IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kirk v. Executive Flight Centre Fuel Services,* 2017 BCSC 726

Date: 20170503
Docket: S135927
Registry: Vancouver

Between:

Robert George Kirk, as Representative Plaintiff

Plaintiff

And:

Executive Flight Centre Fuel Services and Her Majesty the Queen in Right of the Province of British Columbia as represented by the Minister of Transportation and Infrastructure and the Minister of Forests, Lands and Natural Resource Operations, Danny LaSante and Transwest Helicopters Ltd.

Defendants

And:

Danny LaSante, Executive Flight Centre Fuel Services Ltd., Her Majesty the Queen in Right of the Province of British Columbia as represented by the Minister of Transportation and Infrastructure and the Minister of Forests, Lands and Natural Resource Operations and Transwest Helicopters Ltd.

Third Parties

Before: The Honourable Mr. Justice D.M. Masuhara

Reasons for Judgment

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Place and Date of Hearing:	Vancouver, B.C. September 6-9, 2016 October 6-7, 2016
Further Submissions:	March 17, 2017
Place and Date of Judgment:	Vancouver, B.C. May 3, 2017

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I. INTRODUCTION

[1] These Reasons deal with an application that the within action be certified as a class proceeding. The action arises from a spill of approximately 35,000 litres of Jet A1 fuel into Lemon Creek, which is in the Slocan Valley of the West Kootenay region of British Columbia, on July 26, 2013.

[2] The spill occurred as a result of a forty-foot fuel tanker truck overturning into the watercourse. The tanker truck driven by the defendant Mr. LaSante was travelling down a forest service road which ran alongside the creek.

[3] Mr. LaSante was in search of a staging area for refueling helicopters involved in fighting a forest fire in the area.

[4] The spill led to an evacuation order being issued by the Interior Health Authority requiring people to vacate initially an area within a three-kilometre radius of the spill site and an area of three kilometres on either side of the affected waterways from an upstream point of the fuel spill site to a downstream point of the confluence of the Slocan and Kootenay Rivers. The evacuation area is defined in the application as the Evacuation Zone. The order affected approximately 2,776 properties. A "do not use water" order was also issued by the Interior Health Authority for residents who drew water from Lemon Creek, Slocan River and Kootenay River.

[5] The plaintiff classifies the event as a "single incident mass tort" and seeks compensation and claims against all of the defendants in negligence, nuisance and the rule in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330 (U.K.).

[6] The plaintiff proposes that the class be defined as:

> All persons who owned, leased, rented, or occupied real property on July 26, 2013 within the Evacuation Zone (as defined in the Amended Notice of Civil Claim) except for the defendants and third parties.

[7] The relief claimed in this action includes:

> d) Joint and several damages, in the aggregate, against each and all of the Defendants for loss of use and enjoyment of property in an amount to be determined by the Court;
>
> e) Joint and several damages, in the aggregate, against each and all of the Defendants for diminution in property value in an amount to be determined by the Court;
>
> f) Exemplary and/or punitive damages, in the aggregate, relating to the Defendants' negligent acts and omissions leading up to the Spill and the exacerbation of harm;

[8] The defendants each point blame at the other and seek indemnification from one another and/or apportionment of the loss amongst them.

[9] A separate proposed class action has been commenced for personal injuries from the spill; however, I am advised that in that action no steps have been taken at this point in seeking certification.

[10] Counsel also advises that there are proceedings before environmental tribunals regarding responsibility for the spill and criminal proceedings are also underway.

[11] Following the conclusion of the application hearing, counsel brought to my attention *Anderson et al. v. Manitoba et al.*, 2017 MBCA 14 [*Anderson*], leave to appeal to SCC requested. More recently, our Court of Appeal issued *Baker v. Rendle*, 2017 BCCA 72, and submissions were requested and delivered.

II. BACKGROUND

[12] In July 2013, the Province of British Columbia (the "Province") became aware of a wildfire on Perry Ridge in the Slocan Valley and commenced firefighting operations. In this effort, the defendant Transwest Helicopters Ltd. ("Transwest") was engaged to provide helicopter services for the extinguishment operation. The defendant Executive Flight Centre Fuel Services ("Executive") was hired to provide fuel services for the helicopters.

[13] On or about July 25, 2013, the Province began to conduct its extinguishment operation from a staging area, a gravel pit (the "Staging Area") located approximately 40 metres off of Highway 6 on Uris Road (the "Gravel Pit Road").

[14] On July 26, 2013, Mr. LaSante, an employee of Executive, was driving a large tanker truck containing Jet A1 Fuel for delivery to the Staging Area. He turned off of Highway 6 on to Lemon Creek Forest Road. It was a wrong turn. This road is south of the intersection of the Gravel Pit Road and Highway 6, runs parallel to Lemon Creek and does not connect to the Staging Area.

[15] At some point, Mr. LaSante turned the tanker truck around to return back down Lemon Creek Forest Road. In the course of the turn or as he travelled back the tanker truck fell down the embankment and overturned, spilling approximately 35,000 litres of helicopter fuel into Lemon Creek (the "Spill").

[16] The spilled fuel spread throughout connecting waterways. Lemon Creek flows into the Slocan River, which in turn flows into the Kootenay River (the "Affected Waterways").

[17] Mr. LaSante was able to exit the tanker truck and walked down the road to Highway 6 to flag down a vehicle in order to get help.

[18] Once news of the Spill was communicated to officials, the provincial health medical officer and the Regional District of Central Kootenay (the "RDCK") ordered evacuation of local residents on the evening of July 26, 2013 (the "Evacuation"). The Evacuation was ordered pursuant to s. 12 of the *Emergency Program Act*, R.S.B.C. 1996, c. 111, due to immediate danger to life and safety (the "Evacuation Order"). Highway 6 in the vicinity of Lemon Creek was also closed.

[19] The Evacuation Order covered the area depicted on the map attached as Appendix A to the Amended Notice of Civil Claim (the "Evacuation Zone"). It included the following areas:

(a) an area within a three-kilometre radius of the Spill site; and

(b) an area of three kilometres on either side of the Affected Waterways, from an upstream point of the Spill site to a downstream point of the confluence of the Slocan and Kootenay Rivers.

[20] At the time of the Spill there were 2,776 properties included within the Evacuation Zone with a total assessed value for land and improvements of $708,840,787 as of March 2013.

[21] Shortly after the Spill, the Interior Health Authority issued “do not use water” orders for residents who drew water from the Affected Waterways.

[22] The “do not use water” orders remained in effect on the Kootenay River above and below the Brilliant Dam until August 6, 2013, for all areas along the Slocan River south of Winlow bridge until August 8, 2013 and on the Slocan River north of the Winlow bridge and Lemon Creek until August 9, 2013.

[23] Upon learning of the Spill, Executive on July 26, 2013 initiated its emergency plan including retaining Quantum Murray LP to assist in the clean-up.

