

SUPREME COURT OF NOVA SCOTIA

Citation: *Havelka v. Greenfield Construction Ltd.*, 2025 NSSC 10

Date: 20250110

Docket: Halifax No. 499220

Registry: Halifax

Between:

Jiri Havelka and Mary Havelka

Applicants

v.

Greenfield Construction Ltd.
and the Attorney General of Canada

Respondents

DECISION

Judge: The Honourable Justice Peter P. Rosinski

Heard: September 6, 7, 8, 9; November 7, 8, 9, 10, 2022
April 15, 16, 17, 18, 22, 23, 24, 25; July 2, 3; and August 19,
and 20, 2024 in Halifax, Nova Scotia

Counsel: Jiri Havelka and Mary Havelka, Self-Represented
Daniel Jardine for Greenfield Construction Ltd.
Sarah Drodge for the Attorney General of Canada

By the Court:

1 - Introduction

[1] This decision addresses whether the Havelkas have satisfied the Court that the Attorney General of Canada (“Canada”) and its contractor Greenfield Construction Ltd. (“Greenfield”), caused the Havelkas to experience a “nuisance”/substantial and unreasonable interference with the use and enjoyment of their property, including the effects on their mental and physical health.

[2] The Havelkas plead and have argued that it is so, as a result of Canada through the construction activities of its contractor Greenfield between March 2019 and October 31, 2020 (including some minor residual work thereafter as late as February 2022) to the Port La Tour, Nova Scotia, Small Craft Harbour, which is immediately adjacent to the Havelkas’ residence.

[3] I conclude that Canada and Greenfield are not legally responsible for any of the claims put forward by the Havelkas.

[4] If the parties are unable to agree on costs, I will receive their 10-page (maximum) written submissions as follows: Canada and Greenfield within 20 days of the release of the decision; the Havelkas within 20 days of receipt of the Respondents’ submissions; and the Respondents will have a further 10 days to address the submissions of the Havelkas.

2 - Background

[5] Mr. and Mrs. Havelka are both highly educated professionals.

[6] In 2013, when they were approximately respectively 72 and 58 years of age, they were interested in moving from Toronto and looking for a better life in a quiet country location, free of noise, congestion and with clean fresh air.

[7] They ultimately turned their attention to Port La Tour on the Atlantic coast of Nova Scotia, and purchased a residence, being the only one in the vicinity, and coincidentally, immediately adjacent to the site of a Government of Canada, so-called “Small Craft Harbour”.

[8] The Havelkas were very happy with their move to Port La Tour until 2019 when they were 78 and 64 years of age and with more significant health issues than in 2013.

[9] In March 2019, Canada put into motion a construction project to tear down and rebuild the existing wharf, which was seasonally used by a modest fleet of commercial fisher vessels and processors, as well as occasionally by other boats.

[10] Greenfield was tasked to carry out that project.

[11] The project was substantially completed by the end of October 2020.

[12] The legislative authority for Canada to do so is derived from the *Department of Public Works and Government Services Act* and s. 5 of the *Fishing and Recreational Harbours Act*:¹

The Minister may undertake projects for the acquisition, development, construction, improvement or repair of any Scheduled Harbour or any Fishing or Recreational Harbour to which this Act applies.

[13] In broad strokes, the Havelkas claim that the project was extremely disruptive to their use and enjoyment of their property in a myriad of ways, including the impacts on their mental and physical health.

[14] The proximity of their home to the location of the original and replacement wharf (which general area did include 2 notable commercial enterprises) necessarily exposed them to these circumstances - as they described it: “living on a construction site”.

[15] The Havelkas provided very extensive personal evidence about the effects of the project upon their use and enjoyment of their property and their general health.

[16] They fairly described the imposition upon them of the most significant negative effects of the project at specified times during its duration as approaching intolerable.

¹ The *Fishing and Recreational Harbours Act*, RSC. 1985, c. F – 24 – hereinafter “the Act” and Fishing and Recreational Harbours Regulations – SOR/78 – 767; and the *Department of Public Works and Government Services Act*, SC 1996, c. 16.

