

The impact of the construction of medians is currently a contentious area within expropriations law. Expropriating authorities construct medians with the aim of protecting pedestrian and vehicular traffic; the medians then result in the removal of access to and from local businesses. The losses resulting from the construction of medians trigger a compensable loss under the heads of disturbance damages and injurious affection, under the *Ontario Expropriations Act*.¹ The construction triggers a compensable loss pursuant to section 21 of the Act, which states that business damages caused by injurious affection are compensable where no land is taken. The claimant must prove the three conditions set out in clause 1(1)(b) of the Act as well. Early case law indicated that the claimant must prove that the removal of access interfered with his or her land for there to be a compensable claim.

Subsequent case law, however, has made it more difficult to recover losses resulting from the construction of medians. The claimant must now prove that the construction of the median substantially interfered with his or her land, and that the actions of the expropriating authority were unreasonable. A balancing process must be engaged in, and the substantial interference must outweigh the public need for highway improvements. If the expropriating authority can prove that the construction was necessary for the public good and was conducted in a reasonable manner, the claim will not be compensable. If no measures were taken to minimize the impact of construction, however, the claimant will be successful. The onus is on the claimant to adduce evidence to demonstrate that the claim is attributable to construction, and that the nuisance is actionable at common law, for the claim to be compensable in fact. It must be proved that the decline in business was a result of the construction, through the production of financial statements and the testimony of experts. The expropriating authority will present evidence

¹ R.S.O. 1990, c. E.26 [*Expropriations Act*].

demonstrating that its actions were necessary and reasonable. If this can be proven, the claim will not be compensable.

The claimant may also have a compensable claim under the head of disturbance damages. The decision in *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*² significantly widens the scope of recoverable losses under disturbance damages. The losses sustained as a result of the construction of a median will be compensable if the claimant can prove that the losses were the natural and foreseeable consequences of the construction. Further, the claimant must adduce evidence demonstrating the existence of a causal link between the losses and the construction of the median. The claimant may then be awarded compensation for all costs relating to the relocation of the business if it can be demonstrated that the move was caused by the construction of the median.

Thus, the claimant must meet certain criteria to be successful in his or her claim for losses sustained as a result of the construction of the median under the heads of both injurious affection and disturbance damages. In terms of injurious of affection, the claimant must prove, through financial documents and expert testimony, that the interference was substantial and attributable to the construction, and the actions of the expropriating authority were unreasonable. The Ontario Municipal Board or Court will then measure the public utility of constructing the median against the resulting interference. In terms of disturbance damages, the claimant must prove that the business losses, and all costs associated with a relocation should there be one, were directly caused by the construction of the median.

² [1997] 1 S.C.R. 32 (QL) [*Dell Holdings*].

1. Compensation for Injurious Affection

A) In theory, does the construction of a median trigger a compensable loss?

i) Statutory Provisions

The construction of medians triggers a compensable loss under the head of injurious affection pursuant to section 21 of the *Expropriations Act*. The *Expropriations Act* is a remedial statute enacted for the purpose of adequately compensating landowners whose lands have been taken to serve the public interest.³ As such, the Act must be given a broad and liberal interpretation consistent with its purpose, and should not be interpreted to deprive one of common law rights, unless specific sections of the Act permit otherwise.

Section 21 provides that a statutory authority shall compensate the owner of land for loss or damage caused by injurious affection. Business damages caused by injurious affection are compensable where no land has been taken, but an interference with the use of a claimant's property has occurred as a result of the public work.⁴ Where the statutory authority does not acquire part of the land of an owner, as is the case when an expropriating authority constructs a median which then results in the restriction of access, clause 1(1)(b) states that injurious affection includes i) such reduction in the market value of the land of the owner, and ii) such personal and business damages, resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute.

The claimant, therefore, can argue that the losses resulting from the construction of medians trigger a compensable loss under the head of injurious affection, despite no land being taken from the landowner. Subsection 1(1)(b) codifies the common law, which required the

³ *Base Ninety Developments Ltd. v. Ontario (Management Board of Cabinet)* [2004] O.M.B.D. (QL) No.119 at 8.

