

CITATION: Lundy v. VIA Rail Canada Inc., 2015 ONSC 1879  
COURT FILE NO.: CV-12-447653-00CP  
DATE: 20150323

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN: )  
)  
SANDRA LUNDY, DAVID ) *Kirk Baert and Jody Brown for the Plaintiffs*  
CARMICHAEL, ALLISON )  
KACZMAREK and MARC COUROUX )  
Plaintiffs )  
)  
- and - )  
)  
VIA RAIL CANADA INC. and ) *John A. Campion and Sarah Turney for the*  
CANADIAN NATIONAL RAILWAY ) *Defendants*  
COMPANY )  
Defendants )  
)  
Proceeding under the *Class Proceedings Act, 1992* ) HEARD: March 12, 2015  
)

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION AND OVERVIEW

[1] This tiny class action (45 Class Members) raises new questions of huge significance to the procedure for class actions under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[2] The motion now before the court, which I shall label an individual issues motion, raises the question of what is the ambit of the court's jurisdiction to design the procedure for the individual issues stage of a class action. It raises questions about the timing and the content of Offers to Settle (Rule 49 Offers) in a class action in the individual issues stage.

[3] As I shall explain below, the court's jurisdiction to design the individual issues stage of a class action is bounded by: (a) the parameters of any procedure designed by the parties and settled by the court; and (b) the purposes and prescriptions of the *Class Proceedings Act*, which provide an expansive and generous - but not unlimited jurisdiction - to design a litigation plan for the individual issues stage. The court's jurisdiction arises from numerous sections of the *Act* and is an aspect of the access to justice movement heralded by the Supreme Court of Canada's decisions in *Hryniak v. Mauldin*, 2014 SCC No. 7 and *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8.

[4] As I shall explain below, designing the individual issues stage for the circumstances of the case bar, requires the following: (a) there shall be a formal judgment on the common issues; (b) there shall a formal assessment of costs from the commencement of the action to the conclusion of the common issues stage of the action; (c) the parties shall prepare an Individual Issues Litigation Plan, which plan shall be settled upon motion to the court; (d) after the Individual Issues Litigation Plan has been settled, VIA Rail may deliver individual Offers to Settle to Class Counsel; (e) Class Counsel shall disseminate the individual Offers to Settle along with a court approved notice advising the Class Members about the Individual Issues Litigation Plan and the Offers to Settle. In making an Offer to Settle, VIA Rail's offer may be for a lump sum, but it shall not allocate or designate the offered sum among the award, prejudgment interest, costs, or legal fees. For reasons that I shall explain below, how the respective parties rationalize a defendant's lump sum settlement offer for the individual issues stage of a class action is for the respective parties to decide.

[5] In preparing the Individual Issues Litigation Plan, the parties in the case at bar should note that without their consent, the court does not have the jurisdiction to order one or both of the parties to pay the remuneration of a referee.

[6] Accordingly, for the reasons that follow: (1) I grant judgment on common issues 1, 2, 3, and 5 of the Certification Order; (2) I order an assessment of costs from the commencement of the action to date; (3) I order that the parties shall have 40 days to prepare an Individual Issues Litigation Plan; (4) I direct that the after the plan has been settled, VIA Rail may deliver individual Offers to Settle (Rule 49) and Class Counsel shall prepare notices to Class Members of the completion of the common issues stage of the class action, which notices are subject to court approval.

[7] I reserve the matter of the costs of this motion to the settlement of the Individual Issues Litigation Plan motion.

## **B. FACTUAL AND PROCEDURAL BACKGROUND**

[8] On Sunday, February 26, 2012, Sandra Lundy, David Carmichael, Allison Kaczmarek and Marc Couroux were passengers on VIA Rail Train 92 on route to Toronto when the train derailed near Burlington, Ontario.

[9] On July 9, 2012, the Plaintiffs delivered a Fresh as Amended Statement of Claim, asserting the claims of a class of persons comprising the passengers on the train and their family members.

[10] On consent of the parties, on October 1, 2012, the action was certified as a class proceeding. The certified common issues were the following:

1. Did the defendants owe a duty of care to the Class Members when VIA Train 92 was derailed on February 26, 2012?
2. Did each of the defendants breach the standard of care?
3. Was VIA Rail in breach of contract to the Class Members when VIA Train 92 was derailed on February 26, 2012?

4. Should the defendants pay the costs of administering and distributing any monetary judgment and/or the costs of determining the eligibility and any individual issues? If yes, why and what the amounts of those costs?

5. Should the defendants pay prejudgment and post judgment interest?

[11] The consent certification order fixed the costs of the certification motion at \$16,950, all inclusive, and made them payable in the cause.

[12] On April 29, 2013, the defendants filed a Fresh as Amended Statement of Defence.

[13] In that Statement of Defence, the defendants admitted that: (1) the defendants owed the Class Members a duty of care; (2) the standard of care owed by the defendants had been breached; (3) VIA Rail was in breach of contract to the Class Members; and (4) the defendants are liable to pay prejudgment and post judgment interest on any compensatory damages awarded.

[14] In other words, VIA Rail confessed judgment for questions 1, 2, 3, and 5 of the certified common issues.

[15] The parties participated in a mediation before Graham Mew, now Justice Mew, on September 9, 2013. There were 45 passengers remaining in the class at that time.

