SUPREME COURT OF NOVA SCOTIA

Citation: *Surette v. Northwoodcare Group Inc., et al.*, 2024 NSSC 388

Date: 20241218
Docket: Hfx No. 498376
Registry: Halifax

Between:

Erica Surette

Plaintiff

v.

Northwoodcare Group Inc., a body corporate, incorporated in the Province of Nova Scotia; Northwood Homecare Inc., a body corporate, incorporated in the Province of Nova Scotia; Northwood Health Services, a body corporate, incorporated in the Province of Nova Scotia; Northwoodcare Halifax Inc., a body corporate, incorporated in the Province of Nova Scotia; Northwood Support Services Inc., a body corporate, incorporated in the Province of Nova Scotia; Northwood Realty Inc., a body corporate, incorporated in the Province of Nova Scotia; 5534 Almon Street Inc., a body corporate, incorporated in the Province of Nova Scotia; 2641 Northwood Terrace Inc., a body corporate, incorporated in the Province of Nova Scotia; Northwood Homecare Agency, a body corporate, incorporated in the Province of Nova Scotia; Northwood In Touch Personal Emergency Response, a body corporate, incorporated in the Province of Nova Scotia

Defendants

DECISION ON MOTION TO CERTIFY CLASS PROCEEDING

Judge:	The Honourable Justice Scott C. Norton
Heard:	November 18, 2024, in Halifax, Nova Scotia
Decision:	December 18, 2024
Counsel:	Madeleine Carter and Kate Boyle, for the Plaintiffs Karen Bennett-Clayton and Erin McSorley, for the Defendants

By the Court:

Introduction

[1] The plaintiff asks the court to certify this action as a class action. The motion involves a determination only of whether a class action is the appropriate method for advancement of issues common to the class. To quote the plaintiff: "it is about the form the lawsuit will take, not the merits of the case".

[2] In early 2020 the world was changed by the emergence of the COVID-19 virus. Between March 15, 2020 and June 30, 2020, 53 residents at two separate long term care facilities (Northwood Centre and Northwood Manor) (together, "Facility") passed away while experiencing complications associated with COVID-19 ("Deceased Residents").

[3] The proposed class proceeding herein alleges the defendants were negligent in being unprepared and failing to adhere to known precautionary principles and proactive measures to prevent, mitigate and control outbreaks before they become widespread. As a result, the plaintiff alleges that the defendants are legally liable in damages to a class of claimants that include the estates of the Deceased Residents or the Deceased Residents' family members who are entitled to bring an action under the *Fatal Injuries Act*, RSNS 1989, c. 163.

[4] The plaintiff, Erica Surette, is the daughter of the late Patricia West, a resident of Northwood Centre who contracted COVID-19 and passed away on April 22, 2020. Ms. Surette pursues this proposed class action on her own behalf and on behalf of a similarly situated Class.

[5] The defendants are a group of companies alleged to be at all material times responsible for the operation, administration, management, and supervision of the Facility.

The Law

[6] The *Class Proceedings Act,* SNS 2007, c. 28 ("*Act*"), enumerates five criteria for the Court to consider on this procedural motion. To repeat, the court is focused on the form the action will take and does not require a preliminary assessment of the merits, viability, or strength of the claim. The language of the *Act* is mandatory: the

court shall certify a class proceeding where the following five-part test in s. 7(1) is met:

> (a) the pleadings disclose or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by a representative party;
>
> (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 dispute; and
>
> (e) there is a representative party 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, with respect to the common issues, an interest that is in conflict with the interests of other class members.

[7] In interpreting the *Act* and assessing the certification criteria, the court is to bear in mind the three goals of class proceedings: (1) promotion of judicial efficiency by avoiding unnecessary duplication in fact-finding and legal analysis; (2) improved access to justice for claims that may not otherwise be asserted; and (3) modification of the behaviour of actual and potential wrongdoers: *Hollick v. Metropolitan Toronto (City)*, 2001 SCC 68, at para. 15.

[8] The procedural nature of the certification motion informs the plaintiff's evidentiary burden. Certification is intended to be a low bar. Plaintiffs need only to establish that there is "some basis in fact" to conclude that each s. 7(1) certification criterion is satisfied (apart from the s. 7(1)(a) requirement that the pleadings disclose a cause of action, for which no evidence can be considered): *Wright Medical Technology Canada Ltd. v. Taylor*, 2015 NSCA 68, at para. 40; *Hollick, supra*, at para. 25; *Pro-Sys Consultants v. Microsoft Corporation*, 2013 SCC 57, at paras. 63, 71 and 97. Accordingly, the Court does not assess probative weight at this stage, and conflicting facts and evidence are not to be resolved at certification: *Pro-Sys, supra*, at para. 102, *Wright, supra*, at paras. 46-47.

[9] As stated in *Pro-Sys*, the standard for assessing evidence at certification does not give rise to a determination of the merits of the proceeding, nor does it involve a superficial level of analysis that amounts to nothing more than symbolic scrutiny (para. 103). The judge is not to veer into an evaluation of the merits of the claim, or probative weight of the evidence said to support it, or the potential for success: *Wright, supra*, at para. 47.

Evidence

[10] The plaintiff filed affidavit evidence from the plaintiff, Erica Surette, and two other family members of Deceased Residents, Sarah Nolais and Darlene Metzler. In addition, the plaintiff filed an affidavit from Dana MacGillivray, a paralegal at the plaintiff's law firm, and from Dr. Abdu Sharkawy, a medical doctor, board certified in the specialty of Internal Medicine and Infectious Diseases, attaching his expert report.

[11] The defendants filed evidence from Jennifer Tucker, Director of Long Term Care at Northwoodcare Halifax Incorporated, and Dr. Mark Loeb, a medical doctor, also board certified in the specialty of Internal Medicine and Infectious Diseases, attaching his expert report.