⁴ *Dufour v. Sudbury (City)* [1999] O.M.B.D. No.881 (O.M.B.) [*Dufour*]

satisfaction of four conditions in order to successfully claim injurious affection when no land is taken. The *Expropriations Act* reduced the four conditions set out in *R. v. Loiselle*⁵ to three conditions.⁶ These three conditions are the basic criteria for determining the compensability of injurious affection where none of the claimant's land has been expropriated.⁷ In order to successfully claim injurious affection where a median is constructed resulting in the removal of access, the claimant must therefore prove that the damage suffered resulted from an act rendered lawful by powers of the person performing such act; that the damage is actionable under the common law, but for the statutory powers⁸; and that the damage was occasioned by the construction of the public work, not by its user.⁹

Where only some means of access is deprived as a result of the construction of a median, the interference sustained may only give rise to a compensable claim under the head of injurious affection. In *TDL Group Ltd. et al. v. Regional Municipality of Niagara*¹⁰, for example, the Region of Niagara sought to pass a by-law to construct a median to prevent left-turning traffic for operational and safety reasons. A landowner with property on the south side challenged the by-law and claimed the remedy pursuant to section 298(1) of the former *Ontario Municipal Act*.¹¹ The respondent argued that the median, by preventing westbound motorists from turning

⁵ (1962) 35 D.L.R. (2nd) [*Loiselle*].

⁶ The fourth test was eliminated by the *Reform Act* in Ontario.

⁷ Eric E.C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed. (Scarborough: Carswell Thomson Professional Publishing, 1992) [Todd, "Law of Expropriation"].

⁸ Todd, "Law of Expropriation" *supra* note 7 at 370-71 states that if the activity which caused the injurious affection was not done pursuant to statutory powers, or was done in excess of or in abuse of statutory powers, the appropriate remedy is an ordinary action for damages or an injunction. If the activity complained of was performed pursuant to statutory powers, but negligently, the appropriate remedy is an action for damages and not a claim to statutory compensation for injurious affection (See *McCrimmon v. B.C. Electric Ry. Co.* (1914) 20 D.L.R. 834 (B.C.C.A.)). Similarly, if the activity complained of amounts to a private nuisance and the statutory powers do not authorize the creation of the nuisance, the affected landowner's recourse is an action in tort.

⁹ *Loiselle*, *supra* note 5 at 627.

¹⁰ [2001] O.J. No.3017 (QL) [*TDL Group Ltd.*].

¹¹ s.2 R.S.O. 1990, chap.M.45.

directly into their shop, would significantly affect business.¹² Sharpe, J.A., writing for the Court of Appeal, held that the construction of the median did not trigger a compensable claim under section 298(1). This section only applies where the effect of the by-law is to deprive the landowner of his or her only means of access to the highway.¹³ The Court did, however, state that the interruption of the preferred means of access may well give rise to a remedy for compensation for injurious affection under the *Expropriations Act*.¹⁴

ii) Case law

Interference

Following the decision in *Windsor (City) v. Larson et al.*¹⁵, if a claimant could prove that the completed public work interfered with access to his or her land, he or she would be compensated for any loss which directly resulted from that interference. In *Larson*, a concrete raised median was erected in the middle of the highway running in front of the claimant's motel, thereby severely restricting access resulting in the loss of value of the property. The Land Compensation Board awarded the claimant the loss in market value and personal and business damages during construction.¹⁶ The Board found that complete obstruction of access as a result on the construction of the median resulted only for a period of two or three days, but access was made "extremely difficult and uninviting to the passing potential customer." There had been a considerable degree of interference with the access and egress formerly enjoyed. On appeal, the Divisional Court held that the claimant must prove damages as a result of the interference with a private right.¹⁷

¹² *TDL Group Ltd.*, *supra* note 10 at 6.

¹³ *Ibid.*, at 6.

¹⁴ *Ibid.*, at 6.

¹⁵ (1980) 29 O.R. (2d) 669 (QL) [*Larson*].

¹⁶ The City unsuccessfully appealed the Board's decision on loss in market value to the Divisional Court, abandoning its appeal as to personal and business damages at the outset of the hearing.

¹⁷ *Larson*, *supra* note 15 at 349.

A More Stringent Test: Degree of Interference and Reasonableness

The early case law appears to indicate that the construction of medians triggers a compensable loss under expropriations law if a private right, such as the private of access, is interfered with or denied. Subsequent case law, however, has made it more difficult to recover compensation for the loss of access resulting from public works, including medians. In *St. Pierre et al. v. Minister of Transportation & Communications*,¹⁸ for example, which dealt with whether the resultant damage to the claimants' property caused by the construction of a highway was actionable at common law, the Supreme Court of Canada held that the act causing injury or interference with the use or enjoyment of the land must be substantial and, in light of all surrounding circumstances, the injury or interference must be found to be unreasonable.¹⁹

