IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lytton First Nation v. Canadian Pacific Railway Limited,* 2025 BCSC 763

Date: 20250425
Docket: S234686
Registry: Vancouver

2025 BCSC 763 (CanLII)

Between:

Lytton First Nation and Chief Niakia Hanna, on his own behalf and as representative of the Members of Lytton First Nation

Plaintiffs

And

Canadian Pacific Railway Limited, Canadian Pacific Railway Company, Canadian National Railway Company, e-Verifile.com, Inc., doing business as eRailSafe Canada, His Majesty the King in Right of Canada as represented by the Attorney General of Canada, Crown-Indigenous Relations and Northern Affairs Canada, Indigenous Services Canada, Transport Canada, His Majesty the King in Right of the Province of British Columbia as represented by the Attorney General of British Columbia, the Ministry of Transportation and Infrastructure, the Ministry of Forests, Lands, Natural Resource Operations and Rural Development and BC Wildfire Service, the Ministry of Emergency Management and Climate Readiness, the Village of Lytton, John Doe Company No. 1, John Doe Company No. 2, John Doe Company No. 3, and John Doe Company No. 4

Defendants

- and -

Docket: S234734
Registry: Vancouver

Between:

Cook's Ferry Indian Band and Chief Christine Walkem, on her own behalf and as representative of the Members of Cook’s Ferry Indian Band

Plaintiffs

And

Canadian Pacific Railway Limited, Canadian Pacific Railway Company, Canadian National Railway Company, e-Verifile.com, Inc., doing business as eRailSafe Canada, His Majesty the King in the Right of Canada as represented by the Attorney General of Canada, Crown-Indigenous Relations and Northern Affairs Canada, Indigenous Services Canada, Transport Canada, His Majesty

the King in Right of the Province of British Columbia as represented by the Attorney General of British Columbia, the Ministry of Transportation and Infrastructure, the Ministry of Forests, Lands, Natural Resource Operations and Rural Development and BC Wildfire Service, the Ministry Of Emergency Management and Climate Readiness, John Doe Company No. 1, John Doe Company No. 2, John Doe Company No. 3, John Doe Company No. 4

Defendants

- and -

Docket: S234735
Registry: Vancouver

Between:

Siska and Chief Fred Sampson, on his own behalf and as representative of the Members of Siska

Plaintiffs

And

Canadian Pacific Railway Limited, Canadian Pacific Railway Company, Canadian National Railway Company, e-Verifile.com, Inc., doing business as eRailSafe Canada, His Majesty the King in the Right of Canada as represented by the Attorney General of Canada, Crown-Indigenous Relations and Northern Affairs Canada, Indigenous Services Canada, Transport Canada, His Majesty the King in Right of the Province of British Columbia as represented by the Attorney General of British Columbia, the Ministry of Transportation and Infrastructure, the Ministry of Forests, Lands, Natural Resource Operations and Rural Development and BC Wildfire Service, the Ministry Of Emergency Management and Climate Readiness, John Doe Company No. 1, John Doe Company No. 2, John Doe Company No. 3, John Doe Company No. 4

Defendants

Before: The Honourable Justice Branch

Reasons for Judgment

Counsel for the Plaintiffs, Cook's Ferry Indian Band and Chief Christine Walkem, Chief Niakia Hanna and Lytton First Nation, Chief Fred Sampson and Siska:	R.B. Fraser A. Jacobs
Counsel for the Defendant, e-Verifile.com, Inc.:	E.A. Dolden S. Vorbrodt

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Counsel for the Defendant, the Village of Lytton:	J. Copithorne, Articling Student
Place and Date of Hearing:	Vancouver, B.C. March 24, 2025
Place and Date of Judgment:	Vancouver, B.C. April 25, 2025

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I. INTRODUCTION

[1] This is an application by the defendant, e-Verifile.com Inc. (“e-Verifile”), seeking to dismiss the three above-noted actions (the “First Nations Actions”) against it under either Rule 9-5 or 9-6 of the *Supreme Court Civil Rules*. For the reasons expressed below, I conclude that the application should be adjourned until such time as the lead defendants, Canadian Pacific Railway Limited, Canadian Pacific Railway Company (together, “CP”) and Canadian National Railway Company (“CN”), have produced at least some documents.

