

INJURIOUS AFFECTION CLAIMS IN PRIMARY AND ALTERNATIVE ROAD CLOSINGS: HOW, WHEN, WHAT AND WHY.

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Introduction

The authority for a municipality to establish, alter or close a road is found in the *Municipal Act*. In general, the *Expropriations Act* provides a statutory procedure for an owner, affected by the exercise of government authority, to claim compensation. This paper will examine what avenues are available to a property owner to claim compensation when a municipality closes an abutting road.

Prior to the enactment of the *Expropriation Procedures Act*¹ in Ontario, claims for compensation arising from expropriation and injurious affection resulting from the exercise of statutory powers were contained in a diverse spectrum of legislation with often inconsistent procedures. That initial legislation sought to consolidate these procedures in one legislative framework. Substantive matters relating to compensation as a consequence of expropriation and injurious affection were addressed in the subsequent version of the *Expropriations Act (1968)*², which essentially amalgamated nearly all claims for compensation resulting from the exercise of statutory powers relating to property rights into one comprehensive statutory regime.

Despite numerous subsequent reforms and amendments, the basis of compensation in respect of public road closings and alterations appeared to remain in the *Municipal Act (2001)*³. That act has traditionally dealt separately with road closings and alterations and has drawn a distinction where the closing or alteration will deprive any person of their sole means of motor vehicle access. The distinction between primary or sole access roads as compared to alternative access roads would have an impact upon the route and the likely result of a claim. If a claim can be brought, the quantum of recovery should also vary proportionately with the degree of impact.

Given the potential dual scope of legislative framework pertaining to road access and compensation, this article will focus on the efficacy of legal claims by property owners who claim to be injuriously affected by the closing of primary or alternative public access roads.

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¹ S.O. 1962-63, c.43.

² S.O. 1968-69, c. 36.

³ S.O. 2001, c. 25. I have cited the most recent version of the *Municipal Act*; where applicable, earlier versions with the year in parenthesis will be referred to and applied to the body of this article.

Road Closure Affecting Sole Access to an Abutting Property

The roots of the *Municipal Act* extend over 100 years. This legislation has been amended and added to, in order to create a lengthy and arguably comprehensive act. In January of 2003, a more modern and streamlined version of the established municipal legislation came into force in an effort to reflect economic, environmental and social changes, and improve clarity on technical and operational matters.

The most recent version of the *Municipal Act (2001)* provides for specific municipal powers with respect to highway⁴ closing procedures, including alterations.⁵ This is reflected in section 34, which consolidates sections 297, 298, 300 and 301 of the *Municipal Act (1990)*⁶, and also removes the previous requirement that a municipality offer to sell the land of a closed road to adjacent property owners. The relevant portions of section 34 of the *Municipal Act (2001)* read as follows:

- “34. – (1) Before passing a by-law for permanently closing a highway, a municipality shall give public notice of its intention to pass the by-law.
- (2) Before passing a by-law for permanently altering a highway, if the alteration is likely to deprive any person of the sole means of motor vehicle access to and from the person’s land over any highway, a municipality shall give public notice of its intention to pass the by-law.
- (3) In subsections (2) and (7), “over any highway”, in relation to motor vehicle access, means over an upper-tier highway, a lower-tier highway, a single tier highway or a provincial highway.
- (7) A by-law permanently closing or altering a highway is not valid if it would result in a person having no motor vehicle access to and from the person’s land over any highway, unless the person agrees to the by-law.
- (8) Despite subsection (7), if a person fails to agree to a by-law under that subsection within 30 days after public notice is given of the municipality’s

⁴ Section 26 of the *Municipal Act (2001)* broadly identifies the following as highways:

- “1. All highways that existed on December 31, 2002.
2. All highways established by by-law of a municipality on or after January 1, 2003.
3. All highways transferred to a municipality under the *Public Transportation and Highway Improvement Act*.
4. All road allowances made by the Crown surveyors that are located in municipalities.
5. All road allowances, highways, streets and lanes shown on a registered plan of subdivision.”

