Incidental Damages – A Uniquely Albertan Approach

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INTRODUCTION

In the recent case of ***Brese v. City of Edmonton*** (Alberta Land Compensation Board Order No. 425) the Alberta Land Compensation Board awarded the landowners $7,800 for loss of enjoyment by the owners of their land during the construction period. The evidence before the Board was that over a period of thirteen months, intense construction activity occurred on the expropriated lands to create the works for which the land was acquired. The nuisances complained of were noise, dust and exhaust. The owners were unable to sit in their yard, have guests outside, or carry on a normal conversation outside their home during the construction period. The evidence of Mr. Brese was that he suffered from lack of sleep and depression as a result of the construction activities.

The Board cited s. 56(b) of the *Expropriation Act* (R.S.A. 2000, c. E-13) in its analysis of the liability of the expropriation authority and determined that the only two prerequisites for compensation were as stated under that section:

(a) that only a portion of the owner's land be taken; and

(b) the incidental damages result from the construction or use of the works for which the land is acquired.

Although the expropriating authority argued that the Act did not authorize compensation for nuisance, the Board did not infer a third prerequisite – that the damages be economic in nature. While the Board's method of calculation of the quantum of the damage had an economic basis, the damages themselves were clearly non-pecuniary.

Contrary to many other Provinces, Alberta has not restricted expropriation damages to purely economic ones. In this paper, we will explore the origins of our section 56 and examine the reasons for the varying approaches between provinces.

OTHER PROVINCES

In 1967, the Ontario Law Reform Commission was the first in Canada to recommend changes to the compensation scheme for expropriations, many of which were the basis for Ontario's Expropriation Act in 1968/69. Thereafter, several jurisdictions looked to the Ontario Act in determining a new compensation scheme. The OLRC report stated that *"the basic principle to be applied in fixing compensation is the indemnification for losses resulting from the expropriation."*

Ontario, Nova Scotia and New Brunswick enacted the following provisions in their Expropriation Acts:

> **"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; *("effet préjudiciable")*

Neither the OLRC report nor the above section expressly limit expropriation damages in those provinces to economic losses. Earlier cases seem to allow claims in the nature of nuisance. In the 1977 case of ***Trinity Memorial Church v. Cornwall***, 10 LCR 281, $1,000 was awarded as personal damages due to unusual noise, vibration and some trespass. Later, in 1980, in ***Adams v. Ontario (Minister of Transportation & Communications)*** (1980) 20 LCR 241, the Ontario

Divisional Court upheld, but reduced to $3,000, an award for increased noise which interfered with the everyday life of the landowners.

However, as reported in Coates & Waque, ***New Law of Expropriation***, looseleaf (Toronto: Thomson Carswell, 1986) at 10-74.13, the Divisional Court of Ontario in dismissing an appeal of ***Mitsui v. Hamilton (City)***, (1984) 30 LCR 46 made the following comments:

> The history of compensation for expropriation, including disturbance, has been that it is restricted to economic loss. Damages for disturbance were introduced as an independent element of the claim in the 1968-9 Act, but in our opinion that change did not widen compensation to cover more than economic loss. The language is broad, but when read in the context of the Act, it does not extend to compensation for physical or mental injury, even that attributable to the expropriation.

From our review of the reported Ontario cases, nuisance-type awards since ***Mitsui*** under Ontario's injurious affection provisions have been, with the exception of one case at Land Compensation Board level restricted to the direct effect such ongoing nuisance had on the value of the remaining lands*. Whether this is just coincidental or the result of the ***Mitsui*** decision will be seen over the longer term.

The British Columbia equivalent of our section 56 is the following:

> **40(1)**
>
> Subject to section 44, if part of the land of an owner is expropriated, he or she is entitled to compensation for
>
> (a) the market value of the owner's estate or interest in the expropriated land, and
>
> (b) the following if and to the extent they are directly attributable to the taking or result from the construction or use of the works for which the land is acquired:
>
> (i) the reduction in the market value of the remaining land;
>
> (ii) reasonable personal and business losses.

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* (***Cushing v. City of London*** (1987) 37 LCR 345)

The Ontario Municipal Board, however, in a preliminary hearing on a different subject, did quote with approval in ***Wilson v. City of London*** ((1998) 63 LCR) an early case allowing nuisance type claims. The ***Mitsui*** case was not brought to the Boards' attentions in ***Cushing*** or ***Wilson***.

Again, while on the surface this seems a very broad provision for damages of a non-pecuniary nature, it has not been so interpreted. In the 1997 case of ***Patterson v. British Columbia (Ministry of Transportation and Highways)*** [1997] B.C.J. No. 1642, the B. C. Court of Appeal considered whether "personal losses" included "an amount for non-pecuniary losses analogous to damages for nuisance" (para. 7).

