IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1111 Seymour Residences Ltd. v. Vancouver (City),* 2024 BCSC 2304

Date: 20241218
Docket: S234500
Registry: Vancouver

Between:

1111 Seymour Residences Ltd. and Michael Wilson

Plaintiffs

And

City of Vancouver, Vancouver Coastal Health Authority and Raincity Housing and Support Society

Defendants

Before: The Honourable Justice Chan

Reasons for Judgment

Counsel for the Plaintiffs:	C. Ferris, K.C. A.T. Paczkowski S. Kaura, Articled Student
Counsel for the Defendant City of Vancouver:	I.K. Dixon K. Nakanishi
Counsel for the Defendant Vancouver Coastal Health Authority:	D.M. Gyton J.A. Bank J.C. Fu
Counsel for the Defendant Raincity Housing and Support Society:	A. Howell L.H. Leung S. Mainar, Articled Student
Place and Date of Trial/Hearing:	Vancouver, B.C. October 21–25, 2024
Place and Date of Judgment:	Vancouver, B.C. December 18, 2024

Table of Contents

Introduction

[1] The plaintiffs propose a class action on issues of liability and damages in their claims of nuisance against the defendants. The underlying claim relates to the operation of an overdose prevention site at a location in downtown Vancouver. The plaintiffs claim the operation of the overdose prevention centre substantially and unreasonably interfered with the use and quiet enjoyment of their homes and properties, as incidents of disorderly conduct were prevalent. The plaintiffs seek to represent two related groups: a residential class of persons who lived in homes in the area and a class of business owners who had businesses in the area. The plaintiffs bring claims in private nuisance and public nuisance, and seek certification under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("CPA").

[2] The individual plaintiff, Michael Wilson, owns and lives in a strata unit in the building at 1238 Seymour Street, about a block from the Thomas Donaghy Overdose Prevention Site (the "OPS") at 101-1101 Seymour Street, Vancouver. Mr. Wilson has lived in this area with his family since 2013. He works in advertising and as a political consultant. He had his own experiences with addiction early on in his life, and is involved in outreach programs to assist those struggling with homelessness, addiction and poverty.

[3] The corporate plaintiff, 1111 Seymour Residences Ltd., is a wholly owned subsidiary of Wall Financial Corporation ("Wall Financial") and the registered owner of a multi-family residential rental complex at 1107-1115 Seymour Street (the "Seymour Residences").

[4] The Seymour Residences is next to 1101 Seymour Street, the building where the OPS was located. 1101 Seymour Street is owned by the City of Vancouver, and is located at the corner of Seymour and Helmcken Streets. 1101 Seymour is a 15-storey building with four floors of social services and 11 floors of non-market rental housing. Suite 101 was the ground floor location for the OPS, and is across the street from the Emery Barnes Park.

[5] The defendants are the City of Vancouver (the "City"), as the landlord of 101-1101 Seymour; Vancouver Coastal Health Authority ("VCHA"), lessee of the space from the City; and Raincity Housing and Support Society ("Raincity"), a non-profit society that was contracted by VCHA to operate the OPS. The OPS was at this location from March 2021 to March 2024.

[6] The plaintiffs allege that the OPS had a significant impact on the neighbourhood. There was open use and sale of illicit drugs on the sidewalk outside the OPS, discarded needles and drug paraphernalia on the ground and in the park, human waste in the alleys, encampments outside which blocked pedestrians, frequent incidents of break-ins and thefts in the surrounding buildings, and groups of people loitering outside in various stages of intoxication. There was yelling, screaming, and sounds of ambulances, firetrucks and police sirens throughout the day and night. The plaintiffs allege the defendants operated the OPS without regard for the neighbourhood, and the plaintiffs suffered loss of use and enjoyment of their properties. The plaintiffs assert their claim is not about the harm reduction policies which underpin safe consumption sites and overdose prevention sites, but about how the defendants mismanaged the operation of this OPS and have not taken responsibility for its impact on the neighbourhood. The plaintiffs argue the interests of behaviour modification, judicial economy and access to justice would be met by certification as a class action. There are up to 5000 people who are potential class members.

[7] The defendants argue this action does not meet the test for certification. The OPS was opened pursuant to Ministerial Order M 488/2016 of the Minister of Health (the "Ministerial Order") in December 2016, after a declaration of a public health emergency by the provincial health officer in April 2016. This Ministerial Order required regional health boards to provide overdose prevention services where a need was identified. The defendants say there was such a need in the Emery Barnes neighbourhood. The OPS opened in March 2021, at a time when the world was also impacted by the COVID-19 pandemic. The province had ordered the decampment of tent cities, including Oppenheimer Park, in May 2020. Some of those individuals

moved into supportive housing at hotels on Granville Street nearby. The defendants say homelessness, poverty and drug use—those phenomena cited as examples of nuisance by the plaintiff—were already prevalent in the neighbourhood before the OPS opened.

