

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mackay v. British Columbia*,
2013 BCSC 945

Date: 20130530
Docket: 10-1265
Registry: Victoria

In the Matter of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55

and

In the Matter of an Arbitration relating to Wendi Jane Mackay

Between:

Wendi Jane Mackay

Petitioner

And

**Her Majesty the Queen in the Right of the
Province of British Columbia**

Respondent

- and -

Docket: S126608
Registry: Vancouver

Between:

Wendi Jane Mackay

Petitioner

And

**British Columbia Minister of Forests, Lands and Natural Resource
Operations and the British Columbia Archeology Branch**

Respondents

And

The Attorney General of British Columbia

Pursuant to Section 16 of the
Judicial Review Procedure Act

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

In Chambers

Counsel for the Petitioner in both actions:

B.J. Wallace, Q.C.
D.K. Lovett, Q.C.

Counsel for the Respondents in both actions:

J.N. Eades
C.R. Bargaen

Counsel for the Attorney General:

J.G. Penner

Place and Date of Hearing of petitions:

Vancouver, B.C.
March 27 and 28, 2013

Place and Date of Judgment:

Victoria, B.C.
May 30, 2013

[1] The petitioner has brought two petitions as a result of the requirement she undertake significant archaeological work prior to replacing the existing single family home on a property she purchased that was not designated as a heritage site.

[2] A heritage site cannot be altered without a site alteration permit. This requirement applies to both designated and non-designated sites. Although the property she purchased was not designated as a heritage site, the petitioner has been put to a great deal of cost in dealing with delays and archaeological investigations on the property in order to obtain a site alteration permit. The petitioner claims that the requirements to undertake a heritage inspection and a heritage investigation on the site constituted nuisance, in that they significantly interfered with her use and enjoyment of the property.

[3] The first petition was filed in March 2010, and is an appeal of an arbitrator's award (the "Award") dated January 13, 2010. The petition addresses two questions of law arising from the requirement that the petitioner obtain and pay for a heritage inspection and investigation as preconditions for granting a site alteration permit under the *Heritage Conservation Act*, R.S.B.C. 1996, c. 187 [Act].

[4] The second petition was commenced in September 2012, and is a judicial review. The petitioner seeks a declaration that the respondents do not have the authority to order a property owner to obtain and pay for a heritage inspection and investigation as a precondition to obtaining a site alteration permit under the *Act*.

[5] The respondents oppose both petitions. The respondents say that the answers to the two questions to be addressed in the appeal from the arbitrator's award should be "no." The respondents take the position that the arbitrator did not make any errors in law.

[6] The respondents say that the petition for judicial review seeks relief based on the same facts that were before the arbitrator. By agreement between the parties, the petitioner's claim was heard and decided by the arbitrator who was appointed pursuant to the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (now entitled

Arbitration Act). The respondents take the position that the petition for judicial review is an abuse of process and should be dismissed summarily.

Background

[7] The background facts are set out in the Award, and have been summarized in two earlier decisions, *Mackay v. British Columbia*, 2011 BCSC 270 and 2011 BCCA 470. There is little controversy regarding the facts.

[8] In 2006, the petitioner and her late husband purchased a property located at 2072 Esplanade Avenue, Victoria, B.C., (the “property”) from her parents. The petitioner and her husband planned to demolish the existing house and build a new single family house.

[9] In 1971, Ray Kenny, who at all material times was the manager of the permitting and assessment section of the Archaeology Branch of the Ministry of Tourism, Sport and the Arts (the “Branch”), conducted archaeological research on the property for his master’s degree when it was the garden to the adjacent house. During Mr. Kenny’s project, a team of six people conducted an archaeological dig on the property for at least two months. Mr. Kenny’s research yielded more than 850 artifacts. Mr. Kenny prepared an extensive report on his findings that was filed with the Branch.

[10] In 1985, the petitioner’s parents purchased the vacant land on which Mr. Kenny had done his research, and built a house on it. Further artifacts were removed by Grant Keddie of the Royal British Columbia Museum during the construction of the house in 1985. No permits were required or issued in connection with either the construction of the house in 1985 or the removal of the artifacts.

[11] At the time they purchased the property, neither the petitioner nor her husband were aware that the property had been identified as having archaeological significance. There were no indications on title of any restrictions on the property, or that the property was a heritage site as defined by the *Act*. The petitioner and her

husband were unaware that artifacts of heritage value had been recovered from the property.

[12] The architect retained by the petitioner to design the new house suggested that the petitioner contact the Branch to determine whether a heritage-related permit was required for the removal of the old house and construction of the new one. The petitioner requested that her architect make those inquiries on her behalf.

[13] Branch officials advised the architect that the property was part of an undesignated heritage site and was protected by the *Act*, and that in order to build a new house, the petitioner was required to obtain a site alteration permit under s. 12 of the *Act*. In order to obtain the required permits, the petitioner had to engage and pay the costs of a consultant archaeologist to conduct a heritage inspection and prepare a report of the results to provide to the Branch.

