COMPENSATION WHERE NO LAND IS TAKEN: UPDATE OF THE LAW IN ALBERTA

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Economic and population growth in Alberta has led to a proliferation of projects and works for the public benefit, but the negative impacts of these are often borne by private landowners. The question arises as to what compensation should be given to landowners whose land is injuriously affected by public works, but is not actually expropriated. This article examines the common law remedies of negligence and nuisance; addresses the impact of the four tests set out in R. v. Loiselle *for assessing statutory remedies; and provides a review of the evolution of and remedies available under the* Municipal Government Act *and* Proceedings Against the Crown Act.

La croissance économique et l'augmentation de la population en Alberta a donné lieu à une prolifération de projets au bénéfice du public; or ce sont souvent les propriétaires terriens privés qui en subissent les effets nuisibles. La question se pose, à savoir l'indemnité à verser aux propriétaires dont les terres ont été lésées par les travaux publics, mais qui ne sont dans les faits pas expropriées. Cet article examine les redressements de la common law à la négligence et nuisance, aborde l'impact des quatre condiciones énoncés dans R. c. Loiselle *pour évaluer les redressements d'origine législative, examiner l'évolution et les redressements possibles en vertu de la* Municipal Government Act *et de la* Loi sur les procédures contre la Couronne.

TABLE OF CONTENTS

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I. INTRODUCTION

The economic and population growth in Alberta has placed significant strains on its public infrastructure. This has led to a proliferation of large municipal and provincial public projects and works to ease the strain. As these projects increase in number and in scope, so do the potential negative collateral impacts on private landowners and their lands in Alberta. These landowners often bear the burden of the negative impacts of public works, which are brought into existence for the greater public good. A complicated, fundamental policy debate that arises is the extent to which the impacted landowners should be compensated for their burden. The law strives to "strike an acceptable balance between private property rights and the social concern that statutory bodies not be unduly encumbered in the exercise of their powers when providing necessary public works and infrastructure."[1]

The vibrancy of the policy debate is illustrated by the different statutory regimes in place across the Canadian provinces and, further, by the different treatment of those landowners who have a portion of their land expropriated versus those who do not.

In Alberta, landowners who are, ironically, "lucky" enough to have at least a portion of their lands expropriated for the purpose of a public work have a right, pursuant to s. 56 of Alberta's *Expropriation Act*,[2] to claim compensation for "injurious affection" and "incidental damages" if they "result from or are likely to result from the taking [of their lands] or from the construction or use of the works for which the land is acquired."[3]

On the other hand, the landowners who are "unlucky" enough to avoid having any of their lands expropriated can find some comfort in the fact that, historically, the law in Alberta permits some compensation in certain circumstances and, further, that Alberta's courts will generally interpret legislation in favour of the landowner where there is ambiguity. However, these claims are much more complicated, difficult to establish, and depend on the specific legislation at issue at the relevant time.

The remedy of injurious affection where there is no taking finds its roots in a series of English cases and statutes from the mid-1800s. In *Horn v. Sunderland Corporation*,[4] the Master of the Rolls described injurious affection without taking, as set out in the English *Lands Clauses Consolidation Act, 1845*,[5] as

> a remedy for injuries caused by the works authorized by the Act to the lands of an owner who has had none of his land taken in that locality. The remedy is given because Parliament, by authorizing the works, has prevented damage caused by them from being actionable, and the compensation is given as a substitute for damage at law.[6]

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1 *Gerry's Food Mart Ltd. v. St. John's (City of)* (1992), 104 Nfld. & P.E.I.R 294 at para. 16 (Nfld. S.C. (A.D.)) [*Gerry's Food Mart*].
2 R.S.A. 2000, c. E-13.
3 *Ibid.* An analysis of injurious affection claims when some of the owner's land is expropriated is outside the scope of this article.
4 [1941] 2 K.B. 26 (C.A.).
5 (U.K.), 8 & 9 Vict., c. 18.
6 *Supra* note 4 at 42-43.

In some provinces, expropriation legislation was specifically enacted to provide a remedy in the case of injurious affection where no land is taken from the owner.[7] In 1973, the Alberta Institute of Law Research and Reform was of the view that provisions for claims where there is no taking of the claimant's land do not belong in expropriation legislation.[8] Not surprisingly, there has never been a provision in the *Expropriation Act* for compensation where no land is taken. Today, as in the past, landowners in Alberta who do not have any of their lands expropriated, but whose lands are negatively impacted by a public work (impacted landowners), continue to find themselves in an apparently more complicated situation, potentially involving a number of different statutes containing differently worded and, in some cases, frequently amended provisions.[9]

At the 1989 Annual Conference of the Alberta Expropriation Association, Stephen Waqué discussed the unique approach taken by the Alberta legislature and the courts on this topic.[10] At that time, he characterized an impacted landowner's options as being three-fold:

> First, he may have an action at common law most commonly framed in nuisance. Secondly, he may have an action pursuant to a statutory remedy in the nature of an injurious affection claim. Thirdly, he may have a statutory remedy which is interpreted to be a specific remedy in damages not bound by the rules which apply to injurious affection claims.[11]

However, impacted landowners may have a fourth option that is outside the scope of this paper, namely, a claim that the public work has impacted their property to such an extent that it constitutes a de facto expropriation. While such claims are possible, they are inherently difficult to prove and generally restricted by the courts.[12]

Since 1989, there have been significant changes to the legal landscape affecting impacted landowners in Alberta, both with respect to the common law and statutory remedies. The most significant change has been the 2007 amendment of the statutory remedy provided in

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7 See e.g. *Expropriations Act*, R.S.O. 1990, c. E-26, s. 21 [*OEA*]; *Expropriation Act*, R.S.N.B. 1973, c. E-14, s. 46; *Expropriation Act*, R.S.N.S. 1989, c. 156, s. 30(1).

8 Alberta, Institute of Law Research and Reform, *Report No. 12, Expropriation* (Edmonton: Institute of Law Research and Reform, 1973) at 136, online: Alberta Law Reform Institute <http://www.law.ualberta.ca/alri/docs/fr12.pdf> [*ILRR Report*].

9 This article focuses on the provisions of the *Municipal Government Act*, R.S.A. 2000, c. M-26 [*MGA*] and the *Proceedings Against the Crown Act*, R.S.A. 2000, c. P-25 [*PACA*]. Other potentially relevant statutes include: *Highways Development and Protection Act*, S.A. 2004, c. H-8.5, ss. 20-21; *Public Highways Development Act*, R.S.A. 2000, c. P-38, ss. 28-29 [*PHDA*]; *City Transportation Act*, R.S.A. 2000, c. C-14, ss. 26-27 [*CTA*]; *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, s. 131; *Post-secondary Learning Act*, S.A. 2003, c. P-19.5, s. 66; *Railway (Alberta) Act*, R.S.A. 2000, c. R-4, s. 29; *Irrigation Districts Act*, R.S.A. 2000, c. I-11, s. 87; *Historical Resources Act*, R.S.A. 2000, c. H-9, s. 28; *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6, s. 99; *Oil Sands Conservation Act*, R.S.A. 2000, c. O-7, s. 18; *Water Act*, R.S.A. 2000, c. W-3, s. 158; *Government Organization Act*, R.S.A. 2000, c. G-10, s. 14; *Drainage Districts Act*, R.S.A. 2000, c. D-16, s. 34; *Public Lands Act*, R.S.A. 2000, c. P-40, s. 19; *Surface Rights Act*, R.S.A. 2000, c. S-24, ss. 12-14; *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, ss. 26, 28; *Alberta Utilities Commission Act*, S.A. 2007, c. A-37.2, s. 22(1); *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8.

10 Stephen Waqué, "Compensation Where No Land is Taken" (Paper delivered at the Second Annual Conference of the Alberta Expropriation Association, Edmonton, 29-30 September 1989) [unpublished].

11 *Ibid.* at 2.

12 See e.g. *R. v. Tener*, [1985] 1 S.C.R. 533; *Trelenberg v. Alberta (Minister of Environment)* (1980), 31 Alta. L.R. (3d) 353 (Q.B.); *Mariner Real Estate Ltd. v. Nova Scotia (A.G.)* (1999), 178 N.S.R. (2d) 294 (C.A.); *Alberta (Minister of Infrastructure) v. Nilsson*, 2002 ABCA 283, 320 A.R. 88; *Canadian Pacific Railway v. Vancouver (City of)*, 2006 SCC 5, [2006] 1 S.C.R. 227; *Hartel Holdings Co. Ltd. v. Calgary (City of)*, [1984] 1 S.C.R. 337.

the Alberta *Municipal Government Act*,[13] which governs claims relating to municipal public works and has yet to be materially considered by the courts or the Alberta Land Compensation Board (LCB or the Board).[14]

In light of these changes and in light of the significant public works projects currently underway or planned in Alberta (for example, the ring roads and light rail transit extensions in Edmonton and Calgary), the time is ripe to re-evaluate the main remedies available to impacted landowners.

This article will address: (1) the common law remedies available to impacted landowners and the limitations of those remedies; (2) the impact, if any, of the four tests set out by the Supreme Court of Canada in *R. v. Loiselle*[15] in assessing statutory remedies available to impacted landowners; (3) a detailed review of the statutory remedy available under the *MGA*, including a review of the history of the *MGA*, claims made under it, and an assessment of the 2007 amendment; and (4) a brief review of the statutory remedy available under s. 7 of *PACA*.[16] This article does not attempt to address in any detail other potential statutory claims that may exist in Alberta or under applicable federal legislation.

II. COMMON LAW REMEDIES: NEGLIGENCE AND NUISANCE

The impacted landowners' potential common law claims arising out of public works will most likely be framed as actions in either negligence or nuisance.

A negligence claim will be constrained by its well-established traditional legal elements, namely: the existence of a duty of care, a breach of the standard of care, cause in fact, proximate cause, and damage to the plaintiff.[17] Impacted landowners may be tempted to claim that the decision to construct the public work was negligent but, of course, these are public policy decisions that are not generally challengeable through a negligence claim.[18] Nevertheless, negligence may remain a relevant, but often difficult, potential claim for impacted landowners faced with the negative consequences of a public work or structure.

However, in most cases involving damages suffered as a result of the construction or existence of a public work, the common law claim of nuisance will be more relevant as proving negligence is not required. The Supreme Court of Canada has adopted the following description of nuisance:

> The paramount problem in the law of nuisance is, therefore, to strike a tolerable balance between conflicting claims of landowners, each invoking the privilege to exploit the resources and enjoy the amenities of his property without undue subordination to the reciprocal interests of the other. Reconciliation has to be

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13 *MGA*, *supra* note 9, as am. by *Municipal Government Amendment Act, 2007*, S.A. 2007, c. 16 [2007 amendment or 2007 *MGA*].

14 The amended provision has been cursorily considered by the Alberta LCB in *Clark v. Lac Ste. Anne (County of)* (2009), 95 L.C.R. 291 (Alta. LCB) [*Clark*].

15 [1962] S.C.R. 624 [*Loiselle*].

16 *Supra* note 9.

17 See e.g. *Ryan v. Victoria (City of)*, [1999] 1 S.C.R. 201 [*Ryan*].

18 See *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420.

> achieved by compromise and the basis for adjustment is reasonable user. Legal intervention is warranted only when an excessive use of property causes inconvenience beyond what other occupiers in the vicinity can be expected to bear, having regard to the prevailing standard of comfort of the time and place. Reasonableness in this context is a two-sided affair. It is viewed not only from the standpoint of the defendant's convenience, but must also take into account the interest of the surrounding occupiers. It is not enough to ask: Is the defendant using his property in what would be a reasonable manner if he had no neighbour? The question is, Is he using it reasonably, having regard to the fact that he has a neighbour?[19]

Nuisance has also been described as acts or omissions "whereby a person is unlawfully annoyed, prejudiced or disturbed in the enjoyment of land."[20] Where the act or omission results in physical damage to land, the courts have shown a general willingness to make a finding of nuisance based on substantial and unreasonable interference with the enjoyment of property. Where the interference is more nuanced and merely affects the owner's "tranquility and amenity,"[21] the scope of nuisance is circumscribed by examining "whether the ordinary and reasonable resident of that locality would view the disturbance as a substantial interference with the enjoyment of land."[22] To assess whether a nuisance has occurred, courts typically consider "the severity of the harm, the character of the neighbourhood, the utility of the defendant's conduct, and … whether the plaintiff displayed abnormal sensitivity."[23]

When dealing with a nuisance claim related to a public work, the defence of statutory authority is relevant. The traditional test is "whether the statute expressly or impliedly authorizes the damage complained of, and whether the public or other body concerned has established that the damage was inevitable."[24] Broadly speaking, the doctrine immunizes public or other bodies for damage caused while they were acting within the confines of statutory authority.

The scope of the defence of statutory authority was somewhat confused by the Supreme Court in 1989 in *Tock*.[25] The case resulted in the expression of three different views regarding the principles underlying the defence of statutory authority and the basis upon which it should be applied. While some members of the Court would have effectively abolished the defence altogether, others would have restricted it to circumstances in which a nuisance was the inevitable result of a public body carrying out its statutory mandate.

