IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Anastasiades v. Revera Inc.,*
2023 BCSC 1102

Date: 20230627
Docket: S218980
Registry: Vancouver

Between:

Roanda Lila Anastasiades

Plaintiff

And

Revera Inc., Revera Long Term Care Inc., Revera LTC Managing GP Inc., AXR Operating (BC) LP, and AXR Operating (BC) GP Inc.

Defendants

And

Scott Health Services Inc. dba Nurse Next Door, Nurse Next Door Home Healthcare Services, Vancouver Inc., Plan A Long Term Care Staffing & Recruitment Inc., Duke Refrigeration & H.V.A.C. Ltd., Carmichael Engineering Ltd., Coral Canada Wide Ltd., Compass Group Canada Ltd. Groupe Compass Canada Ltee, c.o.b. as Marquise Hospitality, and Pinkerton Consultation & Investigation (Canada) Inc./Pinkerton Consulting & Investigations (Canada) Inc.

Third Parties

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Before: The Honourable Justice Ahmad

Reasons for Judgment

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Place and Dates of Hearing:	Vancouver, B.C. May 15 and 16, 2023
Place and Date of Judgment:	Vancouver, B.C. June 27, 2023

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I. Introduction

[1] It is well known that residents of long-term care facilities were affected by the COVID-19 pandemic in British Columbia. In the year after the BC government declared a provincial state of emergency in March 2020, there were 782 deaths due to COVID-19 in long-term and assisted living facilities in BC.

[2] The defendants – collectively referred to here as "Revera"[1] – own, operate, and manage eight long-term care facilities in BC (the "Care Homes"). In this action, commenced under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*], the plaintiff, Roanda Lila Anastasiades, claims that as a result of the defendants' failures regarding the planning, preparation, and response to the COVID-19 virus at the Care Homes, she and the proposed class members have suffered loss and damages relating to their or their loved ones' contraction of the COVID-19 virus.

[3] Revera denies all allegations of wrongdoing. However, while maintaining its denials, it has filed an Amended Third Party Notice (the "ATPN") against various independent third party contractors.[2] Revera says these contractors provided the services that gives rise to the allegations in the plaintiff's claim against Revera. Given the Third Parties' role in performing the services they did, Revera says that if it is liable to the plaintiff, it is entitled to contribution and indemnity from the Third Parties.

[4] At this hearing, the Third Parties make an application to strike, and are seeking an order to set aside and dismiss the ATPN on the basis that the claims against them are bound to fail. Revera opposes that application. It has filed a

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[1] Revera Inc., Revera Long Term Care Inc., Revera LTC Managing GP Inc., AXR Operating (BC) LP, and AXR Operating (BC) GP Inc. (collectively, "Revera")

[2] Carmichael Engineering Ltd., Scott Health Services Inc. dba Nurse Next Door, Plan A Long Term Care Staffing & Recruitment Inc., DUKE Refrigeration & H.V.A.C. Ltd., Coral Canada Wide Ltd., Compass Group Canada Ltd. Groupe Compass Canada Ltee, c.o.b. as Marquise Hospitality, Pinkerton Consultation & Investigation (Canada) Inc./Pinkerton Consulting & Investigations (Canada) Inc. (collectively, the "Third Parties")

separate application allowing it to amend the ATPN and file a Further Amended Third Party Notice (the "FATPN").

II. BACKGROUND

A. The Pleadings

1. Further Amended Notice of Civil Claim (FANCC)

[5] Although grounded in various causes of action, including negligence / gross negligence, generally speaking, the plaintiff's claims against Revera are based on the following alleged failures:

a) to "adequately and properly plan, prepare for, and respond to the COVID-19 virus";

b) to "implement appropriate protocols or devote sufficient staff and resources to protect residents and bring outbreaks under control"; and

c) to "observe reasonable standards and practices and comply with public health guidelines and directions, including Federal Guidance, Provincial Guidance, and the [*Residential Care Regulation*, B.C. Reg. 96/2009]" regarding: (i) outbreak planning and response, (ii) supply, use, and access to personal protective equipment, (iii) visitor, supplier, and service personnel screening, (iv) resident isolation and testing, (v) staffing levels, and (vi) employee testing and screening.

