IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Heyes v. City of Vancouver,***
2009 BCSC 651

Date: 20090527
Docket: S054152
Registry: Vancouver

Between:

Susan Heyes Inc. dba Hazel & Co.

Plaintiff

And

City of Vancouver, Her Majesty the Queen in Right of Canada, Attorney General of British Columbia, South Coast British Columbia Transportation Authority, Canada Line Rapid Transit Inc. and InTransit BC Limited Partnership

Defendants

Before: The Honourable Mr. Justice Pitfield

Reasons for Judgment

Counsel for the Plaintiff:	A.C. Ward
Counsel for the Defendants:	G.K. Macintosh, Q.C. R.J. McDonnell S. Hern T.A. Dickson
Date and Place of Trial:	March 18-20, March 23-27, 30, April 1-3 Vancouver, B.C.

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Introduction

[1] Susan Heyes Inc. ("Hazel & Co.") seeks damages for negligent misrepresentation, negligence, and nuisance in relation to the construction of the Canada Rapid Transit Line (“Canada Line”) on Cambie Street in the City of Vancouver. When operational, the Canada Line will provide rapid transit connecting downtown Vancouver, the City of Richmond, and the Vancouver International Airport.

[2] Hazel & Co. says that it relied on one or more misrepresentations that the Canada Line would be constructed in the vicinity of its business by means of a bored tunnel that would not disturb the street surface before it renewed the lease of the premises from which it operated and before it ordered or manufactured retail inventory, and incurred economic loss as a result. It claims that the defendants breached a duty of care and were negligent in the process of selecting a consortium comprised of SNC-Lavalin Inc. and Serco Group Inc. (“SNC-Lavalin/Serco”) to design, build, operate and maintain the Canada Line by means of InTransit BC Limited Partnership (“InTransit BC”). Finally, Hazel & Co. claims that the cut and cover or open trench method of construction employed in the vicinity of its business at 16th Avenue and Cambie Street resulted in an actionable nuisance and caused economic loss.

[3] The defendants say that the claims based on misrepresentation and negligence are groundless. They deny that the method of construction caused a nuisance, but say that if it did, then it was a public nuisance in respect of which

Hazel & Co. may not bring an action without the consent of the Attorney General of British Columbia. Alternatively, the defendants say that if any of them caused a private rather than public nuisance, they cannot be liable because they carried out the project under statutory authority and any nuisance that arose was the inevitable consequence of undertaking construction of the Canada Line.

[4] This action is not about government or transportation authority policy. It is an action concerned with the legal rights and obligations of the parties. The issues are these: did the construction of the Canada Line cause Hazel & Co. economic loss, and if so, is any defendant legally obliged to compensate Hazel & Co. for that loss?

[5] For the reasons that follow, I dismiss the claims based on misrepresentation and negligence against all defendants. I find the South Coast British Columbia Transportation Authority ("TransLink"), Canada Line Rapid Transit Inc. ("CLRT"), and InTransit BC liable in nuisance. The nuisance claim against the remaining defendants is dismissed.

The Parties

[6] Hazel & Co. is a British Columbia company of which Ms. Susan Heyes is the sole shareholder, officer, and director. The company is primarily engaged in the design, manufacture, and retail sale of maternity clothing. It operated a retail outlet at 16th Avenue and Cambie Street from 1999 through December 2008.

[7] Each of the defendants was or is involved, in one way or another, in the funding, planning, design, construction, operation, and maintenance of the Canada Line.

[8] The City of Vancouver (the “City") is the lawful owner of Cambie Street on and under which a portion of the Canada Line is located.

[9] TransLink, previously known as the Greater Vancouver Transportation Authority, is responsible for the transportation system in the Lower Mainland.

[10] CLRT is a company that was incorporated on September 17, 2002, under the name of RAV Project Management Ltd. It is a wholly-owned TransLink subsidiary incorporated for the purpose of devising and implementing a plan for the development of a rapid transit line connecting downtown Vancouver, the City of Richmond, and the Vancouver International Airport.

[11] InTransit BC is a limited partnership of which InTransit British Columbia GP Limited is the general partner. SNC-Lavalin Inc. (“SNC-Lavalin”), B.C. Investment Management Corporation (“BCIMC”), and Caisse de dépôt et placements du Quebec (the “Caisse”) are the limited partners. The partnership is the concessionaire which assumed responsibility for the final design, construction, operation, and maintenance of the Canada Line.

[12] The Government of Canada (“Canada”) committed $450 million, and the Province of British Columbia, represented in this action by the Attorney General, committed $300 million to the development of the Canada Line.

[13] In broad terms, the Canada Line was developed by means of a public-private partnership, commonly referred to as a “P3”. Under the arrangement, CLRT managed and coordinated the project and acquired ownership of the assets and infrastructure comprising the Canada Line. Canada and British Columbia provided public funding. InTransit BC provided private equity of approximately $750 million, and committed to design and construct the Canada Line and to operate and maintain it for a term of 35 years.

[14] Hazel & Co. says that each of the defendants is closely connected to the evolution and construction of the Canada Line and therefore liable to pay any damages that may be awarded.

[15] The defendants say that if there is liability at all, the only defendants that can be liable are InTransit BC, CLRT, and TransLink.

Factual Background

[16] A chronological summary of the facts, which are largely agreed upon by the parties, will assist in the discussion of the issues that must be resolved in this action.

(a) The Planning Stage and Request for Expressions of Interest

[17] A rapid transit line connecting Vancouver and Richmond had been considered for many years. It was referred to in the Greater Vancouver Regional District's long-range transportation plan for Greater Vancouver produced in 1993, and included in the Regional District's 1996 Liveable Region Strategic Plan, which was adopted by all municipalities in the Lower Mainland.

[18] In 2000, TransLink embarked on a more detailed consideration of a rapid transit link. TransLink retained Ms. Jane Bird, now the chief executive officer of CLRT, as a consultant to consider the need for the Vancouver-Richmond rapid transit link, prepare a rough estimate of cost, and consider how the private sector might be involved in the project. Ms. Bird reported her findings: the region would benefit from a rapid transit line connecting Vancouver and Richmond, substantial government funding would be required, and the project might attract private investment within a P3 model.

[19] Having obtained an indication of support from Canada, British Columbia, the Cities of Richmond and Vancouver, and the Vancouver International Airport Authority, TransLink moved forward to the project definition stage late in 2001.

[20] The intended purpose of this phase of the project was to refine the concept of the line, emphasizing technical and financial feasibility, with a view to gaining the support required to permit CLRT to issue a request for proposals.

[21] The project team and its consultants proceeded on the basis that the Cambie Street portion of the line would be constructed in a bored or mined tunnel. This assumption flowed from the fact that a large old sewer main in the vicinity of 8th Avenue and Cambie Street could not be moved, and the belief that the line could not be constructed above the sewer. A deep tunnel, not amenable to cut and cover or open trench construction, would therefore be required.

[22] At the early planning stage, each of British Columbia, the Airport Authority and TransLink expressed a willingness to commit $300 million to the project.

Canada appeared willing to contribute $450 million. Potential public funding therefore approximated $1.35 billion, which was not sufficient to construct the line.

[23] The project team considered whether a means could be found whereby available public funding could be augmented by private sector capital to provide the funds required to construct the Canada Line. The team identified a P3 model as the best form of public-private cooperation. It was anticipated that the project would benefit from the innovation, risk management, and cost efficiencies that the private sector was likely to provide. The expectation was that, given an estimate of the amount of public funding that would be available, the private sector would consider whether, with additional private sector funding, a rapid transit line could be designed and constructed, and subsequently maintained and operated, in a manner that would ensure a reasonable return on investment.

[24] With the P3 model in mind, the team summarized the requirements for the line in terms of automated travel, travel time, ridership, and the number of stops at specified locations along a reference line. The line would extend by underground tunnel from Waterfront Station in Downtown Vancouver, south on Granville Street, under False Creek, and along Cambie Street to at least 49th Avenue. From there, the line would continue to Marine Drive either underground, or at or above grade, and from Marine Drive, at or above grade to downtown Richmond and the Vancouver International Airport.

[25] As the planning progressed, TransLink incorporated CLRT under its original name of RAV Project Management Ltd. to oversee and manage the project.

[26] The project team drafted a "Request for Expressions of Interest" ("RFEI"). The purpose of the RFEI was to elicit statements from potential proponents about their qualifications to design, build, partially finance, operate and maintain a project of the kind which was being planned. The RFEI was mailed on November 30, 2002, to approximately 200 private sector companies that had expressed interest in the project, or that were otherwise identified as potential bidders. CLRT received responses from approximately twenty interested parties.

(b) The Initial Request for Environmental Assessment

[27] The Canada Line was not subject to mandatory provincial environmental assessment. 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*"). Nonetheless, s. 7 of the *EAA* permits a proponent to apply to the Environmental Assessment Office (the "EAO") to have a non-reviewable project designated as one that is reviewable.

[28] *The Canadian Environmental Assessment Act*, S.C. 1992, c. 37, which is the federal counterpart to the provincial legislation, requires an environmental assessment in circumstances where a federal authority authorizes payments to, or financial assistance for, a project, or where a project affects lands in which the federal government has an interest, such as the Fraser River or the Vancouver International Airport. The *Canada-British Columbia Agreement for Environmental Assessment Cooperation* permits British Columbia and Canada to co-operate in the

creation of a project-specific environmental assessment plan that will satisfy both the federal and provincial environmental assessment requirements.

[29] On January 13, 2003, CLRT applied under s. 7 of the *EAA* for an order designating the Canada Line as a reviewable project for environmental assessment purposes. CLRT was aware of the federal assessment requirement, and sensitive to the potential impact of the project on the community. CLRT opted for the provincial review because it appeared broader from a socio-economic perspective. The order designating the Canada Line as a reviewable project was granted on September 10, 2003.

[30] The EAO Project Director for the Canada Line directed that the assessment be conducted according to a schedule annexed to the order which was entitled "Scope, Procedures and Methods for the Environmental Assessment of the Richmond/Airport/Vancouver Rapid Transit Project." The document contemplated that the Canada Line would proceed by twin-bored tunnel construction from the Vancouver Waterfront Station to 37th Avenue; by cut and cover tunnel construction from 37th to 63rd Avenue, or by cut and cover tunnel construction to 46th Avenue and then at street level to 63rd Avenue; and then by elevated line thereafter to the Airport and downtown Richmond, although a street level line was an alternative in downtown Richmond. There is no evidence that the environmental assessment process identified any insurmountable problems associated with the project in that form.

(c) Project Definition and Construction Alternatives

[31] By February 27, 2003, the project team had completed a “Final Draft” of the Project Definition Report (the “Final Draft”). The document was marked “Final Draft” because it was anticipated that planned consultation with government bodies and the general public could result in further revision.

[32] The Final Draft summarized and reported on the work carried out in the project definition phase for comment by: the public; the participating agencies, who were Canada, British Columbia, the Vancouver International Airport Authority, TransLink, the City of Vancouver, the City of Richmond, the Greater Vancouver Regional District and the Vancouver Port Authority; and the contributing agencies, who at that time were British Columbia, the Vancouver International Airport Authority and TransLink. It was anticipated that the participating authorities would use the Final Draft to assess whether to approve the project, while the funding agencies would use it to consider the extent of their financial contribution and the appropriate structure of the project.

