

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE JUSTICE )

~~THURSDAY, THE 1<sup>ST</sup> DAY~~

PAUL M. PERELL )

~~OF NOVEMBER, 2012~~

WEDNESDAY, OCTOBER 01, 2012

BETWEEN:

SANDRA LUNDY, DAVID CARMICHAEL,  
ALLISON KACZMAREK and MARC COUROUX

Plaintiffs

and

VIA RAIL CANADA INC. and CANADIAN NATIONAL RAILWAY COMPANY

Defendants

Proceedings under the *Class Proceedings Act, 1992*

**ORDER**

THIS MOTION made by the plaintiffs for certification of this action as a class proceeding, was heard this day at Toronto, Ontario.

ON REVIEWING the motion record, filed,

AND ON REVIEWING the consent of the defendants,

1. FOR THE PURPOSES OF THE ORDER, the following definitions apply:

- (a) “**CJA**” means the *Courts of Justice Act*, R.S.O., 1990 c.C.43, as amended;
- (b) “**Class**” and “**Class Members**” means all persons who were passengers on Via Train 92 on February 26, 2012, when it was derailed near Burlington, Ontario, excluding Via’s employees and CN’s employees;
- (c) “**Class Counsel**” means Sutts, Strosberg LLP, Falconer Charney LLP and Koskie Minsky LLP;
- (d) “**CN**” means Canadian National Railway Company;
- (e) “**Family Class**” and “**Family Class Members**” means the 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;
- (f) “**Notice**” means the notice of this order and the **Opt Out Date** which is attached hereto as schedule “A”;
- (g) “**Opt Out Date**” means February 8, 2013;
- (h) “**Via**” means Via Rail Canada Inc..

2. THIS COURT ORDERS that this action is certified as a class proceeding.

3. THIS COURT ORDERS that the Class is defined as:

*all persons who were passengers on Via Train 92 on February 26, 2012 when it was derailed near Burlington, Ontario, excluding Via’s employees and CN’s employees*

4. THIS COURT ORDERS that Sandra Lundy, David Carmichael and Allison Kaczmarek are hereby appointed as the representatives plaintiffs of the Class.

5. THIS COURT ORDERS that the Family Class is defined as:

*the 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.*

6. THIS COURT ORDERS that Marc Couroux is hereby appointed as the representative plaintiff of the Family Class.

7. THIS COURT DECLARES that the claims asserted on behalf of the Class are negligence and breach of contract.

8. THIS COURT DECLARES that the relief sought by the Class is as set out in paragraph 2 of the Fresh as Amended Statement of Claim.

9. THIS COURT DECLARES that the following common issues are hereby approved:

1. Did the defendants owe a duty of care to the Class Members when Via Train 92 was derailed on February 26, 2012?
2. If yes, what was the standard of care? Did each of the defendants breach the standard of care? If yes, when and how?
3. Was VIA in breach of contract to the Class Members when Via Train 92 was derailed on February 26, 2012? If yes, when and how?
4. Should the defendants pay the costs of administering and distributing any monetary judgment and/or the costs of determining eligibility and any individual issues? If yes, why and what are the amounts of those costs?
5. Should the defendants pay prejudgment and postjudgment interest? If yes, what are the annual interest rates?

10. THIS COURT ORDERS that the litigation plan, attached as schedule "B," to this order is a workable method of advancing the proceeding on behalf of the Class and the Family Class.

11. THIS COURT ORDERS that the Notice is hereby approved.

12. THIS COURT ORDERS that the Class shall be given Notice in accordance with the following program:

- (a) by Class Counsel delivering the Notice by regular mail or email to all Class Members known to them; and
- (b) by Class Counsel posting the Notice on the website [www.viaclassaction.com](http://www.viaclassaction.com).

13. THIS COURT DECLARES that the notice program satisfies the requirements of section 17 of the *Class Proceedings Act*.

14. THIS COURT ORDERS that, before December 7, 2012, Class Counsel shall report to the court by affidavit confirming their compliance with their obligations under paragraph 12 of this order.

