CITATION: G.G. v. Ontario, 2025 ONSC 3011
COURT FILE NO.: CV-22-00680949-00CP
DATE: 20250521

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: G.G. and W.W., Plaintiffs

AND:

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF ONTARIO, NATIVE CHILD AND FAMILY SERVICES OF TORONTO, LINCK CHILD, YOUTH AND FAMILY SUPPORT, BRANT FAMILY AND CHILDREN'S SERVICES, BRUCE GREY CHILD & FAMILY SERVICES, CHILDREN'S AID SOCIETY OF HAMILTON, CATHOLIC CHILDREN'S AID SOCIETY OF HAMILTON, CHILDREN'S AID SOCIETY OF TORONTO, CHILDREN'S AID SOCIETY OF THE DISTRICT OF NIPISSING AND PARRY SOUND, CHILDREN'S AID SOCIETY OF ALGOMA, CHILDREN'S AID SOCIETY OF LONDON AND MIDDLESEX, CHILDREN'S AID SOCIETY OF OXFORD COUNTY, DUFFERIN CHILD & FAMILY SERVICES, DURHAM CHILDREN'S AID SOCIETY, FAMILY AND CHILDREN'S SERVICES OF FRONTENAC, LENNOX AND ADDINGTON, FAMILY AND CHILDREN'S SERVICES OF LANARK, LEEDS AND GRENVILLE, FAMILY AND CHILDREN'S SERVICES OF GUELPH AND WELLINGTON COUNTY, FAMILY AND CHILDREN'S SERVICES NIAGARA, FAMILY AND CHILDREN'S SERVICES OF RENFREW COUNTY, FAMILY & CHILDREN'S SERVICES OF ST. THOMAS AND ELGIN, FAMILY & CHILDREN'S SERVICES OF THE WATERLOO REGION, HALTON CHILDREN'S AID SOCIETY, HIGHLAND SHORES CHILDREN'S AID, HURON-PERTH CHILDREN'S AID SOCIETY, JEWISH FAMILY AND CHILD SERVICE, KAWARTHA-HALIBURTON CHILDREN'S AID SOCIETY, KENORA-RAINY RIVER DISTRICTS CHILD AND FAMILY SERVICES, NORTH EASTERN ONTARIO FAMILY AND CHILDREN'S SERVICES, PEEL CHILDREN'S AID SOCIETY, SARNIA-LAMBTON CHILDREN'S AID SOCIETY, SIMCOE MUSKOKA FAMILY CONNEXIONS, THE CHILDREN'S AID SOCIETY OF HALDIMAND AND NORFOLK, THE CHILDREN'S AID SOCIETY OF OTTAWA, THE CHILDREN'S AID SOCIETY OF THE DISTRICT OF THUNDER BAY, THE CHILDREN'S AID SOCIETY OF THE DISTRICTS OF SUDBURY AND MANITOULIN, THE CHILDREN'S AID SOCIETY OF THE UNITED COUNTIES OF STORMONT, DUNDAS AND GLENGARRY, VALORIS FOR CHILDREN AND ADULTS OF PRESCOTT RUSSELL, WINDSOR-ESSEX CHILDREN'S AID SOCIETY, YORK REGION CHILDREN'S AID SOCIETY, AKWESASNE CHILD AND FAMILY SERVICES, ANISHINAABE ABINOOJII FAMILY SERVICES,

CATHOLIC CHILDREN'S AID SOCIETY OF TORONTO, DILICO ANISHINABEK FAMILY CARE, DNAAGDAWENMAG BINNOOJIIYAG CHILD & FAMILY SERVICES, KINA GBEZHGOMI CHILD & FAMILY SERVICES, KUNUWANIMANO CHILD & FAMILY SERVICES, NIIJAANSINAANIK CHILD AND FAMILY SERVICES, NOGDAWINDAMIN FAMILY AND COMMUNITY SERVICES, OGWADENI:DEO, PAYUKOTAYNO JAMES AND HUDSON BAY FAMILY SERVICES, TIKINAGAN CHILD AND FAMILY SERVICES, and WEECHI-IT-TE-WIN, Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Margaret Waddell, Karine Bédard, Tina Yang, and Melanie Anderson*, for the Plaintiffs

Elizabeth Bowker, Jessica DiFederico, Shadi Katirai, Grace Murdoch, Yael Kogan, and Thomas Russell, for the Defendants, Children's Aid Societies

Victoria Yankou, Nancy Ghobrial, Spencer Nestico-Semianiw, Waleed Malik, and Elizabeth Guilbault, for the Defendant, HMK in Right of Ontario

HEARD: April 2-4, 2025

CERTIFICATION MOTION

I. Overview of the claim

[1] Since prior to the start of the proposed class period in 2007, children's aid societies ("CASs") in Ontario issued so-called "Birth Alerts" – notifications to hospitals and other healthcare providers regarding pregnancies. They were issued to identify to medical staff that the patient raised a child protection concern in respect of the unborn child, and to ensure that the relevant CAS would be notified when the birth took place.

[2] On July 14, 2020, the Ministry of Children, Community and Social Services (the "Ministry"), issued Policy Directive CW 005-20, requiring CASs to cease issuing Birth Alerts. The cessation of Birth Alerts reflected an awareness that these notices exceeded the mandate of CASs pursuant to the *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sch. 1 ("*CYFSA*") and its immediate predecessor, the *Child and Family Services Act*, R.S.O. 1990, c. C.11. Those statutes define children as persons under the age of 18 years old.

[3] Plaintiffs' counsel point out that the definition of "child" in the *CYFSA* and its predecessor reflect established jurisprudence to the effect that fetuses are not legal persons possessing rights: *Tremblay v. Daigle*, [1989] 2 S.C.R. 530. Accordingly, regardless of any potential harm to the fetus, child protection agencies have no jurisdiction to act in protection of, or, by extension, to

require warnings in respect of, the unborn: *Winnipeg Child and Family Services (Northwest Area) v. G (DF)*, [1997] 3 S.C.R. 925, at paras. 15-16.

[4] The Policy Directive also required CASs to issue letters notifying the healthcare practitioners of this cessation, and provided them with a template for this correspondence. The Ministry required the advisory letters to include information from the recently published *Final Report on Missing and Murdered Indigenous Women and Girls*, 2019 (the "*MMIWG Report*"), which had determined that Birth Alerts disproportionately impacted Indigenous mothers and described Birth Alerts as "racist", "discriminatory", and a "violation of the rights of the child, the mother, and the community": *MMIWG Report*, at pp. 1114, 1152-56, 1172.

[5] The Ministry's press release of July 14, 2020 further acknowledged that Birth Alerts disproportionately affect racialized and marginalized parents more generally. In particular, the Ministry took note that expectant parents were potentially deterred from seeking medical help or prenatal care out of fear of having a Birth Alert issued.

[6] The Plaintiffs move under section 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*"), to certify a class action in respect of the issuance of Birth Alerts by the forty-nine CASs named as Defendants in this action. They also seek to certify their claim against the Province of Ontario for its alleged authorization of and participation in the issuance of Birth Alerts. The claims incorporate a number of causes of action at common law together with claims for damages for breach of sections 7 and 15 of the *Charter*.

[7] For the reasons that follow, the action is certified as against Ontario but, as presently structured, not as against the CAS Defendants.

II. Organization of Ontario's CASs

[8] CASs provide child welfare services in Ontario. The CAS Defendants, who represent 49 of the 50 CASs in the province (the 50th one having been formed after the proposed class period), are each formally designated as a CAS under the *CYFSA* and are funded by the Ministry. The evidence in the record demonstrates that the CAS Defendants serve a broad range of constituencies and regions, including Indigenous as well as non-Indigenous communities, urban as well as rural areas, and religious communities.

[9] Importantly, each CAS is a separately incorporated independent entity, with its own articles and set of by-laws, its own board of directors and corporate officers, etc. The record further establishes that the CAS Defendants have each developed their own policies and procedures, unique to the needs and circumstances of the communities they serve, although the overarching policy mandate of all CASs is to promote the best interests of the children in its care.

[10] The more specific function of CASs under the relevant legislation is to deliver provincially regulated child protection services. This includes investigating allegations and gathering evidence as to whether children may be in need of protection, and providing guidance and counselling to families for protection.

[11] The province itself does not deliver child welfare services. Rather, the record establishes that the Ministry provides high-level oversight for the child welfare system. This role involves Ministry personnel in establishing strategic policy, developing legislation and regulations, allocating funding, and licensing and inspecting societies pursuant to legislation, regulations, and standards. The Ministry does not get involved in any given child protection investigation or any given case management decision made by CAS regarding a specific child who may be in need of protection.

[12] Even more specifically, CASs have developed their own protocols and procedures for issuing Birth Alerts, and individual Birth Alerts were issued by a CAS without any direction from or coordination with each other or the Ministry. The evidence establishes that the Ministry had no involvement in individual case-level decisions, and that no one CAS had responsibility for, or involvement in, individual case-level decisions of another. Accordingly, neither the Ministry nor other CASs were informed when a CAS issued a Birth Alert.

[13] The Plaintiffs acknowledge in their pleading that Birth Alerts were issued by individual CASs acting on their own. The Amended Statement of Claim states that they "have been issued based solely on the discretion of each individual [CAS] and its employees or agents." Although in argument the Plaintiffs have put forward the view that CASs took direction from the Ministry, or coordinated with each other, there is no evidence of any such direction or coordination in issuing their individual Birth Alerts.

[14] What the Plaintiffs point to is a series of documents which indicate that Ontario provided high level guidance for Birth Alerts. These documents include, first and foremost, the Eligibility Spectrum, and secondarily, the Child Protection Standards (which incorporate the Eligibility Spectrum), the Risk Assessment Model, and the Provincial/Territorial Protocol. These instruments set out a non-exhaustive list of what CASs are advised and not advised to do in various situations. All parties agree, however, that they do not limit the exercise of discretion or judgment by a CAS in applying its child protection expertise.