[16] There were originally 69 passengers on the train. Eight of these accepted settlement offers from VIA Rail before certification, and 16 passengers opted-out of the action, leaving a class of 45 members. Of these, all but eight Class Members have retainer agreements with Class Counsel. It may be that the eight Class Members without retainers will also retain Class Counsel once the class action enters into the individual issues stage. As will be explained below, at the moment, notwithstanding the absence of retainers, these eight Class Members institutionally have a lawyer and client relationship with Class Counsel and they did so at the time of the mediation.

[17] In advance of the mediation, the Plaintiffs delivered a Damages Brief containing medical information concerning the alleged physiological and psychological injuries claimed by 37 passengers.

[18] The mediation was not successful in resolving the action.

[19] On August 14, 2014, VIA Rail served Rule 49 Offers to Settle addressed to each individual class member. The Offers to Settle were sent to Class Counsel.

[20] Each Offer to Settle contained an offer to pay compensation. The offers ranged from a minimum of \$8,000 to a maximum of \$40,000 for the Class Member. The offers included a requirement that the Class Member execute, on his or her own behalf as well as on behalf of any person asserting a derivative claim under the *Family Law Act*, a full and final release in the form attached to the offer.

[21] The offers also contained a promise by VIA Rail to pay the individual Class Member's legal fees and disbursements in an amount equal to 15% of the settlement amount paid to the Class Member.

[22] Class Counsel refused to communicate the Offers to Settle to Class Members taking the position that it was premature to do so, because the class action had not entered into the individual issues stage of the proceedings.

[23] VIA Rail's position was that notwithstanding the absence of a formal judgment, given the admissions of liability, the action was in the individual issues stage and the Offers to Settle should be provided immediately to the individual Class Members.

[24] With the parties unable to agree about how to proceed, the Plaintiffs brought a motion for: (a) an order granting judgment on the common issues; (b) an order appointing an adjudicator (now admittedly misdescribed as "arbitrator" in their notice of motion); (c) an order setting the terms under which such adjudications will be conducted; and (d) orders granting the Plaintiffs the costs of the certification motion and the costs of the action.

[25] At the hearing of the motion, the plaintiffs delivered a Bill of Costs for \$632,379.35, all inclusive for the costs to the end of the common issues stage of the class action.

[26] VIA Rail does not oppose the granting of judgment on common issues 1, 2, 3, and 5. It opposes any award as to costs for the certification motion and the action. It says that no costs are warranted because: (a) it did not consent to judgment on issue 4, and, therefore, there is no basis for a costs order; (b) it consented to certification and paid costs of \$16,950 in the cause and, therefore, no more costs should be assessed; and (c) it is premature to award costs until after the Offers to Settle and any individual issues trials are resolved. VIA Rail submits that costs cannot be awarded because the "cause" remains to be determined by the individual issues stage of the action.

[27] VIA Rail brought a cross-motion for: (a) an order directing Class Counsel to deliver to each passenger Class Member a copy of the relevant Offer to Settle; and (b) an order directing Class Counsel to report with respect to the responses of Class Members to VIA Rail's Offers to Settle.

[28] Class Counsel does not oppose disseminating VIA Rail's Offers to Settle, but submits that this should only occur after: (1) the court determines what the procedure will be for the individual issues stage of the class action; and (2) the court approves a notice to Class Members informing them of the resolution of the common issues and of their options, including accepting the offer or pursuing individual issues in accordance with the court's determination of the procedure.

### **C. STATUTORY PROVISIONS**

[29] For the purposes of deciding this motion, the relevant statutory provisions are sections 7, 11, 12, 18-27, 29, 31, and 35 of the *Class Proceedings Act, 1992* and rules 20.05, 54.03, and 55.01 of the *Rules of Civil Procedure*. These provisions are set out in Schedule "A" to this Decision.

### **D. DISCUSSION AND ANALYSIS**

[30] This individual issues motion is ultimately about determining the ambit of the court's jurisdiction under s. 25 of the *Class Proceedings Act, 1992*, which is a matter of statutory interpretation of the *Act*. Section 25 must be interpreted in the context of the *Act* and particularly important are sections 7, 11, 12, 18-27, 29, 31, and 35.

[31] Because of the dispute about the dissemination of the Rule 49 Offers to Settle, the motion and cross-motion raises some issues about the relationship between Class Members and Class Counsel as the action enters the individual issues stage.

[32] To get the analysis underway, it is necessary to put s. 25, which is set out below, into its context in the *Act* and also to say something about the nature of the lawyer and client relationship between Class Counsel and individual Class Members during the various stages of a class action.

[33] While s. 11 of the *Class Proceedings Act, 1992* divides a class action into two stages; i.e.: (1) the determination of the common issues; and (2) the determination of the individual issues in accordance with ss. 24 and 25 of the *Act*, this demarcation ignores the pre-certification stage of a class proceeding. For the discussion that follows, it is preferable to divide class actions into three stages: (1) the pre-certification stage; (2) the common issues stage; and (3) the individual issues stage, which depending on the particular class action may include: settlement approval hearings, approval of distribution schemes, or individual issues determinations as designed under s. 25.

