

CANADA / JUDGMENT

## Z.H. v. British Columbia (Transportation and Infrastructure)

2025 BCSC 2544

COURT

Supreme Court of British Columbia

DECIDED

23 December 2025

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2025 BCSC 2544 Z.H. v. British Columbia (Transportation and Infrastructure)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Z.H. v. British Columbia (Transportation and Infrastructure),

2025 BCSC 2544

Date: 20251223

Docket: S222552

Registry: Vancouver

Between:

Z.H., an infant, by her Litigation Guardian, Shyama Devi Minhas

Plaintiff

**And**

His Majesty the King in Right of the Province of British Columbia (Ministry of Transportation and Infrastructure), and Dawson Road Maintenance Ltd.

Defendants

**And**

Commercial Lumber Company Limited, ABC Company #1, Evans Forest Products Ltd., ABC Company #2, Ainsworth Lumber Company Ltd., 0866740 B.C. Ltd. and Aspen Planers Ltd.

Third Parties

Corrected Judgment: The text of the judgment was corrected on the front page on January 14, 2026.

Before: The Honourable Justice Thomas

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.

January 15, 2024,

April 7-11, 2025 and

November 17-21, 2025

Place and Date of Judgment:

Vancouver, B.C.

December 23, 2025

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## Overview

- [1] This matter involves a number of vehicles that were stopped due to a landslide on Highway 99 during an adverse weather event. While waiting for the road to be cleared, a second landslide injured and killed a number of people and damaged vehicles.
- [2] The infant plaintiff seeks to certify a class action pursuant to the common law duty of care category established in *Just v. British Columbia*, [1989] 2 S.C.R. 1228, 1989 CanLII 16.
- [3] The defendants say the matter is ill-conceived because:
  - a) any duty owed to the plaintiff falls outside of the previously recognized *Just* duty;
  - b) the plaintiff has artificially pled a duty within a previously recognized category to improperly avoid a statutory limitation on liability;
  - c) potential victims of the slide cannot be placed within a defined class because the circumstances of each victim require an individual assessment to determine if he or she is statutorily prohibited from seeking compensation for injuries associated with the use of a motor vehicle;
  - d) potential victims of the slide are in an irreconcilable conflict of interest with other class members such that a class action is not feasible; and
  - e) individual issues predominate over common issues such that a class action is neither feasible nor practical.

## Procedural Issues

- [4] There were numerous procedural issues that caused the certification hearing to be adjourned on January 15, 2024. The certification hearing resumed on April 7, 2025 until April 11, 2025, where it was further adjourned at the end of the day. The hearing re-commenced from November 17 to 21, 2025.
- [5] The plaintiff provided an initial written argument (13 pages) and an initial reply argument (65 pages), which she provided to the defendants shortly before the January 15, 2024 hearing, after the plaintiff had received materials from the defendants. The initial problem was that the plaintiff elected to leave the majority of her submissions in the initial

application to her reply submissions in order to prevent the defendants from addressing substantive issues raised in the hearing. In addition, I raised questions that I felt were relevant that had not been addressed by the parties in their initial submissions, specifically with respect to the application of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 [I(V)A].

- [6] After the second adjournment, the parties were required to exchange reply arguments and advised that they would be prohibited from raising any arguments or relying on case law not referred to in their written submissions without leave of the court. The plaintiff provided six additional written reply arguments (391 pages), with the defendants responding in kind (456 pages of response arguments responding to the plaintiff's reply arguments). The parties ultimately provided a 6000-page book of joint authorities (which contained 170 tabs), a supplemental book of authorities, and additional authorities which were handed up during submissions.
- [7] The upshot of this procedural wrangling was that the issues in question, over time, eventually narrowed as many of the initial arguments by the parties were resolved or abandoned. Therefore, the positions advanced and the issues considered are narrower than the scope set out in the pleadings, including the filed class definition and common issues--both of which underwent several revisions over the course of the hearing.
- [8] Counsel did not believe it necessary to refer me to all of the written submissions and exchanges that occurred between them given this procedural history. The written arguments have been filed as lettered exhibits. I have relied upon counsel to address and bring the relevant issues and references to their written materials to my attention during the hearing. In my view, it would be inconsistent with Rule 1-3 of the Supreme Court Civil Rules, BC Reg 168/2009 and the policy reasons underlying the certification procedure--recently summarized by Justice Branch in *Moiseiwitsch v. Canadian National Railway Company*, 2025 BCSC 2377 at paras. 5-7--to address all issues raised and/or implied in the written materials that counsel did not refer me to during the hearing.

## Certification Requirements

- [9] Section 4(1) of the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA] lists the requirements to be met for certification of a class proceeding:

4(1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- (e) there is a representative plaintiff who
  - (i) would fairly and adequately represent the interests of the class,
  - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
  - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

- [10] If all of the requirements in s. 4(1) are satisfied, the court must certify the action. Certification of an action as a class proceeding is not a comment on the merits of the claim but rather a determination of whether the action can appropriately proceed as a class proceeding: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102 [Pro-Sys].
- [11] The Court has "an important gate-keeping role" in this respect: *Krishnan v. Jamieson Laboratories Inc.*, 2021 BCSC 1396 at para. 41. The CPA aims to be fair to both plaintiff and defendants, and hence certification must be a "scrupulous and effective screening process, so that the court does not sacrifice the ultimate goal of a just determination between the parties on the altar of expediency": *Thorburn v. British Columbia*, 2012 BCSC 1585 at para. 117, *aff'd* 2013 BCCA 480.
- [12] The plaintiff bears the burden of establishing that the certification test is met.
- [13] Subsection 4(1)(a), which requires the pleadings to disclose a cause of action, is evaluated using the same test as a motion to strike. A plaintiff will meet this requirement unless, assuming all pleaded facts are true, it is clear and obvious that the claim cannot succeed or has no reasonable chance of success: *Pro-Sys* at para. 63.
- [14] The pleadings should be read as a whole and be given a generous interpretation, with a view to accommodating any inadequacies in the allegations or drafting deficiencies, and without fastening on to matters of form: *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, 1985 CanLII 74 at para. 14.
- [15] Regarding ss. 4(b)-(e), the plaintiff must demonstrate "some basis in fact" for each remaining certification requirement. I agree with the recent articulation of the "some basis in fact" criteria set out by Justice Branch in *Moiseiwitsch* at paras. 115-116: "some basis in fact" requires the court to apply those words directly without any re-casting.