[15] It appears from the evidence that there was never an overarching authority for issuing Birth Alerts. In fact, there is no evidence of any real direction or instruction on the use of Birth Alerts by the Ministry until mid-2020, when it issued the Directive to cease the practice. Although the Plaintiffs assert that Birth Alerts were a product of a top-down direction given to CASs, that appears to be a bald assertion. There is no indication of any "top-down" direction to agencies on whether, how, or when to issue this type of notice; each CAS was left to determine this on its own. Indeed, there is no evidence in the record of a Birth Alert system or "scheme", as Plaintiffs' counsel put it, imposed by the Ministry on CASs in Ontario.

[16] Notes produced by Ontario of an internal Ministry meeting in 2020 discussing an end to the Birth Alert practice indicate that, if anything, the Ministry had ignored the CASs' practice and viewed CASs as lacking any direction. Those meeting notes state: "Currently there is no policy direction on birth alerts, hence the practice is varied and interpretation of [the] practice is different across [agencies]." The Plaintiffs also concede in their Amended Fresh as Amended Statement of

Claim, at paras 26 and 28, that the process for issuing birth alerts was "arbitrary and discretionary" and, by logical extension, lacking in coordination.

[17] This lack of direction and coordination is amply illustrated in the evidence provided by a number of the CAS Defendants on this motion. It appears that some of those agencies had internal policies on the issuance of Birth Alerts, while others did not. Those without internal policies made reference to their own precedents or were guided by specific case-oriented discussions between a CAS worker and their supervisor. In some Indigenous communities, the Band was notified of a CAS's actions regarding their member, while in others there was no such notification.

[18] Similarly, the source of referrals about the potential risk to the infant differed from CAS to CAS and varied with the circumstances. Some referrals were from the police or medical professionals, while others were from community or family. Some of the Birth Alerts were sent only to a narrow group of those closely related to the baby, while others were disseminated broadly depending on the potential risk of harm underlying the alert (e.g. substance abuse, domestic violence, mental illness, etc.)

[19] Further, some hospitals and clinics required specific information to be included in Birth Alerts, while others were satisfied with little more than a request for a phone call when the baby was born. The evidence shows that there were also great differences in the reasons for sending out a Birth Alert – e.g. so that the particular CAS could commence an investigation, to establish contact with the new parent, or, in northwest Ontario to prevent losing Indigenous children to the child welfare system in Manitoba.

[20] In arguing that there is direction and coordination among CASs, Plaintiffs' counsel rely heavily on the fact that CASs in Ontario have formed the Ontario Association of Children's Aid Societies ("OACAS"), and that in that context they pursue initiatives in common. On the other hand, counsel for the CAS Defendants point out that some CASs were members of the Association of Native Child and Family Service Agencies of Ontario and not of the OACAS, and that in any case not all of the CAS Defendants were members of the OACAS during the proposed class period.

[21] The Ministry states that it recognizes the OACAS as a leading industry stakeholder, and that Ministry personnel have consulted with the OACAS directly and through committees and working groups, on a variety of key policy issues including Birth Alerts. The OACAS also has a history of providing training sessions for CAS child protection workers. Additionally, the OACAS works with, and facilitates relationships between, all Ontario CASs including non-member CASs, through its Provincial Directors of Service Group. Moreover, although membership in the OACAS is voluntary, the organization holds itself out as speaking on behalf of the province's CASs. This includes making public their position on Birth Alerts.

[22] One of the OACAS' recommendations to its members is to operate with reference to the Eligibility Spectrum, which is described by one of the government's affiants as a "framework within which child protection services are provided across Ontario". The Eligibility Spectrum was developed by the OACAS and has been in consistent use since 1998. The Ministry has over the past decade adopted the Eligibility Spectrum through the incorporation of its guidelines into the

mandatory Child Protection Standards and by Ministerial Policy Directive CW 002-16 18 dated June 11, 2016.

[23] The Eligibility Spectrum is described in the evidence as a rubric referenced by CAS workers in determining when to take action in a given case. CAS files are coded with references to Eligibility Spectrum sections in order to record the basis of CAS involvement. Although the Eligibility Spectrum does not mention Birth Alerts by name, it appears from the evidence that these guidelines, and in particular sections 10K and 10C thereof (which address, respectively, a request for CAS service in respect of "a caregiver with a problem and their pregancy", and referrals from one CAS to another), form the formal justification for many Birth Alerts. Indeed, a number of CAS witnesses deposed that they relied in particular on section 10K in issuing Birth Alerts.

[24] The creation and maintenance of the Eligibility Spectrum by the OACAS, and its adoption by the Ministry into the Child Protection Standards, is identified by Plaintiffs' counsel as collective action on the part of the CAS Defendants. Plaintiffs also identify as collective action by the CAS the Provincial-Territorial Protocol ("PT Protocol") regarding cross-border provision of child protection services, including mutual enforcement of what it calls "child protection alerts". The PT Protocol contemplates that alerts are to be transmitted between provinces by child protection authorities in respect of pregnancies where "a high-risk pregnant person has or is suspected to have left the [Province or Territory]".

[25] It is this alleged collective action – i.e. the combined Eligibility Spectrum, Child Protection Standards and PT Protocol – that forms the basis of the Plaintiffs' conspiracy claim, as discussed below.

III. The certification criteria

A) Section 5(1)(a) of the *CPA* – cause of action

[26] The Plaintiffs have pleaded five causes of action: conspiracy, negligence, intrusion upon seclusion, misfeasance in public office, and breach of ss. 7 and 15 of the *Charter*. The government of Ontario and the CAS Defendants are situated differently from each other in respect of these claims. After a few general comments about section 5(1)(a) of the *CPA*, the following analysis will therefore proceed first against one set of Defendants and then against the other.

[27] The test that the Plaintiffs must pass in order to meet the cause of action requirement in section 5(1)(a) is identical to that on a motion to strike. That is, the claim will be considered valid unless it is "plain and obvious" that the pleading fails to disclose a reasonable cause of action: *Cloud v. Canada (Attorney General)* (2004), 73 OR (3d) 401, at para. 41 (CA). Generally speaking, this is not an especially high hurdle, since a claim will fail to make it across "only in the clearest cases": *Temilini v. Ontario Provincial Police (Commissioner)* (1990), 73 OR (2d) 664, at para. 13 (CA).

[28] The Court of Appeal has explained that, in approaching section 5(1)(a), "the allegations in the statement of claim are taken as being proven, unless they are patently ridiculous or incapable

of proof": *McCreight v. Canada (Attorney General)* (2013), 116 OR (3d) 429, at para. 29. Accordingly, no evidence need be considered in this first stage of the certification analysis.

i) Claims against the CAS Defendants

a) Conspiracy

[29] The Plaintiffs allege that the CAS Defendants conspired against them "to implement and operate the Birth Alerts Scheme". More specifically, the Plaintiffs have pleaded the tort of unlawful means conspiracy, which requires them to establish that the CAS Defendants: a) acted in concert, by agreement, or with a common design; b) acted unlawfully; c) acted in a way that their conduct was directed toward the Plaintiffs; d) should have known that, in the circumstances, injury to the Plaintiffs was likely to result; and e) caused injury to the plaintiffs as a result of their conduct.

[30] In *Normart Management Limited v. West Hill Redevelopment Company Limited* (1998), 37 OR (3d) 97, at para. 21, the Court of Appeal quoted Bullen, Leake and Jacob, *Precedents of Pleadings*, 12th ed. (London: Sweet & Maxwell, 1975), at pp. 646-47, in setting out the criteria for pleading the tort of unlawful means conspiracy:

> The statement of claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damage occasioned to the plaintiff thereby.

[31] In assessing a conspiracy pleading, it is to be noted that the tort's "collective liability is based on the personal fault of each conspirator who agrees to join the conspiracy and who actually contributes to the planning, financing, and execution of the conspiracy": *Carcillo v. Canadian Hockey League*, 2023 ONSC 886, at para. 276. It is therefore necessary for a party claiming on the basis of conspiracy "to set out discretely the particular acts of each co-conspirator so that each defendant can know what he or she is alleged to have done as part of the conspiracy. [I]t is not appropriate to group some or all of the defendants together into a general allegation that they conspired to injure the plaintiff": *Lilleyman v. Bumblebee Foods LLC*, 2023 ONSC 4408, at para. 102.

[32] To put it another way, "conspiracy allegations require pleading with particularity, including details of the acts alleged against each defendant, as each is entitled to know the case they must meet": *Mackinnon v. Volkswagen Group Canada Inc.*, et al., 2024 ONSC 4988, at para. 65. Moreover, "the separate corporate legal personalities of the alleged conspirators must be respected and their individual roles in furtherance of the conspiracy particularized…": *Bumblebee*, at para. 106.

[33] Not only must each participant's acts be particularized, but an agreement to conspire must be pleaded as being "a joint plan or common intention to do the act which is the object of the

alleged conspiracy": Lewis N. Klar, *Remedies in Tort* (Toronto: Thomson Reuters, 2021), ch. 3, p. 26, at para 14. A given party's acquiescence to the act will not be sufficient to establish the existence of a common plan or design:" *Ibid*., at para. 15. The courts have specifically admonished plaintiffs that they are not to "assume but…not demonstrate multilateral action that would constitute an illegal meeting of the minds and an illegal agreement…as distinct from conscious parallelism, which is not illegal": *Bumblebee*, at para. 299.

[34] The Plaintiffs do not plead any specific meeting or conversation or event in which a meeting of the minds of the alleged co-conspirators – i.e. the 49 CAS Defendants – took place. Rather, they rely on the membership of most (but not all) of them in the OACAS, along with the use of the Eligibility Spectrum. As already described above, the Eligibility Spectrum is authored by the OACAS, and not by any one CAS or any specific combination of CASs. The Plaintiffs also make mention of unparticularized "informal action through collective agreement" as representing activities in furtherance of an alleged conspiracy.

