
CANADA / JUDGMENT

Gautam v. Canada Line Rapid Transit Inc.

2010 BCSC 163

COURT

Supreme Court of British Columbia

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2010 BCSC 163 Gautam v. Canada Line Rapid Transit Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gautam v. Canada Line Rapid Transit Inc.,

2010 BCSC 163

Date: 20100205

Docket: S087866

Registry: Vancouver

Between:

Gary Gautam dba Cambie General Store,

557856 B.C. Ltd. dba Sofa So Good, George King and Jane King

Plaintiffs

And

Canada Line Rapid Transit Inc., Intransit BC Limited Partnership,

Intransit British Columbia G.P. Ltd. and SNC-Lavalin Inc.

Defendants

Before: The Honourable Mr. Justice Pitfield

Reasons for Judgment

Counsel for the Plaintiffs:

P.R. Bennett

M.W. Mounteer

Counsel for the Defendants:

G.K. Macintosh, Q.C.

S. Hern, T.A. Dickson

R.J. McDonell

Place and Date of Hearing:

Vancouver, B.C.

November 4-5, 2009

Place and Date of Judgment:

Vancouver, B.C.

February 5, 2010

Introduction

- [1] The plaintiffs, who are property owners or business proprietors on Cambie Street between 2nd and 25th Avenues in Vancouver ("Cambie Village"), have commenced an action under the Class Proceedings Act, R.S.B.C. 1996, c. 50 (the "CPA"). The plaintiffs claim damages resulting from the nuisance allegedly caused by the construction of the rapid transit rail link known as the "Canada Line" which connects downtown Vancouver to Richmond and the Vancouver International Airport. Alternatively, they claim that they have the option of waiving damages for the tort of nuisance and requiring the defendants to disgorge the benefit that they derived by employing the cut and cover, as opposed to the bored tunnel, method of construction in accordance with the waiver of tort doctrine. In the further alternative, they seek compensation on the basis that their properties and businesses were injuriously affected by the construction.
- [2] On this application the plaintiffs apply for orders certifying the action as a class proceeding, defining the class, stating the common issues to be tried, and appointing the plaintiffs as representatives of the class. The defendants oppose certification on the basis that the action does not raise common issues and, in any event, a class proceeding is not the preferable procedure by which to resolve the issues in the action.
- [3] This substance of this action is similar, in some respects, to *Heyes v. City of Vancouver*, 2009 BCSC 651. In that case, Canada Line Rapid Transit Inc., InTransit BC Limited Partnership, and South Coast British Columbia Transportation Authority were found liable for the nuisance associated with the use of cut and cover tunnel construction in the vicinity of a business located at 16th Avenue and Cambie Street in Vancouver. The decision is under appeal to the Court of Appeal. Claims of waiver of tort and injurious affection were not advanced in that action.

- [4] As was described in Heyes, construction of the Canada Line took place from 2005 through 2009. Work was initially undertaken to relocate utilities at various points on Cambie Street so that cut and cover tunnel construction could proceed. Construction of the tunnel itself commenced at the south end of Cambie Street and proceeded north by means of what has been described as a "construction train". Cut and cover construction involved the excavation of a trench from south to north through Cambie Village, the installation of a tunnel in the trench, the backfilling of the trench, and the eventual restoration of the street surface itself. Throughout construction, vehicle and pedestrian traffic on Cambie Street was affected. The extent of the disruption and the alleged impact thereof on property owners and merchants in Cambie Village provide the basis for the dispute between the parties to this action.
- [5] This application is not concerned with the merits of any particular claim. Rather, it is concerned with the question of whether the entitlement of Cambie Village property owners and merchants to compensation or damages is amenable to determination in a class proceeding, as opposed to some other form of individual or collective proceeding, such as a multi-party action or one or more test cases. In order to be certified as a class proceeding, issues of fact or law common to all members of the class must exist, a class proceeding must be the preferable procedure by which to resolve the common issues, and determination of such common issues as are found to exist must advance the action as a whole.

