IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rorison v. Insurance Corporation of British Columbia,* 2022 BCSC 624

Date: 20220422
Docket: S202406
Registry: Vancouver

Between:

Robert Rorison and Brayden Methot

Plaintiffs

And

Insurance Corporation of British Columbia and Her Majesty the Queen in Right of the Province of British Columbia

Defendants

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

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for the Plaintiffs, appearing via videoconference:	J.S. Stanley G. van Ert E.A. Emery
Counsel for the Defendant, Insurance Corporation of British Columbia, appearing via videoconference:	G.P. Brown, Q.C. J.A. Morris
Counsel for the Defendant, Her Majesty the Queen in Right of the Province of British Columbia, appearing via videoconference:	G. Morley L.V. Mauro K. Millar
Place and Dates of Hearing:	Vancouver, B.C. April 26-28, June 28-30, November 26, 2021, & February 11, 2022
Place and Date of Judgment:	Vancouver, B.C. April 22, 2022

Table of Contents

INTRODUCTION

[1] The plaintiffs, Robert Rorison and Brayden Methot, applied for certification of a class proceeding alleging that the defendant, Insurance Corporation of British Columbia ("ICBC"), wrongfully assumed certain costs properly borne by the defendant, Her Majesty the Queen in Right of the Province of British Columbia (the "Province" or the "Government"), through the Medical Services Plan ("MSP").

[2] At issue is the cost of basic medical care for people injured in motor vehicle accidents. ICBC is a provincial Crown corporation that has a monopoly on basic auto insurance. The Province provides publicly funded universal health care through MSP. Where medical practitioners provide care that was made necessary by a motor vehicle accident, MSP pays for it as it would any other medical care, but then receives reimbursement from ICBC (the "MSP Payments").

[3] The MSP Payments are made pursuant to what the plaintiffs alleged to have been unlawful agreements between ICBC and the Province. They say those payments have wrongfully increased insurance costs for all buyers of compulsory vehicle insurance (the "Ratepayer Class") while reducing the amount of other medical and rehabilitation benefits available to people who have suffered catastrophic injuries in motor vehicle accidents (the "Accident Victim Class"). The plaintiffs sought certification for both classes.

[4] After the certification application was heard and while reasons were being prepared, the Legislature enacted Bill 12, *Insurance (Vehicle) Amendment Act, 2021*, 2nd Sess., 42nd Parl., British Columbia, 2021 (assented to 28 October, 2021) [*Amendment Act*], which amended the *Insurance (Vehicle) Act,* R.S.B.C. 1996, c. 231 [*IVA*]. Pursuant to these amendments, ICBC is now specifically required to "reimburse the government for costs of health-related services": s. 14.2 of the *IVA.* The *IVA,* as amended, also retroactively authorizes all previous payments and states that validation applies "despite any decision of a court to the contrary made before or after this section comes into force": s. 14.3(2) of the *IVA.*

[5] The *Amendment Act* is clearly intended to pre-empt the claim of the Ratepayer Class and one issue now is whether any portion of that claim can survive it. It does not affect the claim of the Accident Victim Class and the issues on certification for that class essentially remain as originally argued.

[6] In May 2021, major changes to legislation governing motor vehicle insurance and litigation came into force. British Columbia adopted a full "no-fault" system which does not permit legal actions for injuries suffered in motor vehicle accidents. This proceeding was commenced and relates to claims that arose before that change came into force. In these reasons, references to governing legislation, other than the *Amendment Act*, are to legislation as it existed prior to that change.

THE RATEPAYER CLASS

[7] The Ratepayer Class potentially consists of everyone who has purchased automobile insurance from ICBC since it was formed in 1973. The plaintiff, Mr. Rorison, who seeks to represent the Ratepayer Class, says he has purchased compulsory automobile insurance from ICBC throughout that period, with insurance premiums increasing substantially over that time.

[8] Mr. Rorison says some of those increased insurance premiums are the result of the Province "raiding" ICBC's budget to pay for things that ICBC should not have to pay for, including the MSP Payments at issue.

[9] The plaintiffs say that, from January 1, 1988 to March 31, 2018, payments from ICBC to MSP totalled almost $900 million. When considering the periods before and after those dates, the total payments at issue will likely be well in excess of $1 billion.

THE ACCIDENT VICTIM CLASS

[10] All persons injured in motor vehicle accidents were eligible to receive certain medical and rehabilitation benefits (the "Accident Benefits") from ICBC on a no-fault basis. Until January 1, 2018, ICBC's liability to each insured for Accident Benefits was limited to $150,000. For accidents occurring after that date, the limit was raised

to $300,000. Those maximum limits generally become relevant only for those insureds who suffer permanent and very severe or catastrophic injuries from a motor vehicle accident.

[11] The plaintiffs allege that payments made by ICBC to MSP for basic medical care have been improperly included in the maximum total, reducing the amount available to pay for other Accident Benefits.

[12] Mr. Methot, the representative plaintiff for the Accident Victim Class, was rendered a quadriplegic in a motor vehicle accident on June 9, 2014. He says that on April 14, 2015, ICBC advised him that he had reached the limit of Accident Benefits. After obtaining a statement of payments made to him or on his behalf, he learned that ICBC had paid $3,709.43 to MSP from his Accident Benefits.

[13] The plaintiffs also filed affidavits from five other members of the proposed Accident Victim Class who were injured at various dates between 2008 and 2017 and say that MSP payments were deducted from their Accident Benefits.

