SUPREME COURT OF NOVA SCOTIA
Citation: *Bishop v. Northview GP Inc.*, 2021 NSSC 225

Date: 20210712
Docket: *Hfx*, No. 481345
Registry: Halifax

Between:

Dawn Bishop

Intended General Class Representative Plaintiff

and

Trevor Hurley, Linda McInnis, John Breisch and Adam Pesant

Intended Sub Class Representative Plaintiffs

and

Northview GP Inc. (cob as Northview Apartment REIT) and D.D. 81 Primrose Ltd. and Halifax Regional Municipality and Halifax Regional Water Commission

Defendants

Certification Motion
Decision

Judge:	The Honourable Justice Christa M. Brothers
Heard:	February 22, 2021, in Halifax, Nova Scotia
Counsel:	David G. Coles, Q.C., Shani Frugtnient and Meaghan Kells, for the Plaintiffs Brian K. Awad, Q.C., for the Defendants, Northview GP Inc. and D.D. 81 Primrose Ltd. Tara A. Miller and Allison Harris, for the Defendants, Halifax Regional Municipality and Halifax Regional Water Commission

By the Court:

Overview

[1] This proposed class proceeding arises from a fire which occurred in an apartment building at 81 Primrose Street in Dartmouth (the "Building") on May 19, 2018.

[2] The Notice of Action and Statement of Claim was issued on November 2, 2018, and has been amended twice (September 3, 2020, and January 9, 2021). The original intended Representative Plaintiff, Sarah Parker, was changed to Dawn Bishop with the second amendment. Additional sub-class representatives have also been added.

[3] A motion for certification was first held on March 18, 2019 before Justice Wood, as he then was, (the "First Certification Motion"). Wood, J. dismissed the motion without prejudice to the Plaintiffs' right to bring a further motion to address insufficiencies in the evidence and common issues which were too broadly defined. On this motion, affidavits from the sub-class affiants were provided. No cross-examination was sought.

[4] The Plaintiffs have advanced sufficient evidence and the defendants agree that this action can be certified. What is left is some further refinement of the common issues.

Background and Proposed Parties

[5] Dawn Bishop resides in Dartmouth, Nova Scotia. Ms. Bishop lived in apartment 217 and was in the Building on the night of the fire. The Intended Representative Plaintiffs for the various Sub Classes all lived in various units in the Building at the time of the fire.

[6] The Plaintiffs submit that the Intended General Class will consist of residents and occupants of 81 Primrose Street, including subclasses who suffered damage to property resulting from the fire on May 19, 2018, excepting the late Ms. Wieslawa "Visha" Dratwa and her estate ("Class Members"). The proposed General Class would also include those individuals' insurers.

[7] The Defendant Northview GP Inc. ("Northview") was thought to be a real estate management company that operated the Building. However, counsel has alerted the Plaintiffs that they named the incorrect defendant and that an amendment to the named defendant will have to occur. The named defendants have advised that the manager of the Property is not Northview GP Inc., but MetCap Living Management Inc. The Plaintiffs are entitled to seek an amendment of their pleadings to name the correct corporate entity. The Plaintiff should do so as soon as is practicable. For the purposes of this decision and without an amendment, I will continue to refer to the named defendant, Northview.

[8] The Defendant D.D. 81 Primrose Ltd (" the Building Owner") owned the Building.

[9] The Defendant Halifax Regional Municipality ("HRM") is named and alleged to be responsible for monitoring safety deficiencies and enforcing safety standards.

[10] The Defendant Halifax Regional Water Commission (" the Water Commission") is alleged to be responsible for maintaining fire hydrants proximate to 81 Primrose Street and alternate water sources.

The Allegations

[11] It is alleged that on May 19, 2018, in the early hours of the morning, a fire in the Building caused one death, multiple injuries, loss of property and displaced approximately 150 people.

[12] The Statement of Claim alleges that belongings of some residents were damaged or destroyed by smoke and fire, and some residents experienced personal injury and stress, trauma, or emotional and psychological injury.

[13] It is alleged that the fire originated from apartment 425. The resident of that apartment died in the fire. It is alleged that the deceased was known by residents of the Building to be a careless smoker, and that the owner and property manager received complaints from residents that the deceased's behavior posed a danger but took no action with respect to these complaints.

[14] The Statement of Claim alleges that when fire trucks arrived and firefighters attempted to establish a water supply from the fire hydrant closest to the Building, the hydrant did not work, nor did a second hydrant further from the Building.

Firefighters finally established a water supply using a third hydrant, further from the Building.

[15] It is further alleged that there were deficiencies in the operation of an emergency alarm bell system installed in the Building, and that smoke detectors in some units did not function. Ms. Bishop states that to her knowledge the smoke detectors were not inspected after March 2017. The claim alleges that the Building was not properly equipped with sprinklers or other fire suppressant systems.

[16] Mr. Pesant states that Northview stored some property belonging to residents, some of which was damaged, and that Northview has not complied with requests to produce some of the property.

[17] As noted earlier, Wood, J. at the First Certification Motion dismissed the motion without prejudice to the Plaintiffs to bring a further motion to address insufficiencies in the evidence and definition of common issues. The Plaintiffs have filed this further certification motion.

[18] Initially the first and second Defendants maintained this proceeding was not ready for certification. This position developed at the hearing of the motion.

[19] The second and third Defendants, HRM and HRWC submit that the only outstanding issue is the matter of "common issues", per s. 7(1)(c) of the *Class Proceedings Act*, S.N.S. 2007 c. 28 (the "CPA"). They say some of the common issues require further refining and others are inappropriate for certification.

Issues

[20] While initially it appeared some of the Defendants were opposing certification, during the hearing it became clear that the only outstanding issue is the "common issues" per s. 7(1)(c) of the CPA.

[21] While not a barrier to certification, HRM and HRWC also oppose or seek clarification of certain elements of the Plaintiffs' proposed Second Litigation Plan.

Law and Analysis

[22] In deciding whether to certify a class action the following sections of the CPA and the test must be considered. Section 4 of the CPA provides for a proposed representative plaintiff to seek certification:

> 4(1) One member of a class of persons may commence a proceeding in the court on behalf of the members of that class.
>
> […]
>
> > 4(3) The person who commences a proceeding under subsection (1) shall make an application to the court for an order certifying the proceeding as a class proceeding and, subject to subsection (5), appointing the person as representative plaintiff for the class.

[23] The test for certification is set out at s. 7(1) of the CPA as follows:

> **Certification by the court**
>
> 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.

[24] A party has five criteria that they must satisfy for certification:

1. the pleadings must disclose a cause of action;
2. there must be an identifiable class;
3. the representative must be appropriate;
4. there must be a common issue; and
5. a class action must be the preferable procedure.

[25] The class representative must establish an evidentiary basis for the certification. As Rothstein, J. said, for the court, in *Pro-Sys Consultants v Microsoft Corp*, 2013 SCC 57, at para 100:

> [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, 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).