- [16] When assessing whether the plaintiff has met this standard, the court must recognize that certification is typically decided at the early stage of the proceedings and should not conduct a detailed weighing of evidence; rather, it should limit itself to determining if there is some evidence supporting the certification requirements: *AIC Limited v. Fischer*, 2013 SCC 69 at para. 43.
- [17] Although certification is generally a low hurdle, it presents a hurdle nevertheless, and must serve as a "meaningful screening device": *Pro-Sys* at para. 103. A judge hearing a certification application plays an important gatekeeping role to ensure that only claims in the common interest of class members are advanced, and to "weed out claims of dubious merit early in the certification stage": *Chow v. Facebook, Inc.*, 2022 BCSC 137 at paras. 10, 45.

#### Section 4(1)(a) - Cause of Action

##### The Pleadings

[18] The Amended Notice of Civil Claim pleads the following:

6. The Deceased Parents had awakened at 6 a.m. in Vernon and checked the road conditions and saw that the Coquihalla Highway was closed. All highways leading to Vancouver were closed except for Highway 99.
7. They noted that Highway 99, otherwise known as the Duffey Lake Road, was open. There was no mention of any natural disasters, warnings or alerts to warn drivers of any hazardous road conditions along this highway. The highway was shown as open and safe according to DriveBC.
8. As a result, the Deceased Parents returned home to Vancouver through Highway 99.
11. The day before the mudslide had seen a substantial and unusual amount of rain in the region. On Sunday, November 14, 2021, a forecasted "atmospheric river" dropped a highly unusual amount of rain in the region and in the vicinity of Highway 99.
12. Pemberton received 39.5 mm of rain on the Sunday, November 14, 2021, with another 50.9 mm on Monday, November 15, 2021. Lillooet received 27.8 mm of rain on the Sunday with another 33.8 mm on Monday. These were the rainiest November 14 and 15 on record for the region. They were also forecasted.
13. As a result of the "atmospheric river", rocks were strewn all over Highway 99 and muddy water was streaming down the sides of the mountain along Highway 99. This situation continued to get worse on the Monday, November 15, 2021.
16. Unusually, on November 15, 2021, all highways leading to the Lower Mainland, including the Coquihalla and Highway 7, were closed but Highway 99 remained open. This had the effect of funneling all traffic bound for the Lower Mainland through Highway 99.

17. A resource road is a road found on Crown land that is not part of the Provincial highway system.
18. The mudslide above Highway 99 started on a resource (logging) road.
19. The Crown knew or should have known the road had not been properly deactivated.
20. Deactivation is a technique for managing water and preventing slides. It involves intercepting water and directing it onto stable slopes. Drainage management is important for the stability of slopes below the road. It also involves stabilizing fills on steep slopes or stabilizing the road prism. This is all done to prevent the precise problem that arose in this case, a mudslide. It was not done on the resource road that created the mudslide in this case.
26. The Crown had failed to properly deactivate the resource road and knew what the consequences were of failing to properly deactivate a resource road that was not actively being used, thereby allowing this serious risk to users of Highway 99 to exist.

## Legal Basis

8. Given the Ministry understood the risk of mudslides and non-deactivated roads, and given the unusual weather conditions, it is entirely foreseeable mudslides would occur along steep elevated areas above the Duffey Road area and pose a very serious risk to the increased amount of motoring public along that corridor that day.
9. The Ministry had further knowledge of the resource road above Highway 99, the Duffey Lake Road, which had not been deactivated and which thereby presented a very serious risk to users of the Duffey Lake Road which would be triggered by the substantial rain in this case. This was a well understood interaction and the Crown had faced similar events in the past.

Does the Crown owe a duty of care analogous to the duty recognized in Just?

## Position of the Plaintiff

- [19] The plaintiff has put forward a confined the duty of care analogous to the duty recognized by the Supreme Court of Canada in Just, set out in *Nelson (City) v. Marchi*, 2021 SCC 41 as follows:
- [29] As demonstrated by Just and subsequent jurisprudence, the factors uniting cases under the Just category are as follows: a public authority has undertaken to maintain a public road or sidewalk to which the public is invited, and the plaintiff alleges they suffered personal injury as a result of the public authority's failure to maintain the road or sidewalk in a reasonably safe condition. Where these factors are present, the Just category will apply, obviating the need to establish proximity afresh.

[30] The Just category covers a variety of situations, including the prevention of injuries from rocks falling onto the road (Just), the prevention of injuries from trees falling onto the road (Swinamer), and the prevention of injuries from black ice on the road (Brown). It also clearly extends to the prevention of injuries from snowbanks created by a government defendant on the road and sidewalk. In our view, Ms. Marchi has proved that her circumstances fall within the scope of the Just category. As discussed below, it remains open to the City to prove that the relevant government decision was a core policy decision immune from liability in negligence.

[20] The plaintiff has constrained the duty of care question to the following question:

Is it plain and obvious that the Crown should not have had the travelling public in mind as a class of people that would be potentially harmed by the failure to deactivate the forest service road? Or to put it another way: "was there an obligation on the Crown in this case when dealing with deactivation above a highway to be mindful of the plaintiff's legitimate interests in conducting its affairs - i.e., driving on a highway?"

[21] The plaintiff says the situation at bar is analogous to the facts in *Mostertman v. Abbotsford (City)*, 2024 BCSC 906, and that the conclusion of Justice Dley equally applies here:

[39] The plaintiffs plead that Abbotsford knew of the impending danger of the weather events and that failing in its duty to properly operate the Pump Station would inevitably cause flooding and harm to those in the Outer and Inner Sumas Prairie. In the amended notice of civil claim, the plaintiffs state:

51. Knowing of the forecasted atmospheric river and presence of other factors such as the increased the risk of flooding and the vital function of the Barrowtown Pump Station, Abbotsford failed to ensure that an adequate number of properly-trained staff were present at the Barrowtown Pump Station in the days prior to, and during, the Sumas Flood. If Abbotsford had ensured the proper staffing of the Barrowtown Pump Station, or if the employees on shift had taken reasonable measures including, but not limited to, ensuring the floodboxes were closed, the flooding to the Outer Sumas Prairie would have been reduced in geographic scope or eliminated.