The conflicting viewpoints in *Tock* resulted in considerable uncertainty in the lower courts for some time. That uncertainty, however, was put to rest a decade later by the Supreme Court of Canada in *Ryan*.[26] Justice Major, speaking for a unanimous Court, stated:

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19 *St. Pierre v. Ontario (Minister of Transportation and Communications)*, [1987] 1 S.C.R. 906 at para. 7 [*St. Pierre*], citing *Pugliese v. National Capital Commission* (1977), 17 O.R. (2d) 129 at 154 (C.A.).

20 R.F.V. Heuston, ed., *Salmond on the Law of Torts*, 17th ed. (London: Sweet & Maxwell, 1977) at 50, cited in *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181 at 1190 [*Tock*].

21 *Tock*, *ibid.* at 1192.

22 *Ibid.* at 1191.

23 *Ibid.* Nuisance is discussed in more detail below, as it has become relevant by virtue of the incorporation of the "actionable rule" (also discussed below) into the *MGA*.

24 *Ibid.* at 1193.

25 *Ibid.*

26 *Supra* note 17.

> Statutory authority provides, at best, a narrow defence to nuisance. The traditional rule is that liability will not be imposed if an activity is authorized by statute and the defendant proves that the nuisance is the "inevitable result" or consequence of exercising that authority.… An unsuccessful attempt was made in *Tock* … to depart from the traditional rule. Wilson J. writing for herself and two others, sought to limit the defence to cases involving either mandatory duties or statutes which specify the precise manner of performance. La Forest J. (Dickson C.J. concurring) took the more extreme view that the defence should be abolished entirely unless there is an express statutory exemption from liability. Neither of those positions carried a majority.
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> In the absence of a new rule, it would be appropriate to restate the traditional view, which remains the most predictable approach to the issue and the simplest to apply. That approach was expressed by Sopinka J. in *Tock*, at p. 1226:
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> > The defendant must negative that there are alternate methods of carrying out the work. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance.… The standard is a higher one. While the defence gives rise to some factual difficulties, in view of the allocation of the burden of proof they will be resolved against the defendant.[27]

Since *Ryan*, Alberta courts have meaningfully examined the defence of statutory authority in respect of nuisance claims only at the Provincial Court level.[28] In each case, the Court held that the common law defence of statutory authority would fail based on the lack of inevitability of the damages.

However, in each of these cases, the defendant was protected in respect of nuisance claims by the statutory defence contained in s. 528 of the *MGA*, which will be relevant to the potential common law claims that impacted landowners may advance with respect to certain kinds of public works. It provides:

> A municipality is not liable in an action based on nuisance, or on any other tort that does not require a finding of intention or negligence, if the damage arises, directly or indirectly, from roads or from the operation or non-operation of
>
> (a) a public utility, or
>
> (b) a dike, ditch or dam.[29]

If the damage suffered by an impacted landowner due to the construction of a public work or structure is the inevitable consequence of the public work, or if a municipality can rely on s. 528 of the *MGA* as a defence to a common law nuisance claim, impacted landowners would be well advised to consider advancing a statutory claim for compensation. In order to properly consider that option, it is first necessary to understand some of the specific tests that are frequently referred to in the context of statutory claims for compensation.

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27 *Ibid.* at paras. 54-55.

28 *Stachniak v. Thorhild No. 7 (County of)*, 2001 ABPC 65, 285 A.R. 1; *Neuman v. Parkland (County of)*, 2004 ABPC 58, 355 A.R. 169; *Stachniak v. Thorhild No. 7 (County of)*, 2006 ABPC 182, 402 A.R. 349.

29 *Supra* note 9.

III. THE "FOUR CONDITIONS" SET OUT IN *LOISELLE*

Legal counsel and courts alike often seem to gravitate toward enumerated tests or criteria with the goal of simplifying or clarifying the application of the law to particular fact situations. Claims for injurious affection where no land is taken are a good example of this.

In the 1962 landmark Supreme Court of Canada decision, *Loiselle*, the landowner had operated a garage and service station on a highway in Quebec. As a result of the construction of the St. Lawrence Seaway, the highway was closed some 80 feet beyond the landowner's property and diverted some 1,500 feet, which left the landowner's property on a dead-end highway. No portion of his land was taken. *The St. Lawrence Seaway Authority Act*[30] specifically provided:

> *The Authority shall pay compensation* for lands taken or acquired under this section or *for damage to lands injuriously affected by the construction of works erected by it* and all claims against the Authority for such compensation may be heard and determined in the Exchequer Court of Canada in accordance with sections 46 to 49 of the Exchequer Court Act.[31]

The Supreme Court set out "[t]he conditions required to give rise to a claim for compensation for injurious affection to a property, when no land is taken," which the Court stated were "now well established."[32] These conditions, which are referred to in this article as the "four conditions," were:

> (1) the damage must result from an act rendered lawful by statutory powers of the person performing such act;
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> (2) the damage must be such as would have been actionable under the [common law], but for the statutory powers;
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> (3) the damage must be an injury to the land itself and not a personal injury or an injury to business or trade;
>
> (4) the damage must be occasioned by the construction of the public work, not by its user.[33]

For the purposes of this article, the description of these conditions used by Professor Eric Todd is adopted, namely (1) the "statutory authority rule"; (2) the "actionable rule"; (3) the "nature of the damage rule"; and (4) the "construction and not the use rule."[34] As noted by Waqué, "[b]efore one can embark on a discussion of the law in this area, one must acquire the vocabulary"[35] of the four conditions set out in *Loiselle*. This is particularly so given the fact that courts and administrative tribunals repeatedly refer to these conditions, and

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30 S.C. 1951 (2d Sess.), c. 24.
31 *Ibid.*, s. 18(3), cited in *Loiselle*, *supra* note 15 at 627 [emphasis added].
32 *Loiselle*, *ibid.*
33 *Ibid.*
34 Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2d ed. (Scarborough: Carswell, 1992) at 370-92.
35 Waqué, *supra* note 10 at 6.

legislatures appear to attempt to specifically exclude or include some or all of them in their statutory regimes. However, it is also important to put the four conditions in context.

In setting down these "well established" principles, the Supreme Court relied on two authorities, namely *Autographic Register Systems Ltd. v. Canadian National Railway*,[36] and *The Law of Expropriation* by George Challies.[37] These and other authorities[38] disclose that the genesis of the four conditions comes from substantial judicial interpretation of English, Canadian, and provincial statutes from the 1800s and early 1900s that contain language similar to *The St. Lawrence Seaway Authority Act*.[39]

Notwithstanding this apparent limitation on the applicability of the four conditions to the specific legislation in issue in that case, these conditions appear to have been applied on occasion without much scrutiny of the legislation at issue. Todd aptly stated that "despite the advent of [federal] and provincial expropriation legislation, in most Canadian jurisdictions the basic criteria for determining the compensability of injurious affection where none of the claimant's land has been expropriated are the same four rules which were developed by the English courts in interpreting nineteenth century English legislation."[40]

The attractiveness of a consistent approach where the four conditions are applied to all claims for compensation when no land is taken is apparent as it would give practitioners, the Alberta LCB, and the courts guidance and the benefit of years of consideration of these conditions in specific factual situations. Unfortunately, however, this would usurp the role of the legislature and the policy decisions made in drafting legislation to address these issues. Further, it would offend the well-established principles of statutory interpretation mandated by the Supreme Court of Canada: that the words of an enactment "are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act," and the intention of the legislature.[41]

Accordingly, each specific statutory compensation provision must be closely scrutinized to see whether the four conditions, or other conditions, apply. In Alberta, this means a careful review of the *MGA*, *PACA*, and possibly other legislation depending on the circumstances.

The lack of a uniform or constant application of the four conditions in Alberta is most evident in the *MGA* and its various versions and predecessor legislation over the past 40 years, which illustrate the legislature's periodic attempts to exclude or include some or all of the four conditions. For example, as discussed in more detail below, in *Beierbach v. Medicine Hat (City of)*[42] the Alberta Court of Appeal, in interpreting the relevant *MGA* provisions in place at the time, which were significantly different from those reviewed in *Loiselle*, noted that "[t]he criteria for a valid claim stated in *Loiselle* must be put to one

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36 [1933] Ex. C.R. 152 [*Autographic Register*].
37 The Honourable George S. Challies, *The Law of Expropriation*, 2d ed. (Montreal: Wilson & Lafleur, 1963).
38 Including Todd, *supra* note 34 at 370-92.
39 *Ibid.* at 370.
40 *Ibid.* at 369-70.
41 E.A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87, cited in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21 [*Rizzo*].
42 (1982), 33 A.R. 128 (C.A.) [*Beierbach*].

side."[43] As noted by Waqué, *Beierbach* gave rise to a "specific remedy in damages not bound by the rules [that is, the four conditions that apply to injurious affection claims]."[44]

The courts in other provinces have taken a similar approach and have recognized that the four conditions may or may not be applicable to a claim based on the particular legislation in question. As noted by Waqué, the nature of the damage rule has been abolished in Ontario pursuant to ss. 1 and 21 of the *OEA*,[45] which provide a specific remedy for "personal and business damages" where none of the owner's lands are taken.[46] Similarly, in *Currie v. Chase (Village of)*[47] the British Columbia Supreme Court, in considering the then applicable British Columbia legislation, held that the construction and not the use rule did not apply due to the specific wording of the legislation as compared to the statute at issue in *Loiselle*. As noted by the Newfoundland Court of Appeal in *Gerry's Food Mart*, "it must be shown that the injury to the claimant's property comes within the ambit of the harm prescribed as compensable under the statute authorizing performance of the act from which the injury resulted."[48]

While it is clear that the four conditions set out in *Loiselle* remain important to an assessment of a claim for compensation in Alberta when the owner's land is not taken, they must be reviewed in the context of the specific legislation at issue. This dynamic is brought to the forefront when the history of the *MGA*, and its substantial amendment in 2007, is reviewed.

IV. STATUTORY CLAIMS AGAINST MUNICIPALITIES WHERE NO LAND IS TAKEN

A. *WALTER WOODS LTD. V. EDMONTON (CITY OF)*[49]

Walter Woods is significant for two main reasons. First, it was one of the earliest cases that characterized a claim for compensation without taking in Alberta under the *City Act*[50] and, in so doing, it differentiated between a general compensation provision and a specific compensation provision contained in the *Act*. Second, for a short period of time, it appeared to have abolished the nature of the damage rule and broadened the liability of municipalities for personal damages and business losses.

The claimant in *Walter Woods* carried on a wholesale hardware business and owned a building in what the Court described as a "light industrial" district in Edmonton. The building was designed with truck bays on its west side to move goods in and out of the building, and with loading and unloading accommodation at the rear designed to take advantage of the railway tracks lining the back of the building. In 1959, the City of Edmonton began

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43 *Ibid.* at para. 14.
44 Waqué, *supra* note 10 at 2.
45 *Supra* note 7.
46 Waqué, *supra* note 10 at 12.
47 (1986), 35 L.C.R. 293 (B.C.S.C.) [*Currie*].
48 *Supra* note 1 at para. 21. See also the *ILRR Report*, *supra* note 8 at 125, where it is noted that "the statutes are not all identical, and some of them are so worded that the four rules are not all applicable."
49 (1962), 47 W.W.R. 193 (Alta. S.C. (T.D.)) [*Walter Woods* (T.D.)], aff'd (1963), 39 D.L.R. (2d) 167 (Alta. S.C. (A.D.)), aff'd [1964] S.C.R 250 [*Walter Woods*].
50 R.S.A. 1955, c. 42.

construction of an overpass supported by a series of pillars erected along the street in front of the claimant's property. The Court found that access to the building had been interfered with, no doubt causing injurious affection to the property.

In *Walter Woods*, the applicable legislation included a general compensation provision. Section 299 of the *City Act* provided:

> The commissioners shall make due compensation to the owners or occupiers of, or other persons interested in, any land taken by the city in the exercise of any of the powers conferred by this Act, and shall pay damages for any land or interest therein injuriously affected by the exercise of such powers, and the amount of such damages shall be such as necessarily result from the exercise of such powers beyond any advantage that the claimant may derive from the contemplated work.[51]

At the trial level, Milvain J., whose interpretation of the provision was upheld by the Supreme Court of Canada, held that s. 299 of the *Act* authorized compensation for lands injuriously affected, though not expropriated.[52] This section was included in the *City Act* when it was first passed in 1955. Its language was somewhat similar to the language that was at issue in *Loiselle*,[53] including the use of the words "injuriously affected," and it can be reasonably concluded that the four conditions would have applied with one exception. The *City Act* arguably did not incorporate the construction and not the use rule because it did not expressly limit compensation to damages to the lands "affected by the construction" as did the statute in *Loiselle*. This distinction does not appear to have been addressed by the Court in *Walter Woods*.

