DECISION **2018 NSUARB 188**
M08240

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE EXPROPRIATION ACT

- and -

IN THE MATTER OF AN APPLICATION by **WILLIAM BLAKE AUCOIN, NANCY LOUISE GUICHON AND 3255773 NOVA SCOTIA LIMITED, DOING BUSINESS AS SHANGRI-LA COTTAGES** to determine compensation to be paid to them by the **MUNICIPALITY OF THE DISTRICT OF EAST HANTS** for their interests in properties located at 619 & 653 Burntcoat Road, Burntcoat, Nova Scotia, identified as PID's 45108339 & 45108370

BEFORE:	Roberta J. Clarke, Q.C., Member
CLAIMANTS:	**WILLIAM BLAKE AUCOIN** **NANCY LOUISE GUICHON** **3255773 NOVA SCOTIA LIMITED DOING BUSINESS AS SHANGRI-LA COTTAGES** Robert H. Pineo, LL.B. Jennifer Singh, J.D., Articled Clerk
RESPONDENT:	**MUNICIPALITY OF THE DISTRICT OF EAST HANTS** Marc Dunning, LL.B.
HEARING DATE:	May 14-16, 2018
FINAL SUBMISSIONS:	June 21, 2018
DECISION DATE:	**October 10, 2018**
DECISION:	**Total compensation of $116,212.00 is awarded. The Board makes orders and directions and retains jurisdiction as set out in Paragraphs [249] - [253].**

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I INTRODUCTION & BACKGROUND

[1] The Bay of Fundy is known for its dramatic tide changes. Burntcoat Head in rural Hants County, Nova Scotia, is described as the site of the world's highest tides and is the site of a lighthouse and park where visitors can view the tidal action and walk on the ocean floor at low tide. Visitors can also enjoy expansive views, and reportedly spectacular sunsets. The park, known as Burntcoat Head Park (Park), is owned and now operated by the Municipality of the District of East Hants (MEH or Respondent). The Park is reached by a roadway running from Burntcoat Road.

[2] Next door, served by the same roadway, and to the northeast of the Park, and to the south of the Park, are lands owned by 3255773 Nova Scotia Limited, a company controlled by Nancy Guichon and Blake Aucoin (collectively, Claimants).

[3] Through their numbered company, the Claimants operate a recreational cottage business called "Shangri-La Cottages" which consists of three cottages on the northeast parcel which are rented to tourists and locals on a seasonal basis. Cottage guests are able to enjoy the same expansive views and sunsets as visitors to the park. Ms. Guichon and Mr. Aucoin market their business as a peaceful rural retreat where guests can experience a quiet, private and relaxing atmosphere.

[4] To the southeast of the Park on the north side of the roadway, are lands Ms. Guichon and Mr. Aucoin own personally.

[5] The parcel immediately south of the Park is a vacant field from which hay is cut by a local resident.

[6] In 2013, the MEH wanted to capitalize on the natural beauty of the area, and the publicity generated about the tides and the Bay of Fundy in general. With funding

from provincial and federal governments, it developed a plan to enhance the visitor experience at the Park and to attract more tourists which would contribute to the local economy. By 2014, it undertook work to drill a new well, improve trails, and install new flooring in the lighthouse. Council of the MEH accepted and approved an action plan or Master Plan for the development of the Park, based on a consultant's report.

[7] In 2015, new washrooms were constructed, as well as a new stairway to access the shoreline and ocean floor at low tide. More work was carried out at the Park the following year. The work was carried out mainly using external funding provided by Tourism Nova Scotia and the Atlantic Canada Opportunities Agency.

[8] By 2016, the MEH ultimately realized that to accomplish the enhancement of the visitor experience, it needed to own the roadway leading to the Park and to expand the parking lot area. Thus, the Municipal Council decided in April 2016, to acquire parts of the property owned by Ms. Guichon, Mr. Aucoin and their numbered company. Ultimately, this resulted in an expropriation, the certificate for which was filed on June 6, 2016, in the Hants Land Registration Office.

II THE CLAIM

[9] Ms. Guichon, Mr. Aucoin, and their numbered company filed a claim for compensation with the Nova Scotia Utility and Review Board on August 14, 2017, pursuant to the *Expropriation Act*, R.S.N.S. 1989, c. 156, as amended (*Act*). They claimed:

> 3. The Claimant claims the following compensation:
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> a. Value of the lands taken: $76,500;
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> b. Compensation for injurious affection to the remaining land: $76,500;
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> c. Compensation for mitigation of injurious affection: 96,924 plus HST;

d. Recovery of all reasonable legal costs, disbursements and experts' fees;

e. Tax where applicable;

f. Interest; and

g. Such further and other relief under the *Expropriation Act* that later becomes apparent and as this Honourable Board thinks fit and just.

[Exhibit S-1, p. 2]

[10] In their pre-hearing submission, the Claimants also sought compensation for their time.

[11] The MEH in its reply filed on August 22, 2017, relied on the valuation report prepared by Ingram Varner and Associates, citing a market value of lands taken of $61,000, and injurious affection of $27,300. MEH denied any claim for injurious affection or disturbance "…beyond compensation for reasonable mitigation measures".

III THE HEARING

[12] The Board heard the claim in a public hearing at its offices in Halifax on May 14-16, 2018, inclusive. The Appellants were represented by Robert Pineo, LL.B., and Jennifer Singh, J.D., Articled Clerk, and Marc Dunning, LL.B., appeared for the MEH. The Board heard from four witnesses on behalf of the Claimants: Ms. Guichon; Jeff McLean, of Altus Group Limited, who was qualified as an expert capable of giving opinion evidence on all aspects of real estate appraisal and expropriation compensation, including property valuation, injurious affection and Canadian Uniform Standards of Professional Appraisal Standards (CUSPAP); Hans Pfeil, a licensed landscape architect, formerly of WSP Canada Inc., who was qualified as an expert capable of giving opinion evidence on the design, costing and effectiveness of berms and buffers including fences; and Mr. Aucoin.

[13] The witnesses for the MEH were John Ingram of Ingram Varner Associates, who was qualified as an expert capable of giving opinion evidence on compensation payable under the *Act*, including market value of land, injurious affection and disturbance and on the Retrospective Appraisal Report prepared by Mr. McLean; Robert LeBlanc, of Ekistics Plan + Design, who was also qualified as an expert, in his case, in landscape microclimatology, including dust and noise mitigation, and land use planning, capable of giving opinion evidence on appropriate measures to mitigate dust and noise from roads and on the design of the landscaped buffer proposed by Mr. Pfeil; Kate Friars, Director of Parks, Recreation and Culture with the MEH; April MacLean, Tourism Development Officer of the MEH; and Connie Nolan, Chief Administrative Officer (CAO) of the MEH.

[14] At the conclusion of the hearing, Counsel agreed to file written submissions and reply submissions on certain dates which were subsequently extended by agreement.

[15] With the consent of the parties, and in the absence of Counsel, as agreed, the Board undertook a site visit on May 21, 2018.

IV THE ISSUES

[16] Under the provisions of s. 47 of the *Act*, the Board is charged with determining the compensation to be paid by an expropriating authority to a property owner when the parties have not agreed on the amount of compensation. Section 26 of the *Act* describes the components of compensation.

[17] In this matter, the issues before the Board are:

- What is the market value of the land taken?

- What amount, if any, should be paid for injurious affection to the remaining lands of the Claimants?
- What amount, if any, should be paid to the Claimants to mitigate the injurious affection/disturbance?
- What amount, if any, should be paid for the Claimants' time?
- Should the Board direct any payment to be made to the holder of the collateral mortgage registered against the property?
- What rate of interest should be paid, and from what date?
- What costs are payable, if any, to the Claimants?

[18] After considering the evidence and submissions of the parties, for the reasons set out in this Decision, the Board finds that compensation to be paid by the MEH is as follows:

Market Value of Parcels A and C	$54,800.00
Market Value of Parcel B	$6,200.00
Injurious Affection from taking of Parcels A and C	nil
Injurious Affection from taking of Parcel B	nil
Mitigation of Injurious Affection to remaining lands northeast of the Park (Cottage lands)	$55,212.00
TOTAL MONETARY COMPENSATION	$116,212.00

[19] The Board orders the MEH to modify its undertaking to install additional speedbumps as set out in Paragraph 207. The Board retains jurisdiction to (a) consider any applications by the Claimants to enforce the undertakings if required, and (b) to determine any additional amount of compensation which may be required if the MEH is unwilling to modify the undertaking as directed.

[20] The Board is not persuaded on the evidence, however, that any compensation should be paid for the Claimants' time as described in Paragraph 15 of their pre-hearing reply submission.

[21] The Board retains jurisdiction to assess the amount which should be paid to the Claimants for their time attending the hearing. The Board will receive submissions from Counsel on this portion of the claim.

[22] The Board directs that, to satisfy s. 27(13) of the *Act*, a portion of the compensation relating to the corporate Claimant's land shall be held in trust by Counsel for the corporate Claimant. The amount is to be calculated in accordance with the Respondent's submissions and paid to the mortgage holder; provided if the mortgagee waives or releases the payment of the amount or any part of it, such amount or part shall be paid to the corporate Claimant.

[23] The Board also finds that the Claimants are entitled to interest at the rate of 6% on the total market value of the lands and the compensation for injurious affection, from February 2, 2016, subject to any adjustment resulting from the statutory payment made to the Claimants on August 6, 2016.

[24] The Board considers that costs are best left to be dealt with post-Decision, if the parties are unable to agree. The Board reserves jurisdiction to address, if necessary, the issue of costs which should be paid to the Claimants. The Board will hear the parties on the issue of costs on application on reasonable notice by either party.

V ANALYSIS AND FINDINGS

1.0 Market Value of Land Taken

1.1 Direct Comparison Approach

[25] Pursuant to s. 26(a) of the *Act*, when a person's land is expropriated, that person is entitled to be compensated for the market value of the land, which is defined in s. 27(2) as:

> **(2)** Subject to this Section, the value of land expropriated is the market value thereof, that is to say, the amount that would have been paid for the land if, at the time of its taking, it had been sold in the open market by a willing seller to a willing buyer.

[26] Three parcels of land were taken as a result of the expropriation: two of them, Parcels B and C, were long and relatively narrow parcels which abut and widened the roadway to the Park. Parcel A is larger and was taken to extend the parking area for the Park primarily, as well as to widen the road leading to the parking area, and to create a corridor leading to the shoreline. Parcels A and C were owned by the corporate Claimant, and Parcel B by Ms. Guichon and Mr. Aucoin. According to Mr. MacLean's evidence, the parent parcels were purchased separately from two different owners.

[27] The Board heard opinion evidence from Mr. McLean on behalf of the Claimants. He concluded that the market value of all three parcels, consisting of about 5.98 acres, was $76,500, based upon the direct comparison approach. He used eight vacant land sales to establish the value. In his opinion, the highest and best use of the land, both before and after the taking, was for recreational purposes similar to the existing cottage development. He described a "Larger Parcel" which included the lands owned by the corporate Claimant, and an area of land running from Burntcoat Road to the shoreline which is part of the lands owned by Ms. Guichon and Mr. Aucoin personally. He viewed this total area as the land with "the most immediate development potential".

[28] Mr. McLean identified eight comparable sales of vacant lands to establish a value for the expropriated lands on a per acre basis:

Index	PID	Address	Vendor / Purchaser	Sale Date	Sale Price	Area (ac)	Price per Acre	Time Adj. $/Acre	Comments
1	45183357	Lot Lc-1 (portion Of) No 215 Hwy Noel, Hants County	June Mason/June Manley Alison Rosemary Manzer	14-Aug-15	$ 23,000 Useable	3.6 1.5	$ 6,389 $ 15,333	$ 6,389 $ 15,333	Much of the lands are salt marsh with less than half upland area. Buyer planned to develop single cottage.
2	45109550	Burntcoat Road Noel, Hants County	James William Ettinger William Arnold Bright - Trudy Lynn Vroegh	09-Jun-16	$ 53,000 Useable	8.0 6.4	$ 6,625 $ 8,281	$ 6,625 $ 8,281	Flat piece of cleared farm land. Some unusable wetland at back from property. Purchaser had no relation to vendor and bought with intention of putting a cottage on property.
3	45071321	Sunrise Drive Tennecape, Hants County	Tennycape 26 Acres Inc. 3229189 Nova Scotia Limited	28-Mar-12	$ 97,500	25.8	$ 3,779	$ 3,779	Waterfront parcel in Tennecape. The transaction details could not be confirmed with the vendor or purchaser.
4	45070844	1863 Highway 215 Tennecape, Hants County	Ann Hanes Wendy F Brown	18-May-13	$ 250,000	20.0	$ 12,500	$ 12,500	Views and easy access to water. Over half cleared, other wooded. Semi-distant relationship between Vendor/Purchaser. Realtor thinks it went above market value. Site includes 2 streams, bisecting property.
5	45395480	1925 Highway 215 Tennecape, Hants County	Anthea Diane Burden Mary Ellen & Ryan Seale	06-Oct-14	$ 10,000	2.6	$ 3,876	$ 3,876	Waterfront parcel in Tennecape. The transaction details could not be confirmed with the vendor or purchaser.
6	55057434 & 55057442	Lot 2 & 3 West Halls Harbour Road Halls Harbour, Kings County	Joyce & John Neville Gregory & Katherine Sanford	30-May-13	$ 117,000	6.2	$ 18,871	$ 18,871	Two adjacent parcels with challenging access and uncleared. Halls Harbour would be considered superior in terms of location.
7	45180049	No. 215 Highway Kempt Shore,	Louis Dugas David & Beverly Tebogt	20-Jun-13	$ 180,000	15.0	$ 12,000	$ 12,000	Parcel of land with path to shore. Included a house and shed which according to the realtor was a tear down. The land was not cleared and sloped toward the water.
8	55010607	Lot Jin-2 Ocean View Road Baxters Harbour, Kings County	Mark Neary Jason H. Deal	12-Dec-16	$ 48,000	0.96	$ 49,807	$ 49,807	Small near Baxters Harbour in Kings County. The parcel had frontage on the Bay of Fundy and was accessed via a right of way that was a "goat path" according to the realtor. The site could most likely support a three season cottage.

[Exhibit S-4, pg. 39]

[29] Although Mr. McLean made no adjustment for time as he said the sales were all relatively close to the effective date of the expropriation, he adjusted for the quality of the land and the respective locations. Mr. McLean concluded that his Sale Nos. 1, 7 and 6 were the best indicators of value and concluded the per acre value of the land taken to be $15,000, with a 50% reduction for the areas which were encumbered by access easements.

[30] On cross-examination, Mr. McLean acknowledged he was not aware of an easement agreement between the corporate Claimant and the MEH over a portion of Parcel A.

[31] Mr. McLean testified that he visited all the comparable properties except Sale No. 8 in Baxter's Harbour which he had an assistant view on his behalf. His visit to Sale No. 6 in Hall's Harbour was after he had written his report, but he was personally

familiar with the area. He also stated that he had contacted the realtors who had been involved with the sales. As well, he had spoken with the vendors in all but two instances.

[32] In Mr. McLean's opinion, the Shangri-La property is "very unique" and there were not many comparables to establish his benchmark. He emphasized the fact that the property was next to the attraction of the Park; the only comparable which he described as being located near an attraction was the Hall's Harbour sale, where he described the market, rather than the land, as being superior to the Shangri-La location.

[33] When cross-examined about his Sale No. 1, on which he relied, Mr. McLean agreed that he had not attributed any value to anything other than what he considered the usable area of the land, discounting the marshland entirely. He agreed that the value was a "significant consideration in getting to that $15,000 per acre number." Mr. McLean also acknowledged that he had considered his Sale No. 4 which sold for $12,500 per acre as comparable, but that he was "a little uncomfortable" about the sale because he understood there was a relationship between the parties to the transaction.

[34] Since he had not valued the three expropriated parcels separately but used the larger parcel concept, Mr. McLean said he had not considered that Parcels B and C were further away from the water. He agreed that it was necessary to consider that there is a well, owned by the MEH, on Parcel A which could impact future development. He also agreed that Ms. Guichon had told him that she had not investigated getting approval for building more cottages.

