NUISANCE, NEGLIGENCE AND THE CANADA LINE

November 27, 2009

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I. INTRODUCTION

Local governments make decisions every day that have a direct effect on the profitability of people's lands. Fundamentally, local governments' role of regulating the structure of our communities, whether it be through zoning, parks dedication, engineering works, subdivision approvals, business licensing, etc. affects property rights, and costs people money. The Canada Line case, *Susan Heyes Inc. (c.o.b. Hazel and Co.) v. Vancouver City et al* 2009 BCSC 651 is a stark illustration of just how much money a local government service may cost a business owner, and tests the limits of our legal system and jurisprudence as to when such losses are compensable. The B.C. Supreme Court awarded Ms. Heyes $600,000 in lost business income as a result of the cut and cover method of construction of the Canada Line running outside of her business on Cambie Street in the City of Vancouver. Other business owners are currently seeking to certify a class action suit to seek their own business losses as a result of the same construction, and the combined business losses can be expected to be in the tens of millions.

In *Heyes*, Ms. Heyes alleged many different bases for pursuing recovery of her business loss, including injurious affection, negligence, negligent misrepresentation and nuisance. The claims in injurious affection, negligent misrepresentation and negligence were not upheld. However, her claim in nuisance was allowed, and has opened the door to an application of the tort of nuisance to deal with regulatory decision-making which has the potential to be far more significant in its effects on regulatory decision-making than the prospect of judicial review for acting outside of one's jurisdiction, or even negligence. The case is currently under appeal and set to be heard at the B.C. Court of Appeal in April 2010. The class certification was heard by the same judge that heard the *Heyes* action, and judgment has been reserved.

Appendix A to this paper provides a more detailed discussion of the facts in *Heyes.* This case is a good opportunity for local government to review the fundamentals of liability in negligence and in nuisance. How is it that no fault could be found with respect to the decision to accept or adopt the method of construction or the Canada Line itself, and yet business losses are payable?

II. NEGLIGENCE

Many people have an intuitive understanding of the meaning of the term negligence. Legally, it requires an act that a reasonable person would know could cause harm to the person who was harmed. It is accidental harm as opposed to intentional harm, and in many cases people act knowing that there is a risk but no harm is done. However, when our actions that have the potential to injure a person or their property do in fact cause such a result, we may be liable for repairing that harm through an award of monetary damages. This is the fundamental compensatory purpose of the law of negligence.

However, simply acting where we know our actions may cause a risk of loss to another is not sufficient to establish liability in negligence. Many actions have this potential, and indeed, there are times where we act intentionally knowing that some person may gain and another person may lose as a result of our actions. So the courts have imposed limits on what types of conduct, and specifically what relationships between people, may give rise to liability in negligence. Frequently, this consideration is skipped in common discussions of negligence. This is because many cases in which negligence is applied are so common that we understand that the relationship is one that gives rise to liability. For example, it has been well established that a person driving their car has a sufficiently close relationship to other people on the road, such that failure to pay attention and drive cautiously may cause other people physical injury. In legal terms, this means that the driver of a car owes other people on the road a duty of care. Similarly, there are statutory duties of care imposed with respect to occupiers or owners of land, and local governments frequently encounter negligence issues in the context of the maintenance and design of their publicly owned facilities that are accessed by the public.

But while the duty of care analysis is frequently skipped over, and it is frequently presumed that a sufficient relationship exists between our actions and those we may eventually cause damage to, in the case of local governments, this question of the duty of care takes on particular importance in limiting the scope of liability for local government decisions. In a series of cases, the Supreme Court of Canada has found that local governments may be liable in negligence where a duty of care is established, but that in order to determine whether a duty of care exists, two criteria must be met:

1. a relationship of sufficient proximity; and

2. no policy considerations that would negate the imposition of the duty.