⁵ The power of a municipality to close a road is well entrenched in the common law, so long as such road closure by-law is passed in good faith and does not serve a private as opposed to public interest. See for example, *Fisher v. Vaughan (Municipal Council)* (1853), 10 U.C.Q.B. 492 (C.A.), *Styles v. Victoria (City)* (1899), 8 B.C.R. 406 (C.A.) in respect of the former proposition; and *Jones v. Tuckersmith (Township)* (1917), 45 O.L.R. 67, 47 D.L.R. 684 (S.C.C), *Wallace v. Dauphin*, [1932] 2 W.W.R. 405, 40 Man. R. 474 (K.B.) in respect of the latter proposition.

⁶ R.S.O. 1990, C.M.46.

intention to pass the by-law, the municipality may apply to the Ontario Municipal Board and the Board, after hearing the parties, may confirm, vary or rescind the by-law and may impose limitations and conditions respecting the closing or altering of the highway, which may include the payment of compensation to the owner and the provision of an alternative means of access to the land.

In relation to the issues at hand, the provisions in section 34 specifically provide that the by-law purporting to close or alter a road is not valid if it serves to deprive a person of their only right of public access unless the defined process is followed successfully.

As articulated in subsections (7) and (8), the limiting provisions of section 34 can be overcome either by agreement with the landowner, or with the blessings of the OMB. However, the OMB can “confirm, vary or rescind the by-law which may include the payment of compensation to the owner and the provision of an alternate means of access to the land”.

Section 34 of the *Municipal Act (2001)*, therefore, clearly expresses that it is not uncontestable for a municipality to pass a by-law closing a road that is the sole motor-vehicle access to an abutting property. The cases interpreting previous versions of the section confirm this approach.

In *Re McArthur v. Southwold (Township)*⁷, it was held that no council could close any public road whereby a person would be deprived of ingress and egress to his lands without providing “some other convenient road or way of access”. More specifically, the Court of Appeal asserted that this principle only applied to cases where the road closed was the only means or convenient means of access, and did not apply when there was another existing way of access. This reasoning was taken further in subsequent rulings.

In the Supreme Court of Canada case *Kuchma v. Tache R.M.*⁸, a municipal by-law directing the closing of parts of a highway was upheld after a survey of all circumstances, which included some limited use of the highway in question, and the fact the municipality did not close the entire highway in order to leave ingress and egress to the claimant’s land. By addressing the equivalent section of the *Municipal Act (2001)* for Manitoba⁹, Justice Estey stated:

“[T]he essential purpose of the section is to preserve to the occupant, a way of ingress and egress, and if the closing of a highway by the municipality incomes (sic) that the occupant “will be excluded from ingress and egress”, then and in that event only must “some other convenient way of access be provided”¹⁰

In *Kuchma*, the closing of one road left access to another, although less convenient, road open. As such, the court decided that the landowner could not contend that he would be excluded from ingress or egress within the meaning of that section.

⁷ (1878), 3 O.A.R. 295 (C.A.).

⁸ [1945] 2 D.L.R. 13 [hereinafter *Kuchma*].

⁹ R.S.M. 1940, c. 141.

¹⁰ *Kuchma, supra*, note 8 at 22.

In dealing with the issue of compensation, Justice Estey unequivocally stated that, as applied to a closure of a road that is the sole access to a property, “it appears to be well established that compensation need not be dealt with in the by-law itself. The omission to do so does not affect the rights of the applicant with respect to any claim that he may have for compensation.”¹¹ Essentially, the ruling confirms that in addition to providing alternative access where a sole access is taken away, compensation may be claimed. This is consistent with the basic principle of expropriation compensation theory, which is to put a claimant in the same position they previously enjoyed.¹²

The decision in *Kuchma* also referred to the finding in the case of *Re Credit Foncier Franco-Canadien v. Swansea*¹³, which was subsequently followed in *The Trusts and Guarantee Company Limited v. The Municipal Corporation of the Township of Toronto*¹⁴. In these cases the Ontario Court of Appeal stringently held that section 496 of the *Municipal Act (1937)*, had no application to a street (in the case of *Swansea*) or highway closing (in the case of *Trusts and Guarantee Company*) by-law where another means of access exists.

In reliance upon the relevant statutory authorities, the common law decisions relating to closing a road that is the sole access to property seem quite clear as to effect and compensation. A road closing by-law cannot have the effect of fully removing a landowner’s sole access to his or her property. If another access point exists, then the bylaw is presumed valid. If there is no other access, it is up to the municipalities to either provide alternate access or compensation.