15. THIS COURT ORDERS that a Class Member may only opt out of this action by sending an election to opt out, by ordinary mail, fax, email or courier which election must be received or post marked on or before the Opt-Out Date, and must be signed by the Class Member or such Class Members' authorized representative, stating

that the Class Member opts out of this class action and also stating the Class Member's full name, address, telephone number and birth date:

BY REGULAR MAIL OR COURIER TO:  
Howie & Partners LLP, Chartered Accountants  
3063 Walker Road,  
Windsor, ON N8W 3R4,  
Attention: Via rail Class Action

or BY FAX TO:  
519.250.1929

or BY EMAIL TO:  
classaction@howieandpartners.com  
subject: Via Rail Class Action

16. THIS COURT ORDERS that if a Class Member opts out, he or her Family Members are deemed to have opted out of this class action.

17. THIS COURT ORDERS that no Class Member may opt out of this action after 5:00 p.m. eastern time on the Opt-Out Date.

18. THIS COURT ORDERS that Sarkis Isaac of Howie & Partners LLP shall, on or before March 8, 2013, report to the Court and to counsel for the parties by affidavit and advise as to the names and addresses of those persons, if any, who have opted out of this class action.

19. THIS COURT ORDERS that no person may opt out a minor or a mentally incapable Class Member from this action without the permission of the court after notice to The Children's Lawyer and/or the Public Guardian and Trustee, as the case may be.

20. THIS COURT ORDERS that the claim for punitive damages is hereby dismissed without costs.

21. THIS COURT ORDERS that the costs of this motion are hereby fixed in the amount of \$15,000 plus HST of \$1,950, total \$16,950, payable in the cause.

*Perell, J.*

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JUSTICE

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ENTERED AT / INSCRIT À TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO.:

OCT 3 1 2012

AS DOCUMENT NO.:  
À TITRE DE DOCUMENT NO.:  
PER / PAR: *AM*

# NOTICE OF CERTIFICATION OF THE VIA RAIL DERAILMENT CLASS ACTION

This Notice may affect your rights. Please read carefully

## THE CLASS ACTION

This action in the Ontario Superior Court of Justice arises out of a train derailment which occurred near Burlington, Ontario on February 26, 2012 at approximately 3:30 p.m. The defendants are Via Rail Canada Inc. (“Via”) and Canadian National Railway Company (“CN”).

This notice is directed to the **CLASS MEMBERS** who are all persons who were passengers on Via Train 92 on February 26, 2012 when it was derailed near Burlington, Ontario, excluding Via’s employees and CN’s employees.

This notice is also directed to the **FAMILY CLASS MEMBERS** who are the 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.

## CERTIFICATION

On November 1, 2012, Justice Perell certified this action as a class proceeding. The court has not determined the merits of the action. The certification order is posted at [www.viaclassaction.com](http://www.viaclassaction.com)

## DO NOTHING IF YOU WISH TO PARTICIPATE

Class Members are automatically included in the class action and need not do anything at this time if they wish to participate. They will be bound by the judgment in the action whether favourable or not.

## OPT OUT ONLY IF YOU WISH TO BE EXCLUDED

If you are a Class Member, as described above, but wish to be excluded and not bound by any future order made in this class action, you must send a signed statement indicating that you wish to be excluded from this class action, containing your name, address, and telephone number, by prepaid mail, fax or email to Howie & Partners, Chartered Accountants, 3063 Walker Road, Windsor ON N8W 3R4, Attention: Via Rail Class Action or by fax to 519.250.1929 or by email to [classaction@howieandpartners.com](mailto:classaction@howieandpartners.com)

If your election to opt out is not received or post marked by 5:00 p.m. eastern time on February 8, 2013, you will be bound by all orders made in this action.

If a Class Member cannot personally make an election to opt out, the person making the election for the Class Member must provide their personal information, together with a copy of the document that permits the person to act on the Class Member’s behalf, such as a will, Certificate of Appointment (death) or Power of Attorney (incapacity).

