

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

KATHERINE GANDY and EMILY WALKER

Plaintiff(s)

– 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 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, NOGDAWINDAMIN FAMILY AND COMMUNITY SERVICES, OGWADENI:DEO, PAYUKOTAYNO JAMES AND HUDSON BAY FAMILY SERVICES, TIKINAGAN CHILD AND FAMILY SERVICES and WEECHI-IT-TE-WIN

Defendant(s)

Proceeding under the *Class Proceedings Act, 1992*

**STATEMENT OF DEFENCE AND CROSSCLAIM
OF HIS MAJESTY THE KING IN RIGHT OF ONTARIO**

1. The Defendant, His Majesty the King in right of Ontario (the “Crown”) denies each and every allegation contained in the Amended Fresh as Amended Statement of Claim (the “Claim”) except as specifically admitted hereafter.
2. The Crown admits that some Children’s Aid Societies (“CASs”) in Ontario issued birth alerts, hospital alerts, or birth notifications (“Birth Alerts”) as set out in paragraph 2 of the Claim but has no knowledge of when birth alerts first started being used.
3. The Crown admits that it issued a policy directive requiring that CASs discontinue the use of Birth Alerts as set out in paragraphs 9 and 52-53 of the Claim and pleads that by December 2020, all CASs had confirmed in writing that they had implemented the requirements of the policy directive.
4. The Crown admits that the Ontario Association of Children’s Aid Societies (“OACAS”) developed the Ontario Child Welfare Eligibility Spectrum, which has been adopted by reference into the Ontario Child Protection Standards, but denies that it references or permits Birth Alerts as alleged in paragraph 45 of the Claim.
5. The Crown admits that Ontario is a signatory to the Provincial/Territorial Protocol: On Children, Youth and Families Moving Between Provinces and Territories as alleged in paragraph 47 of the Claim.

6. With respect to paragraph 15, the Crown is subject to all liabilities in tort to which it would be liable if it were a person in respect of torts committed by an officer, employee or agent of the Crown, and under any Act, or under any regulation or by-law made or passed under any Act.
7. The Crown admits the allegations contained in paragraph 6.
8. The Crown has no knowledge or insufficient knowledge to admit or deny the allegations contained in paragraphs 11-12, 56-61, and 65-75 of the Claim.
9. Paragraphs 13 and 126 of the Claim require no responsive pleading.

Ontario's Child Protection Regime

10. Child welfare and protection in Ontario is governed by the *Child, Youth and Family Services Act*, 2017, SO c-14, Sched 1 ("CYFSA"). Prior to April 30, 2018, the *Child and Family Services Act*, RSO 1990, c C-11 ("CFSA") was the primary statute governing child protection and welfare in Ontario.
11. In Ontario, CASs are independent legal entities with the exclusive statutory mandate to deliver child protection services to children as prescribed in the CYFSA and its predecessor statute, the CFSA. Each CAS is responsible for carrying out its statutory mandate within its specific geographic territory. Further, each CAS is responsible for developing its own policies and procedures to carry out its statutory mandate. The board of directors of each CAS is responsible for appointing a local director, creating by-laws, and ensuring that their CAS meets the standards of service prescribed through legislation and regulations and policy. CASs are not owned, operated or managed by the Crown and are not Crown agents.
12. The functions of the CASs have been prescribed by the CYFSA as follows:
 - a) investigating allegations or evidence that children may be in need of protection;
 - b) protecting children where necessary;

- c) providing guidance, counselling and other services to families for protecting children or for the prevention of circumstances requiring the protection of children;
- d) providing care for children assigned or committed to its care;
- e) supervising children assigned to its supervision;
- f) placing children for adoption; and
- g) performing any other duties given to it through legislation.

13. The Crown retains a high-level supervisory role over the CASs through the Ministry of Children, Community and Social Services (the “Ministry”). In its supervisory role, the Ministry provides funding to the CASs and develops quality standards for program areas in consultation with the CASs. The primary purpose of the Ministry’s oversight is to ensure that the CASs have the necessary funding for the services they provide and to ensure that the services provided are in compliance with the jointly developed standards.

