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HOT TOPICS & CASELAW UPDATE

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I. INTRODUCTION

The year 2015 has seen developments in many areas of interest to local governments, both in the courts and in the realm of shifting legislation and policy. This paper provides a brief overview of two of the former and two of the latter, covering suggested practices in the swiftly expanding world of drone use, identifying a potential shift in the balance of power between road authorities and federal railway companies, confirming the applicability of the framework of the *Adams* case when it comes to challenges with the homeless, and taking a deferential approach to the selection of the P3 model for government project delivery.

II. HOT TOPIC #1: REGULATION AND USE OF DRONES

Although the use of unmanned aerial vehicles, or "drones", has yet to become the subject of caselaw, a recent explosion in popularity, availability, ease of use and lowering of price point has brought these flying objects swiftly to the forefront of regulatory attention. Local governments will be interested in both the potential pitfalls surrounding use of drones, either for municipal purposes or by the public within municipal boundaries, and the potential pitfalls associated with their use.

Potential applications for the use of drones by local governments include bylaw enforcement, tourism promotional campaigns, surveying and mapping, research and security. In addition to complying with federal aircraft regulations, local governments hoping to employ drone technology must consider issues related to Criminal Code requirements, negligence, nuisance/trespass, privacy, and criminal harassment.

A. Current Regulatory Landscape

Rather than "drone", Canadian statutes variously use the terms Unmanned Air Vehicle (UAV), Unmanned Air System (UAS), Remote Piloted Aircraft Systems (RPAS), and Model Aircraft. A drone is considered an aircraft, although one designed to fly without a human operator on board, and therefore will be subject to the requirements of the *Aeronautics Act* and the *Canadian Aviation Regulations*. Federal Parliament has exclusive jurisdiction to directly regulate aeronautics, but local governments may still find themselves in a position to address the effects of drone use through land use issues; for example, in *Lake Country (District) v. Kelowna Ogopogo Radio Controllers Association*, 2014 BCCA 189, the defendant club leased three hectares of ALR land upon which was located an unpaved airstrip used for the taking off and landing of model aircraft. All model aircraft operated by the club, its members and visitors weighed less than 35 kilograms. Upon appeal, this was deemed permissible ancillary use of the ALR land.

"Model aircraft", defined as an aircraft weighing less than 35 kg that is mechanically driven or launched into flight for recreational purposes, and that is not designed to carry persons or other living creatures, are specifically excluded from the definition of "aircraft" by the Regulations and therefore are not subject to many of the requirements of the Regulations and the *Aeronautics Act*. Somewhat incongruously, under the current use-based definition, a model aircraft may become an aircraft mid-flight if the type of use changes from recreational to commercial or other.

Currently, the only requirement that directly applies to model aircraft provides that "no person shall fly a model aircraft […] into clouds or in a manner that is or is likely to be hazardous to aviation safety". UAVs, on the other hand, require a special flight operation certificate (SFOC) under the Regulations before being permitted to fly. Further, since UAVs come under the definition of "aircraft", the more general and extremely stringent safety regulations put in place to govern the operation of passenger airplanes will apply. Failure to obtain or operate pursuant to the conditions established in a SFOC, or failure to comply with the general aircraft operating and flight rules set out in the Regulations could lead to administrative monetary penalties or summary conviction leading to fines or imprisonment.

In November 2014, the Minister of Transport issued two exemptions to exempt certain UAV operations from specific requirements of the Regulations. One exemption addresses UAVs that are 2 Kg or less and requires that such operators must comply with 37 safety conditions. The second exemption addresses UAVs greater than 2 Kg up to and including 25 Kg. In order to qualify for the exemptions, certain conditions must be met: for example, the operator must be at least 18 years of age and have attended a pilot ground school program. Exempt UAVs require $100,000 in liability insurance, and must follow other rules such as yielding the right of way to manned aircraft and maintaining a direct line of sight with the operator. These exemptions are a temporary measure; Transport Canada is currently in the process of overhauling the regulatory regime which applies to drones, with dedicated legislation expected to be enacted in 2016.

