

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

CAROL HARPER,

) Tina Yang
Plaintiff,) Melanie Anderson
) for the plaintiff

- and –

THE GOVERNMENT OF MANITOBA,

) Ross A. McFadyen
Defendant.) Andrew D.F. Sain
) for the defendant
)
) JUDGMENT DELIVERED:
) June 19, 2026
)

MOTION BY DEFENDANT TO ADMIT AFFIDAVIT

GREENBERG J.

INTRODUCTION

[1] The defendant has brought a motion to dismiss the plaintiff's claim on the basis that it was filed outside the applicable limitation period. This decision relates to the admissibility of an affidavit which the defendant seeks to introduce to support that motion.

[2] The plaintiff's claim challenges the validity of "birth alerts" - written notices distributed to hospitals by a Child and Family Services agency regarding pregnant women whose children might be in need of protection at birth. The plaintiff, whose child was apprehended as a result of a birth alert, seeks to have this action, which claims declaratory relief and damages, certified as a class proceeding under ***The Class Proceedings Act***, C.C.S.M., c. C130, on behalf of all persons who have been subject to birth alerts. In a previous ruling, I directed that the motion to dismiss the plaintiff's claim be heard before the certification application (***Harper v. Manitoba***, 2025 MBKB 100).

[3] The defendant's motion to dismiss the claim is brought under King's Bench Rule 21.01 which requires the defendant to obtain leave to file an affidavit. The plaintiff is not opposed to the defendant filing an affidavit but says that the draft affidavit presented by the defendant contains irrelevant evidence and inadmissible hearsay.¹

BACKGROUND

[4] The plaintiff gave birth to a child at St. Boniface Hospital in Winnipeg on January 8, 2019. Winnipeg Child and Family Services had issued a birth alert regarding the plaintiff on December 18, 2018. As a result, the agency was notified when the child was born and, on January 10, 2019, the child was apprehended from the hospital. The plaintiff subsequently agreed to transfer guardianship of the child to her aunt.

[5] The practice of issuing birth alerts was subject to criticism for some time and, on July 1, 2020, the practice was brought to an end in Manitoba. The plaintiff says that she

¹ The plaintiff has filed a responding motion to strike the impugned parts of the affidavit. I do not think that the plaintiff's motion is necessary since the affidavit has not yet been filed. In any event, it leads to the same result.

did not know that a birth alert had been issued regarding her pregnancy until sometime in September 2021 when she obtained copies of her hospital records from St. Boniface Hospital. On March 15, 2022, the plaintiff filed her claim alleging that the issuance of the birth alert breached her privacy rights, was not based on lawful authority and breached her rights under ss. 7 and 15 of the ***Canadian Charter of Rights and Freedoms***.

[6] At the time that the plaintiff's claim was filed, the limitation period for claims against "public officers" was governed by s. 21(1) of ***The Public Officers Act***, C.C.S.M. c. P230. That provision required claims to be filed within two years of the occurrence of the act complained of. The provision did not contain an element of discoverability (***Ostrowski v. Weinstein***, 2022 MBQB 3). However, a plaintiff could apply under Part II of ***The Limitations of Actions Act***, R.S.M. 1987, c. L150, for an extension of the limitation period in certain circumstances.² The plaintiff acknowledges that she did not file her claim within the time set out in ***The Public Officers Act*** and that she also missed the time frame under Part II of ***The Limitations of Actions Act***. However, she alleges that the defendant fraudulently concealed the use of birth alerts from the public generally and, in particular, fraudulently concealed the issuance of a birth alert in her case. As a result, the plaintiff says that the limitation period was tolled until September 2021 when she first discovered that the birth alert had issued.³

² ***The Limitations of Actions Act*** and s. 21 of ***The Public Officers Act*** have now been repealed and replaced by other legislation.

³ I note that, while the defendant seeks to dismiss the claim in its entirety, the plaintiff has not challenged the application of limitations legislation to her claim for declaratory relief under the ***Charter***, although, arguably, without the claim for damages, the claim for a declaration alone would be moot (***Manitoba Metis Federation Inc. v. Canada (Attorney General)***, 2013 SCC 14, at para. 135; ***Shot Both Sides v. Canada***, 2024 SCC 12, at para. 68).

