

Federal Court



Cour fédérale

Date: 20250606

Docket: T-116-23

Citation: 2025 FC 1029

Ottawa, Ontario, June 6, 2025

PRESENT: Madam Justice McDonald

CLASS PROCEEDING

BETWEEN:

JENNY FERRIS

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

[1] On this contested Motion, the Representative Plaintiff, Jenny Ferris, asks the Court to certify a class proceeding pursuant to Rule 334.16 of the *Federal Courts Rules*, SOR/98-106 [Rules]. The proposed class proceeding is brought on behalf of post-secondary students with

permanent disabilities who accumulated “Excess Debt” as a result of the operation of the Canada Student Loans Program (CSLP). In the Statement of Claim (Claim), the Plaintiff alleges that students with permanent disabilities incurred Excess Debt due to discriminatory practices under the CSLP, contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

[2] Canada opposes the certification of this Action as a class proceeding arguing that there is no reasonable cause of action disclosed for a s. 15(1) *Charter* claim. Canada also argues that the criteria for certifying this matter a class proceeding cannot be met.

[3] On a motion for certification of a class proceeding, the Court does not assess the merits of the claim nor assess if the claims will ultimately succeed. Rather, the task on a certification motion is to consider if the claim, as pleaded, can proceed as a class proceeding based upon the requirements in the *Rules* and the relevant jurisprudence.

[4] In this case, I am satisfied that this claim can move forward as a class proceeding with the proposed Representative Plaintiff and the proposed class definition. I am not prepared to certify common question (c) as it is currently worded in relation to the Ontario Superior Court in *Simpson v Canada (Attorney General)*, 2020 ONSC 6465 [*Simpson*]. At this stage, I cannot conclude that *Simpson* is binding on this Court or on the facts alleged. I will, however, certify this matter as a class proceeding conditional on the Plaintiff amending common question (c) to remove the reference to *Simpson*. Otherwise, I will certify the balance of the proposed common questions, and I am satisfied that the requirements of Rule 334.16 are met.

I. Overview

A. *The Action*

[5] In the Statement of Claim filed on January 12, 2023, Ms. Ferris alleges that the CSLP discriminates against post-secondary students with permanent disabilities by causing them to incur “Excess Debt”—a defined term—as compared to students without permanent disabilities. This discrimination, she argues, violates s. 15(1) of the *Charter*. The claim is brought on behalf of all students who incurred student debt between August 1, 1995 and the date of certification, have a permanent disability that extended their education, and did not receive sufficient repayment assistance.

[6] At paragraph 15 of the Claim, Ms. Ferris states that the CSLP operates on a “Time in Study Structure”, meaning a student’s debt increases with the amount of time it took that student to complete, or attempt to complete their course of study. Under this structure, a student’s total loan amount is determined by the number of semesters required to complete or attempt to complete their course of study, meaning higher debt for students who take longer. As well, the borrowing rate escalates when a student ceases to be classified as a dependent, which occurs four years post-high school or two years after entering the labor market.

[7] Ms. Ferris claims that the “Time in Study Structure” disproportionately impacts students with permanent disabilities, who often take longer to complete their studies due to their disabilities, resulting in additional “Excess Debt”.

[8] “Excess Debt” is a term defined in the Claim as “the Student Debt that a Student would not have incurred if they did not have a Permanent Disability that caused them to extend their course of post-secondary education. For greater certainty, this includes any interest or penalties on debt incurred due to the extension of their post-secondary education.”

[9] “Permanent Disability” is defined in the Claim as “a functional limitation caused by a physical or mental impairment that restricts the ability of a person to perform the daily activities necessary to participate in studies at a post-secondary school level or the labour force and is expected to remain with the person for the person’s expected life.”

[10] Ms. Ferris, on behalf of the Class, seeks the following relief in addition to the certification of the action as a class proceeding:

- (b) A declaration that the Excess Debt is unconstitutional, being in breach of section 15 of the *Charter*;
- (c) A declaration that the Class is not required to pay any outstanding Excess Debt, or any interest or penalties thereon; and
- (d) Damages under section 24 of the *Charter* in the amount of all payments made by Class to Canada or one of the Provinces on account of the Excess Debt;

B. *Proposed Representative Plaintiff*

[11] The proposed Representative Plaintiff, Jenny Ferris, provided Affidavits affirmed on August 17, 2023, and March 30, 2024. She includes transcripts, student loan information, and

information about her graduate studies. Below I will summarize the portions of her Affidavits that outline her education and how she has accrued Excess Debt.

[12] Ms. Ferris was born blind. On October 25, 1979, she was adopted from India and moved to London, Ontario with her adoptive family. In early 1981, the family relocated to Whitehorse, Yukon, where she grew up and attended elementary and high school. She states she was the first blind person to graduate from a public high school in Yukon.

[13] Ms. Ferris began her undergraduate studies at Yukon College in September 1993. She states that, due to the lack of accessible braille textbooks, she had to rely on audio cassettes which arrived late in the semester. This delay led to her failing all courses in her two semesters at Yukon College.

[14] In January 1995, Ms. Ferris enrolled at Malaspina College in British Columbia, where she still lacked braille textbooks and had to rely on classmates reading aloud as an accommodation. This forced her to take a reduced course load, resulting in five semesters of study to earn 19.50 transfer credits, which is equivalent to approximately three semesters.

