

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

BM and CA

Appellants
(Plaintiffs)

- and -

**HIS MAJESTY THE KING IN RIGHT OF ONTARIO
and ATTORNEY GENERAL OF CANADA**

Respondents
(Defendants)

- and -

**ANISHINABEK NATION, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION,
CHIEFS OF ONTARIO, and NISHNAWBE ASKI NATION**

Interveners

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PART I: OVERVIEW

1. British Columbia Civil Liberties Association (“**BCCLA**”) intervenes to address the following questions: if a government delegates the delivery of public programs to a public sector entity that is independently subject to the *Charter*, in what circumstances does that government have **residual *Charter* liability** for the entity’s unconstitutional conduct, through government “actions” that cause or contribute to the entity’s *Charter* breaches, and/or government “inaction” in failing to take steps to prevent or reduce the risk of *Charter* breaches by the entity?
2. These are novel constitutional questions which the Certification Judge addressed in dismissing the certification motion in relation to the “removed child claim” against Ontario for off-reserve children. He determined that child protection decisions are made by independently governed Children’s Aid Societies (“**CASs**”), which are liable under the *Charter* in their own right, and whose decisions are not attributable to Ontario. Further, he ruled that Ontario has no *Charter* liability for its “inaction” in failing to prevent *Charter* breaches by CASs. The fact that the CASs act under delegated authority from provincial legislation made no difference.¹
3. BCCLA takes no position on the merits of this appeal, which will turn on the legal significance of the cluster of federal-provincial agreements, statutes, policies and directives that govern CASs for Indigenous children in Ontario. Rather, BCCLA seeks to provide a broader legal framework for the residual *Charter* liability of governments, within which the Court can address some of the specific issues before it, and which can apply to future cases in this and other contexts.

¹ *BM et al. v. Ontario*, [2025 ONSC 4575](#), paras [64-66](#) [**BM**].

4. Residual *Charter* liability for the government through “actions” and/or “inaction” should be found where there is a “nexus” between the delegating government and the public sector entity. Whether such a nexus exists will vary from case to case. This stands in contrast to the categorical approach taken by the Certification Judge, which seemingly rejects residual *Charter* liability under any possible scenario.

5. In determining whether a nexus exists, the Court should assess a non-exhaustive list of factors. In the specific context of this appeal, these factors include (but are not limited to): (a) whether the delegating government retains oversight and intervention powers; (b) whether delegation is subject to legally enforceable conditions that in substance require *Charter* compliance; and (c) whether the government owes a fiduciary duty toward program beneficiaries (e.g. Indigenous children).

PART II: SUMMARY OF THE FACTS

6. BCCLA takes no position on the facts of this appeal.

PART III: ISSUES

7. BCCLA takes no position on the outcome of this appeal.

8. Our submissions relate to the following issues raised by the appeal:

- a. **Issue 1**: Can governments have residual *Charter* liability?
- b. **Issue 2**: When does a “nexus” exist to impose residual *Charter* liability?

PART IV: THE LAW

A. Issue 1: Can governments have residual *Charter* liability?

9. Under the first branch of *Eldridge*, the *Charter* applies to public sector entities that are legally separate from the federal or a provincial government, but which, by their very nature or due to the degree of governmental control over them, are “government”

within the meaning of s. 32(1) of the *Charter*.² It is not in dispute that the *Charter* applies to CASs in their own right, by their very nature, under the first branch of *Eldridge*.³

10. But the Supreme Court did not address in *Eldridge* whether governments have residual *Charter* liability for public sector entities that they create and to which they delegate legal powers, and, if so, under what circumstances. The Certification Judge appeared to categorically reject residual *Charter* liability by governments for all public sector entities possessing delegated authority which operate independently of government, including but not limited to CASs. But this is an open constitutional question on which there is no Supreme Court authority.

11. The Court should approach this issue from first principles. The starting point is *Eldridge*, which explained that governments “should not be allowed to **evade** their constitutional responsibilities by delegating the implementation of their policies and programs to private entities”.⁴ The principal concern in *Eldridge* itself was delegation to a hospital, a private entity. The Court held that the *Charter* applied to hospitals because they delivered a government program – the second branch of *Eldridge*.

12. But *Eldridge* **also** explained that the same concern – governments evading their *Charter* responsibilities through delegation – extends to **public sector entities** that are

² *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624, para 44 [*Eldridge*].

³ By contrast, the British Columbia Court of Appeal recently commented, in *obiter*, that CASs are bound by the *Charter* under the second branch of *Eldridge*, because they implement a specific government program: *Alter v. The University of British Columbia*, 2026 BCCA 253, para 61. However, that question was not before the court in *Alter*, which concerned the application of the *Charter* to public universities. Moreover, in support of this proposition, *Alter* cited *C.R. v. Her Majesty the Queen in Right of Ontario*, 2019 ONSC 2734, para. 110, *aff’d* sub nom *J.B. v. Ontario (Child and Youth Services)*, 2020 ONCA 198, but with respect, it inaccurately characterized those decisions, because neither this Court nor the Superior Court held that CASs are bound by the *Charter* under the second branch of *Eldridge*.

