

AUG 18 2021



Filed pursuant to the Class Proceedings Act, R.S.B.C. 1996, c.50

S 217469

No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CAREL MOISEIWITSCH

PLAINTIFF

AND:

CANADIAN NATIONAL RAILWAY COMPANY and
CANADIAN PACIFIC RAILWAY COMPANY

DEFENDANTS

NOTICE OF CIVIL CLAIM

This action has been started by the plaintiff for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff,

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

CLAIM OF THE PLAINTIFF

Part 1: STATEMENT OF FACTS

The Parties

1. The Plaintiff, Carel Moiseiwitsch, is currently without fixed address. Until June 30, 2021, she was a visual artist and a homeowner and resident of the Village of Lytton, British Columbia. The Plaintiff has an address for service at 511-55 East Cordova Street, Vancouver, BC, V6A 0A5.
2. The Defendant, Canadian National Railway ("CN Rail"), is a federally incorporated company registered under the laws of Canada and has an address for service at 935 de la Gauchetiere Street West, Montreal, Quebec, H3B 2M9.
3. The Defendant, Canadian Pacific Railway Company ("CP Rail"), is a federally incorporated company registered under the laws of Canada and has an address for service at 7550 Ogden Dale Road S.E., Calgary, Alberta, T2C 4X9.

Background

4. The Village of Lytton is British Columbia's second smallest municipality. Lytton is home to approximately 250 residents, some of whom own their lands and some of whom are tenants. Lytton's property tax roll recognizes approximately 150 properties. The area surrounding the Village of Lytton includes nine separate reserves administered by the Lytton First Nation which are home to approximately 2,000 band members.
5. The Village of Lytton is in an arid climatic region with significant forestation, brush and undergrowth. During summer months, Lytton routinely has the hottest temperatures in Canada. On three consecutive days in June of 2021, Lytton recorded the highest temperatures ever recorded in Canada.
6. At all material times the Plaintiff has owned the property at 421 Alonzo Way, Lytton, British Columbia, V0K 1Z0, in fee simple (the "Property"). The Property has the following legal description:
Lot 7, Block 16, Section 1, Township 15, Range 27, Meridian Land District
25 TOWNSITE OF LYTTON
PID: 006-447-147.
7. The Plaintiff's home was a 1.5 storey, three bedroom house of approximately 1,600 square feet that was built on the Property (the "Home"). In addition to ordinary household and personal items and clothing, the Plaintiff kept her art collection and rug collection in her Home (the "Personal Items").

8. The Plaintiff is a part owner of an information technology and graphic design company operated out of her Home (the "Business"). The Business provided information technology and graphic design services to residents of Lytton and the surrounding area, as well as remote services to other areas of British Columbia. The Plaintiff kept business records, electronic hardware, telecommunications equipment and other inventory and assets relating to the Business at her Home.
9. The Defendant CN Rail is a Class I freight railway headquartered in Montreal, Quebec. CN Rail operates throughout Canada and the Midwestern and Southern United States. CN Rail is Canada's largest railway in terms of revenue and the size of its network. It has 24,000 employees. It was founded in 1919 as a Crown corporation and privatized in 1995.
10. In particular, CN Rail operates trains and rail tracks running to and from the ocean ports in Vancouver to Hope and through the Fraser Canyon running more or less parallel to Highway 1 from Hope to Kamloops, passing through Boston Bar and Lytton, following the paths of the Fraser and Thompson Rivers.
11. The Defendant CP Rail is a Class I freight railway headquartered in Calgary, Alberta. CP Rail operates throughout Canada and portions of the United States. It has 11,900 employees. CP Rail was incorporated in 1881 as a privately held corporation.
12. CP Rail operates trains and rail tracks running to and from the ocean ports in Vancouver to Hope and through the Fraser Canyon running more or less parallel to Highway 1 from Hope to Kamloops, passing through Boston Bar and Lytton, following the paths of the Fraser and Thompson Rivers.

Events Preceding the Fire

13. Commencing on June 27th, 2021 temperatures in Lytton rose to a level at which it was unsafe to operate trains. The temperature in Lytton peaked at 49.6 degrees Celsius on June 29th, which was the hottest temperature ever recorded at ground level in Canada.
14. The record-breaking heat in Lytton, coupled with severe drought in the area presented a fire risk. The Province of British Columbia (the "Province") notified the Defendants of extreme risk of wildfires, which was the highest possible rating according to the Canadian Forest Fire Danger Rating System. High winds are known by the Defendants to regularly blow Northeast through the Fraser Canyon and through Lytton in the summer months.
15. Throughout the period from June 27, 2021 to June 30, 2021, forest fires were burning in the vicinity of Lytton (the "Forest Fire"). At approximately 3:00 p.m. on June 30,

2021, a freight train operated by CN Rail combusted in Boston Bar, approximately 39 kilometers South of Lytton (the “Boston Bar Fire”).

