Court of Queen's Bench of Alberta

Citation: Klassen v Canadian National Railway Company, 2022 ABQB 280

Date: 20220419
Docket: 1903 13250
Registry: Edmonton

Between:

Norman Klassen

Plaintiff

- and -

Canadian National Railway Company

Defendant

Reasons for Decision, Application for Certification of a Class Action and Application for Summary Dismissal of the Honourable Mr. Justice James T. Neilson

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[1] This action has been brought by the proposed representative Plaintiff, Norman Klassen, on behalf of a class persons who are or were residents of Parkland County, Alberta during the relevant class period. The action is based in nuisance, alleging that the Defendant, Canadian National Railway Company (CN) continued the use of train whistles at specific crossings in Parkland County notwithstanding steps taken by the County to require CN to cease the ongoing operation of whistles at the crossings.

[2] CN, in response, asserts that it has complied with all regulatory requirements for the cessation of train whistles at the subject level crossings within the County and has filed an application for summary dismissal on the grounds that the action has no merit against it.

[3] CN operates the Edson Subdivision, its main transcontinental line through Parkland County in an east-west, west-east direction. Before a second line was opened in 2018, an average of 29 trains passed through the County each day. That number has since increased.

[4] The Plaintiff Klassen had submitted a petition to the County of Parkland signed by over 100 residents in the vicinity of 12 level crossings at issue. Following the request of the petitioning residents, the County passed a bylaw on September 20, 2017, requesting CN to cease train whistles at the subject crossings.

[5] CN states that it took the required steps under federal regulation to cease the train whistles at varying times. The Plaintiff alleges that any whistle cessation was not completed on a timely basis, hence the claim in nuisance.

Application for Certification of the Class Action

[6] S. 5(1) of the *Class Proceedings Act*, S.A. 2003, c C-16.5 sets out the five preconditions to certification of a class action:

a) the pleadings disclose a cause of action;

b) there is an identifiable class of 2 or more persons;

c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;

d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,

i. will fairly and adequately represent the interests of the class,

ii. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

iii. does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

[7] The Alberta Court of Appeal has recently affirmed the test for certification in ***Spring v Goodyear Canada Inc.***, 2021 ABCA 182 at paragraphs 17 and 18 as follows:

> [17] The representative plaintiff must establish all five of the preconditions to certification found in s. 5 of the *Class Proceedings Act*. If those five preconditions are met, the action must be certified; if they are not met, the application for certification must be dismissed.
>
> [18] The certification process plays a screening role, but it is limited in scope. At the certification stage, the judge is ruling on a purely procedural question. The judge must not deal with the merits of the case, as they are to be considered only after the application for certification has been granted: ***L'Oratoire Saint-Joseph du Mont-Royal v J.J.***, 2019 SCC 35 at para. 7...

[8] The Alberta Court of Appeal has given further guidance as to sufficient facts to support the application for certification as a class proceeding in ***Fisher v Richardson GMP Limited***, 2022 ABCA 123 at paras 34-36:

> The court must certify the action as a class proceeding where all the requirements of subsections 5(1)(a) to (e) are satisfied. If the requirements are not met, the certification application must be dismissed: *CPA*, ss. 5(3) and 5(4); *Spring* at para 17.
>
> The applicant must show there is some "basis in fact" for each of the statutory requirements, except for the requirement that the pleadings disclose a cause of action. This criterion is governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is plain and obvious that no claim exists: *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at paras 63 and 99, citing *Hollick v Toronto (City)*, 2001 SCC 68 at para 25; *Warner* at paras 12-14.
>
> The "basis in fact" standard has been described as "sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of...the *CPA* not having been met": *Pro-Sys* at para 104. The evidentiary burden is not onerous and requires only a minimum evidentiary basis: *Warner* at para 13, citing *Hollick* at paras 24-25 and *Stewart v General Motors of Canada Ltd*, [2007] OJ No 2319 (SCJ). This is consistent with the principle that the certification hearing is not a determination of the merits of the claim: *CPA*, s. 6(2). It is, instead, a procedural application concerned with the *form* of the action: *Warner* at para 10, citing *Pardy v Bayer Inc*, 2004 NLSCTD 72 at para 91. The question is not whether the claim is likely to succeed, but whether it is appropriately prosecuted as a class action: *Hollick* at para 16.

A. Cause of Action

[9] The Statement of Claim pleads that CN has failed to cease train whistling at the subject crossings, thereby committing the tort of private nuisance.