Prior to the Supreme Court of Canada decision in *Cooper v. Hobart*, 2001 3 SCR 537 the first question of proximity was a fairly low threshold to cross, and required only that the relationship was sufficiently close such that damage might be reasonably foreseeable. In many cases, with the benefit of hindsight, we find that damage that has occurred was reasonably foreseeable. In addition, this is very close to the test for finding a breach of the standard of care, or what is more commonly considered the negligence itself. However, after the *Cooper v. Hobart* case, this stage of the test took on new significance, as a limiting factor in the imposition of liability. Now the first question is whether the relationship is such that other similar relationships have already been recognized in tort law as giving rise to a duty of care. With respect to regulatory bodies, it also requires a consideration of whether the statutory framework for the decision or action contemplates liability in tort.

In the *Cooper v. Hobart* case, for example, the question was whether the Superintendent of Mortgage Brokers owed a duty of care to investors who invested significant amounts of money with an errant mortgage broker. The Superintendent, as regulator of mortgage brokers, had the power to suspend the mortgage broker, but did not do so until after many investors had lost a lot of money. The question was whether this type of regulatory decision-making could give rise to a duty of care to the investors. No duty of care was found for a number of reasons, including the

fact that this was a claim in pure economic loss where no person or property had been damaged, and the regulatory scheme under which the Superintendent operated did not contemplate that the Superintendent would be liable to investors who invested with the mortgage brokers that the Superintendent regulated. Liability in these circumstances would tend to make the Superintendent the insurer of investment losses, while the statutory scheme anticipated more of a purely regulatory role with the Superintendent of Mortgage Brokers only owing some duties of procedural fairness to the mortgage brokers that were regulated. Thus, one can see that, while public regulators make decisions that may cause significant losses to members of the public, the courts have excluded these regulations from the ambit of negligence liability in some cases through the duty of care analysis.

The second requirement for the imposition of a duty of care requires a consideration of policy factors. In the context of local government law, we frequently refer to this stage of the test as a consideration of whether the decision at issue was an "operational" or a "policy" decision. The courts have found that it would be inappropriate to impose liability in negligence on government decision-makers with respect to decisions of policy. Thus, it is frequently stated by courts that operational decisions may attract liability, but decisions that involve the balancing of numerous peoples' interests, or the balancing of financial considerations and resource considerations, should not be the subject of negligence claims.

It is for this reason that municipal lawyers frequently exhort clients to ensure that policies are in place with respect to high risk or liability areas, such as maintenance of roads and sidewalks, skate parks and playgrounds, etc. Where decisions can be squarely founded in a policy decision based on allocation of resources there is a much stronger chance that a duty of care in negligence can be avoided. However, where an operational decision that is not dictated by policy, or which departs from policy, results in physical damage, then the duty of care is established and local governments can be expected to be liable in the same way as private actors are.

Whether a decision is a "policy" decision or an "operational" decision can be the subject of considerable debate and argument in court. Many decisions will have elements of each, and the question may be better considered as one of degree.

Consider the following indicators:

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POLICY	·	**OPERATIONAL**
Decides what to do	vs	Decides how it is done
Considers effective use of resources, balances broad public interests		Uses budgeted resources
Adopted by elected representatives, senior staff		Made by lower level staff

In the *Heyes* case, no duty of care with respect to negligence was found. However, the decision is somewhat confusing in that the Court finds that the decision to authorize a cut and cover construction for the Canada Line was actually an operational decision. Nevertheless, the Court later appears to contradict this finding, stating (at para 123 and 124) "selection of a method of construction to be employed on any kind of project does not, of itself, create a duty of care;" and "negligent execution of the selected method could cause actual harm, but no negligence of that kind is alleged in this case."

In addition, the Court relies on the fact that there is no allegation of injury to person or property, and as such this is a case of pure economic loss or business loss which does not fit with any of the established categories of recovery in negligence. We note in this respect that negligent misrepresentation was rejected by the Court as a basis for compensation, on the basis that representations made earlier in the process that the project would be constructed by a bored tunnel, and that the cut and cover would be less disruptive than it eventually was, were made on the basis of information available at the time they were made. The Court finds that those representations were reasonable at the time they were made based on the information available.

