DECISION **2020 NSUARB 16**
M07934

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE EXPROPRIATION ACT

- and -

IN THE MATTER OF AN APPLICATION by **ELAINE RHYNOLD, GERARD MASON AND DOWN TO EARTH ART GALLERY, INC.** to determine compensation, including legal and other costs reasonably incurred, to be paid to them by **HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NOVA SCOTIA,** in respect to the expropriation of lands located in Antigonish, Nova Scotia, PID No. 01229319

BEFORE:	Richard J. Melanson, LL.B., Member
CLAIMANTS:	**ELAINE RHYNOLD** **GERARD MASON** **DOWN TO EARTH ART GALLERY, INC.** Robert H. Pineo Jennifer R. Singh
RESPONDENT:	**ATTORNEY GENERAL OF NOVA SCOTIA** Sean Foreman, Q.C. Jack Townsend
HEARING DATE(S):	October 7-10, 2019
FINAL SUBMISSIONS:	November 14, 2019
DECISION DATE:	**February 11, 2020**
DECISION:	**The Claimants provided notice of this claim to the Province within the statutory notice period. The Claimants do not have a claim for injurious affection related to impairment of access. This claim is dismissed.**

TABLE OF CONTENTS

1.0 INTRODUCTION 3
2.0 ISSUES 4
3.0 BACKGROUND 4
4.0 FACTS 6
5.0 SITE VISIT 14
6.0 ISSUE 1 – LIMITATION DEFENCE 17
7.0 ISSUE 2 – INJUROUS AFFECTION WITHOUT A TAKING – ANALYSIS AND FINDINGS 28
7.1 Impairment of Access, Diversion of Traffic and Loss of Visibility 28
7.2 Antrim Analytical Framework 33
7.3 Analysis and Findings 35
7.4 Section 30(2) of the Act 44
8.0 SUMMARY OF BOARD FINDINGS 49
APPENDIX “A” 50
APPENDIX “B” 53

1.0 INTRODUCTION

[1] This case is about whether changes to the configuration of the Trans-Canada Highway in the Antigonish area, arising from a highway twinning and by-pass project, give rise to a claim for injurious affection, against the Province of Nova Scotia (Province), on the part of the Claimants.

[2] This claim is determined under the *Expropriation Act*, R.S.N.S. 1989, c.156, (*Act*). The relevant provisions of the *Act* are attached as Appendix "A".

[3] Down to Earth Art Gallery, Inc. (Down to Earth) operates a custom framing, art supplies and artwork sales store from a property located at 240 Main Street, Antigonish, PID No. 01229319 (Property). Elaine Rhynold and Gerard Mason are the principals of Down to Earth.

[4] In 2009, the Province began construction of a Highway 104 twinning and by-pass project in the Antigonish area (Antigonish By-Pass). The former Trans-Canada Highway 104 in this area was designated Trunk 4 (Old Highway 104 or Trunk 4). The Antigonish By-Pass is currently part of Trans-Canada Highway 104.

[5] Down to Earth is located near the intersection of Church Street and Main Street. This is approximately one kilometer from the intersection of Church Street and the Old Highway 104.

[6] While none of the Claimants' lands have been expropriated, the Claimants say this re-configuration of the Trans-Canada Highway has caused injurious affection to the Property. The Claimants say the foregoing altered vehicular access into Antigonish, resulting in decreased traffic and fewer customers seeking their art products.

[7] The parties have agreed that at this stage the Board is only required to determine whether the Province has incurred liability for injurious affection under the *Act*.

The issue of the amount of damages sustained by the Claimants, if any, has been deferred, pending the results of this hearing.

[8] The Board has determined that the Claimants are not entitled to damages under the *Act.*

2.0 ISSUES

[9] The Board will determine two issues in this proceeding:

i. Was notice of this claim provided to the Province within the one-year statutory notice period?

ii. Did the re-configuration of the Trans-Canada Highway, by the creation of the Antigonish By-Pass in the Antigonish area, give rise to a claim by the Claimants for injurious affection?

[10] For the reasons that follow, the Board has determined that the answer to the first question is “yes”. The answer to the second question is “no”.

3.0 BACKGROUND

[11] This is one of five claims for injurious affection brought by persons who operate or operated businesses in the Town of Antigonish during the time period relevant to these proceedings.

[12] The five claims for compensation under the Act are:

- M07925 – *Pleasant Valley Nurseries Ltd. et al v. (Nova Scotia) Department of Transportation and Infrastructure Renewal;*
- M07933 – *Tri-C Management Limited et al v. (Nova Scotia) Department of Transportation and Infrastructure Renewal;*
- M07934 – *Down to Earth Art Gallery Inc. et al v. (Nova Scotia) Department of Transportation and Infrastructure Renewal;*

- M07936 – *Dream Catcher's Deli & Treats Limited et al v. (Nova Scotia) Department of Transportation and Infrastructure Renewal*;
- M07937 – *Justamere Café Limited et al v. (Nova Scotia) Department of Transportation and Infrastructure Renewal*.

[13] In a commendable effort to reduce costs and create efficiencies, the parties agreed all five matters would be heard during the week of October 7, 2019. While no formal consolidation was sought, the parties agreed to the following:

- The evidence of witnesses for all claimants and the Province could be used in all proceedings;
- The Board's findings on liability would be binding on all claimants;
- A pre-filed Joint Exhibit Book (JEB), filed on August 27, 2019, and marked Exhibit B-5, which contains documents related to the five claims, was admitted by consent;
- A pre-filed Supplemental Exhibit Book, filed on September 30, 2019, and marked Exhibit B-6, which also contains documents related to the five claims, was admitted by consent;
- A colour version of a plan dated November 8, 2011, depicting Phase I of the Antigonish By-Pass, was admitted by consent, in all proceedings, at the start of the hearing (see Exhibit B-7). A black and white version of this document had been included in the JEB (see Exhibit B-5, Tab 31);
- A poster-size Google map of the area of the Antigonish By-Pass was also admitted by consent, in all proceedings, at the start of the hearing (see Exhibit B-8). A smaller version of this map had been included in the Claimants' pre-hearing submissions;

- During the course of the hearing, certain witnesses provided markings, with initials, on the black and white version of the plan at Tab 31 of the JEB. This document was admitted, without objection, in all five proceedings (see Exhibit B-9).

[14] The substantive evidence in the five proceedings therefore consists of the documents found in Exhibits B-5 to B-9, and the oral testimony of the following witnesses:

- Ernest Curry, who provided evidence on behalf of Tri-C Management Limited, which owns the Claymore Inn, and Justamere Café Ltd.;
- Phyllis Baker and Henri Steeghs, who presented evidence on behalf of Pleasant Valley Nurseries Limited;
- Elaine Rhynold and Gerard Mason, who testified on behalf of Down to Earth Art Gallery Inc.;
- Roseanne MacEachern and Michael Knocton, who gave testimony on behalf of Dream Catcher's Deli & Treats Limited; and,
- Sheena Berthiaume and Donald Richard Duane Cross, who testified on behalf of the Province. Ms. Berthiaume was the project engineer for Phase I of the Antigonish Bypass, responsible for project management during the construction phase. Mr. Cross was the Department of Transportation and Infrastructure Renewal (DTIR) engineer who led the team responsible for the project design and planning.

4.0 FACTS

[15] The Old Highway 104, running through Antigonish, posed a significant safety risk. The combination of local and intra-provincial traffic resulted in a very large

number of vehicles travelling on this portion of the highway on a daily basis. There were intersections, between Antigonish streets and Old Highway 104, without interchanges and at the same grade level.

[16] The speed limit on Old Highway 104, near Antigonish, was 70 or 80 km per hour. The traffic volume in this vicinity was greater than was typical for the remainder of Highway 104. In fact, Mr. Cross testified that a section of Old Highway 104, between the James Street intersection and the Addington Forks Road intersection, had the highest collision rate of any 100-series highway in Nova Scotia.

[17] The Province sought solutions. In the spring of 1998, public consultations began. Three potential routes, with various alignments, were reviewed and discussed. The main point of the initial decisions was choosing a preferred route between one which continued to pass directly through the Town of Antigonish and one which by-passed it, a short distance away. A third option, which would have placed the by-pass a considerable distance from the town, was seen as the least favourable route.

[18] From a business preservation perspective, some in the community advocated for the route which passed through the town. This route would essentially have been in the footprint of the Old Highway 104. The Province ultimately chose the by-pass option for pragmatic and safety reasons.

[19] Mr. Cross explained that it would not have been feasible to create modern interchanges within the Old Highway 104 route. For safety reasons, the interchanges could no longer be at the same grade as town intersections. There was not enough space to safely fit the desired three interchanges. The available space would cause a situation where the interchanges were too close together.

[20] Beyond that, if the Old Highway 104 route was chosen, over the by-pass option, the footprint of the three proposed interchanges would have required the acquisition of much more land from private property owners. This would have included acquiring property from Saint Francis Xavier University and various business owners.