The Lytton Fire

16. The Defendants caused or contributed to a wildfire that burned down the Village of Lytton (the “Lytton Fire”). The Lytton Fire started at approximately 4:15 p.m. on June 30, 2021 in an area of Lytton known as “Hobo’s Hollow”, on the East side of the Fraser River at the place where the CN Rail bridge crosses the Fraser River in Southwest Lytton. High winds bearing approximately Northeast at 60-70 km/h spread the fire and by approximately 6:00 p.m. on June 30, 2021, all of Lytton was consumed by the fire caused by the Defendants.
17. The Lytton Fire was caused by heat and/or sparks emanating from a freight train owned by CP Rail, including CP Rail cars and engines, that was operated by CN Rail by CN Rail employees on tracks owned by CN Rail (the “Train”).
18. CP Rail transferred care, custody, and control of the Train to CN at Kamloops in the morning of June 30, 2021. When the Train passed through Lytton prior to the Lytton Fire, it contained a locomotive and railcars owned by CP, operated by CN on its Ashcroft Subdivision rail line.
19. The Lytton Fire was not caused by the Forest Fire or the Boston Bar Fire or a lightning strike. The burn area of the Lytton Fire does not overlap with the burn area of the Forest Fire or the Boston Bar Fire.

Damage from the Lytton Fire

20. The Lytton Fire destroyed the Plaintiff’s Home, Business and Personal Items. Utility service to the Property was and continues to be interrupted. The Plaintiff was forced to flee from the Lytton Fire and was almost killed. She has been made homeless and has incurred expenses for temporary housing and provisions that she would not otherwise have incurred. The Plaintiff has suffered business losses. She has suffered psychological injury from proximity to death and the loss of her Home and life as she knew it. Her pet cat was killed by the Lytton Fire.
21. Approximately 90% of the Village of Lytton, including homes, businesses, and historical landmarks, was destroyed by the Lytton Fire. The post office, ambulance station, health centre, RCMP detachment, Lytton Hotel, Lytton Village Office, and Lytton Chinese History Museum were all destroyed by the Lytton Fire.
22. The Lytton First Nation includes 56 Reserves in the vicinity of Lytton. The Lytton Fire damaged or destroyed structures and property located on some of these Reserves.

23. Two Reserves—IR 17 Klahkamich and IR 18 Klickkumcheen—border on the Village of Lytton to the south and north, respectively, and suffered extensive damage. Many structures, including the Lytton First Nation band office, a church, and homes, were burned to their foundations and vehicles destroyed.

24. Surrounding reserves which also suffered damage from the Lytton Fire include IR 27 and 27A Papyum, IR 24 Tuckozap, IR 22A Kleetlekut and IR 16 Two Mile Creek.

The Class

25. This action is brought on behalf of the following classes:

- a. all natural or legal persons with loss of real or personal property or business losses in the Lytton Fire (the “Class”);
- b. all natural or legal persons with a subrogated claim for recovery of insurance indemnity paid in relation to damage and other losses in the Lytton Fire (the “Subrogation Class”);
- c. all governmental entities with loss of real or personal property or business losses in the Lytton Fire (the “Governmental Entity Subclass”); and
- d. all persons who sustained personal injuries in the Lytton Fire (the “PI Subclass”).

26. The “Class Members” or the “Class” includes the Subrogation Class, the Governmental Entity Subclass, and the PI Subclass.

Cause of the Lytton Fire

27. The following actions or omissions of CN Rail (collectively, the “CN Negligent Acts”) caused or contributed to the Lytton Fire, and constitute a breach of duty to the Plaintiff:

- a. Operating the Train in what it knew or ought to have known were unsafe prevailing conditions;
- b. Operating the Train at higher speed or load than is safe for the prevailing conditions;
- c. Operating the Train without ensuring that the braking system and other mechanical systems were safe for the conditions;
- d. Failing to inspect the Train and ensure that CP Rail had installed spark arrestors, braking, and other systems on the Train that are less prone to cause fire in the vicinity of the tracks;

