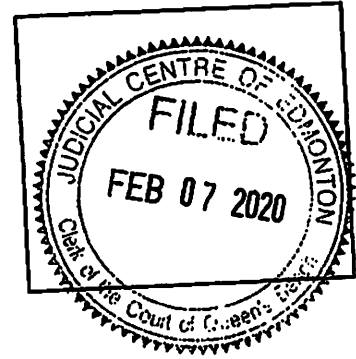


**FORM 27**  
**[RULE 6.3 AND 10.52(1)]**

Clerk's stamp



**COURT FILE NUMBER**

**1903-13250**

**COURT OF QUEEN'S BENCH OF ALBERTA  
 JUDICIAL CENTRE**

**EDMONTON**

**PLAINTIFF**

**NORMAN KLASSEN**

**DEFENDANT**

**CANADIAN NATIONAL RAILWAY COMPANY**

**DOCUMENT**

**Brought under the Class Proceedings Act**  
**APPLICATION FOR CERTIFICATION OF CLASS**  
**PROCEEDING TO BE HEARD FEBRUARY 18, 2020,**  
**8:30 A.M. BEFORE JUSTICE J. T. NEILSON**

**ADDRESS FOR SERVICE AND CONTACT  
 INFORMATION OF PARTY FILING THIS  
 DOCUMENT**

**BRANCH MACMASTER LLP**  
 Barristers  
 1410 - 777 Hornby Street  
 Vancouver BC V6Z 1S4  
 Luciana P. Brasil  
 Avichay Sharon  
 Trevor Siemens  
 Phone: 604-654-2999  
 Fax: 604-684-3429  
 File: X01-058

**JENSEN SHAWA SOLOMON DUGUID HAWKES LLP**  
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 800, 304 - 8 Avenue SW  
 Calgary, Alberta T2P 1C2

Gavin Price  
 Kajal Ervin  
 Sean Carrie  
 Phone: 403 571 1520  
 Fax: 403 571 1528  
 File: 14499-001

A  
B  
C  
D  
E  
F

Clerk's stamp

**FORM 27**  
**[RULE 6.3 AND 10.52(1)]**

COURT FILE NUMBER	1903-13250
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	EDMONTON
PLAINTIFF	NORMAN KLASSEN
DEFENDANT	CANADIAN NATIONAL RAILWAY COMPANY
DOCUMENT	<u><b>Brought under the Class Proceedings Act</b></u> <u><b>APPLICATION FOR CERTIFICATION OF CLASS</b></u> <u><b>PROCEEDING TO BE HEARD FEBRUARY 18, 2020,</b></u> <u><b>8:30 A.M. BEFORE JUSTICE J. T. NEILSON</b></u>
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	<b>BRANCH MACMASTER LLP</b> Barristers 1410 - 777 Hornby Street Vancouver BC V6Z 1S4 Luciana P. Brasil Avichay Sharon Trevor Siemens Phone: 604-654-2999 Fax: 604-684-3429 File: X01-058  <b>JENSEN SHAWA SOLOMON DUGUID HAWKES LLP</b> Barristers 800, 304 - 8 Avenue SW Calgary, Alberta T2P 1C2  Gavin Price Kajal Ervin Sean Carrie Phone: 403 571 1520 Fax: 403 571 1528 File: 14499-001

## NOTICE TO RESPONDENT: CANADIAN NATIONAL RAILWAY COMPANY

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Judge.

To do so, you must be in Court when the application is heard as shown below:

Date:	<u>To Be Determined</u>
Time:	<u>To Be Determined</u>
Where:	<u>Edmonton Law Courts</u>
Before Whom:	<u>The Honourable Justice James T. Neilson, Case Management Justice</u>

Go to the end of this document to see what else you can do and when you must do it.

### Definitions

1. In this Application, including the supporting Appendices and Affidavits, the following terms have the following meanings:

**“Application”** means this Application for the certification of a class proceeding brought by Norman Klassen, as the proposed Representative Plaintiff.

**“Action”** means the within Action, Court File Number 1903-13250.

**“Class”** has the meaning ascribed to it in paragraph 2(b) of this Application.

**“Class Counsel”** means the law firms of Branch MacMaster LLP and Jensen Shawa Solomon Duguid Hawkes LLP, also referred to as JSS Barristers.

