

CANADA / JUDGMENT

SWA Vancouver Limited Partnership v. Unite Here, Local 40

2019 BCSC 1806

COURT

Supreme Court of British Columbia

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2019 BCSC 1806 SWA Vancouver Limited Partnership v. Unite Here, Local 40

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

SWA Vancouver Limited Partnership v. Unite Here, Local 40 ,

2019 BCSC 1806

Date: 20191002

Docket: S1910845

Registry: Vancouver

Between:

SWA Vancouver Limited Partnership by its general partner,

SCG Aquarius Vancouver Hotel Inc., doing business as The Westin Bayshore and The Owners
Strata Plan LMS 3033

Plaintiffs

And

Unite Here, Local 40, John Doe, Jane Doe and Persons Unknown

Defendants

Docket: S1910847

Registry: Vancouver

Between:

Innvest Hotels LP doing business as Hyatt Regency Vancouver

Plaintiff

And

Unite Here, Local 40, John Doe, Jane Doe and Persons Unknown

Defendants

Docket: S1910846

Registry: Vancouver

Between:

New World Estates Ltd. doing business as Pinnacle Hotel Harbourfront

Plaintiff

And

Unite Here, Local 40, John Doe, Jane Doe and Persons Unknown

Defendants

Corrected Judgment: The second page of this judgment was corrected on November 7, 2019

Before: The Honourable Madam Justice Fitzpatrick

Oral Ruling Re Application for an Injunction

In Chambers

Counsel for the Plaintiffs:

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J.L. Quail

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Place and Date of Hearing:

Vancouver, B.C.

October 1 and 2, 2019

Place and Date of Ruling:

Vancouver, B.C.

October 2, 2019

THE COURT:

Introduction

- [1] Three separate actions are before me today, commenced by entities operating as various downtown Vancouver hotels, being the Hyatt Regency Vancouver (the "Hyatt"), the Westin Bayshore (the "Westin") and the Pinnacle Hotel Harbourfront (the "Pinnacle"). A co-plaintiff in the action commenced by the Westin is The Owners Strata Plan LMS 3033 (the "Strata"), which are the owners of a stratified residential development located across from the Westin. I will refer collectively to all three hotels as the "Hotels" save and except where it is necessary to refer to them separately.
- [2] The Hotels and the Strata seek an injunction to restrain, to some extent, the picketing activities of the members of the defendant, Unite Here, Local 40 (the "Union"). The Hotels and/or the Strata's objections to those activities can be generally described as arising in two categories: firstly, alleged interference with the movement of persons or vehicles at or near the entrances, exits, driveways or public roadways at the Hotels; and secondly, objections to the level and nature of the noise that is being created by the Union's members on the picket lines.
- [3] The Union opposes the granting of the injunction. Alternatively, the Union has made submissions concerning the form of the order in terms of what it contends are the reasonable limits on its activities that should be imposed in the circumstances.

Background Facts

- [4] The Union is the bargaining unit for approximately 1,000 employees working at the Hotels. The Hotels negotiate jointly with the Union. The collective bargaining agreement between the parties expired in June 2018.
- [5] Negotiations have taken place since June 2018, however, it is very evident that the parties have been unsuccessful in reaching a renewed agreement.
- [6] On September 19, 2019, the Union commenced a strike of the Hotels and the picketing at the Hotels began immediately. Generally speaking, the picketing times are from 7:00 a.m.-7:00 p.m. seven days a week.
- [7] In addition, the Hotels have initiated a lockout which became effective September 25, 2019.

Legal Principles - Picketing

- [8] The legal principles relating to picketing are not in issue.

- [9] The Union refers to various authorities with respect to the constitutional protections afforded to picketing activity under the Charter of Rights and Freedoms (the "Charter"). The Charter is engaged with respect to s. 2(b) (freedom of expression) and s. 2(d) (freedom of association). These protections recognize that employees are entitled to gather and express themselves in a collective manner to as to exert pressure to advance the interests of the employees within a labour dispute.
- [10] In *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, the Court stated:
32. Picketing, however defined, always involves expressive action. As such, it engages one of the highest constitutional values: freedom of expression, enshrined in s. 2(b) of the Charter. This Court's jurisprudence establishes that both primary and secondary picketing are forms of expression, even when associated with tortious acts: *Dolphin Delivery*, supra. The Court, moreover, has repeatedly reaffirmed the importance of freedom of expression. It is the foundation of a democratic society (see *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2 (CanLII); *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697; *R. v. Butler*, 1992 CanLII 124 (SCC), [1992] 1 S.C.R. 452). The core values which free expression promotes include self-fulfilment, participation in social and political decision making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect freely on one's circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one's life and perhaps the wider social, political, and economic environment.
- 33 Free expression is particularly critical in the labour context. As Cory J. observed for the Court in *KMart Canada Ltd. v. U.F.C. W., Local 1518*, [1999] 2 S.C.R. 1083 (S.C.C.), "[f]or employees, freedom of expression becomes not only an important but an essential component of labour relations" (para. 25). The values associated with free expression relate directly to one's work. A person's employment, and the conditions of their workplace, inform one's identity, emotional health, and sense of self-worth: Reference re Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313 (S.C.C.); *K Mart*, supra.
- [11] The Hotels do not dispute the fundamental importance of the Union members being able to exercise their Charter rights through picketing. It particular, picketing allows the Union to act in a manner that enhances its bargaining power in what might otherwise be inequality in the relationship between employers and employees: See *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 at para. 55.
- [12] In addition, the Hotels do not dispute the fundamental purpose of the picketing, including exercising economic pressure on the employer not only directly against the employer, but also by engaging the public in their cause. In *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 588, the Court stated:

all picketing is designed to bring economic pressure on the person picketed and to cause economic loss for so long as the object of the picketing remains unfulfilled. There is, as I have earlier said, always some element of expression in picketing. The union is making a statement to the general public that it is involved in a dispute, that it is seeking to impose its will on the object of the picketing, and that it solicits the assistance of the public in honouring the picket line. Action on the part of the picketers will, of course, always accompany the expression, but not every action on the part of the picketers will be such as to alter the nature of the whole transaction and remove it from Charter protection for freedom of expression.

