CITATION: Pugliese v. Chartwell, 2024 ONSC 1135
COURT FILE NO. CV-20-00640771-00CP
Balausiak v. Extendicare, **COURT FILE NO.** CV-22-00684319-00CP
Brough v. Responsive, **COURT FILE NO.** CV-20-00640016-00CP
Hannon v. Revera, **COURT FILE NO.** CV-20-00645495-00CP
Do v. Schlegel, **COURT FILE NO.** CV-22-00688509-00CP
Robertson v. Sienna, **COURT FILE NO.** CV-20 00640883-00CP
McVeigh v. Toronto, **COURT FILE NO.** CV-22-00687579-0000
McDermott v. ATK, **COURT FILE NO.** CV-20-00644726-00CP
DATE: 20240307

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ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

TERESA PUGLIESE by her estate executor ALBINO PUGLIESE, IRIS ROPER by her litigation administrator MARGARET ROPER, PAMELA NITCHKE by her estate executor MURRAY NITCHKE, ALBINO PUGLIESE, MARGARET ROPER, and MURRAY NITCHKE

Plaintiffs

-and-

CHARTWELL RETIREMENT RESIDENCES, CHARTWELL MASTER CARE LP, CHARTWELL MASTER CARE CORPORATION, CHARTWELL MASTER CARE CORPORATION in its capacity as trustee of GP M TRUST, GP M TRUST (by its trustee CHARTWELL MASTER CARE CORPORATION) in its capacity as general partner of CHARTWELL MASTERCARE LP, REGENCY LTC OPERATING LIMITED PARTNERSHIP by its general partner REGENCY OPERATOR GP INC., TRILOGY LTC INC., LIUNA LOCAL 837 NURSING HOME (ANCASTER) CORPORATION, LIUNA LOCAL 837 NURSING HOME (HAMILTON) CORPORATION, DELCARE LTC INC., VILLA FORUM

Defendants

AND B E T W E E N:

GERTRUDE BALAUSIAK by her estate representative JEFFREY BALAUSIAK, TERESA ZAJAC by her estate representative HENRY ZAJAC, URSULA DREHLICH by her estate representative SYLVIA LYON, DONNA HATINEN by her estate representative KAREN

MacRAE, LEO HATINEN by his estate representative KAREN MacRAE, PEGGY HANNON by her litigation guardian, SUZANNE ZAGALLAI, JEFFREY BALAUSIAK, HENRY ZAJAC, SYLVIA LYON, KAREN MacRAE, and SUZANNE ZAGALLAI.

Plaintiffs

-and-

EXTENDICARE INC., SOUTHBRIDGE HEALTH CARE GP INC, SOUTHBRIDGE CARE HOMES INC., EXTENDICARE (CANADA) INC., VILLA COLOMBO HOMES FOR THE AGED INC., CVH (NO.1) LP by its general partners SOUTHBRIDGE HEALTH CARE GP INC. and SOUTHBRIDGE CARE HOMES LP (by its general partner SOUTHBRIDGE CARE HOMES INC.), CVH (NO.2) LP by its general partners SOUTHBRIDGE HEALTH CARE GP INC. and SOUTHBRIDGE CARE HOMES LP (by its general partner SOUTHBRIDGE CARE HOMES INC.), CVH (NO.3) LP by its general partners SOUTHBRIDGE HEALTH CARE GP INC. and SOUTHBRIDGE CARE HOMES LP (by its general partner SOUTHBRIDGE CARE HOMES INC.), CVH (NO.4 LP) by its general partners SOUTHBRIDGE HEALTH CARE GP INC. and SOUTHBRIDGE CARE HOMES LP (by its general partner SOUTHBRIDGE CARE HOMES INC.), CVH (NO.5) LP by its general partners SOUTHBRIDGE HEALTH CARE GP INC. and SOUTHBRIDGE CARE HOMES LP (by its general partner SOUTHBRIDGE CARE HOMES INC.), CVH (NO.6) LP by its general partners SOUTHBRIDGE HEALTH CARE GP INC. and SOUTHBRIDGE CARE HOMES LP (by its general partner SOUTHBRIDGE CARE HOMES INC.), CVH (NO.7) LP by its general partners SOUTHBRIDGE HEALTH CARE GP INC. and SOUTHBRIDGE CARE HOMES LP (by its general partner SOUTHBRIDGE CARE HOMES INC.), CVH (NO.8) LP by its general partners SOUTHBRIDGE HEALTH CARE GP INC. and SOUTHBRIDGE CARE HOMES LP (by its general partner SOUTHBRIDGE CARE HOMES INC.), CVH (NO.9) LP by its general partners SOUTHBRIDGE HEALTH CARE GP INC. and SOUTHBRIDGE CARE HOMES LP (by its general partner SOUTHBRIDGE CARE HOMES INC.), HALTON HEALTHCARE LTC INC., SOUTHLAKE RESIDENTIAL CARE VILLAGE, TENDERCARE NURSING HOMES LIMITED, F.J. DAVEY HOME, LAND O'LAKES COMMUNITY SERVICES, THE BOARD OF MANAGEMENT FOR THE DISTRICT OF MANITOULIN, SOUTHBRIDGE HEALTH CARE LP by its general partner SOUTHBRIDGE HEALTH CARE GP INC., and 1942454 ONTARIO INC.

Defendants

AND B E T W E E N:

WILLIAM BROUGH by his estate representative DARREN BROUGH, MAURICE ALBERT ORCHARD by his estate representative CHRISTINA KINDER, GASTON SCHWALB by his estate representative KIM KOBLINSKY, ANNETTE DERY by her estate executor ELIE DERY, WILLIAM VAN DYKE by his estate executor TERENCE VAN DYKE, BEATRICE GRACE GENDRON by her estate executrix JACQUELINE AMABLE, MARIE BEDARD by

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her estate executrix ANGIE THORN, DARREN BROUGH, CHRISTINA KINDER, KIM KOBLINSKY, ELIE DERY, TERENCE VAN DYKE, JACQUELINE AMABLE and ANGIE THORN

Plaintiffs

-and-

RESPONSIVE GROUP INC., RESPONSIVE MANAGEMENT INC., RESPONSIVE MANAGEMENT SERVICES INC., RESPONSIVE HEALTH MANAGEMENT INC., RYKKA CARE CENTRES LP, RYKKA CARE CENTRES GP INC., RYKKA CARE CENTRES II GP INC., RESPONSIVE MANAGEMENT II INC., RESPONSIVE HEALTH MENTORS LTD., VERMONT SQUARE LTC LP by its general partner VERMONT SQUARE LTC INC., COOKSVILLE CARE CENTRES FACILITY INC., EATONVILLE CARE CENTRE FACILITY INC., ANSON PLACE CARE CENTRE FACILITY INC., 914 BATHURST GP INC., SHARON FARMS & ENTERPRISES LTD., HAWTHORNE CARE FACILITY INC, DTOC II LONG TERM CARE LP by its general partner DTOC II LONG TERM CARE MGP (a general partnership, by its partners DTOC LONG TERM CARE GP INC. and ARCH VENTURE HOLDINGS INC.), INA GRAFTON GAGE HOME OF TORONTO and 848357 ONTARIO INC.

Defendants

AND B E T W E E N:

ROY HANNON, by his estate representative STEPHEN HANNON, BERNARD RENAUD by his estate representative LORI RENAUD, ANGELA MASUCCI by her estate representative PETER MASUCCI, ASSUNTA RICCI by her estate representative TONINO RICCI, SHIRLEY EGERDEEN by her estate representative TRACY ROWLEY, STEPHEN HANNON, LORI RENAUD, PETER MASUCCI, TONINO RICCI and TRACY ROWLEY

Plaintiffs

-and-

REVERA INC., REVERA LONG TERM CARE INC., HAROLD AND GRACE BAKER CENTRE, AXR OPERATING (NATIONAL) LP. by its general partner AXR OPERATING (NATIONAL) GP INC., BAYWOODS PLACE OPERATING INC., CARLINGVIEW MANOR OPERATING INC., DOVER CLIFFS OPERATING INC., ELMWOOD PLACE OPERATING INC., HANOVER OPERATING INC., HEARTWOOD OPERATING INC., HUMBER VALLEY TERRACE OPERATING INC., and STONERIDGE MANOR OPERATING INC.

Defendants

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AND B E T W E E N:

MINH DO, deceased, by his estate representative VIET DO,
ANNA SULYMA, deceased, by her estate representative, PATRICIA KORCHUK,
VIET DO and PATRICIA KORCHUK

Plaintiffs

-and-

SCHLEGEL VILLAGES INC. RBJ SCHLEGEL HOLDINGS INC. and SCHLEGEL HEALTHCARE INCORPROATED

Defendants

AND B E T W E E N:

KATHRYN ROBERTSON, deceased, by her estate representative ALLISON GAANDERSE, CHARLES BLAGDON, deceased, by his estate representative ROSEMARY BLAGDON, SAKUNTHALADEVI UTTAMALINGAM, deceased, by her litigation guardian VASUKI UTTAMALINGAM, UTTAMALINGAM PONNAMPALAM, deceased, by her estate representative VASUKI UTTAMALINGAM, VIGNESWARY POORANALINGAM, deceased, by her estate representative PAHIRATHAN POORANALINGAM, MEHRI ARMAND, deceased, by her estate representative SAMAN DIVANBEIGI, DORRITT AMY PAUL, deceased, by her estate representative JOCELYN BARROWS, CARMELA COLALILLO, deceased, by her estate trustee LUCIA FRACASSI, DENNIS SHORTLIFFE, deceased, by his estate representatives SCIA SHORTLIFFE and ANGELE MANSFIELD, INNIS INGRAM, ROSEMARY BLAGDON, VASUKI UTTAMALINGAM, PAHIRATHAN POORANALINGAM, MEHRAN DIVANBEIGI, JOCELYN BARROWS, TARA BARROWS, LUCIA FRACASSI, SCIA SHORTLIFFE, ~~and~~ ANGELE MANSFIELD and ALLISON GAANDERSE

Plaintiffs

-and-

SIENNA SENIOR LIVING INC., VIGOUR LIMITED PARTNERSHIP by its general partner VIGOUR GENERAL PARTNER INC., ROYALE DEVELOPMENT LP by its general partner THE ROYALE DEVELOPMENT GP CORPORATION, 2063414 INVESTMENT LP by its general partner 2063414 ONTARIO LIMITED, FRIULI LONG TERM CARE, 2063415 INVESTMENT LP by its general partner 2063415 ONTARIO LIMITED , 2063412 INVESTMENT LP by its general partner 2063412 ONTARIO LIMITED , SPENCER HOUSE

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INC., WOODS PARK CARE CENTRE INC., 989169 ONTARIO LIMITED operating as PRIMACARE MANAGEMENT SERVICES, LEISUREWORLD SENIOR CARE LP by its general partner LEISUREWORLD SENIOR CARE GP INC.

Defendants

AND B E T W E E N:

JOAN McVEIGH by her litigation administrator GREG McVEIGH, JOSEPH McVEIGH by his litigation administrator GREG McVEIGH, and GREG McVEIGH

Plaintiffs

-and-

CITY OF TORONTO, CITY OF OTTAWA, REGIONAL MUNICIPALITY OF DURHAM, THE CORPORATION OF THE COUNTY OF ESSEX, THE CORPORATION OF THE COUNTY OF HASTINGS and THE REGIONAL MUNICIPALITY OF PEEL.

Defendants

AND B E T W E E N:

ELIZABETH SARAH MCDERMOTT by her estate representative MAUREEN ELIZABETH HAMILTON MCDERMOTT CARGILL, JEAN PATRICIA POLLOCK by her estate representative PAMELA CHRISTINE SMITH, ZELLORA GRAHAM by her estate representative BILLY POWELL, GERARDINA FRASCHINI by her estate representative LUCY FRASCHINI, , ELISE ARTHUR by her litigation administrator KARA FERREIRA, CATHERINE BAZIOS by her estate representative APOSTOLOS (PAUL) BAZIOS, ANNA SFORZA by her estate representative DOMENICA GUSCIGLIO, MAUREEN ELIZABETH HAMILTON MCDERMOTT CARGILL, PAMELA CHRISTINE SMITH, BILLY POWELL, LUCY FRASCHINI,, KARA FERREIRA, DOMENICA GUSCIGLIO and APOSTOLOS (PAUL) BAZIOS.

Plaintiffs

-and-

ATK CARE INC., OMNI HEALTH CARE LTD., 0760444 BC LTD. as general partner of OMNI HEALTH CARE LIMITED PARTNERSHIP, ELM GROVE LIVING CENTRE INC., GEM HEALTH CARE GROUP LIMITED, DOWNSVIEW LONG-TERM CARE CENTRE LIMITED, JARLETTE LTD., 859530 ONTARIO INC. (operating as JARLETTE HEALTH SERVICES and ROYAL ROSE PLACE), MEADOW PARK (LONDON) INC., PRIMACARE

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LIVING SOLUTIONS INC., 1245556 ONTARIO INC., SHARON FARMS & ENTERPRISES LIMITED, S & R NURSING HOMES LTD, MEDLAW CORPORATION LIMITED, SHAPARRALL LIMITED, HOLLAND CHRISTIAN HOMES INC., ADVENT HEALTH CARE CORPORATION, BAYCREST CENTRE FOR GERIATRIC CARE carrying on business as APOTEX (THE JEWISH HOME FOR THE AGED), BETHANY LODGE, BRUYÈRE CONTINUING CARE INC., HELLENIC HOME FOR THE AGED INC., THE KENSINGTON HEALTH CENTRE, KRISTUS DARZS LATVIAN HOME, MARKHAVEN, INC., MON SHEONG FOUNDATION, PEOPLECARE INC., PEOPLECARE NOT-FOR-PROFIT HOMES INC., THE GOVERNING COUNCIL OF THE SALVATION ARMY IN CANADA, ST. CLAIR O'CONNOR COMMUNITY INC., ST. DEMETRIUS (UKRAINIAN CATHOLIC) DEVELOPMENT CORPORATION, ST. JOSEPH'S HEALTH CENTRE OF SUDBURY, ST. JOSEPH'S AT FLEMING, ST. PATRICK'S HOME OF OTTAWA INC., THE PERLEY AND RIDEAU VETERANS' HEALTH CENTRE, THE REKAI CENTRES, TRI-COUNTY MENNONITE HOMES, VISION '74 INC., VILLA COLOMBO SENIORS CENTRE (VAUGHAN) INC., UNITY HEALTH TORONTO, UNIVERSALCARE CANADA INC., and LUTHERAN HOMES KITCHENER-WATERLOO

Defendants

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COUNSEL:

Joel Rochon, Golnaz Nayerahmadi, Annelis Thorsen, Juela Xhaferraj, Aylin Manduric, Sarah Fiddes, Pritpal Mann, David Himelfarb, Cerise Latibeaudiere, Darryl Singer, Mathura Santhirasegaram, and Kristina Olivo, for the Plaintiffs in Balausiak v. Extendicare (CV-22-00684319-00CP), Brough v. Responsive (CV-20-00640016-00CP), Do v. Schlegel (CV-22-00688509-00CP), Hannon v. Revera (CV-20-00645495-00CP), McDermott v. ATK (CV-20-00644726-00CP), McVeigh. v. Toronto (CV-22-00687579-00CP), Pugliese et al. v. Chartwell (CV-20-00640771-00CP), and Robertson v. Sienna (CV-20 00640883-00CP)

Daniel Michaelson and Erik Joffe, for the Plaintiffs in Pugliese v. Chartwell (CV-20-00640771-00CP).

Gary Will and Gordon Marsden, for the Plaintiffs in Balausiak v. Extendicare (CV-22-00684319-00CP), Brough v. Responsive (CV-20-00640016-00CP), Do v. Schlegel (CV-22-00688509-00CP), McDermott v. ATK (CV-20-00644726-00CP), McVeigh. v. Toronto (CV-22-00687579-00CP), and Pugliese et al. v. Chartwell (CV-20-00640771-00CP).

Robert Ben, Stephen Birman, and Lucy Jackson, for the Plaintiffs in Balausiak v. Extendicare (CV-22-00684319-00CP), Hannon v. Revera (CV-20 00645495-00CP), and Robertson v. Sienna (CV-20-00640883-00CP).

Pinta Maguire and Aditi Gupta, for the Plaintiffs in Brough v. Responsive (CV-20-00640016-00CP).

Chris Rhone, Ruby Egit, Elizabeth Cunningham, and Lujza Csanyi, for Defendants, *Christopher Rhone, Ruby Egit and Elizabeth Cunningham* for the Defendants, Chartwell Retirement Residences, Chartwell Master Care LP, Chartwell Master Care Corporation, Chartwell Master Care Corporation in its capacity as trustee of GP M Trust, GP M Trust (by its trustee Chartwell Master Care Corporation) in its capacity as general partner of Chartwell Mastercare LP, Regency LTC Operating Limited Partnership by its general partner Regency Operator GP Inc., and Trilogy LTC Inc., in Pugliese v. Chartwell (CV-20-640771-00CP)

Elizabeth Bowker, Andrea LeDrew, Linette King, and Lujza Csanyi, for the Defendants, LiUNA Local 837 Nursing Home (Ancaster) Corporation, LiUNA Local 837 Nursing Home (Hamilton) Corporation, Delcare LTC Inc., and Villa Forum, in in Pugliese v. Chartwell (CV-20-640771-00CP)

Deborah Berlach, Shadi Katirai, Leigh Clark, and Grace Murdoch, for the Defendants, FJ Davey Home, Land O'Lakes Community Services, Tendercare Nursing Homes Ltd., and the Board of Management for the District of Manitoulin, in Balausiak v. Extendicare (CV-22-684319-00CP)

Elizabeth Bowker, Andrea LeDrew, Linette King, and Lujza Csanyi, for the for Defendants, Southbridge Health Care GP Inc., Southbridge Care Homes Inc., CVH (No. 1) LP by its general partners Southbridge Health Care GP Inc. and Southbridge Care Homes LP (by its general partner Southbridge Care Homes Inc.), CVH (No. 2) LP by its general partners Southbridge Health Care GP Inc. and Southbridge Care Homes LP (by its general partner Southbridge Care Homes Inc.), CVH (No. 3) LP by its general partners Southbridge Health Care GP Inc. and Southbridge Care Homes LP (by its general partner Southbridge Care Homes Inc.), CVH (No. 4 LP) by its general partners Southbridge Health Care GP Inc. and Southbridge Care Homes LP (by its general partner Southbridge Care Homes Inc.), CVH (No. 5) LP by its general partners Southbridge Health Care GP Inc. and Southbridge Care Homes LP (by its general partner Southbridge Care Homes Inc.), CVH (No. 6) LP by its general partners Southbridge Health Care GP Inc. and Southbridge Care Homes LP (by its general partner Southbridge Care Homes Inc.), CVH (No. 7) LP by its general partners Southbridge Health Care GP Inc. and Southbridge Care Homes LP (by its general partner Southbridge Care Homes Inc.), CVH (No. 8) LP by its general partners Southbridge Health Care GP Inc. and Southbridge Care Homes LP (by its general partner Southbridge Care Homes Inc.), CVH (No. 9) LP by its general partners Southbridge Health Care GP Inc., and Southbridge Care Homes LP (by its general partner Southbridge Care Homes Inc.), Southbridge Health Care LP by its general partner Southbridge Health Care GP Inc. and 1942454 Ontario Inc., in Balausiak v. Extendicare (CV-22-684319-00CP)

Chris Stribopoulos, Christine Galea, Lauren Furukawa, Oneal Banerjee, Andrea Trozzo, Elka Dadmand and Jessa Conmigo for the Defendants, Extendicare Inc., Extendicare (Canada) Inc. and Southlake Residential Care Village, in Balausiak v. Extendicare (CV-22-684319-00CP)

Stephen Ross, Andrew Yolles, Meryl Rodrigues and Erin Crochetiere for the Defendants, Villa Colombo Homes for the Aged Inc., in Balausiak v. Extendicare (CV-22-684319-00CP)

Deborah Berlach, Shadi Katirai, Leigh Clark, and Grace Murdoch for the Defendants, Responsive Group Inc., Responsive Management Inc., Responsive Management Services Inc., Responsive Health Management Inc., Rykka Care Centres LP, Rykka Care Centres GP Inc., Rykka Care

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Centres II GP Inc., Responsive Management II Inc., Responsive Health Mentors Ltd., Vermont Square LTC LP by its general partner Vermont Square LTC Inc., Cooksville Care Centres Facility Inc., Eatonville Care Centre Facility Inc., Anson Place Care Centre Facility Inc., 914 Bathurst GP Inc., Sharon Farms & Enterprises Ltd., Hawthorne Care Facility Inc., Ina Grafton Gage Home of Toronto, and 848357 Ontario Inc., in Brough v. Responsive (CV-20-640016-00CP)

Alan Rudakoff K.C. and Ashley Reid, for the Defendant, DTOC II Long Term Care LP, in Brough v. Responsive (CV-20-640016-00CP)

Deborah Berlach, Shadi Katirai, Leigh Clark, and Grace Murdoch for the Defendants, Revera Inc., Revera Long Term Care, Carlingview Manor, Stoneridge Manor, Baywoods Place Operating Inc., Carlingview Manor Operating Inc., Dover Cliffs Operating Inc., Elmwood Place Operating Inc., Hanover Operating Inc., Heartwood Operating Inc., Humber Valley terrace Operating Inc., Stoneridge Manor Operating Inc., and AXR Operating (National) LPR, in Hannon v. Revera (CV-20-00645495-00CP).

Chris Stribopoulos, Christine Galea, Lauren Furukawa, Oneal Banerjee, Andrea Trozzo, Elka Dadmand and Jessa Conmigo, for the Defendants, Schlegel Villages Inc., RBJ Schlegel Holdings Inc., and Schlegel Healthcare Incorporated, in Do v. Schlegel (CV-22-00688509-00CP)

Andrew Lee, Lisa E. Hamilton, and Tina Jian, for the Defendants, Sienna Senior Living Inc., Vigour Limited Partnership by its general partner Vigour General Partner Inc., Royale Development LP by its general partner, The Royale Development GP Corporation,2063414 Investment LP by its general partner 2063414 Ontario Limited, 2063415 Investment LP by its general partner 2063415 Ontario Limited, 2063412 Investment LP by its general partner 2063412 Ontario Limited, and Leisureworld Senior Care LP by its general partner Leisureworld Senior Care GP Inc., in Robertson v. Sienna (CV-20-640883-00CP)

Peter F. Yaniszewski and Theresa Hartley, for the Defendant, Spencer House Inc., in Robertson v. Sienna (CV-20-640883-00CP)

Deborah Berlach, Shadi Katirai, Leigh Clark and Grace Murdoch, for the Defendant, Woods Park Care Centre Inc., in Robertson v. Sienna (CV-20-640883-00CP)

Stephen Ross, Andrew Yolles, Meryl Rodrigues, and Erin Crochetiere, for the Defendant, Friuli Long Term Care, in Robertson v. Sienna (CV-20-640883-00CP)

Glenn Zakaib, John Hunter, Robert Stefanelli, Kirsten Franz, and Amy Murakami, for the Defendant, City of Toronto, in McVeigh v. Toronto (CV-22-00687579-0000)

Stephen Libin and Paul Tushinski, for the Defendant, Regional Municipality of Peel, in McVeigh v. Toronto (CV-22-00687579-0000)

Tim Farrell and Jay Skukowski, for the Defendant, County of Hastings, in McVeigh v. Toronto (CV-22-00687579-0000)

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Nada Nicola-Howorth, C. Kirk Boggs and Kathryn Ball, for the Defendant, Regional Municipality of Durham, in McVeigh v. Toronto (CV-22-00687579-0000)

Christina Polano and Eric Blain, for the Defendant, Corporation of the County of Essex, in McVeigh v. Toronto (CV-22-00687579-0000)

Jonathan de Vries, for the Defendant, City of Ottawa, in McVeigh v. Toronto (CV-22-00687579-0000)

Deborah Berlach, Shadi Katirai, Leigh Clark, and Grace Murdoch, for the Defendants, S & R Nursing Homes Ltd., ATK Care Inc. carrying on business as River Glen Haven Nursing Home, Meadow Park, OMNI Healthcare Ltd. carrying on business as Almonte County Haven, Markhaven Inc., Trinity Village Care Centre, St. Demetrius Development Corporation, Sharon Farms & Enterprises Limited, Ukrainian Canadian Care Centre, Holland Christian Homes Inc., Jarlette Ltd., Lutheran Homes Kitchener Waterloo, The Salvation Army, The Rekai Centres, Kristus Darzs Latvian Home, 0764044 BC Ltd as general partner of Omni Health Care Limited Partner, People Care Inc. PeopleCare Not for Profit Homes, Vision ’74, and Bethany Lodge, in McDermott v. ATK (CV-20-00644726-00CP)

Kate Crawford and Lauren Malatesta, for the Defendants, Advent Health Care Corporation, The Jewish Home for the Aged (referred to as “Baycrest Centre for Geriatric Care carrying on business as Apotex (The Jewish Home for the Aged”), Bruyère Continuing Care Inc., St. Joseph’s Health Centre of Sudbury, St. Joseph’s at Fleming, and Unity Health Toronto, in McDermott v. ATK (CV-20-00644726-00CP)

Stephen Ross, Andrew Yolles, Meryl Rodrigues, and Erin Crochetiere, for the Defendants, Medlaw Corporation Limited, Villa Colombo Seniors Centre (Vaughan) Inc., The Kensington Health Centre, Shaparrall Limited, and Tri- County Mennonite Homes, in McDermott v. ATK (CV-20-00644726-00CP)

Elizabeth Bowker, Andrea LeDrew, Linette King, and Lujza Csanyi, for the Defendants, Downsview Long Term Care Centre Limited and Gem Healthcare Group Ltd., in McDermott v. ATK (CV-20-00644726-00CP)

Michael Best and Neil Searles for the Defendants, Mon Sheong Home for the Aged, Hellenic Home Scarborough, and Hellenic Home for the Aged, in McDermott v. ATK (CV-20-00644726-00CP)

David Merner, Heikki Cox-Kikkajoon, and Hiba Fasih, for the Defendant, Elm Grove Living Centre Inc., in McDermott v. ATK (CV-20-00644726-00CP)

Alan Rudakoff K.C. and Ashley Reid, for the Defendant, UniversalCare Canada Inc., in McDermott v. ATK (CV-20-00644726-00CP)

Shanti Barclay and Jodie Therrien, for the Defendant, St. Patrick’s Home of Ottawa, in McDermott v. ATK (CV-20-00644726-00CP)

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Lisa E. Hamilton, Andrew Lee, and Tina Jian for the Defendants, Primacare Living Solutions Inc., 1245556 Ontario Ltd. operating as Burton Manor Long Term Care Facility. and St. Clair O'Connor Community Inc, 124556 Ontario Inc., in McDermott v. ATK (CV-20-00644726-00CP)

Stephen Libin and Paul Tushinski for the Defendants, The Perley and Rideau Veterans' Health Centre, in McDermott v. ATK (CV-20-00644726-00CP)

HEARD: January 15 – February 4, 2024

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IV. Disposition

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E.M. MORGAN J.:

REASONS FOR DECISION

I. Structure of the litigation

[1] These eight proposed class actions are all brought by the estates of persons who died of COVID-19 or by individuals who were infected with COVID-19 in long term care ("LTC") homes in Ontario during the pandemic. Each group of Plaintiffs seeks certification under section 5(1) of the *Class Proceedings Act, 1992*, SO 1992, c. 6 ("*CPA*").