No person may opt out a minor or mentally incapable person without permission of the court after notice to The Children’s Lawyer and/or the Public Guardian and Trustee, as appropriate.

A person who opts out cannot participate in the class action, will not be bound by any future order made in the class action, and will not

be eligible for any recovery in the class action but may be eligible to pursue an individual claim.

**Do not opt out if you wish to participate in the class action.**

If you do not opt out of the class action on or before 5:00 p.m. eastern time on February 8, 2013, you will be a Class Member.

## CLASS COUNSEL FEES AND DISBURSEMENTS

The plaintiffs and Class Counsel signed a fee agreement providing for the payment to Class Counsel of fees, disbursements and applicable taxes, only in the event of success, to be paid out of the recovery in the class action as follows:

(a) 30% of the recovery plus disbursements and taxes, if the class action is settled before the commencement of trial of the common issues; or

(b) 33.3% of the recovery plus disbursements and taxes, if the class action is settled after the commencement of trial of the common issues or is determined by judgment after the trial.

Class Counsel will make a motion to the court to have the fee agreement approved. You will not be required to pay legal fees to Class Counsel unless the plaintiffs are successful in this action. If the class action is successful, legal fees will be deducted from your recovery.

After the class action is resolved there may be individual issues that remain outstanding. If a Class Member wishes to retain a lawyer to assist with these issues, the Class Member may be required to pay additional fees in addition to the amounts set out above.

## INFORMATION

This Notice was approved by the Ontario Superior Court of Justice. The court offices will be unable to answer any questions about the matters in this Notice. Please direct questions for Class Counsel to:

Theodore Charney Falconer, Charney LLP 8 Prince Arthur Ave. Toronto, ON M5R 1A9	Tel: 416.964.3408 x233 Fax: 416.929.8179 Email: <a href="mailto:tedc@falconercharney.com">tedc@falconercharney.com</a>
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Sharon Strosberg Sutts, Strosberg LLP 600-251 Goyeau Street Windsor, ON N9A 6V4	Tel: 1.866.229.5323 x8296 Fax: 1.866.316.5308 Email: <a href="mailto:sharon@strosbergco.com">sharon@strosbergco.com</a>
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## INTERPRETATION

This Notice is a summary of some of the terms of the certification order. If there is a conflict between the provisions of this Notice and the terms of the certification order, the certification order prevails.

“Schedule B”

**LITIGATION PLAN  
VIA RAIL DERAILMENT CLASS ACTION  
AS AT JULY 23, 2012**

**DEFINITIONS**

1. Unless otherwise stated, capitalized terms that are not defined in this litigation plan have the definitions assigned to them in the statement of claim. In addition, the following defined terms apply:

- (a) **“Action”** means this proposed class proceeding, court file No. CV12-447653-00CP, commenced in the **Court**;
- (b) **“Administrator”** means a person appointed by the **Court** to carry out the functions described in the **Plan**;
- (c) **“Class”** and **“Class Members”** means all persons who were passengers on Via Train 92 on February 26, 2012, when it was derailed near Burlington, Ontario, excluding **VIA**’s employees and **CN**’s employees;
- (d) **“Class Counsel”** means the law firms of Sutts, Strosberg LLP, Falconer Charney LLP, Koskie Minsky LLP, and Howie, Sacks & Henry LLP;
- (e) **“CN”** means Canadian National Railway Company;
- (f) **“Court”** means the Ontario Superior Court of Justice;
- (g) **“CPA”** means *Class Proceedings Act, 1992*, S.O. 1992, c. 6, as amended;
- (h) **“Family Class”** and **“Family Class Member”** means the 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;
- (i) **“Notice Program”** means the method of distributing the **Notice** described in paragraph 24(c);
- (j) **“Notice”** means the notice to the **Class** of the certification of the **Action** as a class proceeding;



- (k) **“Plan”** means this litigation plan;
- (l) **“Referee”** or **“Referees”** means a person or persons appointed by the **Court** to carry out the functions described in the **Plan**;
- (m) **“Train 92”** means **VIA** 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;
- (n) **“VIA”** means Via Rail Canada Inc.; and
- (o) **“Website”** means the websites developed and maintained by **Class Counsel** at <http://www.viaclassaction.com> and <http://fcbarristers.com/viarail/>.

