Life in the Big City—Limits on Compensation for Infrastructure Construction in Canada

by Graham Rempe and Phong Phan



The shovels are in the ground in Canada: after the recent economic woes, governments at all levels committed to wide-scale infrastructure spending. This allowed the commencement of major infrastructure projects such as the construction of transit, and the upgrading of roads, sewers, water mains, and other utilities. These improvements often went hand-in-glove with other measures intended to improve the streetscape in our cities and encourage new and improved development along those streetscapes. It has been a time of great excitement and some turbulence.

Of course, with construction comes some degree of disturbance: dust, noise, traffic disruption, and business impacts. This article will review recent cases to see how the Canadian courts are dealing with the impacts from infrastructure construction— either as tort claims based on nuisance— or under the subset of expropriation law known as injurious affection.

We will examine the fallout from construction of the Canada Line transit system in Vancouver and the nuisance claims that were advanced as a result, including one class action case. We will then move to Toronto, where another class action case arose from the construction of the St. Clair Light Rail Transit (LRT) system. Finally, we will review a recent Ontario Court of Appeal case which dealt with the scope of injurious affection claims under Ontario's *Expropriations Act*, where no lands are taken.

Entitlement to Damages

"*Ask not what your country can do for you. Ask what you can do for your country.*" When the American President John F. Kennedy uttered these words during his 1961 Inaugural Address, he was asking the citizens of the United States, indeed, the citizens of the world, to maintain high standards of strength and sacrifice to advance the common good. That spirit appears to have waned. Citizens want new mass transit, good roads, and safe water and sewer services. They do not want to bear the incidental costs of such improvements. The prevailing view now appears to be that the state should compensate them for any disruption resulting from such improvements.

The Canadian Context

The law of eminent domain, generally known in Canada as expropriation, is essentially the same as is provided for in the Fifth Amendment of the U.S. Constitution. Federal or provincial authorities may take land, but they must pay "just" compensation in return. What is "just" is governed by common law, legislation, and administrative tribunals. Depending on the nature of the authority and the jurisdiction, claims for compensation may be advanced in the courts, or before specialized tribunals such as the Ontario Municipal Board.

Where no land is taken, some Canadian jurisdictions will compensate for elements of loss known as injurious affection. This type of loss is similar to loss referred to as inverse condemnation in some U.S. jurisdictions. The general principles between U.S. and Canadian law are similar.

The B.C. Nuisance Cases

A great deal of construction took place in and around Vancouver, British Columbia, to accommodate the Winter Olympics in 2010. One major project was the new Canada Line added to the Vancouver Skytrain transit system. That construction was not without impacts. The original proposal called for a tunnel to be bored under a commercial area known as Cambie Village; however, as a result of financial and design considerations, the tunnel proposal was replaced with "cut and cover" excavation. This resulted in disruption to businesses along Cambie Street. The consortium building the project had publicly stated that the disruption caused by the construction would be significant for only a three-month period at any given

location. There were complications, and the construction caused some disruption on Cambie Street over a four-year period, resulting in business losses. A maternity shop, Hazel and Company, run by Susan Heyes, sued the consortium.[1]

Justice Pitfield of the British Columbia Superior Court rejected the claims for negligent misrepresentation[2] and negligence.[3] The negligence claim failed because the selection of a construction method did not create a duty of care; economic loss, absent harm or injury, was non-compensable; and the plaintiff had conflated negligence, which looks at the conduct of the party, with nuisance, which looks at the reasonableness of the harm done.

In his analysis of nuisance, Justice Pitfield considered the character of the neighbourhood, the nature of the interference, the sensitivity of the plaintiff, and the utility of the project. On the latter point, he noted that the public benefit of the Canada Line could not be overstated. It served a vital transportation need, removing cars from the road, relieving congestion, and reducing the emission of greenhouse gases. Nonetheless, he concluded that:

> The nature, severity and duration of the impact... resulting from cut and cover construction outweigh the social and public utility associated with the creation of the Canada Line to a degree that warrants compensation for nuisance absent any defence to the claim.[4]

Pitfield J. then reviewed the defence of statutory authority, relying on the test set out by the Supreme Court of Canada in *Ryan v. Victoria (City)*,[5] and adopting the requirement that a statutory authority must demonstrate that the nuisance is "practically impossible to avoid." He concluded that "... because there was an alternative method of construction [i.e. tunnelling] that would not have caused a nuisance in the Cambie Village area, the statutory authority defence must fail."[6] The consortium was liable for economic loss of $600,000.[7]

Shortly after that decision, Pitfield J. heard a motion advanced on behalf of the other property owners and businesses in Cambie Village to certify a class proceeding based on nuisance, waiver of tort, and injurious affection. That action, *Gautam v. CLRT Inc.*, was certified by Pitfield J. as a class proceeding.[8]

Citizens want new mass transit, good roads, and safe water and sewer services. They do not want to bear the incidental costs of such improvements.

