

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN:

SANDRA LUNDY, DAVID CARMICHAEL,  
ALLISON KACZMAREK and MARC COUROUX

Plaintiffs

- and -

VIA RAIL CANADA INC., and  
CANADIAN NATIONAL RAILWAY COMPANY

Defendants

Proceeding under the *Class Proceedings Act, 1992*

FRESH AS AMENDED STATEMENT OF CLAIM

DEFINED TERMS

1. The following terms and definitions apply throughout this statement of claim:

- (a) "Agreement" means the agreement Via Rail and CNR entered into allowing Via Rail to use CNR rail tracks in, among others, the Oakville Subdivision;
- (b) "Allison" means Allison Kaczmarek;
- (c) "Class" and "Class Member" means all persons who were passengers on Via Rail train 92 on February 26, 2012, which departed from Niagara Falls, Ontario, en route to Toronto, Ontario, when it left the tracks at approximately 3:30 p.m. near Burlington, Ontario, except for Excluded Persons;

AMENDED THIS July 9, 2012 PURSUANT TO  
MODIFIÉ CE CONFORMÉMENT À  
 RULE/LA RÉGLE 28.02  
 THE ORDER OF Justice Perrell  
L'ORDONNANCE DU June 26, 2012  
DATED / FAIT LE (M. Benton)  
REGISTRAR GREFFIER  
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

- (d) “**CNR**” means Canadian National Railway Company;
- (e) “**CROC**” means Canadian Rail Operating Rules, TC O-0-93;
- (f) “**David**” means David Carmichael;
- (g) “**Derailment**” means the derailment of the **Train** which occurred on February 26, 2012;
- (h)
- (i) “**Excluded Persons**” means employees of **Via Rail** or **CNR** who were passengers on the **Train**;
- (j) “**Family Class Member**” means living partners, spouses, children, grandchildren, parents, grandparents or siblings of a **Class Member**, or where such family member has died, the personal representative of the estate of the deceased family member;
- (k) “**FLA**” means *Family Law Act*, R.S.O. 1990 c.F.3;
- (l) “**Marc**” means Marc Couroux;
- (m) “**Oakville Subdivision**” means the rail operating subdivision of Oakville;
- (n) “**RTC**” means rail traffic controllers;
- (o) “**Sandra**” means Sandra Lundy;
- (p) “**Train**” means Via Rail train #92, which departed from Niagara Falls, Ontario, at or about 2:06 p.m. on February 26, 2012, en route to Toronto, Ontario, and left the tracks at approximately 3:30 p.m. near Burlington, Ontario; and
- (q) “**Via Rail**” means Via Rail Canada Inc.

2. The Plaintiffs claim on their own behalf and on behalf of the other Class Members:

- (a) an order certifying this action as a class proceeding and appointing the Plaintiffs as representative plaintiffs of the Class;
- (b) general and special damages in the amount of \$25,000,000 or such other amount as this Court deems appropriate;

- (c) damages pursuant to section 61 of the *Family Law Act*, R.S.O. 1990, c. F.3;
- (d) aggravated and punitive damages in the amount of \$5,000,000 or such other amount as this Court deems appropriate;
- (e) the cost of past and future insured health services provided by the Ontario Health Insurance Plan or pursuant to the *Health Insurance Act*, RSQ, c A-29 and *Hospital Insurance Act*, RSQ, c A-28;
- (f) a declaration that Via Rail and CNR were negligent;
- (g) a declaration that Via Rail breached the contractual obligations that it owed to the Class Members;
- (h) a declaration that Via Rail and CNR are vicariously liable for the acts or omissions of their employees, servants or agents;
- (i) prejudgment and postjudgment interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (j) costs of this action together with applicable taxes;
- (k) costs of notice and of administering the plan of distribution of all recovery in this action, plus applicable taxes; and
- (l) such further and other relief as to this Honourable Court may seem just.

#### **THE PARTIES**

3. Sandra resides in the City of Niagara Falls, in the Province of Ontario. At all material times, Sandra was a passenger on the Train which was eastbound en route from the City of Niagara Falls, Ontario to Toronto, Ontario on February 26, 2012.

