DECISION **2017 NSUARB 155**
M07894

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE EXPROPRIATION ACT

- and -

IN THE MATTER OF a claim by **PORRIDGE POT FOODS INC. O/A THE WOODEN MONKEY** for compensation to be paid by the **HALIFAX CONVENTION CENTRE CORPORATION, HALIFAX REGIONAL MUNICIPALITY** and **THE ATTORNEY GENERAL OF NOVA SCOTIA** for injurious affection to its interests as a tenant and operator of a full-service restaurant at 1707 Grafton Street, Halifax, Nova Scotia

BEFORE:	Roland A. Deveau, Q.C., Vice Chair Roberta J. Clarke, Q.C., Member Richard J. Melanson, LL.B., Member
CLAIMANT:	**PORRIDGE POT FOODS INC.** **o/a THE WOODEN MONKEY** Raymond F. Wagner, Q.C. Madeline Carter, LL.B. Kate Boyle, LL.B.
RESPONDENTS:	**ATTORNEY GENERAL OF NOVA SCOTIA** Mark V. Rieksts, LL.B. **HALIFAX REGIONAL MUNICIPALITY** E. Roxanne MacLaurin, LL.B. **HALIFAX CONVENTION CENTRE CORPORATION** Ian R. Dunbar, LL.B.
WRITTEN BRIEFS:	June 23, 2017
PRELIMINARY HEARING DATE:	June 29, 2017
UNDERTAKINGS:	June 30, 2017
DECISION DATE:	**September 27, 2017**
DECISION:	**None of the Respondents is a "statutory authority" in relation to the Works. Accordingly, the matter does not fall within the Board's jurisdiction and the claim is dismissed.**

1.0 INTRODUCTION

[1] This is a Decision respecting a Preliminary Hearing held by the Nova Scotia Utility and Review Board (Board) respecting a Notice of Hearing and Statement of Claim filed under the *Expropriation Act,* R.S.N.S. 1989, c. 156 (*Act*) by Porridge Pot Foods, operating as The Wooden Monkey (Wooden Monkey or Claimant). The claim is made against Her Majesty the Queen in right of the Province of Nova Scotia (Province), represented by the Attorney General of Nova Scotia; the Halifax Regional Municipality (HRM); and the Halifax Convention Centre Corporation (HCCC).

[2] The Claimant operates a full service locally-sourced restaurant in a four-storey building located at 1707 Grafton Street in downtown Halifax (Property). It asserts claims against the Respondents for injurious affection under s. 30(1) and s.3(1)(h)(ii)(B) of the *Act*, for business damages arising out of the construction of the Nova Centre.

[3] The Nova Centre project is being constructed by Argyle Developments Limited (Argyle), a wholly owned subsidiary of Rank Inc., on lands now owned by Argyle Consolidated Inc. (ACI), a company owned by Argyle and Rank. The Nova Centre project is a multipurpose development complex, which is to include office towers, a hotel, retail shops, residential space, a parking garage and a convention centre.

[4] The construction of the Nova Centre project and the involvement of the various parties (including the Respondents) is governed by a complex set of commercial agreements, including: a Cost Sharing Agreement, an Agreement in Principle, a Design Construction Agreement, and a Lease Agreement. These various agreements are described in greater detail later in this Decision.

[5] The Nova Centre encompasses the entirety of the block between Prince, Sackville, Market and Argyle Streets, and is diagonally across from the Property.

Construction began in November 2012. Construction was to end in January 2016. After three announced delays, construction continues to this date.

[6] There was some discussion in the submissions about what part, or all, of the development should constitute the "Works" for the purposes of the legislation, i.e., whether the entire Nova Centre project (approximately one million square feet) comprises the Works, or just the portion containing the Convention Centre (approximately 290,000 square feet). For the purposes of the disposition of this matter in this Decision, it is not necessary for the Board to make a finding on what comprises the "Works" as it has no impact on the result. For the purposes of this Decision, the Board will assume that the "Works" is comprised of the entire Nova Centre project (as alleged by the Claimant), without making a finding on the point.

[7] The Claimant filed its Notice of Hearing and Statement of Claim with the Board on February 27, 2017. An amended Statement of Claim was filed on March 20, 2017.

[8] A Preliminary Hearing was held at the Board's offices on March 22, 2017, to canvass procedural matters and a timeline for the prehearing filing of evidence and the hearing on the merits. A number of jurisdictional issues were raised by the Respondents. Counsel for the parties also agreed to a timeline for the filing of submissions and the holding of a Preliminary Hearing on the jurisdictional issues, to be held at the Board's offices on June 29, 2017.

[9] The written submissions were to be completed on June 2, 2017, but the Board granted two extensions to counsel for the Province to file his reply submissions, first to June 7th, then another request to extend the deadline to June 22nd.

[10] At the initial Preliminary Hearing on March 22nd, the Board noted that an evidentiary foundation would likely be required for some or all of the jurisdictional issues. All counsel indicated their intention to file such evidence or documentation, by way of affidavit or otherwise, concurrently with the filing of their written submissions. Such evidence was filed by the various parties along with their submissions.

[11] The primary jurisdictional issue to be considered by the Board at the Preliminary Hearing was whether the Board has the jurisdiction to consider the Wooden Monkey's claim for injurious affection. Among other grounds, it is alleged by the Respondents that none of them is a "statutory authority" in relation to the "Works", and that the Respondents were not constructing the "Works".

[12] The Preliminary Hearing on the jurisdictional issues was held as scheduled on June 29, 2017. The Claimant was represented by its counsel, Raymond F. Wagner, Q.C., Madeleine Carter, LL.B., and Kate Boyle, LL.B. The Respondents were represented by their respective counsel as follows: the Province by Mark V. Rieksts, LL.B.; HRM by E. Roxanne MacLaurin, LL.B.; and the HCCC by Ian R. Dunbar, LL.B.

2.0 ISSUES

[13] There are two primary issues in this matter, as follows:

1. Whether any or all of the Respondents are a "statutory authority" in respect of the construction of the "Works"?

2. Whether the claim for injurious affection has been made "within one year after the damage was sustained or after it became known" to the Claimant?

[14] Based on its review, the Board concludes that none of the Respondents is a "statutory authority" with respect to the Works, as that term is intended under the

Expropriation Act or any other enactment. As a result, the claim made by the Wooden Monkey does not fall within the Board's jurisdiction under the *Act*. The claim is dismissed.

[15] In the circumstances, it is unnecessary for the Board to address the second issue of whether the claim for injurious affection was made within the required time.

3.0 STATUTORY PROVISIONS

[16] The claim for injurious affection is brought under s. 3(1)(h)(ii)(B) of the *Act:*

> **Interpretation of Act and service of documents**
> **3** **(1)** In this Act,
> ...
> (h) "injurious affection" means
> ...
> (ii) where the statutory authority does not acquire part of the land of an owner,
> (A) such reduction in the market value of the land of the owner, and
> (B) such personal and business damages, resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute, [Emphasis added]
> ...

[17] The term "statutory authority" is defined in s. 3(1)(p):

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

[18] A claimant shall be compensated for injurious affection:

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

[19] The claim for injurious affection must be filed within a specified time:

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

[20] The Claimant submits, in part, that the Province acted in relation to the Works by virtue of its statutory authority to issue Orders-in-Council (OICs) under the *Finance Act,* S.N.S. 2010, c. 2*:*

> **77 (1)** Notwithstanding any enactment, power or authority, no member of the Government Reporting Entity is authorized to enter into a net debt obligation, directly or indirectly, without first forwarding to the Minister
> (a) a report and recommendation setting out the terms, conditions and rationale for the net debt obligation and requesting approval to enter into the net debt obligation; and
> ...
> (3) The Minister shall, on the basis of the report and recommendation referred to in subsection (1),
> (a) approve the net debt obligation provided the person authorized or empowered to enter into the net debt obligation does not require the approval of the Governor in Council to do so; or
> (b) forward the report and the report and recommendation for the consideration of the Governor in Council.
> (4) The Governor in Council may authorize the entering into of the net debt obligation referred to in subsection (1).

