

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Moiseiwitsch v. Canadian National Railway Company*,  
2025 BCSC 2377

Date: 20251202  
Docket: S217469  
Registry: Vancouver

Between:

**Carel Moiseiwitsch**

Plaintiff

And

**Canadian National Railway Company and Canadian Pacific Railway Company**

Defendants

**See Schedule "A" for Additional Styles of Cause**

Before: The Honourable Justice Branch

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Place and Dates of Hearing:	Vancouver, B.C. September 29 and October 1–3, 2025
Place and Date of Judgment:	Vancouver, B.C. December 2, 2025

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**I. INTRODUCTION**

[1] “Some basis in fact”.

[2] This simple phrase has spawned a litany of litigation, a blizzard of briefs, a surplus of submissions.

[3] This class certification application largely turns on the proper interpretation and application of this phrase—specifically, whether the plaintiff has provided “some basis in fact” to support their theory that the horrific fire that destroyed Lytton, BC in 2021 (the “Fire”) was caused by railway operations.

[4] In my view, it is time for class certification hearings to focus on the application of the “some basis in fact” principle rather than its interpretation. We are well past the time when the basic principles of class action certification should be settled, allowing the parties to focus more narrowly on their application in each case. It is time for the certification debate to be largely limited to where a particular case falls on the robust continuum of previously decided cases, akin to the approach in other well-developed areas.

[5] In my view:

- a) focus by class counsel on the cause of action that best fits the facts;
- b) adherence by the parties to the relevance test on certification;
- c) application rather than reconsideration of existing legal principles by the judiciary; and
- d) deference to comparable previously decided case law by all;

would result in class action certification hearings that:

- a) are shorter (three days is usually sufficient for a proper oral presentation in my view); and

- b) require the presentation of fewer legal authorities and a much more constrained evidentiary record.

[6] I would expect that fewer than ten decisions on either side of the particular case's position on the existing continuum should be more than enough to guide the court. It is admittedly more difficult to provide specific advice regarding the evidentiary record, but what I can confirm is that what is being provided at present is excessive. In my years pursuing, opposing, and judging class actions, what "really matters" on certification usually fits in a single bankers box.

[7] This improved focus should, in turn, result in quicker and more concise certification decisions. My hope is that most decisions on this preliminary procedural point can be fewer than 40 pages and issued within 90 days. This would allow the parties to quickly (1) get to trial if the case is certified, or (2) get on with their lives if certification is rejected.

[8] In relation to the ideal length of certification judgments, I have failed miserably in this case. I do not blame counsel for this tome, given the current level of uncertainty regarding both the legal principles and the appropriate level of evidence to be filed, but I am hopeful that we will see improvement from both the bar and the judiciary in the future.

[9] Improvement is clearly necessary. Class actions were intended to improve access to justice and judicial economy. But the bloated certification process that has developed threatens to undermine the public's confidence, respect, and appreciation for this valuable tool in appropriate cases. If class cases continue to take too long to resolve, we risk running headlong into a critique that "justice delayed is justice denied." We must do better.

[10] I have tried to do better in the present case by adopting a "back to basics" approach. Specifically, regarding the issue most central to the debate, I find that the phrase "some basis in fact" should be restored to its original, unvarnished,

uncomplicated force. It is binding. It works. There is no need to shade, colour, or overexplain it. We should simply apply it.

[11] After applying this approach, I have concluded that the certification test is met in this case. The case may proceed as a class action, with certain adjustments.

## **II. BACKGROUND**

### **A. Introduction**

[12] Obviously, to apply the “some basis in fact” test, the Court must first establish the relevant facts.

[13] What are the facts relevant to certification that were presented to me?

### **B. The Railway Operations Through Lytton**

[14] The defendants, Canadian National Railway Company (“CN”) and Canadian Pacific Railway Company (“CP”), each own railway tracks that run approximately parallel to one another through Lytton, BC. The CN track begins in Kamloops at Mile 0 and ends in Boston Bar at Mile 126 (the “CN Track”). It passes through Lytton at Miles 97–98. It is operations on the CN Track that the plaintiff hypothesizes caused the Fire.

[15] The CN Track crosses two bridges in Lytton. In the photo below, the North Lytton Bridge is near the top. The key South Lytton Bridge is near the bottom. The CN Track runs down along the Fraser River from the North Lytton Bridge towards the South Lytton Bridge. CP’s Track is on the right-hand side of the photo, between Lytton and the highway, as seen in the top-right corner of the image. The location along the CN Tracks suspected of being the source of the Fire is at the north end of the South Lytton Bridge.



[16] CN and CP have, by agreement, granted one another the right to operate trains on each other's tracks. Under this agreement, CN and CP predominantly operate westbound trains down the CN Track on the left-hand side of the photo. The implicated train in this case was running westbound on the CN Track, heading down towards the bottom of the image and the South Lytton Bridge.

[17] Under a separate agreement, CN and CP agreed that CN crews may operate CP trains on CN's tracks in the Fraser Canyon, and CP crews may operate CN trains on CP's tracks. CN and CP personnel receive training and information on operating each other's trains. CN and CP must provide each other with locomotives that are in

good running order, properly serviced and equipped, compliant with regulatory requirements, and clear of all inspection requirements. CN personnel inspect all trains on CN’s rail network, including CP locomotives.

[18] Below is a photo showing mile markers. The red line depicts the CN Track (labelled as “CN Ashcroft”). The red boxes are the mile markers at Miles 97.29, 97.38, 98, 98.2, and 98.35. The yellow box marks a wayside detector at Mile 97.6. The plaintiff’s alleged origin of the Fire is at Mile 98.2, the second box from the bottom, just before the South Lytton Bridge.



[19] CN says that over the relevant period, it took steps to mitigate and address the risk of fire from trains running down the CN Tracks, including by:

- a) imposing a speed limit of 25 mph;
- b) warning train crews to avoid excessive braking;
- c) deploying heat patrols (i.e., hi-rail trucks equipped with fire suppression tools that move along the tracks, monitoring the tracks and surrounding lands for any indication of heat-related issues, including fires); and
- d) avoiding other work (such as rail grinding and welding) with a higher risk of fire.

**C. The Fire: June 30, 2021**

[20] In the days leading up to the Fire on June 30, 2021, weather conditions created a tinderbox in Lytton.

[21] On June 21, 2021, a fire risk assessment was circulated within CP. It forecasted a heat wave across western Canada for June 25 to July 2, and noted that the last such extreme heat event occurred more than 100 years ago.

[22] Three days before the Fire, CP had information that Lytton had just experienced the hottest day ever recorded in Canada, at 46.1°C. Lytton broke that record the next day. Lytton set a final heat record the day before the Fire, when the temperature reached 49.6°C and relative humidity dipped to 8%.

[23] Fire risk maps distributed by the federal government during this period warned that the risk in and around Lytton was “Extreme”, the highest level of danger under the Canadian Forest Fire Danger Rating System (“CFFDRS”).

[24] A key determinant of risk under the CFFDRS is the Fire Weather Index (“FWI”), a measure of weather and fire fuel conditions. Any FWI score above 30 falls into the highest risk category, again “Extreme”. On several days leading up to June 30, 2021, the heat and dryness drove the FWI score in Lytton to more than double

the threshold for “Extreme” risk: with the index hitting scores of 67, 71, and 75 on June 22, 23, and 25, respectively.

[25] On June 30, 2021, despite slightly lower temperatures than the preceding days, the high winds around Lytton drove the FWI score to a new high of 106—more than three-and-a-half times the threshold for a designation of “Extreme” risk.

[26] Early that morning, a train identified as C-73152-29 (“Train 731”)—a Vancouver-bound freight train owned by CP—was on its way westbound to Kamloops to be turned over to CN’s custody for the remainder of its journey southwest. It consisted of three diesel-electric locomotives and 152 open-top coal cars. It was 8,291 feet long and carried more than 21,000 tons of coal.

[27] Trackside heat sensors on CP’s track before Kamloops detected elevated temperatures on the wheel bearings of locomotive CP9836, one of the train’s four locomotives. This locomotive was removed from Train 731 upon arrival in Kamloops. When it transferred control of Train 731 in Kamloops, CP’s crew apparently did not inform CN of the high bearing temperatures experienced that morning.

[28] Train 731 continued south towards Lytton, now operated by a CN crew.

[29] CN also uses wayside detectors with infrared sensors to measure the temperature of train wheels and bearings as trains travel along CN’s rail network. There were no alerts from any of the wayside detectors from Kamloops through Lytton. A wayside detector at Mile 97.6 recorded Train 731’s arrival at 4:31:34 p.m.

[30] Seventy-six seconds later, the train reached the road crossing at Mile 98.14, beside a gravel parking lot at the south end of Lytton. The plaintiff’s theory proposes that this is where the defendants’ railway operations started the Fire (the “Proposed Origin”).

[31] The area around the Proposed Origin is known as “Hobo’s Hollow”, an area frequently accessed by people to park their cars and cross a pedestrian bridge over the Fraser River.

[32] The Proposed Origin is exposed to the strong southerly winds that prevail in the Fraser Canyon. As the train passed the Proposed Origin, onboard video suggests that the wind was blowing loose particles of coal, creating clouds of fine coal dust from the open cars and dispersing it into the air around the gondola cars and potentially into the dry grass beside the tracks. See the video screenshot below.



[33] The videos from Train 731 do not show any signs of fire, smoke, or obstructions on the tracks as the train passed through Lytton.

[34] Given the high temperatures, CN's self-imposed speed limit was 25 mph. (At the relevant time, Transport Canada had not imposed its own speed restrictions.) Event recorder data indicates that for less than a minute during its journey through Lytton, Train 731 travelled between 25.1 and 25.4 mph. At this time, the reading apparent to Train 731's operators would (unfortunately, says the plaintiff) have only shown as the closest whole number: 25 mph.

[35] Onboard video from Train 731 shows some sagebrush growth in CN's right-of-way around Mile 98.14, with dense, dry vegetation lining the edges of the gravel ballast under the tracks. CN and CP have rights-of-way extending on either side of

their tracks. Federal legislation considers vegetation a fire hazard and requires railways to control vegetation and other combustible materials within the right-of-way.



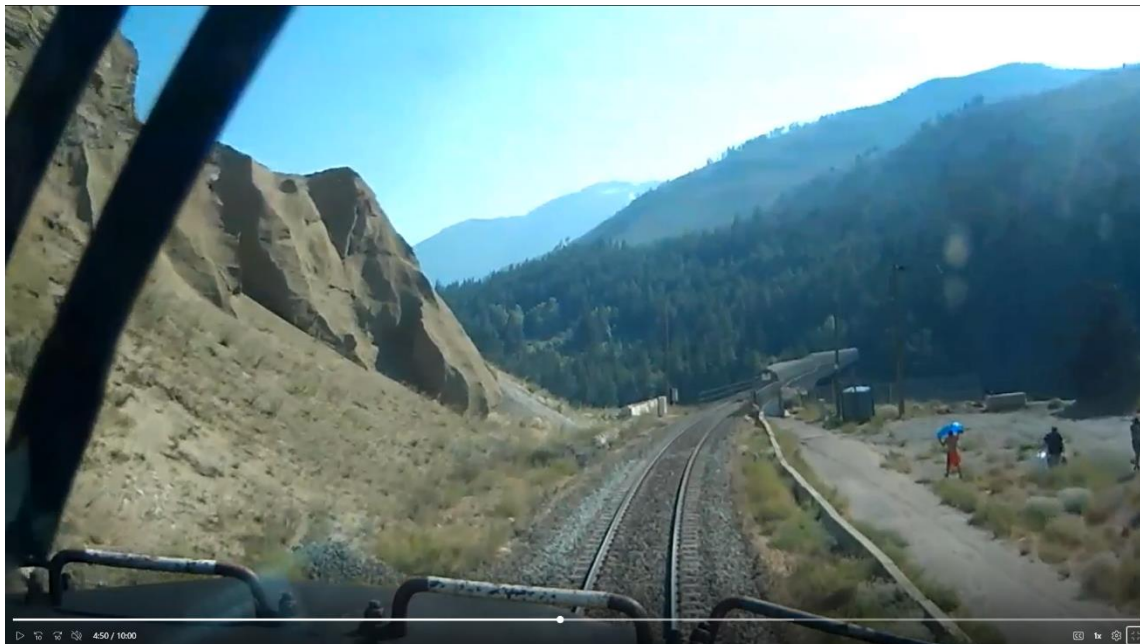
[36] An individual named Fabian Duncan observed Train 731’s passage through the Proposed Origin. He was sitting in the shade at the northeast corner of the gravel parking lot above the tracks in the picture below. He was a few hundred feet away from the tracks. Between 4:38 p.m. and 4:41 p.m. (or just two to five minutes after Train 731 passed by), Mr. Duncan “saw smoke coming from behind the tracks”. He estimated this was “about 150 feet to the north” of the South Lytton Bridge. On cross-examination, he identified the location where he first saw smoke as “1” on the image below. He made his observations from the points labelled as Locations 4 and 5 near the top of the image. Mr. Duncan first saw fire in the orange-shaded area.



[37] When Train 731 passed through the Proposed Origin, there were vehicles in the parking lot, as shown in the screenshot below.



[38] There were also pedestrians headed toward the pedestrian bridge. These pedestrians are visible in the video footage from the lead locomotive of Train 731, as depicted on the right of the screenshot below.



[39] To provide a better sense of relevant points, the defendants prepared the following helpful graphic. (Note that, while I have included the defendant's labels, this decision should not be read as the Court adopting their descriptions as findings of fact):



1. Duncan Origin Area
2. Duncan-observed fire spread
3. Duncan-observed fire spread
4. Mr. Duncan's station
5. Where Mr. Duncan moved to
6. Duncan-observed fire spread
- A. South Lytton Bridge
- B. Hobo's Hollow
- C. The Fire Point
- D. Presumed BC Wildlife Service Origin Area
- E. Parked Cars
- F. Approximate location of pedestrians

[40] It took just under four minutes for the full length of the train to pass the Proposed Origin, with the tail end departing at 4:36 p.m.

[41] Train 731's event recorder showed no unusual braking, acceleration or deceleration, no handling violations, and no aggressive behaviour over the course of

its passage through Lytton. Train 731's air brakes were not applied within approximately ten miles of Lytton. While travelling through Lytton, the crew used only dynamic braking (i.e., relying on the locomotives' electric motors without applying physical brakes to the train's wheels). CN's dragging equipment detectors did not alert the train crew to any component dragging on the track. CN staff periodically observed the visible length of Train 731 and reported no defects or safety issues.

[42] A CN fire patrol in a hi-rail truck was following about 15 minutes behind Train 731. At about 4:45 p.m.—four to seven minutes after Mr. Duncan saw smoke—CN's fire patrol arrived at Mile 97 and “saw black smoke coming from the direction of Lytton”. About 160 meters short of the Proposed Origin, the patrol encountered “fire on both sides of CN's Tracks that prevented them from continuing”.

[43] At 4:49 p.m., a Lytton resident at the corner of 5th Street and Main Street took a photo of a cloud of dark smoke rising from the area near the Proposed Origin.

[44] At 4:51 p.m.—15 minutes after Train 731's passage—an eyewitness filmed the area around Proposed Origin from the opposite side of the river. In the foreground, the foliage on the slope down to the river appears unburned, but beyond the trees at the crest of the hill, the area is obscured by thick smoke.

[45] By 6:13 p.m., most of the structures in the southern part of Lytton had been entirely consumed by fire, and those in the east were in the final stage of consumption. By 7:30 p.m., most structures in town and the adjacent reserve lands had either been destroyed or were burning.

[46] From approximately 5:01 p.m. to 8:09 pm., track detectors further along the CN Track outside of Lytton at Mile 112 indicated that train wheel temperatures reached a 'medium' level of 278°F on the left side of Train 731. This was four times hotter than the previous measurement before the Proposed Origin. It was also seven times hotter than the train's average temperature between Kamloops and Lytton. However, they did not reach the level necessary to trigger an alert to CN personnel.

At 300°F, the data would have been reviewed. Personnel would determine whether a crew should perform an inspection. An alert requiring the train to stop would only issue if a detector reached 550°F.

**D. The Evacuation Orders**

[47] Once the Fire was active, the following evacuation orders were issued under s. 12(1) of the *Emergency Program Act*, R.S.B.C. 1996, c. 111 [*EPA*]:

- a) an evacuation order was issued for all properties in the Village of Lytton at 6:00 p.m. on June 30, 2021;
- b) two evacuation orders for large areas north and east of Lytton along Highways 12 and 1 were issued at 8:00 p.m.;
- c) an evacuation order for the Squamish-Lillooet Regional District Electoral Area “B” was issued on July 1, 2021;
- d) evacuation orders for the Thompson-Nicola Regional District Electoral Area “I” were issued on July 1, 2021, July 5, 2021, and July 5, 2021;
- e) the BC Wildfire Service issued an area restriction order on July 3, 2021; and
- f) further evacuation orders for the Thompson-Nicola Regional District Electoral Area “I” were issued on July 5 and 6, 2021.

**E. The Damage**

[48] The Fire spread rapidly, destroying buildings over a large area, including:

- a) most of the Village of Lytton;
- b) several of the 56 reserve lands designated under the *Indian Act*, R.S.C. 1985, c. I-5 [*Indian Act*], for the exclusive use and benefit of Lytton First Nation (“LFN”);

- c) several of the 26 reserve lands designated under the *Indian Act* for the exclusive use and benefit of Cook’s Ferry Indian Band (“Cook’s Ferry”);
- d) several of the 25 reserve lands designated under the *Indian Act* for the exclusive use and benefit of the Siska Indian Band (“Siska”) (the areas in b, c and d together will be referred to as the “Reserves”); and
- e) a substantial portion of the traditional territory of the Nlaka’pamux Nation (the “Traditional Territory”) to which LFN, Cook’s Ferry, and Siska all belong.

[49] Members of Cook’s Ferry and Siska were required to evacuate their Reserves, but their infrastructure and homes were not destroyed. Other Reserves sustained serious property damage.

**F. The Regulatory Regime**

[50] The *Railway Safety Act*, R.S.C. 1985, c. 32 (4th Supp.) [*RSA*] is the primary statute governing the construction, operation, and maintenance of railroads. The *RSA* and the regulations issued under it give Transport Canada the authority to regulate national railway operations, like those carried out by CN and CP.

[51] While the Fire was burning, two ministerial orders were released that affected CN’s operations:

- a) On July 9, 2021, the Minister of Transport issued a ministerial order under the *RSA* (MO 21-05) requiring CN to cease all operations between Kamloops and Boston Bar for 48 hours except for emergency fire response and maintenance/repair work; and
- b) On July 11, 2021, the Minister of Transport issued a further ministerial order (MO 21-06) imposing speed limits on nationwide rail traffic for areas with an “extreme” fire risk and a temperature of at least 30°C. These were new ministerial requirements that did not exist previously. The lowest

speed limit imposed—25 mph—was the same speed limit CN had mandated for Train 731 as it travelled through Lytton on the day of the Fire.

[52] Neither MO 21-05 nor MO 21-06 was issued as an enforcement measure for non-compliance with the *RSA*. There has not been a finding by any regulatory body that CN or CP breached the *RSA* or related regulations in relation to the Fire.

### **G. The Government Proceedings and Investigations**

[53] Investigations by other fact-finding bodies have limited relevance on certification. I am not bound by their findings. Their conclusions would be based on a different factual record. Chief Justice Hinkson declined to allow admission of the Transportation Safety Board’s (“TSB”) final conclusions in the first attempt to certify a claim regarding the Fire: *O’Connor v. Canadian Pacific Railway Limited*, 2023 BCSC 1371 (the “First Certification Decision” or “FCD”) at para. 81.

[54] That said, the work done by other entities may provide the Court with a clearer picture of the evidence available for any class trial, and may highlight the likely issues that will arise in any class litigation. For those limited purposes, I find that the work of the entities discussed below may be considered.

[55] At the RCMP’s request, Transport Canada inspected Train 731 on July 6, 2021. It did not identify any defects or concerns.

[56] On October 14, 2021, the TSB released the results of its investigation. The investigation did not find “any link between railway operations and the fire”. The TSB inspected Train 731, looking for hot bearings, burnt brake heads, built-up tread, and other potential fire-creating causes. No anomalies were noted. The TSB met with the local BC Wildfire Service fire origin investigator. The TSB interviewed railway employees who were engaged in operating trains in the area or in maintenance. The TSB collected and analyzed samples of a black, carbonaceous, coal-like substance found near Mile 98.14. The TSB’s lab concluded that the substance “had little in common” with comparison samples taken from a train. The TSB reviewed the videos from Train 731. It reviewed the hot box detectors and event recorder data. It

reviewed simulations of the three locomotives from Train 731 under load, which revealed no sparking. Exhaust stacks were inspected. No anomalies were observed or reported from any of these reviews.

[57] On February 20, 2024, a representative of the Ministry of Forests initiated cost recovery proceedings against CN under s. 25 of the *Wildfire Act*, S.B.C. 2004, c. 31, by way of a letter to CN. The letter stated that the BC Wildfire Service had “completed an investigation indicating [CN] may have caused or contributed to the [Fire]”. The letter also advised that “a copy of the Incident Report with supporting information setting out [the BC Wildfire Services’] case will be forwarded shortly”. On April 2, 2024, however, the Ministry of Forests wrote to CN stating that the “BC Wildfire Service is no longer proceeding with a cost recovery action” and “[t]he BC Wildfire Service is now closing its file”. CN never received a copy of the “Incident Report with supporting information” promised in the earlier February 2024 letter.

