IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Watson-Hurthig v. Insurance Corporation of British Columbia,* 2025 BCSC 855

Date: 20250507
Docket: S235814
Registry: Vancouver

Between:

Erik Watson-Hurthig

Plaintiff

And

Insurance Corporation of British Columbia

Defendant

Before: The Honourable Justice Greenwood

Reasons for Judgment

Counsel for Plaintiff:	N. McQuarrie
Counsel for Defendant:	J. Morris E. LeDuc
Place and Date of Hearing:	Vancouver, B.C. January 16-17, 2025
Place and Date of Judgment:	Vancouver, B.C. May 7, 2025

[1] There are two applications before the court in relation to a proposed class action against ICBC for insurance products that it sold to motorists in British Columbia during the Covid-19 Pandemic, when travel was restricted.

[2] The Plaintiff was an insured motorist who purchased his Autoplan insurance from ICBC. He contends that once the province of British Columbia switched to a no-fault regime on May 1, 2021, insured motorists could no longer bring an action against other motorists for bodily injury or damage to a vehicle. Thus, when travel restrictions were brought in and motorists were unable to leave the province for non-essential purposes, there was virtually no risk of exposure that would justify the payment of third-party insurance premiums as they existed during the restricted period.

[3] The plaintiff contends that ICBC wrongly profited from billions of dollars of premiums for third party liability insurance during the restricted period. The proposed class action seeks recovery for all B.C. motorists who were insured by ICBC, paid premiums for third party liability, and did not operate a motor vehicle outside of B.C. between May 1, 2021 and July 1, 2021 [the “restricted period”].

[4] The plaintiff filed his initial Notice of Civil Claim [NOCC] on August 21, 2023. He filed an Amended Notice of Civil Claim [ANOCC] in response to ICBC’s pleadings in October of 2023.

[5] The applications before the court are an application by the plaintiff to further amend the pleadings and an application by the defendant for summary judgment. The amendments sought by the plaintiff are contained in a Proposed Amended Notice of Civil Claim [PANOCC]. Both applications were heard together.

[6] The issue at the heart of the dispute between the parties on both applications is whether or not the plaintiff has a cause of action at all that should be allowed to proceed. For the reasons that follow, I have concluded that the plaintiff’s case is bound to fail because the pleadings disclose no viable cause of action or reasonable claim against ICBC.

[7] The facts that lead me to this conclusion are not in dispute, and there is no need to weigh evidence, or make findings of credibility in order to arrive at such a conclusion. In my view, there is no genuine issue of material fact that would require a trial, and there are no pleaded facts that would support a legal remedy in the circumstances. Accordingly, I would dismiss the plaintiff's application to further amend the notice of claim and grant summary judgment to the defendant.

Factual and Statutory Background

Basic Coverage

[8] ICBC is obliged to operate a plan of "universal compulsory vehicle insurance" *(Insurance (Vehicle) Act*, R.S.B.C., c. 231, s. 2), which for convenience I will refer to as basic coverage. In order to drive a vehicle on a highway, all motorists in BC must have a certificate confirming that they have basic coverage (*Motor Vehicle Act*, R.S.B.C., c. 318, s. 3(1)(c), "certificate", *Insurance (Vehicle Act)*, s. 1(1)).

[9] Under the statutory scheme, basic coverage includes third party liability coverage to cover motorists for losses caused by vehicle usage that results in bodily injury, death, or damage to property (*Insurance (Vehicle Act)*, s. 7(1), *Insurance (Vehicle) regulation*, B.C. Reg. 447/83, s. 1.1, ss. 63 ff).

[10] Effective May 1, 2021, the province moved to a no-fault or "enhanced care" system. No amendments were made to the legislation that requires motorists to maintain third party liability coverage. Third party coverage was and still is required, but certain prohibitions have been introduced which prevent actions being brought against insured parties in relation to bodily injury and vehicle damage arising from a motor vehicle accident (*Insurance (Vehicle) Act*, ss. 115, 172 & 173).

[11] The *Utilities Commission Act*, R.S.B.C. 1996, c. 473 applies to ICBC as if it was a public utility (*Insurance Corporation Act*, R.S.B.C. 1996, c. 228, s. 44(1)). The significance of that fact in the present context is that the BC Utilities Commission ["BCUC"] has jurisdiction over the premiums and rates charged for basic coverage based on the combined effect of a number of pieces of relevant legislation

(*Insurance Vehicle Act,* s. 46.2(3), *Insurance Corporation Act*, ss. 44(3)(a) & 44(3)(b), *Utilities Commission Act*, ss. 1, 23, 58 & 60. Where the BCUC has jurisdiction by statute, its jurisdiction is exclusive (*Utilities Commission Act*, s. 105(1)).

[12] The rates approved by the BCUC are the only "lawful, enforceable and collectable" rates for the services provided by ICBC. It cannot collect or receive compensation other than the scheduled rate specified by the BCUC (*Utilities Commission Act*, ss. 61(3) & 63).

[13] The affidavit materials before the court include the affidavit of Kelly Aimers who is the Chief Actuary and Director of Regulatory affairs for ICBC. As explained in her affidavit, ICBC's rates for basic insurance are set out in the basic insurance tariff, which is amended whenever the BCUC makes an order related to ICBC's rates. There is no dispute that ICBC charged the tariff rates during the restricted period.

[14] There is a comprehensive complaint mechanism under the *Utilities Commission Act* whereby the BCUC may determine whether any rates charged are "unjust, unreasonable, insufficient, unduly discriminatory" or otherwise in contravention of the law. Within the statutory scheme there is a mechanism for class proceedings, and a procedure under which an applicant may apply to have the BCUC reconsider one of its own decisions *(Utilities Commission Act*, ss. 58, 59(4), 59(5), 89, 99 & 116). All of those procedures apply to ICBC by virtue of s. 44(1) of the *Insurance Corporation Act.*

[15] The way in which ICBC applies to the BCUC for rate changes for a given policy year is outlined in Ms. Aimer's affidavit and is not in dispute. ICBC must apply to the BCUC for a general rate change by December 15th of each year, or at any time that it is directed to do so by the Lieutenant Governor in Council or the BCUC itself. The rate changes are prospective, and rely on forecasts of costs based on accepted actuarial practices. ICBC operates basic insurance as a "closed system." In essence, this means that when there are more claims and greater costs than forecast, ICBC will draw down on its operating capital to make up the shortfall. By

contrast, if there are fewer claims and the costs are lower than forecast, the difference is directed back into ICBC's operating capital. Savings thus captured, may impact future rate applications. ICBC does not profit from basic coverage.

[16] On December 15, 2020, ICBC applied for a rate change for a 23-month "2021 policy year" that would run from May 1, 2021 to March 31, 2023. This rate change application included amendments related to the implementation of the enhanced care program, and covered the restricted period. ICBC sought and was granted a 15% decrease to rates for basic insurance. After a public rate approval process, the BCUC approved the rate change. Rebates were provided to insured motorists whose policies were in effect on or after May 1, 2021.

[17] ICBC applied to the BCUC for a number of rebates related to the Covid pandemic and those rebates were approved. When considering the "2021 policy year" rates, the BCUC did not require updated actuarial estimates based on the pandemic, because the impact on the rate change would be limited, it would take several months for new estimates to be prepared, and the impact of the pandemic was being addressed through rebates. Any further impacts would be captured by ICBC's closed system in relation to basic coverage.

