IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N:

	)	***A. J. Ladyka***
DAVID WEREMY	)	*for the Applicant*
	)	
	)	***D. A. Rosenfeld*** *and*
(Plaintiff) Respondent	)	***N. A. Gondek***
	)	*for the Respondent*
- and -	)	*(via videoconference)*
	)	
THE GOVERNMENT OF MANITOBA	)	*Chambers motion heard:*
	)	***October 14, 2020***
	)	
(Defendant) Applicant	)	*Decision pronounced:*
	)	***April 8, 2021***

LEMAISTRE JA

Introduction

[1] The defendant (Manitoba) seeks leave to appeal an order certifying a class proceeding pursuant to *The Class Proceedings Act*, CCSM c C130 (the *CPA*). The issue for the proposed appeal is whether the certification judge relied on inadmissible hearsay evidence to define the class period.

[2] I am not persuaded that Manitoba has raised an arguable case of substance warranting the attention of the full Court. For the reasons that follow, the motion for leave to appeal is dismissed.

Background

[3] The plaintiff filed a statement of claim against Manitoba for systemic negligence and breach of fiduciary duty for its operation of the Manitoba Developmental Centre in Portage la Prairie (MDC), and sought an order certifying the action as a class proceeding.

[4] The certification judge granted the certification order (see *Weremy v The Government of Manitoba*, 2020 MBQB 85). In doing so, she defined the class as follows:

> . . .
>
> . . . [A]ll persons who resided at [MDC] for any period or periods of time between July 1, 1951 and the date of the certification order herein, and who were alive as of October 31, 2016 . . ..
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> . . .

[5] In support of his motion for certification, the plaintiff filed his own affidavit and the affidavits of three other people who resided at MDC between 1954 and 1977 (the affiants). These affidavits described the abuse and mistreatment of residents at MDC during that period. Manitoba accepted that these affidavits were admissible and provided sufficient evidence for a class definition that included persons who resided at MDC from 1951 to 1977.

[6] The plaintiff filed two additional affidavits sworn by a lawyer and the Executive Director of People First of Canada, with the following exhibits attached:

1. five decisions from labour relations arbitrators issued between 1990 and 2005 arising from grievances by MDC staff (the arbitral decisions);

2. a 2001 decision of the Court of Queen's Bench involving the disciplinary appeal of an MDC employee after she was sanctioned by a licensing body (the court decision);

3. excerpts of four annual reports of the Manitoba Ombudsman from 1986 to 1989 regarding the investigation of an allegation of abuse made by a resident of MDC in 1985 and ongoing problems identified during the investigation (the Ombudsman reports); and

4. two inquest reports issued by Provincial Court judges in 2007 and 2014 regarding the deaths of two residents at MDC (the inquest reports),

(collectively, the documents).

[7] Also attached as an exhibit to the affidavit of the Executive Director of People First of Canada was a video documentary from 2008 (the video). The video contains interviews of individuals who say they have knowledge of residents being mistreated at MDC.

[8] Manitoba opposed the admission of the documents on the basis that they were hearsay.

[9] The certification judge found that the documents were admissible because the plaintiff did not seek to rely on them for the truth of their contents.

She stated, "Rather, he seeks to establish that the [d]ocuments were published as written. Accordingly, the contents of the [d]ocuments are not hearsay for the purposes of this motion, and are admissible" (at para 38).

[10] In the alternative, the certification judge concluded that the arbitral decisions and the court decision could have been included in the book of authorities only, rather than being attached as exhibits to the affidavits (the plaintiff filed them both ways) "to establish that the decisions were made and the underlying reasons for each of them" (at para 40). She stated (at para 42):

> I accept that [the arbitral decisions and the court decision] and the reasons for them are relevant to determining whether there is some basis in fact upon which a class proceeding could be based, because the decisions confirm that between 1990 and 2005:
>
> a) allegations of resident abuse or neglect were made against MDC staff;
>
> b) [Manitoba] was aware of the allegations;
>
> c) staff members were disciplined, either by [Manitoba] or a licensing body; and
>
> d) there was an adjudicated review of the discipline.

[11] Regarding the Ombudsman reports and the inquest reports, the certification judge determined that they were also admissible pursuant to the public documents exception.

