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CLIENT UPDATE

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ANTRIM TRUCK CENTRE
SUPREME COURT RESTORES COMPENSATION AWARD FOR NEW HIGHWAY CONSTRUCTION

By Sean G. Foran

Where no land is actually taken from landowners, when is a public authority liable to pay compensation for the construction of public works? In *Antrim Truck Centre Ltd. v. Ontario (Minister of Transportation)*, a decision released on March 7, 2013, the Supreme Court of Canada has established guidelines in balancing the interests of public authorities and private landowners.

Key Facts

Antrim Truck Centre ("**Antrim**") owned property on Highway 17 just west of Ottawa in the village of Antrim from 1978 to 2004. Until 2004 Highway 17 was the main east-west highway travelling to and from Ottawa and was part of the Trans-Canada highway. It was a two-lane highway and the Antrim property had direct access on to the roadway in both directions. Antrim ran a "truck-stop" business at that location, with gas and diesel pumps, a restaurant, bakery, gift shop and a truck sales, leasing and service centre.

However, in September, 2004, the Ministry of Transportation of Ontario ("**MTO**") opened a new section of Highway 417 running parallel to Highway 17 near the Antrim property. It is a four-lane highway in that location and there was no direct access from the Antrim property to Highway 417. Rather, motorists using Highway 417 could only reach the Antrim property via an interchange; the Antrim property was approximately 2 km from Highway 417. Shortly after Highway 417 opened, Antrim closed its business and subsequently opened another truck-stop further west on Highway 417.

Decisions Below

As a result, Antrim claimed compensation for damages for injurious affection before the Ontario Municipal Board and was awarded $58,000 for business loss and $335,000 for loss in market value of the land.

The Ontario Divisional Court upheld the MTO's appeal of the award, however, the Ontario Court of Appeal set aside the Board's decision, effectively concluding that the MTO was not liable in nuisance for the construction of Highway 417 in the vicinity of the Antrim property.

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Antrim's claim was for compensation for injurious affection under Ontario's *Expropriations Act*. The MTO did not expropriate any of Antrim's land in constructing Highway 417. Where no land is taken by a public authority, the Act provides a right to compensation for injurious affection which occurs when the authority's activities interfere with the claimant's occupation or enjoyment of land. The claimant must meet three requirements to succeed: (i) the damage must result from action taken under statutory authority; (ii) the action must give rise to liability but for the statutory authority; and, (iii) the damage must result from the construction, not the use, of the works.

Supreme Court of Canada Restores Award

The Supreme Court of Canada overturned the Court of Appeal and restored the Board's award. There was no issue before the court as to requirements (i) and (iii) above. The real issue was whether the construction of Highway 417 by the MTO would give rise to liability but for the statutory authority (the "actionable rule"). The claim was advanced on the grounds of private nuisance, that is, the claimant alleged that the MTO's construction would have rendered it liable in nuisance but for its statutory authority to construct the highway.

Justice Cromwell, writing for a unanimous court, held that in determining whether a public authority is liable for public works, the main question is how to decide whether an interference with the private use and enjoyment of land is unreasonable when it results from construction which serves an important public purpose. As in all other cases of private nuisance the reasonableness of the interference must be determined by balancing the competing interests. That balance is appropriately struck by answering the question of whether, in all the circumstances, the claimant has shouldered a greater share of the burden of construction than it would be reasonable to expect individuals to bear without compensation.

Nuisance consists of an interference with land that is both substantial and unreasonable. A substantial interference is one that is non-trivial, amounting to more than a slight annoyance or trifling interference. Assuming the interference is substantial, the next question to be determined is whether the interference was also unreasonable in all of the circumstances to justify an award of compensation.

Nuisance – Unreasonableness Balancing Test

Determining unreasonableness involves a balancing exercise, the focus of which is on whether the interference is such that it would be unreasonable in all of the circumstances to require the claimant to suffer it without compensation. In this regard, the Supreme Court of Canada made it clear that the focus is not on whether the nature of the authority's conduct is reasonable, but rather on whether the interference suffered by the claimant is unreasonable. The authority's conduct is a relevant factor in the balancing exercise, however, the Court reasoned that if simply balanced against the interference to the private interest, without more, the public utility of the work will generally outweigh even very significant interference to private land. This would defeat the purpose of the right to claim compensation for injurious affection set out in the *Expropriations Act*. The Court held that "the distinction is thus between interferences that constitute the "give and take" expected of everyone and interferences that impose a disproportionate burden on individuals."

Conversely, the Court held that "the reasonableness analysis should favour the public authority where the harm to property interests, considered in light of its severity, the nature of the neighbourhood, its duration, the sensitivity of the plaintiff and other relevant factors, is such that the harm cannot reasonably be viewed as more than the claimant's fair share of the costs associated with providing a public benefit."

The Supreme Court of Canada held that the Board's application of the law of nuisance to the facts in this case was reasonable. The Board found that in all of the circumstances, Antrim should not be expected to endure permanent interference with the use of its land that caused a significant reduction of its market value in order to serve the greater public good and the Court held that this conclusion was reasonable.

In carrying out the balancing exercise to determine whether the MTO's construction was reasonable, the Board considered the extent of the changes to Highway 17, including the fact that it was diverted into a dirt road a short distance east of the truck stop, Antrim's knowledge and involvement in the plans to construct Highway 417 and the extent to which Antrim's concerns were taken into account by the MTO in its decision making. The Board also considered the utility of the new highway construction, however, it did not allow that concern to "swamp" consideration of whether it was reasonable to require Antrim to bear without compensation the burden inflicted on it by the construction. In this regard, the Court held that "the Board properly understood that the purpose of the statutory compensation scheme for injurious affection was to ensure that individuals do not have to bear a disproportionate burden of damage flowing from interference with the use and enjoyment of land caused by construction of a public work."

Public Authorities – Reasonable Conduct May Not Be Enough

The Supreme Court of Canada, in focusing on the damage suffered by the landowner rather than the conduct of the authority, has recalibrated the balancing exercise required in determining liability for nuisance. The Ontario Court of Appeal decision in *Antrim* afforded some certainty to municipalities and other statutory authorities that as long as their actions in carrying out the public works were reasonable, there was little risk of liability to pay compensation for injurious affection. By shifting the focus to the disproportionate harm suffered by landowners, public authorities no longer have the comfort of knowing that they will avoid liability even when their actions are reasonable.

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