See *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62 at paras. 34-36.

- [13] Accordingly, a fundamental objective of picketing is to exert economic pressure on the Hotels to break the impasse in bargaining.
- [14] One means of doing exerting pressure is by discouraging members of the public, suppliers and third parties from crossing the picket line and/or from doing business with the employer generally toward garnering sympathy and perhaps support from those persons. Other trade unions may also show their support by participating in picketing activities. In *Alberta (Information and Privacy Commissioner)* at para. 36, the Court stated:
- [36] The effectiveness of picket lines is dependent on the ability of the union to try to convince the public not to cross the picket line and do business with the employer. Cory J. recognized the significance of the role of public opinion in *Kmart*, where he observed that "it is often the weight of public opinion which will determine the outcome of the dispute": para. 46.
- [15] Finally, the Union refers to the fact that picketing can be of assistance in fortifying and displaying the solidarity of the employees on the picket line in what is obviously a collective endeavour towards the objective of negotiating a new collective bargaining agreement with the Hotels.
- [16] The involvement of the public is of some importance in respect of picketing activities. Picketing activities may engage the public to not only acknowledge the dispute but perhaps support it. As such, picketing necessarily involves some degree of public engagement and public inconvenience or disruption, which is recognized and accepted as a legitimate price to pay in Canadian society: See *Alberta (Information and Privacy Commissioner)* at para. 36.
- [17] That said, as the Hotels argue, like all Charter rights, these rights are not absolute and must be balanced against other rights when the price of expression by picketing is considered in relation to the benefits of picketing: See *Pepsi-Cola* at paras. 36-37.
- [18] The limits of legal picketing are reached at tortious or unlawful conduct. In *Pepsi-Cola*, the Court stated:

103. At this point we may usefully review what is caught by the rule that all picketing is legal absent tortious or criminal conduct. The answer is, a great deal. Picketing which breaches the criminal law or one of the specific torts like trespass, nuisance, intimidation, defamation or misrepresentation will be impermissible, regardless of where it occurs. Specific torts known to the law will catch most of the situations which are liable to take place in a labour dispute. In particular, the breadth of the torts of nuisance and defamation should permit control of most coercive picketing. Known torts will also protect property interests. They will not allow for intimidation, they will protect free access to private premises and thereby protect the right to use one's property. Finally, rights arising out of contracts or business relationships also receive basic protection through the tort of inducing breach of contract.
- [19] Therefore, the limits of the picketing are such that activities which stray into unlawful or tortious actions are impermissible.
- [20] It is common ground here that picketing that obstructs the lawful entry to and exit from premises is unlawful and impermissible.
- [21] However, the Union argues that lawful picketing may include picketing activity that only temporarily interferes with persons or vehicles to some degree for the purpose of communication by Union members. The Union refers to the comments of Justice Brown (as he then was) in *Brookfield Properties Ltd. v. Hoath*, 2010 ONSC 6187:
- [36] [P]icketing which attempts to communicate information to those attempting to enter into or leave premises may result in temporary delays where the targets of the communicated message stop and engage the picketers in discussion. Delays incidental to such communication which last only for the amount of time reasonably required to convey the message may fall into the category of permissible impedence, rather than unlawful obstruction or blockage.
- [22] I am satisfied that the statements found in *Brookfield* do not represent the law in BC in face of a number of authorities from this province.
- [23] In *Cara Operations Ltd. v. The Hotel, Restaurant and Culinary Employees Union Local 40*, 2004 BCSC 1753, the plaintiff argued that the union's striking members were blocking access or preventing ingress and egress from the plaintiff's place of operations by moving very slowly along the picket line in close proximity to each other (para 4).
- [24] In *Cara Operations*, Chief Justice Brenner held that there was no issue that the plaintiff was entitled to injunctive relief. The real issue in that case was whether an injunction should provide that there is to be no obstruction or interference with ingress or egress, or whether the injunction should permit the union members to slow or stop vehicles or persons moving across the picket line for a limited and defined period of time to allow picketing members an opportunity to persuade those who would cross the picket line of their position and their views (para. 6). The Court rejected the position of the Union.

[25] The Court came to the same result in *Telus Communications Inc. v. Telecommunications Workers Union*, 2005 BCSC 1162, where the union applied for an order allowing for temporary obstruction of access to and from premises of the employer to allow members to communicate with the public. Justice Burnyeat followed *Cara Operations* and denied the application:

[14] the decision in *Pepsi-Cola*, supra, has not changed the existing law in British Columbia. Access unrestricted and unimpeded by a period of time to allow communication to take place is still available to employers and those who seek to enter their premises.

