



## **Substantial and Unreasonable Injurious Affection after *Antrim Truck Centre Ltd. v. Ontario (Transportation)***

*By Scott McAnsh*

Antrim Truck Stop is located just off Highway 417 near Arnprior, just west of Ottawa. It did not exist at that location until 2004. Prior to moving to Arnprior, Antrim Truck Stop was more true to its name, being located near the hamlet of Antrim on Highway 17. At that time the truck stop was located on the Trans-Canada highway system. In September of 2004, however, the Province of Ontario opened a new stretch of Highway 417 parallel to Highway 17, altering the course of the Trans-Canada highway system and severely limiting highway access to the Antrim Truck Stop. Once the new Highway 417 opened, it was a two kilometer trip to and from the highway to the truck stop involving the use of some dirt roads. The new road effectively put Antrim Truck Stop out of business at its former location. Antrim moved to mitigate its losses, but sought compensation for the damage the construction of the new highway had wrought.

Antrim Truck Centre Ltd. brought a claim against the Province under Ontario's *Expropriations Act*<sup>1</sup> for injurious affection. After years of travelling through Ontario's courts, Cromwell J., writing for a unanimous Supreme Court of Canada, on March 6, 2013, determined that Antrim Truck Centre Ltd. was entitled to compensation for injurious affection in the amount of \$393,000: \$58,000 for business loss and \$335,000 for loss in market value of the land, as initially determined by the Ontario Municipal Board. While this is much less than the \$8,224,671 initially claimed by Antrim Truck Centre Ltd., the path the claim took through the Ontario Municipal Board, the Divisional Court, the Court of Appeal and finally, the Supreme Court of Canada, makes for very interesting reading and provides a thorough review of the thorny area of law known as injurious affection. *Antrim Truck Centre Ltd. v. Ontario (Transportation)*<sup>2</sup> is an important of case for municipal lawyers across the country.

### **Injurious Affection**

Injurious Affection occurs when the activities of an expropriating authority have a negative impact on the use or enjoyment of land in a manner that demands compensation. Nearly expropriation legislation in Canada allows for compensation of injurious affection.<sup>3</sup> Indeed there

<sup>1</sup> *Expropriations Act*, R.S.O. 1990, c. E.26

<sup>2</sup> 2013 SCC 13 ["Antrim"]

<sup>3</sup> See: *Expropriation Act*, R.S.P.E.I. 1988, c. E-13, s. 11; *Expropriation Act*, R.S.N.S. 1989, c. 156, s. 26; *Expropriation Act*, R.S.N.B. 1973, c. E-14, s. 38; *Expropriations Act*, R.S.O. 1990, c. E.26, s. 13; *The Expropriation Act*, C.C.S.M. c. E190, s. 25; *Expropriation Act*, R.S.A. 2000, c. E-13, s. 42; *Expropriation Act*, R.S.B.C. 1996, c. 125, s. 41; *Expropriation Act*, R.S.Y. 2002, c. 81, s. 3. But notes that there are five Acts that do not explicitly authorize compensation for injurious affection: *Expropriation*

is some suggestion that without the statutory provision for injurious affection, a defence of statutory authority defeats a claim in nuisance.<sup>4</sup> In the Ontario legislation, the definition of “injurious affection” in section 1(1) of the Act outlines its parameters:

“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;

The Act authorizes all municipal expropriation in Ontario.<sup>5</sup> It was, therefore, no surprise that both the City of Toronto and Metrolinx intervened before the Supreme Court. This section is the basis for the three part test for injurious affection in Ontario: (1) statutory authority; (2) actionability; and (3) construction, not use. That is, a claim for injurious affection is only valid if the action complained of is the construction of a work by a statutory authority for which the statutory authority would be liable, were it not for the statutory protection provided to the authority. In *Antrim* the Court noted that the first and third aspects of the test were not contested, meaning that the only live issue was if there was an actionable claim by Antrim. That action, like most claims for injurious affection, was a claim in private nuisance.