**“CPA”** means the *Class Proceedings Act*, SA 2003, c C-16.5

**“Defendant”** means the named Defendant in this Action, Canadian National Railway Corporation.

**“Litigation Plan”** means a plan for proceeding with this Action as required by section 5(1)(e)(ii) of the CPA.

**“Representative Plaintiff”** means the Plaintiff, Norman Klassen

**“Statement of Claim”** means the Statement of Claim in the within Action filed June 26, 2019.

**Remedy claimed or sought:**

2. Norman Klassen, as the proposed Representative Plaintiff, seeks an Order:

- (a) Certifying this Action as a class proceeding;
- (b) Defining the “Class” 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
- (c) Appointing Norman Klassen as the Representative Plaintiff in this Action;
- (d) Stating the nature of the claims asserted on behalf of the Class, as per **Appendix A** to this Application;
- (e) Stating the relief sought on behalf of the Class, as per **Appendix B** to this Application;
- (f) Identifying the common issues in this class proceeding, as per **Appendix C** to this Application;
- (g) Approving the form and method of Notice of Certification to be given to members of the Class, as per **Appendix D** to this Application;
- (h) Ordering the Defendant to pay the costs of any Notices ordered by this Honourable Court;

- (i) Allowing members of the Class to opt out of this class proceeding within 60 days from the date of Notice of Certification to the Class by submitting an Opt Out Form in the same or similar form as attached at **Appendix E** to this Application;
- (j) Approving the Litigation Plan put forward by the proposed Representative Plaintiffs as per **Appendix F** to this Application;
- (k) Providing such advice and directions as may be necessary to move this matter forward;
- (l) Awarding costs of this Application to the Representative Plaintiff; and
- (m) Granting such further and other relief as this Honourable Court may deem just and appropriate having regard to all of the circumstances.

**Grounds for making this Application:**

3. This Application is brought by the proposed Representative Plaintiff on the following grounds:
  - (a) The nature of the claims brought on behalf of the Class are as set out in the Statement of Claim in this Action, and as outlined in **Appendix A** to this Application;
  - (b) The Statement of Claim in this Action discloses a cause of action against the Defendant;
  - (c) There is an identifiable Class of 2 or more persons;
  - (d) The claims of the prospective Class Members raise common issues respecting the within Action;
  - (e) A class proceeding is the preferable procedure for the fair and efficient resolution of the common issues;

- (f) The proposed Representative Plaintiff will fairly and adequately represent the interests of the Class;
- (g) The proposed Representative Plaintiff has produced a Litigation Plan which sets out a workable method of advancing the Action on behalf of the Class;
- (h) The proposed Representative Plaintiff has produced a method of Notice of Certification to be given to members of the Class notifying Class Members of the Action; and
- (i) The proposed Representative Plaintiff does not have, on the common issues or otherwise, an interest that is in conflict with the interests of the other Class Members.

**Material or evidence to be relied on:**

4. The proposed Representative Plaintiff will rely on the following material and evidence for this Application:
  - (a) The Statement of Claim, filed June 26, 2019;
  - (b) The Statement of Defence, filed November 8, 2019;
  - (c) Any other pleadings or materials filed in this Action;
  - (d) The Affidavit of Norman Klassen, sworn February 3, 2020;
  - (e) The Affidavit of Steven Bilawchuk, sworn February 3, 2020;
  - (f) The Affidavit of Dr. Mathias Basner, sworn February 7, 2020 and to be filed; and
  - (g) Such further and other materials and evidence as counsel may advise and this Honourable Court may permit.

**Applicable rules:**

5. Rules 2.6, 2.8, 2.9 and 6.3 of the Alberta *Rules of Court*; and
6. Such further and other Rules as counsel may advise and this Honourable Court may permit.

**Applicable Acts and regulations:**

7. The *Class Proceedings Act*, 2003 SA, c C-16.5; and
8. Such further and other Acts or Regulations as counsel made advise and this Honourable Court may permit.

**How the application is proposed to be heard or considered:**

9. This Application will be heard as directed by the Case Management Justice, the Honourable Justice James T. Neilson.

**AFFIDAVIT EVIDENCE IS REQUIRED IF YOU WISH TO OBJECT.****WARNING**

If you do not come to Court either in person or by your lawyer, the Court may give the applicant what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant a reasonable time before the application is to be heard or considered.

**LIST OF APPENDICES**

**APPENDIX A – NATURE OF THE CLAIMS ASSERTED ON BEHALF OF THE CLASS**

**APPENDIX B – THE RELIEF SOUGHT ON BEHALF OF THE CLASS**

**APPENDIX C – PROPOSED COMMON ISSUES IN THIS CLASS PROCEEDING**

**APPENDIX D – PROPOSED FORM AND METHOD OF NOTICE OF CERTIFICATION**

**APPENDIX E – PROPOSED OPT OUT FORM**

**APPENDIX F – PROPOSED LITIGATION PLAN**

## **APPENDIX A – NATURE OF THE CLAIMS ASSERTED ON BEHALF OF THE CLASS**

The claims asserted on behalf of the Class are as follows:

