AIRPORT NOISE:

NUISANCE AND THE DEFENCE OF STATUTORY AUTHORITY

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Overview

Before considering the issues of nuisance and statutory authority as they developed over years of litigation in the *Sutherland*[1] case. I will briefly acquaint you with the history of the Vancouver International Airport ("YVR") including proposals for the development of a North Parallel Runway. I will then consider the nature of an actionable nuisance and the distinction between a public and private nuisance. The Plaintiffs' Claim and the Defences and in reply thereto will then be addressed together with the decisions of the Supreme Court and Court of Appeal. In considering these issues and the history of the *Sutherland* litigation the concept of the defence of statutory authority will be examined with particular emphasis on the requirement to prove the "inevitability" of the nuisance. Finally the importance of the case to local, provincial and federal governments and their respective agencies will be highlighted.

History of YVR

1931

1. On February 26, 1931 the City of Vancouver was issued a licence under the *Aeronautics Act* to operate a public customs airport "Vancouver Airport" on Sea Island. The 475 acre site comprised a single runway, an administration building and two hangars.

1939-1947

2. On November 28, 1939, the Minister of Transport ("the Minister") designed Vancouver Airport for direct and indirect use for military purposes under the Air Regulations. Pursuant to an agreement with the City and Canada the Airport was operated by the Departments of National Defence and Transport until 1947 when the operation of the Airport was returned to the City of Vancouver. Between 1940-1948 two runways were constructed, the terminal building was expanded, and aircraft manufacturing and maintenance facilities were built as well as other improvements made at federal government expense.

1948-1954

[1] *Sutherland v. Canada (Attorney General),* (2001) 202 D.L.R. (4th) 313 (B.C.S.C.) at p. 316

3. In 1948 Vancouver Airport was renamed the Vancouver International Airport ("YVR"). In 1953 Transport Canada ("Transport") funded construction of a new east-west runway, now designated runway 08R-26L. In 1954 Canada began a major program of land acquisition and expropriation to assemble reserve lands for anticipated future expansion, including proposed parallel runways. This program continued throughout the 1950's to the 1980's.

1960-1962

4. On November 9, 1960 the Minister offered to purchase YVR from the City for $2,750,000.00; the City accepted the offer on March 1, 1962. Licences were issued to Transport from time to time to operate YVR.

1992 to Present

5. The Vancouver International Airport Authority ("YVRAA") became a designated Airport Authority on May 21, 1992 by Order in Council. Pursuant to a lease agreement between Canada and YVRAA the management, operation and maintenance of YVR was transferred from Canada to YVRAA as of July 1, 1992. Canada retained ownership of the lands on which YVR was situated. On February 2, 1999 the Minister issued, pursuant to the *Aeronautics Act*, an Airport Certificate to YVRAA to operate YVR in accordance its Operations Manual dated January 26, 1999.

The North Parallel Runway

6. While a third runway proposal was only announced in 1972 consideration of such a proposal had long been a subject of discussion in aviation and public circles including the following:

a. In 1946 a Preliminary Report upon an Airport Plan for the Metropolitan area of Vancouver by consultants Harland, Bartholomew and Associates, Town Planners was

published by Vancouver's Town Planning Commission. The Report envisaged the City acquiring all of Sea Island for export expansion that would include two 10,000 foot parallel runways.

b. In 1953 the Lower Mainland Regional Planning Board of B.C. published a Report entitled "Airports for the Lower Mainland". The Report noted the increase in air traffic and the need for a second runway by 1961 and probably a third by 1971.

c. In March 1959 the City's Technical Planning Board submitted its Airport Study – 1959 forming part of its overall plan for the future of YVR. The Board referred in its study to the existing major E-W runway (08R 26L), the construction of a second E-W runway (08L 26R) parallel to the main runway and the construction of two new cross-wind runways all of which had been planned by Transport.

d. Distinct from airport planning studies and reports referred to earlier the subject of parallel runways was considered in a number of public documents, professional journals and newspaper reports and articles. From as early as 1959 there were articles available to the public reporting on the runway configuration adopted to provide for two parallel runways 10,600 feet in an east-west direction approximately 4,200 feet apart, and two cross-wind runways at 9,200 feet and 4,800 feet respectively.

e. In 1972 much of the property on Sea Island north of the airport was expropriated by Canada as part of its YVR continuing expansion program and step toward construction of a parallel runway.

f. As a result of public opposition to the expropriations and general concern about the airport expansion project an Airport Planning Committee was formed in 1973. The Committee's task was to examine three different runway concepts.

g. In March 1976, Transport proposed a new option 1.7 km north of, and parallel to the existing main runway, contained entirely within the Sea Island dikes.

h. On August 12, 1976 the Minister announced that the Parallel Runway Project ("the Project") would be given further and deliberate consideration and would not be started before 1978.

i. On June 24, 1992, the Minister announced the Project would be going ahead.

7. Under the Federal Environmental Assessment and Review Process (the "EARP"), projects with potential environmental effect must be subjected to formal public review. Accordingly, in 1976 Transport referred the parallel runway proposal for public review by an Environmental Assessment Panel. The Panel obtained public comment on draft guidelines subsequently issued Guidelines for the Preparation of an Environmental Impact Statement (EIS Guidelines) to Transport in July, 1978. Shortly after receiving the final Guidelines in 1978, Transport postponed further planning for the runway project. Planning resumed in 1981; following public hearings in June 1983, new guidelines were issued to Transport in October, 1983. Shortly thereafter, Transport again suspended planning for the Project due in part to an economic recession.

8. Following the beginning of an economic recovery in 1985, and a significant increase in aircraft activity at YVR, Transport reviewed its planning for the Project. The Panel was reactivated in November, 1989.

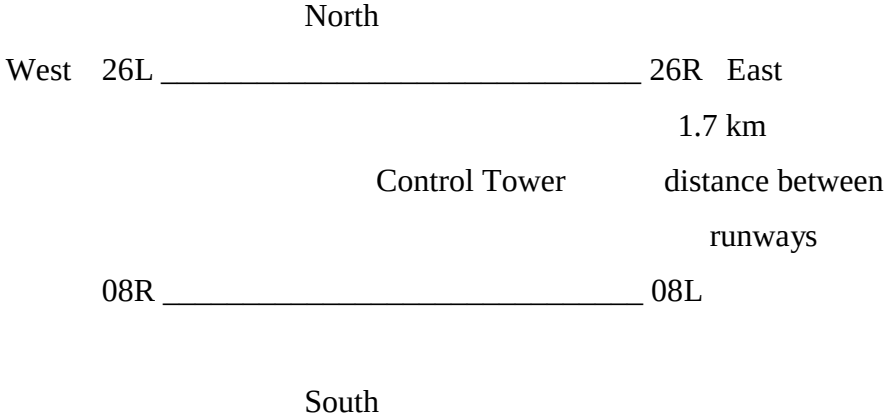
9. In its August 1991 Report on the Parallel Runway Project at YVR the Panel acknowledged a need for more runway capacity at YVR.