The court considered the following principles:

> "Arguably an award of this nature is consistent with the remedial nature of expropriation legislation. In Dell, for example, Cory J., speaking for the majority discussed the construction of expropriation legislation at pp. 44-45 of the decision:
>
> > The expropriation of property is one of the ultimate exercises of governmental authority. To take all or part of a person's property constitutes a severe loss and a very significant interference with a citizen's private property rights. It follows that the power of an expropriating authority should be strictly construed in favour of those whose rights have been affected. This principle has been stressed by eminent writers and emphasized in decisions of this Court.[citations given]
> >
> > Further since the Expropriations Act is a remedial statute, it must be given a broad and liberal interpretation consistent with its purpose. Substance, not form, is the governing factor ...
>
> On the other hand, it was the view of the B.C. Law Reform Commission in its 1971 Report on expropriation that economic reinstatement should be the goals of the proposed Expropriation Act. The Commission dealt with this subject at p. 122 of its report:
>
> > What should be the basic principle of the compensation provisions of the proposed expropriation statute? We believe the principle should be that the expropriated owner is entitled to economic reinstatement. The general principle underlying the recent legislation enacted in various Canadian jurisdictions is that the expropriated owner should be put in the same economic position that he was in prior to the expropriation. Although this principle is not expressly articulated in the Ontario, Manitoba and Federal statutes, the general effect of those statutes is to provide indemnification for economic loss.

The court then went further to weigh these opposing principles and concluded at paragraph 46:

"...In my view, the concept of indemnification is consistent with the principle of economic reinstatement referred to by the B.C. Law Reform Commission, but is does not accord with an award of damages for non-pecuniary damages as are claimed here.

Although the words 'reasonable personal ... losses' could be interpreted to encompass non-pecuniary losses, I am not persuaded that the legislature intended to incorporate non-pecuniary damages akin to damages for nuisance into the Act."

Clearly the Brese award for nuisance would not have been granted in British Columbia and possibly not in Ontario and the Maritimes. So the question is: "What makes Alberta different?"

ALBERTA HISTORY

Alberta's modern day *Expropriation Act* came into existence in 1974 following a report from our Institute of Law Research and Reform issued in March of 1973 (Report No. 12). That report considered Ontario's provisions for "personal and business losses" in partial takings, but preferred the term "incidental damages" for incorporation into our new Act.

The phrase "incidental damages" had previously been applied in Alberta in relation to company takings under the *Expropriation Procedure Act* (EPA). In takings by the Provincial Crown and municipalities, the EPA provided for compensation for injurious affection. However, in relation to company takings, the phrase used was "incidental damages", not injurious affection. The Institute's report referred to a P.U.B. case of ***Dome Petroleum Ltd v. Swanson*** (No. 30470, September 22, 1972) which stated that our Court of Appeal had held that the phrase "incidental damages" was a broad one that included injurious affection. The Institute's report, stated that incidental damages could be incurred in the absence of injurious affection (at 116), and that *"[a]s to the items properly to be considered under 'incidental damages' there is no all-inclusive list. It is clear that injurious affection to the whole parcel is included, even though the term 'injurious affection' does not appear in Part 3 (of the EPA)"*(at 118).

The Institute opined, *"We think that provision for 'incidental damages' on highway takings and indeed on all partial takings is as appropriate as it is for company takings."* (at 109). It then made the following recommendation at p. 110 of its report:

> *RECOMMENDATION #56*
>
> *WHERE PART OF AN OWNER'S LAND IS TAKEN COMPENSATION SHALL BE GIVEN FOR INJURIOUS AFFECTION, INCLUDING SEVERANCE DAMAGE AND ANY REDUCTION IN MARKET VALUE TO THE REMAINING LAND, AND ALSO FOR INCIDENTAL DAMAGES, PROVIDED THE INJURIOUS AFFECTION OR INCIDENTAL DAMAGES RESULT FROM OR ARE LIKELY TO RESULT FROM THE TAKING OR FROM THE CONSTRUCTION OR USER OF THE WORKS FOR WHICH THE LAND IS ACQUIRED.*

Out of this recommendation was born our Section 56:

> **Injurious affection and incidental damage**
>
> **56** When only part of an owner's land is taken, compensation shall be given for
>
> (a) injurious affection, including
>
> (i) severance damage, and
>
> (ii) any reduction in market value to the remaining land,
>
> and
>
> (b) incidental damages,
>
> if the injurious affection and incidental damages result from or are likely to result from the taking or from the construction or use of the works for which the land is acquired.

There are a couple of notable differences then between the Alberta and Ontario provisions. The Ontario Act uses the phrase "personal and business losses" as a subset of "injurious affection", while the Alberta Act separates and distinguishes "incidental damages" from "injurious affection" both in the title to s. 56 and in its text.

The Institute recommended substitution of the "personal and business losses" phrase with "incidental damages", knowing the latter phrase was broader in scope. It had a choice: fall in line with the other provinces and use the more restrictive wording or make a recommendation in line with previous policy. The Institute chose the latter.

It makes sense then that s. 56 has since been more broadly interpreted here than have parallel sections in other provinces.