[7] The issues in the defendant's motion to dismiss the plaintiff's claim are: 1) when the plaintiff first knew that a birth alert was used in the apprehension of her child and 2) whether the defendant fraudulently concealed the practice of birth alerts and, specifically, whether they fraudulently concealed the issuance of the birth alert in her case so that the plaintiff could not have known about it. The defendant seeks to introduce the affidavit of Sherry Lyn Lam, affirmed February 11, 2026, to address these issues. Ms Lam is an Issues Management Specialist for the Child Protection Branch of the Manitoba Department of Families and, as such, is personally familiar with the background of this case. Her affidavit includes information she has gleaned from records of various child and family services agencies (collectively "CFS") who were involved with the plaintiff when she was raising her first child and were involved in the apprehension of her second child, the child who is the subject of these proceedings.

[8] The Lam affidavit contains 47 paragraphs and 39 exhibits. The plaintiff says that 26 paragraphs of the affidavit and most of the exhibits should not be admitted as they are irrelevant and/or contain hearsay. She also argues that much of the affidavit is inadmissible because its prejudicial effect outweighs its probative value. I do not intend to address the admissibility of each paragraph and each exhibit individually as I believe that, to a large extent, the plaintiff's objections can be addressed cumulatively.

[9] As I will explain, with the exception of three paragraphs and the related exhibit, I find the proposed affidavit and exhibits are admissible.

LEGAL PRINCIPLES

[10] The following principles apply in assessing the admissibility of the defendant's proposed affidavit.

Fraudulent Concealment

[11] In ***M.(K.) v. M.(H.) [K.M. v. H.M.]***, [1992] 3 S.C.R. 6, at p. 57, the Supreme Court held that "fraudulent concealment" is to be given a broad interpretation. It is a form of equitable fraud not limited to conduct amounting to the tort of fraud. However, there must be some deliberate concealment of the facts. Writing for the majority, La Forest J. said:

65 There is an important restriction to the scope of fraudulent concealment, which Halsbury's, 4th ed., vol. 28, para. 919, at p. 413, describes as follows:

In order to constitute such a fraudulent concealment as would, in equity, take a case out of the effect of the statute of limitation, it was not enough that there should be merely a tortious act unknown to the injured party, or enjoyment of property without title, while the rightful owner was ignorant of his right; there had to be some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts.

[12] More recently, in ***Pioneer Corp. v. Godfrey***, 2019 SCC 42, the Court confirmed that unconscionable conduct of some sort is required to establish fraudulent concealment.

Brown J. explained:

[54] While a special relationship [between the plaintiff and defendant] is a means by which a defendant might conceal the existence of a cause of action, equitable fraud may also be established by pointing to other forms of unconscionable behaviour, such as (for example) "some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts" (*M. (K.)*, at p. 57, citing Halsbury's Laws of England (4th ed. 1979), vol. 28, para. 919). In short, the inquiry is not into the *relationship* within which the conduct occurred, but into the *unconscionability* of the conduct itself.

[emphasis in original]

Relevance

[13] Evidence is relevant if it helps to prove a fact in issue or helps the court assess the probative value of evidence (*British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20, at paras. 57-58). The threshold for admissibility is low (*R. v. Schneider*, 2022 SCC 34, at para. 39).

[14] Even where evidence is relevant, it may be excluded if it is more prejudicial than probative. But evidence is not prejudicial simply because it helps proves the case of the party who tenders it. As explained by Wagner C.J.C. in *R. v. Hussein*, 2026 SCC 2:

[28] Evidence will have a prejudicial effect where "it is prone to being misused, its reliability cannot be adequately tested, or it may otherwise operate unfairly or produce problematic collateral costs" (D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at p. 52).

[15] The risk that evidence will be misused is more a concern in jury trials where the trier of fact is not experienced in the proper use of evidence (*R. v. Laporte*, 2016 MBCA 36, at paras. 163 and 170).