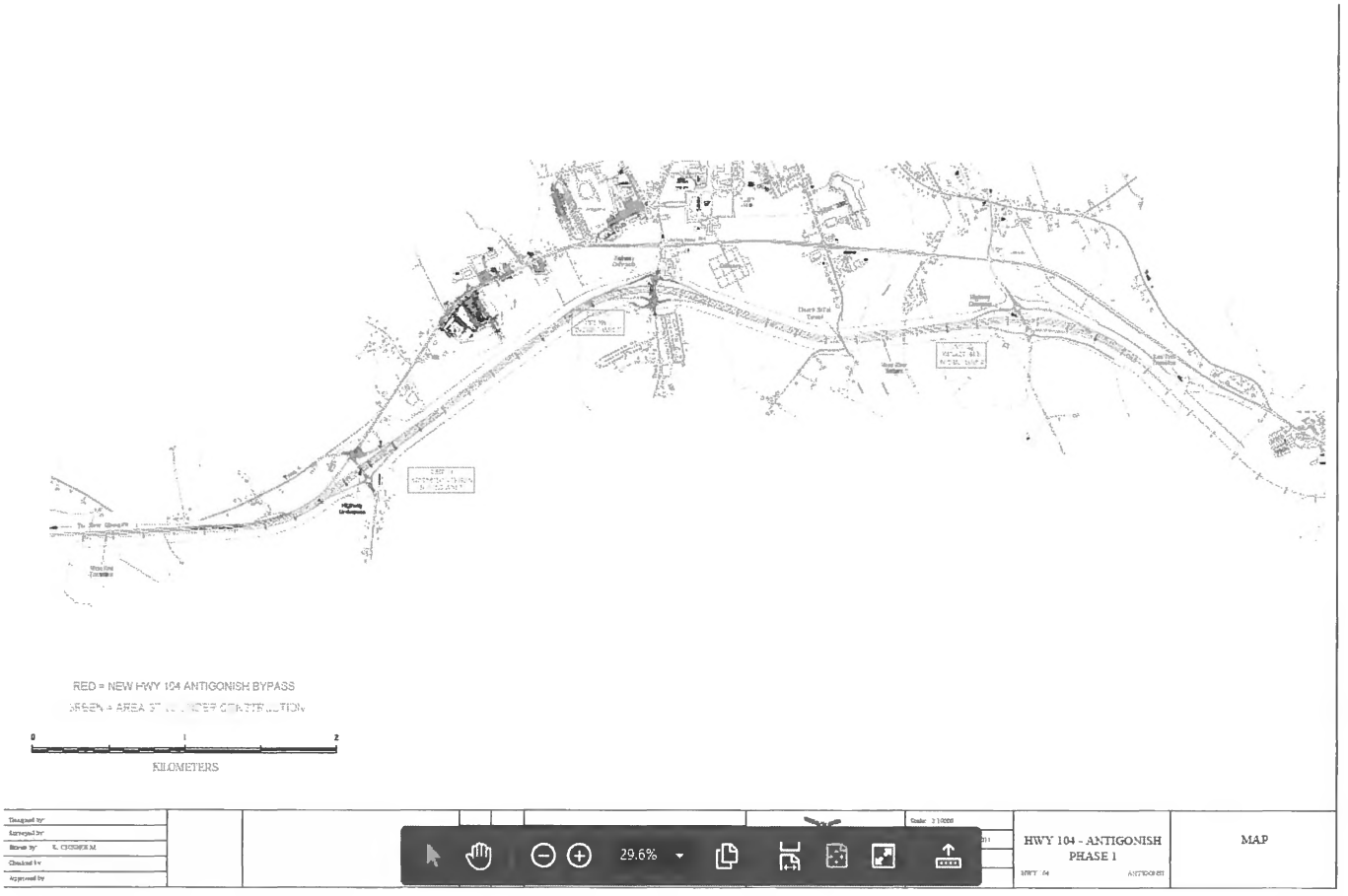
[21] In 2008, as the project start date was on the horizon, a community liaison group (CLG) was formed to address potential concerns, including those arising from the chosen highway alignment. The CLG included representation from the business community, the community at large, the Town and County of Antigonish, environmental groups and DTIR.

[22] One key concern raised during CLG meetings was the visibility of the Town from the Antigonish By-Pass. Signage was discussed as a mitigating factor. As well, the design of the interchange at exit 32 was changed so it elevated above Trunk 7, which road leads into the Town.

[23] While three interchanges were seen as sufficient for access purposes, the CLG raised concerns with respect to the use of roundabouts, which were a relatively low-occurrence highway option in the Province at the time. DTIR responded by bringing in an expert to do a presentation on how roundabouts work.

[24] Phase 1 of the Antigonish By-Pass Project started approximately two kilometers west of Addington Forks. It went to the Beech Hill Road and transitioned back to the existing Trans-Canada Highway just west of the South River Road. Phase 2 of the project went from the Beech Hill Road to Dagger Woods.

[25] Work started on Phase 1 during the winter of 2009. Phase 1 was opened to the public in September, 2012. Phase 1 is depicted in plan form below:



[Exhibit B-7]

[26] During the construction of Phase 1, at the west end of the project, approximately two kilometers west of Addington Forks, there was a temporary detour which moved traffic from Highway 104, onto newly constructed eastbound lanes, and then back onto the Old Highway 104. There were only minor disruptions related to lane closures and traffic control so this detour could be put into place.

[27] During Phase 1, except for temporary lane closures, the Old Highway 104 remained open to traffic. No other local or regional roads were closed during this construction.

[28] When Phase 1 of the Antigonish By-Pass opened to traffic in September 2012, a portion of the Old Highway 104 was closed from the Beech Hill intersection to just west of what is now the South River Road. The Board notes the South River Road is also described as the "Old Trunk 4" in some of the testimony. In any event, the closed section of the Old Highway 4 is generally depicted in Exhibit B-9.

[29] While the above-described section of the Old Highway 104 was closed, westbound traffic could access the Town of Antigonish as follows:

- Take the South River Road which leads to the Town center;
- Move onto Phase 1 of the Antigonish By-Pass, via a temporary short dirt transition road, and take one of three exits (33, 32 or 31), using the associated interchanges and roundabouts.

[30] Phase 2 of the Antigonish By-Pass was completed in approximately September, 2016. The portion of Old Highway 104 (now Trunk 4) which had been closed was re-opened. The temporary transition between Old Highway 104 and the Antigonish By-Pass was removed.

[31] With the completion and opening of both phases of the Antigonish By-Pass, the Old Highway 104, which had intersections at grade with Antigonish streets, was essentially in the same state as it had been prior to the start of the project.

[32] The intersection between the Old Highway 104 and Church Street, which is relevant to this matter, maintained the same configuration as it had prior to the start of the Antigonish By-Pass project. However, the Old Highway 104 (now Trunk 4) was no longer an intra-provincial highway.

[33] Westbound access to Trunk 4, and the Church Street intersection, in the vicinity of Antigonish, from the Antigonish By-Pass, is now availavle in one of the following ways:

- Take Exit 35, near Taylor Road, and go through one roundabout to access Trunk 4; travel along Trunk 4 until reaching the Church Street intersection;
- Take Exit 33 (the Board notes there is no Exit 34) and navigate one roundabout on the Beech Hill Road. Proceed to the intersection of the Beech Hill Road and Trunk 4, where access into Trunk 4 is controlled by stop signs. Turn left onto Trunk 4 and proceed to the Church Street intersection;
- Take Exit 32, navigate one roundabout, turn left on Trunk 4 to arrive at the Church Street intersection;
- Take Exit 31, and travel through one roundabout. This leads to Trunk 4, where one could turn right to reach the Church Street intersection;
- Theoretically, one could take Exit 30, and proceed to the intersection of the Beaver Meadow Road and Trunk 4 at James River. One would then have to back track to Antigonish. This is an unlikely route but would be available if the other access points had been missed.

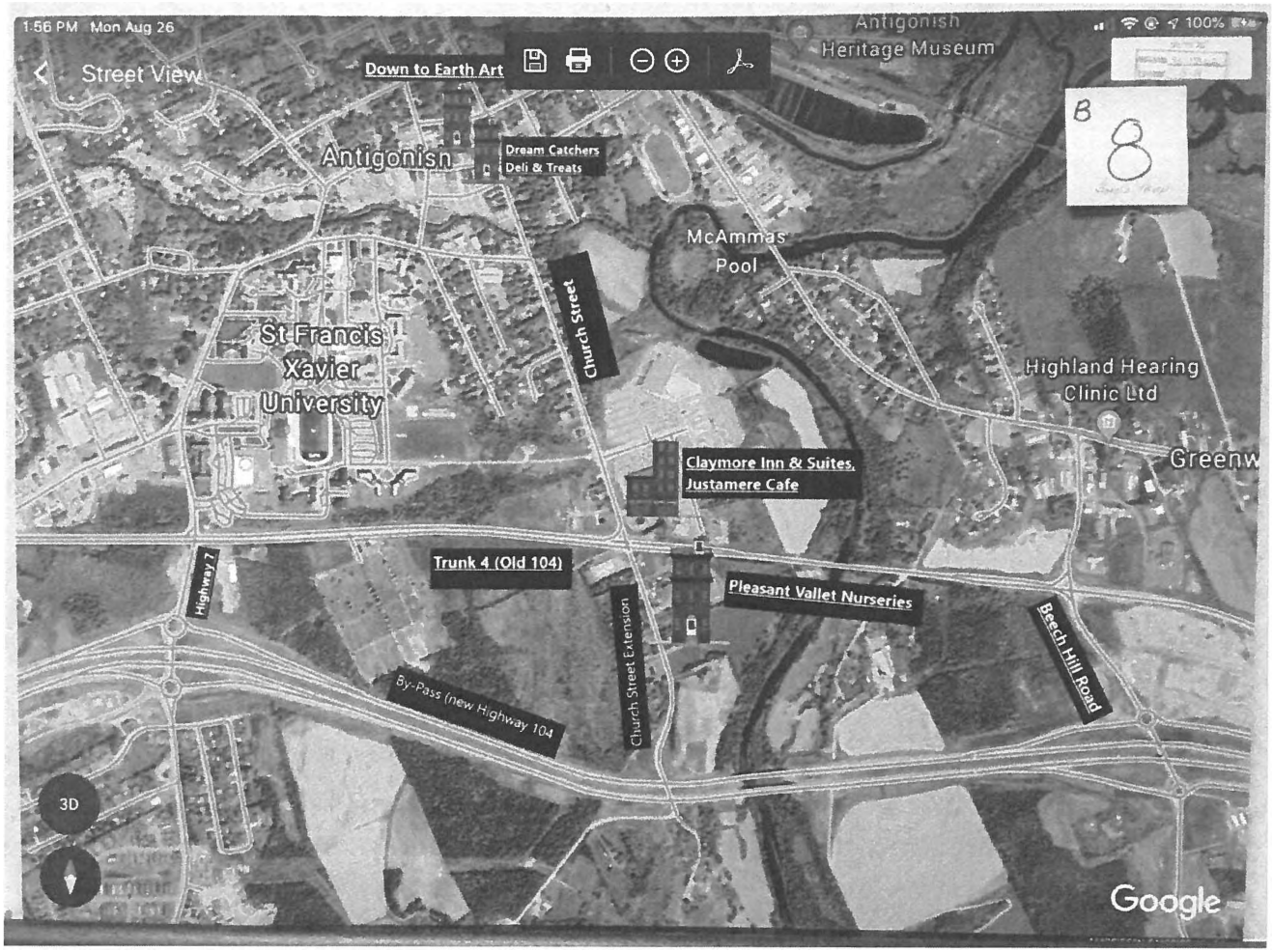
[34] Eastbound access to Trunk 4, and the Church Street intersection, can be achieved by the following routes:

- Take Exit 30 and proceed to the intersection of the Beaver Meadow Road and Trunk 4 at James River. After taking a right-hand turn, Trunk 4 leads into Antigonish;

- Take Exit 31, go through two roundabouts, arriving at Trunk 4. A right-hand turn onto Trunk 4 allows you to travel to the Church Street intersection;
- Take Exit 32, pass through two roundabouts, and access Trunk 4 via a right-hand turn. One can proceed to the Church Street intersection;
- Take Exit 33, navigate two roundabouts and turn left at the intersection with Trunk 4. A left-hand turn on Trunk 4 would lead to the Church Street intersection.

