Case Comment

Susan Heyes Inc. (Hazel & Co.) v. South Coast B.C. Transportation Authority

Meredith James[*]

1. INTRODUCTION

This case comment considers the analysis of the British Columbia Court of Appeal (BCCA) in *Susan Heyes Inc. v. Vancouver (City)*,[1] At trial, the judge found that the construction of a transit line in downtown Vancouver was the source of a nuisance that resulted in a significant decline in the plaintiff business's income and held the defendants liable, awarding damages in the amount of $600,000.[2] Writing for the appellate court, the Honourable Madam Justice Neilson[3] upheld the finding of nuisance on appeal, however, she overturned the trial judge's holding that the defendants had failed to establish the defence of statutory authority.

At the Court of Appeal the appellants sought to ground the defence of statutory authority in several sources:

- the legislation under which the Transportation Authority was initially incorporated;
- a resolution to proceed with the project proposal passed by the Authority's Board;
- the City's authority to regulate vehicular and pedestrian traffic under its Charter; and
- the Environmental Assessment Certificate for the project.

They were successful in establishing the defence on the basis that the Authority's incorporating legislation provided statutory authority for the construction of the transit line and nuisance was an inevitable result of exercising that authority. Alternatively, the Justice Neilson found that the City's Charter could also have formed the basis of the defence.

In addition, Justice Neilson also considered whether the Environmental Assessment Certificate was a source of statutory authority. Although this analysis is in obiter, as the defence was established on other grounds, it provides an interesting opportunity to consider what form an environmental assessment-based defense of

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1 *Susan Heyes Inc. v. Vancouver (City)*, 2011 BCCA 77 [*Heyes* BCCA].

2 *Susan Heyes Inc. v. Vancouver (City)*, 2009 BCSC 651, 43 C.E.L.R. (3d) 94; reversed 2011 CarswellBC 269 (C.A.) [*Heyes* BCSC].

3 The Honourable Madam Justice Prowse concurring and the Honourable Madam Justice Saunders concurring with additional reasons.

statutory authorization may take.

While only time will tell the full significance of this decision, the author offers two thoughts on its possible importance. With this affirmation of the traditional view of the defence of statutory authority, the BCCA first, limits the applicability of the Supreme Court of Canada (SCC) decision *Barrette c. Ciment du St-Laurent inc.*[4] outside Quebec and second, suggests that taking a "common sense" approach to assessing the viability of alternative proposals may include a wide range of factors including cost.

2. FACTS OF THE CASE

Each of the appellants (the defendants at trial) played a key role in the implementation of the Canada Line, a regional transportation system connecting downtown Vancouver, the City of Richmond and the Vancouver International Airport. The appellant TransLink[5] is responsible for the regional transportation systems in the Greater Vancouver Regional District. It was initially incorporated pursuant to the *Greater Vancouver Transportation Authority Act* (*GVTAA*).[6] The appellant Canada Line Rapid Transit Inc. (CLRT)[7] is a wholly-owned subsidiary of TransLink whose role was to devise and implement a plan to develop the Canada Line. The third appellant was the public-private partnership InTransit BC Limited Partnership, established to develop the Canada Line.

The respondent (the plaintiff at trial), Hazel & Co., operated a maternity wear business in a retail outlet located on the street under which the Canada Line was built.

The trial judge found that the cut and cover method of constructing the Canada Line substantially interfered with the respondent's use and enjoyment of its premises. He concluded: "Consideration of the relevant factors supports the findings that the extent of the interference was sufficiently unreasonable to constitute nuisance."[8]

The appellate judge emphasized the importance of precisely defining the source of the nuisance. She noted that the trial judge did not find that it was the Canada Line *per se* that caused the nuisance: "Instead, the claim was based on the allegation that the cut and cover construction methodology chosen by the appellants to build the Canada Line through Cambie Village caused the nuisance." She also noted the trial judge's finding that the traffic disruptions in the construction zone required by the cut and cover construction method "were integrally linked to it and could not be separated from it in this case."[9]

The Canada Line was not subject to mandatory provincial environmental as-

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4 *Barrette c. Ciment du St-Laurent inc.*, 2008 SCC 64, [2008] 3 S.C.R. 392 [*St. Lawrence Cement*].

5 Translink's current name is the South Coast British Columbia Transportation Authority and it continues pursuant to the *South Coast British Columbia Transportation Authority Act*, S.B.C. 1998, c. 30.

6 *Greater Vancouver Transportation Authority Act*, S.B.C. 1998, c. 30 [*GVTAA*].