[14] Accordingly, the petitioner retained Millenia Research Limited (“Millenia”) at her expense to conduct the required inspection. In order to proceed with the inspection, Millenia was required to obtain an inspection permit under s. 14(2) of the *Act*. The inspection permit was issued on May 7, 2007, and by June 15, 2007, all work authorized by the permit has been completed. The petitioner paid Millenia \$5,877 for the initial inspection.

[15] Millenia reported that the site tested positive for cultural deposits and recommended further work be undertaken to allow for a number of hand excavations, as well as careful machine removal and screening of cultural deposits. Millenia’s cost estimate for the additional work recommended in the report was \$42,792. The petitioner questioned both the Branch and Millenia about the requirement for further work on the site, given the extensive work that had been undertaken by Mr. Kenny in 1971. The petitioner subsequently terminated her contract with Millenia, which prompted the withdrawal of Millenia’s permit application on July 5, 2007.

[16] The petitioner then retained archaeologist Shane Bond for an all inclusive price of \$51,342, and a new permit application was made on August 30, 2007. What then occurred were various attempts by Mr. Bond to obtain a site alteration permit. Throughout the process, the petitioner continued to question the Branch about its authority to impose the requirement for a s. 14 investigation on the property.

[17] The petitioner says that as a result of the ongoing delays caused by the requirements imposed by the Branch, construction was delayed. The petitioner asserts she has suffered losses of approximately \$600,000, as a result of the costs associated with obtaining the site alteration permit, the additional costs associated with the delay in construction, and the loss of value of the property.

[18] The petitioner brought a claim against the Branch for the recovery of her losses, alleging that the Branch had wrongfully applied the permit scheme under the *Act*. In her claim, the petitioner alleged:

- a) the Branch did not have the statutory authority to require her to obtain and pay for a heritage inspection under s. 14 of the *Act* as a precondition to the issuance of the site alteration permit; and
- b) the Branch's requirements constituted a nuisance because they interfered with her enjoyment of the property.

[19] The parties agreed that the petitioner's claim would be determined in an arbitration under the *Commercial Arbitration Act*, and retained an arbitrator. The Award was issued on January 13, 2010, dismissing the petitioner's claim on the basis that she had failed to prove any liability on the part of the Crown.

[20] The petitioner sought leave to appeal the Award to the B.C. Supreme Court. The two questions of law framed by the petitioner were:

- a) Did the arbitrator err in law in failing to apply the correct test necessary to establish nuisance, as articulated in paragraph 133 of his reasons, in concluding in paragraph 137 of his reasons that the actions of the Branch

could not be said to have caused physical injury to the land or interfered with the petitioner's enjoyment of the property; and

- b) If nuisance is established, did the arbitrator err in law in finding that the Branch had the statutory authority to require the petitioner, in the manner it did, to engage at her expense archaeologists to conduct a heritage inspection and a heritage investigation on her property and to obtain permits under s. 14 of the *Act* for those purposes, as preconditions to granting her a site alteration permit under s. 122 of the *Act*?

[21] In February 2011 the chambers judge dismissed the application for leave to appeal on the grounds that there was no question of law raised in the Award in regards to nuisance. Since the second alleged error was only relevant in the event that nuisance was established, it was moot.

[22] The petitioner appealed. On November 16, 2011, the Court of Appeal set aside the February 2011 order and granted leave to appeal the Award on the two questions identified by the petitioner. This is that appeal.

[23] On September 20, 2012, the petitioner commenced a petition seeking judicial review and applying for a declaration that the respondents do not have the statutory authority under the *Act* to order a property owner to obtain and pay for a s. 14 heritage inspection and a s. 14 heritage investigation as preconditions to granting a site alteration permit. In the 2012 petition, the petitioner relies on some of the same facts that she relies on in support of the appeal from the Award.

[24] However, she also relies on some additional facts arising from her dealings with the Branch in 2012, which she alleges impacted the sale of the property to a third party.

[25] The petitioner received an offer to purchase the property in 2012. The offer was subject to several conditions, including the buyer's satisfactory review of the Branch's records for the property and any heritage conservation implications for the property. Following communications between the Branch and the purchaser's

realtor, additional conditions were added that there were no outstanding filings to be made or conditions to be fulfilled pursuant to the Act.

[26] The petitioner provided the relevant archaeology documents to the purchaser. However, the purchaser advised he would not sign off on the conditions because the archaeologists who conducted the excavations and inspections under the heritage investigation permit had not filed a report. The purchaser raised concerns that the Branch might require completion of the archaeological work at the purchaser's expense. The petitioner alleges she suffered losses as a result.

Petitioner's Position

[27] The petitioner takes the position that although the arbitrator articulated the correct test for nuisance, he applied a different test. The petitioner says after defining nuisance "as an act that directly or indirectly causes physical damage to the land or substantially interferes with the use or enjoyment of land", the only inference that can be drawn from the paragraphs that follow is that the arbitrator then applied a test for nuisance that did not include an act that "indirectly" "substantially interferes with the use and enjoyment of the land."