As stated earlier, case law in Canada dealing with other statutory regimes had, up until this point, generally incorporated the nature of the damage rule and provided that no damage to trade or business would be recoverable where no lands were taken by expropriation. The Court in *Walter Woods* specifically noted that s. 299 of the *City Act* did not allow for compensation for business loss (thereby confirming the incorporation of the nature of the damage rule). This is also consistent with the section's focus on damages to "any land or interest therein" injuriously affected.

The Court further held that the compensation was to be based on the difference in value, to the owner, of the land as it was prior to the work and as it was at the completion of the work. In assessing the amount compensable under s. 299, the Court included compensation for the increased cost of doing business, capitalized loss in revenue potential, and the curtailment of development on the basis of the building as originally planned, apparently

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51 *Ibid.*, s. 299(1).

52 Section 303(1) of the *City Act*, *ibid.*, also provided:

> When any land not taken for any work or undertaking constructed, made or done by the corporation or commissioners under the authority of this Act is injuriously affected by such work or undertaking, the owner or occupier or other person interested therein may, within fifteen days after notice has been given in a local newspaper of the completion of the work, file with the city clerk his claim for damages in respect thereof stating the amount and particulars of the claim.

Justice Milvain characterized this provision as "procedural" and it did not materially factor into his interpretation of the *City Act*: *Walter Woods* (T.D.), *supra* note 49 at 200.

53 The Court noted that the provisions in s. 299 were "not unfamiliar and there have been many cases decided under such provisions": *Walter Woods* (T.D.), *ibid.* Presumably the learned Justice was referring to the line of authorities relied on in *Loiselle*, which supported the incorporation of the four conditions.

because these were relevant to the use of the income approach of market valuation of the property. In this way, because the property was commercial in nature, the Court allowed some compensation for what was, arguably, a type of business loss notwithstanding the existence of the nature of the damage rule.[54]

The Court in *Walter Woods* then went on to interpret s. 303a of the *City Act*, which had been added by an amendment in 1960[55] and which was a specific compensation provision related to the erection or construction of a city work or structure. It provided:

> Notwithstanding any other provision of this Act, where in the exercise by a city of any of the powers conferred on it by this Act the city, *in the erection or construction of a city work or structure, causes damage to an owner or other person having an interest in land immediately adjacent to the land upon which the city erects or constructs the work or structure by reason of loss of or permanent lessening of use of the land of that owner or other person, the person sustaining the damage is entitled to compensation* therefor and may, at any time after the damage has been sustained and within sixty days after notice has been given in a newspaper of the completion of the work or structure in respect of which the damage is sustained, file with the city clerk a claim for damages in respect thereof, stating the amount and particulars of his claim.[56]

Justice Milvain held that because the damage was described as being to "an owner or other person," the provision was included to "provide damage to a person as distinguished from his damage caused through depreciation in the value of property."[57] On this basis, he allowed compensation for the adverse effect on the claimant's annual sales caused by the presence of the overpass.

The effect of the *Walter Woods* decision was, at minimum, to abolish the nature of the damage rule in Alberta where there was no expropriation at all, and probably entirely. However, the advantage to landowners was short-lived. Not surprisingly, s. 303a of the *City Act* was amended in 1966[58] to add a subsection that provided:

> The amount payable for damages under this section shall not exceed the amount of the difference between
>
> (a) the appraised value of the property prior to the exercise by the city of any of the powers conferred on it by this Act, and
>
> (b) the appraised value of the property after the exercise of the powers referred to,
>
> together with an amount of not more than ten per cent of the amount of the difference as so determined.[59]

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54 The Court of Appeal stated in *Beierbach*, *supra* note 42 at para. 12, that "[t]he general income earning capacity of premises is an element that appraisers can legitimately take into account."
55 *An Act to amend The City Act (No. 2)*, S.A. 1960, c. 15, s. 12.
56 *Ibid.* [emphasis added].
57 *Walter Woods* (T.D.), *supra* note 49 at 210-11.
58 *An Act to amend the City Act*, S.A. 1966, c. 15.
59 *Ibid.*, s. 24.

This amendment was incorporated when the Alberta legislature repealed the *City Act* and passed the 1968 *Municipal Government Act*.[60] In *Beierbach*, this amendment was held by the Court of Appeal to have substantially altered the *ratio* in *Walter Woods* and to have limited compensation claims to those related to the value of the property, to the exclusion of personal damages.[61]

B. *BEIERBACH V. MEDICINE HAT (CITY OF)*

In *Beierbach*, the claimants were owners and operators of a motel and self-serve gas station in Medicine Hat. In 1976, the Trans Canada Highway was widened and upgraded, and a pedestrian overpass constructed, for a distance that included the stretch passing in front of the motel. The project severely affected the appearance of the motel and its visibility to passing traffic, which caused a loss of profitability and other costs.

By this time, the applicable legislation was the 1970 *Municipal Government Act*,[62] which contained provisions equivalent to ss. 299 and 303a of the *City Act*— ss. 131 and 135, respectively.[63] It did not include an equivalent of s. 303 of the *City Act*.

The first important finding by the Court of Appeal in *Beierbach* related to when the general compensation provision (s. 131) and the specific compensation provision (s. 135) applied. The Court held that the specific provision, not the general provision, applied where there was no expropriation of any property.[64]

The second and more fundamental finding by the Court, as noted above, was that the specific compensation provision was not necessarily encumbered by the four conditions and must be interpreted on its own. Justice Clement held:

> But the statutory provisions are somewhat different today. There is no equivalent in the Act of s. 303(1) of the *City Act*. The remedy of compensation arises when a case is made out of injurious affection resulting from expropriation, under s. 131 (which is not applicable here), or under s. 135(1) when there has been no expropriation but the construction has resulted in loss or permanent lessening of use. In such case (as is the present one) the amount of compensation is limited by s.s. (4). The criteria for a valid claim stated in *Loiselle* must be put to one side. What is to be determined now in view of the juridical and legislative history, is the scope of the phrase "damage to an owner — by reasons of loss of or permanent lessening of use of the land of that owner" in the light of the nature of the limitation on amount of damage prescribed by s.s. (4).[65]

The Court concluded by stating that "we are not dealing with a case predicated on injurious affection, and s. 135 neither by its terms nor by implication nor inference postulates such a requirement."[66] Justice Clement probably did not need to go so far because the claimants' case in *Beierbach* failed as a claim based on personal damages in the nature of

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60 S.A. 1968, c. 68, s. 135(4). Notably, s. 303 of the *City Act* was not included in the 1968 version of the *MGA*.
61 *Beierbach*, *supra* note 42 at para. 15.
62 R.S.A. 1970, c. 246 [1970 *MGA*].
63 *Ibid.*
64 *Supra* note 42 at para. 5.
65 *Ibid.* at para. 14.
66 *Ibid.* at para. 20.

their expected loss of profit (that is, the claimants failed to meet the nature of the damage rule). It may very well have been that, upon closer scrutiny, the justification for some or all of the four conditions would have applied equally to the specific remedy contained in s. 135 of the 1970 *MGA*.

Nevertheless, as will be seen, Clement J.A.'s findings in *Beierbach* and subsequent cases justifiably led Waqué to the conclusion that there was a specific statutory remedy in damages available to Alberta landowners that was "not bound by the rules which apply to injurious affection claims."[67] *Beierbach* became the foundation upon which several significant Alberta decisions were based and, until 2007, it could be argued that Alberta had a more generous compensation regime where no land was taken than other provinces.

C. LAND COMPENSATION BOARD DECISIONS FOLLOWING *BEIERBACH*

Following *Beierbach*, the Board had occasion to consider *Beierbach* and claims made pursuant to the *MGA* on four separate occasions before a 1994 amendment to the *MGA*.

1. *MERIDIAN PROPERTIES LTD. V. CALGARY (CITY OF)*[68]

In *Meridian Properties*, the landowner made a claim under the specific compensation provision found in s. 137 of the 1980 *Municipal Government Act*[69] (formerly s. 135 in the 1970 *MGA*) relating to the permanent reduction in the value of its lands caused by the erection of an overpass that elevated the grade of the avenue fronting the subject property and limited access to part of the property. The Board awarded compensation pursuant to that section because it was "convinced that the subject land has suffered some loss in value because of the construction of the overpass and the presence of the retaining wall and ramp which would obstruct the view of the ground floor rental in any projected building."[70] The Board followed *Beierbach*, including its rejection of personal losses (that is, the nature of the damage rule), but otherwise failed to conduct any analysis of the four conditions. Most significantly, the Board did not engage in an analysis of whether the statutory authority rule or the actionable rule applied.

2. *SPOLETINI V. CALGARY (CITY OF)*[71]

In *Spoletini*, the claimants owned land improved with an apartment block and made claims under s. 137 of the 1980 *MGA* for loss of value to the lands caused by an elevated overpass in front of their lands. They also claimed for increased maintenance costs attributable to the overpass. The Board characterized the claim as one "based on the impact of the overpass on the rentability of the apartment building."[72] It again followed *Beierbach* and awarded $60,000 "for the reduction in the market value of the subject land."[73]

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67 Waqué, *supra* note 10 at 2.
68 (1984), 64 A.R. 358 (LCB) [*Meridian Properties*].
69 R.S.A. 1980, c. M-26 [1980 *MGA*].
70 *Supra* note 68 at para. 35.
71 (1984), 31 L.C.R. 346 (Alta. LCB) [*Spoletini*].
72 *Ibid.* at 353.
73 *Ibid.* at 358.

Spoletini is significant because, on its facts, the landowners may not have been able to meet the actionable rule. The loss suffered by the landowner seems to have come very close to a loss of view or loss of prospect, which the Supreme Court in *St. Pierre* held could not support a common law nuisance claim. The Board's application of the *Beierbach* interpretation of the *MGA*'s specific compensation provision did indeed appear to make the law in Alberta more favourable than in other provinces.

3. *NOMAR CONSTRUCTION LTD. V. CALGARY (CITY OF)*[74]

In *Nomar Construction*, the landowner claimed compensation pursuant to the specific compensation provision in the 1980 *MGA* for a decrease in the value of residential lands that were ripe for redevelopment with an apartment building. The claim arose out of the widening of an avenue as part of the construction of an overpass and boiled down to two factors: increased traffic flow and the loss of on-street parking in front of the subject land. The Board awarded compensation for these two factors.

Nomar Construction is significant because it is doubtful that the portion of the claim related to increased traffic flow on the overpass and the widened avenue would have been able to meet the construction and not the use rule. Accordingly, like *Spoletini*, *Nomar Construction* lends further support to the notion that Alberta landowners enjoyed, at least in some respects, a more generous compensation regime than other provinces in the absence of a taking.[75]

4. *SCHMAUDER V. MEDICINE HAT (CITY OF)*[76]

In *Schmauder*, the owner of a residential rental property made a claim pursuant to the specific compensation provision in the 1980 *MGA* as a result of a road widening that caused a loss of on-street parking and an alleged deprivation of access. The Board again noted that it was bound by the *Beierbach* interpretation and further reiterated that as long as the loss reduced the market value of the property, it was compensable. In particular, the Board noted that even the loss of view, rejected as a ground of compensation by the Supreme Court in *St. Pierre*, would be compensable in Alberta. In essence, the statutory regime as interpreted in *Beierbach* would put impacted landowners in a better position than if the negative impact to their property had been caused by another private landowner.

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74 (1985), 65 A.R. 195 (LCB) [*Nomar Construction*].

75 For example, ss. 1 and 21 of the *OEA*, *supra* note 7, clearly incorporate the construction and not the use rule.

76 (1993), 50 L.C.R. 191 (Alta. LCB) [*Schmauder*].

In *Schmauder*, the Board awarded compensation and concluded:

> The board agrees with the respondent that *Beierbach* has simplified the law in Alberta with respect to damages when no land is taken. The board agrees with the respondent that the board must be satisfied that the construction of the municipal works is causally connected to the diminution of the market value of the subject lands.[77]

Schmauder is significant because it was the first time that the Board appeared to indicate that it was not comfortable with the state of the law. It stated:

> Because *Beierbach* is binding on the board, the board must direct its analysis only to whether there has been damage to the owner of the subject lands because there has been loss of or permanent lessening of the use of those lands. The board determines that there has been such damage to the owner of the subject lands. On the one hand, the board does agree with the premise of the *St. Pierre* case. If municipal corporations are to be held liable to landowners for every alteration in their circumstances created by the changes that need to be made, the financial implications would prohibit progress and development. None the less, the law of Alberta is that if the land is less valuable after the construction of the municipal works and the devaluation is because of the works, the owner is entitled to compensation.[78]

Although the relevant provisions of the *MGA* were amended in 1994, it was not until the 2007 amendment that the Alberta legislature made amendments apparently intended to address the Board's concerns.

D. THE 1994 AMENDMENT

In 1994, the relevant compensation provisions of the *MGA* were again amended as part of a major amendment to the *MGA*.[79] There were two main aspects of the amendment insofar as they related to claims for compensation by a landowner having no land expropriated.