[18] ICBC was never directed to apply for a rate change for the restricted period, by either the Lieutenant Governor in Council, or by the BCUC. They therefore charged the rates during the restricted period that had been approved in the rate approval process.

[19] For the period immediately following the "2021 policy year," the BCUC noted the decreased crash frequency during the pandemic and the subsequent rebound when restrictions were lifted but found that the closed system addressed the problem and protected policy holders from unexpected changes in costs or revenues.

Optional Coverage

[20] While ICBC is required to provide basic coverage, it is also permitted to provide optional insurance. Optional insurance is a contract of insurance that is separate from vehicle insurance provided under the mandatory plan. It can be provided by ICBC or other insurers (*Insurance (Vehicle) Act*, ss. 1, "insurer," and "optional insurance contract," & s. 58).

[21] As Ms. Aimer's affidavit establishes, optional insurance rates are not regulated or set by the BCUC but operate essentially on a commercial basis. ICBC's basic coverage and optional coverage are run separately as a matter of law, and the revenue and costs from the sale of optional insurance are separate from the closed system related to basic insurance. In other words, revenue from basic coverage cannot be used to subsidize ICBC's optional vehicle insurance business (*Insurance Corporation Act*, s. 49).

Plaintiff's Factual Assertions

[22] The plaintiff is an electrical engineer who worked in the Greater Vancouver Regional District during the relevant time periods. There is no dispute that the plaintiff owned and operated a vehicle in the restricted period, or that he purchased basic coverage and optional coverage from ICBC that included third party liability insurance above the compulsory amount of $200,000.

[23] As a result of the pandemic, travel restrictions were in place for non-essential travel for all B.C. residents from March 19, 2020 to June 15, 2021, and recreational travel outside of B.C. was not permitted between June 15, 2021 and July 1, 2021.

[24] The plaintiff relied on news reports related to the Ministerial Order restricting travel during the restricted period. He says he was aware of public statements that any positive financial impacts to ICBC from the pandemic would benefit customers, and he chose to continue purchasing all of his insurance, both basic and optional, from ICBC on the basis that excess profits would be returned.

[25] The plaintiff says he relied on ICBC's promise to return excess profits to his detriment because he could have purchased some products from another insurer. He says he was not informed that he did not need extended third party liability insurance because he was not leaving the province. He says he would likely have cancelled his contract of optional insurance including extended third-party liability if he had been aware of the potential "inability to use" the insurance products that were sold to him, and if he had not been promised a refund.

[26] The plaintiff says that ICBC's website, which outlines the reasons for extending third party liability coverage beyond the $200,000 that is mandatory, made it seem like he needed additional third-party coverage when he did not.

[27] On February 14, 2023, the plaintiff wrote to ICBC and requested a refund for the premiums he paid for third party liability insurance on the basis that he abided by the imposed travel restrictions and that he was therefore paying for a service that he "was not able to use."

Legal Framework

Summary Judgment

[28] Pursuant to Rule 9-6 of the *Supreme Court Civil Rules*, the defendant is entitled to apply for summary judgment. The relevant portions of Rule 9-6 read as follows:

> **Application by answering party**
>
> (4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.
>
> **Power of court**
>
> (5) On hearing an application under subrule (2) or (4), the court,
>
> (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly ….

[29] A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future: *Canada v. Lameman*, 2009 SCC 14 at para. 19.

[30] The test for summary judgment is set out in *Beach Estate v. Beach*, 2019 BCCA 277 at paras. 48 and 49:

> [48] Rule 9-5 is a challenge on the pleadings. Rule 9-6 is a challenge on a limited review of evidence. A defendant can succeed on a Rule 9-6 application by showing the case pleaded by the plaintiff is unsound or by adducing sworn evidence that gives a complete answer to the plaintiff's case: *B & L Holdings Inc. v. SNFW Fitness BC Ltd.*, 2018 BCCA 221 at para. 46, quoting *Progressive Construction Ltd. v. Newton* (1981), 1980 CanLII 493 (BC SC), 25 B.C.L.R. 330 at 335; *International Taoist Church of Canada v. Ching Chong Taoist Association of Hong Kong Ltd.*, 2011 BCCA 149 at para 14. Such evidence generally is adduced in the form of an affidavit. If the court is satisfied that the plaintiff is bound to lose or the claim has no chance of success, the defendant must succeed on the Rule 9-6 application: *Canada v. Lameman*, 2008 SCC 14 at paras. 10–11. Conversely, if the plaintiff submits evidence contradicting the defendant's evidence in some material respect or if the defendant's evidence in support of the Rule 9-6 application fails to meet all of the causes of action raised by the plaintiff's pleadings, the application must be dismissed: *B & L Holdings Inc.* at para. 46, quoting *Progressive Construction Ltd.* at 335.
>
> [49] Although an application under Rule 9-6 invokes the court's consideration of evidence, it is not a summary trial: *Century Services Inc. v. LeRoy*, 2015 BCCA 120 at para. 32. The judge is not permitted to weigh evidence on a Rule 9-6 application beyond determining whether it is incontrovertible: any further weighing may only be done in a trial: *Tran v. Le*, 2017 BCCA 222; *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500 at paras. 8-12.

See Also: *Sakwi Creek Hydro Limited Partnership v. Dickin*, 2023 BCCA 188 at paras. 24 & 25.

[31] As noted by the Supreme Court of Canada in *Canada v. Lameman*, at para. 10:

> ….The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

Application to Amend

[32] Rule 6-1 of the *Supreme Court Civil Rules* governs the amendment of pleadings. The decision to allow an amendment is an exercise of discretion. The facts alleged are taken as established. The relevant factors include whether there is any prejudice to the other side, and whether the proposed amendments disclose a reasonable claim or not. There is no need to adduce evidence so long as the pleading discloses a reasonable cause of action: *Kwikwetlem First Nation v. British Columbia (A.G.*), 2021 BCCA 311 at para. 166, *McNaughton v. Baker*, 1988 CanLii 3036 (BCCA).

[33] The fundamental purpose of pleadings is to define the issues to be tried with clarity and precision, give the opposing parties fair notice of the case to be met, and enable the parties to take effective steps for pre-trial preparation: *Mayer v. Mayer*, 2012 BCCA 77 at para. 215.

[34] As Saunders J.A. said in the context of a class proceeding in *Sandhu v. HSBC Finance Mortgages*, 2016 BCCA 301 at para. 44:

> …..Authorities tend to be generous in making available the possibility of amendments to fine tune the pleadings and to bring clarification to obscure issues, e.g., *Watson v. Bank of America Corporation,* 2015 BCCA 362 at paras. 87, 106, 140, 197. Nonetheless, in British Columbia – a cost beneficial jurisdiction to plaintiffs – fairness and access to justice considerations, including to defendants, reinforce the proposition that the essentials of a cause of action must be pleaded else the pleadings may be found to be fatally lacking. The court will consider in this mix the length of time the plaintiff has had to "get it right". [emphasis added].

