# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Moiseiwitsch v. Canadian National Railway Company*,
2025 BCSC 230

Date: 20250214
Docket: S217469
Registry: Vancouver

Between:

**Carel Moiseiwitsch**

Plaintiff

And

**Canadian National Railway Company and Canadian Pacific Railway Company**

Defendants

**See Schedule "A" for Additional Styles of Cause**

Before: The Honourable Justice Branch

## Reasons for Judgment

| | |
|---|---|
| Counsel for Carel Moiseiwitsch: | R. Mogerman, K.C. |
| Counsel for Canadian National Railway Company: | P. Williams |
| Counsel for Canadian Pacific Railway Company: | M. Eizenga<br>I. Ishai<br>K. Andrews |
| Counsel for Attorney General of Canada: | H. Davis |
| Counsel for Attorney General of British Columbia: | K. Kotliarsky |
| Counsel for Lytton First Nation and Chief Niakia Hanna: | S. Batkin |

| | |
|---|---|
| Counsel for Christopher O'Connor and Jordan Spinks: | A. Vecchio, K.C.<br>V. Cheung<br>J. Giovannetti<br>S. Jaworski |
| Counsel for Village of Lytton: | S. Gladders<br>R. Lau |
| Place and Date of Hearing: | Vancouver, B.C.<br>January 13-14, 2025 |
| Place and Date of Judgment: | Vancouver, B.C.<br>February 14, 2025 |

# Table of Contents

## I. INTRODUCTION

[1] This is an application by the defendants to defer their document discovery obligations in actions brought by individual plaintiffs allegedly injured as a result of the fire that occurred in Lytton, BC on June 30, 2021 (the "Fire").

[2] The many class and individual actions regarding the Fire before me for case management are set out in the style of cause above and at Schedule "A".

[3] In summary, I am not prepared to issue an unconditional stay of the document discovery process, but I am willing to temporarily pause the obligation to allow certain steps in the proposed class actions to be taken first. Specifically, I am prepared to defer the production of the first tranche of documents to August 1, 2025.

## II. BACKGROUND

[4] After the Fire, many parties initiated litigation, including two proposed class actions and several individual actions. The early history of these proceedings is reviewed in a series of decisions issued regarding carriage and class certification, reported at *Moiseiwitsch v. Canadian National Railway Company*, 2022 BCSC 331 (the "Carriage Decision"), appeal dismissed 2022 BCCA 321 (the "Carriage Appeal"), and *O'Connor v. Canadian Pacific Railway Limited*, 2023 BCSC 1371 (the "Certification Decision").

[5] In the Certification Decision, the Court declined to certify, but provided that the plaintiff could amend his pleading. Following this decision, the losing plaintiff in the earlier Carriage Decision filed an application asking the Court to reconsider the question of carriage. Before that application could be heard, the plaintiffs in the two competing class actions came to an agreement to move their matters forward together under the *Moiseiwitsch* style of cause. A timetable has been established that will move that class proceeding forward to a consideration of certification on fresh pleadings on October 1-3, 2025. The parties to the proposed class actions are also considering whether a conditional trial window should be reserved for late 2026 or early 2027.

[6] As noted, there are also cases advanced by individual parties:

a) The First Nation Litigation: There are three representative actions advanced by three First Nations.[1] They have indicated that they will opt out of any certified class action that includes them within the class definition, and will also argue at any certification hearing that they should be excluded from any certified class definition. These plaintiffs oppose any deferral of the document discovery obligation in their actions. They do remain open, however, to the prospect that there could be a joint liability trial with any certified class action. The First Nation Litigation includes claims against the Federal and Provincial Governments, and Transport Canada. These are claims not advanced in the *Moiseiwitsch* class action. The First Nation Litigation plaintiffs allege that the Federal and Provincial Governments failed to adequately prepare for, and respond to, the Fire. They also allege that the Federal Government failed to provide proper funding for fire protection services prior to the fire. Further, the Lytton First Nation's claim alleges that the Village of Lytton breached agreements regarding fire protection and water services.

b) The Institutional Litigation: There are two institutional actions, one advanced by the Village of Lytton and the other by Inland Health.[2] They have also indicated that they will likely opt out of any certified class action. They do not agree with an unrestricted deferral of the document production obligation in their actions, but are prepared to agree that a deferral of 12-18 months would be appropriate.[3]

c) The Subrogated Litigation: There is an action advanced by 117 insureds who seek to, at a minimum, advance the subrogated interests of their