Hearsay

[16] The rule against the admissibility of hearsay evidence only applies where an out-of-court statement is tendered to prove the truth of the contents of the statement. The purpose of the evidence must of course be considered in the context of the issues in the proceeding where it is tendered.

[17] Even where a statement is hearsay, it will be admissible where it falls within one of the traditional exceptions to the hearsay rule, whether statutory or common law, or where it meets the test of necessity and reliability. The specific hearsay exceptions relied upon by the defendant are the common law rule that allows evidence of admissions by a

party and the statutory exception for business records under s. 49 of ***The Manitoba Evidence Act***, C.C.S.M., c. E50.

[18] In addition, the King's Bench Rules allow hearsay in affidavits on motions where the hearsay statement is based on the deponent's information and belief provided the source of the information and the fact of the belief are specified in the affidavit (Rule 39.01(4)). This rule is applied with some flexibility. As explained by Joyal C.J.Q.B. in ***Winnipeg (City) v. Caspian Projects Inc. et al.***, 2020 MBQB 120:

[55] Although I acknowledge that the identification of the source information and belief in an affidavit is generally a precondition to admissibility, it is erroneous to approach the requirement to specify the source of information and belief "in an overly rigid fashion" (*Allianz Global v. Attorney General of Canada*, 2016 ONSC 29 (CanLII) at para. 15) ("*Allianz*"). In *Allianz*, the Court stated that "[t]he rule is not designed to require a formulaic recital and it may be sufficient if the source of the information and belief is obvious if the affidavit is read generously" (at para. 15).

[19] And in ***Winnipeg (City) v. Sheegl et al.***, 2023 MBCA 63, Mainella J.A. commented:

[111] In *Dakota Ojibway Child and Family Services*, this Court explained that, consistent with the "culture shift" (at para 147) signalled in *Hryniak* away from traditional trial procedures in an appropriate case and the wording of the relevant rules of court on a summary judgment motion, there can be some relaxation of the rules of evidence as to the contents of an affidavit provided that the judge is satisfied that a fair and just determination of the issues can otherwise be made.

[112] The approach signalled in *Dakota Ojibway Child and Family Services* does not mean that exclusionary rules, such as the rule against hearsay, have been abolished or should be ignored on a motion for summary judgment. Far from it. Rather, the judge should exercise their gatekeeper role, mindful that they enjoy some leeway as to the use of hearsay evidence in an affidavit filed on a motion for summary judgment (for example, where the underlying source of the information is reliable and would be admissible at a trial (see *Saito v Lester Estate*, 2021 ABCA 179 at paras 11-12)).

[20] While the above comments were made in the context of a motion for summary judgment, in my view they are equally applicable in the context of the comparable procedure under Rule 21.

[21] Ultimately, the overarching concern in determining the admissibility of evidence is to protect the truth-seeking function of the court. As Pomerance J.A. said in ***McCormack v. Evans***, 2025 ONCA 767:

[80] The pursuit of truth is the cardinal principle in civil proceedings. As it was put in *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287, at para. 24:

Nearly 20 years ago, Cory J. observed that "[t]he ultimate aim of any trial, criminal or civil, must be to seek and to ascertain the truth". Although the parallel objectives of proportionality and efficiency have become increasingly important in the civil procedure context, seeking the truth remains the cardinal principle in civil proceedings. Informed by this objective, the rules of the law of evidence in civil matters allow judges "to find out the truth, and to do justice according to law". [Citations omitted.]

ANALYSIS

[22] The admissibility of the Lam affidavit must be considered with regard to the issues on the motion to dismiss, that is to say: 1) when the plaintiff knew about the birth alert; and 2) whether the defendant fraudulently concealed the use of birth alerts generally or in her case specifically. The plaintiff's credibility is a key aspect of the first issue. The admissibility of the affidavit must also be assessed with regard to what matters are contentious. As I will explain, some of the evidence to which the plaintiff objects are stated as fact in her pleading or is contained in affidavits that she has filed.

