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Case Law Update

Antrim Truck Centre: Epilogue

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Case Law Update

ANTRIM TRUCK CENTRE LTD. v. ONTARIO (TRANSPORTATION), 2013 SCC 13

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Facts

- Antrim Truck Centre Ltd., operated a truck stop complex on property adjacent to Highway 17, near the Hamlet of Antrim, Ontario. Most of its business came from drivers directly accessing the truck complex from a very busy Highway 17.

- Highway 17 was notoriously dangerous, so in 2004 the Province of Ontario decided to replace it with the construction of a new section of Highway 417, running parallel to the old Highway 17.

- The new Highway 417 did not provide any direct access to the truck stop. However, there was still a circuitous route one could follow to eventually gain access to the truck stop complex.

Facts

- Antrim argued that this roadway alteration effectively put them out of business.

- Under the *Expropriations Act* of Ontario, Antrim brought a claim for damages for injurious affection before the Ontario Municipal Board.

- The Ontario Municipal Board awarded $58,000.00 for business loss, and $335,000.00 for loss of market value of the land. This decision was then upheld on Appeal with the Divisional Court.

Facts

- The Court of Appeal then set aside the Board's decision finding that the Board's application of the law of private nuisance to the facts was unreasonable because it failed to consider two factors in its reasonableness analysis, and because it failed to recognize the elevated importance of the utility of the Province's conduct where the interference was the product of an essential public service.

- Antrim appealed to the Supreme Court of Canada

Analysis

- At the outset, the Court framed the question under review as follows:

"How should we decide whether an interference with the private use and enjoyment of land is unreasonable when it results from construction which serves an important public purpose?"

Analysis

- In order to recover under the *Act*, the Court stated that the claimant must meet three statutory requirements:
  - The damage must result from action taken under statutory authority;
  - The action would give rise to liability but for that statutory authority; and
  - The damage must result from the construction and not the use of the works.

Analysis

FIRST REQUIREMENT

Statutory Authority - discussion

SECOND REQUIREMENT

- Actionability - discussion

- In this case (and in most injurious affection cases), the would-be illegality of the Province's activity is based on a claim of nuisance.

Analysis

- To make out the tort of nuisance, two elements must be proven: the interference must be both substantial and unreasonable.

- "Substantial" means that compensation will not be awarded when the interference is simply a trivial or sight annoyance.

- Focus was on issue of "unreasonable" interference

Analysis

- The Court must look at *all* of the relevant circumstances (such as the severity of the interference, the character of the neighbourhood, utility of the defendant's conduct, and the sensitivity of the plaintiff).

- Issue … whether an individual member of the community will be shouldering a disproportionate share of the cost of the beneficial service.

Analysis

- Temporary disruptions commentary… obiter

- Court concludes Province's interference in the business of Antrim was both substantial and unreasonable and supported a finding of nuisance.

- The Supreme Court of Canada concluded that the Province's interference in the business of Antrim was both substantial and unreasonable and supported a finding of nuisance.

Analysis

THIRD REQUIREMENT

- Construction vs. use.

- Claimant's damage must result from the construction and not the use of the works.

Analysis

- In Antrim, it was admitted by the Province that the construction caused the damages.

- In conclusion, the Supreme Court of Canada found that Antrim had met the three statutory requirements to prove injurious affection, allowed the Appeal, and restored the award of the Ontario Municipal Board.

Antrim Truck Centre: Epilogue

The Future of Compensation Claims Where No Land is Taken

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Antrim – The Authority's Perspective

- City of Toronto
  - Toronto Transit Commission
  - Federation of Canadian Municipalities
  - Association of Municipalities of Ontario
- B.C. Attorney General

City of Toronto

- Reasonableness needs to be considered!

- In dense urban areas, virtually all interferences can be construed as “material”

B.C. Attorney General

- Nuisance law is ill-defined / amorphous – “the law of nuisance is a nuisance”

- Need to clarify nuisance law, define parameters

Takeaways from the *Antrim* Decision

- Two-part nuisance test survives!
  - must be substantial *and* unreasonable interference (paras 18 – 21)
  - reasonableness always considered, even in the face of "material" harm (paras 46 – 51)

- Balancing not limited to four factors (from *Mandrake*); there is no checklist! (para 26)
  - Further, all four factors need not be explicitly addressed (para 54)

Takeaways from the *Antrim* Decision

- Everyone must put up with a certain amount of "temporary" disruption for "essential" construction (para 41)
  - Room for further debate on these terms?