[35] With great respect, these efforts do not identify a meeting of the minds such as required for a conspiracy claim. The pleading of "informal action" is too vague to qualify as a pleading of material fact. It fails to specify the actual acts of the individual CAS Defendants that constitute the conspiratorial agreement, and so lacks the kind of specificity that the courts have required for a pleading to survive a no-cause-of-action challenge.

[36] As for the membership of many CASs in the OACAS and the OACAS' authorship of the Eligibility Spectrum, that too does not amount to a conspiratorial agreement or a meeting of the minds. At most, it is parallel action by similarly situated actors, but not by actors who have reached an agreement with each other or even necessarily discussed the matter with each other.

[37] The OACAS is a professional membership organization, akin to the Canadian Bar Association ("CBA"), the Ontario Bar Association, or the Advocates Society. The fact that many lawyers belong to those organizations and participate in their meetings, educational projects, best practices committees, etc. does not make the members and their law firms co-conspirators in the organizations' many endeavors.

[38] By way of illustration, much like the OACAS' development of the Eligibility Spectrum, in past decades the CBA, a membership organization composed of most (but not all) of the legal profession, developed a Code of Professional Ethics as a guideline to its members; one might even say as a 'framework within which legal services are provided across Ontario [or Canada]'. Its members mostly saw the merit of having a set of ethical guidelines and followed them – not out of agreement with each other, but in parallel with each other of their own volition. Then, much like the Ministry's adoption of the Eligibility Spectrum into its regulatory framework by its policy directive, the Law Society of Ontario ("LSO") has enacted the CBA's Code into its regulatory framework, forming today's Rules of Professional Conduct.

[39] Neither the CBA's recommended Code, nor the LSO's enacted Rules, amounts to a conspiracy of lawyers. They are a set of standards developed by people engaged in a common, but not a collective, service profession. Lawyers and law firms did not follow the CBA's ethics Code

by agreement with each other; rather, they came to the set of standards in parallel, and it was then embraced as good and uniform governance by the government-authorized regulator. The Eligibility Spectrum fits the same mold; developed by a profession that acts in parallel, not by agreement as a collective enterprise or a conspiracy, and then embraced by the Ministry as a good and uniform set of standards.

[40] Turning to the Plaintiffs' reliance on the existence of the PT Protocol and their argument that the CAS Defendants' compliance with the PT Protocol constitutes an act in furtherance of a conspiracy among themselves, the Plaintiffs have similarly misconstrued the document in issue. The PT Protocol cannot possibly represent a conspiratorial or any other type of agreement among CASs, as it is not an agreement among them. It is an agreement between provinces and territories in Canada. Its subject matter is with respect to children, youth, and families moving across provincial or territorial borders.

[41] The provinces and territories have signed onto the PT Protocol, and it is at that level that it was developed and put into place, not at the level of any given CAS or grouping of CASs. The Protocol is no more of an agreement between individual CASs than an international treaty is an agreement between individual citizens to treat each other in certain ways. A government-to-government agreement is not a contract between the individuals or entities across jurisdictions that the agreement addresses; it is a meeting of minds of minds of governments, not of the governed with each other.

[42] In short, the Plaintiffs have not pleaded material facts that would support a cause of action in conspiracy. Neither the common, or parallel adoption of the Eligibility Protocol, nor the inter-governmental adoption of the PT Protocol, represents a collective agreement among CASs. It is plain and obvious that this cause of action does not meet the section 5(1)(a) threshold as against the CAS Defendants.

b) Negligence, intrusion upon seclusion, and misfeasance in public office

[43] The other common law causes of action pleaded by the Plaintiffs as against the CAS Defendants all suffer from a structural defect, commonly referred to as the *Ragoonanan* problem. First identified in *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2000), 51 OR (3d) 603 (SCJ), at para. 54, the courts have determined that "it is not sufficient in a class proceeding…if the pleading simply discloses a 'reasonable cause of action' by the representative plaintiff against only one defendant and then puts forward a similar claim by a speculative group of putative class members against the other defendants."

[44] The Court of Appeal sharpened the focus on this structural issue in *Hughes v. Sunbeam Corporation (Canada) Ltd*. (2002), 61 OR (3d) 433, at para. 18, where Justice Laskin stated succinctly that, "In a proposed class action, there must be a representative plaintiff with a claim against each defendant." In *Carcillo, supra*, at para. 47, this principle was applied to dismiss certification where 5 plaintiffs, who played for 5 hockey teams, brought a class action against 60 teams altogether likewise, in *Pugliese v. Chartwell [McDermott v. ATK Care Inc.]*, 2024 ONSC

1135, at para. 100, it was applied to dismiss certification where 14 plaintiffs, who either resided in or whose deceased relatives resided in 6 long term care homes, brought a class action against 39 homes altogether.

[45] As with the hockey teams in *Carcillo* and the independently owned homes in *Pugliese*, "[t]here is no collective or concerted action liability in the immediate case": *Carcillo*, at para. 231. As indicated, the CAS Defendants are not component parts of a single enterprise, and they are not co-conspirators who have combined to harm the Plaintiffs. Rather, they are separate, independently governed entities who operate in parallel without any top-down direction. Having concluded that the conspiracy claim cannot succeed as pleaded, there is nothing in the claim to suggest that the CAS Defendants acted in concert in issuing Birth Alerts; they acted in common, or in parallel, but that is all.

> To state the obvious, similarity is not commonality. Defendants' counsel submitted at the hearing that while class actions allow for common issues, a person injured by defendant 'A' cannot sue defendant 'B' because it separately injured others in a similar way. The owner of a Toyota with a bad transmission cannot sue Honda even if Honda's transmissions are just as bad; and all Toyota owners cannot form a class with all Honda owners and sue both manufacturers on the theory that they've both done wrong and if the colours bleed it will all come out in the wash. Such a claim "[would] not involve the common acts or omissions of a collective. There [would be] no certifiable causes of action for a collective liability": *Carcillo*., at para. 355.

[46] The relationship between the 49 CAS Defendants is non-hierarchical. They are separate, distinct, and equivalent entities; there is no top-down, enterprise-wide, relationship. Whatever the acts of each of the CAS Defendants might be, and regardless of how harmful the alleged conduct may have been, there cannot be systemic negligence or collective intrusion upon seclusion or group misfeasance. The CAS Defendants do not act in concert in respect of Birth Alerts – i.e. neither as co-conspirators nor as a single enterprise.

[47] Since the CAS Defendants are independent actors, they cannot be liable in unison regardless of whether Birth Alerts were wrongful or rightful. If those alerts caused harm, the harm was caused by each CAS to the specific persons for whom the alerts were issued. The CAS Defendants may have acted in similar fashion, but, "[t]o state the obvious, similarity is not commonality": *Pugliese*, at para. 96. There simply is no *lis*, and no causal connection or cognizable harm, between the Plaintiffs G.G. and W.W. and 47 of the 49 CAS Defendants.

[48] To use as obvious a hypothetical as possible, if G.G., an Indigenous person for whom a Birth Alert was issued by Native Child and Family Services Toronto, were to bring a lawsuit against, say, the Defendant, Jewish Family and Child Service, the suit would be bound to fail. There would be no link between the harm suffered by one party and any act done by the other party. And what the Plaintiffs cannot do on a one-off basis, they equally cannot do on a class action basis. As presently structured, the Plaintiffs' claim against any of the CAS Defendants that did not issue a Birth Alert against either of them, is bound to fail.

[49] Again, the Plaintiffs have not pleaded material facts that would support causes of action in negligence, intrusion against seclusion, or misfeasance in public office. It is plain and obvious that those causes of action do not meet the section 5(1)(a) threshold as against the CAS Defendants.

c) Sections 7 and 15 of the *Charter*

[50] It is not controversial to say that CASs are "the beneficiar[ies] of invasive and incursive powers that the legislature felt necessary to enable its corporate agent[s] to effect the…laudable end of protecting children from abuse, neglect, and endangerment": *Children's Aid Society of London and Middlesex v. H.(T.)*, 1992 CanLII 4042, at para. 24. Accordingly, CASs can be considered to be "instruments of the government within the meaning of subsection 32(1) of the *Charter*: *Chatham-Kent Children's Services v. K.(J.)*, 2009 ONCJ 589, at para. 24.

[51] While every CAS must therefore respect the *Charter* rights of those with whom it interacts and may be the subject of legal action in the event of a *Charter* breach, the question remains as to who is able to bring that action. Traditionally in constitutional litigation, any citizen or resident of Canada has had standing to challenge the validity of legislative action; the standing rules in such cases have been held to be as broad as the law's own reach: *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138. This wide-open rule has been premised on the need to invoke standing on the basis of public interest where the challenged law potentially impacts everyone across the society: *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662; *Chaoulli v Quebec (Attorney General)*, [2005] 1 S.C.R. 35.

[52] Even where the claim is personal in nature, the pan-societal ramifications of the challenged law may provide a ground for standing for a challenger not personally impacted if there is no other feasible way to bring the matter to court: *Minister of Justice (Can.) v. Borowski*, [1981] 2 S.C.R. 575. But that is where the public interest standing doctrine ends. For personal rights that are protected by the *Charter*, and especially where the challenge is to administrative action rather than to legislation, a challenge "can only be made by the person whose *Charter* rights have been infringed": *R. v. Edwards*, [1996] 1 S.C.R. 128, at para 45.

[53] Thus, for example, where a *Charter* claimant dies before the case can be heard, the matter is considered personal to the litigant and the challenge dies with the challenger: *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429. Likewise, where the right at stake is, like the right to be free from unreasonable search and seizure, dependent on the particular circumstances of the challenger, the *Charter* challenge must be brought by the interested party: *R. v. Borecky*, 2011 BCSC 1573.

