

[Translation]

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-06-000521-100

DATE: October 21, 2013

PRÉSIDIANT: THE HONOURABLE CHANTAL MASSE, J.S.C.

GAÉTANNE CUMMINGS

Applicant

vs.

VIA RAIL CANADA INC.

Respondent

JUDGMENT

Introduction

- [1] **WHEREAS** the Court is seized of a Motion for authorization to institute a class action for the purposes of the final approval of a settlement, presented on October 16, 2013, hereinafter the "**Motion**";
- [2] **WHEREAS**, on September 1, 2010, the Applicant, Gaétane Cummings, filed a motion with the office of the Superior Court of Montreal seeking authorization to institute a class action against the Respondent, VIA Rail Canada Inc. ("**VIA**"), and to be ascribed the status of representative of the members of the group described below (the "**Motion for Authorization**");

“All persons residing in Canada with a disability who are Wheelchair reliant for their mobility and who used the services offered by the defendant or who were deprived of its services due to the inaccessibility of their rail cars.”

- [3] **WHEREAS**, on May 30, 2013, before the Motion for Authorization was presented for adjudication and further to good faith negotiations, the Applicant and VIA (collectively the “Parties”) reached a Settlement Agreement (the “**Settlement Agreement**” or “**Settlement**”), **Schedule A** to this judgment;

Settlement Agreement

- [4] **WHEREAS** the Applicant and the Respondent have agreed to the terms and conditions of the Settlement Agreement subject to approval by the Court and without any admission whatsoever by the Respondent VIA and for the sole purposes of bringing an end to the litigation between the Parties;

- [5] **WHEREAS** the Settlement Agreement provides as follows:

- (a) That the institution of the class action outlined in the Settlement Agreement be authorized against VIA for the sole purposes of the approval of the Settlement Agreement;
- (b) That the designated group, for the purposes of the authorization, is defined as follows:

Group A: all persons residing in Canada with a disability who are permanently reliant on a Wheelchair for their mobility and who personally purchased a train ticket from VIA for a trip which said persons took between August 31, 2007 and August 31, 2010 between Toronto and Vancouver with a least one night onboard in a rail car with sleeping compartments used by VIA in the trains that namely travel between Toronto and Vancouver (“**Sleeper Car**”).

Group B: all persons residing in Canada with a disability who are permanently reliant on a Wheelchair for their mobility, who are not Group A Members, and who want to travel onboard a VIA train for a trip between Toronto and Vancouver with at least one night onboard in a Renovated Park Sleeper Car, with an accessible double sleeping compartment, which is scheduled to be put into service by VIA between Toronto and Vancouver in 2014 (“**Renovated Sleeper Car**”), within the year following the putting into service by VIA of said Renovated Sleeper Car.

(collectively the “**Group**”);

- (c) That the common question on the basis of which the Parties have agreed to settle the class action is the following:
- Are the VIA Rail cars, which travel between Toronto and Vancouver, accessible?
- (d) That VIA agrees to settle the class action but continues to deny having contravened any obligations whatsoever;
- (e) That the Parties have agreed to settle the class action on a national basis;
- (f) That the Superior Court of Québec shall maintain jurisdiction for the application, enforcement and execution of the terms and conditions of the Settlement and that the Parties and their attorneys defer to such jurisdiction;
- (g) That the members of the Group had and have access to a telephone line dedicated to the class action (1-855-882-7979 or TTY 1-800-268-9503), to the Group's attorney (450-586-4905) and to the Internet site dedicated to the class action (www.viarail.ca/en/classaction) to obtain further information or to answer any questions they may have about the class action or its settlement;
- (h) That VIA:
- (i) Shall assume the costs of disseminating and publishing the notices;
 - (ii) Shall assume the costs related to the administration of the Settlement Agreement;
 - (iii) Shall assume the fees and disbursements of the Applicant's and the Group's attorney;
 - (iv) Is in the process of adapting accessible sleeper cars in its Renovated Sleeper Cars as defined in the Settlement Agreement;
- (i) The Settlement Agreement provides for the following time limits:
- (i) The Notice to the 49 Group A Members, the Media Notice and the Notice on VIA's Internet site were to be sent and/or published within 30 days of the Preliminary Judgment, that is, before July 20, 2013;
 - (ii) Any Request for Exclusion/to Opt Out of the Settlement Agreement by a Group A Member or a Group B Member had to be sent within 30 days of the Media Notice, that is, before midnight on August 15, 2013;
 - (iii) Any objection to the Settlement Agreement had to be sent within 10 days preceding the Motion for Final Approval, that is, before midnight on October 7, 2013;
 - (iv) The Notice of Final Judgment must be published on VIA's Internet site within 2 days of this judgment;
 - (v) The fees of the Applicant's attorney must be paid within 60 days of this judgment;

