

COURT OF APPEAL FOR ONTARIO

CITATION: Tree-Techol Tree Technology v. VIA Rail Canada Inc., 2017
ONCA 876

DATE: 20171116

DOCKET: C63445

MacFarland, Hourigan and Benotto JJ.A.

BETWEEN

Tree-Techol Tree Technology and Research Company Inc., 1374007 Ontario Ltd.
And Bryan M. McNair

Plaintiffs (Respondents)

and

VIA Rail Canada Inc. and Canadian National Railway Company

Defendants (Respondents)

Bronwyn N. Martin and B. Robin Moodie, for the appellant Intact Insurance Company

Tom Hanran, for the respondents VIA Rail Canada Inc. and Canadian National
Railway Company

E. Savas, for the respondents Tree-Techol Tree Technology and Research Company
Inc., 1374007 Ontario Ltd. And Bryan M. McNair

Heard and released orally: October 26, 2017

On appeal from the order of Justice Donald J. Gordon of the Superior Court of
Justice, dated February 1, 2017.

REASONS FOR DECISION

[1] An insured is under no obligation contractually or statutorily to include an insurer's subrogated claim in its action. Only if an insurer chooses to pursue such a claim is an insured then required to cooperate and not compromise the insurer's claim. Were it otherwise, there would no need to give an insurer a right to subrogate. Here, the insurer was well aware of all the facts. The insureds had had to commence a claim against Intact Insurance Company (their insurer) to recover all their losses

covered by the policy, they were adverse in interest and may still be in respect of certain aspects of the claim.

[2] The fact that the insurer missed the limitation period cannot be cured by an application for intervenor status. Intact had the right to commence a subrogated claim, but just as the motion judge put it, forgot to do so. Its claim was out of time and the appeal is dismissed. Costs to the Respondents VIA Rail and Canadian National Railway fixed in the sum of \$12,000 and to the respondent non-party in the sum of \$8000 – both inclusive of disbursements and HST.

“J. MacFarland J.A.”

“C.W. Hourigan J.A.”

“M.L. Benotto J.A.”