[8] The defendants' position is individual trials are required for the plaintiffs to prove it was the OPS that caused the various categories of disorderly conduct. The defendants say the issue of causation in this nuisance claim is not straightforward and cannot be litigated on a class-wide basis. The defendants further argue there are no common issues that can properly be the subject of certification, and this action ought not proceed as a class action.

Factual Background

Evidence of the Plaintiffs

[9] The plaintiffs have tendered affidavits from the two plaintiffs, Mr. Wilson and Bruno Wall, the president and director of 1111 Seymour Residences Ltd. In addition, the plaintiffs have submitted affidavits from the residential building managers at the Seymour Residences and the director of security for Wall Financial. The plaintiffs also submitted records obtained from the City through freedom of information requests.

[10] VCHA objected to the admissibility of portions of these affidavits, arguing there was opinion, unattributed hearsay, conclusions and argument in the guise of evidence. Most of the objections relate to VCHA's view that the affiants were opining on causation, providing their views that the OPS was the cause of the incidents of disorderly conduct the affiants observed. In my view, these affidavits were not intended to provide an opinion on legal causation. The affiants were providing their first-hand observations of what they saw outside. I do not see any issue with respect to admissibility.

[11] These affidavits set out personal observations of drug use, encampments, discarded needles, garbage, human waste, intoxicated people, breaches of security at the Seymour Residences, and loitering outside the Seymour Residences. After the

OPS was relocated in April 2024, the affiants state the neighbourhood has returned to calm. Photographs were attached showing the area outside the OPS during and after the OPS was operated at that location.

[12] The plaintiffs have submitted an expert report from Dr. Julian Somers, a clinical psychologist and professor of health sciences at Simon Fraser University. VCHA and Raincity both objected to the admissibility of this expert opinion. They argue it is of no probative value as it does not relate to any issues in the certification hearing, and that Dr. Somers' report provides no methodology to assess a class-wide loss. I find that Dr. Somers' report is admissible, as he provides his opinion on the shortcomings of the OPS. This opinion may be relevant to the question of commonality on liability issues.

[13] Dr. Somers' opinion is that there were insufficient "evidence-based practices" to address the additional needs of the target population at the OPS, such as referrals for housing, employment, medical and psychological interventions: Somers Affidavit No. 1 at 8–9. His opinion is that the lack of these further referral to services led to the foreseeable impacts the OPS produced in the neighbourhood. Without these further referrals, "there was little to prevent OPS clients from continually increasing in numbers and surviving in the immediate vicinity of the OPS": Somers Affidavit No. 1 at 8

Evidence of the Defendants

[14] The defendants tendered affidavits from the deputy chief medical health officer of VCHA, the operations director for substance use and harm reduction with VCHA, the deputy city manager, and the associate director of Raincity. The defendants' evidence provides background and context of the opening of the OPS, why that location was chosen, and various data compiled from the City's fire and rescue service and the City's 311 system, used to request service or report an issue.

[15] In addition, the defendants tendered an expert report from Dr. Thomas Kerr, a psychologist and professor in the division of social medicine at the University of British Columbia. Dr. Kerr's opinion is that the opening of the OPS did not cause the incidents

of disorderly conduct complained of by the plaintiffs. His opinion is that the research shows drug users do not travel more than four city blocks to use a drug consumption site, and there is no evidence to support a "honey pot" effect which draws additional users from a wide area. He is of the view the disorderly conduct was contributed to by a variety of factors, including a large and rapid increase in homelessness in Vancouver and the establishment of new social housing buildings near the area.

Legal Framework

[16] The requirements for certification are set out in s. 4 of the CPA.

> **Class certification**
>
> **4** (1) Subject to subsections (3) and (4), 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.
>
> (2) 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 the following:
>
> (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.

Do the Pleadings Disclose a Cause of Action?

[17] The first certification requirement requires that the pleadings disclose a cause of action. This requirement is assessed on the same standard of proof that applies to a motion to dismiss. That is, a plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25 ("*Hollick*"); *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 63 ("*Pro-Sys*").

Elements of Private Nuisance

[18] For a claim in private nuisance, there must be a substantial interference by the defendant with the owner's use and enjoyment of land that is unreasonable. A substantial interference with property is one that is non-trivial. Not every minor and transitory interference is actionable. It must be an interference that substantially alters the nature of the plaintiff's property or interferes to a significant extent with the actual use being made of the property: *Antrim Truck Centre Ltd. v. Ontario (Transportation),* 2013 SCC 13 at paras. 19–22 ("*Antrim*"). 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: *Antrim* at para. 23.