- (vi) The Settlement Agreement does not provide for any time limit for the payment of the agreed sum to the Applicant but the Parties have agreed that this sum shall be remitted to the Applicant within 60 days of this judgment;
- (vii) Any Claim Form 1-A or Claim Form 1-B must be sent to VIA before midnight on the 120th day following this judgment;
- (viii) The Credit to Group A Members must be used within 12 months following this judgment;
- (ix) The Notice of Putting Into Service of the Renovated Sleeper Cars must be published on VIA's Internet site within 2 days following the putting into service of said Renovated Sleeper Cars;
- (x) The Discount for Group B Members must be used within 12 months following the putting into service of the Renovated Sleeper Cars

Notices to members of the Group

[6] **WHEREAS** in accordance with the Settlement Agreement and in accordance with the Preliminary Judgment rendered by the Court on June 20, 2013, approving the publication of the Notices to the members:

- (i) VIA has disseminated and published the Notice on VIA's Internet site, the Media Notice and the Notice to the 49 Group A Members;
- (ii) VIA put a web page dedicated to the class action on-line at www.viarail.ca/en/classaction within 30 days of the Preliminary Judgment;
- (iii) Between July 11 and 16, 2013, VIA published the Media Notice in 42 newspapers across Canada, namely in the following newspapers: The Globe and Mail, Vancouver Province, Vancouver Sun, Victoria Times Colonist, Edmonton Journal, The Edmonton SUN, Stony Plain Reporter (Weekly), Prince George Citizen, Calgary Sun, Calgary Herald, Regina Leader-Post, Saskatoon StarPhoenix, Hudson Bay Post, Winnipeg Free Press, The Winnipeg SUN, Toronto Star, Toronto SUN, Ottawa Citizen, The Ottawa SUN, London Free Press, The Londoner (Weekly), Kingston Whig-Standard (Daily Community), Niagara Falls Review (Daily Community), Sarnia This Week (Weekly), The Observer (Daily Community), Recorder & Times (Daily Community), Windsor Star, The Sudbury Star (Daily Community), Montreal Gazette, La Presse, Journal de Montréal, Journal de Québec, Le Soleil, Le Droit, Times and Transcript, The Chronicle Herald, Daily Gleaner, The Guardian, Telegram, Whitehorse Star, Yellowknifer, News/North;

[7] **WHEREAS** the Notice on VIA's Internet site, the Media Notice and the Notice to the 49 Group A Members were disseminated and published in French and in English;

Authorization

- [8] **WHEREAS** the Respondent, VIA, agrees to the authorization of the class action for the sole purposes of the final approval of the Settlement, which consent shall be withdrawn if the Court does not approve the Settlement Agreement;
- [9] **WHEREAS** where the Applicant agrees to the authorization of the Settlement for the sole purposes of the approval of the Settlement, the criteria established under Article 1003 C.C.P. are mitigated;
- [10] **WHEREAS** the mitigation of the criteria established under Article 1003 C.C.P. as well as the allegations of this Motion and the exhibits in support thereof, including the affidavit of the Applicant, Ms. Cummings, overall justify that the Court grant this Motion;

Approval

- [11] **WHEREAS** the Court approves the Settlement Agreement as fair, reasonable and in the best interest of the members of the Group by basing itself on the following factors established by jurisprudence:
- Probability of the recourse's success;
 - Importance and nature of the evidence produced;
 - Terms, conditions and advantages of the Settlement Agreement;
 - Recommendation of the attorneys and their experience;
 - Cost of future expenses and likely length of the litigation;
 - The number and nature of objections and exclusions/opt out requests;
 - Good faith of the Parties and absence of collusion;
- [12] **WHEREAS**, more specifically, the Court finds that:
- i. No objection was raised by the members of the Group;
 - ii. The negotiations transpired in good faith and without any collusion;
 - iii. The risk, cost, complexity and likely length of the litigation support the approval of the Settlement Agreement;