[12] After admitting the documents into evidence, and taking into account the video, the certification judge considered whether there was evidence to support a class definition that included persons who resided at MDC after 1977 (at paras 71-72):

> Although I have not been presented with any direct evidence of systemic abuse or mistreatment at MDC after 1977, I am satisfied by the [d]ocuments that the following events occurred:
>
> a) in 1985 an allegation of resident injury was made, which prompted the Ombudsman to conduct an investigation of MDC, and make a series of recommendations to [Manitoba];
>
> b) between 1990 and 2005 five arbitral decisions issued, by which MDC staff were disciplined for resident abuse or neglect, or conduct that resulted in resident neglect;
>
> c) in 2001 this court upheld a serious disciplinary sanction imposed upon a long-term MDC staff member by her professional licensing body for the use of inappropriate force against a resident;
>
> d) in each of 2007 and 2014, inquest reports and recommendations were issued by the Provincial Court of Manitoba, relative to the death of an MDC resident [footnote omitted]; and
>
> e) in 2008, a video documentary was produced in which individuals made allegations of abuse at MDC.
>
> Although I can attach only limited weight to this evidence, it generally supports the plaintiff's allegations and provides some basis in fact for the claim from 1977 to present. . . .

Proposed Grounds of Appeal

[13] Manitoba's proposed grounds of appeal are that the certification judge erred in law:

1. in admitting the documents into evidence;

2. in finding that the contents of the documents were not hearsay and were admissible to meet the evidentiary requirements for certification;

3. in making the alternative finding that the underlying reasons for the arbitral decisions and the court decision were admissible to meet the evidentiary requirements for certification;

4. in making the alternative finding that the Ombudsman reports and the inquest reports fit within the public documents exception to the rule against hearsay;

5. in finding that the video was admissible to meet the evidentiary requirements for certification; and

6. in defining the class period to include persons who resided at MDC after December 31, 1977.

Test for Leave to Appeal

[14] Section 36(4)(a) of the *CPA* provides for an appeal of a certification order with leave. The factors to be considered on a motion for leave are: 1) whether the appeal raises a question of law; 2) whether the case is of sufficient importance to warrant the attention of the full court; and 3) whether there is an arguable case of substance (see *Anderson et al v Manitoba et al*, 2015 MBCA 123 at paras 23-27; see also *Pisclevich et al v Government of Manitoba*, 2018 MBCA 127 at para 11). If the issues raised on the proposed appeal, considered in light of the relevant standard of review, have a reasonable prospect of success, then there will be an arguable case of

substance (see *Cann v Director, Fort Garry/River Heights*, 2020 MBCA 101 at para 29).

[15] In *Meeking v Cash Store Inc et al*, 2014 MBCA 69, Steel JA pointed out that a certification order is a discretionary decision entitled to deference and that the grant of certification is not final (see paras 21-22, 34; see also the *CPA* at sections 8(3), 10(1)).

[16] I agree with Manitoba that the admissibility of evidence raises a question of law. However, absent an error in principle, whether such evidence was properly admitted is a question of mixed fact and law to be reviewed on a standard of palpable and overriding error (see *Dobrowolski v Dobrowolski*, 2020 MBCA 105 at paras 21-22). Whether the evidence is sufficient to satisfy a legal test is a question of mixed fact and law (see *Housen v Nikolaisen*, 2002 SCC 33 at para 36).

Positions of the Parties

[17] Manitoba argues that, without the documents and the video, "there would have been no evidence to meet the standard of 'some basis in fact' that the class definition should include persons who resided at MDC over the 43-year period from 1977 to the date of the Certification Order." Manitoba says that the certification judge failed to apply the correct legal principles in admitting this evidence and, therefore, the class definition should be amended to include only persons who resided at MDC between July 31, 1951 and December 31, 1977.

[18] Manitoba asserts that, despite stating that she relied on the documents for the fact that they were published, the certification judge went

beyond that use. It says that the documents in this case stand alone and are not sufficient evidence for the class definition. It argues that, while there need not be direct evidence for every single year, this case involves 43 years with no direct evidence and this gap is too large to certify. Finally, it contends that the certification judge's finding that the Ombudsman reports and the inquest reports were admissible under the public documents exception is at odds with the plaintiff's assertion that they were not tendered for their truth.

[19] The plaintiff argues that Manitoba was out of time to file its motion for leave to appeal.

[20] In the alternative, the plaintiff argues that the certification judge did not err in admitting the documents and the video or by using them as sufficient evidence to meet the certification requirements regarding the class definition. The plaintiff asserts that the documents and the video were properly used by the certification judge to establish that there was some basis in fact that systemic investigations were conducted; findings were made about systemic failures; systemic recommendations were made; employees were disciplined for abusive conduct; and Manitoba was aware of the reports, findings and recommendations about MDC operations over the decades.