The first prong of this two pronged test holds that the claimant must demonstrate that the construction of the median substantially interfered with the use or enjoyment of his or her land. McIntyre J. distinguished *Loiselle* and *Larson* where the conduct of the public authority had substantially altered the nature of the claimants' property or interfered significantly with the actual use being made of the property. He held that in both *Loiselle* and *Larson*, the construction of the public works in close proximity "so changed their situation as to greatly reduce if not eliminate their value for the uses to which they had been put prior to the construction and could, therefore, be classed as nuisances."²⁰

B. What conditions must be proved before the loss will be compensable in fact?

i) Substantial Interference

For the construction of medians to trigger a compensable loss, therefore, the claimants must prove substantial interference. The claimants in *Dufour*, for example, were able to prove

¹⁸ [1987] 1 S.C.R. 906 (QL) [*St. Pierre*].

¹⁹ *Ibid.*, at 17.

²⁰ *Ibid.*, at 17.

that the inconvenience caused by the road construction, which included replacing watermains, sewers and widening roads, amounted to a compensable loss. The inconvenience resulted in a substantial interference with access to the property for vehicles and pedestrians for a period of time.²¹

In *Munden v. Windsor (City)*²², the claimants were denied compensation for injurious affection where access was prevented as a result of road widening. The Board held that the claimants did not establish that the road reconstruction conducted by the City so substantially changed the situation prior to construction, and did not reduce the value of the claimants' premises for its use prior to the reconstruction.²³ For the construction of medians to trigger a compensable loss, the claimants must prove that the construction substantially altered the situation that existed prior to the construction, and the losses resulted from the construction.

ii) Construction, Not Use

To be compensable, the claimant must prove that his or her loss or damages resulted from the construction of the median, and not its use. In *Larson*, the Divisional Court stated that the test of whether property is actually damaged by operation or use is “to consider whether the works as constructed, if left unused, would interfere with the actual enjoyment of the property; if not, no compensation is payable.”²⁴ The Court in *Larson* held that the actual loss or reduction in market value was as a “result of the construction of the barrier...and not a loss as a result of the traffic using those roadways after their construction.”²⁵ Thus, the construction of the median triggered a compensable loss, and the loss was proven to be a resultant of the construction of the median and not its subsequent use.

²¹ *Dufour*, *supra* note 4 at 13.

²² [2002] 77 L.C.R. 217 [*Munden*].

²³ *Ibid.*, at 227.

²⁴ *Larson*, *supra* note 15 at 138 (citing Challies, *The Law of Expropriation*, 2nd ed. (1963)).

²⁵ *Ibid.*, at 676.

iii) Reasonableness & Balancing Competing Interests

The second prong of the test enunciated in *St. Pierre* states that the actions of the expropriating authority must be considered unreasonable. The Board in *Whitnall v. Sarnia (City)*²⁶ held that the test hinges on the “degree of interference and the reasonableness of the actions of the authority.”²⁷ This formulation of the test makes it more difficult for claimants to recover for the loss of access resulting from the construction of public works. The Supreme Court in *St. Pierre* found that there had been no such interference as to constitute a nuisance, and there was nothing unreasonable in the Minister’s use of the land. The Court held that the Minister was authorized with the duty to construct highways and its actions were reasonable in light of the circumstances.²⁸

The decision in *St. Pierre* permits an expropriating authority to rely on the reasonableness of its actions, and the public benefit of the construction of a public work to defend itself against claims for compensation. The Court in *St. Pierre* justified the denial of recovery on the basis of the public purse argument. The Court held that highways will inevitably cause disruption, but are necessary for the public. To “fix the Minister with liability for damages to every landowner whose property interest is damaged, by reason [of] the construction of a highway on neighbouring lands,” wrote the Court, “would place an intolerable burden on the public purse.”²⁹ The Court engaged in a balancing process and concluded that the utility for the public good far outweighed the disruption and injury suffered by the adjoining landowners.³⁰ When dealing with the law nuisance, then, the courts must engage in a balancing process. Courts must balance the

²⁶ [1999] O.M.B.D. No. 654 (QL) [*Whitnall*].

²⁷ *Ibid.*, at 9.

²⁸ *St. Pierre*, *supra* note 18 at 8.

²⁹ *Ibid.*, at 8.

³⁰ *Ibid.*, at 8.

competing interests of landowners and the public at large. The need for the public work must be weighed against the disruption and injury to nearby landowners.

