IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gautam v. Canada Line Rapid Transit Inc.,* 2015 BCSC 2038

Date: 20151106
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., SNC-Lavalin Inc. and The South Coast British Columbia Transportation Authority

Defendants

Brought under the *Class Proceedings Act*, RSBC 1996, c 50

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

Counsel for the Plaintiffs:	P. R. Bennett D. G. Volk
Counsel for the Defendants:	R. J. McDonell S. Hern
Place and Date of Trial:	Vancouver, B.C. November 24-28, 2014 December 1-4, 8-12, 2014 January 20-22, 2015 March 30-31, 2015 April 1-2, 2015
Place and Date of Judgment:	Vancouver, B.C. November 6, 2015

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I. INTRODUCTION

[1] This action is brought under the *Class Proceedings Act*, RSBC 1996, c 50, and concerns claims for damages for nuisance and injurious affection arising out of the construction of the Canada Line through Cambie Village in Vancouver between November 2005 and July 2009.

[2] Cambie Street is one of Vancouver's four major transportation corridors, traversing the city from the downtown peninsula all the way to the Fraser River. Cambie Village occupies the section of the Cambie corridor that runs between 6th Avenue and King Edward Avenue (25th).

[3] The members of the class are persons who either owned businesses that operated from premises located in Cambie Village, or owned commercial premises there. It comprises upwards of 250 businesses of all kinds, and approximately 70 property owners. Their claim centres on how the method used to construct the tunnel under Cambie Street affected access to their premises.

[4] The method used for construction of the tunnel through that area was known as "cut and cover". This involved excavating a large trench down the centre of Cambie Street (the "cut") after first moving utilities located beneath the street. Concrete tunnels were then constructed in the open trench. When they were completed, the excavated material was refilled over the tunnel (the "cover"), utilities were restored, and the surface of the road was refinished and repaved.

[5] An alternative method, which the plaintiffs say could have been used and would have minimized interference with their businesses, is tunnel boring. This method was used under the downtown core and under False Creek. It involves a tunnel boring machine working underneath the street without disturbing the street surface, except where stations are located and where the machine enters and emerges from the ground. If continued south through Cambie Village to King Edward Avenue, the plaintiffs say, this method, would have left the members of the class relatively unscathed.

[6] The common issues certified for trial in this proceeding were these:

A. 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?

B. If the answer to Question A 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?

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

[7] A fourth common issue, concerning whether the members of the class were entitled to waive any claim for damages for nuisance and to claim restitution ("waiver of tort"), was abandoned at the end of the trial.

[8] This is not the first time that a claim for damages has come before the courts in relation to the construction of the Canada Line through Cambie Village. Issues essentially encompassing Questions A and B were litigated in *Heyes v Vancouver (City)*, 2009 BCSC 651 ("*Heyes SC*"), where the plaintiff business was awarded damages for nuisance of $600,000 against three parties who are defendants in this case. That judgment was reversed in *Susan Heyes Inc. (Hazel & Co.) v South Coast BC Transportation Authority*, 2011 BCCA 77 ("*Heyes CA*"), on the ground that the defendants were entitled to the defence of statutory authority (the issue raised by Question B in this case). Leave to appeal to the Supreme Court of Canada was denied. The result was a dismissal of the claim.

[9] Why, some may wonder, are we looking at nuisance in relation to cut and cover construction all over again? Because, the plaintiffs say, the evidence they have adduced at this trial is different and supports a different approach and analysis in relation to the defence of statutory authority. It follows, they argue, that this Court need not, and should not, reach the same conclusion to Question B as did the Court of Appeal in *Heyes CA*.

[10] Then, at the end of the trial, the defendants took a position that would, if accepted, foreclose consideration of Questions B and C altogether. I turn to deal with these matters.

II. LITIGATION HISTORY AND THE COMMON QUESTIONS

A. The *Heyes* litigation and Question B

[11] Private nuisance consists of an interference with the claimant's use or enjoyment of land that satisfies two elements: first, the interference must be substantial; and second, it must be unreasonable: *Antrim Truck Centre Ltd v Ontario (Transportation)*, 2013 SCC 13 at para 18.

[12] Where that has been found to have occurred, the defendant may escape liability by demonstrating that, with respect to the activity in question, it was acting under statutory authority, and the interference complained of was the inevitable result of that authorized activity. As interpreted by the Court of Appeal, this means that where the nuisance arises from the exercise of a discretionary statutory power, the defendant must demonstrate, to succeed, that there was no practically feasible option that would have avoided creating a nuisance: *Heyes CA* at paras 116-119.

[13] As we shall see, the procurement process that was undertaken here generated two proposals for construction of the Canada Line that were considered worth pursuing to a final offer stage. The first was from a consortium called RAVxpress. The second was the successful consortium, called SNC-Lavelin/Serco ("SNCLS"). The RAVxpress proposal involved tunnel boring for the line through downtown, under False Creek, and then along the Cambie corridor from False Creek to a point well south of Cambie Village. The SNCLS proposal also contemplated tunnel boring downtown and under False Creek, but utilized an innovative process of cut and cover construction under most of Cambie Street, including Cambie Village. This offered a number of advantages, including a substantial financial saving and significantly reduced risk, but was going to be more disruptive during the period of construction.

[14] The nuisance claim in both this case and in the *Heyes SC* case, in essence, is that the defendants' choice of cut and cover construction through Cambie Village

was a substantial and unreasonable interference with the claimants' use and enjoyment of land, and therefore constituted a private nuisance. That was the finding of the trial judge in *Heyes SC*, and it was not disturbed on appeal. The trial judge went on to reject the defence of statutory authority, essentially on the ground that the competing RAVxpress proposal that involved tunnel boring was viable, and therefore represented a feasible non-nuisance alternative.

[15] The Court of Appeal disagreed. In all of the circumstances, the court found that looking at the two proposals as a whole, and noting, among other things, a cost differential of over half a billion dollars in public funds between the two proposals, only the SNCLS proposal was practically feasible. Moreover, the court concluded, the RAVxpress proposal did not constitute a non-nuisance alternative when looking at the project as a whole as opposed to focusing solely on the Cambie Village area. Accordingly, the defendants were entitled to the protection of the defence of statutory authorization. Does that answer Question B in this case? The plaintiffs say, correctly, that it does not.

[16] The plaintiffs do not attempt to relitigate the question of whether the RAVxpress proposal was a viable and practically feasible non-nuisance alternative. That is not open to them. They concede that the defendants were exercising a discretionary statutory power—but, they say, based on the evidence, it was open to the defendants to achieve a non-nuisance result with the SNCLS proposal it preferred by replacing cut and cover construction with tunnel boring between False Creek and King Edward Avenue. They maintain that the defendants have failed to satisfy the onus upon them of proving that this alternative was not practically feasible. This was not considered in the Court of Appeal because the evidentiary foundation for it did not then exist.

[17] Consequently, the plaintiffs submit, while the analysis of the elements of private nuisance must yield the same result of a finding of substantial and unreasonable interference in response to Question A, the record here differs from what was before the Court of Appeal, and the answer to Question B, they assert, should also be different.

[18] The defendants accept that I am not foreclosed from arriving at a conclusion on the defence of statutory authority that is different from that reached by the Court of Appeal in *Heyes CA* (although they say I ought not to), and given the origin and development of this Class Proceeding, a different conclusion is clearly open to me.

[19] Pitfield J.'s trial judgment in *Heyes SC* was delivered on May 27, 2009. He subsequently certified this action as a class proceeding by order pronounced February 5, 2010: *Gautam v Canada Line Rapid Transit Inc*, 2010 BCSC 163 ("*Gautam SC*"). A year later, on February 18, 2011, the Court of Appeal delivered its Reasons for Judgment in *Heyes CA*, overturning Pitfield J.'s trial judgment. Four months after that, on June 15, 2011, it upheld Pitfield J.'s certification order (*Gautam v Canada Line Rapid Transit Inc*, 2011 BCCA 275 ("*Gautam CA*")), noting at para 4 that "the *Heyes* decision is not necessarily conclusive of the issues raised in this Court".