The interesting aspect of this case is that, while the Court did not find liability in negligence, and indeed did not even find that a duty of care existed such that liability would flow from the relationship between the government and private actors involved in that case and the business, the Court found that recovery was available for pure economic losses pursuant to a claim in nuisance, despite the lawfulness and reasonableness of the decision, and despite its policy aspects. This finding, in our view, significantly opens the door on the scope of recovery in nuisance to policy and statutory decision-making where recovery has been limited by the courts for claims in negligence to date, and where no element of fault or carelessness is required.

III. NUISANCE

The elements of nuisance are fairly simply stated. In the *Heyes* case the Court followed the frequent definition also used in the B.C. Court of Appeal in *Sutherland et al v. Canada et al*:

> Nuisance may be either a private nuisance or a public nuisance. Linden, Canadian Tort Law, 6th ed. (Toronto: Butterworths, 1997) at p. 523, defines the former as "an unreasonable interference with the use and enjoyment of land by its occupier" and the latter as "an unreasonable interference with … the use and enjoyment of a public right to use and enjoy public rights of way."

Simply stated, nuisance requires an "unreasonable" interference with the use or enjoyment of land. The question as to whether the interference is reasonable or unreasonable is often the critical inquiry in a nuisance case. However, where the allegation is that the nuisance was caused by a government actor, or a party acting pursuant to statutory authority, additional defences arise with respect to the scope of the statutory authority, and whether the nuisance is the inevitable consequence of the statutory authority. Inherent in the cases that discuss the issue of nuisance, and in particular the *Heyes* case and the *Sutherland* case, is the question as to whether

a statutory decision may give rise to liability in nuisance where the statutory decision itself creates or authorizes the unreasonable interference with the use of land.

If a statutory decision itself is immune from nuisance liability, this would be more similar to the negligence line of cases which immunizes from tort liability policy decisions made within a government jurisdiction, regardless of whether that statutory decision was a mandatory one. Such an approach tends to immunize local governments in their policy-making roles from decisions specifically authorized by statute, provided the decision is lawful. However, an alternative understanding of the law of nuisance, and the one employed by the B.C. Supreme Court in the *Heyes* case, is that lower level discretionary regulatory decisions that create interferences in the use of land create an actionable nuisance, even if the decision itself is a reasonable one from a judicial review or administrative law perspective. Under that line of cases, unless a statute specifically mandates the interference in the use of land, essentially delegated decisions under statutory authority have no immunity.

A key question arises as to at what level of delegated authority the immunity arises. For example, the *Community Charter* directly authorizes municipalities to by bylaw regulate and prohibit in relation to the uses of highways pursuant to section 36 of the *Community Charter*. Pursuant to section 38, council may by resolution temporarily restrict or prohibit all or some types of traffic on a highway. Section 33 creates a system for compensation, but only where the elements of injurious affection are made out, and then only for property value loss (See Appendix B). However, *Heyes* raises the question as to whether delegated discretionary decisions made by resolution are not immune where the discretion may have been exercised to avoid the nuisance. For example, pursuant to section 38(2) council may by bylaw authorize a municipal employee to control traffic on a highway. Where an employee makes those decisions, as a delegated authority under section 38, the cases are currently unclear as to whether that employee is exercising a statutory authority and is therefore immune, or, if that employee acts within their authority but in such a way as to cause economic loss, the municipality may be liable in nuisance.

In the *Heyes* case, the Court adopted a much broader scope of liability under nuisance for local governments, and found liability for business losses and pure economic losses, where there was no damage or loss of value to property, and there was no negligence and no duty of care, and the conduct itself was within the jurisdiction of the statutory actor, i.e. it had already been found to be reasonable in judicial review proceedings. In this case and under this analysis, the only factors as to whether business losses are recoverable as a result of a statutory decision is the reasonableness of the interference, to be determined by a number of factors, including the character of the neighbourhood, the nature, severity and duration of the interference, and the social utility of the impugned conduct. In this case, because TransLink, and its subsidiary CLRT, saved 400 million dollars by opting to adopt the cut and cover method of construction, and this was found to be at the economic expense of businesses along the corridor, the Court found that this was not a reasonable interference with the business' use of land.

