



No. S217469  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

CAREL MOISEIWITSCH

PLAINTIFF

AND:

CANADIAN NATIONAL RAILWAY COMPANY and  
CANADIAN PACIFIC RAILWAY COMPANY

DEFENDANTS

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

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**AMENDED NOTICE OF APPLICATION**

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**Name of Applicants:** the plaintiff, Carel Moiseiwitsch

**TO:** The defendants, Canadian National Railway Company ("CN Rail") and Canadian Pacific Railway Company ("CP Rail")

**AND TO:** parties in the related actions

TAKE NOTICE that an application will be made by the Applicant to the Honourable Justice Branch, at 800 Smithe Street, Vancouver, B.C. V6Z 2E1 on September 29 – October 3, 2025, at 10:00 am in person for the orders set out in Part 1 below.

The applicant estimates that the application will take 4 days.

[ x ] This matter is not within the jurisdiction of an Associate Judge. Justice Branch is the case management judge.

## PART 1: ORDERS SOUGHT

1. An Order adding Jordan Spinks and the Wawanesa Mutual Insurance Company (“**Wawanesa**”) as plaintiffs to this action and amending the plaintiff’s notice of civil claim as set out in **Schedule D** (fresh as amended) and **Schedule E** (with amendments in redline) to this Notice of Application;
2. An Order pursuant to s. 8(1) of the *Class Proceedings Act*, RSBC 1996, c. 50 (“*CPA*”):
  - (a) certifying this proceeding as a class proceeding pursuant to the *CPA*;
  - (b) appointing the plaintiffs Carel Moiseiwitsch and Jordan Spinks as the representative plaintiffs for the class, and appointing The Wawanesa Mutual Insurance Company as the representative plaintiff for the Subrogation Subclass;
  - (c) certifying the following class:
    - (i) all natural or legal persons who claim to have suffered losses as a result of the Lytton Fire within one or more of the following subclasses (the “**Class**”):
      - A. all natural persons who claim to be the spouse, parent or child of a person who died on June 30, 2021, as a result of the Lytton Fire (the “**Wrongful Death Subclass**”);
      - B. all natural or legal persons who claim to have suffered—as a result of the Lytton Fire—loss of real property, or loss of use or enjoyment of real property, which they owned, had an interest in, or occupied, which has not been indemnified by insurance (the “**Real Property Subclass**”);
      - C. all natural or legal persons who claim to have suffered a loss of personal property as a result of the Lytton Fire which has not been indemnified by insurance (the “**Personal Property Subclass**”);
      - D. all governmental entities which claim to have suffered loss of real property, interference with the use of real property, or loss of personal property as a result of the Lytton Fire (the “**Government Subclass**”);
      - E. all natural or legal persons who claim to have suffered personal injuries as a result of the Lytton Fire, causing a loss

which has not been indemnified by insurance (the “**Personal Injury Subclass**”);

- F. all natural or legal persons who claim to have suffered income loss and/or business loss because the Lytton Fire caused property damage or personal injury to another natural or legal person on whom their income or business depended, and which has not been indemnified by insurance (the “**Relational Economic Loss Subclass**”); and
- G. all natural or legal persons with a subrogated claim to recover an insurance indemnity paid in relation to damage and losses resulting from the Lytton Fire (the “**Subrogation Subclass**”);

(ii) but not including:

- A. the defendants, and the directors and officers of each, and their immediate family members;
- B. counsel to all parties in this proceeding, and their immediate family members;
- C. judges or associate judges presiding in this proceeding at any time, and their immediate family members;
- D. Chief Niakia Hanna and the Lytton First Nation;
- E. Chief Fred Sampson and Siska Band; and
- F. Chief Christine Walkem and the Cook’s Ferry Indian Band.

The Lytton Fire is defined as the fire designated K71086 by the BC Wildfire Service (“BCWS”) that started on June 30, 2021 in or around the village of Lytton and subsequently spread across the geographic area indicated in the BCWS public information map of August 19, 2021.

(d) stating the nature of the claims asserted on behalf of the Class to be:

A claim for compensation for personal injuries or wrongful death, losses of real or personal property, loss of use and enjoyment of property, income or business losses, and/or expenses incurred, asserting negligence, public nuisance, private nuisance and breach of the rule in *Rylands v. Fletcher* as causes of action;

- (e) certifying the proceeding on the basis of the common issues set out in **Schedule A** to this Notice of Application;
- (f) stating the relief sought to the Class Members at the trial of the common issues to be:
  - (i) an Order in the nature of declaratory relief that the acts or omissions of one or both defendants caused or contributed to the Lytton Fire;
  - (ii) an Order in the nature of declaratory relief that one or both defendants breached a duty owed to the Class Members;
  - (iii) an Order in the nature of declaratory relief that one or both defendants breached the rule in *Rylands v. Fletcher*;
  - (iv) an Order in the nature of declaratory relief that one or both defendants' acts or omissions caused a substantial, non-trivial interference with the enjoyment of, and/or the loss of the use of, Class Members' property;
  - (v) an Order in the nature of declaratory relief that one or both defendants' acts or omissions caused a public nuisance;
  - (vi) an Order remitting to individual assessment the quantum of some or all of the damages to which each Class Member may be entitled in negligence, public nuisance, private nuisance or breach of the rule in *Rylands v. Fletcher*;
  - (vii) an Order in the nature of declaratory relief that one or both defendants are "wrongdoers" within the meaning of section 1 of the *Health Care Costs Recovery Act*, SBC 2008, c. 27 and are liable for the past and future cost of health care services, as assessed for Class Members.
  - (viii) an Order in the nature of declaratory relief that members of the Government Subclass are entitled to recover from one or both of the defendants the Government Losses as defined in **Schedule A**;
  - (ix) an Order in the nature of declaratory relief that members of the Wrongful Death Subclass are entitled to recover from one or both of the defendants the Wrongful Death Losses as defined in **Schedule A**;
  - (x) an aggregate damages award for the Class Members' non-pecuniary damages in nuisance, pursuant to s. 29(1) of the *CPA*;

- (xi) an aggregate damages award for the Common Experience Damages of the Class Members, as defined in Schedule A, pursuant to s. 29(1) of the *CPA*;
  - (xii) pre- and post-judgment interest pursuant to the *Court Order Interest Act*, RSBC 1996, c. 78, s. 128;
  - (xiii) punitive damages;
  - (xiv) costs for the administration of the plan of distribution for relief obtained in this action; and
  - (xv) such further relief as this Honourable Court deems just.
- (g) certifying the proceeding on the basis of the common issues set out in **Schedule A** to this Notice of Application;
  - (h) approving the proposed Litigation Plan set out in **Schedule B** to this Notice of Application, including a process for opting out of the Class; and
  - (i) approving the Notice of Certification substantively in the form set out in **Schedule C** to this Notice of Application.
3. If certification is granted, an order pursuant to section 12 of the *CPA* that, in the event that:
- i. an insured Class Member was only partially indemnified by an insurer Class Member for a loss claimed in the action; and
  - ii. either that insured Class Member or their insurer, but not both, elects to opt out of the class action;

the subrogated and non-subrogated rights of recovery for that Class Member's loss will be severed, with the insured having an exclusive right to control the claim for the uninsured portion of the loss, their insurer having an exclusive right to control the claim for the portion it indemnified, and neither the insurer nor the insured shall be obligated to share with the other any proceeds recovered by them for their respective portion of the loss. Settlement or judgment of either severed portion of the loss will not extinguish any right to pursue the other severed portion, either inside or outside of the class action as determined by any valid election to opt out.

## PART 2: FACTUAL BASIS

### The Lytton Fire

3. In late June, 2021, a historic heat wave settled over southern British Columbia. For three successive days, the town of Lytton set and broke records for the hottest temperatures ever recorded in Canada. Its final record—49.6 degree Celsius—exceeded the hottest days ever recorded in Europe or South America.
4. In the afternoon of June 29, the Fraser Canyon was extremely dry, with relative humidity of 8 percent. The fire risk was elevated from High to Extreme—the highest possible level of danger.

Affidavit #2 of Galena Campbell, affirmed February 18, 2025  
("Campbell #2"), Exhibits "L" and "N"

5. On the defendants' railways, the heat triggered certain safety protocols: rails were inspected for heat buckling; fire patrols were assigned, and trains were warned never to exceed 25 miles per hour and to avoid excessive braking.

Campbell #2, Exhibits "H"-"K"

6. Just before 4:30 p.m., train C73152-29 entered the town of Lytton (the "Coal Train"). It was more than two kilometers long and loaded with 21,000 tons of coal in open-top cars. It was powered by three diesel-electric locomotives stationed at the front, middle and end of the train.

Campbell #2, Exhibit "Y"

7. Automated trackside equipment logged the Coal Train's arrival at mile 97.6 at 4:31:34 p.m. 54 seconds later, it reached mile 98. The Coal Train's speed exceeded the 25 mile per hour limit.

Campbell #2, Exhibits "E" and "G"

8. At 4:32:50, the Coal Train passed the level crossing at Mile 98.14 and continued across the Fraser River. Coal dust spilled from the train's uncovered cars and was lofted by strong winds. Coal particles fell in the dry vegetation beside the

tracks, and on the trailing locomotives that had rooftop fans venting heat generated by the dynamic braking system.

Campbell #2, Exhibit "E"

9. At 16:36, the train finished passing the crossing at Mile 98.14.

Campbell #2, Exhibit "E" and "G"

10. Within two to five minutes, a man sitting 100 feet from the tracks noticed smoke and then knee-high flames in the grass beside the tracks. The fire spread rapidly in the brush.

Affidavit #1 of Fabian Duncan, made February 8, 2022 ("Duncan #1"), paras. 5 and 6.

11. At 16:49, several hundred meters away, a woman in the village of Lytton used her phone to photograph a column of smoke, more than a hundred feet high, towering above where the train had passed 13 minutes earlier.

Campbell #2, Exhibit "Z"

12. An evacuation was ordered and the residents of Lytton fled as flames engulfed the village. Approximately 90 percent of the structures in Lytton were destroyed, including homes, businesses, government buildings, and historic landmarks. On several of the Lytton First Nation's reserve lands, buildings were damaged or destroyed entirely, including homes, a church, and the Nation's band office.

Proposed Amended Notice of Civil Claim, paras. 27-30.

Affidavit # 1 of Peter Senez, affirmed on December 21, 2021 ("Senez #1"), Exhibit 'A' page 23, Figure 16.

13. The fire spread north between the Fraser and Thompson rivers and west across Highway 8. Designated as fire K71086 by the BCWS, the fire eventually covered an area of approximately 85,000 hectares, causing widespread damage and destruction across that area.

Senez #1, Exhibit 'A' paras. 1 and 22-31, and Appendix B

## **The Railways**

14. The defendants, CN Rail and CP Rail, are Class 1 freight railways that operate rail tracks and trains through Lytton. By an agreement between them, rail traffic on their respective tracks through the Fraser Canyon is coordinated: CN Rail's track carries both companies' westbound trains, and CP Rail's carries their eastbound trains.

Response to Civil Claim of Canadian National Railway Company  
("CN Response to Civil Claim"), paras. 11-15.

15. The Coal Train was powered by CP Rail diesel locomotives and consisted of 152 CP Rail coal cars but, because it was travelling on CN Rail tracks, was operated by a CN Rail crew.

CN Rail Response, paras. 17-19.

16. The lead locomotive on the Coal Train was equipped with a forward-facing camera which recorded its passage through Lytton. According to the defendant CP Rail, the forward-facing view shows nothing unusual at Mile 98.14—the suspected origin of the Lytton Fire.

Response to Civil Claim of Canadian Pacific Rail Company, para.  
26.

## **The Proposed Class Action**

17. This action was commenced on August 18, 2021. The proposed representative plaintiffs, Carel Moiseiwitsch, Jordan Spinks, and Wawanesa seek to certify a class proceeding on behalf of a class of natural and legal persons, business and governmental entities, as set out in Part 1, which suffered various losses as a result of the Lytton Fire.

## **Causes of Action**

18. On their own behalf and on behalf of the proposed class, the plaintiffs claim against the defendants in negligence, public nuisance, private nuisance, and breach of the rule in *Rylands v. Fletcher*.

Proposed Amended Notice of Civil Claim, para. 43.

19. The plaintiffs claim that the Lytton Fire was caused by heat, sparks or other incendiary material emanating from the Coal Train, a train which was owned by CP Rail and operated by CN Rail on tracks owned by CN Rail. The conduct of the defendants that caused the Lytton Fire was negligent and constituted a public nuisance, a private nuisance and a breach of the rule in *Rylands v. Fletcher*.

Proposed Amended Notice of Civil Claim, paras. 44-58.

20. The defendants are alleged to be liable in negligence, public nuisance, private nuisance and in breach of the rule in *Rylands v. Fletcher*, to the plaintiffs for reasons including operating the Coal Train in what it knew or ought to have known were unsafe conditions in terms of the risks posed by the condition of the Coal Train, the tracks and the surroundings. The defendants operated, and directed the operation of, the Coal Train on June 30, 2021, despite knowing that doing so in the prevailing conditions posed a severe wildfire risk.

Proposed Amended Notice of Civil Claim, paras. 44-58.

21. The acts or omissions of the defendant CN Rail that the plaintiff claims caused the Lytton Fire are set out in the Proposed Amended Notice of Civil Claim at paragraph 35. They include CN Rail's failure to heed the provincial wildfire risk levels, failure to have or abide by a fire preparedness plan, and failure to maintain the tracks and related infrastructure in a condition suitable for train operation.

22. The acts or omissions of the defendant CP Rail that the plaintiff claims caused the Lytton Fire are set out in the Proposed Amended Notice of Civil Claim at paragraph 37. They include its request or direction to CN Rail to operate the Coal Train in what it knew or ought to have known were unsafe prevailing conditions, its failure to install or maintain appropriate safety equipment on its locomotives and rail cars that would have prevented the ignition of the Lytton Fire, and its failure to maintain its locomotives or freight cars, which formed the Coal Train, in a safe condition.

23. The plaintiffs have retained and instructed experts including Peter Senez, a professional engineer and forensic fire investigator, and Ian Naish, a rail safety consultant and the former director of rail investigations for the Transportation Safety Board of Canada. In their reports, Mr. Senez and Mr. Naish provide methodologies, within their respective areas of expertise, for determining the cause(s) of the Lytton Fire.

