January 21, 2022 **CV-20-648597-CP and related actions**

The *Robertson*-related Motions to Consolidate and Amend Statements of Claim

- Counsel for Ps: 8 firms as listed in the factums[1]
- Counsel for Ds: 14 firms as listed in the factums

Heard: In writing with consent of counsel

Note: *In order to make my rulings on these procedural and pleading motions more understandable to both counsel and the appeal court (should any party should seek leave to appeal) I set them out below in a succinct and easy-to-read fashion. By "LTC" I mean Long Term Care Homes.*

Brief Background: *As all counsel well understand, these motions are the culmination of class counsels' efforts to implement this court's suggestion as to how the LTC proposed class actions should reasonably proceed. This court suggested that the Roberston/LTC proposed class action (with some 96 defendants) together with the other 20 related and overlapping actions should be reconstituted and reorganized into "ten or so" parallel proceedings grouped by owner/operator for easier manageability. Ps' class counsel consortium, to their credit, have now achieved the suggested reorganization and intend to advance 8 proposed class actions — one against the municipalities, and 7 others as organized by owner/operator groups: Sienna, Revera, Schlegel, Responsive, Extendicare, Chartwell, and the Independently Owned LTCs.*

Ps bring the required procedural motions to formally consolidate each of the 7 proposed class actions[2] and amend the related statements of claim — adding, removing and correcting parties or parties' names and generally fine-tuning the consolidated pleadings. It is important to understand that it is the overlapping and related constituent claims in each of the proposed class action groupings that are being consolidated and it is the consolidated pleadings incorporating the contents of the constituent claims in each of the proposed class action groupings that are being amended. There are no surprises and no limitation issues. Ps submit, in my view correctly, that the motions fall comfortably within Rules 5, 6, 26 and 1.04 and the case management powers provided to this court under s. 12 of the CPA. Ds, however, resist these motions and advance an array of objections.

My rulings and reasons are set out below. I begin by noting that I am somewhat inclined to agree with Ps that Ds' opposition to these motions is more about an attempt to prematurely contest certification and force either a disaggregation of the claims or a reissuance of the consolidated actions under the amended CPA because of some perceived advantage in the amended CPA's certification requirements. And less about any real instances of unfairness or non-compensable prejudice.

Decisions: This court agrees with Ps on each of the issues in dispute and grants Ps' motions for consolidation and amendment — but with some qualifications and two exceptions (City of Kingston and Comhold Investments) as noted below.

Rulings and reasons: I begin with the rulings that, in my view, are almost self-evident:

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[1] As a judge, I prefer "factums" to "facta" – less pretentious and now accepted by all dictionaries as common usage.

[2] Counsel for the defendants in the Municipal Actions have consented to the consolidation of the actions involving the municipalities, reserving their right to make submissions at certification re the application of SORA, the amended CPA, and other relevant matters.

(i) ***Carriage Order.*** The July 24, 2021 draft Carriage Order re the Ontario Action did not dismiss the omnibus Robertson/LTC action. This is, with all due respect, a silly submission that not only defies common sense but is untenable in light of the CPA requirement for leave to discontinue proposed class actions. It is also contrary to what was said by this court in the Carriage Decision and what was discussed at case conferences and in correspondence between counsel. There was never any suggestion that only the action against Ontario would proceed and the omnibus Robertson action would be dismissed in its entirety. In any event, given that the Carriage Order has not yet been issued, Ps can propose a revised draft Carriage Order that makes the obvious even more obvious.

(ii) ***SORA s. 2(1).*** Ps' interpretation of s. 2(1) of SORA is indeed correct. Ds' interpretation is grammatically unsound and untenable. On a plain reading of s. 2(1) (and without referring to what was stated and confirmed to the same effect many times over by AG Downey during the Legislative Debates) — no cause of action arises where D made a good faith effort to comply **AND** was not grossly negligent. That is, a cause of action will arise if P *either* pleads D's lack of good faith effort *or* facts amounting to gross negligence. Here, with the two exceptions noted below, Ps have sufficiently pleaded one or the other or both.

(iii) ***Gross negligence*** is not a distinct cause of action under Ontario law and need not be pleaded specifically. It is sufficient, as here, that one of more of the constituent pleadings imported into the consolidated grouping allege material facts that can arguably amount to gross negligence: see the detailed listing in Ps' Reply Factum Sched. D. Given this reality, there is no need to consider Ps' equally compelling submissions re the allegations relating to Ds' lack of good faith effort. In any event, I note that this allegation has been sufficiently established in the pleadings as well, whether explicitly or otherwise.

(iv) ***SORA and automatic dismissal.*** Ps are right that SORA does not operate to extinguish claims automatically. The application of SORA is fact-specific and is determined by the court on a case-by-case basis. For example, whether allegations relating to good faith efforts or gross negligence are sufficiently established in the pleadings requires actual judicial consideration. Dismissals are not automatic without some level of judicial review.

(v) ***The amended CPA.*** Ps are also right about the amended CPA issue. The amended CPA provisions (and, in particular, the meaning of "superiority" and "predominance") have yet to be judicially interpreted and applied. There is no good reason to assume that the court's application of the different certification vocabulary would necessarily result in materially different outcomes *on the alleged facts herein.* Any suggestion to the contrary today is speculative and premature and cannot reasonably provide the basis for a non-compensable prejudice finding.