1. The Class Members have suffered a substantial and unreasonable interference with the enjoyment and/or use of properties on which they reside due to the Defendant's past and ongoing use of audible train whistles at designated public grade crossings in Parkland County from September 2017 through to and including the present.
2. The Defendant is a federally regulated national transportation network company, and operates a transcontinental railway that goes across Canada, including through Parkland County.
3. Where the railway crosses a public grade crossing, the federal Canadian Rail Operating Rules require all trains to sound a train whistle. The rule applies 24 hours a day and the whistle must be sounded even if a crossing has lights, bells and crossing arms. The train whistle must begin at least a quarter mile before each crossing, and is sounded in a sequence of 2 long - 1 short - 1 long distinct whistles. The sequence may be repeated according to the speed of the movement, with the last long whistle held until the crossing is fully occupied by the train. In areas where there are crossings in close proximity, the whistle must still be sounded at each crossing.
4. The train whistle volume is regulated by the federal government and does not change depending on the time of day or neighbourhood characteristics of a given crossing.
5. There are 12 public grade crossings in Parkland:
  - (a) Range Road 13 ("Crossing 1");
  - (b) Range Road 14 ("Crossing 2");
  - (c) Range Road 15 ("Crossing 3");
  - (d) Range Road 20 ("Crossing 4");
  - (e) Range Road 21 ("Crossing 5");
  - (f) Range Road 22 ("Crossing 6");
  - (g) Range Road 25 ("Crossing 7");
  - (h) Range Road 32 ("Crossing 8");
  - (i) Range Road 40 ("Crossing 9");
  - (j) Range Road 262 ("Crossing 10");

(k) Range Road 265 ("Crossing 11"); and

(l) Range Road 271 ("Crossing 12");

(collectively, the "Crossings").

6. Since 2018, the Defendant's trains operate in two directions along the railway corridor to accommodate increased train activity. Due to the addition of the second track there has been a significant increase of noise pollution caused by the train whistles. Dozens of trains travel along the railway corridor and Crossings each day, at all hours of the day and night. At times trains travelling in both directions approach the same public grade crossing at or nearly the same time, thereby prolonging the noise pollution caused by the train whistles.
7. On December 31, 2002, in recognition of the impact of the train whistles on surrounding municipalities, the federal government created a procedure for transitioning to whistle cessation at designated public grade crossings. The procedure applies only to non-emergency situations at public grade crossings.
8. In creating a procedure to transition to whistle cessation, the federal government created an alternative to audible train whistles which ensures public safety while minimizing noise pollution associated with the use of train whistles.
9. In order to cease the use of train whistles, a municipality is required to follow Transport Canada's eight step procedure for obtaining and maintaining whistle cessation (the "Whistle Cessation Procedure").
10. The Whistle Cessation Procedure incorporates the applicable sections and appendices from the *Railway Safety Act*, *Grade Crossing Regulations*, and *Grade Crossings Standards*.
11. The Whistle Cessation Procedure provides that a municipality must: consult with the railway company to assess the feasibility of the request; provide notice to the public and other interested parties of its intent to switch to non-audible train signals at the designated crossings; and pass a resolution requesting that the rail operator cease the use of the train whistle.
12. The Whistle Cessation Procedure is a joint initiative which aims to promote collaboration between the railway company and municipality to ensure crossings remain safe, while minimizing unnecessary noise pollution caused by train whistles.
13. In late 2016, Parkland County consulted Transport Canada regarding the Whistle Cessation Procedure. Transport Canada advised Parkland County of the requirement to follow the eight-step process. Transport Canada further advised that the eight steps did not need to be followed sequentially.

14. In or about January 2017, Parkland County passed the first reading of the whistle cessation bylaw which prohibits the use of the train whistle at the Crossings (the "Bylaw").
15. In or about the Spring or Summer of 2017, Transport Canada informed Parkland County that, by default, a crossing that is equipped with lights, gates, and bells meets the requirement of s. 23.1(1)(a) of the *Railway Safety Act*. Transport Canada further noted that Parkland County was still required to satisfy s. 23.1(1)(b): passing a resolution declaring train whistles are prohibited at the Crossings.
16. In or about July 2017, Parkland County informed interested organizations, including the Defendant, that on August 22, 2017 Parkland County would hold a meeting to entertain the second and third reading of the Bylaw. At or about this time, Parkland County also provided public notice of its intent to pass the Bylaw through advertisement in the local paper, the County-wide newsletter, and the Parkland County internet website.
17. On August 22, 2017, the Parkland County council passed the second and third reading of Bylaw 2016-27, Being a Bylaw to Provide for the Regulation of Train Whistles Within Parkland County, in the Province of Alberta.
18. On August 30, 2017, Parkland County notified the Defendant of the passing of the Bylaw and completion of the requisite steps pursuant to s. 23.1(1) of the *Railway Safety Act* and s. 104 of the *Grade Crossings Regulations*.
19. In or about September 2017, Parkland County engaged in discussions with the Defendant and Transport Canada regarding the Defendant's obligation to refrain from using train whistles pursuant to s. 23.1 of the *Railway Safety Act* and inform Transport Canada of its intent to cease blowing the train whistle as required by Canadian Rail Operating Rules, Rule No 14.
20. Contrary to its statutory obligations to s. 23.1(1) of the *Railway Safety Act* and s. 104 of the *Grade Crossings Regulations* and the eight-step process established by the Ministry of Transport, the Defendant did not cooperate with Parkland County. The Defendant was non-responsive and uncooperative in the process leading up to, and after, the passing of the Bylaw.
21. The Defendant claimed it did not have the requisite crossing studies to determine whether the Crossings met the safety requirements for whistle cessation when it knew or ought to have known that it had in its possession material safety assessments pursuant to its obligations under the *Grade Crossing Regulations* and associated Standards and federal guidelines.
22. In or about October 2017, more than a month after Parkland County provided notice of the passing of the Bylaw, the Defendant informed Parkland County that it would not entertain whistle cessation without a crossing safety assessment or a letter from