ALBERTA CASES

The ***Brese*** case was not an anomaly. Rather, the Alberta Land Compensation Board was following a number of cases that established a landowner's right to non-pecuniary damages. Some of those cases follow:

Lorenz v. Lloydminster (City), (1982) 26 LCR 157

- A series of incidental damages, pecuniary and non-pecuniary, were claimed. The non-pecuniary included noise and dust pollution and loss of privacy. The claim embraced a variety of matters which *"are difficult to prove and difficult if not impossible to quantify"* (at para. 26(f)). Nevertheless, the Board awarded a lump sum award of $5,000.

Gosling Operations Ltd v. Alberta (Minister of Transportation) (1983), 28 LCR 226

- Board awarded incidental damages for, among other things, exposure to unwanted visitors and construction nuisances in the sum of $3,500.

Groten v. Alberta (Minister of Environment), (1985) 33 LCR 211

- The Minister expropriated several acres of land for an irrigation canal. The Landowner sought compensation for incidental damages, some of which were quantifiable, and some not. Again, they included increased risk of trespass and dust and noise problems during construction. A lump sum award of $7,000 was granted for all items of general disturbance.

Rose v. Alta. (1985), 64 A.R. 367 (LCB)

- A landowner claimed $10,000 for inconvenience and general disturbance.
- The Minister did not challenge the claim itself, but did challenge the amount.
- The owner claimed several things under this head, including $1000 for general disruption of his livestock business and family residence.

- The Board was satisfied that this amount was understated and that other matters of inconvenience or disturbance may have been overlooked. The Board awarded the $10,000 that the landowner asked for.

Postman v. R., (1985) 32 LCR 369

- A claim was made for general disturbance damages as a sub-heading of incidental damages. The damages complained of included temporary disruptions of access, dust and noise problems. The Board stated at para. 63:

> The board recognizes some nuisance and losses arise as a result of the construction of the canal and its existence crossing the subject land. The board also recognizes the difficulties inherent in attempting to precisely quantify such items of claim. After carefully weighing all of the evidence and applying its experience the board finds that appropriate and fair compensation for these items of claim is a lump sum of $2,500 and awards that amount to the owner therefore.

INCIDENTAL vs. DISTURBANCE DAMAGES

In all cases of expropriation in this province, a landowner is entitled to:

(a) market value of the land taken,

(b) damages attributable to disturbance,

(c) the value of any element of special economic advantage,

(d) damages for injurious affection, and

(e) an allowance for the compulsory nature of the taking in "unusual circumstances".

Disturbance damages have been specifically defined in section 50 to include "such reasonable costs and expenses as are the natural and reasonable consequences of the expropriation".

Are incidental damages then any different than disturbance damages? Are landowners whose lands have been only partially taken in any better or worse position than those whose entire lands have been expropriated?

Chairman Boyd sought to clarify the definitions of the various types of damages under the *Expropriation Act* in ***Hat Development Ltd. v. Medicine Hat (City) (No. 2)*** (1988) 39 LCR 29, at 68:

> Confusion has arisen out of the use of the two terms "disturbance damages" and "incidental damages". The former term is used where there is an entire taking and no issue of injurious affection arises. Incidental damages is the term used in the statute where there is a partial taking. The terms are frequently used interchangeably in cases before the board and the board has consistently held that such usage is not objectionable provided the damage is properly characterized. If the damage is to the land itself, i.e. injurious affection either by way of severance or reduction in market value then clearly the damage is not an incidental or disturbance damage. If the damage is of a nature which does not affect the value of the land then it is of the nature of a disturbance to the landowner which must be compensated for and whether it be called an incidental damage or a disturbance damage is not of critical relevance.

In his text ***Expropriation in Canada: A Practitioner's Guide*** (Aurora: Canada Law Book, 1988), Mr. Boyd states (at 95):

> In partial takings these claims are sometimes referred to as incidental damages rather than disturbance damages. Nothing turns on the use of the terms "disturbance damages" or "incidental damages" and at times they are used interchangeably.

That Mr. Boyd's definition of incidental damages differs slightly from that of the Alberta Institute of Law Research and Reform should not undermine his message that damages attributable to the taking, no matter the label, ought to be compensable.

Messr's Coates and Waque (***New Law of Expropriation***) at pages 15-98 to 15-101 have listed a number of cases in which s. 50 and s. 56 damages seemingly overlap. Indeed in many of the Alberta cases listed above the Board did not attempt to categorize the damages as relating to one or the other section. It is certainly arguable that some types of non-pecuniary damages are also available to land owners under the earlier section. A counter argument is that those are the damages contemplated by the 5% awarded under Section 50 (a)(i)(A).

CONCLUSION

Alberta, as we all know, is a staunchly independent province. Due to its resource base, it has a lengthy history of dealings between corporations, municipalities, the Crown and landowners over forced entries and acquisitions. That Alberta has, as a result, chosen a different, more liberal path for compensation than other provincial governments is not surprising.

The vast majority of non-pecuniary incidental or disturbance damages awards have been for nuisance issues arising out of construction or use of the works for which the lands were taken. The assessment of these damages has been done on a rather arbitrary basis. We believe the issue for expropriated Albertans is not whether a particular damage suffered can be easily quantified but rather whether a real and substantial connection can be established between the expropriation and the damage. If the connection can be made, the LCB will utilize its expertise to assess the quantity.

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