Analysis

Was Manitoba's Motion for Leave to Appeal Filed Out of Time?

[21] The plaintiff's argument that Manitoba's motion for leave to appeal is statute-barred can be summarily dismissed.

[22] The time requirements for filing a notice of appeal (or motion for leave to appeal) are set out in r 11 of the MB, *Court of Appeal Rules*, MR 555/88R (the *CA Rules*). Rule 11 reads, in part:

> **Time for service**
> **11(1)** Subject to subrules (2) and (2.1), a notice of appeal shall be filed and served within the following time limits:
>
> (a) in a case where the judgment appealed from is required to be filed, within 30 days after that filing;
>
> . . .
>
> (c) in any other case, within 30 days after the pronouncement of the judgment appealed from.
>
> . . .
>
> **11(3)** A party who wishes to file a notice of appeal shall, where practicable, file the judgment appealed from in the court appealed from before filing the notice of appeal.
>
> **11(4)** Where the judgment appealed from is not filed in the court appealed from, the party may file a notice of appeal accompanied by a letter by or on behalf of the appellant indicating the reason why the judgment has not been filed.

[23] The certification judge delivered her reasons for judgment on May 29, 2020. The certification order was filed in the Court of Queen's Bench on July 22, 2020. Manitoba filed its motion for leave to appeal on August 14, 2020.

[24] The plaintiff argues that the 30-day time limit started to run on May 29, 2020, when the certification judge pronounced her judgment and, therefore, Manitoba failed to meet the requirements of the *CA Rules* when it

filed its motion for leave to appeal. He says that r 11(1)(c) is the applicable rule. I disagree.

[25] In *Singh v Pierpont*, 2015 MBCA 18, Beard JA explained that, pursuant to r 11(3) of the *CA Rules*, "a written judgment or order must be signed and filed in the court appealed from" (at para 19) before the notice of appeal is filed. She also pointed out that r 11(1)(c) is a residual clause. Furthermore, "[u]ntil the judgment or order has been formalized, the judge who pronounced it can hear further evidence and argument and change his or her mind as expressed in the earlier pronouncement" (*Ridout v Ridout*, 2003 MBCA 61 at para 12).

[26] In this case, the applicable rule is r 11(1)(a) and the appeal period started to run on the date the order was filed (see *Singh* at paras 19-28). Therefore, Manitoba filed its motion for leave to appeal within the time requirements of the *CA Rules*.

What is the Evidentiary Standard on a Motion for Certification?

[27] A certification motion is a procedural process to determine whether a claim "is appropriately prosecuted as a class action" (*Hollick v Toronto (City)*, 2001 SCC 68 at para 16; see also para 17). Section 4 of the *CPA* establishes the requirements for certification of a class action. The certification criteria are to be applied generously and in a way which gives effect to the objectives of judicial economy, enhanced access to justice and modification of harmful behaviour (see *Hollick* at paras 14-15).

[28] One of the requirements for certification is a clear class definition (see the *CPA* at section 4; and *Western Canadian Shopping Centres Inc v*

Dutton, 2001 SCC 46 at paras 38-41). In *Dutton*, McLachlin CJC explained the approach that should be taken when identifying the class (at para 38):

> . . . Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria [citations omitted].

[29] One of the purposes of class actions is to deal with all similar potential claims at the same time. While the class definition should not be unnecessarily broad, "[i]t is preferable to err on the side of inclusion, not exclusion, and not leave possible claimants outside the class" (*King & Dawson v Government of PEI*, 2020 PECA 13 at para 45(v); see also *Hollick* at paras 20-21).

[30] Where the appropriate scope of the class is not apparent from the nature of the claim, the plaintiff has the onus of establishing an appropriate class definition. In order to meet the evidentiary standard for the class definition, the plaintiff must demonstrate "some basis in fact" (*Hollick* at para 25) that the other proposed class members have similar potential claims (see paras 20, 25).