[24] On July 27, 2013 Quantum Murray started with its emergency environmental remediation services to contain, clean and rehabilitate affected areas.

[25] On July 27, 2013, the RDCK lifted the Evacuation Order.

[26] Other steps taken by Executive included engaging the following: SNC Lavalin to provide environmental impact assessments; Polaris Applied Science to conduct the shoreline clean-up assessment techniques to prioritize and focus the remedial activities; and Peak Communications to assist in providing emergency communications and provide an on-site information officer. Executive also established a “Resiliency Centre” in the community which provided potable water stations offering drinking water and shower facilities for local residents.

[27] Executive operated the Resiliency Centre from August 4, 2013 until August 11, 2013. Thereafter the centre was taken over and run as the "Recovery Centre" under the joint auspices of Emergency Management BC and the RDCK until August 30, 2013.

[28] By October 2, 2013, the objectives set by the Province's regulatory authorities (i.e. the Ministry of Environment) for remedial measures were reached.

[29] As of January 31, 2016, Executive deposes that it expended $5,457,000 in costs associated with its response to the Spill.

[30] The plaintiff alleges that, upon spilling into Lemon Creek, the fuel floated down the Slocan and Kootenay Rivers resulting in the thin, higher esters and aromatics within the fuel evaporating into an airborne vapour (the "Vapour") which contains benzine, a human carcinogen.

[31] The plaintiff further pleads that with evaporation of the Vapour, what remains in the Affected Waterways is a thicker, oily, jelly-like substance (the "Sludge") and that the Sludge contains various heavy metal additives and stabilizers that are some of the most toxic substances known.

[32] In terms of damage to property, the plaintiff pleads:

> **The Distribution and Contamination**
>
> 68. Following the Spill, a gas plume of airborne Vapour particles disseminated throughout the vicinity of Lemon Creek, the Slocan Valley and the Kootenay River, coming into contact with individuals, wildlife, livestock, and domestic and agricultural premises ("the Exposure") and causing physical symptoms in local residents, workers and tourists including burning eyes, sore throats, headaches, respiratory distress and other symptoms of ill health.
>
> 69. Following the Spill, the Sludge floated on the waterways of Lemon Creek, the Slocan River and the Kootenay River, adhering to sediment, penetrating stream and river banks and contaminating wetlands, gardens, livestock feeding grounds, agricultural grounds, wells, surface water sources, irrigation systems, laundry machines, plumbing systems and septic fields ("the Contamination").
>
> 70. The downstream distribution of the Fuel was halted by the closure of floodgates at the Brilliant Dam before Castlegar, leaving a two-to-

three kilometer plume, 30 to 50 meters wide, of stagnant Fuel visible in the Kootenay River above the Brilliant Dam.

Property damage

71. The Spill and Contamination have affected property along no less than 80 km of shoreline and 10 km^2 of swampland.

72. In order to remediate the Contamination, every blade of grass will have to be washed by hand with absorbent material which itself will have to be safely removed from the environment. It will take at least six years to remediate the Contamination.

73. In some cases, the Contamination has eliminated the sole source of potable water on a property and effectively rendered that property practically incapable of being sold or remortgaged.

74. The Spill and the Contamination have caused the real properties within the Evacuation Zone ("the Properties") to diminish in market value.

[33] In terms of interference with quiet enjoyment, the plaintiff pleads:

Interference with quiet enjoyment

75. The Spill, Exposure and Contamination have caused the Class members to suffer a loss of use of their Properties and a continuing interference with the quiet enjoyment of their Properties, particulars of which include loss of use of wetlands, gardens, livestock feeding grounds, agricultural grounds, wells, surface water sources, irrigation systems, laundry machines, plumbing systems and septic fields.

76. The Properties include residences that, at the time of filing, remain inhabitable.

77. The Properties include farms that, at the time of filing, remain unusable.

78. The Properties include bed & breakfast establishments, motels, camping grounds and recreational facilities, some of which have been shut down indefinitely.

79. The Spill caused a distribution of jet fuel into the Slocan Drainage so as to constantly and continuously expose the Class members and their Properties and their inhabitants to toxins for an indefinite duration.

Causation

…

81. Within the vicinity of the Evacuation Zone, the Spill caused a distribution of Vapour and Sludge resulting in widespread and continued Exposure and Contamination throughout the Evacuation Zone.

> 82. The Spill and the Contamination have caused the Class members to suffer a diminution of the market value of their Properties.
>
> 83. The Exposure and Contamination caused the Class members to suffer a loss of use of their Properties.
>
> 84. The Contamination caused the Class members to suffer a continuing interference with the quiet enjoyment of their Properties.
>
> **Exacerbation of Harm**
>
> 85. Subsequent to the Spill, from July 28, 2013, to July 31, 2013, the Provincial Defendant used aircraft water bombers to irrigate the Fire with Fuel-contaminated water from the Slocan River, thereby further disseminating the Exposure and Contamination throughout the Slocan Valley watershed and exacerbating the aforementioned harm.

[34] The applicant filed the expert evidence of three individuals: Mr. Englar, chemist (Ret.); Mr. Birtwell, biologist; and Dr. Kilpatrick, real estate appraiser.

[35] The defendants filed expert evidence including that of Dr. Hers, professional geo-environmental engineer; Ms. Atkinson, professional geo-environmental engineer; Mr. Godfrey, accredited appraiser; and Mr. Dybvig, accredited appraiser.

[36] With this background in mind, I turn to the questions regarding whether this proceeding should be certified.

III. CERTIFICATION

[37] The goals of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*], are access to justice, behaviour modification and judicial economy. These goals are to be kept in mind in the certification process. The requirements for obtaining certification are set out in s. 4(1) of the *CPA*:

> 4(1) 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.

[38] 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 those specified in s. 4(2) of the *CPA* as follows:

> (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.

[39] The onus is on the party seeking certification to meet all of the requirements. The burden is not an onerous one. The cause of action requirement in s. 4(1)(a) is satisfied unless, assuming all the pleaded facts are true, it is plain and obvious that the claim cannot succeed: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980; *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25. With respect to the other four requirements in s. 4(1), the applicant need only provide a minimum evidentiary basis that shows some basis in fact for each of them; the certification hearing is procedural and not the forum where the merits of the action are decided: *Hollick* at paras. 24–25; *Dow Chemical Company v. Ring, Sr.*, 2010 NLCA 20 at para. 14, leave to appeal ref'd [2010] S.C.C.A. No. 187. The "some basis in fact" standard does not require the court to resolve conflicting facts and evidence at the certification stage. The "some basis in fact" inquiry is limited as it is a low hurdle. The authorities on this

point have reiterated that at the certification stage the court is ill-equipped to resolve such conflicts: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102 [*Pro-Sys*].