[35] Mr. Ingram testified on behalf of the MEH. In his opinion, the market value of the land taken, which he valued as three distinct parcels, was $61,000. He also used

the direct comparison approach. He used six comparable vacant land sales in reaching his opinion:

SCHEDULE OF VACANT LAND SALES

# Property	Sale Date	Sale Price	Area (acres)	Price /acre	Remarks Vendor/Purchaser
1] 9425 Highway 215 Maitland PID 45159811	Feb-16	$24,000	6.50	$3,692	Wooded land with river frontage on Shubenacadie River just south of Cobequid Bay. Vendor: Ralph and Edna Bilby Purchaser: Melissa Yorke and Jeffrey Harrington
2] Highway 215 Noel PID 45183357	Aug-15	$23,000	3.60	$6,389	Small land parcel with view of Cobequid Bay. No water frontage but located very close to the shore. Vendor: June Mason Purchaser: Alison Manzer
3] 1031 North Medford Road North Medford PID 55018006	Sep-13	$289,000	21.28	$13,581	Mix of cleared and wooded land with frontage on Minas Basin. Newly poured concrete foundation and driveway in place. Vendor: Richard and Pamela Matheson Purchaser: Robert and Carol Webb
4] Highway 215 Kempt Shore PID 45180049	Jun-13	$180,000	15.00	$12,000	Cleared land with frontage on Minas Basin. Old house on site has no contributory value. Old cemetery located on the property. Vendor: Louis Dugas Purchaser: David and Beverly teBogt
5] 1863 Highway 215 Tennecape PID 45070844	May-13	$250,000	20.00	$12,500	Mix of wooded and cleared land with frontage on Cobequid Bay. Some sandy beach area. Estate sale that sold after 6 months of market exposure. Vendor: Estate of Sarah Brown Purchaser: Wendy Brown
6] Sunrise Drive Tennecape PID 45071321	Mar-12	$97,500	25.80	$3,779	Wooded land with frontage on Cobequid Bay. Currently listed for sale at an asking price of $299,900.00 since March 2016. Vendor: Tennycape 26 Acres Inc. Purchaser: 3229189 Nova Scotia limited

[Exhibit S-8, p. 20]

[36] Mr. Ingram did not share Mr. McLean's view of the highest and best use; rather, he said that the highest and best use of the lands north of the right-of-way to the Park, both before and after the taking, would be the existing recreational and residential use, with short-term potential for expansion. The lands to the south of the right-of-way, and to the east "would have a highest and best use as an agricultural and/or rural residential use" with future long-term potential for "tourism related and seasonal

residential uses". In Mr. Ingram's view, the distance from the water was a factor in determining the highest and best use. He also confirmed his opinion that the change in the configuration of the lands to the south due to the expropriation did not have an impact on its highest and best use.

[37] On cross-examination, Mr. Ingram said that he had been aware of factors about the development of the Park and tourism in the area, but that this did not lead him to conclude that the likelihood of development on the southern lands would be more imminent than he had estimated.

[38] Mr. Ingram made some adjustments to the prices for his comparable sales for time and considered their location and physical characteristics. He gave greatest weight to his Sales 4 and 5 and used the overall adjusted average rate to support the value of $13,000 per acre for the unencumbered area of Parcels A, and C, reducing the value of the encumbered areas by 50%, just as Mr. McLean had done. Like Mr. McLean, Mr. Ingram was not aware of the easement agreement between the corporate Claimant and the MEH.

[39] Mr. Ingram did not use the larger parcel concept because he attributed different highest and best uses to the areas. Thus, he valued Parcel B separately, noting it comes from a significantly larger parcel and is wooded land. He applied a value of $6,500 per acre to Parcel B, relying on his Sale 2. No reduction was required for encumbrances.

[40] The Board observes that of the comparable sales used by both appraisers, four were common to both reports:

- Mr. McLean's Sale No. 1 is Mr. Ingram's Sale 2 (Lot LC-1, Noel);
- Mr. McLean's Sale No. 7 is Mr. Ingram's Sale 4 (Kempt Shore);

- Mr. McLean's Sale No. 4 is Mr. Ingram's Sale 5 (Brown property,Tennecape); and,
- Mr. McLean's Sale No. 3 is Mr. Ingram's Sale 6 (Sunrise Drive, Tennecape).

[41] The differences in judgment as to which property was most comparable to the Claimants' lands relate to how Mr. McLean adjusted his Sale No. 1 (Lot LC-1, Noel); the distance of two of Mr. McLean's comparables from the Shangri-La property (i.e. Hall's Harbour and Baxter's Harbour); the use of Mr. McLean's Sale. 6 (Hall's Harbour); and the use of Mr. Ingram's Sale 5 (Brown property).

[42] Mr. Ingram toured the Shangri-La property and the area in general, but did not visit the comparables, choosing to rely on various mapping sources available to him. He did not contact any realtors, vendors or purchasers. Instead, he thought that the MLS information and data available to him in his office was sufficient to rely on the sales he selected as relevant.

[43] While the ultimate values used by both appraisers are not as significantly different as the Board has seen in other expropriation matters, the Board notes that the major difference between the two appraisal reports is, as far as land value is concerned, the use of the larger parcel concept. Mr. McLean considered all three parcels to be part of a larger parcel with all three having the same highest and best use and per-acre value. Mr. Ingram said that the highest and best use was not consistent for all three parcels, and that those parcels nearer Burntcoat Road and further from the water would be less valuable. He said that this concept would not allow a uniform rate per acre.

[44] Both appraisers consider the market in the general area of the expropriated property to be relatively stable with little activity. The Board considers that of the comparables used by Mr. McLean, Sales Nos. 6 and 8 are too distant to be considered

truly comparable; further, the weight given to Sale No. 6 in Hall's Harbour because it is near an attraction does not persuade the Board. As suggested by Mr. Ingram, the Board concludes that Hall's Harbour sales attract a premium.

[45] As to the uniqueness of the property, the Board favours Mr. Ingram's view when he testified:

> Q. Okay, and when Mr. McLean testified, he said that, in his view, there weren't many comparable sales. He said the site is unique. What do you say to that?
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> A. Certainly, there ... there's not a lot of activity in that market. There are very few sales. I guess that's not unique to Nova Scotia in general, but the rural areas there tends to be a scarcity of comparable sales status. So it's ... it's a typical situation in that regard. I don't know if I'd characterise the subject as unique. All of the properties have some unique characters to them relative to each other. So I guess in that sense it is unique, but I don't know if I'd use that word to characterise it.
>
> Q. What about the fact that it is located beside a park?
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> A. That has ... that has strengths and weaknesses, I guess. The ... the proxim- ... the fact that a park is in the general area is ... is a good thing. It ... it's a feature, a positive feature to the general area being next door to it. As ... you know, as we've heard here, it has, you know, merits and ... less desirable features. So I ... I certainly didn't see anything in the data I looked at that suggested that that location in specific merited adjustment or premium over the ... the sales that I was looking at.
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> [Transcript, pp. 550-551]

[46] The Board also considers that in valuing Lot LC-1 in Noel, which is closer to the expropriated lands, the marshland should not be entirely discounted, accepting Mr. Ingram's view that it has contributory value. Mr. McLean said that this sale was important in setting the upper limit of his range of per-acre value. Without including this sale, and eliminating the Hall's Harbour transaction, as well as the Baxter's Harbour sale, Mr. McLean's range would be narrowed.

[47] Mr. McLean acknowledged that he had considered his Sale No. 4 (Brown property), and his Sale No. 7 (Kempt Shore), to which Mr. Ingram had given the greatest weight. With the time adjustment used by Mr. Ingram for these two sales, which occurred about three years before the effective date of the expropriation, the Board is persuaded that $13,000 per acre is an appropriate value.

1.2 Impact of October 2014 Easement Agreement

[48] Both appraisers made a 50% adjustment to the value of the encumbered land for the areas subject to certain identified easements, which the Board accepts. The Board notes that neither of them was aware of the October 2014 easement agreement between the corporate Claimant and the MEH. As a result, neither of them adjusted for it.

[49] Mr. Pineo reviewed with Ms. Guichon the circumstances surrounding the receipt and execution of the easement agreement. Mr. Dunning reviewed this with Ms. Nolan, as well. She said that she did not want the MEH to start work for the well on lands that it did not own and required the easement.

[50] The easement agreement contains Schedule C showing the area intended to be burdened by the easement, and describes an area measuring 164 meters by 85 meters on the northern part of the southern lands, immediately adjacent to the Park property, and an area 10 meters wide running along the eastern boundary of the Park to the shoreline.

[51] Within the area is the well the MEH installed. Mr. Ingram testified that the existence of the well would not impact his opinion of value. He was not asked if he would reduce the value of the land due to the existence of the easement in question.

[52] Mr. Pineo submitted that the Board should not take into account any decrease in value of Parcel A by virtue of s. 33(c) of the *Act,* which provides:

> **33** In determining the value of land expropriated, no account shall be taken of
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> …
>
> (c) any increase or decrease in the value of the land resulting from the anticipation of expropriation by the expropriating authority or from any knowledge or expectation, prior to the expropriation, of the purpose for which the land was expropriated; or
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> …

[53] Both the granting of the October 2014 easement and the installation of the well occurred much earlier than the expropriation. However, the Board is not persuaded that the evidence shows that any decrease in value due to the well or the easement resulted from any knowledge of the purpose of the expropriation. The Board agrees with Mr. Dunning's submissions that the evidence does not support a conclusion that expropriation was a consideration at that time. The Board concludes that s. 33(c) does not apply here.

[54] Mr. Pineo also pointed to the lack of a witness to Ms. Guichon's signature, the failure of the MEH to offer her the opportunity to obtain independent legal advice, the failure to register the easement, and her statements that she did not appreciate the nature and consequences of the document. In Mr. Pineo's submission, "the easement was never perfected and was not enforceable at law". He said that it did not comply with the requirements of the *Conveyancing Act,* R.S.N.S. 1989, c. 97 because it was not sealed or registered.

[55] Mr. Dunning submitted that it is not necessary for the easement to burden or run with the Claimants' propery in order to be enforceable. Further, he said that Ms. Guichon had "…testified that she read and understood the easement prior to signing it", and that its language was clear about which lands were affected and what work was to be done.

[56] The Board observes that the lack of a seal by the corporate Claimant may not be fatal, given the provisions of s. 13(1) of the *Corporations Miscellaneous Provisions Act,* R.S.N.S 1989, c. 100, which address the absence of a seal on a contract executed by a corporation.

[57] The Board also observes that the provisions of s. 30(2) of *Registry Act,* R.S.N.S. 1989, c. 392, as amended, mean proof of the signature of one of the parties is sufficient to permit registration. As the signature on behalf of the MEH is witnessed, and an Affidavit of Execution is sworn, as required by s. 31(b) of the *Registry Act*, the Board concludes that the lack of a witness to Ms. Guichon's signature is not fatal either. The Board is also mindful of Ms. Guichon's acknowledgement during the hearing that she signed the agreement and returned it to Kim MacDonald of the MEH.

[58] The Board also notes Ms. Guichon's communications with Ms. MacDonald about the extent and location of the area subject to the easement lead it to conclude that it cannot be said that absence of legal advice negates the agreement.

[59] As for the failure to register the easement agreement, the Board agrees with Mr. Dunning that the effect of registration is to give notice to third parties. The failure to register does not mean the agreement is not binding on, and enforceable between, the parties themselves.

[60] The Board observes, however, that for compensation required by the *Act,* it must determine the market value of a property, defined as the amount which a willing buyer would pay to a willing seller. The lack of the notice of the encumbrance of an easement to a buyer, which would otherwise have been provided by its registration, leads the Board to find that there should be no adjustment in value of Parcel A due to the October 2014 easement.

1.3 Larger Parcel Concept

[61] The Board must now determine whether the $13,000 per acre value should be applied to all three parcels taken, using the larger parcel concept proposed by Mr.

McLean, or accept Mr. Ingram's individual parcel approach, and make an adjustment for land further away from the water and closer to Burntcoat Road.

[62] With respect to the highest and best use of the lands, Mr. McLean had said that Parcel A would be the next logical place for the Claimants to develop. He suggested that it is higher and had good views of the Bay of Fundy. However, he agreed that Ms. Guichon had told him that they had not pursued seeking approval for development there.

[63] The Board does not agree completely with Mr. McLean. It considers that only the portion of Parcel A which is north of the Park roadway on the corridor to the shore to possibly be an area which the Claimants might develop in the reasonably near future. This is because it is adjacent to the existing cottages, although the Board is mindful that being so close to the Park, the Claimants might prefer to have retained it as is. The Board further observes that the plan identified by Ms. Guichon and prepared for the previous owner of the lands shows possible development of the northern portion of the corporate Claimant's property with additional cottages. In the Board's view, that area is more likely the site of any future development. As will be discussed in the section of this Decision on injurious affection, the Board considers that, if the Claimants had any plans for future expansion, it would be on the northern lands.

[64] Consequently, the Board accepts Mr. Ingram's opinion that the highest and best use of the northern lands and the southern lands are different. The southern lands have no waterfrontage, although they have a water view. Other than the Noel property (Mr. McLean's Sale No. 1/Mr. Ingram's Sale 2), the Halls Harbour property (Mr. McLean's Sale No. 6), and Mr. McLean's Sale No. 2 on Burntcoat Road, the properties used by both

appraisers all have waterfrontage, although in one case (Mr. Ingram's Sale 1 in Maitland), it was on the Shubenacadie River.

[65] Mr. Ingram applied the value of $13,000 per acre to the Parcel A lands, apart from the areas subject to existing easements, which he valued at 50% less. He also valued Parcel C, which runs from the intersection with Burntcoat Road, in the same fashion, even though it is without waterfrontage. He applied a value of $6,500 per acre to Parcel B, which also runs from a small corner of Parcel C at the intersection with Burntcoat Road and is part of the lands owned by Ms. Guichon and Mr. Aucoin personally. He made that adjustment due to its nature – wooded land, part of a larger parcel, and "well removed from the water frontage". He used the per-acre value of his Sale 2 (Noel) to support the value.

[66] Mr. McLean applied the value he had opined to all the land taken, regardless of ownership, but with the 50% adjustment for the lands encumbered by easements. He used a "larger parcel concept" which he determined to be the area "with the most development potential" and comprised all the lands owned by the corporate Claimant and an area of the personally-owned lands extending from Burntcoat Road to the shoreline, of which Parcel B is a narrow part. There was no evidence before the Board about the width of that swath of land. The width, at the shoreline, of the part taken from the corporately owned lands is 66 feet.

[67] It was to the entire larger parcel that Mr. McLean ascribed the value and rate per-acre. Rather than consider the three parcels separately, he considered them to be "part of the whole". He agreed, however, that Parcels C and B were further than the

front of Parcel A from the water, but made no reduction for that. In Mr. McLean's opinion, this concept can be used, even where multiple properties are not contiguous.

[68] Mr. Dunning explored the larger parcel concept with Mr. Ingram:

> Q. Larger parcel. Can you give us your opinion on that?
>
> A. Yeah, certainly. That's a consideration in ... in a partial taking appraisal in particular where your larger parcel can be comprised of a multitude of smaller individual PID's or, you know, different parcels that have ... have a consistent use, a consistent ownership that they can be viewed as forming part of ... of a single asset, a single property and would have ... presumably in that situation would also have a similar highest and best use overall.
>
> Q. And why didn't you apply that in your appraisal?
>
> A. I looked at ... basically, the highest and best use in my conclusion was there were two highest and best uses, as I was mentioning earlier. The northerly portion of the property is well suited, and to a large extent is already used, as a tourism-related use as the cottages. To the south I saw ... I felt the highest and best use of those lands was agricultural or rural residential use. So they ... they needed to be valued on a ... a separate basis because they had differing highest and best uses, which impacts on the rate-per-acre that would apply in either case.
>
> Q. So just to be clear. Because you chose to look at highest and best use in two types - one for the north, one for the south - you can't do that ... I'm just trying to understand this. You can't have highest and best use for different parts and also apply a larger lot concept. They're incompatible approaches. Am I ...
>
> A. Yeah, essentially, because ...
>
> Q. ... understanding that correctly?
>
> A. ... what the larger parcel is allowing you to do is apply a uniform rate to the larger parcel, a uniform rate-per-acre to the larger parcel. So I guess you could use it if you took an average of the rates indicated by the two highest and best uses, but because there are two highest and best uses, it ... it sort of defeats the point of the larger parcel. There isn't a consistent use across the ... the whole parcel. So ... or an anticipated use across the whole parcel. So they need to be looked at in isolation.
>
> Q. And in your opinion, is it appropriate to look at this larger parcel concept with respect to the subject in this case or not?
>
> A. In my opinion, no, because there ... there are two distinguishable highest and best uses for the overall property. So I ... I believe they need to be viewed separately on that basis.
>
> [Transcript, pp. 579-581]

[69] In closing submissions, the Respondent said that "unity of ownership", which is a required component of the larger parcel concept, does not exist for the parcel identified by Mr. McLean, because part of the lands are owned by the corporate Claimant, and part are owned by Ms. Guichon and Mr. Aucoin. While they are directors of the numbered company, the MEH said it is "a distinct and separate legal entity".