[6] At sub-paras. 48(a) to (o) of the FANCC, the plaintiff sets out more details of those alleged failures, as follows:

a) failing to implement an adequate pandemic response plan for residents, or at all, when it was obliged to do so at common law and under contract and knew, or ought reasonably to have known, that such a plan was required to safeguard the health, safety, well-being and dignity of the residents;

b) failing to conduct adequate visitor screening in accordance with public health guidance and directives;

c) failing to undertake adequate screening and testing measures for staff, including staff who exhibited symptoms of COVID-19 or worked

in close contact with presumed, suspected, or confirmed cases of COVID-19;

d) failing to undertake adequate screening and testing measures for residents, including residents who exhibited symptoms of COVID-19 or who had been in close contact with presumed, suspected, or confirmed cases of COVID-19;

e) failing to ensure that staffing levels in the Homes were sufficient to provide the expected and proper standard of care to residents;

f) failing to ensure that staff and contractors providing care to residents were adequately trained, including in the prevention, identification and control of COVID-19 outbreaks in the Homes;

g) failing to communicate adequately or at all with families of residents;

h) failing to communicate adequately with public health officials;

i) failing to adequately supply or require [personal protective equipment] for visitors, residents, suppliers, contractors, and other individuals who entered the Homes in accordance with public health guidance and directives;

j) failing to undertake adequate contact tracing, in a timely manner or at all;

k) failing to ensure the [Care] Homes were adequately ventilated;

l) failing to maintain a reasonably safe and clean environment within the [Care] Homes;

m) failing to take reasonable steps to protect the health and safety of residents;

n) failing to follow public health guidance and directives, including the Provincial Guidance and Federal Guidance; and

o) such further acts or omissions as become known to the plaintiff.

(collectively, the “Alleged Failures”).

[7] The plaintiff alleges that, among other things, the Alleged Failures amount to gross negligence.

[8] She claims that as a result of the Alleged Failures, the COVID-19 virus spread through the Care Homes, infecting residents and causing loss and damages to her and the proposed class members, including all residents of the Care Homes, whether they contracted COVID-19 or not, and the estates and family members of residents who passed away after testing positive for COVID-19.

[9] The FANCC does not provide how the Alleged Failures caused the spread of the COVID-19 virus through the Care Homes.

2. Response to Amended Notice of Civil Claim (RANCC)

[10] Revera has not yet filed a response to the FANCC. It has filed a response to the Amended Notice of Civil Claim ("ANCC").

[11] In its response to the ANCC, Revera expressly denies that it committed the Alleged Failures. It states that it complied with all applicable regulations, public health guidelines and directives, and that "there was nothing more that they reasonably could, or should, have done to prevent the presence or spread of COVID-19 in the [Care Homes]".

[12] Revera states:

> Throughout the COVID-19 Pandemic, [Revera] hired various contractors to perform services in the [Care] Homes. These contractors were not Revera employees but rather had an independent contractor relationship with [Revera].

[13] The RANCC describes the scope of work provided by the Third Parties under three categories: staffing; ventilation; and cleaning, screening, housekeeping and one-on-one resident care.

[14] While maintaining its denial of liability, Revera asserts that if liability is found against it, any damages or losses suffered by the plaintiff and the proposed class members were "caused or contributed to by the breach of duty, negligence, gross negligence, and/or breach of contract of the [Third Parties] with whom [Revera] contracted to work in the [Care] Homes…".[3] Revera goes on to set out what it describes as "particulars" of those wrongdoings for each of the Third Parties.

[3] This allegation and particulars are contained, not in the facts section of the ARNCC, but in Part 3: Legal Basis. For the purpose of this application.

3. Amended Third Party Notice (ATPN) / Further Amended Third Party Notice (FATPN)

[15] At the time Revera filed the RANCC, it also filed a third party notice, which was subsequently amended by the ATPN. Since then, Revera has prepared a Further Amended Third Party Notice (the "FATPN").

[16] On this application, Revera seeks leave to amend the ATPN and file the FATPN.

[17] In both the ATPN and the FATPN, Revera repeats its denial of liability provided in the RANCC, but pleads in the alternative that if it is held liable to the plaintiff and/or the proposed class members, Revera is "entitled to contribution and indemnity from the Third Parties on the basis that each of the Third Parties carried out services for [it] that are alleged to have been carried our negligently". It sets out the services provided by each of the Third Parties under the same three broad categories referred to in the RANCC.