## OVERVIEW

2. This Plan contemplates a determination of eligibility and an assessment of damages for each Class Member after the determination of the common issues.

## CLASS COUNSEL

3. Class Counsel is comprised of the law firms of Sutts, Strosberg LLP, Falconer Charney LLP, Koskic Minsky LLP, and Howie, Sacks & Henry LLP. Class Counsel has the requisite knowledge, skill, experience, personnel and financial resources to prosecute this class action to conclusion.

4. Class Counsel intends to add other lawyers and other professionals to their complement if they consider it necessary. These other professionals may be paid on a contingency basis and Class Counsel intends to seek Court approval to have their usual

fees increased by the multiplier, if any, which will be applied to Class Counsel's base fees.

5. Class Counsel anticipates that prosecuting this action will require:
  - (a) reading, organizing, profiling, scanning, managing and analyzing thousands of documents; and
  - (b) expert evidence with respect to the cause of Train 92's derailment.

#### **CLASS DEFINITION**

6. The plaintiffs seek to represent a Class defined as follows:

all persons who were passengers on Via Train 92 on February 26, 2012, when it was derailed near Burlington, Ontario, excluding VIA's employees and CN's employees.
7. The plaintiffs seek to represent the Family Class defined as follows:

means the 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.

#### **REPORTING TO AND COMMUNICATING WITH THE CLASS MEMBERS**

8. Pursuant to an order of Justice Perell dated March 9, 2012, VIA provided Class Counsel with its passenger list for Train 92 which contained name and contact information for 68 people who were aboard. There were 68 Class Members listed on the VIA list which was delivered to Class Counsel. Additionally, Class Counsel knows of 59 potential Family Class Members who registered with them.

9. Class Counsel created the Website which contains information about the status of the action and explains how a class action operates. Copies of some of the publicly filed Court documents, Court decisions and notices and other information relating to the action will be posted on or will be accessible from the Website. This will allow Class Counsel to keep the Class Members, wherever resident, informed of the status of the action.

10. Class Counsel created a questionnaire which permits Class Members to register with and provide Class Counsel with information about the damages of the Class as a result of Train 92's derailment. It also collects information about physical and/or emotional injuries, loss of income, and damage to personal property.

11. From time to time, Class Counsel will send email updates reporting on the status of the Action directly to members of the Class who provide email addresses. They will also post these updates on the Website.

#### **LITIGATION SCHEDULE**

12. Justice Perell has been appointed as the case management judge to oversee the conduct of this Action.

13. Following the certification of this Action as a class proceeding, Class Counsel will ask Justice Perell to set a litigation schedule for:

- (a) the completion of pleadings;
- (b) the documentary production and delivery of affidavits of documents;

- (c) the examinations for discovery, including the location and length of the examinations;
- (d) the delivery of experts' reports; and
- (e) the trial of the common issues.

14. Class Counsel and counsel for the defendants will likely request that the litigation schedule be amended from time to time, as required.

#### **ACCESS TO AND PRESERVATION OF EVIDENCE**

15. The defendants have been or will be asked to preserve and protect all relevant information and business documents whether in electronic or paper form including all documents relating to Train 92's derailment and all investigators' documents in their power, possession or control.

#### **DOCUMENT EXCHANGE AND MANAGEMENT**

16. The defendants possess most, if not all of the documents relating to the common issues such as the documents relating to the design, maintenance and operation of Train 92. These documents will be produced to Class Counsel through the normal production, cross-examination and examination for discovery processes. The plaintiffs will produce all documents in their possession.

17. Class Counsel anticipates and is able to handle the intake and organization of the large number of documents that will likely be produced by the defendants. Class Counsel will use data management systems to organize, code and manage the documents.

