Injurious Affection, Class Actions and the Canada Line Litigation

I. Introduction

The construction of the Canada Line Rapid Transit project, which connects downtown Vancouver with Vancouver International Airport and the City of Richmond, involved the prolonged excavation of Cambie Street, one of Vancouver's major thoroughfares. This excavation and tunnel construction made it difficult for the public to conveniently access businesses operating on Cambie Street, many of which are small businesses located in an 18 block shopping district between 7th Avenue and King Edward Street, known as Cambie Village.

This restriction in access to Cambie Village resulting from this "cut and cover" method of tunnel construction had a significant impact on the revenues of these businesses operating in Cambie Village. Many continued to operate with reduced revenues. Others either relocated or shut down. This, in turn, impacted property owners, who in some cases reduced rents to assist their tenants to continue to operate during the Canada Line construction or were left with vacant premises which could not be leased while the construction was ongoing.

This state of affairs inevitably lead to claims for compensation by those affected by the construction of the Canada Line. In *Heyes* v. *City of Vancouver*, 2009 BCSC 561 ("*Heyes*"), a merchant who operated a retail clothing store in Cambie Village and who was forced to relocate as a result of the Canada Line construction obtained judgment for $600,000 in nuisance damages for business loss. In *Gautam* v. *Canada Line Rapid Transit Inc.*, 2010 BCSC 163 ("*Gautam*"), a class proceeding was certified to advance similar claims in nuisance, or in the alternative, for injurious affection, on behalf of business operators and property owners in the Cambie Village. Both of these decisions are presently under appeal.

This paper will focus the implications of these decisions for claims of injurious affection under s. 41 of the *Expropriation Act*, R.S.B.C. 1996, c. 125. Three implications will be addressed:

(a) a temporary interference with public access to properties is actionable both as a private and public nuisance

(b) a temporary reduction in land value resulting from that interference with access to property may support a claim for injurious affection; and

(c) a class proceeding is a proper vehicle for nuisance and injurious affection claims suffered by a group of persons where there is a common basic injury resulting from interference with access to their property.

II. The Injurious Affection Claim in *Gautam* v. *Canada Line Rapid Transit Inc.*

The central claim advanced in the *Gautam* class action is a claim for damages for nuisance. This claim raises the same question addressed in the *Heyes* action: was the cut and cover construction of the Canada Line carried out under the kind of statutory authority necessary to provide a defence of claims in nuisance?

In *Heyes*, the defendants asserted that there was statutory authority for any nuisance caused by the construction of the Canada Line because the project was constructed pursuant to the exercise of statutory powers conferred by the *South Coast British Columbia Transportation Authority Act*, S.B.C. 1998, c. 30 and pursuant to an Environmental Assessment Certificate issued under the *Environmental Assessment Act*, S.B.C. 2002, c. 43, which *Act* required the Canada Line to be constructed under the construction plan approved by the Certificate. The defendants asserted that the Environmental Assessment Certificate provided statutory authority in the same way that the airport certificate issued pursuant to regulations under the *Aeronautics Act*, R.S.C. 1985, c. A-2, in relation to the implementation of the north runway at the Vancouver International Airport provided statutory authority for any nuisance caused by noise resulting from the operation of that runway, as determined by the Court of Appeal in *Sutherland* v. *Canada (Attorney-General)*, 2002 BCCA 416.

The Court in *Heyes* rejected the argument that the Environmental Assessment Certificate provided statutory authority for the nuisance resulting from the construction of the Canada Line:

> "A wide range of federal, provincial and municipal legislation, including statutes, regulations, and bylaws, stipulates that a permit must be obtained as a precondition to the commencement of an undertaking or the performance of an act. A certificate issued under the *EAA* is no different. While each permit is a form of statutory authorization, it is not the kind of statutory authority with which the defence is concerned. The relevant statutory authority is that which has been conferred to undertake and fulfil a specific responsibility, invariably in the public, as opposed to private, interest. The defence does not extend to anyone who has obtained the permits required in the course of carrying out the undertaking." (para. 200)

The Court accepted that the Canada Line was constructed pursuant to statutory powers conferred by the *South Coast British Columbia Transportation Authority Act*, but held that "because there was an alternative method of construction [a bored-tunnel] that would not have caused a nuisance in the Cambie Village area, the statutory authority defence must fail"; para. 203.

