CITATION: Mitton v. Ministry of Transportation, 2024 ONSC 6608
COURT FILE NO.: CV-17-11-A1
DATE: 20241126

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Ronald Busch	)	
	)	Michael Beeson for the Plaintiff
Plaintiff	)	
	)	
– and –	)	
	)	
Cristy Mitton	)	
	)	
Defendant	)	R. Stephen Baldwin for the Defendant
	)	
– and –	)	
	)	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, REPRESENTED BY THE MINISTER OF TRANSPORTATION FOR THE PROVINCE OF ONTARIO and CARILLION CANADA INC.	)	Martin P. Forget and Earl Murtha for the Third Parties
	)	
Third Parties	)	
	)	**HEARD:** June 10, 11, 12, 14, 17 and 18

REASONS FOR JUDGMENT

HOOPER J.

[1] On February 12, 2015, Cristy Mitton ("Mitton") lost control of her vehicle, entered the lane of Ronald Busch's ("Busch") oncoming vehicle, and a collision resulted. Both drivers were seriously injured. Busch commenced an action against Mitton for damages. Mitton commenced a Third Party Claim against the Ministry of Transportation and its winter operation's contractor, Carillion Canada Inc. alleging negligent winter maintenance. The MTO is vicariously responsible for any liability found against Carillon Canada. Accordingly, the third parties will collectively be referred to as the "MTO".

[2] The parties agree that Busch has no liability for this accident. The main action between Busch and Mitton resolved with Mitton admitting 1% liability and paying Busch's damages. The MTO accepts this settlement of the main action as reasonable.

[3] The sole issue at trial is the liability of the MTO.

Evidence at Trial

General Comments

[4] Four fact witnesses were called at trial:

a. Ronald Busch

b. Christy Mitton

c. Lars Romeski – ambulance attendant

d. Staff Sergeant Maryann MacNeil – investigating officer

[5] In addition, Mitton's counsel read in excerpts from the transcript of the discovery of Lloyd George, Superintendent of Construction and Operations with Carillion Canada and John Potts, Maintenance Superintendent with the Ministry of Transportation.

[6] The parties also provided the court with a Joint Liability Brief. Given the resolution of the main action, some of the documents had to be removed. The removal of those documents was on consent. The redacted Joint Liability Brief was entered as an exhibit and the parties agreed on the use to which those remaining documents could be put for evidentiary purposes.

[7] Each party called one expert. While the expert reports were not put into evidence, the parties agreed to make many of the summaries, charts and photos contained therein formal exhibits at trial to be relied upon as evidence. The parties also agreed to file the GPS recordings relied upon by the experts as exhibits.

[8] Overall, there were very few factual inconsistencies between the various witnesses. The experts also accepted the underlying documentation as accurate.

Background Facts

[9] On the morning of February 12, 2015, Busch testified that he left his home on Lake Dore Road for work at the Canadian Forces base in Petawawa. Busch remembered that morning as being very cold, with sufficient snow on his vehicle that he had to brush it off. There was no ice on his vehicle, only loose snow. Busch also recalled there was enough snow accumulation for him to note that he would need to use his snowblower on his driveway when he returned home later that evening.

[10] Busch was asked for his recollection of the temperature. He thought it was between -15˚C and -20˚C. He did not know for certain. He described it as a beautiful, clear morning.

[11] From Lake Dore Road, Busch turned northbound on Highway 41 towards Pembroke. He described Highway 41 as "snow covered to centre bare". When Busch was asked to give his definition of "snow covered to centre bare," he indicated he meant parts of the roadway were snow covered and other parts of the roadway were bare pavement at the centre but remained snow covered closer to the shoulders on each side.

[12] Highway 41 is a two-lane highway with a posted speed limit of 80 km/hr. When conditions are good, Busch would normally drive 90-95 km/hr on this highway. Due to the conditions on February 12, 2015, Busch reduced his speed to 70 km/hr. He had no problem with traction while on Highway 41. He described the roads as "not great" but would not call them poor.

[13] Busch recalled having traveled for about five minutes on Highway 41, and had just passed Walsh's Road, when he saw Mitton's sedan in the southbound lane driving towards him. He recalled Mitton's vehicle coming over a slight rise and slight bend in the highway when he saw the back end of the vehicle swing into his northbound lane. As he watched, Mitton's vehicle seemed to correct, with its back end returning to the southbound lane and Busch recalled thinking: "oh they've got it". A brief moment later, the vehicle's back end swung more heavily into his lane. Busch then watched as the vehicle's front end "hooked" sharply turning into his northbound lane. Busch pressed hard on the brake and moved into the shoulder but could not avoid the collision. Mitton's vehicle collided with the driver's side of Busch's vehicle at a 30-45˚ angle.

[14] On cross-examination, Busch confirmed that he saw Mitton lose control as she was coming out of a slight bend in the highway. He believed Mitton was traveling at a greater speed than he was but could not be sure. When Busch braked hard after the Mitton vehicle "hooked" into his lane, he had no issue with skidding or sliding.

[15] Mitton was called as a witness. She had no recollection of the day of the accident and had no evidence as to either the driving conditions that morning, or the cause of her loss of control. She described herself as a careful and experienced driver. She was very familiar with this stretch of Highway 41 as it was her route to work. She was driving to work on the day in question and does not believe she was in any hurry. Her evidence was that she would normally adjust her speed for the road conditions.

[16] The winter forecast for February 12, 2015 predicted temperatures to drop during the daytime hours on February 12. This is atypical. Generally temperatures rise during daytime hours and get colder overnight. On February 12, it was forecasted to do the opposite.

[17] Both parties agree that as of 6:00 a.m. on February 12th, the likely temperature in the area of the accident was -12˚C. The temperature continued to fall. When salting commenced at 7:24 a.m., the temperature in the area of the accident had dropped to between -14˚C and -15˚C. By the time of the accident, the temperature in the area was between -15˚C and -17˚C.[1] Temperatures were forecasted to continue to fall, reaching -29˚C in the evening of February 12.

[18] Sunrise on February 12, 2015 was at 7:15 a.m.

[19] The parties agree that this accident occurred at 8:23 a.m.

