SUPREME COURT OF NOVA SCOTIA

Citation: *Elwin v. Nova Scotia Home for Coloured Children*, 2013 NSSC 196

Date: 20130626
Docket: Hfx No. 343536
Registry: Halifax

Between:

June Elwin, Harriet Johnson, and Deanna Smith

Plaintiffs

v.

The Nova Scotia Home for Coloured Children, a body corporate and the Attorney General of Nova Scotia, representing Her Majesty the Queen in right of the Province of Nova Scotia

Defendants

Judge: The Honourable Justice Arthur J. LeBlanc.

Heard: June 10-11, 2013, in Halifax, Nova Scotia

Counsel: Ray Wagner, Q.C. and Michael Dull, for the plaintiff
Catherine Lunn and Peter McVey, for the defendant Attorney General of Nova Scotia

By the Court:

INTRODUCTION

[1] The Attorney General of Nova Scotia ("the Province") has moved to strike a number of statements from all of the affidavits filed by the plaintiffs in support of their motion for class certification. The Province challenges these statements on many grounds, including: irrelevance; hearsay; unqualified opinion evidence; speculation; inappropriate argument; and inappropriate solicitor's affidavit.

[2] The Province's counsel made submissions that it brought this motion to preserve the rule of law. If what they meant by that is that the rules of evidence exist for very good reasons and are not simply technicalities, then I agree. However, to the extent the Province was suggesting that this motion was brought only as a public service, it is important to recall that litigation is always an adversarial process. The Province is representing the interests of its client in this matter just as the plaintiffs' counsel are representing theirs, and this motion too was brought because the Province has an interest in striking inadmissible evidence.

[3] For their part, the plaintiffs agreed to file amended affidavits responding to some of the concerns raised by the Province, deleting some of the statements and

revising others. However, the plaintiffs maintain that many of the statements are appropriate, and they refused to alter or remove many of them.

LAW ON STRIKING AFFIDAVITS IN A CERTIFICATION MOTION

[4] A motion to strike an affidavit is governed by rule 39.04. In relevant part, it provides that:

> **39.04 […] (2)** A judge must strike a part of an affidavit containing either of the following:
>
> > **(a)** information that is not admissible, such as an irrelevant statement or a submission or plea;
> >
> > **(b)** information that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay admissible on a motion but not supported by evidence of the source and belief in the truth of the information.
>
> **(3)** If the parts of the affidavit to be struck cannot readily be separated from the rest, or if striking the parts leaves the rest difficult to understand, the judge may strike the whole affidavit.

[5] That rule essentially codifies the principles set out at paragraph 20 of *Waverley (Village) v Nova Scotia*, (1993) 123 NSR (2d) 46 (SC), aff'd on other grounds (1994), 129 NSR (2d) 298 (NSCA) [*Waverley*]. The principles in *Waverley*, *supra*, have been endorsed by the Court of Appeal on several occasions (see eg *Hogeterp v Huntley*, 2007 NSCA 75 at para 25).

[6] There was some dispute on this motion as to whether ordinary principles of admissibility apply to a motion for class certification. The plaintiffs submitted that they were in some ways relaxed, noting at paragraph 7 of their brief that:

> the scope for putting information before the court on a certification motion, given its procedural nature, is considerably broader than it would be on a motion going to the actual determination of the merits of the claims advanced.

For that proposition, they cited Justice Tausendfreund's decision *Fanshawe College of Applied Arts and Technology v LG Phillips LCD Co, Ltd*, 2009 CanLII 65376 at paras 23-27 (ONSCJ) [*Fanshawe*].

[7] The Province contested that. It noted that in *Williams v Cannon Canada Inc*, 2012 ONSC 3692 at para 10 (Div Ct) [*Cannon Canada*], the Divisional Court of Ontario said that *Fanshawe* dealt with weight, not admissibility. Accordingly, the Province submits the principle of *stare decisis* prevents me from relying on *Fanshawe* to the extent that it is inconsistent with a decision of a court by which it is bound. Further, they note that at paragraph 12, the Divisional Court in *Cannon Canada* went on to approve the motion judge's statement that: "[w]hile the evidentiary burden on a certification motion is the low, 'basis in fact' test, that burden must be discharged by admissible evidence."

[8] Firstly, the argument on *stare decisis* is without merit. I am bound by decisions of the Supreme Court of Canada and decisions of our own Court of

Appeal. Decisions from other provinces can, at most, be persuasive. Therefore, even if a decision from another province is expressly overturned by that province's appeal court, I am permitted to adopt the reasoning of either the lower court or the appeal court, depending on which I find more persuasive. Put another way, I reject the Province's argument that I am precluded from finding Justice Tausendfreund's reasoning persuasive merely because it may no longer be the law in the province of Ontario.

[9] In any event, I agree with the Divisional Court that only admissible evidence may discharge the plaintiffs' burden at the certification hearing. However, I also accept that admissibility is affected in at least two ways by the fact that this is a motion for certification: (1) hearsay can be admitted so long as the affiant believes it and identifies the source; and (2) some facts which are ultimately irrelevant to establish the merits of the case may nonetheless be relevant to one or more of the factors under subsections 7(1)(b-e) of the *Class Proceedings Act*, SNS 2007, c 28.

(1) Hearsay is admissible.

[10] This proposition was initially challenged by the Province in its brief at paragraph 47. However, that appears to have been withdrawn at the hearing as the

Province proceeded on the basis that the only problem was that no sources were identified or there were no statements of belief.

[11] For the sake of completeness, I note that rule 22.15 governs this question. In relevant part, rule 22.15 provides that:

> **22.15 (1)** The rules of evidence apply to the hearing of a motion, including the affidavits, unless these Rules or legislation provides otherwise.
>
> **(2)** Hearsay not excepted from the rule of evidence excluding hearsay may be offered on any of the following motions:
>
> **[…]**
>
> **(c)** a motion to determine a procedural right;
>
> **[…]**
>
> **(3)** A party presenting hearsay must establish the source, and the witness' belief, of the information.