First, the general provision previously found in s. 133 of the 1980 *MGA* (formerly found in s. 131 of the 1968 and 1970 *MGA*, and s. 299 of the *City Act*) was repealed and not replaced. As a result, the 1994 *MGA* no longer made any reference to "injurious affection" at all and, arguably, the *MGA* was moving even farther away from the four conditions.

Second, the primary subparagraph of the specific compensation provision that defined the right of compensation was replaced with s. 534(1) of the 1994 *MGA*, which provided:

> A person having an interest in land that is adjacent to land upon which a municipality has constructed or erected a public work or structure is entitled to compensation from the municipality for loss of or the permanent lessening of use of that person's land caused by the public work or structure.[80]

It is not clear whether this amendment was intended to change the scope of the right to compensation or to simplify the rather cumbersome language of its predecessors. If it was

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77 *Ibid.* at 217.
78 *Ibid.* at 215.
79 S.A. 1994, c. M-26.1 [1994 *MGA*].
80 *Ibid.*

intended to restrict the scope of claims made under the *MGA*, two subsequent decisions of the Board and the Alberta Court of Appeal suggest that it failed to do so.

E. *SANDS MOTOR HOTEL LTD. V. EDMONTON (CITY OF)*[81] AND *GRAVEL V. EDMONTON (CITY OF)*[82]

In 2005, the Alberta Court of Appeal gave judgment on two significant claims under s. 534 of the 2000 *Municipal Government Act*,[83] the relevant provisions of which were largely the same as the 1994 *MGA*. At a minimum these cases continued the trend started 23 years earlier in *Beierbach* and arguably further extended the scope of liability faced by municipalities.

In *Sands*, the claimant operated a hotel and free-standing beer and liquor store on the corner of the Yellowhead Trail and a major road in Edmonton. After the construction of a diamond interchange and a road extension, the hotel suffered from reduced visibility and access, which the hotel claimed had permanently lessened the use of the property and its market value. The Board found that there had been a permanent lessening of use because hotel use was no longer the highest and best use for the property.[84] It went on to assess whether it was the public works or other factors that were the cause of the decreased value of the property. The Board awarded the claimant a significant award of compensation in excess of $2,000,000. The Court of Appeal, in denying the City's appeal, did not analyze the provisions of the 2000 *MGA* in any detail. The Court held that the grounds raised were largely factual, deference was to be accorded to the Board, and that the case was unsuitable for appellate intervention.

Although *Sands* involved a much more significant monetary amount, *Gravel* was more significant from a legal perspective. In *Gravel*, an owner of a residential property claimed compensation pursuant to s. 534 of the 2000 *MGA* for damages resulting from the widening of a street, which caused the property to immediately abut the widened road. In particular, the owner claimed for permanent impairment of "the quality of the residential use"[85] of the property caused by increased traffic noise, increased toxic fumes, and increased shaking and reverberation of the property.

The main issue in *Gravel* was whether the owner had suffered a permanent lessening of use of the property. The Board held that quality of use as a residential home, which it linked to the concept of "livability," was included in the meaning of "lessening of use" in s. 534 of the 2000 *MGA*.[86] The Board noted that "[a] determination of the factors underlying the usefulness of a residential property in terms of its amenities and disamenities, is a complex undertaking. But in the marketplace, people make this determination on a regular basis."[87] The Board awarded compensation.

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81 2005 ABCA 402, 376 A.R. 365 [*Sands*].
82 2005 ABCA 374, 380 A.R. 372 [*Gravel*].
83 R.S.A. 2000, c. M-26 [2000 *MGA*].
84 *Sands Motor Hotel Ltd. v. Edmonton (City of)* LCB Order No. 429 (4 August 2004), online: LCB <http://www.landcompensation.gov.ab.ca/downloads/documentloader.ashx?id=8748> [*Sands* (LCB)].
85 *Gravel*, *supra* note 82 at para. 3.
86 *Gravel v. Edmonton (City of)* (2004), 86 L.C.R 1 at 17 (Alta. LCB) [*Gravel* (LCB)].
87 *Ibid.* at 23.

The City of Edmonton appealed to the Court of Appeal. The Court denied the appeal. In the course of its decision, the Court:

- held that the term "loss of use" was intended to extend to situations where "the property is simply less useful, such as where the benefit and enjoyment of residential property is decreased," and includes "quality of use considerations";[88]

- confirmed that "the old law of injurious affection has no application to claims for compensation under s. 534 of the *MGA*";[89]

- rejected the City's argument that the Board's interpretation placed an "intolerable burden on the public purse";[90] and

- held that the interpretation of s. 534 did not render s. 528 of the *MGA* nugatory. Section 528 protects a municipality from liability in a nuisance action if the damage arises directly or indirectly from roads. The Court held that the "nuisance action barred by s. 528 is markedly different from the claims that may be made under s. 534."[91]

The result in *Gravel* further solidified that, in Alberta, claims for compensation against a municipality where there was no taking enjoyed an advantage over other provinces or even over common law claims that might have been available if the work had been a private work. Claims based on noise and fumes, which were presumably based on the use and not the construction of the public work, were allowed. Further, the threshold as to what constituted a lessening of use was set very low: any reduction in the quality of use of the property, even one based largely on perception, could be the basis for a claim as long as that perception would be reflected in a lower market value after the construction of the work. Presumably, this would apply even if the use of the lands for the public work was "reasonable" and would not have given rise to a claim in nuisance at common law. Adjacent landowners, in effect, had better rights against municipalities statutorily authorized to construct public works than they would if they were making common law claims against their private neighbours.

It is not surprising that the Alberta legislature, with a long list of municipal infrastructure projects scheduled, passed the 2007 amendments to the *MGA*. These amendments largely undo over 25 years of legislative amendments and jurisprudence in order to restrict the availability of claims, and arguably reintroduce some or all of the four conditions.

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88 *Supra* note 82 at para. 9.
89 *Ibid.* at para. 10.
90 *Ibid.* at para. 11.
91 *Ibid.* at para. 13.

F. THE 2007 AMENDMENT

In 2007, s. 534 of the *MGA* was repealed[92] in its entirety and replaced with the following:

(1) In this section, "injurious affection" means, in respect of land, the permanent reduction in the appraised value of land as a result of the existence, but not the construction, erection or use, of a public work or structure for which the municipality would be liable if the existence of the public work or structure were not under the authority of an enactment.

(2) Within one year after the construction or erection of a public work or structure is completed, as signified by the construction completion certificate, the municipality must deliver or mail to every owner of land that abuts land on which the public work or structure is situated, and place in a newspaper circulating in the municipality, a notice that

(a) identifies the public work or structure,
(b) gives the date of completion, and
(c) states that claims for compensation under this section must be received within 60 days after the notice is published in the newspaper.

(3) Subject to subsection (4), an owner of land that abuts land on which a public work or structure is situated is entitled to compensation from the municipality for injurious affection to the owner's land.

(4) An owner of land described in subsection (3) is entitled to compensation under this section only if the owner files with the municipality a claim within 60 days after notice of the completion of the public work or structure is published in the newspaper.

(5) A claim must state the amount claimed and the particulars of the claim to prove the claim.

(6) The value of any advantage to a claimant's land derived from the existence of the public work or structure must be set off against the amount otherwise payable as compensation for injurious affection.

(7) No compensation is payable for injurious affection caused by

(a) the existence of boulevards or dividers on a road for the purpose of channelling traffic, or
(b) the restriction of traffic to one direction only on any road.

(8) No action or claim for injurious affection may be made except under this section.

(9) If the claimant and the municipality are not able to agree on the amount of compensation for injurious affection, the claimant and the municipality may agree to have the amount determined by binding arbitration under the *Arbitration Act*.

(10) If the claimant and the municipality do not agree to have the amount of compensation for injurious affection determined by binding arbitration, the amount of compensation for injurious affection must be determined by the Land Compensation Board.

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92 *Supra* note 13.

(11) Subject to the regulations made under subsection (15), the Land Compensation Board may follow the practices and procedures used under the *Expropriation Act*.

(12) Except in exceptional circumstances, the Land Compensation Board may not award legal costs on a solicitor-client basis in respect of a proceeding under this section.

(13) An appeal lies to the Court of Appeal from any determination or order of the Land Compensation Board under this section.

(14) Section 37 of the *Expropriation Act* applies to an appeal under subsection (13).

(15) The Minister may make regulations

(a) respecting the practice and procedure of a proceeding before the Land Compensation Board under this section;
(b) subject to subsection (12), respecting costs that may be awarded by the Land Compensation Board in respect of a proceeding under this section.

(16) This section applies only in respect of public works and structures for which a construction completion certificate is issued after this section comes into force.[93]

The author has been unable to find anything helpful in Hansard to shed any light as to the stated purpose of the 2007 amendment. However, as indicated above, it was almost certainly in direct response to the development of the law, commencing with *Beierbach* in 1982 and culminating with *Gravel* in 2005.

The 2007 amendment dramatically changed the claims in Alberta for compensation where there is no taking. It created a new statutory regime for such claims against municipalities, which seems to borrow concepts and phrases from various places. While it does not simply revert back to the traditional language used in many statutes across Canada (like the version interpreted in *Loiselle*), it does appear in many respects to be an attempt to at least partially revert back to *Loiselle*. Impacted landowners and counsel dealing with municipal public works will have to dust off *Loiselle* — largely ignored in Alberta for 25 years — as it has once again become relevant.

The 2007 amendment has not yet been considered by the courts. However, the LCB has had occasion to refer to the new s. 534 in *Clark*.[94] In *Clark*, a Regional Services Commission made up of four municipalities known as North 43 Lagoon Commission,[95] partially constructed and operated a sewage lagoon on lands adjacent to the lands of the claimants. The claimants commenced an application claiming compensation for the loss of use and the loss of value of the lands due to the presence of the sewage lagoon. The issues were whether the respondent municipalities and the Commission fall within the definition of "municipalities" in the *MGA*, and whether the Board had jurisdiction, in the circumstances,

93 *Ibid.*, s. 534.
94 *Supra* note 14.
95 Established by the *North 43 Lagoon Commission Regulation*, Alta. Reg. 181/2003.

to determine compensation under s. 534 of the *MGA*. The Board held that the respondent municipalities and the Commission fall within the definition of "municipalities" and, therefore, the Board had jurisdiction to hear the claimants' application under s. 534 of the *MGA*.[96] The Board decided that, in the alternative, should it be "incorrect in its characterization of the Commission as a Municipality," then the Commission "was an agent acting on behalf of the Municipalities and that the Respondent Municipalities continue to be Municipalities for the public work construction as provided for in section 534 of the *MGA*."[97] Specifically, the Board noted that s. 534 is "remedial in nature, intending to provide a remedy against a municipality for loss of or the permanent lessening of use of a person's land caused by the public work or structure."[98]

In the future, the Board will have to interpret s. 534 as a matter of first instance, having regard to the remedial nature of the provisions and the historically broad interpretation of the predecessor provisions by the Alberta Court of Appeal. In *Clark*, the Board employed the Supreme Court of Canada's interpretive approach in *Rizzo*[99] and *Montreal (City of) v. 2952-1366 Quebec*,[100] as well as s. 10 of Alberta's *Interpretation Act*,[101] and would likely err on the side of the impacted landowner where there is doubt. When interpreting such compensation provisions it has been stated:

> In approaching the construction of this section from the perspective of the claim which is now before the Court, the *Urban and Rural Planning Act* must be viewed as a statute encroaching upon the rights of the subject. English and Canadian law has traditionally treated such enactments on the same footing as penal statutes in that they are subjected to being strictly construed so as to be accorded a wide construction favouring respect for the subject's rights. This approach necessarily entails … [that] any ambiguity in a statutory provision with respect to a subject's right to compensation for property compulsorily taken from him or her will be resolved in favour of the claimant's right to reimbursement.[102]

This approach is also consistent with the approach mandated in the expropriation context by the Supreme Court in *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*[103]

This article will now review some key changes in Alberta to the statutory claim for compensation where there is no taking and some important issues raised by the 2007 amendment.

1. THE RETURN OF "INJURIOUS AFFECTION"

Section 534(3) of the 2007 *MGA* expressly provides a right of compensation for "injurious affection" to the owner's land.[104] Unlike the provisions at issue in *Beierbach*, where the Court of Appeal stated that "we are not dealing with a case predicated on injurious affection,

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96 *Clark*, *supra* note 14 at 297.
97 *Ibid.* at 299.
98 *Ibid.* at 298.
99 *Supra* note 41.
100 2005 SCC 62, [2005] 3 S.C.R. 141.
101 R.S.A. 2000, c. I-8.
102 *Gerry's Food Mart*, *supra* note 1 at para. 26 [footnotes omitted].
103 [1997] 1 S.C.R. 32.
104 *Supra* note 13.

and s. 135 neither by its terms nor by implication nor inference postulates such a requirement,"[105] the 2007 *MGA* now does found itself upon "injurious affection."

