

Lawyers warn about infrastructure delays

Compensation to property owner adds to municipal pressures

BY CHARLOTTE SANTRY

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Public infrastructure projects may face delays or be scrapped altogether as a result of a Supreme Court of Canada decision, lawyers are warning.

Antrim Truck Centre Ltd. v. Ontario (Transportation) established new guidelines for weighing the interests of a public authority against those of private landowners. The case involved a truck stop on Highway 17 in Antrim, west of Ottawa, effectively put out of business when the road was rerouted in 2004.

The owner of the truck stop claimed compensation for injurious affection under the Expropriations Act and received \$58,000 for business loss and \$335,000 for the land's loss in market value.

The Ontario Court of Appeal set aside the decision on the basis that the Ministry of Transportation wasn't liable under nuisance law. However, the Supreme Court overturned that finding on March 7, 2013.

Compensation for injurious affection can be available if the claimant meets three requirements. First, the damage must result from action taken under statutory authority. Second, the

damage would give rise to liability but for that statutory authority. Third, the damage must result from the construction and not the use of the works.

In this case, the unresolved question for the Supreme Court related to the second test of whether the highway construction would have given rise to compensation under the law of private nuisance if it hadn't taken place under statutory authority.

While the Court of Appeal decision had emphasized the ministry's good conduct, the Supreme Court stressed the reasonableness of the interference.

"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 services an important public purpose," wrote Justice Thomas Cromwell.

"If simply put in the balance with the private interest, public utility will generally outweigh even very significant interferences with the claimant's land."

Everyone has to put up with a certain amount of temporary disruption caused by essential work, the court said, citing *Andreae v. Selfridge & Co. Ltd.*

Another case, *Newfoundland (Minister of Works, Services, and*



While some lawyers predict new challenges for municipalities, Sean Foran says it's not yet clear what the implications of the Supreme Court decision will be.

Transportation) v. Airport Realty Ltd., considered compensation flowing from the reconstruction of the access road to St. John's airport. The court rejected the idea that a public works project could simply be balanced against the severity of harm. Otherwise, "a high degree of public utility would always trump even very extensive interference," the court stated in *Antrim*.

But there's a distinction, it found, between the "give and take" expected of everyone and harm causing a "disproportionate burden" on individuals.

Here, the highway construc-

tion had "inflicted significant and permanent loss." The appellant should "not be expected to endure permanent interference with the use of its land that caused a significant diminution of its market value in order to serve the greater public good," the court stated.

Derek McCallum, a partner at Aird & Berlis LLP, says the case suggests municipalities planning public works projects now have "more uncertainty in terms of their bottom-line costs."

"For these major highway infrastructure projects, it seems inevitable that some claims will now happen," he says, adding that municipalities will need to set aside money for claims they wouldn't have previously expected to face. "That could stop public infrastructure projects from going ahead," he says.

Sean Foran, a partner at Weir-Foulds LLP, says municipalities need to be "mindful" of the decision but is slightly circumspect about its long-term implications. "The Supreme Court has provided some guidelines on how to analyze what's at the heart of nuisance claims for injurious affection where no land has been taken," he says. "How these guidelines are interpreted and applied by the municipality board and Ontario courts remains to be seen."

He finds municipalities already check whether planned projects are likely to affect individuals and businesses. But he adds: "Anyone working in this area is going to have to advise municipal clients to have some regard for the effect of projects on surrounding landowners, in particular whether one or more landowners are going to be disproportionately affected by the project."

The reasonableness test in the Supreme Court's decision takes into account the nature of a neighbourhood, the project's duration, the sensitivity of the plaintiff, and "other relevant factors."

Interferences that last a long period of time are more likely to attract a remedy, although temporary inconveniences could also be bad enough to support a claim in some circumstances, the court said.

The "character" of a neighbourhood may be "highly relevant in the overall balancing," Cromwell suggested, quoting an unpublished University of Ottawa thesis by lawyer Michael Senzilet.

Senzilet had suggested that if claimants have decided to live in urban environments close to "public corridors" where many public projects are necessary, this personal choice must factor into compensation claims. **LT**