[12] The Province asserted in its brief that "a 'procedural right' is not the subject-matter of the Motion," but I disagree. At paragraph 15 of *Hollick v Toronto (City)*, *supra*, Chief Justice McLachlin described a class action as "a procedural tool." A certification motion is the mechanism by which plaintiffs gain access to that procedural tool. At paragraph 16, the Chief Justice went on to say that "the certification stage is decidedly not meant to be a test of the merits of the action." Rather, it "focuses on the form of the action." A certification motion does not settle any substantive rights – it is solely about whether the plaintiffs have a procedural

right to advance their claim as a class action. As such, it is "a motion to determine a procedural right," and is among the motions contemplated by rule 22.15(2)(c).

[13] Indeed, on my reading of Justice Tausendfreund's in *Fanshawe College of Applied Arts and Technology v LG Phillips LCD Co, Ltd, supra*, that is really all he said. At paragraph 27, he noted that:

> Recognizing that certification orders do not settle substantive rights, but are procedural in nature, courts have regularly accepted affidavits sworn on information and belief on certification applications: *Hoffman v. Monsanto Canada Inc.*, [2003] S.J. No. 259 (Q.B.) at para. 52.

In my view, I do not believe that the decision in *Cannon Canada, supra*, reversed that even if the *stare decisis* objection had been valid.

[14] Still, the Province is correct that rule 22.15(3) requires an affiant to identify the source of the statement and swear that he or she believes the statement to be true. If that is not present, then the statement must be struck out pursuant to rule 39.04(2)(b), quoted *supra*.

(2) Some facts which are ultimately irrelevant to establish the merits of the case may nonetheless be relevant to one or more of the factors under subsections 7(1)(b-e) of the Class Proceedings Act.

[15] The question that I have to decide on the motion is: should this action be certified as a class proceeding? As a result, evidence is only relevant on this

motion if it tends to show that the conditions in section 7(1) of the *Class Proceedings Act*, *supra*, are met. That section provides that:

> **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,
>
> **(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
>
> **(e)** there is a representative party who
>
> **(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.

Section 7(2) also sets out some further elements that should be considered when assessing preferability, and naturally evidence supporting those elements is also relevant.

[16] It must be remembered that the evidential burden to establish those elements is not necessarily great. In *Hollick v Toronto (City)*, 2001 SCC 68, the Supreme Court of Canada considered the extent of evidence which should be submitted on a

motion for class certification under section 5(1) of Ontario's class proceedings legislation, which is nearly identical to our section 7(1). At paragraph 24, Chief Justice McLachlin said that:

> … the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action.

She also cautioned that "that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members." Thus, the evidence need not be conclusive on the merits, but, with the exception of section 7(1)(a) (which must be satisfied only on the pleadings), the elements under section 7(1) do need to be proven.

[17] That is not controversial, but there was some dispute between the parties as to its consequences. On some matters, the plaintiffs submitted that the actual truth of the evidence was irrelevant to this motion. The Province contested this, saying that the truth is always relevant and rhetorically asking what the purpose of evidence and cross-examination is if the Court is not allowed to assess its truth. In its view, the plaintiffs have confused the standard of proof, that of "some basis in fact", with admissibility.

[18] To settle that dispute, it is necessary to consider the extent to which evidence on this motion can touch on the merits. Although section 8(2) of the *Class*

Proceedings Act, supra, makes it clear that an order certifying a class "is not a determination of the merits of the proceedings," some evidence which touches on the merits is admissible. At paragraph 22 of *Caputo v Imperial Tobacco*, 1997 CanLII 12162, 34 OR (3d) 314 (SCJ) (cited to CanLII), Justice Winkler (as he then was) said that:

> While evidence pertinent to the issues on the motion may, on occasion, overlap with evidence going to the merits of the action, this incursion may be permissible if the evidence sought is also relevant to the motion.

In other words, evidence is admissible if it is relevant to the elements of subsections 7(1)(b-e). In some cases, that evidence may also be relevant to the merits of the ultimate case. However, the mere fact that intrusion exists does not serve to render the evidence inadmissible.

[19] To use a more concrete example, the many affidavits of potential class members filed in this case make allegations that are central to the cause of action alleged. They are populated with accounts of alleged malnutrition, neglect, physical abuse, and sexual abuse. These affidavits speak to the merits of the claims.

[20] However, that is not the reason they are relevant to this motion. Rather, they are relevant because, among other things, they tend to show that there are more than two former residents of the NSHCC who allege that they were abused, thus

making more likely the proposition that there is an identifiable class whose members share an interest in resolving questions related to whether the province is liable for their abuse. In addition, the number of affiants who make these allegations can be relevant to whether a class proceeding would be a preferable route to resolve those issues.

[21] In other words, the allegations in the affidavits are relevant primarily for the facts that: (1) someone is making them; and (2) that they bear material similarities to other allegations made by other people in the same potential class of persons. However, the merits of the allegations remain largely irrelevant since I am not adjudicating their truth; I am only deciding whether their truth should be adjudicated as a class proceeding or not.

[22] As such, the plaintiffs are correct that, for the purposes of this motion, the truth of many of the specific claims of the affiants is irrelevant. However, this does not mean that everything is admissible or that it does not matter whether *anything* in the affidavits is true. The evidence must be relevant to the requirements in section 7(1)(b-e), and it will be struck if it is not. Further, those facts that are relied upon to establish those requirements must still be true.

[23] As for the Province's hypothetical question about the purpose of cross-examination in this context, the Province can still attack the affidavits on the basis that they do not show that any of the requirements in section 7(1)(b-e) are met. For instance, if the Province could show that one of the affiants was never a resident of the NSHCC, then plainly that affidavit could no longer be used to show that the class definition proposed by the plaintiffs is appropriate. They would have to rely on other evidence. Likewise, if the Province can by cross-examination show that the allegations being made are really not similar at all, then that would be relevant to whether the evidence discloses any common issues.