[21] With respect to the Works, specifically, the Claimant refers to s. 79 of the *Halifax Regional Municipality Charter,* S.N.S. 2008, c. 39 *(HRM Charter)* and s. 33 of the *Halifax Convention Centre Act,* S.N.S. 2014, c. 8 (*HCC Act*), which contain the following provisions, among others:

> ***HRM Charter:***
> **Power to expend money**
> **79 (1)** The Council may expend money required by the Municipality for
> ...
> (c) repayment of money borrowed by the Municipality, the payment of interest on that money and payment of sinking funds;
> ...
> (l) advertising the opportunities of the Municipality for business, industrial and tourism purposes and encouraging tourist traffic, with power to make a grant to a non-profit society for this purpose;
> (m) promotion and attraction of institutions, industries and businesses, the stabilization and expansion of employment opportunities and the economic development of the Municipality;
> ...
> (x) lands and buildings required for a municipal purpose;
> ...
> (aa) streets, culverts, retaining walls, sidewalks, curbs and gutters;
> ...
> (ac) placing underground the wiring and other parts of a system for the supply or distribution of electricity, gas, steam or other source of energy or a telecommunications system;
> ...
> (ap) industrial parks, incubator malls and land and other facilities for the encouragement of economic development;

...
(aw) all other expenditures
(i) authorized by this Act or another Act of the Legislature,
(ii) that are required to be made under a contract lawfully made by, or on behalf of, the Municipality,
(iii) incurred in the due execution of the duties, powers and responsibilities by law vested in, or imposed upon, the Municipality, the Mayor, Council or officers.

HCC Act:
33 Notwithstanding any other enactment, the Municipality may expend money for
(a) the construction, operation, maintenance or use of the Convention Centre;
(b) a grant or contribution to the Corporation for the construction, operation, maintenance or use of the Convention Centre; or
(c) any combination of clauses (a) and (b).

[22] Under the *HCC Act,* the Province and HRM are responsible for jointly appointing a board of directors to provide strategic direction and oversight for the convention centre.

4.0 STATUTORY INTERPRETATION

[23] In determining the intent of any particular statute, this Board is mindful of *Verdun v. Toronto Dominion Bank,* [1996] 3 S.C.R. 550, and cases following it (see, for example, *Chartier v. Chartier,* [1998] S.C.J. No. 79; *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27), which make it clear that the Supreme Court of Canada has adopted what it calls the "modern contextual approach" to legislative interpretation, supplanting earlier rules it has supported, such as the "equitable construction approach", the "plain meaning rule", and the "golden rule".

[24] In *Re Rizzo & Rizzo Shoes Ltd.*, Mr. Justice Iacobucci said:

> ...Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p.87, he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[25] On the matter of the purpose of legislation, *Nova Scotia (Crop and Livestock Insurance Commission) v. DeWitt,* [1996] N.S.J. No. 566 (S.C.), is of interest. Goodfellow, J., quotes Driedger (3rd ed.) at pages 38 - 39:

> ... Modern courts do not need an excuse to consider the purpose of legislation. Today purposive analysis is a regular part of interpretation, to be relied on in every case, not just those in which there is ambiguity or absurdity. As Matthews, J.A. recently wrote in *R. v. Moore* [(1985), 67 N.S.R. (2d) 241, at 244 (C.A.)]:
>
> > From a study of the relevant case law up to date, the words of an Act are always to be read in light of the object of that Act. Consideration must be given to both the spirit and the letter of the legislation.
>
> ...in *Thomson v. Canada* (Minister of Agriculture), [1992] 1 S.C.R. 385, at 416, where L'Heureux-Dubé, J., wrote:
>
> > [A] judge's fundamental consideration in statutory interpretation is the purpose of legislation.

[26] The Board must also have regard to the *Interpretation Act*, R.S.N.S. 1989, c. 235, including ss. 9(1) and 9(5):

> **9(1)** The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.
>
> **9(5)** Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
> (a) the occasion and necessity for the enactment;
> (b) the circumstances existing at the time it was passed;
> (c) the mischief to be remedied;
> (d) the object to be attained;
> (e) the former law, including other enactments upon the same or similar subjects;
> (f) the consequences of a particular interpretation; and
> (g) the history of legislation on the subject.

5.0 NOVA CENTRE PROJECT – COMMERCIAL AGREEMENTS

[27] The Province, HRM and the Government of Canada (Canada) have all agreed to provide financial contributions in relation to the Convention Centre portion of

the Nova Centre project. The nature of these financial contributions is detailed in a series of contractual arrangements.

(a) Cost Sharing Agreement

[28] The Province and HRM entered into an agreement on July 11, 2012 (Cost Sharing Agreement), which provides that, subject to Canada contributing 1/3 of the capital construction costs, the Province and HRM will contribute funding, on a 50/50 basis, for the following costs associated with the Convention Centre:

- capital construction costs (contemplated to be $56,400,000 for each party);
- all lease capital costs;
- facility maintenance costs, property taxes, operating costs and lifecycle costs during the term of lease between the Province and Argyle;
- the payment of the annual operating deficit of the public sector entity that will operate the Convention Centre.

[29] HRM's obligation to make the financial contributions only commences on the date the Province makes its first payment to the landlord under a contemplated lease for the Convention Centre.

[30] The Cost Sharing Agreement establishes a formula whereby HRM can defer, for a maximum period of 10 years, a portion of its required contributions, if property taxes generated from the Works do not exceed HRM's financial contributions two years after the first payment is made, by the Province, under the contemplated lease. Interest would accumulate on the amount deferred.

[31] The Cost Sharing Agreement provides for the creation of a public sector entity to manage the operations of the Convention Centre. The board of directors of this public sector entity is jointly appointed by HRM and the Province. This public sector entity was later incorporated as the HCCC.

[32] The Cost Sharing Agreement says negotiations with Argyle will be led by the Province, but HRM is allowed three representatives to participate in the negotiations.

[33] The Cost Sharing Agreement provides for a 25-year lease of the Convention Centre to the Province, with two five-year extension options. The proposed lease is to include an option for the Province to purchase the Convention Centre, at the end of the initial lease term, at a price to be negotiated. There is a proposed second option to purchase the Convention Centre for One Dollar at the end of 30 years, if the lease is extended. Both options to purchase are proposed to be subject to the mutual agreement of the Province and HRM.

[34] The Cost Sharing Agreement contemplates the substantial completion of the Convention Centre, hotel and office tower components of the Works at the same time. It further contemplates Argyle would provide a construction schedule for these components of the Works, along with monthly status updates to a Works Committee, which would include one representative from HRM, who could provide updates to HRM Council.

[35] An option to purchase, and right of first refusal, in favour of HRM, in relation to the existing World Trade and Convention Centre, were also included in the agreement. The Cost Sharing Agreement was amended on March 28, 2013, to clarify the mechanics related to the exercise of these rights.

[36] The Cost Sharing Agreement provides that HRM will remit its required contributions to the Province, and not to Argyle. Except for the fact no payment is due until the Province makes its first lease payment, the timing and amount of the payments from HRM are not clearly spelled out in the Cost Sharing Agreement, although a staff

report prepared for HRM Council, at the time the Cost Sharing Agreement was approved, estimated an annual cost of just over $6 million dollars. Neither Argyle, nor HCCC (which did not exist when the Cost Sharing Agreement was executed) are parties to this agreement.

[37] Canada is not a party to the Cost Sharing Agreement. The Board was not provided with any documents which directly detail the manner in which funds are to flow from Canada, or the precise amount of the contribution.

(b) Agreement in Principle

[38] On July 12, 2012, the Province and Argyle reached an Agreement in Principle summarizing the basic details surrounding the building and leasing of the Convention Centre.

[39] Section 2.1 (a) of the Agreement in Principle says:

> **2.1 Argyle Responsibility**
>
> (a) Argyle agrees that it will design, construct, equip and commission the Convention Centre at its cost and risk. The Province will not be required to make any payments pursuant to the Design Construction Agreement or to lease the Convention Centre pursuant to the Lease Agreement unless it has been substantially completed, in accordance with the provisions of the Design Development Agreement, by the Substantial Completion Date. Subject to the foregoing, the Lease Agreement will commence on the Substantial Completion Date, and the Province will remit a payment in the amount $51.4 million to Argyle on that date, which payment will be applied by Argyle toward the costs incurred for the leasehold improvements for the Convention Centre.

[40] It was contemplated the Convention Centre, hotel and office tower (to core and shell specifications), together with an associated parking garage, would all be completed contemporaneously by December 31, 2015.

[41] The Agreement in Principle provides for a Lease Agreement in relation to the Convention Centre, with a term as set out in the Cost Sharing Agreement between

the Province and HRM; namely, a 25-year term, with two five-year extension options and two purchase options.