10. The Panel's Report was issued with twenty-two recommendations to the Ministers of Transport and the Environment in August 1991. The Panel decided the benefits accruing to the economy and people of British Columbia would be not only substantial but crucial to economic growth. The Panel recommended a noise compensation program be accepted in principle and

referred to the Noise Management Committee for study and action.

11. The Panel referred in its Report to extracts from the March 1990 Report of James F. Hickling Management Consultants Ltd. Assuming no noise reduction and mitigation measures were undertaken the Hickling Report estimated the present value (1988) of noise costs in the noise exposure area associated with an 8,000 or a 9,940 foot parallel runway at $43.4 million, representing $31.7 million for those households affected in Vancouver $11.7 million for those in Richmond.

12. On June 24, 1992 the Minister of Transport announced the third runway project would be going ahead. The Minister's Press Release announced the government would continue to focus on the implementation of effective noise reduction and mitigation measures rather than on compensation. While Transport rejected the recommendation of a noise compensation program the Department agreed to institute a comprehensive noise mitigation program. This program included several of the Panel's recommendations for noise mitigation.



PUBLIC v. PRIVATE NUISANCE: THE DISTINCTION

13. A legal nuisance may be either a private or public nuisance or both. Linden, *Canadian Tort Law*, 6th ed. (Toronto: Butterworths, 1997) at p. 523, defines the former as "an unreasonable interference with the use and enjoyment of land by its occupier" and the latter as

"an unreasonable interference with … the use and enjoyment of a public right to use and enjoy public rights of way"[2]. Further:

> "Individuals are entitled to bring private actions in public nuisance only where they have sustained some special or particular damage beyond that suffered by the rest of the public. Failing that special damage, the action may only be commenced by the Attorney General: Linden, *supra*, at pp. 525-530"[3].

14. With respect to what constitutes a nuisance, Holmes, J., the trial judge in *Sutherland*, referred to *Royal Anne Hotel Co. Ltd. v. Ashcroft*[4] at pp. 465-466 wherein McIntyre J.A. summarized the law as follows[5]:

> "As has been said in *Street on Torts*, at p. 212: "The essence of the tort of nuisance is interference with the enjoyment of land." That interference need not be accompanied by negligence. In nuisance one is concerned with the invasion of the interest in the land; in negligence one must consider the nature of the conduct complained of. Nuisances result frequently from intentional acts undertaken for lawful purposes. The most carefully designed industrial plant operated with the greatest care may well be or cause a nuisance, if, for example effluent, smoke, fumes or noise invade the right of enjoyment of neighbouring land owners to an unreasonable degree: see *Manchester Corp. v. Farnworth*, [1930] A.C. 171 (H.L.) and *Walker v. McKinnon Industries Ltd.*, [1949] O.R. 549, as examples."

THE PLAINTIFF'S CLAIM

15. In the spring of 1997 approximately 350 Plaintiffs commenced an action against YVRAA and Canada as a result of noise generated by the operation of the North Parallel Runway ("the North Runway") which commenced operations in November 1996. The subsequent application to have their action certified as a class action was dismissed, however, pursuant to Court Order three "test" cases were allowed to proceed to trial. As Holmes, J. stated in his reasons[6] it was hoped the test cases would resolve major legal issues raised in the defences that were common to all potential Plaintiffs and perhaps afforded some assistance in principle regarding issues that were not in common but 'intrinsically individualistic". The three sets of

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[2] *Sutherland, supra,* at p. 316
[3] *Sutherland, supra,* at p. 317
[4] *Royal Anne Hotel Co. Ltd. v. Ashcroft,* [1979] 2 W.W.R. 462 (B.C.C.A.)
[5] *Sutherland, supra,* at p. 317
[6] *Sutherland, supra,* at p. 316

Plaintiffs were selected to represent different locations and times when they purchased their residents. These three Plaintiffs were resident landowners in the Tait subdivision which is within the Bridgeport area of Richmond. Their properties were located almost directly under the flight path of the North Runway. Holmes J. succinctly stated the Plaintiffs' case as follows:

> "[3] The claim of nuisance is grounded on allegations that the aeronautical activity of arriving and departing aircraft on the north runway creates excessive, deafening and disturbing noise and vibrations which has caused each of them substantial and unreasonable interference with residential use and enjoyment of their property.
>
> [4] Particulars of the alleged nuisance are expressed in para. 16 of the statement of claim as:
>
> - Interference with normal conversations inside and outside the home;
> - Interference with the use of telephones, radio and television;
> - Interference with daily tasks;
> - Interference with and reduction in the quality of rest and sleep;
> - Creation or aggravation of hypertension;
> - Interference with the reasonable and comfortable use of gardens, patios, yards and recreational property;
> - Interference in the normal use and enjoyment of community amenities in the affected areas;
> - Creation of fear and apprehension; and
> - Expulsion of noxious fumes in the vicinity of residential homes.
>
> [5] The plaintiffs claim in para. 17 of the statement of claim that, as a result, their properties have been rendered significantly less desirable and their market values reduced."[7]

THE DEFENCES

[7] *Sutherland, supra,* at pp. 314-315

16. With one exception both YVRAA and Canada pleaded substantially the same defences to the Statement of Claim. Holmes J. correctly summarized the defendants' position as follows:

> [6] The defendants deny the nuisance and raise two main alternative pleas: any nuisance is public and no action in private nuisance is sustainable; and, any nuisance created is authorized by statute. The defendants also raise issues as to contributory fault on the part of the plaintiffs whom they allege have failed to appropriately mitigate their damages." [8]

17. Canada's position was that under Section 4.2 of the *Aeronautics Act*, R.S.C. 1985, Chap. A-2 (the "*Act*"), Parliament conferred on the Minister extensive authority to construct, maintain and operate airports and to establish aerial routes. By necessary implication this included the right to determine the location of airports, including runways. Section 4.9 of the *Act* authorized the Governor in Council to make *Regulations* respecting aeronautics including: activities at aerodromes and the location, inspection, certification, registration, licensing and operation of aerodromes (ss. 4.9(e)).

Nuisance/Public Nuisance

18. Canada's position at trial was that the operation of the North Runway did not cause an actionable nuisance. Considering all relevant circumstances, including the nature of the locality in question and the utility of the Defendants' conduct, we argued the operation of YVR did not constitute a nuisance to the Plaintiffs, as it did not cause a substantial, material and "unreasonable interference" with the Plaintiffs' use and enjoyment of their properties.

