COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *K.O. v. British Columbia (Ministry of Health),* 2023 BCCA 289

Date: 20230717
Docket: CA48254

Between:

K.O. by her Litigation Guardian J.O. and J.O.

Appellants
(Plaintiffs)

And

His Majesty the King in Right of British Columbia (Ministry of Health)

Respondent
(Defendant)

Before: The Honourable Mr. Justice Willcock
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated April 8, 2022 (*K.O. v. British Columbia (Ministry of Health)*, 2022 BCSC 573, Victoria Docket S183061).

Counsel for the Appellants:	R.S. Sahota P.W. Dudding
Counsel for the Respondent:	C. Friesen M.A. Witten T. Bant
Place and Date of Hearing:	Vancouver, British Columbia April 17–18, 2023
Place and Date of Judgment:	Vancouver, British Columbia July 17, 2023

Written Reasons by:
The Honourable Mr. Justice Willcock

Concurred in by:
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Madam Justice Horsman

Summary:

This is an appeal from the dismissal of an application for certification of a class proceeding on behalf of persons who suffered from a mental illness, and on behalf of family members who rendered personal care to members of the main class. The appellants claimed that persons with mental illness received substandard care because the respondent failed to address the stigmatization of individuals suffering from mental illness in the healthcare system. They said this failure breached a common law duty of care, as well as ss. 7 and 15(1) of the Charter. Held: Appeal dismissed. The certification judge correctly concluded that a common law duty of care is inadequately pleaded, and cannot be made out on the facts alleged. Further, the pleadings do not make out an arguable case that the appellants' s. 7 or s. 15(1) Charter rights have been breached. The alleged failure to address stigma is not a gap in the provincially-funded healthcare program. There is no judicially discoverable and manageable standard for assessing, in general, whether the government's response to mental health stigma is adequate, or whether insufficient priority has been given to the needs of those affected by mental illness. These questions engage the accountability of the legislature and are not suitable for adjudication.

Table of Contents

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

[1] This is an appeal from an order dismissing an application brought on behalf of K.O. by her litigation guardian J.O., and J.O. himself, to have these proceedings certified as a class action. Reasons for judgment are indexed at 2022 BCSC 573.

[2] The appellants seek to bring a class claim on behalf of all persons who, on or after July 1, 1968, suffered from a mental illness while resident in British Columbia (the main class), and on behalf of family members who rendered personal care to a member of the main class. They seek damages alleged to have been caused by substandard medical care resulting in personal injury, loss of dignity and the denial of patients' rights. They attribute the substandard care to a failure on the part of the respondent to address the stigmatization of individuals suffering from mental illness in the provincially-funded healthcare system. The claim rests upon three alternative allegations:

a) the respondent breached a common law duty to K.O., and others similarly situated, to take reasonable care to eliminate stigma in the healthcare system;

b) the respondent beached K.O.'s right, guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*, to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on mental disability; and/or

c) the respondent breached K.O.'s s. 7 *Charter* rights by failing to take any or adequate steps to ensure that persons with mental illnesses are able to access medical treatment of a reasonable standard within a reasonable time, thereby endangering their lives and security of the person.

[3] In response to the claim, the respondent acknowledges that mentally ill persons may suffer stigmatization in the form of prejudicial attitudes and discriminatory behaviour. The respondent acknowledges the stigmatization of individuals experiencing mental illness may affect their self-perception and deter them from seeking care, but says such stigmatization is a product of long-standing and multiple causes, including cultural attitudes. It denies the allegation that it has taken no steps or inadequate steps to address stigmatization of mental illness in the healthcare system. It denies it has a legal obligation to do so.

Judicial History

[4] By motion originally filed in late 2019, and heard in late 2021, the appellants sought to certify the class action and to have the certification order set out the common issues that are appended to these reasons. The common issues identified by the appellants all relate to stigmatization of individuals with mental illness. None relate to specific failures to provide care.

[5] The application for certification was dismissed because the certification judge concluded the pleadings do not disclose a cause of action; it was plain and obvious the claim as pleaded could not succeed. He considered the pleadings to consist almost entirely of bare allegations unsupported by material facts. He could see no specific allegation of harm occasioned by anyone for whom the respondent is said to be directly or vicariously liable, and no allegation of specific tortious acts by people for whom the respondent is responsible. For this reason, the judge found this case to be unlike the authorities cited by the appellants: *Rumley v. British Columbia*, 2001 SCC 69, and *Fullowka v. Pinkerton's of Canada Ltd*., 2010 SCC 5.

[6] He held:

> [24] ... While I do not doubt that mental healthcare in this province could be improved and even dramatically so, the legal reality in a private lawsuit is that systemic failures such as those alleged here must be linked to concretely pleaded factual allegations of fault, causation and harm.
>
> …
>
> [26] … Before a claim such as the present one can proceed, either in tort or under the *Charter*, the plaintiffs must have an arguable cause of action against identifiable individuals for factually specific wrongdoing: *Ontario v. Phaneuf*, 2010 ONCA 901 at para. 13.

[7] In his view, the claim was bound to fail not only because of the inadequacy of the pleadings, but also because of the nature of the allegations made:

> [32] The *Charter* claims are also bound to fail, not only on the basis already given about the factual adequacy of the pleadings, but also because no state action, law, regulation or policy is impugned in the pleadings that could be said to constitute, directly or indirectly, a threat to K.O.'s s. 7 *Charter* right to life, liberty or security of the person (as in, for example, *Carter v. Canada (Attorney General)*, 2015 SCC 5), or which, in its effects, creates an impermissible or disproportionate distinction, disadvantage or burden based on a prohibited ground in s. 15 (as in *Fraser v. Canada (Attorney General)*, 2020 SCC 28). Instead, it is the absence of state action, law, regulation or policy that purports to be the basis of this lawsuit.

