NOVA SCOTIA COURT OF APPEAL

Citation: *Northwood Care Group Inc. v. Surette*, 2025 NSCA 52

Date: 20250623
Docket: CA 540231
Registry: Halifax

Between:

NORTHWOODCARE GROUP INC., a body corporate, incorporated in the Province of Nova Scotia; **NORTHWOOD HOMECARE INC.**, a body corporate, incorporated in the Province of Nova Scotia; **NORTHWOOD HEALTH SERVICES**, a body corporate, incorporated in the Province of Nova Scotia; **NORTHWOODCARE HALIFAX INC.**, a body corporate, incorporated in the Province of Nova Scotia; **NORTHWOOD SUPPORT SERVICES INC.**, a body corporate, incorporated in the Province of Nova Scotia; **NORTHWOOD REALTY INC.**, a body corporate, incorporated in the Province of Nova Scotia; **5534 ALMON STREET INC.**, a body corporate, incorporated in the Province of Nova Scotia; **2641 NORTHWOOD TERRACE INC.**, a body corporate, incorporated in the Province of Nova Scotia; **NORTHWOOD HOMECARE AGENCY**, a body corporate, incorporated in the Province of Nova Scotia; **NORTHWOOD IN TOUCH PERSONAL EMERGENCY RESPONSE**, a body corporate, incorporated in the Province of Nova Scotia

Appellants

v.

ERICA SURETTE

Respondent

Judge:	Van den Eynden, J.A.
Motion Heard:	April 10, 2025, in Halifax, Nova Scotia in Chambers
Written Decision:	June 23, 2025
Held:	Motion for leave to appeal dismissed
Counsel:	Karen Bennett-Clayton, Erin McSorley and James Pinchak, for the appellants Peter C. McVey, K.C., Madeline Carter and Kate Boyle, for the respondent

Decision:

Overview

[1] The appellants, collectively referred to as "Northwood" appeal an interlocutory order certifying a class proceeding. As the impugned order is interlocutory, leave to appeal is required.

[2] Pursuant to the provisions of the *Class Proceedings Act*[1] (the "*Act*") a judge of this Court (as opposed to a panel) must determine the leave application. Section 39 of the *Act* provides:

> (3) With leave of a judge of the Nova Scotia Court of Appeal, any party may appeal to that court from
>
> (a) a certification order […]
>
> […]
>
> (7) For greater certainty, an application for leave to appeal pursuant to this Section must be made before a single judge of the Nova Scotia Court of Appeal.

[3] To succeed on its leave application Northwood must raise an arguable issue—meaning a ground of appeal that is realistic and of sufficient substance to be capable of persuading a panel of this Court to allow the appeal.[2]

[4] For the following reasons, I am not satisfied that Northwood raised an arguable issue and leave to appeal the interlocutory order[3] must be denied.

The Certification Decision

[5] The plaintiff Erica Surette (respondent in this appeal) filed an action under the *Act* on behalf of a proposed class of individuals whose next of kin tested positive for COVID-19 and passed away while residing in facilities operated by Northwood during the proposed class period of March 15, 2020 to June 30, 2020.

[6] During this period, 53 residents died after contracting COVID-19. The statement of claim alleges Northwood owed legal duties to the deceased residents,

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[1] S.N.S. 2007, c. 28.
[2] *Certified Coating Specialists Inc. v. Halifax-Dartmouth Bridge* Commission, 2016 NSCA 77 at para. 17.
[3] The proceedings in the court below are at the preliminary certification stage. No judgement on the claims has been rendered. Leave is not required to appeal the outcome of a common issues trial as per s. 39(1) of the *Act*.

breached those duties and the standard of care, and caused harm and damages as a result of the deaths.

[7] Justice Scott C. Norton of the Nova Scotia Supreme Court heard Ms. Surette's certification motion. His decision is reported at 2024 NSSC 388.

[8] The judge set out the legal principles that guided his analysis, beginning with the legislative criteria:

> [6] The *Class Proceedings Act*, SNS 2007, c. 28 ("*Act*"), enumerates five criteria for the Court to consider on this procedural motion. To repeat, the court is focused on the form the action will take and does not require a preliminary assessment of the merits, viability, or strength of the claim. The language of the *Act* is mandatory: the court shall certify a class proceeding where the following five-part test in s. 7(1) is met:
>
> > (a) the pleadings disclose or the notice of application discloses a cause of action;
> >
> > (b) there is an identifiable class of two or more persons that would be represented by a representative party;
> >
> > (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
> >
> > (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute; and
> >
> > > (i) would fairly and adequately represent the interests of the class,
> > >
> > > (ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and
> > >
> > > (iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members.