[20] Lars Romeski ("Romeski") was an ambulance attendant on scene. He completed the Ambulance Call Report ("ACR") for Busch. In addition to the information in the ACR, Romeski also has an independent recollection of this accident. He recalled it being extremely cold that

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[1] A chart was prepared by the MTO expert, Timothy Leggett, of recorded temperatures in the area for February 11 and February 12, 2015.

morning, so much so that as he provided medical attention to Busch, he needed to swap out with another attendant to warm his hands. He also recalled that one of the concerns he had when treating Busch was Busch's risk of hypothermia. Fortunately, Busch, a helicopter pilot with the Canadian military, was wearing long underwear under his flight suit.

[21] On the ACR, Romeski recorded the temperature as -15˚C plus windchill.[2] He also recorded the roads on his way to the accident scene as being "poor", but made no specific note about Highway 41, the accident site, or the area of the highway where Mitton likely lost control.

[22] Staff Sergeant Maryann MacNeil ("MacNeil") was one of the police officers investigating this accident. MacNeil completed the Motor Vehicle Accident Report ("MVAR"). She does not have any independent recollection of this accident other than what was recorded in her notes and on the MVAR. Any notations regarding the roadway she made were with respect to the collision site. MacNeil did not record any observation of the area where Mitton likely lost control. MacNeil also did not record the outside temperature at the time of the accident. Her notes last recorded the temperature at 6:00 a.m. as -12˚C.

[23] For the collision site, MacNeil recorded the roadway as flat and straight with loose snow. There is an option on the MVAR to record "ice" as the roadway's condition. MacNeil did not select that option. She did not give evidence of having any difficulty driving to the accident scene. When determining the cause of the accident, MacNeil marked that Mitton was driving too fast for the conditions. During her evidence, she agreed that the conditions of the road contributed to the accident.

[24] No witnesses were called to give evidence of icy roads in this area. Neither of the first responders testified to slipping while walking around the scene attending to Busch and Mitton.

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[2] Both experts agreed that the relevant air temperature for winter maintenance operations excludes wind chill. Therefore, when considering the temperatures at the time the MTO made its winter operation decisions, only the recorded air temperature is used.

The court was not given any approximate distance between where Mitton lost control and where the collision occurred.

Winter Maintenance Standards

[25] The MTO has established winter maintenance instructions for its contractors: *Maintenance Operating Instruction M-700-C:Winter Maintenance Operations During Winter Season* ("M-700-C").[3] In describing the efficacy of the recommended treatments within these instructions, the MTO states:

> The recommended treatments listed in this Operating Instruction have been proven effective for providing a standard level of service. Departure from the recommended treatments might be necessary for unusual circumstances and will require the judgment of the Supervisor, based on past experience.

[26] Within these instructions, the winter operators are required to monitor weather reports and regularly patrol the roadways in order to make informed decisions on whether to plow, salt, or sand. Those three actions are the tools within the winter maintenance operator's toolbox.[4]

[27] With respect to sanding, the relevant portions of M-700-C are:

> Sand is used as an abrasive to provide traction on slippery surfaces. It will be used most often when the temperature is too low for salt to be effective. Sand is most effective in providing traction on dry, hard, snow.
>
> As a general rule, sand will be used when the temperature is falling below, or not expected to rise above -12˚C. However, sand will be used at higher temperatures if traction is required immediately.
>
> Sanding, when required, should normally follow after the plowing operations. This minimizes the amount of sand being pushed off to the side of the road.

[28] With respect to salting, the relevant portions of M-700-C are:

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[3] The parties agreed that M-700-C applied to the relevant portion of Highway 41.
[4] Salt can also entail using de-icing liquid but that was not used in this case. The only two substances used by the MTO on February 12, 2015 were salt and sand.

> Salt applied to snow, forms a brine mixture. This reduces the possibility of the snow sticking to, or packing on the pavement. It also prevents ice build-up and allows the plow to remove the snow easier. Salt, assisted by sun, traffic, and warmer daytime temperatures, is also used as a melting agent to eliminate icy conditions.
>
> As the temperature gets lower, the effectiveness of the salt decreases until it becomes ineffective.
>
> *Normally salt should not be applied when the temperature is below -12˚C. However, in the presence of sun and heavy traffic volume, which creates a higher road surface temperature, salt can be effective down to a temperature of -18˚C.* [Emphasis in the original.]
>
> …
>
> As a general rule, salt should not be applied during night hours to 05:00, since nighttime temperatures are usually lower and sun and traffic volumes are not present to enable salt to work effectively… Salting after the storm to bare the pavement, should be done after 05:00.

[29] There is a chart within M-700-C to clarify for contractors which tools (plowing, sanding, or salting) are recommended to be used under certain conditions. For temperatures between -12˚C and -18˚C, with packed snow, sanding is recommended to be applied on slippery sections. Salt is not recommended unless temperatures are expected to rise. At the bottom of that table, however, the following provision is included:

> Recommended treatment for various conditions shown on this chart should be used in MOST cases. However, unusual circumstances may necessitate departure from the recommended treatment. [Emphasis in original.]

[30] Ongoing patrolling is required to determine if the winter operations are being successful and/or to identify any areas that require specific attention. Patrolling was a key issue in dispute between the experts. Therefore, the patrolling requirements under M-700-C must be borne in mind.

[31] Within M-700-C, there are specific patrolling requirements:

> *Beginning of Storm*
>
> Commence road patrolling as the storm begins, in order to direct and monitor effectiveness of snow removal operations and to relay road and weather information to the District office.

> *During Storm Conditions*
>
> Continue to perform road patrol duties to monitor weather and road conditions, to ensure that necessary operations are undertaken with minimum delay.
>
> *Radio equipped plows and spreaders can assist in monitoring weather and road conditions.*
>
> *Section IX – General*
>
> Winter road patrol may be carried out by designated personnel once per shift and more often during threatening or actual storm conditions. However, unnecessary road patrolling should be eliminated. Road patrolling should be reduced where possible and offset by other means of acquiring the necessary road condition reports; e.g. Police, C.Bs., adjoining patrols, etc. Notation of conditions and action taken, if any, is to be recorded in the appropriate place in the Patrol Supervisors and Night Patrolmen's Diary.
>
> KEEPING ACCURATE DIARIES CANNOT BE OVER-EMPHASIZED.
>
> Inspection by road patrols shall cover all routinely observed road conditions, in addition to ensuring that winter levels of service are maintained. [Emphasis in the original.]