[54] Over the past several decades, the Supreme Court of the United States has applied this thinking to constitutional litigation and, by extension to class actions. In that series of cases, the U.S. court has invoked the same principles and drawn the same distinction as have the Canadian courts between the public interest of constitutional challengers and the private interest of those claiming for constitutional damages.

[55] In *Bailey v. Patterson*, 369 U.S 31 (1962), a case from early in the Civil Rights era, a group of African American litigants brought a challenge to a discriminatory Mississippi law barring them

from using the state-run public transportation system. In the process, the challengers also sought to stay the prosecution of several criminal cases seeking to enforce those laws. The Court allowed the challenge to the state legislation to proceed, but at the same time held that the challengers "lack standing to enjoin criminal prosecutions under Mississippi's breach of peace statutes, since they do not allege that they have been prosecuted or threatened with prosecution thereunder": *Ibid*., at 31.

[56] This distinction then formed the basis of the class action rule for constitutional challenges in *Allee v. Medrano*, 416 US 802. There, a group of farm workers attempting to unionize and to go on strike, challenged the actions of a Texas police force in harassing them in violation of freedom of speech and assembly. The Court dismissed he claim, reasoning that there were two possibilities for a case of this nature, at 828-829:

> If an individual named appellee was and is subject to prosecution under one of the challenged statutes, that appellee would have standing to challenge the constitutionality of that statute… Prosecutions instituted against persons who are not named plaintiffs cannot form the basis for standing of those who bring an action… [I]t bears repeating that a person cannot predicate standing on injury which he does not share. Standing cannot be acquired through the back door of a class action.

[57] Given the logic and structure of constitutional litigation, the concept of standing is closely related, and at times identical to, the concept of causation. A claim for individual relief under section 24 of the *Charter* – as opposed to the society-wide remedy under section 52(1) of declaring a law to be of no force or effect – "can only be made by the person whose *Charter* rights have been infringed": *Edwards, supra*, at para. 45.

[58] In other words, the alleged *Charter* violation must be shown to have caused the Plaintiff harm in need of relief. The private interest standing required to bring a *Charter* damages claim may be described in the same way as Justice Sopinka described causation in a negligence claim: "an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former.": *Snell v. Farrell*, [1990] 2 S.C.R. 311, at para. 27. If there is no causation linking the Defendant's alleged act to the Plaintiff's claimed harm, then there no standing and no cause of action.

[59] The relief sought by the Plaintiffs herein confirms that, from the very outset, this is a private interest *Charter* claim. In paragraph 1 of the Amended Fresh As Amended Statement of Claim, the Plaintiffs seek findings (and declarations of those findings) as to the individual rights of the claimants, and monetary damages for the violation of those rights. More specifically, paragraphs 1(a)(iii) and (iv) seek declarations that the acts of the CAS Defendants infringed the Plaintiffs' and class members rights under sections 7 and 15 of the *Charter* and that those infringements are not save by section 1, while paragraph 1(c) and (d) seek monetary compensation for the harm caused by those alleged infringements of rights.

[60] There is no request in the Plaintiffs' pleading to strike down any legislation or regulatory enactment – i.e. no societal or 'public law' remedy. As explained in the section above, Birth Alerts have already been cancelled by the Ministry; but that cancellation did not end the Plaintiffs' claim, since it is a personal rights claim for compensation and not a societal claim about constitutionality at large. The claim, and the remedies for the claim, require causation as between Defendants and Plaintiffs.

[61] It is therefore evident that the same *Ragoonanan* problem that challenges the Plaintiffs in their common law claims, challenges them in their *Charter* claims. The two named Plaintiffs may have had their rights to life, liberty, and security of the person, or their respective equality rights infringed, but, if so, it was by one of the CAS Defendants for each of them. It was not by all of the CAS Defendants, or even by any two of the CAS Defendants if one of which was not the one that is alleged to have specifically harmed them.

[62] To once again use an obvious example from the record, if, as the Plaintiff G.G. deposes, her child was, prompted by a Birth Alert, apprehended by Native Child and Family Services Toronto in violation of her rights under sections 7 and 15 of the *Charter*, she can seek a declaratory and compensatory remedy from that organization. The same is true for the Plaintiff W.W., who deposes that Chatham-Kent Children's Services intervened with her health care and interfered with her at the birth of her baby, prompted by a Birth Alert to her medical practitioners.

[63] But neither Plaintiff has a legal basis for seeking compensation or a declaration from the CAS Defendant that is alleged to have harmed the other. Absent a causal link, G.G. has no standing to bring a *Charter* damages claim, or to seek a declaration of *Charter* violation, against Chatham-Kent Children's Services, nor does W.W. have standing to seek equivalent remedies against Native Child and Family Services Toronto. Those organization would be, in effect, strangers to those *Charter* claims, as they had no interaction with, and could not have breached the *Charter* rights, of the particular claimant. That lack of standing equates to a lack of a cause of action against the CAS Defendants.

[64] As with the common law claims, the Plaintiffs have not pleaded material facts that would support causes of action against the CAS Defendants for *Charter* rights infringements. It is plain and obvious that, as against the CAS Defendants, the Plaintiffs' *Charter* claims will fail. They therefore do not meet the section 5(1)(a) threshold.

ii) Section 5(1)(b)-(e) – fallout of the *Ragoonanan* problem

[65] Once the lack of a cause of action is identified, there is no real need to analyze the claim against the CAS Defendants beyond section 5(1)(a) of the *CPA*. The Plaintiffs must succeed in establishing each step of the certification analysis, and if they fail on any one of those steps the motion cannot succeed.

[66] That said, it is worth noting in passing that the *Ragoonanan* problem reverberates through the section 5(1) analysis. Thus, for example, one can also say that the Plaintiffs do not make up a proper class under section 5(1)(b) since they do not comprise a proposed class with two or more members that go together as a class. For the same reason, the two named Plaintiffs are not proper

representative Plaintiffs under section 5(1)(e). At the most, they are a Plaintiff with a claim against Native Child and Family Services Toronto and a Plaintiff with a claim against the entirely unrelated Chatham-Kent Children's Services, with no link other than similarity between them.

[67] Two individuals do not comprise a class if they do not bring a common claim, and the record does not disclose the claims of any other individuals who are proposed as class members. The two named Plaintiff here cannot form a class by separately suing two different Defendants.

[68] In a similar way, there are no common issues between the Plaintiffs or between the proposed class members. Since each CAS acts independently, and each Birth Alert is in that sense *sui generis*, resolving whether or not one Plaintiff was wronged by Native Child and Family Services Toronto does not resolve whether the other was wronged by Chatham-Ket Children's Services. Accordingly, the section 5(1)(c) test is not met by the Plaintiffs' claim.

[69] For these reasons, the claim herein also cannot be said to be the preferable procedure for resolving issues for the proposed class. Rather, the preferable procedure would be to re-structure the claim on a CAS-by-CAS basis, such that all of the subjects of Birth Alerts from each CAS Defendant bring their action collectively as a class action against that one CAS.

[70] While I have not engaged in a full analysis of such re-constituted claims here, I am confident in saying that proposed class actions against individual CAS Defendants rather than all of them together would, at the very least, overcome the *Ragoonanan* objection to certification. Without such re-structuring, however, the present claim is not the preferable procedure and does not satisfy the section 5(1)(d) portion of the certification test.

iii. Claims against Ontario

[71] As against the government of Ontario, the Plaintiffs plead claims in negligence and breaches of sections 7 and 15 of the *Charter*. In analyzing the viability of these claims, it is necessary to understand the active/passive role of the Ministry in respect of CAS actions and the issuance of Birth Alerts.

[72] The *Ragoonanan* problem does not apply to the claims advanced by the Plaintiffs against Ontario. The province stands in the same relationship with both of the representative Plaintiffs and with all of the proposed class members. There is no causal mismatch between claimant and alleged tortfeasor the way there is with the claims against the 49 independent CASs.

[73] That said, Ontario cannot be held vicariously liable for the acts of any CAS. Those organizations do not act on behalf of the Crown; their activities – including the issuance of Birth Alerts – are a product of their own volition and their own independence governance.

[74] To this end, sections 34(5) and (6) of the *CYFSA* provide:

> (5) A society and its members, officers, employees and agents are not agents of the Crown in right of Ontario and shall not hold themselves out as such.

> (6) No action or other proceeding shall be instituted against the Crown in right of Ontario for any act or omission of a society or its members, officers, employees or agents.

[75] Accordingly, any cause of action against the province in respect of the activities of CASs must be direct, based on sustainable allegations of wrongful conduct by the government of Ontario itself and not of the CASs. With that in mind, it is important to observe that although the province does not directly administer or conduct the business of the CASs, it does have substantial oversight authority for CASs.

[76] For example, under section 4(1) and (2) of the *CYFSA*, the Ministry can issue binding directives relating to the CASs' administration and its substantive mandate. Likewise, under section 43, the Ministry can order compliance by a CAS and issue directives regarding the way in which it provides its authorized services and, through officials that it appoints, to investigate CAS activities and compliance. Ultimately, the Ministry is empowered under section 44(3) of the *CYFSA* to take control of a CAS, up to and including running the organization itself:

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

[77] Counsel for the Plaintiffs submit that as a holistic legislative package, the individual CASs are each accountable to the Ministry in respect of their service delivery and performance of their statutory functions. Moreover, the legislation ensures that while the Ministry does not run or

administer any one CAS, it retains ultimate authority over their operations. Given the substantial powers of regulation, veto, and direction allocated to the Ministry under the governing statute, it is hard to argue with the Plaintiffs' position in this regard.

[78] The Ministry itself has represented to the Auditor General of Ontario during a 2015 audit that the Ministry's administration of the provincial "Child Protection Services Program" involved a number of managerial oversight tasks. These include setting strategic direction for all CASs, establishing and revising the legislative and policy framework in which the CASs operate, and setting standards for the quality and delivery of CAS services.