⁴ *Eldridge*, para 42 (emphasis added).

clearly government under the first branch of *Eldridge*. LaForest J. (for the Court) illustrated this point by reference to labour arbitrators under the *Canada Labour Code*, who are clearly “government” for the purposes of s. 32, explaining his earlier decision in *Slaight Communications*:

In *McKinney*, I pointed to *Slaight*, *supra*, as an example of a situation where action taken in furtherance of a government policy was held to fall within the ambit of the *Charter*. I noted, at p. 265, that **the arbitrator in that case was “part of the governmental administrative machinery for effecting the specific purpose of the statute”**. “It would be strange”, I wrote, “if the legislature and the government could evade their *Charter* responsibility by appointing a person to carry out the purposes of the statute”; see *idem*. **Although the arbitrator in *Slaight* was entirely a creature of statute and performed functions that were exclusively governmental**, the same rationale applies to any entity charged with performing a governmental activity, even if that entity operates in other respects as a private actor ...⁵

13. *Slaight Communications*’ solution to the problem of evasion through delegation was that the public sector entity wielding delegated authority (labour arbitrators under the *Canada Labour Code*) was subject to the *Charter* in its own right, and independently liable for *Charter* breaches.

14. But *Eldridge* is silent on whether delegating governments can have residual *Charter* liability that exists concurrently and alongside the *Charter* liability of public sector entities to which they delegate powers. This *Charter* liability could take two forms.

15. *First*, government may take “**actions**” that cause or contribute to the entity’s *Charter* breaches. This would occur, for example, if the government created policies, defined procedures, and/or issued directives, which the public sector entity was

⁵ *Eldridge*, para 42, citing *Slaight Communications Inc. v. Davidson*, [\[1989\] 1 SCR 1038](#) (emphasis added).

required (*de jure* or *de facto*) to follow and implement that caused or increased the likelihood of the entity violating the *Charter*, and the government had actual or constructive knowledge of the *Charter* breach.⁶

16. *Second*, governments could be liable for their “**inaction**”, in failing to take steps to prevent or reduce the risk of *Charter* breaches by public sector entities, of which the government had actual or constructive knowledge. An example is GG, a different certification decision recently issued by the same judge (which is also under appeal to this Court and is under reserve).⁷ GG accepted in principle that Ontario could be liable under s. 7 of the *Charter* for the use of Birth Alerts by CASs through “the passive act of inattention to wrongful conduct ... to a practice that Ministry personnel would have, or should have, understood to be beyond the CAS authority.”⁸

17. To be sure, the distinction between “action” and “inaction” can be slippery and difficult – for example, when governments possess regulatory powers, have exercised them to a limited degree but not to redress or prevent *Charter* breaches by the public sector entity, and have actual or constructive knowledge of those *Charter* breaches. Indeed, GG explained that the “inaction”/ “action” distinction could be a difficult one in practice in the CAS context:

I acknowledge that there is a conceptual difference between perpetrating wrongdoing and failing to stop it. But that line is a fine one. Under the circumstances, where, pursuant to sections 44(1)-(3) of the *CYFSA*, the Ministry is under an affirmative statutory duty to regulate in the public interest, the line seems so fine as to be barely perceptible. The commission/omission distinction here, like

⁶ *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, [2023 SCC 17](#), para 114.

⁷ *GG v. Ontario*, [2025 ONSC 3011](#) [GG]; Court of Appeal File Nos. COA-25-CV-0957, COA-25-CV-0958.

⁸ GG, para [113](#).

a driver is said to have either pressed too hard on the gas or to have failed to take their foot off the gas, is at this point too close to call.⁹

18. Residual *Charter* liability serves as a check against the perverse incentives for governments to attempt to “evade” or wash their hands of their responsibilities under the *Charter* by simply creating a public sector entity, delegating powers to it, and walking away – especially when they retain regulatory authority over that entity but exercise it selectively.

19. Residual *Charter* liability is particularly important when courts determine that damages are an “appropriate and just” remedy under s. 24(1) based on the principles set out in *Ward* in *Charter* class actions such as this one.¹⁰ Entities wielding delegated authority – like CASs – may be thinly capitalized. Even if they are insured, they may be unable to pay out a substantial *Charter* damages claim completely. Absolving governments, with far greater resources, of residual *Charter* liability, could leave *Charter* claimants without the remedy that a court has determined under s. 24(1) is “appropriate and just” in the circumstances. Failing to impose residual *Charter* liability could create perverse incentives for governments to “offshore” certain public programs.