Whether the defense of statutory authority was properly rejected in *Heyes* is now before the B.C. Court of Appeal, which has heard the appeal from the trial judge's decision but (as of the date this article was written) has reserved Judgment on it. If it is ultimately determined that the authority under which the Canada Line was constructed was sufficient to provide a defence of statutory authority for any nuisance caused by the "cut

and cover" construction, then the *Gautam* action will pursue an alternative claim of injurious affection resulting from that same construction. The claim asserted is that the construction of the Canada Line injuriously affected properties in Cambie Village by reducing the market value of those properties during the construction of the Canada Line.

In *R.* v. *Loiselle*, [1962] S.C.R. 624, the Supreme Court of Canada held that the conditions required to give rise to a claim for compensation for injurious affection to property where no land is taken in the construction of a public works project, are well established. Those conditions are:

> "(a) the damage must result from an act rendered lawful by statutory powers of the person performing such act;
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> (b) the damage must be such as would have been actionable under the common law, but for the statutory powers;
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> (c) the damage must be an injury to the land itself and not a personal injury or an injury to business or trade;
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> (d) the damage must be occasioned by the construction of the public work, not by its user."

If the construction of the Canada Line was carried out under statutory authority sufficient to provide a defence to claims in nuisance for damages resulting from the construction, then both the first and fourth conditions set out by the Supreme Court of Canada in *Loiselle* are satisfied. The remaining issues in *Gautam* concern whether a claim for injurious affection, based on the interference with the public's ability to access property during the construction period, meets the second and third conditions:

> (a) would the temporary restrictions in access to property caused by the construction of the Canada Line have been actionable under common law, but for the statutory powers under which the construction was carried out?; and
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> (b) if so, does the resulting damage to the market value of the property constitute injury to the land itself and not a personal injury or an injury to business or trade?

III. Temporary Interference with Access is Actionable in Nuisance

In *Heyes*, Mr. Justice Pitfield set out the following settled definitions of private and public nuisance:

> "Linden, *Canadian Tort Law*, 6th ed. (Toronto: Butterworths, 1997) at p. 523 defines a private nuisance as 'an unreasonable interference with the use and enjoyment of land by its occupier' and a public nuisance as 'an

> unreasonable interference with the use and enjoyment of a public right to use and enjoy public rights of way.'" (para. 155)

The defendants in *Heyes* argued that the plaintiff had no claim in private nuisance because the interference of the public's ability to travel down Cambie Street to the plaintiff's store did not interfere with any right attaching to the land occupied by the plaintiff. They asserted the right to travel down Cambie Street was a public right and interference with that public right was therefore a public nuisance.

The defendants argued that the plaintiff could not bring a claim of public nuisance because the loss the plaintiff suffered was no different from the kind of loss suffered by other members of the public who operated businesses along Cambie Street, relying on the decision in *Stein (c.o.b. Chateau Granville)* v. *Gonzales* (1984), 58 B.C.L.R. 110 (S.C.). In that case, McLachlin J., as she then was, held that the plaintiffs had no right to maintain an action in nuisance for business losses allegedly caused by the defendant prostitutes frequenting the area outside the plaintiffs' business premises on the ground the injuries suffered by the plaintiffs were the same type as those suffered by other members of the public.

Both these arguments relating to private and public nuisance were rejected by the Court in *Heyes*:

> "Hazel & Co. is entitled to assert a claim either because a public nuisance resulted in a loss that was its loss and not common to the general public, or because the adverse effect upon its use and enjoyment of its premises constituted a private nuisance. In either case, there is no reason why Hazel & Co. should be compelled to look to the Attorney General to seek relief for the damage it suffered as a consequence of the nuisance. The loss was unique to Hazel & Co. and of no consequence to the general public." (para. 160)

Mr. Justice Pitfield then concluded:

> "While it is not necessary to decide whether cut and cover construction should be regarded as a public or private nuisance, I would conclude that it is private in nature because it substantially and unreasonably interfered with Hazel & Co.'s use and enjoyment of its leased premises. If it was public in nature, then Hazel & Co. is entitled to assert a claim because it is in a position to prove, and has proved, special damage in the form of financial loss which was not incurred by any other member of the public." (para. 163)