[58] The RCMP conducted a “complex investigation” into the Fire, “including determining the cause and origin of the fire”, and reviewed “all movements and actions of any individuals, vehicle traffic and a southbound freight train that were all in the [Hobo’s Hollow] area around 4:30 p.m. when the [Fire] first began”. The RCMP investigation included a review of the findings from the BC Wildfire Service, the TSB, and Transport Canada. The RCMP also performed the following steps:

- a) an “exhaustive search of two areas of interest related to the possible origin of the [Fire]”, including “a 1km radius near Lytton”;
- b) a collection of 55 physical exhibits and over 400 videos and photographs;
- c) 168 witness interviews; and
- d) engagement of a “professional and credible Subject Matter Expert”.

[59] Upon the completion of its investigation, the RCMP stated that it “has not determined the cause of the [Fire]”. RCMP Southeast District Commander Brad Haugli is quoted in the press release saying, “[w]hile we have no single source or

cause that can account for the [Fire], it was not due to a lack of effort. Significant work was done to not only look at establishing and confirming what did happen, but to eliminate what did not happen.” The announcement concluded with the following statement: “While the investigative efforts have concluded, it does not preclude credible information being received in the future.”

## H. The Litigation

[60] After the Fire, many parties commenced lawsuits, including proposed class actions, representative actions, multi-plaintiff actions, subrogated actions, and single plaintiff actions. The certification application before me arises in the proposed class action, *Moiseiwitsch v. Canadian National Railway Company*.

[61] The history of these proceedings is reviewed in a series of earlier decisions reported at *Moiseiwitsch v. Canadian National Railway Company*, 2022 BCSC 331 (the “Carriage Decision”), appeal dismissed 2022 BCCA 321 (the “Carriage Appeal”); *O’Connor v. Canadian Pacific Railway Limited*, 2023 BCSC 1371 (the FCD); *Moiseiwitsch v. Canadian National Railway Company*, 2025 BCSC 230 (the “Documents Decision”); and *Lytton First Nation v. Canadian Pacific Railway Limited*, 2025 BCSC 763 (the “E-Verifile Decision”) (collectively, the “Decisions”).

[62] Beyond the two class actions, *Moiseiwitsch* and *O’Connor*, the other cases I am case managing are as follows:

- a) The First Nations Litigation: First Nations advance three representative actions.<sup>1</sup> Unlike the class actions, the First Nations Litigation includes claims against the Federal and Provincial Governments, and Transport Canada. The First Nations Litigation plaintiffs allege that the Federal and Provincial Governments failed to adequately prepare for, and respond to, the Fire. They also allege that the Federal Government failed to provide proper funding for fire protection services prior to the fire. Further, the

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<sup>1</sup> *Lytton First Nation v. Canadian Pacific Railway Limited*; *Cook’s Ferry Indian Band v. Canadian Pacific Railway Limited*; *Siska v. Canadian Pacific Railway Limited* (collectively the “First Nations Litigation”).

Lytton First Nation’s claim alleges that the Village of Lytton breached agreements regarding fire protection and water services, another claim not advanced in the class actions.

The damages sought in the First Nations Litigation can be organized into three broad categories:

- a. losses suffered directly by the First Nations (the “First Nations Claims”), including:
  - i. loss of infrastructure, homes and equipment owned by the First Nations, and, in the case of LFN, a company it owned called Kumcheen Enterprises Ltd.;
  - ii. business and economic losses, including the interruption of and complete loss of economic activities;
  - iii. financial loss suffered as a result of having to provide alternative accommodation and services to their members (the “Members”);
  - iv. the cost of providing additional financial support to Members whose livelihood was lost as a result of the Lytton Fire or who needed to be relocated; and
  - v. loss of business revenue and loss of revenue from third-party businesses, especially forestry companies that had been paying compensation or royalties;
- b. losses suffered by the First Nations as well as their Members arising from loss and destruction of the Reserves and the Traditional Territory (the “Communal Aboriginal Rights Claims”), including:
  - i. destruction of sacred sites, cultural artifacts and historical landmarks;
  - ii. loss of traditional knowledge, practices and cultural ceremonies due to the destruction of cultural resources;
  - iii. damage to or contamination of forestry resources, water bodies, soil and wildlife habitat of the Reserves as well as the Traditional Territory;

- iv. interference with or loss of agricultural productivity and the ability of LFN and its Members to rely on locally produced agricultural products;
  - v. loss or disruption of traditional hunting, fishing, harvesting and gathering on the Reserves and within the Traditional Territory for food, social, trade and ceremonial purposes; and
  - vi. loss of economic opportunities for the First Nations and their Members; and
- c. losses suffered by the Members as individuals (the “Individual Member Claims”), including:
- i. loss of personal property located both on and off Reserves;
  - ii. loss of services provided by the First Nations;
  - iii. adverse health consequences;
  - iv. employment and business losses in addition to the Communal Aboriginal Rights Claims;
  - v. costs of having to relocate;
  - vi. loss of real property located off the Reserves; and
  - vii. costs of providing accommodation and support for other Members displaced by the Lytton Fire.

As will be reviewed further below, there is also an application before me to strike these Individual Member Claims. This issue overlaps with the question of whether the *Moiseiwitsch* class definition should cover these claims.

- b) The Subrogated Litigation: An action has been filed in the name of 117 insureds seeking to advance their insurers’ subrogated claims. The insureds fit within the proposed class definition. The insurers have agreed to have their claims advanced within the present class action. Initially, a proposal was made to establish a separate subclass to represent the insurers’ interests within the *Moiseiwitsch* action. However, when the defendants and the Court raised concerns about ensuring proper opt-out

rights under such a structure, this effort was discarded. Any issues that may arise between the insurers and their insureds will now be addressed (if necessary) at a later stage in the proceedings.

- c) The Institutional Litigation: There are two institutional actions, one advanced by the Village of Lytton and the other by Interior Health. They have indicated that they will opt out of any certified class action.
- d) The Liptrot Litigation: There was an individual action filed on behalf of a single prospective class member by counsel in the *Moiseiwitsch* litigation. Mr. Liptrot has agreed to participate in the class action should it be certified.

[63] The full styles of cause for these various actions are set out in Schedule “A”. I will refer to these cases collectively as the “Non-Class Action Litigation” or “NCA Litigation”.<sup>2</sup>

[64] In terms of the litigation activity to date, the most important development for present purposes is Chief Justice Hinkson’s reasons in the FCD. In the FCD, the Court declined to certify the *O’Connor* case that had been initially granted carriage, but provided that the plaintiff could amend his pleading. Following this decision, the losing plaintiff in the Carriage Decision filed an application asking the Court to reconsider the question of carriage. Before that application could be heard, the plaintiffs in the two competing class actions agreed to move their efforts forward together under the *Moiseiwitsch* style of cause. It is the *Moiseiwitsch* case that now moves for certification. I will be referring to the FCD throughout these reasons to test whether my analysis remains consistent with, or is properly distinguishable from, this earlier decision.

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<sup>2</sup> There is one action not subject to common case management advanced by an individual who was formerly counsel for Ms. Moiseiwitsch in this action: *Gratl v. Canadian National Railway Company* (Action No. S234394). The future conduct of this case will now likely rise or fall with Mr. Gratl’s choice whether or not to exercise the opt-out right that will be provided through this decision.

**I. The Proposed Representative Plaintiffs in the *Moiseiwitsch* Action**

[65] The plaintiff, Carel Moiseiwitsch, was a long-time owner of property in Lytton. Her home and its contents were destroyed. Ms. Moiseiwitsch and her husband operated an information technology and design company out of their home in Lytton, the equipment, inventory, and assets of which were also destroyed. None of her home, its contents, or her business were insured at the time. As a result of the Fire, Ms. Moiseiwitsch was displaced from Lytton and forced to relocate, settling temporarily in Vancouver. Ms. Moiseiwitsch claims to have sustained lasting trauma due to her experience of fleeing the rapidly spreading fire and losing her home, her possessions, her pet cat, and her way of life.

[66] Jordan Spinks is the second proposed representative plaintiff. He is a member of the Kanaka Bar Indian Band. The Fire and associated evacuation order displaced him from his home on Indian Reserve Papyum 27 for several months, caused him to lose personal property, and led to his job loss and periods of unemployment and underemployment. The Fire’s destruction disrupted his ability to hunt and fish. The cumulative toll of these losses has left him depressed and concerned about the mental well-being of his family and his Band.

**J. The Expert Evidence**

**1. Dr. Peter Senez**

[67] Ms. Moiseiwitsch has tendered expert opinion evidence from Dr. Peter Senez, a professional engineer and fire investigator with more than 25 years’ experience in conducting forensic fire investigations. This evidence was not before Hinkson C.J. in the application leading to the FCD.

[68] Dr. Senez has provided three affidavits:

- a) the first December 2021 affidavit attaches a report opining on a methodology to determine the origin and cause of the Fire (the “First Report”);

- b) the second February 2025 affidavit reviews the new evidence available since his first report, surveys the available evidence, and opines on its consistency with various potential causes commonly considered in wildfire investigations (the “Second Report”); and
  - c) the third August 2025 affidavit reviews and replies to evidence tendered by the defendants in response to this application (the “Third Report”),
- (collectively, the “Senez Reports”).

[69] In his First Report, Dr. Senez provides the following map, which helpfully illustrates the funnel-like geographic features around the Proposed Origin:



[70] Dr. Senez concludes as follows in his First Report:

15. Our preliminary investigation and witness information has thus far corroborated the relative area of origin of the fire established by BCWS (see **Figure 2**). In general, the burn patterns to the trees in this area correspond with fire development from the area of the tracks and burning down towards the river. It is common in wildfires to "back-burn" where the burning takes place opposing the direction of the wind and the natural topographical

tendencies of burning. This is presented in **Figure 4**, and will be expanded upon in future reporting if needed. This determination is preliminary and where new information comes to light may need to be reevaluated.

16. It will be necessary to correlate the circumstances of activities and causation scenarios to establish possible and/or probable causes of this fire. This will require a more detailed investigation and more meticulous evaluation of the potential causation scenarios. Since the fire is occurring at or near the train tracks, at or near the time of a train passing, it is appropriate to consider trains as a potential cause of this fire among other considerations of potential causes that may be unrelated to trains. We will continue to gather data to evaluate the potential for human or natural causes as part of our ongoing investigation.

17. The TSB website report is further indicative of the need for additional investigation. The TSB Report suggests the investigation was limited to one locomotive. Consequently, there appears to be no examination of the other locomotives on the train nor of the train cars carrying coal. This is problematic as the train cars being pulled by the locomotives also include mechanisms that can generate heat, spark or fail and, therefore also have potential to cause fires. Further, there appears to be no investigation of other trains or locomotives, including one train which is reported to have been damaged by fire in Boston Bar. It warrants further investigation to confirm whether there could be potential issues or correlations with this train to this fire.

...

20. Pursuant to NFPA 921, I expect the investigation into the Fire to include the following steps:

- a. Collect data and evidence, some sources of which are described below;
- b. Determine the origin(s) of the Fire and the cause of the Fire, including the circumstances, conditions, or agencies that brought the ignition, source, fuel and oxidant together;
- c. In determining the origin of the fire, NFPA 921 indicates the importance of witness information and/or electronic data. There are a number of witnesses to the fire and understanding specific observations, vantage point perspectives in those observations and the timing of those observations could be beneficial in clarifying the origin and considering potential fire causation scenarios. Similarly, there is considerable electronic data from the trains that should have been gathered by the respective public agencies or may otherwise be available through the Defendants.
- d. Correlating witness observations to our identified fire patterns from the site along with the fire dynamics of initiation and spread will further assist in defining appropriate hypotheses for consideration in causation and potential contributing factors related to early fire spread.
- e. Evaluate potential causes of the fire relative to the known ignition sources, types of fuel first ignited, and the circumstances, such as

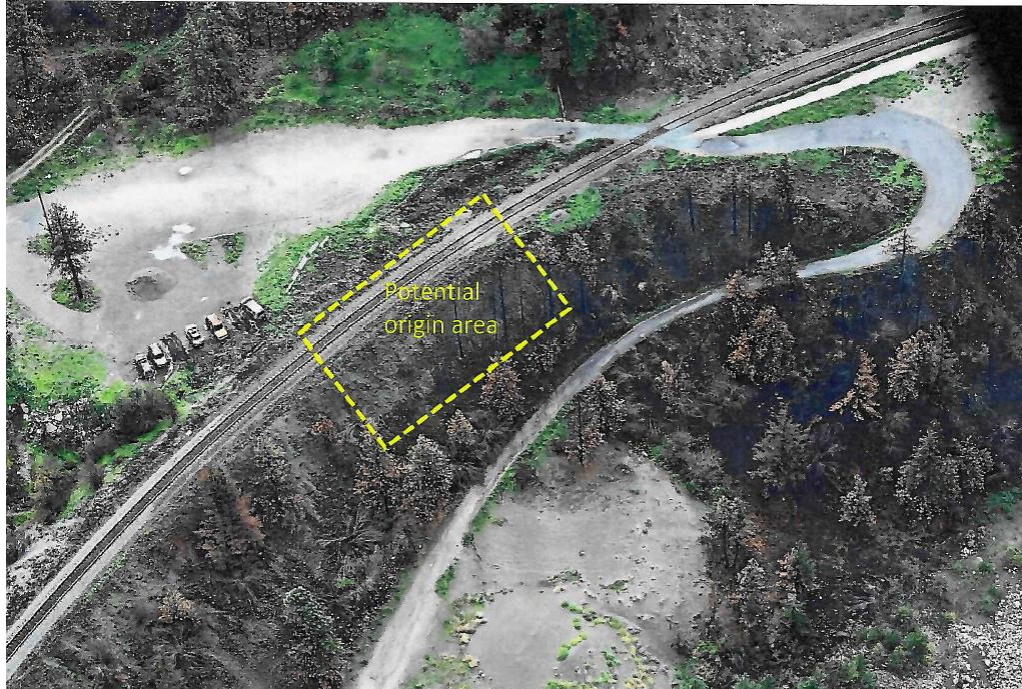
failure or human actions, that allowed the factors to come together and start the fire. This may involve literature search, testing, or analysis of recovered items.

[71] The defendants note that the BC government data catalogue website, where Mr. Senez accessed the “BC Wildfire Approximate Fire Origin” referred to above (or what the defendants refer to as the “Fire Point”) states that the data is “[n]ot to be used for legal purposes”. Dr. Senez was cross-examined on his use and treatment of this evidence. The key exchange was as follows:

- Q Right. Okay. Well, we'll get to that in a minute. But if we just go back to the picture, it has here “BC Wildfire Service approximate fire origin” and there's a circle, a dotted red circle. Do you see that?
- A Yes.
- Q That doesn't quite look like a dot that I have seen on the BC Wildfire Service's origin areas. That looks larger than that. Is that you're expanding the reach of what is on the map or ...?
- A I was really just trying to capture the region of what I saw on the map. I don't know that their dot was a dot that had precision. It was a dot as a generalized area so -- and I have not concluded as to where the area origin of the fire is. I have only approximated based on the preliminary information that I have got. I would love to see BC Wildfire's information so I can try to refine that or develop that more. But at this point in time I don't have all the information.

[72] In his Second Report, Dr. Senez notes that he now has access to new information. He states:

The [First] Report determined a potential origin area, shown in **Figure 2-3**. The origin aligned with BCWS origin, and there was a focus on identifying additional information that could assist in further quantifying the fire causation scenarios.



**Figure 2-3: Potential Origin Area** [[First] Report Figure 4]

The [First] Report did not specifically conclude or narrow the potential causes of the fire, identified additional information on a range of subjects, including train C73152-29 operating on the railroad that was traveling south past the fire origin location, just before the fire **Figure 2-4**.

This [Second Report] provides additional information from two witnesses, including photo and video, as well as on-board video from three locations on train C73152-29 that was not previously available at the time of the [First] Report. This new information provides additional support in substantiating the origin of the fire, facilitates a more concise timeline, and narrows the potential causation scenarios for this fire.

...

## **5.0 FIRE CAUSATION CONSIDERATIONS**

The more complete timeline and additional observations outlined in the previous sections provide a path to limit the number of credible causation scenarios that warrant consideration in this matter. The [First] Report did not elaborate on fire causation scenarios in anticipation of obtaining additional information. This included additional information from the BC Wildfire Service, TSB and RCMP investigations, only some of which has been obtained at the time of preparation of this report.

Chapter 27 of NFPA 921-2024 provides a reference to possible ignition sources for wildfires in general terms. This includes human factors such as smoking materials or incendiary (arson) ignitions and railroad operations. Other considerations such as hot work, track grinding, vehicle operations, electricity, industrial work, self-heating or refraction through glass are also identified in NFPA 921, but, in this instance, do not have any identifiable applicability. The NFPA 921 guide also considers the potential for campfires

but does not consider ignition associated with other simultaneous or already burning wildfires.

Based on the information available, there is limited physical evidence that has been identified with respect to fire causation. Many of the causes described above would not necessarily leave physical evidence since it is consumed in the combustion process. Nevertheless, by combining the physical location of the origin with the known activities and circumstances, a picture of possible and probable cause can be developed.

In this instance, the fire origin is located adjacent to the railroad tracks. There is no indication of someone walking along the tracks immediately prior to the fire. However, there are no physical barriers preventing someone from doing so. My current understanding is that the more regular walking path for locals would be to use the road accessed either on foot or by car and then cross the bridge on foot to access residences on the west side of the river. It is, therefore, common for people to be walking in the wider area, but not specifically in or near the area of fire origin. Further, there is no evidence of smoke or fire when the lead locomotive passes the area of fire origin (or at any point in the video). Fire is observed and recorded shortly after the train passes.

Section 27.10.1.6 of NFPA 921 suggests railroad operations “can create competent ignition sources, including frictional heating of moving parts, exhaust particles, hot brake shoes, sparks created from metal strikes, overheated wheel bearings, and fires from derailments.” The TSB investigation summary does not appear to consider the spectrum of possibilities, nor does it consider the wind conditions and amount of raised coal dust, which is combustible, observed in the video. Nevertheless, the currently available circumstances, area of fire origin, and timing of the fire align best with a causation scenario associated with the railroad operations.

Finally, although the George Road fire had been burning for several days prior to the Lytton fire, the smoke plume was traveling well away to the east from the town as evidenced by witness video approximately a half hour before the fire. No smoke was observable in the town prior to the Fire.

**Table 5-1** consolidates the likelihood of potential ignition sources based on the available information on this Fire, available at the time of preparation of this report.

Table 5-1: Causation Matrix

Potential Fire Causation Mechanism	Physical Evidence	Circumstantial Evidence	Proximity to the area of fire origin, shown in Figure 2-3	Additional Context	Qualitatively likelihood
Human Activity (arson, fireworks, discarded smoking materials, campfires)	No	<p>Train footage crossing the Mile 98.14 level crossing shows three individuals at the bridge crossing approximately 10-30 seconds prior to the head car reaching the level crossing.</p> <p>Witness 1 to the fire was located across the gravel parking lot to the area of fire origin.</p> <p>There are no observations of persons in the immediate vicinity of the fire origin.</p>	<p>Witness 1 was approximately 75 meters to the northeast of the area of fire origin.</p> <p>Witness 2 and two other pedestrians were approximately 100 meters to the south of the area of fire origin.</p>	<p>Witness 1 is known to have been working at the time of the fire assisting locals across the bridge with supplies.</p> <p>Witness 2 crossed the bridge, heading away from the area of fire origin.</p> <p>RCMP investigation press release implies no evidence of criminality or other activity that is human related.</p> <p>Unlikely location for someone to be walking. Locals would use the road down from town to cross the bridge which was used for regular pedestrian traffic.</p>	Possible but considered unlikely based on the available evidence.
Railroad Operations	No	<p>The train had passed through the area of fire origin 2-5 minutes prior to the fire. The fire developed very close to the train tracks very shortly after the train passed by.</p> <p>Train is on descent and approaching a curve which could include braking activity.</p> <p>High winds and hot temperatures would allow for ease of ignition of the forest bed.</p>	Portions of the track are encompassed in the area of fire origin.	<p>One train was reported damaged by fire in Boston Bar [Preliminary Report Item 17], it is our understanding that this was a different train and unrelated, but additional confirmation is warranted.</p> <p>The details of the investigation conducted by TSB on the train are not available, but their investigation does not consider many of the factors identified in NFPA 921 that are potential causes of railway fires.</p>	The timing and location of the fire align well with a train causation scenario being a possible or probable cause of this fire, with the timing aligning with Train C73152-29.
Overhead cable Line Fault	No	No supporting evidence	The overhead cable runs approximately 30-50 m south of the area of fire origin, shown in Figure 3-4.	The cable line is a continuous segment of cable without breaks or gaps. Appears to be communication cable and not power related. Separate three-phase power lines were observed on either side of the Fraser River.	Remote
Fire Spread from Nearby Wildfire	No	<p>The George Road Fire had been burning for several days and started approximately 7 km south of Lytton.</p> <p>High winds could allow travel of burning embers.</p>	The George Road Fire is distal to Lytton Fire area of origin by some distance to the east.	No indications of the fires being related.	Remote

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**6.0 CONCLUSION AND REMAINING QUESTIONS**

1. Following the Preliminary Report, with the addition of new documents and assumptions provided by CFM, the following notable information was obtained:

- a. The additional information affirmed and did not alter the area of fire origin, as reported in the Preliminary Report.
- b. The additional information reduced the time between the passage of the train and the first observed indication of the fire from 18 minutes down to 2-5 minutes. A better timeline has been established for the rate of fire development.
- c. The details on the RCMP investigation are unknown, however the high quantity of witness interviews (168), along with the statement that there is “no evidence to suggest the fire was intentionally set by the actions, or inactions, of any individual”.
- d. The forward-facing footage from the lead locomotive does not support a fire ignition prior to the train passing.

e. Other video footage from the train does not provide any indication of fire smoke, and all videos support strong wind displacing coal dust and debris on the train.

