IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mostertman v. Abbotsford (City),* 2024 BCSC 906

Date: 20240529
Docket: S01697
Registry: Abbotsford

Between:

Caroline Mostertman and Robert Gordon

Plaintiffs

And

The City of Abbotsford

Defendant

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

Before: The Honourable Justice Dley

Reasons for Judgment

Counsel for the Plaintiffs:	A.A. Vecchio, K.C. S.J. Jaworski J. Giovannetti
Counsel for the Defendant, The City of Abbotsford:	B.B. Olthuis, K.C. N.P.R. Bond B. Reedijk
Place and Dates of Trial/Hearing:	Abbotsford, B.C. April 22–26, 2024
Place and Date of Judgment:	Abbotsford, B.C. May 29, 2024

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INTRODUCTION

[1] The plaintiffs apply to certify this action as a class proceeding. The action arises out of the November 2021 Sumas Flood.

[2] The plaintiffs allege that the magnitude of the flooding and resulting damage occurred because the City of Abbotsford ("Abbotsford") failed to close the floodboxes at the Barrowtown Pump Station. The action is framed in negligence and nuisance.

[3] Abbotsford argues that the application is fatally flawed and cannot succeed.

[4] One of the two plaintiffs, Robert Gordon, has passed away. Although in these reasons I have referred to the plaintiffs in the plural, it is apparent that there will need to be additional plaintiffs named to instruct counsel and represent the relevant classes.

[5] For the following reasons, the application is granted and the action is certified as a class proceeding.

BACKGROUND FACTS

[6] The Sumas Prairie is a floodplain in Abbotsford. It was a lake of about 40 square kilometres until it was drained in the 1920s for agricultural and flood control purposes. The Sumas Prairie is a low-lying area and naturally fills with water.

[7] The Sumas Dike covers about 16.8 kilometres along the south-eastern portion of the Prairie. The area shielded by the dike is known as the Inner Sumas Prairie, while the remainder is known as the Outer Sumas Prairie.

[8] The Sumas Prairie is bounded by several rivers and tributaries, the most noteworthy being the Fraser and Sumas Rivers. Southwest of the Sumas Prairie in Washington State, is the Nooksack River which has occasionally caused flooding into the Sumas River and across the border into British Columbia.

[9] From November 13, 2021 through November 15, 2021, the area experienced two atmospheric rivers which brought significant rainfall and, together with snowmelt,

caused rivers and tributaries to rise. The Fraser River rose to the extent that it caused water to flow into the Sumas River and flooded the Sumas Prairie.

[10] The Barrowtown Pump Station ("Pump Station") is operated and maintained by Abbotsford. The Pump Station continually drains the Sumas Prairie. Regardless of precipitation, if the Pump Station were not operating, the Prairie would be under water within two to three days.

[11] The Pump Station has four floodboxes (or flood gates) which are designed to regulate the flow of water from the Fraser, Vedder and Sumas rivers. Under normal conditions, the Sumas River flows through the open floodboxes and joins with the Vedder River, where they ultimately flow into the Fraser River.

[12] The portion of the Sumas River to the southwest of the Pump Station is referred to as the "Sumas River side" and the portion to the northeast of the Pump Station is referred to as the "Fraser River side".

[13] When the Fraser River side is higher than the Sumas River side, this results in the reversing of the flow direction of the Sumas River, a phenomenon called reverse flow. If the floodboxes are left open during a reverse flow, the back flooding causes flooding to the Outer Sumas Prairie and, if the water flows over top of the Sumas Dike or the Dike breaches, into the Inner Sumas Prairie. If the floodboxes are closed during reverse flow, floodwater from the Fraser and Vedder rivers is prevented or at least reduced from entering the Sumas Prairie.

[14] The operating procedures for the Pump Station say that its operators must be prepared for a "Storm Event" which occurs two to three times a year. The floodboxes are to be closed during a Storm Event. According to the operating procedures, the floodboxes should be closed when the Fraser River side water level reaches 3.0 metres.

[15] The floodboxes were not closed during the November 2021 Storm Event. Water from the Fraser River back flooded into the Outer Sumas Prairie and rose to

the extent that it caused the Sumas Dike to breach, flooding the Inner Sumas Prairie. Residents were told to evacuate.

[16] The plaintiffs were residents of the Sumas Prairie and sustained physical damage and harm as a result of the flooding. They sue Abbotsford in negligence and nuisance. They apply for certification of a class action claim against Abbotsford on behalf of those who claim to have suffered personal injury, displacement, or damages as a result of Abbotsford's alleged misconduct relating to the Sumas Flood.

ABBOTSFORD'S POSITION

[17] Although Abbotsford acknowledges that many residents of the city suffered substantial upheaval and property damage, it maintains that the flooding was caused by the Nooksack River. Abbotsford opposes the application for certification and says that anyone who has an alleged claim arising out of the flooding should make such a claim individually. There are over 1,400 properties in the Sumas Prairie area.

[18] Abbotsford takes the position that the plaintiffs' plan to represent classes of people in a claim against the city is fatally flawed and cannot succeed because:

a) the claims do not disclose a valid cause of action and are bound to fail;

b) the plaintiffs have failed to identify a properly identifiable class of two or more persons that is not internally in conflict;

c) the bulk of the plaintiffs' proposed common issues suffer from insuperable difficulties;

d) the plaintiffs have not produced a suitable litigation plan; and

e) a class action is not the preferable procedure for the fair and efficient resolution of any common issues.

LEGISLATIVE REQUIREMENTS

[19] Before a matter may be certified as a class action, s. 4(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*] requires an applicant to show that:

> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
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> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
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> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
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> (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.

[20] The *CPA* must be interpreted generously to satisfy its objectives of judicial economy, access to justice, and behaviour modification: *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at para. 109.

[21] The focus of the certification hearing is on the form of the action and whether it can proceed as a class proceeding: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [*Pro-Sys*] at paras. 101–105. It is not a hearing on the merits.

[22] The factors for certification as legislated were neatly summarized in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 [*Western Canadian Shopping Centres*] at paras. 38–41:

> [38] While there are differences between the tests, four conditions emerge as necessary to a class action. First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the

> outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria: see *Branch*, *supra*, at paras. 4.190-4.207; Friedenthal, Kane and Miller, *Civil Procedure* (2nd ed. 1993), at pp. 726-27; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Ct. (Gen. Div.), at paras. 10-11.
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> [39] Second, there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.
>
> [40] Third, with regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.
>
> [41] Fourth, the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class … [Citations omitted.]

[23] The applicant in a certification hearing must show that their pleadings disclose a proper cause of action: s. 4(1)(a), *CPA*. That assessment is done as if determining a motion to strike. The applicant will not succeed if it is plain and obvious that the proposed claim cannot succeed. In making that determination, the

court is to assume that the pleaded facts are true: *Pro-Sys* at para. 63. The pleadings are to be read generously, as they might reasonably be amended: *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at para. 17.

[24] In order to satisfy the requirements in ss. 4(1)(b) through (e) of the *CPA*, a plaintiff need only show "some basis in fact". It is a low evidentiary threshold; less than the burden of proof on a balance of probabilities. Some basis in fact is better measured against no basis in fact: *Nissan Canada Inc. v. Mueller* , 2022 BCCA 338 [*Mueller*] at paras.133–136. It does not require that the court weigh or resolve conflicting facts and evidence: *Finkel* at para. 20.

