Court File No.: 07-CV-335506 PD1

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JASMIN SIMPSON

Applicant

- and -

THE ATTORNEY GENERAL FOR HER MAJESTY THE QUEEN IN RIGHT OF CANADA (REPRESENTING THE MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO (AS REPRESENTED BY THE MINISTER OF TRAINING, COLLEGES AND UNIVERSITIES)

Respondents

APPLICATION UNDER RULE 14.05(3)(g.1)(h) of the *RULES OF CIVIL PROCEDURE*

APPLICANT'S FACTUM

Date: August 26, 2019

BAKERLAW
Barristers and Solicitors
4711 Yonge Street
Suite 509
Toronto, ON M2N 6K8

David Baker LSO#: 17674M
Laura Lepine LSO #: 77382R
dbaker@bakerlaw.ca
llepine@bakerlaw.ca

Tel: 416-533-0040
Fax: 416-533-0050

Lawyers for the Applicant

Department of Justice Canada
Ontario Regional Office
120 Adelaide Street West, Suite 400
Toronto, ON M5H 1T1

Joseph Cheng LSO #45356W
Jon Bricker LSO #56714J
Joseph.cheng@justice.gc.ca
Jon.bricker@justice.gc.ca

Tel: 647-256-7481
Fax: 416-973-0809

Lawyers for the Respondent, Attorney General of Canada

Ministry of Attorney General
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

Daniel Guttman LSO #43748E
Padraic Ryan LSO #61687J
danielguttman@ontario.ca
padraicryan@ontario.ca

Tel: 416-326-4468
Fax: 416-326-4015

Lawyers for the Respondent, Ministry of Attorney General

Court File No.: 07-CV-335506 PD1

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JASMIN SIMPSON

Applicant

- and -

THE ATTORNEY GENERAL FOR HER MAJESTY THE QUEEN IN RIGHT OF CANADA (REPRESENTING THE MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO (AS REPRESENTED BY THE MINISTER OF TRAINING, COLLEGES AND UNIVERSITIES)

Respondents

APPLICATION UNDER RULE 14.05(3)(g.1)(h) of the *RULES OF CIVIL PROCEDURE*

APPLICANT'S FACTUM

PART I: OVERVIEW

1. This case is about how the structure and framework of the Canada Student Loans Program ("CSLP") discriminate against students with disabilities ("SWD"), specifically those who take longer to complete their post-secondary education for disability-related reasons ("SWD(longer)").
2. SWD may take longer to complete their post-secondary education ("PSE") because of disability-related reasons including:
    i. The need to take a preparatory year in order to upgrade their credentials for post-secondary education;

ii. The need to enroll in a specialized program designed to accommodate students with disabilities;
iii. The need to take a reduced course load as a result of the individual's disability; and
iv. The need to take a medical leave of absence from study resulting in a loss of credits in a school year.

3. The structure of the CSLP means that most SWD(longer) will incur greater debt than their non-disabled peers. Because it does not cap loans on a per-program basis, the CSLP fails to take these disability-related needs into account, and consequently discriminates based on disability.

4. The Applicant, Jasmin Simpson, was a student with multiple disabilities who took longer to complete her PSE due to a combination of the four disability-related reasons listed above. As a result, she incurred greater debt than her non-disabled peers (students without disabilities, "SWOD").

5. The Canadian and Ontario governments have failed to address this discriminatory distinction in the administration of the CSLP. The failure to address the debt discrepancy perpetuates the historical disadvantage of persons with disabilities, who are underrepresented in both PSE and employment.

6. This violation of the Applicant's section 15 *Charter* rights is not justified by section 1 and requires immediate redress in the form of a declaration, damages, and the return of monies paid pursuant to unconstitutional legislation.

PART II: FACTS AND EVIDENCE

A. Integrated Student Loans in Ontario

i. Structure of the CSLP – Federal

7. The CSLP recognizes the value of PSE and that finances can be a barrier to equal access to it (*Frith*; *Rahman*). The program "promotes accessibility to postsecondary education for

students who require financial support to undertake their studies" (*Rahman*). Accessibility to PSE is achieved through the provision of "needs-based financial aid in the form of loans and grants to supplement the resources available to students" (*Frith*; *Rahman*).

> Affidavit of Rosaline Frith, Joint Application Record Vol. J, Tab AA ["*Frith*"] at paras 5, 34.
> Affidavit of Atiq Rahman, Joint Application Record Vol. Q, Tab AA ["*Rahman*"] at paras 5, 16, 17.

8. The CSLP structure is governed by various legislation as well as Harmonization Agreements, in place in many provinces to outline the obligations and responsibilities between the federal and provincial governments.

> *Frith, supra* para 7 at paras 16-32.

9. The *Canada Student Financial Assistance Act*, R.S. 1994 c. 28 ("*CSFAA*") and the *Canada Student Financial Assistance Regulations*, SOR/95-329 ("*CSFA Regulations*") govern the CSLP and set out the framework for student loans.

10. To receive a loan, a student must be a "qualifying student", defined by section 2(1) of the *CSFAA* to be:

> [A] person
> (a) who is a Canadian citizen, a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act or a protected person within the meaning of subsection 95(2) of that Act,
> (b) who is qualified for enrolment or is enrolled at a designated educational institution as a full-time student or part-time student for a period of studies at a post-secondary school level, and
> (c) who intends to attend a designated educational institution as a full-time student or part-time student for a period of studies described in paragraph (b) if it is financially possible for that person to do so [emphasis added].

11. Section 2(1) of the *CSFA Regulations* defines a "full-time student" as a person:

> (a) who, during a confirmed period within a period of studies, is enrolled in courses that constitute:
> i. at least 40 per cent and less than 60 per cent of a course load recognized by the designated educational institution as constituting a full course load, in the case of a person who has a permanent disability and elects to be considered as a full-time student, or

ii. at least 60 per cent of a course load recognized by the designated educational institution as constituting a full-time course load, in any other case,

(b) whose primary occupation during the confirmed periods within that period of studies is the pursuit of studies in those courses, and

(c) who meets the requirements of subsection 5(1), 6(1) or section 7(1), as the case may be [emphasis added].

12. The *CSFA Regulations* define "period of studies" to be:

> [T]he length of time that a designated educational institution considers to be a **normal school year** for the program of studies in which the qualifying student or the borrower is enrolled and that, where the period between the day on which that person ceased to be a full-time student pursuant to section 8 or a part-time student pursuant to section 12.3, as the case may be, and the first day of the first confirmed period of the current school year is less than six months, includes that period [s. 2(1), emphasis added].

13. The CSLP is structured to administer loans based on "time in study" with maximum loan amounts determined on a "per week" rather than a "per program" basis (*Frith*). In recognition that finances can be a barrier to PSE participation, the CSLP provides that no interest is payable by a student borrower during the time that he/she is a student (*CSFAA*). Repayment obligations are delayed until the last day of the seventh month after which the borrower is no longer a student (*CSFAA*).

> *Frith*, *supra* para 7 at para 39.
> *CSFAA supra* para 9, ss. 7, 8.

14. The CSLP also provides flexibility for the Governor-in-Council to make regulations regarding the operation of the CSLP for part-time students, such as determining student status, repayment terms, advancement of loans, and the maximum number of weeks allowable before repayment obligations are triggered (*CSFAA*). Section 15(p) of the *CSFAA* provides that the Governor-in-Council may make regulations providing for the establishment and operation of grant programs for qualifying students whose financial

needs are greater than the maximum amount of the financial assistance that may be given to the student and prescribing classes of persons who are eligible for such grants.

CSFAA supra para 9, s. 15.

15. The CSLP framework includes debt management measures which are available following loan consolidation (*Frith*), some of which are directed towards students with disabilities. These measures take effect only after debt has been incurred and do not address inequality that arises at the time debt is incurred.

Frith, supra para 7 at paras 48-61.

16. To "promote inclusion of those with permanent disabilities, CSLP offers provisions to *accommodate* disabled borrowers at two distinct points, at the eligibility phase [reduced course load requirements] to increase access opportunities to post-secondary education, and at the repayment phase" (*Frith*, emphasis added). No accommodations are made during the study phase, which is when debt is actually incurred (*Frith*).

Frith, supra para 7 at para 65.

17. These provisions include:

(a) The Permanent Disability Benefit ("PDB"), a repayment tool that allows the cancelling of debts for students with permanent disabilities experiencing exceptional financial hardship (*CSFAA*; *Carraro*);

CSFAA, *supra* para 9, s. 11.1.
Affidavit of Cynthia Carraro, Joint Application Record Vol. K, Tab AA ["*Carraro*"] at para 4-9.

(b) The Repayment Assistance Plan ("RAP"), created for borrowers experiencing financial difficulties (*Lebrun 2012*). The RAP re-evaluates a student's monthly payment amount to make it more "affordable" to repay the loan within 15 years (*Lebrun 2012*). The RAP for Students with Permanent Disabilities functions similarly, though SWD are assisted to repay their loans over a ten-year period (*CSFA Regulations*; *Lebrun 2012*).

Affidavit of Marc Lebrun, February 2, 2012, Joint Application Record Vol. L, Tab DD ["*Lebrun 2012*"] at paras 80, 81, 86.
CSFA Regulations, *supra* para 9, Part V.

(c) The Severe Permanent Disability Benefit fully forgives the debt of students who, by reason of a severe, permanent disability, are unable to repay the student loan and will never be able to repay it (*CSFAA*; *Lebrun 2012*).

> *CSFAA*, *supra* para 9, ss. 11, 11.1.
> *Lebrun 2012*, *supra* para 17 at para 90.

ii. Implementation of the CSLP – Provincial

18. The implementation of the CSLP is impacted by provincial legislation and agreements. In Ontario, the Ontario Student Loan Program ("OSAP") is governed in part by the Ontario *Ministry of Training, Colleges and Universities Act*, R.S.O. c. M.19 ("*MTCUA*"), the regulations made under the *MTCUA*, as well as the Canada-Ontario Agreement on Harmonization of Federal and Provincial Student Loans Programs (the "Harmonization Agreement").

19. Section 5(1) of the *MTCUA* provides that the Minister may make grants and awards to students of universities. Various provisions of *Ontario Student Loans Made Before August 1, 2001*, R.R.O. 1990, Reg. 774 and *Ontario Student Loans Made August 1, 2001 To July 31, 2017*, O. Reg. 268/01 ("*O. Reg. 268/01*") allow for back-end, means-tested debt relief, addressing debt after it has been occurred, in specific circumstances. The Ontario programs do not address debt load at the time it is incurred by students.

20. The administration of integrated student loans in Ontario is guided by the Harmonization Agreement. Ontario delivers both the Ontario and Canada portions of a post-secondary student loan for Ontario residents under the federal and provincial legislation. The Harmonization Agreement defines "qualifying student" with reference to the definition provided in the federal legislation. At the time Ms. Simpson attended university, the Harmonization Agreement defined a "qualifying student" in the same manner as the Federal legislation.

21. Like the Federal legislation, the period of a loan is for one "period of study" (*O. Reg. 268/01*). As such, provincial loans are also administered on a yearly rather than on a per program basis. The same delayed interest provisions also apply to the provincial portion of the loan, which ensures students in study are not responsible for paying interest on their loans (*Rahman*).

> *O.Reg. 268/01*, *supra* para 19, ss. 3.1, 7(2).
> *Rahman*, *supra* para 7, Exhibit J, ss. 4.7, 4.8.

22. Like the CSLP, OSAP is rooted in the principle that "financial need should not be a barrier to accessing postsecondary education" (*Jackson*). Society benefits from the attainment of PSE (*Jackson*).

> Affidavit of Richard Jackson, Joint Application Record Vol. K, Tab BB ["*Jackson*"] at para 5.

23. Most provincial PSE grants and programs are available to both SWD and SWOD (*Wall*; *Morris 2014*; *Morris 2016*). Furthermore, Ontario has some programs aimed at SWD that involve providing "funding to postsecondary institutions and other organizations" (*Jackson*). This funding cannot be applied to reduce student debt (*Morris Cross-Examination*) Only programs for "financial assistance directly targeted to students with disabilities" (*Jackson*) are relevant to the issue of student debt loads.

> Affidavit of Donna Wall, Joint Application Record Vol. L, Tab AA ["*Wall*"] at paras 9-30.
> Affidavit of Noah Morris, June 6, 2014, Joint Application Record Vol. M, Tab BB ["*Morris 2014*"] at paras 15-32.
> Affidavit of Noah Morris, October 4, 2016, Joint Application Record Vol. P, Tab BB ["*Morris 2016*"] at paras 4-33.
> Transcript of the Cross-examination of Noah Morris, Joint Application Record Vol. S, Tab AA ["*Morris Cross-Examination*"] at p. 71, q. 254.
> *Jackson*, *supra* para 22 at para 44.

24. These include:

(a) An exception to the general rule that Ontario does not provide financial assistance to student studying out-of-country: students who leave Canada to attend PSE where American Sign Language is the only or dominant language of instruction are eligible (*Jackson*);

Jackson, *supra* para 22 at paras 16, 56-60.

(b) The Ontario Tuition Grant, which has different eligibility criteria for SWD including allowing a longer time period between high school and university and eligibility for out-of-country programs for deaf students (*Wall*);

Wall, *supra* para 23 at para 13, p. 6.

(c) The provincial Repayment Assistance Plan, though, like the federal RAP, the provincial RAP does not apply retroactively to address debt incurrence and is only available to students experiencing financial difficulties (*Wall*);

Wall, *supra* para 23 at paras 14-24.

(d) The September 2007 cap on college tuition fees, wherein the Ontario government "implemented a policy that requires tuition fees to be capped for students with permanent disabilities attending publicly-assisted colleges who take longer to complete their program due to their disability" (*Wall*; *Morris Cross-Examination*; *Undertaking #4 to Morris Cross-Examination*).

Wall, *supra* para 23 at para 25.
Morris Cross-Examination, *supra* para 23 at p. 59, q. 215.
Undertaking #4 to Cross-examination of Noah Morris, Joint Application Record Vol. S, Tab BB, #4 ["*Undertaking #4 to Morris Cross-Examination*"] p. 1.

(e) The extension to the number of weeks SWD may receive financial assistance, though debt continues to accumulate during the additional weeks of study (*Morris Cross-Examination*).

Morris Cross-Examination, *supra* para 32 at p. 58, qs. 205-13.

B. The Applicant's Experience

25. Jasmin Simpson is an Ontario resident who completed her Bachelors and Master of Social Work degrees ("BSW" and "MSW") at Gallaudet University in Washington, U.S.A. from 1999-2008. She has Systemic Lupus Erythematosus, is deaf, and is legally blind. She communicates using American Sign language ("ASL") (*Simpson*).

Affidavit of Jasmin Simpson, December 21, 2006, Joint Application Record Vol. B, Tab AA ["*Simpson 2006*"] at para 2.

26. Ms. Simpson took a preparatory year before attending post-secondary; she did not incur a student loan for this year (*Simpson 2006*). Ms. Simpson required 5 years to complete her BSW and 3 years to complete her MSW. Ontario does not offer a non-honours BSW but

offers an honours BSW in four years (*Simpson 2010*). For students with a BSW, an MSW can be completed in 10 months to 1 year (*Simpson 2010*).

> *Simpson 2006*, *supra* para 25 at para 3.
> Affidavit of Jasmin Simpson, August 5, 2010, Joint Application Record Vol. G, Tab BB ["*Simpson 2010*"] at para 1.

27. There are no post-secondary education institutions in Canada that can fully accommodate Ms. Simpson's disabilities. Gallaudet is the only liberal arts university in the world designed exclusively for deaf and hard of hearing students (*Simpson 2006*). Affiant Mr. Malkowski affirmed the importance of specialized educational institutions such as Gallaudet, noting that "all aspects of a [PSE] are accessible" and that the use of interpreters in an Ontario university cannot provide a comparable level of accessibility (*Malkowski*). Moreover, the cost of hiring an interpreter in Ontario far exceeds the expense associated with attending a fully inclusive institution like Gallaudet (*Malkowski*).

> *Simpson 2006*, *supra* para 25 at para 14.
> Affidavit of Gary Malkowski, Joint Application Record Vol. D, Tab AA ["*Malkowski*"] at paras 17, 20, 21-24.