Transport Canada stating the Crossings met the requirements of the *Grade Crossing Regulations* and associated Standards.

23. The Defendant made false statements to Parkland County and the Ministry of Transportation by asserting it did not have crossing studies and related information in respect of the Crossings; however, it appears that such studies and information were in its possession.
24. Due to the Defendant's non-compliance with its statutory obligations, Parkland County was forced to pursue step 5A of the eight-step process and requested that the Ministry of Transportation make a final decision regarding whistle cessation.
25. It was later discovered that at the time the Defendant claimed it did not have the requisite crossing studies and related information it was in fact in the possession of such information and studies as required by the *Grade Crossing Regulations* and associated Standards. As a result of the Defendant's failure to cooperate and lack of disclosure for many months it unnecessarily prolonging the process of whistle cessation.
26. Upon review of the studies obtained from the Defendant's offices, Transport Canada determined Crossings 1 - 5, complied with the requirements for whistle cessation. As such, on April 17, 2018, Transportation Canada ordered the Defendant to cease using the train whistle at Crossings 1 - 5 by May 1, 2018. The Defendant complied with that order on May 1, 2018.
27. Given that it appears the Defendant had the required crossing studies and related information, the Defendant ought to have ceased the use of the train whistle at Crossings 1 - 5 shortly after being notified of the passing of the Bylaw on August 30, 2017. Thus, for the period of September 2017 through May 1, 2018, the Defendant was unlawfully using the train whistles at Crossings 1 - 5.
28. Further, on the basis of the reports obtained by Transportation Canada, Parkland County was notified that Crossings 6, 7 and 12 required minor upgrades to satisfy the Whistle Cessation Process. Said upgrades were completed on or about the summer of 2018. However, to this day the Defendant has still failed to comply with its statutory obligations under section 23.1 of the *Railway Safety Act* and has not ceased whistle cessation at these three Crossings.
29. Further, from the period of September 2017 to present, the Defendant has and continues to frustrate Parkland County's ability to satisfy the Whistle Cessation Process at Crossings 8 - 11. The Defendant has failed to make the necessary upgrades to the Crossings, to the extent any are required, nor has it cooperated with Parkland County in order to ensure the necessary upgrades are made to the Crossings that the Defendant owns and operates.

30. The past and ongoing use of train whistles at the Crossings constitutes a nuisance that has caused Class Members to suffer losses and damages.

## APPENDIX B – THE RELIEF SOUGHT ON BEHALF OF THE CLASS

The Representative Plaintiff, on behalf of the Class, seeks the following relief:

1. An Order pursuant to the *CPA* certifying this action as a class proceeding and appointing the Plaintiff as the representative of a class to be certified by the Court;
2. A finding that the Defendant has created a nuisance as between the Defendant and the Class Members;
3. A finding that the Defendant contravened its statutory duties under the *Railway Safety Act*, *Grade Crossing Regulations*, and *Grade Crossings Standards*.
4. A finding that the Defendant engaged in unfair practices and breaches of good faith contrary to the *Railway Safety Act* and common law;
5. An award of damages in an amount to be proven at Trial comprised of one or more of the following:
  - (a) Damages for breach of common law nuisance;
  - (b) Damages for breach of the Defendants' duty of care owed to Class Members;
  - (c) Damages for breach of good faith;
  - (d) General damages;
  - (e) Aggravated damages;
6. Punitive damages;
7. Special damages and out-of-pocket incurred by the Plaintiff and Class Members, including:
  - (a) Costs of counselling or therapy for sleep disorders;
  - (b) Compensation for lost time and/or loss of income;Or such other amount as may be proven at Trial or as the Court may deem just and appropriate in the circumstances;
8. An order, pursuant to s. 30 of the *CPA* directing an aggregate monetary award;
9. An order, pursuant to s. 32 of the *CPA* allowing for the use of standard claim forms or other documentary evidence or such other procedure as warranted under the circumstances;

