IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Stubbington v. British Columbia (Child Welfare),* 2025 BCSC 839

Date: 20250505
Docket: S229843
Registry: Vancouver

Between:

Catherine Stubbington and Rena Knight and N.S. by his Litigation Guardian, The Public Guardian and Trustee of British Columbia

Plaintiffs

And

The Provincial Director of Child Welfare, His Majesty the King in the Right of the Province of British Columbia (Ministry of Child and Family Development)

Defendants

Before: The Honourable Justice Stephens

Reasons for Judgment
(Defendants' Pre-Certification Hearing Application to Strike Portions of the Plaintiffs' Affidavit Evidence and Two Expert Reports)

Counsel for the Plaintiffs:	J. Stanley G. van Ert I. Kordic E. Emery
Counsel for the Defendants:	N. Isaac J.L.M. Gleed
Place and Date of Hearing:	Vancouver, B.C. October 30, 2024 December 16, 2024
Place and Date of Judgment:	Vancouver, B.C. May 5, 2025

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Overview

[1] Before the certification hearing of this putative class action has taken place, the defendants apply[1] to strike some 24 paragraphs, or 58 portions of paragraphs, of five affidavits, as well as two expert reports, intended to be relied on by the plaintiffs in support of certification.

[2] The defendants object to these affidavit portions, and seek to strike them on this preliminary application, on the grounds that the impugned portions are unattributed hearsay, improper lay opinion, argument, or legal conclusions. The defendants also contend the plaintiffs' two expert reports are inadmissible.

[3] The defendants ask this court to decide these admissibility issues now, prior to the certification hearing, and strike them out.

[4] In these Reasons, I provide my views as to when I would strike out evidence before the certification hearing, and give my ruling on the admissibility objections. In my view, the court has a discretion as to whether to strike out evidence in advance of a certification application, and to decide what threshold should apply to an admissibility objection when doing so. On this application, I decide that I will determine an evidentiary objection, and strike out evidence, only if the evidence is clearly inadmissible (not arguable).

[5] For the reasons which follow, I find that some, but not all, of the impugned evidence shall be struck out preliminarily. However, much of the impugned affidavit evidence will not be struck out. The admissibility of the impugned evidence not struck may be revisited at the certification hearing itself. For a listing of the evidence which is and is not struck out, see the table at Schedule A.

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1 After the hearing of this notice of application, on January 10, 2025 this Court ordered that the notice of civil claim be further amended to add an additional plaintiff: *Stubbington v British Columbia (Director of Child Welfare)*, 2025 BCSC 237 at para 52.

Background: The Action Sought to be Certified

[6] In this proposed class action, the plaintiffs allege that the Ministry of Children and Family Development and its predecessor ministries (collectively, the "MCFD") have, since 1974, been, among other things, systemically negligent in failing to provide "Infants in Care" with the "Basic Rights of Childhood" ("BRC"), exposing those children to "Adverse Childhood Experiences" ("ACE"), resulting in compensable harm. The action also alleges breach of fiduciary duty, and of s .7 of the *Canadian Charter of Rights and Freedoms.*

[7] The plaintiffs' proposed class definition seeks to include British Columbia residents who were under the age of 19 and whose BRC were not met by the defendants and who sustained physical, sexual, social, emotional, psychological or psychiatric harm as a result of their BRC not being met while in the care of the MCFD from 1974 to the date of certification.

[8] The defendants describe the claim as consisting of "an all-encompassing challenge to the entire child welfare system in British Columbia as it has existed and evolved over a fifty-year period, alleging breaches of fiduciary duty, negligence, and breaches of rights under the *Canadian Charter of Rights and Freedoms*".

[9] The amended notice of civil claim advances allegations, including:

a) the defendants have "systematically failed" to provide all Infants in Care with the BRC;

b) as a result of failing to provide the BRC, Infants in Care were exposed to ACE; and

c) the defendants "knew or ought to have known" of these breaches as the result of "public inquiries, media reports, public complaints and internal reviews/audits by the defendants and their agents".

[10] The plaintiffs plead that the denial of BRC occurred "systemically" as the result of the following ten "systemic failures":

a) creating and allowing a culture to exist that accepted and normalized the failure to meet minimum expectations in providing the Basic Rights of Childhood to Infants in Care;

b) creating and allowing a culture to exist that fostered indifference to the need in providing the Basic Rights of Childhood to Infants in Care;

c) failing to adequately train, support and supervise social workers and other employees or agents in providing the Basic Rights of Childhood to Infants in Care;

d) failing to adequately select, screen, educate, train, monitor, review and audit foster parents to see that they were providing the Basic Rights of Childhood to Infants in Care;

e) failing to adequately arrange placements for Infants in Care to see that the were receiving the Basic Rights of Childhood;

f) failing to adequately review and audit social workers and other employees or agents who were able to engage in isolated acts of corruption and misappropriate and goods intended to provide the Basic Rights of Childhood to Infants in Care;

g) failing to respond appropriately to public inquiries, media reports, public complaints and internal audits indicating the Basic Rights of Childhood of Infants in Care were not being met;

h) creating, fostering and maintaining an environment that produced social worker disengagement from their responsibilities to provide Infants in Care with the Basic Rights of Childhood;

i) failing to discharge their duties and responsibilities under the Act and predecessor legislation;

j) failing to act in the best interests of Infants in Care; and

k) such further and other particulars as counsel may advise.

Background: The Impugned Evidence

[11] The impugned portions of affidavit and expert report evidence are extensive, and the affidavit excerpts are set out in the table at Schedule A to these Reasons. However, I provide here some excerpts from the impugned evidence.

Alkalay Affidavit #1

[12] Linoy Alkalay deposes she has “worked on the downtown east side of Vancouver since 2016 working to help those impacted by substance abuse and to promote harm reduction”. She deposes, at paras. 5–7, that she has worked with individuals at Carlile Youth Concurrent Disorders Centre (“Carlile”) and as a Youth

Care Worker and at Foundry BC ("Foundry") as an Intensive Case Manager, and that:

> Almost all these individuals were in the care of Ministry of Children and Family Development ("MCFD") at some point and almost all of them report being exposed to some form of abuse (physical, sexual, or emotional) and neglect while they were in the care of the MCFD.

[13] She deposes that reports of abuse or neglect are "extraordinarily consistent" and that her clients share "common characteristics", which she particularizes at para. 12, including:

> They are profoundly overwhelmed by issues of addiction and mental health such that that have little or no ability to purse matters beyond basic needs (food, housing, etc.) and they often struggle to pursue these basis needs.

Clancy Affidavit #1

[14] Angela Clancy is the Executive Director of the Family Support Institute of BC. She deposes, for example, that "the MCFD consistently fails to meet the medical and behavioral needs of children in its care with disabilities, by making decisions and/or ignoring advice and directions that is incongruent with what would be expected of a reasonable parent" (para. 7). Ms. Clancy further deposes having "observed reoccurring or systemic issues within the MCFD that cause harm to children and youth", including that "[s]ocial workers appear to have disengaged from their responsibilities to children in care" (para. 9(f)).

Richardson Affidavit #1

[15] Dr. Anamaria Richardson is a pediatrician and deposes that many of her patients are in the care of the MCFD. She deposes that, "[t]he MCFD routinely ignore my medical recommendations whereas parents routinely follow my medical recommendations" (para. 5), and that the "vast majority of my patients who are in the care of the MCFD have experienced harm as a result of the MCFD failing to follow my medical recommendations" (para. 7). She deposes having observed that most of her patients have experienced harm generally as a result of being in the care of the MCFD, which she particularizes at para. 7 as including, for example:

> My patients have been neglected in the care of the MCFD with, examples including leaving children in soiled diapers for prolonged periods of time, removing all objects from a room, not doing personal hygiene.

[16] She deposes that for the past seven years, she has "observed reoccurring or systemic issues within the MCFD that cause harm to infants in its care" (para. 8), including, for example, that "social workers ignore and fail to address legitimate medical issues raised about children in care" (para. 8(b)).