It should be noted that nuisance is a highly contextual claim, where the unreasonableness of the interference is key. In *Heyes*, the Court dismissed the nuisance action as against the City of

Vancouver, the Attorney General of British Columbia, and of Canada. The Court found that their involvement was not sufficiently connected to the construction of the Canada Line to create liability in nuisance. This seems to imply a type of proximity analysis similar to the negligence analysis. However, it is apparent why such an analysis might be required if the ambit of nuisance liability for government action is as broad as is contemplated in this case. With respect to the claim against Canada and the Attorney General of British Columbia, the Court found that neither party was a partner in the development, but was simply a funder. Therefore, it is presumed that they did not cause the disruption at issue. With respect to liability of the City, the City owned Cambie Street, and approved of and permitted the obstruction of the street for the construction and operation of the Canada Line. It was this obstruction that was the sole source of the business loss at issue in these proceedings. However, the Court excuses the City on two different bases. At paragraph 162, the Court appears to excuse the City from liability on the basis that the City has direct statutory power to regulate the use of streets, and this "may immunize the City from liability." The Court goes on to find that such immunity is not enjoyed by entities such as TransLink, or the private entities who constructed the Canada Line for commercial purposes, as opposed to general City purposes. The Court states that the City's regulation of traffic is not the issue in this project, but was "merely a function or outcome of the method of construction chosen by CLRT and TransLink and carried out by Intransit BC." The Court also, at paragraphs 172 and 173 finds that the City signed the Site Access Agreement for use of the City streets before it had sufficient involvement or knowledge of the specifics of the project. It is hard to understand how this would immunize the City, or how the Court could have found this, when many representatives of the City were directly on the board of TransLink at the time. Nevertheless, it would appear that the Court, although not articulating its reasons fully, considers that the City was a proper statutory actor acting more clearly under statutory authority than the now privately managed GVTA or the commercial decisions of the private partners.

IV. APPEAL IN-PROGRESS

In September 2009, TransLink, CLRT and InTransit BC filed an appeal with the BC Court of Appeal. The Appellants argue that the construction of the Canada Line was not in fact an actionable nuisance. In their factum, the Appellants say that the trial judge erred as follows:

1. the trial judge erred in determining that the defence of statutory authority was not established;

2. the trial judge erred in failing to recognize that Hazel & Co. has no cause of action in nuisance because it has no right to any particular volume or character of street traffic flow on Cambie Street; and

3. the trial judge erred in failing to give significant weight to the social utility of the Canada Line in his assessment of whether the disruption on Cambie Street constituted "unreasonable harm".

With respect to the statutory authority defence, the Appellants argue that statutory authority for the construction of the Canada Line arose from TransLink's December 1, 2004 resolution, the

environmental assessment certificate and the City's permits and approvals of all traffic disruptions required for the construction of the Canada Line. The December 1, 2004 TransLink resolution was passed pursuant to statutory authority under the *South Coast British Columbia Transportation Act*, and that resolution authorized one specific proposal, which included cut and cover construction. The Appellants argue that it was not appropriate for the Court to look beyond this resolution and inquire whether there were other projects TransLink might have authorized which might have caused the respondent less disruption. Further, the environmental assessment certificate was granted on June 8, 2005 after a thorough review process, which included review specifically of the cut and cover construction, including the kinds of economic losses complained of by the respondent. The Appellants argue that the EAC constitutes unambiguous statutory authorization to proceed with a method of construction that included those losses, and consequently they are not tortious. These impacts were also authorized by the City of Vancouver under the statutorily authorized Vancouver Access Agreement, in which the City agreed to provide TransLink and CLRT with access to Cambie Street for the purposes of the construction, and the City authorized TransLink and CLRT to make traffic changes to facilitate that construction.