[42] The Lease Agreement terms proposed in the Agreement in Principle have the effect of amortizing construction costs (less the Province's initial payment of $51,400,000) over 25 years, as base rent.

[43] The Agreement in Principle also stipulates basic lease terms whereby the Province will be responsible for:

- property taxes and operating costs related to the Convention Centre; and,
- interior repair and maintenance.

[44] Under the lease proposed in the Agreement in Principle, Argyle would be responsible for:

- repair and maintenance of structural components; and,
- any components the Convention Centre shares with other buildings on the site.

[45] The Agreement in Principle provides for the negotiation and execution of a definitive Lease Agreement, and a definitive Design Construction Agreement, at a later date.

[46] HCCC and HRM are not parties to the Agreement in Principle, and neither party is referenced in this agreement.

(c) Design Construction Agreement

[47] On February 29, 2016, the Design Construction Agreement contemplated by the Agreement in Principle was executed by the Province, Argyle, ACI and the NC CC Developments Partnership (NCC).

[48] The Design Construction Agreement stipulates that on March 2, 2015, ACI acquired, from Argyle, the property on which the Works are being constructed. ACI holds

title to the Convention Centre portion of the Works in trust for NCC. The Design Construction Agreement says that the entire property will be registered under the *Condominium Act,* R.S.N.S. 1989, c. 85, as amended. The Convention Centre will be a unit of the condominium corporation created upon registration. The Convention Centre will then be transferred to NCC. The Design Construction Agreement further provides that other components of the Works, such as the hotel, financial office towers, retail facilities, and a parking garage, will also be separate condominium units, owned by other entities.

[49] Section 44.4 of the Design Construction Agreement sets out the general relationship between the parties:

> **44.4 Relationship Between the Parties**
>
> (a) The Parties shall be independent contractors and the execution of this Design Construction Agreement will not create any relationship between the Province and Argyle, the Province and ACI or the Province and NCC as partners, joint venturers, employer and employee, master and servant, or of principal and agent. Unless otherwise expressly provided herein, the Province shall not be or be deemed to be an agent of Argyle, ACI or NCC and shall not have authority to represent that it is an agent of Argyle, ACI or NCC or to make any representations or warranties or to create any obligations that purport to bind Argyle, ACI or NCC. Unless otherwise expressly provided herein, neither Argyle, ACI nor NCC shall be or be deemed to be an agent of the Province and shall not have authority to represent that it is an agent of the Province or to make any representations or warranties or to create any obligations that purport to bind the Province. [Emphasis added]

[50] The Design Construction Agreement created a Works Committee, consisting of three representatives of the Province (one of whom is designated by HRM) and three representatives of Argyle. The goal of the Works Committee is to promote cooperative and effective communication. A quorum could be achieved without the presence of the HRM designee.

[51] The Works Committee's limited authority is spelled out in Section 2(d):

> **2(d)** For clarity, the Works Committee shall not have authority to approve:

(i) any amendment to or waiver of any provision of this Design Construction Agreement;

(ii) any amendment to the Project Schedule, the Scheduled Substantial Completion Date or the Scheduled Final Completion Date;

(iii) any Change; or

(iv) any matter in respect of which either the Province or Argyle has a right of consent or may exercise discretion pursuant to the terms of this Design Construction Agreement.

[52] Sections 17.4 (a) and (b) describe, in part, Argyle's responsibilities in relation to the construction of the Convention Centre:

17.4 Complete and Operational Facility

(a) Argyle shall design, engineer, construct and commission the Facility so that the Facility is ready for use and occupancy by the Province on a Turnkey basis on the Substantial Completion Date, and meets the requirements hereof, including the Commissioning Plan, the General Design Requirements, the Progress Submission (subject to Argyle addressing and correcting the deficiencies identified by the Province therein as set out in the Review Comments attached as Appendix 1 to Schedule 3-Progress Submission) and the requirements of Section 17.6, Section 17.7 and Section 17.8, subject to the terms and conditions set out therein.

(b) Argyle shall complete the design and construction of the Facility to accommodate the installation, operation, repair and maintenance of all Facility components and equipment installed by Argyle (including Equipment), and including as required, mechanical, electrical and plumbing connections, structural accommodation and efficient access, all to the tolerances and specifications as may be specified and required by the manufacturers or suppliers thereof.

[53] The Province has detailed input in design development documents and working drawings pursuant to Section 17.6 of the Design Construction Agreement. The contractual terms make it clear Argyle has the ultimate responsibility to oversee the project, perform the design and construction, obtain the required permits and approvals, obtain and install the required equipment, correct deficiencies, address changes in technical standards, assume the financial risk, and generally be "responsible for all construction means, methods, procedures and techniques used to undertake and coordinate the Works…" (see Section 17.9).

[54] Argyle's ongoing responsibilities for the construction of the Works, despite the transfer in ownership of the property to ACI, is confirmed in the recitals to the Design Construction Agreement:

> **AND WHEREAS** Argyle and ACI confirm that on the Closing Date Argyle remains responsible for the design and construction of the Complex and the design, construction, equipping and Commissioning of the Facility notwithstanding the transfer of its legal ownership of the lands comprising the Site to ACI and that Argyle is the developer and general contractor for the design and construction of the Complex, including the Facility;

[55] A work schedule was established pursuant to the Design Construction Agreement, and it was now envisaged Argyle would achieve substantial completion on February 24, 2017, at an aggregate fixed price of $169,200,000. The Province and Argyle were jointly responsible for the retention and remuneration of an Independent Certifier, who, in addition to various responsibilities during the term of the agreement, will ultimately be responsible for determining when substantial completion is achieved.

[56] When substantial completion is achieved, the Design Construction Agreement requires the Province to make a lump sum payment of $51,400,000, as contemplated in the Agreement in Principle. There are other payments the Province is potentially obligated to pay relating to change orders and delays caused by the Province.

[57] The Design Construction Agreement renders Argyle potentially liable to the Province for $2,500,000 in damages if the north office tower and the hotel are not substantially completed within 18 months of substantial completion of the Convention Centre.

[58] The Design Construction Agreement provides that Argyle, ACI and NCC are responsible for obtaining financing for the construction of the Convention Centre, and performing such financing obligations as required by the lenders. The construction

mortgage for the Works must be discharged in relation to the Convention Centre, and replaced with security specific to the Convention Centre, when the Province makes the $51,400,000 payment.

[59] HCCC and HRM are not parties to the Design Construction Agreement. HCCC is not referenced in this agreement. HRM is referred in relation to the Works Committee. As well, there is reference in the recitals to HRM being a party to an agreement with the Province, Rank, and Argyle, dated September 6, 2013, in relation to the commencement of subgrade construction. This agreement is not before the Board.

(d) Lease Agreement

[60] On February 29, 2016, contemporaneous with the signing of the Design Construction Agreement, the Province, Argyle, ACI and NCC entered into a Lease Agreement.

[61] The Lease Agreement provides that on the date the property on which the Works are being constructed is accepted for registration as a condominium, ACI will transfer its interest in the Convention Centre to NCC. In turn, NCC will lease the Convention Centre to the Province on a Turnkey basis. Argyle covenants it will also be liable for NCC's obligations to the Province under the Lease Agreement.

[62] The Lease Agreement has a 25-year initial term. The Annual Base Rent during the initial term is calculated utilizing estimates relating to the long-term financing costs of the Convention Centre, to a maximum of $11,153,140 annually. The minimum Annual Base Rent will be $10,760,570, unless NCC achieves an interest rate below 4.25%. When the actual final financing costs are determined, the Annual Base Rent will be finalized.

[63] The Lease Agreement addresses many standard commercial leasing issues, including:

- the Province's obligation to pay operating costs and real property taxes related to the Convention Centre and its common elements. The monthly operating costs were estimated at $82,188, if the term of the lease had started on February 24, 2017;
- the allocation of responsibility for repair and maintenance costs;
- utilities;
- warranties;
- alterations to the premises;
- parking (10% being allocated to the Convention Centre);
- subordination and non-disturbance provisions relating to mortgage financing;
- Force Majeure and substantial destruction provisions;
- environmental provisions;
- condominium matters;
- default and remedy provisions;
- confidentiality provisions;
- indemnity provisions, and;
- assignment and change of control provisions.

[64] The Lease Agreement contains two five-year extension options. Unlike the initial term, where the Annual Base Rent is established based on long-term financing costs related to the construction of the Works, the extension options are based on market rent.

