148, although a litigation plan is not to be scrutinized in great detail at this stage, it must demonstrate that the plaintiff and counsel have "thought the process through, and grasp its complexities". Justice Mactavish noted that there are no fixed requirements for the plan as it will depend on the nature, scope and complexity

of the litigation and provided the following non-exhaustive list of would typically be included at para 151:

> However, the jurisprudence has established the following non-exhaustive list of the matters to be addressed in a litigation plan:
>
> > (i) the steps that are going to be taken to identify necessary witnesses and to locate them and gather their evidence;
> >
> > (ii) the collection of relevant documents from members of the class as well as others;
> >
> > (iii) the exchange and management of documents produced by all parties;
> >
> > (iv) ongoing reporting to the class;
> >
> > (v) mechanisms for responding to inquiries from class members;
> >
> > (vi) whether the discovery of individual class members is likely and, if so, the intended process for conducting those discoveries;
> >
> > (vii) the need for experts and, if needed, how those experts are going to be identified and retained;
> >
> > (viii) if individual issues remain after the termination of the common issues, what plan is proposed for resolving those individual issues; and
> >
> > (ix) a plan for how damages or any other forms of relief are to be assessed or determined after the common issues have been decided.

[443] See: *Sorotski* at paragraph 78. See also *Paron v Alberta (Minister of Environmental Protection)*, 2006 ABQB 375 at paragraph 130, *Bellaire v Independent Order of Foresters* (2004), 5 CPC (6th) 68 (Ont SupCt) at paragraph 53, and *Boucher v. PSAC* (2005), 18 CPC (6th) 391 (Ont SupCt.) at paragraph 29.

[444] The bottom line is that the plan must permit the motions judge to determine if the representative plaintiff should be given this responsibility (*Buffalo* at para 152).

[445] The plaintiff's proposed Litigation Plan touches on some of the elements identified in *Buffalo*, but in a superficial way. It refers to notice, but not to how potential class members will be located, time lines for document production, examinations for discovery and exchange of experts' reports, and time lines for anticipated interlocutory motions, as well as general steps for the resolution of issues post-trial. It depends on case management to address a wide range of potential issues. The plaintiff noted that the Plan is supplemented by the record. The record refers to how potential claimants may be identified and located, how proof of illness could be established and that an administration firm has been consulted and a proposal will be developed to address notice, proof and evidence. Ideally, these elements should be included in the proposed Litigation Plan. However, the lack of a robust litigation plan is not fatal. As noted in *Buffalo* at para 153:

> It is open to the Court to allow counsel to file a revised litigation plan, where the other requirements for certification have been met: see, for example, *Sorotski*, at paragraph 82. See also *Carom v. Bre-X Minerals Ltd.* (1998), 20 C.P.C. (4th) 163 (Ont. Gen. Div.), and *Tom's Grain & Cattle Co. v. Arcola Livestock Sales Ltd.*, 2004 SKQB 338.

[446] In this case, the other requirements for certification, albeit of a more limited class proceeding, have been met. An amended litigation plan will be necessary to reflect the more narrow scope of the causes of action and the common issues, and to reflect the management of the litigation with respect to Category 1 class members, as well as to address the applicable

elements set out above from *Buffalo*. The plaintiff should provide a proposed revised Litigation Plan and seek agreement of the defendant before relying on case management.

**Conclusion**

[447] The plaintiff's motion for certification of this action as a class proceeding on common questions relating to the defendant's alleged negligent implementation of the *Act* is granted. The plaintiff, Ms McCrea, will be designated as representative of the Class, Category 1 and the proposed Litigation Plan will be approved as an interim plan, subject to the comments noted above.

[448] The defendant's motion to strike the plaintiff's claim as disclosing no reasonable causes of action pleadings is granted in part; the causes of action for negligent misrepresentation, misfeasance in public office and unjust enrichment have no reasonable prospect of success and are struck.

[449] In accordance with Rule 334.39 of the *Rules* there will be no costs awarded in connection with this motion.

**ORDER**

**THIS COURT ORDERS that**

1. This action is certified as a class proceeding;

2. The plaintiff, Ms McCrea, is appointed as the representative of the Class;

3. The Class (or Class Members) is defined as follows:

   All persons who, during the Class Period (March 3, 2002-March 24, 2013)

   - Applied for and received EI parental benefits;
   - Suffered from an illness, injury or quarantine during the course of their parental leave; and,
   - Applied for EI sickness benefits and were denied because they were on parental leave or not otherwise available to work at the time of their sickness benefit application.

4. The nature of the claims asserted on behalf of the Class and the relief sought by the Class are the following:

   With respect to the claim for negligence and negligent administration of the *Act*;

   - A declaration that the defendant negligently administered and failed to implement the *EI Act* in a manner that caused damage to the plaintiff and Class Members, as particularized in the claim
   - Special damages and general damages for negligence in the amount of $450 million or such other sums as the Court finds appropriate at the trial of the common issues or at a reference(s) under the *Rules*;
   - Prejudgment and post judgment interest;

- An order directing a reference or other directions as necessary to determine issues not determined at the trial of common issues;
- Costs of this action plus costs of the distribution of any award under the Rules, including costs of notice associated with the distribution and the fees to a person administering the distribution pursuant to Rule 334.28;
- Such further and other relief as the Court seems just.