[70] Further, the Respondent said, because there are, in Mr. Ingram's opinion, two different highest and best uses for the lands to the north and south, the larger parcel concept cannot be used.

[71] In their reply closing submissions, the Claimants submitted that there is unity of ownership, taking into account context, as well as a broader, and not exhaustive, concept of owner under the *Act*. They said that the Board had implicitly applied the larger parcel concept in *Re Expropriation Act*, 2006 NSUARB 109 (*Johnson*), where different parcels were held in the name of each spouse, but operated "as a single enterprise".

[72] Further, the Claimants relied on a decision of the British Columbia Court of Appeal in *Holdom v. British Columbia Transport*, 2006 BCCA 282, where non-contiguous lands with different owners were considered. In that case, the Court said:

> [53] The Board treated Parcel B and Lot 89 together as a "larger parcel" on the basis that Chevron's leasehold interest in one and fee simple ownership of the other, together with a single use for both, constituted unified ownership for the purpose of s. 40(6). Seen that way, the larger parcel is contiguous to the land taken. With respect, I agree with the Board's interpretation and application of the Act as reflected in the following excerpt from the Board's reasons:
>
> > [78] No case authority or learned commentary was brought to our attention which interprets the meaning and scope of section 40(6) of the Act, or any equivalent in other expropriation statutes, so as to assist in determining the entitlement question before us. Absent such authority we have nevertheless concluded from our review of the circumstances of this case in light of the wording of section 40(6) that it is appropriate to compensate Chevron for any reduction in market value to Lot 89 resulting from the partial taking and the Project.
> >
> > [79] The fact is that Parcel B and Lot 89 are contiguous, i.e., physically touching one another. The two lots had also for many years been inextricably linked as a "joint site" or "larger parcel" for gas station use by the Burnaby covenant and were tied together by the long term lease between Holdom and Chevron. However, as Transit argues, mere usage as distinct from ownership may not be sufficient to satisfy the requirements of section 40(6).
> >
> > [80] Be that as it may, the courts have said that, in the context of entitlement to compensation under expropriation law, a broad and liberal interpretation should be applied. **In the present instance we do not consider that an overly restrictive interpretation should be placed on the meaning of "common ownership" or "unified ownership" so as to require strict unity of title to the two parcels in question.** In the present instance Chevron was the owner in fee simple of Lot 89 at the

> date of the partial taking from Parcel B. It also had for the purposes of the Act an acknowledged ownership interest as lessee under the long term lease of Parcel B. As well, it owned all of the service station improvements constructed on Parcel B. Therefore, we are persuaded by Chevron's submission that it should be considered a defined "owner" of both lots comprising the larger parcel. In our view Chevron as the owner of Lot 89 retained land that was contiguous to the expropriated land or, alternatively, nearby land that was enhanced by unified ownership with the land expropriated.
>
> [54] B.C. Transit submits that s. 40(6) must be construed as a complete code for determining compensation for partial takings and no regard should be had for the wider meaning given in the definitions section. Accordingly, "owner", within the four corners of s. 40(6), must mean registered owner in fee simple.
>
> [55] **This is a bare assertion with no logical, contextual, or policy support. I can find no reason to adopt a narrower definition of "owner" for the purposes of partial takings than the Act provides generally in s. 1.** The Board's approach accords with the purpose of the Act and gives full effect to s. 40(6). [Emphasis added in the original]
>
> [Claimants' Post Hearing Reply Submissions, June 21, 2018, pp. 3-5]

[73] The Claimants went on to submit that the personal lands "were held for a common purpose with the corporately held cottage lands: for the operation and expansion of the cottage business". They pointed to Ms. Guichon's testimony about considering putting some "high-end RV spots" on the southern lands and Mr. Aucoin's having started a culvert and "sort of an access and looked at the cost of gravel".

[74] The Board is unwilling to speculate on why the large parcel to the east of the roadway leading to the Park is held by Ms. Guichon and Mr. Aucoin personally, rather than through a company which they control.

[75] The Board is not persuaded on the evidence, however, that there is a common purpose or usage for the two parcels, nor for the portion of the corporately held lands to the south of the Park, currently only used for a local resident to take hay. Further, the Board has accepted Mr. Ingram's opinion that the highest and best use of the parcels is not the same. As a result, even though the lands taken might be considered

contiguous, they cannot be said to have the same utility as far as the larger parcel concept applied by Mr. McLean is concerned.

[76] The Claimants submitted that Mr. Ingram had assigned the same per-acre value to Parcel C, which is part of the lands south of the Park, as Parcel A, and "adjusted it downwards by 50% for the presence of the existing easement and its distance farther away from the water." This is not consistent with the Board's understanding of Mr. Ingram's opinion of the value of Parcel C. Further, the Claimants appear to suggest that Parcel B is subject to an easement, which does not accord with the evidence, including the Survey Plan prepared by Alan Gallant which is included in the Agreed Statement of Facts.

[77] However, the Board observes that, a lower value is assigned to Parcel B, much of which is equally distant from the water as Parcel C. While this initially appears contradictory, the Board understands that the value is based on a per-acre value of the much larger parent parcel of Parcel B, and Parcel C is a part of the southern lot, where Mr. Ingram did not adjust for the area nearer Burntcoat Road.

1.4 Findings – Market Value of the Lands Taken

[78] The Board is persuaded by the evidence of Mr. Ingram, for the reasons outlined in the foregoing sections of this Decision. Therefore, the Board finds the market value of the land taken is:

Parcels A and C	**$54,800**
Parcel B	**$ 6,200**
Total Market Value	**$61,000**

2.0 Injurious Affection

[79] The *Act* provides, in s. 26(c), that a party is to be compensated for injurious affection to remaining lands where only a portion of the party's lands are taken. It is defined in s. 3(1)(h)(i):

> **3** **(1)** In this Act,
> …
> (h) "injurious affection" means
> (i) where a statutory authority acquires part of the land of an owner,
> (A) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and
> (B) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute,

[80] The definition in the circumstances of this matter, where the MEH acquired part of the land, contemplates two categories of injurious affection: a resulting reduction in market value to the remaining land; and personal and business damages "resulting from the construction or use, or both of the works thereon".

[81] In pre-hearing submissions on behalf of the Claimants, Mr. Pineo addressed injurious affection, being: the loss of market value to the southern lands; and the loss of privacy to the "cottage business lot". The Board understands that this second issue does not relate to any reduction in market value, but rather, to personal or business damages contemplated by s.3(1)(h)(i)(B) of the *Act.*

[82] The Board will separately consider the two constituents of injurious affection, as defined, in this Decision.

2.1 Reduction in Market Value of Remaining Land

[83] Mr. McLean opined that an amount of $76,500 should be paid for compensation due to injurious affection to the remaining lands, the same amount he opined as the market value of the lands taken.

[84] In his opinion, only the southern parcel of the corporately held lands, consisting of about 11 acres after the taking of Parcels A and C, were injuriously affected by a reduction in market value. He attributed this to the change in the configuration of the parcel which would impact its development potential, and the means of access to it. He testified that the southern lands were one of the best areas for development, because they were closest to the Park, as well as the water and the existing cottages, with good access to the roadway. He thought it would be a good area for an RV park because of its proximity to the Park and the view to the water.

[85] Mr. McLean described the property before and after the taking:

> A. So I ... I wanted to ... to kind of ... the map on page 46 of my report is ... is good because it shows what's ... what's happening and outlines the southern remainder nice and clearly. But I like this map because it really shows what happened to the property. So before, we have a nice squared-off development site where the best frontage on what I would have called the southern remainder has direct exposure to the park. It's connected, basically, to the existing development. If you wanted to use amenity space, you go right across there.
>
> In ... after the expropriation what you're left with is a narrow, pretty much, area which, to me, which only ... you wouldn't put a cottage there. It would mostly just be used to access the part at the back. It's more of a corridor than an actual develop-able area now, in my opinion. The back portion, I think, would be develop-able over a longer time frame now. I would think that you would even ... when you think about the site as an integrated development site, you would even begin to develop land on the adjacent uncleared PID first to keep it as an integrated site. It's basically been ... the southern remainder has basically been cut off from the core operation, and that's ... that was my initial kind of observation. To quantify that, you know, my ... and considering my highest and best use is for recreational development, I would have ranked that remainder portion to be less comparable to the ideal, and that's why I applied a lower rate to it after the takings.
>
> [Transcript, pp. 218-219]

[86] As a result, Mr. McLean reduced the per-acre market value of the lands remaining in the southern parcel from the $15,000 per acre he had used to determine

market value of the land taken to $8,000 for unencumbered land. He determined that value from the ranking of his comparable sales, due to the less favourable configuration and less immediate likelihood of development. He believed the land was less desirable than it had been before the taking.

[87] Mr. McLean did not conclude that the northern part of the company's lands was injuriously affected. This seems curious to the Board as part of Parcel A is a part of that area he considered the "larger parcel" to determine the highest and best use. As noted earlier in this Decision, the Board considers the lands there might be more likely to be developed in any expansion of the cottage operations than the southern parcel.

[88] The plan for the sewage disposal bed prepared for the previous owner showing three additional cottages on the site did not lead the Board to conclude that the taking of the swath of land on the northern side of the roadway into the Park would impair the prospect of any future development. There was no evidence before the Board on which it could conclude that the market value of that remaining area of the corporately held lands was reduced because of the taking.

[89] In contrast, Mr. Ingram stated in his report:

> **8.3 Injurious Affection**
>
> As noted in *section 6.2*, the anticipated increased visitation to Burntcoat Head Park would be expected to have some positive effects to the local economy but it could also adversely impact on the marketability of the Shangri-La cottages operation due to a possible decrease in privacy. As a result, a degree of buffering would serve to mitigate this exposure to increased traffic. The property is currently directly exposed to the roadway and the park and this has been the case since the development of the cottages.
>
> [Exhibit S-8, p. 24]

[90] The Board notes that Mr. Ingram referred to the "…marketability of the …cottages operation", and not the market value of the land. Thus, the Board concludes that Mr. Ingram did not opine that the market value of the remaining lands was reduced.

The Board will address the element of injurious affection determined by Mr. Ingram in the section of this Decision regarding personal and business damages and mitigation below.

[91] While Mr. Ingram agreed that the area of the remaining land is less, he opined that there is still potential for development. In his review of Mr. MacLean's report, he said:

> As a result of the taking, the width and configuration of the remainder is changed and the size is reduced but potential for development remains. Therefore, a reduction in the applicable rate per acre does not appear to be reasonable. However, if this remainder was seen to be negatively impacted in terms of development potential, as expressed in the Altus report, any reduction in the rate per acre would have to be applied to a lower rate per acre than the $15,000.00/acre used in the calculation in that report. Therefore, the estimated amount of injurious affection is considered to be overstated.
>
> [Exhibit S-9, p. 8]

[92] Although Mr. Ingram agreed that there was a change in the configuration of the southern portion of the corporately owned lands, he did not believe it affected its highest and best use. He assumed that access to the lands would be unchanged.

[93] There appeared to be no disagreement between the appraisers that the taking of Parcel B did not result in injurious affection by reducing the value of the lands owned by Ms. Guichon and Mr. Aucoin personally.

[94] Counsel for the Claimants submitted that, as opined by Mr. McLean, the shape of the remainder of the southern land was irregular and would be undesirable to a developer. He argued that the land was narrower, especially at the front. Further, he said the most desirable - and more valuable - portion, closest to the park and the water, had been removed. The Board understood that this referred to the area taken for the parking lot expansion, and did not include the portion leading to the shoreline, however.

[95] Consequently, Mr. Pineo submitted that the market value of the southern lands had been reduced because of the acquisition of Parcels A and C.

[96] Counsel for the MEH, however, submitted in pre-hearing submissions that only about one-quarter of the lands were taken, and the remainder had not changed in either configuration or width. Mr. Dunning submitted that the Board should reject Mr. McLean's opinion that the southern portion was the best area for development and was now too narrow. He said this opinion was unfounded as it did not consider the 2014 easement, the installation of the well, and the lack of any documented plans for development.

[97] Instead, Mr. Dunning submitted that the Board should accept Mr. Ingram's evidence that the southern lands were not injuriously affected as its width remained sufficient for residential development and the utility of the land had not changed. Further, he argued that the October 2014 easement had already impacted the development potential of the lands.

[98] The Board is not persuaded, on a balance of probabilities, that the remaining lands of the corporate Claimant to the south of the park and the roadway, have been reduced in market value by the taking of Parcels A and C. The Board considers that the changes in the configuration of the land do not mean that the land is any less likely to be developed than it was before the taking – there is merely less land available for that purpose. The award for the value of the land taken is compensation for that. In the Board's view, to award an additional amount as injurious affection would be tantamount to allowing double recovery.

[99] Therefore, the Board finds there is no reduction in market value due to the acquisition of the three parcels, and therefore, no amount of compensation is payable to the corporate Claimant or the individual Claimants for such a claim.

[100] The Board notes, however, that s. 3(1)(h)(i)(A) of the *Act* also refers to reduction in market value caused, not just by the acquisition, but alternately "…by the construction of the works thereon or by the use of the works thereon or any combination of them". The Board understands the "combination" could include the "acquisition" as well as "the construction" and/or "the use". This became the subject of submissions by both Counsel in connection with the applicability of the "*Edwards* rule" in the context of work done at the Park and the museum on the Park lands, including various improvements in the years preceding the expropriation. The Board discusses this issue later in this Decision.

2.2 Personal and Business Damages

2.2.1 Injurious Affection or Disturbance?

[101] In their Notice of Hearing, the Claimants did not specify a claim for disturbance, but claimed $96,924 plus HST for mitigation of injurious affection. The Board notes that Counsel for the Claimants confirmed during the hearing that no claim for HST was being advanced, however.

[102] In their pre-hearing reply submissions, the Claimants emphasized that while Mr. McLean had referred to this amount as "disturbance damages" in his report, their claim was for the mitigation of the nuisances of noise, dust, and privacy issues, under the heading of injurious affection damages.

[103] Mr. Ingram opined that there was no basis for a claim for disturbance damages; instead, he addressed the claim for injurious affection damages in his discussion of a tree buffer, and his commentary on Mr. McLean's disturbance claim.

[104] The MEH, in its pre-hearing submissions, identified the provisions of the *Act* which address disturbance. Section 26, which describes the elements of compensation for expropriated lands provides that the owner of such lands is entitled to compensation for:

> **26** ...
>
> (b) the reasonable costs, expenses and losses arising out of or incidental to the owner's disturbance determined as hereinafter set forth;

[105] Disturbance is further referenced in s. 27(3):

> **27**...
>
> **(3)** Where the owner of land expropriated was in occupation of the land at the time the expropriation document was deposited in the registry of deeds and, as a result of the expropriation, it has been necessary for him to give up occupation of the land, the value of the land expropriated is the greater of
>
> (a) the market value thereof determined as set forth in subsection (2); and
>
> (b) the aggregate of
>
> (i) the market value thereof determined on the basis that the use to which the land expropriated was being put at the time of its taking was its highest and best use, and
>
> (ii) the costs, expenses and losses arising out of or incidental to the owner's disturbance including moving to other premises but if such cannot practically be estimated or determined, there may be allowed in lieu thereof a percentage, not exceeding fifteen, of the market value determined as set forth in subclause (i),
>
> plus the value to the owner of any element of special economic advantage to him arising out of or incidental to his occupation of the land, to the extent that no other provision is made by this clause for the inclusion thereof in determining the value of the land expropriated. [Emphasis added]

[106] The MEH went on to submit that what is allowed as disturbance damages must be reasonable and arise from disturbance caused by the expropriation. Here, it argued, the Claimants and their property were exposed to dust, noise and loss of privacy prior to the expropriation. At most, they could recover for any increase in any of them. Further, it submitted that the buffer proposed in Mr. McLean's report, based on the report of Mr. Pfeil, would over-compensate the Claimants, and is therefore unreasonable. The

MEH further stated that the same arguments apply to the claim for injurious affection damages.

[107] In its post-hearing reply submissions, the MEH noted that the Claimants were relying on the decision in *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority* [1997] 1 S.C.R. 32 which discusses "full and fair compensation to an owner" due to its characterization of the impact and nature of expropriation. It suggested that *Dell Holdings* had addressed a specific claim for disturbance damages in a "shadow period", and thus could be distinguished.