14. The Ministry may also issue directives to CASs respecting their provision of services. However, the Ministry plays no role in, and does not supervise, the day to day operations of CASs. The direct and primary responsibility for the protection and care of children rests with the applicable CAS, and not with the Crown. The Crown does not directly provide care or protection services for children in the CASs’ care.

15. The Crown plays no role in a CAS’s child protection investigation or a CAS’s case management decisions involving a child who was or might be in need of protection or care. CASs are responsible for all decisions pertaining to the apprehension, placement and monitoring placements to ensure the needs of the child are met.

16. The Crown pleads that it is not liable for any tort allegedly committed by any CAS or its servants or agents.

Birth Alerts in Ontario

17. The Crown is aware that some CASs employed Birth Alerts throughout the Province. There are no provisions relating to Birth Alerts in the *CYFSA* or its predecessor statute, the *CFSA*.

18. Following the release of the *Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, the Ministry issued a Directive to all CASs dated July 13, 2020, directing all CASs to cease the practice of Birth Alerts by October 15, 2020. The Directive also set out various requirements for the CASs, including that they advise local hospitals, pre- and post-natal service providers, and other relevant healthcare practitioners of the Directive.

19. The Directive also required all CASs to confirm to the Ministry that they have implemented the requirements of the Directive on or before October 31, 2020. The Ministry is not aware of any CAS that is currently continuing the practice of Birth Alerts in contravention of the Directive.

Liability and Damages

20. The Crown denies that any of its servants or agents failed to comply with or enforce relevant practices, directions or legislation regarding Birth Alerts or otherwise in its oversight of the CASs.

21. The Crown denies that it or its servants or agents owed a private law duty of care to the Plaintiffs or any member of the proposed class. In the alternative, if any such duty were owed, which is specifically denied, the Crown denies that any duty was breached.

22. The Crown pleads that it cannot be held liable in respect of decisions made which are based on policy considerations. The Crown is immune from suit in respect of any alleged negligence in the making of or failure to make a decision in good faith respecting a policy matter and pleads and relies upon subsections 11(4) and (5) of the *CLPA*. No duty of care is owed to the Plaintiffs or any member of the proposed

class for policy or planning functions of the Crown that involve the allocation of resources and policy choices.

23. The Crown denies that the Plaintiffs or any member of the proposed class have suffered any loss or damage as alleged.

24. In the alternative, if the Plaintiffs or any member of the proposed class have suffered damages, such loss or damage were not the result of acts and/or omissions of the Crown or by any other person or persons for whom the defendant is in law responsible.

25. If the Plaintiffs or any member of the proposed class have suffered any loss or damage as alleged or otherwise, which is not admitted but denied, such alleged loss and damages are excessive and too remote to be recoverable at law.

26. If the Plaintiffs or any member of the proposed class suffered any loss or damages as alleged or otherwise, which is not admitted but denied, they have failed to mitigate their damages.

27. In any event, the issue of what damages, if any, were suffered by class members requires proof by individual class members. An aggregate assessment of damages would not be in conformity with section 24 of the *Class Proceedings Act*.

28. The Crown pleads that there was no act or omission on the part of any of its employees, servants or agents which would warrant an award of punitive, aggravated or exemplary damages.

No breach of the Charter

29. The Crown pleads that Ontario is not the proper defendant to the Plaintiffs' *Charter* claims. Ontario did not create or maintain the Birth Alerts Scheme as alleged by the Plaintiffs. Ontario is not liable for the conduct of third-party *Charter* actors, such as the CASs.

30. In the alternative, the Crown denies that any act or omission on the part of Ontario or its servants or agents breached the Plaintiffs' or proposed class members' rights under ss. 7 or 15 of the *Charter*.