[65] The Lease Agreement also contains three purchase options. One purchase option is only exercisable in the event lenders realize on their security rights in relation to the Convention Centre, and cannot find a suitable buyer who will assume NCC's obligations under the Lease Agreement. In this case, the Province can purchase the Convention Centre for One Dollar and assume the mortgage thereon.

[66] The Province can also purchase the Convention Centre at a "fair and reasonable" price at the end of the initial lease term. Finally, the Province can purchase the Convention Centre for One Dollar at the end of the first extension term.

[67] Subject to payment obligations to its lenders, if NCC defaults in its obligations under the Lease Agreement, in circumstances entitling the Province to terminate the Lease Agreement in the first two years of the initial term, NCC is obligated to pay back to the Province, over eight years, the substantial completion payment discussed above of $51,400,000. Argyle specifically does not assume this potential liability.

[68] HRM and HCCC are not parties to the Lease Agreement. The only reference to HCCC is in Section 2.5(a), where the Lease Agreement provides that the "Province, either directly, or indirectly through the Halifax Convention Centre Corporation or its successor, shall have the sole and exclusive use of the Facility during the Lease Term."

[69] HRM is only referenced when detailing the portion of HRM property taxes payable by the Province to NCC for the Convention Centre, and in one geographic reference.

6.0 ANALYSIS AND FINDINGS

Issue #1: Whether any or all of the Respondents are a "statutory authority" in respect of the construction of the "Works"?

(a) Respondents' submissions

[70] The Respondents submit that the Board does not have jurisdiction to entertain the Wooden Monkey's claim for injurious affection.

[71] The Respondents have raised this preliminary issue, asserting that this matter falls outside the scope of the Board's jurisdiction. Among other reasons, the

Respondents submit that none of them is a statutory authority in relation to the construction of the Works, as contemplated under the *Expropriation Act*.

[72] First, the Province submits that the types of claims identified by the Wooden Monkey do not constitute actionable nuisance at common law, and thus do not fall under what the Legislature intended as injurious affection in the *Act*:

> 59. Assuming the construction impacts relate only to a public work, the categories of loss claimed are not compensable as not meeting the requirements of the "actionable rule" noted above. The damage must be an actionable nuisance at common law; and the nuisance would give rise to liability but for the defence of statutory authority - the damages must be the inevitable consequence of the construction authorized by statute, such that the defence of statutory authority would apply.
>
> 60. Paragraph 15 of the Amended Claim refers to the following categories of impacts from the construction: (i) water, electricity, internet and phone disruption; (ii) water infiltration from broken pipe; (iii) reduction in street parking; (iv) blocked pedestrian and traffic access due to street closures; (v) dirt, noise, dust, vibration from drilling and blasting of rock on-site; (vi) unsafe conditions due to traffic collisions of trucks near entrance to claimant's property; (vii) interference with the operation of seasonal patio; (viii) interference with waste removal and efficient operation of business; (ix) obstruction of loading zone.
>
> 61. None of these described impacts are authorized by provincial statutory authority, so as to trigger compensation for damages as the Province would be liable for as arising from the exercise of statutory authority. Utility disruption did not occur pursuant to provincial statutory authority; and neither did reduction in street parking or street closures; such closures and drilling and blasting were done under municipal approvals. Private vehicle accidents are not compensable since such acts are negligence claims, and are clearly not done under statutory authority. Similarly, acts of trespass or encroachment on the claimant's property, or carelessness in operation of vehicles resulting in blockage of access to the claimant's property are not authorized under provincial statutory authority.
>
> [Province's Pre-Hearing Brief, May 3, 2017, paras. 59-61]

[73] The Province also addressed the issue of "statutory authority":

> 71. Section 30(1) requires that a "statutory authority" compensate a landowner for damage caused by injurious affection. "Statutory authority" is defined at s.3(1)(p) of the Act as "Her Majesty the Queen in right of the Province or any person or body empowered by statute to expropriate land or cause injurious affection". A "statutory authority" is not limited to the Province, but to anyone person "empowered by statute…to cause injurious affection."
>
> 72. The Province is defined as a statutory authority, but as the rest of the definition makes clear, in the context of a particular claim the Province is only a statutory authority where 'empowered by statute' to 'cause injurious affection'. This follows from the definition of injurious affection at s.3(1)(h)(ii), and the "statutory authority" requirement: "the damage must result from action taken under statutory authority". The Province is a statutory authority only where empowered by statute to cause damage: the statutory power under which the authority acts must provide a defence of statutory authority for the nuisance suffered.

73. Reading these provisions together, the Province, if found to be acting as a statutory authority is required under s.30(1) to compensate the owner of land for loss or damage caused by injurious affection with no taking, provided that the owner can bring himself within the definition of s.3(1)(h)(ii) of the *Expropriation Act.* The claimant must establish that its claim meets the requirements of "statutory authority" and "actionability", noted above.

The Statutory Authority Rule

74. Whether the Province is a statutory authority in this case is directly related to whether the Province is authorized to construct the works under some statutory authority. The statutory authority rule requires damage to have resulted from an act rendered lawful by the statutory powers of the person performing the act. The injurious affection for which compensation is claimed must arise from an act rendered lawful by statutory powers. Therefore, to obtain statutory compensation against the Province, the construction of the works must be conducted under some provincial "statutory authority".

75. Section 3(1)(h)(ii) also requires that the authority pursuant to statute must be for the construction of the works by the statutory authority. If it is the Province that is being claimed against as a statutory authority, then it is the Province that must be empowered by statute to construct the works. This is supported in the wording of section 3(1)(h)(ii), which refers to business damages, "resulting from the construction and not the use of the works by the statutory authority.... " By comparison the definition for injurious affection with a taking at [s.3(1)(h)(i)], reads

> " .. business damage, 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".

The construction of works must be "by the statutory authority" for compensation for injurious affection with no taking; there is no such requirement in the definition for injurious affection with a taking, since the phrase "by the statutory authority" is omitted (see *Expropriation Act,* s.3(1)(h)(i)). [Emphasis in original]

[Province's Pre-Hearing Brief, May 3, 2017, paras. 71-75]

[74] Counsel for the Province submitted that the Province did not fall under the definition of "statutory authority" under the *Act* with respect to injurious affection where no lands of the Claimant were taken. Mr. Rieksts asserted that Executive Council's exercise of authority to issue Orders-in-Council authorizing the Minister of Transportation and Infrastructure Renewal to enter into the four Agreements did not constitute "statutory authority" under the *Act* since it was strictly related to a net debt obligation, not authorizing the Province to construct the Works or empowering it to cause injurious affection. Moreover, he argued the Agreement in Principle is contractual in nature, in that "its terms

are the product of agreement, not specific statutory authority" (para. 85). In Mr. Rieksts' view, the Agreement is not a statutory authorization for construction by the Province of the Convention Centre.

[75] Mr. Rieksts submitted that the provisions relating to recovery for injurious affection claims with no taking of land must be strictly construed and, unlike the presumption of compensation where land is expropriated, there is no presumption of compensation where no land is taken: *The Queen in Right of British Columbia v. Tener et al.,* 1985 CanLII 76 (SCC), cited in *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General),* 1999 CanLII 7241 (NSCA), at para. 26.

[76] Further, Mr. Rieksts referred to s. 10 of the *Expropriation Act* and noted that there is a distinction between a "public work" and whether there is "statutory authority" for the "public work". In his view, the appropriation of monies for the use of the facility, albeit for a public purpose, does not make it a "public work".

[77] Similarly, counsel for HRM submitted that HRM is not constructing the Works under statutory authority; secondly, that the allegations contained in the Statement of Claim are not actionable at common law against HRM; and finally, that HRM has not caused any damages resulting from the construction of the Works.

[78] After noting that the fee simple legal title to the Property on which the Nova Centre is being built is owned by ACI, Ms. MacLaurin submitted:

> ...HRM does not own or occupy any of the lands upon which the Works are being constructed. ...
>
> HRM is not a party to the design and construction agreement which relates to the Works. It will not be a tenant of the newly constructed Convention Centre. ... The Convention Centre component of the Nova Centre is publically sponsored by all three levels of government. HRM and the Province have entered into a Memorandum of Understanding (MOA) with respect to the cost sharing of the Convention Centre by the Province and HRM. ...