It would also appear, however, that where sole access is cut off due to a road closure, compensation is payable so as to avoid a presumably successful challenge to the operating by-law. If this proposition was to be construed in light of subsection 34(8), however, a by-law removing sole access away from a landowner may stand because the aforementioned cases do not contemplate the new wording of the *Municipal Act (2001)*, which infers negotiation and mediation type processes so as to obtain the approval of a landowner prior to any formal application to the OMB. Accordingly, this begs the question of whether compensation is payable where alternative access points exist.

Road Closure where Alternative Access Exists

In *The TDL Group Ltd. and Chrigyn Ltd. v. Regional Municipality of Niagara*¹⁵, the Ontario Court of Appeal considered the nature of a property owner’s right of access in

¹¹ *Ibid.*

¹² See *Trusts and Guarantee Company*, *infra*, note 14 at 69.

¹³ [1940] O.W.N. 53, [1940] 1 D.L.R. 446 [hereinafter *Swansea* cited to D.L.R.].

¹⁴ [1942] O.R. 68-73 [hereinafter *Trusts and Guarantee Company*].

¹⁵ [2001] 55 O.R. 3d 1, [2001] O.J. No. 3017 [hereinafter *TDL Group* cited to O.R.].

respect of their interpretation of section 298 of the *Municipal Act (1990)*, the predecessor version of section 34. Here, a planned median that had the effect of causing patrons of the respondent Tim Hortons franchise to take a circuitous route to its commercial establishment was found to be outside the scope of “sole access”, and as such, compensation under the *Municipal Act (1990)* was rejected. In the following quote, however, Sharpe J.A. acknowledges the potential that interruption of a preferred or alternative means of access as a result of municipal works may well give rise to a remedy for compensation for injurious affection, but that such remedy could only arise as a claim for injurious affection under the *Expropriations Act*:

“There is a clear distinction to be drawn between an interference with a common law right of access, which will lead to a remedy for compensation for injurious affection, and a denial of access, which will trigger the remedy conferred by s.298(1). The statutory remedy under s.298(1) consists not only of compensation but also of a right to an alternative means of access and can be invoked only where the owner is deprived of access, not where access is merely limited.”¹⁶

Similarly, Chief Justice Robertson’s obiter dicta in *Swansea* provided that:

“[S]o long as the owner is not wholly excluded from access to his land by a public highway there is no reason why the closing of any additional means of access he may have, cannot be the subject of compensation.”¹⁷

The scope of liability for injurious affection was left open in *TDL Group* and to an extent, in *Swansea*, but expressly limits the potential compensation role of section 34 of the *Municipal Act (2001)* in relation to alternative road closings. Although *TDL Group* and *Swansea* was considered in light of sole access statutory road closure provisions, an Ontario court considered the issue of injurious affection where a property enjoyed multiple roadway access and one of those roadways was subsequently closed by a municipality.

In *Re Tate and Toronto (City)*¹⁸, a property on the west side of a street running north and south was held to have been “injuriouly affected” within the meaning of section 437 of the *Municipal Act (1903)*¹⁹, which dealt with compensation for lands taken or injured. The section read:

“437. Every council shall make to the owners or occupiers of, or other persons interested in, real property entered upon, taken or used by the corporation in the exercise of any of its powers, or injuriouly affected by the exercise of its powers due compensation for any damages, (including cost of fencing when required) necessarily resulting from the exercise of such powers, beyond any advantage which the claimant may derive from the contemplated work; and any claim for such compensation, if not mutually agreed upon, shall be determined by arbitration under this Act.”

¹⁶ *Ibid* at 4 of 5.

¹⁷ *Swansea, supra*, note 13 at page 450.

¹⁸ [1905] O.J. No. 220 [hereinafter *Tate*].

¹⁹ 3 Edw. VII. C.19.

Although the *Municipal Act (1903)* does not specifically address the circumstances of a road closing, its reference to those “[i]njuriously affected by the exercise of municipal powers” arguably brought the *Tate* facts within the wording of the municipal statute. In *Tate*, the city of Toronto closed a street called Herrick Street, which caused the owner of the adjoining property to take a longer route to reach a major road (i.e., Bathurst Street). The facts also showed that the claimant could, without using Herrick Street, reach Bathurst Street by going a comparatively short distance either north or south and cross over on another road to Bathurst Street.