[9] The judge then set out leading authorities to guide his interpretation and assessment of the s. 7 criteria:

> [7] In interpreting the *Act* and assessing the certification criteria, the court is to bear in mind the three goals of class proceedings: (1) promotion of judicial efficiency by avoiding unnecessary duplication in fact-finding and legal analysis; (2) improved access to justice for claims that may not otherwise be asserted; and (3) modification of the behaviour of actual and potential wrongdoers: *Hollick v. Metropolitan Toronto (City)*, 2001 SCC 68, at para. 15.
>
> [8] The procedural nature of the certification motion informs the plaintiff's evidentiary burden. Certification is intended to be a low bar. Plaintiffs need only to establish that there is "some basis in fact" to conclude that each s. 7(1) certification criterion is satisfied (apart from the s. 7(1)(a) requirement that the pleadings disclose a cause of action, for which no evidence can be considered): *Wright Medical Technology Canada Ltd. v. Taylor*, 2015 NSCA 68, at para. 40; *Hollick, supra*, at para. 25; *Pro-Sys Consultants v. Microsoft Corporation*, 2013 SCC 57, at paras. 63, 71 and 97. Accordingly, the Court does not assess probative weight at this stage, and conflicting facts and evidence are not to be resolved at certification: *Pro-Sys, supra*, at para. 102, *Wright, supra*, at paras. 46-47.
>
> [9] As stated in *Pro-Sys*, the standard for assessing evidence at certification does not give rise to a determination of the merits of the proceeding, nor does it involve a superficial level of analysis that amounts to nothing more than symbolic scrutiny (para. 103). The judge is not to veer into an evaluation of the merits of the claim, or probative weight of the evidence said to support it, or the potential for success: *Wright, supra*, at para. 47.

[10] The judge was satisfied the pleadings disclosed a cause of action (s. 7(1)(a)); there is an identifiable class of two or more persons (s. 7(1)(b)); a class action was a preferable procedure (s. 7(1)(d)); and Ms. Surette is an appropriate proposed representative plaintiff, her interests are not in conflict with other class members, and although with some adjustment, she produced a workable plan to advance the class proceeding (s. 7(1)(e)). None of these findings are challenged on appeal.

[11] As to s. 7(1)(c)—claims of the class members raise a common issue, the judge was satisfied that two of Mr. Surette's three proposed issues could be certified as common issues.

[12] The *Act* defines common issues:

> 2 In this Act,
>
> […]
>
> (e) "common issues" means
>
> (i) common but not necessarily identical issues of fact, or

> (ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

[13] The judge referenced *Pro-Sys*[4] again, wherein the Supreme Court of Canada reviewed the principles for ascertaining whether issues are common. The judge noted:

> [42] The principles for determining whether issues are common are outlined by the Supreme Court of Canada in *Pro-Sys, supra*, at para. 108:
>
> > 1. The commonality question should be approached purposively.
> >
> > 2. An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
> >
> > 3. It is not essential that the class members be identically situated vis-à-vis the opposing party.
> >
> > 4. It not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
>
> [43] *Pro-Sys* clarified the "some basis in fact" test in the context of the common issues requirement at para. 110:
>
> > In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether [the common issues] are common to all the class members.

[14] The judge also quoted extensively from this Court's decision in *Capital District Health Authority v. Murray*, 2017 NSCA 28[5] and followed the direction set out therein. This Court's direction in *Murray* is consistent with the directions from the Supreme Court of Canada in *Pro-Sys* and *Hollick*.[6]

[15] The judge then sets out Ms. Surette's proposed common issues:

> [47] […] The plaintiff seeks certification of the following proposed common issues:

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[4] *Pro-Sys Consultants Ltd. v. Microsoft Corp*., 2013 SCC 57.
[5] At para. 46 of his decisions the judge cites paras. 44–48 of *Murray*. These paras. review in detail the directions provided by the Supreme Court of Canada respecting the appraisal of commonality for the purpose of a certification application.
[6] *Hollick v. Metropolitan Toronto (City)*, 2001 SCC 68.

> (a) Did Northwood Halifax owe a duty of care to the Residents to prevent and mitigate COVID-19 outbreaks at the Facility?
>
> (b) If the answer to common issue (1) is "yes", did the acts or omissions of Northwood Halifax, or their officers and/or agents, breach the applicable standard of care?
>
> (c) If the answer to common issue (2) is "yes", did Northwood Halifax's breach(es) of the duty of care cause or contribute to the harms suffered and/or losses incurred by the class members?