[18] In the FATPN, Nurse Next Door Home Healthcare Services, Vancouver Inc. was added as one of the Third Parties having provided services to Revera.

[19] In the proposed FATPN, Revera seeks the same relief set out in the ATPN, which includes:

a) declarations that:

i. "to the extent Revera [is] liable for the [p]laintiff's, or any of the Putative Class Members' loss, damage or expense, such loss, damage or expense was caused in whole or in part by the breach of duty, negligence, gross negligence, and/or breach of contract of the Third Parties";

ii. Revera is entitled to contribution and indemnity pursuant to s. 4 of the *Negligence Act*, R.S.B.C. 1996, c. 333;

b) Indemnification from the Third Parties in accordance with their degree of fault, "for any amount that may be due from [Revera] to the Plaintiff of the Putative Class Members…".

[20] In the proposed FATPN, Revera:

a) Sets out the Alleged Failures exactly as those are set out in the plaintiff's FANCC against Revera, and specifically denies any liability for the Alleged Failures (paras. 10 and 13);

b) States that each of the Third Parties carried out the services that are implicated by the Alleged Failures and that, if Revera committed the Alleged Failures, they were therefore caused by or contributed to by the Third Parties (paras. 14–16);

c) Sets out the services provided by each of the Third Parties and the ways in which Revera alleges those services caused or contributed to the Alleged Failures (paras. 32–46); and

d) States that if the plaintiff and/or the proposed class members suffered loss and damages, it was caused by breach of duty, negligence, gross negligence, and/or breach of contract of the Third Parties (paras. 58–70).

[21] Revera does not provide how the Third Parties' services caused the spread of the COVID-19 virus through the Care Homes.

4. Third Party Responses to ATPN

[22] None of the Third Parties have filed a response to the ATPN.

B. Litigation Status

[23] The class proceeding certification hearing is set to commence on December 4, 2023. The Third Parties have also scheduled two tentative applications to be heard on August 24 and 25, 2023, including an application for the summary dismissal of the third party claims. If those claims are not dismissed, they anticipate

seeking standing to participate at the certification hearing. Whether either application is necessary will depend on the outcome of their applications to set aside and dismiss the ATPN currently before me.

[24] Given the timeline of those applications, at the conclusion of this hearing I advised counsel that I would provide them with my decision as soon as possible. By memorandum dated May 30, 2023, I advised counsel that, having reviewed the materials and considered the submissions of the parties, my decision is as follows:

a) The third party proceedings are stayed pending the determination of the certification hearing;

b) For certainty, the stay of the third party proceedings also applies to:

i. the applications of the third parties to strike the third party claims;

ii. the possible applications to dismiss the third party claims; and,

iii. with the exception noted below, the defendants' application to further amend the ATPN by way of the FATPN;

c) Notwithstanding the stay of the third party proceedings, the Third Parties are at liberty to apply for standing to participate in the certification hearing; and,

d) The third party action against Nurse Next Door Home Healthcare Services, Vancouver Inc. is discontinued and the style of cause is to be amended accordingly.

[25] I advised the parties that reasons for that decision would follow. These are my reasons.

III. ISSUES

[26] The substantive issues to be considered on these applications are:

a) Should the ATPN be set aside and Revera's third party claims dismissed; and

b) Should Revera be granted leave to further amend the ATPN in the form of the FATPN?

IV. DISCUSSION AND ANALYSIS

A. The Third Parties' Applications to Strike the ATPN

1. Legal Framework

[27] Rule 3-5(8) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, provides the court with the broad discretion to set aside third party proceedings: *The Owners, Strata Plan LMS 1751 v. Scott Management Ltd*., 2010 BCCA 192 at para. 72, citing *Lui v. West Granville Manor Ltd.*, 1985 CanLII 155 (BC CA), 61 BCLR 315.

[28] A third party notice may be set aside on the same grounds that a notice of civil claim may be struck pursuant to Rule 9-5(1): *Ari v*. *Insurance Corporation of British* Columbia, 2021 BCCA 180 at para. 67, citing *McNaughton v. Baker*, 1988 CanLII 3036 (BC CA) at para. 18, 25 B.C.L.R. (2d) 17.

