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WHAT'S NUISANCE IN CONSTRUCTION?

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By RBS Lawyers

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Owner's liability for damage claims for nuisance in construction project overturned by BC Court of Appeal

The controversial decision of the trial court in the claim by Susan Heyes Inc. ("Susan Heyes") against the governmental, corporate and partnership entities charged with overseeing, administering, constructing and operating the Canada Line transportation system from Vancouver's airport to downtown (collectively the "Ownership Parties") highlights the exposure to liability for owners who pursue construction on their property that causes economic loss to their neighbours through the tort of nuisance.

In the trial decision, the court found in favour of Susan Heyes for the sum of \$600,000 finding that the "cut and cover" construction method for the Canada Line through the Cambie Street corridor where Susan Heyes operated its business was a nuisance and that an alternative method of tunnelling underneath Cambie Street was available to Ownership Parties which would not have caused the loss suffered by Susan Heyes.

The Court of Appeal did not disturb the trial judge's finding of nuisance against the Ownership Parties. However, the Court of Appeal dismissed the award of \$600,000 completely and held that the trial judge incorrectly found there was no defence of statutory authority available to the Ownership Parties to carry out the acts causing nuisance.

In other words, despite a finding of nuisance against the Ownership Parties, the Court of Appeal was prepared to hold that the Ownership Parties could not be held liable for the nuisance as a specific provision from the statute authorizing construction of the Canada Line authorized the acts causing the nuisance and nuisance was the inevitable result of the statutorily authorized acts.

However, it is important to point out that most property owners do not enjoy a statutory defence authorizing their acts causing nuisance like those who built the Canada Line. As a result, the common law of nuisance is a significant consideration for any large construction project that may adversely affect the businesses of





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neighbours to the project site. As the trial decision in the Susan Heyes case illustrates, the damages can be significant.

At common law, nuisance is a field of liability that focuses on the harm suffered rather than prohibited conduct. It is defined as unreasonable interference with the use of land. 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. The interference must be intolerable to an ordinary person. 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 use of the neighbouring property and the utility of the activity. The interference must be substantial, which means that compensation will not be awarded for trivial annoyances.

Failure to properly consider the impact of a construction project on neighbouring lands and businesses may result in significant damages for the economic loss suffered by neighbouring land and business owners and commensurate liability for construction project owners.



VANCOUVER OFFICE:
700 - 401 W GEORGIA STREET
VANCOUVER, BC CANADA V6B 5A1
TEL: 604.682.3664 FAX: 604.688.3830

SURREY OFFICE:
200 - 10233 153 STREET
SURREY, BC CANADA V3R 0Z7
TEL: 604.582.7743 FAX: 604.582.7753

RBS.CA