Preliminary Issue – Admissibility of Evidence

[12] The defendants say that the plaintiff has fundamentally failed to provide a sufficient evidentiary basis to meet the threshold for certification. They assert that the majority of the evidence on which the plaintiff seeks to rely in support of the motion for certification is comprised of inadmissible hearsay, inadmissible opinion, and/or evidence protected by the *Quality-improvement Information Protection Act*, SNS 2015, c.8 ("*QIIPA*"), and thus is of no assistance to the plaintiff.

[13] Specifically, the defendants challenge the admissibility of the following exhibits to the affidavit of Dana MacGillivray:

(a) Exhibit "A" – 2014-15 Guide to Influenza-Like-Illness/Influenza Outbreak Control for Long-Term Care Facilities and Adult Residential Centres. This document on its face was published by the Province of Nova Scotia Department of Health, Department of Health and Wellness, Public Health Branch, Communicable Disease Prevention and Control Division.

(b) Exhibit "D" – Nova Scotia Health and Wellness Licensing Inspection Report (Annual Inspection). This is an annual inspection report of Northwood Centre conducted in December, 2019 made by the Nova Scotia Department of Health and Wellness.

(c) Exhibit "M" – Executive Summary & Recommendations by Dr. Chris Lata and Dr. Lynn Stevenson of the Northwood Quality-improvement Review Committee. This is the executive summary to a report made pursuant to a quality improvement review under the *Quality - improvement Information Protection Act*, SNS 2015, c.8.

(d) Exhibit "N" – September 2020 report from the Province's internal review of infection prevention and control within the LTC sector in Nova Scotia, titled "COVID-19 First Wave Review". This document was published as a report of the Minister of the Department of Health and Wellness, Government of Nova Scotia.

(e) Exhibit "O" – NSGEU Report "Neglecting Northwood Chronicling the death of 53 Nova Scotians". This document was prepared by the Nova Scotia Government and General Employees Union "with the intent of presenting it to the government review committee, but was not out of concern that some of the information it contains would be caught by the confidentiality provisions that govern operations of the review committee".

[14] The plaintiff says that the challenged exhibits to the MacGillivray affidavit are not proffered to prove the truth of the matters asserted within the exhibits, but rather to support that there is "some basis in fact" for one or more of the certification criteria in s. 7(1)(b) to (e) of the *Act*. The evidentiary threshold for certification is not onerous and courts "must not impose undue technical requirements on plaintiffs": *Capital District Health Authority v, Murray*, 2017 NSCA 28, at paras. 31-34.

[15] Alternatively, the plaintiff says that on a procedural motion such as this, *Civil Procedure Rule* 22.15(2)(c) permits hearsay evidence to be offered if the deponent identifies the source and affirms their belief in its accuracy. Even if the source is not identified by name, evidence may be admitted if other details indicate it originates from a credible or reliable source: *Sweetland v. Glaxosmithkline Inc.*, 2014 NSSC 216, at para. 13 ("*Sweetland* 2014"); *Rule* 22.15(3). *Sweetland* 2014 was a motion to strike parts of the affidavit evidence filed in support of a future certification hearing. Justice Wood confirmed that the purpose of this requirement, in the context

of a motion for certification, is to allow the court to assess the credibility and reliability of the evidence being offered (para. 15).

[16] In *Sweetland v. GlaxoSmithKline*, 2016 NSSC 18, Justice Wood decided the certification motion. At the outset of the decision, he stated:

> [5] The certification motion is procedural in nature. It is not the time for assessing the substantive merits of the plaintiffs' allegations except to the extent that they may impact on the certification criteria. At this stage the court performs a gatekeeping function directed to ensuring that the claims being advanced in the litigation lend themselves to resolution through the mechanism of a class proceeding.
>
> [6] Since the motion is procedural, the rules with respect to the admission of evidence are somewhat more relaxed. For example, hearsay is admissible (*Civil Procedure Rule* 22.15; *Elwin v. Nova Scotia Home for Coloured Children*, 2013 NSSC 196). The party seeking certification must satisfy the court that the requirements in s.7(1) of the *Act* have been met. With the exception of s.7(1)(a) the applicant must provide sufficient evidence to show there is some basis in fact for concluding that each of the criteria have been met. It is important to remember that this does not involve any threshold assessment of the relative strength or weakness of the allegations being made.

[17] Here, except for the NSGEU report, the challenged exhibits are comprised of reports published by the Province of Nova Scotia. With regard to this type of evidence, a general statement of belief within a single paragraph of an affidavit can sufficiently establish the affiant's belief in the information for the limited purposes of a certification hearing: *Elwin v. Nova Scotia Home for Coloured Children*, 2013 NSSC 196, at paras. 47-50.

[18] At the certification stage, requiring the plaintiff to submit affidavits or adduce *viva voce* evidence from all individuals with personal knowledge of the challenged exhibits would be excessive, and undermine the procedural nature of the certification motion. It would also subvert the "some basis in fact" evidentiary threshold, which does not require the court to test the merits of the claim, as at a trial, or resolve conflicting facts and evidence: *Wright, supra*, at paras. 46-47; *Hollick, supra*, at paras. 16, 18, 25; and *Pro-Sys, supra*, at para. 102.

[19] In summary, at the certification motion, the some basis in fact threshold requires the court to be satisfied that evidence exists, not determine if it is true or of any particular weight.

