

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: February 11, 2015

CASE NO(S): LC110038

PROCEEDING COMMENCED UNDER subsection 26(b) of the *Expropriations Act*, R.S.O. 1990, c. E.26, as amended

Claimant:	R. Jordan Greenhouses Limited
Respondent:	Town of Grimsby
Subject:	Land Compensation
Property Address/ Description:	274 Main Street West
Municipality:	Town of Grimsby
OMB Case No.:	LC110038
OMB File No.:	LC110038

Heard: October 14-27, 2014 in Grimsby, Ontario

APPEARANCES:

Parties

Counsel

R. Jordan Greenhouses Limited
("Jordan's")

J. Doherty/R. Aburto

Town of Grimsby (the "Town")

T. Richardson/M. Atherton

DECISION OF THE BOARD DELIVERED BY BLAIR S. TAYLOR

INTRODUCTION

[1] This matter arises out of a claim for compensation for Injurious Affection (no taking) caused by the construction activity of the Town in the Spring of 2010 on Main Street West in the Town of Grimsby, where at 274 Main Street West, Jordan's had its place of business.

BACKGROUND AND CONTEXT

[2] For about 80 years, the Jordan's greenhouses and garden center have been located at 274 Main Street West, Grimsby (the "Subject Lands"). The business was started by Jeff Jordan's grandfather in or about the 1930s, carried on by Jeff Jordan's parents, and then bought by Jeff Jordan and Rebecca Jordan in or about 1999. Up until 2009-2010, the focus of Jordan's was largely as a wholesale operation.

[3] Main Street West at this location is a narrow two lane road with a right-of-way width of about 20 to 26 metres. Main Street West is a semi urban cross section with two paved lanes, modest gravel shoulder, side ditches and a sidewalk in front of Jordan's. Main Street West is also known as old Highway #8, as it was formerly a Provincial Highway. Currently it is designated as a "Wine Route" as it leads to a number of the local wineries in the Niagara Peninsula.

[4] The Subject Lands are approximately three acres in size with about a 600 square feet ("sq. ft.") store, 25,000 sq. ft. of greenhouses (of which 10,000 sq. ft., are heated), 60,000 sq. ft. of outdoor growing area, a 25 car parking lot, and two residences. Access to the Subject Lands is solely from Main Street West.

[5] The Subject Lands are located in a primarily residential area, including new residential development and existing residential homes. There are also two high schools in the general vicinity of the Subject Lands, and Main Street West is used by the schools as a route for their student runners. Jordan's is the only business within the final construction area.

[6] In addition to being one of the principal shareholders of Jordan's, Jeff Jordan also served on the Town of Grimsby Council for three terms: 1997 through to 2006. For the years of 2003 to 2006, he was a member of the Public Works Committee of Council.

[7] With the occurrence of September 11, 2001, the rise of the Canadian Dollar against the American Dollar and the recession in 2008, the Ontario wholesale flower market was negatively affected, and so too was Jordan's.

[8] This led to a decision to refocus Jordan's to a primarily retail market. The first step in that direction occurred when Jeff Jordan was contacted by the Mayor of the Town about advertising on the Town's website. In the spring of 2009, Jordan's completed a video advertisement at a cost of almost \$5,000 that ran on the Town's website and was designed to increase Jordan's local presence.

[9] This was followed in the fall of 2009 with a new business plan to implement the shift to a retail focus. The business plan anticipated a 40-50% increase in sales for 2009-2010, and increasing profit margins through the sale of their own products. To facilitate this new business plan, one of the greenhouses was equipped with an "energy curtain" to facilitate public use, the store area was redesigned, the display area was extended, a new sign obtained, the web site changed, new uniforms for staff, a changed order for plants and other inventory.

[10] On March 20, 2010, the "grand opening" of the "new" Jordan's was held, promoted by an advertisement in the local paper, promotion at the Chamber of Commerce, and word of mouth.

[11] On or about April 5, 2010, construction was commenced to install the new sewer main and laterals on Main Street West in front of the Subject Lands, this being the construction that has precipitated the claim by Jordan's.

[12] The Subject Lands were sold before the hearing.

[13] In 2015, Jordan's still operates but at a new location.

[14] Jeff Jordan is also employed as head of sales at another nursery operation, a position he started in January/February of 2013.

DECISION

[15] The Board, having considered the evidence and the submissions of counsel, finds that Jordan's was injuriously affected by the construction activity carried out in the

Spring of 2010, under the auspices of the Town.

[16] Secondly, the Board finds that there were damages suffered by Jordan's as a result of the Town's construction project and the Board awards damages to Jordan's in the amount of \$115,000.

THE HEARING

[17] The Board heard evidence from Jeff Jordan one of the principals of Jordan's. He testified to the Board that he had been on the Public Works Committee of the Town of Grimsby Council from the period of 2003 to 2006. For the Committee meetings that commenced at 4:30 p.m. he had difficulty getting to them on time especially during the spring months. He stated that at the Public Works Committee meetings he would indicate that the Spring months were his busy months and that it was difficult to get to the Committee meetings on time and present, at that time, were Bob La Roux the Director of Public Works (the "Director") and Bob Nesbitt the Assistant, Director of Public Works (the "Assistant Director").

[18] In addition, in 2007 Jordan's sold a small piece of land to Losani Development that was adjacent to the Subject Lands. Mr. Jordan testified that the agreement was Losani Development would install a sewer lateral to the Subject Lands so Jordan's would have municipal sanitary sewer service available to the Subject Lands. He further testified that in the summer of 2007, with the water main construction going on Main Street, that he discussed with the Director that when the sanitary service eventually came to Main Street West, that if the Town were to do such construction, that it should never be in the months of April, May and June for construction because that was his busy time of year. He testified that the Director responded to say:... "yes, I know that those are your busy months." On that basis, Mr. Jordan believed that if sewer construction were to occur on Main Street West that it would not occur in his busy season.

[19] Mr. Jordan, in order to adequately convey the construction experience at Jordan's, took video footage with regard to the construction. One of the videos is from

May 6, 2010, which would be the Thursday before Mother's Day with the ongoing construction on the street. The video shows a backhoe/loader laying fill in a trench and occupying the lane with dump trucks operating in the second lane. The video shows no car traffic. Other images from the video show one customer walking into the store after parking along the side of the road some 18 minutes earlier; shows a school bus waiting to go through the construction area; it shows people getting out of their vehicles due to the length of time that they are waiting and it would appear that at least 20 minutes go by before vehicles can go through the construction zone.

[20] The evidence of Mr. Jordan was corroborated by two lay witnesses: Christina Scazighino, who resides at 262 Main Street West and Michelle Urban who resides at 381 Main Street West.

[21] Ms. Scazighino told the Board that her property is just a few doors down from the Subject Lands and that she had resided there for some 18 years. Her experience was that in the spring, Jordan's was a busy place every year but that prior to construction in 2010 it was very busy that year; it opened early and it was so busy that there had been no parking available in the Jordan's parking lot. When asked about her characterization of the sewer construction, she advised that it was "pretty intense". Her children have a school bus stop on Main Street West but due to all the construction around them, she was very concerned with her children's safety as the trenches were so deep and that there were so many trucks on the narrow right-of-way. She indicated that due to those concerns, she had actually called the Town with safety concerns. Subsequently, the school buses could not maneuver through the construction area and ultimately, the school bus pickup was changed and there was also letter from Canada Post indicating that due to the unsafe conditions they would not be making home delivery. Ms. Scazighino indicated that in her view, the stoppage in traffic for activity on Main Street West would be in the five to 15 minute range and it was never easy, that she sometimes sat for 15 minutes just to try to get home while others who were in the lineup turned around and avoided the area. In her opinion, she did not believe that it was safe to walk or ride a bike in the area during the construction.

[22] Ms. Urban, who resides at 381 Main Street West, has been there for seven

years. Her property is about two kilometres away at Casablanca Road but Jordan's had always been her place to go for gardening materials. In 2010, prior to the construction, she described the activity at Jordan's as being "bananas". It was very, very busy and one could not find a parking spot in the Jordan's parking lot.