2. Regarding the cause of the fire:

a. There is no physical evidence available to isolate a causation theory.

b. At this time, there is no circumstantial evidence to support arson, smoking or other human activities, nor is there any evidence to corroborate an electrical failure.

c. The circumstances of the train passing by, the potential for the train to have fire causation mechanisms that would not necessarily leave physical evidence behind, and the subsequent timing and remote location of the origin beside the tracks align with a railway operation causation theory.

d. Circumstances of ignition from other fires is not supported by observations of smoke away from the town, the absence of smoke in the train video, and the absence of smoke or fire on any of the train video recorders.

[Emphasis added.]

[73] In his Third Report, Dr. Senez responds to Dr. Alexandra Syphard’s report discussed below, noting that “the higher the fire exposure, the less effective the fire hardening measures may be”, and “[e]stablishing a mechanism of ignition of an individual parcel building would not preclude ignition of the parcel building even if that protected measure was implemented, especially given the beyond extreme threshold FWI index described above”.

[74] Dr. Senez also identified a potential weakness in the TSB’s investigation, as it related to their review of the wayside station data discussed above:

... the fire origin is between the two wayside detection points where the hot wheel was detected. This was not addressed by TSB, which in their report only identifies considering the two wayside detection points prior to the incident location. This could indicate a failure leading to a hot wheel.

[75] In cross-examination, Dr. Senez reviewed two ‘fire spread maps’ prepared by his team, plotting fire spread indicators and assessments of the direction the Fire advanced at various locations on aerial photographs. One such map is provided below, where red arrows indicate the direction of fire spread at each location plotted.



[76] In cross-examination, Dr. Senez attempted to explain how these patterns (i.e., with some of the fire spreading down the hill into Hobo's Hollow) could be explained in light of his preliminary views on Proposed Origin and Mr. Duncan's evidence. He stated:

- Q And you gathered information about the weather, the wind speeds, et cetera, et cetera; correct?
- A Correct
- Q And I understand that, in fact, very close to the area you call the possible or probable or potential origin area that there is, in fact, a weather station very close to that?
- A There is.
- Q And did you get the weather data from that station?
- A Yes.
- Q And that indicated that, A, it was hot. Not as hot as it had been the days before that in respect of the days before the Lytton wildfire started, but ultimately you had fairly constant winds with gusts and the winds blowing around 30 to 40 kilometres an hour. Do you recall that?
- A On the day of the fire?
- Q Yes.
- A Yeah, that's about right.

- Q And basically they were flowing from the south-southeast essentially up the Fraser River?
- A That's correct.
- Q So essentially parallel with the Fraser River was the weather pattern?
- A That's not quite accurate because the Fraser River is turning a little bit there, and so exactly how the winds patterns were flowing and the topography in that space is probably a little bit more complicated than that simplification, but contextually south to north generally along the river, yes.
- ...
- Q ... If you accept what he saw and that he was able to see –
- A I accept it moves -- point 1 moves the origin further away from the tracks, so if that's what you mean decreases the probability, but it also lines up with the wind.
- Q Lines up with the wind. It's more consistent with the wind than your origin direction?
- A No, not necessarily, because the wind was coming somewhat at an angle, if I recall correctly.

**2. Ian Naish, Rail Safety Engineer**

[77] Ms. Moiseiwitsch tendered expert evidence from Ian Naish, a professional engineer with more than 30 years' experience in rail safety investigations, including 11 years as director of rail investigations for the TSB. Again, these affidavits were not available to Hinkson C.J. for the FCD.

[78] Mr. Naish provided three affidavits:

- a) the first December 2021 affidavit opines on a methodology to identify standards and practices used by the defendants to mitigate the risk of rail-related fires, identifies conduct relevant to the Fire, and assesses whether that conduct complied with applicable standards and industry practices;
- b) the second March 2025 affidavit opines on new evidence available since his first report; and
- c) the third August 2025 affidavit reviews and replies to evidence tendered by the defendants.

[79] Mr. Naish describes the federal legislation which governs rail operations, including regulations specific to fire prevention, as well as internal procedures. Mr. Naish opines that he can apply a methodology to assess what the defendants did and whether it complied with regulatory requirements, industry standards, or best practices.

[80] Mr. Naish identified that onboard data indicates abnormal throttle behaviour on CP8013 (the mid-train locomotive) while Train 731 was travelling through Lytton. He opines that at several points in the data, CP8013's throttle increases by two positions at a time, which differs from the throttle responses of the other two locomotives, and appears to be contrary to a direction from CP that "to minimize sparks", the throttle should be advanced "slowly, one notch at a time". He states:

Whether or not this behaviour of the mid-consist locomotive's throttle response was by design, it seems to contradict CP's operating instructions (below) regarding increasing throttle settings by just one notch at a time because of the risk of exhaust stack embers being ejected.

[81] Mr. Naish also notes the presence of large coal particles on the hood of locomotive CP8013. Mr. Naish opines that remote (i.e., uncrewed) mid-train locomotives can present an increased risk of fire, citing an incident in which a mid-train locomotive on a similar CP coal train ignited a grass fire near Elko, British Columbia, just eight days after the Fire.

### **3. Michael Stevens, Insurance Adjuster**

[82] Finally, Ms. Moiseiwitsch tendered expert evidence from Michael Stevens, a chartered professional accountant, certified fraud examiner, and forensic accountant. Mr. Stevens was asked to opine on methods of assessing real and personal property losses, business losses, and public infrastructure repair costs attributable to the Fire.

[83] Mr. Stevens describes a methodology he previously used to assess individual property losses in a class action arising from a flood. The methodology included an assessment of:

- a) what losses can be assessed (including damage to structures, personal belongings, and vehicles; property devaluation; and costs associated with moving, storage, and cleanup);
- b) what evidence can be used to substantiate individuals' losses (e.g., ownership agreements, site inspections, photographs, fair market value assessments, repair quotations, and invoices);
- c) how to determine an appropriate measure of property losses (repair and replacement costs up to fair market value); and
- d) how to develop measures to address claims assessment issues, such as fraud detection, allowances where supporting documents are unavailable, and accounting for prior compensation.

[84] Mr. Stevens opines that the same methodology could be applied to help assess losses attributable to the Fire. However, assessing business losses would also involve:

- a) comparing pre- and post-Fire financial information, including sales, expenses, and tax returns;
- b) obtaining supporting evidence such as sales receipts, supplier invoices, and payroll records; and
- c) analyzing transactions between related party businesses to verify claimed expenses.

[85] Mr. Stevens opines that a workable methodology for assessing public infrastructure repair costs would include aspects of the methods described for property losses and business losses, as well as certain additional steps particular to public infrastructure, including assessing government property tax rolls and utility companies' financial statements, and to determine the value of capital assets written off as a result of the Fire, as well as new capital assets acquired for the purpose of rebuilding infrastructure.

[86] Lastly, Mr. Stevens opines that the necessary data to complete the methods he describes is available and can be obtained through the procedures set out in his report, including through interviews with individual class members and open-source research.

**4. Dr. Alexandra Syphard**

[87] CN tendered a report from Dr. Alexandra Syphard (the “Syphard Report”). She is a research ecologist at the Conservation Biology Institute and adjunct professor in the geography department at the University of San Diego. Her training is in Public Health, Environmental Studies, and Geography. She is a research scientist whose work focuses on statistical analysis of fire data. In addition to work experience in a variety of wildfire-related fields, Dr. Syphard also currently holds the following relevant positions:

- a) Director of Science of the Global Wildfire Collective;
- b) Wildfire Consultant for the State of California’s Office of the Attorney General;
- c) Associate Editor, Journal of Pyrogeography and International Journal of Wildland Fire;
- d) Board Member of California’s Wildfire Safety Advisory Board;
- e) Member of the Scientific Advisory Panel for California’s Wildfire & Forest Resilience Task Force;
- f) Member of the International Advisory Panel of Chile’s Center for Climate and Resilience Research; and
- g) Member of the International Advisory Panel for “FIRE-RES”: Fire-Resilient Communities in Europe.

[88] Dr. Syphard has been studying wildfire science for nearly 30 years, including wildfire behaviour, structure loss, land use, and vegetation dynamics.

[89] Dr. Syphard has no engineering training. She has never conducted or participated in a forensic fire investigation. On cross-examination, Dr. Syphard admitted that she had no familiarity with the National Fire Protection Association (“NFPA”). The NFPA is a standards development organization based in the United States. It is a leading organization focused on all aspects of fire prevention and safety. Several NFPA standards are adopted in jurisdictions across Canada through building and fire codes. One of the NFPA guides is NFPA 921, the “Guide for Fire and Explosion Investigations” (“NFPA 921”). NFPA 921 details the accepted industry standards for investigating and analyzing fires, including wildfires. NFPA 921 states that it “is designed to assist individuals who are charged with the responsibility of investigating and analyzing fire and explosion incidents and rendering opinions as to the origin, cause, fire spread, responsibility, or prevention of such incidents and the damage and injuries that arise from such incidents.” NFPA 921 provides that:

It should be kept in mind that fire investigation is a specialized field. Those individuals not specifically trained and experienced in the discipline of fire investigation and analysis, even though they may be experts in related fields, may not be well qualified to render opinions regarding fire origin and cause. In order to offer origin and cause opinions, additional training or experience is generally necessary.

[90] Subsections 15.5.2 through 15.5.10 of NFPA 921 list examples of professional or specific engineering and scientific disciplines, along with areas where these personnel may help the fire investigator. The listed disciplines are all within the field of engineering. Dr. Syphard does not have the qualifications listed in NFPA 921.

[91] Dr. Syphard was asked to opine on whether all structures have an equal probability of igniting in a fire like the Fire, whether it is possible to determine how the Fire ignited certain structures, and, if so, what information would be required to make that determination.

[92] Dr. Syphard identified several risk factors that, she says, determine the likelihood that a structure will ignite from a nearby fire. She provides a methodology to determine whether any of the risk factors contributed to a specific structure’s ignition:

For a comprehensive evaluation in Lytton, one would need to gather detailed information for all exposed Structures, destroyed, damaged, and surviving, to assess how many and which Risk Factors were present at each site, and where they were located relative to the main residence. This comparative approach, used in numerous post-fire studies, helps to isolate the most important factors leading to ignition under specific fire conditions. Exposure is never uniform, and ignition mechanisms often vary significantly within small areas of a community (Maranghides et al., 2022). In addition to documenting features of the building and parcel, it would be important to quantify proximity to other structures (i.e., overlapping *Home Ignition Zones*, the area within ~ 30 meters of a structure that most influences its ignition risk), as well as the surrounding topography and vegetation that could influence fire behavior.

While much of the relevant data would ideally come from pre-fire records, an equally critical element of the analysis involves post-fire forensic investigation. This could be achieved through aerial photo and time-sequence analysis documenting where the wildfire and structure fires were burning, and when each Structure ignited. In the case of Lytton, this type of analysis revealed that wildfire had ceased burning adjacent vegetation by the time many Structures ignited, and that structure-to-structure ember and flame spread became the primary driver of ongoing fire destruction (Cohen & Westhaver, 2022).

Ultimately, a rigorous analysis of structure ignition in Lytton would require combining spatially detailed structure-level data with fire behavior reconstruction or modeling, and time-sequenced imagery. This integrated approach would not only document which Risk Factors were present at each structure but also help distinguish between ignition from direct wildfire exposure versus cascading urban fire spread—both of which were present, but the latter was especially dominant in Lytton (Cohen & Westhaver, 2022).

[93] Appended to Dr. Syphard’s report is a report entitled “An examination of the Lytton, British Columbia wildland-urban fire destruction”, prepared by Jack D. Cohen and Alan Westhaver (the “Cohen Report”). She lists the Cohen Report as a document relied upon, and at various points in the Syphard Report, she references it more specifically. As discussed in the next section, the plaintiff raises a concern about Dr. Syphard’s use of the Cohen Report.

### III. ANALYSIS

#### A. Preliminary Evidentiary Issue: The Admissibility of Dr. Syphard’s Report

[94] Ms. Moiseiwitsch objects to the admission of Dr. Syphard’s opinion on the basis that:

- a) it does not meet the threshold criteria for admissibility of expert evidence because Dr. Syphard is not properly qualified to provide the opinion proffered; and
- b) the report does not comply with Rule 11-6(1)(f)(i) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, requiring that the expert's opinion include a description of the factual assumptions on which the opinion is based.

### 1. Qualifications

[95] The law governing admissibility of expert opinion evidence flows from the Supreme Court of Canada's decision in *R. v. Mohan*, [1994] 2 S.C.R. 9, 1994 CanLII 80 [*Mohan*], subsequently clarified in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 [*White Burgess*]. The requirement for a "properly qualified expert" under step one of the *Mohan* inquiry demands that the expert has acquired special or peculiar knowledge through study or experience in respect of the matters to which the expert will testify. The fact that a person has lectured and written extensively on a subject that is of interest to him or her does not in and of itself constitute him or her an expert for the purposes of testifying in a court of law on the subject of that specialty: *R. v. Orr*, 2015 BCCA 88 at para. 67.

[96] The plaintiff complains that Dr. Syphard's work experience does not include fire investigation, and she does not have any training or experience that would qualify her to investigate the spread of the Fire. She allegedly demonstrated her lack of familiarity with fire investigation when she was unable to identify the NFPA.

[97] In my view, the plaintiff sets up a straw man and then seeks to knock it down. Dr. Syphard was not retained to opine on the cause of the Fire or to perform a fire investigation. Rather, Dr. Syphard was retained to discuss the need for individualized assessments of the damage or destruction to properties in Lytton. Her opinion on this point is built on her experience in analyzing the drivers of wildfires in urban and non-urban environments and studying wildfire risk to communities. I find that she is qualified to opine on the multi-factorial and individual assessment of a building's risk of wildfire destruction. She has lectured, written, and worked in this

area. For example, she has advised the California Department of Insurance and other state bodies on wildfire catastrophe modelling and risk reduction in wildland-urban interface communities, has provided wildfire risk analysis for the San Diego Zoo and Safari Park, and has worked with a municipal program on land use planning to protect the community from wildfire risk.

## 2. Failure to Properly List Assumptions of Fact

[98] The plaintiff says there is no way to know from Dr. Syphard's report or cross-examination precisely what facts she has assumed to be true, in particular in relation to her treatment of the Cohen Report. Rule 11-6 of the *Supreme Court Civil Rules* sets out a series of requirements for the admissibility of expert reports, which include the requirement of "a description of the factual assumptions on which the opinion is based".

[99] As noted, the Cohen Report is included as an appendix to the Syphard Report. During her cross-examination, she stated as follows about her use of the Cohen Report:

Q And so those assumptions are the only facts about the Lytton fire that you relied on in forming your opinion?

A Those assumptions as well as the information provided in the report by Jack Cohen.

Q But you don't list the Cohen report or any facts from it in your list of assumptions; correct?

A Correct. I just listed it as an attachment because I referenced it within my statement.

Q You assumed all the facts in the Cohen report are true?

A I cannot -- I cannot say whether or not they are true. I just have read them.

Q You've told me that you've included facts about the Lytton fire from that report as your assumptions; is that right?

A Yes. I have referenced that report and what its findings were in the references of my statement.

Q And you've assumed those findings to be correct, to be true?

A When I have referenced them I found them to be true. However, I cannot state that every single thing in that report is invariably true because I haven't researched everything stated in the report.

- Q Where do you list -- but you haven't listed the facts from within that report that you have assumed to be true; is that right?
- A Correct.
- Q So it's not clear from the face of your report which of the facts from the Cohen report you have relied on as assumptions?
- A When I have provided a reference to that report within my document, those would be the statements that I relied on. For example, on the bottom of page 4, I said that structure-to-structure ember and flame spread became the primary driver of ongoing fire destruction, and I referenced that document as the source of information I used for that statement.
- ...
- Q Is it the conclusion in the report that you assume to be true or the documentation referred to in the report that you assume to be true?
- A The documentation in the report that I assume to be true. I was not -- I was not the principal investigator, but I can assume that when Cohen and Westhaver conducted their report they did it in truth, and I was basing my statements on the findings of their research that they described within that report.
- Q So you have assumed some of that report to be true but not all of it?
- A I'm not assuming anything of the report to be untrue. I am just referencing the information in the report in which they used what I believe to be rigorous scientific methods to produce results that they described in their report. "True" is a difficult word for scientists to use, so I'm just saying that their methods were justifiable and the results that resulted or the results from those methods were in line with current scientific practice.
- ...
- Q And you assumed at least part of the information in that report to be true?
- A Yes. Jack Cohen is a highly trustworthy scientist who has been studying home ignitions since the 1990s.
- Q And are you familiar with the ICLR?
- A ICLR. Could you please tell me what that stands for.
- Q The -- turning to the first page of the Cohen report which is at page 34 of your affidavit.
- A Okay.
- Q So then the second page, which is at page 33, there's a note there that this paper is produced as an ICLR research paper series. Are you familiar with the ICLR?
- A Not particularly. I've heard of it, but I don't the people who work there.

Q And again you've assumed some, but not all, of this report is true in forming our opinion?

A Yes. I don't find that anything is untrue. I just used it as a source of information on data that they found that described what happened in the fire.

[100] The plaintiff argues that Dr. Syphard's reliance on the Cohen Report violates the principle that an expert's opinion must be the result of independent analysis, and another expert's opinion cannot simply be adopted. Dr. Syphard assumed "at least part of the information in that report to be true". She did not conduct any investigation or assessment of the data reviewed by the authors of the Cohen Report. She was not familiar with the ICLR, the organization that published the paper as part of a research series.

[101] CN responds that the Syphard Report contains citations indicating when she relies on the Cohen Report and when she does not. She further explains her use of the report on cross-examination when she stated, "[w]hen I have provided a reference to [the ICLR Report] within my document, those would be the statements that I relied on". They say that Dr. Syphard explained the distinction between her opinion and that expressed in the Cohen Report: she relies on the Cohen Report for information about the conditions of the Fire, given that she did not investigate it as directly as the Cohen Report authors did. Otherwise, she relies on her own knowledge and the relevant academic literature. On cross-examination, she clarified and qualified her reliance on the ICLR Report, recognizing the limits of her vantage point and the rigours of the scientific method.

[102] CN suggests that her approach to the Cohen Report parallels that of Dr. Senez and Mr. Naish, who, for example, relied on information from the TSB's investigation in their reports.

[103] I agree with CN. It is clear that Dr. Syphard is not an experienced expert witness, at least in the Canadian environment. She has used the term "assumption" in a way that does not fit neatly with its usual use in the Canadian approach to the preparation of expert reports. At the end of the day, I find that she was simply trying

to follow the same approach as the plaintiff's experts regarding the recognition and acknowledgement of the existing reports and investigations, but she became somewhat tied in knots by the "assume/assumption" language.

[104] Even if it were true that she assumed facts from the Cohen Report in the more technical sense without properly acknowledging or specifying each fact, I am prepared to waive the requirement that the assumptions be formally and precisely set out pursuant to Rule 11-6(1)(f). I find that the exercise of my discretion in this respect is appropriate given that:

- a) the certification process is not a determination of the merits, where greater evidentiary precision is necessary; and
- b) as recognized by the BC Court of Appeal, certification is meant to be a fluid, flexible procedural process: *Halvorson v. British Columbia (Medical Services Commission)*, 2010 BCCA 267 at para. 23.

[105] The core message from the Syphard Report is clear, without any reliance on the Cohen Report: that there may be situations in which questions of causation and contributory negligence will need to be considered individually. The plaintiff does not seriously contest this point, which is quite collateral to the main points of disagreement between the parties on this application. As such, any prejudice created by admission of the Syphard Report is diminished. I also note in favour of admitting the report:

- a) This case has already taken too long to reach a final decision on certification. Striking the report (with the resulting need to consider whether the defendants should be allowed to correct the problem with an amended report) will only delay the case further, which is not in anyone's interests; and
- b) The Court can still consider the issues raised by the lack of clarity around the Cohen Report in assessing the weight to be attributed to the Syphard Report.

[106] With the relevant and admissible evidence set, we can now proceed to the application of the certification test.

## **B. Certification**

### **1. General Principles**

[107] A court must certify a class action where the requirements for s. 4(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [CPA] are met. Certification will be ordered where:

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

[108] This test is to be interpreted in a broad and purposive manner consistent with the goals of class proceedings: judicial economy, access to justice, and behaviour modification: *Halvorson* at para. 23.

[109] The Court has “an important gate-keeping role” in this respect: *Krishnan v. Jamieson Laboratories Inc.*, 2021 BCSC 1396 at para. 41. The CPA aims to be fair to both plaintiff and defendants, and hence certification must be a “scrupulous and effective screening process, so that the court does not sacrifice the ultimate goal of a just determination between the parties on the altar of expediency”: *Thorburn v. British Columbia*, 2012 BCSC 1585 at para. 117, appeal dismissed 2013 BCCA 480.

[110] The plaintiff bears the burden of establishing that the certification test is met.

[111] Except for s. 4(1)(a), which is assessed based on the pleadings alone, the plaintiff must establish “some basis in fact” for each of the remaining requirements.