B. Wait, what about Question A?

[20] This trial proceeded, then, on the basis that it would determine the three common issues set out above: A, whether the defendants' impugned activity had substantially interfered with the plaintiffs' use and enjoyment of property; B, if so, whether they were entitled to the defence of statutory authority; and C, if that defence applied, whether the plaintiffs could assert a claim for injurious affection—an alternative claim that is only available if there was interference that amounts to nuisance but was authorized by statute. It is not available where there is no nuisance, and is both unavailable and unnecessary where the nuisance was not authorized by statute.

[21] Much of the plaintiffs' evidence concerned the nature of the interference they suffered as a result of the Canada Line construction. Most of the defendants' evidence addressed the utility and development of the concept that was employed, and the impracticability of any alternatives.

[22] Then, in final argument, the defendants took a position that had not previously been advanced in this litigation, and was not articulated in their otherwise very helpful opening statement: that only Question A could be determined by the court in

this proceeding. Question A, the defendants point out, is limited to the first of the two elements required to establish nuisance, that of substantial interference. The question of the second element, whether that interference was also unreasonable, was not certified as a common issue, the defendants maintain, and deliberately so. It therefore cannot be addressed in the common issues trial because "the trial judge on a common-issues trial cannot deal with an issue that has not been certified as a common issue": *Bennett v British Columbia*, 2012 BCCA 115 at para 46.

[23] Consequently, the defendants assert, a finding of nuisance cannot be made; it follows that neither Question B (statutory authority) nor Question C (injurious affection) can be determined as both are premised on a finding of nuisance.

[24] This position has the virtue of being in accord with the literal wording of the Question A. But that wording was carefully chosen, and it is difficult to understand why the court would certify three questions as common issues to be determined in this proceeding if, on their face, only one of them could be answered. Viewed this way, the defendants' position smacks of an attempt to relitigate the certification hearing.

[25] The plaintiffs argue that the defendants are wrong in suggesting that it was never intended that a finding of nuisance be made in favour of each class member, The issue of whether the activity was also unreasonable, they say, is implicitly included in Question A. They point to the position taken by the defendants in their factum in the Court of Appeal, and to that Court's decision in *Gautam CA* where Madam Justice Bennett, for the Court, said this at para 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.

[26] With respect, this passage is not, in my view, capable of importing into the common issue a question that was deliberately omitted by the chambers judge if, as the defendants submit, that was the case. The Court of Appeal did not change the questions, but dismissed the appeal and left the questions as they were. Moreover,

the defendants did not raise in that Court the point they are raising here. It follows that Bennett J.A.'s comment was not a considered disposition of the issue. Accordingly, I must return to the certification judgment of Pitfield J.

[27] In *Gautam SC*, Mr. Justice Pitfield noted that the principal point of departure between the plaintiffs and the defendants centred on the question of whether the proposed class action raised common issues as defined by the *Class Proceedings Act*. In para 21, he set out the questions stated by the plaintiffs 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?
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> 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?
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> 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?
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> 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?

[28] The position of the defendants, Pitfield J. observed, was that the answer to each question would vary depending upon the circumstances of each member of the class, so that certification should be refused. The judge then turned to consider questions 1 and 2 together:

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

…

[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
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> (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.
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> [Emphasis added.]

[29] It is clear from para 24 of these Reasons that the judge specifically directed his mind to the two elements that must be found to exist in order to necessary to constitute the tort of nuisance. In this regard, I find it useful to return to the *Antrim Truck Centre* case where the Supreme Court of Canada discussed these two elements in detail:

> [20] The two-part approach, it must be conceded, is open to criticism. It may sometimes introduce unnecessary complexity and duplication into the analysis. When it is applied, the gravity of the harm is, in a sense, consider twice: once in order to apply the substantial interference threshold and again in deciding whether the interference was unreasonable in all of the circumstances.
>
> [21] On balance, however, my view is that we ought to retain the two-part approach with its threshold of a certain seriousness of the interference… Retaining a substantial interference threshold underlines the important point that not every interference, no matter how minor or transitory, is an actionable nuisance; some interferences must be accepted as part of the normal give

> and take of life. Finally, the threshold requirement of the two-part approach has a practical advantage: it provides a means of screening out weak claims before having to confront the more complex analysis of reasonableness.

[30] The court then turned to discuss the issue of reasonableness in a context that is germane to the present claim: how reasonableness is to be assessed in the context of interference caused by projects that further the public good:

> [25] The main question here is how reasonableness should be assessed when the activity causing the interference is carried out by a public authority for the greater public good. As in other private nuisance cases, the reasonableness of the interference must be assessed in light of all of the relevant circumstances. The focus of that balancing exercise, however, is on whether the interference is such that it would be unreasonable in all of the circumstances to require the claimant to suffer it without compensation.
>
> [26] In the traditional law of private nuisance, the courts assess, in broad terms, whether the interference is unreasonable by balancing the gravity of the harm against the utility of the defendant's conduct in all of the circumstances…. In relation to the gravity of the harm, the courts have considered factors such as the severity of the interference, the character of the neighbourhood and the sensitivity of the plaintiff…. The frequency and duration of an interference may also be relevant in some cases…. A number of other factors, which I will turn to shortly, are relevant to consideration of the utility of the defendant's conduct. The point for now is that these factors are not a checklist…. Courts and tribunals are not bound to, or limited by, any specific list of factors. Rather, they should consider the substance of the balancing exercise in light of the factors relevant in the particular case.
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> [Emphasis added.]

[31] On the basis of this review, I conclude that the defendants are correct in submitting that the issue of the element of the reasonableness of the defendants' activity does not fall to be decided as part of Question A. The question of the gravity of harm in the context of whether the interference was substantial was considered appropriate for determination as a common issue because in the particular circumstances of this case, the analysis could be limited to the effect of construction on access to properties and businesses. That was the reason for Pitfield J.'s restatement of the question.

[32] The question of the gravity of harm in the context of whether the interference was unreasonable, however, was specifically rejected because it necessarily includes consideration of (among other things) the severity of the loss incurred by the claimant, which could not be a common issue. For some, like Hazel & Co., the

loss might be intolerable. For others, given the significant long-term benefits accruing from the construction of the Canada Line, it might be more easily tolerated.

[33] Where does this leave us? The defendants say I should answer the first question and then stop. If the answer is "no", the action should be dismissed. If the answer is "yes", the matter should be referred to an assessor as discussed by Pitfield J. before coming back to me for consideration of Questions B and C, depending upon the assessor's findings.

[34] I am unable to accept the defendants' argument in this regard. While I agree that Question A is limited to the element of substantial interference and will not yield a finding of whether the defendants are liable in nuisance, I do not agree that Questions B and C are thereby necessarily disqualified: see *Sutherland v Canada (Attorney General)* (1997), 15 CPC (4th) 329 (BCSC) at para 36. The views expressed by Pitfield J., as upheld in the Court of Appeal, indicate to me that it was contemplated that if substantial interference is established across the class, then it becomes an efficient and worthwhile exercise to determine, for the class, the remaining two questions on the assumption that at least some of the plaintiffs will be able to establish the necessary element of unreasonableness. The trial proceeded on that basis. There is no prejudice to the defendants in continuing on this course, and it is in accord with principles of fairness and proportionality. The issues were fully litigated.

[35] Before turning to those questions, it is helpful to identify the defendants.

III. THE DEFENDANTS

[36] The defendants are, as one would expect, the parties responsible for the design and construction of the Canada Line.