[40] If the five conditions are met, the court must certify the action.

IV. DISCUSSION

[41] I will discuss the criteria in the order set out under s. 4(1) of the *CPA*.

A. Do the pleadings disclose a cause of action?

1. Parties' Positions

[42] Pleadings are to be approached generously and with allowance made for drafting inadequacies. As mentioned the Amended Notice of Civil Claim sets out the causes of action as negligence, nuisance and the rule in *Rylands v. Fletcher*. These are well-established causes of action. However, the defendants submit that there are a variety of deficiencies which make it plain and obvious that a claim cannot succeed.

[43] Executive, whose arguments are adopted by Mr. LaSante and largely adopted or supported by the other defendants, submits that the plaintiff's pleadings do not disclose a cause of action on behalf of all class members. It is argued that there are no facts pleaded and no evidence to support that there was any groundwater contamination or any contamination whatsoever, beyond the Affected Waterways. I note evidence is not a consideration at this stage.

[44] Executive submits the proposed class definition goes beyond property owners on the Affected Waterways and includes people in the Evacuation Zone who do not reside on the Affected Waterways. It is submitted, absent pleadings of damage to property, the claims in negligence and *Rylands v. Fletcher* fail as pure economic loss is not recoverable. The defendants include references to the following in support: *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2; *Ultramares Corp. v. Touche* (1931), 255 N.Y. 170 at 178–80, 1931 NY LEXIS 660 at 15–19 (C.A.); *Bethlehem Steel Corp. v. St. Lawrence Seaway Authority* (1977), [1978] 1 F.C. 464 (T.D.); *1340232 Ontario*

Inc. v. St. Lawrence Seaway Management Corp., 2004 FC 209; *Conestoga Meat Packers Ltd. v. Fehr*, [2007] O.J. No. 3150 (S.C.J.); *Cuff v. Canada National Railway Company*, 2007 ABQB 761; and *Brooks v. Canadian Pacific Railway Ltd.*, 2007 SKQB 247.

[45] It is further pointed out that the proposed class definition includes persons who leased, rented or occupied land in the Evacuation Zone. It is argued that since there cannot be a claim for diminution of property values by those who merely occupy, rent or lease lands, it is plain and obvious that the pleadings disclose no reasonable cause of action in respect to those classes of persons.

[46] It is also argued that for some in the proposed class, the claims of nuisance are speculative at best. In this regard, these defendants argue that the plaintiff has alleged a diminution of property value as a result of a public stigma in the future arising from the spill and that this does not support a reasonable cause of action. In support the defendants cite *Smith v. Inco Limited*, 2011 ONCA 628 at para. 59, leave to appeal ref'd [2012] 1 S.C.R. xii (note); and *Wiggins v. WPD Canada Corporation*, 2013 ONSC 2350. As a result of all of the submissions, the defendants say that the claims advanced in the Amended Notice of Civil Claim do not disclose causes of action available to all members of the class and that it is plain and obvious that those claims are likely to fail.

[47] In respect to the claim under *Rylands v. Fletcher*, the Province sets out the established four requirements:

(a) the defendant made non-natural use of his land;

(b) the defendant brought onto his land something which was likely to do mischief if it escaped;

(c) the substance in question escaped; and

(d) damage was caused to the plaintiff's property (or person) as a result of the escape.

[48] The Province argues that based on the plaintiff's pleadings, it is plain and obvious that no claim lies against the Province for the escape of the fuel for one or more of the following reasons:

a. the Province was not using the land where the escape occurred;
b. the Province was not involved in the non-natural use of its land;
c. the Province did not bring the fuel onto its land; and/or
d. the Province did not have possession nor control over the fuel that escaped from the Fuel Tanker.

[49] Alternatively, the Province argues that even if the first three conditions or requirements to establish a claim against the Province based on the rule in *Rylands v. Fletcher*, the fourth condition or requirement involving damage has not been met, at least with respect to some of the proposed class members.

[50] Similar to Executive's submission, the Province argues that the persons who "occupied" or "used" real property as set out in the class definition would not be entitled to damages based on diminution of property value if they do not have any legal interest in any real property.

[51] In respect to nuisance the Province argues that in order to establish a claim of private nuisance against it, the plaintiff must establish that the Province caused both a substantial interference and an unreasonable interference with the use and enjoyment of the lands in question: *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 [*Antrim Truck Centre*].

[52] The Province submits that there are insufficient allegations of fact to establish a claim that there was a substantial and unreasonable interference by the Province with the use and enjoyment of the lands of the proposed class members.

[53] Further, as already submitted based on the class definition, many of the proposed class members are not in a position to claim damages for diminution of property value based on nuisance.

[54] In respect to negligence the Province submits that the pleadings do not establish a private duty of care. It argues that it is questionable that the Province had the "Operational Responsibility" as described by the plaintiff, i.e. a duty of care for the transportation of fuel by an independent contractor who was delivering fuel in a fuel tanker driven by a professional driver. It is submitted that the Province was not in a position to reasonably foresee harm to the proposed class members with respect to a professional driver of the loaded fuel tanker doing the following: driving past the Staging Area located just off the highway, turning left off of the highway, driving up a narrow winding road past signs warning of an "End of Maintained Public Road" and "Road Closed", and then turning around and driving the fuel tanker back along the road, and having a single motor vehicle accident with the result that the fuel leaked from the fuel tanker: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 13.

[55] In addition, or in the alternative, it is stated that the Province has passed legislation to regulate drivers of commercial vehicles including fuel tankers such as the *Commercial Transport Act*, R.S.B.C. 1996, c. 58; the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318; and the *Transport of Dangerous Goods Act*, R.S.B.C. 1996, c. 458. The Province has pleaded all of these statutes.

[56] With respect to the allegations involving the "Road Maintenance Responsibility", it is submitted that the Province did not have a duty of care for an unmaintained and closed road. The Province submits that it is illogical for it to have a duty of care to maintain a road that has been closed.

[57] The Province has passed legislation with respect to its responsibilities for public roads such as the *Transportation Act*, S.B.C. 2004, c. 44, which it has pleaded in the Province's Amended Response to the Amended Notice of Civil Claim.

[58] Moreover, the Province has pleaded a policy defence at para. 29 of the Legal Basis section of its Amended Response to the Amended Notice of Civil Claim.

[59] Finally, there also is the likelihood of indeterminate liability and the impact on the taxpayers if the Province has a duty of care to maintain a closed road.

[60] In short, the Province argues that the plaintiff's pleadings do not establish a private duty of care owed by the Province: *Cooper v. Hobart*, 2001 SCC 79.

2. Determination on Disclosure of Cause of Action

[61] With respect to the action in negligence, the detailed pleadings (including the adopted pleadings by the plaintiff of the third party notices and responses to the notices) clearly set out the necessary assertions of fact in relation to duty of care, breaches of duty and injury or harm caused, against the defendants under this cause.

