# SUPREME COURT OF NOVA SCOTIA

**Citation:** *Williams v. Nova Scotia (Attorney General)*, 2025 NSSC 184

**Date:** 20250617
**Docket:** Hfx 531490
**Registry:** Halifax

2025 NSSC 184 (CanLII)

**Between:**

James Williams

Plaintiff

and

The Attorney General of Nova Scotia
Representing his Majesty the King in right of Nova Scotia

Defendant

## ADMISSIBILITY DECISION

**Judge:** The Honourable Justice Jamie Campbell

**Heard:** May 27, 2025, in Halifax, Nova Scotia

**Counsel:** Michael Dull K.C. and Emma Arnold, for the Plaintiff
Daniel Boyle and Lyndsay Scovil, for the Defendant

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**By the Court:**

[1] James Williams is seeking to have an action certified as a class proceeding under the *Class Proceedings Act*, S.N.S. 2007, c. 28. The certification motion is scheduled to be heard from December 16 through December 18, 2025. Counsel on behalf of Mr. Williams have filed seven affidavits in support of that motion. The Attorney General of Nova Scotia has objected to the admissibility of all or portions of the affidavits of Emma Arnold, Zoë Caddell, and Dr. Stuart Grassian.

[2] The AGNS argues that the affidavits do not comply with the rules of evidence and the *Nova Scotia Civil Procedure Rules*. Mr. Michael Dull, counsel on behalf of Mr. Williams, says that the opposition to the admissibility of the affidavits is based on a fundamental mischaracterization of the purpose of the evidence. He maintains that the affidavits are not offered to prove the truth of the statements made in them or to assert that the statements are "correct, factual, should be adopted, or offer conclusions on the merits of the litigation". He says that they are offered for a limited purpose on a procedural motion, that being to evidence "some basis in fact" that the certification requirements are met. They are offered to provide context.

**Issue**

[3] The issue for determination on this motion is whether affidavits filed on a certification motion, intended to show that there is some basis in fact that the certification requirements are met, must contain admissible evidence and follow the requirements set out in the *Nova Scotia Civil Procedure Rules*.

**Evidentiary Threshold at Certification**

[4] The issue before the court on a certification motion is a procedural one. It is whether a class action is the appropriate vehicle to advance the issues common to the class. That is about the structure of the litigation, not the merits. And the test is intended to set up a "low bar". *Hollick v. Toronto (City)*, 2001 SCC 68, paras. 16, 18 and 25. At certification the court is not required to resolve conflicting facts and evidence, determine or assess the merits of the case or pronounce on the viability or strength of the action. *Wright Medical Technology Canada Ltd. v. Taylor*, 2015 NSCA 68 , para. 4.

[5] The test is to be applied in a purposive and generous way to give effect to the goals of class actions, which are to promote the efficient use of judicial

resources, provide access to justice for litigants, and sanctioning wrongdoers and encouraging them to change their behavior (*Hollick*, para. 15). Those goals are achieved by ensuring that the threshold is not high before the plaintiff can proceed with the substantive claim on the common issues at trial.

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**Rules for the Admissibility of Affidavit Evidence**

[6] The procedural nature of the certification motion informs the admissibility of the evidence.

[7] Rule 39 of the *Civil Procedure Rules* set out the acceptable contents of an affidavit. An affidavit may only contain evidence that is admissible under the rules of evidence, the *Civil Procedure Rules* or legislation. Rule 39.02(1) allows that hearsay may be included when permitted under the Rules, a rule of evidence or legislation provided that the affidavit identifies the source of the information and the witness' belief in the truth of the information.

[8] Rule 22.15 of the *Civil Procedure Rules* permits hearsay on information and belief in certain circumstances. Those are on *ex parte* motions when permitted by the judge, on motions on which representations of fact, instead of affidavits are permitted, if the hearsay is limited to "facts that cannot be reasonable contested", on motions to determine procedural rights, on motions for an order that affects only the interests of a party who is disentitled to notice, or on motions on which a Rule or legislation permits hearsay. Hearsay may be presented in an affidavit but there are limitations.

[9] Affidavits do not allow for a form of evidentiary free for all, in which the deponent "speaks their mind" or "tells their truth", with argument, speculation, opinion and irrelevant facts included for context or narrative. Rule 39.04(2) provides that a judge <u>must</u> strike a part of an affidavit that is inadmissible. As Justice Davison said in *Waverley (Village) v. Nova Scotia (Minister of Municipal Affairs*), 1993 NSSC 71, "great care" should be taken in their drafting. If evidence is not admissible, it should not and cannot be part of an affidavit.

**Admissibility in the Context of a Certification Motion**

[10] If a class representative is required to show some basis in fact for each of the certification requirements, that low bar must be met using admissible evidence. A certification motion is not an exception to the rules that govern the proper contents of affidavits.

