COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Rorison v. Insurance Corporation of British Columbia,* 2023 BCCA 474

Date: 20231219
Docket: CA48291

Between:

Robert Rorison and Brayden Methot

Appellants/
Respondents on Cross Appeal
(Plaintiffs)

And

Insurance Corporation of British Columbia

Respondent/
Appellant on Cross Appeal
(Defendant)

And

His Majesty the King in Right of the Province of British Columbia

Respondent
(Defendant)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Hunter
The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated April 22, 2022 (*Rorison v. Insurance Corporation of British Columbia*, 2022 BCSC 624, Vancouver Docket S202406).

Counsel for the Appellants Robert Rorison and Brayden Methot:	G. van Ert J.S. Stanley B. Reedijk
Counsel for the Respondent Insurance Corporation of British Columbia:	G.P. Brown, K.C. J.A. Morris
Counsel for His Majesty the King in Right of the Province of British Columbia:	J.G. Morley L.V. Mauro
Place and Date of Hearing:	Vancouver, British Columbia May 29–30, 2023

Place and Date of Judgment: Vancouver, British Columbia
December 19, 2023

Written Reasons by:
The Honourable Mr. Justice Hunter

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Abrioux

Summary:

The appellants, Robert Rorison and Braydon Methot, applied for certification of two classes: BC drivers who pay insurance premiums (the "Ratepayer Class") and catastrophically injured persons (the "Accident Victim Class"). The appellants appeal the chambers judge's denial of certification of the Ratepayer Class. The respondents, the Insurance Corporation of British Columbia ("ICBC") and the Province of British Columbia (the "Province"), cross-appeal the judge's certification of the Accident Victim Class.

The appellants allege that ICBC has been making gratuitous payments to the Province for medical expenses incurred by injured B.C. motorists, although ICBC was not actually liable to reimburse the Province for such expenses and the Province was already in receipt of federal funding for these costs. Members of the Ratepayer Class say they were charged inflated insurance premiums because of this scheme, which amounted to an unconstitutional tax.

The Accident Victim Class alleges that these payments improperly reduced their maximum available benefits.

The judge certified the Accident Victim Class claim, but declined to certify the Ratepayer Class on the basis that the pleadings failed to disclose a viable cause of action as required by s. 4(1)(a) of the Class Proceedings Act [*CPA*]. *The judge also declined to certify wilful concealment as a common issue in the Accident Victim Class claim.*

ICBC, appellant on cross-appeal, contends that the Accident Victim Class should not have been certified because determining the liability of ICBC to the Accident Victim Class, and the Accident Victim Class' entitlement to punitive damages, turns on the quantum of their individual claims and involves no issues amenable to a common issues trial. ICBC submits also that if the Accident Victim Class claims were properly certified, the judge erred in not bifurcating the punitive damage claims, and in not giving effect to ICBC's limitations defences to reduce the size of the class.

Held: The appeal is allowed in part and the cross-appeal is dismissed.

With respect to the Ratepayer Class, the judge erred in concluding that s. 4(1)(a) of the CPA was not made out by improperly focusing on one factor out of several in the legal framework for distinguishing a tax from other types of government levies, namely

a connection between the services provided and the funds collected. Nor does the Amendment Act conclusively bar the unconstitutional tax claim.

With respect to the Accident Victim Class, the judge did not err in determining that there were common issues of liability and punitive damages that justified certifying the class. Further, the judge did not err in his failing to include an order bifurcating the punitive damage claim or giving effect to the limitations defence.

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Reasons for Judgment of the Honourable Mr. Justice Hunter:

Introduction and Background

[1] This is a class action certification appeal and cross-appeal concerning the motor vehicle accident insurance scheme in British Columbia.

[2] The Insurance Corporation of British Columbia ("ICBC") has for many decades had an arrangement with the Province of British Columbia whereby ICBC has paid the Province the cost of medical services necessitated by motor vehicle accidents (the "Remittances"), and then included those amounts in the rates charged to motorists in British Columbia.

[3] The appellants, Robert Rorison and Braydon Methot (together, the "Appellants") have challenged the legality of these arrangements. They assert that the additional charge to motorists in British Columbia arising from the inclusion of medical costs constitutes an unconstitutional tax because it bears no relationship to the provision of automobile insurance to motorists.

[4] The federal government already funds physician services under the *Canada Health Act*, R.S.C. 1985, c. C-6. As well, at the relevant times s. 88(6) of the *Insurance Vehicle Regulation*, B.C. Reg. 447/83 [*Regulation*] provided that ICBC "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." The Appellants' claim was made on behalf of motorists who have paid the allegedly inflated rates over the years, referred to as the "Ratepayer Class".

[5] The Appellants also sought certification of a claim for wilful concealment of the arrangements by which ICBC paid the Remittances to the Province.

[6] In addition, the Appellants challenge ICBC's practice of reducing the maximum insurance benefits available to catastrophically injured victims, referred to as the Accident Victim Class, under Part 7 of the Regulation. This had the effect of shrinking the benefits available to members of the Accident Victim Class, who needed every dollar of the total benefits available to them ($150,000, at the time) on account of their very serious injuries.

[7] The Appellants applied for certification as a class action of both the B.C. motorists who pay insurance premiums (the "Ratepayer Class") and catastrophically injured motorists.

[8] Five months after the Appellants filed their Notice of Civil Claim on March 3, 2020, the British Columbia government began to draft a bill aimed at retroactively validating the Remittances made to the Province pursuant to the Agreement. The *Insurance (Vehicle) Amendment Act*, 2021, S.B.C. 2021, c. 23 [*Amendment Act*] came into force on October 28, 2021.

[9] On February 11, 2022, the Appellants amended their Notice of Civil Claim in light of the legislation. The Appellants abandoned the Ratepayer Class' private law causes of action but maintained the unconstitutional tax claim.

The Certification Hearing

[10] At the certification hearing, the respondents opposed certification of the Ratepayer Class claim on the ground that the unconstitutional tax claim was bound to fail, if not from the outset, then certainly after the enactment of the retroactive legislation embodied in the *Amendment Act*. Thus, they argued the Ratepayer Class claim failed to disclose a cause of action required by s. 4(1)(a) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*].

[11] ICBC accepted that the maximum insurance benefits available to catastrophically injured victims should not have been reduced by the medical payments, but asserted that this was not a systemic issue but arose by error from time to time. ICBC corrected these errors when it became aware of them in individual cases. ICBC opposed certification of the Accident Victim Class claim on the ground that the Accident Victim Class claim raised no common issues under s. 4(1)(c) of the *CPA*.

[12] On April 22, 2022, in reasons for judgment indexed as 2022 BCSC 624, Justice N. Smith certified the action in respect of the Accident Victim Class but denied

certification of the Ratepayer Class. In particular, the judge (i) dismissed the unconstitutional tax claim as "doomed to fail"; and (ii) declined to set out "wilful concealment" as a common issue between both the Accident Victim Class and the Ratepayer Class. At the same time he certified a number of other common issues.

[13] The Appellants appeal both these aspects of the judge's orders concerning the Ratepayer Class claims.

[14] The judge did certify the Accident Victim Class claims, holding that the claims raised common issues sufficient for certification. ICBC cross-appeals the judge's certification of the Accident Victim Class, and argues that the judge erred in law or principle by certifying the following common issues: (i) whether the Accident Victim Class was entitled to punitive damages and, if so, in what amount; and (ii) whether ICBC is liable to the Accident Victim Class in negligence, breach of contract, breach of the duty of good faith, and/or unjust enrichment.