[37] The defendant South Coast of British Columbia Transportation Authority is better known as "TransLink". Its statutory mandate is to provide a regional transportation system, including transportation by rail.

[38] In 2002, TransLink formed a subsidiary called RAV Project Management Ltd., or "RAVCO", to devise and implement a rapid transit rail line connecting Richmond,

the Airport, and Vancouver (the "RAV Line"). In 2006, RAVCO became the defendant Canada Line Rapid Transit Inc. ("CLRT") as the project progressed to construction, and the RAV Line developed into the Canada Line. CLRT remained a wholly-owned subsidiary of TransLink.

[39] CLRT's mandate was to oversee the procurement, design, construction and implementation of the Canada Line through what was then a new vehicle, a public-private partnership, or P3. Ultimately this was accomplished through the selection of the SNCLS consortium as the successful proponent. That consortium became the principal component of the defendant Intransit BC Limited Partnership, of which the defendant Intransit British Columbia GP Ltd is the general partner (collectively "Intransit BC"). Intransit BC thus became the concessionaire that assumed responsibility for the final design, construction, operation and maintenance of the Canada Line, contributing private equity of approximately $750,000,000.

[40] The defendant SNC-Lavalin Inc. ("SNC"), is a limited partner of Intransit BC, and was the general contractor responsible for the design and construction of the Canada Line.

[41] TransLink, CLRT and Intransit BC were the parties initially found liable in *Heyes SC*.

IV. DISCUSSION

A. 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?

[42] The plaintiffs say that this question raises no real issue. It will be remembered that Pitfield J. framed this question in order to focus on the effect of construction on access to the plaintiffs' properties and businesses. That the cut and cover construction method resulted in a significant and prolonged restriction of access to the properties in Cambie Village is abundantly clear on the evidence, and I so find. As the Supreme Court of Canada put it in the *Antrim Truck Centre* case at para 19, "A substantial interference with property is one that is non-trivial". There was nothing trivial about the many months of seriously impaired access to their

premises which the members of this class had to endure. The interference was substantial.

[43] The defendants did not contend that the cut and cover construction caused no substantial interference. But they say that the plaintiffs have failed to prove substantial interference to each member of the class, noting that certification does not mean that evidence establishing the claim for one person establishes it for all class members. If it is not established for all class members, the defendants contend, relying on *Bou Malhab v Diffusion Métromédia CMR Inc*, 2011 SCC 9, the common question must be answered in the negative.

[44] In considering this position, it is worth recalling the words of Pitfield J. on the certification hearing at para 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.
>
> [Emphasis added.]

[45] The Court of Appeal (at para 32) agreed with this analysis. Pitfield J. was, of course, intimately familiar with the evidence concerning the effect of cut and cover construction on Cambie Village, having presided over the *Heyes* trial. That does not bind me in my assessment of whether that amounted to substantial interference in this case, but having heard the evidence, I agree with him.

[46] In their written argument, the defendants submit:

> It is not a matter of the number of witnesses called, but their diversity of experiences and the impossibility of comparing the experience of small retail stores to big box megastores to passive landowners to strategic developers to professional service providers to national banks. If more witnesses were called, they would have shown a greater diversity, not less. The class-wide inferences that the plaintiffs ask of this Court to make cannot be sustained.

[47] This is much the same argument they presented to support their position before Pitfield J. that the questions proffered by the plaintiff should not be certified as common issues. For the reasons just discussed, it is an argument that has considerable validity (and indeed was accepted) in relation to the second element, unreasonableness, including the factors of severity of damage and public utility.

[48] As the excerpt quoted from the defendants' argument suggests, it may well prove to be that some members of the class suffered no or relatively little financial loss, while some others may have been quite content to sustain a temporary loss in order to reap the future rewards of greatly enhanced public access and development potential. That would be relevant to the question of (un)reasonableness. But on no account of the evidence can it be suggested that the significantly restricted public access to the businesses and properties in question was a trivial or insubstantial interference with the use and enjoyment of these premises.

[49] As I read it, the *Bou Malhab* case does not assist the defendants. Rather, it supports the position of the plaintiffs. It concerned a class action for defamation, a claim that raises very different considerations. The plaintiffs claimed that words that were published in a radio broadcast defamed all taxi drivers of a certain cultural/linguistic background. The court noted that an individual is not entitled to compensation solely because he or she is a member of a group about which offensive comments have been made. Any member of the group who brings action must have sustained personal injury to succeed. The class claim was dismissed because of the absence of proof that a personal injury was sustained by members of the group. But that did not mean that each plaintiff had to establish specific injury. In its reasons, the court noted, at para 54, that:

> …there can be no question of requiring each member of the group to testify to establish the injury actually sustained. Proof of injury will usually be based on presumptions of fact…. In this regard, the plaintiff must prove an injury shared by all members of the group so the court can infer that personal injury was sustained by each member. Proof of injury suffered by the group itself and not by its members will not in itself be enough to give rise to such an inference. On the other hand, the plaintiff is not required to prove that each of the members sustained exactly the same injury. The fact that the wrongful conduct did not affect each member of the group in the same way or with the same intensity does not prevent the court from finding the defendant civilly liable.

[50] Once again, the defendants' position may have prevailed in relation to the second element of the tort of nuisance, that of unreasonableness, had that been certified as a common issue. But it was not, essentially for the very reasons discussed in *Bou Malhab*. With respect to the first element, I find that the plaintiffs have proved substantial interference of the nature described above that was shared by all members of the group, from which the inescapable inference arises that it was sustained by each member.

[51] It follows that the answer to Question A is "yes".

B. 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?

1. The principal issue: was there practically feasible alternative?

[52] The plaintiffs concede that, as was found in *Heyes CA*, the defendants were exercising a discretionary statutory power when they selected the SNCLS proposal, and entered into the contracts that led to the construction of the Canada Line in a manner that employed cut and cover tunnel construction through Cambie Village. As noted, it was this utilization of cut and cover tunnel construction that substantially interfered with the plaintiffs' use and enjoyment of their premises.

[53] It follows, as articulated by the Court of Appeal, that the issue is whether the defendants can demonstrate that there was no "practically feasible option to cut and cover construction" that would have avoided this interference, "given the scientific possibilities, the financial picture, and other relevant circumstances, viewed from a common sense perspective": *Heyes CA* at para 119; see also *Gautam CA* at para 41.

[54] It is unnecessary for me to review the law that led the Court of Appeal to that formulation. It is binding upon me. Also binding upon me are the findings of the Court of Appeal in *Heyes CA* concerning the sources of the defendants' statutory authority. The Court of Appeal accepted some of the sources relied upon by the defendants, and rejected others. As this matter is likely to return to that Court, it is

appropriate to note that I make no independent findings concerning the sources of the defendants' statutory authority, but proceed on the basis of those found in the Court of Appeal.

[55] Turning to the question of options, it is common ground that the only alternative to cut and cover construction was bored tunnel construction. As we have seen, the *Heyes* claim foundered on the proposition that the RAVxpress proposal, which employed tunnel boring down the Cambie corridor and would therefore have mostly avoided the type of disruption that the plaintiffs here experienced, was a feasible alternative.

[56] The Court of Appeal concluded it was not practically feasible—not because it employed tunnel boring *per se*, but because as a conceptual whole, it was not reasonably capable of achieving all of the required objectives, including cost parameters of prime importance to the public purse.

[57] But, the plaintiffs submit, the evidence adduced at this trial makes it clear that well after its proposal was accepted, SNC-Lavelin itself considered replacing the cut and cover construction method with tunnel boring between Broadway Station and 29th Avenue—most of the Cambie Village area. It did so in order to explore whether this would save money in the circumstances it then faced, and concluded that it would cost more. Nevertheless, the plaintiffs say, the incremental cost would have been in the range of $34 million or less, not the half billion dollars contemplated in the Court of Appeal. This level of additional cost, together with the costs associated with increased risks, were, the plaintiffs assert, well within what was practically feasible for the defendants to incur.

