COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *LaSante v. Kirk,*
2023 BCCA 28

Date: 20230119
Dockets: CA47539; CA47546; CA47550; CA47551

Docket: CA47539

Between:

Danny LaSante

Appellant
(Defendant and Third Party)

And

Robert George Kirk, as Representative Plaintiff

Respondent
(Plaintiff)

And

Executive Flight Centre Fuel Services Ltd., His Majesty the King in Right of the Province of British Columbia as represented by the Minister of Transportation and Infrastructure and Minister of Forests, Lands and Natural Resource Operations and Transwest Helicopters Ltd.

Respondents
(Defendants and Third Parties)

- and -

Docket: CA47546

Between:

His Majesty the King in Right of the Province of British Columbia as represented by the Minister of Transportation and Infrastructure, and the Minister of Forests, Lands and Natural Resource Operations

Appellant
(Defendant and Third Party)

And

Robert George Kirk, as Representative Plaintiff

Respondent
(Plaintiff)

And

Executive Flight Centre Fuel Services Ltd., Danny LaSante, and Transwest Helicopters Ltd.

Respondents
(Defendants and Third Parties)

- and –

Docket: CA47550

Between:

Transwest Helicopters Ltd.

Appellant
(Defendant and Third Party)

And

Robert George Kirk, as Representative Plaintiff

Respondent
(Plaintiff)

And

Executive Flight Centre Fuel Services Ltd., His Majesty the King in Right of the Province of British Columbia as represented by the Minister of Transportation and Infrastructure and the Minister of Forests, Lands and Natural Resource Operations and Danny LaSante

Respondents
(Defendants and Third Parties)

- and -

Docket: CA47551

Between:

Executive Flight Centre Fuel Services Ltd.

Appellant
(Defendant and Third Party)

And

Robert George Kirk, as Representative Plaintiff

Respondent
(Plaintiff)

And

His Majesty the King in Right of the Province of British Columbia as represented by the Minister of Transportation and Infrastructure and the Minister of Forests, Lands and Natural Resource Operations, Danny LaSante and Transwest Helicopters Ltd.

Respondents
(Defendants and Third Parties)

Before: The Honourable Chief Justice Bauman
The Honourable Justice Griffin
The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated May 21, 2021 (*Kirk v. Executive Flight Centre Fuel Services*, 2021 BCSC 987, Vancouver Docket S135927).

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Place and Date of Hearing:	Vancouver, British Columbia September 8, 2022
Place and Date of Judgment:	Vancouver, British Columbia January 19, 2023

Written Reasons by:
The Honourable Mr. Justice Grauer

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Justice Griffin

Summary:

The appellants appeal the decision of a chambers judge re-certifying an action as a class proceeding. The action arises from the spill of Jet A1 fuel into Lemon Creek and the connected waterways and the subsequent evacuation and water use orders. The respondent brought a claim against the four appellants in negligence, nuisance, and the rule in Rylands v. Fletcher. The matter was certified as a class proceeding in 2017. In 2019, this Court allowed the appellants' appeal in part, and remitted the matter to the chambers judge for reconsideration of certain common issues. In 2021, the chambers judge dealt with the remitted issues and re-certified the action. On this appeal, the appellants say that the chambers judge erred in (1) certifying the common issue involving both elements of nuisance, (2) certifying the common issue involving aggregate damages, and (3) concluding that a class proceeding would be the preferable procedure.

Held: Appeal dismissed. The judge did not err, as the appellants argue, by including both elements of nuisance (an interference that is both substantial and unreasonable) in common issue (e). In the particular circumstances of this case, it was open to him to find a basis in fact to certify a common issue in nuisance based on the mere fact of the evacuation and water advisory orders.

The judge did not err by observing that the criteria of s. 29(1) of the CPA*, need only be met to award aggregate damages and not to certify them as a common question. The judge was correct to conclude that if the respondent succeeds at the common issues trial in establishing liability in nuisance flowing from the evacuation, the appropriateness and amount of aggregate damages would become an issue that would necessarily be common.*

Finally, the judge did not err in concluding that a class proceeding would be the preferable procedure. His two decisions should properly be read together, as he reviewed and weighed each consideration set out in s. 4(2) of the CPA *in his first decision, and dealt with specific arguments, such as that a predominance of individual issues is not determinative of the preferability analysis, in his second decision. He did not err in focusing on the concerns of access to justice and judicial economy, considering that the context of the class proceeding is a single incident mass tort.*

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Reasons for Judgment of the Honourable Mr. Justice Grauer:

1. INTRODUCTION

[1] This class proceeding was commenced on August 7, 2013, more than nine years ago. The detailed background has been amply set out in the three judgments described below. For present purposes, it is sufficient to note that the claim arises out of the spill of a tanker truck full of Jet A1 fuel into Lemon Creek, and from there into the Slocan and Kootenay Rivers. This led to a Declaration of State of Local Emergency in the area, and the issuance of both evacuation and water use orders.

[2] The representative plaintiff, Mr. Kirk, classifies the event as a "single incident mass tort", and claims on his own behalf and on behalf of a class of persons who owned, leased, rented or occupied real property in the area that was subject to the evacuation orders. The claim is framed in negligence, nuisance, and the rule in *Rylands v. Fletcher* (1868), LR 3 HL 330 (UK). On this appeal, we are primarily concerned with the claim in nuisance.

[3] Mr. Justice Masuhara first certified this matter as a class proceeding on May 3, 2017 (*Kirk v Executive Flight Centre Fuel Services*, 2017 BCSC 726 [*Kirk SC #1*]). The defendants appealed.

[4] On April 5, 2019, this Court allowed the appeal in part, striking several of the common issues approved by the judge, and remitted the matter to the judge for reconsideration of certain other common issues (*Kirk v Executive Flight Centre Fuel Services Ltd.,* 2019 BCCA 111 [*Kirk CA*]).

[5] On May 21, 2021, Masuhara J. dealt with the remitted issues, reconsidered the question of preferability, and certified this matter as a class proceeding for the second time (*Kirk v Executive Flight Centre Fuel Services*, 2021 BCSC 987 [*Kirk SC #2*]).

[6] The defendants are back. They say that the judge erred in his reconsideration of the matters remitted to him by certifying new common issues involving (1) the

elements of nuisance and (2) aggregate damages in nuisance. They say further that the judge erred in concluding that (3) a class proceeding would be a preferable procedure for the fair and efficient resolution of the certified common issues.

[7] For the reasons that follow, I conclude that this appeal should be dismissed.

[8] To understand the defendants' position, it is helpful to look at the chronology of events and the procedural history in more detail. In doing so, I propose to concentrate on those aspects that are relevant to this appeal. As noted, additional detail may be gleaned from the three judgments previously rendered in this matter as cited above.

2. BACKGROUND

[9] As this appeal turns largely on the proposed claim framed in nuisance, it is important to understand that the foundation of the common issues certified for the claim in nuisance is not the direct effect of spilled fuel on property owned by the proposed members of the class. Rather, it is the alleged interference with their use and enjoyment of their property resulting from the evacuation orders and water use orders that were issued in response to the contamination by the spilled fuel.

[10] In this way, Mr. Kirk sought to avoid the problem of having to assess the degree of alleged contamination or pollution of each individual property to establish liability. Nevertheless, the defendants argued before, and continue to argue now, that the claim in nuisance (both as presented and as reconsidered) is not suitable for determination as a common issue because what happened affected different properties at different times and different class members in different ways, with the result that there is no common experience capable of either founding a class-wide claim in nuisance in fact or establishing the elements of nuisance in law.