7 Now renamed RAV Project Management.

8 *Heyes* BCSC, *supra*, note 2 at para. 138.

9 *Heyes* BCCA, *supra*, note 1 at para. 47.

sessment.[10] The CLRT chose, however, to apply for a provincial review pursuant to s. 7 of the *Environmental Assessment Act* (*EAA*).[11] At the time the order designating the Canada Line as a reviewable project was granted, the procurement process was not complete and so the assessment initially proceeded on the understanding that the tunnel would be built using bored tunnel construction rather than cut and cover.[12] After the Environmental Assessment Office's review of the project, and report to the responsible provincial Ministers, the Ministers directed further assessment and public consultation. Following that further consultation, the CLRT agreed to the conditions set out in a draft Environmental Assessment Certificate (EAC) and the Ministers issued the EAC, followed shortly thereafter by the federal equivalent pursuant to the *Canadian Environmental Assessment Act*.[13]

3. ESTABLISHING THE DEFENCE OF STATUTORY AUTHORITY

The rationale behind the defence of statutory authority is that "if the Legislature expressly or implicitly says that a work can be carried out which can only be done by causing a nuisance, then the legislation has authorized an infringement of private rights."[14] In *Manchester (Borough) v. Farnworth*, Viscount Dunedin set out the classic statement of the defence of statutory authority:[15]

> When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility of situation and of expense.

In *Tock v. St. John's Metropolitan Area Board*, three members of the SCC authored reasons that, although concurring in the result, proposed different approaches to the defence of statutory authority — Justices Sopinka, Wilson and La Forest. In *Ryan v. Victoria (City)*,[16] the SCC chose to adopt Justice Sopinka's description of the "traditional view" of the defence of statutory authority from

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10 *Heyes* BCSC, *supra*, note 2 at para. 27 ("It was a railway of less than 20 kilometres in length and therefore not a reviewable project within the meaning of the *Environmental Assessment Act*, S.B.C. 2002, c. 43, (the "*EAA*"), and Table 14 of the *Reviewable Projects Regulation*, B.C. Reg. 370/2002 (the "*Regulation*")").

11 *Environmental Assessment Act*, S.B.C. 2002, c. 43 [*EAA*].

12 *Heyes* BCCA, *supra*, note 1 at para. 26.

13 S.C. 1992 c. 37 [CEAA]. See *Heyes* BCCA, *supra*, note 1 at para. 28.

14 *Tock v. St. John's (City) Metropolitan Area Board*, [1989] 2 S.C.R. 1181, 64 D.L.R. (4th) 620 at para. 91 (Reasons of Justice Sopinka) [*Tock*].

15 *Manchester (Borough) v. Farnworth* (1929), [1930] A.C. 171 (U.K. H.L.) at 183 [*Manchester*].

16 *Ryan v. Victoria (City)*, 168 D.L.R. (4th) 513, [1999] 6 W.W.R. 61 (S.C.C.) at para. 55 [*Ryan*].

Tock:[17]

> 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.

Restating this test in *Ryan*, Justice Major wrote on behalf of the SCC:[18]

> 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.

In 2008, the SCC released its decision in *St. Lawrence Cement Inc. v. Barrette*. The plaintiffs, complaining of dust, odours and noise from the defendant's cement plant, brought a claim under article 976 of the *Civil Code of Québec*,[19] which prohibits owners of land from forcing their neighbours to suffer abnormal or excessive annoyances. The defendant raised several issues, including a claim of immunity under the special statute applicable to its plant. Addressing this point, the SCC stated:[20]

> First, SLC argues that as a result of the *SLC Special Act* passed by the Quebec legislature in 1952 to govern its activities, it has immunity from actions in damages relating to its industrial activities. In its view, this immunity results from the rule that a person or a corporation may not be held liable in nuisance if the activity in question is authorized by statute and it is proved that the nuisance is the inevitable result or consequence of exercising that authority. According to SLC, although this rule derives from English law (*Allen v. Gulf Oil Refining Ltd.*, [1981] 1 All E.R. 353 (H.L.); *Manchester Corporation v. Farnworth*, [1930] A.C. 171 (H.L.); *Hammersmith and City Railway Co. v. Brand* (1869), L.R. 4 H.L. 171), it is recognized in Canadian common law (*Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201; *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181) and is also applicable in Quebec law (*Canadian Pacific Railway Co. v. Roy*, [1902] A.C. 220 (P.C.); *Ouimette; Laforest v. Ciments du St-Laurent*, [1974] C.S. 289).
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> The statute relied on by SLC provides no basis for this defence. Although the *SLC Special Act* authorized the operation of the plant while requiring that the best means available be used, it in no way exempted SLC from the application of the ordinary law. When the legislature excludes the application of the ordinary law, it generally does so expressly. For example, the *Act respecting industrial accidents and occupational diseases*, R.S.Q., c. A-3.001, provides that "[n]o worker who has suffered an employment injury may institute a civil liability action against his employer by reason of his employment injury" (s. 438). Likewise, with regard to bodily injury, the *Au-*

17 *Tock*, *supra*, note 14 at para. 95.