[58] What the defendants could and should have done, the plaintiffs accordingly assert, is ask SNCLS for a revised proposal that included tunnel boring in the Cambie Village area, either through the BAFO invitation, or as a priced option thereafter.

[59] Had the defendants done so, the plaintiffs say, bored tunnel construction through Cambie Village could have been incorporated into the SNCLS proposal at a

cost that was capable of being supported through available additional private financing and public funding, without giving rise to unmanageable risks. It follows, they submit, that it was a practically feasible alternative.

[60] The defendants, on whom the onus lies, called as witnesses many of the persons responsible for overseeing the procurement and construction of the Canada Line. They maintain that altering the SNCLS proposal as suggested by the plaintiffs was never an available option and was not practically feasible. They say further that the Canada Line could not possibly have been built by any means of construction without causing significant disruption: in short, that there was no "non-nuisance alternative".

[61] On the basis of the evidence led in this trial, I conclude that the onus on the defendants has been satisfied. I find on a balance of probabilities that there was no practically feasible alternative in the particular circumstances of this project.

2. How did the Canada Line get built?

(a) Some observations

[62] After hearing all of the evidence, I could not help but form the impression that it was a near-miracle that the Canada Line got built at all. It was an extraordinarily large, complex and challenging infrastructure project. It employed a P3 model that was a first in North America for this size of project, and had to be successfully navigated through the formidable shoals of politics and bureaucracy at four levels of government, competing local interests, environmental regulations, engineering challenges, ideological objections and funding conundrums (an incomplete list). It was a remarkable achievement.

[63] Although the concept of a rapid transit line linking Richmond and Vancouver had been contemplated since the 1970s, it was not until 2000 that TransLink undertook a detailed consideration of the merits of the concept. This was inspired in part by recognition by the Vancouver International Airport Authority ("YVR") that something needed to be done about long term access to Sea Island, given the existing congestion. For obvious reasons, it also attracted the interest of the City of

Vancouver, the City of Richmond, the Greater Vancouver Regional District, and the Governments of British Columbia and Canada.

[64] To start to this process, TransLink retained Jane Bird as a consultant to take a very high level look at what interest there was in funding such a project, and how it might be organized to move forward.

[65] The project did move forward, and Ms. Bird's role evolved into that of Project Director, and ultimately Chief Executive Officer of first RAVCO and then its successor, CLRT. In these capacities, she presided over the project's definition and the very careful design of the procurement process. She dealt with all of the stakeholders including TransLink, YVR, and the various levels of government, oversaw the evaluation of the responses first to the Request for Proposals ("RFP") and then to the request for Best and Final Offers ("BAFO"), cajoled and persuaded as necessary, and, with the assistance and hard work of her colleagues, guided the project to its successful conclusion Ms. Bird testified at some length at the trial of this action, and was a most impressive witness.

[66] I do not propose to review in detail all of the stages through which the project passed *en route* to its ultimate fulfilment. These have been described in two courts in the *Heyes* litigation. I will confine myself to those aspects that are particularly important to my findings, as well as those matters that were not covered in *Heyes*.

(b) The procurement process

[67] Part of Ms. Bird's task at the outset was to consider, in the context of funding, what model should be employed for the procurement of this project. Traditionally, large transit infrastructure projects in North America were funded entirely through the public sector as public works. But there was no appetite for this on the part of the provincial government. While the contribution of public funds would be necessary from all levels, the province did not consider such a project could or should be fully funded publicly. It was greatly in favour of employing a P3 model, not only for the purpose of accessing private sector capital, but also to access private sector expertise, gain flexibility, and protect the public from bearing much of the risk.

[68] As a concept, the P3 model did not meet with universal approval. Some among the stakeholders were ideologically opposed to the involvement of the private sector in a public project of this magnitude, particularly as the P3 model would involve the private sector not just in the building of the project, but in the operation and maintenance of the Canada Line as well.

[69] It is no business of the court to weigh the competing ideological merits of the two models. The reality is that, as Mr. Ken Dobell testified, the government of the day was not interested in the public sector alternative. Had Ms. Bird and her staff concluded that a P3 model was impracticable, I am satisfied that in all probability, the project would have stopped right there. While other public agencies may have remained interested, the project was going nowhere without the support of the provincial government.

[70] As it is, Ms. Bird concluded, with the assistance of international consultants, that a P3 model was both feasible and preferable. That conclusion is not challenged. The project continued along its evolutionary path accordingly.

[71] Consistent with this model, Ms. Bird's project team made it clear that in developing their Project Definition and heading to the RFP stage, it was not their role to provide a solution. Rather, they looked to the private sector to be creative and to devise the engineering solution that would deliver the best value. It was contemplated that the Canada Line would proceed by twin bored-tunnel construction from the Vancouver waterfront to at least King Edward Avenue. Indeed, for most of the downtown peninsula and under False Creek, there was no alternative. From False Creek South along the Cambie corridor, it was contemplated that the tunnel would have to run below an old sewer line at 8th Avenue, whence the ground rose considerably. These factors suggested construction of a deep tunnel built by tunnel boring machine. But the only formal requirement in the RFP, I find, was that this part of the line be built underground. How was left to the proponents.

[72] Ms. Bird testified at length as to the care with which this process was designed in order to maintain the necessary standards of fairness and

confidentiality. This was of vital importance in a P3 project of this magnitude. I accept her evidence in this regard.

[73] When the responses to the RFP came in, the project team's expectation was fulfilled: the private sector was indeed creative. The two most attractive proposals were from consortiums that included industry leaders such as Bombardier and SNC-Lavelin. The RAVxpress proposal included tunnel construction by means of tunnel boring and mining throughout the underground portion. The SNCLS proposal, however, employed cut and cover construction for the underground portion from 2nd Avenue south. It was able to do so because its engineers had devised an innovative means of permitting the tunnel to pass above, rather than below, the problematic sewer line at 8th Avenue. After getting past the sewer line, it proposed to use stacked tunnels instead of side-by-side tunnels (allowing the preservation of traffic flow on one side of Cambie Street during construction, and protecting the Cambie Heritage Boulevard).

[74] Throughout this entire process, of course, funding was an issue of fundamental importance. It encompassed a complicated set of interconnected variables that included not only the demands and limitations of different levels of government, but also such factors as ridership projections, revenue potential and private financing capacity. With respect to the responses to the RFP, there was a significant difference in cost between the SNCLS and RAVxpress proposals, while a third proposal was priced to the point that took it out of the running. But even the SNCLS proposal required more public funding than was available. Hence the BAFO stage.

[75] I find that it would not have been practically feasible for RAVCO/CLRT to invite SNCLS to submit a best and final offer that included an amendment to substitute bored tunnel construction through Cambie Village. As Ms. Bird testified, that would have threatened the integrity of the competitive process that was the foundation of this procurement. That process had already yielded a proposal that included bored tunnel construction (RAVxpress). The stated purpose of the BAFO stage was to invite the proponents to refine their proposals, particularly with a view to sharpening their pencils. It was not intended to alter the competitive balance, nor

would that have been within the parameters of fairness within which the procurement was structured. The sort of deviation that the plaintiffs suggest should have been followed would, in my view and in the view of Ms. Bird, have threatened the success of the entire P3 process as structured. On no account were the architects of the procurement process prepared to take that risk. In any practical sense, taking into account the circumstances they faced, it was not an option that was feasible.

[76] In *Heyes CA*, the Court of Appeal noted this at para 64:

> Moreover, the preferred proponent was selected by competitive procurement process, and it was not open to CLRT to suggest changes to the SNC-Lavelin/Serco proposal before that process was complete.

[77] On the evidence I have heard, I come to the same conclusion.