10. An order that the damages be paid by the Defendant into a common fund and distributed to the Class Members in an appropriate manner as directed by the Court;
11. An order or declaration that the Defendant take specific steps to:
  - (a) Cease the use of audible train warning signals at Crossings 6, 7 and 12;
  - (b) Implement the procedure for transitioning to non-audible train warning signals at Crossings 8 - 11;
  - (c) Implement and enforce protocols or procedures regarding the manner in which requests from municipalities to transition to non-audible train warning signals are received and executed;
  - (d) Ensure internal compliance with the procedures for transitioning to the use of non-audible train warning signals at properly-equipped grade crossings;
  - (e) Educate, train and supervise employees, agents, servants and third parties engaged by the Defendant for the purposes of monitoring and assessing the safety and suitability of transitioning grade crossings to non-audible train warning signals;
12. Pre-judgment interest and post-judgment interest;
13. The costs of this Action on a substantial indemnity basis;
14. The costs of administering the plan of distribution of the recovery in this Action; and
15. Such further and other relief as may be required and as this Honourable Court deems to be just and appropriate in the circumstances.

## APPENDIX C – PROPOSED COMMON ISSUES IN THIS PROCEEDING

The proposed common issues are set out below. Capitalized terms are as defined in the Statement of Claim.

1. Did the Defendant breach its obligations to refrain from the use of audible train warning signals pursuant to s. 23.1 of the *Railway Safety Act*?
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?
  - (a) If so, did the Defendant breach that duty?
  - (b) If so, was it reasonably foreseeable that the Class Members would suffer harm as a result of that statutory breach?
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 Members entitled to an aggregate assessment of damages for part or all of the damages they suffered?
  - (c) If so, which 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 cost 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 6, 7 and 12?

- (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 the necessary upgrades to Crossings 8-11 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 audible train warning signals?

## **APPENDIX D – PROPOSED FORM AND METHOD OF NOTICE OF CERTIFICATION**

1. The proposed form of Notice of Certification is attached.
2. The proposed method for delivery of Notice of Certification is as follows:
  - (a) Class Counsel will send a copy of the Notice of Certification to all Class Members who have provided them with their contact information.
  - (b) Class Counsel will arrange for the Notice of Certification to be published once, or as many times as required by the Court, in the following newspapers: The Edmonton Journal, The Stony Plain Reporter, The Spruce Grove Examiner, the Edmonton Sun, and the National Post.
  - (c) Class Counsel will send the Notice of Certification by mail or e-mail to any person who requests it after publication in the above noted newspapers.
  - (d) Class Counsel will issue a Press Release with respect to the Notice of Certification within 10 days of the Certification Order being issued.
  - (e) Class Counsel will publish the Notice of Certification on the:
    - (i) JSS Barristers website at [www.jssbarristers.ca/pages/class-actions/class-actions.cfm](http://www.jssbarristers.ca/pages/class-actions/class-actions.cfm)
    - (ii) Branch MacMaster website at [www.branchmacmaster.com/class-actions/](http://www.branchmacmaster.com/class-actions/)

## **CLASS ACTION REGARDING CANADIAN NATIONAL RAILWAY COMPANY**

### **NOTICE OF CERTIFICATION**

#### **What is the Class Action About?**

A lawsuit has been certified as a Class Action against Canadian National Railway Company.

The lawsuit alleges that the Class Members who were all residents of Parkland County were subjected to an ongoing nuisance in the form of train whistles at public grade crossings in Parkland County. The lawsuit alleges that the County of Parkland gave notice of and passed a bylaw allowing for the cessation of whistle usage at certain crossings but that the Defendant, Canadian National Railway Company failed to cease the use of train whistles on a timely basis or at all regarding 12 specific crossings in Parkland County.

The Representative Plaintiff is Norman Klassen. In this lawsuit the Representative Plaintiff is seeking damages on his own behalf and on behalf of everyone who was a resident of Parkland County and who lived within 1.75 miles of public grade railway crossings where the Defendant operated or continues to operate train whistles, allegedly in contravention of a whistle cessation procedure that was put in place by the federal government and followed by Parkland County.

#### **How do I know if I am a member of the Class?**

The Class has been defined by the Court 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 30, 2017 onwards.

If you were a resident of Parkland County at any time from September 30, 2017 onward and you lived within 1.75 miles of one of the twelve Crossings identified in the Statement of Claim, then you are likely a Class Member.

If you are not sure whether you are a member of the Class or not, or if you would be entitled to damages should the Defendant be found responsible and required to pay damages, then you should speak to Class Counsel, whose address is set out below.

#### **How do I participate in this Class Action?**

Class Members who wish to participate in the Class Action do not need to do anything at this time. They are automatically included in the Class Action.

Class Members who wish to participate are also encouraged to contact Jensen Shawa Solomon Duguid Hawkes LLP ("Class Counsel") at:

Kajal Ervin / Gavin Price / Sean Carrie  
 Jensen Shawa Solomon Duguid Hawkes LLP  
 #800, 304 – 8 Avenue SW  
 Calgary, Alberta T2P 1C2  
 (403) 571-1520  
 classactions@jssbarristers.ca

### **What if I do not want to participate in the Class Action?**

Any Class Member who wishes to opt out of the Class Action must do so by sending a written opt out form, signed by the Class Member, stating that he opts out of the Class Action. The written opt out form can be obtained from Class Counsel, and must be sent by pre-paid mail, courier, or e-mail to Class Counsel at the address above.