[10] As to whether the pleadings disclose a cause of action, the Court is to "winnow out" actions which are clearly frivolous or manifestly unfounded. As with an application to strike a pleading, the Court must be satisfied that it is "plain and obvious" that the "pleadings disclose no cause of action", should the Court decline to certify on the basis of s. 5(1)(a): ***Hollick v Toronto (City)*** 2001 SCC 68 at paragraph 25.

[11] The elements of a private nuisance have ben confirmed by the Supreme Court of Canada in ***Antrim Truck Centre Ltd v Ontario (Transportation)***, 2013 SCC 13 at para 19 as follows:

> The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both substantial and unreasonable. A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances.

[12] The Supreme Court in ***Antrim*** also considered the threshold requirement at paras. 22 and 23, that "only interferences" that "substantially alter the nature of the claimant's property itself"

or interfere "to a significant extent with the actual use being made of the property" are sufficient to ground a claim in nuisance:

> [22] …substantial injury to the complainant's property interest is one that amounts to more than a slight annoyance or trifling interference. As La Forest J. put it in ***Tock v. St. John's Metropolitan Area Board***, 1989 CanLII 15 (SCC), [1989] 2 S.C.R. 1181, actionable nuisances include "only those inconveniences that materially interfere with ordinary comfort as defined according to the standards held by those of plain and sober tastes", and not claims based "on the prompting of excessive 'delicacy and fastidiousness'": p. 1191. Claims that are clearly of this latter nature do not engage the reasonableness analysis.
>
> [23] In referring to these statements I do not mean to suggest that there are firm categories of types of interference which determine whether an interference is or is not actionable, a point I will discuss in more detail later. Nuisance may take a variety of forms and may include not only actual physical damage to land but also interference with the health, comfort or convenience of the owner or occupier: ***Tock***, at pp. 1190-91. The point is not that there is a typology of actionable interferences; the point is rather that there is a threshold of seriousness that must be met before an interference is actionable.

[13] The Statement of Claim pleads particulars of the nuisance allegedly interfering with the use of the property on which the members of the proposed Class reside:

> [38] The severity of the noise pollution caused by the Defendant has and continues to have detrimental impact on Mr. Klassen and other Class Members' ability to enjoy the use of the property on which they reside. The noise pollution caused by the train whistles caused ongoing disturbance to natural sleep routines. This in turn, has and continues to cause, members of the Class physical injury as well as mental distress.
>
> [39] Due to the noise pollution caused by the train whistles, Class Members cannot fully enjoy their yards, and must constantly pause during conversations. Family members and friends refrain from visiting Class Members at their homes, especially overnight, due to the noise pollution caused by the train whistles. Overall, the noise pollution caused by train whistles has forced the members of the Class to alter their normal lifestyles and has diminished their enjoyment of their homes, especially since the summer of 2018 when class members experienced a significant increase in train activity.

[14] At the certification application stage, the Court does not embark on a consideration of the merits as to whether the elements, in this case, of the tort of private nuisance, is to be made out in the evidence. Should the action be certified, then this would be one of the common issues to be considered at the subsequent trial.

[15] As the Statement of Claim discloses a cause of action, the requirement under s. 5 (1)(a) of the *Class Proceedings Act* is met.

A.1 Application by the Defendant for Summary Dismissal

[16] During the course of the preliminary case management conferences before me, the Defendant filed an application for summary judgment on the basis that it had complied with

regulatory requirements for whistle cessation and that the action has no merit. In view of the fact that the certification application is procedural in nature, and that the actual merits of the alleged tort are not before the application judge, the Court must consider whether it is inappropriate for a summary dismissal application to proceed before the certification application. The non-exhaustive list of factors that the Court may consider include

a) any delay to the Plaintiff in proceeding with the certification application;

b) the extent to which a preliminary application may dispose of the whole action or narrow the issues between the parties;

c) the complexity and interplay of the issues that may arise in and between the precertification and the certification applications:

Cannon v Funds for Canada Foundation, 2010 ONSC 146 at para 15; ***Wright v First Service Residential,*** 2020 ABQB 705; ***Shaver v Mallinckrodt Canada ULC,*** 2021, BCSC 455.