[16] Northwood conceded that proposed issue (a)—the issue of whether a duty of care was owed—is a common issue appropriate for certification. Northwood contested certification of the proposed common issues (b) and (c).

[17] The judge was not satisfied that proposed issue (c)—causation—should be certified as a common issue and declined to do so. He explained:

> [64] Here, the plaintiff's expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. More precisely, the workable methodology must be capable of proving the breach of the standard of care was the cause in fact for the 53 Deceased Residents to contract COVID-19. The plaintiff must show a workable methodology that is capable of proving causation on the basis of "statistical evidence".
>
> [65] The plaintiff has failed to meet this evidentiary burden. The plaintiff identifies no evidence in the record which actually explains, or even identifies, this workable methodology. Unlike the Ontario cases relied on by the plaintiff, there is no epidemiological expert evidence before me. There is no evidence to establish some basis in fact in this case that a statistical epidemiological approach to determining causation can be taken (as was done by the court in *Levac*). With respect, I am unable to certify the causation question on the basis of the record before me.

[18] The judge was satisfied that proposed issue (b)—whether Northwood breached the standard of care—should be certified as a common issue. The judge explained:

> [49] The plaintiff's at the motion hearing clarified that the alleged breaches of the standard of care are particularized in para. 103 of the plaintiff's Third Amended Notice of Action (Clean Version) and Statement of Claim. These allegations pertain specifically to the implementation of practices, procedures, and/or policies aimed at preventing and controlling the spread of infectious diseases including COVID-19. These include but are not limited to the failures to: enforce physical distancing; control the risks posed by the Facility's crowded design; restrict dangerous contact and shared personal items; adequately manage

staff and resident movement; conduct sufficient testing; secure alternative accommodations; enforce timely use of personal protective equipment ("PPE"); and, implement public health guidelines. These allegations relate to a failure to carry out policies, rather than to a failure in the creation or content of infection protection and control ("IPAC") policies.

[50] The defendants argue that the standard of care cannot be determined in common because it evolved over the class period. With respect, I agree with the plaintiff that the case is about one outbreak, during a single "first wave" of COVID-19, and it is alleged that the most basic IPAC protocols (pre-dating the emergence of COVID-19) were not adhered to. This is not a case where the relevant standard of care evolved. Revisions to COVID-19 directives, for example, are immaterial to the applicable standard of care, because the plaintiff alleges that the defendants failed to adhere to even the most basic IPAC standards — such as those outlined in the 2014-15 Guide to Influenza-Like-Illness/Influenza Outbreak Control for Long-Term Care Facilities and Adult Residential Centres — that existed well before the pandemic. While COVID-19 was an unprecedented global health crisis, there is some basis in fact that foundational IPAC principles were already well recognized, and the plaintiff alleges that these basic, well-established IPAC standards were core measures for managing infectious disease risks, and that they were not adequately implemented at the Facility.

[51] The plaintiff alleges that the failure to implement even basic IPAC measures contributed to one deadly outbreak at the Facility, during the first wave of COVID-19, with a devastating domino effect, where the fate of one resident in catching COVID-19 impacted other residents. The critical period examined at trial will focus on the period prior to the first reported deaths on April 18, 2020, as by then, the disease had taken hold, and thereafter, deaths of Northwood residents were reported on a daily basis.

[52] The trial of this issue will turn on identifying the appropriate IPAC practices and policies that were in existence and should have been followed at the Facility at the onset of the COVID-19 outbreak. This can be determined in common. It does not vary across claimants.

[53] The mere fact that the fact the Northwood Quality-improvement Review Committee conducted a review (without the contents of its report being admitted in evidence) is some basis in fact that the Facility — and specifically its response to COVID-19 — can be examined as a single system. Beyond showing the commonality of the issue, and while not necessary for certification in Nova Scotia, this evidence also supports the existence of the common issues, in the sense that the spread of COVID-19 at the Facility was considered significant enough to warrant a system-level investigation; Dr. Lata and Dr. Stevenson were to "analyze the outbreak and the response to determine what factors contributed to the spread of COVID-19 at Northwood.

[…]

> [56] I find on the record of admissible evidence that the plaintiff has met the very low threshold of establishing there is some basis in fact that the common issue of breach of the standard of care as framed can be decided as a common issue. In my view, proceeding as a class action on this issue will avoid duplication of fact-finding or legal analysis.