[15] ICBC also argues in the alternative that if the Accident Victim Class claims were properly certified, the judge erred in not requiring bifurcation of the punitive damage claims, and in not giving effect to the limitations defences advanced by ICBC.

[16] For the reasons that follow, I would allow the appeal in part. I would set aside the judge's finding that the Ratepayer Class claim failed to disclose a cause of action as required by s. 4(1)(a) of the *CPA* and remit the case to the chambers judge for determination on the remaining certification requirements. I would dismiss the appeal to the extent of certifying wilful concealment as a common issue.

[17] I would dismiss the cross-appeal seeking decertification of the Accident Victim Class and decline to give effect to the cross-appellants' alternative arguments concerning bifurcation and limitation periods.

Issues on Appeal and Cross-appeal

[18] The following issues and sub-issues are raised by the Appellants' appeal:

(1) Did the judge err in refusing to certify the Ratepayer Class?

(a) Did the judge err in concluding that the Ratepayer Class' unconstitutional taxation claim discloses no reasonable cause of action, thus failing to satisfy s. 4(1)(a) of the *CPA*?

(b) Does the Ratepayer Class satisfy the remaining certification requirements?

(2) Did the judge err by refusing to certify the "wilful concealment" claim as a common issue for the Accident Victim Class?

[19] The following issues and sub-issues are raised by the respondent ICBC in its cross-appeal:

(1) Did the judge err in law or principle by certifying the Accident Victim Class?

(a) Did the judge err by certifying as a common issue whether ICBC is liable to the Accident Victim Class?

(b) Did the judge err in finding that a class proceeding was the preferable procedure?

(c) Did the judge err by certifying punitive damages as a common issue?

(2) If, in the alternative, the Accident Victim Class was properly certified, did the judge err by failing to "bifurcate" the common issue of punitive damages?

(3) If, in the alternative, the Accident Victim Class was properly certified, did the judge err by failing to narrow the definition of the class in light of applicable limitations periods?

[20] The two respondents are differently situated vis-à-vis the Appellants' claims and with respect to their cross-appeals:

- The Appellants appeal dismissal of the Ratepayer Class claim against the Province only. They do not appeal dismissal of the Ratepayer Class claim against ICBC.

- The Appellants appeal the judge's refusal to set out wilful concealment as a common issue for the Ratepayer Class and Accident Victim Class. Because the Accident Victim Class brings its claim against ICBC as well, this issue is on appeal as against both ICBC and the Province.

- The cross-appeal is filed by the respondent ICBC alone.

[21] The central issue on the appeal concerning certification of the Ratepayer Class is whether the unconstitutional tax claim discloses a reasonable cause of action per s. 4(1)(a) of the *CPA*. The Province has not made submissions on the remaining certification requirements.

The Appeal

Did the judge err in concluding that the Ratepayer Class' unconstitutional taxation claim discloses no reasonable cause of action, thus failing to satisfy s. 4(1)(a) of the *CPA*?

[22] The Appellants argue that the judge erred in finding that the unconstitutional taxation claim failed to disclose a reasonable cause of action under s. 4(1)(a) of the *CPA*. This issue is the primary subject of the appeal.

[23] Section 4(1)(a)–(e) of the *CPA* provides that a court must certify a class proceeding where 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 must 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; and
>
> (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.

[24] The burden is on the plaintiff to demonstrate that these requirements have been met: *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 at paras. 99–104.

[25] This Court will review the question of whether the pleadings of a putative class disclose a cause of action on a correctness standard: *Wakelam v. Wyeth Consumer Healthcare*, 2014 BCCA 36 at para. 8; *Jiang v. Peoples Trust Co.,* 2017 BCCA 119 at para. 38; *Workers' Compensation Board v. Sort*, 2022 BCCA 318 at para. 75; *Sharifi v. WestJet Airlines Ltd.*, 2022 BCCA 149 at para. 30.

Standard of Review

[26] The s. 4(1)(a) requirement—the most relevant provision on the appeal—concerns whether the pleadings disclose a cause of action, assuming the pleaded facts are true.

[27] Whether the pleadings disclose a cause of action is assessed on the same "plain and obvious" standard as motions to dismiss for failure to disclose a cause of action. As the Supreme Court of Canada explained in *Hunt v. Carey*, [1990] 2 S.C.R. 959 at 980:

> The question to be decided, then, is whether it is "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action. Is there some radical defect which would amount to an abuse of process of the court such that the claim should be struck? The fact that the point is a novel one would not prevent the issue proceeding to trial.

[28] The question of whether the pleadings disclose a reasonable cause of action as required by s. 4(1)(a) is a pure question of law and, as such, does not attract appellate deference on appeal. The standard of review is correctness. The certification judge has a measure of discretion in assessing the requirements under s. 4(1)(b) to (d) of the *CPA*, but the Court will interfere if there has been an extricable error of law, an error in principle, or if the decision was clearly wrong: *Workers' Compensation Board v. Sort*, 2022 BCCA 318 at paras. 75–76.

[29] The Province urges this Court to apply rigorous scrutiny in assessing whether the Ratepayer Class claim discloses a cause of action. The Province relies on the Supreme Court of Canada's decision in *Atlantic Lottery Corp. Inc. v. Babstock*, where Justice Brown explained that courts must strike claims that have no reasonable prospect of success as part of the "need for a culture shift to promote 'timely and affordable access to a civil justice system'" 2020 SCC 19 at para. 18. Justice Brown explains that courts can achieve this result by using "the power to strike hopeless claims": *Atlantic Lottery* at para. 18.

[30] In my view, *Atlantic Lottery* neither implicitly nor explicitly alters the *Hunt* test, and accordingly the *Hunt* test is applicable here.

[31] The issue, therefore, is whether the judge was correct that the Ratepayer Class claim was hopeless and accordingly failed the first certification requirement.

The Judge's Analysis of s. 4(1)(a)

[32] The judge held that the pleadings failed to disclose a cause of action. He reasoned that the Appellants had pleaded a "nexus" between the increased insurance charges and the services the Ratepayers Class received. This nexus would render the impugned Remittances as a fee rather than a tax. Accordingly, he determined that the unconstitutional taxation claim was doomed to fail even before the intervention of the *Amendment Act*.

[33] The judge characterized the pleadings as follows:

> [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.]

[34] The judge characterized the pleadings as alleging that the MSP Payments increased ICBC's operating costs. Therefore, proving the Appellants' claims would require the Appellants to show that the Remittances resulted in increased insurance premiums. That particular showing, he reasoned, would amount to proving a nexus between the increased costs and the auto insurance services provided, thereby establishing them as a fee rather than a tax:

> [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.

[35] The judge concluded that the pleadings failed to disclose a cause of action even before the effect of the *Amendment Act* was considered. As a result, his reasons contain no discussion of the effect of the *Amendment Act*.

The Legal Framework: Taxes, Regulatory Charges, or User Fees

[36] Section 53 of the *Constitution Act, 1867*, 30–31 Vict., c. 3 (UK) requires that taxes be imposed under the authority of the Legislature. The Appellants accept that in principle, a provincial legislature can displace s. 53 by express language, but no argument is made here that this has been done. The Province accepts that if the inclusion of medical expenses in ICBC rates is arguably a tax, the claim should proceed.

[37] The Province argues, however, that ICBC rates are not governmental levies at all. If they are, they are user fees, not taxes, whereas the Remittances by ICBC to the government are either regulatory charges or civil liabilities to the Crown.