28. Provincial affiant Ms. Wall stated that a "complete" postsecondary education is available in Canada for deaf students, despite the fact that "no university in Canada … offers the primary mode of instruction through ASL" (*Wall*). As Ms. Wall is not an expert in the education of SWD or in disability accommodations, her comments on this point should be disregarded in favour of Mr. Malkowski's. Mr. Malkowski attested that Gallaudet fully accommodates students in a way that Canadian PSE institutions are unable to mimic. Further, Ms. Wall's statements are contradicted by Ontario programs which specifically provide an exception to the funding restrictions for out-of-country students to allow students attending Gallaudet to receive student loans, thereby recognizing that a

comparable program is not available in Ontario (*Wall*; see also *Jackson*). Ms. Simpson applied for and received student loans for her enrollment at Gallaudet (*Simpson 2006*).

> *Wall*, *supra* para 23 at paras 106-07, 13, 52(7).
> *Malkowski*, *supra* para 27 at paras 15-25.
> *Jackson*, *supra* para 22 at paras 16, 56-60.
> *Simpson 2006*, *supra* para 25.

29. In February 2001, while enrolled in the second semester of her second year at Gallaudet, Ms. Simpson became severely ill due to a lupus flare-up (*Simpson 2006*) She was advised to withdraw for hospitalization and care by her family in Ontario (*Simpson 2006*). Ms. Simpson spent the next three months in and out of an Ontario hospital in order to stabilize her condition (*Simpson 2006*).

> *Simpson 2006*, *supra* para 25 at paras 19, 20-21.

30. Ms. Simpson contacted Gallaudet and OSAP officials to advise of her withdrawal (*Simpson 2006*). Many Ontario universities provide an appeal mechanism whereby students who may have to withdraw from studies after an established cut-off date because of disability-related reasons may apply for a refund of tuition and fees (*Simpson 2006*). However, because she had withdrawn after the withdrawal cut-off date, Gallaudet was obliged by U.S. immigration law to bill her for the Spring 2001 semester (*Simpson 2006*).

> *Simpson 2006*, *supra* para 25 at paras 20, 25, 23, Exhibit 14.

31. OSAP officials were aware of the U.S. immigration rules prior to approving Ms. Simpson's out-of-country student assistance (*Simpson 2006*). Nonetheless, Ms. Simpson had to return OSAP funding received for that semester on a prorated basis, despite the fact that this amount was still owed to Gallaudet (*Simpson 2006*). This meant that, in addition to losing her school year, which she would have to repeat, Ms. Simpson was required to pay an amount of approximately $13,000 (negotiated to approximately $9,000) out of her own

pocket before she would be permitted to re-enroll and complete her studies (*Simpson 2006*). She was unable to repay the entire amount by the start of the Fall 2001 term and so was not permitted to re-enroll in her program until January 2002 and only after negotiating a payment plan with Gallaudet (*Simpson 2006*). Ms. Simpson was also required to pay interest on her loans from October 2001-January 2002 (*Simpson Cross-Examination*).

> *Simpson 2006*, *supra* para 25 at paras 28, 28-29, 30, 31.
> Transcript of the Cross-Examination of Jasmin Simpson, Joint Application Record Vol. R, Tab CC ["*Simpson Cross-Examination*"] at p. 42, q. 155.

32. Ms. Simpson mounted a *Charter* challenge to OSAP's policy of requiring students to repay monies loaned where a student withdraws for illness and must pay tuition for the missed semester. She also raised the issues that she incurred loans for a year while she was on medical leave and that interest accrued on her loan while she was withdrawn for medical reasons (*Simpson 2006*). This challenge sought to demonstrate how OSAP's policies failed to account for the different experience SWD have in PSE as well as the overwhelmingly burdensome impact OSAP policies have on deaf students who are obliged to pursue their PSE studies at international institutions with appropriate programming.

> *Simpson 2006*, *supra* para 25 at para 33.

33. As a result of her challenge, the Ontario government changed its policy. Provided that a deaf student studying out-of-country is able to demonstrate that she/he has withdrawn for medical reasons, they would no longer be expected to return OSAP amounts necessary to pay outstanding debts to universities (*Simpson 2006*). Ontario also reimbursed Ms. Simpson for interest which accrued on her Ontario loans and reduced her outstanding debt load by issuing bursary amounts for which she would have been eligible had she been enrolled between January 2001 and January 2002 (*Simpson 2006*).

> *Simpson 2006*, *supra* para 25, Exhibit 18.

34. The Ontario government alleged that it was not able to forgive the loan amounts incurred by deaf students attributable to a school year lost for reasons of illness (*Simpson 2006*). It advised that this was due to the Harmonization Agreement (*ASF-ON*). Instead, Ontario agreed as part of the terms of settlement reached in April 2003:

> [T]o open discussions with the relevant federal government authority on the issue of Ontario and Canada student loan eligibility and loan reduction in circumstances of the early withdrawal from studies of deaf out of country students due to serious medical reasons. In the event these discussions result in a change of student loan policy, the amount of Ms. Simpson's student loans will be reduced accordingly (*Simpson 2006*).

Simpson 2006, *supra* para 25 at para 34, Exhibit 18.
Agreed Statement of Facts between Jasmin Simpson and the Attorney General of Ontario, Joint Application Record Vol. A, Tab 6 [*ASF-ON*] at para 4.

35. The Release signed with the settlement did not bar future claims and so does not estop Ms. Simpson from bringing the present Application (*Simpson 2006*).

Simpson 2006, *supra* para 25, Exhibit 18.

36. Counsel for Ms. Simpson wrote to the federal Ministers overseeing the student loan program in March 2004 and August 2006, asking that the disproportionate impact the student loan system has on students with disabilities be addressed (*Simpson 2006*). While the "over-award" policy was amended, the Ministers declined to address the other issues raised (*ASF-all*).

Simpson 2006, *supra* para 25 at paras 36-39.
Agreed Statement of Facts between Jasmin Simpson and Both Respondents, Joint Application Record Vol. A, Tab 5 ["*ASF-all*"] at para 2.

37. Aside from her student loan, Ms. Simpson's sole source of income during her PSE was her Ontario Disability Support Program ("ODSP") allowance. Ms. Simpson's "bursaries and grants did not offset each year of additional loan funding received" (*Simpson 2010*). As a result of the CSLP framework, Ms. Simpson incurred greater debt than her non-disabled

peers, because of her disability-related need to take longer to complete the same program of study (*Simpson 2010*).

Simpson 2010, *supra* para 26 at paras 7, 15.

38. Ms. Simpson faced the following consequences from this unequal debt incurrence:

    (a) Ms. Simpson was obliged to take student loans (approximately $4,400.00) for an academic semester she was unable to complete for medical reasons;

    (b) Ms. Simpson had to borrow money for a subsequent academic year (approximately $8,800 USD) to make up for the year lost because of her illness;

    (c) Ms. Simpson's federal student loans accrued interest ($368.50), which she paid, while she was withdrawn from school for medical reasons;

    (d) While out of school for medical reasons, Ms. Simpson was obliged, for five months, to make payments on her federal loans ($353.45), while also attempting to pay Gallaudet tuition so that she could return to her studies; and

    (e) Because of her disability, Ms. Simpson required nine years to complete her degrees rather than the standard length of approximately five years. As a result of this additional time, Ms. Simpson graduated with a student loan that is substantially more than her non-disabled peers' (approximately $76,550).

39. Ms. Simpson lost one year of future employment income while making up an academic year lost due to the lupus flare-up, another year due to her preparatory year, and 4 years due to the length of her specialized programs, all solely because of her disabilities. This lost income, while causing her disadvantage, was not the result of the additional debt incurrence.

C. Higher Debt Load Incurred by SWD(longer) under the CSLP

i. Summary of Affiants

40. In addition to her own evidence, the Applicant filed evidence from the following experts on this Application:

i. **Dr. Anthony Chambers**: Dr. Chambers was an "assistant professor and Program Coordinator with the Higher Education Program" as well as the former "Director for the Centre for the Study of Students in Postsecondary Education Theory and Policy Studies" at the Ontario Institute for Studies in Education at the University of Toronto (*Chambers*). Dr. Chambers' expertise relates to "the experience of students in postsecondary education, including barriers faced by students pursuing postsecondary education" (*Chambers*; *Cross-Examination of Chambers*).

> Affidavit of Tony Chambers, Joint Application Record Vol. G, Tab AA ["*Chambers*"] at paras 1, 3.
> Transcript of the Cross-Examination of Anthony Chambers, Joint Application Record Vol. U.2, Tab DD ["*Cross-Examination of Chambers*"] at p. 58, q. 249; p. 76, q. 338; p. 116, q. 524; p. 118, q. 526.

ii. **Adele Furrie**: Adele Furrie is a management consultant who worked for Statistics Canada for 40 years and has particular expertise in the area of living with a disability (Furrie 2013). Her expertise has been recognized by the federal and Ontario governments as she has provided "expert advice on the collection, analysis and dissemination of survey data" on various federal and provincial projects regarding individuals with disabilities (Furrie 2013).

> Affidavit of Adele Furrie, November 15, 2013, Joint Application Record Vol. H, Tab BB ["*Furrie 2013*"] at paras 1, 5.

iii. **Dr. David Lewis**: Dr. Lewis was the Senior Vice President of HDR Corporation as Director of Economics and Financial Services (*Lewis 2013*). Dr. Lewis has worked as an economist on disability issues in government and the private sector and specializes "in the conduct of public policy analysis, risk analysis, forecasting, and applications of Cost-Benefit Analysis and Regulatory Impact Analysis (*Lewis 2013*).

> Affidavit of David Lewis, November 20, 2013, Joint Application Record Vol. H, Tab CC ["*Lewis 2013*"] at paras 1, 32, 2, 3.

iv. **Gary Malkowski**: Gary Malkowski is the former President, Public Affairs at the Canadian Hearing Society and has direct knowledge of educational support services provided to SWD (*Malkowski*; see also *Malkowski Cross-Examination Exhibits*).

> *Malkowski*, *supra* para 27 at para 1.
> Exhibits from the Cross-Examination of Gary Malkowski, Joint Application Record Vo. R, Tab GG ["*Malkowski Cross-Examination Exhibits*"], Exhibit 1.

v. **Julia Munk**: Julia Munk, a former Disability Issues Consultant, "[c]oordinator for the University of Toronto Access Centre, and a consultant for the National Education Association of Disabled Students" provided her expert opinion of the challenges faced by SWD in PSE (*Munk*). Her expertise arises from her personal experience working with persons with disabilities in the PSE setting and as a former post-secondary student with a disability who took longer to complete her PSE

because of her disability. Academic research was provided to support and validate her personal experience (*Munk Cross-Examination*).

> Affidavit of Julia Munk, Joint Application Record Vol. E, Tab AA ["*Munk*"] at paras 2, 4-6.
> Transcript of the Cross-Examination of Julia Munk, Joint Application Record Vol. T, Tab AA ["*Munk Cross-Examination*"] at p. 30, q. 117.

vi. **Dr. Melanie Panitch**: Dr. Melanie Panitch, PhD, MSW, Founder of the School of Disability Studies at Ryerson University and the Institute for Disability Studies Research Education, has researched and taught in the areas of human rights and disability and has extensive experience with SWD in the PSE setting (*Panitch 2007*). Her experience is rooted in her interaction with students and discussions regarding the impact of financial aid policies on such students, as well as research in the areas of social policy (*Panitch Cross-Examination*). Dr. Panitch has almost a decade's worth of experience working at the Roeher Institute in the technical arm of the Canadian Association for Community Living researching policy and disability (*Panitch Cross-Examination*). Her affidavit provides an expert's overview of the experience of SWD in PSE and their experience with financial aid.

> Affidavit of Melanie Panitch, June 27, 2007, Joint Application Record Vol. F, Tab AA ["*Panitch 2007*"] at paras 1, 2, 5.
> Transcript of the Cross-Examination of Melanie Panitch, Joint Application Record Vol. R, Tab JJ ["*Panitch Cross-Examination*"] at p. 15, q. 58; p. 20, q. 77-79; p. 40, q. 158.

vii. **Alex Usher**: Mr. Usher, President of Higher Education Strategy Associates, is an internationally recognized expert in post-secondary student financial aid (*Usher*). Expert federal affiant Dr. Finnie acknowledged the expertise of Mr. Usher in making the calculations detailed in his affidavit, which clearly establish the additional debt incurred by students who take longer to complete their program due to disability (*Finnie Cross-Examination*).

> Affidavit of Alex Usher, Joint Application Record Vol. H, Tab AA ["*Usher*"] at paras 1-5.
> Transcript of the Cross-Examination of Ross Finnie, Joint Application Record Vol. T, Tab CC ["*Finnie Cross-Examination*"] at p. 10, q. 28-35.

viii. **Frank Smith**: Frank Smith was the "National Coordinator for the National Educational Association of Disabled Students" which is responsible for pursuing equal access to post-secondary education for students with disabilities (Smith, at para 2-3). Mr. Smith is an expert in the educational experience of persons with disabilities. Federal government affiant Mr. Rahman validated the authority of Mr. Smith by identifying him as a key participant in stakeholder discussions regarding the delivery of student loans (*Rahman Cross-Examination*). Mr. Smith was not cross-examined and therefore his evidence is uncontradicted.

> Affidavit of Frank Smith, Joint Application Record Vol. C, Tab AA ["*Smith*"] at paras 2-3.

Transcript of the Cross-Examination of Atiq Rahman, Joint Application Record Vol. T, Tab FF ["*Rahman Cross-Examination*"] at p. 47, q. 145.

41. Provincial Respondent affiants were Richard Jackson, Donna Wall, Noah Morris, and Jessica Kelly.

42. Federal Respondent affiants were Rosaline Frith, Cynthia Carraro, Marc Lebrun, Atiq Rahman, Dr. Ronald-Frans Melchers, Dr. Ross Finnie, and Dr. Timothy Farmer.

ii. SWD are More Likely to Take Longer to Complete PSE than SWOD and May Do So for Disability-Related Reasons

43. SWD are underrepresented in PSE (*Furrie 2013*; *Rahman*; *Smith*; *Panitch 2007*). Federal affiant Mr. Rahman advised that the reduced course-load requirements for SWD in PSE as an accommodation designed in part to encourage increased attendance of SWD in PSE (*Rahman Cross-Examination*). SWD in PSE also tend to be older when participating in PSE as compared to SWOD (*Furrie 2013*; *Furrie 2017 CSD*). SWD are less likely than SWOD to take either undergraduate or graduate (university) programs and are more likely to attend non-degree programs than SWOD (*Furrie 2013*). Degree of disability also impacts educational experience. As the degree of disability increases, the level of educational attainment decreases (*Furrie 2017 CSD*). With respect to deaf students in particular, provincial affiant Mr. Jackson alleged that Mr. Malkowski was incorrect in stating that the number of deaf students in PSE has decreased since 1997 (*Jackson*). However, Mr. Jackson's comment is misleading: the source for his critique references a source referring to *students with disabilities* in PSE in general and not deaf students specifically (*Jackson*). Dr. Finnie acknowledged that there "*is* an overall access gap faced by students with disabilities, [and] it is substantial" (*Finnie*, emphasis in original).

Furrie 2013, *supra* para 40 at para 50, p. 19: Table 8; para 31, p. 10: Table 2; para 39, p. 13: Table 5;

Rahman, *supra* para 7 at paras 10-15
Smith, *supra* para 40 at paras 2-3;
Panitch 2007, *supra* para 40 at paras 8, 6;
Rahman Cross-Examination, supra para 40 at p. 92, q. 288;
Supplementary Affidavit of Adele Furrie (CSD), November 24, 2017, Joint Application Record Vol I, Tab BB [*Furrie 2017 CSD*] at para 32, Table 1; para 36: Table 3
Jackson, *supra* para 22 at paras 97, 13, Exhibit E (Note that there is no source for the data in Exhibit E)
Affidavit of Ross Finnie, Joint Application Record Vol. O, Tab AA ["*Finnie*"], at para 16.