## Nuisance

Private nuisance requires a two part analysis on the part of the court, which must determine: (1) if the interference with the enjoyment and use of land is substantial; and (2) if the interference with the enjoyment and use of land is unreasonable.

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*Act*, R.S.C. 1985, c. E-21; *Expropriation Act*, R.S.N.L. 1990, c. E-19; *Expropriation Act*, R.S.Q., c. E-24; *Expropriation Act*, R.S.N.W.T. (Nu) 1988, c. E-11; *Expropriation Act*, R.S.N.W.T. 1988, c. E-11; though injurious affection is still available at common law

<sup>4</sup> See *Susan Heyes Inc. (Hazel & Co.) v. South Coast B.C. Transportation Authority*, 2011 BCCA 77 at para. 182, per Saunders J.A., concurring

<sup>5</sup> *Municipal Act, 2001*, S.O. 2001, c. 25, s. 6 & *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch A, s. 9

### *Substantial*

In *Antrim* the Court provided a summary of the law concerning what type of interference is substantial. The general statement, “[a] substantial interference with property is one that is non-trivial,”<sup>6</sup> is of limited assistance. The Court cited some previous authority on this issue, but did not devote many words to the issue, as the interference in *Antrim* was clearly non-trivial in nature.

It is still useful to recall that “only those inconveniences that materially interfere with ordinary comfort as defined according to the standards held by those of plain and sober tastes” will be substantial, and not claims based “on the prompting of excessive ‘delicacy and fastidiousness’”<sup>7</sup> That is, we are all expected to put up with some interference with our use and enjoyment of land. Only substantial interference requires compensation. This is “part of the normal give and take of life.”<sup>8</sup>

### *Unreasonable*

The bulk of *Antrim* focused on the question of when interference is unreasonable enough to ground a claim in private nuisance, and therefore injurious affection. This was the stage at which the Court of Appeal for Ontario found that there was no claim for injurious affection.<sup>9</sup> The short answer given by the Supreme Court was that “the question is whether the interference is greater than the individual should be expected to bear in the public interest without compensation.”<sup>10</sup> The Supreme Court found that the Court of Appeal for Ontario had erred in treating the factors used to assess reasonableness as a strict checklist.<sup>11</sup> The factors are not a checklist, “they are simply ‘[a]mong the criteria employed by the courts in delimiting the ambit of the tort of nuisance’”<sup>12</sup>

Before looking at the factors, however, the Court clarified that “the focus in nuisance is on whether the interference suffered by the claimant is unreasonable, not on whether the nature of the defendant’s conduct is unreasonable.”<sup>13</sup> That is, it is not determinative that the statutory authority made a reasonable use of the land and made reasonable construction decisions. Liability may still follow, if in all the circumstances the interference was unreasonable. This is an important point that will, no doubt, influence future claims in nuisance or injurious affection as it means that even where all reasonable steps are taken to minimize nuisance the impact on a particular landowner may still be found to be unreasonable in all of the circumstances.

Cromwell J., for the Court, was careful to note that the defendant’s conduct is not an irrelevant consideration, but made it clear that the conduct of the public authority is but one factor to consider in determining reasonableness. It is interesting to note here that the Court of Appeal had reversed the lower courts as those courts had not considered two factors: the character of the

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<sup>6</sup> *Antrim*, *supra* note 2 at para. 19

<sup>7</sup> *Tock v. St. John’s Metropolitan Area Board*, [1989] 2 S.C.R. 1181 at 1191, as cited in *Antrim*, *supra* note 2 at para. 22

<sup>8</sup> *Antrim*, *supra* note 2 at para. 21

<sup>9</sup> *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2011 ONCA 419

<sup>10</sup> *Antrim*, *supra* note 2 at para. 34

<sup>11</sup> *Antrim*, *supra* note 2 at para. 53

<sup>12</sup> *Antrim*, *supra* note 2 at para. 26, citing *Tock*, *supra* note 7 at 1191

<sup>13</sup> *Antrim*, *supra* note 2 at para. 28

neighbourhood and the utility of the Province's activity.<sup>14</sup> Cromwell held that the Court of Appeal had made utility a super factor, which it was not to be. It was fine to consider the fact that there was great utility in the construction of the new Highway 417, but that did not tip the balance as strongly as the Court of Appeal had held.