- Character of neighbourhood may be "highly relevant", especially in "urban core" (para 43)

- Reasonableness test must focus on the reasonableness of the interference, not the reasonableness of the public work (paras 28, 56)

Attributes of Antrim

- Two-part test survives! Can't do away with reasonableness analysis

- Yes! There ought to be a factual-laden inquiry. This what balancing is all about

- Give deference is given to the decision-maker reviewing the evidence

Issues with Antrim

- Danger of being *cherry-picked* by Courts

- Does Antrim really change anything in BC?

  - Possibly; interference of works exceeds what is necessary to achieve the purpose of the works and, therefore, not protected by defence of statutory authority?

Mackay vs. BC, 2013 BCSC 945

- Antrim cherry-picked?
- Petitioner claimed that requirements to undertake heritage works on its property constituted nuisance
- Court agreed and cited Antrim heavily

Mackay vs. BC, 2013 BCSC 945

- But wait... was there even a “nuisance”?
  - No adjoining landowner interfering with one’s use and enjoyment
  - Works were simply a regulatory requirement for redevelopment
  - If this case stands, then nuisance is expanding (and becoming more of a nuisance)

Gichuru v. York, 2013 BCCA 203

- Private nuisance claim
- Judge erred by failing to apply appropriate test – i.e. consider whether interference was substantial
- Appeal dismissed
- Importance of a two-part test affirmed, but no need to explicitly set out the test
- Semantics will not get in the way of a well-reasoned decision based on the facts (para 23)

Case Study

The “Coffee Shop”

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Antrim Truck Centre Ltd. v. Ontario (Transportation), 2013 SCC 13

[2] The main question on appeal is this: How should we decide whether an interference with the private use and enjoyment of land is unreasonable when it results from construction which serves an important public purpose?

The answer, as I see it, is that the reasonableness of the interference must be determined by balancing the competing interests, as it is in all other cases of private nuisance.

The balance is appropriately struck by answering the question whether, in all of the circumstances, the individual claimant has shouldered a greater share of the burden of construction than it would be reasonable to expect individuals to bear without compensation.

The Balance

"The balance is appropriately struck by answering the question <u>whether, in all of the circumstances, the individual claimant has shouldered a greater share of the burden of construction</u> than it would be reasonable to expect individuals to bear <u>without compensation</u>."

The Balance (cont'd)

What Does This Mean in Practical Terms?

- Disproportionate share of the "burden of construction"
- That share is "unreasonable" – if compensation is not paid
- *There can (and will) be situations where an individual must shoulder a greater share of the burden of construction, without compensation.*

The “Easy” Cases

- Some situations are well known as potential sources of compensation claims where no land is taken:
  - *Construction resulting in the claimant’s property being at the end of a dead end road (Loiselle, 1962, Gerry’s Food Mart, 1992)*
  - *Construction of a median that alters access and negatively affects business (Larson, 1980, Jespersons, 1994)*
  - *Airport Hotel relegated to a secondary road, not obvious to visitors and not taken by normal airport traffic (Airport Realty Ltd., 2001)*