> The MOA anticipates that the Province will enter into a lease agreement for the Convention Centre for a period of 25 years, with two 5 year extension options and an option to purchase. The MOA also provides that HRM's cost sharing contributions do not commence until the date that the first payment under the lease agreement for the Convention Centre is made by the Province. It is anticipated that the aggregate tax revenue to HRM from the Convention Centre and the other Nova Centre facilities will offset HRM's financial contribution….HRM's financial contributions will be made directly to the Province.
>
> To date, HRM has not provided any funding for the construction of the Convention Centre or any of the Works undertaken by Argyle. Argyle has no rights under the MOA, and consequently, no ability to enforce any of HRM's obligations to the Province.
>
> [HRM Submissions, April 28, 2017, pp. 2-3]

[79] With respect to the legislative provisions under which HRM derives its authority, HRM submitted:

> The Statement of Claim at paragraphs 9 - 11 refers to the *HRM Charter,* the *Halifax Convention Centre Act*, and an MOA between HRM and the Province. HRM submits that there are no provisions in the *HRM Charter* or the *Halifax Convention Centre Act* which authorize HRM to construct the Works. The MOA likewise, does not contain any clauses which could be interpreted as giving HRM authority to construct the Works. Furthermore, the MOA is not legislation and, therefore, would not be a proper consideration in the determination of the issue of the statutory authority defence.
>
> [HRM Submissions, April 28, 2017, p. 10]

[80] While the *HRM Charter* grants HRM the power to expend money for various purposes, including the promotion and attraction of institutions, industries and businesses, and economic development, Ms. MacLaurin submitted that these provisions do not expressly or implicitly authorize an infringement on the private rights of any party.

[81] In relation to the specific types of claims alleged by the Claimant as arising from the construction activities, HRM submitted:

> HRM did not undertake any activities that allegedly interfered with the Claimant's electricity, water, internet or phone service. Furthermore, HRM was not the cause of any dirt, noise, dust, or vibrations emanating from the construction site. HRM did not do any of the blasting complained of in paragraphs 22 and 25 of the Statement of Claim. HRM did not undertake any of the plumbing work relating to the installation of the pipe referred to in paragraph 21. Simply put, the damages claimed do not arise as a result of any actions on the part of the Municipality. The Municipality is not liable at common law for nuisances committed by third parties in relation to construction on private property.
>
> …
>
> With respect to paragraphs 27 and 28 of the Statement of Claim, HRM did not operate any of the vehicles which were allegedly involved in collisions with Claimant's patio or [the Claimant's] personal vehicle. In any event, motor vehicle accidents are not nuisance claims

> they are claims in negligence and should be brought in the Supreme Court against the individual vehicle owner/operators.
> ...
> With respect to paragraph 31, the fact that a private vehicle may have blocked a loading zone is not something that would be actionable against HRM at common law.
>
> [HRM Submissions, April 28, 2017, pp. 6-7]

[82] With respect to the permanent street closure of a portion of Grafton Street, and other temporary street closures, to accommodate the construction of the Works, Ms. MacLaurin submitted:

> With respect to street closures, HRM submits that the *HRM Charter* provisions relating to street closures are broad powers which provide authority for street closures in general and is not statutory authority for the construction of the Works.
>
> [HRM Submissions, April 28, 2017, p. 10]

[83] The HCCC submits that, in its case, it is even clearer that there is no authority to construct the Works; or for the Claimant to be compensated for injurious affection; or, for that matter, for the HCCC to ever be a statutory authority under the *Act*:

> 11. The principal submission of HCCC in relation to jurisdiction is that it is not a "statutory authority" for any purpose, including in relation to the Works, as it has no authority to expropriate land or to cause injurious affection. The HCCC only has the powers of an ordinary corporation. There is also no statute which authorizes HCCC to construct the Works, pursuant to which the HCCC could hypothetically raise a defence of statutory authority to a claim of private nuisance. Accordingly, the NSUARB does not have jurisdiction to decide the claim made against the HCCC.
>
> [HCCC Submission, May 3, 2017, para. 11]

[84] Further, Mr. Dunbar, counsel for the HCCC, noted that while the construction of the Works purportedly began in late 2012, the HCCC did not exist as a legal entity until it was incorporated under the *HCC Act,* which came into force on April 1, 2016. The *HCC Act* provides that the object of the corporation is simply to "operate, maintain and manage the activities of the Halifax Convention Centre…".

(b) Claimant's submissions

[85] In its Statement of Claim, the Wooden Monkey submitted that each of the Respondents is responsible for the construction of the Works, and that the construction has proceeded "under the authority of statute". In his pre-hearing brief, Mr. Wagner said:

> 4. The construction of the Works is made possible by significant expenditures of capital construction costs (among other costs) by the Respondents. The Respondents are public bodies funding public infrastructure. The public is the intended ultimate beneficiary of the infrastructure.
> 5. The authority for the actions of the Respondents in constructing the Works derives from statute.
> 6. For these reasons, claims for damages caused by the construction of the Works fall squarely within the scope of the *Expropriation Act* (the "*Act*").
>
> [Claimant's Brief, May 19, 2017, p. 1]

[86] The Claimant relies on the Supreme Court of Canada decision in *Antrim Truck Centre Ltd. v. Ontario (Transportation),* [2013] S.C.J. No. 13, as support for its interpretation of the injurious affection provisions in s. 3(1)(h)(ii)(B) of the *Act*. The Claimant stated that the provisions of the *Act* demonstrate the clear intent of the Legislature to compensate parties who have suffered injury, notwithstanding the public nature of, and the public benefit derived from, the works being constructed.

[87] Referring to the definition in s. 3(1)(p) of the *Act*, Mr. Wagner submitted that, rather than searching for statutory authority to cause injurious affection, the issue for the Board is whether the Works are carried out under statutory authority.

[88] Regarding HRM, Mr. Wagner said it can only act by exercise of statutory authority as it is a body created by statute, i.e., the *HRM Charter*. He said that HRM is only able to expend money pursuant to s. 79 of its *Charter*. He also noted that HRM had closed a portion of Grafton Street and conveyed it to the developer to assist in construction of the Works. Additionally, s. 33 of the *HCC Act* specifically authorizes HRM to expend money for the construction of the Convention Centre. Therefore, in Mr.

Wagner's view, its involvement in the construction of the Works is clearly under statutory authority.

[89] With respect to the Province, Mr. Wagner said that in s. 3(1)(p) it is "expressly identified" as a statutory authority. He disputed the Province's interpretation of the provision as literal and in conflict with a proper, purposive interpretation.

[90] Further, Mr. Wagner argued that the Orders-in-Council made under the *Finance Act* approving the Province's entering into the Cost Sharing Agreement with HRM and the Agreement in Principle with Argyle are the basis of the statutory authority of the Province to construct the Works. He noted that Orders-in-Council were the basis on which the first part of the test in *Antrim* was met.

[91] In response to questions from the Board, Mr. Wagner said:

> The province says that these Orders in Council only authorized the province to enter into contractual arrangements. The province says they don't authorize construction of The Works and therefore it falls outside the Act. The claimant asked the Board to consider what the contractual arrangements in question are for.
>
> They are for the construction of the convention centre which is integrated within the other portions of The Works. Yes the contractual arrangements authorized by Section 77 of the **Finance Act** result in the payment of money but why is the money being spent, who is spending it, who requested the project and who is ultimately using and possibly owning the building? These cannot be overlooked.
>
> The construction of the work occurred because of and at the behest from the Province. And HRM. The arrangements are entered into for the construction of The Works to cause them to be constructed. Construction is the task being contemplated.
>
> It is being constructed by the government since the government solicited a developer to come forward. The government is paying significant funds for construction and the government is ultimately using and owning the building.
>
> [Transcript, pp. 153-154]

[92] It is the Claimant's position that if the Works are not a public work, then the Province and HRM have no authority to expend funds in accordance with the Agreements.

[93] Mr. Wagner submitted that the various agreements before the Board reveal the split in capital construction costs between the Province and HRM, and the additional critical roles of each of them in the design and leasing of the Works. He said the Board must look at the context in which the expenditures are made, and their purpose.

[94] Mr. Wagner said that the HCCC is created and governed by a single purpose statute and its only purpose is to serve the interests of HRM and the Province. He described it as run by, and an arm of, government.

[95] The Claimant rejected the submissions of the Province and HRM that it is the developer, Argyle, who is constructing the Works. Comparing the structure of the arrangements to a "P3" structure or public-private partnership, Mr. Wagner said this does not deprive the Works of their "public essence". The contractual structure should not shield the Respondents from liability for injurious affection. He claimed if the Board were to accept the submissions of the Province and HRM such a finding would "…be out of step with the realities of public infrastructure financing in the modern era" (Transcript, p. 161).