[33] The document stated that it was not intended to provide a solution, but to sufficiently define the project so that the private sector would be encouraged to be creative and to devise the solution that would deliver the best value.

[34] The Final Draft suggested ten possible options for the placement of the Canada Line. Each option contemplated a bored tunnel under Cambie Street between 6th Avenue and King Edward or 25th Avenue to the south. Although

contemplated on another portion of the line, cut and cover construction was not considered for the line north of King Edward.

[35] The requirement for a bored tunnel was premised on the assumption that had been made in the early planning stage, namely, that the tunnel under Cambie Street would have to be bored or mined, rather than being constructed by the cut and cover method, because the depth required to take the tunnel below the sewer line at 8th Avenue and Cambie Street, and the natural rise in the surface of the land as one moves south on Cambie, would prohibit construction by any means other than boring or mining.

[36] Bored tunnel construction requires the creation of a portal or opening at a point along the intended route of the tunnel. A tunnel-boring machine is used to excavate material from the portal to the depth of the tunnel. Thereafter, the machine bores into the subsurface material at the required depth and grade, and in the required direction. The tunnel is supported and reinforced as the boring machine proceeds on its intended course. Excavated material is removed from the tunnel through the portal.

[37] An alternative to bored tunnel construction employs more conventional mining techniques, including entry to the underground by way of a shaft, the mining and removal of the subsurface material through the shaft, and the reinforcement of the tunnel as underground mining or excavation proceeds.

[38] Neither the bored nor mined methods of tunnel construction disrupt the surface except in the vicinity of a portal or a shaft.

[39] Cut and cover tunnel construction, by contrast, requires the excavation of a trench from the surface to the depth of the tunnel floor, the placing of pre-cast tunnel sections in the open trench, and the return of excavated material to cover the tunnel structure and restore the land to its original surface grade. An alternative to the use of pre-cast tunnel sections involves the construction of forms in the trench for the tunnel floor, walls and roof, and the pouring of concrete in place. The feasibility of cut and cover construction is affected by the depth of the tunnel below grade: the deeper the tunnel, the less feasible cut and cover construction becomes. Cut and cover construction is significantly less expensive than either bored or mined tunnel construction.

[40] The Final Draft stated that it was not intended to provide a solution, but to define the project in sufficient detail to motivate the private sector to find the solution that would deliver the best value. In addition to describing the various options, the authors said the following:

> Ultimately, the private sector will develop and propose solutions within the reference alignment that meet the performance standards and the defined design parameters. They may or may not mirror the options identified by the project team.

[41] Vancouver City Council considered the Final Draft in a three-day meeting from May 13 to 15, 2003. At the conclusion of the meeting, City Council approved the project by resolution subject to a number of conditions, one of which was that the line would be located in a tunnel from Waterfront Station in downtown Vancouver south to at least 46th Avenue on Cambie Street. The resolution did not specify the manner in which the tunnel would be constructed.

[42] TransLink was advised of the City's decision. On May 23, 2003, the TransLink board approved in principle the preparation and issuance of a Request for Proposals ("RFP"). At the same meeting, TransLink confirmed its commitment to contribute $300 million to construction of the line, provided that the Airport Authority and British Columbia did the same, and provided Canada agreed to commit $450 million.

(d) The Request for Proposals Stage

[43] On August 25, 2003, CLRT sent the RFP to four of the 20 entities that had responded to the RFEI. The RFP indicated that it was intended to encourage innovation from the private sector, but required compliance with the essential elements that had been put forward by the Cities of Richmond and Vancouver, one of which, insofar as Vancouver was concerned, was that the line be located in a tunnel between 2nd and 46th Avenues.

[44] The RFP stated that proponents were at liberty to develop alternatives to the vertical and horizontal alignments provided that the limits described for each were respected. The vertical alignment described the maximum depth of the tunnel at any point. The horizontal alignment described the course the line would follow from one end to the other. The RFP made no mention of cut and cover construction. Rather, the manner in which the tunnel would be constructed was left to the proponents for consideration. The deadline for responses to the RFP was January 23, 2004.

[45] The staff of CLRT and each of the respondents to the RFP entered into confidentiality agreements prohibiting the disclosure of a proponent's proposal to the

competition or to the public. I find that the use of confidentiality agreements was consistent with the stated intention of CLRT to encourage innovative solutions and to protect the commercial interests of the separate proponents.

[46] By January 23, 2004, three of the four entities to which the RFP had been directed submitted a response. Each of the three respondents submitted a "base case" and one or more "alternates". CLRT considered the proposals submitted by RAVxpress and SNC-Lavalin/Serco to be the most meritorious.

[47] The base case and alternate proposals submitted by RAVxpress proposed bored tunnel construction on Cambie Street.

[48] One of the alternate proposals submitted by SNC-Lavalin/Serco contemplated cut and cover tunnel construction from 2nd to 37th Avenues rather than the bored tunnel construction envisaged in the Final Draft. Cut and cover construction became feasible because SNC-Lavalin/Serco engineers were able to devise a means of permitting the tunnel to pass above the problematic sewer line at 8th Avenue. That plan permitted a substantial reduction in the depth of the tunnel at 8th Avenue, and a corresponding reduction in tunnel depth along the length of Cambie Street.

[49] The proposals were evaluated by CLRT's evaluation committee and its five sub-committees in the period from February through May 2004. The evaluation committee recommended that RAVxpress and SNC-Lavalin/Serco be asked to submit a best and final offer (“BAFO”). The recommendation was accepted by the CLRT board and recommended, in turn, to TransLink.

(e) The Best and Final Offer Stage and the Selection of a Concessionaire

[50] On June 30, 2004, the TransLink board voted to complete the procurement process by proceeding to the BAFO stage, and entering into a concession agreement if certain specified conditions were satisfied.

[51] In July 2004, CLRT invited SNC-Lavalin/Serco and RAVxpress to submit their BAFO by September 29, 2004. Each of the invitees submitted a BAFO, which was then reviewed by an evaluation committee until mid-November.

[52] On November 5, 2004, British Columbia and TransLink signed funding agreements confirming their respective financial commitments to the project.

[53] The CLRT board met with its evaluation committee in the period November 15 - 17, 2004. The committee favoured and recommended the SNC-Lavalin/Serco proposal for several reasons, foremost among which was the reduction in the required amount of public funding. The SNC-Lavalin/Serco proposal quantified the public funding commitment at approximately $1.4 billion, and the RAVxpress proposal, at approximately $2 billion. The difference was obviously material given that public funding was limited to $1.35 billion. The difference in the cost of the SNC-Lavalin/Serco and RAVxpress proposals was largely due to the proposed use of cut and cover rather than bored tunnel construction.

[54] Another factor commending the SNC-Lavalin/Serco BAFO was the proposal to use stacked, as opposed to side-by-side, tunnels from approximately 13th Avenue south to 63rd Avenue. That aspect of the design allowed the cut and cover trench to

be excavated in the middle of Cambie Street, leaving the east side of the street for the use of construction equipment and access, and the west side, for north-south traffic. The stacked tunnel concept also allowed construction of the tunnel on the east side of the Cambie Heritage Boulevard, thereby reducing the potential adverse effects on the Boulevard itself.

[55] On November 17, 2004, the CLRT board resolved to recommend final negotiations and completion of a concession agreement with the SNC-Lavalin/Serco consortium. That recommendation was forwarded to TransLink. TransLink staff reported to the TransLink board on November 26, 2004.

[56] On November 30, 2004, CLRT signed a site access agreement with the City. The agreement specified the terms on which CLRT would be granted a licence permitting access to City property for the purpose of constructing and operating the Canada Line.

[57] On December 1, 2004, the TransLink board resolved to approve the CLRT recommendation that SNC-Lavalin/Serco be selected as the concessionaire, conditional upon on the project being fully funded. TransLink authorized CLRT to negotiate and sign a contract with SNC-Lavalin/Serco.

(f) Public Disclosure and Discussion of Construction Methods

[58] From the commencement of the financial and technical feasibility assessments, the general public was advised that the Canada Line would be located in a tunnel on that portion of Cambie Street from 2nd Avenue to at least 37th

Avenue. The information that was in the public domain indicated that the tunnel would be bored or mined. There was no reference in any of the material suggesting that a cut and cover method of tunnel construction would be employed on that portion of the line.

[59] As I have remarked, the possibility of cut and cover tunnel construction along Cambie Street from 2nd to 37th Avenue was first raised by SNC-Lavalin/Serco in January 2004 when it responded to the RFP. The SNC-Lavalin/Serco proposal to use cut and cover construction was not disclosed to the public, including others engaged in the proposal process. The confidentiality agreements prevented disclosure of the design proposals and cost estimates that had been received and were under consideration.

[60] The fact that the construction proposal approved by the TransLink board on December 1, 2004, would involve a cut and cover trench from 2nd Avenue south first entered the public domain in December 2004 by way of disclosure on the EAO website.

[61] Notwithstanding that posting, neither TransLink nor CLRT made a public announcement of like kind. Rather, reports of the proposal to use cut and cover construction appeared in the media in January 2005. The reports and ensuing enquiries resulted in a public information meeting of CLRT representatives and concerned citizens at the Plaza 500 Hotel in Vancouver on January 25, 2004. At the meeting, Ms. Bird confirmed on behalf of CLRT that cut and cover construction would be used. When asked about the impact of the method on any particular

segment of Cambie Street, Ms. Bird advised those at the meeting, including Ms. Heyes, that the tunnel trench would be open at any particular location on the street for a period of not more than three months. The estimate reflected the fact that at the time, the SNC-Lavalin/Serco proposal contemplated using a pre-cast method of tunnel construction which would entail excavation of the tunnel trench, offsite fabrication of tunnel sections, the transport and installation of those sections by a boom and gantry system and the filling and remediation of the trench within a reasonable time thereafter.

[62] The Cambie Street merchants and others who would be affected by cut and cover tunnel construction were predictably outspoken and critical. Ms. Bird testified that "some attendees were anxious for information, some were angry."

[63] The estimate of the duration of open trenching ultimately proved to be incorrect. A trench was partially or completely open at any location for a period of up to eight months. The substantial increase in time arose because, as excavation began at the south end of Cambie Street, unstable ground was encountered making it difficult to use a pre-cast method of tunnel construction. That method was abandoned and replaced by the "pour-in-place" method that required more time.

[64] I find, in any event, that the statement that the tunnel trench would be open in front of any particular location on Cambie Street for a period of three months was a gross over-simplification of the impact that cut and cover construction would have on Cambie Street. I will address the actual impact of that kind of construction on Hazel & Co. in due course.

[65] Soon after the January 25, 2005, public meeting, persons who were most likely to be affected by cut and cover construction, including Ms. Heyes on behalf of Hazel & Co., formed the Do RAV Right Coalition with a view to a renewed and detailed environmental assessment of the cut and cover proposal. As noted, the original assessment had proceeded on the basis that bored tunnel construction would be used from 2nd to 37th Avenues, if not further south.