[20] In this case I agree with the plaintiff that the challenged exhibits that are publications and reports by departments of the Nova Scotia Government have been transparently sourced and are credible and reliable for the limited evidentiary purpose of establishing some basis in fact of the issues for certification. Accordingly, I will permit the following challenged exhibits to be used for the basis of establishing some basis in fact:

1. Exhibit A. The plaintiff offers this evidence to demonstrate some basis in fact that IPAC policies and procedures are a Facility-wide issue: (i) guidelines existed at and prior to the material time and applied to all Residents in the Facility regardless of their room type, floor, location in Northwood Manor or Centre, or the dementia status of a Resident; and (ii) there were accepted facility-wide strategies for the prevention and control of influenza at the material time. This evidence is some basis in fact of the commonality of the proposed common issues of a duty of care and breach of the standard of care (these are questions that are capable of being answered in common, because IPAC policies applied consistently to the Deceased Residents, across the Facilities, this being one example of such a policy) and, because the commonality of these issues is supported by this evidence, it also underscores the preferability of a class action (that is, there are common issues that would significantly advance the litigation for all class members, making a class action the preferable procedure).

2. Exhibit "D". This is a licensing inspection report prepared following an inspection of the Northwood Centre between December 3 to 5, 2019 by Provincially-appointed inspectors ("Inspection Report"). The plaintiff adduces it to show that the proposed common issues can be resolved on a class-wide basis: the Facilities were inspected as one for licensing standards, because the Facility is a system, and are capable of being evaluated as such. From this it can be inferred that the Facility's response to COVID-19 can be assessed at the Facility-level at a common issues trial, with the outcomes binding all class members. By providing "some basis in fact" that the proposed common issues are common to the Class, the Inspection Report supports a rational connection between the proposed common issues and the proposed class definition of the bereaved family members of Deceased Residents. Furthermore, because the Inspection Report illustrates that the Facilities' adherence to standards can be evaluated in a single proceeding, it supports the preferability of the action as a class action.

3. Exhibit "N". The First Wave Review demonstrates that IPAC policies and practices, and accountability, in Nova Scotia's LTC sector can be reviewed and evaluated as a system, even when the broad system in question there covered the entire Long Term Care ("LTC") sector in the province. The fact that the review occurred, without evidence by individual residents of LTC homes, demonstrates that the proposed common issues (here, at the narrower single Facility level) can be evaluated and answered in common. As the First Wave Review supports commonality, it also demonstrates that the proposed common issues are rationally connected to the proposed Class whose family members died at the Facility during the first wave. Answering proposed common issues focussed on the defendants' liability will significantly advance the litigation for all. Conversely, requiring each class member to present individualized evidence of IPAC processes and practices in repeated individual trials, when these can instead be evaluated efficiently and properly as a system, in one proceeding, would be inefficient and unmanageable.

[21] The NSGEU is the recognized bargaining agent for public and private sector employees. It has a role as an advocate for its members. The NSGEU Report is stated to be based on "hundreds of internal NSHA [Nova Scotia Health Authority] documents obtained through the Freedom of Information process, discussions with NSGEU nursing staff who are redeployed to Northwood at the height of the COVID outbreak and material on the public record". The authors are not identified. The hundreds of documents referred to are not, for the most part, cited or produced with the report. The identities of the NSGEU nursing staff who were spoken to are not identified. The report makes numerous statements of fact which are often based on multiple levels of hearsay from unknown sources. The report contains numerous statements of inadmissible opinion. It was not presented to the government review committee for which it was prepared and so its contents was not vetted or challenged by that committee.

[22] Unlike the government published reports, I do not find the NSGEU Report has sufficient credibility and reliability to establish some basis in fact of the issues for certification. The NSGEU Report does not establish some basis in fact that the issues of duty of care and standard of care can be considered on a Facility basis. The NSGEU Report contains multiple level hearsay and unqualified expert opinion evidence based on hearsay. I give it no weight.

[23] The defendants challenge Exhibit "M", the Executive Summary & Recommendations by Dr. Chris Lata and Dr. Lynn Stevenson of the Northwood Quality-improvement Review Committee ("Quality Improvement Recommendations"), on the basis that, *inter alia*, "quality-improvement information" is not admissible in evidence in a legal proceeding pursuant to *QIIPA*.

[24] "Quality-improvement information" is defined under s. 2(j) of *QIIPA* and specifically excludes some information from the prohibition:

> information in any form that is communicated for the purpose of, or created in the course of, carrying out a quality-improvement activity, but does not include
>
> ...
>
> (ii) the fact that a quality-improvement committee met or conducted a quality-improvement activity,
>
> ...
>
> (iv) the terms of reference of a quality-improvement committee...

[25] The plaintiff offers the Quality Improvement Recommendations to show that the Facility - and in particular its response to COVID-19 - can be examined as a single system, demonstrating that the proposed common issues of duty and breach of standard of care can be determined at a trial independent of findings of fact relating to the circumstances of particular Deceased Residents (and again, because the evidence supports the commonality of the issues, it supports the class action being the preferable procedure). The fact that they conducted a quality-improvement activity, and their mandate to "analyze the outbreak and the response to determine what factors contributed to the spread of COVID-19 at Northwood," provide some basis in fact that the defendants' COVID-19 response can be assessed on a class-wide basis, and that a class action is the preferable procedure.

[26] Given this limited purpose, and recognizing s. 9(2) of *QIIPA*, the plaintiff agreed to strike the contents of the Quality Improvement Recommendations, retaining only the title, as evidence of the fact that a quality-improvement committee conducted this quality improvement activity. Portions of the plaintiff's certification brief referencing the contents of the Quality Improvement Recommendations were also disregarded by me.