52. If Abbotsford had ensured the proper staffing of the Barrowtown Pump Station, or if the employees on shift had taken reasonable measures including, but not limited to, ensuring the floodboxes were closed, the flooding to the Inner Sumas Prairie would have been prevented.

[42] For a claim in negligence, a full duty of care analysis is unnecessary if the duty of care has already been recognized in an analogous case. In the absence of an analogous case, the court is to determine whether the circumstances disclose reasonably foreseeable harm and proximity in order to establish a *prima facie* duty of care. The proximity question requires the plaintiff to show that the defendant was in a close and direct relationship so that it would be fair and just to impose a duty of care. If the plaintiff establishes a *prima facie* or arguable

case, the court must decide whether there are residual policy considerations that justify the denial of liability: Nelson at paras. 16-19.

[43] I conclude that the duty of care has already been recognized in analogous categories of cases. Some of those cases include:

- a) Nelson;
- b) Just;
- c) Pisclevich v. Manitoba, 2018 MBCA 127;
- d) Pisclevich v. Manitoba, 2018 MBQB 52 (see paras. 13-15);
- e) Pisclevich v. Manitoba, 2021 MBQB 141;
- f) Anderson v. Manitoba, 2017 MBCA 14; and
- g) Anderson v. Manitoba, 2014 MBQB 255.

[44] The facts that decide whether the defendant owes a duty of care, as well as its conduct and the consequences arising therefrom, differ from case to case. No two cases will be identical. Nonetheless, the plaintiffs say that the decisions of the Manitoba courts arising out of that province's 2011 floods are on point. I agree.

[45] The 2011 Manitoba floods caused widespread property damage and many residents evacuated their homes. The Anderson and Pisclevich actions alleged that the flooding was caused by Manitoba exercising its water control functions during the spring and summer of 2011. Manitoba had diverted water into Lake Manitoba, which caused extensive flooding.

[46] I find the Manitoba cases of Anderson and Pisclevich to be persuasive. The courts recognized the same causes of action which are also pleaded and applicable here. The Manitoba courts concluded that the actions should be certified.

[47] The facts alleged in the Manitoba cases are close to what is alleged to have happened in Abbotsford. In both cases, the governmental authority which controlled the waterways either took steps to divert water (Manitoba) or failed to divert water as prescribed in its operating procedures (Abbotsford).

[48] I am satisfied that the claims advanced by the plaintiffs are not novel. They are founded on long accepted causes of action framed in negligence and nuisance. The facts and issues are on par with those considered in the Anderson and Pisclevich cases.

Position of the Defendants

## Mostertman

- [22] The defendants say that Mostertman involved the determination of whether a municipality owed a duty of care to plaintiffs injured by the negligent operation of a pump house during a flood. It does not address the issue of the imposition of a Just duty of care on the Ministry of Transportation respecting the deactivation of a resource road.
- [23] I agree with the defendants. The analysis of the duty of care in Mostertman was found to be analogous to *Pisclevich v. Manitoba*, 2018 MBQB 52 and *Anderson v. Manitoba*, 2014 MBQB 255, rev'd on other grounds 2017 MBCA 14--cases involving analogous fact patterns to those in Mostertman. Although there is a passing reference to Just, the creation of the duty of care relied upon in both arose from an analysis of the underlying statutory regimes which involve different considerations than the case at bar. I do not read Mostertman as authority for a broad expansion of the Just duty of care, or for placing the duty owed by municipalities operating pump houses to members of the public impacted by those services into the Just category. In my view, such an interpretation would be contrary to the comments of the Supreme Court of Canada in *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 at paras 27-28.

### Are these Facts Analogous to Just?

- [24] The defendants say that Just establishes a duty of care for governments to maintain roads that they have invited citizens to use, whereas this case involves the Crown's obligation to deactivate a resource road. I agree with the defendants that this is how the plaintiff has framed and limited the duty question in this cause of action.
- [25] They say the fundamental defining feature of the Just duty of care is that the Crown must have physical control over the source of the risk of harm, in this case highways. The Ministry of Transportation, through the Transportation Act, S.B.C. 2004, c. 44, has authority for planning, designing, maintaining, and closing highways.
- [26] In this case, the governing legislation provides the statutory power and authority for the deactivation of resource roads to the Ministry of Forestry, and contains a limitation on liability for damages arising from this power pursuant to s. 125.2(2) of the Forest and Range Practice Act, S.B.C. 2002, c. 69 and s. 142 of the Forest Act, R.S.B.C. 1996, c. 157. The defendants say that the plaintiff has attempted to shoehorn the duty owed to her into the established Just category to avoid a review of the underlying legislation, which they say would prohibit the creation of a duty of care for deactivation of resource roads.
- [27] I have found it useful to conceptualize this issue by hypothetically considering what duties might arise to the Ministry of Transportation under the statutory authority and powers provided to it under the governing legislation. It is possible that the Ministry of Transportation might have a duty to design and build a road that is not likely to be affected by an improperly deactivated resource road, or alternatively, to close a highway that is likely to be impacted by improper deactivation (I make no comment whether either duty is

analogous to that in Just ). However, in my view, the Ministry of Transportation cannot owe a duty to deactivate a resource road because it lacks the power or authority to deactivate or inspect these roads.

- [28] In these circumstances the plaintiff has limited her cause of action to that arising from the duty owed by the Ministry of Transportation to maintain the highway pursuant to the recognized duty of care established by the Supreme Court of Canada in Just. As noted, she characterizes the issue to be decided by this Court as follows:

Is it plain and obvious that the Crown should not have had the travelling public in mind as a class of people that would be potentially harmed by the failure to deactivate the forest service road? Or to put it another way: "was there an obligation on the Crown in this case when dealing with deactivation above a highway to be mindful of the plaintiff's legitimate interests in conducting its affairs - i.e., driving on a highway.