[38] Later in this judgment, I will address the question whether there is an arguable case that rates charged by ICBC, which has a statutory monopoly over basic automobile insurance in this Province, can be characterized as government levies. The central question in this appeal is whether there is an arguable case that the component of ICBC rates that derives from the amount of Remittances to the Province can be characterized as a tax that is not authorized by the legislature.

[39] A court adjudicating the constitutionality of a government levy must first characterize the levy's primary purpose, in "pith and substance": *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134 at para. 30 [*Westbank*]. Levies—financial costs imposed by a government entity—are either taxes, regulatory charges, or user fees.

[40] The distinctions between these three types of levies were clarified by the Supreme Court of Canada in *Re Eurig Estate*, [1998] 2 S.C.R. 565 [*Eurig Estate*] and *Westbank*. As the Supreme Court of Canada explained in *Westbank*:

> [30] In all cases, a court should identify the primary aspect of the impugned levy. This was the underlying current of the earlier cases on s. 125, which focussed on the "pith and substance" of the charge: *"Johnnie Walker"* case, *supra*; *Re Exported Natural Gas Tax*, *supra*. Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or (3) to charge for services directly rendered, i.e., to be a user fee.

[41] In *Eurig Estate*, the Supreme Court of Canada determined that the levy in question was a tax, rather than a user fee, on the basis of the following factors:

> [15] Whether a levy is a tax or a fee was considered in *Lawson*, *supra*. Duff J. for the majority concluded that the levy in question was a tax because it was: (1) enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; and (4) intended for a public purpose.
>
> [16] The first, third and fourth criteria pertain to the nature of the levy, while the second criterion involves a consideration of the manner in which the levy was imposed…

[42] The Court went on to identify an additional factor:

> [21] Another factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided in order for a levy to be considered constitutionally valid.
>
> [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.

[43] In *Westbank*, the Supreme Court of Canada further distinguished taxes, this time from regulatory fees. The Court explained that a levy will be a regulatory fee, rather than a tax, where it is "imposed primarily for regulatory purposes, or as necessarily incidental to a broader regulatory scheme": at para. 32. This analysis requires identifying the existence of a regulatory scheme. The Court identified the following indicia of a regulatory scheme in *Westbank*:

> [24] …[F]actors to consider when identifying a regulatory scheme include the presence of: (1) a complete and detailed code of regulation; (2) a specific regulatory purpose which seeks to affect the behaviour of individuals; (3) actual or properly estimated costs of the regulation; and (4) a relationship between the regulation and the person being regulated, where the person being regulated either causes the need for the regulation, or benefits from it. This is only a list of factors to consider; not all of these factors must be present to find a regulatory scheme. Nor is this list of factors exhaustive.

[44] The third factor, which concerns the estimated costs of the regulation, is particularly relevant to this appeal. The Supreme Court of Canada explained that "[r]egulatory schemes usually involve expenditures of funds on costs which are either known, or properly estimated." Where there is a "fairly close 'nexus' between the estimated costs and the revenues raised through the regulatory scheme," this suggests the existence of a regulatory scheme rather than a tax: *Westbank* at para. 27.

[45] In sum, *Eurig Estate* distinguished taxes from user fees. *Westbank* distinguished taxes from regulatory charges. Both analyses involve assessing the nexus between the levy and the service provided.

[46] The analysis developed in *Eurig Estate* and *Westbank* was reviewed more recently by the Supreme Court in *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7 [*Connaught*] The Court summarized the distinctions among government levies in this way:

> [19] It will be useful to first differentiate a regulatory charge from a user fee. A user fee, by definition, is a fee charged by the government for the use of government services or facilities. In the case of user fees, as stated by this Court in *Eurig*, there must be a clear nexus between the quantum charged and the cost to the government of providing such services or facilities. The fees charged cannot exceed the cost to the government of providing the services or facilities. However, "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" (see *Eurig*, at para. 22).
>
> [20] By contrast, regulatory charges are not imposed for the provision of specific services or facilities. They are normally imposed in relation to rights or privileges awarded or granted by the government. The funds collected under the regulatory scheme are used to finance the scheme or to alter individual behaviour. The fee may be set simply to defray the costs of the regulatory scheme. Or the fee may be set at a level designed to proscribe, prohibit or lend preference to a behaviour, …

[47] To determine whether the levy is a regulatory charge, then, the first step is to identify the existence of a relevant regulatory scheme, and then to find a relationship between the charge and the scheme itself: *Connaught*, at paras. 25–27.

[48] Where a regulatory scheme has been identified, it is necessary that the fee revenue not exceed the regulatory costs in order to render s. 53 of the *Constitution Act* meaningless: *Connaught*, para. 39, citing *Ontario Home Builders* … A significant or systematic surplus above the cost of the regulatory scheme would be inconsistent with a regulatory charge: *Connaught,* at para. 40.

[49] The Court in *Connaught* supported the need for factual review where the nexus between the revenues collected and the persons regulated is doubtful:

> [46] … Where the connection between the use of the revenues generated from a government levy and the persons being regulated is doubtful, the courts will scrutinize the facts to ensure that the Constitution is not circumvented by executive or bureaucratic edict.

The Alleged Legal Errors

[50] The Appellants identify two errors with the judge's conclusion that the Ratepayer Class claim failed to disclose a cause of action. First, they say the judge misapplied the *Eurig* and *Westbank* frameworks, focusing on one factor for analyzing the pith and substance of the Remittances while ignoring others. Second, the judge erred in concluding that the mere presence of an intermediary between the Ratepayer Class and the Province, i.e., ICBC, established a nexus between the service and the levies.

[51] In reviewing the judge's reasons, I approach my analysis in two parts. I first assess the viability of the unconstitutional tax claim prior to the intervention of the *Amendment Act*, in light of the two errors alleged by the appellants. Second, I consider whether the *Amendment Act* forecloses an otherwise viable unconstitutional tax claim.

The Judge Misapplied the Eurig and Westbank framework

[52] The Appellants argue that the judge erred by determining the constitutional nature of the levy without regard to all of the *Eurig* and *Westbank* factors and without hearing evidence on those factors. Instead, he erroneously limited his analysis to one of the factors, namely whether the levy was used to cover a public body's operational costs. The Appellants say that the judge incorrectly interpreted *Eurig* and *Westbank* to stand for the proposition that a levy used to cover a public body's operational costs is *always* a regulatory charge or user fee, and not a tax.

[53] The Appellants contend that *Eurig* and *Westbank* instead make clear that the use of payments for an operational cost—i.e., a levy's nexus with a service—is just one of a series of (non-exhaustive) factors that a court is to use when distinguishing a regulatory charge or fee from a tax. The other factors include how the levies are paid, how they are used, their quantum, their purported justification, and more.

[54] The Appellants argue that these factors required fact-finding to properly assess. They say that it was not open to the judge to strike out the unconstitutional tax claim on the pleadings alone.

[55] The Province responds that the Appellants' position is inconsistent with the practice of a number of courts that have indeed determined whether a levy is a tax or non-tax based on pleadings alone. Moreover, the Province observes that neither *Eurig Estate* nor *Westbank* contains any suggestion that assessing whether a particular levy is a tax is a factual issue that cannot be determined via pleadings alone.

[56] Finally, the Province argues that the Appellants' pleadings contain no allegations relevant to the other factors that the Appellants say the judge should have considered. Accordingly, the Province argues that there was no reason for the judge to refuse to make the s. 4(1)(a) determination on the pleadings.