[35] Theoretically, one could take Exit 35, navigate two roundabouts, access Trunk 4 and take a left-hand turn. One would then have to back track to the Church Street intersection.

[36] The most likely routes to enter Antigonish, once on the Antigonish By-Pass, are via Exits 31, 32, or 33. The most direct route to the Church Street intersection, travelling east, is by taking Exit 32 and joining Trunk 4 via Highway 7. For westbound traffic, the shortest route would be taking Exit 33 onto the Beech Hill Road. Exhibit B-8, reproduced below, provides a satellite view of these two access points:



[Exhibit B-8]

[37] Down to Earth has been located at 240 Main Street in Antigonish (Property) since 1996. The business had expanded to a larger part of the building, but Down to Earth now leases, to a third party, the portion of the building in which its operations began.

[38] Originally, Down to Earth sold primarily prints and reproductions. It now sells more original artwork, including works created by provincially and nationally recognized artists. In addition to paintings, Down to Earth carries glasswork and Inuit ironworks carvings. The sale of art supplies and custom framing also form part of the business.

[39] Down to Earth experienced a major drop in the number of patrons coming to the Property in the beginning of 2011. This continued in 2012. The situation improved to some extent in 2013 and 2014.

[40] Traffic appeared to be increasing last year as well. Mr. Mason indicated moving the Tourist Bureau from the Antigonish Mall to Exit 32 had helped considerably. There also appeared to be more familiarity with the use of roundabouts as time passed.

[41] With respect to the closure of Trunk 4 near the Beech Hill Road intersection, Mr. Rhynold did not know if this had resulted in more traffic being diverted onto the South River Road and towards the Main Street area.

[42] Down to Earth has never been visible from Trunk 4. The speed limit in the vicinity of the Church Street intersection is and was 70 km per hour. There is a set of lights at this intersection. Mr. Mason said people were more likely to turn into Antigonish from Trunk 4, than coming off the Antigonish By-Pass, where the speed limit is 110 km per hour.

5.0 SITE VISIT

[43] The prospect of a site visit was raised during the hearing. Counsel for both parties indicated some benefit could be derived from such a visit. The Board agreed. The parties agreed the Board could proceed with the site visit without being accompanied by counsel. The Board therefore conducted the site visit on October 10, 2019.

[44] The Board travelled by car from Halifax, joining Highway 104 at Exit 15E, then proceeded east on Highway 104 to Exit 30. At the end of the off-ramp, the Board turned left on the Beaver Meadow Road and proceeded to Trunk 4 at James River. After

turning right and driving east a short distance towards Antigonish, the Board turned around and returned the way it had come to the on-ramp and back onto Highway 104.

[45] Proceeding east on Highway 104, the Board took Exit 31 at Antigonish. After going through two roundabouts, the Board arrived at Trunk 4. After making a right-hand turn onto Trunk 4, the Board proceeded a short distance, before returning the way it had come and proceeding again onto Highway 104.

[46] The Board proceeded east to Exit 32. After again passing through two roundabouts, the Board arrived at Trunk 4. The Board made a right-hand turn onto Trunk 4 and proceeded to a set of traffic lights at the intersection of Trunk 4, Church Street and the Church Street Extension, in the Town of Antigonish.

[47] The Board turned left at the intersection of Trunk 4 and Church Street and proceeded to the intersection of Church Street and Main Street. After turning left onto Main Street, the Board went around the block, returning to Church Street and to the intersection of Church Street and Trunk 4.

[48] The Board proceeded through the intersection of Trunk 4 and Church Street onto the Church Street Extension, under a tunnel beneath Highway 104, before turning around and returning to Trunk 4.

[49] The Board turned right on Trunk 4 and proceeded to the intersection with Highway 316, passing the South River Road intersection on the left. The Board followed Highway 316 north and went through two roundabouts, exiting at the South Side Harbour Road. The Board proceeded a short distance on the South Side Harbour Road. The Board returned to the first roundabout and took the on-ramp to Highway 104 at Exit 35.

[50] The Board proceeded west to Exit 33, taking the off-ramp and driving through one roundabout. The Board exited the roundabout on Beech Hill Road in Antigonish. The Board then proceeded to the intersection of Trunk 4 and Beech Hill Road, where traffic is controlled by a stop sign.

[51] The Board went through the intersection and drove to the South River Road. After turning left onto the South River Road and driving a short distance, the Board returned to the Beech Hill Road. At the intersection of the Beech Hill Road and Trunk 4, the Board turned right onto Trunk 4 and proceeded to the Church Street intersection. The Board then went through the lights and returned to Exit 32. After navigating one roundabout, the Board returned to Highway 104 and drove back to Halifax.

[52] As part of the site visit, the Board was able to observe five potential access and egress points from Highway 104 in the vicinity of Antigonish. The Board's observations included:

- The access and egress points and visibility at Exit 30, and the road configuration leading to Trunk 4 at James River;
- The width and configuration of, and the visibility associated with, the roundabouts at Exits 31, 32, 33 and 35;
- The manner in which traffic enters and exits Trunk 4 at the various intersections;
- The configuration of the Church Street, Trunk 4, and Church Street Extension intersection;
- The lights at this intersection, including the fact there is no left green arrow for cars travelling east or west;
- The location of the Down to Earth Art Gallery;

- The configuration of the streets, the traffic lights, and traffic flow on Church Street, Main Street and the Church Street Extension on the day of the site visit.

6.0 ISSUE 1 – LIMITATION DEFENCE

i) Facts Relevant to the Limitation Defence

[53] The Province has raised a limitation argument with respect to Down to Earth's claim for injurious affection. The following are the key facts established by the evidence relevant to this issue:

- Construction on Phase 1 of the Antigonish By-Pass started in the winter of 2009;
- Down to Earth's revenues saw a significant drop in 2011 and 2012. There was some improvement in 2013 and 2014. Financial results apparently improved somewhat in the last two years prior to the Board hearing. Mr. Mason attributed this improvement to the Nova Scotia Tourist Bureau being relocated from the Antigonish Mall to an area near Exit 32. Ms. Rhynold added the local population were acquiring a familiarity with the roundabouts;
- Phase 1 of the Antigonish By-Pass was opened in September, 2012. At that time, a portion of Trunk 4 was closed to traffic to allow work to continue on Phase 2;
- Mr. Mason said he was initially unaware of Down to Earth's right to initiate an injurious affection claim;
- Jarrett Reaume of M.D.D. Forensic Accountants was retained in early 2015;
- On August 27, 2015, Mr. Pineo sent a letter to the Province asserting the following:

> This letter is to provide notice to the Province of Nova Scotia that (Eileen Curry of Justamere Café Limited/Elaine Rhynold and Gerard Mason of Down to Earth Art Gallery Inc.), Antigonish, will be asserting a business loss claim in relation to the losses sustained from the rerouting of traffic away from its business, the impaired access for the public to reach its business, and for the loss of market value to its premises.

> I will be in touch in the coming weeks to further substantiate the claims identified in this letter.

- The parties agree that Mr. Pineo's letter of August 27, 2015, contains sufficient particulars to constitute notice in writing pursuant to s. 31(1) of the *Act;*
- The closure of a portion of Trunk 4 ended in approximately October, 2016, when Phase 2 of the project was completed;
- The M.D.D. Forensic Accountants' report was received in mid-2016.

ii) The Province's Position

[54] The Province submits that Down to Earth's claim for injurious affection is barred because of s. 31(1) of the *Act,* which says:

> … a claim for compensation for injurious affection shall be made by the person suffering the damage or loss in writing with particulars of the claim within one year after the damage was sustained or after it became known to him, and, if not so made, the right to compensation is forever barred. [Emphasis added]

[55] The Province submits *Re Dartmouth Crossing Ltd.,* 2015 NSUARB 48, stands for the proposition that once the Claimants knew "… they had suffered some damage or loss", the limitation period began to run, even if they did not know the full extent of the loss until they had received experts' reports quantifying the same.

[56] The Province acknowledges Mr. Pineo's August 2015 letter contains sufficient detail to constitute notice as required by s. 31(1) of the *Act.* Given the date of the written notice, the Province asserts that in order to come within the limitation period, Down to Earth must have only learned they suffered some damage after August, 2014.

[57] Counsel for the Province submits the evidence of Mr. Mason establishes he was aware of loss or damage by 2012 or 2013. The Province argues the August 27, 2015 notice is well over the one-year limitation period.

iii) The Claimants' Position

[58] The Claimants submit the Province has placed unwarranted weight on the significance of *Dartmouth Crossing.* In particular, the issue in that case focused on the sufficiency of the content of the written notice provided by the landowner. The parties had essentially agreed when the limitation began to run.

[59] Mr. Pineo argues that the wording in s. 31(1) is of primary importance. In particular, the phrase "… after the damage was sustained or after it became known to him…" means the limitation period can only begin to run against all claimants when:

> … 1) the extent of the impairment to the access to their buildings was complete; 2) the damages were actually sustained; and 3) the Claimants have sufficient knowledge of the damages.
>
> [Reply Brief of the Claimants, para. 12]

[60] Counsel for the Claimants say that after Phase 1 of the Antigonish By-Pass was complete, in September 2012, the closure of a portion of Trunk 4, while work on Phase 2 continued, created a continuous impairment of access. This work was not completed until 2016. This is well after notice in writing was provided to the Province.