[96] Further, Mr. Wagner submitted that the Respondents should not be permitted to "contract out" of their legislated obligations.

[97] The Claimant also submitted that the Board need not look at the second part of the test in *Antrim*, i.e., that the defence of statutory authority would be available to the Respondents, to determine whether it has jurisdiction to adjudicate its claim. Mr. Wagner said that the Province's position would require the Board to hold a full factual inquiry on the Wooden Monkey claim. He addressed this in his pre-hearing Brief:

> 72. The Respondents discuss the defence of statutory authority in their submissions. In essence, the defence of statutory authority requires a defendant to establish that it is practically impossible to avoid the alleged nuisance in question. It is a factual inquiry

> requiring examination into the way in which a work is carried out. It is available only in restricted circumstances. Perversely, the limited availability of the defence of statutory authority in nuisance claims is cited as a reason to impede the present claim from being heard by the Board under the Act.
>
> 73. Yet the restrictive availability of the defence of statutory authority to government against nuisance claims is to further the policy of holding governments to account, and restricting their immunity under the common law. One does not follow from the other. The defence of statutory authority is approached restrictively in order to *hold public bodies accountable* in the context of common law claims. The narrowness of the defence of statutory authority does not translate into restrictive access to the Board to have an injurious affection claim heard. That would be in conflict with the Supreme Court of Canada's policy of holding government to account for harm caused by its activities.
>
> 74. Furthermore, the Respondents' view on the defence of statutory authority would place a curious onus on a prospective claimant to, as a preliminary step to having the claim heard by the Board, establish that a defence of statutory authority would be made out by a defendant in a common law nuisance claim. Not only is that untenable from a policy perspective for the reason explained above, but procedurally it would entail a full factual inquiry into the manner in which the work in question was constructed by the defendant (i.e. were there alternative methods?) before jurisdiction could even be confirmed. [Emphasis in original]
>
> [Claimant's Brief, May 19, 2017, pp. 14-15]

[98] At the hearing, Mr. Wagner described such a process as a "waste of judicial resources". His submission was that the Board is well-suited to hear the claim and he argued that the Board has exclusive jurisdiction to hear it. He relied on two cases, *Curactive Organic Skin Care Ltd. v. Ontario* (2012 ONCA 81), and *Casa Luna Furniture v. Ottawa* (*City*), [2009] O.J. No. 874 where, he said, the Ontario courts found that injurious affection claims were exclusively in the jurisdiction of the Ontario Municipal Board (OMB) due to the language in the Ontario expropriation legislation, and not in the jurisdiction of the Superior Court. He stated the provisions of the Ontario legislation conferring jurisdiction on the OMB are "nearly identical" to s. 22 of the *Utility and Review Board Act*, S.N.S. 1992, c.11.

[99] Mr. Wagner said that in *Curactive*, the Ontario Court of Appeal affirmed that it was the substance of the claim, which the Court concluded was for injurious affection,

and not the form of pleadings (describing the grounds as negligence, nuisance and abuse of power), which governed the question of jurisdiction.

[100] Mr. Wagner concluded by saying that, should the Board decline to hear the claim, "…it would undermine the intent of the legislation to provide a right of compensation for injurious affection" (Transcript, p. 175).

(c) Findings

[101] Having raised this preliminary issue, the burden falls on the Respondents to show, on a balance of probabilities, that the Board does not have the jurisdiction to consider this claim.

[102] Based on its review of the submissions and the law, the Board considers that the primary jurisdictional issue that must be determined in this proceeding is whether the Respondents fall within the scope of a "statutory authority", as that term is used in the *Expropriation Act,* thereby allowing the Claimant to recover damages for injurious affection.

[103] Put another way, as the Board will more fully describe below, the threshold issue to be determined is whether the Respondents have the statutory authority to construct the Works, such that the Claimant is entitled to be compensated for its personal or business damages under the *Expropriation Act* or under another enactment.

[104] To provide some context for the Board's analysis, it is useful to provide some background on the genesis of injurious affection under the statute, where there is no taking of lands.

[105] In *Food City Ltd. v. New Glasgow (Town)*, 1980 CanLII 2632 (NSAD), a case where no lands of the claimant were taken, Cooper, J.A., described the "mischief" which the statutory provisions relating to injurious affection were enacted to address:

> Although I have come to my answer upon consideration of the relevant sections of the Act alone, it may be desirable for me to refer briefly to what I understand to be the "mischief" which the sections were enacted to overcome. At common law an action would lie for nuisance caused by the construction of a work. If, however, the work was constructed under the authority of a statute such an action, in the absence of negligence, would not lie. The purpose of the provisions of the Act relating to injurious affection, and particularly having regard to s. 3(1)(h), is to take away from a statutory authority the defence [it] previously had at common law that it was constructing the work under the authority of a statute. [Emphasis added]
>
> [para. 12]

[106] The Nova Scotia Expropriations Compensation Board in *Ben's Ltd. v. City of Dartmouth* (1978), 14 L.C.R. 357, which reviewed the statutory history of the injurious affection provisions, stated:

> It will be seen that subcls. 3(1)(h)(i) and (ii) of the *Expropriation Act, 1973*, impose different and conceptually inconsistent limitations on the right to compensation for business and personal damages depending on whether there has been a partial taking or no taking of the claimant's lands...The right to compensation for injurious affection where no land is taken evolved on somewhat different principles as a substitute for the common law action of nuisance which would have existed but for the statutory authority to construct the work. This right to compensation was, however, limited to the detrimental effects of the emplacement or construction of the works and compensation based on their use was exempted.
>
> [p. 362]

[107] In *Tock v. St. John's Metropolitan Area Board,* [1989] 2 S.C.R. 1181, Sopinka, J., outlined the defence of statutory authority:

> 90 ... The defence of statutory authority which is applied in Canada is based on the statement of Viscount Dunedin in *City of Manchester v. Farnworth,* [1930] A.C. 171, at p. 183:
>
> > When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense.

> It has been adopted by our Court in *City of Portage La Prairie v. B.C. Pea Growers Ltd.*, [1966] S.C.R. 150, and *Schenck v. Ontario (Minister of Transportation and Communications)*, [1987] 2 S.C.R. 289, …
>
> 91 The rationale of the defence is that if the legislature expressly or implicitly says that a work can be carried out which can only be done by causing a nuisance, then the legislation has authorized an infringement of private rights. If no compensation provision is included in the statute, all redress is barred. See Fleming *The Law of Torts* (6th ed. 1983), at p. 407 and *City of Campbellton v. Gray's Velvet Ice Cream Ltd.*, *supra*, at p. 439. There is no question that legislation may expressly authorize an interference with private rights by so providing in explicit language. Where the only reasonable inference from the legislation is that such interference is authorized, then the same result obtains by implication. Hence the language in the cases that the defence is made out if the nuisance is authorized expressly or by implication.
>
> …
>
> 93 The criticism of the present state of the law which is the springboard for the desire to change it is largely based on the fact that the term "inevitable consequences" is too vague and uncertain. That term is the expression of the factual conclusion that the necessary causal connection exists between the work authorized and the nuisance. If the necessary connection exists, then it follows that the legislature authorized that which is the inevitable consequence of the work described in the statute.
>
> 94 The burden of proof with respect to the defence of statutory authority is on the party advancing the defence. It is not an easy one. The courts strain against a conclusion that private rights are intended to be sacrificed for the common good. The defendant must negative that there are alternate methods of carrying out the work. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance. It is insufficient for the defendant to negative negligence. The standard is a higher one. While the defence gives rise to some factual difficulties, in view of the allocation of the burden of proof they will be resolved against the defendant.
>
> [*Tock, supra,* paras. 90-94]

[108] In *Ryan v. Victoria (City),* [1999] 1 S.C.R. 201, the Supreme Court of Canada confirmed the articulation of the statutory authority defence by Sopinka, J., at para. 55.

[109] The Board embarks on its analysis of the threshold issue by first taking account of the object of the *Expropriation Act*. In the words of Iacobucci, J., in *Rizzo*:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the Legislature].

[110] As stated by L'Heureux-Dubé, J., in the Supreme Court of Canada's judgment in *Thomson:*

> [A] judge's fundamental consideration in statutory interpretation is the purpose of legislation.