[17] However, upon further submissions, I concluded that CN could apply for summary dismissal on a discrete issue involving statutory interpretation, that would not require assessment of the merits of the action on its facts. This way, the summary dismissal application could be heard at the same time as the scheduled certification application, given the overlapping submissions on the law. Accordingly, the parties arrived by consent on the wording of the summary dismissal issue to be considered at this stage, memorialized in the consent Procedural Order filed on May 18, 2021, as follows:

> Does the Defendant, Canadian National Railway Company, have obligations to refrain from the use of audible train warning signals and with respect to the regulatory procedure for achieving cessation of audible train warning signals pursuant to the *Railway Safety Act*, and regulations promulgated thereunder?

The Regulatory Scheme for Cessation of Train Whistles at Level Crossings

[18] Canada has implemented statutory and regulatory requirements governing the use of train whistles or horns (the parties have used those terms interchangeably) by trains approaching road crossings at grade. The governing legislation is the *Railway Safety Act*, R.S.C. 1985, c. 32(4th supp.) as amended and the regulations made pursuant to that *Act* and the standards and procedures established by the Minister of Transport under that legislation.

[19] The *Railway Safety Act* applies in respect of railways that are within the legislative authority of parliament. This includes the CN line in question.

[20] S. 3 provides that the objectives of this *Act* are to:

> (a) promote and provide for the safety and security of the public and personnel, and the protection of property and the environment, in railway operations;
>
> (b) encourage the collaboration and participation of interested parties in improving railway safety and security;
>
> (c) recognize the responsibility of companies to demonstrate, by using safety management systems and other means at their disposal, that they continuously manage risks related to safety matters; and

> (d) facilitate a modern, flexible and efficient regulatory scheme that will ensure the continuing enhancement of railway safety and security.

[21] S. 3.1 of the *Act* sets out the Minister's responsibility respecting railway safety:

> 3.1 The Minister is responsible for the development and regulation of matters to which this *Act* applies, including safety and security, and for the supervision of all matters connected with railways and, in the discharge of those responsibilities, the Minister may, among other things,
>
> > (a) promote railway safety and security by means that the Minister considers appropriate;
> >
> > (b) provide facilities and services for the collection, publication or dissemination of information;
> >
> > (c) undertake, and cooperate with persons undertaking, projects, technical research, study or investigation;
> >
> > (d) inspect, examine and report on activities related to railway matters; and
> >
> > (e) undertake other activities that the Minister considers appropriate or that the Governor in Council may direct.

[22] Appendix 2c of the *Railway Safety Act* sets out the railway locomotive inspection and safety rules. These rules provide, among other things that passenger and freight trains are to be equipped with horns meeting the prescribed specifications.

[23] The *Canadian Rail Operating Rules* prescribe certain requirements for engine whistle signals in s. 14 as follows:

> (ii) Engine whistle signals must be sounded as prescribed by this rule, and should be distinct, with intensity and duration proportionate to the distance the signal is to be conveyed. Unnecessary use of the whistle is prohibited.
>
> ...
>
> 14(l)
>
> (i) (#)At public crossings at grade:
>
> > A whistle post will be located 1/4 mile before each public crossing where required. Whistle signal must be sounded by movements:
> >
> > - exceeding 44 MPH, at the whistle post
> > - operating at 44 MPH or less, in order to provide 20 seconds warning prior to entering the crossing.
> >
> > Whistle signal must be prolonged or repeated until the crossing is fully occupied.
> >
> > EXCEPTION: Not applicable when manual protection is to be provided or when shoving equipment other than a snow plow over a crossing protected by automatic warning devices.

...

(iv)Special instructions will govern when such signal is prohibited in whole or in part.

[24] Under the *Railway Safety Act*, Grade Crossings Regulations have been passed and Transport Canada has established the Grade Crossings Standards and issued the Grade Crossings Handbook which is incorporated by reference in the Grade Crossings Standards.

[25] The *Railway Safety Act* was amended by s. 23.1, that sets out restrictions on the use of the whistle on any railway equipment:

Use of Whistles

23.1 (1) No person shall use the whistle on any railway equipment in an area within a municipality if

(a) the area meets the requirements prescribed for the purposes of this section; and

(b) the government of the municipality by resolution declares that it agrees that such whistles should not be used in that area and has, before passing the resolution,

(i) consulted the railway company that operates the relevant line of railway,

(ii) notified each relevant association or organization, and

(iii) given public notice of its intention to pass the resolution.

Ministerial decision

(2) The Minister may decide whether the area meets the prescribed requirements and the Minister's decision is final.