[26] In *Murray v Capital District Health Authority*, 2016 NSSC 141, affirmed, 2017 NSCA 29, ("Murray (2016)") the Representative Plaintiff moved to add the Province as a defendant after information surfaced that the Province had acknowledged responsibility for harm that had previously been attributed to the Defendant, Capital District Health Authority. Although the circumstances are different, Justice Boudreau provided a thorough overview of the caselaw and principles relating to certification of class actions. She noted that section 7(1) of the CPA is not discretionary. It provides that certification must be ordered when five factors are made out to the satisfaction of the Court (para. 26). At paras 27 and 29, Boudreau, J. went on to comment:

> [27] It has often been said that the test for class certification is not meant to be an onerous threshold. Each of the criteria noted in s. 7(1) of the CPA (with the exception of s. 7(1)(a) which is to be made out on the pleadings alone), is to be made out by showing "some basis in fact" on the evidence. (*Taylor v. Wright Medical Technology Canada Ltd*., 2014 NSSC 89 (N.S. S.C.); *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 (B.C. C.A.)).
>
> …
>
> [29] Class action legislation must be given a "large and liberal interpretation" to ensure that its goals are met (*Anderson v. Canada (Attorney General*), 2010 NLCA 106 (N.L. T.D.); *Hollick, supra*). I quote again, as I did in my original certification decision, from the New Brunswick Court of Appeal *Gay v. Regional Health Authority* 7, 2014 NBCA 10 (N.B. C.A.):
>
> > 7 The present appeal raises the usual threshold issue, which is whether, having regard to the accepted standards of review, the motion judge committed reversible error in dismissing the motion for certification. The appellants contend he did and for the reasons that follow, we respectfully agree and conclude certification order ought to have been granted. Bluntly put, our view is that, if certification is not appropriate in a case such as the

> present one, informed observers might be forgiven for wondering if the *Class Proceedings Act* is not merely a trompe l'oeil in terms of access to justice for innocent victims of systemic failures whose harm and expenses are relatively modest (see *AIC Limited*, paras. 22 - 34). There will always be an argument against certification. However, no objection can be rooted in the substantial merits of the action, and, ultimately, the question to be resolved is whether any arguable procedural objection should overwhelm the case in favor of collective relief. Where, as here, there is some basis in fact for the conclusion that each of the statutory conditions for certification has been met, denial of certification cannot be upheld on the basis of judicial discretion. After all, s. 6(1) of the *Class Proceedings Act* is unambiguous; the court must certify if the statutory conditions are met. At any rate, fear of the unfamiliar is no reason for refusing certification.

[27] Each element of the certification test in section 7(1) of the CPA must be given a broad and liberal interpretation.

[28] The Supreme Court of Canada in *Hollick v. Toronto (City), 2001 SCC 68* affirmed that class proceedings legislation should be afforded a broad and liberal interpretation and should be construed generously. An overly restrictive approach should be avoided. McLachlin, CJC, as she was then, highlighted that the certification stage is not meant to be a test of the merits of the action, but rather an inquiry into whether a class action is the best form for the action proceed.

[29] Recently, the Nova Scotia Court of Appeal referred to the burden on the plaintiff and the preferability requirement in *Organigram Holdings Inc. v. Downton*, 2020 NSCA 38, where the Court stated:

> 124 When determining whether a class proceeding would be preferable, the Court has to consider the factors described in 7(2) of the Act …
>
> 125 In *AIC Limited v. Fischer*, 2013 SCC 69, the Supreme Court of Canada described the preferability burden on a plaintiff:
>
> > 48 The party seeking certification of a class action bears the burden of showing some basis in fact for every certification criterion: *Hollick*, at para. 25. In the context of the preferability requirement, this requires the representative plaintiff to show (1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim, and (2) that it would be preferable to any other reasonably available means of resolving the class members' claims: *Hollick*, at paras. 28 and 31. A defendant can lead evidence "to rebut the inference of some basis in fact raised by the plaintiff's evidence": M. Cullity, "Certification in Class Proceedings - The Curious Requirement of 'Some Basis in Fact'" (2011), 51 Can. Bus. L.J. 407, at p. 417 … [bolding added by NSCA]

> . . .
>
> 127 Preferability is determined by considering the three goals of class actions: access to justice, judicial economy, and behaviour modification. The importance of the common issues must be considered with respect to the claim as a whole, including the individual issues (*Hollick v. Toronto (City)*, 2001 SCC 68 at ¶27-28; *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at ¶69 cited in *MacQueen* at ¶176).
>
> 128 While class action preferability is not defeated by the presence of substantial individual issues, the common issues must not be overwhelmed or subsumed by the individual issues. [emphasis added]

[30] It is against this backdrop of case authority that I find the evidentiary basis is satisfactory and this matter should be certified. In fact, counsel at the hearing did not advance any real argument to the contrary. The HRM and HRWC agreed that the matter should be certified and advanced arguments only in relation to the common issues.

Cause of Action

[31] The Plaintiffs assert that the Defendants are liable to the Class Members in negligence or gross negligence and that the Building Owner is liable to them in breach of contract. Additionally, the Plaintiffs say the Building Owner or Northview are liable for failing in their duties as bailees for the Class Members.

[32] Section 7(1)(a) of the CPA requires that an assessment of whether a cause of action is disclosed be made strictly on the basis of the pleadings, assuming all facts pleaded to be true.

[33] In *Canada (Attorney General) v. MacQueen*., 2013 NSCA 143 ("*MacQueen*"), the Nova Scotia Court of Appeal confirmed that the CPA is procedural, not substantive, legislation, and that the test under 7(1)(a) is not onerous. Pleadings are adequate provided that it is not "plain and obvious" that the cause of action will fail (para 53). The Court said at para 54:

> [Pleadings] must be read generously to allow for inadequacies owing to drafting frailties and the respondents' lack of access to documents and discovery…

[34] *MacQueen* indicates that a generous reading of the pleadings will not overcome pleaded facts inconsistent with the underlying cause of action or important factual omissions. However, the Defendants have raised no concerns regarding the facts pleaded at this stage.

[35] The Supreme Court of Canada in *Hunt v Carey Canada Inc*., [1990] 2 S.C.R. 959, in determining whether portions of a plaintiff's claim should be struck, discussed the "plain and obvious" test:

> 36 … assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in R. 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under R. 19(24)(a).

[36] The case law is clear that the test for whether pleadings disclose a cause of action is a low standard. In the present case, the Plaintiffs intend to demonstrate, that the negligence of each of the Defendants, in whole or in part, contributed to the fire and resulting damages at issue in these proceedings.

[37] None of the named Defendants have contended that the pleading fails to meet this test. It appears to be conceded that the pleading discloses a cause of action. The Court accepts that the pleading does meet this low standard or low threshold. The pleading is sufficient.

Identifiable Class

[38] The Plaintiffs submit the Class to be defined as one General Class and four Sub Classes. The following is the proposal:

1. General Class: All residents and occupants of the Building, including the following General Class and Sub Classes and their insurers where applicable, who suffered damage to property resulting from the fire on May 19, 2018, excepting the late Ms. Wieslawa "Visha" Dratwa and her estate.
2. Sub Class A: Individuals occupying and/or present in units at the Building at the time of the fire on May 19, 2018, but not named on a lease.
3. Sub Class B: Individuals occupying and/or present in units at the Building on May 19, 2018, who suffered trauma as a consequence of the fire such that they received/are receiving medical treatment in respect to the same.

4. Sub Class C: Individuals occupying and/or present in units at the Building at the time of the fire on May 19, 2018, who did not have any form of tenant insurance in place at the material time.

5. Sub Class D: Individuals occupying and/or present in units at the Building at the time of the fire on May 19, 2018, and who suffered a loss of property after the fire which was in the care and custody of the Property Management Company and/or the Defendant Building Owner.

[39] The following principles of the requirement of an identifiable class are noted at paragraph 45 of *Murray v Capital District Health Authority*, 2015 NSSC 61[1]:

> (a) membership in the class should be determined by objective criteria that do not depend on the outcome of any substantial issue in the litigation;
>
> (b) the class definition should bear a rational relationship to the common issues;
>
> (c) the class must be bounded and not unlimited membership;
>
> (d) it is not necessary to identify every, or even most of the Class Members at the certification stage;
>
> (e) a proper class definition does not need to include only those persons whose claims will be successful;
>
> (f) all Class Members need not have an equivalent likelihood of success. The defining aspect of Class Membership is an interest in the resolution of the proposed common issues;
>
> (g) the class definition is the group to be bound by the result, including to the extent the claims fail.