[17] Mrs. Havelka was at times despondent, primarily because she feared the project's effects would so negatively affect Mr. Havelka's health that the prospect of his continued living would be jeopardized.²

[18] The project involved the construction and de-construction of two temporary wharves, the first of which was used to enable de-construction of the existing wharf, and the second of which was used to enable construction of the new replacement wharf at a location immediately adjacent to the Havelkas' property, which itself continued up to the Ordinary High Water Mark at that location. It also involved limited dredging of the harbour to prepare it for the deconstruction and construction.

[19] The duration and level of *prima facie* nuisance led to a significant level of animosity between the Havelkas and Greenfield staff in particular.

3 - The legal proceedings (claims/defences) herein

[20] The Havelkas' ultimately sought legal advice from Richard Norman, who drafted their Application in Court, which was filed on July 20, 2020, as amended on October 29, 2020.

[21] That Amended Application read in part:

Greenfield and the Public Works ("Canada") have undertaken the work on the wharf in a negligent, inappropriate and unreasonable manner ... has caused unnecessary noise, odour, bright lights, dust, and other effects which have unreasonably interfered with the Applicants' enjoyment of their property and had a serious impact on their health ... causing reasonably foreseeable damages to the Applicants ... committed the tort of nuisance ... Applicants have pleaded with the Respondents to mitigate the harmful effects of the construction methods, but the Respondents have declined to take reasonable steps to do so ...

² There was no expert evidence that would support specific findings by the Court how, if at all, the project directly or indirectly negatively affected the Havelkas' mental and physical health. Nevertheless, their testimony clearly demonstrated that the *prima facie* nuisance generated by the project more likely than not caused their overall mental and physical health to be less robust than it would have been without the project proceeding. The nature and level of the disruption by the project's specific work and its effects on the use and enjoyment of the Havelkas' property fluctuated in intensity throughout the project timeline. Some of the most disruptive effects of the project arose through the need to use heavy equipment in very close proximity to the Havelkas' home, including the methodically and necessarily slow, but very loud, pile-driving of wharf support poles into the bottom of the harbour. The configuration of the roadways in that area necessitated that over of the project's duration, and for significant periods of time, Greenfield's heavy machinery and equipment regularly impeded ingress and egress to the Havelka's property. The Havelkas testified, with some justification, that this gave them a feeling that they were imprisoned in their home. The project's activities generally also significantly interfered with the Havelkas' pre-project enjoyable routine of walking of their dogs in and around the wharf area and having visitors at their home.

The Applicants seek:

1. special, general, aggravated and punitive damages;
2. interlocutory and/or permanent injunction to require the Respondents cease construction;
3. prejudgment interest;
4. costs.

[22] The Havelkas remained self-represented throughout the proceeding thereafter.

[23] Greenfield filed a Notice of Contest on August 7, 2020. Therein, they pleaded:

6-Greenfield Construction Ltd. denies that the Applicants have suffered compensable damages in any form relating to the completion of this contract. Greenfield Construction further denies that the work is being done so in a negligent manner or that their actions and completion of the contract constitute a nuisance. Greenfield Construction Ltd. denies that the Applicants are entitled to the relief sought in this Application, or any relief.

7-Greenfield Construction Ltd. denies any a liability to the Applicants and states that as an agent of the Attorney General of Canada, by virtue of the contractual relationship in fulfilling its obligations to the Attorney General of Canada, the Attorney General of Canada is vicariously liable for the actions of Greenfield Construction Ltd.

Greenfield Construction Ltd. states that the Attorney General of Canada is liable for contribution and indemnity for the actions of Greenfield Construction Ltd.

[24] Greenfield also filed its own Claim on August 7, 2020, seeking “an interlocutory and/or permanent injunction to keep the Applicants from entering or interfering with Greenfield’s worksite... and costs”.

[25] Canada filed its Amended Notice of Contest on May 11, 2022.