[2] In the initial carriage motion for this matter, Justice Edward Belobaba observed that "[t]he staggering COVID-related death toll in Ontario LTC homes generated numerous proposed class actions": *Nisbet v. Ontario*, 2021 ONSC 3072, at para. 4. He ordered the consolidation of those actions – initially numbering 27 in all – in his unreported procedural ruling of January 21, 2022 (CV-20-648597-CP and other actions). He later described the consolidated actions in an explanatory footnote: "The defendants are grouped by the owners/operators – namely, Sienna, Revera, Schlegel, Responsive, Extendicare, Chartwell, the independently owned LTCs and those owned by municipalities": *Robertson v. Ontario*, 2022 ONSC 5127, at n. 2, aff'd 2024 ONCA 86.

[3] I feel compelled to observe at the outset that the organizational structure of this complex litigation is far more than a mere footnote to the case; it is the product of work engaged in over the course of many months by counsel and by Justice Belobaba. This hard work has allowed the case to move forward without becoming mired in a procedural bog. The present omnibus motion, with eight different styles of cause and court file numbers, collecting the claims of thousands of LTC residents, visitors, and family members, against some 100 Defendants representing 304 LTC homes, is a testament to that effort.

[4] At the same time, it is important to understand that the consolidation was a way of making the litigation manageable, but was not an adjudication about the substantive implications of the multi-case structure. Justice Belobaba was clear in his consolidation endorsement that he had not considered the merits any aspect of the claims – including questions about whether, from a substantive law point of view, they are appropriately aggregated in this way. He specifically deferred those questions to the certification motions:

> Ps bring the required procedural motions to formally consolidate each of the 7 proposed class actions and amend the related statements of claim – adding, removing and correcting parties or parties' names and generally fine-tuning the consolidated pleadings…

> My rulings and reasons are set out below. I begin by noting that I am somewhat inclined to agree with Ps that Ds' opposition to these motions *is more about an attempt to prematurely contest certification* and force either a disaggregation of the claims or a reissuance of the consolidated actions… [emphasis added]

[5] Sadly, Justice Belobaba was not able to see the case through to its conclusion. I now am seized of the certification motions that the consolidated cases present and to which Justice Belobaba deferred all analysis. In considering certification of these actions, I will, as usual, follow the scheme set out in section 5(1) of the *CPA*.

[6] As referenced in para. 2 above, six of the actions consolidated here pertain to privately owned corporate groups, each of which owns and/or manages a chain of LTC homes. The other two actions pertain to municipally owned homes (McVeigh v. Toronto) and to a large number of independently owned homes (McDermott v. ATK). All of the actions raise a number of core legal issues which will be discussed in the context of the section 5(1) criteria. I will flag at the outset that municipal and independent homes actions raise issues of their own, as the Defendants there do not belong to an overarching corporate group. That distinction will be discussed under a separate heading further below.

[7] In their overview of the case, Plaintiffs' counsel argue that a class action encompassing harms wrought on Ontario's LTCs by a world-wide pandemic is necessary to do justice to its victims. As they put it in their core factum, "[t]he Defendants in these eight class proceedings were responsible for providing a safe 'home' to vulnerable, elderly Residents and systemically failed to do so during the COVID-19 pandemic." Citing a statement in one of their expert reports that "the Defendants could have prevented up to 90 percent of the COVID-19 outbreaks in their LTC homes", Plaintiffs' counsel submitted at the hearing that whatever the impediments of legal doctrine may be, they are here to work with the court to ensure that the victims get compensated and that such a tragedy never repeats itself.

[8] For their part, Defendants' counsel argue in their overview that the entire package of claims is ill-conceived and too complex to be considered as a class action. It is their view, as expressed in their core factum and as argued in various ways at the certification hearing, that, "[t]hese actions depend entirely on individual circumstances and issues, including what happened to specific people at particular points in time during a constantly changing pandemic landscape…" The Defendants therefore submit that the cases as consolidated do not work. They contend that the claims contained therein require individual actions even if, as one of their experts has opined, proving individual causation for asymptomatic transmission of COVID-19 is likely impossible.

[9] Neither side is entirely wrong, but neither side is entirely right.

[10] The "vulnerability of the Class members, the underlying context involving widespread loss of life during a pandemic, and the resulting devastation and trauma to family members…", as Plaintiffs' counsel describe it in their factum, does not dispense with the requirements of legal doctrine. Substantive legal principles such as the need for a *lis* – a claim based on legal duty and corollary rights as between the plaintiffs' proposed class and any defendant, and the *CPA*'s need for commonality of claims rather than similarity of claims, cannot be ignored. The court's function is not to work out novel compensatory/distributive solutions for the proposed class, but to ensure

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that the claims are adjudicated objectively and in accordance with the common law's framework for those claims: *Clements v. Clements*, [2012] 2 SCR 181, at para. 7.

[11] That said, and contrary to Defendants' counsel's admonitions, the claims as presented here are not utterly unworkable as class proceedings. As discussed in these reasons, there are some legal obstacles – missing representative plaintiffs, difficulties with causation, etc. – that narrow the ambit of what can be certified. But the alternative – thousands of individually litigated claims – would be truly unworkable. It would demand resources that were disproportionate to any one claim, and would clog an already overburdened civil litigation system to the point of dysfunction. It would also likely leave a large number of individuals and families – by any measure an enormous amount of suffering – with no remedial path. That injustice would be, as Lord Denning famously said, "a reproach to the law or to the judge who administers it": *In re Vandervell's Trusts (No. 2)*, [1974] 3 WLR 256, at 264 (CA).

[12] This novel case, in dealing with what at the time was a novel corona virus, demands an analysis that can fit it into the established structures of the law.

II. The COVID-19 pandemic in LTC homes

[13] The COVID-19 pandemic was a time of tragedy in Ontario's LTC homes. No one disputes that. The loss of life among the elderly and frail residents of those homes was enormous. Plaintiffs' expert witness, Dr. Abdu Sharkawy, states that, overall, up to 34.5% of COVID deaths in Ontario took place in LTC homes, while Plaintiffs' counsel relate that that the total number of fatalities in those homes is in the range of 4,000. Nearly half of those deaths took place during the intense first wave of the pandemic, from March through May of 2020: Mike Crawley, "Ontario considers 'good faith' immunity from COVID-19 lawsuits", CBC News (17 June 2020) <https://www.cbc.ca/news/canada/toronto/ontario-covid-19-lawsuits-civil-immunity-1.5614365>.

[14] Studies have demonstrated that the LTC sector was the epicentre of the pandemic, accounting for some 80% of Canada's COVID-19 fatalities during the first wave: Steve Novakovic, "Shielded from Shame: Civil Immunity for Ontario's Long-Term Care Facilities in the Wake of COVID-19", (2021) 79 U. Toronto Fac. L. Rev. 257, at 259, citing Nathan M Stall, Aaron Jones, Kevin A Brown, Paula A Rochon, & Andrew P Costa, "For-profit long-term care homes and the risk of COVID-19 outbreaks and resident deaths" (2020) 192:33 Can. Medical Assoc. J. E946. The pandemic resulted in staff shortages as LTC personnel themselves became sick or were unable to come to work, society-wide lockdowns, and widespread infections and isolation for the residents of the Defendants' LTC homes.

[15] Defendants do not deny the tragic circumstances of the pandemic, nor do they take issue with the fact that LTC homes suffered severely from the devastation wrought by COVID-19. They point out that, like the residents of LTC homes, their administrative and front-line health-care employees, and their industry, also bore the brunt of COVID-19. They further submit that the Ontario government recognized the devastating impact of the pandemic on the LTC industry. Counsel for the Defendants state that in recognition of the essential role played by health care workers and LTC facilities, the legislature has enacted the *Supporting Ontario's Recovery Act*, SO

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2020, c. 26, Sched. 1 ("*SORA*") to protect the industry from liability for all but the most egregious wrongs.

III. The certification criteria

[16] The criteria for certification under section 5(1) of the *CPA* are well known. What follows is a sequential analysis of those criteria as they apply to this litigation. There are a number of general principals that apply to all of the actions, which will be discussed under each branch of section 5(1). Then, either during the course of that discussion or immediately following it, those principles will be specifically applied to each of the eight actions.

(a) Cause of action – section 5(1)(a)

[17] Identifying a cause of action is the one certification criterion for which there is no requirement that the Plaintiffs demonstrate an evidentiary foundation: *McCracken v. Canadian National Railway*, 2012 ONCA 445, at para 75. The pleading can form the basis for a class proceeding unless it is "plain and obvious" that it discloses no reasonable cause of action: *Cloud v Attorney General of Canada*, [2001] OJ No 4163, at para. 10 (SCJ).

[18] The Plaintiffs have put forward a number of causes of action: negligence, breach of fiduciary duty, breach of contract, breach of the *Occupiers Liability Act*, and breach of section 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). As explained below, a cause of action in negligence is the only one that is not bound to fail. It is plain and obvious that the other causes of action pleaded cannot proceed. Furthermore, it is plain and obvious that the cause of action in negligence itself is bound to fail as against some of the Defendants in these actions.

[19] Given how complex this litigation is, with its combination of 8 actions against 6 corporate groups, 6 municipalities, and some 34 independently owned and managed LTC homes, the cause of action discussion will be somewhat more protracted than usual. While on the pleadings alone, and as a matter of law, I determine that negligence is the only possible cause of action available to the Plaintiffs, the scope and limitations on that cause of action are necessary for an understanding of the overall certification analysis.

[20] For the sake of coherence, therefore, the discussion of general principles governing this litigation that starts off nominally under section 5(1)(a) of the *CPA* will delve into, and overlap with, some of the other criteria under section 5(1) – e.g. class definition (section 5(1)(b)), commonality of some of the proposed common issues (section 5(1)(c)), and preferable procedure (section 5(1)(d)). In that respect (although, again, not for the purpose of determining the section 5(1)(a) criterion itself), the analysis will make reference not only to the causes of action as pled but to the evidence contained in the record.

i. The effect of *SORA*

[21] The Ontario government's policy toward LTC home liability relating to the pandemic has found expression in *SORA*. That statutory intervention came midway through the pandemic, and is designed to protect businesses and essential service providers from liability resulting from infection with the COVID-19 virus, SARS-CoV-2.

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[22] More specifically, section 2(1) of *SORA* provides:

> 2 (1) No cause of action arises against any person as a direct or indirect result of an individual being or potentially being infected with or exposed to coronavirus (COVID-19) on or after March 17, 2020 as a direct or indirect result of an act or omission of the person if,
>
> (a) at the relevant time, the person acted or made a good faith effort to act in accordance with,
>
> (i) public health guidance relating to coronavirus (COVID-19) that applied to the person, and
>
> (ii) any federal, provincial or municipal law relating to coronavirus (COVID-19) that applied to the person; and
>
> (b) the act or omission of the person does not constitute gross negligence.

[23] As indicated, the Plaintiffs bring their claims on the basis of multiple causes of action. The Defendants submit that all of these must fail in the face of section 2(1) of *SORA*, save and except for the claim of negligence to the extent that it reaches the level of "gross negligence". It is their view, and I agree, that the question of what is eliminated by *SORA* should be addressed up front and not saved for trial: see *Walkom v. Law Society of British Columbia,* 2019 BCCA 391.

[24] On a plain reading of section 2(1), the Defendants are correct. *SORA* prohibits all COVID-related actions with the exception only of those claiming a lack of good faith effort to comply with public health guidance or other legal requirements, or acts or omissions of gross negligence. Since a lack of good faith is not a component of the present set of claims against LTC homes, the causes of action at issue boil down to the question of whether the allegations are of gross negligence.

[25] That phrase is not exactly a legal term of art. But whatever else it may mean, it connotes a species of negligence. By contrast, breach of fiduciary duty, breach of contract, and breach of occupiers' liability, do not require a showing of negligence – let alone gross negligence – on a defendant's part.

[26] For the common law and statutory causes of action other than negligence pleaded by the Plaintiffs, the liability is strict. That is, there is no need to prove any particular mental state, including carelessness. For breach of fiduciary duty, once a preference for one's own interest over that of the rights-holding beneficiary is established, the ingredients of liability are complete. Likewise for breach of contract, all one need show is a failure by the opposing party to adhere to an enforceable bargain; and for breach of the *Occupiers Liability Act*, a claimant need only demonstrate that an injury was incurred on a property for which another is responsible. Unlike in the law of negligence, in all of these causes of action there is no need to establish fault on the part of a defendant.

[27] Plaintiffs' counsel suggest that the other causes of action can remain, but with negligence added as an extra ingredient. With respect, however, none of that would be legally meaningful.

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Such hybrid creatures have been called a "doctrinal fantasy": *Del Giudice v. Thompson*, 2021 ONSC 5379, at para. 258. A 'negligent breach of contract', for example, like other such hybrid formulations, simply means negligence; the claimant would have to prove that the opposing side caused damage by breaching a duty of care and falling below an applicable standard of care: *Adams v. Thompson, Berwick, Pratt & Co.*, [1986] 1 BCLR (2) 97, at 105 (BC SC); *Rotary Drum Corp. v. Louisiana-Pacific Canada Ltd*., 2001 ABQB 297, at para.5. The contractual element adds nothing to the tort analysis and there is no advantage in suing in both: *Rotary Drum Corp. v. Louisiana-Pacific Canada Ltd.*, 2001 ABQB 297, at para. 6, citing G. Fridman, *The Law of Contract* (4th ed.), at 738-39.

[28] Likewise, physicians generally have a fiduciary duty toward patients: M*cInerney v. MacDonald*, [1992] 2 S.C.R. 138, at 149; *Norberg v. Wynrib*, [1992] 2 SCR 226, at 272 (McLachlin J., concurring). This duty exists separate and apart from a doctor's professional duty to treat all patients with the competence expected of a physician in the given setting: *Barker v. Barker*, 2022 ONCA 567, at paras. 105-108. In the absence of *SORA*, there is no need to prove negligence if the doctor fails to act in the patient's interest but rather acts in her own. If negligence is added to the fiduciary ingredients, the result will be a merger of fiduciary duties with duties of care in negligence such that the only real cause of action will, again, be in negligence. If liability is found in negligence, the Plaintiffs cannot recover more than once and so adding another cause of action with the same analysis to the mix would be of no consequence: *Michaud v. Comeau*, 2020 NBCA 47, at para. 17.

[29] Accordingly, causes of action that do not amount to a pleading of negligence cannot be sustained in the face of legislation enacted to exclude them. As Justice Belobaba put it in *Robertson, supra*, at para. 10, the COVID-related claim against the provincial government:

> The *SORA* law, enacted in 2020, prohibits almost all COVID-related litigation. Section 2(1) makes clear that no COVID-related cause of action can arise where the defendant made a good faith effort to comply with the applicable law or regulations and the defendant's act or omission did not amount to gross negligence. In other words, no COVID-related lawsuits may proceed against any defendant, including the provincial government, unless there are allegations of gross negligence.

[30] The *SORA* protection applies retroactively to actions commenced prior to its enactment: *SORA*, s. 2(4). It likewise applies regardless of when the cause of action claimed in the proceeding arose: *SORA*, s. 2(5). Furthermore, it applies despite any conflict or inconsistencies with public health enactments: *SORA*, s. 2(2). Accordingly, the only claim that the Plaintiffs can bring that is not doomed to fail is one of negligence, where the impugned conduct is demonstrated to entail not just negligence, but "gross negligence."

[31] The parties agree that while "gross negligence" must be given meaning, it is not a term of art connoting a specific standard in the law of negligence. As the courts have said, there is "no litmus test to the elements of gross negligence": *Doxtator v. Birch*, [1972] 1 OR 321-329 (HCJ). What is clear, however, is that to be liable for gross negligence the defendant's conduct must be shown to be unquestionably faulty.

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ii. The 'gross negligence' requirement

[32] Under section 2(1) of *SORA*, there must be evidence that the relevant standard of care was breached in a way that shows "a very marked departure from the standards by which responsible and competent people in charge of…[LTCs] habitually govern themselves": *McCulloch v. Murray*, [1942] SCR 141, at 145. Put another way, "'[g]ross negligence' must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not": *Khanna v. Canada*, 2022 FCA 84, at para. 7.

[33] Under this standard, Plaintiffs need not only show harm to themselves, they must show fault by the Defendant – and an elevated level of fault, at that. The fault may be one of commission or omission: *Francis v. Ontario*, 2020 ONSC 1644, at para. 465. The Plaintiffs' allegation of excessive delay in coming up with COVID-suitable infection prevention and control ("IPAC") policies and protocols combines both of those type of acts. And while the precise level of elevation has never been articulated in scientific fashion by the courts, it has been made clear that "[a]ll these phrases, gross negligence, willful misconduct, wanton misconduct, imply conduct in which, if there is not conscious wrongdoing, there is a very marked departure from the standards by which responsible and competent people…habitually govern themselves: *McCulloch v. Murray*, [1942] SCR 141, at 145.

[34] With this in mind, there are aspects of the expert evidence submitted by the Plaintiffs that seem overstated and that, more importantly, miss the point. As an illustration, Plaintiffs' expert Dr. Dick Zautman, an emeritus professor at Queens University and an infectious disease specialist, opines in his Reply Report, at para 57, that any case of COVID contracted by a resident of a LTC home who has not had a recent visitor represents a fault in the home's IPAC system. That system, it is commonly acknowledged, represents a standard of preventative medicine to which all medical facilities, including LTC homes, must adhere. It is Dr. Zautman's view that virtually any infection/death of an LTC resident represents a falling below of IPAC standards; and it is Plaintiffs' counsel's submission that any infection/death of an LTC resident is therefore actionable as against the corporate owner/management of the LTC home.

[35] According to Dr. Zautman, the elements of IPAC should be layered so that any gap at one spot is covered by another layer – hand hygiene supplements masking, which supplements social distancing, which supplements cohorting, which supplements testing, etc. This so-called "Swiss cheese" model represents what Dr. Zautman opines is the standard of care for LTC homes to achieve.

[36] The result, as Dr. Zautman explains it, should be a sealed, virus-impregnable environment:

> Upon discovering that a resident now had COVID-19 who had not had visitors and had been confined to their room, one can safely assume that they must have acquired the infection from another person in that same LTC home because that is how COVID spreads. Therefore there had to be a breakdown in one of the layers of the Swiss cheese model somewhere in the care of that resident to account for how they acquired the infection.

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[37] Defendants' counsel complain, with some justification, that what the Plaintiffs and their experts seek from LTC homes is a standard of perfection. After all, Dr. Zautman's description of the standard of care sounds more like the Defendants are made to be the Plaintiffs' insurers – not generally the way a reasonable standard is defined in an area of law that requires proof of fault: *Fullowka v. Pinkerton's of Canada Ltd*., [2010] 1 SCR 132, at para. 80. For example, in the parallel action against Quebec LTCs, the Superior Court in that province opined that authorizing a class action to proceed against any home that did not have a COVID-19 outbreak among more than 25% of its residents is to be excluded from the claim, as there can be no inference that a smaller outbreak was a result of fault: *Daubois v. Centre d'hébergement et de soins de longue durée Sainte-Dorothée*, 2024 QCCS 145, at para. 118.

[38] Plaintiffs' counsel bridle at the characterization that they are seeking to impose an unreasonable standard. They respond, also with some justification, that all COVID outbreaks in LTC homes, and especially those resulting in one or more deaths, are a serious, non-trivial matter.

[39] That said, Plaintiffs' counsel have effectively confirmed Defendants' counsel's view in explaining how they selected some of the Defendants and how the specific homes owned and/or managed by those Defendants came to be included in these actions. Plaintiffs' counsel indicated in oral submissions that, particularly in the independent homes action (McDermott v. ATK) and the municipal homes action (McVeigh v. Toronto) and certain of the other actions, they researched outbreaks and deaths in LTC homes province-wide, and where they found any outbreak or death they added that Defendant or the particular home to the claim. In other words, they sued for every COVID-related death, as if the LTC homes' gross negligence was co-terminus with the pandemic itself.

[40] Plaintiffs' counsel's approach, of course, builds on Dr. Zautman's opinion that any COVID case in an LTC home must be the result of faulty IPAC precautions taken by the owner or manager of the home. What Dr. Zautman's view of COVID outbreaks and IPAC standards misses is an acknowledgment that Ontario's LTC homes are not a laboratory-controlled environment; they are a human environment which, during the relevant period, were caught up in a world-wide pandemic. That is not to say that IPAC standards can be dismissed; as discussed further below, they generally reflect the relevant standards to which LTC homes must adhere and often enough may represent standards which the Defendants did not meet. But the homes themselves are staffed with individuals who during the relevant period lived in a pandemic-afflicted world.

[41] At the hearing, I posed the scenario of a nurse who arrives at work feeling fine, perhaps after commuting on public transportation. To embellish on the hypothetical, say the LTC home has done all that it should do in designing and putting in place IPAC protocols. Imagine further that sometime during the course of the workday, the nurse suddenly sneezes. Common sense dictates that if that sneeze introduces COVID-19 into the home and a resident is thereby infected, an outbreak will have occurred without a failure of IPAC. There will have been no systemic fault on the part of the home's corporate owner/manager.

[42] Common sense also dictates that the scenario is not far-fetched. The LTC homes can close themselves off to non-essential visitors, but they cannot function without medical staff, attendants,

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cleaning staff, catering staff, maintenance staff, and other service providers. Rapid tests for COVID were not available at the beginning of the pandemic, and even once they became available in large quantities they are not 100% accurate. Asymptomatic, aerosol transmission of the virus makes a hermetically sealed LTC home an impossibility.

[43] What the Plaintiffs seek to impose, and what Dr. Zautman's report suggests, is what tort law refers to as strict liability – i.e. where "[l]iability is 'strict' in the sense it is unnecessary for the plaintiff to prove the defendant's negligence": *Hollis v. Birch*, 1990 CanLII 1112 (BC SC). In Canada, this standard has been applied to the production of highly dangerous products or the provision of highly dangerous services, such that "the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety": *Otash v. Sonnenberg et al.* (1968), 1968 CanLII 627 (AB CA). Where applicable, strict liability holds that "when a plaintiff proves that he has been injured by an injurious substance… there is a presumption of negligence on the part of the [defendant]": *Zeppa v. Coca-Cola Ltd.*, 1955 CanLII 160, at 193 (ON CA).