[57] This ground of appeal is comprised of two distinct issues: (i) an initial, threshold question of whether a judge can determine if an unconstitutional tax claim satisfies s. 4(1)(a) of the *CPA* on pleadings alone; (ii) and if so, whether the judge properly dismissed the unconstitutional tax claim in this case for failing to disclose a cause of action.

[58] In *Fareau v. Bell Canada*, 2022 ONSC 2479, the plaintiff inmates impugned Ontario's contractual arrangement with Bell Canada for telephone services for inmates. Pursuant to their contract, Ontario was entitled to a commission from Bell. The plaintiffs alleged that this constituted an unconstitutional tax. The motions judge dismissed this claim for failing to disclose a cause of action. This aspect of the motion judge's decision was upheld by the Ontario Court of Appeal: *Fareau v. Bell Canada*, 2023 ONCA 303, at paras. 13 and 57–74.

[59] As the result in *Fareau* makes apparent, there is no principled reason why unconstitutional tax claims cannot be excised at the pleadings stage should they fail to disclose a cause of action.

[60] The converse is also true. In cases where courts have allowed unconstitutional tax claims to *proceed*, it is not because such claims can never be dismissed at the pleadings stage. Rather, it simply was not "plain and obvious" that the levy in question could not be characterized as an (unconstitutional) tax. See, for example, *National Steel Car Limited v. Independent Electricity System*, 2019 ONCA 929, at para. 10.

[61] Finally, the Appellants' submission in this respect is also inconsistent with the controlling test from *Hunt*. If it were necessary to hear evidence on each *Eurig Estate* and *Westbank* factor at the certification stage, all certification applications concerning the pith and substance of a levy would thereby be immune from dismissal, even if they failed to satisfy s. 4(1)(a) of the *CPA*. Pleadings that disclose a radical defect as set out in *Hunt* must be dismissed.

[62] I therefore disagree with the Appellants' submission that "the chambers judge erred by thinking he could determine the constitutional nature of the levy without regard to all of the *Westbank* factors, and without hearing evidence on any of them."

(Emphasis added). As a threshold matter, it was not an error for the judge to consider striking out the unconstitutional tax claim here without a full evidentiary record.

[63] While it was not an error of principle for the judge to consider dismissing the certification application on the pleadings alone, I agree with the Appellants that the judge ultimately erred in denying certification in this case. The judge failed to fully consider the full range of factors that comprise the *Westbank* and *Eurig Estate* framework. This, in turn, meant that he failed to consider other aspects of the Appellants' pleadings that clearly support their allegation that the Remittances were unconstitutional taxes.

[64] In *Eurig Estate*, the Supreme Court of Canada explained that "[a]nother factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided in order for a levy to be considered constitutionally valid" (at para. 21; emphasis added.) This language suggests that the nexus between the quantum charged and the cost of the service provided is but one of various indicia of a user fee.

[65] Accordingly, even if the Appellants pleaded a nexus between the costs they incurred and the services they received, and even if such a nexus exists in fact (as the Province argues), this would not decisively settle the classification of the impugned levy. It follows that even if the judge correctly interpreted the pleadings to allege such a nexus, he erred in reasoning that the Appellants' claim failed to disclose a cause of action solely on that basis.

[66] In principle, the other *Eurig Estate* and *Westbank* factors could point away from a user fee and towards the levy in question being a tax. These factors might ultimately overwhelm the apparent nexus identified by the judge in the pleadings and allow the claim to clear the low threshold in *Hunt*. Put simply, that apparent nexus is just one factor in determining the pith and substance of the levy.

[67] Indeed, a review of the Appellants' Amended Notice of Civil Claim ("ANOCC") confirms that the Appellants pleaded facts going to the other *Eurig Estate* and *Westbank* factors. For example, the Appellants pleaded that the Remittances are purportedly used to reimburse the Province's already funded healthcare costs, which goes to the public purpose factor (ANOCC at paras. 23–42).

[68] The Appellants also pleaded that there is no regulatory foundation for the Remittances, which goes to whether the Remittances were collected pursuant to a

regulatory scheme (ANOCC at para. 29). With respect to whether the Remittances are taxes or user fees, the Appellants pleaded that ICBC received money from the ratepayers that goes beyond recouping the costs of the ICBC insurance scheme (ANOCC at paras. 23–30 and 45).

[69] Therefore, in my respectful view, the judge erred in concluding that the Ratepayer Class' claim was bound to fail. He did so by relying on a subset of the totality of the *Eurig Estate* and *Westbank* factors he ought to have considered. A consideration of these additional factors requires a more complex consideration of the claim. It cannot be said that it is "plain and obvious" that the claim will fail.

[70] Strictly speaking, this conclusion makes assessing the second alleged error concerning the certification of the Ratepayer Class unnecessary. However, for the sake of completeness, I go on to discuss the Appellants' second alleged error.

The Judge Erred in Concluding that the Presence of an Intermediary Establishes a Nexus between the Services and the Levies

[71] The Appellants further argue that the judge erred in concluding that the Ratepayer Class claim is doomed to fail because the Appellants impugn the premiums paid to an intermediary (ICBC) rather than the funds remitted to the Province itself. This, the judge held, was fatal to the unconstitutional tax claim because it established a nexus between (1) the increased premiums the Ratepayer Class paid to ICBC; and (2) the vehicle insurance services provided to the Ratepayer Class, thereby demonstrating that the increased levy in question is not a tax (Certification Reasons, at para. 47).

[72] The Appellants contend that the mere presence of an intermediary as a tax collecting agent cannot save an otherwise unconstitutional tax. They argue that if such an argument were accepted, governments could unilaterally increase the price of a service provided by a regulator—even on the basis of costs unrelated to the regulator's mandate—and then use the increased payments from consumers as a source of additional revenue. This would violate the constitutional guarantee against taxation in the absence of legislation through a backdoor.

[73] Ultimately, the Appellants say that they impugn both the Agreement between ICBC and the Province *and* the Remittances from ICBC to MSP for raising costs for the Ratepayer Class. The fact that the increased costs come via the intermediary step of payment to ICBC is a detail about how the Remittances are paid without constitutional significance.

[74] The Province offers two arguments in response. First, it argues that the presence of ICBC as a middleman is indeed decisive, because while it is a Crown corporation, it is not "governmental" simply by virtue of being owned by the government. Because the increased premiums are being paid to a non-governmental entity first, they are cannot be taxes. Only those Crown corporations that have special powers or functions—such as municipalities—exercise "governmental" functions. ICBC provides auto insurance, which is an ordinary *market* function (although in British Columbia it happens to be monopolized by ICBC). Accordingly, the fact that the rate increases were paid to ICBC first means that they cannot be "taxes," because they are not *governmental* costs, i.e., levies, in the first place.

[75] Second, echoing the judge's analysis, the Province argues that the Remittances in question are "plainly" regulatory charges according to the facts pleaded by the Appellants. The Province argues that "[t]he essential material fact in the ANOCC is that premiums for basic auto insurance are regulated based on the cost of operations and the reimbursements were part of those costs."

[76] I agree with the Appellants that the judge erred in assuming that the intermediary step of increased premiums paid to ICBC established a nexus between the impugned levy and the auto insurance services in question. This error occurred where the judge noted that "[t]he 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" (Certification Reasons, at para. 47).

[77] From this, the judge concluded that the Appellants "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" (Certification Reasons, at para. 47).

[78] The fact that the rate increases in question were made to an arguably non-governmental entity may eventually inform the merits analysis of the unconstitutional taxation claim. However, the proposition that ICBC is not a governmental entity—the key premise of the Province's argument—is itself controversial. Testing its plausibility requires discovery, the marshalling of evidence, and examination of that evidence.