[27] A summary of the terms of reference of the quality improvement committee was included in a press release issued by the Minister of Health and Wellness on June 30, 2020. It is worth noting that the Quality Improvement Review of the

defendants' response to the COVID-19 outbreak considered within its terms of reference: (i) whether the preparedness for and response to COVID-19 infections were appropriate and timely during each stage of the outbreak; and (ii) best practices in effectively controlling and preventing the introduction and spread of COVID-19 in LTC settings. This mandate asked similar questions to those the common issues judge will be asked to decide at trial. Arguably, the common issues have already been demonstrated to be capable of examination - albeit from a medical, not legal, perspective - without individual class member evidence.

[28] The redacted Exhibit "M" is admissible for the limited purpose discussed.

Dr. Sharkawy Affidavit

[29] I next turn to consider the defendants' objections to the affidavit of Dr. Abdu Sharkawy attaching his expert report. Dr. Sharkawy is an expert in infectious disease and internal medicine. No objection was made to his qualifications in these fields and he was not cross-examined.

[30] The defendants object to the contents of Dr. Sharkawy's Report on the basis that it is based on inadmissible hearsay, opinion and protected information from the challenged exhibits attached to the MacGillivray affidavit. I will disregard any contents of the Sharkawy Report based on the contents of Exhibit "M", other than the fact and manner in which the review was conducted as discussed above. The plaintiff agreed, and I order struck para. 52 of the Sharkawy Report based on the inadmissible content of Exhibit "M".

[31] I will disregard any contents of the Sharkawy Report based on the contents of Exhibit "O", the NSGEU Report.

[32] In addition, the plaintiff has agreed, and I order struck the following challenged portions of paras. 31, 50, and 51 of the Sharkawy Report on the basis that the opinions expressed are beyond his expertise:

> 31 "and is sparsely staffed by an employee base that is prone to work in multiple sites to supplement a tenuous income."
>
> 50 "not in small measure related to low pay and thin health insurance benefit packages"
>
> 51 "...cannot be dismissed solely on the basis of supply chain issues that became notable in the spring of 2020".

[33] I will briefly address the remaining objections made by the defendants to the Sharkawy Report:

1. Paragraph 34 refers to a 2015 Nova Scotia Nurses Union report and 2018 report titled "Charting the Course", the author of which is not clear. The plaintiff argues that these references are acceptable because *Rule* 55.04(3) requires that an expert must include "(b) reference to all the literature and other authoritative material consulted by the expert to arrive at and prepare the opinion, which may be provided in an attached list". With respect, these reports, as described, are not authoritative material such as an accepted text or peer reviewed paper. Dr. Sharkawy is relying upon them for facts, not accepted expert theory. I will give this paragraph no weight on the motion.
2. Paragraph 36 refers to Dr. Sharkawy's reference to the Licensing Inspection Report admitted as Exhibit "D". His opinion in this paragraph goes to the merits and not whether there is some basis in fact for the certification criteria. It will be given no weight on the motion.
3. Paragraphs 46, 48, 49 and 55 all include references to Exhibit "O", the NSGEU Report. Those references and any opinions based upon them will be given no weight on the motion. In addition, the opinions in paragraphs 48 and 49 "from an engineering standpoint" is beyond Dr. Sharkawy's apparent scope of expertise.

[34] I note that the purpose of the Sharkawy Report at this stage is to provide the court with some basis in fact to satisfy the certification criteria. Dr. Sharkawy's remaining opinions are admissible to address the commonality of the proposed common issues, the rational relationship between the common issues and the proposed class (s. 7(1)(b)), and the preferable procedure requirement (s. 7(1)(d)) of the *Act*.

The Criteria for Certification

Section 7(1)(a) – The Pleadings Disclose a Cause of Action

[35] The defendants acknowledge that the pleadings disclose a cause of action in negligence against Northwoodcare Halifax Incorporated, Northwood Homecare Inc., and Northwood Support Services Inc. They say there is no cause of action against the remaining named defendants.

[36] No evidence is admissible for the purpose of assessing the pleadings. The allegations of fact as pleaded, unless patently ridiculous or incapable of proof, must be accepted as proven and assumed to be true.

[37] Whether the remaining defendants should be struck from the action will be determined at a later time. I note that the plaintiff has acknowledged that she has no interest in pursuing claims against defendants who are not proper parties to the action.

[38] This criterion has been satisfied by the plaintiff.

Section 7(1)(b) – There is an Identifiable Class of Two or More Persons

[39] The plaintiffs propose the scope of the class described as follows:

> the executors or administrators of the estates of the persons deceased, or family members who are entitled to bring an action under the *Fatal Injuries Act*, RSNS 1989, c 163, including the spouse, common law partner, parent or child as defined therein, of Residents of the Northwood Halifax Long-Term Care Facility who passed away due to COVID-19 or related complications from March 15, 2020 to June 30, 2020.

[40] The defendants accept that the "Class" as proposed discloses an identifiable class and concedes that the plaintiff has satisfied this requirement. This criterion has been satisfied.

Section 7(1)(c) – Claims of the Class Members Must Raise a Common Issue

[41] Common issues are defined under s. 2(e) of the *Act* as:

> (i) common but not necessarily identical issues of fact, or
>
> (ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[42] The principles for determining whether issues are common are outlined by the Supreme Court of Canada in *Pro-Sys, supra*, at para. 108:

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.