(g) Completion of the Environmental Assessment Process

[66] Once the work required by the environmental assessment plan was completed, CLRT applied for an Environmental Assessment Certificate on November 19, 2004. On December 2, 2004, the day after TransLink approved the SNC-Lavalin/Serco proposal, which was a departure from the project as assessed because of the proposal to use additional cut and cover construction, the EAO wrote to CLRT requesting a supplement to the application. The EAO stated that the supplement should address "consequential variations to the impact assessments and mitigation measures described in the [original] Application." In the same correspondence, the EAO fixed a 45-day period to commence on January 10, 2005 and to close on February 23, 2005, to elicit public comment.

[67] The supplementary information was provided by CLRT. By April 2005, the EAO had compiled its report for submission to the Minister of Sustainable Resource Management, the Minister of Water, Land and Air Protection, and the Minister of Community, Aboriginal and Women's Services (the "responsible Ministers"), who would consider whether to issue an Environmental Assessment Certificate.

[68] On April 11, 2005, the Do RAV Right Coalition filed a petition in this court seeking judicial review of two decisions of the Project Director:

1. The decision to accept the Canada Line project, including the cut and cover proposals, for formal review under the *EAA* in December 2004; and

2. The decision of December 17, 2004, stating that CLRT's "past and proposed public consultation programs are in full compliance with legislative requirements under the [*EAA*]."

[69] On April 19, 2005, the responsible Ministers directed that the project undergo further assessment and that a period of further public consultation extend from April 25 to May 16, 2005.

[70] On May 27, 2005, CLRT agreed to the conditions stated in a draft of the Environmental Assessment Certificate. The actual certificate was signed by the responsible Ministers and formally issued on June 7, 2005. Canada issued the federal equivalent on June 15, 2005.

[71] The Do RAV Right Coalition petition for judicial review was heard by Bauman J., as he then was, on June 20-24, 2005. The petition was dismissed with written reasons on June 30, 2005. The Court of Appeal heard and dismissed an appeal from the learned judge’s ruling in October 2006.

[72] In September 2005, InTransit BC, which was by then the concessionaire, proposed modifications to the construction plan for Cambie Street. The proposal

was to move the cut and cover tunnel between 13th and King Edward Avenue from the east side to the centre of Cambie Street, to close the east side of the street so that it could be used for construction access, and to use a pour-in-place method of tunnel construction. An amended environmental assessment certificate approving the changes was issued November 29, 2005, by which time construction of the Canada Line was underway.

(h) The Concession Agreement and the Course of Construction

[73] By April 14, 2005, all public funding agreements had been executed. By July 2005, certain modifications had been made to the SNC-Lavalin/Serco proposal so that the project could proceed with the available public and private funding.

[74] In July 2005, SNC-Lavalin/Serco formed the limited partnership, InTransit BC, for the purpose of undertaking the project. The partnership retained SNC-Lavalin as the primary contractor.

[75] On July 29, 2005, the concession agreement was signed between CLRT, TransLink and InTransit. The agreement specified the terms on which the Canada Line would be constructed, particularized the ownership of property comprising the line, and specified the terms on which InTransit BC would be granted the concession to operate and maintain the Canada Line for a term of thirty-five years from completion.

[76] Construction of the Canada Line commenced in late 2005, has continued without interruption since, and is currently scheduled for completion in September 2009, when the line will be fully operational.

[77] The defendants say that construction occurred near the premises of Hazel & Co., or between 15th and 17th Avenues, as follows:

July 2006:	Sewer relocation work at the intersection of 16th Avenue
June 2007:	Bridge construction for east-west traffic at 16th Avenue
July 2007:	Tunnel excavation in the vicinity of 16th Avenue
November 2007:	Restoration of intersection adjacent to Hazel & Co. premises at 16th Avenue
July 2007-February 2008:	Tunnel excavation, tunnel construction, and road restoration between 15th and 16th Avenues

[78] With respect, the summary is an over-simplification of the extent and duration of activities associated with, or resulting from, cut and cover construction that affected the vicinity of 16th Avenue and Cambie Street. The summary ignores the fact that preparatory and post-construction work was required and undertaken along Cambie, and the fact that tunnel construction at different times and different locations affected the length of Cambie Street.

[79] Cut and cover construction was to be carried out by means of what was described as a “construction train”. First, Cambie Street would be disrupted in order to relocate municipal utilities and services. Relocation would then be followed by the removal of the road surface, the excavation of the tunnel trench, the installation of the tunnel sections, the backfilling of the trench, and the eventual remediation of

Cambie Street. Any point along the route would be and was adversely affected as the various cars of the so-called "train" moved from south to north along the street. Trenching was only one car on the train.

[80] The estimated three-month impact of cut and cover construction upon Cambie Street merchants generally, and Hazel & Co. in particular, proved to be inaccurate as is evident from the following.

[81] On April 10, 2006, CLRT announced that soil testing work would take place between 2nd and King Edward Avenues, and utility relocation work would begin in May 2006 and continue through December 2006. The first phase of sewer relocation work at the intersection of 16th Avenue and Cambie west to Ash Street, began in May 2006. The second phase of sewer relocation in the same area commenced on July 17, 2006 and was scheduled for completion in August 2006.

[82] The evidence establishes, and I find as a fact, that utility and services relocation along Cambie Street took place over a period of approximately one year and would not have been necessary in the portion of Cambie Street from 10th Avenue to 19th Avenue had the bored tunnel method of construction been employed.

[83] On October 16, 2006, CLRT advised the public that "Phase 1" of tunnel construction would begin between King Edward and 19th Avenues in November 2006, with "minor site preparation work" to commence October 23, 2006. "Phase 2" between 19th and 14th Avenues would commence in January 2007. CLRT advised that:

> By starting construction at King Edward Avenue in November 2006 and moving north utilizing the same construction method being used in the south Cambie area (King Edward Avenue to 64th Avenue), the overall construction period between King Edward Avenue and 14th Avenue is reduced from 14 months to 11 months.

[84] On February 13, 2007, CLRT informed the public that a pedestrian and vehicle bridge would be constructed at the 16th Avenue intersection to permit east-west travel on 16th Avenue over the trench. CLRT advised that bridge construction would begin on June 10, 2007, and continue for approximately four weeks.

[85] On March 15, 2007, CLRT announced that "utility relocation and tunnel construction [was] underway on Cambie Street between 16th Avenue and West Broadway, with a single lane of traffic in each direction." It was anticipated that the work would be completed by the end of May.

[86] Actual excavation for tunnel construction purposes commenced in early July 2007 in the vicinity of the Hazel & Co. premises. Cambie Street was substantially restored for traffic and pedestrian travel in that vicinity by November 16, 2007, but cut and cover construction had not been completed by that time along the length of Cambie Street.

[87] Photographs depicting various stages of construction were available to the public on the CLRT website, and in monthly reports compiled by R.W. Beck Inc., the independent engineering firm retained to report on construction progress. The photographs that were admitted in evidence indicate that traffic on Cambie Street north of 24th Avenue was affected by the closure of the northbound lanes before November 23, 2006. By that time, the east side of the street had been closed to

traffic and asphalt had been stripped from the street in preparation for tunnel construction. Excavation work had been carried out between 15th and 13th Avenues by April 30, 2007.

[88] The reports compiled by R.W. Beck Inc. indicate that tunnel-related construction activities were in progress at the south end of Cambie Street by November 2005. The work then moved north, consistent with the "construction train" concept. Overall, cut and cover construction adversely affected Cambie Street from and after commencement in the fall of 2005.

[89] Traffic restrictions on turns and parking were imposed. By November 2006, the east side of Cambie Street had been closed to all traffic to accommodate construction equipment and workers engaged in tunnel construction in the centre of Cambie Street. Vehicular traffic was confined to one northbound and one southbound lane on the west side of Cambie Street between 15th and 17th Avenues. The pedestrian sidewalk on the east side of Cambie Street remained passable. The ability to cross Cambie Street was limited to certain intersections.

[90] Preparatory work continued in the vicinity of 16th Avenue and Cambie Street in the period from November 2006 through to July 2007. The construction monitor's report recorded that actual cut and cover construction commenced on June 8, 2007 between 16th and 17th Avenues, and on July 4, 2007, between 15th and 16th Avenues. By that time, cut and cover construction was fully underway at one stage or another, affecting not less than ten city blocks along Cambie Street. Actual cut and cover tunnel construction was finished by November 30, 2007, between 16th

and 17th Avenues, and by February 25, 2008, between 15th and 16th Avenues. Final paving after construction was completed between 15th and 17th Avenues on October 18, 2008.

[91] From the foregoing it is apparent, and I find as a fact, that the vicinity of 16th Avenue and Cambie Street was affected by cut and cover construction and activities required by or associated with it from the fall of 2005 through October 2008.

(i) The Impact of Canada Line Construction on Hazel & Co.

[92] Hazel & Co. carried on business in the vicinity of Vine Street and 4th Avenue in Vancouver until 1999 when it relocated to premises at the northeast corner of Cambie Street and 16th Avenue under a five-year lease. Ms. Heyes described the new location as very visible and pedestrian friendly. It was located in what was known by the surrounding community as the “Cambie Village”.

[93] The company's principal business was the sale of maternity wear. Customers who purchased maternity wear from Hazel & Co. frequently returned after childbirth to acquire women's and children's wear. Approximately 80 percent of the inventory was designed and manufactured by Ms. Heyes at another location.

[94] The first five-year term of the lease was to expire in December 2003. When considering whether or not to renew for a further term, Ms. Heyes decided to make enquiries about the development of the proposed Canada Line. She called the City and was told by a person not identified in evidence that the line would be going down Cambie Street. She was told that there would be no station at 16th Avenue.

She searched the City's website, where she located the February 2003 Final Draft of the Project Definition Report. From that report, she concluded that the Canada Line would be an underground system constructed by means of a bored tunnel on Cambie Street with no station stop in the vicinity of 16th Avenue where Hazel & Co. was located.

[95] Ms. Heyes liked the location from which Hazel & Co. operated. Business had improved since relocating from the 4th Avenue location. She determined that she could endure any disruption associated with construction of the Canada Line by means of a bored tunnel. She exercised the right to renew the Hazel & Co. lease. The landlord wished to renew for a three-year term. Ms. Heyes preferred a five-year term. Ultimately, the lease was renewed for a five-year term to expire in December 2008. There was no provision in the lease permitting termination at the option of the lessee should Canada Line construction interfere with business operations.

[96] Ms. Heyes learned of the proposal to proceed by cut and cover construction in January 2005 when the media began reporting on the topic. She attended the neighbourhood meeting convened at the Plaza 500 Hotel. She heard Ms. Bird say that the period of disruption resulting from open trench construction in front of any business would be three months. Ms. Heyes became involved, along with others in the Cambie Village area, with the formation of the Do RAV Right Coalition formed to publicize the fact that there had been no public consultation about the likely impact of cut and cover, as opposed to bored tunnel, construction, and to compel further environmental assessment. As I have remarked elsewhere in these reasons, the initiative failed.