[31] In *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57, Rothstein J noted that the certification process is a meaningful screening

device and evidence has a role to play. He explained that the standard of some basis in fact is not the same as proof on a balance of probabilities, does not require the court to resolve conflicting facts and evidence, and does not require the court to engage in complex assessments as to whether the plaintiffs will be able to establish their case at trial. He wrote (at paras 102, 104-5):

> . . . The certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action; "rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding" (*Infineon* [*Pro-Sys Consultants Ltd v Infineon Technologies AG*, 2009 BCCA 503], at para. 65).
>
> . . . There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met.
>
> . . . I think it important to emphasize that the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial. After an action has been certified, additional information may come to light calling into question whether the requirements of s. 4(1) continue to be met. It is for this reason that enshrined in the *CPA* is the power of the court to decertify the action if at any time it is found that the conditions for certification are no longer met (s. 10(1)).

[32] In *Soldier v Canada (Attorney General)*, 2009 MBCA 12, Steel JA described the court's role at the certification stage as "a gatekeeper function" (at para 21). Accordingly, while base assertions or mere speculation in motion briefs, pleadings or argument will not be sufficient for certification, the evidentiary standard is relatively low, and the evidentiary foundation need not be exhaustive or be a record upon which the merits will be argued (see

Sun-Rype Products Ltd v Archer Daniels Midland Company, 2013 SCC 58 at paras 61, 70, 91; *AIC Limited v Fischer*, 2013 SCC 69 at para 41; and *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at paras 138, 160).

What Constitutes Some Basis in Fact for the Identifiable Class Requirement?

[33] The jurisprudence establishes that, in order to satisfy the identifiable class requirement, there must be an evidentiary basis which supports the existence of others, in addition to the plaintiff, who share a common claim (see *Toms Grain & Cattle Co Ltd v Arcola Livestock Sales Ltd*, 2006 SKCA 20 at paras 20, 28). However, direct evidence is not required from the other proposed class members and they need not be named or known at the certification stage (see *Dutton* at para 38; and *Hollick* at para 25; see also *Walls et al v Bayer Inc*, 2005 MBQB 3 at paras 34-38, 42, leave to appeal to Man CA refused, 2005 MBCA 93; leave to appeal to SCC refused, 31113 (15 December 2005)).

[34] Courts have regularly considered evidence, such as complaint records; government or official reports; and affidavits of counsel attesting to the existence of other potential class members, as sufficient evidence to establish some basis in fact that the class exists as alleged. This evidence has been found to be objectively reliable information supporting the existence of other potential class members who shared similar experiences and issues as the plaintiff without being used for the truth of its contents.

[35] For example, in *Hollick*, the appellant met the evidential burden of "some basis in fact" (at para 25) to support the scope of the proposed class on the basis of complaint records obtained from the Ontario Ministry of Environment and Energy and the Toronto Metropolitan Works Department.

The Court relied on the fact that the complaints were made and not whether the complaints were legitimate (see para 26; see also *Hollick v Metropolitan Toronto (Municipality)* (1998), 168 DLR (4th) 760 at para 10 (Ont Ct J (Gen Div) (Div Ct))).

[36] Similarly, in *Rumley v British Columbia*, 1998 CarswellBC 2343 (SC), the certification judge relied on reports prepared by the Ombudsman and special counsel regarding allegations of abuse of students at Jericho Hill School for the limited purpose of determining whether the certification requirements had been met. These reports were also relied on by the Court of Appeal and the Supreme Court of Canada on appeal (see *LR v British Columbia*, 1999 BCCA 689; and *Rumley v British Columbia*, 2001 SCC 69). However, these same reports were ruled inadmissible for the truth of their contents at trial (see *Rumley et al v HMTQ*, 2003 BCSC 234).

[37] In *Warner v Smith & Nephew Inc*, 2016 ABCA 223, leave to appeal to SCC refused, 37229 (2 February 2017), the Alberta Court of Appeal overturned the certification judge's determination that the plaintiff had not produced evidence of an identifiable class of two or more persons. Paperny JA, writing for the majority, concluded that the certification judge erred by applying too high an evidentiary standard to the identifiable class requirement. In doing so, she noted that the certification judge had admitted into evidence a report of the Alberta Bone & Joint Health Institute that supported the existence of other patients who shared similar experiences and issues as the plaintiff without establishing this as a fact.

[38] Other examples of cases in which records, reports and/or affidavits of counsel were relied on for the identifiable class requirement of certification

include: *Walls*; *Pardy et al v Bayer Inc*, 2004 NLSCTD 72, leave to appeal to NL CA refused, 2005 NLCA 20; leave to appeal to SCC refused, 30920 (10 November 2005); *Harrison v XL Foods Inc*, 2014 ABQB 720; and *Harris v Bayerische Motoren Werke Aktiengesellschaft*, 2020 ONSC 1647.