[61] Since impairment to access continued, according to the Claimants, it was not possible to tell if the drop in customer traffic was of short-term duration, or permanent in nature.

[62] As to the extent of knowledge required, the Claimants made the following submission:

> The learned authors in the leading expropriation text, *New Law of Expropriation,* by John A. Coates and Stephen F Waqué, "Nova Scotia," vol 2, (Toronto: Carswell, 2016) provide further analysis of the timing requirement at page 28-71:
>
> > The limitation period does not start to run when the expropriation documents are filed. **The period only begins to run after the damage has occurred and after the owner knows of the damage.** In the context of subsection 31(1), it might be argued that knowledge means **when the owner knows of the damage in enough detail that it can be particularized.** On this basis, an owners' general realization upon receiving notice of expropriation that his or her remaining lands are worth less does not constitute the knowledge necessary to support a claim in which particulars must be stated. **The limitation period is triggered by particular knowledge, not belief. Furthermore, subsection 31(1) does not impose a duty of due diligence on the owner to become informed as to the injurious affection within one year of receiving notice of expropriation. Therefore, the period only starts when the owner has actual knowledge of the damage sustained, not when the owner should, by due diligence, have known** (citations omitted), [Emphasis added]
>
> And at pages 28-72:
>
> > Thus, it was held that the claimant did not possess sufficient knowledge of the particulars of injurious affection for the purposes of subsection 31(1) until the claimant **received the report of his own appraiser, who had been instructed to consider injurious affection.** [Emphasis added]
>
> [Reply Brief of the Claimants, para. 21]

[63] Mr. Pineo argues, based on these principles, the Claimants provided notice before the limitation period even began to run.

iv) Analysis and Findings

[64] The onus is on the Province to establish, on a balance of probabilities, that the Claimants did not provide notice in writing within the one-year time frame set out in s. 31(1) of the *Act.* For the reasons which follow, the Board has determined the Province has not met the burden of proof to establish the limitation defense.

[65] The passage from *New Law of Expropriation,* quoted by the Claimants, is primarily based on *R. v. Research Island AG,* (1994), 132 N.S.R. (2d) 156 (C.A), which case is also referenced by the Board in *Dartmouth Crossing.* The Board is not aware of

any other recent decisions from the Nova Scotia Court of Appeal which analyzes the meaning of s. 31(1) of the *Act* in detail.

[66] The main principles which can be gleaned from *Research Island* are as follows:

- The purpose of s. 31(1) of the *Act* is to protect an expropriating authority from having to meet claims on their merits where the landowner has not responded aggressively enough;
- Section 31(1) must be considered remedial and construed liberally;
- Section 31(1) of the *Act* does not impose a duty of due diligence upon a landowner, where land has been expropriated, to become informed as to injurious affection within one year of receiving notice of the expropriation;
- Time only begins to run when the landowner learns of the damage in sufficient detail that it can be particularized;
- The clock only starts to run when the landowner has actual knowledge of the damage sustained, not when through due diligence, the owner should have known;
- In many cases, an expert report is required in order to be able to particularize the claim;
- While there may be immediate realization that lands have been impacted, this bold realization is not sufficient to support a claim in which particulars must be stated;
- It might take some time to discover the actual effect of the expropriation.

[67] *Dartmouth Crossing* was not a detailed analysis of when the limitation period starts under s. 31(1) of the *Act.* The Board specifically acknowledged this:

> [53] While *Research Island* does concern the interpretation of s. 31(1), the Board concludes that it is centred on the question of when the owner acquired the necessary knowledge of

> the loss to start the one-year limitation period. This is not in dispute in the present proceeding: the parties agree on when the period began, and ended.
>
> [54] On the other hand, *Research Island* does not explore the amount of information which an owner must communicate to the expropriating authority when giving notice of a claim of injurious affection. This is the point in dispute in this proceeding.

[68] The Board cautioned that wording in *Research Island* which indicated "any doubts which arise in the interpretation of the section should be resolved in favour of the expropriated owner" should be disregarded in favour of the modern rule of statutory interpretation, which requires a contextual and purposive approach.

[69] By this caution, the Board did not imply that *Research Island* is bad law. The Board was simply saying that the "strict construction" approach would not be used in its analysis of the issue before it, which was the sufficiency of the particulars provided in the landowner's notice.

[70] In the end, in *Dartmouth Crossing,* the Board reviewed caselaw relating to limitation periods generally, and expropriation legislation in particular, and came to the following conclusions:

> [104] However, the Board sees the decision as consistent with the direction given by the Supreme Court of Canada on the subject of limitation periods. It will be recalled that in *Yugraneft*, the Court set out the following purposes of limitations:
>
> - certainty (including knowing when a period begins and ends);
> - evidentiary concerns (preservation of evidence);
> - diligence (avoiding stale claims).
>
> [105] In the passage just quoted, the Superior Court saw information supplied by the owner as satisfying the statutory requirement for particulars. Three components of this information referred to specifically by the Court in *Zygocki* (OSCJ) are:
>
> - allowing the municipality to know of the existence of the claim;
> - informing the municipality of the nature of the claim;
> - providing enough information to allow for preservation of evidence;

> [106] The Board sees the decision of the Court in *Zygocki* (OSCJ) as consistent with, and embodying, the Supreme Court of Canada's approach in *Yugraneft*, without using its specific language.
>
> [107] The Board sees the three components enumerated in *Zygocki* (OSCJ) as essential to compliance with s. 31(1).

[71] These principles have general applicability to the matter before the Board. They are not inconsistent with *Research Island.*

[72] The findings of the Nova Scotia Court of Appeal in *Research Island* on how to approach when the limitation period begins to run under s. 31(1) were not dependent on the strict construction approach mentioned in one paragraph of that decision.

[73] A fair reading of *Research Island* indicates it was determined by analyzing the specific wording used in s. 31(1) of the *Act,* when reviewed in the context of the *Act* and the purpose of expropriation legislation as a whole. In making the analysis, the Nova Scotia Court of Appeal compared the language in the *Act* to other limitation concepts, distinguishing it from insurance claims and limitation of actions legislation.

[74] The Nova Scotia Court of Appeal's analysis is consistent with the modern approach to statutory interpretation, as elaborated upon in *Rizzo & Rizzo Shoes Ltd (Re),* 1998 CanLII 873 (SCC), [1998] S.C.R. 27.

[75] Therefore, in the Board's opinion, using the contextual and purposive approach to interpret s. 31(1) of the *Act* leads to the same result as set out in *Research Island.*

[76] *Research Island* involved a claim for injurious affection where land had been expropriated. Historically, as pointed out by the Province, a claim for injurious affection without a taking has not invoked a presumption in favour of compensation.

[77] This said, s. 31(1) of the *Act* makes no distinction between injurious affection with or without a taking. There is no reason in principle, or expressed in the language of the *Act,* why a different test should be applied to the two situations.

[78] *Research Island* makes a connection between the need for particulars and the knowledge required to start the clock running on the limitation period. The logical conclusion which flows from this is that the less stringent the requirement for particulars, the sooner a claimant will have sufficient knowledge such that the limitation period begins to run. It is not apparent whether the Court had in mind the type of particulars provided in this case.

[79] When one looks at the meaning of the words used in s. 31(1) of the *Act,* there are clearly two situations which can trigger the limitation period:

- When damage was sustained by the Claimants; and,
- After the damage sustained becomes known to the Claimants.

[80] The provision does not say the earlier of when damage is sustained or when it becomes known to the Claimants. The two triggering events need not occur at the same time.

[81] In the case of Down to Earth, one of the activities upon which the claim is based (the partial temporary closure of a portion of Trunk 4) was not completed until October, 2016. In this sense, the claim is partly based on a continuing nuisance until the situation only became permanent in 2016.

[82] The Board is aware that limitation periods for continuing nuisances can lead to a situation where only the portion of the damages occurring within the limitation period

is recoverable. *Research Island* makes it clear that s. 31(1) of the *Act* need not be interpreted in the same manner as other limitation concepts.

[83] The scheme of the compensation provisions leading to the Board assuming the responsibility for making a final determination are helpful in analyzing legislative interest. The legislative scheme envisages a notice in writing pursuant to s. 31(1) of the *Act,* negotiations pursuant to s. 36 of the *Act,* and a referral to the Board pursuant to s. 47(1) of the *Act,* if the parties cannot come to an agreement. Compliance with s. 31(1) of the *Act* is required before negotiations can be triggered. While negotiations are not a mandatory component, they are certainly contemplated by the *Act,* and as a policy matter, should be encouraged.

[84] The Board is of the view the scheme of the *Act* contemplates written particulars of the full scope of the injurious affection claim, followed by potential negotiations related to the claim as a whole. It would not be reasonable to interpret s. 31(1) of the *Act* as requiring a landowner to provide a series of notices as different aspects of the injurious affection claim become known.

[85] Therefore, for the legislative scheme to operate effectively, the activities which constitute the nuisance, in the case where at least part of the claim is based on a temporary, continuing nuisance, should at least be completed before the limitation period beings to run.

[86] The Board notes this would be consistent with the fact situation in *Dartmouth Crossing,* where the Board found the date the work was completed was the date the limitation period began to run. At that time, the claimants in that case apparently

had sufficient knowledge of the extent of the damages. In *Research Island,* the expropriation was completed well before the claimants gained sufficient knowledge.

[87] In this sense, the importance of *Dartmouth Crossing* in elaborating when the limitation period begins to run should not be overstated. The completion of the work activities which may give rise to a claim is an important consideration. As well, the extent of the knowledge required must be assessed in light of the circumstances in each case.

[88] Mr. Mason and Ms. Rhynold provided little detail explaining why their business was impacted. They related comments from patrons, especially seniors, with respect to wishing to avoid roundabouts. As well, there were comments from customers with respect to the barrier and transitions, when a portion of Trunk 4 was closed, being dangerous.

[89] The essence of Down to Earth's claim is that the construction of the Antigonish By-Pass, the use of roundabouts, and the temporary closure of Trunk 4, diverted traffic from the Town of Antigonish itself. This meant fewer customers visited their location on Main Street.