[15] Ms. Ferris transferred to the University of Victoria in September 1997, where she could print electronic versions of textbooks into braille. However, she continued to study at a reduced course load. She graduated in 2001 with a Bachelor of Arts in Psychology after 18 semesters of post-secondary education. The Yukon Grant covered 10 semesters, but she had to take out student loans for the remaining eight (8) semesters, resulting in Excess Debt.

[16] From 2001-2010, Ms. Ferris pursued a Master's Degree in Public Administration at the University of Victoria, taking one course per semester due to her disability. She graduated in June 2010 after 17 semesters of graduate education. A Yukon grant covered two semesters, but she obtained student loans for the remaining semesters, leading to further Excess Debt. Additionally, breaks due to fatigue and exhaustion caused interest to accumulate on her student loans.

[17] On June 30, 2010 Ms. Ferris began repaying her student loans totaling \$55,887.75. Her application for debt forgiveness was denied. She was later granted extended repayment terms and approved for interest-only payments. Ms. Ferris alleges that the accumulated debt and interest is Excess Debt and was accumulated due to the extended time required for her studies because of her permanent disability.

[18] Since 2023, Ms. Ferris has been employed as a Policy Analyst with the Treasury Board of Canada.

C. *Evidence*

[19] In addition to the Affidavits of Jenny Ferris, the Plaintiff filed the following Affidavits from potential class members, each of whom have permanent disabilities and have debt from the CSLP:

- (a) Affidavit of Andrew Fenwick affirmed August 17, 2023.
- (b) Affidavit of Kinnery Chaparrel affirmed August 18, 2023.

(c) Affidavits of Christine Roschaert affirmed August 18, 2023 and March 31 2024.

[20] The Plaintiff has also filed expert Affidavit evidence as follows:

- (a) Affidavits of Adele Furrie affirmed August 17, 2023 and March 19, 2024. Ms. Furrie was retained to provide an expert opinion on (1) whether there is a credible and plausible methodology for determining whether the Class (as defined in Paragraph 1.(c) in the Statement of Claim) was financially impacted by the conduct alleged; (2) if so, whether such a methodology would likely enable me to reliably quantify loss on a class-wide basis for students with disabilities who accumulate Excess Debt over the relevant period of August 1, 1995, to the date of certification; and (3) whether the data required to carry out the methodology are likely available.
- (b) Affidavits of Alex Usher sworn August 17, 2023 and April 5, 2024. Mr. Usher is presented as an expert on post-secondary education. He includes a report he co-authored entitled the *Price of Knowledge*, as well as several other reports on the costs of post-secondary education.

[21] On this Motion, Canada filed the following evidence:

- (a) Affidavit of Jonathan Wallace, affirmed February 14, 2024. Mr. Wallace is the Director General of the Canada Student Financial Assistance Program within

Employment and Social Development Canada. His affidavit includes annual reports on the administration of the *Canada Student Financial Assistance Act*; supplementary Statistical Reviews related to the annual reports that provide detailed data on grants, loans, repayment assistance, copies of Canada's "integration agreements" with several provinces and a harmonization and integration agreement with Ontario;

- (b) Affidavit of Dajin Li, affirmed February 14, 2024 who is the Manager of the Student Aid Analytics Team within the Canada Student Financial Assistance Program at Employment and Social Development Canada. His affidavit is in reply to the Usher Affidavit.
- (c) Affidavit of Nicholas Leclair, sworn February 14, 2024. Mr. Leclair is the Manager, Client Services Division of the Canada Student Financial Assistance Program within Employment and Social Development Canada.

II. Issues

[22] The issue on this Motion is whether this claim should be certified as a class proceeding. Rule 334.16(1) sets out the five conditions that must be met for an action to be certified as a class proceeding:

- A. Reasonable cause of action,
- B. Identifiable class,
- C. Common questions,
- D. Preferable procedure, and

E. Representative plaintiff.

[23] When these five conditions are met, Rule 334.16(1) states that the Court “shall” certify the proceeding as a ‘class proceeding’.

III. Analysis

A. *Reasonable cause of Action considerations*

[24] In assessing if the pleadings disclose a reasonable cause of action, the Court does not assess the merits of the Claim but assumes that the facts outlined in the Claim are true or capable of proof. Certification will only be denied if it is “plain and obvious” that no claim exists (*Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 63 [*Pro-Sys*]). A claim that has no reasonable prospect of success will not satisfy the first condition of Rule 334.16 (*Canada (Attorney General) v Nasogaluak*, 2023 FCA 61 at para 18 [*Nasogaluak*]).

[25] Here, the Claim is that the operation of the CSLP discriminates against students with permanent disabilities, causing them to incur Excess Debt. This discrimination arises because students with disabilities often need more time to complete their studies due to various disability-related challenges, such as needing remedial courses, alternative or special courses, and taking breaks due to illness. As a result, they accumulate more debt compared to their peers without disabilities.