[34] The three stages of a class proceeding reflect the various ways that class proceedings are resolved or come to an end. If certification is refused, then both the pre-certification stage and the class action come to an end, but pursuant to s. 7 of the *Act*, the action may continue as a regular proceeding in altered form.

[35] If certification is granted, then the action proceeds to the common issues stage. If the Representative Plaintiff fails at the common issues trial, then the class action comes to an end, and there is a judgment favouring the defendant binding on all Class Members who did not opt-out.

[36] If the Representative Plaintiff succeeds at the common issues stage or if the parties settle without a common issues trial, then the class action moves into the individual issues stage where it may come to an end in a variety of ways. In the individual issues stage, if there is an approved settlement, then the class action will end in accordance with the settlement agreement. If there is a settlement, the parties virtually have an unlimited freedom of contract ability to shape the individual issues stage of the class action. (In *Berry v. Pulley*, 2011 ONSC 1378, I discuss the treatment of settlement offers during this stage. For present purposes, it is not necessary to repeat that discussion.)

[37] If the Representative Plaintiff succeeds at the common issues stage but there is no settlement, then the nature of the individual issues stage will depend on the nature of the outcome of the common issues stage. If aggregate damages were proven at the common issues trial and there are no individual issues left to be determined, then the class action may come to an end with a distribution scheme approved by the court. If causation or the quantification of damages or some other individual issues remain to be determined, then the individual issues stage will involve individual issues trials in accordance with s. 25 of the *Act*, the interpretation of which is discussed further below.

[38] In the case at bar, common issues 1, 2, 3, and 5 are not dispositive of the action and the action is about to enter the individual issues stage. An order under s. 25 is required and a notice to Class Members under s. 18 is required.

[39] Before considering s. 25 further, it is necessary to turn now to the relationship between class counsel, the plaintiff, and class members during the individual issues stage.

[40] The relationship between class counsel, the plaintiff, and class members varies from stage to stage in a class proceeding. At the outset of a class action and throughout, there is a genuine plaintiff who has a lawyer and client relationship with the lawyer of record: *Fantl v. Transamerica Life Canada*, [2008] O.J. No. 1536 (S.C.J.) at paras. 73-80, leave to appeal granted [2008] O.J. No. 2593 (S.C.J.), aff'd [2008] O.J. No. 4928 (Div. Ct.), aff'd 2009 ONCA 377; *Richard v. British Columbia*, [2007] B.C.J. No. 1645 (S.C.), motion to quash appeal dismissed [2008] B.C.J. No. 221 (C.A.); *Attis v. Ontario (Minister of Health)*, 2010 ONSC 4508. The plaintiff is a putative class Member, and he or she will be the class's representative plaintiff if the action is certified.

[41] Before certification, there is no lawyer and client relationship between a putative class member and the lawyer of the representative plaintiff; however, there is a potential lawyer and client relationship. The needs of the *Class Proceedings Act, 1992*, require that there be a *sui generis* relationship between lawyer and potential class members and that there be some responsibilities imposed on the lawyer acting for the proposed representative plaintiff that are owed to the potential class members: *Fantl v. Transamerica Life Canada*, *supra*, at paras. 73-80; *Heron v. Guidant Corp.*, [2007] O.J. No. 3823 (S.C.J.) at para. 10, leave to appeal ref'd [2008] O.J. No. 48 (S.C.J.); *Lundy v. VIA Rail Canada Inc.*, 2012 ONSC 4152.

[42] After certification, there is a lawyer and client relationship between class counsel and the class members: *Ward-Price v. Mariners Haven Inc.*, [2004] O.J. No. 2308 (S.C.J.); *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada*, [2003] O.J. No. 1016 (Master); *Glover v. Toronto (City)*, [2009] O.J. No. 1523 (S.C.J.) at paras. 89-94.

[43] In the individual issues stage, the lawyer and client relationship may continue between class counsel and individual class members, but if there are going to be individual issues trials, the individual class members are free to be self-represented or to retain new lawyers for the individual issues trials.

[44] I pause here to point out a potential serious problem to the structure of the class actions regime by the freedom of class members to select different lawyers for the individual issues stage of the action. The problem is that the *Class Proceedings Act, 1992* operates on an entrepreneurial model in which class counsel share in the success of the class members, but the integrity of that model is threatened if class members change lawyers at the individual issues stage because there may be a dispute between the new lawyer and class counsel about how their respective contingency fee agreements function in the circumstances. This problem is thankfully not present in this tiny class action, (and without empirical or even anecdotal evidence it may only be a theoretical concern to other class actions), but I mention it because the problem of separating class counsel and class members from the financial rewards of the class action is relevant to a consideration of the ambit of s. 25 of the *Act* and to the discussion later about the terms of the Rule 49 Offers to Settle.

[45] With that background it is now possible to discuss the ambit of s. 25, which states:

*Individual issues*

25. (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

- (a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;
- (b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and
- (c) with the consent of the parties, direct that the issues be determined in any other manner.

*Directions as to procedure*

(2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity.

*Idem*

(3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,

- (a) dispense with any procedural step that it considers unnecessary; and
- (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

*Time limits for making claims*

(4) The court shall set a reasonable time within which individual class members may make claims under this section.

*Idem*

(5) A class member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court.

*Extension of time*

(6) Subsection 24 (9) applies with necessary modifications to a decision whether to give leave under subsection (5).