[108] In anticipation of such submissions, the Claimants argued that the Supreme Court of Canada in *Dell Holdings* did not confine its reasoning to disturbance damages.

[109] The Board notes that in discussing s. 26(b) and s. 27(3) of the *Act,* Coates and Waqué, in the *New Law of Expropriation,* indicate that in some cases it is unclear whether damages were awarded for injurious affection or disturbance. While Todd, in *The Law of Expropriation and Compensation in Canada,* 2nd ed., says that disturbance damage "…may be defined generally as economic loss suffered by an owner by reason of having to vacate expropriated property", it seems clear from a review of both texts that disturbance damages are not necessarily confined to situations where the owner has had to move or vacate the property.

[110] In this matter, there is no evidence that the Claimants had to move or vacate any portion of their properties. Consequently, the Board considers it appropriate to treat the claim put forward under the heading of injurious affection, rather than for disturbance damages. The Board notes, as an aside, that disturbance damages do not attract a claim for interest under s. 53 of the *Act.*

2.2.2 Resulting from the Construction or Use, or Both?

[111] Claims for personal and business damages for injurious affection as defined in s. 3(1)(h)(i)(B) of the *Act*, unlike those for reduction in market value in s. 3(1)(h)(i)(A), must result from the construction or use, or both, of the works, but not the acquisition of the land. The Board now turns to a consideration of how that applies in this matter.

[112] The term "works" is not defined in the *Act*; nor are the terms "construction" or "use". The Board discusses the meaning of "works" in Section 2.2.3 of this Decision.

[113] In *Ben's Ltd. v. Dartmouth (City)* (1978), 24 N.S.R. (2d) 439, 14 L.C.R. 357, the Nova Scotia Expropriations Compensation Board dealt with a claim for compensation for land taken, and for business damages, where a highway was being widened, and during the period of construction, the road was closed for a time. At paragraph 13 of its decision, the Expropriations Compensation Board said:

> …it is necessary to determine whether the word "construction" as used in the statute refers to the product of the work or its process. The question appears to have been resolved in a decision of the Land Compensation Board of Ontario in the *Zadworski* case [*Zadworski v. Minster of Transportation & Communications* (1972), 4 L.C.R. 100] where it was held that the word "construction" had both meanings in the identical provision of the Ontario statute. This Board accepts the findings in that case.

[114] This Board adopts that interpretation of "construction". Therefore, the act of constructing, as well as what was constructed, potentially could result in damages for which the Claimants should be compensated.

[115] Further, the Board considers that "use" should be interpreted in accordance with its plain or ordinary meaning. The Board sees this as how what was "constructed" is utilized, taken advantage of, or put into service.

2.2.3 The Works?

[116] The parties entered into two Agreed Statements of Facts which were filed with the Board as Exhibits S-14 and S-15. In Exhibit S-15, work done by the MEH between 2014 and the date of expropriation, and work done after that date, was identified. The nature of the work, the amount of external funding for it, and the location of the work (i.e., whether on Park land, or land which was expropriated) was described. This work was confirmed by both Ms. MacLean and Ms. Nolan of the MEH.

[117] Based on that information, the Board notes that, prior to the date of expropriation, what was done by the MEH was done on Park lands; however, the new well was drilled on land subject to the October 2014 easement, which was subsequently expropriated as part of Parcel A. After the expropriation date, fencing was erected on Parcel A, the parking lot for the Park was expanded on Parcel A, and calcium chloride was applied to the roadway to the Park on part of Parcels A and C. Speed bumps were installed along the same roadway. Additionally, the lighthouse windows and cupola were replaced or repaired on Park lands.

[118] In their post-hearing submissions, the MEH also noted that the access roadway was graded and gravelled in 2016 and signage was installed on expropriated land.

[119] The Board turns now to consider whether all these activities (and the results of them) constitute the works. The issue relates to when and where they were performed.

[120] The Board understands that the Claimants consider everything done by the MEH makes up the works. The Claimants argued that all the work described in the Agreed Statement of Facts constitutes a “Project” which began before the formal

expropriation in 2014 with the enhancements to the Park and the marketing of the high tides of the Bay of Fundy. Thus, they submit that the formal expropriation was merely the "final step" in a process. The process started with the drilling of the new well in the fall of 2014, improvements to the lighthouse or museum and the trails in 2014-15, the new washrooms and stairway to the shore in 2015-16, and the new trails and interpretive panels in 2016.

[121] According to the Claimants, the beginning of the process was the beginning of the expropriation because that is when the MEH initially obtained property rights by the October 2014 easement. They said it is also when the Claimants knew that their land would be acquired. They claim that the period from October 2014 to the date of the formal expropriation is a shadow period, and they should be compensated for damages which occurred during this period. During this period, they said, the MEH used the lands to construct improvements to the Park; they said Ms. Nolan, the CAO, used the word "expropriate" in correspondence to them in 2015; they referred to negotiations to purchase the land up to 2015, as well the notice of intention to expropriate on February 2, 2016.

[122] The Claimants took the position that the works existed during this shadow period, or were constructed during this period, and used during this period. Further, they said the works remain and continue to be used by members of the public. In their view, the works are what has contributed to the increased interest in the Park, with increasing numbers of visitors, which has resulted in nuisance, interfering with their enjoyment and use of their property.

[123] The MEH, in contrast, submitted that there was no shadow period, and alternatively, if there were a shadow period, it began, at the earliest, on February 2, 2016, the date of the notice of intention to expropriate, or more accurately, April 27, 2016, when Council instructed that expropriation be undertaken if an offer to purchase was not accepted. It says that Ms. Nolan's letter of April 1, 2015, to the Claimants specifically stated that the Municipality was not suggesting expropriation. Further, it says that in October 2014 when the easement agreement was sought and executed, only the right to access the property, and "exploration of possible formal acquisition" was discussed. The MEH said that this does not imply expropriation would result.

[124] Additionally, the MEH said that the negotiations to purchase the land that took place up to August 19, 2015, which is referred to in documents filed in the Joint Exhibit Book, but not addressed at the hearing, did not create a shadow period.

[125] The MEH submitted that the work which was done as part of the project contemplated by the Park Master Plan, starting in 2014, was not the beginning of the expropriation process. Therefore, the MEH does not consider the construction prior to the date of expropriation as the works.

[126] Turning to where the activities took place, the MEH submitted that any damages resulting from construction and use of land which was not expropriated, i.e., the Park lands, are not recoverable under s. 3(1)(h)(i) of the *Act*. It relied on the *Edwards* rule which it said means that only compensation can be awarded to compensate for nuisance damages if the construction or use of the works is on the land which was expropriated.

[127] The MEH said that based on the decision of the Expropriations Compensation Board in *Ben's Ltd.,* the *Edwards* rule applies here.

[128] Counsel for the Claimants agreed that the Court of Appeal in *Johnson* confirmed that the *Edwards* rule was codified in s. 3(1)(h)(i)(A) of the *Act*. However, the Claimants said, with the exception of the nuisance created by lights shining from the newly constructed washrooms on the Park lands, all the nuisance for which damages are claimed originated from the lands taken, or from the increased numbers of visitors to the Park because of "the enhancements for which the expropriated land was acquired".

[129] In *Ben's Ltd.,* at Paragraph 11, the Expropriations Compensation Board identified the fact that the word "thereon", contained in s. 3(1)(h)(i)(A), was omitted in s. 3(1)(h)(i)(B) of the *Act* made it unclear:

> The language which deals with a partial taking is less clear because the word "thereon" is omitted in subs. 3(1)(h)(i)(B), but it may be a fair inference (pending judicial interpretation to the contrary) that the Legislature intended the spatial limitations of the *Edwards* rule to apply to personal and business damages in the case of a partial taking. It is urged on behalf of the claimant that the *Edwards* rule is not incorporated in s. 3(1)(h)(i)(B), but for the reasons set out below, the Board has found it unnecessary to deal with the question in this case.

[130] The Board notes that in *Johnson*, the Court of Appeal confirmed that the *Edwards* rule "…was subsumed in the definition of injurious affection in the *Act…*" and went on to refer to s. 3(1)(h)(i)(A) addressing the question of a loss in value of remaining lands. In addressing a claim under s. 3(1)(h)(i)(B), the Court considered a claim for transportation costs due to the severance of a road; the Court noted that the claimants did not own the land on either side of the road and none of their lands "…were affected by the severance of that road…" and rejected this Board's award for extra transportation costs.

[131] The Board agrees that, for the purposes of s. 3(1)(h)(i)(A) of the *Act,* where the construction and/or the use of the land is the basis for a claim, the land must be the land which is expropriated. However, the Board notes that this relates to a claim for reduction in market value caused to the remaining land. The Board determined earlier in this Decision that there was no reduction in market value to the remaining land as a result of the taking. Further, the Board is not persuaded on the evidence that there is any reduction in market value as a result of the construction or use of the lands.

[132] With respect to the claim for personal or business damages under s. 3(1)(h)(i)(B), the Board observes that the Court in *Johnson* discussed the foundation of the *Edwards* rule:

> [169] The *Edwards* rule is founded upon Privy Council decision in *Sisters of Charity of Rockingham v. The King*, 1922 CanLII 489 (UK JCPC), [1922] 2 A.C. 315, (1922), 67 D.L.R. 209. The Minister of Railways and Canals had expropriated two small promontories owned by the Sisters on the eastern side of an existing railway, on the margin of Bedford Basin, for the construction of a railway shunting yard. The Sisters claimed compensation on the ground that their property on the western side of the railway, which had not been taken, had been injuriously affected by the construction of that yard. The Privy Council noted at p. 216 that a claimant is not entitled to compensation arising from the anticipated construction of works upon lands taken from others. It then continued:
>
> > The problem of applying the above principles in a case where the mischief complained of has arisen partly on lands taken from the claimants, and partly on other lands outside their property, can only be settled by a consideration of all the circumstances in a particular case. Clearly in this case the appellants are entitled to a less amount of compensation than if all the lands taken in the laying out of the shunting yard had belonged to them, but on the other hand, the fact that other lands are comprised in the scheme in addition to the lands taken from the appellants, does not deprive the appellants of their right to compensation, so long as their claim is not extended beyond mischief which arises from the apprehended legal user of the two promontories of a railway shunting yard.
>
> [170] The English Court of Appeal applied the rule from the *Sisters of Charity* decision in *Edwards*, supra. There the claim pertained to traffic noise resulting from the construction of a truck road both within and without the boundaries of lands compulsorily acquired from the claimant. The decision limited compensation to the depreciation caused by the noise, vibration, smoke, etc. actually done on only the piece of land taken from the claimant. [Emphasis added *Re Johnson*, 2005 NSCA 99]

[133] The Board is aware that the *Edwards* rule has been the subject of criticism in both the Todd and Coates and Waqué texts. It has been suggested that it is inconsistent with the purposive approach to interpretation of expropriation legislation, such as in *Dell Holdings*, to fully and fairly compensate a landowner. It appears to the Board that it may be inconsistent with the statement in *Sisters of Charity*, noted above, requiring "…a consideration of all the circumstances in a particular case". However, in the absence of any judicial interpretation other than the Court of Appeal findings in *Johnson*, the Board will not find that the works or activities need not be limited to the expropriated lands.

[134] The Claimants, in post-hearing submissions, relied alternatively, on s. 3(1)(h)(ii)(B), which permits a claim for personal damages where no land has been taken, but arising from the construction only, and not the use, of the works. They cited the decision of the Supreme Court of Canada in *Antrim Truck Centre Ltd v. Ontario (Transportation)*, [2013] 1 S.C.R. 594 in support, saying:

> 31. In application to the present case, the Claimants submit that prior to the expropriation, they suffered interference with their enjoyment of their land. The tranquility required for their business operations was lessened, they experienced dust, new buildings with lights shining on their property and trespassers from the Park. The Claimants submit that the interferences that they suffered from 2014 to the date of expropriation were significant and clearly constitute the tort of nuisance.
>
> [Claimants' Post Hearing Brief, June 14, 2018, p. 8]

[135] In response, the MEH says s. 3(1)(h)(ii)(B) does not apply as this is not a case where no land was taken.

[136] As the claims put forward by Ms. Guichon, Mr. Aucoin, and their numbered company are clearly made in the context of the expropriation, the Board considers that s. 3(1)(h)(ii)(B) does not apply. However, as will be seen in the following section, the concept of nuisance is similar in both cases; it is the balancing of what a landowner might

reasonably be expected to bear, as a result of the construction, where land is taken and where it is not that distinguishes when a claim for compensation will be successful.

[137] The Board agrees with the Claimants that the main source of the nuisance claims made by the Claimants is the construction and use of the works on the land which was taken. The Board will discuss the incidence of nuisance as it relates to the construction and/or use of the works in the following section.

[138] The Board is not persuaded that the Claimants were under the shadow of expropriation as suggested by their Counsel in his submissions. While it will discuss the Park Master Plan in greater detail in the next sections of this Decision, the Board finds that there is nothing in the activities or communications of the MEH, including any negotiations for purchase, which would lead to any apprehension that it would exercise, or even need to use, its power to expropriate any of the Claimants' lands prior to the February 2, 2016 notice. Work being undertaken at the Park to attract visitors and improve or enhance the visitor experience did not require expropriation. Although it acknowledged the desirability of "partnerships…with key landowners" and "agreements with nearby landowners", neither acquisition of lands, nor expropriation, were contemplated in the Master Plan.

[139] Consequently, the Board finds that there is no shadow period, and thus the claim for damages for injurious affection should not begin prior to the February 2, 2016, notice. Further, the Board finds the works means the activities on the lands expropriated, and it is their construction and use which must result in personal and business damages if the Claimants are to be compensated for such injurious affection.

2.2.4 Nuisance

[140] To succeed in a claim for damages for injurious affection under s. 3(1)(h)(i)(B), the damages must be what "the statutory authority would be liable for if the construction or use were not under the authority of a statute". This means that the damages must be recoverable at common law. This is referred to as the "actionable rule".

[141] Ms. Guichon testified:

> Q. Okay, and what can you say about ... and I'm asking you about your own observations as a neighbouring land owner, but from your own observations can you say if visitorship has increased since the enhancements to the park began?
>
> A. Yes, it has.
>
> Q. Okay.
>
> A. Yeah, we have noticed an increase in traffic.
>
> Q. Okay, and was it a minor increase, significant increase? How would you characterise it?
>
> A. It ... it seems quite significant. The traffic really seems to have increased, different types of traffic, a lot more RV, motorcycle, tour bus. That kind of stuff, yeah.
>
> Q. Okay, and prior to the enhancement ... sorry. First of all, when did the enhancements to the park begin?
>
> A. Some of it began in the fall of 2014. So that would have been the trails and the well and the washroom and the stairs in the fall of 2015.
>
> Q. Okay, and was there any construction in 2016?
>
> A. In 2016 the road was graded and gravelled. I ... some of that construction could have carried on into the spring. I can't remember.
>
> Q. Okay, and from your observations did the construction - that is, the enhancements - have an impact on your property?
>
> A. Yes, they did.
>
> Q. How so?
>
> A. Well, there was a ... you know, we've got heavy dump trucks coming down very early in the morning. They were coming and going all day long. So there was more noise, more dust, you know, diesel fumes, that kind of stuff.
>
> Q. Okay, and that was during the construction.
>
> A. During the construction.
>
> Q. Yes.
>
> A. Yeah.
>
> Q. And since the construction - that is, since the ... you know, the operation of the park following the construction - can you say what, from your own observations ... whether there's been an impact to your property?
>
> A. Yes, just because of the increase in the numbers of visitors.

Q. Okay.

A. Yes.

Q. And what type of impacts have you observed?

A. There's more dust. There's more noise. You know, we're getting a lot of dust coming into the property. The traffic, at times, is lined up on the road. The parking ... the visual of the parking lot. And we have people trespassing on our property quite frequently.

Q. Okay, and did you have some of these impacts prior to the enhancements to the park?

A. We did have people coming on to our property. We've tried to mitigate that as far as we had put up a fence prior to the fence that the Municipality has put up. We've had to put up some signs to keep people out. So we did have some ... and people driving into the property confused about where they should go.

Q. Okay, and so those took place prior to the enhancements, and how about dust? Did you have dust ...

A. I ...

Q. ... difficulties prior to?

A. ... don't recall dust being a significant problem until they re-graded and re-gravelled the road in the spring of 2016.

Q. Okay. Do you recall making any complaints of dust to the Municipality prior to, prior to the construction...

A. I ...

Q. ... of those enhancements?

A. I don't recall complaining about dust, no. I ... I know I talked about the increase in the traffic, but the dust, per se, I don't ... I don't recall that.