31. The Crown specifically denies the allegations at paragraphs 94, 96 and 100-101 of the Amended Fresh as Amended Statement of Claim that the adoption of the OACAS Eligibility Spectrum into the Ontario Child Protection Standards, or the adoption of any other directive or policy issued under the *CYFSA* or *CFSA*, breached ss. 7 and 15 of the *Charter*.

32. The Crown denies the Plaintiffs' allegation at paragraph 110 of the Amended Fresh as Amended Statement of Claim that it knew the Birth Alerts Scheme infringed the *Charter*.

33. The Crown denies the Plaintiffs' allegation at paragraph 112 of the Amended Fresh as Amended Statement of Claim that it was recklessly or willfully blind to alleged unconstitutionality of the Birth Alerts Scheme.

34. In the alternative to paragraphs 31-34 above, the Crown pleads that if *Charter* ss. 7 or 15 are breached, which is denied, any such breach is demonstrably justified under s. 1 of the *Charter*.

35. In the further alternative, the Crown pleads that *Charter* damages are not a just and appropriate remedy. Even if there is a breach of the *Charter*, which is denied, no act or omission of the Crown was clearly wrong, in bad faith or an abuse of power. In any event, an award of *Charter* damages would be inappropriate as it would undermine good governance considerations, the rule of law, and create a chilling effect on the issuance of ministerial directives under the *CYFSA*.

Claims Barred by Expiry of Limitation Period

36. The Crown pleads that the Claim is barred by the expiry of the limitation period and it should be dismissed with costs on that basis.

37. The Crown pleads and relies upon the provisions of the *Crown Liability and Proceedings Act, 2019*, SO 2019, c. 7, Sched 17; *Limitations Act, 2002*, SO 2002, c 24, Sched B, as amended; *Child, Youth and Family Services Act, 2017*, SO 2017, c 14, Sched 1 and associated Regulations enacted thereunder; *Child and Family Services Act*, RSO 1990, c, c-11 and associated Regulations enacted thereunder; and *Negligence Act*, RSO 1990, c N-1.

38. The Crown accordingly submits that the Plaintiffs' action against it be dismissed with costs.

Not Appropriate for Class Proceeding

39. This case does not meet the test for certification under the *Class Proceedings Act*.

40. The Crown denies that the claims can be determined on a class basis or that a class proceeding would be the preferable procedure for the resolution of the claims in this case.

41. The Crown reserves the right to amend its defence if the action is certified as a class proceeding.

CROSSCLAIM

42. The Crown claims as against the co-Defendant CASs for:

(a) contribution and indemnity with respect to any amounts for which the Crown may be held liable to pay to the Plaintiff;

(b) pre- and post-judgment interest in accordance with the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C-43;

(c) the costs of the Crown in defending the main action;

(d) the costs of this crossclaim; and

(e) such further and other relief as to this Honourable Court may deem just.

43. The Crown pleads and relies upon the facts set out in the foregoing Statement of Defence. In the alternative and for the purpose of this crossclaim only, the Crown adopts and relies on the allegations of the Plaintiff against the CASs in the Statement of Claim, except to the extent that they are inconsistent with the facts as pled by the Crown in this Statement of Defence and Crossclaim.

44. If this Honourable Court finds the Crown is liable to the Plaintiff, and also finds that the CASs are liable to the Plaintiff, then the Crown claims contribution and indemnity from the CASs to the extent they are found at fault. In that regard, the Crown pleads and relies upon the provisions of the *Negligence Act*, R.S.O. 1990, c. N.1.

45. The Crown also pleads and relies upon the *Rules of Civil Procedure* and the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s. 27, all as amended.

46. The Crown proposes that the crossclaim be tried with or immediately after the trial of the main action.

DATE: July 21, 2023

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- and -

**HIS MAJESTY THE KING IN RIGHT OF ONTARIO ET
AL.**

Plaintiffs

Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding Commenced at Toronto

**STATEMENT OF DEFENCE AND CROSSCLAIM OF
HIS MAJESTY THE KING IN RIGHT OF ONTARIO**

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