[40] To date, there are approximately sixty former residents and guests who have agreed in writing to be part of the class action sought to be certified. There may be additional class members who have not yet come forward. The Plaintiffs have registered the class action with the National Class Action Database and are prepared to follow any further notice procedures put in place through the certification process.

[41] Membership in the proposed class definition will be relatively easy to determine. It is a discrete class, of limited membership, determined by objective criteria. Class membership is not dependent on any outcome.

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[1] An earlier decision by Justice Boudreau in the same matter that was the subject of her decision in 2016 NSSC 141.

[42] Any individuals that fall within the definition of the class, and wish to be excluded, may opt out of the class proceeding according to the terms as determined by this Court.

[43] Again there has been no argument advanced by the Defendants that there is no identifiable class. There is clearly an identifiable class of more than two individuals as required by the *Act* and developed case law.

Common Issues

[44] The real issue for this motion is whether there are common issues that allow this class action to be certified. The Plaintiffs submitted proposed common issues. I have concluded that, while the Plaintiffs' articulation of common issues has some merit, there are some problems with their articulated common issues.

[45] The CPA defines "common issues" in section 2(e) as:

1. common but not necessarily identical issues of fact, or
2. common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[46] *Murray* (2016*)* provides additional guidance on the topic of common issues in class proceedings. At paragraph 50 Justice Boudreau noted that:

> [50] The common issues requirement is also subject to the same low threshold as the other requirements, that is "some basis in fact" to support its finding. Our Court of Appeal (In *MacQueen v. Sydney Steel Corp.,* 2013 NSCA 143 (N.S. C.A.)) recently approved of a list of legal principles to consider when assessing whether common issues exist, and if so, what they are:
>
> > [123] The legal principles relating to common issues were summarized in *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 at p. 81 as follows:
> >
> > > [81] There are a number of legal principles concerning the common issues requirement in s. 5 (1) (c) that can be discerned from the case law. Strathy J. provided helpful summary of these principles in *Singer v. Schering-Plough Canada Inc.* 2010 ONSC 42, 87 C.P.C. (6th) 276. Aside from the requirement just described that there must be a basis in the evidence to establish the existence of the common issues, the legal principles concerning the common issues requirement are described by Strathy J. in Singer, at para. 140, are as follows:

The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centers Inc. v. Dutton* 2001 SCC 46, [2001] S.C.R. 534 at para. 39.

An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud*, at para. 53.

There must be a rational relationship between the class identified by the plaintiff and the proposed common issues: *Cloud*, at para. 48.

The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim*: Hollick*, at para. 18.

A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class: *Harrington v. Dow Corning Corp*. [1996] B.C.J. No. 734, …, aff'd 2000 BCCA 605, leave to appeal to SCC ref'd [2001] S.C.C.A. No. 21.

With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff's be capable of extrapolation, in the same manner, to each member of the class: *Dutton*, at para. 40, *Ernewein v. General Motors of Canada Ltd*., 2005 BCCA 540… at para. 32, *Merck Frosst Canada Ltd. v. Wuttunee* 2009 SKCA 43, .. (C.A.), at paras. 145 - 46 and 160.

A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant: *Williams v. Mutual life Assurance Co. of Canada* (2000) 51 O.R. (3d) 54, at para. 39, aff'd (2001) 17 C.P.C. (5th) 103 (Div. Ct.), aff'd [2003] O.J. No. 1160… (C.A.); Fehringer v. Sun Media Corp (2002) 27 C.P.C. (5th) 155 (S.C.J.), aff'd (2003) 39 C.P.C. (5th) 151 (Div. Ct.).

Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis: *Chadha v. Bayer Inc*. 2003 CanLII 35843 (C.A.), at para. 52, leave to appeal dismissed [2003] S.C.C.A. No. 106, and Pro-Sys Consultants Ltd. v. Infineon Technologies AG, 2008 BCSC 575, at para. 139.

> Common issues should not be framed in overly broad terms: "it would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class-action could only make the preceding less fair and less efficient": *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, at para. 29.

[47] The Plaintiffs submit that there is "some basis in fact" to support a finding that there are common issues amongst the class members and that there is a clear and rational relationship between the Class Members and the proposed common issues. While counsel has argued the members of the class are of modest means, there was no evidence to support that contention. The affidavits indicate that a fire occurred and the class members suffered damages as a result. Some have claimed personal injury or, more specifically psychological injury, monetary damages, or both.

[48] The first Defendants suggested that there were no common issues established because individual findings of fact would be required for each individual claimant, relying on *MacQueen*.

[49] The first Defendants also argue that the standard form lease, and the requirement for the tenants to obtain fire insurance, raises an individualized, liability-related issue concerning a covenant to insure and an assumption of risk in relation to a fire loss. They say that because of this standard lease and, in particular, Part 13 of that lease, each tenant may be barred from suing for fire-related losses. The Defendants argue that this necessitates separate and individual trials where the following issues are dealt with:

> *What was communicated to each tenant by 81PL (or its agent) with regard to the obligation to purchase tenant insurance?*
>
> *What was the understanding of each tenant with regard to the issue of tenant insurance?*
>
> *If the tenant purchased tenant insurance covering the period May 2018, what is the legal impact on the tenant's ability to sue 81PL for fire-related damages?*
>
> *If the tenant held such insurance, what is the legal impact on the tenant's ability to sue MetCap for fire-related damages?*

If the tenant held such insurance, what is the legal impact on the insurer's ability to prosecute a subrogated claim against 81PL or MetCap?

If the tenant did not hold such insurance, what is the legal impact on the tenant's ability to sue 81PL or MetCap for fire-related damages?

Whether or not the host tenant held insurance, what is the legal impact of Part 13 of the lease on the ability of a guest (i.e. a Subclass A plaintiff) to sue 81PL or MetCap for fire-related losses?

[50] In actuality, the only individualized issues are the first two questions. The rest are common issues that apply to that whole tenant class.

[51] The first Defendants argue that s. 7(d)'s requirement for a class proceeding to be the preferable procedure is the real issue facing the Court. They argue that this case will break down into individual proceedings. Counsel also suggested there be a pre-qualification procedure before certification be considered. It was suggested that the "covenant to insure" issue relating to tenants and the standard lease be considered and decided first. However, no such motion was made in advance of this second certification motion.

[52] Counsel for the Defendants argued that the Supreme Court, in an earlier decision, has said this is an individualized assessment. He conceded he had not put this case before the Court and could not name the case at the hearing. He conceded in argument that there is a common issue of whether the lease on its face, requires the tenant to obtain fire insurance to cover property and psychological injuries.

[53] In argument, counsel conceded that the tenants who are signatories to the lease have a common issue with regards to the covenant to insure. The argument was only in relation to the timing of certification, and ultimately he conceded that he could have this issue dealt with first, before the common issues trial.

[54] The certification stage is the first stage or given priority over other motions while motions in advance are allowed *albeit* in limited circumstances. (*Baxter v. Canada (Attorney General)* ,[2005] O.J. No. 2165.

[55] How and when the "covenant to insure" issues should be adjudicated must be addressed in a case management conference with the parties. Northview proposed the following common issue:

1. Does the wording of the standard form lease render irrelevant whether the tenant insurance box is ticked if the landlord was negligent?
2. Is it relevant whether the tenant actually contracted for insurance, and what that insurance actually provided?