The British Columbia Court of Appeal subsequently reversed the decision of the trial judge in the *Heyes* case.[9] The appellate court upheld the finding of nuisance, but, unlike the trial judge, concluded that the defence of statutory authority *did* apply. The court concluded that, for reasons broader than those considered by the trial judge, the selected proposal (which included the cut and cover component) was the only practically feasible option for construction. Although there was a nuisance, it was the inevitable result of the only feasible alternative (cut and cover). This established the statutory authority defence.[10]

The court also noted that, although a bored tunnel may have decreased the disturbance at Cambie Village, it would have increased the disturbance elsewhere. The conclusion of the trial judge would have the effect of simply transferring the nuisance to other parties at other locations. An option that only relocates the disturbance was not, in the court's view, a non-nuisance alternative, and should not operate to defeat the defence of statutory authority.[11]

The court also accepted the appellant's argument that the City's traffic management by-laws provided a second statutory authority defence to the transit authority.[12] Following the decision, a motion for leave to appeal was filed with the Supreme Court of Canada; however, the Supreme Court declined to hear the case.[13]

After the *Heyes* decision, the consortium appealed the *Gautam* certification decision to the B.C. Court of Appeal. A different panel than that which heard the *Heyes* decision dismissed the appeal and upheld the certification order. The *Heyes* panel had concluded that the discretion to construct "could not be exercised without disruption to many citizens' use and enjoyment of their property, regardless of the construction method chosen."[14] The *Gautam* panel, in commenting on *Heyes*, concluded that "the decision has crystallized one common issue, which is whether the cut and cover construction was the only feasible method."[15]

What emerges from these B.C. cases? As the injurious affection rules do not apply to public/private partnerships, the only remedy available is through the tort of nuisance. It was common ground that the undertaking was a nuisance. The question remained whether the damage was an inevitable result, in which case the statutory authority defence was available, as in *Heyes*. In *Gautam*, however, the court was open to hearing further evidence as to whether different methods for undertaking the construction may have had a different effect, such that harm was not the inevitable result.

It is the view of the authors that the decision on whether to carry a project out by any particular construction method is fundamentally a policy choice based

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on factors such as cost, convenience, and political considerations. If the extent of the disruption caused by the chosen method is out of proportion with the typical effects from works of that nature to the point of unreasonableness, then there may be a nuisance claim. It is hard to understand why, though, the court would investigate the type of construction authorized by the public authority, especially given the Canadian jurisprudence providing municipalities with wide latitude in making policy decisions.[16]

The St. Clair LRT Project

In an action very similar to the *Heyes* case, Curactive Organic Skin Care Ltd. sued the Province of Ontario, the City of Toronto, and the Toronto Transit Commission (TTC) for economic loss alleged to have resulted from the construction of the St. Clair LRT system.[17]

St. Clair Avenue is a wide right-of-way in the City of Toronto, which has had streetcar service since 1913. The streetcar tracks were in need of extensive repair or replacement, so the City and the TTC conducted an environmental assessment study and obtained approval to construct a streetcar (also known as an LRT) on its own dedicated right-of-way. This was carried out in accordance with approved Official Plan policies. Various other upgrades to utilities, street furniture, and lighting were carried out at the same time.

As with the Vancouver construction, residents in the affected area vigorously opposed the proposal.[18] A purpose-formed group known as SOS, or Save Our St. Clair, had been involved in the public consultation carried out through the environmental assessment process. This group also requested Ontario's Minister of the Environment to require further study.[19] The Minister refused the request. Contracts were tendered and the shovel was literally going into the ground when SOS launched a court challenge to the authority to undertake the project. Ultimately, the Ontario Divisional Court dismissed the challenge, noting that that the applicant took a "narrow and technical" approach.[20] Construction, having been delayed for almost one year, resumed.