The Ontario Municipal Board in *Coady v. Town of Port Hope*³¹, for instance, held that the proven need for public improvement (namely, the widening of a channel to prevent flooding) far outweighed the temporary interference sustained by the claimants. Mrs. Coady claimed compensation for injurious affection causing business loss because her customers found it difficult to access her business during the construction of the channel. The Board referred to *St. Pierre* and the principle that the right to use land is actionable in nuisance if, in the context of the circumstances, that use “unreasonably interferes with [his or her] neighbour’s similar right.” Accordingly, the Board found no actionable nuisance and failed to see how the municipality acted unreasonably to the claimants. To find an actionable nuisance in this case would be “tantamount to declaring [that any] municipality could not undertake any improvement for the public good in general, no matter how minor, if a minority of the public was temporarily inconvenienced, subject to running the risk of facing claims for injurious affection.” The Board further held that it is the municipality’s responsibility to construct necessary public works to ensure the health, safety and well-being of its constituency.

The balance that must be struck between competing interests is emphasized in both *St. Pierre* and *Coady*. The responsibility of a public authority to implement public works for the benefit of the public must be measured against the resulting inconvenience and disruption to claimants. If a claimant is successful in proving a substantial interference resulted from the construction of a median, but the Board finds that the public need for the median outweighs the resulting interference and disruption, the claimant’s loss will not be compensable. The expropriating authority will demonstrate that there was a public need for the median by calling

³¹ (1987) 38 L.C.R. 66 (O.M.B.) [*Coady*].

experts to testify that the median was required to ensure the safety of all users of the road. If the construction was conducted in a reasonable manner, the loss will not be compensable.

In *Jesperson's Brake & Muffler Ltd. v. Chillwack (District)*³², however, the British Columbia Court of Appeal held that there was nothing in *St. Pierre* to suggest that in determining whether there has been a nuisance, the Court must engage in a balancing process to determine whether the Minister's conduct or use of the land has been unreasonable.³³ The Court stated that in both *Loiselle* and *Larson*, the fact that there had been substantial or significant interference with access to the claimant's land was enough to constitute a nuisance. Finch J.A. stated that the Supreme Court in *St. Pierre* distinguished the previous cases because there had been no interference with access in the case before it, but rather simply interference with view, privacy, prospect, or other loss of amenity.³⁴ Thus, according to *Jesperson*, an examination of whether or not the Minister's conduct or use of the land was reasonable should not be undertaken; rather, courts must determine whether there has been substantial interference or significant interference with access to the claimant's land, and whether the interference can be classed as an actionable nuisance. This alone will determine whether or not the construction of the public work constitutes a compensable loss. This case, however, was decided prior to the decision in *Whitnall* and its reasoning has not been followed in subsequent decisions. For the losses resulting from the construction of a median, therefore, the claimant must establish that actions of the expropriating authority were unreasonable.

In *Mid Transportation Services Ltd. v. Windsor (City)*³⁵, for example, the Ontario Municipal Board denied compensation for injurious affection caused to Mid Transportation

³² [1994] B.C.J. No. 404 (QL) [*Jesperson*].

³³ *Ibid.*, at 32.

³⁴ *Ibid.*, at 32.

³⁵ [1994] O.M.B.D. No. 519 (QL) [*Mid Transportation*].

Services Limited by the City of Windsor through staged road reconstructions on the basis that the reconstruction programme was conducted in a reasonable manner.³⁶ The reconstruction resulted in the presence of a permanent raised median. The median prevented customers approaching from the south and south east from making left hand turns into the property, and prevented vehicles from exiting to the north.³⁷ The Board found that the reconstruction resulted in some inconvenience and difficulty to Mid Leasing (Windsor),³⁸ but concluded that the reconstruction programme was necessary to correct a dangerous situation, and proceeded in a careful manner so as not to substantially interfere with the rights of the adjoining landowners. It was proved that the raised median was necessary to ensure the safety of public users of the highway.³⁹ Further, the City demonstrated that all reasonable efforts were made to alleviate any disruption caused by the construction to the landowners desiring to reach their businesses.⁴⁰ Measures were instituted, such as putting up directional signs and markers, to provide both access and clear signage as to the means of access.⁴¹ The Board concluded that, although some inconvenience occurred to the claimant with respect to changed access, dust, noise, this disruption was not unreasonable having regard to the circumstances, and reasonable access was not withdrawn.⁴²

The Ontario Court of Appeal in *TDL Group Ltd.* also holds that an expropriating authority may alter a highway as it sees fit in the best interests of society; specifically, to address the underlying public policy consideration of public safety. The decision provides authority for

³⁶ *Ibid.*, at 1.