[56] Northview suggested at the hearing that these questions would advance the litigation. The Plaintiffs, at the hearing, agreed that these common issues should be dealt with before the other common issues.

[57] The HRM and HRWC objection to certification relates to the proposed common issues as per s. 7(1)(c), with their position summarized as follows:

1. Proposed common issues relating to duty of care, standard of care and punitive damages need to be further refined; and
2. Proposed common issues relating to damages are inappropriate for certification and/or lack the necessary evidentiary basis required for certification.

[58] The Common Issues proposed by the Plaintiffs are:

(a) Did any or all of the Defendants owe a common law duty of care to the General Class Members?

(b) If a common law duty of care is found to apply to any of the Defendants, did that/those Defendant(s) breach the corresponding standard of care?

(c) Were any or all of the Defendants negligent and/or grossly negligent, and did that negligence or gross negligence cause or contribute to the injuries and/or losses of the General Class Members?

(d) Did the Defendant Building Owner and/or Northview owe a statutory duty of care to the General Class Members by virtue of the *Occupiers' Liability Act*, S.N.S. 1996, c. 27, or otherwise?

(e) Did either or both the Defendant Building Owner and/or Northview breach its/their respective statutory duties owed to the General Class Members under the *Occupiers' Liability Act* or otherwise?

(f) If it is found that either or both the Defendant Building Owner and/or Northview breached their respective statutory duties to the General Class Members, did that breach cause or contribute to the injuries and/or losses of the General Class Members?

(g) Did the Defendant Building Owner and Northview breach their contractual obligations to the General Class Members?

(h) If it is found that either or both the Defendant Building Owner and/or Northview breached their respective contractual obligations to the General Class Members, did that breach cause or contribute to the injuries and/or losses of the General Class Members?

(i) To what extent, if any, are some or all of the Defendants liable for the general damages suffered by members of the General Class?

(j) To what extent, if any, are some or all of the Defendants liable for the special damages suffered by members of the General Class?

(k) Should any or all of the Defendants pay punitive damages? Should punitive or aggravated damages be paid? In what amount should punitive or aggravated damages be paid?

[59] The common issues related to each Sub Class are as follows:

(l) With respect to Sub Class A, individuals occupying and/or present in units at the time of the fire but not named on a lease, was there a verbal or implied contract with the Defendant Building Owner and/or Northview which took the place of a lease?

(m) If the answer to the above question is yes, did the Defendant Building Owner and/or Northview breach their respective contractual obligations to Sub Class A Members?

(n) If it is found that the Defendant Building Owner and/or Northview breached their respective contractual obligations to Sub Class A Members, did that breach cause or contribute to their injuries and / or losses?

(o) With respect to Sub Class B, individuals occupying and/or present in units at the time of the fire who suffered trauma as a consequence of the fire, did the negligence or gross negligence of the Defendants, if any, materially cause or contribute to the injuries?

(p) With respect to Sub Class C, individuals occupying and/or present in units at the time of the fire who did not have tenant insurance at the time, does a lack of insurance alter the liability or contractual obligations of the Defendant Building Owner and/or Northview?

(q) With respect to Sub Class D, individuals occupying and/or present in units at the time of the fire who suffered a loss of property after the Fire while the property remained in the Building, did the Defendant Building Owner or Defendant Northview breach obligations to the Sub Class Members in acting as bailees for the property?

(r) To what extent, if any, are some or all of the Defendants liable for the damages suffered by each member of the Sub Classes in addition to, or instead of damages awarded to each General Class Member?

[60] The Plaintiffs concede that the determination of individual damages would remain to be decided after the hearing on the common issues. However, that is not a reason to deny certification as the case law in *Murray* (2016), confirms. An issue can be a common issue even if it makes up a small portion of the overall question of liability, and "even though many individual issues remain to be decided after its resolution."

[61] The Plaintiffs submit that a determination of the common issues as noted above would resolve a substantial portion of the question of liability and would move the litigation forward.

[62] The HRM and HRWC submit that issues relating to duty of care and standard of care could be appropriate for certification, but are stated too broadly and require refining. They say common issues related to causation and quantum of damages are not appropriate for certification on the basis these items require individual assessments and are not common to all class members.

[63] Two cases out of Ontario provide guidance on the framing of common issues in a class action arising from a fire loss: *Carillo v Vinen Atlantic S.A.*, 2014 ONSC 5269, and *Blair v Toronto Community Housing Corp*, 2011 ONSC 4395. Both of these actions were certified.

[64] *Blair v Toronto Community Housing Corp* , is similar to the current factual matrix before the Court. Former tenants of an apartment building in Toronto suffered property damage and emotional distress as a result of a September 2010 fire that appeared to have been fueled by a tenant who hoarded paper. The main challenges to certification related to a previous compensation plan and the proposed representative plaintiff. Eight common issues were certified, seven of which related to duty of care/standard of care and one to punitive damages.

[65] *Carillo v Vinen Atlantic S.A.* is also similar to the current matter. Former residents of an apartment building in Toronto suffered damage as a result of a fire in March 2009. The plaintiff brought an action against the building owner, management company, superintendent, property manager, as well as Toronto Hydro, as the fire appeared to have started in the electrical room where Toronto Hydro had installed smart meters. Toronto Hydro opposed certification mainly on the basis that there was no properly pleaded negligence claim against it (no proper cause of action). Justice Perell disagreed and certified the action. All the proposed common issues addressing duty of care and standard of care were certified. Two questions concerning aggregate damages and costs were found not appropriate for certification.

[66] Considerable guidance can be taken from these two cases when determining the appropriateness of certifying the proposed common issues. Common issues in the present matter are very similar and the common questions in this case should resemble the questions aptly framed by Justice Perell in *Blair* , and *Carillo,*.

[67] Further, the Court in *Singer v. Schering-Plough Canada*, 2010 ONSC 42, said at para 140:

> …a common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for or against the class.

[68] In the present case, the determination of the first two elements of the tort of negligence, being duty of care and standard of care. will certainly advance the litigation. In fact, if either of the first two elements fails, the litigation will be at an end.

[69] The Court in *MacQueen* referred to the comment by the Supreme Court of Canada in *Western Canadian Shopping Centers Inc. v Dutton,*at para 39, cited in *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, that the underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis . Certainly, the first two elements of negligence are common issues amongst the Class Members:

1. Did any or all of the Defendants owe a common law duty of care to the General Class Members?
2. If a common law duty of care is found for any of the Defendants, did that / those Defendant(s) breach the corresponding standard of care?

[70] If the above elements were decided in the affirmative, it would prevent the duplication of any fact-finding that would naturally occur if all the Class Members were to proceed on an individual basis.

[71] Finally, in *Murray* (2016) the Court commented at para 68:

> It is acknowledged that class actions can evolve as matters proceed. This is appropriate and, in my view, a fairly necessary part of the process. Courts have held that within a class action proceeding, a case management judge can decide to re-state the common issues with greater particularity (*Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (Ont. C.A.)). Therefore, I am open to further discussion about the common issues as they have been presently framed, and open to continued debate about modifications.

[72] The Plaintiffs acknowledge that discovery and disclosure are pending, and additional information may be revealed through those processes. The common issues as they are stated within this motion are preliminary and may be revisited as necessary throughout the litigation.

Common Issues Relating to Duty of Care and Standard of Care

[73] Proposed common issues "a", "b", and "c" address duty of care and standard of care in relation to all Defendants:

> Did any or all the Defendants owe a common law duty of care to the General Class Members?
>
> If a common law duty of care is found to apply to any of the Defendants, did that/those Defendant(s) breach the corresponding standard of care?
>
> Were any or all the Defendants negligent and/or grossly negligent, and did that negligence or gross negligence cause or contribute to the injuries and/or losses of the General Class Members?

