Date: 20260202
Docket: CI 21-01-31122
(Winnipeg Centre)
Indexed as: Lewsey et al. v. Revera Inc. et al.
Cited as: 2026 MBKB 18

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

LAWRENCE LEWSEY as representative of the, estate of ETHEL LEWSEY, deceased, and EDDIE CALISTO-TAVARES as representative of the estate of MANUEL CALISTO, deceased,	)	Darryl Singer Christopher C. Wullum Vicky Liu for the plaintiffs
plaintiffs,	)	Charles A. Sherbo Anthony R. Foderaro for the defendants, Revera Inc., AXR operating (National) LP, AXR Operating (National) GP Inc., Revera LTC Managing GP Inc. and Axium Infrastructure Inc.
- and -	)	
REVERA INC., AXR OPERATING (NATIONAL) LP, AXR OPERATING (NATIONAL) GP INC., REVERA LTC MANAGING GP INC., AXIUM INFRASTRUCTURE INC., GDI SERVICES (CANADA) L.P., WINNIPEG REGIONAL HEALTH AUTHORITY and SHARED HEALTH INC.,	)	Derek M. Olson Brooke Petersen for the defendant, GDI Services (Canada) L.P.
defendants.	)	William L. Bowles Kelly L. Dixon for the defendants, Winnipeg Regional Health Authority and Shared Health Inc.
	)	Judgment Delivered: February 2, 2026

PERLMUTTER A.C.J.

INTRODUCTION

[1] The plaintiffs Lawrence Lewsey and Eddie Calisto-Taveres move for an order under ***The Class Proceedings Act***, C.C.S.M. c. 130 (the "***CPA***") certifying this action as a class proceeding against the defendants Winnipeg Regional Health Authority ("WRHA"), Shared Health Inc. (collectively, the "WRHA defendants"), and AXR Operating (National) LP ("Revera")[1]. Mr. Lewsey and Ms Calisto-Taveres are the son and daughter, respectively, of two former residents of the Maples Personal Care Home ("Maples") who brought this action on behalf of the estates of their late parents under ***The Fatal Accidents Act***, C.C.S.M. c. F50 and ***The Trustee Act*** R.S.M. 1987, c. T160. Their claims concern events that occurred between October 18, 2020, and January 12, 2021, when an outbreak of COVID-19 occurred at Maples, allegedly causing many residents of Maples to test positive for COVID-19 and many residents to die from complications of COVID-19. Mr. Lewsey and Ms Calisto-Taveres are also put forward as the proposed representative plaintiffs on behalf of the two proposed classes.

[2] The proposed class proceeding alleges that the defendants were negligent and that Revera as the operator of Maples also breached its fiduciary duty and committed breaches of contract regarding the standard required to prevent the spread of COVID-19 during the outbreak. Broadly, the allegations relate to alleged failures to adequately plan for, and respond to, the COVID-19 outbreak at Maples.

---

[1] At the conclusion of the hearing, the plaintiffs' counsel agreed to dismiss the action against the defendant GDI Services (Canada) LP. Previously, the plaintiffs discontinued their claims against the other defendants.

[3] The defendants concede that certain of the requirements for certification are met but, given the unmet requirements, they oppose certification.

BACKGROUND

[4] Maples is a for-profit personal care home in Winnipeg, with capacity for up to 200 residents over two floors. Maples provides long-term care including nursing, meals, assistance with daily living, recreational activities, and accommodation services.

[5] In March 2020, the first cases of COVID-19 were reported in Manitoba. On March 20, 2020, the Province declared a state of emergency and Manitoba entered the global pandemic. Beginning March 2020, the WRHA defendants published guidelines and provided instructions to personal care homes for addressing COVID-19, which included infection prevention and controls ("IPAC") and the care of residents.

[6] On October 18, 2020, staff at Maples identified a resident who resided on the second floor having symptoms indicative of COVID-19. On October 20, 2020, the test results of this resident indicated she was positive for COVID-19. On this same day, a COVID-19 outbreak was declared at Maples which lasted until January 12, 2021 (the "outbreak period"). It was reported that 157 residents tested positive and approximately 56 residents died during the outbreak period.