19. While we acknowledged "coming to the nuisance" (which is to say the Plaintiffs moved or chose to buy property near YVR and the North Runway) is no defence to an actionable nuisance YVR was in existence prior to the Plaintiffs purchasing their subject property and had been expanding since the Airport opened in 1931. Notice of the possibility of airport expansion, and therefore the potential impact of YVR's operations on their neighbourhood, was provided by

[8] *Sutherland, supra,* at p. 315

widely publicized studies such as the Airport Planning Committee, the Master Plan for YVR, and the EARP proceedings, as well as Airport Zoning Regulations, which were amended to include reference to a parallel runway in 1960. Accordingly, all of the Plaintiffs knew or ought to have known that the character of the neighbourhood into which they were moving was or could be impacted by aircraft noise, and in particular by the continued growth and expansion of the Airport and its operations. Canada argued that, considering all the relevant facts, there was no actionable nuisance in the case at bar.

20. Canada's position was that if the Plaintiffs were subjected to a nuisance any such nuisance was a public nuisance, and was not actionable in the absence of the consent of the Attorney General of B.C. In Plaintiffs' Second Amended Statement of Claim it had been alleged that the Plaintiffs were all subjected to noise and vibrations from aircraft taking off and landing which constitutes an unreasonable interference of the use and enjoyment of the Plaintiffs' properties. The Defendants' position was that no special damage was alleged much less proved.

21. In *St. Lawrence Rendering Co. Ltd. v. Cornwall (City)*[9], Mr. Justice Spence quoted 24 *Halsbury 2nd ed*. 1937, which states that a public nuisance is a nuisance:

> " … which inflicts, damage, injury or inconvenience upon all the King's subjects, or upon all of a class who come within the sphere of its operation. It may, however, affect some to a greater extent than others."

22. In *Attorney General v. PYA Quarries Ltd.*[10], Lord Denning and Lord Justice Romer both defined public nuisance. Lord Justice Romer stated:

> "It is, however, clear, in my opinion, that any nuisance is 'public' which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects … the question whether the local community within that sphere [neighbourhood] comprises a sufficient number of persons to constitute a class of the

[9] *St. Lawrence Rendering Co. Ltd. v. Cornwall (City)*, [1951] O.R. 669 (Ont. H.C.J.)
[10] *Attorney General v. PYA Quarries Ltd.*, [1957] 2 Q.B. 169 (C.A.)

> public is a question of fact in every case. It is not necessary, in my judgment, to prove that every member of the class has been injuriously affected; it is sufficient to show that a representative cross-section of the class has been so affected for an injunction to issue."(At 184)

23. Canada's position was that aircraft noise at YVR did not constitute a private nuisance. The operation of 26R was neither a private nor a public nuisance, particularly taking into consideration the importance of aeronautics to Canada's national and international interests. In the event a nuisance was found our position was that it was a public nuisance for the evidence established at least a thousand residents in Richmond were subjected to the noise. The consequential noise resulting from the operation of 26R, which had been planned and in the public eye for decades prior to the commencement of operations in November 1996, was a natural consequence of its operation.

DEFENCE OF STATUTORY AUTHORITY

24. The theory underlying the defence of statutory authority is that Parliament or the provincial legislatures have the ability to limit or derogate from property rights through the enactment of a statute. In authorizing operations which interfere with the private rights Parliament determines that public rather than private interests are to prevail. A statute, regulation or Order in council may expressly or impliedly authorize an operation which would otherwise be unlawful; this is the essential principle of statutory authority. When the location for the operation is authorized, the location has been established by law. Once the location for the operation has been decided the person upon whom the authority has been conferred must take all proper care in carrying out the operation. In other words, the consequences must be the inevitable result of exercising the authority granted. Neither the person seeking the authority nor the recipient of the authority has a duty to consider the competing interests of others before seeking or acting upon the authority conferred.

25. The Supreme Court of Canada has recently reaffirmed the traditional formulation of the defence of statutory authority. In *Ryan v. Victoria (City)*[11], Major J. stated at p. 238 (S.C.R.):

[11] *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at 238, (1999) 168 D.L.R. (4th) 513 (S.C.C.)

> "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."

26. The rationale behind the traditional approach was summarized by La Forest J. in *Tock v. St. John's (City) Metropolitan Area Board*[12], as follows:

> "Briefly put, the test applied by the courts when faced with the decision whether a nuisance may be defended on the ground that it was created pursuant to the exercise of statutory authority takes the form of inquiring whether the statute expressly or impliedly authorizes the damage complained of, and whether the public or other body concerned has established that the damage was inevitable."

27. In *Diversified Holdings Ltd. v. British Columbia*[13] Macfarlane J.A. agreed that the immunity may be implied (at p. 35):

> "The statute is examined in each case to ascertain whether the Legislature has expressly or by necessary implication granted immunity from action. In most cases the statute does not contain an immunity clause, but it directs the execution of some specific undertaking, or authorizes the implementation of some policy. When the statute does not expressly grant immunity from liability in nuisance the courts have inferred immunity in cases where the statute is mandatory or imperative in nature; where the actions complained of were expressly or impliedly authorized by the statute; or where the invasion of the plaintiff's interests was the inevitable consequence of the actions taken."

28. From these principles it is apparent that the key task in the application of the defence of statutory authority is to interpret the legislative framework to determine if it authorizes the infringement of private rights. The concept of inevitability is important as a means of considering whether the infringement was intended by the legislature or not. Where a certain activity inevitably causes a nuisance, then the authorization must logically have also authorized that nuisance.[14]

29. The test for determining whether the defence applies involves a consideration:

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[12] *Tock v. St. John's (City) Metropolitan Area Board,* [1989] 2 S.C.R. 1181, at p. 1193 (S.C.C.)
[13] *Diversified Holdings Ltd. v. British Columbia*, (1982) 41 B.C.L.R. 29 (B.C.C.A.)
[14] Factum of YVRAA at pp. 15-16

(i) whether the statute expressly or impliedly authorizes the activities giving rise to the damage complained of; and

(ii) Whether the body concerned has established that the damage was the inevitable result of the statutorily authorized activities.

30. A careful analysis of the scheme enacted by the *Aeronautics Act* and the *Canadian Aviation Regulations* ("*CARS*") reveals that there are three independent yet interlocking sources of express and unequivocal statutory authority for the very activities that are said to give rise to a nuisance in this case. These sources of statutory authority can be summarized as follows:

(a) The *CARS* enacted pursuant to the *Aeronautics Act*, R.S.C. 1985, c. A-2, required that aircraft approaching runway 26R (the "North Runway") at YVR fly directly over the Respondents' properties;

(b) The Airport Certificate issued to the YVRAA authorized the operation of the North Runway in precisely the manner it is currently being operated, namely, with approaches and takeoffs of aircraft over the properties;

(c) The Ground Lease between the Crown and the YVRAA, approved by Order In Council pursuant to a statute, which authorized the operation of YVR in precisely the manner it is currently being operated, which necessarily and inevitably involves approaches and takeoffs of aircraft over the Respondents' properties.