[25] In spite of the low threshold, the court must still provide appropriate scrutiny of the evidence and be satisfied that the proceeding will not founder at the merits stage: *O'Connor v. Canadian Pacific Railway Limited*, 2023 BCSC 1371 at para. 109.

DO THE PLEADINGS DISCLOSE A CAUSE OF ACTION: S. 4(1)(a)?

[26] The plaintiffs allege that Abbotsford breached its duty of care by failing to close the floodboxes when it knew or should have been aware that there was a significant storm event coming or when the Fraser River rose to the reverse flow level.

[27] The pleadings should be viewed generously, without putting form over substance. A claim should not be labelled as doomed to fail simply because it may be difficult to prove: *Live Nation Entertainment, Inc. v. Gomel*, 2023 BCCA 274 at paras. 82–87.

[28] The purpose of pleadings is to specify the claim so that the opposing party is able to comprehend the specifics of the claim and thus be in a position to have a meaningful response. The pleadings are to be read as a whole and are not to be subjected to a piecemeal parsing. Analyzing pleadings is not for the purpose of awarding prizes for the quality of literary excellence. Rather, pleadings are to be viewed within the context of function, which is to ensure that there is a proper cause

of action disclosed with enough specificity to place a party on notice as to the claim being made against them: *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 at paras. 21–23; *Mancuso v. Canada* (*Minister of National Health and Welfare*), 2015 FCA 227 at paras. 17–19.

[29] The statement of material facts forms the basis of a proper pleading and "must tell the defendant who, when, where, how and what gave rise to its liability": *Canada (Attorney General) v. Frazier*, 2022 BCCA 379 at para. 70.

[30] The plaintiffs' allegations of material facts include the following:

a) in or about 1912, a federal Order-in-Council granted the drainage of Sumas Lake with the objective of transforming the area into fertile and productive land, now known as the Sumas Prairie;

b) the Sumas Prairie sits below sea level and is at a lower elevation than the Fraser and Nooksack rivers;

c) the Fraser and Nooksack rivers have overflowed their banks in the past, causing disastrous flooding in the Sumas Prairie;

d) the Sumas Dike guards the Inner Sumas Prairie by redirecting floodwaters away from the Sumas Lakebed and into the Sumas River channel;

e) the Barrowtown Pump Station is managed and operated by Abbotsford. The Pump Station sucks water out of the Sumas Prairie. Without the Pump Station operating, the Sumas Prairie would naturally fill with water in two to three days under dry weather conditions;

f) the Pump Station has four floodboxes which regulate the flow of water between the Sumas and Fraser rivers. Normally, the floodboxes are open so that water from the Sumas River can flow through. When the water level of the Fraser River side exceeds that of the Sumas River

side (reverse flow), the floodboxes must be closed to prevent flooding to the Sumas Prairie (back flooding);

g) the Pump Station operating procedures state that the purpose of the floodboxes is to prevent or minimize flooding on the Sumas River side and that the floodboxes should be closed when the water level of the Fraser River side exceeds 3.0 metres. The procedures further prescribe that the Station's operators must be prepared for a "Storm Event" and that the floodboxes are to be closed in a Storm Event;

h) Abbotsford knew that despite the Sumas Dike, overflow from the Fraser River side would likely cause flooding in the Sumas Prairie if the Pump Station was not operated in a reasonable manner;

i) on November 5, 2021, the potential for "atmospheric river" activity was forecasted. On November 10, flood forecasters advised Abbotsford that two atmospheric rivers were expected to impact the Pacific Northwest between November 11–14, 2021;

j) on November 13, 2021, two atmospheric rivers brought intense rainfall to the Abbotsford area and parts of Washington near the British Columbia border;

k) at about 8:25 a.m. on November 14, 2021, the water level of the Fraser River side reached a height of 3.04 metres. The Pump Station floodboxes remained open;

l) the Pump Station floodboxes were closed at about 11:35 a.m. on November 15, 2021. By that time, the water level of the Fraser River side had reached a height of 6.87 metres. The water level of the Fraser River side was always higher than the water level of the Sumas River between 8:10 p.m. on November 14, 2021 and 11:35 a.m. on November 15, 2021. Water from the Fraser and Vedder Rivers flowed

through the open Pump Station floodboxes and flooded the Outer Sumas Prairie;

m) on November 16, 2021, the Sumas Dike overflowed and gave way in two places, causing water to flow into and flood the Inner Sumas Prairie; and

n) the plaintiffs are residents of Abbotsford and their properties were flooded. They suffered loss and damage as a result of the flooding.

[31] The plaintiffs plead that Abbotsford had a duty to operate and staff the Pump House in a reasonable and prudent manner, but did not do so.

[32] The plaintiffs and Abbottsford disagree about the duty of care. Abbottsford argues that this is a positive duty case, citing authorities such as *Childs v. Desormeaux*, 2006 SCC 18.

[33] In *Childs*, the Court was dealing with social host liability where an intoxicated guest driving his car after leaving a party intoxicated, caused an accident. The action was dismissed on the basis that social hosts of parties where alcohol is served do not owe a duty of care to public users of highways. The Court concluded that there was no proximity established. There was no finding that the hosts knew, or ought to have known, that the defendant driver, upon leaving the party, was impaired. On the facts, the accident was not reasonably foreseeable. The court also concluded that a private social host was not expected to monitor their guest's alcohol intake and therefore, no duty arose because the complaint related to a failure to act or nonfeasance in circumstances where there was no positive duty to act: *Childs*, at paras. 41–48.

[34] The plaintiffs say that the better analysis of the duty relative to the facts as alleged in the pleadings is by reference to *Nelson (City) v. Marchi*, 2021 SCC 41 [*Nelson*].

[35] In *Nelson*, the plaintiff had fallen as she tried to cross a snowbank left by the city during its snow clearing of parking stalls. The city had failed to provide an access route through the snowbank for those using the parking stalls.

[36] The Court referred to its previous decision in *Just v. British Columbia*, [1989] 2 S.C.R. 1228 [*Just*], and concluded that the regular principles of negligence applied with respect to the city's duty of care. The city's argument that the failure to create a pathway was a core policy decision did not sway the Court. Although core policy decisions are exempt from claims in negligence, the operational implementation of policy may be subject to the duty of care in negligence: *Nelson* at paras. 23, 41.

[37] The plaintiffs emphasize that their complaints are related to the city's operational failures regarding the floodboxes, rather than issues related to core policy decisions. That is the crux of the pleadings.

[38] It should be noted that this is not an action involving the governmental authority acting in its capacity as a regulator. The claim is based on the allegations that Abbotsford is liable for operational failure.

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

> 51. Knowing of the forecasted atmospheric river and presence of other factors such as the increased the risk of flooding and the vital function of the Barrowtown Pump Station, Abbotsford failed to ensure that an adequate number of properly-trained staff were present at the Barrowtown Pump Station in the days prior to, and during, the Sumas Flood. If Abbotsford had ensured the proper staffing of the Barrowtown Pump Station, or if the employees on shift had taken reasonable measures including, but not limited to, ensuring the floodboxes were closed, the flooding to the Outer Sumas Prairie would have been reduced in geographic scope or eliminated.
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> 52. If Abbotsford had ensured the proper staffing of the Barrowtown Pump Station, or if the employees on shift had taken reasonable measures including, but not limited to, ensuring the floodboxes were closed, the flooding to the Inner Sumas Prairie would have been prevented.