Senez # 1, Exhibit A pp. 8-9.

Affidavit #1 of Ian Naish affirmed December 16, 2021("Naish #1"), at Exhibit 'A', pp. 4-6.

### **Two or More Class Members**

24. In addition to the plaintiffs there are hundreds of individuals who were residents of Lytton and surrounding First Nations and/or present there on June 30, 2021. These individuals are now located throughout British Columbia, and are in the same or similar position as the proposed representative plaintiffs.
25. Additionally, the following entities, among others, are included in the Class and have suffered damages as a result of the Lytton Fire:
- (a) The Village of Lytton;
  - (b) The Province of British Columbia, with losses including infrastructure for health care services;
  - (c) The Government of Canada, with losses including infrastructure for postal delivery, policing, and weather reporting; and
  - (d) BC Hydro, with losses including infrastructure for power distribution.

### **One or More Common Issues**

26. The proposed common issues are listed in Schedule "A" of this Notice of Application. The facts and evidence support the certification of the proposed common issues.
27. Mr. Peter Senez is an engineer with over 25 years of experience in fire engineering, fire science and fire investigation. He opines that there are

methods available to determine both the origin and cause of the Lytton Fire, as well as its course and spread. He describes those methods in his report and opines that the data and/or information necessary to implement those methods is or ought to be available.

Senez # 1 Exhibit 'A' and Affidavit of Peter Senez affirmed on February 18, 2025 ("Senez #2") at Exhibit 'A'

28. Mr. Ian Naish is a professional engineer and rail safety consultant with over 30 years of experience in rail safety regulation and investigation, including 11 years as the Director of the Rail and Pipelines Investigation Branch of the Transportation Safety Board of Canada. He opines that there are methods available to assess whether the defendants followed reasonable procedures, standards and practices on the day of the Lytton Fire. He also opines that the data and/or information required to implement the methods he identifies is or ought to be available.

Naish #1 at Exhibit 'A'

### **Preferable Procedure**

29. The proposed class action is the preferable procedure because:
- (a) The questions of fact and law common to the proposed Class predominate over any questions affecting only individual Class Members;
  - (b) a significant number of proposed Class Members do not have a valid interest in individually controlling the prosecution of separate actions;
  - (c) the claims have not been adjudicated elsewhere;
  - (d) other means of resolving these claims are less practical and less efficient;
  - (e) the administration of the proposed class proceeding will cause less difficulties than those likely to be experienced if relief were sought by other means; and
  - (f) it accords with the three principles underlying class action proceedings: access to justice, behaviour modification, and judicial efficiency.

30. The plaintiffs are aware of the substantial costs that pursuing this action as an individual action would entail and would not be able to prosecute it as an individual action.

Affidavit #2 of Carel Moiseiwitsch, affirmed December 16, 2021 (“Moiseiwitsch #2”), para. 5.

Affidavit #3 of Jordan Spinks, affirmed February 10, 2025 (“Spinks #3”), para. 31.

31. The plaintiff has proposed a workable Litigation Plan to determine the claims advanced in this action.

Schedule “B” to this Notice of Application

32. The plaintiff has retained and instructed Michael Stevens, a chartered professional accountant and certified fraud examiner, who details in an expert report dated February 14, 2025 that there are methodologies to practically and efficiently assess Class Members’ real and personal property losses, business losses and damage to public infrastructure attributable to the Lytton Fire.

Affidavit #1 of Michael Stevens, affirmed February 14, 2025, (“Stevens #1”) Exhibit “C”.

33. There are no other preferable means to resolve the claims of the Class Members.

### **Representative Plaintiffs**

34. The plaintiff, Carel Moiseiwitsch, owns in fee simple, and at the time of the Lytton Fire resided at, a property in the village of Lytton. The Lytton Fire destroyed the plaintiff’s home on this property, incinerating personal property and business assets. Ms. Moiseiwitsch escaped the fire by fleeing her home with little warning, losing a family pet in the process. In addition to losses of real, personal and business property, Ms. Moiseiwitsch has suffered, and continues to suffer, psychological injuries, lost business income, and the costs of temporary housing.

Affidavit #1 of Carel Moiseiwitsch, affirmed October 27, 2021 (“Moiseiwitsch #1”), paras. 12-16.

35. The plaintiff Jordan Spinks is the Chief of the Kanaka Bar Indian Band and, at the material times, worked in Lytton and resided on Indian Reserve Papyum 27, a reserve governed by the Lytton First Nation.

Spinks #3, paras. 3 and 8.

36. The plaintiff the Wawanesa Mutual Insurance Company is an insurer that filed a subrogated claim for losses caused by the Lytton Fire.

37. The plaintiffs are prepared to represent the interests of the Class Members and are aware of the duties entailed in acting as a representative plaintiff.

Moiseiwitsch #2, para. 7.

Spinks #3, paras. 7, 25, 26 and 30.

Affidavit #1 of F. Smolders affirmed July 7, 2025 (**Smolders #1**), para. 10

38. The plaintiffs have put forward a litigation plan providing a workable method for advancing the litigation, including a methodology for addressing any individual issues remaining after the common issues trial. As part of that Litigation Plan, the plaintiffs have put forward a notice program providing a reasonable method for notifying the Class Members of the certification of this action.

Moiseiwitsch #2, para. 9.

Schedule B

Spinks #3, paras. 25, 26, and 28.

Stevens #1, Exhibit "C".

39. The plaintiffs are not aware of any conflict with Class Members with respect to the proposed common issues.

Moiseiwitsch #2, para. 10.

Spinks #3, para. 29.

Smolders #1, para. 12.

### **Subrogation Subclass Members**

40. The Subrogation Subclass consists of insurers who claim subrogated rights of recovery for certain losses suffered by their insureds as a result of the Lytton

Fire. Those insureds are also class members. The subrogated claims arise from contracts for automobile, habitational and commercial property and business insurance between insurers in the Subrogation Subclass and other Class members under which indemnities have been paid for certain losses sustained as a result of the Lytton Fire.

41. To date, members of the Subrogation Class have indemnified more than \$41.5 million in losses resulting from the Lytton Fire, with approximately 10% of claims still being processed.

Smolders #1, at para. 10

42. On June 23, 2023, six Subrogation Subclass members filed a civil claim (Action S-234544 in the Vancouver registry of this Court) to advance subrogated claims in the names of 114 of their insureds who sustained insured losses as a result of the Lytton Fire (the “Insurers’ Subrogated Action”). Consistent with their contracts and their duties of good faith to their insureds, the Insurers’ Subrogated Action sought to recover damages for the 114 plaintiffs’ entire losses, whether insured and uninsured.
43. The 114 plaintiffs in the Insurers’ Subrogated Action, the six insurers which filed it, and every loss for which it seeks to recover are all encompassed within the proposed class action. Each of the six insurers is a member of the proposed Subrogation Subclass, and each of their 114 insureds, if they claim recovery of any uninsured loss, is a member of one or more of the other proposed subclasses, depending on the nature of their losses.
44. The insurers’ rights to pursue subrogated claims for insured losses arise under the policies of insurance and pursuant to s. 36 of the *Insurance Act*, R.S.B.C. 2012, c. 1, which provides that on making a payment or assuming liability under a contract, the insurer is subrogated to all rights of recovery of the insured against any person and may bring an action in the name of the insured to enforce those rights. The insurers exercised that right in 2023 by filing the

Insurers' Subrogated Action in the names of their insureds and for all losses, insured and uninsured.

45. Some insurance policies have clauses expanding the statutory right of subrogation by providing that the insurer, not the insured, may control the claim for all losses. For others without such language, the common law provides that the insured may assert control of a subrogated claim commenced by their insurer, unless and until fully indemnified for all their losses (insured and uninsured).
46. Without a further order from this court, the right to opt out the insured's claim for all losses both insured and uninsured, will follow from the right to control the claim as set out in the insurance policy.
47. At present, the insurers exercise control of all claims for all 114 plaintiffs named in the action they commenced. The insurers have exercised that control since June 2023.
48. Wawanesa has consulted with each of the six insurers who commenced the Insurers' Subrogated Action, and has been advised by each of them that if:
  - (a) this action is certified as proposed in this application;
  - (b) an order is made severing the insurer's subrogated claims from their insured's uninsured claims as requested herein; and
  - (c) Wawanesa is appointed as a representative plaintiff for the Subrogation Subclass;

then such Insurers will support the certification of this action, and will agree to stay the Insurer's Subrogated Action to allow their subrogated claims to be pursued within this class action.

Smolders #1, at para. 7

49. As a result, the order requested at paragraph 3 of this Notice of Application will ensure that all subrogated claims for insured losses are pursued within the

proposed class proceeding, while preserving the right of a class member to opt out with respect to the portion of their losses which has not already been indemnified.

### **PART 3: LEGAL BASIS**

#### **Certification of the Action**

50. This action should be certified as a class proceeding and the plaintiffs should be appointed representative plaintiffs because the requirements of s. 4(1) of the *CPA* are met. Specifically:
- (a) the pleading discloses four causes of action;
  - (b) there is an identifiable class of two or more persons based on objective criteria;
  - (c) the claims of the Class Members raise common issues;
  - (d) a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues; and
  - (e) there are representative plaintiffs who:
    - (i) will fairly and adequately represent the interests of the Class Members;
    - (ii) have produced a plan for the proceedings that sets out a workable method of advancing the proceeding on behalf of the Class Members and notifying Class Members of the proceeding; and
    - (iii) do not have a conflict of interest with the other Class Members with respect to the common issues.
51. Certification does not concern the merits of the action, but merely its form. The first requirement (cause of action) for certification set out in section 4(1)(a) of the *CPA* is determined based on the pleadings alone. For the remaining requirements for certification set out in sections 4(1)(b) through 4(1)(e) of the *CPA*, a plaintiff need only show “some basis in fact”. This is a low evidentiary threshold that falls below the balance of probabilities test.

52. For the commonality test in s. 4(1)(c) of the *CPA*, the court must consider the language of the common issue that is proposed, and whether there is some basis in fact, as opposed to no basis in fact, that supports the argument that the issue is a common across members of the class. The underlying question is whether allowing the suit to proceed as a class action will avoid duplication of fact-finding or legal analysis.

*Mentor Worldwide LLC v. Bosco*, 2023 BCCA 127 at para 33

*Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2008 BCSC 1263 at para 108, 110.

53. The plaintiff proposes common issues of fact and law, as set out at Schedule A. The crucial questions of factual and legal causation—those relating to whether the Lytton Fire was caused by the defendants’ conduct—are not dependent on the circumstances of any individual class members and can be determined on a common evidentiary record. The affidavits of Messrs. Naish and Senez address methods for answering those common questions.
54. If some basis in fact for the existence of the issue is required, the information and opinions contained in the expert reports of Messrs. Naish and Senez, as well as the affidavits of Mr. Duncan and Ms. Campbell, meet the requirement that the allegations in the Proposed Amended Notice of Civil Claim might be or could be true.

*Lilleyman v Bumble Bee Foods LLC*, 2024 ONCA 606 at paras 72 and 74.

Naish #1 and #2 at Exhibit ‘A’

Senez Affidavits #1 and #2 at Exhibit ‘A’

Campbell #2

Duncan #1

55. The proposed notice program is a reasonable method of notifying putative Class Members of the certification of this action.
56. It is fair, just and reasonable that the defendants pay the costs of certain aspects of the notice program.

**PART 4: MATERIAL TO BE RELIED ON**

1. Proposed Amended Notice of Civil Claim, being Schedule D to this Notice of Application;
2. Response to Civil Claim of Canadian National Railway company, filed November 12, 2021;
3. Response to Civil Claim of Canadian Pacific Railway company, filed November 12, 2021;
4. Affidavit #1 of Carel Moiseiwitsch, affirmed October 27, 2021;
5. Affidavit #2 of Carel Moiseiwitsch, affirmed December 16, 2021;
6. Affidavit #2 of Andrew Johnson, affirmed December 20, 2021;
7. Affidavit #1 of Peter Senez, affirmed December 20, 2021;
8. Affidavit #2 of Peter Senez, affirmed February 18, 2025;
9. Affidavit #1 of Ian Naish, affirmed December 16, 2021;
10. Affidavit #2 of Ian Naish, affirmed March 6, 2025;
11. Affidavit #1 of Michael Stevens, affirmed February 14, 2025;
12. Affidavit #1 of Sean Tweed, affirmed February 6, 2025;
13. Affidavit #3 of Jordan Spinks, affirmed February 10, 2025;
14. Affidavit #1 of Fabian Duncan, affirmed February 8, 2022;
15. Affidavit #2 of Galena Campbell, affirmed February 18, 2025;
16. Affidavit #1 of Frances Smolders, affirmed July 4, 2025; and
17. Such other material as this Court may consider relevant.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
  - (i) you intend to refer to at the hearing of this application, and
  - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
  - (i) a copy of the filed application response;
  - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
  - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: 08/Jul/2025



Signature of lawyer  
for applicant

Michelle Segal

*To be completed by the court only:*

Order made

in the terms requested in paragraphs ..... of Part 1 of this notice of application

with the following variations and additional terms:

.....  
.....  
.....

Date: .....

Signature of  Associate Judge  Judge

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**APPENDIX**

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THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts

### **Schedule A: Common Issues**

Defined terms have the meaning ascribed to them in the Proposed Amended Notice of Civil Claim or the Notice of Application for Certification.

#### **Factual Causation**

1. Did heat, sparks or other incendiary material resulting from the passage of the Coal Train cause the Lytton Fire?
2. Did the acts or omissions of one or both of the defendants cause or contribute to the Lytton Fire?

#### **Negligence**

3. Did either defendant owe a duty of care to Class Members?
4. What standard of care was required of the defendant(s)?
5. Did either defendant breach the standard of care?
6. If yes, did the breach(es) cause or contribute to the Lytton Fire?

#### **Private nuisance**

7. As a result of the Lytton Fire, was there an order or orders issued to restrict access to, or use of, real property in and around Lytton?
8. If so, were the terms of the order(s) such that use or enjoyment of real property to which it applied was substantially, non-trivially, and unreasonably interfered with?