[8] The certification judge considered it to be obvious that the court cannot require the enactment and resourcing of anti-stigma initiatives. There was no judicially discoverable or manageable standard for assessing the adequacy or efficacy of "anti-stigma" policy sought by the appellants. Whether and to what extent the government should adopt policies intended to destigmatize mental illness is a question beyond the institutional competence of the judicial system, such decisions being inherently policy decisions and immune from judicial scrutiny: *Cirillo v. Ontario*, 2021 ONCA 353; *Tanudjaja v. Canada (Attorney General),* 2014 ONCA 852.

[9] While recognizing the prospect (identified in *Eldridge v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624, 1997 CanLII 327 (S.C.C.), and *Gosselin v. Québec (Attorney General),* 2002 SCC 84) that s. 7 may one day be interpreted as imposing positive obligations upon the government, the judge concluded it is "settled law" that the *Charter* does not impose a duty upon the government to enact policies

addressing discrete social problems or to confer a benefit upon individuals that is not required by law*: Scott v. Canada (Attorney General),* 2017 BCCA 422; *Rogers v. Faught*, 2002 CanLII 19268 (Ont. C.A.); *Leroux v. Ontario*, 2021 ONSC 2269 rev'd 2023 ONCA 314.

[10] Finally, the judge noted there were insurmountable obstacles to certification of the class action other than its lack of merit. He was of the view that most significant issues identified in the pleadings defy common aggregate analysis. The claim is brought on behalf of an "enormous and ill-defined class", and there is no objective clarity in its definition. The common issues described by the appellants are simply an aggregation of individual *Charter* violations. The only true common issues are not controversial, and might be resolved without advancing the class action. Most of the remaining issues are dependent on individual findings of fact: the nature and extent of an individual's illness; the way in which the illness is perceived; and the manner in which stigma affects the service afforded to the patient, if at all.

Grounds of Appeal

[11] The appellants identify nine, partially-overlapping grounds of appeal.

Mischaracterization of the plaintiff's case

[12] The appellants contend it is an error to say the case is founded upon "variations on an allegation that the government under-funds mental health services". They deny this is a "positive rights" claim. To the extent the appellants' complaint appears to be under-funding of the healthcare system (and that case is certainly identified in the amended notice of civil claim), the appellants say the certification judge should have simply struck out references to under-funding in the pleadings without dismissing the application for certification.

[13] If the action is certified as a class proceeding, the class will seek a remedy that will lead to them being able to access the full range of medical services available to residents of British Columbia on equal terms. The appellants say the damages they seek are intended to lead to behavioural change: in the words of their

expert witness, Dr. Knaak, the revision or elimination of rules, policies, and practices, both formal and informal, of healthcare institutions that arbitrarily restrict the rights of, and opportunities for, people of the stigmatized group, and that yield negative consequences.

[14] What is sought is described as “a comprehensive, multi-level strategy and approach” to “understand and address mental illness related stigmatization as a structural problem”. The appellants say their claim is analogous to the plaintiffs’ claim in *Eldridge*. Just as the provision of sign interpreters in that case would entail some expense but was an appropriate *Charter* remedy, so, they say, damages arising from the failure to take measures to address mental health stigma may be called for as a s. 24 *Charter* remedy, even if the claim is founded upon the allegation that the government should have taken initiatives that entail some expense.

[15] The appellants characterize their claim as a challenge to the underinclusiveness of the healthcare system: the failure to address an obstacle that precludes the appellant K.O., and others similarly situated, from obtaining a benefit that should be equally available to all. The appellants rely upon the Court’s observation in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 1998 CanLII 816 (S.C.C.):

> [61] … The mere fact that the challenged aspect of the *Act* is its underinclusiveness should not necessarily render the *Charter* inapplicable. If an omission were not subject to the *Charter*, underinclusive legislation which was worded in such a way as to simply omit one class rather than to explicitly exclude it would be immune from *Charter* challenge. If this position was accepted, the form, rather than the substance, of the legislation would determine whether it was open to challenge. This result would be illogical and more importantly unfair. Therefore, where, as here, the challenge concerns an Act of the legislature that is underinclusive as a result of an omission, s. 32 should not be interpreted as precluding the application of the *Charter*.

[16] They argue the court should not assume that a comprehensive program to address mental health stigma will require “a massive expenditure of funds”. There is no evidence to suggest that is the case. Further, to dismiss all s. 15(1) claims arising from adverse impact because the remedy will require the expenditure of funds will result in a “thin and impoverished” version of s. 15(1).

[17] The respondent says this is clearly a positive rights claim that is not justiciable. There is no doubt the appellants are seeking to establish they have suffered damages due to the failure of the government to discharge its legal obligation to the class. Discharging that obligation by establishing a comprehensive program to address mental health stigma will certainly entail some (although unquantified and perhaps unquantifiable) expense.

[18] The respondents say the complaint is not that an established program is underinclusive. It is, rather, a claim to entitlement to a new program. The judge was correct to say there is no impugned law or policy before the court.

Failure to appropriately address core policy immunity

[19] The judge concluded that "while publicly funded efforts at education and moral suasion to reduce or eradicate mental health stigma may well be eminently sensible, humane, and in our collective best interests, they are optional, not mandatory." He expressed the view that the question whether the government should address the problem of mental health stigma is a matter of public policy and resource allocation, and not justiciable. Even the establishment of a program to do so would not give rise to a relationship of proximity such as to give rise to a private law duty (citing *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at paras. 71–73). He summarized:

> [31] I would go further and say that the adequacy of core government policy on important social, economic and political matters – and I would emphasise that healthcare, including mental healthcare, comprises the largest single item of expenditure in the provincial budget, a principal focus of government finances and operations, and a central preoccupation of many citizens and certainly the media – is purely a matter of public law and administration and is not properly the subject of a lawsuit in tort: *R. v. Imperial Tobacco Canada Ltd.* at paras. 90–91.