Section 623.65(d) of the Regulations requires that an application for a SFOC must be received by the appropriate Regional Transport Canada General Aviation Office at least 20 working days prior to the date of the proposed operation, unless Transport Canada agrees to a shorter notice period. A SFOC may be issued to authorize an UAV to operate for any civil purpose, including or surveillance.[1] Although SFOCs are intended to be flight specific short-term authorizations issued on a case-by-case basis, long-term or blanket authorities can be granted in certain circumstances where the SFOCs are being issued to organizations with an established history of previously approved SFOCs. The blanket SFOC approvals may be permitted for a specific geographical area, or for a defined time period, for example up to a year, if the site and mission requirements are identical for each flight. This is generally how SFOCs are granted to law enforcement, who would utilize the UAV on an on-demand basis (e.g. for crime scenes that are

[1] https://www.priv.gc.ca/information/research-recherche/2013/drones_201303_e.asp#heading-003-2

sectioned off or traffic accidents). Blanket SFOC's may be attractive to local governments which wish to conduct extended operations such as surveying for a new zoning bylaw, or surveillance to enforce regulatory bylaws.

There are restrictions on the use of UAVs over urban areas. Certain key conditions apply to all operations under a SFOC, one of which requires that the operator only fly the UAV "over areas that would permit a safe landing on the surface without hazard to persons or property in the event of any emergency requiring immediate descent." Potential additional conditions which may be attached to a SFOC authorization include prohibitions on operating the UAV over or within a built-up area of a city or town, or within a certain distance of any built-up area of a city or town; or a restriction on operating near noise sensitive areas, such as churches, hospitals, parks and schools.

B. Negligence

Bodily injury or property damage by a drone could potentially lead to negligence claims. This could be caused by unsafe flying, such as failure to observe the minimum clearance distances from people or objects, or by drone malfunction, which is a legitimate concern given that a homemade or commercially available jammer intended to block cellphone signals could also lead to a loss of control over a drone and resulting damage.

A particular safety issue with the flying of drones is the potential for negative interactions with aerodromes. Although there are about 250 registered airports and a total of about 2,500 registered aerodromes, unregistered and temporary-use aerodromes such as helicopter pads, floatplane and ski-plane operations are not included, bringing the total number up to about 6,500 aerodromes which by virtue of their use for aircraft fall under federal regulatory jurisdiction.

C. Nuisance and Trespass

The tort of nuisance protects the common law right to quiet enjoyment of one's property, while both the common law and legislation protect against trespass, with or without proof of actual damages. Use of a drone over another's person's property is likely to constitute trespass if the flight is low enough to interfere with use of property, and in such cases may also constitute a nuisance.[2]

The question of trespass is entwined with privacy concerns. Canada has adopted standards allowing flights to within 1,000 feet over urban areas and 500 feet over rural. Flights under 500 feet may or may not be considered trespass under a private right of action. The question of trespass will depend on the intended flight patterns, and the purpose of the flights.

[2] *Lord Bernstein of Leigh v. Skyviews & Gen. Ltd*., [1977] 2 All E.R. 902; Didow v. Alberta Power Limited, 1988 ABCA 257

D. Privacy Issues

Privacy concerns associated with drone use, *per se*, are not regulated by Transport Canada. When assessing whether a breach of privacy has occurred, the test is not what the air regulations provide, but rather whether the accused's reasonable expectation of privacy is breached. In assessing the reasonableness of a claimed privacy interest, the "totality of the circumstances" must be considered.

From jurisprudence regarding other types of surveillance, when the surveillance involves technology, factors to be considered include:

- Subject matter of the aerial surveillance;
- The technology user's direct interest in the subject matter of the surveillance;
- The observed individual's subjective expectation of privacy; and
- Whether an objectively reasonable expectation of privacy existed.

The final factor is determined after an analysis of:

- The place where the alleged search occurred;
- Whether the subject matter was on public view;
- Whether the subject matter had been abandoned;
- Whether the information was already in the possession of third parties;
- Whether the technique was intrusive in relation to the privacy interest;
- Whether the use of surveillance technology itself was objectively unreasonable; and
- Whether the surveillance technology exposed any intimate details of the observed individual's lifestyle or part of his core biographical data. [3]

Although these factors have not yet been considered in light of UAV flights, in a case where aerial footage taken through a zoom lens at 1,000 feet was used to pinpoint a marijuana grow operation, the defendant was found to have had no reasonable expectation of privacy, given that the accused could not reasonably have expected that aircraft would not be flying at that height.[4]

[3] *R. v. Tessling*, [2004] S.C.C 67
[4] *R. v. Kwiatkowski*, [2010] B.C.J. No. 428; see also *R. v. Cook*, [1999] A.J. No. 527.