Exceptions

(3) Despite subsection (1), the whistle may be used if

(a) there is an emergency;

(b) any rules in force under section 19 or 20 or any regulations require its use; or

(c) a railway safety inspector orders its use under section 31.

[26] The Grade Crossings Regulations provide that a railway company must ensure compliance with the requirements of these Regulations and that a road authority must ensure compliance with the requirements of these Regulations.

[27] S. 104 of the Regulations provides as follows:

Prescribed requirements

104 For the purposes of section 23.1 of the Railway Safety Act, the following requirements are prescribed:

(a) the area must be located

(i) within a railway right-of-way, on each side of a public grade crossing, and within 0.4 km from the outer edge of the crossing surface...

(ii) within the road approach;

(b) the area must have a public grade crossing that has the applicable protection referred to in sections 105 to 107;

(c) the area must not have repeated incidents of unauthorized access to the line of railway; and

(d) the area must not require whistling for a grade crossing located outside the area.

The Eight Step Procedure

[28] Transport Canada has issued the detailed procedure to be followed if a resident who wants to stop train whistling in the neighbourhood to contact the local municipality. The municipality must follow the numbered procedure and, in brief, municipalities must

- consult with the railway company whether the request is feasible
- notify the public and others that it intends to stop the whistling
- pass a municipal council resolution

[29] The detailed procedure comes from s. 23.1 of the *Act*, s. 104 of the Grade Crossings Regulation and appendix D of the Grade Crossings Standards, as set out in the Grade Crossings Handbook dated 2016-12-14, article 28, appendix D. The procedure is as follows:

Step 1

Interest for whistling cessation is expressed.

An interest for whistling cessation exists when a municipality receives a request from a citizen or a community group to stop train whistling at a specific area (one crossing or multiple crossings) along a railway corridor.

Step 2

Municipality consults with railway company.

The municipality consults with the railway company that operates the relevant line of railway to assess the feasibility of the whistling cessation request.

Step 3

Municipality issues notifications and public notice. The municipality notifies all relevant associations or organizations ...

and issues a public notice of its intention to pass a resolution declaring that it agrees that whistles should not be used at a specific area (crossing or multiple crossings) along a railway corridor.

Step 4

Municipality and railway assess the crossing(s) against the prescribed requirements in the *Grade Crossings Regulations* and Grade Crossings Standards.

The municipality and the railway company assess whether or not the area (crossing or multiple crossings) meets the whistling cessation requirements specified in section 104 of the *Grade Crossings Regulations* and Appendix D of the Grade Crossings Standards. This may be done by engaging a professional engineer to determine if the area complies with the conditions in the regulations.

Step 5

Municipality and railway agree that the crossing(s) meets the prescribed requirements of the Grade Crossings Regulations and Standards.

If the municipality and the railway company do not mutually agree that the crossing(s) meets the prescribed requirements, they should try to resolve the conflict.

Step 5A (optional)

Municipality and railway request a final decision from Transport Canada.

If disagreement between the municipality and the railway persists, the supporting documentation should be provided to Transport Canada (railsafety@tc.gc.ca) for further assessment. Transport Canada’s decision on the issue is final.

Step 6

Municipality passes a resolution declaring that it agrees that whistles should not be used in that area, thereby prohibiting train whistling.

Once it is deemed that the provisions of the *Grade Crossings Regulations* and Standards are satisfied, the municipality must declare, by resolution, that it agrees that train whistles should not be used at the prescribed crossing(s). A copy of the resolution should be sent to the railway company and all relevant associations or organizations, including the headquarters of Transport Canada’s Rail Safety Directorate...

Step 7

> Railway company notifies Transport Canada and informs the municipality within 30 days that it has arranged to have whistling ceased at the crossing(s).
>
> Upon receipt of the resolution, the railway company issues its special instructions, as per CROR 14(l)(iv), eliminating the application of CROR 14(l)(i), while providing for CROR 14(f). The railway company notifies the headquarters of Transport Canada's Rail Safety Directorate (railsafety@tc.gc.ca) of the effective date of whistling cessation at the crossing(s), and provide a copy of its special instructions.
>
> The railway company notifies the municipality and/or the road authorities in writing of the whistling cessation not later than 30 days after the day whistling is ceased.

Step 8

> Municipality and railway share the responsibility for monitoring and maintaining the conditions that support the cessation of train whistling at the crossing(s).
>
> A Transport Canada Railway Safety Inspector may order the reinstatement of whistling at the crossing(s) should the responsible authorities fail to maintain the area in a manner that meets the prescribed requirements of the Grade Crossings Regulations and section 23.1 of the Railway Safety Act.

