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# BCEA – November 3, 2012

*Compensation for injurious affection where no land is taken – A safari through the "impenetrable jungle" of nuisance law*

TORONTO

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The opinions expressed herein are those of the author

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## City Building in the City of Light

- Early 19th century Paris had problems
- Narrow streets were unsafe and unhealthy
- Commerce was constrained
- Most important, the narrow alleys were easily barricaded which impeded the movement of troops and artillery

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**The Father of Modern Paris?**

- Napoleon III hired Georges-Eugene Haussmann, a planner, to "modernize" Paris
- Slums were razed
- Broad boulevards, water service, sewers, etc were created



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## What results?

- Many people displaced to peripheral banlieus
- Much outrage over loss of "old" Paris and huge cost of the undertakings
- Napoleon III fired Haussmann
- Was it all worth it?

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## Infrastructure today – The agony and the ecstasy?

- Canada Line in Vancouver/Richmond. *Susan Heyes* case (to BCCA)
- St. Clair Light Rail Transit system in Toronto. *Curactive Organic* case (to OCA)
- Reconstruction of "killer" Highway 17 as Highway 417 near Ottawa. *Antrim Truck Centre* case (to SCC Nov 14, 2012)



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## *Susan Heyes Inc. v South Coast BC Transportation Authority*, 2011 BCCA 77

- Original proposal to tunnel cost more than the money that was available
- 3P partner proposed affordable cut and cover with stacked tunnels through Cambie Village area
- Dewatering problems led to delays so that the Cambie merchants were affected for much longer than expected

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## *Heyes* cont'd

- Pre-construction challenge to statutory authority failed
- At trial after construction, BCSC concluded there was no negligence or negligent misrepresentation
- Liable in nuisance as alternative (boring) was available. No defence of statutory authority
- BCCA upheld nuisance but concluded that a statutory authority defence was available as cut and cover was the only feasible option and the interference was the inevitable result of construction
- See also *Gautam v CLRT*, 2011 BCCA 275



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## *Curactive Organic Skin Care Ltd. v Ontario*, 2012 ONCA 81

- Upgrade of existing streetcar line as LRT
- OPA and EAA approvals in place
- Last minute challenge to authority to proceed with the project failed
- $105 million class action lawsuit based on abuse of authority and negligence
- Plaintiff immediately advised by COT/TTC that their remedy (if any) was for injurious affection
- Motions to dismiss successful on basis that any remedy was in the exclusive jurisdiction of the Ontario Municipal Board

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## *Curactive* cont'd

- OCA upheld motion judge's decision
- Pleadings of negligence were simply a disguised injurious affection claim which should have been before the OMB
- Allegations of abuse of authority were not injurious affection; however, as the plaintiff had repeatedly refused to specify what the abusive acts were, that portion of the claim was also dismissed



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## *Antrim Truck Centre Ltd v MTO*, 2011 ONCA 419

- "Killer" highway rebuilt so that Antrim now on a secondary road rather than the main highway
- Owners aware of plans and moved operation
- Decrease in market value of the original property
- Unlike *Heyes* and *Curactive*, the *Antrim* claim was based on the constructed state of the works rather than the effects of the construction

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## *Antrim* cont'd

Test for injurious affection under Ontario *Expropriations Act*

- Authorized by statute
- Actionable but for statutory authority
- Result of construction not use



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## *Antrim* cont'd

Construction not use

- OMB, Divisional Court and Court of Appeal held this test was satisfied
- Theory that the reconstructed state of the road system reduced access to the claimant's property
- Arguably the issue is the effect on <u>flow</u> of traffic which is typically non-compensable
- <u>Not</u> before SCC

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## *Antim* cont'd

Actionability

- Based on nuisance: a "substantial and unreasonable interference with … use or enjoyment of land"
- OCA held that reasonableness depends on a balancing of:
  - Severity of harm
  - Claimant's sensitivity
  - Character of neighbourhood
  - Utility of works (especially important for OCA)
- OMB and Divisional Court had failed to conduct balancing, so OCA did. No nuisance



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## *Antrim* cont'd

Issue at SCC

- Claimant's position that, as interference with access is substantial, its reasonableness need not be considered
- Thus, the utility of the works, a major consideration for OCA, should have no bearing on liability

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## *Antrim* cont'd

- SCC hearing on November 14, 2012
- City of Toronto granted intervener status (along with others)
- City concern that claimant's position would lead to greatly increased claims and liability wherever public works affect traffic patterns
- Potential for dramatic effect on city building



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## Conclusions

- Legislators and Courts have historically limited availability of compensation for public works where no lands are taken
- May be some limited potential for compensation where act of construction has an impact (dust, noise, reduced access)
- Potential for liability arising as a result of the completed state of the constructed works (even if unused)???