(c) Options, risk factors and funding

[78] Nevertheless, the plaintiffs contend, either during the BAFO process, or after it was complete and SNCLS's proposal was underway, the defendants could have requested SNC-Lavalin, as general contractor, to price a change to bored tunnel construction through Cambie Village as an option. There were other options priced, including a station at 57th Avenue (rejected), a station at 2nd Avenue (advanced) and a Bicycle and Pedestrian Lane (advanced). Had they done so, the plaintiffs say, they would have learned that additional bored tunnel construction could have been accomplished for a price well within what was feasible. Although they would not have been obliged to pay that price, it is not reasonable that they require the plaintiffs to bear the brunt of the consequences of that choice.

[79] The evidence satisfies me that this proposition, too, was not practically feasible.

[80] It is obvious that the construction of the underground portion through Cambie Village by means of tunnel boring was technically feasible. That is clear from the expert evidence, and it would not otherwise have been part of the RAVxpress proposal. But it raised problems far beyond cost.

[81] Of fundamental importance to the defendants TransLink and CLRT in evaluating the proposals was the apportionment of risk. An essential goal of the P3 process was to transfer as much risk as possible from the public sector to the private sector. In this way, it was sought to avoid the pitfalls of other public works projects where the public is left on the hook for the consequences of such things as construction delays and cost overruns. In the present context, two kinds of risk were particularly important: scheduling risk and geotechnical risk.

[82] Tunnel boring is risky business. Just ask the good folks in Seattle. Geotechnically, it cannot be predicted with certainty just what subsurface conditions a tunnel boring machine will encounter until it gets there. In challenging conditions, tunnel boring machines can get stuck and break down. If they do, and it is not a rare occurrence, that part of the project comes to a halt until the problem is fixed. Repair can be very expensive. If it is not possible to solve the problem through access via the tunnel the machine has bored, then it will be necessary to excavate a mine shaft down to it. In the words of Michael Stevenson, who was with SNC-Lavalin at the time and considered a tunnel boring option, such events were “not something we could tolerate from cost and schedule”.

[83] Cut and cover construction has risks as well. But if a problem is encountered on one section, construction can proceed on a different section while the problem is solved. The overall timing remains relatively unaffected.

[84] Scheduling was of vital importance to this project. It always is, but the advent of the 2010 Winter Olympics made it particularly critical here, from the perspective of both international prestige and local logistics. To quote Mr. Stevenson again, “it was quite onerous having to complete before the Olympics”.

[85] From the perspective of TransLink and RAVCO/CLRT, there was a significant drawback to the RAVxpress proposal. Unlike the SNCLS proposal, it contemplated sharing the geotechnical risk in a way that left TransLink significantly exposed. The SNCLS proponent, on the other hand, agreed at the BAFO stage to accept all of the geotechnical risk. SNC-Lavalin considered this carefully and agreed to do so in order to gain a competitive advantage (fulfilling a goal of the P3 procurement

process designed by Ms. Bird and her team). It reasoned that it could be fairly confident about the geotechnical risk in the downtown area where tunnel boring was necessary, because with all of the excavating and building that had taken place downtown, a great deal was known about subsurface conditions. The same was not true of the Cambie corridor, but by using cut and cover construction, the risk there was minimized. That proved to be a winning strategy.

[86] No proposal ever came from SNC-Lavalin to change the method of tunnel construction under Cambie Village. It was indeed considered in-house. As Mr. Stevenson testified, it arose in the context of contemplating a change in the method of cut and cover construction (from pre-cast to cast-in-place), and increasing pressure from RAVCO to reduce cost. The idea was to explore whether it could result in a saving. The concept was quite quickly abandoned when it became evident that it would not; on the contrary, it would increase the cost. As I see it, the incremental cost that was contemplated in that very preliminary exercise is not particularly relevant. It went in the wrong direction, and so the idea deemed not worth pursuing. It therefore never reached the levels within SNC-Lavalin that would have subjected it to a more rigorous analysis in terms of feasibility, cost and risks. Those factors are intertwined. It is not simply a question of the increased hard cost based on preliminary estimates and assuming no adverse events. Risk is very expensive.

[87] The plaintiffs point out that when SNC-Lavalin explored this concept, it received information from its tunnel boring subcontractor, SELI, that suggested that bored tunnel construction work through Cambie Village would be less expensive and faster than tunnel boring under downtown and False Creek. With respect, that is not evidence upon which any reliance can be placed. It was not expert evidence properly tendered, and really shows little other than SELI's enthusiasm for a bigger contract.

[88] It follows that while I accept the conclusion of the plaintiffs' tunnel boring expert, Dean Brox, that bored tunnel construction was technically feasible under Cambie Village, I accept also the observation of the defendants' expert, Robert Moncrieff, that tunnel boring machines become stuck or break down with some

frequency, and when they do, the consequences may be catastrophic. While accountants have formulae that value such risks, they are project-killing if they occur. The more important point is that, I find, this risk was not one that TransLink and RAVCO/CLRT could feasibly accept in this project given the funding and scheduling constraints.

[89] The reality is that this scenario never came to pass, so how it might have played out remains a matter of conjecture. In the absence of any concrete proposal from SNC-Lavalin, the defence evidence convinces me that the effect of any such change on the three foundational pillars of cost, geotechnical risk and schedule, rendered it practically unfeasible.

[90] The plaintiffs' argument is based in part on two further points: the observation that both additional public funding and additional private capital had been made available to permit the completion of this project; and the proposition that the incremental cost of tunnel boring under Cambie Village could have been covered within this added funding. This latter point is based in part on Mr. Brox's opinion that the cut and cover construction through Cambie Village could have been replaced by tunnel boring for cost premium of approximately $34 million. It is also based on the public sector comparator, an accounting paradigm that allowed comparison of the cost of the project as a public-private partnership to what the project would notionally have cost as a public work.

[91] With respect, the plaintiffs' argument in this regard seems to me to be based upon a selective and speculative retrospective view. Mr. Brox's analysis treats the method of tunnel construction as though it were a component easily switched in or out, changing only the construction cost. That is not what the defendants were dealing with. They were dealing, as noted, with a project in which cost, risk, schedule and many other aspects were all delicately balanced, making changes of this sort exceptionally risky and effectively impracticable.

[92] I am also unable to accept the public sector comparator as a yardstick by which the feasibility of a conversion to bored tunnel construction can be measured. The evidence is quite clear that it was never intended to be anything of the kind.

More importantly, the evidence satisfies me that the project that was able to proceed to completion was so carefully and precariously crafted when it came to funding that the changes that the plaintiffs say ought to have been initiated were simply not practically feasible. The project team was constantly pushing the funding envelope and coming up with innovative ways to shuffle funding sources in order to maximize what could be made available. They were often unsuccessful. As an example, the rail line to Richmond stops short of what was originally contemplated. A planned final stop at the south end of Richmond Centre was retracted as one of the steps thought necessary to squeeze the project within the available funding.

[93] Yet at TransLink's insistence, a bicycle and pedestrian crossing over the Fraser River was added to the bridge that would carry the rail line, financed by TransLink. But that does not mean that anything else could also have been added. The juggling act was far more complicated than that. As Ms. Bird explained in reference to the bike bridge:

> It was extremely annoying to me. This was because the bike department wanted to put a bike bridge over the bridge and I thought it was interesting that you could find $8 million for your bicycle bridge but you couldn't find $8 million to add a significant piece to your transportation infrastructure in the Lower Mainland.
>
> And the answer to that, as we know, is because when you--because governments have pockets of money for things that they like to do related to a particular initiative. So TransLink probably applied for a bike grant and they got money for bikes, but you can't take bike money and put it on the train ledger. And I remember at the time being extremely annoyed about all of that. But that is the reality of government policies and money and there are certain monies for certain policy initiatives that they in their appropriate wisdom don't let you transfer to other things. So there I was with a bike bridge, which was ironic to me.