[35] No single factor should be given overriding importance in deciding whether to allow an amendment. Litigation has an evolutionary quality, and there must be some flexibility in ensuring that pleadings adapt to changing circumstances. If delay in seeking changes to pleadings or parties is attributable to errors by counsel, a party should not be penalized by its lawyer's conduct unless there is irremediable prejudice: *Preferred Steel Construction v. M3 Steel (Kamloops),* 2015 BCCA 16 at paras 47 & 51.

[36] A proposed amendment will not be allowed where it advances a fundamentally different claim based on facts not originally pleaded after the expiry of a limitation period, but no there is no such barrier to claims based on the facts originally pleaded: *Blueberry River First Nation v. Laird*, 2020 BCCA 76 at para. 222. There is also a discretion under s. 4(4) of the *Limitation Act,* RSBC 1996, c 266, to permit amendments even when they give rise to a fresh cause of action that would have been barred by the lapse of time: *Teal Cedar Products (1977) v. Dale Intermediaries*, 1996 CanLii 3033 (BCCA) at para. 43, *Blueberry river* at para. 21.

Issues to be Decided

[37] There are three issues to be decided on the applications before the court are as follows:

a) Is the plaintiff's Claim in relation to basic coverage bound to fail or does it disclose a potentially viable cause of action?

b) Should the PANOCC be refused on the basis that it discloses a new cause of action that is statute barred? and

c) Is the plaintiff's proposed claim in relation to optional coverage bound to fail or does it disclose a viable cause of action?

The Basic Coverage Claim

(1) Is the Plaintiff's Claim in relation to basic coverage bound to fail or does it disclose a potentially viable cause of action?

[38] The plaintiff advances a multitude of causes of action that he says arise from ICBC's actions including, negligence, negligent misrepresentation, breach of contract, unjust enrichment, breach of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*], and breach of the *Frustrated Contracts Act*, R.S.B.C. 1996, c. 166.

[39] In my view, in light of the nature of the mandatory scheme for basic coverage in British Columbia, including the fact that it is a closed system, where rates are set in a public and independent process, the plaintiff's claim is bound to fail.

[40] The fundamental problem with the plaintiff's claim in so far as basic coverage is concerned is that ICBC cannot be liable for charging rates over which it has no control, and over which the BCUC has exclusive jurisdiction. That central problem is a through line that impacts the viability of all of the causes of action that the plaintiff proposes in relation to basic coverage.

[41] Contrary to the plaintiff's assertions, third party liability insurance did "exist" as a product during the restricted period. It covered property damage other than vehicle damage, and still covered vehicle damage and personal injury when a motorist travelled outside of British Columbia despite the restrictions.

[42] The essence of the plaintiff's complaint is that the risk of a claim was much lower due to the combined effect of the no fault regime and the travel restrictions, and therefore the cost should have been lower. In my view, that is a complaint about the rates paid for coverage during the restricted period. ICBC had no unilateral control over those rates, which were set in accordance with a statutory process over which the BCUC has exclusive jurisdiction. Moreover, as a closed system, there is a mechanism for spreading any savings that might accrue as a result of fewer claims in future years through rebates, or through the rate setting process in subsequent years.

[43] In that sense, the central nature of the dispute in relation to basic coverage is a dispute over rate setting. Following the reasoning in *Owners Strata Plan LMS 1816 v. British Columbia Hydro and Power Authority*, 2002 BCSC 485, and the distinction between the exclusive jurisdiction of the BCUC and jurisdiction over private law remedies discussed in *Princeton Light & Power v. MacDonald*, 2005 BCCA 296, I find that the BCUC has exclusive jurisdiction over the claim in relation to basic coverage. The *Utilities Commission Act* provides a means of resolving disputes related to the fairness or reasonableness of rates set by BCUC and charged by

ICBC. It is only in relation to the claim over optional coverage, that private law remedies arise and the BCUC has no jurisdiction.

[44] An examination of each of the plaintiff's proposed causes of action reinforces that conclusion.

No viable claim in negligence or negligent misrepresentation

[45] The plaintiff's negligence claim would depend on establishing that ICBC owed him a duty of care "to avoid the kind of loss alleged" (*Saadati v. Moorehead*, 2017 SCC 28 at para. 13). Quite apart from the issue of whether the plaintiff suffered a loss, ICBC could not have owed him a duty of care to adjust or lower its rates, since it cannot legally do so unilaterally. Nor could there be a negligence claim for ICBC's failure to apply to the BCUC for a rate reduction, because ICBC's ability to apply for such reductions, and the timing of its applications is governed entirely by statute.

[46] When there is a comprehensive legislative scheme that governs rate setting, as is the case with ICBC, the regime effectively supplants any common law obligation that might otherwise arise: *Jackson v. Canadian National Railway*, 2012 ABQB 652 at para. 66, aff'd 2013 ABCA 440 at para. 47. ICBC has a number of statutory duties, but even if the plaintiff could establish that ICBC did not act in accordance with its obligations, the law does not recognize an action for negligent breach of statutory duty: *Holland v. Saskatchewan*, 2008 SCC 42 at paras. 7-11, *Wu v. Vancouver (City)*, 2019 BCCA 23 at paras. 43 & 58.

[47] The plaintiff argues, in particular, that there is a viable claim of negligent misrepresentation against ICBC, but the pleaded facts are not capable of establishing all of the elements of the tort of negligent misrepresentation.

[48] A claim for negligent misrepresentation requires a duty of care based on a "special relationship" between the parties, an untrue, inaccurate or misleading representation negligently made, and reliance by the plaintiff on the representation which resulted in damage: *Live Nation Entertainment v. Gomel*, 2023 BCCA 274 at para. 129.

[49] In this case, the alleged misrepresentations are (1) a representation made by ICBC to the BCUC on July 16, 2021 that "any positive net impacts to ICBC's financial results due to COVID-19 will benefit customers, which can include returning the benefit directly to customers in the form of a rebate or through capital to build ICBC's rate stabilization fund," and (2) a representation in February 2022 in the ICBC services plan to the effect that no further Covid-19 related savings or rebates were included in the forecast going forward."

[50] Both of these alleged misrepresentations occurred after the restricted period had ended. Quite apart from the difficulty of establishing a duty of care for statements made in the context of the rate setting process, there are no facts pleaded to establish that the plaintiff relied on those representations in entering into or renewing his insurance that covered the restricted period. Nor would it have been possible for the plaintiff to enter into or renew a contract of insurance based on representations that had not yet been made. In my view, this is a fatal defect.

[51] It is also unclear on what facts the plaintiff would be able to establish that either of the statements were untrue, inaccurate or misleading. All that the first statement says is that net positive impacts will benefit customers, which "can include" rebates or contributions to ICBC's rate stabilization fund. As time passed, there were in fact some rebates, and in accordance with the closed system, any additional savings would have benefited customers indirectly. ICBC made no direct promises to refund premiums, or issue specific rebates, nor could they, because they did not unilaterally control the process of applying for a rebate and having it approved. There is no air of reality to a claim of negligent misrepresentation.

No viable claim in unjust enrichment

[52] The plaintiff also seeks to advance a claim of unjust enrichment, but the claim is inconsistent with ICBC's statutory obligations that arose as a matter of law

[53] A plaintiff can succeed on a claim of unjust enrichment if he or she can show that the defendant was enriched, that he or she suffered a corresponding

deprivation, and that the corresponding deprivation occurred in the absence of a juristic reason: *Moore v. Sweet*, 2018 SCC 52 at para. 37. Unjust enrichment is an equitable remedy. At the heart of the remedy is "the notion of restoring a benefit which justice does not permit one to retain:" *Bao v. Welltrend United Consulting*, 2025 BCCA 3 at para. 26, citing *Kerr v. Baranow*, 2011 SCC 10 and *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762.

