COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia (Minister of Public Safety) v. Latham,* 2023 BCCA 104

Date: 20230302
Dockets: CA48063; CA48065

Docket: CA48063

Between:

His Majesty the King in Right of the Province of British Columbia (Minister of Public Safety)

Appellant
(Defendant)

And

Gregory Latham and Geraldine Latham

Respondents
(Plaintiffs)

And

Joanna Moradian, Rodney Burwell Goy, Donna Lynn Goy, Jin Shun Pan, Edward Arthur Pednaud, Rae-Dene Pednaud, Kevin Patrick Pickell, Lilian Irene Pickell, Elliott Held, Karen Cassie Held and Harjit Singh Rai

Respondents

And

Canadian Civil Liberties Association

Intervener

- and -

Docket: CA48065

Between:

His Majesty the King in Right of the Province of British Columbia (Minister of Public Safety)

Appellant
(Defendant)

And

Carole Rosewall

Respondent
(Plaintiff)

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And

Joanna Moradian, Rodney Burwell Goy, Donna Lynn Goy, Jin Shun Pan, Edward Arthur Pednaud, Rae-Dene Pednaud, Kevin Patrick Pickell, Lilian Irene Pickell, Elliott Held, Karen Cassie Held and Harjit Singh Rai

Respondents

And

Canadian Civil Liberties Association

Intervener

Before: The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Abrioux
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated January 10, 2022 (*Rosewall v. Sechelt (District of)*, 2022 BCSC 20, Vancouver Dockets S197779, S197778).

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Place and Date of Hearing:	Vancouver, British Columbia October 25–26, 2022
Place and Date of Judgment:	Vancouver, British Columbia March 2, 2023

Written Reasons by:
The Honourable Mr. Justice Abrioux

Concurred in by:
The Honourable Mr. Justice Fitch
The Honourable Madam Justice Horsman

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Summary:

In response to the appearance of sinkholes in a subdivision, the District of Sechelt declared a State of Local Emergency (the "SOLE") under the Emergency Program Act and issued an evacuation order. The respondent homeowners brought a claim against the appellant, the Province of British Columbia, in private nuisance for extending the SOLE and funding the District's construction of a fence that prevented access to the subdivision. The judge concluded that the Province was liable in nuisance and could not rely on the defence of statutory authority. On appeal, the Province argues, inter alia, that the judge erred in expanding the tort of nuisance to include purely administrative action. Held: Appeals allowed and actions dismissed. Nuisance requires, at minimum, that the defendant engage in some kind of use of the land from which the interference emanates. Expanding the tort to include statutory decisions that directly regulate property would effectively create an exception to the rule that the unlawful exercise of a statutory power does not give rise to liability in damages unless civil fault is shown. The judge erred in law in finding the Province liable in nuisance, as it was not a proper defendant to such a claim on these facts. Considering the Province's conduct during the litigation, no order is made as to costs in this Court or the court below.

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Reasons for Judgment of the Honourable Mr. Justice Abrioux:

I. Introduction

[1] The central issue on these appeals is whether the trial judge was correct in concluding that, at law, the appellant, His Majesty the King in Right of the Province of British Columbia (Minister of Public Safety) (the "Province"), could be found liable in private nuisance on the basis of a finding that statutory powers permitting the direct regulation of the respondents' use of property were exercised unlawfully.

[2] The Province appeals from orders following a trial granting judgment against it in nuisance and awarding Carole Rosewall, Gregory Latham, and Geraldine Latham (the "Latham Respondents") special and non-pecuniary damages. The reasons for judgment are indexed as 2022 BCSC 20 (the "Reasons").

[3] The Latham Respondents are retirees who purchased houses in Seawatch, a new subdivision overlooking the Sechelt Inlet in an area at risk for the development of sinkholes.

[4] Their claims arise from the evacuation of residents of Seawatch by the municipal authority, the District of Sechelt (the "District"), following the appearance of a large sinkhole beside a roadway. In ordering the evacuation, the District claimed statutory authority pursuant to ss. 12 and 13 of the *Emergency Program Act*, R.S.B.C. 1996, c. 111 [*EPA*]. The District also declared a State of Local Emergency (the "SOLE") on February 15, 2019, which the Province continuously renewed.

[5] Pursuant to the SOLE and its renewals, the Province provided the District with funding for the construction of a permanent fence that surrounded Seawatch, depriving residents of access to their properties.

[6] The Latham Respondents alleged that the Province was liable in nuisance. The judge agreed, concluding in his Reasons that:

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> [91] The Province has contributed to the present state of affairs in two ways: by encouraging and funding construction of a permanent fence to prevent people from entering Seawatch since May 2019; and by purportedly and unlawfully maintaining the SOLE in force since May 17, 2019.
>
> [92] …[T]he Province's actions might best be characterized as administrative in nature…
>
> [97] …[T]he interference with the plaintiffs' use and enjoyment was unreasonable, and it lies within the province of the tort of nuisance to attach consequences to the Province's actions.

[7] The Province raises several grounds of appeal, including that the trial judge erred in finding that the Province's repeated renewal of the SOLE under the *EPA* was unlawful. In my view, it is unnecessary to decide the issue of the lawfulness of the SOLE, or any of the other grounds of appeal raised by the Province. Assuming that the conduct of the Province was unlawful in an administrative law sense, the narrow legal question that arises is whether that unlawfulness equates to liability under the tort of private nuisance.

[8] As I shall explain, in my view, this case does not involve the competing uses of land required to bring the claim within the scope of the tort of nuisance. The judge erred in expanding the tort to capture the Province's exercise of emergency powers to directly regulate the respondents' use of their property.

[9] I would therefore allow the appeals and dismiss the actions.

II. Background

A. The Facts

[10] The facts relevant to the legal issue I have identified are not significantly in dispute.

[11] In 2008, the Latham Respondents purchased houses in Seawatch. While underground stream activity created a risk of sinkholes in the area, a geotechnical engineering firm had determined that it was still suitable for single-family houses. The District had permitted the development on the basis of a covenant registered

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against title that provided for its indemnification against loss arising from subsidence (the "Covenant").

[12] The District obtained reports from another geotechnical engineering firm, Thurber Engineering Ltd. ("Thurber"), after sinkholes appeared in 2012 and 2015. After a new sinkhole appeared beside a roadway on December 25, 2018, Thurber recommended in a report dated February 6, 2019 (the "Thurber Report") that the District no longer permit occupancy of Seawatch (not necessarily permanently) and that steps be taken to manage groundwater at the site.

[13] Pursuant to s. 12 of the *EPA*, the District declared a SOLE. Once a SOLE is declared, s. 13 of the *EPA* empowers a local government to exercise a wide range of powers necessary to "prevent, respond to or alleviate" the effects of an emergency. In this case, the District ordered the residents of Seawatch to evacuate their homes effective February 15, 2019. The same day, the District constructed a fence around Seawatch.

[14] The Province funded the District's construction of a permanent fence to prevent entry to Seawatch, which was in place by May 2019.