[94] And so it was that a bike bridge got funded, but an extended Richmond terminus did not. It was not a matter of pick and choose, of preferring cyclists to Cambie Village merchants or stations in Richmond. It was a matter of what was practically feasible within the myriad demands, limitations, risks and restrictions the defendants faced. Viewing the project as a whole, as I must, and employing a common sense perspective, I conclude that what was practically feasible did not include a change from cut and cover construction to tunnel boring under Cambie Village. The potential impact on the project's viability was too great.

[95] Because of my finding in this regard, it is unnecessary for me to consider whether, if tunnel boring were practically feasible, it would have produced a non-nuisance alternative. I note only that given the unavailability of any findings concerning the nuisance element of (un)reasonableness, I doubt that it is even possible to determine whether tunnel boring construction, if feasible, would have offered a non-nuisance alternative. The question of a non-nuisance alternative does, however, arise in a different context in the following section.

3. Was there a less disruptive alternative other than tunnel boring?

[96] The plaintiffs submit that even if tunnel boring under Cambie Village was not a practically feasible alternative, the defendants have failed to prove that it was impossible to carry out the cut and cover construction in accordance with the original schedule of three months for each block, which would have given rise to less interference.

[97] The plaintiff Leonard Schein of the Park Theatre, a reliable and forthright witness, did not hesitate to acknowledge that the Canada Line was an important and valuable undertaking. He thought that disruption for three or four months as originally scheduled was "worth the sacrifice". That it took much longer was the foundation of the claim in *Heyes SC* for misrepresentation. That claim was rejected by Pitfield J.:

> [104] The second alleged misrepresentation is that made by Ms. Bird at the public meeting on January 25, 2005, when she stated that open trench, cut and cover construction would last no more than three months in front of any residential or business property. The representation proved to be incorrect.
>
> [105] Ms. Bird testified that the representation was based on information provided to her by SNC-Lavalin/Serco. The advice was premised on the ability to construct the tunnel by means of a construction train using pre-cast tunnel forms that would be set in place by a system of cranes and gantries. That was the intended course in January 2005, and, given the premise, I find that Ms. Bird's estimate was reasonable.
>
> [106] I accept Ms. Bird's evidence that the contractor encountered difficulty in the early stages of cut and cover construction because of the unstable nature of the walls in the trench that was excavated to accommodate the pre-cast sections. The instability prompted SNC-Lavalin/Serco to change from pre-cast to pour-in-place construction. The change required wall stabilization, the building of forms for the floor, walls and roof of the tunnels, the pouring of concrete, and the backfilling of the trench. The prolonged process resulted in

> the trench being open for a period of time considerably in excess of three months.

[98] There are two problems with the plaintiffs' proposition in the context of the present claim.

[99] First, like Pitfield J., I find on the evidence (Ms. Bird, Mr. Hewitt and Mr. Eastman) that it was not feasible to carry out the cut and cover construction in a manner that would have limited it to three months in front of any location. The approach taken by the plaintiffs would dissect the project to block by block through Cambie Village, where as I must look at it as a whole, taking into account the ground conditions encountered, the changes in construction-method required, and the management of resources throughout. The cut and cover tunneling work as a whole, I am satisfied, was completed as quickly as was practically feasible.

[100] On the evidence, this is not a case where choices were made that altered the schedule as a matter of convenience or profit. Examples of such cases include *Plater v Town of Collingwood et al*, [1968] OR 81 (Ont HCJ) and *Ryan v Victoria (City)*, [1999] 1 SCR 201. In the latter case, which involved an injury claim by a motorcyclist, the Supreme Court of Canada considered a defence of statutory authority in relation to a railway's use of "flangeway" gaps along the inner edge of street-grade tracks that were wider than the minimum prescribed by regulation. The court concluded that the railway's decision to exceed the minimum by more than one inch, which created a considerably greater risk than was absolutely necessary, was a matter of discretion that was not an "inevitable result" of complying with the regulations. This case is quite different. Although the defendants here were exercising a discretionary statutory power, the failure to meet the original three-month schedule was not the result of the exercise of that discretion. The problem lay with the impracticability of the original schedule, not with how the construction was carried out. The soil difficulties encountered, the changes to the method of construction, and the necessity of meeting overall schedules all contributed to an inability to meet the original three month schedule, but it was a question of inability, not choice.

[101] Second, the evidence satisfies me that even if the trench construction could have been completed more quickly on some blocks, the degree of interference throughout the village would have continued to be substantial, and much greater then was apparently contemplated in the "three-month scenario". Thus most of the plaintiffs reported impact on their businesses well before actual cut and cover construction took place in front of them, because of the interruption to traffic flow and access on Cambie Street arising from other aspects of the project. They could not escape disruption.

[102] As was stated by the Court of Appeal in *Heyes CA* and confirmed in the evidence at this trial, stations still needed to be constructed, tunnel boring machines had to have entrances and exits, and construction sites and traffic closures were inevitable. Even the tunnel boring concept briefly considered by SNC-Lavalin maintained cut and cover construction from False Creek up to Broadway. In the present scenario, blocks of cut and cover construction of more limited duration in front of any particular location would still have severely affected access throughout the village, as would necessarily-extended cut and cover construction in other blocks. Moreover, maintenance of the original pre-cast concept in place of the substituted cast-in-place methodology would have resulted in additional traffic blockages and impediments that were unanticipated when the three-month schedule was proposed.

[103] From this, it is evident that a possible location-dependent reduction in time in accordance with the plaintiffs' block-by-block scenario would not have yielded a non-nuisance alternative. Is it enough that some businesses might conceivably have suffered less disruption while still encountering substantial interference? In the circumstances of this project, I do not think it is.

[104] This is not a case like *Ryan*, or *Turpin v Halifax-Dartmouth Bridge Commission* (1959), 21 DLR (2d) 623 (NSSC), where the conduct that gave rise to the risk of harm could not be demonstrated to have been necessary and resulted in a permanent interference. Here, the defendants have established that the method of construction employed, which gave rise to the substantial temporary interference of which the plaintiffs complain, was the only practically feasible course open to them.

The authorities provide no support for the proposition that the defendants are further obliged to prove that they could not have shuffled resources within that scope of construction in the hope of mitigating inevitable interference to a limited extent for a few of those affected (assuming that would have been possible), notwithstanding that it was impossible to achieve such mitigation for all. Given the inevitability of interference, and all of the myriad parties ultimately affected and benefited by this enormous project, the imposition of such an obligation in this case cannot be justified.

[105] It follows from my conclusions that Question B must also be answered in the affirmative.

C. Did the interference nonetheless result in injurious affection for which compensation may be claimed by any owner or tenant?

1. What are the elements of the cause of action?

[106] This cause of action was not raised in *Heyes*. It is statutory in nature, and arises under sections 41 and 42 of the *Expropriation Act*, RSBC 1996, c 125, where rights in relation to land have been injuriously affected although there has been no taking, or expropriation, the property.

[107] I do not propose to explore its rather mysterious legislative history. It followed that of the equivalent legislation in England, which is described by Lord Hoffman for the House of Lords in *Wildtree Hotels Ltd v Harrow London Borough Council*, [2001] 2 AC 1 at 6-7. Its development was rooted in the construction of the railways in the 19th century which, as Lord Hoffman observed (at p. 8), "involved massive changes in the urban and rural landscape of the United Kingdom and the disruption of the lives and businesses of very large numbers of people."