Requirements for Certification

- [6] An action must be certified as a class proceeding if the conditions set forth in s. 4(1) of the CPA are satisfied:

4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- (e) there is a representative plaintiff who
 - (i) would 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, on the common issues, an interest that is in conflict with the interests of other class members.

[7] Section 4(2) specifies the factors that are to be taken into account in assessing whether a class proceeding is the preferable procedure for resolution of the common issues:

4(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
- (b) whether a significant number of the members of the class 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.

[8] The term "common issues" is defined in s. 1 of the CPA:

"common issues" means

- (a) common but not necessarily identical issues of fact, or
- (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

[9] The defendants acknowledge that the statement of claim discloses a cause or causes of action, and they do not object to the description of the class or to the naming of the plaintiffs as representatives of the class with the result that these matters may be addressed summarily.

The Causes of Action

[10] The parties agree that the statement of claim discloses two and possibly three causes of action. The first is a claim in nuisance, which is unreasonable interference with the use and enjoyment of property owned or occupied by another. The second is a claim based on the waiver of tort which some authorities have described as a remedy but others have described as an independent cause of action. The third is a claim for injurious affection which is economic loss occasioned by the exercise of a statutory power by a body which is empowered to expropriate land and interests therein where no expropriation has taken place.

[11] There is no doubt that one or more causes of action are disclosed in the statement of claim. The initial requirement for certification has been satisfied.

The Proposed Class

[12] The proposed class is:

All persons who have either owned

- (a) a business which operated from premises located within the business improvement area established pursuant to the Cambie Village Business Improvement Area designation by-law, City of Vancouver By-Law No. 9247, which business improvement area covers Cambie Street and its adjoining blocks between 2nd Avenue and King Edward Avenue, as set out particularly in Schedule "A" to By-Law No. 9247 (the "Cambie Village"); or
- (b) a property in Cambie Village occupied by such a business owner

at any time from November 1, 2005 to the completion of the "Canada Line Construction in Cambie Village" (collectively, the "Class").

[13] The definition of the class appropriately describes those persons who have an interest in the action. The class is comprised of approximately 62 individuals or companies who own properties in Cambie Village, and approximately 215 individuals or companies who operate a business from leased premises in the same area.

[14] I am satisfied that the owners and tenants constitute an identifiable class of two or more persons with the result that the second requirement for certification has been satisfied.

The Representative Plaintiffs

- [15] Mr. Gautam operates the Cambie General Store, a small convenience store, located on the northwest corner of Cambie Street and 18th Avenue. He is a lessee of the premises from which he operates. He operated the business prior to the commencement of construction of the Canada Line and continues to do so.
- [16] 557856 B.C. Ltd., doing business as "Sofa So Good", is a retail furniture business which operated from a location between 6th and 7th Avenues on Cambie Street until the business relocated in 2007, allegedly due to Canada Line construction.
- [17] Mr. and Mrs. King operated G. King Photo-Colour Ltd., initially from a site in the vicinity of 15th Avenue and Cambie Street, and later from a site at the corner of 15th Avenue and Cambie Street. The Kings own both properties.
- [18] The amended statement of claim pleads facts in support of the allegation that the use of cut and cover construction caused each plaintiff economic loss.

[19] There is nothing in the record to suggest that these plaintiffs would not fairly and adequately represent the interests of the class. They have produced a workable plan to be followed in the event that the action is certified, and they do not appear to be in conflict with any other class members on the questions that are described as common issues. I am satisfied that these parties will be appropriate representative plaintiffs in the event that the action is certified as a class proceeding.

The Identification of Common Issues

[20] The principal point of departure between the plaintiffs and the defendants centres on the question of whether the action raises common issues as defined by the CPA, and if so, whether a class proceeding is the preferable means by which to address the complaints of members of the class.