³⁷ *Ibid.*, at 2.

³⁸ *Ibid.*, at 4.

³⁹ *Ibid.*, at 7.

⁴⁰ *Ibid.*, at 7.

⁴¹ *Ibid.*, at 5.

⁴² *Ibid.*, at 5.

the proposition that municipalities have the right to construct median strips on public roads and highways in the best interests of society, even when the result is a deprivation of access.

Thus, if the expropriating authority can prove that the median is necessary to ensure safety, and conducts its work in a reasonable and careful manner so as not to deprive landowners of access while instituting measures to provide access during construction, the losses suffered by the claimant will not be compensable. Similarly, the expropriating authority has a general duty to mitigate, and compensation for injurious affection may be reduced if the authority is found to have mitigated the impact of construction of the median.⁴³ In *C. Corp. (Ontario) Inc. v. St. Thomas (City)*,⁴⁴ for example, the City properly managed the construction project with a view to minimizing disruption and loss, and the Board concluded that the City's conduct did not amount to an actionable nuisance.

If measures are not taken to minimize the impact of the construction, however, the construction will trigger a compensable loss. In *Venmar Bakery Ltd. v. Peel (Regional Municipality)*⁴⁵, for example, the Region acted in an unreasonable manner by failing to ensure that adequate traffic controls were provided during the construction of watermains and sewers, and by failing to ensure that access to at least one entrance to the plaza was maintained at all times during the construction period.⁴⁶ The Board held that this failure to maintain access resulted in a reduction in customers which caused a business loss. The claimant, therefore, was entitled to compensation for the damages arising from the loss of business resulting from the construction of the public work.

⁴³ Todd, "Law of Expropriation," *supra* note 7 at 392.

⁴⁴ [1994] O.M.B.D. No. 961 (QL) (O.M.B.).

⁴⁵ [2000] O.M.B.D. No. 293 (QL) (O.M.B.).

⁴⁶ *Ibid.*, at 29.

C. What evidence must be adduced for the Board to making a finding of compensable loss?

Clearly, there are significant hurdles standing in the way of a claimant who sustains losses as a result of the construction of a median. For a claimant's loss to be compensable, the claimant must first prove a substantial interference as to constitute an actionable nuisance, and then must further demonstrate that the expropriating authority's actions were unreasonable having regarding to the circumstances. This portion of the analysis will consider how a claimant may prove compensable loss to receive an award under the head of injurious affection.

i) Onus

The onus is on the claimant to adduce evidence to receive an award under the Act for any head of damage. While there is no burden of proof of market value on either party, according to Coates and Waque, where damages are claimed for injurious affection by way of a reduction in the market value of the remaining lands, the onus is on the claimant.⁴⁷ The damages to be proved should include those incurred up to the date of arbitration and also future or prospective damages resulting from the construction,⁴⁸ and should be assessed as against the statutory authority as of the date of the arbitration.⁴⁹

ii) Is the loss attributable, and is the claim actionable?

For the loss resulting from the construction of a median to be compensable, the claimant must prove that its losses were attributable to the construction, and that his or her claim is actionable against the expropriating authority. If there was a change or reduction in access, the claimant may claim reduction in market value or business loss, but the claimant must prove that

⁴⁷ John A. Coates & Stephen F. Waque, *New Law of Expropriation Ontario* (Scarborough: Thomson Canada Limited, 1995) at 10-59 [Coates & Waque, "New Law"].

⁴⁸ Todd, "Law of Expropriation," *supra* note 7 at 103.

⁴⁹ *Fried v. Ontario (Minister of Transportation & Communication)* (1972) 3 L.C.R. 262 (Ont. L.C.B.) at 270.

the losses were attributable to the construction⁵⁰, or the claim will be dismissed.⁵¹ The claimant may assert that the duration and substantial nature of the nuisance make it actionable. When claims for loss are based on non-physical factors, such as loss of access resulting in loss of revenues or clients, it is difficult to prove the claim. Coates and Waque state that it is difficult to produce objective evidence of the degree of loss of value in such instances.⁵² An approach, suggested by Coates and Waque, is to base the calculation of the loss on the cost to cure approach. If this approach is taken, however, the claim is better characterized as a disturbance damage.⁵³ The best approach is to calculate the loss as a percentage of sales.

