COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Gautam v. Canada Line Rapid Transit Inc.,* 2011 BCCA 275

Date: 20110615
Docket: CA037929

Between:

Gary Gautam dba Cambie General Store,
557856 B.C. Ltd. dba Sofa So Good,
George King and Jane King

Respondents
(Plaintiffs/Applicants)

And

Canada Line Rapid Transit Inc.,
Intransit BC Limited Partnership,
Intransit British Columbia G.P. Ltd. and SNC-Lavalin Inc.

Appellants
(Defendants/Respondents)

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Hall
The Honourable Madam Justice Bennett

On appeal from: Supreme Court of British Columbia, February 5, 2010,
(*Gautam v. Canada Line Rapid Transit Inc.*, 2010 BCSC 163, Docket No. S087866)

Counsel for the Appellants:	G.K. Macintosh, Q.C. & S. Hern
Counsel for the Respondents:	P.R. Bennett & M.W. Mounteer
Place and Date of Hearing:	Vancouver, British Columbia March 2, 2011
Place and Date of Judgment:	Vancouver, British Columbia June 15, 2011

Written Reasons by:
The Honourable Madam Justice Bennett

Concurred in by:
The Honourable Chief Justice Finch
The Honourable Mr. Justice Hall

Reasons for Judgment of the Honourable Madam Justice Bennett:

[1] Gary Gautam is a business proprietor in an area of Vancouver on Cambie Street between 2nd and 25th Avenues known as the "Cambie Village". He and other business and property owners were successful in obtaining certification of a class action against the appellants who were involved in building the Canada Line rapid transit system which connects Vancouver with Richmond and the Vancouver International Airport. I will refer to this group as "Canada Line". Canada Line appeals the certification order.

[2] At the opening of the appeal, Canada Line sought an adjournment based on what it submitted was "uncertainty" as a result of the release of the "*Heyes*" decision a few days earlier. (*Susan Heyes Inc. (Hazel & Co.) v. South Coast B.C. Transportation Authority*, 2011 BCCA 77.*)* In that case, the trial judge allowed Susan Heyes Inc.'s claim that the building of the Canada Line rapid transit system amounted to a nuisance and that the claim was not defeated on the basis of statutory authority. The Court of Appeal upheld the finding of nuisance, but overturned the decision with respect to statutory authority and concluded that the claim was defeated on this basis.

[3] Canada Line submitted that this appeal should await the outcome of any application for leave to appeal to the Supreme Court of Canada which Susan Heyes Inc. might initiate. We decided to hear the appeal, reserving the issue of whether this decision should be placed in abeyance pending future developments in the *Heyes* case.

[4] In my view, the appeal should not be delayed because, as will be seen below, the *Heyes* decision is not necessarily conclusive of the issues raised in this Court. The decision to proceed with this appeal is not a direction to the trial court to proceed. Whether the trial should be postponed pending the outcome of any further appeal by Susan Heyes Inc. is a matter for the case management or trial judge.

[5] In my view, the appeal should be dismissed.

Facts

[6] The construction of the Canada Line rapid transit system took place between 2005 and 2009. The construction commenced at the south end of Cambie Street and proceeded north in a manner referred to as a "construction train". The method of construction was "cut and cover" which involved the excavation of a trench from south to north Cambie, the installation of a tunnel in the trench, the backfilling of the trench, and the restoration of the street surface. Needless to say, the construction train proceeded through Cambie Village. The respondents submit this disruption gives rise to several claims: nuisance, waiver of tort, and injurious affection.

[7] The class is comprised of approximately 62 individuals or companies who own properties in the Cambie Village and approximately 215 individuals or companies who operate a business from leased premises in the Village.

Reasons of the Chambers Judge

[8] The chambers judge, who was also the trial judge on the *Heyes* case, set out the criteria for certification of a class action in ss. 4(1) and (2) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("*CPA*"):

> 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:
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> (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;
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> (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.
> >
> > (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.

[9] Canada Line did not dispute that the statement of claim discloses a cause or causes of action, that there was an identifiable class of two or more people, or that the plaintiffs were appropriate representatives of the class. (Mr. Gautam operates a small convenience store on Cambie Street. 557856 B.C. Ltd. operated a furniture store on Cambie Street, but relocated in 2007, allegedly because of the Canada Line construction. Mr. and Mrs. King are property owners and operators of a business on Cambie Street.) Rather, Canada Line's challenge to the certification of the action focused on the questions of whether common issues exist and whether a class proceeding is the preferable approach.

[10] The chambers judge stated the common issues as follows:

> [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?

[11] The first common issue addresses the claim in nuisance. The chambers judge applied the test in *Sutherland v. Attorney General of Canada*, [1997] B.C.J. No. 2550 (S.C.), where the court stated that a finding of nuisance depends on the following findings of fact:

> (1) that the conduct of 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.