[24] I will discuss some of the other implications of the foregoing analysis as I work through the evidence, but for now I would make one final observation. Since the focus of the certification motion is different from the focus at later stages of a class proceeding, some evidence which is relevant now may be irrelevant later. As such, evidence found admissible now may be inadmissible later, and evidence that is inadmissible now may be admissible later.

ANALYSIS

[25] Before the hearing, the plaintiffs agreed to strike some of the statements impugned by the Province and amend others, and they included two schedules with

their brief setting out which those were. At the hearing, the plaintiffs also agreed to withdraw a few more statements. For the record, I identify those in the table below:

Statements Withdrawn by Plaintiffs at Hearing		
Affiant	**Para**	**Statement**
June Elwin	19	"My mother must have made a complaint because ... for my remark to my mother."
Harriet Johnson	35	"... was supposed to have been residing at the home but instead ..."
Star-Ann Smith	17	"All the residents knew that there was a room on the third floor of the Home where the severely beaten were taken until they were healed. If we knew that someone had been badly beaten, and we didn't see that resident around for a week or two, we knew that he or she was taken to 'that room'. I believe that staff members would hide the severely beatem in that room to keep the really bad injuries out of sight."
Jane Earle	8	"The NSHCC was unlike any other institution in the Province at the time. In the mid-sixties, the Province made a decision to start placing its wards into foster homes and small group homes. Evidence led the Province's decision-makers to understand that placing wards in these environments was in the best interest of the wards. The Province closed down other orphanage-like institutions, like the Veith House and the Children's Foundation of Halifax."
	9	"The Province was aware since at least the mid-sixties that the placement of wards in foster homes and small group homes was of greater benefit for the children."
	14	"I believe that the combination of poor training and poor wages resulted in the retention of staff who were unable to adequately detect child predators."

[26] As well, the Province has agreed to permit some of the amendments, as well as withdrew its objections to an element of another passage. Those are:

Statements Accepted by Province at Hearing		
Affiant	**Para**	**Statement**
June Elwin	17	"The young girl, who I believe slept in Ms. Williams' bed, was approximately three years old."
Deanna Smith	14	"If I wanted a drive from Georgie Williams to certain locations, it was understood that I had to perform sexual favours on him."
	24	"... a young boy ... a young girl ..."
Krista Borden	8	"After that, I was forced to take birth control every night."

[27] I am satisfied that those changes are reasonable, and so I will accept them and not address them further in this decision. As well, where the plaintiffs have proposed a rewording and the Province has not consented, I will consider only the revised wording.

Inconsistent Testimony on Cross-Examination

[28] The Province contested several statements on the basis that they elicited inconsistent testimony on cross-examination. In my view, it is not necessary to strike statements from an affidavit on the basis that a cross-examination was successful, any more than it would be to strike statements from the record if the witness had given the testimony orally. When a statement in an affidavit has been

retracted or reversed, that goes to the weight it will be assigned, not its admissibility. For that reason, I reject the Province's argument and will not strike the following statements:

Admissible Statements Inconsistent with Cross-Examination		
Affiant	**Para**	**Statement**
Harriet Johnson	4	"Russell and I became wards of the Province of Nova Scotia."
	15A	"… from one beating I …"

Relevance

[29] The Province alleges that some affidavits contain irrelevant information. These are:

Affidavits Alleged to be Irrelevant		
Affiant	**Para**	**Statement**
Harriet Johnson	29	"I witnessed staff members Herbie Desmond and Veronica Marsmen have sex with each other in the room of a resident while they were on duty. I walked into the room and saw Veronica Marsmen's breasts. She saw me right before I closed the door and ran. We did not talk about what I had witnessed but immediately after this incident I lost my allowance for two weeks. I knew that this was punishment for what I had mistakenly seen."
Sandra Scarth	All	Whole Affidavit & Exhibits

[30] Paragraph 29 of Harriet Johnson's affidavit alleges that she saw two staff members having sex, and that they punished her for it by withholding her

allowance for two weeks. Inappropriate conduct while on duty and undeserved punishment is relevant to the competence of the staff, and it is therefore relevant to establishing that a common issue is whether the Province breached any duties it might have owed.

[31] The affidavit of Sandra Scarth was essentially presented by the plaintiffs as a vehicle to introduce her expert report, and the Province raises a number of objections to it, among them its relevance. In its view, it adds nothing to the other affidavits except an opinion on the duty and standard of care, which are relevant only to the merits.

[32] The plaintiffs disagree, submitting that Ms. Scarth's affidavit is relevant since it is evidence of an identifiable class and commonality.

[33] In my view, the Province is correct that Ms. Scarth's affidavit is irrelevant at this stage of the proceedings. Ms. Scarth's report simply assumes the truth of the plaintiffs' allegations and proceeds to provide an opinion on whether, in those circumstances, a duty of care existed, what the standard of care was, and whether there is evidence that it was breached. At this stage, however, it is irrelevant whether the Province *actually* owed or breached a duty of care to the residents of the home. The plaintiffs only need to show that the pleadings disclose a cause of

action, and evidence is neither required nor permitted to make that out: *Hollick v Toronto (City)*, *supra* at para 24.

[34] Further, I disagree with the plaintiffs that her opinion reveals that there is an identifiable class or that the class has issues in common. Fundamentally, Ms. Scarth brings no personal knowledge of the Nova Scotia Home for Coloured Children, its atmosphere, or whether anyone was abused there. Her opinion is based entirely on the affidavits and other material submitted by the plaintiffs, along with some independently obtained documents about the historical standard of care in other child-care institutions. It adds nothing to those accounts and is dependent entirely on their accuracy. Her affidavit and report are wholly irrelevant at this procedural stage and I am required to strike it by rule 39.04(3).