[74] The HRM and HRWC Defendants agree that determination of duty of care and standard of care will advance the litigation for or against the Class. However, they argue these proposed common issues are presently framed in overly broad terms. The concern with framing issues too broadly was discussed by Justice Boudreau in *Murray* (2016)at para 50:

> Common issues should not be framed in overly broad terms: "it would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had

> initially been certified as a class-action could only make the preceding less fair and less efficient": *Rumley v British Columbia*, 2001 SCC 69 [2001] 3 S.C.R. 184, at para. 29.

[75] Taking guidance from *Blair, supra*, and *Carillo, supra*, the HRM and HRWC argue that common issue "a" ought to be refined to address duty of care in relation to each of the allegations in the pleadings. For example:

> Did the Defendant HRM owe a duty of care to the Class Members to regularly inspect and test or cause the Building Owner to regularly inspect and test the Building's fire safety system to identify any deficiencies and ensure its operation?
>
> Did the Defendant HRM owe a duty of care to the Class Members to warn them of unsafe or hazardous conditions with respect to the Building's premises that the Defendant was aware of or ought to have known of?
>
> Did the Defendant HRM owe a duty of care to Class Members to require the Building Owner or its Agent to eliminate unsafe conditions or other threats to occupant safety?
>
> Did the Defendant HRWC owe a duty of care to Class Members to exercise all reasonable care, skill, diligence, and competence in maintaining fire hydrants and water supply within its jurisdiction?

[76] The HRM and HRWC Defendants submit that before proposed common issue "b" can ask if the standard of care was breached, there ought to first be a common issue in relation to each Defendant that asks, "If a duty of care was owed, what was the appropriate standard of care?" A determination of whether negligence or gross negligence is the appropriate standard of care is required in relation to allegations against the HRM and HRWC Defendants pursuant to s. 310 of the *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39; s. 26(a)(ii) of the *Halifax Regional Water Commission Act*, S.N.S. 2007, c 55; and s. 300 of the *Municipal Government Act*, S.N.S. 1998, c 18.

[77] After "b" asks whether the corresponding standard of care was breached, HRM and HRWC submit, there ought to be a question that asks "When and how was the standard of care breached"?

[78] As currently phrased, proposed issue "c" is asking two distinct questions: whether there was negligence and/or gross negligence, and whether that negligence or gross negligence caused or contributed to the losses of the class members.

[79] Whether any of the Defendants were negligent or grossly negligent is a very broad question that in essence asks if there was a duty of care owed, what standard

of care applied, and if the standard of care was breached. These common issues should be refined as proposed by HRM and HRWC.

[80] As noted above HRM's objection to certification relates to the proposed common issues as per s. 7(1)(c) with its position as follows:

1. Proposed common issues relating to duty of care, standard of care and punitive damages need to be further refined; and
2. Proposed common issues relating to damages are inappropriate for certification and/or lack the necessary evidentiary basis required for certification.

[81] I agree. The common issues proposed by the Plaintiffs should be refined. I consider the following as proper common issues:

> Did the Defendant HRM owe a duty of care to the Class Members to regularly inspect and test or cause the Building Owner to regularly inspect and test the Building's fire safety system to identify any deficiencies and ensure its operation?
>
> Did the Defendant HRM owe a duty of care to the Class Members to warn them of unsafe or hazardous conditions with respect to the Building's premises that the Defendant was aware of or ought to have known of?
>
> Did the Defendant HRM owe a duty of care to Class Members to require the Building Owner or its Agent to eliminate unsafe conditions or other threats to occupant safety?
>
> Did the Defendant HRWC owe a duty of care to Class Members to exercise all reasonable care, skill, diligence, and competence in maintaining fire hydrants and water supply within its jurisdiction?

[82] Similar questions would be asked in relation to the other Defendants and constitute proper common issues.

Causation

[83] The next issue is whether there can be common issues framed with regard to causation. Whether any negligence caused or contributed to the losses of the class members is a question of causation, and is inappropriate for certification in this matter. In *Organigram, supra*, the Court did not certify as a common issue the

question of whether the pesticide caused health effects. Applying that analysis and application of legal principles to this set of circumstances, there is a real issue that some common issues relating to causation are not suitable for certification.

[84] The most significant concern raised by HRM and HRWC relates to causation. Inevitably this requires an individual quantification of the claims. This is not a common issue. There would need to be evidence to demonstrate a workable methodology for dealing with damages. As stated by Boudreau, J. in *Murray* (2016):

> [50]
>
> ….
>
> > With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff's be capable of extrapolation, in the same manner, to each member of the class: *Dutton,* at para. 40, *Ernewein v. General Motors of Canada Ltd*., 2005 BCCA 540… at para. 32, *Merck Frosst Canada Ltd. v. Wuttunee* 2009 SKCA 43… at paras. 145 – 46 and 160.
> >
> > A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant…
> >
> > Where questions relating to causation of damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis…

[85] The evidence has to be before me now, not after the matter is certified, to demonstrate a workable methodology. None was provided by the Plaintiffs.

[86] Proposed common issues "c", "f", "h", "n" and "o", as framed, are inappropriate for certification as they deal with causation in relation to damages ("c", "f" and "h" with respect to all class members and "n" and "o" specifically with respect to Sub Class A and B members):

> c. Were any or all the Defendants negligent and/or grossly negligent, and did that negligence or gross negligence cause or contribute to the injuries and/or losses of the General Class Members?
>
> f. If it is found that either or both the Defendant Building Owner and/or Northview breached their respective statutory duties to the General Class

> Members, did that breach cause or contribute to the injuries and/or losses of the General Class Members?
>
> h. If it is found that either or both the Defendant Building Owner and/or Northview breached their respective contractual obligations to the General Class Members, did that breach cause or contribute to the injuries and/or losses of the General Class Members?
>
> n. If it is found that the Defendant Building Owner and/or Northview breached their respective contractual obligations to Sub Class A Members, did that breach cause or contribute to their injuries and / or losses?
>
> o. With respect to Sub Class B, individuals occupying and/or present in units at the time of the fire who suffered trauma as a consequence of the fire, did the negligence or gross negligence of the Defendants, if any, materially cause or contribute to the injuries?

[87] Proposed common issues "i", "j" and "r" also deal with issues of causation in relation to damages suffered by each class member/subclass member:

> i. To what extent, if any, are some or all the Defendants liable for the general damages suffered by members of the General Class?
>
> j.. To what extent, if any, are some or all the Defendants liable for the special damages suffered by members of the General Class?
>
> r. To what extent, if any, are some or all the Defendants liable for the damages suffered by each member of the Sub Classes in addition to, or instead of damages awarded to each General Class Member?

[88] I accept these are not common issues appropriate for certification.

[89] As noted at para 55 of the Plaintiffs' brief, the Supreme Court of Canada has indicated that "the underlying foundation of a common issue is whether its resolution will avoid duplication of fact finding or legal analysis" *Dutton, supra* at para 39, as paraphrased in *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443.

[90] As Justice Boudreau noted at para 50 in *Murray* (2016), common issues relating to causation of damages must be supported with evidence that demonstrates a workable methodology for determining such issues. That is, in order to determine whether there is "some basis in fact" for the loss-related common issues, "some assurance is required that the questions are capable of resolution on a common basis" (*Pro-Sys Consultants Ltd v Microsoft Corp, supra*, at para 114).

