
Independence and Relevance of Expert Evidence: Recent Insights from the Ontario Municipal Board in *Antrim Truck Centre Ltd. v. Minister of Transportation for the Province of Ontario*

In a recent¹ decision in *Antrim Truck Centre Ltd. v. Her Majesty the Queen in Right of the Province of Ontario Represented by the Minister of Transportation for the Province of Ontario* (“Antrim”), the Ontario Municipal Board (“OMB”) had to consider the issue of compensation for injurious affection when no land is taken. Specifically, the OMB had to decide what items of compensation can or cannot be awarded when no land is taken. A number of experts provided evidence during the hearing that lasted over 15 days. As a result, the OMB had the opportunity to assess and comment on the admissibility and credibility of the evidence of these expert witnesses. The OMB’s comments in this regard provide useful guidance in terms of the standards that expert witnesses should adhere to in order to have their evidence accepted by the OMB or any other adjudicating person or body.

Background

Antrim Truck Centre Ltd. (the “Claimant”), owned a property on Highway 17, near the City of Ottawa, where it operated a truck stop with a restaurant, bakery, gas bar, offices, and truck leasing and sales service (the “Subject Property”). On September 24, 2004, the Ontario Ministry of Transportation (the “Respondent”), opened a new section of Hwy 417 which ran parallel to Hwy 17 (approximately 500 meters apart near the Claimant’s property).

The Claimant alleged that due to the building of Hwy 417, Hwy 17 was effectively “closed”, therefore putting the Claimant out of business. The Claimant relocated its business to another location approximately 15 kilometres west of the Subject Property (the “New Property”). The Claimant claimed Injurious Affection under the *Expropriations Act* and damages of \$8,224,671, the majority of which related to disturbance damages and relocation costs.

The Respondent denied the claim, asserting no legal liability and stated that Hwy 17 was not closed, but remains open to the present day.

Injurious affection where no land is taken

The OMB member hearing the case, Mr. N.C. Jackson, noted that under Sections 21 and 1(1) of the *Expropriations Act*, compensation for Injurious Affection can be awarded when no land is taken. However, a Claimant must prove that (i) the Claimant suffered damages; (ii) these damages were caused by the *construction* and not the *use* of the work (in this case, the damages were caused by the physical construction and physical presence of Hwy 417 in relation Hwy 17, and not by the use of Hwy 417), and (iii) the expropriating authority would be liable for the damages had the construction causing the damage not been undertaken under the authority of statute.

Significantly, the OMB noted that there is *no* provision in the *Expropriations Act* for compensation relating to disturbance damages where no land is taken (whereas there *is* a provision when land is taken).

Claim for disturbance damages and relocation costs at the New Property

The OMB noted that about \$7,680,126 of the \$8,224,671 claim comprised disturbance damages and relocation costs, including site remediation, land costs, building costs, site works, equipment costs, moving and professional advice and costs of financing the New Property. The OMB ruled that these damages were of the type “*that cannot be awarded in the absence of the expropriation of all or part of the Antrim site*” and, therefore, dismissed “*that significant aspect of the Claim*”².

Notwithstanding the statutory and legal principles by which the \$7,680,126 was dismissed, it is interesting that the OMB noted that the New Property and buildings were “*much larger*” than the Subject Property, featured a new construction business and was generally “*in a much better position*” than at the Subject Property. The OMB’s observations imply that the Claimant’s claim may have been overstated. Accordingly, absent the legal principles upon which the claim was reduced, an analysis of the claim to identify and exclude “betterments” at the New Property might have otherwise been required.

Injurious Affection at the Subject Property

Having considered the evidence, the OMB decided the Respondent was liable for damages. The OMB further decided that the construction of Hwy 417 effectively ended Hwy 17 “*but for a dirt road extension*”, and, therefore, damaged the Subject Property, and such damages were the result of the construction and not the use of the Hwy 417. Therefore, the OMB awarded compensation to the Claimant for Injurious Affection at the Subject Property, comprising \$58,000 for business losses and \$335,000 for the loss in market value of the Subject Property. The expert evidence considered in arriving at these figures is discussed below.