See *Sun-Rype Products Ltd. v. Teamsters Local Union No. 213*, (13 November 2001), Vancouver Doc. S077594 (B.C.S.C.) at para. 13; *Canada Post Corp. v. Union of Postal Communications Employees*, 2008 BCSC 1692 at para. 29; *Great Canadian Railtour Company Ltd. v. Teamsters Local Union, No. 31*, 2011 BCSC 973 at para. 8; *Cascade Aerospace Inc. v. Unifor Local 114*, 2014 BCSC 1461 at paras. 34-40.

[26] In *Canadian National Railway v. United Truckers Association of British Columbia*, 2014 BCSC 487, Justice MacIntosh stated:

[16] Nonetheless, in my view, two earlier decisions of this Court, are determinative of the outcome here in favour of the injunctive relief being granted. I refer to *Telus Communications Inc. v. Telecommunications Workers Union*, 2005 BCSC 1162 and to *Air Canada v. Canadian Auto Workers Union*, 2011 BSCS 888. From those decisions, at least in this province, a picket's intentional blockage of lawful vehicle or pedestrian traffic, albeit temporary blockage, is unlawful, tortious, conduct which is to be enjoined.

[27] None of the authorities that the Union has referred to me on this application detract from this principle. Accordingly, it remains the law in BC that any action by union members which prevents ingress and/or egress to or from an employer's property, even for a brief or short period of time, is unlawful and tortious conduct.

Legal Principles - Injunctions

[28] The Hotels have referred to well-known authorities in respect of injunctions generally, being *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; and *British Columbia (Attorney General) v. Wale*, [1986] B.C.J. No. 1395 (C.A.).

[29] Those cases require that two matters must be addressed before an injunction can be granted:

- a) Firstly, the applicant must establish that there is a serious or fair question to be tried. This is not a particularly high bar, since it need only be shown that the claim is neither frivolous nor vexatious; and

- b) Secondly, the applicant must establish that the balance of convenience favours the granting of the injunction. In RJR, this is said to include a consideration of irreparable harm. In *Wale*, irreparable harm is considered on a stand-alone basis outside of the balance of convenience analysis. The latter approach is well established in BC and is consistently followed on injunction applications.
- [30] I acknowledge the Union's reliance on *Prince Rupert Grain Ltd. v. Grain Workers' Union, Local 333*, 2002 BCCA 641. At para. 27, the court refers to the application of the RJR test in the context of picketing, particularly where the interim order or injunction sought was seen as effectively providing the relief sought in the action.
- [31] The final relief sought by the Hotels in the actions is broader than what is sought to be addressed on these applications. In any event, I acknowledge that Prince Rupert is authority for the proposition that, in the context of picketing, where the substantial issue in the action would effectively be granted by the injunction, the initial threshold test is higher, namely whether the applicant has established a strong prima facie case.
- [32] Accordingly, I approach this application as requiring that the Hotels and Strata establish either a strong prima facie case to be tried in respect of whether the Union member's picketing activities go beyond appropriate expressive actions taken in accordance with their Charter rights, in light of the concerns and arguments raised by the Hotels and Strata.

The Applications

- [33] The Hotels' and Strata's applications, to enjoin any blockage of the Hotels' premises and to restrict the noise and noise levels, arise from two main allegations:
- a) Firstly, that Union members have been impeding the ingress and egress of vehicles and people from the Hotels' premises; and
- b) Secondly, the noise levels that are emanating from the three picket lines are unreasonable and not truly in accordance with the purpose of picketing, as protected by the Charter.
- [34] The Hotels in all three actions have filed substantial affidavit evidence from various persons who have been affected by the picketing. In large part, those involve hotel employees such as managers and front desk staff. There have also been affidavits from investigators or security firms who have been hired by the Hotels. Finally, there are numerous affidavits that address the level of impact of the activities, particularly the noise, from the point of view of others, such as neighbouring residents (the Strata) and people working in downtown Vancouver.
- [35] Many of the Hotels' affidavits attach video evidence taken at various times since the beginning of the strike on September 19, 2019. The latest video in evidence is dated September 26, 2019, just one day before these applications were filed.

Access Issues

- [36] I agree with the Union that persons who voluntarily stop or stop their vehicles to engage with the Union's members cannot be seen as being impeded in their passage. However, the Union members must give way to anyway indicating a desire or intention to enter or exit the premises without engaging with Union members: see *Great Canadian Railtour* at para. 11.
- [37] I am bound to apply BC law if I am satisfied that vehicle or pedestrian traffic to and from the Hotels' premises have been stopped or delayed, however, temporarily, even if the picketers are otherwise engaged in peaceful activities and are doing so or attempting to do so in an attempt to engage those persons in their cause. If anyone is involuntarily stopped, such as by a Union member standing in the way of their vehicle while attempting to engage with that person, that would be impermissible: See *Gateway Casinos & Entertainment Limited v. BCGEU*, 2018 BCSC 1700 at para. 29.
- [38] In this case, the Hotels have recounted a number of instances alleging that the picketers have obstructed, impeded, hindered or blocked access to persons and/or vehicles entering or travelling to and from the Hotels' premises. These activities have occurred to differing degrees at each of the three locations.
- [39] I have no difficulty accepting the Hotels' evidence concerning the access issues. The Hotels' counsel has pinpointed the relevant evidence at Schedule B of the Hotels and Strata's written argument. In particular: at the Westin, there is evidence of picketers standing in front of vehicles and directing them to another entrance where there was a clear intention to enter the entrance where the picketers were crossing in the path of vehicles; and, at the Pinnacle, there is evidence that picketers have blocked tour buses and that they have impeded the removal of visitors' belongings from the bus so that it could be transferred to the hotel.
- [40] With respect to the Hyatt, there is one minor incident with respect to a guest having to leave the hotel's premises to arrange for a taxi, when ordinarily she would have had the taxi pull up to the entrance. The Hyatt's counsel acknowledges, however, that this was not a significant matter.
- [41] The more significant event took place on September 26, 2019. On that date, indisputably, the Union members blocked the sidewalk on Burrard Street such that pedestrians were required to use the bus lane, which no doubt posed potential danger for those pedestrians. Later still, the Union members spilled out into the middle of Burrard Street, requiring the Vancouver Police Department ("VPD") to block off the entire street. As a result, there was no vehicle access to the Hyatt during that time. That particular episode is acknowledged by the Union, as it must, given the video recording. The Union's counsel describes this event as an "enthusiastic" blocking of the sidewalk and street. Enthusiasm aside, it is clear that the Hyatt was negatively affected during that time by reason of ingress and egress issues.