[23] She testified that everything changed with the construction. She advised that most people tried to avoid Main Street West all together. The delays were totally unacceptable and it appeared to her that the vehicular traffic to Jordan's petered off right away. At the beginning, she advised that people tried to get through the construction area but it just turned out to be impossible and then subsequently nobody went through the construction area.

THE MAIN STREET WEST SEWER CONSTRUCTION PROJECT (the "PROJECT")

[24] In 2007, this section of Main Street West in Grimsby did not have any municipal sanitary sewers and the Public Health Unit of the Region of Niagara did a survey of septic systems on Main Street West from Kerman Road to Casablanca Road. The results of this were reported to the Town of Grimsby in 2008 whereby the Public Health Unit requested that the Town of Grimsby extend the sanitary sewer line in that area.

[25] On November 27, 2008, a Town Staff Report recommended to Council that a sanitary sewer main and laterals be constructed in this area which would include some 79 properties at a cost of \$1.3 million. Individual costs per property would be \$16,400 plus the individual property owner would have to spend between \$6,000 to \$14,000 for the private cost of connection. Additionally, the Town would require all property owners within this area to hook up within 12 months after the construction or pay penalties for not hooking up. The anticipated construction schedule in the report provided for public notice in January of 2009, tender closing in August 2009, an updated notice in September of 2009, and construction completed in May of 2010.

[26] On January 21, 2009, a Town of Grimsby letter went out notifying property owners of a Public Information meeting for the sewer project scheduled for January 29 indicating the cost of \$17,000 per property, plus their own private costs and advising

that the construction would likely be complete by mid-2010.

[27] It would appear that the Public Information session did not go as planned as there were a number of concerns and complaints with regard to the anticipated costs.

[28] This led to a revised Staff Report dated February 6, 2009, which advised Town Council that the costs, according to the public, were financially unacceptable. In the revised Staff Report, it is noted that only seven properties had been identified as needing septic replacement and therefore, Staff had devised a much reduced construction strategy for only the eastern third of the study area, where five of the identified properties were located, which would reduce the geographic extent of the project and its cost to \$515,000. The reduced construction area included the Subject Lands, but there was no proposal to connect the Subject Lands as there was an existing sanitary sewer lateral from an adjacent plan of subdivision connected to the Subject Lands.

[29] On February 9, 2009, the Town of Grimsby provided an update letter to the public indicating that the Town would be proceeding with the reduced construction plan, that there would be no mandatory hook up, that they anticipated the design and tender work to be completed in the fall of 2009 and construction in 2010.

[30] On February 26, the Town of Grimsby prepared the Terms of Reference to retain Professional Engineering Services for the Project. The Terms of Reference included the following:

- 3.1.1 to arrange to meet with 13 property owners in order to provide allocation for the proposed laterals (but not with Jordan's),
- 3.1.4 prepare specifications and contract documents for tendering,
- 3.1.6 prepare the draft tender advertisement; attend the tender opening; review tenders and make a recommendation to the Director of Public Works for acceptance of the tenders and work shall be completed for the project by Friday, August 21, 2009.

[31] The covering letter that went out with the request for proposals to a select group

of engineering firms is dated May 19, 2009 and indicated that the project will “move forward for construction in the fall of 2009”. The successful tenderer, S. Llewellyn & Associates Limited (“the Consulting Engineer”) advised that so long as they had received authorization by the Town to proceed no later than June 20, 2009, that all works up to and including the closing of the tender would be completed on or before August 21, 2009.

[32] Ten days after the proposed August 21, 2009 tender closing, on August 31, 2009, a tender timeline schedule was prepared by the Assistant Director of Public Works with a revised tender close date of September 30, 2009.

[33] On September 11 2009, the Town of Grimsby provided an updated letter to those within the Project area indicating that the Town expected this tender to close in October 2009 and to start construction in November 2009 or early 2010.

[34] The Town received five construction bids and the Consulting Engineer did a comparison of the five bids. Of note is Item A-3 for Construction Signage and Traffic Control. The bid prices ranged from \$2,500 (from the successful tenderer) to \$25,000. On October 9 the Staff Report recommended the tender be awarded to Kenwood Trenching and Sand Excavating Ltd. (“Kenwood”) and on October 19, 2009 Council authorized and awarded the contract to Kenwood.

[35] On October 23, a pre-construction meeting was held with two representatives from the Town of Grimsby in attendance, a representative of Kenwood and the Consulting Engineer. The Minutes note that construction will commence on November 16/17, roads to be restored by binder asphalt by mid-December. Item 6 on the Minutes indicates that “Kenwood to maintain one lane of traffic at all times during construction and two lanes at night. Kenwood to ensure that access to private properties is maintained at all times.”

[36] Notwithstanding the planned construction start of November 16/17, 2009, Kenwood did not sign the construction documents forcing the Consulting Engineer to follow-up with Kenwood by email on November 9, 2009, inquiring if Kenwood was going

to start on November 16. It is clear to the Board that efforts had been made for a Fall construction start as the required Niagara Region Public Works Construction Encroachment Permit was issued on November 11, 2009 authorizing the construction subject to a number of conditions one of which was “the road must be open for two-way traffic at all times during construction and two lanes must be open for traffic at night time.”

[37] With no response from Kenwood, the Consulting Engineer followed up again by email on December 17, 2009 stating that the Town had not received Kenwood’s letter proposing to start in the Spring, nor have they received the signed contracts.

[38] Kenwood, in response, sent two letters both dated December 18, 2009 and both by regular mail. The first December 18 letter states that Kenwood recommends waiting for improved weather conditions in the Spring. The second December 18 letter recommends waiting for the re-opening of the asphalt plants in mid to late March 2010 before starting. Neither were received by the Town until early January, 2010.

[39] It appears that Kenwood finally signed the construction contract for the Project on or about January 18, 2010. In that signed contract, Kenwood proposed that the construction work would commence by the 15 day of March 2010 and be completed by the first day of June 2010. The Supplementary Special Provisions of the contract S.4. provided the following:

The Contractor shall submit a Construction Schedule to the Contract Administrator prior to any construction on the site. The Schedule shall show in a clear critical path diagram the proposed progress of all activities for the main items and site development of the contract...

[40] Additionally, S.7 Traffic Control During Construction states the following:

Flagging and signing for traffic control in this contract within the work area shall be in accordance with the Ontario Traffic Manual (March 2001) produced by the Ministry of Transportation (Ontario).

Traffic control must be in accordance with the Ontario Traffic Manual (2001) Temporary Conditions Field edition....

[41] With the signed contract finally in hand, the Engineering Consultant by letter

dated March 24, 2010 wrote to the residents of Main Street West to indicate that the Town had awarded the contract to Kenwood and that Kenwood was scheduled to commence this project on March 29, 2010. (The Board would note that this was the first communication to the public by the Town or its representatives since the Town letter of September 11, 2009).

[42] The issuance of this March 24, 2010 notice resulted in a flurry of activity. Firstly, Kenwood, on March 29 (the date that construction was supposed to commence) sent an email to the Town indicating that:..."an issue that came up is that a detour around the site will be required when installing the sanitary laterals to the far side. There is not enough room to maneuver the machinery within the confines of one lane. The delays to traffic and ourselves would prove frustrating if one lane was made to be left open. We would close the road from Roberts to Kerman with the exception of local traffic and detour over to Livingston. Cooperation from the Region will be required." This is the first mention of any road closure being required.

[43] Jeff Jordan did not receive the March 24, 2010 letter directly. Rather, one of his neighbours provided a copy to him where he was startled to learn that construction would start on March 29, 2010. Mr. Jordan advised that he immediately called the Director and asked him to defer the project as it would bankrupt him as it was in his busy season. He testified that the response that he received from the Director was that he would work with him on this and try and defer the project. Exhibit 2, Tab 91 is an email from the Director dated March 29, 2010 at 10:08 a.m. to the Engineering Consultant indicating:

Regarding the request to delay to mid-June, I need a stronger comment from the contractor. Cost to delay in writing, etc., as I have to set up a defence for a possible compensation claim. The reason behind this is that Jordan Greenhouse has contacted me and stated that the project will destroy his retail business and he will go bankrupt. His only profit months are April, May and June and even with one lane open and both lanes open at the end of the work day he feels prospective customers will divert from this area during construction. He is basing this on his previous experience in the fall when you constructed the sewers on Main Street to the west of him. His business went down by 85% according to him. The contractor mentioned that he was using a mobile traffic light. I hope he knows that this would be only during the work day and that two lanes must be open thereafter. Also this will impact the contractor's request to close the roads for laterals. I cannot support this for the reason even though I agree with him.