The Bylaw Passed by Parkland County

[30] On September 20, 2017, Parkland County passed bylaw 2016.27, stating that it agreed that train whistling should not be used at 12 crossings. A copy of the resolution was sent to the Defendant, CN and to Transport Canada's rail safety directorate headquarters.

The Issue in CN's Summary Dismissal Application

[31] The parties identified, by consent, the issue to be considered by the Court in CN's summary dismissal application. During the Case Management process, I permitted this issue to be heard at the same time that was scheduled for the certification application, on the basis that it was a discrete issue of statutory interpretation not involving consideration of the action as a whole based on the merits. To repeat the issue:

> Does the Defendant, Canadian National Railway Company, have obligations to refrain from the use of audible train warning signals and with respect to the regulatory procedure for achieving cessation of audible train warning signals pursuant to the *Railway Safety Act*, and regulations promulgated thereunder?

[32] From the review of the pertinent legislative regime, it is clear that, yes, CN does have obligations to refrain from the use of audible train warning signals and with respect to the

regulatory procedure for achieving cessation of audible train warning signals pursuant to the *Railway Safety Act*, s. 23.1(1) and regulations promulgated thereunder.

[33] However, in its submissions with respect to its summary dismissal application, CN asserted two additional issues for the Court, namely:

> b) Has CN shown that it was at all times acting lawfully?
>
> c) Is there any genuine issue for trial in relation to Klassen's claim in nuisance?

[34] The Plaintiff in reply objected to these two additional issues being considered in this summary judgment application as going beyond the issue that was agreed upon by consent of the parties, and as permitted by me during the case management process.

[35] I agree with the Plaintiff's submissions in this regard. There are several issues that would follow, requiring a consideration of the action as a whole on its merits. CN asserts that it has complied with all regulatory requirements in relation to whistle cessation in the context of this case. This evidence is detailed in the Affidavit of Julianne Threlfall sworn on December 14, 2020. Step 5A of the Eight Step Procedure provides that:

> If a disagreement between the municipality and the railway persists, the supporting documentation should be provided to Transport Canada for further assessment. Transport Canada's decision on the issue is final.

[36] The Minister did consider and issue a final decision with respect to some of the crossings on April 17, 2018 as follows:

> I, Brigitte Diogo, Director General Rail Safety, as authorized by the Minister of Transport under section 45 of the *Railway Safety Act*, have determined that the area located at Mile Points 27.02, 28.04, 29.07, 30.10 and 31.11 [i.e. crossings 1-5 as identified in the Statement of Claim] of the Canadian National Railway Company's Edson subdivision, Parkland County, Alberta meets the prescribed requirements, as set out in s. 104 of the *Grade Crossings Regulations*.

[37] However, as deposed by Ms. Threlfall, CN reserves the right to decide under what circumstances it will agree to whistle cessation, versus involving a Minister to making a decision.

[38] The Plaintiff contends, however, that there are issues as to whether CN complied with its obligations, on a timely basis or at all before whistle cessation was achieved at the relevant grade crossings. The Plaintiff asserts that the Defendant had inserted further requirements that had to be met before issuing a notification that whistling is to cease at a particular crossing. This includes the requirement placed by CN on the municipality to conduct an engineering assessment. The Plaintiff made extensive submissions in this regard, derived from the cross-examination of Threlfall on affidavit and undertakings and certain records that have been produced in advance of the certification application. Further discovery will be required if this action is certified, with respect to issues b) and c) set out in paragraph 33 of these reasons.

[39] To answer those issues, a trial judge would have to embark on an inquiry based on all of the evidence to be presented by the Defendant, by the Plaintiff, and presumably, by the County of Parkland with respect to its dealings with CN and the Minister of Transport.

[40] Similarly, as a cause of action has been identified in the pleadings, it would be up to the trial court to determine whether, on the basis of all of the evidence before it and the law, CN did commit the tort of private nuisance as pleaded.

[41] In short, at this stage of the proceedings, the Court does not embark on an inquiry dealing with the merits of these two additional issues. Again, the certification application is a procedural step and it is not the function of the Court to make determinations on the merits of the action and defence in these circumstances.