[35] Before leaving this, however, I note that the Province has also attacked the report based on Ms. Scarth's qualifications to provide an expert opinion in this matter. That was inappropriate. If the Province had concerns about her qualifications, then it should have cross-examined Ms. Scarth and raised them then, giving her and plaintiffs' counsel an opportunity to alleviate those concerns. The Province chose not to do so. Having foregone that opportunity, the Province should not now have attacked Ms. Scarth's expertise under the guise of an argument on necessity.

[36] However, to be perfectly clear, I am not commenting in any way on whether Ms. Scarth is qualified, or indeed on any of the other substantive submissions of the Province. If this class is certified, an expert on the historical standard of care for childcare institutions may or may not be required at the common issues trial, and Ms. Scarth may or may not be qualified to provide such a service. Those are ultimately determinations for the trial, and my above comments should not be taken to be a ruling on those matters. Rather, my only ruling is that Ms. Scarth's report is not relevant to any of the elements under subsections 7(1)(b-e).

Scandalousness

[37] At paragraphs 24-30 of its brief, the Province complained that much of the plaintiffs' evidence is primarily directed at the merits. To avoid contests on the merits at this stage, the Province asked for a clear ruling discouraging this conduct, and they noted at paragraph 29 that:

> To hold otherwise is to encourage the filing by plaintiffs of shocking, scandalous but inadmissible evidence, perhaps calculated to generate publicity for the class proceeding, but irrelevant to the matters in issue at the Certification Hearing.

[38] Now, in its reply at the end of the hearing, the Province made clear that it was only seeking to have the statements specified at the end of its brief struck, and as such this argument was not meant to be a general argument that all the affidavits

should be struck on the basis of the volume of materials filed. As such, I will only address the statements that the Province specifically identified as scandalous.

[39] I have not been referred to any law on striking scandalous affidavits, but rule 39.05 provides that:

> **39.05** A party who files a scandalous, irrelevant, or otherwise oppressive affidavit is subject to the provisions of Rule 88 - Abuse of Process.

[40] In *Adelaide Capital Corp v Smith's Field Manor Development Ltd*, [1994] NSJ No 107 (QL), 129 NSR (2d) 241 (SC) (cited to NSJ), Justice Saunders considered the predecessor to rule 39.05 and said at paragraph 25 that:

> The wording in C.P.R. 38.11 " ... scandalous, irrelevant or otherwise oppressive ..." is disjunctive. In order to reject a defective affidavit I need not be satisfied that it is both scandalous and irrelevant. Either, or some other oppression apart from those two, will suffice.

Strictly speaking, the language in rule 39.05 is also disjunctive, so the same comment should apply and even a relevant statement can be struck if it is scandalous.

[41] In my view, however, I do not think it is appropriate to strike comments relating to the abuse of children in this case for being shocking or scandalous unless it is also irrelevant. After all, neglect and abuse of children is shocking. It is also what is alleged to have occurred in the plaintiffs' pleadings, and so it is

relevant to one of the core questions of this motion: are there issues common to the proposed class relating to such abuse? It would be utterly unfair to the affiants to strike their affidavits on the basis that what they allege was done to them was too shocking.

[42] Indeed, I cannot see how the process of the court is abused by relevant assertions of fact unless the material is so gratuitously scandalous that it overwhelms any relevance the statement might have had. This is reflected in many of the cases I have reviewed. Typically, where affidavits have been struck for being scandalous, the passages were either of no relevance or of marginal relevance to the cause of action alleged: *Hillcrest Development Co v Nova Scotia (Attorney General)* (1997), 163 NSR (2d) 307 (CA) at paras 22-26; *Wall v Horn Abbot Ltd* (1999), 176 NSR (2d) 96 (CA) at paras 33-36; *Fiske v Nova Scotia (Attorney General)*, 2001 NSCA 159, [2001] NSJ No 470 (QL) at paras 26-45.

[43] As for the specific statements alleged to be scandalous, the Province only identifies four. One such statement was at paragraph 24 of Deanna Smith's affidavit and it has been amended by the plaintiffs to remove the allegedly scandalous parts. The remaining statements are:

Allegedly Scandalous Statements in Affidavits		
Affiant	**Para**	**Statement**
June Elwin	8	"It was as if we were slaves."
	15	"She was very cruel."
Harriet Johnson	15A	"... from one beating I ..."

[44] In my view, those statements are directly relevant to the issues and are not gratuitously scandalous or shocking.

Hearsay

[45] In *R v Smith*, [1992] 2 SCR 915 at 924, the Supreme Court tentatively approved by the following definition for hearsay:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.

This definition is consistent with the decision of the Supreme Court of Canada in *R v Khelawon*, 2006 SCC 57 at para 35, [2006] 2 SCR 787.

[46] As mentioned earlier, such hearsay is admissible on a procedural motion so long as a source is identified and the affiant states his or her belief in the out-of-court statement.

[47] The Province accepted that at the hearing, but has argued that some of the out-of-court statements in the affidavits should be struck on the basis that the source is not identified by name. In many of the statements in issue, the source is identified by his or her role ("a staff member" or "another resident"). In *Waverley*, *supra*, the fourth requirement set out by Justice Davison at paragraph 20 is:

> 4. The information as to the source must be sufficient to permit the court to conclude that the information comes from a sound source and preferably the original source.

[48] I adopted this requirement in *Atlantic Canada Opportunity Agency v Ferme D'Acadie*, 2008 NSSC 334, a case where the affiant was seeking to strike the action against him. If granted, it would have ended the proceeding.

[49] It must be remembered that here, this is a procedural motion and the affiants are recalling events that allegedly occurred, in some instances, over a half a century ago. Although a named source would usually be preferable, it must be recalled that the events in issue occurred when the affiant was still a child. Such lapses of memory can be expected, and to prevent the affiant from identifying the source by his or her role would effectively prevent the witness from testifying to many relevant matters that he or she recalls. In my view, information as to the person's role at the NSHCC can permit the court to conclude the information comes from a sound and original source, and it can be admitted on that basis.