[28] The petitioner submits the Award contained contradictory findings in that the arbitrator stated the actions of the Branch in requiring archaeological work and permits to disturb the site for the purpose "cannot be said to have caused physical injury to the land or interfered with its enjoyment." The arbitrator then states in the next paragraph that "it is impossible to grant a permit to disturb a heritage site and avoid at the same time, an injury to or an interference with the land, the subject of the Permit."

[29] The petitioner submits, having made that finding, the arbitrator should have given effect to that impossibility in deciding whether the actions of Branch officials interfered with the petitioner's enjoyment of her property. The failure to do so was an error of law.

[30] The petitioner says that if the arbitrator was drawing a distinction between the Branch's role in requiring the archaeological work be done and issuing permits to allow it to be done, and the doing of work, he is making an error in law. The petitioner says the definition of nuisance includes indirect interference, and that it is an error in law to distinguish the bureaucratic act of requiring the interference from the physical interference that is the inevitable consequence of the requirement.

[31] The petitioner says the nuisance complained of and the harm suffered was that for several months the property could not be used for any purpose other than archaeological examination and research. The interference with the property's use and enjoyment was total. The petitioner was denied any use and enjoyment and had to pay for the interference. The arbitrator erred in failing to include interference with use and enjoyment of land in his concept of nuisance.

[32] The petitioner says there is no express provision in s. 12 of the *Act* allowing the Branch to require a heritage inspection or investigation as a precondition to issuing a site alteration permit under the section. The arbitrator made an error of law by inferring that because the Branch had the ability to impose conditions or refuse a permit under s. 12, it could require a home owner to engage and pay for a thorough heritage inspection and investigation of the property.

[33] Section 14(4) sets out a scheme under which the Minister or his delegate may order a heritage inspection or a heritage investigation, where certain developments or uses are proposed for land. Section 14(7) provides that the Minister, but not his delegate, may require the person developing or using the property to pay for the heritage inspection or heritage investigation. No such order was made in this case.

[34] The petitioner says the Branch officials had no authority to require a citizen to pay for a heritage inspection or investigation under any circumstances. In forcing the petitioner to do so, they exceeded their statutory authority. The petitioner says that she does not fall within the circumstances in which a Minister can order her to pay for the research under s. 14(7).

[35] Accordingly, both questions on the appeal should be answered “yes.”

[36] The petitioner takes the position that the petition for judicial review is not an abuse of process because the judicial review and the appeal from the Award seek different relief. The relief the petitioner is seeking on the judicial review is a declaration against the respondents, while on the appeal she seeks a direction to the arbitrator in support of a monetary claim.

[37] Further, the appeal relates to the past conduct of the Branch officials, including their assertion of statutory authority which the petitioner says they do not have. The judicial review relates to the past conduct but also relates to the subsequent assertion of statutory authority, which is ongoing and which has a continuing adverse impact on the petitioner.

[38] The issue on both the judicial review and the second question on the appeal is whether the officials of the Branch have the statutory power they assert. It is fair and convenient that the official’s exercise of a statutory power be considered in both contexts in the same hearing.

Respondents’ Position

[39] The respondents point to the fact that the appeal from the Award is not a hearing *de novo* or fresh hearing, and that the Court’s only task is to answer the two questions of law relating to the test of private nuisance.

[40] The respondents submit that both questions should be answered “no.” The law of nuisance attempts to strike a balance between the competing interests of neighbouring landowners. Nuisance considers whether the use of property has created substantial interference with the use or enjoyment of the property of a neighbour that is unreasonable in the circumstances.

[41] Reasonableness is determined by having regard to factors including the character of the neighbourhood, the sensitivity of the claimant, and the utility of the defendant’s conduct. Nuisance does not apply in the appeal because the petitioner

does not complain about adverse impacts that result from the actions on neighbouring lands. The Branch is not a neighbouring property owner. Rather, the Branch is the administrator of a statutory scheme that balances competing rights in property under the *Act*.

[42] This appeal stems from the petitioner's dissatisfaction with the statutory scheme. Although framed in nuisance, the real contention in the appeal is that the respondent ought to pay for the required inspection and investigation to ensure the protection of heritage property. The *Act* does not operate that way. The imposition of nuisance is incompatible with the *Act*.

[43] The *Act* provides discretion to the Branch to deny a site alteration permit application, absent the Branch having sufficient information regarding the nature of the site, the anticipated impact of the proposed work and any steps required to mitigate impact on heritage property. The arbitrator found that the Branch exercised its discretion reasonably and in good faith.

[44] A landowner electing to develop property may choose to acquire the requisite information, or not. The election by the landowner to retain agents to carry out an inspection and investigation on the landowner's own property does not fit within the rubric of private nuisance. Such activities are not imposed on land through the activities of a neighbouring property owner on neighbouring land. Rather, such activities are permitted by a property owner on its own lands in order to develop its property without disturbing or destroying heritage property in violation of the *Act*. Consenting to an allegedly nuisance-causing activity precludes a finding of the tort of nuisance.