- [42] The Union argues that these activities do not amount to interference. The Union's counsel argues that, if they are infractions, they were in the early and perhaps more "enthusiastic" days of the picketing. He assures me that the Union has taken steps and will continue to take steps to ensure that no such activities happen again. It is worth noting that the incident at the Hyatt on September 26, 2019 was well beyond the first days of the picketing when such behavior might perhaps be understood to have taken place within that context.
- [43] Despite the Union's position and assurances, I accept that the evidence presented by the Hotels is such that they have established a strong prima facie case that the actions of the picketers at the Hotels have impeded people from access to and from the Hotels' premises, albeit more often than not, temporarily. Having established instances of temporary denial of access to and from the Hotels' premises by the picketers, the Hotels have also established that such activity is illegal: See *Great Canadian Railtour* at para. 8.
- [44] As for the balance of convenience and irreparable harm, as the Hotels argue, if illegal picketing activity has been established on a prima facie basis, the Courts are less concerned about the issue of irreparable harm.
- [45] In *Pacific Western Airlines Ltd. v. U.A.W.*, 1986 ABCA 38, the court stated:
- [13] A great mass of precedents establishes that unlawful action by pickets will be enjoined whether or not irreparable harm is established. Moreover, where it is shown that certain activities have led to the commission of unlawful action, those activities will be so controlled as to prevent further similar problems while leaving each side in the dispute free to pursue legitimate goals by legitimate means. It is hardly necessary to cite the many cases in which this control has been exercised without reference to the existence of irreparable harm.
- [46] The U.A.W. decision was followed by this Court in *T.N.T. Canada Inc. v. General Truck Drivers and Helpers Union, Local 31*, [1990] B.C.J. No. 2976 (S.C.). Justice MacDonald held:
- [11] I have concluded that where the activity complained of is indisputably unlawful, indeed here it is conceded to be so, the task of the Court in determining the balance of convenience is quite different than in those cases where there is merely a strong prima facie case. I accept the proposition advanced by the Plaintiff that in a situation such as this the proof of irreparable harm and the question of whether damages are an adequate remedy cease to be significant factors. I agree with the principle expressed in the *Alberta P.W.A.* case referred to earlier. This court should not condone the blockading of the Plaintiff's premises for the avowed purpose of coercing it to accede to the Union's claims,
- [47] The Hotels have not presented any evidence about the harm, if any, incurred by reasons of the actions of the Union members in impeding access to their premises. However, I agree that irreparable harm is quite a lesser concern in terms of whether the injunction should be granted. The point is that the Union has no right to impede ingress or egress to the Hotels' premises, period.

[48] I am not satisfied that the Union's counsel's assurance to the Court that it will not happen again will be sufficient to ensure that this activity does not occur in the future.

[49] In summary, I accept that the Hotels have met the test with respect to the granting of an injunction to address any further access issues.

Noise Issues

[50] As this hearing progressed, the noise issues became the more substantive issue to be addressed.

[51] The Hotels have filed numerous affidavits and videos from hotel staff, private investigators, security personnel and other persons in the vicinity of the picket lines on this issue.

[52] For the purpose of these reasons, I will not recount the full details of all that evidence. The pinpoint references to the evidence are summarized in Schedule A of the Hotels and Strata's counsel's written argument.

[53] In addition, I have reviewed the video footage at the three locations which is referred to some of the affidavits and exhibited by USB sticks. The videos do not depict every day of picketing, nor every hour of certain days; however, I accept that they are representative of the manner in which the Union members have been conducting themselves with respect to the creation of noise and the level and constancy of the noise that has been consistently produced at these locations.

[54] In a nutshell, since the picketing began, and for the entire daily time frame of the picketing, the Union's members have undertaken a campaign of producing constant and deafening sounds from the picket lines. This level of noise has directly negatively affected those working or staying at the Hotels; in addition, the noise has reached far and beyond the Hotels' premises to affect other people in the vicinity. It is quite apparent that the noise heard in these videos, to any normal person, is quite extreme.

[55] No one questions the right of the Union members, in accordance with their Charter rights, to express themselves, as previously outlined, and in so doing, make noise. In that respect, I agree with the Union's counsel that one can expect some noise to be coming from the picket lines that will add to the usual sounds that one would find at the Hotels' locations.

[56] The Hotels and Strata argue, however, that the tort of nuisance is engaged by the picketing activity, not by the noise per se, but by the level and constancy of the noise coming from the picketing lines such that it is negatively affecting hotel staff, hotel guests, Strata owners or renters, nearby office workers and nearby members of the public.