[14] In its response to civil claim, ICBC says it has a policy under which it does not reduce the coverage limit for Accident Benefits by the amount of MSP Payments and denies that it has done so. As evidence of that policy, ICBC produced an internal memorandum dated October 4, 1996, which is said to apply on “files where we would expect to reach the limit (i.e., severe brain injury, quadriplegic).” That memorandum also acknowledged that those deductions had been made since April 1994.

[15] The evidence of Mr. Methot and the other affiants clearly indicates that this policy has not been followed in all cases. That is confirmed by ICBC in affidavits from Serbjit Bains, Senior Director of Claims Injury Services.

[16] Ms. Bains says a review of closed files showed that the policy was applied in a majority of cases, but identified 275 instances where it appears not to have been applied or not applied correctly. Some of those individual insureds are believed to have now died. However, as of June 14, 2021, ICBC had written to 262 insureds,

received responses from 115, and was in the process of preparing cheques to reimburse 89 of them for unpaid Accident Benefits. ICBC requested further information from most of the remaining 26 insureds. Prior to that, ICBC says it sent letters to 12 insureds with open files requesting they provide proof of eligible expenses for reimbursement. Six did so and were sent cheques for their remaining coverage.

[17] Mr. Methot is among the insureds who received cheques. He received a cheque for $3,709.43 but says he has not cashed it. Counsel for the plaintiffs says that ICBC's offers of reimbursement have not included any interest for delayed payment and, notwithstanding its evidence of those offers, ICBC has not formally admitted liability to the Accident Victim Class.

GOVERNING STATUTES AND AGREEMENTS

[18] ICBC is required to operate the system of vehicle insurance by s. 7(1) of the *IVA*, which reads:

> **7** (1) Subject to section 2 and compliance with this Act and the regulations, the corporation must administer a plan of universal compulsory vehicle insurance providing coverage under a motor vehicle liability policy required by the *Motor Vehicle Act*, of at least the amount prescribed, to all persons
>
> (a) whether named in a certificate or not, to whom, or in respect of whom, or to whose dependants, benefits are payable if bodily injury is sustained or death results,
>
> (b) whether named in a certificate or not, to whom or on whose behalf insurance money is payable, if bodily injury to, or the death of another or others, or damage to property, for which he or she is legally liable, results, or
>
> (c) to whom insurance money is payable, if loss or damage to a vehicle results
>
> from one of the perils mentioned in the regulations caused by a vehicle or its use or operation, or any other risk arising out of its use or operation.

[19] In addition to the provisions of the *IVA*, details of the plan are set out in the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83 [*Regulation*]. The *Regulation*, along with the *IVA*, form part of a statutory contract between the ICBC, as insurer,

and the purchasers of insurance: *McIlvenna (litigation guardian of) v. Insurance Corporation of British Columbia*, 2008 BCCA 289 at para. 22; *Fredrickson v. Insurance Corp. of British Columbia* (1985), 64 B.C.L.R. 301 (S.C.) at 310.

[20] Under Part 6 of the *Regulation*, ICBC paid costs and damages on behalf of insured motorists who were at fault for accidents (the "tort claims"). Under Part 7 of the *Regulation*, it paid Accident Benefits on a no-fault basis to all persons injured in accidents. However, pursuant to s. 88(6) of the *Regulation*, which is contained in Part 7:

> (6) The corporation is not liable for any expenses paid or payable to or recoverable by the insured under a medical, surgical, dental or hospital plan or law, or paid or payable by another insurer, except expenses referred to in subsection (1) (a) and (b).

[21] MSP operates under the *Medicare Protection Act*, R.S.B.C. 1996, c. 286 [*MPA*], s. 3(3) of which reads:

> (3) The Medical Services Plan established under the former Act is continued and the function of the commission is to facilitate, in the manner provided for in this Act, reasonable access, throughout British Columbia, to quality medical care, health care and prescribed diagnostic services for residents of British Columbia under the Medical Services Plan.

[22] Section 5.3 of the *MPA* says:

> **5.3** The plan includes as benefits
>
> (a) all medically required services provided by enrolled medical practitioners,
>
> (b) all required services provided by enrolled health care practitioners and prescribed as benefits under section 51,
>
> (c) benefits that are performed in approved diagnostic facilities, and
>
> (d) any benefits that are performed by practitioners in a health facility that has entered into an agreement with one or more regional health boards designated under the *Health Authorities Act* or with the Provincial Health Services Authority, in accordance with the agreement.

[23] Prior to the formation of ICBC, private automobile insurers had informal arrangements with the Province, under which they reimbursed the Province for some of the expenses that would, but for public provision, be covered by their insurance.

ICBC continued that practice when it became responsible for all automobile insurance.

[24] This reimbursement practice was first formalized by an agreement between the Province and ICBC in 1988. That agreement covered only tort claims, with ICBC paying MSP a flat amount of $200 for each tort claim after settlement or trial.

[25] The 1988 agreement was amended in 1994 to provide reimbursement from auto insurance for all services provided by medical practitioners as a result of motor vehicle accidents. The 1994 agreement provided for the payment of medical practitioners' actual fees as they were incurred and included services under Part 7 of the *Regulation*, as well as tort claims, subject to insurance coverage limits.

[26] Prior to 2003, the amounts ICBC charged for auto insurance were set by the Province through Orders in Council. Since 2003, ICBC has been required to seek approval of its rates for basic insurance from the B.C. Utilities Commission ("BCUC").

[27] The MSP Payments at issue have been included in the operating costs that ICBC has sought to recover through approved rates. They do not appear to have been the subject of any specific discussion or consideration in the BCUC's proceedings, perhaps because they comprise a very small part of ICBC's total operating expenses.