[11] This is what happened.

[12] The spill occurred on July 26, 2013 in the course of an attempt by Executive Flight Centre Fuel Services Ltd. and its driver, Mr. LaSante, to supply fuel to

Transwest Helicopters Ltd . Transwest had been engaged by British Columbia to provide helicopter services in the fighting of a wildfire in the Slocan Valley. These are the four defendants (appellants).

[13] On July 26, 2013 at 19:00, the Regional District of Central Kootenay declared a state of local emergency.

[14] On July 26, 2013 at 20:00, the Interior Health Medical Health Officer ordered the evacuation of all persons within 300 metres from the spill site and the fuel slick down Lemon Creek and the Slocan River, and issued a Do Not Use Water Order to all residences using surface water and all water purveyors within 3 kilometres.

[15] On July 26, 2013 at 21:30, the evacuation area was significantly expanded, from 300 metres to 3 kilometres from the spill site and the fuel slick, an area encompassing approximately 2,776 properties.

[16] On July 27, 2013 as of 08:00, the Evacuation Zone was reduced. Residents living further than 800 metres from watercourses were no longer subject to the evacuation order. The Do Not Use Water Order remained in place for all water users within the evacuation order area and within 3 kilometres of watercourses.

[17] On July 27, 2013 at 13:00, the Regional District of Central Kootenay lifted the evacuation order, permitting the return of nearly 600 residents who had left their homes. The Do Not Use Water Order remained in effect.

[18] Two of the persons who had left their home were Mr. Kirk and his daughter. Mr. Kirk woke up to an overpowering odour of fuel and a terrible headache on July 27, 2013 at 05:00, and found the evacuation notice attached to his door. He and his daughter immediately left their home. They returned that evening.

[19] On August 6, 2013, Interior Health lifted all Do Not Use Water restrictions on the Kootenay River, but the Do Not Use Water Order for drinking water and recreational use remained in effect for Lemon Creek and the Slocan River.

[20] This Do Not Use Water Order was lifted for the Slocan River south of the Winlaw Bridge on August 8, 2013; all remaining restrictions were lifted on August 9, 2013.

[21] In relation to the nuisance claim, Mr. Kirk proposed four common issues in his application for certification. They followed three common issues, (a), (b), and (c), that dealt with the negligence claim. The nuisance common issues were these:

> (d) Did the acts or omissions of any of the Defendants cause an evacuation order to be issued with respect to the class members' properties?
>
> (e) Did the resulting evacuation of the class members from their properties constitute a loss of use of their real properties and/or an interference with the quiet enjoyment of their real properties?
>
> (f) Did the acts or omissions of any of the Defendants, jointly and/or severally, cause the class members to suffer a loss of use of their properties and/or an interference with the quiet enjoyment of their properties?
>
> (g) Did any of the Defendants, through their acts or omissions, commit the tort of nuisance by jointly and/or severally causing and/or contributing to the Spill (as defined in the Amended Notice of Civil Claim)?

3. PROCEDURAL HISTORY

3.1 Kirk SC #1

[22] In this first certification decision, the judge began by setting out the goals and the requirements of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*]. These are not controversial:

> [37] The goals of the [*CPA*] are access to justice, behaviour modification and judicial economy. These goals are to be kept in mind in the certification process. The requirements for obtaining certification are set out in s. 4(1) of the *CPA*:
>
> > 4(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
> >
> > (a) the pleadings disclose a cause of action;
> >
> > (b) there is an identifiable class of 2 or more persons;
> >
> > (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[38] In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters, including those specified in s. 4(2) of the *CPA* as follows:

> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[39] The onus is on the party seeking certification to meet all of the requirements. The burden is not an onerous one. The cause of action requirement in s. 4(1)(a) is satisfied unless, assuming all the pleaded facts are true, it is plain and obvious that the claim cannot succeed: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980; *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25. With respect to the other four requirements in s. 4(1), the applicant need only provide a minimum evidentiary basis that shows some basis in fact for each of them; the certification hearing is procedural and not the forum where the merits of the action are decided: *Hollick* at paras. 24–25; *Dow Chemical Company v. Ring, Sr.,* 2010 NLCA 20 at para. 14, leave to appeal ref'd [2010] S.C.C.A. No. 187. The "some basis in fact" standard does not require the court to resolve conflicting facts and evidence at the certification stage. The "some basis in fact" inquiry is limited as it is a low hurdle. The authorities on this point have reiterated that at the certification stage the court is ill-equipped to resolve such conflicts: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102 [*Pro-Sys*].

> [40] If the five conditions are met, the court must certify the action.

Disclosure of a cause of action

[23] The judge then proceeded to consider the first criterion, whether the pleadings disclosed a cause of action. With respect to the claim in nuisance, he first set out the pleading:

> [74] With respect to the action in nuisance the Amended Notice of Civil Claim states:
>
> > 107. Each and all of the Defendants, through their acts and/or omissions described herein, have committed the tort of nuisance by jointly and/or severally causing and/or contributing to the Spill and distribution of Vapour and Sludge throughout the Evacuation Zone so as to impose a continuing interference with the Class members' quiet enjoyment of their Properties.

[24] The judge then turned to the legal requirements for a claim in nuisance, being an interference with the use or enjoyment of land that is both substantial and unreasonable:

> [75] The leading case on private nuisance is [*Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13]. At para. 18, Cromwell J. for the Court confirmed that [a] claim in nuisance "consists of an interference with the claimant's use or enjoyment of land that is both substantial and unreasonable". He goes on to state at para. 19 that, "[a] substantial interference is one that is non−trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances."
>
> [76] At para. 23, Cromwell J. states that nuisance is not confined to:
>
> > firm categories of types of interference which determine whether an interference is or is not actionable …. Nuisance may take a variety of forms and may include not only actual physical damage to land but also interference with the health, comfort or convenience of the owner or occupier …. The point is not that there is a typology of actionable interferences; the point is rather that there is a threshold of seriousness that must be met before an interference is actionable.

[25] The judge then concluded that the pleading adequately disclosed a cause of action in nuisance—a conclusion not challenged on appeal:

> [77] The plaintiff's pleadings in my view adequately set out assertions which at this stage meet the non-trivial and unreasonable interference threshold. The assertions as to the nature of the Spill, the Evacuation Order, the impacts and the assertions as to the defendants' actions are sufficient.
>
> [78] While the interest or lack of an interest in a particular property by a particular class member has implications on the type of damages which may be available, e.g. damages for diminution in property value would not be available to those not having an interest in land, there are other damages available to those having a lesser or no interest to the extent they have suffered the necessary interference with the use and enjoyment of land. Differing types of damages to those within a class is not fatal to certification. However, refining the class or even creating subclasses are considerations which may be addressed as things become clearer post-certification.
>
> [Emphasis added.]