4. David resides in the City of Toronto, in the Province of Ontario. At all material times, David was a passenger on the Train which was eastbound en route from the City of Niagara Falls, Ontario to Toronto, Ontario on February 26, 2012.

5. Allison resides in the City of Vaudreuil-Dorion, in the Province of Quebec. At all material times, Allison was a passenger on the Train which was eastbound en route from the City of Niagara Falls, Ontario to Toronto, Ontario on February 26, 2012.

6. The Plaintiff, Marc Couroux ("Marc"), resides in the City of Vaudreuil-Dorion, in the Province of Quebec. Marc is Allison's common-law spouse.

7. Via Rail is a corporation incorporated under the laws of Canada with its head office in Montreal, Quebec. Via Rail owns, maintains, services and operates railway rolling stock. It operates passenger rail service in the province of Ontario and elsewhere. Via Rail owned and was operating the Train on February 26, 2012.

8. Via Rail employs various staff to maintain and operate their trains as well as to provide various services to customers onboard their trains. In particular, Via Rail employs:

- (a) staff to perform servicing, maintenance and component repair services on their trains;
- (b) engineers to operate their trains; and,
- (c) staff responsible for the safety and comfort of passengers who occupy the passenger cars.

9. CNR is a corporation incorporated pursuant to the laws of Canada and is engaged in the business of providing freight and passenger railway transportation services throughout Canada. CNR was, at all material times, the owner of the railway bed, switching mechanism and signals upon which the Train was operating at the time of the derailment in the Oakville Subdivision.

10. CNR employs various staff to inspect, repair and maintain railway tracks, signals and switches, including in the Oakville Subdivision.

11. In addition, CNR is responsible for the operation of railway traffic on the tracks they own. CNR accomplishes this, in part, through the employment of rail traffic controllers ("RTC"), who are responsible for operating the switch system, which turns on the advanced and intermediate signals advising locomotive engineers of speed restrictions. In addition, RTCs are required to communicate to locomotive engineers any changes in railway traffic operations through radio communication.

12. Pursuant to section 138 of the *Canada Transportation Act*, S.C. 1996, c. 10, Via Rail and CNR entered into an agreement allowing Via Rail to use CNR rail tracks in, among others, the Oakville Subdivision (the "Agreement").

#### **THE CLASS**

13. The Plaintiffs bring this action pursuant to the *Class Proceedings Act*, 1992 on behalf of the following class:

- (a) all persons who were passengers on Via Rail train 92 on February 26, 2012, which departed from Niagara Falls, Ontario, en route to Toronto, Ontario, when it left the tracks at approximately 3:30 p.m. near Burlington, Ontario, except for Excluded Persons ("Class" or Class Member"); and
- (b) living partners, spouses, children, grandchildren, parents, grandparents or siblings of a Class Member, or where such family member has died, the personal representative of the estate of the deceased family member ("Family Law Class Member").

## THE TRAIN DERAILMENT

14. On February 26, 2012, the Train departed Niagara Falls at approximately 14:06 EST eastbound for Toronto. After a scheduled stop in Aldershot, the Train departed and accelerated as it headed eastbound through the Oakville Subdivision.
15. There were 72 passengers and 5 crew members on board the Train.
16. At approximately 3:30 p.m. EST, the Train went over a crossover east of Aldershot at mile 33.3 of the Oakville Subdivision. A “crossover” is defined in the CROC as “a track joining adjacent main tracks, or a main track and another track”.
17. The crossover at mile 33.3 in the Oakville Subdivision is stipulated as a “slow speed” crossover. The CROC defines “slow speed” as “a speed not exceeding fifteen (15) miles per hour”.
18. The Train was travelling at a speed of 67 mph (108 km/h) when it entered the crossover from track 1 to track 2. The Via Rail representatives responsible for the Train’s operation failed to apply the brakes at all, and travelled through the cross-over at over four times the applicable speed limit.
19. As a result of the Derailment of the Train, the locomotive and the first two coach cars struck a building and overturned.
20. The Class Members suffered serious and permanent personal injuries and other damages, which are described in further detail below at paragraphs 43-59.