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The project took longer than had been predicted and developed a considerable notoriety in the Toronto media. After the construction, the TTC commissioned a forensic review to examine how future projects could be implemented without the delays and complaints experienced with St. Clair.[21] The study's authors had concerns about open-ended public consultation, noting that inordinate attention and resources were devoted to dealing with individuals whose main interest was to ensure that the project would not proceed. Extension of the public debate in this manner, they opined, meant that "closure" of the consultation process was never really achieved. This lack of closure plagued the entire implementation process.

As construction was completed, Curactive Organic Skin Care Ltd. launched a $105M class proceeding on behalf of a wide range of commercial interests along the right-of-way.[22] The claim alleged liability for economic losses incurred as a result of negligence and gross negligence during construction and, in the case of the City, an abuse of authority.[23] The period for which the plaintiff claimed included the delay that had resulted from the earlier court challenge. Prior to a motion for certification, the City and the TTC brought a motion to dismiss on the basis that the court lacked jurisdiction, and that the pleadings disclosed no reasonable cause of action. Justice Perell of the Ontario Superior Court dismissed the action.[24] He concluded that the claim as pleaded was, in fact, one of "injurious affection," as defined in the Ontario *Expropriations Act*.[25] Jurisdiction for injurious affection lay exclusively with the Ontario Municipal Board.[26] In dismissing the claim, Justice Perell noted that, regardless of the way the claim was pleaded, "Curactive's damages amount to the injury known as injurious affection."[27] In his view, the negligence and abuse of authority pleadings were "being used to disguise what is a claim for compensation that is within the jurisdiction of the Ontario Municipal Board."[28] Therefore, there was no further need to deal with those allegations.

On appeal, the Court of Appeal for Ontario agreed, finding that the negligence allegations were a disguised injurious affection claim.[29] The court also ruled that the abuse of authority allegations could be advanced, but had not been properly pleaded,[30] and dismissed the appeal.

The Antrim Truck Stop

Later this year, the Supreme Court of Canada will consider an injurious affection claim where no lands were taken. The case, *Antrim Truck Centre Ltd. v. Ontario (MOT)*,[31] arose when Ontario's Ministry of Transportation rebuilt a dangerous section of highway. Antrim, the claimant, which had formerly operated a truck stop on the main highway, now found itself 1.8 km away from the rebuilt highway. It advanced a claim for injurious affection under the Ontario *Expropriations Act*. The Ontario Municipal Board awarded damages, and on appeal, the Ontario Divisional Court upheld that award. However, on further appeal, the Ontario Court of Appeal reversed those decisions.

The Court of Appeal noted that a successful injurious affection claim required that the claim be "actionable" but for the application of the statutory authority defence. To establish that the claim was "actionable," the claimant had to demonstrate that it met the common law test for nuisance. The court wryly characterized the state of the law of nuisance as itself a nuisance.[32] Nonetheless, Antrim was required to meet the accepted test and demonstrate that the damage was both substantial and unreasonable. The court accepted that Antrim's displace-

ment from the highway was a substantial effect; however, it viewed the reasonableness requirement based on a four-pronged, common law test. Under this test, the claimant has to demonstrate the activity is unreasonable having regard to the severity of the interference; the character of the neighbourhood; the utility of the undertaking; and the sensitivity of the claimant. The court determined that the Ontario Municipal Board and Divisional Court had not carried out the necessary balancing. Had they done so, they would have placed a great deal of weight on the utility of the authority's conduct and concluded, as the Court of Appeal did, that the activity was not unreasonable and therefore, not a nuisance.[33]

The Supreme Court of Canada granted leave to appeal, and the case is expected to be argued in November 2012. In the meanwhile, the Ontario Municipal Board has considered the *Antrim* decision in rulings on injurious affection claims. In *Carpet Clear Out Corp.*,[34] for example, the Board concluded that, although street reconstruction had caused substantial interference, it was not beyond what the claimant should have expected, given the urban context and the necessity of the work.

Conclusions

As noted by the Court of Appeal for Ontario, the law of nuisance can be a nuisance. It has been characterized as incapable of any exact or comprehensive definition. It is recognized, however, that as society becomes more complex and developed, so, too, does the law of nuisance. Ultimately — and particularly in a rich urban fabric—the principles of "give and take" and "live and let live" require a generous interpretation in favour of the activities of public authorities, as was recognized by the Court of Appeal for Ontario in the *Antrim* case. The alternative makes those activities prohibitively expensive and impossible to undertake. This, of course, is cold comfort to those suffering material interference and inconvenience.