[90] Unlike some of the Claimants in other proceedings, Down to Earth's business losses started during the construction period of Phase 1 of the Antigonish By-Pass, and apparently continued through the opening of Phase 1 and beyond. While the principals of Down to Earth were aware they were suffering business losses in 2011, they could not have known how permanent or extensive this situation would be.

[91] It is evident from the principals' evidence that the degree of loss was changing, and in fact the situation was improving. In this situation, at the very least, the

impact on the market value of the Property would have been speculative until traffic patterns normalized.

[92] The portion of the claim based on a decrease in market value implies a degree of permanence to the change in traffic flow. The extent of this change must be ascertained before the existence and amount of damages can be determined in any meaningful way.

[93] It is the completion of the activities giving rise to a claim, the knowledge of the facts underlying the injurious affection claim, and, sufficient knowledge of the extent of the damages, which trigger the limitation period. If the foregoing criteria are followed, the concerns with respect to certainty; preservation of evidence; and, the timely pursuit of claims, are addressed.

[94] Based on caselaw unrelated to expropriation matters, the Province argues that ignorance of the law is not a basis upon which to delay the start of a limitation period. Whether this proposition is tenable, considering an owner need not exercise due diligence to become informed as to injurious affection, need not be determined in this case.

[95] While Mr. Mason testified that he was initially not aware of his right to claim compensation for injurious affection, Down to Earth actually gained knowledge of its legal rights before the limitation period began to run, and, through counsel, notified the Province.

[96] The limitation argument therefore fails. The Board finds that the Province has not established that the written notice was provided outside the one-year limitation period.

7.0 ISSUE 2 – INJUROUS AFFECTION WITHOUT A TAKING – ANALYSIS AND FINDINGS

[97] There is no dispute that the Province is an expropriating authority and a statutory authority within the meaning of ss. 3(1)(d) and 3(1)(p) of the *Act.* The parties agree the construction of the Antigonish By-Pass was undertaken pursuant to statutory authority. As well, the parties agree the Province did not expropriate any portion of the Property.

[98] Subject to s. 30(2) of the *Act,* which will be addressed separately, s. 30(1) requires that a statutory authority "… compensate the owner of land for the loss or damage caused by injurious affection."

[99] The location and ownership of the Property was established by appropriate documentation.

[100] The Board is satisfied Down to Earth has the status to bring this claim under the *Act.* Elaine Rhynold and Gerard Mason were also named as Claimants. As the issue was not raised in argument, and it is not relevant to the outcome of this proceeding, the Board need not address whether the principals of a corporate owner are also owners under the *Act.*

7.1 Impairment of Access, Diversion of Traffic and Loss of Visibility

[101] The Claimants allege the construction of the Antigonish By-Pass and associated roundabouts impaired access to the Property, thereby giving rise to a claim for injurious affection. They say the situation is similar to the facts in *Antrim Truck Centre Ltd.* v. *Ontario (Transportation),* 2013 SCC 13, [2013] 1 S.C.R. 594. In *Antrim,* a claim for injurious affection was upheld in circumstances where new highway construction by-

passed a truck stop. This construction was determined to have significantly and permanently impaired access to the business.

[102] The Claimants say their claim is based on impairment to access and not on traffic diversion. Unlike some of the other claims addressed in this series of decisions, the Property was never visible from Old Highway 104. The Board does not consider the issue of loss of visibility from a highway is raised in this matter. This issue will not be further considered herein.

[103] The Province says the facts in *Antrim* were very different than those in this matter. The Province argues this case is about diversion of traffic from Old Highway 104. The Province submits diversion of traffic is not compensable as injurious affection.

[104] Subsection 3(1)(h)(ii) of the *Act* defines the term "injurious affection" without a taking as follows:

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

[105] In *Dell Holdings Ltd.* v. *Toronto Transit Operating Authority,* [1997] 1 S.C.R. 32, the Supreme Court of Canada indicated that expropriation legislation "should be read in a broad and purposive manner in order to comply with the aim of the *Act* to fully compensate a landowner where property has been taken." The Province argues that *Dell Holdings* makes a clear distinction between a situation where land is taken and one where no land is taken.

[106] The Province draws attention to the following paragraphs in *Dell Holdings:*

> 34. The difference in judicial treatment is described by Wilson J. in T*ener*, *supra,* at pp. 547-48, where she wrote:
>
> Where land has been taken the statute will be construed in light of a presumption in favour of compensation [citation omitted] but no such presumption exists in the case of injurious affection where no land has been taken. [Citation omitted.] In such a case the right to compensation has been severely circumscribed by the courts. . . .
>
> . . .
>
> 36. It is as well significant that the Act itself makes a clear distinction between those situations in which compensation is paid where no land is taken, and compensation paid where land is in fact taken. Where land is taken, compensation is primarily provided for in ss. 13, 15, 18, 19, 23 and in the definitions in s. 1(1)*(e)(i)*. The circumstances in which compensation is to be paid where no land is taken are provided for in s. 21 and in s. 1(1)*(e)(ii)*. There is no provision for recovery for disturbance damages where no land is taken. Injurious affection damages can be recovered both where the land is taken and where land is not taken but the tests to be met are very different. Where land is taken, the damages may relate to construction and the use of the works but where no land is taken the damages are limited to those flowing from the construction of the works even if the use also causes damages. There is therefore a clear foundation for concluding that there is a very real and significant difference between awarding compensation in those situations where land is expropriated from those where it is not. It follows that damages for disturbance can appropriately be awarded in situations where there has been an expropriation even though no damages for disturbance will be awarded in situations where there has not been an expropriation.

[107] The Province submits the "broad and purposive" approach for claims where property has been taken is not applicable to situations where there is no taking. In such cases, the Claimants must strictly comply with the requirements of the legislation.

[108] The Board is mindful that some of the language used in *Dell Holdings* must be considered in light of the modern rule of statutory interpretation, which provides for a purposive analysis, where "… the words of an *Act* 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 Parliament": *Rizzo & Rizzo Shoes Ltd. (Re),* 1998 CanLII 837 (SCC), [1998] S.C.R. 27 at para. 21.

[109] In any event, the legal principles discussed in *Dell Holdings* are in fact primarily based on a contextual and purposive analysis of the legislation. The more restricted basis upon which compensation is awarded for injurious affection, in situations

where there is no taking, arises by virtue of the legislative history and the language in the statute.

[110] In *Antrim,* the Supreme Court of Canada was able to provide a detailed analysis, based on the wording of a provision virtually identical to that found in the *Act*, without recourse to presumptions or strict construction.

[111] In *Antrim,* the Supreme Court of Canada discussed the three statutory requirements in the Ontario expropriation legislation, which are the same as in the *Act:*

> [5]. . . Thus, in order to recover under the Act, the claimant has to meet these three statutory requirements, which are often referred to as the requirements of "statutory authority", "actionability" and "construction and not the use". These requirements mean that (i) the damage must result from action taken under statutory authority; (ii) the action would 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. Where these conditions are present, the Act requires that the complainant be compensated for the amount by which the affected land's market value was reduced because of the interference, and for personal and business damages: . . .

[112] In this case, the Province says the damages, if any, which the Claimants have suffered are the result of traffic diversion. The Province says the foregoing is not actionable in nuisance at common law. Therefore, the Province says, the claim must fail based on the second statutory requirement.

[113] In *Re Inglis,* 2012 NSUARB 120, the Board reviewed the common law related to whether diversion of traffic, as opposed to impairment of access, could form the basis for a claim in nuisance under the common law. The Board held there was no precedent for such a proposition and declined to expand the common law concept of nuisance to include such a claim.

[114] *Inglis* was decided before *Antrim.* In fact, the Board cited the Ontario Court of Appeal decision, which *Antrim* overturned, as an example of a case supporting the proposition that loss of traffic flow was not compensable at common law.

[115] This said, the facts in *Inglis* were quite different than in *Antrim.* The Board made the following specific findings of fact in *Inglis* at paras. 4-5:

> [4] At no time – before, during, or after the construction of Highway 101 - was access by Mrs. Inglis, and her fruit stand, to Highway 201 limited in any way. For greater certainty, the construction, or subsequent operation, of Highway 101 created no impediment to traffic on Highway 201 from being able to stop at her fruit stand and buy fruit. Highway 201 remained open and unimpaired while the Highway 101 construction occurred, and it continues to be open.
>
> [5] When Highway 101 came into operation in the Tupperville area, however, the amount of traffic along Highway 201, and specifically by the Inglis fruit stand, diminished. Revenue for the fruit stand dropped, and ultimately Mrs. Inglis decided to close it.

[116] The distinction between traffic diversion and impairment of access was not the focus of the Supreme Court of Canada in *Antrim.* Rather, in the first line of the decision, at para. 1, the Court held that the highway construction in that case had "… significantly and permanently interfered with access to the appellant's land." The issue before the Court, when considering whether the claim met the actionable rule, was whether this interference was substantial and unreasonable, as assessed under nuisance law principles.

[117] *Antrim* did not directly overrule the line of cases relied upon by the Board in *Inglis,* when it determined that diversion of traffic, as opposed to impairment of access, was not actionable. Impairment of access has long been held to be actionable in nuisance.

[118] There is therefore no binding authority, or Board precedent, which directly addresses the fact scenario before the Board. As pointed out by the Claimants, the application of *Antrim* to the facts in this matter is a case of first impression for the Board. No case authority was provided where *Antrim* had been considered by courts, or other tribunals, in a similar context. Given recent amendments to the *Act,* the five informally

consolidated cases considered in these proceedings may also be the only time the Board is called upon to make a determination on the issue.

7.2 Antrim Analytical Framework

[119] *Antrim* provided a succinct definition of what constitutes nuisance:

> 18. The Court of Appeal concluded that a nuisance consists of an interference with the claimant's use or enjoyment of land that is both substantial and unreasonable: paras. 79-80. In my view, this conclusion is correct.