[91] This may require expert evidence to show that the existence of the loss is related to the causes of action and to the class. The Court in *Pro-Sys Consultants* said:

> [113] In addition to the common issues relating to scope and existence of the causes of action pleaded, the remaining common issues certified by Myers J. relate to the alleged loss suffered by the class members and as to whether damages can be calculated on an aggregate basis. The loss-related common issues, that is to say the proposed common issues that ask whether loss to the class members can be established on a class-wide basis, require the use of expert evidence in order for commonality to be established. The standard upon which that evidence should be assessed is contested and I turn to it first below. A question was also raised regarding whether the aggregate damages provision can be used to establish liability. I also address this below.

[92] In *Pro-Sys Consultants* an indirect purchaser class action, the Supreme Court of Canada described the requirement for expert evidence (paras 114-126), noting the following with respect to the strength of evidence required:

> [118] In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.

[93] The importance of first establishing that the loss is common to the class is highlighted by the Ontario Court of Appeal decision in *Chadha v Bayer Inc*., (2003) 63 OR (3d) 22, in overturning the motion judge's decision to certify liability issues as common:

> [52] In my view, the motion judge erred in finding that liability could be proved as a common issue in this case. The evidence presented by the appellants on the motion does not satisfy the requirement prescribed by the Supreme Court in *Hollick* of providing sufficient evidence to support certification. The evidence of the appellants' expert assumes the pass-through of the illegal price increase, but does not suggest a methodology for proving it or for dealing with the variables that affect the end price of real property at any particular point in time. The motion judge focused on the expert's opinion that the loss could be measured, rather than on how any such loss could first be established on a class-wide basis.

[94] No evidence, expert or otherwise, has been tendered to demonstrate any basis in fact for finding that there is a common loss to Class Members, nor for a working methodology to prove it or address any variables. While some or all of the Defendants' alleged actions or inactions could be found to be capable of causing injury and/or property damage generally, whether this fire caused the damages claimed by each Class Member is dependent upon findings of fact to be made with respect to each individual claimant.

[95] If it is found that HRM is liable in gross negligence for failing to maintain the hydrants in good working condition, then it must be determined whether the inability to access water increased the duration of the fire, and if so, if the increased duration of the fire caused or contributed to the damages suffered by each individual Class Member.

[96] It is entirely possible that one or more Class Members located at one side of the building would have suffered their losses regardless of the duration of the fire, while other Class Members in a different part of the building would not have suffered their losses to the same extent or at all if the fire had been extinguished sooner. This necessarily requires an individual assessment of each Class Member's evidence on causation and damages. There has been no evidence tendered to establish that there is a common loss, nor a working methodology for proving it on a class-wide basis. As such, issues relating to causation for damages are inappropriate for certification.

[97] In the circumstances, I cannot conclude that the Plaintiffs have satisfied me that there are common issues on causation. I refer to the principles set out by Strathy, J. in *Singer v. Schering-Plough Canada Inc.*, *supra*, at para 140, some of which I referred to above (citations omitted):

> The following general propositions, which are by no means exhaustive, are supported by the authorities:
>
> A: The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis…
>
> B: The common issue criterion is not a high legal hurdle, and an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution...
>
> C: There must be a basis in the evidence before the court to establish the existence of common issues... As Cullity J. stated in *Dumoulin v. Ontario*, at para. 27, the plaintiff is required to establish "a sufficient evidential basis for the existence of the common issues" in the sense that there is some factual basis for the claims made by the plaintiff and to which the common issues relate.

> D: In considering whether there are common issues, the court must have in mind the proposed identifiable class. There must be a rational relationship between the class identified by the Plaintiff and the proposed common issues…
>
> E: The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim…
>
> F: A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class…
>
> G: With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class…
>
> H: A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant…
>
> I: Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis…
>
> J: Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient"…

[98] There needs to be individual findings of fact which are inherent in causation of damages issues. The Plaintiffs confused damages with causation in their approach to the common issues question. Recently in *Robbins v. Bajwa*, 2020 NSSC 311, Chipman, J referred to well known precedents concerning causation:

> 127. …The parties acknowledge the Supreme Court of Canada's decision in *Snell v. Farrell* (1990), 72 D.L.R. (4th) 289 (S.C.C.) provides the foundation for the Court's causation analysis. In *Anderson*, Justice Bourgeois set forth the law on causation in detail at paras. 59 - 66, and I adopt her analysis.
>
> 128 Later in her decision, Justice Bourgeois had this to say about causation:
>
> > 288 While the burden rests upon the plaintiff to establish causation, often, a defendant will elicit evidence to undermine the plaintiff's case, including putting forward alternate theories of causation. In the present case, neither

> party has elicited direct evidence which would establish with medical certainty the cause of Ms. Anderson's stroke. To accept any of the theories of causation advanced, the Court will, by necessity, need to infer causation from the evidence presented. This is not an uncommon situation in the context of a medical malpractice action.

129 In coming to her ultimate disposition, Bourgeois J. opined:

> 306 In determining causation, the Court finds it appropriate to apply the "but for" test. A robust and pragmatic view of all of the evidence must be taken, given the nature of this case. Given the lack of decisive medical evidence as to causation, the Court must rely upon inferences arising from the evidence accepted. I find that it is probable that but for the arterial punctures on April 5, 1997, Ms. Anderson would not have suffered the stroke on April 6. I find it probable that the artery punctured was the vertebral artery, which prompted the development of a clot. This clot embolized, and became lodged in the base of the brain. Because of Ms. Anderson's abnormal Circle of Willis, she did not have adequate compensatory blood flow to minimize or prevent the resulting damage to the areas of her brain.

130 At the Court of Appeal, Justice Bourgeois in *Ketler v. Nova Scotia (Attorney General)*, 2016 NSCA 64 (N.S. C.A.), noted at para. 30 that causation is a necessary element in a negligence action. She went on to discuss the legal test for causation, as recently articulated by the Supreme Court of Canada:

> 37 *Clements* is widely recognized as the most recent explanation of the test for causation in negligence actions. In *Ediger v. Johnston*, 2013 SCC 18, a medical malpractice claim, Justices Rothstein and Moldaver do not limit the applicability of the Court's earlier decision. They state:
>
> > 28 This Court recently summarized the legal test for causation in *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181. Causation is assessed using the "but for" test (*Clements*, at paras. 8 and 13; *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, at paras. 21-22). That is, the plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred (*Clements*, at para. 8). "Inherent in the phrase 'but for' is the requirement that the defendant's negligence was necessary to bring about the injury — in other words that the injury would not have occurred without the defendant's negligence" (para. 8 (emphasis deleted)).

131 In *Ediger (Guardian ad litem of) v. Johnston* [2013 CarswellBC 791 (S.C.C.)] (a case curiously omitted by counsel in their otherwise extensive books of authorities), a unanimous Supreme Court reviewed the legal test for causation (paras. 28, 29) and re-stated the application of the seminal case of *Snell v. Farrell*:

> 36 The Court of Appeal's reasons also suggest that it understood the trial judge to have improperly relied on *Snell v. Farrell*, ..., in order to draw an "inference of causation" (paras. 83-85). *Snell* stands for the proposition that the plaintiff in medical malpractice cases — as in any other case — assumes the burden of proving causation on a balance of the probabilities (pp. 329-30). Sopinka J. observed that this standard of proof does not require scientific certainty (*Snell*, at p. 328; *Clements*, at para. 9). The trier of fact may, upon weighing the evidence, draw an inference against a defendant who does not introduce sufficient evidence contrary to that which supports the plaintiff's theory of causation. In determining whether the defendant has introduced sufficient evidence, the trier of fact should take into account the relative position of each party to adduce evidence (Snell, at p. 330).