44. Employment levels increase with level of education (*Furrie 2017 CSD*). However, notwithstanding level of education, as degree of disability increases, employment rate decreases. For example, persons without disabilities who have a university degree are employed at a rate of 81%, while those with a severe disability and a university degree are employed at a rate of 62% (*Furrie 2017 CSD*). For individuals with a non-university post-secondary degree, the employment rate for those without a disability is 84% compared to 46% for those with a severe disability (*Furrie 2017 CSD*). Other employment benefits for persons with disabilities associated with obtaining a post-secondary degree: this level of education can also prevent social isolation, increase visibility, and improve public perception of persons with disabilities (*Munk*; *Panitch 2007*; *Jackson*; see also *Malkowski*).

Furrie 2017 CSD, *supra* para 44 at para 41; Table 6.
Munk, *supra* para 40 at paras 7-11.
Panitch 2007, *supra* para 40 at para 7.
Jackson, *supra* para 22 at para 5.
Malkowski, *supra* para 27 at paras 1, 5, 8-10.

45. However, SWD are also more likely to earn a lower income and to be under-employed than their non-disabled peers (*Smith*). While provincial affiant Mr. Jackson alleged that deaf post-secondary graduates are employed more and earn more than the general Ontario population, this statement is misleading and should be disregarded (*Jackson*). A careful review of Mr. Jackson's source for this statement demonstrates that, in almost every category listed, those who are deaf are employed at lower rates and earn less than the general Ontario population (*Malkowski*). Dr. Finnie acknowledged that the "rate of return",

or the likelihood of being gainfully employed after graduation for SWD would be taken into account by prospective students and suggested that the loans program should be adjusted to reflect this lower employment rate (*Finnie Cross-Examination*).

> *Smith*, *supra* para 40 at paras 2-3, 6, 9.
> *Jackson*, *supra* para 22 at para 98.
> *Malkowski*, *supra* para 27, Exhibit 4, p. 21, Table #5.
> *Finnie Cross-Examination*, *supra* para 40 at p. 162, qs. 623-25.

46. Federal affiant Dr. Melchers critiqued some of Ms. Furrie's statistical methods. However, he had understood the data to relate specifically to the experiences of persons with disabilities under the CSLP: in fact, the data related to the educational and employment experience of persons with disabilities (*Melchers 2018*). Dr. Melchers also alleged that there was no overview of the limitations of the source data (*Melchers 2018*). The data was sourced from Statistics Canada: Ms. Furrie's affidavit provides ample information regarding the data and its limitations (*Furrie 2017 CSD*). Dr. Melchers further alleged that Ms. Furrie had not identified her variables (*Melchers 2018).* For simplicity and readability, and in a manner consistent with her reports for Statistics Canada and for public and private clients, the information contained in Ms. Furrie's affidavit was simplified to exclude technical terms and jargon such as the names of the specific variables: this does not, however, change the validity of her conclusions. On cross-examination, Dr. Melchers admitted that his and Ms. Furrie's respective "Table 1s" are actually identical (*Melchers Cross-Examination 2018*). Clearly, both affiants used the same variables. Dr. Melchers' failure to recognize this without assistance calls into question his other conclusions, as does his admission that he had left out nearly 400 000 people from some of his calculations and his refusal to admit this was an "error" (*Melchers Cross-Examination*).

> Supplementary Affidavit of Ronald-Frans Melchers, Joint Application Record Vol. Q, Tab BB ["*Melchers 2018*"] at paras 10, 13.
> *Furrie 2017 CSD*, *supra* para 43 at para 24; Appendix 3.

Transcript of the Continued Cross-Examination of Ronald-Frans Melchers, Joint Application Record Vol. S, Tab DD ["*Melchers Cross-Examination 2018*"] at p. 120-21, qa. 441-45; p. 132-24, qs. 499-506.

47. Finally, Dr. Melchers critiqued the choice of age range of 18-64 in Ms. Furrie's calculations and alleged that the questions used in the surveys were inappropriate (*Melchers 2018*). The age range choice was appropriate because Statistics Canada used the same range for its employment studies (*Melchers Cross-Examination*). Dr. Melchers also acknowledged that the exclusion of 15-18-year-olds would have no impact on the conclusions (*Melchers Cross-Examination*). With respect to the appropriateness of the questions used, Melchers could not identify any better data (*Melchers Cross-Examination*). Ultimately, Dr. Melchers was unable to demonstrate any flaw in Ms. Furrie's analysis or call into question any of her conclusions. Federal affiant Mr. Rahman also used the same statistics as Ms. Furrie in his evidence (*Rahman*).

Melchers 2018, *supra* para 47 at para 14.
Melchers Cross-Examination, *supra* para 47 at p. 114, qs. 410-11; p. 136-40, qs. 512-32.
Rahman, *supra* para 7 at paras 10-15.

48. Affiants for all parties have observed that society at large stands to benefit from SWD participation in PSE, but that these students face barriers. Barriers include the likelihood that students with disabilities will take longer to complete their studies and financial considerations (debt incurrence).

49. Students with disabilities are more likely to take longer to complete their studies than their non-disabled peers (*Smith*; *Munk*; *Chambers*; *Furrie 2013*). Approximately 34% of students with disabilities take longer to complete their PSE (*Furrie 2017 CSD*, para 39, Table 5). Depending on the level of severity, the rates of students with disabilities reporting it took longer to complete their level of education increased from 24.9% for those with a mild disability to 44% for those with a severe disability (*Furrie 2017 CSD*). Federal affiant

Dr. Finnie confirmed that SWD are more likely to still be in university after 4 years when compared to SWOD and acknowledged that some SWD will take longer to complete their PSE (*Finnie*; *Finnie Cross-Examination*). Federal affiant Mr. Rahman refused to acknowledge that taking longer can be a barrier to SWD, while federal affiant Ms. Frith did acknowledge this (*Rahman Cross-Examination*; *Frith*).

> *Smith*, *supra* para 40 at paras 20, 22.
> *Munk*, *supra* para 40 at paras 12, 14-15.
> *Chambers*, *supra* para 40 at paras 11, 13.
> *Furrie 2013*, *supra* para 40 at paras 11, 32.
> *Furrie 2017 CSD*, *supra* para 43 at para 39, Table 5.
> *Finnie*, *supra* para 43 at para 40.
> *Finnie Cross-Examination*, *supra* para 40 at p. 86, qs. 270-84.
> *Frith*, *supra* para 7 at para 66.

50. In addition, federal affiants agreed that one of "the most important impediments to the pursuit of [PSE] include financial situations" (*Rahman*). Mr. Rahman also agreed with federal affiant Ms. Frith's affidavit, at paragraph 64, wherein she noted that SWD face barriers to PSE including additional costs (*Rahman Cross-Examination*). Dr. Finnie, despite not having looked directly at the issues in this case on his studies, confirmed that financial barriers are reported as one of the reasons for lack of participation in PSE (*Finnie*). Federal affiant Mr. Marc Lebrun acknowledged that "additional barriers may exist for students with permanent disabilities including "exceptional costs associated with their disabilities" (*Lebrun 2012*).

> *Rahman*, *supra* para 7 at para 7.
> *Rahman Cross-Examination*, *supra* para 40 at p. 86, q. 270.
> *Finnie*, *supra* para 43 at paras 27-28.
> *Lebrun 2012*, *supra* para 17 at para 40.

51. Indeed, the CSLP was created in recognition that loans are required to ensure equal access to PSE (*Frith*). Debt is a barrier to SWD (*Smith*). Dr. Panitch outlined the role financial barriers play with respect to the under-inclusion of SWD in PSE (*Panitch 2007*). Dr.

Panitch confirmed that the length of time needed to complete a PSE program can result in additional loans and fees (*Panitch 2007*). As Mr. Malkowski observed, high debt load is a principal barrier to PSE as it leads to some SWD abandoning their PSE pursuits (*Malkowski*). This is especially so in light of the fact that SWD are likely to take longer to complete their program, resulting in increased financial consequences (*Munk*). Mr. Usher's affidavit supported the conclusion that SWD face unique barriers to PSE participation with respect to student loans.

> *Frith*, *supra* para 7 at para 5.
> *Smith*, *supra* para 40 at at paras 20, 22.
> *Panitch 2007*, *supra* para 40 at paras 8, 6, 9-10; 15-18.
> *Malkowski*, *supra* para 27 at paras 26, 30-31.
> *Munk*, *supra* para 40 at paras 12, 14-15.

52. This conclusion is further supported by the perceptions of SWD themselves. Dr. Chambers' affidavit details a study he co-authored on the "Assessment of Debt Load and Financial Barriers Affecting Students with Disabilities in Canadian Post-Secondary Education ([t]he Report)" (*Chambers*). The study included a literature review, interviews with SWD across Canada, and an online survey regarding SWD's perceptions of their experience with debt load and financial barriers at PSE (*Chambers*; *Chambers Cross-Examination*). Of the students who participated, 60% "believed that financial costs would influence the completion of their studies", 39% "changed their educational pursuits due to financial barriers" and 26% decided to not pursue further PSE as a result of debt incurred during their first degree (*Chambers*). Dr. Chambers concluded that SWD have a perception that they will graduate with higher debt loads than their non-disabled peers (*Chambers*). Federal affiants Drs. Melchers and Finnie both confirmed that studying the lived perceptions of SWD is a worthwhile endeavour if one wants to understand the effects of a particular program (*Melchers Cross-Examination 2016*; *Finnie Cross-Examination*). Dr. Finnie

endorsed Dr. Chambers' survey design and methodology as valid (*Finnie Cross-Examination*).

> *Chambers*, *supra* para 40 at paras 4, 8, 14, 18.
> *Chambers Cross-Examination*, *supra* para 40 at p. 102, q. 462
> Transcript of the Cross-Examination of Ronald-Franz Melchers, Joint Application Record Vol. S, Tab DD ["*Melchers Cross-Examination 2016*"] at p. 54, q. 187-89.
> *Finnie Cross-Examination*, *supra* para 40 at p. 149, q. 572-81; p. 126, q. 481-90.

53. Despite confirming that his expertise does not extend to disability models, definitions of disability, or barriers to PSE (*Melchers Cross-Examination 2016*), Dr. Melchers critiqued Dr. Chambers' study in several ways. None of these critiques both supported and impact Dr. Chambers' conclusions. First, Dr. Melchers suggested that, while it is useful to demonstrate the range of perceptions, the small sample size is incapable of supporting inferences to a larger population (i.e. SWD v SWOD) (*Melchers 2012*). The sample surveyed were students registered with Disability Services Offices at Canadian PSE institutions (*Melchers 2012*). Not all students with disabilities register with such offices, and as a result, SWDs could be missing from the sample (*Melchers 2012*). However, to Dr. Chambers' knowledge, no researcher has found a way to identify SWD who are not registered with Disability Services Offices (*Chambers Cross-Examination*). Dr. Finnie agreed that Disability Services Offices would be a "rich" source of data when looking for SWD(longer) (*Finnie Cross-Examination*). With respect to survey design, Dr. Chambers confirmed that the sample was not random and that it was not intended to be (*Chambers Cross-Examination*). Moreover, Dr. Chambers recognized the limitations associated with the small number of males who responded to the study, however, he explained that the results were consistent with PSE demographics (*Chambers Cross-Examination*). Dr. Chambers further acknowledged that his study was not comparative in nature (SWD and SWOD) (*Chambers Cross-Examination*). Finally, Dr. Chambers acknowledged that

preliminary findings of the study should not have been presented at a conference which included some potential survey respondents, but that it was impossible to know if this contaminated the sample (*Chambers Cross-Examination*). Given that this information appears to be unavailable from other sources, the study provides the best available insight into the views of SWD in PSE. Despite Dr. Melchers' critique that the conclusions of the study should not be generalized, he did not challenge its results (*Melchers 2012*).

> *Melchers Cross-Examination 2016*, *supra* para 52 at p. 49, q. 163;
> Affidavit of Ronald-Frans Melchers, February 2, 2012, Joint Application Record Vol. L, Tab CC ["*Melchers 2012*"] at paras 13, 17; 15; 23.
> *Chambers Cross-Examination*, *supra* para 40 at p. 113, q. 511; p. 27, q. 115; p. 21, q. 90; p. 115, q. 523; p. 113, q. 510; p. 93, q. 430-33.
> *Finnie Cross-Examination*, *supra* para 40 at p. 126, q. 481-83.

54. Provincial fact affiant Ms. Wall also critiqued Dr. Chambers' Report despite her lack of expertise related to research or statistics (*Wall*). Ms. Wall critiqued the lack of comparison with the perceptions of students without disabilities (*Wall*). Of course, this comparator is unnecessary since SWOD, even if they take longer to complete their degree, cannot take longer *because of a disability.* Any difference in debt incurrence cannot be based on a SWOD's disability. Ms. Wall also commented on Dr. Chambers' statistical analysis (*Wall*). In addition to not being a researcher or statistician and therefore not being qualified to do so, her critiques inappropriately conflate important points and are rooted in her assumptions. For example, because 63% of respondents stated that they felt they would be able to obtain a job after graduation, Ms. Wall assumed this meant that their job choices would not be restricted as a result of their debt load or at all (*Wall*). This conclusion is unfounded as it is possible that a student's job choices could be restricted because of their debt and yet he/she could still feel confident that they would be able to attain a job after

graduation. Ms. Wall's critiques are unfounded and come from a source lacking relevant expertise; they should be disregarded in their entirety.

Wall, *supra* para 23 at paras 1-3, 70-100; 83; 98-100; 100.

iii. SWD(longer) Incur More Debt than SWOD or SWD(same)

55. When SWD take longer to complete the same programs of study as their non-disabled peers because of their disability, they stand to incur greater debt. Ms. Simpson's experience provides four examples of why a student with a disability may take longer to complete a PSE program because of disability. In Ms. Simpson's case, she took longer because: 1) the need to take a preparatory year; 2) the need to attend a specialized program which accommodates disabilities; 3) the need to take a reduced course load; and 4) the need to withdraw for medical reasons.

56. Mr. Usher's affidavit demonstrates the "objective basis for the proposition that under the CSLP, students with disabilities who take longer to complete their studies (SWD(longer)) may accumulate higher debt for this reason, as compared to students without disabilities (SWOD) and students with disabilities who do not take longer to complete their studies (SWD(same))" (*Usher*). He demonstrates that, for those SWD who do take longer, some will incur significantly greater debt than their non-disabled peers (*Usher*). Mr. Usher conducted an analysis of three scenarios where SWD(longer) will incur greater debt than SWOD or SWD(same), addressed in greater detail below with respect to the effect of the CSLP structure. He concluded that a lack of a "structural cap on the total level of debt that can be accumulated by SWD(longer)" can result in SWD(longer) incurring greater debt (*Usher*).

Usher, *supra* para 40 at paras 10, 1-2, 43, 32.

57. Ms. Munk outlined that, as a consequence of expenses accruing on a per semester basis rather than on a per credit/program basis, SWD who take longer to complete their program[s] will inevitably incur more debt (*Munk*). Dr. Panitch confirmed that additional time needed can result in additional loans and fees (*Panitch 2007*; *Panitch 2016*). Ontario affiant Mr. Jackson attempted to rebut Ms. Munk and Dr. Panitch's evidence regarding the increased costs SWD have to pay when taking part-time studies, by indicating that these expenses would have to be paid regardless of whether the student was in PSE or not (*Jackson*). However, he neglected to account for the fact that, when in PSE, a SWD may not be able to work to cover these fees, which may be the case after graduating from PSE. Mr. Rahman, pointing to the reduced-course load requirements for SWD as being an "accommodation", was unable to cite any other "accommodation" made for SWD where the student ended up being personally responsible for paying the costs of the accommodation (*Rahman Cross-Examination*). The implication is that the government has accommodated students with disabilities by allowing them to take a lower course load than non-disabled students and still be eligible for loans, but places the onus on the student to pay for that accommodation by having debt accrue on a per semester basis rather than a per-program basis. In other words, if the student accepts the accommodation and takes longer to complete their program because of a disability related-reason, they will bear the additional costs associated with taking longer.

> *Munk*, *supra* para 40 at paras 16-19.
> *Panitch 2007*, *supra* para 40 at paras 15-18.
> Addendum to the Affidavit of Melanie Panitch, Joint Application Record Vol. H, Tab DD ["*Panitch 2016*"] at paras 4-5.
> *Jackson*, *supra* para 22 at para 96.
> *Rahman Cross-Examination*, *supra* para 40 at p. 55, q. 167.