The decision with respect to the right to claim in public nuisance is significant because it clarifies any potential uncertainty on that issue arising from the broad language used by the Court in *Stein* v. *Gonzales* (which is distinguishable on the basis that McLachlin J. emphasized in that case that "it is not alleged that the defendants are interfering with the

plaintiffs' use of their property" and that "there is no suggestion that ingress or egress to their property has been blocked"; para. 14). The conclusion in *Heyes* that the plaintiff had a cause of action in public nuisance is consistent with established common law authority, which was reviewed at length by the Court of Queen's Bench in the recent decision of *Colour Quest Ltd.* v. *Total Downstream UK plc*, [2009] All E.R. (D) 311.

Colour Quest involved many claims for nuisance arising out of an explosion and fire at an oil storage depot, which resulted in road closures which had a substantial impact on over 600 businesses in the area. After a detailed review of authority, the Court concluded:

> "...there is long standing and consistent authority in support of the proposition that a claimant can recover damages in public nuisance where access to or from his premises is obstructed so as to occasion a loss of trade attributable to the obstruction of his customers' use of the highway and liberty of access." (para. 459)

The Court's conclusion in *Heyes* that the plaintiff also had a cause of action in private nuisance arising out of the interference with the public's ability to access the plaintiff's business is consistent with the B.C. Court of Appeal's decision in *Jesperson's Brake & Muffler Ltd.* v. *Chilliwack (District)*, [1994] B.C.J. No. 404, 40 BCAC 279. In that case, the Court of Appeal held that a permanent impairment in direct access to property could support a claim for injurious affection, on the basis that the impairment would have been actionable at common law in nuisance if it were not statutorily authorized. In this same context of a claim for injurious affection, the Ontario Superior Court of Justice, Divisional Court in *Antrim Truck Centre Ltd.* v. *Ontario (Minister of Transportation)*, 2010 ONSC 304 has recently affirmed that interference with access is actionable in private nuisance:

> "The interference must be approximate and substantial, but there does not need to be a direct, physical interference with the plaintiff's property or a complete obstruction of access for a claim to be established." (para. 77)

> "It is clear from a review of the caselaw that where the change in access following the construction of a public work amounts to a substantial interference with the land owner's right to reasonable use and enjoyment of their property, an actionable claim in nuisance may be founded." (para. 87)

IV. A Temporary Interference in Access May Constitute Temporary Injury to Land

In *Gautam*, Mr. Justice Pitfield, who had been appointed Case Management Judge of that action prior to the *Heyes* trial, certified as a common issue the question of whether, if there was statutory authority for the interference with the class members' use and enjoyment of land resulting from the construction of the Canada Line, "did the

interference nonetheless result in injurious affection for which compensation may be claimed by any owner or tenant"?; *Gautam*, para. 51. As stated above, this claim for injurious affection is based on the allegation that the construction of the Canada Line in Cambie Village reduced the market value of the properties owned or occupied by the members of the class during the period of construction.

The injurious affection claim advanced in *Gautam* is novel in the sense that no Canadian court appears to have considered whether a claim for injurious affection can be maintained where the construction of public works has resulted in a temporary reduction in the value of land during construction. However, the House of Lords recognized an entitlement to compensation for injurious affection in such circumstances in *Wildtree Hotels Ltd.* v. *Harrow London Borough Council*, [2001] 2 A.C. 1.

In *Wildtree Hotels*, the owners of a hotel claimed that the construction of improvements to a nearby bridge restricted access to the hotel and was very detrimental to its operations. The House of Lords held that the owners of the hotel were entitled to compensation for the temporary reduction in the letting value of the property during the course of construction:

> "What the decision of this House in *Argyle Motors (Birkenhead) Ltd. v. Birkenhead Corp [1974] 1 All ER 201, [1975] AC 99* establishes is that one cannot make a claim for loss of profit as such. Non constat that the interference which caused such loss of profit, which may have been attributable to the special nature of the business, has had the same or indeed any effect upon the open market letting value of the premises. But there is nothing in authority or logic to say that the letting value of the premises cannot be affected by an interference which makes it less convenient to conduct the kind of business for which they would otherwise have been suitable. A plaintiff who can prove such a reduction in value, for whatever period, is entitled to compensation."