II. BACKGROUND

[2] The plaintiffs bring claims on behalf of three First Nations for losses sustained as a result of a fire that destroyed the Village of Lytton and surrounding areas (the “Fire”)

[3] There is an array of individual, class and representative actions that have been filed by persons affected by the Fire (the “Actions”). I am case managing all of the Actions. The background and litigation history of the Actions is reviewed in the following decisions:

a) *Moiseiwitsch v. Canadian National Railway Company*, 2022 BCSC 331 (the “Carriage Decision”), appeal dismissed 2022 BCCA 321 (the “Carriage Appeal”),

b) *O’Connor v. Canadian Pacific Railway Limited*, 2023 BCSC 1371 (the “Certification Decision”); and

c) *Moiseiwitsch v. Canadian National Railway Company*, 2025 BCSC 230 (the “Document Production Decision”)

(Collectively, the “Decisions”)

[4] I will not repeat any facts set out in the Decisions, but simply review the additional facts and evidence necessary for the resolution of the present application.

[5] The First Nation Actions were filed on June 29-30, 2023.

[6] In the First Nation Actions, in addition to claims for loss and damage suffered by the First Nations themselves, the plaintiffs bring representative actions on behalf of the members of their First Nation community for any damages or loss suffered by each individual member. The plaintiffs seek compensation for damage to their traditional territory; destruction of sacred sites, cultural artifacts and historical landmarks; business and economic losses; loss of traditional hunting, fishing and harvesting; loss of personal property; adverse health consequences; the cost of providing alternative facilities and accommodation to members whose homes were destroyed, and financial support to those who have lost their livelihoods. The plaintiffs claim that the total damages will be in excess of $57.6 million.

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[7] One of the defendants in the First Nation Actions is the applicant e-Verifile (which is now called CARCO Group, Inc. following a merger).

[8] The plaintiffs plead that e-Verifile was responsible for vetting and training CN and CP employees and subcontractors. They essentially allege that e-Verifile was negligent as follows. e-Verifile failed to ensure that CP, CN, and John Doe Company No. 1 to 4 were properly trained and capable of fulfilling their responsibilities. Particular include failing to:

a) comply with statutory requirements;

b) safely operate, monitor and maintain equipment and railway lines;

c) implement and enforce fire safety, detection and prevention policies;

d) ensure that CN and CP personnel and contractors were properly trained and supervised.

[9] e-Verifile filed their responses to the civil claims (the “Responses”) on December 22, 2023. In the Responses, e-Verifile denies that it had a substantive training role. It pleads that its services to the railways were limited to the following: conducting background checks on employees of railway contractors; delivering access to training programs; and issuing credentials for their online training.

[10] On February 6, 2024, Dayna Mizowek, the Vice-President of Client Success for e-Verifile, swore an affidavit (the “Mizowek Affidavit”). This affidavit asserts that:

a) e-Verifile administers a program called eRailsafe.

b) Railroad operators, including the defendants CP and CN, used its program to ensure that “personnel who need access to railroad properties in Canada have passed specified background screening, taken a safety test and received a proper identification badge”.

c) Contractors who are vendors supplying services to railroad operators use e-Verifile’s system to comply with the requirements mandated by their railroad industry clients.

d) Contractors' employees use the system to register for background checks and to take online training programs.

e) eRailsafe was designed by a committee of railway companies, including CP and CN. The committee sets certain minimum requirements that must be included as part of an eRailsafe certification. This includes certain background checks and a “short security awareness training course”. In addition, railroad operators can require individuals to undergo additional background checks and training.

f) Other than the required background checks, neither CN nor CP required additional background checks to be performed.

g) Both CN and CP provided their own training and testing courses which e-Verifile hosted and administered.

h) eRailsafe obtains the required background checks for each individual, assesses them in accordance with the railroad company’s adjudication criteria, and advises the railroad company whether the individual has passed the background checks and completed the specified courses.

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The railway companies retain decision-making authority with respect to the suitability or approval of any given contractor's employee.

i) If the railway company approves a contractor's employee, e-Verifile will issue a credential, in the form of a badge, to the contractor's employee.

j) e-Verifile does not regulate railway activities and has not been issued any order or direction by a Canadian railway safety inspector.

k) e-Verifile does not manage fire risk in British Columbia or anywhere else.