[43] *Pro-Sys* clarified the "some basis in fact" test in the context of the common issues requirement at para. 110:

> In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether [the common issues] are common to all the class members.
>
> [Emphasis added]

[44] The defendants assert that assessing the common issues criterion involves a two-step process: (1) the plaintiff must show that there is some basis in fact that the proposed common issue *actually exists*; and (2) the plaintiff must show that there is some basis in fact that the proposed issue is common to each class member. This test has been accepted by the Federal Court of Appeal in *Jensen v. Samsung Electronics Co. Ltd.*, 2023 FCA 89. The Federal Court of Appeal explained the rationale for this requirement as follows, at para. 80:

> [80] I am also in full agreement with the Motion Judge that the two-step approach is the only one consistent with the underlying rationale and the purpose of the certification process. If that process is to be meaningful and to achieve its objective to root out unfounded and frivolous claims, there must be a minimum assessment of the proposed common issue to ensure that it has an air of reality. Otherwise, the certification would not achieve its goal and almost any proposed certified action would have to be certified: *Dine v. Biomet*, 2015 ONSC 7050, [2015] O.J. No. 6732 (QL) at para. 15, fn 9. To quote again from the Motion Judge, "[a] cause of action with no factual underpinning does not become somehow more founded because it is common to a group of plaintiffs, nor does it gain any more value or traction just because it is shared by hundreds, thousands or millions": Reasons at para. 214. Allowing a common issue lacking a basis in fact to proceed to trial would certainly not promote judicial economy, nor would it promote behaviour modification, or enable access to justice

[45] The plaintiff says that the two-step test does not apply in Nova Scotia because the Court of Appeal has not articulated a two-step test that assesses whether there is an "air of reality" to an issue. Even in those jurisdictions implementing a two-step

test that assesses whether there is an "air of reality" to an issue, that test is articulated in a way that is intended to respect the Supreme Court of Canada's pronouncements on the some basis in fact standard that: "the certification stage is decidedly not meant to be a test of the merits of the action," and this "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."

[46] I am not prepared to adopt a two-step process in light of the current instruction from our Court of Appeal. In *Murray, supra*, Justice Fichaud gave the following directions on the approach to the appraisal of commonality for a certification application, at paras. 44-48:

> [44] The Supreme Court of Canada has instructed on the appraisal of commonality for a certification application.
>
> [45] In *Pro-Sys*, Justice Rothstein said:
>
> > [108] In *Western Canada Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, this Court addressed the commonality question, stating that "the 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 her 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 is 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.
> > >
> > > ...
> >
> > [110] The multitude of variables involved in indirect purchaser actions may well provide a significant challenge at the merits stage. However, there would appear to be a number of common issues that are identifiable. In order to establish commonality, evidence that the acts alleged actually

> occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members.
>
> [111] Myers J. concluded that the claims raised common issues. I agree that their resolution is indeed necessary to the resolution of the claims of each class member. Their resolution would appear to advance the claims of the entire class and to answer them commonly will avoid duplication in legal and factual analysis. Those findings are entitled to deference from an appellate court.
>
> [112] The differences cited by Microsoft are, in my view, insufficient to defeat a finding of commonality. *Dutton* confirms that even a significant level of difference among the class members does not preclude a finding of commonality. In any event, as McLachlin C.J. stated, "[i]f material differences emerge, the court can deal with them when the time comes" (*Dutton*, at para. 54).

[46] In *Vivendi Canada Inc. v. Dell'Aniello*, [2014] 1 S.C.R. 3, Justices LeBel and Wagner for the Court recapitulated the principles:

> [41] In *Dutton*, this Court laid down certain principles to be applied in deciding whether a class action raises one or more issues that are common to the claims of all the members of a class. McLachlin C.J., writing for the Court, stated the following:
>
> > Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit. [underlining by Justices LeBel and Wagner]
> >
> > ...

[43] In *Dutton*, this Court also stated that, for there to be a "common issue", success for one member of the class must bring with it a benefit for all the others:

> All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.

[44] In *Rumley v. British Columbia*, [2001] SCC 69, [2001] 3 S.C.R. 184 (S.C.C.), this Court confirmed the principles from *Dutton*. In the case of the commonality requirement, the purpose of the analysis is to determine "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis": para. 29, quoting *Dutton*, at para. 39. The Court also stated that a question can remain common even though the answer to the question could be nuanced to reflect individual claims: para. 32.

[45] Having regard to the clarifications provided in *Rumley*, it should be noted that the common success requirement identified in *Dutton* must not be applied inflexibly. A common question can exist even if the answer given to the question might vary from one member of the class to another. Thus, for a question to be common, success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another.

[46] *Dutton* and *Rumley* therefore establish the principle that a question will be considered common if it can serve to advance the resolution of every class member's claim. As a result, the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members.

[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.
>
> ...
>
> ...
>
> For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim. The focus of the analysis is not on how many individual issues there might be, but on whether there are issues the resolution of which would be necessary to resolve each class member's claim.

[48] The existence of significant individual issues does not disqualify the proceeding from class certification for the common issues. The authorities contemplate that pragmatic trial management will reconcile the two. However, the nature and prolixity of individual issues may defeat the guiding objective to avoid duplication. Then pragmatism will not avail and a class proceeding is inexpedient. In *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, Chief Justice McLachlin for the Court explained:

> 29 There is clearly something to the appellant's argument that a court should avoid framing commonality between class members in overly broad terms. As I discussed in *Western Canadian Shopping Centres Inc., supra*, at para. 39, the guiding question should be the practical one of "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceedings less fair and less efficient.

[47] With these principles in mind, I will turn to this case. The plaintiff seeks certification of the following proposed common issues:

(a) Did Northwood Halifax owe a duty of care to the Residents to prevent and mitigate COVID-19 outbreaks at the Facility?

(b) If the answer to common issue (1) is "yes", did the acts or omissions of Northwood Halifax, or their officers and/or agents, breach the applicable standard of care?

(c) If the answer to common issue (2) is "yes", did Northwood Halifax's breach(es) of the duty of care cause or contribute to the harms suffered and/or losses incurred by the class members?

