



CASE COMMENT

Heyes v. City of Vancouver, 2009 BCSC 651

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On May 27, 2009 the B.C. Supreme Court awarded damages of \$600,000 to a business enterprise at 16th & Cambie Street in Vancouver on the basis of nuisance resulting from construction of the Canada Line project. Claims of negligence were dismissed, and claims of nuisance were dismissed against the City, Canada and British Columbia. Nuisance was found as against Translink, Canada Line Rapid Transit Inc. and InTransit BC Limited Partnership – the entities directly concerned with the construction of the line.

The Court determined that nuisance was compensable as the choice of a cut and cover method of construction created an unreasonable interference with the enjoyment of the plaintiff's property. The Court concluded as a fact that the originally planned method of bored tunnel construction would not have created that nuisance. The case analyzes the defence of statutory authority and public versus private nuisance. On the issue of nuisance, the court considered the "give and take" or "live and let live" approach to the law of nuisance in organized society, where certain levels of interference must be accepted. On this principle, damages should be awarded only in those cases where the nuisance is greater than a party should be required to bear, at least without compensation. A plaintiff may also be compensated for a public nuisance, where that nuisance creates a harm which is peculiar to the plaintiff, resulting in special damages. Since an alternative method of construction existed which would not have caused the nuisance, nuisance was not the "inevitable result" of the necessary work to be undertaken. Therefore the Court determined that the statutory authority defence failed.

The Court dismissed the claim of nuisance against the City of Vancouver on the basis that the City, even though it is the owner of the street, was not aware of the manner in which its street would be used when a license was granted for the construction of Canada Line, and that no evidence suggested the City had the capacity to cancel the access licence in order to stop construction. The Court did not find it necessary, therefore, to analyze whether the *Vancouver Charter* would otherwise provide the City any immunity from liability. The claims in nuisance against Canada and British Columbia were dismissed as those parties were not partners in the project such that they would participate in any profits arising from it.

In large part, the choice of construction method was made to economize on the overall cost of the Canada Line project. Shifting this cost to be uniquely absorbed by one or more business enterprises is outside the "give and take" which represents the general inconvenience of such large projects, and created one or more unique losses which should be compensated. From a municipal liability perspective, this case suggests that decisions on project methods should take into account the potential for nuisance as the statutory defence protection is not absolute. Freedom to choose? Not quite.