Jurisdiction

[42] Although not specifically pleaded in its Statement of Defence filed on November 8, 2019, the Defendant raises, in its response to the Plaintiff's submissions in support of its Certification application, that the Court's jurisdiction to consider this case is ousted by the *Canada Transportation Act* S.C. 1996, c.10, Sections 95.1-95.3:

> **Noise and Vibration**
>
> **Obligation**
>
> 95.1 When constructing or operating a railway, a railway company shall cause only such noise and vibration as is reasonable, taking into account
>
> (a) its obligations under sections 113 and 114, if applicable;
>
> (b) its operational requirements; and
>
> (c) the area where the construction or operation takes place.
>
> 2007, c. 19, s. 29
>
> **Guidelines**
>
> 95.2 (1) The Agency shall issue, and publish in any manner that it considers appropriate, guidelines with respect to
>
> (a) the elements that the Agency will use to determine whether a railway company is complying with section 95.1; and
>
> (b) the collaborative resolution of noise and vibration complaints relating to the construction or operation of railways.
>
> **Consultations**
>
> (2) The Agency must consult with interested parties, including municipal governments, before issuing any guidelines.
>
> Not statutory instruments
>
> (3) The guidelines are not statutory instruments within the meaning of the *Statutory Instruments Act*.
>
> 2007, c. 19, s. 29
>
> **Complaints and investigations**
>
> 95.3 (1) On receipt of a complaint made by any person that a railway company is not complying with section 95.1, the Agency may order the railway company to

> undertake any changes in its railway construction or operation that the Agency considers reasonable to ensure compliance with that section.
>
> **Restriction**
>
> (2) If the Agency has published guidelines under paragraph 95.2(1)(b), it must first satisfy itself that the collaborative measures set out in the guidelines have been exhausted in respect of the noise or vibration complained of before it conducts any investigation or hearing in respect of the complaint.

[43] However, the *Canada Transportation Act* does not contain clear and unequivocal language conferring exclusive jurisdiction on the agency to determine a complaint against the Defendant in relation to noise: ***Horseman v Horse Lake First Nation***, 2002 ABQB 765 at paras 2-3 and 88. As stated by the Supreme Court of Canada in ***Chrysler Canada Ltd v Canada (Competition Tribunal)***, [1992] 2 SCR 394 at para 12, it is important to distinguish between enactments which confer exclusive jurisdiction to a tribunal to the exclusion of the Superior Courts, usually through expressed privative clauses, and enactments which confer jurisdiction to a tribunal without extinguishing the jurisdiction of the Superior Courts.

[44] In this case, there is no privative clause excluding the jurisdiction of this Superior Court to consider the claim against the Defendant alleging breach of the private tort of nuisance. Neither the agencies, nor the Minister of Transport under the *Railway Safety Act*, confer jurisdiction to decide issues relating to an action in private nuisance against the corporation.

[45] Furthermore, with respect to jurisdiction, the Defendant attorned to the jurisdiction of the Court by filing its Statement of Defence and bringing the Summary Judgment application for its own benefit: ***Bansal v Ferrara Pan Candy Co Inc***, 2014 ABQB 384 at paras 16-18.

[46] I find that this Court has jurisdiction to consider the case at bar.

B. An identifiable Class of Two or More Persons

[47] In his Statement of Claim, the definition of the "class" proposed by Klassen is as follows:

> All persons who have lived within 1.75 miles from each of the Crossings [as defined in the Statement of Claim] from September 20, 2017 onwards.

[48] The Plaintiff then proposed four subclasses, depending on the date when whistle cessation did come into effect for the particular crossings after the County passed bylaw 2016.27 on September 20, 2017, as follows:

The crossings are defined further in the Statement of Claim:

a) Crossings 1-5: Whistle cessation was achieved on May 1, 2018, within 30 days after the ministerial order of April 17, 2018.

b) Crossings 6 and 12: Whistle cessation was achieved September 5, 2019. The factual issue is whether the requirements had been met earlier than that date, but the Defendant refrained from issuing its notice on a timely basis.

c) Crossings 7 and 8: Whistle cessation was achieved but no date is specified yet in the evidence. Discovery will be required regarding any special instructions issued by CN with respect to these crossings.

d) Crossings 9, 10 and 11: As of the certification application, train whistles has not ceased. There was a general requirement that upgrades be made to these and all level crossings by November 2021. Records will need to be produced with respect to the requirements being achieved for these crossings.