[108] The parties agree that the applicable principles are those described by the Supreme Court of Canada in *The Queen v Loiselle*, [1962] SCR 624 at 627:

> The conditions required to give rise to a claim for compensation for injurious affection to a property, when no land is taken, are now well established [citations omitted]. These conditions are:
>
> (1) the damage must result from an act rendered lawful by statutory powers of the person performing such act;

> (2) the damage must be such as would have been actionable under the commonlaw, but for the statutory powers;
>
> (3) the damage must be an injury to the land itself and not a personal injury or an injury to business or trade;
>
> (4) the damage must be occasioned by the construction of the public work, not by its user.

[109] These principles are entirely consistent with those described by Lord Hoffman at page 7 of the *Wildtree* decision. The first two conditions are satisfied by the answers I have given to Questions A and B, subject to the assumption discussed above. The fourth is a given: the problem here arose from the construction of the Canada Line, not from its use and operation.

[110] The issue, then, revolves around the third principle. Does it encompass a temporary injury, and in the circumstances of this case, is it available to tenants as well as landlords? The way in which the parties have approached this issue requires a determination of the proper scope of the question.

2. What is the scope of this question?

[111] The question as originally stated by the plaintiffs is set out in para 27, above. The question certified as a common issue was as reframed by Pitfield J. in *Gautam SC*:

> [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?

[112] The problem, once again, relates to what has to be established across the class. The plaintiffs submit that Question C:

> …does not require the Plaintiffs to establish that the rental value of each and every property within Cambie Village was negatively impacted by the construction of the Canada Line. All the Plaintiffs need establish is that construction of the Canada Line negatively impacted the rental value of properties within Cambie Village, and that this impact on rental value constitutes, in law, an injury to land for which compensation for injurious affection may be awarded. This is sufficient for the Court to answer the injurious affection common question in the affirmative. Individual class members will then be required in the second phase of this class proceeding to establish that they are entitled to compensation for injurious affection on this basis.

[113] They go on to submit that:

> …the evidence before the court establishes that the cut and cover construction of the Canada Line negatively impacted the rental value of the properties on Cambie Street. Under the principles set out by the House of Lords in *Wildtree*, this is an injury to land that entitles class members who can demonstrate that they suffered such an injury to compensation for injurious affection.

[114] The defendants argue that the plaintiffs' approach materially departs from their position at the certification hearing, and now amounts to an abandonment of the issue previously certified as common. As the defendants analyze it, the question now amounts to "whether there is a claim in law common to all class members in injurious affection based on negative impact to rental value during construction?" According to the defendants, the answer to that question is "no" because (a) in law a claim for injurious affection in British Columbia is only available for loss of market value of real property, of which there is no evidence; and (b) such a loss of rental revenue or value as the evidence does establish is not class-wide even if it could support a claim for injurious affection.

[115] Once again, it is necessary to return to the Reasons of the certification judge in order to understand the intended scope of the question. As Pitfield J. noted in the excerpt quoted above, the fact that the circumstances may differ among members of the class does not mean there is no common issue. Thus, as the Supreme Court of Canada observed in *Vivendi Canada Inc. v Dell'Aniello*, 2014 SCC 1 at para 46, "a

question will be considered common if it can serve to advance the resolution of every class member's claim"

[116] Where the common interest of this class lies is in exploring the limits of this claim. It is not intended to determine whether any or all members of the class have a valid claim for injurious affection. As Pitfield J. stated, it is the ability to assert the claim that is raised, not whether all members of the class will succeed. Accordingly, the question must be read as raising the common issue of whether, on the evidence adduced at trial, the law permits parties in the position of the class members to advance a claim for injurious affection. In my view, that is what the question is intended to explore, and that is how answering the question must be approached.

3. Who may advance this claim?

[117] A person entitled to compensation for injurious affection is described in subsections 41(2) and (3) of the *Expropriation Act* as an "owner" of land. Section 1 of that *Act* defines "owner", in relation to land, as meaning:

> (a) a person who has an estate, interest, right or title in or to the land including a person who holds a subsisting judgment or builder's lien,
>
> … or,
>
> (c) a person who is in legal possession or occupation of land, other than a person who leases residential premises under an agreement that has a term of less than one year;
>
> [Emphasis added.]

[118] It is evident from this definition that all members of the class qualify as "owners" within the meaning of section 41 of the *Act*. They are all either owners of land within Cambie Village, or lessors of business premises there who were in legal possession or occupation of the land.

4. What claim may they advance?

[119] Given the third of the four principles described above, it is clear that a claim for compensation for injurious affection cannot include a claim for loss of business revenue of the sort that was advanced by Hazel & Co. in *Heyes*, and is sought in this litigation as part of the claim for damages for nuisance. As the Supreme Court points out in *Loiselle*, a claim for injurious affection is limited to damage that

comprises injury to the land itself: it is the land that must be injuriously affected, not the person or the business. Yet as Lord Hoffman observes (*Wildtree* at p. 7),

> …this rule also provides scope for a great deal of argument about whether, for example, interference with the utility of the land for the purpose of carrying on a business is damage to the land or a personal loss by the proprietor of the business.

[120] This is the nub of the problem that arises here.

5. What does the evidence establish?

[121] The construction of the Canada Line caused no physical injury to the land owned or occupied by the plaintiffs in this case. The plaintiffs say, however, that on the evidence, the cut and cover construction substantially interfered with access to the properties, and I have found this to be the case. This, the plaintiffs assert, resulted in an impairment of the rental value of properties in the Cambie Village for the duration of the construction, exemplified by landlords granting tenants rent relief, or incurring losses because businesses were unable to afford the rent charged in existing leases.

[122] In law, the plaintiffs assert, citing *Wildtree*, this constitutes sufficient injury to land to satisfy the third condition for compensation for injurious affection. In effect, submit the plaintiffs, a negative impact on rental value of necessity constitutes a negative impact on the value of the land, and hence gives rise to an injury to the land itself.

[123] In support of this proposition, several plaintiffs testified about losses due to impairment of rental value. The plaintiffs George King and Jane King, for instance, owned properties that became untenanted. Their son explained that, as a result of the interference with access to that property occasioned by the cut and cover construction of the Canada Line, they were obliged to reduce the rent charged for their premises, and in the end were unable to find paying tenants at all. Other plaintiffs, as leaseholders, found themselves paying rent they could ill afford given the impairment to access to their premises, while others were able to negotiate an abatement of their rent.

[124] The plaintiffs led expert evidence from William Gosset, who concluded that the Canada Line construction did affect the rental value of properties in the Cambie Village area. Indeed, the defendants' expert, Carl Nilsen, accepted that Mr. Gosset's report provides evidence that market rental value was affected for at least some properties for at least part of the construction period.

[125] An interesting aspect of Mr. Gosset's opinion is his review of property values in Cambie Village over the time in question as determined from the assessments of the BC Assessment Authority. Mr. Gosset prepared two graphs comparing values in the Cambie corridor with total values for the City of Vancouver between 2002 and 2012.

[126] The first shows a steady increase in property values in the Cambie corridor from 2002 through 2009, with a much steeper rate of increase after 2009 (coinciding with the completion of the Canada Line). This compares with a similarly steady rate of increase for the City of Vancouver to 2008, but unlike the Cambie corridor, the city as a whole experienced a rather flat line from 2009-2012. Mr. Gosset opined, however, and I accept, that this graph does not truly compare market conditions because the corridor contained four developments that were so heavily dominant in size that they skewed the annual results. Removing those four developments (thereby illustrating one of the difficulties in trying to extrapolate across the class) yielded the second graph.

[127] The second graph again shows a steady increase in commercial property values over the City of Vancouver to 2008, with a slight decrease from 2008 to 2010, and a resumption of a steady increase from 2010 to 2012. By comparison, the values in the Cambie corridor increased steadily to 2008, then decreased to 2009 more than was the case for the city generally, returning to just over 2008 levels in 2010, and shooting up thereafter at a much steeper rate of increase than for the rest of the city.