[112] The “some basis in fact” test was initially developed by Justice Sharpe (as he then was) in *Taub v. Manufacturers Life Insurance Co.*, [1998] O.J. No. 2694, 1998 CanLII 14853 (S.C.J.):

At a minimum, the court must be satisfied that there is a class of more than one person and that the issues raised by members of the class satisfy the requirement that they raise common issues, and that a class proceeding would be the preferable procedure for the resolution of the common issues. In most class proceedings, these factual matters may well be obvious and require little evidence. Most class proceedings arise from situations where the fact of wide-spread harm or complaint is inherent in the claim itself. Obvious examples are claims arising from mass disasters such as subway or air crashes or claims based on allegations of harm from wide-spread pollution. I do not say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. I do say, however, that there must, at the very least, be some basis in fact for the court to conclude that at least one other claim exists and some basis in fact for the court to assess the nature of those claims that exist that will enable the court to determine whether the common issue and preferability requirements are satisfied.

[Emphasis added.]

[113] This approach was later adopted by the Supreme Court of Canada in *Hollick v. Toronto (City)*, 2001 SCC 68. Chief Justice McLachlin, writing for a unanimous Court, stated as follows:

[25] I agree that the representative of the asserted class must show some basis in fact to support the certification order. As the court in *Taub* held, that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the *Report of the Attorney General’s Advisory Committee on Class Action Reform* clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see Report, at p. 31 (“evidence on the motion for certification should be confined to the [certification] criteria”). The Act, too, obviously contemplates the same thing: see s. 5(4) (“[t]he court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence”). In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action ...

[Emphasis added.]

[114] With two such renowned jurists setting out the test so clearly, one would have assumed this would be more than sufficient to guide courts and counsel.

Unfortunately, as noted above, that has not been the case. Courts and counsel have poked, pushed, and prodded at the test for almost a quarter of a century. We have now suffered an array of reformulations, recharacterizations, and restatements stapled upon the original test. Various courts have sought to “clarify” matters by supplementing the test with additional language:

- a) The court must be satisfied that the case can proceed on a class basis “without foundering at the merits stage” [emphasis added]: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [*Pro-Sys*] at para. 104;
- b) Where the “some basis in fact” is intended to be established through an expert methodology, the methodology must be “sufficiently credible or plausible” to raise some “realistic prospect of establishing” the relevant factor [emphasis added]: *Pro-Sys* at para. 118;
- c) “... The standard for assessing evidence at certification does not give rise to “a determination of the merits of the proceeding” (*CPA*, s. 5(7)); nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.” [emphasis added]: *Pro-Sys* at para. 103;
- d) The “some basis in fact” standard requires something “more than superficial scrutiny of the sufficiency of the evidence” [emphasis added]: *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307 [*Sharp*] at para. 27;
- e) “This means that a plaintiff will not satisfy the some-basis-in-fact standard and that certification will be denied if the claims of the class member are not at least plausible...” [emphasis added]: *Jensen v. Samsung Electronics Co. Ltd.*, 2021 FC 1185 at para. 208;

- f) "... the putative class member must have a claim, or at the very least some minimal evidence supporting the existence of a claim" [emphasis added]: *Jensen v. Samsung Electronics Co. Ltd.*, 2023 FCA 89 [*Jensen 2023*] at para. 78;
- g) "... mere speculation will not be enough ..." [emphasis added]: *Jensen 2023* at para. 79;
- h) "... Assessing whether the claim made by putative class members is genuine, even if asserted in common by a number of claimants, is entirely distinguishable from an examination of its merits ..." [emphasis added]: *Jensen 2023* at para. 79;
- i) "... If that process is to be meaningful and to achieve its objective to root out unfounded or frivolous claims, there must be a minimum assessment of the proposed common issue to ensure that it has an air of reality ..." [emphasis added]: *Jensen 2023* at para. 80;
- j) "... the plaintiff must present sufficient evidence to show 'some basis in fact' .... This does not involve an assessment of the merits. Thus, for example regarding the commonality requirement, the plaintiff must show some basis in fact that the issues are common to all class members, not some basis in fact that the acts actually occurred ..." [emphasis added]: *Mentor Worldwide LLC v. Bosco*, 2023 BCCA 127 [*Mentor*] at para. 33; and
- k) "... requiring some basis in the evidence that the proposed common issues actually exist is quite different from determining the merits of the proposed action [...]" [emphasis added]: *Lilleyman v. Bumble Bee Foods LLC*, 2024 ONCA 606 at para. 71.

[115] There was a spirited debate at the certification hearing as to how each of these cases shaded the test in favour of one party or the other. As indicated above, I prefer a return to basics. The criminal law bar has been able to function for centuries

applying the phrase “beyond a reasonable doubt”. The family law bar has been able to function with the “best interests of the child” test for decades. I believe the class action bar should be able to operate with the “some basis in fact” language alone. It says what it means, and it means what it says. The balance of this judgment (beyond the cause of action test of course) seeks to simply apply those words directly, without any unnecessary recasting.

[116] Two additional points must be kept in view when applying the certification test:

- a) In assessing the weight of evidence required, the court must keep in mind the context of the *CPA* scheme, which envisions that applications for certification will be brought at the early stages of the proceeding, normally before any merits discovery has been provided to the plaintiff: *Mueller v. Nissan Canada Inc.*, 2022 BCCA 338 at para. 136.
- b) While the defendant is entitled to respond to the plaintiff’s effort to meet the test with contrary evidence, the court cannot (realistically) engage in a detailed weighing of conflicting evidence: *Mentor* at paras. 33–34.

[117] With this general review of the certification test complete, we pause consideration of the “some basis in fact” test while we analyze the first certification requirement—the existence of a cause of action. As noted, this is the one aspect of the test that does not require the application of the “some basis in fact” test.

**2. Causes of Action**

**a) Generally**

[118] The requirement under s. 4(1)(a) of the *CPA* mirrors the standard applied on an application to strike a proceeding under Rule 9-5(1) of the *Supreme Court Civil Rules*. It is met unless the claim is, even when the facts pleaded are assumed to be true, plainly and obviously bound to fail: *Mayer v. Merchant Law Group LLP*, 2025 BCSC 1106 at para. 45.

[119] The pleading “must be read generously to allow for inadequacies due to drafting frailties and the plaintiff’s lack of access to key documents and discovery information”: *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399 at para. 138. Courts are to consider the claims both as they are and as they may be amended: *Sharp v. Royal Mutual Funds Inc.*, 2020 BCSC 1781 at para. 22. Novel claims that “might represent an incremental development in the law” should be allowed to proceed: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 19.

[120] I review each of the proposed causes of action below.

**b) Negligence**

[121] A successful action in negligence requires that: (1) the defendant owed the plaintiff a duty of care; (2) the defendant’s behaviour breached the standard of care; (3) the plaintiff sustained damage; and (4) the damage was caused, in fact and in law, by the defendant’s breach. Where physical harm to a person or their property is a reasonably foreseeable consequence of a negligent act, a *prima facie* duty of care is established: *Cooper v. Hobart*, 2001 SCC 79 at para. 36; *Price v. Smith & Wesson Corporation*, 2025 ONCA 452 at paras. 40–47.

[122] The defendants take little issue with the fact that negligence has been properly pleaded in relation to the claims for personal injury and property damage. However, the defendants take issue with the plaintiff’s negligence claim for relational economic losses suffered by a proposed subclass.

[123] In terms of the underpinning for such a claim, Mr. Spinks says he was rendered unemployed due to the destruction of the assisted living centre in Lytton, where he worked. He seeks to claim those losses within this class proceeding. The plaintiff proposes a version of the subclass class definition which she argues makes this aspect of her claim narrow, viable and certifiable:

All natural or legal persons who claim to have suffered income loss because the Lytton Fire damaged real property at which they worked, or personal property used in the ordinary course of their employment, and which has not been indemnified by insurance.

[124] The plaintiff proposes a corresponding amendment to the pleadings, as follows:

The defendants each owed a duty of care to the Relational Economic Loss Subclass arising from the foreseeability of property damage to businesses within the boundary of the Lytton Fire, the inter-relationship and/or dependence of workers on their employer which is akin to a joint venture, and a worker's inability to allocate the risk of a business disruption to the business owner/employer.

[125] Relational economic losses are those suffered as a result of personal injury or property damage to a related third party. It is a category of pure economic loss that the courts have allowed to proceed under certain narrow conditions. As the Court stated in *Cooper*:

[36] ... Relational economic loss (related to a contract's performance) may give rise to a tort duty of care in certain situations, as where the claimant has a possessory or proprietary interest in the property, the general average cases, and cases where the relationship between the claimant and the property owner constitutes a joint venture: *Norsk, supra*; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, 1997 CanLII 307 (SCC), [1997] 3 S.C.R. 1210. When a case falls within one of these situations or an analogous one and reasonable foreseeability is established, a *prima facie* duty of care may be posited.

[126] The plaintiff relies primarily on three decisions to support their argument that the s. 4(1)(a) test is met in this present context, notwithstanding the novelty of the claim.

[127] In *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, 1992 CanLII 105 [*Norsk*], CN was allowed to recover its lost profits arising from its inability to use a bridge owned by Public Works Canada, which the defendant had negligently damaged. A divided Supreme Court narrowly allowed CN to sue on the basis that its relationship with Public Works Canada was tantamount to a joint venture vis-à-vis the damaged bridge. Justice McLachlin (as she then was) reasoned that extension of the joint venture category to cover the situation in *Norsk* was appropriate because CN's contractual relationship was such that "for practical purposes [it] is in the same position as if [it] owned the property physically damaged": at 1162.

[128] In *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, 1997 CanLII 307 [*Bow Valley*], a fire on an oil rig caused damage to the rig. The companies using the rig were contractually obliged to continue paying for it while it remained out of service. The companies sued the manufacturer of the heating system, which they believed caused the fire. The Supreme Court of Canada denied the companies' claims for pure economic loss. The Court held that any duty of care owed by the manufacturer to the companies should be negated on policy grounds, specifically, concerns about indeterminate liability. However, in so doing, the Court accepted that a duty of care might be found where the plaintiff's inability to allocate risk to the property owner by contract was slight due to the type of transaction or the inequality of bargaining power: at para. 69. The majority of the Court also accepted "that the categories of recoverable contractual relational economic loss are not closed and that whether or not a new category ought to be created is determined on a case-by-case basis": at para. 113.

[129] Finally, in *Waterway Houseboats Ltd. v. British Columbia*, 2019 BCSC 581 [*Waterway BCSC*], a flood resulted in significant damage to property owned by Vinco Holdings Ltd. ("Vinco") and leased to Waterway Houseboats Ltd. ("Waterway") for the purpose of renting houseboats owned by a group of individual houseboat owners (the "IHOs"). The flooding interrupted the rental business, but the IHOs sustained no property damage *per se*. The trial judge found that IHO had a common cause of action with Waterway, the company that rented the houseboats, and that Waterway had a direct claim under a statute. The trial judge awarded relational economic losses to the houseboat owners, stating at para. 484: "the evidence establishes that having regard to the entire relationship, the Individual Houseboat Owners must be regarded as being in a common venture with Waterway...". This decision was partially reversed on appeal, and remitted for further consideration, but on other grounds related to the statutory scheme. The Court of Appeal affirmed that the common venture exception would apply, and a finding of liability for pure economic loss would be possible, if the defendants were found to be liable in negligence: *Waterway Houseboats Ltd. v. British Columbia*, 2020 BCCA 378 at paras. 339, 355.

[130] The plaintiff accepts that their claim would be an extension of the law, extending it to employees of employers whose property was damaged. However, based on the decisions above, she argues that it would be a mere incremental development, supported by logic and policy.

[131] I do not accept that the proposed extension of the law represents a mere incremental development.

[132] The Supreme Court of Canada has emphasized the common law’s reluctance to protect purely economic interests. Such protection is reserved for exceptional cases: *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 at paras. 19–22 and footnote 2. The plaintiff must fit within one of the three required “special circumstances” identified above to proceed with a claim for relational economic loss; failing that, a novel proximity analysis is required to support the claim: *Pacific Bioenergy Corporation v. AG Growth International Inc.*, 2025 BCSC 80 [*Pacific Bioenergy*] at para. 42.

[133] The proposed economic loss claim here clearly does not fit into any of the three established categories. As such, a novel proximity argument is required.

[134] In that respect, the narrow extension of the joint venture category in *Norsk* does not aid the plaintiff. Employees do not own their employers’ property, nor are they tantamount to owners. Their relationship with employers is nothing like a joint venture. Indeed, the determination of whether one is an employee is often considered in contrast to whether the relationship is better characterized as a joint venture. There is no basis to extend the joint venture category here, nor to create a new analogous category open to all employees.

[135] In *Norsk*, both McLachlin and the dissenting La Forest JJ. rejected the “known plaintiff” test: at 1110–1112, 1163. The defendants argue that the plaintiff’s approach here amounts to a proposed “known plaintiff” test. I agree.

[136] In *Bow Valley*, McLachlin and La Forest JJ. concurred in denying the parent companies of an oil rig owner damages for relational economic loss when the rig

was put out of commission for several months due to a fire. The parent companies argued the manufacturer of a faulty part owed them a duty to warn, on the basis that their economic losses while the rig was out of commission were foreseeable given their parent-subsidiary relationship to the rig's owner. The Court's central reason for dismissing the above proximity argument was the problem of indeterminate liability— if the parent companies' claim succeeded on the basis of foreseeability arising out of their own contractual arrangements with the rig owner, then there was no basis to prevent a host of other claims arising from other relationships.

[62] ... If the defendants owed a duty to warn the plaintiffs, it is difficult to see why they would not owe a similar duty to a host of other persons who would foreseeably lose money if the rig was shut down as a result of being damaged ...

[63] ... Why should one type of contractual relationship, that of HOOL, be treated as more worthy than another, e.g., that of the employees on the rig?  
...

[137] The Supreme Court's identification of employees as a "problem category" is telling.

[138] There is no definite end to the plaintiff's proposed extension of the law. There is no reason that other parties contractually related to and/or dependent on an employer, such as the employer's shareholders, could not make the same argument. It is no answer that an employee relies heavily on their employer for income. Any person who is contractually dependent on property owned by or income provided by another would be in the same position: *Bow Valley* at para. 66.

[139] I find that concerns about indeterminate liability are paramount here and prevent a finding that the proposed extension should be allowed to proceed to trial.

[140] *Waterway* is distinguishable. The trial judge found that individual owners of houseboats had a common cause of action with *Waterway*, a company that rented the houseboats. The trial judge found that the houseboat owners and *Waterway* were essentially running a common venture: at paras. 484–485.

[141] I find comfort in my conclusion from the results of *Pacific Bioenergy*. Pacific Bioenergy, a wood pellet manufacturer, sued the defendants for damages arising from the collapse of a silo storing its pellets at a terminal, resulting in operational losses. The defendants applied to strike the claim under Rule 9-5(a), arguing it was an impermissible claim for relational economic loss. An Associate Judge dismissed the application, but the claim was struck on appeal. The Court concluded as follows:

[47] As I addressed briefly above, *Livent* and *Maple Leaf* set out and clarified the proximity analysis required to be undertaken to find a duty of care. In *Subway [Franchise Systems of Canada, Inc. v. Canadian Broadcasting Corp., 2021 ONCA 25]* Zarnett J.A., derived three fundamental points from this proximity analysis, as follows:

[78] First, proximity is distinct from reasonable foreseeability of harm. Parties are not in a proximate relationship simply because it is reasonably foreseeable that carelessness by one will harm the other economically. “[T]he defendant’s ability to reasonably foresee injury to a plaintiff is insufficient to ground a finding of proximity”: *Maple Leaf* (SCC), at para. 84.

[79] Second, the proximity analysis takes place against the backdrop of the fundamental principle that a plaintiff must have a right, or legally cognizable interest, that would be vindicated by recognizing a duty of care on the part of the defendant. This is particularly important in cases of pure economic loss because there “is no general right, in tort, protecting against the negligent or intentional infliction of pure economic loss”. The loss to be recovered must be “the result of an interference with a legally cognizable right”: *Maple Leaf* (SCC), at paras. 18-19.

[80] Third, the proper identification and assessment of all relevant factors arising from the relationship between the parties, in order to determine whether their relationship can truly be called proximate, furnishes a “principled basis” to determine to whom duties are owed and to whom they are not, as well as the scope of the duties: *Livent*, at para 31.

...

[51] Here, there are no representations pleaded as having been made by the defendants to the plaintiff and significantly there is no pleading of the plaintiff having relied on any representation or undertaking. Holding oneself out to the general public as being an expert in the design and manufacture of silos does not translate to a close and direct relationship sufficient to give rise to a duty of care.

[52] Similarly, concerning the party’s expectations, there is nothing in the NCC alleging that the expectations of the parties emanated from their relationship with one another. In fact, the NCC does not mention expectations other than at para. 30 where it is pleaded the defendants, knew or ought to

have known, that the terminal would continue to be used by the plaintiff during and after the completion of the work. Expectations in the air unconnected with anything said or done by the parties cannot give rise a close and direct relationship.

[53] The final factor relied upon by the Associate Judge as establishing a *prima facie* duty of care is the finding that the defendants knew the plaintiff would suffer economic loss from a silo failure. This is nothing more than a finding of foreseeability of damage which is not sufficient to establish proximity: *Maple Leaf*, para. 84; *Subway*, para. 78.

[54] Relatedly, the Associate Judge additionally erred in her proximity assessment by failing to take into account or giving appropriate weight to several highly relevant factors, namely:

- a) there is no allegation in the NCC the plaintiff had any proprietary interest in the terminal;
- b) there is no allegation in the NCC of a direct contractual relationship between the plaintiff and defendants;
- c) there is no allegation in the NCC that the plaintiff's expectations were based on anything said or done by the defendants;
- d) there is no allegation in the NCC of any representations or undertakings made by any of the defendants to the plaintiff;
- e) there is no allegation in the NCC of the plaintiff relying on a representation made by the defendants or altering its position in any way based on a representation by the defendants; and
- f) there are no allegations in the NCC of any dealings whatsoever between the plaintiff and the defendants.

[55] These are all relevant considerations that indicate an absence of a close and direct relationship between the plaintiff and defendants.

[142] These latter factors are also relevant in the present case.

[143] As to the question of indeterminate liability, the Court in *Pacific Bioenergy* concluded as follows:

[64] The considerations addressed by McLachlin J. in *Bow Valley* apply here. From the NCC it is apparent that there are many more than two potential plaintiffs. The potential plaintiffs would also include: the entities who intended to store and ship agricultural products when the terminal expansion was completed; the ship owners and charterers who called at the terminal; the purchasers of cargo loaded from the terminal; the truckers and railways that delivered product to the terminal and the stevedores and other persons who worked at the terminal. It was foreseeable that all of these potential plaintiffs would suffer economic loss if the terminal was shut down due to negligence on the part of the defendants. There is no logical principled reason to draw a distinction between these other users and the plaintiff,

especially considering that the plaintiff has not pleaded anything giving rise to a special or unique relationship between it and the defendants.

[Emphasis added.]

[144] Again, it is telling that the Court in *Pacific Bioenergy* used the terminal's employees as a clear example of a group to which relational economic loss should not extend, notwithstanding that the stevedores would have had arguments about inequality of bargaining power similar to those advanced here.

[145] Even if I were to allow that this claim cleared the pleadings threshold, I do not believe it would be preferable to include such claims in this otherwise certifiable proceeding. This case will already be among the most sweeping in Canadian history. It does not need to carry the weight of marginal claims.

[146] I conclude that Ms. Moiseiwitsch and Mr. Spinks have no prospect of success with their claim for relational economic loss, and this aspect of the pleading should be struck.

**c) Public Nuisance**

[147] In the FCD, Hinkson C.J. found that the public nuisance claim advanced was bound to fail. He concluded that the alleged class-wide harms were “incongruent” with public nuisance’s requirement for “special damage” over and above that suffered by the public generally: paras. 172–174. I see no reason to arrive at a different conclusion.

[148] Public nuisance requires both (i) interference with a public right, and (ii) an unreasonable interference with that right by the defendants. The typical plaintiff in a public nuisance case is the Attorney General (who seeks a public remedy, usually an injunction, for the public benefit). The Supreme Court of Canada in *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, 1999 CanLII 706, described the public nuisance cause of action as follows:

[52] ... “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”: see *Klar, supra*, at p. 525. Essentially, “[t]he conduct complained of must amount to . . . an attack upon

the rights of the public generally to live their lives unaffected by inconvenience, discomfort or other forms of interference”: See G. H. L. Fridman, *The Law of Torts in Canada*, vol. I (1989), at p. 168. An individual may bring a private action in public nuisance by pleading and proving special damage. See, e.g., *Chessie v. J. D. Irving Ltd.* (1982), 1982 CanLII 2918 (NB CA), 22 C.C.L.T. 89 (N.B.C.A.). Such actions commonly involve allegations of unreasonable interference with a public right of way, such as a street or highway. See *ibid.*, at p. 94.

[149] When private litigants seek private remedies for a public nuisance, they also must plead and ultimately prove some “special damage” that is not shared by the rest of the community. Without special damage, private litigants have no standing to sue for public nuisance: *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38 at paras. 67–68.

[150] The defendants argue that the special damage requirement has not been satisfied here. I agree.

[151] The plaintiff purports to plead special damages on behalf of the entire proposed class, ranging from loss of access to commerce to damage to personal property to the relational economic losses discussed above. But there is no pleading that the alleged damage for the class members differs in kind or degree from the damage suffered by the community at large. Indeed, the class here is effectively the entire community. This inherent contradiction highlights the tension inherent in attempting to use a class proceeding to seek a public nuisance remedy. The private nuisance cause of action, which I have certified below, is a much better fit with these facts. Furthermore, a class proceeding pursuing a private nuisance claim achieves nearly the same ends as the proposed public nuisance claim, but in a far more analytically justifiable manner. Each class member will be able to advance their own damages claim if an overarching nuisance is established.