18. If required, the documents may be maintained on a secure, password-protected internet website for the purposes of access by members of Class Counsel via the world wide web.

19. The same data management systems will be used to organize and manage all relevant documents in the possession of the plaintiffs, although the plaintiffs have virtually no documentation relating to the common issues other than what is available in the public domain.

#### **PLAINTIFFS' EXPERTS**

20. The plaintiffs have retained:

- (a) Reginald G. Learn, former Ontario District Superintendent of Railway Occurrences with the Transportation Safety Board of Canada: to opine on the design, maintenance and control of Train 92 and the CN tracks material to the derailment;
- (b) Dr. Brian Hoffman: for determining the psychological impact of Train 92's derailment on the Class Members; and
- (c) Carol Brierbrier & Associates: for assessing the occupational health impact of Train 92's derailment on the Class Members.

21. The plaintiffs may retain other experts as necessary as the Action proceeds.

**MEDIATION**

22. The plaintiffs will participate in mediation or non-binding alternative dispute resolution efforts if the defendants are prepared to do so.

**THE FOLLOWING TERMS OF THIS PLAN PRESUPPOSE THAT THE COURT CERTIFIES THE ACTION AS A CLASS PROCEEDING****NOTICE OF CERTIFICATION OF THE ACTION AS A CLASS PROCEEDING AND THE OPT-OUT PERIOD**

23. Class Counsel knows the names and addresses of all 68 Class Members.
24. As part of the certification order the Court will be asked to:
- (a) set an opt-out date that is sixty (60) days after the date of the order certifying the Action as a class proceeding, subject to further direction of the court or written agreement of the parties;
  - (b) settle the form and content of the Notice in the form agreed upon by the parties;
  - (c) settle the particulars of the Notice Program as follows:
    - (i) by Class Counsel posting the Notice on the Website; and
    - (ii) by Class Counsel mailing and emailing the Notice to the 68 Class Members.
  - (d) approve the following opt-out procedure:
    - (i) all Class Members who do not wish to be bound by any future settlement or judgment must opt out of the class proceeding by sending a written election to opt-out, to a person designated by the Court and must do so on or before the opt out deadline, which shall be a date that is 60 days from the date of the order certifying this Action as a class proceeding;

- (i) if a Class Member opts out, the Family Class Members are deemed to have opted out;
  - (ii) a minor or a person who is mentally incapable may be opted out by their parent, guardian or trustee, as appropriate; and
  - (iii) no Class Member may opt out after the expiration of the opt-out period unless there is a reasonable explanation for missing the opt-out period which is acceptable to all counsel, or alternatively which is approved by the court; and
- (e) appoint Sarkis Isaac, an accountant with Howie & Partners in Windsor, to receive the written elections to opt out of the class action and, within thirty (30) days after the expiration of the opt-out period, to deliver to the Court and the counsel for the parties an affidavit listing the names and addresses of all persons who have opted out of this class action. Mr. Isaac has previously been appointed by the Court to fulfill these tasks.

#### **EXAMINATIONS FOR DISCOVERY**

25. Class Counsel intends to examine for discovery at least one representative of each defendant and estimate that, subject to undertakings and refusals, these examinations will take two days. Counsel for the defendants may examine any or all of the representative plaintiffs.

26. The plaintiffs may ask the Court for an order allowing them to examine multiple representatives of the corporate defendants, if necessary.

#### **CLARIFICATION OF COMMON ISSUES**

27. From time to time, the plaintiffs may ask the Court for an order to amend, clarify and/or redefine the common issues.

28. The plaintiffs will ask the Court to set a date for the trial of the common issues within six months after the completion of examinations for discovery, including the delivery of answers to the undertakings and the resolution of any refusals motions.

29. The findings of fact and conclusions on the common issues will permit the judge at the common issues trial to give directions, pursuant to s. 25(3) of the *CPA* to deal with any remaining individual issues.