58. Dr. Chambers' Report also confirmed that SWD(longer) have added expenses and greater debt (*Chambers*). Federal affiant Marc Lebrun acknowledged the "exceptional costs" that may exist for students with permanent disabilities (*Lebrun 2012*). Incurring greater debt than their peers is one such exceptional cost for SWD(longer). Dr. Melchers also confirmed that SWD(longer) "may accumulate more debt than [SWOD] or [SWD(same)]", calling this a "given" (*Melchers 2014*).

> *Chambers*, *supra* para 40 at paras 11, 13.
> *Lebrun 2012*, *supra* para 17 at para 40
> *Supplementary Affidavit of Ronald-Frans Melchers*, Joint Application Record Vol. M, Tab CC ["*Melchers 2014*"] at para 61.

59. Dr. Finnie was not aware of any studies done which look at whether SWD take longer to complete PSE and so accumulate more debt (Finnie Cross-Examination). When asked if he knew of a way to study this particular issue, Dr. Finnie recommended that CSLP data be gathered which accounts for disability and look at the amount of debt incurred at the time of consolidation (*Finnie Cross-Examination*). Ms. Furrie conducted just such a study.

> *Finnie Cross-Examination*, *supra* para 40 at p. 115, q. 433-34; p. 116, q. 436-46.

60. In order to demonstrate the extent of the discrepancy Mr. Usher had identified (see above at para 56), Ms. Furrie analyzed federal debt data from the CSLP and examined the difference in debt incurred for SWOD and SWD (*Furrie 2013*). Ms. Furrie examined CSLP data for full-time students during the 2008/09 - 2010/11 school years, noting that micro-level data was not available (*Furrie 2013*). For example, the data provided did not allow her to determine how long a student attended PSE, or whether the program was completed upon debt consolidation; only the number of years for which a student incurred a loan as a result of PSE attendance (*Furrie Cross-Examination*). Moreover, the CSLP data only

includes federal data and not provincial. Ms. Furrie used the same data used in federal affiant Marc Lebrun's affidavit (*Lebrun 2012*).

> *Furrie 2013*, *supra* para 40 at paras 14, 19, 23, 24, 13, 15.
> Transcript of the Cross-Examination of Adele Furrie, November 29, 2016, Joint Application Record Vol. S, Tab FF ["*Furrie Cross-Examination 2016*"] at p. 44, q. 170; p. 45, q. 173.
> *Lebrun 2012*, *supra* para 17 at para 47.

61. Ms. Furrie examined the CSLP debt data by looking at the amount of debt incurred by SWD and SWOD at the time of debt consolidation (*Furrie 2013*). Ms. Furrie then attempted to control for variables such as length of program, institution of study, and type of program, in order to see if this would change her conclusions (*Furrie Cross-Examination*). Mr. Usher emphasized that Ms. Furrie's disaggregated data, namely, her attempts to control for variables such as program length and type of program, etc., results in the most accurate characterization of the issues raised in this case because it helps to account for the vast differences in PSE experience for SWD compared to SWOD (*Usher Cross-Examination*). When loan amounts are broken down on the basis of these variables, the debt experience of SWD compared to SWOD becomes more apparent.

> *Furrie 2013*, *supra* para 40 at para 30.
> *Furrie Cross-Examination 2016*, *supra* para 60 at p. 59, q. 225; p. 75, q. 288.
> Transcript of the Cross-Examination of Alex Usher, Joint Application Record Vol. R, Tab AA ["*Usher Cross-Examination*"] at p. 121, q. 523-528; p. 140, q. 589.

62. When controlling for the above-noted variables, Ms. Furrie found:

    a) SWD "are more likely to take longer to achieve their level of education";

    b) SWD who attend university or private institutions accrue more debt than SWOD attending the same institutions;

    c) "SWD were less likely than SWOD to take either undergraduate or graduate (university) programs but the average debt that they accrued was greater than that of SWOD";

    d) SWD were more likely to attend non-degree programs than SWOD, and SWD accrued lower debt on average at these institutions;

e) Debt varied for program of study, but generally SWD had higher debt loads than SWOD; and

f) The average debt for SWD was greater across most types of post-secondary institutions.

> *Furrie 2013*, *supra* para 40 at paras 11, 32; 37, p. 13: Table 4; para 39, p. 13: Table 5; para 39, p. 13: Table 5; paras 40-41, p. 14: Table 6a.

63. Ms. Furrie concluded that SWD and SWOD have different experiences "both in the type of post-secondary education taken and the size of the average student debt" (*Furrie 2013*). Based on the actual experience of students receiving CSLP loans, Ms. Furrie's analysis confirmed that SWD(longer) attending university are likely to incur greater debt than SWOD and SWD(same).

> *Furrie 2013*, *supra* para 40 at para 48.

64. Respondent affiants did not present evidence to disprove Ms. Furrie's work and she provided explanations for the various criticisms raised by Respondent affiants. For example, Ontario affiant Mr. Morris critiqued Ms. Furrie's work, noting that her assessment of loans being split on a 60% to 40% basis for federal and provincial contributions respectively is a generalization (*Morris 2014*). The 60:40 figure outlining the split between federal and provincial debt was provided to Ms. Furrie by CSLP personnel and represents a rough approximation which will vary from province to province (*Furrie 2013*). Regardless, the 60:40 split does not impact Ms. Furrie's analysis or conclusions which demonstrate that SWD(longer) were likely to incur greater debt than SWOD, regardless of the proportion of debt owed to the federal as compared to the provincial/territorial jurisdiction.

> *Morris 2014*, *supra* para 23 at para 52.
> *Furrie 2013*, *supra* para 40 at paras 19-20.

65. Mr. Morris also commented that Ms. Furrie's analysis does not account for new programs in Ontario which have been introduced to address debt issues such as repayment assistance plans and various grants available to students (*Morris 2016*). Ms. Furrie looked at debt at consolidation. Programs such as repayment assistance plans are not applicable until the repayment stage. As explained in Section A.i. above, repayment assistance plans do not address the discrepancy in debt *incurred* as they have no retroactive effect. Repayment plans do not impact Ms. Furrie's analysis as these programs come into effect *after* consolidation. Other programs such as the CSGSPD were demonstrated by Mr. Usher to not work to reduce the overall debt incurred for SWD(longer).

> *Morris 2016*, *supra* para 23 at para 42.

66. Dr. Melchers critiqued Ms. Furrie's use of averages, suggesting it was not the most accurate representation of the data (*Melchers 2014*). Ms. Furrie used averages to correspond with Federal affiant Mr. Lebrun's use of averages in his affidavit. Using the same calculation with the same data allows for the best comparison between affidavit evidence (*Furrie 2016*). Dr. Melchers refused to acknowledge that the weaknesses in Ms. Furrie's use of averages would equally apply to the Federal affidavits sworn by Mr. Lebrun and Mr. Rahman (*Melchers Cross-Examination*). However, Dr. Melchers seemed to implicitly recognize that if the averages were used for the same purpose in all three affidavits (i.e. comparing groups), then the weaknesses would apply to all three (*Melchers Cross-Examination*). As Ms. Furrie, Mr. Lebrun and Mr. Rahman all used averages in the same way, the same weaknesses apply to all three affidavits.

> *Melchers 2014*, *supra* para 58 at paras 12, 16-18.
> Affidavit of Adele Furrie, June 3, 2016, Joint Application Record Vol. H, Tab EE ["*Furrie 2016*"] at paras 31-32.
> *Melchers Cross-Examination 2016*, *supra* para 52 at p. 39, q. 138-47.

67. In any event, Ms. Furrie's 2016 affidavit included calculations demonstrating the average and median debt incurred for PSE students (*Furrie 2016*). The use of medians did not change the conclusion that SWD accrue more debt than their non-disabled counterparts if they attend university for undergraduate or graduate programs (*Furrie 2016*).

> *Furrie 2016*, *supra* para 66 at para 32; Tables 5, 7b, 7c, para 55.

68. Dr. Melchers also critiqued Ms. Furrie's failure to analyze the size of debt difference between SWD and SWOD (*Melchers 2014*; see also *Melchers 2016*). However, Ms. Furrie was working with censal data and, as such, there is no variability to analyze (*Furrie Cross-Examination 2016*). In other words, because she had *all* of the data from *all* of the students who consolidated their loans in the years considered, there was no variability to analyze (Furrie Cross-Examination 2016). Likewise, standard deviation and sampling error calculations are not applicable when dealing with a census. Dr. Melchers did acknowledge this (*Melchers Cross-Examination 2016*). He further indicated that he understood that debt was capped on an annual basis, but did not realize that debt was not capped if incurred over a number of years (Melchers Cross-Examination 2016).

> *Melchers 2014*, *supra* para 58 at paras 24, 31, 33, 36-37.
> Further Supplementary Affidavit of Ronald-Frans Melchers, September 26, 2016, Joint Application Record Vol. P, Tab AA ["*Melchers 2016*"] at paras 9-10.
> *Furrie Cross-Examination 2016*, *supra* para 60 at p. 39, p. 82, q. 311.
> *Melchers Cross-Examination 2016*, *supra* para 52 at p. 23, q. 83-88; p. 28, q. 100-01.

69. Dr. Melchers accepted Ms. Furrie's conclusions stating that: "[a]lthough students with disabilities do consolidate after more years of study and consequently [have] higher levels of indebtedness, this appears to be primarily the consequence of their greater persistence in completing undergraduate programs of study" (*Melchers 2014*). Dr. Melchers confirmed that his expertise does not extend to disability, models, definitions of disability, of barriers: he consequently doesn't have the expertise to comment on the experience of SWD in PSE

(*Melchers Cross-Examination 2016*). Dr. Melchers bases his conclusion on an assumption about persistence, while having admitted that it is possible that SWOD have the same or greater persistence rates but simply do not require a loan for all years of study (*Melchers Cross-Examination*). Ms. Furrie's conclusion, which is not based on this assumption, should be preferred.

> *Melchers 2014*, *supra* para 58 at para 48.
> *Melchers Cross-Examination 2016*, *supra* para 52 at p. 49, q. 164; p. 55, q. 192-94.

70. Dr. Finnie also failed to realize that Ms. Furrie was looking at censual data and so his critiques on her "sample" are not applicable (*Finnie Cross-Examination*). Dr. Finnie further misinterpreted Ms. Furrie's data with respect to his critique that she looked at all students who ever go into consolidation (*Finnie*). She in fact looked at all loans that were consolidated *in the year listed* and not all students who had *ever* gone into consolidation as of that year: Dr. Finnie declined to acknowledge his error (*Finnie Cross-Examination*). Conversely, Mr. Rahman did acknowledge this aspect of Ms. Furrie's data and agreed that Mr. Finnie had misinterpreted what it represented (*Rahman Cross-Examination*).

> *Finnie Cross-Examination*, *supra* para 40 at p. 106, q. 392-421.
> *Finnie*, *supra* para 43 at para 63.
> *Rahman Cross-Examination*, *supra* para 40 at p. 145, q. 441-47.

71. Dr. Finnie challenged Ms. Furrie's conclusions on the basis of his work on PSE access, barriers, persistence, and debt issues (*Finnie*). While Dr. Finnie has the expertise to comment on persistence, the studies on which he bases his conclusions actually exclude students with severe disabilities; his conclusions are thus inapplicable (*Furrie 2017 PISA*). This was explained in Ms. Furrie's 2017 affidavit on the YITS and PISA studies. The PISA study excluded schools for students with disabilities as well as students who were unable to take the test including those deemed "educable mentally retarded" or those who were

functionally disabled in a way which would prevent them from taking the test (*Furrie 2017 PISA*). Regarding the YITS study, there were two samples selected. The YITS-A sample excludes many students with disabilities (*Furrie 2017 PISA*). The YITS-B sample includes persons with disabilities (*Furrie 2017 PISA*). Ms. Furrie notes that Dr. Finnie is inconsistent regarding which YITS sample (A or B) he is referring to and also makes conclusions on the basis of the PISA and YITS-A survey results (*Furrie 2017 PISA*). Thus, Dr. Finnie's research and conclusions leave out the key group being considered in this case, thereby rendering it irrelevant to issues to be determined in this case and calling into question his expertise to comment on these issues.

> *Finnie*, *supra* para 43 at para 3.
> Supplementary Affidavit of Adele Furrie (YITS_PISA), November 24, 2017, Joint Application Record Vol. I, Tab AA ["*Furrie 2017 PISA*"] at paras 18-22; 14-15; 17-18; 18, 22.

72. Moreover, Dr. Finnie acknowledged another limitation of his studies. He relied on one of his projects entitled "Under-Represented Groups in Postsecondary Education in Ontario: Evidence from the Youth in Transition Survey" (*Finnie*). He acknowledged that the paper does not look at the factors raised in this case (i.e. length of time to complete studies, debt load discrepancies and debt discrepancy as a deterrence for PSE participation) (*Finnie*; see also *Finnie Cross-Examination*). Moreover, Dr. Finnie confirmed that his research has not specifically looked at debt aversion and its relationship to PSE participation (*Finnie*).

> *Finnie*, *supra* para 43 at paras 7; 17; 20, 24.
> *Finnie Cross-Examination*, *supra* para 40 at p. 26, q. 101.

73. Ultimately, the evidence demonstrates that SWD(longer) incur greater debt than SWOD. Mr. Lebrun explained that SWD had on average less *annual* debt than SWOD (*Lebrun 2012*). However, in 2009-2010, SWD had higher average *overall* loans than SWOD at universities (*Lebrun 2012*; see also *Lebrun 2014* which confirms this to be the case in 2011-

2012; *Rahman*). Mr. Rahman provided more recent data which supported Ms. Furrie's calculations, that undergraduate SWD had higher average overall loan balances than their non-disabled peers (*Rahman*). While lower *annual* debt was assumed by Mr. Lebrun to correlate with equal or lesser overall debt, it does not.

> *Lebrun 2012*, *supra* para 17 at paras 47; 79.
> Supplementary Affidavit of Marc Lebrun, June 4, 2014, Joint Application Record Vol. M, Tab AA ["*Lebrun 2014*"] at para 12.
> *Rahman*, *supra* para 7 at paras 60; 90.

74. For those SWD(longer) who take longer for disability-related reasons, such as any of the four circumstances experienced by Ms. Simpson, the greater debt incurred is discriminatory.

iv. The Debt Discrepancy is Not Remedied by Any Initiative under the CSLP

75. Bursaries and grants available as part of the CSLP do not address the additional expenses associated with taking longer to complete the educational program (*Smith*). As such, the CSLP does not account for the "differences in education experience" of SWD as it is structured so that these students pay more for their education (*Smith*). Specifically, because the CSLP does not provide "back end" debt relief to ensure students completing the same program incur the same amount of debt, "[t]he student loan system exacerbates the disadvantage experienced by persons with disabilities" who take longer to complete their studies because of a disability (*Panitch 2007; Panitch 2016*).

> *Smith*, *supra* para 40 at paras 26; 29.
> *Panitch 2007*, *supra* para 40 at para 19.
> *Panitch 2016*, *supra* para 57 at paras 10-12.

76. Affiant Mr. Usher tested three hypothetical CSLP scenarios and compared debt loads for persons with disabilities and those without. When doing his calculations for SWD(longer), Mr. Usher used an additional 2 years based on the definition of "full-time student" in the

CSLP program noting that SWD can take 150% of time to complete their degree and still be considered a full-time student (*Usher Cross-Examination*). Mr. Usher's tables show federal and provincial debt amounts combined. His calculations demonstrate that in all three scenarios SWD(longer) incur greater debt than SWOD or SWD(same) despite initiatives available. While annual tuition and loan caps assist with annual debt incurrence, Mr. Usher's calculations show that the CSLP's lack of a "structural cap on the total level of debt that can be accumulated by SWD(longer)" can result in SWD(longer) incurring greater debt (*Usher*).

> *Usher Cross-Examination*, *supra* para 61 at p. 106, q. 445.
> *Usher*, *supra* para 40 at para 32.

a) Ontario Disability Support Program Payments

77. First, Mr. Usher examined whether the receipt of Ontario Disability Support Program ("ODSP") payments, which increases the resources available to SWD, would result in a decrease in the amount of student loans required. Ms. Simpson was receiving ODSP payments while attending Gallaudet University.