[152] The pleas regarding aggregate damages also undercut the argument that the special damages requirement has been met.

[153] I find support for my conclusion in *Stein v. Gonzales*, 58 B.C.L.R. 110, 1984 CanLII 344 (S.C.). In *Stein*, the plaintiffs were downtown Vancouver business

owners. They alleged that prostitution in the area made their premises less desirable to customers and tenants and resulted in at least the prospect of financial losses. Justice McLachlin (as she then was) held the owners had not suffered special damage and thus had no standing to bring a public nuisance claim because other businesses in the community were affected similarly:

[12] In the case at bar it is not alleged that the defendants are interfering with the plaintiffs' use of their property. There is no suggestion that ingress or egress to their property has been blocked. The essence of the plaintiffs' complaint is that the neighbourhood has deteriorated as a result of the defendants' activities in the streets and alleys surrounding their premises, making their premises less desirable to guests and prospective tenants and raising the prospect of financial loss.

[13] Does this constitute damage different than that suffered by other members of the community or a class thereof? I think not. Many other citizens carry on business in the area in which the plaintiffs operate their establishments. There is no suggestion that they, like the plaintiffs, will not suffer losses as a consequence of the increase of prostitution in the neighbourhood. The onus is on the plaintiffs to demonstrate that their loss is special and unique. This they have failed to do.

[14] ... To put the matter another way, different citizens may suffer different injuries as a result of the defendants' conduct, ranging from harrassment [*sic*] and annoyance to financial loss. But the injuries suffered, insofar as they are of the same type as those suffered by other members of the public exercising their public rights, remain public injuries in the eyes of the law.

[Emphasis added.]

[154] The plaintiff suggests that the class's claims are "special" because other communities were not damaged in the same way. I agree with the defendants that such a submission impermissibly expands the law of public nuisance. The question when assessing special damage is not whether the plaintiff suffered special damage when compared to all Canadians. Rather, the question is whether the damage differs from that of others affected by the alleged nuisance. I agree with Hinkson C.J. when he suggested that, in this context, the proper boundary of the public would more accurately be the community of Lytton: FCD at para. 172.

[155] The public nuisance claim, as pleaded, is bound to fail and should be struck.

**d) Private Nuisance**

[156] The tort of private nuisance seeks to remedy substantial and unreasonable interference with an owner or occupier’s use and enjoyment of land. It involves a two-part test. The court must consider:

- a) whether the interference is *substantial* in that it “substantially” alters the nature of the property itself or interferes to a “significant” extent with the actual use being made of the property; and,
- b) if so, whether, in the circumstances, the interference was *unreasonable* in character and extent:

*Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at paras. 19–21.

[157] The plaintiff pleads both elements of the tort. She asserts that the defendants caused the Fire and caused substantial interference with class members’ use and enjoyment of real property, which they owned, occupied or had an interest in, including by contaminating, damaging or destroying real property so as to diminish its value or use, render it inaccessible, and impose costs for its remediation and reconstruction. As alleged, the interference amounted to both a “substantial” alteration to the properties themselves and a “significant” interference with the actual use of the properties.

[158] In the FCD, Hinkson C.J. found that the private nuisance claim needed to be confined to those with an interest in land before it would be certifiable:

[179] The private nuisance claim has the same difficulty as the public nuisance claim: it is made on behalf of the entire proposed class, yet not everyone in the class had an interest in land that could be alleged to have been interfered with. Thus, it is plain and obvious that a private nuisance claim brought on behalf of the entire class is bound to fail as there are insufficient material facts to support such a claim.

[180] I find that the plaintiff’s pleadings in private nuisance do not meet the requirements of s. 4(1)(a) of the *CPA*. In my view, in light of the fact that I am certifying other causes of action, the proper solution in this case is to simply require that the pleading be amended to clarify that this cause of action is only brought on behalf of those with an interest in land. I find that I have the

discretion to narrow rather than strike the claim, particularly where other aspects of the claim are going to be certified in any event.

[159] I agree with that finding. But the plaintiff in the present action has improved upon the pleading before Hinkson C.J. in the FCD. They plead as follows:

52. The defendants' conduct constituted a private nuisance. It caused the Lytton Fire and caused substantial and unreasonable interference with Class Members' use and quiet enjoyment of real property which they owned, occupied, or had an interest in, including by damaging, destroying, or contaminating real property so as to:

- a. diminish or prevent their use and quiet enjoyment of the property;
- b. render it unusable or inaccessible;
- c. diminish its value;
- d. increase the cost and complexity of remediation and reconstruction; and
- e. cause Real Property Losses, Personal Property Losses and Insured Losses.

53. This interference was particularly unreasonable because, *inter alia*:

- a. the Village of Lytton and the surrounding areas are residential communities whose residents do not meaningfully benefit from the operation of the Defendants' trains through and/or in close proximity to their neighbourhoods;
- b. the interference, including but not limited to damage and/or destruction of and restriction of access to land, was severe;
- c. the interference has prevented the Real Property Subclass Members from inhabiting and/or using the land in the same manner that they did prior to the Lytton Fire and is ongoing;
- d. The Defendants' conduct in operating the Coal Train on June 30, 2021, was in furtherance only of a private, profit-making enterprise and lacked any social utility—adequate or at all—to outweigh the risk posed to the Real Property Subclass members and the significance of the losses inflicted on them. Alternatively, any utility did not outweigh the significance of the interference with Real Property Subclass Members' ability to use and enjoy their land; and
- e. the Defendants did not take adequate precautions to prevent and/or mitigate the cause and/or spread of the Lytton Fire, including through CN Rail's Wrongful Conduct and CP Rail's Wrongful Conduct.

[160] I find that this plea is adequate to sustain the private nuisance cause of action.

**e) The Rule in *Rylands v. Fletcher***

[161] The rule in *Rylands v. Fletcher* is a doctrine of strict liability for harm resulting from the escape of a dangerous substance. To establish liability under the rule, a plaintiff must establish four elements: (1) a non-natural use of land; (2) that the defendant gathered on their land something likely to cause harm if it escaped; (3) that the ‘something’ escaped; and (4) resulting damage: *Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 111 [*Kirk BCCA 2019*] at para. 86.

[162] The plaintiff says they have met all the requirements by pleading the following:

- a) that operating Train 731, particularly at this particular time and place, posed an “extraordinary risk” to adjacent lands and persons while providing no significant benefit to the community subjected to that risk;
- b) that CN brought onto its land—by means of three diesel-electric locomotives pulling more than 20,000 tons of flammable coal—particular substances likely to ignite a fire if they escaped, including superheated oil and air, electrical current, sparks, and loose and airborne particles of flammable coal;
- c) that these hazardous substances escaped Train 731 and CN’s land; and
- d) that the escape caused harm to class members.

[163] There is some authority suggesting that *Rylands v. Fletcher* may be applied to the types of circumstances that arise in this case. Courts, including the Supreme Court of Canada, have referred to the rule as part of their analysis holding railways liable for damage caused by the escape of fire from vehicles: *The Canada Southern Railway Company v. Phelps*, [1884] 14 S.C.R. 132, 1884 CanLII 54 [*Canada*

*Southern*]. See also *Brody's Limited v. Canadian National Railway Company*, [1929] 4 D.L.R. 397, 1929 CanLII 443 (A.B.C.A.).<sup>3</sup>

[164] The defendants do not contest that the *Rylands* claim is properly pleaded for at least part of the class. Similar to the concern above regarding private nuisance, the defendants object only that it has been advanced on behalf of the entire class rather than being limited to those with an interest in land.

[165] Hinkson C.J. held in the FCD that the rule in *Rylands* is land-based: it could only apply to proposed class members with an interest in real property in and around Lytton: at para. 187.

[166] However, the plaintiff here relies on authority that does not appear to have been before Hinkson C.J. to support an argument that the rule in *Rylands* could also be used to advance a claim by all those who foreseeably suffer a loss or personal injury from an escape: *Gertsen et al. v. Municipality of Metropolitan Toronto et al.* (1973), (1974) 2 O.R. (2d) 1, 1973 CanLII 606 (S.C.) and *Aldridge and O'Brien v. Van Patter, Martin and Western Fair Association*, [1952] O.R. 595, 1952 CanLII 127 (S.C.). In *Aldridge*, the Court stated:

I am of the opinion, therefore, in view of the cases in the English Court of Appeal which I have cited, that a Court is justified in finding a liability under the principle of *Rylands v. Fletcher* for personal damages, and for personal damages sustained not by the owner or occupant of adjoining lands but by anyone to whom the probability of such damage would naturally be foreseen. Certainly it is hard to understand how the probability of injury to persons in the public park would not naturally be foreseen in the circumstances of the present case. In fact, that probability was foreseen by everyone concerned, an aspect of the case to which I shall refer when I am dealing with the question of liability upon the ground of negligence.

[167] I find that these cases are sufficient to support these claims, at least at the low pleading standard applicable to certification.

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<sup>3</sup> The trial judge found that *Rylands* applied to a case where an employee conducting maintenance on a truck caused a fire. The decision was upheld on appeal, although the appellate court relied on the negligence cause of action alone.

**f) Conclusion on Pleading**

[168] In summary, my conclusion on s. 4(1)(a) is as follows:

- a) The negligence cause of action is certifiable as pleaded in the plaintiff's proposed amended notice of civil claim, so long as the references to relational economic losses and insured losses are removed. On the latter point, as discussed earlier, the plaintiff concedes that the Subrogation Subclass should be removed at this stage of the proceedings. This renders the references to "Insured Losses" in the pleadings unnecessary, as such losses were defined as those losses which were indemnified and subrogated by the Subrogation Subclass.
- b) The public nuisance cause of action is not certifiable and should be struck in its entirety.
- c) The private nuisance cause of action is certifiable as pleaded in the plaintiff's proposed amended notice of civil claim, so long as the references to "Insured Losses" are removed.
- d) The liability under the rule in *Rylands v. Fletcher* cause of action is certifiable as pleaded in the plaintiff's proposed amended notice of civil claim.

**3. Class Definition**

[169] Section 4(1)(b) of the *CPA* requires the plaintiff to establish an identifiable class of two or more persons. It is "essential... that the class be defined clearly at the outset of the litigation" because the class definition serves the critical functions of identifying "individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment": *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 [*Dutton*] at para. 38.

[170] Section 4(1)(b) imposes two requirements: first, any person's claim to membership in the class must be "determinable by stated, objective criteria", which

do not depend on the merits of the case: *Dutton* at para. 38. Second, “there must be a rational relationship between class membership and the common issues”: *Harrison v. Afexa Life Sciences Inc.*, 2018 BCCA 165 at para. 25. The plaintiff must establish some basis in fact “that at least two persons could self-identify as class members and could later prove they are members of the class”.

[171] The class definition should not be unnecessarily broad, and “where the class could be defined more narrowly, the court should either disallow certification or allow certification on [the] condition that the definition of the class be amended”: *Hollick* at para. 21. A class definition that includes “large, identifiable groups of people who manifestly have no claim” is overbroad and should not be certified: *Douez v. Facebook, Inc.*, 2018 BCCA 186 at para. 69.

[172] The plaintiff seeks to certify a class defined as follows:

All natural or legal persons who claim to have suffered losses because of the Lytton Fire within one or more of the following subclasses:

- (i) all natural persons who claim to be the spouse, parent or child of a person who died on June 30, 2021, as a result of the Lytton Fire (the “Wrongful Death Subclass”);
- (ii) all natural or legal persons who claim to have suffered—as a result of the Lytton Fire—loss of real property, or loss of use or enjoyment of real property, which they owned, had an interest in, or occupied, which has not been indemnified by insurance (the “Real Property Subclass”);
- (iii) all natural or legal persons who claim to have suffered a loss of personal property as a result of the Lytton Fire which has not been indemnified by insurance (the “Personal Property Subclass”);
- (iv) all governmental entities which claim to have suffered loss of real property, interference with the use of real property, or loss of

personal property as a result of the Lytton Fire (the “Government Subclass”);

- (v) all natural persons who claim to have suffered personal injuries as a result of the Lytton Fire, causing a loss which has not been indemnified by insurance (the “Personal Injury Subclass”);
- (vi) all natural or legal persons who claim to have suffered income loss because the Lytton Fire damaged real property at which they worked, or personal property used in the ordinary course of their employment, and which has not been indemnified by insurance (the “Relational Economic Loss Subclass”); and
- (vii) all natural or legal persons with a subrogated claim to recover an insurance indemnity paid in relation to damage and losses resulting from the Lytton Fire (the “Subrogation Subclass”);

but not including:

- (i) the defendants, and the directors and officers of each, and their immediate family members;
- (ii) counsel to all parties in this proceeding, and their immediate family members;
- (iii) judges or associate judges presiding in this proceeding at any time, and their immediate family members;
- (iv) Chief Niakia Hanna and the Lytton First Nation;
- (v) Chief Fred Sampson and Siska Band; and
- (vi) Chief Christine Walkem and the Cook’s Ferry Indian Band.

The “Lytton Fire” is defined as “the fire designated K71086 by the BC Wildfire Service (“BCWS”) that started on June 30, 2021, in or around the Village of

Lytton and subsequently spread across the geographic area indicated in the BCWS public information map of August 19, 2021.

[173] In the FCD, Hinkson C.J. expressed concerns about the proposed definition before him, stating:

[212] Defining subclasses could help add clarity to the pleadings, class definition, and the common issues. However, as presently drafted, the subclasses achieve the opposite; rather than being cohesively created to reflect the various causes of action and the proposed common issues, the proposed subclasses risk creating the “monster of complexity” alluded to by the defendants. This is a barrier to certifying the class definition.

...

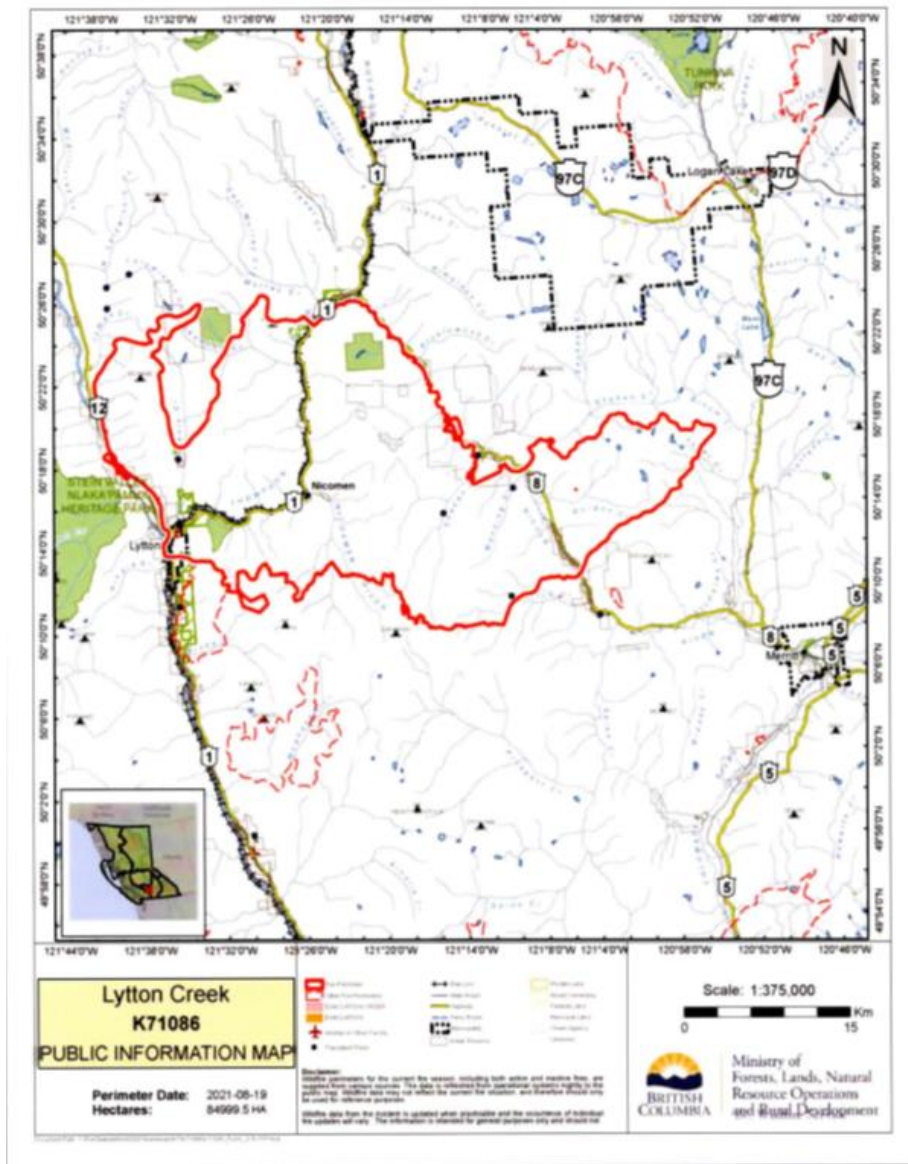
[215] I agree with the defendants that there is a real risk of conflicting interests arising between the members of the class as presently constructed. This situation is similar to that in *Nixon v. Canada (Attorney General)*, 21 C.P.C. (5th) 269, 2002 CarswellOnt 1350 (S.C.), where Justice Molloy denied certification because the proposed class definition included individuals who could have started a fire, or prevented the fire from being put out, thus making them potentially liable to others within the proposed class by reason of their conduct. The potential conflict is not remedied by removing John and Jane Doe as defendants at this stage, since these land-owners may eventually be added as defendants once again.

[216] Given this potential conflict of interest, I am hesitant to accept the proposed class definition.

[174] I find that the class definition proposed in the present case is workable, with a few adjustments.

[175] The defendants suggest that the Personal Injury and Property Subclasses are defined more broadly than the negligence pleading allows. They say that proximity cannot be established for all individuals within the 83,000-hectare Fire boundary used by the plaintiff.

[176] I accept that there should be greater precision in the class definition, but that this can be accomplished without finding that the class definition is so flawed as to be fatal to certification. In the approved definition below, I have more expressly narrowed the claims to damage sustained in the defined Fire area, using the map below, which the plaintiff has already referenced in their proposed definition.



[177] It may well be that there are persons within the defined geographic area who sustained no damage. But the class action procedure can accommodate some amount of overbreadth. While overbreadth should be avoided where possible, the countervailing benefit of certainty and clarity must also be considered. There are distinct benefits to defining the class based on a clear objective map rather than on impermissible subjective or merit-based characteristics. I accept that the defendants may succeed in arguing that certain class members within this boundary will not succeed under certain causes of action. But that is not the test for a proper class. It is almost inevitable in any class proceeding that certain persons within the class will

not succeed at the end of the day. But that does not mean that there is no proper class. The *CPA* is designed to filter out individuals without proper claims, either by a refined answer to a common question or by establishing individual issues hearing hurdles that certain class members will not be able to clear. At the end of the day, the defendants should be comfortable knowing that they will never have to pay damages to someone who is not entitled to same.

[178] Reliance on a clear boundary also reduces the potential manageability concerns that could arise and undermine preferability later in the certification test.

[179] I find that the slight refinements adopted below are supported by the decision in *Kirk BCCA 2019*, which similarly used geographic boundaries to define a fuel spill class “by reference to the Evacuation Zone”: paras. 21–22, 63.

[180] Although I have found that the nuisance and *Rylands* claims are only available to persons within the boundary and who have certain characteristics, I do not see that this reality requires an amendment to the proposed class definition, given the broader potential scope of the negligence claim. The constraints on certain causes of action will come into play through any judgment on the common issues, and again through any subsequent individual hearings. But at the outset of the claim, it should seek to capture all individuals with any type of claim, subject to manageability or conflict concerns.

[181] The defendants submit that there are conflicts within the class. As noted, Hinkson C.J. expressed similar concerns.

[182] First, the defendants express concern that the Province of British Columbia and the Village of Lytton, among other government entities, are among the proposed class members included under the Government Subclass. They note that these are the entities responsible for the evacuation orders, which ground one of the bases for aggregate damages. Any government class members may find themselves both class members and the subject of criticism by class members regarding the scope and timing of the evacuation order.

[183] While there may not be a direct legal conflict (since the Government Subclass members are not currently defendants or third parties), I agree that including them undermines the class's cohesion. It will complicate the proceedings to such an extent that certifying a class with these entities would make the case less preferable. I anticipate challenges in managing settlement negotiations, responding to offers, prioritizing recovered funds, and developing an overall strategy for the claims. Furthermore, Hinkson C.J. noted at para. 375 of the FCD that the Province had a legitimate interest in pursuing its separate claim under the *Wildfire Act*, and I see no reason to disagree. I believe the Government Subclass should be removed. However, if they choose to pursue their claims independently, the Court will certainly be receptive to including their claims within the case management framework.

[184] The defendants also raise a broader conflict concern relying on the Syphard Report. They argue that class members' own negligence in protecting their homes or storing dangerous materials may be found to have contributed to the spread of the Fire to their own property or to the property of others.