[44] The Engineering Consultant on March 30 at 9:44 a.m. sent an email to Kenwood indicating that the Town still needed to know the impact of a delay to June 1. That response came less than two hours later from Kenwood:

The cost is \$38,875.00 per week for the crew only. We expect the crew to do \$12,000.00 to \$15,000.00 per day of work. This will put the total up to \$60,000.00 to \$75,000.00 per week. We will not have another major job for this crew to go to for another four - five weeks. If we need to leave the site we may not be able to re-start on June 1, 2010. It will likely be a later date depending on where we go in the meantime.

[45] By 3:24 p.m. that afternoon the Assistant Director responded by email:

We have discussed the impact and the cost to defer is too great, therefore please proceed.

We anxiously await your construction schedule.

Once you start construction, I am asking Scott to convene a site meeting so we may review and be clear our expectations of the Road Authority (Region) and the Town for Road and Traffic Maintenance.

[46] The decision not to defer is further confirmed in the email of March 31 by the Engineering Consultant to Kenwood which includes:

The Region is reviewing your request to open cut lateral trenches and that the open cut method is contrary to regional policy. You may have to meet with the Region to plead your case. The contact at the Region is Pavel Zelenak. Closure of Main Street West will not be permitted by the Region.

[47] On Monday, April 5, 2010, Kenwood commenced construction on the Project.

[48] On April 13 the Assistant Director, in order to assess Kenwood's request to close Main Street West, walked Main Street West. The Engineering Consultant via email reported to Kenwood that in the Assistant Director's opinion ... "there are only three sanitary laterals that would cause a problem should the laterals be bored or open cut "half and half". He is still not clear as to why this cannot be done other than it is quicker and easier for you to complete the work. To this end you should review and consider offering a credit to the Town if the road is to be closed." The Engineering Consultant ends his email with the following:

Based on the above please provide us with a schedule ASAP and we will engage in further discussions.

[49] Exhibit 2, Tab 111 contains the only Construction Schedule filed with the Board. It is identified as being a “preliminary” schedule by Kenwood as of April 16, 2010. It is a one-page document and it is dated after construction had already commenced.

[50] On April 23, 2010 the first Site Meeting was held with regard to this project. The first item of discussion concerned Regional Issues. The Minutes note:

After much discussion it was decided that Kenwood would proceed with the installation of the main line sewers and services to the south side of Main Street. Upon completion of above, Main Street will be closed from Casablanca Boulevard to Kerman Avenue to local and business traffic (in sections) for a period of two weeks, in order to allow for the installation of the services on the north side of the road to be completed...Peach Bud Race is on June 29th – Kenwood to ensure road is restored by this time. .. Region advised they are satisfied with traffic control on site.

[51] Another item on the agenda was the maintenance of traffic and accesses and the Minutes note that there were no concerns with maintenance of access to private properties and the Town was ... “okay with Kenwood using automatic traffic signals at either end of the site provided the time delays are reduced at night.”

[52] On Sunday, April 25, Jeff Jordan contacted the Mayor of the Town of Grimsby. The call originated due to the fact that the portable traffic signals for the construction site were not working properly over the weekend. Mr. Jordan had attempted to call the emergency contact number for Kenwood but that the emergency contact number only went to voice mail.

[53] Mr. Jordan had reported that the portable traffic lights were signaling red in both directions and no traffic was getting through the construction area at all. Unable to speak directly to the contractor, Mr. Jordan contacted the police, who were on site to direct traffic.

[54] On April 28, Mark Stirtzinger, the Town Inspector, sent an email to the Engineering Consultant with regard to traffic control concerns. He stated the following:

Vehicles exiting from Linden Lane may NOT know which way to turn since they may NOT be aware of which traffic direction on Main Street has the green light.

Linden Lane is down to one lane constantly and sometimes NO lanes due to stockpiling, loading and unloading of materials.

Some residents driving on Linden Lane may have conflicts with construction vehicles because there is NO flagman in the vicinity of Linden Lane.

Also in one instance, two-way traffic was observed on Main Street West through the construction zone. It is probable some vehicles are not adhering to the stop lights.

I understand some delays have been much longer than three minutes as indicated on the stop light boards.

Could you please address the Town concerns with the contractor.

[55] By email, dated April 29, Kenwood contacted the Engineering Consultant to ask him to inform the Region that Kenwood would be closing Main Street on Monday, May 10 for the lateral installation. The Engineering Consultant replied on the same day to indicate that that is insufficient time as the Region needs at least two weeks' notice to be able to advertise the road closure.

[56] On Monday, May 3, the Engineering Consultant further responded to Kenwood to indicate that with regard to the road closure that ... "at our site meeting of April 23rd Kenwood was asked when they needed the road to be closed in order to do the services. Kenwood advised that they could not provide a date at that time and that it would be discussed at the next site meeting. However it was clear to both Bob Nesbitt and me that they needed at least two weeks. You had indicated that due to how slow things were proceeding you needed additional working days etc., so we had no idea that you would be looking for a road closure by May 10th. Nevertheless I suggest you contact Pavel Zelenak at the Region in order to obtain the permit for the road closure and Pavel will let you know when the road can be closed."

[57] The Assistant Director also reported on May 5 to the Director that the Kenwood trucks were being loaded with excavated material, that the excavated material was being off-loaded into the trench and trucks with granular back-filling the trench without an interruption in sequence. This process was taking five to eight minutes plus a potential three-minute delay for the queue to make its way through the site.

[58] Finally, on May 6 the Assistant Director sent a message to the Director that road

closure has been set for two weeks commencing Tuesday, May 25, that the Region will post notice to the general public prior to closure and advertise same, that the Region will attempt to get their electronic message board on site to indicate to the general public businesses will be open and two lanes of access will be available from either the east or west during this period.

[59] Mr. Stirtzinger's diary indicates that on Friday, May 7 traffic was delayed for more than five minutes, with cars turning around at the west limit of the project.

[60] On Tuesday, May 11 the Kenwood started sanitary laterals on north side and maintaining one lane traffic (notwithstanding the fact that the requested road closure had been sought in order to allow for the installation of the laterals on the north side). However, some delays were more than five minutes and Kenwood was asked to cease operations by Town and Region due to traffic delays.

[61] On May 11, the Director provided an update to Kenwood, the Engineering Consultant and the Town Staff with regard to Jordan's. He notes that Jordan's has written claiming a loss of revenue. The Town has asked their solicitor to comment and their solicitor has indicated that Jordan's may make a claim under the *Expropriations Act*. It is also noted that Kenwood could be drawn into the claim as a third party. The Director asks Kenwood to be mindful of the permit that has been issued by the Region and the conditions that are contained therein. He concludes with the following:

We would encourage Kenwood to manage traffic control as best they can and make every effort possible to allow access to Jordan's place of business. Lack of providing access will no [doubt] have repercussions.

[62] On May 13, the Director responded formally to the Jordan's claim of May 5. He stated in part:

... I am unaware of any verbal discussion or document advising me or Town Staff prior to approximately the 26th day of March 2010 that would have indicated that construction in the spring of 2010 would have caused financial hardship to Jordan's Green House business. We have certainly discussed your concerns about the Main Street West traffic delays and road conditions related to the Town's water main replacement in 2000, and the developer's sewer servicing in 2003 and 2007. I, however, did not hear or make any connection at these times to possible

business financial impacts.

...Town Staff did not receive any verbal or written comments from you that the spring construction would be an issue for your business. If we had known this at any time prior to the tender notice in early September 2009 we could have changed the construction date to suit your needs. We did not have a deadline that would have forced us to do the work in the spring of 2010; although, several property owners with deficient septic systems had contacted us inquiring how soon sewers would be available to hook up.

As you may be aware once we had knowledge of your situation, on or about the 26th of March 2010 we contacted the sewer contractor regarding potential delay of the project but this was not possible, as they had already hired staff and had mobilized to commence the construction. We also provided road signage beyond the construction limits as well as newspaper advertisements, all intended to advise road users that your business was open during construction.