[54] In this case the plaintiff was required to have basic coverage, including third party liability coverage. The rates charged by ICBC for mandatory third-party liability coverage were the only lawful, enforceable and collectable rates that they could charge in accordance with the BCUC process. Compliance with a mandatory statutory scheme cannot ground a claim in unjust enrichment.

[55] Juristic reasons for enrichment include circumstances where "the enrichment of the defendant at the plaintiff's expense is required by law, such as where a valid statute denies recovery": *Kerr v. Baranow* at para. 41. A valid statutory scheme that requires payment of the very premiums complained of is a clear juristic reason for any deprivation that may have occurred.

No viable claim for breach of contract

[56] The alleged claim of breach of contract suffers from similar problems. The plaintiff contends that ICBC breached its contractual duties by charging premiums for third party liability and by failing to reimburse customers for premiums paid on a *per diem* basis for a largely non-existent product. However, as I have already outlined, ICBC had no choice but to charge the premiums they did and had no ability to reimburse customers except as directed by the BCUC.

[57] A more fundamental problem with any claim in breach of contract is that the plaintiff has not identified what contractual terms have been breached. A party who alleges breach of contract is required to plead the terms of the agreement: *Madadi v. British Columbia*, 2018 BCSC 1891 at para. 94. In this case, the plaintiff has not put forward any express or implied contractual term that would require ICBC to change

its premiums or refund customers on a *per diem* basis, and it is doubtful whether such a contractual obligation could exist in light of the nature of the statutory scheme that was in place.

[58] In my view, these problems are insurmountable, even if one accepts the plaintiff's assertion that what was purchased was "drastically different than [what was] presented."

[59] I had some difficulty following the plaintiff's argument based on what he referred to as "unilateral post contractual modification," but I understood it to be a contention that ICBC agreed to amend the contract of insurance when it promised on July 16, 2021 that "any" positive impacts to ICBC would benefit customers, then violated its own promise. However, I see nothing specific in ICBC's general statement made in the context of the rate setting process. The statement simply cannot reasonably be construed as a specific promise amounting to a contractual term. It would make no sense for ICBC to modify the contract of insurance to include a promise to return premiums for basic insurance, when that process is run through the BCUC.

No viable claim for Breach of the Business Practices and Consumer Protection Act

[60] I do not consider the plaintiff's argument based on a breach of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*] sustainable. The essence of his complaint is that ICBC engaged in deceptive acts or practices by continuing to offer third party liability insurance during the restricted period and failing to fully refund the plaintiff. He relies on what he says was a material change to the insurance product that was purchased.

[61] The defendant says that the provision of basic coverage is not a "consumer transaction," as that term is defined in the legislation. There is certainly an argument that the regulatory rate setting process under the BCUC is not a consumer transaction, but even if it were, I do not see how simply applying rates and providing

rebates that were authorized within a comprehensive statutory process could amount to a deceptive or unconscionable act.

No other viable statutory claim

[62] The plaintiff also contends that there is a cause of action under the *Frustrated Contract Act*, R.S.B.C. 1996, c. 166, but section 2(b) of the *Act* specifies that the act does not apply to "a contract of insurance." The plaintiff argues that s. 2(b) was never designed to apply to compulsory insurance, but I see nothing in the legislative history of the provision which would alter the plain meaning of the words. Accordingly, I see no valid claim under the *Frustrated Contract Act*.

[63] Finally, the plaintiff asserts that ICBC breached the *Utilities Commission Act*, by failing to apply to the BCUC when there was a change in the revenue cost ratio, and by subjecting the plaintiff and others to "undue prejudice" by continuing to collect premiums. First, the prohibition in s. 59(2) against a utility subjecting any person to "undue prejudice or disadvantage" does not apply to ICBC by virtue of s. 44(1) of the *Insurance Corporation Act*. Second, the substance of the argument suffers from the same frailty as the other proposed causes of action.

[64] The manner and timing of ICBC's applications to BCUC are governed by statute. There is nothing in the *Utilities Commission Act* that would require ICBC to apply to the BCUC whenever there is change to the revenue cost ratio. Even if there were, it is the BCUC itself that has jurisdiction over complaints that a utility has not complied with the requirements of the *Act*.

Conclusion on basic coverage

[65] For all of the above reasons, I am unable to find that there is any viable cause of action in relation to basic coverage during the restricted period. Even adopting a generous approach, and assuming that all of the alleged facts are true, I conclude that the plaintiff is bound to lose, and that the claim in relation to basic coverage has no chance of success.

(2) Should the application to file the PANOCC be dismissed on the basis that it discloses a new cause of action that is statute barred?

[66] There are two issues in relation to the plaintiff's application to further amend the pleadings. The primary issue is whether the proposed amendments disclose a reasonable claim or not, including all the essentials of a valid cause of action. However, ICBC raises a preliminary objection, arguing that the PANOCC is an entirely new action that is statute barred. For the reasons that follow, I would not dismiss the plaintiff's application to amend on that basis.

[67] At the heart of the dispute between the parties is whether the original pleadings were intended to capture both compulsory and optional third-party insurance, or whether the original claim was limited to compulsory insurance, and it is only now that the plaintiff seeks to add a claim in relation to optional insurance.

[68] I agree with the defendant that the language in the original notice of claim was aimed primarily at compulsory insurance. The defendant points to a number of examples, including statements that the plaintiff purchased "compulsory auto insurance products," (para. 14), that ICBC was the "sole provider of compulsory basic auto insurance," (para. 33(b)), and that the plaintiff was forced to pay ICBC's rates "in order to obtain compulsory auto insurance products."

[69] I do not agree with the plaintiff's argument that the definition of the proposed class in the original NOCC captured all individuals who had both basic and optional insurance. Under paragraph 24(b) of the NOCC, the class was defined as those who "paid the premiums for compulsory insurance." It is true that all those who have optional insurance paid premiums for compulsory insurance, but not all of those who paid for compulsory insurance necessarily had optional insurance.

[70] The plaintiff says that para. 10 of the ANOCC clarified the situation, but that paragraph only alleges that ICBC was a supplier of services under the *BPCPA*. It does not differentiate between compulsory and optional insurance at all.

[71] It is clear to me on the facts, that counsel for the plaintiff simply failed to appreciate the potential significance of the difference between compulsory and optional insurance in relation to the issues he wished to raise regarding third-party liability insurance.

[72] Should I then conclude that the PANOCC is an entirely new cause of action based on new facts? For several reasons, I do not think that conclusion is warranted.

[73] First, the plaintiff's overall claim based on paid premiums for third party liability insurance during the restricted period was broad enough to capture optional insurance products. For example, the overview of the plaintiff's claim at para. 5 of the ANOCC is broad enough to include all motorists who paid premiums for third party liability:

> 5. This class proceeding seeks recovery for all BC's motorist [sic] who were insured by ICBC, for the *per diem* premiums paid for third party bodily injury and vehicle damage coverage, which was not available, as a result of travel restrictions during the Restricted period.