[62] I do not accept the defence argument that there are no facts pleaded supporting groundwater contamination or any contamination beyond the Affected Waterways. I agree with the plaintiff's submissions that the pleadings assert direct exposure, continuation and damage to properties throughout the Evacuation Zone.

[63] With respect to the defence that economic loss is not available absent damages, though I have found that the plaintiff has asserted damage, I am persuaded that it is not plain and obvious that the plaintiff's case is bound to fail because of the absence of damages. I note that the plaintiff has identified at least two mechanisms of diminution, other than from direct contamination, that may be compensable: first, devaluation from environmental degradation that is secondary to incidents of fuel contamination; and second, loss of property value as a result of the degradation of an environmental amenity (the waterway) that had previously enhanced its value.

[64] I am of the view *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, is applicable here. In that case, the Supreme Court of Canada allowed recovery of pure economic loss by a railway arising from the closure of a rail bridge damaged by a barge being towed by a tug. Public Works Canada owned the bridge and obtained full recovery of damages at trial. The

Supreme Court of Canada upheld the trial decision permitting recovery of the railway for pure economic loss on the basis there was sufficient proximity between a wrongful act and the loss. In this regard, the court stated at 1152–53:

> In summary, it is my view that the authorities suggest that pure economic loss is *prima facie* recoverable where, in addition to negligence and foreseeable loss, there is sufficient proximity between the negligent act and the loss. Proximity is the controlling concept which avoids the spectre of unlimited liability. Proximity may be established by a variety of factors, depending on the nature of the case. To date, sufficient proximity has been found in the case of negligent misstatements where there is an undertaking and correlative reliance (*Hedley Byrne*); where there is a duty to warn (*Rivtow*); and where a statute imposes a responsibility on a municipality toward the owners and occupiers of land (*Kamloops*). But the categories are not closed. As more cases are decided, we can expect further definition on what factors give rise to liability for pure economic loss in particular categories of cases. In determining whether liability should be extended to a new situation, courts will have regard to the factors traditionally relevant to proximity such as the relationship between the parties, physical propinquity, assumed or imposed obligations and close causal connection. And they will insist on sufficient special factors to avoid the imposition of indeterminate and unreasonable liability. The result will be a principled, yet flexible, approach to tort liability for pure economic loss. It will allow recovery where recovery is justified, while excluding indeterminate and inappropriate liability, and it will permit the coherent development of the law in accordance with the approach initiated in England by *Hedley Byrne* and followed in Canada in *Rivtow*, *Kamloops* and *Hofstrand*.

[65] The requisite analysis does not simply turn on the presence or absence of physical damage. Rather, it involves a legal determination of proximity, which can be founded on the basis of such factors as physical propinquity. The Court, as well, held that the categories giving rise to liability for pure economic loss are not closed.

[66] Given the low threshold on the s. 4(1)(a) hurdle and given the "flexible approach" taken by the courts to the law of pure economic loss, it is not plain and obvious that the Plaintiff's action is bound to fail on the basis of the law of economic loss. The claims of putative class members are not plainly and obviously, "[d]istant losses which arise from collateral relationships" (*Canadian National Railway Co.* at 1154).

[67] I am of the view that the cases relied upon by the defence are distinguishable.

[68] With respect to the specific arguments of the Province regarding duty of care and defences, I am persuaded by the applicant's reply submissions. With respect to the Province's duty of care argument regarding transportation of fuel by an independent contractor, the issue is not determinable without an examination of the factual matrix. Thus, it is not available for consideration at the certification stage.

[69] I also note that the plaintiff has framed the Province's duty of care beyond transportation as per paras. 98–100 of the Amended Notice of Civil Claim.

[70] In respect to the Province's duty of care argument relating to road maintenance, there remains a factual determination as to whether the road was closed, particularly where the road was accessible and accessed by Mr. LaSante.

[71] Further, I note that the plaintiff has also framed the Province's duty of care beyond the duty to care for road maintenance *per se* and includes a duty of care to communicate, warn, deactivate and obstruct and/or deter access (see paras. 38–40 and 54 of the Amended Notice of Civil Claim).

[72] The Province's various defences to the negligence claim include that:

- harm was not reasonably foreseeable to the Province;
- the Province's duty of care was narrowed by its statutory regulation of drivers;
- the Province had no road maintenance responsibility for an unmaintained and closed road;
- the policy defence as pled at para. 29 of Legal Basis for the Province's Amended Response to Civil Claim;
- the Province did not breach the standard of care because it was trying to reduce the risk of harm by fighting a fire and the Province was not transporting fuel; and
- the material contribution test is inapplicable.

[73] These defences require adjudication on the merits. It cannot be said that the existence of any one of these defences renders it plain and obvious that the action is bound to fail.

[74] With respect to the action in nuisance the Amended Notice of Civil Claim states:

> 107. Each and all of the Defendants, through their acts and/or omissions described herein, have committed the tort of nuisance by jointly and/or severally causing and/or contributing to the Spill and distribution of Vapour and Sludge throughout the Evacuation Zone so as to impose a continuing interference with the Class members' quiet enjoyment of their Properties.

[75] The leading case on private nuisance is *Antrim Truck Centre*. At para. 18, Cromwell J. for the Court confirmed that to claim in nuisance, "consists of an interference with the claimant's use or enjoyment of land that is both substantial and unreasonable". He goes on to state at para. 19 that, "[a] substantial interference is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances."

[76] At para. 23, Cromwell J. states that nuisance is not confined to:

> firm categories of types of interference which determine whether an interference is or is not actionable …. Nuisance may take a variety of forms and may include not only actual physical damage to land but also interference with the health, comfort or convenience of the owner or occupier …. The point is not that there is a typology of actionable interferences; the point is rather that there is a threshold of seriousness that must be met before an interference is actionable.

[77] The plaintiff's pleadings in my view adequately set out assertions which at this stage meet the non-trivial and unreasonable interference threshold. The assertions as to the nature of the Spill, the Evacuation Order, the impacts and the assertions as to the defendants' actions are sufficient.

[78] While the interest or lack of an interest in a particular property by a particular class member has implications on the type of damages which may be available, e.g. damages for diminution in property value would not be available to those not having an interest in land, there are other damages available to those having a lesser or no interest to the extent they have suffered the necessary interference with the use and enjoyment of land. Differing types of damages to those within a class is not fatal to

certification. However, refining the class or even creating subclasses are considerations which may be addressed as things become clearer post-certification.

[79] With respect to the action under *Rylands v. Fletcher*, pleadings relating to this extension to the law of nuisance have established a cause of action against all of the defendants.

[80] I agree with the plaintiff's submission that the Province's arguments noted above are arguments on factual and legal issues on the merits and are not resolvable at the certification stage.