[50] That said, I am sympathetic to the Province's argument that such statements should be excluded since they are essentially unverifiable. However, hearsay is not admitted on a motion simply because it is verifiable, but rather because it is relevant and an efficient way to receive evidence on a motion without unduly expanding its scope by including many witnesses. Further, because this motion only determines a procedural right, the prejudice to the defendant is not as great as it would be if it were a determination on the merits.

[51] Identifying the source is primarily meant to enhance the relevance of the statement by showing that the source is a reliable one to make the particular statement. Nevertheless, where statements are unverified and unverifiable, that may affect the weight of such evidence.

[52] Additionally, in some cases, the affiants do not expressly state in the paragraph that he or she believes the particular out-of-court statement. However, though an express statement is preferable, the affiants have included a general statement of belief in information obtained from others at paragraph 1 of their affidavits and I accept that as sufficient in these circumstances.

[53] The following statements meet the rules for admitting hearsay by identifying both source and belief, and I will not strike them:

Rules for Admitting Hearsay on a Procedural Motion Met		
Affiant	**Para**	**Statement**
June Elwin	8	"He informs me that he was forced to work on farms around Preston and that he received nothing for this labour."
Star-Ann Smith	29	"... and I believe from my conversations with other residents and male staff that the Home would place me on birth control."
Krista Borden	8	"Prior to the appointment a staff member, brought me into the office and told me that all the young girls at the Home get put on birth control pills. The staff member said that that is why I was going to the doctor - to be put on birth control medication."

[54] Others were not out-of-court statements at all, but were instead personal observation. Some of these were amended to make that more clear.

[55] For instance, at paragraph 20 of her affidavit, Deanna Smith describes a process by which staff members and other residents would sexually abuse residents. The paragraph itself does not make her source of knowledge clear, but the very next paragraphs allege that she was a victim of the process. Reading the affidavit as a whole, paragraph 20 is a personal observation.

[56] With respect to another, Krista Borden says at paragraph 15 of her affidavit that she recalled seeing some papers in the office detailing allegations of abuse against another resident. The Province objected on the basis that no source was identified. Admittedly, the evidence is not admissible to show the truth of the

abuse alleged in those papers. However, the papers are admissible for the mere fact that Ms. Borden saw them in the office, which is itself relevant since it tends to make more likely the proposition that the NSHCC was aware of allegations of abuse.

[57] On the basis that the following passages are personal observations, I will not strike them:

Admissible Personal Observations		
Affiant	**Para**	**Statement**
June Elwin	8	"I regularly witnessed the boys being shipped to farms around Preston, Nova Scotia to work on other farms as well. Almost daily a man named L.E. Evans would pick up the boys in front of the Home in a green truck. I listened as he and staff members would tell the boys that there were going to work on other farms around Preston. I watched as boys were made to get onto the back of the truck and be driven away. My brother, Ward Young, was among these boys. ... I know that Mrs. Clayton's mother, Miss Martin, was a staff member at the Home. I believe that L.E. Evans, Mr. and Mrs. Clayton were friends with staff member Ross Kenny. I witnessed Ross Kenny regularly have lunch with them."
Deanna Smith	20	"Georgie Williams and the other staff would choose which young residents to target on any given evening. Once selected, the staff, the sisters and the young residents would go into a bedroom. The sisters would intimidate the young residents into getting completely naked. If a resident refused, they would be beaten and allowance and other privileges would be taken away."

Krista Borden	15	"I recall being helping in the office with staff member Sherry Bernard and seeing papers that belonged to another resident. The papers detailed incidents of abuse between the author and staff member Mr. Sparks. Ms. Bernard photocopied the papers and put the photocopies in the resident's folder. Ms. Bernard advised that anything I saw in the office was not to leave the office."
Tracey Dorrington-Skinner	16	"I witnessed staff members routinely administer birth control pills to the girls."
Garnet Smith	8	"Mrs. Jefferson had a hole cut in her bloomers and she made the boys kiss her private parts through the hole in her bloomers before they were allowed to pass and go into the dormitory."
Shirley Melanson	14	"There was never enough food to eat at the home and some of the residents use to steal food…"

[58] Notably, the Province objected to the passage in Ms. Elwin's affidavit since Mr. Evans was only added by amendment and the Province has not had an opportunity to investigate the allegations or cross-examine Ms. Elwin on them. The plaintiffs responded that the Province was missing the point, and that verifying such a mundane detail at this stage would be purposeless since it goes only to the merits.

[59] In my view, the plaintiffs are correct, largely for the reasons I discussed earlier. Whether Mr. Evans actually did these things is relevant to the merits of the action, but even if he ultimately did not the fact that Ms. Elwin says that he did is some evidence that there are other former residents out there who could complain of being forced to perform non-wage labour.

[60] However, two statements in the affidavits are hearsay and do not properly identify a source. These are:

Rules for Admitting Hearsay on a Procedural Motion Not Met		
Affiant	**Para**	**Statement**
Deanna Smith	17	"From my discussions with David T., Harriet Johnson, Teresa Alison, and other residents who I cannot currently recall, I know others had similar issues with wetting the bed."
	31	"I later realized that Ms. Mills was very close with Georgie Williams. They were relatives or good friends. I believe this after overhearing a conversation about Ms. Mills attending Georgie Williams' house for a BBQ."

[61] With respect to paragraph 17, it is unclear whether the named individuals wet the bed themselves, observed others wetting the bed, or simply heard rumours that other people had wet the bed. As such, the source remains unclear. With respect to paragraph 31, there is no source whatsoever except a conversation between unknown individuals.

[62] As such, it is necessary to address the plaintiffs' argument that such statements are not being submitted for the truth of their contents. In their brief, the plaintiffs cited as an example the Supreme Court's decision in *Hollick v Toronto (City)*, *supra*. There, the plaintiff complained of noise and physical pollution from a landfill. On commonality, he submitted 115 pages of complaints records obtained

from the Ontario Ministry of Environment and Energy and the Toronto Metropolitan Works Department. Chief Justice McLachlin found that those records satisfied the plaintiff's evidentiary burden to show that there were common issues.