[74] As the plaintiff points out, he did not "parse out" whether "the premiums" included only compulsory premiums, only optional premiums, or both.

[75] The defendant argues that the plaintiff's definition of "premiums" is at all times specific to compulsory insurance and cites para. 14 of the NOCC which reads as follows:

> 14. The plaintiff purchased <u>compulsory</u> auto insurance products from ICBC annually up until present. During the Restricted Period the plaintiff paid premiums for third party coverage (the "Premiums"), for property damage…

[76] In my view, paragraph 14 is not as definitive as ICBC suggests. For example, the second sentence says simply that during the restricted period "the plaintiff paid premiums for third party coverage." That statement is broad enough to encompass optional insurance.

[77] In short, I do not conclude that the proposed amendments are a fundamentally new claim based on different facts. In my view, both the nature of the claim, and the factual underpinning of the claim, are closely related, and the pleadings are broad enough to support the proposed amendment which seeks to bring greater clarity to the claim and is consistent with the desire for precision, clarity and an opportunity for the defendant to properly defend the claim.

[78] In *Sandhu*, at para. 44, the Court of Appeal laid out a generous approach to the possibility of amendments to "fine tune" pleadings and "bring clarification to obscure issues" in the context of class proceedings. The court at the certification stage has the discretion to "allow amendments to the pleadings to patch up deficiencies": *Sandhu* at para. 22.

[79] In *Ocean Pacific Hotels v. Lee,* 2025 BCCA 57, for example, Butler J.A. found that the trial judge had erred in certifying a claim under s. 4(1)(a) of the *Class Proceedings Act*, but ordered that the plaintiffs be given leave to amend their pleadings even though their proposed notice of civil claim did not plead the essentials of a cause of action, and even though the plaintiff had proposed amendments at trial and on appeal that were not sufficient. At para. 94, the Court stated:

> [94] In addition, while it is true the deficiencies in the pleadings are substantive, this Court has permitted significant amendments to class action pleadings if it is in the interests of justice to do so. For instance, in *Basyal v. Mac's Convenience Stores Inc.*, 2018 BCCA 235…this Court permitted amendments to pleadings which were deficient in non-technical ways even though they went "to the crux of most of the causes of action advanced, and [would] necessitate a thorough 're-think' of the case": at para. 78. Similarly, in *Workers' Compensation Board v. Sort*, 2022 BCCA 318, this Court permitted plaintiffs of a class action to make "[s]ignificant and substantive amendments" to the pleadings before referring the matter back to the certification judge: at para. 190.

[80] In the circumstances of this case, I do not think the plaintiff's claim over optional insurance products is entirely distinct or new, or that the application should be dismissed on that basis. I would adopt Neilson J.A.'s comment in *Preferred Steel*

at para. 47 that “litigation has an evolutionary quality, and there must be some flexibility in ensuring that pleadings adapt to changing circumstances.”

[81] Even if the claim over optional insurance were considered a new claim, I would exercise my discretion to permit the amendments notwithstanding the defendant’s arguments based on the *Limitation Act*. As noted in *Century Services v. LeRoy*, 2015 BCCA 120 at para. 10, the approach to an application to amend should be “generous and non-technical, thereby to permit amendments as are necessary to determine the real question between the parties, considering always the interests of justice.”

[82] The entire focus of the plaintiff’s claim is on third-party liability coverage, and the argument that it had fundamentally changed as a result of the combined effect of no-fault insurance and travel restrictions. The plaintiff’s arguments can be applied to either compulsory or optional insurance. ICBC has always known that it sells both compulsory and optional third-party liability insurance, and did so during the restricted period. In my view, the initial breadth of the plaintiff’s claim was sufficient to put ICBC on notice as to the issues that might reasonably arise in the litigation.

[83] In my view, the failure to distinguish between optional and compulsory insurance in the original pleadings is at most attributable to poor drafting, or a failure on counsel’s part to appreciate the potential importance of the distinction. Either way, I do not think the plaintiff should be penalized for a delay or what might have been an error attributable to counsel. That is particularly true given the early stage of the litigation and the absence of irremediable prejudice.

[84] For all these reasons, I would not give effect to the plaintiff’s argument that the proposed amendments disclose an entirely new claim that is statute barred. As no other prejudice is alleged, the question of whether it is in in the interests of justice to allow the proposed amendments turns on whether they give rise to a reasonable claim and a valid potential cause of action, or not.

(3) Is the plaintiff's proposed claim in relation to optional coverage bound to fail or does it disclose a potentially viable cause of action?

[85] The plaintiff alleges all of the same causes of action in relation to his argument for optional insurance as he relied on for basic coverage. For convenience, they are: negligence, negligent misrepresentation, breach of contract, unjust enrichment, breaches of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, the *Frustrated Contracts Act*, R.S.B.C. 1996, c. 166, and the *Utilities Commission Act*.

[86] In order to assess whether the plaintiff has a potential case in relation to optional third-party insurance during the restricted period, the statutory framework for setting rates, the "closed system" outlined in the affidavit of Ms. Aimers, and the exclusive jurisdiction of the BCUC have no application, because in this sphere ICBC operates on a commercial basis, and is able to contract and set premiums as it sees fit.

[87] There are three broad contextual factors that are relevant to the analysis. The first factor is the uncertainty of a claim that is a feature of all insurance contracts. The second contextual factor is that information about the no fault regime and the travel restrictions was in the public domain rather than in the knowledge of only one of the parties. The third contextual feature is that optional contracts of insurance were voluntary, and could be cancelled at any time. All three contextual factors are important background against which to assess the various proposed causes of action.

[88] That does not mean, of course, that insurers are immune from potential liability. An action for negligent misrepresentation may lie if the contracting party is wrongfully misled by statements made leading to the formation of the contract *Queen v. Cognos*, [1993] 1 S.C.R. 87. A claim for breach of contract may lie where an insured can show that the insurer failed to meet its obligations, or where there was a breach of the duty of honest performance: *Bhasin v. Hyrnew*, 2014 SCC 71

C.M. Callow Inc. v. Zollinger, 2020 SCC 45. These are merely examples, but they underline the need to consider each of the plaintiff's proposed causes of action.

[89] None of the causes of action put forward in the PANOCC are legally sustainable and I would dismiss the application to amend on that basis.

No potentially valid claim in negligence

[90] The plaintiff's primary argument is based on negligent misrepresentation that caused a "loss" by virtue of the premiums that were paid and never refunded. In my view, the PANOCC does not allege facts that would establish a duty of care, the existence of false or misleading statements by ICBC, a special relationship of proximity between ICBC and the plaintiff, or reasonable reliance on any of the alleged misstatements.

[91] Liability requires that the defendant owed a duty of care to the plaintiff "to avoid the kind of loss alleged," and that the defendant breached the applicable standard of care: *Saadati* at para. 13.

[92] The first stage of the *Anns/Cooper* framework for recognizing a duty of care requires a special relationship of proximity. Whether a relationship of proximity exists between two parties at large, or whether it inheres only for particular purposes or in relation to particular actions, will depend upon the nature of the particular relationship at issue *Deloitte & Touche v. Livent*, 2017 SCC 63 at para. 27.