[26] It pleaded that the Havelkas’ Application should be dismissed because, in part (not verbatim):

- the Applicants have not established that a “nuisance” was caused by the carrying out of its project at the Port La Tour Small Craft Harbour;
- and Canada relied on:
 - the *Crown Liability and Proceedings Act*, RSC 1985, c. C-50 and in particular section 22 which precludes this Court from granting relief or making an order “against a servant of the Crown that is not competent to grant or make against the Crown”. “Servant” is defined in subsection 2 as:

“includes agent, but does not include any person appointed or employed by or under the authority of a law of the legislature of Yukon, of the Northwest Territories or for Nunavut”;

- section 18 of the *Federal Courts Act* RSC 1985, c. F-7 [in relation to the claim for an injunction, as that nature of claim must be dealt with in the Federal Court];

- the *Protection of Property Act*, RSNS 1989, c. 363 [in an effort to obtain a court order to keep the Havelkas off the construction site];

- the *Fishing and Recreational Harbours Act*, RSC 1985, c. F – 24, in particular sections 4 to 8 and the Regulations made pursuant thereto.

[27] Canada also relies upon the statutory immunity derived from the above-noted legislation as elaborated upon by the Court in *Ryan v. Victoria (City)*, [1999] 1 SCR 201.

4 - The findings of the Court

A - The Trial process

[28] The Court heard evidence over 18 days, starting on September 6, 2022, and ending on July 3, 2024.

[29] I have had the benefit of written and oral submissions.

[30] Every opportunity was provided to the Havelkas to present their evidence and arguments in a fulsome manner, given that they were self-represented throughout the trial.

[31] Mr. and Mrs. Havelka filed multiple, very comprehensive affidavits supported by a great number of exhibits, photographs and video recordings.

[32] Canada presented the affidavit of Sylvia MacDonald, P.Eng.

[33] Sylvia MacDonald is with Public Services and Procurement Canada (PSPC), as the Project Manager and Departmental Representative of the PSPC Minister responsible for the project.

[34] Although her affidavit states that she “visited the site regularly”, given the lengthy duration of the project, I note that the evidence I accept suggests that she only visited the site in person approximately 15 times.

[35] She relied heavily on the completed Site Inspection Reports provided to her by Gordon Davidson, P. Eng. who was on site regularly – but did not testify.

[36] Greenfield presented the affidavit of Breanne Tozier, who is a Vice President of the company. She rarely visited the site.

[37] Thus, as the Havelkas have pointed out, they continuously lived beside the construction project site and were in a position to give direct eyewitness account testimony about the progress and effects of the project upon them, whereas the only witnesses from Canada and Greenfield were minimally present at the site.

[38] Canada and Greenfield relied upon Site Inspection Reports and similar documentation which is “hearsay”, but admissible pursuant to the “business records” statutory and common law exception to the introduction of documentary hearsay evidence.³

[39] Notably, a very substantial number of the daily Site Inspection Reports - including individual pages ranging in dates from November 28, 2019, until November 27, 2020 (Exhibit 10) which should have been included in the affidavit of Sylvia MacDonald, were not, and were not disclosed to the Havelkas until late April 2024.

[40] As counsel for Canada stated in her brief filed June 28, 2024:

During the Applicants’ cross-examination of Canada’s affiant in this Application in Court, it came to light the various site inspection reports were inadvertently omitted from Canada’s affidavit evidence. The Applicants’ requested disclosure of the omitted reports so they could question Canada’s affiant about them. Canada subsequently provided the omitted reports to the Applicants and Greenfield Construction and provided a copy to the judge presiding over this Application. Given the late disclosure of the reports, the Court directed Canada to file a brief outlining whether the late disclosure should lead to consequences against Canada... Ms. MacDonald testified initially, that while some of the Site Inspection Reports attached to her affidavit were out of order, her affidavit contained a complete copy of the Reports. However, after further questioning by the Applicants and upon closely reviewing the Reports attached to her affidavit, Ms. MacDonald