[44] Given the rapid and dangerous spread of COVID-19, and the elderly, frail, and inherently susceptible population residing in LTC homes, it is on one hand understandable that an infectious disease expert might seek to impose an IPAC onus on those homes that makes them responsible for any and all outbreaks. But strict liability is not the way the law works. In fact, it is the opposite of what the Ontario legislature embraced in enacting *SORA*.

[45] Whether one agrees with the policy or not, the effect of *SORA* is not to open LTC homes to liability in circumstances where negligence might be otherwise hard to prove. Rather, the effect of *SORA* is to close off the prospect of liability unless a marked departure from IPAC and other applicable standards can be demonstrated on the evidence.

[46] *SORA* does not permit a court to presume fault on the part of a LTC home from the very fact that illness or death has occurred. Gross negligence on the part of any Defendant must ultimately be proved. To the extent that the expert evidence poses a standard of perfection, or a standard which presumes fault from the fact of injury, it cannot be taken into account under the legal regime established by the Ontario legislature in *SORA*.

iii. The top-down theory

[47] In framing the cause of action in negligence, Plaintiffs' counsel place considerable emphasis on the top-down nature of the corporate Defendants' responsibilities. These responsibilities, they submit, parallel the Defendants' hierarchical corporate structures – particularly within the six corporate groups sued here: Chartwell, Extendicare, Responsive, Revera, Schlegel, and Sienna. They point out that the LTC homes themselves, although locally managed, are not suable legal entities and are therefore not named as Defendants. Rather, it is the corporate owners and related companies that are the Defendants and who are provincially licensed to operate the homes. It is the corporations that form each Defendant corporate group or enterprise who, it is alleged, are liable for the substandard conduct described in the pleadings.

[48] As discussed above, although the claims cover the entire pandemic period, their emphasis is on the Defendants' alleged lack of preparedness and their failure to heed the precautionary principle in the run-up to the pandemic and in its first stages. Thus, Plaintiffs' counsel stress in

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their written and oral submissions that the companies that sit at the apex of the six corporate pyramids are responsible for formulating and adopting IPAC policies for their respective LTC homes to implement:

> While the *LTCHA* [*Long Term Care Home Act*] imposes specific IPAC-related obligations on 'licensees' – all of which are wholly owned subsidiaries of or managed by Chartwell, Extendicare, Responsive, Revera, Sienna, and Schlegel – the ultimate responsibility for adopting IPAC policies and pandemic plans rests with the corporate head office, which directs the operations of their LTC homes. The corporate head offices control the content of the IPAC policies and the timing of their implementation and are responsible for oversight of all LTC homes within their respective umbrella…
>
> Each of the LTC corporate head offices adopted a centralized strategy in the face of COVID-19; set chain-wide IPAC policies applicable to all LTC homes under their umbrella; disseminated COVID-19 related correspondence to their respective LTC homes; and delayed recklessly and inexplicably for weeks before mobilizing their response to COVID-19.

[49] Indeed, even in the later stages of the pandemic, the claim focuses mostly on the failure of the LTC homes owned by the corporate Defendants to have in place policies that would prevent the spread of COVID-19. They submit in their core factum that, "The Defendants' gross negligence and systemic failure to audit and oversee the implementation of IPAC best practices persisted throughout the Class Period, resulting in an unabated, uniform pattern of IPAC breaches across their LTC homes." Since the class period stretches for more than three years – from January 25, 2020, the date that COVID-19 was first reported in Ontario, to May 5, 2023, the date that the World Health Organization declared an end to the global state of emergency over – the continuous responsibility of the corporate LTC chains is a crucial part of the Plaintiffs' theory of the case.

[50] The emphasis on the top-down faults of the Defendant corporations is important in a number of respects. In the first place, the corporate wrongdoing is characterized by Plaintiffs' counsel as gross negligence, bringing the claim of systemic failure within what *SORA* defines as actionable. It is arguable that no one misstep (or even a number of separate missteps) by a local LTC home administration would suffice to meet this elevated standard.

[51] As an example, there are many instances in the record where inspectors from the provincial Ministry of Long-Term Care report seeing a member of the staff failing to wash hands properly between attending to residents. Such an instance on its own arguably falls below the requisite standard of care in an LTC home setting; but at the same time, a discreet error (or even a number of discreet errors) by a harried staff member would arguably not qualify as a systemic matter or as a "marked departure" from the standard of care: *McCulloch*, *supra*, at 145. By contrast, a failure by the same LTC home's corporate head office to formulate a hand hygiene policy or to implement timely and effective hand hygiene training as part of its overall IPAC responsibilities would arguably be the kind of "greater neglect" that the courts have identified as meeting the gross negligence standard: *Khanna*, *supra*, at para. 7.

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[52] Another important aspect of the Plaintiffs' top-down theory is that in focusing the liability analysis on corporate head offices, it explains the consolidation efforts engaged in by counsel. Originally, the claims encompassed by the present proceeding covered the gamut of possible targets, ranging from an "omnibus" claim against the owners and operators of 96 LTC homes with COVID-19 outbreaks to actions targeting only a single LTC home. As Plaintiffs' counsel explain it, "The reconstitution of these claims, based on the corporate design, ownership, and management of the homes, was intended to streamline the proceedings and address the corporate Defendants' concern that they should face only a single proposed class proceeding in relation to COVID-19."

[53] Moreover, the top-down focus is in line with the Plaintiffs' claims of systemic negligence. Despite many similarities between all LTC homes, the corporate Defendants are each the subject of their own distinct pleading and are each responsible for their own systemic issues. As will be discussed below in respect of the *Charter* claim, being subject to Ontario regulation – including the elaborate regulation that accompanies the provision of health care – does not make the six corporate chains named in these actions part of government. Likewise, it does not merge them into one legally responsible entity. For the Chartwell, Revera, Extendicare, Schlegel, Responsive, and Sienna actions, the systemic negligence claim is as against each of the corporate groups separately, as each is responsible for the IPAC policies and other measures that apply system-wide within the corporate chain.

[54] To be clear, Plaintiffs' counsel spends considerable time in its written submissions explaining how all LTC homes and their licensees are similarly regulated, and that they are all included within the definition of "health service provider" under s. 1(2) of the *Connecting Care Act, 2019*, which is the statute that establishes a provincial agency, Ontario Health, to coordinate the healthcare system in Ontario. They also make efforts to demonstrate that LTC homes receive public funding and that they are all subject to Service Accountability Agreements as required by s. 22(1) of the *Continuing Care Act*. Despite these features of the Ontario health care environment, the six corporate groups sued in these actions make up six legally distinct enterprises.

[55] For a systemic negligence claim to be made out, there must, first and foremost, be an "immediately identifiable single institution that is accused of systemic negligence": *Carcillo v. Canadian Hockey League*, 2023 ONSC 886, at para. 245. Distinct but similarly situated and regulated institutions that do not make up a single corporate group cannot be sued "as if they constituted a single institution or enterprise": *Ibid*., at para. 246. The Plaintiffs' top-down theory reinforces this legal imperative.

[56] As Plaintiffs' counsel state in their factum, "[t]he corporate head offices control the content of the IPAC policies and the timing of their implementation and are responsible for oversight of all LTC homes within their respective umbrella." The responsibility for systemic negligence must be shown to move from top down, not from bottom up and not sideways across separate corporate groups.

iv. The need for a *lis*

[57] Although it seems too obvious to have to say out loud, to make out a claim in negligence, plaintiffs need defendants and *vice versa*. Like the children on either end of a playground teeter-totter, the entire apparatus of justice depends on the relationship between the two. In private law,

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"[l]iability consists in a legal relationship between two parties, each of whose position is intelligible only in the light of the other's position": E.J. Weinrib, "Correlativity, Personality, and the Emerging Consensus on Corrective Justice", [2001] 2 *Theoretical Inquiries in Law* 107, at 118 (2001). This linear relationship, or correlativity of the parties, "highlights the obvious fact that the liability of the defendant is always a liability to the plaintiff": *Ibid.*

[58] This structural necessity, when applied to a negligence claim, defines both the cause of action and a defendant's duty of care. In order to sue, an injured plaintiff must have been injured by a party that owed that plaintiff a legally recognized duty.

[59] As lawyers well know, when May Donohue (*née* Mary M'Allister) took ill from drinking tainted ginger beer bought for her by a friend at the Wellmeadow Café in Paisley, Scotland, she could not bring a suit in contract as she had no dealings with the café or its owner, Francis Minchella. She was advised by her solicitor to sue David Stevenson, the manufacturer of the product, for having negligently allowed a snail into the beverage. Although Mr. Stevenson at first denied responsibility, his identity as manufacturer was apparent on the face of the bottle: Martin R. Taylor QC, "Mrs. Donohue's Journey" in: *Modern Law of Negligence* (Continuing Legal Ed. Soc. of B.C., 1991), reproduced in Scottish Council of Law Reporting, *Session Cases Bicentenary 1821-2021*, online: < Donoghue v Stevenson Case Resources | 'Mrs. Donoghue's Journey' Paper (scottishlawreports.org.uk)>

[60] Had Ms. Donohue drunk another beverage maker's product – say, Coca Cola – or had a snail found its way into a Coca Cola bottle and there met its demise, she would have had no suit against Mr. Stevenson. In the circumstances, however, Stevenson was the proper defendant. To use Lord Atkin's famous phrase, Donohue, as the reasonably foreseeable consumer of Stevenson's product, was Stevenson's legal "neighbour". He owed her a duty of care and she had a cause of action against him: *Donohue v. Stevenson*, [1932] AC 562. To add the obvious, Coke wasn't sued because Coke owed Donohue nothing; even if some Coca Cola bottles also contained their own molluscs, there would have been no duty/rights relationship, or *lis*, connecting the product to the claimant.

[61] What is true for an ordinary negligence suit is equally true in a class action. The class of two or more people must have a cause of action against the defendant(s); as a corollary, the defendant(s) must owe a duty to the class. Putative class members (other than the representative plaintiff) are not parties to the action in the usual, formal sense: *Haddad v. Kaitlin Group Ltd*., 2012 ONSC 4515, at 18. However, they are akin to parties in that they are advancing the same claim against, and have the same relationship with, the defendant: *Amyotrophic Lateral Sclerosis Society of Essex County* v., 2019 ONCA 344, at paras. 17-19.

[62] Of course, a class proceeding may contain subclasses that raise a somewhat different sets of issues than the main body of class members – as where a public offering misrepresents the value of securities to purchasers in multiple provinces, *Pearson v. Boliden Ltd*., 2002 BCCA 624, or where purchasers are fraudulently induced into identical transactions at different times and at different price points, *Peppiatt v. Royal Bank of Canada* (1996), 27 OR (3d) 462 (Gen. Div.), or where there are direct and indirect purchasers of a defective product, *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, [2013] 3 SCR 545, or of a product whose price was

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inflated by a conspiracy of defendants: *David v. Loblaw*, 2021 ONSC 7331, aff'd 2022 ONCA 833.

[63] Nevertheless, the class must be composed of members with the same fundamental relationship with the alleged wrongdoer. Where "the proposed classes share a central commonality" in the form of a shared claim against the same defendant, subclasses are appropriate to signify factual differences in the events leading to the common claim: *Good v. Toronto (Police Services Board)*, 2016 ONCA 250, at para. 63.

[64] Unlike a social insurance scheme, where the relationship of claimants to the entity from which they claim is that of spokes to the hub of a wheel, the relationship of claimants to defendants in a negligence suit is linear. This structure lies at the heart of civil litigation, and does not change just because the Plaintiff represents a class. In public law litigation such as a constitutional challenge, the courts have recognized that citizenship or other badge of membership in the polity may be enough to support a plaintiff's standing: *Canada (Minister of Justice) v. Borowski*, [1981] 2 SCR 578, at 598. But at issue there is "the right of the citizenry to constitutional behaviour" by the state and the state's correlative duty to the public: *Thorson v. Canada (Attorney General)*, [1975] 1 SCR 138, at 162. By contrast, a private law cause of action such as negligence requires an injured claimant linked to a wrongdoing defendant.

[65] The law of negligence has been flexible on the issue of multiple defendants where the difficulty is not whether or not the plaintiff has a cause of action against one or the other of the defendants, but rather is one of proof. In the well-known case of *Cook v. Lewis*, [1951] SCR 830, the Supreme Court of Canada found that an action lies against two hunters who simultaneously fired toward the plaintiff such that it was unclear which of the two shot him. The key to sustaining the suit, in the Court's view, was the joint enterprise in which the two hunters were engaged. Other traditional contexts in which liability was found on a joint enterprise basis include injury inflicted by five men "joy riding" together in a car and egging the river on: *Grand Trunk R. Co. v. Dixon* (1920) 51 DLR. 567 (SCO).

[66] In more contemporary commercial settings, the joint enterprise theory has formed the basis for liability of all members of a corporate group for a wrong perpetrated by one or more of them in pursuit of their collective business: *Downtown Eatery (1993) Ltd. v. Ontario*, [2001] O.J. No. 1879 (ON CA). Like vicarious liability for employees, enterprise liability serves "the broader function of transferring to the enterprise itself the risks created by the activity performed by its agents": *Bazley v. Curry*, [1999] 2 SCR 534, at para. 31, citing *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 SCR 299, at 339.

[67] Plaintiffs' counsel submit that the *CPA* affords sufficient flexibility to deviate even further from the traditional pattern of negligence law. They point out that courts have been able to accommodate non-traditional instances where there are multiple defendants who have injured class members in the same way.

[68] Thus, for example, in *Campbell v. Flexwatt Corp*., 1997 CanLII 4111 (BC CA), the court certified an action against multiple producers of a generic injurious product. It was clear that not every member of the consumer class has purchased the impugned product from every defendant.

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The nexus between the class and the defendants, however, was that the consumers had bought the identical generic product for which at least the question of fitness-for-purpose was the same. In cases of multiple suppliers of the identical generic product, where there is no issue of variance between the defendants, the courts in British Columbia have been prepared to certify a consumer class for the sole purpose of determining the product's fitness – although not to determine duty, or causation, or any other related issue: *Harrington v. Dow Corning Corp*., 2000 BCCA 605.

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[69] The enterprise theory as applied to the present set of cases would allow the classes as defined in the claims against the large corporate groups to proceed against those groups. In view of the top-down theory of liability put forward by Plaintiffs' counsel, it is significant to note that within a corporate family the joint enterprise approach has been used to tie the head office and the members of the group together in liability to the employees or customers: *Kent v. Stop N' Cash 1000 Inc*., [2006] O.J. 22660 (SCJ).

[70] To take the Chartwell group of companies as an example, the Second Amended Consolidated Statement of Claim names 8 or 9 (depending on whether one counts trustees and trusts separately) Chartwell-related corporations, trusts, and limited partnerships as Defendants: Chartwell Retirement Residences, Chartwell Master Care LP, Chartwell Master Care Corporation, Chartwell Master Care Corporation in its capacity as trustee of GP M Trust, GP M Trust (by its trustee Chartwell Master Care Corporation) in its capacity as general partner of Chartwell Mastercare LP, Regency LTC operating limited Partnership by its general partner Regency Operator GP Inc., and Trilogy LTC Inc. The corporate structure is a complex one, an overview of which is contained in paragraph 51 of the Plaintiffs' pleading:

> Chartwell Master Care Corporation is a corporation governed by the laws of Ontario. It is wholly owned by Chartwell Retirement Residences (an unincorporated Real Estate Trust) and its subsidiaries. Chartwell Master Care Corporation is the sole trustee of GP M Trust (which is in turn the general partner of Chartwell Master Care LP) and manages its business and operations as well as the business and operations of Chartwell Master Care LP, and each of their subsidiaries, including entities in which they either directly or indirectly have a joint venture interest.

[71] In *Downtown Eatery*, *supra*, at para. 36, the British Columbia Supreme Court considered the impact of this type of arrangement in the context of employment lawsuits, stating that, [a]lthough an employer is entitled to establish complex corporate structures and relationships, the law should be vigilant to ensure that permissible complexity in corporate arrangements…does not…defeat the legitimate entitlements of wrongfully dismissed employees." This enterprise-oriented logic has been adopted and applied by the courts of Ontario: see *Kent v. Stop N' Cash*, *supra*, at para. 36.

[72] As described in the Plaintiffs' pleading, the residents of Chartwell's owned and managed LTC homes were analogous to the employees in *Downtown Eatery*, in that they were "at all times under the supervision, control and direction of the corporate officers and directors" at the top of the corporate chain: *Kent*, at para. 37. I am prepared to say that the class in the Chartwell owned and/or managed homes have a *lis*, or put forward a claim, as against the entire Chartwell corporate

family. To do otherwise – i.e. to try to parcel out which part of the class has a claim against precisely which Chartwell subsidiary or trust – not only ignores the top-down theory of liability put forward by Plaintiffs' counsel, but would, in effect, allow an elaborate corporate structure, however legitimate that might be for Chartwell's own management and, perhaps, tax purposes, to defeat the rights of the residents under their care. That is precisely what the enterprise approach to liability is meant to avoid.

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[73] Defendants' counsel point out that each of the corporate claims goes beyond naming the components of a single corporate enterprise. Five of the corporate claims name as Defendants the components of a single corporate family such as Chartwell *plus* several independently owned, arm's length Defendants. Those independently-owned Defendants are included because they contract for management services with the named corporate family, but are otherwise corporately unrelated to that named family and have no connection to the corporate family's LTC homes. They do not act in enterprise with the named corporate family in relation to any of the impugned LTC homes that they do not own, notwithstanding that a substantial portion of the class members claiming against them were residents in those homes.

[74] Of the six corporate groups named in the cases at bar, all but the Schlegel group exhibit the problem of including Defendants with whom a large number of class members have no *lis*, or even any purported nexus or claim. The Schlegel group are the owners/licensees of all of the LTC homes that they manage and that are at issue in the claim against them. The other five corporate groups – Chartwell, Extendicare, Responsive, Revera, and Sienna – are the owners/licensees and managers of some of the LTC homes included in the actions against them, and are managers, but not owners or licensees, of any of the other LTC homes included in the actions. For those five, there is a mismatch between the class and some of the Defendants.

[75] For example, in *Pugliese v. Chartwell*, the claim is in reference to putative class members in twenty-three LTC homes. Of those, 19 are owned and managed by various Chartwell entities named as Defendants in the action. The other four are managed by one or more of the Chartwell companies but are owned by non-Chartwell related corporations also named as Defendants: Liuna Local 837 Nursing Home (Ancaster) Corporation, Liuna Local 837 Nursing Home (Hamilton) Corporation, Delcare LTC Inc., and Villa Forum. The only relationship between any of the Chartwell group and the four non-Chartwell Defendants is that there is a separate management contract between each of the independent owners and Chartwell.

[76] Accordingly, there is nothing to link the vast majority of the class – i.e. the residents (or their estate representatives) of the 19 LTC homes owned and managed by Chartwell entities – to the 4 non-Chartwell entities. The entire class, including the residents of the four independently owned LTC homes, have a claim against Chartwell as manager, and a subset of them – the residents of the 19 Chartwell-owned homes – also have a claim against Chartwell as owner/licensee. However, the class as a whole does not have a claim against the independent owners.

[77] Those four independent owners are each engaged in a joint enterprise with Chartwell in respect of their one particular LTC home, but they are strangers to the lawsuit of the residents of all the other homes. There is no sense in which those four Defendants are engaged in a joint enterprise either with each other or with Chartwell with respect to residents of any of the homes in

issue other than their own. It is not a case where a subset of the class has a different claim against one or more Defendants; it is a case where there are four Defendants against whom a large subset – nearly the entire class – has no claim at all.

[78] Accordingly, forming subclasses for those with claims against the four independent owners will not remedy the problem of mismatched class and Defendants. One would also have to exclude the rest of the class from any claim against the independent owners.

[79] I pause here to point out that this issue is related to, although slightly distinct from, the question of whether a representative plaintiff is required for each Defendant: see Vince Morabito, "Standing to Sue and Multiple Defendant Class Actions in Australia, Canada and the United States" (2003), 41 *Alberta Law Rev*. 295, at 305-319. The representative plaintiff issue will be discussed in the section below.

[80] For now, it suffices to note that the need for a *lis*, or nexus between the class and the Defendants, would also not be resolved by the addition of new representative plaintiffs. If there were a representative plaintiff for each of the independently owned homes (which in the Chartwell action there is not, but which there are for some of the independently owned homes in the Extendicare, Revera, Responsive, and Sienna actions), the residents of the Chartwell-owned homes would still have to be excluded from the claims which those new representative plaintiffs would pursue against the non-Chartwell owners. As indicated, Chartwell and each of the independent owners do not act in enterprise for any homes other than the four homes owned by the independents.

[81] I use Chartwell as an example here only because it is the first case listed in the multiple style of cause for these proceedings. However, the same reasoning that applies to the Chartwell action applies to the Extendicare, Responsive, Revera, and Sienna actions.

[82] Each of those is constructed in a way that is similar to Chartwell; that is, they each propose a class of residents of LTC homes owned and/or managed by the named corporate group, but also include claims against owners/licensees of LTC homes that are unrelated to the named corporate group. Those independently-owned homes are managed under contract by the named corporate group, and so the residents of those homes, like all of the other class members in their action, have a claim against the named group in its management capacity. However, the class members who are not residents of those independently-owned homes have no claim against the independent owners.

[83] In the Chartwell, Extendicare, Revera, Responsive, and Sienna cases, the litigation against each of the independent owners would have to be carried on as a separate piece of litigation, not as part of the present class actions. The residents of the independently owned homes can remain as part of the present class definitions as they all have a claim against the named corporate group as manager. But the independent owners cannot be the target of the present class actions; a *lis*, or legal nexus, between the class and those Defendants does not exist.

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v. The *Ragoonanan* problem

[84] In *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2000), 51 OR (3d) 603 (SCJ), at para. 54, the Court held that "it is not sufficient in a class proceeding…if the pleading simply discloses a 'reasonable cause of action' by the representative plaintiff against only one defendant and then puts forward a similar claim by a speculative group of putative class members against the other defendants." That proposition was reiterated by the Court of Appeal in *Hughes v. Sunbeam Corporation (Canada) Ltd*. (2002), 61 OR (3d) 433, at para. 18, where Justice Laskin stated succinctly: "in a proposed class action, there must be a representative plaintiff with a claim against each defendant."

[85] This principle continues to bind the Court. It has recently been applied by Justice Perell in *Carcillo v. Canadian Hockey League*, 2023 ONSC 886, where the representative plaintiffs fell considerably short of what was required for a class action against multiple defendants:

> [58] Messrs. Carcillo, Taylor, and Quirk are former players with claims against five of the 60 teams comprising major junior hockey today.
>
> . . .
>
> [437] The result is that their proposed action is bereft of 55 representative plaintiffs. The Ragoonanan Motion succeeds, and thus for at least 55 of the Defendants, there is an additional reason to dismiss the certification motion.

[86] The *Ragoonanan* principle applies to the cause of action criterion in section 5(1)(a) of the *CPA* as well as to the representative Plaintiff issue in section 5(1)(1)(e) of the *CPA*. One cannot have a class action without a representative plaintiff, and one cannot sustain an action at all without a named plaintiff.

[87] Since I consider the corporate groups named in the six corporate actions to each represent a cohesive enterprise, it is sufficient for there to be at least one representative Plaintiff for each of the Chartwell, Extendicare, Revera, Responsive, Schlegel, and Sienna corporate groups. In my view, it is not necessary for there to be a separate representative Plaintiff for each component part of a collective Defendant enterprise like the Chartwell group or the Responsive group, etc.

[88] Where the Visitors Class or the Family Class have no representative plaintiff against one of the six corporate groups, but the Residents Class in the same action does have a representative plaintiff, the existing Plaintiff can represent both classes. There is no need to fill in for the missing class representative in that situation. Divisional Court has indicated its approval of "a plaintiff asserting causes of action which are not that plaintiff's personal causes of action but which are asserted by the plaintiff on behalf of class members": *Boulanger v. Johnson & Johnson Corporation* (2003), 64 OR (3d) 208, at para. 41.

[89] I will point out that if a representative Plaintiff from the Residents Class also represents the other proposed classes in the same action, that may solve the formal problem but leave a substantive one. That is, it is hard to see how harm to visitors will ultimately be proven without a witness/deponent to provide evidence that he or she was harmed as a visitor and how it occurred. For the purposes of certification there may be some basis in fact for harm to a Visitor Class based

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on inspection reports or other observational evidence, but the evidentiary standard for certification is significantly lower than the balance of probabilities standard that will prevail down the road: *Pro-Sys Consultants Ltd. v Microsoft Corporation*, [2013] 3 SCR 477, at para 102.