[93] In cases of economic loss from negligent misrepresentation, the defendant's undertaking and the plaintiff's reliance are determinative factors. As Karakatsanis J. stated in *Livent* at para. 30, "where the defendant undertakes to provide a representation or service in circumstances that invite the plaintiff's reasonable reliance, the defendant becomes obligated to take reasonable care." However, she went on to explain that:

> [31] Rights, like duties, are, however, not limitless. Any reliance on the part of the plaintiff which falls outside of the scope of the defendant's undertaking of responsibility — that is, of the purpose for which the representation was made or the service was undertaken — necessarily falls

> outside the scope of the proximate relationship and, therefore, of the defendant's duty of care … By assessing all relevant factors arising from the relationship between the parties, the proximity analysis not only determines the *existence* of a relationship of proximity, but also delineates the *scope* of the rights and duties which flow from that relationship. In short, it furnishes not only a "principled basis upon which to draw the line between those to whom the duty is owed and those to whom it is not" (*Fullowka*, at para. 70), but also a principled delineation of the scope of such duty, based upon the purpose for which the defendant undertakes responsibility. As we will explain, these principled limits are essential to determining the type of injury that was a reasonably foreseeable consequence of the defendant's negligence. [emphasis added].

[94] There is no dispute that it is the duty of a public insurer to provide all the information a customer needs concerning the available range of coverage so that a customer can make an informed choice about the level of coverage he or she needs: *Mann v. BCAA*, 2004 BCSC 139 at para. 71, *Fletcher v. Manitoba Public Insurance Co.* [1990] 3 S.C.R. 191.

[95] In *Fletcher,* the Supreme Court of Canada found that a public insurer has a duty of care to properly inform its customers of all available coverages, both compulsory and optional. However, in that case, the insurance agent that dealt with the plaintiff failed to advise him of the available underinsured motorist coverage that would have protected him from monetary loss that he incurred as a result of having insufficient coverage. In this case, there is no factual allegation that an agent who dealt with Mr. Watson-Hurthig (or any other motorist) misinformed him about what coverage was available or what it covered.

[96] Here liability is asserted on the basis of a series of general statements made by ICBC regarding its financial position, and its plans to address the effect of Covid-19. However, the statements themselves were not made in circumstances that would attract an undertaking of responsibility or invite reliance on them when making decisions about optional insurance.

[97] The facts alleged in the PANOCC that are said to give rise to a claim in negligent misrepresentation are:

1. ICBC's letter dated July 16, 2021 in the context of the rate setting process that included the following two statements:
    a. "any positive net impacts to ICBC's financial results due to COVID-19 will benefit customers, which can include returning the benefit directly to customers in the form of a rebate or through capital to build ICBC's rate stabilization fund"; and
    b. "...providing rebates to handle temporary windfalls…benefits customers, since they will see an immediate benefit and will not experience rate fluctuations once the event has concluded, and rates would need to be re-adjusted to reflect a return back to 'normal state'";
2. ICBC's statement in the context of the rate setting process in its 2022 Service Plan that "there were no further COVID-19 related savings or rebates included in the forecast going forward";
3. Two statements made in ICBC's Autoplan Insurance Brochure:
    a. "many drivers increase Basic Third Party Liability coverage to $1 million or more because if you are found responsible for a serious crash causing injury or damage, you could be required to pay damages well above $200,000"; and
    b. "Purchasing additional Third Party Liability gives you extra protection when the cost of the other party's claim has exceeded the $200,000 limit of your Basic third Party Liability"; and
4. Misrepresentations with respect to ICBC's net profits.

[98] These alleged misrepresentations fall into three different categories: (1) Statements in the context of the rate setting process, and (2) Statements in the ICBC brochure, and (3) statements about ICBC's profits. I will analyze each in turn.

Statements in the context of the rate setting process

[99] I am not convinced that a duty of care arose in relation to the first group of alleged misstatements. Both the July 16, 2021 letter and the 2022 Service Plan addressed basic insurance, and how to address Covid-19 savings in that context. They did not invite or even suggest reliance by customers in relation to optional contracts of third-party liability insurance.

[100] A court must direct its attention to whether the defendant has undertaken to provide a representation in circumstances that invited the plaintiff's reasonable reliance on the representation, and whether there was in fact detrimental reliance on

the representation: 1688782 *Ontario Inc. v. Maple Leaf Foods*, 2020 SCC 35 at paras. 32-36, *Live Nation Entertainment v. Gomel*, 2023 BCCA 274 at para. 129.

[101] In my view, the purpose for which the statements were made falls outside of the scope of the proximate relationship between ICBC and its customers in relation to the provision of accurate information for the purposes of optional insurance, and therefore outside of the duty of care.

[102] I am bound to accept the truth of the plaintiff's claim in his 2nd affidavit that he was aware of the statement that any net positive impact to ICBC's financial picture would benefit customers, and that he chose to purchase and maintain all of his insurance products through ICBC on the basis that excess profits would be returned. However, those statements fell outside of any undertaking of responsibility on the party of ICBC in relation to optional insurance coverage.

[103] Nor was reliance on any of ICBC's representations in the context of the rate setting process reasonable in relation to optional insurance. Those statements have nothing to do with optional insurance, so it is difficult to see how they could induce the plaintiff to rely on them in making any decisions related to optional insurance. In addition, they were made after the restricted period had ended. As I have already noted, it would not have been possible for the plaintiff to rely on either statement to enter into or maintain his contract with ICBC during the restricted period.

[104] The statements made by ICBC in the rate setting process were also forward looking and either forecasted or predicted what Covid-19 savings would be, or addressed how they would be accounted for in the future. In the context of an alleged misrepresentation that is related to a contractual relationship, actionable misrepresentations cannot be based on future hypothetical events. They must be misrepresentations as to factual matters in existence at the time that are material to the contract and influential in producing it: *PD Management v. Chemposite*, 2006 BCCA 489 at paras 13-14.

[105] Finally, there are really no facts in the PANOCC to suggest that the statements made in the context of rate setting were untrue, inaccurate or misleading, much less known to be at the time they were made. Contrary to the assertions made by the plaintiff, ICBC did not "promise to refund any positive net impacts to ICBC to its customers," or promise to return "excess profits" - it simply promised that positive net impacts would "benefit" customers.

[106] A reasonable claim requires the plaintiff to plead the material facts necessary to formulate a complete cause of action: Rule 3-1(2)(a), *Sayhoun v. Ho*, 2013 BCSC 1143 at paras. 15-17, 21, 25. While I am not to weigh evidence, I am entitled to consider the alleged facts when assessing the overall viability of the claim. In this case, ICBC's statements in the rate setting process do not give rise to a viable cause of action in relation to optional contracts of insurance.

Statements in the ICBC brochure

[107] The plaintiff alleges that the statements in the ICBC brochure describing how many drivers increase basic third-party liability insurance because damages can be well above $200,000 and that purchasing such additional insurance gives you extra protection were misleading statements because they "suggest that it is necessary" to purchase such insurance.

[108] I do not read the general statements in the ICBC brochure as suggesting that increasing third party liability insurance is necessary or mandatory. While the brochure recommends such coverage, there is nothing in the brochure statements that can be shown to be untrue, inaccurate or misleading. Both the fact that many drivers obtain third-party liability insurance above what is required, and the fact that it protects an insured from damage above $200,000 appear to be accurate statements. I see nothing in the ICBC brochure that could reasonably be characterized as misleading.