[7] Mr. Lewsey brings this action on behalf of the estate of his late mother, a resident at Maples during the outbreak period who tested positive for COVID-19 on October 29, 2020, and died on November 2, 2020, allegedly from COVID-19 complications. Ms Calisto-Taveres brings this action on behalf of the estate of her late father, also a resident of Maples during the outbreak period who tested positive for

COVID-19 on October 30, 2020, and died on November 11, 2020, allegedly from COVID-19 complications. It is alleged that several failures by Revera (as detailed below) during the outbreak period caused or contributed to the outbreak, the infection of many residents at Maples with COVID-19, and the death of many residents from complications of COVID-19.

[8] The claim against the WRHA defendants is that Revera was party to a service purchase agreement with WRHA under which WRHA imposed certain standards and obligations on Revera as a personal care home operator. Under ***The Health System Governance and Accountability Act***, C.C.S.M. c. H26.5, WRHA, as the health authority in the Winnipeg region, is responsible for provision of health services as outlined therein and the operation of a personal care home in the Winnipeg region, such as Maples, requires WRHA approval. It is alleged that the WRHA defendants provided information, services, and support to personal care homes, including Maples, concerning COVID-19 IPAC and support with staffing levels. As well, it is alleged that in November 2020, WRHA became directly involved in monitoring the situation at Maples during the outbreak and at some point, in November 2020, WRHA became involved in overseeing the management at Maples and providing additional staffing resources.

[9] It is also alleged staffing shortages were not immediately addressed by the WRHA defendants and an investigation report following a November 2, 2020 inspection of Maples was not shared with the CEO of WRHA until November 6, 2020. This forms part of the allegations of a delayed response by the WRHA defendants. On November 7, 2020, the Province advised that it became aware of critical circumstances

at Maples, and that Revera had provided incorrect information about staffing levels, on the evening of November 6, 2020.

CERTIFICATION REQUIREMENTS

[10] The requirements for certification are set out in s. 4 of the ***CPA***, as follows:

> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of two or more persons;
>
> (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and
>
> (e) there is a person who is prepared to act as the representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and
>
> (iii) does not have, on the common issues, an interest that conflicts with the interests of other class members.

Do the pleadings disclose a cause of action?

[11] In ***Pro-Sys Consultants Ltd. v. Microsoft Corporation***, 2013 SCC 57, the Supreme Court of Canada provided the following regarding this requirement for the British Columbia equivalent to s. 4(a) of the ***CPA***:

> 63 The first certification requirement requires that the pleadings disclose a cause of action. In *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261 ("*Alberta Elders*"), this Court explained that this requirement is assessed on the same standard of proof that applies to a motion to dismiss, as set out in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. That is, **a plaintiff satisfies this requirement unless, assuming all**

> **facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed** (*Alberta Elders*, at para. 20; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25).
>
> [emphasis added]

[12] Revera accepts that the pleadings meet the test of disclosing the causes of action alleged against it. The WRHA defendants did not take issue with this requirement. I am satisfied that this requirement is met.

Remaining Certification Requirements

[13] With respect to the remaining certification requirements, in ***Pro-Sys Consultants***, Rothstein J. explained:

> [100] The *Hollick* standard of proof asks not whether there is some basis in fact for the claim itself, but rather **whether there is some basis in fact which establishes each of the individual certification requirements**. McLachlin C.J. did, however, note in *Hollick* that evidence has a role to play in the certification process. She observed that "the *Report of the Attorney General's Advisory Committee on Class Action Reform* clearly contemplates that **the class representative will have to establish an evidentiary basis for certification**" (para. 25).
>
> ...
>
> [102] ...The "some basis in fact" standard does not require that the court resolve conflicting facts and evidence at the certification stage. Rather, it reflects the fact that at the certification stage "the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight"... **The certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action; "rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding"**...
>
> ...
>
> [104] In any event, in my respectful opinion, there is limited utility in attempting to define "some basis in fact" in the abstract. Each case must be decided on its own facts. **There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met**.
>
> [105] ... the outcome of a certification application will not be predictive of the success of the action at the trial of the common issues. I think it important to

> emphasize that **the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial**...
>
> [emphasis added]

Is there an identifiable class?

[14] The plaintiffs sought to certify the proposed classes as follows:

a) All persons who contracted COVID-19 while being a resident at the Maples between October 18, 2020 to January 12, 2021; and

b) All family members as defined under ***The Fatal Accidents Act*** and the estates of those persons who contracted COVID-19 while being a resident at Maples between October 18, 2020 and January 12, 2021, and who died of complications related to COVID-19.