18 *Ryan*, *supra*, note 16 at para. 54.

19 *Civil Code of Québec*, S.Q. 1991, c. 64.

20 *St. Lawrence Cement*, *supra*, note 4 at paras. 97-98.

> *tomobile Insurance Act*, R.S.Q., c. A-25, provides that "[c]ompensation under this title stands in lieu of all rights and remedies by reason of bodily injury and no action in that respect shall be admitted before any court of justice" (s. 83.57). There is no provision in the *SLC Special Act* precise enough to justify a conclusion that the law of civil liability has been excluded for all consequences of the plant's activities.

The relevance of this holding outside Quebec has been uncertain. Some commentators have suggested that the SCC's reasoning for the rejection of the defence of statutory authorization under Quebec's *Civil Code* may have "gutted" the defence in common law.[21] In *Tomagatick v. Ontario (Director, Ministry of Environment)*, however, the Ontario Environmental Review Tribunal (OERT) rejected an argument that the defence of statutory authority was no longer relevant:[22]

> The Tribunal does not agree with the Director's submission that the Supreme Court of Canada decision in *St. Lawrence Cement* means that the defence of statutory authority is no longer applicable in all nuisance cases. In the circumstances of that case, the relevant legislation did not have the effect of providing a defence of statutory authority; thus, compliance with regulatory requirements did not preclude a successful action under the *Civil Code* provision similar to common law nuisance. It may be that in other cases, legislation or an approval might provide such a defence. The individual circumstances of each case, including the applicable common law or *Civil Code* provision, and other applicable statutes must be considered.

Heyes offered the first opportunity for an appellate court to consider the relevance of the *St. Lawrence Cement* case outside of Quebec. Did *St. Lawrence Cement* alter the standard that must be met by the defendant in order to establish the defence of statutory authority? Must the statute expressly preclude a right of action in nuisance?

4. THE DECISION OF THE BRITISH COLUMBIA COURT OF APPEAL

The appellants sought to ground the defence in several possible sources of statutory authority. Set out below are the arguments raised regarding each statutory authorization or approval and the Justice Neilson's analysis of each issue.

(a) Greater Vancouver Transportation Authority Act

The *GVTAA* clearly set out the authority to construct the Canada Line. The appellants also attempted to establish that *express* authority to construct the Canada Line using cut and cover construction had been granted through a resolution passed

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21 See Robert Mansell, "Civil Liability for Environmental Damage" in *Butterworth's Canadian Environmental Law*, looseleaf (Markham, ON: LexisNexis, 1991) at s. 18.27.3 [Mansell].

22 *Tomagatick v. Ontario (Director, Ministry of Environment)*, 2009 CarswellOnt 1257, [2009] O.E.R.T.D. No. 15 at para. 108 [*Tomagatick*]; followed in *Protect Our Water & Environmental Resources v. Ontario (Director, Ministry of Environment)* (2009), 43 C.E.L.R. (3d) 180 (Ont. Environmental Review Trib.) at para. 80 [*Protect Our Water and Environmental Resources*].

by its Board approving the decision to proceed. They attempted to demonstrate that the regulation granted statutory authority on several basis: first, that the trial judge recognized that this resolution constituted statutory authority;[23] second, that the resolution had sufficient legislative character to constitute statutory authority;[24] and third, in the alternative, that the resolution could derive statutory authority from its enacting legislation, the *GVTAA*.[25]

Justice Neilson rejected each of these arguments. She rejected the first argument on the basis that the balance of the trial judge's reasons did not support the appellants' contention. Second, she found that as resolutions do not create "a norm or rule of general application" they do not have legislative character.[26] Third, she held that a resolution is not equivalent to an order-in-council in such a way that it can derive statutory authority from its enacting legislation.[27]

As noted above, the *GVTAA did* give TransLink statutory authority to build the CanadaLine. Thus, although the respondents could not establish a specific authorization of the cut and cover method of construction, they did establish authority for the construction of the Canada Line. She thus moved on to a consideration of whether the nuisance created by the cut and cover construction method was inevitable.