[26] The Claim is that the adverse impacts of this Excess Debt include increased financial pressure to drop out of their studies, reinforcing stereotypes about their intellectual abilities, lower employment rates, salaries, and lifetime wealth. These impacts exacerbate existing disadvantages faced by people with disabilities, such as lower educational attainment, higher costs of education, and non-eligibility for scholarships. The Claim alleges that failing to forgive the Excess Debt discriminates against students with disabilities by denying accommodation for their needs. The Claim alleges that this is a form of adverse impacts discrimination under s. 15 of the *Charter*, specifically on the basis of mental and physical disability. This is pleaded at paragraphs 17–23 in the Claim:

C. The Adverse Impacts on Students with Permanent Disabilities

17. On average, Students with Permanent Disabilities take longer to complete their course of studies. While not all Students with Permanent Disabilities take longer, all members of the Class took longer for reasons directly or indirectly caused by their disabilities. The reasons include:
 - (a) **Remedial Courses or Preparatory Years:** Some Students with Permanent Disabilities must take additional courses or preparatory years as a result of their Permanent Disabilities. For example, a Student with dyslexia might need to take a remedial course or semester in reading before starting other courses. By postponing other courses, these courses extend the length of these Students' courses of study.
 - (b) **Alternative or Special Courses:** Some Students with Permanent Disabilities take alternative or special courses as a result of their Permanent Disabilities. For example, a post secondary institution may offer one program taught in American Sign Language, but that program extends over more semesters than a comparable inaccessible program. Alternatively, accommodating supports may be offered intermittently, requiring Students

with Permanent Disabilities to postpone other courses and extend the length of their course of study.

- (c) **Withdrawal Due to Illness or Time to Recover:** Some Students with Permanent Disabilities may be unable to perform their academic work for stretches of time. For example, a Student with epilepsy, schizophrenia, psychosis, or Crohn's disease might have to stop working during an episode or flare up. A Student with carpal tunnel syndrome, arthritis, or chronic pain may have to take breaks after physical exertion. A Student with chronic fatigue syndrome, an intellectual disability, or an acquired brain injury might have to take breaks after mental exertion. These Students may need to take fewer courses per semester so that they have time to take these breaks, extending the length of their course of study. Alternatively, a Student may, due to illness, be forced to withdraw without completing the semester. The Student's failure to successfully complete the semester means that they must repeat it, extending the length of their course of study.
- (d) **Time to Access Supports:** Some Students with Permanent Disabilities may require supports for their disabilities which require them to spend more time on coursework. For example, a deaf or blind Student might need to wait to study or start assignments until course materials are provided to them in a format they can understand. This is exacerbated by any limits on the interpreter's availability, or if the interpreter needs prep time to understand technical jargon. These delays may require that Student to take fewer courses per semester, extending the length of their course of study.
- (e) **Administrative Delays in Getting Supports:** Some Students with Permanent Disabilities who need supports must obtain those supports before starting classes. The institutions they attend may take a while to approve or implement those supports, requiring those Students to delay courses, which extends the length of their course of study.

- (f) **Cost of Supports:** Some Students with Permanent Disabilities who need supports must work part time – while remaining full-time Students for purposes of the Student Loan Program – to pay for those supports. This takes time away from their studies, so those Students cannot take as many courses per semester, extending the length of their course of study.
- (g) **Effects of Failure to Get Supports:** Some Students with Permanent Disabilities who need supports do not get those supports, and therefore fail a class and must take it again. This extends the length of their course of study.

- 18. Thus, on average, Students with Permanent Disabilities end up with more Student Debt than similarly-situated Students without Permanent Disabilities.
- 19. In some cases, the Excess Debt forces Students with Permanent Disabilities to withdraw from their course of study before they are finished, which simultaneously accelerates the repayment schedule and leaves them without the academic credential which would have allowed them to earn enough to repay their Student Debt. If these Students decide to return to their course of study, the cost of doing so after the pause is likely to be higher due to inflation.
- 20. In some cases, Students with Permanent Disabilities must take more classes than they are physically, mentally, or emotionally able to bear simply to extend the Grace Period. This can adversely affect their academic performance or their health, and even exacerbate their disabilities.
- 21. Collectively, the impacts described above in paragraphs 18-20 are the “Adverse Effects”.

D. The Adverse Effects Reinforce Existing Disadvantages

- 22. People with Permanent Disabilities experience six relevant existing disadvantages.
 - (a) **Intelligence Stereotypes:** People with Permanent Disabilities face stigma because of the stereotype

that they are not as smart as people without Permanent Disabilities.

- (b) **Lower Educational Attainment:** On average, people with Permanent Disabilities have lower levels of educational attainment than people without Permanent Disabilities, and their rate of educational attainment is in decline.
- (c) **Higher Cost of Education:** In addition to the costs of disability supports, some Students with Permanent Disabilities may need to attend specialized educational institutions for their own disabilities, which are more expensive. For example, deaf Students cannot get the same level of accommodation at a Canadian university as they can get at Gallaudet University, in the United States, which is more expensive.
- (d) **Non-Eligibility for Scholarships:** Many scholarships, bursaries, and awards are only available to students in full-time education. As discussed above, some Students with Permanent Disabilities cannot pursue full-time studies due to their disabilities.
- (e) **Lower Employment and Salaries:** In part due to lower educational attainment, on average, people with Permanent Disabilities are less likely to be employed, and have lower salaries when they are employed, than people without Permanent Disabilities.
- (f) **Less Lifetime Wealth:** In part due to the higher cost of education, non-eligibility for bursaries, and lower employment and salaries, on average, people with Permanent Disabilities have less lifetime wealth than people without Permanent Disabilities.

23. The Adverse Effects imposed on Students by the Student Loan Program reinforces these disadvantages, increasing the headwinds faced by disabled people.

- (a) The Excess Debt reinforces higher costs of education and lower lifetime wealth.