[45] The arbitrator considered, and rejected, the petitioner's contention that the Branch had caused indirect interference, in finding at paragraph 139 of the Award that it could not be said the activities of the archaeologists were imposed upon the land by the Branch. The respondent says the arbitrator correctly dismissed the petitioner's claim in nuisance.

[46] The respondents take the position that the petition for judicial review is an abuse of process and should be summarily dismissed. The respondents say it is an abuse of process for the petitioner to seek to have the court determine, in the judicial review proceeding, the very question that has been decided by the arbitrator, and which is the subject of an appeal.

[47] The respondents submit that is also an abuse of process to seek declaratory relief when a statutory route of appeal exists: relying on *Shuswap Lake Utilities Ltd. v. Mattison*, 2008 BCCA 176.

Appeal from the Award

[48] As stated earlier, the two questions of law to be addressed in the appeal are:

- a) Did the arbitrator err in law in failing to apply the correct test necessary to establish nuisance, as articulated in paragraph 133 of his reasons, in concluding in paragraph 137 of his reasons that the actions of the Branch could not be said to have caused physical injury to the land or interfered with the petitioner enjoyment of the property? and
- b) If nuisance is established, did the arbitrator err in law in finding that the Branch had the statutory authority to require the petitioner, in the manner it did, to engage at her expense archaeologists to conduct a heritage inspection and a heritage investigation on her property and to obtain permits under s. 14 of the *Act* for those purposes, as preconditions to granting her a site alteration permit under s. 122 of the *Act*?

[49] The paragraphs in issue in the Award in the first question are as follows:

133. A nuisance has been defined as an act that directly or indirectly causes physical injury to land or substantially interferes with the use or enjoyment of the land or an interest in the land where in the light of all the surrounding circumstances the injury or interference is unreasonable (*Royal Anne Hotel Co. Ltd. v. Ashcroft (Village)* ... [1979] B.C.J. No. 2868 (C.A.))

134. The tort of nuisance is a tort to the land and not a tort to the person (*Sutherland v. Canada (Attorney General)*, 2001 BCSC 1024... at paragraphs 231 to 233).

135. Nuisance describes a type of harm that is suffered, rather than a kind of conduct that is forbidden (Linden, Canadian Tort Law 3rd ed. p. 531).

136. Where, as here, it is said that what otherwise would be a nuisance was an activity authorized by statute, then

The defendant must negative that there are alternate methods of carrying out the work. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance. It is insufficient for the defendant to negative negligence. The standard is a higher one. While the defence gives rise to some factual difficulties, in view of the allocation of the burden of proof they will be resolved against the defendant.

Ryan v. Victoria (City), [1999] 1 S.C.R. 201... at para. 55.

137. The injury or interference complained of here can only be the actions of the Branch in requiring the Claimant to authorize and to finance an archaeological inspection and investigation upon her land. These actions cannot be said to have caused physical injury to the land or interfered with its enjoyment. It may be a tort to the Claimant but it is not a tort to the land.

[50] As stated earlier, the petitioner takes the position that the arbitrator correctly stated the law, but then applied a test for nuisance that did not include an act that “indirectly” “substantially interferes with the use and enjoyment of the land.”

[51] The respondents take the position that the arbitrator was correct in finding that nuisance did not apply on the facts as he found them.

[52] The law of nuisance was recently discussed by the Supreme Court of Canada in *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13, in the context of a claim for injurious affection based on the tort of nuisance. The appellant owned a truck stop complex on property located adjacent to Highway 17 near Ottawa, Ontario. In September 2004, the respondent built a new highway running parallel to Highway 17 near the appellant’s property. The portion of Highway 17 adjacent to the complex was changed to a dirt road, and motorists could not access the complex off of the new highway. As a result, the truck stop was essentially put out of business. The appellant brought a claim for injurious affection before the Ontario Municipal Board and received an award. The decision was upheld on appeal to the Divisional Court. However, the Court of Appeal set aside the Board’s decision, finding the application of nuisance to the facts was unreasonable.

[53] In allowing the appeal, the Supreme Court of Canada clarified nuisance. To prove nuisance, a claimant must establish that the defendant has caused substantial and unreasonable interference with the use or enjoyment of the claimant's land. The Court noted, at para. 19, that a substantial interference is one that is not trivial. The requirement for substantial interference is a threshold requirement. If the claimant establishes substantial interference, then the claimant must also establish that the interference was unreasonable.

[54] The Court confirmed, at para. 22, that the categories of nuisance are not closed. However, the interferences that are sufficient to ground a claim in nuisance are "only interferences that 'substantially alter the nature of the claimant's property itself' or interfere 'to a significant extent with the actual use being made of the property'".

[55] The Court goes on to state:

23 In referring to these statements I do not mean to suggest that there are firm categories of types of interference which determine whether an interference is or is not actionable, a point I will discuss in more detail later. 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: *Tock*, at pp. 1190-91. 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.

24 I therefore find that a private nuisance cannot be established where the interference with property interests is not, at least, substantial. To justify compensation, however, the interference must also be unreasonable. ...