5. The Common Questions are the following:

*The EI Act Interpretation and Administration Issues*

i) Were persons who, during the Class Period, were on parental leave and who suffered from an illness, injury or disability before or during their parental leave eligible to collect sickness leave benefits, all as defined under the *EI Act*?

ii) If the answer to question i) is "yes", was the *EI Act* – during the Class Period – administered by the defendant (the Commission or Service Canada) in accordance with its terms when the defendants failed to approve the sickness leave benefits of the Class Members?

*General Negligence Issues*

iii) If the answer to the question ii) is "no", did the defendant (the Commission or Service Canada) owe the Class Members a duty of care in administering the *EI Act*?

iv) If the answer to question iii) is "yes", then what is the content of the duty, and which defendants owed such a duty?

v) If the answer to question iii) is "yes", did the defendants who owed such a duty breach that duty of care?

*Aggregate Damages, Vicarious Liability and Administration Costs Issues*

vi) Should the defendants pay the cost of administering and distributing recovery to the Class?

6. The attached Litigation Plan is approved as an interim plan and amendments will be required to reflect the causes of action and common issues certified and the management of the litigation.

7. No costs are awarded.

"Catherine M. Kane"
Judge

# ANNEX A

## LITIGATION PLAN

The plaintiffs propose the following Litigation Plan if certification is granted:

**Notice**

1. A hearing will be held within thirty (30) days of the issuance of the certification order to settle the terms and manner of notice.

2. The Court should settle the form and content for notification of the certification of the action as a class proceeding, and set an opt-out date within a fixed period of time after the date of the order certifying the action.

3. The plaintiffs further propose that the defendants distribute the notice by mail to all class members.

4. The plaintiffs propose that notice be mailed out in accordance with paragraph 3 no later than sixty (60) days after the Court renders a decision with respect to the notice.

5. The plaintiffs further propose that the opt-out date should be forty-five (45) days following the end of the period for mailing notice to class members.

**Documentary Assembly and Production**

6. It is proposed that lists of documents be exchanged no later than sixty (60) days from the entry of the certification order.

**Examinations for Discovery**

7. It is proposed that examinations for discovery should take place within sixty (60) days from the date that any production ought to be completed.

8. The plaintiffs anticipate that the examinations for discovery of the defendants will require approximately two (2) days, subject to refusals and undertakings.

9. The plaintiffs propose that all undertakings be completed within sixty (60) days of the conclusion of the examinations for discovery.

**Exchange of Expert Reports**

10. The exchange of expert reports, if any, should take place within sixty (60) days of the conclusion of examinations for discovery, including the completion of undertakings. Following examinations for discovery, and the exchange of expert opinions, if necessary, the parties may attend before the Court in order to clarify and/or redefine the common issues. At this point the plaintiffs do not anticipate the need for any expert reports.

**Case Management and Interlocutory Applications**

11. There will be case management conferences before the appointed judge every two (2) months, unless the parties and the Court agree that such a hearing is not required.

12. Unless a particular application is a matter of urgency, all interlocutory applications will be heard at these regular case management hearings.

13. Any party bringing an interlocutory application will file supporting material at least fourteen (14) days prior to the case management conference. The respondents will file any responding affidavit material seven (7) days prior to the conference. The applicant will file its factum five (5) days prior to the hearing. The respondent will file a responding factum three (3) days prior to the hearing. The court will determine whether any additional oral argument is required and advice the parties accordingly.

**Common Issues Trial**

14. The common issues trial will determine whether the defendants could be liable to the plaintiff based on the various common issues. The common issues trial will proceed pursuant to the Federal Courts Rules. It is anticipated that the common issues trial will be less than two (2) weeks in duration.

15. The plaintiffs anticipate that at the common issues trial the Court will determine the various common issues arising in the present case.

**Litigation Steps Following the Common Issues Trial**

16. If the plaintiffs are successful, in whole or in part, an orderly process for the resolution of any remaining issues may be required.

17. Within thirty (30) days of the issuance of a judgment for the plaintiffs on any of the common issues, the parties will convene for argument to determine the appropriate way to resolve any outstanding issues.

18. The plaintiffs intend to argue that the resolution of the common issues alone will allow the Court to make an order to repay class members as though applications had been made and the benefits had been properly granted. If the plaintiff is not successful in this respect and individual issues remain, the plaintiff will propose the following process:

    (a) Claims forms will be developed to deal with these issues, to be completed by the class members within a specified time;

    (b) If the defendants dispute the evidence or claim amount of a class member, the defendants will respond in writing;

    (c) The Prothonotary or other appropriate person will make a report on any such disputes; and

    (d) The court can confirm the report to decide whether further trial-like processes are required before coming to a final resolution.

**Review of the Litigation Plan**

19. The Litigation Plan should be reconsidered and revised as necessary under the continuing case management authority of the Court.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-210-12 |
| **STYLE OF CAUSE:** | JENNIFER MCCREA v THE ATTORNEY GENERAL OF CANADA AND THE CANADA EMPLOYMENT INSURANCE COMMISSION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | DECEMBER 16, 2014,<br>DECEMBER 17, 2014,<br>DECEMBER 18, 2014 |
| **ORDER AND REASONS:** | KANE J. |
| **DATED:** | MAY 7, 2015 |

**APPEARANCES:**

| | |
|---|---|
| Mr Stephen Moreau<br>Ms Amanda Darrach<br>Ms Mariam Moktar | FOR THE PLAINTIFF |
| Mr Paul Evraire<br>Ms Christine Mohr | FOR THE DEFENDANTS |

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