The Ontario Court of Appeal affirmed compensation awarded to the property owner by an arbitrator on the basis that “[t]he loss of access to and from the plaintiff’s property by Herrick Street injuriously affected and depreciated the property”.²⁰ The court also held that the street closing was a direct interference with the enjoyment of the claimant’s property, where the right of egress was directly affected and made far less convenient, and that the “light, air and view will be to an appreciable extent obstructed”.²¹ By basing its reasoning on the effect of the road closing against the value of the claimant’s property, a wide net was cast by the court in determining that compensation was payable for injurious affection in this instance. It should be noted that *Tate* has not been judicially considered in almost 100 years.

As such, it appears under that statute, where no land was taken, an owner whose lands were injuriously affected by the closing of alternative access, could recover compensation. The changes in the legislation, however, now arguably place all claims of injurious affection in the *Expropriations Act (1990)*. As a result, claims for alternative road closings appear to have been left in the hands of the common law interpreting the more general sections of the applicable legislation.

The case law further suggests that the standard imposed by the courts to succeed with such a claim, although not inconceivable, is somewhat high. This should be considered with the guidance of the *Expropriations Act (1990)*. It should also be noted that such remedies have been stretched to interact with the nuisance concept in tort law in relation to the tests set out for injurious affection. This is articulated in the next section.

The Expropriations Act (1990)

The advent of the *Expropriations Act (1968)* consolidated nearly all claims for injurious affection. In the case of public road closings, it has not expressly been codified as a cause of action under the *Expropriations Act (1990)*, or its earlier versions. Accordingly, whether or not such a claim exists may potentially turn on interpretation of that legislation. The cases that follow provide some insight as to the interpretation of the *Expropriations Act*.

²⁰ *Tate, supra*, note 18 at page 2 of 4.

²¹ *Ibid.*

In *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*²², a land developer who owned lands in Mississauga was actively trying to obtain approvals for development of those lands. During that same year, the Toronto Area Transit Authority commenced a study to determine a location for a Go Train Station in the area. For 3 years, all approvals for development were withheld resulting in a delay in development for at best a 2 year period. The developer claimed damages for business loss resulting from the delay. After deciding in favour of the developer, the split majority of the Supreme Court of Canada held that “[t]he *Expropriations Act* is a remedial statute, which must be given broad and liberal interpretation consistent with its purpose to adequately compensate those whose lands are taken to serve the public interest.”²³ According to the spirit of *Dell*, it would be justified to suggest that compensation for injurious affection in respect of alternative road closings may be covered by the *Expropriations Act (1990)*.

Conversely, *747926 Ontario Limited et al. v. Upper Grand District School Board*²⁴ distinguishes *Dell Holdings* by narrowing the application of expropriation legislation and suggesting that it is an all inclusive statute. In *Upper Grand*, the definition of “market value” in the *Expropriations Act* was considered. Here, the claimant developer purchased land to develop a residential subdivision, in which the Upper Grand District School Board expropriated a portion of it for a school site. The claimant sought compensation for developers’ profits under the *Expropriations Act*. The Ontario Court of Appeal disallowed such claim for damages because the definition of “market value” relied upon by the claimant did not reference any concept of profit given that the market adjusts for potential of land for future development. Accordingly, *Upper Grand School Board* casts doubt upon the wide scope of the *Expropriations Act (1990)* contemplated by *Dell Holdings*, although neither deals specifically with alternative road closings.

With respect to road closures, the ability to make a claim for compensation for injurious affection was considered prior to *Dell* or *Upper Grand*. In the case of *Rotenberg et al. v. Borough of York*²⁵, the Court suggests that road closing claims for injurious affection are limited under the *Expropriations Act (1970)*²⁶. In *Rotenberg*, a planned realignment of certain streets caused the claimant’s apartment building to cease being located on a through road, but situated instead on a cul-de-sac. Pursuant to the alignment, the area was also approved for a redevelopment of apartments. In assessing whether compensation was payable for the realignment, the Ontario Court of Appeal narrowed the issue down to whether the damages claimed met the test for injurious affection under the *Expropriations Act*.