B. Is there an identifiable class?

1. Parties' Positions

[81] The class definition proposed by the applicant is as follows:

> All persons who owned, leased, rented, or occupied real property on July 26, 2013 within the Evacuation Zone (as defined in the Amended Notice of Civil Claim) except for the defendants and third parties.

[82] The Province argues that the proposed class fails for lack of clarity. It points to the differences or conflicts between the wording used in the Notice of Civil Claim, Amended Notice of Civil Claim, the Notice of Application, the affidavit of Mr. Kirk, the litigation plan and/or the applicant's written submissions in respect to persons proposed as class members. Further, the Province submits that the map outlining the Evacuation Zone provides no means of identifying the location of properties and there is no definition or description of the "Spill site" referred to in the pleadings.

[83] There are no legal descriptions on the map, nor any GPS coordinates, street names or property boundaries that delineate with certainty the exact area of the initial Evacuation Zone in order to enable individuals to determine whether they fall within the initial Evacuation Zone.

[84] It is submitted that with this lack of detailed information some individuals will not be able to look at the criteria set out in the proposed definition and readily determine whether they are or are not part of the proposed class in the case at bar.

[85] The Province also argues that there is no rational connection between the proposed class and proposed common issues, and that the class definition is both too broad and too narrow. In regard to being too narrow or under–inclusive, it is submitted that this is because the class definition fails to include persons who acquired real property within the Evacuation Zone after July 26, 2013, and/or outside the Evacuation Zone.

[86] The Province also argues that there is no evidence that two or more persons in the proposed class have a complaint or concern or claim about any actual contamination or pollution on their property.

[87] Contrary to the Province's position, Executive acknowledges that the class as defined by the applicant is, "precise, objective, and presently ascertainable." However, it argues that the class definition is overbroad as it includes people whose properties are in the Evacuation Zone, but not on the Affected Waterways. Absent injury to property, it is submitted these parties would have no claim whatsoever in diminution of property value. The class also includes individuals who may have owned or leased land in the Evacuation Zone at the time of the Evacuation Order, but who were not present during the evacuation and therefore suffered no interference with the use and enjoyment of their property as a result of the Spill.

[88] Executive also argues that there is a lack of rational relationship between the proposed members and the claims advanced on behalf of the class. Executive submits that the Evacuation Order was originally based on public health orders made by the medical health officer at Interior Health and had no connection with damage to property. Thus there is no rational connection between the class definition and the basis for the claims being advanced.

[89] Executive also submits that there is a lack of unity in the class. It says that the evidence shows that the Evacuation Zone changed over time and that the "do not use water" orders were based on a different set of parameters than the Evacuation Zone. Furthermore, within the class area there is a wide array of

property types (recreational/residential/commercial/agricultural) and uses which would each experience its own unique set of issues.

[90] Given the diverse and personal issues raised in the pleadings, it is argued that the class definition is inadequate and cannot be saved by amendment.

2. Determination on Identifiable Class

[91] Overall, I am satisfied that there is an identifiable class.

[92] While there are some differences in the various filings, the definition as proposed in the hearing before me is the one to be reviewed. Also, while I have some concerns regarding the map attached to the Amended Notice of Civil Claim as raised by the defence, I am satisfied that a given property can ultimately be determined objectively so as to allow a person to ascertain inclusion or not in the class. In this regard, I agree with the applicant that this can be by reference to a measurement, i.e. the distance of the property from a relevant waterway in the Evacuation Order and the records of the RDCK, the local government that delineated the zone, ordered the evacuation and administered the evacuation. The lack of precision the defence points to is not fatal.

[93] I also do not find the changes in the Evacuation Order over time and their difference with the parameters for the “do not use water” orders detract from the sufficiency of the class definition. These matters can be dealt with post-certification by amendment to the class definition.

[94] As to diversity of property within the proposed class definition, I do find this to be a defect; however, as discussed earlier, refinement if required is better considered post-certification. Similarly, with respect to the class being too broad and/or too narrow, at present the proposed class is adequate and refinement if required is better considered post-certification.

[95] With respect to the defence argument regarding the absence of evidence of two or more persons, affidavits from individuals raising a claim in a certification

proceeding are not a requirement. The test requires evidence of "some basis in fact" of two or more persons. In this case, I accept the applicant's submission that the affidavit of Nelle Maxey #1 which at para. 26 identifies numerous persons who raised complaints to her, provides "some basis in fact". She lists them as follows:

> a) 30 Residents who reported fuel product (sheen, emulsion and/or smell) on river or shorelines or in their tap water/toilets;
>
> b) 6 Residents who were concerned about the contamination of the underground water channels within the Lemon Creek alluvial fan;
>
> c) Many Residents who remained concerned about the safety of swimming and tubing in the Slocan River after the Interior Health Authority canceled its Order as defined in the Wittmayer Affidavit at paragraph 29;
>
> d) 23 Residents who reported health concerns and symptoms; eight reports involved children and five of these 23 Residents had symptoms which were medically diagnosed as resulting from exposure to fuel or vapor associated with the Spill;
>
> e) 16 Residents who were concerned about the safety of their drinking water, both before and after the Interior Health Authority canceled its Order as defined in the Wittmayer Affidavit at paragraph 29;
>
> f) 7 Residents who reported concerns for wildlife and fish health, including three reports of contaminated beaver lodges;
>
> g) 7 Residents who reported concerns regarding the safety of consuming or selling fruit and vegetable produce, eggs, milk and/or meat;
>
> h) 5 Residents who were concerned about the Centre closing and the resulting loss of shower and potable water tank facilities;
>
> i) 4 Residents who wanted their evacuation expenses recorded …; and
>
> j) 3 Residents and business owners who reported business losses.

[96] I am therefore satisfied that the evidence is sufficient in establishing that there is some basis in fact of an identifiable class of two or more persons.

C. Do the claims raise common issues and do they predominate over individual issues?

[97] Section 4(1)(c) of the *CPA* requires that the claims of the class members "raise common issues, whether or not those common issues predominate over issues affecting only individual members".

[98] Under s. 1 of the *CPA*, common issues are defined as:

> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[99] Therefore, to satisfy s. 4(1)(c) of the *CPA*, the claims made by class members must raise common, but not necessarily identical, issues of either fact or law.

[100] The commonality requirement is based on the notion that "individuals who have litigation concerns 'in common' ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings": *Pro-Sys* at para. 106.

[101] The common issue criterion is not a high legal hurdle. The plaintiff need only provide some basis in fact to support the existence of common issues. An issue can be common 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: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 53, 2004 CanLII 45444 at para. 53 (C.A.), leave to appeal ref'd [2005] S.C.C.A. No. 50.