- [29] In my view, the plaintiff has narrowed her case to issues tied to deactivating a resource road. The duty of care must be linked to the governing body with the corresponding statutory duty. It may be that the Ministry of Transportation might owe a duty to design a safe highway, or to close an unsafe highway; given obligations flowing from the invitation to use the highway arising from the Just duty of care; but I do not see how such obligations could extend to properly deactivating a resource road as advanced by the plaintiff. This represents a novel issue that requires scrutiny of the underlying legislation and surrounding circumstances.

### Relationship of Proximity

- [30] In the alternative, the defendant says that in determining whether a case is analogous to previous cases where a duty of care was found, one must consider the particular factors that justified recognizing the prior category and determine whether those factors exist in the relationship at issue before the court, such that the element of proximity is the same: Revelstoke (City) v. Gelowitz, 2023 BCCA 139 at paras. 26, 32.

- [31] In Just at para. 12, the Supreme Court of Canada noted the following factors underlying their finding that a duty of care existed:

In the case at bar the accident occurred on a well used major highway in the Province of British Columbia. All the provinces across Canada extol their attributes and attractions in the fierce competition for tourist business. The skiing facilities at Whistler are undoubtedly just such a magnificent attraction. It would be hard to imagine a more open and welcoming invitation to use those facilities than that extended by the provincial highway leading to them. In light of that invitation to use both the facilities and the highway leading to them, it would appear that apart from some specific exemption, arising from a statutory provision or established common law principle, a duty of care was owed by the province to those that use its highways. That duty of care would extend ordinarily to reasonable maintenance of those roads. The appellant as a user of the highway was certainly in sufficient proximity to the respondent to come within the

purview of that duty of care. In this case it can be said that it would be eminently reasonable for the appellant as a user of the highway to expect that it would be reasonably maintained. For the Department of Highways it would be a readily foreseeable risk that harm might befall users of a highway if it were not reasonably maintained. That maintenance could, on the basis of the evidence put forward by the appellant, be found to extend to the prevention of injury from falling rock.

- [32] In this case the defendants say that the pleadings are distinguishable from the Supreme Court of Canada's findings in *Just*. They say that *Just* should be confined to routine maintenance issues; whereas this case involves an extreme or emergency situation, which created unsafe conditions such that the *Just* duty of care is not analogous.
- [33] The plaintiff says that *Drive BC* stated that the highway was open, and that opening a highway is sufficient, within this factual matrix, to fall within the *Just* category.
- [34] In my view, it would be necessary to have a full factual matrix to decide the proximity issue. I cannot say that it is plain and obvious that the "invitation to use the highway issue" is bound to fail for the proximity issues raised by the defendants at this stage in the proceedings. Therefore, if I am wrong, and the determination of duty should proceed as a common issue, the concerns raised by the defendants with respect to proximity would be relevant at the common issue stage.

## Conclusion

- [35] I have determined that the action, as framed by the plaintiff in argument, is not analogous to the previously recognized *Just* duty of care. Therefore, the claim is bound to fail, and this is dispositive of the application. However, if I am wrong on that determination, I will address the other issues raised by the parties.

## Section 4(1)(b) - Identifiable Class of Two or More People

- [36] Section 4(1)(b) of the CPA requires the plaintiff to demonstrate some basis in fact that "there is an identifiable class of 2 or more persons". The purpose of the class definition is to identify who is entitled to notice, who is entitled to any relief awarded, and who is bound by the judgment: *Jiang v. Peoples Trust Company*, 2017 BCCA 119 [*Jiang*] at paras. 74, 82.
- [37] In *Jiang* at paras. 82, 88-92, the Court of Appeal summarized the principles governing this criterion as follows:
- a) the class must be defined with reference to objective criteria that do not depend on the merits of the claim;
  - b) the class definition must bear a rational relationship to the common issues it should not be unnecessarily narrow or broad; and

- c) the plaintiff must establish some basis in fact that at least two persons could self-identify as class members and could later prove they are members of the class.

### Proposed Class Definition

[38] The plaintiff revised her definition of class during certification to address the limitation on actions contained in s. 115 of I(V)A and s. 10 of the Enhanced Accident Benefit Regulation, which state:

#### No actions or proceedings for bodily injury

115 (a) a person has no right of action and must not commence or maintain proceedings respecting bodily injury caused by a vehicle arising out of an accident

Accidents excluded from application of Part 10 of the Act

10 For the purposes of section 114 (2) (c) [application of Part 10 of the Act] of the Act, the following circumstances are prescribed:

- (b) only one vehicle is involved in the accident and the vehicle is not in motion, except
- (i) in respect of bodily injury that is caused by the opening or closing of the vehicle's door, trunk or tailgate, or
- (ii) in respect of bodily injury that is caused by being struck by the vehicle's load while the vehicle is being loaded or unloaded;

[39] The Supreme Court of Canada in *Westmount (City) v. Rossy*, 2012 SCC 30 considered the applicability of similar legislation to the situation where a tree fell on a stationary car and killed the occupant. The issue was whether the death was caused by an automobile, which would preclude the ability to bring an action to recover damages. The court determined:

[53] Although the vehicle may have been stationary or moving through an intersection, the evidence on the record is that Mr. Rossy was using the vehicle as a means of transportation when the accident occurred. This is enough to find that the damage arose as a result of the "accident" within the meaning of the Act and that the no-fault benefits of the scheme are triggered.

[40] The plaintiff at p. 3 of the May 31, 2025 Written Submissions finalized the proposed class as follows:

"All occupants, or the personal representatives and dependents of those occupants that died, of the approximately 56 cars who were stopped by the first mudslide on the Duffey Lake Highway the morning of November 15, 2021, who claim they suffered any type of personal injury, including any psychological injury, or property damage, arising in any way, from the second mudslide that occurred that day and which at the time of the second mudslide: (1) the car of the occupant was turned off and had no driver in the driver's position, or (2) the occupant of the car was outside of the car."

[41] The plaintiff says that the I(V)A applies when the injuries sustained "are connected enough to the use of the vehicle to justify the plaintiff's compensation under the government no-fault scheme".

[42] The two qualifications in the proposed class are:

- a) the car of the occupant was turned off and had no driver in the driver's position; or
- b) the occupant of the car was outside of the car.