78. Ontario affiant Mr. Jackson stated that SWD who receive ODSP incur lower debt overall than SWOD upon completion of an undergraduate degree (*Jackson*). He provided some information to suggest that the longer a SWD receiving ODSP takes to complete his or her degree, the less debt they incur because ODSP covers the living costs and because the lower educational costs sometimes associated with a reduced course load are able to be covered by grants rather than loans (*Jackson*). Mr. Jackson failed to account for the fact that not every student with a disability will be eligible for ODSP. Moreover, his calculations presume that ODSP rates will cover *all* the living expenses for students with disabilities leaving the CSLP to cover *only* educational expenses. As demonstrated by Mr. Usher and

Ms. Simpson's experience, this is not the reality. While Mr. Jackson's comments regarding ODSP may be true for some SWD, it is not true for all, and it was not true for Ms. Simpson who maxed out her debt each year despite receiving ODSP (*Morris Cross-Examination*). The relief sought in this case would not apply to SWD's who incur less debt.

Jackson, *supra* para 22 at paras 76, 80.
Morris Cross-Examination, *supra* para 23 at p. 74, q. 272.

79. Ontario affiant Mr. Morris likewise suggested that ODSP would offset the difference in debt and result in lower debt overall (*Morris 2016*). His baseless assumptions are that each individual in the SWD(longer) category receives ODSP and that this amount, when combined with the other financial assistance available, will result in a lower overall debt. Mr. Morris did not provide any facts to support his assumptions. Moreover, in cross-examination, Mr. Morris confirmed that students receiving ODSP could still end up incurring the maximum amount of debt per year (*Morris Cross-Examination*).

Morris 2016, *supra* para 23 at para 45.
Morris Cross-Examination, *supra* para 23 at p. 74, q. 272.

80. Ultimately, Mr. Usher demonstrated that SWD(longer) receiving ODSP will still incur more debt than SWOD and SWD(same) (*Usher*).

Usher, *supra* para 40 at paras 29-30, p. 9: Table 2 (below).

Table 2:

Student Group	Total Cost	Resources	Need	Annual Loan	Total Loan
SWOD	$15,000	$4,000	$11,000	$7,300	$29,200 [$7,300 x 4]
SWD (same)	$15,000	$7,000*	$8,000	$7,300	$29,200 [$7,300 x 4]
SWD (longer)	$15,000	$7,000*	$8,000	$7,300	$43,800 [$7300 x 6]
SWOD	$11,000	$4,000	$7,000	$7000	$28,000 [$7,000 x 4]
SWD (same)	$11,000	$7,000*	$4,000	$4,000	$16,000 [$4,000 x 4]
SWD (longer)	$11,000	$7,000*	$4,000	$4,000	$24,000

					[$4,000 x 6]

*includes (hypothetical) receipt of $3,000 in ODSP annually

b) Canada Student Grant for Students with Permanent Disabilities

81. Mr. Usher also examined the impact of receipt of the Canada Student Grant for Students with Permanent Disabilities ("CSGSPD"). The CSGSPD is a $2000 grant given to all students with permanent disabilities for each year of PSE study (*Usher*). Ms. Simpson received the CSGSPD for each year she was entitled to receive it.

Usher, *supra* para 40 at para 24.

82. Mr. Usher's calculations demonstrate that, even with the receipt of this grant, SWD(longer) still incur greater debt than SWOD and SWD(same) (*Usher*). Because the CSGSPD is counted as income rather than a reduction in a student's need, receipt of the grant for SWD(same) may result in a lower overall loan if the student's needs are lower than the maximum loan amount. However, for SWD(longer), the grant does not offset the additional expenses arising from additional years of study.

Usher, *supra* para 40 at para 31, p. 10: Table 3 (below).

Table 3:

Student Group	Total Cost	Resources	Need	Annual Loan	Total Loan
SWOD	$15,000	$4,000	$11,000	$7,300	$29,200 [$7,300 x 4]
SWD (same)	$15,000	$6,000	$9,000	$7,300	$29,200 [$7,300 x 4]
SWD (longer)	$15,000	$6,000	$9,000	$7,300	$43,800 [$7300 x 6]
SWOD	$11,000	$4,000	$7,000	$7000	$28,000 [$7,000 x 4]
SWD (same)	$11,000	$6,000	$5,000	$5,000	$20,000 [$4,000 x 4]
SWD (longer)	$11,000	$6,000	$5,000	$5,000	$30,000 [$5,000 x 6]

c) Tuition

83. Though not unique to the CSLP, some PSE institutions offer a reduction in tuition for students with disabilities consequently taking a reduced course load. Gallaudet did not offer reduced tuition costs for students taking a reduced course load and so these students, including Ms. Simpson, paid full tuition for all years of PSE attendance (*Usher*). Nevertheless, Mr. Usher assessed whether reduced tuition would result in lesser debt for SWD(longer). Mr. Usher's calculations demonstrate that *even when a tuition reduction is offered* for students taking a reduced course load, while the *annual* tuition expenses may be lower for SWD(longer), *total* debt accrued at the end of the program may end up being greater for SWD(longer) than for SWOD or SWD(same) (*Usher*).

Usher, *supra* para 40 at paras 27; 28, p. 8: Table 1 (below).

Table 1:

Student Group	Total Cost	Resources	Need	Annual Loan	Total Loan
SWOD	$15,000	$4,000	$11,000	$7,300	$29,200 [$7,300 x 4]
SWD (same)	$15,000	$4,000	$11,000	$7,300	$29,200 [$7,300 x 4]
SWD (longer)	$13,000	$4,000	$9,000	$7,300	$43,800 [$7,300 x 6]
SWOD	$11,000	$4,000	$7,000	$7000	$28,000 [$7,000 x 4]
SWD (same)	$11,000	$4,000	$7,000	$7000	$28,000 [$7,000 x 4]
SWD (longer)	$9,000	$4,000	$5,000	$5,000	$30,000 [$5,000 x 6]

d) Dr. Chambers' Report and Ontario CSLP initiatives

84. As described above, Dr. Chambers found that SWD have a perception that they will graduate with higher debt loads than their non-disabled peers. He found that these perceptions would be impacted if the financial loan scheme was altered (*Chambers*). He noted that these perceptions play a key role in informing systemic changes and one of the perceptions was the need for more grants (*Chambers Cross-Examination*). Provincial

affiant Ms. Wall indicated that Ontario had taken steps to address some of the Report's recommendations (*Wall*). While the programs she describes do suggest that Ontario recognizes the challenges associated with financial barriers to PSE, many of the programs identified are available to both SWD and SWOD. Moreover, none of these programs impact Ms. Simpson's case as they do not address the discrepancy between debt incurred by SWD(longer) and SWOD or SWD(same) *in identical programs*. Consequently, Ontario's initiatives likewise do not remedy the debt discrepancy.

> *Chambers*, *supra* para 40 at para 18.
> *Chambers Cross-Examination*, *supra* para 40 at p. 108, q. 490-507.
> *Wall*, *supra* para 23 at paras 91-100.

v. The Debt Discrepancy Can Be Remedied

85. None of the Respondent affiants suggested that remedying the debt discrepancy for SWD(longer) would constitute an undue hardship. In fact, Dr. Finnie confirmed that decreasing student loans by offering more grants could have the effect of causing students to attend PSE, stay in PSE, or pursue further degrees (*Finnie Cross-Examination*). Dr. Finnie further affirmed that "up-front", "simple tuition strategies are much more effective" at increasing accessibility for disadvantaged groups than "back-end" programs (i.e. loan repayment such as RAP-PD) (*Finnie Cross-Examination*). He noted that "changes in the loan system could potentially lead to improved [PSE] access" (*Finnie*). Dr. Finnie considered SWD to be a disadvantaged group in the PSE context and agreed that capping tuition as a general concept would be an appropriate response to meeting SWD's needs (*Finnie Cross-Examination*).

> *Finnie Cross-Examination*, *supra* para 40 at p. 93, q. 344; p. 136, q. 518; p. 137, q. 520-22.
> *Finnie*, *supra* para 43 at Exhibit E, p. 17.

86. Dr. Lewis, Applicant's affiant, provided evidence regarding the costs and benefits that would be associated with remedying the difference in debt incurrence (*Lewis 2013*). Dr. Lewis analyzed the cost-benefit ratio associated with eliminating the structural barrier posed by the CSLP and the fact that SWD(longer) incur greater debt than SWOD (*Lewis 2013*). He noted that stereotypical views often lead to the costs being overemphasized while the benefits are neglected (*Lewis 2013*). A fair assessment of the cost-benefit ratio "embraces both use and non-use related benefits of accessibility; it recognizes benefits to people both with and without disabilities; and, importantly, it identifies reduced stigmatic harms and humiliation as a distinct, separate and quantifiable benefit of accessibility" (*Lewis 2013*). Cross-sector benefits such as "reduced pressure on social welfare system and fiscal burdens "insurance value" of potential future need of persons currently without disabilities, and 'existence value' of ensuring a protection deemed an aspect of civil society" should also be considered (*Lewis 2013*).

Lewis 2013, *supra* para 40 at paras 17-20; 9; Exhibit 2 p. 4-5; p. 7-8; p. 6.

87. Dr. Lewis examined whether a reduced debt load is likely to result in "an increase in the rate of participation of SWD in PSE (*Lewis 2013*). He calculated the price elasticity of demand to examine "to what extent, consumers change their use (demand) of a good or service it [*sic*] in response to changes in its price" (*Lewis 2013*). Dr. Finnie critiqued Dr. Lewis' use of elasticities and suggested that the wrong elasticity was used in his calculations (*Finnie*). While it was evident that Dr. Finnie disagreed that the government should eliminate the larger debt incurred by SWD(longer) as he thought this would be too difficult to do (Finnie at para 76), on cross-examination, he acknowledged that he did not actually know any elasticity numbers for debt in Canada (*Finnie Cross-Examination*). Dr. Lewis' selection of elasticity numbers should be preferred to Dr. Finnie's as he has the

greater expertise in this regard. In any event, Dr. Lewis addressed Dr. Finnie's critique of the use of -0.6 elasticity assumption by indicating that his calculations were based on a wide range of elasticity assumptions (*Lewis 2016*). Dr. Lewis also defended his use of tuition elasticity rather than interest rates, given that debt equalization would eliminate all debt (principal and interest) accrued for *additional* years of study (*Lewis 2016*).

> *Lewis 2013*, *supra* para 40 at paras 23; 24.
> *Finnie*, *supra* para 43 at paras 72-74; 76.
> *Finnie Cross-Examination*, *supra* para 40 at p. 151, q. 585-89.
> Supplementary Affidavit of David Lewis, June 3, 2016, Joint Application Record Vol. H, Tab FF ["*Lewis 2016*"] at paras 11, 13.

88. With respect to the benefits associated with PSE participation, Dr. Lewis included consideration for private returns such as higher income, job satisfaction, improved health and greater life satisfaction (*Lewis 2013*) as well as social benefits such as economic growth, reduced crime, improved health, increased volunteer activity and democratic participation, etc. (*Lewis 2013*). Dr. Lewis also examined the expected lifetime earnings increase for SWD who attend PSE (*Lewis 2013*). Dr. Lewis further examined the estimated public costs to eliminate the structural barrier to equal PSE access (*Lewis 2013*). Dr. Lewis included a generous 10% figure to represent administration costs: the costs associated with the administration of a CSLP which results in equal distribution of loans (*Lewis 2013*).

> *Lewis 2013*, *supra* para 40 at Table 4; paras 37-41, Tables 4, 5; Table 5; paras 33-36, p. 14: Table 3; para 36.

89. While cost-benefit calculations are sensitive to many factors, Dr. Lewis ultimately concluded that, on average, the ratio is approximately $1.40 of benefits to $1.00 of costs (*Lewis 2013*). He noted that the calculation "excludes the value of unmeasured benefits such as greater job satisfaction, improved health and longevity, and greater life satisfaction" (*Lewis 2013*). Dr. Lewis confirmed that this ratio also fails to account for the fact that SWD are underrepresented in PSE, which is likely to increase the elasticity of

demand (*Lewis 2013*). Ultimately, the calculations demonstrate that, if the difference in accrued debt between SWD and SWOD was eliminated, approximately 235 more SWD per year would attend PSE (*Lewis 2013*). Moreover, the proposed remedy of ensuring equality in debt incurrence will result in savings in other areas of the CSLP. For example, if debt is capped on a per program basis rather than per year basis, some funding currently being invested in the repayment assistance programs could be diverted into debt equalization. This reallocation of the funds devoted to the CSLP would ensure that debt is incurred in a more equal fashion rather than on a retroactive basis. Moreover it would ensure that assistance is provided to all SWD(longer) and not only those who later have trouble repaying the loans.

Lewis 2013, *supra* para 40 at paras 46; 26, p. 11: Table 1.

90. Dr. Melchers critiqued Dr. Lewis' use of Ms. Furrie's data and questioned the conclusions rendered regarding debt equalization based on Ms. Furrie's use of averages (*Melchers 2014*). Dr. Lewis addressed these criticisms in his 2016 affidavit wherein he instead applied Ms. Furrie's 2016 affidavit use of medians to his calculations. Despite the use of medians, Dr. Lewis concluded that there would likely still be significant positive economic benefits that stand to be gained from resolving the inequity caused by the framework of the CSLP (*Lewis 2016*).

Melchers 2014, *supra* para 58 at para 57.
Lewis 2016, *supra* para 87 at paras 16-17.

91. Provincial affiant Mr. Morris also critiqued Dr. Lewis' economic analysis (*Morris 2014*). Mr. Morris is not an economist and is unqualified to challenge Dr. Lewis' conclusions: this portion of his evidence should be disregarded.

Morris 2014, *supra* para 23 at paras 60-63.

92. Dr. Lewis concluded that the economic benefits associated with eliminating structural barriers in the CSLP could be proportionate with the economic costs (*Lewis 2013*). While Dr. Lewis qualified his calculations by noting that several assumptions were required as a result of unavailable data (i.e. the difference in value between loans of SWD(longer) and SWOD), his work demonstrates there are likely significant benefits to be gained from debt equalization and these must be seriously considered along with any allegation of undue hardship that may be raised by the Respondents (*Lewis 2013*).

Lewis 2013, *supra* para 40 at paras 51; 50.

PART III: STATEMENT OF ISSUES

ISSUE 1: Should the evidence of Dr. Farmer be admitted?

ISSUE 2: Does the increased debt incurred by SWD(longer) violate section 15 of the *Charter*?

ISSUE 3: Is the violation justified pursuant to section 1 of the *Charter*?

ISSUE 4: What is the appropriate remedy for the violation?

PART IV: LAW AND AUTHORITIES

Issue 1: The evidence of Dr. Farmer should not be admitted

93. Timothy Farmer was an "Assistant Professor in the Applied Human Sciences Department at Concordia University in Montreal" and a consultant for the Access Centre for Students with Disabilities at the University (*Farmer 2012*). He has a PhD in Educational Psychology and has experience working with students with disabilities in the PSE context (*Farmer 2012*). Dr. Farmer swore two affidavits wherein he critiqued the work of Dr. Chambers, Ms. Furrie, Mr. Usher, and Dr. Lewis. The Applicant submits that Dr. Farmer's evidence is inadmissible.

Affidavit of Timothy Farmer, February 2, 2012, Joint Application Record Vol. L, Tab BB ["*Farmer 2012*"] at para 1.

94. The Supreme Court of Canada has recently clarified the legal framework for the admissibility of expert evidence. The Court set out a two-stage test. First, the evidence must meet the admissibility threshold (*White*). The threshold test includes assessing the independence and impartiality of the expert (*White*). The second step, also known as the "gatekeeping step", requires judges to balance the risks and benefits of admitting the evidence (*White*).