[15] In ***Western Canadian Shopping Centres Inc. v. Dutton***, 2001 SCC 46, Chief Justice McLachlin explained the identifiable class requirement as follows:

> 38 ...the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. **The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation**. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria...
>
> [emphasis added]

[16] In ***Hollick v. Toronto (City)***, 2001 SCC 68, Chief Justice McLachlin further discussed the appropriate scope of the class as follows:

> 21 The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is

> not unnecessarily broad -- that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended...
>
> [emphasis in original]

[17] The WRHA defendants did not take serious issue with this criterion. While Revera accepts that the definition of the proposed class in (a) meets the objective requirements by which members of a class can be identified, it takes issue with the proposed class in (b) to the extent it references those "who died of complications related to COVID-19". It is Revera's position that this aspect of the proposed class in (b) is dependent on the outcome of the litigation as it requires an assessment of cause of death and would be part of any damages. Indeed, circular definitions referencing the merits of the claim or subjective characteristics ought to be avoided (***Chadha v. Bayer Inc.***, 2003 CanLII 35843 (ON CA), (para. 69)). In ***Cirillo v. Ontario***, 2021 ONCA 353, the Ontario Court of Appeal commented that a "causation criterion is inherently merit-based" (para. 53).

[18] As noted below, the plaintiffs are not proposing to certify a class proceeding on the issue of causation. Therefore, there is no need to identify a class of members who died from COVID-19. As suggested by counsel for both Revera and the plaintiffs at the hearing, this concern is best addressed by having only one class and including in the proposed class in (a) the family members of those who died as defined under ***The Fatal Accidents Act*** and their estates (without reference to the cause of death). Accordingly, to the extent I am allowing certification, it is on condition that the definition of the class be amended accordingly.

Are there common issues?

Proposed Common Issues

[19] With respect to Revera, the proposed common issues are:

i. During the period from October 18, 2020 to January 12, 2021, did Revera owe the class members any or all of the duties of care alleged at paragraph 49 of the amended statement of claim?

ii. During the period from October 18, 2020 to January 12, 2021, did Revera owe the class members a fiduciary duty as alleged at paragraph 51 of the amended statement of claim?

iii. During the period from October 18, 2020 to January 12, 2021, did Revera owe any contractual obligations to the class members as alleged at paragraph 53 of the amended statement of claim, and if so, what were the contractual terms?

iv. If the answer is "yes" to one or more of the above, did Revera breach any of those duties or obligations in the manner or manners alleged at paragraph 50 of the amended statement of claim?

[20] The allegations of breach in paragraphs 50(a), (b), (c), and (p) of the amended statement of claim relate to planning and implementing an IPAC plan. The remaining allegations in paragraph 50 identify the following specific elements and allege related breaches of such an IPAC plan:

- 50(d) – screening and monitoring staff and visitors to Maples for COVID-19;

- 50(e) – supply and use of personal protective equipment ("PPE") for staff at Maples;
- 50(f) – training and educating staff on how to prevent and contain the spread of COVID-19 at Maples;
- 50(g) – assessing residents and staff for COVID-19 symptoms and their testing;
- 50(h) – cohorting and physical distancing of residents;
- 50(i) and (j) – ensuring there was properly skilled, qualified, and competent staff and adequate staffing levels;
- 50(k) – sanitizing, disinfecting, and deep cleaning areas of Maples; and
- 50(l), (m), and (n) – ensuring adequate care including medical and nursing care with adequately kept resident records.

[21] With respect to the WRHA defendants, the proposed common issues are:

i. During the period from October 18, 2020 to January 12, 2021, did the WRHA defendants, either or both, owe the class members any or all of the duties of care alleged at paragraph 55 of the amended statement of claim?

ii. If the answer is "yes" to the above, did the WRHA defendants, both or either, breach any of those duties in the manner or manners alleged at paragraph 56 of the amended statement of claim?

[22] With respect to the allegations of breach in paragraph 56 of the amended statement of claim:

- 56(a) – relates to failing to inspect and ensure Maples was meeting COVID-19 standards and guidelines to address any outbreak;
- 56(b), (c), and (d) – concern identifying staffing levels, anticipating and planning for additional staffing needs, and responding to requests for additional staffing;
- 56(e) – relates to ensuring medical and nursing needs were being met;
- 56(f) – relates to providing clear guidelines and protocols for personal care homes to prevent and respond to outbreaks of COVID-19; and
- 56(g) – concerns provisions of PPE and providing related training, education, and fitting of PPE.