[97] The economic impact on construction on Hazel & Co. was material. In the fiscal years ending December 31, 2000 through December 31, 2004, the company's net sales, cost of sales and gross profit were the following:

	2004	2003	2002	2001	2000
Net Sales	$687,450	$669,838	$675,094	$636,975	$595,644
Cost of Sales	355,621	345,198	315,754	317,242	284,064
Gross Profit	$331,829	$324,640	$359,340	$319,733	$311,580

[98] The comparable figures for the fiscal years ending December 31, 2005 through December 31, 2008 were the following:

	2008	2007	2006	2005
Net Sales	$376,318	$344,793	$505,787	$556,206
Cost of Sales	205,915	238,763	342,485	310,909
Gross Profit	$170,403	$106,030	$163,302	$245,297

[99] Ms. Heyes testified that the decline in gross profit was caused solely by cut and cover tunnel construction in the vicinity of her company's premises. Notwithstanding the defendants' claim that tunnel construction at 16th Avenue and Cambie Street endured for a limited period of time, the defendants did not adduce any evidence from which one could conclude that the decline in gross profit experienced by Hazel & Co. was due to anything other than cut and cover construction and related activities from the fall of 2005 through December 2008. I find as a fact that cut and cover construction, and the activities associated with it, was the sole cause of the economic loss incurred by Hazel & Co. in the four year period. The question remains: is any defendant liable for damages in respect of the loss?

The Claims and the Defences

(a) Misrepresentation

[100] In its statement of claim, Hazel & Co. alleges that it suffered damage as a result of two negligent or false representations. The first was that the Canada Line would be constructed by twin-bored tunnels along Cambie Street between 2nd and 37th Avenues in Vancouver. The second was that open trench, cut and cover construction would last no more than three months in front of its premises.

[101] The first of the alleged misrepresentations relates to the information provided to Ms. Heyes when, in mid-2003, she enquired about the likely impact of Canada Line construction on the Cambie corridor. She was told that the tunnel would be bored underground and would not disrupt the surface in the vicinity of her business. Later in 2003, relying on that representation, Ms. Heyes renewed the Hazel & Co. lease for a five-year term.

[102] By December 1, 2004, the nature of the project had changed. TransLink had approved a project using cut and cover tunnel construction from 2nd to 37th Avenues.

[103] All of the evidence points to the fact that in mid-2003, bored tunnel construction was contemplated by TransLink and CLRT. The possibility of using cut and cover tunnel construction in the Cambie corridor first emerged in the SNC-Lavalin/Serco response to the RFP in January 2004. There is no evidence to support the allegation that the representation made in mid-2003 with respect to the

method of tunnel construction was false or negligent. While that should have been apparent to the plaintiff and its counsel well in advance of trial, the claim in relation to that representation was not abandoned until the plaintiff's closing submissions.

[104] The second alleged misrepresentation is that made by Ms. Bird at the public meeting on January 25, 2005, when she stated that open trench, cut and cover construction would last no more than three months in front of any residential or business property. The representation proved to be incorrect.

[105] Ms. Bird testified that the representation was based on information provided to her by SNC-Lavalin/Serco. The advice was premised on the ability to construct the tunnel by means of a construction train using pre-cast tunnel forms that would be set in place by a system of cranes and gantries. That was the intended course in January 2005, and, given the premise, I find that Ms. Bird's estimate was reasonable.

[106] I accept Ms. Bird's evidence that the contractor encountered difficulty in the early stages of cut and cover construction because of the unstable nature of the walls in the trench that was excavated to accommodate the pre-cast sections. The instability prompted SNC-Lavalin/Serco to change from pre-cast to pour-in-place construction. The change required wall stabilization, the building of forms for the floor, walls and roof of the tunnels, the pouring of concrete, and the backfilling of the trench. The prolonged process resulted in the trench being open for a period of time considerably in excess of three months.

[107] I find that Ms. Bird's representation regarding the expected duration of open trench construction was based on reliable information provided to her in January 2005. The representation became inaccurate when conditions encountered in the course of construction necessitated change.

[108] The Supreme Court of Canada described the elements of a claim based upon negligent misrepresentation in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, 99 D.L.R. (4th) 626 at 110:

> The required elements for a successful … claim have been stated in many authorities, sometimes in varying forms. The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted. In the case at bar, the trial judge found that all elements were present and allowed the appellant's claim.

[109] On the evidence, I find that Ms. Bird did not negligently misrepresent the likely duration of actual open trench construction. The representation was based on information and advice on which she was entitled to rely and was not untrue, inaccurate, or misleading at the time it was made.

[110] Moreover, there is no evidence that Hazel & Co. relied on the representation that was made to make any decisions or do anything that affected its business. There is some evidence that purchasing and manufacturing decisions may have been affected by the representation. However, the consequences of such decisions will be reflected in the overall assessment of loss sustained by Hazel & Co.

[111] It follows that the claim for damages resulting from either negligent or false misrepresentation is dismissed as against all defendants.

(b) Negligence

[112] Hazel & Co. framed its action in negligence in the statement of claim as follows:

> The Defendants, and each of them, owe the businesses situate on Cambie Street between 2nd Avenue and 37th Avenue, including the Plaintiff, a duty to exercise reasonable care in conducting the Defendants' business activities, including the construction of the RAV Line, so as not to inflict unreasonable harm on other businesses in the vicinity.

[113] In closing submissions, counsel restated the claim in the following terms:

> It is submitted that [CLRT] was in a relationship of sufficient proximity to [Hazel & Co.] that it owed [Hazel & Co.] a duty of care not to subject it to unreasonable harm. When CLRT accepted SNC-Lavalin/Serco's [best and final offer], knowing that it deviated from the reference alignment and knowing that its chosen method of construction would inevitably and unreasonably harm the business interests of [Hazel & Co.], it breached that duty.

[114] The defendants respond to the claim saying that none of them owed a duty of care to Hazel & Co., that the decision to accept the SNC-Lavalin/Serco proposal was a policy decision in respect of which no duty of care arose, and that any loss sustained was economic in nature and not compensable in accordance with the legal principles governing claims in negligence.

[115] The question of whether a duty of care arises in any particular circumstances must be answered by reference to the two-part test developed by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728, and adopted by

the Supreme Court of Canada in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641. The test was stated in *Kamloops* at p. 10-11:

> (1) is there a sufficiently close relationship between the parties the [defendant] and the person who has suffered the damage) so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to that person? If so,
>
> (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

[116] The threshold under the first part of the test is low as stated by the Supreme Court of Canada in *Ryan v. Victoria (City),* [1999] 1 S.C.R. 201, 168 D.L.R. (4th) 513 at para. 23:

> The first step of the *Anns/Kamloops* test presents a relatively low threshold. In order to establish a *prima facie* duty of care, it must be shown that a relationship of "proximity" existed between the parties such that it was reasonably foreseeable that a careless act by the Railways could result in injury to the appellant.

[117] In the present case, there is a sufficient relationship or proximity between the party responsible for the construction of the Canada Line and adjacent property owners or business operators to create a *prima facie* duty of care. It was readily foreseeable that a failure to exercise reasonable care in the construction of the Canada Line could cause harm to adjacent property owners or occupiers. That conclusion compels consideration of the second part of the *Anns/Kamloops* test. Is there reason to negative or limit the duty insofar as the selection of SNC-Lavalin/Serco is concerned?

[118] The defendants say the selection was a policy decision that did not give rise to a duty of care. It is settled law that a duty of care does not exist in respect of what

may be termed government policy as opposed to operational decisions. The Supreme Court of Canada discussed the distinction in *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 206 D.L.R. (4th) 193 at para. 38:

> It is at this second stage of the analysis that the distinction between government policy and execution of policy falls to be considered. It is established that government actors are not liable in negligence for policy decisions, but only operational decisions. The basis of this immunity is that policy is the prerogative of the elected Legislature. It is inappropriate for courts to impose liability for the consequences of a particular policy decision. On the other hand, a government actor may be liable in negligence for the manner in which it executes or carries out the policy. In our view, the exclusion of liability for policy decisions is properly regarded as an application of the second stage of the *Anns* test. The exclusion does not relate to the relationship between the parties. Apart from the legal characterization of the government duty as a matter of policy, plaintiffs can and do recover. The exclusion of liability is better viewed as an immunity imposed because of considerations outside the relationship for policy reasons – more precisely, because it is inappropriate for courts to second-guess elected legislators on policy matters….

[119] The decision to accept the SNC-Lavalin/Serco proposal was not a policy decision. It was an operational decision because it reflected the manner in which TransLink and its subsidiary CLRT decided to carry out or execute their statutory mandate to build a rapid transit line. That exercise was entirely operational in nature.

[120] While some or all of the defendants were obliged to exercise reasonable care not to harm adjoining property owners or occupiers in the course of constructing the Canada Line, no duty of care attached to the selection process insofar as Hazel & Co. was concerned. The Hazel & Co. claim to the contrary founded in negligence must fail for three reasons.

[121] First, apart from the difficulties in law that attach to the negligence claim, there is no evidence that CLRT breached any duty of care it could possibly be said to have owed Hazel & Co. in the selection of SNC-Lavalin/Serco as the successful proponent. The claim is that CLRT owed Hazel & Co. a duty to consider and accept only construction proposals that corresponded to what was called the "reference alignment". The alignment developed by CLRT showed the limits of the horizontal alignment and the limits of the vertical plane.

[122] None of the material circulated with the RFP specified the manner in which the tunnel portion of the line had to be constructed. As explained elsewhere in these reasons, the Final Draft of the Project Definition Report assumed that construction would employ the bored tunnel method because of the anticipated depth of the tunnel. The fact that SNC-Lavalin/Serco was able to devise a plan that reduced the depth at which the tunnel between 2nd and 37th Avenues would be constructed meant that it was able to propose the alternative and cheaper cut and cover method of construction.

[123] Selection of a method of construction to be employed on any kind of project does not, of itself, create a duty of care. One is free to select from a variety of alternative methods of construction. The duty of care on the person who has made the selection is to refrain from carrying out construction in a manner that causes foreseeable harm to any person to whom the duty is owed. It is not the selection of a particular method of construction, but the consequences associated with or flowing from its execution, that may give rise to liability in negligence.

[124] Only negligent execution of the selected method of construction could cause actionable harm. No negligence of that kind is alleged in this case.

[125] The second reason derives from the fact that Hazel & Co. does not allege harm to person or property. Ordinarily, the common law does not permit recovery in negligence where there has been no injury to person or property, and the loss or damage is wholly economic in nature. The exceptions to the general rule were described as follows in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 at 1049, 91 D.L.R. (4th) 289:

1. The Independent Liability of Statutory Public Authorities;
2. Negligent Misrepresentation;
3. Negligent Performance of a Service;
4 Negligent Supply of Shoddy Goods or Structures;
5. Relational Economic Loss.

[126] The fact that the claim does not fit within any of the first four categories is readily apparent. Moreover, the claim does not fall within the category of relational economic loss. That category ordinarily describes those claims for economic loss sustained by a third party as a consequence of a negligent act that caused loss or damage to another. Hazel & Co. does not allege that any defendant caused harm or injury to any person or property. As a result, Hazel & Co. cannot claim that it incurred any economic loss as a result of harm or injury done to another.