Common issues

[26] Addressing the proposed common issues, the judge noted the following principles:

> [97] Section 4(1)(c) of the *CPA* requires that the claims of the class members "raise common issues, whether or not those common issues predominate over issues affecting only individual members".
>
> [98] Under s. 1 of the *CPA*, common issues are defined as:
>
> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.
>
> [99] Therefore, to satisfy s. 4(1)(c) of the *CPA*, the claims made by class members must raise common, but not necessarily identical, issues of either fact or law.
>
> [100] The commonality requirement is based on the notion that "individuals who have litigation concerns 'in common' ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings": *Pro-Sys* at para. 106.
>
> [101] The common issue criterion is not a high legal hurdle. The plaintiff need only provide some basis in fact to support the existence of common issues. An issue can be common even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 53, 2004 CanLII 45444 at para. 53 (C.A.), leave to appeal ref'd [2005] S.C.C.A. No. 50.
>
> [102] The common issue need not dispose of the litigation, however, it is sufficient if it is an issue of fact or law common to all claims and its resolution has a reasonable prospect of advancing the litigation for (or against) the class: *Harrington v. Dow Corning Corp.* (1996), 22 B.C.L.R. (3d) 97, (S.C.)

> [*Harrington BCSC*], aff'd 2000 BCCA 605 [*Harrington BCCA*], leave to appeal ref'd [2001] S.C.C.A. No. 21.
>
> [103] The issues do not have to be determinative of liability. It is sufficient that these claims, if decided in a single trial, will help to advance the litigation in some material way for the benefit of class members. In *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343 (C.A.), leave to appeal ref'd [1998] S.C.C.A. No. 13, the Court of Appeal held:
>
> > [53] When examining the existence of common issues it is important to understand that the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief. To require every common issue to be determinative of liability for every plaintiff and every defendant would make class proceedings with more than one defendant virtually impossible.
>
> [104] A common question can exist if the answer given to the question might vary from one member of the class to another. It is not necessary that all class members must succeed on a common question; however, success for one member cannot lead to failure for another: *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 45.
>
> [105] At the certification stage, the common issues should be framed in general terms. As the action proceeds, the court may determine that the common issues need to be more particularized: *Miller v. Merck Frosst Canada Ltd*., 2011 BCSC 1759, leave to appeal ref'd 2012 BCCA 137.

[27] Applying these principles, the judge concluded at para 110 that the common issues framed under nuisance (as well as those framed under negligence and the rule in *Rylands v Fletcher*) "are common in terms of facts. They have the potential to reasonably advance the litigation and provide for access to justice and judicial economy". Those proposed common issues are quoted above at para 21.

Preferability

[28] The judge had little difficulty in concluding that a class proceeding was preferable. A question raised before us is whether he should have come to a different conclusion the second time around. What he said the first time was this:

> [129] In my view, a class proceeding is preferable.
>
> [130] At the heart of this action is the Spill, a single event that is said to have affected a significant part of a community. There are numerous defendants in this case. Their conduct in relation to the Spill is the focus of the common issues. The action seeks to determine which of the defendants caused the fuel to spill into Lemon Creek. There is complexity to the legal and

> factual issues. The defendants seek to place blame or at least share the blame with the other defendants and seek indemnity from the others as well. They are involved in related criminal and regulatory proceedings. The defendants here have greater resources than the typical individual class member.
>
> [131] In circumstances such as these, I do not find it fair or efficient for individuals to be required to advance through an individual action to obtain some form of redress from the defendants. Moreover, litigating the common issues through a class proceeding has the significant advantage of key findings being decided once.
>
> [132] While behaviour modification is important, this factor is not as significant as the two other goals in the circumstances of this case as presently understood. However, this goal is advanced by using the tort system to encourage environmental responsibility.
>
> [133] The focus in this case is largely about determining the cause of, and responsibility for, the Spill. This focus, rather than its subjective effect, distinguishes this case from the circumstances in the recent decision by the BC Court of Appeal in [*Baker v. Rendle*, 2017 BCCA 72] and makes it consistent with the Manitoba Court of Appeal decision in [*Anderson v. Manitoba*, 2017 MBCA 14]. This feature looms large in terms of significance in a qualitative sense.

[29] The judge then reviewed the considerations set out in section 4(2) of the *CPA*, finding they supported his conclusion that a class proceeding is preferable:

> [136] My finding that a class proceeding is preferable is also supported by my review in respect to the considerations set out in s. 4(2)(a)–(e) of the *CPA*.
>
> (a) Do the questions of law or fact common to the members of the class predominate over questions affecting only individual members?
>
> [137] The defence argues that questions and individual issues of each class member predominate over the common issues. Cases in support include *Baker*; *Bittner v. Louisiana Pacific Corp*. (1997), 43 B.C.L.R. (3d) 324, (S.C. Chambers); *Parsons v. Coast Capital Savings Credit Union*, 2007 BCCA 247, leave to appeal ref'd [2007] 3 S.C.R. vii (note); *Roberts v. Canadian Pacific Railway*, 2006 BCSC 1649, [2006] B.C.J. No. 2905; and *Benning v. Volkswagen Canada Inc. et al.*, 2006 BCSC 1292.
>
> [138] Though there are significant questions relating to individual members, who may be also be significant in number, the common issues are threshold questions which are complex and contested by the defendants. Qualitatively, the common issues are critical and predominate. The common issues must be addressed before consideration of the individual issues. In any event, predominance alone is not determinative. It is but one consideration of many in the preferability analysis.
>
> (b) Do a significant number of class members have a valid interest in individually controlling the prosecution of separate actions?

[139] The defendants point to other legal proceedings in their submissions including: [*Ross v. Executive* in the British Columbia Supreme Court, Vancouver Registry No. VLC-S-S1559993 [*Ross Action*]]; *Executive v. British Columbia and Transwest* in the British Columbia Supreme Court, Vancouver Registry No. S155457 [*Executive Action*]; *Burgoon v. EFCFS* and *British Columbia*, British Columbia Provincial Court, Nelson Registry No. 24399-2; and an Environmental Appeal Board proceeding, No. 2013-EMA-022.

[140] The aforementioned proceedings relate to the Spill, but are different in terms of the nature of relief sought or the nature of the proceedings.

[141] There is no evidence showing that a significant number of class members have a valid interest in individually controlling the prosecution of separate actions in relation to the matters in this case.

> (c) Will this class proceeding involve claims that are or have been the subject of any other proceedings?

[142] As mentioned above, there are other proceedings; however, the *Ross Action* and *Executive Action* seek different relief than sought in the instant case and advance claims on behalf of different claimants than those in the proposed class in this case. The *Executive Action* assumes the present case will be certified.

[143] In terms of the criminal and regulatory proceedings, they are not focused on determining the common issues in this case. The issues in those proceedings arise from distinct statutory provisions and framework. Neither proceeding has jurisdiction over the liability in this case.

[144] This consideration does not cause or diminish the preferability of this proceeding.

> (d) Are other means of resolving the claims less practical or less efficient?

[145] The defence argues that the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means in the case at bar because of all of the individual issues and need for individual trials in order to make findings of individual facts.

[146] It is further submitted that a class proceeding that would require individual trials due to the individual inquiries to establish loss and therefore liability would be unmanageable: *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 at para. 56, [2003] O.J. No. 27 at para. 56 (C.A.), leave to appeal ref'd [2003] S.C.C.A. No. 106. It is also argued that a class proceeding that would inevitably require individual inquiries would result in delay and expense: *Roberts* at para. 82.

[147] In short, a class proceeding would be, "inefficient, unmanageable and costly": *Thorburn v. British Columbia (Public Safety and Solicitor General)*, 2013 BCCA 480 at para. 53.