[12] The chambers judge concluded that a finding of substantial interference does not require proof of economic loss. He held that the "complaint of substantial impairment with access is a common feature of each class member's complaint."

[13] He concluded that if substantial interference is proved, the question of individual loss can be addressed in the manner proposed by the plaintiffs, that is, with the assistance of an assessor pursuant to s. 27 of the *CPA*.

[14] The chambers judge concluded that the question of whether statutory authority defeats the claim was a common issue.

[15] The chambers judge concluded that the question of whether the class can avail itself of the principle of waiver of tort, without being required to prove that each member of the class had incurred a loss as a result of the decision to proceed with cut and cover rather than with a bored tunnel, was a common issue.

[16] The issue of injurious affection only arises if Canada Line's defence of statutory authority is successful. This issue was not raised in *Heyes*. The chambers judge concluded that the issue of whether the members of the class can claim for injurious affection was a common issue.

[17] Finally, the chambers judge considered whether a class action was the preferable procedure for the litigation, with reference to *CPA* s. 4(2) (a)-(e).

[18] He found that the "common allegation is that construction substantially interfered with access to the properties or businesses owned or operated by members of the class." He concluded that this common feature favoured certification.

[19] He found that the predominant question of law was the defence of statutory authority which applied to all members of the class, and that individual circumstances had no bearing on this defence. In addition, the evidence on the issue of substantial interference and the defence of statutory authority will be similar in many respects. He concluded this also favoured certification.

[20] He was intimately familiar with the fact that there were other proceedings. Having been the trial judge in *Heyes*, he was in a unique position to identify the issues which differentiated the cases. Significantly, he found that there were facts pleaded in this case which were not pleaded in *Heyes* and said, at para. 57:

> [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.

[21] The chambers judge was also apprised of a multi-party action which had been filed arising from the construction of the Canada Line rapid transit system. He

concluded that a multi-party action was “less practical or less efficient” than class proceedings as far as the owners and business proprietors in the Cambie Village were concerned. He further found that judicial economy would be best served by proceeding with a class action.

Issues on Appeal

[22] The questions for this Court are whether the chambers judge erred in concluding that the claims alleging nuisance, waiver of tort, and injurious affection can be resolved as common issues, or in determining that a class action is the preferable procedure for the resolution of the issues in dispute between the parties.

Standard of Review

[23] The standard of review applicable to the order of a judge on a certification application was stated in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 at para. 28:

> [28] Section 4 of the *CPA* states that an action “must” be certified if all of the statutory criteria are satisfied. Accordingly, a judge on a certification application is not exercising a discretionary power in granting or refusing certification of an action as a class proceeding. However, the judge has a measure of discretion in the assessment of the statutory criteria and, absent an error of law, this Court will not interfere with an exercise of judicial discretion unless it is persuaded the chambers judge erred in principle or was clearly wrong: *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343, [1998] W.W.R. 275 (C.A.) at para. 25, leave to appeal ref’d [1998] S.C.C.A. No. 13].

Common Issues

a) Nuisance

Position of the parties

[24] Both parties agree on the general law of nuisance stated in *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64 at para. 77:

> [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).

[25] The appellants submit that absent the loss of business by a member of the class, the actions of Canada Line did not cause a nuisance. They submit that business loss is not a measure of damages as a result of nuisance, but one of the elements to be assessed in determining whether nuisance occurred in the first place.

[26] The appellants submit that the chambers judge ignored the individual factors, in particular, those necessary for a determination of whether the interference was unreasonable. The appellants submit that the common issue with respect to the question of whether there is nuisance cannot be determined without an examination of the particular circumstances of each claimant, and therefore is not suitable for a class action.

[27] The respondents submit that proof of economic loss is not necessary to establish nuisance, and therefore there is no need for individual assessments in order to establish nuisance. It submits that the harm is the interference with the public's ability to access the Cambie Village during the construction of the Canada Line rapid transit system. The respondents submit that in order to find substantial interference "the court must consider whether the restrictions uniformly imposed throughout the Cambie Village were so severe that an ordinary person would find the interference intolerable." A court does not need to perform an individual assessment in order to decide this question.

Analysis

[28] The appellants rely on the decision of *Mandrake Management Consultants Ltd. v. Toronto Transit Commission* (1993), 102 D.L.R. (4th) 12 (Ont. C.A.) which was a nuisance case arising from noise emanating from the Toronto subway system. Mr. Justice Galligan, for the majority, discussed four factors in "cases … which involve only interference with tranquility and amenities." These factors are the nature of the locality in question, the severity of the harm, the sensitivity of the plaintiff and the utility of the defendant's conduct. The appellants say that apart from locality, which may be a common issue among possible sub-classes, the remaining factors cannot be determined on a common basis.