[32] Therefore, under the contract, patrolling is required in advance and during a winter event. Patrollers will note the conditions on their routes and will call into the MTO field office to report those conditions and steps being taken. The stretch of Highway 41 at issue in this litigation is referred to either as Route 22 or Patrol No. 4373A, depending on which MTO record is being reviewed.

[33] A patroller is required to complete a Road Patrol Information sheet setting out the routes, the patroller, and documenting road conditions and steps taken. There are no Road Patrol Information sheets for Patrol Route 4373A. There are patrolling records for nearby routes 4373 and 4372. The patroller who completed those records was Gerard Lorbetskie (“Lorbetskie”).

[34] The MTO logs record Lorbetskie calling into the field office and providing a report of the temperature, road conditions, and winter operations for 4373, 4372 and 4373A, notwithstanding he does not appear to have traversed Route 4373A at any point during his shift. The information he provides for these three routes is identical.

[35] At 7:20 a.m. on February 12,. Lorbetskie called into the field office and reported the following to operator M.Campbell for 4373A:

> Switching to plowing and salting. Temp -14. Light trace of scattered snow. Snow covered and snow packed.

[36] Lorbetskie gave the same exact information for Route 4372 and 4373. It seems clear that Lorbetskie was using his patrolling of nearby routes and simply assuming those same conditions existed on Patrol Route 4373A.

[37] The MTO set a target for its contractors to reach bare pavement as soon as possible after a winter event.[5] For a Class 2 Highway such as Highway 41, the contractual target is for the contractor to reach bare pavement in their geographic area within 16 hours of the winter event ending.

[38] As both experts explained to the court, if snow becomes packed on the roadway, it cannot be cleared by plowing alone. It also cannot be cleared by spreading sand. Sand does not break up snow-packed roads as the snow has already bonded to the roadway. Sand only provides immediate traction. The only way to clear packed snow is to spread salt, wait for approximately 30 minutes for the salt to create a brine to break up the packed snow, and then plow the brine/broken snow mixture away. Given the falling temperatures, had salt not been applied to break up the snow during the morning of February 12, the roads would have remained partially snow-packed until the temperatures began to rise again. There was no evidence of when temperatures were expected to rise, only that temperatures were going to continue to fall to -29˚C throughout the day on February 12.

The Experts

[39] Each side called one expert. For Mitton, that expert was Russell Brownlee (“Brownlee”). The MTO’s expert was Timothy Leggett (“Leggett”). Neither party took issue with the

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[5] Bare pavement is defined as 90-95% clear of any snow or ice.

qualification of the other's expert. Both were qualified to provide an opinion as to the appropriateness and sufficiency of the winter maintenance undertaken by the MTO on February 11-12, 2015 and the impact of that winter maintenance on Mitton's loss of control of her vehicle. Leggett was also qualified as an expert in accident reconstruction.

Evidence of Russell Brownlee

[40] Brownlee's criticisms with respect to the MTO's maintenance can be summarized as follows:

a) The MTO did not sufficiently patrol this stretch of Highway 41 during this winter event.

b) Although the GPS records and winter operation records show that sand was applied to the hills and curves in the subject area, the area of the accident—a straight portion of Highway 41—does not appear to have been treated with sand during the early hours of February 12.

c) Salt was used instead of sand during the winter operations commencing at 7:24 a.m. on February 12.

Patrolling

[41] The accident occurred on Plow and Spread Route 22 ("Route 22"). A patrolling supervisor and patrollers operated in the area, but none passed over Route 22 specifically. While Brownlee conceded that winter operators could also provide patrolling functions, it was his opinion that designated patrollers (i.e., individuals who were only tasked with the patrolling function) should have been actively monitoring the area particularly as salt was being used to ensure it was effective. In Brownlee's opinion, had patrollers been actively patrolling Route 22, the MTO would have realized that salt would have limited effectiveness and that sanding and continuous plowing were required.

Failure to treat subject area in the early morning hours of February 12

[42] During his cross-examination, Brownlee was questioned about each action taken by the MTO between 5:15 p.m. on February 11 and 6:40 a.m. on February 12. He had no issue with any of the operations performed during that time period. Although there was no evidence of patrolling,

Brownlee accepted that each step taken by the winter operator made sense for the time of day and apparent road conditions and therefore, was appropriate. Those steps included:

> *February 11, 2015*
>
> 5:15 p.m. to 6:32 p.m. – Salting without plowing northbound; no activities southbound[6] – this was before the winter storm began.
>
> 7:15 p.m. to 8:40 p.m. – Sanding hills and curves northbound without plowing; no activities southbound.[7]
>
> 9:30 p.m. to 11:00 p.m. – Plowing northbound; sanding straight and flat sections southbound without plowing.
>
> 11:15 p.m. to 00:34 a.m. – Plowing northbound and southbound; sanding hills and curves southbound.
>
> *February 12, 2015*
>
> 2:15 a.m. to 3:55 a.m. – Plowing in both directions over entirety of the route.
>
> 5:10 a.m. to 6:40 a.m. – Sanding hills and curves without plowing northbound; no activities southbound.

[43] Brownlee's criticism of the MTO appears to be based on the fact that hills and curves were treated with sand during the 11:15 p.m. pass and the 5:10 a.m. pass but nothing other than plowing was done for the straight stretches of the highway.

[44] The difficulty in Brownlee's evidence is that he appears to have assumed Mitton lost control on a straight and flat area of Highway 41. While it is true that the *collision* occurred on a straight portion of the highway, Busch's evidence was that Mitton lost control as her vehicle was

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[6] For a two-lane highway—salting and sanding are performed in the centre of the highway and will spread over both lanes.

coming over a hill and coming out of a slight bend in the roadway. That was the only evidence as to where Mitton lost control.

[45] I note that the map of Route 22 filed as an Exhibit depicts the area of the collision is in the middle of a long, straight stretch of Highway 41, but this map does not identify every slight curve in the highway, nor does it show hills. The GPS video of the winter operator's actions as he is sanding "hills and curves" confirms sand is being applied throughout this stretch the highway, either because there is a slight bend in the road that is not picked up by this map, or there is a hill.