[11] Justice Wood, (as he then was), in *Sweetland v. Glaxosmithkline Inc*., 2014 NSSC 216, noted that in a procedural motion, like a certification motion, hearsay is permissible, provided that the deponent establishes the source and the witness' belief of the information. He acknowledged that the evidentiary onus on the plaintiff seeking certification in a class action is not high and requires only that they show "some basis in fact" for each of the certification requirements. But that low threshold does not mean a low threshold with respect to the standards of admissibility.

> The low threshold of proof required on a certification motion should not be equated with a relaxation of the requirements for admissibility of evidence. A certification motion, like any motion, can only be decided on evidence that is properly before the court. The motion record must comply with the rules of evidence. For procedural motions this includes hearsay, provided the source is identified and the witness is able to establish their belief in the information. These requirements allow the court to assess the credibility and reliability of the hearsay statements being offered. (para. 15)

[12] In that case at issue was the admissibility of a United State Senate staff report. It was found to be "clearly inadmissible when examined against the elementary rules dealing with admission of evidence" (*Sweetland*, para. 16). The elementary rules dealing with the admission of evidence apply in the context of a certification motion. The Senate staff report was hearsay, and its author was not identified. It contained conclusions of fact based on reviews of documents and information from telephone interviews. In some cases, the sources were anonymous. The report was "rife with opinion on factual, medical and legal issues" (para. 16).

[13] More recently, in *Scott v. Regional Health Authority B (c.o.b. Horizon Health Network)*, 2022 NBQB 22, the court noted that while the burden is "some basis of fact" the standard must be satisfied on admissible evidence.

> That said, while the burden on the Plaintiff for all but one of the certification requirements is the lesser standard of "some basis in fact", the Plaintiff must satisfy this standard by submitting admissible evidence. The "some basis in fact" standard is an evidentiary burden of proof: it is not a separate lower standard going to the admissibility of the Plaintiff's evidence.
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> The "some basis in fact" lesser burden proof cannot be relied upon to admit evidence that would otherwise be inadmissible. (paras. 29-30)

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[14] The low bar for certification must be met based on admissible evidence. *Kish v. Facebook Canada Ltd.*, 2021 SKQB 198, para. 13.

**Affidavit of Dr. Grassian**

[15] Dr. Stuart Grassian is a Board-certified psychiatrist practising in Massachusetts. He taught at Harvard for over 25 years. Dr. Grassian has provided an affidavit in which he offers his opinion on the psychiatric effects of stringent conditions of confinement in correctional institutions and in particular the psychiatric effects on inmates of restricted and isolated “lockdown” confinement. Those issues relate directly to the claims set out in the pleadings.

[16] Mr. Dull on behalf of Mr. Williams, in oral argument on the motion, said that Dr. Grassian’s opinion was not put forward as an expert opinion but as context that would help to inform the decision on the certification requirements. Mr. Dull says that there is no requirement at the certification stage to weigh evidence or make findings with respect to facts.

[17] Dr. Grassian’s report is in the form of an opinion. He offers his opinions based on facts provided to him. He has not been qualified to give an expert opinion and has not been put forward as an expert. Inadmissible evidence cannot properly be admitted as “context”.

[18] As noted in *Kish*, at para. 14, citing Warren K. Winkler, Paul M. Perrell, Jasminka Kalajdzic and Alison Warner, *The Law of Class Actions in Canada* (Toronto: Canada Law Book, 2014), pages 32-33, evidence is inadmissible if it is opinion that has not been properly qualified. Opinion evidence in a certification motion can only be tendered through a properly qualified expert and proper qualification is a precondition to admitting opinion evidence on a certification motion. The authors go on to say that where expert evidence is produced on a motion for certification, the nature and amount of investigation and testing required to provide the basis for a preliminary opinion is not as extensive as it would be for an opinion given at trial. A lesser level of scrutiny is applied to opinions offered at the certification motion, “if they are otherwise admissible” (p. 33).

[19] Dr. Grassian’s affidavit is not admissible because it contains his opinions, and he has not been put forward as an expert but as a person able to provide context. He has not been formally qualified as an expert.

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**Affidavit of Emma Arnold**

[20] Several portions of the affidavit affirmed by Emma Arnold are not admissible. The parties have discussed having a replacement affidavit filed to delete portions of the affidavit that contain opinion, argument and submissions.

[21] The only paragraph that remains in dispute is paragraph 14.

> An action of this kind will likely be extremely expensive to pursue. The documentary evidence will be extensive and time consuming to collect and review. Numerous expert witnesses will likely be retained throughout the course of the proceedings. It is likely that litigating this case will cost hundreds of thousands of dollars, at a minimum, much more than the likely damages of the individual class members. The subject matter of this litigation is complex. I have been advised by Michael Dull, based on his experiences in other class actions, they estimate that the fees and disbursements that will be incurred in this proceeding will be approximately $100,000.00 up to and including the certification motion, and in excess of $500,000.00 up to and including a common issues trial.

[22] The AGNS says that the paragraph contains both opinion and hearsay.