[79] The Ministry's oversight, according to the audit, also entailed the monitoring of the CASs' delivery of child protection services, as well as the monitory of CASs' performance and outcomes against expectations. This level of supervision and monitoring would inevitably have created an awareness by the Ministry of the use of Birth Alerts by the various CASs.

[80] The Ministry's deponent, former Child Welfare Services acting manager Kevin Morris, conceded in cross-examination that in exercising its supervisory functions, the Ministry had never turned its mind to the fact that intervention during pregnancies was not within CAS jurisdiction, since that jurisdiction is defined as being limited to children rather than fetuses. In fact, the evidence in the record shows that the Ministry never did any effective assessment of whether CASs were staying within their statutorily authorized area of operation, or whether they were meeting the standard of care expected of them.

[81] In cross-examination, Mr. Morris described the Ministry's initiatives in regulating and overseeing CAS activities as minimal, lacking even in basic due diligence:

> Q: There was never any organized effort in the Ministry to perform supervision or oversight to determine that CASs were staying within their mandate when they delivered services?
>
> A: Yeh, the – it is not part of the function of the Ministry to look at these cases on a day-to-day basis. The responsibility for meeting the standards is with the Societies.

[82] Another Ministry representative, former Manager of Prevention and Protection Services Lori Bennett, did concede, however, that the Ontario government could have directed the cessation of Birth Alerts at any time. But this concession came with a caveat worthy of attention:

> Q: Do you agree that the Ministry could have told Ontario CASs to stop birth alerts at any time?
>
> A: They could have done had they known there was a concern about birth alerts.

[83] The Ministry's oversight functions were active enough that Ministry personnel were aware of Birth Alerts. It would seem, however, that the Ministry's analytic capacity was not sufficiently

triggered to understand on its own that Birth Alerts were both discriminatory and, in targeting pregnancies and fetuses rather than parents and children, beyond CASs' statutory jurisdiction.

[84] For that reason, the Ministry's evidence is that, despite being the statutorily mandated overseer and regulator, it needed to be told by someone else that Birth Alerts are problematic and must cease. Ms. Bennett did not go on to elaborate on who it was that she and the Ministry would expect to alert the Ministry to the need to fulfill its mandate. But what the evidence does make clear is that, in the wake of the *MMIWG Report*, the Ministry became cognizant of the harmful and discriminatory effect of Birth Alerts. Only at that point did the Ministry terminate the practice in fulfillment of its mandate.

a) Negligence

[85] Plaintiffs' counsel summarize the negligence claim against Ontario as follows:

> a. Ontario is alleged to owe a duty of care to the Birth Parent Class Members—arising out of the Ministry's statutory oversight and authority over the CAS Defendants—that required Ontario to ensure that the CAS Defendants acted 'within the bounds of the law' and in accordance with their legislative purposes and functions;
>
> b. this duty was breached by Ontario's authorization of the unlawful Birth Alerts Scheme and its failure to take any action to restrain the CAS Defendants from issuing Birth Alerts despite its knowledge of the Birth Alerts Scheme and the reasonable foreseeability of resulting harm to the class members; and
>
> c. Ontario's breach of its duty of care caused damage to the Class Members.

[86] The pleading claims damages from the government of Ontario for what can be called a tort of omission. That is, in failing to engage its statutory mandate to ensure that CASs stay within their jurisdiction and do not act in a discriminatory and harmful way, the Ministry breached its duty to the public and to the targets of the Birth Alerts. The Plaintiffs contend that in so breaching its duty, the Ministry fell below the requisite standard of care and caused reasonably foreseeable harm to the Plaintiffs and class.

[87] Overall, the Plaintiffs submit that since the *CYFSA* and its predecessor legislation grant the province "the power to rationalize and oversee the practices of the children's aid societies", it was incumbent upon it to use that power and wrongful for it not to do so: *Papassay v. Ontario* (2015), 126 O.R. (3d) 587, at para. 43 (SCJ). In short, since "CASs are accountable to the Ministry for the delivery of services", the Ministry is accountable to those to whom the services are delivered (or misdelivered): *Dilico Anishinabek Family Care v. Ontario*, 2020 ONSC 892 at para. 56. When government has an overarching duty to supervise, the failure to do so, with ensuing harm, is actionable: *Reilly v. Alberta*, 2022, ABKB 612, at paras. 30, 34; *Reilly v. Alberta*, 2024 ABCA 270, at paras. 14-16.

[88] As Plaintiffs' counsel explain, identifying Ontario's duty of care in this way complements rather than conflicts with the province's mandate. The duty is owed to a finite number of individuals who are the targets of CAS practices, and it operates in a context in which the Ministry exercises regulatory control and oversight. Moreover, this duty does not impose unmanageable or indeterminate liability: see *Robertson v. Ontario*, 2022 ONSC 5127, at para. 55.

[89] Importantly, since Birth Alerts do not operate for the protection of living children, they are beyond CAS authority. Accordingly, fashioning a duty of care out of the government's duty to oversee raises no concern about potentially conflicting duties being imposed on government. By definition, there is no "overarching statutory or public duty" to consider in claiming liability against Ontario for acquiescing to acts of the CASs that were beyond their jurisdiction: *Syl Apps Secure Treatment Centre v. B.D.*, [2007] 3 S.C.R. 83, at para. 28. Its duty was to keep the regulated entities – i.e. the CASs – within their statutory boundaries.

[90] Counsel for Ontario argues that the Plaintiff's negligence claim takes aim at a policy decision, and that it therefore falls within the scope of immunity under section 11(4) of the former *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, sch. 17 ("*CLPA*"). That section, which was in force until July 2020 – i.e. for virtually the entire proposed class period of 2007-2020 – provides:

> No cause of action arises against the Crown or an officer, employee or agent of the Crown in respect of any negligence or failure to take reasonable care in the making of a decision in good faith respecting a policy matter, or any negligence in a purported failure to make a decision respecting a policy matter.

[91] In making this submission, counsel for Ontario rely on the Court of Appeal's decision in *Bowman v. Ontario*, 2022 ONCA 477. Justice Brown, for a unanimous court, held that the then newly elected government's decision in August 2018 to cancel the previous government's Basic Income ("BI") program was a "decision…respecting a policy matter" and thus could not be the subject of a liability claim. The Court, at para. 76, made reference to the definition of a "policy matter" in section 11(5) of the *CLPA*. That definition includes:

- The funding of a program, project or other initiative, including ceasing to provide such funding (s. 11(5)(b)(i)); and

- The termination of a program, project or other initiative (s. 11(5)(d)).

[92] By way of background, Justice Brown reviewed the origin of the BI program. He indicated that the cancelled program was a "pilot project to study the value of implementing a basic income for residents of Ontario", which had been implemented on a trial basis in several counties. The policy was a matter of some political debate; it was implemented by Ontario's Liberal government in 2017 and terminated by Ontario's new Conservative government in 2018. As Justice Brown relates it, at *Bowman*, paras. 14-15, 19-20:

> [14] In April 2017, Premier Wynne announced the commencement of the BI Program in three urban areas: Hamilton/Brantford, Lindsay, and Thunder Bay… She described the pilot as a three-year project in the selected communities.
>
> [15] In late April 2017 the Ministry issued a news release and published a webpage that described the BI Program.
>
> . . .
>
> [19] In June 2018, a provincial election was held. The Progressive Conservative Party formed a new majority government.
>
> [20] In late July 2018, Ontario announced that it was terminating the BI Program. All BI Payments ceased as of March 25, 2019.

[93] Justice Brown then contrasted the BI policy with the administrative segregation policy that was the subject of a liability claim in *Francis v. Ontario* (2021), 154 O.R. (3d) 498 (CA). There, the Court granted summary judgment against Ontario for breaching a duty of care to class members in respect of the operation of an administrative segregation system in correctional facilities. The Court of Appeal reasoned that the decision-making in issue was of an operational, not a policy nature: *Ibid*., at para. 104. Since operational decisions did not fall within the scope of section 11(4) of the *CLPA*, no immunity applied and the suit was not barred as against the Ontario Crown.

[94] As previously discussed, after being alerted to the problems with Birth Alerts by the *MMIWG Report* and engaging with various stakeholders, the Ministry issued a Policy Directive on July 14, 2020 directing CASs to cease the practice of birth alerts. Counsel for Ontario submits that this Directive reflects a governmental policy decision which would attract immunity under section 11(4) of the *CLPA*. They argue that by logical extension Ontario's failure to issue that Policy Directive earlier, or at all, cannot give rise to liability as it is likewise a policy decision that attracts immunity.

[95] A reading of Ontario's entire argument in this matter highlights the deep irony of this position. Counsel for Ontario insists at an earlier point in its argument that Birth Alerts are not, and never were, a policy of the government of Ontario. In fact, they contend in their factum that, "society managers authorized society workers to issue birth alerts or that workers believed birth alerts were authorized in a general sense without any connection to provincial policies." They further point out that the evidence in the record shows that "documents prepared by Ministry employees when it was considering whether to prohibit the use of birth alerts…noted that there was no provincial policy on birth alerts."

[96] Accordingly, while the elimination of Birth Alerts was a policy matter that would fall within the *CLPA* immunity provision, the implementation and ongoing use of Birth Alerts was not a provincial policy. Rather, it was treated as an administrative or operational matter, formulated and implemented at the CAS level but not at the Ministry level. Thus, counsel for Ontario submit that, "Societies independently came up with their own policies and processes (sometimes written,

sometimes ad hoc) on how and when to issue birth alerts. This helps explain why there was no uniformity of approach on birth alerts across the societies."

[97] It is therefore very much the case that while the directive ordering the cessation of Birth Alerts was an Ontario government policy for which the province has immunity from suit, the ongoing use of Birth Alerts – and the failure to stop them until alerted to do so by others – was not an Ontario government policy. By analogy, a tavern owner's directive that bar tenders must require a drunk patron call a taxi is a policy directive, whereas the ack of any attention paid by the tavern owner to patrons getting drunk in the first place is not a policy of the tavern. That the former is a policy directive and the latter is a non-policy does not represent a logical contradiction; it is simply a reflection of two different approaches – perhaps one responsible and the other irresponsible – taken at a different time.