[46] As a result, I find that Brownlee was mistaken in his conclusion that the area in which Mitton lost control had not been treated with sand prior to the accident. I find it more probable than not that the area where Mitton lost control was treated with sand during the winter operations performed on February 11 between 7:15 p.m. and 8:40 p.m., and between 11:15 p.m. and 00:34 a.m., and on February 12 between 5:10 a.m. and 6:40 a.m.

The decision to use salt at 7:24 a.m. on February 12

[47] At 7:24 a.m. on February 12, the winter operator began to salt the northbound lane reaching the area of the collision and where Mitton lost control at approximately 7:45 a.m. In Brownlee's opinion, given the time of day (shortly after sunrise) and the air temperature (below -12˚C), spreading salt at this time was contrary to industrypractice. In his view, had continuous plowing and sanding occurred during the winter operations performed at 7:24 a.m., this would have likely addressed the snow-covered sections of the roadway and improved traction for Mitton, thereby reducing the chance of her losing control of her vehicle.

[48] Brownlee conceded, however, that had sand been applied on the run at 7:24 a.m., while the temperatures continued to drop, salt would not have been usable in the runs that followed. This would mean that this stretch of Highway 41 would have continued to be snow-packed until the temperatures rose above -18˚C during the daytime hours. That could have been days later. According to Brownlee, it is not uncommon for northern highways to remain partially snow-packed during the winter months.

[49] During cross-examination, Brownlee was asked about the winter operations that continued after the accident. Even though the temperature continued to fall, the MTO spread salt again later that morning and, by late afternoon, the highway had been returned to bare pavement. Brownlee did not criticize the second application of salt at 1:00 p.m. on February 12 even though it was applied when the temperature was -17˚C because, in his view, it was a sunny day and he presumed that the road surface temperature had increased from the sun and traffic. As long as the roads were being properly monitored to ensure they met the proper conditions for the salt's effectiveness and a refreeze was not occurring, Brownlee took no issue with the MTO exercising judgment and using salt below the preferred temperature of -12˚C.

[50] The difficulty with this part of Brownlee's opinion is that there is not enough time between the application of salt at 7:45 a.m. on February 12 and the accident at 8:23 a.m. for the MTO to do anything other than what it was doing—returning to plow the salt brine/broken up snow mixture that had formed on the highway. This is not a case where the MTO applied salt and left the road unattended for hours. The accident unfortunately occurred in the middle of the ongoing winter operations.

Evidence of Timothy Leggett

[51] The MTO called Leggett as their expert. Leggett is a registered professional mechanical engineer in the provinces of British Columbia and Ontario. He has been involved in motor vehicle accident reconstruction with a particular emphasis on winter road maintenance.

[52] Leggett agreed with Brownlee's timeline of the winter operations performed, but he did not take issue with a lack of patrolling. In his opinion, the individuals performing the winter operations also perform a patrolling function, thereby meeting the patrolling requirements under the contract.

[53] In Leggett's view, the snow removal contractor made the right decision to switch from salt to sand in the early hours of February 12 for the following reasons:

a. While salt is not as effective in temperatures below -12˚C, it can still form a brine and break up packed snow with the combination of sunlight as well as higher traffic volumes in the morning commute.

b. Given the forecast, the winter operators had a small window of time to try to remove the packed snow. As snow-packed roadways are a clear hazard for drivers, trying to get the road to bare pavement was the preferred option. Leggett also relied heavily on the fact that the choice made by the winter operator worked—bare pavement was achieved by the afternoon of February 12.

[54] During cross-examination, Leggett was faced with the decision of *Wasylyk v. County of Simcoe*[8], a case in which he testified as an expert witness on behalf of the plaintiff. As in the case before me, in *Wasylyk*, Leggett examined winter road maintenance procedures, policies, and practices in effect as of the date of the collision and provided his opinion as to whether the decision to use salt in that case was appropriate. In *Wasylyk*, Leggett opined that in the circumstances of that case, salt should not have been used. The following is the trial judge's summary of Leggett's opinion commencing at para. 146:

> [146] Mr. Leggett explained that the options available to Simcoe County prior to the collision to maintain safe conditions on its roads included proactive and reactive operations involving the application of salt as an anti-icer (preventing the bond of ice on the road's surface) and a de-icer (breaking the bond once formed), or sand, which provides traction on a slippery surface.
>
> [147] In his view, the use of salt in blowing snow and drifting conditions was poor practice, illadvised because the moist brine created by its application would act as a magnet, attracting the blowing snow where it would stick instead of simply blowing across the roadway. With lower temperatures, the risk of refreeze increased. Refreeze due to the dilution of salt is a well-known phenomenon in the winter maintenance industry.

[8] 2022 ONSC 4458.

> [148] Further, once the decision to apply de-icing chemicals is made, (in this case, salt) operations and reapplications should have been continuous to avoid a refreeze.
>
> [149] The more appropriate response by Simcoe County would have been to patrol and plow and apply sand as necessary. When the roads warmed in the afternoon, Simcoe County could have continued with this approach, or switched to straight salt. If this was the choice, then circuit times would have needed to be short, particularly if the ambient temperatures were in the process of dropping.
>
> [150] Once Mr. Payne chose to apply salt on CR 88, he should have been on alert to prevent a refreeze. This would have included monitoring the temperatures and any incoming precipitation, returning to CR 88 to check the roadway within a reasonable period, and reapplying salt if necessary.

[55] Mitton suggests that Leggett is being inconsistent in his opinion in the case before me by now suggesting salting was appropriate, by failing to find a refreeze, and by failing to find an issue with the level of patrolling performed.

[56] The difficulty for Mitton is that the winter event in *Wasylyk* was completely different than the winter event on February 11-12, 2015. In *Wasylyk*, the ongoing weather event was much heavier. Once the snow stopped, the winter maintenance operators in *Wasylyk* had to contend with drifting snow and ongoing snow squalls: see *Wasylyk*, at para. 18.