Q. Okay, and present day - that is, after the construction - can you say if the dust became more of a problem or ...

A. It ...

Q. ... less of a problem?

A. It was a significant problem in 2016 and at the beginning of last ... in 2017. And it is right now today. Even yesterday we had an incident with people speeding up the road and creating dust. So it continues to be a problem when they're not ... I realise now they're putting calcium chloride on the road, but it's ... it's still an issue when the park is closed.

Q. Okay, and has any calcium chloride been put down this year yet?

A. No.

Q. Now in terms of noise, I had asked you if the impacts of dust were different after the construction of the enhancements, but how about noise?

A. Noise has ... yes, there has been more noise because we get different types of traffic now. Larger groups of motorcycles, that sort of thing. At special events, for example. I think it was last year there was a radio station there and they were blasting music out all afternoon very, very loudly. So the wind coming ... we get all the prevailing winds our way. So this noise really travels. We can hear a lot of what goes on over at the park.

…

Q. Okay, and I think you said it is ... the gate is closed, though, during the off-season.

A. They've attempted to close the gate in the off-season. They closed it last year when the park closed, but that results in people just driving into our place. Last year the gate was closed and within five minutes we had someone in our property asking us to use the washroom because they couldn't access the park. So we requested that it be reopened, and it was.

Q. Okay, and in terms of people accessing the park during the evenings in the spring, summer, and fall, what have you observed?

A. Sometimes we have RV's parking there overnight. We have kids there sometimes and they're doing doughnuts in the parking lot, things like that. What else have we seen?

Q. And in relation to those activities after hours has Shangri-La Cottages taken any action?

A. Not generally, no. We don't police the park. One time I ... I did call the police when there was a group of teenagers spray-painting the chairs and the fence down there, but generally, we don't interact with people at night.

Q. Okay, and did these things, these evening-hour accesses to the park, did that occur prior to the enhancements to the park?

A. On occasion we would get the odd RV parking there, but there seems to be more now. They're ... like, we've seen four or five at a time parking there overnight.

Q. Okay.

A. Yeah.

Q. And what's the problem with an RV parking there overnight?

A. They could be running generators. It's the noise, it's the visual, again, from ... from the cottages.

Q. Okay.

A. Yeah.

Q. Has your occupancy ... have the Shangri-La Cottages occupancy increased since the enhancements to the park?

A. No. We've been at a pretty high occupancy now for quite a number of years. So we had built the business to a point where we had a good clientele and we were well advertised and well respected as a cottage business. So we were up in our occupancy in 2013, 14.

Q. Okay. Have park guests ever entered on your lands?

A. Yes, they do.

Q. Okay, and could you explain what you've observed?

A. We've observed people climbing the fence. The new fence that's there is built like a ladder with five rungs or something and people do climb right over it to take pictures. People will walk onto the property. They ... because they know there's a good ... a good viewing point along the front of our property.

Q. Viewing of the bay?

A. Viewing of the bay, yeah. I've had children come to play on our play structure, that sort of thing, and we just can't allow it for liability reasons. We have tried to mitigate that by putting up signs for private property, that sort of thing.

Q. Okay, and did you have difficulties with park guests entering your land prior to the enhancements to the park?

A. We did, yes. We had ... people would regularly come over, just over onto ours from the lighthouse because it's a really good vantage point from there. So the year before the

fence was put up ... so that would have been in probably 2015. We had to block it off. We put up our own fence at that point in time because we had to limit our liability.

Q. Okay, and did the fence you put up work? Did it keep people off of your property?

A. For the most part. I mean, we didn't put it all the way along. We put it on the main area. People still walked around it at times and came over anyway.

Q. Okay. Okay, and can you say whether or not the instances of park guests entering your property increased or decreased or stayed the same as a result of the enhancements to the park?

A. I don't think they're any worse, really. I think we get ... we get the odd person still coming over, but with the signage and the fence and everything it's ... it's helped to some degree.

Q. Okay. Since the enhancements to the park have you had any complaints from your paying guests regarding the activities on the park?

A. We've had a few. We've had complaints of dust. We had a family staying there in September of 2016 and over a period of the evening there was ... there was a wind coming towards cottage 3 and they were outside and just being inundated with dust for the entire time. They couldn't eat outside, they said, because it was dusty. People complain about the lights on the washroom now because they're so bright. People like to have fires and ... outside and watch the stars, that sort of thing. So ... and I think one of the only negative things that anyone's ever said on Trip Advisor is just that the park is quite busy at times.

Q. Okay.

A. So ...

Q. And did you have similar complaints prior to the enhancements to the park?

A. No.

[Transcript, pp. 42-46 & 54-58]

[142] Several photographs showing vehicles parked along the roadway, the numbers of tour buses, a large group of motorcycles, dust blowing along the roadway, at various times in 2016, taken by Ms. Guichon were identified. Ms. Guichon went on to describe how their business operation was affected by these:

Q. And why is it that privacy, aesthetics, quiet, and a lack of dust are so important to Shangri-La Cottages?

A. Well, we need to maintain this, this property that we have there. I mean, it is simply amazing there. People come there. They seem a little stressed upon arrival and they get into their cottage and an hour later they are totally relaxed. I mean, it's an atmosphere that we've created. We have high-end cottages that we sell. We have customer service. We just take care of people and we don't want to ruin that. We don't want to lose that. The ... the guests that are coming to the park have ... I have seen them change over the years, because it used to be people that they just happened upon the park. There wasn't a lot of advertising, and they would come along and they were relaxed. And now with the advertising of the park they're rushing down there because it's high tide, we got to go see it. So it's zoom, zoom, zoom, zoom. Whereas people were ... were more laidback, and that was the atmosphere that sells. That's why people come to Shangri-La. If you sit on a deck and watch a sunset in the evening, it's ... it's magical. They call ... they called it Shangri-La for a reason. So we just ... we don't want to lose that. We don't want it to be a

> tourist trap. We don't want it to be that type of a business. We want to maintain. People are relaxed. They're happy. They enjoy the peacefulness of the place.
>
> [Transcript, pp. 72-73]

[143] Mr. Aucoin testified that the dust has become substantially worse since the development of the Park, until the MEH started applying calcium chloride in the summer of 2017. He also described some of the impacts he had observed with the increase in numbers of visitors to the Park:

> Q. Okay. Now since the beginning of the construction of the enhancements to the park have you noticed an increase in park visitors going onto your property? Or has it remained the same? Or has it decreased?
>
> A. It has definitely increased.
>
> Q. Okay.
>
> A. Yeah.
>
> Q. And can you give the Board specifics?
>
> A. It's just since they're increasing the traffic to the park, what happens a lot of times people ... depending on where they're from, if first time visiting. They get a little confused when they come down, and you see it all the time. They'll drive in and they'll realise that we're ... they've missed the park. To the point ... it got so bad last year we had to put up a sign, a basic sign right at the end of our driveway just saying that, Park, and some arrows on it just to try to curb it to some degree. But I mean, one of the worst days was I had a full-size truck come in with a trailer and a boat and canoes on the top and drove right down to my furthest cottage and then proceeded to do a big U-turn on my lawns, which is a grave concern because all my plumbing and electrical is underground. So ...
>
> Q. Okay.
>
> A. So that's ... that would be the worst example, but commonly just, you know, vehicles and cars coming in and ... and we're at the point we're probably going to have to put up a sign trying to stop and control that traffic.
>
> Q. Okay.
>
> A. It's ... you know, it impacts on the privacy of my guests to a great degree. So ...
>
> Q. Okay. Now in terms of noise in relation to your cottage operation. Can you say, since the beginning of the construction enhancements, has the noise increased, stayed the same, or decreased?
>
> A. It has definitely increased for sure.
>
> Q. And how so? What noises are you hearing that...
>
> A. More ...
>
> Q. ... you didn't hear before?
>
> A. More motor vehicles, obviously. Park is busier. People ... depending on the ... on the winds, we can ... because we're directly east of the park, pretty much, we can hear whole conversations just from the parking lot, from the lighthouse because of the proximity of the park to us. So other concerns would be ... it's become quite a popular spot for the

local teenagers and stuff on the weekends specifically, and much more throughout the summer months.

Q. Okay.

A. So it's ... the problem is definitely getting worse every year.

Q. Yeah.

A. So ...

Q. And what is the problem with teenagers and locals going on the cottage property ... or sorry, the park property?

A. The teenagers and locals?

Q. Yes.

A. They're not always a problem. Sometimes ... you know, a lot of locals just want to go down to enjoy the park. The youth themselves are typically the most problematic because in our area they're car-crazy. So they do ... you know, as Nancy has said, they do doughnuts and stuff in the parking lot. I'm pretty sure there's drinking and other things going on over there at night. We have to keep an eye on it at sometimes because we're concerned with our guests. So there's late-night noise at times, too, just with ... with the young people in the park.

Q. Okay.

A. So ... and I know the staff has had some interactions with them, which I believe is one of the reasons they had some vandalism done there last year, I believe. So ...
Q. Okay, and in terms of these after-hour visitors, have you had any other difficulties with after-hour visitors to the park?

A. Nothing ... nothing that really stands out.

Q. Okay.

A. Just lights and stuff, of course, affect the parking lot, I believe because of the ... the vandalism last year. There's been an obvious RCMP presence ... has been stepped up. I'm assuming the Municipality has asked for that, as there was times and weeks where they were down every day, but I mean, they even come over sometimes in the evening, because vandalism has been done at that time, and they'll sit on our side of the parking lot with the headlights pointed right at my cottages. And it happened multiple times to the point I got upset with it one night and took my truck, turned it around, turned the headlights on, pointed them back at the RCMP just to give him the message, You can't keep doing that. So ...

Q. Okay. Okay.

A. ... many privacy concerns, yeah.

Q. Nancy testified about RV's being there overnight. Did you experience anything similar?

A. Yes, yes.

Q. Okay, and what was your experience?

A. Well, the first couple years we were there when the park was far less busy you'd get the odd one. Once in awhile over summer ... I can recall maybe in the first couple of years maybe two, maybe three, four at the most. Now the word has obviously gotten out it's a free place to park your RV for a night and it's become a regular occurrence. For instance, last night we had two.

Q. Okay.

A. We've had nights where there's four or five.

Q. Okay.

A. And I sell peace and quiet in a cottage business. So now my guests are looking at an RV park, pretty much, close to the cottages as well.

Q. Okay.

A. So ...

Q. And what's the difficulty with the RV's being in the park property?

A. From my mind, it's not a huge difficulty just in the fact of the invasion of the privacy and what I'm selling. A lot of my guests aren't coming to an RV park but that that parking lot is fairly close and ... and this is what they're seeing. I mean, the odd time I hear a generator running. Not all night or anything like that, which I own an RV. So I understand the need to do that. But you get that noise once in awhile as well and so it's ... there's been big changes since our first couple years there and what we're dealing with.

[Transcript, pp. 272-277]

[144] Mr. Aucoin elaborated on concerns about lights in response to questions from Mr. Dunning:

Q: Mr. Aucoin, you talked about ... I think your words were lights affecting the parking lot. Can you ... where ... can you just tell me where those lights are coming from?

A. You're talking about the ... the police lights, like the headlights?

Q. I think it was before ... was that ... I just noted that you made a comment about lights affecting the parking lot and then you went on to talk about the RCMP.

A. Yeah.

Q. I just wanted to clarify, are you ... is the issue you've mentioned about the lights, is that solely related to the RCMP, or are there other light issues that ...

A. There are other light issues. So the RCMP is one example.

Q. Okay.

A. Vehicles like I was talking about, the youth driving in there at night, and ... and it's not just the youth. Some ... some tourists, you know, depending on the time of year and stuff. So as soon as they turn out of the parking lot, because of the topography, the headlights have to point right over to my property before they make the turn. So it's ... it's a constant thing. Their new washroom facility has lights all around it, which is an issue for us as well. If you've ever been to our property or anybody who knows, it's a great place for stargazing and stuff like that, and one of the things that people love about the place is that ... the darkness of the night. So that's been ... that's been some impact and, yeah, part of the reason we're looking for ... to protect ... protect the privacy of our cottages.

[Transcript, pp. 277-279]

[145] On cross-examination, Mr. Dunning explored with both Ms. Guichon and Mr. Aucoin their observations of impacts from the visitors to the Park prior to the beginning of the works described in the Agreed Statements of Fact, and the increased promotion of

the Park. While they both acknowledged that there had been incidents of dust, noise, and traffic, as well as trespass on their property prior to this, they said that the impact had increased over time. In particular, Ms. Guichon described the dust situation as worse during the construction phases, with the worst being in 2016 when the parking lot was being constructed. She agreed, however, that the construction was short-term. She testified that the increased numbers of visitors to the Park which she had observed led to an increase in the incidents which affected her enjoyment and use of the property, as well as that of her guests.

[146] Mr. Aucoin testified that since they had acquired the property in 2011 he had:

> …seen the visitorship to the park slowly, slowly rise and probably accelerating over the last couple years with ... with the enhancements and the ... you know, the advertising and all that for the park.
>
> Q. Would you agree with me that ... just want to see the number here. Would you agree with me that there was ... you observed a noticeable increase in the number of visitors specifically from twenty- ... in 2015 compared to what you were seeing in 2014?
>
> A. I wouldn't say any particular year was extremely noticeable difference.
>
> Q. Okay.
>
> A. From my general observations over the time we've been there - this will be our seventh season - I'm going to say the ... the visitation is increasing ten to 20 percent per year, roughly, just from my general observations.
>
> [Transcript, p. 280]

[147] In pre-hearing submissions, the Claimants stated:

> 18. Both Parties' appraisers agree that the taking of the land by the Respondent has caused compensable injurious affection to the cottage rental business of the Claimants. Both agree that the proximity of the roadway and the increased attendees will detract from the privacy and relative seclusion enjoyed by the business and its patrons pre-expropriation. Where the appraisers differ is in the cure for the injury.
>
> [Claimants' Pre-Hearing Submissions, April 18, 2018, p. 7]

[148] As discussed later in this Decision, the Board observes that the difference between the appraisers on this point, is not only with respect to the cure, but also to the extent of the injury.

[149] The Claimants said that their, and their cottage guests', enjoyment and use of the property has been interfered with or damaged by what they described as "the Project". By the time the Claimants filed their pre-hearing reply submission, the scope of the injurious affection was broadened to include dust and noise, as well as privacy concerns, "…arising from the expropriation and use of the museum". References to lights and trespass appeared in the post-hearing submissions. Citing *Antrim*, the Claimants said that the threshold for establishing the tort of nuisance is "something more than trivial interference".

[150] In its post-hearing submissions, the MEH submitted that the evidence regarding dust, noise and privacy concerns was general; further, it noted there was no evidence other than that of Ms. Guichon and Mr. Aucoin themselves. Additionally, some of the incidents described, such as the vehicle with boat and canoes coming on to the cottage property, were one-time occurrences.

[151] In *St. Pierre v. Ontario (Ministry of Transportation & Communications*, [1987] 1 S.C.R. 906, the Supreme Court discussed the tort of nuisance in the context of a claim for injurious affection where the landowners had built a retirement home on rural land, and later adjacent land was expropriated, and a highway built. McIntyre, J., said:

> 10. The only basis for an action to recover damages in the circumstances of this case would be the tort of nuisance. Nuisance has been variously described. In this case both parties have suggested definitions and there seems to be little if any dispute between them on the general description of the concept of nuisance. Reference has already been made to the comprehensive definition in Fleming, *The Law of Torts*. I would add the definition expressed in Street, *The Law of Torts* (6th ed., 1976), p. 219:
>
> > A person, then, may be said to have committed the tort of private nuisance when *he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or of an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.*
>
> I am far from suggesting that there are not other definitions, and I do not suggest that the categories of nuisance are or ought to be closed. The above definitions, however, cover the general concept and we must now seek to apply it in the circumstances of this case.

…

> 12. No such interference is to be found in the circumstances of this case. I agree with the Court of Appeal that what the appellants complain of here is the loss of prospect or the loss of view. There are as well the elements of loss of privacy, but in essence the complaint is that once they dwelt in a rural setting with a pleasing prospect and now they are confronted on one side of their land at least with a modern highway. It is a claim for loss of amenities. That the use of the highway will constitute a disruptive element is probably true but that is a field of damage which may not be considered. The claim is limited to loss occasioned by the construction.