In so holding, the House of Lords expressly rejected the argument that a claim for loss of past rental value was an attempt to "dress up part of the temporary loss of profits as a loss of value of land when that value has not in fact been lost". The House of Lords reasoned that the plaintiff's interest in the property has been damaged by interference with the use of the property if the letting value of the property in the open market has been reduced while the interference continued.

The certification of the claim of injurious affection in *Gautam* was based on this authority. This does not represent an adoption of it for the purposes of B.C. law, as a certification application is not meant to be a determination on the merits of the claim; *Hollick* v. *Toronto (City)*, 2001 SCC 68 at para. 6. Rather, the plaintiff need only establish that the claim raises a triable issue. The certification of the injurious affection issue in *Gautam*, therefore, is at least a judicial recognition that there is a triable issue as to whether injurious affection may be established where the construction of public works has temporarily affected the value of a person's interest in the land they own or occupy.

The House of Lords decision in *Wildtree* should be persuasive authority in British Columbia concerning claims for injurious affection because the House of Lords was interpreting the right to compensation for injurious affection under a statutory provision which has the same legislative roots as s. 41 of the B.C. *Expropriation Act*. The claim in *Wildtree* was for compensation under s. 10 of the *Compulsory Purchase Act* of 1965, which was, as the House of Lords described it in *Wildtree*, "a modernized version of Section 68 of the *Lands Clauses Consolidation Act* 1845". This same provision survived in British Columbia as s. 67(1) of the *Expropriation Act*, R.S.B.C. 1979, c. 117, and s. 41(2) of the present *Expropriation Act* preserves the right to compensation for injurious affection given by that section.

The circumstances of one of the representative plaintiffs in *Gautam* demonstrate that the principle applied by the House of Lords in *Wildtree* is a sound one. One of the plaintiffs owned property on Cambie Street which had a parking lot which could only be accessed from Cambie Street. During the construction of the Canada Line, the entrance was barricaded. Traffic could not access this parking lot. There is no doubt that had this obstruction been permanent, the loss in market value would be an injury to property in respect of which compensation would be payable. Why should the result be any different if the value of the property is reduced during the period of construction because of the very same kind of obstruction? The property is clearly injured in the same way. The only difference is that the injury is temporary rather than permanent.

V. Class Proceeding as a Vehicle for Nuisance and Injurious Affection Claims

The requirements for certification of an action as a class proceeding are set out in s. 4(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. Those requirements are:

> "(b) there is an identifiable class of 2 or more persons;
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> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
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> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
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> (e) there is a representative plaintiff who
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> (i) would fairly and adequately represent the interests of the class,
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> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members."

The *Gautam* action is significant in that it is the first case in which a B.C. Court has held that an action for nuisance meets these requirements and may be certified as a class proceeding. Previous decisions have refused to certify such actions on the basis that the nuisance claims advanced did not give rise to common issues which could be determined for the benefit of the class as a whole because the nuisance at issue was not commonly experienced among the class and therefore, individual inquiries were necessary to determine whether there had been unreasonable interference with each person's use and enjoyment of property. See, for example, *Sutherland* v. *Attorney Gene*ral, [1997] B.C.J. No. 2550 (S.C.), involving claims of noise during the operation of a runway impacting a large group of residents of Vancouver and Richmond in varying degrees, and *Roberts* v. *Canadian Pacific Railway Co.*, [2006] B.C.J. No. 295, 2006 BCCS 1695, involving varying emissions of coal dust on properties situated along more than 1,200 kilometres of railway track in British Columbia.