- iv. The credit and discount program offered to the members of the Group is fair, reasonable and merits the Court's approval;
- v. The Parties' attorneys, who have experience in class action matters, recommend the approval of the Settlement Agreement;

Fees of the Applicant's attorney

- [13] **WHEREAS** no member of the Group has objected;
- [14] **WHEREAS** the Respondent assumes the payment of the fees of the Group's attorney and the members of the Group do not suffer any prejudice;
- [15] **WHEREAS** the Court approves the expenses and fees of the Applicant's attorney up to a maximum of \$95,000 as being fair and reasonable;
- [16] **WHEREAS** no member of the Group requested exclusion or opted out;
- [17] **CONSIDERING** the Motion presented by the Applicant to obtain a judgment authorizing the Class Action for the sole purposes of the final approval of the Settlement;
- [18] **CONSIDERING** the elements of proof adduced in support of said Motion, *inter alia*:
- (a) The exhibits; and
 - (b) The affidavit of the Applicant Gaétane Cummings;
- [19] **GIVEN** the representations of the attorney of the Group and of the Applicant Gaétane Cummings and the representations of the Respondent's attorney;
- [20] **WHEREAS** the Parties intend to comply with Sub-section 1(3) of the *Regulation respecting the percentage withheld by the Fonds d'aide aux recours collectifs*, RRQ, c R-2.1, r 2;
- [21] **GIVEN** Article 1025 of the *Code of Civil Procedure*.

FOR THESE REASONS, THE COURT:

- [22] **GRANTS** this Motion;

- [23] **AUTHORIZES** a class action against the Respondent for the sole purposes of a settlement in accordance with the terms and condition of the Settlement Agreement (Schedule A);

The Applicant / representative

- [24] **ASCRIPTIONS** to the Applicant the status of representative to the Group defined as follows:

Group A: all persons residing in Canada with a disability who are permanently reliant on a Wheelchair for their mobility and who personally purchased a train ticket from VIA for a trip which said persons took between August 31, 2007 and August 31, 2010 between Toronto and Vancouver with a least one night onboard in a rail car with sleeping compartments used by VIA in the trains that namely travel between Toronto and Vancouver ("**Sleeper Car**").

Group B: all persons residing in Canada with a disability who are permanently reliant on a Wheelchair for their mobility, who are not Group A Members, and who want to travel onboard a VIA train for a trip between Toronto and Vancouver with at least one night onboard in a Renovated Park Sleeper Car, with an accessible double sleeping compartment, which is scheduled to be put into service by VIA between Toronto and Vancouver in 2014 ("**Renovated Sleeper Car**"), within the year following the putting into service by VIA of said Renovated Sleeper Car.

hereinafter the "**Group**";

Fair and reasonable Settlement Agreement

- [25] **DECLARES** that, for the application of this judgment, the definitions set out in the Settlement Agreement between the Applicant and the Respondent, dated May 30, 2013, attached to this judgment as **Schedule A**, apply and are incorporated herein by reference;
- [26] **DECLARES** that the Settlement Agreement and its Schedules form an integral part of this judgment;
- [27] **DECLARES** that the Settlement Agreement reached between the Applicant and the Respondent, including the schedules attached thereto, constitute a transaction within the meaning of Articles 2631 and following of the *Civil Code of Québec*, binding all the parties and all the members of the Group who did not request exclusion or did not opt out;

- [28] **DECLARES** that the Settlement Agreement reached between the Applicant and the Respondent, including the schedules attached thereto, is valid, fair, reasonable and is in the best interest of the members of the Group, the Applicant and the Respondent;
- [29] **APPROVES** the Settlement Agreement, **Schedule A** to this judgment;
- [30] **DECLARES** that the French version of the Settlement Agreement constitutes the agreement between the Parties on which they have agreed and that this French version takes precedence and that the English version is only a translation, in that, in the event of discrepancy between the French and the English version, the French version shall take precedence;
- [31] **ORDERS** the Parties and the members of the Group, except those who have requested exclusion or opted out in accordance with the Settlement Agreement, to comply with the Settlement Agreement, **Schedule A** to this judgment;

Exclusions/opting out and objections

- [32] **DECLARES** that the deadline given to the members of the Group to request exclusion or to opt out was August 15, 2013, that is, the 30th day after July 16, 2013;
- [33] **DECLARES** that all the members of the Group who did not request exclusion or who did not opt out within this time limit that expired on August 15, 2013 are bound by the Settlement Agreement and may no longer request exclusion or opt out in the future;
- [34] **DECLARES** that the deadline to object to the Settlement Agreement was October 7, 2013;
- [35] **DECLARES** that all the members of the Group who did not object before October 7, 2013 may no longer do so;