[148] The defendants argue that there are other preferable procedures such as a test case. However, when asked about the specifications of the test case, the Province retreated from its position and stated that a test case was

> not appropriate. Executive, Transwest and Mr. LaSante support a test case, but only limited to being bound on the determination of liability regarding the tanker rolling into Lemon Creek.
>
> [149] The defendants propose no method for how all of the potential privies would be bound on all of the issues.
>
> [150] I am of the view that the other means are less practical and efficient than a class proceeding.
>
> (e) Would the administration of this class proceeding create greater difficulties than those likely to be experienced if relief was sought by other means?
>
> [151] Based on my discussion above, I do not see that the administration of this class proceeding creates greater difficulties than through other means.
>
> [Emphasis original.]

[30] In the result, the judge approved the common issues as proposed by Mr. Kirk, and certified the action as a class proceeding.

3.2 Kirk CA

[31] Before addressing the issues raised on appeal, this Court felt it necessary to clarify the different types of damages claimed. In doing so, Justice Garson, for the Court, remarked at para 43 that it "is somewhat difficult to discern the claims [Mr. Kirk] advances on behalf of the proposed class".

[32] At para 48, Garson J.A. observed that one of the kinds of damages being advanced was "loss of use and enjoyment of property as a result of the evacuation and contamination" —relevant to the claim in nuisance which is central to the present appeal —then noted at para 50 in relation to this aspect of the claim:

> It is not clear to me if the proposed class action seeks damages in the aggregate for the evacuation. (Below, at para. 83 I make orders remitting this, among other questions, to the chambers judge).

[33] As we shall see, before us, the appellants maintain that the judge erred in his consideration of the aggregate damages issue when the matter was remitted to him.

[34] Justice Garson then turned to the issues on appeal. The first issue was whether the judge erred in his conclusion that there was an identifiable class of two or more persons [*CPA* s. 4(1)(b)]. She concluded that he had not.

[35] The second issue was whether the judge erred in finding that the claims of the class members raised common issues [*CPA* s. 4.1(c)]. This Court first considered the three common issues in negligence, which are not in issue before us. Justice Garson concluded that the judge properly certified issues (a) and (b) as common issues, but had erred in certifying issue (c) because it raised the question of specific causation.

Common issues in nuisance

[36] This Court then turned to the common issues in nuisance, which remain the focus of the appeal before us. Justice Garson set out the questions, and then summarized the appellants' argument:

> [75] The judge certified the following four questions in nuisance:
>
> Nuisance
>
> (d) Did the acts or omissions of any of the Defendants cause an evacuation order to be issued with respect to the class members' properties?
>
> (e) Did the resulting evacuation of the class members from their properties constitute a loss of use of their real properties and/or an interference with the quiet enjoyment of their real properties?
>
> (f) Did the acts or omissions of any of the Defendants, jointly and/or severally, cause the class members to suffer a loss of use of their properties and/or an interference with the quiet enjoyment of their properties?
>
> (g) Did any of the Defendants, through their acts or omissions, commit the tort of nuisance by jointly and/or severally causing and/or contributing to the Spill (as defined in the Amended Notice of Civil Claim)?
>
> [76] The appellants argue that the claim in nuisance lacks sufficient commonality. They all make similar arguments regarding the centrality of the individual damage assessment to liability in nuisance. They argue that individual experiences varied widely across the class. Therefore liability in nuisance cannot be determined on a class-wide basis.

[37] Justice Garson next discussed the applicable law:

> [77] To make out a claim in private nuisance, the plaintiff must prove (1) a substantial, non-trivial interference with their use and enjoyment of property, and (2) that the interference is unreasonable. As noted in *Baker v. Rendle*:
>
> > [41] … The focus is primarily on the effect on the complainant rather than on the alleged tortfeasor's conduct ([*Antrim Truck Centre*

> *Ltd. v. Ontario (Transportation)*, 2013 SCC 13] at para. 28). Thus, contrary to the appellant's submission in this Court, a measure of subjectivity exists even at the stage of determining whether liability exists, and not merely when determining the extent of liability.
>
> [Citation added.]
>
> [78] Class actions in nuisance will generally be certified only where there is a clear universal question. In *Gautam v. Canada Line Rapid Transit Inc.,* 2011 BCCA 275, the class members were individuals who owned properties or leased business premises along Cambie Street in Vancouver. They brought claims in nuisance, waiver of tort, and injurious affection, asserting that the cut-and-cover method of construction of the Canada Line had severely restricted access to their properties. Bennett J.A. accepted as a common issue the question of whether the restricted access was so significant as to cause the ordinary person to find it intolerable. She considered it unnecessary for the Court to consider the effect on each owner or business proprietor in order to ascertain whether the construction had caused substantial, unreasonable interference: at para. 32.
>
> [79] Similarly, in *Anderson v. Manitoba*, a universal issue existed with respect to whether or not Manitoba's operation of water control structures had caused the flooding of the class members' properties. A determination with respect to this issue would serve to advance the litigation for the whole class.
>
> [80] In contrast, where a universal issue cannot be shown, a claim in nuisance may not be suitable for a class action because it will turn on the assessment of damage to each individual class member. In *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143, neighbours of a steel works claimed that emissions from the works had caused them nuisance and personal injury. The Court of Appeal allowed the defendants' appeal from the certification of the class action. The court found that it would be impossible to determine liability in nuisance without inquiring into how each class member used their property and the extent to which contaminants interfered with their use and enjoyment of the property or substantially caused physical injury to the property itself: at para. 143.
>
> [Emphasis added.]

[38] Justice Garson then turned to apply these principles to the common issues in nuisance, finding no error in accepting issue (d) as a common issue, but finding error in relation to issues (e) and (f), and potentially in relation to issue (g). In the result, Garson J.A. struck issue (f), remitted issue (e) to the judge for reconsideration, and amended issue (g):

> [81] Here, like in *Anderson*, the claim in nuisance involves a universal question regarding causation. Common issue (d) asks whether the acts or omissions of any of the appellants caused the evacuation and Do Not Use Water Orders to be issued. I see no error in the judge's certification of this

> issue. It is common to the class and will materially advance the claims of all the class members.
>
> [82] Common issues (e) and (f) likewise concern individual causation. Each of these issues as worded would require an individual assessment of the subjective impact of the evacuation or the consequences of the acts or omissions of the appellants on class members in order to determine whether they suffered a loss of use and enjoyment of their properties. As an example of the differences between class members, some members may not have resided on their property or if they did reside there, they may not have been home before, during, or after the evacuation; some may have had greater inconvenience if they needed to take care of children or livestock. The issues would inevitably break down into individual proceedings. The judge erred in certifying these issues.
>
> [83] However, I would remit common issue (e) to the chambers judge to reconsider, as there may be a basis in fact to certify a common issue in nuisance for the class or subclass(es) based on the mere fact of the evacuation and water advisory orders, without more. On remission, the judge should consider if these orders established a common experience that gave rise to a non-trivial interference, leaving the ability to prove more to the individual assessment of damages. I would strike common issue (f) without remitting it.
>
> [84] Common issue (g) could have been certified if it only asked whether any of the appellants caused or contributed to the spill. As written, however, it asks whether any of the appellants committed the tort of nuisance by causing or contributing to the spill – thus requiring an individual assessment of damage to each class member. I would delete the words "commit the tort of nuisance by" but otherwise dismiss the objection to this common issue.
>
> [Emphasis added.]

[39] As we shall see, on reconsideration, Masuhara J. revised the wording of issue (e) and certified it as a common issue. The appellants say he erred in doing so.

[40] Justice Garson further concluded that the judge had erred in certifying as a common issue the question of whether the acts or omissions of any of the defendants had caused the real properties in question to diminish in market value (at para 97). This is, of course, no longer in issue, but it is of relevance to the manner in which Garson J.A. approached the third issue: whether the judge erred in finding that a class proceeding was the preferable procedure.