[90] Furthermore, for the representative Plaintiff from one class to represent another class, that Plaintiff must also have a cause of action of their own against the same Defendant: *Sankar v. Bell Mobility*, 2013 ONSC 5916, at para. 100. For that reason, representative Plaintiffs with claims against the named corporate groups in the Chartwell, Extendicare, Revera, Responsive, or Sienna actions would not be suitable representatives as against of the independent owners in those actions unless they had a claim against those same independent owners. That issue is now moot given my conclusion that the claims against the independent owners in those actions cannot be certified. But if any proposed class actions were to be re-started as against any of those independent owners on a standalone basis, representative Plaintiffs would have to be named for each one.

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vi. The municipal and independent homes claims

[91] The *lis* problem and the *Ragoonanan* problem (discussed above) are both pertinent to the municipal homes action (McVeigh v. Toronto) and the independent homes action (McDermott v. ATK). In fact, those problems are so severe in these two actions that they undermine their viability.

[92] In the opening sentence of their McVeigh v. Toronto factum, Plaintiffs' counsel describe the action as follows: "This action arises from the grossly deficient and piecemeal IPAC practices and COVID-19 responses of six municipalities – the City of Toronto, the Regional Municipality of Peel, the City of Ottawa, the Region of Durham, the County of Essex and the Corporation of the City of Hastings… - in the 12 Long Term Care homes they own and operate…" In the opening sentence of their McDermott v. ATK factum, Plaintiffs' counsel describe the action in a similar way: "The 39 long-term care homes involved in this proceeding…are owned and operated by 34 entities but share significant commonalities for the purposes of this proposed class action."

[93] In McVeigh v. Toronto, six municipalities – i.e. six distinct, legally unrelated entities – are sued in respect of the LTC homes that each of them separately owns and operates. In McDermott v. ATK, thirty-four distinct, legally unrelated corporations are sued in respect of the LTC homes that each of them separately owns and operates. In both actions, the relationship of the Defendants to each other is non-existent. There is no top-down theory to these actions; the Defendants are not alleged to reflect any hierarchical structure as between themselves, nor are they alleged to be a single enterprise acting in unison.

[94] The Defendants are grouped together in these two actions because they are, for want of a better description, similar to each other. As Plaintiffs' counsel puts it in their McDermott v. ATK factum, "[e]ach Independent Defendant stands in a near identical position vis-à-vis the Resident and Visitor Class Members and owed them the same duties."

[95] In this, the Defendants and their respective homes in the two actions are in much the same position as the hockey teams named as defendants in *Carcillo*. As Justice Perell described it, at para. 78, the plaintiffs' claim of abuse by Canada's junior teams "is premised on a collective liability of the incorporeal 60 teams and the incorporeal four leagues for systemic breach of

fiduciary duty, systemic negligence, collective vicarious liability, and breaches of the Québec causes of action. The legal nature of these incorporeal entities is at the centre of the Plaintiffs' theory of their case against the Defendants." As in *Carcillo*, the Plaintiffs seek a judgment against multiple Defendants even though the factual and legal scenario they describe makes it patently clear that "[t]here is no collective or concerted action liability in the immediate case": *Ibid*., at para. 231.

[96] To state the obvious, similarity is not commonality. Defendants' counsel submitted at the hearing that while class actions allow for common issues, a person injured by defendant 'A' cannot sue defendant 'B' because it separately injured others in a similar way. The owner of a Toyota with a bad transmission cannot sue Honda even if Honda's transmissions are just as bad; and all Toyota owners cannot form a class with all Honda owners and sue both manufacturers on the theory that they've both done wrong and if the colours bleed it will all come out in the wash. Such a claim "[would] not involve the common acts or omissions of a collective. There [would be] no certifiable causes of action for a collective liability": *Ibid*., at para. 355.

[97] In much the same way, Mr. Carcillo, who suffered abuse while playing on the Sarnia Sting, cannot sue the Lethbridge Hurricanes or the Halifax Mooseheads, where his two co-plaintiffs suffered similar abuse: *Ibid*., at paras. 60-62. In the absence of collective or top-down acts making disparate defendants a single enterprise, there is no *lis* between the parties. "In the class action context, the U.S. Supreme Court has put the matter in terms of a claimant's standing to sue: "it bears repeating that a person cannot predicate standing on injury which he does not share. Standing cannot be acquired through the back door of a class action": *Allee v. Medrano*, 416 US 802, at 829 (1974).

[98] Since the relationship between the Defendants in McVeigh v. Toronto and in McDermott v. ATK is non-hierarchical, there is no top-down, enterprise-wide, claim in either action. Whatever the acts of each Defendant might be, and regardless of how harmful the alleged conduct may have been, there cannot be systemic negligence. The unrelated Defendants do not act in concert to create a system – a grossly negligent one or otherwise.

[99] In addition to all of that, there are some 34 Defendants in McDermott v. ATK and only six representative Plaintiffs who relate to six of those Defendants. In McVeigh v. Toronto, there are six Defendants and only three representative Plaintiffs, all of whom relate to the same Defendant, the City of Toronto. Since there is no collective enterprise among the disparate Defendants, the *Ragoonanan* problem persists in these actions. In the absence of a representative Plaintiff with a claim against each Defendant, there is no cause of action against that Defendant and the claims cannot be maintained: *Hughes v. Sunbeam*, *supra*, at para. 18.

[100] In the absence of collective action, or an enterprise, top-down theory of liability, against any of the Defendants in McDermott v. ATK, and in the absence of some 28 representative plaintiffs, that action cannot be certified. It would have to be reconstituted and pursued as separate actions against each Defendant, with a representative plaintiff against each one (unless two or more can be shown to be part of the same corporate enterprise). Standalone class actions against any of the independent home Defendants are certainly conceivable if the present claim were disaggregated and representative plaintiffs were found for each claim. A court would then have to

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separately determine whether the rest of the criteria in section 5(1) of the *CPA* are met for each of those reconstituted claims.

[101] The same is true of McVeigh v. Toronto. There is no collective action, and no enterprise-wide, top-down theory of liability, directed at the six Defendants. They are each separate municipalities with separate legal identities, separate governance structures, and separate policies (including separate IPAC policies and protocols). Although they bear similarities to each other, there is no sense in which they act in concert or constitute a single enterprise. Likewise, five of the six Defendants have no representative plaintiff suing them. Accordingly, an action against the 5 municipalities lacking a Plaintiff cannot be sustained, and the action against all six municipal Defendants cannot be certified.

[102] Again, the McVeigh v. Toronto claims would have to be reconstituted and pursued as separate actions against each of the municipal Defendants, with a representative plaintiff against each one. I note that at least one claim not included in McVeigh v. Toronto has been issued against another Ontario municipality on a standalone basis: *Adamo v. Windsor* (Court File No. CV-22-00691183-00CP). As with the McDermott v. ATK claims against independent homes, others are certainly conceivable if the present McVeigh v. Toronto action were disaggregated. A court would, once again, have to separately determine whether the rest of the criteria in section 5(1) of the *CPA* are met for each of those reconstituted claims.

[103] I note that the specific claim against the City of Toronto could, with some drafting revisions, likely be repackaged almost immediately as a standalone claim. McVeigh v. Toronto already has three named Plaintiffs who are representative of the Resident Class for the six LTC homes encompassed by the Toronto claim. The Plaintiffs' pleading as it now stands does not spell this out, and I have therefore not reviewed the record sufficiently to make a definitive determination. However, there may well be evidence that would support the kind of top-down theory of systemic negligence for the City of Toronto much as there is for the claims against the Chartwell, Extendicare, Revera, Responsive, Schlegel, and Sienna corporate groups.

[104] Having concluded that these actions cannot be certified and that to do so they must be disaggregated, the problem of missing representative Plaintiffs is, strictly speaking, moot. But given that so much time was spent by the parties debating a potential solution to that problem, and in view of the fact that it may arise again if the municipal and independent claims, or parts thereof, are resurrected as standalone claims against single Defendants. There are very few representative Plaintiffs in either McVeigh v. Toronto or McDermott v. ATK, and one can predict that it will be a challenge to find representative plaintiffs if those claims are brought back in disaggregated form.

[105] Plaintiffs' counsel submit that the solution to any missing representative plaintiff is to have the Defendants find a plaintiff for them. They rely on *Vecchio Longo Consulting Services Inc. v. Aphria Inc.*, 2021 ONSC 5405, where underwriter defendants in a securities misrepresentation case were ordered to produce a list of primary market purchasers. The case was certified as against the corporate issuer for a class of the secondary market claimants, but there was no representative plaintiff for the primary market claim against the underwriters.

[106] Justice Perell observed that the claims were in substance identical since the same misrepresentations were made in the prospectus as were made in the secondary market disclosures.

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He also commented, at para. 1: "I suspect that based on their own sales records, the Underwriters can deduce that some of their customers were harmed by their purchase of Aphria shares...relating to the same public offering and faulty prospectus."

[107] A modified version of the *Aphria* approach was taken in *Singh v. RBC Insurance Agency Ltd.*, 2023 ONSC 1439, where there was a certifiable action brought by a plaintiff whose own personal claim turned out to be time barred. Certification was granted on a conditional basis, giving class counsel 100 days to find a new representative plaintiff. A similar order was made in *Azar v. Strada Crush Limited*, 2019 ONSC 4436, where the representative plaintiff was determined to be unqualified and removed from his role, and class counsel was given 60 days to bring a new motion to replace him.

[108] In each of these cases, the *Ragoonanan* principle was applied such that the cases could not proceed if, after a limited period of time, a representative plaintiff was not found to fill the gap. It is noteworthy, however, that in neither *Singh* nor *Azar* were the defendants compelled to assist class counsel in locating a new representative plaintiff. The rationale for refraining from any such order was stated clearly in *Singh*, at para. 228:

> There is no evidence before me on this certification motion that Class Counsel would have any difficulty in locating a new representative plaintiff who worked at RBC General during the relevant period. Class Counsel has obtained the evidence of three affiants who worked at RBC General, and there is no reason to believe that Class Counsel could not contact further P&C Advisors who worked with the affiants while at RBC General.

[109] The same rationale applies here, even more forcefully. The within actions were commenced in 2021 and were revised and reconstituted in their present form in early 2022. In January 2023, the hearing of the certification motion was commenced before Justice Belobaba, who unfortunately passed away before the combined set of motions could be completed. Having filed all of their motion materials, and having had a dry run of a substantial portion of the certification motions, the parties then had to pause for a full year until a new certification hearing could be scheduled before me.

[110] In all that time, the Plaintiffs and their counsel were unable to come up with any new representative plaintiffs to solve their significant *Ragoonanan* problem. In fact, the record contains no indication that they made any efforts in this regard. This is a surprising omission.

[111] I would also observe that the task imposed on the securities underwriters in the *Aphria* case to produce a list of purchasers is a relatively minimal burden. They had to print out the list of stock purchasers of record and send it to opposing counsel. By contrast, the task requested by Plaintiffs' counsel here represents an enormous burden to impose on the Defendants.

[112] For any case where there is no parallel representative plaintiff for the Resident Class, the task of combing through an LTC home's visitors' logs from the height of the pandemic to find a Visitor Class representative is a daunting task. One administrator at a Region of Durham LTC home has filed an affidavit in McVeigh v. Toronto in which she chronicles the efforts she went to in gathering a visitors list for just one month during the pandemic:

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> 85. I have made efforts to determine the number of visitors to Hillsdale Terraces since the outset of the pandemic, but this is an extremely time consuming process. Each visitor to Hillsdale Terraces was and is required to complete a sign-in sheet each time they enter the home. Since the beginning of the pandemic, thousands of pages of sign-in sheets have been generated. It takes a significant amount of time to review each page, determine the category of visitor and exclude repeat visitors in order to estimate class size. As a result, I have not been able to provide complete numbers for each category of visitor, but have done my best with the assistance of counsel to provide useful information. General Visitors
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> 86. General visitors are typically resident family and friends, although this category may also include paid companions. General visitors were prohibited from entering Hillsdale Terraces as of March 14, 2020 until May 22, 2021, at which time outdoor visits were reinstated. Beginning on July 7, 2021, each resident was permitted a maximum of two general visitors at a given time inside the home, with social distancing protocol in place depending on the visitors' vaccination status.
>
> 87. Given the sheer number of visitors, including repeat visitors, it is very difficult to provide an accurate estimate of general visitors since March 11, 2020. With the assistance of counsel, I was able to determine that the total number of different (ie. not repeat) visitors in June of 2022 was approximately 552.

[113] After the general visitors, the affiant then describes the task of compiling different varieties of visitors to the home: essential care givers, support workers, end of life visitors, government inspectors, student placements, and paid companions. She testified that the handwritten sign-in sheets made it difficult to tally the ultimate numbers. Counsel on behalf of Durham submitted that it took tens of hours of lawyers' time assisting the client's administrator to compile the figures for just the month of June. She also indicated that the contact information appears to be a mix of phone numbers and addresses.

[114] Plaintiffs' counsel characterizes the request for assistance here as merely clerical and amounting to little more than the usual notice to be given to class members. However, the request amounts to considerably more that; it would permit counsel on one side, although lacking a client, to imagine a class, and then require counsel on the other side to spend a very substantial amount of time and effort shopping around in the proposed class for a client for his or her opponent.

[115] Class actions have been criticized in legal scholarship for being more about lawyer entrepreneurship than the rights of clients: see Warren K. Winkler and Sharon D. Matthews, *Caught in a Trap – Ethical Considerations for the Plaintiff's Lawyer in Class Proceedings*, Court of Appeal for Ontario archives: <Caught In a Trap - Ethical Considerations for the Plaintiff's Lawyer in Class Proceedings - Court of Appeal for Ontario (ontariocourts.ca)>. The notion of starting a lawsuit without a client and compelling a defendant to find one is, in my respectful view, a step too far.

[116] Accordingly, if new, disaggregated proposed class actions are in the future commenced against the independent or municipal Defendants, a representative plaintiff will have to be named

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for each one. Under the circumstances, the Defendants should not be put in the position where they have put time and effort into finding persons who would claim against them.

vii. The *Charter* claim

[117] In addition to the common law and statutory claims referenced above, the Plaintiffs plead a cause of action for breach of the proposed class members' rights to life, liberty, and security of the person under section 7 of the *Charter*. They submit that as the supreme law of Canada, constitutional rights such as those under section 7 cannot be extinguished by an ordinary statute such as *SORA*.

[118] In the circumstances, however, the Plaintiffs cannot rely on the *Charter* for a cause of action or remedy. In the first place, the Defendants (with the exception of the municipally-owned LTC homes) are not government bodies and, although health care is an important provincial responsibility under the *Constitution Act, 1867* and otherwise, the LTC homes are not themselves carrying out governmental functions. By analogy, property and civil rights in the province is an equally important provincial responsibility, but property owners and managers are not themselves carrying out governmental functions. The fact that a subject matter is a responsibility for government means that government enacts laws for the sector, but it does not mean that any private enterprise operating in the sector is part of government and thus subject to the *Charter*: *R.W.D.S.U. v. Dolphin Delivery*, [1986] 2 SCR 573, at paras. 34, 38-40.

[119] Plaintiffs' counsel spend much energy arguing that health care, including elder care, is one of government's most important functions. However, as the Supreme Court of Canada observed in *McKinney v. University of Guelph*, [1990] 3 SCR 229, "Many institutions in our society perform functions that are undeniably of an important public nature, but are undoubtedly not part of the government. These can include railroads and airlines, as well as symphonies and institutions of learning." It would take active government involvement in the operating business to make private sector actors subject to the *Charter*: *Stoffman v. Vancouver General Hospital*, [1990] 3 SCR 483, at 512. The critical point here is that government has no day-to-day control over the running of LTC homes: *Canadian Blood Services v. Freeman*, 2010 ONSC 4885, paras. 340 *et seq*. Government in this context is a regulator, not an operator.

[120] Additionally, being a supplier of essential public goods or services such as housing, food, transportation, education, legal services, and health services does not place an entity under the *Charter* spotlight: *Flora v. OHIP*, 2007 CanLII 339 (Div Ct), aff'd 2008 ONCA 538; *Lewis v. Alberta Health Services*, 2022 ABCA 749, at paras. 52-77; *Strata Plan NW 499 v. Kirk*, 2015 BCSC 1487, at paras. 143-160. If it were otherwise, every condominium corporation, caterer, taxi company, private school, law firm, and physician would be subject to *Charter* review. That is obviously not the case.

[121] In a parallel way, the municipally-owned homes at issue in McVeigh v. Toronto are not operating in their capacity as local government or as agent of government; if that were the case they would be subject to the Charter like any other government branch or department: *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, [2009] 2 SCR 295. Rather, they are licensees under a provincial regulatory scheme

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for LTCs. Like the privately owners of the LTC homes at issue in the other actions, the municipal Defendants are running a business enterprise – albeit for the most part a non-profit enterprise.

[122] Municipalities are subject to the *Charter* where they are "empowered to make laws, to administer them and to enforce them within a defined territorial jurisdiction": *Godbout v. Longueuil (City)*, [1997] 3 SCR 844, at para. 51. That is not the capacity in which they are alleged to have engaged in the impugned conduct here. Managerial decisions and rules in municipal LTC care homes are not municipal by-laws and regulations, and the city as political entity has no day-to-day function in those homes.

[123] The claims in all eight of the actions at issue here are, in essence, negligence claims. The Court of Appeal has specifically admonished that "allegations of negligence cannot be 'dressed up as *Charter* breaches'": *J.B. v. Ontario (Child and Youth Services)*, 2020 ONCA 198, at para. 60. That admonition alone is a complete answer to the claim of breach of *Charter* in respect of the allegedly substandard IPAC policies and protocols in the LTC homes at issue here.

[124] In addition, and most relevantly, the Court of Appeal has observed that "[a]s a general proposition, the application of the *Charter* is confined to government action, not inaction": *Rogers v. Faught*, 2002 CanLII 19268, at para. 32. Thus, even quasi-governmental regulators such as the College of Physicians and Surgeons or the College of Dentistry are only subject to *Charter* review for what they do and not what they fail to do. "[T]he *Charter* does not impose on the Colleges an affirmative duty to establish specific programs and standards of practice to deal with discrete medical problems.": *Ibid*. What is true for the regulators themselves is certainly true for LTCs as regulated entities.

[125] The core submission of the Plaintiffs is that the Defendants failed to design and put in place IPAC standards that were needed during the pandemic. While a minor part of the Plaintiffs' claims impugns the quality or content of the policies that the LTC homes implemented, the essence of the litigation surrounds the Defendants' delays and omissions in this regard. Plaintiffs' counsel spell out the allegations thoroughly in their factum:

> The Defendants are alleged to have embarked on a course of conduct that exposed the Class Members, throughout the Class Period, to harm and that subordinated their safety to other interests. The Defendants' response was systemically and inexplicably delayed, woefully deficient, and inconsistent with well-established IPAC standards. The Defendants failed to take timely and reasonable action to protect their Residents,265 and recklessly delayed in implementing IPAC policies to prevent and contain COVID-19 outbreaks in their LTC homes. It is alleged that 'plans, precautionary measures, PPE supplies, and IPAC protocols were not in place either prior to the start of the pandemic or in the weeks leading up to the outbreaks in the Defendants' LTC facilities. [citations omitted]

[126] The Court of Appeal has recently reconfirmed, in the context of COVID-related government policies, that "[s]ection 7 of the *Charter* does not create a positive obligation on the state to take measures to ensure that each person enjoys life, liberty, or security of the person": *Robertson v. Ontario*, 2024 ONCA 86, at para. 75. As here, the core allegation in *Robertson* was

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that the Defendant – there, the government of Ontario – "failed to respond to the treat of COVID-19 in the LTC homes in a timely manner": *Ibid*. The Court went on to state that "[w]hile it is true that the claims impugn the manner in which Ontario responded to COVID-19 in the LTC homes, the repeated complaint is that the measures adopted were delayed, vague and inadequate. In other words…the appellants' claim is that the government response was 'too little, too late'": *Ibid*.

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[127] The Court in *Robertson* considered the essence of the alleged wrongdoing to be inaction – delay and neglect – rather than action, and as a result found that the *Charter* did not apply to the government of Ontario in the circumstances. The same logic applies even more aptly to the private sector Defendants in the present actions. As in *Robertson*, section 7 of the *Charter* provides no cause of action in respect of the Plaintiffs' claims which are, in essence, claims about omissions – i.e. the Defendants' inaction and delay in fashioning and implementing IPAC and in observing the precautionary principle. There can be no *Charter* damages claimed against them since not only are they not government entities performing government functions, but the challenged conduct – or non-conduct – is not subject to *Charter* scrutiny.

(b) Class definition – section 5(1)(b)

[128] The Plaintiffs' proposed class definition in all eight proceedings is identical. The proposal consists of a Resident Class, a Visitor Class, and a Family Class pursuant to s. 61 of the *Family Law Act*, RSO 1990, c. F.3. The proposed class definitions are as follows:

> Residents', 'Resident Class' and 'Resident Class Members' mean all persons who were Residents in, or received care at, the [Defendants'] LTC homes at any time between January 25, 2020 and May 5, 2023, or, where the person is deceased, the estate of that person.
>
> 'Visitors", 'Visitor Class' and 'Visitor Class Members' mean all persons who entered any of the [Defendants'] LTC as part of the homes' volunteer programs or to visit Residents at any time between January 25, 2020 and May 5, 2023, and where the person is deceased, the estate of that person.
>
> 'Family Class' and 'Family Class Members' mean all persons including, but not limited to, spouses, children, parents, and other relatives who, on account of a personal relationship to any one or more Resident Class Members and Visitor Class Members, have a derivative claim for damages under s. 61 of the *Family Law Act*.

i. The class period

[129] Defendants' counsel take issue with the length of time covered by the class period. They submit that the pandemic, and the precautionary and IPAC measures required to address the pandemic, morphed over time, and that three years is simply too long to realistically track the relevant events. They also submit that the crux of the claim is related to the Defendants' alleged delays and incompetence in putting in place IPAC policies and protocols, which happened during the early stages of the pandemic.

[130] Plaintiffs' counsel submit that under the circumstances, a Class Period of 3¼ years is logically consistent with the claims against the Defendants. They further submit that not only is the proposed Class Period appropriately bound in time, but the subject matter to be addressed during that period is appropriately bound in geography by being tied to the specific LTC homes referenced in the Plaintiffs' pleadings.

[131] The proposed Class Period in all eight proceedings begins on January 25, 2020, just prior to the arrival of the first COVID-19 cases in Ontario and at a time when it was clear to the medical and LTC community that it was on its way here. The proposed Class Period ends on May 5, 2023, the date that the WHO declared the global state of emergency in respect to COVID-19 to be over. This time frame is not longer than other cases involving systemic wrongdoing: see *Cavanaugh v. Grenville Christian College*, 2012 ONSC 2995, at para 29, aff'd 2021 ONCA 755.

[132] While I agree with Defendants' counsel that the first wave of COVID-19, and the run-up to that wave as it became apparent that the disease was spreading around the world, is the most crucial time for these claims. However, I would also acknowledge that the record contains some basis in fact for the Plaintiffs' allegation that the breaches of the standard of care by the Defendants continued through the proposed Class Period. The IPAC measures implemented by each set of Defendants in the various actions may have changed in detail, but lasted in their essence for the entire pandemic. The Plaintiffs' experts opine that the standard of care remained roughly constant from the beginning of the pandemic to the end.

[133] The record, composed of a large number of Ministry of Health and Ministry of Long Term Care inspection reports, the opinions of Drs. Sharkawy and Zautman, and affidavits of the Plaintiffs and of various staff members of the Defendants' homes, contains evidence of delay in producing IPAC protocols, insufficient training in IPAC, and a lack of preparedness with respect to PPE supplies and other matters. These issues are said by Drs. Zautman and Sharkawy to have started at the outset of the Class Period and to have reverberated throughout the Class Period. Especially in a class action involving systemic negligence, courts have determined that "it is not necessary to show an uninterrupted basis in fact of wrongdoing for the Class Period": *Ibid.*, at para. 119.

[134] The Plaintiffs have proposed a Class Period that is rational and sufficiently calibrated to their claim.

ii. Class definition and scope of the alleged negligence

[135] The scope of the conduct as issue in these proceedings is limited by a number of factors – e.g. the requirement under *SORA* that the impugned conduct reflect a marked departure from the standard of care, and the need to identify the alleged systemic misconduct at the top of the corporate apex rather than at the bottom or most localized level. Another limitation on the wrongdoing identified by the Plaintiffs is the nature of the evidence on which the allegations are based.