It will undoubtedly be argued that s. 534 of the 2007 *MGA* is an express attempt by the legislature to incorporate the four conditions set out in *Loiselle*. However, while the inclusion of the term "injurious affection" will certainly have to be given some meaning, and the potential application of *Loiselle* and the four conditions will have to be considered, the better view is that the Board and the courts will interpret the new provision by applying ordinary rules of statutory interpretation and will analyze the specific words used.

2. WHO CAN MAKE A CLAIM: AN "OWNER" OF "LAND"

The previous versions of the *MGA* provided that any person having "an interest in land" that is adjacent to land on which a municipality has constructed or erected a public work or structure was entitled to compensation if they met the other requirements set out in the statute.[106] What constituted an interest in land could be quite broad depending on the circumstances. At a minimum, it would include any registerable interest, including leasehold interests. Although the use of the phrase "interest in land" does not appear to have been the subject of any material consideration by the Board or the Court of Appeal in the context of claims for compensation where there is no taking, it is likely that this would have been interpreted consistently with other judicial interpretation of the phrase.

The 2007 amendment now restricts the compensation remedy to "an owner of land."[107] "Owner" is defined in the 2007 *MGA* to mean "in respect of [patented] land, the person who is registered under the *Land Titles Act* as the owner of the fee simple estate in the land."[108]

While this change will probably have a minimal impact on claims related to residential properties, which would typically be brought by the registered owner, it may have a significant impact on claims related to commercial properties. The new provisions would appear to prefer owner-operated over lessee-operated commercial operations on lands. The rationale behind this change is unknown, and its justification is difficult to identify.

The lessee of, and operator of, a business on commercial lands adjacent to a public work no longer appears to have a claim under the *MGA* and, further, may not have any recourse against the lessor unless the lease provides some remedy. While the lessor would continue to have a claim as the owner of the affected land (provided all of the other requirements of the statute are met), the decrease in the appraised value of the lessor's lands may have to take into account the fact that the lessor may be entitled to continue to enforce the lease.[109] Depending on the terms of the lease and, in particular, its rental rate, this may be a significant factor. Further, the commercial lessor may have difficulty claiming the collateral costs that might arise if the lessee breaks the lease and vacates the property, or makes a claim against

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105 *Supra* note 42 at para. 20.
106 See e.g. the 1980 *MGA*, *supra* note 69.
107 *Supra* note 13, s. 534.
108 *Ibid.*, s. 1(1)(u)(ii).
109 This, in turn, may be subject to the lessee's position that the lease has been frustrated by the public work.

the lessor for breach of the lease caused by the public works, as those types of claims may not meet the nature of the damages rule.

3. "PERMANENT REDUCTION IN THE APPRAISED VALUE OF LAND"

a. The Retention of the Nature of the Damages Rule?

As noted above, the *City Act* was amended in 1966 to address the *Walter Woods* decision, which, at least in certain circumstances, had the effect of abolishing the nature of the damages rule in Alberta. In particular, the 1966 amendment provided that the maximum compensation available (subject to a 10 percent discretional surcharge, which is discussed below) was based on the difference between the appraised value of the property prior to the exercise of the municipal powers, and the appraised value of the property after the exercise of those powers (often referred to as the "before and after" approach). By the time of the enactment of the 2000 *MGA*, the language of this provision had been amended slightly to provide that the valuation dates were not dependent on the exercise of the municipalities' powers, but were dependent on the date that the public work was constructed or erected.[110] Other provinces, such as Ontario, continue to allow claims for personal damages or business loss.[111]

The inclusion of these provisions in the Alberta statutes was ostensibly an attempt to incorporate the nature of the damages rule into the statutory claim for compensation, notwithstanding the criticism of this rule.[112] That is, the claimant had to establish that the damages were related to the land itself and not personal damages, or solely an injury to business or trade. However, as discussed above, if such damages could be legitimately incorporated into the objective assessment of the value of the land then there could, in effect, be compensation for these damages.[113] As stated in *Beierbach*, "loss of business … is a factor that may be taken into account insofar as it may affect the sale value of the property to another owner in respect of such use as that other may put the property to."[114] However, the Court of Appeal also warned that it is the "value of the property that is to be appraised, not the Owners' expectations nor their business losses standing alone."[115]

The 2007 amendment links injurious affection to the "permanent reduction in the appraised value of land."[116] This will undoubtedly be argued to be a continuation of the application of the nature of the damages rule.

b. The Continued Use of Market Value Appraisals

Section 534(1) of the 2007 *MGA* specifically incorporates the concept of appraised values of land. While one can imagine a multitude of ways to appraise a property, the appraisal must

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110 *Supra* note 83.
111 *OEA*, *supra* note 7, ss. 19, 21-22.
112 See e.g. Todd, *supra* note 34 at 388-91; Waqué, *supra* note 10 at 6-8.
113 See e.g. *Beierbach*, *supra* note 42.
114 *Ibid.* at para. 12.
115 *Ibid.* at para. 17.
116 *Supra* note 13, s. 534(1).

be based on "market value ascertained by acceptable criteria."[117] There remains some flexibility in how market value is determined. As noted in *Beierbach*, "[m]arket value is routinely determined by one or a combination of several approaches, depending on the circumstances, but all of them have in view the probable sale value of the property."[118] As stated above, the general income earning capacity of the premises is an element that the appraisers can legitimately take into account in determining market value.

c. The Retention of the "Before and After" Methodology?

The 2007 *MGA* does not include the specific before and after formula for calculating compensation where there is no taking (which had been incorporated into the legislation after *Walter Woods*). The utility of the before and after approach is open for reconsideration by the Board.

An alternative methodology to the before and after approach was proposed in *Gravel*, before the 2007 amendment was passed. In *Gravel*, the appraiser for the municipality suggested a different approach that used only one valuation date. The Board noted:

> [The municipality's appraiser] explained that a single effective date was used in order to reduce the number of variables. For example, only one set of comparables needed to be analyzed and adjusted for physical differences. In addition, the variable effect of time is removed from the equation.
>
> The before valuation was conducted under the hypothetical assumption that the public work had not been completed and the property remained oriented one lot east of 99th Street. The after valuation was then conducted on the assumption that the public work had been completed and the property was located directly adjacent to the 99th Street. The only consideration then, becomes the adjustment for location for one lot off 99th Street versus adjacent to 99th Street. As the before and after valuation is based on the same effective date, this method takes into account changes to 99th Street.
>
> [The municipality's appraiser] stated that in his opinion, the aforementioned method utilizing one effective date is more accurate and reliable than using a "before" effective date of March 10, 2000 and an "after" effective date of March 10, 2001. He maintained that this approach more precisely mirrors the intention of s. 534 of the Act.[119]

The Board rejected this approach and again reaffirmed the before and after approach as follows:

> [The municipality's appraiser] has selected an effective date governing the "before" appraisal that coincides with the City's notice of *construction completion*. The Board finds an inherent contradiction in this approach. How can the before date be the same as the after date?
>
> [The municipality's appraiser's] selected methodology is overly remote. It introduces a further element of artificiality to a process already laden with subjective judgment. And it superimposes a whole new set of

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117 *Beierbach*, *supra* note 42 at para. 17.
118 *Ibid.*
119 *Gravel* (LCB), *supra* note 86 at 16.

> assumptions on the valuation process. Therefore, and notwithstanding [the municipality's appraiser's] rationale, the Board finds his approach to be inconsistent with the intent of the Act.
>
> The Board prefers the approach taken by [the claimant's appraiser]. It is the Board's view that the intent of s. 534(5)(a) must be taken at face value. It prescribes an appraisal of the property prior to the commencement of the public work.[120]

Notwithstanding these comments, the alternative approach proposed in *Gravel*, like the before and after approach, has an attractive, logical basis and, given the new wording in s. 534, it may now be considered a reasonable alternative approach to determining the reduction in the appraised value of land. It is questionable whether the alternative approach actually involves more subjective elements than the before and after approach, which has seen the Board struggle to assess whether the decreases in property values resulting from the before and after approach were caused by other factors, such as a declining real estate market or changes in laws. The alternate approach, although it has its limitations, would seem to provide a level playing field. Further, the hypothetical assumptions that would have to be made in the alternate approach would be similar to those that appraisers and the Board are accustomed to under s. 45 of the *Expropriation Act*,[121] where they must engage in the hypothetical exercise of ignoring the scheme for which the property is being expropriated in order to determine market value.

Having said all of this, while there may be other methodologies proposed and adopted in the future, the 2007 *MGA* does not expressly provide for a different methodology than has been used in the past. Accordingly, it is most likely that the Board and appraisers, for the sake of certainty, will continue to consider the appraised value both before and after the public work came into existence. A prudent approach by appraisers and instructing counsel, however, might be to use both approaches to support their conclusions and the clients' positions. If the two approaches produce materially different results, then this should be explored.

d. The "Before" Date

One issue that had arisen prior to the 2007 amendment was how to choose the before and after valuation dates used in the before and after approach since the legislation did not set out how this was to be done. The 2007 *MGA* similarly does not expressly set out dates on which the lands are to be appraised for the purposes of the assessment. While this likely shows a statutory intention to give the Board and appraisers some flexibility to deal with the specific facts of particular cases, previous cases decided under the old provisions are likely still germane.

As noted above, in *Gravel*, the Board rejected an approach that used the date of the completion of construction of the works as the before date. In the other reported decisions,

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120 *Ibid.* at 24 [emphasis in original].
121 *Supra* note 2.

there has not been much debate or analysis with respect to the determination of the before date to be used, and it is often agreed to by the parties.[122]

These cases suggest that it is reasonably settled that in utilizing the before and after approach, the before date should be reasonably close to the date when construction of the public work commenced. With the new phraseology of the 2007 *MGA* now emphasizing the "existence" of the public work or structure (but not its "construction, erection or use"),[123] it can be expected that it will be argued that this mandates the use of a valuation date immediately preceding the day the public work is completed or comes into "existence." It could also be argued instead that "existence" means the approval of the work before construction begins. In any event, it appears that the 2007 amendment's deletion of the specific formula for calculating the compensation for injurious affection provides a greater flexibility for the Board to assess the impact of the "existence" of the public work or structure. A broad interpretation of existence and a flexible approach to the choice of the before date would be consistent with the Board's approach regarding the choice of the after date in previous cases.[124]

e. The "After" Date

Historically, there has been more disagreement between claimants and municipalities surrounding the choice of an after date for valuation. The leading case is *Spoletini*, where the Board noted that the provisions of the *MGA* "are of little assistance in establishing the effective date for the after valuation."[125] It went on to say the following:

> In the board's opinion the determinative factor or test to be applied in selecting the appropriate effective date for the after valuation called for under s-s. (4)(b) is as follows. A reasonable period of time after completion of the works must be allowed in order to permit a proper and fair assessment of the impact of the works on the property which is alleged to have been damaged. The length of that time period will not necessarily be the same in all cases and must be determined in the light of the facts and circumstances present and the nature of the claim for damages which is being made. The time period should be no longer than is necessary to establish such impact because with the effluxion of time the valuation becomes more difficult to make. Clearly it is the impact or damages to the property which directly result from or are attributable to the works which must be measured and general market and economic conditions which affect the property but which are unrelated to the works must be screened out in the valuation process. The longer the time period under review the more difficult and uncertain the process of valuation becomes.[126]

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122 In *Meridian Properties*, *supra* note 68 at para. 9, the parties agreed to a September 1981 valuation date but it was not clear exactly how this related to the exercise of the municipal power other than that construction had commenced some time in 1981. In *Nomar Construction*, *supra* note 74 at para. 12, the parties agreed that the valuation date would be the day before construction of the public work commenced. In *Spoletini*, *supra* note 71 at 353, the parties agreed that the before date was at the end of the month in which construction of the public work commenced. In *Schmauder*, *supra* note 76 at 194, the Board agreed that the before date was the date before construction commenced. In *Sands* (LCB), *supra* note 84 at 6, the parties agreed that the before date was between one and two months from commencement of construction.

123 *Supra* note 13, s. 534(1).

124 Discussed in Part IV.F.3.e, below.

125 *Spoletini*, *supra* note 71 at 353.

126 *Ibid.*

The Board has generally followed this reasoning in subsequent cases, both in the context of provisions focused on the exercise of municipal powers and those focused on the construction or erection of the public work. For example, in *Schmauder* the Board accepted an after date that "gives a reasonable period in which to assess the impact of the work on the value of the subject lands."[127] Similarly, in *Sands* the Board held that a date "nearly two months after the completion of construction, is a sufficient period of time to permit a proper and fair assessment of the impact of the works on the value of the property."[128] Insofar as the Board continues to use the before and after approach to claims made under the 2007 *MGA*, one would expect that it will apply a similar test to assess the impact of the existence of the public work on the owner's lands.

f. "Permanent" Reduction in Appraised Value

The 2007 *MGA* introduces a new word that was not previously found in the *MGA* compensation provisions. That is, reduction in the appraised value of the owner's land must be "permanent."[129] "Permanent" is defined in *Black's Law Dictionary* as "[c]ontinuing or enduring in the same state, status, place or the like, without fundamental or marked change, not subject to fluctuation, or alteration, fixed or intended to be fixed; lasting; abiding; stable; not temporary or transient.… Generally opposed in law to 'temporary,' but not always meaning 'perpetual.'"[130] As one wonders if any public work or structure will be truly "perpetual," the legislature must have intended "permanent" to mean something less. Given that the physical and economic life of public works and infrastructure is clearly limited, this must set an outside limit on what permanent means. In most cases, the permanent requirement will likely not be material. This is particularly so given that most economic calculations used by appraisers in relation to the calculation of loss, such as the income approach to value a commercial property on a before and after basis, involve economic horizons of 20 years or less. However, in an appropriate case, the Board may have to put some parameters around what is permanent and what is not in the context of s. 534 of the *MGA*.