In allowing the appeal by the Borough of York and disallowing the claim for injurious affection, Evans J.A. stated:

²² [1997] 1 S.C.R. 32, [1997] S.C.J. No. 6 [hereinafter *Dell Holdings* cited to S.C.J.].

²³ *Ibid.*

²⁴ [2001] O.J. No. 3909 [hereinafter *Upper Grand School Board*].

²⁵ (1974), 4 O.R. (2d) 457 [hereinafter *Rotenberg*].

²⁶ (1970), c.154, s.21.

“The damages suffered by the claimants do not flow from the actions of the borough either directly or indirectly and if there is any remedy open to the claimants, and I do not suggest there is, it does not arise under the Expropriations Act.”²⁷

Against this negative background, we propose to revisit the basis on which any such claims for road closings could be advanced. We will then revisit *Rotenberg*.

Before embarking on an exercise to determine the legal effect of claims under the relevant expropriation authorities, it is first necessary to establish the basis of compensation for injurious affection.

Section 21 of the *Expropriations Act (1990)* provides statutory authority for compensation to owners for loss or damage caused by injurious affection. It is, perhaps, a codification of the common law tort of nuisance. Injurious affection is defined in s.1(1)(b) of the *Expropriations Act (1990)* as:

...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

The Supreme Court of Canada in the *Queen v. Loiselle*²⁸ articulated four conditions which must be met in order to establish a claim for compensation for injurious affection, where none of the claimant’s property was taken. In that case, damage for injurious affection was awarded because the public authority diverted a highway as a result of the construction of the St. Lawrence Seaway, which caused the claimant’s property to be located on a dead end highway. By virtue of *Loiselle*, the conditions required to establish compensation for injurious affection are:

1. The damage must result from an act rendered lawful by statutory powers of the person performing such act;
2. The damage must be of a kind that would have been actionable under the common law;
3. The damage must be an injury to the land itself and not a personal injury to a business or trade;
4. The damage must be occasioned by the construction of the public work, not by its user.”

It is to be noted that *Loiselle* pre-dated the current expropriations legislation and much of these requirements are arguably superceded by the legislation. However, the four points are a useful exercise. The first point is overcome, as the *Municipal Act (2001)* authorizes the closing of roads, which is directly attributable to the scope of power available to a municipality.

²⁷ *Rotenberg*, *supra* note 25 at 460.

²⁸ [1962] S.C.R. 624 at 627 [hereinafter *Loiselle*]. See also *St. Pierre v. Ontario (Minister of Transportation and Communications)*, [1987] S.C.R. 906 (S.C.C.), *St. Pierre, infra*, at note 31, which reiterates the test set out in *Loiselle*.

The damage is actionable as discussed subsequently, in brief. The third hurdle has been eliminated by virtue of the *Expropriations Act (1990)* section 1(b)(ii), and the case of *Windsor v. Larson*²⁹, which awarded compensation for personal and business damages arising from injurious affection as a result of the construction of a median. Regarding the fourth point in *Loiselle*, ‘construction’ is a term used in the current expropriation legislation.

The definition of ‘construction’ in the road closing context would be instructive, if such claims clear the last hurdle of *Loiselle* as well as section 1(1)(b) of the *Expropriations Act (1990)*. It is uncertain whether the act of closing a road (i.e. passing a bylaw) would be construed as “construction” of “works” within the definition found in section 1(1)(b). A bifurcated claim may have to be advanced based on the argument that the physical removal and construction for some post-closing use, brought the road closing within the ambit of the definition. However, it is also necessary to ignore the use (or removal of use).

Aggressive counsel could argue the point given the right factual situation involving closure. This was attempted in *Rotenberg*, where the street alignment and proposed development of additional apartment buildings were outlined before the court under the auspices of injurious affection in respect of the claimant apartment building owner.

In *Rotenberg*, the claimants were owners of a small apartment building. The building was located on the corner of 2 through streets. A planning study was conducted. As a result of the planning study, the area was redeveloped for additional apartments in the area that included the closing of certain roads. One of the street closings resulted in the claimant’s apartment building being located on a cul-de-sac.