[136] The main body of evidence asserting gross negligence on the part of the corporate Defendants comes from the reports of prominent infectious disease specialists, Drs. Zautman and Sharkawy. In accordance with their well-established expertise, the two medical/public health

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expert reports authored by these witnesses are primarily devoted to explaining the elements of IPAC and the precautionary principle. Following on that, Drs. Zautman and Sharkawy go on to describe what they see as the shortfalls of the Defendants in respect of infection control and prevention.

[137] Dr. Zautman's and Dr. Sharkawy's reports are accompanied in the Plaintiff's motion materials by a shorter expert report by Mr. Paul Tuttle, a former president of one of the Defendant LTC chains. As a management professional, Mr. Tuttle focuses his opinion on the top-down, head office responsibility for IPAC protocols in LTC chains.

[138] In addition, the record contains the evidence of numerous proposed representative Plaintiffs, most of whom are family members of LTC home residents who died during the COVID-19 pandemic and who, in their affidavits and cross-examinations, describe matters that they observed in their family members' homes. There are also a substantial number of Ministry of Long-Term Care inspection reports in the record; these likewise contain various observations made by the Ministry inspectors at the point-in-time of the particular inspection. Finally, there is a Canadian Armed Forces report describing what the was observed by military personnel who were asked to intervene in the operations of 5 of the more than 300 homes in issue here.

[139] The non-expert, observational evidence of family members, Ministry inspectors, and armed forces personnel adds local colour, as it were, to the more top-down focus of the Plaintiffs' two medical experts. However, given that the Defendants' impugned conduct is said to lie at the top of their respective organizational pyramids, any observations from the ground level have only limited relevance to assessing the standard of care. To use a simple analogy, poor driving by taxi drivers, and even repeated and multiple instances of poor driving in a given fleet, does not necessarily impugn the top-down safety protocols put in place by the taxi corporation. Taxi drivers, like LTC staff (or lawyers in a firm, teachers in a school, etc.), have agency of their own and sometimes make individual errors.

[140] Plaintiffs' counsel argue that a continuous pattern of missteps on the ground signifies a problem at the top. Whether or not that is the case, the focus of the actions seeking certification is clear – it is the harms alleged to have ensued from the mishandling the infection prevention and controls that should have been in place leading up to and during the pandemic. IPAC standards, and the alleged mishandling of IPAC responsibilities at the respective Defendants' corporate level, are addressed extensively by the expert evidence. It is not other forms of mismanagement by the Defendants that is the focus of Dr. Zautman's and Dr. Sharkawy's reports; it is mismanagement of the Defendants' IPAC responsibilities in respect of COVID prevention at the time when they counted most.

[141] Plaintiffs' counsel put it succinctly in their core factum:

> Collectively, the 31 proposed Representative Plaintiffs provide evidence of the widespread chaos that overwhelmed the Defendants' LTC homes during the pandemic. Their experiences, while not identical, paint a remarkably consistent and disturbing picture of the LTC Defendants' systemically delayed and grossly

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> deficient response to COVID-19, a response that left over 3,500 Residents dead and over 16,000 infected.

[142] The COVID focus of these actions is self-evident from the very first sentences of Plaintiffs' counsel's core submissions:

> When COVID-19 first hit Ontario's long-term care ("LTC") homes in the early spring of 2020, it spread like wildfire. In the first wave alone, almost 2,000 Residents died and more than 6,000 others were infected. To date, at least 3,300 Residents have lost their lives in the Defendants' LTC homes. The death toll only increased as the pandemic continued to ravage the Defendants' LTC homes.

[143] That said, Plaintiffs' counsel go on to add another sentence to their introductory paragraph which adds a different dimension to the claim:

> Those that escaped infection still suffered profoundly as the Defendant owners, operators, and licensees – utterly unprepared for a pandemic – failed to provide Residents with even basic necessities and care.

[144] One can appreciate that the class size, and the entire focus of the litigation, is enlarged exponentially by this latter sentence. It brings into play the experiences of every single resident of the Defendants' LTC homes during the time of COVID-19, whether or not they contracted the disease or were in a home which had widespread outbreaks.

[145] Even discounting the rather extreme rhetorical flourish with which Plaintiffs' counsel's sentence ends – there is, in fact, no evidence of starvation in the LTC homes, or of residents dying of thirst, freezing for want of shelter, or actually being deprived of other necessities of life – the expansion of the claim in this way is disproportionate to the record meant to address it. There is relatively little in the thousands of pages of evidence in these combined legal actions that is devoted to non-COVID related hardship. As the Quebec Court of Appeal has stated, it is for the moving party in a proposed class action "to identify a group that sticks to reality and the magnitude of the problem giving rise to the dispute": *Citizens for a Quality of Life v. Citizens for a Quality of Life v. Aéroports de Montréal*, 2007 QCCA 1274, at para. 107.

[146] For the most part, the record before me contains little more about non-COVID mistreatment than occasional observations about residents being left alone for long periods or waiting a long time to be fed or bathed. I do note that these observations are significantly magnified in the few LTC homes that are subject to the Canadian Armed Forces report. Defendants' counsel argue that that the military report is hearsay, as it has been inserted into the record in unsworn form and with no opportunity for the authors to be cross-examined. I take the Defendants' point, but I would not want to exclude the report entirely on the grounds of hearsay; rather, I would give it relatively little weight as anecdotal evidence pertaining to only a small fraction of the LTC homes in issue in these proceedings.

[147] Plaintiffs' counsel argue that even LTC residents who never contracted COVID-19 were exposed to the risk of contracting the disease due to the negligence of the Defendants. There are, of course, occasions, especially in systemic negligence cases, where a class has been defined not

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by the harm its members actually suffered but by their exposure to the risk of harm: see *Anderson v. Wilson*, 1998 ONSC 18878, aff'd. in part (1999), 44 OR (3d) 673 (CA). In fact, there are cases that have been certified in Ontario, albeit only a small number, where the psychological harm caused by exposure to risk of an infection disease was the focal point of the claim: *Healey v. Lakeridge Health Corporation* (2011), 103 OR (3d) 401, at para. 55 (ON CA).

[148] That is not, however, the focal point of the cases in issue here. It is at most a footnote to the otherwise voluminous evidentiary record. During the course of a three-week hearing of the combined certification motions, I would be surprised if more than a cumulative 10 minutes were spent on the class members' non-COVID experiences. There is not, for example, a single representative Plaintiff or other affiant who deposes that they are a resident or visitor or family member of a resident that did not contract COVID-19 but who gives evidence of the risk they endured despite not becoming ill.

[149] Given the exponential way in which expanding the class to include all residents – those who were infected by COVID-19 and those who were not – enlarges the class and inflates the claim, the class definition in this respect is a tail wagging the dog. The conceptually small sub-part effectively overshadows the main part of the claim, leading to a reverse hierarchy of claims.

[150] In saying this I do not dismiss the evidence in the record of discomfort experienced by LTC home residents during the pandemic. I equally do not ignore the anecdotal and observational evidence in the inspection reports and elsewhere of patients waiting extra long times for meals, baths, bedding changes, clothing changes, washroom use, etc. I likewise do not underestimate the extent of the feelings of loneliness, isolation, psychological distress, and general helplessness that many residents are described in family members' affidavits and elsewhere as having experienced. There is evidence of that in the record, although it is generally referenced in passing or as a footnote to the voluminous evidence dealing with IPAC, infectious disease precautions, and COVID-19.

[151] Moreover, the record lacks any evidence that these types of hardships were related to the Defendants' corporate office conduct or top-down negligence. Any observations in the record of distressed residents are made in passing, as it were, and are perspectives taken from ground level.

[152] And even at that, the record fails to provide a way to distinguish the effects of the LTC homes' mishandling of the pandemic from the effects of their proper handling of the pandemic. In his report, Dr. Zautman describes residents suffering "a lack of socialization…emotional distress, loneliness, cognitive decline, and depression", as well as "emotional pain and anguish on the part of their families being helpless to assist their loved ones in the LTC homes…" I am sure that Dr. Zautman is accurate in describing the psychological hardship and isolation that many residents experienced during the Class Period.

[153] However, Dr. Zautman himself identifies social distancing patients from each other, closing the facilities to outside visitors, cohorting the residents and isolating COVID patients from non-COVID residents as proper IPAC policies to be implemented in the homes. It is little surprise that isolation and psychological distress would ensue. It would be very odd for a court to impugn the conduct which amounts to putting in place difficult measures that the Plaintiffs' medical experts prescribe.

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[154] One of the representative Plaintiffs in the Sienna action, Kathryn Robertson, graphically demonstrates the conceptual problem with this broad claim. As pleaded by the Plaintiffs, Ms. Robertson became depressed as a result of the isolation experienced during the pandemic. In response, she took steps toward authorization of medical assistance in dying. She passed away in late 2020, after the outbreak in her LTC home was over. The record is clear that at no point did Ms. Robertson contract COVID-19; her depression, tragic as it is, was a result of her feeling isolated, which was itself a result of the LTC home implementing IPAC protocols described as essential by Plaintiffs' experts.

[155] The Plaintiffs connect this and other non-COVID deaths to the claim against Sienna (and, in effect, the Defendants in all of the actions) by pointing to Dr. Zautman's generalized observation in his report that "the poor overall preparedness and response to the COVID-19 pandemic in Ontario's LTC homes… resulted in profound social isolation for the residents…Consequently, the residents suffered emotional, psychological and neurocognitive negative affects at alarming rates." This, then, connects back to Dr. Zautman's assessment that 90% of COVID cases in LTC homes could have been avoided – an assessment that he supports with an interesting comparison: "when one considers the very different results obtained by the Canadian 'Atlantic Bubble.'".

[156] With the greatest of respect, the comparison is so inapt that it tends to undermine Dr. Zautman's entire point. To compare the closure of individual LTC homes to the closure of four entire provinces is not exactly a scientific, apples-to-apples measurement. Nothing the management of LTC homes could have done – with staff, service people, food, and all supplies coming in from the pandemic-inflicted Ontario society around them – could have replicated the carrying on of normal life in the closed and self-sufficient Atlantic provinces. In line with that, nothing the Defendants could have done for the residents of their LTC homes – who had to be kept away from people living in COVID-plagued Ontario outside the homes – could have replicated that lack of social isolation and freedom from other psychological ills experienced by Atlantic Canada's citizenry at large.

[157] The fact is that the Plaintiffs' own expert evidence about IPAC measures makes it likely that the advent of a pandemic took an emotional/psychological toll on elderly and often frail LTC home residents. But that expert evidence does not support this type of harm to non-COVID positive residents as being a manifestation of top-down failures by the Defendants. To include as class members the residents who suffered distress as a result of the pandemic and the sometimes onerous precautionary measures taken in response, has the effect of expanding the proceedings beyond any realistic basis in fact contained in the record. There is no basis for including in the class those who endured the (undoubtedly difficult) pandemic-era harms other than actual COVID-19 infections.

[158] I would also add that the other non-COVID harms that the evidence shows some residents suffering – i.e. the long wait times for meals, bathing, clothing changes, etc. – are ground-up observations rather than top-down policies. It is not too much of a generalization to say that these issues are virtually all related to local staff working under, and coping with, the stressful circumstances that prevailed in medical institutions, including LTC homes, during the pandemic. With increased medical attention came decreased non-medical attention.

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[159] To the extent that there is any evidence relating these incidents to Defendants' head offices, it is in the comments by Drs. Zautman and Sharkawy about the Defendants' lack of preparedness for staff shortages. Both doctors opine that ever since the 2003 SARS outbreak in Ontario and the studies that followed it, it has been foreseeable that another infectious respiratory disease would come one day. They say in various ways in their reports that Ontario's LTC homes should have been prepared for, among other IPAC-related matters (hygiene policies and protocols, ample PPE supply, staff training in IPAC methods, etc.), the staffing shortages that might ensue.

[160] When LTC staff non-attendance did take place during the 2020 first wave of COVID, the two doctors attribute the problem to the Defendants' lack of IPAC preparedness. By way of illustration, Dr. Sharkawy observes that many homes reflected "a thinly resourced, over extended workplace environment." He is of the view that LTC homes should have improved their "understaffed facilities not in small measure related to low pay and thin health insurance benefit packages…"

[161] Similarly, Dr. Zautman laments many LTC homes' "low levels of staffing and the hazards of part-time and casual employment…" In his report he generally includes staff shortages, or the lack of staff planning, as part of the list of IPAC deficiencies. Thus, for example, he says that LTC preparedness would include "specific training of long-term care staff on IPAC procedures, internal audits of readiness and assessment of personal protective equipment limits with planning for cohorting and safe alternative placement of residents when the capacity of long- term care homes was exceeded, *staffing planning*, testing and tracing of cases." [emphasis added]

[162] Defendants' counsel respond, accurately, that while the two physicians mention staff planning as part of preparedness, they provide little by way of further explanation. As one counsel put it, LTC homes can stock up in advance on PPE such as masks, gowns, gloves, and visors, and can stockpile other IPAC necessities such as disinfectant and hand sanitizer. But they cannot keep spare nurses in the storage closet in case of an outbreak.

[163] It is true that since the 2003 SARS outbreak when many hospital staff members contracted the disease in the course of treating it, it has been foreseeable that staff shortages would be a problem if another new infectious respiratory disease came along. Accordingly, the experts have emphasized that IPAC precautions to protect staff should have been front and centre for the LTC homes, as they were as important and necessary as precautions taken for residents. But there is no evidence that anyone actually foresaw, or that any corporate LTC licensee could have taken precautions against, what actually transpired during the COVID-19 pandemic – the closure of the entire society, with all of the spillover effects that a mass closure entails.

[164] Again, an LTC home can, and the experts say must, protect its staff – from physicians to nurses to housekeepers to cooks – with adequate PPE and other IPAC-related measures. If staff are prevented from getting sick themselves, they will be more readily available for work. But an LTC home can do little about mass staff shortages resulting from the staff members' children's schools being closed and the sudden need for home childcare during daytime work hours. The LTC homes can likewise do little about escalating COVID-19 cases among staff resulting from the need of those staff members to tend to COVID-positive family members at home, or to shop for food in COVID-reddled supermarkets, or to commute to work on crowded public

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transportation. Unlike the residents of LTC homes, who can be locked down and isolated, the staff live out in the pandemic-inflicted world. They contracted COVID-19 in significant numbers, often not through any fault of the Defendants.

[165] Staff shortages of this nature, and the massive lack of available labour in society once the COVID-19 pandemic hit, is not addressed by the experts. There is no basis in fact in the record for determining that the actual staff shortages experienced in the pandemic – not the hypothetical ones that the experts contemplated post-2003 – were managed negligently by the Defendants. The staff shortages were, indeed, highly problematic and caused considerable hardship to the residents of the homes. But there is no evidence in the record to even start to demonstrate that the failure to find replacement staff in a society that was shut down and in which workers were unavailable amounted to a lack of planning or to gross negligence.

[166] As a final point on this topic, what evidence there is in the record as to how the Defendants might have handled the staffing problems, and why their helplessness to do so was negligent, is inadmissible. That evidence, again, comes from Drs. Zautman and Sharkawy. As related above, both of those expert physicians take it on themselves to opine about the salary levels of LTC home staff. Dr. Sharkawy is of the view that LTC home staff should get better health insurance benefits, and Dr. Zautman is of the view that they should be working full- time instead of part time. Both doctors think that staff should get paid more.

[167] I have the greatest of respect for the medical knowledge of these two experts, and I have no trouble qualifying them as experts in infectious disease care, prevention and control. But labour economics, corporate financial management, and the economics of running a LTC home seem a bit out of their lane. Interestingly, Mr. Tuttle, who as a LTC corporate executive might have the right background to opine on these matters, does not do so. His expert report, submitted on behalf of the Plaintiffs, sticks to the topic of corporate responsibility for IPAC policy development and implementation. He does say, however, that as a corporate CEO management he would have been responsible for IPAC policies and for "ensuring the financial health of the corporation."

[168] Unlike Mr. Tuttle, the Plaintiffs' two medical experts have no experience with financial management in the LTC sector or any other industry. For an infectious disease specialist to opine on salary levels paid by any or all of the Defendant businesses is simply not helpful or admissible evidence. It is a bit like asking a judge to opine on the salaries of court registrars or transcriptionists. I do not know, because Drs. Zautman and Sharkawy likely do not know, what the financial statements of each of the LTC chains here look like, and whether paying some staff more will mean increasing fees or reducing other necessary expenditures, etc. There is nothing in the record – no basis in fact – on which an actual standard of care in this respect could be measured.

[169] Drs. Zaltman and Sharkawy give admissible opinions on medical issues, but not on financial ones. LTC staff may or may not be underpaid. But there is no basis in fact for saying that the Defendants were grossly negligent in the way they paid their staff. For all I know reading the record, corporate management of any of the Defendants may have been negligent in another way had they raised salaries and endangered the financial health of the corporate group – a responsibility that Mr. Tuttle identifies as central to their position. The staff shortages were without

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a doubt severe; but they were, as far as the evidence in the present record is concerned, a result of the pandemic itself.

[170] The class must be reduced to match the scope of the evidence in the record. The claim for which there is some basis in fact is entirely related to IPAC, the 2020-2023 pandemic, and the COVID-19 cases that transpired during the time of the pandemic. The record does not support the expansion of the class to include non-COVID related harms. The extent to which the record contains some basis in fact for non-COVID harms to be actionable as a product of any of the Defendants' systemic wrongdoing is negligible.

[171] Plaintiffs' counsel has repeatedly characterized the present actions as COVID-19 actions. As they put it in their core factum:

> Chartwell, Extendicare, Responsive, Revera, Schlegel, and Sienna LTC homes operate within a top-down corporate structure, with centralized policies, including IPAC policies, and responses to COVID-19. The claims involving these Defendants are quintessential claims arising from systemic wrongdoing: a corporate-wide failure to adopt, implement, and enforce life-saving IPAC measures.

[172] The class definitions should follow this lead. In each of the actions, the class definition for the Family Class, being derivative of the Resident Class, can remain as proposed by Plaintiffs' counsel. On the other hand, the definition of the Resident Class and the Visitor Class shall be amended in each action to read:

> 'Residents', 'Resident Class' and 'Resident Class Members' mean all persons who contracted COVID-19 and who were Residents in, or received care at, the Defendants' LTC homes at any time between January 25, 2020 and May 5, 2023, or, where the person is deceased, the estate of that person.
>
> 'Visitors', 'Visitor Class' and 'Visitor Class Members' mean all persons who contracted COVID-19 and who entered any of the Defendants' LTC as part of the homes' volunteer programs or to visit Residents at any time between January 25, 2020 and May 5, 2023, and where the person is deceased, the estate of that person.

(c) Common issues – section 5(1)(c)

[173] It is well settled that in order to qualify as a common issue, an issue must represent a necessary part of the resolution of each class member's claim: *Hollick v. Toronto (City)*, [2001] 3 SCR 158, at para. 18. A proposed common issue does not have to lead to a final disposition of the action, so long as it is a matter whose resolution will advance the litigation of the entire class: *Harrington v. Dow Corning Corp.*, 2000 BCCA 605, leave to appeal ref'd [2001] SCCA No. 21.

[174] The goal of identifying common issues is to avoid duplication in either the legal analysis or the fact-finding that goes into adjudicating the clam. In that way, the common issues foster judicial economy and improve access to justice: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 SCR 534, at paras. 39, 40.

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[175] Importantly, common issues cannot depend on findings which will have to be made upon individual inquiry or at subsequent individual trials; likewise, they cannot be premised based on assumptions that, in effect, circumvent the need for individual inquiries or trials: *Nadolny v. Peel (Region),* [2009] O.J. No. 4006, at paras. 50-52 (SCJ); *Collette v. Great Pacific Management Co.,* 2003 BCSC 332, at para. 51, var'd on other grounds 2004 BCCA 110. The test of commonality is whether the answer to a proposed common issue question can be extrapolated to each class member: *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City),* 2015 ONCA 572, at para. 48; *Merck Frosst Canada Ltd. v. Wuttunee,* 2009 SKCA 43, at paras. 145-46, 160, leave to appeal refused, [2008] SCCA No. 512.

[176] In terms of the factual basis of the proposed common issues, the Plaintiffs must demonstrate that there is some basis in fact that the proposed common issue is a real issue in the case and that it can be answered in common for all of the class members: *Kuiper v. Cook (Canada) Inc*., 2020 ONSC 128, at para. 26 (Div Ct). There must be a rational connection of the proposed question to all class members; it cannot be fashioned or framed in a way which assumes, without evidentiary support, commonality across the class: *Carcillo,* at para. 347.

[177] The Plaintiffs propose the identical common issues for the Chartwell, Extendicare, Responsive, Revera, Schlegel, and Sienna actions. The questions are presented by Plaintiffs' counsel under topical sub-headings. That pattern will be reproduced in the following analysis.

i. Negligence and Gross Negligence

> (1) Did the Defendants, or any of them, owe a duty of care to the members of the Classes related to COVID-19 outbreaks in their long-term care ("LTC") homes in Ontario?
>
> (2) If the answer to 1) is "yes", what was the applicable standard of care?
>
> (3) If the answer to 1) is "yes", did the Defendants, or any of them, breach the duty of care they owed to all or any of the members of the Classes? If so, when and how did the breach(es) occur?

[178] This series of questions asks about two of the four required elements of a negligence claim. In *Mustapha v. Culligan of Canada Ltd*., [2008] 2 SCR 114, at para. 3, the Supreme Court described these elements:

> A successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach.

[179] Turning first to the duty of care questions 1 and 3, the analysis is intertwined with the cause of action analysis under section 5(1)(a) of the *CPA*. As previously discussed in these reasons, the duty of care defines the legal relationship between the parties to a negligence action. Generically, section 3 of the *Fixing Long Term Care Ac, 2021,* SO 2021, c. 39 (Residents' Bill of Rights)

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establishes a duty of care from the licensee of a LTC home to the residents. But that is only the beginning of the relevant issues here, not the end. In this set of actions, there is a problematic gap in the relationship between the class as defined and some of the named Defendants.

[180] In *Carcillo*, at paras. 273, 288, Justice Perell began his cause of action analysis with the observation that the action before him was structurally flawed:

> The design and aim of Messrs. Carcillo, Taylor, and Quirk's proposed class action are based on the theory that the members of the group comprised of all the Defendants are collectively, i.e., jointly and severally, liable for what occurred over the 48-year Class Period. There, however, is a very serious design problem in this theory…
>
> For present purposes, the legal point to emphasize is that the individual members of the unincorporated association are not liable unless as individuals they would be liable under the substantive law.

[181] Like the 60 teams whose conduct was at issue in *Carcillo*, the Defendants named in each of the corporate actions are, in effect, unincorporated associations. Although they are mostly corporate entities, the members of a corporate family such as the Chartwell family or the Extendicare family, etc. do not formally exist as a single, overarching incorporated entity. Unlike in *Carcillo*, however, those corporate groups form a recognizable enterprise. As discussed in Part III(a)(iv) above, each of those corporate families can be sued collectively on an enterprise liability basis.

[182] Considered as a singular enterprise, there is a basis in fact for concluding that each of the six corporate groups owed a duty of care to the class members in the action against them – i.e. to the residents and visitors to their respective homes and, derivatively, to the families of those class members as defined in the *Family Law Act*. The pleadings themselves define each set of Defendants – i.e. each of the members of the six corporate groups – as operating with each other as an enterprise.

[183] Furthermore, the expert evidence of Paul Tuttle provides some evidence that for the six corporate group Defendants, head office was responsible on an enterprise-wide basis – i.e. for LTC homes owned/licensed and/or managed by the group – for IPAC policy design and oversight. Plaintiffs' counsel submit that, in fact, this duty of care is mandated by section 86(1) of the *Long Term Care Home Act*, which imposes a requirement on licensees to "ensure that there is an infection prevention and control program for the home."

[184] The Defendants do not deny that the licensee of any LTC home owes a duty of care to residents and visitors in that home. On an enterprise basis, this includes the companies in the licensee's corporate family that manage any given LTC home for which it is responsible. And while the statutory mandate only speaks of licensees, the manager of a LTC home in contract with the licensee and delegated many of its tasks cannot escape responsibility if the requisite standard is not met. In Lord Atkin's terms, the management company has a duty to take care of the residents and visitors in the licensee's LTC home. They are the foreseeable subjects, and potential victims,

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of the infection prevention and control program that the management company devises on behalf of the licensee.

[185] As indicated in Part III(a)(iv) above, however, there is no connection of the class to certain of the Defendants named in five of the six corporate actions – i.e. those Defendants who are not part of the larger corporate family at issue in the particular claim (the Schlegel action being the one exception where there are no independent Defendants named). For those five actions, the duty of care question cannot be answered in common for the entire class, as some of the class are owed a duty by the independent LTC home owners and some are not.