[40] The plaintiffs have framed their action in negligence, gross negligence, public nuisance and private nuisance. Ms. Mostertman alleges that as a result of the flood, she and the proposed Class Members suffered property damage. The pleadings include some particulars of those losses.

[41] In a negligence action, the plaintiff must prove that:

a) the defendant owed a duty of care;

b) the defendant's conduct breached that standard of care;

c) the plaintiff sustained damage; and

d) the damage was caused by the defendant's breach.

[*1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 at para. 18.]

[42] For a claim in negligence, a full duty of care analysis is unnecessary if the duty of care has already been recognized in an analogous case. In the absence of an analogous case, the court is to determine whether the circumstances disclose reasonably foreseeable harm and proximity in order to establish a *prima facie* duty of care. The proximity question requires the plaintiff to show that the defendant was in a close and direct relationship so that it would be fair and just to impose a duty of care. If the plaintiff establishes a *prima facie* or arguable case, the court must decide whether there are residual policy considerations that justify the denial of liability: *Nelson* at paras. 16–19.

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

a) *Nelson*;

b) *Just*;

c) *Pisclevich v. Manitoba*, 2018 MBCA 127;

d) *Pisclevich v. Manitoba*, 2018 MBQB 52 (see paras. 13–15);

e) *Pisclevich v. Manitoba*, 2021 MBQB 141;

f) *Anderson v. Manitoba*, 2017 MBCA 14; and

g) *Anderson v. Manitoba*, 2014 MBQB 255.

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

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

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

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

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

[49] I also find that the pleadings include a relationship of foreseeability and proximity. Reasonable foreseeability of harm and proximity are the cornerstones to the analysis of liability in negligence. The proximity analysis was succinctly summarized in *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19 at para. 23:

> In addition to foreseeability of harm, proximity between the parties is also required: *Cooper*, at para. 31. The proximity analysis determines whether the parties are sufficiently "close and direct" such that the defendant is under an obligation to be mindful of the plaintiff's interests: *Cooper*, at para. 32; *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 24. This is what makes it just and fair to impose a duty: *Cooper*, at para. 34. The proximity inquiry considers the "expectations, representations, reliance, and the property or other interests involved" as between the parties: *Cooper*, at para. 34. In cases of personal injury, when there is no relationship between the parties, proximity will often (though not always) be established solely on the basis of reasonable foreseeability: see *Childs*, at para. 31.

[50] The occupants of the Sumas Prairie depended and relied on the proper operation of the Pump Station. Even under dry conditions, the Pump Station served to protect the area from being awash in water. Abbotsford was in control of the Pump Station at all times and would have been aware of the harm to the Sumas Prairie if the Pump Station was not operated in accordance with its operating procedures. This is the foreseeable harm pleaded by the plaintiffs.

[51] The Sumas Prairie was subject to flooding, but for the proper operation of the Pump Station. This was the close and direct relationship of proximity pleaded by the plaintiffs.

[52] Abbotsford has argued that the Nooksack River overflow caused the flooding, but that argument ignores the basic tenet of negligence law as set out in *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 17, 1996 CanLII 183: the plaintiff does not have to show that the defendant was the sole cause of the injury or harm. In any event, this application is not the time or place to be weighing evidence or trying to determine the merits of the action—that is best left for trial.

[53] The plaintiffs allege that Abbotsford's failure to operate the Pump House in accordance with the established procedures was the cause of the harm. The pleaded facts disclose a *prima facie* duty of care with reasonable foreseeability of

harm. The material facts alleged point to a close and direct relationship between the parties so as to show a sufficiently proximate relationship.

[54] I am satisfied that the plaintiffs' claims in negligence disclose a cause of action.

[55] The plaintiffs have also particularized their claim for special damage arising from a public and private nuisance.

[56] For a claim in private nuisance, the plaintiff must prove that the defendant's conduct or acts substantially and unreasonably interfered with their use and enjoyment of property: *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at paras. 18–19.

[57] A public nuisance has been defined as any activity which unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 52, 1999 CanLII 706.

[58] A public nuisance claim requires the plaintiff to plead:

a) that there is a public right; and

b) that there was an unreasonable interference with that right.

[*Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366 [*Valeant*] at para. 177.]

[59] Public rights include unobstructed access to public facilities, highways, clean air and water, or to other public resources: *Valeant* at para. 181.

[60] The pleadings here make the necessary allegations supported by reference to material facts that justify the claims in public and private nuisance.

[61] I conclude that the pleadings satisfy the requirements of alleging the causes of action in negligence and nuisance. It is not plain and obvious that the pleaded causes of action are bound to fail.

[62] The plaintiffs have met their burden under s. 4(1)(a) of the *CPA.*

IS THERE AN IDENTIFIABLE CLASS OF TWO OR MORE PERSONS: s. 4(1)(b)?

[63] Section 4(1)(b) of the *CPA* requires the plaintiffs to show that there is an identifiable class containing two or more persons. The governing principles with respect to class definition were summarized in *Jiang v. Peoples Trust Company*, 2017 BCCA 119 [*Jiang*] at para. 82:

> In sum, the principles governing the identifiable class requirement may be summarized as follows:
>
> - the purposes of the identifiable class requirement are to determine who is entitled to notice, who is entitled to relief, and who is bound by the final judgment;
> - the class must be defined with reference to objective criteria that do not depend on the merits of the claim;
> - the class definition must bear a rational relationship to the common issues — it should not be unnecessarily broad, but nor should it arbitrarily exclude potential class members; and
> - the evidence adduced by the plaintiff must be such that it establishes some basis in fact that at least two persons could self-identify as class members and could later prove they are members of the class.

[64] At the certification stage, a class definition may include those who may not ultimately establish a claim. The class should not be restricted to all persons who suffered damage, provided the class is "not irrationally overly broad": *Bowman v. Kimberly-Clark Corp.*, 2023 BCSC 1495 [*Bowman*] at para. 109.

[65] The plaintiffs have revised their class definition and bring this action on their own behalf and on behalf of the following overlapping sub-classes:

> (1) All persons (and their estates) who were resident in the Sumas Prairie between November 14-16, 2021 and who claim to have suffered personal injury and/or damage to personal and/or real property located in the Sumas Prairie as a result of flooding in the Sumas Prairie between November 14-16, 2021 (the "Negligence Subclass" and "Negligence Subclass Members");

> (2) All persons (and their estates) who claim to have suffered personal injury and/or damage to personal and/or real property located in the Sumas Prairie as a result of flooding in the Sumas Prairie between November 14-16, 2021 (the "Public Nuisance Subclass" and "Public Nuisance Subclass Members"); and
>
> (3) All persons who claim to have suffered interference with real property located in the Sumas Prairie which they owned, had an interest in and/or occupied as a result of flooding in the Sumas Prairie between November 14-16, 2021 (the "Private Nuisance Subclass" and "Private Nuisance Subclass Members").