[111] The principles of statutory interpretation relating to expropriation legislation were described in the seminal case of *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority,* [1997] 1 S.C.R. 32. The Nova Scotia Court of Appeal affirmed those principles in *Re Johnson*, 2005 NSCA 99, as per Oland, J. A.:

> [48] At this point it would be helpful to review some matters and principles relevant to this appeal. I begin by pointing out that when parcels A, B, C and D were expropriated late in 1995, the applicable legislation consisted of the *Expropriation Act* R.S.N.S. 1989, c. 156 as amended by 1992 S.N.S. c. 11 s. 36 (the *Act*). According to its s. 2, "It is the intent and purpose of this *Act* that every person whose land is expropriated shall be compensated for such expropriation."
>
> [49] Any entitlement to compensation for expropriation must be contained within the provisions of the *Act*. Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada* (2nd Ed., 1992) states at p. 35:
>
> > It has never been suggested that there was a common law right to compensation. On the contrary, as Lord Parmoor stated in *Sisters of Charity of Rockingham v. R.* "Compensation claims are statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of the land taken, or for damage, on the ground that his land is 'injuriously affected', unless he can establish a statutory right."
>
> [50] As a consequence, an owner of an interest of land which has been taken must demonstrate that the legislation which authorizes the expropriation provides for the particular type of compensation claimed.
>
> [51] Expropriation legislation is to be given a broad and liberal interpretation, consistent with its purposes. The governing principles were set out in *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority,* [1997] 1 S.C.R. 32, 142 D.L.R. (4th) 206 at § 20-21 and 23 (S.C.R.) as follows:
>
> > 20 The expropriation of property is one of the ultimate exercises of governmental authority. To take all or part of a person's property constitutes a severe loss and a very significant interference with a citizen's private property rights. It follows that the power of an expropriating authority should be strictly construed in favour of those whose rights have been affected. This principle has been stressed by eminent writers and emphasized in decisions of this Court. . . .
> >
> > 21 Further, since the *Expropriations Act* is a remedial statute, it must be given a broad and liberal interpretation consistent with its purpose.

> Substance, not form, is the governing factor. . . . In *Laidlaw v. Municipality of Metropolitan Toronto*, [1978] 2 S.C.R. 736, at p. 748, it was observed that "[a] remedial statute should not be interpreted, in the event of an ambiguity, to deprive one of common law rights unless that is the plain provision of the statute".
>
> 23 It follows that the *Expropriation Act* should be read in a broad and purposive manner in order to comply with the aim of the Act to fully compensate a land owner whose property had been taken. [Underlined emphasis added]
>
> [*Re Johnson*, paras. 48-51]

[112] Thus, while counsel for the Province argued that injurious affection provisions with no taking should be strictly construed as against the Wooden Monkey, the Board considers that the approach in *Dell Holdings* should apply when it comes to interpreting the expropriation statute.

[113] In this respect, the Board notes that *Tener* was decided before *Dell Holdings* and that it is distinguished on its facts from the present matter. In *Tener,* the claim involved the B.C. Ministry's refusal to issue a park use permit to the registered owners of mineral claims, effectively preventing them from pursuing their mineral claims located within a provincial park. In the Board's view, the application of *Tener* with respect to the interpretation of the *Expropriation Act* in this proceeding should be restricted to the facts in *Tener,* which involved regulatory action in relation to land use, rather than the construction of works.

[114] Similarly, *Mariner Real Estate* did not involve the construction of works. The case involved a claim for injurious affection resulting from the designation of a beach under the *Beaches Act,* R.S.N.S. 1989, c. 32, which restricted the use of the claimants' lands.

[115] Ultimately, the Board is not prepared to find that cases like *Tener* and *Mariner Real Estate* (paras. 75-78) extend as far as Mr. Rieksts suggests with respect to

interpreting the legislation. Nevertheless, in the Board's view, *Tener* and *Mariner Real Estate* are not inconsistent with the principle that any claim for injurious affection with no taking of land must be based on the wording of the statute, considered in its entire context.

[116] Clearly, any claimant must be able to frame their claim under the expropriation statute, or other applicable legislation. In its interpretation of the *Act*, this Board must take account of the remedial nature of the statute. As noted in *Dell Holdings,* the legislation "must be given a broad and liberal interpretation consistent with its purpose".

[117] It is trite to state that the Board is an administrative tribunal and, as such, it has no inherent powers like the Courts. As a result, the Board's jurisdiction is derived from the authority outlined in its enabling statute.

[118] Section 22 of the *Utility and Review Board Act* provides as follows with respect to the Board's jurisdiction:

> **Jurisdiction**
> **22 (1)** The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it.
>
> **(2)** The Board, as to all matters within its jurisdiction pursuant to this Act, may hear and determine all questions of law and of fact.

[119] In *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570, the Court considered an administrative tribunal's jurisdiction to apply the *Canadian Charter of Rights and Freedoms.* In the context of the circumstances in that case, the Court held:

> … the jurisdiction of a statutory tribunal must be found in a statute and must extend not only to the subject matter of the application and the parties, but also to the remedy sought.

[120] The Supreme Court of Canada considered the matter of injurious affection (in circumstances where there was no taking of land) in *Antrim Truck Centre Ltd. v.*

Ontario (Transportation). In *Antrim,* the Province of Ontario constructed a new public highway near a truck stop. The construction of the highway had a significant negative impact on the business, which eventually closed. The *Antrim* case dealt with the *Ontario Expropriation Act,* R.S.O. 1990, c. E.26, which mirrors the language of the *Act* in Nova Scotia in relation to injurious affection.

[121] The Court held as follows, as per Cromwell, J.:

> 5 The Ontario Expropriations Act, R.S.O. 1990, c. E.26, provides a right to compensation for injurious affection on certain conditions: s. 21. Where none of the claimant's land is expropriated, the Act provides a right to compensation for "such reduction in the market value of the land of the owner, and ... such personal and business damages, resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute": s. 1 (1). Thus, in order to recover under the Act, the claimant has to meet these three statutory requirements, which are often referred to as the requirements of "statutory authority", "actionability" and "construction and not the use". These requirements mean that (i) the damage must result from action taken under statutory authority; (ii) the action would give rise to liability but for that statutory authority; and (iii) the damage must result from the construction and not the use of the works. Where these conditions are present, the Act requires that the complainant be compensated for the amount by which the affected land's market value was reduced because of the interference, and for personal and business damages: ss. 1(1) and 21. [Emphasis added]

[122] In *Antrim,* the Board notes that the claimant (appellant) had already satisfied the first and third requirements of the above three-part test, so the issue of statutory authority was not before the Court. In that case, the damages arose from the construction of a public highway, where there was no question under the legislative scheme about the statutory authority to construct the works. While counsel for the Claimant in the present matter has relied heavily on *Antrim*, this is an important distinction from the present proceeding.

[123] Mr. Wagner, counsel for the Claimant, submitted that the *Antrim* decision represents the current state of the law and that it demonstrated the test for injurious affection has to be applied more broadly.

[124] While the Board recognizes that *Antrim* represents an important and binding legal precedent, being the most recent pronouncement by the Supreme Court of Canada respecting injurious affection where there is no taking of lands, the Board is also mindful that any such claim for injurious affection must nevertheless be assessed in light of the statutory provisions which the Board must apply, and the facts before it.

[125] Thus, despite the Claimant's assertion that the Board has exclusive jurisdiction with respect to claims for injurious affection, the Board finds that any such jurisdiction, express or implied, must be based on specific authority conferred upon it by the words of the statute.

[126] The primary issue to be canvassed in the present matter is whether the Respondents were carrying out the construction of the Works as a "statutory authority," or alternatively, under "statutory authority."

[127] It bears repeating, as noted above, that there was no question under the legislative scheme in *Antrim* that there was "statutory authority" to construct the works. In *Antrim*, it was acknowledged in all levels of the proceeding that there was such authority. However, that is the very issue under consideration in the present matter.

[128] In determining in this case what is intended by the term "statutory authority," the Board concludes that cannot be appropriately determined without taking into account the provisions as set out in the *Act.* As noted earlier in this Decision, statutory authority is defined as follows:

> 3(1)(p) "statutory authority" means Her Majesty in right of the Province or any person or body empowered by statute to expropriate land or cause injurious affection; [Emphasis added]

[129] Further, s. 30(1) of the *Act* specifically provides that a statutory authority shall compensate the owner of land for loss or damage caused by injurious affection.