THE AMENDMENT ACT

[28] The *Amendment Act* received royal assent and came into force on October 28, 2021. The relevant provision of the *Amendment Act* is s. 2, which repealed the pre-existing s. 14.1 of the *IVA* and replaced it with the following three sections:

> **Agreements**
>
> **14.1** (1) The corporation [i.e., ICBC] may enter into agreements that it considers necessary or advisable with a person or entity to advance the purposes of this Act.
>
> (2) Without limiting subsection (1), the corporation may enter into an agreement with the government for the purposes of section 14.2.

Costs of health-related services

14.2 (1) In this section and section 14.3, **"costs of health-related services"** means costs of health-related services arising from bodily injury or death arising out of an accident.

(2) The corporation must reimburse the government for costs of health-related services.

(3) The amount to be reimbursed under subsection (2) is the amount set out in an agreement between the government and the corporation, which amount may be some or all costs of health-related services incurred by the government over the period or periods subject to the agreement.

Validation

14.3 (1) In this section:

"agreement" means an agreement, whether in written form or not, entered into between the corporation and the government in or after 1973 under which payments were made, including, but not limited to, the following:

(a) the agreement dated January 21, 1988, entered into by the corporation and British Columbia, as represented by the Minister of Health;

(b) the agreement dated April 1, 1994, entered into by the corporation and British Columbia, as represented by the Minister of Health;

"payments" means payments made under an agreement in relation to the costs of health-related services.

(2) Despite any decision of a court to the contrary made before or after this section comes into force, all payments made by the corporation before this section comes into force that would have been validly made had they been made under an agreement made under section 14.1 for the purposes of section 14.2, as those sections read on the date this section comes into force, are conclusively deemed to have been validly made and all payments received by the government under that agreement are conclusively deemed to have been validly received.

(3) For certainty, payments referred to in subsection (2) are conclusively deemed to have been legitimate costs incurred by the corporation used to establish premiums for certificates.

(4) This section is retroactive to the extent necessary to give full force and effect to its provisions and must not be construed as lacking retroactive effect in relation to any matter because it makes no specific reference to that matter.

CERTIFICATION REQUIREMENTS

[29] The certification of an action as a class proceeding is governed by s. 4 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*], which reads.

> **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.
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (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.

[30] Section 4(1) of the *CPA* sets out five separate requirements that must be met before certification is granted.

[31] An order certifying a class action is not a determination of the merits of the claim. In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102, the Supreme Court of Canada said:

> [102] . . . The certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action; "rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding" . . .
>
> [Citation omitted.]

[32] Whether the pleadings disclose a cause of action under s. 4(1)(a) of the *CPA* is decided on the same basis as an application to strike pleadings. The rule is that a pleading should not be struck unless, assuming all facts pleaded to be true, it is plain and obvious that no claim exist and the action is certain to fail. The remaining four certification criteria in s. 4(1) of the *CPA* each require "some basis in fact." If the plaintiff discharges that burden, the court must certify the action: *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 16, 25; *Pro-Sys* at para. 63; *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 at para. 25.

[33] In considering whether the pleadings disclose a cause of action, the focus is on the pleadings as they stand or as they may be amended: *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959 at 977–978.

THE RATEPAYER CLASS

CAUSES OF ACTION: s. 4(1)(a)

[34] The causes of action on behalf of the Ratepayer Class are set out in the notice of civil claim ("NOCC"). At the hearing of the certification application, the plaintiffs did not seek certification of all pleaded causes of action, but did so for claims of breach of contract against ICBC, illegal taxation against the Province, and negligence and unjust enrichment against both defendants.

[35] The plaintiffs now concede that the *Amendment Act* has effectively barred all private law claims by the Ratepayer Class against ICBC and the Province based on

the agreements and payments. They now seek certification against the Province only on the single constitutional issue of illegal taxation.

[36] It is therefore no longer necessary for the Court to rule on any of the other claims advanced by the Ratepayer Class. Nor is it necessary to rule on the question, extensively argued at the hearing, of whether a claim based on allegedly excessive insurance costs is barred by the BCUC's approval of ICBC's rates.

[37] The plaintiffs allege that the MSP Payments, as reflected in insurance rates, amount to an unconstitutional tax because taxes may only be levied through properly enacted legislation. They were not sanctioned by any such legislation prior to the enactment of the *Amendment Act*, which the plaintiffs now say cannot operate retroactively. The relevant portions of the NOCC, as it originally read, include:

> **Unconstitutional tax**
>
> 43. The increases to compulsory auto insurance rates sought and obtained from time to time by ICBC from the Utilities Commission as a result of the Remittances constitute a tax on the Ratepayer Class (the "Levies").
>
> 44. The Levies were not enacted in accordance with ss. 53, 90 and 92(2) of the *Constitution Act, 1867*. The Levies were not enacted by the Legislature at all. Rather, they were charged by the [BCUC] on application by ICBC.
>
> 45. The Levies result in the Ratepayer Class being unconstitutionally taxed for the cost of MSP payments unlawfully charged to the Accident Benefit accounts of victims of motor vehicle accidents even though MSP is already funded by the lawful, and constitutionally valid, taxes the Government collects from residents of British Columbia.
>
> 46. The Levies are an unconstitutional tax on the Ratepayer Class and are, to the extent of their inconsistency with the Constitution of Canada, of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*.