[29] The applicable test under Rule 9-5(1) is well-known: a claim will be struck if, assuming the facts pleaded to be true, it is plain and obvious that the claim has no reasonable prospect of success, or is certain to or bound to fail: *Nevsun Resources v*. *Araya*, 2020 SCC 5 at paras. 64–65 and 144.

[30] A class action claim, or any claim, is bound to fail if it pleads insufficient material facts to support any element of the cause of action: *Sharp v*. *Royal Mutual Funds Inc.*, 2021 BCCA 307 at paras. 30 and 34; *McNaughton* at para. 21.

[31] In deciding whether a claim is bound to fail, the pleadings ought to be read generously and considered as they might reasonably be amended: *Nevsun Resources* at para. 143, citing *British Columbia/Yukon Association of Drug War Survivors v*. *Abbotsford (City)*, 2015 BCCA 142 at para. 15.

2. Position of the Parties

[32] It is the Third Parties' position that Revera fails generally to provide material facts regarding the allegations of wrongful acts or omissions committed by the Third Parties and regarding how their conduct caused the losses alleged by the plaintiff. They argue that the requirement to plead material facts is heightened in the context of this action in which immunity legislation had been enacted to restrict claims relating to the COVID-19 pandemic.

[33] Pursuant to s. 5(1) of the *COVID-19 Related Measures Act*, S.B.C. 2020, c. 8 [*CRMA*], [4] no legal proceedings for prescribed damages related to the COVID-19 pandemic lie or may be commenced or maintained against certain prescribed persons.[5] The exception to the operation of s. 5(1) is a claim for gross negligence: *CRMA*, s. 5(2). The *COVID-19 (Limits on Actions and Proceedings) Regulation*, B.C. Reg. 204/2020, provides that s. 5(1) of the *CRMA* only provides immunity if the prescribed person was acting in accordance with all applicable emergency and public health guidance, or had a reasonable belief that they were doing so.

[34] The Third Parties argue that both Revera's ATPN and FATPN fail to set out the material facts for a claim grounded in gross negligence, as is required to render the claim outside of the *CRMA* protections. In particular, they argue that Revera's third party claim fails to provide material facts with respect to: (a) the conduct that amounts "gross negligence", (b) the emergency and public health guidance applicable to each of the Third Parties and when and in what ways the Third Parties failed to act in accordance with that guidance, or (c) whether and when the Third Parties lacked reasonable belief that they were not acting in accordance with the same.

[4] Repealed in late 2022, but in effect at the time of the Alleged Failures.
[5] Section 3(2)–(3) of the *COVID-19 (Limits on Actions and Proceedings) Regulation*, B.C. Reg. 204/2020, states that a "prescribed person" includes persons engaged in acts including (a) the operation or provision of an essential service, or (b) an activity, including a business, that is carried on for direct or indirect gain or profit. For the purposes of this application, I have assumed that the Third Parties are a "prescribed person" as considered under s. 5(1) of the *CRMA.*

[35] Revera argues that for a third party notice to be struck, the applicant has an extremely high bar to meet: the third party claim must have "no reasonable prospect of success" and be "certain to fail", and furthermore, that the case to strike a pleading as failing to disclose a cause of action must be "perfectly clear": *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465 at paras. 20–22. Revera argues that the Third Parties' applications fall significantly short of that bar.

[36] In any event, Revera argues that the circumstances and the context of this matter make it premature to set aside the ATPN at this early stage in the proceeding. That context includes the complex claims raised in the proposed class action, the fact that the proceeding is in the pre-certification stage, and the "flow-through" nature of its third party action.

3. Discussion and Analysis

[37] In support of their applications, the Third Parties refer to cases that consider applications to strike generally, and cases where the courts have considered claims that are subject to immunity legislation and claims for gross negligence.

[38] They place particular reliance on the decisions in *Polanski v. Scharfe*, 2016 ONSC 3861, and *Ferrer v. 589557 B.C. Ltd.*, 2020 BCCA 83, in respect of what they allege are the deficiencies in Revera's claims for gross negligence. Those decisions provide that bald allegations are an insufficient basis for a claim for gross negligence. They argue that a pleading of gross negligence requires specific pleading of material facts that the defendant's conduct constituted reckless disregard or a marked departure from the standard of care, and not just "mere negligence": *Canadian National Railway Company v. Holmes*, 2015 ONSC 3038 at paras. 24–25.