[186] To take one example in the Chartwell claim, some of the members of the resident class reside in the Cawthra Gardens Long Term Care Residence, which is managed by a Chartwell company but owned and licensed by Del Care LTC Inc., an arm's length corporation unrelated to the Chartwell group. For the residents of Cawthra Gardens, Del Care as licensee would be a proper Defendant along with the Chartwell group; they act in concert and both have a duty of care to those class members. But the class as defined in the Chartwell claim encompasses a large number of members – indeed, the vast majority – to whom Del Care owes no duty and who have no claim against Del Care. There is no commonality to the duty of care question so long as Del Care LTC Inc. is a Defendant in the action.

[187] The only way the duty of care questions can be certified is if it is certified as against the Chartwell Defendants only. Given that the problem is not just a lack of commonality but, for the independently-owned Defendants in the Chartwell, Revera, Extendicare, Responsive, and Sienna actions, the lack of a cause of action, this approach to certification makes sense. After all, courts have long required that "[t]here must be a rational relationship between the class, the causes of action, and the common issues…": *Fischer v. IG Investment*, 2010 ONSC 296, at para. 131, citing *Pearson v. Inco Ltd.* (2006), 78 OR (3d) 641 (ON CA) at para. 57.

[188] The corporate groups, as discussed, are each an enterprise interacting collectively with the entire class; the other independent owners/licensees who contract with those corporate groups for management services do not interact with the class as defined. In each of these actions, the duty of care questions are only certifiable against the corporate group acting as an enterprise as owners/licensees and/or managers of all of the homes included in those respective claims. The duty of care questions cannot be certified, as there is no commonality, with respect to the independent owners/licensees in those actions.

[189] The record indicates that the independent owners/licensees in the five corporate actions where this issue is relevant are:

> (a) Chartwell: Cel Care LTC Inc., LiUNA Local 837 Nursing Home (Ancaster) Corp., LiUNA Local 837 Nursing Home (Hamilton) Corp., and Villa Forum.
>
> (b) Revera: Baywood Place Operating Inc., Carlingview Manor Operating Inc., Dover Cliffs Operating Inc., Elmwood Place Operating Inc., Hanover Operating Inc., Heartwood Operating Inc., Humber Valley Terrace Operating Inc., Stoneridge Manor Operating Inc., and Harold and Grace Baker Centre.

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(c) Extendicare: Southbridge Health Care GP Inc., Soutbridge Care Homes Inc. (general partner of Southbridge Care Homes LP), Southbridge Healthcare LP, CVH (No. 1) LP, CVH (No. 2) LP, CVH (No. 3) LP, CVH (No. 4) LP, CVH (No. 5) LP, CVH (No. 6) LP, CVH (No. 7) LP, CVH (No. 8) LP, CVH (No. 9) LP, 1942454 Ontario Inc., Halton Healthcare LTC Inc., Southlake Residential Care Village, Tendercare Nursing Homes Limited, Villa Colombo Homes For The Aged Inc., West Park Healthcare Centre, F.J. Davey Home, Land O'Lakes Community Services, Pine Meadow Nursing Home, The Board of Management for the District of Manitoulin, and Trillium Health Partners.

(d) Responsive: Cooksville Care Centres Facility Inc., Eatonville Care Centres Facility Inc., Anson Place Care Centres Facility Inc., Hawthorne Care Facility Inc., Vermont Square Inc., 914 Bathurst GP, 848357 Ontario Inc., Sharon Farms & Enterprises Ltd., DTOC Long Term Care GP LP by its general partner DTOC II Long Term Care MGP (a general partnership, by its partners DTOC Long Term Care GP Inc. and Arch Venture Holdings Inc.), and Ina Grafton Gage Home of Toronto.

(e) Sienna: Friuli Long Term Care, Spencer House Inc., and Woods Park Centre Care Inc.

[190] Turning to proposed question 2 dealing with standard of care, the Defendants put up considerable resistance to the Plaintiffs' view of the standard expected of the LTC homes. Defendants' counsel submit that the Plaintiffs have failed to establish the standard of care to which the Defendants are to be held. It is their view that Plaintiffs' experts' opinions on breaches of the standard are "divorced from any standard as none are articulated." Defendants' counsel argue in their core factum that "the Plaintiffs' experts did not review or consider the Defendants' IPAC policies (or pandemic plans) and as such they cannot form any opinion on their adequacy."

[191] With the greatest of respect, Defendants' counsel misstate the issue on a certification motion. The question is not whether the Plaintiffs have proven breach of the applicable standard of care, or whether Plaintiffs' experts have rendered definitive opinions. If the question is certified, the issue of breach will be determined on the evidence adduced at the common issues trial. For the present motion, the question is a far more basic one: is there some basis in fact for determining the applicable standard of care in common for the entire class?

[192] The answer to that question is: yes, there is. Unlike causation, which will be discussed below but which many courts have said is a highly individualized issue, standard of care applies across all claimants who share the same cause of action. The standard of care in formulating IPAC policies and putting the precautionary principle into action on an enterprise-wide basis does not vary from resident to resident, or from visitor to visitor, or even from home to home.

[193] The fact that there are issues that may not be able to be determined on a common basis does not undermine the viability of a common issues trial on those issues that can be so determined: *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444, at para. 103. The point of the common issues is to identify those questions whose answer will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 SCR 534, at

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para. 39. Separate inquiries for causation or damages, if necessary, can be done by way of mini-trials subsequent to a common issues trial: *Anderson v. St. Jude Medical Inc.*, 2003 CanLII 5686, at para. 58 (SCJ).

[194] I would emphasize that the standard of care issues for which there is some basis in fact are the IPAC standards and the elements of the precautionary principle as they relate to COVID-19. As discussed in Part III(b)ii above, there is no basis in fact for considering on a common basis any other standard of care issues with respect to resident care or the treatment of visitors in any of the Defendants' LTC homes. The class in each action is now defined as those who were infected with or died of COVID-19, and the relevant standard of care relates to COVI-19 precautions, primarily in the formulation of the IPAC policies and protocols by each set of Defendants.

[195] There is some basis in fact for the standard of care as it relates to IPAC policies and protocols applying to the top of the corporate pyramid for each set of corporate Defendants. As indicated, Paul Tuttle testifies to this effect. And although the Defendants submit that implementation of each corporate group's IPAC policies and protocols is done at the home level rather than at corporate level, they do not seriously take issue with the fact that design and supervisory/audit and training responsibilities for IPAC are done corporately.

[196] Defendants' counsel's primary response in respect of the standard of care is that the content of the standard of care as articulated by Drs. Sharkawy and Zautman is so vague as to be non-existent. They submit, in principle correctly, that without a properly expressed standard, it is impossible to assess whether any breach occurred: *Waterway Houseboats Ltd. v. British Columbia*, 2020 BCCA 378, at para. 367. They further observe that in *Fullowka*, *supra*, at para. 80, where the standard of care espoused by the plaintiff was that the defendant "had failed to ensure that the entrances were properly guarded to avoid incursions", the Court held that this bald statement cannot constitute a standard of care as it "does not indicate what 'properly' guarding the entrances required [the Defendant] to do."

[197] Defendants' counsel say that the same conclusion should be reached in respect of the Plaintiffs' experts' views here. It is their view that the references by Drs. Sharkawy and Zautman to "best practices", the "precautionary principle", and vague and undefined IPAC standards, all amount to "hollow" verbiage that, like the phrase "properly guarded" in *Fullowka*, convey no tangible meaning.

[198] I do not agree. As discussed in Part III(a)(i) above, Dr. Zautman can be faulted for presuming causation wherever there is a COVID infection or death in a LTC home. But he does not engage in the same kind of presumption when it comes to providing the content of a proper IPAC policy. Given the context of the allegations against the corporate Defendants, providing expert evidence of what should be in the IPAC policies and protocols enacted by the Defendants does precisely what Plaintiffs' counsel says the experts do not do. In fact, Dr. Zoutman is quite detailed and precise in setting out his view of IPAC which, in the circumstances, is his view of the applicable standard of care.

[199] As referenced in Part III(a)(ii) above, Dr. Zautman's view of the content of the standard that the LTC corporate Defendants must live up to is, figuratively speaking, like a slab of Swiss

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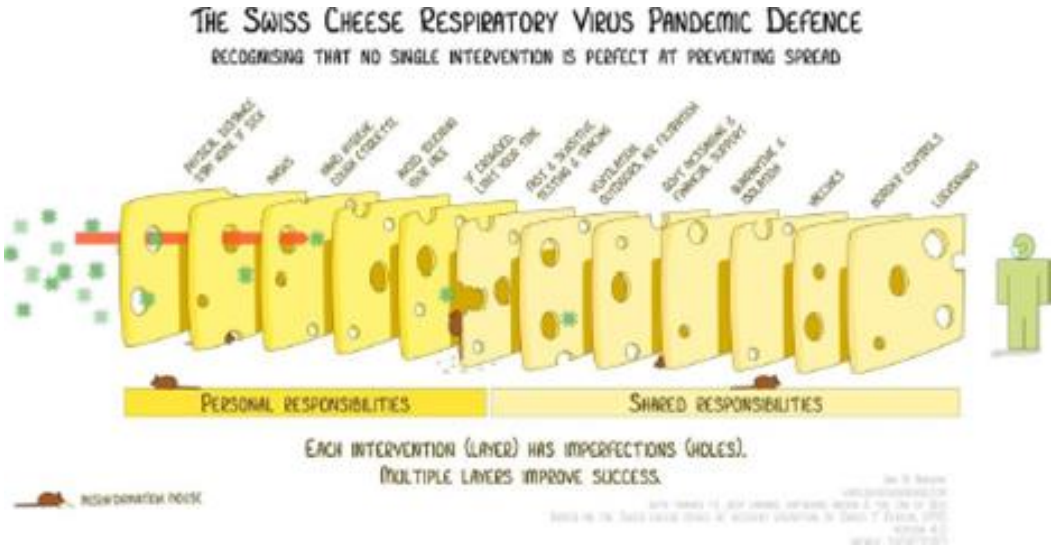
cheese. Dr. Zautman not only opines on the content of this so-called Swiss cheese model, his report contains a graphic illustration of the standard, with specific policy and protocol explanations:



[200] As can be seen, the content put forward by Dr. Zautman is quite specific. It incudes a spectrum of measures, from advance planning to masks to hand hygiene to testing to ventilation to isolation to vaccines, etc. Dr. Zautman's written explanations go into even more detail, and discuss the education and training standards expected of LTC corporations, the cohorting and social distancing protocols contained in these standards, the PPE requirements, and a number of other specific matters.

[201] Again, at this stage in the proceeding, the Plaintiffs do not have to prove the applicable standard; they only have to bring forth some basis in fact for the ability to make this determination in common down the road. In my view, the Plaintiffs' expert reports meet that requirement.

[202] The Court of Appeal has held that "IPAC is akin to a systemic policy or practice": *Levac v. James*, 2023 ONCA 73, at para. 49. Indeed, the Defendants' affiants in the six corporate cases go to some effort to show that the corporate parent did in fact fulfill, or make efforts to fulfill, the standard of care that Dr. Zautman would have them meet.

[203] By way of illustration, the following affidavit evidence can be summarized from the Defendants' records in each of the actions. These summaries are not thorough recitations, but rather are brief notations of emblematic activities on the part of the corporate Defendants:

- One of Chartwell's affiants, Aurora home administrator Greg Boudreau, deposes that the home he administers, Aurora, received from Chartwell's head office in January 2020 a memo outlining planning and pre-pandemic precautionary steps. At the end of January 2020, he received more communications from Chartwell seeking to ensure IPAC compliance and indicating that Chartwell had a supply of PPE for its homes. In March 2020, he was advised that Chartwell had formed a "critical

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incident command" to deal with outbreaks and that head office had set up a 24-hour telephone line for COVID-related help on a timely basis.

- One of Revera's affiants, its Chief Medical Officer Dr. Rhonda Collins, deposes that in or around January 27, 2020, Revera's head office directed each of its homes to review the company's Pandemic Plan and Emergency Preparedness Protocols. On February 3, 2020, Revera mandated screening for COVID-19 symptoms for all persons entering its homes, and on March 12, 2020 Revera's head office cancelled offsite outings for residents of all of its homes. At the same time, it required all of its homes to isolate residents exhibiting COVID symptoms. Revera also attempted centralized stockpiling of PPE during phase I of the pandemic, but its affiant says that it was stymied in this effort by the government of Ontario.

- One of Extendicare's affiants, its Vice President for Strategy and Performance Kathryn Bradley, deposes that Extendicare consistently updated its COVID policies over the course of the pandemic, and these updates were continuously available to the homes it owned and/or operated or managed through its training platform and intranet repository. Extendicare's head office implemented a national Incident Management System and team led by its National Director of IPAC. Extendicare corporate also established a centralized PPE procurement and supply chain management system and a universal masking protocol, and set a policy of mandatory testing of all staff and residents when testing became available. It also eliminated admission to 3 and 4 bed wards in all of its homes.

- One of Responsive's affiants, its Executive Vice President Operations Dan Kaniuk, deposes that Responsive's two management companies ensured that all Responsive homes had an IPAC manual in place on January 1, 2020, and that these policies have been continually updated. By May 2020, the Responsive group had developed a COVID-specific policy manual, the COVID-19 Pandemic Playbook, which was released in October 2020. Responsive also limited visitors to all homes to essential personnel only starting in April 2020 through to the end of October 2020. Mr. Kaniuk also deposes that using corporate resources, Responsive engaged in a centralized effort to source and stockpile PPE for all of its homes for most of 2020 and into the early par of 2021. Further, in April 2020, Responsive head office established a direct relationship with a Chinese manufacturer of COVID-19 rapid antibody and rapid antigen tests. It should be noted, however, that a decision of this court in April 2020 found Responsive to be, in effect, hording scarce PPE and depriving its use to staff in four of it homes: *Ontario Nurses Association v. Eatonville/Henley Place* (2020), 150 OR (3d) 255 (SCJ).

- One of Schlegel's affiants, its Chief Operating Officer Paul Brown, deposes that the Schlegel head office oversees all of the Schlegel LTC homes and, in particular is responsible for IPAC policies in all homes. Corporate policies on matters such as masking and vaccinations are promulgated uniformly across all of the Schlegel homes. Another Schlegel affiant, its Director of Environmental Services, Yvonne Bialek, indicated that throughout the pandemic the head office provided the individual homes with IPAC direction and guidance, and that corporate

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headquarters had set up an incident management structure to deal with any COVID outbreaks. By December 2021, Schlegel corporate had centralized its IPAC auditing system to process and monitor IPAC compliance at all Schlegel LTC homes.

- One of Sienna's affiants, its Vice President of Regional Operations Philippa Welch, deposes that in Sienna's 2020 second quarter report to shareholders, the corporate group's Executive Vice President Operations, Joanne Dykmenna, wrote to home-level management and assured them that the Sienna group has "best practice infection control practices in place…" In describing Sienna's centralized pandemic policies, Ms. Welch stated that, "where it deemed necessary, Sienna would implement the appropriate policies company wide, and, at times, maintain more restrictive policies than those recommended or implemented for the province for the safety of residents, team members and staff." Sienna's evidence makes the further point that during the pandemic the corporate office had the responsibility of conducting IPAC compliance audits of the homes within its corporate group.

[204] In all, the record in the Chartwell, Revera, Extendicare, Responsive, Schegel, and Sienna actions contains some basis in fact for determining the standard of care question as a common issue. It also discloses some basis in fact for answering the two duty of care questions as common issues as against the Defendants who are members of those named corporate families.

[205] The record actions contains no basis in fact for determining any of the proposed common issues as against those Defendants in the Chartwell, Revera, Extendicare, Responsive, and Sienna actions who contract for services with members of the named corporate groups but are independently owned and are not members of those groups.

ii. Breach of Fiduciary Duty

(4) Did the Defendants, or any of them, owe a fiduciary duty to the members of the Resident Class?

(5) If the answer to 4) is "yes", what was the nature of this duty?

(6) If the answer to 4) is "yes", did the Defendants, or any of them, breach their fiduciary duty to the members of the Resident Class? If so, when and how did the breach(es) occur?

iii. Breach of *Occupiers' Liability Act*

(7) As owners, occupiers, and operators of LTC homes, did the Defendants or any of them owe a duty, pursuant to the Occupiers' Liability Act, to ensure the safety of the Resident Class Members and the Visitor Class Members in LTC homes?

(8) If the answer to 7) is "yes", did the Defendants or any of them breach their statutory duties as occupiers?

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iv. Breach of Contract

> (9) Did the Defendants' contract with the Resident Class Members expressly or implicitly require the Defendants to provide care and services to the Residents and to treat them with respect and dignity in accordance with the Residents' Bill of Rights?
>
> (10) If the answer to 9) is "yes", did the Defendants, or any of them, breach their contract with the Resident Class Members during the Class Period by failing to provide them with the care and services contracted for in a safe environment?

[206] For the reasons set out in Part III(a)(i) above, the only possible cause of action pursuant to section 2(1) of *SORA* is negligence. None of the other causes of action can be certified as none are applicable to any of the present actions.

[207] There is no basis in fact to support the questions going to any of the pleaded causes of action except for negligence.

v. Characterization of Defendants' Conduct

> (11) If the answer to 3), 6), 8) and/or 10) is "yes", did any or all of the Defendants' breach(es) of common law, equitable, statutory, and contractual obligations amount to gross negligence?

[208] As discussed in Part III(a)(i) above, negligence is the only cause of action that may proceed in these actions. *SORA* requires that the negligence be "gross negligence" in order for the claim to be viable. Negligence, whether "gross" or otherwise, is not a component of liability in any of the other common law, equitable, statutory, and contractual causes of action that the Plaintiffs have pleaded; adding an element of "gross negligence" to those causes of action does little more than turn them into claims in negligence.

[209] Accordingly, the common issue question with respect to gross negligence is certifiable only with respect to the Plaintiffs' claim in negligence. There is no basis in fact to support the proposed common issues with respect to any of the other causes of action.

vi. Breach of Section 7 of the *Charter of Rights and Freedoms*

> (12) Do the Defendants, or any of them, perform government functions in administering, operating, and/or managing their LTC homes?
>
> (13) If the answer to 12) is "yes", does the Defendants' impugned conduct in response to COVID-19 subject them to Charter scrutiny?
>
> (14) If the answer to 13) is "yes", did the Defendants' impugned conduct deprive the members of the Resident Class of their rights to life and/or security of the person, contrary to section 7 of the Charter?

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> (15) If the answer to 14) is "yes", was such deprivation of life and/or security of the person in accordance with the principles of fundamental justice?
>
> (16) If the answer to 15) is "yes", and the answer to 15) is "no", were such deprivation(s) and/or breach(es) justified under section 1 of the Charter?

[210] For the reasons set out in Part III(a)(vii) above, there can be no claim against the corporate Defendants under section 7 of the *Charter* for the acts set out in the Plaintiffs' pleadings. None of the Defendants are acting as government in their LTC home capacity, and their actions are not state action for constitutional law purposes. Further, the impugned conduct amounts to a series of omissions rather than positive acts; omissions of this sort are not amenable to challenge under section 7 of the *Charter*.

[211] Accordingly, there is no basis in fact to support the proposed common issues questions with respect to the *Charter*. They cannot be certified.

vii. Causation

> (17) Did the Defendants' conduct cause or contribute to the harm(s) suffered and/or losses incurred by the Class Members?

[212] The scientific evidence in the record dealing with causation contains a rather intense debate between Plaintiffs' experts, Drs. Zautman and Sharkawy, and Defendants' experts, Dr. Mark Loeb, a professor at McMaster University and an infectious disease specialist, and Dr. Earl, a certified family medicine specialist whose professional focus is on long-term care and rehabilitative medicine. The former are of the view that it is possible, and even easy, to trace causation of any given COVID-19 case in a LTC home to an IPAC failure on the part of the home, while the latter are of the view that it is virtually impossible to do so.

[213] Plaintiffs' counsel submit that the very fact that there is such a debate indicates that the low evidentiary threshold for a certification motion has been met. In principle, they are correct in that position. Indeed, appellate courts, including the Supreme Court of Canada, have said so in a number of leading cases. Justice Rothstein summarized the jurisprudence on this point in *Pro-Sys*, *supra*, at para. 99:

> The starting point in determining the standard of proof to be applied to the remaining certification requirements is the standard articulated in this Court's seminal decision in *Hollick*. In that case, McLachlin C.J. succinctly set out the standard: '. . . the class representative must show some basis in fact for each of the certification requirements set out in . . . the Act, other than the requirement that the pleadings disclose a cause of action' (para. 25 (emphasis added)). She noted, however, that 'the certification stage is decidedly not meant to be a test of the merits of the action' (para. 16). Rather, this stage is concerned with form and with whether the action can properly proceed as a class action (see *Hollick*, at para. 16; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th)

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> 272 (‘*Infineon*’), at para. 65; *Cloud v. Canada (Attorney General)* (2004), 2004 CanLII 45444 (ON CA), 73 O.R. (3d) 401 (C.A.), at para. 50).

[214] That said, the debate between experts can be seen as not really a debate at all, but rather a case of experienced physicians addressing the same subject matter but speaking at cross purposes. For example, Dr. Loeb’s focus is on causation in the sense of individualized proof. It is his view that since the scientific community has come to understand that COVID-19 is a disease with aerosol transmission, and that it often transfers from person to person asymptomatically, the potential causes of any person’s illness are myriad and elusive. In his report Dr. Loeb sates:

> Determining why a person did or did not develop COVID-19 is still very challenging. The source of the infection, that is the person who transmitted the virus to the resident, may not be known. This is compounded by the fact that asymptomatic infection is well recognized to occur… Therefore the source of the infection may have had no symptoms and therefore could not have been identified. To the extent that measures involved identifying symptomatic individuals to be effective (e.g., cohorting, quarantining, contact tracing, resident placement), further information would not be helpful because the source could potentially never be known. In summary, for the measures in question it is not possible to show that a specific resident would have avoided contracting COVID-19.

[215] In contrast to Dr. Loeb’s view, Dr. Zautman states in his Reply Report:

> First, Dr. Loeb is proposing a standard for decision-making and the application of IPAC interventions in public health and infectious diseases, and likely all other areas of health sciences, that simply does not exist and would be impossible to achieve. His proposed standard, applied broadly, would very reasonably be expected to negate the bulk of our capacity to make any decisions in most fields of public and population health as well as in clinical medicine.
>
> Second, knowledge in medicine is much more than just the results of randomized clinical trials. Our understanding of viral respiratory infections is based upon the basic science and fundamental principles of microbiology and virology, among others. (Hill AB. The environment and disease- association or causation. Proc R Soc Med. Jan 1965). The practice of safe medicine is based upon fundamental scientific underpinnings at the molecular, biochemical, cellular, and individual and population levels. We rely on all of this evidence to support our decision-making in the practice of all branches of medicine. The practice of isolating a sick person with an infectious disease away from others who are susceptible and vulnerable to that disease, but who do not yet have that infectious disease, is based upon the first principles of the understanding of how infectious diseases are transmitted and the fact that they do transmit from one person to the other depending on the immunity of the other susceptible persons. One does not need a controlled trial of isolation and cohorting to know that it will be effective in reducing transmission from one person to the other.

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[216] Dr. Loeb, ignoring the balance of probability standard that prevails in civil litigation, addresses the question of whether absolute proof of causation can ever be achieved. Dr. Zautman, ignoring the litigation context and onus of proof altogether, addresses the question of what constitutes prudent medical practice. The fallacy of both approaches can be illustrated by juxtaposing Dr. Zautman's next sentence with a venerable Canadian constitutional case. Dr. Zautman concludes his thought on issues of "proof" by saying, in effect, that an outbreak of COVID in a LTC home is itself proof that IPAC would have prevented it:

> For example, one does not need to do a controlled trial of stepping indoors when it is raining to know that doing so will prevent you from getting wet. Similarly, performing a controlled trial of a fire suppression sprinkler system in LTC is neither reasonable nor practical.

[217] Dr. Zautman is, of course, correct when he says that common sense prudence requires a sprinkler system in a LTC building, and no amount of testing that hypothesis is needed to come to the conclusion. At the same time, he misconceives the question on which he was asked to opine. The issue is not whether a sprinkler will be prudent; it is whether the absence of a sprinkler system, or, more to the point, a poor sprinkler system, can be determined to be the "cause" of burns suffered in a fire.