³ See section 23 of the *Nova Scotia Evidence Act*, RSNS 1989, c. 154, specifically: “(2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.” I bear in mind that those Reports contain limited written recordings and were not created to specifically address the issues raised by the Havelkas in this litigation, and that the writer of the Reports was not available for cross-examination.

realized that some Site Inspection Reports were indeed missing from the Exhibit attached to her affidavit. While Ms. MacDonald was still on the witness stand, the Applicants requested disclosure of the omitted reports from her. Ms. MacDonald undertook to compare the Reports attached to her affidavit with her original records to identify any Reports that were omitted and to disclose any such Reports to the Applicants.

In court on the morning of April 25, 2024, which was the last scheduled day of this proceeding, Canada confirmed the existence of various Site Inspection Reports that had not previously been disclosed to the Applicants.... Canada provided some of the omitted Reports to the Applicants that day and subsequently sent a bound volume containing the omitted Reports to the Applicants and Greenfield Construction via courier on May 14, 2024.

... It is also important to note that Canada is not the party seeking to introduce the additional Reports into evidence at this point.

B - General comments on the credibility of the witnesses

[41] When a Court references the “credibility” of a witness, it intends that single reference to address two aspects of the witness’ presentation of evidence to the Court.

[42] Namely, is the Court satisfied the witness testified “honestly”/truthfully to the best of their ability, and even if so, is the Court also satisfied that the witness’ testimony is objectively reliable as to its content?

[43] Mr. Havelka testified in a sincere and measured manner, genuinely trying to convey his best recollection in relation to all the matters about which he testified, including the serious upset that the project caused to he and his wife.

[44] I found him to be a credible witness.

[45] Mrs. Havelka testified in a manner that left me with an impression she was thinking as an advocate for her position while trying to convey information to the Court.

[46] This is not unexpected for a self-represented individual who is sincerely upset by the effects, direct and indirect, of the project upon the lives of herself, her husband, and their pets.

[47] At times, I was very impressed by her recall.

[48] However, at other times, I sensed her emotions may have gotten the best of her, and she overstated, by the innocent use of hyperbole or otherwise, the evidence she was then presenting.

[49] Nevertheless, I generally found her testimony on matters significant to the outcome of this litigation largely to be credible.

[50] I found Ms. MacDonald to be very well prepared, and to have an excellent recall of the progress of the project and matters material to this litigation.

[51] She presented her evidence in a credible manner.

[52] I also found Ms. Tozier to have presented her evidence in a credible manner.

C - An assessment of the evidence

[53] I will not comb through the evidence in any detail, as I find it unnecessary to do so.

[54] I have a very clear picture of the factual context in this litigation and have carefully considered all the evidence that was presented, in light of the arguments regarding the claims and defences, and otherwise. I am satisfied that they did, at sporadic points in time, through their project activities create conditions of *prima facie* nuisance.

[55] I am **not** satisfied, more likely than not, that Greenfield “negligently” provided any of the material services required by the contract with Canada.

[56] While the Court is satisfied that the project between March 2019 and October 2020/February 2022 unquestionably at times caused the Havelkas to be subject to substantial interferences with their enjoyment and use of their property which could *prima facie* constitute “nuisance”, I am satisfied that the Respondents, on the whole, took reasonable, albeit not fully effectual, steps to mitigate the effects of the *prima facie* “nuisance” created by them (that is, seen individually or cumulatively: noise, dust and debris; odours; artificial lighting in the early morning or at night; blockages of ingress and egress from their property; and any other effects which interfered with

their use and enjoyment of their property, and at times may have had a material impact on their general health)⁴.

[57] Even if I am wrong in that respect, I am further satisfied that Greenfield has the benefit of statutory immunity flowing from the immunity that Canada enjoys.

[58] Firstly, I am amply satisfied that Canada had clear legislative authority to undertake the scope of the project at Port La Tour (s. 5 *Fishing and Recreational Harbours Act*; and ss. 6 and 7 of the *Department of Public Works and Government Services Act*), and did so carry out the execution thereof in a manner contemplated by that authority.