Friedlander Affidavit #1

[17] Dr. Robin Friedlander is a psychiatrist and deposes that some of his patients "are in the care of the [MCFD]". He deposes, for example, that "[t]he MCFD routinely ignores or fails to implement my medical recommendations respecting children who are in its care", and "there is a systemic emphasis on moving [children with complex behavioural issues] into care arrangements where they do not receive appropriate treatments" (paras. 4–5). He deposes that for the past 28 years he has "observed reoccurring or systemic issues within the MCFD that cause harm to children in its care" (para. 6), which he particularizes as, for example, "social workers are profoundly unwilling to follow and implement medical advice in respect of children in care".

Orsetti Affidavit #1

[18] Dan Orsetti is the Deputy Public Guardian and Trustee of British Columbia ("PGT"). He deposes, among other things, that the PGT is property guardian for several children who would be class members if the proceeding is certified with the current class definition, and that (at para. 6):

> The PGT is of the view that, for these clients, there is evidence in support of the claim alleged against the MCFD as plead in the Amended Notice of Civil Claim, and which merit a judicial determination.

[19] He further deposes that he is "aware of additional case files that were once with the PGT, and which would have met the same criterion as set out paragraph 6, but which are no longer active because the children have reached the age of 19" (para. 8). Mr. Orsetti deposes that "[t]he claims identified in paragraph 6 are complex

and often the damages are too modest for litigation to be viable from a cost benefit perspective" (para. 9) and that "the majority of claims identified in paragraph 6 are not viable as individual claims".

[20] He also deposes that, "[t]he PGT is of the view that the cases identified in paragraph 6 are viable in respect of the technical elements of negligence" (para. 10).

[21] Mr. Orsetti deposes that "[m]any of the cases identified in paragraph 6 share common features of what I characterize as systemic issues", which he summarizes as including, among other things, the "MCFD failure to meet the standard of care required of them pursuant to the CFCSA, including failing to adequately follow up and monitor children once they are in care to mitigate the risk of adverse childhood events being visited upon them" (para. 11(b)).

[22] He deposes that "[t]here is a very real concern within the office of the PGT that these children [over the age of majority] will not be able to pursue traditionally litigated claims as adults, where such claims are technically viable" (para. 12).

[23] Mr. Orsetti deposes, "[i]f this proceeding is certified, the PGT would support the use of a trauma informed resolution process to assess individual compensation and/or a reduction in the use of traditional litigation processes to evaluate individual claims" (para. 13), and further that "[i]f this case is certified, it would allow the cases I identified in paragraph 6, to be adjudicated and avoid the barriers created by the need to bring individual lawsuits" (para. 14).

Sullivan Report

[24] Dr. Richard Sullivan has prepared an expert report dated August 29, 2023 (the "Sullivan Report"). He is sought to be qualified "to give evidence about accepted standards of practice, comment on performance in relation to those accepted standards as well as factors that have impacted same, and the efforts that have been made for the purpose of improving the MCFD's performance including the outcomes of those efforts" (application response, para 52).

[25] One of his facts and assumptions is that “Canada has been signatory to the UN Convention on the Rights of the Child since 1991”.

[26] In his expert report, Dr. Sullivan answers questions put to him including: his “opinion on whether there were Systemic Failures within the MCFD or predecessor Ministries that have impacted the delivery of the BRC and which caused infants in care to be exposed to ACE”; and to “comment on when the MCFD became aware of any Systemic Failures you identify by referencing public inquiries, media reports, internal audits or other sources of information that were reasonably available to the MCFD”.

[27] One of his answers includes the statement that, “[b]udgets ultimately fall within the purview of the provincial treasury board and response to Ministerial requests may be contingent on the minister’s clout within cabinet”, and that “[the Minister’s] best hope may be that there is no bad news on their watch and they are able to move on at the next cabinet shuffle.”

[28] Dr. Sullivan states, among other things, “[i]t is not off-hand to say that the Ministry has always known of its short-comings” and that “[t]he Minister knew or should have known every time systemic problems were identified in public inquiries, internal audits and media coverage”.

[29] In the last paragraph of his report, he opines that “[i]gnorance of failure would not excuse the Province from dereliction in meeting its responsibility to protect its children from ACEs and the violation of their BRC”.

Douglas Report

[30] Dr. Janet Douglas has prepared an expert report dated July 24, 2023 (the “Douglas Report”). She is sought to be qualified “to give evidence on failures of the MCFD in relation to their policies, factors that affect those outcomes, the MCFD’s awareness of those outcomes, and efforts that have been made to address those outcomes including the consequences of those efforts” (application response, para 50).

[31] In her report, she answers questions put to her including: to "set out and explain your opinion on whether there were Systemic Failures within the MCFD or predecessor Ministries that have impacted the delivery of [BRC] and which caused infants in care to be exposed to [ACE]"; and to "comment on when the MCFD became aware of any Systemic Failures". She provides the opinion, among others, that have been "systemic failures within the MCFD and predecessor Ministries". Her report describes "multiple public inquiries, reports and media attention on the [MCFD] over the decades", and states that the "research and literature identified overarching systemic failures: Inadequate budget; inadequate staffing; unmanageable and frequent change within government, and lack of communication, collaboration, and meaningful consultation."

[32] The Douglas Report states, among other things, that "[t]he Ministry knew, or ought to have known, about these failures as referenced in inquiries, reports, research literature, the media, and the Ministry's own *Child and Family Practice Reviews* and *Child Welfare Practice Audits*."

The Parties' Positions

[33] The defendants contend that the impugned portions of the affidavits are inadmissible. The Province seeks orders striking the impugned affidavit evidence "in whole or specified part, on grounds they consist of inadmissible lay opinion, unattributed hearsay, and argument".

[34] The defendants rely on this Court's comment in *Huebner v. PR Seniors Housing Management Ltd., D.B.A. Retirement Concepts*, 2021 BCSC 837 at para. 15, that a presiding judge should rule on evidence of questionable admissibility and not simply assess objections as part of the weighing exercise: see also *C.D. v Facebook, Inc. (Meta Platforms Inc.)*, 2024 BCSC 2081 at para. 13 [*Facebook*]. They cite R. 22-2(12) of the *Supreme Court Civil Rules*, which provides that an affidavit must be confined to things the affiant could state at trial. Because certification under s. 4 of the *Class Proceeding Act*, R.S.B.C. 1996, c. 50 [*CPA*], is

an interlocutory application, R. 22-2(13) permits the use of hearsay evidence in an affidavit if the source of the information and belief is given.

[35] The defendants refer to the Court of Appeal's comments in *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, to similar effect:

> [31] … Despite the robust approach taken by Canadian courts to class actions, I know of no authority that would support the admissibility, for purposes of a certification hearing, of information that does not meet the usual criteria for the admissibility of evidence. A relaxation of the usual rules would not seem consonant with the policy implicit in the Act that some judicial scrutiny of certification applications is desirable, presumably in view of the special features of class actions and the potential for abuse by both plaintiffs and defendants …

[36] The Province also "objects to the admissibility of two expert reports for failing to satisfy the threshold requirements for admissibility". The defendant submits that the Sullivan Report and Douglas Report "opine directly on the ultimate issues in a manner that clearly usurps the role of the trier of fact, does not call for any specialized knowledge or expertise that the experts possess but the trier of fact does not, and are unnecessary".

[37] The plaintiffs contend that the impugned portions of affidavits are admissible. They rely on the commentary in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 [*Infineon*], that "the evidentiary burden" on a certification application "is not an onerous one – it requires only a 'minimum evidentiary basis'": para. 65.

[38] The plaintiffs say that on a certification application, the court does not make findings of fact about the claim on its merits; rather, the court must assess whether there is "some basis in fact" to establish the requisite elements of a class proceeding. They contend that the purpose of the impugned portions of affidavits is important to assessing the defendants' objections, and that when properly considered in this context, the evidence is not hearsay because it not admitted for the truth of its contents, and the impugned lay opinion is not opinion at all, but fact and admissible.

[39] The plaintiffs submit that the impugned statements are not being adduced for a hearsay purpose, and contend:

> …The descriptions of the children's statements and official records are not being adduced to prove the truth of the contents of those statements and records. These descriptions are being adduced as evidence that the statements were made and that the official records in question exist.

[40] The plaintiffs submit that the fact "such statements were made to service providers by children and that official records capturing such statements exist is relevant to the 'some basis in fact' standard for certification."

