

Non-taking Injurious Affection

- An owner's land could be injuriously affected by activities on adjoining land, without any of the owner's land partially taken (expropriated) by the works. For example:
 - Access might be hindered by changing street grades or by the direction of traffic flow
 - Obnoxious uses of neighbouring land: the construction and use of public restrooms, noisy schools, parking lots, hospitals, fire-halls, sewage lagoons and airports, etc.

Statutory Bases for Compensation

- *Canada Expropriation Act, RSC 1985 c E-21*, does not provide compensation for injurious affection where none of the claimant's land has been expropriated.
- *Ontario Expropriation Act, RSO 1990 c E-26*, defines the situations of non-taking injurious affection in s 1(1)(b).
 - (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; ("effet préjudiciable")
- The basic principle of compensation is the same as partial taking injurious affection (*OEA*, s 21): compensation for loss or damages (nuisance tort).

Compensability of Non-taking Injurious Affection

- The four conditions or criteria to determine compensability of non-taking injurious affection were affirmed by the Supreme Court of Canada in *R v Loiselle*, [1962] SCR 624¹:
 - The damage must result from an act rendered lawful by statutory powers of the person performing such act; (**The Statutory Authority Rule**);
 - The damage must be such as would have been actionable under the common law, but for the statutory powers; (**The Actionable Rule**);
 - The damage must be an injury to the land itself and not a personal injury or an injury to business or trade; (**The Nature of Damage Rule**);
 - The damage must be occasioned by the construction of the public work, not by its use; (**The Construction and Not the Use Rule**).

The Statutory Authority Rule

- The construction claimed of should have been performed and decided by a statutory authority (s 1(1) ...by the statutory authority).

¹ The four-condition test was originally applied in *Autographic Register Systems Ltd v Canadian National Railway Company*, [1933] Ex CR 152.

- If the activity which caused the injurious affection was not done pursuant to statutory powers, or was done in excess of or in abuse of statutory powers, the appropriate remedy would be an ordinary action for damages or an injunction, not statutory compensation for injurious affection provided by the legislation.
- Even if the act of non-taking injurious affection were done pursuant to statutory powers, an illegal act or negligence would call for a regular action for damages, not statutory compensation for injurious affection.

The Actionable Rule

- The authority should be liable at common (tort) law, save for the defence of statutory authority: “reference to what the law has traditionally recognized as being proper subjects of compensation” (s 1(1)...as the statutory authority would be liable for if the construction were not under the authority of a statute...).
- The test is whether the damage would have been actionable at common law if the activity causing the damage had not been authorized by statute.
- This rule is drawing a line between compensable and non-compensable injurious affection of non-taking. But for this rule, all kinds of claims with indefinite characters might be filed for injurious affection.
- The actionable rule imposes on statutory authorities the same burden of liability to pay compensation for injurious affection as the burden imposed on private developers to pay damages at common law.

The Nature of Damage Rule

- The old rule of the nature of damage was that the actionable injury must be actual injury to the land itself, excluding loss of business profits or damage to the goodwill of business. However, the restrictive rule was later loosened by legislation.
- In Ontario, however, statutory definition of injurious affection includes personal and business damages (s 1(1) ...such personal and business damages...), in addition to actual injury to the land.
- By restricting the type of damages for which statutory authorities must pay compensation, the nature of damage rule makes the statutory authorities’ liability less than that imposed by the common law on private developers.

The Construction and Not the Use Rule

- The old test used to be whether the property was actually damaged by operation or use, or whether the works as constructed, even if the works were left unused, would interfere with the actual enjoyment of the property.²
- In Ontario, statutory definition of injurious affection effectively prevents compensation for damages incurred by the “use” of the constructed facilities (s 1(1) ...resulting from the construction and not the use of the works...).

² *Windsor (City) v Larson*, (1980) 20 LCR 344, 350 (Ont Div Ct).

Duty to Mitigate Damage in Non-taking Injurious Affection

- The general duty to mitigate damages remains. However, courts have distinguished the principle for duty to mitigate in a non-taking injurious affection, and lowered the bar, from the principle in a partial-taking injurious affection.
- For non-taking injurious affection, since there has been no expropriation and no divesting of the rights of property owners to use their lands as they may please, the compensation will not be reduced just because the owners did something on the land after they gained full knowledge of the authority's plan to develop nearby.

Cases to Read

- *St Pierre v Ontario (Minister of Transportation & Communications)*, [1987] 1 SCR 906.
- *Antrim Truck Centre Ltd v Ontario (Minister of Transportation)*, 2013 SCC 13.