[59] Secondly, Greenfield was clearly acting in the capacity of an agent/servant of Canada as contemplated by the *Crown Liability and Proceedings Act*, RSC 1985 c. C-50 per section 2 – “servant”:

includes agent, but does not include any person appointed or employed by or under the authority of the law of the legislature of Yukon, of the Northwest Territories or for Nunavut.

[60] Canada and Greenfield rely upon the reasons of the Supreme Court of Canada as stated in *Ryan v. Victoria (City)* [1999] 1 SCR 201 at p. 237:

53 **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. See *Chessie, supra*, at p. 94.** The trial judge found, at p. 206, that “the configuration and design of the railway tracks on Store Street constituted an unreasonable interference to the public of its right of access”. He noted that Store Street was a mixed retail, industrial, and commercial area, and that the Railways should have foreseen the hazard posed by the flangeways to riders of two-

⁴ Without referencing an exhaustive list of the jurisprudence that I have been referred to by counsel and the Havelkas, I have considered all the cases that have been referred to my attention, including: *Antrim Truck Centre Ltd. v. Ontario*, 2013 SCC 13; *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64; *Ryan v. Victoria (City)*, [1999] 1 SCR 201; *Tri-C Management Ltd. v. Nova Scotia (Att. Gen.)*, 2021 NSCA 26; *Day v. Valade*, 2017 NSSC 175 at paras. 35-36 per Wood, J, as he then was. I am acutely aware that whether a nuisance has been created in this case is dependent on a factual matrix, which did vary daily, over the course of the project. The volume of evidence presented by the Havelkas was very substantial, albeit frequently repetitive, and the qualitative nature of the evidence (e.g. the subjective testimony of the Havelkas, still photographs and video), that is argued to be indicia of “nuisance”, must all be examined contextually, given all the circumstances, as is evident in the case law which references the numerous factors to be taken into account.

wheeled vehicles. He found, at p. 207, that the cost of that hazard should be borne by the Railways as a matter of policy:

In this case, the defendant Railways clearly installed that particular flange-rail system without regard to vehicular traffic. It was chosen because it cost less, and it was longer lasting and better suited to the needs of the rail traffic. However, the result of this choice of flange-rail, which created an almost 4-inch gap, was to effectively increase the risks to vehicle traffic. The cost of that increased risk to others must fall on the defendant Railways. It is a “cost of running the system.”

The Court of Appeal did not dispute the trial judge’s finding that there was an unreasonable interference but **held that the Railways had a defence of statutory authority because “the flangeways were an inseparable consequence of requiring the tracks to be laid at street grade flush with street level and the roadway paved between the rails” (p. 68). The issue is whether the Court of Appeal erred in that conclusion.**

54 **Statutory authority provides, at best, a narrow defence to nuisance. The traditional rule is that liability will not be imposed if an activity is authorized by statute and the defendant proves that the nuisance is the “inevitable result” or consequence of exercising that authority.** See *Lord Mayor, Aldermen and Citizens of the City Manchester of v. Farnworth*, [1930] A.C. 171 (H.L.), at p. 183; *City of Portage La Prairie v. B.C. Pea Growers Ltd.*, 1965 CanLII 101 (SCC), [1966] S.C.R. 150; *Schenck v. Ontario (Minister of Transportation and Communications)*, 1987 CanLII 21 (SCC), [1987] 2 S.C.R. 289. An unsuccessful attempt was made in *Tock, supra*, to depart from the traditional rule. Wilson J. writing for herself and two others, sought to limit the defence to cases involving either mandatory duties or statutes which specify the precise manner of performance. La Forest J. (Dickson C.J. concurring) took the more extreme view that the defence should be abolished entirely unless there is an express statutory exemption from liability. Neither of those positions carried a majority.

55 **In the absence of a new rule, it would be appropriate to restate the traditional view, which remains the most predictable approach to the issue and the simplest to apply. That approach was expressed by Sopinka J. in *Tock*, at p. 1226:**

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.