[41] As to impugned lay opinion evidence, the plaintiffs submit, "most if not all of the impugned statements are statements of fact directly observable by the affiants in the course of their work with children in care" and that the "affiants' beliefs about adverse consequences experienced by their patients or clients flowing from the MCFD decision-making are relevant to the 'some basis in fact standard'". They submit that the evidence suggests a belief as to a "correlation between MCFD conduct and harm to children" but "[w]hether such a correlation actually exists is a question for trial". In the alternative, the plaintiffs say the evidence does meet the test for lay opinion evidence.

[42] As to the challenge to Mr. Orsetti's Affidavit #1 evidence, the plaintiffs submit that this is "contextual information, based on his professional experience, that is relevant to and may assist the Court's ultimate determination of preferability".

[43] The plaintiffs submit that the expert evidence is necessary and admissible. Further, they submit "it is not a bar to admissibility that an expert's opinion may go to ultimate issues for the trier-of-fact", relying on *R. v. Burns*, [1994] 1 SCR 656, 1994 CanLII 127 at 666, which states "it has long been accepted that expert evidence on matters of fact should not be excluded simply because it suggests answers to issues which are at the core of the dispute before the court".

Discussion

Legal Background: Certification Application Test

[44] These objections arise in the context of a pending application for certification of a class action, which has not yet been heard. On a certification application, the following test must be satisfied, as explained by this Court in *O'Connor v. Canadian Pacific Railway Limited*, 2023 BCSC 1371:

> [108] In order to certify a class action, the plaintiff must show that his proposed proceedings meet the elements set out in s. 4(1) of the *CPA*, namely that:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who:
>
> i. would fairly and adequately represent the interests of the class,
>
> ii. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> iii. does not have, on the common issues, an interest that is in conflict with the interests of other class members.
>
> [109] With respect to the requirements for certification set out in sections 4(1)(b) through (e) of the *CPA*, a plaintiff need only show "some basis in fact". This is a low evidentiary threshold that falls below the balance of probabilities test. However, the certification must still serve as a meaningful screening step that is more than symbolic scrutiny. There must be sufficient evidence to satisfy the Court that the proceeding will not founder at the merit's stage: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 101–103 [*Pro-Sys*].
>
> [110] The *CPA* is to be interpreted generously to fulfill the three objectives of judicial economy, access to justice, and behaviour modification: *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at paras. 109

[45] There is some commentary in the case law as to whether, on a certification application, evidence is required not only to show there is a common issue that can

be decided on a class wide basis, but also whether there is a common issue in the first place: *O'Connor* at paras. 242–263. Chief Justice Hinkson in *O'Connor* at para. 260, referring to *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338, leave to appeal to SCC ref'd 40479 (4 May, 2023), gives an illustration of the relevance of evidence as to whether there is a common issue, that being consideration of whether there is some "evidence that the alleged defect existed". However, the Court of Appeal stated in *Mentor Worldwide LLC v. Bosco,* 2023 BCCA 127 at para. 33 that the s. 4(b)–(e) criteria "does not involve an assessment of the merits". See also *British Columbia v. Apotex Inc*., 2025 BCSC 92 at paras. 584–593; and *Bosco v. Mentor Worldwide LLC*, 2024 BCSC 1931 at paras. 88–89.

[46] Therefore, it is at least arguable that evidence regarding the existence of a common issue about the allegations that form the subject matter of certification may be relevant to a certification application, not simply whether there is evidence that that issue can be determined on a class wide basis.

Issue 1: Should the Court Decide the Admissibility Objections Preliminarily, in advance of the Certification Application*?*

[47] The defendants have challenged the admissibility of the evidence pre-certification. No sequencing decision was sought, and instead the parties, at the outset of the hearing of this application, requested that the court decide the admissibility issues in advance of certification (though the plaintiffs provided an alternative position on the issue of process at the end of the hearing). Given the manner in which this application came before me, I have decided to determine this application in advance of the certification hearing.

[48] The defendants submit that it is not in the interests of efficiency to defer deciding the evidentiary issues until later on in this proceeding, and instead should decide the admissibility issues now.

Striking out Affidavit Evidence on Interlocutory Applications: Generally

[49] This Court "has the jurisdiction to strike portions of affidavits which contain passages which are inadmissible": *McMahon v. Harper*, 2017 BCSC 2328 at para.

108, citing *Chamberlain v. School District #36 (Surrey)*, 60 B.C.L.R. (3d) 311, 1998 CanLII 6723 (S.C.), at para. 15. In "practical terms, when there is no time between the application to strike inadmissible evidence and the hearing of the *lis*, this means portions of filed affidavits are given no weight by the court": *Chamberlain* at para. 15.

[50] The Court in *McMahon* elaborates that:

> [109] The mischief of including inadmissible "evidence" in affidavits is that it requires the opposing party to determine how to respond, lengthens the time required for the court and the parties to review and consider affidavits, and risks the decision-maker falling into legal error by relying on inadmissible material. The chambers hearing process is poorly suited to making rulings on admissibility of passages in affidavits. As a result, usually the court simply chooses not to give any weight to the inadmissible passages, without any formal order regarding the inadmissible passages.

[51] The question of striking affidavits prior to a hearing on the merits was considered in *Braaten v. Kelowna (City)*, 2022 BCSC 2105, in which Justice Warren (then of this court) discussed the "clearly inadmissible" standard in such applications:

> [29] … As Justice Esson said in *Evans Forest Products Inc.* at para. 8, the unusual step of striking out portions of affidavits prior to the hearing on the merits should be taken only where the material is clearly not relevant and where it would be prejudicial to the other party to not strike it out before the hearing. As he noted, potential prejudice could arise by the opposing party being put to the trouble and expense of preparing rebuttal affidavits.
>
> [30] In my view, the same principle applies to an interlocutory application to strike out affidavits that are said to be inadmissible for reasons other than irrelevance. That is, portions should be struck out on an interlocutory application only where the material is clearly inadmissible, including where nothing is to be gained by considering admissibility in the context of resolving the substantive dispute.
>
> [Emphasis added].

[52] There is also support for the proposition that it is not appropriate to rule on admissibility until all of the evidence has been heard: *Taheri v. Hosseini*, 2023 BCSC 801 at paras. 40–43.

Striking out Evidence: Certification Applications (Proposed Class Proceedings)

[53] In a proposed class action proceeding, the usual rules of evidence apply — there are no modified rules of admissibility: *Ernewein* at para. 31.

[54] On "a certification motion, the court has… an important gate-keeping role with respect to the admissibility of evidence, and it is not appropriate or fair to shirk that responsibility by saying let it in, and the objections will go to weight rather than admissibility": *Huebner* at para. 15.

[55] Thus, objections to an applicant's evidence have been decided at the time of the hearing of the certification application itself (as opposed in advance of the certification application): see e.g., *O'Connor* at paras. 81, 85 (ruling on expert evidence admissibility); and *Liptrot v. Vancouver College Limited*, 2022 BCSC 1851 (hearsay objections addressed in the midst of certification application).

[56] However, there are also cases from this Court that have decided evidentiary objections to affidavits on a preliminary application, in advance of a certification application: see e.g., *Facebook* (objections to admissibility primarily based on non-authentication of documents and hearsay); *Huebner* (objections of hearsay, unqualified opinion evidence, argument and irrelevant commentary); and *McEwan v. Canadian Hockey League*, 2022 BCSC 1104 (objections of inadmissible opinion, hearsay, relevance, and argument).

[57] Other decisions from this Court have declined to rule on preliminary evidentiary objections to expert evidence in advance of a certification application, since deciding the objections would be premature: see for e.g., *Siwocha v. Rechochem Inc.*, 2024 BCSC 67 (pre-certification application for ruling expert reports not admissible). In *Siwocha* at para. 7, the Court quoted *Option Consommateurs v. Samsung Electronics Canada Inc.*, 2023 QCCS 2388, which stated:

> [180] …Indeed, it may be dangerous to exclude expert evidence at a preliminary stage, without having had the benefit of full evidence enabling the

> judge to weigh the necessity or relevance of the expert report. Caution is called for.

[58] In *Bui v. Cargill, Incorporated*, 2024 BCSC 1364, this Court declined to rule on an evidentiary objection, finding it would "be premature to exclude the statements at this stage of the proceeding": para. 10. The Court deferred the matter to a full argument at the certification hearing on relevance:

> [9] Counsel for the defendants should have a full opportunity to argue at the certification hearing the relevance of the affidavit evidence. To prohibit them from doing so on a preliminary basis does not, in my view, meet the needs of justice. I agree with Justice Groves in *Siwocha v. Recochem Inc.*, 2024 BCSC 67 at para. 10 that the court should exercise significant caution before excluding evidence prior to the certification hearing.