Preferability

[41] In deciding that the preferability issue should be remitted to the chambers judge, Garson J.A. said this:

> [151] We did not hear submissions on how the preferability analysis would be affected by the removal of the common issue regarding diminution of property value. Neither did the chambers judge. Absent this common issue, the amounts to be recovered will undoubtedly be smaller, thus increasing the concern for access to justice which is one of the primary advantages of a class action: *Pro-Sys Consultants v. Infineon* [2009 BCCA 503] at para. 74. Nonetheless, given that the scope of the proposed class action will have changed considerably as a result of these reasons, I consider it more appropriate to remit the question of preferability to the chambers judge to be determined with the benefit of submissions from the parties.
>
> [Emphasis added.]

[42] Once again, the appellants maintain that the judge erred in his reconsideration of this issue.

3.3 Kirk SC #2

[43] In his second certification decision, the judge reiterated the procedural history of the matter, noting that the record before him on this application was the same as the record before him on the first application.

Common issue (e) – Nuisance

[44] The judge turned first to consider the remitted issue of proposed common issue (e), noting this Court's direction at para 83 of *Kirk CA* that he should consider whether the evacuation and water advisory orders "established a common experience that gave rise to a non-trivial interference, leaving the ability to prove more to the individual assessment of damages". He observed at para 14:

> To the extent that the fact of the evacuation and "do not use water" orders resulted in (i) a common experience among the class members that (ii) rose to the level of "non-trivial interference", liability in nuisance may be suitable for determination at a common issues trial. Any loss as a result of the alleged nuisance beyond this common experience could then be proven at the individual assessment stage following the common issues trial.

[45] The judge addressed the question of whether the issue would advance the litigation, concluding at para 22 that it would only do so "if it clearly incorporates the elements of the tort of nuisance". Consequently, in his view, the legally pertinent question was whether the orders impacted class members' rights to use and enjoyment such that they substantially and unreasonably interfered with that use and

enjoyment. He framed the issue in that way because the only experience that appeared to be common to all class members, and could therefore be asserted without individual analysis, was the issuance of the orders in relation to their properties.

[46] The judge proceeded to resolve the question by certifying the following common issue:

> [23] So that the common issue can serve to advance this litigation, I would adopt the wording used by the Court of Appeal and amend it to read:
>
> > Did the fact of the resulting evacuation and water advisory amount to non-trivial and unreasonable interference with class members' use and enjoyment of the affected properties?
>
> Though I am skeptical of whether the loss of a right to use and enjoyment amounts on its own to non-trivial interference with actual use and enjoyment, I am willing to hear arguments on this point. This is in part due to the relative novelty of the argument and the questions it raises about how the tort of nuisance relates to property rights. The cases cited by the defendants (see e.g. *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13; *Baker v. Rendle*, 2017 BCCA 71; *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108; *MacQueen*) for the proposition that plaintiffs must show interference with "actual" use and enjoyment have not dealt with circumstances that are readily comparable to the circumstances of the instant case, in particular the evacuation order. As a result, they do not clearly and unequivocally stand for the proposition that a "complete" loss of the "right" to use and enjoyment as allegedly resulted from the relevant orders could not represent such interference. Thus, I certify the amended common issue as set out above.

[47] Before us, Mr. Kirk maintains that the judge was doing precisely what this Court instructed him to do. The appellants, however, say that the judge erred in failing to take properly into account that to establish liability in nuisance, one must establish not only *substantial* (non-trivial) interference, but also *unreasonable* interference with the use or enjoyment of land, and that the latter is not possible on a class-wide basis.

Aggregate damages in nuisance

[48] The judge next turned to the proposed common issue of aggregate damages in nuisance, setting out the statutory requirements, and the defendants' position:

> [24] The plaintiff has also argued for certification of aggregate damages in nuisance. The requirements for an aggregate damages award are set out at s. 29 of the *CPA*:
>
> > Aggregate awards of monetary relief
> >
> > 29 (1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if
> >
> > > (a) monetary relief is claimed on behalf of some or all class members,
> > >
> > > (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and
> > >
> > > (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.
> >
> > (2) Before making an order under subsection (1), the court must provide the defendant with an opportunity to make submissions to the court in respect of any matter touching on the proposed order including, without limitation,
> >
> > > (a) submissions that contest the merits or amount of an award under that subsection, and
> > >
> > > (b) submissions that individual proof of monetary relief is required due to the individual nature of the relief.
>
> [25] The defendants submit that aggregate damages should not be certified because aggregate damages cannot be certified as a common issue where liability has not been shown. Liability in this case depends on whether or not there was a non-trivial interference with class members' use and enjoyment of the affected properties — a question of fact that is still in issue. The defendants also contend that the lack of a sufficient mechanism for calculating aggregate damages related to the loss of a right to use and enjoyment weighs against certification of the issue. Finally, the defendants argue that aggregate damages were not proposed as a common issue previously, and are being improperly introduced as a new issue upon my reconsideration of the remitted issues.

[49] In concluding that the question of aggregate damages in nuisance should be certified as a common issue, the judge said this:

> [26] Certification of aggregate damages does not amount to a commitment to awarding aggregate damages. The criteria under s. 29 need only be met to award such damages, not to certify them as a common issue. Though I have expressed my skepticism about the nuisance claim brought on a class-wide basis, if the plaintiff succeeds in establishing liability under that cause of action, the appropriateness and amount of aggregate damages would be in

> issue. I find that the theory of damages inherent to the plaintiff's claim in nuisance for loss of a right, while perhaps not fully developed, is sufficient to satisfy the "methodology" requirement referenced by the defendants.
>
> [27] Though it was unclear based on the originally certified issues whether the plaintiff was seeking aggregate damages in nuisance, a fact that the Court of Appeal acknowledged, they have made the fact that they are doing so clear in their reply submissions at this hearing. Rather than an introduction of a new common issue, I view this as a clarification of the common issue that has been remitted to me for further consideration.
>
> [28] I would therefore certify the issue of aggregate damages, borrowing some of the language from the aggregate damages common issue approved by the Court of Appeal in *Tucci v. Peoples Trust Company*, 2020 BCCA 246, as follows:
>
> > Can a part of the Class Members' damages in nuisance be assessed in the aggregate pursuant to section 29 of the *CPA*? If so, in what amount?

Preferability

[50] Finally, for present purposes, the judge turned to consider the remitted issue of preferability. Responding to arguments raised by the defendants, he said this:

> [43] I cannot accept the defendants' submissions that the remaining common issues will not advance the litigation. Determining which of the defendants are causally and legally responsible for the spill and to what extent is a necessary determination in any litigation related to the spill and its effects. The fact that this determination does not in itself attach liability to any particular loss does not prevent it from moving the litigation forward, as per *Anderson*.
>
> [44] I also cannot accept the suggestion that joinder would be a preferable means of bringing these claims. The class at issue contains potentially thousands of members. Though the defendants may be displeased by the perceived "unwieldy" nature of this litigation, I can think of no reason why joinder would solve this issue in a way that adequately makes up for the impact it could have on access to justice. As the Court of Appeal noted, the striking of the property value diminution issue significantly reduced the potential for recovery by class members. The determination of key issues in the litigation in a class proceeding will almost certainly serve to make recovery more accessible for class members, even if damages are ultimately to be determined on an individual basis. Furthermore, given the size of the class and the potential for separate claims re-hashing the same questions of causation and responsibility, I find that a class proceeding is a more efficient use of judicial resources than joinder.
>
> [45] Though the decision of the Court of Appeal serves to diminish the predominance of the common issues in relation to individual issues, as I noted in my previous certification decision, the predominance of individual issues is not determinative of the preferability analysis. Given the centrality of

> questions of causation and responsibility in negligence to the litigation, I am not convinced that individual issues related to damages predominate over common issues. However, even if they do, the concerns of access to justice and judicial economy, the issues with joinder for a class this large, and the fact that the common issues will clearly move the litigation forward on a class-wide basis, would lead me to determine that a class proceeding is the preferable mechanism for resolving those issues.
>
> [46] While I appreciate the defendants' agreement to be bound by joinder, it is important to remember that joinder introduces the possibility of exposure to costs and other monetary obstacles that are not present in class proceedings and that work against the goal of access to justice. For this and the foregoing reasons I find that joinder is not preferable to a class proceeding under these circumstances.