The British Columbia *Privacy Act* also creates the tort of violation of privacy without proof of damage, and states that privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass. The use of a portrait of another identified or identifiable individual for advertising or promotional purposes is also a separate tort under the *Privacy Act*. Care must be taken to avoid inadvertent use of UAV-collected footage for legitimate purposes which nevertheless run afoul of privacy legislation.

Recent news stories highlight the privacy and safety gaps in the current regulatory regime. During one of the driest summers in recent memory, drones have twice grounded British Columbia firefighting crews by flying too close to wildfires. In response, Transport Canada has added a new regulation preventing drones from flying closer than 9 km from forest fires, airports, heliports, aerodromes, or built-up areas.

Privacy concerns have also been substantiated, as exemplified by a recent report of a drone spying on a topless sunbather on her balcony in Vancouver. Where UAVs are used for commercial aims, their use would be covered by the *Personal Information Protection Electronic Documents Act* (PIPEDA), and subject to the same restrictions as any other data collection practice. However, where the use is private, murky "expectation of privacy" standards may prove an insufficient deterrent to prevent these types of inappropriate uses.

Further complicating drone regulation, the federal government's authority to regulate low altitude drone flight may not be exclusive. Low altitude flights by aircraft over private property can interfere with property rights and may leave an avenue for municipalities to regulate drone operation. Legal space for provincial or municipal regulation will change the political equation.

III. HOT TOPIC #2: FEDERAL RAILWAY CROSSING UPGRADE COSTS

Many BC municipalities have federal railway lines passing through their jurisdictions. Although these railways were often pivotal to the early development of settlements, in modern times the conflicts between these often hazardous rail transportation corridors and use by pedestrians, motorists, cyclists and nearby residents and businesses within hearing range can pose significant challenges.

Subsection 101(4) of the *Canada Transportation Act* provides that section 16 of the *Railway Safety Act*, R.S.C., 1985, c. 32 (4th Supp.) ("RSA") applies if parties are unsuccessful in negotiating an agreement relating to the apportionment of the cost of constructing or maintaining the road crossing. In cases where the parties involved cannot agree on the apportionment of the liability to meet the construction, alteration, operational or maintenance costs for the road crossing, the provisions of section 16 of the RSA enable a person who stands to benefit from the completion of the work to refer the matter to the Agency for a determination.

For many years, when it came to who would foot the bill for safety-related crossing upgrades, railways often found themselves with the upper hand in such negotiations due to the principle of seniority, which dictated that the party who came second to the crossing (often, especially in the case of federal railway lines, the municipality) was solely responsible for the costs of crossing construction, maintenance and upgrades, and the corresponding principle that the party benefitting from the work ought to pay for it. Most often, it is the demands of municipal traffic increases which necessitate changes to road crossings, rather than alterations in the needs of the railway companies. Local governments also often come under significant pressure from residents to upgrade safety standards so as to prevent the need for train whistling, which is disruptive in residential areas. In cases where there was a clear and obvious benefit to the rail line, the railway company might contribute a small percentage toward crossing construction, but municipalities were most often left with the majority of the expenses. In striking agreements to facilitate such crossing construction – most often in the form of statutory right of way agreements – many municipalities also agreed to shoulder the cost of future reconstruction based on the presumption that seniority will continue to govern.

Among other amendments, subsection 16(4.1) was added to the RSA and came into force on April 1, 2013. It states:

> However, if a grant has been made under section 12 in respect of the railway work, and the proponent of the railway work, or any beneficiary of it, is a road authority, the maximum amount of the construction and alteration costs of the railway work that the Agency may, under subsection (4), apportion to the road authority is 12.5% of those costs or, if a higher percentage is prescribed, that higher percentage.