Thus, the Appellants argue that any statutory decision, and not simply decisions that are mandated by statute, are subject to immunity from nuisance. The immunity arises where the injury or damage is the inevitable result of a statutory decision. The Appellants argue that delegated decision-making, including decisions by the City of Vancouver's departments to close portions of Cambie Street, and the GVTA's resolution to authorize cut and cover are statutory decisions which themselves are immune from liability in nuisance. In this respect, they rely on the case of *Sutherland v. YVR Airport Authority* in which the B.C. Court of Appeal stated that it is not the Court's role to reconsider policy decisions made by delegated public decision-makers. Rather, once a statutory decision in that respect has been made, nuisance is only available if there were ways in which to implement that delegated decision which would not have caused the damage. It may be that this issue will not be resolved until this case goes all the way to the Supreme Court of Canada.

The issue of delegated authority and immunity for statutory actors seems particularly problematic for P3 contracts where private actors are implementing publicly determined mandates. Under the traditional nuisance analysis, they may be liable in nuisance separate from the public body if they perform their publicly authorized work in a way that causes a nuisance that was not required by the scope of work or regulations regarding that work. However, as roles previously performed by public regulatory bodies are contracted to private, for-profit corporations, the Courts appear to be struggling with the immunity previously granted to perform these functions and are more reticent to recognize the private contractor as protected by the statutory regimes in place.

V. CONCLUSION

In conclusion, the *Heyes* case may beckon a new era where negligence liability is no longer the main consideration for local governments, and that business losses, recoverable through nuisance, without proof of fault or a duty of care, become a much greater concern. In addition, if

upheld, this decision will make the profitability of specific businesses a much greater factor in policy decisions by government actors than they have been in the past, as this case would suggest that public works that affect more profitable businesses will have a greater financial consequences on a local government than works that affect non-commercial properties or less profitable commercial operations. That may be an unintended consequence of the reasoning in this case, but if the reasoning is upheld by the Court of Appeal and ultimately the Supreme Court of Canada, considerations of liability in nuisance will have to play a much greater role in local government decision making.

APPENDIX A

Susan Heyes Inc. (c.o.b. Hazel & Co.) . Vancouver (City) **[2009] B.C.J. No. 1046**

Hazel & Co., which operated a maternity clothing store at 16th Avenue and Cambie Street in Vancouver, brought this action against the Crown, the City of Vancouver, South Coast British Columbia Transportation Authority ("TransLink"), Canada Line Rapid Transit ("CLRT") and InTransit BC for damages for negligent misrepresentation, negligence and nuisance in relation to the construction of the Canada Rapid Transit Line ("Canada Line") on Cambie Street in Vancouver. The Canada Line, which is now operational, provides rapid transit connecting downtown Vancouver, the City of Richmond, and the Vancouver International Airport. Each of the defendants was involved in the funding, planning, design, construction, operation, and maintenance of the Canada Line.

Hazel & Co. claimed that, before it renewed its lease and before it ordered or manufactured inventory, it relied on misrepresentations made in 2003 that the Canada Line would be constructed in the vicinity of its business by means of a bored tunnel that would not disturb the street surface. In January 2005, once it became clear that cut and cover construction would be used rather than bored tunnel construction, Hazel & Co. relied on further representations that open trench, cut and cover construction would last no more than three months in front of its premises. In fact, the vicinity of 16th Avenue and Cambie was affected by cut and cover construction and its related activities from the fall of 2005 until October 2008. In addition to these alleged misrepresentations, Hazel & Co. claimed that the defendants breached a duty of care and were negligent in choosing cut and cover construction for the line. Hazel & Co. further claimed that the cut and cover method of construction used in the vicinity of its business resulted in an actionable nuisance and caused economic loss.

The defendants denied that the method of construction caused a nuisance, but if it did, then it was a public nuisance in respect of which Hazel & Co. could not bring an action without the consent of the Attorney General. Alternatively, the defendants said that if any of them caused a private nuisance, rather than a public nuisance, they could not be liable because they carried out the project under statutory authority and any nuisance that arose was the inevitable consequence of undertaking the statutorily authorized construction of the Canada Line.

On May 27, 2009, the BC Supreme Court issued its decision, allowing the plaintiff's action in part. The court dismissed the misrepresentation and negligence claims, but found TransLink, CLRT and InTransit BC liable in nuisance, and awarded Hazel & Co. damages of $600,000 for the business loss occasioned by that nuisance.