[185] I do not find that these concerns destroy the level of class cohesion required at this stage:

- a) All class members still have an interest in determining the initial cause of the Fire;
- b) All class members still have an interest in obtaining findings of liability against the present defendants;
- c) Although Dr. Syphard identifies possible issues that may emerge, Dr. Senez opines that such conflicts will likely be rare, given that the tremendous force of this Fire is such that much of the damage may have been inevitable;
- d) The plaintiff indicated that they were prepared to confirm in the notice that they undertake not to pursue claims that other class members were negligent and would advise class members of this concession expressly

through the notice. As such, any class member who believes that there are viable claims against their neighbours will be free to opt out;

- e) The CPA is sufficiently flexible to allow for such individual responsibility issues to be addressed during the individual issues phase of the litigation;
- f) Although Hinkson C.J. identified this as a concern in the FCD, it should be noted that he only indicated that the concern made him “hesitant” to accept the proposed class definition: FCD at para. 216; and
- g) I do have some concern that, in arriving at this hesitancy in the FCD, the Court relied on the decision in *Nixon v. Canada (Attorney General)*, [2002] O.J. No. 1009, 21 C.P.C. (5<sup>th</sup>) 269 (S.C.). The key problem in *Nixon* was a concern that certain members of the class may have started the fire: para. 3. That is not the allegation here. Furthermore, rather than reject certification outright, decisions have addressed this issue by ensuring that any identified wrongdoers are excluded from the class: *Hay v. Mundi 910 Victoria Enterprises Ltd.*, 2022 BCSC 2127 [*Hay*] at paras. 56–62; *Carillo v. Vinen Atlantic S.A.*, 2014 ONSC 5269 at para. 55; *Blair v. Toronto Community Housing Corporation*, 2011 ONSC 4395 at paras. 16–18, 40.

[186] There are aspects of the class definition that must be amended in light of my findings regarding the causes of actions that may proceed. Specifically, the Relational Economic Loss Subclass should be removed. The Subrogation Subclass should also be removed, given the plaintiff’s concession that the insurance subrogation issues should be considered later.

[187] I also find that it should be made somewhat clearer that there is one overarching class rather than merely a collection of separate subclasses. I have altered the introductory language to make that clear.

[188] I accept the use of a “claims made” definition proposed in this case, particularly as it is tied to losses at a particular time in a particular place. This adds

helpful objectivity to the assessment necessary to recover at the individual issues stage of the proceeding.

[189] These adjustments leave us with the following certifiable definition:

For purposes of the class definition below, the “Lytton Fire” is defined as “the fire designated K71086 by the BC Wildfire Service (“BCWS”) that started on June 30, 2021 in or around the village of Lytton”, and the “Lytton Fire Area” is the geographic area indicated in the BCWS public information map of August 19, 2021.

The class includes all natural or legal persons who claim to have suffered losses because of the Lytton Fire, and who fit within one or more of the following subclasses:

- (i) all natural persons who claim to be the spouse, parent or child of a person who died on June 30, 2021, as a result of the Lytton Fire (the “Wrongful Death Subclass”);
- (ii) all natural or legal persons who claim to have suffered loss of real property in the Lytton Fire Area, or loss of use or enjoyment of real property in the Lytton Fire Area, which they owned, had an interest in, or occupied, which has not been indemnified by insurance, as a result of the Lytton Fire (the “Real Property Subclass”);
- (iii) all natural or legal persons who claim to have suffered a loss of personal property in the Lytton Fire Area, as a result of the Lytton Fire (the “Personal Property Subclass”); and
- (iv) all natural persons who claim to have suffered personal injuries while in the Lytton Fire Area, as a result of the Lytton Fire (the “Personal Injury Subclass”);

but not including:

- (i) the defendants, and the directors and officers of each, and their immediate family members;
- (ii) counsel to all parties in this proceeding, and their immediate family members;
- (iii) judges or associate judges presiding in this proceeding at any time, and their immediate family members;
- (iv) Chief Niakia Hanna and the Lytton First Nation;
- (v) Chief Fred Sampson and the Siska Band; and
- (vi) Chief Christine Walkem and the Cook’s Ferry Indian Band.

## 5. Common Issues

[190] Commonality is the “central notion of a class proceeding”: *Pro-Sys* at para. 106. Common issues are the unifying force that justifies the existence of a class

proceeding, because “individuals who have litigation concerns ‘in common’ ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings”: *Pro-Sys* at para. 106. To be common, “the class members’ claims must share a substantial common ingredient”: *Pioneer Corp. v. Godfrey*, 2019 SCC 42 [*Pioneer*] at para. 104; *Pro-Sys* at para. 108.

[191] Common issues must be determinable on a class-wide basis and “cannot be dependent upon individual findings of fact made with respect to each class member”: *Kirk BCCA 2019* at para. 65. In other words, a common issue must be answerable with “common proof” to avoid “duplication of fact-finding or legal analysis”: *Dutton* at para. 39. The resolution of a common issue must be necessary to the resolution of every class member’s claim: *Pioneer* at para. 104; *Pro-Sys* at para. 108.

[192] The plaintiff proposed the common issues set out in Schedule A. I review below the issues that have not already been negated by my findings on the available causes of action.

**a) Causation Issues**

[193] The first two proposed common issues are as follows:

1. Did heat, sparks or other incendiary material resulting from the passage of Train 731 cause the Lytton Fire?
2. Did the acts or omissions of one or both of the defendants cause or contribute to the Lytton Fire?

(collectively, the “Causation Issues”.)

[194] The plaintiff accepts that if the Causation Issues cannot be certified, the certification application should fail. They are the core common issues from which the balance of the analysis flows.

[195] The defendants do not seriously contest that the Causation Issues have the capacity to be considered in common in the abstract. Rather, their primary argument

is that the issues are not supported by “some basis in fact”—essentially, they argue that “there is no there there”.

[196] The defendants rely heavily on the fact that Hinkson C.J. concluded in the FCD that the prior evidentiary record failed to establish some basis in fact for similar causation issues. Hinkson C.J. concluded the evidence boiled down to “the sequence of [Train 731] passing and [Mr. Duncan] seeing smoke shortly thereafter”. The defendants assert that not enough has changed since the FCD to warrant a different outcome.

[197] I disagree. The record before me is more extensive in terms of the documentary and expert evidence.

[198] I place particular reliance on the Senez Reports, which were not before Hinkson C.J. Expert opinion is evidence: *Mohan* at 23. It is particularly relevant and helpful evidence in a class certification hearing, as it illustrates the likely path of the litigation. On certification, the court’s challenge is to project the probable future course of the litigation. Is it going to break down and devolve into individual hearings that may overwhelm available court processes? Or is it the type of case largely controlled by a few key common issues? Expert evidence can be extremely helpful in this respect.

[199] In the present case, the parties effectively ran through a preview of their prospective causation arguments at trial, guided in large measure by the available expert evidence. The debate alone illustrated to me that there is “some basis in fact” to support the Causation Issues. There was enough to show that a reasonable contest could be had. The plaintiff may not succeed, as the defendants have strong arguments in their favour, but there is an observable path to resolution in the plaintiff’s favour as well.

[200] Here is the evidence that I find creates “some basis in fact” to support the Causation Questions:

- a) The risk of fire was at peak levels due to the extreme heat and wind on the day in question. These conditions created a situation in which the smallest error by the defendants could operate as a causal tipping point. To invoke a baseball analogy, the dangerous conditions put the plaintiff “on third base”. Did the plaintiff provide “some basis in fact” sufficient to bring their theory the rest of the way home to certification? I find that they did.
- b) As noted by Dr. Senez in his cross-examination, the NFPA identifies Railroad Operations as a potential cause of wildfires:

The operation of locomotives and other rail equipment can create competent ignition sources, including frictional heating of moving parts, exhaust particles, hot brake shoes, sparks created from metal strikes, overheated wheel bearings, and fires from derailments. New construction, repairs, cutting or grinding on rails, warning flares/devices, and many other operations associated with railroads can also create competent ignition sources for wildfires.
- c) There is evidence of local geographic risk factors around the Proposed Origin near the CN Track—including upslope terrain and strong, predictable prevailing winds.
- d) Smoke from the Fire was first seen by Mr. Duncan only approximately 2–5 minutes after Train 731 passed the Proposed Origin. Although Hinkson C.J. found that the temporal connection was not enough on its own, it is still undoubtedly a notable factor in the plaintiff’s favour.
- e) There is some evidence that Train 731 was exceeding CN’s internal speed limit during its travel through Lytton. The defendants argue that it was only marginally over their limit, less than a mile per hour. But CN established the limit. If they felt that the fire risk could be properly mitigated at 26 mph rather than 25 mph, they would presumably have said so.
- f) There is some evidence of winds discharging coal dust onto at least one of the locomotives and also into the air around Train 731 as it passed the Proposed Origin.

- g) There is evidence that some of the wheels on Train 731 were at elevated heat levels after passing through the Proposed Origin.
- h) There is some evidence of plant material growing up around the area of the Proposed Origin.
- i) There are photographs taken within 13 minutes of Mr. Duncan's observation of smoke that do not show any evidence of fire downslope to the river from the Proposed Origin, which tends to undercut the theory that the pedestrians in the area caused the Fire.
- j) There are photographs taken from Lytton within 13–16 minutes of Train 731 passing the Proposed Origin that are roughly consistent with the Proposed Origin.
- k) There is substantial evidence of burning at the Proposed Origin.
- l) Although his investigation is not complete, Dr. Senez does provide the Court with the following opinion evidence:

Section 27.10.1.6 of NFPA 921 suggests railroad operations "can create competent ignition sources, including frictional heating of moving parts, exhaust particles, hot brake shoes, sparks created from metal strikes, overheated wheel bearings, and fires from derailments." The TSB investigation summary does not appear to consider the spectrum of possibilities, nor does it consider the wind conditions and amount of raised coal dust, which is combustible, observed in the video. Nevertheless, the currently available circumstances, area of fire origin, and timing of the fire align best with a causation scenario associated with the railroad operations.

[201] For their part, the defendants suggest that Mr. Duncan's observations belie the Railway Operations theory because he places his first observations of the Fire well away from the Proposed Origin near the CN Track. But the evidence is not as clear as they suggest. While he does put his first observation away from the Proposed Origin, his first observation was of smoke, not fire. Smoke can obviously move around rapidly depending on available air currents. This was a complex geographic area to analyze in that respect, as Dr. Senez points out. Mr. Duncan

appears to place his first sighting of fire closer to the Proposed Origin. In his cross-examination, the key exchange went as follows:

- Q Do let's - where the first page of Exhibit 8, and I've just put a circle on there and I'll put a one, and that's the circle identified by one, us where you were standing to get a better look at the fire. Correct?
- A Better look at the smoke.
- Q Yes, the....
- A I didn't see fire until it's already getting over to here and along here towards us, behind this bush...
- Q Okay.
- A ... because on the side of this bush, there's a Lytton Village sign that said, 'No Dumping' and it's not a place to dump your garbage and there was a big sign there that said that, and that's where the fire was starting to present itself right here. Because all through here was just all smoke. We just seen smoke.

[202] The defendants argue that all or part of the Senez Reports are inadmissible (specifically, the TSB report photograph), unreliable (because they relied on the "Fire Dot", the point identified on the BCWS' public-facing website as the starting point of the Fire), unhelpful (the eyewitness photographs and videos taken from a distance), and/or include evidence that was already before Hinkson C.J. (the TSB report and the eyewitness photographs). I do not find that those concerns are sufficient to undercut the evidence reviewed above:

- a) the substance of the consideration of the TSB report in the Senez Reports is aimed at determining whether the existing public investigations had been sufficient to determine the origin of the Fire conclusively, and the Senez Reports do not purport to determine any material facts based on the TSB report;
- b) Dr. Senez does not simply adopt the BCWS' point of origin (or "Fire Dot"). Dr. Senez analyzes it (to the extent possible at this early stage), then concludes (with all the qualifications appropriate to this early stage) that the Fire Dot is "in general alignment" with, or "corroborated" by the

available evidence, allowing him to propose a “potential” and “general” point of origin that should be investigated further; and

c) Hinkson C.J. did not have the Senez Reports.

[203] The defendants suggest that Dr. Senez’s opinion is flawed because he does not explain how the Fire would have spread as it did under the prevailing wind conditions. In particular, they express confusion about why, in at least one illustration, Dr. Senez has the Fire running down the above hill towards the Proposed Origin. However, as noted above, during cross-examination, Dr. Senez pointed out the complexity of the area's wind patterns, which could, in turn, explain unusual fire spread patterns.

[204] The defendants say that the timing evidence is the same as that which Hinkson C.J. already found insufficient. Moreover, they suggest that the plaintiff is being inconsistent when they attempt to rely heavily on Mr. Duncan’s timing estimate of “two to five minutes” as if it were precise, but then at the same time try to undermine his distance estimates and observations as to where he first saw the Fire. However, after reviewing Mr. Duncan’s evidence myself, I find that while his timing evidence is reasonably clear, his location evidence was difficult to follow or understand. What the state of the evidence does tell me is that we need a trial, where the Court will see Mr. Duncan give his evidence, and where counsel will be able to be more precise in their examinations about where and when he saw smoke and fire. I am not prepared to say that the difficulties in analyzing Mr. Duncan’s evidence should drive the class from the judgment seat. Mr. Duncan’s evidence is not (obviously) inconsistent with plaintiff counsel’s instructed assumption to Dr. Senez that smoke developed from behind the track north of the bridge, followed by flames.

[205] The defendants argue that they have negated any possibility that Railway Operations caused the fire. They summarize this point in their following chart:

<b>Claim para.</b>	<b>Causal Theory</b>	<b>Evidence</b>
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- 23.a. Sparks or combustible particles ejected from the exhaust systems of one or more of the 731 Train’s three locomotives.

There is no evidence of any sparks of combustible material being ejected from the exhaust systems of any one or more of the locomotives, notwithstanding Mr. Duncan’s eyewitness account, multiple roll-by inspections by CN personnel, and video from the locomotives and several pedestrians in the area.
  
- 23.b Heat, sparks or flames produced by overheating resistors in the dynamic systems of one or more of the 731 Train’s three locomotives.

There is no evidence to support any aspect of this theory, notwithstanding Mr. Duncan’s eyewitness account, multiple roll-by inspections by CN personnel, and video from the locomotives and several pedestrians in the area.
  
- 23.c Sparks generated by metal-on-metal friction between the train’s wheels and the curved rails.

There is no evidence of any sparks having emanated from the contact between the wheels and the rails as the 731 approached and travelled through Lytton. Moreover, the 2022 Briggs Affidavit confirms that no wayside detectors displayed any heat alerts as 731 travelled through Lytton (paras. 38-41, and Exhibit F). Further, 731 did not apply its air brakes through Lytton.
  
- 23.d Sparks or hot metal falling from the train’s brake shoes.

There is no evidence of any sparks or hot metal falling from the brakes as 731 travelled through Lytton. Moreover, the 2022 Briggs Affidavit confirms that no wayside detectors displayed any heat alerts as 731 travelled through Lytton (paras. 38-41, and Exhibit F). Further, 731 did not apply its air brakes through Lytton.
  
- 23.e Heat or fragments of hot metal released from the train’s wheel bearings.

There is no evidence of any sparks or hot metal falling from the wheels as 731 travelled through Lytton. Moreover, the 2022 Briggs Affidavit confirms that no wayside detectors displayed any heat alerts as 731 travelled through Lytton (paras. 38-41, and Exhibit F).

23.f	Sparks from electrical wiring in one or more of the 731 Train's three locomotives and 152 cars.	There is no evidence of any electric wiring issues in any of the locomotives or rail cars. Moreover there is no evidence of sparks, per above.
23.g	Sparks caused by metal dragging or falling from the train.	There is no evidence of any metal dragging or falling from 731, let alone any sparks from such metal. The 2022 Briggs Affidavit confirms that no dragging equipment detectors were triggered by 731 as it travelled through Lytton (paras. 43-44).

[206] I find that the defendants are “hard marking” the plaintiff on their theory at this early stage. It is possible to succeed in a fire case even if no eyewitness saw the initial sparks fly. Indeed, in most fire cases, there is no such origin eyewitness evidence available. At trial, the Court will be entitled to draw inferences about the initiation of the fire from surrounding circumstances. Regarding the negligence points, I must consider that the plaintiff has not had access to discovery from the defendants. The plaintiff has sufficiently supported the negligence concerns they raise. The detailed evidence will come later.

[207] The defendants note that the wheel temperature allegation rests on evidence from Mr. Briggs that was already before Hinkson C.J. Furthermore, they say that contrary to the plaintiff's assertions, the temperature readings were not sufficient to trigger any alarms for Train 731's operators or for remote radio control operators in Edmonton. Finally, the wheels in question were on the left side of Train 731, while Dr. Senez and the plaintiff say the Fire started on Train 731's right. That is all correct, but:

- a) While not high enough to trigger an alarm, the measurement was certainly elevated. At trial, the Court will have to determine how and why it became elevated between the two locations on either side of the Proposed Origin; and
- b) The equipment only records the temperature of the hottest wheel, so the others may have also been elevated to similar temperatures.

[208] The defendants propose alternate causes they suggest are sufficient to drive the relative weight of the plaintiff's Railway Operations theory below the "some basis in fact" level. These include that the Fire was caused either by (1) a vehicle fire in the parking lot to the north of the Proposed Origin, (2) pedestrians travelling to the south of the Proposed Origin, (3) glass bottles, or (4) the spread of the nearby George Road fire. I find that none of these alternatives rests on an evidentiary footing heavy enough to push the plaintiff's Railway Operations theory down below the "some basis in fact" level.

[209] There is no doubt that vehicles can create ignition sources hot enough to ignite. But what we know about the application of a car fire theory here is that:

- a) Mr. Duncan first spotted smoke to the south, further away from the parking lot than the Proposed Origin;
- b) No other investigative body has yet raised the prospect that a vehicle could have been the cause;
- c) The defendants have provided no evidence from owners of the vehicles to suggest that there was a problem with their car that could have started the Fire; and
- d) Dr. Senez specifically addressed this potential cause in his cross-examination, stating, "There's no suggestion that the car initiated the fire that spread. There is no indication that the location of the origin was near a car."

[210] There is also no doubt that pedestrians smoking cigarettes can cause wildfires. However, what we know about the pedestrian theory is that:

- a) There is no evidence from any of the pedestrians that they were smoking (or engaging in other activities that create a risk of fire);
- b) The area traversed by the pedestrians showed little evidence of burning; and

- c) There is a reasonable prospect that the RCMP interviewed the pedestrians, but there is no evidence of a confession or incriminating information having been gathered through the process. What we do know is that the RCMP decided not to lay charges against any pedestrian.

[211] While 24 glass bottles were in the vicinity, there is no evidence that the necessary refraction and reflection of sunlight occurred.

[212] Regarding the George Road fire, aside from its relative proximity, there is no material evidence that it became the Fire at issue in this case at the relevant time.

[213] Recall that both parties have the opportunity (and responsibility) to provide all facts relevant to certification. If the defendants had more to offer on these alternative theories to support their position on certification, this would have been the time.

[214] I am comforted in my decision that the plaintiff has cleared the “some basis in fact” threshold to support the trial of a causation question by the following fire decisions on the merits. These decisions show what level of evidence is going to be required at the end of the day, let alone the level of proof needed for the much lighter “some basis in fact” standard:

- a) In *Canada Southern*, the plaintiff property owner was able to sustain a jury ruling in her favour on the merits of her fire damage claim against the defendant railway, relying on evidence not overwhelmingly stronger than the evidence the plaintiff has already put on the table here. A group of boys saw sparks coming out of the train's smokestack at the station, over 100 feet away from the plaintiff's home;
- b) In *Canadian Pacific Railway Co. v. Kerr*, 49 S.C.R. 33, 1913 CanLII 39, the Supreme Court of Canada upheld a finding that CPR was responsible for a fire in East Kootenay, British Columbia that had allegedly been sparked from the engine of a train operated by CPR on its tracks. As Hinkson C.J. noted in the FCD, the inference that the train had caused the

fire was based on, among other factors, the fact that the fire occurred during "an unusually hot summer and a consequently parched surface in the immediate neighbourhood of the railway track". The key witness only saw the fire ten minutes after the train had passed. No one saw the actual genesis of the fire. Chief Justice Fitzpatrick concluded as follows:

The origin of the fire is fixed by the witness Anderson beyond dispute. The material elements of fact from which the inference of negligence was drawn were: an unusually hot Summer and a consequently parched surface in the immediate neighbourhood of the railway track. The engine went by the place at which the fire was first seen at ten minutes to two in the afternoon, when there was no fire. Ten minutes afterwards the fire was seen by Anderson, and five minutes later by the engineer of the next train. I think the fair inference was drawn by the judge and we should not interfere.

[215] I am further comforted by the decision in *Kirk BCCA 2019* that a similar causation question was appropriate. As the Court stated, "[t]he question of whether the conduct of one or more of the appellants caused or contributed to the spill is a common issue, the answer to which may materially advance the litigation for the class": at para. 72.

[216] As I indicated above, I have applied the "some basis in fact" test directly, without reliance on the various shading of the test that the courts have grappled with subsequent to its establishment. If I am found to be wrong in this approach, I would confirm that the evidence is also sufficient to establish that the plaintiff's theory:

- a) "will not founder";
- b) has "some minimal evidence supporting the existence of a claim";
- c) is beyond "mere speculation";
- d) is "genuine";
- e) is not "unfounded or frivolous";
- f) has an "air of reality";

- g) is “plausible”;
- h) is “sufficiently credible”;
- i) survives more than “superficial scrutiny” or “symbolic scrutiny”; and,
- j) last, but not least, “actually exists”.

[217] Beyond the “some basis in fact” evidentiary challenge to the Causation Issues, the defendants argue that all the proposed common issues are inherently individual. I disagree specifically regarding the Causation Issues. Every class member is interested in knowing what caused this Fire.