[21] The plaintiffs state the following questions as common issues:

1. Did the construction of the Canada Line on Cambie Street in Cambie Village significantly impair the public's ability to conveniently access the Cambie Village properties?
2. If the answer to (1) is yes, would the reasonable owner or occupant of property in Cambie Village regard the significant impairment of public access to Cambie Village resulting from the construction of the Cambie Line as a substantial interference with the use and enjoyment of the Cambie Village properties for business purposes?
3. If the answer to (2) is yes, was there statutory authority for the unreasonable interference with the use and enjoyment of the Cambie Village properties, or any of them, caused by the construction of the Canada Line?
4. If the answer to (3) is no for some or all of the Cambie Village properties, are the Class members entitled to waive their right to claim damages for nuisance resulting from the unreasonable interference with their use and enjoyment of those Cambie Village properties and instead claim restitution of the benefit received by the Defendants for their wrongful conduct in inflicting the nuisance?
5. If the answer to (3) is yes for some or all of the Cambie Village properties, are the Class members entitled to compensation for injurious affection for any temporary diminution in the value of their interest in those Cambie Village properties caused by the construction of the Canada Line?

[22] The defendants say that the answer to each of the questions will vary depending upon the circumstances of each member of the class and, because the individual issues predominate, that certification should be refused.

(a) Questions One and Two: Substantial Interference with the Use and Enjoyment of Property

[23] The substance of Questions 1 and 2 is nuisance, the essence of which was described in Heyes at para. 134:

134 The character of nuisance in the Canadian context was recently described in *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392 at para. 77:

At common law, nuisance is a field of liability that focuses on the harm suffered rather than on prohibited conduct (A. M. Linden and B. Feldthusen, *Canadian Tort Law* (8th ed. 2006), at p. 559; L.N. Klar, *Tort Law* (2nd ed. 1996), at p. 535). Nuisance is defined as unreasonable interference with the use of land (Linden and Feldthusen, at p. 559; Klar, at p. 535). Whether the interference results from intentional, negligent or non-faulty conduct is of no consequence provided that the harm can be characterized as a nuisance (Linden and Feldthusen, at p. 559). The interference must be intolerable to an ordinary person (p. 568). This is assessed by considering factors such as the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use and the utility of the activity (p. 569). The interference must be substantial, which means that compensation will not be awarded for trivial annoyances (Linden and Feldthusen, at p. 569; Klar, at p. 536).

[24] In *Sutherland v. Attorney General of Canada*, [1997] B.C.J. No. 2550 (S.C.), 15 C.P.C. (4th) 329, 75 A.C.W.S. (3d) 218, the court stated that a finding of nuisance depended on two findings of fact:

- (1) that the conduct or acts complained of substantially interfered with the use and enjoyment of property; and
- (2) that the interference was unreasonable in light of all the surrounding circumstances.

[25] Question 1 is concerned with the impact of construction on the public's access to businesses in Cambie Village. The impairment of access is alleged to be the source of the nuisance caused by construction of the Canada Line. With respect, the concern is not so much whether the public's access was impaired, but whether the impairment of access adversely affected property owners and business proprietors to the extent necessary to constitute a nuisance. That determination must take into account the nature, severity, and duration of the impairment with due regard for the character of the neighbourhood and the use to which the properties in Cambie Village were put, as well as the effect upon individual owners or merchants.

[26] The defendants do not plead that the effect of construction varied from place to place in Cambie Village. Indeed, there is little in the record on this application to suggest that the impact of construction on access to the properties and businesses in Cambie Village differed markedly from location to location along Cambie Street. The plaintiffs allege that the defendants recognized the impact of construction upon Cambie Village owners and merchants. They cite the executive summary of a report entitled "Review of Canada Line Business Support Programs" prepared by or for the defendants in 2007:

There is unanimous agreement that the construction related disruption has caused hardship on small businesses along the Line currently in particular for those merchants located in the Cambie Village area and adjacent to some station construction sites.