#### **Public nuisance**

9. Did the Lytton Fire interfere with public rights and interests so as to constitute a public nuisance?
10. If found to have been suffered by a Class Member as a result of the Lytton Fire, would the following types of harm constitute special damage(s) for which a defendant could be held liable under public nuisance:
  - a. personal injury;

- b. loss of real property; and/or
- c. loss of personal property?

***Rylands v. Fletcher***

- 11. Did either defendant engage in a non-natural use of land in CN Rail's right of way in Lytton?
- 12. Did either defendant bring onto CN Rail's right of way something likely to cause harm if it escaped?
- 13. If so, did that thing escape from CN Rail's right of way?
- 14. If so, is either defendant strictly liable for any personal injury, loss of real property, or loss of personal property, found to have been caused to a Class Member by the aforementioned escape?

**Apportionment of Liability**

- 15. If one or both defendants' are found to be at fault for the Lytton Fire, is any resulting liability joint and several?
- 16. If one or both defendants are found to be at fault, what degree of fault should be assigned to each of them?

**Damages**

**Aggregate Damages**

- 17. Did all Class Members who were forced to flee and evacuate their homes as a consequence of the Lytton Fire share a common experience of physical inconvenience and distress that justifies an award of damages pursuant to section 29(1) of the *CPA* (the "Common Experience Damages")? If so, in what amount?
- 18. Can some or all of the Class Members' damages in private nuisance for loss of use and enjoyment of property be assessed in the aggregate pursuant to section 29(1) of the *CPA*? If so, in what amount?

### **Declarations re. Individual Damages**

19. Are the members of the Government Subclass entitled to recover from one or both of the defendants amounts provided to third parties on a discretionary basis as disaster relief or emergency provision?
20. Are either or both defendants “wrongdoers” pursuant to section 1 of the *Health Care Costs Recovery Act*, SBC 2008, c. 27, such that the past and future costs of health care services for individual members of the Personal Injury Subclass are payable by one or both defendants?
21. Was the conduct of one or both of the defendants sufficiently reprehensible to warrant punishment by an award of punitive?
22. What is the liability, if any, of one or both of the defendants for court-ordered interest?

### **Administration Costs**

23. Should one or both of the defendants pay the costs of administering and distributing any monetary judgement and/or determining eligibility and/or the individual issues and if so, who should pay what costs and in what amount?

## **Schedule “B”: Litigation Plan**

### **SECTION 1 - GENERAL**

#### **Defined Terms**

1. In this plan, terms have the same meaning as given to them in the Notice of Civil Claim, unless otherwise noted. Otherwise:
  - (a) “BC Court” means the Supreme Court of British Columbia;
  - (b) “Class Action” means Supreme Court of British Columbia, Vancouver Registry, Court File No.S217469;
  - (c) “Class Counsel” means Camp Fiorante Matthews Mogerman LLP and Slater Vecchio LLP;
  - (d) “Class Member” or “Class Members” means the definitions provided in paragraph 31 of the Proposed Amended Notice of Civil Claim.
  - (e) “Common Experience” means the experience shared by all Class Members who were forced to flee and evacuate their homes as a consequence of the Lytton Fire, suffering significant physical inconvenience and distress;
  - (f) “CPA” means the *Class Proceedings Act*, R.S.B.C. 1996, c. 50;
  - (g) “Websites” means [www.cfmlawyers.ca](http://www.cfmlawyers.ca) and [www.slatervechio.com](http://www.slatervechio.com).

#### **Reporting**

2. Class Counsel will report regularly to the Class Members through their respective Websites. The Websites will be updated regularly to provide information on the status of the Class Action. Class Counsel will all designate a person to manage the communications with Class Members.

### **SECTION 2 – CERTIFICATION APPLICATION**

#### **Notice**

1. As part of the certification order, the plaintiff will ask the Court to:
  - (a) Settle the form and content of the notice of certification (the “Notice of Certification”); and

- (b) Determine the means by which the Notice of Certification will be given to the Class Members (the “Notice Program”).
2. The plaintiffs propose that the Notice of Certification be substantially in the form of Schedule C to the Notice of Application for Certification.
3. The scope of the Notice Program will depend on notice previously given in the Class Action and could include one or more of the following elements (in English and/or French, as appropriate):
- (a) sent by email or direct mail by Class Counsel to any person who has registered with Class Counsel to receive updates;
  - (b) sent by email by Class Counsel to any person (or their counsel) known by Class Counsel as having commenced a similar or related action in Canada;
  - (c) posted by Class Counsel on their Websites;
  - (d) a shortened version will be published once in the following newspapers subject to each having reasonable publication deadlines and costs:
    - (i) The Vancouver Sun;
    - (ii) Village of Lytton News;
    - (iii) Lytton - The Free Press;
    - (iv) Ashcroft Cache Creek Journal;
    - (v) Bridge River Lillooet News; and
    - (vi) Merritt Herald;
  - (e) sent to the following organizations requesting voluntary distribution to their membership:
    - (i) Village of Lytton;
    - (ii) Lytton First Nation;
    - (iii) Nlaka’pamux Nation Tribal Council; and
    - (iv) Thompson- Nicola Regional District;

- (f) posted by Class Counsel on CFM Lawyer's Twitter page, Slater Vecchio's social media pages, and on the "Lyttonite" Facebook group page; and
  - (g) sent by email (if known) and direct mail to the last known address to each of the plaintiffs named in BCSC File S234544 (the "Subrogation Action")
4. Class Counsel will consider whether any additional notice should be provided as part of the Notice Program.
  5. The plaintiffs will ask the Court to order that the costs of the Notice Program be paid by the defendants.

### **Opting Out**

6. The Notice of Certification shall advise putative Class Members of their rights to opt-out of the Class Action.
7. If the opt-out period has not already run, the following opt-out procedure is proposed:
  - (a) A person may opt-out of the Class Action by sending a written election to opt-out, signed by the person, by pre-paid mail, courier, fax or email to Class Counsel at an address specified in the Notice of Certification;
  - (b) The written election to opt-out must contain the following information in order to be valid:
    - (i) the person's full name, current address, email address and telephone number;
    - (ii) if the person seeking to opt-out is a corporation or other entity, the name of the corporation or entity, and the position of the person submitting the request to opt-out on behalf of the corporation or entity; and
    - (iii) a statement to the effect that the person wishes to be excluded from the action.
    - (iv) a statement indicating if the person was insured under any policy of insurance that paid out indemnity in relation to any portion of any loss, damage, expense or injury they suffered as a result of the Lytton Fire; and

- (v) if it is the insurer that is opting out, the name of the insured whose subrogated claim is being opted out, together with the insured's current address, email address and telephone number .
- 8. Written elections to opt-out must be postmarked no later than sixty (60) days after the Notice of Certification is first published (the "Opt-Out Deadline"). Where the postmark is not visible or legible, the election to opt-out shall be deemed to have been postmarked seven (7) days prior to the date that it is received by Class Counsel.
- 9. Within thirty (30) days of the Opt-Out Deadline, Class Counsel will provide a report to the defendants and the Court listing the names of all persons who requested to opt-out of the Class Action.

### **SECTION 3 – LITIGATION STEPS PRECEDING THE COMMON ISSUES TRIAL**

#### **Case Conferences**

- 1. After disposition of the certification application, assuming success for the plaintiff, Class Counsel will ask the Court to set a case planning conference to schedule the steps in the Class Action pending the common issues trial. The schedule will include the litigation steps set out below.

#### **Pleadings**

- 2. The parties may amend their pleadings from time to time as required.

#### **Document Exchange and Management**

- 3. Within 30 days of an order certifying the Class Action, the parties will agree on and implement a discovery plan in accordance with the Sedona Conference Principles and a schedule to engage in meet and confers, subject to this Court's further orders. If there are areas of disagreement after 30 days, any of the parties may seek direction from the Court.
- 4. Class Counsel anticipate and are able to handle the intake and organization of the number of documents that will likely be produced by the defendants and will use data management systems to organize, code and manage the documents.
- 5. The same data management systems will be used to organize and manage all relevant documents in the possession of the plaintiff.

### **Examinations for Discovery**

6. The plaintiffs will conduct an examination for discovery of at least one representative from each of the defendants but cannot, until the production of documents has been completed, estimate the time required for each examination. Scheduling will also need to include time for receipt of responses to anticipated undertakings and refusals.
7. The plaintiffs may ask the Court for an order allowing examination of more than one representative of each defendant, if necessary.
8. On dates agreed to by the parties or by order of the court, the parties will conduct examinations for discovery after receiving document production.
9. The method and meeting place of any examination for discovery shall be agreed upon between the parties.

### **Expert Reports**

10. Class Counsel anticipate the exchange of detailed expert reports.
11. The plaintiff propose that all expert reports be exchanged within 120 days of the completion of examinations for discovery, unless the Court orders otherwise.
12. Within 60 days of expert reports being filed, cross-examinations on those reports will be completed.

### **Applications**

13. At any stage, the plaintiffs may bring an application asking the Court to clarify or redefine the common issues, if required.
14. Although no applications other than those indicated in this plan are currently anticipated by the plaintiffs, additional applications may be required and will be scheduled as the case progresses.

## **SECTION 4 – TRIAL OF THE COMMON ISSUES**

1. The common issues will be as ordered and approved by the Court on the certification application. The common issues trial will answer the common issues certified by the Court.

### **Notice of Resolution**

2. Class Counsel will prepare a notice, the form, content and method of dissemination of which is to be approved by the Court, informing Class Members of the resolution of the common issues trial, the amount and allocation of aggregate damages, if applicable, and the claims process, including the claims deadline, if applicable.

## **SECTION 5 – LITIGATION STEPS FOLLOWING THE COMMON ISSUES TRIAL**

1. Within 45 days of a decision following the common issues trial, assuming success in favour of the plaintiff, the parties shall attend a case planning conference to set a schedule and to confirm the process to be followed in bringing the Class Action to final resolution. The process which will be required is dependent on the nature of the decision at the common issues trial.

### **Distribution of Aggregate Damages**

2. If liability and aggregate damages are determined in part at the common issues trial, a plan for distributing the aggregate damages award will be developed by the plaintiff, in accordance with section 29(1) of the *CPA*, to provide fair compensation through an efficient, timely, and impartial distribution process.
3. The plaintiffs are aware of the potential need to accommodate varying interests among and potentially within various Subclasses. This may involve independent representation and/or expert advice to ensure all Class Members are treated fairly. If necessary, the Court, or a referee appointed by the Court, will be asked to determine the division of the aggregate damages award among the Subclasses, and, if necessary, appoint separate counsel for each Subclass.
4. The plaintiffs will ask the Court to implement and adopt a claims procedure pursuant to subsections 32(2)-(4) of the *CPA*, which includes the following steps:
  - (a) setting a claims deadline before which eligible Class Members will be required to file their claims for compensation;

- (b) a claims process, including online claims; and
  - (c) appointing an administrator who will implement the claims process.
5. In order to address the individual issues remaining, and pursuant to subsections 31(1), 32(1) and 33(1) of the *CPA*, the Court or a referee, if one is appointed, will be asked to determine whether the claims of Class Members should be assessed in a summary claims procedure or in some other manner reasonably expected to benefit Class Members.

### **Residual Distribution**

6. If after all approved payments of aggregate damages are made to eligible Class Members, there remain monies available for distribution by virtue of the failure of Class Members to cash the cheques received as compensation for their claims, interest earned or otherwise, the plaintiffs will ask the Court to approve, pursuant to section 36.2 of the *CPA*, a *cy prés* distribution to an organization(s) that operates for the benefit of Class Members, or to otherwise approve a fair distribution of the residual amount to Class Members.

### **Individual Claims Procedure: Individual Class Members' Damages**

7. Class Counsel may propose an initial assessment and distribution of the claims of the Subrogation Subclass on the basis of documentary disclosure provided by those Subclass members.
8. If the Court determines certain common issues in favour of the Class, individual losses and the amount and distribution of damages will be determined in accordance with sections 27 and 28 of the *CPA*.
9. The plaintiffs are aware of the potential need to accommodate varying interests between Class Members, including between and within Subclasses, through independent representation and expert advice to ensure that all Class Members are treated fairly. If necessary, the Court will be asked to appoint separate counsel for each Subclass.
10. The plaintiff will ask the Court to implement and adopt a claims procedure, which may include the following steps:
- (a) setting a claims deadline before which eligible Class Members will be required to file claims for compensation;

- (b) appointing one or more persons, including one or more independent experts, as administrator(s) to:
  - (i) implement a claims process, including the review and assessment of filed claims and consideration of reporting from experts that have:
    - A. reviewed evidence including photographs, videos, media, fire and police reports, site inspections, quotations, invoices, property details, schedules and proofs of loss, insurance policies, medical records and adjusting reports including interviews and statements;
    - B. utilized resources providing actuarial, forensic audit and accounting, and quantity surveying information;
    - C. interviewed Class Members;
    - D. assessed loss of income, including review of tax filings and payslips;
    - E. assessed any payments made to Class Members that should be deducted from an assessment of their claim amount; and
    - F. assessed business losses, including review of tax filings and the use of forensic accountants' business specialists;
  - (c) granting the right to appeal the administrators' decision to the Court or the Court's designee for a final and binding decision, in accordance with section 27 of the *CPA*; and
  - (d) reviewing reports from the administrator to the Court at the conclusion of and throughout the claims procedure.

11. Class Counsel may assist members of the Personal Injury Subclass and the Wrongful Death Subclass with collection of the evidence necessary to establish Wrongful Death Losses and Personal Injury Losses, including through obtaining expert medical opinions. Class Counsel will use dedicated file and document management software such as Amicus Attorney, Primafact and/or Filevine to manage Personal Injury and Wrongful Death Subclass member claims. Where necessary, Class Counsel will assist in retaining and instructing medical or economic experts to provide expert opinion on Subclass Members' Personal Injury or Wrongful Death Losses. Class Counsel may propose an abbreviated report format with standard factual assumptions about the Lytton Fire in the interest of economy and efficiency.
12. Class Counsel may propose the use of "test cases", through which certain Class Members' loss and damages are assessed and those assessments are applied to other Class Members, including through the use of statistical sampling.

### **Costs**

13. The plaintiff will ask the Court to order that the defendants pay all administration costs, including the costs of the notice and the fees of the administrator and referees or alternatively that those costs be paid out of the total recovery after payment of counsel fees, disbursements, and taxes but before any distribution to the eligible Class Members.