- (b) The fact that Excess Debt prevents some Students with Permanent Disabilities from completing their studies prevents those Students from using academic credentials to counter intelligence stereotypes and exacerbates lower employment and salaries. It also reduces their visibility in student bodies at educational institutions. In turn, all of these effects reinforce intelligence stereotypes.
- (c) Some Students with Permanent Disabilities must over-extend themselves to avoid Excess Debt, resulting in lower academic performance. That reinforces intelligence stereotypes, limits the degree to which those Students can use their academic credentials to counter intelligence stereotypes, and reinforces lower employment and income.
- (d) Some Students with Permanent Disabilities must over-extend themselves to avoid Excess Debt, resulting in further health consequences and further medical costs to treat those health consequences. That reinforces less lifetime wealth.

[27] At paragraphs 24–27 of the Claim, the Plaintiff outlines the findings in *Simpson* where the court found that the operation of the CSLP and the Ontario Student Assistance Program (OSAP) infringed on Ms. Simpson’s equality rights under s. 15(1) of the *Charter*. In *Simpson*, it was found that the operation of the CSLP drew a distinction based on the plaintiff’s disability resulting in her taking longer to complete her post-secondary studies, and that by not redressing the adverse effects of this distinction through the operation of the CSLP, it perpetuated her disadvantage as a person with disabilities (*Simpson* at para 337). The court also concluded that the infringement of Ms. Simpson’s s. 15(1) rights were not saved under s. 1 of the *Charter* (*Simpson* at para 367). The court declined to order *Charter* damages but ordered that

Ms. Simpson's debts arising from this discriminatory application be forgiven and that the monies paid by her be returned (*Simpson* at paras 382-385).

[28] At paragraphs 29-47 of the Claim, the Plaintiff details her post-secondary experiences and the repayment process.

(1) Does this Claim disclose a reasonable cause of action?

[29] The core of the Claim is that the operation of the CSLP breaches s. 15 of the *Charter*. Legal counsel for the Plaintiff asserts that Canada is bound by the findings in *Simpson* (because they did not appeal) and therefore Canada cannot argue in this case that the Plaintiff's *Charter* claim will fail. In response, Canada argues that the s. 15 law has evolved since the decision in *Simpson* and, in any event, *Simpson* is not binding on this Court.

[30] The ultimate significance of the *Simpson* decision to this proposed class proceeding would require the consideration of several factors, including the factual similarities or differences and the evidentiary record. Those considerations are beyond the mandate of the Court on a certification motion. To the extent that *Simpson* addresses similar facts and the same or similar programs, I accept that the decision may indeed be persuasive. However, it is premature at this stage to assess the impact or value of the *Simpson* decision to this class proceeding. Furthermore, it is not enough for the Plaintiff to rely on *Simpson* as definitively establishing the "reasonable cause of action" criteria has been met in her case. Rather, the Claim as drafted must stand on its own to support the reasonable cause of action requirement.

[31] That said, I am satisfied that the Plaintiff has pleaded sufficient material facts to demonstrate disadvantage based on a distinction, and by extension a reasonable cause under s. 15(1) of the *Charter* for the following reasons.

[32] To establish a reasonable cause of action on a s. 15(1) *Charter* claim, the Plaintiff must demonstrate that the impugned law or state action: (i) creates a distinction based on enumerated or analogous grounds, including mental or physical disability, and (ii) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating a disadvantage (*R v Sharma*, 2022 SCC 39 at para 28 [*Sharma*]). The impact at stage 1 of the analysis must be “disproportionate” as “[a]ll laws are expected to impact individuals” (*Sharma* at para 40).

[33] On the first part of the s. 15 test, the Plaintiff claims that the CSLP creates a distinction based on disability because:

- (a) The CSLP uses a "Time in Study Structure," meaning students who take longer to complete their studies incur more debt;
- (b) Students with Permanent Disabilities often take longer to complete their studies due to their disabilities; and
- (c) As a result, these students are more likely to accumulate higher debt ("Excess Debt") than students without disabilities in similar circumstances.

[34] Canada argues that *Sharma* imposes a stricter requirement on the first part of the s. 15(1) test, which asks whether the impugned law or government action, in its impact, “created or

contributed to the disproportionate impact...” (*Sharma* at para 45). Canada focuses on this paragraph of *Sharma* to argue that the CSLP did not *create or contribute* to the accrual of any alleged Excess Debt by students with disabilities. Rather, Canada argues the Excess Debt is created by the funding structures set by post-secondary institutions, which require payment per course or semester, not per program.

[35] Based upon my review of *Sharma*, I do not accept that it imposes a heightened evidentiary burden on the first part of the s. 15(1) test. The Court in *Sharma* at paragraph 33 states: “...we do not alter the two-step test for s. 15(1). Rather, we seek to bring clarity and predictability to its application...”.

[36] I read *Sharma* as requiring evidence of a causal link or nexus between the impugned law or action and the harm—in this case, “Excess Debt”. I also note paragraph 49 of *Sharma*, where the court states that to give proper effect to the promise of s. 15(1), “a claimant’s evidentiary burden cannot be unduly difficult to meet.”

[37] Based on the facts pleaded, I find it reasonable to infer a causal connection between the operation of the CSLP and the disadvantage alleged by students with disabilities. Whether that connection is ultimately made out is a matter for determination on the merits after certification. At this stage, the only question is whether it is plain and obvious that no such connection exists. It is not. The Plaintiff has pleaded sufficient material facts to support distinction based on disability and satisfies the first step of the s. 15(1) analysis.