Counsel for the claimants were initially successful at the Land Compensation Board in arguing that damages were payable because the Borough of York permitted construction of high-rise apartment buildings near the claimant, and in doing so, the damages for “construction” damage were a direct consequence of the road closure.

In reversing that decision and ruling in favour of the Borough, the Ontario Court of Appeal held that compensation was not payable for damages resulting from a development authorized by an official plan amendment or a zoning by-law because the business loss arose from construction of the apartment buildings on private lands and are not consequential damages resulting from the road closure. As such, the claimant in *Rotenberg* was unable to bring himself within the meaning of injurious affection because damages flowed from the construction of apartment buildings in the immediate vicinity and not the construction of the public works itself.

This separation may be somewhat artificial. Section 14(4)(b) of the *Expropriations Act (1990)* could arguably now be used to tie all *Rotenberg* events together. The court’s

²⁹ [1980] 29 O.R. (2d) 669 [hereinafter *Larson*].

choice to ignore the link between the road closure and the construction that necessitated it, may be indicative of a desire to minimize or eliminate such claims.

The case of *St. Pierre v. Ontario (Minister of Transportation and Communications)*³⁰ further visited damages in respect of injurious affection relating to “construction” of public works. In *St. Pierre*, the appellants owned land that was zoned “open space”. Shortly thereafter, the respondent acquired a strip of land adjoining the eastern boundary of the appellant’s land to construct a highway, which was opened to traffic. A claim was made based on the intrusion of a public highway adjacent to the claimant’s property, depreciating its value as a rural haven. Given the circumstances of the case, the Supreme Court of Canada determined that the sole question for determination was whether the construction of the highway with its resultant damage to the property would have been actionable at common law.

In dismissing the appeal, the court referenced the tort of nuisance³¹ and held that there was no interference resulting from construction of the highway. Although the Supreme Court of Canada recognized that “use” of the highway probably constituted a disruptive element in a claim for lost amenities, it explicitly stated that “[t]his is a field of damage which may not be considered because the claim is limited to loss occasioned by construction”.³²

When considering claims for compensation as a result of alternative road closings, if it is unlikely the claim will succeed under the *Expropriations Act*, one may be tempted to try to shelter under the road closure language of the *Municipal Act* (2001). This would likely fail when one examines the *Municipal Act* (2001) and the common law authorities that consider them. Section 2 of the *Expropriation Act* (1990) must also be considered.

Section 2 states:

- 2.(1) Despite any general or specific Act, where land is expropriated or injurious affection is caused by a statutory authority, this Act applies.

References in other Acts Deemed References to this Act

- (2) The provisions of any general or specific Act providing procedures with respect to the expropriation of land or the compensation payable for land expropriated or for injurious affection that refer to the *Municipal Act*, the *Ministry of Government Services Act* or any other Act shall be deemed to refer to this Act and not to the *Municipal Act*, the *Ministry of Government Services Act* or other Act as the case may be.

Application to Drainage Works

³⁰ [1987] 1 S.C.J. No. 27, [1987] 1 S.C.R. 906 [hereinafter *St. Pierre* cited to O.J.].

³¹ The specifics relating to nuisance and injurious affection are visited later on.

³² *St. Pierre*, *supra* note 30 at 7 of 8.

- (3) This Act does not apply to the use of or injury to land authorized under the *Drainage Act* for the purposes of a drainage works constructed under that Act or any proceedings in connection therewith.

Conflict

- (4) Where there is a conflict between a provision of this Act and a provision of any other general or special Act, the provision of this Act prevails.

Where injurious affection is caused, the *Expropriations Act* (1990) applies. Where there is a conflict with another Act, this *Expropriations Act* (1990) prevails. These powerful words could be argued to allow claims for injurious affection to be under its umbrella. It could also be argued that the specific sections of the *Municipal Act* (2001) are not in direct conflict.

If there was a conflict procedurally, say between section 34(8) of the *Municipal Act* (2001), and the *Expropriations Act* (1990), the *Expropriations Act* (1990) should be held to have priority. This proposition is confirmed in *Ontario (Ministry of Transportation) v. Tripp*³³, where Weiler J.A. explicitly indicates “that section 2 of the Expropriations Act states that in the event of a conflict the Act prevails”³⁴. However, Weiler J.A. did not have to utilize the section as it was held that no conflict arose in the case at hand because the operating section of the *Expropriations Act* (1990) was silent on the matter of interest.³⁵ This is similar to the silence within the *Municipal Act* (2001), on the closing of alternative access points.