B. Issue 2: When does a “nexus” exist to impose residual *Charter* liability?

20. Residual *Charter* liability for the government through “action” and/or “inaction” should be found where there is a “nexus” between the delegating government and the public sector entity. Whether such a nexus exists will vary from case to case.

21. In determining whether a nexus exists, the Court should assess a non-exhaustive list of factors. In the specific context of this appeal, they would include (but are not

⁹ GG, para [116](#).

¹⁰ *Vancouver (City) v. Ward*, [2010 SCC 27](#).

limited to): (a) whether the delegating government retains **oversight and intervention powers**, (b) whether delegation is subject to **legally enforceable conditions**; and (c) the existence of a **fiduciary relationship** between the government and program beneficiaries (e.g. Indigenous children).

1) Oversight and intervention powers

22. GG provides a good example of a “nexus” through **oversight and intervention powers**. The basis for the government’s residual *Charter* liability was Ontario’s statutory “affirmative statutory duty” to regulate CASs “in the public interest” under ss. 44(1) to 44(3) of the *Child, Youth and Family Services Act, 2017*.¹¹ Section 41(2) defines the “public interest to include “any matter the Minister regards as relevant”, and specifically enumerates the “the quality of the financial and operational management of the society”, “the society’s capabilities with respect to its corporate governance”, and “the quality of services provided by the society.” The Minister’s powers under s. 41(3) are likewise broad and include an “order that the society cease a particular activity or take other corrective action”.

23. A nexus could arise either from the failure to exercise these powers to prevent or reduce the risk of *Charter* breaches by CASs (“inaction”), especially if the government was on notice of them – the very cause of action certified in *GG* – or if the government exercised them in a manner that caused or contributed to the *Charter* violations engaged in by the CASs, by issuing policies, creating procedures, and/or issuing directives (“action”).

¹¹ *Child, Youth and Family Services Act, 2017*, [SO 2017, c 14, Sch 1, ss 44\(1\)-\(3\)](#); *GG*, para [116](#).

2) Conditions that in substance require *Charter* compliance

24. Statutory **conditions** that accompany delegation which in substance require *Charter* compliance can also create the requisite nexus. For example, *An Act respecting First Nations, Inuit and Métis children, youth and families* delegates authority to “child and family services” in relation to Indigenous children (s. 1), subject to national standards. These national standards include prioritizing prenatal care to prevent apprehension at birth (s. 14(2)), prohibiting apprehension solely based on socio-economic conditions that disproportionately disadvantage Indigenous Canadians (s. 15), and prioritizing placement of an Indigenous child with parents, family, members of the same Indigenous group/ community/ people, another Indigenous group/ community/ people, or another adult (s. 16(1)).¹²

25. These national standards are in substance identical to the application of ss. 7 and 15 of the *Charter* in the specific context of child and family services for Indigenous peoples. If child and family services agencies breach these conditions, then in effect they violate the *Charter*. The Act requires Canada to take measures within its authority to ensure child and family services agencies comply with these conditions – i.e., the *Charter*. In these circumstances, Canada’s inaction might trigger residual *Charter* liability.

26. As a general proposition, when government issue standards that accompany delegation which track the content of *Charter* guarantees, they assume residual liability for *Charter* breaches by public sector entities wielding delegated authority.

¹² *An Act Respecting First Nations, Inuit and Métis children, Youth and Families*, [SC 2019, c 24](#), ss. [1](#), [14\(2\)](#), [15](#), [16\(1\)](#); *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, [2024 SCC 5](#), paras [83-84](#).

3) Fiduciary duty

27. A final factor relevant to this appeal is the existence of a *sui generis* fiduciary duty toward Indigenous children by Canada and Ontario. The Certification Judge determined it was plain and obvious that such fiduciary duties did not exist and refused to certify these causes of action.¹³ By contrast, in parallel litigation in British Columbia, the British Columbia Supreme Court has certified these claims.¹⁴

28. The BCCLA takes no position on that point. Rather, it suggests that, **at a minimum**, on the plain and obvious standard, Ontario owes a *sui generis* fiduciary duty to the Removed Child claimants in relation to apprehension or protection decisions (as opposed to Indigenous child welfare more generally). Such decisions engage the child's s. 7 interest in security of the person (*KLW*) and are accompanied by discretionary control by the Crown (*Wewaykum*).¹⁵ Such a *sui generis* fiduciary duty would also create the requisite "nexus" to impose residual *Charter* liability on Ontario in relation to CAS apprehension or protection decisions under delegated authority.

PART V: ORDER REQUESTED

29. BCCLA takes no position on the disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON THIS 7th DAY OF JULY, 2026

Sujit Choudhry / Mani Kakkar / Erica McLachlan

¹³ *BR*, paras [76-83](#).