[59] As seen from these cases, determination of admissibility objections on an application to strike affidavit evidence on a preliminary application, in advance of a certification application, is not done as of right and is instead a matter of judicial discretion. In *Huebner*, the Court decided that evidentiary motions should be heard prior to the certification hearing, because, among other things: the volume of the plaintiffs' materials and the breadth of objections to them; that "dealing with admissibility at the same time as certification would be cumbersome and confusing for the parties and the court"; that the "only way the defendants can know the case they have to meet is to have the evidentiary motions dealt with in advance of the certification hearing"; and the Court was "satisfied that there is a basis for challenging the affidavits": *Huebner* at para. 5, quoting the Court's earlier ruling to hear evidentiary motions in advance, indexed as 2020 BCSC 1037 at para. 15. In *McEwan* at para. 2, the Court expressed the view it was appropriate to decide the admissibility issues in advance of the certification hearing.

[60] This Court's decision in *Facebook*, relied on by the defendants, does not state that admissibility issues necessarily must be resolved before the certification application hearing, but that such issues should be decided and not simply assessed as going to weight. At para. 13, in the context of discussing evidentiary rulings in a certification hearing, the Court states that a presiding judge "should rule on evidence

of questionable admissibility and not simply assess objections as part of the weighing exercise".

[61] Further, in *McEwan*, Justice Sharma observed that there may be instances where it is not prudent to decide a hearsay objection on a preliminary application:

> [83] … A crucial factor in determining whether a statement is admissible is to ascertain for what purpose it is being adduced. While not determinative, a party's assertion that an out-of-court statement is not being proffered for the proof of the truth of its content cannot be ignored and should not lightly be discarded. If the stated purpose logically fits with the statement and that purpose does relate to an issue, it is difficult to conceive why a court would strike out that evidence as being hearsay on a preliminary motion. This is especially true when the statements are being analyzed before the other party's evidence has been filed.
>
> [Emphasis added.]

Timing and Threshold for Striking out Evidence on the Pre- Certification Application in this Case

[62] These comments in *McEwan* are apposite to the application before me. That is because in response to the evidentiary objections to hearsay, the plaintiffs argued that the impugned evidence was not being adduced for the truth of their contents. But, on a preliminary application, arguments in support of certification have not yet even been made yet.

[63] Further, the "*CPA* must be construed generously in order to achieve its objectives of access to justice, judicial economy, and behavior modification": *Krishnan v. Jamieson Laboratories Inc.*, 2021 BCSC 1396, aff'd 2023 BCCA 72 at para. 42, citing *Infineon*. Striking out certification application evidence adduced by a plaintiff applicant in advance of the certification hearing, when it may be premature to do so, would be at odds with the objective of access to justice in class proceedings.

[64] *Huebner* at para. 16 specifically referenced R. 9-5(1) in the context of the application to strike portions of affidavits in advance of a certification hearing.

[65] I do not suggest that the plain and obvious standard for striking pleadings (see e.g., *British Columbia (Director of Civil Forfeiture) v. Lam*, 2023 BCSC 159 at para. 20) should necessarily apply to a motion to strike affidavit evidence in all cases (see *McEwan* at para 64). Although, this court has linked the power to strike inadmissible portions of affidavit evidence to R. 9-5(1): *Braaten v. Kelowna (City)* at para 28.

[66] But, the reference to R. 9-5(1) on an application to strike affidavit evidence, to the particular circumstances of the preliminary application before me, is apt: the application to challenge admissibility of evidence before the certification hearing engages a consideration of whether evidence is clearly inadmissible which justifies in the circumstances, that evidence be struck preliminarily — before the merits of the certification application is fully argued. In my view the sentiment of R. 9-5(1) applies to the circumstances before me, and suggests that the inadmissibility should be clear (and not arguable) in order to be decided on this preliminary application in advance of the certification application.

[67] In my view, when faced with an application to strike, or declare inadmissible, affidavit evidence in advance of a certification hearing in a proposed class action proceeding, the court has a discretion to determine whether to do so and, if so, what threshold to apply when deciding whether to strike out evidence. As part the exercise of that discretion, I consider whether it would be unfair to require a party to respond to evidence without ruling on their admissibility objections.

[68] In the circumstances before me on this application, including the nature of the objections and the plaintiffs' response, I would decide an admissibility objection before the certification application, on this application to strike, if the impugned evidence is clearly inadmissible. I would not strike out impugned evidence that is not clearly inadmissible, and instead defer admissibility to the certification hearing, particularly given that many of the asserted grounds for admissibility relate to arguments not yet made on the certification application itself: see *Bui* at para. 9; *Braaten v. Kelowna (City)* at paras. 29-30.

Issue 2: Application to Strike Portions of Affidavits in this Case

[69] In my view, some of the affidavit evidence is clearly inadmissible and should be struck out preliminarily. However, many of the other admissibility objections raise evidentiary issues that are arguable and I decline to do so.

Affidavits (other than Orsetti Affidavit #1)

[70] This is an action alleging, among other things, systemic negligence and harm caused by that negligence to children in the care of the MCFD.

[71] Some of the impugned affidavit evidence speaks directly to alleged systemic harm. However, no attribution of the source of persons whose experience is recounted is given for the specific instances, and the source is instead spoken of in broad and general terms. While the plaintiffs assert that this evidence is not tendered for the truth of its contents, that is not how some of the affidavit evidence is presented, which in some cases would appear to be tendered in support of the truth of the assertion of systemic failures by the defendants. I do not discount lightly the plaintiffs' assertion that evidence is not tendered for the truth of its contents for the purposes of the certification application. However, I was not persuaded by the plaintiffs that some of the impugned evidence is relevant to any other purpose on certification than for the truth of its contents: *Huebner,* at para. 31. I therefore find some portions of the impugned evidence should be characterized for the purposes of this application as tendered to prove the truth of the contents of statements concerning the allegations of systemic failures by MCFD — the substantive allegations made in the notice of civil claim — and clearly inadmissible hearsay.

[72] I add that I do not find the plaintiffs' reliance on *Tietz v. Affinor Growers Inc*., 2022 BCCA 307, to be of assistance, given the different context in which the affidavit evidence was assessed in that case: see paras. 106–112.

[73] However, many portions of the impugned evidence raise admissibility issues that are less clear, and arguable, and they should not be struck out at this stage.

[74] Admissibility must be assessed with reference to the "some basis in fact" criterion on a certification hearing. As explained in *McEwan*:

> [49] … The key is to analyze the impugned statements within the affidavits to properly determine the purpose for which it is being proffered, and relate that to an issue identified in the pleadings.
>
> [50] Most importantly, that enquiry must be done keeping in mind that the issue before the court at certification will be whether there is "some basis in fact" for establishing common issues trial.
>
> [Emphasis added.]

[75] Further, "[t]here are no findings of fact made at certification since the issue is whether the record reveals 'some basis in fact' to find the action suitable as a class action" (*McEwan* at para. 84); and "a determination that something is admissible for the purposes of certification does not necessarily mean it is admissible in the same fashion for the trial" (para. 98).

[76] The plaintiffs oppose many of the evidentiary objections on the basis that impugned evidence is relevant to whether there is "some basis in fact" with regard to certain certification criteria, and on the basis of arguments yet to be made to the court on the merits of certification. The plaintiffs argue that much of the impugned affidavit evidence is relevant to whether there is "some basis in fact" for preferability and to the existence of common issues.

[77] A plaintiff's assertion that evidence goes to a certain purpose which renders it admissible ought "not lightly be discarded": *McEwan* at para. 83.

[78] Evidence of a large number of reports of common alleged defects has been considered when evaluating the certification criterion of commonality: *Griffin v. Dell Canada Inc*., 72 CPC (6th) 158, 2009 CanLII 3557 (O.N.S.C.) at para. 83, cited with approval in *McEwan* at para. 52. Here, some of the impugned evidence is arguably of the same nature as that discussed in *Griffin*. In that case, the Court found such evidence to be of assistance on the certification application, stating:

> [83] … The persistence and remarkable similarity of the complaints in relation to each of the five models across such a large group of users amount

> to some evidence that there is reason to believe that the computers have a defect that interferes with their normal operation".
>
> [Emphasis added].