[39] In this case, the Third Parties argue that Revera's FAPTN does not set out the standards of care that might apply, whether there was any marked departure from or reckless disregard for that standard, or the manner or timing of such a departure.

[40] The third parties also rely on decisions in which courts considered applications to strike claims made in the context of immunity legislation similar to the *CRMA*. Those cases emphasise that the necessity of pleading material facts to ground a claim in gross negligence may be heightened in cases where immunity legislation requires such a pleading: *Khan v. Law Society of Ontario*, 2021 ONSC 6019, and *Cirillo v. Ontario*, 2020 ONSC 3983, aff'd 2021 ONCA 353.

[41] While the cases relied on by the third parties do contemplate the types of claims that Revera had made in this case (i.e., for gross negligence or under various immunity statutes), none are considered in the specific context of this case – that is, in which the claim is made either: (a) at the pre-certification stage of a proposed class proceeding, or (b) not as an originating action, but as a third party claim.

[42] As noted, Revera argues the context and complex nature of this action make an application to strike premature at this stage. Before turning to the substantive aspects of the applications to strike, I will consider that argument.

a) Is it premature to make the application to strike?

i. Is it premature to determine the applications to strike the ATPN at the pre-certification stage of the proposed class action?

[43] Revera argues that a proposed class action is an "action with ambition", and this unique status makes it premature to determine the application to strike at the pre-certification stage: *MacKinnon v. Instaloan Financial Solution Centres (Kelowna) Ltd.*, 2004 BCCA 472 at para. 33.

[44] Revera relies on the decision in *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Agriculture and Lands)*, 2009 BCSC 1593, in which the court considered a pre-certification application for particulars that the defendant argued were the material facts necessary to ground the cause of action. There, the application was dismissed because the court concluded it was premature to require the plaintiff to provide particulars, not material facts at the pre-certification stage.

[45] The Third Parties do not argue that Revera has failed to provide sufficient particulars. As they concede, no demand for particulars has been made. They argue that Revera has failed to disclose material facts. In my view, in relying on the decision in *Kwicksutaineuk/Ah-Kwa-Mish First Nation*, Revera has failed to distinguish between the two.

[46] In *Kwicksutaineuk/Ah-Kwa-Mish First Nation*, the court noted the distinction between the necessity for material facts and the necessity for particulars at the pre-certification stage:

> [41] … As Hanssen J. noted in *Bellan v. Curtis*, 2007 MBQB 221 at para. 21, 219 Man. R. (2d) 175, "[t]here is a substantial difference between the particulars [the defendants] require for the certification hearing or to file their statements of defence and the information they may later require for the purposes of trial."
>
> …
>
> [44] … in my view it is clear that the *Cansulex* factors and the traditional approach for ordering particulars under *Rule* 19 must be applied with due regard to the nature of an intended class proceeding, keeping in mind that a certification application is not a trial of the action on its merits.
>
> [45] Accordingly, the question in the present matter is not whether a further statement of material facts may be necessary in order to prepare for trial. As this is a proposed class proceeding, the question is whether the certification materials, which include the Statement of Claim, provide the defendants "… with sufficient information so that it understands, at least in broad strokes, what the plaintiff's case is about" [citations omitted].
>
> …
>
> [49] The question become[s] this: does the pleading, the Amended Statement of Claim, make sufficient averments of material fact to establish, on the application of the law, a cause of action?
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> [Emphasis added.]

[47] In other words, while it may be premature to require Revera to provide particulars, the fact that this proceeding remains at the pre-certification stage, in and of itself, does not obviate the need for Revera to plead material facts.

[48] Notably, in *K.O. v. British Columbia (Ministry of Health)*, 2022 BCSC 573, the court struck a claim at a certification hearing on the basis that the claim did not plead material facts. In doing so, it considered the stage of the proceeding:

> [18] I am aware that I am not supposed to parse or fuss at this early stage, but to wave through any arguable cause of action, however novel or seemingly implausible, and to certify it as a class proceeding as long as the other statutory criteria are satisfied. I remind myself that the line between material facts and bald allegations can be elusive, that I am to assume that any material fact alleged is true, that a broad and generous approach is required, and that my role on this application is only to ensure that the pleadings define the facts and issues in dispute between the parties with enough precision to make the pre-trial and trial proceedings manageable and fair [citations omitted].
>
> [19] On the other hand, if insufficient material facts are pleaded to support every element of a proposed cause of action, then it is bound to fail: *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500 at para. 11. While I recognise that a certification application is not the place for findings of fact or a determination of the case on the merits, it is appropriate and necessary to subject the pleadings to a sceptical analysis to determine their true character: … Merely symbolic scrutiny of the claim at the certification stage will not suffice [citation omitted].
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> [Added emphasis].