Legal Principles

[23] In ***Pro-Sys Consultants***, Rothstein J. addressed the commonality question by reference to ***Dutton***, with the following:

> 108 In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, this Court addressed the commonality question, stating that **"[t]he underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis"** (para. 39). I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of that decision:
>
> (1) The commonality question should be approached purposively.
>
> (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
>
> (3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.

(4) It not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.

(5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[emphasis added]

PARTIES' POSITIONS

[24] The plaintiffs submit that the proposed common issues are in keeping with the common issues that were certified in the Ontario long-term care home class proceedings of ***Pugliese v. Chartwell***, 2024 ONSC 1135 and ***Head v. 859530 Ontario Inc.***, 2025 ONSC 4817. As well, the plaintiffs submit that the proposed common issues align with ***Surette v. Northwoodcare Group Inc. et al.***, 2024 NSSC 388 (leave to appeal denied at 2025 NSCA 52), where the common issues certified included determining whether a duty of care was owed to prevent and mitigate COVID-19 outbreaks at two long term care facilities and whether there was a breach of the standard of care. The plaintiffs note that in light of analogous case law and the evidence on this motion, they are not proposing causation as a common issue.

[25] Revera accepts that the issues of whether it owed a duty of care to residents of Maples, whether it owed any contractual obligations to residents of Maples, and whether it owed residents a fiduciary duty (proposed issues (i) to (iii) above) are common issues that are appropriate for certification. I agree.

[26] As well, Revera acknowledges that allegations with respect to adequate planning for the outbreak, namely that Revera "fail[ed] to properly and adequately plan for... an

outbreak of COVID-19 at Maples" (paragraph 50(a) of the amended statement of claim) are sufficiently common among class members. I agree. Revera's planning, such as the creation of its "COVID-19 Playbook" to be used by personal care homes across Canada, including Maples, to assist managers of personal care home staff in making decisions in the context of the pandemic and containing steps to prevent or respond to an outbreak along with its adoption of policies from the WRHA defendants applied home-wide and to all residents. Therefore, there is some basis in fact to determine this issue on a common basis.

[27] It is Revera's position that there is no basis in fact to establish that the remaining alleged breaches can be determined in common. These relate to Revera's implementation of its plans; to appropriately respond to the outbreak; to follow certain protocols or standards concerning screening, use of PPE, training, cohorting, physical distancing, cleaning, communication, and record-keeping; and to ensure staffing to care for residents. Revera argues that for any such alleged breach, the "who", "where", "what", and "when" of that breach will need to be identified and then compared to a particular resident's positive (i.e. causative) test date, their location, and their movement in order to determine if it is applicable. Revera submits this is a highly individualized exercise, which would break down into individual trials for each resident. Revera points out that this would need to occur even if one were to identify the timing of each individual breach at a common issues trial. Revera assert that if the plaintiffs have any hope of relating breaches to causation, this can only be done by addressing each individual alleged breach.

[28] As well, it is Revera's position that the standard of care is not necessarily common across all residents, depending on the specific allegation and on the opportunity for involvement or decision-making of individual residents. Revera suggests there is the prospect of individual participation and responsibility which must be addressed based on each resident's cognitive and/or physical states.

[29] It is the position of the WRHA defendants that the identification of the common issues of alleged duties depends upon the identification of the common issues of alleged breach. It is also the WRHA defendants' position that the proposed common issues are framed so generally, the plaintiffs have not met their onus of showing that each issue is a common one. Like Revera, they assert that other proposed common issues are specific to individual residents or inapplicable to certain residents, such that the class action proceeding objective of avoiding duplication of fact finding or legal analysis would not be met.