[218] The example brings to mind one of the earliest judicial decisions on Canada's constitution: *The Citizens Insurance Company of Canada v. Parsons* (1880), 4 SCR 215, aff'd [1881] 7 A.C. 96 (P.C.). The case challenged the province's jurisdiction to enact certain fire insurance regulations that Citizens Insurance Co. relied on to deny coverage for damage to Parson's hardware store. The Privy Council determined that ordinary business regulation is within Ontario's powers under section 91(13) of the *Constitution Act, 1867* (property and civil rights in the province), and not within the federal government's powers under section 91(27) (trade and commerce). Interestingly, what the prior Supreme Court of Canada judgment makes clear (and what was ignored in the Privy Council) is that Parsons had been improperly storing barrels of gunpowder that exploded in his premises.

[219] Needless to say, *Parsons* took place long before the era of fire suppression sprinklers. But the scenario today would raise a question that Dr. Zautman does not ask: if the sprinklers malfunctioned due to negligent installation, would they have been a "cause" of the damage that ensued from the explosion? No one doubts that sprinklers are good practice; but it is not obvious that they caused any injury that would not have been caused otherwise.

[220] Neither Dr. Loeb's view that nothing can ever be established as a cause of any COVID case in a LTC home, nor Dr. Zautman's view that precaution is called for such that every COVID-19 case in a LTC home should be seen as the fault of the home, addresses the problem at hand. When it comes to a systemic negligence claim like that put forward by the Plaintiffs, a precise causation analysis may not be possible. As the Supreme Court of Canada pointed out in *Clements v. Clements*, [2012] 2 SCR 181, at para. 10, the ordinarily applicable test of causation is the "but for" test, which is to be applied with common sense rather than with laser-like precision. Thus, in the right circumstances, "an inference of causation may be drawn although positive or scientific proof of causation has not been adduced": S*nell v. Farrell*, [1990] 2 SCR 311, at 330.

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[221] In expounding on this point, the Supreme Court has stated that, "The 'but for' test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence 'materially contributed' to the occurrence of the injury": *Athey v. Leonati*, [1996] 3 SCR 458, at para. 15. As the Court has explained it, "'material contribution' as a substitute for the usual requirement of 'but for' causation only applies where it is impossible to say that a particular defendant's negligent act in fact caused the injury. It imposes liability not because the evidence establishes that the defendant's act caused the injury, but because the act contributed to the risk that injury would occur": *Clements*, at para. 15.

[222] The "material contribution" approach is a departure from ordinary tort principles – a "radical step", as Lord Diplock put it in *Browning v. War Office*, [1962] 3 All E.R. 1089, at 1094 (CA). It is therefore an approach that, if invoked to solve a thorny causation problem, must also be contained. As the Supreme Court put it, "recourse to a material contribution to risk approach is necessarily rare, and justified only where it is required by fairness and conforms to the principles that ground recovery in tort": *Clements*, at para. 16. As with blood donor screening, the material contribution analysis is applicable to COVID-19 "where multiple independent causes may bring about a single harm…[and] unique difficulties in proving causation": *Snell*, at para. 87.

[223] The causal question here is whether a Defendant's IPAC policies and procedures, assuming they have been determined to be substandard, "materially contributed to the risk of harm, making it a "necessary causal antecedent that contributed beyond *de minimis*.": *B.M. v. British Columbia (Attorney General)*, 2004 BCCA 402, at para. 187. The Court of Appeal has confirmed that this can be done, among other ways, through use of statistics and a rational inference therefrom if the record contains extensive evidence of the correlation between IPAC usage and harm: *Levac v. James*, *supra*, at para. 54. Accordingly, infection rate can conceivably be a proxy for IPAC implementation if the data is realistic and reliable: *Levac v. James*, 2021 ONSC 5971, at para. 130 (trial judgment).

[224] The key to this approach is not to collect the causation-oriented data at too high a level of generality. For example, in *Massie v. Provincial Health Services Authority*, 2023 BCSC 1275, the Court denied certification of the causation questions posed by a claim against a concededly abusive health care worker at B.C. Womens Hospital. In reaching its conclusion, the Court commented, at para. 101, that the question been posed in such a way that "[l]iability presumes causation of harm. Each of the class members likely had different experiences with Ms. Cleroux, given the variety of her nursing tasks at the BCWH." In other words, a court cannot take the generally similar harms suffered by class members to automatically presume causation for each class member; each class member had different experiences which must somehow be taken into account in a causation analysis: *T.L. v. Alberta (Director of Child Welfare)*, 2006 ABQB 104, at para. 103.

[225] As in *Massie*, but on an even greater scale, the record in the present set of actions does not establish that the class members in each action, or even that the LTC homes covered by each action, are, to use Defendants' counsel's phrase, "cookie cutters one to the next." To analyze causation on a common level, there must be more than a mere veneer of commonality. As an Alberta court put it in *T.L. v. Alberta (Director of Child Welfare)*, 2006 ABQB 104 , at para. 103, "Systemic breach issues should not be stated so generally that the answer to the systemic breach issue is unlikely to be of much practical assistance in resolving the claims of individual class members."

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[226] As a matter of causation, and as discussed in Part III(a)(ii) above, as a substantive requirement of *SORA*, I cannot take into account Dr. Zautman's view that any one COVID-19 infection in any one home can be presumed to be evidence of systemic failure. The proposed causation question, like all the other proposed questions, requires some basis in real fact in order to be certified as a common issue.

[227] Neither Dr. Zautman nor Dr. Sharkawy visited any of the homes at issue in these actions. Their accounts are all second hand – in Dr. Sharkawy's case, what he received and opined on appears to be a timeline of COVID-19 outbreaks prepared by Plaintiffs' counsel – i.e. not even hearsay from a purportedly objective source. In Dr. Zautman's case, he bases his opinion on a series of Ministry of Long Term Care reports that record inspection visits by Ministry personnel to some of the Defendants' LTC homes during the course of the pandemic. From these reports he draws the conclusion that all six corporate groups experienced "systemic failure" causing deadly outbreaks of COVID.

[228] Defendants' counsel object to the admissibility of the Ministry inspection reports as hearsay from an unsworn source. Citing the B.C. Court of Appeal in *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, at para. 31, they submit that "[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…"

[229] While I understand the point, I am inclined to admit the Ministry reports as evidence. In the first place, section 173.1(1) of the *Long Term Care Homes Act* provides that a signed copy of any Ministry inspection report "is admissible as evidence of the…inspection report and of the facts appearing in the document". Moreover, the reports are from an otherwise objective source, and for the most part do not amount to opinion-type evidence. Overall, their value is that they objectively describe events that the inspectors saw unfold. Such observations from ordinary experience are always admissible: *Huebner v. PR Seniors Housing Management Ltd.*, 2021 BCSC 837, at para. 37.

[230] Ironically, what the reports describe is more supportive of the Defendants' position on causation than it is of the Plaintiffs'. There is nothing in them that suggests system-wide negligence across an entire corporate group of homes. It is fair to say that while the Ministry's reports reveal faulty behaviour on the part of some LTC home staff, they do not evidence any institutionalization of the faults they uncover: *Cavanaugh*, *supra*, 2021 ONCA 755, at para. 37. In fact, they would be hard put to evidence systemic fault across an entire LTC enterprise composed of multiple homes, since the inspections only take place at the home level, one at a time. Accordingly, the evidence is not systemic and, as it happens, neither is it uniform. Rather, it is highly inconsistent.

[231] As an example, one can juxtapose inspection reports from two Schlegel LTC homes. In one home – Schlegel Village of Aspen Lake – the inspection report indicates no problems in respect of masking, hand hygiene, cohorting, social distancing, PPE usage or availability, or any other IPAC matters, except that a number of visitors and support workers entered the home without having to show their proof of having taken a rapid antigen COVID test. In another home – Schlegel Village at St. Clair – the inspection report indicates COVID positive patient wondering around the premises, no staff cohorting, a failure to keep patients in their rooms, a lack of hand sanitizer, staff improperly donning and doffing PPE, and no IPAC training for over 30% of the staff.

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[232] Similar juxtapositions can be made within all of the corporate groups. Taking two Sienna LTC owned or managed homes as a further example, in one home – Norfinch Care Community – the report indicates no N95 masks worn when in direct contact to COVID patients, some staff not wearing full PPE, visitors not donning PPE, audits of hand hygiene program required, lack of precaution signage in infected patients' rooms, training needed on administering antigen tests, and compliance orders issued. In another Sienna home – Woods Park Care Centre – the Ministry inspectors report that everything was up to standard except for two staff members not wearing protective eyewear, and the authors of the report offer "koodos" to the home for its admirable IPAC compliance.

[233] The differences among the LTC homes in each of the corporate groups when it comes to infection and death numbers are equally pronounced. Looking at the statistics for the Extendicare owned or managed homes, the record shows that Extendicare Guildwood in Scarborough incurred a total of 198 resident infections and 50 resident deaths. During the same period, Extendicare Tri-Town in Haileybury incurred a total of 26 resident infections and 1 resident death. Likewise for Chartwell owned or managed LTC homes, Westbury Long Term Care Residence in Etobicoke incurred 144 resident infections and 27 deaths. During the same period, Parkhill Long Term Care Residence incurred 12 resident infections and 0 deaths.

[234] Courts have stated on previous occasions that "the more divergent the class, and the more varied the circumstances giving rise to the alleged breach of duty, the less likely it will be that a workable systemic breach common issue will be possible": *T.L. v. Alberta, supra*, at para. 109. While the IPAC standard of care may be set at the corporate head office as a matter of group-wide policy, the implementation of those standards, and the consequent harm caused by their implementation, happens at the individual home. "The individual breaches of duty alleged raise polycentric and individual considerations that go far beyond the generalized 'policies and operations' of the Defendant": *Ibid*.

[235] It may be possible, or it is at least conceivable, to determine whether IPAC policies and protocols for an entire corporate group were up to standard and were adopted in a timely fashion. But it is simply not possible to determine on a common basis that it was those corporate-wide policies, and not something else, that caused 27 deaths in one home but no deaths in another within the same corporate group, or that caused 50 deaths in one home but only 1 death in another under the same corporate umbrella. As Justice Perell observed in *Banman v. Ontario*, 2023 ONSC 6187, at para. 297: "systemic wrongdoing cases inherently present difficulties for a class member in proving that the systemic wrongdoing caused him or her harm." In the six actions at issue here, that is, if anything, an understatement.

[236] It is well established that "[w]here questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis": *Andriuk v Merrill Lynch Canada Inc*., 2014 ABCA 177, to at para. 10. The Plaintiffs present no such methodology here; rather, they embrace the idea that, as Dr. Zautman reiterates in his Reply Report, no real methodology is necessary at all:

> When considering any one resident of a LTC home it would be quite straightforward to determine if the resident acquired their COVID-19 infection

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> from the LTC home. During at least the first 3 waves of the pandemic, LTC residents were confined to their facilities. As well, many residents of LTC homes, due to their underlying health status and other factors, do not venture out of their LTC home at all. Thus, their LTC home would be the only place where residents could have acquired COVID-19 infection.

[237] As discussed in Part III(a)(ii) above, strict liability is not an approach permissible under *SORA*, and one cannot just assume that any infection or death is caused by the Defendants' faulty acts. Some analytic methodology is necessary. Neither an expectation of perfection, nor Dr. Zautman's elsewhere expressed ballpark figure of COVID-19 being 90% preventable, fills this void. A methodology for establishing causation cannot be an expert witness' guesstimate; it must be a plausible, working methodology: *Kibalian v Allergan Inc*., 2022 ONSC 7116, at paras. 36-37.

[238] The reason no workable analytic methodology is provided seems to be that there is none, beyond Dr. Zautman's blanket assumption, that would explain the actual data from the homes. Given the wide divergence of infections and deaths in homes within the same corporate group, with some experiencing dozens of deaths and hundreds of infections and others experiencing no deaths and almost no infections, no shared baseline level of harm can be identified for any set of homes. When one home within a corporate enterprise is the site of 27 deaths within the first two months of the pandemic and another is the site of 1 death, generalizations about the effect of systemic problems do not provide a methodology for proving causation: *Cavanaugh*, *supra*, 2021 ONCA 755, at para. 37. What the Plaintiffs rely on, and what their expert reports express, is really a form of argument for advocating better vigilance by LTC homes; but it is not a method of proof.

[239] It may be that, as with the harms described in *Bassam*, at para 296, the claim of harm to patients "assumes general causation when the issue to be determined is the idiosyncratic one of individual harms suffered by individual patients." Having said that, I am cognizant of Dr. Loeb's point that it will never be possible to isolate the cause of an individual having contracted COVID-19.

[240] Indeed, in this respect, Dr. Loeb and Dr. Zautman are on the same page, although they express the point differently and draw opposite conclusions. But in my view, neither approach is acceptable – i.e. Dr. Loeb saying that individual causation is impossible because we don't know how each person was infected, or Dr. Zautman saying that individual causation doesn't matter because it's enough to know that people were infected regardless of how and why. The rights of both the class and the Defendants must be taken more seriously by the Court than either of those opposite approaches suggest.

[241] To state the matter bluntly, there is no real basis in fact in the record for adopting Dr. Zautman's view that whatever it is that the Defendants did must have caused COVID-19 infections and deaths. By the same token, there is no real basis in fact in the record for adopting Dr. Loeb's view that nothing the Defendants did caused COVID-19 infections and deaths.

[242] What the factual basis in the record points to is that while the IPAC and COVID-relevant protocols were developed on an enterprise basis at the corporate level for each Defendant group, the implementation of those protocols was at the home level. Each LTC home within the group

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utilized the corporate policies and protocols in their own way and with varying results. While there are, of course, facts that are specific to the medical condition and experience of each individual resident, the IPAC implementation was done on a local enterprise level by the administration of each of the corporate owned/managed homes.

[243] This home-to-home variance in implementation translated into home-to-home variance in results. One can take as an example the first two Plaintiffs in the Chartwell claim, Teresa Pugliese and Margaret Roper, who were residents of Chartwell's Aurora Long Term Care Residence and Ballycliffe Long Term Care Residence, respectively. Both homes experienced COVID outbreaks during the first wave of the pandemic (April to May/June 2020). The record shows that at Aurora there were 42 resident infections during that period, while at Ballycliffe there was double that amount – 82 infections (32 deaths) – during the first wave.

[244] The administrators of the two homes were affiants on behalf of the Defendants in the Chartwell action. They each describe receiving the same communications and policy initiatives from Chartwell corporate headquarters; but they also each describe very different experiences in implementing those policies. Those differences reflect their different locations, staffing, building design, resident population and medical conditions prevalent in the two homes. They also reflect the different understandings of COVID-19 precautions by the two homes' administrations. Furthermore, the affiants describe the two homes implementing various IPAC measures at somewhat different times, depending on their specific experiences with residents testing positive.

[245] The senior administrator at Aurora, Greg Boudreau, has deposed that Aurora is a LTC home with 235 beds divided into an older section of the building with class C accommodations (3 and 4-bed wards) and a newer section with class A accommodations (semi-private rooms). One wing is secured for residents with severe dementia. Mr. Boudreau confirms that as Aurora's administrator he received at Aurora a variety of Chartwell memos and communications outlining the company's IPAC protocols, explaining their necessity with the advent of COVID-19, and instructing on use of PPE, disinfectants, hand hygiene, screening visitors and staff, cohorting of residents, etc.

[246] In his affidavit, Mr. Boudreau relates that on March 20, 2020, a resident returned to Aurora from hospital, having tested negative for COVID-19 before being discharged. She was in palliative care and her son visited her often that week. Mr. Boudreau goes on to depose that on March 26, 2020, staff at Aurora tested her again, and that she died that same day. The test sample was sent out to a Public Health lab since LTC homes did not have the capacity to process the test in-house at that time, and on April 9, 2020 the results came back positive for COVID-19. From that date, the home was in outbreak mode, immediately cohorting COVID-positive patients and hiring extra staff.

[247] Mr. Boudreau further deposes that on April 29, 2020, Public Health Ontario issued a report that resulted from its IPAC inspection visit to Aurora. The report of that visit is in the record. It paints a relatively positive picture of a health care facility coping well with the pandemic.

[248] The Public Health report records only minor problems at the Aurora LTC home at the end of April 2020, and makes a few minor recommendations. It confirms that there is proper signage at the home signalling any COVID-19 patients, that there is active screening and ongoing

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monitoring of all staff and visitors to the home, and that any who test positive are sent home and instructed to contact their health care provider. It further reports that screeners are properly suited with PPE, including N95 masks, and that all staff practice proper hand hygiene and are masking appropriately. It then verifies that the home has an adequate supply of N95 masks, surgical masks, gloves, gowns, and eye protection, and that symptomatic residents, or those who have travelled outside the home, are placed on contact/droplet precautions in a single room where feasible. The only recommendation in the report is that goggles be assigned to individual staff members rather than pooled, although it was noted that the home's goggles have been disinfected. It also recommended that all staff be mask fit tested to ensure that N95 masks operate at maximum effectiveness.

[249] The senior administrator at Ballycliffe, Duna McKay, has deposed that Ballycliffe is a LTC home with 100 beds that are a mix of class A, B, and C accommodations – i.e. from single rooms to multiple ward rooms. Approximately 80% of the residents at Ballycliffe suffer from dementia or other form of cognitive impairment. Like Mr. Boudreau, she confirms that as Ballycliffe's administrator she was sent Chartwell's memos and communications outlining its IPAC protocols and explaining their necessity in respect of COVID-19, and providing instructions on PPE use, disinfectants, hand hygiene, screening visitors and staff, cohorting of residents, etc.

[250] In her affidavit, Ms. McKay relates that no one is certain how COVID-19 first entered Ballycliffe LTC home, but that on March 30, 2020 a staff person did not pass the entrance screening, and then on April 1, 2020 a resident had a fever and shortness of breath – distinctive COVID-19 symptoms. Both were tested by Durham Public Health – and on April 3, 2020 the test came back positive. From that date, the home went into a full-scale outbreak.

[251] Ms. McKay further deposes that on April 17, 2020, the IPAC team from nearby Ajax Pickering Hospital issued a report that resulted from an assessment visit to Ballycliffe. The report of that visit is in the record. It paints a very problematic picture of a health care facility not coping well with the pandemic.

[252] The Ajax hospital report records that there were severe staff shortages although the absenteeism varied day to day, with the result being that "staff from other roles are functioning as care aides (e.g. Infection Control Nurse is providing care, giving meds, so cannot function in the role of IPAC)." It also describes that there were insufficient trash cans for depositing soiled PPE, curtains between beds not changed when a COVID positive resident moves to isolation room, staff wearing homemade masks, double masks, ill fitting masks, masks under the chin, plastic bags for gowns due to a shortage, eye protection not used during swabbing, medical equipment not properly disinfected, shortage of disinfection wipes, empty hand sanitizer wall mounts, and staff wearing work clothes home – for the most part, classic IPAC violations.

[253] The two reports, when read side-by-side, explain how two LTC homes with the same corporate head office and the same IPAC policies and protocols in mid-to-late April 2020 can have such different results, with Aurora having double the residents but half the infections as Ballycliffe. A similar comparison can be done within any of the six corporate groups and between any of their respective homes. The home-to-home evidence graphically demonstrates that while standards may be set, and perhaps measured, at the corporate level, causation is only capable of being analyzed at the home level.

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[254] To identify the cause of Ms. Pugliese's illness and death at Aurora, one has to examine the IPAC and COVID-19 situation at Aurora; and to identify the cause of Ms. Roper's illness and death at Ballycliffe, one has to examine the IPAC and COVID- situation at Ballycliffe. Those are the local enterprises to which the evidence in the record points. Each home is part of the larger corporate enterprise in creating IPAC protocols. But each home also acts as its own localized enterprise in implementing IPAC procedures, and, in doing so, either preventing or causing harm.

[255] Causation must be assessed home by home, not at the corporate head office level. The causation question necessarily addresses the implementation of COVID-related protocols and policies in each home and the experience of the residents with that implementation. The proposed question with respect to causation cannot be certified. If at a common issues trial the standard of care is found to have been breached in any of the corporate actions, the causation question will then require separate mini-trials for each LTC home in issue in those actions. At that point, statistical evidence such as that approved in *Levac*, *supra*, at para. 54 (ON CA) and para. 130 (SCJ), or any other causation evidence of systemic harms, may be brought to bear for each home as a self-contained system or enterprise.

[256] As discussed in Part III(a)(v) above, these home-by-home mini-trials will require evidence with respect to both the Resident Class and the Visitor Class. A finding of systemic negligence against the corporate enterprise will, of course, be the "legal catalyst" for the mini-trials on causation: *Banman*, *supra*, at para 285. And while most of the evidence in the mini-trials will doubtless be directed toward how the corporate Defendants' IPAC and other COVID-related precautions were implemented for the residents, it cannot be assumed that harm caused to residents in a given LTC home was also caused to visitors in that home. Causation has to be proved on the home level for residents and, separately, for visitors.

[257] Visitors, unlike residents, circulated in society during the pandemic, and so by definition raise causation issues that are potentially more complicated than the residents. Moreover, visitors may have received different treatment by the given home that they visited, with some being more well protected from COVID-19 exposure than others. The home-by-home mini-trials will have to consider evidence with respect to the visitors' experience in each LTC home, and will have to determine, on a balance of probabilities, whether the Visitor Class in any particular home – in addition to the Resident Class – was caused harm by the negligence of the Defendants in that action.

viii. Damages and Remedies

> (18) If the answer to 3), 6), 8) 10), 11), 14), and/or 17) is "yes", and the answer to 15) and 16) is "no", are the members of the Classes entitled to general damages arising from the Defendants' negligence, breach(es) of fiduciary duties, the *Occupiers' Liability Act*, and/or for breach(es) of contract?
>
> (19) If the answers to 14) is "yes", and the answers to 15) and 16) are "no", are damages available to the Resident Class Members under section 24 of the *Charter*?

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> (20) If the answer to 3), 6), 8) 10), 11), 14), and/or 17) is "yes", the answer to 11) is "yes" and the answer to 15) and 16) is "no", are the Class Members entitled to disgorgement of the benefits and profits enjoyed by the Defendants as a result of their breaches?
>
> (21) If the answer to 3), 6), 8) 10), 11), 14), and/or 17) is "yes", and the answer to 15) and 16) is "no", can the Court make an aggregate assessment of all or some of the damages suffered by the Class Members pursuant to sections 24 and 25 of the *CPA*, as a part of the common issues trial?
>
> (22) Does the conduct of the Defendants, or any of them, warrant an award of aggravated, exemplary and/or punitive damages, and if so, in what amount?

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[258] For the reasons discussed above, negligence is the only certified cause of action in the six corporate actions. As indicated, the Plaintiffs' theory of liability is one of systemic, top-down negligence; that theory applies to the analysis of the standard of care. Also for the reasons discussed above, causation in each action must be tried on a home-by-home basis, not an enterprise or system-wide basis. Both are essential ingredients of liability in negligence.

[259] Causation must be addressed separately in each home for the Residents Class and the Visitors Class. Those two classes are separate sub-classes precisely because their experiences in the LTC homes differed.

[260] Accordingly, if systemic negligence is proven in any of the six corporate actions, and if causation of harm to either the Residents Class or the Visitors Class, or both, is proven in any home included in that corporate action, those class members will be entitled to general damages. The general damages issue must therefore be determined on a home-by-home basis, not as a common issue for any one class. It will be for the judge conducting the home-by-home mini-trials to make that determination.

[261] The same Residents and/or Visitors Class members who are determined on a home-by-home basis to be entitled to general damages may, also on a home-by-home basis, be entitled to other remedies such as disgorgement of profits, aggravated, exemplary and/or punitive damages. At least on the surface, if there is a finding that damage was caused not just by negligence but by gross negligence – as there must be under *SORA* – some elevated form of damages may be called for. However, it will ultimately be for the judge conducting the home-by-home mini-trials to make that determination.

ix. Questions relating to the municipal and independently-owned Defendants

[262] The Plaintiffs have also proposed an additional 22 common issues questions that pertain specifically to the McVeigh v. Toronto and McDermott v. ATK actions. Many of those repeat the questions applicable to the six corporate actions, slightly modified to fit the nature of the municipal and independent home claims.

[263] For the reasons set out in Part III(a)(vi) above, those two actions lack a viable cause of action and for the most part lack representative Plaintiffs. They cannot be certified for those reasons. Accordingly, none of the proposed common issue questions specifically addressed to those two actions can be certified either, as there is no basis in fact to support them.

(d) Preferable procedure – section 5(1)(d)

[264] The "transition provision" of the amended *CPA*, section 39(1), provides that the former version of the statute will apply to proceedings commenced before October 1, 2020:

> 39(1) Except as otherwise provided by this section, this Act, as it read immediately before section 35 of Schedule 4 to the *Smarter and Stronger Justice Act, 2020* came into force, continues to apply with respect to,
>
> (a) a proceeding commenced under section 2 before that day;
>
> (b) a proceeding under section 3 or 4, if the motion for certification was made before that day; and
>
> (c) any other proceeding under this Act that may be prescribed, in the prescribed circumstances, including a proceeding commenced under this Act on or after that day.