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[11] e-Verifile argues that while it is technically accurate to summarize the services provided by e-Verifile as "vets and trains subcontractors located in BC for CP Rail and CN Rail," e-Verifile does so only by:

a) confirming that a given contractor is a legitimate corporate entity;

b) facilitating background checks of contractor employees; and

c) enabling online delivery of the security awareness training course and the railway companies' own training courses.

[12] It was unclear from the record whether CN/CP's own courses offered through e-Verifile's system touched on fire safety, fire prevention or fire mitigation, or how any such courses may have been branded or labelled by e-Verifile.

[13] On September 16 and 23, 2024, Mr. Steve Vorbrodt, the lawyer for e-Verifile, wrote to counsel for the First Nation Plaintiffs, seeking availability for a proposed summary judgment application.

[14] The Mizowek Affidavit was not delivered to the plaintiffs until late 2024. e-Verifile delivered a list of documents on October 18, 2024. However, at the hearing of the present applications, e-Verifile confirmed that its production did not include:

a) documents showing the content of the website or websites e-Verifile created for use by CN and CP employees and subcontractors;

b) copies of the badges provided by e-Verifile to the employees and subcontractors tested through its system.

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[15] The parties eventually agreed that e-Verifile's application could be brought on March 24, 2025. However, the plaintiffs say that they agreed to this date with the expectation that full document production from all the key parties would have occurred by then. That did not occur. The Document Production Decision deferred production of CN and CP's initial tranche of documents until August 1, 2025.

[16] The plaintiffs accept that the pleading allegations relating to e-Verifile are general in nature at this stage. They assert that more complete details will not be known until:

a) CN and CP complete their document production; and

b) there is an examination for discovery of an e-Verifile representative.

[17] On September 25, 2024, counsel for e-Verifile wrote to plaintiffs' counsel asking whether the plaintiffs wanted to examine Ms. Mizowek.

[18] On December 16, 2024, plaintiffs' counsel advised counsel for e-Verifile that he wanted to conduct an examination for discovery of Ms. Mizowek between January 13 and February 15, 2025. On January 6, 2025, e-Verifile advised that Ms. Mizowek has now retired. e-Verifile did offer to make her replacement, Ms. Diana Carter, available. The plaintiffs continued to insist that Ms. Mizowek be the representative. e-Verifile continued to offer examination dates for Ms. Carter.

[19] It was only on March 10, 2025, that e-Verifile confirmed in a definitive way that Ms. Mizowek would not attend any discovery. e-Verifile did not provide any detail on its efforts to secure her attendance, such as whether any compensation or expense reimbursement was offered.

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III. ANALYSIS

A. Rule 9-5

[20] The first provision relied upon by e-Verifile is Rule 9-5. Claims may be struck under Rule 9-5(1)(a) for failing to disclose a cause of action.

[21] In considering a Rule 9-5(1)(a) application, the Court must consider the application based on the pleadings as they stand or with amendments as might reasonably be made: *Murray Market Development Inc. v. Casa Cubana*, 2018 BCSC 568 at para. 7.

[22] Although e-Verifile alleges that the plaintiffs have failed to plead all material facts necessary to support a cause of action, I find that the pleadings meet the test, particularly given that the evaluation must be based on the pleadings as they may be amended. e-Verifile did not aggressively argue otherwise, accepting that it was relying primarily on Rule 9-6, which I address below.

[23] Specifically, it is clear that an allegation of negligent training leading to damages can form the basis for a cause of action: see, for example, *Trans North Turbo Air Ltd. et al. v. North 60 Petro Ltd.*, 2003 YKSC 18 at paras. 231-238; *Rockwood et al. v. Noel's Motor & Transit Ltd.*, [1997] N.J. No. 155, 1997 CanLII 15952 at para. 25.

[24] Here, it is at least arguable that:

a) It is foreseeable that a failure to train railway employees could result in injury to persons along the railway line;

b) CN and CP cannot avoid responsibility for properly training their employees by contracting it out to a company such as e-Verifile;

c) By contractually assuming the training responsibility on behalf of CN and CP, e-Verifile arguably enters into a proximate legal relationship: *Beazley v. Suzuki Motor Corporation*, 2008 BCSC 13, paras. 46-51; *Winnipeg*

Condominium Corporation No. 36 v. Bird Construction Co., 1995 CanLII 146 (SCC), [1995] 1 SCR 85, at para 43.