#### **AFTER THE RESOLUTION OF THE COMMON ISSUES**

30. Upon application of any party, the Court will set a procedure for the resolution of the individual issues which will include a procedure for determining issues of individual causation and damages in relation to each of the Class Members who have not opted out. The parties will have an opportunity to make submissions to the Court regarding the procedure to be followed for the resolution of the individual issues, and regarding the appropriate time to make this determination.

#### **CLASS COUNSELS' ONGOING REPRESENTATION OF THE CLASS MEMBERS**

31. Class Counsel may decide to continue to act as the lawyer for a particular Class Member after the common issues are resolved if requested to do so by the Class Member. The Class Member will be required to pay fees, disbursements and taxes for this



additional service which is not provided as part of Class Counsel's responsibility. If a Class Member retains other lawyers or a representative, the Class Member must pay the fees, disbursements and taxes for their services on whatever basis they privately agree.

#### **THE PROCEDURE FOR RESOLUTION OF THE INDIVIDUAL ISSUES**

32. After determining the common issues, the trial judge will be asked to give directions as to the procedure for the determination of the individual issues which may include holding separate mini trials for each Class Member or may include having a referee appointed to deal with some of the claims. The type of hearing will depend upon the nature and complexity of the claim and the amount of damages claimed by the Class Member.

33. The Court may be asked to authorize a hearing or hearings before the Referee to allow the Class Members and the defendants to adduce general and expert evidence which may be applicable to some or all individual claims. The type of evidence which may be of general application is, for example, expert evidence about the psychological impact the derailment of Train 92 may have across the Class.

34. Individual issues which a Referee or the trial Judge may be required to decide for each of the Class Members may include whether the derailment was a cause of the damage and injury the Class Member alleges he or she suffered, the actual cost of replacement or fixing the Class Members' personal property with which they travelled,

payment of other out-of-pocket expenses and the cost of alternate accommodation during the time the Class Members were displaced from their travel destination or home.

35. Each Class Member may assert a subrogated claim for insured services and expenses.

36. A claimant may appear at the individual stage of the proceedings in person or with Class Counsel or such other representative as he or she may designate in writing. A claimant will be responsible for the additional cost of such representation. A defendant may appear by counsel or in person.

#### **THE DISTRIBUTION PROCESS**

37. The Administrator will not make any distribution to eligible Class Members until authorized by the Court.

38. Each eligible Class Member shall sign such documents as the Administrator may require in accordance with a protocol approved by the Court as a condition precedent to receiving any distribution.

**INSUFFICIENT RECOVERED MONIES**

39. In the event that the defendant(s) do not pay all of the assessed damages in full, the Court will be asked to give further directions to determine whether there should be any priorities of payment among eligible Class Members.

**CLASS COUNSEL FEES AND ADMINISTRATION EXPENSES**

40. At the conclusion of the common issues trial, the Court will be asked to fix the amount of Class Counsel's fees, disbursements and applicable taxes ("Class Counsel Fees"). Class Counsel will ask the Court to direct the Administrator or the defendants to pay the Class Counsel Fees out of any monies recovered. Class Counsel Fees are a first charge on every recovery.

41. The Court will be asked to fix the costs of the persons appointed to implement and oversee the Plan such as the Administrator and the Referee, and the Court will determine who is to pay these costs.

**FINAL REPORT**

42. After the Administrator makes the final distribution to Class Members, the Administrator shall make its final report to the Court in such manner as the Court directs and the Court will be asked to then make an order discharging the Administrator.

**REVIEW OF THE LITIGATION PLAN**

43. The Court may revise this Plan before the determination of the common issues at the common issues trial or otherwise. The parties reserve the right to seek an amendment of any of the terms of the Plan.

**MOTIONS FOR DIRECTIONS**

44. The Administrator, Referee, Class Counsel, and the defendants may apply to the Court for directions.

LUNDY et al.

Plaintiffs

vs. VIA RAIL CANADA INC. et al.

Defendants

Court File No. CV12-447653-00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
PROCEEDINGS COMMENCED AT TORONTO**

**CERTIFICATION ORDER**

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Lawyers for the plaintiffs