[57] In *Sutherland v. Vancouver International Airport Authority*, 2002 BCCA 416 at para. 34, the court stated that the elements of the tort of nuisance are "the unreasonable and substantial interference with the use and enjoyment of lands".

- [58] In *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13, Justice Cromwell described the elements of the tort of nuisance as follows:
- [19] 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 the circumstances.
- [59] The requirement of "substantial" harm requires more than a trivial annoyance. 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: see *Suzuki v. Munroe*, 2009 BCSC 1403 at para. 36, citing *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181 at 1190-92 and *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64 at para. 77.
- [60] Accordingly, the reasonableness of the interference must be assessed in light of all of the relevant circumstances, and the focus is on whether the interference is such that it would be unreasonable in all of the circumstances to require that the claimant suffer without compensation: See *Antrim* at para. 25, cited in *469238 B.C. Ltd. (c.o.b. Lawrence Heights) v. Okanagan Aggregates Ltd. (c.o.b. Motoplex Speedway and Event Park)*, 2016 BCSC 721 at para. 131.
- [61] In *Suzuki*, the plaintiffs sued for damages and an injunction arising from noise levels from a defendant neighbour's air-conditioner. The Court stated at paras. 37-38 that "nuisance may be created even where the activity complained of is otherwise lawful" and "compliance with local municipal bylaws does not mean that the activity complained of cannot be a nuisance".
- [62] Conversely, it is well taken on this application that a breach of a municipal bylaw does not inevitably lead to the conclusion that the noise from the picketing lines constitutes a nuisance that is actionable by the Hotels and the Strata: See *Scholton v. Chemainus Health Care Centre*, 1995 CanLII 319 (B.C.S.C.) at paras. 24-28.
- [63] In *Motoplex*, the plaintiffs were claiming damages for nuisance and a permanent injunction preventing noise from a motorcar racetrack. The plaintiffs alleged that noise from the operation of the racetrack interfered with their use or enjoyment of their lands. Similar to the evidence adduced in *Suzuki* and on this application, the evidence before the Court included not only the personal experiences of persons who experienced those sounds but also expert evidence concerning the sound levels emanating from the racetrack based on decibel (dBA) measurements. The Court found that the evidence demonstrated that the noise from the racetrack substantially interfered with the use and enjoyment of their lands: para. 163. The Court also found that the noise from the racing cars was an unreasonable interference with the individual plaintiffs: para. 175.

- [64] The Court in Motoplex found that the noise from the defendant's racetrack constituted a private nuisance for the individual and corporate plaintiffs and awarded damages, in addition to granting an injunction requiring the noise level not to exceed 80 dBA averaged over a five minute period: paras. 177-178, 194-196.
- [65] I would begin by noting again the Union's argument, which I accept, that this issue must be considered in the context of the Union member's fundamental right to express themselves on the picket lines. Accordingly, any limit on those activities - to the extent that they present a substantial and unreasonable interference with the property of others - must protect, to the extent possible, those rights of expression and association.
- [66] The Union members have the right of freedom of expression to create some noise in their picketing activities toward convincing others of the merits of their position and also, to engage and perhaps garner support for that position.
- [67] The Union members have chosen to use all manner of instruments to create the noise, such as vuvuzelas, drums and sirens. One particular egregious use of a siren occurred when, on at least some occasions, the siren was purposefully directed at hotel guest rooms as early as 7:00 a.m., where presumably guests was trying to sleep or perhaps relax in the morning. In addition, the Union members have taken measures to use other equipment for the purpose of amplifying these sounds to extreme levels.
- [68] I am more than satisfied that the level of noise emanating from the picket lines is a substantial interference with the enjoyment of the Hotels' properties by not only the hotel staff and guests, who perhaps are the more direct object of the Union, but also nearby residents and the public in general.
- [69] The Westin is a unique situation given that it is located in a more residential area than the other two of the Hotels. As stated, the Strata is located directly across the street from the Westin. The evidence clearly establishes that the noise, both in level and constancy, is causing substantial annoyance and physical, mental and psychological harm to not only the hotel's staff and guests, but also to people who live in the Strata's building.
- [70] All of the many residents who filed affidavits refer to having trouble sleeping and being disturbed when they attempt to work from home or just live at home. These residents are finding that they are unable to do that or they are under considerable stress and anxiety in their daily lives as a result of the constant and loud noise. They cannot open their windows. Some say that they are not even able to listen to their own television. Many state that the present situation is intolerable.