[56] The Court then deals with the issue of how reasonableness should be assessed when the interference is a result of actions being taken for the greater public good. A balancing exercise must be undertaken. The focus of the balancing exercise between private and public interests is whether the interference is such that it would be unreasonable for the claimant to suffer it without compensation.

[57] The Court, at para. 26, notes the factors courts have considered in determining whether the interference is reasonable, including the severity of the interference, the character of the neighbourhood, the frequency and duration of the

interference, and the sensitivity of the claimant. The factors are not a checklist and the factors relevant to the particular case should be considered.

[58] Although the respondents assert that the arbitrator was correct in his application of law to the facts, it is apparent from the reasons that the arbitrator only considered nuisance to be made out if there was a tort to the land, not to the claimant as is set out in paragraph 137 of the Award.

[59] As stated in *Antrim*, “[n]uisance 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.”

[60] Accordingly, I have concluded that the arbitrator erred in law in limiting the nuisance to “a tort to the land.”

[61] I agree with the petitioner that the arbitrator made contradictory findings. In paragraph 137, the arbitrator finds the actions of the Branch in requiring archaeological work and permits to disturb the site for the purpose “cannot be said to have caused physical injury to the land or interfered with its enjoyment,” and then in paragraph 138, states that “[i]t is impossible to grant a permit to disturb a heritage site and avoid at the same time, an injury or interference with the land, the subject of the permit.” In my view, the arbitrator should have given effect to that impossibility in deciding whether the actions of the Branch officials interfered with the petitioner’s enjoyment of her property. The failure to do so was an error in law.

[62] The respondents assert that there was no substantial interference because the interference is not permanent. However, the respondents have provided no authority for that proposition. Certainly there are many situations in which nuisance has been found where the interference with the use or enjoyment of the land is not permanent. As noted in *Antrim* at para. 26, the frequency and duration of the interference may be a relevant factor to consider in some cases.

[63] It is clear from the facts found by the arbitrator that the interference with the petitioner's use and enjoyment of the land was substantial in that it did not allow her to use the land for almost a year and has put her to a great deal of expense.

[64] The respondents argued that the interference could not be nuisance because the petitioner authorized the archaeologists to undertake the inspection and investigation, and that the only reason the inspection and investigation were required was because the petitioner wanted to undertake works on her land. However, the arbitrator found that the Branch required the petitioner to undertake the work as a precondition to obtaining a site alteration permit.

[65] There is evidence that the value of the land has been impacted by the requirement that a site alteration permit has to be obtained prior to work being undertaken on it. In *Antrim* and *The Queen v. Loiselle*, [1962] S.C.R. 624, nuisance was found in circumstances where the interference resulted in a loss of value to the claimant's land. In my view, the respondents' argument that the petitioner consented to the interference, and therefore has no actionable claim in nuisance, does not take into account several facts. The petitioner had no choice, and made the applications, and did the work under protest. Another fact that the argument ignores is that the requirement for a site alteration permit under the *Act* for any work on the site reduces the value of the property significantly.

[66] Much of the respondents' argument centered on the fact that *Antrim* did not specifically state that the interference could be indirect. However, it is apparent from reading *Antrim* that the question to be determined is whether the interference complained of is substantial and unreasonable, not whether it is direct as argued by the respondents. In my view, *Antrim* does not stand for the proposition that in order to be nuisance the interference has to be direct interference and cannot be indirect interference.

[67] Having reached the conclusion that nuisance was not made out because the interference complained of was not a tort to land, although it may have been a tort to the petitioner, the arbitrator did not go any further to determine whether the

interference with the petitioner's enjoyment and use of the property was substantial and unreasonable. As a result, the arbitrator did not undertake the balancing exercise set out in *Antrim*.

[68] The respondents argue that the arbitrator did undertake a balancing exercise in the Award, and point to the fact that the arbitrator found that members of the Branch acted reasonably. However, as noted in para. 28 of *Antrim*:

Generally, the focus in nuisance is on whether the *interference suffered by the claimant* is unreasonable, not on whether *the nature of the defendant's conduct* is unreasonable. ... 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 his or her land is unreasonable.

[69] The reasonableness of a defendant's conduct may be a relevant factor, but a finding of reasonable conduct will not in and of itself, preclude a finding of liability. Even when the defendant is a public authority, reasonableness is only one factor to be considered along with other relevant factors. As noted at para. 30:

Moreover, in the reasonableness analysis, the severity of the harm and the public utility of the impugned activity are not equally weighted considerations. If they were, an important public purpose would always override even very significant harm caused by carrying it out. As the editors of *Fleming's The Law of Torts* put it, the utility consideration "must not be pushed too far... . [A] defendant cannot simply justify his infliction of great harm upon the plaintiff by urging that a greater benefit to the public at large has accrued from his conduct": s. 21.110. The words of McIntyre J.A. in *Royal Anne Hotel* are apposite:

There is no reason why a disproportionate share of the cost of such a beneficial service should be visited upon one member of the community by leaving him uncompensated for damage caused by the existence of that which benefits the community at large. [p. 761]

[70] After discussing the case law, the Court in *Antrim* stated at para. 40:

Of course, not every substantial interference arising from a public work will be unreasonable. The reasonableness analysis should favour the public authority where the harm to property interests, considered in light of its severity, the nature of the neighbourhood, its duration, the sensitivity of the plaintiff and other relevant factors, is such that the harm cannot reasonably be viewed as more than the claimant's fair share of the costs associated with providing a public benefit. ...