*Determination under cl. (1)(c) deemed court order*

(7) A determination under clause (1) (c) is deemed to be an order of the court.

[46] In the main, s. 25 requires the court to do four things. First, the court must define the issues to be resolved in the further hearing that will constitute the individual issues stage of the class action. Second, the court must decide who will decide those issues. The court's choices as to a decision-maker are limited to: (a) the judge who determined the common issues; (b) another judge, possibly the judge who was case managing the class action but potentially other judges; (c) one or more referees under the rules of court (this is an allusion to Rules 54 and 55 of the *Rules of Civil Procedure*); and (d) with the consent of the parties another adjudicator, whose determination of the individual issues will be given the authority of a court order. Third, the court must give any necessary directions relating to the procedures for the individual issues stage. Fourth, the court shall set a reasonable time limit for individual claims.

[47] Seven observations may be made about these four matters that a court must determine under s. 25.

- First, the court's power under s. 25 to design the individual issues stage is augmented by other sections of the *Class Proceedings Act, 1992*, most particularly s. 12, which states:

*Court may determine conduct of proceeding*

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

- Second, in my opinion, the parties should have an opportunity to propose how the four matters should be determined before the court makes a final decision. As a matter of statutory interpretation, this follows because s. 25 envisions the possibility of the parties agreeing about the design of the individual issues stage.
- Third, there is a very extensive jurisdiction for the parties by consent, and a somewhat more limited but still very generous jurisdiction for the court by order, to design the individual issues stage of the class action.
- Fourth, s. 25 (3) empowers the court in giving directions as to the procedure to dispense with any procedural step or to authorize any special procedural steps. To that empowerment, I would add the court's powers on a summary judgment motion under rule 20.05 and the urgings of the Supreme Court of Canada in *Hryniak v. Mauldin, supra* and *Bruno Appliance and Furniture, Inc. v. Hryniak, supra* to employ those powers when justice can be done without requiring a regular trial. Creativity and the principles of proportionality have a role to play in designing the individual issues stage of a class action.
- Fifth, the only major constraint on the design of the individual issues stage is that the court's procedural and evidentiary choices must be consistent with justice to class members and the defendants. What is consistent with justice will depend upon the nature of the particular case and upon the fundamental principles of justice and of natural justice. Once again the lessons being learned about proportionality and access to justice from the *Hryniak v. Mauldin*, and *Bruno Appliance and Furniture, Inc. v. Hryniak* jurisprudence will be informative in illuminating what is consistent with justice for the parties.
- Sixth, the major constraint of consistency with justice is necessarily vague, and I doubt that many universal principles can be extracted beyond saying that each party is entitled to notice of the case they have to meet and that each party is entitled to some sort of procedural and evidentiary means to make its case and to meet the case of the opponent. The means chosen must be non-arbitrary and the resulting adjudication must be capable of meaning appellate review, but beyond that I do not know what more can be said.
- Seventh, the design of the individual issues stage; i.e., the steps to be taken to establish an individual claim must be settled in order that the class members may receive the notice prescribed by s. 18 of the *Act* for where individual participation is required. This notice must be approved pursuant to ss. 20-22 of the *Act*.



[48] During argument, VIA Rail submitted that certain rights like the right to cross-examine a claimant could not be taken away in designing the individual issues stage. I agree that in some cases it would be inconsistent with justice to take away the right to cross-examine, but I do not think that denying a right to cross-examine would be inconsistent in every case. For example, if the only issue in the case at bar for the individual issues stage was whether the Class Member was on board the train at the time of derailment, a sworn affidavit without any right of cross-examination strikes me as sufficient.

[49] Some aspects of s. 25 are certain. It is certain that the court does not have the jurisdiction, for instance, to force the parties to enter into an arbitration agreement and to hire an arbitrator at the parties' expense to resolve the dispute. The parties could agree to an arbitration procedure, but the court has no ability to outsource its adjudicative function beyond that provided by s. 25 (1) of the *Class Proceedings Act* and by Rules 54 and 55 of the *Rules of Civil Procedure*. Under these provisions, the court may only determine or fix the remuneration of a decision-maker if the parties consent to the appointment of a particular referee.

[50] It is certain that absent the consent of the parties, the design of the procedure for the individual issues stage cannot be a no costs regime or a regime in which the defendant pays costs in any event of the outcome. Under the scheme of the *Class Proceedings Act, 1992*, class members are not exposed to costs during the common issues stage but the *Act* expressly exposes class members to adverse costs awards for the individual issues stage. Section 31(2) of the *Act* states:

31. (2) Class members, other than the representative party, are not liable for costs except with respect to the determination of their own individual claims.

[51] This is enough said about s. 25 to begin to address the motion and the cross-motion in the case at bar.

[52] In my opinion, before resort can be made to s. 25, the common issues stage must be formally brought to an end. This can be achieved by a settlement, a summary judgment motion, a trial judgment, or as in the case at bar, a confession of judgment and a motion for judgment.

[53] In the case at bar, the parties agree that a judgment should issue at least for common issues 1, 2, 3, and 5, and a judgment should issue accordingly.

[54] I grant the parties 40 days from the release of these Reasons for Decision to prepare an Individual Issues Litigation Plan, after which the Plaintiffs shall apply for an Order settling the plan.