31. While these three sources of statutory authority are distinct from each other, they are inter-related and form part of an integrated and comprehensive regulatory scheme respecting aviation.

THE TRIAL DECISION OF HOLMES, J.

32. The trial judge decided YVRAA and Canada had created a nuisance and that statutory authority provided no defence. He found the aircraft noise substantially affected the Plaintiffs

use and enjoyment of their property and that the interference with the Plaintiffs' property was unreasonable in all of the surrounding circumstances. He referred to the Tait subdivision[15] as a residential enclave within Bridgeport bounded by industrial and commercial use lands and considered the fact that two Richmond neighbourhoods (Odlin Park, Burkeville) experienced more aircraft noise than the Tait subdivision to be irrelevant. Holmes J. considered it was the change in the noise level by the construction and operation of the North Runway that made the difference between the Odlin Park and Burkeville neighborhoods and the fact that the Tait subdivision was likely to become worse with the commencement of takeoffs in the future.

33. Holmes, J. found that while the Plaintiffs could have discovered the proposed airport expansion the "notice defence" (more accurately, in legal terms the "coming to the nuisance" defence) was unavailable. While acknowledging the immense utility of YVR he held the burden imposed on the Plaintiffs "exceeds that reasonable degree of tolerance expected of residential property owners to facilitate airport expansion."[16] He found the rights of the Plaintiffs had been "trampled upon and that they should not be required "to bear a disproportionate burden to facilitate the greater public good"[17].

34. As for the defence of statutory authority Holmes, J. held the onus was on the defendants to "demonstrate that the nuisance is the inevitable result of an undertaking authorized by statute"[18] and referred to three cases that had settled the law in this area[19]. The Defendants were required to prove that constructing and operating the North Runway was an undertaking authorized by statute, and secondly, that the nuisance created was the "inevitable result" of the exercise of that authority.

35. Holmes, J. held the Minister had the power under the *Aeronautics Act, CARS,* and ancillary legislation to make the necessary cumulative decisions and the final decision to construct the North Runway. It was important, he held, that it was YVRAA not Canada that actually constructed and now operated the runway. Holmes, J. concluded that the defence of

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[15] *Sutherland, supra,* at p. 339
[16] *Sutherland, supra,* at p. 345
[17] *Sutherland, supra,* at p. 346
[18] *Sutherland, supra,* at p. 351
[19] *Tock, supra*, *Ryan, supra* and *Manchester Corp., infra*

statutory authority provided no defence to Canada or YVRAA as the North Runway was neither constructed nor operated by or on behalf of the Minister under Section 4.2 of the *Aeronautics Act.* He further held the *Aeronautics Act* did not mandate the construction of the runway as located, constructed and operated. As the YVRAA remained a distinct entity from the Minister and did not have the Minister's jurisdiction under the *Act* he found no connection between the construction and operation of the runway and the Minister's power under Section 4.2 of the *Aeronautics Act*[20].

36. While YVRAA had been issued an Airport Certificate by the Minister's officials authorizing YVRAA to operate the Airport in accordance with its Airport Operations Manual approved by the Minister, Holmes, J. held the airport certification process had its focus on safety and was never intended to confer legislative authority to commit a nuisance[21]. On the subject of the certification process for airport and the inevitability of noise caused by the operation of the North Runway he stated at p. 358:

> [273] "It is obvious that once the location of a runway is set the flight paths accessing it are fixed. Landings follow a prescribed 3-degree descent path. The height above ground of landing aircraft is determined accordingly. The speed of the landing aircraft on descent is controlled and the configuration of power and trim determines the noise that results.
>
> [274] It is the orientation of the runway which predetermines the area that will experience the noise of user aircraft. As was repeatedly emphasized in evidence, once an aircraft is on approach, centred in the flight path, powered and trimmed for the prescribed descent rate, there is nothing the pilot of the aircraft can do to abate the noise that aircraft creates except to land the plane.
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> [274A] I do not find the airport certification process or the air traffic control regulations can be said to authorize the nuisance that has occurred. The purpose of these regulations

[20] *Sutherland, supra,* at p. 357
[21] *Sutherland, supra,* at p. 357

> is safety. The certification process and regulations do not expressly preclude liability for nuisance, and indirectly, although some noise is necessarily produced by compliance with them, I cannot find that the only reasonable inference from such regulations is that they were intended to authorize nuisance."

37. Not only did Holmes, J. decide the *Aeronautics Act* and *CARS* did not authorize the alleged noise nuisance he further decided the nuisance was not an inevitable result of carrying out statutorily authorized operations. Holmes, J. spent considerable time discussing how the North Runway could have been configured differently or how other airports such as Boundary Bay, Abbotsford or Pitt Meadows could have been expanded to deal with the need for increased capacity and divert traffic away from YVR[22]. Further the Court found the Plaintiffs' properties could have been expropriated and Canada or YVRAA negotiated compensation and acquired releases from Plaintiffs. Having found there were, in the Court's view, other ways and means of either locating the runway at a different location or configured differently it could not be said the aircraft noise was "the inevitable consequence of the exercise of any specific statutory authority or in response to any particular required statutory duty"[23]. He did find, however, and this was of crucial importance for the appeal, that "once the runway is placed the die is cast on how aircraft must approach and depart the runway over the Plaintiffs' properties[24].

38. The trial judge also noted:

> "[302] In my view it is only if the new runway must be located on Sea Island, in its existing location, and that it must be operated to its fullest potential capacity, that the complained-of nuisance to residents of the Tait subdivision becomes inevitable. The onus has not been met.
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> [303] I do not accept the defendants have met the standard of the test delineated in *Tock* and *Ryan* and reached a point where the consignees may be said to be inevitable and a

[22] *Sutherland, supra,* at pp. 359-361
[23] *Sutherland, supra,* at p. 360
[24] *Sutherland, supra,* at p. 361

statutory defence available."

39. Both YVRAA and Canada as landlord were found liable for the damages sustained by the Plaintiffs. The Court awarded damages which, in the trial judge's view, reflected the past and future harm and "which dispose of the matter while having the effect of legalizing the continuation of the nuisance[25]. The Court awarded the three sets of Plaintiffs $75,000.00, $40,000.00 and $60,000.00 respectively representing the diminution in the value of their properties caused by the operation of the new runway. Costs associated with moving were also awarded. Damages to which the Defendants were exposed from similar awards to the remaining Plaintiffs and others yet to join the litigation was upwards of $50 million.