While one can imagine creative arguments about the potential impact of the use of the word "permanent" in s. 534(1) of the 2007 *MGA*, it would appear most likely to be addressing three potential scenarios. The first scenario would be the potential negative impact on land values during the course of construction of the public work or structure. Elimination of this type of claim would be consistent with the use of the phrase "but not the construction, erection or use" included in s. 534(1).[131]

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127 *Supra* note 76 at 215. In *Nomar Construction*, *supra* note 74 at 199, the Board rejected the owner's proposal that the after valuation date should be the date after the date construction was scheduled to commence. The owner's choice of dates was likely motivated by the fact that the market was in a decline.

128 *Sands* (LCB), *supra* note 84 at 14-15. See also *Gravel* (LCB), *supra* note 86 at 25.

129 *Supra* note 13, s. 534(1).

130 *Black's Law Dictionary*, 6th ed., *s.v.* "permanent."

131 *Supra* note 13.

The second potential scenario would be a situation where the public work or structure was itself temporary in nature and should have only a temporary impact on the value of the owner's lands.[132]

The third potential scenario would be a situation where a permanent public work or structure has only a temporary impact on the appraised value of the owner's lands. One can imagine situations where the initial impact of a public work on land values may be negative, but the long-term impact may be positive.

The difficulty that the Board, claimants, and appraisers may have in some cases will be the extent to which the parties can bring evidence of the likelihood of future events occurring, which would show that the impact is only temporary. Significant expert evidence may be required. The best that the Board will be able to do is assess the evidence before it as of the effective date that it chooses, and in the context of its interpretation of what is permanent and what is not. What is permanent may change depending on the circumstances.

4. "AS A RESULT OF THE EXISTENCE, BUT NOT THE CONSTRUCTION, ERECTION OR USE"

As noted above, prior to the 2007 amendment claimants could claim for anything that caused a lessening of the use of their property and which was reflected in the appraised value of their property. In the 2007 amendment, the legislature has attempted to restrict claims to those arising out of the "existence" of the public work or structure and has specifically excluded claims resulting from "the construction, erection or use, of a public work or structure."[133] This phraseology does not fit neatly into the four conditions. It will be most efficient to examine the words used in more detail.

a. "Existence" of a Public Work or Structure

"Existence" has been defined as: "[b]eing; the fact or state of existing."[134] And, it appears that the legislature intended the word "existence" to have a broad meaning. For example, the legislature must have been of the view that the "construction, erection or use" of the public work or structure was also related to the "existence" of the public work or structure as, otherwise, the specific exclusion of those words would not have been necessary. Accordingly, to the extent possible, it can be argued that the meaning of "existence" is intended to have, and may be interpreted to have, a broad meaning subject to these specific limitations. It may be argued, for example, that a loss of value related to the threatened or planned existence of a public work or structure should be compensable provided that all of the other requirements set out in the statute are met.[135]

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132 However, there may very well be situations where a temporary public work or structure could have a permanent impact on an owner's lands.

133 *Supra* note 13, s. 534(1).

134 *The Oxford English Dictionary*, 2d ed., *s.v.* "existence."

135 This type of argument appears to have been rejected by the Ontario Court of Appeal in *St. Pierre*, *supra* note 19, which involved differently worded legislation.

b. "Construction" and "Erection"

The 2007 *MGA* specifically excludes claims based on the reduction of the permanent appraised value of lands that are related to the construction or erection of public works or structures. It is important to note that the use of the word "construction" has historically had two meanings, as described by Todd. He states that "[c]learly, 'construction' includes not only acts done in the course of construction but also, as in *St. Pierre*, the completed fact of construction."[136]

Municipalities might be tempted to argue that the inclusion of the word "construction" as an exception in s. 534(1) of the *MGA* was intended to eliminate claims based on either historical use of the word "construction." If this was true, then the result would be that virtually all conceivable claims related to the "existence" of a public work would potentially be eliminated. However, if the legislature had intended this, the compensation provisions could have been removed entirely. The better interpretation would be that the use of the word "construction" was only intended to cover the process of construction and erection and not the state of existence of, or the completed fact of, the finished and erected public work. This is consistent with the specific use of the words "construction" and "erection" and a contextual interpretation of the section.

c. Exclusion of Claims Related to "Use" of the Public Work or Structure

The specific exclusion of damages caused by the "use" of the public work or structure in s. 534(1) of the *MGA* results in the incorporation of the spirit of the construction and not the use rule, notwithstanding the criticism of this rule. It has been similarly incorporated in other provinces, such as Ontario.[137]

Challies has defined the test this way:

> The damage for which compensation is sought must be caused by the construction of the works and not by the use of them after construction, for the taker is not bound to pay compensation for damage from the use of works for purposes authorized by statute. The test of whether the property is actually damaged by operation or use is to consider whether the works as constructed, if left unused, would interfere with the actual enjoyment of the property; if not, no compensation is payable.[138]

Of course, how the rule applies in any particular factual scenario will depend on how the Board defines what precisely constitutes the public work or structure.[139]

In any event, the incorporation of the construction and not the use rule is a substantial restriction on the claims that were available under the previous versions of the *MGA*. Impacted landowners will no longer be able to make claims resulting from the use of public

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136 Todd, supra note 34 at 391.
137 *OEA*, *supra* note 7.
138 Challies, *supra* note 37 at 137-38 [footnotes omitted].
139 For example, whether the seepage of sewage from a sewage lagoon is a result of the "use" of the sewage lagoon or its existence may depend on whether the public work is defined as the lagoon prior to the introduction of sewage or the lagoon following the introduction of sewage.

work projects. For example, claims that were successful in *Gravel* — related to vibration, noise, and toxic fumes from the use of a widened road — will almost certainly no longer be available. Cases will undoubtedly arise where it is not as clear when an alleged harm is related to the "use" of the public work or structure. In those circumstances, the Board may have to employ an interpretation of "use" that builds in some concept of remoteness in order to avoid unfairness or unintended consequences. In cases that are close to the line, the Board may interpret the statute in favour of the landowner in order to be consistent with its remedial nature.

5. INCORPORATION OF THE STATUTORY AUTHORITY RULE AND THE ACTIONABLE RULE

As discussed earlier, since at least 1982 the statutory authority rule and actionable rule have both been irrelevant to claims for compensation in the absence of a taking in Alberta. Section 534(1) of the 2007 *MGA* now provides that claimants must establish that the permanent reduction in the appraised values of their property is something "for which the municipality would be liable if the existence of the public work or structure were not under the authority of an enactment."[140] By adding this phrase to the end of s. 534(1), the legislature has revived these two of the four conditions, which historically have caused impacted landowners difficulties in advancing claims. Claimants, their counsel, and the Board must now re-educate themselves on the statutory authority rule and the actionable rule, which in turn will usually require them to assess in each case (a) whether the municipality would have been able to rely on the defence of statutory authority; and (b) whether, in any event, the loss complained of would have been actionable at common law, usually in the form of a nuisance claim.

a. The Statutory Authority Rule

As described above, in order to advance a claim under s. 534 of the 2007 *MGA*, the claimant will have to establish that the municipality would have been liable if the existence of the public work was "not under the authority of an enactment."[141] This involves a detailed scrutiny of whether the defence of statutory authority, as most recently elaborated on by the Supreme Court in *Ryan*, discussed above, would have been successful if the claim was advanced as a common law claim. If the defence would apply, then the statutory authority rule would be established and would not be a bar to a s. 534 claim. If the defence would not apply, then the statutory authority rule would not be established and a s. 534 claim would not be available.

This means that in Alberta, in every case for compensation under s. 534, the Board will now likely have to consider whether or not the alleged harm caused by the municipal work was the "inevitable consequence" of the public work or whether the claim based on nuisance related to roads or otherwise falls within the specific statutory defence contained in s. 528 of the *MGA*.

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140 *Supra* note 13.
141 *Ibid.*

Where the applicability of the municipality's statutory authority defence is not clear, as would often be the case, impacted landowners and their counsel are put in a difficult position. This was noted by Waqué:

> [I]t follows that the choice between a claim at common law and a claim for injurious affection ought to be decided in favour of a claim at common law where there is a clear exception to the defence of statutory authority and little doubt but that the defence will, therefore, be defeated. In a case where it is clear that none of the exceptions to the defence of statutory authority would succeed and, therefore, the defence would likely prevail, an action should be brought under the shelter of a statutory provision permitting such an action if it exists. In cases where it is not clear whether or not the defence will succeed, both causes of action must be preserved by … legislation, as well as commencing an action in the Superior Court. If that is done and one trips on the defence of statutory authority, a limitations period will not prevent the pursuit of the other remedy.[142]

Impacted landowners can reasonably expect opposition by municipalities faced with proceedings launched through both common law actions and statutory remedies, including, possibly, motions to stay one of the proceedings in favour of the other in the event that they are extant at the same time.[143] There is some authority that sets out tests which, if met, could mean that impacted landowners could be limited to their statutory claims.[144] On the other hand, there is also authority that provides that the elimination of the common law claim should only result where "there could be no doubt that the statute was intended to apply."[145] Generally speaking, if impacted landowners' statutory claim fails, or would fail on the ground that the municipality cannot rely on its defence of statutory authority to a common law action,[146] then it is quite possible that the common law claim will still be available.[147] This is likely so notwithstanding the existence of s. 534(8) of the 2007 *MGA*, which expressly prohibits any common law claim for injurious affection, but does not specifically exclude claims for nuisance or negligence (both of which seem to be expressly contemplated by s. 528 of the 2007 *MGA*).

Impacted landowners faced with this problem will have to be aware of the different statutory limitations that would apply to both their common law and statutory claims. Under s. 534(2) of the 2007 *MGA*, statutory claims for compensation must be received within 60 days after the notice of the completion of the public work or structure is published in the newspaper. Pursuant to Alberta's *Limitations Act*,[148] a common law claim for nuisance or negligence must be filed within two years from the date that the claimant knew or ought to have known "(i) that the injury for which the claimant seeks a remedial order had occurred,

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142 Waqué, *supra* note 10 at 11.

143 See e.g. *Paat v. Ontario (Minister of Transportation and Communications)*, [1988] O.J. No. 2900 (H.C.J.) (QL) [*Paat*]; *Aquino v. Canada (Ministry of the Environment)* (1990), 44 L.C.R. 47 (Ontario Municipal Board); *Metropolitan Toronto Evangelical Christian Centre v. Tiny (Township of)* (1990), 45 L.C.R. 155 (Ontario Municipal Board).

144 See e.g. *Canadian National Railway Co. v. Trudeau*, [1962] S.C.R. 398; *North Vancouver (District of) v. McKenzie Barge & Marine Ways Ltd.*, [1965] S.C.R. 377.

145 *Taxis v. Edmonton (City of)* (1982), 38 A.R. 621 at para. 24 (Q.B.) [*Taxis*], citing *Re Kemptville Milling Co. Ltd. v. Kemptville (Village of)* (1922), 53 O.L.R. 8 at 12 (S.C. (A.D.)).

146 As set out in *Ryan*, *supra* note 17.

147 *Portage La Prairie (City of) v. B.C. Pea Growers Ltd.*, [1966] S.C.R. 150. See also *Taxis*, *supra* note 145; *Paat*, *supra* note 142; *Empringham Catering Services Ltd. v. Regina (City of)*, 2002 SKCA 16, 217 Sask. R. 138 at paras. 44-46 [*Empringham Catering*].

148 R.S.A. 2000, c. L-12.

(ii) that the injury was attributable to conduct of the [municipality], and (iii) that the injury, assuming liability on the part of the [municipality], warrants bringing a proceeding."[149] The two-year limitation for an action at common law may give impacted landowners enough time to advance their statutory claim first and then, if unsuccessful because they fail to establish the statutory authority rule, to file a common law claim.

b. The Actionable Rule

After the interpretation of the relevant provisions of the *MGA* in *Beierbach*, the claimant no longer had to establish that the damages suffered would also have been actionable at common law. As noted above, this provided Alberta landowners with an advantage over landowners in other provinces. Now, s. 543(1) of the 2007 *MGA* has very likely revived the so-called actionable rule (notwithstanding some criticism of the rule[150]). In future claims, the permanent reduction in appraised value of the lands must be related to something that would be actionable at common law. As noted earlier, this primarily points impacted landowners to claims in nuisance.