Relevance

[23] The Lam affidavit contains information about the plaintiff's history with CFS; the circumstances surrounding the apprehension of her second child; information about birth alerts that appear on the government website and in publicized government reports; and

media articles about the use of birth alerts and the government decision to terminate their use. In my view, everything in the Lam affidavit and exhibits is probative of either when the plaintiff knew about the birth alert or whether the defendant deliberately concealed the use of birth alerts.

[24] The plaintiff provides several reasons for challenging the relevance of parts of the Lam affidavit. First, she says that parts of the Lam affidavit respond to affidavit evidence that the plaintiff filed earlier in these proceedings but on which she does not intend to rely in the motion to dismiss. The plaintiff has affirmed two affidavits in these proceedings, one on August 3, 2023 and one on September 6, 2024 (the plaintiff's "second affidavit"). She has also filed the affidavit of Sharron Wang (sworn August 29, 2024). These affidavits were filed to support the plaintiff's application for certification, which is yet to be heard. The plaintiff says that, as she intends to rely only on part of her second affidavit to respond to the defendant's motion to dismiss, the rest of that affidavit and the other two affidavits are not relevant to the defendant's motion and, therefore, the portions of the Lam affidavit which respond to them are not admissible. Specifically, the plaintiff says that she is only relying on the portions of her second affidavit that speak to when she learned of the birth alert. She is not relying on the portions that address her history with CFS. She says that any evidence about matters that pre-date the apprehension which is in issue in this case is irrelevant.

[25] I reject this argument. The plaintiff cannot choose to rely on only those portions of her affidavit which assist her. As I said, her credibility is central to a determination of when she knew about the use of the birth alert in her case and to that end the defendant

can file evidence that shows statements that the plaintiff made under oath are not true even if they do not directly relate to a substantive issue in the defendant's motion.

[26] More specifically, in her second affidavit, the plaintiff asserts that she raised her first child with help from her family "in a safe, caring and culturally appropriate home" (para. 14). Paragraphs 7 and 8 of the Lam affidavit respond to this assertion with evidence that CFS was involved with the plaintiff's care of her first child, that there were allegations of maltreatment with respect to that child and that the child was ultimately made a ward of Winnipeg CFS. In my view, that evidence is relevant to the plaintiff's credibility.

[27] Second, the plaintiff argues that the evidence of her history with CFS offends the collateral fact rule. She says that the defendant can only tender evidence that challenges her credibility on the narrow issue in this case – when she knew of the birth alert. The plaintiff has produced no authority to show that the collateral fact rule has been used to prohibit a party from presenting evidence responding to the assertions made by their opponent. The collateral fact rule usually applies to evidence tendered as rebuttal or reply. In ***Landmark Vehicle Leasing Corporation v. Mister Twister Inc.***, 2015 ONCA 545, the court held:

[19] A party triggers the collateral fact rule when, after closing its own case, it seeks to call rebuttal evidence to contradict a witness' testimony on a collateral matter: see *R. v. Krause*, [1986] 2 S.C.R. 466, at pp. 474-75. Cross-examination on a collateral matter does not trigger the rule.

[20] Counsel is entitled to challenge a witness' credibility in cross-examination. The scope of that cross-examination is limited by the requirements of relevance and other rules applicable to cross-examination. For example, the cross-examination cannot be abusive or overly repetitive. The collateral fact rule has nothing to do with the scope of the cross-examination. Similarly, documents may be put to a witness during cross-examination for the purposes of impeachment. The admissibility of

those documents is subject to various evidentiary rules, such as relevance, but the collateral fact rule is not one of them: see S.C. Hill, D.M. Tanovich & L.P. Strezos, *McWilliams' Canadian Criminal Evidence*, loose-leaf, 5th ed. (Toronto: Thomson Reuters, 2015), at c. 6. The cross-examination of Mr. Blazys in respect of his alleged prior lies under oath did not offend the collateral fact rule.

See also ***R. v. MacIsaac***, 2017 ONCA 172, at paras. 58-59.

[28] While the above cases address the application of the collateral fact rule to cross-examination, the comments should apply equally to “direct” evidence on a motion.