[15] Since February 2019, the Minister of Public Safety (the "Minister") has extended the SOLE at seven-day intervals to prevent its expiry. The Minister has the statutory authority to grant such extensions under s. 12(6) of the *EPA*. The District's requests and Minister's approvals followed a standard format, reproduced at para. 73 of the Reasons:

> **Extension Request for**
>
> **State of Local Emergency**
>
> WHEREAS life and property remain at risk due to land subsidence, including sinkhole formation and slope instability, in the District of Sechelt;
>
> AND WHEREAS response to this land subsidence, including sinkhole formation and slope instability, continues to require use of the emergency powers to protect the health, safety or welfare of people or to limit damage to property;

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> The Mayor of the District of Sechelt has requested to extend the duration of the declaration of a state of local emergency due to expire on [date] at midnight.
>
> [Signature of mayor]
>
> [Dated]
>
> **Minister Decision**
>
> IT IS HEREBY APPROVED pursuant to Section 12(6) of the *Emergency Program Act* (RS, 1996, Chap. 111) that the District of Sechelt may extend the duration of a state of local emergency for a further seven days to [date] at midnight.
>
> [Signature of Minister]
>
> [Dated]

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[16] As of the date of the judge's order, Seawatch remained closed, with no efforts taken to remedy its geotechnical issues. No further geotechnical investigations had been conducted nor had further reports been made to the Minister since February 2019: Reasons at para. 74.

[17] The Latham Respondents claimed against the Province in nuisance and, in the alternative, for compensation for injurious affection under s. 41 of the *Expropriation Act*, R.S.B.C. 1996, c. 125.

[18] While the Latham Respondents had originally also named the District as a defendant in these actions, they discontinued their claims against it approximately three weeks before trial after this Court dismissed actions brought by other Seawatch residents against the District. The Court concluded that the Covenant released claims in nuisance against the District in connection with the SOLE and related evacuation order: *Rai v. Sechelt (District)*, 2021 BCCA 349 at paras. 59–61 (the "Covenant Appeal").

B. The Reasons for Judgment

[19] The trial judge began his analysis by observing that the interference with the respondents' use and enjoyment of their property through the Minister's repeated renewals of the SOLE was "manifest": Reasons at para. 16. The Province advanced

a defence of statutory authority. The trial judge noted that this defence raised the "critical issue" of whether the Minister's actions were lawful: Reasons at para. 18. For reasons that are not clear on the record, the Latham Respondents had not challenged the Minister's renewal of the SOLE by way of an application for judicial review prior to the trial. The trial judge concluded that, in assessing the lawfulness of the Minister's actions, he should apply the reasonableness standard of review analysis set out *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, even though the form of proceeding was an action for damages rather than a judicial review.

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[20] The judge first reviewed the scheme of the *EPA*. He noted that the declaration of a SOLE authorizes the local authority to exercise "extravagant powers", including the power to acquire or use land or personal property; control or prohibit travel in an area; require persons to render assistance; fix prices or ration supplies or services; enter into properties without a warrant; and demolish structures: Reasons at para. 28. He observed that a local government's ability to declare a SOLE is constrained in a number of ways, including that it requires an "emergency". In the trial judge's view, the use of the term "emergency" supported a temporal connotation to a SOLE. He concluded that the seven-day time limit on the renewal of a SOLE further supported that the *EPA* contemplates an emergency as a "condition of a temporary nature", as opposed to a usual and enduring state of affairs: Reasons at paras. 31, 39.

[21] The judge concluded that, while "the Minister's decision to approve an initial extension of the SOLE was reasonable" in light of the Thurber Report, later extensions were not: Reasons at paras. 78–80. Without "any additional information or developments" beyond the Thurber Report, the "interminable renewal of SOLEs declared by the District has been, and continues to be, unreasonable and an abuse of the statutory powers conferred under the *EPA*", ceasing to be lawful after May 17, 2019: Reasons at paras. 79–80, 85.

[22] As he had decided that the defence of statutory authority did not apply after the renewals ceased to be lawful, the judge then considered whether the Province was liable in nuisance. While the "purported exercise of statutory powers without authorization is not, in itself, tortious", he noted that the "government is not immune from private liability where the elements of a cause of action are present": Reasons at paras. 86, 88. He described nuisance, in turn, as involving an indirect interference with the plaintiff's land and the "reconciliation of conflicting interests in connection with competing uses of land": Reasons at para. 93, citing *W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavation Ltd.,* 2007 NSCA 92 at paras. 125-132 [*Eric Whebby*]. In addressing these principles, the judge cited *Northern Cross (Yukon) Ltd. v. Yukon (Energy, Mines and Resources),* 2021 YKCA 6, leave to appeal to SCC ref'd, 40053 (4 August 2022) [*Northern Cross*] for the proposition that the "implementation of government policy applicable to the plaintiff's property could, in principle, suffice" to establish nuisance: Reasons at para. 94.

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[23] The judge found that the elements of nuisance were present in the Province's actions:

> [96] In my view, the Province's actions in encouraging and funding the construction of the fence constituted a nuisance. By encouraging and funding the construction of the fence, the Province participated in creating an obstacle that satisfies the requirement in *Eric Whebby* of an indirect interference with the plaintiffs' use and enjoyment of their property. The fence is located on property adjacent to the plaintiffs' property and blocks access to their land…
>
> [98] I do not think it matters that the Province's contribution to the erection of the fence was financial rather than physical. Although the lens offered by nuisance may still be awkward, it does not undermine the tort to hold that it attaches consequences to unauthorized government actions – be they physical or administrative – on adjacent properties that unreasonably interfere with the use and enjoyment of property.
>
> [99] I need not decide whether the extensions of the SOLE, by themselves and without the additional element of the fence, would alone constitute a nuisance by virtue of their direct and indirect impact on the plaintiffs' property. This is a point on which the reasoning in *Eric Whebby* is at odds with the reasoning in *Northern Cross.*
>
> [Emphasis added.]

[24] Finally, the judge concluded that the Province's actions were a cause of the Latham Respondents' loss, noting that the evidence did not establish that their permanent exclusion from their homes as a result of geological instability was necessary and inevitable. He also found that the harm they suffered was foreseeable: Reasons at para. 102. The defence of voluntary assumption of risk was not available to the Province, as the release in the Covenant was not for its benefit: Reasons at para. 104. As a result, the judge concluded that "the Province's encouragement and funding of a permanent fence that physically prevented the plaintiffs from accessing their homes constituted a nuisance after May 17, 2019": Reasons at para. 105.

[25] The judge found that the Latham Respondents were not contributorily negligent: at para. 108. He did not address the alternative claim for injurious affection, as that cause of action requires that the injury arise from a lawful exercise of statutory powers (unlike the unlawfully extended SOLE): Reasons at para. 109.

[26] The judge then considered the Latham Respondents' claims for special damages consisting of out-of-pocket expenses related to their move into rental accommodation, as well as for non-pecuniary damages arising from the loss of the use of their homes: at paras. 110–125. He awarded Ms. Rosewall special damages of $68,265.78 and non-pecuniary damages of $40,000, and awarded the Lathams $51,200 collectively in special damages and $40,000 each in non-pecuniary damages: Reasons at para. 126.

[27] The judge concluded that the Latham Respondents were entitled to their costs: Reasons at para. 128. In reasons indexed as 2022 BCSC 448 (the "Costs Decision"), the judge subsequently awarded the Latham Respondents double costs for steps taken after the Province had rejected their pre-trial offer to discontinue the action: at para. 34.

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C. Applications to Intervene and to Add Respondents

[28] The Province and Latham Respondents consented to having the Latham and Rosewall appeals heard together.