## RAILWAY SAFETY - BREACH OF THE DEFENDANTS' DUTIES

21. Via Rail and CNR are subject to detailed statutory regulations regarding train and railway operations. The defendants owed a duty of care to the Class Members to ensure the safe operation of the Train and railway operations which included adhering to the minimum regulatory standards set out in the legislation and regulations. For the reasons set out below, the defendants failed to meet their obligations.

### *Via Rail failed to comply with its regulatory obligations*

22. The crossover in the Oakville Subdivision over which the Derailment occurred is designated as a "slow speed crossover". Pursuant to the CROC, the maximum speed for a slow crossover is 15 mph. Via Rail violated this rule when its agents operated the Train at a speed of 67 mph through the crossover.

23. In addition, the CROC's section on Signals provides:

#### SPEED COMPLIANCE

If speed requirements for their movement are exceeded, crew members must remind one another of such requirements. If no action is then taken, or if the employee controlling the engine is observed to be non-responsive or incapacitated, other crew members must take immediate action to ensure the safety of the movement, including stopping it in emergency if required.

24. Via Rail violated this rule when none of the three engineers in the locomotive took any action to decrease the speed of the Train at any point after leaving the Aldershot station. The crew members ignored signals advising them they were entering a crossover and subsequently entered the crossover at 67 mph when it went through the crossover at mile 33.3. The brakes were functioning but were not applied.

25. Pursuant to section 6.1 of the *Passenger Handling Safety Rules*, Via Rail was required to ensure that a safety check had been completed prior to the departure of the Train from Niagara Falls or at intervals otherwise identified in their passenger safety plan, and confirm that “carts, parcels, luggage and oversize articles are properly stowed and secured.” Via Rail failed to ensure that carts, parcels, luggage and oversized articles were properly stowed and secured with a number of Class Members being injured as a result of these items being dislodged at the time of the Derailment.

26. Pursuant to Rule 4.0 of the *Railway Employee Radio Communication Rules*, Via Rail was required to ensure that communication was made clearly and concisely. Via Rail failed to communicate to the CNR RTCs that there was an issue with the switch or that it was in a dangerous position.

27. Via Rail failed to ensure the locomotive brakes were maintained, inspected and repaired as provided by regulation, and as a result the Train was travelling at excessive speed at the time of the Derailment. The Train’s brakes were reportedly functioning but were not applied as the Train entered the crossover and derailed.

28. Further particulars of Via Rail’s breaches are set out in paragraphs 33-36 below.

***CNR failed to comply with its regulatory obligations***

29. CNR also failed to comply with its regulatory obligations and duty of care.

30. In particular, pursuant to the Signals and Traffic Control Systems Standards, CNR was required to comply with section 5.1, which states:



5.1 Every railway company shall ensure that signal circuits and signal devices, that affect the safety of the train operations, are tested and inspected at the minimum frequencies specified in the company's single inspection and test instructions which are to be filed with Transport Canada periodically. Tests and inspections shall be performed by a qualified person.

CNR failed to ensure the operation of signals through regular tests and inspections by a qualified person.

31. Pursuant to Rule 4.0 under the *Railway Employee Radio Communication Rules*, CNR was required to ensure that communication between their RTCs and train engineers was made clearly and concisely. CNR was responsible for the operation of railway traffic on the tracks they own. In addition to the switch and signal systems, CNR regulates railroad traffic through the employment of RTCs, who are required to communicate to locomotive engineers any changes in railway traffic operations through radio communication. CNR failed to ensure the Via Rail engineers were clearly and concisely advised that they were approaching a "slow speed" crossover and therefore needed to reduce their speed.

32. Further particulars of CNR's breaches are set out below.

#### **FURTHER PARTICULARS OF THE DEFENDANTS' NEGLIGENCE**

33. The defendants acted negligently and failed to meet the minimum standards imposed on them in the normal maintenance, repair, inspection and operation of the Train, the railway tracks, signals and switches.

34. The Derailment of the Train and the resulting injuries and damages were caused by the negligence, fault or breach of duty of the defendants and their agents,

servants and employees, for whose negligence they are in law responsible, the particulars of which, without limitation, are as follows.