[51] Once again, the action was certified as a class proceeding.

4. ON APPEAL

4.1 Nuisance: appellants' position

[52] The appellants maintain that the judge erred both in law and in fact. They submit that he erred in law in misapplying the legal test for a claim in nuisance. They say further that he made a palpable and overriding error in finding that there was some basis in fact for a common experience among class members arising from the evacuation and water use orders that were made.

[53] As to the error of law, the appellants point out that, as the Court explained in *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at para 18, a claim in nuisance consists of an interference with the claimant's use or enjoyment of land that is "both substantial and unreasonable". Justice Cromwell explained at para 19:

> … [a] substantial interference with property is one that is non−trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances.

[54] The problem here, the appellants say, is twofold. First, they argue that while the substantial interference threshold is less complex than the unreasonable interference threshold, it requires that the interference substantially alter the nature of the property, or interfere to significant extent with the actual use being made of

the property: *Antrim* at para 22. It does not, they say, contemplate the loss of a right on its own.

[55] Second, they say that the judge rolled the two inquiries discussed by Cromwell J. into one. They focus on what this Court said in *Kirk CA* at para 83, which I repeat here for ease of reference:

> [83] However, I would remit common issue (e) to the chambers judge to reconsider, as there may be a basis in fact to certify a common issue in nuisance for the class or subclass(es) based on the mere fact of the evacuation and water advisory orders, without more. On remission, the judge should consider if these orders established a common experience that gave rise to a non-trivial interference, leaving the ability to prove more to the individual assessment of damages. I would strike common issue (f) without remitting it.
>
> [Emphasis added.]

[56] In the appellants' submission, this Court directed the judge to address the threshold of a common experience giving rise to non-trivial interference. The judge, they argue, began that way but then added in the second element of reasonableness without addressing how it was to be dealt with. Thus, the question he certified was whether the orders amounted to "non-trivial and unreasonable interference with class members' use and enjoyment…" (emphasis added).

[57] This contrasts, the appellants say, with the approach taken with respect to the claim in nuisance litigated in the class proceedings arising out of the construction of the Canada Line. There, the question of substantial (non-trivial) interference was certified as a common issue, leaving the question of whether there was also unreasonable interference to be determined on an individual basis: see *Gautam v Canada Line Rapid Transit Inc*., 2015 BCSC 2038 [*Gautam SC #1*] at paras 31–34.

[58] In the result, the appellants assert the judge erred in law by including the issue of "unreasonable interference" in the common question he certified. They say it requires a separate inquiry that is not susceptible of examination as a common issue.

[59] As to the error of fact, the appellants submit that it was a palpable and overriding error for the judge to find that there was some basis for alleging a common experience of substantial interference (let alone unreasonable interference) arising from the orders that were made. They point to the fact that the proposed class includes a variety of properties, residential and commercial, and a variety of individuals, some of whom lived on the properties, some of whom leased their properties or rented them out, some of whom left their properties empty. Consequently, the appellants say the class members' rights of use and enjoyment were not common: a landlord, for instance, would have no right of quiet use and enjoyment. It is not enough, the appellants argue, that all members were subject to the same orders, because the law of nuisance focuses on impact, and the orders could not have had a common impact on all members of the class.

4.2 Discussion

[60] In considering the appellants' arguments, I find it helpful to bear in mind the following comment from G.H.L. Fridman, QC et al.: *The Law of Torts in Canada*, (3rd ed (Toronto: Thomson Reuters, 2010) at 147 (footnotes omitted):

> The impossibility of providing a definition of nuisance for legal purposes has frequently been stated. Nuisance is a vague doctrine, very difficult to define accurately. An actionable nuisance, it has been said, cannot be defined with exactitude. Indeed, it is not always clear whether the defendant's behaviour constitutes an actionable nuisance or some other wrong, such as trespass, negligence, or the collection, and consequent escape of some dangerous object within the scope of the doctrine of *Rylands v. Fletcher*. Frequently, a plaintiff will claim under several, possibly all of these various heads of liability, because it is not clear which is the most appropriate. Sometimes liability will ensue under more than one (if not, indeed, under them all).

[61] In this case, Mr. Kirk has indeed claimed under three of those various heads of liability, as described above. The issue before us is not whether he will succeed on any of them. As noted by the judge in *Kirk SC #1* at para 39 (quoted above following para 22), a certification hearing is procedural and not the forum where the merits of the action are decided. The onus on the applicant, then, is simply to provide a minimum evidentiary base that shows some basis in fact for each

proposed common issue. The question is not whether the applicant will succeed in establishing liability on the facts.

[62] We are, of course, dealing with common issue (e) as amended by the judge:

> Did the fact of the resulting evacuation and water advisory amount to non-trivial and unreasonable interference with class members' use and enjoyment of the affected properties?

[63] It is evident from the passage from *Kirk CA* (quoted above following para 38) that this Court considered precisely those arguments raised by the appellants as summarized above when it certified common issue (d), struck common issue (f), amended common issue (g), and remitted common issue (e) to the judge for reconsideration.

[64] Justice Garson remitted common issue (e) with the instruction (at para 83) that the judge should consider whether the evacuation and water use orders "established a common experience that gave rise to a non-trivial interference, leaving the ability to prove more to the individual assessment of damages". Why? Justice Garson explained: because "there may be a basis in fact to certify a common issue in nuisance for the class or subclass(es) based on the mere fact of the evacuation and water advisory orders, without more" (emphasis added).

[65] As I read this part of the judgment, Garson J.A. clearly had in mind the potential for a common issue in nuisance that necessarily encompassed *both* elements of the tort, notwithstanding her subsequent reference to "non-trivial interference", which was the element that was the focus of that case. In my opinion, given her preceding explanation, she intended her instruction to cover both elements of nuisance.

[66] It follows, as I see it, that the judge did not err merely by including both elements instead of limiting his reconsideration to the element of substantial interference. The question is whether it was open to him on the evidence to find a basis in fact to certify a common issue in nuisance "based on the mere fact of the evacuation and water advisory orders". I consider that it was.

[67] I turn first to the element of substantial interference. While it is true that there were variations in the geographical application of the orders at different times, the main orders for evacuation and water use covered the entire class, on penalty of imprisonment and fines. In this regard, it did not matter what kind of individuals they were. Their ability to use and enjoy their property was affected. While Mr. Kirk may ultimately fail in establishing that the law of nuisance extends to an interference with the right to use the property, as opposed to an interference with the property itself, I agree with the judge that the point is not so clear that it can be said that the claim is bound to fail.