The written opt-out form must be received by Class Counsel no later than \_\_\_\_\_, 2020

No Class Member will be permitted to opt out of the Class Action after \_\_\_\_\_, 2020. If you opt-out of the Class Action, you will take full responsibility for initiating your own lawsuit against the Defendant and for taking all legal steps necessary to protect your claim, if you wish to proceed with a claim.

### **What are the costs to me?**

Class Members will not be personally liable to pay any legal fees or disbursements to Class Counsel.

If the Class Counsel is successful in establishing that the Defendant is liable to pay money to the Class Members, the Court will then proceed to determine which Class Members may be entitled to that money, and how such amounts should be distributed to those Class Members.

The Representative Plaintiff has retained Class Counsel to represent him and the Class in this lawsuit. Class Counsel will only be paid legal fees if the lawsuit is successful. If the lawsuit is successful, Class Counsel will request that legal fees be set by the Court.

If the Class Action is successful, legal costs will be deducted from the amounts recovered for the Class Members, but only after such costs are approved by the Court.

### **How do I find out more about this Class Action?**

Questions about the matters in this Notice must not be directed to the Court. The Certification Order and other information with respect to this Class Action can be obtained at the following websites:

[www.jssbarristers.ca/pages/class-actions/class-actions.cfm](http://www.jssbarristers.ca/pages/class-actions/class-actions.cfm)

[www.branchmacmaster.com/class-actions/](http://www.branchmacmaster.com/class-actions/)

In addition, questions for Class Counsel should be directed by mail, e-mail, or telephone to:

Kajal Ervin / Gavin Price / Sean Carrie  
Jensen Shawa Solomon Duguid Hawkes LLP  
#800, 304 – 8 Avenue SW  
Calgary, Alberta T2P 1C2  
(403) 571-1520  
classaction@jssbarristers.cas

## APPENDIX E – PROPOSED OPT-OUT FORM

### OPT OUT FORM

TO: JENSEN SHAWA SOLOMON DUGUID HAWKES LLP (“JSS BARRISTERS”)

I, \_\_\_\_\_ (insert full name), have received notice of the Class Action claim commenced against Canadian National Railway Company.

I believe that I am a Class Member. I was a resident of Parkland County between September 30, 2017 and the present date and resided within 1.75 miles of one of the twelve Crossings defined in the Statement of Claim.

**I DO NOT** wish to participate in the Canadian National Railway Company Class Action.

I understand that by **OPTING OUT** of this Class Action, I will not be eligible for any benefit that may be available to the Class upon resolution of this matter.

I understand that, if I believe I suffered losses or damages and I wish to pursue any remedy with respect to the use of train whistles by Canadian National Railway Company at public grade level train crossings in Parkland County, I must do so on my own.

I understand that the *Limitations Act*, RSA 2000, c L-1 may limit or extinguish any rights I may have to pursue a remedy if I do not act promptly to pursue any claim.

Dated the \_\_\_\_\_ day of \_\_\_\_\_, 2020.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Witness

Insert Mailing Address:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Telephone Number:

\_\_\_\_\_

Email Address:

\_\_\_\_\_

## **APPENDIX F – PROPOSED LITIGATION PLAN**

### **INTRODUCTION**

1. The *Class Proceedings Act* requires a workable Litigation Plan to be put into place as part of the certification process. Norman Klassen, as the proposed Representative Plaintiff in this matter, hereby proposes the following draft Litigation Plan, and further proposes that the final Litigation Plan involve input from counsel for the Defendant and direction from this Honourable Court.

### **CERTIFICATION APPLICATION**

2. The Certification Application will be heard by the Case Management Justice based on a schedule to be set, and amended as necessary, through the case management process.
  - (a) The Representative Plaintiff shall file his Certification Application and related materials, including any expert affidavit(s);
  - (b) The Defendant shall complete Questioning on the Plaintiff's affidavit and expert affidavits filed in support of the Certification Application;
  - (c) The Representative Plaintiff will provide responses to undertaking requests made during Questioning, subject to privilege, relevance and materiality;
  - (d) The Defendant may file materials in response to the Certification Application, including any expert affidavit(s);
  - (e) The Representative Plaintiff shall complete Questioning on the Defendant's affidavit(s) and expert affidavit(s) filed in response to the Certification Application;
  - (f) The Defendant will provide responses to undertaking requests made during Questioning shall be provided, subject to privilege, relevance and materiality;
  - (g) The Representative Plaintiff shall file reply materials to the Certification Application Response, including any reply expert affidavit(s)
  - (h) The Defendant shall complete Questioning on the Plaintiff's reply affidavit(s) and reply expert affidavit(s) filed in support of the Certification Application;
  - (i) The Representative Plaintiff will provide responses to undertaking requests made during Questioning, subject to privilege, relevance and materiality;
  - (j) Questioning on undertaking responses shall be completed;

- (k) The Representative Plaintiff shall file and serve his Brief of Law and Argument with respect to the Certification Application;
- (l) The Defendant shall file and serve its Response Brief of Law and Argument with respect to the Certification Application;
- (m) The Representative Plaintiff may file and serve a Reply Brief of Law and Argument with respect to the Certification Application; and
- (n) The Certification Application shall be heard.