[63] On May 17 the Region of Niagara gave public notice with regard to the closing of Main Street West on May 25 through to June 4.

[64] The third Site Meeting was held on May 19, 2010. Under Regional Issues, it is noted that the road closure is scheduled for May 25 and there have been no recent concerns expressed by the Region regarding traffic moving through the site.

[65] On May 20 Mrs. Jordan wrote to the Assistant Director of Public Works with regard to the road closure. She stated in part:

... We were surprised that we were not informed that the Town would not be advertising for two weeks prior to the road closure as you indicated that this was required. You had promised us that there would be two weeks without construction while the Town advertised for the closure. This did not happen.

[66] On May 21, Canada Post delivered a message to its customers indicating that:

...due to the work now in progress on your street delivery of mail to your mailbox may be disrupted. We wish to inform you that when access to mailboxes is unsafe for our staff other delivery measures must take place.

[67] On May 25 the Assistant Director responded to Mrs. Jordan with regard to her email of May 20. In part he states the following:

The intent of the road closure was to allow for the installation of sanitary laterals to the north side of Main Street West. Contrary to the Town's wishes, the contractor proceeded to install these laterals prior to the road closure. The contractor has requested that the road closure still take place, to allow for the repair of two cross culverts and to allow the balance of restoration to complete the project and be off the site by June 4th weather permitting. ... You are correct in that we have had many opportunities for dialogue and exchange of information. We have attempted to convey information about the progress of the project as we receive it, usually after our bi-weekly site meetings. In several instances the information conveyed to us and subsequently to you by the contractor about timelines and schedules of activities have been altered unilaterally by the contractor. (emphasis added)

[68] On May 25 further traffic issues arise as the Assistant Director sent an email to the Region of Niagara indicating, in part, the following:

All traffic is currently being detoured and no traffic is getting to Jordan's Garden Centre. It was the intent to have access to Jordan's at all times.

...

[69] On May 26, in response to a letter from the Jordan's dated May 19, the Director replied:

In summary the Town carried out a public meeting and provided two informational letters to you in January and February 2009. These letters indicated the sewer construction in 2010 with completion by July 2010. You indicate that you did not advise the Town of your concern with the spring construction as the sewers were going to be installed in the fall of 2009. Unfortunately the assumption of fall construction was not a matter of fact and you have suffered from the timing of the Town project.

[70] On May 29th Rebecca Jordan sent an email to the Assistant Director of Public Works in which she states in part that:

We would like to advise that the road closed signs at Kerman and Roberts Road were not put face down or moved off the road platform to allow for the passage of vehicles for the weekend like you indicated. The road remains closed now for the entire weekend of May 29th and May 30th. We were anticipating that the road would be open for this very busy weekend in May. We did go ahead and plan for staffing, etc., after your response email advising us that the road would be open to through traffic. The weekend road closure will have serious financial implications on our seasonal business. The spring season is short and losing a weekend in May is very upsetting. We have already suffered serious losses since this construction began.

[71] On Monday, May 31, 2009 the Assistant Director confirmed to the Director that

the road closure signs remained in place over the weekend. Further, the Assistant Director indicated to the Director on May 31 that he had visited the site on Friday afternoon after lunch, at which time there was a “single lane only” at Linden Lane and that it was the intent of Kenwood to leave it that way. The email message then states the following:

I indicated to Kenwood that that would not be satisfactory for the weekend and requested they place granular in the trench on the south side of Main Street West in this area to allow a pavement width of 6.5 metres minimum. The balance of Main Street West had a minimum 6.5 already. There was sufficient room for two vehicles to pass.

When I left the site, I had asked the contractor to move the road closed signs or place them face down to make it passable for two way traffic. After considering this prior to leaving the site we were informed by Kenwood that due to concerns about liability they thought it would be best to leave the road closed signs in place. The Town could have ordered the contractor to move the signs but by so doing we would inherit the liabilities should someone drive into the main sewer trench left six inches low for paving by Norjohn on Monday.... I would not want to hazard a guess as to how many people travel the wine route and buy plants.

ENGINEERING EVIDENCE: JORDAN’S

[72] In support of the Jordan’s claim for injurious affection, the Board heard from Carrie Curtis, a professional engineer with MTE Consultants Inc. Before joining MTE, she was a senior project manager at the City of Kitchener. She is currently the Service Sector Leader for Site Development at MTE and previously was the manager of the company’s municipal team.

[73] Ms. Curtis provided a comprehensive report found at Exhibit 4, Tab 2. The report was prepared following a site visit to the Subject Property, the examination of substantially all the exhibits presented to the Board, the examinations for discovery for the Director, and Mr. Jordan and the questions and answers from the written examination of the Director.

[74] The executive summary of her report provides the opinion that the actions of the Town of Grimsby indicate that the necessary planning, due diligence, project management and contract preparation/administration were completed in a manner that resulted in unnecessary and readily avoidable impacts to the business operations of

Jordan's. The disregard of construction impacts on the complete project area specifically regarding planning and communication and trafficking access issues was contrary to industry standard practices, regulations and regional standards/permits requirements. There are five areas that Ms. Curtis is critical of the actions of the Town of Grimsby:

- i) An overall lack of planning and identification of critical path or technically necessary elements;
- ii) An overall lack of accountability and enforcement of the contract permits and regulations
- iii) The lack of a proper communication strategy with the public, residents and businesses that lead to the commencement of a project at a time of year that was obviously adverse to the business of Jordan's. Common sense would have dictated that the construction schedule be adjusted to avoid the busiest season for a garden centre;
- iv) Standard industry best practices were not followed with respect to:
 - Communication
 - Design Process
 - Construction start and constraints not identified in the contract
 - Attendance of key individuals, representatives not at the pre-construction meeting
 - Construction schedule not completed

- Staging plans and traffic control plans not prepared
 - Ontario Traffic Manual Book Seven and Regional Road Permit Requirements were not adhered to or enforced
 - Signage was inappropriate
 - Meeting times were not appropriate and significant topics were not discussed
 - Construction documentation was not adequate
- v) The failure to adopt, follow and enforce appropriate standard practices led to undue traffic delays and road closures that could have been avoided entirely or significantly reduced some of the impacts from construction during the spring season for the Jordan's.

[75] In support of her assessment of the actions of the Town concerning its Project, Ms. Curtis provided four sets examples of materials used by the Region of Waterloo, the City of Kitchener, the City of Waterloo and the City of Cambridge for items such as the Terms of Reference, project scheduling, communication strategies, standards and outputs, documentation requirements, standard type plans (staging, detouring, etc.) She advised that the Project would be considered a Schedule A+ project under the Municipal Class Environmental Assessment document. As such it would be considered to be "pre-approved" (with no right of appeal); however the public is to be advised prior to project implementation. In Part A, Section A2.1.1 (Level of Complexity) of the Municipal Class Environmental Assessment document, it is recommended that proponents are responsible for "customizing" public consultation for each specific project beyond the minimum requirements outlined in the Class Environmental Assessment document. This, she said, would be considered the minimum level of best practice within the industry.

[76] With regard to the January 22, 2009 public notice from the Director, Ms. Curtis testified that the Town's notice did not provide any plans, or any details as to the start date, duration or likely impacts that this construction would have on the residents. In contrast, Ms. Curtis referenced a typical information package provided at a public consultation centre for a road project completed by the Region of Waterloo. The information is for a rural community smaller than Grimsby yet the information package is 13 pages long, provides a map with figures as well as specific details on the construction staging, road closures and detours, property access and working hours during construction. Ms. Curtis highlighted the fact that this information package was sent out at the preliminary design stage in November 2008 with a proposed construction start of August 2009 indicated.