As explained in ***R. v. Krause***, [1986] 2 S.C.R. 466, at pp. 473-4, the purpose of the rule is to prevent a party from splitting its case:

15 At the outset, it may be observed that the law relating to the calling of rebuttal evidence in criminal cases derived originally from, and remains generally consistent with, the rules of law and practice governing the procedures followed in civil and criminal trials. The general rule is that the Crown, or in civil matters the plaintiff, will not be allowed to split its case. The Crown or the plaintiff must produce and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in the pleadings; in a criminal case the indictment and any particulars: see *R. v. Bruno* (1975), 27 C.C.C. (2d) 318 (Ont. C.A.), per Mackinnon J.A., at p. 320, and for a civil case see: *Allcock Laight & Westwood Ltd. v. Patten, Bernard and Dynamic Displays Ltd.*, [1967] 1 O.R. 18 (Ont. C.A.), per Schroeder J.A., at pp. 21-22. This rule prevents unfair surprise, prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is, to put in part of its evidence -- as much as it deemed necessary at the outset -- then to close the case and after the defence is complete to add further evidence to bolster the position originally advanced. The underlying reason for this rule is that the defendant or the accused is entitled at the close of the Crown's case to have before it the full case for the Crown so that it is known from the outset what must be met in response.

[29] The plaintiff has provided no authority to suggest that the collateral fact rule prohibits an applicant from supporting a motion with evidence challenging assertions made by the respondent. The applicant is not “stuck” with the respondent’s assertions if they are not triggered by cross-examination (***MacIsaac***, para. 58).

[30] Of course, the weight to be attributed to this evidence can be a matter for argument.

[31] Third, the plaintiff challenges the relevance of paragraph 25 and exhibit I of the Lam affidavit which refer to a statement made in a Kinship Family Profile in the CFS file regarding the plaintiff's aunt, the person whom the plaintiff proposed as guardian of her child and the person whom was ultimately awarded guardianship. The profile, dated February 24, 2019, indicates that the CFS worker who prepared the profile discussed the apprehension and the use of the birth alert with the aunt. The plaintiff argues that the profile, which reflects the aunt's awareness of the birth alert, is not relevant to the plaintiff's awareness of it. I disagree. The fact that the plaintiff's aunt, who was present when the child was apprehended and was actively involved in the situation, knew of the birth alert in February 2019 is relevant to whether the plaintiff should also have known about it. In any event, evidence that the CFS worker discussed the birth alert with the plaintiff's aunt is relevant to whether the defendant fraudulently concealed the use of the birth alert.

[32] Fourth, the plaintiff challenges the admissibility of an exhibit to the Lam affidavit which summarizes 27 media articles about the plaintiff's case and the use of birth alerts. The media articles, which span the timeframe from January 2018 to February 2020, are attached as exhibits. The plaintiff argues that the summary of the articles is not evidence and is irrelevant argument. In my view, the media articles show that the use of birth alerts was a matter of public discourse and are relevant to the allegation that their use was concealed from the public. The fact that Ms Lam summarized the contents of the articles is expected. Exhibits cannot be attached to an affidavit without some reference in the body of the affidavit to the contents of the exhibits. The fact that the summary is

formatted in a table and attached as an exhibit, rather than included in the body of the affidavit, goes to its form, not substance. Any suggestion that the summary editorializes the media articles can be assessed by a review of the articles themselves.

[33] Finally, the plaintiff challenges the admissibility of paragraphs in Ms Lam's affidavit that refer to the fact that the apprehension of her child was filmed and the video was livestreamed on Facebook. The plaintiff says that this evidence is prejudicial and not relevant because there is no reference in the video to the birth alert. In my view, this evidence is relevant to the motion because it provides important context to show that the various media reports that are attached as exhibits, which do not mention the plaintiff by name, are indeed about her case. The argument that the evidence is prejudicial is odd since the plaintiff herself put this information before the court. Her amended statement of claim alleges that a video of the apprehension was posted on Facebook and she attests to her uncle's filming of the apprehension in her second affidavit (amended statement of claim, para. 41; second affidavit, paras. 27-28).