### **SECTION 6 – AMENDMENTS OF THIS PLAN**

1. This plan may be amended from time to time by directions given at case management conferences or by further order of the Court.

## **SCHEDULE C: NOTICE OF CERTIFICATION LYTTON FIRE CLASS ACTION NOTICE OF CERTIFICATION**

If you suffered loss, damage or injury as a result of the fire started in Lytton, British Columbia, on June 30, 2021 (the “Lytton Fire”), or if you are an insurer that indemnified an insured for loss, damage, expense or injury as a result of the Lytton Fire, you should read this notice carefully.

This class action has been certified by the Supreme Court of British Columbia.

### **A. WHAT IS A CLASS ACTION?**

A class action is a lawsuit filed by one person on behalf of a large group of people.

### **B. WHAT IS THIS CLASS ACTION ABOUT?**

This class action claims that Canadian Pacific Railway (“CP”) and/or Canadian National Railway (“CN”) caused or ignited the Lytton Fire, and that they are liable to pay damages to all persons who suffered loss, damage, expense or injury as a result of the Lytton Fire.

The purpose of this class action is to require CP and/or CN to pay compensation to Class Members. The representative plaintiffs are Carel Moiseiwitsch, who was a resident of and homeowner in Lytton, and Chief Jordan Spinks of the Kanaka Bar Indian Band. In addition, The Wawanesa Mutual Insurance Company is the representative plaintiff for insurers in the Subrogation Subclass.

For more information about this Lytton Fire Class Action, see the class action cases webpage online at [www.cfmlawyers.com](http://www.cfmlawyers.com) or <https://www.slatervecchio.com/>

### **C. WHO IS AFFECTED BY THE CLASS ACTION?**

You may be affected by this class action if you are a Class Member. Class Members include all persons, businesses and governmental bodies who suffered loss, damage or injury as a result of the Lytton Fire, and insurers who paid out insurance claims for such losses. Loss, damage, expense or injury includes:

- Uninsured damage to or loss of a home, house or other structure
- Uninsured damage to or loss of personal property or other items
- Physical injury
- Psychological injury

- Uninsured loss of business or rental income
- Expenses—including for shelter, food, clothing, insurance deductibles, or increased insurance premiums—that you would otherwise not have incurred
- Indemnity payments made by an insurer to an insured pursuant to an insurance policy in respect of any loss, damage, injury or expense incurred or sustained by that insured as a result of the Lytton Fire.

#### **D. WHAT IF I AM INSURED?**

If you are insured, or believe you may be insured, you should proceed in the ordinary way to make an insurance claim to your insurer. This class action does not prevent you from making an insurance claim and does not limit your right to collect insurance benefits.

If you have already submitted a claim to your insurer for loss or damage in connection with the Lytton fire and that claim has not yet been resolved, you may continue to communicate with your insurer in respect of that claim.

If you were only indemnified by your insurer for *part* of a loss claimed in this action, please review the section below (Section E) carefully to understand your rights.

#### **E. WHAT DO I NEED TO DO RIGHT NOW?**

If you want to participate in this class action, you do not need to do anything. If you are a Class Member, you will be automatically included in the proceeding.

If you do not want to be included in the class action, you can exclude yourself from the class action ("opt-out") by sending a signed letter to Class Counsel, with the following information:

- your full name, current address, email address and telephone number;
- if you are writing on behalf of a company, the name of the company and your position at the company;
- a statement saying that you (or the company or government) want to opt-out of the class action;
- indicating if you are an insured under any policy of insurance that was paid out indemnity in relation to any portion of any loss, damage, expense or injury you suffered as a result of the Lytton Fire;

- if you are an insurer, the name of the insured whose subrogated claim is being opted out, together with the insured's current address, email address and telephone number; and
- your reason for opting out.

Requests to opt-out of the proceedings must be post-marked by ♦.

If you exclude yourself or opt-out:

- you will not be eligible to participate in the ongoing class action, and
- you will not receive any money from this class action, but
- you will be able to start your own case against the defendants regarding the claims at issue in the class action.

If you do nothing, and so do not exclude yourself or opt-out:

- you will be eligible to participate in the ongoing class action, and
- you may receive money from this class action, but
- you will not be able to start your own case against the defendants regarding the claims at issue in the class action.

If you were only partly indemnified by your insurer for losses claimed in this action:

- If you choose to opt out but your insurer does not, you will have the exclusive right to control and advance your claim only for that portion of your losses that were not paid by your insurer (the "Uninsured Losses"), and your insurer will have the exclusive right to control and advance a claim only for that portion of your losses that were indemnified by your insurer (the "Insured Losses"). Your right to opt out of the action will apply only to your Uninsured Losses, and you may pursue recovery of those Uninsured Losses outside of this class action. Your decision to opt out your claim for Uninsured Losses will not affect your insurer's ability to claim for recovery of your Insured Losses within this class action as a member of the Subrogation Subclass.
- If your insurer chooses to opt out but you do not, the insurer's right to opt out of the action will apply only to the insurer's subrogated claim for Insured Losses. The insurer will have the exclusive right to control and advance a subrogated claim for the Insured Losses outside of the class action, and you will have the exclusive right to control and advance a claim within the class action only for Uninsured Losses. The insurer's decision to opt out its claim for Insured Losses will not affect your ability to claim for Uninsured Losses as a Class Member in this action.

If either an insurer or an insured, or both, elect to opt out of the class action:

- an application can be made to the Court to lift the stay in the Insurer's Subrogated Action (BCSC File S234544) as it pertains to that portion of the claim that has been opted out and the party opting out may pursue the opted out claims within the Insurer's Subrogated Action, as permitted by the Court.
- Alternatively if you are an insured who has opted out, and you are a member of the Cook's Ferry Indian Band, Lytton First Nation or Siska, you may be able to pursue your claim for recovery of Uninsured Losses within the separate actions filed by or on behalf of those groups (BCSC Files S-234734, S0234686 and S-234735).

If you elect to stay in the class action, you do not need to do anything. If you do nothing, Class Counsel will represent you as a Class Member for your claims, or for the portion of your claim that was not opted out of the class action.

This is your only chance to exclude yourself or opt-out of the class action.

You may obtain an Opt-Out Form by calling Class Counsel at 604-682-5111 or emailing [lyttonfireclassaction@slatervecchio.com](mailto:lyttonfireclassaction@slatervecchio.com).

**If you have not already done so, you should make a detailed list of all losses, injuries and damage you have suffered. You should keep any documents about your losses and replacement costs including quotes, receipts, medical records and photographs. You should also write down your experience of the Lytton Fire in anticipation that you may need to refresh your memory at a future date.**

#### **F. WHO ARE THE LAWYERS WORKING ON THIS CLASS ACTION?**

The law firms of Camp Fiorante Matthews Mogerman LLP and Slater Vecchio LLP are jointly working for Class Members on this class action. Class Counsel can be contacted at:

Email: <a href="mailto:lyttonfireclassaction@slatervecchio.com">lyttonfireclassaction@slatervecchio.com</a> Tel: 604-682-5111 Toll-Free: 1-888-737-9990
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As an individual, you do not have to pay the lawyers working on this class action any money out-of-pocket. The lawyers will be paid from the money collected in the class action. The BC Court will decide how much the lawyers will be paid.

**G. WHERE CAN I ASK MORE QUESTIONS?**

For more information, please email [lyttonfireclassaction@slatervecchio.com](mailto:lyttonfireclassaction@slatervecchio.com) or call 604-682-5111.

To receive future notices and updates regarding this class action register online at <https://www.slatervechio.com/class-action/lytton-creek-wildfire-class-action/>

This notice has been approved by the Supreme Court of British Columbia.

**Schedule 'D'- Fresh as Amended Notice of Civil Claim**

No. S217469  
Vancouver Registry

*In the Supreme Court of British Columbia*

Between

**CAREL MOISEIWITSCH, JORDAN SPINKS and THE WAWANESA MUTUAL  
INSURANCE COMPANY**

Plaintiffs

and

**CANADIAN NATIONAL RAILWAY COMPANY and  
CANADIAN PACIFIC RAILWAY COMPANY**

Defendants

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

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**AMENDED NOTICE OF CIVIL CLAIM**

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This action has been started by the plaintiffs 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 plaintiffs.

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 plaintiffs 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 plaintiffs,

- (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 PLAINTIFFS

### Part 1: STATEMENT OF FACTS

1. On June 30, 2021, during a historic heat wave, a freight train operated by the defendants sparked a fire which destroyed Lytton, British Columbia.

#### *The Plaintiffs*

2. The plaintiff Carel Moiseiwitsch is a visual artist and was, until June 30, 2021, a homeowner and resident of Lytton, British Columbia. She has an address for service at Suite 400 - 856 Homer Street, Vancouver, BC, V6B 2W5.

3. At all material times Ms. Moiseiwitsch was the owner in fee simple of a property in Lytton. The property is located at 421 Alonzo Way, Lytton, BC, V0K 1Z0, and 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 (the "**Moiseiwitsch Property**").

4. The Moiseiwitsch Property included a three-bedroom house that contained ordinary household and personal items, as well as her art collection. The home also hosted the plaintiff's business, an IT and graphic design company which served the residents of Lytton and clients elsewhere in BC (the "**Moiseiwitsch Business**"). The plaintiff kept business records and various inventory and assets of the Moiseiwitsch Business at her home in Lytton.
5. The plaintiff Jordan Spinks is the Chief of the Kanaka Bar Indian Band and, at the material times, worked in Lytton and resided on Indian Reserve Papyum 27, a reserve governed by the Lytton First Nation. He has an address for service at 1800 – 777 Dunsmuir Street, Vancouver, BC, V7Y 1K4.
6. The plaintiff the Wawanesa Mutual Insurance Company ("**Wawanesa**") is a company with an office at 100-4120 Yonge Street, Toronto, Ontario.

### ***The Defendants***

7. 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.
8. 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.
9. CP Rail and CN Rail are Class 1 freight railways which—as particularized below—owned and operated the Coal Train (defined below), and the tracks and right-of-way the Coal Train used to move through Lytton on June 30, 2021.

### ***Background***

10. The defendants direct all freight rail traffic between Vancouver and Kamloops through Lytton. To manage the high volume of traffic, trains are assigned to tracks by travel direction, rather than ownership. As a result, both defendants’ westbound trains run on CN Rail’s right-of-way through Lytton and are operated by CN Rail personnel.
11. Lytton is a small community in the Fraser Canyon. It was home to approximately 250 residents, both landowners and tenants. The property tax roll for the municipality of the Village of Lytton recognizes approximately 150 properties. In addition, approximately 2,000 members of the Lytton First Nation live on reserves surrounding Lytton. During summer months, the Fraser Canyon is dry and hot—often the hottest place in Canada. The risk of igniting wildfires is extreme.
12. In June 2021, the national weather services of Canada and the United States issued public warnings of an unusual weather system forming over the Pacific Ocean that would bring severe heat to British Columbia.
13. On June 23, 2021, Environment Canada warned of a record-breaking heat wave across much of British Columbia starting on June 25.

14. On June 25, Environment Canada warned of even higher temperatures in the southern Interior over the next three days, including in Lytton.
15. For three successive days starting on June 27, Lytton set and broke records for the highest temperatures ever measured in Canada. On the afternoon of June 29, the temperature in Lytton hit 49.6 degrees Celsius—the hottest day ever recorded in Canada, Europe or South America.
16. In the afternoon of June 30, 2021:
  - a. fire danger—an indicator of the ease with which vegetation can ignite—was rated as Extreme in Lytton, the maximum level in the Canadian Forest Fire Danger Rating System;
  - b. another wildfire was already active in the region around Lytton;
  - c. another southbound CN Rail freight train had already caught fire earlier that afternoon south of Lytton, near Boston Bar; and
  - d. the air temperature was over 48 degrees Celsius.
17. At approximately 4:30 p.m., a freight train loaded with more than 20,000 tons of coal drove through Lytton.

### ***The Lytton Fire***

18. Train C73152-29 (the “**Coal Train**”) was comprised of 152 open-top cars loaded with coal. It stretched more than a mile and a half in length and was pulled by three diesel-electric locomotives owned and maintained by CP Rail and operated by a CN Rail crew.
19. The fire that destroyed Lytton on June 30, 2021 was designated K71086 by the BC Wildfire Service (the “**Lytton Fire**”). The Lytton Fire was caused by the Coal

Train, which ignited dry vegetation and other combustible materials on and beside the rails at approximately mile 98.1 of CN Rail's right of way.<sup>1</sup>

20. Near mile 98, a straight section of track is followed by a right curve over a level crossing at mile 98.14, then a bridge across the Fraser River.
21. CN Rail's right of way at and around mile 98.1 contained combustible materials, including dry vegetation on and immediately adjacent to the tracks, coal spilled by previous trains, and discarded timbers, some coated with flammable creosote. The presence and proximity of combustible materials in the CN Rail right of way increased the risk of ignition there and made it not only a source of fuel to sustain a trackside fire, but also a vector along which one could travel toward and into the town of Lytton.
22. To reduce friction and heat between the wheels and rails and reduce the risk of sparks as southbound trains navigate the curve at mile 98.1, trackside equipment just before mile 98 automatically applies lubricant to the rails or wheel flanges of passing trains.
23. More than 8,000 feet in length, the Coal Train took nearly four minutes to pass mile 98.1. During this time, the Coal Train emitted heat, igniting dry vegetation and other combustible materials on and beside the tracks near mile 98.1.
24. The Coal Train ignited the Lytton Fire by emitting heat in one or more forms:
  - a. sparks or combustible particles ejected from the exhaust systems of one or more of its three locomotives;
  - b. heat, sparks or flames produced by overheating resistors in the dynamic systems of one or more of its three locomotives;
  - c. sparks generated by metal-on-metal friction between the train's wheels and the curved rails;

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<sup>1</sup> Mile-post references are to CN Rail's Ashcroft Subdivision, which runs between Kamloops and Boston Bar.