Claim forms

- [36] **APPROVES** Claim Form 1-A essentially as per the format of the form attached as **Schedule B-1A** to this judgment;
- [37] **APPROVES** Claim Form 1-B essentially as per the format of the form attached as **Schedule B-1B** to this judgment;

Notice of Final Judgment and Notice of Putting Into Service

- [38] **APPROVES** the Notice of Final Judgment essentially as per the format of the notice attached as **Schedule C** to this judgment;
- [39] **APPROVES** the Notice of Putting Into Service of the Renovated Sleeper Cars essentially as per the format of the notice attached as **Schedule D** to this judgment;

Indemnities and fees

- [40] **APPROVES** the payment of the sum of \$31,666.67 to the Applicant in accordance with the Settlement Agreement, **Schedule A** to this judgment, which sum shall be paid to the Applicant within 60 days of this judgment;
- [41] **APPROVES** the payment of the maximum sum of \$95,000 to the Applicant's and the Group's attorney as judicial and extrajudicial fees, disbursements and expenses, which sum shall be paid within 60 days of this judgment;

Timetable

- [42] **ACKNOWLEDGES** and **APPROVES** the timetable regarding the administration of the Settlement Agreement, in accordance with the Settlement Agreement, as follows:
- (i) Orders that the Notice of Final Judgment, **Schedule C** to this judgment, be published within 2 days of this judgment;
 - (ii) Orders that the sum of \$31,666.67 be paid to the Applicant within 60 days of this judgment;
 - (iii) Orders that the fees of a maximum of amount of \$95,000 be paid to the Applicant's attorney within 60 days of this judgment;
 - (iv) Orders that Claim Form 1-A or 1-B (**Schedules B-1A** and **B-1B** to this judgment) be sent to the Respondent before midnight on the 120th day following this judgment;
 - (v) Orders that the Credit to Group A Members must be used within 12 months of this judgment;
 - (vi) Orders that the Notice of Putting Into Service of the Renovated Sleeper Cars (**Schedule D** to this judgment), be published within 2 days of the Renovated Sleeper Cars being put into service;
 - (vii) Orders that the time limit to use the Discount for Group B Members be 12 months following the putting into service of the Renovated Sleeper Cars;

Enforceability of the Settlement

- [43] **DECLARES** that each member of the Group who makes a claim pursuant to the Settlement Agreement is irrevocably deemed to have agreed to the withdrawal, without costs and without prejudice against the Respondent, and, by the effect of this judgment, all claims that a member of the Group has or may have had against VIA and its predecessors, successors and assigns, directly or indirectly associated with the allegations of the Class Action or in any other manner related thereto are settled without any other recourse against VIA, in accordance with the terms and conditions of the Settlement Agreement;
- [44] **ORDERS** and **DECLARES** that this judgment, including the Settlement Agreement, binds each member of the Group who has not validly requested exclusion from or opted out of this class action;
- [45] **ORDERS** and **DECLARES** that on the date of this judgment, all the members of the Group shall have given release and discharge and shall be definitively deemed to have given full, final, irrevocable and perpetual release and discharge to the Respondent with regard to any claim directly or indirectly associated with the allegations of this class action;
- [46] **ORDERS** and **DECLARES** that on the date of this judgment, no member of the Group shall institute, continue, maintain or assert, whether directly or indirectly, in Quebec or elsewhere in Canada, on their own initiative or on behalf of any group or any other person, any action, proceedings, cause of action, claim or demand whatsoever against the Respondent or any person who might claim a contribution or an indemnity from the Respondent with regard to any claim directly or indirectly associated with the allegations of this Class Action or in any other related manner;
- [47] **DECLARES** that the Court shall maintain an ongoing monitoring role, for the purposes of the execution of this judgment and **NOTES** that the Applicant and the Respondent recognize the Court's jurisdiction for such purpose;
- [48] **RESERVES** the Parties' right to apply to the Court to resolve any dispute whatsoever arising from the Settlement Agreement;
- [49] **THE WHOLE** without costs.

Chantal Masse, J.S.C.

Me Jean Yanakis

Counsel for Applicant

Me Joëlle Boisvert

Counsel for Respondent

Hearing date : October 16, 2013

Translation