[55] I urge the parties to be creative and to have regard to the principles of proportionality. Just as settlement agreements in class actions have shown an impressive amount of creativity, there is no reason why Individual Issues Litigation Plans cannot demonstrate a similar amount of procedural creativity. A one size fits all approach is not necessary in designing Individual Issues Litigation Plans.

[56] With the grant of judgment and the entry into the individual issues stage, in my opinion, there should be an assessment of the costs of the class action up to the completion of the common issues stage.

[57] During the common issues stage, costs is a risk to which the defendant was always exposed. During the common issues stage, costs is a risk to which, in theory, the representative

plaintiff was also exposed, but, in reality or in practice, the risk of an adverse costs award is assumed by class counsel or the Class Proceedings Fund or with court approval by third party litigation funders. During the common issues stage, individual class members are not exposed to costs. These risks associated with costs awards changes as the action enters the individual issues stage. Thus, the matter of costs needs to be dealt with at the conclusion of the common issues stage and the entry into the last stage of the class action.

[58] Had there been a common issues trial in the case at bar, the matter of costs would have been dealt with after the trial and before the entry into the individual issues stage. Similarly, costs needs to be dealt with as a part of a confession of judgment on the common issues. Before entering into the individual issues stage where individual class members become for the first time exposed to costs, the litigation slate, so to speak, needs to be wiped clean of any costs claims.

[59] I disagree with VIA Rail's submission that the Plaintiffs' entitlement to costs, which, in theory, are designed to indemnify the Plaintiffs for the legal fees paid to Class Counsel, cannot be determined until the outcome of the individual issues stage. This submission is incorrect because the matter to be determined at the completion of the common issues stage is what costs is the plaintiff entitled to for getting the matter to the third and final stage of the class action; i.e. the individual issues stage.

[60] Just as a plaintiff's entitlement to costs after a successful certification motion does not normally depend on the outcome of the common issues trial, the successful Representative Plaintiffs in the case at bar and their Class Counsel are entitled to their costs for the successful completion of the common issues stage of the class action. The "cause" of the communal part of the class action is at an end and the Plaintiffs are entitled to recover their costs in the cause. Class Counsel's entitlement to costs does not depend on the outcome of the individual issues determinations. Without any double counting for costs attributable to the certification stage of the action, Class Counsel are entitled to costs for successfully stewarding the class proceeding through its second stage, the common issues stage.

[61] I hasten to add that I am not deciding that there should be a costs award for \$632,379.35, all inclusive, in the case at bar. I am only deciding that costs should now be assessed and the slate should be wiped clean. In this regard, I can add that costs should be assessed without regard to the Offers to Settle, which are not factors until the action enters into the individual issues stage.

[62] I also hasten to add that I am not ignoring the implications of VIA Rail's argument to the end that it would be a discredit to the class actions regime if Class Counsel were to be awarded \$632,379.35, and it turned out that by the acceptance of Offers to Settle or the determination of the individual issues Class Members recovered say \$200,000 gross; i.e. before the deduction for contingency fees.

[63] My response to this argument is that the prospects of the ultimate recovery will in the normal course be a factor in determining whether a party's claim for costs is fair and within the reasonable expectations of the unsuccessful party. Further, whatever sum is awarded for costs, it will be determined in accordance with the principles developed and developing for class proceedings, and those principles do not ignore that Class Counsel ultimately must demonstrate that he or she actually earned the legal fees by productive work and not by padding the dockets in order to finance the litigation without risk. Further still, whatever is awarded for costs may

affect Class Counsel's ability to enforce its contingency fee agreement, but that is not a concern for a defendant. Further still, assuming that it turned out that Class Counsel actually could justify costs of \$632,379.35 and Class Members only recovered \$200,000 gross (with an enforceable contingency fee) or \$200,000 net (because the contingency fee was unenforceable), it does not necessarily follow that the class actions regime, which is built upon encouraging entrepreneurial Class Counsel to take on the risk of class proceedings, is discredited. At worst, the outcome would reveal that the class action regime is not perfect and from time to time the optics of a particular class action are not pretty but quite ugly.

[64] For the case at bar, I direct that if the parties cannot agree about the costs for the action up to the entry into the individual issues stages, they may make submissions in writing beginning with the Plaintiffs' submissions within 20 days after the release of these Reasons for Decision followed by VIA Rail's submissions within a further 20 days.

[65] This brings me to the matter of VIA Rail's Rule 49 Offers to Settle that already have been sent to Class Counsel.

[66] In my opinion, Class Counsel was correct in not disseminating the offers until the common issues stage had formally come to a conclusion. Up until that juncture, the Class Members were not exposed to costs consequences, but the theory of Rule 49 Offers is that they have potential costs consequences. Those costs consequences require a demarcation of the commencement of the individual issues stage and that starting point cannot be determined until the nature of the individual issues stage is defined, which has not yet occurred.

[67] I also agree with Class Counsel that Class Members could not be meaningfully advised and could not make a fully informed and intelligent decision about whether to accept the Offer to Settle until they understood what was the alternative to acceptance; i.e. proceeding to an individual issues determination where the Class Member will be exposed to an adverse costs award.

