Ontario Municipal Board
Commission des affaires municipales
de l'Ontario

ISSUE DATE: May 22, 2015 **CASE NO(S).:** LC090033

PROCEEDING COMMENCED UNDER subsection 26(b) of the *Expropriations Act*, R.S.O. 1990, c. E.26, as amended

Claimant:	Willies Car & Van Wash Limited
Respondent:	County of Simcoe
Subject:	Land Compensation
Property Address/ Description:	Part 1 on Part Lot 6, Concession 15, Alliston,
Municipality:	Town of New Tecumseth, County of Simcoe
OMB Case No.:	LC090033
OMB File No.:	LC090033

Heard: June 16 to 17, 2015 in Alliston, Ontario

APPEARANCES:

Parties	**Counsel**
County of Simcoe	S. Rayman and K. Hancock (law clerk)
Willies Car & Van Wash Limited	J. J. Feehely and C. Butler

DECISION DELIVERED BY R. G. M. MAKUCH AND ORDER OF THE BOARD

[1] Willies Car & Van Wash Limited (the "Claimant") owns and operates a car wash on a 1.4 ha site with frontage of 189.26 metres ("m") on the south side of Highway 89 ("HW 89") at the east end of Alliston, the largest urban community in the Town of New Tecumseth. HW 89 is a significant east/west link between the community of Alliston and Highway 400 to the east.

[2] The car wash business began operations in the year 2000 and relies heavily on traffic going to and from the Honda Automobile Manufacturing Plant (“Honda”) to maintain its business activity and income level, according to the Claimant. It is located approximately 300 m east of County Road 10 (Tottenham Road), which had been the principal access to the Honda plant from HW 89. In January 2007, County Road 10 was re-routed approximately one kilometre to the east of its former location. This new alignment provides access to the Honda plant.

[3] At a later date, that portion of County Road 10 between Industrial Parkway (parallels the south property line of Honda) and HW 89 was closed and conveyed to Honda by Simcoe County. Employees and visitors to the plant could no longer access the plant from Industrial Parkway.

[4] The Claimant claims damages for injurious affection in a situation where the statutory authority did not acquire any part of its lands. The damages claimed are based on a five-year period between February 29, 2008 and February 28, 2013.

[5] The Claimant alleges that the realignment of County Road 10 led to a significant drop in traffic passing by the car wash and resulted in a reduction in the number of vehicles using its car wash.

[6] There was also a claim made for the reduction in value of the lands owned by the Claimant but Counsel advised the Board at the commencement of the hearing that this aspect of the claim was not being pursued.

[7] The Respondent, County of Simcoe, takes the position that the claim is barred by statute and also denies that there were any consequential damages suffered by the Claimant as a result of the works undertaken by the Respondent.

LIMITATION ON CLAIM FOR INJURIOUS AFFECTION WHERE THERE IS NO TAKING OF LAND

[8] The Respondent argues that the Claimant is not entitled to any compensation on the grounds that the claim is barred by s. 22 of the Expropriations Act ("Act"), which requires a claimant to make a claim for compensation for injurious affection within one year after the damage was sustained or after it became known to the claimant.

[9] Section 22(1) of the Act provides that:

> Subject to subsection (2), a claim for compensation for injurious affection shall be made by the person suffering the damage or loss in writing with particulars of the claim within one year after the damage was sustained or after it became known to the person, and, if not so made, the right to compensation is forever barred.

[10] The Claimant alleges that the road closing did not actually take place until September 2007 because employees of the Honda plant continued to have access to the plant from the closed road allowance and that it was only after the results of the next fiscal year end that they realized that they were able to ascertain damages which did not show up until about one month after the end of fiscal 2009 in April, when financial statements were available. It did not know of the losses until April 2009, when its accountant produced financial reports following its fiscal year end on February 28, 2009 and that it would not have been impossible for it to know of the losses until then.

[11] The Board has considered the evidence as well as the submissions of counsel and agrees with counsel for the Respondent that this claim is barred for failing to comply with s. 22(1) of the Act.

[12] The evidence shows that the actual construction of the realignment of County Road was completed on or about December 27, 2006 and was made official on January 23, 2007, with the registration of the by-law to stop up and close the former County Road 10. The by-law to establish the new public highway (realignment of County Road 10) was also registered on January 23, 2007.

[13] The Respondent also took other steps to advise the public of the closure by publishing notices in local newspapers some months before the closure along with the posting of signs along the affected roadway indicating the timeline for the road closure and realignment.

[14] The Board agrees with the Respondent's position that if the Claimant suffered business losses, it knew or ought to have known that these losses were occurring on a monthly basis from the time that the former County Road 10 was formally closed on January 23, 2007 and ought to have been known to the Claimant for the fiscal year ended February 28, 2008.

