A summary of Injurious Affection

Where no land of the claimant is expropriated

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30 March 2011

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Introduction

The Ontario *Expropriations Act*[1] ("*OEA*") provides compensation for damages suffered by claimants due to any expropriations of land or any construction of public works. If no land of the claimant is expropriated, the *OEA* provides compensation for "injurious affection". A claim for injurious affection is the primary recourse available to a claimant in these circumstances. When claiming damages for injurious affection several requirements must be satisfied by the claimant[2] on the balance of probabilities.[3] Some of these requirements are found in the section 1 definition of "injurious affection" in the *OEA*. Section 1 of the act states:

> "injurious affection" means,
>
> (a) where a statutory authority acquires part of the land of an owner,
>
> (i) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and
>
> (ii) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute,
>
> (b) where the statutory authority does not acquire part of the land of an owner,
>
> (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,
>
> and for the purposes of this clause, part of the lands of an owner shall be deemed to have been acquired where the owner from whom lands are acquired retains lands contiguous to those acquired or retains lands of which the use is enhanced by unified ownership with those acquired;

[1] R.S.O. 1990, c. E.26.
[2] *Munden v. Windsor (City)* (2002), 77 L.C.R. 217 (O.M.B.) at para. 29 [*Munden*].
[3] *1010898 Ontario Ltd. v. London (City)* (1999), 68 L.C.R. 125 (O.M.B.) at para. 17.

The scope of this paper is limited to circumstances where no land has been expropriated from the claimant. It examines the various statutory and common law requirements that must be satisfied by a claimant in order to receive compensation.

The Requirements

Prior to the enactment of the current definition of injurious affection, claims for such damages were primarily analyzed according to the test in *The Queen v Loiselle* ("*Loiselle*").[4] When introduced, this test had four parts as follows[5]:

> (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 commonlaw, but for the statutory powers;
>
> (3) the damage must be an injury to the land itself and not a personal injury or an injury to business or trade;
>
> (4) the damage must be occasioned by the construction of the public work, not by its user

Following *Loiselle*, and upon the recommendation of the Toronto Department of the Attorney General, the definition of injurious affection was modified to its current state.[6] This legislative enactment had two significant consequences. First, the third requirement preventing compensation for personal and business damages was removed. The legislation specifically allowed for personal and business damages within the definition of injurious affection. Second, the final part of the *Loiselle* test was adopted by the legislature. However, the legislature chose to ignore the first two requirements and did not address them in any manner when changing

[4] [1962] S.C.R. 624 [*Loiselle*]
[5] *Ibid*. at para. 6.
[6] *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation),* 2010 ONSC 304 at para. 68 [*Antrim*].

the definition of injurious affection. Since the legislature did not explicitly change the common law, the first two requirements remain part of the law and must still be satisfied by a claimant seeking compensation for injurious affection. As a result, a claimant must now satisfy the first, second and fourth requirement of the *Loiselle* test in order to be compensated. A general summary of the current law for each of these three requirements is provided below.

Requirement 1

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

The first requirement of the *Loiselle* test is generally not contentious during court proceedings. Various provincial statutes allow statutory authorities to expropriate land and all of these expropriations satisfy this requirement. The *OEA* itself does not give any authority to expropriate and any contention at this stage will have to be analyzed under the authorizing statute.

Requirement 2

> the damage must be such as would have been actionable under the common law, but for the statutory powers;

This requirement is generally the most difficult to satisfy for claimants. Over the years, it has become the focus of the analysis and is commonly used to balance public good against private harm. The first challenge for a claimant is to choose the correct common law tort to prove in order to satisfy this requirement.

In *St. Pierre v. Ontario (Minister of Transportation & Communications)* ("*St Pierre*"),[7] the Supreme Court of Canada, when considering this requirement, stated that "[t]he only basis for an action to recover damages *in the circumstances of this case* would be the tort of nuisance."[8] This language would suggest that nuisance, among other actions at common law, can be used to satisfy this requirement. However, in *1395559 Ontario Inc. v. West Nipissing (Township)* ("*1395559*"),[9] when referring to the above quote, the Ontario Municipal Board found that the Supreme Court of Canada was not referring to the particular facts in that case, but was making that statement in regards to the four conditions. Essentially, the Ontario Municipal Board concluded, without a detailed analysis, that proving the common law tort of nuisance was the only means of satisfying this requirement. On appeal[10], the Ontario Superior Court of Justice modified the damages awarded but did not find that the Board's reading of *St Pierre* was incorrect.