White Burgess v Abbott and Haliburton Co., 2015 SCC 23, at paras 23, 34, 24 [*White*].

i. Stage 1: Admissibility Threshold

95. The Court in *R v Mohan* stated that an expert must have special knowledge or expertise. The evidence must be necessary in that it is "outside the experience and knowledge of a judge or jury [who] must be assisted in light of its potential to distort the fact-finding process" (*Mohan*). However, experts "must not be permitted to usurp the functions of the trier of fact" (*Mohan*). Finally, the expert must be independent, impartial, as well as capable and willing to fulfill his duty to the court (*White*). Dr. Farmer fails to meet each of these criteria.

R v Mohan, [1994] 2 SCR 9, at paras 23-25 [*Mohan*].
White, *supra* para 94 at para 49.

a) Dr. Farmer lacks the requisite expertise

96. The Respondent has failed to outline the areas in which Dr. Farmer is being proffered as an expert. Dr. Farmer himself suggested his expertise relates to his work with students with learning disabilities, research methods, his personal experience as a person with disabilities, and his experience working with statistics (*Farmer Cross-Examination 2017a*).

Transcript of the Cross-Examination of Timothy Farmer, February 2, 2017, Joint Application Record Vol U.1, Tab BB ["*Farmer Cross-Examination 2017a*"] at p. 84, q. 281.

97. Dr. Farmer denied being an expert in statistics, public policy, or the CSLP and admitted he is not an economist (*Farmer Cross-Examination 2017a*). Despite this, Dr. Farmer proffered his critique of Ms. Furrie's statistical analysis, Mr. Usher's calculations regarding the impact of the CSLP on students with disabilities, and Dr. Lewis' economic analysis. Dr. Farmer is not qualified to comment on any of these areas and his evidence is inadmissible as a result.

Farmer Cross-Examination 2017a, *supra* para 96 at p. 96, q. 330-34; p. 242, q. 871-73.

b) Dr. Farmer's evidence is unnecessary

98. Many of Dr. Farmer's opinions are based on his personal experience as well as independent research. Dr. Farmer acknowledged that none of his work has been published and that his research is not social science-based but rather is based on his own case studies on learning disability assessment tests (*Farmer Cross-Examination*).

Farmer Cross-Examination 2017a, *supra* para 96 at p. 87, q. 287-97.

99. Dr. Farmer explained that his opinions are "common sense" and based on what he looked up online (*Farmer Cross-Examination 2017a*). When discussing Dr. Lewis' analysis, Dr. Farmer stated that "anybody can understand" it and that "it takes a simple person with an IQ" to evaluate the alleged weaknesses of Dr. Lewis' calculations (*Farmer Cross-Examination 2017a*). If Dr. Farmer's opinions are in fact "common sense", expert evidence from Dr. Farmer is unnecessary for the trier of fact and therefore inadmissible.

Farmer Cross-Examination 2017a, *supra* para 96 at p. 180-84, q. 655-63; p. 183, q. 661.
Mohan, *supra* para 95 at para 23.

c) Dr. Farmer lacks independence and impartiality

100. An expert owes a duty to the court (*White*). The expert cannot become an advocate who "is trying their best for their client to counter the other side" (*Alfano*). The expert's evidence must "not be influenced as to form or content by the exigencies of the litigation or by pressure from the client" (*Alfano*). Dr. Farmer's evidence fails to meet these criteria.

> *White*, *supra* para 94 at para 10.
> *Alfano v Piersanti*, 2012 ONCA 297, at paras 100, 108 [*Alfano*].

101. Dr. Farmer was recruited by Federal Department of Justice lawyer James Gray, who was previously counsel on this case and with whom he has a close, personal relationship (*Farmer Cross-Examination 2017c*). While being cross-examined (across multiple dates), Dr. Farmer swore an additional affidavit, commissioned by Mr. Gray instead of the federal counsel assigned to the file (*Farmer Cross-Examination 2017c*). In this affidavit, he sought to defend many of the answers given during the initial part of his cross-examination: seeking to salvage the damage done to his evidence through cross-examination. The commissioning of this affidavit violated the rule that a lawyer ought not to communicate with a witness during the cross-examination process (*Rules*). Further, despite the cautions provided to Dr. Farmer that he should not discuss his testimony while between cross-examination dates, he nevertheless sought out a lawyer for the federal Respondent to assist with providing further evidence (*Farmer Cross-Examination 2017a*).

> Transcript of the Cross-Examination of Timothy Farmer, July 18, 2017, Joint Application Record Vol V, Tab BB ["*Farmer Cross-Examination 2017c*"] at p. 276, q. 965, p. 275, q. 960-63, p. 278, q. 969; p. 279, q. 976-79.
> *Rules of Professional Conduct*, Rule 5.4-2, 1 s. 1.1 [*Rules*].
> *Farmer Cross-Examination 2017a*, *supra* para 96 at p. 108, q. 373.

102. Mr. Gray participated significantly in the development of the new affidavit. For example, Dr. Farmer confirmed that Mr. Gray informed him "[t]his has to be said" (*Farmer Cross-Examination 2017c*). While Dr. Farmer alleged that this was only with respect to his affidavit's footnotes, he did admit that it was not he, but rather Mr. Gray, who altered the

affidavit (*Farmer Cross-Examination 2017c*). There is thus a "realistic concern" that Dr. Farmer is neither willing nor capable of fulfilling his duty to the court, as he is more concerned with meeting the wishes of the client: the Federal government, as represented by his friend, Mr. Gray. Consequently, his evidence is inadmissible.

> *Farmer Cross-Examination 2017c*, *supra* para 101 at p. 284, q. 991; p. 281, q. 980.
> *Alfano*, *supra* para 100.
> *White*, *supra* para 94 at para 48.

ii. Stage 2: Gatekeeping

103. While Dr. Farmer's evidence should be found to be inadmissible based on the admissibility threshold stage of the test, in any event it should be excluded at the gatekeeping stage. This is because the risks of its inclusion outweigh the benefits. His decision to opine on areas beyond his knowledge and expertise led to several inaccurate statements, rendering his evidence inaccurate, unreliable, and inadmissible.

104. First, Dr. Farmer suggested that some questions in Dr. Chambers' study were leading (Farmer 2012). These allegations are without merit as Dr. Farmer ignored the questions preceding these questions. For example, Dr. Farmer suggested that the question "how did financial barriers facilitate or hinder postsecondary education experience?" is leading (Farmer 2012); he ignored the prior question "Do you feel you have encountered any financial barriers during your studies" (*Chambers*).

> *Farmer 2012*, *supra* para 93 at paras 23-26; 24.
> *Chambers*, *supra* para 40 at Exhibit 2, p. 6.

105. Second, Dr. Farmer suggested that he was an expert on "biased sampling" but that he could not comment on whether Ms. Furrie's data was an example of biased sampling as Ms. Furrie failed to identify the source of her data (*Farmer Cross-Examination 2017a*).

Dr. Farmer ignored the fact that Ms. Furrie had both identified the source of her data and pointed out the limitations in her own data (*Furrie 2013*).

> *Farmer Cross-Examination 2017a*, *supra* para 96 at p. 99, q. 338.
> *Furrie 2013*, *supra* para 40 at paras 12-13.

106. As well, despite acknowledging that the CSLP only allows for identification of students with permanent disabilities, Dr. Farmer criticized Ms. Furrie and Mr. Usher for failing to explore the range of disabilities, particularly temporary, episodic disabilities (*Farmer Cross-Examination 2017b*).

> Cross-Examination of Timothy Farmer, February 3, 2017, Joint Application Record Vol. U.1, Tab CC ["*Farmer Cross-Examination 2017b*"] at p. 252, q. 913.

107. While acknowledging he is not an expert in economics or student finance, Dr. Farmer suggested that Dr. Lewis failed to adequately consider CSLP debt relief programs (*Farmer Cross-Examination 2017a*; *Farmer 2014*). This criticism ignores the fact that Dr. Lewis' calculations pertain to debt *at consolidation*, which is prior to any debt relief program application. Dr. Farmer made several other criticisms of Dr. Lewis' economic model – suggesting that it was unreliable and "theoretical" based on Dr. Farmer's own personal experience and research into "the facts" – but failed to realize Dr. Lewis' model addressed debt rather than tuition price (*Farmer Cross-Examination 2017a*).

> *Farmer Cross-Examination 2017a*, *supra* para 96 at p. 39, q. 122-25; p. 178, q. 651, p. 184, q. 664.
> Supplementary Affidavit of Timothy Farmer, July 15, 2014, Joint Application Record Vol. N.1, Tab AA ["*Farmer 2014*"] at paras 156-57.

108. Dr. Farmer elected to provide a statistical analysis at paragraphs 187-91 of his 2014 affidavit without any expertise in this area as well as comments regarding the appropriate PSE placement for deaf students without expertise regarding accommodations (*Farmer Cross-Examination 2017a*). Dr. Farmer's comments contradict those of other Respondent

affiants regarding SWD underrepresentation in PSE (*Finnie*; *Rahman*) and those of Mr. Malkowski, who is an expert in accommodations for deaf students.

> *Farmer Cross-Examination 2017a*, *supra* para 96 at p. 167, q. 605-14.
> *Finnie*, *supra* para 43 at para 16.
> *Rahman*, *supra* para 7 at para 15.

109. Finally, Dr. Farmer admitted that he incorrectly referenced material in the footnotes of his affidavits (*Farmer Cross-Examination 2017a*; *Farmer Cross-Examination 2017b*; *Farmer Cross-Examination 2017c*). He failed to recognize other errors (*Farmer Cross-Examination 2017b*). There was no reply to Dr. Farmer's cross-examination and these errors remain uncorrected: his conclusions are thus uncorroborated.

> *Farmer Cross-Examination 2017a*, *supra* para 96 at p. 7, q. 11; p. 11, q. 16; p. 14, q. 22.
> *Farmer Cross-Examination 2017b*, *supra* para 106 at p. 215, q. 760; p. 217, q. 761.
> *Farmer Cross-Examination 2017c*, *supra* para 101 at p. 308, q. 1066-73.

110. In light of Dr. Farmer's criticisms that ignore basic facts, his decision to opine on topics beyond his expertise, and the errors contained in his own references, Dr. Farmer's evidence is inaccurate, unreliable, and unusable. Admitting his affidavits into evidence would be risky and would require a careful parsing of the affidavits to ensure the evidence is accurate and supported by the requisite knowledge, expertise and independence. Rather than assisting the court, the admission of Dr. Farmer's evidence would create additional work for the court without offering any benefit. Dr. Farmer's evidence should be excluded in its entirety. In the alternative, it should be given very little weight and the evidence of expert affiants, where it contradicts Dr. Farmer, should be preferred.

Issue 2: The increased debt incurred by SWD(longer) violates section 15 of the *Charter*

111. Section 15 of the *Charter* states:

> 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.
>
> *Canadian Charter of Rights and Freedoms*, s.15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

112. The provision is intended to "eliminate the exclusionary barriers faced by individuals in the enumerated or analogous groups in gaining meaningful access to what is generally available" (*Quebec*). Section 15 of the *Charter* focuses on substantive equality in order to protect a person's right "to be free from discrimination" (*Withler*).

> *Quebec v A*, 2013 SCC 5, at para 319 [*Quebec*].
> *Withler v Canada (Attorney General)*, 2011 SCC 12 at paras 2, 31 [*Withler*].

113. The Supreme Court of Canada has previously held that:

> [D]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.
>
> *Andrews v Law Society of British Columbia* [1989], 1 SCR 143, at p. 174-75 [*Andrews*].

114. In order to demonstrate a section 15 violation, the Applicant must establish that the law creates a distinction based on enumerated or analogous grounds and that the distinction results in a disadvantage by "perpetuating prejudice or stereotyping" (*Withler*, *Kapp*). The focus is on the *impact* of the impugned law (*Andrews*).

> *Withler*, *supra* para 112 at para 30.
> *R v Kapp*, 2008 SCC 41, at para 17.
> *Andrews*, *supra* para 113 at p. 165.

i. There is a distinction based on an enumerated ground

115. To demonstrate a distinction, it is not necessary to identify a "mirror comparator group, but . . . [rather one must look] at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage

or negative stereotypes about that group" (*Withler*). Thus, comparison is still a necessary part of the analysis:

> The role of comparison at the first step is to establish a "distinction". Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s.15(1).
>
> It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited."
>
> *Withler*, *supra* para 112 at paras 40, 62-63, emphasis added.

116. The Supreme Court has repeatedly held that, once the government provides a benefit, it is obliged to do so in a non-discriminatory manner (*Native Women's Assn.*; *Eldridge*). A claim of discrimination may be established based on the adverse effects of a facially neutral benefit scheme.

> *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627, [1994] S.C.J. No. 93 at paras. 51-52 [*Native Women's Assn.*].
> *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86 at paras. 60-66, 73, 74, 77, 78 ["Eldridge"].

117. A section 15 analysis based on indirect discrimination involves examining a law which:

> [P]urports to treat everyone the same . . . [but] has a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds. . . . Historical or sociological disadvantage may assist in demonstrating that the law imposes a burden or denies a benefit to the claimant that is not imposed on or denied to others.
>
> *Withler*, *supra* para 112 at para 64.

118. The CSLP fails to account for the unique PSE experience of SWD. While it purports to extend the benefit of financial assistance for PSE access to all Canadians equally (is facially neutral), the program fails to account for the fact that SWD may take longer to complete the same PSE program than their non-disabled peers for disability-related reasons. The CSLP indirectly discriminates against these students as it results in their paying more for their education than their non-disabled peers while enrolled in the same program.

119. The distinction on the basis of disability arises from the method of loan administration selected by the CSLP. The CSLP administers loans based on a "period of study", defined to mean the length of a school year (*CSFA Regulations*). Loans are administered on a per-year basis rather than a per-program basis. This means that, if a student requires additional time to complete his or her PSE program, he or she is likely to incur greater loans. Where the need to take longer arises solely because of a disability-related reason, this discrepancy in debt accrual is discriminatory. This Application is solely about the instances wherein a student takes longer for a disability-related reason *and* incurs greater debt as a result of the need to take longer.

CSFA Regulations, *supra* para 9, ss. 2(1), 5(d).

120. Disability-related reasons which may result in a SWD taking longer to complete their program include: 1) the need to take a reduced course load; 2) the need to take a disability-related leave of absence; 3) the need to take preparation courses for a degree program; and 4) enrollment in a program designed to accommodate specific disability-related needs which may, as a result of the nature of the accommodations, require additional time to complete (for example, Gallaudet programs) (*Finnie Cross-Examination*). While some of these reasons may be reality for non-disabled students (such

as taking a reduced course load), the analysis in this case relates solely to SWD(longer). Dr. Finnie's analysis regarding SWOD taking longer in some instances is irrelevant (*Finnie Cross-Examination*).

Finnie Cross-Examination, *supra* para 40 at p. 172, q. 667-73; p. 191, q. 715.

121. The definition of "full-time student" under the CSLP framework recognizes that some students with disabilities may be required to take a reduced course load. Students with disabilities can be considered "full-time" and therefore eligible for a loan despite only taking a 40-60% course load (*CSFA Regulations*). However, there is no corresponding recognition to account for the fact that taking a 40-60% course load will require additional "periods of study" and therefore additional loans in order to complete the PSE program.

CSFA Regulations, *supra* para 9, ss. 2(1).

122. The CSLP also fails to account for disability-related leaves of absences as it does not forgive loans, fees or interest incurred as a result of disability-related leaves. For example, Ms. Simpson received a loan for her 2000/01 school year but took a disability-related medical leave of absence in February 2001. She did not obtain any benefit from this school year: nevertheless, she incurred a loan. In effect, she was charged for a year in which she did not attend PSE solely because of her disability.

123. Interest also accrued during Ms. Simpson's disability-related leave (*Simpson 2006*; *Simpson Cross-Examination*). Loans are provided interest-free, to "full-time students" but this definition does not include students on disability-related leaves of absence (*CSFAA*; *CSFA Regulations*). If a student takes a leave of absence because of a disability-related reason rather than choosing to take a leave from their studies, then he or she has not ceased to be a full-time student. He or she is *prevented* from attending school because of their disability. The CSLP does not account for this.

Simpson 2006, *supra* para 25 at para 41.
Simpson Cross-Examination, *supra* para 31 at p. 42, q. 155.
CSFAA, *supra* para 9, s. 7.
CSFA Regulations, *supra* para 9, s. 5.