[20] The appellants contend the chambers judge was not in a position to determine that their claims were an attack upon the government's core policy making. They note that in *Nelson (City) v. Marchi,* 2021 SCC 41, the Supreme Court of Canada considered in detail the manner in which policy decisions may be

distinguished from the operations of government. The distinction turns on findings of fact that should not be decided on preliminary or summary application.

[21] They say the respondent did not identify a specific decision with respect to how to address stigma. Without some evidence of a deliberative process, the appellants say the court could not address the defence that the absence of a stigma-elimination policy was a result of government exercising its policy-making role and thus immune from review.

[22] The respondent says the judge correctly identified the claim, as described in the appellants' own pleadings. The fact that the claim rests on an allegation that sufficient effort has not been made to address stigma (and thus that funds have not been spent on this worthy endeavour) is not what makes the claim non-justiciable. The respondent acknowledges the court can, as in *Eldridge*, fashion a remedy where it finds that a benefit is underinclusive in a manner that offends s. 15(1). However, a court cannot accept the argument that the appellants are entitled to damages arising from the failure to establish a program without mandating what initiatives the *Charter* requires. The fact the appellants are unable to say what steps will discharge the duty reflects the fact that the question is not suitable for adjudication. That is so even where the identified problem poses an obstacle to delivery of specific benefits.

[23] The respondent says the judgment in *Eldridge* does not assist the appellants because the question in that case was whether sign language interpreting was integral to the universal benefit established by legislation or whether it was ancillary to the plan. The mandated initiative was clearly defined. No similar question with respect to the specific content of the benefit afforded to recipients (or how the benefit must be defined in a *Charter*-compliant manner) arises in the case at bar.

[24] The respondent says that whereas in *Eldridge* the plaintiffs sought funding for a service that would enable them to benefit from the legislation to the same extent as hearing persons by obtaining medical services, the plaintiffs in the case at bar seek damages arising from the absence of a service that is available to no one:

"stigma free medical care". The government cannot be compelled to eradicate all obstacles to medical care, including obstacles that arise from attitudes or prejudices. The "underinclusion" alleged here does not arise from the design of the provincially-funded healthcare system or a lacuna in the legislation. The respondent says the appellants' complaint is that the government has failed to act at all to eliminate stigma, in contrast to *Vriend* or *Eldridge* where it was found to have acted in an under-inclusive manner. This claim, the respondent says, is in substance a challenge to a failure to exercise a power.

Application of the wrong legal standard to address the pleadings

[25] The first basis for dismissing the certification application was the judge's conclusion that the pleadings do not meet the formal requirements of R. 3-1 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. While the appellants allege the existence of mental health stigma (the existence of which is not denied), and that the respondent has failed to sufficiently address the existence of that stigma, they do not allege any specific act or omission that has caused injury, other than saying:

> 12. Throughout the Infant Plaintiff's life, she has not had access to high quality patient care that is medically appropriate and that ensures reasonable access to medically necessary services in relation to her mental illnesses …

[26] The appellants say the respondent did not raise the absence of material facts in the pleadings as an issue at the certification hearing, and that if they had done so the appellants would have drawn the judge's attention to the particular manner in which the sufficiency of pleadings in *Charter* cases is addressed. In particular, the appellants rely on the following passages from the judgment of this Court in *Council of Canadians with Disabilities v. British Columbia (Attorney General),* 2020 BCCA 241 (rev'd in part 2022 SCC 27):

> [95] Whether a reasonable cause of action is disclosed on the pleadings depends on the nature of the cause of action alleged and the material facts pleaded in support, assuming the truth of those factual allegations. For example, in *Canadian Bar Association, BCSC*, Chief Justice Brenner noted that a claim for a declaration that there is a constitutional right to civil legal aid would almost certainly be struck because there is ample authority that there is no general constitutional right to legal aid, but only a right arising in specific

> circumstances: at para. 102; see also *Canadian Bar Association, BCCA* at para. 37. However, some constitutional rights are more general in their application and pleadings regarding the particular factual context of a specific individual's case need not always be pleaded for a constitutional claim to disclose a reasonable cause of action. Rather, depending on the cause of action pleaded, the facts underlying a broad and systemic constitutional challenge may relate to an identifiable group of similar individuals in materially similar circumstances, rather than to a specific individual in specific circumstances.
>
> [96] In *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2010 BCCA 439, Justice Saunders commented that individual and systemic constitutional challenges differ significantly in scope and that "the problems arising from that difference may be resolved by taking a more relaxed view of standing in the right case": at para. 59. She also noted that this difference is particularly acute in cases involving alleged systemic discrimination. In *British Columbia v. Crockford*, 2006 BCCA 360, Justice Levine explained:
>
> > [49] A complaint of systemic discrimination is distinct from an individual claim of discrimination. Establishing systemic discrimination depends on showing that practices, attitudes, policies or procedures impact disproportionately on certain statutorily protected groups: see *Radek* at para. 523. A claim that there has been discrimination against an individual requires that an action alleged to be discriminatory to proven to have occurred and to have constituted discrimination contrary to the *Code*. The types of evidence required for each kind of claim are not necessarily the same. Whereas a systemic claim will require proof of patterns, showing trends of discrimination against a group, an individual claim will require proof of an instance or instances of discriminatory conduct.
>
> [97] As is apparent from the foregoing, broad systemic constitutional challenges are a unique form of civil litigation, as are the form of pleadings and evidence required to advance and prove them. While material facts sufficient to ground such a challenge must be pleaded to enable the claim to serve as a foundation for public interest standing, cases such as *Downtown Eastside*, *British Columbia/Yukon Association of Drug War Survivors* and *British Columbia Civil Liberties Association v. Canada (Attorney General)* affirm that an individual plaintiff and plaintiff-specific material facts are not always necessary for a serious justiciable issue to be raised.
>
> [Emphasis added.]

[27] In its response to civil claim, the respondent identified the inadequacy of the pleadings in the following terms:

> 73. The Notice of Civil Claim consists of policy arguments with no material facts or proper legal basis pleaded in support.