[102] The common issue need not dispose of the litigation, however, it is sufficient if it is an issue of fact or law common to all claims and its resolution has a reasonable prospect of advancing the litigation for (or against) the class: *Harrington v. Dow Corning Corp.* (1996), 22 B.C.L.R. (3d) 97, (S.C.) [*Harrington BCSC*], aff'd 2000 BCCA 605 [*Harrington BCCA*], leave to appeal ref'd [2001] S.C.C.A. No. 21.

[103] The issues do not have to be determinative of liability. It is sufficient that these claims, if decided in a single trial, will help to advance the litigation in some material way for the benefit of class members. In *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343 (C.A.), leave to appeal ref'd [1998] S.C.C.A. No. 13, the Court of Appeal held:

> [53] When examining the existence of common issues it is important to understand that the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the

> litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief. To require every common issue to be determinative of liability for every plaintiff and every defendant would make class proceedings with more than one defendant virtually impossible.

[104] A common question can exist if the answer given to the question might vary from one member of the class to another. It is not necessary that all class members must succeed on a common question; however, success for one member cannot lead to failure for another: *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 45.

[105] At the certification stage, the common issues should be framed in general terms. As the action proceeds, the court may determine that the common issues need to be more particularized: *Miller v. Merck Frosst Canada Ltd*., 2011 BCSC 1759, leave to appeal ref'd 2012 BCCA 137.

[106] The common issues proposed by the applicant in the Notice of Application are:

> **Negligence**
>
> (a) Did all, or any of, the Defendants owe a duty of care to the class members?
>
> (b) Did all, or any of, the Defendants breach this duty, and if so, when?
>
> (c) If the Defendants, or any of them, did breach their owed duty, did this breach cause the class members to suffer harm?
>
> **Nuisance**
>
> (d) Did the acts or omissions of any of the Defendants cause an evacuation order to be issued with respect to the class members' properties?
>
> (e) Did the resulting evacuation of the class members from their properties constitute a loss of use of their real properties and/or an interference with the quiet enjoyment of their real properties?
>
> (f) Did the acts or omissions of any of the Defendants, jointly and/or severally, cause the class members to suffer a loss of use of their properties and/or an interference with the quiet enjoyment of their properties?
>
> (g) Did any of the Defendants, through their acts or omissions, commit the tort of nuisance by jointly and/or severally causing and/or contributing to the Spill (as defined in the Amended Notice of Civil Claim)?

Rylands v. Fletcher

(h) Does the rule in Rylands v. Fletcher … apply to the facts in this case? If so, are any or all of the Defendants liable for damages in accordance with this rule?

Diminution of Property Value

(i) Did the acts or omissions of any of the Defendants cause the real properties within the Evacuation Zone [as defined in the Amended Notice of Civil Claim] to diminish in market value? If so, what is the best method for valuing the diminution of that market value?

Punitive Damages

(j) Do the acts or omissions of any of the Defendants justify an award of punitive damages?

(k) If an award of punitive damages is justified, and if the aggregate compensatory damages awarded to class members does not achieve the objectives of retribution, deterrence and denunciation in respect of [the acts or omissions of the Defendants], what amount of punitive damages is awarded against the Defendants, or any of them?

Apportionment of Liability

(l) Has the damage and/or loss to the class members been caused by the fault of two or more of the Defendants? If so, what is the degree to which each of the Defendants is at fault?

(m) If two or more of the Defendants are found to be at fault, are they jointly and severally liable to the members of the class?

[107] The loss component of liability is not proposed as a common issue. As well, individual damages are not proposed as a common issue. The applicant states that the proposed common issues exclude a determination of any alleged contamination or pollution to any individual property. The applicant distinguishes this from the common issue of determining the best method for valuing the diminution of market value as a determination in respect to the elements of general causation, i.e. a determination of any causal relationship between the alleged tortious act and the triggering of factors which are degrading of market value, the identification of those factors and the articulation of a mass appraisal framework by which those factors may be applied in the course of individual loss assessments following a common issues trial: see *Harrington BCCA* at paras. 63–64; and *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260 at paras. 51–55.

[108] I note s. 7(a) of the *CPA* permits certification where individual damages will remain to be assessed after the determination of common issues:

> **Certain matters not bar to certification**
>
> 7 The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:
>
> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;

[109] The above provision is an indicator of the flexible and practical approach to be taken.

[110] In my view the common issues grouped in the Notice of Application under Negligence, Nuisance, and the rule of *Rylands v. Fletcher* are common in terms of facts. They have the potential to reasonably advance the litigation and provide for access to justice and judicial economy.

[111] In my view, the common issue regarding diminution of value is appropriate in that it is, as submitted by the applicant, a determination to be made with respect to elements of general causation: see generally *Harrington BCCA* and *Stanway*. I accept the applicant's argument that this common issue involves determination within the scope of general causation, as follows:

> (a) determination of any propensity for injury to property value arising from any environmental degradation, amenity loss or market stigma; and
>
> (b) judicial determination of a formula for assessing/quantifying any such detrimental impact of the Spill.

[112] In my view, this common issue has a reasonable prospect of advancing the litigation.

[113] In regard to punitive damages, the defendants argue that the facts pleaded do not come close to the exceptional threshold for such damages. The defendants note their actions were in support of a response to a public emergency — a forest fire.

Executive at the request of the Province was delivering fuel for helicopters engaged in the firefighting effort. It was in this effort in which Mr. LaSante took a wrong turn and travelled down a closed road where the tanker truck overturned, resulting in the Spill. Executive says its response was immediate and thorough. It submits that even if a tort was committed (which it denies), the defendants' conduct does not reach the standard of highly reprehensible or a "marked departure from ordinary standards of decent behaviour": *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 36.

[114] Transwest agrees and argues a similar line of reasoning as Executive.

[115] The Province also submits similar reasoning to Executive.

[116] The arguments put forth by the defence are related to the merits and are not for consideration at this stage. The pleadings and evidence are sufficient to support the claim for punitive damages to go forward.

[117] I am of the view that the questions are appropriate for a common issues trial. The pleadings indicate some basis in fact and these questions will advance the litigation. I find support for this in *Rumley v. British Columbia,* 2001 SCC 69 at para. 34.

[118] The applicant's reply submissions state that on July 22, 2016 the Federal Crown instituted fresh proceedings against the Province, Executive and Mr. LaSante by way of an Information sworn at the Provincial Court of British Columbia at Nelson. They describe the prosecution as involving charges of two counts of "depositing a deleterious substance in a water frequented by fish" under the *Fisheries Act*, R.S.C. 1985, c. F-14; that the penalty on conviction is a minimum of $5,000 for an individual and $100,000 for the government or a company; that the prosecution involves six counts of "introducing waste into a stream causing pollution" under the *Environmental Management Act*, S.B.C. 2003, c. 53 [*EMA*]; and that the maximum penalty set out in the *EMA* is a $1-million fine or six months in jail.