[127] The third failing is the assertion that liability in negligence arises because the defendants caused Hazel & Co. “unreasonable harm”. The suggestion overlooks

the base principle associated with any claim of negligence, that being that all harm resulting from the negligence, whatever its magnitude, is compensable. One must not be concerned with the question of whether an unreasonable amount of harm has been suffered. It is the award of damages that reflects the nature, extent, and severity of the harm done.

[128] With respect, the Hazel & Co. claim in negligence has conflated the torts of negligence and nuisance. The focus in an action in negligence must be the reasonableness or unreasonableness of the conduct of the party who owes the duty of care and whose breach of the duty caused harm to person or property. When the focus is the reasonableness or unreasonableness of the harm done, the claim is properly grounded in nuisance, which is concerned with unreasonable interference with one's use and enjoyment of property.

[129] It follows that the claim in negligence is dismissed as against all defendants.

(c) Nuisance

[130] In *St. Pierre v. Ontario (Minister of Transportation and Communications)*, [1987] 1 S.C.R. 906, 39 D.L.R. (4th) 10 at para. 10, the Supreme Court of Canada endorsed the definition of private nuisance found in Street, *The Law of Torts,* 6th ed. (London: Butterworths, 1976) at p. 219:

> …A person, then, may be said to have committed the tort of private nuisance *when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or of an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable*… [Emphasis in original]

[131] Four questions arise in relation to the Hazel & Co. claim based on the tort of nuisance:

1. Did cut and cover construction of the Canada Line tunnel from 2nd to 37th Avenue cause a nuisance?

2. Was the nuisance, if any, public or private in nature, and if public, is Hazel & Co. entitled to assert a claim in respect of it against any defendant?

3. Can any defendant claim that, because of the nature of its relationship with the Canada Line, it cannot be liable in nuisance?

4. If cut and cover construction caused a nuisance in respect of which Hazel & Co. may advance a claim against any defendant, can that defendant avail itself of the defence that it was acting under a statutory authority?

1. Did cut and cover construction cause a nuisance?

[132] Hazel & Co. says that cut and cover construction substantially and unreasonably interfered with its use and enjoyment of the leased property from which it carried on its business. In response, the defendants say that while the impact of construction upon Hazel & Co. was significant, it was reasonable in the context of the Canada Line project.

[133] The tort of nuisance is broad in scope. It affords a remedy when the use of land owned or occupied by one person adversely affects the use and enjoyment of property owned or occupied by another. The claimant need not own the affected land. Some lesser interest, such as occupation under a lease, is sufficient: *Soleiko v. Canada* (1988), 22 F.T.R. 20.

[134] The character of nuisance in the Canadian context was recently described in *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392 at para. 77:

> At common law, nuisance is a field of liability that focuses on the harm suffered rather than on prohibited conduct (A. M. Linden and B. Feldthusen, *Canadian Tort Law* (8th ed. 2006), at p. 559; L. N. Klar, *Tort Law* (2nd ed. 1996), at p. 535). Nuisance is defined as unreasonable interference with the use of land (Linden and Feldthusen, at p. 559; Klar, at p. 535). Whether the interference results from intentional, negligent or non-faulty conduct is of no consequence provided that the harm can be characterized as a nuisance (Linden and Feldthusen, at p. 559). The interference must be intolerable to an ordinary person (p. 568). This is assessed by considering factors such as the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use and the utility of the activity (p. 569). The interference must be substantial, which means that compensation will not be awarded for trivial annoyances (Linden and Feldthusen, at p. 569; Klar, at p. 536).

[135] Unlike negligence, the tort of nuisance is not concerned with the existence of a duty of care, or with the exercise of reasonable care in the use of the land from which the nuisance originates. The tort of nuisance is concerned only with the effect of the use of one's land upon the use and enjoyment of the land owned or occupied by another: see Fleming, *The Law of Torts*, 9th ed. (Sydney, N.S.W.: LBC Information Services, 1998) at 493-494; Linden and Feldthusen, *Canadian Tort Law*, 8th ed. (Markham, Ont.: LexisNexis Butterworths, 2006) at 559.

[136] The tort of nuisance also differs from that of negligence in that economic loss occasioned by the nuisance is fully compensable without limitation, provided the loss is proved on the balance of probabilities: Fleming at 493 - 494; Linden and Feldthusen at 597.

[137] Consideration of the question whether any particular use of land results in a nuisance must take into account the fact that in the modern world of multi-purpose land use, high density urbanization, and frequent if not continuous urban transformation and improvement, citizens and enterprises are expected to engage in a process of reasonable “give and take”. The challenge is to identify the point at which give and take falls out of balance sufficiently to warrant a remedy. The point was discussed by Robins J. in *Schenk v. The Queen* (1981), 34 O.R. (2d) 595, 131 D.L.R. (3d) 310, (aff’d (1984), 49 O.R. (2d) 556 (C.A.), [1987] 2 S.C.R. 289) at 319:

> Certainly, not every invasion of a person's interest in the use and enjoyment of his land is actionable. The principle of "give and take, live and let live" is fundamental to the adjustment of claims in the law of nuisance. That principle is best expressed in the *Restatement of the Law of Torts, Second American Law Institute,* §. 822 (1969), in these terms:
>
> > Life in organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of "give and take, live and let live," and therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another. Liability [for damages] is imposed only in those cases where the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation.

[138] The evidence in this case compels me to find as a fact that cut and cover construction of the Canada Line tunnel between 2nd and 37th Avenues on Cambie Street substantially interfered with Hazel & Co.'s use and enjoyment of its premises. Consideration of the relevant factors supports the finding that the extent of the interference was sufficiently unreasonable to constitute a nuisance.

A. The Character of the Neighbourhood

[139] Cambie Street and 16th Avenue is located in what is known by the community as the "Cambie Village". It is a comparatively small business locale occupied by a number of small enterprises, of which Hazel & Co. was one from 1999 through 2008. The economic viability of the businesses located there results from the local character of the Village and comfortable access for customers. In the case of Hazel & Co., reasonable access was particularly important because of the nature of the company's clientele who were principally pregnant women, some of whom would undoubtedly have been required to bring young children with them as they shopped. I accept the evidence of the store's manager, Ms. Cromie, that Hazel & Co. enjoyed a reputation that extended well beyond the immediate locale. The store was a shopping destination for customers from the broad base of the lower mainland.

B. The Nature, Severity and Duration of the Interference

[140] There can be no doubt that access to Hazel & Co. was adversely affected by cut and cover tunnel construction. Parking was eliminated on Cambie Street. Pedestrian crossing was restricted or curtailed. Parking on 16th Avenue was restricted as were left turns at 16th Avenue to northbound and southbound traffic.

Left and right turns were prohibited for traffic westbound on 16th Avenue. Left hand turns were prohibited for eastbound traffic on 16th Avenue. The result of these restrictions was that customers who wanted to find their way to the store were required to find a way to travel to the vicinity of the store, find a place to park at some distance from the store, and make their way to the store on foot over some considerable distance through what was an intensely disruptive construction area encompassing large portions of Cambie Street.

[141] As a result, Hazel & Co. experienced a decrease in the number of its customers. It reduced staff as a result. Prior to the commencement of construction and in addition to Ms. Heyes, the company employed a manager, an assistant manager, and several part time staff. The store was staffed by two persons during the week and three on the weekends. During construction, when vehicular and pedestrian traffic decreased, sales declined. On some days no customers visited the store. Staff was reduced from two to one on weekdays, and from three to one and one half on weekends.

[142] The severity of the harm to Hazel & Co. resulting from cut and cover construction and the lengthy closure or disruption of Cambie Street is obvious from an examination of the financial information tendered as evidence, and to which I have referred elsewhere in these reasons.

[143] Gross profit in the period 2000 through 2004 averaged $329,424, and in the period 2005 through 2008, averaged $171,258, an average decline of approximately 48%: see paras. 96 - 97, *supra*. If one excludes 2005 because Canada Line

construction began in late 2005, gross profit in the period 2006 through 2008 averaged $145,578, a decline of 56% from the average for the period 2000 to 2004. The greatest loss occurred in 2007 when construction in the vicinity of 16th and Cambie was at its height. Its gross profit was $106,031, or 31% of average gross profit in the period 2000 to 2004. The loss of business income in the period from mid-2005 through December 2008, a period of just over three years, exceeded $500,000, and was wholly attributable to cut and cover construction on Cambie Street north of King Edward Avenue.

C. Personal Sensitivity

[144] Personal sensitivity on the part of Ms. Heyes or anyone else to dust, noise, or other physical discomfort associated with construction is not a factor of any importance in this case. The claim in nuisance results solely from the impact of construction on the financial performance of an otherwise very viable business enterprise and is not noise or odour-related except, perhaps, to the extent that those factors may have deterred customers from going to shop on Cambie Street.

D. The Social Utility of the Impugned Conduct

[145] The defendants say that the magnitude and utility of the Canada Line project outweigh the deleterious consequences to Hazel & Co. In submissions, they described the utility of the project in the following terms:

> The public benefit of the Canada Line cannot be overstated. It will serve a vital transportation need, allowing more people to travel to and from the Downtown core while removing cars from the road. It will increase mobility while relieving congestion and the emission of greenhouse gases. It is a $2 billion public works project designed to serve the public interest for about 100

> years. The federal government, the provincial government, the City of Vancouver, the City of Richmond and TransLink are all contributing to this project because they deem it to have such a significant public benefit. It is a project entirely aimed at serving the public interest, including the savings to taxpayers that results [sic] from the P3 structure.

[146] The defendants say that while the impact of construction on Hazel & Co. was significant, it was of a temporary nature and ought not to be overstated. They say that they took all possible steps, outside of direct payments, to mitigate the impact of cut and cover construction. The steps included an advertising program intended to inform the public that merchants on Cambie Street were open for business, and frequent public announcements designed to inform the public of changes in traffic patterns and the timing and expected duration of various construction activities along the line. With respect, the defendants' submissions are not persuasive.

[147] Whether or not any particular action will amount to a nuisance for which damages should be awarded requires the balancing of competing interests. The point is made by Linden in *Canadian Tort Law*, 4th ed. (Toronto: Butterworths, 1998) at 504:

> …a "tolerable balance" must be struck between the competing interests of landowners "each invoking the privilege to exploit the resources and enjoy the amenities of his property without undue subordination to the reciprocal interests of the other". The ultimate question to be asked is whether the defendant is using his property reasonably having regard to the fact that he has a neighbour.

[148] The indisputable fact which I find on the evidence in this case is that the use of cut and cover construction was endorsed because it was cheaper and, in combination with some other aspects of the SNC-Lavalin/Serco proposal, reduced cost by more than $400 million so as to permit construction within the range of public

funding commitments. The reduction in cost was achieved by imposing an unacceptable burden on Hazel & Co. A loss of more than $500,000 over four years resulting from the decline in sales and the reduction of approximately 50% in gross profit caused solely by cut and cover construction, cannot be regarded as a tolerable or acceptable burden which should be absorbed by Hazel & Co. as its contribution to the realization of a project of general public utility.