[38] After the parties provided submissions on the effect of the *Amendment Act*, the plaintiffs filed an amended NOCC. The most significant addition under this cause of action is a new para. 44.1, which reads:

> 44.1 In the alternative, if s. 53 of the *Constitution Act, 1867* is inapplicable in British Columbia, the Levies are contrary to the principle of no taxation without representation which is imported into British Columbia constitutional law by the preamble to the *Constitution Act, 1867*.
>
> [Emphasis in original.]

[39] The issue under this cause of action is not the legality of the contracts between ICBC and the Province under which payments were made. The constitutional question relates only to whether specific legislation was required to pass those costs onto policy holders. If so, the plaintiffs say the MSP Payments were unlawfully charged to policy holders at the time they were collected and the new legislation cannot retroactively cure a constitutional deficiency

[40] The requirement for enactment by the legislature applies to taxes, but not to fees charged by government for services, nor to regulatory charges. The key factor that identifies a fee or a regulatory charge is a relationship or nexus between the levy and the service provided or the regulatory scheme: *Eurig Estate (Re)*, [1998] 2 S.C.R. 565 [*Eurig Estate (Re)*] at paras. 20–22; *620 Connaught Ltd. v. Canada (Attorney General),* 2008 SCC 7 [*620 Connaught Ltd.*] at paras. 19–28.

[41] The plaintiffs say that the Province cannot settle the question of whether the MSP Payments are a regulatory charge or a tax simply by asserting that belief in legislation. Instead, they say that the characterization must be based on evidence in a trial of common issues.

[42] Before dealing with any issues raised by the *Amendment Act*, it is necessary to determine whether the pleadings disclosed a claim based on unconstitutional taxation that is not bound to fail. In other words, would the Court have certified that cause of action before the *Amendment Act* was enacted?

[43] In *Eurig Estate (Re)*, the Supreme Court of Canada found that probate charges calculated based on the size of the estate were a tax and not a fee because they lacked the necessary connection to the service:

> [22] In determining whether that nexus exists, courts will not insist that fees correspond precisely to the cost of the relevant service. As long as a reasonable connection is shown between the cost of the service provided and the amount charged, that will suffice. . . Although the cost of granting letters probate bears no relation to the value of an estate, the probate levy varies directly with the value of the estate. The result is the absence of a nexus between the levy and the cost of the service, which indicates that the levy is a tax and not a fee.

[44] However, in *620 Connaught Ltd.*, the Supreme Court of Canada found that business licence fees were a regulatory charge and not a tax because they were connected to a regulatory scheme.

[45] The difficulty the plaintiffs face here is that their attempt to characterize the MSP Payments as a tax is inconsistent with the loss that members of the Ratepayer Class are alleged to have suffered. The NOCC alleges that the MSP Payments have increased ICBC's operating costs and policy holders have been required to pay those additional costs. The relevant portions of the amended NOCC include:

> 36. The Remittances have driven up ICBC's operating costs.
>
> 37. ICBC has responded to its increased costs by repeatedly applying to its regulator, ~~the British Columbia Utilities Commission ("Utilities Commission"),~~ (the "Regulator") to increase the rates it charges to the Ratepayer Class for compulsory insurance. Prior to 2003, the Lieutenant Governor in Council was the Regulator. Since 2003, the Regulator has been the British Columbia Utilities Commission.
>
> [. . .]
>
> 42. The effect of the rate increases sought and obtained by ICBC has been to increase the amounts paid by the Ratepayer Class for compulsory auto insurance.
>
> [Emphasis and strikethrough in original.]

[46] The relief claimed by the Ratepayer Class includes:

> 71. The plaintiffs seek against the defendants jointly and severally
>
> [. . .]
>
> (b) a declaration that the Levies are an unconstitutional tax contrary to ss. 53, 90 and 92(2) of the *Constitution Act, 1867*, or, in the alternative to s. 53, contrary to the preamble of the *Constitution Act, 1867*, and restitution of the moneys collected to Rorison and the other members of the Ratepayer Class;
>
> [Emphasis in original.]

Determination on Causes of Action for the Ratepayer Class

[47] The damages claimed by the Ratepayer Class are not alleged to flow directly from the MSP Payments as between ICBC and MSP, but from the extent to which those payments are alleged to have increased the cost to policy holders. The plaintiffs must show that some identifiable portion of their insurance premiums, or of

the amounts by which premiums have increased over time, arose directly from the MSP Payments. They have pleaded and will have to prove the very nexus between the charges and the services that will define the charges as a fee and defeat their attempt to characterize them as an unconstitutional tax.

[48] For that reason, I find that the claim of unconstitutional taxation is doomed to fail and would have been doomed to fail even in the absence of the *Amendment Act*.

[49] As that is the only cause of action the plaintiffs now seek to pursue on behalf of the Ratepayer Class, and the only remaining claim against the Province, I must dismiss the application for certification of this class.

THE ACCIDENT VICTIM CLASS

CAUSES OF ACTION: s. 4(1)(a)

[50] The claim of the Accident Victim Class is advanced only against ICBC and ICBC concedes that the NOCC discloses a cause of action in breach of contract, negligence, or unjust enrichment.

[51] In the amended NOCC, the plaintiffs allege a breach of contract by ICBC as follows:

> **Breach of contract and duty of good faith**
>
> [. . .]
>
> 66. . . . ICBC is the statutory first party insurer of members of the Accident Victim Class and has a duty to act in good faith when assessing the Accident Benefits payable to them.
>
> [. . .]
>
> 68. ICBC breached, and continues to breach, its contractual duties to the members of the Accident Victim Class. In particular:
>
> (a) ~~in the case of the Accident Victim Class,~~ ICBC breached its duty to act in good faith when assessing the Accident Benefits payable to them;
>
> (a.1) ICBC breached s. 88(6) of the Regulation, and its predecessor provisions, by making payments to the Province for which it was not liable, then deducting amounts so paid from the Accident Benefits accounts of members of the Accident Victim Class,

> thereby causing loss to the members of the Accident Victim Class.
>
> [Emphasis and strikethrough in original.]