[66] Abbotsford raises a number of objections to the plaintiffs' proposed class. First and foremost, it argues that there is no identifiable class. In its written submissions, Abbotsford states:

> 197. A clear class definition is essential. It defines who is entitled to notice, who is entitled to relief if so awarded, and who is bound by the judgment. The class must be defined by objective criteria and without reference to the merits, and must bear a rational relationship to the common issues asserted by all class members.
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> 198. The class definition must be sufficiently clear that potential class members must be able to determine whether they are or are not members.
>
> 199. Beyond this identification issue, the class action is not an appropriate procedural vehicle if class members have conflicting interests…

[67] The plaintiffs define the Sumas Prairie as an area which covers almost two-thirds of the municipality. Abbotsford says that the area is overbroad. I agree.

[68] The definition is much too broad and bears little resemblance to the original footprint of Sumas Lake and the area that is serviced by the Pump Station. The area within which the sub-classes are to be identified must bear a relationship to the pleaded duty of care and the proximity relationship. It must bear a rational relationship to the common issues. The proposed boundaries of the Sumas Prairie go well beyond those areas in which Abbotsford is alleged to owe a duty of care.

[69] There must be some basis in fact to support the area of the sub-classes. Mr. LaCas is an engineer who provided affidavit evidence regarding the flooding. In his Affidavit #2, Mr. LaCas opined that if the floodboxes had been operated in accordance with the stated rules:

a) there would likely have been lower flood levels and less area flooded in the Outer Sumas Prairie; and

b) there likely would have been less or no flooding to the Inner Sumas Prairie.

[70] As a result, the Sumas Prairie definition should more appropriately be limited to those areas that lie within the footprint of the drained Sumas Lake and include the Outer and Inner Sumas Prairie. There are 1,423 properties identified by Abbotsford as being in the flood plain. Those properties must all be included within the definition of the Sumas Prairie.

[71] Abbotsford has provided a helpful spreadsheet setting out all of the properties that it considers to be in the Sumas Prairie. Attached as Exhibit B to the affidavit of Aman Rossing is a USB thumb drive containing the spreadsheet that details all of the “Sumas Prairie Floodplain Properties”. All of those properties are to be contained within the definition of the Sumas Prairie.

[72] The plaintiffs suggest that the area identified by the Evacuation Order issued on November 16, 2021 (Exhibit kk – Tweed Affidavit #1) be used to define the Sumas Prairie. I agree. The Evacuation Order refers to the Sumas Prairie and sets out specific boundaries. This should cover the properties referred to in Mr. LaCas’ assessment of the area affected.

[73] Accordingly, the Sumas Prairie shall be defined as the areas bordered by:

- Sumas Mountain, DeLair Road and Old Yale Road to the north;
- the United States border to the south;
- Chilliwack City border to the east; and
- the ridge west of Railroad Road.

[74] Abbotsford also argues that the class definitions are not properly defined in a manner that would permit a member of the public to determine whether they are a member of the class as a whole or the subclasses. It is argued that the reference to "personal injury" is unacceptably vague because determining a psychological injury is a complex exercise. It is also argued that the reference in the Private Nuisance Subclass to "interference" with real property raises a challenging complex issue. Abbotsford says that these references rely exclusively on claims-based definitions and that there is considerable debate as to whether they are objectionable on the grounds of subjectivity or ambiguity.

[75] A claims-based definition is not necessarily objectionable. In *Rumley v. British Columbia*, 2001 SCC 69 [*Rumley*] and *Bowman*, the courts certified a claims-based personal injury subclass.

[76] The focus of the inquiry is to determine if the proposed classes objectively define who is entitled to notice, relief and be judgment bound. It is not an inquiry as to the merits: *Jiang* at paras. 81–82.

[77] I conclude that the definitions are appropriately set out so that the public can assess and determine whether they fall into the respective classes or subclasses. Accordingly, Abbotsford's objection on this ground must fail.

[78] In addition to the arguments against there being a defined class, Abbotsford relies on *Western Canadian Shopping Centres* for the proposition that the proposed classes raise the following two serious conflicts:

a) the conflicts between the Inner and Outer Sumas Prairie residents; and

b) the conflicts between class members subject to an indemnity and the rest of the class.

[79] At para. 40 of *Western Canadian Shopping Centres*, the Supreme Court confirmed that a class action should not be allowed if class members have conflicting interests.

[80] Abbotsford says that the conflict between the Inner and Outer Sumas Prairie residents arises because if the Sumas Dike had not breached, there would have been less or no damage to the Inner Sumas. However, the Outer Sumas residents have a diametrically opposed interest, because those residents would need to show that Abbotsford's conduct had no effect on the collapse of the Dike. The conflict is said to arise because the collapse of the Dike caused water to rush from the Outer to the Inner Sumas Prairie and thereby relieved the Outer Sumas from flooding.

[81] Stella Chiu, an engineer in the Abbotsford Drainage and Wastewater section, has deposed to the apparent conflict. She states that the Sumas Dike does not protect the Outer Sumas Prairie and that the presence of the Dike can make flooding worse in certain parts of the Outer Sumas during Nooksack River overflow events. Ms. Chiu states that Abbotsford's diking and flood protection infrastructure can increase flood risk for some, while decreasing flood risk for others.

[82] The plaintiffs say that there is no conflict because at the time the Sumas Dike breached, the water level in the Outer Sumas Prairie was decreasing as water flowed back into the Fraser River. They argue that the Dike breach only hastened the time it took for the Outer Sumas Prairie to empty of floodwater.

[83] The respective positions taken by the parties would require a weighing of the evidence. It would also require dealing with the merits with evidence that would be available only through a trial. The issue as framed by the plaintiffs focuses on the alleged wrongful conduct of Abbotsford. The focus of the litigation is not to determine what the flood protection infrastructure should be as it relates to the various risks faced by the Outer and Inner Sumas Prairie residents. To focus on that issue would be tantamount to turning this application into a public hearing that is far beyond the parameters of the pleadings.

[84] There may be a conflict on the question of damages based on whether the aggrieved individuals resided in the Outer or Inner Sumas Prairie, but there is no conflict as it relates to Abbotsford's duty of care in its operation of the Pump Station.

As a result, I conclude that there is no conflict as alleged by Abbotsford with respect to the residents of the Inner or Outer Sumas Prairie.

[85] Even though there is no conflict, the issues raised by Abbotsford as it relates to the exposure to flooding between the Inner and Outer Sumas Prairie leads to the conclusion that each area should have its own representative plaintiff. Leave is granted for the plaintiffs to amend the style of cause accordingly.

[86] Abbotsford also contends that there is a conflict between those residents who are subject to a covenant that may preclude them from obtaining relief and those residents whose covenants provide Abbotsford with a right to indemnification.

[87] Of the 1,423 properties within the floodplain, roughly 40 percent (or approximately 550 properties) have a flood covenant registered against title. About 400 of those properties include flood covenants granting Abbotsford's right to indemnification. About 850 properties are not burdened by any covenant.

[88] Ms. Mostertman's property is one of those bound by a covenant that precludes claims arising out of flood damage. This covenant states:

> … in the event of any loss or damage caused by flooding of the said lands, including any loss or damage to any building or structure, or any part thereof constructed or located on the said lands or to any contents thereof caused by such flooding, the Covenanter shall not claim damages from or hold the District of Abbotsford or the Province of British Columbia responsible for liable for any such loss or damage.