The plaintiff says this class distinction will root out people who clearly are precluded from commencing an action by the I(V)A and is sufficiently narrow that the class members can have this issue determined as a common issue. Furthermore, to the extent that individual issues must be considered, this can be done after common issues have been resolved.

[43] I agree with the plaintiff that it is appropriate to exclude class members who clearly would be precluded from bringing a claim and that a mechanism to determine which of the defined class members fall within the I(V)A scheme is necessary.

Position of the Defendants

### **Not an objectively identifiable class**

[44] The defendants say that the proposed class definition lacks objective clarity such that potential class members would not be able to self-identify. Specifically, they say:

- a) whether a vehicle is "turned off" is confusing and could apply to a variety of conditions such as use of a radio, and may be difficult for a backseat passenger to determine;
- b) the criteria of "no driver in the driver's position" is also ambiguous as to whether it would apply to a driver who had reclined his seat; and
- c) the criteria of "outside of the car" is ambiguous because someone could have been outside of their car and then returned to their car during the second landslide.

[45] The proposed class definition is similar to that proposed in *Harrison v. Afexa Life Sciences Inc.*, 2018 BCCA 165, a case in which potential class members would have been required to remember, six years after purchasing medication, the specific representations on the medication packaging. In *Harrison*, the court concluded that "the practical difficulties of placing individuals within or outside of the class would be insurmountable": para. 51.

[46] In my view, the facts presented here do not share the same memory issues that concerned the court in *Harrison*. The concerns raised by the defendants are not fatal to the ability to objectively identify. Rather, they can be addressed by clearer language in the proposed class, such as:

- a) clarifying what constitutes a vehicle being "turned off", such as "key out of ignition" or "motor off";

- b) amending the "no driver in the driver's position" to say "no driver in upright driver's position"; or
- c) specifying the timeframe for being outside of the car, to say "outside of car until the end of the second landslide".

### No Basis in Fact

[47] The defendants say that there is no factual evidence supporting the existence of any members of the proposed class. That is, the defendants argue that the plaintiff has not pointed to any evidence that any of the 56 vehicles in question were actually turned off, had no driver in the driver's position, or had occupants outside of the vehicle. I reject this argument. There does not have to be proof that a class member ultimately falls within a class, only some evidence of an ability to self-identify: *Jiang v. Peoples Trust Company*, 2017 BCCA 119 para. 82. I am satisfied that a potential class member would be able to self identify given the significance of the underlying event; especially in comparison to the underlying circumstances in *Jiang*.

[48] Additionally, I reject the defendant's argument that there is no evidence to support "some basis in fact" that members of the proposed class exist. The infant plaintiff's mother was found in the passenger's seat of the car and her father was found outside of the car. In addition, in Ms. Haidon's affidavit she swears:

" At the time of the second mudslide occurred, many people were out of their vehicles. One individual was outside of his vehicle with his wife and mother. When the second mudslide occurred, he made sure his wife and mother made it back to their car but he unfortunately did not make it and was swept away by the mudslide. It was my understanding that 5 people perished in this mudslide, this individual, the infant plaintiff's parents and two other men.

Many people after the second mudslide were going into shock. Many vehicles were also claimed by the mudslide I took two people to the Pemberton Hospital "

[49] In my view, this provides some basis in fact that two or more people could fall into both of the proposed categories.

### Unextractable Conflict of Interest

[50] The defendants say that, if a duty analogous to the Just category exists, this duty would be based upon an invitation to use the highway. It is apparent from the affidavit evidence that there were clear objective signs that travelling on the highway was not safe. Therefore, there is a real likelihood of a conflict of interest between the individual occupants of a car on the basis that it was not reasonable to travel or continue travelling on the highway.

- [51] They rely on cases such as *Cal-Gas Inc. v. Knorr*, 2012 SKQB 207, in which the court found the injured plaintiff 50% contributorily negligent for driving in conditions known to be hazardous:
- 19) For several reasons, I find the plaintiff to be contributorily negligent. First, there is Ed Flahr's conduct. He drove into a whiteout not knowing what lay before him. He knew that the highway was covered in ice and there was at least one vehicle in front of him. Although 40 kilometres per hour is slow for a highway, it was too fast that day. Indeed, he ought not to have been driving on that stretch at all. Experienced truck driver Terry Unger pulled over because visibility was near zero. That was the sensible thing to do. That is what Ed Flahr should have done. Instead, he took an unacceptable risk.
- 20) Moving up the chain, it was not reasonable for Cal-Gas to have its trucks on the highway that day. Cal-Gas has a facility in Kerrobert about two kilometres from the accident site. Someone could easily have checked the provincial government's "Highway Hotline" by telephone or internet and found out that travel on Highway 21 was "not recommended." No one did. Nor did anyone have to. On the evidence, any reasonable person simply looking out the window would have concluded that no one should be driving.
- [52] Given these existing conditions, the driver and passenger may have a disagreement about the safe operation of the vehicle, and one may be found liable while the other is not, depending on the interactions between them: *Hansen v. Sulyma*, 2013 BCCA 349 at paras. 17-18.
- [53] In my view the conflict identified by the defendants is more than speculative; in these circumstances there is a real possibility that such a conflict may exist. See *Watson v. Bank of America Corporation*, 2014 BCSC 532 at para. 358, rev'd on other grounds 2015 BCCA 362.
- [54] The problem with the conflict of interest between the parties is that one lawyer cannot act for both parties: *Dobosz v. Doe*, 2001 BCSC 938 at para. 16. Therefore, as in *Nixon v. Canada (Attorney General)*, (2002), 21 C.P.C. (5th) 269 (Ont. S.C.J.), where a class action was brought on behalf of a fire at a penitentiary that had been started by some of the inmates in the proposed class, a class action cannot proceed because of an unretractable conflict of interest.
- [55] The plaintiff says that the parties all have the same interest with respect to establishing that negligent deactivation of the road caused the landslide and the conflict can simply be resolved at the individual issue stage. She relies on *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2011 BCCA 187 where Justice Donald, dissenting, notes:
- [72] As to the future of the action, any sharing of an award will involve a divergence of interests, but I do not see how that presents an insuperable barrier to a resolution of the common issues. Neither group is prejudiced in taking the case on together and they may not be able to do it any other way. Separate representation at the damages stage can easily be arranged.