[57] Leggett, testifying in *Wasylyk*, gave evidence that salt acts as a binding agent to snow. As a result, when there are snow squalls or significant drifting snow and salt is spread, it causes that drifting snow to stick to the roadway instead of blowing by. In other words, it acts like a magnet, creating snow-packed roadways rather than preventing them: at para. 147. However, in the case before me, there is no reference to drifting snow in the area of the accident at the time the decision was made to switch from sand to salt.

[58] With respect to a refreeze, Leggett conceded in his evidence before me that a refreeze can occur when salt is applied at too low a temperature. There is, however, no evidence that such a refreeze occurred between the salt application at 7:45 a.m. and the accident at 8:23 a.m. on February 12.

[59] Finally, while Leggett criticized the municipality in *Wasylyk* for not continuously patrolling after they began to apply salt, in this case, there is insufficient time between the salt

application and the time of the accident to have any concern over lack of patrolling. In addition, Leggett accepts that winter operators provide a patrolling function and one such operator was on his way back to plow the subject area. Mitton's vehicle was, unfortunately, ahead of the plow.

[60] As a result, I do not find Leggett's opinion in the case before me to be inconsistent with *Wasylyk*.

Assessment of the Expert Evidence

[61] As stated several times in these reasons, the experts agreed on most of the chronology and the decisions made by the MTO. Where the experts differed, I preferred the opinion of Leggett for the following reasons:

(a) One of the premises of Brownlee's opinion was that the accident occurred on a straight stretch of Highway 41 and the MTO had focused its sanding operations prior to the accident on hills and curves. While it is true that the collision occurred on a straight portion of the roadway, this was not where Mitton lost control. Busch's uncontradicted evidence was that Mitton lost control as she was coming out of a curve in the roadway. As a result, Brownlee based his findings on the wrong portion of the roadway.

(b) While Brownlee critiqued the GPS records for being unable to confirm with precision where the sand, salt or plowing occurred, they were quite impressive. As the recordings were played for the court, I could see where the plow was dropped or where sand/salt was applied.[9] During the passes focused on "hills and curves", sand was being dropped with regularity as the operator was driving along Highway 41, even on areas that appeared straight on the map.

(c) Although there were no independent patrollers on Route 22, I accept the opinion of Timothy Leggett that the winter maintenance operators did provide a patrolling function while they plowed, spot-sanded, and salted during this winter event.

[9] The GPS records could not confirm whether it was sand or salt that was applied, only that something was being applied to the roadway. Other records confirmed the rate of spread and that rate identifies the substance being used (salt is spread at 130 kg/2 lane km and sand is spread at 570 kg/2 lane km).

(d) Brownlee did not explain how additional patrolling between the application of salt at 7:45 a.m. and the accident at 8:23 a.m. would have made any difference. The plow was on its way back to plow the area where Mitton lost control. The driver had not taken any break and the route was an appropriate length. Even if a dedicated patroller had been driving around and noticed any issue on the roadway, the plow could not have reached the subject area any faster.

(e) Brownlee's primary criticism of the use of salt the morning of the accident is that it could cause a refreeze. There is no evidence that it did cause a refreeze. The evidence was that the MTO continued to use salt later in the day at even lower temperatures and bare pavement was restored by 4:00 p.m.

Findings of Fact

[62] Based all of the evidence, I make the following findings of fact:

(i) The relevant area of Highway 41 is categorized as a Class 2 Highway.

(ii) The forecasted temperature predicted an atypical event of the temperature dropping over the course of the day.

(iii) From 11:15 p.m. on February 11 until 00:45 a.m. on February 12, 2015, Route 22 was spot-sanded at the hills and curves. I find this included the area where Milton lost control.

(iv) From 2:15 a.m. to 3:55 a.m. on February 12, 2015, Route 22 was fully plowed in both directions with neither sand nor salt applied.

(v) From 3:55 a.m. until after the subject accident, only light snow and/or flurries were reported in the surrounding areas.

(vi) From 5:10 a.m. to 6:40 a.m., Route 22 was spot-sanded at the hills and curves. I find this included the area where Mitton lost control.

(vii) As of 6:00 a.m., the temperature in the area of the accident was -12˚C. The temperature continued to fall.

(viii) Sunrise on February 12, 2015 was at 7:15 a.m.

(ix) When salting commenced at 7:24 a.m., the temperature in the area of the accident had dropped to between -14˚C and -15˚C at the accident site.

(x) From 7:24 a.m. to 9:24 a.m., the northbound lane was plowed and both lanes were salted.

(xi) There was no independent patrolling of Route 22 during this winter event, but the winter operators plowing, sanding, or salting did patrol the area, particularly when they spot-sanded during the runs at 11:15 p.m. and 5:10 a.m.

(xii) Salt was applied over the area where Mitton lost control at approximately 7:45 a.m.

(xiii) The roadway was partially snow-packed but I find the application of salt at 7:45 a.m. did not cause a refreeze.

(xiv) Mitton lost control at 8:23 a.m.

(xv) The winter operator who had spread salt over the area where Mitton lost control at 7:45 a.m. was on his way back to plow this stretch of the highway when the accident occurred.

Issues

[63] The following issues were tried before me:

a. Is the admission of 1% liability a barrier to the defendant bringing this Third Party Claim?

b. What is the test to determine liability?

i. Was the roadway in a state of non-repair?

ii. If the roadway was in a state of non-repair, did that state of non-repair cause Mitton to lose control of her vehicle?

iii. If (i) and (ii) are answered in the affirmative, has the MTO discharged its onus in proving it made reasonable efforts to correct the non-repair?

c. If there is liability found against the MTO in (b), what is the MTO's percentage of liability?

Law and Analysis

Issue (a) - Is the admission of 1% liability a barrier to the defendant bringing this Third Party Claim?

[64] The MTO takes the position that this litigation is barred from moving forward following Mitton's admission of 1% liability when settling the main action. In the alternative, the MTO states that the circumstances of this accident demonstrate obvious negligence on the part of Mitton, therefore barring any liability against the MTO.