[63] The Province disputed the position of the plaintiffs, saying that it confused the standard of proof with admissibility. It also attempted to distinguish *Hollick, supra*, on the basis that the complaint records in that case were business records and so admissible under a traditional exception to the hearsay rule.

[64] However, and with respect, the Province's submission misunderstands the uses which the Supreme Court made of the complaints records. At paragraph 26 of *Hollick, supra*, Chief Justice McLachlin noted that the records made it sufficiently clear that "many individuals besides the appellant were concerned about noise and physical emissions from the landfill." That was established by the mere fact that a number of individuals made complaints, not by whether their complaints were truthful or accurate.

[65] As such, the plaintiffs' argument generally has merit, but whether a statement is relevant for the mere fact it was made depends on the particular out-of-court statement. As a generic example, if an affiant testifies that another former resident told her she was abused at the home and intends to sue the province, then

the mere fact that the statement was made is relevant to whether there are common issues relating to abuse which affect all the members of an identifiable class. Put another way, it tends to show that there is at least one other person who has a similar cause of action against the province and who would benefit from a resolution of any common issues between them. That remains the case even if, ultimately, the other resident was not abused.

[66] In that sense, therefore, hearsay can be admissible, but the party seeking to introduce the evidence must identify *why* the fact that it was made is relevant. It is not enough to say simply that the merits of the action do not matter and therefore any hearsay that touches on those merits is admissible. Rather, evidence that touches on the merits of the action is only admissible if it is also relevant to the section 7 factors, and the plaintiffs have to identify what that is.

[67] In the case of the impugned statements in Ms. Smith's affidavit, however, I do not see that they are relevant to the section 7 factors for the mere fact that they were made. Bed wetting is common among children and that fact is only relevant to the section 7 factors if it was a result of abuse. As such, the statement that other residents had similar issues is only relevant if it is true.

[68] Similarly, the statement about Ms. Mills and Mr. Williams being good friends is used in the affidavit to imply that Ms. Mills covered up the allegation that Ms. Smith was abused by Mr. Williams. If it is true, it would be relevant. It is not, however, relevant for the mere fact that it was made.

[69] In any event, someone attending a co-worker's barbeque is not strong evidence that they were good friends, though that concern would go to weight, not admissibility.

[70] Finally, some of the exhibits attached to Mr. Dull's affidavit are also impugned as being hearsay. These include:

Impugned Exhibits in Mr. Dull's Affidavit	
Exhibit	**Description**
A	Excerpt from a book by Charles Saunders which chronicles the history of the NSHCC.
B	Newspaper articles from 1998 describing some of the alleged abuse at the NSHCC.
WW	Newspaper article reporting on a request the NSHCC made to the government for a $45,000.00 grant.
YY	An undated and handwritten note drafting a proposal to the Honourable Wm. Gillis regarding raising the per diem rate for the NSHCC.

[71] The Province contends that the newspaper articles and the excerpt from Saunders' book are essentially un-sourced hearsay. Indeed, in *Waverley*, *supra* at para 14, Justice Davison approved the following analysis from *Savings &*

Investment Bank Ltd. v. Gasco Investments (Netherlands) BV (1983), [1984] 1 All ER 296 at 305 (Ch D):

> I find it impossible to accept counsel for SIB's submission that it is sufficient in order to comply with r 5(2) that the deponent should identify only the source to him of his information even though it is clear that that source was not the original source. Thus, if the deponent was informed of a fact by A, whom the deponent knows not to have firsthand knowledge of the fact but who had obtained the information from B, I cannot believe that it is sufficient for the deponent to identify A as the source of the information. That, to my mind, would largely defeat the requirement that the sources and grounds should be stated and would make it only too easy to introduce prejudicial material without revealing the original source of hearsay information by the expedient of procuring as the deponent a person who receives information second hand. By having to reveal such original source and not merely the immediate source, the deponent affords a proper opportunity to another party to challenge and counter such evidence, as well as enabling the court to assess the weight to be attributed to such evidence.

[72] I agree that the relevant materials in *Share and Care* and much of the newspaper articles are not properly sourced. As such, they can only be admitted if they are relevant for the mere fact that they were made.

[73] With respect to exhibit A, the plaintiffs have not identified any reason why the fact that Mr. Saunders wrote that book is relevant to any of the factors set out in subsections 7(1)(b-e), so it will be struck.

[74] With respect to exhibit B, the newspaper articles are plainly not admissible for the truth of their contents. However, I think they are admissible as context for the parameters of the plaintiffs' requests for information from the Nova Scotia

Archives. It helps to explain the basis upon which the Archives would have conducted their search.

[75] With respect to exhibit WW, the plaintiffs have not identified any reason why it is relevant for the mere fact that it was made. It is struck.

[76] Finally, exhibit YY is an unsourced and undated document. Its purpose is unclear and the only possible relevance it has to this motion is its description of the *per diem* rates. Since that is only relevant if it is true, it will be struck.

Negative Knowledge Statements

[77] The Province has argued that some statements should not be admitted on the basis that they testify to a negative. These are:

Negative Knowledge Statements		
Affiant	**Para**	**Statement**
Star-Ann Smith	15	"I am unaware if the police ever did anything as a result of the vicious assault to Robin and myself."
Stacey Beals	16	"I do not recall ever being visited by a child care worker during my residency at the Home."
Harold Middleton	13	"I do not recall being visited by anyone employed by the Children's Aid Society while I was a resident of the Home."
Shirley Melanson	18	"I do not recall being visited by social workers for the Children's Aid Society except for one occasion."

[78] The Province says that an affiant can only testify to what he or she knows, not what he or she does not know. As well, the Province submits that it successfully challenged some of these statements about visits from child-care workers from other affiants on cross-examination, and that they would be able to do so here.