**b) Negligence Issues**

[218] The plaintiff proposes the following common issues on negligence:

- 3. Did either defendant owe a duty of care to Class Members?
- 4. What standard of care was required of the defendant(s)?
- 5. Did either defendant breach the standard of care?
- 6. If yes, did the breach(es) cause or contribute to the Lytton Fire?

[219] Once again, I find that these issues are common. They are supported by the same evidence outlined for the Causation Issues, supplemented by information provided by the rail safety engineer Ian Naish. Mr. Naish identifies several issues that could be considered further in a common issues trial, such as the effect of vegetation near the Proposed Origin and the speed of Train 731. These types of negligence issues are commonly certified in mass tort cases: *Hay* at paras. 72–73, 78. They can be resolved by examining the conduct of the defendants rather than that of each individual class member. There is at least “some basis in fact” to think that the class could be successful at establishing duty and breach for the entire class. The fact that the Court may eventually decide that the duties are owed to a more limited group does not invalidate the common issue. The plaintiff has done enough to justify at least an attempt to seek a global overarching finding of duty and breach.

**c) Private Nuisance Issues**

[220] Proposed common issues 7 and 8 relate to the private nuisance claim:

7. As a result of the [Fire], was there an order or orders issued to restrict access to, or use of, real property in and around Lytton?
8. If so, were the terms of the order(s) such that use or enjoyment of real property to which it applied was substantially, non-trivially, and unreasonably interfered with?

[221] I agree with the plaintiff that these are proper common issues. They are similar to those approved in *Kirk BCCA 2019* at paras. 78–79, 81.

[222] The defendants argue that if these issues are certified, they should be limited to subclasses with real property interests. Given that the plaintiff has met the standard to maintain a broader scope of claim, I do not view it as appropriate to narrow the framing of the common issue at this time. There is no conflict between the class entitled to recover under this cause of action and the other causes of action, reducing the need for separately defined subclass issues.

**d) The Rule in *Rylands v. Fletcher***

[223] The following issues relate to the claim pursuant to *Rylands v. Fletcher*:

11. Did CN engage in a non-natural use of land in CN's right of way in Lytton?
12. Did CN bring onto its right of way something likely to cause harm if it escaped?
13. If so, did that thing escape from CN's right of way?
14. Are the following types of losses compensable under the rule in *Rylands v. Fletcher*?
  - a. Losses arising from personal injury or death;
  - b. Losses arising from damage to real property, including loss of use and enjoyment;
  - c. Losses arising from damage to personal property; and
  - d. Relational economic losses to a worker arising from damage to real property at which they worked or personal property they used in the ordinary course of their employment?

[224] The plaintiff has pleaded that theory of liability only against CN, which owned and controlled the land on which the train travelled through Lytton. It is not pleaded against CP.

[225] CN takes no position on the potential commonality of proposed issues 11–13 (a reasonable partial concession given the principles set out in *Kirk BCCA 2019* at paras. 85–88) but says that these issues alone are insufficient to justify certification. However, as will be seen above and below, I have found that there is a wider list of common issues that can properly be certified. There is enough work that can be done in common to justify the class action effort. I am supported in this view by the decision of Justice Masuhara in *Kirk Executive Flight Centre Fuel Services, 2021 BCSC 987 [Kirk BCSC 2021]* at para. 31.

[226] CN does suggest that, if certified, issues 12-13 should be particularized so the parties know what “thing” is alleged to have escaped CN’s land. I agree. The plaintiff outlines in their claim that the escaped “things” included exhaust, oil, sparks, heat and particulate coal matter. The common issue should be particularized in that way.

[227] CN complains that issue 14 is so “watered down to avoid the inherently individual nature of damages assessment that it is meaningless.” I find that allowing a court to outline the categories of damages that could be claimed is a meaningful advancement in the prosecution of the claim, even though the plaintiff (properly) does not suggest that the damages themselves can be determined at the common issues stage.

**e) Apportionment of Liability**

[228] Proposed common issues 15–16 are as follows:

- 15. If both defendants are found to be at fault for the [Fire], is any resulting liability joint and several?
- 16. If both defendants are found to be at fault, what degree of fault should be assigned to each of them?

[229] I agree with the defendants that neither of these issues should be certified at this time, because they presume that there is no prospect of a contributory

negligence finding. In British Columbia, contributory negligence on the part of the plaintiff severs joint and several liability amongst any at-fault defendants: *Negligence Act*, R.S.B.C. 1996, c. 333, s. 4; *Alragheb v. Francis*, 2021 BCCA 457 at para. 29. The prospect of contributory negligence may be remote (as Dr. Senez suggests, based on the overwhelming force of the Fire), but at this stage, I cannot say that it is non-existent.

[230] I find additional support for this conclusion in Hinkson C.J.’s rejection of a substantially similar common issue in the FCD at para. 333.

**f) Aggregate Damages**

[231] Issues 17 and 18 ask whether aggregate damages can be certified:

17. Did all class members who were forced to flee and evacuate their homes as a consequence of the [Fire] share a common experience of physical inconvenience and distress that justifies an award of damages pursuant to section 29(1) of the CPA (the “Common Experience Damages”)? If so, in what amount?

18. Can some or all of the class members’ damages in private nuisance for loss of use and enjoyment of property be assessed in the aggregate pursuant to section 29(1) of the CPA? If so, in what amount?

[232] I find support for Issue 17 in Justice Masuhara’s decision in *Kirk BCSC 2021*, which certified an aggregate damages issue related to a nuisance claim arising from the impact of a single evacuation and “do not use” water orders, based on the allegedly common experience of those orders.

[233] The defendants argue that this case is distinguishable because the plaintiff here seeks to recover aggregate damages based on multiple orders rather than a single order. However, I note that Justice Masuhara’s analysis is not expressly tied to the fact that there was only a single evacuation order:

[26] Certification of aggregate damages does not amount to a commitment to awarding aggregate damages. The criteria under s. 29 need only be met to award such damages, not to certify them as a common issue. Though I have expressed my skepticism about the nuisance claim brought on a class-wide basis, if the plaintiff succeeds in establishing liability under that cause of action, the appropriateness and amount of aggregate damages would be in issue. I find that the theory of damages inherent to the plaintiff’s claim in

nuisance for loss of a right, while perhaps not fully developed, is sufficient to satisfy the “methodology” requirement referenced by the defendants.

[234] The fact of multiple orders does not destroy the initial commonality of the question. Rather, it just extends the length of the common issues trial and could drive a more refined answer.

[235] The defendants also argue that, unlike *Kirk BCSC 2021*, no methodology supports an aggregate damages calculation. They say that the plaintiff’s damages expert, Mr. Stevens, does not address several difficult issues, such as:

- a) the individualized nature of his proposed categories of damages (real and personal property losses, business losses, and damage to public infrastructure);
- b) the requirement under his proposed methodology for “detailed and dedicated” forms for different parties suffering loss; and
- c) the failure to address the necessary factors of physical inconvenience and loss of enjoyment in calculating aggregate damages.

[236] I find that the two issues can be resolved in common. I see nothing materially distinguishable in the relatively thin discussion of the expert evidence on this point in *Kirk BCSC 2021* (see para. 26), appeal dismissed *LaSante v. Kirk*, 2023 BCCA 28 [*Kirk BCCA 2023*], and I find additional support in *Abbotsford (City) v. Mostertman*, 2024 BCSC 906 at paras. 128–130. As the Court of Appeal stated in *Kirk BCCA 2023*:

[84] I see no error in the judge’s observation that the criteria of section 29(1) of the *CPA* need only be met to award aggregate damages, not to certify them as a common question. Indeed, that is inherent in this Court’s order remitting the question of “damages in the aggregate for the evacuation” to the chambers judge (*Kirk CA* at para 50). That was in the context of this Court’s conclusion (*Kirk CA* at para 48) that one of the three kinds of damages being advanced in this litigation comprises “loss of use and enjoyment of property as a result of the evacuation and contamination”.

**g) Residual Issues**

[237] Finally, the plaintiff advances three miscellaneous issues:

19. Are the members of the Government Subclass entitled to recover from one or both of the defendants amounts provided to third parties on a discretionary basis as disaster relief or emergency provision?

21. Was the conduct of one or both of the defendants sufficiently reprehensible to warrant punishment by an award of punitive damages?

23. Should one or both of the defendants pay the costs of administering and distributing any monetary judgement and/or determining eligibility and/or the individual issues and if so, who should pay what costs and in what amount?

[238] Issue 19 falls away with my decision not to certify a Government Subclass.

The existence of the issue highlights the advisability of excising them from the class given that no other class members have an interest in the answer in terms of issue 21, to certify punitive damages as a common issue, there must be “material beyond the pleadings that establish[es] a basis in fact” for awarding them: *MacKinnon v. Pfizer Canada Inc.*, 2022 BCCA 151 at para. 7.

[239] In *Kirk BCCA 2019*, the Court of Appeal rejected a punitive damages issue where the facts pleaded were that the defendant made a mistake with disastrous consequences, and that the various appellants failed to prevent the mistake or to respond adequately afterwards. The Court concluded that none of this described conduct could be described as high-handed, oppressive, or malicious: at para. 140.

[240] I agree that the same conclusion should be reached here. Pointing to the weather conditions and extreme heat that preceded the Fire is not enough. Those conditions may inform the standard of care, but this has no bearing on whether the defendants were high-handed, oppressive, or malicious.

[241] In relation to issue 23, I find it is far too early to certify the issue regarding responsibility for administration costs. This may be a point that can be revisited at a later date, but there are too many paths this litigation might follow at present to predict how such an issue should be properly framed.

## 6. Preferable Procedure

[242] To determine whether a class action is the preferable procedure, the Court must consider all relevant factors, including those set out in s. 4(2) of the *CPA*, which asks whether:

- a) questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
- b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
- c) the class proceeding would involve claims that are or have been the subject of any other proceedings;
- d) other means of resolving the claims are less practical or less efficient;
- e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[243] The preferability analysis must be conducted “through the lens of the three principal goals of class actions, namely judicial economy, behaviour modification and access to”: *Fischer* at para. 22.

[244] In *Scott v. TD Waterhouse Investor Services Inc.*, 2001 BCSC 1299 at paras. 115–116, Madam Justice Martinson summarized the practical advantages of class proceedings, all of which apply to the plaintiff’s proposed class action:

- a) case management is by a single judge (*CPA*, s. 14);
- b) the class is able to attract sophisticated lawyers through the aggregation of potential damages and the availability of contingency fee agreements (*CPA*, s. 38);
- c) class members may apply to participate in the class action (*CPA*, s. 15);

- d) a formal notice program alerts all interested persons to the status of the litigation (*CPA*, ss. 19-23);
- e) simplified structures and procedures for individual issues can be designed by the court (*CPA*, s. 27);
- f) the court approves any settlement (*CPA*, s. 35);
- g) class members are protected from adverse cost awards during the common issues stage of the case (*CPA*, s. 37);
- h) the limitation period applicable to the claim may be tolled for the entire class (*CPA*, s. 39); and
- i) orders and settlements accrue to the benefit of the entire class without resorting to principles of estoppel (*CPA*, s. 26).

[245] In *Jiang v. Peoples Trust Company*, 2017 BCCA 119, Chief Justice Bauman described the “wealth of judicial tools” available in ss. 12, 27-28 of the *CPA* to “address individual issues in a timely and practical manner and, importantly, in ways that promote the objectives of access to justice, judicial economy and behaviour modification that at bottom, are what the *CPA* is all about encouraging”: at para. 112. Chief Justice Bauman summarized the purpose and effect of these powers in *Jiang* at para. 118:

... In the individual issues stage the court enjoys access to many tools designed to assist in the timely and proportionate resolution of any issues. This is a critical advantage to the class proceeding and it is by the imaginative use of these tools that the objectives of the class proceeding regime – access to justice, judicial economy and behaviour modification – will be realized.

[Emphasis added.]

[246] In terms of preferability, I am concerned that a class proceeding may be the only tool available to realistically have a chance of achieving the three goals of class proceedings. Over more than four years since the fire, two public bodies have conducted investigations, but neither has shared its detailed findings with class

members. Multiple non-class actions were filed by individual residents, insurers, First Nations, and public bodies, and, whether under joint case management or not, but not one has been resolved on its merits.

[247] In declining to certify the class proceeding proposed in the FCD, Hinkson C.J. did find that many of the proposed common issues were certifiable “if various deficiencies were remedied”: at para. 374. He accepted that, if the deficiencies in the common issues proposed in that action were fixed, “a class action would be more procedurally efficient than other processes given that the common issues proposed would need to be settled in individual actions, regardless”: at para. 389. I find that the various deficiencies have been remedied to such an extent that a preferability finding can now be made in the plaintiff’s favour.

[248] In rejecting the defendants’ submission that multiple joinder actions were preferable because they would allow for pooling of resources, shared lawyers, and joint hearings, Hinkson C.J. found that:

[388] ... A class proceeding would accomplish the same aims and without the complexity of navigating separate actions that then need to be joined.

[249] I agree.

[250] Hinkson C.J. also found “no evidence” to suggest that a significant number of Lytton residents would want to control their own actions and held that the speculative prospect that some individuals might choose to do so did not weigh against certification. Further, Hinkson C.J. concluded:

[378] ... It could frustrate access to justice and judicial economy to require the residents of Lytton to bring individual claims for losses allegedly flowing from the same misconduct.

[251] Hinkson C.J. also noted as follows:

[393] ... [I] find that behaviour modification could be encouraged through a class action, even if railways are already regulated.

[252] Again, I agree with these findings.

[253] The defendants argue that the preferability test is not met. They note that Hinkson C.J. accepted only that a class action “could” be preferable if the plaintiff remedied the identified defects. However, as noted above, the plaintiff has addressed many of the defects identified by Hinkson C.J., and I have trimmed other aspects of the claim to make it more manageable.

[254] The defendants also lean once again on the potential for contributory negligence claims, either by class members against other class members, or in relation to an individual class member's own failure to properly protect their own property. However, I find that this does not undercut the preferability of the matter proceeding as a class action:

- a) Dr. Senez opines that the force of the Fire was such that these issues are likely to be reduced from what might have been the situation in a less forceful fire that required other contributions to push it forward. In other words, the destruction of property may have been so inevitable in this case that there will be no realistic way for the defendants to establish contributory negligence causation in many cases;
- b) The plaintiff is willing to expressly forego any prospect of one class member seeking to recover against another class member;
- c) Claims of contributory negligence will have to overcome the law in relation to pre-existing conditions: See *Oakville Storage & Forwarders Ltd. v. Canada National Railway*, 3 O.R. (3d) 1 at 28–29, 1991 CanLII 7334 (C.A.) at paras. 85-89; and
- d) Even if contributory negligence is found to be an individual issue in any cases, the CPA is designed to handle such situations with the array of tools identified above. I do not see that these individual issues will predominate over the core common issues, which should be considered only once and for all.

**7. Representative Plaintiffs**

[255] The defendants advance a relatively *pro forma* challenge to the ability of Ms. Moiseiwitsch and Mr. Spinks to serve as representative plaintiffs, on the grounds that the claims they seek to advance collectively are too individualized for any person to represent the entire class. I have already addressed this concern in my analysis of the class definition, common issues and preferability. In light of my conclusions on those points, I find no residual concerns regarding these individuals serving in this role. I also find that their proposed litigation plan is adequate at this stage.

[256] The defendants also took issue with Wawanesa's appropriateness as a class representative. However, in light of the plaintiff abandoning their effort to have the insurance subrogation rights addressed as initially proposed, this issue has also fallen away.

**C. A Final Word Regarding the FCD**

[257] I have certified this case notwithstanding that Hinkson C.J. did not do so in the FCD.

[258] The defendants argue that parties to a certification decision cannot simply re-litigate the merits of a decision that has not been successfully appealed. They note that where new information is relied on to challenge such an earlier order, “that evidence must meet the strict standard to any attempt to re-litigate a final order”. The court must determine whether (i) the new evidence, if presented at first instance, would probably have changed the result; and (ii) the new evidence could have been obtained before the decision at first instance. While I accept these general principles, I do not find that the FCD prevents me from reaching the conclusion set out above.

[259] Although I have not come to the same final conclusion as Hinkson C.J. did in the FCD, as I have noted at various points throughout this judgment:

- a) Hinkson C.J. allowed for the possibility of a different result in the future by providing that the plaintiff could amend the pleading and return. He stated:

[409] In summary, I find that the plaintiff's pleadings do not meet the requirements of s. 4(1)(a) of the CPA. This, on its own, is fatal to his certification application. I have nonetheless considered the balance of the parties' submissions and found various deficiencies with the class definition, common issues and the litigation plan. Given these findings, it was premature to consider whether a class action was the preferable procedure. Therefore, it may be possible to certify a class action if the plaintiff can cure the deficiencies in his pleadings.

[410] For these reasons, the plaintiff's application to certify the class action is dismissed on the present pleadings, but with leave to amend his pleadings.

- b) In the application before me, there is not simply an amended pleading in the same action, but:

- i. an entirely different and narrower pleading;
- ii. in an entirely different action;
- iii. brought by a new combination of counsel;
- iv. supported by a new evidentiary record; and
- v. providing updated and additional legal authority.

- c) The new evidentiary record is key, as Hinkson C.J. acknowledged when he stated:

[269] I do not doubt that there are many documents in the defendants' possession that could be material to the plaintiff's claims. However, I have grave concerns about the evidentiary record before me.

[Emphasis added.]

- d) Notably, Hinkson C.J. did not have the benefit of any of the comprehensive expert reports before the Court on this application, on which I have relied heavily. In particular, I do not believe that with the

benefit of the Senez Reports, Hinkson C.J. would have described the Railway Operations theory as mere “wishful thinking”: FCD at para. 270.

- e) It appears that Hinkson C.J. did not have the benefit of the BC Court of Appeal’s decision in *Mentor*, which was decided after argument occurred. I find that *Mentor* clarifies the extent to which a court should delve into the merits at certification: at para. 33. It is not clear to me that Hinkson C.J. would have reached the following merits-driven conclusions with the benefit of *Mentor*:

[67] Notably, neither Mr. Robitaille nor Mr. Woolf [the plaintiff’s experts in the FCD] opined as to what caused the Wildfire, let alone whether it was caused by an act or omission by any of the defendants...

[84] The sum of the opinions proffered in Mr. Robitaille’s and Mr. Woolf’s reports is that the two experts believe that it is possible to determine the cause of the Wildfire and that there is some information that could help determine whether the defendants played a role. The reports are led for the purpose of providing a factual foundation for the common issues in this case and that they can be proven in common. Again, neither report opines on what caused the Wildfire.

[85] I find that the four reports by Mr. Robitaille and the two reports by Mr. Woolf are inadmissible as they are not relevant...

...

[278] I find that there is no factual basis pleaded to allow the conclusion that the Wildfire was started by train C73152-29 or otherwise by CPR’s or CNR’s acts or omissions.

#### **IV. THE OVERLAPPING FIRST NATIONS INDIVIDUAL MEMBER CLAIMS**

[260] As noted, the proposed class excludes the three First Nations that have commenced their own litigation, as well as their Chiefs. As a result, the proposed class does not include the First Nations Claims and Communal Aboriginal Rights Claims brought in the names of the Chiefs. However, the class action does purport to include Individual Member Claims for members of those same bands.

[261] To address the overlapping actions involving the Individual Member Claims, CN seeks to rationalize matters by striking those claims from the First Nations Actions. CN argues that the Chiefs lack standing to bring the Individual Member Claims in a representative capacity.

[262] For their part, the plaintiff in *Moiseiwitsch* argues that it is preferable for these Individual Member Claims to be litigated within their class action.

**A. The Application to Strike the Representative Proceeding in Part**

[263] As noted, CN argues that the Chiefs lack the standing to advance the Individual Member Claims in a representative capacity. CP and the Attorney General of Canada support this position.

[264] Rule 20-3(1) of the *Supreme Court Civil Rules* provides for the ability to pursue a representative proceeding, as follows:

Representative proceeding

(1) If numerous persons have the same interest in a proceeding, other than a proceeding referred to in subrule (10), the proceeding may be started and, unless the court otherwise orders, continued by or against one or more of them as representing all or as representing one or more of them.

[265] The test for when a representative proceeding may be appropriately brought is historically derived from the decision of Chief Justice McEachern in *Kripps v. Touche, Ross & Co.*, 7 B.C.L.R. (2d) 105, 1986 CanLII 758 (S.C.), summarized in *Pasco v. Canadian National Railway Company*, 34 B.C.L.R. (2d) 344 at 353, 1989 CanLII 249 (C.A.) [*Pasco*], as follows:

There are three sub-issues under R. 5(11) and these have been set out quite clearly in the case *Kripps v. Touche, Ross & Co.*, a decision of Chief Justice McEachern (C.J.S.C. as he then was), No. C862031, 15th October 1986 [now reported (1986), 7 B.C.L.R. (2d) 105 at 108-109].:

Those questions are:

1. Is the purported class capable of clear and definite definition? ...
2. Are the principal issues of fact and law essentially the same as regards all members [of the class]? ... [and]
3. Assuming liability, is there a single measure of damages applicable to all members?

[266] CN argues that the Individual Member Claims must be struck, as they require greater levels of individual consideration than B.C.'s traditional representative rule can accommodate.

[267] The historically narrow approach to the representative rules in place across the country was expanded by the Supreme Court of Canada's decision in *Dutton*, where the Court stated:

[31] Absent comprehensive codes of class action procedure, provincial rules based on Rule 10, Schedule, of the English Supreme Court of Judicature Act, 1873 govern. This is the case in Alberta, where class action practice is governed by Rule 42 of the Alberta Rules of Court: ...