[89] As noted, there are approximately 400 properties that are bound by similar covenants, but also include the following indemnification provisions:

> (g) that in the event of any loss or damage caused by flooding of the Lands, including any loss or damage to any building or structure, or any part thereof, constructed or located on the Lands, or to any contents thereof, caused by such flooding, the Grantor will not sue, claim damages from, or hold the City responsible or liable for, any such loss or damage;
>
> (h) to release, save harmless and indemnify the City, its elected and appointed officials, officers, invitees, licensees, employees, servants and agents from and against all liability, actions, causes of action, expenses, damages, costs (including legal costs on a solicitor/client

> basis) claims, debts, losses (including injurious affection) or demands whatsoever by the Grantor or any other person which have arisen or may arise out of, or are in any way due directly or indirectly to the granting or existence of this Agreement including but not limited to:
>
> (i) any breach of any covenant or agreement on the part of the Grantor contained in this Agreement or any steps taken by the City to enforce this Agreement; and
>
> (ii) any injury to persons, including bodily injury and death, or damage to or a loss of property on or about the Lands;

[90] Abbotsford maintains that the properties which are covered by either form of covenant are in conflict with those that have no such covenants. In particular, it is argued that the properties subject to the indemnification clause have more at stake in the event that the covenants are ruled to be enforceable. Abbotsford intends to pursue indemnification.

[91] Whether the covenants are enforceable or not is a matter for another hearing when the merits of the issue can better be assessed.

[92] However, I agree with Abbotsford's alternative argument that there should be subclasses for the properties bound by the respective covenants. The issues facing those with covenants are unique and should have their own representative plaintiffs. Importantly, the properties that are subject to the indemnification clause must be treated differently than the others because of their exposure to indemnification costs. Those properties must be provided with a clear and robust notice pointing out the indemnification provision and the potential for liability if the covenants are enforceable. Those properties should also have their own counsel to ensure that there is no conflict.

[93] Leave is granted to allow the addition of representative plaintiffs and to arrange for other counsel to represent the group of properties that are encumbered with the indemnification covenant.

[94] There are to be separate subclasses for those covered by the respective forms of covenant: see *Paron v. Alberta (Environmental Protection)*, 2006 ABQB 375 at para. 67.

[95] Further submissions will be necessary to determine when those with the indemnification covenant may opt out without liability exposure. Those submissions should also address how to deal with the issue of the covenants. For example, it may be prudent to deal with the enforceability of the covenants as a whole. If the covenants are not enforceable, then that may inform the question of whether there is exposure to the properties subject to indemnification.

[96] Taking into account the conclusions that I have reached, the plaintiffs have established that there is an identifiable class of two or more members as required by s. 4(1)(b) of the *CPA*.

DO THE CLAIMS OF THE CLASS MEMBERS RAISE COMMON ISSUES: S. 4(1)(c)?

[97] Under s. 4(1)(c) of the *CPA*, the plaintiffs must show that the claims of the class members raise common issues. An issue is considered "common" where its resolution is necessary to the resolution of each class member's claim. The critical question in the assessment of commonality is "whether allowing the suit to proceed as a representative [class proceeding] will avoid duplication of fact-finding or legal analysis": *Western Canadian Shopping Centres* at para. 39.

[98] The threshold to show commonality is low. The plaintiff need only show that the determination of a triable factual or legal issue will advance the litigation: *Service v. University of Victoria*, 2019 BCCA 474 at para. 59.

[99] Although common issues are not required to predominate over individual or non-common issues, there must be a sharing of a substantial common ingredient amongst the class members' claims. Success for one class member must mean success for all, although the benefits from a successful prosecution may not be achieved to the same extent: *Pro-Sys* at para. 108.

[100] At para. 43 of *Western Canadian Shopping Centres*, the Court summarized the approach to be taken where individual claims and issues may differ amongst

class members and stated that certification should not be denied on the grounds that:

(1) the relief claimed includes a demand for money damages that would require individual assessment after determination of the common issues;

(2) the relief claimed relates to separate contracts involving different members of the class;

(3) different class members seek different remedies;

(4) the number of class members or the identity of every class member is unknown; or

(5) the class includes subgroups that have claims or defences that raise common issues not shared by all members of the class.

[101] The plaintiffs are required to show that there is "some basis in fact" that the claims raise common issues. The factual evidence at this stage is only relevant with respect to whether the common issues are common to all class members. This was succinctly stated in *Mueller* at para. 133:

> In analyzing whether there is some basis in fact for a common issue, the court must consider the language of the common issue that is proposed, and whether there is some evidence that supports the argument that it is a common issue across members of the class.

[102] There is no requirement to adduce evidence to show that the alleged wrongdoings actually occurred: *Pro-Sys* at para. 110.

[103] The plaintiffs have revised their list of common issues and now propose to certify the following as common issues (as set out in Schedule A of the plaintiffs' Amended Certification Reply Argument):

Factual Questions

1. What caused the Sumas Flood?

…

3. Did the City of Abbotsford, through its acts or omissions, cause and/or contribute to the extent of the Sumas Flood? If so, how?

…

4.1. What were the terms, including scope and duration, of the evacuation issued in respect of the Sumas Flood?

Negligence and Gross Negligence

5. If the answer to question 3 is yes, then did the City of Abbotsford:

a. Owe the Negligence Subclass Members, or some of them, a duty of care with respect to operating and/or staffing the Barrowtown Pump Station?

b. What was the standard of care owed by the City of Abbotsford to the Negligence Subclass Members with respect to operating and/or staffing the Barrowtown Pump Station?

c. Did the City of Abbotsford breach the standard of care?

Nuisance

Public Nuisance

6. Based on the answers to question 3, did the Sumas Flood and the City of Abbotsford's associated activities unreasonably interfere with the public's interest in questions of health, safety, morality, comfort or convenience, amounting to an attack upon the rights of the public generally to live their lives unaffected by inconvenience, discomfort or other forms of interference?

Private Nuisance

10. Based on the answers to questions 3 and 4.1, did the City of Abbotsford's acts or omissions cause or contribute to the issuance of the evacuation order (s) issued with respect to the Private Nuisance Subclass Members' properties?

10.1. Based on the answer to question 4.1, did the Sumas Flood and/or resulting evacuation amount to non-trivial and unreasonable interference with Private Nuisance Subclass Members' use and enjoyment of properties subject to one or more mandatory evacuation order?

Damages

15. Based on the answer to questions 3, 4.1 and 5:

a. Did some, or all, Private Nuisance Subclass Members who were ordered to or put on alert to evacuate from their homes as a result of the Sumas Flood suffer damages for which the City of Abbotsford is liable?

Aggregate Damages

16. Based on the answers to question 15, can a part of the Private Nuisance Subclass Members' damages be assessed in aggregate pursuant to section 29 of the *Class Proceedings Act*? If so, in what amount?

Punitive Damages

17. If the City of Abbotsford is liable for damages, then are those damages sufficient or do the objectives of retribution, deterrence and denunciation require an award of punitive damages? If so, in what amount?

Administrative Issues

Interest

18. If the City of Abbotsford is liable for damages, then is the City of Abbotsford liable to pay interest on the award? If so, in what amount?