40. In summary, Holmes, J. found Canada jointly liable as landlord for the nuisance created by its tenant YVRAA. The judge found: (a) that the defence of statutory authority was unavailable; (b) that noise from aircraft using 26R was inevitable over the Tait subdivision; and (c) that the defendants had not discharged the onus of establishing that there were no alternatives for acquiring additional runway capacity which could be used without causing a nuisance to the Plaintiffs.

THE LEGAL ISSUES ON APPEAL:

ISSUE ONE: THE JUDGE ERRED IN DECIDING THAT THE DEFENCE OF STATUTORY AUTHORITY WAS NOT AVAILABLE TO THE DEFENDANTS

41. Canada and YVRAA argued the defence of statutory authority was available to both defendants for two distinct and complementary reasons:

(a) Under the *CARS* the Minister authorized YVRAA to operate YVR, including 26R, at a specific location in accordance with its Airport Operations Manual. The inevitable result or consequence of those operations, including the operation of the North Runway, is the noise from aircraft using YVR. Aircraft noise is inevitable at YVR and all other airports;

[25] *Sutherland, supra,* at p. 364

(b) YVR's arrival and departure routes are not determined by YVRAA; they are statutorily mandated by the *CARS* which, when fully complied with, provide the defence of statutory authority to airlines, the Minister and YVRAA.

42. The trial judge acknowledged statutory authority may be available to non-governmental bodies and private entities but erred in finding it was unavailable to the defendants for the following reasons:

(a) in the context of this nuisance action it is the operation, not the construction of 26R, which causes the alleged nuisance;

(b) the Minister had the authority to decide the location of 26R, and took into consideration the advice of experts acquired over decades;

(c) while the *CARS* and Airport Certificate address safety, they also relate to the public interest generally and the control of aeronautics;

(d) whether Canada could have expropriated the property is not a relevant consideration; and

(e) the noise is "inevitable", as was acknowledged by the judge, given the location of 26R.

43. Canada argued Holmes, J. erred when he considered the merits of alternative locations for a new runway. Following the test of the Supreme Court set out in *Ryan v. Victoria*, [1999] 1 S.C.R. 201 at 238, the trial judge ought to have decided whether the noise of aircraft using 26R, which had been the site chosen by the Minister, was the "inevitable result" or consequence of the operations authorized by the Minister.

44. Holmes, J. found Canada could have expropriated properties under 26R's flight path. This is clearly wrong for unless property is "required" there is no legal basis for its expropriation[26]. In considering the "inevitability" of aircraft noise the judge erroneously took into consideration the Panel's recommendation for compensation. This recommendation would not benefit subsequent purchasers or others subjected to equal or greater noise. In any event

[26] *Grauer v. Canada (Attorney General)*, (1986) 34 L.C.R. 225 (F.C.T.D.)

these recommendations did not bind the Minister[27].

a) The Defence of Statutory Authority Correctly Understood

45. In authorizing operations which interfere with the private rights Parliament determines that public rather than private interests are to prevail. Parliament has statutorily authorized essential public services that interfere with the private rights of the minority for the greater public good. The only reservation is that proper care be taken in exercising the conduct, activity or operations authorized. A statute, regulation or Order in Council may expressly or impliedly authorize an operation which would otherwise be unlawful; this is the essential principle of statutory authority. When the location for the operation is authorized the location has been established by law.

46. Once the location for the operation has been decided the person upon whom the authority has been conferred must take all proper care in carrying out the operation. In other words, the consequences must be the inevitable result of exercising the authority granted. Neither the person seeking the authority nor the recipient of the authority has a duty to consider the competing interests of others before seeking or acting upon the authority conferred.

47. The defence of statutory authority is available when the location of an authorized operation is a matter of discretion provided the operation would cause a nuisance wherever situated.

48. The alleged nuisance is not caused by the airport's ground operations but by aircraft using YVR; 26R does not cause the nuisance; had 26R not been built it would still be possible for a change in arrival or departure routes of aircraft using 26L/08R (the main south runway) to produce a noise nuisance that would impact the residents of the Tait subdivision.

b) Inevitability Correctly Understood

[27] *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)*, [1991] 1 F.C. 641 (C.A.) at pp. 667-668, *Cantwell v. Canada (Minister of the Environment)*, (1991) 41 F.T.R. 18 at p. 27 (F.C.T.D.)

49. Holmes, J. misunderstood the concept of "inevitability" in the context of a nuisance action. The concept of inevitability requires all proper care to be taken in carrying out the authorized operations. The ordinary incidents or "inseparable consequences" of the operations have been legalized under the *Act* and *Regulations*. For the Court to require more would reduce or render nugatory the authority conferred by Parliament.

50. Holmes, J. did not follow the "inevitability" test set forth in *Ryan*. Instead of asking the question whether the noise of aircraft using 26R was the "inevitable result" or consequence of using the runway, having in mind his finding that the location was statutorily authorized, he found the noise was not inevitable to the residents of Tait subdivision because the defendants had not discharged the onus of proving other suitable sites were not available. The test applied by the judge was clearly wrong.

51. Holmes, J. considered the merits of alternative sites for acquiring additional runway capacity, despite the fact that in the 1970's and 1980's Ministers had considered and rejected these same alternative sites. The Minister did not have an obligation to confer with the residents of Tait subdivision before determining the location of 26R nonetheless there was considerable opportunity for public input to the decision of where to locate the new runway through the EARP and other processes. Further it had been the subject of considerable private study over the previous fifty years and had been rejected by the Minister for appropriate reasons.

c) The Inevitability of Aircraft Noise

52. The trial judge correctly found that aircraft noise over Tait subdivision was inevitable once the location of 26R had been determined by the Minister. More specifically he found that:

> (a) following the prescribed 3º descent path "the speed of the aircraft on descent is controlled and the configuration of power and trim determines the noise that results"; and

(b) once the aircraft is properly lined up on final approach "powered and trimmed for the prescribe descent rate, there is nothing the pilot of the aircraft can do to abate the noise that aircraft creates except to land the plane".

53. It has been expressly recognized in the *Act* and *CARS* that aircraft noise is an inevitable consequence of operating aircraft and airports. *CARS* 602.105 requires operators to follow applicable noise abatement procedures and requirements specified by the Minister. *CARS* 602.106(1) limits the operations of certain types of aircraft on noise restricted runways.