[49] These subclasses, therefore, are distinguished by the respective periods for which, as the Plaintiff alleges, train whistling continued after the County passed its bylaw and when whistling actually ceased, or continued with respect to Crossings 9, 10 and 11.

[50] The Plaintiff produced affidavit evidence from two experts, Steven Bilawchuk and Dr. Mathias Basner, whose opinions form a framework for the proposed class and subclasses.

[51] Bilawchuk specializes in environmental noise monitoring and impact assessments. He developed a model, namely an initial noise study and a second noise study which took into account the distances from each crossing when approaching trains would sound their horns and the decibel levels and noise receptor heights to be considered.

[52] Mr. Bilawchuk's model assessed the common effects of noise transmission, taking into account variations such as topographic difference and different types of construction of dwellings.

[53] These were the type of variations absent from the evidence before the Court in ***Sutherland v Canada(Attorney General of)***, 1997 Canlii 2147 (BCSC). That case was a nuisance claim for damages allegedly arising from the use of a newly expanded runway at the Vancouver International Airport. The Court dismissed the class action certification application, notwithstanding objective proof of sound levels throughout the area affected. However, establishing liability with respect to each class member would involve numerous factor that were inherently subjective.

[54] Dr. Mathias Basner, a professor of sleep and chronobiology, filed affidavit evidence as to the health effects of noise including the effects of sound generated by train whistles. The effects of noise on health, in his opinion, includes several negative health consequences, namely annoyance, sleep disturbance, impaired cognitive performance, and an increased risk for cardiovascular disease. Sleep disturbing affects can be observed once the maximum sound pressure level exceeds 30-40 decibels. The decibel range of 40-55 decibels includes risks of adverse cardiovascular health effects. Also, people are more susceptible to noise as night which can disrupt key phases of sleep.

[55] The Plaintiff asserts that the decibel threshold levels of concern identified by Dr. Basner can be used in conjunction with the noise modeling for each crossing prepared by Mr. Bilawchuk to determine potential zones of disturbance and health impacts.

[56] The threshold to establish the identifiable class and subclasses is not high at this stage of the proceeding and has been met in this case.

[57] The exact size of the class and each subclass is unknown at present but would be bounded and objectively determinable based on the proposed class definition.

[58] Klassen has personally spoken with more than 100 individuals who have advised that they have lived within 1.75 miles of a Crossing and have been affected by the use of train whistles at a Crossing. Also, he and another Parkland County resident, Frank Lichtner obtained

signatures for a petition that together they have obtained more than 100 signatures in support of whistle cessation at the relevant crossings.

C. The Claims of the Prospective Class Members Raise a Common Issue

[59] The proposed common issues in this proceeding are as follows:

1. During the relevant Class Period, did or does the use of train whistles at the Crossings constitute a substantial and unreasonable interference with the occupation and use of the Class Members' property?
2. Did the Defendant breach its duty to refrain from causing nuisance once it was notified of Parkland's passing of the Bylaw?
3. Did the Defendant owe the Class Members a duty to refrain from engaging in unfair practices and act in good faith, including but not limited to cooperate with the municipality once advised of the desire to transition from audible to non-audible train warning signals and, if so, did the Defendant breach that duty?
4. If it is established that the Defendant breached any of its duties referred to above, are the Class members entitled to an award of damages?
    a) If so, what is the appropriate quantum of damages?
    b) If so, are the Class member entitled to an aggregate assessment of damages for part of all of the damages they suffered?
    c) If so, what part of the damages?
    d) How will the damages be distributed among the Class members?
5. Are the Class Members entitled to punitive and/or aggravated damages?
    a) If so, in what amount?
6. Should the Defendant be ordered to pay pre-judgment interest?
7. Should the Defendant pay the costs of administering and distributing recovery?
    a) If so, in what amount?
8. Should the Defendant be ordered to cease the use of audible train warning signals at or near crossings 9, 10 and 11?
    a) Or, in the alternative, should the Defendant be ordered to pay damages to Class Members who live in the vicinity of these Crossings until it ceases the use of audible train warning signals?
9. Should the Defendant be ordered to make necessary upgrades to Crossings 9, 10 and 11 and subsequently cease the use of audible train warning signals?
    a) Or, in the alternative, should the Defendant be ordered to pay damages to Class Members who live in the vicinity of these Crossings until it ceases the use of audible train warning signals?