Cost of Individual Damages Assessments

19. If the City of Abbotsford is liable for damages, then should the City of Abbotsford pay the costs of individual damages assessments?

Cost of Distribution

20. If the City of Abbotsford is liable for damages, then what is the appropriate distribution of damages to the class, and should the City of Abbotsford pay the costs of distribution? If so, in what amount?

[104] The underlying issue regarding the entire proceeding is the cause of the flooding. The issues as to the cause and whether Abbotsford's acts or omissions caused and/or contributed to the extent of the flooding is common on a class-wide basis. Mr. LaCas provides some evidence as to the cause of the flooding. His evidence goes directly to the question of whether there is some basis in fact that the claims raise common issues.

[105] Mr. LaCas was asked a number of questions relevant to the issues raised in the plaintiffs' pleadings and claims. Mr. LaCas included the following information in his affidavits along with reference to methodology and source materials:

a) there were forecasting models available to predict and identify the risk of flooding in the Sumas Prairie;

b) there were mitigation strategies available to reduce or eliminate the risk of damage caused by flooding;

c) methods are available to assess the impact of open floodboxes at the Barrowtown Pump Station;

d) the geographical boundaries of the flooding resulting from the Sumas Flood;

e) whether the rules prescribed in the Pump Station operating procedures were followed; and

f) the difference in the impact of the flooding between the Outer and Inner Sumas Prairie.

[106] In his Affidavit #1 at p. 48, Mr. LaCas described some of the methodology available in assessing the impact of the open floodboxes:

> 5.9.2.3 Floodbox Analysis
>
> The Sumas Prairie Dike requires internal drainage behind the dikes to be released through flood boxes and pumped to the Sumas River, which is tributary to the Fraser River. In this case floodboxes at the Barrowtown Pump Station are gated conduits with a pump system arrangement.
>
> A floodbox analysis is an available method to assess the impact that an open floodbox or open floodboxes at the Barrowtown Pump Station had on "backflooding" on the eventual flooding in the Sumas Prairie. For the purpose of this document, "backflooding" refers to the reverse flows into the Sumas Prairie from the Barrowtown Pump Station.
>
> The analysis would involve the use of a numerical hydraulic model, such as the Storm Water Management Model (SWMM) developed by the US Environmental Protection Agency. The Sumas Prairie basin would be modeled as a storage unit with an associated area-elevation relationship. Each floodbox/gate would be modelled as a submerged orifice with an assigned discharge coefficient. Pumps would be input into the model using the corresponding head-discharge curves (i.e., pump curves). Water levels would be set on the Sumas Prairie, and the discharge immediately downstream of the pump station. Simulation scenarios of open and closed floodboxes/gates would be modelled with different water levels. A modeling results matrix would be prepared illustrating the effects of the corresponding operating conditions developed for each scenario. The modelling results matrix could be used to assess the impact of floodbox operations and would be able to determine the volume of "backflooding" due to open floodbox or floodboxes during high Fraser River levels, and the impact of open floodbox or floodboxes on floodwater levels in the Sumas Prairie.

[107] Mr. LaCas's evidence, read as a whole, supports his comments in Affidavit #2 at pp. 21–22, that speak to the issue of causation:

> **5.3.1 Question No. 3**

If the answer to Question 2 is "No", how would the flooding have been different in the following areas had these rules been adhered to in the days leading up to and during the Sumas Flood:

i) the portion of the Sumas Prairie outside of the area guarded by the Sumas Dike.

ii) the portion of the Sumas Prairie guarded by the Sumas Dike.

5.3.2 Response

In response to Question No. 3, my response to Question No. 2 was "No", therefore the flooding would have been different in the following areas had these rules been adhered to in the days leading up to and during the Sumas Flood:

- The portion of the Sumas Prairie outside of the area guarded by the Sumas Dike would likely have had lower flood levels and less area flooded.
- The portion of the Sumas Prairie guarded by the Sumas Dike would likely have had less or no flooding from the Sumas River due to a reduced likelihood of the Sumas Dike overtopping.

5.3.2.1 Sumas Prairie outside of the area guarded by the Sumas Dike

Had the Sumas River Flood Boxes been closed when the water level of the Fraser River Side reached Elevation 3.0 metres, there would have been no inflow from the Fraser River Side of the Sumas River Flood Boxes.

The open Sumas River Flood Boxes allowed reverse flow from Fraser River Side which would have contributed more water flowing into the Sumas Prairie outside of the area guarded by the Sumas Dike.

Had the flood boxes been closed the water level of the Fraser River Side would not have raised appreciably because the water level of the Fraser River Side is governed by the flow in the main stem of the Fraser River and its tributaries further upstream. In turn, since the flood boxes were open the flow into the Sumas River Side elevated the water level of the Sumas River.

Furthermore, the Fraser River Side flow into the Sumas River Side would have impeded the outflow of the Sumas River.

Quantitative analysis using standard numerical 2-D hydraulic modelling of the Fraser River, Sumas River, Flood Box operation, and Sumas River and Sumas Prairie outside of the area guarded by the Sumas Dike would provide a more detailed analysis of flood levels and area flooded.

5.3.2.2 Sumas Prairie guarded by the Sumas Dike

The SCADA data indicates that prior to closing the Sumas River flood box gates during the 26 hour and 55 minute period discussed above, the inflow from the Fraser River Side would have contributed more water upstream on the Western Sumas Prairie outside of the area guarded by the Sumas Dike.

Furthermore, with the Sumas River Flood Box Gates closed the Fraser River Side would not have flowed into the Sumas River Side and therefore there would be less water volume in Western Sumas Prairie outside of the area

> guarded by the Sumas Dike (Eastern Sumas Prairie), reducing the risk of dike overtopping and consequent flooding into the area guarded by the Sumas Dike.
>
> Quantitative analysis using standard numerical 2-D hydraulic modelling of the Fraser River, Sumas River, Flood Box operation, and Sumas River and Sumas Prairie outside of the area guarded by the Sumas Dike would provide a more detailed analysis of flood levels and area flooded.

[108] Abbotsford has argued that there is no sound methodology attached to Mr. LaCas's evidence regarding causation. I disagree.

[109] The plaintiffs are required to provide some evidence of a workable methodology, but there is no requirement that all material facts be set out in the proposed methodology. The court summarized the standard in *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 at para. 104:

> … It is required that a plaintiff lead some evidence that there is a plausible and realistic methodology to establish loss on a class-wide basis, but where the methodology consists of an econometric model, it is not necessary to build the model or identify with precision what information will be used to populate the model, as long as there is some evidence that information will be available to do so.

[110] Mr. LaCas has set out his proposed methodology in his affidavits. This application is not to be confused with the proof requirements at trial. Accordingly, Mr. LeCas is not required to prove his methodology at this stage. Additionally, his methodology does not need to be "compelling" as long as it is realistic: *Lewis v. WestJet Airlines Ltd.,* 2022 BCCA 145 at para. 159. I find Mr. LaCas's methodology to be realistic.

[111] I am therefore satisfied that there is some basis in fact to show that Questions 1 and 3, relating to causation, are issues affecting the entire class.

[112] The terms of the evacuation order are also common on a class-wide basis. This is a relatively straight forward determination and there is some evidence in the affidavit of Sean Tweed of such an order. I find that Question 4.1 is also an issue affecting the entire class.