- e. Failing to maintain the railway in a condition suitable for train operation, including failure to remove brush, shrubbery and other tinder-dry combustibles from the vicinity of its tracks;
- f. Failing to maintain the Train in a condition such that it would not ignite surrounding brush, shrubbery and other combustibles in the vicinity of its tracks by means of sparks or other incendiary materials;
- g. Failing to douse the vicinity of its tracks with a water train;
- h. Failing to post an employee to watch for smoke or fire;
- i. Failing to maintain and deploy extinguishing equipment near the point of ignition and fire;
- j. Failing to adequately train employees to detect and extinguish fires;
- k. Failing to maintain the tracks in a condition such that it would not generate sparks or other incendiary material;
- l. Failing to have a fire preparedness plan (a "Fire Plan") and failing to update the Fire Plan every five years to account for elevated fire risk resulting from climate change, including increased winds and temperatures;
- m. Failing to include procedures for extinguishing or controlling a fire, internal fire notification procedures and procedures for notifying fire services in the Fire Plan and its updates;
- n. Failing to communicate the Fire Plan and its updates to its employees and failure to keep a record thereof;
- o. Failure to have a fire hazard reduction plan ("FHRP") and failing to update it every five years to account for increased fire risk resulting from climate change, including increased winds and temperatures;
- p. Failing to set out a process for identifying, reducing or eliminating fire hazards in the FHRP, and failing to set out measures that will be taken and suppression equipment that will be used for each fire danger level used by the Canadian Wildland Fire Information Service;
- q. Failing to implement the Fire Plan and FHRP, failure to communicate the Fire Plan and FHRP to its contractors, and failure to supervise the implementation of the Fire Plan and FHRP by employees and contractors;
- r. Failure to maintain fire suppression equipment in good working order; and

- s. Failure to conduct an annual inspection of its fire suppression equipment.

28. The following actions or omissions of CP Rail (collectively, the "CP Negligent Acts") caused or contributed to the Lytton Fire, and constitute a breach of duty to the Plaintiff:

- a. Directing or requesting CN Rail to operate the Train in what it knew or ought to have known were unsafe prevailing conditions;
- b. Directing or requesting CN Rail to operate the Train at higher speed and/or load than is safe for the prevailing conditions;
- c. Failing to maintain the spark arrestors, braking system, and other systems of the Train in a condition such that it would not ignite surrounding brush, shrubbery and other combustibles in the vicinity of its tracks by means of sparks or other incendiary materials emanating from the Train;
- d. Failing to install spark arrestors, braking, and other systems on the Train that are less prone to cause fire in the vicinity of the tracks;
- e. Directing or requesting CN Rail to operate the Train knowing that the CN Rail's track was not maintained in a safe condition suitable for the prevailing conditions, and knowing that CN Rail would not deploy or maintain a water train or other fire suppression equipment within the vicinity of a potential fire and would not deploy property trained employees to detect and extinguish any fire;
- f. Failing to have a fire preparedness plan (a "Fire Plan") and failing to update the Fire Plan every five years to account for elevated fire risk resulting from climate change, including increased winds and temperatures;
- g. Failing to include procedures for extinguishing or controlling a fire, internal fire notification procedures and procedures for notifying fire services in the Fire Plan and its updates;
- h. Failing to communicate the Fire Plan and its updates to its employees and contractors, including CN Rail, and failure to keep a record thereof;
- i. Failing to implement the Fire Plan and failure to supervise the implementation of the Fire Plan;
- j. Failure to maintain fire suppression equipment in good working order; and
- k. Failure to conduct an annual inspection of its fire suppression equipment.

29. The Defendants knew or ought to have known of the high heat and high wind conditions, and that, given all the circumstances, it was unsafe to run trains through Lytton on or about June 30, 2021. The Defendants knew or ought to have known of the risk of causing or contributing to a fire.
30. Rail trains have been starting fires in Canada and British Columbia for over 140 years. Risk of fire caused by train operation is well known and understood by the Defendants. Increases of fire risk during periods of high heat, wind and desiccation are well-known to the Defendants.
31. The Defendant CN Rail was found liable for causing a wildfire in 2015 in the Lytton area which burned 2,200 hectares of land. Hours before the Lytton Fire, CN Rail experienced the Boston Bar Fire. CN Rail and CP Rail knew about the Boston Bar Fire before the Lytton Fire started and should have postponed rail traffic through Lytton until the danger had passed and at least until the cause of the Boston Bar Fire was minimally understood.
32. Detection and suppression of fires caused by trains is well understood by the Defendants, who simply chose to save money by not taking the steps that could have prevented or suppressed the Lytton Fire, and to increase revenue by operating trains when it was unsafe to do so.

Damages

33. As a result of the Defendants' conduct described above, the Plaintiff and members of the Class have sustained loss and damage, particulars of which are as follows:
- a. loss of real property;
 - b. loss of personal property;
 - c. loss of housing; and
 - d. loss of business income.
34. Further, as a result of the Defendants' conduct described above, the Plaintiff and members of the PI Subclass have sustained loss and damage, particulars of which are as follows:
- a. loss of income and earning capacity;
 - b. pain, suffering and enjoyment of life;
 - c. cost of health care, treatment and medication;

- d. physical injury;
- e. cost of care provided by family members; and
- f. psychological injuries

35. The Plaintiff pleads that the Defendants' conduct was high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful, wilful, and in disregard of the Plaintiff's rights and the rights of the Class and, as such, renders the Defendants jointly and severally liable to pay punitive damages.