[79] Even if is true that Crown corporations do not act as government entities in *all* their affairs, the governmental or non-governmental character of ICBC's provision of auto insurance cannot be resolved on appeal from a certification application. Given

that ICBC enjoys a government-granted monopoly for the provision of auto insurance in British Columbia, it is not obvious that its insurance premiums do not amount to governmental levies of any kind. In short, the Province's argument is not a reason to shut down the unconstitutional tax claim at the certification stage.

[80] Second, while it is true that the Appellants pleaded that 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," the Appellants *also* pleaded that the basis for these increases was unrelated to any legitimate operational cost: ANOCC at paras. 24–25, 28, and 42.

[81] Therefore, it is not accurate that the Appellants pleaded a nexus between the rate increases and operational costs simpliciter. That oversimplifies and distorts their pleadings. The Appellants' broader submission, made clear by the ANOCC, is that the increased premiums are attributable to illegitimate operational costs, i.e., the Remittances.

[82] Accordingly, in my respectful view, it was an error for the judge to conclude that the Appellants pleaded a nexus between the rate increases and the services the class members received. The Appellants' contention was precisely that the Remittances had no legitimate connection to the services they received from ICBC. The fact the Remittances were alleged to have been drawn from payments first made to ICBC does not amount to pleading a "nexus" that renders the Remittances something other than a tax.

[83] I conclude that the judge erred in concluding that the unconstitutional tax claim was bound to fail prior to the *Amendment Act*.

The Effect of the Amendment Act

[84] The judge's conclusion meant that he did not consider whether the Ratepayer Class claim survived the *Amendment Act*. Because I have identified two legal errors in the judge's conclusion, I now turn to that analysis.

[85] I reiterate that this Court is not called upon to decide the unconstitutional taxation claim on the merits. The question is simply whether it is "plain and obvious" that the Appellants' unconstitutional tax claim no longer discloses a cause of action because of the *Amendment Act*.

[86] It is common ground between the parties that the *Amendment Act* is not itself a taxing statute. That is, the *Amendment Act* does not impose a *new* retroactive tax that collects the amounts of the rate increases.

[87] The Province characterizes the *Amendment Act* as a "liability statute" because it retroactively imposed liability for the medical services payments on ICBC. This altered the prior state of affairs, when ICBC had no liability for medical service payments by reason of s. 88(6) of the *Regulation.*

[88] The key provisions of the *Amendment Act*, according to the Province, are s. 14.2(2), which provides that "the corporation must reimburse the government for costs of health-related services" and s. 14.3(3), which specifies that the Remittances were legitimate operational costs. This provision is coupled with another important one: the retroactivity provision in s. 14.3(4):

> ***Insurance (Vehicle) Amendment Act, 2021, S.B.C. 2021, c. 23***
>
> **2** Section 14.1 is repealed and the following substituted
>
> **Agreements**
>
> **14.1** (1) The corporation 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.
>
> [Emphasis added.]

[89] The Province contends that even if the Remittances were arguably unlawful or illegitimate prior to the *Amendment Act*, after the enactment of the legislation, there can be no doubt that the Remittances were part of ICBC's operating costs. After all, the Legislature has said as much, retroactively specifying that they were (see s. 14.3(3)). A court now assessing the pith and substance of the Remittances to determine what kind of levy they were must "consider the legal situation as it has now been retroactively clarified by the legislature."

[90] The Province cites *Kingstreet Investments Ltd. v. New Brunswick (Finance)* 2007 SCC 1 at para. 27 for the proposition that, by re-characterizing the legal situation via the *Amendment Act*, the Legislature provided a legal basis for collecting the Remittances. The Province argues that in doing so, the legislature was not declaring points of constitutional law, but was simply determining the context in which the constitutional analysis is conducted. If this is correct, the rate increases were not taxes, and the unconstitutional tax claim now fails to disclose a cause of action.

[91] The Appellants contend that the Ratepayer Class' unconstitutional tax claim survives the enactment of the *Amendment Act*. They argue that the Legislature cannot, by fiat, render unconstitutional taxes constitutional. The Appellants submit that the Legislature has no power to render unconstitutional taxation constitutional, even by legislative recharacterization of the kind described by the Province and purportedly undertaken in s. 14.3(3).

[92] Rather, unconstitutionally collected *funds* can be retained by the government through a retroactive tax (that is itself constitutional). But even then, the new

retroactive tax would be a distinct fiscal instrument that simply has the effect of permitting the government to retain the funds. The initial tax would remain unconstitutional and could be impugned accordingly.

[93] In my view, the Appellants' claim is not bound to fail, even in light of the *Amendment Act*. The issue of whether the *Amendment Act* bars the unconstitutional taxation claim cannot be decisively resolved at the certification stage and accordingly does not warrant dismissal of the Ratepayer Class claim.

[94] The Province contends that the *Amendment Act* definitively forecloses the Appellants' claim because it specifies that ICBC was liable for the costs of medical services. However, it is not clear that this argument meaningfully differs from an argument of legislative fiat, which the Province concedes is not possible.

[95] Put differently, there may not be a distinction between the Legislature's declaring a point of constitutional law—which both parties acknowledge is impossible—and the Legislature's retroactively declaring that a levy is an operational cost in pith and substance. The latter declaration does not merely "set the context" for the constitutional analysis; it appears to conduct that analysis. Moreover, the Appellants dispute the premise that the Legislature has the power to retroactively re-characterize the pith and substance of a levy. In my view, these issues merit development and resolution on a full record.

[96] Nor do I consider that the Supreme Court of Canada's decision in *Kingstreet* is dispositive of the case at bar, as the Province urged us to accept at the hearing of this appeal. *Kingstreet* affirms a proposition that is not in dispute as between the parties, namely that the Legislature has the power to enact *new* taxing legislation that would retroactively collect tax monies that were previously collected pursuant to an unconstitutional law. Both parties accept that the Legislature has this power. Both parties agree that the *Amendment Act* is not a taxing statute.

[97] *Kingstreet* also makes clear that a legislature cannot immunize itself from claims relating to unconstitutional legislation with subsequent retroactive legislation i.e., by legislative fiat of points of constitutional law (at para. 27, citing *Amax Potash Ltd. Government of Saskatchewan*, [1977] 2 S.C.R. 576 at 592).

[98] I do not read *Kingstreet* to clearly stand for the proposition that a legislature can recharacterize the pith and substance of a levy. The question here is whether the attempt in the *Amendment Act* to recharacterize the rate increases as operational

costs in s. 14.3(3) amounts to something meaningfully different than legislative fiat. That is an arguable issue.

[99] In sum, the effect of the *Amendment Act* on the unconstitutional taxation issue raises a number of arguable issues. Given the low threshold established by *Hunt*, I am of the view that the unconstitutional tax claim is not bound to fail even in the face of the *Amendment Act*.

[100] Accordingly, in my view, the judge erred in finding that the unconstitutional tax claim disclosed no cause of action under s. 4(1)(a) of the *CPA*.

Does the Ratepayer Class satisfy the remaining certification requirements?

[101] Because the judge concluded that the Ratepayer Class failed to satisfy s. 4(1)(a) of the *CPA*, he did not conduct an analysis of the remaining certification requirements, i.e., s. 4(1)(b)–(d). The Appellants now seek an order certifying the Ratepayer Class, arguing that if s. 4(1)(a) of the *CPA* is satisfied, certification must follow.