[68] Thus, in the case at bar, several steps need to be taken before Class Counsel disseminate any Offers to Settle to Class Members. What is required is that: (1) the common issues stage of the class action must be formally completed by the judgment that I have ordered; (2) an Individual Issues Litigation Plan needs to be negotiated and settled by the court; (3) the Offers to Settle need to be amended to be undifferentiated lump sum offers; and (4) a notice to Class Members under s. 18 of the *Act* needs to be prepared informing Class Members of the outcome of the common issues stage of the action.

[69] The reason that the Offers to Settle should be lump sum offers is that it is not the defendant's concern about how its monetary offer to settle is allocated between the individual Class Member and his or her lawyer for the individual issues stage, which lawyer is not necessarily Class Counsel.

[70] A defendant can rationalize to itself why it is paying whatever sum it offers, but it is to just stir up trouble in the inherently conflicted area of contingency fee agreements in class actions to specify how much is being offered for costs to remunerate the Class Member's lawyer. I see no disadvantage to the defendant simply making a lump sum offer, and it will just have to live with the rancour of thinking that Class Counsel or the Class Member's new lawyer may ultimately receive more than the defendant thinks the lawyer is entitled.

[71] VIA Rail submitted that the court should not be concerned about the form and substance of its Offers to Settle because all notices distributed to the Class Members must be approved under ss. 18 and 20 of the *Class Proceedings Act* and any settlements reached as a result of such notices are subject to judicial scrutiny and approval under s. 29 of the *Act*.

[72] While I agree that the court will be involved in approving the notice that goes to Class Members about the completion of the common issues stage of the class proceeding, I disagree that s. 29 of the *Class Proceedings Act* applies so that the court must approve of the settlement reached if an individual Class Member accepts the Offer to Settle. Section 29 does not apply to the individual issues stage of a class action.

[73] Individual Class Members are not persons under an incapacity, and once the common issues stage is completed, a Class Member is entitled to accept individual offers to settle without obtaining court approval. Moreover, introducing s. 29 procedure to individual settlements is unnecessary and a waste of the court's resources. There may be some litigation about the enforceability of the contingency fee agreements under the *Solicitors' Act*, R.S.O. 1990, c. s.15, but that is not the defendant's concern.

[74] VIA Rail submitted that the process of judicial supervision over individual settlements would ensure that individual settlements do not have the effect of prejudicing the rights and interests of Class Counsel, and thereby undermining the effectiveness of the class actions regime. That submission, however, is not an argument for introducing s. 29 procedure for the individual issues stage of a class action; rather, it is an argument for why granular offers to settle should not be permitted because they will just conflict monger. And, it is another argument for why the slate needs to be cleaned of costs claims at the completion of the common issues stage of the class action.

#### E. CONCLUSION

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



Perell, J.

## **Schedule "A"** **Statutory Provisions**

*Class Proceedings Act, 1992, S.O. 1992, c. 6*

*Refusal to certify: proceeding may continue in altered form*

7. Where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for the purpose, the court may,

- (a) order the addition, deletion or substitution of parties;
- (b) order the amendment of the pleadings or notice of application; and
- (c) make any further order that it considers appropriate.

*Stages of class proceedings*

11. (1) Subject to section 12, in a class proceeding,

- (a) common issues for a class shall be determined together;
- (b) common issues for a subclass shall be determined together; and
- (c) individual issues that require the participation of individual class members shall be determined individually in accordance with sections 24 and 25.

*Separate judgments*

(2) The court may give judgment in respect of the common issues and separate judgments in respect of any other issue.

*Court may determine conduct of proceeding*

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

....

*Notice where individual participation is required*

18. (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, the representative party shall give notice to those members in accordance with this section.

*Idem*

(2) Subsections 17 (3) to (5) apply with necessary modifications to notice given under this section.

*Contents of notice*

(3) Notice under this section shall,

- (a) state that common issues have been determined in favour of the class;

- (b) state that class members may be entitled to individual relief;
- (c) describe the steps to be taken to establish an individual claim;
- (d) state that failure on the part of a class member to take those steps will result in the member not being entitled to assert an individual claim except with leave of the court;
- (e) give an address to which class members may direct inquiries about the proceeding;  
and
- (f) give any other information that the court considers appropriate.

*Notice to protect interests of affected persons*

19. (1) At any time in a class proceeding, the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding.

*Idem*

(2) Subsections 17 (3) to (5) apply with necessary modifications to notice given under this section.

*Approval of notice by the court*

20. A notice under section 17, 18 or 19 shall be approved by the court before it is given.

*Delivery of notice*

21. The court may order a party to deliver, by whatever means are available to the party, the notice required to be given by another party under section 17, 18 or 19, where that is more practical.

*Costs of notice*

22. (1) The court may make any order it considers appropriate as to the costs of any notice under section 17, 18 or 19, including an order apportioning costs among parties.

*Idem*

(2) In making an order under subsection (1), the court may have regard to the different interests of a subclass.

*Statistical evidence*

23. (1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.

*Idem*

(2) A record of statistical information purporting to be prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada may be admitted as evidence without proof of its authenticity.

*Notice*

(3) Statistical information shall not be admitted as evidence under this section unless the party seeking to introduce the information has,

- (a) given reasonable notice of it to the party against whom it is to be used, together with a copy of the information;
- (b) complied with subsections (4) and (5); and
- (c) complied with any requirement to produce documents under subsection (7).

