

WHAT'S A NUISANCE?

Three recent court decisions – from the U.S. Supreme Court, Ontario Court of Appeal, and B.C. Court of Appeal – involved actions claiming relief on the basis of nuisance. The results of these decisions are significant.

American Electric Power Co., Inc, et al v. Connecticut et al was decided by the U.S. Supreme Court on June 20, 2011. The case involved claims by a number of U.S. states and New York City as well as three nonprofit land trusts. The Plaintiffs asserted that by contributing to global warming, a number of major electric power companies had unreasonably interfered with “public rights” in violation of the federal common law of interstate nuisance. The Plaintiffs sought injunctive relief requiring the power companies to “cap...carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade.” The Supreme Court, in a unanimous decision of the 8 justices participating, held that the actions were not maintainable because the nuisance claim was superseded or “displaced” by provisions of the *U.S. Clean Air Act* which authorized the US EPA to regulate greenhouse gas emissions. The Court observed that the US EPA, as an expert agency, was better placed to regulate greenhouse gas emissions than a series of federal judges adjudicating on an *ad hoc* basis. The issue of whether state nuisance law might have application (or whether it was pre-empted by federal law) was left open by the Court for subsequent consideration. The Court was not unanimous but equally divided on whether the Plaintiffs had status to bring the action.

On June 2, 2011, the Ontario Court of Appeal in *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, in the context of a statutory claim for compensation, was called upon to determine whether a new section of Highway 417 near Ottawa which impeded road access to a truck stop owned by the Plaintiff substantially and unreasonably interfered with the Plaintiff’s use and enjoyment of its property so as to be actionable in nuisance. The truck stop was located on Highway 17 and the new section of Highway 417 had been constructed in part to re-route traffic away from Highway 17 as a matter of public safety. In an exhaustive decision, the Court reviewed the evolution of the tort of nuisance to the present day. Significantly, the Court said, “*Particularly as people live in closer proximity to each other, a certain amount, arguably an ever-increasing amount, of interference with each other’s property must be tolerated.*” The Court emphasised that before a claim in nuisance can be made out, a balancing of the competing interests must be undertaken, including balancing the utility of the conduct complained of, particularly where the conduct arises from an essential public service. After moving through this balancing process, the Court determined that a case in nuisance had not been made out. It might be noted, however, that the B.C. Court of Appeal in the February, 2011 judgment in *Heyes v. South Coast BC Transportation Authority*, applied the nuances of the balancing process somewhat differently.

On June 15, 2011, in *Gautam v. Canada Line Rapid Transit Inc.*, the B.C. Court of Appeal upheld a decision certifying a class action (a single action brought on behalf of a large group or class as opposed to individual law suits) in nuisance against the companies involved in the construction of the Canada Line. In *Gautam*, the class was comprised of a number of property owners and business operators in the Cambie Village area. In rejecting the Appellants’ arguments that the case was not appropriate for certification as a class action, in part because there was not sufficient commonality, the Court determined that the nuisance claims would not necessarily require an assessment of the impact of the Canada Line construction on each individual claimant such as to prevent certification of the nuisance claim as a class action.

This Current Summary was prepared by Gary Letcher and Andrea Akelaitis of the EKB Environmental Practice Group with the assistance of Stanley Leo and Murray Bartsch, both articling students at EKB.