This new subsection limits the costs that the Agency may apportion to a road authority in a case where Transport Canada has agreed to grant funding. Critically, the Agency will only have jurisdiction to apportion costs under subsection 101(4) of the CTA where no existing agreement is in place which apportions these costs, even where such an agreement was made prior to the coming into force of subsection 16(4.1). In one decision, the Agency wrote that the very fact that Transport Canada had agreed to grant funding to upgrade a crossing led to a presumption that there were serious safety issues, beyond a mere whistling exemption, at the crossing.[5] This shift in responsibility for cost allocation appears to reflect a recognition that despite their protestations, railways as well as road authorities stand to benefit from improved safety at crossings.

In negotiating or renewing crossing agreements where the possibility of federal funding exists, local governments are advised to keep subsection 16(4.1) in mind and not blindly assume financial responsibility for crossing installations or upgrades that might be shifted largely to railway companies under the new legislation.

[5] Canada Transportation Agency Decision No. 62-R-2001, made February 13, 2001.

IV. CASE LAW UPDATE

A. Local Governments and Homeless Encampments - Abbotsford v. Shantz, 2015 BCSC 1909

The BC Supreme Court's decision in *Abbotsford v. Shantz* was released October 21, 2015, following a 23 day trial. The case was notable for Abbotsford's actions in spreading chicken manure at one of the homeless encampments and competing claims for damages. The claims for damages were dismissed as were the more expansive claims of the BC/Yukon Association of Drug War Survivors ("DWS"). At the end, does the decision of Chief Justice Hinkson advance the rights of homeless persons occupying municipal property beyond the rights granted under the decision in *Victoria (City) v. Adams*, 2008 BCSC 1263; affirmed 2009 BCCA 563?

The Court of Appeal in *Adams* framed the issue narrowly as follows:

> When homeless people are not prohibited from sleeping in public parks, and the number of homeless people exceeds the number of available shelter beds, does a bylaw that prohibits homeless people from erecting any form of temporary overhead shelter at night – including tents, tarps attached to trees, boxes or other structures – violate their constitutional rights to life, liberty and security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms*?

The Court of Appeal affirmed the Supreme Court's answer that a prohibition on the erection of temporary shelter in those circumstances was a violation of the section 7 Charter right of security of the person and confirmed the granting of a declaration that homeless people had a right to sleep overnight in parks and to cover themselves with temporary overhead shelter.

In *Abbotsford v. Shantz* the DWS argued that, at a constitutional minimum, the City's homeless had a right to obtain the necessities of life, including the following:

- Warmth and adequate protection from the elements, including Survival Shelter;
- Rest and sleep;
- Community and family connection;
- Effective access to safe living spaces;
- Freedom from physical, mental and psychological health risks and effects of exposure to the elements, sleep deprivation, chronic threatened or actual displacement and the isolation and vulnerability related to such displacement.

The Court rejected the position that the right to obtain the necessities of life was a "foundational principle" underlying the s. 7 guarantee of life, liberty and security of the person. The focus of the Court then turned to where there was a deprivation of life, liberty or security of the person caused by state (Abbotsford's) action and whether any such deprivation was contrary to the principles of fundamental justice. Consistent with the outcome in *Victoria v. Adams*, the liberty interest under s. 7 was found to be engaged by Abbotsford's bylaws that interfered with the fundamentally important personal decision to shelter one's self in circumstances where there is no practical alternative shelter.

The s. 7 analysis required the Court to go further and consider whether the objective of the law is met without the law suffering from arbitrariness, overbreadth or gross disproportionality. On this part of the analysis the City achieved a small victory in persuading the Court the impugned bylaws were not arbitrary. Some deference to council on the need to balance competing rights was shown in the following passage:

> [197] Although public property is held in trust for the public, the right to access and use public spaces is not absolute. Governments may manage and regulate public spaces, provided that such regulation is reasonable and accords with constitutional requirements. Reasonableness must be assessed in light of the public purpose described.
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> [198] I reject the submission of DWS that there is no rational connection between holding parks land for the pleasure, recreation or community use of all of the City's citizens and absolute evictions of the City's homeless from any City land. While the City's homeless are part of the citizenry, for whom the City holds its parks property, they are not the only citizens entitled to the use of that property. I find that the City must be permitted to balance the needs of all of its parks users.