In *St. Pierre*, the Supreme Court noted the following definition of nuisance:

> 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 of an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.[151]

The inclusion of the actionable rule in s. 543 of the 2007 *MGA* may mean the end of any realistic claim related to loss of prospect or loss of view. While such claims were compensable under the previous provisions if they resulted in a permanent lessening of the use of the claimant's land, both the Supreme Court of Canada and Alberta courts have generally held that a loss of prospect or view does not give rise to actionable nuisance at common law.[152] Having said that, one can imagine extreme cases of the destruction of a view or prospect that may be unreasonable enough to establish nuisance.

The Supreme Court has held that the categories of nuisance are not closed.[153] Unfortunately for impacted landowners, the unique blend of provisions in the 2007 *MGA* already eliminate many of the potential types of claims that would meet the actionable rule. For instance, many nuisance claims would arise from the use of the public work. Thus, while claims related to vibration, toxic fumes, dust, and noise would likely meet the actionable rule, they will likely fail because they are based on the use of the public work or structure. When considering what other potential nuisance claims might meet the "existence" test, things like blockage of light, loss of privacy, decreased visibility of commercial properties, the inherent repugnant nature of the public work, or environmental damage caused by the existence of the

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149 *Ibid.*, s. 3(1).
150 Todd, *supra* note 34 at 378-79.
151 *Supra* note 19 at para. 10, citing Harry Street, *The Law of Torts*, 6th ed. (London: Butterworths, 1976) at 219 [emphasis omitted].
152 *St. Pierre*, *ibid.*; *Becze v. Edmonton (City of)* (1993), 144 A.R. 321 (Q.B.).
153 *St. Pierre*, *ibid.* at para. 10.

public work come to mind. Whether any of these types of claims can meet the modern test for nuisance is uncertain and would undoubtedly involve significant research spanning hundreds of years of case law. That is a subject for another article.

One key remaining avenue of claim under the 2007 *MGA* would appear to arise if the existence of the public work or structure causes an interference with a right of access to an impacted landowner's adjacent lands.[154] It has been noted in a number of cases that the deprivation of one's common law right to access their property can give rise to a claim in nuisance.[155] In *Loiselle*, the Supreme Court held that the construction of a canal that blocked the main highway adjacent to the claimant's property was a "physical interference with a right which the owner was entitled to use in connection with his property,"[156] and would give rise to "a valid claim in damages under the general law."[157] There are ample other instances where a restriction on access has been held to constitute a nuisance or has been enough to meet the actionable rule.[158] There is some uncertainty as to the degree of interference with access that is required.[159] In *St. Pierre*, the Supreme Court, in discussing *Loiselle* and *Windsor*,[160] noted:

> 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 classed as nuisances.[161]

Future cases will have to be decided on their own facts. In a deprivation of access case, impacted landowners should also consider whether their situation may fall under the purview of ss. 26-27 of the *City Transportation Act*;[162] ss. 28-29 of the *Public Highways Development Act*;[163] and ss. 20-21 of the *Highway Development and Protection Act*,[164] as the compensation available under these legislations appears to provide a broader form of compensation not

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154 Some access-related claims are likely prohibited by s. 543(7) of the 2007 *MGA*, *supra* note 13, which provides no compensation for injurious affection caused by "the existence of boulevards or dividers on a road for the purpose of channelling traffic" or "the restriction of traffic to one direction only on any road."

155 See e.g. *Empringham Catering*, *supra* note 147; *Norway Pines Cabins Ltd. v. Minister of Highways for Ontario* (1966), [1967] 1 O.R. 12 (C.A.) [*Norway Pines*]; *TDL Group Ltd. v. Niagara (Regional Municipality of)* (2001), 21 M.P.L.R. (3d) 7 (Ont. Sup. Ct. J.), rev'd on other grounds, (2001), 55 O.R. (3d) 1 (C.A.).

156 *Supra* note 15 at 628.

157 *Ibid.* at 627.

158 See e.g. *Autographic Register*, *supra* note 36; *Walter Woods*, *supra* note 49; *Windsor (City of) v. Larson* (1980), 29 O.R. (2d) 669 (Sup. Ct. J. (Div. Ct.))[*Windsor*]; *Taylor v. Belle River (Village of)* (1910), 17 O.W.R. 815 (C.A.); *Tate v. Toronto (City of)* (1905), 10 O.L.R. 651 (C.A.); *Jesperson's Brake & Muffler Ltd. v. Chilliwack (District of)* (1992), 47 L.C.R. 172 (B.C. Expropriation Compensation Board); *Gerry's Food Mart*, *supra* note 1; *Airport Realty Ltd. v. Newfoundland (Minister of Works, Services, and Transportation)*, 2001 NFCA 45, 205 Nfld. & P.E.I.R. 95. See also cases cited in Challies, *supra* note 37 at 134-36.

159 See e.g. *Par Holdings Ltd. v. St. John's (City of)* (1994), 122 Nfld. & P.E.I.R. 204 (Nfld. S.C. (T.D.)) [*Par Holdings*]; *Thomson Lumber & Building Materials Ltd. v. Ontario (Minister of Highways)*, [1964] 2 O.R. 175 (C.A.). In *Norway Pines*, *supra* note 155 at para. 18, the Court stated: "[i]t is enough to say that where interference with access is shown, its degree and extent relative to the abutting land go to quantum. I do not rule out the possible application of a *de minimis* principle in this branch of the law." See also *Petro Canada v. Vancouver (City of)* (1996), 82 B.C.A.C. 299; *Coady v. Port Hope (Town of)* (1987), 38 L.C.R. 66 (Ontario Municipal Board).

160 *Windsor*, *supra* note 158.

161 *St. Pierre*, *supra* note 19 at para. 11.

162 *CTA*, *supra* note 9.

163 *PHDA*, *supra* note 9.

164 S.A. 2004, c. H-8.5.

encumbered by the use of the words "injurious affection" or other limitations present in the 2007 *MGA*.[165]

It should also be noted that claims may not meet the actionable rule if they are based on a nuisance that is common to the public in general.[166]

6. SECTION 543(6): SET-OFF FOR ADVANTAGES

Previous versions of the *MGA* did not expressly provide that any benefit or advantage obtained by impacted landowner resulting from the public work was to be set off against the compensation awarded. It is not clear whether this issue was ever specifically addressed by the Board or the courts.

The 2007 *MGA* leaves no room for doubt. It is now expressly provided in s. 534(6) that the "value of any advantage to a claimant's land derived from the existence of the public work or structure *must* be set off against the amount otherwise payable as compensation for injurious affection."[167] A similar provision is found in *PACA* and other provincial statutes.[168]

In dealing with this provision in the future, the Board and Alberta courts may get some guidance from cases dealing with a similar provision in Ontario.[169] Generally speaking, only advantages that are specific to the landowner will be taken into account, not an advantage enjoyed by other properties in the neighbourhood or the public at large. This is consistent with the fact that, pursuant to the actionable rule, the landowner will not be able to claim damages suffered by the public at large. Further, the onus will be on the municipality to prove the advantage.

In any event, to the extent they did not in the past, impacted landowners will now have to consider and factor in the specific or unique potential advantages that they have obtained from the public work or structure.

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165 For example, s. 27 of the *CTA*, *supra* note 9, provides:

> Compensation for closing access
>
> 27(1) Subject to subsections (2) to (5), if a means of access was maintained in accordance with this Part and the bylaws and is subsequently closed pursuant to section 26, the city shall compensate each owner of the adjacent land for the loss resulting to that owner from the closing of the means of access.
>
> (2) The aggregate amount of compensation payable in an individual case shall not exceed the difference between
>
> (a) the appraised value of the adjacent land prior to the closing of the means of access, and
>
> (b) the appraised value of that land after the closing of the means of access
>
> together with an amount of not more than 10% of the difference so determined.

166 See *Autographic Register*, *supra* note 36; *W.H. Chaplin & Co. Ltd. v. Mayor of Westminster (City of)*, [1901] 2 Ch. 329 at 334; *R. v. MacArthur* (1904), 34 S.C.R. 570; Challies, *supra* note 37 at 136-37.

167 *Supra* note 13 [emphasis added].

168 See e.g. the *OEA*, *supra* note 7, s. 23.

169 See John A. Coates & Stephen F. Waqué, *New Law of Expropriation*, vol. 1 (Toronto: Carswell, 1986) at 10-160 to 10-163.

7. REPEAL OF THE 10 PERCENT "DISCRETIONAL SURCHARGE"

Prior to 2007, the relevant provisions of the *MGA* had provided that, in addition to the difference between the appraised value of the claimant's land before and after the exercise of the municipality's powers or the construction or erection of the public work, impacted landowners could be awarded "an amount of not more than 10% of the amount of the difference."[170] This was described by the Court of Appeal in *Beierbach* as a "discretional surcharge" and a "consequential award, not a primary one."[171]

The LCB took a very restrictive view of this so-called surcharge and, on numerous occasions, had held that the onus rested with the claimant to obtain the additional 10 percent award.[172] While the 10 percent surcharge was usually advanced as part of the claim, this was generally unsuccessful.[173] In fact, it appears to have been awarded in only one case, and with no real analysis or explanation as to basis for the award.[174]

The 10 percent discretional surcharge no longer exists in the 2007 *MGA*. On a practical basis, this is likely not a major blow to impacted landowners given the historical reluctance of the Board to exercise its discretion in favour of the award.

8. NO SOLICITOR-CLIENT LEGAL COSTS EXCEPT IN EXCEPTIONAL CIRCUMSTANCES

While the loss of the 10 percent discretional surcharge is likely not a major blow to impacted landowners, s. 543(12) of the *MGA* probably is.

Previous versions of the *MGA* were silent on the issue of the claimant's legal costs. The issue was addressed in some detail in *Spoletini*. The Board held as follows:

> The *Municipal Government Act* does not, in s. 137 or elsewhere, make reference to or deal with the matter of costs in an application of this type before the board. The board is of the opinion that the jurisdiction granted to the board pursuant to s. 137(3) extends to and includes the disposition of costs arising as a result of an application and hearing before the board pursuant to the section.
>
> Counsel for the Owners argued that the within application is analagous to an application for determination of compensation made pursuant to the *Expropriation Act* and that s. 39(1) of that Act should be applied.
>
> …
>
> Counsel further argued that the position of the Owners herein is analagous to the owner who is expropriated, in that it is an act of the City over which the owners have no control that gives rise to the application.

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170 See e.g. s. 137(4) of the 1980 *MGA*, *supra* note 69.
171 *Beierbach*, *supra* note 42 para. 15.
172 See e.g. *Nomar Construction*, *supra* note 74; *Sands* (LCB), *supra* note 84.
173 See e.g. *Sands* (LCB), *ibid.*; *Nomar Construction*, *ibid.*; *Gravel* (LCB), *supra* note 86; *Spoletini*, *supra* note 71.
174 *Schmauder*, *supra* note 76.

> Counsel for the City argued that the within proceedings are analagous to ordinary litigation and that the rules pertaining thereto and not s. 39 of the *Expropriation Act* should be applied. The position of the City is that costs should be awarded on a party-and-party basis and not a solicitor-and-client basis.
>
> The board finds that it is not bound to apply the *Expropriation Act* provisions as to costs in cases arising under the *Municipal Government Act*. While the board may award costs of the same basis as is set out in s. 39 of the *Expropriation Act* it must consider each case on its own merits and deal with costs accordingly. Indeed in [*Beierbach*] after considering all of the circumstances the board found that each of the parties must bear its own costs.[175]

In *Spoletini*, the Board concluded that the owners were entitled to be paid by the City for the reasonable legal, appraisal, and other costs incurred by the owners for the purposes of determining the damages payable to them by the City, on a solicitor-client basis. The Board reached this conclusion "having regard to the complexity of the issues involved and the element of success achieved by the Owners."[176] In *Gravel*, the Board found that the claimant's case was "presented efficiently and in a professional manner," that the claim was highly successful, and that the claimant was "entitled to be fully reimbursed for reasonable legal and expert costs."[177] In *Sands*, the Board made a similar finding on a similar basis and also awarded the claimant its "reasonable costs for the time spent by its President … on [the] claim."[178] Following the analysis in *Spoletini*, it appears that there was only one case in which the claimant did not obtain its reasonable legal and appraisal costs.[179]

The 2007 amendment now provides that legal costs may only be awarded on a solicitor-client basis in "exceptional circumstances."[180] It is not clear how this will be interpreted by the Board. If the Board borrows from costs decisions in ordinary litigation, it will mean that it will be unusual for the claimant to recover anything even approaching its actual legal costs, even if it is successful. This, in turn, will be a serious deterrent for many claimants wishing to advance legitimate claims.