This narrow reading of *St Pierre* has not had the impact that would be expected for two reasons. First, few claimants, if any, have attempted to satisfy this requirement by proving a common law tort other than private nuisance. Second, subsequent decisions have not supported this conclusion. In *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)* ("*Antrim*"),[11] a decision after *1395559*, the Ontario Superior Court of Justice stated that this requirement "*may* be satisfied by demonstrating a claim in nuisance."[12] Since the Ontario Superior Court of Justice has itself chosen not to follow the narrow reading in *1395559*, it is

[7](1983), 28 L.C.R. 1 (O.N.C.A.) [*St Pierre*]; aff'd [1987] 1 S.C.R. 906 [*St Pierre*].
[8] Para 10 [emphasis added].
[9] 84 L.C.R. 39 (O.M.B.) at para. 25 [*1395559*].
[10] *1395559 Ontario Inc. v. West Nipissing (Township)* (2006), 53 R.P.R. (4th) 69 (O.N.S.C.).
[11] *Antrim*, *supra* note 6.
[12] *Ibid.* at para. 71 [emphasis added].

highly unlikely that this reading will be persuasive for future claims and torts other than nuisance will be allowed to satisfy this requirement.

Despite this fact, few claimants, if any, have attempted to satisfy this requirement by any tort other than nuisance. As such, the remaining analysis of this requirement focuses on the tort of nuisance and the requirements for proving it.

The common law tort of nuisance

In *St Pierre*, the Supreme Court of Canada adopted the following definition of nuisance from Street, *The Law of Torts* (6th ed., 1976), p. 219:

> *A person, then, may be said to have committed the tort of private nuisance when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or of an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.*[13]

The Ontario Superior Court of Justice, in *Antrim,* simplified this definition by describing nuisance as "an unreasonable interference with the use and enjoyment of land".[14]

Although conceptually simple, proving nuisance can be a daunting and expensive task for any claimant. Specifically, proving that the injury or interference was unreasonable

[13] *St Pierre*, *supra* note 7 para. 10.
[14] *Antrim*, *supra* note 6 para. 72.

can be difficult since courts have used this unreasonableness requirement to balance policy goals of the statutory authority against the private losses suffered. The courts focus on the reasonableness of the harm suffered and not the reasonableness of the public work.[15] In *Antrim*, the court listed four factors that have been considered by the courts when assessing whether the claim is actionable in nuisance[16]:

(1) the severity of the interference;

(2) the character of the neighbourhood;

(3) the utility of the defendant's conduct; and

(4) the plaintiff's sensitivity.

The courts do not generally provide a clear analysis of each of these factors and consider the situation on the whole. As such, much of the analysis depends on the specific facts of the case. However, certain types of losses have well developed case law and if the claimant's loss falls within one of these categories, the claimant's task can be greatly simplified. Some of types of losses that are most commonly argued before the courts are discussed below. These types of losses are not necessarily the ones that occur most frequently in reality since most expropriation claims are settled outside of court.

[15] See *Loiselle*, *supra* note 4 at para. 8; *Windsor (City) v Larson* (1980), 29 O.R. (2d) 669 (Div. Ct.) [*Larson*] at para. 13. See especially *Jesperson's Brake & Muffler Ltd. v. Chilliwack (District)* (1994), 88 B.C.L.R. (2d) 230 (C.A.).

[16] *Antrim*, *supra* note 6 at para. 73.

i. Loss of Access

The Ontario Superior Court of Justice dealt with a loss of access issue in 2010 in the case of *Antrim*. In her decision, Wilson J. not only provided a review of injurious affection, but also of compensation for loss of access. She stated that in order to receive compensation for loss of access, "[t]he interference must be proximate and substantial, but there does not need to be a direct, physical interference with the plaintiff's property or a complete obstruction of access for a claim to be established."[17] There are, therefore, two types of loss of access claims. The first is one where there is direct, physical interference or a complete obstruction and the second is one where the interference is proximate and substantial.

i.a. Direct, physical interference or a complete obstruction

Cases where there is direct, physical interference or a complete obstruction of the property are rarely argued before courts today since such an obstruction is clear on the facts and the statutory authority is generally willing to settle.

In *Loiselle*, the highway next to the claimant's gas station was moved in a way that the claimant's property was isolated in a cul-de-sac after construction. The Supreme Court of Canada found that this was a direct, physical interference with access to the claimant's property and that it was obviously grounds for a claim of nuisance at common law.

