YOUNG ANDERSON
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CLIENT BULLETIN

NO LIABILITY IN NUISANCE FOR CANADA LINE CONSTRUCTION

In a significant decision for local governments, the Court of Appeal reversed the decision of the British Columbia Supreme Court in *Heyes v. South Coast B.C. Transportation Authority* on Friday. In its immediate effect, this decision reverses the award of $600,000 in business losses paid by Translink and its subsidiary and private partner to a business owner on Cambie Street during the cut and cover Canada Line construction. On a broader basis, it may also signal that the courts are not entertaining the broad recovery for nuisance for major infrastructure changes and works suggested by the trial decision.

Canada Line construction on Cambie Street in the cities of Vancouver and Richmond was a major infrastructure project which involved traffic disruptions along a major transportation route for approximately 5 years. As a result of this work, this major thoroughfare was reduced to only single lane traffic, and occasionally alternating traffic, with limited parking and turning opportunities. Both the B.C. Supreme Court, and the Court of Appeal found that the business losses to just one business, Hazel & Co. owned by the Plaintiff Susan Heyes, was $600,000. A class action is still extant in relation to the many other businesses located along Cambie Street during this period.

In May 2009, a B.C. Supreme Court judge found Translink, its subsidiary, and its private partner, liable in nuisance for the business losses. This decision spurred an time of uncertainty and resurgence of claims and threatened claims against local governments in relation to business losses relating to the closure of roads, whether temporary or permanent.

A finding of nuisance does not require any finding of fault, negligence, improper purpose or lack of statutory authority to act in order to prove damages. A finding of nuisance is purely based on the reasonableness of the interference with a person's enjoyment of their property. In finding that neither the *Greater Vancouver Transportation Authority Act,* Translink's resolution to adopt a particular proposal, the *Vancouver Charter*, or the City's bylaws and regulations with respect to road closures constituted sufficient statutory authority to defend the claim in nuisance, the trial court decision opened the door to a potential major new area of liability for local governments which would be very difficult to defend.

With the Court of Appeal's decision reversing the trial judge, the scope of that new area of liability has been reduced. The Court of Appeal found that the *Greater Vancouver Transportation Authority Act,* which authorized Translink to construct facilities for the purposes

of developing a regional transportation system, and the *Vancouver Charter,* which authorized the City to change the traffic pattern on its roads, were sufficient statutory authority to provide a defence to nuisance in this case. On the facts of this case, the Court of Appeal also found that Translink's alternative options in terms of a bored tunnel construction of the Canada Line were not viable alternatives, and in fact were not even non-nuisance alternatives. The Court of Appeal also rejected the trial judge's finding that private partners could not benefit from the same protection and statutory defences as their public partners.

There are a few remaining areas of concern in relation the decision. The Court of Appeal rejected Translink's resolution to adopt the route and construction method proposed by the successful proponent as a decision with sufficient policy and legislative hallmarks to create a statutory authority defence. Therefore, the burden on the government body was much higher because it had to prove that the nuisance caused was the inevitable and necessary result of the much broader discretion granted in the *GVTAA.* Essentially, Translink had to prove that it had no other options that were viable on a practical level (not simply financially) and that would not have caused an equal amount of nuisance. In addition, the *Vancouver Charter* authority which allows for the City to create traffic closures and disruptions was considered statutory authority to cause the nuisance, but not necessarily sufficient to create a defence without the Court's further finding that the specific closures and traffic changes were required for the cut and cover line as authorized by Translink.

As a result, local governments can rest somewhat easier knowing that no liability was found in this case. However, it is not clear that simply any policy decision will be an adequate legislative basis for creating a defence to the nuisances caused by infrastructure works. In fact, the Court has asserted its role in terms of reviewing the reasonableness of such projects and weighing the potential losses of such projects against their social utility. As a result, where business losses are likely to be significant, all viable alternatives to the specific traffic closures may have to be considered for their nuisance potential in the short and long term, and decisions to implement traffic changes will have to be made with the proper authority to ensure some level of defence from subsequent claims in nuisance.

Francesca Marzari