[30] For example, the WRHA defendants argue that the alleged breach by them in paragraph 56(e) of the amended statement of claim "failing to ensure the medical and nursing needs of the residents of Maples were being met during the outbreak period" does not identify which needs were not met and would require an examination of each patient's particular needs and care. The WRHA defendants argue that the alleged breach in not adequately responding to requests for additional staffing during the outbreak period (paragraph 56(c) of the amended statement of claim) would not impact all residents or all residents in the same way such that the duplication of fact finding or legal analysis would be avoided. These defendants point out that there is no indication

that staff shortages affected every cohort or every location or that they occurred at the same time. Accordingly, it is the WRHA defendants' position that the only issues that may be appropriate as common are:

- Did WRHA fail to identify concerns over staffing levels and/or care of residents during its inspection of Maples on November 2, 2020 and/or fail to address those concerns in a timely way (paragraph 56(b) of the amended statement of claim)?
- Prior to the outbreak in October 2020, did WRHA fail to anticipate and plan for additional staffing needs at personal care homes caused by outbreaks (paragraph 56(d) of the amended statement of claim)?

Standard of Care, Fiduciary Duty and Contract as Common Issues

[31] I am satisfied that there are common issues surrounding standard of care, fiduciary duties, and contract. There is some basis in fact to support them, and they are rationally connected to the class members. In my view, all residents would be in a similar situation under the care of the Maples staff. The plaintiffs' claim relating to systemic IPAC based policies and procedures at Maples during the material time is supported by Aleksandra Grzeszczuk, who is their expert in gerontology nursing, non-acute IPAC, and administration of long-term or personal care homes. In her report, Ms Grzeszczuk outlines various standards expected of a personal care home in Manitoba as it relates to common IPAC measures that should have been implemented during the pandemic.

[32] The evidence from Revera's witnesses Matthew Braun and Rechelle Flores describe the measures they say were implemented, which also provides some basis in fact for the existence of such standards. The defendants' expert Dr. Mark Loeb confirmed on cross-examination support, albeit qualified, for some similar intervention measures to those identified by Ms Grzeszczuk. While Dr. Loeb raises as issues the level of efficacy of measures used to reduce COVID-19 transmission, in my view, such issues are not to be determined at the certification stage.

[33] I agree with the plaintiffs' submissions that the standards alleged against Revera are systemic ones that would have an impact on all residents of the facility and the standard applicable to all residents should not vary. This would be equally applicable to the WRHA defendants and their involvement in setting standards for care of residents at personal care homes during the pandemic and ensuring compliance with standards by Revera. As indicated in an email from Mr. Braun of Revera dated October 28, 2020, sent to families of residents:

> This plan [Maples' plan for addressing the outbreak] will be developed in close collaboration with the Winnipeg Regional Health Authority, for whose guidance we remain deeply grateful.

[34] In my view, E.M. Morgan J.'s comments from ***Pugliese*** are equally applicable in the case at hand:

> 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.

[35] Like in ***Surette***:

> 52 The trial of this issue will turn on identifying the appropriate IPAC practices and policies that were in existence and should have been followed at the Facility at the onset of the COVID-19 outbreak. This can be determined in common. It does not vary across claimants.

[36] As observed by E.M. Morgan J. in ***Pugliese***, in ***Levac v. James***, 2023 ONCA 73 (para. 49), the Ontario Court of Appeal has held that "IPAC is akin to a systemic policy or practice". It is also my view that the following observations of Healey J. in ***Head*** would apply equally to the present case:

> 123 Resolution of the standard of care will significantly advance the litigation for all members of the Classes. And as the Plaintiffs' counsel concede, if they are not successful on the standard of care issue, the action is over. There is significant judicial economy in requiring the plaintiffs to prove the standard of care, and its breach, at a common issues trial.

Breaches as Common Issue

[37] The alleged breaches against Revera are largely grounded in general systemic issues of planning and implementing an IPAC plan along with specific elements of this IPAC plan and policy. Likewise, the alleged breaches against the WRHA defendants are similar to those against Revera as they relate to systemic IPAC based matters that connect with the allegations against Revera. At the common issues stage, the factual analysis will be focused on the conduct of the defendants and not the specific impact on each resident or the individual circumstances of each resident. The determination of the answers to the alleged breaches does not require evidence from each individual class member (or their personal representatives if deceased). As well, there is no basis to conclude that the answers to the questions of the alleged breaches would give rise to conflicting interests among members.