35. Via Rail and CNR, including their agents, servants and employees, were negligent in that:

- (a) they failed to meet the minimum standards provided in the *Railway Safety Act* and the regulations, rules, guidelines, policies and standards made thereunder;
- (b) they hired incompetent employees, agents, servants, and are vicariously liable for the acts or omissions of their employees, servants or agents;
- (c) they failed to take corrective measures to correct the danger and alleviate the risk of travelling on the railway bed, when the danger thereof should have been apparent;
- (d) they allowed a situation of danger to exist when, by the use of reasonable effort, they could have prevented a situation of danger;
- (e) they failed to establish and maintain a proper communication system in the Niagara Falls-Toronto corridor that would ensure that the Train engineers, track repairpersons and RTC could openly and readily communicate with CNR as to existing Train and track conditions including switches;
- (f) they failed to take adequate care to ensure the safe operation of the Train and railway; and
- (g) their conduct constituted a marked departure from the standard of care expected of them.

36. Via Rail, and its agents, servants and employees for whom Via Rail is responsible, were negligent in that:

- (a) they failed to establish an adequate inspection, maintenance and repair system;
- (b) they failed to inspect or adequately inspect the Train;

- (c) they failed to have or maintain the Train in a proper state of mechanical report suitable for the safe use thereof on a public railway;
- (d) they failed to ensure the locomotive was designed and constructed to provide safe operations and protection of operating crew in order to ensure the safety of passengers;
- (e) they failed to inspect and repair the locomotive to ensure safe operations as well as to ensure the design and maintenance of all components, appurtenances and control apparatuses was completed to ensure they perform their function;
- (f) they failed to inspect or adequately inspect the Train, including the brakes and its components, and wheel defects;
- (g) they failed to ensure that the coaches were designed and constructed to provide for safe operations and for the protection of passengers from accidents caused by failure of car equipment;
- (h) they failed to ensure design of the passenger car incorporated appropriate safety features such as protective cages for rotating equipment, safety securement for food carts, for ceiling and other hinged panels, anti-skid decking and fail safe interlocks for all electrical equipment;
- (i) they failed to perform a pre-departure inspection to ensure that carts, parcels, luggage and oversize articles were properly stowed and secured;
- (j) they permitted or allowed the Train to run with insufficient on-board personnel to monitor and direct the safe and proper operation of the Train;
- (k) they failed to educate and instruct or adequately educate and instruct their workers in the proper mode of operating the Train;
- (l) they permitted or allowed the Train to run without sufficient qualified engineers;
- (m) they permitted incompetent operators whose faculties of observation, perception, judgment and self-control were impaired to operate the Train;
- (n) they permitted an inexperienced person to operate the Train who failed to keep a proper lookout and therefore failed to discover the presence of a danger;
- (o) they permitted the Train to be operated at an excessive rate of speed considering the circumstances;

- (p) they permitted the Train to be operated at an excessive rate of speed with the brakes not being applied at the time the Train entered the crossover;
- (q) they ignored the advanced and intermediate signals which advised them to reduce speed and did not take action to stop a crew member from operating the train at an excessive speed;
- (r) they failed to properly train their operators on how to operate the Train and react in situations such as in the present situation;
- (s) they failed to provide adequate supervision by a qualified examiner during the practical training of an engineer;
- (t) they failed to advise CNR that there were engineers-in-training operating trains from time to time in the Toronto region in order to ensure an adequate level of instructions was provided;
- (u) they failed to apprise themselves of the dangerous condition of the railway bed, including the construction being performed in Burlington, and they ought reasonably to have so appraised themselves and accordingly acted more cautiously;
- (v) the engineers failed to acknowledge, monitor and adhere to any existing conditions and all notes, memoranda, directives or radio control instructions regarding the right to proceed ahead;
- (w) they failed to observe that the switch at about mile 33.3 of the Oakville Subdivision was in the backwards or incorrect position;
- (x) the engineers failed to heed the red target evidencing an open switch;
- (y) they failed to communicate to the RTC Division or anyone that there were problems with the switch or that it was in a dangerous position;
- (z) the engineers failed to abide by the CROC's; and
- (aa) they failed to prioritize safety over the corporation's goal over profit and providing service without delays.