[29] The Canadian Civil Liberties Association (the "CCLA") applied for intervener status in both appeals. A group of non-party Seawatch homeowners—Joanna Moradian, Rodney Burwell Goy, Donna Lynn Goy, Jin Shun Pan, Edward Arthur Pednaud, Rae-Dene Pednaud, Kevin Patrick Pickell, Lilian Irene Pickell, Elliott Held, Karen Cassie Held, and Harjit Singh Rai (the "Rai Respondents")—also applied to be added as respondents to the appeals. They had outstanding actions that included claims in nuisance against the Province that were based on the same factual and legal grounds found to have been established by the judge. The Rai Respondents had also advanced the claims against the District that were found to be released in the Covenant Appeal.

[30] Justice DeWitt-Van Oosten allowed both applications, granting the CCLA leave to make submissions regarding the interpretation of ss. 1 and 12 of the *EPA* and the exercise of the Minister's discretion under s. 12(6): *Latham v. British Columbia (Minister of Public Safety)* (14 July 2022), Vancouver CA48063, CA48065 (B.C.C.A. Chambers).

III. Grounds of Appeal

[31] The Province says that the trial judge erred in:

a) applying a standard of correctness to the Minister's interpretation of the *EPA* and the decisions he made under it;

b) adopting an incorrect and unsupportable interpretation of the *EPA*'s definition of "emergency" and the Minister's role in approving SOLE extensions; and

c) finding that a government decision to fund a third party's activities, under a statute that confers benefits, could give rise to an indefinite liability in nuisance.

[32] Since I would conclude that the judge erred in finding that the Province's actions gave rise to liability in nuisance, that issue is dispositive of the appeal. Accordingly, I need not address the other grounds of appeal, which include the CCLA's submissions.

IV. Legal Framework

A. The Law of Nuisance

1. General Principles

[33] The judge found the Province liable for "actions [that] might best be characterized as administrative in nature", which the Province, appropriately in my view, describes as "regulatory nuisance": Reasons at para. 92. By "regulatory nuisance", I take the Province to refer to executive action by a government body pursuant to statutory authority that authorizes an interference with the claimant's use of land but does not involve competing uses of land. It is thus necessary to review the development of certain foundational principles in the jurisprudence to consider whether the actions of the Minister, even if they were unlawful in an administrative law sense, can provide the legal basis for liability in nuisance.

[34] In *Royal Anne Hotel Co. Ltd. v. Village of Ashcroft* (1979), 95 D.L.R. (3d) 756 at 760, 1979 CanLII 2776 (B.C.C.A.) [*Royal Anne Hotel*], this Court succinctly explained the purpose of the private law tort of nuisance:

> In my opinion the *rationale* for the law of nuisance in modern times, whatever its historical origins may have been, is the provision of a means of reconciling certain conflicting interests in connection with the use of land, even where the conflict does not result from negligent conduct. It protects against the unreasonable invasion of interests in land.

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[35] In *Smith v. Inco Limited*, 2011 ONCA 628, leave to appeal to SCC ref'd, 34561 (26 April 2012), the Court of Appeal for Ontario cited *Royal Anne Hotel* in support of a similar sentiment:

> [39] People do not live in splendid isolation from one another. One person's lawful and reasonable use of his or her property may indirectly harm the property of another or interfere with that person's ability to fully use and enjoy his or her property. The common law of nuisance developed as a means by which those competing interests could be addressed, and one given legal priority over the other. Under the common law of nuisance, sometimes the person whose property suffered the adverse effects is expected to tolerate those effects as the price of membership in the larger community. Sometimes, however, the party causing the adverse effect can be compelled, even if his or her conduct is lawful and reasonable, to desist from engaging in that conduct and to compensate the other party for any harm caused to that person's property. In essence, the common law of nuisance decided which party's interest must give way. That determination is made by asking whether in all the circumstances the harm caused or the interference done to one person's property by the other person's use of his or her property is unreasonable: *Royal Anne Hotel Co. Ltd. v. Village of Ashcroft* (1979), 95 D.L.R. (3d) 756 (B.C.C.A.), at pp. 760-61.
>
> [Emphasis added.]

[36] Both trial and appellate courts have undertaken the challenge of establishing a legal test for actionable nuisance. Recently, in *LaSante v. Kirk*, 2023 BCCA 28, Justice Grauer stated:

> [60] In considering the appellants' arguments, I find it helpful to bear in mind the following comment from G.H.L. Fridman, QC et al.: *The Law of Torts in Canada*, (3rd ed (Toronto: Thomson Reuters, 2010) at 147 (footnotes omitted):
>
> > The impossibility of providing a definition of nuisance for legal purposes has frequently been stated. Nuisance is a vague doctrine, very difficult to define accurately. An actionable nuisance, it has been said, cannot be defined with exactitude. Indeed, it is not always clear whether the defendant's behaviour constitutes an actionable nuisance or some other wrong, such as trespass, negligence, or the collection, and consequent escape of some dangerous object within the scope of the doctrine of *Rylands v. Fletcher*. Frequently, a plaintiff will claim under several, possibly all of these various heads of liability, because it is not clear which is the most appropriate. Sometimes liability will ensue under more than one (if not, indeed, under them all).

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[37] In *Susan Heyes Inc. (Hazel & Co.) v. South Coast B.C. Transportation Authority*, 2011 BCCA 77, leave to appeal to SCC ref'd, 34224 (20 October 2011) [*Heyes BCCA*], Justice Neilson discussed the definition of private nuisance:

> [36] Private nuisance is the unreasonable interference with an occupier's use and enjoyment of his or her land. In *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392 at para. 77 the Supreme Court summarized the description of the tort by several well-known academics:
>
>> 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).

[38] From these principles, the Supreme Court of Canada identified a "two-part test" to establish private nuisance: "to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both *substantial* and *unreasonable*": *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 [*Antrim*] at para. 19.

2. Nuisance and Competing Uses of Land

[39] As described in the governing authorities, including *Royal Anne Hotel*, the tort of nuisance developed as a means of addressing competing interests in land. Flowing from the traditional role of the tort in mediating competing land uses, there are inherent limits on the scope of the tort of nuisance that are of relevance to the issues raised on the present appeal.

[39] First, a nuisance typically arises from an indirect, not direct, interference with a plaintiff's reasonable enjoyment of land, in the sense that the interference must

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have originated elsewhere: *Eric Whebby* at paras. 127–128. As observed in *Eric Whebby*, it is not simply the “dead hand of ancient legal technicality” that justifies maintaining the distinction between direct and indirect interferences:

> [131] … Rather it reflects the role of the modern law of nuisance as a means of reconciling conflicting interests in connection with competing uses of land: see *Royal Anne Hotel* at 467; *Tock v St. John’s Metropolitan Area Board*, [1989] 2 S.C.R. 1180 *per* LaForest, J. at 1196. Before there can be conflicting interests in connection with the use of land, there must be uses of different lands which come into conflict.

[40] Second, and relatedly, a defendant’s liability will typically depend on ownership or occupation of the premises from which the nuisance emanates: Andrew Botterell, “Nuisance” in Erika Chamberlain & Stephen G.A. Pitel, eds., *Fridman’s The Law of Torts in Canada*, 4th ed. (Toronto: Thomson Reuters, 2020) 181 at 208. The situation is more complex, however, where the owner is sued but was out of occupation, or when the occupier is sued but the interference was outside of its control: see Botterell at 208–213; Gregory S. Pun, Margaret I. Hall & Ian M. Knapp, *The Law of Nuisance in Canada*, 2nd ed. (Toronto: LexisNexis Canada Inc., 2015) at 3.89–3.104.