[149] It is no answer to claim, as the defendants do, that they have taken all possible steps to mitigate the impact of cut and cover construction. It is obvious that the steps taken were not effective. The steps taken did not staunch the loss. At best, they may have reduced the loss that would otherwise have been incurred. Moreover, the defendants' claim overlooks the fact that CLRT had other options that would have accommodated the public interest while eliminating or substantially reducing harm and inconvenience to Hazel & Co. Bored tunnel construction was an alternative that would not have affected Hazel & Co. and much or all of Cambie Village to any significant degree. Bored tunnel construction was clearly contemplated by CLRT as a viable alternative. That is evident from the fact that the proponent of that method of construction was asked to submit its final offer at the BAFO stage of the proponent selection process.

[150] Mr. Eastman, CLRT's chief engineer, testified that tunnel boring would have had an impact at West Broadway and King Edward Avenues, where significant disruption would have occurred in the course of station stop construction. On his evidence, some disruption would also have occurred at 19th Avenue where a shaft would have been opened in order to extract subsurface material resulting from the

tunnel boring process. The defendants tendered no evidence regarding the extent, if any, to which Hazel & Co. would have been affected by those closures.

[151] Likewise, the defendants tendered no evidence to support the claim that bored tunnel construction would have resulted in a loss to Hazel & Co. approaching anything like that which was sustained. On the evidence that was adduced, I find that the disruption in the vicinity of Cambie Street and 16th Avenue would have been minimal had bored tunnel construction been employed, and so too would have been the resulting loss to Hazel & Co.

[152] The ultimate question remains: does the balancing involved in a "give and take" or "live and let live" analysis for the purpose of identifying compensable nuisance require a single enterprise to absorb an undisputed business loss of more than $500,000 for the benefit of the public as a whole in order that some or all of the defendants may reduce the cost of construction? In my opinion, the answer can only be no. I find that the nature, severity and duration of the impact on Hazel & Co. resulting from cut and cover construction outweigh the social or public utility associated with the creation of the Canada Line to a degree that warrants compensation for nuisance, absent any defence to the claim.

2. Public or Private Nuisance?

[153] The defendants claim that Hazel & Co. cannot advance a claim in nuisance because the nuisance complained of is public rather than private in nature.

[154] The Supreme Court of Canada discussed the nature of public nuisance in *Ryan* at para. 52:

> The doctrine of public nuisance appears as a poorly understood area of the law. "A public nuisance has been defined as any activity which unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience": see *Klar, supra*, at p. 525. Essentially, "[t]he conduct complained of must amount to . . . an attack upon the rights of the public generally to live their lives unaffected by inconvenience, discomfort or other forms of interference": See G. H. L. Fridman, *The Law of Torts in Canada*, vol. I (1989), at p. 168. An individual may bring a private action in public nuisance by pleading and proving special damage. See, e.g., *Chessie v. J. D. Irving Ltd.* (1982), 22 C.C.L.T. 89 (N.B.C.A.). Such actions commonly involve allegations of unreasonable interference with a public right of way, such as a street or highway. See *ibid*., at p. 94.

[155] Linden, *Canadian Tort Law,* 6th ed. (Toronto: Butterworths, 1997) at p. 523 defines a private nuisance as “an unreasonable interference with the use and enjoyment of land by its occupier” and a public nuisance as “an unreasonable interference with the use and enjoyment of a public right to use and enjoy public rights of way.”

[156] It is well-established that a public nuisance may also be a private nuisance. The Court of Appeal addressed the point in *Sutherland v. Vancouver International Airport Authority,* 2002 BCCA 416, 170 B.C.A.C. 233 at para. 27:

> It is settled law that the same conduct may constitute both public and private nuisance. In *Stein v. Gonzales* (1984), 31 C.C.L.T. 19 (B.C.S.C.) McLachlin J., as she then was, said at 23:
>
> > The first question is whether, notwithstanding its public character, the conduct of the defendants of which the plaintiffs complain is a private nuisance. A public nuisance may also constitute a private nuisance where the plaintiff is the occupier of land and the nuisance causes damages to his use and enjoyment of the land: John P.S. McLaren, "Nuisance in Canada", in Studies in Canadian Tort Law, Allen M. Linden, editor (1968)....

[157] The fact that a nuisance may be regarded as public in nature does not preclude an action by a single member of the public if that member can prove special damage, by which is meant damage that is peculiar or unique to that claimant. The fact that several members of the public are individually and adversely affected by the public nuisance does not produce a different result. Each member of the public uniquely affected by the public nuisance may assert a claim. The adverse effect upon one is not the adverse effect upon another. The Court of Appeal addressed the point in *Sutherland* at paras. 28-29:

> 28. [McLachlin J.] explained the policy behind the rule requiring civil actions for public wrongs to be brought in the name of the Attorney General, at 22:
>
> > The policy behind this rule is that the public and criminal jurisdiction of the Court is not to be usurped in a civil proceeding. As long as the suffering or inconvenience is general, there is no place for independent intervention by private citizens. This rule, which prevents individuals from taking upon themselves the role of champions of the public interest, has been said to be established "for the purpose of preventing oppression by means of a multiplicity of civil actions for the same cause": Salmond & Heuston on the Law of Torts, p. 83.
>
> 29. And in *Armstrong v. Langley* (1992), 69 B.C.L.R. (2d) 191, Rowles J.A. said at p. 202:
>
> > The appellant did not seek the consent of the Attorney General to lend his name to relator proceedings. A private person has standing to sue for declaratory or injunctive relief in respect of a matter of public interest without the Attorney General being a party if the person is able to satisfy one of the two conditions set out by Buckley J. in Boyce v. Paddington Borough Council, [1903] 1 Ch.109 at 114:
> >
> > A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such that some private right of his is at the same time interfered with ...; and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.

[158] In *Sutherland*, the Court of Appeal determined that the construction of a new runway at the Vancouver International Airport created both a private and public nuisance. Finch C.J.B.C., expressed the view of the panel at para. 34:

> 34. In my opinion, the plaintiffs succeeded in establishing the elements of private nuisance: unreasonable and substantial interference with the use and enjoyment of their lands. They are not to be denied a remedy because the defendants' conduct in the circumstances also amounts to a public nuisance.

[159] In this case, both a public and private nuisance resulted from cut and cover construction in the vicinity of Cambie Village. The convenience of the general public was affected by the widespread disruption to vehicular and pedestrian traffic throughout the lengthy course of construction on that portion of Cambie Street. At the same time, Hazel & Co. was uniquely affected by that nuisance as is evident from the significant decline in the financial performance of its business.

[160] Hazel & Co. is entitled to assert a claim either because a public nuisance resulted in a loss that was its loss and not common to the general public, or because the adverse effect upon its use and enjoyment of its premises constituted a private nuisance. In either case, there is no reason why Hazel & Co. should be compelled to look to the Attorney General to seek relief for the damage it suffered as a consequence of the nuisance. The loss was unique to Hazel & Co. and of no consequence to the general public.

[161] The defendants argue that Hazel & Co. should be denied a remedy because no right accruing to the company has been affected. Rather, the rights affected are those pertaining to the use of roads, in relation to which the City has broad statutory

powers under the *Municipal Act*, R.S.B.C. 1996, c. 324 and the *Vancouver Charter*, S.B.C. 1953, c. 55. The defendants say that "as long as the City acts under its statutory powers, the City's regulation of city streets does not constitute a public nuisance because it is the City that determines the public's rights to access city streets."

[162] With respect, the argument must fail. Even if the statutory power to regulate the use of streets may immunize the City from liability, that immunity is not enjoyed by entities such as TransLink, CLRT and InTransit BC who are using City streets under licence for their own commercial purposes as opposed to general City purposes. The source of the nuisance in this case was the method of construction employed by those responsible for the project. The City's regulation of traffic is not the issue. Regulation was merely a function or outcome of the method of construction chosen by CLRT and TransLink and carried out by InTransit BC.

[163] While it is not necessary to decide whether cut and cover construction should be regarded as a public or private nuisance, I would conclude that it is private in nature because it substantially and unreasonably interfered with Hazel & Co.'s use and enjoyment of its leased premises. If it was public in nature, then Hazel & Co. is entitled to assert a claim because it is in a position to prove, and has proved, special damage in the form of financial loss which was not incurred by any other member of the public.

3. Nuisance and the City of Vancouver, Canada, and the Attorney General

[164] At this point in the analysis, it is appropriate to consider whether any defendant can claim that it is not sufficiently connected to the construction of the Canada Line to be liable in nuisance.

[165] Hazel & Co. claims that the City should be liable in nuisance because it owned the land from which the nuisance originated. It says that Canada and the Attorney General should be liable in nuisance because they were in partnership with TransLink, CLRT and InTransit BC for the purpose of constructing the Canada Line. It also says that the latter three entities should be liable in nuisance because they planned, approved and implemented the project in the way that gave rise to the nuisance.

[166] In response, Canada and the Attorney General say they were not partners in a partnership with the other defendants. They were public funders. The City says that it used its property in a manner permitted by the *Vancouver Charter* and it is immune from suit as a result.

[167] The submission that Canada and the Attorney General are partners with other defendants and liable as a result is premised on the fact that the Canada Line was developed by means of what is commonly referred to as a "P3" model. With respect, the label is not determinative of whether, from a legal perspective, those parties were or were not partners. If any person or entity is to be considered a partner at

law, the person or entity must be carrying on business in common with one or more others with a view to profit: *Partnership Act*, R.S.B.C. 1996, c. 348, s. 2.

[168] Counsel for Hazel & Co. adduced no evidence that Canada or the Attorney General was party to any arrangement by which either would share in any revenue or profit from the eventual operation of the Canada Line. Canada and the Attorney General participated as funders. Each contributed a sum of money toward the capital cost of the Canada Line. The infrastructure comprising the line is owned by CLRT, but operated by InTransit BC in accordance with a revenue sharing arrangement between those two entities only.

[169] Each of Canada and the Attorney General is a government body that contributed capital to assist in the creation of an undertaking for general public benefit. Neither was entitled to interest on their contribution, nor to a share of revenue or profit from the operation of the line. Neither is obliged to contribute to any operating loss that might be incurred in the future. In sum, neither was a partner in the legal sense of the word. The claim in nuisance against each of them is dismissed.

[170] The analysis in relation to the City's position is different. As I have remarked elsewhere in these reasons, the City owns Cambie Street. It approved of and permitted the use of its land for the construction and operation of the Canada Line.

[171] A land owner who permits others to use its land in a manner that creates a nuisance may, depending upon on the circumstances, be liable for that nuisance even though the nuisance is created by another. Liability will ensue when the owner

authorizes or "permits a use of its land by another which can be expected to cause the alleged nuisance," or where the owner "knows, or reasonably ought to know, of a nuisance and allows it to continue or 'adopts' it": Karen Horsman & Gareth Morley, *Government Liability: Law and Practice*, looseleaf (Aurora, Ont.: Canada Law Book, 2007) at 6-10; Linden & Feldthusen (8th ed.) at 583; *Talarico v. Northern Rockies (Regional District)*, 2008 BCSC 861, 47 M.P.L.R. (4th) 242 at paras. 46-48; and *Ross v. Wall* (1980), 114 D.L.R. (3d) 758, 23 B.C.L.R. 294 at paras. 5-7 (C.A.).