[38] On the second part of the test—whether the distinction leads to disadvantage—the Plaintiff pleads that the distinction created by the CSLP causes significant disadvantages for Students with Permanent Disabilities by, including:

- (a) Economically excluding some people with Permanent Disabilities from getting post-secondary credentials, hurting their job prospects;
- (b) Making it harder for people with Permanent Disabilities to access higher education and the labour market; and
- (c) Reinforcing harmful stereotypes that people with Permanent Disabilities are less educated and less able to contribute to the workforce.

[39] Canada argues that the CSLP does not reinforce, perpetuate, nor exacerbate “disadvantage” because it does not deny a benefit or impose a burden on students with disabilities, compared to students without disabilities. Rather, they characterize the CSLP as providing special benefits to students with disabilities by way of grants and repayment assistance measures which are not available to other students. I accept that grants and repayment assistance may ameliorate the impact of the CSLP for students with disabilities, but such assistance may not be sufficient to extinguish Excess Debt. Furthermore, this can only be assessed with the benefit of a full evidentiary record, which is not the role of the Court on a motion for certification.

[40] I am satisfied on the facts plead in the Claim that the Plaintiff has established a reasonable cause of action for the s. 15(1) *Charter* claim advanced.

[41] Finally, on the reasonable cause of action requirement, Canada argues that the claim cannot proceed because the Plaintiff should be forced to claim against the provinces as Canada has no authority to forgive the provincial portions of the student loans. They note that in *Simpson* the Plaintiff obtained recovery against the Province of Ontario.

[42] The Statement of Claim names only Canada as a Defendant. At paragraph 8 of the Claim, the Plaintiff asserts:

In each Province, the Student Loan Program is funded and administered jointly by Canada and that Province, such that the program is a single unified scheme for which both levels of government are fully responsible.

[43] I understand the Plaintiff to be relying upon the “unified scheme” nature of the CSLP and the joint liability of Canada with the provinces as the basis to address any provincial share of the debt. If the Plaintiff is not successful in establishing joint liability on the part of Canada, any recovery would be restricted to the federal government alone. I do not view this as an issue going to the viability of the claim against Canada, in the sense of demonstrating there is no cause of action against Canada, rather it is an issue that ultimately goes to the ability to recover from Canada for any provincial portion of the CSLP.

[44] Overall, I am satisfied that the Statement of Claim discloses a reasonable cause of action.

B. *Identifiable Class*

[45] On the final four criteria for certification—identifiable class, common questions, preferable procedure and suitability of the representative plaintiff—the Plaintiff bears the burden of adducing evidence to show “some basis in fact” that these criteria have been met (*Canada v Greenwood*, 2021 FCA 186 at para 94 [Greenwood]). This threshold is lower than the balance of probabilities as certification is not the appropriate stage to resolve conflicts in the evidence. This lower standard nevertheless requires the Plaintiff to lead enough evidence to satisfy the certification judge that the requirements for certification have been met such that the proceeding should be allowed to proceed (*Pro-Sys* at paras 102–105).

[46] For the identifiable class, the Plaintiff must establish some basis in fact that there is an identifiable class of two or more persons. Class proceedings require an identifiable class to identify persons who are entitled to notice, who may be entitled to relief, and who may be bound by any judgment. The identification of class members must be based upon objective criteria, must not be dependant on the outcome of the litigation, and must bear a rational connection to the common issues (*Hollick v Toronto (City)*, 2001 SCC 68 at para 17). Further, it is not necessary for class members to be identically situated to each other, but all class members must benefit from the successful prosecution of the action (*Pro-Sys* at para 108).

[47] In this case, the Plaintiff’s proposed class is defined in the Statement of Claim as follows:

- (c) “**Class**” means all Students who:

- (i) Incurred Student Debt between August 1, 1995 and the date of certification of this action as a class proceeding;
- (ii) Have a Permanent Disability that caused them to extend their course of post-secondary education; and
- (iii) Did not receive sufficient Repayment Assistance to offset their Excess Debt.

[48] The above definition is objectively defined and clearly identifies that to be a class member, a person must prove that (a) they took out loans from the CSLP; (b) they have a Permanent Disability; (c) that Permanent Disability caused them to extend their course of studies; and (d) as a result, they incurred Excess Debt. These are objective criteria that bear a rational connection to the common issues.

[49] Canada argues that the class definition is “merits based” and that the Court would be required to make individual determinations on whether a class member’s s. 15(1) rights were infringed. In other words, a determination of each class member’s claim would be necessary as a pre-condition of ascertaining class membership (*Frohlinger v Nortel Networks Corporation*, 2007 CanLII 696 (ONSC)).

[50] Even if this is a merits-based definition as alleged, that alone is not disqualifying. This Court has certified merits-based class definitions in *Heyder v Canada (Attorney General)*, 2019 FC 1477 [*Heyder*] and *Thomas v Canada (Attorney General)*, 2024 FC 655 [*Thomas*]. In *Heyder* the certified class definition required class members to establish that they “experienced sexual misconduct”. In *Thomas*, the Court noted that “this Court has certified class definitions that reference the merits of the litigation” as long as “it is not dependent on the outcome *per se*” (*Thomas* at para 105). In *Tippett v Canada*, 2019 FC 869, the Court went one step further, certifying a class definition that required class members to establish that they “suffered injury due to sexual abuse, assault, or harassment”.

[51] I am satisfied that the class definition is objectively defined. I note the Affidavit evidence details the factual experiences of four individuals with permanent disabilities who took longer to complete their post-secondary education. These individuals satisfy the elements of the proposed class definition above. In my view, there is an evidentiary underpinning to support some basis in fact for an identifiable class.