[65] To support this proposition, the MTO relies upon a series of cases that state that road authorities do not have a duty to maintain the roadway for negligent drivers: see e.g., *Deering v. Scugog (Township)*[10]. The MTO submits that any duty of road authorities is only owed to the ordinary driver exercising reasonable care. When defining "ordinary driver", the MTO relies upon the following quote from *McLeod v. General Motors of Canada Limited et al*.[11]:

> The "ordinary driver", exercising ordinary care, does *not* include those who do not pay attention, drive at excessive speeds, or who are otherwise negligent. The "ordinary driver" is expected to adjust his or her behavior according to the nature of the roadway and driving conditions, and such adjustments may include driving *below* the speed limit. Moreover, the "ordinary driver" is one with the skill and care expected of a reasonable driver, "from the general driving pool", at the time and place in question, and not some more limited pool of drivers having limited experience or qualifications comparable to a specific plaintiff. [Footnotes omitted.]

[66] Simply put, it is the MTO's position that once a driver is found to be negligent, the MTO no longer has a duty of care to that driver and cannot be found evenly partially responsible for the loss. Interestingly, the quote above is only part of the paragraph from *McLeod*. The MTO left out the following sentences that precede what it quoted to the court:

> Municipalities must provide for ordinary drivers who exercise ordinary care. This includes those of average driving ability, and not simply model drivers who are perfect or prescient, especially perceptive, or gifted with exceptionally fast reflexes. It includes, rather, the ordinary driver who is of average intelligence, pays attention, and uses caution when conditions warrant, but is human and sometimes makes mistakes.[12]

[67] Mistakes attract liability in civil cases. The court's comments in *McLeod* cannot be reconciled with the MTO's submission that only innocent drivers can sue road authorities. There

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[10] 2010 ONSC 5502, 3 M.V.R. (6th) 33, aff'd [2012] 2012 ONCA 386, 33 M.V.R. (6th) 1, leave to appeal refused, [2012] S.C.C.A. No. 351.
[11] 2014 ONSC 134, at para. 52.
[12] *McLeod*, at para. 52.

is also a significant difference between a driver who runs a stop sign[13] and a driver who fails to reduce her speed enough for the winter conditions as would appear to be the case with Mitton.

[68] Here, the MTO relies upon the police officer's conclusion that Mitton was "driving too fast for the road conditions" as a confirmation that Mitton was "driving at excessive speeds" and therefore negligent as found in *Deering*[14]; however, I have no evidence of the actual speed of Mitton's vehicle. She may have made a mistake in failing to reduce her speed given the slipperiness of the roadway at a curve; however, that mistake does not necessarily place 100% responsibility on her and zero responsibility on the road authority responsible for maintaining that curve during this winter event. Accepting the MTO's argument could potentially insulate road authorities from their winter maintenance responsibilities provided they could place some element of mistake or misjudgment on the driver.

[69] I also note that Mitton's admission of 1% liability was necessary resolve the main action, pay the plaintiff, and proceed solely with the trial of the Third Party Claim. It was an acknowledgement that, given the facts of this case, Mitton would more than likely be found to be partially responsible for the accident. I do not accept that this admission acts as a barrier to Mitton pursuing the MTO. Mitton's decision to resolve the main action was prudent. It saved court time, the use of judicial resources, and avoided dragging an innocent plaintiff through a full trial. These types of practical concessions in litigation that streamline trials should be encouraged.

Issue (b) - What is the appropriate test?

[70] The area of Highway 41 in question is classified as a King's Highway. Its maintenance is governed by the *Public Transportation and Highway Improvement Act* ("*PTHIA*")[15].

[71] The relevant statutory provisions under the *PTHIA* are as follows:

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[13] See *Fordham v. Dutton Dunwich, (Municipality)*, 2014 ONCA 891, 70 M.V.R. (6th) 1.
[14] 2010 ONSC 5502, 3 M.V.R. (6th) 33, aff'd 2012 ONCA 386, 33 M.V.R. (6th) 1, leave to appeal refused, [2012] S.C.C.A. No. 351.
[15] R.S.O. 1990, c. P.50.

Ministry to maintain and repair

> **33.** (1) The King's Highway shall be maintained and kept in repair by the Ministry and any municipality in which any part of the King's Highway is situate is relieved from any liability therefor, but this does not apply to any sidewalk or municipal undertaking or work constructed or in course of construction by a municipality or which a municipality may lawfully do or construct upon the highway, and the municipality is liable for want of repair of the sidewalk, municipal undertaking or work, whether the want of repair is the result of nonfeasance or misfeasance, in the same manner and to the same extent as in the case of any other like work constructed by the municipality.

Liability for damage in case of default

> (2) In case of default by the Ministry to keep the King's Highway in repair, the Crown is liable for all damage sustained by any person by reason of the default, and the amount recoverable by a person by reason of the default may be agreed upon with the Minister before or after the commencement of an action for the recovery of damages.

[72] Mitton argues that upon the first fall of snow, a King's Highway falls into a state of non-repair requiring the MTO to correct the default. Mitton takes the position that once that state of non-repair occurs, the burden shifts to the MTO to prove it performed appropriate winter maintenance. Put another way, according to Mitton, as soon as a winter event starts, the MTO is responsible for every accident that occurs on their highways during that winter event unless they can prove otherwise.

[73] I do not agree. In my view, this is far too strict of a test. There is no obligation to commence winter operations at the first fall of snow: see *Simms v. Municipality of Metropolitan Toronto et al.*[16]

[16] (1978), 28 O.R. (2d) 606 (C.A.), at p. 607.

[74] The MTO argues that the appropriate test for liability is as stated by Rouleau J.A. in *Lloyd v. Bush* ["*Lloyd (ONCA)*"][17]:

> [62] In *Fordham v. Dutton Dunwich, (Municipality),* 2014 ONCA 891, [2014] 327 O.A.C. 302, at para. 26, Laskin J.A. set out the four-step test to be applied when a claim is made against a municipality for non-repair. It can be summarized as follows:
>
> - *Non-Repair*: The plaintiff must prove the existence of a condition of non-repair, that is, a road-based hazard that poses an unreasonable risk of harm to ordinary, non-negligent users of the road, with a view to the circumstances including the "character and location" of the road.
>
> - *Causation*: The plaintiff must prove that the condition of non-repair caused the loss in question.
>
> - *Statutory Defences*: If the plaintiff has proven both non-repair and causation, a *prima facie* case is made out against the municipality. The municipality then bears the onus of proving that one of the three independently sufficient defences in s. 44(3) applies. These defences include proof that the municipality took reasonable steps to prevent the default from arising (s. 44(3)(b)).
>
> - *Contributory Negligence*: If the municipality cannot establish any of the statutory defences, it will be found liable. The municipality can, however, still demonstrate that the plaintiff's driving caused or contributed to his or her injuries.