The court dismissed the claims of misrepresentation and negligence against all of the defendants. The court found there was no evidence to support the plaintiff's allegation that the representations made in 2003 with respect to the method of tunnel construction were false or negligent. Further, the representations regarding the expected duration of open trench construction were based on reliable information as it existed in January 2005. The 2005

representation became inaccurate when conditions encountered in the course of construction necessitated change.

With respect to the claim of negligence, the court agreed that there *was* a sufficient relationship of proximity between the party responsible for the construction of the Canada Line and adjacent property owners or business operators to create a prima facie duty of care. It was readily foreseeable that a failure to exercise reasonable care in the construction of the Canada Line could cause harm to adjacent property owners or occupiers. However, the court found that only negligent execution of the selected method of construction could cause actionable harm in negligence, and no such negligence was alleged by the plaintiff. Furthermore, Hazel & Co. did not allege that any defendant caused harm or injury to any person or property. As a result, it could not claim that it incurred any economic loss as a result of harm or injury done to another.

With respect to the claim of nuisance, the court agreed that the cut and cover construction of the Canada Line tunnel substantially interfered with Hazel & Co.'s use and enjoyment of its premises. The extent of the interference was sufficiently unreasonable to constitute a nuisance. Access to Hazel & Co. was adversely affected by the cut and cover tunnel construction. Parking was eliminated on Cambie Street, and pedestrian crossing was restricted or curtailed. Customers who wanted to find their way to the store were required to find a way to travel to the vicinity of the store, find a place to park some distance away from the store, and make their way to the store on foot through what was an intensely disruptive construction area. As a result, Hazel & Co. experienced a considerable decrease in the number of its customers, had to reduce it staff, and saw its gross profits decline by 48 per cent.

The Court concluded that the nature, severity and duration of the impact on Hazel & Co. resulting from cut and cover construction outweighed the social or public utility associated with the creation of the Canada Line to a degree that warranted compensation for nuisance. Further, cut and cover construction was a *private* nuisance because it substantially and unreasonably interfered with Hazel & Co.'s use and enjoyment of its leased premises. While possible that it was the statutory power to regulate the use of streets did immunize the City of Vancouver from liability, that immunity was not enjoyed by TransLink, CLRT and InTransit BC, who were using City streets under licence for their own commercial purposes, as opposed to general City purposes. Also, as there was an alternative method of construction available that would *not* have caused a nuisance, the statutory authority defence failed in any event. The sole source of the nuisance was the method of construction employed by those responsible for the project. The nuisance emanated from the design plan selected by TransLink and CLRT, and carried out by InTransit BC. They were equally responsible for the nuisance they caused and were jointly and severally liable to Hazel & Co.

The Court found that Canada and the Attorney General merely contributed capital to assist in the creation of an undertaking for general public benefit. The claim in nuisance against each of them was dismissed. The court found that, while the City did own Cambie Street, it did not know, and could not have been reasonably expected to know, that its property would be used by TransLink, CLRT and InTransit BC in a manner that would cause a nuisance. For this reason, the claim in negligence against the City was also dismissed.

APPENDIX B

INJURIOUS AFFECTION

Classically, injurious affection involves the acquisition of part of a parcel of land from its owner by a public body where the market value of the remaining land is thereby reduced, or where the personal and business use of land is affected by the construction on or use of the acquired land, and the public body would be liable to those affected but for the statutory authority permitting the acquisition. In such cases, compensation may be recoverable by those affected.

According to *The Law of Expropriation* by George S. Challies, "compensation is recoverable not only for the value of land taken, but for consequential damage to other property." Such consequential damage is referred to as "injurious affection". Where a statute requires that compensation be paid to an owner for lands compulsorily taken, one element to be included in determining such compensation is the damage sustained by the owner due to injurious affection to his adjoining lands, caused by the taking.

However, a claim for injurious affection may also arise where no land is actually taken by a public body. Injurious affection where no land is taken refers to the right or ability of a landowner to claim compensation from a public body when that body constructs a public work or takes other steps which adversely affect the value of the landowner's property, but with respect to which no land is physically taken from the landowner. Compensation for injurious affection where no land is taken is referred to in section 41 of the British Columbia *Expropriation Act*.