- [56] In my view, the conflict appears to be relevant and related to the proposed common issue of the duty owed to the class at large due to the fact that the Just duty of care arises from an invitation to use the highway.
- [57] An assessment of contributory negligence against a driver (or potentially a passenger) requires an analysis of the degree to which they are at fault relative to the fault of the defendants who breached the duty owed to the plaintiffs: Negligence Act, R.S.B.C. 1996, c. 333, ss. 1, 4.
- [58] It is unclear to me how this assessment would occur in the procedure proposed by the plaintiff, who takes the position that this is simply an individual issue, unrelated to the proposed common issues, which can be deferred until after the common issues have been resolved.
- [59] Given the necessary comparative assessment of fault between parties, it is not clear to me that all the proposed plaintiffs would have the same interest with respect to the nature and extent of the duty owed to the users of the highway. In my view, there is a realistic possibility that one group of plaintiffs may have an interest in downplaying certain factors that could have a negative impact on their potential liability, which would be contrary to the interests of other plaintiffs.
- [60] In my view, the conflict-of-interest issue is a significant concern. It may be possible that the conflict could be managed if it were limited to damages as noted by Donald J.A., in dissent, in *Sun-Rype Products Ltd.* However, in the case at bar the conflict potentially goes to the heart of the negligence claim, that of the nature and extent of the duty owed to the plaintiffs.

#### Section 4(1)(c) - Do Common Issues Predominate Over Issues Affecting Individual Members?

- [61] Common issues are the unifying force that justifies the existence of a class proceeding because "individuals who have litigation concerns in common ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings": *Pro-Sys* at para. 106.
- [62] As noted by Justice Branch in *Moiseiwitsch*:
- [191] Common issues must be determinable on a class-wide basis and "cannot be dependent upon individual findings of fact made with respect to each class member": *Kirk BCCA 2019* at para. 65. In other words, a common issue must be answerable with "common proof" to avoid "duplication of fact-finding or legal analysis": *Dutton* at para. 39. The resolution of a common issue must be necessary to the resolution of every class member's claim: *Pioneer* at para. 104; *Pro-Sys* at para. 108.
- [63] Typically, in cases where defendants owe a common duty and breach that duty, causing injury to multiple people, the matter is properly brought as a class action, despite many potential substantive and time-consuming individual issues: *Bowman v. Kimberley-Clark Corporation*, 2023 BCSC 1495 at para. 249.

### Breach of Standard of Care in Deactivation of the Road

- [64] The plaintiff proposes a series of common questions to resolve the issue of whether the resource road was negligently deactivated, and if so whether this caused the second landslide.
- [65] In my view, it is clear that these are common issues. The matter can be resolved through expert evidence, based upon an examination of the common physical evidence and the conduct of the defendants, as opposed to examining the conduct of individual class members. The plaintiff's expert evidence provides some basis in fact that the class could be successful in establishing a breach of the standard of care for the benefit of the entire class.

### Duty Owed to All Class Members

- [66] The plaintiff says that a duty analogous to the Just duty of care can be established on a common basis. It is not clear to me that this is the case. As I noted earlier in my conflict-of-interest analysis, issues of individual knowledge might be relevant to the "invitation to use the highway" claim that underlies the duty of care issue.
- [67] I agree with the plaintiff that the fact that if the duty is dependent on individual factors the result would be unusual results, such as a situation where two people parked next to each other and injured by the same landslide might be owed different duties of care. Although I am troubled by this possible result, I am not prepared to dismiss the relevance of individual factors on the duty owed to the plaintiffs at this stage of the proceedings.

### Applicability of the Insurance (Vehicle) Act

- [68] As noted, the plaintiff has constructed the class definition to exclude people entitled to compensation under the non-fault automobile insurance scheme.
- [69] The defendants say that coverage under the I(V)A is not suitable as a common issue. The determination of whether a person falls within the purview of the I(V)A requires an individual assessment of each situation. They say it would be improper for the court to make a concrete exception for certain types of claims, relying on *Umpherville v. Saskatchewan Government Insurance*, 2025 SKCA 69 at paras 14-15.
- [70] In my view, the court in *Umpherville* does not go as far as suggested by the defendants. Ms. *Umpherville* obtained leave to appeal on the question as to whether the commission "err in law by expressly concluding coverage cannot be provided under the [Manitoba no fault legislation] for injuries sustained while being arrested". The court concluded that:
- [15] In my view, the Commission was referring to the circumstances of the matter at hand when it made its comments. On a reading of the reasons as a whole, there is no indication that the Commission was attempting to create a broad-reaching exception that covered every situation involving an arrest or speaking to anything other than the situation it was analyzing. The statement was used to highlight the stated purpose of the AAIA - to aid in

interpreting the legislation and to demonstrate how the circumstances in which Mr. Sasakamoose was injured did not fit within that purpose. I do not see this as an error.

- [71] The plaintiff says that the I(V)A applies when the injuries sustained "are connected enough to the use of the vehicle to justify the plaintiff's compensation under the government no-fault scheme". He says his class distinction will root out people who clearly are precluded from commencing an action by the I(V)A and are sufficiently narrow that the class members can have this issue determined as a common issue.
- [72] I agree with the plaintiff that it is appropriate to exclude class members who are entitled to benefits under the automobile legislation and therefore precluded from bringing a claim. In my view, it is possible to articulate some boundaries regarding the extent of coverage provided by the legislation for a defined fact pattern, despite the need for nuanced analysis. It is appropriate to screen out claims that clearly do not have a cause of action.
- [73] With respect to resolving the I(V)A issues as a common issue using the principles underlying the two groups of classes set out by the plaintiff, I have found the comments made by the court in *Smith v. Zrobek*, 2018 MBQB 22 instructive on whether it may be appropriate to draw general conclusions on the applicability of the automobile legislation:
- [59] When I look at the trend of authorities, they do appear to be weighted towards extending coverage for no-fault benefits whenever possible. There is a very generous approach being taken by courts and arbitrators in cases in which the eligibility of a claimant for no-fault benefits is at issue. Some of the decisions appear to extend coverage beyond what is necessary to give effect to the legislation, or policy under consideration. Indeed, there does not appear to be any comment on the need to strike a balance in an assessment as to how liberal an interpretation ought to be used. An unlimited liberal approach extends coverage, but at the same time deprives a citizen from seeking compensation, even better compensation than the statutory compensation, from third parties. There are two interests that compete when the manner of interpreting the coverage provisions is being considered, namely, those who wish to maximize coverage in every case and those who wish the right to seek compensation from third parties unrestricted by a government program. The balance which needs to be struck between these two interests is perhaps best achieved by injecting into the analysis a consideration of the mischief which the Part 2 provisions were legislated to address.
- [60] All of the authorities suggest that the Act should be interpreted in accordance with its purpose. The purpose of the Manitoba legislation was discussed by Helper J.A. in *McMillan* (at paras. 54 - 55):