Hearsay

[34] While I find that all of the Lam affidavit and exhibits are relevant to the issues in the defendant's motion to dismiss, the plaintiff argues that much of the affidavit contains inadmissible hearsay.

[35] Several paragraphs of the Lam affidavit refer to the plaintiff's history with CFS and to the circumstances surrounding the apprehension that is the subject of this action. The agency records from which that information is gleaned are attached as exhibits. The plaintiff says that these paragraphs and the records are hearsay as Ms Lam has no direct

knowledge of the information in the affidavit. In my view the CFS records are made in the “usual and ordinary course of business” and are admissible under s. 49 of ***The Manitoba Evidence Act***. ***The Child and Family Services Act*** requires agencies to keep records according to standards established by the Director of Child and Family Services (s. 7(1)(q)), and these records are routinely admitted as business records (***D.L. v. ANCR***, 2022 MBQB 109, at para. 141; ***T.D. v. J.D.***, 2025 MBKB 102, at para. 92).

[36] The defendant also relies on Rule 39 to support admitting this evidence as based on information and belief. The plaintiff says that this rule only allows hearsay where the source of the affiant’s knowledge and her belief is set out in the affidavit. She says that Ms Lam did not have any direct involvement with the Harper file and did not adequately explain the source of her information. However, that requirement must be applied with some flexibility. I am satisfied that the source of the information and belief is obvious from the affidavit (***Caspian***, *supra*, para. 5).

[37] The plaintiff argues that the summary of selected media reports, in addition to being irrelevant, is hearsay. The defendant says these reports are not being introduced for their truth but “to show the statements about birth alerts were made and publicly-available in mainstream media sources” (Defendant’s Brief, para. 53). As I said earlier, the reports are being used to show that birth alerts were the subject of public discourse and are therefore relevant to the issue of fraudulent concealment. I find that the reports are not being introduced for a hearsay purpose and are, therefore, admissible. Moreover, it is notable that the Wang affidavit filed by the plaintiff contains some of the very same articles which she says are inadmissible by the defendant.

Probative vs. Prejudice

[38] The plaintiff argues that the evidence of her child welfare history is more prejudicial than probative and should not be admitted. She says the evidence is prejudicial because it relates to “sensitive, private and deeply personal information” and that she is prejudiced by the inability to cross-examine on it. While the evidence may be personal, the plaintiff has chosen to litigate a matter that involves the disclosure of personal information. She should understand that, by doing so, she is exposing herself to the disclosure of other personal information if it is relevant to her claim. As I said, the evidence tendered by the defendant regarding the plaintiff’s child welfare history responds to the plaintiff’s own evidence about her parenting history.

[39] I have found that the CFS records are admissible as business records. There is no requirement that business records are tendered through the individuals who recorded the information. Business records are commonly created by several people over a period of time. The fact that admitting business records into evidence allows limited ability to cross-examine can be raised as an issue going to weight (***The Manitoba Evidence Act***, s. 49(4)). The plaintiff points out that the CFS records contain accounts from third parties that amount to double or triple hearsay. While those accounts have not been redacted from the exhibits, they should be given little weight. In fact, it does not appear that the defendant is placing any reliance on third party accounts. The records are being tendered to respond to assertions made by the plaintiff and to that end the information included in the body of the affidavit relates to the actions of the agencies not the accounts of third parties.

The CBC Interview

[40] Several paragraphs of the Lam affidavit and two attached exhibits relate information about a story reported by CBC News, The National, which was posted on YouTube, and a follow-up article on the CBC website the next day. The CBC story is about birth alerts and includes excerpts from a video interview with a person who Ms Lam states is the plaintiff. The interviewee is not identified, and her face is not visible in the video. A transcript of the video is attached as an exhibit to the affidavit, as is a copy of the website article. In the interview, the interviewee makes statements which suggest that she was aware that a birth alert had been issued in her case. If the interviewee is the plaintiff, those statements would contradict her claim that she did not know that a birth alert had been used in her case until September 2021, when she obtained her hospital records.

[41] The plaintiff argues that this evidence is hearsay and does not meet the requirements for admission under Rule 39. The defendant says that the plaintiff's statements in the news reports are admissible as party admissions.