[71] As noted earlier, the arbitrator found that it was impossible to grant a permit to disturb a heritage site without causing injury to or interference with the land which is the subject of the permit. In my view, it is clear from the Award that the arbitrator did not undertake the requisite balancing exercise. He did not determine whether the interference was unreasonable by balancing the gravity of the harm to the petitioner against the utility of the respondents' conduct in all of the circumstances. The arbitrator's task was to determine, having regard to all of the circumstances, if it was unreasonable to require the petitioner to suffer the interference without compensation. In my opinion the arbitrator failed to consider the relevant factors in this case, such as whether it is reasonable to require the petitioner to pay more than her fair share of the costs associated with providing a public benefit, being the collection and preservation of artifacts on the site.

[72] For the above reasons I have concluded that the answer to the first question is "yes."

[73] I turn to the second question: did the arbitrator err in law in finding that the Branch had the statutory authority to require the petitioner, in the manner it did, to engage at her expense archaeologists to conduct a heritage inspection and a heritage investigation on her property and to obtain permits under s. 14 of the *Act* for those purposes, as preconditions to granting her a site alteration permit under s. 122 of the *Act*?

[74] Statutory authority provides a limited defence to a claim of nuisance, in that where the interference is authorized by statute, a nuisance will not be actionable if it results in the least injury to the land or the least interference with use of the land necessary to achieve the purpose for which the interference was authorized. If the statute does not authorize the nuisance, it is not permitted.

[75] Section 13 of the *Act* prohibits the damage, excavation, digging in or alteration of a site that contains artifacts; however, the Branch may authorize these kinds of activities and issue permits under ss. 12 and 14.

[76] The relevant portions of those sections provide:

12 (1) In this section, except subsection (6), and in sections 3 (4), 13 (4), 14 (2) and (4) and 32, "minister" includes a person authorized in writing by the minister for the purposes of the section.

(2) The minister may

- (a) issue a permit authorizing an action referred to in section 13, or
- (b) refuse to issue a permit for an action that, in the opinion of the minister, would be inconsistent with the purpose of the heritage protection of the property.

(3) A permit issued under subsection (2) (a) may include requirements, specifications and conditions that the minister considers appropriate and, without limiting the generality of this, the permit may

- (a) be limited to a specified period of time or to a specified location,
- (b) require the holder of the permit to consult with or obtain the consent of one or more parties whose heritage the property represents or may represent,
- (c) require the holder of the permit to provide the minister with reports satisfactory to the minister, and
- (d) specify a repository for heritage objects that are removed from the heritage property.

(4) Despite any other enactment, a permit issued under subsection (2) (a) may specify the siting, dimensions, form, exterior design and finish of new construction or renovations to a building or structure.

(5) The minister may, with the concurrence of the holder of the permit, amend, suspend or cancel a permit issued under subsection (2) (a).

...

14 (1) A person must not excavate or otherwise alter land for the purpose of archaeological research or searching for artifacts of aboriginal origin except under a permit or order issued under this section.

(2) The minister may, by permit, authorize a heritage inspection or heritage investigation of any property.

(3) A permit issued under subsection (2) does not authorize entry onto land or into a building without the permission of the owner or occupier.

(4) The minister may order that a heritage inspection or heritage investigation be conducted if the minister considers that any one or more of the following apply:

- (a) land may contain a heritage site or heritage object protected under section 13;
- (b) land that may have heritage value, or that may include a heritage site or heritage object, may be subject to subdivision;

(c) the property may be subject to alienation from government ownership;

(d) property that may have heritage value, or land that may include heritage property, may be subject to alteration by natural or human causes;

(e) an object that may have heritage value may be subject to removal from British Columbia.

(5) The provisions of section 12 (2), (2.1), (2.2), (3), (5) and (6) apply to permits and orders under this section.

(6) A heritage inspection or heritage investigation ordered under subsection (4)

(a) must state the purpose of the heritage inspection or heritage investigation,

(b) must specify how long the order is to remain in effect,

(c) must require that the heritage inspection or heritage investigation be carried out in an expeditious manner,

(d) may provide that property covered by the order is subject to protection under section 13 while the order remains in effect,

(e) may require the owner to undertake actions to preserve the integrity and condition of property covered by the order while the order remains in effect, and

(f) may include any terms, conditions or specifications that the minister considers appropriate for the purpose of the heritage investigation.

(7) If an order for a heritage inspection or heritage investigation made under subsection (4) relates to

(a) alienation of government owned property,

(b) a public work authorized to be undertaken under an Act,

(c) the extraction or harvesting of resources from land,

(d) the subdivision of land, or

(e) changes in use or development of land,

the minister may require the person purchasing, subdividing, developing or using the property to undertake or pay for the heritage inspection or heritage investigation.