[99] The complications from attempts to certify causation as a common issue were discussed by Wood, J. (as he then was) in *Sweetland v. GlaxoSmithKline Inc*., 2016 NSSC 18, at para 58:

> Since certification is based upon the particular evidence and circumstances of each case it should not be surprising to find that general causation questions are not always certified as common issues. For example, in *Martin* the court refused to certify a common issue asking whether the medication in question caused “weight gain, diabetes and/or related metabolic disturbances”. The court’s first concern was that the phrase “metabolic disturbances” was unclear and not consistently used by the experts. The court also concluded that the general causation question lacked commonality for the following reasons:
>
> > 232 Common issue 1 is a general causation question. This means that if it was accepted as a common issue, an individual trial would be required to determine if Seroquel caused each class member to gain weight and/or develop diabetes. This common issue alone would not determine liability.
> >
> > 233 The plaintiffs have offered no evidence to show that this issue is capable of being assessed in common. It is not susceptible to a single answer at this abstract level. Asking in the abstract if Seroquel can cause weight gain and diabetes is only the beginning of the inquiry. There is a problem with a general causation question when there is no evidence that "compelling epidemiological or statistical evidence might be sufficient to establish individual causation or go a long way to doing so": *Merck Frosst Canada Ltd. v. Wuttunee*, [2009] S.J. No. 179 at para 144 (Sask. C.A.), leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 512 ("*Wuttunee*").
> >
> > 234 Adding to the difficulty is the fact that this is not a case where the drug is alleged to have caused a unique harm. In contrast, Seroquel is alleged to cause weight gain and diabetes. These are two conditions that are ubiquitous in society. The evidence that has been provided shows that this general

causation question is just the beginning of the inquiry and that its resolution is dependent upon individual findings of fact with respect to each claimant.

235 The plaintiffs' expert, Dr. Wirshing, states that there is "great variability in the degree to which different populations of patients are affected by the metabolic toxicity of Seroquel." When Dr. Wirshing was cross-examined he provided further evidence that there would be considerable difficulty managing this issue in common. He agreed that the population data shows that some patients taking Seroquel will gain weight, some will lose weight and others will experience no weight change. As a result, the population data will not assist in determining causation for the class and an individual inquiry is required.

236 In Dr. Barrett's report he also explains the inability to answer this common issue by relying on the population data. It is clear from the following evidence that this common issue cannot be assessed in common. He states as follows in section 5 of his report:

> o Population data is useful in providing an understanding for the risk factors that lead to diabetes and the relative magnitude of each risk factor. However, in determining whether or not Seroquel caused weight gain or DM in an individual patient it is not sufficient to simply examine population data. Population data cannot be translated to the issue of causation in the individual patient. This is underscored by the fact that diabetes and obesity are both common disorders in the Canadian population in the absence of Seroquel administration.
>
> o In order to determine individual causation the court does need to appreciate as necessary background and context the population risk factors described in the section on general causation. It is then necessary to identify all of the diabetes risk factors the individual has and consider the strength of each individual risk factor possessed by the individual in order to appreciate the overall diabetes risk for that individual. Only then can one address whether Seroquel as a possible single risk factor can reasonably be considered as causative in that individual. This process requires analysis of the medical records, psychiatric records, history of pharmaceutical use and life changes that are occurring in each individual.

237 The individuality of this issue is also apparent from the evidence of Dr. Chue. He states at page 31 of his report as follows:

> o In order to determine whether a drug such as Seroquel caused a specific "Heath Risk" to occur in a particular individual, an understanding is required of the prevalence, nature, etiology, and known or associated risk factors in the general population for each of the specific "Heath Risks".

> o With this understanding, one would then need to consider the individual's unique circumstances including their risk factors for that specific "Heath Risk". This will require a comprehensive analysis by specialists qualified in the medical fields applicable to the particular "Health Risk". This will entail a review for each individual of their full medical history including complete medication exposure history, family history and psychiatric history, and other relevant factors including age, ethnicity, lifestyle, and gender. This information would be obtained from medical and psychiatric records, and pharmacy records. Where there is incomplete information, further investigations and/or physical examination may be required.
>
> o Taking weight gain as an example, there is an epidemic of obesity in Canada with weight gain being an increasing problem in all strata of the general population. The population with mental illness is at greater risk of weight gain and obesity than the general population. Thus, a recorded weight change in an individual patient treated with Seroquel must be analyzed carefully taking into account the individual's specific risk factors and medical history in the context of the background population risk.
>
> 238 When the evidence dealing with diabetes is considered the individuality of the issue remains and we are led to the same conclusion: there is no evidence that this issue can be managed in common.

[100] The Plaintiffs provided no similar cases on their motion to support a finding that there is a common issue in relation to causation.

[101] The Plaintiffs' proposed common issues that include causation are as follows:

> (c) Were any or all of the Defendants negligent and/or grossly negligent, and did that negligence or gross negligence cause or contribute to the injuries and/or losses of the General Class Members?
>
> (f) If it is found that either or both the Defendant Building Owner and/or Northview breached their respective statutory duties to the General Class Members, did that breach cause or contribute to the injuries and/or losses of the General Class Members?
>
> (h) If it is found that either or both the Defendant Building Owner and/or Northview breached their respective contractual obligations to the General Class Members, did that breach cause or contribute to the injuries and/or losses of the General Class Members?

> (n) If it is found that the Defendant Building Owner and/or Northview breached their respective contractual obligations to Sub Class A Members, did that breach cause or contribute to their injuries and / or losses?
>
> (o) With respect to Sub Class B, individuals occupying and/or present in units at the time of the fire who suffered trauma as a consequence of the fire, did the negligence or gross negligence of the Defendants, if any, material cause or contribute to the injuries?

[102] The Court must not certify as common issues those dealing with cause or contribution to injuries. These are questions of individualized damage assessments. The Plaintiffs may be able to establish a failure concerning working hydrants and resultant delay, but individualized assessments would be needed with the application of those findings. At the hearing, the Plaintiffs agreed with this approach.

[103] The above questions are not appropriate for certification. In addition the following common issues as proposed by the Plaintiffs should not be certified in keeping with *Organigram, supra:*

> (i). To what extent, if any, are some or all of the Defendants liable for the general damages suffered by members of the General Class
>
> (j) To what extent, if any, are some or all of the Defendants liable for the special damages suffered by members of the General Class?
>
> (r) To what extent, if any, are some or all of the Defendants liable for the damages suffered by each member of the Sub Classes in addition to, or instead of damages awarded to each General Class Member?

[104] These proposed common issues relating to causation for personal injuries are not appropriate for certification.

[105] *Blair, supra* did not certify any issue that dealt with causation. There are good reasons for this. I will follow that precedent.

Punitive/Aggravated Damages

[106] Proposed common issue "k" asks the Court to award punitive or aggravated damages and if so, to determine the amount of damages:

> k. Should any or all the Defendants pay punitive damages? Should punitive or aggravated damages be paid? In what amount should punitive or aggravated damages be paid?

[107] Justice Perell addressed a similar proposed common issue about punitive damages in *Blair, supra*:

> [48] In my opinion, Ms. Blair's proposed question with respect to punitive damages is too broad and must be narrowed to focus on the question whether the Defendants' conduct would warrant an award of punitive damages.
>
> [49] For the reasons I expressed in *Robinson v. Medtronic Inc*., [2009] O.J. No. 4366 (S.C.J.), aff'd 2010 ONSC 3777 (CanLII), [2010] O.J. No. 3056 (Div. Ct.), a claim for punitive damages will not be suitable for a common issue when the court cannot make a rational assessment about the appropriateness of punitive damages until after individual assessments of the compensatory losses of class members has been completed. However, where the ultimate determination of the entitlement and quantification of punitive damages must be deferred until the conclusion of the individual trials, the question of whether the defendants' conduct was sufficiently reprehensible or high-handed to warrant punishment is capable of being determined as a common issue at the common issues trial: *Chalmers (Litigation guardian of) v. AMO Canada Co*., 2010 BCCA 560.