[77] Ms. Curtis then reviewed the second letter (February 13, 2009) by the Director, and found that it was similar to the first letter of January 22 whereby the focus was on the deficient septic systems and there was only one sentence related to the construction:..."the actual fixed cost and interest rate charge will be set after the sewer is designed and tendered for construction, which we hope to have ready for the fall of 2009 with construction in 2010." Ms. Curtis opined that this statement is vague and does not provide any residents with necessary details to fully understand what the construction impacts will be. In contrast, Ms. Curtis pointed to the Region of Waterloo example where the information provided to the residents includes:..."The work will involve deep excavations for the storm sewer replacement and for road based construction. It will therefore be necessary to close the roads to all but local traffic when construction is occurring." From an engineering perspective, Ms. Curtis stated that even at the preliminary stage of the project the Town of Grimsby would have been aware that the construction of the sanitary sewer and laterals would involve deep excavations of a minimum of 3.5 metres or more and considering the depth of the sewer, the narrow right-of-way and a confined working area along Main Street West, the Town should have anticipated that some kind of road closure/staging and detouring would be required for construction. In her opinion, it was the Town's responsibility to plan and manage their projects such that critical items as constructability and road closure are understood at the outset of the project and it was unreasonable that the

Town expected the general public to understand these construction impacts or infer those impacts from the limited amount of information provided by the Town. In that regard, Ms. Curtis referenced Exhibit 26, the examination of the Director on March 7, 2012 where when asked if it was a deliberate conscious decision not to talk to all the property owners in the construction area, he responded: "Not a deliberate conscious effort, it was something that we never do ... we rely on the property owners, business owners to contact us and we work out any of their problems - as we go along if there is an issue." Ms. Curtis stated that from a municipal perspective, the overall success of a project often hinges on how the project team is able to communicate with the affected stake holders within the projected impact area and their ability to identify and mitigate impacts that will result from the construction activity. She stated that this is a standard practice to involve the various stake holders in the decision making up front and to let them know their opinion matters and is being considered in the grand scheme of the project. In this regard, she highlighted the Municipal Class Environmental Assessment in Part A, Section A2.1.1 which states:

Determination of level of complexity is an inherent function of the management of a project."...

"While the Class Environmental document defines the minimum requirements for environmental assessment planning, the proponent is responsible for "customizing" it to reflect the specific complexities of the needs of a project.

[78] The importance of early public consultation is also noted in the Municipal Class Environmental Assessment document in Section A28.2:

Note: It is preferable for early consultation and identification of issues rather than concerns being raised at the end of the process after decisions may have been made.

[79] In Ms. Curtis' opinion, it is the responsibility of the Town at the onset of the construction project to identify all potential issues, impacts and risks (i.e. social, environmental, financial, technical, etc.) with regard to the general category of social/business impacts and, in this case, there was only one business within the project area to consider. The onus was on the Town to contact Jordan's to explain the critical components of the project and solicit feedback. With regard to

timing, Ms. Curtis notes that in Exhibit 26, Question 347, Mr. Le Roux stated:

But if certainly if he had contacted me ahm, before we – at least before we put the project out to tender, we could have had the approvals, we could have had the design and tender documents all finished and ready to go but I could of – I could have changed that date. As I have said many times I – wish I had I wish I had known. I wish he had told me. And just quite honestly the fact that he puts he responsibility on me is totally unacceptable. If he does not contact me and bring this new information to my attention I cannot deal with it.

[80] This, Ms. Curtis contrasts to the actions of the City of Kitchener, where the City made considerable efforts during the pre-design stages to identify concerns of the local residents and business owners. In that particular case, the successful consultant actually conducted a field recognizance exercise, meeting personally with many of the existing businesses along the project area prior to the initiation of the project. In comparison then with the actions of the Town of Grimsby, Ms. Curtis opined that the Town did not provide an adequate level of communication to the public for this project based on current industry standards.

[81] Turning then to the Terms of Reference package prepared by the Town of Grimsby for the Engineering Consultant, Ms. Curtis noted the absence of any requirement for a communication strategy.

[82] With regard to timing, Ms. Curtis testified that the award of the Engineering Consulting was made on June 15, 2009 and all the works up to and including the closing of the tender were to be completed by August 21, 2009 whereas the actual closing date for the tender was on September 30, 2009.

[83] Ms. Curtis then referred to the communication of September 11, 2009 by the Director, this being letter in which the Town indicated that they expected to tender the project in October 2009 and to start construction in November or early 2010. Ms. Curtis again noted that there is absolutely no detail outlining duration or impacts and again the focus of the letter is primarily on the details related to hooking up to the sewer.

[84] With regard to Traffic Control, in comparing the contractors' bids Ms. Curtis

stated that the Kenwood price was significantly lower than the other contractors for the construction signage and traffic control and this she opined was a red flag for the Town and at a minimum the Town should have made an inquiry to Kenwood regarding this item and asked for clarification as to what Kenwood was proposing to do for signage and traffic control.

[85] During discoveries, the Town was asked to produce the traffic control plan submitted and used by Kenwood. In a written response, the Town produced only a photocopy of a sample control plan from the March 2001 Ontario Traffic Manual Book Seven. Based on this, it would appear that Kenwood never had an official traffic control plan in place for this project and it would appear the Town did not require traffic control plan to be produced or even questioned the lack of an adequate plan being in place.

[86] Returning to the construction schedule, Ms. Curtis advised that the Town of Grimsby Council made the award of project on Monday, October 19, 2009 and the tender itself identified a potential start date of October 20, 2009. A preconstruction meeting was held on October 23, 2009 with a start date established as of November 16/17, 2009.

[87] Ms. Curtis stated that the submission of a construction schedule is expected at the preconstruction meeting and is part of best practices. (From the record, it would appear that only a preliminary construction schedule was produced on April 16, 2010 after the construction had already commenced).

[88] Referencing the October 23, preconstruction meeting again, Ms. Curtis noted that the Region was not present at the meeting although the Project was on a Regional road. At this meeting, the Town did not request staging plans, traffic control plans or a construction schedule notwithstanding the supplementary special provisions in the contract required a construction schedule prior to any construction on the site and the conditions of the Region of Niagara Encroachment Permit also stipulate that the applicant is to prepare a traffic protection plan. The preconstruction meeting established that construction would commence on November 16 /17. In fact it was not until January 15, 2010, that Kenwood actually signed the construction contract. Ms.

Curtis notes that the Director in his September 11, 2009 letter indicated that the Town was expecting to tender this project in October 2009 and start construction in November 2009 or early 2010. Yet in early 2010 the construction contract had not yet even been signed by Kenwood. That is about a three month delay between the award and execution of the contract and again there does not appear to be any schedule or any urgency on behalf of the Town or Kenwood to complete this project.

[89] It was not until March 24, 2010 that any further public notice was given: i.e. when the Engineering Consultant issued his letter to the residents indicating that Kenwood had been awarded the contract and would be starting construction on March 29. This was the first notice to the residents that had a firm construction start date and it was only five days before the start of construction and the letter indicates "...you may experience some delays or disturbances to your daily routines."

[90] Ms. Curtis testified that this does not depict an accurate representation of the construction disruption and it does not follow best practices for notification particularly as the Town had the ability to notify the property owners at a minimum over the winter months of the delay. Moreover, she stated there was no clear reason why the Town could not have found the time to contact the one and only business along Main Street West with regard to the timing and construction impacts related to the project.

[91] Ms. Curtis then testified that on March 29, the day that construction was supposed to commence, Kenwood sent an email to the Engineering Consultant that "an issue has come up with regard to a detour around the site being required". Ms. Curtis opined that road closures, constructability and traffic controls are all items that should have been identified and discussed at the preconstruction meeting and not on the planned first day of construction.

[92] Ms. Curtis referenced the email chain on March 30 from the Assistant Director indicating that the Town has discussed the impact and the cost to defer the project too great therefore, Kenwood was to proceed. He notes "we anxiously await your construction schedule" and states that "once you start construction then he is going to ask the Engineering Consultant to convene a site meeting so we may review and be

clear on our expectations of the Road Authority and the Town for Road and Traffic Maintenance.”

[93] Again, Ms. Curtis opined that the Town is being reactive in asking for a site meeting and to identify its expectations after construction has already commenced and not having dealt with potential issues up front.