...

(9) A person whose property is damaged during the course of a heritage inspection or heritage investigation ordered under subsection (4) is entitled to have the damage repaired at the expense of the government or, if the damage cannot be repaired, to compensation from the government.

[77] The respondents take the position that the arbitrator did not make an error in law in finding that in any event the actions of the Branch did not constitute nuisance because they were directly authorized by the *Act*.

[78] The petitioner's aim was to build a new house on the property, not to undertake archaeological research. The provisions under s. 12 of the *Act* were therefore the applicable statutory provisions.

[79] There is no express provision in s. 12 allowing the Branch to impose as a condition of a site alteration permit that a heritage inspection or investigation be conducted.

[80] There are three options available to the Branch when an owner applies for a s. 12 permit:

1. To grant the permit without requirements or specifications;
2. To grant a permit with requirements and specifications; or
3. To refuse the permit.

[81] The arbitrator discussed the statutory authority of the Branch under s. 12 in the Award, stating:

101. There is no express provision in section 12(3) allowing the Branch to impose as a condition that a Heritage Inspection and/or a Heritage Investigation be first undertaken by a professional archaeologist at the cost of the person applying for a Site Alteration Permit.

102. Despite the absence of such a provision it is plain that the Branch has the power to decline to issue a permit under section 12 unless an assessment is made of its site, its heritage value and the potential impact of the proposed development upon it. Without it the Branch may have no means of knowing whether the property in fact contains heritage objects or human remains and thus be a protected site nor what impact a proposed development may have. Such an assessment may be cursory and not involve an Archaeological Impact Assessment by a professional archaeologist. But to require a thorough inspection by a professional archaeologist as a precondition of issuing a Site Alteration Permit is, I conclude, within the power of the Branch under the *Act*.

103. It is also plain that if an Archaeological Impact Assessment reveals the existence and extent of a heritage site and assesses the impact upon it by a proposed development, then the Branch has the power to decline to issue a Site Alteration Permit until a redesign avoids, or some other measures mitigate, the impact to the site.

104. The Branch may require mitigative measures to be taken before issuing a Site Alteration permit, or it may require mitigative measures as a condition of the permit.

105. If the preconstruction mitigating measures are necessary then they can only be authorized by issuing a Heritage Investigation Permit.

106. I conclude that requiring a Heritage Investigation as a precondition of issuing a Site Alteration Permit is within the powers of the Branch under the Act.

[82] It is clear from reading the Award that the arbitrator inferred from the Branch's ability to impose conditions or to refuse a s. 12 permit that it could require a property owner to authorize and pay for a heritage inspection and/or heritage investigation of the property.

[83] However, s. 14 specifically provides the authority under the *Act* to order a heritage inspection or a heritage permit, not s. 12. Section 14 sets out a scheme under which the Minister, or his or her delegate, may order a heritage site inspection or a heritage site investigation.

[84] Section 14(4) provides that the Minister can order a heritage inspection or a heritage investigation in certain specified circumstances. In those cases, the property owner must allow archaeological work to proceed on the property, but there is no requirement the owner pay for the work. Section 14(7) provides the Minister (not his or her delegate) may require the owner to pay for the work. No Ministerial order was made in this case.

[85] In *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, the Supreme Court of Canada discussed the principles of statutory interpretation and adopted the following at para. 21:

[21] The parties both relied on the approach used in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10, which confirmed that statutory interpretation involves a consideration of the

ordinary meaning of the words used and the statutory context in which they are found:

It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see 65302 *British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can [page13] support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute.

[86] Courts have taken the position that any statutory provisions authorizing the invasion or interference with private property rights should be strictly construed and in the case of ambiguity, should be interpreted in favour of the citizen: *Colet v. The Queen*, [1981] 1 S.C.R. 2 at 10.

[87] As well, the *Act* must be read in conjunction with s. 23 of the *Land Title Act*, R.S.B.C. 1996, c. 250, which provides that title to property is clear unless one of the listed interests in s. 23(2)(a) to (j) is registered on the property.

[88] I agree with the petitioner that given the specific provision in s. 14(7) permitting the Minister to order an owner to pay for a heritage investigation and/or heritage inspection in specified circumstances, it is inappropriate to infer that the ability of the Branch to impose conditions or refuse a permit under s. 12 meant that the Branch officials could require the petitioner to undertake a thorough investigation or heritage inspection at her own expense as a precondition to the permit. Section 12(1) does not allow the Minister to delegate the authority under s. 14(7) to make an order requiring a person to pay for a heritage investigation or a heritage inspection.

[89] As noted in *Kitkatla Band v. British Columbia (Small Business, Tourism and Culture)*, 2000 BCCA 42, the *Act* seeks to strike a balance between competing interests. That was echoed by the Supreme Court of Canada in *Kitkatla Band v. British Columbia (Small Business, Tourism and Culture)*, 2002 SCC 31, where the Court commented that the *Act* attempts to balance the heritage value of a particular site or object against other interests.