[19] The reasonableness analysis must be assessed in light of all the circumstances. The balancing asks whether the interference is such that it would be unreasonable to ask the owner to suffer it without compensation: *Antrim* at para. 25. The focus of the reasonableness analysis in private nuisance is on the character and extent of the interference with the claimant's land; the burden on the claimant is to show that the interference is substantial and unreasonable, not to show that the defendant's use of its own land is unreasonable: *Antrim* at para. 28. The plaintiff must

show the substantial and unreasonable interference is caused by the defendant: *Milward v. Cache Creek (Village),* 2024 BCSC 352 at paras. 21–25, 29; *Jorgensen v. Kamloops (City),* 2020 BCSC 864 at paras. 78–80; *Nelson v. British Columbia (Environment),* 2020 BCSC 479 at para. 267. The plaintiffs also argue a defendant may be liable for failing to remedy a nuisance it did not create or consent to on its own property after becoming aware of it or could have become aware of it: *The Owners, Strata Plan LMS 3539 v. Ng*, 2016 BCSC 2462 at para. 33.

Elements of Public Nuisance

[20] For a claim of public nuisance, the plaintiff has to show a public right was unreasonably interfered with by the defendant and that the plaintiff suffered special damage. A public nuisance has been defined as any activity which unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience: *Ryan v. Victoria (City),* [1999] 1 S.C.R. 201 at para. 52 ("*Ryan*"). Whether or not a particular activity constitutes a public nuisance is a question of fact. Many factors may be considered, including the inconvenience caused by the activity, the difficulty involved in lessening or avoiding the risk, the utility of the activity, the general practice of others, and the character of the neighbourhood: *Ryan* at para. 53.

[21] A plaintiff must show special damage, which is damage different from that suffered by the general public. However, there is a debate in the jurisprudence about whether special damage need constitute a different type or simply a different degree of damage to the general public: *O'Connor v. Canadian Pacific Railway Limited,* 2023 BCSC 1371 at paras. 163–170 ("*O'Connor*").

The Pleadings

[22] The plaintiffs filed an amended notice of civil claim on August 27, 2024. The plaintiffs plead the following as the "Impugned Conduct", occurring between March 1, 2021 and March 31, 2024, which they claim has substantially and unreasonably interfered with the use and enjoyment of their properties:

- Loitering, sleeping, camping, erecting structures, storing and/or abandoning personal property and debris on public and private lands

around the OPS, thereby impeding or dissuading access to homes and businesses in the Emery Barnes Neighbourhood;

- Defecating on the ground within the Emery Barnes Neighbourhood, particularly the alley ways;
- Depositing garbage and other debris throughout the Emery Barnes Neighbourhood, including biohazardous materials such as used needles and syringes distributed by RainCity staff;
- Behaving in a disorderly fashion and invading the privacy of the Class Members;
- Engaging in criminal activity around the OPS, including the sale and use of illicit drugs, assault, vandalism, property damage and trespass;
- Creating noise disturbances;
- Creating a general air of discomfort that has affected the Plaintiffs and Class Members, and discouraged or impeded members of the public from seeking access to businesses and residences in the Emery Barnes Neighbourhood.

(Collectively the "Impugned Conduct")

[23] The plaintiffs plead they have "repeatedly brought the ongoing Impugned Conduct to the attention of the Defendants", and the defendants "have failed to take effective steps to prevent the people they invite to the Emery Barnes Neighbourhood for the purposes of accessing the OPS from unreasonably and substantially interfering with the use and enjoyment of neighbouring properties and the operation of neighbouring businesses".

[24] The plaintiffs also plead "the Impugned Conduct also unreasonably and substantially interfered with the Plaintiffs' and Class Members' public interest in questions of health, safety, morality, comfort or convenience; in traversing public highways; and in the use and enjoyment of public resources and facilities in the Emery Barnes Neighbourhood".

[25] The plaintiffs plead the defendants knew or ought to have known about the private and public nuisance caused by the Impugned Conduct and have failed to take any or sufficient steps to abate the nuisance. The plaintiffs plead they have suffered harm, loss, damage and expense including non-pecuniary loss, loss of business and/or rental income, out of pocket expenses to repair property damage and

diminished value of real property. With respect to the public nuisance, the plaintiffs plead they have suffered “special and particular damages above and beyond those suffered by the public generally”.