> 74. The Notice of Civil Claim does not disclose any judicially discoverable or manageable legal standard but instead asks the Court to embark on a proceeding resembling a public inquiry.

[28] Further, in its response to the certification application, the respondent says:

> 43. To make out a reasonable cause of action, a pleading must contain the material facts necessary to address all of the constituent elements of a cause of action known to law. A "material fact" is a fact that is "essential to the formulation of a complete cause of action" *Young v. Borzoni et al*, 2007 BCCA 16 at para. 20.
>
> …
>
> 50. The amended notice of civil claim does not disclose any judicially discoverable or manageable legal standard but instead asks the Court to embark on a proceeding resembling a public inquiry.
>
> 51. The plaintiffs do not challenge any legislative provisions.
>
> 52. The proposed representative plaintiff has failed to plead specific circumstances but relies on generalities and conclusions.
>
> 53. There is no identified state action supporting a claim in damages. [Citations omitted.]
>
> 54. The plaintiffs' claim in negligence focuses on resource allocation and policy decisions and, as such, the plaintiffs have failed to establish a viable claim in negligence.
>
> 55. A claim in negligence requires proof of a private law duty of care. The pleaded facts must disclose a close and direct relationship of proximity in which a failure to take reasonable care could foreseeably cause loss or harm to the plaintiff class. [Citations omitted.]

[29] The respondent says the judge was right to find that the claim is "structurally flawed" because the appellants do not impugn a particular law or state action.

Consideration of inappropriate criteria: manageability

[30] The appellants say the judge erred by considering whether this action, if certified, would become unmanageable as too unwieldy. They say that is not a criterion expressly identified in the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, as one that ought to be considered when addressing certification. They say the question under s. 4(1)(a) of the *Class Proceedings Act* is whether the pleadings disclose a cause of action, not whether the cause of action is "manageable".

[31] The respondent says the appellants' complaint is that the judge erred by considering matters that only go to preferability when he was addressing the adequacy of the class definition and the existence of common issues. The respondent says the appellants "do not suggest he was wrong on preferability; they suggest only that he considered preferability under the wrong subheadings".

Erroneous consideration of the evidence

[32] The appellants contend the trial judge erred in law in his treatment of the evidence, by rejecting the expert testimony of Dr. Peter Jaffe and Dr. David Wolfe with respect to the damage effected by stigmatization of mental illness, even though that evidence was unchallenged. They say this amounted to placing an inappropriate burden on the appellants, and the class, by subjecting the case to exacting scrutiny.

[33] The respondent says that the evidence of the appellants' experts was evidently unreliable or inadmissible but "[m]ore fundamentally, individualized investigation would be required to determine how, if at all, the absence of a comprehensive strategy to combat stigma has affected a given class member".

Erroneous application of the test under s. 4(1)(b)

[34] The *Class Proceedings Act* requires the court to certify a class proceeding on an application if the requirements in s. 4(1) are met. Section 4(1)(b) requires that there be an identifiable class of two or more persons. The appellants contend the judge erroneously considered questions with respect to class definition when addressing this criterion.

[35] The judge found the proposed class to be inadequately defined. The class includes all persons who suffer from a long list of disorders, and includes persons whose illness has not been diagnosed, persons who have not sought any medical treatment and persons who are not satisfied with the care they have received. He considered the definition lacked the objective clarity necessary to permit members of the class to be notified, or to identify those entitled to relief and those bound by the judgment.

[36] The appellants say they have been and are prepared to modify the definition of the class to include only those who have been diagnosed with one of the described mental illnesses by a mental health professional. They say they meet the criteria that must be assessed in relation to the sufficiency of the definition of a class, as identified by the Chief Justice in *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at para. 82:

- the purposes of the identifiable class requirement are to determine who is entitled to notice, who is entitled to relief, and who is bound by the final judgment;
- the class must be defined with reference to objective criteria that do not depend on the merits of the claim;
- the class definition must bear a rational relationship to the common issues — it should not be unnecessarily broad, but nor should it arbitrarily exclude potential class members; and
- the evidence adduced by the plaintiff must be such that it establishes some basis in fact that at least two persons could self-identify as class members and could later prove they are members of the class.

[37] The appellants say there is nothing about the definition of the class in the *Class Proceedings Act* to suggest that persons who have not in fact been wronged, or who do not wish to sue, must be excluded from the definition. As the court noted in *Jones v. Zimmer GMBH*, 2011 BCSC 1198:

> [42] The fact that the class definition may contain persons who did not suffer any injury is an expected outcome of a class definition. As Cullity J. held in *Tiboni v. Merck Frosst Canada Ltd*., 2008 CanLII 37911 at para. 78 (Ont S.C.J.), "this is virtually ordained by the authorities that preclude merits-based class definitions." ...

[38] The respondent says there was no error in the judge's conclusion that the appellants' pleadings suffer from the same deficiency as the pleadings considered in *Monaco v. Coquitlam (City),* 2015 BCSC 2421. The class definition is overbroad in that it includes persons who would have no rational connection to the common issues proposed by the plaintiffs.

Application of the wrong test under s. 4(1)(c)

[39] Section 4(1)(c) requires consideration of the question whether claims of the class members raise common issues. The *Act* expressly provides that, at this stage,

the court should address the existence—rather than the predominance of—the common issues. The appellants say the judge placed too much weight upon the fact that admissions by the respondent reduced the scope of the common issues for resolution in the proceedings. They say it is an error to consider admissions at this point (and in particular the extent to which admissions resolve common issues), because admissions are not useful to the class plaintiffs until they are embodied in an order. Further, they contend the trial judge conflated the existence of common issues with the question of preferability.