Over the decades, courts have applied the "reasonableness" analysis required in relation to nuisance in varying ways: sometimes more favourable to claimants; sometimes more favourable to public authorities. Some have likened the jurisprudence to a pendulum, swinging between the interests of private property concerns and the interests of the state. Cases such as *Heyes, Gautam, Curactive* and *Antrim*, where no land is taken, represent a potential "high-water mark" of compensation for inconvenience caused by public works. Public authorities in Canada will watch with bated breath to see which way the pendulum swings at the Supreme Court of Canada. The Court last considered injurious affection in 1987,[35] where it noted:

> All highway construction will cause disruption. Sometimes it will damage property, sometimes it will enhance its value. To fix the Minister with liability for damages to every landowner whose property interest is damaged, by reason only of the construction of a highway on neighbouring lands, would place an intolerable burden on the public purse. Highways are necessary: they cause disruption. In the balancing process inherent in the law of nuisance, their utility for the public good far outweighs the disruption and injury which is visited upon some adjourning lands.[36]

Neighbourhoods change. Construction, reconstruction, and improvement are an integral aspect of life in the Big City. If municipalities must insure that businesses will be unaffected by municipal undertakings, the potential for ever-expanding municipal liability is a chilling one. On the other hand, where municipal undertakings exceed all standards of reasonableness, some compensation should be expected. The Supreme Court of Canada will soon provide further guidance as to how the necessary balancing will be carried out.

(Authors' Note: The opinions expressed are those of the authors. The authors thank Christina Achkarian for her research assistance.)

Notes

1. *Susan Heyes v. Vancouver*, 2009 BCSC 651; rev'd., 2011 BCCA 77; leave to appeal denied, *Susan Heyes Inc. dba Hazel & Co. v. South Coast British Columbia Transp. Auth. et al.*, 2011 SCCA 175 (S.C.C. Oct. 20, 2011).
2. *Heyes,* 2009 BCSC 651, paras. 100-111.
3. *Ibid.* at paras. 112-129.
4. *Ibid.* at para. 152 (see, generally, paras. 130-203).
5. [1999] 1 S.C.R. 201, at paras. 54-55.
6. *Heyes, supra* note 1, at para. 203.
7. Note that claims against the federal, provincial and municipal governments were dismissed, as the involvement of these governments was deemed insufficient to attract liability.
8. *Gautam v. CLRT Inc.,* 2009 BCSC 1013; aff'd, 2011 BCCA 275.
9. *Susan Heyes Inc. (Hazel & Co.) v. South Coast B.C. Transp. Auth.*, 2011 BCCA 77.
10. *Ibid.* at paras. 134-135.
11. *Ibid.* at para. 144.
12. *Ibid.* at paras. 149-154. The court noted, however, that these by-laws did not provide statutory immunity.
13. *Susan Heyes Inc. dba Hazel & Co. v. South Coast British Columbia Transp. Auth., et al.*, 2011 SCCA 175 (S.C.C. Oct. 20, 2011).
14. 2011 BCCA 77, para. 145.
15. *Gautam v. Canada Line Rapid Transit Inc.*, 2011 BCCA 275, at para. 41.
16. See, e.g., *Catalyst Paper Corp. v. North Cowichan*, 2012 SCC 2.
17. *Curactive Organic Skin Care Ltd. v. Toronto (City) et al.*, 2011 ONSC 2041; 2011 ONSC 3064 (costs); aff'd, 2012 ONCA 81.
18. The authority to construct the Canada Line in Vancouver was challenged, unsuccessfully, in the B.C. courts. See *Do RAV Right Coalition v. Richmond, et al.*, 2005 B.C.S.C. 991; aff'd, 2006 B.C.C.A. 571; leave to appeal to S.C.C. denied with costs; [2007] S.C.C.A. No. 163.
19. The environmental assessment was carried out under s.15.1 of Ontario's *Environmental Assessment Act*, R.S.O. 1990, c. E. 18 ("EAA"), and the Municipal Engineers Association's Municipal Class Environmental Assessment, approved October 2000. Once an environmental study report is completed under the Municipal Class EA process, anybody opposed to the undertaking may seek a Part II order under s. 16 of the EAA, which requires that an individual envi-