The kinds of factual situations that have given rise to claims for injurious affection in the absence of a taking are quite broad in scope. Early cases often involved the lessened enjoyment or utility of property resulting from the construction of railway lines and the construction of works on riverbeds. Many of those early English cases involved alteration or elimination of access to highways or rivers, vibration, or other disturbances resulting from train traffic through residential or business neighbourhoods. The Canadian cases have involved interference with access or devaluation of property as a result of development of riverfront and dockage facilities and highway developments.

The leading cases dealing with the question of compensation for injurious affection in the absence of a taking are marked by a remarkable lack of unanimity and strong dissents on the part of the judges. Recently, however, the courts have been more willing to award compensation for injurious affection. This may be because public works being undertaken in Canada today, as opposed to public works being undertaken fifty years ago, are more infra-structural in nature and considered less necessary to ensure a basic standard of living for the population. Additionally, there is a higher proportion of the population owning property, as opposed to renting, so the stakes become higher when a public project interferes with the value of that land. As well, the current breadth of government generally and the protection given to public bodies from claims in nuisance, may be seen by the courts as insulating those public bodies excessively from claims for compensation when the activities of those bodies have substantially harmed landowners.

The concept of injurious affection with no taking has a direct and significant relationship to the common law of public nuisance. An appreciation of that connection helps to clarify and make understandable the precise nature of injurious affection when there is no taking. Where the broad ambit of statutory authority given to a public body makes a claim for damages for public nuisance on the part of a landowner impossible to maintain, the law of compensation for injurious affection in the absence of a taking has been used by the courts to "fill in the gaps" when obvious harm which the courts felt should be compensated has occurred.

The problem, of course, if claims for compensation for injurious affection with no taking are permitted, is where the line is to be drawn between those who will be awarded compensation and those who will not. Any particular public project could be fairly said to affect a very great number of persons adversely with respect to such questions of access, view, noise, and lowered values because of a change in the character of the neighbourhood. The early decisions attempted to resolve this difficulty by stating that only those persons who are particularly aggrieved (more in extent than their neighbours) by the works have a right to claim for injurious affection in the absence of a taking. Those whose estate in their lands was affected in common as to quality or quantity with their neighbours had no right to claim compensation for injurious affection in the absence of a taking.

Today, the courts will impose a four-step test in order to impose limits on the remedy of compensation for injurious affection in the absence of a taking (*The Queen v. Loiselle*, [1962] S.C.R. 624 at p. 627). The four conditions that must be satisfied in order that compensation will be awarded are as follows:

1. the damage must result from an act rendered lawful by statutory powers of the person performing such act;

2. the damage must be such as would have been actionable under the common law, but for the statutory power;

3. the damage must be an injury to the land itself and not a personal injury or an injury to business or trade; and

4. the damage must be occasioned by the construction of the public work, not by its user.

The best general conclusion to be drawn from the decisions and the applicable statutes seems to be as follows:

1. there is no presumption in favour of compensation for injurious affection in the absence of a taking;

2. there must be a statutory foundation in order to found a claim for compensation for injurious affection in the absence of a taking (in B.C., we refer to section 41 of the *Expropriation Act*) and section 33 of the *Community Charter*;

3. where there is such a statutory foundation, the four-step test must be satisfied by the claimant before compensation will be awarded;

4. the courts have shown a consistent pattern of attempting to find an avenue to provide compensation for injurious affection in the absence of a taking when the societal trend promotes private interests over public, or when a particular situation appears to demand compensation, either by holding the statutory foundation to exist, or by determining that an expropriation has in fact occurred.

In the *Heyes* case, injurious affection was struck as a basis for the claim early on and no appeal has been brought in this respect. However, injurious affection continues to be advanced in the class action proceedings by other businesses against the *Heyes* defendants. In our view, this line of authority is more consistent with the established law for recovery for losses that result from public works, although, if successful, it can be expected to result in significantly reduced damage awards, in that it does not compensate for business loss.