[109] The question of whether additional third-party liability was "necessary" or not during the restricted period would have been in the eye of the beholder. Third party liability was still necessary for damage to property other than motor vehicles within

British Columbia, and for those motorists who did travel outside of British Columbia despite restrictions (for example for essential travel). It is not difficult to imagine a claim being well above $200,000. One motorist might therefore conclude additional third-party liability coverage was necessary. Another might conclude that it was not, since they were not travelling outside of British Columbia and the risk of a third party claim was low.

[110] All of this simply underlines the reality that insured motorists had a choice what to do during the restricted period. All of the necessary information was in the public domain and readily available. Both the switch to the no-fault regime and the existence of travel restrictions were known facts, and not particular facts known only to ICBC and its representatives.

[111] In my view, it is a stretch to suggest that a failure to update the ICBC brochure to address all possible ramifications of the Covid-19 pandemic could ground liability, particularly when the need for third party liability would still depend on the individual driver's needs.

[112] In *Fletcher* at pp. 211-212, the Supreme Court of Canada recognized that a failure to disclose information in the insurance context could give rise to liability in negligence, but cited English authority to the effect that in such cases it may be much more difficult to infer an undertaking of responsibility.

[113] While the plaintiff may argue that ICBC had a positive obligation to disclose the changed level of risk that existed at the time, the simple fact is that insured motorists were armed with all the information they needed to make an informed decision. If they did not want additional third-party insurance in light of the travel restrictions that were imposed, they could cancel the coverage at any time. There is no air of reality to the claim of negligent misrepresentation in relation to the ICBC brochure.

Alleged misrepresentations about ICBC's profits

[114] In my view, the plaintiff's argument based on the statements that have been made about ICBC's expected profits does not give rise to a viable negligence claim. There is no statement that could reasonably be interpreted as a promise to return profits, and general statements about ICBC's profits are irrelevant.

[115] The essence of the plaintiff's claim is that ICBC should be obliged to return profits to its customers. However, in the absence of a viable legal claim, the amount of profit an insurance company may make is not for a court to dictate: *Steward v. Lloyd's Underwriters*, 2022 BCCA 84 at para. 227.

[116] The plaintiff's claim in this regard is based on the idea that ICBC's profits from optional insurance were improper because they benefited from fewer claims. However, a contract of insurance is, by its nature, already based on uncertainty with respect to whether a particular risk will arise. If the underlying conditions change and the risk of a claim becomes more likely, an insurer is not then able to charge more premiums. By the same token, if underlying conditions change and the risk of a claim becomes less likely, the insured is not then able to obtain a refund of the agreed price.

[117] Recognizing a claim in negligence for failing to refund monies agreed to in an otherwise valid contract of insurance based on a change in the underlying conditions, would undermine the certainty and predictability that is reasonably required in the insurance industry.

[118] In this case, for example, those motorists who purchased optional third-party insurance got what they bargained for – financial protection against a defined risk. If a duty of care in negligence existed on the part of insurers to refund money every time the underlying risk of an uncertain event changed, then the contracting parties would never be able to rely on the terms of an insurance contract. It would be subject to constant change, and an ongoing obligation on the part of insurers to disgorge profits.

[119] In my view, the mere fact that an insurer profited from a change in underlying conditions is not evidence of civil wrongdoing. In any event, there is no factual foundation outlined in the ANOCC or PANOCC for the assertion that ICBC made any specific misrepresentation in relation to returning its profits, much less an assertion that would give rise to a duty of care, or a breach of the standard of care, in the context of optional insurance.

No potentially valid claim for breach of contract

[120] The plaintiff contends that ICBC is liable for breach of contract and breach of its duty of good faith performance because it charged premiums for risks that did not exist, or where the risk exposure had "materially changed," or by failing to reimburse premiums paid on a *per diem* basis where the product purchased was "drastically different" than advertised.

[121] I do not accept that argument. The product had not changed, even if the risk exposure had. In essence, the plaintiff received the indemnification that he contracted for, and the contract did not depend on the profits made or not made by the defendant.

[122] As noted by Karakatsanis J., in dissent, in *Atlantic Lottery Corp v. Babstock*, 2020 SCC 19 at para. 91, the elements of a cause of action for breach of contract are the existence of a contract and the breach of a term of that contract.

[123] The plaintiff has not identified any specific contractual term, implied or otherwise, that would entitle him to a refund of premiums based on a change to the certainty of the underlying risk. In my view, that is a substantive failure that is fatal to the viability of the claim for breach of contract. The pleadings must outline the contractual term that has been breached.

[124] Implied terms of a contract may be inferred based on the presumed intention of the parties, where it is necessary in order to give "business efficacy" to a contract, or where the parties if questioned would say that they had obviously assumed such a term was a part of the contract: *M.J.B. Enterprises v. Defence Construction*, [1999]

1 S.C.R. 619 at para. 27. Good faith may also play a role in the law of implied terms to fill in gaps, or ensure that interpretation of a contract is reasonable *Bhasin* at para. 44.

[125] Here it is unrealistic to say that it could have been the presumed intention of the parties that premiums would be refunded on a *per diem* basis. There are no facts in the ANOCC or PANOCC from which such a contractual term could reasonably be inferred.

[126] The plaintiff also relies on the duty of good faith and honest performance. However, the duty of honest performance does not eliminate the need prove the existence of a contractual term in the first place. Rather, it establishes that once a contractual term has been established, the parties must perform their existing contractual duties honestly and reasonably, not capriciously or arbitrarily, and they must not lie or otherwise knowingly mislead each other about matters directly linked to performance of the contract (*Bhasin* at para. 63 & 73).

[127] The plaintiff cannot rely on the duty of honest performance to argue that he entered into a contract of insurance with ICBC based on their dishonesty. The Court of Appeal recently affirmed that the duty of honest performance does not extend to dishonesty inducing someone to enter into a contract: *Ocean Pacific Hotels v. Lee*, 2025 BCCA 57 at para. 72.

[128] There are no facts in the pleadings upon which it could be found that ICBC lied or knowingly misled motorists about an issue “directly linked to performance of the contract.” ICBC met its contractual duty to indemnify the plaintiff in relation to third party liability above $200,000.

[129] Even if the move to a no-fault regime and the travel restrictions changed the likelihood of a claim, those facts were not concealed by ICBC. They were well known and in the public domain as they arose. The plain fact is that if the plaintiff was unhappy with the premiums being charged for optional insurance during the restricted period, he could have cancelled his optional coverage at any time.

No valid claim for unjust enrichment

[130] The plaintiff's claim for unjust enrichment in respect of optional coverage is based on the notion that ICBC was unjustly enriched by payment of premiums for a product that did not exist or "had a materially different value as compared to what was represented during the restricted period."

[131] As noted, optional insurance did "exist" during the restricted period. A more fundamental problem with this claim, in my view, is that there were juristic reasons for any additional enrichment caused by the combined effect of the contract of optional insurance and the travel restrictions.

[132] The law is clear that a contract and a "disposition of law" can each individually amount to a juristic reason that would deny recovery in a case alleging unjust enrichment: *Kerr* at para. 41, *Garland v. Consumer's Gas Co.*, 2004 SCC 25 at paras. 49-51.