[1] *Lytton First Nation v. Canadian Pacific Railway Limited; Cook's Ferry Indian Band v. Canadian Pacific Railway Limited; Siska v. Canadian Pacific Railway Limited* (the "First Nation Litigation")
[2] *Interior Health Authority v. Canadian Pacific Railway Limited; Village of Lytton v. Canadian National Railway Company* (the "Institutional Litigation")
[3] It should be noted that in addition to being a plaintiff, the Village of Lytton is simultaneously a defendant in the claim brought by the Lytton First Nation. In that latter matter, they have adopted a contrary position and consent to the applicant defendants' proposed orders.

insurers.[4] They do not agree with an unrestricted deferral of the document production obligation within their action. They suggest that a deferral of 12 months would be appropriate. They have not yet determined whether they will opt out of any certified class proceeding that includes their claims.

d) The *Liptrot* Litigation: There is an individual action filed on behalf of a single potential class member by proposed class counsel in the *Moiseiwitsch* litigation.[5] However, in light of the carriage agreement, counsel confirmed that Mr. Liptrot will participate in any certified class action and will not be seeking to move his litigation forward pending a certification decision.



[7] I will refer to these cases collectively as the "Non-Class Action Litigation" or "NCA Litigation". The present applications to defer discovery are advanced in each matter within the NCA Litigation.

[8] On these applications, defendants Canadian National Railway Company, Canadian Pacific Railway Company, Canadian Pacific Railway Limited, and the Attorney General of Canada seek the following order:

> An order under Rules 7-1(1) and 22-4(2) extending all Rule 7-1(1) document discovery deadlines in this action until:
>
> > (a) 35 days after any and all class certification applications in *O'Connor et al. v. Canadian Pacific Railway Limited*, Action No. 560588, Kamloops Registry and *Moiseiwitsch v. Canadian Pacific Railway Company et al*, Action No. S217469, Vancouver Registry are finally resolved, inclusive of appeals or requests for reconsideration; or
> >
> > (b) this Court otherwise orders.[6]

[4] *Thoms v. Canadian Pacific Railway Limited* (the "Subrogated Litigation")
[5] *Liptrot v. Canadian National Railway Company* (the "*Liptrot* Litigation")
[6] Canadian National Railway Company and Canadian Pacific Railway Company filed applications seeking this order in each of the NCA Litigation actions. The Attorney General of Canada only filed applications in the First Nation Litigation actions. Canada is also a defendant in the Institutional and Subrogated Litigation, but says that since it has not yet filed its Response in those actions, the Rule 7-1 discovery timeline has not yet begun. This judgment should not be read as addressing this issue.

## III. ANALYSIS

[9] The relevant *Supreme Court Civil Rules* are Rule 7-1(1), requiring each party to prepare and serve a list of documents within 35 days after the pleadings close; Rule 22-4(2), allowing a court to extend time periods even after they have expired; and Rule 1-3 which states that the object of the *Rules* "is to secure the just, speedy and inexpensive determination of every proceeding on its merits" and that this involves a consideration of proportionality.

[10] The defendants accept that they bear the burden of justifying a stay of their document production obligations. They also accept that the Court may exercise its discretion in the management of the array of case-managed proceedings before it. They acknowledge that any decision under Rule 22-4(2) involves weighing the request for extension against any prejudice the plaintiffs will experience as a result of the delay: *Liang v. Barnard*, 2022 BCSC 491 at para. 13. Nonetheless, they argue there are good reasons to place a pause on their document discovery obligations, most notably:

a) It is not clear that the pleadings in the NCA Litigation are settled, and any change could affect the scope of their discovery obligations. They argue that amendments are inevitable because the pleadings in the NCA Litigation are flawed or ambiguous. Thus, it would be unfair to impose a document discovery obligation at this time.

b) If discovery is ordered now, there is a risk that its content will improperly bleed into (and complicate) the class certification process.

c) There is no urgency to provide discovery, particularly in light of the fact that many of the NCA Litigation plaintiffs waited until nearly the expiry of the limitation period to file their actions and have done little to move them forward since that time. In particular, the plaintiffs have not even produced their own documents.

d) It would be more efficient to provide discovery at one time across all actions. As such, it makes sense to wait and see what happens in the class certification process before activating the discovery obligations.