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due process, and consequently, Bowlby was not required to go through the appeal process set out in the zoning ordinance in order to state a cognizable procedural due process claim. Addressing the "ripeness" requirement, the court noted that "the *Williamson County* final-decision requirement makes more sense when the taking alleged is a regulatory taking." Bowlby's injury was suffered at the time the Board revoked her permits, and, notwithstanding that the permits could be reinstated in the future, her permits were definitively taken away. A "procedural due process claim that is brought concurrently with a takings claim, such as Bowlby's, should be analyzed not under the principles of *Williamson County*, but according to "general ripeness principles'." Bowlby had not stated a due process claim that was "ancillary" to her takings claim, but rather, one that was separately cognizable, being a property interest in the permits to operate her business, not just in the business itself. Thus, she had an injury separate from any potential taking, as well as a final decision by the Board. Even if a court were to decide that the defendants did not violate the Takings Clause by causing Bowlby to lose her business, they still violated her right to procedural due process. *Bowlby v. City of Aberdeen*, No. 11-60279, 2012 U.S. App. LEXIS 9717 (5th Cir. May 14, 2012). ML

ListServ

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seasoned advice from friends who have faced the same monsters, and lived to tell about it.

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Construction Compensation

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ronmental assessment be carried out.
20. *SOS v. Toronto (City)*, [2006] O.J. No. 671 (S.C.J.–Div. Ct.), at para. 51. Note also that there was an earlier decision which had resulted in the reconstitution of the Divisional Court panel. See *SOS v. Toronto (City)*, [2005] O.J. No. 4738.
21. Study, Kelman, L., and Soberman, R.M, *"Getting It Right," Lessons from the St. Clair Streetcar for the Implementation of Transit City* (January 7, 2010), available at http://www3.ttc.ca/About_the_TTC/Commission_reports_and_information/Commission_meetings/2010/Jan_20_2010/Reports/Transit_City_Impleme.pdf.
22. The Province was sued on the basis that it had negligently failed to ensure that construction was not disruptive. The Province indicated, at the outset, that it would move to dismiss the action against it on the basis that it owed no duty of care to the plaintiff. The claim against the Province was subsequently discontinued by consent.
23. The abuse of authority claims were based on alleged "sinister" policies of "blockbusting," as well as a "war on cars," all of which were stated to be an abuse of authority for the purposes of the claim.
24. *Curactive Organic Skin Care Ltd. v. Toronto (City) et al.*, 2011 ONSC 2041. See also, *Casa Luna Furniture v. Ottawa (City)*, [2009] O.J. No. 874 (S.C.J.), an earlier case from Ottawa with a similar result.
25. *Expropriations Act*, R.S.O. 1990, c. E. 26, s. 1(1).
26. *Ontario Municipal Board Act*, R.S.O. 1990, c. O. 28, s. 36.
27. *Curactive Organic Skin Care Ltd. v. Toronto (City) et al.*, 2011 ONSC 2041, at para 28.
28. *Ibid.* at para. 36.
29. *Ibid.* at paras. 6-7.
30. The court noted that the appellant had failed to plead any material facts to substantiate its allegations of "sinister" and secret policies, in spite of numerous requests.
31. *Antrim Truck Centre Ltd. v. Ontario (MOT)*, [2009] O.M.B.D. No. 1; aff'd, 2010 ONSC 156 (Div. Ct.); rev'd, 2011 ONCA 419; leave to appeal granted [2011] S.C.C.A 378.
32. *Antrim*, 2011 ONCA 419, at para. 79.
33. *Ibid.* at para. 144.
34. *Carpet Clear Out Corp. v. Wellington North*, [2011] O.M. B.D. No. 763.
35. *St. Pierre v. Ontario (MOTC)*, [1987] 1 S.C.R. 906.
36. *Ibid.* at para. 13. ML

Code Enforcement

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group. The hope is that, when that person sees what the association is trying to accomplish and the impact that property violations have, they may make the decision, on their own, to correct their own property violations. We have seen this approach succeed, as well.

The neighborhood associations also perform cleanup activities, as a group, to encourage all property owners in their area to keep their properties looking good. There has been great success in involving citizens with these kinds of associations. The one drawback is that these associations can get a bit grumpy if a particular violation exists longer than they think it should. Although our code enforcement officers are fairly successful in dealing with violations, these groups tend to focus on what still exists and what has come into existence since their last meeting. However, the overall benefit of these citizen groups outweighs the grief we sometimes get over particular violations.

My city council typically thinks of innovations only in terms of enacting a new ordinance. It seems to me that sometimes, new ordinances won't accomplish as much as we expect. Taking steps that are outside the normal response or way of handling a particular issue may be much more beneficial—innovation should include a level of "outside-the-box" thinking. Accordingly, I applaud any municipality using innovative approaches in code enforcement, and for living by the "try, try again" credo. ML