*Contents of notice*

(4) Notice under this section shall specify the source of any statistical information sought to be introduced that,

- (a) was prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada;
- (b) was derived from market quotations, tabulations, lists, directories or other compilations generally used and relied on by members of the public; or
- (c) was derived from reference material generally used and relied on by members of an occupational group.

*Idem*

(5) Except with respect to information referred to in subsection (4), notice under this section shall,

- (a) specify the name and qualifications of each person who supervised the preparation of statistical information sought to be introduced; and
- (b) describe any documents prepared or used in the course of preparing the statistical information sought to be introduced.

*Cross-examination*

(6) A party against whom statistical information is sought to be introduced under this section may require, for the purposes of cross-examination, the attendance of any person who supervised the preparation of the information.

*Production of documents*

(7) Except with respect to information referred to in subsection (4), a party against whom statistical information is sought to be introduced under this section may require the party seeking to introduce it to produce for inspection any document that was prepared or used in the course of preparing the information, unless the document discloses the identity of persons responding to a survey who have not consented in writing to the disclosure.

*Aggregate assessment of monetary relief*

24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

- (a) monetary relief is claimed on behalf of some or all class members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

*Average or proportional application*

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis.

*Idem*

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members.

*Court to determine whether individual claims need to be made*

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order.

*Procedures for determining claims*

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims.

*Idem*

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

- (a) the use of standardized proof of claim forms;
- (b) the receipt of affidavit or other documentary evidence; and
- (c) the auditing of claims on a sampling or other basis.

*Time limits for making claims*

(7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section.

*Idem*

(8) A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court.

*Extension of time*

(9) The court may give leave under subsection (8) if it is satisfied that,

- (a) there are apparent grounds for relief;
- (b) the delay was not caused by any fault of the person seeking the relief; and
- (c) the defendant would not suffer substantial prejudice if leave were given.



*Court may amend subs. (1) judgment*

(10) The court may amend a judgment given under subsection (1) to give effect to a claim made with leave under subsection (8) if the court considers it appropriate to do so.

*Individual issues*

25. (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

- (a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;
- (b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and
- (c) with the consent of the parties, direct that the issues be determined in any other manner.

*Directions as to procedure*

(2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity.

*Idem*

(3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,

- (a) dispense with any procedural step that it considers unnecessary; and
- (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

*Time limits for making claims*

(4) The court shall set a reasonable time within which individual class members may make claims under this section.

*Idem*

(5) A class member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court.

*Extension of time*

(6) Subsection 24 (9) applies with necessary modifications to a decision whether to give leave under subsection (5).

*Determination under cl. (1) (c) deemed court order*

(7) A determination under clause (1) (c) is deemed to be an order of the court.

*Judgment distribution*

26. (1) The court may direct any means of distribution of amounts awarded under section 24 or 25 that it considers appropriate.

*Idem*

(2) In giving directions under subsection (1), the court may order that,

(a) the defendant distribute directly to class members the amount of monetary relief to which each class member is entitled by any means authorized by the court, including abatement and credit;

(b) the defendant pay into court or some other appropriate depository the total amount of the defendant's liability to the class until further order of the court; and

(c) any person other than the defendant distribute directly to class members the amount of monetary relief to which each member is entitled by any means authorized by the court.

*Idem*

(3) In deciding whether to make an order under clause (2) (a), the court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant.

*Idem*

(4) The court may order that all or a part of an award under section 24 that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order.

*Idem*

(5) The court may make an order under subsection (4) whether or not all class members can be identified or all of their shares can be exactly determined.

*Idem*

(6) The court may make an order under subsection (4) even if the order would benefit,

(a) persons who are not class members; or

(b) persons who may otherwise receive monetary relief as a result of the class proceeding.

*Supervisory role of the court*

(7) The court shall supervise the execution of judgments and the distribution of awards under section 24 or 25 and may stay the whole or any part of an execution or distribution for a reasonable period on such terms as it considers appropriate.

*Payment of awards*

(8) The court may order that an award made under section 24 or 25 be paid,

(a) in a lump sum, forthwith or within a time set by the court; or

(b) in instalments, on such terms as the court considers appropriate.

*Costs of distribution*

(9) The court may order that the costs of distribution of an award under section 24 or 25, including the costs of notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment or may make such other order as it considers appropriate.

*Return of unclaimed amounts*

(10) Any part of an award for division among individual class members that remains unclaimed or otherwise undistributed after a time set by the court shall be returned to the party against whom the award was made, without further order of the court.

*Judgment on common issues*

27. (1) A judgment on common issues of a class or subclass shall,

- (a) set out the common issues;
- (b) name or describe the class or subclass members;
- (c) state the nature of the claims or defences asserted on behalf of the class or subclass; and
- (d) specify the relief granted.

*Effect of judgment on common issues*

(2) A judgment on common issues of a class or subclass does not bind,

- (a) a person who has opted out of the class proceeding; or
- (b) a party to the class proceeding in any subsequent proceeding between the party and a person mentioned in clause (a).

*Idem*

(3) A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that,

- (a) are set out in the certification order;
- (b) relate to claims or defences described in the certification order; and
- (c) relate to relief sought by or from the class or subclass as stated in the certification order.