[68] None of the cases cited to us by the appellants in support of their argument involved the complete loss of the right to use and occupy the properties, which is what occurred here. Each of those cases (including *Baker v Rendle*, 2017 BCCA 72, *Windsor v Canadian Pacific Railway Ltd.*, 2014 ABCA 108, and *Canada (Attorney General) v MacQueen,* 2013 NSCA 143) concerned an impact on the class members' properties that interfered with their use and enjoyment, but none involved an outright legal prohibition of their ability to use and enjoy the property. In my view, that prohibition provides some basis in fact for the proposition that the class members shared a common experience that could, in law, constitute substantial interference with their use or enjoyment of their land. In relation to the element of substantial interference, the situation is akin to what this Court approved as a common issue in *Gautam v Canada Line Rapid Transit Inc.*, 2011 BCCA 275 at para 38 [*Gautam CA #1*]; see also *Gautam v South Coat British Columbia Transportation Authority*, 2020 BCCA 135 at para 100 [*Gautam CA #2*].

[69] A similar analysis, in my view, is available in relation to the second component of the tort of nuisance: unreasonable interference. This is not a case like *Gautam SC #1*, where the question of reasonableness was left to be determined on an individual basis after the common issues trial. That case involved interference in the form of reducing public access to the class members' business premises. This case involves a prohibition of access by the class members to their own properties. *Gautam SC #1* involved a public work, the construction of the Canada Line, which

interfered with the class members' properties for the public good, and which would ultimately result in significant long-term benefits to many members of the class (see para 32). This case involves no prospect whatsoever of benefits either to the public or to members of the class. There are no advantages from the actions of a public authority to be weighed against individual harm caused thereby as was necessary in the Canada Line litigation: see *Gautam CA #2* at para 102 (I refer to the *Gautam* cases collectively as the "Canada Line litigation").

[70] I return to the *Antrim* case. It is important to remember that the main question on that appeal was how the Court should decide whether an interference with the private use and enjoyment of land is unreasonable when it results from construction that serves an important public purpose. It was, in short, all about the second element of unreasonable interference in the context of public works. Justice Cromwell went on to say at para 2:

> The answer, as I see it, is that the reasonableness of the interference must be determined by balancing the competing interests, as it is in all other cases of private nuisance. The balance is appropriately struck by answering the question whether, in all of the circumstances, the individual claimant has shouldered a greater share of the burden of construction than it would be reasonable to expect individuals to bear without compensation.
>
> [Emphasis added.]

[71] That is the sort of balancing that was required in the Canada Line litigation, and it provides important context. It is at what Cromwell J. described at para 48 as "the heart of the tort of private nuisance", so that it still needed to be considered even when the interference constituted material or physical damage to the land. But it is not at the heart of the nuisance alleged in this case. There is nothing to balance. No good was ever going to come out of the evacuation and water use orders. There was no beneficial or even normal use of property by others, no competing public or private interests, to weigh against the interference with the class members' use and enjoyment of their properties.

[72] Justice Cromwell went on to note at para 50 of *Antrim* that "even though the reasonableness of the interference should be assessed in every case, the court will

sometimes quite readily conclude that some types of interferences are unreasonable without having to engage in a lengthy balancing analysis."

[73] The gist of the judge's conclusion in *Kirk SC #2*, as I understand it, is that there was some basis in fact for concluding that this was such a case: the type of interference was such that both the degree and the unreasonableness could be assessed on a class-wide basis. In the end, as the judge commented in *Kirk SC #2* at para 23, the argument is novel, and Mr. Kirk may fail. Nevertheless, as Justice McIntyre for the Court was careful to say in *St. Pierre v Ontario (Minister of Transportation and Communications),* [1987] 1 SCR 906 at 915, "I do not suggest that the categories of nuisance are or ought to be closed".

[74] The appellants nevertheless assert that there can be no commonality when it comes to assessing the reasonableness of the interference, given the differences among the members of the class. That was an important factor in the Canada Line litigation. In the context of this particular case, however, the balancing factor that was an essential aspect of the Canada Line litigation, and also of *Antrim*, is missing.

[75] What the appellants argue, in essence, is that some of the members of the class may have suffered no loss, in which case the interference cannot have been unreasonable. That remains to be seen and, of course, is relevant to their claims for damages, which will be tried in part on an individual basis. But in the unusual circumstances of this case, it does not necessarily mean that the clear and absolute interference with their ability to use and enjoy their property was reasonable. The commonality arises because the interference, in the form of the evacuation and water use orders, applied equally to every property and each class member. The question becomes, in essence, can it ever be reasonable for a property owner, lessee or occupier to be subjected to such a prohibition when there is no public benefit?

[76] Moreover, the appellants raised a similar objection at the initial hearing in the context of submissions concerning the class definition being too broad because of differing interests in particular properties by particular class members. As the judge

observed (*Kirk SC #1* at para 78), “refining the class or even creating subclasses are considerations which may be addressed as things become clearer post-certification.” This Court agreed with that observation: *Kirk CA* at para 60.

[77] In my view, at this stage of the litigation, it was open to the judge to certify common question (e) as he stated it. The judge will, of course, continue to manage this litigation and will be in a position to deal with how the interference is to be assessed on a class-wide basis. As the judge commented in *Kirk SC #1* at para 159:

> As well, the litigation plan filed is reasonable based on the current stage of the proceedings. It reflects an understanding of the case and a framework for proceeding efficiently. Obviously, it is a work in progress, as in most other cases at this stage.

4.3 Aggregate damages: the appellants’ position

[78] The appellants argue that the judge erred in law in certifying a common issue for aggregate damages because the preconditions of section 29 of the *CPA* cannot be met. It is based largely upon their proposition that the judge erred in certifying common issue (e) in nuisance. As noted above, I am satisfied that the judge did not so err.

[79] To reiterate, section 29(1) of the *CPA* provides as follows:

> **29** (1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if
>
> (a) monetary relief is claimed on behalf of some or all class members,
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[80] The judge did not specifically deal with aggregate damages in *Kirk SC #1*, but in *Kirk CA*, this Court remitted the question of damages in the aggregate to the judge for consideration. In *Kirk SC #2*, as we have seen, the judge certified the issue this way at para 28:

> Can a part of the Class Members' damages in nuisance be assessed in the aggregate pursuant to section 29 of the *CPA*? If so, in what amount?

[81] In doing so, the judge acknowledged the argument of the appellants that in accordance with section 29, aggregate damages cannot be certified as a common issue where liability has not been established. In this case, they pointed out, whether they are liable in nuisance will depend upon questions of fact that remain in issue concerning the nature of the interference. The judge observed at para 26 that "[t]he criteria under [section] 29 need only be met to award such damages, not to certify them as a common issue."

[82] The appellants argue nevertheless that for aggregate damages to be certified as a common issue, a plaintiff must show that there is a reasonable likelihood that the preconditions in section 29(1) would be satisfied and an aggregate assessment would be made if the plaintiffs are otherwise successful at the common issues trial. They say that the judge erred in concluding that the preconditions would be met because of his error in failing to properly address the second branch of the test in nuisance. Accordingly, he wrongfully concluded that liability would be made out so that the preconditions to section 29 would be satisfied. This further follows, they say, because nuisance is not actionable without damages, and the damages would have to be assessed on an individual basis.