- [71] The level of harm being perpetrated on the residents near the Westin is very troubling. There is no doubt that the Union itself recognizes the unreasonableness of this situation. The Union's counsel advised the Court yesterday that the Union had agreed that they would cease the use of noise making instruments at the Westin, save except for drums. In addition, the Union agreed that the picketers would not use any amplification of the noise at the Westin.
- [72] The Pinnacle is a different situation. No nearby residents have given evidence on this application. However, the hotel's director of the front office says that it sounds like a nightclub. She has difficulty concentrating and, at the end of the day, her ears are ringing. The hotel has presented similar and numerous complaints from staff and guests about the level and constancy of noise and the substantial harm that they are suffering by reason of that noise, as amplified during the eight to ten hours that the Union members are walking the picket line.
- [73] The situation at the Hyatt is also replete with complaints from staff and guests. Emails from guests have been put into evidence; in at least one example, the guest not surprisingly demanded that her money be refunded given the level of discomfort that she experienced. Similarly, some guests at the Pinnacle have demanded their money back.
- [74] It should be obvious to anyone that people who in stay in hotels are there not only to sleep, but perhaps work in the hotels, or otherwise enjoy the amenities at the hotels. These guest activities can vary in terms of hours depending on the purpose for their stay in a Vancouver hotel.
- [75] The level of the noise with respect to the Hyatt is somewhat of a different scenario given it is located near the very busy street corner at Burrard Street and Georgia Street in downtown Vancouver. No doubt noise at that location is normally punctuated by high levels of noise from time to time, such as from ambulance or police car sirens or even rap lovers wandering by with a boom box blaring on their shoulder. Those are fleeting inconveniences or annoyances from noise that the public (save perhaps rap lovers) suffer in their daily experiences. No one would suggest that there is anything untoward in that respect as a "substantial" interference with their lives.
- [76] The situation at the Hyatt is, however, another kettle of fish. The videos, supported by the anecdotal evidence, indicates that, even at a busy street corner in downtown Vancouver, the picketing has created unusual constant and deafening noise during the picketing hours.
- [77] That noise has affected not only people who might be sleeping or working in the Hyatt, but also others who work in the area. The Hyatt has presented evidence from two lawyers who work from law offices close to the Hyatt. These lawyers outline that this level of noise is something that they are not used to encountering, even after working in that area for some years. They both state that the noise level is causing significant disruption to their business activities; some staff are suffering significant discomfort to the point where they are unable to work from their offices and seek to work from home; some of them are unable to work in

their usual office spaces; some wear earplugs; and, at least one person feels dizzy and nauseous at the end of the day. Accordingly, the noise being generated at the Hyatt by the picketers is well beyond the usual daytime din at Burrard Street and Georgia Street.

- [78] Similar to the evidence before the Court in Motoplex and Suzuki, the Hotels have submitted expert evidence from Steve Meszaros, a professional sound engineer. Mr. Meszaros conducted measurements of the dBA levels at the Hotels, principally on September 25, 2019.
- [79] What informed Mr. Meszaros' measurements and analysis to some degree were the City of Vancouver Zoning & Development Bylaw that classifies certain "zones" and more importantly, Vancouver Noise Control Bylaw No. 6555 (the "Bylaw"). The Bylaw sets certain maximum levels of noise in those zones. In a designated "activity zone", which applies to the Hyatt and the Pinnacle, the Bylaw provides that "no person shall make, cause or permit to be made or caused, continuous sound the sound level of which is" 70 dBA during the day. The Westin is designated as a "quiet zone" such that the daytime limit under the Bylaw is 60 dBA. The "daytime" is defined to include the time between 7:00 a.m.-10:00 p.m. on weekdays and Saturday and between 10:00 a.m.-10:00 p.m. on Sundays.
- [80] Mr. Meszaros measured the noise levels at all three locations at a source other than at 6.1 metres from the source of the noise, namely the picket lines. That is relevant because s. 9 of the Bylaw indicates that the sound measurement is deemed as emanating from a zone and shall:

be measured at the point of reception or at least 6.1 meters from the source of the noise or sound, whichever is greater.

- [81] Mr. Meszaros' measurements indicate that, on September 25, 2019, the dBA levels at the Hotels rose considerably above the Bylaw limits and remained fairly constant throughout the picketing period and then returned to what could be considered to be normal levels and within the Bylaw limits when the picketing ceased around 7:00 p.m. In all three cases, the dBA levels far exceeded the daytime limits established under the Bylaw.

- [82] The measured noise levels were as follows:

- a) at the Hyatt (70 dBA level), the dBA levels were consistently at the 75-80 dBA range, often at the 80-85 dBA level and even reached above 90 dBA on two occasions, even when measured further away than 6.1 meters;
- b) at the Pinnacle (70 dBA level), the dBA levels were consistently at the 80-90 dBA range, adjusted to account for measurement closer to the source than 6.1 meters; and
- c) at the Westin (60 dBA level), the dBA levels were consistently above 75 dBA and were often above 80 dBA, even when measured at 25 meters away, well further away than 6.1 meters.

- [83] In Motorplex, the Court stated that each 10 dBA increase in sound level equates to a doubling of the sound in the listener's perception and an increase of 20 dBA is a fourfold increase: para. 51. The Union does not dispute that this is a relevant factor to be considered on these applications.
- [84] As noted above, there is considerable evidence that the level of noise and constancy being generated by the picketers is causing substantial interference with the enjoyment of the property of others, including the Hotels and the Strata.
- [85] Is this behaviour unreasonable? Again, I acknowledge the Union's right and the members' right to express themselves through picketing, which is an important Charter right. In my view, the answer is undeniably yes.
- [86] In summary, I agree that the evidence on these applications establishes a strong prima facie case that the conduct of the picketers constitutes nuisance. In particular, the nature, consistency, volume and duration of the noise being generated by the picketers is causing a substantial and unreasonable interference with the Hotels' premises by employees and guests of the Hotels, the Strata's resident owners and renters premises, the workplaces of nearby office workers and members of the general public at or near the Hotels' premises.
- [87] Freedom of expression allows members of the Union to communicate with others concerning their cause. That is an important aspect of their right to picket. That includes facilitating the members' engagement with persons who might choose to stop at or drop by the picket lines to allow Union members to educate them about that cause. Any reasonable person would expect some level of noise to be generated by this activity, noise that would be endured not only by the Hotels' staff and guests but also by the public within a reasonable ear shot.
- [88] This situation presents a significantly different matter. I question how the Union could be seen as asserting its rights to communicate with these other persons given the constant barrage of this deafening noise at the Hotels and directed at the Hotels. For example, if the members were trying to truly engage someone in conversation who might be walking or driving by, I question how anyone could even hear those communications over the din that is created by this noise. One of videos in fact shows a member of the public walking past the picketers at the Hyatt who puts her fingers in her ears, which I would take as indicative that she was not interested in hearing from the members about what was going on and that she only concerned about protecting her hearing while she walked by.
- [89] On that latter point, it is somewhat ironic that the Union members themselves recognize the deafening nature of the noise and the potential harm to their own hearing as a result of the noise. The videos show that, to a large extent, the Union's members are wearing ear plugs or headphones or ear phones to protect their hearing. No doubt this is a reasonable thing for them to do, particularly given that they are at "ground zero" in terms of where this noise is being generated and where it can safely be assumed to be the loudest.