[17] *Ibid.* at para. 78.

i.b. Proximate and substantial interference

In any loss of access situation where there is no direct, physical interference, the claimant must show that that there is a proximate and substantial interference. Such interference has been found in various situations.

In *Antrim* the claimant operated a truck center on Highway 17. The Ministry constructed a new highway north of the claimant's lands. The construction work for the new highway did not impact the claimant in any significant way. However, the new highway, as finalized, cut across the existing Highway 17. This caused Highway 17 to abruptly end a short distance from the claimant's property since no overpass was constructed for either highway 17 or the new highway.[18]

In reaching her decision, Wilson J. found that even when access to the claimant's property from highway 17 had remained unchanged, the claimant's customers would have to take sharp ninety degree turns and drive on unpaved roads in order to access the claimant's property from the east. The practical difficulties of this task for trucks, the primary customers of the claimant's business, amounted to proximate and substantial interference with access to the claimant's property.

[18] Highway 17 was connected there to a dirt road, but the presence of the dirt road was not a material fact in this analysis.

In *Windsor (City) v Larson* ("*Larson*"),[19] the court found that the construction of a median preventing left turns onto the claimant's property was sufficient loss of access to satisfy the requirements for nuisance at common law.

In *Schmauder v. Medicine Hat (City),*[20] the Alberta Land Compensation Board decided in favour of the claimant where public parking was removed from in front of the claimant's store. In that case, the store's customers had no other parking available and the Board found that in these circumstances, parking was analogous to access to the land. Although this decision is now eighteen years old, it has not yet been referred to by an Ontario case and it is unclear whether the same reasoning will be applied in Ontario.

The preceding three cases are only examples of proximate and substantial interference and many other circumstances exist where substantial interference with access was found by the courts.

ii. Loss of view or Loss of privacy

The second type of common nuisance claim is the loss of view or the loss of privacy. This was the primary injury suffered by the claimants in *St Pierre*. The claimants owned a retirement home in a rural area. The statutory authority expropriated land adjacent to their property and constructed a highway. The claimants brought an action for

[19] *Larson*, *supra* note 15.
[20] (1993), 50 L.C.R. 191 (A.L.C.B.).

injurious affection for the loss of view and loss of privacy. The Supreme Court of Canada found that "in essence the complaint is that once [the claimants] dwelt in a rural setting with a pleasing prospect and now they are confronted on one side of their land at least with a modern highway."[21]

The court concluded that there was no recovery available for these losses. It based its conclusion on the reasonableness requirement and supported it with the floodgates argument. Since the statutory authority was required to construct highways for the greater good and almost all highway construction would cause some property owners a loss of view and privacy, the court refused compensation in this case.

iii. Other losses

Claimants have been successful in receiving compensation for other types of losses. Compensation for losses such as noise and vibration, flooding, restrictive by-laws is not often litigated and there is little relevant case law available. The details of such claims for nuisance are not considered here and can be better researched with specific case facts.

Summary of Requirement 2

The second requirement has been the subject of much litigation in the past decades. However, much of the litigation depends upon the nuisance case law. While loss of

[21] *St Pierre*, *supra* note 7 at para. 12.

access and loss of view and privacy have been examined in detail in regards to this requirement, other losses remain with little persuasive case law.

Requirement 3

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

In *Windsor (City) v Larson* ("*Larson*"),[22] the Ontario Division Court explained the distinction between "construction" and "use":

> The test of whether the 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.[23]

This test is conceptually simple and provides clear solutions in most circumstances. For example, if one of the entrances of the claimant's building is blocked for several weeks due to construction, it is clear that it is the construction and not the use of the public work that has caused this "injurious affection".[24] Conversely, if the claimant is disturbed by the noise caused by vehicles using a new highway, that claim is not caused by the construction, but by the use of the works and thus is not compensable under the *OEA*.[25]

[22] *Larson*, *supra* note 15.
[23] This language was adopted by the court from Challis on the *Law of Expropriation*, 2nd ed. (1963) at p 138
[24] See *Smith v. Stratford (City)*, 2000 CarswellOnt 4899 (O.N.S.C.).
[25] See *St Pierre*, *supra* note 7.