[41] The issue of whether an individual who is in neither occupation nor ownership of the land can be liable in nuisance appears to be unresolved. Some commentators consider that anyone who creates a nuisance, “whether or not in occupation of the land from which it emanates”, may be liable: Allen M. Linden et al., *Canadian Tort Law*, 12th ed. (Toronto: LexisNexis Canada Inc., 2022) at 11.02(2); see also Beth Bilson, *The Canadian Law of Nuisance* (Toronto: Butterworths, 1991) at 14; Botterell at 208; Philip H. Osborne, *The Law of Torts*, 6th ed. (Toronto: Irwin Law, 2020) at 411.

[42] Other commentators treat this question as one with no definitive answer: Pun, Hall & Knapp at 3.88; Andrew D. Gay, “Nuisance” in Karen Horsman & Gareth Morley, eds., *Government Liability: Law and Practice* (Toronto: Thomson Reuters,

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2017) (loose-leaf updated 2022, release 3) 7:1 at 7:7. *Eric Whebby*, for its part, highlights this issue but likewise does not identify a resolution:

> [128] The requirement for indirect rather than direct interference is not dependent on the defendant's status in relation to the land where the nuisance originates. On the question of what that status must be, there is a division of opinion: does the defendant have to be an owner or an occupier, or may he or she be simply a user or even a trespasser? (See, for example, the discussion in Bilson at 10-14; *Southport Corp. v. Esso Petroleum Co.*, [1954] 2 All E.R. 561 (C.A.) at 570, rev'd but not on this point [1956] A.C. 218 (H.L.); *J. P. Porter Co. Ltd. v. Bell et al*, [1955] 1 D.L.R. 62 (N.S.S.C.); *Jackson v. Drury Construction Co. Ltd*. (1974), 4 O.R. (2d) 735 (C.A.); *Corkum v. Lohnes* (1981), 43 N.S.R. (2d) 477 (S.C.A.D.); Anthony M. Dugdale et al. (eds.) *Clerk and Lindsell on Torts*, 19th ed., (London: Sweet and Maxwell, 2006) s. 20–51.) Whatever the answer to that question may be, there is virtually no doubt that nuisance is concerned with indirect, not direct, interference with the plaintiff's enjoyment of his or her land…
>
> [Emphasis added.]

[43] The authorities cited in support of these analyses, while without a clear common thread, generally seem to involve at the very least a defendant who is using land in some capacity, even if not while technically in occupation: see, for instance, Pun, Hall & Knapp at 3.88, note 2. For example, in *Jackson et al. v. Drury Construction Co. Ltd.* (1974), 4 O.R. (2d) 735, 1974 CanLII 474 (C.A.) [*Drury*], the court concluded that contractors blasting rock while reconstructing a road, while not occupants of the land, were liable in nuisance for opening fissures in the bedrock that allowed material from a nearby pig farm to escape into the plaintiff's well.

[44] Further uncertainty arises where the defendant is a government entity that does not own or occupy the land that is said to be the source of an alleged nuisance. This issue has rarely been addressed directly.

[45] Some trial court decisions suggest that government bodies might be liable in nuisance for administrative action that is not accompanied by ownership, occupation, or other use of land. In *Falkoski v. Osoyoos (Town)*, [1998] B.C.J. No. 719, 1998 CanLII 2817 (S.C.), the court concluded that a town was liable in nuisance for approving a subdivision despite being aware that it would interfere with the plaintiff's mineral rights: at paras. 39–44. Similarly, in *Sapone v. Clarington*

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(Municipality), [2001] O.J. No. 4991, 14 C.L.R. (3d) 254 (S.C.J.), the court refused to strike a claim in nuisance against the defendant municipality for granting building permits in contravention of a bylaw, citing *Drury* as an example of a non-occupier being found liable for nuisance: at paras. 6–8. The Supreme Court of British Columbia concluded that an arbitrator erred in declining to hold a branch of a provincial ministry liable in nuisance for its requirement that a plaintiff meet certain preconditions to the issuance of a permit: *Mackay v. British Columbia*, 2013 BCSC 945 at paras. 1–2, 19, 100.

[46] While there is little appellate authority for this position, the judge in his analysis seemed to refer to *Northern Cross* as implying that a governmental body can be liable in nuisance for purely regulatory action that directly interferes with a plaintiff's property: Reasons at paras. 94–95. There, the Court of Appeal of Yukon dismissed an appeal from a chambers judge's refusal to strike a claim in nuisance advanced against the Yukon government in relation to its moratorium on hydraulic fracking in areas in which the plaintiff held exploration permits.

[47] Other cases suggest that regulatory action, without more, is not a valid basis for liability in nuisance. In *Heyes v. City of Vancouver*, 2009 BCSC 651 [*Heyes BCSC*], rev'd on other issues *Heyes BCCA*, the court dismissed claims in nuisance against the Government of Canada and the Attorney General of British Columbia, concluding that, while they contributed capital to the development of a transit line, they were not partners in the impugned construction: at para. 169. In *Waterway Houseboats Ltd. v. British Columbia*, 2019 BCSC 581 [*Waterway BCSC*], rev'd on other grounds 2020 BCCA 378 [*Waterway BCCA*], the judge concluded that the Province of British Columbia was not liable in nuisance for issuing approvals relating to the construction of certain works in and around a waterway that later flooded: at paras. 372–381. Relying on *Heyes BCSC* and *Sullivan v. Desrosiers*, [1986] N.B.J. No. 156, 1986 CanLII 5779 (C.A.), leave to appeal to SCC ref'd, 20331 (1 June 1987) (which involved a landowner defendant using certificates of compliance as a shield in his defence against a nuisance claim), Gay concludes at 7:7 that:

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> However, the mere issuance of a licence or permit at large, authorizing some activity not on the Crown's land, cannot give rise to liability in nuisance on the part of the issuing authority. Regulatory licences are not licences to commit torts and those operating in regulated industries must respect the property rights of others like anyone else.
>
> Similarly, the mere fact that a government funds a project will not expose the government to liability in nuisance.
>
> [Emphasis added; footnotes omitted.]

[48] I am not aware of any authority from this Court finding that a government defendant that did not own, occupy, or use land can be liable in nuisance to a plaintiff for direct interference with private property that is caused by the exercise of regulatory powers.

B. The Standard of Review

[49] The "existence of nuisance is a question of fact" to be approached "with considerable deference" to the trial judge: *Heyes BCCA* at para. 48.

[50] The Province's appeal, however, turns on whether a defendant government can be liable in nuisance for a direct interference with the respondents' property through the exercise of statutory powers. Reviewing the Reasons involves the "interpretation of common law principles": *Provost v. Dueck Downtown Chevrolet Buick GMC Limited*, 2021 BCCA 164 at para. 36. The issue on appeal concerns a question about what the correct legal test is: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 43. In my view, these appeals therefore engage a question of law to be reviewed on a correctness standard: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

V. The Source of the Alleged Nuisance

[51] As Justice Neilson observed in *Heyes BCCA*, "[b]efore considering the appellants' arguments, it is critical to precisely define the source of the nuisance pleaded and established by" the plaintiff in the court below: at para. 47.