I now turn to the rulings that are not as self-evident:

(vi) ***Old CPA, new CPA, same proceeding.*** There will be occasions, perhaps even here, where the certification judge will need to consider and apply the differently-worded certification requirements for different claims in the same proceeding. I have every confidence that class action judges, myself included, will be able to do so and explain their analyses in a reasonably straight-forward fashion. The prospect of old and new CPA provisions applying in the same certification may make for detailed judicial analysis but the analysis is manageable and should not be a cause for concern.

(vii) ***Presumptive commencement date of the consolidated proceedings***. In my view, the commencement date of the consolidated proceedings should at least *presumptively* correspond to the date of the issuance of the constituent claims. The applicability of either the CPA or the amended CPA is based on the timing of the commencement of *proceedings* under the statute, not the addition of *causes of action* and their underlying material facts: see s. 39(1). I also note that Ps suggested approach (discussed next) sensibly defers some of the analysis to the certification motion.

(viii) ***Underlining and deferring makes sense.*** As Ps have proposed and as the draft amended consolidated pleadings reflect, amendments relating to new parties and new material facts (relating for example to new Covid outbreaks) have been underlined for easy identification. At certification, this court may consider whether the underlined portions (new entities other than misnomers or new material facts) should attract any procedural or substantive rights under the amended CPA. In my view, deferring these deliberations to certification where the court will have more complete motion records is a fair and reasonable approach.

(ix) ***Misnomer and the "litigation finger"***. I agree with Ps that the notice requirement is not engaged where, as here, the limitation period has not yet expired and the proposed new Ds have failed to demonstrate that any non-compensable prejudice would be caused by being added to the claims. As for Ds' submission that that this court has no discretion to add new Ds that did not have any cases of Covid among their residents, I note that the proposed class definitions in one or more of the constituent claims in Revera, Sienna, Chartwell and Responsive includes all residents regardless of whether they were infected with Covid-19.

I also note that Ds provided no authority for the proposition that this court lacks discretion to add new Ds that did not have any cases of Covid among their residents. More specifically, Ds do not explain how the proposed amendments would be unreasonable or unjust, which is the primary consideration on misnomer motions. As MacLeod J. noted in *Loy-English*, "[t]he object of pleading analysis should not be one of looking for traps, tricks or loopholes".[3] Courts should not take an unduly narrow approach to the pleadings; and on the evidence herein there is simply no good reason to deny these motions to amend pleadings before the expiry of limitation periods.

(x) ***No evidence of any non-compensable prejudice.*** When all is said and done, there is nothing unreasonable or unfair in the motions to consolidate and amend. Ds have filed no evidence of any genuinely non-compensable prejudice that would preclude the proposed consolidations and pleading amendments.

I complete my list of rulings by referring to two specific Ds, the City of Kingston and Comhold Investments:

(xi) ***City of Kingston***. My decision on this issue is deferred. The City of Kingston, owner of the Rideaucrest Home and a proposed D in the consolidated Extendicare action, protests its inclusion in the LTC proceedings because, *inter alia,* Rideaucrest had no Covid-related deaths or even infections. Ps respond with a number of nuanced points that are somewhat persuasive but not completely so. Before I decide this issue, I would welcome a brief sur-reply factum from the City of Kingston — I ask for this because Ds' Joint Sur-Reply Factum made no submissions relating to the City of Kingston. Once I receive this additional factum from the City, I will issue an Addendum to this Endorsement setting out my decision in this

[3] *Loy-English v. The Ottawa Hospital et. al*., 2019 ONSC 6075 at para. 21(i).

regard. Alternatively, counsel may choose to resolve this item on their own without further involving the court — for example, agreeing on a consent dismissal but with leave to amend or some other resolution.

Counsel for Ps and the City to advise how they intend to proceed.

(xii) ***Comhold Investments***. The only allegation specific to Comhold Investments in the plaintiffs' proposed consolidated pleading is that Comhold owns Medlaw which owns and operates the Pinecrest LTC in Bobcaygeon. I agree with Ds that it is not clear what duty of care was owed (or breached) by Comhold as owner of Medlaw, nor in what capacity it was involved in the operations of the LTC other than as the parent corporation of Medlaw. The pleadings require amendment. The claim against Comhold Investments is dismissed but with leave to amend.

This concludes my list of rulings. I would ask that counsel advise if I have missed any items or matters that should have been addressed in this Endorsement. Counsel in the City of Kingston matter should get back to me as soon as they can and indicate how they wish to proceed.

Orders to go accordingly.

Costs: Ps have prevailed on the bulk of the issues in dispute and are entitled to costs. Some portion of the costs relating to item (viii) should probably be deferred to the certification motion — if either side disagrees, they can make appropriate submissions.

If costs cannot be resolved by the parties, I would be pleased to receive Ps' written submissions within 30 days and D's responding submissions within 30 days thereafter, and if more time is needed, to be advised accordingly. Ideally, Ds should try to co-ordinate their responses and forward a joint responding submission. If this cannot be achieved, then multiple submissions will of course be accepted. Ps may provide a very brief reply within 10 days of Ds' response.

I thank all counsel for their assistance.

Signed: *Justice Edward Belobaba*

Notwithstanding Rule 59.05, this Judgment [Order] is effective and binding from the date it is made and is enforceable without any need for entry and filing. Any party to this Judgment [Order] may submit a formal Judgment [Order] for original signing, entry and filing when the Court returns to regular operations.