[11] In my view, none of these reasons is sufficient to justify an indefinite deferral of the document discovery obligation. I address each below.

### A. Status of the Pleadings

[12] The defendants argue that the Certification Decision highlighted several weaknesses in the *O'Connor* pleading – weaknesses that exist equally in the NCA Litigation pleadings.

[13] The NCA Litigation plaintiffs, particularly the plaintiffs in the First Nation Litigation, respond that they carefully reviewed the Certification Decision, and are comfortable that their pleadings can withstand any attack. They note that their pleadings are not identical to those critiqued in the Certification Decision, and are arguably better particularized. The First Nation Litigation plaintiffs also note that they may have arguments that the duty of care is heightened in Indigenous litigation.

[14] I accept that the Certification Decision does not inevitably or automatically require amendments to the NCA Litigation pleadings, not least because the NCA Litigation plaintiffs were not parties to the Certification Decision.

[15] The NCA Litigation plaintiffs also note that if the defendants were of the view that their pleadings were flawed or ambiguous, they had more direct remedies to address that problem than applying to stay their discovery obligations. Specifically, they could bring (or should have brought) applications to strike or applications for particulars.

[16] I agree that these types of applications would have been a more logical way to address any perceived pleadings failings.

### B. Risk to the Certification Process

[17] In my view, the risk to the certification process is overstated. Any discovery offered in the NCA Litigation will be protected from improper disclosure to the plaintiffs in the proposed class proceeding by the implied undertaking rule.

[18] There was a problematic aspect that could have arisen in relation to the application of the implied undertaking rule in the *Liptrot* litigation, given that counsel in this individual case overlapped with one of the firms carrying the proposed *Moiseiwitsch* class action. But this risk has now dissipated as a result of Mr. Liptrot's agreement to stand down his case pending certification, and his commitment to participate in any certified class action.

[19] There is a small residual risk created by the fact that it is possible that any documents produced will find their way into publicly filed affidavits that could be accessed by proposed class counsel before certification. However, this risk is highly attenuated by the following factors:

a) There are no applications presently planned in the NCA Litigation in advance of the new certification hearing, minimizing the likelihood that there will be a raft of affidavits filed; and

b) There is no right to file material on certification that is not relevant to certification. Hence, it would only be a very limited set of materials where there could be any risk of information "bleeding" into the certification process.

### C. Urgency

[20] The First Nation Litigation plaintiffs argue that the proposed orders sought would be prejudicial to them since discovery could be delayed for years. They note that in *Liang,* the court appeared to accept that a delay of even a few months could be prejudicial: para. 13.

[21] In terms of the alleged lack of urgency by the NCA Litigation plaintiffs up to this point, the First Nation Litigation plaintiffs note that it is their right to evaluate their position up to the expiry of the limitation period. I accept that proposition. They also note that their conduct since filing has been reasonably diligent. In terms of their own document production, they agree that any order should be "two-way", i.e. that the defendants should not be required to produce their documents until the plaintiffs have also produced their own.

[22] I do not find that the NCA Litigation plaintiffs have somehow waived their right to insist on compliance with the *Rules* through their conduct to date. They have moved their proceedings forward with reasonable dispatch in complex circumstances.

### D. Efficiency Concerns

[23] The defendants' submission on efficiency is that it would be more appropriate for all the case-managed Lytton Fire cases to stay on the same discovery track. As such, it makes sense to slow down discovery in the NCA Litigation, so that its discovery process aligns with any discovery that will occur in the class litigation. They analogize to the approach to discovery in class proceedings, where discovery is generally stayed until after certification: *Mentor Worldwide LLC v. Bosco*, 2023 BCCA 127 at paras. 35-38.

[24] There are several difficulties with this argument.

[25] At a fundamental level, if accepted as a global proposition, it would undercut the structure of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, which provides for an unconditional opt-out right in s. 16. The provision of an opt-out right recognizes that there will be individuals for whom it will be more efficient to pursue claims outside the class proceeding rather than being tied to the result (or the timing) of the class proceeding. Most of the NCA Litigation plaintiffs unequivocally assert that they will opt out of any certified class proceeding. I note that there are no restrictions on the opt-out right – class members do not have to prove that their case is sufficiently distinct from the class proceeding, nor that there is a good reason supporting their

decision to opt out. The *Class Proceedings Act* provides that the right may be exercised without question and without the application of any test.