See also: *Liptrot v. Vancouver College Limited* at para 21 ("there is a distinction between relying on statements in documents, not as proof of the facts recorded, but as some basis in fact demonstrating the existence of certain common issues and the availability of evidence").

[79] Similarly, in *McEwan*, this Court acknowledged that in *Miller v. Merck Frosst Canada Ltd.*, 2013 BCSC 544, evidence was admitted to establish some basis in fact for the existence of an identifiable class of two or more persons:

> [51] The plaintiff says the point is underscored by the acceptance in several decisions of affidavits to satisfy certification which contained unattributed out-of-court statements. For instance, in *Miller v. Merck Frosst Canada Ltd.*, 2013 BCSC 544 at para. 127–8, Punnett J. allowed affidavits containing hearsay or double hearsay statements sought to be admitted to establish some basis in fact for the existence of an identifiable class of two or more persons. In doing so, Punnett J. relied on *Chalmers v. AMO Canada Company*, 2009 BCSC 689, where the court specifically referred to s. 5 (5)(c) of the legislation which requires only that the "best information" be adduced regarding the size of the class. That information is almost always in the form of hearsay and does not prove the class size but is relevant to considering the procedural issues.
>
> [Emphasis added.]

[80] It is at least arguable that some portions of the impugned evidence, which speaks to the affiants' knowledge of reports, may be admissible on a similar basis as the evidence in *Griffin*: as not for the truth of its contents, but to demonstrate some basis in fact for the criteria of commonality, preferability, and the size of the proposed class (*CPA* s. 5) on the certification application.

[81] Further, there is a general test for the admissibility of lay opinion evidence: see e.g., *Graat v. The Queen*, [1982] 2 S.C.R. 819 at 837, 1982 CanLII 33; *American Creek Resources Ltd. v. Teuton Resources Corp*., 2013 BCSC 1042 at paras. 16–18.

[82] For example, in *Huebner* at paras. 36–37, statements about "whether a facility was understaffed, staff were overworked or hallway clutter formed a safety

risk to residents" was found to be "within the realm of ordinary experience" and admissible lay opinion evidence:

> [36] Finally, as noted in Paciocco at 239:
>
> > Lay witnesses may present their own relevant, personal 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 effectively without resort to conclusions.
>
> [37] Without going into great detail at this point, I am generally satisfied that much of the impugned opinion evidence is within the realm of ordinary experience and/or the experiential capacity of the affiant. For example, statements about whether a facility was understaffed, staff were overworked or hallway clutter formed a safety risk to residents are within the realm of ordinary experience. Specialized knowledge or training is not required to make those observations. As well, I am satisfied that in many cases, the affiants were in a position to make the observations upon which they formed their opinions.
>
> [Emphasis added.]

[83] Similarly, there are some portions of the impugned evidence that are not clearly inadmissible lay opinion, and a determination of admissibility should be deferred to the certification hearing.

[84] Nevertheless, I am satisfied that some other portions of the affidavit evidence are opinions which clearly do not meet the test for lay opinion evidence, going beyond merely a compendious mode of stating facts that persons with ordinary experience are able to make.

[85] Some of the impugned evidence express opinions beyond ordinary experience, and personal opinions "that go beyond lay observations or that go beyond a duly qualified expert's area of expertise are inadmissible": *Cambie*

Surgeries Corporation v. British Columbia (Attorney General), 2018 BCSC 514 at para. 39.

[86] For example, Ms. Alkalay deposes her view as to whether certain treatment of children results in "both adverse short-term effects and adverse long term and life altering effects": Alkalay Affidavit #1 at para. 10(a). Similarly, she provides an opinion as to whether past childhood experience impacts a person's ability to sustain mental effort in order to pursue a legal case: Alkalay Affidavit #1 at para. 12(d). In my view, each of these statements are examples of clearly an opinion going beyond ordinary experience suitable for lay opinion evidence.

[87] Further, Dr. Richardson opines that harm has been experienced by patients because her medical recommendations have not been followed: Richardson Affidavit #1 at para. 7. These types of opinions call for some form of expertise, is not lay opinion evidence, and are inadmissible.

[88] Therefore, while some of the lay opinion evidence objections raise arguable admissibility issues which should not be decided on this application, some of the impugned affidavit evidence is clearly inadmissible lay opinion and should be struck out. I also find some portions to be argument. I set out my determinations of admissibility on a paragraph by paragraph basis in Schedule A.

Orsetti Affidavit #1

[89] Similarly, while some portions of the Orsetti Affidavit #1 evidence are clearly inadmissible, significant portions are not clearly so at this stage and determination of admissibility should be deferred to the certification hearing.

[90] For example, significant aspects of the Orsetti Affidavit #1 may arguably be relevant to whether there is some basis in fact for preferability, and without hearing argument on certification I decline to decide admissibility of such portions at this time.

[91] However, some other aspects of this affidavit, in my view, clearly constitute legal argument (for example, whether there has been a breach of the standard of care: para. 11(b)). See Schedule A.

Conclusion: Application to Strike Affidavit Evidence Portions

[92] I find that a significant portion of the affidavit admissibility issues are arguable, and I defer them to certification, but some other portions should be struck.

[93] Attached to these Reasons as Schedule A is a table which sets out which portions of the impugned evidence shall be struck out at this time, and which portions which shall be deferred to certification hearing.

[94] I have considered the defendant's argument that it needs to know if the plaintiffs' evidence is admissible before it delivers responsive evidence. However, the *Rules* do not provide a respondent with a right to a decision on admissibility pre-certification. How a court considers this as a factor toward deciding admissibility pre-certification is a matter of judicial discretion. In the face of an arguable issue of admissibility, the objective of access to justice in class proceedings militates in this case toward determining the admissibility issue at the certification hearing, and not preliminarily.

Issue 3: Expert Evidence Objections

[95] Despite that this is a chambers proceeding, and that R. 11-6 does not apply, the normal rules of evidence apply to the certification application. In *O'Connor*, the Court said:

> [71] Rule 11-6 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 sets out how to tender expert reports at trial, but does not apply in general on an application. However, it is well established that the normal rules of evidence apply to a certification application, including the usual criteria for admissibility: *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 at para. 31 [*Ernewein*].
>
> [72] On an application for certification, the Court has an important gate-keeping role with respect to the admissibility of evidence. In *Huebner Estate v. PR Seniors Housing Management Ltd. (cob Retirement Concepts)*, 2021 BCSC 837 at para. 15, Justice Murray commented that "it is neither

> appropriate nor fair to shirk that responsibility by saying let it in and the objections go to weight rather than admissibility."
>
> [73] In *Mostertman v. Abbotsford (City)*, 2022 BCSC 1769 [*Mostertman*], Justice Dley wrote that to be admissible in a certification application, the expert opinion must still meet the test from *R. v. Mohan*, [1994] 2 S.C.R. 9, 1994 CanLII 80, and set out the "essential components of qualifications, education, experience, information and assumptions on which the opinion is based, the instructions given, and the research": *Mostertman* at paras. 19, 21.
>
> [74] I accept that expert opinion evidence on an application for certification must, therefore, satisfy a two-step inquiry to be admissible. First, the opinion must be: 1) relevant; 2) necessary in assisting the trier of fact; 3) not subject to an exclusionary rule; and 4) from a properly qualified expert. Second, the Court may use its residual discretion to exclude the evidence if its prejudicial effect outweighs its probative value: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 19.
>
> [75] An expert affiant must attest or testify that they recognize and accept their duty to assist the Court and be impartial, independent, and unbiased: *White Burgess* at paras. 32, 48.
>
> [76] In *Ewert v. Canada (Attorney General)*, 2016 BCSC 962 at para. 32 [*Ewert 2016*], after considering various authorities, Justice Blok held that "as a general rule, the courts have ruled inadmissible investigative reports or reports of commissions and the like."
>
> [77] In *Ernewein*, the Court of Appeal considered the admissibility of an investigative report by the US Secretary of Transportation related to the matters being litigated. The Court agreed with the chambers judge, and held that the report was inadmissible and "not evidence" (para. 31).