[133] In this case the claim for unjust enrichment relates to the retention of premiums, but the premiums were charged in accordance with a valid contract, and any reduction in the number of claims that profited ICBC was the result of a disposition of law, namely the travel restrictions. In my view, the combined effect of the contract for insurance and the legislative basis for the travel restrictions amount to a juristic reason for any enrichment that resulted.

No potentially valid claim for breach of the BPCPA

[134] At paragraphs, 77-87 of the PANOCC, the plaintiff outlines his claim that ICBC engaged in deceptive acts and practices, by offering third party liability coverage during the restricted period when such services were not needed or were drastically reduced; unconscionable acts by failing to refund premiums in that regard, and a further breach of the *BPCPA* by virtue of offering an unsolicited service.

[135] There is no dispute that the terms of the *BPCPA* apply to consumer transactions, and provide that a person who has suffered damage or loss due to a

contravention of the *Act* may bring an action against a supplier of goods or services (s. 171). Unlike the provision of basic insurance, I am satisfied that the plaintiff's claim in relation to optional insurance is a consumer transaction under the *BPCPA*.

[136] Neilsen J. described the purpose of the *BPCPA* in *Koubi v. Mazda Canada Inc.*, 2012 BCCA 310 at para 63 as follows:

> [63] … A close examination of the statute's legislative objectives and provisions reveals a clear intent to provide an exhaustive code regulating consumer transactions, directed to both protection of consumers and fairness and consistency for all parties in the consumer marketplace. The Act has over 200 provisions that comprehensively establish, administer, and enforce statutory rights and obligations directed to the regulation of consumer transactions in a multitude of circumstances. It provides extensive powers and remedies to a statutory director and investigative staff to ensure compliance with its requirements. These include investigation, collection of evidence, and enforcement through undertakings, compliance orders, prohibition orders, court-appointed receivers or property freezing orders, in addition to recourse to court proceedings as set out in ss. 171 and 172. It also enacts a panoply of statutory sanctions for suppliers and other offenders who breach the statutory rights of consumers, including administrative penalties of up to $50,000 for a corporation, and offences with penal consequences that include fines of up to $100,000 for a corporate offender.

[137] The relevant contraventions of the act that the plaintiff relies on are the prohibitions against engaging in deceptive acts or practices (s. 5(1)), engaging in an unconscionable act or practice (s. 9(1)), and supplying unsolicited goods or services to a consumer (ss. 11-14).

[138] In my view, despite the breadth of the *BPCPA*, it does not give rise to a valid cause of action on the facts alleged in the ANOCC or PANOCC. ICBC did nothing more than continue to provide insurance coverage on the same terms and at the same premiums as provided for in the contract. In my view, the mere fact that claims were likely to be reduced during the restricted period, does not amount to a deceptive or unconscionable act. As noted above, if the plaintiff believed that the need for additional third-party liability coverage was drastically reduced, he could have cancelled his coverage. The fact that he chose to maintain his coverage despite government travel restrictions does not transform the payment of premiums he contractually agreed to into unconscionable acts and practices.

[139] The situation could theoretically be different if ICBC had made a direct promise in clear terms to the plaintiff or other motorists to refund premiums if they maintained coverage and ICBC profited more than expected due to a lesser number of claims. However, despite the plaintiff's efforts to persuade me otherwise, the facts (even assuming they are true) simply are not reasonably capable of supporting that interpretation.

[140] The plaintiff relies on the same alleged misleading statement under the *BPCPA* as he does in his negligence claim: namely the July 16, 2021 statement that any positive net impacts due to Covid-19 would benefit customers. Quite apart from the fact that this was not a specific promise about refunding profits directly, it was also a statement made in the context of BCUC proceedings in respect of insurance rates for basic coverage, and therefore cannot reasonably be construed as the promise to refund motorists in respect of optional insurance.

[141] I do not consider the argument that optional third-party insurance during the restricted period was an unsolicited good to be a sound argument. Section 11 of the BPCPA states that "unsolicited goods or services" means goods or services that are supplied to a consumer who did not request them. In my view, it is clear from the facts in the ANOCC and PANOCC that the plaintiff requested optional insurance. Nor was there a "material change in the goods or services" that were provided. The plaintiff's coverage remained the same throughout the restricted period.

Is there a potentially valid claim under the Frustrated Contract Act?

[142] With respect to the plaintiff's claim under the *Frustrated Contract Act*, I find no difference between his claim in relation to basic coverage or optional coverage. The *Frustrated Contract Act* has no application to a contract of insurance and therefore cannot give rise to a valid cause of action.

The caselaw in California does not support the plaintiff's claim

[143] In support of his case, the plaintiff relies on American caselaw including in particular *Day v. Geico*, 580 f supp. 3D 830 (2022), a decision from the United

States District Court in San Jose, California. The underlying complaint in that case was similar to the plaintiff's complaint in this case; a failure to properly refund auto insurance premiums based on savings to the insurance company as a result of the Covid-19 lockdown.

[144] In its 2022 decision, the court found no merit to some causes of action, but found potential merit in others and granted leave to amend. The court distinguished between rate setting on one hand, and the unfair application of rates on the other.

[145] In my view, one must be cautious when considering the jurisprudence from the United States in this context, because the statutory framework for insurance in British Columbia is distinct from that in California. Even so, reading the case as a whole, I am unable to find that it offers much if any support for the plaintiff's claim.

[146] In the initial decision of the court, the insured's claim that Geico had improperly charged premiums (and failed to refund them) survived a motion to dismiss. However, there are two features of the case that distinguish it from the present case. First, Geico made a more specific public statement than is alleged against ICBC. Geico referred to the money it had saved and said "we are passing these savings on to customers," which might be interpreted as a direct promise to refund all the savings. Second, there was a difference in the legislative scheme in place. While in British Columbia rebates over basic insurance have to be approved, in California there is a discretion to adjust premiums that is written into the contract of insurance.

[147] Of particular note is the fact that the same court reconsidered the case in *Day v. Geico*, 2024 WL 1244481 (March 21, 2024), and summarily dismissed the plaintiff's claim. It found that there was no evidence to show unfair conduct or a genuine dispute over material facts. The theory that failure to return a greater amount of premiums was unfair was rejected on the basis that that is how insurance works. Even if the insurer could have returned a greater portion of the premiums, failure to do so did not support a cause of action.

[148] In my view, even apart from the danger of applying cases that arose in a different legislative context, the caselaw in California does not support the plaintiff's claim.

Conclusion

[149] My conclusion is that the plaintiff's application to amend the pleadings does not disclose a reasonable claim or a potentially viable cause of action that warrants a trial. Accordingly, the application to amend must be dismissed.

[150] Considering all of the causes of action advanced by the plaintiff, and accepting all of the factual allegations as true, I find there is no genuine issue to be tried. The plaintiff's case, in my view, has no chance of success. Accordingly, I am bound to grant the defendant's application for summary judgment.

Summary of Orders

[151] The plaintiff's application to further amend the notice of civil claim is dismissed.

[152] The defendant's application for summary judgment under Rule 9-6 is granted.

[153] The defendant has succeeded on both applications and is entitled to its ordinary costs on scale B, unless there are facts I am unaware of. If so, the parties may make additional submissions on costs in writing within 30 days of the release of this judgment.

"Greenwood J."