- [27] The first question is concerned with the nature, extent, and severity of the disruption and the impact on access associated with construction in Cambie Village. That determination requires an objective assessment and need not be unique to the circumstances of any particular owner or merchant. In fact, the complaint of each member of the class is the same: the effect of construction upon parking and turns permitted to and from Cambie Street, restrictions on cross street access and pedestrian crossings, and restrictions on sidewalk access, combined to impair access to properties and businesses the length of Cambie Street between 2nd and 25th Avenues.
- [28] It is correct to say, as the defendants do, that in order to establish a claim for damages occasioned by the alleged interference, each owner and merchant will be obliged to demonstrate that the degree of interference was unreasonable. That claim derives from the fact that economic loss is alleged to have been sustained by each member of the class. One may conclude that a significant interference with access which resulted in any economic loss to any owner or merchant was unreasonable. Conversely, it might be argued that the economic loss experienced by any owner had to be more than trifling and of an amount sufficient to permit characterization of the loss as unreasonable.
- [29] It is not apparent to me that the finding of substantial interference requires proof of economic loss. Rather, the issue of substantial interference will require the parties and the court to compare and contrast the character of the street before and during construction by reference to such things as traffic flow, access to parking, access to crosswalks and cross streets, sidewalk access and capacity, and any other factors that may be considered relevant to property and business access. Differences in impact will likely be reflected in the economic loss alleged by any member of the class. The need to assess economic loss resulting from construction which substantially interfered with property and business access, rather than other factors, does not detract from the fact that the complaint of substantial impairment with access is a common feature of each class member's complaint. The question of whether the common complaint is more or less important than the quantification of each owner's or proprietor's loss will be a factor when considering whether a class proceeding is the preferable procedure by which to resolve the issues in dispute, a point to which I will return.
- [30] In my opinion, the first question, if restated to focus on the effect of construction on access to properties and businesses, raises an issue that is common to all members of the class.
- [31] The second question is directed at the issue of whether an owner or occupant would regard the impairment of access as amounting to a substantial interference with the use and enjoyment of the Cambie Village properties for business purposes. With respect, that question is not germane to the action and I would not conclude that it should be stated as a

common issue. In the determination of nuisance, the subjective view of any owner or occupant must give way to an objective assessment of the severity of the impact of the conduct or activities complained of upon any particular owner or occupant and the group as a whole.

- [32] In combination, the first and second questions focus on the question of whether the use of cut and cover construction impeded access to the properties and businesses in Cambie Village to the degree necessary to constitute a nuisance in the event an economic loss can eventually be proved. In my opinion, the common issue raised by the first and second questions can be better framed in a single question as follows:

Did the cut and cover tunnel construction of the Canada Line substantially interfere with the use and enjoyment of property by owners or by business proprietors on Cambie Street from 2nd Avenue to King Edward Avenue?

- [33] If substantial interference is proved, the question of whether individual loss resulted from the alleged interference with access can be addressed in the manner suggested by the case management plan. The plan proposes that in the event the court determines that there was substantial interference with access, the question of whether the impact was unreasonable as regards any owner or business will be determined with the assistance of an assessor in the manner contemplated by s. 27 of the CPA:

27 (1) When the court determines common issues in favour of a class or subclass and determines that there are issues, other than those that may be determined under section 32, that are applicable only to certain individual members of the class or subclass, the court may

- (a) determine those individual issues in further hearings presided over by the judge who determined the common issues or by another judge of the court,
- (b) appoint one or more persons including, without limitation, one or more independent experts, to conduct an inquiry into those individual issues under the Rules of Court and report back to the court, or
- (c) with the consent of the parties, direct that those individual issues be determined in any other manner.

- [34] The defendants argue that assessment of the impact is at the core of the action. They say that the assessment will depend on the type of business, the effect of location on sales, the nature of the customer base, the manner in which customers made their way to the business, the sensitivity of the clientele, the effect of other market forces on business performance, and the efforts made by the business to adjust to construction in order to mitigate losses. With respect, this statement of requirements overlooks the fact that the principal evidence of loss will be a reduction in revenue during construction. The assessor's concern will be to quantify the loss and to consider whether any loss was attributed to factors other than construction. Upon receipt of the assessor's report, the court may determine whether the amount of the loss sustained by any member of the class because of

construction rather than some other cause was unreasonable in the circumstances.