- d. sparks or hot metal falling from the train's brake shoes;
  - e. heat or fragments of hot metal released from the train's wheel bearings;
  - f. sparks from electrical wiring in one or more of its three locomotives and 152 cars; and
  - g. sparks caused by metal dragging or falling from the train.
25. Once ignited by the Coal Train, the fire's growth was fueled by the combustible material accumulated in CN Rail's right of way. Minutes after the tail-end locomotive of the Coal Train passed, smoke and then flames were visible in the dry grass and brush beside the tracks at mile 98.1.
26. Dry, dense vegetation immediately adjacent to the tracks allowed the fire to spread rapidly along the CN Rail right of way directly toward the town of Lytton.
27. The narrow gap between dry vegetation on either side of the tracks allowed the fire to jump the tracks and advance up a short grassy slope into the town of Lytton.
28. Within hours of the Coal Train's passage, the fire had destroyed approximately 90% of Lytton, including homes, businesses, infrastructure, and government buildings.

### ***The Plaintiffs' Losses***

29. Each of the plaintiffs suffered harm as a result of the Lytton Fire.
30. The plaintiff Carel Moiseiwitsch was forced to flee the rapidly advancing fire, which destroyed her home and business, and killed her pet cat. The trauma of narrowly escaping death and losing her home, her business and a beloved pet caused Ms. Moiseiwitsch psychological injuries. She incurred extraordinary expenses due to the mandatory evacuation.
31. The plaintiff Jordan Spinks and his family fled their home on Indian Reserve Papyum 27. He suffered psychological injuries, lost personal property, and

incurred extraordinary expenses due to the mandatory evacuation. The fire destroyed the assisted living centre where he worked, rendering him unemployed.

### ***The Class***

32. Ms. Moiseiwitsch, Mr. Spinks, and Wawanesa bring this action on behalf of all natural or legal persons who claim to have suffered losses as a result of the Lytton Fire within one or more of the following subclasses (the “**Class**”):
- a. all natural persons who claim to be the spouse, parent or child of a person who died on June 30, 2021, as a result of the Lytton Fire (the “**Wrongful Death Subclass**”);
  - b. all natural or legal persons who claim to have suffered, as a result of the Lytton Fire, loss of real property or loss of use or enjoyment of real property which they owned, had an interest in, or occupied, which has not been indemnified by insurance (the “**Real Property Subclass**”);
  - c. all natural or legal persons who claim to have suffered a loss of personal property as a result of the Lytton Fire which has not been indemnified by insurance (the “**Personal Property Subclass**”);
  - d. all governmental entities which claim to have suffered loss of real property, interference with the use of real property, or loss of personal property as a result of the Lytton Fire (the “**Government Subclass**”);
  - e. all natural or legal persons who claim to have suffered personal injuries as a result of the Lytton Fire, causing a loss which has not been indemnified by insurance (the “**Personal Injury Subclass**”);
  - f. all natural or legal persons who claim to have suffered income loss and/or business loss because the Lytton Fire caused property damage or personal injury to another natural or legal person on whom their income or business depended, and which has not been indemnified by insurance (the “**Relational Economic Loss Subclass**”); and

- g. all natural or legal persons with a subrogated claim to recover an insurance indemnity paid in relation to damage and losses resulting from the Lytton Fire (the “**Subrogation Subclass**”).
33. The “Class Members” or the “Class” *includes*:
- a. the Wrongful Death Subclass;
  - b. the Subrogation Subclass;
  - c. the Real Property Subclass;
  - d. the Personal Property Subclass;
  - e. the Government Subclass;
  - f. the Relational Economic Loss Subclass; and
  - g. the Personal Injury Subclass.
34. The “Class Members” or the “Class” *excludes*:
- a. the defendants, and the directors and officers of each, and their immediate family members;
  - b. counsel to all parties in this proceeding, and their immediate family members;
  - c. judges or associate judges presiding in this proceeding at any time, and their immediate family members;
  - d. Chief Niakia Hanna and the Lytton First Nation;
  - e. Chief Fred Sampson and Siska Band; and
  - f. Chief Christine Walkem and the Cook’s Ferry Indian Band.

## ***The Defendants' Knowledge and Conduct***

### **CN Rail's Wrongful Conduct**

35. CN Rail operated the Coal Train when it passed through Lytton and was responsible for operating and maintaining the tracks and right of way near mile 98.1 where the Lytton Fire began.
36. The following conduct of CN Rail caused or contributed to the Lytton Fire (collectively, "CN Rail's Wrongful Conduct"):
  - a. operating the Coal Train without due care, including by:
    - (i) operating the Coal Train through Lytton when it knew or ought to have known that the prevailing weather conditions created an unreasonable and extraordinary risk of igniting combustible material in the right of way;
    - (ii) operating the Coal Train through Lytton in a manner which increased the risk of generating heat or sparks, including by running at excessively high speed and heavy load, and with excessive or sudden brake and throttle inputs that increased the risk of sparks from the brake and exhaust systems, respectively;
    - (iii) failing to operate the Coal Train's three diesel-electric locomotive engines in accordance with their manufacturers' directions and in a manner which minimized the buildup of combustible material in the engines' exhaust systems and the risk of exhaust sparks;
    - (iv) failing to adequately inspect the locomotives and rail cars to ensure that the Coal Train was in proper working order and free of missing or broken equipment which would pose a fire risk;
    - (v) failing to ensure that the Coal Train was equipped with systems to reduce the risk of sparks, including appropriate and functional

turbochargers, spark arrestors, exhaust components, and composite brake pads; and

- (vi) operating the Coal Train in a populated area subject to extreme fire risk without fire suppression equipment and personnel in sufficient proximity to suppress fires ignited by the Coal Train;

b. failing to take reasonable care to maintain the tracks and right of way near mile 98.1 to reduce the risk of ignition there, including by:

- (i) failing to remove combustible vegetation on and immediately adjacent to the tracks;
- (ii) allowing combustible material to accumulate on or adjacent to the tracks, including coal dropped from the Coal Train and previous trains carrying coal in uncovered cars;
- (iii) storing combustible material in the right of way, including discarded timbers and railway ties coated with creosote;
- (iv) failing to douse potential fuel sources in the immediate vicinity of the tracks with water;
- (v) failing to ensure that the lubricator near mile 98 was functional, maintained, and adequate to minimize the risk of sparks resulting from friction between the wheels and rails during the curve near mile 98.1;
- (vi) failing to adequately inspect or maintain the rails near mile 98.1 to detect and repair defects and damage which increased the risk of sparks generated by friction between the wheels and rails, including warping caused by extreme heat during the afternoon of June 30, 2021;

- c. failing to take reasonable care to maintain the right of way between miles 96.5 and 98.14 to reduce the risk of it becoming a vector for fire to spread around, through and into Lytton, and onto the far bank of the Thompson River, including by:
  - (i) failing to remove combustible vegetation on and immediately adjacent to the tracks;
  - (ii) allowing combustible material to accumulate on or adjacent to the tracks, including coal dropped from the Coal Train or previous trains;
  - (iii) storing or stockpiling combustible material in the right of way, including discarded timbers and railway ties coated with creosote; and
  - (iv) failing to douse potential fuel sources in the immediate vicinity of the tracks with water.

### **CP Rail's Wrongful Conduct**

- 37. CP Rail owned and maintained the Coal Train, including its three diesel-electric locomotives and 152 rail cars.
- 38. The following conduct of CP Rail caused or contributed to the Lytton Fire (collectively, "CP Rail's Wrongful Conduct"):
  - a. failing to adequately maintain and inspect each of the Coal Train's three locomotives including by failing to:
    - (i) inspect and maintain each locomotive's spark arrestors, eductor tubes, turbo discharge ducts, and related exhaust components to prevent oil accumulation or carbonaceous deposits which increased the risk of exhaust sparks;
    - (ii) adequately test each locomotive for exhaust system leaks and exhaust sparks;

- (iii) adequately inspect, test and maintain each locomotive's dynamic braking system to prevent overheating in their resistor grids;
- b. failing to adequately maintain and inspect the Coal Train's 152 rail cars—including the braking systems, wheels, bearings and axles of each—for defects or damage which could increase the risk of sparks or overheating;
- c. equipping the Coal Train with systems for air braking and dynamic braking which posed a risk of overheating and emitting sparks, flames or molten metal;
- d. requesting and permitting CN Rail to operate the Coal Train through Lytton:
  - (i) without taking reasonable steps to ensure that the rails, trackside equipment, and right of way used by CN Rail were adequately maintained to minimize the risk of fires on or adjacent to the tracks; or
  - (ii) in a manner which increased the risk of fire, including by operating during hours of peak fire risk, running at excessive speed or load, and using excessive or sudden brake and throttle inputs.

### ***The Defendants' Knowledge***

39. The defendants knew or ought to have known that operating the Coal Train through Lytton on the afternoon of June 30, 2021, posed an unreasonable risk of harm to nearby people and property. This knowledge of risk arose from their knowledge of the following:
- a. freight trains such as the Coal Train can, and frequently have, ignited combustible materials near the tracks by particular mechanisms—including exhaust sparks; overheating wheels, brakes, and resistor grids; sparks generated by friction between the wheels and rails; electrical faults; and dragging metal—which, for decades, have been subjects of government regulation, technical study, and litigation in the jurisdictions in which the defendants do business;

- b. Lytton had recently experienced drought and extreme heat, resulting in a fire risk rated as Extreme by the Canadian Forest Fire Danger Rating System;
- c. the probability of a train emitting sparks is greater when it is loaded than when it is empty, greater when braking is required (as on a downhill gradient), and greater in curves than on straight sections of track—all risk factors raised by operating the Coal Train through Lytton near mile 98.1;
- d. hours earlier, another CN Rail train on the same track caught fire near Boston Bar, 39 kilometers south;
- e. the section of CN Rail’s right of way which passed through Lytton, including mile 98.1, contained combustible material in close proximity to the tracks, including dense, dry vegetation and discarded timbers and railway ties;
- f. the probability that a spark emitted by a passing train will successfully ignite nearby fuel sources and become a self-sustaining fire increases in certain conditions, including high air temperature, low relative humidity, prolonged absence of rainfall, strong winds, and sloped terrain—all conditions that were present near mile 98.1 of CN Rail’s right of way in Lytton on June 30, 2021; and
- g. the same conditions increase the rate at which a fire, once ignited, will intensify and spread; and
- h. proximity between a rail right of way and a community increases the risk that a fire in the right of way will spread to the community and reduces the likelihood of detecting and suppressing the fire before it does so. The risk created by proximity is increased where the community lies uphill or downwind of the right of way. Each geographic risk factor was present near mile 98.1 of CN Rail’s right of way on June 30, 2021,

(collectively, the “**Knowledge of Risk**”).

## **Damages**

40. By the conduct particularized above, the defendants caused or contributed to the Lytton Fire and caused harm to the plaintiffs and Class Members, including:

a. for the Wrongful Death Subclass:

- (i) funeral and burial costs;
- (ii) loss of financial support;
- (iii) loss of guidance;
- (iv) loss of inheritance;
- (v) loss of household services; and
- (vi) counselling costs;

(collectively, the “**Wrongful Death Losses**”)

b. for the Personal Injury Subclass:

- (i) physical and psychological injuries;
- (ii) past and future loss of income and earning capacity;
- (iii) pain, suffering and loss of enjoyment of life;
- (iv) past and future costs of health care; and
- (v) cost of care provided by family members

(collectively, the “**Personal Injury Losses**”)

c. for the Real Property Subclass:

- (i) loss of and/or interference with use and enjoyment of real property;
- (ii) loss of personal property;

(iii) business loss; and

(iv) income loss;

(collectively, the “**Real Property Losses**”)

d. for the Personal Property Subclass:

(i) loss of, damage to, or loss of use or enjoyment of, personal property;

(ii) income loss; and

(iii) business loss;

(collectively, the “**Personal Property Losses**”)

e. for the Relational Economic Loss Subclass:

(i) business loss;

(ii) income loss; and

(iii) loss of opportunity;

(collectively, the “**Relational Economic Losses**”)

f. for the Government Subclass:

(i) loss of and/or interference with use and enjoyment of real property;

(ii) loss of personal property;

(iii) business loss and/or income loss;

(iv) fire control expenses incurred to contain and suppress the Lytton Fire;

(v) costs of discretionary or emergency monetary relief;

(vi) loss of timber and other natural resources; and

(vii) costs of environmental remediation;

(collectively, the “**Government Losses**”); and

g. for the Subrogation Subclass, losses to members of the Real Property and Personal Property subclasses that were indemnified and subrogated pursuant to a contract of insurance, including:

(i) loss of, and/or interference with use and enjoyment of, real or personal property; and

(ii) economic losses, including loss of income and business interruption,

(collectively, the “**Insured Losses**”).

41. The plaintiffs and Class Members suffered additional, intangible losses which can be compensated only by an award of aggravated damages. The defendants’ conduct resulted in the destruction and abandonment of an entire community. Residents were evacuated and dispersed. The town site was contaminated, cordoned off and made uninhabitable for years. The nature, duration and scale of the losses suffered simultaneously by the plaintiffs and Class Members compounded and aggravated the harm to each, and inflicted additional and intangible injuries. Class Members suffered not only the tangible loss of property, but also the intangible loss of its sentimental value and historical significance. They lost their community and their way of life. The speed and scale of the destruction amounted to the near-total erasure of a community and inflicted losses which cannot be relieved by ordinary, compensatory damages and requires awards of aggravated damages.

42. In the circumstances present on and in the days prior to June 30, 2021, and in light of their knowledge of the extraordinary risk posed by freight rail operations through Lytton at that time, defendants’ conduct—including CN Rail’s Wrongful Conduct and CP Rail’s Wrongful Conduct—was reprehensible, reckless and callously indifferent to the interests of the plaintiffs and class members. It demonstrated a reprehensible lack of concern for public safety, or for the interests of the Class.

Compensatory damages are neither intended nor adequate to denounce, punish and deter the decisions and conduct that caused the Lytton Fire. Punitive damages are required.