[19] Subsumed in the common issue of whether there was a breach of the standard of care is the determination of what the applicable standard is. The judge made that clear when he summarized his findings:

> [88] I find that a class action is the appropriate and preferable procedure to determine the common issues of whether the defendants owe the Plaintiff Class a duty of care; the appropriate standard of care; and, whether that standard of care was breached. The issue of causation is not certified as a common issue. The Litigation Plan, as amended by my decision, is approved.

[20] Northwood's appeal is focused on the judge's finding that the appropriate standard of care and whether that standard of care was breached were common issues. I will refer to additional reasons the judge supplied respecting the legal principles he applied to his analysis of certification of this proposed common issue. But first I will set out Northwood's complaint of error.

Ground of appeal raised by Northwood

[21] Northwood raises only one ground of appeal, framed as follows in its notice of appeal:

> 1. The motion judge committed a reviewable error in failing to properly assess the proposed common issues as required by subparagraph 7(1)(c) of the *Class Proceedings Act*, SNS 2007, c. 28, including disregarding the legal test to be applied to this assessment of proposed common issues.

[22] As noted, s. 7(1)(c) of the *Act* provides:

> 7 (1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 if, in the opinion of the court,
>
> […]
>
> (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;

[23] In its submissions Northwood particularized the alleged error to mean that the test employed by the judge was "contrary to binding Supreme Court of Canada and appellate authority".[7]

Does this ground of appeal raise an arguable issue?

[24] Before setting out what Northwood claims is the correct legal test to assess whether an issue is common, I will review the test Justice Norton identified and applied.

[25] As set out above, the judge followed the direction of the Supreme Court in *Pro-Sys* and *Hollick* and this Court's direction in *Murray*. These cases make clear that the analysis is to be squarely directed toward the issue of commonality, not evaluating whether the claim itself has a basis in fact. This places the focus on whether there is a rational connection between the class as defined and the asserted common issues. To establish this, the representative plaintiff, in this case Ms. Surette, must show there is some basis in fact for each of the certification requirements set out in the *Act*.

[26] To illustrate, the Supreme Court said in *Hollick*:

> 18 […] As I wrote in *Western Canadian Shopping Centres Inc.*,[8] the underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" (para. 39). Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial ... ingredient" of each of the class members' claims.
>
> 19 […] To put it another way, the issue is whether there is a rational connection between the class as defined and the asserted common issues: see *Western Canadian Shopping Centres Inc.* at para. 38 ("the criteria [defining the class] should bear a rational relationship to the common issues asserted by all class members").

And in *Pro-Sys*:

> [100] The *Hollick* standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements. McLachlin C.J. did,

[7] Northwood factum at para. 24.
[8] 2001 SCC 46.

> however, note in *Hollick* that evidence has a role to play in the certification process. She observed that "*the Report of the Attorney General's Advisory Committee on Class Action Reform* clearly contemplates that the class representative will have to establish an evidentiary basis for certification" (para. 25).

[27] In *Pro-Sys* the Supreme Court when on to emphasize:

> [102] […] The certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action; "rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding". [citation omitted]
>
> [103] Nevertheless, it has been well over a decade since *Hollick* was decided, and it is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" […]; nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.
>
> […]
>
> [110] [...] In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members.

[28] It is clear from the foregoing that the required analysis does not involve a determination of the merits of the proceeding. Further, while the Supreme Court recognizes the difficulty in identifying a common issue in the absence of advancing *some* evidence about the claim generally, it does not demand an analysis of the merits of the claim beyond the certification requirements.

[29] In *Murray*[9] this Court, citing para. 110 of *Pro-Sys*, reinforced that (1) the focus of the analysis of s. 7(1)(c) is on commonality, not whether the acts alleged occurred; and (2) the factual evidence required at this stage goes only to establishing whether the proposed question(s) are common to all the class members.

[30] As laid out above, Justice Norton applied the forgoing principles when assessing whether the claims of the class members raise a common issue.

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[9] Para. 45.

[31] Northwood asserts, as it did before the motions judge, that the applicable test is a two-part framework which requires a plaintiff to demonstrate there is (1) some basis in fact that the proposed common issue actually exists; and (2) some basis in fact that the proposed issues are common to each class member. The test the judge employed was the equivalent to the second step.

[32] Northwood says the judge's failure to apply a two-step framework to his analysis under s. 7(1)(c) impacted the certification process.[10] Apart from proffering that conclusory statement, Northwood did not demonstrate how this submission is borne out in the record or the judge's decision.