(b) Question Three: The Defence of Statutory Authority

[35] The third question is concerned with the defence of statutory authority. Because acting in accordance with statutory authority is a defence, the defendants are obliged to prove that they may avail themselves of it. No claimant is required to prove the contrary.

[36] The defence of statutory authority is pleaded in paras. 15 and 19 of the amended statement of defence:

15. The Canada Line was constructed in compliance with all applicable permits, licences, approvals, and authorizations from the relevant government, municipal and regional district authorities. In particular, the construction of the Canada Line was in accordance with the federal and provincial Environmental Assessment Certificates issued for the project, and in accordance with the City of Vancouver's authorizations, approvals and permits for all disruptions of traffic along Cambie Street during construction.

...

19. In the alternative, if the Plaintiffs establish a claim in nuisance, the Defendants were acting pursuant to statutory authority at all times, and the alleged nuisance was the inevitable consequence thereof.

[37] The defence of statutory authority was examined in *Heyes*. The essence of the defence is that a public authority acting pursuant to a statutory duty or power will not normally be liable for any nuisance resulting from the performance of the duty or power. The defence is subject to a significant limitation. Where alternative methods for the exercise of the statutory power or authority exist, the method that is least disruptive must generally be employed. The failure to do so, where the result is unreasonable interference with the use or enjoyment of one's property, may expose the authority to liability for nuisance.

[38] The defendants claim that the defence applies to avoid liability in respect of any nuisance resulting from construction of the Canada Line anywhere in Cambie Village. The claim is based on the assertion that the defendants acted with the protection afforded by environmental assessment certificates and other permits obtained from municipal, provincial, and federal authorities. The assertion appears to be an all or nothing claim. There is no reason why its merit cannot be considered as a common issue affecting the class as a whole. A similar claim was dismissed in *Heyes*. The dismissal will most likely constitute a ground of appeal before the Court of Appeal. In the event that the defendants prevail on appeal, the class claims of nuisance and waiver of tort will necessarily fail, although the claim of injurious affection may persist.

[39] In the event that the global application of the defence of statutory authority as pleaded is rejected on appeal in *Heyes*, it will still be open to the defendants to claim that they should be protected by the defence in relation to certain portions of the line, or perhaps even its

entirety, either on the basis, newly pleaded, that bored tunnel construction would have been no less invasive than was cut and cover construction, or on the basis that any nuisance caused in a specific part of Cambie Village could not have been avoided because no non-disruptive construction option was available. If the latter claim is made, the defendants will be obliged to define the portion or portions of Cambie Village to which the defence of statutory authority is alleged to apply. If a more limited defence applies in some locations and not others, thereby affecting some property owners and merchants but not others, the CPA will allow the defendants to apply for the designation of a sub-class in relation to which that iteration of the defence is alleged to apply.

[40] In my opinion, the third question can be better framed as follows:

If the answer to Question 1 is Yes, was there statutory authority for the interference with the use of any property in Cambie Village thereby absolving the defendants of liability for economic loss resulting from nuisance?

(c) Question 4: Waiver of Tort

[41] The fourth question is concerned with waiver of tort, a topic that was discussed in *Heward v. Eli Lilly & Co.* (2008), 91 O.R. (3d) 691 (Ont. Div. Court), at para 20:

[20] The nomenclature "waiver of tort" is somewhat confusing. A plaintiff is not waiving the right to sue in tort but rather, electing to base his/her claim in restitution. The plaintiff thereby seeks to recoup the benefits that the defendant has derived from the tortious conduct. For example, if the tortfeasor's gain exceeds the quantum of damages that the plaintiff might recover in an action in tort, the plaintiff might well choose to concurrently pursue the alternative (so-called "waiver of tort") remedy founded in restitution.