37. CNR and its agents, servants and employees for whom CNR is responsible, were negligent in that:

- (a) they failed to take reasonable or any care to ensure that the passengers would be reasonably safe in using the track bed;

- (b) they failed to provide proper or any safeguards to ensure the safety and security of persons using the railway bed;
- (c) they failed to take reasonable or any steps to establish as procedure to ensure that routine maintenance, inspections or repairs of the railway bed were carried out on a reasonably regular and consistent basis thereby permitting a situation of danger to arise;
- (d) they failed to test and inspect and maintain the railway tracks, signals and switches;
- (e) they permitted or allowed the railway bed and switching mechanisms to be constructed, designed, and maintained, without due or any regard for the safety of persons lawfully using the railway bed;
- (f) they permitted repairs and maintenance of the track to be completed without providing adequate information to trains passing through the area;
- (g) they allowed their employees, agents or servants to position the switch at the Derailment site in a dangerous position;
- (h) they positioned the switch at mile 33.3 in a dangerous position;
- (i) they failed to communicate or signal to their own RTC's or anyone that the switch was in a dangerous position;
- (j) they failed to return or properly return the switch from a dangerous position;
- (k) they failed to ensure the switch was in the proper position and failed to provide the Via Rail engineers with advanced and intermediate signals to slow the Train down;
- (l) they failed to warn persons of the danger attendant in operating a train on the aforementioned railway bed;
- (m) they failed to ensure the RTC's communicated the appropriate instructions to trains passing through the Oakville Subdivision, including information regarding track changes;
- (n) the RTC's failed to monitor the repair or maintenance work being completed in the Oakville Subdivision;
- (o) the RTC's failed to abide by the CROC's;

- (p) they failed to make themselves cognizant of the fact that Via Rail's trains were, from time to time, being operated by engineers-in-training in the Toronto region;
- (q) they failed to ensure that the minimum standards for communications were being met in ensuring the engineers-in-training had received clear and timely instructions as to track changes; and
- (r) they allowed their Agreement to take precedence over the safety of Via Rail passengers by focusing on ensuring that Via Rail's train service was not delayed in order to avoid penalties.

38. Further particulars of the negligence of the defendants are within the knowledge of the defendants.

39. The defendants are responsible for the negligence of their employees, servants and agents as described above.

#### **VIA RAIL'S BREACH OF CONTRACT**

40. The Class Members were passengers on the Train. Each of them entered into a contract with Via Rail. One of the terms of the contract between the Class Members and Via Rail required Via Rail to ensure the safe operation of the Train and the safety of the passengers, and compliance with all of the regulatory requirements set out above.

41. Via Rail breached its contract with the Plaintiffs and Class Members by virtue of the failures set out in paragraphs 21-28 and 33-36 above.

#### **DAMAGES**

42. As a result of the negligence of the defendants and breach of contract of Via Rail, the Class Members suffered serious and permanent personal injuries.

43. As a result of the negligence of the defendants and breach of contract of Via Rail, David suffered personal injuries including, but not limited to, multiple spinal fractures, laceration of the liver, fractures of the ribs, nasal bone, and sternum, injury to the head, pain and suffering, emotional trauma, psychological injury, nervous shock and general tearing and straining of the muscles, nerves, tendons and ligaments throughout his body. David has suffered a loss of enjoyment of life, and a loss of amenities. David is unable to participate in those recreational, social, household, athletic and employment activities to the extent to which he participated in such activities prior to the accident.

44. As a result of the negligence of the defendants and breach of contract of Via Rail, Allison, Susan and the other Class Members have also sustained serious and permanent personal injuries, and have sustained, and will continue to sustain, pain and suffering, emotional trauma, psychological injury, nervous shock, a loss of enjoyment of life, and a loss of amenities. The Class Members are unable to participate in those recreational, social, household, athletic and employment activities to the extent to which they participated in such activities prior to the accident.