[49] On the basis of the above, I am satisfied that it may be premature to require a claimant to provide particulars prior to certification of a class action. I am equally satisfied however that, barring the considerations that I will discuss below, material facts are required at the pre-certification stage.

[50] Given that conclusion, the applications to strike may well be informed by a determination of whether the further information sought by the Third Parties are properly characterized as material facts or particulars. However, before that analysis, I will consider the “flow-through” nature of Revera’s claim and whether that impacts the applications to strike at this stage.

ii. Is it premature to determine the applications to strike the ATPN given Revera’s claim as “flow-through” third party claim?

[51] As the starting point on this argument, Revera emphasizes that its third party claim is a “flow-through” claim commenced pursuant to Rule 3-5(1)(a). That Rule provides a mechanism for third party claims where a party alleges they are “entitled to contribution or indemnity from the [third party] in relation to any relief that is being sought against the party in the action”.

[52] Revera's ATPN does not raise any independent cause of action or seek relief that is not directly tied to the plaintiff's claim. Revera's claims against the Third Parties are wholly dependent on the plaintiff's ability to: (a) prove liability against Revera on the basis of the material facts, including the Alleged Failures set out in the ANCC, and (b) prove that the Alleged Failures caused the alleged losses. If the plaintiff is unable to prove either, Revera's claims against the Third Parties will effectively be extinguished.

[53] The Third Parties' argument that Revera has failed to provide adequate material facts reflects on both of those necessary elements of the plaintiff's ultimate claim. As a purely "flow-through" claim, the basis of Revera's claims against the Third Parties is taken directly from and limited to the facts alleged in the ANCC. If the ATPN does not adequately set out material facts, as the Third Parties allege, that failure may be due to the fact that the plaintiff may not have adequately set out material facts in the ANCC. For the purpose of this analysis, I do not decide either point, but merely note the relationship between these pleadings.

[54] Notwithstanding the state of the plaintiff's pleadings, the Third Parties argue – and I agree – that it nonetheless remains incumbent on Revera to provide the material facts the Third Parties require in order to know the case they must meet. However, to the extent that Revera has knowledge of facts beyond those set out in the ANCC, for the reasons that follow, in my view, it would be unfair to require it to set out those facts against the Third Parties at this early stage of the proceeding.

[55] As noted in *Ari*, where potential grounds for a third party claim exist prior to certification, those third party proceedings should be commenced at the pre-certification stage. [6] Revera cites that decision, together with potential limitation issues, as the basis for commencing the third party notice when it did, at this early stage in the proceeding. The early inclusion in the process means that the third party claims have been commenced prior to Revera having had any opportunity to

[6] Although the chambers decision in *Ari* was upheld on a different basis than as set out by the chambers judge , the outcome was the same

conduct cross-examinations or discoveries that might shed further light on the plaintiff's claim.

[56] Until Revera has had the opportunity to engage in that fact-finding process, it cannot know more about the plaintiff's claim than is set out in the ANCC. In coming to that conclusion, I am guided by the determination of a similar issue in *British Columbia/Yukon Association of Drug War Survivors*, where the Court of Appeal upheld a decision of the Chief Justice of this Court adjourning an application to dismiss portions of pleadings until the completion of the discovery stage of the proceedings. The Court of Appeal noted:

> [15] It must be remembered in assessing pleadings under Rule 9-5(1) that the exercise involves assessing the claim as pleaded or as it may reasonably be amended and that the pleadings are to be read generously. This is the approach taken by the Chief Justice. In my opinion, *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42, does not change that long standing principle. In *Imperial Tobacco* there was no issue about whether amendments could be made to remedy deficiencies in the pleadings in order to state a reasonable claim. The question was whether if the action were allowed to proceed additional facts would be unearthed that would make out a claim that was not sustained by the existing pleading. The issue was not whether the claim could be better particularized after discovery to permit more specific pleading. Here the Chief Justice accepted that there were deficiencies in the pleadings stemming from their generality but took the view that those deficiencies could be remedied or might be remedied after discovery. I see no reversible error in that determination.
>
> [Added emphasis.]