[60] The first common issue involves the consideration of evidence and application of the law relating to private nuisance, c.f. ***Antrim Truck Centre Ltd v Ontario (Transportation)*** cited above in these reasons at paragraphs 11 and 12. This is an issue common to each Class Member. Likewise, the second proposed common issue, whether the Defendant breached its duty to refrain from causing nuisance, is also an issue common to all Class Members.

[61] The British Columbia Court of Appeal in ***Kirk v Executive Flight Centre Fuel Services Ltd***, 2019 BCCA 111, stated that class actions in nuisance will generally be certified only where there is a clear universal question, at paragraphs 77 and 78 as follows:

> [77] To make out a claim in private nuisance, the plaintiff must prove (1) a substantial, non-trivial interference with their use and enjoyment of property, and (2) that the interference is unreasonable. As noted in *Baker v. Rendle*:
>
> > [41] … The focus is primarily on the effect on the complainant rather than on the alleged tortfeasor's conduct ([*Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13] at para. 28). Thus, contrary to the appellant's submission in this Court, a measure of subjectivity exists even at the stage of determining whether liability exists, and not merely when determining the extent of liability.
> >
> > [Citation added.]
>
> [78] Class actions in nuisance will generally be certified only where there is a clear universal question. In *Gautam v. Canada Line Rapid Transit Inc*., 2011 BCCA 275, the class members were individuals who owned properties or leased business premises along Cambie Street in Vancouver. They brought claims in nuisance, waiver of tort, and injurious affection, asserting that the cut-and-cover method of construction of the Canada Line had severely restricted access to their properties. Bennett J.A. accepted as a common issue the question of whether the restricted access was so significant as to cause the ordinary person to find it intolerable. She considered it unnecessary for the Court to consider the effect on each owner or business proprietor in order to ascertain whether the construction had caused substantial, unreasonable interference: at para. 32.

Common issues one and two with respect to private nuisance do set out a clear universal question with respect to the claim being advanced by the Plaintiff on behalf of the Class Members.

[62] The third common issue, raising the issue of unfair practices and good faith, is also pertinent to the fifth common issue relating to punitive and/or aggravated damages, should any basis for such liability and damages be established at the common issues trial.

[63] With respect to common issue four, if liability is established against the Defendant, the common issues trial judge can then proceed to assess damages. In this case, it would be open to the trial judge to make an order for an aggregate monetary award in respect of all or any part of the Defendant's liability to class members or subclass members pursuant to s. 30 of the *Class Proceedings Act.*

[64] Common issues six and seven would follow from the finding of any liability on the part of the Defendant and damages being assessed.

[65] Lastly, common issues eight and nine are currently open issues, although by the time of trial for the common issues, audible train warning signals may already have ceased at Crossings 9, 10 and 11.

D. A Class Proceeding Would be the Preferable Procedure

[66] Section 5(2) of the *Class Proceedings Act* provides as follows:

> In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider at least the following:
>
> > (a) whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;
> >
> > (b) whether a significant number of the prospective class members have a valid interest in individually controlling the prosecution of separate actions;
> >
> > (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
> >
> > (d) whether other means of resolving the claims are less practical or less efficient;
> >
> > (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[67] In this case, as summarized in these reasons relating to the common issues, these would predominate over any questions affecting only individual prospective class members. There is no valid interest expressed that individual class members seek to control the prosecution of separate actions, nor are the claims the subject of any other proceedings.

[68] In determining the common issues, this would be more practical and more efficient than requiring the class members to prove their claims individually. The administration of the class proceeding would not create greater difficulties than those likely to be experienced if relief were sought by other means.

[69] I find that the proposed class action is a preferable procedure.

E. There is a Person Eligible to be Appointed as a Representative Plaintiff

[70] I find that Norman Klassen will fairly and adequately represent the interests of the class and subclasses, has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and subclasses and of notifying class members

of the proceeding. In addition, he does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

Conclusion

[71] In conclusion, I find that the Plaintiff has satisfied the five preconditions to certification of a class action as set out in s. 5(1) of the *Class Proceedings Act*. Accordingly, the application to certify this class action is allowed.

[72] Furthermore, the application by the Defendant for summary dismissal of the action is dismissed. The Plaintiff is entitled to his costs for the certification application and response to the summary dismissal application.

[73] If the parties are unable to agree on costs, then they may provide written submissions to me in this regard within 45 days of the issuance of these Reasons for Decision.

Heard on the October 20-22, 2021.
Dated at the City of Edmonton, Alberta this 19th day of April, 2022.

James T. Neilson
J.C.Q.B.A.

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