[102] The Province has not offered submissions on the remaining certification requirements for the Ratepayer Class. It simply seeks an order dismissing the appeal.

[103] While the Appellants and the Province have joined issue on the first certification requirement, they have not done so on the remaining certification requirements. Considering also the judge's lack of analysis on the remaining factors, it would be inappropriate for this Court to conduct the remainder of the certification analysis at first instance on an appeal.

[104] I would allow the appeal with respect to s. 4(1)(a) of the *CPA* alone, remitting the matter to the judge for determination on the remaining certification requirements in s. 4(1)(b)–(e).

Did the judge err by refusing to certify the "wilful concealment" claim as a common issue for the Accident Victim Class?

[105] The second issue on appeal is whether the judge erred in concluding that there was no basis in fact to include wilful concealment as a common issue for claims of the Accident Victim Class.

[106] In their Amended NOCC, the plaintiffs allege that the Province and ICBC "wilfully concealed from the public, including the plaintiffs and other members of the Accident

Victims Class and the Ratepayer Class, the existence and circumstances of the Agreement, the payment of the Remittances by ICBC to the Province contrary to law, and the unlawful Withholdings" and that "[t]he defendants' wilful concealment has succeeded to date in concealing from would-be claimants the fact that they have suffered injury, loss or damage caused by or contributed to by the defendants or either of them."

[107] The test in respect of wilful concealment under the former *Limitation Act*—when "material facts relating to the cause of action have been wilfully concealed"—was adopted by this Court in *Weldon v. Teck Metals Ltd.*, 2013 BCCA 358 as follows:

> [62] "Wilful concealment" in s. 6(3)(e) thus refers to knowingly keeping secret material facts relating to the cause of action, such that it would be unconscionable to allow a limitation defence to defeat the plaintiff's claim. Such may occur even where the motive for concealment is not a dishonest one. The "fraud", in the equitable sense, is inherent in knowingly preventing the plaintiff from concealment seeking legal redress.
>
> [Emphasis added.]

[108] The issue for the certification judge, as for any alleged common issue, was whether there was some basis in fact to support wilful concealment as a common issue. The judge found there was not.

[109] The judge addressed wilful concealment only in the context of the Accident Victims claim, as he had determined the Ratepayers claim should not be certified in any event. In respect of the Accident Victims claim, the judge held as follows:

> [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.
>
> ....
>
> [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*.

[110] The question raised on appeal is whether the judge erred in concluding that there was no basis in fact for the allegation of wilful concealment.

[111] A class plaintiff must show that there is "some basis in fact" to support the claims it wishes to certify as common issues for the class: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25.

[112] The "some basis in fact" test is best contrasted with whether there is "no basis in fact" for the plaintiff's claims: *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187, leave to appeal to SCC ref'd, 38784 (19 December 2019), at paras. 100–104. See also *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338 at para. 134.

The Parties' Positions on Appeal

[113] The Appellants seek to include wilful concealment as a common issue because both the Ratepayer and Accident Victim classes have claims which exceed the 15-year ultimate limitation period set out at s. 21 of the *Limitation Act*, RSBC 1996, c. 266.

[114] Apart from the bare allegation in the pleadings, the principal argument of the Appellants was that the arrangement between ICBC and the Province whereby ICBC charged increased insurance rates as a result of the medical practitioner payments (the Ratepayers claim) had not been published, and, in the case of the Accident Victims claim, ICBC frequently deducted medical practitioner payments from Part 7 benefits available to individual insureds.

[115] No evidence was filed to support the claim that these matters were deliberately kept secret by ICBC or the Province. To the contrary, there was evidence before the certification judge indicating that information about these arrangements was not concealed.

[116] In respect of the Ratepayers claim, there was evidence before the judge that:

> (a) ICBC referred to what would become the 1994 Agreement in a Vancouver Sun article in 1993.
>
> (b) After execution of the 1994 Agreement, the Province provided information to health care professionals and institutions in relation to the implementation of changes arising from the 1994 Agreement.
>
> (c) After implementation of the 1994 Agreement, the changes under the 1994 Agreement were discussed in the Legislature.
>
> (d) The medical practitioner payments from ICBC to the Province were disclosed in public filings with the BC Utilities Commission in respect of the rate approval process.
>
> (e) The periodic increases to ICBC's insurance rates that represent the alleged loss to the Ratepayer Class were also publicly available in BC Utilities Commission documents and rate information provided to Ratepayers.

[117] With respect to the Accident Victims claim, ICBC provided evidence that:

(a) The appellants' counsel's firm published "A Layman's Guide to ICBC Part 7 Benefits" in 2006 explaining the practice of ICBC of withholding medial practitioner payments from the maximum Part 7 payments.

(b) ICBC provided Part 7 printouts to individual insureds identifying medical practitioner payments.

[118] There must be some basis in fact in the evidentiary record before the judge to support considering wilful concealment as a common issue: *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307 at paras. 173–175 [*Sharp*]; *Charlton v. Abbott Laboratories Ltd.*, 2015 BCCA 26 at para. 85. Here, it was open to the judge to conclude that the Appellants had not shown any basis in fact for inclusion of wilful concealment as a common issue.

[119] While the judge was addressing the Accident Victims claim only, I consider that the same analysis applies to the assertions in the Ratepayers claim. There was no basis in the record to support wilful concealment of the arrangements between ICBC and the Province. The record before the judge negated the claim.

[120] In my view, no error has been shown in the judge's decision not to include wilful concealment as a common issue in the Accident Victims claim. I would confirm that decision for both the Accident Victims claim and the Ratepayers claim.

Conclusion on the Appeal

[121] As a result, I would allow the appeal in part. I would set aside para. 2 of the judge's order and remit the claim for certification of the Ratepayers claim to the trial court on the basis that the Appellants have met the requirements of s. 4(1)(a) of the *CPA*.

[122] I would dismiss the appeal seeking an order that wilful concealment is a common issue in the Ratepayers claim.

Cross-appeal

[123] The cross-appeal is brought by ICBC and relates solely to the Accident Victims claim.

[124] The Accident Victim Class alleges that ICBC unlawfully deducted medical practitioner costs from class members' Part 7 benefits. ICBC's deductions, in turn, had the effect of shrinking the pool of benefits available to these catastrophically injured persons.

[125] At the certification hearing, ICBC conceded that the pleadings disclosed a cause of action in breach of contract, negligence, or unjust enrichment in relation to the Accident Victim Class' claim, satisfying s. 4(1)(a) of the *CPA*. However, ICBC disputed that *CPA* s. 4(1)(c)–(d) were satisfied, i.e., the requirements of common issues and preferability.

[126] The judge disagreed. He certified the Accident Victim Class, setting out the common issues of liability in negligence, breach of contract, unjust enrichment, and punitive damages.

[127] On cross-appeal, ICBC raises several allegations of error. First, ICBC argues that the judge erred in certifying liability as a common issue. Second, ICBC contends that punitive damages should not have been certified as a common issue.

[128] In the event this Court finds that the Accident Victim Class was properly certified, the respondent makes two alternative arguments. First, the punitive damages issue should have been "bifurcated," i.e., decided only after a determination of compensatory damages. Second, two applicable limitations periods should have narrowed the definition of the Accident Victim Class.

Did the judge err in law or principle by certifying the Accident Victim Class?

[129] ICBC argues that liability should not have been certified as a common issue. For the reasons that follow, I disagree, and accordingly would dismiss this ground of cross-appeal.