[128] Mr. Gosset notes that apart from minor reductions experienced in 2009 due to economic instability experienced worldwide, general conditions were trending upward through the horizon of the Canada Line construction from late 2005 to mid-

2009. In the Cambie corridor, however, the trend dropped in 2008-2009, reflecting not only the Vancouver-wide downturn in the real estate market, but also the particular effect of the Canada Line construction as brought to the Assessment Authority's attention by a tax consultant acting on behalf of the Cambie Village Improvement Area.

[129] Mr. Gosset further observes that not only did the Cambie corridor experience a greater downturn in 2008-2009 than did the City of Vancouver, due to Canada Line construction, but it also rebounded much faster with a gain of 9.65% in 2010, even though the city as a whole experienced only a 0.27% increase over the same period. I infer that this, too, was due at least in part to the Canada Line.

[130] No evidence was led establishing a decrease in the market value of any particular piece of property in Cambie Village.

[131] From this evidence, I find that the Canada Line construction did have a negative impact on rental values for at least some properties over the time in question, and contributed to a related reduction in the overall assessment value of commercial properties in the Cambie corridor. The completion of the Canada Line, on the other hand, contributed to a significant enhancement of the overall assessment value of those commercial properties, although the same may not be true for some individual properties.

[132] In these circumstances, are the plaintiffs in a position in law to advance a claim for injurious affection? Mr. Nilsen observed that Mr. Gosset's conclusion as to impact on rental value cannot be considered as a general statement applicable to all properties in Cambie Village at all times during the construction period. That is a valid comment. But, as discussed above, it is not necessary for the court to find that all tenants or owners will be able to establish a claim for injurious affection. That will depend on a number of factors, and, as Pitfield J. contemplated, it is not necessary for the plaintiffs to prove a loss across the class. Indeed, it was anticipated that they would not. The wider question was nevertheless found to be suitable for inclusion as a common issue. That question must now be addressed.

6. On the evidence, is a claim for injurious affection maintainable in law?

[133] The plaintiffs rely heavily on the *Wildtree* decision in support of their proposition that a temporary impairment of the rental value of land, which I accept occurred for at least some properties, constitutes, in law, an injury to land for which compensation for injurious affection may be awarded in British Columbia.

[134] The defendants object that the decision in *Wildtree* was based on a stated case. The House of Lords, they say, did not address many of the policy implications that arise from its decision, and it should not be followed here. Instead, the defendants submit, it should be left to the legislature to work through the policy implications in recognizing and valuing temporary disruptions in the use of property.

[135] I accept that the *Wildtree* decision must be treated with some caution because of the procedural differences. But it involved a situation not unlike the one before me, in that public works had been carried out that temporarily obscured the claimants' hotel and prevented or restricted access by the owners and their customers. Moreover, the principal question of law considered by the House of Lords is directly relevant :

> …whether compensation for injurious affection is payable…where the interference with a legal right in respect of land or an interest in land is only temporary and where after such temporary interference the value of the land or the interest in the land has ceased to be affected at the valuation date. [*Wildtree* at p. 6.]

[136] With respect, I find the reasoning in *Wildtree*, and in the authorities of which Lord Hoffman approves, to be persuasive. As I read the case, there is no meaningful difference between the principles applied by the House of Lords in *Wildtree*, and the conditions outlined by the Supreme Court of Canada in *Loiselle.* Within the ambit of the British Columbia legislation, I see no reason why the *Loiselle* conditions would exclude a claim based upon "the effect which [the damage] has had upon the value of the land in the sense of reducing its letting value in the open market while the damage continued" (*Wildtree* at p. 16).

[137] In concluding that such a loss, albeit temporary, would support a claim for injurious affection, Lord Hoffman cited with approval the case of *Ford v Metropolitan and Metropolitan District Railway Cos* (1886), 17 QBD 12 (CA) where the leasehold interest in question:

> …probably had no value at all. But the injurious affection meant that for some period his rooms were worth less on the open market than they would otherwise have been--probably less than the rent he was paying. It was for this loss that he was entitled to compensation. [*Wildtree* at p. 17.]

[138] In my view, that reasoning is equally applicable to the situation before me. The defendants have not brought to my attention any Canadian case supporting the proposition that such a loss cannot be considered as constituting an injury to land under the *Loiselle* principles. It is true that the situation considered in *Antrim* is distinguishable, because of the difference between the Ontario legislation and the British Columbia legislation, but *Re Ogilvie and City of Winnipeg*, [1927] 2 DLR 606 (KB) is an example of a Canadian decision approving compensation for injurious affection in the form of diminution in the value of the land for either use, sale or rent, even where the disturbance and the loss was temporary.

[139] What the defendants put forward as policy implications seem to me to be largely problems of evidence, not policy. They warn, for instance, of the potential for double recovery given that the class includes both tenants and landlords. I do not consider this to be an obstacle. As a matter of evidence, it should be possible to discern whether the loss is that of the landowner who cannot let the land for its undisturbed market value, or that of the leaseholder who is obliged to pay undisturbed market rent for a disturbed property. If the evidence demonstrates that both suffered a loss from the same interference to the land, then as each is an "owner" of land within the meaning of the *Expropriation Act*, it would follow from that *Act* that each is entitled to compensation.

[140] The defendants further caution that if the plaintiffs' interpretation is correct, then a tenant who strategically leases premises affected by the works at a diminished rent on the basis that it will benefit from the project when completed would nevertheless have a claim. If the evidence were as the defendants suggest, then I very much doubt that a claim of loss from injury to land would be established.

A landlord who continued to collect rent unabated through the construction period would seem unlikely to have suffered a loss, while either a landowner or leaseholder who was content to sustain a loss in order to reap the reward of the improvements flowing from the project on its completion may be hard-pressed to demonstrate that the interference with its use of the premises was unreasonable to begin with, thereby failing to satisfy the second *Loiselle* condition.

[141] It is true that in this case, unlike *Wildtree*, we are not dealing with a situation where the value of the land ceases to be affected once the interference stops, but rather one where the value, at least on a macro level, appears to have been enhanced by the completion of the very project whose construction led to the alleged diminution in value. I am not satisfied that this distinction is relevant to the present analysis. It will presumably be taken into account either in the determination of whether the interference was unreasonable, or in the assessment of whether a compensable loss was incurred—for instance, in assessing an alleged loss in the value of a leasehold interest, which will necessarily involve comparing the rental paid or payable by the tenant with the rental that the property was worth over the unexpired portion of the lease, including any portion following the completion of the project.

[142] Accordingly, following *Wildtree*, I conclude that “an injury to the land itself” within the meaning of the third *Loiselle* condition may include, in law, the effect upon the value of the land of a reduction in the its rental value, whether temporary or permanent, and whether sustained by the landowner or the leaseholder—noting that it is not the loss of rent that is compensable, but the consequent loss of value. The plaintiffs have established that reductions in rental value were sustained during the period of construction and that property values, overall, were impacted. In such circumstances, a claim for injurious affection may be advanced. It remains to be determined whether and to what extent any particular landowner or leaseholder has thereby sustained a loss.

[143] It follows that Question C as interpreted above should be answered “yes”.

V. CONCLUSION

[144] The three common questions are all answered affirmatively:

- the cut and cover construction of the Canada Line substantially interfered with the use and enjoyment of property by owners or business proprietors in the Cambie Village;
- there was statutory authority for that interference, thereby absolving the defendants of any liability for economic loss resulting from any nuisance; and
- that interference nonetheless resulted in injury of a type that is capable of supporting a claim for injurious affection by both owners and tenants.

[145] The second and third questions are answered on the assumption that at least some of the plaintiffs will be able to establish that the substantial interference in question was also unreasonable, a necessary element of the tort of nuisance not covered by the first question.

[146] The parties should arrange for a further case management conference to plan the next phase of this litigation, and are at liberty to apply.

"GRAUER, J."