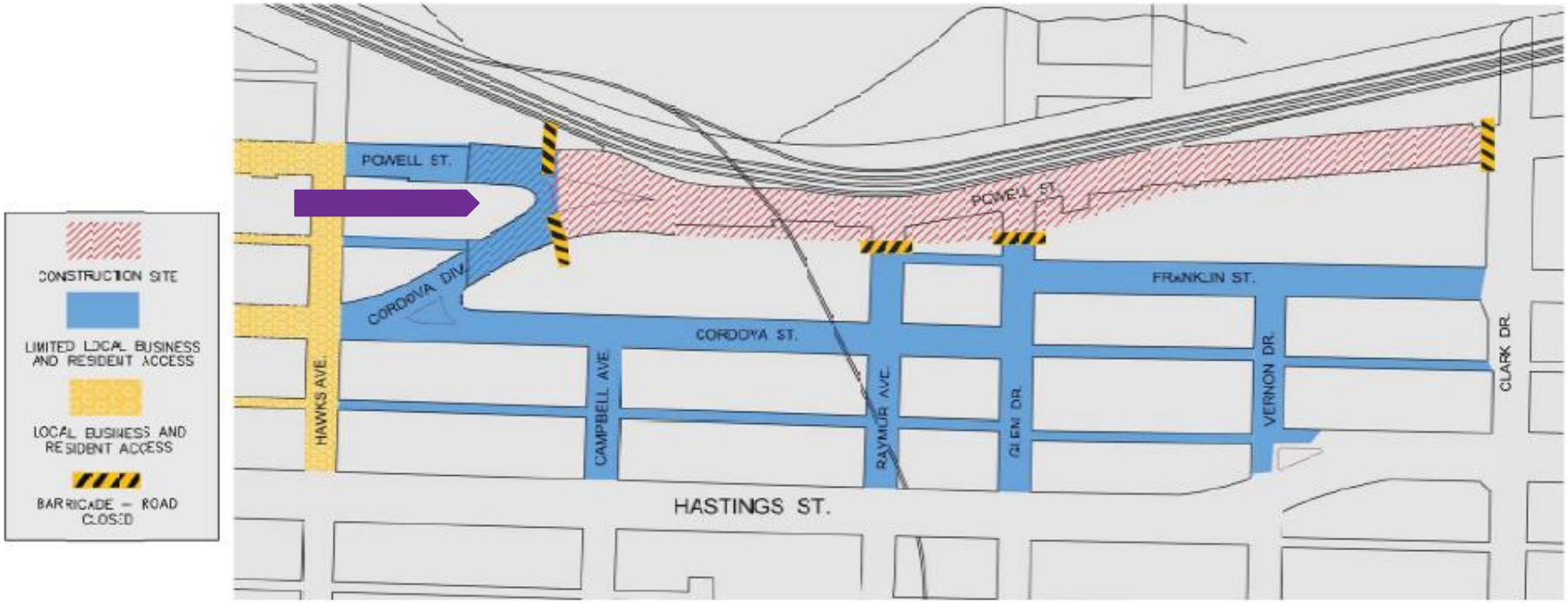
The “Easy” Cases (cont’d)

- There are some situations where we ***don’t*** expect injurious affection claims to be successful:
  - *Loss of prospect / view (St. Pierre, 1987)*
  - *Minor changes to visibility and access (Par Holdings, 1994)*
  - *Noise alone (Mandrake, 1993)*
  - *Temporary disruption - <u>short</u> duration (Andreae v. Selfridge, 1938 (U.K.))*