[79] In my view, such statements are admissible, but will usually be of minimal probative value. If this were a direct examination, it would not be objectionable for counsel to ask a question such as: "Were you ever visited by a child care worker during your residency at the home?" Mr. Beals' answer is simply a qualified "no." It does not become inadmissible simply because Mr. Beals says that he does not recall such a visit rather than: "I was never visited." Further, these statements are relevant insofar as the fact that Mr. Beals does not recall being visited by a child care worker tends to make more likely the proposition that he was not so visited.

[80] As for the cross-examination objection, I considered that more generally earlier, but I would add that I am not prepared to infer that such a cross-examination would be successful on all affiants merely because it was successful on some. As such, all the statements in the table above are admissible.

Speculation & Lay Opinion Evidence

[81] Although both parties dealt with speculation and lay opinion evidence separately, it is convenient to consider them here together.

[82] The Province identifies a number of statements in the affidavits as speculative and mere opinion. It relies on the decision of Justice Davison in *Waverley*, *supra*, where, at paragraph 20, he set out a number of principles relating to affidavits. First among them was: "[a]ffidavits should be confined to facts. There is no place in affidavits for speculation or inadmissable material. An affidavit should not take on the flavour of a plea or a summation."

[83] On the other hand, the plaintiffs seek to draw a distinction between speculation and reasonable inference. In their view, witnesses are permitted to make reasonable inferences from the evidence, even without identifying the facts upon which those inferences are based. They cite paragraph 47 of *R v Grandinetti*, 2005 SCC 5, [2005] 1 SCR 27, where Justice Abella, speaking for the unanimous Supreme Court, said that: "evidence may be inferential, but the inferences must be reasonable, based on the evidence, and not amount to speculation."

[84] Relying on that, the plaintiffs use as an example Ms. Elwin's statements at paragraph 5:

> My constant hunger led to my stealing food that was intended for the garbage. I ate the garbage to compensate for the malnutrition I endured at the Nova Scotia

> Home for Colored [sic] Children. I recall other children stealing food that was intended for the garbage and food that was intended for the pigs as well.

In their brief, the plaintiffs argue that this evidence was based on known facts, and they say that: "eating food from the garbage bin or pig-trough [implies] that the food was intended for the garbage or pigs."

[85] Functionally, I cannot see how I can assess whether an inference is reasonable without being privy to the facts upon which the inference is made. It is certainly true that it is reasonable to infer that food in the garbage is intended for the garbage, but the problem is that the affiant does not *say* that the food was in the garbage. I have no basis to assume that it was. It cannot be the case that I should simply assume that all unsupported inferences are reasonable.

[86] Further, the plaintiffs' reliance on *R v Grandinetti, supra*, is misplaced. When Justice Abella spoke about "inferential evidence," she was referring to evidence from which an inference can be drawn *by the trier of fact*. In no way does that case support the proposition that a witness' inferences are admissible even when he or she does not disclose the factual basis for them.

[87] The plaintiffs find a stronger argument in *R v Graat*, [1982] 2 SCR 819. In that case, the Supreme Court of Canada considered whether a police officer's

opinion that someone was too intoxicated to drive was admissible. At page 837, Justice Dickson (as he then was), said that:

> I accept the following passage from Cross as a good statement of the law as to the cases in which non-expert opinion is admissible.
>
> > When, in the words of an American judge, "the facts from which a witness received an impression were too evanescent in their nature to be recollected, or too complicated to be separately and distinctly narrated", a witness may state his opinion or impression. He was better equipped than the jury to form it, and it is impossible for him to convey an adequate idea of the premises on which he acted to the jury:
> >
> > **[…]**
> >
> > There is nothing in the nature of a closed list of cases in which non-expert opinion evidence is admissible. Typical instances are provided by questions concerning age, speed, weather, handwriting and identity in general [at p. 448].

[88] Put another way, a witness may give an opinion where the facts upon which the opinion is based are assessed on a subconscious level. For instance, when a person assesses the speed of a moving car, he or she does not consciously calculate how many metres it has travelled in how many seconds, and it would be difficult for him or her to accurately recall those details with sufficient precision. Rather, it is experienced and recalled simply as an estimate of speed, and because it is a matter of ordinary experience such an estimate is sufficiently reliable to put it to the trier of fact directly.

[89] In their textbook, *The Law of Evidence*, 6th ed (Toronto, ON: Irwin Law Inc, 2011), David Paciocco and Lee Steusser set out the elements for accepting lay opinion evidence in a straightforward manner at page 183:

> Lay witnesses may present their relevant observations in the form of opinions where
>
> - they are in a better position than the trier of fact to form the conclusion;
> - the conclusion is one that persons of ordinary experience are able to make;
> - the witness, although not expert, has the experiential capacity to make the conclusion; and
> - the opinions being expressed are merely a compendious mode of stating facts that are too subtle or complicated to be narrated as effectively without resort to conclusions.

[90] In my view, some of the statements to which the Province objected are appropriately admitted as lay opinion. For instance: the Province objected to paragraph 6 of June Elwin's affidavit, where she said"[w]e were not provided with adequate clothes at the Home." In my view, whether clothes are adequate is a matter within the ordinary experience of a person and Ms. Elwin was in a better position than I am to make that conclusion. Further, Ms. Elwin cannot be expected to remember every detail of the clothes that every resident was given in sufficient detail to communicate that to the court.

[91] In any event, Ms. Elwin actually did go on to describe the clothes the residents were given, saying that it was "one outfit of clothes which we would be

forced to wear everyday [sic] of the week without having it cleaned. The clothes were old and had rips and holes."

[92] For other statements that the Province impugns as speculation, its concerns really only go to weight. For instance, in Jane Earle's affidavit, she says things like: "[t]he NSHCC paid its staff very low wages." That is a statement of fact about which Ms. Earle has personal knowledge. Although she did not produce better evidence for the statement, such as pay stubs, it does not convert it into a statement of opinion. The lack of expected corroborating evidence merely reduces its weight.