[26] The defendants argue the pleadings are not sufficient to disclose causes of action in private nuisance and public nuisance. With respect to the tort of private nuisance, the defendants allege the pleadings do not establish the plaintiffs’ use of their own private property was substantially and unreasonably interfered with by the Impugned Conduct. The defendants argue the pleadings are vague, and only reference acts in the public, with no connection to how these acts interfered with the plaintiffs’ use of their own personal space. With respect to the tort of public nuisance, the defendants argue there is no basis in the pleadings to hold them liable, as the action ought to be against the individuals who engaged in the Impugned Conduct. The defendants argue the special damage has not been sufficiently particularized.

[27] In my view, assuming all facts pleaded are true, it is not plain and obvious the plaintiffs’ claims cannot succeed. While the descriptions of the Impugned Conduct are general, the descriptions in the pleadings do provide a basis for the torts of private and public nuisance. At this stage the Court is not assessing merits. The pleadings do set out acts which could be viewed as substantial and unreasonable interference with the use and enjoyment of the plaintiffs’ property, as there is impeded access to homes and businesses and interference with privacy, sufficient for the tort of private nuisance. The plaintiffs did plead special damage above and beyond those suffered by the public generally, as the plaintiffs live and work in the area and have experienced a greater degree of harm. The plaintiffs plead the defendants failed to take steps to prevent those engaging in Impugned Conduct from substantially and unreasonably interfering with the use and enjoyment of the neighbourhood.

[28] I find the pleadings disclose causes of action in private nuisance and public nuisance.

Some Basis in Fact

[29] The remaining requirements are to be assessed on the "some basis in fact" standard. It is a "minimum evidentiary basis", less than the standard of a balance of probabilities: *Hollick*, at paras. 24–25. Certification is a procedural step, focused on the form of the action and not on the merits. The court does not resolve conflicts in the evidence nor weigh the evidence: *Pro-Sys*, at para. 102; *Kirk v. Executive Flight Centre Fuel Services Ltd.,* 2019 BCCA 111 at para. 20 [*Kirk*, *BCCA* 2019].

[30] That being said, certification is a useful screening device, and the court is not to engage in such a superficial analysis of the sufficiency of the evidence that the scrutiny becomes only symbolic: *Pro-Sys* at para. 103.

Is there an Identifiable Class?

[31] There must be an identifiable class of two or more persons. The governing principles were summarized in *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at para. 82:

> [82] In sum, the principles governing the identifiable class requirement may be summarized as follows:
>
> - the purposes of the identifiable class requirement are to determine who is entitled to notice, who is entitled to relief, and who is bound by the final judgment;
> - the class must be defined with reference to objective criteria that do not depend on the merits of the claim;
> - the class definition must bear a rational relationship to the common issues — it should not be unnecessarily broad, but nor should it arbitrarily exclude potential class members; and
> - the evidence adduced by the plaintiff must be such that it establishes some basis in fact that at least two persons could self-identify as class members and could later prove they are members of the class.

[32] There is no dispute in this matter that there are two or more persons who fall into the plaintiffs' proposed class definition. The issue is whether the plaintiffs have properly defined the potential class.

[33] The amended NOCC define the class as persons who have:

> a) Owned and occupied property or rented and occupied property pursuant to a tenancy agreement coming under the *Residential Tenancy Act*, SBC 2002, c 78 within the Emery Barnes Neighbourhood, as defined below (the "Resident Class"); or
>
> b) Operated a business from a premise within the Emery Barnes Neighbourhood (the "Business Class")
>
> at any time from March 2, 2021 (when the OPS began operating in the Leased Premises) to the date of certification of this action as class proceeding, or such other date as this Court deems just.
>
> (collectively, the "Class Members")

[34] The Emery Barnes Neighbourhood is defined as the area of downtown Vancouver bounded by Drake Street (to the south west), Homer Street (to the south east), Nelson Street (to the north east) and the alley behind Granville and Seymour Streets (to the north west). A map of the area is attached as Appendix A.

[35] The plaintiffs argue a class can be set by geographical boundaries: *Kirk*, *BCCA* 2019 at para. 63; *Hollick*. The plaintiffs believe based on population census data, there are between 4000 to 5000 people in the proposed class.

[36] The Emery Barnes Neighbourhood is an area defined by the plaintiffs for the purpose of this lawsuit. The OPS is located at 1101 Seymour, near the corner of Seymour and Helmcken, across the street from the Emery Barnes park. The plaintiffs have included properties that border on the streets and alley ways one block in all directions of the Emery Barnes park, with the exception of the north boundary, which only reaches to the alley way between Seymour and Granville (and does not include addresses on Granville Street). The plaintiffs say it is appropriate to exclude Granville Street, as that neighbourhood is qualitatively different from the Emery Barnes Neighbourhood. Granville Street is known as Vancouver's "entertainment district" featuring a range of retail shops, restaurants, hotels, live performance venues, nightclubs, bars and cultural spaces, and the plaintiffs argue it should not be included in the class definition.