[25] Of course, e-Verifile denies accepting any training responsibility. But that issue must be determined based on the evidence. On the face of the pleadings, there is a proper cause of action plead. If e-Verifile requires evidence to make out its case for dismissal, that can only be considered under its alternative ground—Rule 9-6.

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B. Rule 9-6

[26] The claim for dismissal pursuant to his rule requires a more detailed evaluation, given the ability of the applicant to rely on evidence rather than being required to simply accept the pleading.

[27] Rules 9-6(4) and 9-6(5)(a) allow the Court to dismiss the Plaintiffs' claim where there is no genuine issue for trial. The Rule prevents claims with no chance of success from proceeding to trial: *Pantusa v. Parkland Fuel Corporation*, 2020 BCSC 1988 at para 19; *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at paras. 11-12.

[28] A defendant can meet its onus under this rule by adducing sworn evidence, which is a complete answer to the plaintiff's case. If the court is satisfied that there is no genuine issue for trial and the plaintiff has no chance of success, the defendant should succeed: *Beach Estate v. Be*ach, 2019 BCCA 277 at para. 48; *Williams v. Audible Inc.*, 2022 BCSC 834 at paras. 54-56.

[29] In *Xiao v. Fan*, 2020 BCSC 69, Justice Crerar reviewed the circumstances in which a summary judgment application may be premature:

> [48] A respondent to a summary judgment application may also argue that the application is premature as there may exist material evidence that has not yet come to light, but stands a reasonable prospect of emerging in the court of discovery and disclosure. This possibility forms an exception to the general rule that summary judgment applications should be determined on the evidence actually before the court. The purpose of the summary judgment rule "is to prevent claims or defences that have no chance of success from proceeding to trial and not to prevent actions that have some potential of

> succeeding from developing through the discovery process": *Nextgear* at para. 39. In other words, "there may be circumstances in which an application for summary judgment may be premature, such as where a party has not had an opportunity to develop evidence through the discovery process on issues raised in the pleadings": *Veritas Geophysical (Nigeria) Limited v Engergulf Resources Inc.*, 2010 BCSC 1253 at para. 34.
>
> [49] The mere fact that the discovery process is not yet complete is not enough in itself to resist summary judgment. Rather the respondent must articulate "some specificity" for the claim that the discovery process may uncover relevant evidence: *Nextgear* at para. 39. As explained in *Bank of Montreal v Scotia Capita Inc.*, 2002 NSSC 252 (cited in *Coady v Burton Canada*, 2012 NSSC 257, which is cited in *Nextgear* at para. 39) there must be "an indication, at least in a very limited way supported by the circumstances, that the discovery, either oral or often more likely of documents, stands a possible opportunity to confirm an allegation" (at para. 23). In other words, the respondent must demonstrate there is a reasonable prospect further discovery will reveal the existence of a triable issue. In these circumstances, a final order of summary judgment is not warranted; there is still a reasonable doubt about whether a triable issue may yet emerge.

[30] On its face, the Mizowek Affidavit is reasonably compelling in terms of distancing e-Verifile from potential liability. If e-Verifile simply hosted a website that housed CN and CP's own training materials, that may not be enough to bring it within the requisite proximate relationship with the plaintiffs. One might draw a parallel to suing a corner copy shop that printed the key training manual (in the old economy), a farcical suggestion.

[31] However, in my view, there is enough in the record to sustain the pleading for the time being, considering (1) the current state of the evidence, and (2) the need for further evidence. I come to this conclusion for two reasons:

a) From a legal perspective, there remains a viable path to judgment even if you accept the content of Mizowek Affidavit.

b) From an evidentiary perspective, there are material gaps to fill that could impact the proper outcome of any Rule 9-6 application.

[32] In terms of accepting the content of the Mizowek Affidavit, the affiant does accept that e-Verifile took on one key substantive responsibility that goes beyond the

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"copy shop" analogy. e-Verifile did perform the criminal records checks for each employee and subcontractor.