Pursuant to her analysis of the jurisprudence, specifically relying on Viscount Dunedin's classic statement of the defence of statutory authority in *Manchester*, and Justice Sopinka's comments in *Tock* which were later adopted in *Ryan*, Justice Neilson set out the following test to assess the inevitability of the nuisance created by cut and cover construction:[28]

> [W]here nuisance arises from the exercise of a discretionary statutory power, the question of whether the nuisance was inevitable necessarily involves an examination whether there were alternative non-nuisance means of carrying out the authorized activity.
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> . . . . .
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> The question in this context . . . is whether there was a practically feasible option to cut and cover construction that would not have created a nuisance, given the scientific possibility, the financial picture, and other relevant circumstances, viewed from a common sense perspective.

She concluded that while the trial judge was correct to consider whether there were viable options to cut and cover construction as a building method,[29] he erred in limiting his analysis of the alternatives to the construction method alone. Justice

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23 *Heyes* BCCA, *supra*, note 1 at para. 90.

24 *Heyes* BCCA, *supra*, note 1 at para. 92.

25 *Heyes* BCCA, *supra*, note 1 at para. 102.

26 *Heyes* BCCA, *supra*, note 1 at para. 100.

27 *Heyes* BCCA, *supra*, note 1 at para. 106 (declining to accept the applicability of the BCCA's reasoning in *Sutherland v. Canada (Attorney General)*, 2002 BCCA 416, 4 B.C.L.R. (4th) 205; additional reasons at 2003 CarswellBC 288 (C.A.); leave to appeal refused (2003), 319 N.R. 199 (note), 197 B.C.A.C. 159 (note) (S.C.C.) [*Sutherland*]).

28 *Heyes* BCCA, *supra*, note 1 at paras. 116, 119.

29 *Heyes* BCCA, *supra*, note 1 at para. 117.

Neilson found that "a proper examination of the practical feasibility of alternatives has to consider each [project construction] proposal as a whole."[30] She went on to discuss the following distinguishing factors of the proposals: cost; allocation of geotechnical risk; scheduling flexibility; the project objectives, including increasing ridership and preserving heritage landscapes; the feasibility of other project proposals; safety; urban fit; integration; and, governance ability of the private partner.

The difference in cost rendered the alternate construction method "impossible" according to the chief executive office of CLRT. Justice Neilson, noting that there was no evidence suggesting that assessment was in error, concluded that such a "large and insurmountable shortfall in public funding" could not be ignored in assessing the practical feasibility of the options.[31]

The other factors considered went to both the feasibility and the attractiveness of the project proposals. The private partner's assumption of geotechnical risk, the scheduling flexibility of the cut and cover construction method, and greater confidence in the private partner's governance ability increased the feasibility of the project by reducing the risks or costs to the defendants.[32] More attractive stations, increased ridership, preserving heritage landscapes and urban fit also made the cut and cover construction proposal the favoured option.

She concluded that when *all* of the differences between the project proposals were considered, it became evident that the proposal which included cut and cover construction was "the only practically feasible option for constructing the Line."[33] On this basis alone, the defendants had succeeded in establishing the defence of statutory authority. Justice Neilson went on, however, to address the analysis that would have been required had she found that another construction method presented a viable alternative. The author notes that from this point forward, Justice Neilson's comments are in *obiter*.

In her view, where, as here, the other construction options would only relocate the disturbance it is not a non-nuisance alternative and so should not operate to defeat the defence of statutory authority.[34] She found that, in effect, the authorization of the Canada Line in the *GVTAA* provided statutory authority for "the inevitable nuisance that would arise in the course of building rapid transit in this heavily populated urban area."[35] As there was no construction method that would not cause a nuisance to someone, the appellants would have succeeded on this basis as well.

(b) The City of Vancouver's authority to regulate vehicular and pedestrian traffic under the Vancouver Charter

Justice Neilson found that the defence of statutory authority would also have been available under the legislative framework of the *Vancouver Charter*,[36] which

30 *Heyes* BCCA, *supra*, note 1 at para. 121.

31 *Heyes* BCCA, *supra*, note 1 at para. 126.

32 *Heyes* BCCA, *supra*, note 1 at para. 127.

33 *Heyes* BCCA, *supra*, note 1 at para. 133.

34 *Heyes* BCCA, *supra*, note 1 at para. 144.

35 *Heyes* BCCA, *supra*, note 1 at para. 145.