[119] As a result, I adopt the bifurcated approach as set out in *Chalmers v. AMO Canada Company*, 2010 BCCA 560. The assessment of individual punitive damages, if any, will follow the disposition of the criminal proceedings and the common issues trial.

D. Is a class proceeding the preferable procedure for the fair and efficient resolution of the common issues?

1. Parties' Positions

[120] The inquiry into whether a class proceeding is preferable is done through the lens of the goals of the *CPA*: access to justice, behaviour modification and judicial economy. The common issues must be considered in the context of the action as a whole, taking into account their importance in relation to the claims as a whole: *Hollick* at para. 30. The preferability inquiry is directed at two separate questions: preferability in a qualitative sense and preferability in a comparative sense: *Rumley* at para. 35. For a class proceeding to be the preferable procedure, it must represent a fair, efficient and manageable procedure preferable to any alternative method of resolving claims.

[121] For ease of reference, I again set out s. 4(2) of the *CPA* which states that the court must consider all relevant matters including:

> (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.

[122] The defence submits that certification is unwarranted and will serve only to frustrate rather than advance the three goals of the *CPA*.

[123] In terms of judicial economy, it is argued that claims are framed too broadly by including as class members people who do not live on the Affected Waterways and/or people who do not own property. In any event, it is argued that judicial economy is not served as the Affected Waterways have been remediated to regulatory standards. The decision of *Cuff* is cited in support.

[124] In terms of access to justice, reference is again made to the assertion that the contamination has been remediated; as a result, access to justice is not required for redress. Two actions — *Whitewater v. Executive* in the British Columbia Provincial Court, Nelson Registry No. 18884; and *Ross v. Executive* in the Supreme Court, Vancouver Registry No. VLC-S-S-1559993 [*Ross Action*] — are pointed to as examples evidencing access to justice is not a concern. In a similar vein, the Province argues that if Mr. Kirk wishes to pursue damages he can, through individual action. The Province argues that the proposed class members have different interests based on factors such as the location of their real property as well as whether they are owners, tenants or simply users of the private property in the Evacuation Zone at the material time. As a result, there is no common claim for damages of the proposed class. If some member of the proposed class wishes to pursue a claim, there are other options available. The proposed class members with small claims may commence individual actions in provincial court. Alternatively, the proposed class members may join or consolidate their actions in this Court.

[125] The Province further argues that a class proceeding involving a trial of the common issues would not materially improve the position of the members of the proposed class in resolving their individual claims, but would break down into substantial individual trials to determine the numerous individual issues of each person in order to determine whether there was a valid claim for damages.

[126] As to behaviour modification, the defence submits that this goal is not required as there is no need for denunciation of their conduct. This is not a case of a historical polluter that has made money off cutting environmental corners or taking risks. Rather, the subject events resulted from a single vehicle accident that

occurred during the delivery of fuel in support of a firefighting effort which is unlikely to occur again. Moreover, it is argued that behaviour modification has already occurred.

[127] In this regard, Executive argues that it did not ignore its obligations to the public. Once Executive learned of the Spill it took immediate action to clean-up, remediate and address community concerns. It says that it has done everything that it was advised to do by its experts and the Ministry and to date has spent $5,457,000 in addressing the effects of the Spill. Executive submits the evidence shows that the site of the Spill and surrounding waterways have been remediated to regulatory standards.

[128] The defence also argues that behaviour modification can also be addressed through applicable environmental legislation such as the "polluter pays" scheme in British Columbia. In other words, there are other avenues aside from class actions available to address behaviour modification.

2. Determination of Class Proceeding as Preferable

[129] In my view, a class proceeding is preferable.

[130] At the heart of this action is the Spill, a single event that is said to have affected a significant part of a community. There are numerous defendants in this case. Their conduct in relation to the Spill is the focus of the common issues. The action seeks to determine which of the defendants caused the fuel to spill into Lemon Creek. There is complexity to the legal and factual issues. The defendants seek to place blame or at least share the blame with the other defendants and seek indemnity from the others as well. They are involved in related criminal and regulatory proceedings. The defendants here have greater resources than the typical individual class member.

[131] In circumstances such as these, I do not find it fair or efficient for individuals to be required to advance through an individual action to obtain some form of

redress from the defendants. Moreover, litigating the common issues through a class proceeding has the significant advantage of key findings being decided once.

[132] While behaviour modification is important, this factor is not as significant as the two other goals in the circumstances of this case as presently understood. However, this goal is advanced by using the tort system to encourage environmental responsibility.

[133] The focus in this case is largely about determining the cause of, and responsibility for, the Spill. This focus, rather than its subjective effect, distinguishes this case from the circumstances in the recent decision by the BC Court of Appeal in *Baker* and makes it consistent with the Manitoba Court of Appeal decision in *Anderson*. This feature looms large in terms of significance in a qualitative sense.

[134] While the focus in *Baker* is distinguishable, I agree with the submission of the plaintiff here that the principles in that case are applicable and support certification. *Baker* concerned the operation of a compost facility which emitted unpleasant odours. Over a period of seven years these caused about 50 neighbours of the facility to suffer a loss of enjoyment of their properties. There was no dispute concerning responsibility for the unpleasant odours. The common issues focussed on the subjective reactions of the neighbours to the alleged unpleasant smells. Unlike *Baker*, the present case is concerned with the defendants' conduct. The cause of and the responsibility for the Spill must be determined. This focus on responsibility for pollution, rather than its subjective effect, distinguishes the circumstances in this case from *Baker.* As a result, my finding here of preferability does not conflict with *Baker.*

[135] Support for my finding can also be found in the recent case of *Anderson*. Similar to the present case, that case involved a single-incident mass tort: the one-time flooding of residential homes due to alleged defendant conduct. The trial court denied certification on the basis that environmental nuisance claims necessarily focus on individual class members and thus could not be certified as common issues in a class proceeding. The Court of Appeal rejected this rationale. It held that

general causation questions are common to all class members and can be determined independently of the evidence of individual class members. The court held that having this issue determined through one trial for all members would be more efficient for judicial resources as compared to a multitude of individual suits making identical or nearly identical claims.

[136] My finding that a class proceeding is preferable is also supported by my review in respect to the considerations set out in s. 4(2)(a)–(e) of the *CPA*.

(a) Do the questions of law or fact common to the members of the class predominate over questions affecting only individual members?

[137] The defence argues that questions and individual issues of each class member predominate over the common issues. Cases in support include *Baker*; *Bittner v. Louisiana Pacific Corp*. (1997), 43 B.C.L.R. (3d) 324, (S.C. Chambers); *Parsons v. Coast Capital Savings Credit Union*, 2007 BCCA 247, leave to appeal ref'd [2007] 3 S.C.R. vii (note); *Roberts v. Canadian Pacific Railway*, 2006 BCSC 1649, [2006] B.C.J. No. 2905; and *Benning v. Volkswagen Canada Inc. et al.*, 2006 BCSC 1292.