[98] For years, and throughout the class period, the Ministry failed to turn its policy mind to the patently problematic nature of Birth Alerts. Then, in mid-2020, the Ministry was woken up by the *MMIWG Report* and other stakeholders in society and was made aware of its own failures in this regard. Those failures, unlike the ultimate reversal of those failures, are not policy decisions that attract any immunity.

[99] In general, the Plaintiffs' claim against Ontario is not made on a conceptually broad basis. The allegation that the Ministry failed for too long to end Birth Alerts is based on a negligence standard and on the government's responsibilities under section 42 of the *CYFSA*, which vests the Ministry with the power to issue the very type of cease and desist directive that it eventually issued in July 2020. The Plaintiffs' claim asserts that even if Birth Alerts did not originate with the government, the Ministry was aware of the practice and it was in its power to put it to an end.

[100] The Plaintiffs' negligence claim, therefore, is based on the fact that for years the Ministry failed to end what was within its knowledge a wrongful and harmful practice. The Plaintiffs plead that in doing that it is claimed that the government of Ontario breached its duty of care to the Plaintiffs and fell below the requisite standard of care.

[101] Pursued on this basis, it is not plain and obvious that the claim is bound to fail. The *CPA*'s cause of action threshold in section 5(1)(a) is therefore passed with respect to the negligence claim against Ontario.

b) Section 7 of the *Charter*

[102] The Plaintiffs plead that Birth Alerts as practiced by each of the CASs violated the section 7 rights of the Plaintiffs and class members to life, liberty, and security of the person; and they further plead that these violations did not accord with fundamental justice and that the government of Ontario is responsible for such violations. In the first instance, Plaintiffs' counsel argue, correctly, that the pregnancy context in which Birth Alerts operate inevitably raises an issue of liberty. Justice McLachlin (as she then was) explained this succinctly in *Dobson (Litigation Guardian of) v Dobson*, [1999] 2 SCR 753, at para. 85:

> I turn first to liberty. Virtually every action of a pregnant woman – down to how much sleep she gets, what she eats and drinks, how much she works and where she works – is capable of affecting the health and well-being of her unborn child, and hence carries the potential for legal action against the pregnant woman. Such legal action in turn carries the potential to bring the whole of the pregnant woman's conduct under the scrutiny of the law. This in turn has the potential to jeopardize the pregnant woman's fundamental right to control her body and make decisions in her own interest.

[103] Plaintiffs also contend that the issuance of Birth Alerts amounts to an infringement on the privacy rights of the Plaintiffs and all class members, since it compelled the disclosure of personal health information. Indeed, the Birth Alerts at issue here bring this case into close proximity with *Cheskes v. Ontario (Attorney General)* (2007), 87 OR (3d) 581, where Justice Belobaba considered the *Charter* implications of compelled disclosure of adoption and birth records without the impacted individual's consent. He concluded, at para. 83, that the disclosure of those records, like the disclosure of health records without a person's consent, "constitutes an invasion of the dignity and self-worth of each of the individual applicants, and their right to privacy as an essential aspect of their right to liberty in a free and democratic society has been violated."

[104] Plaintiffs' counsel further submit that the child welfare context of Birth Alerts raises issues of security of the person, since "[u]nnecessary disruptions of this bond [between parent and child] by the state have the potential to cause significant trauma to both the parent and the child": *Winnipeg Child and Family Services v. KLW*, [2000] 2 SCR 519, at para 72. They argue, again correctly, that there is "little doubt that state removal of a child from parental custody pursuant to the state's *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent…[and] direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as 'unfit' when relieved of custody": *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 61.

[105] None of this would be particularly controversial if the Birth Alerts were an initiative or the brainchild of the Ministry or some other branch or person in the Ontario government. That, however, is not the case.

[106] As discussed above, the Ministry's involvement in Birth Alerts, up until the Directive to have them cease, was rather passive. This claim is for the most part about Ontario's acquiescence and essential passivity in a practice which was wrongful, but in which it did not itself engage. As already explained, that is because the impugned alerts were issued by independent CAS entities, and not by government itself.

[107] Counsel for Ontario submit that as a matter of both evidence and law, Ontario is not responsible for the actions of CASs. They state that under s. 32 of the *Charter*, the obligations on government under the *Charter* apply to a wide range of governmental and non-governmental entities when engaged in governmental functions: see *Eldridge v. British Columbia (Attorney*

General), [1997] 3 SCR 624, at paras. 30, 44, 52. Those entities are individually responsible for adhering to their *Charter* obligations and for the consequences of not adhering.

[108] CASs and their agents exercise state power in carrying out their child welfare functions, and so each CAS is a "beneficiary of invasive and incursive powers that the legislature felt necessary to enable its corporate agent to effect the, again, laudable end of protecting children from abuse, neglect, and endangerment; however…the legislature acting by or through incorporated agents, or the obvious social benefit of the goal to be achieved, [is not] detracting from a characterization of the society as an agent of government": *Children's Aid Society of London and Middlesex v. H.(T.)*, 1992 CanLII 4042, at para. 4 (OCJ). Furthermore, "[c]ourts have held that state institutions and those acting under public authority are to be held accountable in their own right under section 32 of the *Charter*, as respondents distinct from the Government": *Thomas Christian Zaugg v. Ontario (Attorney General)*, 2019 ONSC 2483, at para 50.

[109] Ontario's counsel particularly rely on what they view as the highly analogous case of *C.R. v. Her Majesty the Queen in Right of Ontario*, 2019 ONSC 2734. In that case, D. Wilson J. (as she then was) allowed Ontario's motion to strike a claim under Rule 21, applying a test that is identical to that applied under section 5(1)(a) of the *CPA*. Justice Wilson reasoned that the government could not be held liable for alleged *Charter* violations by CASs who employed unreliable hair follicle tests in legal proceedings. She further opined, at para. 110, that the government and CASs are not legally interchangeable when it comes to *Charter* rights and obligations:

> This was not addressed in argument, but the various legal entities, of which the CAS is one, have an independent legal identity. If such an entity breaches a *Charter* right, it is potentially responsible for damages flowing from that breach. However, HMQ is not liable for the actions of these various entities; it could be liable for its own actions and for the actions of its employees who caused such a breach [citations omitted].

[110] Ontario's argument likewise relies on the Court's approach in *Selkirk v. Ontario (Minister of Health and Long-Term Care)*, 2020 ONSC 6707, where a motion to strike was granted in response to a constitutional challenge to a transplant waiting list rule adopted by Trillium Gift of Life Network and applied by the University Health Network. The challenger argued that "a review of the evidence at a hearing will show the depth of the Ministry's involvement in the creation and implementation of the [impugned] rule": *Ibid.*, at para. 3.

[111] As Ontario's counsel point out, the Court rejected this argument, stating that nothing in the evidence could change the fact that, as a matter of law, the government was not responsible for the operation of the Trillium organization or the hospital: *Ibid*., at para. 9. Counsel for Ontario summarizes the point in its factum, stating succinctly that "Ontario is not liable for the use of birth alerts by societies."

[112] In line with this analysis, Ontario states that the Plaintiffs' pleading does not contend that the Ministry or any other branch of Ontario government did anything "to direct the issuance of birth alerts." And while that may be true, the pleading certainly makes the point that the Ministry

knew of, acquiesced in, and effectively failed to exercise its responsibly in regard to the Birth Alerts. The Plaintiffs specifically plead that the Ministry failed in its oversight duty, and that the Plaintiffs and putative class members had relied on it to fulfill its obligation to "act within the bounds of the law" – an obligation that the Ministry is alleged to have breached.

[113] To be clear, Ontario's breach of its obligations is alleged to be the passive act of inattention to wrongful conduct; but, as Plaintiffs' counsel point out, the inattention was to a practice that Ministry personnel would have, or should have, understood to be beyond the CAS authority. The Supreme Court's 1989 decision in *Tremblay*, *supra*, that a fetus is not a legal person would not be beyond the horizon of knowledge for any constitutionally aware lawyer, including those within and advising the Ministry.

[114] Likewise, and the Supreme Court's 1997 decision in *Winnipeg Child and Family Services*, *supra*, that a CAS can interfere with a pregnancy on behalf of an unborn child only in the most dire of life-saving circumstances, and that a fetus is not a "legal person in whose interests [a CAS] could act…", would be known by anyone working in this field at the Ministry: *Ibid.*, at para. 16. The Plaintiffs' claim – that Ministry personnel ignored the fact that Birth Alerts are an intervention into a pregnancy for unauthorized reasons – may be one that alleges a misdeed of omission that is so close to a misdeed of commission that it must be left for a full trial to determine.

[115] Furthermore, the *MMIWG Report* pointed out that the Ministry ignored or missed a discriminatory practice. The Ministry itself acknowledged this in its Direction of July 2020, in which it repeated the finding that Birth Alerts "disproportionately impact Indigenous mothers". And while the discrimination may not have been visible on the face of the Birth Alert practice, the Ministry personnel knew the CAS constituency and was expected to protect them in the public interest. That the practice disproportionately impacted on Indigenous people should have come as little surprise to those working in this area.

[116] I acknowledge that there is a conceptual difference between perpetrating wrongdoing and failing to stop it. But that line is a fine one. Under the circumstances, where, pursuant to sections 44(1)-(3) of the *CYFSA*, the Ministry is under an affirmative statutory duty to regulate in the public interest, the line seems so fine as to be barely perceptible. The commission/omission distinction here, like a driver is said to have either pressed too hard on the gas or to have failed to take their foot off the gas, is at this point too close to call.