124. As a result of her experience, Ms. Simpson commenced legal action, challenging the discriminatory nature of the OSAP policies that applied during her medical withdrawal from PSE. In a settlement reached with the Province in 2003 (which did not bar future claims such as the current Application; it further did not release the Federal government from claims related to loan forgiveness), Ontario agreed to amend its loan policies so that students who must withdraw for medical reasons will not be obligated to return the non-repayable assistance they receive. However, the Ontario government alleged it was unable to forgive the loan Ms. Simpson incurred during her medical leave because of the Harmonization Agreement (*ASF-ON*; *ASF-all*). Of course, there is nothing in the Harmonization Agreement which would prevent Ontario from forgiving its *own* portion of the loan. Indeed provincial affiant Mr. Morris has confirmed this to be the case (*Morris Cross-Examination*). The terms of the settlement are relevant only to the calculation of the remaining discriminatory portion of the provincial loan.

Morris Cross-Examination, *supra* para 23 at p. 8, q. 21.
ASF-ON, *supra* para 34 at para 4.
ASF-all, *supra* para 36 at para 2.

125. The *CSFAA* provisions do not provide accommodation or exceptions for students on disability-related leaves or who take longer for other disability-related reasons. Thus, the CSLP disproportionately and negatively impacts SWD who must take longer to complete their program of study because of disability-related reasons.

Withler, *supra* para 112 at para 64.

126. Mr. Usher and Ms. Furrie's evidence, among others', demonstrates that the impact of the CSLP administration is that students with disabilities who take longer to complete

their PSE programs stand to accrue more debt than their non-disabled peers or students with disabilities who do not take longer to complete their program. This was Ms. Simpson's experience. The impact of this distinction if discriminatory, as it places the burden of larger debt loads on students with disabilities who must take longer to complete their PSE programs solely because of their disability (*Withler*). Thus, the distinction arises on the basis of an enumerated ground: namely, disability.

> *Withler*, *supra* para 112 at para 64.
> See also *Norman (Estate of) v Air Canada and WestJet (2008)*, Decision No. 6-AT-A-2008 (CTA), *Air Canada, Jazz Air LP v. Canada*, 2008 FCA 168, *Air Canada, Jazz Air LP & West Jet v. Canadian Transportation Agency, Estate of Eric Norman, Joanne Neubauer and Council of Canadians with Disabilities*, 2008 CanLII 60665 (SCC) [*Norman*].

127. The various debt relief provisions in the student loan scheme do not mitigate the larger debt amounts that result because of the need to take longer for disability-related reasons. For example, the definition of "period of study" does not offer any accommodation for the fact that some students with disabilities need to take longer to complete their programs of study because of disability-related reasons. Further, the definition of "full-time student", and interest and repayment obligations fail to account for disability-related leaves of absences. As a result of the overall structure of loan administration, extra debt results where a student takes longer to complete their studies. Where this additional time is required as a result of a disability, the debt discrepancy is discriminatory.

128. The burden that results is that students with disabilities who must take additional time to complete their program because of their disabilities incur greater loans than their non-disabled peers, despite being enrolled in the exact same program. This debt discrepancy arises solely as a result of the enumerated ground of disability.

ii. The distinction perpetuates a disadvantage, prejudice, or stereotype

129. The second step in the analysis requires demonstration that a disadvantage is perpetuated as a result of the distinction (*Withler*). The focus is on the "*discriminatory* distinctions – that is, distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual's membership in an enumerated or analogous group" (*Taypotat*).

> *Withler*, *supra* para 112 at para 65.
> *Kahkewistahawa First Nation v Taypotat*, 2015 SCC 30, at para 18, emphasis in original [*Taypotat*].

130. The Supreme Court of Canada has confirmed that prejudice and stereotyping are not additional elements to be proven: the focus is remain on the effect or impact of the impugned legislation or policy and whether it "widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it".

> *Quebec*, *supra* para 112 at paras 327-28, 332.

131. In *Norman*, the Canadian Transportation Agency ("CTA") found that charging for travel on a per-seat basis rather than a per-trip basis was discriminatory against those persons who, for disability-related reasons, required more than one seat for either themselves or for an attendant: the effect was that disabled passengers paid more than non-disabled passengers for the same trip. The "one-person-one-fare" principle was upheld by the Federal Court of Appeal; leave to the Supreme Court of Canada was denied.

> *Norman*, *supra* para 126.

132. The distinctions identified above result in differential treatment for students with disabilities who take longer to complete their studies because of their disability. The CSLP "fails to respond to the actual capacities and needs of" students with disabilities "and instead imposes burdens [and] denies a benefit in a manner that has the effect of reinforcing, perpetuating [and] establishing a … disadvantage" upon this group (*Taypotat*). This treatment has a profound and negative impact upon students with disabilities. For

example, Ms. Simpson accrued approximately $76,550 in debt – significantly more than she would have accrued had she not needed to take longer due to her disability. The CSLP was meant to benefit *all* persons seeking access to PSE who required financial assistance (*Frith*). It negatively and disproportionately affects SWD(longer) like Ms. Simpson.

> *Taypotat*, *supra* para 129 at para 20.
> *Frith*, *supra* para 7 at para 5.

133. The Applicant has set out the social conditions in which students with severe disabilities attend post-secondary education. Specifically, SWD are under-represented in PSE and have lower employment rates compared to their non-disabled peers, even when level of education is the same. Students with disabilities are being confronted with the prospect of having substantially higher debt following graduation than their non-disabled peers. This, coupled with research demonstrating that persons with disabilities are chronically under- and unemployed, places a significant burden on these students and deters them from pursuing PSE as there is a lower chance of being able to repay additional loans.

134. The deterrence factor of a massive debt load in general is considerable. In fact, it defeats the whole purpose of the CSLP, which is otherwise designed to make PSE accessible by making it affordable. The Program is not designed to take account of students with disabilities who may require twice as many semesters and consequently accumulate twice as much debt as their non-disabled peers completing the same courses and degrees. SWD such as Ms. Simpson who persevere in PSE are saddled with a staggering debt load upon graduation. Lack of access to post-secondary education for SWD also impacts society as it results in social isolation of persons with disabilities.

135. Applying the same effects-based analysis as in *Norman*, student debt under the CSLP should be incurred on a per program basis rather than on a per year basis. If a SWD requires longer to complete a PSE program, debt should be incurred based on the program itself rather than the number of years required to complete the program. By analogy, a "1 program, 1 debt load" principle should be applied to the CSLP in order to ensure the impact of the program does not negatively and disproportionately affect SWD.

iii. The debt discrepancy violates section 15 of the Charter

136. The student loan program violates Ms. Simpson's section 15 *Charter* rights. The program has been structured in such a way so as to leave students who, because of their disabilities, require longer to complete their studies with a higher debt load than students without disabilities enrolled in the same program. As a result of this distinction, SWD(longer) graduate with higher debt loads and end up paying more for their education than their non-disabled peers. This negatively and disproportionately affects SWD and perpetuates the historical and current disadvantageous position of persons with disabilities in Canadian society.

Issue 3: The violation cannot be justified pursuant to section 1 of the *Charter*

137. Section 1 of the *Charter* provides that:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Charter, *supra* para 111.

138. Ms. Simpson has demonstrated the violation of her section 15 equality rights. The Respondents bear the onus of justifying the limitation (*Oakes*). In *Oakes*, the Supreme

Court of Canada articulated the cumulative test for justification pursuant to section 1, each stage of which must be demonstrated by the state:

i. The limit is prescribed by law;
ii. The limit has a pressing and substantial objective; and
iii. The limit is proportional, that is, there is:
    a) A rational connection between the limit and the right being violated;
    b) Minimal impairment of the right infringed; and
    c) The salutary and deleterious effects are proportionate.

R v Oakes, [1986] 1 SCR 103, at paras 69-71 [*Oakes*].

i. The limit is prescribed by law

139. To be prescribed by law, a limit may be express or implied in a statute or regulation (*Therens*). Alternatively, it may be found in certain government policies (*Greater Vancouver*).

R v Therens, [1985] 1 S.C.R. 613 at para 60.
Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component, [2009] 2 S.C.R. 295 at para 50.

140. The limitations on Ms. Simpson's section 15 *Charter* rights are prescribed by law. As set out in the *CFSA*, the *CFSA Regulations*, and provincial legislation, loans are provided on an annual basis in accordance with the definition of "period of study", and "full-time student" which do not account for students who may take longer to complete their studies. The CSLP is structured pursuant to federal legislation and administered pursuant to provincial legislation, as well as the various agreements between the federal and provincial governments including the Harmonization Agreement.

ii. The limit does not have a pressing and substantial objective

141. A pressing and substantial objective will be neither "'trivial' nor 'discordant with the principles integral to a free and democratic society'" (*Figueroa*). The objective relevant to the section 1 analysis is "*the objective of the infringing measure*" (*RJR-Macdonald*).

> *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at para 59 [*Figueroa*].
> *RJR-MacDonald v Canada*, [1995] 3 SCR 199, at para 144, emphasis in original [*RJR-MacDonald*].

142. The Applicant accepts that, generally, the CSLP has a pressing and substantial objective: its purpose is to provide financial assistance to Canadian students, recognizing that finances can be a barrier to PSE participation (*Frith*; *Rahman*). However, the infringing measure in this case is the fact that loans are provided and debt accumulates on an annual basis to "full-time students" without consideration for the fact that SWD may take longer to complete their programs of study than their non-disabled peers. In other words, the infringing measures are rooted in the definitions of "period of study" and "full-time student" which result in the administration of loans on an annual basis (*CSFA Regulations*).

> *Frith*, *supra* para 7 at paras 5, 43.
> *Rahman*, *supra* para 7 at paras 5, 16-17.
> *CSFA Regulations*, *supra* para 9, s. 2(1)
> .

143. The definition of "period of study" infringes on Ms. Simpson's *Charter* rights as it disproportionately impacts students with disabilities to the extent that such students may take longer than their non-disabled peers to complete an identical program because of disability-related reasons. The definition of "full-time student" infringes Ms. Simpson's *Charter* rights on the basis that, if withdrawn from studies for disability-reasons, debt, interest and fees are still incurred and repayment obligations are triggered if the absence is longer than six months. The lack of accommodation for disability-related leaves of absences or increased length of study results in SWD paying more for their participation in a program than their non-disabled peers *in the same program*.

144. It may be reasonable to assume that the definition of "period of study" is aimed at ensuring that loans are provided commensurate with needs for a student's time in PSE. This may assist in ensuring loans are provided on an as-needed basis; however, there is no reason for loans to be capped on an annual basis rather than a program basis. In other words, there is no *bona fide* justification for the annual cap. Rather, the provision of annual student loans actually runs contrary to the purpose of the CSLP. Specifically, the provision of annual loans results in SWD(longer), a group composed primarily of persons with the most severe disabilities, paying more for their education, thus presenting *a barrier* to PSE participation rather than facilitating PSE participation as is the stated purpose of the program.

145. Moreover, the administration of loans on a yearly basis and the failure to account for SWD(longer) is at odds with the other portions of the CSLP which attempt to provide specific recognition for the unique barriers students with disabilities face in accessing PSE. Namely, the definition of "full-time student" recognizes that SWD may need to take fewer courses, but there is no corresponding recognition in other portions of the CSLP which would address the extra debt incurred as a result of requiring additional "periods of study" to complete a PSE program. As such, it cannot be said that there is a pressing and substantial purpose to these sections as they are inherently contradictory to the overall goals of the CSLP.

iii. The limit is not proportionate

a) There is no rational connection between the limit and the section 15 violation

146. If the Court finds that the offending provisions of the impugned legislation have a pressing and substantial purpose, it must be demonstrated that a rational connection exists

between the impugned sections and the violated right. It must be shown that the impugned law has been "carefully designed to achieve the objective in question" and it is not "arbitrary, unfair or based on irrational considerations" (*Oakes*). In this case, there is no rational connection.

Oakes, *supra* para 138 at para 70.

147. The administration of loans to full-time students on an annual basis is not rationally connected to achieving the objective of increasing access to PSE. Participation in, and benefit from, PSE is program-based. Students enrol in programs of study and graduate with credentials signalling the successful completion of a *program*. There is no recognized benefit for having participated in PSE for a certain number of years. The value of PSE participation is inherently based on the completion of a program, not a specified number of years.

148. Having debt accrue on a per-year basis rather than per-program basis is not rationally connected to the goal of increasing participation and access to PSE. Indeed, the goals of the CSLP arise because of the government's recognition that *completion* of PSE courses and/or programs results in social and economic benefits (*Frith*). The benefits arise upon successful completion of PSE courses and/or programs, not a certain number of years in PSE. As such, there is no rational connection between the impugned legislation and the rights being violated. Even Mr. Rahman noted the arbitrary basis for annual loan provision, commenting that it had never occurred to him to cap debt on a per-program rather than per-year basis (*Rahman Cross-Examination*).

Frith, *supra* para 7 at paras 3-5.
Rahman Cross-Examination, *supra* para 40 at p. 131, q. 390-92.

149. As there is no rational connection between the limit and the violation of Ms. Simpson's section 15 *Charter* rights, the violation cannot be justified under section 1.

b) The limit is not minimally impairing

150. Even if there is a rational connection, the limit is not minimally impairing and must therefore fail. To be minimally impairing, the limit must impair the right "as little as possible" (*Oakes*). The government must demonstrate that, among a range of reasonable alternatives, there is no other less-impairing means of achieving the objective.

> *Oakes*, *supra* para 138 at para 70.
> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 55 [*Hutterian Brethren*].

151. The CSLP structure disproportionately affects students with disabilities in a way that discourages them from attending PSE institutions or leaves them with significantly higher debt to repay despite the employment challenges they face. This impairment is not minimal as it has lifelong implications.

152. As demonstrated, loans offered on a yearly basis result in SWD(longer) paying more for their education than their non-disabled peers in the same program. Loans offered on a per-program basis would not result in the same discrimination. Capping loans based on either of these criteria would not be discriminatory. Alternatively, it would be possible to remedy the discrimination by ensuring that SWD(longer) do not pay more for their education. Any additional time required to complete a PSE program arising from a disability could be provided as non-repayable assistance (i.e. the debt could be capped on a per-program basis for any additional time required to complete the program). A program-based debt cap would eliminate the section 15 *Charter* violation. No evidence has been tendered to suggest that this is not possible or would be onerous. The limit consequently is not minimally impairing.

c) The salutary and deleterious effects are not proportionate

153. In any event, the salutary effects of the limit are not proportionate to its negative impact. At this stage, the Court must consider the "severity of the deleterious effects of a measure on individuals or groups" (*Hutterian Brethren*).

Hutterian Brethren, *supra* para 150 at para 76.

154. As a result of the violation, SWD face additional barriers to PSE access. It has already been demonstrated that this group faces barriers to PSE participation and additional challenges in finding employment. The framework of the CSLP places additional barriers for these students rather than removing barriers, contrary to the stated purpose of the program.

155. The salutary effect of the impugned legislation is that the Respondents are able to administer a PSE access program which corresponds directly with how students are charged at their institution of study. However, the logistical ease of administering such a program does not and cannot justify the section 15 *Charter* violation which results, especially when it is admitted that non-discriminatory alternatives have not even been considered.

156. Any administrative "savings" resulting from the implementation of a discriminatory student loan program are negated by the costs associated with minimal PSE participation by SWD. As described by Ms. Frith, Mr. Jackson, Ms. Munk, Dr. Panitch, and Dr. Lewis, there are multiple benefits to be gained by increasing SWD's PSE participation rates. For example, increased participation of SWD in PSE results in decreased social isolation and increased income for persons with disabilities upon graduation, thereby resulting in decreased reliance on social assistance programs.

157. The burden resulting from the discriminatory structure and impact of the CSLP on SWD(longer) is disproportionate compared to any short-term benefits that result for the governments by not equitably subsidizing education in Canada. Dr. Lewis' economic and cost-benefit analyses further support this conclusion by pointing out the long-term benefits to the governments of ending the discrimination. No contrary evidence has been tendered.