[40] They say the existence, rather than predominance, of the common issues is the question and the judge wrongly addressed the latter, not the former: *Jones*; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924 (C.A.). The appellants place considerable reliance upon the following passage from the judgment of Chief Justice McLachlin in *Rumley*:

> [33] … I question the extent to which differences between the class members should be taken into account at this stage. The British Columbia *Class Proceedings Act* explicitly states that the commonality requirement may be satisfied "whether or not [the] common issues predominate over issues affecting only individual members": s. 4(1)(c). (This distinguishes the British Columbia legislation from the corresponding Ontario legislation, which is silent as to whether predominance should be a factor in the commonality inquiry.) While the British Columbia *Class Proceedings Act* clearly contemplates that predominance will be a factor in the preferability inquiry (a point to which I will return below), it makes equally clear that predominance should not be a factor at the commonality stage. In my view the question at the commonality stage is, at least under the British Columbia *Class Proceedings Act*, quite narrow.
>
> [Emphasis added.]

[41] The respondent says this complaint also amounts to an argument that the predominance of the common issues was considered "under the wrong subheadings".

[42] Relying on *Thorburn v. British Columbia (Public Safety and Solicitor General)*, 2013 BCCA 480 at para. 39, the respondent argues that while the commonality requirement has a low threshold, it was incumbent upon the judge to weigh the extent to which the determination of the proposed common issues would move the

litigation forward. As the Court noted in *Rumley*, at para. 29: “It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms.”

Erroneous consideration of preferability

[43] The appellants assert that the trial judge erred in his consideration of the preferability of a class proceeding in this case; however, they do not identify the nature of the error. The entirety of their submission on this point in their factum is:

> 89. The Chambers Judge premised his preferable procedure analysis on erroneous conclusions made in respect of other certification criteria; his determination cannot stand.

[44] The respondent says we should defer to the judge’s assessment of preferability, and there is no error in his analysis.

Failure to act judicially

[45] In their factum, the appellants contended the judge failed to act judicially. That submission was founded upon concerns with respect to predisposition. They wrote:

> 91. At the outset of the first judicial management conference, the Chambers Judge immediately and without prompting invited the Province to bring an application to strike the pleadings, citing his desire to avoid “another expensive, time-consuming quagmire related to the functioning of our provincial health system.” He stated that he did not want this action to “metastasize into something completely unwieldy,” referring to “taxpayers” being “burdened endlessly” with “litigation costs.” He made those statements without the benefit of substantive submissions or evidence from either party.

[46] That allegation was, properly in my view, abandoned at the hearing of the appeal. It should not have been made in the first place. It is right to say the pleadings in this case were evidently problematic from the outset. There is nothing inappropriate in a case management judge pointing out concerns with respect to the definition of the cause of action at the outset, provided, as here, that the certification application is clearly and comprehensively addressed in a fair and impartial manner.

Analysis

Standard of review

[47] In *Jiang* we held:

> [37] … The standard of review is governed by whether the impugned elements of a certification order are discretionary. To the extent that they are, this Court must review those elements on a highly deferential basis. However, to the extent that the chambers judge's order rests on a question of law, the standard of review is one of correctness (*Low v. Pfizer Canada Inc.*, 2015 BCCA 506 at para. 45).
>
> [38] The identifiable class and preferable procedure requirements involve the exercise of some discretion by the chambers judge. For these requirements an appellate court may only intervene where there is a palpable and overriding error of fact or where there is an error of principle (*Wakelam* at para. 9). However, for the s. 4(1)(a) requirement of whether the pleadings disclose a cause of action, the issue is one of law to be reviewed on a correctness standard (*Wakelam* at para. 8).

[48] In my view, this appeal turns upon whether the judge erred in concluding that the pleadings do not disclose a cause of action. This is a question of law, reviewed on a correctness standard.

[49] For the following reasons, I am of the opinion the judge correctly concluded that a common law duty of care is inadequately pleaded, and cannot be made out on the facts alleged. Further, I am of the view that, taking the allegations of fact pleaded to be true, the pleadings do not make out an arguable case that the appellants' s. 7 or s. 15(1) *Charter* rights have been breached, nor do they make out an arguable case for a s. 24 *Charter* remedy.

Proximity

[50] I should note at the outset of this analysis that, although the Court at the hearing of the appeal expressed concerns with respect to whether the appellants had adequately pleaded a relationship of proximity such as to give rise to a duty of care, that issue is not before us. For reasons canvassed in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, and our recent decision in *Canada (Attorney General) v. Frazier*, 2022 BCCA 379, the appellants faced a significant hurdle in attempting to establish that there was a relationship of proximity between the government and

individual members of the public potentially affected by the alleged failure to exercise legislative powers. However, counsel directed us to an excerpt from the submissions at the certification hearing, where counsel for the respondent indicated that proximity was not then in issue. He said:

> The question at the first stage is -- is whether there is sufficient proximity and there is a great deal of jurisprudence on proximity and it's – it's often at issue in these sorts of cases. It's not at issue before you today. We don't concede anything. We're not admitting that there's proximity. If there is a common issues trial proximity will be vigorously disputed there, but for today, for this certification application, we have not made an issue of proximity.
>
> [Emphasis added.]

[51] In my view, we should not decide the appeal on an issue not fully argued at the certification hearing, because the question was conceded for present purposes. However, nothing in the analysis that follows should be taken as indicating that, on the facts as pleaded in this case, there is a relationship of proximity such as to give rise to a duty of care on the part of government.

Inadequate pleadings

[52] In my view, the question of the adequacy of the pleadings was clearly before the chambers judge. I accept that the judge did not consider the broad leeway given to plaintiffs mounting systemic constitutional challenges, but that leeway does not extend to parties, such as the appellants K.O. and J.O., seeking damages for the breach of a private law duty of care owed to them by the respondent. For substantially the reasons of the certification judge, I am of the view that the pleadings do not make out a private law cause of action in negligence.

[53] If any claim in this case meets the relatively low threshold described in *Council of Canadians with Disabilities*, it is only the claim for relief arising out of the alleged *Charter* breaches.