36 S.B.C. 1953, c. 55.

authorized street closures in the construction zone which were, as noted above, inextricably linked with the construction of the Canada Line. Further, she found that the rationale behind the inevitability analysis, discussed above, would also support a defence of statutory authority grounded in the *Vancouver Charter* as any method of construction would have required similar road closures, and so the nuisance was inevitable.[37]

(c) The Environmental Assessment Certificate granted under the Environmental Assessment Act

At trial, the judge characterized the EAC as a permit granted under the *EAA* and so it could not provide the basis for the defence of statutory authorization. He found that: "While each permit is a form of statutory authorization, it is not the kind of statutory authorization with which the defence is concerned."[38]

Further, he found that the non-mandatory nature of the EAC and the discretion given to CLRT whether to pursue the cut and cover method of construction further distinguished the certificate from the type of statutory authorization that could afford protection to the defendants.

On appeal, the appellants, supported by the Attorney General of British Columbia as intervener, argued that the *EAA* process and the resulting certificate should not be characterized as a permit given the wide scope of the regulatory review, involving public consultations and a balancing of public and private interests.[39]

The Attorney General further argued that an EAC must provide a defence to the proponent from liability for nuisance because without such protection, proponents may be deterred from undertaking large projects. Also, those who object to the project are not without remedy as they may still seek judicial review or bring an action in negligence if the project is not undertaken with appropriate care.

Justice Neilson, however, was not persuaded by these public policy arguments:[40]

> Those arguments fail to persuade me that there is anything in the legislative scheme of the *EAA*, or in the EAC issued under its provisions, demonstrating an intent to remove a common law right of action or to provide authority to the holder of an EAC to create a nuisance.

Following an analysis of the aims of the environmental assessment process, drawing on Justice La Forest's description of the Federal Environmental Assessment Process in *Friends of the Oldman River Society v. Canada (Minister of Transport)*[41] and the words of the *EAA* she concluded:[42]

> The environmental assessment is thus primarily an information-gathering

37 *Heyes* BCCA, *supra*, note 1 at para. 153.

38 *Heyes* BCSC, *supra*, note 2 at para. 200.

39 *Heyes* BCCA, *supra*, note 1 at paras. 156-157.

40 *Heyes* BCCA, *supra*, note 1 at para.158.

41 *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 16–18.

42 *Heyes* BCCA, *supra*, note 1 at para. 163.

> process, directed at considering whether major projects are in the public interest, and ensuring co-ordination of government objectives and policies in mounting such projects. It is highly discretionary and broadly based, and addresses competing interests and concerns at a "macro" level. It does not focus on individual interests or disputes. As the Attorney General points out, it may alert proponents of the project to their potential risks and costs, but I see nothing in the legislation or the process that suggests it is intended to protect those parties from later claims in nuisance.

She went on to state that unlike EAC a statutory authorization the EAC did not have the effect of authorizing the project. In contrast to the *Canadian Aviation Regulations*[43] relied on in *Sutherland*, which had the effect of "authorizing the applicant to operate an aerodrome as an airport", she found "there [was] no similar legislative provision of the *EAA* addressing the effect of the *EAA*."[44]

She found the two authorities relied upon by the respondent to support its argument to narrow the protection granted by the EAC to be of limited assistance given that each was dependent on its own legislative framework. First, she rejected the argument raised by the respondent that *St. Lawrence Cement* establishes that "statutory authority must be express and precise":[45]

> I am not persuaded the Supreme Court has narrowed the defence of statutory authority to that extent. The *St. Lawrence* case arose in the context of the *Civil Code of Quebec*, and the Court devoted only two paragraphs to the issue of nuisance and the defence of statutory authority. I am unable to accept the Court intended this brief treatment to create a significant departure from its earlier decisions dealing with that defence.

Second, she also chose not to accept the analogy drawn by the respondents between the case before her and the SCC decision in *British Columbia Pea Growers Ltd. v. Portage la Prairie (City)*[46] In *Portage la Prairie*, the City argued that regulations under the *Public Health Act*,[47] which required it to obtain Ministerial approval before constructing a sewage lagoon, created a statutory mandate to erect and maintain the lagoon. Justice Martland rejected this argument, stating: "These provisions do not add to the appellant's statutory powers, but make their exercise conditional upon this required procedure being followed."[48] The respondents had sought to affirm the trial judge's characterization of the EAC as "simply a permit that had to be obtained as a precondition to beginning the undertaking" and so pursuant to the *Portage la Prairie* could not provide statutory authority for cut and cover construction.[49]

According to Justice Neilson, the central question was whether either the *EAA* or the EAC issued pursuant to the Act provided statutory authority for the method

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43 *Canadian Aviation Regulation*, SOR/96-433 s. 303.03(1).