[265] As the Court of Appeal observed in *David v. Loblaw Companies Limited*, 2022 ONCA 833, at para. 16, "[t]he Legislature drew a bright line between class action proceedings commenced before the 2020 amendments came into effect, and class action proceedings commenced after that date." In following that bright line principle, it has been the practice of this Court to hold that a class proceeding issued before October 1, 2020 is deemed to have commenced on October 1, 2020, regardless of subsequent amendments or the addition of parties: See *Lubus v. Wayland Group Corp*., 2022 ONSC 4999; *Bourque v. Insight Productions*, 2022 ONSC 174; *Adkin v. Janssen-Ortho Inc*., 2022 ONSC 6670.

[266] In his consolidation endorsement of January 21, 2022, *supra*, Justice Belobaba reasoned that the application of section 39(1) to the present set of actions must be "based on the timing of the commencement of proceedings under the statute, not the addition of causes of action and their underlying material facts." That direction is in keeping with the bright line approach to section 39(1).

[267] The constituent claims that were consolidated into the present 8 actions were each issued by September 25, 2020, a month before the amended *CPA* came into force. That means that the former *CPA* applies to the proceedings in issue in this combined certification motion, regardless of the date of any amendments or consolidations. Accordingly, for the proposed class actions to be the preferable procedure, the common issues need not predominate over the individual issues. The preferability requirement can be met even where, as here, substantial individual issues remain following the determination of the common issues: *Hollick, supra*, at para. 30; *Cloud* (ON CA), *supra*, at para. 75.

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[268] In *AIC Limited v. Fischer*, [2013] 3 SCR 949, at para. 22, the Supreme Court instructed that the preferability inquiry under section 5(1)(d) of the *CPA* is to be conducted "through the lens of the three principal goals of class actions, namely judicial economy, behaviour modification and access to justice." The Court went on to state, at para. 23, that it must consider "the extent to which the proposed class action may achieve the three goals of the *CPA*, but the ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve those goals."

[269] On the surface, the choice here is between class actions and thousands of individual proceedings. There is no administrative or alternative procedure available to the class members, and so traditional lawsuits are the only alternative the law has to offer. From that perspective, a class action is preferable; it is also more in keeping with the Plaintiffs' allegation of systemic negligence. It would make little sense to assess systemic issues like the Defendants' IPAC policies and protocols, and the accompanying standard of care, on an individualized basis.

[270] It also stands to reason that even if there are potentially complex issues of causation and damages that cannot be addressed in common by the class, and that need to be addressed in mini-trials at the LTC home level, it is more in line with judicial economy for at least those questions of negligence that can be answered in common to be addressed in a class proceeding. The sheer cost of litigation, combined with the emotional trauma suffered by class members and families in the wake of the tragic experiences of LTC homes during the pandemic, erect barriers to access to justice that should be minimized where possible: *Ibid*., at para. 38. Individual actions may not be able to address those barriers: *LBP Holdings v. Hycroft,* 2020 ONSC 59.

[271] As Divisional Court has pointed out, in conducting a preferability analysis it is important to "take into consideration that the psychological and economic barriers to access to justice would mean that few class members would actually bring individual actions": *Curtis v. Medcan Health Management Inc*., 2022 ONSC 5176, at para. 43. In addition, behaviour modification is important given the tragedy that befell the LTC homes during the pandemic. Inhibiting the LTC home industry from repeating any mistakes is a significant goal of this class action that would be diluted if individual claims were pursued in its place: *Ibid*., at para. 52.

[272] Accordingly, although individual actions are conceivable – indeed, a number of them have been commenced against the same Defendants and in respect of the same LTC homes at issue here – the class action procedure is overall preferable. It more satisfactorily addresses the goals of access to justice, behaviour modification, and judicial economy.

[273] Having said all of that, certification of a class proceeding is a procedural step only: *Pro-Sys*, *supra*, at para. 102. Not only does it not address the merits of the specific case, it does not change the way a claim will be analyzed at the merits phase. It cannot change the fact that a Plaintiff needs to have a proper claim against the named Defendants; and if, as here, the claim is in negligence, every Plaintiff must have been owed a duty of care by the named Defendants. No amount of appeal to access to justice, or behaviour modification, or judicial economy, will allow a class action to proceed where the class has no cause of action against a named Defendant or where there is no representative Plaintiff to carry the claim.

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[274] Thus, while courts have repeatedly stated that certification "should not involve an assessment of the merits", *MacKinnon v. Volkswagen Group Canada Inc.*, 2022 ONSC 5501, at para. 34 (Div Ct), the other side of the coin is that certification cannot proceed if for basic structural reasons – i.e. no cause of action or no plaintiff – it is plain and obvious that the merits must fail: *Hollick, supra*, at para. 25. Although a class action is the preferable procedure here for the claims where there is a cognizable cause of action and a representative Plaintiff, it cannot be the preferable procedure where those ingredients are missing.

[275] A class action is the preferable procedure against the six corporate groups. It is not the preferable procedure for the claims against the Defendants named in those six corporate actions who are not part of the relevant corporate group and who own and are licensed for their LTC homes independently. Likewise, a class action is not the preferable procedure for the municipal and independent homes actions, where there is no viable cause of action at all.

(e) Suitable representative plaintiff and litigation plan – section 5(1)(e)

[276] In *Coulson v. Citigroup Global Markets Inc.*, 2010 ONSC 1596, at para. 157, Justice Perell observed that "there is often a surreal quality to the debate about whether the proposed representative plaintiff satisfies the fifth criteria for certification". His point was that while representative plaintiffs must be "competent, diligent, vigilant, and committed to giving proper instructions to advance the class action on behalf of the class", *ibid.*, at para. 158, they are just one of many and need not know the 'ins and outs' of a case in the way that class counsel does.

[277] In short, it is for counsel, not the representative Plaintiff, to understand the totality of the case; otherwise there would be no class proceedings at all. Looking at some of Canada's most renowned class-based claims – e.g. those of breast implant recipients, residential school survivors, cigarette smokers, female RCMP officers, First Nations and Inuit "sixties scoop" adoptees, and others – a requirement that representative plaintiffs have knowledge of the case beyond their own personal horizons would have undermined the claims altogether.

[278] It is no secret that class counsel is very much in the driver's seat in putting a class action together and keeping it moving. Accordingly, grilling proposed representative Plaintiffs – here, for the most part, the family members/executors of the estates of persons who died of COVID-19 in LTC homes – on whether they really understand the Defendants' IPAC protocols or whether they are aware of all of the other putative class members' experiences during the pandemic, is not a productive exercise. Representative plaintiffs provide overall instruction to counsel, but they do not drive the action forward or need to know its factual or legal details. As Justice Perell put it, "if the access to justice concerns of the *Class Proceedings Act, 1992* are to be accomplished, the court should not subject the proposed representative plaintiff to the LSAT or some sort of Class Action Aptitude Test…": *Ibid.*

[279] In the six corporate cases being certified here, there are 26 representative Plaintiffs in all. The Defendants challenge the suitability of all of them. I find merit in three of those challenges; the rest are of the type that make it clear that the Defendants would be hard pressed to find any representative plaintiff to be suitable. A short rundown of each of these challenges will suffice, followed by my own brief assessment.

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[280] Plaintiffs' counsel in the Chartwell action propose the following representative Plaintiffs:

- Albino Pugilese – son of Chartwell LTC home resident, Teresa Pugilese. Defendants object because in cross-examination he conceded that while he observed what he thought was improper IPAC, he has no expertise to make that determination.

  Mr. Pugilese passes the section 5(1)(e) test. A witness may make observations, and this testimony should not be taken as opinion and does not disqualify him a representative Plaintiff.

- Murray Nitchke – spouse of Chartwell LTC home resident, Pamela Nitchke. Defendants object because they are not certain from the record what caused Pamela Nitchke's death.

  Mr. Nitchke passes the section 5(1)(e) test. Uncertainty is not a ground of objection, and, in any case, discovery will come at a later time when each Plaintiff can be examined in detail.

- Margaret Roper – daughter of Chartwell LTC home resident, Iris Roper. Defendants object because she gave what they characterize as "inadmissible opinion" evidence by observing that Chartwell "failed to protect my mother" when describing her mother's death.

  Ms. Roper passes the section 5(1)(e) test. Representative plaintiffs are also fact witnesses and may express their subjective view of what they observed. They are also human and may make their sentiments known without being confused with expert opinion.

[281] Plaintiffs' counsel in the Rivera action propose the following representative Plaintiffs:

- Stephen Hannon – son of Rivera LTC home resident, Roy Hannon. Defendants object on the ground that he is unable to confirm that he is executor of father's estate.

  Defendants are correct. If Stephen Hannon is not Roy Hannon's executor, then he has no standing to sue on behalf of the estate. In the event that Stephen Hannon can eventually document his appointment as executor of Roy Hannon's estate, Plaintiffs may move to reinstate him as representative Plaintiff.

- Lori Renaud – daughter of Rivera LTC home resident, Bernard Renaud. Defendants object because she is also a representative Plaintiff in *Robertson v. Ontario* and they submit that this is a conflict of interest.

  Ms. Renaud passes the section 5(1)(e) test. The class in *Robertson* and in the present action bring similar claims against different parties. The claims appear to overlap, but not to conflict. If that changes in the future, it can be revisited in a motion.

- Tonino Ricci – son of Rivera LTC resident, Assunta Ricci. Defendants object because on cross-examination he could not recall certain things he had deposed to in his affidavit, such as whether his mother's roommate had a fever at the time his mother became ill.

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Mr. Ricci passes the section 5(1)(e) test. Representative plaintiffs are like anyone else in that their memory for detail may not be perfect. This has no impact on his ability to play the representative plaintiff role in instructing counsel.

- Tracey Rowley – executor of the estate of Rivera LTC resident, Shirley Egerdeen. Defendants object because she concedes that she has limited knowledge of Shirley Egerdeen's care.

  Ms. Rowley passes the section 5(1)(e) test. As executor, she is the deceased party's legal representative. The Resident Class is composed almost entirely of estates of deceased former residents of LTC homes. The executors have standing on the estates' behalf as that is the only way to bring these actions.

[282] Plaintiffs' counsel in the Extendicare action propose the following representative Plaintiffs:

- Henry Zajac – son of Extendicare LTC resident, Teresa Zajac. Defendants raise no particular objection, except to submit generally that the representative Plaintiffs are not knowledgeable about any homes except the ones that their own family members were in, leaving a large evidentiary gap.

  Mr. Zajac passes the section 5(1)(e) test. Representative plaintiffs do not have to know the facts surrounding all of the other class members' claims. They only have to possess sufficient knowledge and interest that allows them to steer the claim with class counsel.

- Sylvia Lyon – daughter of Extendicre LTC home resident, Ursula Drelich. Defendants raise no particular objection, except to question, along with every other proposed representative Plaintiff, her knowledge of the case.

  Ms. Lyon passes the section 5(1)(e) test. There is nothing in the record to suggest that she does not have sufficient knowledge to steer counsel as representative Plaintiff.

- Karen McRae – daughter of Extendicare LTC home residents, Donna and Leo Hatinen, proposed as representing the Resident Class and the Visitor Class. Defendants object on the ground that as a visitor who came and went from the LTC home, she was a possible vector for the outbreak in the home.

  Ms. McRae passes the section 5(1)(e) test. The objection is speculative. The causation evidence of members of the Visitors Class will be predictably difficult to prove, but that is for the mini-trials following the common issues trial. It does not disqualify a representative Plaintiff for that class.

- Suzanne Zagallai – daughter and litigation guardian of Extendicare LTC home resident, Peggy Hannon. Defendants raise general objections to the representative Plaintiffs, but nothing specific here.

- Ms. Zagallai passes the section 5(1)(e) test. There is nothing in the record to suggest that she is not in a position to capably fulfill the role of representative Plaintiff.

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[283] Plaintiffs' counsel in the Responsive action propose the following representative Plaintiffs:

- Christina Kinde – daughter of Responsive LTC home resident, Maurice Orchard, as representative of the Resident, Visitor, and Family class. Defendants object on the grounds that it is unclear how the mother contracted COVID-19 and, in addition, she is already a plaintiff in *Robertson v. Ontario*.

  Ms. Kinde passes the section 5(1)(e) test. At this stage it is still unclear how anyone in the LTC homes contracted COVID-19. That evidence will come later, but for now does not disqualify a representative Plaintiff. As indicated above, there is no currently discernable conflict between the class members in the present case and those in the *Robertson* case.

- Terrence Van Dyke – son of Responsive LTC home resident, William Vonnell Van Dyke. Defendants object on the basis that it remains unclear how his father contracted COVID-19.

  Mr. Van Dyke passes the section 5(1)(e) test. As indicated above, the evidence of how COVID-19 was contracted will come later, but for now this uncertainty does not disqualify a representative Plaintiff.

[284] Plaintiffs' counsel in the Sienna action propose the following representative Plaintiffs:

- Allison Gaanderse – daughter of Sienna LTC home resident, Kathryn Robertson. Defendants object because she is the lead plaintiff in the clam against the government of Ontario. They also point out that the medical records establish that Ms. Robinson never contracted COVID-19.

  As indicated above, participation in the class action against Ontario is not itself a conflict. However, the class definitions, as amended here, are limited to those who were infected with or died of COVID-19. As discussed at paras. 151-152 above, this would exclude Ms. Robinson and would therefore exclude Ms. Gaanderse.

- Rosemary Blagdon – spouse of Sienna LTC home resident, Charles Blagdon. Defendants raise no particular objection except the general one that she has no connection to the other homes under this corporate group.

  Ms. Blagdon passes the section 5(1)(e) test. As indicated above, a representative Plaintiff need not be a witness on every issue, so long as they have the requisite interest in the case.

- Saman Divanbeigi – son of Sienna LTC home resident, Mehri Armand. Defendants raise no particular objection except for the general objection about overall knowledge of the claim.

  Mr. Divangeigi passes the section 5(1)(e) test. The general objection leads to the general answer. Representative Plaintiffs steer the case at the level of overall instructions to counsel, but do not need to be a witness to detailed events.

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- Mehran Divanbeigi – daughter of Sienna LTC home resident, Mehri Armand, proposed as representative Plaintiff for the Visitor Class and the Family Class. Defendants raise no particular objection to her, but object in general to the Visitor Class as being a viable class.

  Ms. Divangeigi passes the section 5(1)(e) test. The Visitor Class has been determined to be viable, although potentially problematic in an evidentiary sense. That problem, if it emerges, will be addressed at a later stage of the proceedings.

- Vasuki Uttamalingam – daughter and litigation guardian of Sienna LTC home resident, Sakunthaladevi Uttamalingam, proposed as a representative Plaintiff for all three classes. Defendants raise no particular objection, and only raise the general ones about how the representative plaintiffs needs knowledge of other homes impugned in the action, etc.

  Ms. Uttamalingam passes the section 5(1)(e) test. The general objections have been answered above.

- Pahirathan Pooranalingam – son of Sienna LTC home resident, Vigneswary Pooranalingam. Defendants raise no particular objections, and only raise the general ones about representative plaintiffs' knowledge, etc.

  Mr. Pooranalingam passes the section 5(1)(e) test. The general objections have been answered above.

- Jocelyn Barrows – daughter of Sienna LTC home resident, Dorritt Amy Paul, proposed as representative of the Resident Class. Defendants raise no particular objection, and only raise the general ones.

  Ms. Barrows passes the section 5(1)(e) test. The general objections have been answered above.

- Tara Barrows – granddaughter of Sienna LTC home resident, Dorritt Amy Paul, proposed as representative Plaintiff for the Visitor Class and the Family Class. Defendants raise no particular objection.

  Ms. Barrows passes the section 5(1)(e) test. This is the daughter of a representative Plaintiff for the Resident Class in the same action. It is logical for the Visitor Class and Family Class to be represented by another family member.

- Lucia Fracassi – daughter of Sienna LTC home resident, Carmela Colalillo, proposed as representative Plaintiff for all three classes. Defendants raise no particular objection, and only raise the general ones.

  Ms. Fracassi passes the section 5(1)(e) test. The general objections have been answered above.

- Scia Shortliffe and Angele Mansfield – daughters of Sienna LTC home resident, Dennis Shortliffe, proposed as representative Plaintiffs for all three classes. Defendants raise no particular objections.

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Ms. Shortliffe and Ms. Mansfield pass the section 5(1)(e) test. The two daughters as executors of their father's estate have standing as representative Plaintiffs.

[285] Plaintiffs' counsel in the Schlegel action propose the following representative Plaintiffs:

- Viet Do – son of Schlegel LTC home resident, Minh Do. Defendants object on the basis that in cross-examination he displayed poor knowledge of the LTC home contractual terms for residents and was generally unaware of the situation of other residents of Schlegel homes.

  Mr. Do passes the section 5(1)(e) test. Neither of the objections address what is required of a representative Plaintiff. An estate executor's specific knowledge of contractual terms or of other class members' experiences are matters beyond the role a representative Plaintiff is called on to perform.

- Patricia Korchuk – daughter of Schlegel LTC home resident, Anne Sulyma. Defendants object on the ground that the mother tested negative for COVID-19 before her death.

  This is a valid objection. The claim has been limited to COVID-related injury and death, not to overall hardship experienced during the pandemic period and not to death from other causes. In the face of actual evidence that the resident did not contract COVID-19, the resident's daughter as estate executor has no standing in the case.

[286] With the exception of Allison Gaanderse, Stephen Hannon, and Patricia Korchuk, all of the proposed representative Plaintiffs are acceptable in that role and fulfill the section 5(1)(e) requirement. None of the six cases being certified here have been left without a representative Plaintiff.

[287] Defendants' counsel raises no particular objection to Plaintiffs' counsel's litigation plan. The plan is always a work in progress. Twenty-five years ago, in *Carom v. Bre-X Minerals Ltd.* (1999), 44 OR (3d) 173, at 122 (SCJ), Winkler J. (as he then was) made clear that the complexity of the litigation plan should match the complexity of the litigation:

> A workable plan must be comprehensive and provide sufficient detail which corresponds to the complexity of the litigation proposed for certification. In this case, the national scope, the nature of the defendants, the uncertainty of the class size and the number of causes of action alleged mark this as litigation of the most complex nature and kind. Accordingly, a comprehensive and detailed litigation plan is required.

[288] The present litigation is certainly complex in that eight actions have been heard together and six of those will be certified and proceeding to a common issues trial. However, the cause of action has been reduced to one: negligence. Furthermore, the expert witnesses have all been identified by the parties and have provided thorough expert reports and have been vigorously cross-examined. I would expect that discovery leading up to the common issues trial will not be a lengthy matter as the work done to date need not be repeated.

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[289] Plaintiffs' litigation plan will doubtless be narrowed in view of the somewhat reduced focus of the actions explained in these reasons for decision. It will also have to be revisited following a common issues trial given the need for home-level mini-trials on issues of causation. Given the number of home-by-home mini-trials that will potentially be pursued, that may be a logistical exercise that needs careful consideration. However, there is no reason to address that aspect of the plan until after judgment is rendered in the common issues trial: *Kirsh v. Bristol-Myers Squibb*, 2020 ONSC 1499, at para 99.

[290] It is still unpredictable how many homes the Plaintiffs will be prepared to proceed with in those mini-trials, depending on the witnesses available and other matters. Plaintiffs' counsel are only learning now with the issuance of these reasons that home-by-home mini-trials on causation and damages will be called for following the common issues trial. I would not deny or delay certification on the basis that the litigation plan will have to be revised to account for that development.

[291] For present purposes, the litigation plan meets the section 5(1)(e) requirement.

IV. Disposition

[292] Pugliese v. Chartwell (CV-20-00640771-00CP) is certified as against all Defendants except those set out in para. 189(a) above, against whom the certification motion is dismissed.

[293] Hannon v. Revera (CV-20 00645495-00CP) is certified as against all Defendants except those set out in para. 189(b) above, against whom the certification motion is dismissed.

[294] Balausiak v. Extendicare (CV-22-00684319-00CP) is certified as against all Defendants except those set out in para. 189(c) above, against whom the certification motion is dismissed.

[295] Brough v. Responsive (CV-20-00640016-00CP) is certified as against all Defendants except those set out in para. 189(d) above, against whom the certification motion is dismissed.

[296] Do v. Schlegel (CV-22-00688509-00CP) is certified as against all Defendants.

[297] Robertson v. Sienna (CV-20-00640883-00CP) is certified as against all Defendants except those set out in para. 189(e) above, against whom the certification motion is dismissed.

[298] McVeigh v. Toronto (CV-22-00687579-0000) and McDermott v. ATK (CV-20-00644726-00CP) are not certified as class actions. The motions against them are dismissed. The Plaintiffs (or others) are at liberty to re-issue the claims on a disaggregated basis as discussed in paras. 99-102 above.

[299] Plaintiffs are at liberty to discontinue, without costs, any of the actions as against any of the Defendants for whom the present certification motion is dismissed, and to issue a new standalone action against any such Defendant, provided that a representative Plaintiff is named for any such new action. Any future certification motions arising from a standalone claim against one of the present Defendants may make use of the evidence, including all affidavits, exhibits, and cross-examinations, contained in the present record.

[300] The only cause of action in each of the certified actions is negligence.

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[301] The class definitions for the Resident Class and the Visitor Class in each of the certified actions are as set out in para. 172 above. The class definition for the Family Class in each of the certified actions is as set out in the third indented paragraph of para. 128 above.

[302] The common issues for each of the certified actions are as set out in para. 177(i) above.

[303] The proposed common issues with respect to causation and damages are to be addressed in home-by-home mini-trials subsequent to the common issues trial, and not as common issues for the entire class in each action.

[304] Each of the proposed representative Plaintiffs is approved as representative Plaintiff in their respective actions, except for Allison Gaanderse in the Sienna action (CV-20-00640883-00CP), Stephen Hannon in the Rivera action (CV-20 00645495-00CP) and Patricia Korchuk in the Schlegel action (CV-22-00688509-00CP).

[305] Class counsel in the certified actions are as listed for the Plaintiffs in the Chartwell, Rivera, Extendicare, Responsive, Schlegel, and Sienna actions at the beginning of these reasons for decision.

V. Costs

[306] Costs are always discretionary under section 133 of the *Courts of Justice Act.*

[307] The results of this set of motions are mixed. Six of the eight actions are certified, but for fewer issues and fewer Defendants than the Plaintiffs sought. In all eight actions, the Defendants against whom the certification motion is dismissed may be the subject of further certification motions if actions against them are re-issued on a standalone basis, in which case both sides will be able to make use in any future certification motions of the time and work invested in the present motions.

[308] Accordingly, there will be no costs of the present motions awarded for or against any party.

Morgan J.

Date: March 7, 2024

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CITATION: Pugliese v. Chartwell, 2024 ONSC 1135
COURT FILE NO. CV-20-00640771-00CP
Balausiak v. Extendicare, **COURT FILE NO.** CV-22-00684319-00CP
Brough v. Responsive, **COURT FILE NO.** CV-20-00640016-00CP
Hannon v. Revera, **COURT FILE NO.** CV-20-00645495-00CP
Do v. Schlegel, **COURT FILE NO.** CV-22-00688509-00CP
Robertson v. Sienna, **COURT FILE NO.** CV-20 00640883-00CP
McVeigh v. Toronto, **COURT FILE NO.** CV-22-00687579-0000
McDermott v. ATK, **COURT FILE NO.** CV-20-00644726-00CP
DATE: 20240307

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

TERESA PUGLIESE by her estate executor ALBINO PUGLIESE, IRIS ROPER by her litigation administrator MARGARET ROPER, PAMELA NITCHKE by her estate executor MURRAY NITCHKE, ALBINO PUGLIESE, MARGARET ROPER, and MURRAY NITCHKE

Plaintiffs

-and-

CHARTWELL RETIREMENT RESIDENCES, CHARTWELL MASTER CARE LP, CHARTWELL MASTER CARE CORPORATION, CHARTWELL MASTER CARE CORPORATION in its capacity as trustee of GP M TRUST, GP M TRUST (by its trustee CHARTWELL MASTER CARE CORPORATION) in its capacity as general partner of CHARTWELL MASTERCARE LP, REGENCY LTC OPERATING LIMITED PARTNERSHIP by its general partner REGENCY OPERATOR GP INC., TRILOGY LTC INC., LIUNA LOCAL 837 NURSING HOME (ANCASTER) CORPORATION, LIUNA LOCAL 837 NURSING HOME (HAMILTON) CORPORATION, DELCARE LTC INC., VILLA FORUM

REASONS FOR DECISION

E.M. Morgan J.

Released: March 7, 2024

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