[117] In addition to pleading that Ontario's acquiescence in the Birth Alerts deprived the Plaintiffs of their interest in liberty and security of the person, the Plaintiffs submit that these deprivations were not in accordance with fundamental justice. In the first place, they point out that the targeting of fetuses rather than infants or children was *ultra vires* the CASs' authority under the *CYFSA*. Counsel for the Plaintiffs state that it is trite law that unlawful government conduct does not accord with the principles of fundamental justice.

[118] Furthermore, the Plaintiffs submit that Birth Alerts were, regardless of their legality, arbitrary, overbroad, and grossly disproportionate. These principles were summarized by the Supreme Court in *Canada (Attorney General) v. Bedford*, [2013] 3 SCR 1101, 99, 101:

> Arbitrariness – the situation where there is no connection between the effect and the object of the law.
>
> Overbreadth – where the law goes too far and interferes with some conduct that bears no connection to its objective.
>
> Disproportionality – where the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported.

[119] All three of these principles are pleaded by the Plaintiffs in making their section 7 claim. Among the harms that the Birth Alerts are said to have caused are stigmatization and fear. The Ministry, in its July 14, 2020 press release announcing the end of Birth Alerts, specifically acknowledged that, "Expectant mothers can be deterred from seeking prenatal care or parenting supports when pregnant due to fears of having a birth alert issued." The Plaintiffs contend that the effect of discouraging pregnancy care is directly opposed to the public interest that the CASs' mandate is meant to serve.

[120] Finally, the plaintiffs have also pleaded that section 1 of the *Charter* does not save the Birth Alerts or the government's failure to act in the public interest in stopping them during the course of the class period. They plead that Birth Alerts – and Ontario's failure to address them – had no legitimate objective, were contrary to the purposes of the *CYFSA*, and was pursued without statutory authority. Accordingly, the government's infringements of the Plaintiffs' rights were not prescribed by law and cannot be justified in a free and democratic society.

[121] Overall, it is not plain and obvious that the Plaintiffs' claims against Ontario under section 7 of the *Charter* are doomed to fail. The claim against Ontario under section 7 therefore passes the threshold test in section 5(1)(a) of the *CPA*.

c) Section 15 of the *Charter*

[122] Counsel for Ontario level many of the same arguments against the Plaintiffs' claim under section 15 of the *Charter* as they do against the section 7 claim. In essence, it is Ontario's position that the Plaintiffs have not pleaded that government did anything to direct the issuance of Birth Alerts; and since neither the Ministry nor anything in the *CYFSA* affirmatively required the issuance of Birth Alerts, "[a]ny government actor [i.e. any CAS] who relies on the Act to support [Birth Alerts]…does so in error, and the…remedy for such conduct does not lie against Ontario": *Sri Lankan Canadian Action Coalition v. Ontario (Attorney General)*, 2024 ONCA 657, at para. 147.

[123] I will not repeat the analysis of whether the pleading with respect to the Ministry's lengthy acquiescence to Birth Alerts satisfies the causal connection required between the *Charter* claimant and the government. The same analysis regarding the Ministry's commission/omission applies to section 15 as applies to section 7. Suffice it to say that it is likewise not plain and obvious that the Plaintiffs' claim will fail to establish Ontario's responsibility for any alleged section 15 breach.

[124] To put it briefly, the Plaintiffs plead that the Birth Alerts constituted gender and sex-based discrimination against the Plaintiffs and class members on the basis of their pregnancy status. They also plead that Birth Alerts discriminated against a subclass of Indigenous and minority class members on the basis of their race and/or disability, all in violation of the class members' section 15 equality rights. As discussed above, Ontario, in a July 14, 2020 press release, conceded that Birth Alerts disproportionately impacted protected groups.

[125] As Plaintiffs' counsel point out, it is well settled that discrimination in respect of pregnancy constitutes a breach of section 15 rights. The Supreme Court has commented that the association of pregnancy with gender is so strong that "the disproportionate impact on members of that group 'will be apparent and immediate'": *Fraser v. Canada (Attorney General)*, [2020] 3 SCR 113, at para. 61, quoting *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 SCR 548, at para. 33.

[126] To put it another way, the Plaintiffs allege that it was for the Ministry, in fulfillment of its oversight and public interest mandate, to take account of the fact that Indigenous and other identifiable groups would be adversely impacted by Birth Alerts. These types of interventions, "[a]s well as affecting women in particular, issues of fairness in child protection… also have particular importance for the interests of women and men who are members of other disadvantaged and vulnerable groups, particularly visible minorities, Aboriginal people, and the disabled": *New Brunswick (Minister of Health and Community Services)* v. G. (J.), [1999] 3 SCR 46, at para. 114 (*per* L'Heureux-Dubé J., concurring).

[127] Section 15 claims based on adverse impact discrimination are not uncommonly brought as class actions and are certifiable in the ordinary course when the government party is actively responsible for the impugned measure. In the present circumstance, where Ontario is, if not actively responsible for Birth Alerts, alleged to have tolerated them for a lengthy duration while knowing that they were having an adverse impact on section 15 protected groups. In these circumstances, the distinction between active discrimination and passive acquiescence to ongoing discrimination may be one without a substantive difference. It is not plain and obvious that this causal difference will mean that the claim must fail.

[128] The Plaintiffs' claim against Ontario under section 15 therefore passes the threshold test in section 5(1)(a) of the *CPA*.

B) Section 5(1)(b) of the *CPA* – identifiable class

[129] The balance of the analysis under section 5(1) of the *CPA* will proceed as if Ontario were the only Defendant. As explained earlier in these reasons for decision, the claim against the CAS Defendants cannot pass section 5(1)(a) as it contains no viable cause of action against them; and, in addition, the claim against the CAS Defendants cannot pass the other parts of the section 5(1)(a) test.

[130] The Plaintiffs propose a class defined to include:

> All persons who were, while pregnant, the subject of a Birth Alert issued in Ontario on or after May 10, 2007, and who were 18 years of age or older at the

time that the Birth Alert was issued (the "Class" or "Birth Alert Class" or "Class Members"); and

All dependents of members of the Birth Parent Class, as defined by s. 61 of the *Family Law Act*, R.S.O. 1990, c. F.3 (the "Family Class Members").

[131] The Plaintiffs also seek certification of a subclass including all Indigenous, racialized, and/or disabled Class Members (the "Subclass"). Both of the proposed representative Plaintiffs are members of the Class and Subclass.

[132] I see no difficulty with certifying the proposed Class and Subclass, and counsel for Ontario has raised no objections to the Class definition. Both the Class and the Subclass are defined objectively, without reference to the merits, and will allow for the parties to identify Class Members and for the Class Members to self-identify. They are also rationally connected to the proposed common issues. They are limited to individuals who were allegedly harmed by Birth Alerts. They also reflect the ultimate limitation period, and therefore include only those individuals who may have valid claims against Ontario.

[133] As against Ontario, there is an identifiable class of two or more individuals. The section 5(1)(b) test for certification is therefore satisfied.

C) Section 5(1)(c) of the *CPA* – common issues

[134] The advantage of bringing an action as a class proceeding is that issues can be resolved on a common basis and that duplication of fact-finding or legal analysis can thereby be avoided: *Hollick v Toronto (City)*, [2001] 3 SCR 158, at para 18. Satisfying the common issues requirements is, generally speaking, a low bar: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, at para. 52 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50. Nevertheless, the Plaintiffs must show that there is some basis in fact that each proposed common issue actually exists and that it can be answered in common for all class members: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 S.C.R. 477, at paras. 99-100.

[135] The Plaintiffs have proposed 20 common issues to be addressed. However, given my finding that there is no sustainable cause of action against the CAS Defendants, some of those proposed issues are no longer relevant. I will address here the issues that pertain to the claim against Ontario alone, presented in the same order and wording as they appear in Plaintiffs' counsel's materials. Where wording changes are necessary for any given question, I will say so in the discussion below the question.

Common issue #1 – How and when did the Birth Alerts Scheme operate in Ontario?

[136] This is a generically phrased question which does not require an analysis of any one Birth Alert but rather asks about the overall phenomenon. That makes it an acceptable certification question: *Fehringer v. Sun Media Corp.*, [2003] O.J. No. 3918, at paras. 3, 6 (Div. Ct.).

[137] The word "scheme" must be eliminated from the question. There is no basis in fact for characterizing Birth Alerts in that way. As indicated earlier in these reasons, there is no unifying scheme among the CAF Defendants, no collective design for Birth Alerts, and no top-down organization of CASs or the Birth Alerts idea that would make it into a unified scheme.

[138] Rather, Birth Alerts were issued as a matter of conscious parallelism. In assessing the case against Ontario, it is important to understand the factual background of how Birth Alerts operated, but it is also important not to mischaracterize them as a "scheme".

Common issue #2 – Was the Birth Alerts Scheme authorized by statute?

[139] This poses a legal question which can be answered in common for the entire class. It is a valid common issue for this action. Again, the word "scheme" is to be eliminated, so that the question asks: "Were Birth Alerts authorized by statute?"

Common issues #3-5 – N.A.

[140] These 3 questions address conduct pleaded against the CAF Defendants that is not relevant to the claim against Ontario.

Common issue #6 – Did the Crown owe a duty of care to the Birth Parent Class Members in relation to the Birth Alerts Scheme?

Common issue #7 – If the answer to #6 is yes, when did that duty arise, did the standard of care change over the applicable time, and if so, how did it change?

Common issue #8 – If the answer to #6 is yes, did the Crown breach the standard of care it owed to the Birth Parent Class Members, and if so during what period of time?

[141] This series of questions is aimed at fleshing out the particulars of the negligence claim against Ontario. As discussed earlier in these reasons, that is cause of action that is validly posed ax against Ontario, and this set of questions addresses the duty and standard of care that Ontario had in common for all class members.

[142] The word "scheme" is to be eliminated from #6, so that it reads: "Did the Crown owe a duty of care to the Birth Parent Class Members in relation to Birth Alerts?"