[57] In my view, given the necessary inclusion of the Third Parties at the early stage of this proposed class proceeding, it is similarly appropriate to afford Revera the opportunity to conduct a more comprehensive fact-finding inquiry that may allow it to remedy any deficiencies in its pleadings against the Third Parties.

[58] Another factor also supports this conclusion on prematurity. From the commencement of the action, Revera has steadfastly denied that it committed the Alleged Failures or conducted itself in some way that would give rise to a finding of liability. Pleading material facts beyond those set out in the ANCC may well give rise to an inference, if not an admission, of the Third Parties' wrongdoing. Due to the flow-through nature of the claim, this might compromise Revera's position and

deprive it of the opportunity to maintain its denials of wrongdoing. In my view, that outcome would be unfair.

[59] To be clear, the above analysis is not to suggest that Revera is relieved of the obligation to provide the Third Parties with material facts. As I have concluded, to ultimately proceed with the third party claim, Revera will have to set out those facts. However, given the flow-through nature of the third party claims, at this stage in the proceedings it is premature to assess the adequacy of the material facts set out in the ATPN or to require Revera to produce more facts.

[60] More fundamental to that conclusion is the policy consideration of avoiding inconsistent results. This is because the test for striking the third party claim is the same as the test for assessing whether a plaintiff has met the first requirement for certification under s. 4(1)(a) of the *CPA*, that is, whether the pleadings disclose a cause of action. Both require an assessment of whether it is plain and obvious that the claim cannot succeed or, put another way, whether it is bound to fail: *K.O.* at para. 10.

[61] In this case, the facts alleged in the ATPN are drawn directly from the ANCC. A common analysis would be conducted in respect of the same set of facts. Allowing the Third Parties' applications to strike to be heard in advance of the certification hearing gives rise to two possible undesirable outcomes.

[62] First, a finding that the facts alleged in the ATPN (or the proposed FATPN) are insufficient to support Revera's claim against the Third Parties would undoubtedly support an argument that the facts alleged in the ANCC are insufficient to set out the plaintiff's cause of action against Revera. Simply put, the early determination of the Third Parties' strike application could effectively tie the hands of the Court for the certification hearing.

[63] Second, and perhaps more undesirable, is the possibility of inconsistent results. Indeed, one of the very purposes of third party proceedings is to provide

a single procedure for the resolution of related questions, issues, or remedies in order to avoid multiple actions and inconsistent findings: *McNaughton* at para. 14.

[64] In this case, the undesirable outcome of inconsistent results is demonstrated by considering the situation if the Third Parties succeed in striking the ATPN, but the plaintiff succeeds at the certification hearing and then later obtains judgment against Revera. In that case, Revera will have been deprived of the opportunity to recover against the entities who provided the services that give rise to the plaintiff's claim. That outcome cannot be in the interests of justice.

[65] For all of the above reasons, I conclude that it is appropriate that the third party proceedings be stayed pending the determination of the certification hearing. Notwithstanding that stay, given the common issues to be determined (i.e. whether the claim brought by the plaintiff against Revera and the derivative flow-through claim brought by Revera against the Third Parties are "bound to fail"), the Third Parties are at liberty to apply for standing to participate at the certification hearing.

B. Revera's Application to Amend the ATPN

[66] Given the stay of the third party action, Revera's application to amend the ATPN and file the FATPN is also stayed.

[67] However, given the parties' agreement, the third party action against Nurse Next Door Home Healthcare Services, Vancouver Inc. should be discontinued and the style of cause is to be amended accordingly.

V. Costs

[68] Section 37 of the *CPA* precludes the court from awarding costs to any party on an application for certification or to any party to a class proceeding, except in certain circumstances. However, prior to certification, the ordinary rules for the awarding of costs apply: *British Columbia* v. *Apotex Inc.*, 2020 BCSC 1335 at para. 9.

[69] As Revera was substantially successful on this application, it is entitled to costs.

"Ahmad, J."