The Court, however, found against the City on the questions of overbreadth and gross disproportionality. On overbreadth, the Court's reasoning was brief; the bylaws' denial of the homeless right of overnight access to public spaces without permits and preventing them from erecting temporary shelters without permits was simply stated to be overbroad.

To effectively explain the result here one has to draw on the Court of Appeal's reasons in *Victoria v. Adams*. There the Court found Victoria's prohibition on shelters overbroad because it was in effect at all times, in all public places in the City. The Court reasoned that a number of less restrictive alternatives could further the City's concerns relating to preservation of urban parks, such as requiring any overhead protection to be taken away every morning, as well as prohibiting sleeping in "sensitive park regions."

Presumably the prospect of obtaining a discretionary permit allowing the erection of a tent in one of Abbotsford's parks at a cost of $10 per night was considered to be an overly broad restriction, although the Court did not say so expressly. This would appear to be the case judging from the Court's reasoning on the question of gross disproportionality.

Gross disproportionality was described as a state action or legislative response that was so extreme as to be disproportionate to any legitimate government interest. The focus of the Court on this question was the negative impact on the homeless of enforcement of the bylaws through various "displacement tactics". The Court held that the continual displacement of the City's homeless caused them impaired sleep and serious psychological pain and stress that created a risk to their health. However, in the immediately following paragraph the Court emphasized the need for balance:

> [220] The sustainable use of publicly owned property requires that there be some constraints on the way in which it is used. The evidence establishes that activities of people camping in City parks can and has caused damage to that property, with the consequences being shifted onto the City and ultimately taxpayers. In these circumstances, it cannot be said that the impugned Bylaws bear no relation to their objectives.

This was not sufficient to save the bylaws as the Chief Justice was not satisfied that the discretionary procedure for granting of permits for overnight camping in parks represented an effective "safety valve" from the grossly disproportionate effects of the bylaws.

Central to this conclusion was the Court's earlier finding that due to their various personal circumstances the shelter spaces that were presently available were impractical for many of the homeless. This impracticality arose from an inability to abide by the rules of many of the available shelters and a lack of means to pay the rents at others. On that basis the Court was satisfied that there was insufficient shelter space available to house all of the City's available homeless. The practical result is that it will be very difficult for a local government in a similar situation to argue that overnight camping in parks is unnecessary simply on the basis that the count of available beds in various forms of shelters exceeds the number of homeless at any given time.

The Court rejected the DWS' claims for declarations based on alleged breaches of the homeless' freedom of assembly and freedom of association rights under the Charter, as well as rejecting the broad declaration sought with respect to the alleged right to the "basic necessities of life"; the latter not being a burden that fell on the City to discharge (if such an obligation existed).

A reasonable balance between the rights of the homeless and the rights of other residents of the City was said to be in allowing the homeless to set up shelters overnight but requiring them to be taken down in the day. Chief Justice Hinkson rejected the DWS' claim for an order designating specific lands that could be used for overnight camping. While it was said that such designation might provide a degree of certainty to both the homeless and the City, the Court

considered that any such designation was up to the City as a matter of legislative choice. In all likelihood this decision was influenced by the evidence the Gladys Avenue camp had seen the accumulation of hundreds of syringes in a matter of days along with human feces, rotting garbage throughout the encampment, the presence of rats and violence and criminal activity. The Court nevertheless suggested criteria that might govern the City in designating parks or other public spaces for overnight camping.

In the final result a declaration was granted that overnight sleeping in the City's public spaces and the erection of temporary shelters was permitted between the hours of 7:00 p.m. and 9:00 a.m. the following day.

There are two distinguishing features between the Court's order in *Shantz* and the Victoria situation. Following the Court of Appeal's decision in *Adams,* Victoria amended its Parks Regulation Bylaw to require that any temporary shelter be removed between 7:00 p.m. and 7:00 a.m. the following day. The amendment was upheld as a reasonable limit in *Johnston v. Victoria*, 2010 BCSC 1707. There was no discussion in the *Shantz* decision as to why the Court set a 9:00 a.m. removal deadline in its order, when 7:00 a.m. had been found to be reasonable in the *Johnston* case.

