LIDSTONE & COMPANY
Barristers and Solicitors

BULLETIN

TO:	All Clients
FROM:	Lidstone & Company
DATE:	October 21, 2011
RE:	**Supreme Court of Canada Refuses to Hear Susan Heyes Appeal**
FILE:	99999-026

The Supreme Court of Canada has refused to hear an appeal of the BC Court of Appeal's decision in *Susan Heyes Inc. (Hazel & Co.) v. South Coast B.C. Transportation Authority*.[1] This is good news, as local governments considering potentially disruptive construction and public works projects can now rely on the principles set out in the BC Court of Appeal decision when assessing their risk of being held liable in nuisance.

The construction of the Canada Line Rapid Transit route connecting downtown Vancouver, Vancouver International Airport and the City of Richmond lasted from 2005 until 2009. A "cut and cover" construction method was used, causing significant traffic disruption and substantial interference with access to businesses in the area. Susan Heyes, an owner of one of those affected businesses, brought an action against the City of Vancouver, Translink, a number of construction companies, and the provincial and federal governments. At the trial in 2009, TransLink, CLRT and InTransit BC were found liable in nuisance and Heyes was awarded $600,000 in damages.[2]

In February of this year the BC Court of Appeal overturned that decision and dismissed Heyes' claim.[3] The Court of Appeal agreed that the defendants had indeed committed the tort of nuisance by cutting off access to the plaintiff's business, but also concluded that the defendants were protected by the narrow defence of statutory authority. Legislation authorized the building of the Canada Line and it was inevitable that some form of nuisance would have resulted when exercising that statutory authority. The trial judge erred when he concluded that there were other viable "non-nuisance" alternatives to "cut and cover" construction, financial realities could not be ignored when weighing the practical feasibility of the different options available, and the significantly lower cost and reduced risk of the "cut and cover" method made it the only practically feasible option.

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[1] *Susan Heyes Inc. dba Hazel & Co. v. South Coast British Columbia Transportation Authority et al.* (B.C.) (Civil) (By Leave) (34224).
[2] *Heyes v. City of Vancouver*, [2009] 2009 BCSC 651 (B.C.S.C.).
[3] *Susan Heyes Inc. (Hazel & Co.) v. South Coast B.C. Transportation Authority,* 2011 BCCA 77 (B.C.C.A).

Implications

- A local government may be held liable in nuisance where a construction, road building etc. causes more than trivial interference with property (i.e. where it results in restricted access to businesses), even if that project has great benefit to the public.
- Although the "statutory authority" defence is a narrow defence and is not easily made out, as a result of the *Heyes* case it is more likely to offer some protection to local governments.
- When undertaking construction or other projects, local governments should explore whether there are any practically feasible ways of meeting the desired objectives without causing unreasonable interference with property and risking a nuisance claim.
- If there is no practically feasible alternative, and unreasonable interference with property is likely, then local governments should be prepared to make a convincing argument that the interference was an unavoidable and inevitable consequence of the project.