[33] Ms. Surette, contends Northwood's submissions on the applicable (two-part) test put forward in the court below and essentially repeated on this leave to appeal application, reflect (1) an erroneous statement of the law and (2) are doomed to fail should I grant leave to appeal.

[34] I return to the motion judge's decision, in particular, his reasoning path for rejecting Northwood's submissions on the applicable test. The judge provided detailed reasons, and relevant binding authorities, for rejecting Northwood's position. He wrote:

> [44] The defendants assert that assessing the common issues criterion involves a two-step process: (1) the plaintiff must show that there is some basis in fact that the proposed common issue *actually exists*; and (2) the plaintiff must show that there is some basis in fact that the proposed issue is common to each class member. This test has been accepted by the Federal Court of Appeal in *Jensen v. Samsung Electronics Co. Ltd*., 2023 FCA 89. The Federal Court of Appeal explained the rationale for this requirement as follows, at para. 80:
>
> > [80] I am also in full agreement with the Motion Judge that the two-step approach is the only one consistent with the underlying rationale and the purpose of the certification process. If that process is to be meaningful and to achieve its objective to root out unfounded and frivolous claims, there must be a minimum assessment of the proposed common issue to ensure that it has an air of reality. Otherwise, the certification would not achieve its goal and almost any proposed certified action would have to be certified: *Dine v. Biomet*, 2015 ONSC 7050, [2015] O.J. No. 6732 (QL) at para. 15, fn 9. To quote again from the Motion Judge, "[a] cause of action with no factual underpinning does not become somehow more founded because it is common to a group of plaintiffs, nor does it gain any more value or traction just because it is shared by hundreds, thousands or

[10] Northwood factum at paras. 32-33.

> millions": Reasons at para. 214. Allowing a common issue lacking a basis in fact to proceed to trial would certainly not promote judicial economy, nor would it promote behaviour modification, or enable access to justice.
>
> [45] The plaintiff says that the two-step test does not apply in Nova Scotia because the Court of Appeal has not articulated a two-step test that assesses whether there is an "air of reality" to an issue. Even in those jurisdictions implementing a two-step test that assesses whether there is an "air of reality" to an issue, that test is articulated in a way that is intended to respect the Supreme Court of Canada's pronouncements on the some basis in fact standard that: "the certification stage is decidedly not meant to be a test of the merits of the action," and this "standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements."

[35] The judge went on to say:

> [46] I am not prepared to adopt a two-step process in light of the current instruction from our Court of Appeal. In *Murray, supra,* Justice Fichaud gave the following directions on the approach to the appraisal of commonality for a certification application, at paras. 44-48:
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> [quotes from *Murray* omitted]

The principles set out in *Murray,* which fully respect the principles set out by the Supreme Court of Canada in *Hollick* and *Pro-Sys* were reviewed earlier and there is no need to repeat them again.

[36] Northwood did not provide any authority from the Supreme Court of Canada nor from this Court endorsing this two-step framework. Although Northwood suggests this Court has implicitly endorsed this approach, in *Canada (Attorney General) v. MacQueen,* 2023 NSCA 143, that is not the case.

[37] *MacQueen* is of no assistance to Northwood. In *MacQueen*, this Court did not depart from the Supreme Court's guidance in *Hollick* and *Pro-Sys*. In fact, the relevant statements by this Court in *MacQueen* reinforce the key principle in determining whether a common issue arises is that: "there must be a basis in the evidence to establish the existence of the common issues".[11] (Step-two under the test promoted by Northwood). Notably omitted from the legal principles discussed in *MacQueen* is any explicit reference to a "factual basis for the claims made by the plaintiff and to which the common issues relate". (Step-one under the test promoted by Northwood).

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[11] *MacQueen* at para. 123.

[38] Northwood places significant reliance on the Federal Court of Appeal's decision in *Jensen*[12] which articulates a two-part test. But *Jensen* is not binding authority. It has not been cited with authority by the Supreme Court of Canada nor by this Court. Further, although *Jensen* could be read as strictly adopting a two-part test, the result may be more nuanced.

[39] *Jensen* involves an allegation of conspiracy and the Court expressed concern over bald assertions and the claimant not pleading sufficient facts, which if true, could establish a conspiracy claim. In *Jensen*, it appears the two-step approach regarding commonality was employed because of the insufficiency of facts to support the common claim.[13] This is not the case in the present appeal. Thus, reading *Jensen* to suggest, as Northwood does, that if a court does not engage directly in a two-step test this amounts to a reviewable error seems overreaching. Particularly, where it is otherwise obvious that there is a basis in fact to support the existence of valid legal issues, which is the case in the present appeal.