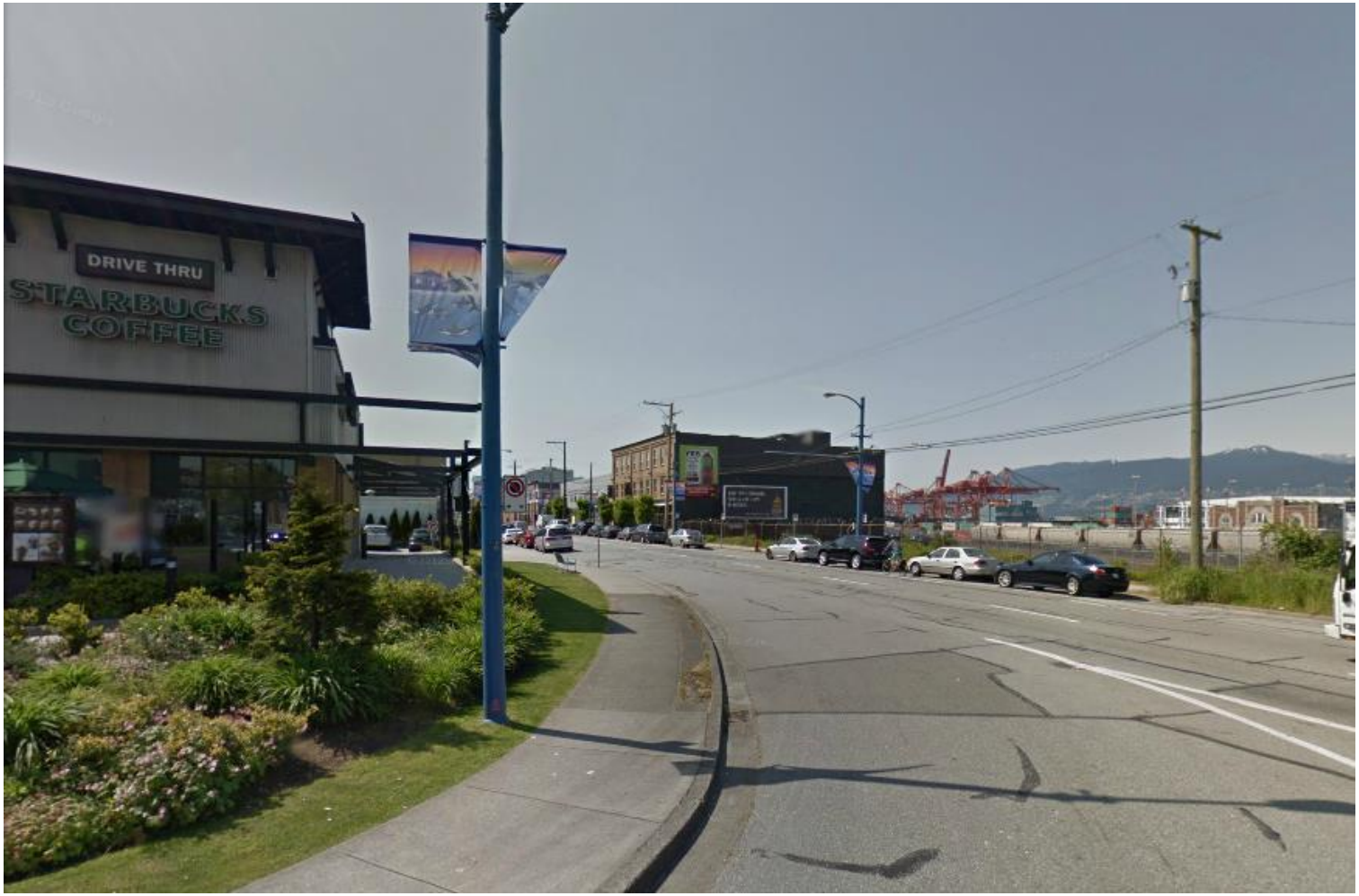
The “Hard” Cases

- Recent cases suggest that there are going to more situations where it is not so easy to determine whether the burden shouldered by the claimant is reasonable in the circumstances:
  - *Antrim – From the OMB to the Divisional Court to the Court of Appeal to the Supreme Court of Canada*
  - *Heyes – Claimant proved nuisance at trial, but Translink was able to establish the defence of statutory authority on appeal, on the basis that the nuisance was inevitable*

The Coffee Shop



The Coffee Shop



The Coffee Shop

- Essential Facts:
  - Traffic closed in both directions on Powell Street
  - Eastbound traffic still permitted on Cordova, but access to the general area will be “limited”
  - One business on the corner of Cordova and Powell is a drive through coffee shop. During a recent radio interview, they suggested that they have closed their drive-through for the duration of the works due to lack of vehicle traffic.
  - Access to the coffee shop has been maintained, with access from Cordova – but there is essentially no “good” westbound approach to this site.

The Coffee Shop – The Claimant's Perspective

- Is the interference suffered by the coffee shop unreasonable in all the circumstances?
- Factors to Consider:
  - Substantial loss of business – so much so that they are closing part of their business
  - "temporary" disruption – but a one-year closure is significant.
  - (Note that loss of market share is often used as a basis for claiming "irreparable harm" in the context of injunctions).

The Coffee Shop – The Claimant's Perspective

- The coffee market is sensitive, and there are many other options. This is not a "destination" store – it is unlikely that people will go out of their way to get there, especially if the drive through option is no longer available.

So?

Based on *Heyes* and *Antrim,* there might be a claim here – but it will be one of the "Hard Cases" – and the City can do a lot to reduce the potential for a significant claim (or any claim at all, for that matter)

The Coffee Shop – The Authority's Perspective

- What authority is conducting the works?
- Presumption of Statutory Authority. So, claimant needs to first show that interference exceeds what was reasonably necessary to achieve the purpose of the works...
- If defence not available, then proceed to analysis based on the facts...
- Substantial interference means more than trivial... so, possibly

The Coffee Shop – The Authority's Perspective

- Reasonableness of the interference...
  - Character of neighbourhood?
    - Downtown urban core
    - Commercial nature of area
  - Sensitivity of Claimant?
    - Access maintained
    - How much pedestrian business? Need to better understand the financial losses - ***the "devil" is in the details***
    - Are they adaptable / how have they "mitigated" the interference?

The Coffee Shop – The Authority's Perspective

- Reasonableness of the interference...
  - Utility of the works?
    - Necessary?
    - Essential?
  - Is the harm disproportionate to this individual business?

The Coffee Shop – Other Issues

- The Landlord's claim is different – in a way, the Landlord "succeeds" if the tenant fails

- Betterment?

The Coffee Shop

What do you think?

Should the tenant be entitled to damages in nuisance for this disruption to their business?

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Thank You!