Legal Framework

[130] Section 4(1)(c) of the *CPA* provides that a class will be certified only where "the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members." See further *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260 at para. 11.

[131] In *Western Canadian Shopping Centres Inc. v. Dutton*, McLachlin C.J.C. explained that there is a common issue of fact or law where "its resolution is necessary to the resolution of each member's class claim." 2001 SCC 46 at para. 39. The certification judge's analysis is to be purposive. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres* at paras. 27 and 39.

[132] The commonality threshold is low; a triable factual or legal issue which advances the litigation when determined is sufficient: *Finkel v. Coast Capital Savings Credit Union,* 2017 BCCA 361 at para. 22 [*Finkel*].

[133] ICBC does not contest the basis in fact of the proposed common issues. It acknowledges that it has breached duties owed to Accident Victims in some cases by reducing their maximum Part 7 benefits by medical practitioner costs. It argues, however, that these breaches were contrary to its own internal policy and do not represent a systemic problem that justifies certifying liability as a common issue.

[134] This policy, ICBC says, was extant at the time of the Remittances, and provided that ICBC was not to limit Part 7 benefits coverage even where medical service costs were involved. The issue, ICBC argues, was that this policy was not consistently applied. ICBC points to the judge's remark that "individual issues are substantial and may predominate" as evidence that the judge recognized, but did not give effect to, the inherently individual nature of the Accident Victim claim (Certification Reasons, at para. 66).

[135] ICBC makes essentially the same argument to challenge the judge's preferability conclusions. It argues that because ICBC has already acknowledged payments to medical practitioners should not reduce the limit of coverage under Part 7, the only issue is whether individual insureds sustained a recoverable loss in fact. This issue raises a number of considerations, specific to individual insureds, not the class as a whole.

[136] The certification judge did not accept these arguments. In his Reasons, he took note of ICBC's promised internal review process for compensating those who suffered losses on account of the increased premiums and Remittances. However, the judge determined that this was insufficient because ICBC's unilateral judgment would determine whether such individuals received compensation (Certification Reasons, at para. 69).

[137] In addition, the judge observed that ICBC had not admitted legal liability, and in any event, that such an admission would not serve to advance the litigation and therefore would not bar certification (Certification Reasons, at para. 67). A mere admission from ICBC would not equip class members with the means to secure relief, whether via the courts or via ICBC's internal claim review policy.

[138] On appeal, ICBC invokes the principle that "a common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant", citing *Finkel,* quoting *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54, [2000] O.J. No. 3821 (S.C.J.) at para. 39, aff'd [2001] O.J. No. 4952, 17 C.P.C. (5th) 103 (Div. Ct.), aff'd [2003] O.J. No. 1160 and 1161 (C.A)).

[139] Replicating its position in front of the chambers judge, ICBC argues that its internal procedure for file review suffices to ensure that those claimants who can prove they suffered a loss will be compensated. ICBC argues that this is the preferable alternative to a class procedure that will not put the class members in any better position to determine their individual entitlements. In fact, even if the Accident Victim Class wins a judgment, their individual entitlement to damages will still have to be determined through a downstream court proceeding. As such, the common issue is likely to devolve into individual trials anyway, and therefore should not have been certified.

Standard of Review

[140] The standard of review of a certification judge's decision on commonality is highly deferential. If some basis of fact in the record is shown to support a common issue, this Court will not interfere with the decision of a certification judge that resolution of the issue will advance the litigation unless the judge has erred in principle or was clearly wrong: *Finkel*, at para. 57.

Analysis

[141] I am unable to see any error of principle in the judge's certification order that would warrant appellate intervention.

[142] The judge was clearly aware of the need for individualized assessments but used his discretion to certify the class nonetheless. He reasoned that individualized assessments of the quantum of loss are best deferred to a post-liability determination. Indeed, he held that the class plaintiffs would be ill-equipped to vindicate their claims without a certification order from a court, leaving them subject to ICBC's unilateral determinations of their entitlement to accident benefits.

[143] In effect, the judge believed that the Accident Victims should not have to seek their own remedy from their alleged wrongdoers. He reasoned that certifying liability as a common issue would advance the litigation by resolving this unacceptable state of

affairs. This was a matter squarely within his discretion, and there is no reason for this Court to interfere with it.

[144] The fact that there will remain questions about individual class members' entitlements to damages in light of their particular injuries and Part 7 benefit claim amounts is not a barrier to certification of the liability common issues. An issue can be certified a common issue "even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution": *Charlton*, at para. 85, citing *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, at para. 140.

[145] As Justice Bennett put the point in *Bodnar v. Community Savings Credit Union*, "[c]lass action jurisprudence is replete with examples of common questions that do not wholly resolve certain individual aspects of the litigation": 2015 BCCA 504 at para. 92.

[146] More specifically, this Court's jurisprudence confirms that a common issue need not "determine liability," in the sense that the resolution of a common issue need not constitute final and comprehensive relief. As this Court explained in *Watson v. Bank of American Corp*, 2015 BCCA 362:

> [152] From these various cases reframing the term "common issue" I take it that a common issue need not be one that determines liability, but must be one encompassed by the litigation, and for which its answer will advance the ultimate determination of outcome. Moreover, commonality requires that the members of the class all have the same qualitative stake in the answer to the question, although the degree of importance to each member need not be the same. In other words, they cannot pull in opposite directions on the issue.
>
> [Emphasis added.]

[147] Finally, I would not give effect to ICBC's submission that the judge himself acknowledged the importance of the individual issues in this case by noting that the "individual issues are substantial and may predominate." (Certification Reasons, at para. 96.) The statutory language of s. 4(1)(c) of the *CPA* permits the certification where "the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members." (Emphasis added).

[148] Moreover, ICBC's submission inappropriately parses the judge's submissions, separating a few words from its context. The judge's full sentence reads: "Although I agree that the individual issues are substantial and may predominate, there are certain common threshold issues." (Certification Reasons, at para. 96.) This conclusion was

not an error of law, and was entirely consistent with the statutory language in s. 4(1)(c) of the *CPA*.

[149] For these reasons, I would decline to give effect to this ground of cross-appeal.

Did the judge err by certifying punitive damages as a common issue?

[150] ICBC's final ground of cross-appeal is that the judge erred in law or principle by certifying punitive damages as a common issue.

[151] The judge certified the following common issues concerning punitive damages:

> 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?

[152] In *Rumley v. British Columbia*, 2011 SCC 69, the Supreme Court of Canada explained that punitive damages can be certified as a class-wide common issue where the "negligence in question is not specific to any one victim but rather to the class of victims as a group" or where the claim is advanced as a "general proposition" rather than with "reference to conduct specific to any one plaintiff": at para. 34.

[153] There must be some basis in fact for the certification of punitive damages as a common issue, just as with any other common issue: *MacKinnon v. Pfizer Canada Inc.*, 2022 BCCA 151 at para. 7; *Sharp* at para. 173.

[154] The certification judge addressed the question of punitive damage in this way:

> [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.

[155] On appeal, ICBC reiterates its position that, like the common issues concerning liability, the punitive damages issues in this case are individual rather than class-wide. ICBC argues that the key factual question is whether, in each individual case, ICBC's policy against deducting Part 7 benefits on account of the Remittances was applied or not. Accordingly, resolving the issue is a matter of ICBC's internal file review process with individual insureds.

[156] In my opinion, while not every single class member may have been a victim of the alleged systemic violation, that is not necessary to certify punitive damages as a common issue. The judge determined that the evidence of a class-wide claim met the low threshold for certifying a common issue. There is no reason to interfere with that finding here.