[52] They also allege that ICBC was negligent as follows:

> **Negligence**
>
> 47. At all material times, ICBC owed members of the Accident Victim Class a duty to take reasonable care in determining the amount of Accident Benefits to which they were entitled under the Regulation and in processing claims to ensure that class members are not deprived of benefits to which they are entitled by statute and regulation.
>
> 48. ICBC breached the duty of care owed to members of the Accident Victim Class, which caused them loss. In particular, ICBC breached its duty of care by:
>
> (a) Deducting from the benefits accounts of members of the Accident Victim Class amounts paid to the Province under the Payments Agreement; and
>
> (b) Failing to detect these underpayments and remedy them, including by the payment of interest on amounts owing.
>
> [Emphasis in original.]

[53] In claiming unjust enrichment in the amended NOCC, the plaintiffs refer to "Remittances" (meaning the MSP Payments); "Levies" (meaning the insurance rates paid by the Ratepayer Class that include the Remittances); and "Withholdings" (meaning the MSP Payments on behalf of the Accident Victim Class), alleging as follows:

> **Unjust enrichment**
>
> 57. ICBC has been and continues to be enriched by the Levies. Members of the Ratepayer Class are correspondingly deprived by the Levies. The Levies form part of the rates members of the Ratepayer Class must pay to insure their vehicles. ~~There is no juristic reason for ICBC's enrichment.~~
>
> 58. ICBC has been and continues to be enriched by the Withholdings. Members of the Accident Victim Class are correspondingly deprived by the Withholdings. The Withholdings are the amounts accident victims would receive in Accident Benefits were ICBC paying them in full as required by law. There is no juristic reason for ICBC's enrichment. In particular, the Amendment Act does not provide a juristic reason for the Withholdings.
>
> [Emphasis and strikethrough in original.]

IDENTIFIABLE CLASS: s. 4(1)(b) of the *CPA*

[54] The principles governing the requirement for an identifiable class were summarized in *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at para. 82:

> [82] . . .
>
> - the purposes of the identifiable class requirement are to determine who is entitled to notice, who is entitled to relief, and who is bound by the final judgment;
> - the class must be defined with reference to objective criteria that do not depend on the merits of the claim;
> - the class definition must bear a rational relationship to the common issues — it should not be unnecessarily broad, but nor should it arbitrarily exclude potential class members; and
> - the evidence adduced by the plaintiff must be such that it establishes 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.
>
> [Emphasis in original.]

[55] A class should be defined as narrowly as practical, excluding large, identifiable groups of people who manifestly have no claim, without excluding those who have a valid claim: *Douez v. Facebook, Inc.,* 2018 BCCA 186 at paras. 68–69.

[56] ICBC concedes that the Accident Victim Class is an identifiable class of two or more persons, but says that the proposed class definition is also overly broad. The plaintiffs propose the following definition of the Accident Victim Class:

> . . . all persons who, since 1973, were injured in a motor vehicle accident while insured by the Insurance Corporation of British Columbia (ICBC) and received accident benefits up to the legal limit of ICBC's liability to pay.

[57] First, ICBC submits this class definition is overly broad because its agreement with the Province came into effect in 1994, and the plaintiffs have not shown any basis in fact for defining the class with reference to 1973. Second, it says an insured who received Accident Benefits at the applicable limit would not have suffered a loss unless they had also incurred further expenses that would otherwise be covered under Part 7 of the *Regulation*.

[58] However, ICBC says that, based on the proposed definition, the primary issues arise under the headings of common issues, preferability, and a workable litigation plan. To the extent it raises questions arising under the *Limitation Act*, S.B.C. 2012, c. 13 [*Limitation Act*], the matter will be dealt with in the separate section below.

COMMON ISSUES: s. 4(1)(c) of the *CPA*

[59] The commonality threshold is a low one, requiring only a triable factual or legal issue that advances the litigation. The critical factors in determining whether an issue is common are that: (i) its resolution will avoid duplicative fact-finding or legal analysis; (ii) it is a substantial ingredient of each class member's claim and must be resolved to resolve the claim; and (iii) success for one class member on the issue will mean success for all: *Finkel v. Coast Capital Savings Credit Union,* 2017 BCCA 361 at para. 22, citing *Thorburn v. British Columbia,* 2013 BCCA 480 at paras. 35–38.

[60] The plaintiffs now propose the following common issues, which I have modified to reflect my finding that there is no cause of action for the Ratepayer Class or against the Province:

1. What are the terms of all agreements between ICBC and the Province whereby ICBC agreed to reimburse the Province (including MSP) for health care expenses arising out of motor vehicle accidents ("the Payments Agreement")?

2. What amounts were paid by ICBC to the Province (including MSP) under the Payments Agreement (the "Payments")?

3. Did ICBC wilfully conceal the existence and circumstances of the Payments Agreement and/or the Payments?

4. Should the Court make an aggregate damages award in favour of the Accident Victim Class members and, if so, in what amount?

5. Did ICBC charge to the Accident Benefits accounts of members of the Accident Victim Class amounts it paid to the Province (including MSP) under the Payments Agreement?

6. If so, is ICBC liable to the Accident Victim Class in (a) negligence; (b) breach of contract and/or breach of its duty of good faith; and/or (c) unjust enrichment?