[52] Although Canada argues that there is no basis in fact for choosing a start date of August 1, 1995, the Plaintiff notes that this is the enactment date for the *Canada Student Financial Assistance Act*, SC 1994, c 28 and the *Canada Student Financial Assistance Regulations*, SOR/05-329. As of January 1995, Ms. Ferris was enrolled in post-secondary studies at Malaspina College in British Columbia. She explains in her Affidavit of August 17, 2023 how her studies were delayed as follows:

17. At Malaspina College, I still did not have access to textbooks in braille and the audio cassettes of my textbooks did not arrive until part way through the semester. To accommodate the delay in the audio cassettes, some of my classmates were paid to read aloud from the textbooks, in person, which allowed me to take notes generally at the same pace as the class. However, this did not allow me to study independently or at my own pace. I had to rely on my peers and work around their schedules.

18. When I finally received the audio cassettes of my textbooks, I was able to study independently. However, having textbooks read to me by my peers and audio cassettes of textbooks were not adequate accommodations. Had I received braille textbooks I would have been able to skim the materials and determine what was relevant and what was not. Instead, I had to listen to, or be read, entire textbooks, which was a very time-consuming task. As a result, I had no choice but to take a reduced course load.

19. In total, I spent five semesters at Malaspina College. In April, 1997, I had 19.50 transfer credits, equivalent to approximately three semesters.

[53] Considering Ms. Ferris was enrolled in post-secondary studies in 1995, I am satisfied that her evidence provides “some basis in fact” requirement for the class start date of August 1, 1995. She explains how her studies were delayed because of her disability, and I accept that a delay in completing studies correlates to the accrual of student debt.

[54] Finally, on the “identifiable class” requirement, Canada argues that the proposed claims, including that of the Representative Plaintiff, are statute-barred by the six-year limitation period under the *Crown Liability and Proceedings Act*, RSC, 1985, c C-50. They argue that Ms. Ferris incurred debt from 1997 to 2009 and thus her claim for damages would be barred as it exceeds the six-year limitation period prescribed in s. 32 of the *Crown Liability and Proceedings Act*, which states:

Provincial laws applicable

32 Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

Règles applicables

32 Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent lors des poursuites auxquelles l'État est partie pour tout fait générateur survenu dans la province. Lorsque ce dernier survient ailleurs que dans une province, la procédure se prescrit par six ans.

[55] Canada's position on the limitation period fails to address that "discoverability" applies to s. 32 of the *Crown Liability and Proceedings Act*. As noted by the Supreme Court "a claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn" (*Grant Thornton LLP v New Brunswick*, 2021 SCC 31 at para 42). Thus, the issue on the applicable limitation period in this case is not necessarily the date when debt started to accrue, but rather, when a plaintiff has actual or constructive knowledge of a claim. That inquiry requires a consideration of individual circumstances and, perhaps evidence, that is beyond the matters to be determined on a certification motion.

[56] On balance, I am satisfied that the Plaintiff has presented some basis in fact to establish an identifiable class and this criteria for certification has been met.

C. *Common questions*

[57] In *Pro-Sys* at paragraph 108, the Supreme Court explains the applicable test for common questions as follows:

- (1) The commonality question should be approached purposively.
- (2) An issue will be “common” only where its resolution is necessary to the resolution of each class member's claim.
- (3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
- (4) It not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
- (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[58] At paragraph 78 of *Jensen v Samsung Electronics Co Ltd*, 2023 FCA 89, the Court clarified that the “some basis in fact” test has a dual component when assessing common issues: first, that the putative class members must have a claim, or at the very least, some minimal evidence supporting the existence of a claim, and second, some evidence that the common issue is such that its resolution is necessary to the resolution of each class member’s claim.

[59] In their Motion, the Plaintiff proposes the following common issues on liability:

- (a) Does the [CSLP] and, in particular, its Time in Study Structure, operate to discriminate against members of the Class?
- (b) If so, has Canada breached section 15 of the *Charter*?
- (c) Are some or all of the following findings in *Simpson v Canada (Attorney General)*, 2020 ONSC 6465, binding as against the Defendant in this proceeding:
 - i. The Time in Study Structure breaches section 15 of the *Charter* because it does not redress the adverse effects that it has produced, in the form of Excess Debt, through an accommodation for Students with a Permanent Disability, e.g. forgiveness of all Excess Debt through Repayment Assistance programs;
 - ii. This breach cannot be saved under section 1 of the *Charter* because it was not minimally impairing by failing to redress Excess Debt; and
 - iii. By choosing to use the Time in Study Structure, Canada has subjected itself to the constitutional constraint that it operate Repayment Assistance programs to forgive all Excess Debt?

[60] The Plaintiff proposes the following common issues on remedies:

- (d) What remedies, if any, are members of the Class entitled to?
- (e) Is Canada responsible for the proportion of Excess Debt attributable to the Provinces?
- (f) Is it appropriate to calculate damages on an aggregate basis pursuant to Rule 334.28(1) of the *Federal Courts Rules*, SOR/98-106, and if so, what is the total amount of Excess Debt?

- (g) What is Canada's liability, if any, for prejudgment and judgment interest under sections 36-37 of the *Federal Courts Act*, RSC 1985, c F-7?
- (h) How should the amounts assessed under (f)-(g) be distributed under Rule 334.28(2) of the *Federal Courts Rules*, SOR/98-106?