44 *Heyes* BCCA, *supra*, note 1 at para. 166.

45 *Heyes* BCCA, *supra*, note 1 at para. 168.

46 *British Columbia Pea Growers Ltd. v. Portage la Prairie (City)* (1965), [1966] S.C.R. 150, 54 D.L.R. (2d) 503 [*Portage la Prairie*].

47 *Public Health Act*, R.S.M. 1954, c. 211.

48 *Portage La Prairie*, *supra*, note 46 at para. 15.

49 *Heyes* BCCA, *supra*, note 1 at para. 170.

of construction. She reaffirmed the test set out by Chief Justice Finch in *Sutherland v. Canada (Attorney General)* interpreting *Ryan*:[50]

> I understand that the onus is upon the defendant asserting the defence to establish clear and unambiguous statutory authority for the work, activity or conduct complained of, in the place where that work, activity or conduct takes place, and express or implied authority to cause a nuisance as the only reasonable inference from the statutory scheme.

As the appellants had not met the onus of establishing that the *EAA*, environmental assessment process or EAC provided statutory authority for the work complained of — specifically cut and cover construction — they had not established the defence. Justice Neilson found that there was nothing to suggest that those impacted by the construction would be precluded by the EAC from bringing an action for nuisance, affirming this portion of the trial judge's reasons.

5. ANALYSIS

(a) Statutory Authorization

One reading of the SCC's reasons in *St. Lawrence Cement* suggests that only where the statute specifically precludes a right of action can a defendant establish a defence of statutory authority. With this decision, the BCCA has affirmed the traditional statement of the defence. As set out by Justice Neilson, the central question is whether the statute provides authorization for the work, activity or conduct complained of. Specifically, what did the legislators *intend* and what is the stated *effect* of the authorization?

From the reasons, it seems that the respondent only raised *St. Lawrence Cement* with respect to whether the EAC constituted a statutory authorization. No rationale was given why it was not considered with respect to the City's *Charter* or the *GVTAA* where a discussion of the implications of following *St. Lawrence Cement* and narrowing the defence would have been valuable.

Mansell suggested in his brief comment on *St. Lawrence Cement* that "the court's reasoning for the rejection of the defense of statutory authorization under the *Civil Code* would seem equally applicable under common law".[51] Justice Neilson explanation as to why she did not follow the decision does not address the underlying reasons for the SCC's comments with respect to the defence. Her reasons also do not acknowledge the SCC's comparative review of Canadian Common Law and French Civil Law regarding "neighbourly disturbances" which concluded that the "schemes seem analogous to the one that can be inferred from art. 976 [of the *Civil Code*][52] or the SCC's conclusion as to the effect of article 976 which shows strong parallels to the common law tort of nuisance[53]

Justice Neilson may have erred in limiting the applicability *St. Lawrence Ce-*

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50 *Sutherland v. Canada (Attorney General)*, 2002 BCCA 416, ¶118; additional reasons at 2003 CarswellBC 288 (C.A.); leave to appeal refused 2003 CarswellBC 1102, 2003 CarswellBC 1103 (S.C.C.).

51 Mansell, *supra*, note 21 at s. 18.27.3.

52 *St. Lawrence Cement*, *supra*, note 4 at para. 79.

53 *St. Lawrence Cement, Ibid.* at para. 86.

ment to Quebec. The SCC was clearly aware of the similarity between article 976 and the tort of nuisance. Further, the SCC did not reject the defendant's arguments with regard to the relevance of the common law defence of statutory authority — rather it rejected that the defence had been established. Thus its conclusion that a statute must "expressly" exclude the application of the ordinary law" — specifically that civil liability be excluded for all consequences of the plant's application — seem to have been directed at the common law defence and thus equally applicable outside Quebec.