[29] In support of their position, the appellants cite *Sutherland*, *supra*, where an application for class certification was brought in a claim for nuisance arising from the completion of the third runway at the Vancouver International Airport. The application was dismissed on the basis that "no meaningful measure of sound emanating from the third runway [could] be ascertained for the class" and therefore there was "no material fact or important threshold factual issue that is common to all the members" (paras. 33-34). Mr. Justice K. Smith (as he then was) concluded that the question of whether the runway created a nuisance depended on individual factors and thus a common issue could not be crafted.

[30] The appellants also refer to the Ontario Court of Appeal's decision in *Hollick v. City of Toronto* (1999), 181 D.L.R. (4th) 426, where certification was refused in a proposed class action in relation to noise and air pollution from a landfill. Because each member of the proposed class was affected differently by the noises, sounds, and smells emanating from the landfill, the Court concluded that the interference complained of was not commonly experienced by the class and thus did not constitute a common issue. Additionally, there were 30,000 class members who lived in different locations over 16 square miles, and the complaints occurred over seven years at different dates. The Supreme Court of Canada disagreed with this analysis. It concluded that the commonality requirement had been met,

[2001] 3 S.C.R. 158 at para. 26. However, the Court declined to certify the class action on the basis that the individual issues overcame the common issues to the point that certification would not advance the litigation and thus it was not the preferable means of resolving the claims. (At para 36.)

[31] However, there are nuisance cases, with different facts, which have been certified. For example, in *St. Lawrence, supra*, the class action involved interference caused by dust, odours, and noise arising from the operation of a cement plant. The action, although brought under the *Quebec Civil Code*, was found to be analogous to a claim in nuisance (paras. 76-78). The trial judge concluded that some form of injury was common to all of the members of the group, while it varied on an individual basis in intensity. In upholding the decision of the trial judge to certify the action, the Court distinguished *Hollick* and said, at para. 110:

> [110] It is true that in *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68, this Court expressed the opinion that the class action was not the preferable means of resolving the claims of the class members. However, in that case, the Divisional Court had noted that "[e]ven if one considers only the 150 persons who made complaints — those complaints relate to different dates and different locations spread out over seven years and 16 square miles" (para. 32). In the instant case, the representatives provided detailed evidence of the injury they had suffered. Dutil J. considered all that evidence and was able to infer from it that the members in each zone had suffered similar injuries. Her analysis contains no error warranting this Court's intervention.

[32] The issue of "severity of harm" in this case is whether the restrictions in access to business indisputably caused by the cut and cover construction were so significant as to cause the ordinary person to find it intolerable. In my respectful view, it is not necessary for the court to consider the effect on each owner or business proprietor in order to ascertain whether there is substantial interference that is unreasonable.

[33] The appellants argue that the damage to the economic interests of each individual member of the class must be established as an element of nuisance rather than simply damages. The argument is that substantial interference needs to be measured by economic loss, which can only be addressed on an individual basis.

[34] The respondents point to *Nor-Video Services Ltd. v. Ontario Hydro* (1978), 84 D.L.R. (3d) 221 (H.C.J.), aff'd [1979] O.J. No. 1792 (C.A.), in support of the reasons of the chambers judge.

[35] Nor-Video Services Ltd. was a provider of cable television in northern Ontario. Ontario Hydro installed a power line system which interfered with Nor-Video's reception and transmission of television broadcast signals. Indeed, it ran the high voltage lines directly in the beam of the receiving antenna of Nor-Video and Thunder Bay, Ontario. As a result, the channel from Thunder Bay was no longer available to Nor-Video's customers.

[36] Hydro had several options of where to locate the power lines. The location it ultimately chose provided a savings in the $1 million range.

[37] The type of nuisance in *Nor-Video* was described by the trial judge at 230:

> The interest which Nor-Video complains has been interfered with or invaded, and allegedly unreasonably so, is, in nuisance terms, its interest in the use and enjoyment of its land. The harm suffered is not, as in most nuisance cases, of a physical nature to land or tangible property nor is it personal discomfort, annoyance or inconvenience. The gravamen of the complaint is the inability to use and enjoy property to the same extent and with the same result as before Hydro's intervention; or, put another way, the plaintiff's complaint is that the interference with TV broadcast reception prevents it from freely enjoying its property and putting it to its full business use. Nor-Video, in short, contends that television reception is an integral part of the beneficial enjoyment of its property and it is entitled in nuisance to protection against the unreasonable and substantial interference with or invasion of such an interest.