[42] In *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, the Court of Appeal suggested that the claim of waiver of tort might be advanced by a class as a whole without requiring proof of individual loss in circumstances where the defendant realized a gain as a result of wrongful conduct. At this point, the limits of what constitutes "wrongful conduct" appear not to have been fully defined.

[43] The plaintiffs assert their claim based on waiver of tort at paras. 22, 23 and 30 of the amended statement of claim:

22. The Defendants constructed the Canada Line tunnel along Cambie Street in the Cambie Village using the "cut and cover" method of construction rather than the "bored-tunnel" method in order to reduce the cost of construction of the Canada Line and thereby increase the profits that will ultimately be earned by the operation of the Canada Line.
23. The Defendants chose to construct the Canada Line tunnel along Cambie Street in the Cambie Village using the "cut and cover" method of construction knowing that this construction method would significantly impair the ability of the public to conveniently access the Cambie Village properties during the period of construction and that businesses

operating in the Cambie Village would be adversely effected as a result, in a manner and to an extent that could have been avoided had the "bored tunnel" method of construction been used to build the Canada Line tunnel under this portion of Cambie Street.

...

30. As set out in para. 22 and 23 above, the nuisance inflicted on the Plaintiffs and other members of the Class by the Defendants through the construction of the Canada Line tunnel on Cambie Street in Cambie Village using the "cut and cover" method was done knowingly and deliberately by the Defendants, in order for the Defendants to minimize the cost of construction of the Canada Line and thereby increase the profits that the Defendants would ultimately enjoy from the operation of the Canada Line.

[44] Whether a decision of the kind alleged to have been made by the defendants engages the principle of waiver of tort, and whether the class can avail itself of the principle without being required to prove that each member of the class has incurred a loss as a result of any decision that was made, are issues that readily lend themselves to characterization as common issues in a class proceeding.

[45] However, in my opinion the question is better framed as follows:

If the defence of statutory authority is not available to any defendant, are the members of the class entitled to waive any claim for damages and to claim restitution from the defendants of an amount equal to the benefit derived from the use of the cut and cover, rather than the bored tunnel, method of construction?

(d) Question Five: Injurious Affection

[46] The last question frames the claim based on injurious affection.

[47] Either an owner or a lessee of property, other than a lessee of residential property under a lease having a term of less than one year, may assert a claim based on injurious affection. Sections 41 and 42 of the Expropriation Act, R.S.B.C. 1996, c. 125 authorize the claim:

41 (1) In this section, "injurious affection" means injurious affection caused by an expropriating authority in respect of a work or project for which the expropriating authority had the power to expropriate land.

(2) The repeal of the Expropriation Act, R.S.B.C. 1979, c. 117, and the amendments and repeals in sections 56 to 128 of the Expropriation Act, S.B.C. 1987, c. 23, are deemed not to change the law respecting injurious affection if no land of an owner is expropriated, and an owner whose land is not taken or acquired is, despite those amendments or repeals, entitled to compensation to the same extent, if any, that the owner would have been entitled to had those enactments not been amended or repealed.

- (3) An owner referred to in subsection (2) who wishes to make a claim for compensation for injurious affection must make his or her claim by applying to the court, and the court must hear the claim and determine
 - (a) whether the claimant is entitled to compensation, and
 - (b) if entitled to compensation, the amount of the compensation.
- (4) Without limiting any other provision of this section, the BC Transportation Financing Authority has no greater liability to compensate an owner for injurious affection than does the Minister of Transportation and Highways.