[90] It is clear from a review of the whole *Act*, that where the legislature wished to impose the costs of a heritage inspection or a heritage investigation on citizens, it did so expressly. As stated earlier, the Minister is empowered to make an order that a person pay for a heritage inspection or a heritage investigation in certain circumstances under s. 14(7). The only subsection that has possible relevance is s. 14(7)(e): change in use or development of the land. Leaving aside the issue of whether replacing one single family home with another on virtually the same footprint was either a change in use or a development of the land, no Ministerial order was made in this case ordering the petitioner to pay for heritage inspection and/or investigation. There is no other provision in the *Act*, and none in s. 12, providing authority to Branch officials to require a heritage inspection or heritage investigation be done at the expense of the owner.

[91] As a result, I have concluded that the Branch officials had no statutory authority to require the petitioner to pay for a heritage inspection or heritage investigation under any circumstances. In requiring the petitioner to do so, they exceeded their statutory authority.

[92] For the reasons set out above, I have concluded the answer to the second question is “yes.”

Judicial Review

[93] In the judicial review the petitioner seeks a declaration that the respondents do not have statutory authority under the *Act* to order a property owner to obtain and pay for a s. 14 heritage inspection and a s. 14 heritage investigation as preconditions to granting a site alteration permit under s. 12 of the *Act*. Although the

petitioner states that the judicial review is not just related to past conduct but also relates to subsequent assertion of statutory authority which is ongoing, there is no order or decision in place that the petitioner seeks to have reviewed.

[94] The relevant provisions of the *Judicial Review Act*, R.S.B.C. 1996, c. 241, are:

2(2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:

...

(b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

[95] One of the respondents is the Minister of Forests, Lands and Natural Resources Operations. As stated above, the Minister and his or her delegates have the authority to order a heritage inspection and a heritage investigation under s. 14(4) of the *Act*, and the Minister has the authority to order a person to pay for the inspection and the investigation in certain circumstances under s. 14(7). Given there has been no Ministerial order, there is no decision in that regard to review.

[96] Insofar as the petitioner's complaint is that there is no statutory authority for the Branch officials to require her to pay for a site inspection and site investigation in 2007 and 2008, those are the very issues being dealt with by the arbitrator by agreement between the parties. In my view, it is an abuse of process for the petitioner to bring this petition based on the same facts and seeking in essence the same relief, as she is before the arbitrator, which she has appealed. In fact, the argument the petitioner presented on the judicial review was identical to the argument she presented on the appeal.

[97] In *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, the Court discussed the doctrines of issue estoppel, *res judicata*, abuse of process and the rule against collateral attack, and summarized them as follows at paras. 34-36:

[34] At their heart, the foregoing doctrines exist to prevent unfairness by preventing "abuse of the decision-making process" (*Danyluk*, at para. 20; see also *Garland*, at para. 72, and *Toronto (City)*, at para. 37). Their common underlying principles can be summarized as follows:

- It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk*, at para. 18; *Boucher*, at para. 35).
- Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness [page441] and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City)*, at paras. 38 and 51).
- The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (*Boucher*, at para. 35; *Danyluk*, at para. 74).
- Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (*TeleZone*, at para. 61; *Boucher*, at para. 35; *Garland*, at para. 72).
- Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (*Toronto (City)*, at paras. 37 and 51).

[35] These are the principles which underlie s. 27(1)(f). Singly and together, they are a rebuke to the theory that access to justice means serial access to multiple forums, or that more adjudication necessarily means more justice.

[36] Read as a whole, s. 27(1)(f) does not codify the actual doctrines or their technical explications, it embraces their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay. That means the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them.

[98] In my view the judicial review, insofar as it deals with the authority of the Branch officials to require the petitioner to pay for the site inspection and investigation in 2007 and 2008, is an attempt to relitigate the issue the petitioner agreed would be heard by the arbitrator, and is an abuse of process.

[99] Given that conclusion, along with the fact that there is no current order or decision to be reviewed, and the broad nature of the order being sought, I am of the view the judicial review should be dismissed.

Conclusion

[100] In summary, the answers to the two questions of law on the appeal from the arbitrator, which are:

(a) did the arbitrator err in law in failing to apply the correct test necessary to establish nuisance, as articulated in paragraph 133 of his reasons, in concluding in paragraph 137 of his reasons that the actions of the Branch could not be said to have caused physical injury to the land or interfered with the petitioner's enjoyment of the property? and

(b) if nuisance is established, did the arbitrator err in law in finding that the Branch had the statutory authority to require the petitioner, in the manner it did, to engage at her expenses archaeologists to conduct a heritage inspection and a heritage investigation on her property and to obtain permits under s. 14 of the *Act* for those purposes, as preconditions to granting her a site alteration permit under s. 122 of the *Act*?

are "yes."

[101] The petition for judicial review is dismissed.

[102] The petitioner is entitled to the costs of the appeal, and respondents are entitled to the costs of the judicial review.

"Gerow J."