Mischaracterization of the appeal

[54] Insofar as the *Charter* claims are concerned, much of what is said by Justice Pardu, for the majority, in *Tanudjaja*, is applicable in this case. There, the plaintiffs

argued the federal government had "either taken no measures, and/or have taken inadequate measures, to address the impact of … changes [to legislation, policies, programs and services which have resulted in homelessness and inadequate housing in Canada and Ontario] on groups most vulnerable to, and at risk of, becoming homeless": *Tanudjaja* at para. 9. They alleged Canada and Ontario had "failed to undertake appropriate strategic coordination to ensure that government programs effectively protect those who are homeless or most at risk of homelessness."

[55] The motion judge struck the claim on the basis that it was plain and obvious it could not succeed; the claim disclosed no reasonable cause of action and was not justiciable.

[56] On appeal, the court held:

> [20] As indicated in *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49, [1989] S.C.J. No. 80, at pp. 90-91 S.C.R., "[a]n inquiry into justiciability is, first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue, or instead deferring to other decision making institutions of the polity".
>
> [21] Having analyzed the jurisprudence relating to justiciability in Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed. (Toronto: Carswell, 2012), the author identified several relevant factors, at p. 162:
>
> > Political questions, therefore, must demonstrably be unsuitable for adjudication. These will typically involve moral, strategic, ideological, historical or policy considerations that are not susceptible to resolution through adversarial presentation of evidence or the judicial process. Justiciable questions and political questions lie at opposing ends of a jurisdiction spectrum.
> >
> > . . . . .
> >
> > [T]he political nature of a matter raises two related dilemmas for courts. The first is the dilemma of institutional capacity. Courts are designed to make pronouncements of law. Arguably, they accomplish this goal more effectively and efficiently than any other institution could. Where the heart of a dispute is political rather than legal, however, courts may have no particular advantage over other institutions in their expertise, and may well be less effective and efficient than other branches of government in resolving such controversies, as the judiciary is neither representative of the political spectrum, nor democratically accountable.

> [22] A challenge to a particular law or particular application of such a law is an archetypal feature of *Charter* challenges under s. 7 and s. 15. As observed in *Canada Assistance Plan (Re)*, [1991] 2 S.C.R. 525, [1991] S.C.J. No. 60, at p. 545 S.C.R.:
>
> > In considering its appropriate role the Court must determine whether the question is purely political in nature, and should therefore be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch.

[57] Justice Pardu distinguished cases relied upon by the appellants, *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, and *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, as challenges to specific state actions or laws, and noted that the appellant Tanudjaja challenged no law. As a result, she held "there is no sufficient legal component to engage the decision-making capacity of the courts": *Tanudjaja* at para. 27.

[58] Further, the claim in *Tanudjaja*, like the claim advanced by the appellants in this case, was "diffuse and broad", and the adequacy of the remedy was incapable of measurement:

> [32] Moreover, the diffuse and broad nature of the claims here does not permit an analysis under s. 1 of the *Charter*. As indicated in *R. v. Oakes*, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7, in the event of a violation of a right guaranteed by the *Charter*, the legislation will nonetheless be sustained if the objective of the legislation is pressing and substantial, the rights violation is rationally connected to the purpose of the legislation, the violation minimally impairs the guaranteed right and the impact of the infringement of the right does not outweigh the value of the legislative object. Here, in the absence of any impugned law there is no basis to make that comparison.
>
> [33] Finally, there is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate or whether insufficient priority has been given in general to the needs of the homeless. This is not a question that can be resolved by application of law, but rather it engages the accountability of the legislatures. Issues of broad economic policy and priorities are unsuited to judicial review. Here, the court is not asked to engage in a "court-like" function, but rather to embark on a course more resembling a public inquiry into the adequacy of housing policy.

[59] In my view, all that is said in these passages is applicable to the case at bar. The diffuse and broad nature of the appellants' claims does not permit an analysis of the government's potential defence under s. 1 of the *Charter* (if it is a law or policy that is challenged), or of the proportionate balancing of *Charter* rights (if the

challenge is to government action). The amended notice of civil claim does not identify any specific acts, legislative or otherwise, that are said to infringe the *Charter*, making it impossible to complete either the justification or proportionate balancing stage of the *Charter* analysis. More importantly, here, there is no judicially discoverable and manageable standard for assessing, in general, whether the government's response to mental health stigma is adequate, or whether insufficient priority has been given in general to the needs of those diagnosed with mental illness. These are not questions that can be resolved by application of law. They engage the accountability of the legislatures.

[60] The appellants seek to have certified an action that does not engage a "court-like" function.

[61] Further, in my view, the chambers judge in the case at bar was right to distinguish *Eldridge*. That case turned upon whether the provision of sign language interpreters for deaf patients in the hospital was properly considered to be an ancillary service (and thus a new benefit) or, rather, part of the core benefit afforded by the legislation. Justice La Forest, for the Court, wrote:

> [68] Having determined that sign language interpretation is a discrete, non-medical "ancillary" service, the courts below were able to conclude that the appellants were not denied a benefit available to the hearing population.
> …
> [69] While this approach has a certain formal, logical coherence, in my view it seriously mischaracterizes the practical reality of health care delivery. Effective communication is quite obviously an integral part of the provision of medical services…That adequate communication is essential to proper medical care is surely so incontrovertible that the Court could, if necessary, take judicial notice of it. As Professor Pothier observes, for the hearing population "conversation between doctor and patient is so basic to the provision of medical services that it is taken for granted"; see Dianne Pothier, "M'Aider, Mayday: Section 15 of the *Charter* in Distress" (1996), 6 *N.J.C.L.* 295, at p. 335.

[62] In exercising the discretion delegated to it to determine whether a service is a benefit pursuant to s. 4(1) of the *Medical and Health Care Services Act*, S.B.C. 1992, c. 76 (now the *Medicare Protection Act*, R.S.B.C. 1996, c. 286), the Medical Services Commission was implementing a government policy to ensure that

all residents receive medically required services without charge. The Commission was obliged to give effect to *Charter* equality guarantees when doing so.