*Judgment on common issues*

27. (1) A judgment on common issues of a class or subclass shall,

- (a) set out the common issues;
- (b) name or describe the class or subclass members;

(c) state the nature of the claims or defences asserted on behalf of the class or subclass; and

(d) specify the relief granted.

*Effect of judgment on common issues*

(2) A judgment on common issues of a class or subclass does not bind,

(a) a person who has opted out of the class proceeding; or

(b) a party to the class proceeding in any subsequent proceeding between the party and a person mentioned in clause (a).

*Idem*

(3) A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that,

(a) are set out in the certification order;

(b) relate to claims or defences described in the certification order; and

(c) relate to relief sought by or from the class or subclass as stated in the certification order.

....

*Discontinuance, abandonment and settlement*

29. (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

*Settlement without court approval not binding*

(2) A settlement of a class proceeding is not binding unless approved by the court.

*Effect of settlement*

(3) A settlement of a class proceeding that is approved by the court binds all class members.

*Notice: dismissal, discontinuance, abandonment or settlement*

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding; and

(c) a description of any plan for distributing settlement funds.

### *Costs*

31. (1) In exercising its discretion with respect to costs under subsection 131 (1) of the *Courts of Justice Act*, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.

### *Liability of class members for costs*

(2) Class members, other than the representative party, are not liable for costs except with respect to the determination of their own individual claims.

### *Small claims*

(3) Where an individual claim under section 24 or 25 is within the monetary jurisdiction of the Small Claims Court where the class proceeding was commenced, costs related to the claim shall be assessed as if the claim had been determined by the Small Claims Court.

### *Rules of court*

35. The rules of court apply to class proceedings

## **R.R.O. 1990, Regulation 194 – *Rules of Civil Procedure***

### WHERE TRIAL IS NECESSARY

#### *Powers of Court*

20.05 (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.

#### *Directions and Terms*

(2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,

(a) that each party deliver, within a specified time, an affidavit of documents in accordance with the court's directions;

(b) that any motions be brought within a specified time;

(c) that a statement setting out what material facts are not in dispute be filed within a specified time;

(d) that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them;

(e) that a discovery plan agreed to by the parties under Rule 29.1 (discovery plan) be amended;

(f) that the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery;

(g) that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit;

(h) that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness;

(i) that any oral examination of a witness at trial be subject to a time limit;

(j) that the evidence of a witness be given in whole or in part by affidavit;

(k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

(i) there is a reasonable prospect for agreement on some or all of the issues, or

(ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;

(l) that each of the parties deliver a concise summary of his or her opening statement;

(m) that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule;

(n) that the action be set down for trial on a particular date or on a particular trial list, subject to the direction of the regional senior judge;

(o) for payment into court of all or part of the claim; and

(p) for security for costs.

#### *Specified Facts*

(3) At the trial, any facts specified under subrule (1) or clause (2) (c) shall be deemed to be established unless the trial judge orders otherwise to prevent injustice.

#### *Order re Affidavit Evidence*

(4) In deciding whether to make an order under clause (2) (j), the fact that an adverse party may reasonably require the attendance of the deponent at trial for cross-examination is a relevant consideration.

#### *Order re Experts, Costs*

(5) If an order is made under clause (2)(k), each party shall bear his or her own costs.

#### *Failure to Comply with Order*

(6) Where a party fails to comply with an order under clause (2) (o) for payment into court or under clause (2) (p) for security for costs, the court on motion of the opposite party may dismiss the action, strike out the statement of defence or make such other order as is just. s. 14.

(7) Where on a motion under subrule (6) the statement of defence is struck out, the defendant shall be deemed to be noted in default.

....

#### TO WHOM REFERENCE MAY BE DIRECTED

##### *Judge or Officer*

54.03 (1) A reference may be directed to the referring judge, to another judge with that judge's consent, to a registrar or other officer of the court or to a person agreed on by the parties.

##### *Person Agreed on by Parties*

(2) Where a reference is directed to a person agreed on by the parties, the person is, for the purposes of the reference, an officer of the court directing the reference.

(3) The judge directing a reference to a person agreed on by the parties may,

- (a) determine his or her remuneration and the liability of the parties for its payment;
- (b) refer that issue to the person to whom the reference is directed; or
- (c) reserve that issue until the report on the reference is confirmed.

...

#### GENERAL PROVISIONS FOR CONDUCT OF REFERENCE

##### *Simple Procedure to be Adopted*

55.01 (1) A referee shall, subject to any directions contained in the order directing the reference, devise and adopt the simplest, least expensive and most expeditious manner of conducting the reference and may,

- (a) give such directions as are necessary; and
- (b) dispense with any procedure ordinarily taken that the referee considers to be unnecessary, or adopt a procedure different from that ordinarily taken.

##### *Special Circumstances to be Reported*

(2) A referee shall report on any special circumstances relating to the reference and shall generally inquire into, decide and report on all matters relating to the reference as fully as if they had been specifically referred.

##### *General Procedure*

(3) Subject to subrule (1), a reference shall be conducted as far as possible in accordance with rules 55.01 to 55.07.

**CITATION:** Lundy v. VIA Rail Canada Inc., 2015 ONSC 1879  
**COURT FILE NO.:** CV-12-447653-00CP  
**DATE:** 20150323

**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

---

**REASONS FOR DECISION**

---

PERELL J.

Released: March 23, 2015