[108] Justice Perell refined the question concerning punitive damages as follows (paragraph 51):

> Was the Defendants' conduct with respect to the fire that occurred on September 24, 2010, sufficiently reprehensible or high-handed to warrant punishment by an award of punitive damages?

[109] Like the proposed common issue in *Blair,* the Plaintiffs' proposed common issue surrounding punitive/aggravated damages is too broad and must be narrowed to focus on whether the Defendants' conduct would warrant such an award. The amount of any punitive or aggravated damage award is not appropriate for a common issue and ought to be deferred until after individual assessments of the losses of each Plaintiff.

Bailee-Negligence Claims

[110] The first Defendants concede that Subclass D Plaintiffs involving the bailee-negligence claims can be certified as a class proceeding.

Challenge to the Litigation Plan

[111] HRM and HRWC argue that the litigation plan is not appropriate. I will address each of these arguments.

[112] First, the Plaintiffs contend that the Defendants should pay for the advertising necessary after certification. They did not provide authority supporting the suggestion that the Defendants have an obligation to pay for the advertising at this stage. Given this, the Plaintiffs agreed that this aspect of the litigation plan would be removed unless they were able to provide such authority. Any such authority should be provided within 30 days of the release of this decision, or this provision should be removed from the litigation plan.

[113] The Plaintiffs asked for the costs of an individual appointed to implement and to oversee the plan. This remains a cost to be borne by the Plaintiffs unless or until the case is resolved or determined in the Plaintiffs' favour.

[114] HRM and HRWC discussed a deadline for document disclosure. If the parties cannot reach agreement on this, they can seek direction from the Court.

[115] The Plaintiffs sought payment of the cost to disseminate the Notice. The cost inherent in proving their case remains their responsibility at this point. This should not be included in the litigation plan. The Plaintiffs agreed to this at the hearing.

Conclusion

[116] In some respects, some of the parties threw the problem of how to order this litigation at the Court to sort out on its own. HRM and HRWC proposed a workable solution. I agree to a large extent with their proposal.

[117] There are many advantages to certifying this action, given the factors have been met. Many claims standing alone would not be very substantial and without such a procedure might not provide access to the proposed litigants to advance claims. Access to justice demands that this matter be certified. The issue is what are the appropriate common issues. At the end of the hearing, I advised the parties that if I certified this action I would set forth the common issues I felt should be certified but would obtain some input and hear from counsel before I certified those restated common issues.

[118] This matter should be certified and there are common issues. However, I do not agree with all of the common issues as suggested by the Plaintiffs. I am open to additional submissions and potential modifications.

[119] The Plaintiffs did not think that HRM and HRWC's articulation of the common issues was appropriate. The Plaintiffs argue that it went into a level of

detail and specificity that was unnecessary. However, at the hearing, counsel conceded that if that level of detail is necessary at this stage, the common issues as articulated were appropriate.

[120] The Court has the ability to restate common issues proposed by the Plaintiffs, as stated by Boudreau J. in *Murray* (2016):

> [68] It is acknowledged that class actions can evolve as matters proceed. This is appropriate and, in my view, a fairly necessary part of the process. Courts have held that within a class action proceeding, a case management judge can decide to re-state the common issues with greater particularity (*Cloud v. Canada*, 2004 CanLII 45444 (ON CA), [2004] O.J. No. 4924). Therefore, I am open to further discussion about the common issues as they have been presently framed, and open to continued debate about modifications.

[121] The following are the common issues that seem appropriate in this matter. I will hear from counsel within the next thirty days of the release of this decision if they have submissions with respect to the wording and restatement of these questions before I certify them. I will accept written submissions. If the parties wish to also be heard, I will have them make this request.

[122] Common issues for the general class are as follows:

a. Did D.D. 81 Primrose Ltd. and Northview owe a duty of care to each person entering on the premises to ensure that each person entering was reasonably safe while on the premises?

b. Did D.D. 81 Primrose Ltd. and Northview owe a duty of care with respect to the condition of the premises, activities on the premises, and the conduct of third parties on the premises?

c. Did D.D. 81 Primrose Ltd. owe a duty of care to all class members to exercise care and skill to ensure safety as tenants or guests?

d. Did Northview owe a duty of care to all class members to exercise reasonable care and skill to ensure their safety as tenants or guests?

e. Did the Defendant HRM owe a duty of care to the Class Members to regularly inspect and test, or to cause the Building Owner to regularly inspect and test, the Building's fire safety system to identify any deficiencies and ensure its operation?

f. Did the Defendant HRM owe a duty of care to the Class Members to warn them of unsafe or hazardous conditions with respect to the Building's premises that the Defendant was aware of or ought to have known of?

g. Did the Defendant HRM owe a duty of care to Class Members to require the Building Owner or its Agent to eliminate unsafe conditions or other threats to occupant safety?

h. Did the Defendant HRWC owe a duty of care to Class Members to exercise all reasonable care, skill, diligence, and competence in maintaining fire hydrants and water supply within its jurisdiction?

i. In relation to the allegations against D.D. 81 Primrose Ltd., is negligence or gross negligence the appropriate standard of care?

j. In relation to the allegations against Northview is negligence or gross negligence the appropriate standard of care?

k. In relation to the allegations against the HRM and HRWC Defendants is negligence or gross negligence the appropriate standard of care pursuant to s. 310 of the *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39, s. 26(a)(ii) of the *Halifax Regional Water Commission Act*, S.N.S. 2007, c 55 and s. 300 of the *Municipal Government Act*, S.N.S. 1998, c 18

l. If a common law duty of care is found to apply to any of the Defendants, did that/those Defendant(s) breach the corresponding standard of care?

m. Did the Defendant Building Owner and/or Northview owe a statutory duty of care to the General Class Members by virtue of the *Occupiers Liability Act* or otherwise?

n. Did either or both the Defendant Building Owner and/or Northview breach its/their respective statutory duties owed to the General Class Members under *the Occupiers Liability Act* or otherwise?

o. Did the Defendant Building Owner and Northview breach their contractual obligations to the General Class Members?

p. Was the Defendants' conduct with respect to the fire that occurred on May 19, 2018, sufficiently reprehensible or high-handed to warrant punishment by an award of punitive damages?

[123] Common Issues Related to the Sub Classes are:

a. With respect to Sub Class A, individuals occupying and/or present in units at the time of the fire but not named on a lease, was there a verbal or implied contract with the Defendant Building Owner and/or Northview which took the place of a lease?

b. If the answer to the above question is yes, did the Defendant Building Owner and/or Northview breach their respective contractual obligations to Sub Class A Members?

c. With respect to Sub Class C, individuals occupying and/or present in units at the time of the fire who did not have tenant insurance at the time, does a lack of insurance alter the liability or contractual obligations of the Defendant Building Owner and/or Northview?

d. With respect to Sub Class D, individuals occupying and/or present in units at the time of the fire who suffered a loss of property after the fire while the property remained in the Building, did the Defendant Building Owner or Defendant Northview breach

obligations to the Sub Class Members in acting as bailees for the property?

[124] In addition, if costs can not be agreed to, I will hear from the parties.

Brothers, J.