[37] The defendants argue the proposed class definition is arbitrary, and drawn to benefit the representative plaintiffs. They argue the plaintiffs have provided no evidence to explain the location of the boundaries. The defendants argue the boundaries are not rationally connected to the allegations of private nuisance and public nuisance proffered at the certification hearing, as some locations where alleged acts of Impugned Conduct occurred are included and some locations have not been included.

Analysis

[38] I will set out the evidence from the plaintiffs on the locations of Impugned Conduct to determine if the proposed boundaries are rationally connected to the claim. Mr. Wilson deposed he has observed loitering, injecting drugs, intoxicated people lying on the ground, makeshift camps under the awning outside, in the immediate area outside the OPS: (Wilson Affidavit No. 1 at paras. 23–30). Mr. Wilson deposed he has also observed Impugned Conduct:

- "between Granville and Seymour Street, and stretch from Drake to Nelson Street" (Wilson Affidavit No. 1, para. 31);
- Most of the laneways, especially the lane between Seymour and Richards Street (Wilson Affidavit No. 1, para. 33);
- Businesses on ground floor of buildings have shattered or boarded up windows, "stretching all the way past Davie Street and all along Nelson and Drake Street (Wilson Affidavit No. 1, para. 33);
- On Davie Street, around Davie and Seymour intersection, Davie and Granville intersection, or the Davie and Richards intersection (Wilson Affidavit No. 1 at para. 34) (emphasis added);
- Emery Barnes Park (Wilson Affidavit No. 1 at para. 37);
- The alleyway next to his residence at 1238 Seymour (Wilson Affidavit No. 1 at para. 39);

- the building at 1238 Seymour (Wilson Affidavit No. 1 at para. 42–43);

[39] Bruno Wall, the representative of the corporate plaintiff, deposed that he has observed Impugned Conduct at the building at 1111 Seymour (next door to the OPS), the sidewalk outside the OPS and "the 1100 block of Seymour and the neighbouring Richards Street": Wall Affidavit No. 1 at paras. 22–31.

[40] The other affidavits from the director of security at Wall Financial, and the resident managers at Seymour Residences, detail incidents occurring outside the OPS, on Seymour Street, Helmcken Street, the underground parkade, an alcove and the courtyard at Seymour Residences.

[41] I find there is no basis in fact for the plaintiffs' proposed class definition. Mr. Wilson deposed to Impugned Conduct occurring outside the proposed boundaries (Granville and Davie intersection). There is no evidence of any Impugned Conduct occurring on Homer Street, which is included in the proposed boundaries. The plaintiffs rely on a planning report from the City for the area of Granville Street from Drake Street to Robson Street to argue the City also views Granville Street as distinct from other areas. While this may be correct for planning purposes, there is no explanation why the Impugned Conduct would stop at the alleyways and not continue on to Granville Street. It is unclear if the plaintiffs are arguing that because the nature of the businesses or residents on Granville Street are so different, any Impugned Conduct would not substantially and unreasonably interfere with their use of property. If that is the plaintiffs' argument, there is no evidence to explain why the impact on Granville Street businesses and residents would be different.

[42] There is no objective basis to accept the boundaries proposed by the plaintiffs. This case is unlike *Kirk v. Executive Flight Centre Fuel Services,* 2021 BCSC 987 [*Kirk*, *BCSC* 2021], aff'd *LaSante v. Kirk,* 2023 BCCA 28 [*Kirk*, *BCCA* 2023]*,* where the geographical boundaries for the proposed class was based on an evacuation order issued by the local health authority. The proposed class members were those ordered to evacuate, which is connected to their claim for nuisance for substantial and unreasonable interference with their use and enjoyment of their properties.

[43] In my view, there is a concern that the proposed boundaries are both over-inclusive and under-inclusive. It is difficult to discern, based on the evidence adduced, where the boundaries should be. The court is concerned the proposed boundaries are unnecessarily broad and also arbitrarily narrow, excluding potential class members. The evidence does not lead to any clear demarcations.

[44] Further, there is a concern that potential class members would include those who engaged in the Impugned Conduct. There is evidence that users of sites like the OPS generally do not travel far. The users stay close to where they live. There is evidence that a large percentage of the users of the OPS lived nearby. There is evidence from the associate director of Raincity that residents in the subsidized housing units in the same building above the OPS were causing disturbances, requiring additional security at the OPS. While the plaintiffs argue they have not sued anyone else, there still remains a possibility that class members may become defendants. In *O'Connor*, Chief Justice Hinkson, as he then was, found it problematic that potential class members could later be added as defendants as more became known about how the wildfire started: paras. 214–215. He found this presented a real risk of conflicting interests among the class members, relying on *Nixon v. Canada (Attorney General)*, 21 C.P.C. 269, 2002 CarswellOnt 1350 (S.C.) where certification was refused as the proposed class included individuals who may have also been liable.