[33] As an extreme example then, it is at least possible that e-Verifile could have botched its criminal records check such that a convicted serial arsonist was allowed to work for the train operator. Negligent hiring has been recognized as a potential basis for tort liability in British Columbia: *Wilson v. Clarica Life Insurance Co*., 2002 BCCA 502 at paras. 13-15; *Massie v Provincial Health Services Authority*, 2023 BCSC 1275 at para. 46. In *CMA v. Just Energy L.P. and Glen Lancaster*, 2012 ONSC 3524 at paras. 32-40, the court allowed such a negligent hiring plea to stand where the core allegation related to the relevant employee's prior alleged fraudulent criminal activity, at least insofar as the probative value of the pleas exceeded the prejudicial effect.

[34] There may be other less extreme scenarios that could also trigger liability.

[35] e-Verifile suggests that such potentially tortious scenarios are too far-fetched to support the claim in the face of a Rule 9-6 application. However, it is difficult for the Court to accept that conclusion before the production of the CN/CP documents. It is true that such production may quickly answer the question whether any potentially implicated employee had cleared a criminal record check, but that cannot be known until the CN/CP document production.

[36] Given the import of this document production, I am not inclined to dismiss the application outright, but rather to adjourn it generally so that it can be brought back on once the CN/CP document production has commenced. Although it cannot be known with certainty whether the hiring due diligence documents will be in the first production tranche or not, I encourage CN and CP to include such documents in this tranche given their import to e-Verifile's status in the case.

[37] The potential effect of additional document production extends to e-Verifile's own production. I raised with counsel two other potential avenues of liability, the consideration of which depends on the availability of more fulsome document production from e-Verifile itself, specifically:

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a) Did e-Verifile purport to undertake more direct responsibility for employee and contractor training and quality on the face of its website pages? (i.e. to a level inconsistent with the Mizowek Affidavit?)

b) Did e-Verifile purport to sanction the suitability of employees and employers through its provision of the approval badges discussed in the Mizowek Affidavit? For example, counsel was unable to answer whether the badges may have used language such as "eRailSafe Canada Safety Approved". Such positive undertakings could have an effect on the viability of any tort claim against e-Verifile. Proximity may be established where a defendant undertakes to provide a representation or service in circumstances that invite the plaintiff's reasonable reliance: *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 at paras. 32-33.

[38] Although the parties have an obligation to put their best foot forward on a Rule 9-6 application (*Royal Bank of Canada v. Superior Flood and Fire Restoration*, 2020 BCSC 1803 at para. 42, rev'd on other grounds 2021 BCCA 383), and these claims were filed nearly two years ago, I do not fault the plaintiffs for not having yet secured all the oral or documentary discovery necessary to argue these issues fully. The issue of who would or could be produced for discovery carried on into March 2025, notwithstanding the general rule that the examining party gets to choose the representative to be examined: *XS West Construction Group v. Brovender,* 2021 BCSC 917 at para. 19. It was only in March that e-Verifile declared its position that only Ms. Carter would be made available. Further, e-Verifile has not yet provided sufficient information to allow the Court to assess whether it has "genuinely attempted to facilitate" Ms. Mizowek's attendance, which the Court in *Strata Plan LMS 923 v. Appia Developments Limited*, 2004 BCSC 233, at para. 18 treated as a relevant consideration. The plaintiffs have also not had time to consider whether they may wish to seek the assistance of letters rogatory to assist in compelling Ms. Mizowek's participation notwithstanding her refusals.

[39] On the documentary discovery side, the obligation falls initially on e-Verifile under Rule 7-1(1), and the Court has identified gaps in that production.

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[40] Lastly, in terms of the plaintiffs' ability to put its best foot forward today, CN/CP's document production was tied up in separate applications and was only resolved recently.

[41] For these reasons, I find that the application under Rule 9-6 should be adjourned until such time as the CN/CP document production has taken place. Furthermore, e-Verifile should consider ensuring that its next document production covers the theories of liability noted above before bringing the application back on for a hearing.

[42] At this time, I find that the plaintiffs have "not had an opportunity to develop evidence through the discovery process on issues raised in the pleadings.": *Xiao*, para. 48.

IV. CONCLUSION

[43] The application is adjourned as set out above.

[44] Unless there are facts or arguments of which I am unaware, the plaintiffs shall be entitled to their costs of this application in the cause. If either counsel wishes to advance an argument for a different costs disposition, they may arrange to address the point before me at 9:00 a.m. via MS Teams on a mutually agreeable date.

"The Honourable Mr. Justice Branch"

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