¹⁴ *Neal v Canada (Attorney General)*, [2025 BCSC 1498](#), paras [182-184](#).

¹⁵ *Winnipeg Child and Family Services v. KLW*, [2000 SCC 48](#), paras. [85-87](#); *Wewaykum Indian Band v. Canada*, [2002 SCC 79](#), para [83](#).

SCHEDULE “A” – LIST OF AUTHORITIES

Jurisprudence

1. *Alter v. The University of British Columbia*, [2026 BCCA 253](#)
2. *BM v. Ontario*, [2025 ONSC 4575](#)
3. *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, [2023 SCC 17](#)
4. *C.R. v. Her Majesty the Queen in Right of Ontario*, [2019 ONSC 2734](#)
5. *Eldridge v. British Columbia (Attorney General)*, [\[1997\] 3 SCR 624](#)
6. *GG v. Ontario*, [2025 ONSC 3011](#) [GG]; Court of Appeal File Nos. COA-25-CV-0957, COA-25-CV-0958
7. *J.B. v. Ontario (Child and Youth Services)*, [2020 ONCA 198](#)
8. *Neal v Canada (Attorney General)*, [2025 BCSC 1498](#)
9. *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, [2024 SCC 5](#)
10. *Slaight Communications Inc. v. Davidson*, [\[1989\] 1 SCR 1038](#)
11. *Wewaykum Indian Band v. Canada*, [2002 SCC 79](#)
12. *Winnipeg Child and Family Services v. K LW*, [2000 SCC 48](#)
13. *Vancouver (City) v. Ward*, [2010 SCC 27](#)

Legislation

1. *Child, Youth and Family Services Act*, 2017, [SO 2017, c 14, Sch 1](#)
2. *An Act Respecting First Nations, Inuit and Métis children, Youth and Families*, [SC 2019, c 24](#)

SCHEDULE “B” – TEXT OF STATUTES, REGULATIONS & BY-LAWS

Canadian Charter of Rights and Freedoms

Life, liberty and security of person

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

...

Equality before and under law and equal protection and benefit of law

- **15 (1)** Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- **Affirmative action programs**

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

...

Application of Charter

- **32 (1)** This Charter applies
 - **(a)** to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
 - **(b)** to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.
- **Exception**

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

An Act Respecting First Nations, Inuit and Métis children, Youth and Families, [SC 2019, c 24](#)

1 The following definitions apply in this Act. ...

child and family services means services to support children and families, including prevention services, early intervention services and child protection services. (*services à l'enfance et à la famille*)

Prenatal care

14(2) To the extent that providing a prenatal service that promotes preventive care is consistent with what will likely be in the best interests of an Indigenous child after he or she is born, the provision of that service is to be given priority over other services in order to prevent the apprehension of the child at the time of the child's birth.

Socio-economic conditions

15 In the context of providing child and family services in relation to an Indigenous child, to the extent that it is consistent with the best interests of the child, the child must not be apprehended solely on the basis of his or her socio-economic conditions, including poverty, lack of adequate housing or infrastructure or the state of health of his or her parent or the care provider.

...

Priority

16 (1) The placement of an Indigenous child in the context of providing child and family services in relation to the child, to the extent that it is consistent with the best interests of the child, is to occur in the following order of priority:

- (a) with one of the child's parents;
- (b) with another adult member of the child's family;
- (c) with an adult who belongs to the same Indigenous group, community or people as the child;
- (d) with an adult who belongs to an Indigenous group, community or people other than the one to which the child belongs; or
- (e) with any other adult.

Powers of Minister

Grounds

- 44** (1) The Minister may exercise a power set out in subsection (3) if,
- (a) a society has failed to comply with a compliance order made under [section 43](#) within the time specified in it; or
 - (b) the Minister considers it to be in the public interest to do so.

Public interest

- (2) In considering the public interest under clause (1) (b), the Minister may consider any matter the Minister regards as relevant including,
- (a) the quality of the financial and operational management of the society;
 - (b) the society's capabilities with respect to its corporate governance; and
 - (c) the quality of services provided by the society.

Powers

- (3) For the purposes of subsection (1), the Minister may do one or more of the following:
1. Order that the society cease a particular activity or take other corrective action within the time specified in the order.
 2. Impose or amend conditions on the society's designation under [subsection 34 \(1\)](#).
 3. Suspend, amend or revoke the designation of the society.
 4. Appoint members of the society's board of directors if,
 - i. there are vacancies on the board, or
 - ii. there are no vacancies, but the appointment is for the purposes of designating that member as chair of the board under paragraph 7.
 5. Remove members of the board and appoint others in their place.
 6. Designate a chair of the board, if the office of chair is vacant.
 7. Designate another chair of the board in place of the current chair.
 8. Appoint a supervisor to operate and manage the affairs and activities of the society.

COA-25-CV-1238

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