The test in *Larson* is also useful when considering the timing of the losses. So long as the loss is due to "construction", it is legally irrelevant if the loss occurs several months after the "construction" has been completed. This was illustrated in *Larson* itself. The court found that the ongoing disruption caused by the barrier was a result of the construction of the barrier and not its use.[26] Implicit within this issue was the conclusion that losses caused by construction are not limited to the day-to-day construction of the works, but can also include losses caused by the works as finally constructed.[27]

However, there are certain situations where the court is faced with the difficulty of determining whether the damage was caused by the construction or by the use of the works. Two such situations are loss of access and anticipated use.

i. Loss of Access

Where a claimant has satisfied the second requirement, he or she must still show that the loss of access was due to the construction and not the use of the public works. Proving that the loss of access was caused by the construction is not difficult where the obstruction was temporary and resulted from ongoing work or from materials and equipment. However, situations involving a permanent loss of access can cause difficulty in satisfying this requirement.

In *Antrim,* it appears that the damages caused to the claimant were due to the lack of use of highway 17, not the use or construction of the new highway. However, when the Ontario

[26] *Larson*, *supra* note 15 at para. 17.
[27] *ibid.*

Superior Court applied the *Larson* test, the court found that it was the construction of the new highway that had made it inconvenient for customers to access the claimant's property since it was the construction of the new highway that had caused Highway 17 to end abruptly.

Antrim is not unique in its analysis. It follows several other cases[28] dealing with loss of access.

ii. Anticipated Use

The construction of transmission lines immediately adjacent to the claimant's property would cause a reduction in the value of the land even if the transmission lines are never used. This reduction in value would be partially explained by the perceived health consequences of the anticipated use of the transmission lines. This loss of value would satisfy the construction versus use test since the very construction of the lines would cause the loss, irrelevant of actual use.

Such a situation occurred in *St. Pierre.* The claimants argued that the construction of a highway next to their retirement home had caused a reduction in the value of the property.[29] The Ontario Court of Appeal rejected this argument since it attempted to bifurcate too finely the losses caused by noise of vehicles on the highway and the losses caused by the anticipated noise. The court reasoned that if the Legislature had intended such reductions to be

[28]See e.g. *Loiselle*, *supra* note 4; *Larson*, *supra* note 8; *Jesperson's Brake & Muffler Ltd. v. Chilliwack (District)* (1994) 88 B.C.L.R. (2d) 230 (B.C.C.A.); *Newfoundland (Minister of Works, Services & Transportation) v. Airport Realty Ltd.* 2001 NFCA 45.

[29] *St. Pierre v. Ontario (Minister of Transportation & Communications)* (1983), 43 O.R. (2d) 767 (C.A.) at para. 3.

compensable, clearer language would have been used.[30] On Appeal, The Supreme Court of Canada did not opine on this reasoning. Rather, The Supreme Court of Canada addressed the issue of reductions in land value due to the anticipated use under the second branch of the *Larson* test.

In *1395559,* the City re-located a pedestrian walkway to within a few inches of the claimant's property line. In its decision, the Ontario Municipal Board awarded damages for the anticipated losses that would be suffered by the claimant from the salt sprayed on the walkway. On appeal, the Board's decision was overturned, but once again, the court did so under the second branch of the *Larson* test.

Courts continue to deny damages for the reduction in value of the claimant's lands due to anticipated use by requiring that the claimant prove the tort of nuisance at common law. The effect of this has been that there has been no persuasive authority on this argument in Ontario.

Summary of Requirement 3

The requirement that the claimant prove that the damage suffered was caused by the construction of the public work and not its use is not a cause for concern in most cases. This is because in most cases, the loss is either clearly caused by the construction or by the use and both parties can agree on this issue before court proceedings. Of the remaining cases, a significant number fall within the ambit of previous judgments and the court can resolve this issue with ease.

[30] *Ibid.* at para. 5.

Furthermore, with *Antrim*, the legal analysis of a loss of access issue has been clarified and this should ensure that more cases on loss of access are resolved out of court. Finally, the anticipated use argument for the construction versus use test remains of little significance given the courts' reluctance to allow such cases beyond the second stage of the *Larson* test. Therefore, no significant changes are expected in the near future in the law relating to the construction versus use test.

Conclusion

Where a claimant has suffered damages when none of his or her land has been expropriated, the legal requirements for compensation are significant. However, most cases in practice do not raise novel issues and can be settled out of court. The number of reported decisions in this area remain low with few cases reaching as far as the Ontario Court of Appeal. As such, there has been little change in the law in the past few years. Furthermore, expansion of the range of claims for injurious affection seems unlikely since The Supreme Court of Canada, in *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*,[31] stated that "[w]here land is taken the statute will be construed in light of a presumption in favour of compensation but no such presumption exists in the case of injurious affection where no land has been taken. In such a case the right to compensation has been severely circumscribed by the courts..."

[31] [1997] 1 S.C.R. 32 at para. 34.