### **NOTIFICATION TO THE CLASS AND OPT OUT PROCEDURE**

3. The Representative Plaintiff proposes that, in the event this matter is certified as a class proceeding, a notice of certification (the **Certification Notice**) be circulated to advise Class Members, among other things, that:
  - (a) The Court certified the action as a class proceeding;
  - (b) The Court has approved a Class definition;
  - (c) Branch MacMaster LLP and JSS Barristers are confirmed as Class Counsel, along with contact information for Class Counsel;
  - (d) A person may only opt out of the class proceeding by sending a written opt out election to the recipient designated by the Court, before a date and time fixed by the Court; and
  - (e) A person may not opt out of the class proceeding after the date fixed by the Court.
4. The Certification Notice shall be given to the Class in a form and manner approved by this Honourable Court. A proposed form and method of the Certification Notice has been attached as **Appendix D** to this Application.
5. The precise and final form of the Notice of Certification to the Class shall be determined by this Honourable Court at the Certification Application after counsel for the Defendant has had an opportunity to provide input.
6. It is proposed that the Notice of Certification to the Class be issued no later than 20 days after the date a Certification Order is granted in this matter.

## **DOCUMENT PRODUCTION AND DOCUMENT MANAGEMENT**

7. It is proposed that the Representative Plaintiff provide his Affidavits of Records no later than 30 days after the Certification Order is granted.
8. It is proposed that the Defendant will provide its Affidavit of Records no later than 60 days after the service of the Representative Plaintiff's Affidavit of Records.
9. Documents will be exchanged in electronic format, to the extent possible, using Eclipse. The parties will confer and agree on document coding protocols to facilitate an orderly exchange of documents, taking into account the direction provided in *Civil Practice Note 4*, with any issues arising to be addressed in Case Management.

## **QUESTIONING**

10. It is proposed that Questioning be completed within 90 days from the date the Defendant provides their Affidavits of Records. The Representative Plaintiff anticipates that the Questioning of the Defendant (including their officers and employees) can be completed in 10 days or less, and that the Questioning of the Representative Plaintiff can be completed in 2 days, all subject to undertakings and objections.

## **COMPLETING UNDERTAKINGS**

11. It is proposed that each party or individual questioned as part of the Part 5 Questioning pursuant to the *Alberta Rules of Court* provide answers to undertakings within 30 days of the undertakings being given.

## **QUESTIONING ON UNDERTAKINGS**

12. It is proposed that any Questioning on undertaking answers given by a person Questioned pursuant to Part 5 of the *Alberta Rules of Court* be completed within 30 days of receipt of the undertaking answers from that person.

## **ISSUES ARISING FROM QUESTIONING**

13. Following the completion of the Questioning process, the parties may seek an amendment of the Certification Order to deal with any necessary refinements to the common issues.
14. In addition to regular Case Management meetings, the Representative Plaintiff proposes that there be a Case Management meeting scheduled to take place within 30 days of the deadline for the conclusion of the Questioning process, including any questioning on undertakings, to deal with or schedule any Applications that may arise from any

objections taken by any party and to address any necessary refinements to the common issues.

#### **EXCHANGE OF EXPERT REPORTS**

15. The Representative Plaintiff anticipates that expert reports will be provided on behalf of all parties.
16. The Representative Plaintiff proposes that expert reports be exchanged in accordance with the sequence outlined in Rule 5.35 of the *Alberta Rules of Court*, on the following schedule:
  - (a) Primary Reports due within 90 days of the completion of Questioning;
  - (b) Rebuttal Reports due within 60 days of the deadline for service of Primary Reports; and
  - (c) Surrebuttal Reports due within 30 days of the deadline for Rebuttal Reports.

#### **ALTERNATIVE DISPUTE RESOLUTION**

17. The Representative Plaintiff and the Defendant shall consider alternative dispute resolution and may discuss and agree upon the format of such a process as between the parties or during a Case Management Meeting, as may be appropriate. If the parties participate in alternative dispute resolution and if the parties reach a proposed settlement of the Action and the Court approves the settlement, this Litigation Plan will require amendment.