Although the *Expropriations Act* (1990) is silent on road closing per se, it addresses injurious affection and the cases suggest those provisions are operative as applied to alternative road closings. This should capture jurisdiction over alternative road closing, if such claims exist.

Application of Common Law Nuisance

In *Boland v. Ontario (Minister of Highways)*³⁶, the appellant landowner argued that the closing of roads injuriously affected his lands because he had less convenient access, and that in turn reduced the value of the lands which he had previously sold. In dismissing the appeal, Aylesworth J.A. of the Ontario Supreme Court – Court of Appeal dealt with the issue of onus for injurious affection by stating that “where no lands are taken, the injurious affection is to be proven by those asserting it”³⁷.

The reasoning in *Loiselle* articulated the test in respect of injurious affection to land as being an “interference”, which was subsequently followed in *Windsor*. However, recent cases suggest a shift in policy and that compensation in relation to the common law right of access must “substantially affect” the rights of a landowner. The bar may be rising.

³³ [1999] O.J. No. 2832.

³⁴ *Ibid* at 6 of 7.

³⁵ *Ibid*.

³⁶ [1959] O.J. No. 260 [hereinafter *Boland*]

³⁷ *Ibid* at 5 of 5.

The finding in *Loiselle* was subsequently distinguished in *St. Pierre* where no part of the appellant's land was taken or acquired, but a claim for injurious affection was commenced on the basis there was a loss of prospect and privacy as a result of the disruption created by construction of a highway. In dismissing the appellant's claim for injurious affection, the Supreme Court of Canada in *St. Pierre* cited the words of Anglin J. in *Canadian Pacific Railway Co. v. Albin*³⁸, who held that in order to succeed in such an action the appellant had to show a "physical interference with a right which the owner was entitled to use in connection with his property, which substantially diminished its value".³⁹ As such, it was not sufficient to merely show an indefinable loss in enjoyment.

Taking this reasoning further and looking at whether the construction of a highway was actionable at common law, the court deemed that the only basis for an action to recover damages in the circumstances would be through the tort of nuisance, which would require a wide variety of interferences against an occupier's interest in the undisturbed enjoyment of their property. In dismissing the cause of action in *St. Pierre*, the court held that a broad approach to the question of nuisance⁴⁰ is fact specific and that the following general concepts relating to the law of nuisance should be applied:

"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 an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable."⁴¹

The Supreme Court of Canada in *St. Pierre* also reviewed those decisions where the courts have taken a more expansive approach to allowing claims for injurious affection. In reviewing the conceptual notion of nuisance, those cases were distinguished as follows:

"[I]n each of those cases the action of the public authority substantially altered the nature of the claimant's property itself or at least interfered to a significant extent with the actual use being made of the property.

In *Loiselle*, the claimant's service station was left at the dead end of a cul-de-sac as a result of a diversion of a highway in order to accommodate the construction of the St. Lawrence Seaway. Similarly, in *Larson*, a concrete median was built in the middle of the highway running in front of the claimant's motel.

In both cases, the construction of the public works in close proximity to the lands so changed their situation as to greatly reduce if not eliminate their value for the uses to which they had been put prior to the construction and could, therefore, be classified as nuisances"⁴²

³⁸ (1919), 59 S.C.R. 151 at 159.

³⁹ *St. Pierre*, *supra*, note 30 at 4 of 8.

⁴⁰ See *Pugliese v. National Capital Commission* (1977), 17 O.R. (2d) 129, *Nor-Video Services Ltd. v. Ontario Hydro* (1978), 4 C.C.L.T. 244.

⁴¹ H. Street, *The Law of Torts* - 6th ed. (Toronto: Buttersworth, 1976).

⁴² *St. Pierre*, *supra*, note 30 at 7 of 8.