[15] The claim for compensation ought to have been initiated not later than January, 2009, to comply with the Act as it is required to serve its claim within one year of when the loss is sustained. It is not reasonable to delay a claim until after the full amount of the loss is calculated as is being advanced by the Claimant. The Claimant is also required to act diligently to inform itself of any loss giving rise to a claim. In this case while the losses ought to have been known at the latest by February 28, 2008, the claim was not served until July 31, 2009, some 30 months after the road was stopped up and closed and the claim was not filed with the Board until September 30, 2009. Furthermore, no previous notice of the claim was given to the Respondent.

[16] In Grooscors v. Ottawa (City) O.M.B.D. No. 126; 92 L.C.R. 117,, the Board found that assessing the quantum of the loss is not what is relevant in s. 22, but the test is rather "knowledge of the loss".

[17] In the case at hand, the Board has no doubt that the Claimant knew or ought to have known at the latest by February 28, 2008, more than one year after the road was closed that it had incurred losses. As mentioned above the claim was not served until July 31, 2009 and is out of time for doing so.

THE CLAIM FOR INJURIOUS AFFECTION

[18] While the Board has determined that the claim is barred by statute, it will nevertheless provide its findings on the claim itself.

[19] It is well settled and trite to suggest that the burden of proving a claim for injurious affection where no land is taken is on the Claimant, who must establish that the interference with the Claimant's property is both substantial and unreasonable thereby establishing that the public authority's actions are analogous to common law nuisance. Furthermore, the presumption in favour of compensation does not exist in such cases. The Claimant must satisfy the burden of proving nuisance in order to succeed.

> "Injurious affection" means,
>
> 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….

[20] The tests for injurious affection where no land is taken are well established and require that:

1) The damage must result from the action taken under statutory authority (the statutory rule);

2) The action would give rise to liability but for that statutory authority (the actionable rule); and

3) The damage must result from the construction and not the use of the work (the construction and not the use rule).

[21] The *Antrim* case (*Antrim Truck Centre Ltd. v. Ontario (Transportation),* [2013] 1 S.C.R. 594) is an authority for the proposition that a claimant must establish that the works causing interference were carried out under statutory authority and that a claim for nuisance must be established and be actionable under the common law. This is a two-part approach to determine the substantiality of the interference and the reasonableness of the interference. Furthermore, compensation is limited to damages arising from the construction of the works and not the use thereof.

[22] There is no issue that the works herein were carried out under statutory authority by the Respondent.

[23] The Supreme Court of Canada in *St. Pierre v. Ontario ("St. Pierre")(Min. of Transportation & Communications),* [1987] 1 S.C.R. 906, explained the tort of private nuisance as the indirect causing physical injury to land or substantially interfering with the use or enjoyment of land or an interest in land, where in the light of all the surrounding circumstances, the injury or interference is held to be unreasonable.

[24] The purpose of this two-part approach is to assess whether a party is left to bear a disproportionate burden of damages flowing from the interference with the use and enjoyment of land caused by the construction of a public work as set out in the *Antrim* case.

[25] The Supreme Court in *Antrim* made the following comment at paragraph 11:

> Retaining a substantial interference threshold underlines the important point that not every interference, no matter how minor or transitory, is an actionable nuisance; some interferences must be accepted as part of the normal give and take of life.

[26] For an interference to be considered actionable, it must have substantially altered the nature of a claimant's property itself or at least interfered to a significant extent with the actual use being made of the property, with a resultant loss of value to it. It must be non-trivial and be such that it amounts to more than a slight annoyance or trifling interference according to the Court in the *St. Pierre* and *Antrim*.

[27] Once it is established that the interference is substantial, one must then establish if it is unreasonable to be compensable. In *Antrim* at paragraph 40, the Court stated:

> Of course, not every substantial interference arising from a public work will be unreasonable. 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 cost associated with providing a public benefit. This outcome is particularly appropriate where the public authority made all reasonable efforts to reduce the impact of its works on neighbouring properties.

[28] In *St. Pierre*, the court stated the following:

> All highway construction will cause disruption. Sometimes it will damage property, sometimes it will enhance its value. To fix the minister with liability for damages to every landowner whose property interest is damaged, by reason only of the construction of a highway on neighbouring lands, would place an intolerable burden on the public purse. Highways are necessary: they cause disruption. In the balancing process inherent in the law of nuisance, their utility for the public good far outweighs the disruption and injury which is visited upon some adjoining lands. The law of nuisance will not extend to allow for compensation in this case.

[29] The evidence before the Board does not satisfy the threshold established by the Court in *Antrim*, where it was quite evident from the first day of the closing of the highway that the losses were substantial and resulted in the closing of the business due to the aforementioned closing of the highway.

[30] In the *Dell* case, *(Dell Holdings Ltd. v. Toronto Area Transit Operating Authority,* [1997] 1 S.C.R. 32) at paragraph 34, the Supreme Court stated:

> Injurious affection damages can be recovered both where the land is taken and where land is not taken but the tests to be met are very different. Where land is taken, the damages may relate to construction and the use of the works but where no land is taken the damages are limited to those flowing from the construction of the works even if the use also causes damages.