Common issues #9-10 – N.A.

[143] These 2 questions address conduct pleaded against the CAF Defendants that is not relevant to the claim against Ontario.

Common issue #11 – Did the actions of (i) the Defendants, or any of them, breach the Birth Parent Class Members' rights under s. 7 of the *Charter*?; (ii) the Defendants, or any of them, breach the Birth Parent Class Members' rights under s. 15 of the *Charter* with respect to discrimination based on sex?

Common issue #12 – If the answer to any part of #11 is yes, are any such breaches saved by s. 1 of the *Charter*?

Common issue #13 – If any breach of the *Charter* is not saved by s. 1, are Birth Parent Class Members entitled to damages under s. 1 of the *Charte*r?

Common issue #14 – If the answer to #13 is yes, can the Court make an aggregate assessment of such *Charter* damages in whole or in part, and if so, in what amount?

[144] This set of common issues appropriately addresses *Charter* issues, although #11 must be re-phrased to be addressed to Ontario alone and not to the CAS Defendants. With those changes, the questions are all validly posed as common issues. There is, as previously discussed, some basis in the factual record for considering whether Ontario has breached sections 7 and/or 15 of the *Charter*.

[145] In addition to the consideration of *Charter* breaches, it is also appropriate to consider whether Ontario is liable for damages under section 24(1) of the *Charter* on a class-wide basis. This will entail an analysis of whether the class members have all suffered a "base level of damages" that can be determined without the need for proof from individual class members and awarded on an aggregate basis: *Brazeau v. Canada (Attorney General)* (2020), 149 OR (3d) 705, at para. 10 (CA).

[146] The Supreme Court of Canada provided guidance on aggregation of damages in *Pro-Sys*, *supra*, at para. 134:

> The question of whether damages assessed in the aggregate are an appropriate remedy can be certified as a common issue. However, this common issue is only determined at the common issues trial after a finding of liability has been made. The ultimate decision as to whether the aggregate damages provisions of the CPA should be available is one that should be left to the common issues trial judge.

Common issues #15-18 – N.A.

[147] These 4 questions address conduct pleaded against the CAF Defendants that is not relevant to the claim against Ontario alone.

Common issue #19 – Are the Class Members entitled to aggravated damages? (i) If yes, can an aggregate assessment be made for some or all of the aggravated damages that the Class Members, or any subset thereof, have suffered, and if so, in what amount?

Common issue #20 – Does the conduct of any of the Defendants warrant an award of punitive damages? (i) If yes, which Defendants, and in what amount?

[148] Although aggravated damages are in the ordinary course focused on an individual Plaintiff, they can be considered in a class action if the common issues judge determines that there was "a base amount of damages that any member of the class (or subclass) was entitled to as compensation

for breach of his or her rights": *Good v. Toronto (Police Services Board)* (2016), 130 OR (3d) 241, at para. 75 (CA). There is some basis in fact for considering that anyone stigmatized or discriminated against by the issuance of a Birth Alert is deserving of at least a minimal award of damages in a certain amount.

[149] As with the other common issues, this set of issues must be slightly re-phrased so that it is clear that they address only one Defendant – i.e. Ontario – and not the 49 CAS Defendants.

D) Section 5(1)(d) of the *CPA* – preferable procedure

[150] In *Hollick, supra*, at para. 30, the Supreme Court stated that "the preferability requirement asks that the class representative 'demonstrate that, given all of the circumstances of the particular claim, [a class action] would be preferable to other methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings."

[151] It is well established that the preferability inquiry in section 5(1)(d) of the *CPA* is to be conducted "through the lens of the three principal goals of class actions, namely judicial economy, behaviour modification and access to justice": *AIC Limited v. Fischer*, [2013] 3 SCR 949, at para. 22. As a matter of overall policy, this stage of the certification test is not only where one must consider how to best achieve the three goals of the *CPA*, but where "the ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve those goals": *Ibid*., at para. 23.

[152] But while the overarching class action goals are of great importance, one cannot lose sight of the fact that certification of a class proceeding is a procedural step only: *Pro-Sys*, at para. 102. This motion therefore makes no determinations as to the merits of the Plaintiffs' claim, and does not make any change in the way the claim will ultimately be analyzed: see *MacKinnon v. Volkswagen Group Canada Inc*., 2022 ONSC 5501, at para. 34 (Div Ct). Thus, for example, it cannot change the fact that a Plaintiff needs to have a proper claim against the each of the Defendants against whom certification is sought.

[153] Although a class action is the preferable procedure here for the claim against Ontario, where there is a cognizable cause of action and a representative Plaintiff, it cannot be the preferable procedure for the claims against the CAS Defendants where there is no causal relationship between the parties and thus no cognizable cause of action. To put the matter somewhat more bluntly, "No amount of appeal to access to justice, or behaviour modification, or judicial economy, will allow a class action to proceed where the class has no cause of action against a named Defendant or where there is no representative Plaintiff to carry the claim": *Pugliese, supra*, at para. 273.

[154] To be clear, class actions might be feasible against the CAS Defendants, but those actions would have to be brought separately against each CAS. Every such action would require a representative plaintiff who has a claim against that specific CASS and a class definition that is composed of persons who were the subject of a Birth Alert from that specific CAS. While I do not propose to pre-judge any such new action or new certification request here, restructuring the claim against the CASs from one omnibus claim against multiple unrelated entities to separate claims against each CAS will at the very least be a route that avoids the *Ragoonanan* problem.

[155] As for the present claim against Ontario, I am satisfied that a class action is the preferable procedure. The alternative would be numerous individual actions, each one by a different individual who as the subject of a Birth Alert. That would be a cumbersome and costly project. As such, it would fail on the Plaintiffs' side to advance access to justice in any visible way and on Ontario's side to foster judicial economy in a meaningful way. Furthermore, as a litigant Ontario is formidably resourced, while advancing individual claims against them would present an onerous cost burden: *Stolove v. Waypoint Centre for Mental Health Care*, 2024 ONSC 3639, at para. 419.

[156] As against Ontario, a class action is the one form of proceeding that has the potential to provide access to justice for the people who suffered the brunt of Birth Alerts, judicial economy in consolidating the many claims, and, most importantly, behaviour modification in respect of the Ontario government's conduct of oversight pursuant to the *CYFSA*.

[157] According to the Supreme Court, behaviour modification in the context of class actions means ensuring that "wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public": *Hollic*k, *supra*, at para. 15. Counsel for Ontario dismisses this concern here, arguing that "once the Ministry became aware of birth alerts being a concern, it acted to end the practice of birth alerts across Ontario."

[158] Ontario's response, quite frankly, provides little comfort. It is no explanation for the Ministry, who despite having a supervisory mandate acquiesced in Birth Alerts being issued for years, to boast of having finally acted when others pointed out that the practice was unauthorized and discriminatory. The CYFSA does not vest the Ministry with oversight and regulatory authority over CASs only to have it ignore those tasks until alerted to problems from the outside.

[159] The present claim against Ontario therefore passes the section 5(1)(d) threshold.

E) Section 5(1)(e) of the *CPA* – representative Plaintiff and litigation plan

[160] The representative Plaintiffs appear to be up to the task of instructing counsel. There is no indication that either of them has any conflict with the class. They each have claims against Ontario that make them class members, and they each are Indigenous persons who fit into the proposed definition of sub-class members as well. As against Ontario, I have no hesitation in approving them in the role of representative Plaintiffs.

[161] As for the proposed litigation plan, it has frequently been said, but bears repeating, that any litigation plan is necessarily a work in progress: *Cloud v. Canada (Attorney General)* (2004), 73 OR (3d) 401, at para. 95 (CA). Given the dynamic nature of litigation, counsel must be able to revise the plan in keeping with the vicissitudes of the action. This case is no exception, and the Plaintiffs will have to ensure that going forward the litigation plan corresponds with the change in the action from one against the government and multiple CASs to one against the government alone.

[162] Counsel for Ontario raise an objection to the requirement in the litigation plan that Ontario undertake the mailing of notices to class members upon certification. The affidavit evidence indicates that neither the Ministry nor any other department of government in Ontario has a data

bank of Birth Alerts. Moreover, Ontario does not have a list of potential class members with last known addresses. The notice requirement appears to place a research burden on the Ministry for a task that in the ordinary course would fall to Plaintiffs' counsel.

[163] In any case, the notice provision in the litigation plan is premature. Notice approval is part of post-certification proceedings, and it can wait until then for the means of compiling a list and contacting potential class members is considered. It should for now be removed from the litigation plan, which is otherwise acceptable.

IV. Disposition

[164] Certification is granted as against Ontario.

[165] The Plaintiffs are appointed representative Plaintiffs, and Plaintiffs' counsel are confirmed as class counsel. The certified causes of action are negligence, breach of section 7 of the *Charter*, and breach of section 15 of the *Charter*. The class and sub-classes are defined as in paragraphs 130-131 above. The certified common issues are Common Issues #1, 2, 6, 7, 8, 11, 12 13, 14, 19, and 20, with modifications as explained in paragraphs 137-149 above.

[166] The motion for certification is dismissed as against the CAS Defendants.

[167] The Plaintiffs are at liberty to discontinue the action as against the CAS Defendants, without costs, and to commence new proposed class actions against each of the CAS Defendants provided that a representative Plaintiff with a claim against the particular CAS is named for any such new action. Any future certification motions arising from a standalone claim against one of the present CAS Defendants may make use of the evidence, including all affidavits, exhibits, and cross-examinations, contained in the present record.

V. Costs

[168] The parties may make written submissions on costs. I would ask counsel for the Plaintiffs to email brief submissions to my assistant within 10 days of today, and counsel for the CAS Defendants to email brief submissions to my assistant within 10 days of receiving the Plaintiff's submissions, and counsel for Ontario to email brief submissions to my assistant within 10 days of receiving the CAS Defendants' submissions.

Date: May 21, 2025 **Morgan J.**