[157] Moreover, ICBC's submissions on this issue turn on the same argument as its position concerning the common issues of liability. I have already rejected the argument that individualized assessments of loss were threshold issues that should have prevented the certification of the common issues concerning liability. The same reasons lead me to reject that argument in the context of punitive damages.

[158] I would dismiss this ground of cross-appeal.

If, in the alternative, the Accident Victim Class was properly certified, did the judge err by failing to "bifurcate" the common issue of punitive damages?

[159] ICBC makes two alternative arguments concerning the cross-appeal. The first is that even if punitive damages was properly certified for the common issues trial, the issue should nonetheless be "bifurcated," i.e., analyzed after a prior determination of compensatory damages. ICBC asks this Court to revise the language of the certification order to reflect this iterative approach as follows:

> 3. If ICBC breached a duty owed to members of the Accident Victim Class, does ICBC's conduct justify punishment in the form of punitive damages?
> 4. If the answer to common issue 3 is yes, and if the compensatory damages awarded to members of the Accident Victim Class after individual issues trials does not achieve the objectives of retribution, deterrence, and denunciation in respect of such conduct, what amount of punitive damages should be awarded?
>
> [Factum of ICBC, para. 172.]

[160] Relying on this Court's decisions in *Rumley v. British Columbia*,1999 BCCA 689, aff'd as *Rumley v. British Columbia,* 2001 SCC 69, *Chalmers*, and *Sherry*, ICBC argues that British Columbia law has developed a "bifurcation approach" with respect to punitive damages. As a result, determining punitive damages *after* compensatory damages is a matter of course, rather than a matter within the discretion of the judge.

[161] The Appellants respond that there is no rule that requires delaying the award of punitive damages until after the judge determines the quantum of compensatory damages. They argue that the decisions cited by ICBC are merely instances of British Columbia courts exercising their *discretion* to bifurcate the issue of punitive damages, though they were not required to do so by any rule of law.

[162] Bifurcation in this context refers to the distinction between determining that the defendant's conduct warrants punitive damages and the actual calculation and award of those damages. In *Sherry v. CIBC Mortgages Inc.*, 2016 BCCA 240, Madam Justice Newbury explained the distinction in this way:

> [41] Under this so-called "bifurcated" approach (see also *Chalmers v. AMO Canada Co.* 2010 BCCA 560 at para. 31), the first issue would be heard and decided at the trial of the other common issues; the second would be decided at a later date following determination of most of the other issues, including the quantum of any compensatory damages. …

[163] The underlying principle behind the concept of bifurcation is that while the factual elements that support punitive damages can be determined at the same time

as the other common issues, the actual quantification of those damages cannot be determined until the amount of compensatory damages has been assessed. This was explained in *Chalmers v AMO Canada Company*, 2010 BCCA 560:

> [31] Although the ultimate determination of the entitlement and quantification of punitive damages must be deferred until the conclusion of the individual trials, it does not follow, in my opinion, that no aspect of the claim of punitive damages should be certified as a common issue. It is my view that the question of whether the defendants' conduct was sufficiently reprehensible or high-handed to warrant punishment is capable of being determined as a common issue at the trial in this proceeding where the other common issues will be determined. The focus will be upon the defendants' conduct, and there is nothing in this case that will require a consideration of the individual circumstances of the class members in order to determine whether the defendants' conduct is deserving of punishment. The ultimate decision of whether punitive damages should be awarded, and the quantification of them, can be tried as a common issue following the completion of the individual trials.

[164] The certification judge did not comment on the question of bifurcation, presumably because it does not appear to have been raised by any of the parties until the settling of the order.

[165] I agree that in the normal course, where punitive damages have been certified as a common issue, the quantification of the punitive damages will not take place until determination of most of the other issues, including quantification of compensatory damages. None of the authorities that have been brought to our attention has included in the certification order a direction to that effect. I would be inclined to leave the sequencing of the consideration of the common issues to the trial judge.

[166] ICBC raises the question whether the issues certified as common issues require elaboration to reflect the usual practice that the quantification of punitive damages occur after the quantification of compensatory damages.

[167] In *Chalmers*, this Court concluded that the certification questions should be separated to make it clear that the final decision regarding punitive damages should await the outcome of the other issues in the case. The first question would be whether the conduct of the defendant warranted punitive damages; the second would be what amount of punitive damages should be awarded. That is the model proposed by ICBC.

[168] More recently, single certification questions concerning punitive damages have been approved in this Court without comment on this issue in *Douez v. Facebook, Inc.*, 2018 BCCA 186 ("Does the Defendant's conduct justify an award of punitive damages in favour of the Class; if so, in what amount?") and *Nissan Canada Inc. v. Mueller*,

2022 BCCA 338 ("Should the defendants pay exemplary or punitive damages, and if so, how much, to whom, and how is it to be distributed?").

[169] In my view, while there may be some value in separating out the certification questions to signal that the trial judge should be aware of the timing issues in awarding punitive damages, it is not an error in principle to include all the elements of punitive damages in one certification question. That being so, I would not interfere with the certification judge's formulation of the question, and would not give effect to this alternative ground of appeal.

If, in the alternative, the Accident Victim Class was properly certified, did the judge err by failing to narrow the definition of the class in light of applicable limitations periods?

[170] ICBC's second alternative argument is that the judge erred in law or principle by defining the Accident Victim Class without regard to applicable limitation periods. ICBC points to two limitations periods that it argues should narrow the size of the Accident Victim Class. The first is s. 103 of the *Regulation*, which provides that an insured must commence an action within two years after the date the last payment was made. The second is the global 15-year limitation period under the *Limitation Act*, S.B.C. 2012, c. 13.

[171] ICBC asks this Court to narrow the class definition to those who received their last insurance benefits payment on or after March 3, 2018, (two years prior to the date the Notice of Civil Claim was filed), or in the alternative, on or after March 3, 2005 (15 years prior to the date the Notice of Civil Claim was filed). ICBC cites this Court's judgment in *Knight v. Imperial Tobacco Limited*, for the proposition that class members with claims barred by a limitation period cannot have their claims litigated in the class action: 2006 BCCA 235 at para. 34.

[172] The certification judge addressed this issue by referring to the statement in *Godfrey v. Sony Corporation*, 2017 BCCA 302 at para. 67, aff'd *Pioneer Corp. v. Godfrey*, 2019 SCC 42 that "a limitation argument can be considered at the certification stage, in exceptional circumstances, but generally should not".

[173] The judge went on consider how the issue of discoverability would complicate the limitation period issue, and concluded that "the existence of a potential limitation issue in respect of at least some class members is not a bar to certification."

[174] Accepting the principle in *Godfrey* that limitation issues may be considered at the certification stage in exceptional circumstances, but generally should not be, I can see nothing in the submissions of ICBC that would meet that standard. No error of principle by the certification judge having been established, I would not give effect to this alternative ground of appeal.

Conclusion on Cross-Appeal

[175] For these reasons, I would dismiss the cross-appeal.

Disposition

[176] In summary, I would make the following orders:

1. The appeal is allowed in part. The order of the judge refusing to certify the Ratepayer Class for failure to disclose a cause of action under s. 4(1)(a) of the *CPA* is set aside. The case is remitted to the chambers judge for consideration of the remaining certification requirements in s. 4(1)(b)–(e).

2. The appeal of the judgment not to certify wilful concealment as a common issue is dismissed.

3. The cross-appeal seeking de-certification of the Accident Victim Class is dismissed.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Abrioux"