[96] "An expert must not only be qualified generally but must also be qualified to express the specific opinion proffered": *R. v. Orr,* 2015 BCCA 88 at para. 67.

[97] In addition, the criterion of necessity is distinct from whether evidence would be helpful. It is an error of law to conflate the two: *R. v. P.J.C.*, 2025 ONCA 196 at para. 36.

[98] In *Infineon*, the Court of Appeal commented that expert evidence should "not be subjected to the exacting scrutiny required at trial", but should nevertheless be admissible expert evidence:

> [66] Accordingly, where expert opinion evidence is adduced at the certification hearing, as it was here, it should not be subjected to the exacting scrutiny required at a trial. On this point, I adopt the remarks of J.L. Lax J. in *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (S.C.J.) at para. 76:

> [76] The court's "gatekeeper" role in respect to expert evidence was clearly articulated by the Supreme Court of Canada in *R. v. Mohan*, [1994] 2 S.C.R. 9 and urged upon trial judges in subsequent decisions. This role applies equally to judges hearing motions for certification: *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, 260 D.L.R. (4th) 488. However, where expert evidence is produced on a motion for certification, the nature and amount of investigation and testing required to provide a basis for a preliminary opinion will not be as extensive as would be required for an opinion to be given at trial. It follows that some lesser level of scrutiny is applied to the opinions offered, if they are otherwise admissible: *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 at para. 19 (Sup. Ct.).
>
> [Emphasis added.]

Issue 4: Should the Expert Reports be Struck Out?

[99] In my view, the two expert reports are not admissible expert evidence and should be struck out.

[100] It is clear that both reports contain inadmissible expert evidence.

[101] These reports present as broad critiques of the defendants on the substantive allegations of systematic negligence or wrongdoing as set out in the notice of civil claim, but not expert evidence.

[102] The expert reports are in significant measure a commentary on reports, literature and media articles, with opinions, including an opinion of "systemic failures" (Douglas Report at para. 23) and that the "Province's…. deficiencies have been revealed repeatedly" (Sullivan Report at 15).

[103] To the extent the reports summarize other documents, reports or media articles, while perhaps potentially helpful, that is not something that meets the necessity criterion for expert evidence admissibility: *R. v. D.D.*, 2000 SCC 43 at paras. 46–47.

[104] The reports also include, in material respects, argument. For example, an opinion on what the Minister or Ministry knew, or should have known, is argument

from these witnesses: Douglas Report at paras. 64-65; Sullivan Report at 14. For example, the Douglas Report opines:

> The Minister knew or should have known every time systemic problems were identified in public inquiries, internal audits and media coverage. Systemic problems were clearly identified in these various external reviews and internal audits.

[105] There is also some merit to the defendants' submission (at para. 135) that aspects of the reports make it difficult "to discern between what is an assumed fact based on a specific source, a fact for which no source is identified, or an opinion." See also *TA Hotel Management Limited Partnership (Re)*, 2024 BCSC 902 at paras. 40, 51.

[106] Dr. Sullivan is sought to be qualified "to give evidence about accepted standards of practice, [and] comment on performance in relation to those accepted standards" (application response, para. 52). In my view, Dr. Sullivan's opinions as to the level of preparation and hopes of a cabinet minister, and a cabinet minister's "clout within cabinet" is clearly not admissible expert evidence, nor is his opinion that "the Ministry has always known of its shortcomings".

[107] The Court is not required to parse through the reports to discern if some part of the reports might constitute admissible evidence: *Mohamed v. Intransit BC Limited Partnership*, 2015 BCSC 1300 at para. 71; *Martin v. Steunenberg*, 2021 BCSC 1411 at para. 240.

[108] I further decline to consider whether these reports might constitute admissible non-expert, lay evidence; neither report is in the form of affidavit evidence: *Ford v. Lin*, 2022 BCCA 179 at para. 65.

[109] I find it to be clear that these reports are not admissible expert evidence, and decide this admissibility objection now.

[110] These reports shall be struck out.

Conclusion and Order Made

[111] For these reasons I order that:

(a) The portions of the affidavits identified in Schedule A determined to be inadmissible are struck out;

(b) the Sullivan Report and Douglas Report are struck out; and

(c) The balance of the relief sought to strike affidavit evidence in the notice of application filed July 22, 2024 which has not been struck out, as reflected in Schedule A, is adjourned generally and may be reset at the same time as the application for certification, subject to any further order of the court.

[112] If the parties cannot agree on costs of this application they may, within 30 days, submit a request to Supreme Court Scheduling for an appearance before me to make submissions on the matter of costs.

"Stephens J."

SCHEDULE A
Table of Impugned Evidence and Admissibility Determinations

Paragraph/ Sentence	Statement	Defendants' Objection(s)	Admissibility Decision on this Application
Affidavit #1 of Linoy Alkalay			
Paragraph 4 (last sentence):	"Almost all these individuals were in the care of Ministry of Children and Family Development ("MCFD") at some point and almost all of them report being exposed to some form of abuse (physical, sexual, or emotional) and neglect while they were in the care of MCFD."	Unattributed hearsay.	Admissibility arguable (e.g. some basis in fact to common issue).
Paragraph 6 (last sentence):	"Almost all these individuals were in the care of Ministry of Children and Family Development ("MCFD") at some point and almost all of them report being exposed to some form of abuse (physical, sexual, or emotional) and neglect while they were in the care of MCFD."	Unattributed hearsay.	Admissibility arguable (e.g. some basis in fact to common issue).
Paragraph 7 (last sentence):	"Almost all these individuals were in the care of Ministry of Children and Family Development ("MCFD") at some point and almost all of them report being exposed to some form of abuse (physical, sexual, or emotional) and neglect while they were in the care of MCFD."	Unattributed hearsay.	Admissibility arguable (e.g. some basis in fact to common issue).
Paragraph 8 (last sentence):	"Almost all these individuals were in the care of Ministry of Children and Family Development ("MCFD") at some point and almost all of them report being exposed to some form of abuse (physical, sexual, or emotional) and neglect while they were in the care of MCFD."	Unattributed hearsay.	Admissibility arguable (e.g. some basis in fact to common issue).
Paragraph 9 (second sentence to end of paragraph):	"Almost all these people were in the care of MCFD at some time in their life. Essentially every youth that I worked with was still in the care of MCFD when I was supporting them. Based on the group of people I have worked with and continue to work with, there is an incredibly high correlation between reported abuse and neglect experienced	Unattributed hearsay. Improper lay opinion.	Admissibility arguable (e.g. some basis in fact to common issue; lay opinion)

	while in the care of MCFD and adverse outcomes such as homelessness, substance abuse and mental health."		
Paragraph 10:	"I am not able to verify the reports of abuse or neglect that these people report experiencing while in the care of MCFD. However, these reports are extraordinarily consistent and include the following:	Unattributed hearsay. Improper lay opinion.	Admissibility arguable (e.g. some basis in fact to common issue).
10(a)	a) Extreme neglect: children in care report are not [sic] provided with sufficient supports to maintain basic hygiene and achieve basic development goals (educational, emotional, social). This results in both adverse short-term effects and adverse long term and life altering effects. An example of a short-term effect that I've witnessed is infants contracting Urinary Tract Infections due to being subjected to poor hygiene conditions. The more long-term effects of neglect in the care of MCFD are low verbal ability, social anxiety, and minimal life skills. Children neglected in the care of MCFD are more likely to experience mental health challenges such an anxiety depression, and borderline personality disorder due to having been neglected.	Unattributed hearsay. Improper lay opinion.	First sentence: Admissibility arguable (e.g. some basis in fact to common issue). Remainder: Inadmissible lay opinion.
10(b)	b) Verbal and emotional abuse: essentially all the children that I supported that were in the care of the MCFD report experiencing some level of verbal or emotional abuse from their care providers. The [sic] report experiencing	Unattributed hearsay. Improper lay opinion.	Other than the last sentence: Admissibility arguable (e.g. some basis in fact to common issue).