[94] As the Town had not identified potential issues on a proactive basis, Ms. Curtis then took the Board to the ensuing traffic issue and cited the email from the Town Inspector on April 28 identifying numerous traffic control concerns on Main Street West and Linden Lane. She noted that there entries in the Town Inspector’s daily journal highlighted issues with traffic control, that the temporary traffic lights malfunctioned resulting in a road closure for the weekend of April 24 and 25, 2010, that there was no working emergency contact information for Kenwood, the letter from Canada Post indicating unsafe conditions for delivery and the various video exhibits from Mr. Jordan showing instances of no traffic cones around the construction area, cars turning around at the construction area, no apparent traffic control from Kenwood directing construction traffic, excessive wait times and unsafe pedestrian conditions. She testified that Ontario Traffic Manual Book Seven incorporates the current best practices in the province and that Book Seven, Section 2.1 Preparation Before Beginning Work states that:

prepare a traffic control plan in detail appropriate to the complexity of the work project and ensure the plan is understood by all the responsible parties before the site is occupied, that the standard practice for a project of this nature would provide a detailed traffic control plan which would address detours, staging, sequences, construction vehicle access, material storage area, temporary barrier, signage, emergency and incident management construction are considerations of safe movements of pedestrians and cyclists.

[95] With regard to the delays, Ms. Curtis stated out that maximum allotted time for light cycles per Book Seven of the Ontario Traffic Manual is 150 seconds. In contrast to this, the Town Inspector noted that traffic was delayed more than five minutes on May 7 and cars were turning around at the west limit of the property. In addition, the video by the Mr. Jordan confirms the statements in the Town Inspector’s diary and shows considerable delays longer than 10 minutes, cars turning around due to the delay and in one instance “running” a temporary traffic light. The video also shows young runners

from the local schools proceeding through the actual construction zone weaving their way between the construction vehicles. (See Ex. 12 minute 48-49).

[96] In conclusion, Ms. Curtis summarized her professional opinion as:

- i) there was an overall lack of planning, identification of a critical path or technically necessary elements;
- ii) there was an overall lack of accountability, enforcement of the contract, permits and regulations;
- iii) the lack of a proper communication strategy with the public, with residents and with businesses led to the commencement of this project at a time that was obviously adverse to the business at the Jordan's;
- iv) standard industry practices were not followed with regard to communication processes, design process, construction start and constraints not identified in the contract, construction schedule not completed, staging and traffic control plans not prepared. The Ontario Traffic Manual Book Seven was not adhered to or enforced; and
- v) there was a failure to adopt, follow and enforce appropriate standard practices which lead to undue traffic delays and road closures that could have been avoided entirely or significantly reduce some of the impacts from construction during the Spring season for the Jordan's.

ENGINEERING EVIDENCE: TOWN

[97] In support of the Town position that the impacts of the Project were part of the "normal give and take" expected of everyone in a municipal construction program, the

Board heard from Ron Scheckenberger an experienced professional engineer with AMEC.

[98] Mr. Scheckenberger provided his opinion in Exhibit 6, Tab 1 being a five page letter dated January 10, 2013, which indicates he had reviewed the MTE Report dated November 29, 2012 and had reviewed only the following:

- i) the examination of the Director March 7, 2012;
- ii) design drawings for Main Street West;
- iii) correspondence to area residents dated January 21, 2009 and February 19, 2009 for meeting Minutes of the preconstruction meeting dated October 23, 2009;
- iv) meeting Minutes of site meeting #1 dated April 23, 2010.

[99] Mr. Scheckenberger, in his letter of opinion, also noted that he has consulted the Director and the Engineering Consultant.

[100] Mr. Scheckenberger's opinion letter had seven key points.

[101] Firstly, his report stated that the Project was a Schedule A+ project under the Class Environmental process which was pre-approved, noting that the public was to be advised prior to project implementation. Mr. Scheckenberger opined that Ms. Curtis should have noted that there is no appeal available to a member of the public: ...“however there would be no ability for the public to request a Part II Order. If the public has any comments they should be directed to the municipal council where they would be more appropriately addressed.” Mr. Scheckenberger stated that in his opinion there were a minimum of six potential points of public contact or more and that any one of the six would have adequately satisfied the requirements of a Schedule A+ undertaking, and, in this case, as opposed to doing one such notice, the Town of Grimsby had exceeded the industry standard.

[102] Secondly, Mr. Scheckenberger points out that the documentation prepared by MTE seemed to make personal reference to the Director.

[103] Thirdly, Mr. Scheckenberger stated that while the MTE review focused on the road as the project, it seemed to miss the essence of the need and justification project under the Municipal Class Environmental Assessment, more specifically being prompted by the Region of Niagara Health Department to address environmental and health hazard issues through the construction of the sanitary sewer. He opined that it would have been inconceivable for any area resident to receive a letter from the Town and not anticipate that there would be an impact to the roadway where the sewer was being constructed.

[104] The fourth point of the AMEC Report was that not a single one the other Class Environmental projects referenced by Ms. Curtis (as examples of good process and in particular of good communication) were "Schedule A+" projects. Thus, they were not appropriate for comparison.

[105] The fifth point referenced the fact that the Region of Niagara did not have a representative at the October 23 preconstruction meeting. Mr. Scheckenberger was advised and reported that the Region of Niagara had been invited but could not attend, but did attend the first Site Meeting.

[106] Following this, the sixth point was that while a substantial amount of blame for the traffic management issues was attributed to the Town of Grimsby by Ms. Curtis, it was not warranted. Mr. Scheckenberger stated that MTE did not seem to recognize or acknowledge that the roadway was under the jurisdiction of the Region of Niagara and hence, management of traffic on the roadway needed to be in accordance with the protocols of the Region of Niagara and not the Town of Grimsby.

[107] Finally, point number seven, Mr. Scheckenberger noted that the traffic management issues were common impacts for this type of project and appear to have been readily mitigated when observed by the Town.

[108] Based on these seven points, Mr. Scheckenberger's report concluded that the engineering review by MTE did not provide an accurate summary of the requirements for Schedule A+ projects and based on his review, Mr. Scheckenberger was of the

opinion that the Town had addressed issues as they arose in order to mitigate concerns and expedite construction.

[109] During his evidence-in-chief, the first issue that Mr. Scheckenberger dealt with was the Schedule A+ projects that Ms. Curtis had identified in her report. Contrary to his opinion set out in his January 10, 2013 letter, Mr. Scheckenberger admitted that all of the projects that Ms. Curtis put forward were in fact Schedule A+ projects under the Municipal Environmental Assessment process. Notwithstanding this, Mr. Scheckenberger maintained his position that the Town had operated in an appropriate manner with respect to the planning, design and implementation of the Project.

INJURIOUS AFFECTION

[110] Section 21 of the *Expropriations Act* provides the following:

A statutory authority shall compensate the owner of land for loss or damage caused by injurious affection.

[111] S.1 (b) of the *Expropriations Act* provides the definition for “Injurious Affection” as meaning:

- i. where the statutory authority does not acquire part of the land of an owner,
- ii. such reduction in the market value of the land of the owner, and
- iii. such personal and business damages, resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were now under the authority of a statute...

[112] The leading case in Canada with regard to injurious affection and compensation is the Supreme Court of Canada’s decision in *Antrim Truck Centre Ltd. v. Ontario Transportation*) [2013] S.C.J. No 13. The Supreme Court notes that injurious affection occurs when the defendant’s activities interfere with the claimant’s use or enjoyment of land and it may arise where, although no land is taken, the lawful activities of a statutory

authority on one piece of land interfere with the use or enjoyment of another property. In the Antrim, case the appellant claimed compensation for injurious affection where no land was taken because the highway construction had significantly impeded access to its lands.

[113] The Supreme Court sets out that under the Ontario *Expropriations Act* for injurious affection where there is no taking to be successful and to recover under the *Act*, a claimant has to meet these statutory requirements:

- i. that the damage must result from action taken under statutory authority;
- ii. the action must give rise to liability but for that statutory authority; and
- iii. the damage must result from the construction and not the use of the works.

[114] In this particular case, it is clear that the first and third tests have been met. The action was taken under the authority of the Town of Grimsby and the request for compensation is from the construction of the works and not from the use of it. Thus, similar to Antrim, what remains is the question whether if the highway construction had not been done under statutory authority would Jordan's have been able to successfully sue for damages caused by the construction?