(a) Duty of Care

[48] The defendants accept that the issue of whether a duty of care was owed by the defendants, Northwoodcare Halifax Incorporated, Northwood Homecare Inc., and Northwood Support Services Inc., to the Deceased Residents of the Facility is a common issue appropriate for certification. As stated above, this motion is not the place to determine if the other named defendants should be parties. I am prepared to certify as a common issue: "Whether the defendants owed a duty of care to prevent and mitigate COVID-19 outbreaks at the Facility to the Deceased Residents of the Facility?".

(b) Breach of Standard of Care

[49] The plaintiff's at the motion hearing clarified that the alleged breaches of the standard of care are particularized in para. 103 of the plaintiff's Third Amended Notice of Action (Clean Version) and Statement of Claim. These allegations pertain specifically to the implementation of practices, procedures, and/or policies aimed at preventing and controlling the spread of infectious diseases including COVID-19. These include but are not limited to the failures to: enforce physical distancing; control the risks posed by the Facility's crowded design; restrict dangerous contact and shared personal items; adequately manage staff and resident movement; conduct sufficient testing; secure alternative accommodations; enforce timely use of personal protective equipment ("PPE"); and, implement public health guidelines. These allegations relate to a failure to carry out policies, rather than to a failure in the creation or content of infection protection and control ("IPAC") policies.

[50] The defendants argue that the standard of care cannot be determined in common because it evolved over the class period. With respect, I agree with the plaintiff that the case is about one outbreak, during a single "first wave" of COVID-19, and it is alleged that the most basic IPAC protocols (pre-dating the emergence of COVID-19) were not adhered to. This is not a case where the relevant standard of care evolved. Revisions to COVID-19 directives, for example, are immaterial to

the applicable standard of care, because the plaintiff alleges that the defendants failed to adhere to even the most basic IPAC standards — such as those outlined in the 2014-15 Guide to Influenza-Like-Illness/Influenza Outbreak Control for Long-Term Care Facilities and Adult Residential Centres — that existed well before the pandemic. While COVID-19 was an unprecedented global health crisis, there is some basis in fact that foundational IPAC principles were already well recognized, and the plaintiff alleges that these basic, well-established IPAC standards were core measures for managing infectious disease risks, and that they were not adequately implemented at the Facility.

[51] The plaintiff alleges that the failure to implement even basic IPAC measures contributed to one deadly outbreak at the Facility, during the first wave of COVID-19, with a devastating domino effect, where the fate of one resident in catching COVID-19 impacted other residents. The critical period examined at trial will focus on the period prior to the first reported deaths on April 18, 2020, as by then, the disease had taken hold, and thereafter, deaths of Northwood residents were reported on a daily basis.

[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.

[53] The mere fact that the fact the Northwood Quality-improvement Review Committee conducted a review (without the contents of its report being admitted in evidence) is some basis in fact that the Facility — and specifically its response to COVID-19 — can be examined as a single system. Beyond showing the commonality of the issue, and while not necessary for certification in Nova Scotia, this evidence also supports the existence of the common issues, in the sense that the spread of COVID-19 at the Facility was considered significant enough to warrant a system-level investigation; Dr. Lata and Dr. Stevenson were to "analyze the outbreak and the response to determine what factors contributed to the spread of COVID-19 at Northwood.

[54] *Pugliese v. Chartwell*, 2024 ONSC 1135, arose from a complex omnibus certification motion relating to eight consolidated proposed class actions against some 100 defendants relating to COVID-19 in 304 long term care homes in Ontario. The court there held that 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 (para. 192). The court confirmed that at the certification stage the plaintiff does not have to prove the applicable standard of care, only bring forth some basis in fact for the ability to make this determination in common down the road (para. 201).

[55] In an appeal of the findings of the common issues judge in a class action centered on IPAC procedures, *Levac v. James*, 2023 ONCA 73, the Ontario Court of Appeal held that IPAC is akin to a systemic policy or practice that is intended to be applied consistently (para. 49). There is therefore no variance amongst residents or need for evidence from individual class members to answer this common question. Indeed, the very fact of the common issues trial in *Levac*, which answered the certified common issues of, *inter alia*, duty of care, standard of care and breach, and causation (all similar to the proposed common issues here), provides persuasive authority that these questions are capable of being answered in common. The trial determinations were upheld by the Ontario Court of Appeal.

[56] I find on the record of admissible evidence that the plaintiff has met the very low threshold of establishing there is some basis in fact that the common issue of breach of the standard of care as framed can be decided as a common issue. In my view, proceeding as a class action on this issue will avoid duplication of fact-finding or legal analysis.

(c) If the answer to common issue (2) is "yes", did Northwood Halifax's breach(es) of the duty of care cause ~~or contribute to~~ the harms suffered and/or losses incurred by the class members?

[57] The plaintiff clarified in their Reply Brief and at the motion hearing that they expect that the common issues trial judge will determine factual causation using the classic "but for" test and say that the words "or contribute to" may be removed from the proposed common issue.

[58] The defendants argue that the distinction between Northwood Manor and Northwood Centre necessitates separate causation analyses. No evidence was filed to demonstrate how there is any meaningful difference between the two sections of the Facility regarding IPAC practices, or why a separate causation analysis would be warranted.

[59] The plaintiff argues whereas the breach of the standard of care alleged concerns the whole Facility, causation may be assessed on the basis of statistical evidence. The plaintiff refers to *Levac v. James, supra*, wherein the Ontario Court

of Appeal found no error in the trial judge's reliance on statistical evidence in drawing a class-wide inference that the defendants substandard IPAC caused the infections (at para. 70).

[60] The plaintiff's argument continues that the very purpose of IPAC policies makes it plain that failure to adhere to the policies can cause the spread of viral respiratory diseases, here COVID-19, which, in turn, can lead to death. In cases of viral outbreaks, like COVID-19, the connection between alleged systemic IPAC failures and resident deaths is both direct and obvious. Given this, the proper focus of the "workable methodology" requirement is, to the extent applicable here, on the "class-wide" aspect of causation. Applied to this case, the "workable methodology" requirement is for some evidence of a method by which, at trial, it can be proven, on a balance of probabilities, that but for the defendants' negligence, the deaths of these 53 Residents from COVID-19 would have been avoided.