[120] Cromwell, J., then elaborated on the parameters of the test of nuisance:

> [19] The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both *substantial* and *unreasonable*. A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances. ... (Emphasis in original)
>
> . . .
>
> [21] Retaining a substantial interference threshold underlines the important point that not every interference, no matter how minor or transitory, is an actionable nuisance; some interferences must be accepted as part of the normal give and take of life. Finally, the threshold requirement of the two-part approach has a practical advantage: it provides a means of screening out weak claims before having to confront the more complex analysis of reasonableness.
>
> [22] What does this threshold require? In *St. Lawrence Cement*, the Court noted that the requirement of substantial harm "means that compensation will not be awarded for trivial annoyances": para. 77. In *St. Pierre*, while the Court was careful to say that the categories of nuisance are not closed, it also noted that only interferences that "substantially alte[r] 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: p. 915 (Emphasis added). One can ascertain from these authorities that a substantial injury to the complainant's property interest is one that amounts to more than a slight annoyance or trifling interference. ... (Emphasis in original)
>
> [23] In referring to these statements I do not mean to suggest that there are firm categories of types of interference which determine whether an interference is or is not actionable, a point I will discuss in more detail later. Nuisance may take a variety of forms and may include not only actual physical damage to land but also interference with the health, comfort or convenience of the owner or occupier: *Tock,* at pp. 1190-91. The point is not that there is a typology of actionable interferences; the point is rather that there is a threshold of seriousness that must be met before an interference is actionable.

[121] If the threshold test of a substantial interference is met, *Antrim* provides the following guidance, with respect to the reasonableness analysis:

- Reasonableness must be assessed in light of all the relevant circumstances (para. 25);
- The Board is called upon to assess "… in broad terms, whether the interference is unreasonable by balancing the gravity of the harm against the utility of the defendant's conduct in all the circumstances (para. 26);
- The Board is not limited by any specific list of factors when considering the gravity of the harm or the utility of the conduct (para. 26);
- Factors such as the severity of the interference, the character of the neighbourhood, whether the Claimants have any particular sensitivity to the harm caused, and the frequency and duration of the interference may be relevant considerations (paras. 53-54).

[122] With respect to the utility of the Province's conduct, the focus is "… on whether the *interference suffered by the Claimant* is unreasonable, not on whether *the nature of the defendant's conduct* is unreasonable" (para. 28). This said, if the manner of proceeding with the construction is unreasonable, it could be a factor weighing in favour of a claimant. This said, if the manner of proceeding with construction is unreasonable, it could be a factor.

[123] *Antrim* went on to further discuss how the utility of the Province's conduct should be considered:

> [30] . . . Even where a public authority is involved, however, the utility of its conduct is always considered in light of the other relevant factors in the reasonableness analysis; it is not, by itself, an answer to the reasonableness inquiry. Moreover, in the reasonableness analysis, the severity of the harm and the public utility of the impugned activity are not equally weighted considerations. If they were, an important public purpose would always override even very significant harm caused by carrying it out. . . .

[124] The balancing exercise between the public good and interference with the use and enjoyment of private property is succinctly expressed by Cromwell, J., at para. 34, as follows:

> … In other words, the question is not simply whether the broader public good outweighs the individual interference when the two are assigned equal weight. Rather, the question is whether the interference is greater than the individual should be expected to bear in the public interest without compensation.

[125] The foregoing indicates the type of interference is not determinative of whether the interference is actionable. The Board should therefore proceed to an analysis of whether the Province's Antigonish By-Pass project created a substantial and unreasonable interference with the Claimants' use and enjoyment of the Property.

7.3 Analysis and Findings

[126] The Claimants do not advance the proposition that diversion of traffic, in and of itself, creates an actionable nuisance which gives rise to injurious affection. The claim is based on impairment of access.

[127] The Antigonish By-Pass was designed to divert though-traffic from the overburdened Old Highway 104. Therefore, highway traffic which by-passed Antigonish, and as a consequence, Down to Earth's business, by utilizing the available by-pass option, rather than due to impairment of access to Trunk 4, or other access points to Antigonish, would be using the by-pass for its intended purpose.

[128] Diversion of traffic, without impairment of access, would therefore not be actionable as injurious affection under the third branch of the statutory test. While the term "construction" includes the works themselves, traffic would be diverted by the use of the by-pass for its intended purpose, where the construction does not cause impairment

to access. Diversion of traffic, without impairment of access, in these circumstances, would be based on use and not construction.

[129] As well, the law of expropriation is based on interference with interests in property. The underlying rationale why diversion of traffic was historically not actionable was because there is no common law proprietary right to have traffic flow directed towards the front of a business. This is highlighted in the following passage in *Inglis:*

> [56] The following passage appears in *Nichols on Eminent Domain*, revised 3rd Edition, 1972, as cited by the Ontario Land Compensation Board in *Zadworski v. Ontario (Minister of Transportation and Communications)*, (1972) 4 LCR 100:
>
> In diverting traffic from in front of an owners' building to a new route, there is no invasion of the rights of the owner, nor is there any legal injury to the land remaining…The state, however, owes no duty to the owner in regard to sending public travel past his door. Our trunk line highways are built and maintained to meet public necessity and convenience in travel, and not for the enhancement of property of occasional land owners along the route…The owner is not entitled to receive any compensation for diversion of traffic. This principle was expressed in one case as follows:
>
> > The owner of land abutting on a highway established by the public has no property or other vested right in the continuance of it as a highway at public expense, and, at least in the absence of depreciation of ingress and egress, cannot claim damages for its mere discontinuance, although, such discontinuance diverts traffic from his door and diminishes his trade and thus depreciates the value of his land. [Emphasis added]

[130] If a property owner has no right to have traffic directed by his door, there is no interference with proprietary rights associated with the use and enjoyment of property when traffic is diverted elsewhere, provided the diversion is not caused by impairment of access. Access is an incident of property ownership. Therefore, the distinction in treatment between the two situations is not based on categorizing forms of interference, but on the fact that, in one case, there is no interference with proprietary rights, in a common law legal sense, at all.

[131] No rationale was provided for extending the bundle of rights associated with property ownership to include a right to have traffic directed towards a particular owner's

business. The Claimants did not advance such a proposition at all. The main thrust of the Claimants' argument was that access had been impaired.

[132] The Board must therefore consider whether, from a factual standpoint, access to the Property was impaired. If so, does this impairment meet the test set out in *Antrim* for actionable nuisance?

[133] As a starting point in the analysis, the configuration of the Antigonish By-Pass and associated roundabouts is considerably different than what occurred in either *Antrim* or *Inglis.*

[134] In *Antrim* the truck stop was located in a rural setting. The business had direct access to the Trans-Canada Highway. It was heavily dependent on truck traffic using the Trans-Canada Highway. The construction of the new highway, which by-passed the truck stop, resulted in significant, permanent changes to the old highway. In particular, the old highway turned into a dirt road just east of the business. Eastbound traffic had to take a circular route to regain access to the Trans-Canada Highway, which included this dirt road and two side roads. The only viable access point was by taking one exit west of the business onto what was now a regional rural road and drive two kilometers to the truck stop, keeping in mind the business primarily catered to truckers.

[135] In *Inglis,* the business in question did not have direct access to old Highway 1, which is similar to the situation in this case. However, Tupperville, where the business was located, was not immediately adjacent to the Trans-Canada Highway, as was the case with the Town of Antigonish. As well, there were no changes made to Highway 201 whatsoever. The access points to Highway 201 were not altered, although the new Highway 101 effectively by-passed any access points on the old Highway 1.

[136] In this case, unlike in *Antrim,* after all the construction was completed, Trunk 4 through Antigonish, in the vicinity of the various access and egress points which could lead to Main Street, and the Down to Earth Gallery, remained the same as it was prior to the construction of the Antigonish By-Pass. What changed was the access points to Trunk 4, and ultimately the town and its businesses. The Board must determine whether this constitutes impairment of access to the Claimants' business.

[137] The issues which Down to Earth identified, based primarily on anecdotal evidence, as having a potential impact on the business were:

- Patrons (especially seniors) wishing to avoid roundabouts;
- Customer comments with respect to the safety of the barrier and transitions, when a portion of Trunk 4 was closed.

[138] Access to the Property from Main Street was not altered or impaired by the by-pass project. Access to Church Street from Trunk 4 was not altered or impaired by the by-pass project. Trunk 4 could still be accessed from a number of points including Exit 32 (via Highway 7) and Exit 33 (via the Beech Hill Road). Also, the South River Road was still accessible and provided access to Main Street.

[139] There were traffic delays occasioned by the traffic control measures on Old Highway 104 during the construction of Phase 1 of the Antigonish By-Pass. These traffic control measures, while perhaps an annoyance, did not amount to an impairment of access to the Property.

[140] Since the completion of Phase 2, there have been five primary access and egress points from Highway 104, to Trunk 4, including three in the immediate vicinity of

the Town. Four of these points have modern roundabouts. Once on Trunk 4, Main Street can be accessed in a variety of ways.

[141] Based on the evidence provided by Mr. Cross, the roundabouts are designed to accommodate traffic which seeks to enter Antigonish. This evidence is consistent with the Board's observations during its site visit.

[142] While the Board understands that many motorists may not have had experience with roundabouts, from an objective perspective, the ones in question do not appear difficult to navigate, once one has a basic understanding of how they work. The roundabouts themselves are not a significant impediment to accessing Trunk 4. Once on Trunk 4, access to Main Street and the Property is as it was before.

[143] Unlike some of the other claimants, the Property has always been some distance from Old Highway 104. The Board does not consider the distances from exits provided by Mr. Curry to be relevant to this Main Street location.

[144] As previously set out, from September, 2012 until October, 2016, a portion of Old Highway 104 was closed from just east of the Beech Hill Road intersection to just west of the South River Road.

[145] While this portion of Old Highway 104 was closed there was a temporary transition to the recently opened Phase 1 consisting of a short dirt road. The Property was not located in this vicinity, and did not have direct access to Old Highway 104.

[146] There was evidence westbound traffic was "diverted" onto Phase 1 of the Antigonish By-Pass. There is evidence westbound traffic was also diverted to the South River Road. Of particular significance, with respect to the Main Street location, traffic

diverted onto the South River Road should actually increase traffic on Main Street, despite Mr. Mason's level of knowledge in this regard.