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[52] The Latham Respondents' notices of civil claim contain the following:

> Part 1: STATEMENT OF FACTS
>
> …
>
> 16. The Lathams [and Ms. Rosewall] are deprived of access to and possession of the Property and all building improvements and chattels thereupon since the issuance of the Evacuation Order. The Defendants' actions have caused the Plaintiffs significant mental stress and anguish, and have caused them to incur costs and expenditures for shelter, clothing and furniture that they would otherwise not have incurred. The Defendants have failed to make arrangements for the care and shelter of the Lathams during this purported state of local emergency.
>
> …
>
> Part 3: LEGAL BASIS
>
> 1. The Defendants continue to substantially interfere with the [Latham Respondents'] access to, use of and possession of the Property and the building improvements and chattels thereupon. This interference is without statutory foundation and is grossly negligent and abusive. The Defendants are liable to the [Latham Respondents] in nuisance, trespass and ejectment.

[53] In concluding that the Latham Respondents had established liability against the Province in nuisance, the judge characterized the conduct in question as "the Province's actions in encouraging and funding the construction of the fence": Reasons at para. 96. The judge observed that "the Province's actions might best be characterized as administrative in nature": at para. 92. He concluded that controlling access to the Latham Respondents' homes represented an unreasonable interference with the use and enjoyment of their land after the SOLE ceased to be lawful on May 17, 2019: Reasons at paras. 96–97.

VI. The Positions of the Parties

A. The Appellant

[54] The Province argues that the trial judge erred in finding that it was liable in nuisance for funding the fence that restricted the Latham Respondents' access to their properties. It says that funding decisions cannot give rise to liability in nuisance, as nuisance deals with competing uses of land rather than administrative action where the government holds no interest in the land at issue. The Province

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characterizes the judge's reasons as expanding the law by creating a tort of "regulatory nuisance".

[55] The Province relies on *Waterway BCSC*, where the court rejected a claim that provincial approvals and disaster funding under legislation enabled a nuisance. The Province argues that the circumstances in *Waterway BCSC* are analogous to the Province's funding decisions at issue on this appeal.

[56] The Province also refers to *Hoffman v. Monsanto Canada Inc.,* 2005 SKQB 225, aff'd 2007 SKCA 47, cited in *Waterway BCSC* at para. 379:

> [122] The tort of nuisance imposes strict liability when the conditions for its application are met. The implications of holding a manufacturer, or even inventor, liable in *nuisance* for damage caused by the use of its product or invention by another would be very sweeping indeed. It is my conclusion that where the activity complained of is the activity of one who is not in occupation or control of adjoining land, and no independent malfeasance is alleged, then, at the very least, direct causation of the damage alleged must be alleged. This is not the case. I conclude that there are no facts alleged in this case that could support a finding that the defendants substantially caused the nuisance alleged.

[57] According to the Province, it was the District's construction of the fence, and not the Province's funding of the work, that directly caused the interference with the respondents' property.

[58] The Province also submits that *Northern Cross* went no further than to recognize that, from a pleadings perspective, a government policy relating to overlapping rights to the same land might give rise to a claim in nuisance. It does not stand for the proposition, as implicitly found by the judge, that the Crown could be liable in nuisance for what is a purely administrative action in a situation where it held no interest in and made no use of the land in question.

[59] The Province notes that *Drury* involved defendant road workers making use of land, and does not stand for the proposition that liability can be divorced from any land use whatsoever. Referring to *Hoffman* at paras. 115–116, it also argues that

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Sapone improperly relied on *Drury* to conclude that issuing a building permit might ground liability, when *Drury* only held that transitory uses of land could suffice.

[60] The Province adds that expanding the established parameters of the law of nuisance by creating a tort of "regulatory nuisance" would lead to absurd results. It says that "regulatory nuisance" would provide landowners with the ability to hold public bodies liable for regulatory limits on land use based solely upon the consequences to a landowner's rights.

B. The Latham Respondents

[61] The Latham Respondents argue that the tort of nuisance requires only a substantial and unreasonable interference with the plaintiff's land: *Antrim* at para. 19. They say that the Province's actions in funding the fence within the context of the renewal of the SOLE satisfied this requirement. They also submit that the fence only existed to implement the SOLE, and that they are both inextricably responsible for the same interference. They add that there were alternatives available that "would ensure public safety but which did not involve excluding the Seawatch residents from their homes", citing the judge's reference to the discovery testimony of Ian Cunnings, a Provincial representative: Reasons at para. 67.

[62] In oral submissions, counsel for the Latham Respondents acknowledged that, according to their reasoning, every order made under the *EPA* that substantially and unreasonably interfered with the use of private property would be *prima facie* actionable in nuisance, subject to the defence of statutory authorization.

[63] Further, the Latham Respondents submit that the trial judge's reasoning did not create absurd results or universal liability. They argue that prospective plaintiffs would still need to establish that a defendant's conduct caused a substantial, unreasonable interference with their land, as they submit the Province's actions did here.

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C. The Rai Respondents

[64] The Rai Respondents add the following to the Latham Respondents' argument. They say that requiring the defendant to have used its own property in interfering with a plaintiff's use of land incorrectly adds another requirement for establishing liability in nuisance. In any event, the Rai Respondents argue that this case involves competing uses of land, as the fence constituted a direct interference with the use of property emanating from an adjoining piece of land. Even if the property were owned by other Seawatch residents, the Rai Respondents rely on *Northern Cross* for the proposition that the Crown's construction (or, by extension, funding) of a blockade on its own land that interfered with a *profit à prendre* could arguably constitute nuisance.

[65] The Rai Respondents also submit that, as each case turns on its own facts, any concern that a finding of liability in this case would unreasonably expand the tort beyond its appropriate limits is unfounded.

VII. Analysis

A. Introduction

[66] The starting point of the analysis, as the judge recognized in his Reasons, is that:

> [86] The purported exercise of statutory powers without authorization is not, in itself, tortious; *Welbridge Holdings Ltd. v. Greater Winnipeg,* [1971] S.C.R. 957 at 969. A government does not owe those affected by the purported exercise of statutory powers a duty of care to act reasonably; *Holland v. Saskatchewan,* 2008 SCC 42, varying 2007 SKCA 18.

[67] According to *Welbridge*, invalidity is the test of neither fault nor liability: at 969. As a result, even if the Province acted unlawfully—a question that is unnecessary to decide here—nuisance must be made out on the facts of the case.

[68] The trial judge found that the Province's liability in nuisance stemmed from its encouragement and funding of a fence constructed by the District to prevent access to the Seawatch subdivision. He found it unnecessary to decide whether the

Minister's extensions of the SOLE would, by themselves and absent the fence, constitute a nuisance: Reasons at paras. 99, 105.

[69] In my view, the trial judge's focus on the fence to the exclusion of the extension of the SOLE creates an artificial divide. As the Province points out, s. 4(2)(c) of the *EPA* authorizes the Minister to make payments to local governments to assist in their emergency response. The funding, accordingly, was premised on the Minister's view that there was an ongoing emergency at the Seawatch subdivision that justified the exercise of powers under the *EPA*. The fence cannot be separated from the Province's extensions of the SOLE: since it was constructed "to prevent people from entering Seawatch", the fence was effectively a means of enforcing the evacuation order made in the exercise of the District's emergency powers under the SOLE, which the Minister continuously extended: Reasons at paras. 7, 9.