[113] Questions 5(a)–(c) deal with the claims framed in negligence and gross negligence. The plaintiffs submit that the issues of whether Abbotsford owed a duty of care, the standard of care, and whether that standard was breached are all questions that are common on a class-wide basis. Abbotsford disagrees.

[114] There is evidence that the floodboxes remained open during the storm event. Mr. LaCas has set out the operating procedures for the Pump Station. In his Affidavit #2, he found that the floodboxes remained open for a prolonged period of time on November 14 and 15, 2021, when the Fraser River side water level exceeded 3.0 metres. His evidence is contested by Abbotsford.

[115] Roydon Braim was employed at the Pump Station for 26 years and understands how it functions. Mr. Braim deposed that the Pump Station "allows around 30,000 acres of farmland in the Sumas Prairie to remain drained and arable". He says that on November 15, 2021, he saw that the Fraser River was back flooding into the Sumas Prairie through open floodboxes.

[116] Abbotsford refers to other affidavits that take issue with the cause of the flooding and Abbotsford's role or lack thereof in it. To decide which evidence is more convincing would require a weighing of the evidence. That is not done at this stage.

[117] Abbotsford submits that there are other factors that either caused or contributed to the floods. It points to evidence that there was additional water flowing into the Sumas Prairie from the melting snowpack and the Nooksack River topping its banks. Those are relevant considerations that will touch on causation as well as the standard of care. However, those are matters which are better suited for determination on the strength of an entire body of evidence that is subjected to the rigours of trial analysis—not here. Whether Abbotsford was in breach of their duty of care is a matter for trial.

[118] I therefore agree with the plaintiffs that Questions 5(a)–(c) are supported by some basis in fact and are issues that are common on a class-wide basis for the Negligence Subclass Members.

[119] Questions 6, 10 and 10.1 deal with the claims framed in public and private nuisance.

[120] With respect to public nuisance, the plaintiffs say that there is evidence in Mr. Tweed's Affidavit #1 and Jenica Banks' Affidavit #1 that the flooding interfered with access to public roads and bridges, an elementary school, affected air quality and interfered with a water main. I agree that such evidence as it relates to Question 6 has been identified in those affidavits.

[121] With respect to private nuisance, there is evidence from Mr. LaCas that a workable methodology is available to ascertain what flood damage occurred as a result of the floodboxes being left open. Mr. LaCas will be able to provide an analysis relevant to the properties impacted by the flooding. Simply because the analysis may yield a different result for different class members is not a reason to deny a question as a common issue: *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at paras. 44–46.

[122] Abbotsford argues that in Question 10.1, the reference to the Sumas Flood is inappropriate because it is not possible to assess the impact of the flood on the proposed subclass. As an authority for its position, Abbotsford refers to *Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 111 at paras. 82–83. I agree that the inclusion of the words "Sumas Flood" may tend to break the issue down into individual proceedings. Accordingly, the reference to the "Sumas Flood" in Question 10.1 shall be removed.

[123] However, the question as to whether the evacuation amounted to a private nuisance is a common issue that will advance the litigation. Even though there may have been numerous evacuation orders, the consequences to the respective subclasses are common issues. It matters not at this stage that there may be some members of the class who do not have a claim—that is a matter for trial. Having these questions certified will move the action forward.

[124] There is some basis in fact for the questions relating to the nuisance claims. Questions 6, 10 and 10.1 are certified as common issues.

[125] Question 15 concerns the issues of damages for the Private Nuisance Subclass Members who were the subject of evacuation orders. Abbotsford argues that this is not a common issue because it cannot be determined how much of the flooding was caused by Abbotsford's conduct. The plaintiffs say that Mr. LaCas has provided a methodology to show which properties were flooded as a result of Abbotsford's failure to adequately staff or properly operate the Pump Station.

[126] As has been the case through much of Abbotsford's arguments, the city has been critical of the evidence proffered by the plaintiffs. However, this is not the time for that kind of analysis of the evidence. The focus of this hearing is on procedure. Evidence is more properly examined, dissected and assessed through the trial laboratory: *Bowman* at para. 74.

[127] I am satisfied that there is some basis in fact to support the plaintiffs' submission that this question should be certified. This is an issue that is common to the class and will move the litigation forward.

[128] Question 16 focuses on whether a part of the Private Nuisance Subclass Members' damages may be assessed in aggregate. Abbotsford argues that the plaintiffs have not offered a methodology as to how such an award could be determined. The plaintiffs say that it is not necessary to advance a methodology for determining aggregate damages and refer to *Spina v. Shoppers Drug Mart Inc.*, 2023 ONSC 1086 at para. 634 which states:

> [634] For there to be an award of aggregate damages, the plaintiff must advance a methodology or show that there is a reasonable likelihood of assessing the defendant's aggregate liability to the class without proof by individual class members.

[129] The plaintiffs refer to the evidence proffered by Mr. LaCas to show that the floodboxes being left open was the likely cause of most of the damage to the Sumas Prairie. Mr. LaCas has also referred to a methodology to determine the portion of

Abbotsford's involvement in the damage. I therefore agree with the plaintiffs that the Private Nuisance Subclass Members who were subject to evacuation orders in the Sumas Prairie can have at least a portion of their damages aggregated.

[130] Accordingly, I will certify Question 16.

[131] Question 17 deals with punitive damages. Abbotsford says that this is not a common issue because, until there is a finding of liability against it, the court cannot determine whether punitive damages are warranted. In answer, the plaintiffs refer to *Rumley* at para. 34:

> As noted above, Mackenzie J.A. certified as common not only the standard-of-care issue but also the punitive damages issues. Here, too, I agree with his reasoning. In this case resolving the primary common issue – whether JHS breached a duty of care or fiduciary duty to the complainants – will require the court to assess the knowledge and conduct of those in charge of JHS over a long period of time. This is exactly the kind of fact-finding that will be necessary to determine whether punitive damages are justified: see, *e.g.*, *Endean, supra*, at para. 48 ("An award of punitive damages is founded on the conduct of the defendant, unrelated to its effect on the plaintiff."). Clearly, the appropriateness and amount of punitive damages will not always be amenable to determination as a common issue. Here, however, the respondents have limited the possible grounds of liability to systemic negligence – that is, negligence not specific to any one victim but rather to the class of victims as a group. In my view the appropriateness and amount of punitive damages is, in this case, a question amenable to resolution as a common issue: see *Chace, supra*, at para. 30 (certifying punitive damages as a common issue on the grounds that the plaintiffs' negligence claim was "advance[d] ... as a general proposition" rather than by reference to conduct specific to any one plaintiff).

[132] *Rumley* confirms that the fact finding involved in determining whether Abbotsford breached its duty of care will inform the analysis of whether Abbotsford is liable for punitive damages. The grounds for liability raised by the plaintiffs are not specific to any one individual, but to the entire class.

[133] Accordingly, I conclude that Question 17 should be certified.

[134] Question 18 deals with the issue of whether interest is to be added to a judgment. The issue is framed so that it is dependent upon, first, whether Abbotsford is liable, and second, whether damages are to be awarded. The first two issues are

common questions that need to be answered in favour of the plaintiffs before interest can be considered. That is entirely appropriate and logical. Whether interest should be awarded on a monetary judgment is a suitable common issue: *676083 B.C. Ltd. v Revolution Resource Recovery Inc.*, 2019 BCSC 2007 at para. 150.