- [90] The Hotels have sought to address their concerns regarding the noise levels by other means.
- [91] On September 19 and 24, 2019, the Hotels each sent letters to the Union to express their concerns. The Hotels received no response from the Union with respect to these letters.
- [92] In addition, the VPD were contacted, not only by the Hotels but by various other individuals, particularly those advancing noise complaints by reason of the picketing. Sgt. Anil Singh of the VPD appears to have been the main contact for these complaints. Soon after the picketing began, on September 21, 2019, he wrote a substantial report outlining the circumstances he observed and his conclusions. Specifically, Sgt. Singh indicated in his report that he believed that the Union members' use of fog horns and sirens/alarms went beyond free expression and "borders on mischief".
- [93] I acknowledge that the Union has also engaged in some discussions with the VPD. There were discussions with VPD officers regarding sirens on September 21, 2019, resulting in the Union later indicated that they would take steps to rein their members in relating to the "accidental" use of sirens directed at the Hotels. On the basis of the evidence before me, those efforts had limited results given that sirens apparently were still used after that date to some extent.
- [94] In addition, on September 23, 2019, the VPD asked the Union to stop the use of a fog horn at the Hyatt. The Union responded that they would consider the matter and get back to the police. There is no evidence that anything came of that request.
- [95] The Hotels have also attempted to engage the City of Vancouver, particularly with respect to the noise limits in the Bylaw. Those efforts were unsuccessful.
- [96] Finally, the Hotels attempted to engage WorkSafeBC, no doubt on the basis that they considered that the noise levels could potentially harm persons. The Hotels received no assistance from WorkSafeBC.
- [97] Having exhausted other means of addressing the issues, I accept that the Hotels and Strata are left to seek relief in this Court to obtain some measure of relief.
- [98] In conclusion, I am satisfied that the Hotels have established a strong prima facie case to support the tort of nuisance arising from the picketing noise levels, given the evidence that these activities are causing a substantial interference with the enjoyment of the Hotels' property and other persons' properties and that it is unreasonable in the circumstances.
- [99] I am also satisfied that the balance of convenience dictates that some limitations be imposed to balance the rights of the Union against the rights of these other individuals who are being significantly and negatively affected by the noise. I find that the evidence establishes that substantial harm is being suffered by the many deponents who attest as to significant and negative physical, mental and physiological consequences arising from the level and constancy of this noise.

- [100] I also conclude that there is likely some reputational harm to the Hotels in terms of the Hotels' guests having a less than satisfying experience, although I place less emphasis on that aspect since, as the authorities indicate, the whole purpose of picketing is to put economic pressure on the employer.
- [101] In any event, as discussed above, the above authorities establish that where picketers are engaging in unlawful or tortious conduct, there is less concern about the requirement to show irreparable harm.

Form of the Orders

- [102] At the commencement of these reasons, I noted that this matter has arisen very quickly and that the Hotels, Strata and the Union has made great strides to address the matter as quickly as possible. To that end, the relief sought in the Hotels/Strata's notices of application have been a bit of a moving target in the sense that the relief sought has been amended or perhaps even withdrawn, depending on how the submissions have progressed.
- [103] I acknowledge that the Union has taken some steps towards controlling the activities of its members and particularly, has recently taken steps at the Westin to control the noise levels there that are particularly disturbing people at the Westin and in that area. However, the Hotels and Strata have met the test, and I am not satisfied that the current assurances by the Union's counsel will be sufficient to stop the problem activity.
- [104] The injunction is granted, as follows.
- [105] Paragraph 1(a) of the order sought was a provision for an injunction with respect to:
- at all times blocking, impeding, hindering, delaying or obstructing or slowing, by any means, partially or completely, the movement of persons or vehicles at or near the entrances, exits, driveways or public roadways to the premises at ... [the Hotels' addresses].
- [106] The Union's counsel has made submissions to the effect that this provision should be amended by including the phrase "physically and directly" after "at all times" in para. 1(a). They argue that only "direct and physical" interference ought to be enjoined which interferes with an individual who desires to enter or exit the premises, such as standing in the way or the equivalent.
- [107] One of the paramount considerations in granting an injunction is to be as clear as possible as to what activities are impermissible so that the party against whom the injunction is granted can conduct themselves with confidence in terms of the potential consequences of their activities.
- [108] It is also beyond argument that any injunction in these circumstances should only be as limiting of the Union's picketing activities as is necessary to prevent any impermissible behaviour.