According to the definition of injurious affection under clause 1(1)(b) of the *Expropriations Act*, the claimant may claim for damages in the reduction of market value, personal damages, and business damages resulting from the construction of a median. To prove that these damages are compensable and attributable to the construction of a median, the claimant may produce financial statements demonstrating a loss in revenue during the period of construction and increase of clients or revenue after the cessation of construction; or call witnesses such as chartered accountants to determine the amount of business loss. The industry experts must base their findings on investigations or on the evaluation of facts, and not on information supplied by the claimant.⁵⁴ The personal and business damages being claimed are of a temporary nature, occasioned by the temporary loss of access to the business during the construction of the median.⁵⁵ When the construction is completed and access is re-established,

⁵⁰ “Construction” includes not only acts done in the course of construction, but also the completed fact of construction, according to Todd at 391.

⁵¹ In *Sam-Sor Enterprises Inc. v. Metropolitan Toronto* (1978) 16 L.C.R. 260; *affd.* (1980), 20 L.C.R. 361 (D.C.), claims for reduction in market value and business were dismissed because the claimant failed to prove that either loss was attributable to the construction of the work rather than to *functional and economic obsolescence*.

⁵² Coates & Waque, “New Law,” *supra* note 47 at 10-68.

⁵³ *Ibid.*, at 10-68.

⁵⁴ *Munden*, *supra* note 22 at 221.

⁵⁵ Coates & Waque, “New Law,” *supra* note 47 at 10-44.

the market value of the injured premises is restored and only the personal or business damages remain to be compensated.

The affected landowner, who operates business in the area, must adduce evidence to demonstrate that the decline in business was attributable to the construction of the median, and should calculate the loss as a percentage of sales. The claimant cannot be awarded both business loss and reduction in market value reflecting the loss in business because this would amount to double compensation.⁵⁶ Since the construction of a median can result in the permanent reduction in access to and from a business, the market value of the injured premises may not be restored. It will be difficult to prove that the median has resulted in a loss of market value; and it will be difficult to calculate this amount. To necessitate this, the valuation date should not be set as of the date of the completion of the construction; rather, it should be set at a later date at which point the deleterious effect of the construction of the median can be measured.⁵⁷

The expropriating authority will in turn argue that its actions were reasonable, access was never fully blocked, and thus the actions of the authority are not actionable. The authority will attempt to demonstrate, through the use of expert testimony, that it took all measures necessary to mitigate the impact of the construction. The authority could argue, for instance, that notice of its actions was given so that the disruption was anticipated by the claimant and the authority's actions were thus reasonable; public consultations were conducted; inquiries as to whether its actions were fair could be requested by the claimant prior to the construction of the median; temporary access was provided; and signage and detours were instituted. Engineers could also be called on behalf of the public authority to testify that the construction of the median was

⁵⁶ In *Larson*, the Board disallowed personal and personal business losses after the cessation of construction.

⁵⁷ *Larson, supra* note 15 at 350-51.

necessary to ensure the safety of public users of the road, and that construction was conducted in a safe and reasonable way.

In *Linden v. Toronto (City)*⁵⁸, for instance, the claimant, Dr. Linden, testified that the subway construction and road widening prevented access and resulted in business damages under the head of injurious affection. As a result of the construction and removed access, he was forced to move his clinic, and lost associates and clients.⁵⁹ A chartered accountant testified as to the amount of business damages, and stated that the loss resulted primarily from the loss of associates.⁶⁰ The Accountant testifying on behalf of the City stated that the construction was not the main reason for the departure of the claimant's associates, and the City also argued that measures were taken to mitigate the impact of construction.

The Board found that the municipality engaged in an effective planning process and access was maintained to the claimant's property.⁶¹ Since the disruption was anticipated, the municipality argued that the interference was reasonable. Access, however, was impaired despite the municipality's mitigating measures to minimize the impact of the construction.⁶² The Board stated that the work was necessary, but was not carried out in all respects in a reasonable manner, and concluded that the common law remedy of nuisance is actionable having regard to the circumstances.⁶³ The Board found that the construction was a motivating factor behind the business loss, but so was an improved location. Damages were thus apportioned by fifty percent; fifty percent representing one half of the reasons behind the departure of the claimant's associates.⁶⁴

⁵⁸ [2003] O.M.B.D. No.276 (QL) (O.M.B.) [*Linden*].

⁵⁹ *Ibid.*, at 2.

⁶⁰ *Ibid.*, at 12.

⁶¹ *Ibid.*, at 26.

⁶² *Ibid.*, at 27.

⁶³ *Ibid.*, at 30.

⁶⁴ *Ibid.*, at 31-32.