[172] The City, CLRT and TransLink signed the site access agreement on November 30, 2004. The agreement granted a licence in favour of CLRT and TransLink to proceed with Canada Line construction. At November 30, 2004, the construction proposals were subject to confidentiality agreements. The evidence does not support a finding that City officials or counsel acting on the City's behalf then knew that the proposal TransLink would approve on December 1, 2004, involved cut and cover construction which would become the source of the nuisance. That being the case, I find as a fact that the City did not know, and could not reasonably be expected to have known, that its property would be used by TransLink, CLRT, and InTransit BC in a manner that would cause a nuisance. Likewise, there is no evidence that, once the project was underway and the fact that it would cause a nuisance was known, the City had the capacity to terminate the access agreement in order to stop construction. I need not, therefore, consider whether the *Vancouver Charter* or the *Municipal Act* afford the City any immunity from liability in this case.

[173] In sum, the City did not have sufficient involvement with, or knowledge of, the specifics of the project that caused the nuisance of which Hazel & Co. complains to justify a finding of liability against it.

[174] TransLink is responsible for the development of a regional transportation plan under its governing legislation. CLRT was incorporated as a TransLink subsidiary for the specific purpose of planning the Canada Line, procuring a designer, builder and concessionaire, and ensuring that the project was carried to completion in furtherance of TransLink's statutory mandate. TransLink and CLRT selected the SNC-Lavalin/Serco proposal employing cut and cover construction. Selection of that proposal resulted in the formation of InTransit BC and the eventual execution of the concession agreement. The nuisance emanated from the design plan selected by TransLink and CLRT, but actually carried out by InTransit BC.

[175] TransLink, CLRT and InTransit BC created the nuisance. In my opinion, TransLink and CLRT on the one hand, and InTransit BC on the other, are equally responsible for the nuisance they caused, and are jointly and severally liable to Hazel & Co. unless protected by a defence available to any or all of them.

[176] The remaining question, therefore, is whether any of those three defendants may avail itself of the defence of statutory authority.

4. The Statutory Authority Defence

[177] The defence of statutory authority as applied in Canada was described by the Supreme Court of Canada in *Ryan* at paras. 54-55:

> 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 v. Farnworth*, [1930] A.C. 171 (H.L.), at p. 183; *City of Portage La Prairie v. B.C. Pea Growers Ltd.*, [1966] S.C.R. 150; *Schenck v. Ontario (Minister of Transportation and Communications)*, [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.

[178] The statutory authority defence evolved to accommodate the fact that the execution of various statutory mandates legislated with the intention of benefiting the general public could cause a nuisance. The common law recognized that it was not appropriate to burden those who were acting under statutory authority, and therefore presumptively in the public interest, with nuisance claims. Persons adversely affected by the exercise of the mandate were obliged to suffer any nuisance associated with the undertaking.

[179] As is apparent from the passages cited from *Ryan*, the defence is limited in its application. It cannot be relied upon in the event that the statutory mandate could

have been carried out in a manner that did not create a nuisance or, if there was but one method of executing the mandate, the nuisance could not have been practicably avoided. In the event that there is no non-nuisance method of carrying out the mandate, any resulting nuisance will be regarded as an inevitable and non-compensable consequence.

[180] The first step in considering the defence is to identify the statutory authority, the exercise of which occasioned the nuisance. The second step is to determine whether the resulting nuisance was the inevitable result or consequence of the exercise of that authority.

[181] In this case, the dispute between the parties is clear. Hazel & Co. says that TransLink and its subsidiary, CLRT, exercised their statutory authority to develop a transportation system in the lower mainland area of British Columbia when they undertook development of the Canada Line. TransLink and CLRT selected the SNC-Lavalin/Serco proposal involving cut and cover construction in preference to the proposal of a competitor, which would have employed bored tunnel construction, thereby avoiding the nuisance of which Hazel & Co. complains.

[182] Hazel & Co. says that the nuisance was not an inevitable consequence of Canada Line construction. It resulted from the statutory authority's decision to select a construction method that created a nuisance rather than one that did not.

[183] In response, the defendants say that the statutory authority under which Canada Line construction occurred was that granted or conferred by the responsible Ministers when issuing an environmental assessment certificate under the *EAA,*

which approved cut and cover construction. The defendants say that nuisance was the inevitable consequence of that approval and there was no practical way of avoiding the nuisance associated with the authorized cut and cover method of construction.

[184] In view of the competing positions, it follows that if the relevant statutory authority is that conferred on TransLink and CLRT by the *South Coast British Columbia Transportation Authority Act*, S.B.C. 1998, c. 30, and if the evidence supports the conclusion that there was an alternative to the cut and cover method of construction which would not have created the nuisance, then the statutory authority defence must fail. Conversely, if the relevant statutory authority is that conferred on TransLink and CLRT under the *EAA* as evidenced by the Ministers' certificate, then the statutory authority defence will apply because nuisance was the inevitable result of the cut and cover construction authorized by the certificate.

A. TransLink's Duty to Provide Transportation Infrastructure

[185] TransLink was incorporated under the *Greater Vancouver Transportation Authority Act*, S.B.C. 1998, c. 30, as the Greater Vancouver Transportation Authority. It was continued under the name of South Coast British Columbia Transportation Authority by amendment and restatement of the legislation under the *South Coast British Columbia Transportation Authority Act* (the "*Act*").

[186] Section 2(3) of the *Act* stipulates that TransLink is not an agent of the government. Sections 3 and 4(a) through (j) describe TransLink's purpose and responsibilities:

> Purpose of the authority
>
> 3. The purpose of the authority is to provide a regional transportation system that
>
> (a) moves people and goods, and
>
> (b) supports
>
> (i) the regional growth strategy,
>
> (ii) provincial and regional environmental objectives, including air quality and greenhouse gas emission reduction objectives, and
>
> (iii) the economic development of the transportation service region.
>
> Responsibilities of authority
>
> 4.(1) Subject to this Act, the authority must do the following to carry out its purpose:
>
> (a) manage and operate the regional transportation system;
>
> (b) develop and implement transportation demand management strategies and programs;
>
> (c) develop and administer programs for certifying motor vehicle compliance with regulations, made under section 50 of the Motor Vehicle Act, that do one or both of the following:
>
> (i) establish exhaust emission standards;
>
> (ii) specify the maximum levels of air contaminants that motor vehicles may emit into the outside atmosphere;
>
> (d) generate and manage funds necessary for its purpose;
>
> (e) acquire, construct and maintain any assets, facilities and other real or personal property required for the regional transportation system;

> (f) review, and advise the Greater Vancouver Regional District, the municipalities and the government regarding the implications to the regional transportation system of,
>
> (i) the regional growth strategy and any amendments to it,
>
> (ii) official community plans applicable to any part of the transportation service region and any amendments to those plans, and
>
> (iii) major development proposals and provincial highway infrastructure plans in the transportation service region;
>
> (g) prepare and implement strategic, service, capital and operational plans for the regional transportation system;
>
> (h) from time to time, negotiate agreements with the government for contribution by the government to the funding of the capital costs of maintaining, improving or expanding the regional transportation system;

[187] The TransLink board is authorized to make decisions by resolution, and to incorporate subsidiaries such as CLRT under s. 190(3)(a) and (g) of the *Act*:

> 190(3) The board must supervise the management of the affairs of the authority and may, unless otherwise provided in this Act, by resolution,
>
> (a) exercise the powers and duties of the authority and the powers and duties conferred on the board under this Act,
>
> …
>
> (g) subject to section 15(7) of this Act,
>
> (i) establish subsidiaries under the Business Corporations Act, or acquire subsidiaries, to carry out the authority's purpose and responsibilities,
>
> (ii) appoint the boards and chairs of those subsidiaries,
>
> (iii) establish rules of conduct for the boards of those subsidiaries, and
>
> (iv) review and approve the annual operating budgets of those subsidiaries.

[188] Section 1 of the *Act* defines the word “subsidiary”:

> "subsidiary" means a subsidiary established or acquired by the board under section 190(3)(g) to carry out a purpose or responsibility, or to exercise a power, of the authority, and includes British Columbia Rapid Transit Company Ltd. and West Coast Express Ltd.;

[189] The provisions of the *Act* that I have reproduced are unambiguous. Section 3 confers a statutory responsibility on TransLink. Section 4 specifies what TransLink *must* do for the purpose of carrying out that statutory responsibility, part of which is the development, management and operation of a regional transportation system of which the Canada Line is a part. There can be no clearer example of the exercise of the statutory authority conferred upon TransLink than the development of the plan for the Canada Line and the selection of SNC-Lavalin/Serco as the concessionaire.

B. The Environmental Assessment Certificate

[190] The general purpose of an environmental assessment is apparent from s. 10(b) of the *EAA*, which permits the executive director who is responsible for its administration to excuse a reviewable project from review if the project "will not have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project."

[191] The scheme of the *EAA* is straight-forward. Section 1 broadly defines a "project" to be either any activity that has or may have adverse effects or the construction, operation, modification, dismantling or abandonment of a physical work. Section 5 authorizes the Lieutenant Governor in Council to prescribe "reviewable projects" by regulation. The *Regulation* prescribes the projects that are

reviewable, among which are: chemical production facilities; facilities for the production of primary metals; forest product manufacturing facilities; pharmaceutical manufacturing facilities; textile, tire, and leather production facilities; mining and energy projects; water management and waste disposal projects; food processing plants; tourist resort projects; and transportation projects.

[192] Sections 6 and 7 of the *EAA* provide for the review and assessment of certain non-reviewable projects:

> Minister's power to designate a project as reviewable
>
> 6(1) Even though a project does not constitute a reviewable project under the regulations, the minister by order may designate the project as a reviewable project if
>
> (a) the minister is satisfied that the project may have a significant adverse environmental, economic, social, heritage or health effect, and that the designation is in the public interest, and
>
> (b) the minister believes on reasonable grounds that the project is not substantially started at the time of the designation.
>
> (2) A project designated as a reviewable project under subsection (1) is one for which an environmental assessment certificate is required.
>
> Application to executive director for reviewable project designation
>
> 7(1) A person who proposes a project that is not a reviewable project under section 6 of this Act or under the regulations may apply to the executive director for the project to be designated as a reviewable project.
>
> (2) An application under subsection (1) must
>
> (a) be in writing, and
>
> (b) state why the applicant wishes the project to be designated as a reviewable project.
>
> (3) After considering an application under subsection (1), and the accompanying reasons, the executive director by order may
>
> (a) grant the application by designating the project as a reviewable project, or

(b) refuse to grant the application

[193] Finally, section 8 of the *EAA* prohibits the undertaking of a project without an environmental assessment certificate:

> Requirement for environmental assessment certificate
>
> 8.(1) Despite any other enactment, a person must not
>
> (a) undertake or carry on any activity that is a reviewable project, or
>
> (b) construct, operate, modify, dismantle or abandon all or part of the facilities of a reviewable project,
>
> unless
>
> (c) the person first obtains an environmental assessment certificate for the project, or
>
> (d) the executive director, under section 10 (1) (b), has determined that an environmental assessment certificate is not required for the project.
>
> (2) Despite any other enactment, if an environmental assessment certificate has been issued for a reviewable project, a person must not
>
> (a) undertake or carry on an activity that is authorized by the certificate, or
>
> (b) construct, operate, modify, dismantle or abandon all or part of the project facilities that are authorized by the certificate,
>
> except in accordance with the certificate.