42 (1) A claim for compensation under section 41 (3) must be made in writing to the court by the person suffering the damage, with particulars of the claim, within one year after the damage

- (a) was sustained, or
 - (b) became known to the person.
- (2) If a claim referred to in subsection (1) is not made in accordance with that subsection, the right to compensation is forever barred.
- [48] The claim in respect of injurious affection may be advanced against any defendant in whom a power of expropriation has been vested by statute but not exercised. The claim may be capable of pursuit notwithstanding that the defendant is protected from a claim in nuisance by virtue of the statutory authority defence. The claim of injurious affection will therefore only be relevant if the defendants are absolved of liability for any nuisance they are found to have caused because of the protection afforded by the defence of statutory authority.
- [49] On the face of it, the question of whether members of the class may successfully assert a claim for injurious affection appears to be a common issue. The question of whether the claim can be pursued by both owners and lessees is a question of law. The claim may be available to owners alone. It may be available to those who hold leasehold interests in property. The issue is common as all property owners and lessees in Cambie Village have an interest in the limits of the claim.
- [50] As with the claim of nuisance, the circumstances of different property owners and lessees may vary in some respects. In my opinion, that fact should be taken into account when considering whether a class action is the preferable procedure to resolve the common issues. The differences do not mean that there is no common issue.

[51] With respect, the question regarding injurious affection is better framed as follows:

If the answer to Question 2 is Yes, did the interference nonetheless result in injurious affection for which compensation may be claimed by any owner or tenant?

Is a Class Proceeding the Preferable Procedure?

- [52] The remaining consideration is whether a class proceeding is the preferable procedure by which to resolve the issues in dispute between the parties. In that regard, the court is directed by s. 4(2) of the CPA to consider all relevant factors including those specified in paragraphs (a) through (e):
- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
 - (b) whether a significant number of the members of the class 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.
- [53] The requirements are stated in the context of the purposes of class proceedings: facilitating access to justice, promoting judicial economy, and encouraging behavioural modification.
- [54] The question of law which appears to predominate in this case is the availability of the defence of statutory authority. The arguments advanced by counsel on behalf of the defendants in Heyes, and the arguments advanced in the submissions made on this application for certification, indicate that the defendants rely on the fact that the defence protects them, whatever the impact of construction, along parts, if not the entirety, of the route through Cambie Village.
- [55] The defence of statutory authority applies to all members of the class. The individual circumstances of any class member have no material bearing on the application of the defence. I would also note that the evidence that will be adduced in relation to the defence will likely be similar in many respects to the evidence that will be adduced in relation to the question of substantial interference. That suggests that a class proceeding is the preferred way to address both the issue of substantial interference and the defence of statutory authority.
- [56] I do not find evidence on this application which would suggest that any number of the members of the class have any reason to want to control the prosecution of separate actions. The complaints among the proposed class members are similar. The common allegation is that construction substantially interfered with access to the properties or businesses owned or operated by members of the class. Neither the class nor the defendants allege that the amount of interference differed materially at any point on Cambie Street in Cambie Village. The common nature of the class complaint favours certification.

- [57] The proposed class proceeding does involve claims that are or have been the subject of any other proceedings. As previously stated, Heyes was such a case. However, the defendants have pleaded facts that were not pleaded in Heyes. These variations pertain to disruption which would have been associated with other means of construction, and the absence of any means of construction that would have resulted in disruption at an acceptable level. It follows that while the issue regarding the protection afforded by municipal, provincial, and federal permitting processes was addressed in Heyes, other aspects of the defence now raised by the defendants were not. The outcome in Heyes will therefore not necessarily resolve the question of liability in this proceeding.
- [58] I have been advised that a multi-party action was commenced on behalf of 41 plaintiffs by writ and statement of claim filed January 14, 2010. Some of the plaintiffs appear to have business addresses in Cambie Village. Many others have addresses south of 25th Avenue in Vancouver. Some have business premises in Richmond. The defendants are those named in the Gautham action but also include the South Coast British Columbia Transportation Authority, otherwise known as Translink.
- [59] The multi-party action pleads claims in nuisance, waiver of tort, and injurious affection. Without particularizing the claim of any of the plaintiffs, each plaintiff claims damages for loss of revenue, loss of profit, increased expenses, cost of relocation, loss of goodwill and, in respect of those plaintiffs who ceased to operate their business, the value of the future revenue that could have been earned from the business had it been able to continue to operate as a going concern.
- [60] It appears that the issues in the multi-party proceeding are the same as the common issues in this case. If the multi-party proceeding should be regarded as the better course of conduct then that action would have to be amended to include any and all others who wish to assert a claim. Alternatively, one or more additional multi-party actions would have to be commenced by other plaintiffs who fall within the class description.
- [61] In my opinion, a multi-party action is less practical or less efficient than a class proceeding in so far as the owners and merchants in Cambie Village are concerned. Each plaintiff in the multi-party action will be obliged to adduce evidence peculiar to that plaintiff because the owners and merchants are separated in location and few, if any, own or operate from adjacent properties. The evidence will be more complex and voluminous as a result than will be the case with the class proceeding which asserts a claim on behalf of all in the Cambie Village area.
- [62] In addition, the CPA provides a means of resolving some of the issues without an adverse effect on judicial economy. As I have stated, s. 27 permits the court, in the event of a finding of liability on the part of any defendant, to determine a means by which to assess the economic loss of any member of the class should such a determination be required. The same flexibility may not be available in a multi-party proceeding.