7. Should the Court award punitive damages against ICBC to the Accident Victim Class and, if so, in what amounts?

[61] In relation to the first two proposed common issues, I agree with ICBC that any issues about the total amount of MSP Payments, or the legality of the contracts with the Province under which those payments were made, are irrelevant. That was the case even before the *Amendment Act*. The causes of action for the Accident Victim Class are based on the terms of the insurance contract, including s. 88(6) of the *Regulatio*n, and on ICBC's compliance or non-compliance with its policy.

[62] I also find that there is no basis in fact for an allegation by the Accident Victim Class of wilful concealment, a point that I will discuss further in dealing with limitation periods.

[63] The amount of MSP Payments on behalf of each class member, and any corresponding loss of Accident Benefits, will be identifiable and vary with each individual. There is, therefore, no basis for an award of aggregate damages, except in relation to any claim for punitive damages.

[64] The individual nature of each class member's loss is the primary basis for ICBC's submission that there are no common issues. ICBC argues that there is no substantial common ingredient because, beyond the fact that all members of the Accident Victim Class were insured under Part 7 of the *Regulation*, their claims all require individual determination.

[65] Each class member will have to establish whether MSP Payments were charged to their Accident Benefits account and whether that resulted in a loss because other eligible expenses were not reimbursed. In each case, ICBC will rely on its recent file review and offers of payment as a complete defence. Some class members also may have, in settlement of tort claims, signed releases that ICBC argues are broad enough to bar this action on their behalf.

Determination on Common Issues

[66] Although I agree that the individual issues are substantial and may predominate, there are certain common threshold issues. First among them is the question of whether the class members are entitled to judgment and the resulting court order interest.

[67] As the plaintiffs point out, ICBC has not, in its pleadings, admitted any legal liability to the Accident Victim Class for the amounts in issue. Even if it had, such an admission would not be a bar to certification. In *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (O.N.C.J. (Gen. Div.)), the Court said at para. 14:

> [14] . . . an admission of liability in the air does not advance the litigation or bind the defendant in respect of members of the proposed class. Without a certification order from this court no public statement by the defendant, and no admission in its defence to the nominal plaintiff, binds the defendant in respect to members of the proposed class. A class proceeding by its very nature requires a certification order for the proposed class members to become parties to the proceeding. If the proposed class members are not parties to the proceedings, the admission of liability, as it relates to them, is no more than a bare promise. . . .

[68] That statement was adopted by this Court in *Dalhuisen (Guardian of) v. Maxim's Bakery Ltd*., 2002 BCSC 528 at para. 8

[69] I also agree with the plaintiffs that, without certification, the question of whether ICBC through its internal process has in fact identified all potential class members and offered them their full entitlement to Accident Benefits would be left to ICBC’s unilateral judgment.

[70] The plaintiffs also seek certification of a common issue of whether the Accident Victim Class is entitled to punitive damages. ICBC's evidence is that, in 1996, it became aware that MSP Payments were being charged to individual Accident Benefits accounts and instituted a policy not to do so in cases where the maximum entitlement might be reached. It is clear from the evidence that ICBC did not follow this policy in many cases. ICBC's affidavit evidence does not specifically provide a date at which it began reviewing files and offering payments, but the dates on some of the correspondence attached as exhibits to Ms. Bains' affidavit suggest that the process began only after ICBC was served with the NOCC in this action.

[71] In *Ari v. Insurance Corporation of British Columbia*, 2019 BCCA 183 [*Ari*], an ICBC employee improperly accessed and sold the personal information of some insureds. The Court of Appeal held that the chambers judge, in certifying a class action on behalf of those insureds, had erred in declining to certify punitive damages as a common issue.

[72] The chambers judge in *Ari* found that there was no reprehensible conduct by ICBC and no basis in fact for an award of punitive damages because ICBC, on being made aware of the security breach, had promptly conducted an internal investigation, assisted a police investigation, terminated the employee involved, and instituted enhanced security measures. The Court of Appeal disagreed and said at para. 30:

> [30] Rather than consider the past history of breaches of privacy by ICBC employees—the evidence supported that at least 7 employees have been terminated by ICBC between 2008 and 2011 for privacy breaches—the chambers judge considered the steps taken *since* the breach in this case was discovered. While laudable on ICBC's part, subsequent conduct is not the sole basis upon which punitive damages are determined. The chambers judge should have accepted as true the allegation that ICBC has a history of employees breaching private information. Instead, she judged the case on the merits on the evidence before her. That was an incorrect approach.
>
> [Emphasis in original.]

[73] The obvious factual issue here is whether ICBC, having instituted a policy in 1996, knew before 2020 that the policy was not being followed in all cases or

whether it took any steps to ensure that it was being followed. While the plaintiffs can only obtain evidence on that point through the discovery process, for purposes of certification, I find that they have established some basis in fact for a punitive damages claim.

[74] I therefore find that there is a basis in fact for the following common issues:

1. Did ICBC charge to the Accident Benefits accounts of members of the Accident Victim Class, and pay the Province (including MSP) amounts in respect of services for which ICBC was not liable under statute or regulation?

2. If so, is ICBC liable to the Accident Victim Class in (a) negligence; (b) breach of contract and/or breach of its duty of good faith; and/or (c) unjust enrichment?