[39] Finally, where the class is alleged to be too broad in scope temporally, courts will not demand precise correspondence of the class period to the available evidence, and have revealed some latitude in extending the end date past the date established by the evidence (see, for example, *Cloud v Canada (Attorney General)* (2004), 247 DLR (4th) 667 (Ont CA), leave to appeal to SCC refused, 2005 CarswellOnt 1866; *Dolmage v Ontario*, 2010 ONSC 1726; *Seed v Ontario*, 2012 ONSC 2681; and *Safioles v Saskatchewan (Government)*, 2014 SKQB 260).

Is There an Arguable Case That the Certification Judge Relied on Inadmissible Hearsay?

[40] Despite the low evidentiary standard for certification, the normal evidentiary rules apply during certification hearings (see *Ernewein v General Motors of Canada Ltd*, 2005 BCCA 540 at para 31; and *Dow Chemical Company v Ring, Sr*, 2010 NLCA 20 at para 21; see also Warren K Winkler et al, *The Law of Class Actions in Canada* (Toronto: Canada Law Book, 2014) at 32). For evidence to be admissible, it must be relevant. If the evidence is inadmissible hearsay, then it cannot be used to establish some basis in fact.

[41] As explained in David M Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin Law, 2015), whether evidence is hearsay depends on the use to be made of it (at p 115):

> . . .
>
> Only those statements offered for their truth offend the rule against hearsay. In other words, hearsay evidence is not identified by the nature of the evidence, but by the use to which the evidence is to be put — its purpose. When an out-of-court statement is offered simply as proof that the statement was made, it is not hearsay, and it is admissible as long as it has some probative value. . . .
>
> . . .

[42] The reliability of an out-of-court statement becomes an issue only when the statement is being relied on for its truth. This principle was explained this way in Sidney N Lederman, Alan W Bryant & Michelle K Fuerst, *The Law of Evidence in Canada*, 5th ed (Toronto: LexisNexis, 2018) (at section 6.27):

> The hearsay rule is invoked only where an out-of-court statement or conduct is tendered as evidence of proof of the facts asserted therein because it is only in that circumstance that there is a need to test the reliability of what is being stated. If such evidence is presented, not for this purpose, but for some other relevant purpose — for example, if it is tendered to show that a person received notice by the fact that a statement was made to her or him — then the statement is admissible as proof, not of its truth, but that the statement was made.
>
> [footnote omitted]

[43] In this case, the plaintiff characterises the documents as "evidence that systemic reports, findings, and recommendations about the operations of MDC were made (including the period following 1977)." The plaintiff states that the documents were not submitted to prove the findings, opinions or conclusions set out in the documents.

[44] Manitoba submits that the documents contain hearsay tendered as proof of their contents.

[45] The certification judge accepted the plaintiff's argument that he was not relying on the documents for their truth and, therefore, their contents were not hearsay.

[46] In my view, the certification judge correctly concluded that the documents were not hearsay based on the use to be made of them. Moreover, she did not rely on the contents of the documents for their truth.

[47] The certification judge was clear that the plaintiff had not provided "any direct evidence of systemic abuse or mistreatment at MDC after 1977" (at para 71). She understood that she could attach only limited weight to the evidence contained in the documents and the video. Regardless, she found that this evidence "provide[d] some basis in fact for the claim from 1977 to present" (at para 72). She also recognised that, without additional evidence regarding the period after 1977, the class definition may need to be revisited (at para 73):

> I recognize that as this matter progresses it may become apparent that there is no evidence to advance the claim for all or part of the time frame after 1977, including with respect to the allegations raised in the [d]ocuments. Those issues will be determined at trial. There is enough evidence on the record, however, to satisfy me that there is some basis in fact for the class period in this case to extend from 1977 to the present.

[48] For example, the certification judge relied on the Ombudsman reports to establish that "in 1985 an allegation of resident injury was made,

which prompted the Ombudsman to conduct an investigation of MDC, and make a series of recommendations to [Manitoba]" (at para 71(a)).

[49] In *Hollick*, the Court relied on the fact that complaints were made as some basis in fact to support the scope of the proposed class. In this case, the fact that an allegation was made, and the Ombudsman conducted an investigation and made recommendations, does not prove that a resident was injured through negligence. However, it supports the assertion that a complaint that a resident was injured was made and the Ombudsman investigated the complaint and made recommendations. When considered in the context of the evidence contained in the affidavits of the plaintiff and the affiants, as well as the other impugned documents, this provides some basis in fact supporting the class definition. In other words, it provides some basis in fact for the assertion that there are potential class members who resided at MDC after 1977.