[61] Common questions (a) and (b) focus on the operation of the CSLP and how that program is alleged to have systemically discriminated against disabled students. I do not accept Canada's assertion that the consideration of the operation of the CSLP can only be done by looking at the facts of each class member. The question proposed is if class members had a delay in their education due to their disability and whether, because of that delay, they incurred Excess Debt by virtue of the CSLP. These questions are certified.

[62] Canada also argues that a *Charter* breach cannot be determined on a class-wide basis because it depends on individual facts, including the impact of each individual student's disabilities on their course of study. They point to the Plaintiff's Affidavit evidence noting that Mr. Fenwick, Ms. Ferris, and Ms. Chaparrel each had unique experiences: their program costs varied, they received differing levels of grants and loans, from different provinces, and they completed their programs over different timeframes.

[63] I understand the argument made by Canada, however the common questions relate to the alleged discriminatory conduct in the operation of the CSLP and whether that conduct caused students with disabilities to incur Excess Debt. The answer to these questions would apply to all class members. I accept that the debt load may differ among students, however an identical

answer is not necessary for all the members of the class, as long as the answer to the question does not give rise to conflicting interests among them (*Vivendi Canada Inc v Dell’Aniello*, 2014 SCC 1 at para 46). No potential conflicts have been identified.

[64] I do have concerns with the inclusion of the reference to *Simpson* in common questions (c). First, I would note that the finding in *Simpson* is not strictly binding on this Court (*Bilodeau-Massé v Canada (Attorney General)*, 2017 FC 604 at paras 107–108), and in certifying common question (c) as it is presently worded, the Court would be implicitly binding itself to the findings in *Simpson*. Ultimately the impact of *Simpson* on this class proceeding will be determined at the common issues trial with the benefit of a full evidentiary record. Accordingly, I will certify the common questions conditional on the Plaintiff amending common question (c) to remove the reference to *Simpson*.

[65] Common question (d) is self explanatory and is certified.

[66] Common question (e) concerns whether the federal government is responsible for the provincial portion of Excess Debt. Consistent with the reasonable cause of action analysis above, because the claim is brought only against Canada, any recovery may be limited to the federal portion of Excess Debt. This question is certified.

[67] Common question (f) relates to aggregate damages. The Court of Appeal in *Greenwood* at paragraphs 188-189 and in *Nasogaluak* at paragraphs 114-115, found that to advance an aggregate damage claim, a methodology for determining those damages must be provided. Here

the Representative Plaintiff relies upon the methodology proposed in the Affidavit of Adele Furrie. Ms. Furrie's methodology builds on the methodology she developed in *Simpson*, which estimated the difference in debt at consolidation accrued by Students with Permanent Disabilities and similarly situated Students without Permanent Disabilities, using administrative data maintained by Employment and Social Development Canada (ESDC) for the CSLP. Ms. Furrie has provided a detailed six-step process outlining the specific inputs that will be used and the outputs that will be generated to calculate Excess Debt for class members on an aggregate basis. Furthermore, she has opined on the data that will be required for the methodology and has knowledge of its existence.

[68] In response to this evidence, Canada relies upon "participant expert" evidence in the Affidavit of Mr. Li who challenges the methodologies, evidence, and findings of Ms. Furrie.

[69] The dispute by the "experts" over the methodology, if any, for aggregate damages cannot be resolved at this stage. The only question at this stage is if the common question posed on aggregate damages can be certified as a common issue. I am satisfied that (f) is an appropriate common question.

[70] Common questions (g) and (h) are self explanatory and are certified.

[71] In summary, apart from common question (c) which I am granting leave to amend, I am satisfied that there is some basis in fact for the proposed common questions. If the Representative Plaintiff is successful in establishing that the operation of the CSLP discriminated

against disabled students, such a finding would apply across the class. The question of the Defendant's liability and the appropriate remedy is common to each class member, arising out of having a permanent disability and incurring Excess Debt from the CSLP because of having said disability. The resolution of most of the common questions are necessary to the resolution of each class member's claim, and each of them will benefit from the successful prosecution of the action, all while avoiding duplication of fact-finding and legal analysis.

D. *Preferable procedure*

[72] For the fourth criteria, a plaintiff must show “(1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim, and (2) that it would be preferable to any other reasonably available means of resolving the class members' claims” (*AIC Limited v Fischer*, 2013 SCC 69 at para 35 [*Fischer*]).

[73] The preferable procedure analysis requires the Court to look to all reasonably available means of resolving the class members' claims, not just the possibility of individual actions. This entails consideration of other potential court procedures, and also non-court proceedings (*Fischer* at para 35).

[74] Once the alternative or alternatives to class proceedings have been identified, the Court must assess the extent to which they address the access to justice barriers that exist in the circumstances of the particular case. The Court should consider both the substantive and procedural aspects of access to justice, recognizing that court procedures do not necessarily set

the gold standard for fair and effective dispute resolution processes. The question is whether the alternative has the potential to provide effective redress for the substance of the plaintiff's claims, and to do so in a manner that accords suitable procedural rights (*Fischer* at para 37).

[75] On these facts, the only alternative procedure to a class proceeding would be individual actions for each of the potential class members. As this claim is advanced on behalf of students with permanent disabilities, I note the direction provided in *Wenham v Canada (Attorney General)*, 2018 FCA 199 as follows:

[80] Mr. Wenham proposes a class proceeding as the preferred procedure. Another available procedure is a test case. At first glance, a test case presents an appealing and perhaps simpler route.

[81] However, the preferability analysis must also consider access to justice considerations. Here, those considerations outweigh any potential efficiencies associated with a test case.