[147] Once on the Antigonish By-Pass, westbound motorists could still access Trunk 4 in Antigonish, by using Exits 31, 32 or 33. As discussed in Ms. Berthiaume's testimony, the most likely point was Exit 33 to the Beech Hill Road intersection. This intersection remained open to allow for westbound traffic to access Trunk 4. According to Ms. Berthiaume's testimony, the closure had no impact with respect to eastbound traffic.

[148] In keeping with the Board's previous analysis, while a portion of Trunk 4 was closed, there continued to be access and egress points to Trunk 4, and Main Street, both east and west of the Property.

[149] The first issue to be determined, based on the foregoing findings and analysis of the facts in this matter, is whether impairment to access to the Property was substantial. This threshold is relatively low, in that the interference with property interests must be more than a "slight" annoyance or a "trivial interference". In para. 22, *Antrim* appears to equate this terminology with there having to be a significant interference with the actual use of the property.

[150] Down to Earth's sales noticeably declined during 2011-2012. This was in large part prior to the opening of Phase 1 of the Antigonish By-Pass. Full recovery has apparently not yet occurred. As previously discussed, during the construction phase, traffic delays, with Trunk 4 and all secondary roads remaining open, does not constitute a substantial impairment of access to Down to Earth's premises.

[151] Once the entire project was completed, the number of available options which allow a motorist to access Trunk 4 is reasonable. This is entirely different than was the case in *Antrim.*

[152] The layout of the access and exit ramps, the roundabouts, and associated roadwork, from an objective point of view, creates no significant impediment to accessing Trunk 4 or Main Street. This can be observed from the plans and Exhibit B-8. It is confirmed by the testimony of Mr. Cross, which is consistent with the Board's own observations when taking a view.

[153] There was no evidence whatsoever presented at the hearing that accessing Trunk 4 was difficult, once motorists had navigated the exit ramps and roundabouts.

[154] The most reasonable inference to be drawn from the evidence is that the Antigonish By-Pass was working as intended. Most through-traffic was likely using the by-pass to avoid the slower speed limits, the local traffic, and, traffic specifically looking to enter Antigonish. This decision was likely not made because of any significant access impairments, but because of the nature of the travel and destinations involved.

[155] While there may have been some people who initially preferred not to use roundabouts, or became confused by the new configuration, from an objective perspective, given the type of roundabouts involved, it would not take long to master the use of this modern traffic configuration, provided, as Mr. Cross testified to, the travelling public used speed appropriate for the circumstances. The roundabouts may be an annoyance, which should dissipate over time, but they do not create a significant impairment to access to Trunk 4. Main Street could be accessed from both Church Street and the South River Road.

[156] In the context of the Trans-Canada Highway, which passes in the immediate vicinity of a town, a modern By-Pass, with safety design features, as discussed by the Province's witnesses, does not create a significant impairment to access to Trunk 4. Consequently, as access to Down to Earth from Trunk 4 has not changed, there is no substantial interference with access to the Property.

[157] The Board must also address the closure of a portion of Trunk 4 just east of the Beech Hill Road intersection for the period from September, 2012 to October, 2016.

[158] While the principals of Down to Earth testified the barricade and transitions, when a portion of Trunk 4 was closed, were dangerous, the fact remains that the westbound traffic had no alternative but to either take the South River Road, which should have diverted more traffic towards Main Street, or the Antigonish By-Pass.

[159] The traffic accessing the Antigonish By-Pass would create a situation much like the current one assessed above. The three main access points to Antigonish from the Antigonish By-Pass were still available. As discussed above, these access points create no significant or substantial impairment to Trunk 4 access. Traffic diverted to the South River Road had ready access to Main Street. Therefore, the temporary closure of Trunk 4 did not create a substantial impairment of access to the Property.

[160] Given this is a case of first impression, despite the findings on the threshold issue, the Board will undertake a reasonableness analysis in any event. Even if one assumes a substantial interference to Down to Earth's proprietary interests in the use and enjoyment of the Property, the Board has come to the conclusion that such interference would be reasonable.

[161] There is no doubt that the construction of the Antigonish By-Pass was a matter of significant public utility. The primary driver for the construction was not convenience, or enhanced efficiency for business and the public at large. The primary reason for the construction was public safety. The Claimants fully acknowledge the public utility of the project. As discussed in *Antrim,* while this is not irrelevant, it cannot be weighed in such a manner as to overshadow the interests of property owners.

[162] The reasons for proceeding with the project; the design that was chosen; the location that was chosen; and, the manner of proceeding with the construction are detailed in the Board's findings of fact. The Board finds there is no evidence to support that the manner in which the Antigonish By-Pass project was undertaken by the Province was defective. Reasonable alternatives were considered and addressed. The Board finds nothing untoward in the conduct of the Province in executing the project.

[163] The Claimants have no particular sensitivity to nuisance, except to the extent the business is dependent on its location. The impact of the Antigonish By-Pass on the Claimants is permanent, in the sense that there was no evidence before the Board the current configuration would change in the foreseeable future. The traffic patterns which have developed since the construction of the By-Pass are likely to remain, unless further work is done in the future. As well, the financial impact on the Claimants appears significant, although the Board is of the view the extent of the financial impact caused by minor impairment of access is likely very limited.

[164] With respect to the severity of the interference, the Board has done a detailed analysis earlier in this Decision. The interference with access was, and is, minor. Any interference was and is even more remote than with respect to any other claimant.

[165] One must consider the temporary traffic lane closures, and the installation of a safe and well-designed by-pass, in the context of a setting near a town. The inconveniences created are minor, in the overall context of the situation. This is especially so when the existing situation, prior to the construction of the Antigonish By-Pass, was a very dangerous one. It created its own challenges with respect to left-hand turns on a busy highway.

[166] From a public policy perspective, if the Claimants' position were to prevail, one could anticipate that almost any business in Antigonish would have a claim for injurious affection from the construction of the Antigonish By-Pass. This claim is an example of the potential floodgate of claims which would potentially be available. The Board is of the view this was not the type of door *Antrim* intended to open, when it addressed a significant and permanent impairment of access to one business, in a rural setting, where access had been severely altered and limited.

[167] Considering all these factors in the balance, the Board finds any interference with the Property is reasonable, in the circumstances of this case. Simply put, in order to be able to take advantage of the amenities and financial opportunities available in a university town setting, the type of interference which occurred in this matter, in providing safety for both the travelling public, and the residents and visitors to Antigonish, is not greater than the Claimants should be expected to bear without compensation.

7.4 Section 30(2) of the Act

[168] Section 30(2) of the *Act* states:

> 30 (2) No compensation is payable for the loss of access to land or egress from land, or both, where the loss is the result of a designation pursuant to the *Public Highways Act* of a highway or land as a controlled access highway, if other access to the land or egress from the land, as the case may be, is available as a result of a service or land access road being provided.

[169] The Province argues that this provision precludes recovery by Down to Earth in the circumstances of this case. The basic premise is that even if access to the Down to Earth is impaired by the construction of the Antigonish By-Pass, since alternative access and egress (in this case to Trunk 4, which is where the impairment is alleged to arise) have been provided, s.30(2) of the *Act* precludes damages for injurious affection.

[170] The Claimants argue that s.30(2) of the *Act* has no application to this matter. After a comprehensive review of the scheme set out in the *Public Highways Act,* R.S.N.S. 1989, c.371 (*PHA*), the Claimants say that, in order for the statutory bar to apply, the loss under s.30(2) of the *Act* must arise from the designation itself, and not the construction or the works associated with the designation of land as a controlled access highway.

[171] The modern approach to statutory interpretation is well summarized in *Sparks v. Holland*, 2019 NSCA 3:

> [27] The Supreme court of Canada and this Court have affirmed the modern principle of statutory interpretation in many cases that "[t]he words of an Act 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 Parliament (*Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27 at ¶21).
>
> [28] This Court typically asks three questions when applying the modern principle. These questions derive from Professor Ruth Sullivan's text, *Sullivan on the Construction of Statutes*, 6th ed (Markham, On: LexisNexis Canada, 2014) at pp. 9-10.
>
> [29] Ms. Sullivan's questions have been applied in several cases, including *Keizer v. Slauenwhite,* 2012 NSCA 20, and more recently, in *Tibbetts*. In summary, the Sullivan questions are:
>
> 1. What is the meaning of the legislative text?
>
> 2. What did the Legislature intend?
>
> 3. What are the consequences of adopting a proposed interpretation?

[172] In this case, the relevant provisions are attached as Appendix "B".

[173] Both parties agree that the compensation scheme, and the exclusions, in the relevant portions of the *PHA*, have no application to any of the five matters before the Board, since none of the owners have property which "adjoins" land designated as controlled access highway.

[174] The Claimants advance the following in their Amended Pre-Hearing Brief:

> [81] The Claimants submit that the interplay between subsection 30 (2) of the *Act* and section 12 of the *PHA* is to allow the Province the flexibility to reserve lands for future highway use, without paying compensation for injuring the affected lands by impairing access to them.
>
> [82] . . . Likewise, the Claimants submit that the interplay between subsection 30 (2) of the *Act* and sections 21 and 24 of the *PHA* is to allow the Province the ability to designate a public highway as a controlled access highway without paying compensation for injuring the affected lands by impairing access to them. [Emphasis in original]

[175] The Board notes that s. 21(1) of the *PHA* allows for a designation in two situations where no land is reserved at all:

- The designation can be made to existing highways or parts thereof, where the Province contributes or has contributed to its construction or maintenance;
- When the Province owns land where it is planned to construct a highway under the *PHA* or plans to construct a highway where it will contribute funds towards construction or maintenance.

[176] Therefore, the designation concept is wider in scope than to provide flexibility for future use of reserved lands, or even lands currently owned by the Province.

[177] The Claimants refined their argument in their Pre-Hearing Reply Brief:

> 32. The Claimants submit that subsection 30(2) requires the Claimants' claims to arise as the result of a designation under the *Public Highways Act,* RSNS 1989, c 371. With respect, none of the Claims advanced by the Claimants are on the basis that the By-Pass or the Old Highway 104 received any designation. Instead, the claims arise solely as a result of the construction of the By-Pass and the resulting impairment to the access. A

> clear answer on the issue emerges if the following hypothetical is answered: If the designations were never made, would the impairments remain and have caused the damages claimed?
>
> 33. The Claimants submit that the answer is obvious: the abstract designation would not alter the impairment to the positive or the negative in any way. Therefore, the damages claimed are not the result of the designation(s).
>
> [Claimants' Pre-Hearing Brief, paras. 32-33]

[178] The issue to be determined by the Board is whether the modern approach to statutory interpretation supports the Claimants' position. The Board finds that reading the words used, in their entire legislative context, does not support the position that s. 30(2) only applies to a designation in the abstract.