[83] Moreover, they assert, Mr. Kirk provided no methodology for assessing damages in the aggregate, and the judge was in error when he found in *Kirk SC #2* at para 26 that "the theory of damages inherent to the plaintiff's claim in nuisance for loss of a right, while perhaps not fully developed, is sufficient to satisfy the 'methodology' requirement referenced by the defendants".

4.4 Discussion

[84] I see no error in the judge's observation that the criteria of section 29(1) of the *CPA* need only be met to *award* aggregate damages, not to *certify* them as a common question. Indeed, that is inherent in this Court's order remitting the question of "damages in the aggregate for the evacuation" to the chambers judge (*Kirk CA* at

para 50). That was in the context of this Court's conclusion (*Kirk CA* at para 48) that one of the three kinds of damages being advanced in this litigation comprises "loss of use and enjoyment of property as a result of the evacuation and contamination".

[85] Moreover, to say as the appellants do that "nuisance is not actionable without damages", means no more than to say that nuisance is not actionable without a substantial and unreasonable interference with the use and enjoyment of property. If the latter is established, then nuisance is actionable: see *Antrim* at paras 21–24.

[86] Consequently, the sort of loss contemplated here, as discussed by this Court in *Kirk CA*, being loss of use and enjoyment of property as a result of the evacuation, is sufficient to ground any claim in nuisance if it is found at trial to rise to the level of substantial and unreasonable interference: see *Antrim* at para 23: "Nuisance may take a variety of forms and may include not only actual physical damage to land but also interference with the health, comfort or convenience of the owner or occupier" [citation omitted].

[87] It follows that the force of the appellants' first argument dissipates in view of my conclusion that the judge did not err by including the unreasonable interference branch of the test for nuisance in the nuisance common question. In the result, the potential arises that liability *could* be made out, satisfying section 29(1).

[88] The judge did nothing more than recognize that, if Mr. Kirk succeeded at the common issues trial in establishing liability in nuisance flowing from the evacuation, the appropriateness and amount of aggregate damages would become an issue that would necessarily be common. The question of individual damages over and above any base level claimed on an aggregate basis, if any, would be determined in the next stage of the trial.

[89] This sort of bifurcated approach is consistent with this Court's decision in *Tucci v Peoples Trust Company*, 2020 BCCA 246, where, as the judge in *Kirk SC #2* observed, this Court allowed the certification of the following as a common issue (at para 122): "Can a part of the Class Members' damages be assessed in the

aggregate pursuant to section 29 of the [*CPA*]? If so, in what amount?" (emphasis added).

[90] The approach has also been followed elsewhere: see, for instance, *Brazeau v Canada (Attorney General)*, 2020 ONCA 184 at paras 102–104.

[91] Certifying the question of aggregate damages as a common question does not indicate an entitlement to aggregate damages, as the appellants' arguments suggest. They assert that, in accordance with the judgment of the Supreme Court of Canada in *Pioneer Corp. v Godfrey*, 2019 SCC 42 at para 116, the aggregate damages provisions of the *CPA* do not allow for an award of damages for class members who suffered no loss. But that discussion occurred in a very different context. It was not about whether aggregate damages could be certified as a common issue; in fact, the Court did not disturb the certification judge's decision to certify two common issues related to aggregate damages. The point the Court was making was different. It concerned the situation *following* the common issues trial:

> [118] … What the jurisprudence of this Court maintains, however, is that, in order for individual class members to participate in the award of damages, the trial judge must be satisfied that each has *actually suffered* a loss where proof of loss is essential to a finding of liability (as it is for liability under s. 36 of the *Competition Act*). Therefore, ultimately, to use the aggregate damages provisions, the trial judge must be satisfied, <u>following the common issues trial</u>, either that *all* class members suffered loss, or that he or she can distinguish those who have not suffered loss from those who have.
>
> [Italicized emphasis original; underlined emphasis added.]

[92] This is entirely consistent with the judge's observation at para 26, quoted above, that "[t]he criteria under [section 29] need only be met to award such damages, not to certify them as a common issue."

[93] The Supreme Court of Canada further confirmed at para 119 of *Pioneer Corp.* that methodology that may not be sufficient for the purpose of establishing liability to all class members (depending on the findings of the trial judge) may nevertheless be sufficient for the purposes of certifying aggregate damages as a common issue. In this case, the appellants have shown no proper basis for interfering with the judge's

exercise of discretion in his case management role in accepting that "the theory of damages inherent to the plaintiff's claim in nuisance for loss of a right, while perhaps not fully developed, is sufficient to satisfy the 'methodology' requirement referenced by the defendants" (at para 26). The *Pioneer Corp*. case simply does not support their position.

[94] I conclude that the judge did not err in certifying, as a common issue, the question of whether a part of the Class Members' damages in nuisance can be assessed in the aggregate pursuant to section 29 of the *CPA.*

4.5 Preferability

[95] In *Kirk SC #1*, after a thorough review of all the appropriate factors, the judge concluded that a class proceeding was the preferable procedure.

[96] In *Kirk CA*, this Court remitted the question of preferability back to the chambers judge because the Court had not heard submissions on how the preferability analysis would be affected by the removal of the common issue regarding diminution of property value. Nevertheless, this Court commented at para 151 that, in the absence of that common issue, "the amounts to be recovered will undoubtedly be smaller, thus increasing the concern for access to justice which is one of the primary advantages of a class action" (emphasis added; citation omitted)". In other words, the case in favour of class proceedings appeared to be even stronger than it was below.

[97] In *Kirk SC #2*, the judge carefully considered the arguments of the appellants to the contrary, and once again concluded that a class proceeding was the preferable procedure.

[98] The appellants now say that the judge erred in that conclusion by failing to exercise his discretion judicially, thereby committing an error in principle. I cannot agree.

[99] The appellants argue that individual trials are inevitable, and that there are more individual issues than there are common issues. As a result, they say, the individual plaintiffs have to come forward in any event and little in the way of judicial and financial resources will be saved. They complain that the judge failed to reweigh each factor, failed to engage in a comparative cost/benefit analysis, and failed to review the pros and cons of the two alternatives: a class proceeding and individual proceedings with joinder.

[100] In my view, the judge considered all of these matters in his two decisions, which should properly be read together. In *Kirk SC #1*, he reviewed and weighed each of the considerations set out in section 4(2) of the *CPA*. In *Kirk SC #2*, when he revisited the question of preferability, he dealt with the specific arguments raised by the appellants, noting correctly, among other things, that a predominance of individual issues is not determinative of the preferability analysis (at para 45). He relied in large part on the centrality of the questions of causation and responsibility in negligence, and on the concerns of access to justice and judicial economy. In my view, he did not err in following this approach; the appellants are asking us, in essence, to reweigh the judge's careful determinations.

[101] It is important to remember that the context is a single incident mass tort. At the heart of the case is the question of who is at fault and how that fault is to be apportioned among the defendants—questions that remain even if the claim in nuisance does not succeed. With a class proceeding, no potential members of the class need come forward until these common issues have been decided. They can then join in or opt out with no exposure to costs as yet. If the judge rules against the class, they need never come forward and they will have no exposure to costs.

[102] As this Court remarked in *Kirk CA*, access to justice is an important factor. In my view, this is particularly so in a case such as this with a class that comprises thousands of people whose access to justice is enhanced to the extent it provides them with significant anonymity (see, for instance, *Lewis v WestJet Airlines Ltd.*, 2022 BCCA 145 at para 114).

[103] Considering all of these circumstances, I am satisfied that no error in principle has been demonstrated.

5. DISPOSITION

[104] For these reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Justice Griffin"