[152] In *Antrim*, the Supreme Court of Canada also addressed a claim for injurious affection arising from highway construction. Cromwell, J., in discussing the concept of private nuisance said:

> …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]
>
> …
>
> 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…
>
> …a substantial injury to the complainants' property interest is one that amounts to more than a slight annoyance or trifling interference.
>
> …
>
> 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…
>
> [*Antrim*, paras. 19, 21, 22, and 23]

[153] Cromwell, J., then went on to discuss how reasonableness should be assessed in the context:

> In the traditional law of private nuisance, the courts 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 of the circumstances…. In relation to the gravity of the harm, the courts have considered factors such as the severity of the interference, the character of the neighbourhood and the sensitivity of the plaintiff…
>
> …
>
> 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 cause by carrying it out.
>
> …
>
> Generally speaking, the acts of a public authority will be of significant utility. If simply put in the balance with the private interest, public utility will generally outweigh even very significant interference with the claimant's land. That sort of simple balancing of public utility against private harm undercuts the purpose of providing compensation for injurious affection. That purpose is to ensure that individual members of the public do not have to bear a disproportionate share of the cost of procuring the public benefit. This purpose is fulfilled, however, if the focus of the reasonableness analysis is kept on whether it is reasonable for the individual to bear the interference without compensation, not on whether it was reasonable for the statutory authority to undertake the work. In short, the question is whether the damage flowing from the interference should be properly viewed as a cost of "running the system" and therefore borne by the public generally, or as the type of interference that should properly be accepted by an individual as part of the cost of living in organized society.
>
> …
>
> Of course, not every substantial interference arising out of a public work will be unreasonable. The reasonableness analysis should favour the public authority where the harm to property interests, considered in light of its severity, the nature of the neighbourhood, its duration, the sensitivity of the plaintiff and other relevant factors, is such that the harm cannot reasonably be viewed as more than the claimant's fair share of the costs associated with providing a public benefit. This outcome is particularly appropriate where the public authority has made all reasonable efforts to reduce the impacts of its works on neighbouring properties.
>
> It is clear, for example, that everyone must put up with a certain amount of temporary disruption cause by essential construction.
>
> …
>
> …it is helpful to consider that some sorts of temporary inconvenience are more obviously part of the normal "give and take" than are more prolonged interferences. While temporary interferences may certainly support a claim in nuisance in some circumstances, interferences that persist for a prolonged period of time will be more likely to attract a remedy…
>
> Another important idea is that the traditional consideration relating to the character of the neighbourhood may be highly relevant in the over all balancing. This point is particularly relevant in cases where a claim is brought against a public authority.
>
> [*Antrim*, paras. 26, 30, 38, 40-41, 42,43]

[154] The Board observes that in both *St. Pierre* and *Antrim*, injurious affection was claimed in instances where no land was taken. As noted above, the *Act* distinguishes personal and business damages in such cases, as under s. 3(1)(h)(ii)(B), it applies to those "resulting from the construction and not the use of the works" (emphasis added).

Where land is taken, the damages may result from either the construction or use, or from both.

[155] The Board concludes that what constitutes the interference is not different whether land was taken or not. The Board agrees that it must be something more than trivial. Here, the damages may arise from either, or both, construction or use. The Board also agrees that the balancing described by Cromwell, J. must be undertaken, but considers that, in the case where land is taken, since the use of the works may give rise to damages, a broader consideration of all of the circumstances should be made.

[156] A major objection by the MEH to the claim for damages is that any nuisance must be incremental, i.e., it must be something more than what existed before the construction and use of the works to compensate the Claimants.

[157] The MEH said that the Park was in existence for many years, even before the Claimants purchased their lands. It was a tourism attraction, and the lighthouse at the Park was described by Ms. Nolan as one of the gems of the Municipality. The Master Plan prepared by BDA Landscape Architects for the MEH in April 2014, said:

> The Bay of Fundy was introduced to the world with its selection in 2011 as a finalist in the New 7 Wonders of Nature campaign. As such, it is in the company of the greatest natural phenomenona on the planet, including; the Grand Canyon, the Amazon River and the Great Barrier Reef, to name a few.
>
> More recently, in February, 2014, the Bay of Fundy was recognized by world experts as one of the Seven Natural Wonders of North America. Sharing this distinction with the Bay of Fundy are six other outstanding natural attractions including, in no particular order, Niagara Falls, the Florida Everglades, Yellowstone and Yosemite national parks, the California redwoods and Mount McKinley.
>
> The Upper Bay of Fundy clearly is widely recognized as a world class attraction which provides remarkable opportunities for tourism growth.
>
> Burntcoat Head Park, the site of the World's highest recorded tides, is well positioned to take advantage of the Bay of Fundy's attraction appeal and tourism potential as a destination for visitors to Nova Scotia Burntcoat Head is also within 90km of Halifax, positioning it as the closest and most accessible Bay of Fundy attraction to this major local tourism market.
>
> [Exhibit S-12, p. 1634]

[158] Interestingly, to the Board, the evidence of both appraisers, and even Ms. Guichon and Mr. Aucoin, lead it to a conclusion that proximity to the Park could be described as what the Board sees as both “a blessing and a curse”. The Park and the access to the highest tides and the ocean floor attracts visitors to the area. It is also an attraction for guests at the cottages. More people coming to the area would be exposed to the cottages as a potential vacation spot. Bringing more people to the area of the cottages also contributes to more traffic and dust, more noise, and less privacy, for the Claimants and their guests, which they say detracts from the quiet idyllic setting they are marketing.

[159] The MEH decided in conjunction with other levels of government to develop tourism in the area with the hope of resulting economic gain. The availability of funding, especially from government agencies, was critical to it. The MEH considered, based on the Master Plan, that improvements at the Park would reap benefits. Additionally, Ms. Nolan expressed concerns about safety and liability of MEH which resulted in some of the work undertaken on Park lands, e.g., the steps to the ocean floor.

[160] The MEH argued that the roadway to the Park was used regularly before the expropriation by members of the public, municipal personnel, the Claimants and their guests. This meant the cottages were exposed to dust, noise and impacts on privacy before then. All that the Claimants can be compensated for, in its view, is any associated increase in dust, noise and the loss of privacy after the expropriation compared to before it. It cited two Alberta cases, *Jacobsen v. The Queen*, 1979 CarswellAlta 512, and *Balgerran Farm Ltd. v. Lacombe (County) No. 14*, 1993 CarswellAlta 950, both decisions of the Alberta Land Compensation Board, in support of this position. In the view of MEH,

compensation for the increase or difference would be full and fair compensation, in line with the principles in *Dell Holdings*.

[161] The Claimants said that the damages they have suffered are a result of the "increased visitorship" to the Park as a result of the expansion or the "Project". Much of the cross-examination of the MEH witnesses was taken up with the measurement of that increase.

[162] The Board understands that various methods have been used over the years to count the number of visitors to the park: a guest book which has been placed in or outside the lighthouse, or at the head of the steps; a relatively recent counter activated by persons walking by or over it, which has been placed at different locations at times; and counting by the staff; all of which involve some degree of estimation. It was clear to the Board, and it seems that the parties agree, that none of these can be relied upon, and indeed, none of them appears to count vehicles coming to the Park. What is clear, and there appears to be no doubt about this, is that the numbers of visitors have increased fairly significantly over the years since the area began to be marketed as a tourism destination. How much of that is due to the advertising in tourism publications, signage, or publicity around the Bay of Fundy and the tides compared to the improvements undertaken at the Park is truly unknown as far as the Board can see. It appears to the Board that there has more recently been a stability in the numbers of visitors, which may be because the promotion of the Park has diminished somewhat with funding cutbacks.

[163] The Board turns now to examine the specific nuisances complained of. First, lights – the Claimants referred to the lights from the washrooms shining on the cottages. The washrooms are not, in accordance with the Board's findings, part of the

works. While this is not an interference giving rise to compensation, the Board notes that the MEH has been co-operative with the Claimants in reducing or turning off the lights on occasions when the night sky holds particular interest, as confirmed by Ms. Friars. There is evidence that headlights of cars travelling on the roadway, which is now wider, shine on the cottages. With more cars apparently coming to the Park, and RVs sometimes parking there overnight, this may be more frequent. However, the Board does not consider that this constitutes a compensable nuisance in itself.

[164] The Board accepts that traffic to the Park has increased. The lands taken were, in part, for expansion of the parking lot. A larger parking lot, therefore means more room for more cars, motorcycles, and RVs; therefore, there are more people enjoying the Park. This in turn leads to more noise from the visitors. There is more dust generated by the traffic, and of course, there was dust generated during the construction of the parking lot, and the gravelling and grading of the road. With more people at the Park, there have been more incidents of trespass on the Claimants' property.

[165] Additionally, this results in intrusion on the privacy of the Claimants' property and the peace and quiet which they and their guests hope to enjoy. The Board notes that with the expansion of the Park lands over the 66-foot-wide swath immediately adjacent to the northern lands of the corporate Claimant, there is now a length of fence erected by the MEH; however, it does not prevent people from climbing the fence if they choose. The Park is now closer to the cottages than it was before the expropriation, and as Ms. Nolan acknowledged on cross-examination, it could be developed in an area closer to the cottage operation.

[166] The Board acknowledges that there was no evidence to demonstrate that the cottage operation has experienced a decrease in occupancy. That may not be the only measure of interference with use and enjoyment, and the Board will not speculate on that.

[167] The Board concludes that the construction and use of the works by the MEH have enabled a situation where the Claimants have suffered business and personal damages which amount to nuisance. This is because it interferes with their use and enjoyment of the property. The Board is satisfied that it is more than a trivial interference and must now consider whether it is unreasonable.

[168] The Board considers that the Claimants and their property have what might be called a susceptibility or sensitivity. It is in an otherwise quiet location, and the peace and quiet, and general ambience of the rural retreat is its selling feature. The Board finds this is a characteristic of the neighbourhood which the MEH knew or ought to have known about when it undertook the works of expanding the parking lot, grading and gravelling the roadway, and erecting the fence, all on lands taken. This is particularly the case due to the involvement of the MEH with the previous operator of the Park, the Burntcoat Head Park Association of which Ms. Guichon and Mr. Aucoin were members, as well as their participation in the Steering Committee working on the Master Plan. Thus, it is a factor which must be considered, as suggested by Cromwell, J., in *Antrim.*

[169] Should the Claimants be expected to bear this interference "as part of the cost of living in organized society", in the words of *Antrim?* It could be said that to some extent they may benefit from the improvements – the larger parking lot means fewer cars parking along the roadway; the fence impedes most of the potential trespassers.

[170] The MEH suggested in its closing rebuttal submission that the public utility of the Park must be weighed against the Claimants' right to use and enjoy their property. The Park is officially open for approximately six months of the year. It is clearly an attraction in the area during that time. It is not the same, in the Board's view, as a highway which is more likely to be in use on a daily and year-round basis.

[171] There was no evidence before the Board to demonstrate any particular economic benefit that has resulted from the works, and consequently, the Board does not consider that the public utility of the expropriation outweighs the use and enjoyment of the Claimants' property. Therefore, the Board finds that the Claimants should be compensated for injurious affection under s. 3(1)(h)(i)(B) of the *Act.*

[172] The measure of the damages for injurious affection is, in the view of the Board, the cost of appropriate mitigation, which is addressed in the next section of this Decision.

2.2.5 Mitigation

[173] According to Todd, at page 130, says: "Mitigation arises where the expropriating authority does something to reduce the loss or damage that would otherwise be incurred by the owner." While it would be, in the ordinary course of litigation, that a plaintiff or claimant has a duty to mitigate any loss, the *Act* contemplates situations where the expropriating authority may undertake mitigation by some action, as indicated in s. 34(b) and s. 65, particularly with respect to undertakings by the authority.

[174] Here, the Claimants said that the mitigation required is the provision of a buffer between the Park and the cottage operation property consisting of a berm, trees, and a fence, at a cost of $96,924 (which includes a 20% contingency), in addition to

easements granted for access to their properties on both sides of the roadway leading to the Park.

[175] In contrast, the MEH said, based on the report of Mr. Ingram, that a buffer consisting of trees will be sufficient. He estimated the cost at $27,300. Its position is that what the Claimants are seeking would result in them being over-compensated by addressing exposure to dust, noise and loss of privacy that occurred before the expropriation and is not at all reasonable.

[176] In addition to the easements, the MEH has also placed three sets of speed bumps on the roadway and has applied calcium chloride to minimize dust. It has provided an undertaking regarding the speed bumps and the road treatment; however, the Claimants submitted that the undertaking is insufficient because they do not believe it is guaranteed to be enforceable and could be discontinued if the MEH no longer owns the Park in the future.

[177] The Board now addresses the issues of the buffer, the speed bumps, the calcium chloride application, the MEH undertaking, and the easements, below.

2.2.5.1 A Buffer

[178] Mr. McLean engaged the services of WSP Canada Inc. to design an appropriate buffer between the cottages and the roadway. This was done by Hans Pfeil, a landscape architect who testified at the hearing. Mr. McLean included the design created by Mr. Pfeil, and his cost estimate in his report. He stated that "…a design which incorporated both a fence and berm along with a treed buffer was recommended by WSP." The estimate included a total of $25,000 for site preparation and earthwork,

$23,900 for a 1.8-meter-tall wood fence, and $31,870 for topsoil, hydroseeding and various types of trees and shrubs, together with a 20% contingency.

[179] Mr. Pfeil had never been to the site. He used site photos and a GEONOVA website to analyse what was needed. He testified:

> Q. Okay, so what were you instructed to do?
>
> A. I got the request to provide conceptual drawings to create a buffer with trees, shrubs, fence, a berm. Yeah, to ... along the ... to protect the property from the ... the gravel roads.
> Q. Okay.
>
> A. So ...
>
> Q. Okay, and what did you understand the nature of the property being protected to be?
>
> A. I've seen the pictures of dust clouds, the amount of traffic on that road, and that's pretty much all, yeah.
>
> Q. Okay, and what did you understand the property was being used for; that is, the Guichon property? Or the Shangri-La property?
>
> A. Yeah, it was ... information provided to me was it's operated as Shangri-La Cottages. So I briefly looked it up, did some desktop research, and noticed that it's ... the value of ... of the property or the business model as being a natural-oriented, quiet place, and that had influence on my design ideas.
>
> Q. Okay, so did you simply design what you were told to design, or did you employ any of your own thought process, research, experience in coming up with the design?
>
> A. I definitely ... after researching the cottages and what they're ... how they operate and what their goal is and what they're trying to offer to the clients, that definitely was my own thought process that I brought into the design and ... but I had the ... given restrictions of, Use these trees, shrubs, fence, a berm, any landscaping natural features that would enhance ... not enhance the property but to protect the ... the cottages from the road.
>
> [Transcript, pp. 139-140]

[180] Mr. Pfeil considered that the berm would provide a barrier to reduce noise and some visual blocking. The trees would enhance the air quality by capturing the dust as well as providing similar visual blocking. He said he had envisioned a gap-free fence to protect the property from trespassers as well as provide visual blocking, and abatement of noise and dust. He originally had proposed two options which were for trees with or without a berm, but at the request of Ms. Guichon, developed a third option which included the fence. On cross-examination, Mr. Pfeil agreed that the final design met her requirements because “That’s why I was hired.”