The Court of Appeal was relying heavily upon previous Court of Appeal authority, in *Mandrake Management Consultants Ltd. v. Toronto Transit Commission*,<sup>15</sup> that utility was to be given substantial weight. While the Supreme Court did not explicitly state that *Mandrake* was wrong, Cromwell J. noted that the comments in *Mandrake* must be viewed in context.<sup>16</sup> It seems that *Antrim* has put more balance back into the "balancing of rights" at the core of a claim of nuisance.

The fundamental factors identified in *Antrim* are not new: (1) severity; (2) nature of the neighbourhood; (3) duration; (4) the sensitivity of the claimant; and (5) the utility of the public work. What is to be determined in weighing those and any other relevant factors, is if "the harm cannot reasonably be viewed as more than the claimant's fair share of the costs associated with providing a public benefit."<sup>17</sup> Everyone must put up with some give and take: some noise and dust from construction, and those in industrial areas are expected to put up with more. At the end of the day we should only have bear our fair share.

One interesting sub-issue settled in *Antrim* was if a reasonableness analysis can be dispensed with where the interference with the land is physical as opposed to a loss of amenity. That distinction was first made 150 years ago and is based on the presumption that when there is an "injury to the value of the property" there "arises a very different consideration."<sup>18</sup> As recently as 2011, the Court of Appeal for Ontario held that the distinction between physical and non-physical damage applied, though it noted some uncertainty in the law in that area at the time.<sup>19</sup> Also in 2011, the British Columbia Court of Appeal assessed reasonableness even where there was physical interference with land.<sup>20</sup> In *Antrim* the Supreme Court stated unequivocally that a reasonableness analysis must be done in all cases and that any distinction between physical damage and amenity damage is unworkable and unnecessary.<sup>21</sup>

This is a very helpful finding by the Court as it negates the need to argue over the type of interference with the land and focus instead and on the difficult analysis of the reasonableness of the interference. That analysis can be guided by the factors set out in *Antrim*.

## Conclusion

In *Antrim* the Supreme Court has provided a clear outline of the law of private nuisance, which lies at the core of injurious affection. The Court affirmed the basics of the law, restored balance

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<sup>14</sup> *Antrim (ONCA)*, *supra* note 9 at paras. 130 & 135

<sup>15</sup> (1993), 62 O.A.C. 202

<sup>16</sup> *Antrim*, *supra* note 2 at para. 35

<sup>17</sup> *Antrim*, *supra* note 2 at para. 40

<sup>18</sup> *St. Helen's Smelting Co. v. Tipping* (1865), 11 H.L.C. 642, at pp. 650-5 as cited in *Smith v. Inco Limited*, 2011 ONCA 628 at para. 45

<sup>19</sup> *Smith v. Inco Limited*, 2011 ONCA 628

<sup>20</sup> *Susan Heyes Inc.*, *supra* note 4

<sup>21</sup> *Antrim*, *supra* note 2 at para. 50

to the process, and settled at least one controversy. As a unanimous decision this is the most important guidance for practitioners. The concern raised on the facts in *Antrim* is primarily where the balance comes down, and that is arguably on the side of the complainant by leaving open a claim for nuisance even where a necessary, safety driven, work is at issue. By clearly stating that the door is left open to claims even where the utility of the project is clear the Supreme Court put balance into the claim analysis, a balance that the Court of Appeal had removed.

What is the fair share of each party in the construction of public goods? *Antrim* has provided a clear framework through which to answer that question.

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