[61] The plaintiff says that the distinction between general and specific causation essentially collapses here because COVID-19, once introduced into a congregate care setting, spreads broadly and rapidly. If the trial judge determines that yes, but for the defendants' actions and omissions, the rate of death from COVID-19 at the Facility would not have occurred, that is the end of the causation analysis. There is no further individual causation analysis required. Quite simply, if the defendants' IPAC practices failed, the entire Facility faced the same heightened risk of exposure and death, justifying a class-wide causation analysis.

[62] With respect, I do not accept this argument. It contemplates a sole remaining issue to be resolved after the common issues trial: resolving the appropriate quantum of damages for each class member, taking into account relevant factors in awarding damages under the *Fatal Injuries Act*. As discussed during the hearing, the proposed common issue question on causation does not end the causation determination for a *Fatal Injuries Act* claim. It merely answers whether the plaintiff has established a sufficient factual causation link (based on statistical analysis) between the breach of the standard of care and the acquisition of COVID-19 by the Deceased Residents. The entitlement to damages is based on a further necessary finding that COVID-19 was the factual cause of death for each Deceased Resident. That issue must remain for determination on an individual basis.

[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. In *Pro Sys*, *supra*, the Supreme Court of Canada provided the following commentary on the standard to which the proposed methodology must be proven:

> [118] In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis ... The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.

[64] Here, the plaintiff's expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. More precisely, the workable methodology must be capable of proving the breach of the standard of care was the cause in fact for the 53 Deceased Residents to contract COVID-19. The plaintiff must show a workable methodology that is capable of proving causation on the basis of "statistical evidence".

[65] The plaintiff has failed to meet this evidentiary burden. The plaintiff identifies no evidence in the record which actually explains, or even identifies, this workable methodology. Unlike the Ontario cases relied on by the plaintiff, there is no epidemiological expert evidence before me. There is no evidence to establish some basis in fact in this case that a statistical epidemiological approach to determining causation can be taken (as was done by the court in *Levac*). With respect, I am unable to certify the causation question on the basis of the record before me.

[66] I refuse to certify causation as a common issue.

Section 7(1)(d) A Class Action Must be the Preferable Procedure

[67] Section 7(1)(d) directs the court to certify a class proceeding when a class proceeding is preferable for the fair and efficient resolution of the dispute. Section 7(2) of the *Act* provides the following guidance:

> 7 (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, the court shall consider
>
> (a) whether questions of fact or law common to the class members predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings;

> (c) whether the class proceeding would involve claims or defences that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means; and
>
> (f) any other matter the court considers relevant.

[68] In addition, s. 10 of the *Act* instructs that the court shall not refuse to certify a class proceeding by reason only that:

> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> (b) the relief claimed relates to separate contracts involving different class members;
>
> (c) different remedies are sought for different class members;
>
> (d) the number of class members or the identity of each class member is not ascertained or may not be ascertainable; or
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

[69] The preferable procedure analysis should be conducted through the lens of the three primary objectives of class proceedings – access to justice, judicial economy, and behaviour modification: *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69, at paras. 22-23; *Hollick*, *supra*, at para. 27.

[70] *Fischer* clarified that preferability is a comparative analysis that asks whether a class proceeding is preferable to all reasonably available means of resolving class members' claims, compared to whatever other forms (court and non-court alternatives) of resolving class members' claims may realistically may be available (paras. 35-36). The preferability analysis is not about whether a class action will realize each goal of judicial economy, behaviour modification and access to justice (para. 22).

[71] The Court in *Hollick* provided the following additional instruction, at para. 29:

> 29 The Act itself, of course, requires only that a class action be the preferable procedure for "the resolution of the common issues", and not that a class action be

> the preferable procedure for the resolution of the class members' claims. I would not place undue weight, however, on the fact that the Act uses the phrase "resolution of the common issues" rather than "resolution of class members' claims". As one commentator writes:
>
> > The [American] class action [rule] requires that the class action be the superior method to resolve the "controversy." The B.C. and Ontario Acts require that the class proceeding be the preferable procedure for the resolution of the "common issues" (as opposed to the entire controversy). [This] distinctio[n] can be seen as creating a lower threshold for certification in Ontario and B.C. than in the U.S. However, it is still important in B.C. and Ontario to assess the litigation as a whole, including the individual hearing stage, in order to determine whether the class action is the preferable means of resolving the common issues. **In the abstract, common issues are always best resolved in a common proceeding. However, it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court.**
>
> See Branch, *supra*, at §. 4.690. I would endorse that approach.
>
> [Emphasis added, underline in original]

[72] Here, the only alternative procedure potentially available to class members is individual lawsuits. The defendants argued that the only common issue capable of certification was duty of care, and on that basis, that a common finding of an existence of duty of care does little to advance the litigation in any meaningful way.

[73] The claims in this matter are made under the *Fatal Injuries Act* and are acknowledged by the plaintiff as having typically modest damage awards for the death of an elderly family member. The individual awards may not justify the disproportionate expenditure of resources – on legal and expert fees – required to advance the action to trial and final resolution.

[74] In actions where individual claims are not large enough to support individual actions, the Supreme Court of Canada has held that "access to justice requires access to a process that has the potential to provide in an economically feasible manner just compensation for the class members' individual economic claims: *Fischer*, at para. 50.

[75] It is also the only workable procedure for assessing the systemic issues alleged in the claim. As the Court held in *Pugliese, supra*, at para. 269:

> [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.