[179] The exclusion from compensation in s.30(2) of the *Act* is similar to the exclusion wording in s.24(3) of the *PHA.* Section 24(3) does not apply because the *PHA* provision only applies to lands which adjoin the designated land.

[180] The Board agrees with the Province that when reading the two statutes as a whole, s.30(2) must be given meaning. It addresses a wider array of properties than s. 24(3) of the *PHA*, recognizing that under expropriation legal principles, impairment of access need not be created by works immediately adjoining the impacted property.

[181] It is also apparent that the exclusion for compensation in s.30(2) of the *Act* is not narrowly tied to damages that might flow from the designation itself. The designation of lands, in and of itself, would not impair access until acted upon. As well, the access to and egress from the land must be available, before the exclusion from compensation comes into play. The wording addresses scenarios beyond the designation, and can include the works associated with the designation.

[182] The clear intent of s.30(2) of the *Act* and s.24(3) of the *PHA* is to limit compensation for injurious affection where a controlled access highway is involved, and access and egress are provided to affected lands.

[183] This interpretation is consistent with the scheme of the *Act,* which allows for, but imposes limitations on, injurious affection damages where there is no taking, by ensuring the limitations in the *PHA* extend to lands beyond "adjoining" lands.

[184] The legislative text supports the interpretation that where alternative means of access and egress are provided, no compensation for injurious affection is available.

[185] The interpretation also supports an object of the *PHA*, to provide an orderly means to build roads and highways for the public good.

[186] The consequences of adopting the proposed interpretation, in the context of this case, are entirely reasonable. Where the Board has found the alternative access and egress to Trunk 4 result in neither a substantial nor unreasonable impairment in relation to the Property, it should follow that no compensation is payable.

[187] The question which remains open is a scenario where the construction associated with a designation of a controlled access highway creates a substantial and unreasonable impairment to access and egress. Can this realistically be interpreted as "…other access to land or egress from land…" contemplated by s. 30(2) of the *Act*? As that is not the Board's finding in this matter, that is a question for another day.

[188] In the final analysis, in the circumstances of this case, s.30(2) of the *Act* leads to the same result as the Board's analysis in relation to the second branch of the statutory test set out in *Antrim*.

8.0 SUMMARY OF BOARD FINDINGS

[189] The Claimants brought their claim within the prescribed time frame.

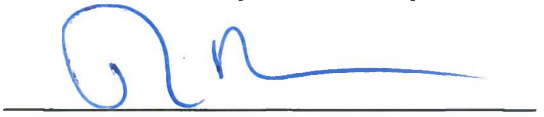
[190] The construction of the Antigonish By-Pass did not substantially or unreasonably impair access to the Property. Therefore, the claim for injurious affection fails.

[191] In this case, s. 30(2) of the *Act,* which excludes compensation where alternative access or egress to land designated for a controlled access highway is provided, leads to the same result as the common law and statutory analysis for injurious affection.

[192] The claim for injurious affection without a taking is dismissed.

[193] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 11th day of February, 2020.



Richard J. Melanson

APPENDIX "A"

3 **(1)** In this Act,

…

(d) "expropriating authority" means Her Majesty in right of the Province and in all other cases any person or body empowered by statute to expropriate land;

…

(h) "injurious affection" means

…

(ii) where the statutory authority does not acquire part of the land of an owner,

(A) such reduction in the market value of the land of the owner, and

(B) such personal and business damages, resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute,

…

(j) "owner" includes a mortgagee, tenant, registered judgment creditor, a person entitled to a limited estate or interest in land, a representative for an adult under the *Adult Capacity and Decision-making Act* to whom authority in respect of the adult's real property has been granted, and a guardian, executor, administrator or trustee in whom land is vested;

…

(p) "statutory authority" means Her Majesty in right of the Province or any person or body empowered by statute to expropriate land or cause injurious affection;

30 **(1)** A statutory authority shall compensate the owner of land for loss or damage caused by injurious affection.

(2) No compensation is payable for the loss of access to land or egress from land, or both, where the loss is the result of a designation pursuant to the Public Highways Act of a highway or land as a controlled access highway, if other access to the land or egress from the land, as the case may be, is available as a result of a service or land access road being provided.

Procedure for claim for injurious affection

31 (1) Subject to subsection (2), a claim for compensation for injurious affection shall be made by the person suffering the damage or loss in writing with particulars of the claim within one year after the damage was sustained or after it became known to him, and, if not so made, the right to compensation is forever barred.

(2) Where the person who is injuriously affected is an infant, an incompetent or a person incapable of managing his affairs, his claim for compensation, if not made on his behalf within the time period stipulated in subsection (1), shall be made within one year after he ceased to be under the disability or, in the case of his death while under the disability, within one year after his death and, if not so made, the right to compensation is forever barred. R.S., c. 156, s. 31.

…

If compensation not agreed upon

36 (1) Subject to Part VA, where the statutory authority and the owner have not agreed upon the compensation payable under this Act and, in the case of injurious affection, Section 31 has been complied with or, in the case of expropriation, Section 13 has been complied with, or the time for complying therewith has expired,

(a) the statutory authority or the owner may serve notice of negotiation upon the other of them stating that it or he, as the case may be, requires the compensation to be negotiated; or

(b) where the statutory authority and the owner have agreed to dispense with negotiation proceedings or are unable to agree to a negotiator within thirty days of service of the notice referred to in clause (a), the statutory authority or the owner may serve notice upon the other of them or upon the Board, to have the compensation determined by the Board.

(2) In any case in which a notice of negotiation is served, the negotiator shall, upon reasonable notice to the statutory authority and the owner, meet with them and, without prejudice to any subsequent proceedings, proceed in a summary and informal manner to negotiate a settlement of the compensation.

(3) Before or during the negotiation proceedings, the negotiator shall inspect the land that has been expropriated or injuriously affected.

(4) Subject to Part VA, where the negotiation proceedings do not result in a settlement of the compensation, the statutory authority or the owner may serve notice upon the other of them and upon the Board stating that it or he, as the case may be, requires the compensation to be determined by the Board as though the negotiation proceedings had not taken place. R.S., c. 156, s. 36; 2019, c. 29, s. 5.

47 (1) The Board shall determine any compensation where the parties have not agreed on the amount of compensation, and in the absence of agreement, determine any other matter required by this or any other Act to be determined by the Board.

…

APPENDIX "B"

Section	Provision
2 (f)	"highway" means a public highway or public road and includes the bridges thereon
3	This Act applies to all highways within the Province not included within the boundaries of a city or town or owned by a municipality...
12	When the Minister is of the opinion (a) that certain lands wilt in future, be required for the construction of a public highway; (b) that the land will not be immediately required for that purpose; (c) that it is desirable, in the interest of economy and certainty, to reserve the lands for highway purposes, he may, in the manner hereinafter set out, reserve the said lands for highway purposes for such period, not exceeding five years, as he considers desirable.
13 (1)	When the Minister desires to reserve lands for highway purposes, he shall file or cause to be filed in the registry of deeds of the district in which the lands are situated a declaration that he so reserves the lands and the period of the reservation together with a plan and description of the lands to be reserved.
13 (2)	Within ten days after the filing of a declaration under subsection (1), the Minister shall notify the owner of any lands affected by the reservation, (a) if the owner and his residence are known to the Minister, by serving upon him or by mailing by registered letter addressed to him at his last known place of residence; or (b) if the owner or his residence are unknown to the Minister, by posting in a conspicuous place on such lands, a notice stating that the declaration has been filed and the date and place of filing and containing a copy of this Section.
13 (3)	The owner of land within or abutting upon a reservation described in a plan and description filed under subsection (1) may, within thirty days after filing of the plan and description, apply to the Minister to

rescind, vary or modify the period or area of the reservation, and the Minister on such application may confirm, rescind, vary or modify the reservation and shall forthwith give notice of his decision to the applicant.

21 (1) The Governor in Council may designate as a controlled access highway

(a) any highway or part thereof in a municipality or any highway or part thereof in a city or town, towards the construction or maintenance of which the Province has contributed or contributes;

(b) any land owned by Her Majesty in right of the Province in a municipality upon which it is planned to construct a highway under this Act, or any land owned by Her Majesty in right of the Province in a city or town upon which it is planned that there be constructed a highway towards the construction or maintenance of which the Province will contribute;

(c) any lands reserved for highway purposes under Section 12.

21 (2) A copy of the order of the Governor in Council designating a highway or part thereof or any land as a controlled access highway shall be published in not less than two issues of the Royal Gazette and shall be filed in the registry of deeds for the registration district in which the highway or part thereof or the land is situate, and notice thereof shall be posted by registered letter to the landowner or landowners concerned and displayed in a conspicuous place on the lands affected.

21 (3) Notwithstanding subsection (2), where the Governor in Council has designated, as a controlled access highway, a new highway or land upon which it is planned to construct a highway, it shall not be necessary to give notice of the designation by registered mail to the landowner or landowners concerned.

24 (1) Where, pursuant to Section 21 or Section 23 or any regulations made thereunder, property is injuriously affected, the owner thereof, in respect of any matter or thing that has not been the subject of compensation, shall be entitled to compensation for such injury.

24 (2) Any question as to whether any property is injuriously affected as aforesaid and as to the amount of payment and compensation shall be determined by arbitration and the provisions of the Arbitration Act shall apply.

24 (3) Notwithstanding subsection (1), where pursuant to Section 21 the Governor in Council designates as a controlled access highway

(a) a new highway or a new portion of a highway;

(b) any land reserved for highway purposes under Section 12; or

(c) any land referred to in clause (b) of subsection (1) of Section 21,

the owner of property that adjoins such new highway, new portion of a highway or land shall not be entitled to compensation for injurious affection to that property resulting from the designation.