[70] The SOLE itself interfered with the respondents' use and enjoyment of their property—without it, the respondents could have lawfully removed the fence and accessed their homes. I note, further, that the Latham Respondents defend the trial judgment on the basis that the Province's liability stems from a finding that the renewals of the SOLE were not a lawful exercise of statutory power: Factum of the Latham Respondents at para. 68. They argue that the encouragement and funding of the permanent fence was reflective of, and consistent with, the Province's intention to "perpetually renew the temporary state of emergency": Factum of the Latham Respondents at para. 70. I agree with the Latham Respondents that the construction of the fence and the extensions of the SOLE must be considered together.

[71] The question that arises on appeal, accordingly, is whether the Province can be liable in nuisance for exercising its statutory powers under the *EPA* to directly regulate the respondents' use of their property on the sole basis that the powers had been found to have been exercised unlawfully.

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B. Nuisance Requires Competing Uses of Land

[72] The case law and commentary that I have canvassed above indicate that nuisance requires, at minimum, that the defendant engage in some kind of use of the land from which the interference emanates.

[73] As articulated in *Royal Anne Hotel*, the tort of private nuisance is animated by the reconciliation of competing interests in connection with the use of land. While the precise contours of the required relationship between the defendant and the land from which the nuisance emanates remain undefined, the preponderance of the case law indicates that liability in private nuisance requires at a minimum some use of land by the defendant.

[74] Unlike the trial judge in this case, I do find some limited assistance in *Waterway BCSC*. There, victims of a flood sued the Province of British Columbia in nuisance on the basis of its authorization of certain works in and around a creek. The court rejected this claim:

> [376] The plaintiffs assert that the McLaughlin Bridge Replacement and Channel Restoration caused a private nuisance when they interfered with the flow of Sicamous Creek and caused a flood to the Vinco Property.
>
> [377] The Province denies that it can be found liable for private nuisance. The Province reiterates that it merely granted the Approvals for the McLaughlin Bridge Replacement and the Channel Restoration and that it did not undertake the actual construction of either project. Rather, those projects were the responsibility of the other defendants pursuant to their *Water Act* Approvals. The Province neither owned nor created the Works that the plaintiffs allege gave rise to actionable nuisance.
>
> [378] The plaintiffs, however, do not claim against the Province as the owner of Sicamous Creek, but instead for issuing the Approvals that enabled the other defendants to cause the nuisance. They assert that by designing and approving the Channel Restoration and providing directions for the height of the McLaughlin Bridge Replacement, the Province failed to abate the nuisance and is therefore liable.
>
> [379] I cannot accede to this argument. Such a concept was rejected in *Hoffman v. Monsanto Canada Inc.,* 2005 SKQB 225 where the Court stated at para. 122:
>
> > [122] The tort of nuisance imposes strict liability when the conditions for its application are met. The implications of holding a manufacturer, or even inventor, liable in *nuisance* for damage caused by the use of its product or invention by another would be very sweeping indeed. It

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> is my conclusion that where the activity complained of is the activity of one who is not in occupation or control of adjoining land, and no independent malfeasance is alleged, then, at the very least, direct causation of the damage alleged must be alleged. This is not the case. I conclude that there are no facts alleged in this case that could support a finding that the defendants substantially caused the nuisance alleged.
>
> [380] Other than issuing the Approvals, there is nothing the Province did that directly impacted the Vinco Property. Respecting the plaintiffs' allegation that the Province failed to abate the nuisance, I agree with the Province that it had no obligation to do so considering the nuisance existed by virtue of a natural hazard...
>
> [381] The plaintiffs' claim against the Province in private nuisance fails.

[75] I am mindful that *Waterway BCSC* is not entirely analogous to the present case. The ownership of the creek was vested in the Province of British Columbia, although it did not own the works themselves; there were thus arguably competing uses of land at play: at paras. 172, 377–378. It can nevertheless be inferred from *Waterway BCSC* that regulatory action alone cannot ground a finding of nuisance, as the judge, following a lengthy trial, found that the issuance of approvals was not a basis for liability.

[76] I would not distinguish *Waterway BCSC* on the same basis as did the trial judge. He found the decision to be "unhelpful" in that it:

> [100] …did not involve conduct equivalent to the funding and construction of the fence. Moreover, the authorizations in that case were lawful, and the approvals in this case ceased to be lawful after May 17, 2019.

[77] I do not consider the governmental conduct in *Waterway BCSC* and this case to be entirely dissimilar, as both involve allegations of nuisance on the basis of regulatory action effectively authorizing construction. Here, instead of directly issuing approvals, the Province extended the SOLE that was the basis for the evacuation order that the fence was built to enforce.

[78] Cases that initially seem to support the respondents' position do not, in my view, erode the tort's rationale of addressing competing land uses, or the principle that a proper defendant in nuisance is one who has made at least some use of land.

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[79] The respondents appear to argue that any substantial and unreasonable interference with land constitutes a nuisance, no matter its origins. And yet the authorities they cite involve competing uses of land, such as a province's construction of a highway near a truck stop owner's land (*Antrim*) or a contest between the owner-operators of a compost facility and area residents (*Baker v. Rendle*, 2017 BCCA 72).

[80] The decisions from the Supreme Court of British Columbia and the Ontario Superior Court of Justice discussed above—*Falkoski*, *Sapone*, and *Mackay*—are inconsistent with established principles regarding the law of nuisance, as they suggest that statutory decisions by a public body that authorize the activity that causes a nuisance may be actionable even when the public body is not in possession of or using the land from which the nuisance emanates. In my view, these cases conflict with the statement in *Royal Anne Hotel* that the rationale that underlies the tort is the reconciliation of competing interests in connection with the use of land. In any event, these decisions are not binding on this Court.

[81] Furthermore, none of these decisions address the circumstances that arise in the present case, which involves the exercise of statutory powers that *directly* regulate the respondents' property. The tort of nuisance is not invoked here to regulate competing land uses, but rather to hold the Province liable for the exercise of statutory powers that, where exercised lawfully, permit a direct and substantial interference with private property rights.

[82] *Northern Cross* is also not determinative of the issue at hand. There, the plaintiff oil and gas company commenced an action in nuisance against Yukon arising from its announcement of a moratorium on hydraulic fracking in areas in which the company held exploration permits. The Court of Appeal of Yukon dismissed Yukon's appeal from a decision refusing to strike this claim, with Justice Voith concluding:

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> [117] I acknowledge that a cause of action based on nuisance is an awkward lens through which to consider a claim for damages arising from the loss of the ability to use land, or an interest in land, where the act causing the alleged nuisance is the implementation of a government policy and the damage suffered arises directly from that act of government. However, at this stage of the proceeding and without Yukon having filed a statement of defence, in the absence of authority that addresses the specific concern I have described, and in light of the additional considerations I have described, I would dismiss this ground of appeal.

[83] In his comment on *Northern Cross*, Gay notes at 7:13.50:

> …In the law of nuisance the offending conduct is typically a competing use of land, meaning *Northern Cross* is an exceptional case. The author is not aware of any case in which a government moratorium or similar government policy was held to constitute a nuisance.