[181] Mr. Pfeil testified that although he saw some issues, depending on the type of trees used, a "…simple row of deciduous trees ten feet apart…" could be a simple solution, though not sufficient protection. Combined with evergreens, it could be a good combination for an all-season effective buffer. On cross-examination, he testified that his first option of a berm with trees and shrubs would provide protection against "…traffic, dust, and noise from the road"; his second option with trees and shrubs was, in his words, "…the most cost-effective way of establishing a buffer…". Both options would not result in the same immediate protection as a fence, which he said was expensive and "…not the most attractive way of doing it". In response to questions from the Board, he said:

> A. …As I said, the fence is a very functional tool, which is protection of your privacy for looks ... and entering a property. But visually, in my opinion, it's not the most attractive tool. So adding trees and shrubs around it blends it in more into the nature and creates a more natural feeling, and the shrubs and trees are just ... adds a level of noise reduction, creates better air, and I think it's just visually ...
>
> Q. So for that same reason you've just described, you wouldn't suggest just having a fence.
>
> A. In my opinion, it looks like a wall and it's not very attractive. Not if you want to continue ... not under the ideas of the Shangri-La Cottages, if you want to operate under that goal of attracting people with a beautiful, natural place, and you create a big wall in there, that's pretty much counter-productive to your idea.
>
> [Transcript, pp. 183-184]

[182] Mr. Ingram, in his report, opined that there might be a decrease in privacy for the cottage operation. He said:

> As a result, a degree of buffering would serve to mitigate this exposure to increased traffic. The property is currently directly exposed to the roadway and the park and this has been the case since the development of the cottages.
>
> Fencing would be expected to adversely impact on the appearance of the property in what is otherwise a very nature setting. A tree buffer would provide a visual barrier between the roadway and the cottage property. The buffer would extend along the northerly boundary of Parcel A where it cuts across Lot 1-A and then along the easterly side of Parcel A where it extends to the water frontage. The length of this buffer is estimated at approximately 870 feet. Based on reference to the Marshall & Swift® valuation service, the cost for average grade trees (15 gallon pot – 20" box) and installation would be $250.00 per tree. Evergreens spaced at eight feet apart would provide some immediate buffering that would increase over time. This would require the planting of approximately 109 trees.
>
> …

> Note that, if desired, a portion of the buffer could potentially be replaced by a fence barrier in the area of the water frontage to minimize the potential for trespassing. The cost would be similar to that of the tree buffer.
>
> [Exhibit S-8, p. 24]

[183] The MEH engaged Ekistics Plan + Design to assess the impact of dust, and dust and sound mitigation. Robert LeBlanc, the President of the company, who is also a landscape architect, testified at the hearing. He opined that a berm would have "little or no impact on dust control" and did not recommend it. He also rejected a fence because it could exacerbate wind, and ultimately, dust conditions. If there were to be a fence, in his opinion, it should have gaps in order to reduce wind speeds. Based on his years of experience, he did not believe that planting vegetation would have an appreciable impact on noise; instead, he opined that reduction of speed on the roadway would be most effective in reducing noise and dust. Mr. LeBlanc suggested that installing speed bumps would be the best course of action.

[184] Mr. LeBlanc was familiar with the Park site and the cottages location, having been involved in the work leading to the Park Master Plan. In commenting on the WSP proposed option, he said:

> A. Yeah, I think one of the things that makes this site unique is kind of the vernacular landscape that's here. It sits out on a headland. Fantastic views from ... from the site and from the park site. You get great views of the water as you're driving down that road, and I do worry about the visual impacts that a fence and a linear berm and regular space plantings that were suggested in the WSP report would have on the visual qualities of this fairly dynamic landscape.
>
> [Transcript, p. 305]

[185] On cross-examination, Mr. LeBlanc confirmed he had had no discussions with Mr. Pfeil, or Ms. Guichon, or Mr. Aucoin, and had not conducted any testing. He agreed that the people who live on the site are best qualified to explain the conditions there.

[186] Ms. Guichon and Mr. Aucoin had been active participants in the Burntcoat Head Park Association which had operated the Park before the MEH assumed management. Ms. Guichon was secretary of the Association. They were also members of the Steering Committee for the Park Master Plan prepared by BDA Landscape Architects who developed the conceptual plan.

[187] The conceptual plan included renderings of the Park enhancements showing a "tree buffer and wildlife corridor" between the parking lot and the southern portion of the corporate Claimant's property as well as a "tree buffer" or "native planting screen" along the boundary between the Park property and roadway and the cottage operations.

[188] Ms. Guichon confirmed that as members of the Steering Committee they had seen the draft report and were satisfied with what was proposed:

> Q. ...If we could turn to the next page, page 1650 of Tab 25 of Exhibit S-12. And on this conceptual drawing this appears to be a two-dimensional one. Can you say whether or not this depicts the Claimant's properties?
>
> A. Yes, it does.
>
> Q. Okay, and you'll see various places, a tree buffer and wildlife corridor is listed?
>
> A. Yes.
>
> Q. Okay, and was that your understanding of what the enhancement project would ultimately be?
>
> A. Yes, it was.
>
> Q. And were you and Shangri-La Cottages satisfied with the conceptual drawings provided in this report?
>
> A. Yes, we were because it provided us ... one of the big things that was important to us was that there be a buffer between us and the parking lot at the time in the park. So we had ... would keep our privacy and the protection of our cottages. So we were ... that was an important element for us. So we were happy with this design.
>
> [Transcript, p. 30]

[189] The Board understands from the evidence of Ms. Guichon and Mr. Aucoin that they changed their minds about what would be sufficient. By the time they communicated through Mr. McLean, their desire was for a berm, fence and trees to

reduce noise, dust and provide privacy. They wanted to maintain the privacy and quiet they had enjoyed and had not experienced since the enhancements to the Park were begun.

[190] The Board understands that the buffer proposed by Mr. Pfeil did not abut the parking lot as in the conceptual plan, and that the Claimants are not seeking such a buffer.

[191] Before making a finding on what would serve as an appropriate buffer, the Board will consider the steps taken by the MEH to date to mitigate the concerns of the Claimants.

[192] The Board observes that Ms. Nolan testified that the MEH had concerns about the access from the Park property onto the Claimants' property as well as the lack of a protective fence at the cliffs where a look-off was proposed. After the expropriation, the MEH built a fence from the road to the shore. Ms. Nolan said:

> That fence was built to replace the existing fence that was there along the cliff and therefore we ... we put it along the other boundary as well for safety, primarily, but I guess we also recognised that it would give a measure of privacy, I guess, to the cottages. People at least couldn't cross that particular spot in the property line, but it was primarily done for safety.
>
> [Transcript, p. 486]

[193] The photographs of the fence show that it is not a solid wood fence, but consists of railings, which would not totally deter anyone from entering the cottages site. It is not a screen between the Park and the Claimants' property.

[194] Ms. Nolan also testified that, after receiving Mr. LeBlanc's report, the MEH decided that it would be useful to install speed bumps. The MEH uses them on other roads, although she said they did not always achieve reductions in speed. The MEH installed three speed bump tracks across the roadway to the Park in 2018. The locations of them were identified by Ms. Friars and by Ms. MacLean. Ms. Nolan explained that the

number of speed bumps and the locations where they were placed was based on the advice of the MEH traffic authority.

[195] Ms. Nolan confirmed that it is a common practice for the MEH to use calcium chloride to control dust on roadways maintained by it. She said that because they had been made aware by the Claimants that dust was a problem for them, they arranged in 2017 to have it applied to the roadway by municipal staff.

[196] The evidence of Mr. Pfeil was that three speed bumps would not be enough. Mr. LeBlanc said that slowing traffic speed using speed bumps would help reduce dust, but he opined that they should go completely across the road. He also opined that there should be at least two more, should be wider, and not have gaps between the sections.

[197] According to the Claimants, since the speed bumps have been installed they have not achieved their purpose as vehicles are being driven in such a manner as to avoid them by partially driving outside or around them, or between the sections. This was confirmed by Mr. McLean, and Ms. MacLean, who had been on the roadway to the Park recently. Their evidence is consistent with the Board's observations on its site visit.

[198] Mr. Aucoin and Ms. Guichon said that the application of calcium chloride had made a difference in the amount of dust; however, Ms. Guichon expressed concern about whether it might be harmful, particularly to animals who might walk on the roadway after an application.

[199] The MEH filed with the Board an undertaking pursuant to s. 34(b) of the *Act*, addressed to the Claimants and to the Board, dated November 29, 2017. In it, the MEH undertakes to:

> 1. Continue to apply calcium chloride to the driveway leading from Burntcoat Head Road to Burntcoat Head Park (the "Park") on an as-needed basis, approximately once per month during the 2018 park season, as means of controlling dust.

2. Install three speed bumps and associated signage along the driveway leading from Burntcoat Head Road to the Park prior to opening the park for the 2018 season.
    a. The speed bumps will be located as follows: one between the parking lot for the park and the driveway entrance to Shangri-La Cottages; and two between the 45 degree bend in the road and Burntcoat Head Road.
    b. The speed bumps will run the width of the road and look like the attached picture, which shows part of a bump.
    c. There will be two signs for each speed bump visible from either direction, one warning that the bump is coming and the other at the location of the bump.
    d. The speed bumps will be removed when the park closes for the season and installed again prior to opening the park for the next season.
3. The Municipality will continue the above in subsequent years as long as it remains an effective means of controlling the speed of traffic and dust from the driveway.

[Exhibit S-12, p. 1294]

[200] Ms. Nolan confirmed that the MEH would be prepared to fix any issues about the spacing, location and numbers of speed bumps if they are not working sufficiently. She testified about the undertaking:

> It's basically a commitment to the Board and to the owners of the cottage that we intend to take action as best we can to ... to control disturbances that they would suffer as a result of ... of dust, and you know, the speedbumps ... the calcium chloride is just a typical practice that we engage in, and yes, it ... it is something that assists them. So no problem ... no problem with an undertaking to the Board that we would continue to do that.
>
> [Transcript, p. 495]

[201] Ms. Friars and Ms. MacLean both testified about the co-operation which had been extended to the Claimants regarding the lights from the washrooms when they wished to enable their guests to enjoy the night sky, as well as directing RVs from overnight usage of the parking lot.

[202] In post-hearing submissions, the Claimants expressed concerns about the enforceability of the undertaking, and the lack of control they would have over the MEH's efforts.

[203] Prior to the commencement of the hearing, the parties confirmed that the MEH had provided the Claimants with an acceptable easement over the roadway to access the Claimants' lands.

[204] With respect to the undertaking, s. 34(b) of the *Act* provides:

> **34** The fact of
> ...
>
> (b) any undertaking given on behalf of the expropriating authority, or by any other person within the scope of his authority, to make any alteration, construct any work or grant or convey any other land or interest therein,
>
> shall be taken into account, in connection with all other circumstances of the case, in determining the amount to be paid to any person claiming compensation for land expropriated.

[205] The Board also notes that s. 65 of the *Act* provides:

> **65** Where land is expropriated or is injuriously affected by a statutory authority, the statutory authority may, before the compensation is agreed upon or determined, undertake to make alterations or additions or to construct additional work or make a grant of other lands, in which case, the compensation shall be determined having regard to such undertaking, and, if the undertaking has not already been carried out, the Board may declare that, in addition to the compensation determined, if any, the owner is entitled to have such alteration or addition made or such additional work constructed or such grant made to him.

[206] The Board finds that an undertaking by the MEH which is addressed to both the Board and the Claimants is a valid component of compensation to mitigate injurious affection and is enforceable. The Board is prepared to include it in its Order in this matter. Should the MEH not abide by the undertaking, the Claimants may make an application to the Board for its enforcement, and the Board retains jurisdiction for that purpose. The Board observes that s. 29 of the *Utility and Review Board Act*, S.N.S 1992, c. 11, as amended, allows an Order of the Board to be made an Order of the Supreme Court and enforced in the same way as an Order of the Court. However, the Board concludes that the undertaking given must be modified, as discussed below. If the MEH is unwilling to modify the undertaking, the Board retains jurisdiction to determine any additional amount of compensation which may be required instead.

[207] The Board is persuaded by the evidence that the three speed bumps as currently configured are not effective. The Board accepts the evidence of Mr. Pfeil and Mr. LeBlanc and finds that five speedbumps are required. They should be placed at the recommended locations and should cover the entire width of the travelled way without any gaps in the sections. The Board orders that the undertaking of the MEH shall be modified in this regard.

[208] The Board is satisfied that the application of calcium chloride during the period when the Park is open to the public as provided in the undertaking is appropriate. However, the Board finds that this will not totally eliminate the dust, and therefore, based on the evidence of Mr. Pfeil, concludes that a buffer of trees is required.

[209] Further, the Board notes that the Claimants were initially satisfied with a buffer of trees as shown on the conceptual Master Plan for the Park to afford privacy. Based on the evidence of Mr. Pfeil, the Board finds that a tree buffer, as described in his Option 2, which he said was most cost-effective, will afford protection from dust, will inhibit noise, and will offer adequate privacy to the cottage operation. The Board accepts that it is possible for the correct mix of deciduous trees and evergreens and shrubs to effect this on a timely basis. Mr. Pfeil, the expert engaged by Mr. McLean, testified this would be an adequate buffer. In this respect, the Board prefers the evidence of Mr. Pfeil over that of Mr. Ingram, and Mr. LeBlanc.

[210] The Board observes that the cottage operation was exposed to the Park prior to the expropriation. Both Mr. Pfeil and Mr. LeBlanc suggested a fence would not be in keeping with the visual impact of the Shangri-La property. Mr. Pfeil had not originally proposed a fence, but only did so when Ms. Guichon requested it.

[211] The Board is mindful that mitigation must be reasonable. It is also mindful of the principles in *Dell Holdings* regarding full and fair compensation to an owner. While the Board agrees that the number of visitors to the Park has increased, it is not persuaded that a fence is necessary to mitigate injurious affection suffered by the Claimants as a result of the use of the roadway and parking lot.

[212] The Board notes that Mr. LeBlanc agreed with a 20% contingency as allowed by Mr. Pfeil. Consequently, the Board accepts that the amount set out in Mr. Pfeil's Option 2 of $55,212.00, represents the amount of compensation which should be paid to the Claimants for injurious affection. This payment is in addition to the installation of the speed bumps, and application of calcium chloride, as provided in the modified undertaking noted above, all of which amounts to reasonable mitigation for the injurious affection claimed. The Board considers this to be "full and fair compensation".

[213] If the easement referred to at the commencement of the hearing has not yet been granted, the Board expects that this would be completed as soon as possible.

3.0 Payment to Security Holder

[214] In its pre-hearing submissions, the MEH said that as there is a mortgage on the lands of the corporate Claimant, the Board should direct payment of a proportionate amount of any compensation to the security holder. It said:

> [125] Prior to the taking, PID 45108339 was 25.3 acres. Parcel A is 4.55 acres and Parcel C is 0.47 acres, collectively 20% of the total acreage.
>
> [126] The payment to RBC from the compensation awarded to the Claimants should be 20% of the amount owing on the collateral mortgage at the date of expropriation, June 6, 2016, less 20% of all payments made on the mortgage since that date.
>
> [Respondent's pre-hearing submission, May 1, 2018]

[215] In their reply to the MEH submission on this point, the Claimants said that this is a private matter between the Claimants and their financial institution and not something which the Respondent has standing to raise, nor is it within the jurisdiction of the Board to make such an order, when the security holder is not a party to the proceeding.

[216] Regrettably, there was little discussion of this in the hearing. The only reference is the following exchange between Counsel for the MEH and Ms. Guichon:

> Q: Yes. Ms. Guichon, this is a copy of the mortgage that was registered against the cottage property at the time of expropriation between the numbered company and Royal Bank of Canada. You're familiar with this document?
>
> A. It's been a long time since I've looked at it. It was in 2011, I'm sure.
>
> Q. Okay, and am I correct that the same mortgage is still on the remaining lands of the cottage operation including the lands south of the access road after expropriation? In other words, this mortgage hasn't been discharged in the past ...
>
> A. No, it has not.
>
> Q. ... year or two. Okay. You still owe money on the mortgage?
>
> A. Yes.
>
> [Transcript, pp. 98-99]

[217] In closing submissions, the Respondent maintained its position that "…the Claimants are required to comply with s. 27(13) of the *Act* and make payment to the mortgagee". The Respondent went on to say:

> [158] The Claimants assert that the Municipality has no standing to request the Board to order the mortgagee be paid and that this is a private matter between the Claimants and the mortgagee. With respect, this argument misses the point. Section 27(13) is clearly applicable on the facts. It requires that the mortgagee be paid. We are simply asking the Board to order that the Claimants comply with their s. 27(13) obligations.
>
> [Respondent's Closing Submissions, p. 38]

[218] In reply, the Claimants described s. 27(13) as providing "an entitlement to the security holder, but…not…a mandatory obligation on the landowner to pay that money over." Further, they submitted that the Respondent had not given notice of the expropriation to the security holder which is an owner as defined by the *Act*. Describing

the bank which holds the mortgage as "a stranger to this proceeding", the Claimants noted that the Respondent had not raised this at the outset of the proceedings, nor had it made it a condition of the statutory payment which had been made.