54. The Minister's restrictions on aircraft noise emission levels are among the most stringent in the world. Aircraft engines generate less noise and pollution today than the early jets (DC8, 707); research into lowering noise emission levels continues. Older noisier jet aircraft are being phased out by regulation. The operation of large jet aircraft in Canada after April 1, 2002 is restricted to Chapter 3 (Stage 3) aircraft which generate less noise than other jet aircraft: *Regulation.* Both the Minister and YVRAA have made all reasonable efforts to minimize the inevitable consequences of noise from aircraft in flight.

55. In issuing an Airport Certificate and establishing aerial routes the Minister has authorized noise at YVR's location and the noise associated with flight paths to and from YVR. The alleged nuisance has been statutorily authorized.

d) Aeronautics Jurisdiction

56. The trial judge correctly found the Minister had the authority, under the *Act* and *CARS*, to determine the location of 26R and to build the runway. The Minister's responsibilities respecting aeronautics are found in Section 4.2 of the *Act.* Subsection 4.9(e) of the *Act* authorizes the Governor in Council to make *Regulations* relating to "activities at aerodromes and the location, inspection, certification, regulation, licensing and operation of aerodromes". The judge also found the Minister had the authority to operate YVR including planning for future expansion. The judge found the Minister determined the location of 26R in its present location and had the power to do so.

e) The Minister's Decisions

57. The judge erred in addressing non-justiciable matters, including: his consideration of alternative sites for a new runway; second-guessing the choice of various Ministers as to the location for 26R; and compensation in the absence of legal entitlement. It was for the trial judge to decide if the alleged nuisance caused by the operation of 26R was authorized by statute, not to second-guess a Minister's decision as to the location of a runway. The consequence of the Court considering the alternative sites rejected by the Ministers contradicts the core principles of statutory authority.

f) The Operation of YVR, Including Runway 26

58. The regulation of aeronautics in Canada is primarily achieved through the issuance, suspension, cancellation or refusal to renew Canadian Aviation Documents as provided for by the *Act* and *Regulations.* The regulatory framework of other federal statutes is substantially the same. Prominent Canadian Aviation Documents include: Air Operator Certificate *CARS* 705.08, Certificate of Registration CAR 202.25-202.28, Airport Certificate *CARS* 302.03, commercial pilot and airline transport pilots' licences *CARS* 401.02-401.95, Air Traffic Controller licences and ratings *CARS* 402.01-402.16.

g) Airport Certificates

59. The trial judge held that neither the airport certification process nor the *CARS* were intended to confer legislative authority to commit a nuisance. However, authorized operations are not a "nuisance" *per se*.

60. The judge found the purpose of the airport certification process to be the promotion of aviation safety. This view is too narrow; the purpose of the process is not restricted to safety but to regulate aeronautics generally and more specifically authority to operate public airports.

61. On February 2, 1999 the Minister issued an Airport Certificate to YVRAA. This Certificate, specifically authorizes YVRAA:

> "to operate a land aerodrome as an airport under the special procedures and conditions as described in Part 2 of this Certificate".

The conditions set forth in Part 2 at p. 2 provide:

> "The Airport will be maintained and operated in accordance with the YVR Operations Manual dated 26 January 1999, unless otherwise approved by the Minister."

62. Under *CARS* 302.03(2) the Minister must approve the Manual prior to issuing an Airport Certificate. Under *CARS* 302.08(5), an airport operator must operate the airport in accordance with the Manual. Any change in the use or operation of YVR, including the operation of 26R, would require YVRAA to submit the proposed change in the form of an amendment to the Manual for the Minister's consideration. The Minister would then have the discretion whether to authorize the proposed change and to amend the Airport Certificate or refuse to do so.

h) Aerial Routes and Flight Paths

63. The judge found the height of jet aircraft on final approach to 26R over the Tait subdivision to be fixed; the aircraft could not be higher or lower. More specifically the judge found:

(a) Federal law and *Regulations* (a "tight cloak of law") impose controls on allocation of airspace, traffic control and aircraft noise;

(b) once the location of a runway is set "flight paths accessing it are fixed";

(c) landings follow a "prescribed 3º descent" path;

(d) "Once the runway is placed the die is cast on how an aircraft must approach and depart the runway over the Plaintiffs' properties".

64. The judge held the above four factors determine the "height above ground of landing aircraft". He further held aircraft movement "in controlled airspace is subject to extremely detailed and precise control". A 3° glide slope or path is a national and international standard.

Aircraft approaching 26R from the east and intercept the glide slope nine or more miles from 26R at an altitude of about three thousand feet; they follow a descent and remain at 3° in relation to the centre line of 26R.

65. There can be no actionable nuisance for the "inevitable" noise which is the natural consequence of aircraft using YVR, provided mandated arrival and departure routes to YVR are adhered to by pilots. The *CARS* govern instrument approaches and all aspects of instrument flight, including departures. Statutory authority provides a complete defence to airlines, airport owners and operators providing the mandated routes are followed.

66. Mandated arrival and departure routes dictate the route or "highways in the skies" aircraft must follow. These are the operations that disturb the residents of Tait subdivision, not ground operations. The Airport Certificate authorizes YVRAA to operate YVR; the statutorily mandated aerial routes authorize the consequential noise of aircraft arriving and departing from YVR.

67. The judge found the noise of aircraft using 26R to be inevitable; the Airport Certificate and *CARS* require compliance with authorized arrival and departure routes to and from YVR provide an absolute defence to the Plaintiffs' claim.

ISSUE TWO: THE TRIAL JUDGE ERRED IN FINDING THE NOISE FROM AIRCRAFT USING 26R CONSTITUTED AN ACTIONABLE NUISANCE.

68. The judge found the defendants created a nuisance. However Canada argued the trial judge failed to give appropriate weight to the public interest, and gave excessive weight to the interference experienced by the Plaintiffs. Canada further argued the interference caused to the Plaintiffs living in Tait subdivision was not unreasonable considering all relevant circumstances, particularly the facts that the parties are not adjoining property owners and 26R is situated a considerable distance from the subdivision. Furthermore, YVR has been operated as an airport since 1931; accordingly the ordinary and reasonable use of the property for the past 70 years has been that of an airport.

69. In a case involving noise resulting from the City of Toronto's subway system *Mandrake Management Consultants Ltd. v. Toronto Transit Commission*[28], the Ontario Court of Appeal held that the Court, in determining whether a person's use of property constitutes a nuisance, ought to weigh the following factors in cases involving "interference with tranquility and amenities".

(a) The nature of the locality in question;
(b) The severity of the harm;
(c) The sensitivity of the plaintiff;
(d) The utility of the defendant's conduct.

a) The Nature of the Locality in Question

70. Canada's position at trial was that the locality in question was the City of Richmond. If not Richmond as a whole our position was that the locality in question was Bridgeport and certainly not just the Tait subdivision as the Plaintiffs had contended.