Although rejected in this case, it may be possible that an environmental approval could provide statutory authority in other circumstances. The admittedly limited potential for such a defense to be based in a simple permit or regulatory approval has been recognized in applications for leave to appeal the grant of a Certificate of Approval under the *Environmental Protection Act*, R.S.O. 1990, c. E 19,[54] a Permit to Take Water under the *Ontario Water Resources Act*, R.S.O. 1990, c. O.40,[55] and a permit to test herbicides.[56]

More specifically, where an approval authorizes the nuisance, rather than the project, a defendant could be successful in establishing the defence. For example, in *Hill v. Vernon (City)*,[57] the city submitted a waste management plan under s. 16 of the *Waste Management Act*.[58] The Minister of Environment approved the plan, and thus authorized "a discharge of waste in accordance with the provisions of the plan and the requirements specified by the minister". The British Columbia Supreme Court found that this approval constituted a statutory authorization:[59]

> In my opinion, the Legislature in empowering the approval of waste management plans by municipalities must have contemplated the likelihood that some people, such as the plaintiffs in this case, might be adversely impacted

54 *Dawber v. Ontario (Director, Ministry of the Environment)* (2008), 36 C.E.L.R. (3d) 191, *(*sub nom. *Lafarge Canada Inc. v. Ontario Enviromental Review Tribunal)* 241 O.A.C. 156 (Div. Ct.). (A number of groups and individuals sought leave to appeal the Ministers decisions to grant the Certificates pursuant to s. 41 of the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28. The Court found that "[i]n some instances, regulatory approval could negate common law rights" at para. 64).

55 *Protect Our Water and Environmental Resources*, *supra*, note 22 at para. 78. ("There are several ways in which common law rights might be diminished [by the grant of a regulatory approval]. In this case, for example, one can ask whether there is a possibility that the issuance of a regulatory approval may protect facilities from certain types of liability. Though the presence of a regulatory approval (as opposed to a statutory immunity provision) may have minimal effect on a nuisance action, an approval may be more relevant in other tort actions such as negligence").

56 *Bolton v. Forest Pest Management Institute*, 14 C.E.L.R. 63, 66 B.C.L.R. 126, [1985] 6 W.W.R. 562 (C.A.) at para. 14 (The defendants had been authorized by provincial and federal permits to conduct research trials of herbicides trials. The judge found that the defence of statutory authority based on these permits was an arguable point better left for trial).

57 *Hill v. Vernon (City)* (1989), 43 M.P.L.R. 177 (B.C. S.C.) [*Hill*].

58 *Waste Management Act*, S.B.C. 1982, c. 41 (repealed by the *Environmental Management Act* as of July 8, 2004).

59 *Hill*, *supra*, note 57 at paras. 27-28.

> by the implementation of a waste management plan, and that it is reasonable in the case of an Act such as here to infer immunity in the city from actions such as the present one.
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> The situation in this case, in my view, falls squarely within the parameters of the defense of statutory authority described by Fleming and quoted *supra*. That is, the "legislation has authorized a certain use on a particular site which will inevitably constitute a nuisance or has imperatively directed a use within a certain area where nuisance cannot be avoided."

Lastly, where there is language in the statute "deeming" the project to be constructed, maintained or operated by statutory authority, it may provide an indication that legislators intended the effect of the approval to be a statutory. For example, in *Tomagatick*, the OERT suggested that Section 59 *Ontario Water Resources Act*[60] could remove a common law right of action in nuisance.[61] The section provides as follows:

> Sewage works that are being or have been constructed, maintained or operated in compliance with this Act, the *Environmental Protection Act* and the regulations under both Acts and with any order, direction or approval issued under the authority of this Act or any predecessor of any provision of this Act *shall be deemed to be under construction, constructed, maintained or operated by statutory authority*. R.S.O. 1990, c. O.40, s. 59.

On September 19, 2011 the following amendment to section 59 will come into force:[62]

> Section 59 [will be] amended by striking out "any order, direction or approval issued under the authority of this Act or any predecessor of any provision of this Act" and substituting "any order, direction or approval issued under the authority of this Act or any predecessor of any provision of this Act or an environmental compliance approval".

Whether an environmental approval or permit may form the basis for a defence of statutory authority must be determined on a case-by-case basis. While "[t]he Courts strain against a conclusion that private rights are intended to be sacrificed for the common good,"[63] it is within the powers of legislators to craft statutes that authorize nuisance-causing activities or projects. *Heyes* should not be taken to definitively pronounce that environmental assessment approvals could never form the basis of the defence. Rather, it offers an example of the analysis to be applied to determine whether an approval with the effect of express or implied statutory authorization of the nuisance is in place.

(b) Inevitability/Alternatives

With this decision, Justice Neilson broadened the factors that can be used to assess the viability of non-nuisance alternatives. Most significantly, she brought cost into the analysis. Also of note, is that in considering the project proposals as a

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60 *Ontario Water Resources Act*, RSO 1990, c. O-40 [emphasis added].