## **Part 2: RELIEF SOUGHT**

43. The plaintiffs, on behalf of members of the Class, seek:
- a. an order certifying this action as a class proceeding against the defendants and appointing Carel Moiseiwitsch and Jordan Spinks as representative plaintiffs for the Class, and appointing Wawanesa as a representative plaintiff for the Subrogation Subclass;
  - b. a declaration that the Lytton Fire constituted a public nuisance;
  - c. on behalf of the Class Members, the following declaratory relief and general and special damages:
    - (i) for the Wrongful Death Subclass, general and special damages for the Wrongful Death Losses;
    - (ii) for the Personal Injury Subclass, general and special damages for the Personal Injury Losses;
    - (iii) for the Real Property Subclass:
      - A. a declaration that the Lytton Fire caused substantial and unreasonable interference with real property and the use and enjoyment of real property in the area burned by the wildfire, such that it constituted a private nuisance; and
      - B. general and special damages for the Real Property Losses;
    - (iv) for the Personal Property Subclass, general and special damages for the Personal Property Losses;

- (v) for the Relational Economic Loss Subclass, general and special damages for the Relational Economic Losses;
  - (vi) for the Government Subclass, general and special damages for the Government Losses; and
  - (vii) for the Subrogation Subclass, special damages in the amount of insurance indemnities paid in relation to the Insured Losses.
- d. punitive damages;
  - e. aggravated damages;
  - f. pre-judgment and post-judgment interest pursuant to the *Court Order Interest Act*, RSBC 1996, c 78, s 128; and
  - g. such further and other relief as this Honourable Court may deem just.

### **Part 3: LEGAL BASIS**

- 44. The plaintiffs' claims are based on the following causes of action advanced on their own behalf and on behalf of the Class:
  - a. negligence;
  - b. public nuisance;
  - c. private nuisance; and
  - d. the rule in *Rylands v. Fletcher*.

#### ***Negligence***

- 45. The Lytton Fire was caused by the defendants' negligence and resulted in losses and injuries to the plaintiffs and Class Members.
- 46. The defendants each owed duties of care to the plaintiffs and the Class Members arising from their proximity and the reasonable foreseeability that failing to exercise

proper care with respect to whether and how to operate the Coal Train on CN Rail's right of way in Lytton on June 30, 2021, could cause harm to the plaintiffs and Class Members.

47. CN Rail did not meet the standard of care required of a railway operator in the circumstances. Particulars of conduct by CN Rail that breached its standard of care, as currently known to the plaintiffs, include CN Rail's Wrongful Conduct as defined in Part 1.
48. CP Rail did not meet the standard of care required of a railway operator in the circumstances. Particulars of conduct by CP Rail that breached its standard of care, as currently known to the plaintiffs, include CP Rail's Wrongful Conduct as defined in Part 1.

### ***Public Nuisance***

49. The defendants' conduct—including CN Rail's Wrongful Conduct and CP Rail's Wrongful Conduct—caused the Lytton Fire, which constituted a public nuisance insofar as it caused substantial and unreasonable interference with public rights, such as:
  - a. access to public property and Crown land;
  - b. access to infrastructure, such as roads and highways;
  - c. access to utilities, including electricity, natural gas, water, and internet and telephone networks; and
  - d. access to commerce.
50. The defendants' conduct in operating the Coal Train on June 30, 2021, was in furtherance only of a private, profit-making enterprise and lacked any social utility—adequate or at all—to outweigh the risk posed to the plaintiffs and Class Members and the significance of the harm inflicted on them.

51. By causing the Lytton Fire, the defendants substantially and unreasonably interfered with plaintiffs' and Class Members' access to and enjoyment of public rights, and inflicted losses on them which differed, in type and degree, from any suffered by the Canadian public with which the defendants interact as federal corporations and Class 1 national freight rail carriers, including:
- a. loss of access to local public property, Crown land, public services, infrastructure, utilities and commerce on which the plaintiffs and Class Members depended to a greater degree, and in a different manner, than other Canadians;
  - b. out-of-pocket expenses resulting from their rapid evacuation and prolonged displacement from the Lytton town site, which was contaminated and cordoned off;
  - c. for members of the Personal Property Subclass, the Personal Property Losses;
  - d. for members of the Real Property Subclass, the Real Property Losses;
  - e. for members of the Relational Economic Loss Subclass, the Relational Economic Losses;
  - f. for members of the Personal Injury Subclass, the Personal Injury Losses;
  - g. for the Wrongful Death Subclass, the Wrongful Death Losses; and
  - h. for the Subrogation Subclass, the Insured Losses.

***Private Nuisance***

52. The defendants' conduct constituted a private nuisance. It caused the Lytton Fire and caused substantial and unreasonable interference with Class Members' use and quiet enjoyment of real property which they owned, occupied, or had an interest in, including by damaging, destroying, or contaminating real property so as to:

- a. diminish or prevent their use and quiet enjoyment of the property;
- b. render it unusable or inaccessible;
- c. diminish its value;
- d. increase the cost and complexity of remediation and reconstruction; and
- e. cause Real Property Losses, Personal Property Losses and Insured Losses.

53. This interference was particularly unreasonable because, *inter alia*:

- a. the Village of Lytton and the surrounding areas are residential communities whose residents do not meaningfully benefit from the operation of the Defendants' trains through and/or in close proximity to their neighbourhoods;
- b. the interference, including but not limited to damage and/or destruction of and restriction of access to land, was severe;
- c. the interference has prevented the Real Property Subclass Members from inhabiting and/or using the land in the same manner that they did prior to the Lytton Fire and is ongoing;
- d. The Defendants' conduct in operating the Coal Train on June 30, 2021, was in furtherance only of a private, profit-making enterprise and lacked any social utility—adequate or at all—to outweigh the risk posed to the Real Property Subclass members and the significance of the losses inflicted on them. Alternatively, any utility did not outweigh the significance of the interference with Real Property Subclass Members' ability to use and enjoy their land; and
- e. the Defendants did not take adequate precautions to prevent and/or mitigate the cause and/or spread of the Lytton Fire, including through CN Rail's Wrongful Conduct and CP Rail's Wrongful Conduct.

## **The rule in *Rylands v. Fletcher***

54. CN Rail is strictly liable under the rule in *Rylands v. Fletcher* for losses inflicted on the plaintiffs and Class Members by its non-natural use of its land in Lytton on June 30, 2021.
55. CN Rail owned, occupied, maintained and operated the railway right of way land, at or near mile 98.1 of the Ashcroft Subdivision, where the Coal Train ignited the Lytton Fire. The fire was ignited in the course, and as a result, of CN Rail using its right of way land in Lytton to operate and move the Coal Train on June 30, 2021.
56. Operating and moving the Coal Train—particularly in the conditions of extreme fire risk present on June 30, 2021—constituted a non-natural use of land which was adjacent to and upwind of the Lytton town centre and other residential property, and thus created a hazard to those adjacent lands and persons which was extraordinary and unreasonable. While posing an extraordinary risk to adjacent lands and persons, the defendants’ use of the right of way served only their private business interests, and was not for the benefit of individuals who resided in or around Lytton and the surrounding communities. Alternatively, any benefit was incidental and did not constitute a general benefit to the community.
57. On June 30, 2021, CN Rail brought onto its land in Lytton substances which were likely, if not certain, to escape the Coal Train and CN Rail’s own land and likely, if not certain, to cause harm to adjacent lands and persons when they did so. These substances included:
  - a. superheated air, oil, and carbonaceous substances contained in and produced by three large, mobile internal combustion engines;
  - b. heat and electrical current generated by three dynamic braking systems which used resistors to convert the enormous kinetic energy and inertia of the loaded Coal Train into electricity and heat;
  - c. heat and sparks generated by hundreds of mechanical braking systems which used friction to slow the Coal Train;

- d. heat and sparks generated by hundreds of metal wheels which used metal-on-metal friction to turn the Coal Train through a curved track in CN Rail's right of way land; and
  - e. 152 uncovered, mobile containers filled to their brims with more than 20,000 tons of flammable coal, some of which fell, or was blown as windborne dust, onto CN Rail's lands and adjacent lands, providing potential means of ignition and sources of fuel for fires.
58. One or more of these hazardous substances escaped the Coal Train and escaped CN Rail's land. In particular:
- a. the Coal Train's three locomotives, by design, vented hot exhaust gasses out of their internal combustion engines, into the air and onto CN Rail's land and adjacent lands;
  - b. while braking as it passed through Lytton, resistor grids in the Coal Train's three dynamic braking systems generated more than 600 volts of electricity and used fans to expel the resulting hot air out of the locomotives and onto CN Rail's land and adjacent lands;
  - c. the Coal Train's hundreds of metal wheels and pneumatic brake shoes generated heat and sparks on the exterior of the Coal Train; and
  - d. flammable coal dust was blown from the Coal Train and lumps of coal spilled onto CN Rail's land and adjacent lands as it passed the vicinity of mile 98.1.

59. As a result of the escape of one or more of the hazardous substances above from the Coal Train and from CN Rail's right of way land, the Lytton Fire was ignited, sustained, and spread, resulting in damage to the Plaintiffs and Class Members.

Plaintiffs' addresses for service: CFM Lawyers LLP  
400-856 Homer Street  
Vancouver, BC V6B 2W5  
**Attn: Reidar Mogerma, K.C.**

or

Slater Vecchio LLP  
1800 – 777 Dunsmuir Street  
Vancouver, BC V7Y 1K4  
**Attn: Anthony Vecchio, K.C.**

Place of Trial: Vancouver Law Courts

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

Date: \_\_\_\_\_

\_\_\_\_\_  
Signature of lawyer for the plaintiffs

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 (4<sup>th</sup> Supp.)

**Schedule 'E' - Notice of Civil Claim with amendments in Redline**

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

No. S217469  
Vancouver Registry

**~~IN THE SUPREME COURT OF BRITISH COLUMBIA~~**  
*In the Supreme Court of British Columbia*

~~BETWEEN:~~Between

**CAREL MOISEIWITSCH, JORDAN SPINKS and THE WAWANESA MUTUAL  
INSURANCE COMPANY**

~~PLAINTIFF~~Plaintiffs

~~AND:~~and

**CANADIAN NATIONAL RAILWAY COMPANY and  
CANADIAN PACIFIC RAILWAY COMPANY**

Defendants  
~~DEFENDANTS~~

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

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**AMENDED NOTICE OF CIVIL CLAIM**

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This action has been started by the ~~plaintiff~~plaintiffs 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~~plaintiffs.

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~~plaintiffs 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~~plaintiffs,

- (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~~PLAINTIFFS

### Part 1: STATEMENT OF FACTS

1. On June 30, 2021, during a historic heat wave, a freight train operated by the defendants sparked a fire which destroyed Lytton, British Columbia.

#### **The ~~Parties~~ Plaintiffs**

2. ~~1.~~The ~~Plaintiff,plaintiff~~ Carel Moiseiwitsch, is ~~currently without fixed address.~~ ~~Until~~a visual artist and was, until June 30, 2021, ~~she was a visual artist and a~~ homeowner and resident ~~of the Village~~ of Lytton, British Columbia. ~~The Plaintiff~~She has an address for service at ~~511-55 East Cordova~~Suite 400 - 856 Homer Street, Vancouver, BC ~~V6A 0A5, V6B 2W5.~~

3. At all material times Ms. Moiseiwitsch was the owner in fee simple of a property in Lytton. The property is located at 421 Alonzo Way, Lytton, BC, V0K 1Z0, and 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 (the “Moiseiwitsch Property”).

4. The Moiseiwitsch Property included a three-bedroom house that contained ordinary household and personal items, as well as her art collection. The home also hosted the plaintiff's business, an IT and graphic design company which served the residents of Lytton and clients elsewhere in BC (the “Moiseiwitsch Business”). The plaintiff kept business records and various inventory and assets of the Moiseiwitsch Business at her home in Lytton.

5. The plaintiff Jordan Spinks is the Chief of the Kanaka Bar Indian Band and, at the material times, worked in Lytton and resided on Indian Reserve Papyum 27, a reserve governed by the Lytton First Nation. He has an address for service at 1800 – 777 Dunsmuir Street, Vancouver, BC, V7Y 1K4.

6. The plaintiff the Wawanesa Mutual Insurance Company (“Wawanesa”) is a company with an office at 100-4120 Yonge Street, Toronto, Ontario.

## The Defendants

7. ~~2.~~ The ~~Defendant,~~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.~~
8. ~~3.~~ The ~~Defendant,~~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.~~
9. CP Rail and CN Rail are Class 1 freight railways which—as particularized below—owned and operated the Coal Train (defined below), and the tracks and right-of-way the Coal Train used to move through Lytton on June 30, 2021.

## **Background**

10. The defendants direct all freight rail traffic between Vancouver and Kamloops through Lytton. To manage the high volume of traffic, trains are assigned to tracks by travel direction, rather than ownership. As a result, both defendants’ westbound trains run on CN Rail’s right-of-way through Lytton and are operated by CN Rail personnel.
11. ~~4. The Village of Lytton is British Columbia’s second smallest municipality. Lytton is a small community in the Fraser Canyon. It was~~ home to approximately 250 residents, ~~some of whom own their lands and some of whom are~~both landowners and tenants. ~~Lytton’s~~The property tax roll for the municipality of the Village of Lytton recognizes approximately 150 properties. ~~The area surrounding the Village of Lytton includes nine separate reserves administered by~~In addition, approximately 2,000 members of the Lytton First Nation ~~which are home to approximately 2,000 band members~~live on reserves surrounding Lytton. During summer months, the Fraser Canyon is dry and hot—often the hottest place in Canada. The risk of igniting wildfires is extreme.

12. In June 2021, the national weather services of Canada and the United States issued public warnings of an unusual weather system forming over the Pacific Ocean that would bring severe heat to British Columbia.
13. On June 23, 2021, Environment Canada warned of a record-breaking heat wave across much of British Columbia starting on June 25.
14. On June 25, Environment Canada warned of even higher temperatures in the southern Interior over the next three days, including in Lytton.
15. For three successive days starting on June 27, Lytton set and broke records for the highest temperatures ever measured in Canada. On the afternoon of June 29, the temperature in Lytton hit 49.6 degrees Celsius—the hottest day ever recorded in Canada, Europe or South America.
16. In the afternoon of June 30, 2021:
  - a. fire danger—an indicator of the ease with which vegetation can ignite—was rated as Extreme in Lytton, the maximum level in the Canadian Forest Fire Danger Rating System;
  - b. another wildfire was already active in the region around Lytton;
  - c. another southbound CN Rail freight train had already caught fire earlier that afternoon south of Lytton, near Boston Bar; and
  - d. the air temperature was over 48 degrees Celsius.
17. At approximately 4:30 p.m., a freight train loaded with more than 20,000 tons of coal drove through Lytton.