- [63] In sum, I am persuaded that the administration of the class proceeding would create fewer difficulties than those likely to be experienced in relation to document production, examinations for discovery, and the adducing of evidence at trial, were one or more multi-party actions to be required. Judicial economy will be well-served by a class proceeding, as will access to justice, having regard for the complexity of the issues in dispute when compared to the loss that may have been sustained by a single owner or merchant.
- [64] The fact that some plaintiffs in the multi-party action are also potential class members is not fatal. Any plaintiff in that position may opt out of the class proceeding if participation in the multi-party action is preferred.
- [65] I am not persuaded that one or more test cases would be helpful in addressing the complaints advanced in the desired class proceeding. That conclusion results from the fact that the defence of statutory authority as now pleaded may have application to some parts of Cambie Street but not others. The plaintiffs say the defence has no application. As I have previously stated, the defendants are obliged to frame the defence in respect of one or more parts of Cambie Village should the defence not have application over the length of Cambie Street in Cambie Village. It is not clear to me how that would be done effectively in one or more test cases, given the wide range of possibilities. It is not for any plaintiff to anticipate how the defendants might claim that the defence applies on a restricted as opposed to general basis. A class proceeding better allows for resolution of the issues associated with the authority of statutory defence.
- [66] As the Court of Appeal stated in *Hoy v. Medtronic, Inc.*, 2003 BCCA 316, the analysis of whether a class proceeding is preferable turns on an assessment of whether such a proceeding would advance the claims in any meaningful way. For the reasons I have discussed, it is my opinion that such a proceeding would do just that, thereby advancing the objects of judicial economy and improved access to the courts. Finally, while behaviour modification is not the dominant concern in this case, an outcome that was favourable to the class might have the beneficial effect of prompting different approaches to the development and construction of substantial and disruptive infrastructure projects in the future.
- [67] In all of the circumstances, I am satisfied that the action should be certified as a class proceeding under the CPA. I state the common issues to be addressed as the following:
1. Did the cut and cover tunnel construction of the Canada Line substantially interfere with the use and enjoyment of property by owners or by business proprietors on Cambie Street from 2nd Avenue to King Edward Avenue?
 2. If the answer to Question 1 is Yes, was there statutory authority for the interference with the use and enjoyment of any property in Cambie Village thereby absolving the defendants of any liability for economic loss resulting from nuisance?

3. If the answer to Question 1 is Yes, and the answer to Question 2 is No, are the members of the class entitled to waive any claim for damages for nuisance and to claim restitution from the defendants of an amount equal to the benefit derived from the use of the cut and cover, rather than the bored tunnel, method of construction?
 4. If the answer to Question 2 is Yes, did the interference nonetheless result in injurious affection for which compensation may be claimed by any owner or tenant?
- [68] I endorse the case management plan subject to amendment or variation as may be required to accommodate this ruling or other factors of consequence as the action proceeds.

"Mr. Justice Pitfield"

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