[115] This leads to the first question: what are the elements of a private nuisance? The Supreme Court has said that a nuisance consists of an interference with the claimant's use or enjoyment of land that is both substantial and unreasonable. The two part test for substantial and unreasonable commences with the review of substantial: i.e. non-trivial and the caution is that not every interference is an actionable nuisance and some interferences must be accepted as part of the normal give and take of life. The Court uses the two part approach to screen out weak claims before having to consider the more complex analysis of reasonableness.

[116] With regard to the first test of substantial, the Supreme Court in *St. Pierre v. Ontario (Minister of Transportation and Communications)* [1987]1 S.C.R. 392 stated that while the categories of nuisance were not closed that only interferences that “substantially alter the nature of the claimant’s property itself” or “interfere to a significant extent with the actual use being made of the property” are sufficient to ground a claim in nuisance. Similarly the Supreme Court in *Tock vs. St. John’s Metropolitan Area Board* [1989] 2 S.C.R. 1181, found that actionable nuisances include only those inconveniences that materially interfere with ordinary comfort as defined according to the standards held by those of plain and similar tastes and not claims based on the prompting of excessive delicacy and fastidiousness. To this, the Supreme Court in *Antrim* added that “nuisance may take a variety of forms and may include not only physical damage to the land but also interference with the health, comfort or convenience of the owner or occupier” (see paragraph 23).

[117] Addressing the issue as to whether the interference with the Jordan’s use or enjoyment of the subject lands was substantial, the Board would note the following: first that the Town initiated a sewer construction program to commence in the Spring of the year during the Jordan’s busiest season to extend for a period of 40 working days which would include for those 40 days closure of at least one lane and closure for two weeks of the entire road, for a business that relied on direct vehicular access. The Board finds that there was substantial interference with the convenience of Jordan’s in the conduct of their business during their busiest season of the year.

[118] The Board will now proceed to the reasonableness test. This test is in broad terms to assess whether the interference is unreasonable by balancing the gravity of the harm against the utility of the defendant’s conduct in all of the circumstances. In terms of gravity, there are several factors that the Supreme Court looks to, which include the severity of the interference, the character of the neighbourhood and the sensitivity of the plaintiff. With regard to the severity of the interference the Board notes that with the construction of the sewer main and with the construction of all the sewer laterals running off main at 90 degrees, on a narrow right of way, to depths that exceeded 3.5 metres, that the effective result was the significant impairment of Main Street West for through traffic and for access to Jordan’s. This significant impairment was heightened

for the unrequired road closure for two weeks in the peak of the Jordan's season.

[119] With regard to the character of the area, the Board notes that the area was largely a residential area with only one business: Jordan's. The Board finds that the Town of Grimsby knew that the Jordan's business was located at that site having been there for 80 years, having solicited a \$5,000 video advertisement for the Town's website from the Jordan's and from the acknowledgement by the Director and the Assistant Director that they both knew the Jordan's business was located there. A reasonable person would have said that this area was largely a residential community with the one outlier being the Jordan's garden centre, which would have as its height of season the Spring season.

[120] Turning to the third factor of the sensitivity of the plaintiff, having found that the Town knew that Jordan's was located at this location and that a garden centre would have its height of season in the spring season, it is clear that the sensitivity of Jordan's was at a peak when the Project was finally acted upon by the municipality.

[121] The Board then looks at the utility of the defendant's conduct and the focus here is on the purpose for which it was being carried out. It is clear that there is considerable utility with regard to having any health or environmental concerns resolved through the replacement of septic systems with a municipal sanitary sewer system. However, the evidence of the Director was that the construction schedule could have been revised as there was no requirement that the work be done at that time. Moreover, it appears that to date, only approximately four residences have in fact hooked up to the new sanitary sewer system. All of this suggests to the Board that in fact there was no urgency with regard to the construction being carried out and that the construction schedule could have been altered.

[122] The Supreme Court is quite clear that the nature of the defendant's conduct is not an irrelevant consideration. The Supreme Court stated that where the conduct is either malicious or careless, that will be a significant factor in the reasonable analysis.

[123] The Board finds that the actions of the municipality were not malicious. The

Board has not been provided with any evidence to suggest that the actions taken were intentional in terms of desire to harm the Jordan's business. However, with regard to the test of careless, the Board notes that the Supreme Court of Canada looked upon with favour this quotation from the editor of Flemings, *The Law of Torts*:

...The "duty" not to expose one's neighbours to a nuisance is not necessarily discharged by exercising reasonable care or even all possible care. In that sense, therefore, liability is strict. At the same time evidence that the defendant has taken all possible precaution to avoid harm is not immaterial, because it has a bearing on whether he subjected the plaintiff to an unreasonable interference, and is decisive in those cases where the offence of activity is carried on under statutory authority ... [I]n nuisance it is up to the defendant to exculpate himself, once a prima face infringement has been established, for example, by proving that his own use was "natural" and not unreasonable.

[124] The Supreme Court indicated that not every substantial interference arising from a public work will be unreasonable. The Court states that everyone must put up with a certain amount of temporary disruption caused by essential construction. One factor in this consideration is the duration of the interference. While in the *Antrim* case, duration was not a factor, as the injury was permanent, the Supreme Court of Canada stated that some sorts of temporary inconveniences are more obviously part of the "normal give and take" than are more prolonged interferences. The Court said "while temporary interferences may certainly support a claim in nuisance in some circumstances, interferences that persist for a prolonged period of time will be more likely to attract a remedy." (See paragraph 42).

[125] To sum up on that point the Supreme Court said "...my view is that in considering the reasonableness of an interference that arises from an activity that furthers the public good, the question is whether, in light of all the circumstances, it is unreasonable to expect the claimant to bear the interference without compensation". (See paragraph 45).

[126] In this case, it is clear that Jordan's was the only business within the construction area, that Jordan's was known by the Town and its officials to be in the construction area, that Jordan's was known as a garden center/nursery, that a lay person would have said that a garden center's peak season would be the Spring, that the Town failed

to have anyone meet with Jordan's or to take into account the prospective impacts that the Main Street Sewer construction would have on the Jordan's business, that the construction, although temporary in nature, was for 40 construction days, during which it effectively denied all but the hardiest motorist to venture there, and at the critical period of the Jordan's business cycle, such that it caused substantial and unreasonable interference with Jordan's use and enjoyment of its land.

[127] Turning to the adequacy of the notice given by the Town to the public, the Board finds that the Town's efforts were to designed to meet the minimum standard set by the Municipal Class Environmental Assessment. To this end, the Board was directed to the Examination of the Director on March 7, 2012: Exhibit 26 contains the following questions and answers:

434 Q. Do you think that the – letter that was sent on March 24th accurately conveyed the extent of the disruption that would arise from the project for the residents within the project area?

A. I don't believe it identified any impact that they should expect. We wouldn't normally try to get into that detail.

435 Q. Why is that?

A. Ahm, we just notify them the project's ongoing. They have a contact number if they have a problem and, ah, that's the way we approach the project. If you--- if you stick your hand in a jar of snakes you're gonna get bit and to tell them they're gonna have problems and concerns is only---it's not a positive approach to it. We deal with their issues if they have any I and most people recognize what the impact of a construction on their road might be, not---not that they necessarily seen it, but certainly they've driven through it in the past, other projects.

[128] The Board finds this to be illustrative of the "reactionary" approach taken by the Town. The Board finds that the Town chose to pursue the minimum notice standards required by the Class Environmental Assessment with the intent to deal with issues that might arise during the course of construction. In this case, the pursuit of minimum standards has led to a situation where the Town could not remedy a fundamental timing issue that was arbitrarily made at the outset without due care and attention to the area and the properties in that area. Moreover, the Board finds that this approach led to the careless implementation and supervision of the Project where the contractor provided

not even a preliminary construction schedule until after the Project had commenced, provided no fixed construction start date, manipulated the signing of the contract to facilitate a start date to suit the contractor, provided no traffic plan, failed to comply with the Ontario Traffic Manual, and in essence managed the Project with the convenience, welfare, and best interests of the contractor only at heart.

[129] In these circumstances, the Board finds that it would be unreasonable to expect Jordan's to bear all the interference that was caused to its business by the careless construction planning, careless construction supervision and careless contract enforcement actions of the Town of Grimsby without compensation. The Board finds that the circumstances of this case of temporary inconvenience fall well outside the normal give and take of life that should be properly accepted as an individual's part of the cost as living in an organized society.