[45] Given my findings below with respect to lack of common issues, in my view, there would be no utility in trying to amend the proposed class definition.

Do the Claims Raise Common Issues?

[46] The plaintiffs must show a basis in fact that the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members. An issue will be common where its resolution is necessary to the resolution of each class member's claim. The threshold is low, as the plaintiff need only show there is a triable factual or legal issue the determination of which will advance the litigation. Resolution of the common issue need not determine

liability: *Service v. University of Victoria*, 2019 BCCA 474 at para. 59. The relevant considerations for determining commonality are set out in *Pro-Sys* at para. 108:

> [108] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, this Court addressed the commonality question, stating that "[t]he underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis" (para. 39). I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of that decision:
>
> (1) The commonality question should be approached purposively.
>
> (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
>
> (3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
>
> (4) It not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
>
> (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[47] The plaintiffs seek certification of the following common issues:

a) Did the acts or omissions of any of the defendants, jointly or severally, cause or contribute to the Impugned Conduct?

b) Does the Impugned Conduct constitute a substantial interference with the use or enjoyment of Class Members' Properties?

c) Does the Impugned Conduct constitute an unreasonable interference with the use or enjoyment of Class Members' Properties?

d) Does the defence of "statutory authority" apply as a defence to the private nuisance claims alleged against VCHA in the Notice of Civil Claim?

e) Are the defendants, VCHA and the City, vicariously liable for the operation of the OPS?

f) Does the Impugned Conduct constitute an unreasonable and material interference with the public's interest in property, safety, health, comfort, or convenience?

g) Does the defence of "statutory authority" apply as a defence to the public nuisance claims alleged against VCHA in the Notice of Civil Claim?

h) Can causation of any damages incurred by the Class Members through the diminishment in market value, as alleged in the Claim, be determined as a common issue?

i) Can the Court make an aggregate assessment of the damages in nuisance suffered by the Class Members? If so, in what amount?

j) If the damage and/or loss to the Class Members was caused by the fault of two or more of the defendants, what is the degree to which each of the defendants is at fault?

k) If two or more of the defendants are found to be at fault, are those defendants jointly and severally liable to the Class Members?

The proposed common issues can be divided into issues on liability (a, b, c, e, f), issues on damages (h, i), issues on apportionment of liability (j, k) and issues on defences (d, g).

Proposed Common Issues on Liability

Did the acts or omissions of any of the defendants, jointly or severally, cause or contribute to the Impugned Conduct?

[48] The plaintiffs submit this is the common causation question which needs to be resolved for each class member's claim. The plaintiffs argue this is a general causation question which does not depend on individual circumstances. Further, the plaintiffs argue that even if there are other intervening causes for the Impugned Conduct, in addition to the defendants' conduct, that can be determined at trial and ought not to

prevent certification of the general causation question, relying on *Mostertman v. Abbotsford (City)*, 2024 BCSC 906 at paras. 111, 117.

[49] The defendants argue this is an incorrect framing of the causation question in an action for nuisance. They argue this question is not rationally connected to what the plaintiffs must establish to show the defendants are liable in nuisance—that the defendants caused substantial and unreasonable interference with the plaintiffs' use and enjoyment of their own property. The defendants emphasize that an action in nuisance is focussed on the impact of the defendant's actions on the plaintiff, and not on the defendant's conduct: *Antrim* at paras. 28–29; *O'Connor* at para. 175. The defendants say resolution of the question proposed by the plaintiffs will not advance the litigation.

Analysis

[50] The Court of Appeal in *Kirk*, *BCCA* 2019 made clear that class actions in nuisance will generally be certified only where there is a clear universal question, as individual damage assessments are central to liability:

> [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.]

[51] There have been some cases where class actions were certified for nuisance claims. In the Canada Line skytrain construction cases, the impact of the cut-and-cover construction on the business and property owners along the Cambie Street corridor was uniform, as access was impeded for all these properties. Certification was granted: *Gautum v. Canada Line Rapid Transit Inc.*, 2010 BCSC 163 at paras. 25–30, 34, aff'd 2011 BCCA 275 at para. 32. In *Mostertman v. Abbotsford*

(City), the central issue was the cause of the flooding in the Sumas prairie: at para. 104.

[52] The Court of Appeal in *Kirk*, *BCCA* 2019 explained why there must be a universal question before a nuisance action can be certified:

> [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.