[194] As discussed above, the *Regulation* stipulates that railways that are greater than or equal to 20 kilometres in length are reviewable projects. The Canada Line was 19.5 kilometres in length and non-reviewable. From a provincial perspective, construction could have proceeded without any environmental assessment of any part of the line. However, the line was subject to federal environmental assessment because the federal government was to commit capital to the project, and the project

involved passage over areas in which the federal government had an interest, namely the Fraser River and the lands leased to the Vancouver International Airport Authority.

[195] Ms. Bird explained the decision to opt into the provincial review process. She testified that the *Canada-British Columbia Agreement for Environmental Assessment Cooperation* provides for harmonized provincial and federal environmental assessment. She explained that while a federal assessment process was mandatory, CLRT volunteered to participate in the provincial environmental assessment process because it contemplated a more thorough analysis of any socio-economic factors than did the federal process. CLRT proceeded on the understanding that a favourable provincial environmental assessment would be endorsed by Canada.

[196] On January 13, 2003, CLRT applied under the *EAA* to have the Canada Line project designated as a "reviewable project" for provincial purposes. The application was granted on September 10, 2003.

[197] I have described and need not repeat the course that the provincial assessment followed. The end result was a certificate issued on June 7, 2005.

[198] The question to be addressed is whether an environmental assessment and the resulting certificate constitute statutory authority for purposes of the statutory authority defence to a claim of nuisance. I conclude they do not.

[199] The *Regulation* prescribes a wide variety of projects that are reviewable and in what circumstances. The logical conclusion to the defendants' argument is that a favourable environmental assessment confers on any proponent, whether private or public, and regardless of the project, the ability to select among alternative designs for a project, one of which has nuisance consequences and the other not, obtain a favourable environmental assessment, and then to proceed without concern or accountability for any nuisance occasioned by the construction or operation of the project. With respect, that is not protection that the *EAA* can provide, nor the kind of statutory authority to which the defence asserted by the defendants applies.

[200] A wide range of federal, provincial and municipal legislation, including statutes, regulations, and bylaws, stipulates that a permit must be obtained as a pre-condition to the commencement of an undertaking or the performance of an act. A certificate issued under the *EAA* is no different. While each permit is a form of statutory authorization, it is not the kind of statutory authority with which the defence is concerned. The relevant statutory authority is that which has been conferred to undertake and fulfil a specific responsibility, invariably in the public, as opposed to private, interest. The defence does not extend to anyone who has obtained the permits required in the course of carrying out the undertaking.

[201] The fact that the *EAA* certificate should not afford protection to the defendants is apparent from the process itself. In this case, the provincial environmental assessment was not mandatory. Rather, CLRT opted into the process. CLRT first applied for approval on the assumption that bored tunnel construction would be pursued on Cambie Street. Bored tunnel construction was also contemplated for the

portion of the route from Waterfront Station to 2nd Avenue. The EAO did not materially object to any aspect of the original proposal. While the EAO did approve cut and cover construction, it did not oblige CLRT to pursue that method of construction in the vicinity of Cambie Village. There is no evidence to suggest that use of the bored tunnel method in the Cambie Village area would have been opposed by the EAO.

[202] The proposal to pursue cut and cover rather than bored tunnel construction resulted solely from a decision made by CLRT. I must conclude that CLRT chose one environmentally acceptable course over another. The choice resulted in the abandonment of a plan that would not have caused a nuisance, and the adoption of another that would.

[203] In the result, because there was an alternative method of construction that would not have caused a nuisance in the Cambie Village area, the statutory authority defence must fail.

Assessment of Damages

[204] But for minor disagreements, none of the defendants dispute the measure of the economic loss sustained by Hazel & Co.

[205] The expert opinion of Gordon R. Milne, chartered accountant, was admitted in evidence. No defendant required his attendance for cross-examination. No defendant tendered any expert or other evidence with a view to contradicting the conclusions or opinions stated in the expert's report. In particular, notwithstanding

the defendants' claim that tunnel construction in the vicinity of the Hazel & Co. premises endured for a limited period of time, the defendants did not adduce any evidence to suggest that the loss incurred by Hazel & Co. was attributable to something other than cut and cover construction and related activities from the fall of 2005 through December 2008. As stated elsewhere in these reasons, I have found as a fact that cut and cover construction, and the other construction activities necessitated by it, was the sole cause of the company's loss.

[206] Mr. Milne computed the net business loss from December 31, 2004 through December 31, 2008 at the amount of $518,611. He did so by reference to the decline in gross profit, and by making appropriate allowances for the reduction in variable expenses resulting from the reduction in gross profit. The calculation of loss at $518,611 was based on the assumption that sales would remain at the 2004 level.

[207] Mr. Milne made another determination assuming that sales would have increased by the same percentages as were reflected in the Statistics Canada marketplace statistics for Vancouver clothing stores from January 1, 2004, through September 30, 2008.

[208] According to Statistics Canada, the percentage increases from 2005 through September 30, 2008 were the following:

2005:	7.2%
2006:	5.2%
2007:	9.6%
2008:	2.3%*

* January – September, 2008

[209] Mr. Milne expressed the opinion that if one assumed Hazel & Co. would have enjoyed comparable increases in sales, its business loss would have approximated $638,611.

[210] The defendants challenge the application of the increased sales assumption, saying that there is no evidence from which to conclude that Hazel & Co. would have performed in accordance with marketplace averages. While I agree with that observation, there is evidence that performance would likely have improved in the period, even if not to the level suggested by Mr. Milne.

[211] Net sales figures for the period 2000 through 2004 were admitted in evidence and not challenged by the defendants. The figures indicate that Hazel & Co. experienced the following year-over-year increases:

2001:	6.9%
2002:	6.0%
2003:	(1.0%)
2004:	2.6%

[212] There is no evidence of the Statistics Canada marketplace changes in the period from 2001 through 2004. As a result, it is not possible to compare the actual performance of Hazel & Co. to the performance of the general Vancouver retail clothing market in the same period.

[213] I find, however, that it is unreasonable to assume that sales would have remained static for the 2005 through 2008 fiscal years. Ms. Heyes suffered injuries in two motor vehicle accidents in 2004. While she fully recovered, it is reasonable to

infer that her injuries reduced her productivity and, in turn, the company's performance in 2004. That notwithstanding, 2004 was the best year Hazel & Co. had experienced in terms of net sales. Absent the injuries Ms. Heyes sustained, it is reasonable to conclude that sales for 2004 would have been higher still, and the business loss for the period 2005 through 2008 would have been greater than the minimum suggested by Mr. Milne.

[214] More importantly, Hazel & Co. achieved moderate increases in sales in the years leading up to 2005. The exception was 2003 when sales declined by approximately one per cent.

[215] Without evidence of the Statistics Canada rates of change in the years 2000 to 2004, I am not prepared to conclude that it is reasonable to assume that the company would have performed at the market average suggested by Statistics Canada. However, I do find that some increase could have been reasonably expected.

[216] In all of the circumstances, I conclude that a reasonable assessment of the loss of business income for the period October 2005 through December 31, 2008, caused by cut and cover tunnel construction is $600,000.

[217] Mr. Milne also made a calculation of the loss likely incurred in the period from January 1, 2009, when Hazel & Co. moved to its new premises at Main Street and 26th Avenue in Vancouver, to the commencement of trial on March 16, 2009. There is no evidence of the actual sales performance of the business from January 1

through March 16, 2009. Any estimate of loss is purely speculative and cannot be attributed to the actions of any defendant in any event.

[218] In addition to claiming the loss of business income, Hazel & Co. advances a claim for interest and the loss of opportunity resulting from the fact that Ms. Heyes was obliged to liquidate personal assets and refinance her home in order to provide Hazel & Co. with working capital in the period from 2005 through 2008.

[219] I find as a fact that Ms. Heyes acted in relation to her personal finances in the manner to which she testified. She sold or refinanced assets and lent the proceeds from those sources to Hazel & Co. by way of a non-interest bearing shareholder loan in respect of which the company incurred no interest expense and no increase in business loss. There is no evidence from which to conclude that Ms. Heyes would have advanced the funds to Hazel & Co. to be used for purposes other than its retail clothing operations. As a result, the company cannot say it was denied the opportunity to apply the funds to other income earning endeavours. Hazel & Co. experienced no compensable loss of opportunity.

[220] The loss of opportunity and the loss in the form of interest costs on funds Ms. Heyes borrowed to lend to Hazel & Co. are those of Ms. Heyes. She is not named as a plaintiff in this action. In the circumstances, the claim to include imputed interest in the assessment of the Hazel & Co. loss must fail.

[221] On all of the evidence, I assess the loss of business income sustained by Hazel & Co. as a consequence of cut and cover tunnel construction at $600,000. I

allocate the loss equally to the 2005 through 2008 fiscal years for purposes of computing pre-judgment interest.

[222] Counsel on behalf of Hazel & Co. asked me to consider making an award of exemplary damages on the basis that CLRT, TransLink and InTransit BC acted with cavalier disregard for the impact of their business decisions upon the plaintiff. With respect, and having regard for all of the evidence that was adduced, I am of the opinion that those defendants believed they were acting in the public interest in relation to a project of considerable complexity. Their failing was not their conduct, but their omission to recognize that their choice of a nuisance-making method of construction would result in liability for the loss sustained by the plaintiff. Exemplary damages are not warranted.

Disposition

[223] In summary, therefore, I grant judgment as follows:

1. The claim based on misrepresentation is dismissed as against all defendants.

2. The claim in negligence is dismissed as against all defendants.

3. The claim in nuisance is dismissed as against the City, Canada, and the Attorney General.

4. TransLink, CLRT and InTransit BC are jointly and severally liable to Hazel & Co. in nuisance.

5. Hazel & Co. is entitled to damages in the amount of $600,000 for the business loss occasioned by the nuisance in the 2005 through 2008 fiscal years.

6. Hazel & Co. is entitled to pre-judgment interest on the basis that one-quarter of the economic loss arose in each of 2005, 2006, 2007 and 2008.

Costs

[224] Hazel & Co. is entitled to costs against CLRT, TransLink and InTransit BC. In the absence of agreement, the parties may speak to the appropriate scale or other matters affecting the assessment of costs.

[225] I consider this an appropriate case in which to exercise discretion to deny costs to the City, Canada, and the Attorney General. Those parties shared a common interest with the other defendants, namely the development of the Canada Line. All defendants were represented by common counsel. No witness was called on behalf of any of those defendants. In the unique circumstances of this action, it is not appropriate to require Hazel & Co. to pay costs to any of Canada, the Attorney General, or the City against whom no relief has been granted.

"Mr. Justice Pitfield"