DAMAGES

[130] In support of the Jordan's claim for damages arising from the construction on Main Street West in Grimsby, the Board heard from Thomas Dyson the president of Dyson & Associates Inc., a chartered business evaluator, a member of the Ontario Expropriation Association and a past president of the Ontario Expropriation Association.

[131] Mr. Dyson had been retained to estimate the business losses incurred by Jordan's resulting from the construction of the sewers on Main Street West in Grimsby during the period of time from March 2010 to June 2010.

[132] His report may be found at Exhibit 4, Tab 1 and the report includes consideration of the reporting operating results for Jordan's for 2006, 2007, 2008, 2009, 2010, 2011 and 2012. In each of those years there was an income loss from operations.

[133] It is only "other income" (such as the sale of some of the property, insurance claims and farm support income) that results in the company having experienced some profit before taxes in four of the seven years. The Board specifically notes that for the years 2010, 2011 and 2012 there were no wages and benefits paid to management,

although there were advances to shareholders in 2011 and 2012 in the amounts of \$25,953 and \$11,178

[134] In his report at Exhibit 4, Tab 1, Mr. Dyson notes that prior to 2009 the business was a primarily a wholesaler of plants and flowers with some retail business. He indicates that in 2009 there was a new business plan to refocus on retailing of plants and flowers and garden and gift accessories. He observed that the seasonal business that is dependent on sales in the spring/early summer and the business is also dependent on vehicular traffic. The Board finds vehicular traffic to be critical to the business due to its location in a largely residential area away from the downtown core and any walk-in trade.

[135] Mr. Dyson documents the operating losses in the fiscal 2006 to 2009 which led to the Jordan's decision to refocus the company's operations to become an exclusive retail operation selling plants and flowers directly to the public. In that regard, a business plan was prepared and certain renovations to the facilities were undertaken. Accordingly, plant material for resale and resale items such as containers, accessories, etc., were purchased and in 2010 the company geared up for its first re-focused retail year.

[136] With the construction commencing on Main Street in April of 2010, Jordan's experienced a wholesale restriction of access for a number of months, inadvertent complete road closures at times and advertent complete road closure for a period of two weeks. The construction generally acted as a significant obstacle to customers attempting to get to Jordan's. With a change from the wholesale focus to the retail focus, Mr. Dyson compared the March to July sales for 2009 through to 2012. They are set out in the table below:

2009	\$121,825
2010	\$100,183
2011	\$85,218
2012	\$110,073

[137] In order to estimate the sales without construction, the Dyson report considered monthly retail sales for the February to April 2010 and compared those to the months of February to April 2009. In 2009 the sales were \$16,512 whereas in 2010 they were \$26,352: a 60 per cent increase in sales. The April 2010 retail sales were \$21,925 compared to the April 2009 sales of \$14,689: an increase of 49 per cent. From this the Dyson report estimated that the sales for May 2010 to April 2011 in the absence of construction would have been at least 50 per cent more than the monthly sales for the previous year, and the estimated sales for the month of May 2011 to July 2012 would have been the same as the sales for the previous year. On this basis, the lost sales from May 2010 to July 2012 would have been approximately \$251,073 from which was deducted \$177,584 for variable expenses including containers and pots, fertilizer and soil, heat, light, water, plants and bulbs, supplies, credit charges, leaving \$73,489 in lost sales.

[138] Other damages outlined by Mr. Dyson include \$19,000 for unsold retail products (plants) see Exhibit 7, Tab 37 for photographs of the discarded materials from the construction period in 2010.

[139] Finally, Mr. Dyson considered the issue of future losses. Mr. Dyson noted that he had considered the issue of future losses and arrived at \$153,924 assuming that the losses would continue indefinitely. However, given the company's ongoing losses from previous years and the company's duty to mitigate losses it was possible that the business might be sold or closed in the near future (which did in fact occur) and calculated the loss of future income to be \$22,342.

[140] Thus, in Mr. Dyson's view, the appropriate amount of compensation is as follows:

- i. lost profit/income for the period May 2010 to July 2012 \$73,489;
- ii. additional cost (product thrown away) \$19,000;
- iii. loss of future income \$22,342;
- iv. Total Claim \$114,831.

[141] The Town retained Deloitte LLP to prepare a limited critique of the report of Thomas Dyson of Dyson & Associates Inc. and such a report was prepared dated August 14, 2014.

[142] The covering letter to the Deloitte report contains the following summary of key findings:

- a) Jordan's survival historically has been dependent on other income;
- b) The business plan to convert the business operation to a retail operation appeared to lack the robustness that Deloitte's expected to see in typical business plans;
- c) Even with the inclusion of the estimated lost sales, Jordan's would have continued to suffer operating losses;

- d) Deloitte's believed a more appropriate loss period if the alleged actions were determined to be true would be longer than the three month construction period and in addition Jordan's did not appear to be a viable business with the continuing operating losses and their best of course of action to mitigate losses would have been to wind up the business;
- e) The methodology used by Dyson to calculate the lost sales was questioned;
- f) The plant wastage is noted as a common practice in the industry and would be incurred in the normal course of a retail operation and given the perceived poor inventory cycle practices, Deloitte questioned the amount of the purged inventory;
- g) In order for wastage to be a true cost of the construction Jordan's should have suffered from lost sales;
- h) Deloitte suggested that when contemplating the sale of a business from a valuation perspective they would consider the fair market value of the business to be the highest price obtainable in an open and unrestricted market. If the sale of the assets were to be considered, the value would be the same as the actual and, but for this scenario, there would be no loss of future income;
- i) Deloitte did not agree with Dyson's approach in calculating the lost value as the value in the Dyson's report is an enterprise value and not an equity value which, in their opinion, led to significantly different results.

[143] There is no doubt that Jordan's was a struggling business enterprise. The

financial results for the years 2006 through to 2009 indicate ongoing operational losses that are offset only by other income such as the gain on the sale of the land to Losani Development, some insurance claims and farm support income. Notwithstanding that the business carried on and as a result of the economic downturn in 2008, made a business decision to re-focus the company to the retail market and a business plan was created to implement same.

[144] The positive initial results of the shift to a retail focus as reported by Dyson are complemented by the anecdotal evidence of Mr. Jordan (“the buzz was back”) and two of his neighbours. It appeared that the business was on the edge of a turnaround entering the critical period of its business cycle: one that includes significant Spring events for a garden center such as Easter, Mother’s Day, Earth Day and the May 24 long weekend.

[145] Mr. Dyson arrived at a figure of a 50 per cent increase in sales which the Board considers to be conservative.

[146] With regard to the issue of plant wastage, the Deloitte report is critical on the inventory control and whether or not the “wrong” inventory had been purchased in 2010 and 2011.

[147] The Board finds Jordan’s to be a small business. If anyone knows the inventory of a small business it is the proprietor of such a small business. The Board finds that Jordan’s purchased plant inventory in compliance with the business plan to refocus to a retail market. The Board finds that due to the construction of Main Street sewer line and all the laterals, the Town effectively blocked vehicular traffic from getting to Jordan’s during the critical time of the year. The Board finds that the \$19,000 for discarded inventory to be appropriate and reasonable in the circumstances.

[148] With regard to the loss of future income, the Board prefers the evidence of Mr. Dyson. The Dyson report clearly recognizes the precarious financial situation that Jordan’s had been in, did an initial calculation of \$153,924 presuming that the losses would continue indefinitely and offset that against the facts that there were ongoing

losses and the company had a duty to mitigate its losses and calculated only a loss of future income of \$22,342.

[149] Thus, the Board would award damages in the amount of \$73,489 for lost profit/income, \$19,000 for product thrown away, and \$22,342 for loss of future income. In total the Board awards Jordan's the amount of \$114,831 rounded to \$115,000.

[150] In the absence of the taking of land in injurious affection proceedings interest is not provided for in the *Expropriations Act* and is not awarded.

[151] The Board will withhold its final Order pending submissions by both counsel on costs.

"Blair S. Taylor"

BLAIR S. TAYLOR
MEMBER

Ontario Municipal Board

A constituent tribunal of Environment and Land Tribunals Ontario
Website: www.elto.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248