[40] Alternatively, Ms. Surette points out that even if a two-step framework were to be applied, it is of no import in this case. That is because the judge found that even if he had to analyze the presence of common issues under the framework proposed by Northwood, the result would be the same. In other words, he found the evidence to sufficiently demonstrate there is some basis in fact that the proposed common issue actually exists (step-one). The judge found:

> [53] The mere fact that the fact the Northwood Quality-improvement Review Committee conducted a review (without the contents of its report being admitted in evidence) is some basis in fact that the Facility — and specifically its response to COVID-19 — can be examined as a single system. **Beyond showing the commonality of the issue, and while not necessary for certification in Nova Scotia, this evidence also supports the existence of the common issues, in the sense that the spread of COVID-19 at the Facility was considered significant enough to warrant a system-level investigation**; Dr. Lata and Dr. Stevenson were to "analyze the outbreak and the response to determine what factors contributed to the spread of COVID-19 at Northwood.
>
> [emphasis added]

[41] Based on the record, the evidence accepted by the judge afforded a sufficient basis for this finding. Further, Northwood did not identify any question of fact or mixed fact and law that is challenged on appeal. No allegations of palpable and

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[12] *Jensen v. Samsung Electronics Co. Ltd.*, 2023 FCA 89.
[13] *Ibid* at paras. 93-94.

overriding error by the judge have been advanced. Rather, the sole ground of appeal pertains to a question of law. And as noted, Northwood did not identify how the application of its preferred test might have impacted the outcome in the court below. This effectively renders Northwood's sole ground of appeal to be academic. An arguable issue must do more than simply raise a matter of pure academic interest.[14]

[42] Finally, I will address an argument that Northwood raised in its oral submissions on leave.

[43] As set out, the judge certified the common issue of both the applicable standard of care and whether it was breached. The pleadings contain nine non-exhaustive allegations of how Northwood breached the requisite standard of care by acting negligently, and/or failing to act at all, in the face of the global pandemic.

[44] Northwood complains that the plaintiff ought to have proposed a separate common issue for each of the nine proposed alleged breaches of the standard of care. From there, Northwood says the judge should have applied the two-part test from *Jensen* to each alleged breach. They say that the motion judge's failure to do so equates to deciding the certification of the issue of standard of care "in a vacuum". And, this alleged error *could* have impacted the outcome due to the "arguably very different" alleged breaches and the changes to the standard of care throughout the class period.

[45] I have dealt with Northwood's argument respecting the inapplicability of a two-part test. In addition, Northwood's underlying complaint that commonality of the issue of standard of care cannot be considered until the applicable standard of care is specified for each of the nine breach allegations must fail.

[46] I say that for three principal reasons.

[47] First, the question of the applicable standard of care can be certified as a common issue. For example, in *Anderson v. Wilson*, [1999] O.J. No. 2494 at para. 36, 122 O.A.C. 69 the Ontario Court of Appeal held that "the common issue as to the standard of conduct expected […], and whether the alleged conduct fell below the standard, can fairly be tried as a common issue".

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[14] *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38 at para.18.

[48] Second, courts have granted the certification questions for class proceedings regarding a breach of the standard of care even when the standard varied throughout the material period. The Supreme Court of Canada has indicated that this may merely require the trial court provide a nuanced answer to the common question.[15] Further, this approach accords with the flexibility afforded by the legislature to the courts under the *Act* to deal with differentiation amongst class members through subclasses and to amend the certification at any time.[16]

[49] Third, the motions judge does not evaluate the common issue of standard of care "in a vacuum", but rather in the context of the IPAC policies, as the Ontario Superior Court of Justice did in *Pugliese v. Chartwell*.[17]

Disposition

[50] For the foregoing reasons, I am satisfied that Northwood has not raised an arguable issue on appeal. In my view, the judge applied the correct legal test, and even if he had adopted the two-part test advocated by Northwood, the result would have been the same given the unchallenged findings by the judge.

[51] Northwood's application for leave to appeal is denied with costs payable by Northwood to the respondent, in the amount of $800.00 inclusive of disbursements.

Van den Eynden, J.A.

[15] *Rumley v. British Columbia*, 2001 SCC 69 at paras. 32-33.
[16] *Ibid*; *Act*, s. 9, 13.
[17] 2024 ONSC 1135.