71. All aspects of YVR's operations have continued to expand over the years. Richmond has likewise continued to grow as has its commercial enterprises and population. Similarly Vancouver and the Province have continued to grow. Growth has resulted in an inevitable increase in all types of noise. The Plaintiffs live under or close to the flight path of the North Runway at YVR. Airport noise is a fact of life for residents of Richmond.

72. From at least 1973, the North Runway was a "project in progress"; the only question was when it would be built. Richmond was the home of an ever expanding airport which was certain to impact the residents of Bridgeport. This was the nature and character of the community in which the Plaintiffs chose to live. Any knowledge acquired concerning the operations of the airport after the opening of the North Runway could readily have been acquired before the Runway commenced operations.

[28] *Mandrake Management Consultants Ltd. v. Toronto Transit Commission*, (1993) 102 D.L.R. (4th) 12 (Ont. C.A.)

b) The Severity of the Harm

73. It is not disputed that "Airports are Noisy Neighbours.

74. At the time of trial none of the Plaintiffs had sold their houses nor did any of them make a serious attempt to sell their houses until it appeared such efforts may have enhanced their chances for success at trial. The residents of Burkeville were subject to greater noise exposure than residents of Bridgeport. Noise mitigation measures in the form of noise abatement procedures favoured residents of Bridgeport rather than Burkeville and Central Richmond. Residents of Bridgeport were not entitled to be noise free any more than any other neighbourhood in Richmond or elsewhere. We are all exposed to unwanted sound, whether it is train, city and highway traffic, Sky Train or ferry terminals.

75. Not only is the North Runway situated to permit the largest capacity, the evidence is clear the location of the Runway has less noise impact on fewer residents of Richmond than any of the alternatives considered by various study groups over the last 25 years.

76. While not disputing the annoyance generated by aircraft noise, it was established that noise levels generated by the North Runway would not qualify the Plaintiffs for compensation if the same noise levels have been generated by highway noise in British Columbia or for aircraft noise programs in the United States. Further it is anticipated that the next generation of commercial aircraft will be quieter than those currently in operation.

c) The Sensitivity of the Plaintiffs

77. The Plaintiffs testified as to a wide range of annoyance but generally speaking used the same language to describe common annoyances. Many of the Plaintiffs were more sensitive than others to the noise and were most upset and obsessed with the aircraft flying over their homes at a height of about 600 feet.

d) The Utility of the Defendants′ Conduct

78. Canada argued the expert evidence provided in the many Reports of YVRAA and Transport that were before the Court established the critical importance of YVR to the Lower Mainland, British Columbia and Canada. In the opinion of experts YVR expansion, including the North Runway was crucial to the implementation of sound and economic policies of British Columbia and Canada.

ISSUE THREE: THE JUDGE ERRED IN CHARACTERIZING THE NUISANCE AS A PRIVATE NUISANCE, RATHER THAN A PUBLIC NUISANCE.

79. Canada argued that if a nuisance was found to exist, the nuisance was a public nuisance. Accordingly, the Plaintiffs had no right to bring this action without the consent of the Attorney General of British Columbia unless they could prove special or particular damages. The Plaintiffs did not have the Attorney General of British Columbia's consent nor were special damages proved.

80. The trial judge erred in finding the existence of a private nuisance by applying an overly restrictive interpretation of what constitutes a public nuisance. If the noise in this case was a nuisance at all it could only have been characterized as a public nuisance, rather than a private nuisance at all, since it affects a sufficiently large class of persons in the same way. Had the trial judge found a public nuisance, he should have dismissed the claim since the plaintiffs did not prove "special" or particular damage.

81. Public (or "common") nuisance is comprised of two categories. The first category consists of those cases satisfying the requirements of private nuisance, but affecting the public generally, or a class of persons. The second category consists of cases involving an interference with the safety or convenience of members of the public generally, but lacks the basic requirement for an action in private nuisance, being an interference with an individual's use and enjoyment of his or her own land.

82. Noise may fall within the first category of public nuisance (a private nuisance affecting a sufficiently large class), but it will never fall within the second category (interference with a public right to use and enjoy public rights of way). A public nuisance is one which

materially affects the reasonable comfort and convenience of life of a class of persons. It is not necessary to prove every member of a class has suffered damage; it is sufficient to show that a representative cross-section of the class has been affected.

83. Although a public nuisance may be proven by establishing a sufficiently large collection of private nuisances, the judge failed to address whether, in the case before him, there was a sufficient collection of private nuisances so as to constitute a public nuisance.

84. In the case of public nuisance, an individual plaintiff lacking the consent of the Attorney General must allege and prove "special" or peculiar damage. To constitute "special damage", the injury or damage sustained must be distinct from that sustained by other members of the public or class. As long as the suffering or inconvenience is general, there is no place for the intervention of private individuals.

85. In the case at bar, all the plaintiffs were affected in the same way. In particular, the judge found that all plaintiffs:

(a) were residents of Bridgeport residing almost directly under the centre line of the flight path of 26R;

(b) claimed damages for nuisance including diminution in the value of their land because of noise and vibrations causing "substantial and unreasonable interference with residential use and enjoyment of their property";

(c) alleged the same particulars of nuisance;

(d) had in common "the substantial loss of amenity in respect of their outside patios, gardens, and grounds";

(e) experienced "interference caused by the impact of noise occurring outside [their] homes".

(f) experienced interference within their homes; and

(g) experienced interference with sleep patterns.

86. The Plaintiffs comprised a sufficiently large class and experienced the same discomfort caused by aircraft noise and that any nuisance endured could only be a public rather

than private nuisance. They did not have the consent of the Attorney General to bring this action and did not plead or prove special damage. In the circumstances, the judge ought to have dismissed their claim.

THE COURT OF APPEAL

87. On July 3, 2002 the British Columbia Court of Appeal allowed (3-0) the appeal and dismissed the Plaintiffs' action. The Court agreed with the Appellants' arguments except for the argument that the alleged nuisance was a public nuisance and that the Respondents needed the consent of the Attorney General to bring the action. The Court held the Plaintiffs succeeded in establishing the elements of private nuisance: unreasonable and substantial interference with the use and enjoyment of their lands. Further the Court held the Plaintiffs should not be denied a remedy because the defendants' conduct in the circumstances also amounts to a public nuisance[29].

88. The Appellants succeeded in establishing the defence of statutory authority. The Court held, as did the trial judge, the location of the runway determined the flight and glide paths that aircraft must follow in landing and taking off from the runway. Flight and glide paths are governed by the *CARS.*

89. The trial judge held that YVRAA was not acting as an agent or acting on behalf of the Minister. The Court of Appeal held, however, that the question of agency was irrelevant. At p. 24 the Chief Justice stated:

> "The proper question is *what* work, conduct or activity was authorized by statute, not *who* was authorized to carry it out. It cannot be disputed that private parties can rely on the defence of statutory authority, if the work in question was authorized by statute …
>
> [87] For the same reason, it does not matter whether there is a factual connection between the construction and operation of the North Runway and the Minister's powers

[29] *Sutherland v. Canada (Attorney General),* (2002) 215 D.L.R. (4th) 1 (B.C.C.A.)