#### **TRIAL OR SUMMARY JUDGMENT ON THE COMMON ISSUES**

18. If appropriate, the Representative Plaintiff may seek summary judgment on one or more of the common issues.
19. If the Representative Plaintiff does not seek summary judgment on common issues, or if any common issues remain following a motion for summary judgment, the Representative Plaintiff will seek the early appointment of the common issue trial judge. The Representative Plaintiff will address issues of trial management to the trial judge in advance of the trial to ensure the orderly and efficient determination of common issues.
20. It is proposed that a Form 37 – Request to Schedule a Trial Date for the common issues will be filed by the parties within 30 days following the deadline for service of the Surrebuttal Reports.
21. The Representative Plaintiff anticipates that the Common Issues Trial will take approximately 15 days.

22. It is anticipated that the Common Issue Trial will resolve all core liability issues. Further it is anticipated that the Common Issues Trial may also resolve certain core damages questions, including the award of punitive or exemplary damages.
23. The Representative Plaintiff may seek an aggregate award of monetary relief, in which case the Class will request that the Court approve and order the distribution of the aggregate award amongst Class Members in proportion to the losses suffered. The methodology for distributing the aggregate award would be worked out between Class Counsel, a claims administrator, and any experts retained by Class Counsel for that purpose. Once finalized, the distribution plan would be brought before the Court for approval.
24. In the event of punitive or exemplary damages being awarded, Class Counsel shall bring a motion before this Honourable Court to determine the manner in which such damages ought to be distributed to the Class. The Representative Plaintiff expects that such damages would be allocated to the Class Members on a *pro rata* basis having regard to the amount of damages sustained by each Class Member.

#### **NOTICE OF RESOLUTION OF COMMON ISSUES**

25. Following the Common Issues Trial, the Representative Plaintiff will ask the Court to:
  - (a) Settle the form and content of a notice of resolution to the common issues (the **Notice of Resolution**); and
  - (b) Order that the Notice of Resolution be distributed substantially in accordance with the method of Notice of Certification set out above, except that the Notice of Resolution shall not be delivered to any Class Member who validly opted out of the proceedings.

#### **RESOLUTION OF ANY REMAINING INDIVIDUAL ISSUES**

26. In the event that the Representative Plaintiff is successful at the common issues stage but an aggregate award of monetary relief is not granted, it is proposed that a Case Management Conference be convened before this Honourable Court to determine the most efficient and practical means of determining the individual issues which remain to be resolved. Pursuant to section 28 of the *CPA*, the Court will be asked to make orders as are necessary to determine all issues not determined at the Common Issues Trial.
27. The Representative Plaintiff expects that the Common Issues Trial will resolve all issues related to duties owed by the Defendant to the Class Members, the nature of relationship between the Defendant and the Class Members, and breaches by the Defendant.

28. The Representative Plaintiff anticipates that the only remaining issues following the Common Issues Trial will relate to damages.
29. The process to address damages may involve individual trials, however, it is expected that such trials will be expedient, and will consume less than one day each, and groupings of the same or similar damages issues are likely to occur. It is proposed that a Case Management Conference be convened before this Honourable Court to determine the most efficient and practical means for proceeding with individual trials, including the possibility of grouping similarly situated claimants together.
30. With respect to the quantum of damages, the Representative Plaintiff expects this will be primarily an expert driven exercise.

#### **CLASS COUNSEL'S FEES AND THE COSTS OF ADMINISTRATION**

31. If the Court awards damages in the aggregate, Class Counsel will ask the Court to order payment of their fees, disbursements and applicable taxes (**Class Counsel Fees**) as a first charge on the aggregate amount.
32. If the Court does not award damages in the aggregate, Class Counsel will ask the Court to direct the Defendant to pay Class Counsel Fees out of the awards in favor of the Class Members, as a first charge on the awards.
33. The Plaintiff will ask the Court to order that the Defendant pay all administration costs, including the costs of all notices and the fees and disbursements of the Administrator as those costs are incurred.

#### **CASE MANAGEMENT AND FURTHER ORDERS CONCERNING THIS PLAN**

34. This Plan may be amended from time to time by agreement between the parties, directions given at case conferences or by further order of the Court.
35. It is proposed that the parties appear before the Case Management Justice for such Case Management meetings as may be required to implement this Litigation Plan and to resolve any issues that may arise, and to establish a process and schedule after the Common Issues Trial.

#### **SCHEDULE SUMMARY**

36. The following is a summary of the proposed schedule from the Certification Order to the Common Issues Trial:

<b>Step</b>	<b>Days Allotted for Completion</b>	<b>Days from Certification Order</b>
1. Certification Order	-	-

2. Notification to Class	20	20
3. Document Production from the Representative Plaintiffs	30	30
4. Document Production from the Defendants	60	90
5. Questioning Completed	90	180
6. All Undertakings Completed	30	210
7. All Questioning on Undertakings Completed	30	240
8. Issues Arising from Questioning	30	270
9. (a) Expert Reports (if required) – Primary	90	330
(b) Expert Reports (if required) – Rebuttal	60	390
(c) Expert Reports (if required) – Surrebuttal	30	420
10. Common Issues Trial	As scheduled by the Court	As scheduled by the Court