[26] As the plaintiff in *Liptrot* argues, “Certification is a procedural screening mechanism for proposed class actions, not a means by which a defendant can aggregate and arrest individual actions in the hopes that the outcome of certification will prove them ‘untenable’”.

[27] At a more case-specific level, the First Nation Litigation plaintiffs note that their case includes allegations against the Federal Government that will never be considered in the proposed class proceeding, given that the plaintiffs in *Moiseiwitsch* made the conscious decision not to pursue this defendant. Having to wait to pursue their case for a class proceeding that will never develop the merits against one of their key defendant targets would be unfair.

[28] At a policy level, Mr. Mogerman K.C., counsel for Ms. Moiseiwitsch, notes that the reason that the document discovery obligation in a class action is deferred is that courts do not want to burden a defendant with the cost of discovery until it is clear that the provision of any discovery will be necessary, and what boundaries will apply to such discovery in light of the certified common issues. Furthermore, if the case is not certified, there is often a high likelihood that the underlying claim will never be pursued (and hence no discovery will ever be required). If certified, the certification decision will often adjust the causes of action as well as the proposed common issues, each of which will alter the scope of the discovery obligation.

[29] These same purposes are not as compelling in individual cases such as the NCA Litigation. As it stands, the pleadings are closed in the NCA Litigation and no motions to strike have been brought. Furthermore, there will never be a certification process in the NCA Litigation that could alter the scope of the discovery obligation.

[30] I agree that this is a persuasive basis supporting a decision not to interfere with the discovery obligations in the NCA Litigation.

[31] The defendants rely on *Canada v. Hudson*, 2024 FCA 33 at para. 47 where the court stated:

> [47] … Multiple proceedings, whether individual actions or class proceedings, that litigate the same issue are inefficient and expensive, cause delay in the administration of justice, and waste scarce judicial and other resources: *Vaeth v. North American Palladium Ltd*., 2016 ONSC 5015 at para. 37; *Apotex Inc. v. Bayer Inc*., 2020 FCA 86 at para. 45. They entail the possibility of inconsistent results and can be prejudicial to a defendant, forced to defend the same allegations on multiple fronts. The need to avoid a multiplicity of class proceedings must, however, always be balanced with the objective of access to justice: *Jensen v. Samsung Electronics Co., Ltd*., 2019 FC 373 at para. 22.



[32] The Subrogated Litigation plaintiffs point out that *Hudson* is distinguishable in that it concerned an appeal from an order declining to stay two proceedings which were alleged to be duplicative of two already certified class actions. They note that the defendants fail to specify how proceeding with document production according to the *Rules* would “cause delay in the administration of justice” or “entail the possibility of inconsistent results” as outlined in *Hudson*. Further, as noted by the First Nation Litigation plaintiffs, the concerns raised in *Hudson* regarding a multiplicity of proceedings can still be addressed through the ongoing case management. I agree with these submissions.

## E. Countervailing Considerations

[33] The NCA Litigation and *Moiseiwitsch* plaintiffs note that there could actually be a benefit to early production. If and when certification is granted, some of the groundwork will already have been performed in relation to discovery, work that can be rolled into the defendants' required efforts in any certified class proceeding. I accept that this would be a benefit.

[34] Also, the narrower the discovery obligations, the less prejudice to the defendants. Here, the First Nation plaintiffs made it clear that they are not seeking document production in relation to damages, but only in relation to liability and causation. They also accept that any document production in the NCA Litigation may be on a rolling basis, given the complexity of the action and the likely volume of

documentation. I agree that these are both reasonable restrictions and will help control the cost and expense of the discovery for the applicant defendants.

### F. Final Practical Considerations

[35] In conclusion, subject to my comments below, I do not find any special reason or adequate basis supporting the exercise of my discretion to issue an unlimited extension of the defendants' discovery obligations. Indeed, there are compelling reasons for beginning the discovery process immediately.