[54] I have concluded that the legislature created an all-encompassing insurance scheme to provide immediate compensatory benefits to all Manitobans who suffer bodily injuries in accidents involving an automobile. I find favour with the observations of Pitt J. in the case of *The Economical Mutual Insurance Co. v. Lott* 1995 CanLII 66 (SCC), [1995] I.L.R. 1-3213 (Ont. G.D.):

I am of the view that the main objective of motor vehicle insurance legislation in the nineties is the reduction in the volume and costs of litigation. The means to achieve that objective is the limitation of access to the courts. For that reason alone I would agree with the observations of Matlow J. in *Canadian General Insurance Co. v. Jevco Insurance Co.*, dated October 21, 1994, that: the no-fault provisions of the Act were intended to constitute a comprehensive code determining the rights of insured persons against their insurers and the rights of insurers against other insurers.

[55] What other intent can be attributed to the legislature when you examine the definition in the context of the scheme as a whole?

[61] The purpose of the Manitoba legislation was to reduce the volume and costs of litigation arising from accidents involving automobiles. Injuries sustained by people disembarking from vehicles was not the mischief which the legislature was concerned about when the no-fault scheme was introduced. The legislature was concerned about people being injured in what are commonly called "automobile accidents," not the occasional slip and fall during disembarkment. To extend coverage for these injuries goes further than necessary, even if a broad and liberal interpretation were to be given to the provisions.

[62] During argument, I was advised by counsel that this is the first time that a similar situation has reached this court. There is a danger that decisions made in these kinds of cases act as stepping stones to the gradual extension of coverage, regardless as to whether they were ever intended by the legislature to be caught by the legislation. There is what might be called a "coverage creep," and it becomes increasingly difficult to deny coverage where there are small incremental differences from the various fact situations where coverage is found to exist. Since this fact situation is one of first impression in this province, I do not feel bound to simply conclude that coverage must exist because in other cases on other facts it was found to exist in other jurisdictions. There is a limit as to how far coverage can or should be stretched. In this case, I have asked myself this question - Was the no-fault legislation brought into effect because there was a concern about people falling when they were exiting their cars? I think not.

[63] The evidence before me shows that the plaintiff had parked her automobile on her driveway, just before she tripped over the fence. She had reached her destination, she had climbed out of her car, and although she had not yet closed the door, nor extricated the children from the vehicle, she had both feet on the ground. The fact that the children were still in the car should not impact upon how the legislation should be applied to the plaintiff, although it might be a pertinent factor in assessing coverage if the children were injured in the event

that the car caught fire while they remained in it. I simply say that injuries sustained in a fall during a person's exit from a vehicle should not automatically be classified as "injuries caused by the use of an automobile." In my view, in this case, the use of the plaintiff's automobile was only a fortuitous prelude to her sustaining injuries in the fall. In my opinion, there should be no coverage under Part 2 of the Act for these injuries.

- [64] If one concluded that all injuries sustained while disembarking from a vehicle are injuries sustained from "using a vehicle," absurdities arise. A person who slips on an icy driveway while disembarking from a vehicle would be entitled to Part 2 benefits whereas a person who simply slips on the same patch of ice as he/she walks up the driveway is not. Similarly, a passenger who trips on his shoelaces would qualify for compensation if he tripped while disembarking from a vehicle, but not if he simply fell while walking down the street. Similarly, subject to s. 79 concerns, an inebriated person who fell from a parked car in his own driveway has a better chance at Part 2 benefits than a drunk man on the street who falls. In all of these examples, the fact that the person was driving or riding in a vehicle immediately before the fall was simply incidental to the subsequent fall. If such a person wished to make a claim for Part 2 benefits, the fact that he/she had been in a car would be fortuitous. Using the language in *Amos*, to the extent that the two-part test is applicable, the second test would not be satisfied.
- [74] I am aware that determining whether the I(V)A applies involves a nuanced analysis; however, I am not convinced that it would be inappropriate or impractical to do so based on the facts provided by the plaintiff, if the definition of class was further revised to address the vagueness issues identified by the defendants. The fundamental issue is whether extending coverage under the I(V)A would be consistent with the purpose and objective of the legislation.
- [75] It may be that after a common issue trial, the issue of coverage cannot be resolved on a common basis for some of those who meet the class definition. In that case, the matter would need to be resolved as an individual issue after resolving the other common issues.

#### Section 4(1)(d) - Is a Class Proceeding the Preferable Procedure for the Fair and Efficient Resolution of the Common Issues?

- [76] Section 4(1)(d) requires a class proceeding to be the preferable procedure for the fair and efficient resolution of the common issues. In making this determination, the court must consider all relevant matters, including the following factors listed in s. 4(2):
- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
  - (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

- (c) whether the class proceeding would involve claims 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.
- [77] The court must consider these factors through the lens of the three principal objectives of class proceedings--that is, judicial economy, access to justice and behaviour modification: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 27.
- [78] The preferability analysis requires the court to consider whether a class proceeding would be a fair, efficient and manageable method of advancing the claims compared with other realistically available means for their resolution. As a result, this analysis warrants a practical cost-benefit approach: *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at para. 25.
- [79] I have already concluded that the matter is not suitable for a class action because the duty of care owed does not fall within a category analogous to that previously determined by the Supreme Court of Canada in *Just*.
- [80] I will nonetheless proceed to apply this test, on the basis that if I was wrong in that conclusion and that the issue of whether a duty exists analogous to that in *Just* can be determined as a common issue as proposed by the plaintiff.