[138] Though there are significant questions relating to individual members, who may be also be significant in number, the common issues are threshold questions which are complex and contested by the defendants. Qualitatively, the common issues are critical and predominate. The common issues must be addressed before consideration of the individual issues. In any event, predominance alone is not determinative. It is but one consideration of many in the preferability analysis.

(b) Do a significant number of class members have a valid interest in individually controlling the prosecution of separate actions?

[139] The defendants point to other legal proceedings in their submissions including: the *Ross Action*; *Executive v. British Columbia and Transwest* in the British Columbia Supreme Court, Vancouver Registry No. S155457 [*Executive Action*]; *Burgoon v. EFCFS* and *British Columbia*, British Columbia Provincial Court,

Nelson Registry No. 24399-2; and an Environmental Appeal Board proceeding, No. 2013-EMA-022.

[140] The aforementioned proceedings relate to the Spill, but are different in terms of the nature of relief sought or the nature of the proceedings.

[141] There is no evidence showing that a significant number of class members have a valid interest in individually controlling the prosecution of separate actions in relation to the matters in this case.

(c) Will this class proceeding involve claims that are or have been the subject of any other proceedings?

[142] As mentioned above, there are other proceedings; however, the *Ross Action* and *Executive Action* seek different relief than sought in the instant case and advance claims on behalf of different claimants than those in the proposed class in this case. The *Executive Action* assumes the present case will be certified.

[143] In terms of the criminal and regulatory proceedings, they are not focused on determining the common issues in this case. The issues in those proceedings arise from distinct statutory provisions and framework. Neither proceeding has jurisdiction over the liability in this case.

[144] This consideration does not cause or diminish the preferability of this proceeding.

(d) Are other means of resolving the claims less practical or less efficient?

[145] The defence argues that the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means in the case at bar because of all of the individual issues and need for individual trials in order to make findings of individual facts.

[146] It is further submitted that a class proceeding that would require individual trials due to the individual inquiries to establish loss and therefore liability would be

unmanageable: *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 at para. 56, [2003] O.J. No. 27 at para. 56 (C.A.), leave to appeal ref'd [2003] S.C.C.A. No. 106. It is also argued that a class proceeding that would inevitably require individual inquiries would result in delay and expense: *Roberts* at para. 82.

[147] In short, a class proceeding would be, "inefficient, unmanageable and costly": *Thorburn v. British Columbia (Public Safety and Solicitor General)*, 2013 BCCA 480 at para. 53.

[148] The defendants argue that there are other preferable procedures such as a test case. However, when asked about the specifications of the test case, the Province retreated from its position and stated that a test case was not appropriate. Executive, Transwest and Mr. LaSante support a test case, but only limited to being bound on the determination of liability regarding the tanker rolling into Lemon Creek.

[149] The defendants propose no method for how all of the potential privies would be bound on all of the issues.

[150] I am of the view that the other means are less practical and efficient than a class proceeding.

(e) Would the administration of this class proceeding create greater difficulties than those likely to be experienced if relief was sought by other means?

[151] Based on my discussion above, I do not see that the administration of this class proceeding creates greater difficulties than through other means.

E. Is there an appropriate representative plaintiff?

[152] Mr. Kirk is the proposed representative plaintiff. He is a retired machinist and a resident of Winlaw, BC, an unincorporated rural community located along the Slocan River, approximately ten kilometres southwest and downstream from the site of the Spill. He owns and lives on a 51-acre rural property which has one kilometre of shoreline along the east side of the Slocan River. Mr. Kirk has resided on this

property with his adult daughter for the past 18 years. His property is within the Evacuation Zone.

[153] It is submitted that Mr. Kirk is an appropriate representative plaintiff. He will adequately represent the class, does not have a conflict with other class members and has developed a reasonable plan for litigating the action and providing notice. As such, he satisfies the requirements to be appointed as representative plaintiff under s. 4(1)(e) of the *CPA*.

[154] The defendants submit that Mr. Kirk is not an appropriate representative plaintiff as his claims are likely to be unique as compared to others in the proposed class or he has potential and actual conflicts of interest with most or the other proposed class members. The defendants argue that the status of Mr. Kirk as a land owner of land which is rural, borders for about one kilometre on the waterway and is comprised of 51 acres, puts him either in a unique position or in conflict with those who had a lesser interest such as renters, lessors or occupiers of property; lands which were non rural; lands which were commercial, recreational and agricultural; and lands which were further inland than along the water way.

[155] It is further submitted that he has not put forward an adequate proposed litigation plan. It is submitted that the plan is too general. It does not provide sufficient details regarding how issues such as causation, liability and damages particularly in respect to individual issues are to be dealt with. Further, the defendants say the proposed notice to class members is not consistent with the proposed class definition and there are no plans on how to deal with out-of-province persons who would fit into the class definition.

[156] In my view, Mr. Kirk qualifies as the representative plaintiff. Any limitations argued by the defendants are met by the recent comment of Justice Savage in *Miller v. Merck Frosst Canada Ltd.*, 2015 BCCA 353 at para. 75, leave to appeal ref'd [2015] S.C.C.A. No. 431:

> [75] The representative plaintiff represents the class, but need not be representative *of* the class: *Hollick v. Toronto (City)*, 2001 SCC 68 at

> para. 21. He or she need not have a claim typical of the class, or be the "best" possible representative. Instead, the court must be satisfied that "the proposed representative will vigorously and capably prosecute the interests of the class": *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 41. Punnett J. was satisfied that Mr. Miller was appropriate for this role, and I see no grounds upon which to disturb his decision.

[157] In terms of the concern regarding a conflict of interest between Mr. Kirk and other members in the proposed class, I do not find on the evidence the level of conflict that would disqualify Mr. Kirk. At this point there is no objection raised by those who have been identified by the defendants as being in conflict with Mr. Kirk. Obviously, if a problem arises, the representative plaintiff may be removed or can withdraw and be substituted.

[158] The evidence shows that Mr. Kirk understands the nature of these proceedings and consents to acting as the representative plaintiff. He understands and accepts the responsibilities he has as a representative plaintiff.

[159] To this point, Mr. Kirk has vigorously prosecuted the claim. Experienced class action counsel has been retained, experts too have been retained and extensive evidence through several witnesses has been adduced. As well, the litigation plan filed is reasonable based on the current stage of the proceedings. It reflects an understanding of the case and a framework for proceeding efficiently. Obviously, it is a work in progress, as in most other cases at this stage.

V. SUMMARY

[160] I am satisfied that the applicant has met the requirements of s. 4(1) of the *CPA*. As a result, I certify this action as a class proceeding.

[161] The class is defined as proposed by the applicant.

[162] The common issues as proposed by the plaintiff are approved.

"The Honourable Mr. Justice Masuhara"