61 *Tomagatick*, *supra*, note 22 at para. 109.

62 S.O. 2010, c. 16, Sched. 7, ss. 3 (29), 9 (2).

63 *Tock*, *supra*, note 14 at para. 95.

whole, she considered factors that would not initially spring to mind as being indicators of feasibility or lack thereof.

As quoted above, in *Ryan* the SCC adopted Justice Sopinka's statement that in establishing that there are no viable non-nuisance alternative "[t]he mere fact that one is considerably less expensive will not avail." In *Heyes*, the Justice Neilson found that there are circumstances where cost may be so prohibitive as to make an alternative "practically impossible":[64]

> In addressing the comparative financial costs of the proposals, I acknowledge the Supreme Court in *Ryan*, at para. 55, approved the view that the mere fact that one option is considerably less expensive will not be sufficient to negative a non-nuisance alternative. In my respectful view, however, the common sense approach advocated in *Manchester* suggests there must be some point at which a strong evidentiary record of significant financial disparity that demonstrates one option is practically impossible, becomes a legitimate consideration in determining the practical feasibility of alternatives.

In assessing the viability of the other proposal, Justice Neilson considered each project construction proposal as a whole — assessing a wide range of factors including cost. She concluded that when looked as a whole, only the chosen method of construction was "practically feasible".

In *Heyes*, the wide-ranging analysis of the differences between the project proposals was supported by a strong evidentiary record that discussed the proposals in detail. This analysis demonstrated that in addition to being more cost effective, the construction method selected was also desirable for many other reasons, reinforcing Justice Neilson's conclusion that the proposal that included cut-and-cover construction was the only viable choice. It remains to be seen whether cost alone could justify a choice not to proceed with a non-nuisance alternative.

To establish the defence of statutory authority, a defendant must shore that the nuisance was the inevitable result of the statutorily authorized work, activity or conduct — i.e. there was no feasible way to complete the work without causing a nuisance. It is important to recognize the difference between considering what makes a non-nuisance option unfeasible and considering what makes a nuisance-causing option desirable. The courts should be cautious in accepting characteristics such as urban fit, preserving heritage landscapes, and more attractive results as evidence of feasibility.

6. CONCLUSION

With this decision, Justice Neilson affirmed a traditional view of the defence of statutory authority in two significant ways. First, she chose not to alter the common law test to incorporate the SCC's recent decision in *St. Lawrence Cement*. As a result the standard to be met by the defendant in establishing statutory authorization of a nuisance was not raised. Pursuant to *Heyes*, the authorizing statute does not require a provision precluding recovery in nuisance in order for it to act as a basis for the defence.

Second, she chose to follow a "common sense" approach to determining

64 *Heyes* BCCA, *supra*, note 1 at para. 125.

whether nuisance was the inevitable result of the authorized work, activity or conduct. In the circumstances of the case, common sense dictated that the "significant financial disparity" between the project proposals should be considered in addition to a wide range of other factors.

Justice Neilson's approach significantly broadens the defence of statutory authority, perhaps making it broader than was contemplated by the SCC in either *St. Lawrence Cement* or in its earlier decisions. To reiterate the words of Justice Major quoted above: "Statutory authority provides, at best, a narrow defence to nuisance."[65] The SCC's analysis in *St. Lawrence Cement* suggested a move toward requiring explicit acknowledgment from legislators that rights of action will not be available should a nuisance arise. In contrast, Justice Neilson's approach suggests that the court should dig deeper to ascertain the legislator's intent.

Such an approach may increase the scope of the defence beyond what is appropriate in a time when we aim to hold governments accountable for legislative decision-making. Nuisance is a powerful tool for environmental protection because of its broad utility: it does not require actual damage and so encompasses a wider scope of grievances and applies to a wider range of situations than trespass or strict liability.[66] Broadening the scope of the defence further limits the availability of a remedy for those who are negatively impacted by nuisance-causing works, activities or conduct. This affirmation of the traditional approach may go too far to protect legislator's ability to proceed with projects at the expense of individuals right at common law to the use and enjoyment of their property.

As the respondents have sought leave to appeal the BCCA's decision, the SCC may yet take the opportunity to comment on the court's approach and settle any uncertainty surrounding the defence of statutory authority.[67]

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65 *Ryan*, *supra*, note 16 at para. 54.

66 Robert Mansell, "Civil Liability for Environmental Damage" in *Canadian Environmental Law*, looseleaf (.....: Butterworths, ...) at s. 18.5.

67 Application for leave to appeal to S.C.C requested, 34224.