[38] As can be seen, the interest and the consequences of the interference are not unlike that alleged here. The trial judge concluded that the conduct of Hydro unreasonably interfered with the interest of Nor-Video, which as noted above was to fully use and enjoy its land, including its ability to put it to full business use. The damages suffered by Nor-Video were not extensive, yet the court found nuisance. I agree with the submission of the respondents that this case supports the conclusion that a substantial interference with the use of property is not necessarily measured by the amount of economic loss. Therefore, the question of whether a nuisance was

created by the construction of the Canada Line rapid transit system may be stated as a common issue.

b) Statutory Authority

[39] The appellants do not allege that the chambers judge erred in stating the defence of statutory authority as a common issue. They point out that in *Heyes*, this Court found that statutory authority defeated the claim in nuisance by Susan Heyes Inc. The respondents submit that this decision was based on the conclusion by the Court of Appeal that the trial judge erred in concluding that the bored tunnel construction was a viable alternative to cut and cover construction. The Court further concluded that cut and cover was the only feasible method of constructing the Canada Line rapid transit system. (Para. 133.)

[40] The respondents submit that this conclusion was based on the "unchallenged evidence" of Ms. Bird, the Chief Executive Officer of Canada Line Rapid Transit Inc. (CLRT). Indeed, that appears to be the basis for the conclusion of this Court at paras. 124 and 126 of *Heyes*:

> [124] Ms. Bird's unchallenged evidence was the public sector funding cap made acceptance of the RAVxpress proposal "utterly impossible". Moreover, the record shows even the financial feasibility of the SNC-Lavalin/Serco proposal was uncertain at the conclusion of the evaluation process in November 2004. CLRT's BAFO Stage Funding Report stated SNC-Lavalin/Serco's proposal had a $343 million shortfall, and concluded it was unaffordable as defined. As a result, the formal selection of SNC-Lavalin/Serco as the preferred proponent by TransLink had to be delayed for several weeks until the participants were able to identify scope changes and funding initiatives to eliminate the shortfall.
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> ...
>
> [126] In my view, this is such a case. The RAVxpress option required over half a billion dollars more in public funding than that of SNC-Lavalin/Serco. It was deemed "impossible" by the chief executive officer of CLRT. There was no evidence suggesting that assessment was wrong. In my view, this large and insurmountable shortfall in public funding cannot be ignored in weighing the practical feasibility of the options.

[41] The respondents submit that they will call evidence to challenge the evidence of Ms. Bird, and thus the evidence at the new trial will be significantly different from

the *Heyes* trial. As a result, the *Heyes* decision has crystallized one common issue, which is whether the cut and cover construction was the only feasible method of constructing the Canada Line rapid transit system.

c) Waiver of Tort

[42] The appellants submit, and the respondents do not disagree, that in order for there to be a waiver of tort, the respondents must establish a claim in nuisance. If the common issues for nuisance fall, then waiver of tort must fall as well. However, since I have concluded that the claim of nuisance is a common issue, then waiver of tort is also a common issue.

d) Injurious Affection

[43] This claim arises if the nuisance claim is successful, but then defeated on the basis of statutory authority. (Susan Heyes Inc. did not plead this claim.) The appellants raise a number of issues in relation to the merits of this claim, but acknowledge that they are not relevant to the issues on appeal. The appellants raise the same argument above that significant interference must be shown in the context of each individual claimant.

[44] They further argue that injurious affection only applies to property owners. I understand that this point is joined between the parties. However, if the appellants are correct, then a sub-class of property owners could potentially make the claim. In my view, this is an issue for the trial court and does not defeat certification.

[45] Therefore, as the nuisance claim is a common issue, injurious affection is as well.

Preferability of Proceeding

[46] The appellants submit that a class proceeding is not the preferable approach to this action. They submit that there are too many individual issues which will predominate the litigation. However, much of their argument is founded on a

successful submission with respect to the nuisance claim, which I have not accepted.

[47] The issues to consider when assessing which method of litigation is preferable are: judicial economy, access to the courts and behaviour modification. (*Hollick* (S.C.C.) at para. 27). The chambers judge considered these factors. He also considered whether a multi-party action would be a better method of bringing the matter before the court. He concluded that the proposed class action would advance the litigation in a meaningful way.

[48] The conclusion of a chambers judge that a class action is the preferable procedure for the resolution of common issues is "generally afforded considerable deference" (*Lam v. University of British Columbia*, 2010 BCCA 325 at para. 77). This Court will only interfere with the decision with respect to preferability of procedure if the chambers judge erred in principle or was clearly wrong. (*Griffiths v. British Columbia*, 2003 BCCA 367 at para. 22).

[49] In my view, the chambers judge did not err when he concluded that the class proceeding would advance the litigation in a meaningful way. I would not interfere with his conclusion that the class action is the preferable procedure.

[50] I would dismiss the appeal.

"The Honourable Madam Justice Bennett"

I agree:

"The Honourable Chief Justice Finch"

I agree:

"The Honourable Mr. Justice Hall"