~~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 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 27<sup>th</sup>, 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 29<sup>th</sup>, 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~~

~~18. [Train C73152-29 \(the "Coal Train"\) was comprised of 152 open-top cars loaded with coal. It stretched more than a mile and a half in length and was pulled by three diesel-electric locomotives owned and maintained by CP Rail and operated by a CN Rail crew.](#)~~

~~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 [fire that destroyed Lytton on June 30, 2021 was designated K71086 by the BC Wildfire Service \(the "Lytton Fire"\)](#). 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.~~ [Coal Train, which ignited dry vegetation and other combustible materials on and beside the rails at approximately mile 98.1 of CN Rail's right of way.](#)<sup>1</sup>

### **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~~

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<sup>1</sup> [Mile-post references are to CN Rail's Ashcroft Subdivision, which runs between Kamloops and Boston Bar.](#)

~~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 damages from the Lytton Fire include IR 27 and 27A Papyum, IR 24 Tuckozap, IR 22A Kleetlekut and IR 16 Two Mile Creek.~~

20. Near mile 98, a straight section of track is followed by a right curve over a level crossing at mile 98.14, then a bridge across the Fraser River.

21. CN Rail's right of way at and around mile 98.1 contained combustible materials, including dry vegetation on and immediately adjacent to the tracks, coal spilled by previous trains, and discarded timbers, some coated with flammable creosote. The presence and proximity of combustible materials in the CN Rail right of way increased the risk of ignition there and made it not only a source of fuel to sustain a trackside fire, but also a vector along which one could travel toward and into the town of Lytton.

22. To reduce friction and heat between the wheels and rails and reduce the risk of sparks as southbound trains navigate the curve at mile 98.1, trackside equipment just before mile 98 automatically applies lubricant to the rails or wheel flanges of passing trains.

23. More than 8,000 feet in length, the Coal Train took nearly four minutes to pass mile 98.1. During this time, the Coal Train emitted heat, igniting dry vegetation and other combustible materials on and beside the tracks near mile 98.1.

24. The Coal Train ignited the Lytton Fire by emitting heat in one or more forms:
- a. sparks or combustible particles ejected from the exhaust systems of one or more of its three locomotives;
  - b. heat, sparks or flames produced by overheating resistors in the dynamic systems of one or more of its three locomotives;
  - c. sparks generated by metal-on-metal friction between the train's wheels and the curved rails;
  - d. sparks or hot metal falling from the train's brake shoes;
  - e. heat or fragments of hot metal released from the train's wheel bearings;
  - f. sparks from electrical wiring in one or more of its three locomotives and 152 cars; and
  - g. sparks caused by metal dragging or falling from the train.
25. Once ignited by the Coal Train, the fire's growth was fueled by the combustible material accumulated in CN Rail's right of way. Minutes after the tail-end locomotive of the Coal Train passed, smoke and then flames were visible in the dry grass and brush beside the tracks at mile 98.1.
26. Dry, dense vegetation immediately adjacent to the tracks allowed the fire to spread rapidly along the CN Rail right of way directly toward the town of Lytton.
27. The narrow gap between dry vegetation on either side of the tracks allowed the fire to jump the tracks and advance up a short grassy slope into the town of Lytton.
28. Within hours of the Coal Train's passage, the fire had destroyed approximately 90% of Lytton, including homes, businesses, infrastructure, and government buildings.

### **The Plaintiffs' Losses**

29. Each of the plaintiffs suffered harm as a result of the Lytton Fire.
30. The plaintiff Carel Moiseiwitsch was forced to flee the rapidly advancing fire, which destroyed her home and business, and killed her pet cat. The trauma of narrowly escaping death and losing her home, her business and a beloved pet caused Ms. Moiseiwitsch psychological injuries. She incurred extraordinary expenses due to the mandatory evacuation.
31. The plaintiff Jordan Spinks and his family fled their home on Indian Reserve Papyum 27. He suffered psychological injuries, lost personal property, and incurred extraordinary expenses due to the mandatory evacuation. The fire destroyed the assisted living centre where he worked, rendering him unemployed.

### **The Class**

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

32. Ms. Moiseiwitsch, Mr. Spinks, and Wawanesa bring this action on behalf of all natural or legal persons who claim to have suffered losses as a result of the Lytton Fire within one or more of the following subclasses (the “Class”):
- a. ~~all natural or legal persons with loss of real or personal property or business losses in~~ persons who claim to be the spouse, parent or child of a person who died on June 30, 2021, as a result of the Lytton Fire (the “Class Wrongful Death Subclass”);
  - b. all natural or legal persons who claim to have suffered, as a result of the Lytton Fire, loss of real property or loss of use or enjoyment of real property which they owned, had an interest in, or occupied, which has not been indemnified by insurance (the “Real Property Subclass”);
  - c. ~~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”);~~ who claim to have suffered a loss of personal property as

a result of the Lytton Fire which has not been indemnified by insurance (the “**Personal Property Subclass**”);

d. ~~e.~~ all governmental entities ~~with~~ which claim to have suffered loss of real ~~or~~ property, interference with the use of real property, or loss of personal property ~~or business losses in~~ as a result of the Lytton Fire (the “~~Governmental Entity~~**Government Subclass**”); ~~and~~

e. all natural or legal persons who claim to have suffered personal injuries as a result of the Lytton Fire, causing a loss which has not been indemnified by insurance (the “**Personal Injury Subclass**”);

f. all natural or legal persons who claim to have suffered income loss and/or business loss because the Lytton Fire caused property damage or personal injury to another natural or legal person on whom their income or business depended, and which has not been indemnified by insurance (the “**Relational Economic Loss Subclass**”); and

g. ~~d.~~ all ~~persons who sustained personal injuries in~~ natural or legal persons with a subrogated claim to recover an insurance indemnity paid in relation to damage and losses resulting from the Lytton Fire (the “~~PI~~**Subrogation Subclass**”).

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

a. the Wrongful Death Subclass;

b. the Subrogation Subclass;

c. the Real Property Subclass;

d. the Personal Property Subclass;

e. the Government Subclass;

f. the Relational Economic Loss Subclass; and

g. the Personal Injury Subclass.

34. The “Class Members” or the “Class” *excludes*:

a. the defendants, and the directors and officers of each, and their immediate family members;

b. counsel to all parties in this proceeding, and their immediate family members;

c. judges or associate judges presiding in this proceeding at any time, and their immediate family members;

d. ~~Cause of~~Chief Niakia Hanna and the Lytton ~~Fire~~First Nation;

e. Chief Fred Sampson and Siska Band; and

f. Chief Christine Walkem and the Cook’s Ferry Indian Band.

### **The Defendants’ Knowledge and Conduct**

#### **CN Rail’s Wrongful Conduct**

35. CN Rail operated the Coal Train when it passed through Lytton and was responsible for operating and maintaining the tracks and right of way near mile 98.1 where the Lytton Fire began.

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

~~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;~~

a. operating the Coal Train without due care, including by:

- (i) operating the Coal Train through Lytton when it knew or ought to have known that the prevailing weather conditions created an unreasonable and extraordinary risk of igniting combustible material in the right of way;
- (ii) operating the Coal Train through Lytton in a manner which increased the risk of generating heat or sparks, including by running at excessively high speed and heavy load, and with excessive or sudden brake and throttle inputs that increased the risk of sparks from the brake and exhaust systems, respectively;
- (iii) failing to operate the Coal Train's three diesel-electric locomotive engines in accordance with their manufacturers' directions and in a manner which minimized the buildup of combustible material in the engines' exhaust systems and the risk of exhaust sparks;
- (iv) failing to adequately inspect the locomotives and rail cars to ensure that the Coal Train was in proper working order and free of missing or broken equipment which would pose a fire risk;

(v) failing to ensure that the Coal Train was equipped with systems to reduce the risk of sparks, including appropriate and functional turbochargers, spark arrestors, exhaust components, and composite brake pads; and

(vi) ~~f. Failing to maintain~~operating the Coal 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;~~populated area subject to extreme fire risk without fire suppression equipment and personnel in sufficient proximity to suppress fires ignited by the Coal Train;

b. failing to take reasonable care to maintain the tracks and right of way near mile 98.1 to reduce the risk of ignition there, including by:

(i) failing to remove combustible vegetation on and immediately adjacent to the tracks;

(ii) allowing combustible material to accumulate on or adjacent to the tracks, including coal dropped from the Coal Train and previous trains carrying coal in uncovered cars;

(iii) storing combustible material in the right of way, including discarded timbers and railway ties coated with creosote;

(iv) ~~g. Failing~~failing to douse ~~the~~potential fuel sources in the immediate vicinity of ~~its~~the tracks with ~~a~~-water-~~train~~;

(v) failing to ensure that the lubricator near mile 98 was functional, maintained, and adequate to minimize the risk of sparks resulting from friction between the wheels and rails during the curve near mile 98.1;

(vi) failing to adequately inspect or maintain the rails near mile 98.1 to detect and repair defects and damage which increased the risk of

sparks generated by friction between the wheels and rails, including warping caused by extreme heat during the afternoon of June 30, 2021;

c. failing to take reasonable care to maintain the right of way between miles 96.5 and 98.14 to reduce the risk of it becoming a vector for fire to spread around, through and into Lytton, and onto the far bank of the Thompson River, including by:

(i) failing to remove combustible vegetation on and immediately adjacent to the tracks;

(ii) allowing combustible material to accumulate on or adjacent to the tracks, including coal dropped from the Coal Train or previous trains;

(iii) storing or stockpiling combustible material in the right of way, including discarded timbers and railway ties coated with creosote; and

(iv) failing to douse potential fuel sources in the immediate vicinity of the tracks with water.

### CP Rail's Wrongful Conduct

37. CP Rail owned and maintained the Coal Train, including its three diesel-electric locomotives and 152 rail cars.

~~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 wind 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.~~

38. ~~28.~~ The following ~~actions or omissions~~ conduct of CP Rail (~~collectively, the “CP Negligent Acts”~~) caused or contributed to the Lytton Fire, ~~and constitute a breach of duty to the Plaintiff:~~ (collectively, “CP Rail’s Wrongful Conduct”):

- a. failing to adequately maintain and inspect each of the Coal Train’s three locomotives including by failing to:

- (i) inspect and maintain each locomotive's spark arrestors, eductor tubes, turbo discharge ducts, and related exhaust components to prevent oil accumulation or carbonaceous deposits which increased the risk of exhaust sparks;
  - (ii) adequately test each locomotive for exhaust system leaks and exhaust sparks;
  - (iii) adequately inspect, test and maintain each locomotive's dynamic braking system to prevent overheating in their resistor grids;
- b. failing to adequately maintain and inspect the Coal Train's 152 rail cars—including the braking systems, wheels, bearings and axles of each—for defects or damage which could increase the risk of sparks or overheating;
- c. equipping the Coal Train with systems for air braking and dynamic braking which posed a risk of overheating and emitting sparks, flames or molten metal;
- d. ~~a. Directing or requesting~~ and permitting CN Rail to operate the Coal Train in what it knew or ought to have known were unsafe prevailing conditions; through Lytton:
  - (i) without taking reasonable steps to ensure that the rails, trackside equipment, and right of way used by CN Rail were adequately maintained to minimize the risk of fires on or adjacent to the tracks;  
or
  - (ii) in a manner which increased the risk of fire, including by operating during hours of peak fire risk, running at excessive speed or load, and using excessive or sudden brake and throttle inputs.

### **The Defendants' Knowledge**

- ~~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 properly 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.~~

39. ~~29.~~ The ~~Defendants~~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~~that operating the Coal Train through Lytton on ~~or about~~the afternoon of June

~~30, 2021. The Defendants knew or ought to have known of the risk of causing or contributing to a fire, posed an unreasonable risk of harm to nearby people and property. This knowledge of risk arose from their knowledge of the following:~~

~~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 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.~~

a. freight trains such as the Coal Train can, and frequently have, ignited combustible materials near the tracks by particular mechanisms—including exhaust sparks; overheating wheels, brakes, and resistor grids; sparks generated by friction between the wheels and rails; electrical faults; and dragging metal—which, for decades, have been subjects of government regulation, technical study, and litigation in the jurisdictions in which the defendants do business;

b. Lytton had recently experienced drought and extreme heat, resulting in a fire risk rated as Extreme by the Canadian Forest Fire Danger Rating System;

c. the probability of a train emitting sparks is greater when it is loaded than when it is empty, greater when braking is required (as on a downhill gradient), and

- greater in curves than on straight sections of track—all risk factors raised by operating the Coal Train through Lytton near mile 98.1;
- d. hours earlier, another CN Rail train on the same track caught fire near Boston Bar, 39 kilometers south;
  - e. the section of CN Rail’s right of way which passed through Lytton, including mile 98.1, contained combustible material in close proximity to the tracks, including dense, dry vegetation and discarded timbers and railway ties;
  - f. the probability that a spark emitted by a passing train will successfully ignite nearby fuel sources and become a self-sustaining fire increases in certain conditions, including high air temperature, low relative humidity, prolonged absence of rainfall, strong winds, and sloped terrain—all conditions that were present near mile 98.1 of CN Rail’s right of way in Lytton on June 30, 2021; and
  - g. the same conditions increase the rate at which a fire, once ignited, will intensify and spread; and
  - h. proximity between a rail right of way and a community increases the risk that a fire in the right of way will spread to the community and reduces the likelihood of detecting and suppressing the fire before it does so. The risk created by proximity is increased where the community lies uphill or downwind of the right of way. Each geographic risk factor was present near mile 98.1 of CN Rail’s right of way on June 30, 2021,

(collectively, the “Knowledge of Risk”).