The better interpretation, in this writer's view, is that "exceptional circumstances" should be given a broad interpretation respectful of the remedial nature of the statute. In particular, the analogy between ordinary litigation and claims made under s. 543 of the *MGA*, as previously urged upon the Board by the municipality in *Spoletini*, does not really hold. While it is true that there is no compulsory taking of land, the public work is often constructed without any meaningful input or regard for the interests of the adjacent landowner, nor does the landowner voluntarily agree to it. Further, the negative impacts of that public work are borne by the adjacent landowner for the benefit of the public at large. It is unfair to saddle impacted landowners with the risk of significant legal and expert costs reasonably incurred to advance their rights or, alternatively, to force them to proceed against municipalities without proper representation and advice.

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175 *Spoletini*, *supra* note 71 at 359 [footnotes omitted].
176 *Ibid.*
177 *Gravel* (LCB), *supra* note 86 at 27.
178 *Sands* (LCB), *supra* note 84 at 44.
179 In *Nomar Construction*, *supra* note 74, the Board held that each party should bear its own costs.
180 *Supra* note 13, s. 534(12).

It is also noted that the 2007 amendment specifically targets legal costs but continues to be silent with respect to appraiser, expert, or other costs. It could be argued that the silence is intended to mean that appraiser and other expert costs are to be treated differently than legal costs, for it would have been easy for the legislature to include such costs in s. 543(12) of the *MGA*. Claimants can reasonably argue, therefore, that they should be compensated for their actual, reasonable appraiser, expert, and other costs. If *Sands* is followed, they may also be able to claim their own personal costs associated with advancing the claim.

V. STATUTORY CLAIM AGAINST THE PROVINCIAL CROWN

The potential statutory claim against the Province of Alberta is found in s. 7 of *PACA*. It provides:

> An owner of land expropriated by the Crown and an owner of land injuriously affected by the exercise of the power of expropriation is entitled to due compensation for any damages necessarily resulting from the exercise of the power of expropriation beyond any advantage that the owner may derive from any purpose for which the land was expropriated or by which the land was injuriously affected.[181]

The provision has its roots in *The Expropriation Procedure Act*.[182] In 1974, as part of the reform to Alberta's expropriation legislation, the *EPA* was repealed and this section was moved into *PACA*.[183] In contrast to the *MGA*, this provision has not been amended and has not been judicially considered. Nevertheless, given the activity of the province in expropriating for the purposes of public works, this provision is one that impacted landowners and their counsel should keep in mind.

A. INCORPORATION OF THE *LOISELLE* FOUR CONDITIONS?

Because it includes the words "injuriously affected," there is a serious risk to impacted landowners that a future court will, without much analysis, simply incorporate *Loiselle*'s four conditions into s. 7 of *PACA*. This is precisely what appears to have happened in relation to the *MGA* at the Board level in *Beierbach* when it concluded that "[t]he Board finds nothing in the language used in s. 135 which would preclude or render unnecessary resort to such rules or conditions to determine whether or not a basis for claim exists."[184] The Board stated:

> For years the Courts, both in Canada and in England, have wrestled with the thorny problem of dealing with claims for injurious affection where the damage is alleged to have been caused by the construction by a municipal authority, on lands which that authority owns, of public works and which municipal lands are adjacent to lands owned by the person making the claim. While the decisions handed down in these cases did lead to some conflict and uncertainty when applied to the facts of specific cases there emerged therefrom a set of four rules or conditions which must be met before a cause of action will be sustained. These rules were considered and affirmed by the Supreme Court of Canada in *The Queen v Loiselle*.[185]

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181 *Supra* note 9.
182 S.A. 1961, c. 30, s. 15 [*EPA*].
183 S.A. 1974, c. 27, s. 70(13).
184 *Beierbach v. Medicine Hat (City of)* (1980), 21 L.C.R. 133 at 143 (Alta. LCB).
185 *Ibid.* at 137-38 [footnotes omitted].

Similar sentiments have been expressed in other cases[186] and a similar application of *Loiselle*'s four conditions appears to have been made in other cases without scrutiny of the specific legislation at issue.[187]

Even if the language used in *PACA* is reviewed afresh, this language, or language very similar to it, has a long legislative history and there appear to be many reported decisions, primarily from Ontario before the reform of the Ontario expropriation legislation, which involve similar language. Any future Alberta court dealing with a claim under *PACA* may have to engage in a complicated analysis of this sea of judicial authority and nuanced statutory language. This analysis is outside the scope of this article.

On the other hand, however, as illustrated by the history of interpretation of the provisions of the *MGA*, Alberta courts have been open to scrutinize and interpret the specific language contained in statutory compensation provisions. Section 7 of *PACA* is sufficiently different than the provision at issue in *Loiselle* to leave this question open for a future court to resolve using ordinary principles of statutory interpretation.

Upon a brief review of s. 7 of *PACA* afresh and, for the purposes of argument, unencumbered by the many reported cases that have touched on arguably similar provisions in other jurisdictions, it is apparent that an impacted landowner will have credible, and even persuasive, arguments to suggest that some of the four conditions do not apply to *PACA*.

With respect to the nature of the damages rule, the provision at issue in *Loiselle* specifically referred to a claim "for damage *to lands* injuriously affected,"[188] which provided a strong indication that the damage was to be to the lands and not a personal damage. However, s. 7 of *PACA* provides that "[a]n owner of land injuriously affected by the exercise of the power of expropriation is entitled to *due compensation for any damages necessarily resulting* from the exercise of the power of expropriation."[189] This provision does not specifically link the damages to either the lands or the owner, but to the exercise of the power of expropriation. On balance, this does not appear to limit claims to damages caused to lands, per se, but instead encompasses all damages necessarily resulting from the expropriation. This might even include what would ordinarily be referred to as disturbance damages in the expropriation context. Accordingly, given the remedial nature of the section, a court may very well err on the side of the impacted landowner and interpret s. 7 of *PACA* to provide compensation for all damages, including personal damages and damages to the owner's lands, provided that they necessarily result from the exercise of the power of expropriation.

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186 In *Re Ogilvie Flour Mills Company Limited and Winnipeg (City of)*, [1927] 1 W.W.R. 833 at 838 (Man. K.B.), the Court stated:

> By a series of decisions in the House of Lords and the Supreme Court of Canada, certain propositions of law respecting compensation for lands injuriously affected by work done under statutory authority, but no part of which has been taken, has been definitely established. These cases were all decided under statutes, the wording of which differs to some extent from the relevant sections of *The Winnipeg Charter*, but the difference is not material and the principles laid down in them are equally applicable to cases under the latter statute.

187 See e.g. *Par Holdings*, *supra* note 159.

188 *Supra* note 15 at 627, citing *The St. Lawrence Seaway Authority Act*, *supra* note 30, s. 18(3) [emphasis added].

189 *Supra* note 9, s. 7 [emphasis added].

With respect to the construction and not the use rule, the provision at issue in *Loiselle* specifically referred to a claim for "damage to lands injuriously affected *by the construction* of works."[190] As noted by Todd, it is the use of the word "construction" in the early English statutes that gave rise to the construction and not the use rule.[191] In contrast, s. 7 of *PACA* does not limit damages to those caused by the construction of the public work, or even the existence of the public work as defined in the 2007 *MGA*. The damages contemplated in *PACA* are those that are "necessarily resulting from the exercise of the power of expropriation."[192] Further, the wording "any purpose for which"[193] in s. 7 suggests that the compensation provisions (and the set-off) relate more broadly to the purpose of the public work as opposed to just its construction. It is difficult to imagine why damages caused by the use of the public work are not necessarily resulting from the expropriation of the property for the purposes of the construction and use of the public work. Accordingly, a future court may very well hold that the construction and not the use rule does not apply to s. 7 of *PACA*.[194] If that happens, impacted landowners may very well be able to seek compensation for things like noise, dust, toxic fumes, and vibration when there is an expropriation by the Crown.

With respect to the statutory authority rule and the actionable rule, there is no language in s. 7 of *PACA* that expressly incorporates these rules. Unfortunately for impacted landowners, this was also the case in the provision at issue in *Loiselle*, and Alberta courts may find it difficult to distinguish *Loiselle* on this basis. The presence of the words "injuriously affected" in s. 7 of *PACA*, together with the strength of the Supreme Court decision in *Loiselle*, may very well be enough to incorporate these two rules into s. 7 of *PACA*.

B. IS AN EXPROPRIATION OF SOME LAND REQUIRED?

As noted, s. 7 of *PACA* provides that the claim must relate to damages "necessarily resulting from the exercise of the power of *expropriation*."[195] This provision raises two issues: first, does the owner of the lands injuriously affected also have to have some lands taken and, second, if not, is the expropriation of some land required to invoke the compensation provision (that is, could the claim be advanced in the absence of any expropriation at all).

With respect to the first issue, the language of the provision does not clearly suggest that the expropriation must be of the owner of the land injuriously affected and, in fact, suggests otherwise by its reference to both the "owner of land expropriated by the Crown" and "an owner injuriously affected."[196] The section seems intended to provide some relief to an impacted landowner who has had no land taken. This was the interpretation of a reasonably

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190 *Supra* note 15 at 627 citing *The St. Lawrence Seaway Authority Act*, *supra* note 30, s. 18(3) [emphasis added].

191 Todd, *supra* note 34 at 391.

192 *Supra* note 9, s. 7.

193 *Ibid.*

194 In *Currie*, *supra* note 47 at 297, the Court adopted this reasoning and held that the construction and not the use rule did not apply where the provision did not use the word "construction."

195 *Supra* note 9 [emphasis added].

196 There would have been no need to include the word "owner" twice in the first line of the section had it been intended that it reference the same owner.

similar provision by the Newfoundland Court of Appeal in *Gerry's Food Mart*. It is likely that an impacted landowner will be able to establish that his or her land does not need to be expropriated to invoke s. 7 of *PACA*.

With respect to the second issue, it is clear that there must be some form of "expropriation" in order to have a valid claim for compensation because it is the exercise of that power which must necessarily result in the damages. However, "expropriation" is not defined in *PACA*.[197] The use of the word "expropriation" in this type of provision has been interpreted to mean any exercise of compulsory acquisition, including the assembly of lands by the Crown pursuant to ostensibly voluntary acquisitions that are made under the threat of future expropriation.[198] This appears to be a reasonable interpretation and may similarly be available to impacted landowners. It would also be consistent with the following comments made by the Alberta Institute of Law Research and Reform in 1973 when it was considering the predecessor to s. 7 of *PACA*, which at the time was included in the *Expropriation Procedure Act*:

> In one important respect this section differs from most comparable ones. Usually a section of this kind applies where property has been injuriously affected "by the exercise of any of the statutory powers" of the authority (e.g., the Municipal Government Act, section 131…). Section 15 on the other hand applies only where the Crown has acquired land by expropriation and not otherwise. There is a certain logic in this, especially where the section is in an expropriation statute. *However in terms of rationality of the law, the right to claim for injurious affection should not vary with the means by which the defendant acquired title.*[199]

If this interpretation is adopted, issues of timing and remoteness may arise, particularly where the land assembly may have taken place over many years.

C. MISCELLANEOUS *PACA* COMMENTS

There are two other notable features of *PACA*. First, it contains a phrase similar to s. 543(6) of the 2007 *MGA*, in that the damages necessarily resulting from the exercise of the power of expropriation must be "beyond any advantage that the owner may derive from any purpose for which the land was expropriated or by which the land was injuriously affected."[200] Like those claiming under the *MGA*, impacted landowners will only be able to claim for a net disadvantage under *PACA* where they have some specific advantage accruing from the public work that is not enjoyed by the public at large or others in the vicinity.

It is also notable that *PACA*, unlike the *MGA*, does not require that the lands injuriously affected be adjacent to or abutting the expropriated lands. Accordingly, there is a wider scope of potential claimants under *PACA* than under the *MGA*. However, like the *MGA*, claims are only available to owners of lands as opposed to owners of interests in lands.

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197 In *Par Holdings*, *supra* note 159 at para. 57, it has been said that this is a "clear expression of legislative intention to limit compensation to damages arising from the exercise of the coercive power of government rather than from the actual construction of the public work."

198 *Ibid.*; *Gerry's Food Mart*, *supra* note 1.

199 *ILRR Report*, *supra* note 8 at 129 [emphasis added].

200 *Supra* note 9, s. 7.

VI. CONCLUSION

The law in Alberta has changed significantly in the last 20 years relating to claims by impacted landowners where none of their land is expropriated but they or their land is negatively impacted by a public work. The trend through the 1980s, 1990s, and into the 2000s, which saw an increasing tendency to award significant compensation to impacted landowners, has likely been curtailed significantly by the wholesale amendments to the *MGA* in 2007. Now, while the current statutory regime is clearly more restrictive and will result in fewer or lower successful claims for compensation where there is no expropriation, the extent of that restriction is uncertain and future cases will be decided as a matter of first instance. Impacted landowners and their legal counsel will likely need to conduct a much more complicated and detailed analysis of the four conditions in *Loiselle* in order to properly assess claims. With respect to claims against the province, while the provisions of *PACA* certainly appear more favourable to claimants than the provisions of the *MGA*, there is little judicial guidance on their interpretation and the four conditions in *Loiselle* will likely be relevant to any claim that might be brought in the future.