In *Adams* the appeal court included a proviso that the declaration permitting the erection of temporary overnight shelter in parks could be terminated upon the Court being satisfied that the bylaw no longer violated s. 7 of the Charter because the essential condition that led to the bylaw being unconstitutional – the lack of adequate shelter beds or appropriate designated areas outside parks to accommodate the homeless – ceased to exist. No similar provision for terminating the declaration was included in the *Shantz* declaration.

Although the decision in *Abbotsford v. Shantz* is complicated by the additional Charter grounds that were argued and the evidence of actions by City employees that the Court characterized as disgraceful or could not be condoned by the Court, the ultimate resolution was, for the most part, a predictable application of the principles laid down in the *Adams* case. For this reason, it is likely that the decision would withstand any appeal. Local governments therefore have to plan on accommodating the needs of the homeless for temporary shelter in public spaces until such time as there is sufficient housing available to meet the disparate needs of the homeless community.

B. Canada Line Nuisance Revisited – Gautam v. Canada Line Rapid Transit, 2015 BCSC 2038

In *Heyes Inc. v. South Coast BC Transportation Authority*, 2011 BCCA 77 the defence of statutory authority was applied to bar a claim for nuisance by an owner who had been awarded $600,000 at trial for business losses sustained as a result of the construction of the Canada Line along Cambie Street in Vancouver. The defence of statutory authority requires a defendant to establish that it was acting under a statutory authority and that the interference complained of was the inevitable result of that authorized activity. In *Heyes* the Appeal Court ruled that the

trial judge had erred in concluding that bored tunnel construction was a viable alternative to the cut and cover method of construction that was actually utilized along the Cambie Village corridor. The cut and cover method of construction was found to have been the only practically feasible option in that the bored tunnel method would have required more than half a billion dollars more in public funding and would have required the public sector to assume significant geotechnical risks, which were accepted as one of the biggest risks of a tunneling. Further, bored tunnel construction would have resulted in significant disruption at many locations, such that it could not be said it represented a non-nuisance alternative to cut and cover construction.

Despite the unfavourable backdrop of the *Heyes* decision, the plaintiffs in *Gautam* were allowed to proceed as a class action and seek the Court's determination of three common issues:

- Question A: Did the cut and cover tunnel construction of the Canada Line substantially interfere with the use and enjoyment of property by owners or by business proprietors on Cambie Street from 2nd Avenue to King Edward Avenue?

- Question B: If the answer to Question A is yes, was there statutory authority for the interference with the use and enjoyment of any property in Cambie Village, thereby absolving the defendants of any liability for economic loss resulting from nuisance?

- Question C: If the answer to Question B is yes, did the interference nonetheless result in injurious affection for which compensation may be claimed by any owner or tenant?

With respect to Question A, the answer would address only half of the nuisance test. Private nuisance consists of an interference with the use or enjoyment of a claimant's land that has two elements: first, the interference must be substantial; and, second, it must be unreasonable; *Antrim Truck Centre Ltd. v. Ontario (Transportation),* 2013 SCC 13. The Court in *Gautam* acknowledged that it would be left to the plaintiffs to attempt to prove in a subsequent hearing whether the cut and cover construction was an unreasonable interference.

On the question of substantial interference, the Court of Appeal in *Heyes* had upheld that part of the trial judge's decision that the impact of the construction had in fact been a substantial interference on the plaintiff's business. The defendants in *Gautam* conceded that the class plaintiffs had also suffered a substantial interference in the use of their properties. Justice Grauer rejected their further argument that the plaintiffs had failed to prove substantial interference to each member of the class. The Court was satisfied that the plaintiffs had proved a substantial interference that was shared by all class members. The severity of the impacts could be left for the later determination of whether the interference was unreasonable in any given case.

On Question B, the Court started by noting that the Appeal Court's determination in *Heyes* that the defendants were exercising a statutory authority when they selected the SNC-Lavalin cut and cover proposal was not open to challenge. However, the plaintiffs contended that there was evidence not before the court in *Heyes* that showed the incremental cost of bored tunnel construction was in the range of $34 million, not the $565 million accepted in *Heyes*.