## **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:~~

40. By the conduct particularized above, the defendants caused or contributed to the Lytton Fire and caused harm to the plaintiffs and Class Members, including:

a. for the Wrongful Death Subclass:

- (i) funeral and burial costs;
- (ii) loss of financial support;
- (iii) ~~a.~~ loss of ~~real property~~ guidance;
- (iv) ~~b.~~ loss of ~~personal property~~ inheritance;
- (v) ~~c.~~ loss of ~~housing~~ household services; and
- (vi) counselling costs;

(collectively, the “Wrongful Death Losses”)

~~b. d. loss of business income.~~ for the Personal Injury Subclass:

~~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:~~

- (i) physical and psychological injuries;
- (ii) ~~a.~~ past and future loss of income and earning capacity;
- (iii) ~~b.~~ pain, suffering and loss of enjoyment of life;
- (iv) ~~c.~~ cost past and future costs of health care, ~~treatment;~~ and medication;

~~d. physical injury;~~

- (v) ~~e.~~ cost of care provided by family members; ~~and~~

(collectively, the “Personal Injury Losses”)

c. for the Real Property Subclass:

- (i) loss of and/or interference with use and enjoyment of real property;
- (ii) loss of personal property;
- (iii) business loss; and
- (iv) income loss;

(collectively, the “Real Property Losses”)

d. for the Personal Property Subclass:

- (i) loss of, damage to, or loss of use or enjoyment of, personal property;
- (ii) income loss; and
- (iii) business loss;

(collectively, the “Personal Property Losses”)

e. for the Relational Economic Loss Subclass:

- (i) business loss;
- (ii) income loss; and
- (iii) loss of opportunity;

(collectively, the “Relational Economic Losses”)

f. ~~psychological injuries.~~ for the Government Subclass:

~~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.~~

- (i) loss of and/or interference with use and enjoyment of real property;
- (ii) loss of personal property;
- (iii) business loss and/or income loss;
- (iv) fire control expenses incurred to contain and suppress the Lytton Fire;
- (v) costs of discretionary or emergency monetary relief;
- (vi) loss of timber and other natural resources; and
- (vii) costs of environmental remediation;

(collectively, the “Government Losses”); and

g. for the Subrogation Subclass, losses to members of the Real Property and Personal Property subclasses that were indemnified and subrogated pursuant to a contract of insurance, including:

- (i) loss of, and/or interference with use and enjoyment of, real or personal property; and
- (ii) economic losses, including loss of income and business interruption,

(collectively, the “Insured Losses”).

41. The plaintiffs and Class Members suffered additional, intangible losses which can be compensated only by an award of aggravated damages. The defendants’ conduct resulted in the destruction and abandonment of an entire community. Residents were evacuated and dispersed. The town site was contaminated, cordoned off and made uninhabitable for years. The nature, duration and scale of the losses suffered simultaneously by the plaintiffs and Class Members compounded and aggravated the harm to each, and inflicted additional and intangible injuries. Class Members suffered not only the tangible loss of property, but also the intangible loss of its sentimental value and historical significance. They

lost their community and their way of life. The speed and scale of the destruction amounted to the near-total erasure of a community and inflicted losses which cannot be relieved by ordinary, compensatory damages and requires awards of aggravated damages.

42. In the circumstances present on and in the days prior to June 30, 2021, and in light of their knowledge of the extraordinary risk posed by freight rail operations through Lytton at that time, defendants' conduct—including CN Rail's Wrongful Conduct and CP Rail's Wrongful Conduct—was reprehensible, reckless and callously indifferent to the interests of the plaintiffs and class members. It demonstrated a reprehensible lack of concern for public safety, or for the interests of the Class. Compensatory damages are neither intended nor adequate to denounce, punish and deter the decisions and conduct that caused the Lytton Fire. Punitive damages are required.

## Part 2: RELIEF SOUGHT

43. 36. The ~~plaintiff~~plaintiffs, on behalf of members of the Class, ~~seeks~~seek:

a. an order certifying this action as a class proceeding against the ~~Defendants~~defendants and appointing ~~the plaintiff as~~Carel Moiseiwitsch and Jordan Spinks as representative plaintiffs for the Class, and appointing Wawanesa as a representative plaintiff ~~in respect of~~for the ~~Class~~Subrogation Subclass;

b. a declaration that the Lytton Fire ~~constitutes a private and~~constituted a public nuisance;

~~c. general damages for negligence, private nuisance and public nuisance;~~

~~c. d.~~ on behalf of the ~~PI Subclass~~Class Members, the following declaratory relief and general and special damages:

(i) for the Wrongful Death Subclass, general and special damages for the Wrongful Death Losses;

(ii) for the Personal Injury Subclass, general and special damages for the Personal Injury Losses;

(iii) for the Real Property Subclass:

A. a declaration that the Lytton Fire caused substantial and unreasonable interference with real property and the use and enjoyment of real property in the area burned by the wildfire, such that it constituted a private nuisance; and

B. general and special damages for the Real Property Losses;

(iv) for the Personal Property Subclass, general and special damages for the Personal Property Losses;

(v) for the Relational Economic Loss Subclass, general and special damages for the Relational Economic Losses;

(vi) ~~(ii)~~ for the Government Subclass, general and special damages for the Government Losses; and

~~(iii) past and future costs of health care services pursuant to the *Health Care Costs Recovery Act*, SBC 2008, c. 27;~~

(vii) for the Subrogation Subclass, special damages in the amount of insurance indemnities paid in relation to the Insured Losses.

d. ~~e.~~ punitive damages;

e. ~~f.~~ aggravated damages;

f. ~~g. pre-judgment~~ pre-judgment and post-judgment interest pursuant to the *Court Order Interest Act*, RSBC 1996, c 78, s 128; and

g. ~~h.~~ such further and other relief as this Honourable Court may deem just.

### Part 3: LEGAL BASIS

44. ~~37.~~ The ~~Plaintiff~~plaintiffs' claims are based on the following causes of action advanced on ~~her~~their own behalf and on behalf of the Class:

- a. negligence;
- b. public nuisance; ~~and~~
- c. private nuisance; ~~;~~ and
- d. the rule in *Rylands v. Fletcher*.

### ***Negligence***

45. ~~38.~~ The Lytton Fire was caused by the defendants' negligence ~~of the Defendants~~and resulted in losses and injuries to the plaintiffs and Class Members.

46. ~~39.~~ The ~~Defendants~~defendants each owed duties of care to the ~~Plaintiff~~plaintiffs and the Class Members. arising from their proximity and the reasonable foreseeability that failing to exercise proper care with respect to whether and how to operate the Coal Train on CN Rail's right of way in Lytton on June 30, 2021, could cause harm to the plaintiffs and Class Members.

47. ~~40.~~ ~~The conduct of the Defendant~~ CN Rail ~~fell below~~did not meet the standard of care required of a railway operator in the circumstances. Particulars of conduct by CN Rail's breachesRail that breached its standard of care, as currently known to the ~~Plaintiff~~plaintiffs, include ~~the CN Negligent Acts~~Rail's Wrongful Conduct as defined in Part 1.

48. ~~41.~~ ~~The conduct of the defendant~~ CP Rail ~~fell below~~did not meet the standard of care required of a railway operator in the circumstances. Particulars of conduct by CP Rail's breachesRail that breached its standard of care, as currently known to the ~~Plaintiff~~plaintiffs, include ~~the CP Negligent Acts~~Rail's Wrongful Conduct as defined in Part 1.

~~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**

49. The defendants' conduct—including CN Rail's Wrongful Conduct and CP Rail's Wrongful Conduct—caused the Lytton Fire, which constituted a public nuisance insofar as it caused substantial and unreasonable interference with public rights, such as:

~~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 and Crown land;
- b. access to infrastructure, such as roads and highways;
- c. access to utilities, including electricity ~~and~~ natural gas, water, and internet and telephone networks; and
- d. access to commerce.

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

50. ~~45.~~ ~~The Defendants~~defendants' conduct in ~~causing the Lytton Fire annoyed, injured, or endangered the comfort, health, convenience and safety of the Plaintiff and the Class.~~operating the Coal Train on June 30, 2021, was in furtherance only of a private, profit-making enterprise and lacked any social utility—adequate or at all—to outweigh the risk posed to the plaintiffs and Class Members and the significance of the harm inflicted on them.

51. By causing the Lytton Fire, the defendants substantially and unreasonably interfered with plaintiffs' and Class Members' access to and enjoyment of public rights, and inflicted losses on them which differed, in type and degree, from any

suffered by the Canadian public with which the defendants interact as federal corporations and Class 1 national freight rail carriers, including:

- a. loss of access to local public property, Crown land, public services, infrastructure, utilities and commerce on which the plaintiffs and Class Members depended to a greater degree, and in a different manner, than other Canadians;
- b. out-of-pocket expenses resulting from their rapid evacuation and prolonged displacement from the Lytton town site, which was contaminated and cordoned off;
- c. for members of the Personal Property Subclass, the Personal Property Losses;
- d. for members of the Real Property Subclass, the Real Property Losses;
- e. for members of the Relational Economic Loss Subclass, the Relational Economic Losses;
- f. for members of the Personal Injury Subclass, the Personal Injury Losses;
- g. for the Wrongful Death Subclass, the Wrongful Death Losses; and
- h. for the Subrogation Subclass, the Insured Losses.

### **Private Nuisance**

52. The defendants' conduct constituted a private nuisance. It caused the Lytton Fire and caused substantial and unreasonable interference with Class Members' use and quiet enjoyment of real property which they owned, occupied, or had an interest in, including by damaging, destroying, or contaminating real property so as to:

- a. diminish or prevent their use and quiet enjoyment of the property;
- b. render it unusable or inaccessible;

- c. diminish its value;
- d. increase the cost and complexity of remediation and reconstruction; and
- e. cause Real Property Losses, Personal Property Losses and Insured Losses.

53. This interference was particularly unreasonable because, *inter alia*:

- a. the Village of Lytton and the surrounding areas are residential communities whose residents do not meaningfully benefit from the operation of the Defendants' trains through and/or in close proximity to their neighbourhoods;
- b. the interference, including but not limited to damage and/or destruction of and restriction of access to land, was severe;
- c. the interference has prevented the Real Property Subclass Members from inhabiting and/or using the land in the same manner that they did prior to the Lytton Fire and is ongoing;
- d. The Defendants' conduct in operating the Coal Train on June 30, 2021, was in furtherance only of a private, profit-making enterprise and lacked any social utility—adequate or at all—to outweigh the risk posed to the Real Property Subclass members and the significance of the losses inflicted on them. Alternatively, any utility did not outweigh the significance of the interference with Real Property Subclass Members' ability to use and enjoy their land; and
- e. the Defendants did not take adequate precautions to prevent and/or mitigate the cause and/or spread of the Lytton Fire, including through CN Rail's Wrongful Conduct and CP Rail's Wrongful Conduct.

**Private Nuisance and The rule in 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, particular during the conditions of extreme fire hazard that prevailed at all times material to this action.~~

54. CN Rail is strictly liable under the rule in *Rylands v. Fletcher* for losses inflicted on the plaintiffs and Class Members by its non-natural use of its land in Lytton on June 30, 2021.

55. CN Rail owned, occupied, maintained and operated the railway right of way land, at or near mile 98.1 of the Ashcroft Subdivision, where the Coal Train ignited the Lytton Fire. The fire was ignited in the course, and as a result, of CN Rail using its right of way land in Lytton to operate and move the Coal Train on June 30, 2021.

56. Operating and moving the Coal Train—particularly in the conditions of extreme fire risk present on June 30, 2021—constituted a non-natural use of land which was adjacent to and upwind of the Lytton town centre and other residential property, and thus created a hazard to those adjacent lands and persons which was extraordinary and unreasonable. While posing an extraordinary risk to adjacent lands and persons, the defendants' use of the right of way served only their private business interests, and was not for the benefit of individuals who resided in or around Lytton and the surrounding communities. Alternatively, any benefit was incidental and did not constitute a general benefit to the community.

57. On June 30, 2021, CN Rail brought onto its land in Lytton substances which were likely, if not certain, to escape the Coal Train and CN Rail's own land and likely, if not certain, to cause harm to adjacent lands and persons when they did so. These substances included:

a. superheated air, oil, and carbonaceous substances contained in and produced by three large, mobile internal combustion engines;

b. heat and electrical current generated by three dynamic braking systems which used resistors to convert the enormous kinetic energy and inertia of the loaded Coal Train into electricity and heat;

c. heat and sparks generated by hundreds of mechanical braking systems which used friction to slow the Coal Train;

d. heat and sparks generated by hundreds of metal wheels which used metal-on-metal friction to turn the Coal Train through a curved track in CN Rail's right of way land; and

e. 152 uncovered, mobile containers filled to their brims with more than 20,000 tons of flammable coal, some of which fell, or was blown as windborne dust, onto CN Rail's lands and adjacent lands, providing potential means of ignition and sources of fuel for fires.

58. One or more of these hazardous substances escaped the Coal Train and escaped CN Rail's land. In particular:

a. the Coal Train's three locomotives, by design, vented hot exhaust gasses out of their internal combustion engines, into the air and onto CN Rail's land and adjacent lands;

b. while braking as it passed through Lytton, resistor grids in the Coal Train's three dynamic braking systems generated more than 600 volts of electricity and used fans to expel the resulting hot air out of the locomotives and onto CN Rail's land and adjacent lands;

- c. the Coal Train's hundreds of metal wheels and pneumatic brake shoes generated heat and sparks on the exterior of the Coal Train; and
- d. flammable coal dust was blown from the Coal Train and lumps of coal spilled onto CN Rail's land and adjacent lands as it passed the vicinity of mile 98.1.

59. As a result of the escape of one or more of the hazardous substances above from the Coal Train and from CN Rail's right of way land, the Lytton Fire was ignited, sustained, and spread, resulting in damage to the Plaintiffs and Class Members.

~~Plaintiff's address for service: Gratl & Company  
Barristers and Solicitors  
511-55 East Cordova Street  
Vancouver, BC V6B 0A5  
Attn: Jason Gratl~~

addresses for service: ~~Camp Fiorante Matthews Mogerman~~ Plaintiffs'  
CFM Lawyers LLP  
400-856 Homer Street  
Vancouver, BC V6B 2W5  
Attn: Reidar Mogerman, **QCK.C.**

or

Slater Vecchio LLP  
1800 – 777 Dunsmuir Street  
Vancouver, BC V7Y 1K4  
Attn: Anthony Vecchio, K.C.

Place of Trial: Vancouver Law Courts

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

~~800 Smithe Street  
Vancouver, BC V6Z 2E1~~

Date: ~~August 18, 2021~~

\_\_\_\_\_

Signature of ~~Lawyer~~ lawyer for ~~Plaintiff~~ the plaintiffs

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 (4<sup>th</sup> Supp.)