[76] I have found that in addition to duty of care, the identification of the standard of care and whether it was breached should be certified. In my view, a common determination of the duty of care, the identification of the standard of care, and whether there was a breach of the standard of care will go a long way to advance the litigation in a meaningful way compared to 53 individual proceedings.

[77] I am satisfied that the plaintiff has established that a class action is the preferable procedure as required by s. 7(1)(d) of the *Act*.

Section 7(1)(e) – Appropriate Proposed Representative Plaintiff and Litigation Plan

[78] Section 7(1)(e) of the *Act* outlines the final criterion for certification. The court must find that there is a 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, with respect to the common issues, an interest that is in conflict with the interests of other class members.

[79] The core requirements in evaluating the adequacy of a proposed representative plaintiff have been articulated in *Dutton, supra*, at para. 41:

> Fourth, the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative's counsel, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class.

[80] Ms. Surette is the executor of her mother's estate, and is thus a member of the proposed Class. She has sworn affidavit evidence of her preparedness to act as a representative plaintiff should the action be certified, of her understanding of the major steps in class actions, and of her acceptance of the responsibilities inherent in the role. Representative plaintiffs provide overall instruction to counsel, and help to steer the case, but they do not drive the action forward or need to know its factual or legal details.

[81] The defendants take no position on whether Ms. Surrette is an appropriate representative plaintiff.

[82] I find that that Ms. Surette would fairly and adequately represent the interests of the Class, in accordance with s. 7(1)(e)(i).

[83] In satisfaction of s. 7(1)(e)(ii), a litigation plan has been produced by the plaintiff that sets out a workable method of advancing the proceeding on behalf of the Class and of notifying class members. The proposed litigation plan is attached as Schedule "C" to the Amended Draft Certification Order filed by the plaintiff on May 24, 2024. It is detailed, and outlines a plan for the following:

(a) dissemination of notice of certification and the opt-out procedure;

(b) ongoing reporting and communication to the Class;

(c) exchange and management of documents produced by all parties;

(d) timing of case management conferences to manage the litigation, including a schedule for remaining steps in the action involving document disclosure, discovery, and exchange of expert reports;

(e) intended process for discoveries, including a conference call post-discovery to address, inter alia, refinement of the common issues;

(f) the intended plan, at this early stage of the litigation, of how the notice of determination of the common issues will be disseminated;

(g) the intended process for assessing individual damages; and

(h) the process by which Approved Claimants who are determined to be entitled to damages following the individual damages assessment can participate in voluntary sharing circles to share their experiences and come together in a healing way.

[84] The Litigation Plan also sets out a simplified process for resolving the remaining individual issues under the heading "INDIVIDUAL ISSUES PROTOCOL". This "Protocol" addresses an approach to the determination of the entitlement to, and quantum of, damages. The individual issues protocol is to be reviewed by the Court to fashion the least expensive and most expeditious method of determining the individual issues.

[85] I have concerns with this part of the Plan. First, it is put forward on the basis that causation would have been determined as a common issue and I have refused to certify causation as a common issue. Accordingly, the Plan will need to address the determination of causation in addition to damages.

[86] Second, the defendants take issue with the individual issues protocol, in that it contemplates that the court will appoint a "referee" who will determine whether each class member is eligible for individual damages and the appropriate quantum thereof based on submitted documentation. The defendants say that the proposed method is not appropriate in the context of a Fatal Injuries Claim, and would deprive the defendants of all procedural rights afforded under the adversarial system, including documentary discovery, examination for discovery and the ability to have the Court adjudicate on the issue of damages. Further, the proposed Plan does not contemplate the defendants having any input whatsoever in the determination of damages. I agree with the defendants that the proposed Protocol may be appropriate where a settlement has been reached between the parties but it does not adequately address the proper resolution of contested claims.

[87] In my view, it is premature to endorse any "Protocol" for the determination of causation and individual damages. I am not satisfied at this time that an appointed referee can or should determine causation and individual damages on the basis proposed. Accordingly, the Litigation Plan will be amended to provide that the process to determine these issues will be deferred. Of course, if and when the plaintiff is successful at the common issues trial, the parties may have views on how those remaining issues can be most effectively and efficiently resolved, and the Plan can be amended through the case management process.

Conclusion

[88] I find that a class action is the appropriate and preferable procedure to determine the common issues of whether the defendants owe the Plaintiff Class a duty of care; the appropriate standard of care; and, whether that standard of care was

breached. The issue of causation is not certified as a common issue. The Litigation Plan, as amended by my decision, is approved.

[89] In the draft Certification Order filed with the court, the plaintiff proposed that the cost of distributing the Notice of Certification to the class members should be paid for by the defendants. As the plaintiff repeatedly stated throughout her motion submissions, nothing has been decided by this motion other than the form of the litigation. No findings of fault have been made against the defendants. There is no logical reason for the defendants to be ordered to pay the costs of distributing the Notice of Certification to the class members. The costs of distribution shall be borne by the plaintiff at this time, subject to recovery at the end of the litigation if the plaintiff is successful.

[90] For the same reasons, I deny the request for costs of the motion to be paid to the plaintiff by the defendants. This motion was required to be made by the plaintiff to be able to advance the litigation as a class action. The defendants made appropriate and reasonable admissions and advanced reasonable arguments on the issues in dispute. The defendants were successful in resisting the certification of the causation issue. Success was divided between the parties. Accordingly, I believe the just and fair cost award is to award costs on the motion as costs in the cause. If the parties are unable to agree on the quantum of the costs to be awarded in the cause, I direct that they each provide me with their written submissions on that issue within three weeks of receipt of this decision.

[91] I am prepared to grant a revised Certification Order accordingly.

Norton, J.