Justice Grauer rejected the argument that a public sector comparator could be used to yield the mooted $34 million saving. It was significant that SNC had considered tunnel construction in-house but rejected it when it was clear it would not produce a cost saving, but instead would increase the cost. The judge accepted that it was reasonable for SNC not to have pursued the option further in terms of a more rigorous analysis that encompassed feasibility and risk as well as cost.

The evidence was that the Province was committed from the outset to the Canada Line being delivered as a P3 project and would not have considered a public sector alternative. The P3 model relied on the private proponent to create an engineering solution that delivered the best value. That turned out to be the SNC proposal, utilizing cut and cover construction for the Cambie Corridor. The evidence was that an amendment to substitute bored tunnel construction would have threatened the integrity of the competitive process and the success of the whole project. The Court accepted that to take this risk would not have been practical.

The Court stressed that weighing the bored construction and the cut and cover options involved more than just an unacceptable cost increase. Part of the Province's consideration in opting for a P3 model was to transfer risk to the private sector. The evidence was that tunnelling posed a greater risk with the prospect of a tunnel boring machine becoming stuck and breaking down, with consequent delay. This was not a risk that the successful proponent was prepared to take on, particularly with a deadline to deliver the project for the 2010 Olympics. On the other hand, the unsuccessful proponent that would have employed bored tunnel construction sought to share the geotechnical risk, leaving Translink significantly exposed.

Finally, the Court rejected the plaintiffs' argument that the defendants failed on the inevitability issue because they could not establish that it was impossible to carry out the cut and cover construction in accordance with the original optimistic schedule of each block only taking three months, which would have resulted in less interference. The delay was occasioned by the need to go from pre-cast to pour-in-place construction. It was not a matter of choice but rather the adoption of the only feasible method of construction, with a resultant inevitability of interference.

The Court thus answered Question B affirmatively, finding that there was no practical alternative to the cut and cover construction method employed, satisfying the 'inevitability" component of the statutory authority defence.

With respect to Question C the Court started with a review of the well-known four part test to establish injurious affection liability. The first two elements – whether the damage resulted from an act rendered lawful by statutory powers and whether the damage would have been actionable under the common law but for the statutory authority – had been addressed affirmatively by the Court's answers to Questions A and B. The third element of the test requires that the damage be an injury to the land itself and not a personal injury or an injury to business or trade. For the *Gautam* class claimants that gave rise to these issues:

> Does it encompass a temporary injury, and in the circumstances of this case, is it available to tenants as well as landlords?

The Court decided that due to the way Question C was framed – whether injurious affection had resulted for which compensation may be claimed – it was not necessary for the claimants to show that every claimant had suffered a loss. It was sufficient to demonstrate the ability to assert the claim.

The law in Canada had not yet been settled on the question of whether a temporary impairment of rental values or the type allegedly sustained for Cambie Village properties was compensable, but the law in the UK favoured compensation. Justice Grauer decided that he would follow the principle favouring recognition of a right to compensation for loss in temporary rental value in the absence of any guiding Canadian authority that denied compensation. He decided that while it may be more difficult for a tenant to make out a claim for injurious affection than a landlord that should not preclude a tenant from being able to advance such a claim. Further, the fact that land values in the area appeared to have been enhanced by the presence of the Canada Line whose construction led to the alleged diminution in value was a factor that would "presumably" be taken into account at the later hearing in determining whether the interference was unreasonable or in the assessment of whether a compensable loss had occurred.

While the final chapter on the plaintiffs' claims has yet to be written the Court's treatment of the common issue questions is still important. The Court has expanded the scope of compensation for injurious affection to include claims by tenants and by landlords for temporary loss of rental value as a species of injury to land.

However, the more important aspect of the case is the decision that the model for delivery of an infrastructure project – such as the use of a P3 – is an important element in favouring a public authority in consideration of a defence of statutory authority. The Court in *Gautam* has indicated that deference should be accorded to public procurement choices in assessing whether interference with a claimant's use of property was inevitable. The other practical inevitability, recognized by Justice Grauer, is that his decision will be considered by the Court of Appeal.

NOTES