[63] In the case at bar, no particular benefit is said to be unavailable to the plaintiffs, and no specific omission or lacuna in a government program is identified as a problem that can or must be remedied in order to effect equality. The fact the appellants are unable to describe a measure that will remedy the obstacle posed by stigma reflects the fact that the alleged failure to address stigma is not a gap in the provincially-funded healthcare program.

[64] Just as stigma affects medical care so, presumably, does it affect education, employment, housing and social services. It is a problem that arguably affects the delivery of all government programs. Similarly, racism, homophobia, ageism and a host of prejudices resemble the stigma faced by persons with mental illness as pervasive problems that may affect the delivery of government programs.

[65] In *Ferrel v. Ontario (Attorney General of)* (1998), 42 O.R. (3d) 97, 1998 CanLII 6274 (C.A.), Associate Chief Justice Morden addressed the allegation that the appellants' s. 15 *Charter* rights had been infringed by the repeal of employment equity legislation. He held that the repeal of the legislation was indicative of the government's policy choices. There, as in the case at bar, the existence of the social problem—discriminatory employment practices—was not disputed, nor was the fact that the problem deserved the attention of government. Associate Chief Justice Morden found that the s. 15(1) claim raised two issues:

a) whether s. 15(1) implies a correlative positive duty on governments to give effect to the right in the form of legislation; and

b) whether s. 15(1) imposes upon government an obligation to enact laws the constitutional adequacy of which would be subject to judicial review under the *Charter*.

The manner in which he addressed these two questions is instructive:

> If it is thought that the term "the right" in s. 15(1) implies a correlative positive duty on governments to give effect to the right in the form of legislation, there are three answers. The first is indicated in what I have just said -- that the right is not a generalized one to have equality interests advanced. The second relates to the fundamental scheme of the *Charter* under which "the right" is vindicated by s. 52(1) which provides, in the present context, that any law which is inconsistent with s. 15(1) "is, to the extent of the inconsistency, of no force or effect". Third, as far as the immediate context of s. 15(1) is concerned, the obligation purportedly imposed by s. 15(1) to enact employment equity legislation would be inconsistent with s. 15(2) which may be said both to shield and encourage legislation of this kind …
>
> Finally, if it is thought that s. 15(1) imposes an obligation to enact employment equity legislation, what is the nature and scope of the obligation? A court is not competent to answer this question in a satisfactory way. It is a question that is not justiciable. Legislatures require substantial freedom in designing the substantive content, procedural mechanisms, and enforcement remedies in legislation of this kind. They are the appropriate branch of government to make these decisions, not courts working from the general terms of s. 15(1).
>
> In this vein, what would be the constitutional minimum content of employment equity legislation? Would it be all of the measures in the 1993 legislation, which contained some 59 sections? If not, what is the minimum? Considerations of this nature are further indications that it would not be sensible to interpret s. 15(1) as imposing an obligation to enact laws the constitutional adequacy of which would be subject to judicial review under the *Charter*.

[66] The Supreme Court of Canada's decision in *R. v. Sharma*, 2022 SCC 39, rendered in November 2022, after the judgment in the case at bar, clarifies the scope of the judgment in *Eldridge* upon which the appellants placed significant weight at the certification hearing. In *Sharma*, the majority resolved what the Court referred to as "three particular uncertainties associated with the s. 15(1) framework", with a view to assisting parties to *Charter* challenges, judges adjudicating them, and legislators seeking to further s. 15's equality guarantee (at para. 32):

> (a) whether the claimant must prove that the impugned law or state conduct *caused* (in the sense of *created or contributed to*) the disproportionate impact on the claimant;
>
> (b) whether *the entire legislative context* is relevant to the s. 15(1) inquiry; and
>
> (c) whether s. 15(1) imposes a *positive obligation* on the legislature to enact remedial legislation, and relatedly, whether the legislature can *incrementally* address disadvantage.

[67] Writing for the majority, Justices Brown and Rowe noted:

> [62] … [I]t is important to confirm two principles related to the government's obligations under s. 15(1).
>
> [63] First, s. 15(1) does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation (*Thibaudeau v. Canada*, [1995] 2 S.C.R. 627, at para. 37; *Eldridge*, at para. 73; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657, at para. 41; *Alliance*, at para. 42). Were it otherwise, courts would be impermissibly pulled into the complex legislative domain of policy and resource allocation, contrary to the separation of powers. In *Alliance*, this Court struck down amendments to Quebec's pay equity legislation that "interfere[d] with access to anti-discrimination law" by undermining existing legislative pay equity protections (para. 39). But in so doing, Abella J. expressly *declined* to impose a "freestanding positive obligation on the state to enact benefit schemes to redress social inequalities" (para. 42). The Court further affirmed that s. 15(1) does not bind the legislature to its current policies …
>
> [64] Secondly, this Court in *Alliance* confirmed that, when the state does legislate to address inequality, it can do so *incrementally*:
>
> > The result of finding that Quebec's amendments breach s. 15 in this case is not, as Quebec suggests, to impose a freestanding positive obligation on the state to enact benefit schemes to redress social inequalities. Nor does it undermine the state's ability to act incrementally in addressing systemic inequality. [Emphasis added [by Brown and Rowe J.J.]; para. 42.]
>
> [65] Incrementalism is deeply grounded in *Charter* jurisprudence. In *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, the Court accepted that the state may implement reforms "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind" (p. 772 (emphasis added)). Expanding on the passage in *Edwards Books*, La Forest J. confirmed in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, that a legislature "must be given reasonable leeway to deal with problems one step at a time, to balance possible inequalities under the law against other inequalities resulting from the adoption of a course of action, and to take account of the difficulties, whether social, economic or budgetary, that would arise if it attempted to deal with social and economic problems in their entirety" (p. 317). He also emphasized that, generally, courts "should not lightly use the *Charter* to second-guess legislative judgment as to just how quickly it should proceed in moving forward towards the ideal of equality" (p. 318). See also *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429; and *Auton*, at paras. 61-62.