Expert evidence – business loss

Loss quantification experts testified on behalf of the Claimant and the Respondent. Objections were raised in respect of the Claimant expert’s ability to give opinion evidence given his close relationship to the Claimant (having served as the Claimant’s chief financial officer). In addition, it was argued that the Claimant’s expert had become an advocate, and had not prepared his own report. It was pointed out that parts of the expert’s report were typed in the office of the Claimant’s Counsel.

Notwithstanding the objections raised, the OMB allowed the Claimant expert to testify, but noted that issues of independence would go towards the weight placed on his evidence. The OMB ultimately found that the Claimant expert’s written report had “*weaknesses... as to preparation, scope and objectivity*”. Moreover, the OMB found “*little proof of actual business damages at Antrim in the Claimant’s evidence*”.

In contrast, the written report of the Respondent’s loss quantification expert was preferred by the OMB for its “*independence, clarity and [the expert’s] preparation of his own report*”. The OMB relied almost entirely on the Respondent’s loss quantification evidence in prorating estimated losses as determined by the Respondent’s expert to arrive at a figure of \$58,000 for compensable business losses.

Expert evidence – property appraisal

Both the Claimant and the Respondent also submitted evidence from property appraisers in respect to the market value of the Subject Property prior to the impact of the Hwy 417 extension. The Claimant’s appraiser used an income approach based on notional rent, and did not conduct an analysis of the highest and best use of the Subject Property. The OMB found this to be a “*restricted appraisal*” and noted “*the use of the income approach is questionable when the business is not sold with the land and is subsequently relocated*”.

In contrast, the OMB preferred the appraisal report of the Respondent’s appraiser. Relying almost exclusively on the Respondent’s appraisal evidence, the OMB concluded that the fair market value of the Subject Property before and after the impact of the Hwy 417 was \$935,000 and \$600,000, respectively, resulting in a compensable loss relating to the decline in market value of \$335,000.

Comments on expert evidence from the Antrim Truck Case

It is clear from the comments of the OMB in this case that independence, objectivity and clarity of expert evidence are very important to adjudicators when considering the admissibility of expert evidence and the weight to place on such evidence. The expert’s ultimate role is to assist the adjudicator of a dispute in an impartial and objective manner, not simply to advocate the position of one of the parties. Experts are

required to maintain their independence, both in fact, and also in appearance, avoiding situations that may create a *perception* that the expert is biased even though, in reality, the expert may be independent. For instance, experts are well advised to avoid situations similar to Antrim whereby electronic copies of expert reports are modified by Counsel at Counsel's premises, or situations whereby the substance of expert reports is materially modified by Counsel in order to advocate the client's position.

Much can also be said about the need for experts to understand the legal principles underlying their expert reports so that their opinions are relevant and useful to the adjudicator. For example, in the Antrim Case, had the Claimant's expert been aware (or alternatively, focused on the fact) that disturbance damages cannot be claimed in cases where no land is taken, then the overall claim would have been lower from the outset, and would have resulted in a more relevant claim amount for the OMB to consider, saving time and cost at the OMB hearing.

In the case of the appraisal experts retained in the case, the OMB found the Respondent's expert had conducted due diligence and had utilized methodologies that were appropriate for the context of Antrim, whereas the Claimant's expert (among other things) used an approach which was inappropriate. Experts should try to ensure that their chosen methodology for a particular engagement is relevant for the context at hand, and that their scope of work is sufficient to provide a result that is credible and realistic.

Liability of the Respondent

One contentious issue arising from Antrim is the OMB's finding of liability against MTO. Although the damages awarded were significantly lower than being claimed by the Claimants, the finding of liability against the Respondent and the related finding that the Claimant's damages were the result of the *construction* rather than the *use* of Hwy 417 may set a precedent for future cases with similar fact circumstances. We understand that both the Claimant and the Respondent have appealed the Antrim decision.

Summary

Antrim is a useful case in terms of clarifying the legal principles of Injurious Affection under the *Expropriations Act*. The case also provides a reminder to expert witnesses and counsel alike as to the need for independence, due diligence and relevance in expert reports. Whether or not the finding of liability against the Respondent is maintained or reversed on appeal will be a matter of interest to stakeholders involved in expropriation proceedings.

¹ January 9, 2009

² [Editors note: Whether, on the facts of this case, some of these items might properly have been allowed as business damages under section 1(1)(b)(ii) of the Act is arguable, given the Board's finding that the case met the test for compensation where no land is taken.]

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