[42] A bit more detail about the impugned paragraphs and exhibits is necessary. Paragraphs 34-36 refer to a CBC news report, posted on YouTube on January 31, 2020, "about the end of the practice of issuing birth alerts in Manitoba." A copy of the video story is not produced in the affidavit. Rather a link to the YouTube website is footnoted and a transcript of part of the news report is attached as an exhibit (exhibit LL) with no indication as to who prepared the transcript. The only reference to the content of the news report that appears in the body of the affidavit is para. 35 which states:

35. Beginning at about 1:22 of the video, Ms Harper spoke about the end of the birth alert program in the following terms:

That's just inhumane to do that to her, to do that to myself, to do that to my family. With these birth alerts ending ... that's a positive step, but I just really hope there's no ... tricks up their sleeves.

[43] In so far as exhibit LL is concerned, a transcript may be used as an aide in interpreting a recording, but it is not itself admissible evidence. While the video of an interview might be admissible as real evidence, assuming its authenticity is not challenged (*R. v. Nikolovski*, [1996] 3 S.C.R. 1197), it should be introduced in a format that allows it to form part of the court record. The usual practice in Manitoba, where a hearing is based on affidavit evidence, is to attach to the affidavit a memory stick with a copy of the video along with an explanation from the affiant as to the source. A link to a website, which is subject to "reference rot" (i.e., the website may be shut down, or its content may change over time), does not create a proper record for the court.

[44] More importantly, I do not find the statement quoted above to be an "admission" by the plaintiff. The statement follows a replay of the Facebook video that shows the plaintiff's child being taken from her with the help of police officers. Her comment, "That's just inhumane" may refer to the manner in which the child was apprehended, which is not disputed, not to whether she knew that a birth alert was used in her case.

[45] Paragraphs 34-36 and exhibit LL should be struck from the affidavit.

[46] Paragraphs 37 and 38 refer to a written article published on the CBC website on February 1, 2020, entitled "Mother whose infant's apprehension was live-streamed 'ecstatic' province ending birth alerts". The full article, which is attached as an exhibit, reports on the practice of birth alerts in Manitoba and quotes the "mother" as saying "I

was ecstatic that it was going in the right direction ...I did not know they had [birth alerts] in place until we experienced that.” While the mother is not identified in the article, the only reasonable inference from the other evidence is that it is the plaintiff. As I said earlier, the plaintiff’s evidence and her amended claim refer to the fact that her uncle filmed the apprehension of her child in January 2019 and that the recording was posted on Facebook. The CBC story refers to a live streamed video of an apprehension in January 2019 and says that custody of the child was later transferred to the mother’s aunt, which also correlates to the plaintiff’s story.

[47] As I said, the defendant argues that the plaintiff’s statement is admissible as a party admission. I agree. The rationale for excluding hearsay – that the maker is not available for cross-examination – is not a concern where the statement is made by a party. I note that the plaintiff did not challenge this evidence on the basis that the report was not accurate. She is nevertheless free to challenge or explain it in responding evidence.

[48] I acknowledge that the news report is double hearsay. The admissibility of the plaintiff’s statement would perhaps be clearer if the journalist who wrote the story provided “first-hand” evidence as to what the plaintiff told her. However, the overarching objective here is a search for the truth and, to that end, in civil cases, the rules of evidence are applied with some flexibility. The plaintiff’s ability to pursue her claim depends on her assertion that she did not know about the birth alert in her case until September 2021. Excluding evidence which refutes that assertion, especially when it comes from a reliable news source, would not foster the search for truth (*Donegani v. Facebook, Inc.*, 2024

ONSC 7153, at para. 31; ***Lac La Ronge Indian Band v. The Attorney General of Canada***, 2025 SKKB 147, at para. 35).

CONCLUSION

[49] The affidavit will be admitted with the exception of paragraphs 34 -36 and exhibit LL. The weight to be attributed to the admitted affidavit can be argued at the hearing of the motion to dismiss.

[50] Costs of this motion should be awarded to the party who is successful on the motion to dismiss.

_____.J.