Part 2: RELIEF SOUGHT

36. The Plaintiff, on behalf of members of the Class, seeks:

- a. an order certifying this action as a class proceeding against the Defendants and appointing the Plaintiff as representative plaintiff in respect of the Class;
- b. a declaration that the Lytton Fire constitutes a private and public nuisance;
- c. general damages for negligence, private nuisance, and public nuisance;
- d. on behalf of the PI Subclass:
 - (a) general damages;
 - (b) special damages; and
 - (c) past and future costs of health care services pursuant to the *Health Care Costs Recovery Act*, SBC 2008, c. 27;
- e. punitive damages;
- f. aggravated damages;
- g. prejudgment and post-judgment interest pursuant to the *Court Order Interest Act*, RSBC 1996, c 78, s 128; and
- h. such further and other relief as this Honourable Court may deem just.

Part 3: LEGAL BASIS

37. The Plaintiff's claims are based on the following causes of action advanced on her behalf and on behalf of the Class:

- a. negligence;
- b. public nuisance; and
- c. private nuisance.

Negligence

38. The Lytton Fire was caused by the negligence of the Defendants.

39. The Defendants each owed duties of care to the Plaintiff and the Class Members.

40. The conduct of the Defendant CN Rail fell below the standard of care required of a railway operator in the circumstances. Particulars of CN Rail's breaches currently known to the Plaintiff include the CN Negligent Acts.

41. The conduct of the Defendant CP Rail fell below the standard of care required of a railway operator in the circumstances. Particulars of CP Rail's breaches currently known to the Plaintiff include the CP Negligent Acts.

42. As a result of the Defendants' negligence particularized above, the Plaintiff and the Class have suffered damages and losses caused by the Lytton Fire.

Public Nuisance

43. The conduct of the Defendants, both individually and in concert with each other, caused the Lytton Fire, which constitutes a public nuisance.

44. The Defendants' conduct in causing the Lytton Fire unreasonably interfered with the Plaintiff's and the Class' rights, including:

- a. access to public property;
- b. access to infrastructure such as roads and highways;
- c. access to utilities including electricity and water; and
- d. access to commerce,

all of which are public rights that have been severely disrupted as a result of the Lytton Fire.

45. The Defendants' conduct in causing the Lytton Fire annoyed, injured, or endangered the comfort, health, convenience and safety of the Plaintiff and the Class.

Private Nuisance and *Rylands v. Fletcher*

46. The Defendants' use of their property started the Lytton Fire, which caused damage to the properties of the Class Members. The conduct of the Defendants was unreasonable. The fire they caused constitutes a private nuisance with respect to the properties of the Class Members.
47. In breach of the rule in *Rylands v. Fletcher*, the Defendants permitted sparks or other hot or burning substances, which are inherently dangerous, to escape from their property onto the Property of the Plaintiff and the properties of the Class Members.
48. The Defendants failed to prevent the escape of sparks or other hot or burning substances, despite knowing, at all material times, that rail transportation operations were a non-natural use of their land and that the associated sparks or hot or burning substances were dangerous things likely to cause harm, particularly during the conditions of extreme fire hazard that prevailed at all times material to this action.

Plaintiff's address for service: Gratl & Company
Barristers and Solicitors
511-55 East Cordova Street
Vancouver, BC V6A 0A5
Attn: Jason Gratl

Camp Fiorante Matthews Mogerman LLP
400-856 Homer Street
Vancouver, BC V6B 2W5
Attn: Reidar Mogerman, QC

Place of Trial: Vancouver

The address of the registry is: The Law Courts
800 Smithe Street
Vancouver, BC V6Z 2E1

Date: August 18, 2021



Signature of Lawyer for Plaintiff

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

Appendix

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

This is a claim for compensation for injury to property and persons caused by fire resulting from the negligence of the defendants.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

☐ a motor vehicle accident

☐ medical malpractice

☒ another cause

A dispute concerning:

☐ contaminated sites

☐ construction defects

☒ real property (real estate)

☒ personal property

☐ the provision of goods or services or other general commercial matters

☐ investment losses

☐ the lending of money

☐ an employment relationship

☐ a will or other issues concerning the probate of an estate

☐ a matter not listed here

Part 3: THIS CLAIM INVOLVES:

[Check all boxes below that apply to this case]

☒ a class action

- ☐ maritime law
- ☐ aboriginal law
- ☐ constitutional law
- ☐ conflict of laws
- ☐ none of the above
- ☐ do not know

Part 4: ENACTMENTS:

Canada Transportation Act, S.C. 1996, c. 10

Class Proceedings Act, R.S.B.C. 1996, c.50

Negligence Act, R.S.B.C., 1996, c. 333

Railway Safety Act, R.S.C., 1985, c. 32 (4th Supp.)