	controlling behaviour from their care providers and being subjected to harsh punishments. Almost all of them report being moved to multiple homes creating a lasting sense of instability. Those placed in group homes experienced coercion and control by the institution and having very low levels self agency or self efficacy. Some would be subjected to body checks by the staff, open-door policies or cameras in their room. This contributes to the youth having no sense of control about their body or their choices.		Last sentence: Inadmissible lay opinion.
10(c)	c) Physical abuse: reports of physical abuse in the placement are very common as are reports of witnessing the physical abuse of others in the household.	Unattributed hearsay.	Admissibility arguable (e.g. some basis in fact to common issue).
10(d)	d) Sexual abuse: in some cases, youth and adults reported being sexually abused while in the care of MCFD. These were horrific experiences that had long term traumatic effects including mental health challenges, substance abuse challenges, and behavioural changes. In my experience supporting victims of sexual abuse, and youth and adults who have been subjected to it often take on feelings of shame and blame and do not fully understand the way they have been victimized. This contributes to underreporting, not pursuing legal actions, and higher vulnerability to abusive relationships in their adult lives.	Unattributed hearsay. Improper lay opinion.	First two sentences: Admissibility arguable (e.g. some basis in fact to common issue). Remainder: Inadmissible lay opinion.
Paragraph 12	"Most of my clients who have been in the care of the MCFD, share these common characteristics:	Unattributed hearsay. Improper lay opinion.	Admissibility arguable (e.g. lay opinion).
12(a)	a) They are profoundly overwhelmed by issues of addiction and mental health such that they have little or no ability to pursue matters beyond basic needs (food, housing, etc.) and they often	Unattributed hearsay. Improper lay opinion.	Inadmissible hearsay. Inadmissible lay opinion.

	struggle to pursue these basic needs;		
12(b)	b) They have an aversion to conflict because they have been traumatized in the past;	Unattributed hearsay. Improper lay opinion.	Inadmissible hearsay. Inadmissible lay opinion.
12(c)	c) They have a strong aversion to engaging with the MCFD due to their past negative experiences with the MCFD;	Unattributed hearsay. Improper lay opinion.	Admissibility arguable (e.g. lay opinion).
12(d)	d) They are consistently unable to secure legal representation to pursue their legal interests due to a lack of funds to pay lawyers and an inability to sustain the mental effort required to pursue lengthy legal cases;	Unattributed hearsay. Improper lay opinion.	Inadmissible hearsay. Inadmissible lay opinion.
12(e)	e) They are often unable to complete and submit simple forms required to obtain services without significant assistance and support; and	Unattributed hearsay. Improper lay opinion.	Admissibility arguable (e.g. lay opinion).
12(f)	f) They are often dependent on government services and fear these will be suspended if they speak out against the government or try to assert their legal rights against the government."	Unattributed hearsay. Improper lay opinion.	Inadmissible hearsay.
Affidavit of Angela Clancy			
Paragraph 7	"Based on my interactions with the MCFD over the past 22 years, I have observed that the MCFD consistently fails to meet the medical and behavioural needs of children in its care with disabilities, by making decisions and/or ignoring advice and directions that is incongruent with what would be expected of a reasonable parent. The most common examples are making medical decisions contrary to the advice of the medical or behavioral caregivers and ignoring complaints relating to the placements where children live. I have observed that these failures have resulted in harm to children in the care of the MCFD. In almost every instance it results in	Improper lay opinion Argument	Inadmissible lay opinion.

	emotional distress. In some circumstances, it has resulted in severe physical harm."		
Paragraph 8	"For the past 22 years, I have observed reoccurring or systemic issues within the MCFD that cause harm to children and youth. Based on my observations these are as follows:	Improper lay opinion	Admissibility arguable (e.g. lay opinion)
8(a)	a) Social workers employed by the MCFD do not appear to have a consistent level of training and often lack the necessary skills to address the issues within their case load;	Improper lay opinion Argument	Inadmissible lay opinion.
8(b)	b) There is a culture of ignoring the legitimate issues raised about a child in case with the MCFD not investigating or examining the issues that are being raised;	Improper lay opinion Argument	Inadmissible lay opinion. Argument
8(c)	c) A consistent unwillingness to follow the advice given to social workers from behavioral and medical professionals that are in the best interests of children in care;	Improper lay opinion Argument	Inadmissible lay opinion.
8(d)	d) There appears to be gaps in process and protocol that requires social workers to make up solutions as they go which results in poor decisions being made in respect of children in care;	Improper lay opinion Argument	Inadmissible lay opinion.
8(e)	e) There is no consistency between process and protocols between different regions in the province and/or an inconsistent application of any such processes or protocols results in poor decisions being made in respect of children in care;	Improper lay opinion Argument	Inadmissible lay opinion.
8(f)	f) Social workers appear to have disengaged from their responsibilities to children in care;	Improper lay opinion	Admissibility arguable (e.g. lay opinion)
8(g)	g) Social workers appear to be over worked and stressed to the point where they neglect or are unable to attend to their file work; and	Improper lay opinion Argument	Admissibility arguable (e.g. lay opinion)
8(h)	h) The MCFD is not culturally sensitive to families who do not speak English as their first language which exposes children from these families to systemic	Improper lay opinion Argument	Admissibility arguable (e.g. lay opinion)

	cultural and racial bias which results in their needs being neglected relative to other children."		
Affidavit #1 of Anamaria Richardson			
Paragraph 5	"The MCFD routinely ignore my medical recommendations whereas parents routinely follow my medical recommendations."	Improper lay opinion Argument	Admissibility arguable (e.g. some basis in fact to common issue).
Paragraph 6:	"I stopped attending virtual and in person meetings with MCFD social workers to discuss and advocate for my recommendations because they were being systemically ignored by the MCFD. It did not matter the identity of the social worker or their supervisors (Team Lead or DOO). My valid and reasonable medical recommendations were being ignored. I now put my recommendations in writing and send them to MCFD social workers and their supervisors so that my comments are on the record."	Improper lay opinion Argument	Third sentence: Inadmissible lay opinion. Remainder: Admissibility arguable (e.g. some basis in fact to common issue; lay opinion).
Paragraph 7	"The vast majority of my patients who are in the care of the MCFD have experienced harm as a result of the MCFD failing to follow my medical recommendation. I have also observed that most of my patients have experienced harm generally as a result of being in the care of the MCFD. My observations are as follows:	Improper lay opinion Argument	Inadmissible lay opinion.
7(a)	a) My patients have harmed themselves because the MCFD has failed to implement medical recommendations (which include best practice behavioural interventions) which would have prevented this self-harm;	Improper lay opinion Argument	Inadmissible lay opinion.

7(b)	b) My patients have been harmed by MCFD contracted caregivers who do not have the training and experience necessary to support complex behavioural issues;	Improper lay opinion Argument	Inadmissible lay opinion.
7(c)	c) My patients have been neglected in the care of the MCFD;	Improper lay opinion	Inadmissible hearsay. Inadmissible lay opinion.
7(d)	d) My patients have been confined to small indoor spaces for prolonged periods of time which is grossly incongruent with managing their complex behavioural issues;	Improper lay opinion Argument	Inadmissible hearsay. Inadmissible lay opinion.
7(e)	e) My patients have had medical issues go undetected and untreated with examples being broken bones and infections and this has occurred where MCFD social workers have expressly ignored my advice to seek out consultations to investigate these medical issues; and	Improper lay opinion Argument	Inadmissible hearsay. Inadmissible lay opinion.
7(f)	f) My patients have been harmed while at their living situations, often by the people caring for them or by other residents in the same placement with group homes being especially problematic as there does not appear to be sufficient resources and skills to manage these children."	Improper lay opinion Argument	Inadmissible hearsay. Inadmissible lay opinion.
Paragraph 8:	"For the past 7 years, I have observed reoccurring or systemic issues within the MCFD that cause harm to infants in its care. Based on my observations these are as follows:	Improper lay opinion	Admissibility arguable (e.g. lay opinion)
8(a)	a) social workers do not have the skills or experience to deal with children that have complex behavioral issues; '	Improper lay opinion	Inadmissible lay opinion.
8(b)	b) social workers ignore and fail to address legitimate medical issues raised about children in care;	Improper lay opinion Argument	Inadmissible lay opinion. Argument

8(c)	c) social workers are profoundly unwilling to follow medical advice in respect of children in care; and	Improper lay opinion Argument	Admissibility arguable (e.g. lay opinion)
8(d)	d) social worker disengagement where they fail to address legitimate and often pressing health and safety issues in respect of children in care."	Improper lay opinion Argument	Inadmissible lay opinion. Argument
Affidavit #1 of Robin Friedlander			
Paragraph 4	"The MCFD routinely ignores or fail to implement my medical recommendations respecting children who are in its care. Conversely, parents of children routinely follow and implement medical recommendations."	Improper lay opinion Argument	Admissibility arguable (e.g. some basis in fact to common issue; lay opinion).
Paragraph 5	"I have observed that many of my patients in the care of the MCFD have experienced harm as the result of the MCFD failing to follow and implement my medical recommendations. There is a profound and systemic reluctance to facilitate and provide treatment to children with complex behavioral issues when such treatments are medically advisable and capable of improving outcomes for these children that would allow them to live in less restrictive care arrangements. Instead, there is a systemic emphasis on moving these children into care arrangements where they do not receive appropriate treatments. Because these children are being denied advisable and effective treatments these children are being lost to these care arrangements where they almost never emerge."	Improper lay opinion Argument	Inadmissible lay opinion.