[23] The views of lawyers as to whether the requirements for certification have been met are not admissible. Those statements may be both argument and opinion. An estimate of legal fees and disbursements and the suggestion that “numerous” expert witness would be likely to be required, is technically an opinion. The person offering the estimate is using their training and experience to assess what is likely to happen in the future. It is not a legal opinion or a prediction of what the outcome of a case might be. It would be unreasonable in this context to require a separate expert to be retained to provide an opinion on how complex and lengthy this matter could potentially be. The estimate of fees and the comment on the complexity of the subject matter of the case can properly be offered by Mr. Dull. Here, Ms. Arnold offers that information, citing Mr. Dull as the source. It is admissible.

**Affidavit of Zoë Caddell**

[24] Mr. Dull has acknowledged that the affidavit of Zoë Caddell is “not the best” and that it could “use some tweeking”. Ms. Caddell is an articled clerk with People’s Advocacy and Transformational Hub, (PATH Legal), the organization with which Mr. Dull is associated. Ms. Caddell was tasked with finding media reports about lockdowns in correctional institutions in Nova Scotia and other available reports and resources on the issue. The deficiencies in the affidavit are

most certainly not her responsibility and none of my comments should be taken as any kind of adverse reflection on her professionalism or her abilities. She was acting on instructions from her principal.

[25] The affidavit is three paragraphs long. Its purpose is to attach 29 exhibits. Of those 22 are online news reports from organizations such as Global News, CTV News, CBC News, Halifax Examiner, The Chronicle Herald, The Conversation, PNI Atlantic News, and Coast Reporter. They contain multiple levels of unsourced hearsay. There is no statement as to whether the deponent believes the information contained in the news reports.

[26] Mr. Dull argues that the purpose of those articles is not to prove the truth of their contents but to show a systemic pattern and to show that the issue was not isolated. If the purpose is to show a systemic pattern and to show that the issue was not isolated, the only way that these articles could do that would be to consider them for the proof of their contents. Otherwise, they might show a level of concern within the media about the issues, or a concern amongst those interviewed by the media, but they do not offer proof of a systemic pattern or proof of an ongoing issue without being considered for the truth of their contents. The articles are unsourced hearsay and are not admissible on that basis. They are also not relevant because they do not address the issues on the certification motion. “Context” cannot make everything that touches on a matter relevant to it.

[27] There are 7 reports attached to the affidavit. The first three are a Report of the Auditor General, Correctional Services, dated December 2006, a Report of the Auditor General to the Nova Scotia House of Assembly, dated May 2018, and a Report of the Auditor General, Follow-up of 2018, 2019, and 2020 Performance Audit Recommendations, dated April 2023.

[28] The Auditor General’s reports are government documents and could serve as evidence that certain findings and recommendations regarding correctional services were made by the Auditor General. The scope of the reports extends far beyond the subject matter of this case, which is lock downs. They contain material that is not at all relevant to the issue of certification and calling the information “context” does not make it relevant. The purpose of an affidavit is to provide relevant evidence related to the matters in issue. Affidavits are not intended as a way to file large volumes of information from which at some point may be extracted the parts that are considered relevant.

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[29] The affidavit attaches the Annual Report of the East Coast Prison Justice Society Visiting Committee 2020-2021, “Conditions of Confinement in Men’s Provincial Jails in Nova Scotia” authored by Hanna B. Garson, Shelia Wildeman, and Harry Critchley, the Annual Report of the East Coast Prison Justice Society Visiting Committee 2021-2022, “Conditions of Confinement in Nova Scotia Jails Designated for Men” authored by Shelia Wildeman, Harry Critchley, Hanna Garson, Laura Beach and Margaret-Anne McHugh, and the Annual Report of the East Coast Prison Justice Society Visiting Committee 2022-2023 authored by Laura Beach, Hans Loewig, Meg MacDonald, Megan Ross, and Sheila Wildeman. Attaching material as an exhibit to an affidavit does not somehow immunize it from scrutiny under the rules of evidence. Hearsay, argument and opinion are no more admissible when attached as an exhibit than when set out in the body of the affidavit.

[30] The final exhibit attached to the affidavit is the Affidavit and Expert Report of Dr. James Austin, sworn March 1, 2017, for use in *Lapple et. al. v. Her Majesty the Queen in Right of the Province of Ontario.* In the report Dr. Austin examines the historical use of prison lockdowns and their consequences on inmates, staff and public safety. It purports to be an expert opinion. Dr. Austin offers his opinion that the frequent use of lockdowns serves to exacerbate tensions between staff and inmates and between inmates. “In the long run, they will serve to worsen inmate and staff safety. Frequent use of lockdowns will also negatively impact the conditions of confinement and interrupt prisoner access to and the impact of rehabilitative programs. Consequently, recidivism rates will be aversely impacted thus increasing the risk to public safety.” (para. 17)

[31] That is an opinion. Opinion evidence is permitted only from qualified experts. Dr. Austin has not been qualified as an expert in this matter. Filing his opinion as an exhibit to an affidavit does not mean that it is admissible for “information purposes” or just for “context”.

[32] The affidavit of Zoë Caddell is struck.

Campbell, J.

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