

CITATION: Lundy v. VIA Rail Canada Inc., 2015 ONSC 3531
COURT FILE NO.: CV-12-447653-00CP
DATE: 20150601

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:** In writing
)

PERELL, J.

REASONS FOR DECISION - COSTS

[1] In the context of what I labelled an “individual issues motion,” which had the purpose of designing the individual issues phase of a class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6: (1) I granted judgment on common issues 1, 2, 3, and 5 of the Certification Order; (2) I ordered an assessment of costs from the commencement of the action to date; (3) I ordered that the parties shall have 40 days to prepare an Individual Issues Litigation Plan; and (4) I directed 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. See *Lundy v. VIA Rail Canada Inc.*, 2015 ONSC 1879.

[2] In my Reasons for Decision, I held, among other things, that: (1) the matter of costs needs to be dealt with at the conclusion of the common issues stage before the entry into the individual issues phase of the class action; (2) the successful Representative Plaintiffs are entitled to costs for the successful completion of the common issues stage; (3) there should be no double counting for costs attributable to the certification stage of the action; (4) costs should be assessed without regard to the offers to settle, which are not factors until the action enters into the individual issues state; and (5) the costs of the individual issues motion were reserved until the Individual Issues Litigation Plan was concluded.

[3] In light of these directives and holdings, the Representative Plaintiffs now request costs of **\$332,052.51** for the common issues stage, comprised of: (a) counsel fees, inclusive of HST, totalling \$127,876.00; and (b) disbursements, inclusive of HST, totalling \$204,176.51.

[4] The Defendant VIA Rail submits that the costs award should be **\$170,739.53** for the common issues stage, comprised of: (a) counsel fees, inclusive of HST, totalling \$125,472.47; and (b) disbursements, inclusive of HST, totalling \$45,267.06.

[5] There is thus no significant dispute about the counsel fees, which VIA Rail submits should be adjusted to exclude costs associated with the Rule 49 offers, which it submits should not be dealt with as part of the common issues phase of the class action. I agree, and I, therefore, award the counsel fees, inclusive of HST, totalling \$125,472.47.

[6] The significant dispute between the parties is about the disbursements and in this regard the hotbed of contention is the disbursements for Occupational Therapy Assessments and Psychological Assessments for Class Members.

[7] These two sets of medical reports represent an expense of \$146,289.61. The balance of the disbursements, for which VIA Rail also has some objections, total \$57,886.90.

[8] VIA Rail submits that the disbursements are disproportionate to the damages likely recoverable in the individual issues phase which VIA Rail estimates to be around \$629,000 in the aggregate, which assessment it has backed up by Rule 49 Offers to Settle. I disagree with this submission as there is no way to test its validity.

[9] VIA Rail submits that the costs of the Occupational Therapy Assessments and Psychological Assessments should be reserved for the Individual Issues Phase of the class action, where the reports' veracity and utility can be tested. And it is in the alternative that VIA Rail submits that the Representative Plaintiffs' award for disbursements should be reduced to \$45,267.06.

[10] I agree with VIA Rail's submission that that the Plaintiffs have included some disbursements that are not recoverable totalling \$12,621.84, and I exclude recovery for these items.

[11] In my opinion, there is some merit to VIA Rail's submission that the expense of the Occupational Therapy Assessments and Psychological Assessments should be reserved for the Individual Issues Phase of the Class Action. However, I do not agree that all of this expense falls within the Individual Issues Phase of the action.

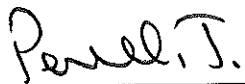
[12] In their Reply Costs Submissions, the Representative Plaintiffs point out that VIA Rail was eager to have these reports and they may have been instrumental in moving this action to the point where VIA Rail consented to judgment and served Rule 49 Offers.

[13] In my opinion, a portion of the expense of the Occupational Therapy Assessments and Psychological Assessments is attributable to the Representative Plaintiffs having successfully shepherded the action to the Individual Issues Phase. I would estimate this contribution to be 30% or \$43,886.88.

[14] Accordingly, I award the Representative Plaintiffs \$89,151.94 for disbursements, and I reserve the decision about the balance of disbursements totalling \$102,402.73 for the Individual Issues Phase of the Class Action.

[15] In the result, the Representative Plaintiffs shall recover costs of \$214,624.41, all inclusive.

[16] Order accordingly.



Perell, J.

Released: June 1, 2015

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