45. As a further result of the negligence of the defendants and breach of contract of Via Rail, the Plaintiffs and Class Members have sustained, and will continue to sustain, a loss of income, a loss of competitive advantage in the employment field, and a diminution of income earning capacity as they are no longer able to carry out the regular duties of their occupation. In addition, they have undergone, and will continue to undergo in the future, therapy, rehabilitation and other forms of medical treatment, and, in addition, have received and will continue to receive medication, including pain

medication. The Plaintiffs and Class Members have incurred, and will continue to incur, great expense for all the aforementioned forms of medical attention, the full particulars of which are not known at this time.

46. The Family Class Members, including Marc, are entitled to damages pursuant to section 61 of the *Family Law Act*, R.S.O. 1990, c. F.3, as amended. The damages for the Family Class Members include, without limitations, pecuniary losses resulting from the injury or death of their family member, expenses incurred for the benefit of the family member, expenses in visiting their family member during his or her treatment and recovery, a reasonable allowance for loss of income and the value of nursing, housekeeping and other services rendered to their family members, an amount to compensate for the loss of guidance, care and companionship reasonably expected to be received from their family member if the misconduct of the defendants had not occurred.

47. The Plaintiffs also plead and rely upon the provisions of the *Health Insurance Act*, R.S.O. 1990, c. H.6, the *Health Insurance Act*, RSQ, c A-29 and the *Hospital Insurance Act*, RSQ, c A-28, and includes in this claim the cost of past and future insured service provided pursuant to this legislation to the Class Members.

48. The damages suffered by the Class Members and Family Law Class Members were foreseeable as a result of the defendants' errors and omissions described above.



### **Aggravated and Punitive Damages**

49. The defendants' conduct warrants the sanction of this Honourable Court in the form of aggravated and punitive damages. As described above, the defendants failed to prioritize the safety of the Class Members and favoured their own interests.

50. Furthermore, the defendants have historically failed to adhere to certain safety standards which led to prior derailments. The defendants failed to sufficiently modify their practices following those derailments or complied with all of the Transportation Safety Board's recommendations.

51. The defendants conducted their affairs with wanton and callous disregard for the Class Members' safety and were reckless as to the consequences of their mistakes, errors and omissions.

### **Service Outside Ontario**

52. The Plaintiffs may serve the Notice of Action and Statement of Claim outside of Ontario without leave in accordance with rule 17.02 of the Rules of Civil Procedure, because this claim is:

- (a) a claim in respect of personal property in Ontario (para 17.02(a));
- (b) a claim in respect of damage sustained in Ontario (para 17.02(h)); and
- (c) a claim against a person ordinarily resident or carrying on business in Ontario (para 17.02(p)).

## Legislation

53. This action is commenced pursuant to the *Class Proceedings Act, 1992*.

54. The Plaintiffs also plead and rely on the *Family Law Act*, R.S.O. 1990, c. F.3., the *Railway Safety Act*, R.S.C., 1985, c. 32 (4th Supp.), *Canada Transportation Act*, S.C. 1996, c. 10, the *Railways Act*, R.S.O. 1950, c. 311, and the Rules and regulations promulgated thereunder, including, *inter alia*, the following:

- (a) Canadian Rail Operating Rules, TC O-0-93 (“CROC”);
- (b) Railway Passenger Handling Safety Rules, TC O-0-16;
- (c) Railway Employee Radio Communication Rule, TC O-0-09;
- (d) Railway Passenger Car Inspection & Safety Rules, TC O-0-26;
- (e) Railway Locomotive Inspection and Safety Rules, TC O-0-112;
- (f) Railway Freight and Passenger Train Brake Inspection Safety Rules, TC O-0-150;
- (g) Railway Employee Qualifications Standards Regulation, SOR/87-150; and
- (h) Rules Respecting Track Safety, TC E-31;
- (i) *Railway Signals & Traffic Control Systems Standards*, TC E-17;
- (j) *Railway Employee Radio Communication Rules*, TC O-0-09; and,
- (k) Via Rail and CNR’s own rule books based on the above regulatory requirements.

55. The Plaintiffs propose that this action be tried at the City of Toronto.

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- and -

VIA RAIL CANADA INC. and CANADIAN  
NATIONAL RAILWAY COMPANY

Defendants

Court File No: CV-12-447653-00CP

**ONTARIO  
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Proceeding Commenced at Toronto

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**FRESH AS AMENDED STATEMENT OF CLAIM**

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