> under the *Aeronautics Act*. This argument also focuses on who is authorized, rather than on what was authorized."

90. The court emphasized the question is "what did the statutory scheme authorize, not who owns the property where the work or activity is to take place."[30]

91. The Court also held that the Ground Lease, approved by Order in Council, required the Authority, *inter alia*, to maintain the Airport at a level of service to meet capacity demands at YVR. The North Runway was constructed to meet present and future demands.

92. As for the effect of the Airport Certificate the Court stated the trial judge erred in looking at the purpose of the Airport Certificate rather than to its legal effect. The Chief Justice stated:

> "The legal effect of the certificate is to authorize the operation, in a specific location, of the airport, including the North Runway. It is quite true that the *Canadian Aviation Regulations* are designed to protect and enhance aviation safety. They, together with the Airport Operations Manual, provide a comprehensive network of rules for the safe and efficient operation of aircraft and airports. However, to look only at the many safeguards inherent in the regulations is to ignore the activities that they authorize. Those activities include landing at and taking off from the North Runway."[31]

93. While the Minister is directed by Regulation to consider "Airport safety" before issuing an airport certificate the Minister is also required to consider the "public interest" and so safety was not the sole matter to be considered before issuing an Airport Certificate.

94. With respect to the requirement to prove the noise associated with the operation of the runway is inevitable the Court accepted the trial judge's finding that the noise emanating from the runway located and configured on Sea Island was inevitable. The Court found the judge

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[30] *Sutherland, supra,* CA at p. 25
[31] *Sutherland,* CA, at p. 26

erred in embarking "on an inquiry into other possible locations for the new runway" and further stated:

> "The precise location and configuration of the North Runway was authorized by statute as noted above. The inevitable result test should have been applied to the newly constructed North Runway in its authorized location, and where it was in fact built."[32]

95. As the location of the new runway was a 'political issue' to be resolved through appropriate public procedures, it was for the Minister to decide and therefore it was not a justiciable or suitable issue for the Court to decide there being, *inter alia*, "many issues of public policy" involved.[33]

96. In his final remarks the Chief Justice acknowledged the Appellants had the onus to prove statutory authority for the "work, activity or conduct" complained of which the Appellants did and further that the noise nuisance was inevitable which they also did. Accordingly, he concluded, "Parliament must be taken, by implication, to have authorized the nuisance as well".

CONCLUSION

97. Perhaps the biggest hurdle to overcome in pleading defence of statutory authority in any case is the "inevitability issue". This issue is very complex but was made easier for the Appellants in this case as a result of Holmes, J.'s finding that the aircraft could not fly lower over the Tait subdivision or make any less noise. Having made that finding the other important issue was whether the Minister had the absolute authority to determine the site of the runway; the Court of Appeal held that the Minister did.

98. Perhaps the most important case on the "inevitability issue" referred to by both the trial judge and correctly applied by the Court of Appeal is *Manchester Corp. v. Farnworth*[34] a 1929 decision of the British House of Lords. The alleged nuisance in that case was the emission of poisonous fumes from the chimneys of an electrical generating station. With respect to the onus of proving the "inevitability" of the alleged nuisance the Court stated:

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[32] *Sutherland*, CA at p. 27
[33] *Sutherland*, CA at p. 28
[34] *Manchester Corp.*, [1930] A.C. 171 (H.L.)

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

99. The defendant corporation was not able to establish the defence of statutory authority because it had not proved that it had taken all due and reasonable care and precautions against causing a nuisance. The burden of proving that they had done so rested on the Defendant. In determining what was reasonable the Court stated the nature and degree of the Plaintiff's suffering and the cost, trouble and inconvenience to the defendant of saving the Plaintiff from it are the elements which must be considered in deciding what is reasonable[35]. The Court held the defendant corporation failed to establish that it had used all reasonable diligence and taken all reasonable steps and precautions to prevent the operations from being a nuisance to their neighbors for two reasons.

> "(1.) At the time of the erection their responsible officers never directed their minds to the prevention of the nuisances, which it was quite obvious might occur, but (2.) they were under the impression that, for all practical purposes, so long as their plant was efficiently and successfully conducted, the neighbours must endure their consequent injuries with such stoicism as they could muster."[36]

100. The Court held what is reasonable means what is reasonable according to all the circumstances, and reasonable not only in the interests of the defendant but also to those expected to bear the nuisance[37]. In each case it would be a question of fact as to whether reasonable steps were taken to avoid or prevent the alleged nuisance.

101. The importance of the *Sutherland* case cannot be overestimated. The decision of the Court of Appeal upheld the principles of the defence of statutory authority. The Supreme Court

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[35] *Manchester Corp., supra,* at p. 194
[36] *Manchester Corp., supra,* at p. 195
[37] *Manchester Corp., supra,* at p. 201

of Canada refused to grant the Respondents leave to appeal. Had the judgment of Holmes J. been upheld historic principles on the law of nuisance would have been placed in a state of confusion. The planning, construction and expansion of essential public services by different levels of government would have been put in jeopardy for fear of incurring unlimited liability and inestimable damages.

102. Had the judgment of Holmes, J. been upheld courts would have been asked to assess the merits of ministerial decisions regarding the operation, management and control of planned public works. In fact courts are ill-equipped to deal with such issues which invariably involve technical, economic, social, health, policy and safety issues. These, by their very nature, involve the exercise of discretion and the making of policy decisions. In this case the effect of the trial judge's decision was to fetter the ability of the Minister to exercise powers conferred by Parliament upon the Minister under the *Aeronautics Act.* Furthermore, had the trial decision been upheld courts would become involved in the assessment of suitable sites for public works. Governments and their agencies could be found liable in respect of the construction, operation, maintenance and control of public works. This could impact not only airports, but also other essential services such as ferry terminals, skytrains, highway expansions and railways. The number of claims that could conceivably be brought against public authorities for claims in nuisance would be inestimable. Furthermore had the decision of Holmes, J. not been overturned courts would be obliged to assess the merits of alternate sites available for such works after they have been completed.

103. The decision of the Court of Appeal clarified the law relating to the defence of statutory authority. Assuming adequate legislation and the correct application of the historic principles relating to statutory authority, particularly relating to the inevitability issue, it is a defence that will benefit all public agencies carrying out their duties in the public interest.