Paragraph 6	"For the past 28 years, I have observed reoccurring or systemic issues within the MCFD that cause harm to children in its care. Based on my observations these are as follows:	Improper lay opinion Argument	Admissibility arguable (e.g. lay opinion)
6(a)	a) social workers do not have the skills or experience to deal with children that have complex behavioral problems;	Improper lay opinion	Inadmissible lay opinion.
6(b)	b) social workers do not appear to have a consistent level of training and often lack the necessary skills to address the issues within their case load;	Improper lay opinion	Inadmissible lay opinion.
6(c)	c) social workers ignore and fail to address legitimate medical issues raised about children in care by physicians like myself; and	Improper lay opinion Argument	Inadmissible lay opinion. Argument
6(d)	d) social workers are profoundly unwilling to follow and implement medical advice in respect of children in care."	Improper lay opinion Argument	Admissibility arguable (e.g. lay opinion)
Affidavit #1 of Dan Orsetti			
Paragraph 6	"I reviewed the Amended Notice of Civil Claim filed in the within action. I have reviewed the proposed class definition. The PGT has undertaken a preliminary review of its case files and *has identified a number of children who meet the proposed class definition.* There are several children for whom the PGT is property guardian, who *would be class members if the proceeding is certified with the current class definition. The PGT is of the view that, for these clients, there is evidence in support of the claim alleged against the MCFD as plead in the Amended Notice of Civil Claim, and which merit a judicial determination."*	Improper lay opinion. Unattributed hearsay. Legal conclusion. Argument	Last sentence: inadmissible argument/legal conclusion. Remainder: Admissibility arguable (e.g. some basis in fact to size of proposed class).
Paragraph 7	"If this matter were to be certified, a more exhaustive review would need to be undertaken of the PGT files. I verily believe that this would result in a much larger number of class members being identified who have	Improper lay opinion Conjecture	Admissibility arguable (e.g. some basis in fact to preferability).

	claims that merit judicial determination."		
Paragraph 8	"In addition to the case files identified in paragraph 6, I am aware of additional case files that were once with the PGT, and *which would have met the same criterion as set out in paragraph 6,* but which are no longer active because the children have reached the age of 19. At age 19, the PGT ceases to be the property guardian of a child who is subject to a CCO."	Improper lay opinion. Unattributed hearsay	Admissibility arguable (e.g. some basis in fact to common issue).
Paragraph 9 (fourth sentence to end of paragraph)	"The claims identified in paragraph 6 are *complex and often the damages are too modest for litigation to be viable from a cost benefit perspective.* The result is that, from the PGT's perspective, *the majority of claims Identified in paragraph 6 are not viable as individual claims.* Even though the child's right to make a claim continues at least until they reach age 21, *I verily believe that these young adults would have difficulties retaining counsel to pursue the claims identified in paragraph 6 for the same reason."*	Improper lay opinion. Unattributed hearsay. Conjecture	Admissibility arguable (e.g. some basis in fact to preferability; lay opinion evidence).
Paragraph 10	"The PGT is of the view that the cases identified in paragraph 6 *are viable in respect of the technical elements of negligence.* The fact that these cases are *not viable as individual claims* because of the cost benefit considerations noted above raises a significant issue with access to justice. The proposed class action, if certified, would provide the PGT an opportunity to bring these cases forward on behalf of CCO clients for adjudication on their merits. I am not *aware of an alternative means that would allow the majority of these cases to be adjudicated."*	Improper lay opinion. Unattributed hearsay. Argument Legal conclusions	First sentence: inadmissible argument/legal conclusion. Remainder: Admissibility arguable (e.g. some basis in fact to preferability).
Paragraph 11, (a), (b), (c) and (d)	Many of the cases identified in paragraph 6 share common features *of what I characterize as systemic issues* I summarize these	Improper lay opinion. Unattributed	Inadmissible argument/ legal conclusion/

	as follows: (a) Children being exposed to an accumulation of adverse childhood events are particularized in paragraph 21 of the Amended Notice of Civil Claim resulting in harm particularized in paragraph 22 of the Amended Notice of Civil Claim; (b) MCFD failure to meet the standard of care required of them pursuant to the CFCSA including failing to adequately follow up and monitor children once they are in care to mitigate the risk of adverse childhood events being visited upon them; (c) The existence of multiple, similar and repeated failures by MCFD to provide children in care with the rights established by Section 70 of the CFCSA and where these failures have resulted in many traumas being visited on the same child; and (d)A persistence of these issues within MCFD that continue to cause harm to children in care, after there have been public inquiries identifying these issues and after acknowledgement of these issues by the MCFD."	hearsay. Argument. Legal conclusions	inadmissible lay opinion
Paragraph 12 (last 3 sentences)	"As the property guardian of children in care, the PGT must consider various factors before deciding to prosecute a claim on behalf of a child. [...] Once that child reaches the age of majority, they will have to navigate the justice system without the support of the	Improper lay opinion. Unattributed hearsay	Admissibility arguable (e.g. some basis in fact to preferability).

	PGT. *That loss of support will add to the challenge of bringing their claim forward and could prevent them from advancing their legal claim as an adult. Often children have suffered emotional trauma from the very event that gives rise to their claim such that they do not want to engage or otherwise participate in traditional litigation. There is a very real concern within the office of the PGT that these children will not be able to pursue traditionally litigated claims as adults, where such claims are technically viable"*		
Paragraph 13	*I am aware of the certification of common issues relating to liability, and the successful resolution of those issues, can lead to alternative means of assessing individual damages other than through traditional litigation. I am aware that trauma informed resolution processes can be established by the consent of the parties or with direction from the Court. An example of this is Vancouver Action S1811960, which was a proceeding where I was instructing counsel for the office of the PGT.* A class action was brought by the PGT as litigation guardian, against the Crown as the result of a social worker, Robert Riley Saunders, who was alleged to have misappropriated funds intended for children who were in care. This case settled following a consent certification. The class members were children who were emotionally vulnerable. A trauma informed and low adversarial assessment process was established to address individual entitlements of compensation. *The class members benefited from this format as opposed to using traditional litigation to assess their individual damages. I believe the class members, and specifically the case*	Improper lay opinion. Unattributed hearsay	Admissibility arguable (e.g. some basis in fact to preferability).

	identified in paragraph 6, would benefit from a similar type of assessment process. This group contains traumatized individuals who would, at a minimum, be better able to participate if there was a reduction in the amount of traditional litigation processes used to evaluate the individual portions of their claims. If this proceeding is certified, the PGT would support the use of trauma informed resolution process to asses individual compensation and/or a reduction in the sue of traditional litigation processes to evaluate individual claims.		
Paragraph 14:	"For the cases identified in paragraph 6, the PGT would better be able to pursue compensation for children for whom the PFT is property guardian in a class action proceeding addressing those claims. As noted above, absent a class action process, there are access to justice issues that make the pursuit of many of these claims virtually impossible due to the cost of traditional litigation on an individual basis and the retraumatization of plaintiffs that can occur when vulnerable persons participate in an adversarial system as individual claimants. *If this case is certified, it would allow the cases I identified in paragraph 6, to be adjudicated and avoid the barriers created by the need to bring individual lawsuits."*	Improper lay opinion. Unattributed hearsay. Argument Legal conclusions.	Admissibility arguable (e.g. some basis in fact to preferability; lay opinion).