[82] What are the access to justice issues here? Like most legal proceedings, the economics of litigation are often intimidating: *Fischer* at para. 27. While there is no direct evidence of Mr. Wenham or the other applicants' economic capacities, it is uncontroversial that disabled individuals face "persistent social and economic disadvantage" placing barriers to education and the labour force and, as a result, directly impacting their earning capacity: *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577 at para. 56. Certainly some of the proposed class face economic barriers to pursuing this litigation.

[83] And physical disability, in and of itself, has also been consistently recognized as a barrier to justice favouring the certification of a class proceeding: *Fischer* at para. 27; *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184 at para. 39; *Cloud v. Canada (Attorney General)* (2004), 2004 CanLII 45444 (ON CA), 247 D.L.R. (4th) 667, 73 O.R. (3d) 401 at para. 87 (C.A.); *Pearson v. Inco Ltd.* (2005), 2006 CanLII 913 (ON CA), 261 D.L.R. (4th) 629, 78 O.R. (3d) 641 at

para. 84 (C.A.); *Kenney v. Canada (Attorney General)*, 2016 FC 367 at para. 26.

[84] These access to justice concerns are better served by the class proceeding. I offer several observations.

[76] In these circumstances, a class action is preferable to numerous individual actions.

E. *Representative Plaintiff*

[77] The proposed Representative Plaintiff, Jenny Ferris, was born blind. In her Affidavits she includes post-secondary school transcripts and student loan information. Her Affidavits outline her time in post-secondary study and how she has accrued Excess Debt.

[78] Canada argues that as in *McMillan v Canada*, 2023 FC 1752, aff'd 2024 FCA 199, Ms. Ferris is not a suitable representative plaintiff because her claim for damages is statute-barred. In other words, she is not “anchored in the proceeding”. As noted above, at this stage I cannot definitively conclude that Ms. Ferris does not have a viable claim or that her claim is statute-barred as there is no evidence on discoverability.

[79] Canada also argues that Ms. Ferris, nor any of the other class members can represent the class because there is no evidence to support paragraph 23 of the Claim, which lists various disadvantages arising from the adverse effects imposed on students by the CSLP. As Canada’s own argument suggests, this is an issue that will have to be proven with “evidence”, which is not the role of the Court on a motion for certification. Disputes on the evidence cannot be assessed at this stage.

[80] There is no suggestion that Ms. Ferris will not fairly and adequately represent the interests of the class members.

(1) Litigation plan

[81] Rule 334.16(1)(e)(ii) requires that the representative plaintiff has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class members and of notifying class members as to how the proceeding is progressing.

[82] The Plaintiff has provided a detailed litigation plan as Exhibit “D” to her Affidavit affirmed August 17, 2023. The litigation plan notes that Class Counsel (Sotos LLP, Ross & McBride LLP, and Hāki Chambers Global) will manage communications, maintain a bilingual website, and distribute notices. Post-certification, the plan includes notice distribution, opt-out procedures, and a discovery process. Discovery, expert retention, and potential motions are outlined. The plan references the need for an Administrator and Arbitrator to manage claims and appeals, if the claim is successful. It notes that damages will be assessed using objective criteria.

(2) Conflict of interest

[83] Rule 334.16(1)(e)(iii) requires that the representative plaintiff does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members. No conflict of interest has been identified between Ms. Ferris and class members.

(3) Fees

[84] Rule 334.16(1)(e)(iv) requires that the representative plaintiff provide a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record. Ms. Ferris includes as Exhibit “E” in her Affidavit a summary of her agreement respecting fees and disbursements between herself and Class Counsel.

IV. Conclusion

[85] In conclusion, I am satisfied that this proposed class proceeding, and the Representative Plaintiff, meet the requirements under Rule 334.16. I will certify this as a class proceeding conditional on the Plaintiff amending common question (c) to remove the reference to *Simpson*.

ORDER IN T-116-23

THIS COURT ORDERS that:

1. This action is certified as a class proceeding pursuant to Rule 334.16 of the *Federal Courts Rules*, SOR/98-106, conditional upon the amendment to common question (c) to remove the reference to *Simpson v Canada (Attorney General)*, 2020 ONSC 6465;
2. Jenny Ferris is appointed as Representative Plaintiff for the Class;
3. The Class is defined as:

All students who:
 - a. Incurred Student Debt between August 1, 1995 and the date of certification of this action as a class proceeding;
 - b. Have a Permanent Disability that caused them to extend their course of post-secondary education; and
 - c. Did not receive sufficient Repayment Assistance to offset their Excess Debt;
4. The common questions are conditionally certified subject to the amendment to common question (c);
5. Upon the approval of the amended common question (c), the Plaintiff can seek approval of the form and content of the notice of certification and the method of disseminating the notice of certification;
6. The Defendant shall produce to the Plaintiff in electronic form a list of students who are members of the proposed Class, including name, mailing address and email address, for the purpose of distributing the notice of certification;

7. The Defendant is to pay the costs of disseminating the notice of certification to Sotos LLP, Ross & McBride LLP and Hāki Chambers Global who are appointed as Class Counsel;
8. The Litigation Plan attached as Exhibit “D” to the August 17, 2023 Affidavit of Jenny Ferris is approved;
9. Any other proceeding based on the facts giving rise to this proposed class proceeding are stayed and no other proceeding based upon the facts giving rise to this proceeding may be commenced without leave of the Court; and
10. No costs are awarded on this Motion.

"Ann Marie McDonald"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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DATED: JUNE 6, 2025

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