In certifying the claims of nuisance in *Gautam*, Mr. Justice Pitfield noted that:

> "...there is little in the record on this application to suggest that the impact of construction on access to properties and business of Cambie Street differed markedly from location to location along Cambie Street." (para. 28)

He then concluded:

> "The common allegation is that construction substantially interfered with access to the property or business owned or operated by members of the class. Neither the class nor the Defendants alleged that the amount of interference differed materially at any point on Cambie Street in Cambie Village. The common nature of the Class complaint favours certification." (para. 56)

Mr. Justice Pitfield reached a similar conclusion on the claim for injurious affection:

> "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." (para. 49)

One of the elements of the test for certification is that the class proceeding be the preferable procedure for the determination of the common issues that arise from class

members' claims. On this point, Mr. Justice Pitfield noted that another multiparty action had been commenced with respect of plaintiffs who were situated in various different locations along the length of the Canada Line advancing similar claims in nuisance, waiver of tort and injurious affection; *Gautam*, para. 58. He concluded:

> "In my opinion, a multi-party action is less practical or less efficient than a class proceeding in so far as the owners and merchants in Cambie Village are concerned. Each plaintiff in the multi-party action will be obliged to adduce evidence peculiar to that plaintiff because the owners and merchants are separated in location and few, if any, own or operate from adjacent properties. The evidence will be more complex and voluminous as a result that will be the case with the class proceeding which asserts a claim on behalf of all in the Cambie Village area.
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> In addition, the CPA provides a means of resolving some of the issues without an adverse effect on judicial economy. As I have stated, s. 27 permits the court, in the event of a finding of liability on the part of any defendant, to determine a means by which to assess the economic loss of any member of the class should such a determination be required. The same flexibility may not be available in a multi-party proceeding."

The utility of a class proceeding for nuisance claims where there is a common injury suffered by the class was affirmed by the Supreme Court of Canada in its decision in *St. Lawrence Cement Inc.* v. *Barrette*, [2008] S.C.J. No. 65. This case involved a class action out of Quebec in which damages were awarded to the class for a "neighbourhood disturbance" caused by dust, odors and noise arising from the operation of a cement plant, a claim under the Quebec Civil Code that was analogous to liability for nuisance at common law. The Supreme Court of Canada affirmed that the trial Judge had committed no error in finding liability and awarding damages to the class on the basis that there was some basic injury common to all members of the group:

> "At the hearing in the instant case, 62 witnesses residing in the four zones described the annoyances they had suffered (Sup. Ct., at para. 23-24). Relying on their testimony, Dutil J. found that the evidence showed a form of injury that was common to all members of the group, but that varied in intensity (para. 398). Dust emissions, odours and noise from the plant had affected the residents of some zones less than others. For this reason, Dutil J. divided the group members into four zones to ensure that there was some basic injury common to the residents of each zone. She thus ensured that there was a common injury in each zone.
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> It is true that in *Hollick* v. *Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68, this Court expressed the opinion that the class action was not the preferable means of resolving the claims of the class members. However, in that case, the Divisional Court had noted that '[e]ven if one considers only the 150 persons who made complaints – those complaints relate to

> different dates and different locations spread out over seven years and 16 square miles' (para. 32). In the instant case, the representatives provided detailed evidence of the injury they had suffered. Dutil J. considered all that evidence and was able to infer from it that the members in each zone had suffered similar injuries. Her analysis contains no error warranting this Court's intervention." (para. 109 – 110)

Similarly, in *Pearson* v. *Inco Ltd.*, (2005) 78 O.R. (3d) 641, the Ontario Court of Appeal held that an action brought in respect of damage to property for nickel emissions from a refinery was properly certified as a class proceeding because the claim involved the single issue of the negative impact on property value, from the disclosure of nickel contamination in the class area. The case subsequently proceeded to trial. The court recently found that the plaintiff had in fact established that public disclosure of nickel contamination in the class area had affected property values but had done so differently in three different locations of the class areas; *Smith* v. *Inco Ltd.*, 2010 ONSC 37, para. 278 – 282. As a result, the class was divided into subclasses and damages were then assessed on an aggregate basis for each of the three subclasses; para. 321 – 330.

These decisions establish that nuisance claims (and therefore, if the act creating the nuisance was statutory authorized, injurious affection claims) may be properly *certified and determined* as common issues in a class proceeding where the claim relies on some form of minimum injury common to the class. This was the basis of certification in *Gautam*, where it was alleged that there was a minimum uniform degree of interference with the public's access to Cambie Village caused by the construction of the Canada Line as it progressed through Cambie Village. If this is established, the liability to compensate for this interference, whether it is in nuisance or for injurious affection, can be determined for the benefit of the class as a whole.