#### Factors Considered in the Analysis

#### **Do common issues predominate**

- [81] The main common issue that would advance the litigation is whether the landslide was caused by a breach in the standard of care in the deactivation of the resource road above the highway. It is clear that this is an appropriate common issue.
- [82] I have concerns regarding the common issues proposed for determining the applicability of the I(V)A. While this issue could be addressed collectively, it may still be necessary to conduct individual assessments for some of the proposed class members to resolve this issue.
- [83] I am not satisfied that the common issues proposed to resolve the issue of the duty owed to the proposed plaintiffs can be dealt with as a common issue. In my view, a determination of duty would require an assessment of proximity, which would require an analysis of individual factors. This raises the potential that a common duty may not be owed to all potential class members, or to put it another way, the existence of the duty may be dependent on individual factors.

[84] The corollary issue raised by this is that, in my view, there is a real possibility of conflict between potential class members with respect to both contributory negligence and the factors underlying the "invitation to use the highway" aspect of the alleged duty.

[85] In my view common issues do not predominate over individual issues and potential conflict of interest.

#### Involvement of Claims Involving Other Proceedings

[86] There are a number of additional proceedings involved with the damages caused by the second landslide:

- a) An additional civil action has been commenced against the defendants. The plaintiff in this action does not wish to participate in the class action. Presumably, the claim in that action is sufficiently large to make it economically feasible to proceed in that manner.
- b) Some personal injury claims have received compensation from ICBC. If benefits have been paid to people that ultimately are not entitled to coverage, I expect that a collateral benefit issue may arise.
- c) Vehicle damage has been compensated by ICBC. ICBC has stated that they do not intend to be involved in the litigation. Although, it is possible that if a claim were advanced, ICBC would have a subrogated interest.

#### Individual Interest in Controlling the Proceedings

[87] It does not appear that there are other individuals with an interest in controlling the proceedings.

#### Number of Class Members

[88] The number of class members appears to be relatively small. Although there may have been up to 50 cars at the site of the second landslide, given the class definition provided by the plaintiff, it may be that a number of the occupants of the cars will be excluded from the class.

#### Are other Means of Resolving the Claims more or less efficient

[89] Although no fault benefits available through the I(V)A appear to be available to people injured by the second landslide at this time, these benefits do not provide full recovery to the victims. However, opting into the action raises the possibility that people will lose entitlement to their I(V)A benefits currently offered to them by ICBC and then ultimately be unsuccessful in establishing liability against the defendants. This raises not only efficiency issues, but also complex notice concerns that have not been addressed by the plaintiff in her litigation plan.

Whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means

[90] The issues I have outlined above pose significant administrative difficulties in managing this matter as a class action when compared to proceeding as an individual action, as some people affected by this landslide have already chosen to do. These issues have not been addressed in the plaintiff's current litigation plan.

Section 4(1)(e) - Is the Representative Plaintiff Suitable?

### Litigation Plan

[91] The main issue raised by the defendants is that Section 4(1)(e)(ii) of the CPA requires a representative plaintiff to produce "a plan for the proceeding that sets out a workable method of advancing the proceedings on behalf of the class and of notifying class members of the proceeding."

[92] In my view, the litigation plan at this stage is expected to be a "work in progress" subject to amendment through case management as the case progresses. The litigation plan is consistent with the principles set out by Justice Church in *Hay v. Mundi 910 Victoria Enterprises Ltd.*, 2022 BCSC 2127:

[120] In my view, the defendants' submission does not reflect the standard of scrutiny of a litigation plan that is required at the certification stage in British Columbia. As set out in the decision of this Court in *Fakhri et al. v. Alfalfa's Canada Inc. cba Capers*, 2003 BCSC 1717 at para. 77 [Fakhri SC], aff'd 2004 BCCA 549, a litigation plan is to be assessed as follows:

[77] The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members.

[121] The British Columbia Court of Appeal, in the recent decision of *Jiang v. Alfalfa's Canada Inc.*, 2019 BCCA 149, considered the decision in *McCracken* and concluded that it did not propose closer scrutiny of the litigation plan than suggested in *Fakhri SC*. Hunter J.A. noted at para. 60, that he preferred the standard set out in an earlier decision of the Ontario Court of Appeal in *Cloud v. Canada (Attorney General)*, 73 O.R. (3d) 401, 2004 CanLII 45444 (C.A.) at para. 95, which provided that:

- [95] The litigation plan produced by the appellants is, like all litigation plans, something of a work in progress. It will undoubtedly have to be amended, particularly in light of the issues found to warrant a common trial. Any shortcomings can be addressed under the supervision of the case management judge once the pleadings are complete.
- [122] When assessed on this standard, the proposed litigation plan sets out a workable method of advancing the proceeding and notifying class members, including a clear notice plan, a plan for the litigation steps leading to the common issues trial, and procedures to deal with individual issues at various stages of the proceeding. The individual procedures can be amended as the case progresses and once counsel has more information about the size of the class and the nature of harm to all class members.
- [93] That said, given the concerns that I have raised, the current litigation plan is inadequate and would have to be revised. In my view, the notice requirements may pose a significant hurdle to the plaintiff given the impact that not opting out of the proceedings could have on potential class members receipt or access to benefits provided by ICBC pursuant to the I(V)A.

## Conclusion

- [94] I find that the pleadings do not disclose a cause of action in negligence analogous to the Just duty of care. Given the position taken by the plaintiff in the hearing, this is fatal to the application for certification.
- [95] If I am wrong, and the pleadings potentially disclose a cause of action analogous to the Just duty of care, in my view it would not be preferable to proceed with a class proceeding for the following reasons:
- a) individual issues predominate over common issues;
  - b) there is a potential unretractable conflict of interest between class members; and
  - c) given the issues articulated in these reasons, in my view, the matter is more efficiently brought as an individual civil action.
- [96] I dismiss the application. I would ask that the parties set a further case management conference to discuss the implications of this ruling on the civil action.

"Thomas J."

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