[93] The following statements are admissible as either lay opinion or because the Province's objection that they are speculative is unfounded:

Affidavits with Admissible Lay Opinion or Non-Speculation		
Affiant	**Para**	**Statement**
June Elwin	5	"... to compensate for the malnutrition ..."
	6	"We were not provided with adequate clothes at the home."
	8	"It was as if we were slaves."
	15	"She was very cruel."
Harriet Johnson	10	"Things only got worse."
Star-Ann Smith	19	"It was an unspoken thing at the home; Residents would not talk to each other about the abuses being committed all around us."
Stacey Beals	17	"It would have been obvious to those looking at use residents that we were being beaten."
Shirley Melanson	14	"There was never enough food to eat at the

		home..."
Harold Middleton	9	"There was never enough food in the house."
	4	"The child care workers at the NSHCC were paid ... low wages."
	11	"I quickly came to appreciate the systemic issues which faced the NSHCC. The NSHCC has long suffered from chronic underfunding."
	12	"I believe that the NSHCC was not provided the funding needed to provide the training required to staff who were working with young children removed from parental care."
	13	"The NSHCC paid its staff very low wages. I believe that the low wages being paid did not enable the NSHCC to attract and retain properly qualified staff."
	21	"Even as an adult she did not recognize the sexual abuse to be wrong."
Jane Earle	21	"I would label these experiences as sexual, physical, and emotional abuse."

[94] However, some of the statements impugned by the Province *are* purely speculative, or else they are opinions for which it should have been easy to convey an adequate idea of the facts upon which the affiant relied. For instance, if Ms. Elwin had eaten food directly out of the garbage, then it is easily possible for her to say so and not rely on some undisclosed facts to say that it was *intended* for the garbage. Whether food is in the garbage is readily apparent to the conscious mind and is not at all a subtle fact to remember.

[95] Similarly, whether other group homes received double or triple the *per diems* the NSHCC received should be demonstrated by documentary evidence

showing the precise salaries of both groups. It is not evident that the salaries at other group homes are within Ms. Earle's personal knowledge, and it would not be difficult to convey the facts that opinion is based on.

[96] The statements I will strike as either inadmissible lay opinion or speculation are:

Affidavits with Inadmissible Lay Opinion or Speculation		
Affiant	**Para**	**Statement**
June Elwin	5	"that was intended for the garbage … on the farm as well."
Jane Earle	4	"… notoriously … I believe that the workers at the NSHCC were the lowest paid such child care workers in the province."
	11	"I know that the per diems paid by the Province to 'white' group homes were significantly higher than those paid to the NSHCC. I believe that these other homes received per diems at least double, sometimes almost triple the quantum of those received by the NSHCC."
	13	"I believe that the NSHCC was not provided the necessary funding to pay any higher wages.

Expert Opinion Evidence

[97] I have already struck Ms. Scarth's affidavit as irrelevant for the purposes of a certification motion, so will not consider it further here.

[98] The Province also objected to Jane Earle's affidavit on the basis that it contains unnecessary expert opinion evidence from someone who has not been qualified as an expert. The plaintiffs agreed to remove all of the paragraphs of Ms. Earle's affidavit that the Province impugned as offering expert evidence, and the other aspects of her affidavit I have dealt with earlier. As such, I do not need to consider this argument further.

[99] As well, the Province objected to Exhibit MM of Mr. Dull's affidavit on the basis that no foundation was laid for opinion evidence. It is a report on the NSHCC prepared in April, 1973, by four students at the Maritime School of Social Work who were placed at one of the Children's Aid Societies. It is true that they are not qualified as experts, but it also contains a contemporaneous factual description of the Home's environment. I will admit it not as expert opinion, but for its factual observations as hearsay admissible on a procedural motion.

Argument & Solicitor's Affidavit

[100] Mr. Dull's affidavit was the subject of the Province's objections that it included argument and was improper as a solicitor's affidavit. The plaintiffs have since sought to amend the affidavit to remove all commentary on the exhibits from Mr. Dull's affidavit. That is the remedy the Province was seeking under these grounds, asking in its brief that I consider only the exhibits (if relevant) and not the

text of the affidavit. As such, I will not consider the propriety of the text of Mr. Dull's affidavit.

[101] The remainder of the objections are all based on other grounds, such as hearsay, and I have considered them earlier.

CONCLUSION

[102] In conclusion, I am prepared to allow all of the amendments requested by the plaintiffs, with the exception of those in paragraphs 17 and 31 of Deanna Smith's affidavit, as those should be struck.

[103] As to what is remaining, I am willing only to strike what I have described above. For ease of reference, I set them out again below:

Elements of Affidavits to be Struck		
Affiant	**Para**	**Statement**
June Elwin	5	"that was intended for the garbage … on the farm as well."
Deanna Smith	17	"From my discussions with David T., Harriet Johnson, Teresa Alison, and other residents who I cannot currently recall, I know others had similar issues with wetting the bed."
	31	"I later realized that Ms. Mills was very close with Georgie Williams. They were relatives or good friends. I believe this after overhearing a conversation about Ms. Mills attending Georgie Williams' house for a BBQ."

	4	"... notoriously ... I believe that the workers at the NSHCC were the lowest paid such child care workers in the province."
	11	"I know that the per diems paid by the Province to 'white' group homes were significantly higher than those paid to the NSHCC. I believe that these other homes received per diems at least double, sometimes almost triple the quantum of those received by the NSHCC."
Jane Earle	13	"I believe that the NSHCC was not provided the necessary funding to pay any higher wages.
	3,4,5	Exhibit A
	58	Exhibit WW, newspaper article
Michael Dull	60	Exhibit YY
Sandra Scarth	All	Whole Affidavit

[104] All other impugned material is admissible for the purposes of the certification motion.

[105] Strictly speaking, affidavits are typically amended by filing a supplementary affidavit correcting any mistakes, pursuant to rule 83.07(1). In these circumstances however, I will simply request that the plaintiff revise the affidavits in accordance with this decision so that the court will be provided with a clean copy of the affidavits.

LeBlanc, J.