3. Should the Court award punitive damages against ICBC to the Accident Victim Class and, if so, in what amounts?

4. Should any award for punitive damages be made as an aggregate award, and if so, in what amount?

PREFERABLE PROCEDURE: s. 4(1)(d) of the *CPA*

[75] The plaintiff must show some basis in fact that a class action would be preferable to other litigation options: *AIC Limited v. Fischer*, 2013 SCC 69 [*Fischer*] at para. 48. The question is analyzed through the lens of the three principal advantages of class proceedings: behaviour modification, access to justice, and judicial economy: *Fischer* at para. 16.

[76] Section 4(2) of the *CPA* refers to considerations for whether a class proceeding would be the preferable procedure:

> **Class certification**
>
> **4** [. . .]
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

> (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] ICBC argues that the claim for the Accident Victim Class fails under all those considerations.

[78] Although a predominance of individual over common issues is not a bar to certification, ICBC says that the predominance of individual issues is excessive in this case. It relies on *Tiemstra v. Insurance Corp. of British Columbia* (1996), 22 B.C.L.R. (3d) 49 (S.C.), aff'd (1997), 38 B.C.L.R. (3d) 377 (C.A.) [*Tiemstra C.A.*]. In that case, the then Chief Justice of this Court refused to certify a class proceeding brought against ICBC by persons who were denied Accident Benefits under Part 7 of the *Regulation* because there was no or minimal damage to their vehicles. The Chief Justice noted multiple liability issues arose in respect of each individual, including the existence and degree of any disability and whether disability in fact arose from a motor vehicle accident. The Court of Appeal in *Tiemstra C.A.* agreed and said at para. 14:

> [14] … the best that the plaintiff could do in the proposed action is to obtain a ruling that the individual claims must be decided on their merits and that while no or minimal damage to the motor vehicle plus the absence of objective signs of injury cannot operate as an automatic disqualification for benefits, they nevertheless can be taken into account in the adjustment of each claim. In other words the common issue does not settle an important element in the dispute; ICBC and the claimant will continue to argue about the validity of the claim.

[79] I do not find this case to be at all comparable. The individual issues here are much narrower and are not subject to the variety of underlying liability issues that

were present in *Tiemstra C.A*. ICBC has already accepted each class member's claim to Accident Benefits and recognized that each member has a disability which entitled them to the maximum payable Accident Benefits limit under the *Regulation*. The class is relatively small compared to that in many class actions, including the potential class in *Tiemstra C.A*. Although there are significant individual issues, I do not see the prospect that was identified in *Tiemstra C.A*. for the matter to "break down into substantial individual trials": para. 17.

[80] Section 27 of the *CPA* allows the Court to establish the procedure for resolving individual issues. Whatever procedure is adopted, many of the individual issues, while by definition not common, will nonetheless be sufficiently similar such that decisions in a few individual cases will likely guide the resolution of many others. I include in that category questions such as the effect of particular language in a release and the kinds of circumstances likely to extend any applicable limitation period.

[81] ICBC argues that, each year, thousands of individuals commence actions claiming benefits under Part 7 of the *Regulation* and that many potential class members have actually done so at some point in the past. It does not say how many of those actions go to trial in either this Court or the small claims division of the Provincial Court but I take judicial notice that such trials are very rare in this Court. I presume many are settled or simply abandoned as part of the process for resolving much larger tort claims. In any case, a class member who commenced and resolved an action under Part 7 of the *Regulation* before having reached the maximum benefit level would not have been in a position to claim the loss underlying this proceeding.

[82] I also do not accept ICBC's argument that its own recent efforts to resolve claims voluntarily constitutes a preferable procedure. ICBC relies on *Richardson v. Samsung Electronics Canada Inc.*, 2018 ONSC 6130 [*Richardson*] for that argument. *Richardson* was a case involving a model of smartphone whose batteries had the potential to overheat and catch fire. Within a month of the defective phones going on the market, the defendant stopped selling them, warned buyers not to use

them, and offered exchanges. Within a further month, it also offered additional credit to buyers who exchanged them for other phones. All of that occurred before the plaintiff commenced the class action. At paras. 72–74, the Ontario Supreme Court concluded:

> [72] An access to justice issue arises as a result: "bad" or negligent behaviour goes unchecked and unchanged and therefore the goal of behaviour modification is unmet.
>
> [73 However, notwithstanding these laudable and important goals, I conclude that a class action is not the preferable procedure in this case. I say this for two reasons in particular. First, the defendant's compensation program is the preferable procedure. The existence of this voluntary compensation scheme squarely addresses access to justice and behaviour modification concerns.
>
> [74] In my view, the defendant's prompt response in concert with Health Canada to safety issues, the recall, the termination of sales, and the compensation package, demonstrates the response of a responsible corporate citizen. It is behaviour that should be encouraged rather than discouraged.

Determination on Preferable Procedure

[83] On the evidence now before me, I cannot find ICBC's internal program to be a preferable procedure. On ICBC's own evidence, some 25 years had passed before it recognized that its own policy was not being consistently followed. It has now adopted a compensation process that, as noted above in another context, operates on the basis of its sole discretion and does not address any claim the plaintiffs might have to interest. The plaintiffs also have not been given any opportunity to review or challenge the completeness of those measures.

[84] I also do not accept ICBC's submission that it would be preferable for individual class members to bring small claims actions in the Provincial Court or the Civil Resolution Tribunal under the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25. If anything, those multiple separate claims would likely be less efficient than a specifically designed procedure under s. 27 of the *CPA*.

[85] I am therefore satisfied that the class action is the preferable procedure for the Accident Victim Class.