[53] In my view, there is no such universal question in this case. The proposed causation question is not a common question that can be answered class wide. This is because the Impugned Conduct advanced by the plaintiffs consists of a variety of actions committed by different individuals at different locations and at different times. It is not possible to group all these different actions together to ask whether the defendants caused or contributed to these incidents.

[54] The Impugned Conduct consists of loitering, camping, erecting structures, defecating, depositing garbage, behaving in a disorderly fashion, engaging in criminal

activity including sale of drugs, assault, vandalism, creating noise disturbances and creating a general air of discomfort. The area where this activity allegedly occurred is about three blocks wide and three blocks long. The time period when this Impugned Conduct occurred spans three years. Further, individuals with their own motivations allegedly committed these acts. The court needs to answer this question individually for each alleged incident of Impugned Conduct.

[55] It is not possible to have a common trial to deal with causation of all the Impugned Conduct. The case at bar is unlike cases such as *Kirk,* where a class proceeding including a claim in nuisance for an oil spill was certified. The representative plaintiff described the claim as a "single incident mass tort": *Kirk v Executive Flight Centre Fuel Services*, 2017 BCSC 726 [*Kirk*, *BCSC* 2017], appeal allowed in part, *Kirk*, *BCCA* 2019. The oil spill resulted in the local health authority issuing an evacuation order and a water use order. The common questions in relation to nuisance that were certified focussed on these orders. In this case, there is no single event or order that can be the focus of a common issue.

[56] The plaintiffs' claim is based on the OPS operating at the Seymour location. This seems to be a claim focussed on a single entity. However, it is not the OPS which substantially or unreasonably interfered with the plaintiffs' use and enjoyment of their private property. The plaintiffs' claim is focussed on the users of the OPS conducting themselves in a manner outside the OPS which substantially and unreasonably interfered with the plaintiffs' use and enjoyment. To prove their claim in private nuisance, the plaintiffs have to prove the Impugned Conduct was done by users of the OPS, and that the Impugned Conduct substantially and unreasonably interfered with the plaintiffs' use and enjoyment of their own property. The actions said to comprise the Impugned Conduct are so varied it is difficult to discern any commonality which can be extracted as a basis for a common issues trial.

[57] In my view, it is not possible to determine this proposed issue on a class basis, as the Impugned Conduct encompasses a wide range of activity. It cannot be said there is a basis in fact to find the Impugned Conduct was completely and solely

engaged in by users of the OPS. Many of the incidents of Impugned Conduct arose in the evening hours when the OPS was closed. The wide geographical area of the defined class places Impugned Conduct blocks away from the OPS. For example, there is no evidence the individuals who deposited human waste in the alley ways, who behaved in a disorderly fashion, who created noise disturbances, or who broke into the parkade were users of the OPS. The plaintiffs rely on anecdotal evidence of observations from before and after the OPS was located on Seymour Street to ask the court to draw an inference of causation. A court hearing a trial on one of these incidents may or may not draw such an inference. However, for the purpose of the certification hearing, such an inference of causation cannot be drawn on the evidence adduced for all the Impugned Conduct to find a clear universal question.

[58] The plaintiffs rely on data from the City to argue there were increased incident reports to Vancouver Fire and Rescue Service in the area after the OPS was opened, as well as data from the corporate plaintiff's monitoring centre to show increased incidents. The defendants rely on the same data from the City to argue the statistics show there has been a steady decline in various categories of service calls, including abandoned items, feces cleanup, needle cleanup and street cleaning. It is not for the court to make any findings at this time. However, even if the court accepts the plaintiffs' characterization of the data, an increase in service calls or security incidents is insufficient to find a basis in fact that all the Impugned Conduct were by users of the OPS. That is the only theory which would support the plaintiffs' proposed causation question. If that finding is made, then and only then does the question of whether the defendants caused the Impugned Conduct advance the litigation. If that finding is not accepted—that all Impugned Conduct is from OPS users—then the question proposed would not advance the litigation at all. Answering the plaintiffs' proposed causation question does not really answer the question of legal causation.

[59] Further, this is not a mass tort case like an oil spill or a flooding which is based on a single source. The nuisance was not caused by an event, but by actions of other individuals who chose to loiter, throw used needles, make loud noises, and engage in sale and use of drugs. How this may impact a finding of causation on the defendants

cannot be ignored. The plaintiffs argue the defendants can be liable for nuisance created by third parties on lands controlled by the defendants, relying on *Mynott v. British Columbia (Ministry of Transportation)*, 2011 BCSC 258. The merits of that argument in these circumstances is an issue suitable for trial. However, for the purpose of the certification application, the Impugned Conduct committed by third parties relied on by the plaintiffs to prove nuisance is too varied to be a common issue.

