

CITATION: Lundy v. VIA Rail Canada Inc., 2016 ONSC 425
COURT FILE NO.: CV-12-447653-00CP
DATE: 20160118

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
SANDRA LUNDY, DAVID) *Theodore P. Charney and Jody Brown for*
CARMICHAEL, ALLISON KACZMAREK) *the Plaintiffs*
and MARC COUROUX)
Plaintiffs)
- and -)
VIA RAIL CANADA INC. and CANADIAN) *John A. Campion and Sarah J. Turney for*
NATIONAL RAILWAY COMPANY) *the Defendants*
Defendants)
)
)
Proceeding under the *Class Proceedings Act, 1992*) **HEARD:** January 15, 2016
)

PERELL, J.

REASONS FOR DECISION

[1] This is the last installment of a motion to settle a litigation plan for the individual issues phase of a class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. The proposed litigation plan is set out as Schedule “A” to these Reasons for Decision.

[2] The background to this motion is set out in a series of decisions; see: *Lundy v. VIA Rail Canada Inc.*, 2015 ONSC 1879; *Lundy v. VIA Rail Canada Inc.*, 2015 ONSC 3531; and *Lundy v. VIA Rail Canada Inc.*, 2015 ONSC 7063.


[3] At the time of the argument of the motion, I made the following endorsement:

This is a motion to approve an Individual Issues Plan. On consent, and for written reasons to follow, I approve the Litigation Plan submitted by the Plaintiffs with the following changes:

- (1) The claimants and the defendant shall deliver affidavits of documents in accordance with the *Rules of Civil Procedure*; and
- (2) The appeal rights from any decision shall be in accordance with the *Class Proceedings Act, 1992*.

There shall be no order as to costs with respect to the motions to settle the Litigation Plan.

[4] An Order should issue in accordance with these Reasons for Decision.



Perell, J.

Released: January 18, 2016

SCHEDULE "A"

INDIVIDUAL ISSUES LITIGATION PLAN

Individual Issues to be Resolved

The issues to be resolved under this plan are the damages, if any, suffered by Class and Family Class Members in this action as a result of the derailment of VIA Rail Train 92 on February 26, 2012 (the "Individual Issues"). This plan shall govern the procedure for the final resolution of the Individual Issues.

Monetary Limits

The applicable procedure for the resolution of the Individual Issues shall be governed by the monetary amount of a Class Member's claim, not including costs or pre-judgment interest, based on the following three levels:

1. Claims under \$50,000;
2. Claims \$50,000 - \$100,000; and
3. Claims over \$100,000.

Uniform Procedures

The following procedure shall be applicable to all claims, regardless of the amount at issue:

1. For all claims, the Individual Issues Litigation Plan provides the following uniform procedures:
 - a. The Defendants shall deliver all-inclusive offers for the Class Member and Family Class Member claims, within 15 days of the order approving the Individual Issues Litigation Plan;
 - b. Notice of the Judgment, Individual Issues Litigation Plan and all-inclusive offers shall be sent to the Class Members within 30 days of the order approving the Individual Issues Litigation Plan ("Notice and Offer Distribution").
 - c. The Class Member shall have 30 days from the date of the Notice and Offer Distribution to accept the Defendants' offer or alternatively, make a counteroffer. The Defendants will have 15 days to accept any counteroffer. If the Class Member's claim is not settled within 45 days, then the Class Member shall have 90 days to deliver a Notice of Application with supporting affidavits for their claim to damages (the "Application Record");
 - d. The Defendants shall have 90 days to deliver a Responding Application Record;
 - e. If at any point an offer to settle is accepted, the Defendants shall provide payment to Class Counsel within 5 days;

- f. Upon settlement, the Defendants will be released of all claims of the Class Member and the Family Class Members by the Class Member's execution of a release on his or her own behalf and on behalf of all Family Class Members and the Class Member will indemnify the Defendants against any claims advanced by Family Class Members notwithstanding the settlement of the Class Member's claim.

Targeted Procedures

If a claim is not settled after the delivery of the Responding Application Record, the following procedures shall be applicable depending on the amount at issue:

Claims Under \$50,000

1. There shall be no cross-examinations on the Application Record or Responding Application Record;
2. A Defence Medical may be scheduled to occur within **60 days** of the delivery of the Responding Application Record; and
3. The Notice of Application, Responding Application Record, Defence Medical (if any), along with Factums from both parties shall be filed for an application in writing to be decided by a judge of the Superior Court, whose decision shall be final and not subject to appeal. Oral submissions shall only be given in the discretion of the deciding judge.

Claims \$50,000 – \$100,000

1. A Defence Medical may be scheduled to occur within **60 days** from the delivery of the Responding Application Record;
2. Cross-examinations, if any, shall occur within **120 days** from the delivery of the Responding Application Record; and
3. After any Defence Medical and cross-examinations are complete, the Application shall continue as a summary judgment motion in accordance with Rule 20 of the *Rules of Civil Procedure*, including the attendant appeal rights for final orders.

Claims Over \$100,000

1. If the Claim is not settled after the Responding Application Record is delivered, the Application shall continue as a trial of an issue in accordance with the *Rules of Civil Procedure*, including the attendant rights for discovery, delivery of expert reports and appeal rights.

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SANDRA LUNDY, DAVID CARMICHAEL,
ALLISON KACZMAREK and MARC COUROUX

Plaintiffs

- and -

VIA RAIL CANADA INC. and CANADIAN
NATIONAL RAILWAY COMPANY

Defendants

REASONS FOR DECISION

PERELL J.

Released: January 18, 2016