[38] There is some basis in fact for the determination of the alleged breaches as common issues. It is uncontested that Maples had the highest attack rate (78.5%) and percentage of deaths (23.5%) of the 10 personal care homes in the category of large personal care homes in Winnipeg. In her evidence, Ms Grzeszczuk described as follows the various IPAC protocols for COVID-19 in long term care homes that would impact **all** residents:

> ...breaches in infection prevention and control [IPAC] practices, protocols, and relevant standards can likely lead to significant risks such as widespread microorganism transmission, extreme staffing shortages compromising the safety of the residents, healthcare workers, visitors, etc., which may lead to a prolonged outbreak that is difficult to contain. (Affidavit of Aleksandra Greszczuk, exhibit "B", p. 30)

[39] From the evidence, the outbreak likely started evolving from an infected visitor attending with other residents at a dining table and setting in motion a domino effect of infections. While the outbreak may have started from one infected visitor, the rapid spread of infection is alleged to be the result of the cumulative effect of all the alleged breaches. There was a "common risk of harm" (***Head***, paras. 120-121).

[40] In my view, the defendants' position as to the need to relate each individual breach to each resident confuses what may be the difficulty of proving causation (which is not proposed as a common issue) with the alleged breaches. It is alleged that all the protocols identified in the amended statement of claim were not being observed as opposed to one particular protocol. The alleged breaches are the same for all members of the proposed class. As I said, the allegation is that the cumulative effect of all the alleged breaches created a common risk of harm. This common risk of harm is the same regardless of the individual circumstances of each resident.

[41] I expect that identifying and resolving through a common issues trial what the defendants describe as the "who", "where", "what", and "when" of any breaches would advance the claims of the entire class and to answer them commonly will avoid duplication in fact-finding and legal analysis. By making these findings at a common issues trial, the claim is materially advanced as there would be findings benefitting the resolution of the claims of individual residents or groups of residents (positively or negatively) with respect to whether the defendants committed the alleged breaches.

[42] In ***Surette*** (at para. 46), Norton J. quoted the following as quoted in ***Capital District Health Authority v. Murray***, 2017 NSCA 28, which is apt:

> [47] Winkler, *The Law of Class Actions in Canada*, pages 109-11, summarizes:
>
> > The underlying critical ingredient of a common issue is whether the resolution of the common issue will avoid duplication of fact-finding or legal analysis. It is not necessary that all or even a majority of the questions of law or fact of the class members be identical, similar or related. **What is required is that the claims of the members raise some questions of law or fact that are sufficiently similar or sufficiently related that their resolution will advance the interests of the class, leaving individual issues to be litigated later in separate trials, if necessary.** It is generally appropriate to include possible defences among the common issues only when they rise to the level of making a subclass necessary.
> >
> > ...
> >
> > A common issue need not dispose of the litigation, nor does it need to be one that is determinative of liability. **It is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class. Further, an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution.** The number of individual issues compared to common issues is not a consideration in the commonality inquiry, although it is a factor in preferability assessment.
> >
> > [emphasis added]

[43] Revera submits that the common issue criterion is not met because the plaintiffs have not provided a workable methodology to explain how issues of location and timing of breaches can be determined in isolation from individual residents. However, the need for a workable methodology does not arise with respect to the question of commonality of breach. Rather, it arises with respect to causation and loss, neither of which the plaintiffs are proposing as common issues. This very point is addressed by Norton J.'s comments in ***Surette***:

> 63 Where causation is proposed as a common issue, the plaintiff must demonstrate that there is a workable methodology to determine causation on a class- wide basis...

[44] As noted, in the case at hand, the plaintiffs are not seeking to establish loss on a class-wide basis. In any event, the defendants' arguments regarding the individualized nature of the breaches are addressed by the above noted quotation from ***Murray***.

[45] In summary, I am satisfied that the issues raised by the alleged breaches are common to all class members.

Is a class proceeding the preferable procedure?

[46] In ***Pisclevich v. Manitoba***, 2018 MBQB 52, Justice McKelvey described the preferability criterion as follows:

> 45 It is necessary for a class proceeding to be the preferable process for the resolution of the plaintiffs' claims. It must represent a fair, efficient and manageable procedure that is preferable to any alternative method of resolving the claims, such as would be the case with individual actions. As was indicated in *Hollick* at paras. 28-31, the two core elements of the preferable procedure inquiry include (1) whether the class action would be a fair, efficient and manageable method of advancing the claim; and (2) whether a class action would be preferable to other reasonably available means of resolving the class members' claims. These elements include the policy objectives of access to justice, judicial economy, and the modification of the behaviour of the wrongdoers. It is necessary to look at possible alternatives and adopt a practical cost-benefit approach to this procedural issue.