2. Compensation for Disturbance Damages

A) In theory, does the construction of a median trigger a compensable loss?

i) Statutory provisions

Disturbance damages may be defined generally as compensation for the reasonable costs suffered by an expropriated owner as a result of the expropriation.⁶⁵ Relocation and incidental costs are usually claimed under this head of damage. Whether any particular item is compensable as disturbance damages will depend on the facts and evidence in the particular case, and the relevant statutory provisions.⁶⁶ Clause 13(2)(b) of the *Expropriations Act* provides that compensation shall be based upon “the damages attributable to disturbance.” Disturbance damages are not defined in the Act, and thus “must be presumed to bear their common law meaning except to the extent that it has been...altered or restricted by the Act.”⁶⁷ Coates and Waque state that the disturbance damages referred to in the Act are the same damages as at common law; that is, all “damages, costs, and expenses as are directly attributable to the expropriation of lands or premises on which a business or undertaking was carried on...”⁶⁸

ii) Case law

The decision in *Dell Holdings* has significantly widened the scope of disturbance damages. In *Dell Holdings*, the Supreme Court of Canada held that, for disturbance damages to be awarded, they must be the natural and reasonable consequence of the expropriation.⁶⁹ The Supreme Court of Canada also stated that the expropriation of all or part of a person’s property constitutes a severe loss and a very significant interference with a citizen’s private property.⁷⁰

⁶⁵ Todd, E.C.E. *Developments in the Law of Expropriation*, Centre for Continuing Education, University of British Columbia, at 30.

⁶⁶ Todd, “Law of Expropriation,” *supra* note 7 at 277.

⁶⁷ *Black v. Brant* (1972) 1 L.C.R. 325 at 333.

⁶⁸ Coates & Waque, “New Law,” *supra* note 47 at 10-45.

⁶⁹ *Dell Holdings*, *supra* note 2 at 28.

⁷⁰ *Ibid.*, at 20.

The power of an expropriating authority should thus be strictly construed in favour of those whose rights have been affected.

At issue in *Dell Holdings* was whether losses suffered by the landowner due to pre-expropriation delay are recoverable. The Supreme Court of Canada found that such losses are recoverable. Cory, J., writing for the Supreme Court, held that the words in clause 13(2)(b) of the *Expropriations Act* should be given their natural and ordinary meaning within the context of the purpose of the Act to provide full and fair compensation to the person whose land is expropriated.⁷¹ The Court found that the expropriation caused the delay, and the losses incurred by Dell Holdings were the direct result of the delay and were therefore the natural and reasonable consequences of the expropriation.⁷² Thus, losses sustained by the claimant during a period of delay that are the natural and foreseeable consequences of the construction of the median could trigger a compensable loss.

The Supreme Court also stated, however, that there can be no recovery for disturbance damages where no land is taken.⁷³ It would appear, then, that the construction of medians would not trigger a compensable loss under the head of disturbance damages. The Supreme Court, however, held that the approach taken to disturbance damages flowing from expropriation is not a temporal one; rather, it is based upon causation.⁷⁴ The Supreme Court concluded that the actual act of expropriation is part of a continuing process, and does not merely refer to the transfer of title of the subject property.⁷⁵ Thus, if the claimant can adduce evidence demonstrating a causal connection between the construction of the median and everything leading up to the construction, and the losses sustained, he or she will have a compensable claim.

⁷¹ *Ibid.*, at 28.

⁷² *Ibid.*, at 28.

⁷³ *Ibid.*, at 36.

⁷⁴ *Ibid.*, at 38.

⁷⁵ *Ibid.*, at 37.

B. What conditions must be proved before the loss will be compensable in fact, and how must these conditions be proved?

i) Causation

The decision in *Dell Holdings* has the effect of broadening the scope of disturbance damages in cases where actual expropriation has yet to take place. Tanaka states that actual disturbance damages that satisfy the test will have a clear, causal connection.⁷⁶ This causal approach for recoverability of pre-expropriation losses widens the ambit of disturbance damages. Given the causal approach, and the fact that the *Expropriations Act* is a remedial statute and should thus be given a broad and liberal interpretation to achieve the aim of the Act, the period before the construction of median could conceivably trigger a compensable loss under the head of disturbance damages.

The claimant may be awarded disturbance damages for relocation costs or moving costs if there is a delay on the expropriating authority's part in providing the claimant with notice. If the claimant can prove, through the use of appropriate industry experts, that this business loss, meaning the loss of net profits due to the relocation, was caused by the expropriation or the delay, the loss will be compensable.⁷⁷ If the causation test can be met, the costs relating to the move, such as advertising expenses or losses, will be compensable.