[50] I am not convinced that the certification judge erred in her characterisation or use of the documents and the video.

[51] Having come to this conclusion, it is not necessary to consider her alternate findings. However, I am also not persuaded that the certification judge erred when she described the relevance of the arbitral decisions and the court decision in the following way (at para 42):

> I accept that these decisions and the reasons for them are relevant to determining whether there is some basis in fact upon which a class proceeding could be based, because the decisions confirm that between 1990 and 2005:
>
> a) allegations of resident abuse or neglect were made against MDC staff;

> b) [Manitoba] was aware of the allegations;
>
> c) staff members were disciplined, either by [Manitoba] or a licensing body; and
>
> d) there was an adjudicated review of the discipline.

[52] I disagree with Manitoba's argument that the certification judge erred in finding that the "underlying reasons" (at para 40) for the arbitral decisions and the court decision were admissible to meet the evidentiary requirements for certification. A fair reading of her reasons shows that her reference to "underlying reasons" relates not to the reasons of the decision-makers, but rather to the complaints that resulted in the proceedings.

[53] Manitoba's argument that the certification judge erred in finding that the Ombudsman reports and the inquest reports were admissible pursuant to the public documents exception to the hearsay rule is of no moment because of the use she made of them. She did not assess the truth of the allegations "underlying" the Ombudsman reports and the inquest reports, and used them only to establish that (at para 71):

> . . .
>
> a) in 1985 an allegation of resident injury was made, which prompted the Ombudsman to conduct an investigation of MDC, and make a series of recommendations to [Manitoba]; [and]
>
> . . .
>
> d) in each of 2007 and 2014, inquest reports and recommendations were issued by the Provincial Court of Manitoba, relative to the death of an MDC resident . . .
>
> . . .

Is There an Arguable Case That There Is Insufficient Evidence to Support the Class Definition?

[54] Finally, Manitoba argues that the certification judge erred in concluding that the evidence supported a class definition that includes persons who resided at MDC after December 31, 1977. This argument raises a question of mixed fact and law. That said, I am not persuaded that the certification judge erred.

[55] When considered in the context of the evidence in the affidavits of the plaintiff and the affiants, the documents and the video provide some basis in fact that the issues identified by them continued to exist at MDC after 1977. They also provide support for the plaintiff's assertion that his experience at MDC was not an isolated one (see *Johnson v Ontario*, 2016 ONSC 5314 at para 65). The documents and the video provide some basis in fact that there are other potential class members who resided at MDC after 1977.

[56] The class definition fulfills the purpose of identifying persons who are entitled to notice, who may be entitled to relief and who would be bound by any result. It also meets the objectives of class proceedings. I am not persuaded that the class definition is overly broad.

Conclusion

[57] The certification judge correctly stated the law regarding hearsay evidence and the evidentiary standard for the identifiable class requirement. She did not err in her application of the law or commit any other error in principle. Manitoba has not established an arguable case that the certification judge erred in using the documents and the video in the way that she did to

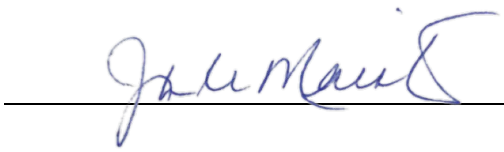
establish that there was some basis in fact to support a class definition that extended beyond 1977.

[58] Moreover, the issues on the proposed appeal do not warrant the attention of the full Court. The certification order is in the nature of an interlocutory order; section 10(1) of the *CPA* allows the Court to amend the order or decertify the proceeding "at any time after a certification order is made".

[59] More importantly, the main issue in this case is whether the certification judge relied on inadmissible hearsay evidence to define the class period. Decisions regarding the admissibility of evidence are highly dependant on the facts and circumstances of the particular case. As explained by Beard JA in *Dobrowolski* (at para 53):

> . . . [T]he determination of the admissibility of hearsay evidence is a very contextual analysis that depends on the underlying facts and the circumstances under which the evidence came about, and this starts with the determination of whether the proposed evidence is being offered for a hearsay purpose. . . .
>
> [emphasis added]

[60] In the result, the motion for leave to appeal is dismissed with costs.



JA