[75] Many of the cases relied upon by both parties involve roadways that are maintained by municipalities; however, there are statutory defences under the *Municipal Act, 2001*[18] that are not available under the *PTHIA*. As a result, I have applied a modified version of the *Lloyd (ONCA)* test:

> - *Non-Repair*: The plaintiff must prove the existence of a condition of non-repair, that is, a road-based hazard that poses an unreasonable risk of harm

[17] 2017 ONCA 252, 9 M.V.R. (7th) 177, at para. 62.
[18] S.O. 2001, c. 25.

> to ordinary, non-negligent users of the road, with a view to the circumstances including the "character and location" of the road.
>
> - <u>*Causation*</u>: The plaintiff must prove that the condition of non-repair caused the loss in question.
>
> - <u>*Reasonableness of Repair:*</u> Upon the plaintiff proving non-repair and causation, the onus shifts to the MTO to prove that their winter maintenance was reasonably addressing this non-repair.

[76] This modified test is also consistent with earlier caselaw such as *Montani v. Matthews*[19].

<u>Was the roadway in a state of non-repair?</u>

[77] In the case of *R. v. Côté et al.*[20], a state of non-repair was found to be equivalent to a special and highly dangerous situation at a certain location on the highway which otherwise to persons reasonably using it was quite passable and usable for traffic.

[78] In *Frank v. Central Elgin*[21], Laskin J.A. expanded the concept of "highly special dangerous situation":

> [8] What winter conditions do impose a duty of repair on municipalities? In *R. v. Coté*, 1974 CanLII 31 (SCC), [1976] 1 S.C.R. 595 at 603, the Supreme Court of Canada confined a provincial or municipal authority's duty or repair narrowly to road conditions that created "a highly dangerous situation at a certain location in the highway, which otherwise, to persons using the same, was quite passable and usable for traffic."
>
> [9] For some years after *Coté*, this court held that the narrow test in *Coté* was the sole test for determining when a municipality had a duty to repair winter road conditions. For example, in *Simms v. Metropolitan Toronto (Municipality)* (1978), 28 O.R. (2d) 606, this court rejected the argument that a municipality may have a duty to salt and sand the roads in response to generalized icy conditions. In this court's view that argument stated the municipality's duty too broadly. Instead, relying on *Coté*, this court confined the municipality's duty to a "high special dangerous situation at a certain location in the highway."

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[19] (1996), 29 O.R. (3d) 257 (C.A.).
[20] [1976] 1 S.C.R. 595, at p. 603.
[21] 2010 ONCA 574, at paras. 8-11.

> [10] Gradually, however, courts began to recognize that a municipality may also have a duty to repair widespread or general ice and snow conditions within its jurisdiction. The general negligence standard applies. A municipality's duty of repair arises not just in a "highly special dangerous situation at a certain location in the highway" but in any situation where road conditions create an unreasonable risk of harm to users of the highway. The former is simply a subset of the latter. See, for example, *Gould v. County of Perth* (1983), 1983 CanLII 1754 (ON SC), 42 O.R. (2d) 548 (H.C.J.), aff'd (1984), 1984 CanLII 2060 (ON CA), 48 O.R. (2d) 120 (C.A.); *Thornhill (Litigation Guardian of) v. Shadid* (2008), 2008 CanLII 3404 (ON SC), 289 D.L.R. (4th) 396 (Ont. S.C.); *Roberts v. Morana* (1997), 1997 CanLII 12257 (ON SC), 34 O.R. (3d) 647 (Ont. Ct. (Gen. Div.)), aff'd (2000), 2000 CanLII 2950 (ON CA), 49 O.R. (3d) 157 (C.A.).
>
> [11] In some civil actions against a municipality, there is a serious issue whether the road conditions complained of triggered the municipality's duty of repair, that is, whether the road conditions gave rise to an unreasonable risk of harm. That is not the case here. As I will discuss, the trial judge accepted (without deciding) that Central Elgin had a duty the morning of the accident to keep Highbury Avenue in a reasonable state of repair. The only issue at trial was whether it fulfilled its duty, that is, whether it met the standard of care required of it.

[79] In *Lloyd (ONCA)*[22], the court defined a state of non-repair in this way:

> [F]or a road to be in a state of non-repair, it must present a hazard that poses an unreasonable risk of harm to ordinary, non-negligent users of the road in the circumstances.

[80] The winter event of February 11-12, 2015 caused Highway 41 to become partially snow-packed. It was partially snow-packed where Mitton lost control. Both experts agree that snow-packed roads create a danger for users of the highway.

[81] I therefore find that this stretch of Highway 41 was in a state of non-repair.

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[22] 2017 ONCA 252, 9 M.V.R. (7th) 177, at para. 71.

Causation

[82] The Supreme Court of Canada restated the test for causation in *Clements v. Clements*[23], holding that the question of causation does not involve merely identifying which causal factors were involved in a particular event, but rather calls for a determination of what causal factor(s) were necessary to a particular event:

> The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was *necessary* to bring about the injury – in other words that the injury would not have occurred without the defendant's negligence. This is a factual enquiry.

[83] Mitton is a qualified driver who is very familiar with driving on Highway 41 as this was her route to work. There is no evidence that she was distracted or that her driving skills were impeded in any way. It was a bright and clear day. Sections of Highway 41 were partially snow-packed. Busch described the roads as "not great".

[84] I find that, on a balance of probabilities, had the road not been partially snow-packed, Mitton would not have lost control. Causation has been met.

Has the MTO proven its winter operations were reasonably addressing the state of non-repair?

[85] Under the third prong of the test, the MTO has the onus of proving that it took reasonable steps to prevent or address the state of non-repair.