[31] In *St. Pierre*, the Supreme Court denied compensation in a matter where a highway was constructed adjacent to the boundary of the claimant's land and held that the use of the highway would constitute a disruptive element but that it is a field of

damage which may not be considered. The claim was limited to loss occasioned by the construction.

[32] In *Munden v. Windsor (City) v. Larson (2002),* 17 L.C.R. 217 at paragraph 17, the Board held that the claimant must prove on a balance of probability that the damages were occasioned by the construction and resultant closing of an access and not by its use. The claim was dismissed because the claimants could not prove that the financial losses resulted from the construction of the works.

[33] The Claimant in the case at hand has not been able to establish that the losses it alleges it incurred were the result of the construction of the works, which occurred prior to December 27, 2006, according to the evidence.

[34] The Claimant has not been able to prove on the balance of probabilities that the losses it alleges it incurred were the result of the re-routing of County Road 10 and the Board finds that the decline in the number of car washes was on the balance of probability, more likely caused by other factors such as general economic decline resulting in reduced consumer spending. Furthermore, regular users of HW 89 who had been customers of the car wash prior to the re-routing of County Road 10 would have been required to travel only a short additional distance on HW 89 to continue to use the car wash according to the evidence.

[35] The Board cannot find based on the evidence before it that the alleged losses were caused by the construction of the works.

[36] The Respondent denies any consequential losses as a result of the rerouting but also maintains that any loss does not warrant or attract compensation in accordance with s. 1(1)(b) of the Act for the following reasons:

1) The losses claimed did not arise from the construction of the Respondent’s works;

2) The Claimant has alleged that the loss has arisen due to reduced traffic counts, which even if proven to be correct does not form the basis of a claim or action;

3) The Claimant has not demonstrated that the road closure and/or realignment of County Road 10 has created a severe and disproportionate loss which is required to establish injurious affection where no land is taken; and

4) The Claimant has not satisfied the "actionable rule" under the test for injurious affection where no land is taken, as it has failed to demonstrate any form of interference that ought not be tolerated by a reasonable property owner without compensation.

[37] Even if the Claimant could establish that the Respondent's works and the consequences of these works satisfied the test for injurious affection where no land is taken, the Claimant still has the onus of establishing that the works created a demonstrable loss.

[38] The Respondent maintains that it carried out reasonable works in a reasonable manner for the benefit of the safety and economy of the community and there is no evidence before the Board that the Respondent's conduct was in any way unreasonable.

[39] In *Zadworski v. Ontario (Minister of Transportation and Communications) (1972, 4 L.C.R. 100)* the Land Compensation Board found that there is a substantial distinction between a diversion of traffic (where access remains) and the complete destruction of access. The Board did not find that there was a common law right of action where there was a diversion of traffic and access continued where it caused inconvenience or loss of business.

[40] The Claimant must establish on the balance of probabilities that the re-routing of County Road 10 was the cause of its alleged losses and it has not done so in this case.

Revenues were up in the year following the re-routing and the evidence suggested that the later downturn may have been caused by weather related factors as well as the downturn in the automobile industry including the elimination of the third shift at the Honda plant in the period 2007- 2008. The Claimant has failed to establish any causal connection between the Respondent's works and any loss it has alleged.

[41] The evidence indicates that the number of vehicles passing through the car wash was approximately the same in fiscal year 2007 after the realignment of County Road 10 as it was in fiscal year 2006 prior to the realignment and also shows that the reduction in the number of vehicles using the car wash did not occur until fiscal years 2008 and 2009, which coincided with a severe recession in the automobile industry and a subsequent elimination of a third shift at the Honda plant, according to the Respondent.

[42] The losses alleged by the Claimant occurred many months after the construction of the works was completed.

[43] In the *Antrim* case, in order to build Highway 417 ("HW 417"), the Ministry closed off Highway 17, some 200 yards from Antrim Truck Centre and it is noted that the Claimant lost 60% of its business on the very first day the road was stopped up and within six weeks the truck centre was re-located. Clearly, it was the construction of HW 417 that caused the damages in that case.

[44] In this case, sales continued to increase after the road was closed and it is evident that it is the use of the re-aligned road after the construction was completed that caused the alleged damages.

[45] The Board finds that the drop in car counts between 6 and 12% alleged by the Claimant does not constitute a substantial interference with its property and could have been caused by other factors such as weather and the decline in the economy.

[46] It is quite clear to the Board that the claim relates to the use of the works and not the construction of the works and that therefore the claim for injurious affection in this case must fail.

ORDER

[47] Accordingly, the claim is dismissed.

[48] The Respondent has requested the Board to exercise its discretion pursuant to s. 32(2) of the Act to award cost in favour of the Respondent in this proceeding but deferred its submission until the issuance of the Board's decision on the merits.

[49] The claim for costs shall be made in writing within 30 days of this Decision in accordance with the Board's *Rules of Practice and Procedure.*

"R. G. M. Makuch"

R. G. M. MAKUCH
MEMBER