> ***Does the Impugned Conduct constitute a substantial interference with the use or enjoyment of Class Members' Properties?***
>
> ***Does the Impugned Conduct constitute an unreasonable interference with the use or enjoyment of Class Members' Properties?***

[60] These proposed questions are not common issues. They concern individual causation requiring an assessment of the impact of the Impugned Conduct on each plaintiff's use and enjoyment of their property. Similar questions were found not proper to be certified in *Kirk*, *BCCA* 2019:

> [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.

> ***Does the Impugned Conduct constitute an unreasonable and material interference with the public's interest in property, safety, health, comfort, or convenience?***

[61] This proposed common issue relates to the tort of public nuisance. In my view, this is not a common issue that can be answered for the class. Each incident of Impugned Conduct has to be litigated, to see if it was done by users of the OPS, and the court has to determine if the Impugned Conduct substantially and unreasonably interfered with the public's interest in property, safety, health, comfort or convenience. There is too much variety in scope, duration and nature of the Impugned Conduct to

determine as a common issue, and there needs to be evidence the Impugned Conduct was done by users of the OPS.

Are the defendants, VCHA and the City, vicariously liable for the operation of the OPS?

[62] It is unclear how the resolution of this issue will advance the litigation. The issue is not vicarious liability for the operation of the OPS, but whether there is any vicarious liability for the Impugned Conduct engaged in by users of the OPS outside the premise of the OPS which substantially and unreasonably interfered with the plaintiffs' use of their own property or the public property. As set out above, the issues of causation and liability are individual assessments.

Proposed Common Issues on Damages

Can causation of any damages incurred by the Class Members through the diminishment in market value, as alleged in the Claim, be determined as a common issue?

Can the Court make an aggregate assessment of the damages in nuisance suffered by the Class Members? If so, in what amount?

[63] In my view, neither of the questions on damages can be certified as common issues. As the Impugned Conduct is so varied in nature, the damages will not be a uniform assessment. This is not the case where the impact was the same across the class, such as everyone being forced to evacuate. Class members may suffer some, all or none of the Impugned Conduct, depending on, for example, if they happen upon the encampments or live further away such that the noise disturbance did not travel there. Moreover, diminishment in market value of property is by its nature an individual assessment, as the specific characteristics of each property would need to be considered.

Proposed Common Issues on Apportionment of Liability

If the damage and/or loss to the Class Members was caused by the fault of two or more of the defendants, what is the degree to which each of the defendants is at fault?

If two or more of the defendants are found to be at fault, are those defendants jointly and severally liable to the Class Members?

[64] Issues of apportionment of liability cannot be determined on a class wide basis where liability is not established on said basis. In this case, liability has to be determined individually, based on (i) proof of the Impugned Conduct, (ii) that the users of the OPS caused the Impugned Conduct, and (iii) proof of a substantial and unreasonable interference with the plaintiff's use and enjoyment.

Proposed Common Issues on Defences

Does the defence of "statutory authority" apply as a defence to the private nuisance claims alleged against VCHA in the Notice of Civil Claim?

Does the defence of "statutory authority" apply as a defence to the public nuisance claims alleged against VCHA in the Notice of Civil Claim?

[65] The defence of statutory authority relates to the mandate contained in the Ministerial Order to set up overdose prevention sites where they are needed. In my view, it is not appropriate to determine the issue of defence of statutory authority in a common trial where the issues with respect to liability have not been certified.

[66] The defence of statutory authority consists of two parts: whether the act causing the nuisance was expressly or implicitly authorized by statute, and if so, whether the nuisance was the inevitable result of the statutorily authorized action: *Susan Heyes Inc. (Hazel & Co.) v. South Coast B.C. Transportation Authority,* 2011 BCCA 77 at para. 79, leave to appeal to SCC ref'd, 2011 CanLII 65590 (SCC). It would be difficult to determine if this defence has been made out in a trial isolated from the liability portion, as the court would not have made any findings about which acts constitute the nuisance. In this case, the acts alleged to constitute nuisance are wide-ranging, from criminal acts to littering. The court cannot make any findings about whether the acts constituting the nuisance were authorized by statute and if they were

the inevitable result, without making findings first on what constituted the nuisance. In my view, this issue cannot be certified as a common issue without the liability issues also being certified.

Is a Class Action Preferable?

[67] As this Court has found no common issues, it is not necessary to address if a class proceeding is preferable.

The Litigation Plan and Representative Plaintiff

[68] As this Court has found no common issues, it is not necessary to address the sufficiency of the litigation plan and if the representative plaintiffs are appropriate.

Conclusion

[69] The application for certification as a class action is dismissed.

"Chan J."

Appendix A