...

[34] Absent comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them.... However desirable comprehensive legislation on class action practice may be, if such legislation has not been enacted, the courts must determine the availability of the class action and the mechanics of class action practice....

...

[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, supra*, at pp. 726-27; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.), at paras. 10-11.

...

[43] The class action codes that have been adopted by British Columbia and Ontario offer some guidance as to factors that would generally *not* constitute arguments against allowing an action to proceed as a representative one. Both state 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: see *Ontario Class Proceedings Act, 1992*, s. 6; *British Columbia Class Proceedings Act*, s. 7; see also *Alberta Law Reform Institute, supra*, at pp. 75-76. Common sense suggests that these factors should no more bar a class action suit in Alberta than in Ontario or British Columbia.

...

[49] Other procedural issues may arise. One is notice. A judgment is binding on a class member only if the class member is notified of the suit and is given an opportunity to exclude himself or herself from the proceeding. This case does not raise the issue of what constitutes sufficient notice. However, prudence suggests that all potential class members be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out, and that this be done before any decision is made that purports to prejudice or otherwise affect the interests of class members.

[50] Another procedural issue that may arise is how to deal with non-common issues. The court retains discretion to determine how the individual issues should be addressed, once common issues have been resolved: see Branch, *supra*, at para. 18.10. Generally, individual issues will be resolved in individual proceedings. However, as under the legislation of British Columbia, Ontario, and Quebec, a court may specify special procedures that it considers necessary or useful: see Ontario *Class Proceedings Act, 1992*, s. 25; British Columbia *Class Proceedings Act*, s. 27; Quebec *Code of Civil Procedure*, art. 1039.

[51] The diversity of class actions makes it difficult to anticipate all of the procedural complexities that may arise. In the absence of comprehensive class-action legislation, courts must address procedural complexities on a case-by-case basis. Courts should approach these issues as they do the question of whether a class action should be allowed: in a flexible and liberal manner, seeking a balance between efficiency and fairness.

[Emphasis added.]

[268] British Columbia retained its representative rule while also implementing class action legislation. Where does that leave the test for a representative proceeding in this Province?

[269] CN argues that *Dutton's* expansion of the representative rule does not apply in BC, as it was unnecessary to broaden the rule given the implementation of comprehensive class proceeding legislation. I accept that the emphasized portions above support that interpretation, as they contrast the situation in BC with that in provinces that (then) had no class proceedings legislation. CN also relies on *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856 at para. 499, aff'd 2017 BCCA 401, aff'd 2020 SCC 5 [*Araya BCSC*], where the Court held as follows:

[499] Furthermore, in this province, the representative proceeding rule has been limited to a narrow class of cases such as claims made by those:

- (a) alleging a common statutory or collective right, for example aboriginal or language rights: *Campbell v. British Columbia (Forest*

*and Range*), 2011 BCSC 448; *Quinn v. Bell Pole*, 2013 BCSC 892 at paras. 17, 19 [Quinn]; *L'Association des parents de l'école Rose-des-Vents v. Conseil scolaire francophone de la Colombie-Britannique*, 2011 BCSC 1495 aff'd 2015 SCC 21 [Conseil scolaire];

(b) who seek a common statutory declaration or remedy such as game show participants, remedies under a collective agreement, owners in a housing development and the like: *James v. British Columbia*, 2007 BCCA 547 [James]; *Parker Cove Owners' Association v. Parker Cove Properties*, 2010 BCCA 100 [Parker Cove]; *Hayes v. British Columbia Television Broadcasting Systems Ltd.* (1990), 1990 CanLII 1525 (BC CA), 46 B.C.L.R. (2d) 339 (C.A.) [Hayes].

...

[511] While the *Dutton* criteria may be of assistance in considering the propriety of a representative action in this province, there are several significant differences between the two proceedings. They include:

(a) Rule 20-3(1) refers to the plaintiffs having “the same interest in a proceeding” whereas s. 4(1)(c) of the *CPA* uses the words “the claims of the class members raise common issues...”. Although “same interest” under the Rule has been held to mean “common interest” that is within the context of the assertion of a “common right” or “common grievance” normally arising from a “common origin” (see *Parker Cove* at paras.7, 9, 39). The “same interest” in my view is not necessarily equivalent to raising “common issues”. While Justice Wilcock in *Conseil scolaire* did refer to the *Dutton* criteria regarding “common issues”, this appears to have been in the context that the plaintiffs had the same or common interest which arose from the educational language questions which were the basis for that proceeding. He also referred to *Shaw* which was relied on by the Court of Appeal in *Hayes*, albeit in relation to a pleadings issue;

(b) s. 4(e)(ii) of the *CPA* requires the filing of a litigation plan. There is no such requirement in Rule 20-3. In my view this supports the proposition that the representative proceeding as it has developed historically in this province applies to situations as described above involving a limited and clearly ascertainable class of persons as opposed to a broader class as contemplated by the *CPA*;

(c) in a class action:

“the opt in procedure would allow for the creation of separate classes with entitlement potentially to different remedies. That is not possible in a representative action”: *Parker Cove* at para. 42.

...

[515] Considering the “history and purpose” of the representative proceeding rule and the circumstances in which it applied both prior and subsequent to *Dutton* and the enactment of the *CPA*, I conclude that common law class actions under *Dutton* are only available in the absence of comprehensive class action legislation. Non *CPA* proceedings are governed

by Rule 20-3 and the way that rule and its predecessors have been interpreted by the courts of this province. This includes the test set out in *Hayes*, although the *Dutton* criteria may well be of assistance in some circumstances.

[Emphasis added.]

[270] Neither the BC Court of Appeal nor the Supreme Court of Canada returned to this issue as the *Araya* case progressed through the levels of appeal.

[271] This narrower approach to interpreting BC's representative rule is consistent with earlier statements by the BC Court of Appeal in *James v. B.C.*, 2007 BCCA 547, although the Court does imply that there should be some liberalization in the approach to the traditional rule:

[33] ...The evident intention of the Legislature in British Columbia is to retain the old form of class action, while permitting the new form. A court's obligation is to make both work, so that litigants can select the procedure that works best for their purposes.

[34] Nevertheless, the approach in *Western Canadian* is helpful where it does apply. From *Western Canadian* at paras. 24, 44, 46 to 48, I take the advice to apply the English Court of Appeal decision in *Markt & Co. Limited v. Knight Steamship Company Limited*, [1910] 2 K.B. 1021 (C.A.) [*Markt*] and the Supreme Court's own decision in *Naken* with caution. Importantly, for our purposes, courts are also to recognize as fundamental the importance of striking a balance between efficiency and fairness...

[35] However, because r. 5(13) pre-existed and survived the enactment of the *Class Proceedings Act* without amendment, I am not attracted by the appellant's invitation to follow the path taken in *Western Canadian* and look primarily to that Act for guidelines. In my view, the better approach is to look to the history of r. 5(13), its purpose as explained in the authorities, and most importantly, to the ordinary meaning of its language in the context of the *British Columbia Supreme Court Rules* as a whole, bearing in mind the need to make the representative action and the class proceeding work as complementary vehicles for the efficient and fair prosecution and defence of causes of action with common issues.

...

[50] This interpretation suggests a representative proceeding may be preferred when the class is limited and clearly ascertainable, as in this case and all the authorities provided to us where a representative proceeding was permitted to continue when challenged. ...

[272] More recently, the narrower approach to the representative rule was applied in *Gray v. 1534 Harwood Street (St. Pierre) Ltd.*, 2024 BCSC 1345.

[273] In light of this Court’s rejection of the availability of the *Dutton* expansion, CN submits that representative proceedings under Rule 20-3(1) remain limited to a narrow class of cases, such as claims made by those:

- a. alleging a common statutory or collective right, for example, Aboriginal or language rights; or
- b. who seek a common statutory declaration or remedy, such as game show participants, remedies available under a collective agreement, or owners within a housing development:

*Araya BCSC* at para. 499.

[274] In *Hwlitsum First Nation v. Canada (Attorney General)*, 2018 BCCA 276, the representative rule was given somewhat greater room to operate in the context of Aboriginal title and rights representative claims.

[275] However, I find that this liberalization does not assist the First Nations in relation to non-communal Individual Member Claims.

[276] I cannot see how the claims could be managed using unguided discretion without undercutting the finding in *Araya*. I also see no basis for deciding not to follow the *Araya* under the approach to decisions of the same court set out in *Re Hansard Spruce Mills*, [1954] 4 D.L.R. 590, 1954 CanLII 253 (B.C.S.C.).

[277] Although the decisions in *James* and *Gray* open the door to some limited procedural innovation and flexibility within the traditional representative rule, I find that, absent a ruling from the BC Court of Appeal holding that *Dutton*’s more flexible “class action-like” approach does, in fact, apply to BC’s traditional representative rule, it would take too much innovation to properly manage the proposed types of claims within the traditional structure. The many complex individual personal injury and property damage claims involved in this case are likely to strain even the much broader (and expressly available) tools under the *CPA*. The processes for the

necessary individual damages hearings would have to be invented “whole cloth” without the guidance or simplicity provided by ss. 27-28 of the *CPA*.

[278] As the defendants point out, there is at least the potential for contributory negligence claims, something the representative rule was never designed to manage.

[279] Beyond this issue, at a very basic level, a class member may allege that something was destroyed in the Fire that the defendants wish to dispute. These types of disagreements can require the full array of litigation tools to resolve, absent statutory instruction to the contrary. The First Nations offer no representative case that has used the vehicle to manage this level of necessary individual inquiry

[280] In *Shaw v. Real Estate Board*, 36 D.L.R. (3d) 250 at 253–254, 1973 CanLII 1061 (B.C.C.A.), the BC Court of Appeal stated:

...for a proper representative action there must be a “common interest” of the plaintiff with those he claims to represent, the exertion of a “common right” or “common grievance”, normally arising from a “common origin”, but once the alleged rights of the class are denied or ignored it is immaterial that the individuals have been wronged in their individual capacity, provided, or course that their claims were not for personal damages. ...

[Emphasis added.]

[281] The present claim would include those for “personal damages”. The First Nations Litigation seeks recovery for “adverse health consequences, including post-traumatic stress disorders”, *inter alia*. It seeks “general damages for economic loss and loss of economic opportunities”. It seeks “general damages for loss of personal property owned by the Members”.

[282] This is not a situation where all that will have to be done at the end of the day is to assign rights to a “common pool”, as in *Pasco: Chace v. Crane Canada Inc.*, 44 B.C.L.R. (3d) 264, 1997 CanLII 4058 at para. 29.

[283] Assuming liability, there is no single measure of damages that could be applied to all members.

[284] It is unfortunate that the representative rule cannot accommodate this level of individual complexity. However, the pressure to implement the *CPA* stemmed from just such weaknesses and limitations in the rule: *Naken v. General Motors*, [1983] 1 S.C.R. 72 at 99–101, 1983 CanLII 19.

[285] Furthermore, even if the requirements were met, I would exercise my discretion not to allow it to go forward in this structure. I say this for the reasons expressed below regarding the management of the overlap in the claims: *Gray* at para. 33. For these reasons, I find that it is preferable to have the Individual Member Claims proceed within the certified class proceeding

[286] As such, I find that the First Nations Litigation cannot proceed as a representative proceeding for the Individual Member Claims under the presently defined scope of BC's representative rule.

### **B. The Class Definition Overlap**

[287] My finding above renders the secondary question of class overlap moot, as there is no longer any overlap. However, should I be in error on the first point, I confirm that, in terms of the question as to whether it was preferable that the Individual Member Claims remain in the class proceeding rather than be litigated through the First Nations Litigation, I would have found that to be so for the following reasons:

- a) The Individual Member Claims have more in common with the similar individual property and personal injury claims that will be advanced in the certified class proceeding than they do with the communal Aboriginal rights claims;
- b) The fact that individual claims such as those advanced here are generally in the control of the individual rather than the Band was highlighted in *Westbank Indian Band v. Normand*, [1993] B.C.J. No. 2131, (*sub nom. Louie v. Normand*) 1993 CanLII 805 (S.C.) at 5;

- c) To the extent that there are unique feature of the individual claims for damages on the part of Indigenous persons, those are going to have to be addressed in the class proceeding in any event, given that there are members of bands other than those pursuing the First Nations Litigation who will be participating in the class proceeding, including the representative plaintiff Mr. Spinks himself;
- d) As matters stand presently, the actions will all be case managed together in any event. In particular, the present intention of the parties is to have a trial on at least the causation issues, at which all NCA will participate; and
- e) If any individual First Nations claimant feels aggrieved by participating in the class proceeding, they will have the right to opt out (which is not as clearly the case were the matter to proceed within the representative proceeding).

[288] I accept there are factors favouring the opposing perspective, such as the fact that:

- a) representation by the Chiefs better reflects the Indigenous legal order and governance systems of the First Nations, which are protected under s. 35 of the *Constitution Act, 1982*; and
- b) First Nations control arguably promotes the principles underlying the United Nations Declaration on the Rights of Indigenous Peoples (“*UNDRIP*”), which underly the interpretation of all provincial statutes pursuant to the *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44, and the *Interpretation Act*, R.S.B.C. 1996, c. 238.

[289] However, I am confident that the Court’s supervisory powers under s.12 of the *CPA* will enable it to ensure that counsel take no steps that improperly undermine *UNDRIP* principles.

**V. CONCLUSION**

[290] The case is certified as a class proceeding.

[291] The causes of action are restricted to:

- a) negligence, not including any claims for relational economic loss;
- b) the Rule in *Rylands v. Fletcher*, and
- c) private nuisance.

[292] The defined class is as follows:

For purposes of the class definition below, the “Lytton Fire” is defined as “the fire designated K71086 by the BC Wildfire Service (“BCWS”) that started on June 30, 2021 in or around the village of Lytton” and the “Lytton Fire Area is the geographic area indicated in the BCWS public information map of August 19, 2021.

The class includes all natural or legal persons who claim to have suffered losses because of the Lytton Fire, and who fit within one or more of the following subclasses:

- (i) all natural persons who claim to be the spouse, parent or child of a person who died on June 30, 2021, as a result of the Lytton Fire (the “Wrongful Death Subclass”);
- (ii) all natural or legal persons who claim to have suffered loss of real property in the Lytton Fire Area, or loss of use or enjoyment of real property in the Lytton Fire Area, which they owned, had an interest in, or occupied, which has not been indemnified by insurance, as a result of the Lytton Fire (the “Real Property Subclass”);
- (iii) all natural or legal persons who claim to have suffered a loss of personal property in the Lytton Fire Area, as a result of the Lytton Fire (the “Personal Property Subclass”); and
- (iv) all natural persons who claim to have suffered personal injuries while in the Lytton Fire Area, as a result of the Lytton Fire (the “Personal Injury Subclass”);

but not including:

- (i) the defendants, and the directors and officers of each, and their immediate family members;
- (ii) counsel to all parties in this proceeding, and their immediate family members;
- (iii) judges or associate judges presiding in this proceeding at any time, and their immediate family members;

- (iv) Chief Niakia Hanna and the Lytton First Nation;
- (v) Chief Fred Sampson and the Siska Band; and
- (vi) Chief Christine Walkem and the Cook’s Ferry Indian Band.

[293] The certified common issues are set out in Schedule B.

[294] The application to strike the aspects of the First Nations Claims relating to Individual Member Claims is granted.

[295] The plaintiff and the First Nations have leave to amend their pleadings to bring them into conformity with these reasons.

[296] The plaintiff has leave to amend the claim to add Mr. Spinks as a representative plaintiff.

[297] The parties should arrange a further case planning conference in short order to settle the certification order and advance their respective proposals regarding the content and provision of notice. I note as well that the Court is holding the May-July 2027 period for a first-phase common issues trial, as previously discussed with the parties. The precise scope of that trial should be discussed at the case planning conference, along with any preliminary steps required to ensure the case reaches trial by that date.

“The Honourable Mr. Justice Branch”

**SCHEDULE A: STYLES OF CAUSE OF THE OTHER CASE MANAGED PROCEEDINGS**

- Lytton First Nation and Chief Niakia Hanna, on his own behalf and as representative of the members of Lytton First Nation v. Canadian Pacific Railway Limited, Canadian Pacific Railway Company, Canadian National Railway Company, Crown-Indigenous Relations And Northern Affairs Canada, E-Verifile.Com, Inc., His Majesty The King In Right Of The Province Of British Columbia As Represented By The Attorney General Of British Columbia, His Majesty The King In The Right Of Canada As Represented By The Attorney General Of Canada, Indigenous Services Canada, BC Wildfire Service, The Ministry Of Forests, Lands Natural Resource Operations And Rural Development, The Ministry Of Emergency Management And Climate Readiness, The Ministry Of Transportation And Infrastructure, The Village Of Lytton, Transport Canada, John Doe Company No. 1, John Doe Company No. 2, John Doe Company No. 3, John Doe Company No. 4 (Action No. S234686).
- Cook's Ferry Indian Band and Chief Christine Walkem, on her own behalf and as representative of the members of Cook's Ferry Indian Band v. Canadian Pacific Railway Limited, Canadian Pacific Railway Company, Canadian National Railway Company, Crown-Indigenous Relations And Northern Affairs Canada, E-Verifile.Com, Inc., His Majesty The King In Right Of The Province Of British Columbia As Represented By The Attorney General Of British Columbia, His Majesty The King In The Right Of Canada As Represented By The Attorney General Of Canada, Indigenous Services Canada, BC Wildfire Service, The Ministry Of Forests, Lands Natural Resource Operations And Rural Development, The Ministry Of Emergency Management And Climate Readiness, The Ministry Of Transportation And Infrastructure, Transport Canada, John Doe Company No. 1, John Doe Company No. 2, John Doe Company No. 3, John Doe Company No. 4 (Action No. S234734).

- Siska and Chief Fred Sampson, on his own behalf and as representative of the members of Siska v. Canadian Pacific Railway Limited, Canadian Pacific Railway Company, Canadian National Railway Company, Crown-Indigenous Relations And Northern Affairs Canada, E-Verifile.Com, Inc., His Majesty The King In Right Of The Province Of British Columbia As Represented By The Attorney General Of British Columbia, His Majesty The King In The Right Of Canada As Represented By The Attorney General Of Canada, Indigenous Services Canada, BC Wildfire Service, The Ministry Of Forests, Lands Natural Resource Operations And Rural Development, The Ministry Of Emergency Management And Climate Readiness, The Ministry Of Transportation And Infrastructure, Transport Canada, John Doe Company No. 1, John Doe Company No. 2, John Doe Company No. 3, John Doe Company No. 4 (Action No. S234735).
- Interior Health Authority, Provincial Health Services Authority, British Columbia Emergency Health Services, The Board of School Trustees of School District No. 74 (Lytton) v. Canadian Pacific Railway Limited, Canadian Pacific Railway Company, Canadian National Railway Company, Transport Canada, Jane Doe, John Doe (Action No. S234510).
- Thoms, et. al v. Canadian Pacific Railway Limited, Canadian National Railway Company, Canadian National Railway Company, Attorney General Of Canada, His Majesty The King In The Right Of The Province Of British Columbia As Represented By The Attorney General Of British Columbia, Ministry Of Forests, Lands, Natural Resource Operations And Rural Development Of British Columbia, Transport Canada, John Doe #1, John Doe #2, ABC Company #1, ABC Company #2, ABC Company #3, ABC Company #4, ABC Company #5, ABC Company #6 (Action No. S234544).
- Village of Lytton, Thompson-Nicola Regional District v. Canadian National Railway Company, Attorney General of Canada, Canadian Pacific Railway Company (Action No. S234395).

- Darren Liptrot v. Canadian National Railway Company, Canadian Pacific Railway Company (Action No. S241391).

**SCHEDULE B: CERTIFIED COMMON ISSUES**

1. Did heat, sparks or other incendiary material resulting from the passage of Train 731 cause the Lytton Fire?
2. Did the acts or omissions of one or both of the defendants cause or contribute to the Lytton Fire?
3. Did either defendant owe a duty of care to Class Members?
4. What standard of care was required of the defendant(s)?
5. Did either defendant breach the standard of care?
6. If yes, did the breach(es) cause or contribute to the Lytton Fire?
7. As a result of the [Lytton Fire], was there an order or orders issued to restrict access to, or use of, real property in and around Lytton?
8. If so, were the terms of the order(s) such that use or enjoyment of real property to which it applied was substantially, non-trivially, and unreasonably interfered with?
11. Did CN engage in a non-natural use of land in CN's right of way in Lytton?
12. Did CN bring onto its right of way oil, sparks, heat or particulate coal matter?
13. If so, did any of the oil, sparks, heat or particulate coal matter escape from CN's right of way?
14. Are the following types of losses compensable under the rule in *Rylands v. Fletcher*?
  - a. Losses arising from personal injury or death;
  - b. Losses arising from damage to real property, including loss of use and enjoyment;
  - c. Losses arising from damage to personal property; and

d. Relational economic losses to a worker arising from damage to real property at which they worked or personal property they used in the ordinary course of their employment?

17. Did all class members who were forced to flee and evacuate their homes as a consequence of the [Lytton Fire] share a common experience of physical inconvenience and distress that justifies an award of damages pursuant to section 29(1) of the CPA (the “Common Experience Damages”)? If so, in what amount?

18. Can some or all of the class members’ damages in private nuisance for loss of use and enjoyment of property be assessed in the aggregate pursuant to section 29(1) of the CPA? If so, in what amount?