[219] The Board observes that ss. 27(10) to (13) of the *Act* provide:

> **(10)** Security holders shall be paid the amount of principal and interest outstanding against the security out of the market value of the land and any damages for injurious affection payable in respect of the land subject to the security in accordance with their priorities, whether or not such principal and interest is due, and subject to subsections (11) and (12).
>
> **(11)** Where land is subject to a mortgage and the amount payable to the mortgagee under subsection (10) is insufficient to satisfy the mortgage in full,
>
> (a) where the mortgage is a purchase-money mortgage the mortgage shall, to the extent that the mortgage affects title to the land, be deemed to be fully paid, satisfied and discharged for all purposes upon payment of the amount payable to the mortgagee under subsection (10); and
>
> (b) where the mortgage is not a purchase-money mortgage and includes a bonus,
>
> (i) the amount by which the amount payable to the mortgagee under subsection (10) is insufficient to pay the amount remaining unpaid under the mortgage, or
>
> (ii) the amount of the bonus,
>
> whichever is the lesser, shall, to the extent that the mortgage affects title to the land, be deemed to be fully paid and satisfied for all purposes upon payment of the amount payable to the mortgagee under subsection (10).
>
> **(12)** No amount shall be paid in respect of a bonus until all security holders have been paid all amounts payable other than any bonus.
>
> **(13)** Where land held as security is expropriated in part or is injuriously affected, a security holder is entitled to be paid to the extent possible in accordance with his priority, out of the market value portion of the compensation and any damages for injurious affection therefor, as the case may be, a sum that is in the same ratio to such portion of the compensation and damages as the balance outstanding on the security at the date of the expropriation or injurious affection is to the market value of the entire land, provided however that the sum so determined shall be reduced by the amount of any payments made to the security holder by the owner after the date of expropriation or injurious affection. [Emphasis Added]

[220] The Board observes that the mortgage in question is a collateral mortgage and charges the lands owned by the corporate Claimant only. It secures a debt which is, on its face, less than the amounts claimed in the Statement of Claim. As far as the copy

provided to the Board appears, there is no provision with respect to the possible expropriation of the land which is security for the debt.

[221] The Board heard no evidence of the amount owing under the mortgage, or the amount which may have been paid against it since the expropriation took place.

[222] It appears to the Board that there is a potential conflict in the provisions of s. 27(10) and s. 27(13) of the *Act*. The former says that "Security holders shall be paid…", while the latter says "…a security holder is entitled to be paid…". The Claimants emphasize the entitlement only.

[223] To resolve any such conflict, the Board considers it must interpret the meaning of these provisions. In doing so, the Board is mindful that the approach to statutory interpretation, particularly in the case of expropriation, should be a broad and purposive one (See *Dell Holdings* which has been followed by the Board in a number of cases, including *Johnson*). The Board has considered the purpose of these provisions, and concludes that the intention is that a security holder does not lose its security or part of it because of an expropriation of land or a part of the land. The Board concludes that s. 27(10) applies where all the secured land is taken or injuriously affected, and that s. 27(13) applies where only a part is taken. The latter section, of necessity, sets out the calculation, as the security holder retains security over the remaining, unexpropriated, lands. It is, in the Board's view, the measure of how much should be paid, rather than changing the nature of the payment to one of entitlement, rather than obligation.

[224] The Board considers this to be consistent with the decision of the Nova Scotia Expropriations Compensation Board in *Park Projects Ltd. v. Halifax (City)* (1981), 22 L.C.R. 244, affirmed at 23 L.C.R. 303 (NSTD), and 25 L.C.R. 193 (NSCA) where the

formula for determining the share payable to a mortgagee in a partial expropriation was set out. A review of cases cited in Coates and Waqué confirms a similar approach in other Canadian jurisdictions.

[225] With respect to the apparent lack of notice to the bank referred to by the Claimants, the Board does not consider this in any way detracts from the provisions of ss. 27(10) and (13). Todd commented, at p. 396:

> The mortgagee may not feel it necessary to be a party to negotiations or proceedings to determine compensation for the mortgaged property, particularly when satisfied that the outstanding balance owing on the mortgage will be adequately covered by whatever compensation may be negotiated or determined.

[226] The Board considers this is especially the case where, in a partial expropriation, a mortgagee may consider that the remaining, unexpropriated, land is sufficient security.

[227] The Board notes that its decision in *Re Expropriation Act*, 2003 NSUARB 154 (which was reversed in part by the Court of Appeal in *Re Johnson*, 2005 NSCA 99 on other grounds), the Board observed that there was some evidence of two security holders during the hearing. One of them had been given notice of the hearing but chose not to participate. Referring to the provisions of the *Act*, the Board directed that the compensation ordered was to be held in trust for the security holders by counsel for the claimants "…as their interests may appear, or until they are in receipt of a release or waiver in regard to such funds."

[228] The Board considers such a direction to be an appropriate way to address the requirements of s. 27(13) of the *Act.* Thus, the Board finds that the method of calculation of how much should be paid to the bank which holds the collateral mortgage on the corporate Claimant's lands is as set out in the Respondent's submissions. The

Board orders that this amount, once calculated, shall be held in trust by Counsel for the corporate Claimant, and paid over to the mortgagee; provided that if the mortgagee waives or releases the payment of that amount, or any part of it, the amount or the part shall be paid to the corporate Claimant.

[229] With respect to the Claimants' assertion that the Board does not have authority to make such a direction, the Board notes that s. 47(1) of the *Act* authorizes the Board to determine compensation and "…any other matter required…to be determined". As the mortgagee is an owner, as included in s. 3(1)(j) of the *Act,* and as the statutory authority is to pay compensation to the owner, the Board concludes such a direction is within its jurisdiction under the *Act.*

4.0 Claimants' Time

[230] Although not specifically claimed in the Notice of Hearing and Statement of Claim, in their Pre-Hearing Submissions, the Claimants stated:

> **Owner's Time**
>
> 27. The Claimants are entitled to compensation for business losses caused by the taking. Owners' time is an element of business loss.
>
> 28. The Claimants have had to divert their management efforts away from regular business operations to deal with this matter. The Claimants are entitled to a reasonable award for the energies spent dealing with this expropriation in an amount to be determined by the Board following hearing all of the evidence.
>
> [Claimants' Pre-Hearing Submissions, p. 9]

[231] In the Pre-Hearing Submissions filed by the MEH, the Respondent stated:

> [110] With respect, a claim for "owner's time" as an element of business loss is not a claim that is properly before the Board. It is not claimed in the Statement of Claim and is raised for the first time in the Claimants' pre-hearing brief. Also, there has been no disclosure on this issue.
>
> [111] If the Claimants are seeking to recover "owner's time" as a type of business loss, entitlement and quantum should be determined at the hearing on the merits as would be the usual approach for any claim of business loss, not in a subsequent costs hearing.

> [112] Also, owner's time in a partial taking is a well-settled issue. It can only be recovered in limited circumstances and to a much narrower degree than is claimed. Our Court of Appeal has stated that there can be no recovery for time spent personally by the owner in negotiations and preparation for the hearing before the Board, attendance before the Board or attendance to instruct or advise counsel; *Re Johnson*, 2005 NSCA 99, at paras. 191 (citing from *Park Projects Ltd. v. Halifax* (1982) 54 N.S.R. (2d) 116 (C.A.)), 192 and 206. [Respondent's Book of Authorities, Tab 9]
>
> [113] If the Claimants are seeking recovery for owner's time they should advise the Board, amend their Statement of Claim, provide disclosure and explain what exactly they are claiming and the authority on which they rely so the Municipality can know the case to meet.
>
> [Respondent's Pre-Hearing Submissions, p. 19]

[232] The Claimants did not amend their Statement of Claim. The Board considers that the general claim for "Such further and other relief under the *Expropriation Act* that later becomes apparent and as this Honourable Board thinks fit and just" as claimed in Paragraph 3g. of the Statement of Claim could encompass a claim for the Claimants' time.

[233] In their pre-hearing reply submission, the Claimants acknowledged "…perhaps they could have been clearer…" in identifying their claim regarding their time. They said:

> Their claim for owners' time is a component of their claim for injurious affection. The *viva voce* evidence that the Claimants will give at the Hearing will show that as a result of the increased visitorship, the operation of the museum and the change in proximity of the Respondent's operations to their own, they were required to work extra time in the operation of their business. Their evidence will be to the effect that they have had to take extra time cleaning dust from their property, particularly prior to the beginning of the calcium chloride treatments, dealing with overnight campers who use the unsecured and unprotected museum property (overnight RVs with noisy generators), directing people away from their property who intended to attend the museum, etc. This is not a claim for business loss as understood by the Respondent and expressed in its Pre-Hearing Brief and it is not a claim for their time spent dealing with the litigation of the expropriation.
>
> [Claimants' Pre-Hearing Rely Submission, p. 5]

[234] The Board notes that the Claimants did not elaborate further on this element of their claim in Post-Hearing Submissions.

[235] During the hearing, Mr. Dunning explored this aspect of the claim with Ms. Guichon:

Q. Okay. In your pre-hearing brief you say that you are making a claim for extra time spent cleaning dust from your property - particularly prior to the beginning of the calcium chloride treatments - dealing with overnight campers who used the unsecured and unprotected museum property, overnight RV's with noisy generators, and directing people away from your property who intended to attend the museum. Do you recall that?

A. Is there a document?

Q. Well, it's in your pre-hearing brief. You're making a claim before this board for ...

A. Okay.

Q. For that. I just want to ask you about each of those. Each of those. So extra time spent cleaning dust from your property. So for this claim, what time period are you talking about here?

A. Well, the worst dust was in 2016. That was the year that it was really bad.

Q. I know, but I'm asking you for purposes of your claim here so that we know and I know and the Board knows. What specific time period are you making this claim for?

A. I don't understand. Like ...

Q. Okay.

A. ... are you talking months or time of day or ...

Q. I don't know, Ms. Guichon. It's your claim.

A. Well, I see. Okay.

Q. Maybe you can answer this question. How much time have you spent, how much extra time have you spent cleaning dust from your property?

A. I don't know if I can put an hour ... I don't know.

Q. Can you tell me what compensation you are seeking from this board for the extra time spent cleaning dust from your property? Are you seeking a certain monetary value? Don't know?

A. I don't know.

Q. Okay, and if I were to ask you the same question for dealing with the overnight campers or directing people away from your property, would your answers be the same as you just gave me?

A. It would be difficult to put a number on it. I mean, I don't ... yes, I don't know.

[Transcript, pp. 126-128]

[236] The Respondent submitted in its Post-Hearing Submission that the Claimants had offered no evidence to support a claim for their time, or extra time.

[237] The Board heard much evidence from Ms. Guichon and Mr. Aucoin about an increased level of dust. In the Board's view, this was not something that "later [became] apparent" to the Claimants. The Board would expect that particulars of any time regarding additional cleaning, for example, for which compensation is claimed would

be provided. The evidence of Ms. Guichon did not enlighten the Board in this respect. The Board considers that, rather than a business loss, if there were such a loss, which the Board does not find, it would be more properly included in either a claim for disturbance or for damages as part of injurious affection.

[238] Any such claim would have to fall within the definition of injurious affection in s. 3(1)(h)(i)(B) of the *Act.* The Board concludes that there was no evidence on which a claim for damages as described in the Claimants' pre-hearing reply submission was proven or could even be quantified.

[239] Further, if the claim, as described in Paragraph 92 above, is for time spent dealing with the expropriation, including any communications, negotiations or attendance at the hearing, the Board observes that the Court of Appeal in *Re Johnson*, 2005 NSCA 99, concluded that compensation for an owner's time is not compensable as costs or damages. In particular, the Court said:

> 200 Consequently, any recovery of owner's time as damages must be as injurious affection as defined in s. 3(h)(i)(B) which encompasses "personal and business damages, resulting from the construction or use, or both, of the work."
>
> 201 According to *Dell Holdings Ltd*., remedial legislation such as the *Act* is to be given a broad and liberal interpretation consistent with its purpose. At § 21 of that decision, the Supreme Court of Canada noted that in the event of an ambiguity, a remedial statute is not to be interpreted to deprive one of common law rights unless the statute is plain.
>
> 202 However even when read broadly, in my view the wording of s. 3(h)(i)(B) does not permit reimbursement for time expended by an owner in relation to an expropriation. The definition of injurious affection is limited to damages which result *from the construction or use* of the works, which here is the Cobequid Pass. The "compliance costs" claimed by the Johnsons do not result from construction or use but to the initial expropriation of property for the purpose of that construction or use.
>
> 203 In summary, the Johnsons' claim for their time in preparing for the hearing, including meetings with their legal counsel and experts, discovery examinations, and responses for information are not, in view of *Park Projects Ltd*., supra costs nor are they injurious affection or disturbance damages. It would appear that the most that they can recover is an amount for their time in attending the hearing before the Board, which was all that was allowed in *Park Projects Ltd*., supra. The quantum is to be determined by the Board. As indicated at § 280 of its decision, it retained jurisdiction to address the issue of quantum, should the need arise. [Emphasis added]

[240] Accordingly, the Board concludes that, as both Ms. Guichon and Mr. Aucoin attended the three days of hearing, it should receive submissions from Counsel on what, if any, amount should be allowed. The Board retains jurisdiction to assess the quantum, if necessary.

5.0 Interest

[241] The *Act* provides that interest is payable on the compensation for the market value of the expropriated lands, and for injurious affection, as set out in s. 53. Unless there are circumstances where the Board considers that interest should be paid at a different rate, due to either the actions or inactions of one party or the other, the rate of interest is set at 6% under s. 53(1).

[242] While the effective date of the expropriation is June 6, 2016, nearly two years before this hearing took place, the Board has no evidence before it to suggest that either party delayed the determination of compensation to any significant extent.

[243] Once the Claimants filed their Notice of Hearing and Statement of Claim with the Board, the matter proceeded in a more efficient and timely matter than many other expropriation proceedings which have been before the Board in recent years. Accordingly, the Board is satisfied that interest at the rate of 6% is payable by the MEH to the Claimants on the market value of the lands taken and injurious affection from the date of February 2, 2016, the date of the Notice of Expropriation, to the date of payment, subject to any adjustment arising from the statutory payment made on August 6, 2016.

6.0 Costs

[244] Section 52(2) of the *Act* makes provision for the payment of reasonable costs and expenses "necessarily incurred by the owner for the purpose of asserting a claim for compensation." The Board considers that this matter should be first left to the parties to consider, once this Decision is issued. If they are unable to agree on costs, the Board will retain jurisdiction to hear an application by either party, on reasonable notice, to consider an award of costs.

VI SUMMARY

[245] The MEH expropriated three parcels of land from the Claimants on June 6, 2016, for the stated statutory purpose of "tourism and tourist traffic, particularly for access to and a parking lot serving Burntcoat Head Park" as set out in the Certificate of Expropriation filed at the Land Registration Office. Some of the land taken was on both sides of the roadway leading from Burntcoat Road to the Park; a larger parcel was taken for the expansion of the Park's parking area and placement of the new washroom building and a corridor to the shore.

[246] The Claimants operate a seasonal recreational cottage business next door to the Park, and own, either personally or through a numbered company they control, land adjacent to the Park and on the opposite side of the roadway. They claim that, as a result of the expropriation, they have experienced increased noise, dust, light interference, and trespass to their lands, all of which they said amounts to nuisance to them and their guests.

[247] The Claimants sought, in addition to compensation for the value of the land which was taken, an amount for injurious affection to their remaining lands, and for mitigation of the injurious affection or disturbance.

[248] The Board, after considering all the evidence, finds that the Claimants should be paid the following amounts:

Market Value of Parcels A and C	$54,800.00
Market Value of Parcel B	$6,200.00
Injurious Affection from taking of Parcels A and C	nil
Injurious Affection from taking of Parcel B	nil
Mitigation of Injurious Affection to remaining lands northeast of the Park (Cottage lands)	$55,212.00
TOTAL MONETARY COMPENSATION	$116,212.00

[249] The Board orders the MEH to modify its undertaking to install additional speedbumps as set out in Paragraph 207. The Board retains jurisdiction to (a) consider any application by the Claimants to enforce the undertaking if required, and (b) to determine any additional amount of compensation which may be required if the MEH is unwilling to modify the undertaking as directed.

[250] The Board is not persuaded on the evidence, however, that any compensation should be paid for the Claimants' time as described in Paragraph 15 of their pre-hearing reply submission.

[251] The Board retains jurisdiction to assess the amount which should be paid to the Claimants for their time attending the hearing. The Board will receive submissions from Counsel on this portion of the claim.

[252] The Board directs that, to satisfy s. 27(13) of the *Act*, a portion of the compensation relating to the corporate Claimant's land shall be held in trust by Counsel for the corporate Claimant. The amount is to be calculated in accordance with the Respondent's submissions and paid to the mortgage holder; provided if the mortgagee

waives or releases the payment of the amount or any part of it, such amount or part shall be paid to the corporate Claimant.

[253] The Board further finds that the Claimants are entitled to interest at the rate of 6% from February 2, 2016, on the total market value of the lands and injurious affection. The Board reserves jurisdiction to address the issue of costs, should the parties not be able to agree on the amount which should be paid to the Claimants. The Board will hear the parties on the issue of costs on application on reasonable notice, by either party.

[254] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 10th day of October, 2018.

Roberta J. Clarke