158. The *Charter* violation consequently is not justified by section 1.

Issue 4: The appropriate remedy for the violation consists of a declaration, damages, and the return of monies paid pursuant to unconstitutional legislation

159. The appropriate remedy to address the discriminatory effects of the student loan program is to declare the framework unconstitutional, award damages to Ms. Simpson, and to return the monies she paid pursuant to unconstitutional legislation.

160. Remedies are a necessary component of the rights afforded by the *Charter*. The Supreme Court of Canada emphasized this point stating that:

> When a person can demonstrate that one of his Charter rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the Charter which surely is to allow courts to fashion remedies when constitutional infringements occur.
>
> *Nelles v Ontario*, [1989] 2 SCR 170, 60 DLR (4th) 609 at p. 641 [*Nelles*].

161. Courts must ensure that *Charter* remedies are meaningful and effective (*Doucet*).

> *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras 25, 55-59 [*Doucet*].

i. A declaration is appropriate

162. Section 52 of the *Constitution* reads:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c. 11.

163. A declaration is appropriate where there are "myriad options available to the government that may rectify the unconstitutionality of the current system" (*Eldridge*). Though it is not the role of the Court to dictate how this will be accomplished, it is presumed that the government will act swiftly, in compliance with the Court's directive, and in good faith (*Eldridge*).

Eldridge, *supra* para 116 at para 96.

164. In the present case, the CSLP framework violates the equality rights of persons with disabilities and the violation is not justified by section 1 of the *Charter*. The program will need to be altered so as not to violate the rights of persons with disabilities and without placing additional burdens upon them. The CSLP is a multi-faceted program. It is implemented differently in each province and requires coordination with financial and post-secondary institutions. Recognizing this complexity, a declaration is appropriate as it respects the governments' freedom and responsibility to rectify the unconstitutional system. The Applicant consequently seeks an order that the Respondents must bring the student loan program into compliance with the *Charter* pursuant to the direction of this Court and that the debts arising from the discriminatory application of the CSLP are no longer binding on her.

165. While oversight of the government's conduct following a declaration of invalidity is a rare power used by the Court, the Supreme Court of Canada in *Doucet* held that "the judicial approach to remedies must remain flexible and responsive to the needs of a given case". Remedies involving judicial oversight may be necessary to meaningfully vindicate the rights of the applicant (*Doucet*). Because of the complexities inherent in the student loan system and the inadequacy of the efforts made to-date to remedy the discrimination,

judicial oversight of this order is both necessary and appropriate. The Applicant thus seeks an order that the Court remain seized of this matter in order to oversee the Respondents' measures to bring the program into compliance with the *Charter*.

Doucet, *supra* para 161 at paras 59, 88.

166. In the alternative, the Applicant respectfully requests that the Court provide the following direction to the Respondents along with its declaration of invalidity:

> Legislative revisions should apply equally to federal and provincial student debt for students who, as a result of their disabilities require additional time to complete their program of study. "Disability" should be defined as it currently is by the CSLP program and revised as necessary. It is understood that students with disabilities may require additional time *inter alia* due to:
>
> (a) the need to take a preparatory course;
>
> (b) the decision to enroll in a program designed for students with disabilities that takes longer to complete than comparable programs that are not specifically designed for students with disabilities;
>
> (c) the need to withdraw due to an illness or disability;
>
> (d) the need to take a reduced course load due to disability; and/or
>
> (e) other instances to be considered on a case-by-case basis.
>
> Administration of the program should be simple and accessible.

ii. An award of damages is appropriate

167. Section 24(1) of the *Charter* reads:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Charter, *supra* para 111.

a) Damages are "appropriate and just"

168. An "appropriate and just" remedy is one which will:

> (1) meaningfully vindicate the rights and freedoms of the claimants; (2) employ means that are legitimate within the framework of our constitutional democracy; (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and (4) be fair to the party against whom the order is made
>
> *Vancouver (City) v Ward*, 2010 SCC 27, at para 20 (citations omitted) [*Ward*].

169. The Supreme Court of Canada in *Ward* held that damages under s. 24(1):

> …must further the general objects of the *Charter*. This reflects itself in three interrelated functions that damages may serve. The function of *compensation*, usually the most prominent function, recognizes that breach of an individual's *Charter* rights may cause personal loss which should be remedied. The function of *vindication* recognizes that *Charter* rights must be maintained, and cannot be allowed to be whittled away by attrition. Finally, the function of *deterrence* recognizes that damages may serve to deter future breaches by state actors.
>
> *Ward*, *supra* para 186 at para 25.

170. Awarding damages in this case would meet each of these functions. First, The Supreme Court of Canada has confirmed that "[g]enerally, compensation will be the most important object … because other *Charter* remedies may not provide compensation for the claimant's personal injury resulting from the violation of his *Charter* rights" (*Ward*). Damages can be awarded to compensate for pecuniary, physical and psychological losses such as distress, humiliation, embarrassment, anxiety, pain and suffering (*Ward*). In the present case, while the declaration requested above will prevent further discrimination, it will not compensate Ms. Simpson for the violation of her *Charter* rights. Ms. Simpson will not have further contact with the CSLP and any changes made as a result of a declaration will not affect her.

> *Ward*, *supra* para 186 at paras 47, 27.

171. As a result of the discrimination outlined above, Ms. Simpson started her career with a student debt that was significantly higher than her non-disabled peers'. The size of Ms. Simpson's loan was an additional burden; one which she still carries to this day. The

size of her loan has prevented Ms. Simpson from being able to utilize her earnings with freedom in a timely manner. Ms. Simpson has suffered personal and psychological injury as she was forced to worry about repaying her loans while on medical leave. Ms. Simpson requires compensation for these pecuniary and non-pecuniary losses.

172. Second, with respect to the function of "vindication", the Supreme Court has recognized that "violations of constitutionally protected rights harm not only their particular victims, but society as a whole" by diminishing confidence in constitutional protections.

> *Ward*, *supra* para 186 at para 28 (citations omitted).

173. Ms. Simpson brought these issues to the attention of CSLP representatives over a decade ago. They requested time to remedy the situation, failed to do so, then prolonged the litigation by claiming the application had been settled (*Perell J. Reasons*) Ms. Simpson requires damages as vindication for the government's refusal to remedy the discrimination. Given the Respondents' knowledge of the barriers students with disabilities face in pursuing PSE and the benefits which society stands to gain from increased participation of SWD in PSE, the refusal to amend the program is inexcusable. Damages are appropriate to vindicate Ms. Simpson and demonstrate that benefit programs are not exempt from the *Charter* and must address the rights of *all*.

> Reasons for Decision of Justice Perell, Joint Application Record Vol. A, Tab 3 ["*Perell J. Reasons*"].

174. Finally, with respect to the function of "deterrence", the Supreme Court of Canada has held that: "deterrence as an object of *Charter* damages is not aimed at deterring the specific wrongdoer, but rather at influencing government behaviour in order to secure state compliance with the *Charter* in the future." (*Ward*).

Ward, *supra* para 186 at para 29.

175. The Respondents are well aware of the different experiences students with disabilities have in post-secondary institutions relative to their non-disabled peers. The Respondents are also aware of the social and economic benefits which result from increased PSE participation. Despite this awareness, there are no policies which alleviate the unequal debt burden these students face. Moreover, the Respondents have displayed bad faith by initially indicating they would address the discriminatory nature of the loan program. Both the Federal and Provincial governments were aware of Ms. Simpson's initial legal case. Both promised to address the issues raised. Ms. Simpson has waited over a decade for these changes but the government has failed to make changes that would address the discrimination she has experienced. In the meantime, Ms. Simpson has diligently worked towards paying off her loans.

176. Both Ms. Simpson and society in general have been negatively impacted as a result of the CSLP's failure to equally support students with disabilities who desire to attend post-secondary institutions. Awarding damages in this case would send a clear, strong, and necessary message to government agencies that the individual circumstances of the various beneficiaries must be considered and addressed. This is especially the case those responsible for the program are notified of the issue, as occurred in this case.

Ward, *supra* para 186 at para 29.

b) The quantum of damages must adequately compensate Ms. Simpson

177. A guide with respect to quantum of damages is the "seriousness of the breach, having regard to the objects of s. 24(1) damages. The seriousness of the breach must be evaluated with regard to the impact on the claimant and the seriousness of the state misconduct" (*Ward*).

> *Ward*, *supra* para 185 at para 52, citations omitted.

178. In light of the serious impact on persons with disabilities including Ms. Simpson and the decade of time she has spent identifying and seeking correction of the discriminatory impact – while continuing to pay student loans incurred pursuant to discriminatory legislation – an award of $25,000 in damages is appropriate.

iii. The return of monies paid pursuant to unconstitutional legislation is appropriate

179. In *Kingstreet*, the Court found that the appellants were entitled to recover the taxes which were paid pursuant to legislation which was *ultra vires*. The Court held that it was proper to:

> [D]iscard the doctrine of protest and compulsion insofar as it applies to payments made to public authorities, whether pursuant to unconstitutional legislation or as the result of a misapplication of otherwise valid legislation. Once the immunity rule is rejected, there is no need to distinguish between cases involving unconstitutional legislation and cases where delegated legislation is merely ultra vires in the administrative law sense. In all such cases, the payment of the charge should not be viewed as voluntary in a sense that would prejudice the taxpayer. Rather, the plaintiff is entitled to rely on the presumption of validity of the legislation, and on the representation as to its applicability by the public authority in charge of administering it.
>
> In cases not involving payments made to public authorities pursuant to unconstitutional legislation or the misapplication of an otherwise valid law, my view is that courts should insist on proof of compulsion in fact. The mere fact that the payment was made in protest should be neither necessary nor sufficient to establish compulsion. Protest may accompany a voluntary payment (in order to protect a hypothetical restitutionary entitlement), and compulsion may occur without any evidence of formal protest. Insisting on compulsion in fact is more principled and ensures that all similarly situated persons will be treated equally, regardless of protest.
>
> *Kingstreet* Investments Ltd. V New Brunswick (Finance), 2007 SCC 1 at paras 57-58 ["*Kingstreet*"].

180. Ms. Simpson protested the need to take additional loans that arose from her disability-related need to take longer to complete her studies. She made payments to public

authorities on the basis of unconstitutional legislation which resulted in additional debt incurrence. She seeks a return of these unconstitutional debt payments which were made pursuant to discriminatory legislation.

iv. Summary of Remedy Sought

181. To meaningfully remedy the discriminatory debt incurrence for SWD(longer), Ms. Simpson is entitled to a declaration of invalidity coupled with judicial oversight of the changes to the CSLP (or in the alternative, direction from the Court) as well as damages and the return of monies paid pursuant to unconstitutional legislation.

182. Each of the components of Ms. Simpson's requested remedy serves a distinct purpose. Declarations and damages in particular differ in the harms they address:

> Damages are meant to repair harms suffered by individuals and in *Maltby* [*v Saskatchewan (Attorney General)*] would have provided the government with little guidance about what standards of confinement were constitutionally required. In contrast, declarations are well suited to provide legal and practical guidance to resolve an underlying dispute and to prevent new ones from arising. Declarations recognize the bureaucratic reality of modern government and do not necessarily have to provide benefits for the applicants who brought the case.
>
> Roach, K. Constitutional Remedies in Canada (2e). October 2017, Thomson Reuters. P. 12-15.

183. Likewise, the return of monies paid pursuant to unconstitutional legislation has a unique purpose in that it is meant to address the presumption of legislative validity on which an individual is entitled to rely.

> *Kingstreet, supra* para 179 at para 57.

184. Ms. Simpson is entitled to a remedy that meaningfully addresses the discrimination she has faced. In this case, she is entitled to a declaration, damages, and the return of monies paid pursuant to unconstitutional legislation.

PART V: ORDER REQUESTED

185. The Applicant requests:

a) A declaration that the CSLP violates section 15 of the *Charter* insofar as it results in greater debt for students with disabilities who take longer to complete their program than their non-disabled peers in the same program;

b) A declaration that this violation is not justified by section 1 of the *Charter*;

c) A declaration that the debts arising from the discriminatory application of the CSLP are not binding on and therefore not payable by the Applicant;

d) Judicial oversight of the changes to the CSLP as a result of the above declarations, with this Court remaining seized;

e) In the alternative, that direction be provided from this Court with respect to changes to the CSLP that are required as a result of the above declarations;

f) An award of $25,000 in damages for the violation of the Applicant's rights plus pre- and post-judgment interest;

g) The return of monies paid by Ms. Simpson pursuant to unconstitutional legislation including federal loan interest, the federal loan amount paid, and the federal loan amount incurred to re-do her missed term;

h) Costs on a substantial indemnity basis, reflecting the public interest involved, with pre- and post-judgment interest; and

i) Such further relief as this Honourable Court deems just.

All of which is respectfully submitted this 26 day of August, 2019.

David Baker
Laura Lepine
Kimberly Srivastava
Bakerlaw
4711 Yonge Street, Suite 509
Toronto, ON M2N 6K8
Tel. 416-533-0040 ext. 222
Fax: 416-533-0050
Email: dbaker@bakerlaw.ca

Lawyers for the Applicant

Schedule "A"
List of Authorities

1. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37
2. *Alfano v Piersanti*, 2012 ONCA 297
3. *Andrews v Law Society of British Columbia* [1989] 1 SCR 143
4. *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62
5. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86
6. *Figueroa v Canada (Attorney General)*, 2003 SCC 37
7. *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, [2009] 2 S.C.R. 295
8. *Kahkewistahawa First Nation v Taypotat*, 2015 SCC 30
9. *Kingstreet* Investments Ltd. V New Brunswick (Finance), 2007 SCC 1 at paras 57-58
10. *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627, [1994] S.C.J. No. 93
11. *Nelles v Ontario*, [1989] 2 SCR 170, 60 DLR (4th) 609
12. *Norman (Estate of) v Air Canada and WestJet (2008)*, Decision No. 6-AT-A-2008 (CTA), *Air Canada, Jazz Air LP v. Canada*, 2008 FCA 168, *Air Canada, Jazz Air LP & West Jet v. Canadian Transportation Agency, Estate of Eric Norman, Joanne Neubauer and Council of Canadians with Disabilities*, 2008 CanLII 60665 (SCC)
13. *Quebec v A*, 2013 SCC 5
14. *R v Kapp*, 2008 SCC 41
15. *R v Mohan*, [1994] 2 SCR 9
16. *R v Oakes*, [1986] 1 SCR 103
17. *R v Therens*, [1985] 1 S.C.R. 613
18. *RJR-MacDonald v Canada*, [1995] 3 SCR 199
19. *Vancouver (City) v Ward*, 2010 SCC 27
20. *White Burgess v Abbott and Haliburton Co.*, 2015 SCC 23
21. *Withler v Canada (Attorney General)*, 2011 SCC 12

Schedule "B"
Legislation

***Canada Student Financial Assistance Act*, R.S. 1994 c. 28**
Passim

***Canada Student Financial Assistance Regulations*, SOR/95-329**
Passim

Canada-Ontario Agreement on Harmonization of Federal and Provincial Student Loans Programs
Passim

***Canadian Charter of Rights and Freedoms*, s.15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11**

1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

15 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.

***Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c. 11**

52 The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

***Ministry of Training, Colleges and Universities Act*, R.S.O. c. M.19**

5 (1) The Minister may make grants and awards to,
(a) students of universities, colleges of applied arts and technology or other post-secondary institutions;
(b) medical residents; and
(c) persons who received a loan under this Act while a student of an institution referred to in clause (a) or while a medical resident and who have not repaid the loan in full. 2006, c. 19, Sched. S, s. 1 (1); 2010, c. 1, Sched. 20, s. 2.

Ontario Student Loans Made Before August 1, 2001, R.R.O. 1990, Reg. 774
Passim

Ontario Student Loans Made August 1, 2001 To July 31, 2017, O. Reg. 268/01
Passim

Jasmin Simpson Applicant	and	The Attorney General et al. Respondents	Court File No: 145/19

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

FACTUM OF THE APPLICANT

Bakerlaw
Barristers and Solicitors
4711 Yonge Street, Suite 509
Toronto, ON M2N 6K8

David Baker LSUC#: 17674M
Laura Lepine LSUC#: 77382R
Tel: 416-533-0040
Fax: 416-533-0050
Email: dbaker@bakerlaw.ca
llepine@bakerlaw.ca

Lawyers for the Applicant