56 **Turning to the facts of this case, the question raised by the traditional test is whether the hazard created on Store Street was an “inevitable result” of exercising statutory authority; that is, whether it was “practically impossible” for the Railways to avoid the nuisance which arose from the flangeways.** As noted previously in the context of negligence, the regulations relied upon by the Railways prescribed a minimum width of 2.5 inches for flangeways. The Railways’ decision to exceed that minimum by more than one inch was a matter of discretion and was not an “inevitable result” or “inseparable consequence” of complying with the regulations. The same may be said of the Railways’ decision not to install flange fillers when such products became available after 1982. **The flangeways created a considerably greater risk than was absolutely necessary. Accordingly, the Court of Appeal erred in permitting the Railways to assert the defence of statutory authority against the claim for nuisance.**

[My bolding added]

[61] While *Ryan* involved distinguishable circumstances since what was at issue there was the standard of care owed by railways to the public (a public nuisance), which is focussed on an assessment of the discharge of statutory obligations, the tenor thereof is consistent with the jurisprudence regarding private nuisances, and as Greenfield has pointed out, although there is evidence that only the Havelkas complained, the present circumstances are akin to a “public nuisance” as described by Justice Major in *Ryan* at paragraph 53.

[62] Greenfield argued, and I accept that:

1. the project was authorized by federal statute, remained overseen by Canada, and was completed within the ambit of the legislation;
2. its purpose was to maintain and upgrade a public wharf and harbour, which provided utility to the community at large, and users in particular;
3. Greenfield was reasonably responsive to the concerns and complaints of the Applicants, and it took reasonable steps to mitigate the effects of the project causing more “nuisance” than was reasonably necessary.⁵

⁵ Greenfield’s Counsel noted that Canada had had discussions with the Havelkas regarding relocating the Havelkas, at its own cost, to another residence away from the site. Sylvia MacDonald testified that she understood that there was “no real offer made”, whereas Mrs. Havelka testified that they did look into it themselves, but rejected the general offer by Canada, as they decided that any of the few residences available (the Covid 19 virus was also very much present at the time) were not suitable for their purposes.

4. the Havelkas chose to live in very close proximity to a significant working harbour wharf, which, six years after they moved there, required a major reconstruction; and
5. they were more sensitive to the effects of the claimed “nuisance” than the average person (they testified that, at the relevant times, Mr. Havelka was generally in poor health, and Mrs. Havelka had a dramatically reduced lung capacity).

Conclusion

[63] The Havelkas have not established that any of the work done by Greenfield for Canada was done “negligently”, thus creating a more sustained or intense “nuisance” vis-à-vis the Havelkas.

[64] Regarding the Havelkas’ “nuisance” claim, I am satisfied that Canada and Greenfield have established that:

1. the scope of the project and its execution were authorized by legislation, and generally carried out by Greenfield in accordance with the instructions from Canada;
2. the claimed sources of “nuisance” *per se* were an inevitable result of the proper exercise of that statutory authority through Greenfield;
3. the undertaking of the project had great public utility; and
4. regarding the degree of nuisance, I am satisfied that the Respondents have established reasonable steps were taken to mitigate any material degree of nuisance that they may have caused to the Havelkas.

[65] Therefore, the Respondents are not legally responsible to the Applicants for any nuisance consequent to the execution of the project by Greenfield, which affected the Applicants.

[66] I dismiss each of the claims made by the Havelkas.⁶

⁶ The Havelkas also claimed as a nuisance that the new wharf was moved to a significantly different location from the previous wharf, and that that new wharf now interferes with their view of the ocean horizon from their home. A loss of the enjoyment of a view is not a nuisance compensable at law – *St. Pierre v. Ontario (Minister of Transportation and Communications)* [1987] 1 SCR 906 at paras. 11-13.

[67] I will receive costs submissions in writing, as set out herein earlier.

Rosinski, J.