[84] Respectfully, I consider *Northern Cross* to be of limited assistance on this appeal. First, it bears remembering that the decision dealt only with an issue raised on the pleadings—whether, assuming the facts pleaded were true, the claim in nuisance was certain to fail such that it ought to have been struck: at para. 109. The court made no determination on the merits, that is, Yukon's liability in nuisance. As the trial judge in this case observed in his Reasons:

> [95] *Northern Cross* only decides that a nuisance claim based on adoption of a government policy that directly applies to the plaintiff's property is legally arguable, not that it would necessarily succeed at trial.

[85] By contrast, the issue before this Court was explored over several days of trial in the court below. This Court has also had the benefit of the parties' submissions on the key issues raised on appeal.

[86] Other aspects of the Court of Appeal of Yukon's reasoning indicate that its decision does not resolve the narrow issue of whether liability in nuisance can arise from statutory decisions by a public body that directly impact private property. And while the moratorium in question applied to all but a limited number of lands in the Yukon, it is not apparent from the decision whether the exploration permits in question related to Crown land. Further, in supporting its holding, the court referred to certain authorities which had found that a fence or blockade could constitute a

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nuisance where it prevented a landowner from accessing their property or a holder of a *profit à prendre* from exercising their rights: at para. 106. Those cases, however, involved competing uses of land between plaintiffs and defendant landowners or protestors blocking roads.

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[87] Finally, the court's statement that nuisance's proper focus is on the harm suffered by the plaintiff (rather than the defendant's conduct) is not, in my view, determinative of the issue at hand: *Northern Cross* at paras. 111–112. As Gay observes at 7:13.50:

> The passage from *Antrim* cited by the Court of Appeal in *Northern Cross* stands for the proposition that the focus of nuisance law is not on whether the defendant's conduct is unreasonable. It does not stand for the proposition that *any* conduct that interferes with a plaintiff's ability to exercise its property rights is actionable, and does not stand for the proposition that a government policy decision which is unconnected to a use of government land is actionable in nuisance…
>
> [Emphasis added.]

[88] Finally, I wish to address this Court's recent decision in *LaSante*. While it appears at first glance to feature similar facts to those in this case, it does not materially assist in resolving the issue on appeal. *LaSante* involved a class proceeding arising from a spill of a truck supplying fuel to a helicopter company engaged by British Columbia to fight wildfires. The proposed representative plaintiff sued British Columbia, the helicopter company, and the driver and his employer in nuisance. This Court upheld the certification of this claim as a common issue. The claim was founded not on the direct effect of the spill, but on interference with property resulting from evacuation and water use orders issued by other government bodies: *LaSante* at para. 9. Unlike in this appeal, however, the theory of British Columbia's liability in *LaSante* was not founded upon its regulatory action, but instead arose from its alleged contribution to the spill that caused the orders to be issued. This case therefore, as pled, involved a use of land by the defendants.

C. The Consequences of Attaching Liability in Nuisance to Governmental Interference with Property by Regulation

[89] I agree with the Province that expanding the boundaries of the law of nuisance to include governmental actions that are purely regulatory in nature could well lead to untenable consequences. It would also be contrary, in my view, to the foundational principle outlined in *Welbridge* at para. 66 above, to which I shall now return.

[90] The first point to be made is that, although the claim in *Welbridge* was grounded in negligence, there is no principled reason, in my view, based on the jurisprudence, for the Supreme Court of Canada's decision not to also apply to a cause of action in nuisance.

[91] Secondly, it would logically flow from the respondents' theory, which is implicitly accepted by the trial judge, that every order issued under the *EPA* that substantially and unreasonably interferes with the use of private property would be *prima facie* actionable in nuisance, subject to the defence of statutory authority. In fact, they concede as such: at para. 62 above. In other words, liability in nuisance would arise automatically from a finding that the exercise of such powers was unlawful in an administrative law sense. Furthermore, the scope of this new form of tort liability would not be restricted to powers under the *EPA*. Liability in nuisance could arise from orders, policies, authorizations, and other decisions made pursuant to any legislation that authorizes a substantial interference with the use of private property regardless of whether the government entity in question has made any use of land. All that would be required to establish liability in nuisance is a successful application for judicial review. In my view, this unbridled expansion of the tort to include "regulatory nuisance" is unprincipled and contrary to the existing jurisprudence.

[92] *Welbridge* informs us that invalidity is not the test of liability; an unlawful exercise of statutory powers does not give rise to liability in damages unless civil

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fault is shown: Reasons at para. 86, citing *Welbridge* at 969. In my view, the trial judgment in this case carves out a broad exception to that rule. Invalidity would effectively be the test of liability where the unlawfulness relates to statutory powers that permit a direct and substantial interference with private property. This form of liability for private nuisance would not be anchored in the traditional rationale for the tort, which is the mediation of competing land uses. Instead, it would effectively create a new species of tort liability for governments arising from regulatory interferences with the use of private property that are subsequently found to be unlawful in an administrative law sense.

[93] I see no basis in the established case authority that governs liability in nuisance, or in the distinction between public law invalidity and private law liability drawn in *Welbridge*, to justify the creation of a tort of regulatory nuisance.

D. Conclusion

[94] In light of the authorities discussed above, I would conclude that a defendant government entity must, at a minimum, be engaged in a use of land in order to attract liability in nuisance. It is not sufficient for competing uses of land to be involved in a general sense. I would also conclude that the tort of nuisance does not extend to regulatory action by a public body that directly interferes with a claimant's use of land, even where those decisions are subsequently found to be unlawful in an administrative law sense. In my view, it makes no difference to the analysis whether one focusses on the Minister's extensions of the SOLE or on the Province's contribution to the funding of a fence.

[95] Here, there is no suggestion that the Province owned, occupied, or made use of land from which a nuisance emanated. The source of the alleged nuisance—the Province's interconnected extensions of the SOLE and funding of the fence—involved an exercise of its statutory powers, a regulatory response under the *EPA* to the geotechnical instabilities in Seawatch. Whether or not a portion of the fence may have been constructed on adjacent land, the purpose of the fence was to directly

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impede the respondents' access to property as a means of enforcing the evacuation order. Furthermore, it was the District, not the Province, that arranged for its construction: Reasons at para. 7. I do not consider purely regulatory activity impacting land, without more, to be a "use" of that land that could attract liability in nuisance.

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[96] To state my conclusions in a somewhat different way: this case does not concern competing uses of land, but rather a government body's exercise of emergency powers to directly regulate the respondents' properties. Respectfully, the judge therefore erred in law in concluding that the Province could be liable in nuisance for its regulatory actions in these circumstances. As the Province is not a proper defendant in this nuisance claim, it is unnecessary to consider whether its actions were a cause of the injury to the respondents' land.

[97] I wish to conclude my liability analysis with certain observations. First of all, I recognize that unresolved issues in the law of nuisance remain. For the purposes of this appeal, we need not finally determine, for instance:

a) the specifics relating to those situations where a defendant must own or occupy (and not just use) land in order to ground liability in nuisance; or

b) whether the nuisance can ever emanate from the same land as it injures.

[98] It is sufficient to conclude that the boundaries of the tort of nuisance cannot be expanded to hold a governmental body liable for the exercise of its statutory powers where it does not own, occupy, or use the land from which the nuisance allegedly emanates. In such a case, the government body is not a proper defendant to a claim in nuisance, and the analysis, including the application of the two-part *Antrim* test, need go no further.