[47] It is the defendants' position that while predominance of individual issues over common issues does not necessarily prevent certification, it is a significant consideration. Revera points out that in ***Hollick***, the Supreme Court of Canada was not persuaded that the class action would be the preferable means of resolving the class members' claim, noting that "[o]nce the common issue is seen in the context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action" (para. 32).

[48] The defendants assert that the multitude of individual issues outweigh the limited benefits from determination of the common issues. However, this assertion is grounded in the defendants' arguments about the very limited common issues. Having found otherwise, I am satisfied that when the common issues are seen in the context of the entire claim, their resolution will significantly advance the action. As such, judicial economy and efficiency favour a class action.

[49] Revera proposes that another reasonably available means of resolving the class members' claims is for those who want to proceed with individual claims to hire the same law firm on a contingency agreement and consolidate some individual actions as appropriate.

[50] Revera also argues that the class action would not provide timely justice for those residents who remain alive given their average age and health and would provide none for those who have passed away. Revera submits that certification would deny it access to justice issues because in many instances Revera may have defences unique to

individual residents particularly with respect to alleged breaches and certification would prevent it from raising these defences.

[51] In my view, to proceed with the alternative suggested by Revera of multiple individual claims in the circumstances would likely undermine the class action policy objectives of access to justice and judicial economy. I agree with the plaintiffs' submission that the court would be left to manage potentially many actions through a consolidation and/or case management process in order to attempt to avoid duplication of evidence and inconsistent findings through individual proceedings. This approach would also invite multiple, duplicative examinations for discovery and potentially multiple experts. Certification would eliminate the need for duplicative proceedings with respect to the common issue and avoid the possibility of inconsistent findings. It would conserve judicial and litigant resources. Expenses, such as expert fees, could be divided among a larger group.

[52] As well, it appears that damages in any individual claim would for the most part be relatively modest in light of the amounts recoverable under ***The Fatal Accidents Act***. While the WRHA defendants submit that under ***The Fatal Accidents Act***, a claim made for a resident with as few as four family members would likely exceed $100,000.00, given the nature and complexity of the proposed action, the cost of proceeding with the litigation on an individual basis would, for many, still likely not justify doing so.

[53] In coming to my views, I find the following in both ***Pugliese*** and ***Head*** particularly apt:

From ***Pugliese***:

> [269] ...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] ...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...

From ***Head***:

> [173] One of the significant factors that makes a class action the superior procedure in this case is the quantum of damages that any plaintiff could expect to recover in an individual action. Negligence claims involving elderly and infirm plaintiffs and derivative *FLA* claims do not typically result in high damage awards. Requiring individual plaintiffs and family members to proceed with individual actions would be impractical and needlessly expensive when considering the costs and risks of an individual trial involving the use of expert witnesses. Many, if not most, would undoubtedly choose not to proceed.

[54] The WRHA defendants also raise as an access to justice issue that it is unknown how many want to pursue an action. As such, it may be that this is an attempt to certify a class action on behalf of only a handful of people who wish to be involved. I expect that at the certification stage in most proposed class actions it is unknown how many people will want to participate. Nevertheless, I do not see this argument as a basis to find that a class action is not the preferable procedure.

[55] Finally, I agree with the defendants that the factor of "behaviour modification" is not a weighty issue in the circumstances.

[56] Having carefully weighed the relevant considerations, I am satisfied that the proposed class action would be a fair, efficient, and manageable method of advancing

the claim and is preferable to other reasonably available procedures to resolve the common issues.

Would the plaintiffs be proper representative plaintiffs?

[57] The defendants take no position with respect this criterion. I am satisfied that they would fairly and adequately represent the interest of the class. They have a common interest with the other class members given that each of them lost a parent who contracted COVID-19 while resident at Maples during the outbreak period.

Litigation Plan

[58] The defendants do not take issue with the plaintiffs' proposed litigation plan. I am satisfied that this is a workable plan in accordance with the requirements of s. 4(e)(ii) of the ***CPA***.

CONCLUSION

[59] As I am satisfied that the requirements of s. 4 of the ***CPA*** are met, this action is certified as a class proceeding on the basis proposed by the plaintiffs with the plaintiffs appointed as the representative plaintiffs under s. 2(2)(b) of the ***CPA***.

A.C.J.