[135] As a result, I conclude that Question 18 should be certified.

[136] Questions 19 and 20 deal with whether Abbotsford should pay the costs of individual damages assessments, the appropriate distribution to the class and the costs of distribution.

[137] These are all common issues that will naturally follow if there is a finding of liability and an award of damages.

[138] I conclude that Questions 19 and 20 should be certified.

IS A CLASS PROCEEDING THE PREFERABLE PROCEDURE: S. 4(1)(d)?

[139] On the question of whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider the following non-exhaustive list of factors set out in s. 4(2) of the *CPA*:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means …

[140] Some of the principles relevant to preferability were set out in *Western Canadian Shopping Centres* at paras. 27–29:

> [27] Class actions offer three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times): see W. K. Branch, *Class Actions in Canada* (1998), at para. 3.30; M. A. Eizenga, M. J. Peerless and C. M. Wright, *Class Actions Law and Practice* (1999), at para. 1.6; Bankier, *supra*, at pp. 230-31; Ontario Law Reform Commission, *Report on Class Actions* (1982), at pp. 118-19.
>
> [28] Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied: see Branch, *supra*, at para. 3.40; Eizenga, Peerless and Wright, *supra*, at para. 1.7; Bankier*, supra*, at pp. 231-32; Ontario Law Reform Commission, *supra*, at pp. 119-22.
>
> [29] Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation: see "*Developments in the Law – The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives*" (2000), 113 Harv. L. Rev. 1806, at pp. 1809-10; see Branch, *supra*, at para. 3.50; Eizenga, Peerless and Wright, *supra*, at para. 1.8; Bankier, *supra*, at p. 232; Ontario Law Reform Commission, *supra*, at pp. 11 and 140-46.

[141] There are at least 1,428 properties that have been identified by Abbotsford as lying within the Sumas Prairie. Even if only a small fraction of those properties decided to pursue claims arising out of the flooding, this would result in a multitude of proceedings. The threshold question central to all such claims relates to the cause of the flooding. Nonetheless, Abbotsford says that it would be preferable for each litigant to come forward individually. The result of that would be a duplication of expenses for each litigant to secure evidence relevant to causation. Depending on

the strength of the evidence and how it is to be presented, there exists the very real potential for inconsistent verdicts.

[142] As will be the case in most circumstances where a class action is contemplated, the defendant will likely have more resources and the superior economic clout to withstand individual litigants. It may be that the costs of proceeding individually would discourage those who do not have the financial wherewithal from proceeding at all. Those potential claimants would be denied access to justice.

[143] I am satisfied that the common issues, particularly as they relate to causation, predominate over any questions affecting only individual members. The remaining common issues cascade from the initial assessment as to whether Abbotsford is liable.

[144] Individual issues will remain after the common issues regarding liability and remedies have been determined on a class wide basis. Those can be dealt with by focussing on the individuality of the particular claim. A number of the proposed class members have received some payments for their losses. There are also a number of members who are subject to covenants that preclude flood related claims. It is likely that the enforceability of the covenants can be dealt with on a class wide basis.

[145] Damage assessments can also be done individually: *Cheetham v. Bank of Montreal*, 2023 BCSC 1319 at paras. 285–287. Thus, even though there may be a significant number of class members having individual interests, those do not overcome the common issues. The individual interests can be accommodated within a class proceeding. I therefore conclude that other means of resolving the claims are less practical or less efficient.

[146] There is no indication that this class proceeding involves claims that are, or have been, litigated in other proceedings.

[147] The alternative to proceeding as a class action is to have each claim separately litigated. That does not accord with the objectives of the *CPA.*

[148] The class proceeding provides for a single and consistent management of the issues that are common to the claimant class. I am therefore satisfied that the administration of the class proceeding would not create greater difficulties than those likely to be experienced if relief were sought by other means.

[149] The result is that after considering all of the factors set out in s. 4(2) of the *CPA*, I am satisfied that a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues.

ARE THE PLAINTIFFS APPROPRIATE REPRESENTATIVES: S. 4(1)(e)?

[150] In order to satisfy the requirements of s. 4(1)(e) of the *CPA*, the proposed plaintiffs must show that they:

> (i) would fairly and adequately represent the interests of the class,
>
> (ii) [have] 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) [do] not have, on the common issues, an interest that is in conflict with the interests of other class members.

[151] Ms. Mostertman has tendered an affidavit addressing and satisfying the s. 4(1)(e) factors.

[152] The plaintiffs acknowledge that the representative plaintiffs will need to be updated to include the interests of those who reside in the Outer Sumas Prairie and those who are subject to the indemnification covenant. Otherwise, there is no concern about the appropriateness of Ms. Mostertman as the representative plaintiff.

IS THE LITIGATION PLAN WORKABLE?

[153] The litigation plan does not need to be in a final and fixed format. It is expected that the plan will change as matters proceed. That is the natural progression of litigation. Accordingly, the litigation plan will be a work in progress and is intended to aid the court by providing a framework within which the case may move forward. The litigation plan must show that the representative plaintiff and

class counsel understand the complexities of the case: *Jiang v. Vancouver City Savings Credit Union*, 2019 BCCA 149 at paras. 54–57.

[154] The litigation plan will need some amendments to consider the rulings that I have made. In particular, there needs to be further consultation with the new representative plaintiffs and counsel for those properties covered by the indemnification covenant. The notice must also be revised and include distribution in the Punjabi language.

[155] That said, the litigation plan, as presented, shows that the representative plaintiffs and class counsel understand the complexities of this litigation. The plan provides for a reasonable method for advancing the litigation, providing the appropriate notices, a disclosure and discovery process and determination of individual issues.

[156] I am satisfied that the litigation plan meets the obligations set out in the *CPA*.

[157] I am also satisfied that Slater Vecchio LLP should be appointed as class counsel.

CONCLUSION

[158] The *CPA* sets out the legislative requirements for certification. The pleadings must disclose a cause of action that is not bound to fail. The other requirements in s. 4(1) must be supported by some basis in fact—it is not a high threshold. In spite of the low threshold, the court must still provide appropriate scrutiny to satisfy itself that the case will not founder at the merits stage. At a certification hearing, the evidence is not to be weighed—it is not a hearing on the merits. The methodology proffered by the applicant need not be compelling as long as it is realistic. The threshold to show commonality is low; the question is whether a class proceeding will avoid duplication of fact-finding or legal analysis. The court must decide whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues. The proposed plaintiffs must show that they are the appropriate representatives by producing a workable litigation plan and not be in conflict with

other class members on the common issues. The litigation plan will likely change as the case proceeds.

[159] For all of the reasons set out above, this claim is to be certified as a class proceeding.

[160] There are additional steps to be taken including the naming of representative plaintiffs for those who have claims respectively in the Outer and Inner Sumas Prairie, and those who are covered by the respective covenants. Counsel needs to be appointed to represent the properties with the indemnification covenant.

[161] Further submissions should be made as to when those claimants with the indemnification covenant may opt out.

[162] Once these outstanding issues have been addressed, counsel should schedule a Case Management Conference to deal with any outstanding issues and to finalize the certification order.

"S.D. Dley J."

Dley J.