[99] I also recognize that this conclusion has the unfortunate effect of precluding an avenue of recourse for the respondents, who seek to remedy the damage caused by the construction of the fence. These appeals only decide the narrow issue of

whether private nuisance is an appropriate cause of action to advance against the Province on these facts. I do not need to comment as to the availability of other common law or administrative law remedies, or the available statutory compensation as set out in s. 19 of the *EPA*.

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[100] Finally, while I would allow the appeals on the legal issue concerning the boundaries of the tort of nuisance, this should not be seen by the Province as an endorsement of its conduct in extending the SOLE. It is not. While I consider it unnecessary for this Court to reach a final conclusion on the lawfulness of the Minister’s extensions of the SOLE in this case, the Province’s impoverished view of the role of the Minister in approving extensions to the SOLE is deserving of comment.

[101] The *EPA* provides in part:

> **Declaration of state of local emergency**
>
> 12 (1) A local authority or, if a local authority consists of more than one person, the head of the local authority, may, at any time that the local authority or the head of the local authority, as the case may be, is satisfied that an emergency exists or is imminent in the jurisdictional area for which the local authority has responsibility, declare a state of local emergency relating to all or any part of the jurisdictional area.
>
> …
>
> (4) Immediately after making a declaration of a state of local emergency, the local authority or the head of the local authority, as the case may be, <u>must</u>
>
> > <u>(a) forward a copy of the declaration to the minister, and</u>
> >
> > (b) cause the details of the declaration to be published by a means of communication that the local authority or the head of the local authority, as the case may be, considers most likely to make the contents of the declaration known to the population of the affected area.
>
> (5) Subject to section 14 (3), a declaration of a state of local emergency expires 7 days from the date it is made <u>unless it is earlier cancelled by the minister, the Lieutenant Governor in Council, the local authority or the head of the local authority.</u>
>
> (6) Despite subsection (5), the local authority may, <u>with the approval of the minister or the Lieutenant Governor in Council</u>, extend the duration of a declaration of a state of local emergency for periods of not more than 7 days each.
>
> (7) Subsections (2) and (4) apply to each extension under subsection (6) of the duration of a declaration of a state of local emergency….

> …
>
> **Cancellation of declaration of state of local emergency**
>
> 14 (1) The minister or the Lieutenant Governor in Council may cancel a declaration of a state of local emergency <u>at any time the minister or the Lieutenant Governor in Council considers appropriate in the circumstances.</u>
>
> [Emphasis added.]

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[102] On appeal, the Province argued that, in extending the SOLE, the Minister has no independent role in determining whether an emergency exists, and cannot second-guess a local authority's decision. However, reading the above provisions according to modern principles of statutory interpretation—"in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament"—it is clear to me that the Province has an ongoing supervisory role in relation to the exercise of the extraordinary powers under the *EPA*: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 1998 CanLII 837 at para. 21, citing Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87. It follows, in my view, that in the circumstances of this case, the District's requests for the SOLE extensions obligated the Minister to provide some independent, ongoing assessment of the declared emergency at Seawatch, especially in light of the evacuation order's obvious drastic effect on the residents and their properties.

<u>VIII. Costs</u>

[103] The Province seeks an order awarding it its costs in this Court and in the court below. The Latham Respondents argue that, if the appeals are granted, the Costs Decision should not be overturned, and they should not be required to pay costs of this appeal.

[104] As recently stated in *Deng v. Zhang*, 2022 BCCA 271, leave to appeal to SCC ref'd, 40390 (9 February 2023):

> [127] This Court has considerable discretion in making an order as to costs both here and the court below. While the general rule is that the party who is successful on an appeal is entitled to costs, ss. 44–45 of the *Court of Appeal*

> *Act* [S.B.C. 2021, c. 6] provides the Court with the discretion to order otherwise if it considers it appropriate to do so.

[105] This Court has the jurisdiction to make any order that the trial judge could have made regarding costs: *Court of Appeal Act*, s. 24(1)(a).

[106] The Latham Respondents' pre-trial offer to settle is relevant to the costs in the court below. Approximately three weeks before the trial, which was set to commence on November 22, 2021, the Latham Respondents discontinued their action against the District following the release of the reasons for judgment in the Covenant Appeal. Two days before the trial, they offered to discontinue their actions in exchange for a waiver of costs by the Province. The Province rejected this offer and proceeded with the seven-day trial.

[107] The trial judge awarded the Latham Respondents double costs for all steps taken in the proceedings below from November 20, 2021 forward: Costs Decision at para. 34. He concluded that the Province "took a substantial and needless risk in rejecting the offer" and the "trial should not have been necessary": Costs Decision at para. 32.

[108] The Province's contradiction on appeal of one of its positions at trial is also relevant in determining the appropriate costs award.

[109] In his causation analysis, the trial judge found that the "evidence does not establish that the permanent exclusion of the plaintiffs from their homes due to geological instability is necessary and inevitable": Reasons at para. 102. His findings on this point were supported by Mr. Cunnings' evidence, which the Latham Respondents read in as part of their case: Reasons at paras. 51, 66–67. In an email written shortly after receipt of the Thurber Report, Mr. Cunnings listed various options in addition to a SOLE that were open to the District to address the safety risk at Seawatch. When asked about the email at his examination for discovery, Mr. Cunnings gave the following evidence:

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Q. Okay. So there were legal options that would in your view ensure public safety that didn't involve exclusion of the residents from their homes?

A. That's correct. There were other options here.

…

Q. Okay. Because many of these options appear on their face less restrictive to the lives of people affected or potentially affected by the order than the actual order that went out; right?

A. Yes.

[110] The Province elected to call no witnesses and brought an insufficient evidence application at the conclusion of trial. In short, Mr. Cunnings' discovery evidence was unchallenged.

[111] At the hearing of the appeal, counsel for the Province was asked whether it was challenging the judge's causation analysis by arguing that the cause in fact of the respondents' loss was not the Province's actions but rather the underlying geotechnical conditions, which would have resulted in a permanent evacuation in any event. Later in their submissions, the Province argued for the first time on appeal that these alternative measures, unlike an evacuation order, would not have prevented owners from entering their homes to ensure public safety. This argument implied that the trial judge was wrong in finding that less restrictive options could have addressed the safety risk at Seawatch, and, by extension, erred in relying on Mr. Cunnings' previously unchallenged evidence.

[112] It is unnecessary for the purposes of these appeals to resolve the parties' disagreement as to whether there were options available to the District to address the public safety risk at the site other than evacuation orders under the *EPA*. Had this issue required resolution, I would not have entertained the Province's attempt, for the first time on appeal, to challenge factual findings by the trial judge that were based on the uncontradicted evidence of the Province's own witness.

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[113] Notwithstanding the Province's success on the legal issue pertaining to "regulatory nuisance", I would make no order as to costs in either this Court or the court below, as:

a) the trial was unnecessary;

b) the Latham Respondents have incurred costs both in the trial court and this Court; and

c) the Province raised for the first time on appeal an argument that contradicted one of its submissions at the trial and unnecessarily complicated the appeal.

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IX. Disposition

[114] For the reasons I have outlined, I would allow the appeals and dismiss the actions against the Province.

[115] I would make no order as to costs either in this Court or the court below.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Madam Justice Horsman"