REPRESENTATIVE PLAINTIFF AND LITIGATION PLAN: s. 4(1)(e) of the *CPA*

[86] There is no evidence to suggest that Mr. Methot is not a proper representative plaintiff for the Accident Victim Class. ICBC objects to his litigation plan primarily because it fails to set out a mechanism for resolving individual issues and therefore fails to respond to what it says is the complexity of the action. Among the cases it relies upon is *Kett v. Mitsubishi Materials Corporation*, 2020 BCSC 1879 [*Kett*].

[87] *Kett* was a claim for a class consisting of at least 1,700 indirect purchasers. The plaintiff alleged that parts suppliers sold parts to automobile manufacturers at inflated prices, resulting in class members paying more than they should have for the vehicles they bought. The complexity of the case is best illustrated by one paragraph from the reasons for judgment:

> [190] Is the case manageable? It will be a massive exercise to follow each shipment of each component from the relevant defendant through any intermediaries, to the [Original Equipment Manufacturer], then down from the [Original Equipment Manufacturer], through additional intermediaries, and eventually to individual class members.

[88] In the face of that complexity, Justice Branch concluded that the "standard form" litigation plan put forward by the plaintiff was not adequate:

> [207] However, the challenges raised by the evidence here demand more than a "standard form" plan. The plaintiff's plan needs to address directly the many threads of liability and damages. While such a plan would be suitable for a case with a clear common core, it is too simplistic for a case lacking in same. . . .

Determination on the Representative Plaintiff and Litigation Plan

[89] I find this case to be one that has "a clear common core" and is much less complex than ICBC attempts portray it. It is also unrealistic to expect the plaintiffs to have produced a meaningful plan to deal with individual issues before the Court has ruled on what constitutes a common issue and what must be left to individual determination.

[90] For present purposes, I find that the plan meets the requirements of s. 4(1)(e)(ii) of the *CPA*. Further modifications and refinements will likely be required as the matter proceeds: *North v. British Columbia (Attorney General)*, 2020 BCSC 2044 [*North*] at para 110.

THE LIMITATIONS ISSUE

[91] Limitation issues do not fit neatly or exclusively into any single category under s. 4(1) of the *CPA*. In *Godfrey v. Sony Corporation*, 2017 BCCA 302 [*Godfrey*], aff'd 2019 SCC 42, the limitation issue was argued under s. 4(1)(a). *Godfrey* was a case where all claims would have been barred and there would have been no cause of action if the limitation period had expired. In this case, any limitation defence would not apply to all claims and ICBC raises the issue as a consideration in identifying a class under s. 4(1)(b). In *North*, the question was considered as one of preferable procedure under s. 4(1)(d).

[92] Regardless of which subsection the matter is considered under, I interpret the following statement from our Court of Appeal at para. 67 of *Godfrey* as one of general application:

> [67] I accept that a limitation period argument can be considered at the certification stage, in exceptional circumstances, but generally should not. . . .

[93] In *Godfrey*, the Court of Appeal at para. 68 found that in the case before it, the limitation issue was "bound up in the facts."

[94] One of those facts is when the claim is discovered. Pursuant to ss. 6(1) and 8 of the *Limitation Act,* discovery of the claim triggers the running of the limitation period:

> **Basic limitation period**
>
> **6** (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.
>
> [. . .]

> **General discovery rules**
>
> **8** Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:
>
> (a) that injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
>
> (c) that the act or omission was that of the person against whom the claim is or may be made;
>
> (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

[95] Section 19 of the *Limitation Act* makes special provision for persons under a disability, potentially extending the period for as long as the disability continues:

> **Discovery rule for persons under disability**
>
> 19 A claim of a person under a disability is discovered,
>
> (a) unless a notice to proceed is delivered under paragraph (b) before the person ceases to be a person under a disability, on the later of the following:
>
> (i) the day on which the person ceases to be a person under a disability;
>
> (ii) the day on which the claim is discovered under section 8, 12, 13, 14, 15, 16 or 17, as the case may be, or
>
> (b) on the day on which a notice to proceed that complies with the requirements of section 20 (2) and any requirements prescribed under section 20 (5) is delivered in accordance with section 20 (1) and with any requirements prescribed under section 20 (5).

[96] In *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, the Supreme Court of Canada said at para. 42 that “a claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn.” The Court further said at para. 44 that “a plaintiff will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence.”

Determination on the Limitations Issue

[97] Each member of the Accident Victim Class would likely have known when their Accident Benefits had reached the maximum limit and ICBC stopped paying for them. The MSP Payments were included in the benefit statements that class members received, or at least could have obtained. Whether that was sufficient to make a claim discoverable under s. 8 of the *Limitation Act* may depend on each person's circumstances and is an individual issue, as is any impact of disability under s. 19 of the *Limitation Act*.

[98] For present purposes, I find that the existence of a potential limitation issue in respect of at least some class members is not a bar to certification.

SUMMARY AND CONCLUSION

[99] The application for certification on behalf of the Ratepayer Class is dismissed.

[100] A class proceeding for the Accident Victim Class is certified against ICBC with the following common issues:

1. Did ICBC charge to the Accident Benefits accounts of members of the Accident Victim Class, and pay the Province (including MSP) amounts in respect of services for which ICBC was not liable under statute or regulation?

2. If so, is ICBC liable to the Accident Victim Class in (a) negligence; (b) breach of contract and/or breach of its duty of good faith; and/or (c) unjust enrichment?

3. Should the Court award punitive damages against ICBC to the Accident Victim Class and, if so, in what amounts?

4. Should any award for punitive damages be made as an aggregate award, and if so, in what amount?

[101] The parties have liberty to apply if they are unable to agree on the terms of an order giving effect to these reasons.

"N. Smith J."