[130] In the Board's opinion, a body is not a "statutory authority" under the *Act* merely because the entity or level of government is incorporated by statute (e.g., HRM under the *HRM Charter* or HCCC under the *HCC Act),* or that the entity is empowered by statute to expend money, incur debt, or enter into a contract respecting the construction of works.

[131] Instead, as required under s. 3(1)(p) of the *Act*, in order to comprise a "statutory authority," the entity must specifically be "empowered by statute to expropriate land or cause injurious affection." The Board considers that such empowerment can be express or implied, but the power conferred on the authority must specifically contemplate the construction of the works that are the subject-matter of the claim. Moreover, there must be authority under the statute for compensation to be paid for damage caused by injurious affection.

[132] While not directly related to the test under consideration in this proceeding, the Board observes that the Courts have applied the same two requirements to a common law claim for *de facto* expropriation: i.e., 1) that there must be an authority under statute to take the lawful action at issue, and 2) that the compensation must be authorized by the legislation. *De facto* expropriation is a form of governmental or regulatory action which significantly restricts or takes away the private rights of ownership, often through stringent controls or prohibitions impacting land use. In *Mariner Real Estate, supra,* Cromwell, J.A., described the two requirements at common law:

> **(a) *De facto* Expropriation:**
>
> [37] The respondents' claim that what was, in form, a designation of their land under the **Beaches Act** is, in fact, a taking of their land by a statutory authority within the meaning of the **Expropriation Act.** This claim of de facto expropriation, or as it is known in United States constitutional law, regulatory taking, does not have a long history or clearly articulated basis in Canadian law. We were referred to only three Canadian cases in which such a claim was made successfully, only two of which dealt with the expropriation of land.

> [38] The scope of claims of *de facto* expropriation is very limited in Canadian law. They are constrained by two governing principles. The first is that valid legislation (primary or subordinate) or action taken lawfully with legislative authority may very significantly restrict an owner's enjoyment of private land. The second is that the Courts may order compensation for such restriction only where authorized to do so by legislation. In other words, the only questions the Court is entitled to consider are whether the regulatory action was lawful and whether the **Expropriation Act** entitles the owner to compensation for the resulting restrictions. [Emphasis added]
>
> [*Mariner*, paras. 37-38]

[133] In *Sutherland v. Vancouver International Airport Authority,* 2002 BCCA 416, the Court noted that in order to constitute a "statutory authority" the statute must specifically provide for express or implied authority to carry out the work complained of:

> The "well settled" rule accepted prior to [Tock v. St. John's (City) Metropolitan Area Board, [1989] 2 SCR 1181] was re-established in Ryan. These authorities and comments make clear what the law requires when the defence of statutory authority is pleaded. The statute must authorize the work, conduct or activity complained of, either expressly or by necessary implication. The test focuses on what work, conduct or activity is authorized by statute, rather than on the person or body upon whom the authority is conferred. [Emphasis added]

[134] Based on its review of the facts in this matter, the Board concludes that none of the Respondents comprised a "statutory authority" or acted under "statutory authority" in relation to the construction of the Works, as that would be contemplated under the *Expropriation Act* in order for the Claimant to recover compensation for injurious affection.

[135] Importantly, there is no specific authority or direction, express or implied, in any of the relevant statutes, for the construction of the Convention Centre by the Respondents or the causation of injurious affection.

[136] The Works are being constructed by a third party, Argyle. ACI, an affiliate of Argyle, is the owner in fee simple of the Property. Further, Argyle is neither an agent, partner nor a contractor of the Respondents.

[137] While a portion of the development will be used as the Convention Centre, the use of that Convention Centre is strictly by way of lease. The lease is for a period of

25 years, with two five-year extension options and an option to purchase. The Province's payments to the developer only begin upon substantial completion of the project, and HRM's cost sharing contributions do not commence until the date that the first payment under the lease agreement for the Convention Centre is made by the Province. HRM's financial contributions will be made directly to the Province, not to the owner, NCC. Further, HRM is not a party to the Lease Agreement.

[138] Moreover, neither the Province, HRM, nor HCCC have provided any financing for the construction of the Convention Centre or any portion of the Works. Argyle, ACI and NCC must finance the construction of the project.

[139] Further, none of the impacts from the actual construction of the Works were caused by the Respondents, because they were not involved whatsoever in the construction.

[140] Indeed, while construction of the Works began in late 2012, the HCCC did not exist as a body corporate until the *HCC Act* came into effect on April 1, 2016.

[141] Taking into account the evidence in this matter and the law, the Board finds that none of the Respondents is a "statutory authority" in relation to the construction of the Works, as intended in the *Expropriation Act*. Accordingly, the Board does not have jurisdiction to consider the claim by the Wooden Monkey.

[142] As a consequence, should the Claimant wish to pursue its claim, it will have to do so in a court of competent jurisdiction.

[143] The claim is dismissed.

[144] Based on the above findings that none of the Respondents are carrying out the construction of the Works as a statutory authority, the Board concludes that it is not

required, for the purposes of this proceeding, to address the second part of the test in s.3(1)(h)(ii)(B) of the *Act*, namely, whether the Respondents would be liable for damages resulting from such construction "if the construction were not under the authority of a statute". The second part of the test only becomes relevant if the Board had found that the Respondents, or any one of them, was a statutory authority. However, because the Board has concluded that none of the Respondents are a "statutory authority" respecting the construction of the Works, it need go no further in its analysis of the statutory test and whether the Respondents would be relieved from liability by operation of the statutory authority defence.

Issue #2: Whether the claim for injurious affection has been made "within one year after the damage was sustained or after it became known" to the Claimant?

[145] Given the Board's conclusion on Issue #1, it is not necessary for the Board to address Issue #2.

7.0 SUMMARY OF BOARD FINDINGS

[146] Porridge Pot Foods, operating as The Wooden Monkey (Wooden Monkey or Claimant), filed a claim under the *Expropriation Act* for injurious affection respecting damages as a result of the construction of the Nova Centre Project (Works) against the Province of Nova Scotia; the Halifax Regional Municipality; and the Halifax Convention Centre Corporation (collectively described as the Respondents).

[147] A Preliminary Hearing was held to determine whether the Board has the jurisdiction to consider the Wooden Monkey's claim for injurious affection.

[148] The Board considers that the primary jurisdictional issue that must be determined in this proceeding is whether the Respondents fall within the scope of a

"statutory authority", as that term is intended under the *Expropriation Act*, thereby allowing the Claimant to recover damages for injurious affection in relation to the construction of the "Works". The claim for injurious affection is brought under s. 3(1)(h)(ii)(B) of the *Act*. The term "statutory authority" is defined in s. 3(1)(p) of the *Act*.

[149] The Board is an administrative tribunal and, as such, it has no inherent powers like the Courts. As a result, the Board's jurisdiction is derived from the authority outlined in its enabling statute, the *Utility and Review Board Act*, and the *Expropriation Act.* Thus, any claimant must be able to frame their claim under the expropriation statute, or other applicable legislation.

[150] In determining in this case what is intended by the term "statutory authority," the Board concludes that cannot be appropriately determined without taking into account the provisions as set out in the *Act*. As required under s. 3(1)(p) of the *Act*, in order to comprise a "statutory authority," the entity must specifically be "empowered by statute to expropriate land or cause injurious affection." The Board considers that such empowerment can be express or implied, but the power conferred on the authority must specifically contemplate the construction of the works that are the subject-matter of the claim. Moreover, there must be authority under the statute for compensation to be paid for damage caused by injurious affection.

[151] Based on its review of the facts in this matter, the Board concludes that none of the Respondents comprised a "statutory authority" or acted under "statutory authority" in relation to the construction of the Works, as that term is used under the *Expropriation Act* in order for the Claimant to recover compensation for injurious affection. Importantly, there is no specific authority or direction, express or implied, in any of the

relevant statutes, for the construction of the Convention Centre by the Respondents or the causation of injurious affection.

[152] Taking into account the evidence in this matter and the law, the Board finds that none of the Respondents is a "statutory authority" in relation to the construction of the Works, as intended under the *Expropriation Act.* Accordingly, the Board does not have jurisdiction to consider the claim by the Wooden Monkey.

[153] As a consequence, should the Claimant wish to pursue its claim, it will have to do so in a court of competent jurisdiction.

[154] The claim is dismissed.

[155] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 27th day of September, 2017.

Roland A. Deveau

Roberta J. Clarke

Richard J. Melanson