Through an assessment of additional cases that pertain to the concept of nuisance and injurious affection, there is a consistent line of authority that suggests the threshold of interference required to forward a claim of nuisance is fairly prohibitive.⁴³ In *Petro Canada Inc. v. Vancouver*⁴⁴, a claim of injurious affection was made in relation to the construction of a bridge. The action was denied on the basis that interference with access to the appellant's property alone was not sufficient to conclude nuisance. Again, the test relied on was "substantial or significant interference" with access to the claimant's land.

Perhaps the most interesting case in respect of nuisance thus far transpires in *Jagtoo v. 407 ETR Concession Co.*⁴⁵, where the plaintiffs brought a motion for an interlocutory injunction to prevent the defendants from building the east partial extension of Highway 407 on the basis that the extension would constitute a nuisance that will result in an increase in the level of noise and alter the rural setting of the area in which the plaintiffs reside. In dismissing the motion, Beaulieu J. cited a line of cases⁴⁶ that examine nuisance actions in light of their effect on the public good, which are summarized in this quote:

"Liability for nuisance will not be imposed if an activity is authorized by statute and the nuisance is a direct result of the authorized activity. According to the learned author John G. Fleming in his work *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998), when determining whether an activity is authorized by a statute, the court must look at the words of the statute:

Such statutes differ greatly: some require, others merely empower the undertakings, some authorize it in a specific location, others leave the where and how to discretion; some provide for compensation, others do not address injurious effects.

If the court finds statutory authority, then the inference to be made is that the intent of Parliament was that the activity is to be tolerated since it is in the public interest. Furthermore, since the activity is in the public interest it cannot be enjoined. Consequently, if nuisance is an inevitable consequence of the activity authorized by statute, it is not actionable."⁴⁷

The ruling in *Jagtoo* identifies another roadblock to an award of compensation based on the tort of nuisance, the defence of "statutory authority" and the inclusion of "public good" policy considerations. Arguably, this ruling avoids, or ignores a more inclusive reading of section 1(1)(b), as set out above. .

⁴³ For a contrary opinion, see *Airport Realty Ltd. v. Newfoundland (Minister of Works, Services, and Transportation)*, [2001] N.J. No. 245, where the court found that the alteration of a road system constituted substantial interference with the Claimant's use or enjoyment of the property, which amounted to a \$300,000.00 loss of value to the claimant hotel.

⁴⁴ [1996] B.J.C. No 3168, leave to appeal to the Supreme Court of Canada denied [1996] S.C.C.A. No. 592 [hereinafter *Petro Canada*].

⁴⁵ [2002] O.J. No 2062 [hereinafter *Jagtoo*].

⁴⁶ See *Acciaroli v. Canada*, [1988] 3 F.C. 389 (T.D.), *Mandrake Management Consultants Ltd. v. Toronto Transit Commission*, [1993] O.J. No. 995 (C.A.).

⁴⁷ *Jagtoo, supra*, note 46 at page 2 of 2.

Conclusions

The law with respect to sole access road closures and a finding of injurious affection is dealt with by section 34 of the *Municipal Act* (2001), with perhaps, procedural overrides from the *Expropriations Act* (1990).

In relation to closings of alternative roads such claims historically were addressed through the *Municipal Act*, as was the case in *Tate*. Such claims could perhaps now be based on the definition of injurious affection in the *Expropriations Act*. These claims may face difficulties in light of the definition of injurious affection as being limited to “construction” of public works, and the restrictive view taken by many courts.

Also to be considered with respect to non-primary access road closure claims is the consideration of the tort of nuisance. The threshold for an impact to be actionable has been held to be “substantial or significant interference”. If a closure significantly alters the nature of a claimant’s property so as to greatly change or eliminate its value, a claim may be possible. One could also argue that the extension of the more general principles of equity are used sparingly, in comparable situations.

Moreover, authorities such as *Jagtoo* suggest that the hurdles for obtaining compensation may be raised even further by reintroducing consideration of the policy initiatives of expropriation or municipally driven activities authorized by statute. These issues have been raised to deflate or deny claims by affected landowners.

This returns us to the central question whether a landowner can claim compensation for the closing of an alternative access. The short answer, perhaps long overdue, is yes, and on sufficiently compelling facts, there is a possibility of recovery. The path would be difficult and have to rely on the comparison to the “median” cases while avoiding “downzoning” and “nimby” cases. This is not a settled area of law, and claims will be difficult to advance successfully.