[86] Compliance with minimum standards or contractual requirements does not provide a road authority with a complete defence. The corollary is also true. The failure to comply does not automatically create liability on the road authority. The facts of each case must be analyzed to

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[23] 2012 SCC 32, [2012] 2 S.C.R. 181, at para. 8.

determine if reasonable steps were taken to address a state of non-repair: see *e.g. Lloyd (ONSC)*.[24]

[87] I have had the benefit of winter maintenance records that both experts agree provide a reliable account of what maintenance was performed. Even though Mitton has attempted to argue that there are inconsistencies in the records, Mitton's expert Brownlee, an expert in reviewing these types of records, found the records to be sufficiently accurate to allow him to render an opinion. Leggett, who has been an expert in over 500 cases, testified that the winter maintenance records produced by the MTO in this case are one of the most complete sets of records he has ever reviewed.

[88] This is not always the case. In other cases, the trial judge must piece together the winter operations performed from the records kept and *viva voce* evidence: see *e.g*., *Lloyd (ONSC)*.[25]

Lack of Patrolling

[89] Although there was no dedicated patroller who traversed Route 22 during this winter event, I find that the winter operators did provide a patrolling function. This is evidenced by their logs and by the GPS video that shows the operator spot-sanding material during the runs that began at 11:15 p.m. and 5:10 a.m.

[90] I also do not believe that patrolling or lack thereof was causative to the state of the roadway when Mitton lost control as the salt had only recently been applied and was still in the process of creating the brine when the accident. Although I do not believe there was a refreeze, even if there had been the beginning of a refreeze, the plow was already on its way to this area. An independent patroller could not have identified a dangerous situation and alerted the winter operator faster than what was already being done.

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[24] 2020 ONSC 842, at paras. 32-34.
[25] 2020 ONSC 842, at para. 38.

Was the MTO negligent in using salt at 7:46 a.m. rather than sand?

[91] At 7:24 a.m. on February 12, the contractor switched from applying sand to salt. After six days of evidence, that is the singular decision that forms the crux of Mitton's allegation against the MTO.

[92] Mitton makes the following arguments:

a) The winter maintenance contract with the contractor specifically prohibits the use of salt in the circumstances that existed as of 7:24 a.m.

b) Using salt in these circumstances caused the well-known phenomenon of a refreeze, creating a hazard on the road for Mitton.

c) Had the contractor used sand, and not salt, Mitton would have had sufficient traction to maintain control of her vehicle.

Does the winter maintenance contract prohibit the use of salt in these circumstances?

[93] The short answer is no. It does not. While using salt is not recommended when temperatures are less than -12˚C, it is not prohibited. The contract allows for the winter maintenance operator to use its judgment. That was what was done here.

[94] The experts agreed that if salt had not been applied as of that early morning pass at 7:46 a.m., the window to apply salt might have closed as the temperature continued to drop. This would have meant that the snow-packed roadway could have continued to be snow-packed until the temperatures started to rise again. According to Leggett, the contractor had a decision to make that morning—use this opportunity to apply salt and break up the packed snow on the roadway to return the road to bare pavement, the safest condition for drivers, or leave the packed snow on the roadway and continue to apply sand until the temperature rose.

[95] This was a judgment call made when there was an atypical forecast projecting falling temperatures during the day. There is a reason the maintenance contract provides for the use of judgment. These are not black and white decisions. Users of the highway rely on the expertise of winter maintenance officials to use the information they have to make the best decision possible. I find the MTO made the best decision it could on the information available to it. I further find that the decision to switch from sand to salt that morning was reasonable.

Did the use of salt cause a refreeze?

[96] While there does not have to be direct evidence of a refreeze on this stretch of the road, and both experts acknowledge refreeze could occur under these circumstances, I cannot reconcile Mitton's suggestion of a refreeze with the complete lack of evidence of any serious issue with this roadway other than Mitton's loss of control. Mitton's read-ins from the MTO's transcripts suggest the MTO should have noted the condition of the roadway when its plow eventually passed through the area after the accident; the implication being that the lack of evidence on the condition of roadway is the fault of the MTO. The court does not have any evidence as to how long it took to clear the accident scene and reopen the roadway to allow the MTO vehicles into the area. Any post-observations by the MTO would therefore likely be irrelevant.

[97] The best evidence of the condition of this roadway is from the three factual witnesses, Busch, Romeski, and MacNeil. None of these witnesses testified to icy conditions on Highway 41. MacNeil's MVAR also did not record icy conditions.

[98] I also note that Busch's uncontradicted evidence was that his vehicle did not slide or skid when he pushed hard on his brakes to try to avoid the collision. There is also no evidence of any other accidents in the area or any alert from the police to the MTO to reattend this area after the accident because of unsafe road conditions.

[99] On the evidence before me, I find that a refreeze did not occur. I do not know why Mitton lost control but there is insufficient evidence to support a finding that it was because the MTO's use of salt created an unsafe condition.

Would the contractor's use of sand and not salt have provided sufficient traction to allow Mitton to maintain control of her vehicle?

[100] This hypothetical misstates the issue before the court. The issue is not whether the Ministry could have used a different substance – the issue I must determine is whether the use of salt was reasonable under all of the circumstances. For the reasons already stated, I find that it was.

Conclusion on the MTO's winter operations

[101] As a result of the above, I find that the MTO's winter operations were reasonably addressing the state of non-repair of the highway at the time of the accident. As a result, there is no liability on the MTO.

Issue (c) - If there is liability found against the MTO, what is the MTO's percentage of liability?

[102] Given my finding that there is no liability on the MTO, the last issue is moot.

Conclusion

[103] The Third Party Claim is dismissed.

[104] If the parties cannot agree on costs, the MTO will have until Friday, December 6, 2024 to file cost submissions of no more than 5 pages in length, double-spaced, excluding any offers to settle or bill of costs. Mitton will have until Friday, December 13, 2024 to file responding cost submissions under the same page restrictions.

Justice Jaye Hooper

Released: November 26, 2024

CITATION: Mitton v. Ministry of Transportation, 2024 ONSC 6608
COURT FILE NO.: CV-17-11-A1
DATE: 2024-11-26

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Ronald Busch

Plaintiff

-and-

Cristy Mitton

Defendant

-and-

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO REPRESENTED BY THE MINISTER OF TRANSPORTATION FOR THE PROVINCE OF ONTARIO AND CARILLION CANADA INC.

Third Parties

REASONS FOR JUDGMENT

Justice J. Hooper

Released: November 26, 2024