The claimant must adduce evidence to prove that there was a causal link between the construction of the median and the losses sustained. If the claimant can prove that the decline in business was as a result of the construction of the median, his or her claim will be compensable. The claimant must prove, through the use of industry experts and financial statements, that financial loss was suffered from the extra costs resulting from the construction of the median,

⁷⁶ C. Schmitz, "S.C.C. widens expropriation liability, Toronto Area Transit Operating Authority v. Dell Holdings Ltd., 1638-006, 44 pp." *The Lawyers Weekly*, 16:37 (February 14, 1997).

⁷⁷ Coates & Waque, "New Law," supra note 47 at 10-125.

and that profits were lost as a result of the construction. The proper method of calculating such a loss should be based on the percentage of sales. Based on the test of causation, it can be argued that the claimant may be compensated for relocation costs if, upon learning that a median is to be constructed which would result in the loss of access to the business, the claimant decided to relocate. If the claimant can prove that he or she decided to relocate upon being made aware of the proposed construction, the claimant's loss will be compensable under the head of disturbance damages given the *Dell Holdings* decision.

The claimant must call industry experts to testify that the decision to relocate the business after the closure of access was caused by the construction of the median. The decision to relocate in these circumstances will then give rise to legal liability on the part of the expropriating authority. A causal link must be established between the relocation and the loss of access resulting from the construction of the median. In light of *Dell Holdings*, the claimant must prove that the damages were caused by the construction of the median resulting in the removal of access for the claim under the head of disturbance damages to be compensable. Clauses (b) and (c) of subsection 18(1) of the *Expropriations Act* permits a landowner to claim compensation under the head of disturbance damages for the cost of finding new premises to replace those expropriated, and for relocation costs, including moving costs. If the owner of a business can prove that the losses were the natural and reasonable consequences of the expropriation, and provided that the costs have been reasonably incurred,⁷⁸ these losses will be compensable.

Given that expropriation is a continuing process, according to *Dell Holdings*, losses that occurred prior to the actual expropriation or construction taking place are compensable. If the proposed construction of a median resulted in a loss to a business owner, the owner, under the

⁷⁸ Todd, "Law of Expropriation," *supra* note 5 at 101.

head of disturbance damage, could claim for business disturbance damages, which may include the cost of finding equally suitable business premises; the cost due to relocation or dislocation of the business, including moving expenses, and all costs incidental to re-establishing the business; an amount to cover potential loss of business and increased costs during the transitional period⁷⁹; the loss of executives' time in moving operation; temporary loss of profits in the interval before the company became established at the new site; mailing and advertising costs; or the cost of interim financing to finance disturbance costs, appraisal fees, legal fees and other expenses.⁸⁰ If the claimant can prove that any of the above losses were incurred as a direct result of the proposed construction and were the natural and foreseeable consequences of the proposed construction, the losses will be compensable under the head of damages.

3. Conclusion

Thus, the construction of a median may trigger a compensable loss under both injurious affection and disturbance damages under the *Expropriations Act*. The claimant, however, must meet certain conditions before his or her losses will be compensable in fact. Under injurious affection, the claimant must prove that the losses sustained were attributable to the construction, and that the interference was substantial and the actions of the expropriating authority were unreasonable. If the public utility of the construction of the median outweighs the interference sustained to the claimant, the loss will not be compensable. However, if the expropriating authority proves that the median strip is required for public safety, but the claimant also proves that he or she suffered a loss in revenues during the process of construction, the claimant will be awarded partial or full compensation. The claimant must prove that the claim is compensable by

⁷⁹ *R. v. Gauthier* [1968] 1 Ex. C.R. 75.

⁸⁰ *Samuel, Son & Co. v. Metropolitan Toronto (Municipality)* [1962] O.R. 463 (QL); *Prophecy Management Ltd. v. Manitoba (Department of Urban Affairs)* (1985) 34 L.C.R. 267, 281 (Man. L.V.A.C.); *Lofranco v. Metropolitan Toronto (Municipality)* (1982) 25 L.C.R. 11, 34 (Ont. L.C.B.).

producing financial documents and calling industry experts to testify that the losses resulted from the construction. Under the head of disturbance damages, the claimant must prove a causal connection between the business losses suffered, and the construction of the median for the claim to be compensable. Relocation costs may also be compensable under the head of disturbance damages. The impact of the construction of medians remains a controversial area within the law of expropriations and will give rise to legal liability should the above conditions be found to exist.

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