[109] In *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048, the Court stressed the need for clarity and restraint in granting injunctions in these situations:

36 Finally, it is necessary that the orders be carefully worded and constrained to ensure that they are fair and not unduly broad. This requirement, too, was met in the case at bar. Over the months, a number of justices reviewed and amended the terminology of the injunctions to make them clearer and fairer. For example, in July 1993, *Esson C.J.S.C.* removed language enjoining "creating a nuisance" -- legal language which some members of the public might not have understood -- and replaced it by more precise language specifying that what was prohibited was "physical" obstruction. Words could be used, signs could be paraded; what could not be done was to physically block the road.

See *Great Canadian Railtour* at para. 9.

[110] The phrase "directly and physically" was included in injunctions granted in both *Southern Railway of British Columbia Limited v. CUPE, Local 7000*, 2015 BCSC 375 (para. 9) and *Great Canadian Railtour* (para. 11).

[111] The Hotels' counsel objects to the word "directly" but not "physically".

[112] I am satisfied that it is appropriate to include the words "physically and directly" in para. 1(a), as suggested by the Union. If any difficulties arise by reason of what the Hotels say might be "indirect" hindering or delaying of persons attending at the Hotels' premises, a further application can be brought to address that matter.

[113] The Hotels have withdrawn the relief originally sought at para. 1(b), which related to entering, picketing, blocking or demonstrating on the Hotels' premises.

[114] The relief sought by the Hotels and Strata to deal with the noise issues have evolved over the course of this hearing. Originally, at para. 1(c), the Hotels sought a prohibition with respect to the use of drums, air horns, sirens, blow horns or whistles at or near the Hotels' premises. At para. 1(d), the relief sought was to prevent the use of microphones, speakers, megaphones or any other electronic devices to amplify sound, or to play pre-recorded sounds or pre-recorded music over 70 dBA at or near the Hotels' premises (the Bylaw limit for the Hyatt and Pinnacle areas). In addition, the Hotels originally sought a "catchall" provision in para. 1(e) to prohibit any noise at or near the Hotels' premises which exceeded 70 dBA.

[115] The Hotels now no longer seek the "catchall" provision in para. 1(e) to prohibit the making of any noise at or near the Hotels' premises exceeding 70 dBA. Instead, they now seek an amalgam of the original relief, such that para. 1 of the order would read in 1(b) and (c):

(b) using drums, air horns, sirens, blow horns, whistles, at or near the Hotels' premises;

- (c) using microphones, speakers, megaphones, or any other electronic device to amplify sound, or to play pre-recorded sounds or pre-recorded music over 70 dBA on an approved sound meter as defined by the City of Vancouver Bylaw No. 6555, emanating at least 6.1 meters from the source of the noise or sound.
- [116] The Union opposes the newly proposed provisions on the basis that the Court should be "agnostic" with respect to the manner in which the Union members make noise. The Union agrees that, if the order is to be granted, it should simply include a originally proposed "catchall" phrase to prohibit the picketers making any noise at or near the Hotels' premises exceeding a certain dBA level. The Union in that respect suggests 80 dBA is appropriate.
- [117] I am satisfied that it is not necessary to include a "catchall" phrase with respect to the amplification level. The noise levels are, generally speaking, subject to the Bylaw. It is clear that the tremendous noise level is largely caused by the amplification mechanisms. Therefore, I agree that para.1 should include the newly amended provisions as proposed by the Hotels and the Strata, with a limit on amplification to disallow such noise beyond 75 dBA.
- [118] I have chosen 75 dBA, which is what the Hotels' counsel suggested in their reply submissions. I agree with the Union that any limit must recognize that there will necessarily be noise from the picketers which takes the noise level to a higher level than the usual din heard at these locations, particularly at the Hyatt. The limit of 75 dBA allows for the expression of some further sound by the picketers.
- [119] The manner of the expression is a more difficult one. I agree that the use of air horns, sirens, blow horns and whistles do not in any way engage a right of expression beyond annoying people and unduly making noise. In addition, as was noted by the Hotels' counsel (and with which Sgt. Singh agreed), the use of a siren can have the effect of distracting or confusing people looking for the source of the "emergency" so that they can act appropriately, perhaps inviting accidents. I do not view the use of these items as a means of expression; rather, they are intended to annoy, particularly the hotel management, I assume.
- [120] Accordingly, the proposed amendment in para. 1(b) is granted with respect to air horns, sirens, blow horns and whistles at or near the Hotels' premises.
- [121] The drums, however, require a different analysis. Drums are a musical instrument that many protestors, sometimes Indigenous protestors, use on a regular basis. I note the Union's offer to restrict some of their activities at the Westin while still retaining the use of drums.
- [122] I would delete "drums" from the proposed amendment to para. 1(b). The new para. 1(c) will be amended to restrain and enjoin the Union from:

at or near the Hotels' premises, using drums or microphones, speakers, megaphones, or any other electronic device to amplify sound, or to play pre-recorded sounds or pre-recorded music over 75 dBA on an approved sound meter as defined by the City of Vancouver Bylaw No. 6555, emanating at least 6.1 meters from the source of the noise or sound.

[123] In summary, the 75 dBA limit will apply not only to the use of the drums, but also amplification of any noise, which could include drums and also, the human voices of the picketers and whatever other means they wish to use to make noise, other than what is prohibited under the amendment to para. 1(b) as above.

[124] There are no issues arising with respect to the remaining relief sought in para. 2 (the Hotels and Strata's undertaking as to damages) or para. 3 (service of the order). Those are granted.

Conclusion

[125] The Hotels and the Strata are granted an injunction on the above terms. In addition, I award costs in the cause.

"Fitzpatrick J."

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