[68] In my view, these passages affirm the principles upon which the judge in the case at bar relied in concluding that there is no reasonable prospect the appellants

can establish that the failure to address mental illness stigma amounts to a breach of s. 15(1) of the *Charter*.

[69] Further, the jurisprudence supports the chambers judge's conclusion that s. 7 of the *Charter* does not impose a duty upon the government to enact policies addressing discrete social problems, or to confer a benefit upon individuals. As the Ontario Court of Appeal recently affirmed in *Leroux*:

> [77] … [T]o make out a deprivation of a s. 7 right, claimants cannot point to the government's failure to provide a financial benefit, even if such a benefit may be necessary to sustain life, liberty, or security of the person: see *Wynberg*, at paras. 218-220; *Flora v. Ontario (Health Insurance Plan, General Manager)*, 2008 ONCA 538, 91 O.R. (3d) 412, at para. 108. This court has upheld the striking of a s. 7 claim at the pleadings stage when the claim alleged that the deprivation stemmed from the state's failure to provide access to publicly-funded autism therapy services for children since "[g]overnment action in not providing specific programs … cannot be said to *deprive* [the claimants] of constitutionally protected rights": see *Sagharian v. Ontario (Education)*, 2008 ONCA 411, 172 C.R.R. (2d) 105, at paras. 52-53, leave to appeal refused, [2008] S.C.C.A. No. 350 (emphasis in original).

[70] For that reason, I would dismiss the appeal.

[71] That being the case, it is not necessary to address the appellants' submission that the judge erred in his analysis of the remaining criteria under s. 4 of the *Class Proceedings Act*. I will only say there is some merit in the appellants' contention that the judge did not conduct the discrete analysis of the statutory criteria that is called for and described in *Rumley*; however, there is also merit in the respondent's argument that, in this case, that simply amounts to a complaint that the preferability analysis occurred under the wrong heading.

[72] I would dismiss the appeal.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Madam Justice DeWitt-Van Oosten"

I agree:

"The Honourable Madam Justice Horsman"

Appendix

Common Issues for Certification

a) During the Class Period, what policies, practices, and systems, if any, did the Province have in place to address stigmatization of mental illness in the British Columbia public health care system?

b) Were such measures comprehensive, system-wide, and effective?

c) What systemic impacts, if any, does stigmatization of mental illness have on the quality and accessibility of British Columbia public health care services for members of the Main Class?

d) Did the Province breach s. 15(1) of the *Charter* in relation to Main Class members? Specifically:

   i. Does stigmatization of mental illness in the British Columbia public health care system have a disproportionate impact Main Class members? If so, when and how?

   ii. If stigmatization of mental illness in the British Columbia public health care system has a disproportionate impact on Main Class members, is this based on an enumerated or analogous ground under s. 15(1) of the *Charter*?

   iii. If stigmatization of mental illness in the British Columbia public health care system has a disproportionate impact on Main Class members, does this perpetuate, reinforce or exacerbate disadvantage for members of the Main Class?

e) Did the Province breach s. 7 of the *Charter* in relation to Main Class members? Specifically:

   i. Does the stigmatization of mental illness in the British Columbia public health care system directly or indirectly increase the risk of or cause

death for Main Class members, thereby engaging the right to life under s. 7 of the *Charter*?

ii. Does the stigmatization of mental illness in the British Columbia public health care system result in physical or serious psychological suffering for Main Class members, thereby engaging the right to security of the person under s. 7 of the *Charter*?

iii. If stigmatization of mental illness in the British Columbia public health care system deprives Main Class members of the right to life or security of the person, is this contrary to the principle of arbitrariness?

f) If the Province breached ss. 15(1) or 7 of the *Charter*, can the Province demonstrably justify, by resort to s. 1, that the breach is a reasonable limit on rights imposed in the context of a free and democratic society?

g) If the Province breached the *Charter* and the breaches are not saved by s. 1, are Main Class members entitled to *Charter* damages? Specifically:

i. Does an award of *Charter* damages serve a compensation, vindication, or deterrence function?

ii. Can the Province show that countervailing factors negate the compensation, vindication, or deterrence function of a *Charter* damages award?

iii. Does a heightened per se liability threshold apply to the *Charter* damages claims of the Main Class? If so, what is the threshold, and has it been met?

iv. If *Charter* damages are recoverable, what amount should be paid, and how shall it be distributed among members of the Main Class?

h) Did the Province breach a common law duty of care? Specifically:

   i. During the Class Period, did the Province owe Main Class members a duty of care to address mental illness stigmatization in the British Columbia public health care system? If so, when did this arise?

   ii. What is the applicable standard of care?

   iii. Did the Province breach the standard of care? If so, when and how?

i) If Main Class members are entitled to recover damages, are “in-trust” damages available for members of the Family Class? Specifically:

   i. What level of familial relationship between a Family Class member and a Main Class member is required to recover damages?

   ii. What level of personal care is required for a Family Class member to recover damages, and how shall this compensation be determined?

j) Did the Province's response (or lack thereof) to stigmatization of mental illness in the British Columbia public health care system constitute egregious or highhanded conduct justifying an award of punitive or aggravated damages? If so, what amount should be paid, and how shall it be distributed among members of the Main Class?

k) If Class members are entitled to damages, can the amount or some portion thereof be determined on an aggregate basis under s. 29 of the *Class Proceedings Act*? If so, what amount should be paid, and how shall it be distributed among members of the Main Class?

l) What procedures should apply to the determination of any individual questions which remain after determination of the common issues, pursuant to s. 27 of the *Class Proceedings Act*?

[Emphasis added.]