[36] That said, I agree that there should be a more limited deferral of the discovery obligation. At a practical level, the defendants will require some time to put together a reasonably useful initial list, particularly in the face of several of the defendants' simultaneous responsibility to prepare materials responsive to class certification. As such, I would issue the following orders in each NCA Litigation matter (save for *Liptrot*):

> The defendants shall deliver the first tranche of their list of documents to [the appropriate NCA Litigation plaintiff[s]] by August 1, 2025.
>
> The [appropriate NCA Litigation plaintiff] shall also deliver the first tranche of their list of documents by August 1, 2025.
>
> Until further order of the court, all lists of documents shall be confined to documents relevant to liability and causation.

"The Honourable Mr. Justice Branch"

## SCHEDULE A: STYLES OF CAUSE OF THE OTHER CASE MANAGED PROCEEDINGS

- *Lytton First Nation and Chief Niakia Hanna, on his own behalf and as representative of the members of Lytton First Nation v. Canadian Pacific Railway Limited, Canadian Pacific Railway Company, Canadian National Railway Company, Crown-Indigenous Relations And Northern Affairs Canada, E-Verifile.Com, Inc., His Majesty The King In Right Of The Province Of British Columbia As Represented By The Attorney General Of British Columbia, His Majesty The King In The Right Of Canada As Represented By The Attorney General Of Canada, Indigenous Services Canada, BC Wildfire Service, The Ministry Of Forests, Lands Natural Resource Operations And Rural Development, The Ministry Of Emergency Management And Climate Readiness, The Ministry Of Transportation And Infrastructure, The Village Of Lytton, Transport Canada, John Doe Company No. 1, John Doe Company No. 2, John Doe Company No. 3, John Doe Company No. 4* (Action No. S234686).

- *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 v. Canadian Pacific Railway Limited, Canadian Pacific Railway Company, Canadian National Railway Company, Crown-Indigenous Relations And Northern Affairs Canada, E-Verifile.Com, Inc., His Majesty The King In Right Of The Province Of British Columbia As Represented By The Attorney General Of British Columbia, His Majesty The King In The Right Of Canada As Represented By The Attorney General Of Canada, Indigenous Services Canada, BC Wildfire Service, The Ministry Of Forests, Lands Natural Resource Operations And Rural Development, The Ministry Of Emergency Management And Climate Readiness, The Ministry Of Transportation And Infrastructure, Transport Canada, John Doe Company No. 1, John Doe Company No. 2, John Doe Company No. 3, John Doe Company No. 4* (Action No. S234734).

- *Siska and Chief Fred Sampson, on his own behalf and as representative of the members of Siska v. Canadian Pacific Railway Limited, Canadian Pacific Railway Company, Canadian National Railway Company, Crown-Indigenous*

*Relations And Northern Affairs Canada, E-Verifile.Com, Inc., His Majesty The King In Right Of The Province Of British Columbia As Represented By The Attorney General Of British Columbia, His Majesty The King In The Right Of Canada As Represented By The Attorney General Of Canada, Indigenous Services Canada, BC Wildfire Service, The Ministry Of Forests, Lands Natural Resource Operations And Rural Development, The Ministry Of Emergency Management And Climate Readiness, The Ministry Of Transportation And Infrastructure, Transport Canada, John Doe Company No. 1, John Doe Company No. 2, John Doe Company No. 3, John Doe Company No. 4* (Action No. S234735).

- *Interior Health Authority, Provincial Health Services Authority, British Columbia Emergency Health Services, The Board of School Trustees of School District No. 74 (Lytton) V. Canadian Pacific Railway Limited, Canadian Pacific Railway Company, Canadian National Railway Company, Transport Canada, Jane Doe, John Doe* (Action No. S234510).

- *Thoms, et. al v. Canadian Pacific Railway Limited, Canadian National Railway Company, Canadian National Railway Company, Attorney General Of Canada, His Majesty The King In The Right Of The Province Of British Columbia As Represented By The Attorney General Of British Columbia, Ministry Of Forests, Lands, Natural Resource Operations And Rural Development Of British Columbia, Transport Canada, John Doe #1, John Doe #2, ABC Company #1, ABC Company #2, ABC Company #3, ABC Company #4, ABC Company #5, ABC Company #6* (Action No. S234544).

- *Village of Lytton, Thompson-Nicola Regional District V. Canadian National Railway Company, Attorney General of Canada, Canadian Pacific Railway Company* (Action No. S234395).

- *Darren Liptrot v. Canadian National Railway Company, Canadian Pacific Railway Company* (Action No. S241391).